

# **The 1948 Palestinian Refugees and the Individual Right of Return:**

## ***An International Law Analysis***

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**BADIL Resource Center**  
for Palestinian Residency and Refugee Rights

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# 1. Introduction: Basic Contours of the Individual's Right of Return

Under international law, all individuals have a right of return. The right of return guarantees all individuals a fundamental right to return to their homes - commonly referred to as their "homes of origin" - whenever they have become displaced from them due to circumstances beyond their control. Like the right to vote, the right of return is an inherent human right which all individuals possess even if, in actual practice, governments may deliberately obstruct the free exercise of that right. However, since the right of return is one accorded under international law, deliberate governmental obstruction of it - just like obstruction of the right to vote - would violate international law and can never be legal. Accordingly, the right of return exists independently of any given government's policy choice to allow the free exercise of it or not.

The purpose of this paper is to demonstrate that under international law, the 1948 Palestinian refugees have the right to return to their homes of origin inside what is now Israel.<sup>1</sup> To accomplish this, the paper surveys the four independent sources in customary international law of the individually-held right of return. State practice implementing the right of return is also reviewed. Through this survey, it becomes clear what the contours of the right of return are, including in state practice. This in turn clarifies specifically how the right of return must be implemented in the case of the 1948 Palestinian refugees,<sup>2</sup> who would be returning to their homes of origin inside Israel, in order for such a return to be consistent with international law. It further becomes clear that implementing the Palestinian refugees' right of return represents a necessary component for crafting a durable solution to their status as refugees,<sup>3</sup> in conformity with other durable solutions designed by the international community under United Nations auspices for other refugee population groups, based upon principles of international law.

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<sup>1</sup> While many useful analyses have been written about the individually-held right of return of the 1948 Palestinian refugees, several contributions stand out in particular for their invaluable insights into the juridical (legal) bases in international law of this right. For the most important among these, see, e.g., John Quigley, "Displaced Palestinians and a Right of Return," *Harvard International Law Journal*, Vol. 39, No. 1 (Winter 1998) 171; John Quigley, "Mass Displacement and the Individual Right of Return," *British Yearbook of International Law*, Vol. 68 (1997) 65; W.T. Mallison and S. Mallison, "The Right to Return," 9 *Journal of Palestine Studies* 125 (1980); W.T. Mallison & S. Mallison, AN INTERNATIONAL LAW ANALYSIS OF THE MAJOR UNITED NATIONS RESOLUTIONS CONCERNING THE PALESTINE QUESTION, U.N. Doc. ST/SG/SER.F/4, U.N. Sales #E.79.I.19 (1979); W.T. Mallison & S. Mallison, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 174-188 (1986); Kathleen Lawand, "The Right to Return of Palestinians in International Law," *International Journal of Refugee Law*, Vol. 8, No. 4 (October 1996) 532. For an analysis of the "right to return" of Palestinians to the Occupied Palestinian Territories of the West Bank (including East Jerusalem) and Gaza Strip (which is a related topic but is not covered in this paper), see John Quigley, "Family Reunion and the Right to Return to Occupied Territory," 6 *Georgetown Immigration Law Journal* 223 (1992).

<sup>2</sup> The "1948 Palestinian refugees" are those Palestinians who became displaced from their homes during the 1948-related conflict (or thereafter) and have never been permitted by the government of Israel to return to their homes of origin, which now lie inside the 1949 armistice lines (which serve as the *de facto* border for Israel).

The main period of hostilities during what is referred to in this paper as the 1948-related conflict lasted from December 1947 through mid-1949, when the four armistice agreements were concluded.

However it should be noted that Israel did continue to displace (expel) Palestinians from within the 1949 armistice lines well after the armistice agreements had been concluded.

The boundaries delineated by the 1949 armistice agreements now constitute the *de facto* "borders" of Israel, since Israel still has no *de jure* borders for two reasons. First, Israel has never concluded final peace agreements with any of its neighboring Arab states, with the exception of Egypt and Jordan. Second, Israel has never enacted a constitution, which would have required delineating borders. (Israel's long-term occupation of the West Bank, including East Jerusalem, and the Gaza Strip point to the most probable reason for this unwillingness to delineate borders - expansionist goals vis-à-vis the remaining territory of historic mandate Palestine.)

Nevertheless, despite the foregoing, Israel has continued to police the 1949 armistice lines and has continued to obstruct the 1948 Palestinian refugees from exercising their right of return across these lines, which therefore effectively serve as *de facto* borders of Israel. Accordingly, the 1948 Palestinian refugees would therefore need to cross *de facto* international borders to exercise their right of return.

For details on the four 1949 armistice agreements demarcating the 1949 armistice lines, see, generally, the General Armistice Agreements, concluded in 1949 between Israel and Egypt (February 24, 1949 (UNTS, Vol. 42, p. 251)); Israel and Jordan (April 3, 1949 (UNTS, Vol. 42, p. 303)); Israel and Lebanon (March 23, 1949 (UNTS, Vol. 42, p. 287)); and Israel and Syria (July 20, 1949 (UNTS, Vol. 42, p. 327)).

Several important aspects framing the contours of the right of return in customary international law can be highlighted at the outset of this discussion. The following enumerated points will be further elaborated upon in the course of this paper.

First, the obligation of states to respect the individual's right of return is a type of rule known as a "customary norm"<sup>4</sup> of international law. Customary norms are legally "binding" upon all states and all states are therefore legally obligated to follow the rules codified by them.

Second - and it is a central purpose of this paper to demonstrate the following proposition - historically speaking, the right of return had achieved customary status in international law before 1948.<sup>5</sup> Accordingly, the right of return has guaranteed the 1948 Palestinian refugees an absolute, unqualified right to return to their homes of origin continuously since the period of their initial displacement during the events surrounding the 1948 conflict.

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<sup>3</sup> The term "displaced persons" has gained prominence in the literature discussing the case of persons whose right of return to their homes or origin is being obstructed by deliberate governmental policy. "Externally displaced persons" are persons who are trapped outside the geographical territory containing their homes of origin - generally as delineated by an international border (*de facto* or otherwise) - and thus are prevented from returning to them. Thus, externally displaced persons would generally be required to cross an international boundary (of some type) in order to exercise their right of return.

"Internally displaced persons," in contrast, are persons who have remained *inside* the borders (again, *de facto* or otherwise) of a given state entity, but who nevertheless have been displaced from their homes of origin and are similarly being prevented from returning to them by deliberate governmental policy.

Displacement can happen through "peaceful" means (such as revoking residency rights or purportedly "denationalizing" certain segments of the population) or through "forcible" means (such as military targeting of civilian populations to "stampede" them from their homes). Regardless of the means used, the resulting displacement is a major violation of a wide variety of rights of the persons so affected. Accordingly, customary international law accords all displaced persons the right to return to their homes of origin.

For purposes of this paper, the phrase "1948 Palestinian refugees" will be used to refer to that group of externally displaced Palestinians (which now includes their offspring of several generations) who were initially displaced from their homes of origin during the 1948-related conflict and have remained trapped outside the 1949 armistice lines ever since. The term "refugee" will be used in this paper instead of the phrase "externally displaced person" because the former is the term most frequently used in common parlance. However, the 1948 Palestinian refugees *are* externally displaced persons, and the two terms are virtually synonymous.

In terms of population figures for the 1948 Palestinian refugees, it is estimated that at least over 700,000 persons were initially externally displaced during the 1948-related conflict, while higher-end estimates place the figure for the initial group of 1948 Palestinian refugees as approaching 1 million. See, e.g., "General Progress Report and Supplementary Report of the United Nations Conciliation Commission for Palestine, Covering the Period from 11 December 1949 to 23 October 1950," U.N. GAOR, 5th Sess., Supp. No. 18, U.N. Doc. A/1367/Rev. 1 (23 October 1950) (Appendix 4 of which, titled "Report of the Technical Committee on Refugees," which was submitted to the Conciliation Commission in Lausanne on 7 September 1949, listed an estimated figure of 711,000 for the "refugees from Israel-controlled territory," a figure which the Technical Committee stated it "believed to be as accurate as circumstances permit"). See also, Janet Abu-Lughod, "The Demographic Transformation of Palestine," in Ibrahim Abu-Lughod (ed.), *THE TRANSFORMATION OF PALESTINE: ESSAYS ON THE ORIGIN AND DEVELOPMENT OF THE ARAB-ISRAELI CONFLICT*, 139, 161 (1971) (an estimated 780,000 displaced Palestinians were trapped outside what became the 1949 armistice lines and were not allowed to return); Ilan Pappé, "Were They Expelled?: The History, Historiography and Relevance of the Palestinian Refugee Problem," in Ghada Karmi and Eugene Cotran (eds.) *THE PALESTINIAN EXODUS 1948-1998*, at 52 (1999) (noting that some demographers put the figure of externally displaced Palestinians from this period at as high as one million persons).

The group of 1948 Palestinian refugees has grown in the intervening passage of five decades to number, with their descendants, roughly five million persons. This includes approximately 3.8 million refugees registered (according to need) with the UN Relief and Works Agency (UNRWA) residing in the five areas of operation: West Bank, Gaza Strip, Jordan, Lebanon, and Syria. For a detailed estimate, see, e.g., Table 7: The Distribution of Palestinians in 1998 (minimum estimate) in, Salman Abu Sitta, *THE PALESTINIAN NAKBA 1948, THE REGISTER OF THE DEPOPULATED LOCALITIES IN PALESTINE (1998)* at 16. The population estimate for 2000 can be derived based on an average per annum increase of approximately 3.5 percent.

In addition, there is currently a large population of "internally displaced" Palestinians inside Israel who also were displaced from their homes of origin and lands during the 1948-related conflict but remained inside what became the 1949 armistice lines and therefore ultimately became citizens of Israel. Nevertheless, despite their status as citizens, Israel has similarly refused to allow the internally displaced Palestinians to return to their homes of origin as well, despite the passage of over five decades since the initial displacement.

The 1948 internally displaced Palestinians initially numbered an estimated 75,000 persons. See, e.g., David Kretzmer, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 57 & n. 39 (1990).

In the intervening passage of time of over five decades since the period of initial displacement, the internally displaced Palestinians inside Israel, with their descendants, have grown to number over 250,000 persons.

<sup>4</sup> See, e.g., Christian Tomuschat, "State Responsibility and the Country of Origin," in Vera Gowlland-Debbas (ed.) *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 61 (1996) (stating that "the right of a person to stay and live in his or her country" constitutes "customary international law").

Third, the individually-held right of return is anchored in four separate bodies of international law: the law of nationality, as applied upon state succession; humanitarian law; human rights law; and refugee law (a subset of human rights law which also incorporates humanitarian law). The right of return exists in these four bodies of law for all factual cases of involuntary displacement, and regardless of the circumstances of displacement. Accordingly, the right of return prohibits any type of deliberate governmental policy designed to block the voluntary return of persons to their homes of origin, including "peaceful" obstructions deliberately barring return after a temporary departure. For example, if individuals happened to travel outside their normal place of residence for a weekend picnic, the right of return guarantees that no governmental policy could be enacted to bar their voluntary return to their homes. The obligation under international law of the "state of origin" from which the involuntarily displaced person originated to receive back persons seeking to return to their homes of origin is absolute.

However, because international law has particularly strong prohibitions against "forcible expulsions" carried out by governments, a fourth major principle regarding the right of return can be noted here. Whenever the facts demonstrate that deliberate, forcible governmental expulsion has been practiced, a heightened obligation to implement the right of return exists. In other words, the factual element of deliberate, governmental forcible expulsion provides an additional, supplementary basis for the obligation for the state of origin (which in this case now also constitutes the expelling state) to implement the right of return. International law prohibits forcible expulsion even when practiced against a single individual. Therefore, the prohibition is accordingly stronger against expulsions practiced on a "mass" scale affecting large numbers of people. Similarly, since discrimination based upon racial, ethnic, religious or political criteria is independently prohibited by customary international law,<sup>6</sup> the prohibition against forcible expulsions ("mass" or otherwise) is even stronger against expulsions practiced in a discriminatory manner, i.e., when targeting a particular ethnic or minority subgroup of the population based upon racial, ethnic, religious or political grounds. Accordingly, "mass" forcible expulsions carried out in a discriminatory manner based upon racial, ethnic, religious or political grounds would be the most strongly prohibited under international law, by virtue of being prohibited on three, independent bases. Each violation of any one of these three, independent prohibitions, therefore, would provide *additional, supplementary* grounds for the obligation of the expelling state to implement of the right of return of the wrongfully expelled persons. A "state of origin" (which an expelling state would necessarily be) already has an absolute obligation to allow displaced persons to return to their homes of origin (as was discussed in the preceding paragraph). However, an expelling state - by virtue of the additional illegality of the forcible expulsion ("mass" or discriminatory or otherwise) - accordingly would have an even greater obligation to repatriate (i.e., allow to exercise their right of return) wrongfully expelled persons. Thus the obligation of the expelling state of origin to implement the right of return of expelled persons is, from a legal perspective, even *greater* than absolute. This is so because, as was just outlined in the preceding paragraph, the obligation of a state of origin to allow the free exercise of the right of return is already absolute regardless of the circumstances of displacement, due to the customary status of the right of return in international law. Therefore, where forcible expulsion was an additional factual element in the circumstances leading to the displacement, it adds *additional* grounds for the implementation of the right of return. Hence, expelling states are not permitted to deviate from the obligation to readmit wrongfully expelled persons, which obligation may therefore be said to be "greater than absolute."

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<sup>5</sup> See, e.g., "A Study of Statelessness," United Nations Department of Social Affairs, U.N. Doc. E/1112, U.N. Sales Pub. 1949.XIV.2 (August 1949) (wherein it is stated that the "[e]xpulsion and reconduction [i.e., repatriation, or allowing to exercise the right of return] are universally recognized measures of order and security; in principle their implementation presents no difficulties in the case of nationals of any given country, since that country is obliged to receive its nationals and the expelled person is simply repatriated"). *Id.*, at 21.

<sup>6</sup> See, e.g., the non-discrimination provision in Article 2(1) of the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A, U.N. Doc. A/6316 (1966), 999 *UN Treaty Series* 171; the non-discrimination provision in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. No. 14531 (1976), p. 3; and the non-discrimination provisions in the Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, 660 *UN Treaty Series* 195.

Fifth, Israel is the *sole* state of origin with the binding obligation under international law to receive back the 1948 Palestinian refugees and thereby to implement their internationally guaranteed right to return to their homes of origin. This is so by virtue of the obvious simple fact that no other state geographically contains the homes of origin of the 1948 Palestinian refugees. Israel's obligation to repatriate the 1948 Palestinian refugees is, accordingly, absolute and unqualified. Since no other state constitutes a state of origin for this particular group of refugees, no other state has any duty whatsoever to repatriate them.

Sixth, the United Nations, as the body representing the international community at the international level, has an obligation to ensure that Israel fully implements the 1948 Palestinian refugees' right of return. This is so because of the immense role which the United Nations played in the chain of events which led to the creation of the 1948 Palestinian refugee phenomenon in the first place.<sup>7</sup> Because Israel's obligation to implement the right of return is required under a binding, customary norm of international law, Israel is not legally permitted - under international law - to derogate (deviate) from the obligation to ensure its implementation. Similarly, because of the massive scale on which Israel is currently violating this binding customary norm of international law, the United Nations also has a responsibility to act to ensure that Israel fully corrects its violation. This is so not only because of the need to encourage respect for international law generally, and thereby to expand the "rule of law" at the international level, but also because of the egregious severity of Israel's violation of fundamental rights of the 1948 Palestinian refugees. Violations of international law of this magnitude and severity give rise to the opportunity for and responsibility of the international community (generally) and individual nation states (separately) to take action at the international level to ensure that the violation is corrected.<sup>8</sup> In this case, the United Nations - with particular emphasis on the Security Council, as the highest decision-making body in the U.N., and with even greater emphasis on the United States, as the most powerful member of the Security Council - has an extremely strong responsibility to hold Israel accountable for its mass-scale violation of international law and to ensure that the violation is remedied by implementing the 1948 Palestinian refugees' right of return.

Seventh, the United Nations has already unambiguously called upon Israel immediately and fully to implement the 1948 Palestinian refugees' internationally guaranteed right of return. This call came as early as December 1948 in the form of General Assembly Resolution 194 (III)<sup>9</sup> [hereinafter "**Resolution 194**"], which stated categorically Israel's obligation under customary international law to allow the 1948 Palestinian refugees<sup>10</sup> to exercise their right of return. Resolution 194 specifically stated that the Palestinian refugees had the right to return to their homes of origin. Resolution 194 is critically important because it reflects the existence in December 1948 of the customary norm requiring that the 1948 Palestinian refugees be permitted to exercise their right of return - and this at the very same time when the events which were creating the Palestinian refugee phenomenon in the first place were still unfolding (since the armistice agreements were not concluded

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<sup>7</sup> The responsibility of the U.N. in permitting the series of events to unfold which created the Palestinian refugee phenomenon is huge and, unfortunately, commonly misunderstood. For example, U.N. General Assembly Resolution 181, of November 1947, which proposed "partitioning" Palestine actually not only had no basis in international law but, on the contrary, violated international law to a very high degree. This is so because "partition" of Palestine ran directly counter to the prior, legally vested national sovereignty rights of the Palestinian people in all of historic, Mandate Palestine, as was covenanted to them by the League of Nations Covenant in 1919. See, section 3.B.1, below, for a discussion of the Palestinian people's prior vested national sovereignty rights in all of historic Mandate Palestine, which inured to them by virtue of the League of Nations Covenant.

<sup>8</sup> See, e.g., Christian Tomuschat, "State Responsibility and the Country of Origin," in Vera Gowlland-Debbas (ed.) THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 76 (1996) (citing the "obligations *erga omnes*" legal concept developed by the International Court of Justice in the 1970 Barcelona Traction case for the proposition that "every State has legal standing to act - in some form - for the protection of basic human rights that have been breached," and finding that this rule has been incorporated into Article 5 of the International Law Commission's Draft Articles on State Responsibility, which the author cites for the proposition that "in case of a violation of a human rights obligation under customary international law or if the breach attains by its seriousness the quality of an international crime, all other States are to be considered injured; in case of a human rights obligation based on treaty law, all other States parties. This gives them legal standing to participate in the enforcement process") (footnotes omitted).

<sup>9</sup> G.A. Res. 194 (III), U.N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948) [hereinafter "G.A. Res. 194"].

until mid-1949). Consequently, Resolution 194 demonstrates conclusively the historical grounding in international law of the 1948 Palestinian refugees' right of return. The binding nature of the customary norm reflected in Resolution 194 requiring Israel to repatriate the Palestinian refugees has not diminished over time but rather has gained only greater strength, as the review in Sections 3 through 6, below, of the four relevant bodies of international law in which the right of return is grounded is intended to demonstrate.

Eighth, the individually-held right of return which is being discussed here is completely separate from any "collective" right of return, whose implementation might be viewed in some circumstances as a helpful precondition for the realization of a peoples' collective human right to self-determination<sup>11</sup> (which is a universally-recognized human right). Individuals - as individuals - possess many separate rights guaranteed under international law. These rights complement each other and do not cancel each other out. Using a biological metaphor, it is like the various organs and systems of the body working together to ensure the healthy functioning of a human being. The fact that one has one's eyesight does not negate the necessity and usefulness of having one's hearing as well, in order to maximize one's overall health and social productivity. Individual rights are not mutually exclusive, under international law, but rather supplementary and complementary. The exercise of one right can never cancel out the exercise of another, and should never be viewed as doing so.

This paper, then, undertakes to examine the right of return as it existed as a customary binding norm of international law in 1948, the immediate and full implementation of which was called for by the U.N. General Assembly in December of 1948 in Resolution 194. Section 2 will examine the text and highlight some important elements of the drafting history of Resolution 194. Sections 3 through 6 will examine the right of return as anchored in four separate bodies of international law: the law of nationality as applied upon state succession; humanitarian law; human rights law; and refugee law (a subset of human rights law which also incorporates elements of humanitarian law). Section VI, in particular, will examine state practice according to which individuals - and in particular refugees - have been permitted, and indeed encouraged, by the international community to exercise their right of return. The review of state practice reflects the important element of *opinio juris* (a sense of legal obligation) on the part of states that implementation of the right of return constitutes a binding legal obligation under international law, and not merely a politically expedient policy choice. Section 7 will conclude by returning to Resolution 194 once more and analyzing - in light of the preceding review of principles and state practice - its continuing unshakable basis for implementing the right of 1948 Palestinian refugees to return to their homes of origin inside Israel.

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<sup>10</sup> G.A. Res. 194 also applies to the 1948 "internally displaced" Palestinians who remained inside what became the 1949 armistice lines and therefore became citizens of Israel but who Israel nevertheless similarly bars from returning to their homes of origin and lands. This paper does not address the topic of the internally displaced Palestinians. However, a forthcoming Brief #11 by BADIL will address the case of the internally displaced Palestinians who continue to remain barred from returning to their homes and lands inside Israel.

<sup>11</sup> See, e.g., G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31 para. 2, U.N. Doc. A/9631, which mentions both the right of return and the "right of self-determination," thus signaling recognition of a "collective" right of return. The "collective right of return," under international law is not an alternative to the individual's right of return. See Section 6, below, where relevant examples from state practice are collected where the "individual" right of return was implemented under the auspices of the international community in conjunction with the "collective" right of return (i.e., exercise of the collective right of self-determination), and the latter was not viewed by the international community as a bar to implementation of the former. The purpose of this paper is to review the sources in international law of the individual right of return and accordingly, the collective right of return is not discussed at length, although its legal foundations are described briefly in Section 3.B.1, below.

## 2. U.N. G.A. Resolution 194: The Right of Return in Customary Law of 1948<sup>12</sup>

In December 1948, the U.N. General Assembly passed Resolution 194 which, *inter alia*, established a mechanism known as the United Nations Conciliation Commission [hereinafter the "UNCCP"] to facilitate implementation of durable solutions for refugees in Palestine. Resolution 194 was closely based upon prior recommendations made by the U.N.-appointed Mediator for Palestine, Count Folke Bernadotte.<sup>13</sup> Resolution 194 unambiguously declared - in reliance upon then-existing principles of customary international law - that Israel was obliged immediately to allow all Palestinian refugees displaced during the 1948 conflict to exercise their right of return.

Paragraph 11 of Resolution 194 sets forth the framework for a durable solution to the predicament of the 1948 Palestinian refugees. Paragraph 11(1) of Resolution 194 by its express terms identifies *three* distinct rights that all Palestinian refugees are entitled to exercise under international law - return, restitution,<sup>14</sup> and compensation.<sup>15</sup> Paragraph 11(1) further affirms that those refugees choosing *not* to exercise their priority rights of return and restitution are nevertheless also entitled to receive full compensation for their losses (and, as is delineated in the following subparagraph 11(2), to be resettled elsewhere).<sup>16</sup> After extended debate, the General Assembly selected the following language to enumerate these three separate, but interrelated, fundamental rights of the 1948 Palestinian refugees, stating that the General Assembly:

*Resolves* that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible" (emphasis added).<sup>17</sup>

The first right enumerated in Resolution 194 is the right of return (which is the main topic of this paper). Paragraph 11(1) of Resolution 194 states the right of return unambiguously, in the phrasing "the refugees wishing to return to their homes... should be permitted to do so at the earliest practicable date."<sup>18</sup> It should also be noted here that Resolution 194 was drafted to apply to all persons displaced during the 1948-related conflict, and therefore covers both the 1948 Palestinian refugees (the externally displaced) and the 1948 internally displaced Palestinians. Both groups of displaced Palestinians therefore have the unqualified right to return to their homes of origin and their lands, despite Israel's continued obstruction of this right vis-à-vis

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<sup>12</sup> This section is based to a very large extent upon unpublished research by Terry Rempel, Coordinator of Research and Information at BADIL Resource Center, in which reports of the U.N. Mediator for Palestine and various Working Papers prepared by the U.N. Secretariat for the UNCCP are reviewed.

<sup>13</sup> For the U.N. Mediator's recommendations, see *Progress Report of the United Nations Mediator on Palestine*, U.N. GAOR, 3d Sess., Supp. No. 11, U.N. Doc. A/648 (1948), *passim* [hereinafter referred to as the "*Mediator's Progress Report*"]. The UNCCP was established under para. 2 of G.A. Res. 194. For more on the creation of the Commission and its broader mandate concerning Jerusalem and other outstanding issues see Terry Rempel, BADIL Brief No. 5, *The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees* (June 2000).

<sup>14</sup> The bases in international law of the right of restitution, as enumerated in Resolution 194, will be addressed in a forthcoming Brief #9 by BADIL, scheduled for publication in February 2001.

<sup>15</sup> The bases in international law of the right of compensation, as enumerated in Resolution 194, will be addressed in a forthcoming Brief #10 by BADIL, scheduled for publication in March 2001.

<sup>16</sup> Resolution 194, in paragraph 11(2), then *instructs* the UNCCP to facilitate implementation of the complete set of solutions to the plight of the refugees. These include, in order of reference, repatriation, resettlement, compensation, and economic and social rehabilitation.

<sup>17</sup> G.A. Res. 194, para. 11(1)

<sup>18</sup> G.A. Res. 194, para. 11(1).

both groups of displaced Palestinians. This point was clarified by a "Working Paper" prepared by the U.N. Secretariat in Geneva in May of 1950.<sup>19</sup>

The emphasis in Resolution 194 on repatriation - i.e., implementation of the right of return - as the preferred solution for Palestinian refugees reflects several customary norms of international law which existed in 1948.<sup>20</sup> That this is so is reflected in the language of the U.N. Mediator's recommendation for a solution to the plight of the refugees - subsequently incorporated into Resolution 194 - which acknowledged the fact that *no new*<sup>21</sup> rights were being created: "The *right* of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be *affirmed* by the United Nations...."<sup>22</sup> (emphasis added). Commenting on the original draft of paragraph 11 (proposed by Great Britain), the representative of the United States similarly acknowledged that the General Assembly was creating *no new rights*, stating instead that the operative paragraph concerning the rights of the 1948 refugees "*endorsed a generally recognized principle* and provided a means for implementing that principle...."<sup>23</sup> (emphasis added).

By contrast, it is important to note that Paragraph 11(1), which delineates the rights of the refugees, does not include resettlement. Resettlement is only included in Paragraph 11(2), which instructs the UNCCP to facilitate implementation of the rights affirmed in Paragraph 11(1) according to the choice of each individual refugee. Thus Resolution 194 placed the emphasis on repatriation. This emphasis was consistent with the mandates of several international agencies established prior to 1948 to facilitate solutions for other groups of refugees.<sup>24</sup>

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<sup>19</sup> See, UN Doc. A/AC.25/W.45, *Analysis of Paragraph 11 of the General Assembly's Resolution of 11 December 1948*, Working Paper Prepared by the U.N. Secretariat (15 May 1950). Section 1, titled "Who Are the Refugees?" states, in paragraph 3:

According to the above interpretation the term "refugees" applies to all persons, Arabs, Jews and others who have been displaced from their homes in Palestine. This would include Arabs in Israel who have been shifted from their normal places of residence.

*Id.*

<sup>20</sup> The sources of the right of return in customary rules from four separate bodies of international law are detailed in Sections 3 through 6 of this paper, below.

<sup>21</sup> This interpretation is amplified by Susan M. Akram and Guy Goodwin-Gill in *Brief Amicus Curiae*, Board of Immigration Appeals, Falls Church, Virginia, published in *Palestine Yearbook of International Law* (forthcoming, 2000-2001). See, also, Lex Takkenberg, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 243 (1998) (similarly noting that "Count Bernadotte was apparently of the opinion that the right of refugees to return already formed part of existing international law").

<sup>22</sup> See, *Mediator's Progress Report*, part I ("The Mediation Effort"), sect. VIII ("Conclusions"), no. 4 ("Specific Conclusions"), subsection (i) (containing the quoted language). See, also, *Mediator's Progress Report*, part I ("The Mediation Effort"), sect. V ("Refugees"), subsection (5) (wherein Bernadotte reviewed his position, stated in a report to the Security Council (U.N. doc. #S/948) which he made following receipt of a letter dated August 1, 1948 from the Provisional Government of Israel regarding Israel's view of the Palestinian refugee problem, that "it was [Bernadotte's] firm view that the right of the refugees to return to their homes at the earliest practicable date should be *affirmed*") (emphasis added).

<sup>23</sup> See, *Compensation to Refugees for Loss of or Damage to Property to be Made Good under Principles of International Law or in Equity*, Working Paper Prepared by the U.N. Secretariat, U.N. Doc. W/30 (Restricted) (Original: English) (31 October 1949), available on the UNISPAL website (the quoted language appearing in paragraph 8 of the Working Paper). The final draft of what became paragraph 11(1) includes the phrase "under principles of international law and in equity" as an amplification on the right to compensation, which (as is discussed in the following few paragraphs of text of this paper) applies to two potential groups of refugees - returnees and non-returnees). The Working Paper clarifies that the amplifying phrase was included specifically to refer to those refugees *choosing to exercise their right of return*. The drafting history recorded in the Working Paper clarifies that the states participating in the debate on Resolution 194 viewed international law as according sufficient protection to the right of compensation for refugees choosing *not* to return. However, the concern was that *equal* levels of protection for the right of compensation be guaranteed for all *returning* refugees as well. The possibility that the returning refugees' equally valid right of compensation (under international law) might be somehow be obstructed by Israel arose from the realization that the *returning* refugees - who would be returning to Israel as nationals of Israel, and hence would be subject to its domestic laws - might find themselves faced with discriminatory property compensation laws and procedures enacted by Israel falling *below* the internationally guaranteed standards. Hence the reference to "international law and equity" was inserted at precisely the point in Paragraph 11(1) of Resolution 194 enumerating the right to compensation (and, most significantly, was *not deemed necessary at any other point in Resolution 194*), to guarantee that the *returning refugees'* right to compensation would be protected at the internationally guaranteed levels, in the event that Israel's domestic compensation laws failed to accord with international standards.

<sup>24</sup> These include, for example, the Office of the High Commissioner for Russian Refugees (established by the League of Nations), the U.N. Relief and Rehabilitation Administration, and the International Refugee Organization. For information on the mandates of these respective organizations, all three of which were founded prior to 1948, see, *generally*, Louise Holborn, REFUGEES: A PROBLEM OF OUR TIME. THE WORK OF THE UNHCR, 1951-72 (2 volumes, 1975), *passim*.

The U.N. Mediator, whose thinking the General Assembly so closely tracked in drafting Resolution 194, clearly regarded the right of return as the most appropriate remedy to correct what he clearly viewed as the mass expulsion of the 1948 Palestinian refugees and the resulting massive violation of their fundamental human rights:

It is, however, undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict....The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumors concerning real or alleged acts of terrorism, or expulsion....There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity....It would be an offence against the principles of elemental justice, if these innocent victims of the conflict were denied the right to return to their homes...<sup>25</sup>

The second right enumerated in Resolution 194, which is closely connected to the first, is the right of restitution, or the right to regain possession of private property belonging to the returning 1948 Palestinian refugees. This right is stated in the language of Resolution 194 indicating the specific "destination" or "location" where the General Assembly declared the refugees had the right to exercise their right of return, which was clearly stated as being the right "to return to their homes"<sup>26</sup> (emphasis added). That the General Assembly intended to *incorporate* the right of restitution *within* the right of return in Resolution 194 is clearly spelled out in a Working Paper prepared by the U.N. Secretariat dated March 1950.<sup>27</sup> The General Assembly reiterated the right to restitution in the Palestinian context in a 1974 resolution referring to the "inalienable rights of the Palestinians to return to their homes and property from which they have been displaced and uprooted."<sup>28</sup>

The third right enumerated in Resolution 194 - the right of compensation - entitles *two groups* of Palestinian refugees to full monetary compensation for certain categories of their private property. The *first* group of refugees comprises those who might choose to exercise their right of return. *Returning* refugees in this group are entitled to receive full compensation for all private property which had been damaged or destroyed, because this is property which these refugees would otherwise be entitled to regain repossession of under the second enumerated right - the right of restitution - if the property had not been damaged or destroyed. The *second* group of refugees comprise those who might *voluntarily* choose *not* to exercise their priority rights of return and restitution. This group of *non-returning* refugees is also entitled to receive full compensation for *all* of their property, irrespective of whether it had been damaged or destroyed, because they had been wrongfully displaced from it in violation of international law. Again, that this is the correct interpretation of the General Assembly's language in Resolution 194 is clearly spelled out in a Working Paper prepared by the U.N. Secretariat dated October 1949.<sup>29</sup>

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<sup>25</sup> See, *Mediator's Progress Report*, part I ("The Mediation Effort"), sect. V ("Refugees"), subsections 6 & 7 (containing the quoted language).

<sup>26</sup> G.A. Res. 194, para. 11(1).

<sup>27</sup> See *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, Working Paper prepared by the U.N. Secretariat, Geneva, March 1950, UN doc. A/AC.25/W.81/Rev. 2 (Annex I) (1950). Paragraph 1 of the Working Paper clearly outlines the inclusion of the "right of restitution" in the "right of return":

1. The underlying principle of paragraph 11, sub-paragraph 1, of the resolution of the General Assembly of [11] December 1948, is that the Palestine refugees shall be permitted *either* to return to their homes and be reinstated in the possession of the property which they previously held *or* that they shall be paid adequate compensation for their property. The purpose of the present paper is to furnish some background for this principle and to recall similar historical situations where claims of restitution of property or payment of compensation were put forward.

*Id.*, para. 1.

<sup>28</sup> G.A. Res. 3236, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 31, para. 2, U.N. Doc. A/9631 (1974).

<sup>29</sup> See, *Compensation to Refugees for Loss of or Damage to Property to Be Made Good Under Principles of International Law or Equity*, Working Paper prepared by the U.N. Secretariat, Geneva, October 1949, UN doc. A/AC.25/W.81/Rev. 2 (Annex II) (1949). This Working Paper examines the drafting history of Paragraph 11(1) of Resolution 194. Paragraphs 12 and 13 of the Working Paper summarize the two categories of property for which the *two* identified groups of refugees are entitled to receive full *compensation*.

To recapitulate, Resolution 194 clearly delineates several extremely important principles the implementation of which is required for the full and legal realization of the Palestinian refugees' right of return under international law. *First, Resolution 194 clearly identifies the exact place to which refugees are entitled to return - i.e., to their homes.* Another way of stating this principle is that the right of restitution has been *incorporated into* the right of return and these two rights are now, accordingly, inseparable. The drafting history of this provision of Paragraph 11(1) of Resolution 194 is instructive. In choosing the term "to their homes," the U.N. Secretariat stated that the General Assembly clearly intended to describe the specific right of each refugee to return to "his house or lodging and not [just generally to] his homeland."<sup>30</sup> In drafting the language of Paragraph 11(1), the General Assembly specifically *rejected* two separate amendments that had referred more generally to the refugees' right to return to "the areas from which they have come."<sup>31</sup>

*Second, Resolution 194 affirms that return must be guided by the individual choice of each refugee.* According to the U.N. Mediator's report, the refugees' "unconditional right to make a free choice should be fully respected."<sup>32</sup> Reviewing the drafting history of Resolution 194, the U.N. Secretariat stated that in selecting the language of paragraph 11(1), "the General Assembly intended to confer upon the refugees as individuals the right of exercising a free choice as to their future."<sup>33</sup> The legal advisor to the U.N. Economic Survey Mission reached the same conclusion: "The verb 'choose' indicates that the General Assembly assumed that the principle 'the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so' [i.e., the right of return] would be fully implemented, and that all the refugees would be given a free choice as to whether or not they wished to return home."<sup>34</sup> The principle of refugee choice had also recently been incorporated into the mandate of the International Refugee Organization,<sup>35</sup> established in 1947 to facilitate solutions for WWII refugees in Europe, and would subsequently become a key principle governing durable solutions to refugee flows.

*Third, Resolution 194 identifies the time frame for the return of refugees - i.e., "at the earliest practicable date."* That the General Assembly intended for Israel to repatriate the Palestinian refugees *immediately*, and without waiting for any final peace agreement with the other parties to the conflict, is indicated by the chosen phrasing of paragraph 11(1). Based on the drafting history and debate, the U.N. Secretariat concluded that

the [General] Assembly agreed that the refugees should be allowed to return "when stable conditions had been established." It would appear indisputable that such conditions were established by the signing of the four Armistice Agreements [in 1949].<sup>36</sup>

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<sup>30</sup> See, *Analysis of Paragraph 11 of the General Assembly Resolution of 11 December 1948*, United Nations Conciliation Commission for Palestine, Working Paper Prepared by the U.N. Secretariat, U.N. Doc. A/AC.25/W.45 (Restricted) (Original: English) (15 May 1950), available on the UNISPAL website [hereinafter referred to as "*Analysis of Paragraph 11*"] (the opening sentence of section 3 containing the quoted language).

<sup>31</sup> *Id.*

<sup>32</sup> See, *Mediator's Progress Report*, part I ("The Mediation Effort"), sect. V ("Refugees"), subsection 8 (containing the quoted language).

<sup>33</sup> See, *Analysis of Paragraph 11* (the opening sentence of section 2 containing the quoted language).

<sup>34</sup> See, Paolo Contini, *Legal Aspects of the Problem of Compensation to Palestine Refugees (Dated 22 November 1949)*, attached to *Letter and Memorandum dated 22 November 1949, Concerning Compensation, Received by the Chairman of the Conciliation Commission from Mr. Gordon R. Clapp, Chairman, United Nations Economic-Survey Mission for the Middle East*, United Nations Conciliation Commission for Palestine, U.N. Doc. W/32 (Restricted) (Original: English) (19 January 1950), available on the UNISPAL website (the opening paragraph to section I containing the quoted language). The Economic Survey Mission was established by the UNCCP in August 1949 as a subsidiary body of the UNCCP to examine the economic situation in the countries affected by the conflict in Palestine and to make recommendations for economic programs to address the existing, and future economic aspects of a solution to the conflict.

<sup>35</sup> See, *generally*, Louise Holborn, *REFUGEES: A PROBLEM OF OUR TIME. THE WORK OF THE UNHCR, 1951-72* (2 volumes, 1975).

<sup>36</sup> See, *Analysis of Paragraph 11* (the concluding paragraphs of Part One, section 6 containing the quoted language). See, also, John Quigley, "Displaced Palestinians and a Right of Return," *Harvard International Law Journal*, Vol. 39, No. 1 (Winter 1998), 171, at 188, for a detailed discussion of the drafting history of the phrase "at the earliest practicable date," reaching the same conclusion.

Fourth, Resolution 194 imposes an unqualified obligation upon Israel both to readmit the refugees and to create the circumstances enabling their safe return. The U.N. Secretariat held the view that Israel was obligated under Resolution 194 to create conditions facilitating the return of the refugees. Reviewing the meaning of the phrase that refugees wishing to return to their homes "should be permitted to do so," the U.N. Secretariat noted that the injunction imposed an obligation on Israel "to ensure the peace of the returning refugees and protect them from any elements seeking to disturb that peace."<sup>37</sup>

Finally, Resolution 194 was drafted to apply to all persons displaced from their homes of origin during the 1948 conflict in Palestine. While the first two drafts of paragraph 11(1) used the term "Arab refugees," the final draft approved by the General Assembly on 11 December 1948 only used the term "refugees." The discussion in the General Assembly concerning the draft resolutions indicates that the term "Arab refugees" was initially used simply because most of the refugees were in fact Palestinian Arabs. By using the broader term "refugees," however, the General Assembly indicated that the rights reaffirmed in paragraph 11(1) were to be applied on a non-discriminatory basis.<sup>38</sup>

The fact that the General Assembly made Israel's admission as a member to the United Nations conditional upon its implementation of Resolution 194<sup>39</sup> clearly indicates that the General Assembly considered Israel to be fully bound to ensure full implementation of the Palestinian refugees' right of return.

Despite the clarity of the formulation of the legal obligations contained in Resolution 194, which the General Assembly has reaffirmed annually<sup>40</sup> without diminution since its original promulgation in 1948, Israel has completely ignored its obligations thereunder. Rather than immediately and fully repatriating the 1948 Palestinian refugees, as required by international law, Israel has instead deliberately blocked their return.<sup>41</sup> Nevertheless, the right of return as articulated in Resolution 194 has remained, in the succeeding five decades since its initial promulgation, entirely consistent with binding norms of customary international law. This fact only strengthens the relevance of Resolution 194 as a framework for crafting a durable solution for the situation of the 1948 Palestinian refugees. We turn now to a consideration of the four independent sources in international law of the 1948 Palestinian refugees' individually-held right of return.

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<sup>37</sup> See, Analysis of Paragraph 11 (the third paragraph of Part One, section 5 containing the quoted language).

<sup>38</sup> *Id.*, at Part One, section 1.

<sup>39</sup> See, G.A. Res. 273 (1949) of May 11, 1949 (admitting Israel to the United Nations). This resolution contains the following relevant points:

First, in the fourth preambular paragraph, the General Assembly expressly "*Not[ed]*... the declaration by the State of Israel that it 'unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of the United Nations'."

Second, in the fifth preambular paragraph, the General Assembly expressly "*Recall[ed]*... [G.A.] resolution...of 11 December 1948," i.e. Resolution 194, regarding repatriation, restitution and compensation for all displaced Palestinians (i.e., the 1948 Palestinian refugees and the internally displaced Palestinians).

Third, also in the fifth preambular paragraph, the General Assembly "[took] note of the declarations and explanations made by the representative of the Government of Israel [Abba Eban] before the *Ad Hoc* Political Committee in respect of the said resolutions." On May 5, 1949, Abba Eban had pledged to U.N.'s *Ad Hoc* Political Committee that Israel would both compensate the 1948 Palestinian refugees for their private property and also respect the property of Palestinians remaining inside the Green Line. See *Yearbook of the United Nations 1948-49* (1950), pp. 399-401; Abba Eban, *An Autobiography* (1977), pp. 140-42; Records of the Forty-Fifth and Forty-Sixth meeting of the General Assembly (agenda items 54 and 55, concerning Israel's application to membership in the United Nations), U.N. doc. A/AC.24/SR.45 (5 May 1949) (containing statements Abba Eban was authorized to make to the U.N. with respect to Israel's application for membership in the U.N.), available on the UNISPAL website.

<sup>40</sup> See, e.g., Kathleen Lawand, "The Right to Return of Palestinians in International Law," *International Journal of Refugee Law*, Vol. 8, no. 4, 532, 545 & n. 60 (October 1996).

<sup>41</sup> Indeed, not only has Israel deliberately barred the return of the Palestinian refugees - in contravention of the first right enumerated in Resolution 194 - it has also violated the second (restitution) and third (compensation) rights enumerated in Resolution 194. Israel has done so by confiscating the entire private property holdings - both real and personal - of the 1948 Palestinian refugees, as well as huge quantities of the private property of the 1948 internally displaced Palestinians, for the express purpose of converting the property for exclusive use by Jews. It has been observed repeatedly that Israel simply could not have survived economically as a young state without the "free" use of the massive property holdings confiscated in their entirety from the 1948 Palestinian refugees, which have remained completely uncompensated for the past five decades, as well as the huge amounts of property confiscated from the internally displaced Palestinians, which for the most part have also remained uncompensated (or at most, undercompensated). See, e.g., Don Peretz, *ISRAEL AND THE PALESTINE ARABS*, at 143, 147 (1958).

### 3. The Right of Return in the Law of Nationality

The law of nationality is a subset of the larger "law of nations," which regulates state-to-state obligations. The law of state succession is also a subset of the law of nations, which has particular implications for application of the rules of the law of nationality.

The following discussion of the law of nationality is divided into four subsections, all of which address customary norms of international law binding upon Israel.

Subsection A includes a short discussion of the rule of international law which stipulates that while questions of nationality are largely regulated by the domestic (internal) jurisdiction of states, international law is nevertheless applicable and can "trump" domestic law if there is a conflict between the two.

Subsection B surveys relevant rules of the law of state succession. State succession occurs when one state (the "predecessor" state) is followed in the international administration of a geographical territory by another state (the "successor" state). As is discussed further below, in the case of the Palestinian refugees, the predecessor state was the embryonic state of Palestine for which, under international law, the British Mandate for Palestine constituted at most only a "stand-in," "custodian" or "guarantor."<sup>42</sup> The successor state (for part of the territory of Mandate Palestine) was Israel. Applying the rules of the law of state succession to the case of the Palestinian refugees, it becomes apparent that Israel was obligated to permit the Palestinian refugees to return to their homes of origin following the fact of succession merely by virtue of the fact that the refugees were "habitual residents" of the geographical territory undergoing the change of sovereignty. This right of return in the law of state of succession is based *solely* on the individual's status as a *habitual resident* of the territory undergoing succession, and is quite apart from the question of nationality status. However, continuing the examination further, it becomes apparent that the law of state succession also required Israel to offer its nationality status to the 1948 Palestinian refugees as of the date of succession. Therefore the refugees *should have* received status as nationals of Israel - by automatic operation of the law of state succession - as of the date that Israel succeeded the British Mandate for Palestine in the international administration of (part of) historic Mandate Palestine. That being the case, all of the regular rules of the international law of nationality would thereafter apply to Israel's subsequent treatment of the Palestinian refugees. The law of nationality, as is discussed in the following two subsections, provides additional independent bases for the right of return *outside* of the context of state succession.

A brief discussion of the status of the Palestinian people as collective holders since 1919 of the vested national sovereignty rights in the area of *all* of mandate Palestine - by virtue of which they collectively comprise the entity actually constituting the "predecessor state" in this factually interesting case of state succession - is included in subsection B.

Having established that the 1948 Palestinian refugees *should have* received status as nationals of Israel by automatic operation of the law of state succession, the following two subsections then elucidate two more relevant principles of the law of nationality of relevance to the Palestinian refugees. Subsection C describes

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<sup>42</sup> See, e.g., The Covenant of the League of Nations, 28 June 1919, reprinted in Henry Cattan, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 259 (1973) (Article 22(2) stating "the tutelage of [] peoples [of colonies and territories] should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League"). See, also, International Status of South-West Africa, 1950 I.C.J. 128, 150 (11 July 1950) (separate advisory opinion of Judge McNair) (stating, regarding the position of a mandate territory in international law, "if and when the inhabitants of the Territory obtain recognition as an independent State... sovereignty will revive and vest in the new State," which indicates that the local population holds actual *de jure* sovereignty of mandate territory throughout the entire duration of the mandate).

the "rule of readmission," whereby states are required by international law to readmit (i.e., allow to exercise their right of return) their own nationals. The rule of readmission is, therefore, the basis of the right of return in the law of nationality *outside* of the context of state succession.

Subsection D describes the prohibition against denationalization, which is a corollary of the rule of readmission. States may not seek to avoid the rule of readmission by purportedly "denationalizing," or attempting to "cast out," their own nationals. This prohibition is especially heightened when the purported denationalization is being carried out on discriminatory grounds by targeting a specific ethnic or racial minority subgroup of the population based upon racial, ethnic, religious or political grounds. Denationalizations - especially when carried out on a discriminatory basis based upon racial, ethnic, religious or political grounds - are categorically prohibited under international law and hence are illegal. Because they are illegal, such purported denationalizations cannot constitute the legal basis for a denial of entry of nationals. Consequently, the prohibition against denationalization - especially when selective denationalization practiced on discriminatory grounds is factually proven - can constitute yet another basis for the right of return in the law of nationality.

A brief discussion of Israel's mass-scale purported "denationalization" of the entire group of 1948 Palestinian refugees through enactment of its Nationality Law of 1952 as an attempt to justify its continued obstruction of the refugees' right of return is therefore also included in subsection D.

### **3.A The Domestic Discretion of States to Regulate Nationality Status Is Limited by International Law**

The first major principle of relevance to the right of return is that while states do have discretion in regulating their nationality status, such discretion has clear limits under international law and the actions of states in this regard will only be recognized at the international level to the extent that they comply with international law. This principle is universally recognized. In 1923, the Permanent Court of International Justice articulated this principle in the *Tunis and Morocco Nationality Decrees* advisory opinion.<sup>43</sup> The rule was also articulated in the authoritative 1930 Hague Convention on Certain Questions relating to Conflict of Nationality Laws.<sup>44</sup> The International Court of Justice also reaffirmed this principle in the 1955 *Nottebohm* case.<sup>45</sup> Various prominent United Nations bodies, including the General Assembly's Sixth (Legal) Committee<sup>46</sup> and the U.N. High Commissioner for Refugees,<sup>47</sup> have also clearly formulated this principle as a recognized rule of customary international law.

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<sup>43</sup> *Tunis and Morocco Nationality Decrees advisory opinion*, PCIJ, Series B, No. 4 (1923) at p. 24 (stating that "in the present state of international law, questions of nationality are, in the opinion of the Court, *in principle* within th[e] reserved [domestic jurisdiction of states]," but qualifying the statement with the phrase "in principle" to provide for cases where international law would be relevant to determinations of nationality status and could overturn, or "trump," domestic law determinations) (emphasis added).

<sup>44</sup> Convention on Certain Questions relating to the Conflict of Nationality Laws, *League of Nations Treaty Series*, vol. 179, p. 89 (1930). Article I stated the principle as follows:

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

*Id.*, art. I.

<sup>45</sup> *Nottebohm* case, 1955 ICJ Reports 1, 23 (stating the principle that a state's determination regarding conferral of nationality status can only be recognized by other states if the determination has fallen within international standards regarding the existence of a "genuine link" between the individual and the state).

<sup>46</sup> GAOR, 51st Session, International Law Commission, 48<sup>th</sup> Session, Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons, p. 9 (Vaclav Mikulka, Special Rapporteur), U.N. Doc. A/CN.4/474 (1996) (observing that in the UN General Assembly Sixth Committee debate, "it was generally recognized that, while nationality was essentially governed by internal law, certain restrictions on the freedom of action by States derived from international law").

<sup>47</sup> U.N. High Commissioner for Refugees, Regional Bureau for Europe, Division of International Protection, *The Czech and Slovak Citizenship Laws and the Problem of Statelessness* (February 1996) (stating that "Nationality matters fall within the sovereign domain of each State and it is for each State to define the rules and principles governing the acquisition and loss of nationality *provided* these rules do not contradict international law").

### 3.B The Law of State Succession - Two Independent Bases for the Right of Return

The law of state succession applies whenever a predecessor state is followed in the international administration of a geographical territory by a successor state.

In the case of the 1948 Palestinian refugees, the predecessor state was the embryonic state of Palestine for which, under international law, the British Mandate for Palestine constituted at most only a "stand-in," "custodian" or "guarantor." The actual, vested holders of sovereignty over the entire territory of historic Mandate Palestine throughout the entire period of the Palestine Mandate were the *Palestinian people*,<sup>48</sup> on whose behalf the British Mandatory was exercising a merely temporary, "custodial" role (much like, in systems of monarchies, "guardians" were frequently appointed to assist young monarchs who had not yet attained adulthood but whose status as sovereign monarchs was nevertheless unquestioned). The successor state, in this factually interesting case of state succession, was Israel (at least for part of historic, Mandate Palestine).

Under the law of state succession, when territory undergoes a change of sovereignty, the law of state succession requires that inhabitants (commonly referred to as "habitual residents"<sup>49</sup>) of the geographical territory coming under new sovereignty be offered nationality by the new state.<sup>50</sup> This rule represents a customary norm and is binding upon all states.<sup>51</sup> What this rule means in practical terms is that when a change in sovereignty occurs over territory, the habitual residents of that territory automatically acquire nationality status in the successor state because it geographically contains their homes of origin, whose location obviously remains unchanged. Furthermore, this rule applies regardless of whether the habitual residents of the territory so affected are actually physically present within the territory undergoing the change of sovereignty on the actual date of the change or not.

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<sup>48</sup> See Section 3.B.1, below, for further discussion of the *de jure* national sovereignty of the "predecessor" state in this case, which was held by the Palestinian people collectively as beneficiaries of the "sacred trust" of the Mandate.

<sup>49</sup> "Habitual residents" are inhabitants of a particular geographical area whose long-term residence there has established that area as their place of permanent residence, containing their homes of origin.

Regarding the selection of the concept of "habitual residents" as the operative concept upon which to base the rules of the law of state succession, see General Assembly Resolution A/RES/55/153 (12 December 2000), "*Articles on Nationality of Natural Persons in Relation to the Succession of States*," which endorsed the International Law Commission's choice of "habitual residents" as the operative concept. The "Official Commentary" to Article 5 states:

As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, "the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State." Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one." This is explained by the fact that "the population has a 'territorial' or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority." Also, in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), "there is substantial connection with the territory concerned through residence itself."

*Id.*, (footnotes omitted).

<sup>50</sup> See, e.g., L. Oppenheim, I INTERNATIONAL LAW 598 (7<sup>th</sup> ed., 1948) (stating that "the inhabitants of the subjugated and the ceded territory acquir[e] *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory," and referring to this rule as being "settled by the customary Law of Nations"); Ian Brownlie, "The Relations of Nationality in Public International Law," 39 *The British Yearbook of International Law* 284, 320 (1963) ("the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality"); Charles Hyde, II INTERNATIONAL LAW 1090 (1945) ("Whenever a State acquires from another part of its territory, the inhabitants of the area transferred, who were nationals of the former sovereign, are, in the absence of an agreement collectively naturalized."); F.A. Mann, "The Effect of Changes of Sovereignty upon Nationality," 5 *Modern Law Review* 218, 221 (1941-2) ("The modern rule of customary international law may be formulated as follows: The nationality of the predecessor state is lost and that of the successor state is acquired by such inhabitants of the ceded or annexed territory as were subjects of the superceded sovereign.")

<sup>51</sup> See, e.g., "Comment: UNHCR and Issues Related to Nationality," Vol. 14, no. 3 *Refugee Survey Quarterly* 91, 102 (1995) (UNHCR Center for Documentation on Refugees) (stating that "State practice internationally reinforces the rule that, in principle, the population goes with the territory and, therefore, receives nationality corresponding with residency").

The General Assembly has adopted<sup>52</sup> a set of legal principles which conclusively demonstrate that under the rules of the law of state succession, the 1948 Palestinian refugees have an absolute right to return to their homes of origin inside the 1949 armistice lines. These principles are called the "Articles on Nationality of Natural Persons in Relation to the Succession of States" [hereinafter "**ILC Articles on Nationality/State Succession**"]. They were prepared by the International Law Commission [hereinafter the "**ILC**"], which is a U.N. body of legal experts charged with clarifying specific topics of international law assigned to it for study by the General Assembly. The General Assembly adopted the ILC Articles on Nationality/State Succession verbatim as submitted by the ILC<sup>53</sup> to the General Assembly and requested states to follow them in their state practice regarding nationality conferral in the context of state succession.<sup>54</sup> Thus the ILC Articles on Nationality/State Succession reflect binding customary international law, since their purpose is to *clarify* the application of certain rules from the law of state succession.

**Article 14(2)** of the ILC Articles on Nationality/State Succession specifically enumerates a right of return in the law of state succession for all habitual residents of a territory undergoing a change in sovereignty. This right of return is based *solely* upon an individual's status as a habitual resident of the territory undergoing the change of sovereignty:

**Article 14: Status of habitual residents**

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.
2. A State concerned *shall* take all necessary measures to allow persons concerned [i.e., habitual residents] *who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.*<sup>55</sup> (emphasis added)

Three aspects of **Article 14(2)** are of great importance in clarifying the rules of the law of nationality as applied upon state succession in the case of the 1948 Palestinian refugees.

First, *the right of return as set forth in Article 14(2) is phrased independently of the nationality status of the habitual residents upon whom it is conferred.* Therefore, nationality status is completely irrelevant to (in other words, is not a required element for) the existence of the right of return enabling habitual residents of a territory undergoing a change of sovereignty to be entitled to return to their homes of origin in that geographical area.

Second, *Article 14(2)'s right of return applies by its express terms to all habitual residents of a given geographical territory undergoing a change of sovereignty even if they were actually outside the geographical territory concerned on the actual "date of succession."*

Third, *implementation of Article 14(2) is mandatory for all successor states, as is indicated by use of the word "shall" in Article 14(2).*

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<sup>52</sup> See General Assembly Resolution A/RES/55/153 (12 December 2000), "Articles on Nationality of Natural Persons in Relation to the Succession of States" [hereinafter referred to as "ILC Articles on Nationality/State Succession"].

<sup>53</sup> See Report of the International Law Commission on the Work of Its Fifty-First Session (3 May - 23 July 1999), GAOR 54<sup>th</sup> Sess., Supp. 10, U.N. doc. A/54/10 and Corr. 1 & 2), chapter IV titled "Nationality in Relation to the Succession of States."

<sup>54</sup> See G.A. Res. A/RES/55/153 (12 December 2000).

<sup>55</sup> ILC Articles on Nationality/State Succession, art. 14.

The appropriateness of applying the rules of **Article 14(2)** to the case of the 1948 Palestinian refugees is obvious, since they too were affected by a "specific case where the succession of States is the result of events leading to the displacement of a large part of the population," which, as is explained in the ILC's "Official Commentary" to **Article 14(2)**, is exactly the factual situation which **Article 14(2)** was designed to address.<sup>56</sup>

**Article 5** of the ILC Articles on Nationality/State Succession presents the same rule as **Article 14(2)**, but phrases it in the more traditional language of the law of nationality:

**Article 5: Presumption of nationality**

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.<sup>57</sup>

Applying **Article 5** to the case of the Palestinian refugees, it becomes apparent that the 1948 Palestinian refugees - because they were habitual residents of the territory undergoing the change of sovereignty - should have been deemed automatically (by operation of the international law of state succession) to have become nationals of the successor state (Israel) as of the date of succession. As such, Israel was - and remains - required to readmit them, under the traditional "rule of readmission" (which is a rule from the law of nationality discussed in subsection 3.C, above) requiring states to readmit their own nationals. As the ILC's "Official Commentary" to **Article 5** explains, the presumption that habitual residents of a territory undergoing a change of sovereignty will acquire the nationality status of the successor state through the automatic operation of international law is a strong one. This presumption can only be rebutted by nationality procedures *which are themselves in conformity with the ILC Articles on Nationality/State Succession, specifically, and international law, generally*. This rule merely reiterates the international law limits on the domestic jurisdiction of states to regulate nationality status, as has already been discussed in Section 3.A, above.

Article 5, then, reflects the traditional rule, already stated at the beginning of this subsection, above, that - in Ian Brownlie's words - "the population follows the change of sovereignty in matters of nationality."<sup>58</sup> This rule was recognized by a Tel Aviv district court in a 1951 case,<sup>59</sup> in which the judge's opinion expressly stated that international law and rules of the law of state succession, in particular, were specifically relied upon. The judge came to the conclusion that in the absence of any law to the contrary (and since the opinion

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<sup>56</sup> See *ILC Articles on Nationality/State Succession*. The "Official Commentary to Article 14 states:

Paragraph 2 addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission feels that ... it was desirable to address explicitly the problem of this vulnerable group of persons.

*Id.*

<sup>57</sup> *ILC Articles on Nationality/State Succession*, art. 5.

<sup>58</sup> See Ian Brownlie, "The Relations of Nationality in Public International Law," 39 *The British Yearbook of International Law* 284, 320 (1963) ("the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality").

<sup>59</sup> *A.B. v. M.B.*, 17 ILR 110 (Tel Aviv District Court, 6 April 1951, Zeltner, J.). This case is widely cited. See, e.g., Kathleen Lawand, "The Right to Return of Palestinians in International Law," Vol. 8, no. 4 *International Journal of Refugee Law* 532, 562 & n. 147 (October 1996); Guy Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW* 242 & n. 190 (2d ed. 1996) (noting that this is the only Israeli court case on the nationality status of Palestinians following the date of state succession which expressly relied upon international law and the law of state succession to reach its decision); Ian Brownlie, "The Relations of Nationality in Public International Law," 39 *The British Yearbook of International Law* 284, 318 (1963); Lex Takkenberg, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 183 & n. 56 (1998) (also noting the judge's reliance upon international law and specifically the law of state succession to reach the decision); *ILC Articles on Nationality/State Succession*, "Official Commentary" to Article 5, note 44.

was rendered in 1951, Israel had not yet enacted its 1952 Nationality Law), all Palestinians who remained inside the 1949 armistice lines should be regarded as having become nationals of the state of Israel through the automatic operation of international law:

...the point of view according to which there are no Israeli nationals is not compatible with public international law. The prevailing view [based on Oppenheim, Schwarzenberger, and Lauterpacht] is that, in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitant of the ceding State becomes automatically a national of the receiving State....If this is the case, is it possible to say that the inhabitants of part of a State which is transformed into an independent State are not ipso facto transformed into the nationals of that State? So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals - a phenomenon the existence of which has not yet been observed.<sup>60</sup>

The judge's conclusion reached in this 1951 case is correct, under international law, regarding the automatic acquisition of Israeli nationality status by all the Palestinians who remained inside the 1949 armistice lines as of the date of succession. However, the law of state succession requires *the same result* as well for all 1948 Palestinian refugees who were temporarily displaced outside the territory undergoing the change of sovereignty on the date of succession. In particular, **Article 14(2)** and **Article 5** of the ILC Articles on Nationality/State Succession require this result with respect to the case of the 1948 Palestinian refugees. This is so because the law of state succession specifically requires that the successor states take *two* separate actions vis-à-vis all habitual residents of the geographical territory undergoing a change of sovereignty: (1) permit all habitual residents (even those who may have become temporarily displaced *outside* the territory undergoing the change of sovereignty) to return to their homes of origin in the territory undergoing the change of sovereignty (**Article 14(2)**); and (2) to accord nationality status of the successor state automatically to all habitual residents (again, irrespective of temporary location) of the territory undergoing the change of sovereignty as of the date of succession (**Article 5**).

The logic of interpreting international law to require that the result of the 1951 Tel Aviv district court case be extended also to regard Israeli nationality status as having been automatically conferred upon the 1948 Palestinian refugees as well (i.e., in addition to those Palestinians who remained inside the 1949 armistice lines) as of the date of succession was recognized as early as 1949 by the legal advisor to the U.N. Economic Survey Mission for the Middle East, in an opinion letter he addressed to the UNCCP dated 22 November 1949:

It appears [ ] that Arabs should be regarded as having the same citizenship status as Jews, both at the time of their displacement and upon their re-admission to Israeli territory. The temporary exodus from Israel of those refugees who will return legally to that country would not seem to change their citizenship status.<sup>61</sup>

Accordingly, correct application of the rules of the law of state succession indicates that the 1948 Palestinian refugees - even though temporarily displaced outside what became the 1949 armistice lines "because of

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<sup>60</sup> A.B. v. M.B., 17 ILR 110 (Tel Aviv District Court, 6 April 1951, Zeltner, J.).

<sup>61</sup> See Paolo Contini, *Legal Aspects of the Problem of Compensation to Palestine Refugees (Dated 22 November 1949)*, attached to Letter and Memorandum dated 22 November 1949, Concerning Compensation, Received by the Chairman of the Conciliation Commission from Mr. Gordon R. Clapp, Chairman, United Nations Economic-Survey Mission for the Middle East, United Nations Conciliation Commission for Palestine, U.N. Doc. W/32 (Restricted) (Original: English) (19 January 1950), available on the UNISPAL website (Section II(d) containing the quoted language in the second full paragraph).

events connected with the succession of states"<sup>62</sup> - *should have been regarded* as having acquired Israeli nationality status as of the date of succession by automatic operation of international law. As will become clear from discussion of the "rule of readmission" from the law of nationality, addressed in the following Subsection 3.C, below, this automatic acquisition of Israeli nationality status by the 1948 Palestinian refugees as of the date of succession would, thereby, accord them grounds for their right of return based upon the interplay of the combination of rules from the law of state succession and the law of nationality - i.e., based upon their status as *nationals* of Israel. This basis for their right of return to their homes of origin inside the 1949 armistice lines exists independently of and *in addition to* their already existing right to return to their homes of origin, which inured to them under the law of state succession solely by virtue of their status as *habitual residents* of the territory undergoing the change of sovereignty.

In light of the above rules, it therefore becomes clear that Israel's requirement under its 1952 Nationality Law (discussed, below, in Section 3.D.1, below) that the 1948 Palestinian refugees must have been *physically present inside* what became the 1949 armistice lines between certain time periods for them to qualify for Israeli nationality status therefore not only has no basis in international law but actually violates the international law of state succession.

There are two more provisions of the ILC Articles on Nationality/State Succession which are extremely relevant to the case of the Palestinian refugees - **Article 15**,<sup>63</sup> which prohibits governments from practicing discrimination in the conferral of nationality status, and **Article 16**,<sup>64</sup> which requires that adequate due process safeguards be provided in the determinations of nationality status. Israel has violated **Article 15** by drafting its 1952 Nationality Law in such a way as to effectively denationalize the entire large group of 1948 Palestinian refugees (who should have, on the contrary, been regarded as having become nationals of Israel by automatic operation of international law on the date of state succession), while allowing Jews from anywhere in the world to acquire Israeli nationality status through the much more generous terms of the Law of Return (also discussed in Subsection 3.D.1, below). Israel has violated **Article 16** by failing to allow the 1948 Palestinian refugees to re-enter the 1949 armistice lines, thereby denying them the basic opportunity to be heard in a court of law to challenge the legality - particularly under international law - of Israel's 1952 Nationality Law.

Notice, too, that the ILC's Articles on Nationality/State Succession apply irrespective of the circumstances under which a displaced population came to be displaced (i.e., through peaceful or forcible means). The ILC Article on Nationality/State Succession were drafted to cover *both* scenarios and their purpose in both cases is the same - to ensure that states accord to all involuntarily displaced habitual residents their internationally guaranteed right to return to their homes of origin.

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<sup>62</sup> See *ILC Articles on Nationality/State Succession*, art. 14(2).

<sup>63</sup> See *ILC Articles on Nationality/State Succession* (of which, Article 15, concerning "Non-discrimination," reads: "States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground").

<sup>64</sup> See *ILC Articles on Nationality/State Succession* (of which, Article 16, concerning "Prohibition of Arbitrary Decisions Concerning Nationality Issues," reads: "Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States").

### 3.B.1 *The Vested National Sovereignty of the Palestinian People as the "Predecessor State" in this Case of State Succession*

In this specific case of state succession, the Palestinian people comprised the predecessor state. The Palestinian people collectively acquired *de jure* national sovereignty in all of historic, Mandate Palestine in 1919 by virtue of the sovereignty grant contained in **Article 22, Paragraph 4** of the Covenant of the League of Nations.<sup>65</sup> Full *de jure* sovereignty over the entire territory of historic, Mandate Palestine vested<sup>66</sup> in the Palestinian people by virtue of the "Class A" mandate status granted to them by the League of Nations, based upon the terms spelled out in the Covenant. Britain assumed its purely fiduciary (and clearly non-sovereign) role as mandatory power in Palestine fully subject to the clear limitations and statement of purpose for mandates spelled out in **Article 22** of the Covenant of the League of Nations. The League of Nations'

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<sup>65</sup> Covenant of the League of Nations, 28 June 1919, reprinted in Henry Cattán, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 259 (1973). Article 22 reads, in part:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a *sacred trust* of civilization and that *securities* for the *performance* of this *trust* should be *embodied in this Covenant*.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their *existence as independent nations* can be *provisionally recognized* subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

*Id.*, art. 22 (emphasis added).

As is clear, paragraph 4 of Article 22 specifically refers to the geographical area which formerly had been occupied by the Turkish Empire. This area, which included Palestine, was ultimately divided into five separate mandate areas - Palestine, Trans-Jordan, Lebanon, Syria, and Iraq - all of which were denominated "Class A" mandates because they were deemed to be the most ready to achieve their full sovereign independence and were therefore expected to receive their independence sooner than the "Class B" or "Class C" mandates.

Thus, the League of Nations itself, as early as 1919, "provisionally" recognized Palestine's "existence" as an "independent nation" in Article 22 of its Covenant. The Covenant of the League of Nations both predated the appointment of Britain by the League of Nations in the fiduciary role of mandatory power in Palestine and served as the juridical basis for Britain's authority to serve in the fiduciary role of mandatory power. This being so, Britain assumed its fiduciary role as mandatory power in Palestine fully subject to all the terms of Article 22 of the Covenant of the League of Nations.

The mandate concept, as designed by the League of Nations, was specifically characterized in Paragraph 1 of Article 22 of the Covenant as a "sacred trust" for the development of the national sovereignty rights of the territories so affected. The beneficiaries of the "trust" (and hence only true holders of the "corpus" of the trust - or actual national sovereignty, in this case) were the indigenous local populations on whose behalf the mandates were being created. The mandatory powers were merely fiduciary "managers" of these trusts. The mandatory powers were never intended to supplant or replace the indigenous local populations as the holders of *de jure* national sovereignty rights in the areas where mandates were envisioned.

This being the case, Britain assumed the role of mandatory power in Palestine with the clear understanding that its responsibility, and in fact its very *raison d'être* as a mandatory power in the first instance, was as a fiduciary charged with bringing the League of Nations' "provisional" recognition of Palestine's "existence" as an "independent" sovereign "nation" into full realization, i.e., to assist the Palestinian people in a fiduciary capacity their achievement of full, independent sovereign statehood in all of historic, Mandate Palestine.

Any subsequent actions by Britain in its fiduciary role as mandatory power which may have tended to derogate from the terms of Article 22 would therefore have been *ultra vires* and hence void under the terms of the Covenant of the League of Nations. Certainly the *de jure* national sovereignty rights (the "corpus" of the trust) held by the beneficiaries on whose behalf Britain was "managing" the mandatory "trust" arrangement would remain intact, unaffected and unchanged by any such *ultra vires* actions by Britain (or subsequently by the United Nations).

Of the five "Class A" mandates created by the League of Nations out of the former Turkish Empire, only Palestine failed to achieve full independent sovereign statehood. The other four - Trans-Jordan, Lebanon, Syria and Iraq - all achieved the sovereign independent statehood as pledged to them in Article 22 of the League of Nations. The people of Palestine received the same pledge in 1919 as the other "Class A" mandates and have remained entitled to full sovereign independent statehood ever since.

<sup>66</sup> See, e.g., John Quigley, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 15 & n. 5 (1990), citing Duncan Hall, MANDATES, DEPENDENCIES, AND TRUSTEESHIPS 81 (1948) ("The League of Nations' Permanent Mandates Commission, which oversaw mandate administration, said that mandatory powers had no right of sovereignty but that the people under the mandate held ultimate sovereignty").

covenant to the Palestinian people of *de jure* sovereignty over all of historic, Mandate Palestine was passed on to, and inherited by, the United Nations. Consequently, both Britain and the United Nations were jointly obligated to bring about the de facto realization of the Palestinian people's prior vested grant of *de jure* national sovereignty in all of historic, Mandate Palestine. Any and all British or United Nations actions which might have tended to derogate from the prior, *vested grant of de jure national sovereignty* in all of historic, Mandate Palestine to the Palestinian people would accordingly have been *ultra vires*, and hence cannot be regarded as "legal" under international law.

Similarly, the provisional government of Israel's unilateral declaration of independence in May of 1948 was in complete contravention of the U.N. Security Council resolutions which immediately preceded<sup>67</sup> (and followed)<sup>68</sup> that unilateral action. By April of 1948, the U.N. Security Council had expressly backed away from the recommendation contained in General Assembly Resolution 181<sup>69</sup> (known as the "Partition Resolution") of 29 November 1947. Instead, the U.N. Security Council was seeking a more peaceful - and therefore more legal, under international law - way of dealing with the situation. The United States had by that point even proposed a "Trusteeship Agreement" for Palestine,<sup>70</sup> which was completely different from the partition concept and instead proposed instituting a provisional trusteeship for the *whole territory* of historic, Mandate Palestine under which *all* residents (regardless of nationality, religion or ethnicity) would have lived together under a single, secular and democratic government administered under the auspices of the U.N. Trusteeship Council. By that point it was apparent to all actors - including the U.N. Security Council and especially the United States (as documented in internal State Department memoranda<sup>71</sup> from that period) - that partition of Palestine ran completely counter to the legal self-determination rights (and express wishes) of the Palestinian people and therefore could only be imposed in violation of international law (and through force). Consequently, partition would necessarily be illegal under international law under two, interrelated rules which both had recently been codified in the Charter of the United Nations,<sup>72</sup> in June of 1945. First, the customary norm recognizing the self-determination rights of peoples had been codified in **Article 1(2)**<sup>73</sup> of the Charter. Second, the rule of the "inadmissibility of the acquisition of territory by force" had been codified in **Article 2(4)**<sup>74</sup> of the Charter. The United Nations could not legally impose partition

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<sup>67</sup> See, e.g., S.C. Resolution 44 (1 April 1948), in which the Security Council, on U.S. urging, passed a resolution requesting the Secretary-General to convene a special assembly of the General Assembly to "consider further the question of the future government of Palestine," and specifically the trusteeship agreement proposed by the U.S. for Palestine. Thus the U.N. Security Council, the highest policy setting body for the United Nations, ultimately abandoned the partition concept proposed in Resolution 181. Rather, the Security Council and the General Assembly in 1948 were jointly engaged in seeking a peaceful solution that would not have violated the international norm prohibiting discrimination based upon racial, ethnic, religious or political grounds and that also would not have infringed upon the legal self-determination rights of the indigenous Palestinian population, nor have to be imposed upon them against their will by force of arms. See also S.C. Resolution 43 (1 April 1948); S.C. Res. 46 (17 April 1948); S.C. Resolution 48 (23 April 1948).

<sup>68</sup> See, e.g., S.C. Res. 49 (22 May 1948); S.C. Res. 50 (29 May 1948); S.C. Res. 53 (7 July 1948); S.C. Res. 54 (15 July 1948); S.C. Res. 56 (19 August 1948); S.C. Res. 61 (4 November 1948); S.C. Res. 62 (16 November 1948); S.C. Res. 66 (29 December 1948).

<sup>69</sup> G.A. Res. 181, U.N. GAOR, 2d Sess., U.N. Doc. A/519 (1947) (resolution of November 29, 1947, recommending partition of Palestine).

<sup>70</sup> The U.S. delegation to the U.N. drafted and circulated a document titled "Draft Trusteeship Agreement for Palestine: Working Paper Circulated by the United States Delegation," U.N. doc. A/C.1/277 (1948), appearing in Official Records of the Second Special Session of the General Assembly, Annex to Volumes I and II (1948).

<sup>71</sup> See, e.g., "Report by the Policy Planning Staff on Position of the United States with Respect to Palestine," 19 January 1948, 5 *Foreign Relations of the United States 1948* 546, 549, 553 (1976) (in which the State Department's policy planning staff reported to the U.S. Secretary of State in January 1948 that imposition of the partition plan would appear to violate the Palestinians' right to self-determination under international law).

<sup>72</sup> See Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force October 24, 1945 [hereinafter "*U.N. Charter*"].

<sup>73</sup> See *U.N. Charter*, art. 1(2). Article 1(2) enumerates one of the specific purposes of the United Nations as being:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

*Id.*, art. 1(2).

<sup>74</sup> See *U.N. Charter*, art. 2(4). Article 2(4) reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This binding rule of customary international law is reflected in earlier international agreements, including the 1928 Kellogg-Briand Pact and the 1932 Stimson Doctrine.

upon the Palestinian people in violation of their self-determination right nor through use of force against their wishes, and the Security Council (including, quite explicitly, the United States) expressly recognized this.

Based upon the foregoing, it becomes clear that the Palestinian people collectively constituted the predecessor state in this factually interesting case of state succession, while the British mandatory power merely constituted a fiduciary "guarantor" or "enabler" for the *de facto* coming into existence of the Palestinian state. Any actions by Britain or the U.N. which in any way derogated from the full grant of *de jure* sovereignty to the Palestinian people would therefore necessarily have been *ultra vires* under international law and therefore could never contain, or convey, any legal legitimacy whatsoever.

### 3.C The "Rule of Readmission" - An Obligation Owed to Other States

The right of individuals to return to their homes of origin has other foundations in the law of nationality, independent of the law of state succession. Under the law of nationality, the duty to implement the individual's right of return is an obligation owed by a state to all other states. The rule is that states are required to readmit their own nationals (i.e., to allow them to exercise their right of return) because to refuse to do so would impose on some other state a resulting obligation to receive, or to "host," the "rejected" individual.<sup>75</sup> This principle is known as the "rule of readmission." The rule rests upon the premise that a state may not choose to reject, or leave "stranded," a national outside its borders by refusing readmission because such an action would impose an unacceptable corresponding burden upon another ("receiving") state to accept the stranded individual.<sup>76</sup> Under international law, states may not burden each other in this way.<sup>77</sup> The rule is universally recognized<sup>78</sup> and has achieved customary status: "[A] State [of origin] owes to other States at large (and to particular States after entry [of nationals from the state of origin]), the duty to re-admit its nationals."<sup>79</sup>

### 3.D The Prohibition against (Mass) Denationalization

There exists another customary (binding) rule under the law of nationality known as the "prohibition against denationalization." This rule follows as a natural corollary to the rule of readmission, already discussed immediately above. The prohibition against denationalization prevents a state from using revocation of nationality, or purported denationalization, as a means of avoiding its obligation to admit its own nationals. This rule - like the rule of readmission, which is its "sister" rule in the law of nationality - had attained customary status well before the events of 1948. As one commentator has noted, the prohibition against denationalization follows as a direct corollary of the rule of readmission: "States are precluded from resorting to the denationalization of nationals abroad 'solely for the purpose of denying them readmission or to prevent their return', as such action would amount to 'a direct infringement of the sovereign rights of the State of residence'."<sup>80</sup>

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<sup>75</sup> See, e.g., Richard Plender, INTERNATIONAL MIGRATION LAW 71 (1972) ("The proposition that every State must admit its own nationals to its territory is so widely accepted that it may be described as a commonplace of international law").

<sup>76</sup> See, e.g., P. Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 53 (1979) ("the State of nationality is also under an obligation to admit a national born abroad who never resided on its territory if his admission should be demanded by the State of residence").

<sup>77</sup> See, e.g., Guy Goodwin-Gill, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 137 (1978) ("Considered simply as an obligation between States, the duty to admit *nationals* is firmly fixed within the corpus of general international law").

<sup>78</sup> See, e.g., Lex Takkenberg, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 238 (1998) (stating "nationals have a virtually unlimited right to enter their own country").

<sup>79</sup> See, e.g., Guy Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW vii (2d. ed. 1996). See, also, *Id.*, at 269 (referring to "the duty of the State to readmit its nationals" as constituting a legal obligation, binding upon all states).

<sup>80</sup> See Kathleen Lawand, "The Right to Return of Palestinians in International Law," Vol. 8, No. 4, *International Journal of Refugee Law* 532, 552 (October 1996) (citing P. Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 54, 57 (1979)).

Noted commentators are uniform in stating the rule against denationalization in categorical terms. For example, John Fischer Williams, writing in 1927, phrased the rule as follows: "[A] state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory."<sup>81</sup> Similarly, Richard Plender put the rule as follows: "[A] state may not justify its expulsion or non-admission of its own former nationals by drawing attention to the fact that it first took the precaution of denaturalizing them."<sup>82</sup> The entry for "Population, Expulsion and Transfer" in the authoritative *Encyclopedia of Public International Law* puts the rule just as categorically, stating that nationals may not be denied re-admission on the rationale that they are no longer nationals.<sup>83</sup> Another commentator states the rule equally categorically: "For international law purposes, States do not enjoy the freedom to denationalize their nationals in order to expel them as 'non-citizens'."<sup>84</sup>

Further authority for the "prohibition against denationalization" exists in an authoritative draft international convention dating from 1930,<sup>85</sup> resolutions by U.N. organs,<sup>86</sup> and various regional declarations.<sup>87</sup>

Denationalization is prohibited under international law in the case of a single instance, affecting a single person. The prohibition against denationalization is therefore much stronger when denationalization is implemented on a "mass" scale and is intended by the government so acting to cast out a whole large class of nationals from the body politic of the state.

Under human rights law, as will be discussed in Section 5, below, such "mass" denationalization is even more illegal under international law when the class of persons being cast out of the citizenry by the state so acting is selected based on discriminatory grounds such as race, ethnicity, religion or political belief which - under binding treaty and customary human rights law - are expressly prohibited from being used by any state in its governmental actions. Such prohibited grounds include those listed, for example, in **Article 2(1)** of the International Covenant for Civil and Political Rights: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>88</sup>

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<sup>81</sup> See John Fischer Williams, "Denationalization," 8 *British Yearbook of International Law* 45, 61 (1927) (stating also "There will also be general agreement that a state is bound to receive back across its frontiers any individual who possesses its own nationality..."). See, also, *Id.*, at 56 ("The duty of a state to receive back its own nationals is laid down by the accepted authorities in the most general terms and is in accordance with the actual practice of states").

<sup>82</sup> See Richard Plender, *INTERNATIONAL MIGRATION LAW* 87 (1972).

<sup>83</sup> See Alfred de Zayas, "Population, Expulsion and Transfer," in Bernhardt (ed.), 8 *Encyclopedia of Public International Law* 438, 442 (1985).

<sup>84</sup> See Guy Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW* 242 & n. 186 (2d ed. 1996) (citing D.P. O'Connell, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW*, vol. 1, 498-9 (1967)).

<sup>85</sup> See Research in International Law, Harvard Law School, "Nationality, Responsibility of States, Territorial Waters: Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930," *The Law of Nationality*, 23 *American Journal of International Law* 13, 16 (1929) (Article 20, of which, provides that "A State may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another State, if such person is a national of the first State or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other State").

<sup>86</sup> See, e.g., Draft Principles on Freedom and Non-Discrimination in Respect of Everyone to Leave Any Country, Including His Own, and to Return to His Country, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Res. 2B(XV), U.N. Doc. E/CN.4/846 (1963) p. 44 at p. 46 (paragraph II(b) of which states "No one shall be arbitrarily deprived of his nationality... as a means of divesting him of the right to return to his country").

<sup>87</sup> See, e.g., Strasbourg Declaration on the Right to Leave and Return, art. 6, para. (b), 26 November 1986 (stating that "No person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country"), cited in Hurst Hannum, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 156 (1987).

<sup>88</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A, U.N. Doc. A/6316 (1966), 999 *UN Treaty Series* 171, art. 2(1) (ratified by Israel on October 3, 1991).

### 3.D.1 *Israel's Purported Denationalization of the 1948 Palestinian Refugees through Its 1952 Nationality Law*

Israel has two laws governing citizenship: one for Jews and the other for non-Jews. The law conferring citizenship on Jews is the Law of Return.<sup>89</sup> It provides automatic Israeli citizenship for any Jew in the world who wishes to immigrate to Israel.<sup>90</sup> The law casts a wide arc, to grant Israeli citizenship to the largest number of Jews possible. As one apologist for the Law of Return phrased it, "the Law of Return does not discriminate *against* any racial group; it merely grants members of one group, the Jewish people, a privilege not granted to the members of any other group."<sup>91</sup>

In stark contrast is Israel's 1952 Nationality Law,<sup>92</sup> which was drafted with the obvious purpose of excluding the largest number of 1948 Palestinian refugees from eligibility for Israeli citizenship as possible. While the law carefully avoids the use of the term "non-Jew" in describing the narrowly defined<sup>93</sup> categories of persons who became eligible for Israeli citizenship based upon the 1952 Nationality Law, it becomes clear the law was obviously *intended* to apply to non-Jews only because Jews would obviously avail themselves of the far easier terms and procedures of the Law of Return. In contrast, the 1952 Nationality Law (for non-Jews) imposes strict requirements that persons applying for nationality (or citizenship) status based upon this law need to have been physically present inside the 1949 armistice lines between certain dates. The vast majority of 1948 Palestinian refugees were factually incapable of meeting these strict physical presence requirements of Israel's 1952 Nationality Law. Hence this entire large group of persons was effectively denationalized by that law. It is on the basis of this purported denationalization that Israel asserts having a purported basis for obstructing the right of return of virtually the entire class of persons comprising the 1948 Palestinian refugees.

However, since Israel's 1952 Nationality Law obviously completely violates the rule of the law of nationality prohibiting denationalization, it is accordingly completely illegal under international law. This is all the more so, since such a large number of persons was purported to be denationalized by this law. Furthermore, the group chosen for selective denationalization was clearly *selected* on discriminatory grounds (i.e., racial, ethnic, religious or political criteria) prohibited by human rights law, in particular (see Section 5, below), and international law, in general. Hence, Israel's purported denationalization is even more illegal under international law.

In concluding this review of the right of return in the law of nationality, it becomes clear that the right of return is exceptionally strongly grounded in this body of law. Under the international law of nationality, states are limited in their domestic discretion to regulate their own nationality status by several binding

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<sup>89</sup> 4 *Laws of the State of Israel* 114 (1950).

<sup>90</sup> 4 *Laws of the State of Israel* 114 (1950) (Section 1 of the law provides: "Every Jew has the right to come to this country [Israel] as an *oleh* [Jewish immigrant]").

<sup>91</sup> A. Rubinstein, *The Constitutional Law of the State of Israel* (Jerusalem, 1959), 161, 182, cited in David Kretzmer, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 36 & n.6 (1990).

<sup>92</sup> Nationality Law, 5712/1952, 93 *Official Gazette* 22 (1952).

<sup>93</sup> For example, former citizens of the Palestine Mandate of Arab origin could only qualify for Israeli nationality (citizenship) under the 1952 Nationality Law if they met the following stringent criteria under Section 3:

(a) A person who immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israel national under Section 2, shall become an Israel national with effect from the day of the establishment of the State if:

(1) he was registered on the 4<sup>th</sup> Adar, 5712 (March 1, 1952) as an inhabitant under the Registration of Inhabitants Ordinance, 5709-1949; and

(2) he is an inhabitant of Israel on the day of the coming into force of this Law; and

(3) he was in Israel, or in an area which became Israel territory after the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.

(ii) A person born after the establishment of the State who is an inhabitant of Israel on the day of the coming into force of this Law, and whose father or mother becomes an Israel national under subsection (a), shall become an Israel national which effect from the day of his birth.

Nationality Law, 5712/1952, 93 *Official Gazette* 22 (1952), sect. 3.

customary norms of international law. First, under the law of state succession, newly emerging successor states are under a binding obligation of customary law to allow *all* habitual residents of a territory undergoing a change of sovereignty to exercise their right to return to their homes of origin from which they may have become temporarily displaced during the process of succession. Second, in addition to the foregoing, the law of state succession imposes another separate (but related) obligation upon successor states to accord their new nationality status to all habitual residents of the geographical territory undergoing the change in sovereignty, a process which in any case is presumed to occur automatically by operation of international law. This second rule of the law of state succession effectively accords habitual residents a second, independent basis upon which to exercise their right of return to their homes of origin from which they may have become temporarily displaced during the process of succession because as nationals of the successor state, they then can invoke the rule of readmission. The rule of readmission, which requires states to readmit their own nationals, derives directly from the law of nationality (independently of the law of state succession), and this rule consequently forms the third basis for the individuals' right of return in the law of nations. Finally, the law of nationality contains a fourth rule prohibiting states from denationalizing their own nationals in an attempt to cast them out of the body politic. All four of these rules operating together form a solid basis for implementing the 1948 Palestinian refugees' individual right of return to their homes of origin inside the 1949 armistice lines, based solely upon the law of nationality as applied upon state succession. Accordingly, Resolution 194 is fully implementable solely upon the basis of customary norms from this body of international law alone.

However, we turn now, however, to consideration of a second body of international law - international humanitarian law - which provides a second solid basis for the immediate and full implementation of the 1948 Palestinian refugees' right of return under Resolution 194.

## 4. The Right of Return in Humanitarian Law

The right of return is also anchored in humanitarian law, which is the body of law regulating what states are permitted to do during war. Both the provisional government of Israel (through responsibility for its army) and the Zionist paramilitary forces which preceded it organizationally (for which Israel also inherited responsibility for their actions, under the law of state responsibility) were fully bound by the rules of humanitarian law when they unilaterally embarked upon the enterprise of trying to establish a state through military means. Both the Hague Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>94</sup> [hereinafter the "**Hague Regulations**"] (which are universally recognized, including by Israel,<sup>95</sup> to have achieved customary status by 1939) and the 1949 Geneva Civilians Convention<sup>96</sup> [hereinafter the "**Fourth Geneva Convention**"] (to which Israel is a signatory) provide for the right of return of displaced persons to their homes following the cessation of hostilities. Thus the right of return exists as a binding norm of humanitarian law, and Israel is under a corresponding positive obligation to ensure its implementation.

Under humanitarian law, there is a general right of return which applies to all displaced persons generally, *irrespective* of how they came to be displaced during the period of conflict. For example, if persons came to be displaced because they were temporarily away from their homes on a holiday during the period of conflict and then were barred re-entry, they would still have an internationally guaranteed right of return under humanitarian law. This first type of right of return is referred to in this paper as the "general" humanitarian law right of return.

In addition, there is a second basis for the right of return provided for in humanitarian law, which provides additional grounds for implementing the right of return. This *supplemental* basis for applying the right of return applies when persons have been displaced through a "forcible expulsion" (for example, at gunpoint, under threat of fire or through the deliberate military "stampeding" of a population out of its place of habitual residence). Deliberate, forcible expulsion - especially when carried out on a "mass" scale - is expressly prohibited under humanitarian law. The prohibition is, of course, even stronger against mass forcible expulsions carried out on a discriminatory basis (just as was the case with the prohibition against denationalization, analyzed in the immediately preceding section), since governmental discrimination based upon racial, ethnic, religious or political criteria - in any context - is categorically prohibited by customary norms of international law, including human rights law. The only appropriate corrective remedy under international law for a case of illegal forcible (mass) expulsion, especially when practiced on discriminatory grounds, is implementation of the right of return for all persons so displaced; therefore, the fact of forcible expulsion (and especially when discriminatorily based) consequently becomes an additional, secondary basis for implementation of the right of return of persons forcibly displaced from their homes of origin. This second type of right of return is referred to in this paper as the "forcible (mass) expulsion" humanitarian law right of return.

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<sup>94</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Annex: Regulations Respecting the Laws and Customs of War on Land, T.S. No. 539, 1 Bevans 631, signed at The Hague, 18 October 1907, entry into force 26 January 1910 [hereinafter "Hague Convention" and "Hague Regulations," respectively].

<sup>95</sup> The Israeli High Court has ruled routinely, beginning with the famous 1962 *Eichmann* case, that the Hague Regulations constitute customary international law binding upon Israel. See *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *International Law Reports* 293 (29 May 1962). This ruling has been consistently upheld since then. See, e.g., *Hilu v. The Government of Israel*, HC 302/72, HC 306/72, 27 *Piskei Din* [2] 169; *Ayyoub v. Minister of Defence*, HC 606/78, 610/78, 33 *Piskei Din* [2] 113 (commonly referred to as the "Beit El" case); *A Teacher's Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*, HC 393/82, 37 *Piskei Din* [4] 785, 793.

<sup>96</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 *UN Treaty Series* 287 (entered into force 21 October 1950) [hereinafter "Fourth Geneva Convention"] .

If, for example, it should be sufficiently demonstrated that the 1948 Palestinian refugees were deliberately driven out in an illegal forcible mass expulsion, and especially one which had discriminatory goals as its purpose (i.e., deliberating seeking to displace that group of persons based upon their race, ethnicity, religion or political beliefs) - and it must be noted here that the historical evidence for this proposition is already monumentally strong and continually gains weight as further research is conducted into this question - then that fact would provide additional, supplementary bases for the 1948 Palestinian refugees to exercise their right of return. In this context, the decisions of the International Military Tribunal at Nuremberg<sup>97</sup> [hereinafter "**IMT**"] are particularly relevant, for Nuremberg established unequivocally that forcible mass expulsions - especially when practiced on discriminatory grounds based upon racial, ethnic, religious or political criteria - are illegal under international law and that the only legally appropriate remedy is repatriation (i.e., implementation of the right of return) for all persons so forcibly displaced.

For purposes of this paper, then, the following terminology will be employed to distinguish between the two distinct rights of return under humanitarian law. The first - which applies generally to guarantee all displaced persons their right of return following a conflict - will be termed the "general" humanitarian law right of return. The second - which applies in the circumstances of forcible (mass) expulsion - will be termed the "forcible (mass) expulsion" humanitarian law right of return.

#### **4.A The "General" Right of Return in Humanitarian Law**

The most basic, underlying principle of humanitarian law - which was first codified in Article 43 of the Hague Regulations and has been incorporated into all subsequent customary humanitarian law, including the Geneva Conventions and their related Protocols - is that a "belligerent" (i.e., military) occupant is required to apply the law of the temporarily displaced sovereign during the period of military occupation. Article 42 of the Hague Regulations defines when "military occupation" is considered to have commenced.<sup>98</sup>

In the case of the 1948-related conflict, the Zionist paramilitary forces and the military forces ("*Haganah*" / "Israel Defense Forces") of the provisional government of Israel which succeeded them organizationally (responsibility for the actions of *all* of which Israel inherited under the law of state responsibility) established successive "zones of military occupation" as they progressively gained territorial control over specific geographical areas and as they also, in the process, progressively displaced local community after local community of Palestinians, who became - collectively - the 1948 (externally displaced) Palestinian refugees and the internally displaced Palestinian citizens of Israel.

**Article 43** of the Hague Regulations states the rule that military occupants - because their presence is only temporary - must apply the law of the preceding sovereign.<sup>99</sup> What this rule means in practice is that a belligerent occupant must preserve the legal and social *status quo* in the occupied territory to the maximum extent possible, pending the final legal resolution of the conflict, i.e., a peace agreement. The content of the

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<sup>97</sup> See, generally, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 1945-46 (42 vols. 1947-49), *passim*.

<sup>98</sup> See, Hague Regulations. Article 42 reads:

Territory is considered occupied when it is actually placed under authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

*Id.*, art. 42.

<sup>99</sup> See, Hague Regulations. Article 43 reads:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

*Id.*, art. 43.

rule of Article 43 is broader in the official French version<sup>100</sup> (which is universally recognized, including by the Israeli High Court,<sup>101</sup> to be the only official text of the Hague Regulations) than in the English rendition. The French version of the rule of **Article 43** means, in practical terms, that a belligerent occupant must let the population continue its normal existence with a minimum of interference.

The **Article 43** rule requiring a belligerent occupant to let the local population continue its normal existence with a minimum of interference would logically necessarily include a requirement that the local population be permitted to remain in or return to their homes of origin following the cessation of hostilities. Thus, the rule of **Article 43** is the foundation of the general right of return in humanitarian law.

In addition, there is a specific repatriation provision of the Hague Regulations, which applies to "prisoners of war." This appears in **Article 20**, which lays out a very clear rule: "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."<sup>102</sup> Note that the **Article 20** obligation to repatriate captured combatants is *mandatory*, as is indicated by the word "shall." Applying this rule to the case of Israel, Israel would therefore not have any discretion regarding its obligation to repatriate captured combatants. Its obligation to do so is absolute.

While the Hague Regulations do not specifically articulate the obligation of a state to repatriate *civilian* (i.e., non-combatant) habitual residents of the territory who may have become temporarily displaced during the conflict, it must be immediately obvious that the entire purpose of the Hague Regulations - as is clearly stated in the Preamble to the Hague Convention - and indeed of all humanitarian law generally is to "mitigate" the "severity" of war as much as possible and to spare the local inhabitants (i.e., the habitual residents) to the maximum extent possible.<sup>103</sup> The famous "Martens Clause" in the final paragraph of the preamble to the Hague Convention states the all-important rule that the Hague Regulations are to be read and construed in light of their overriding purpose (to spare the local inhabitants the horrors of war to the maximum extent possible), and that any "gaps" which might appear in the Hague Regulations (i.e., cases where the rules do not specifically address a particular factual situation) are to be "filled" with general principles of international law.<sup>104</sup> Accordingly, it must be logically obvious that a rule of humanitarian law *requiring* the repatriation of prisoners of war following the cessation of hostilities must also *necessarily include* a rule *requiring* the repatriation of non-combatant civilian habitual residents to their homes of origin following the cessation of hostilities. Accordingly, **Article 20** of the Hague Regulations must be interpreted as incorporating, by logical necessity, the right of return of *all* habitual residents to a territory following the cessation of hostilities (and not just prisoners of war, or combatants, who are, in any case, specifically covered by the express language of Article 20). The "duty of care" in situations of combat under humanitarian law is always *greater* towards civilians than towards combatants, even though combatants are also, obviously, entitled to

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<sup>100</sup> The French version of Article 43 states the obligation of the belligerent occupant as maintaining "*l'ordre et la vie publics*," which phrase has been incorrectly translated in the English version of the text. See Edmund H. Schwenk, "Legislative Powers of the Military Occupant under Article 43, Hague Regulations," 54 *Yale Law Journal* 393, 398 (1945) (construing *l'ordre et la vie publics* to mean "social functions and ordinary transactions which constitute daily life").

<sup>101</sup> See, e.g., Yoram Dinstein, "The Israeli Supreme Court and the Law of Belligerent Occupation: Deportations," 23 *Israel Year Book on Human Rights* 1, 19-20 (1993) (stating that the Israeli High Court has found that the English rendition of Article 43 is incorrect and that the French version of Article 43 gives the correct (broader) interpretation of the rule).

<sup>102</sup> See Hague Regulations, art. 20.

<sup>103</sup> See Hague Convention, third preambular paragraph (stating the purpose of the Hague Convention and annexed Regulations to be "to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible"); *Id.*, fifth preambular paragraph (restating the purpose: "these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants").

<sup>104</sup> See Hague Convention, final preambular paragraph ("Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience").

specific enumerated protections under humanitarian law. Applying this rule to the case of Israel, Israel would therefore not have any discretion regarding its obligation to repatriate displaced civilians *or* captured combatants (prisoners of war). Its obligation to repatriate *all* displaced Palestinians is therefore unconditionally guaranteed under the "general" humanitarian law right of return.

Phrasing the effect of the rules contained in **Articles 43** (and by implication **Article 20**) of the Hague Regulations in the language of the law of nationality, Gerhard von Glahn, an authoritative commentator on humanitarian law, states the following rule which reiterates the general right of return in humanitarian law permitting *all* displaced habitual residents to return to their homes of origin:

The nationality of the inhabitants of occupied areas does not ordinarily change through the mere fact that temporary rule of a foreign government has been instituted, inasmuch as military occupation does not confer *de jure* sovereignty upon an occupant.<sup>105</sup>

Since a belligerent occupant has no *de jure* sovereignty - i.e., no *legal* authority under international law - to change any aspect of the underlying legal status of the territory it has come to occupy, neither the Zionist paramilitary forces nor the provisional government of Israel which succeeded them organizationally (and therefore inherited legal responsibility for their actions) had any legitimate *de jure* authority to alter *any* of the basic *legal* rights of the habitual residents of the territories which successively came under their ever-expanding zones of military occupation during the various phases of the 1948-related conflict, even if those habitual residents happened to be temporarily displaced from their homes during the conflict. This prohibition against changing legal facts applies most strongly in the case of residency rights. The right to reside in (or to return to) one's home is a fundamental right upon the implementation of which the exercise of a whole host of other rights is necessarily based. Accordingly, residency rights, including the right to return to one's home of origin, would accordingly receive the strongest of protections under **Article 43** of the Hague Regulations.

Thus the Hague Regulations constitute the foundational source of the general right of return in customary humanitarian law of *all* displaced persons to return to their homes of origin following the cessation of hostilities.

This general humanitarian law right of return of *all* displaced persons to return to their homes of origin following the cessation of hostilities was subsequently incorporated into the Fourth Geneva Convention and its related Protocols. The sources of the right of return in the Fourth Geneva Convention are **Article 4**, **Article 6(4)** and **Article 158(3)**. **Article 4** defines the "protected persons" who are covered by the Convention.<sup>106</sup>

The definition of protected persons covers *all* habitual residents of a territory who may have become temporarily displaced from their place of origin during the conflict (for whatever reason), and provision for their repatriation has been made in two separate articles of the Convention. The first repatriation provision appears in **Article 6(4)**, which covers the "end dates" of the applicability of the Convention. Specifically, **Article 6(4)** states that the Convention shall remain in effect even after the cessation of hostilities for those protected persons *in need of repatriation*.<sup>107</sup>

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<sup>105</sup> See Gerhard von Glahn, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 60 (1957).

<sup>106</sup> See Fourth Geneva Convention. Article 4 reads:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

*Id.*, art. 4.

<sup>107</sup> See Fourth Geneva Convention. Article 6(4) reads:

Protected persons whose release, repatriation or re-establishment may take place after [the Convention would otherwise cease to be applicable] shall meanwhile continue to benefit by the present Convention.

*Id.*, art. 6(4).

The second repatriation provision appears in **Article 158**, which covers the procedures whereby a state may "denounce" the Convention. Specifically, **Article 158(3)** states that a denunciation may not take effect *until after the repatriation* of protected persons has occurred.<sup>108</sup>

It is clear from the foregoing that the drafters of the Fourth Geneva Convention intended for the unqualified voluntary repatriation to their homes of origin of any and all habitual residents of a territory undergoing conflict temporarily displaced (for whatever reason) during that conflict. Thus the Fourth Geneva Convention incorporated the general customary humanitarian law right of return, which it inherited from the Hague Regulations.

#### **4.B The "Forcible (Mass) Expulsion" Right of Return in Humanitarian Law**

As mentioned in the introduction to this section, above, there is a second right of return in humanitarian law, which is referred to in this paper as the "forcible (mass) expulsion" humanitarian law right of return. This second type of right of return found in humanitarian law exists as a legal "remedy" (corrective action) in cases where states have forcibly expelled populations in violation of international law. Forcible expulsions cover cases where displaced persons have been deliberately forced out of their homes (e.g., at gunpoint or by deliberate military "stampeding" of any type) and then subsequently have been prevented from returning to them.

Even a single case of forcible expulsion is prohibited under humanitarian law. The prohibition is accordingly magnified when large numbers of people are forcibly displaced. Because the rights of more people are adversely affected in cases of "mass" forcible expulsion, the illegality of that action is even greater, under international law. Further, forcible expulsions carried out on a discriminatory basis are even more strongly prohibited because of the general customary norm of international law prohibiting governmental discrimination based upon race, ethnicity, religion or political belief generally. However, the involuntary (i.e., forcible) transfer (i.e., expulsion) of even a single individual - e.g., through deportation - is conclusively prohibited under humanitarian law.

The outcome of a forcible expulsion is a population of habitual residents deliberately transferred away from, and prevented from returning to, their homes of origin - all against their will. The rule is quite simple: "[d]eliberate mass expulsions of a population and population transfers are ... prohibited under international law."<sup>109</sup>

The prohibition against forcible expulsion - mass or otherwise - has its basis in the **Article 46(1)** of the Hague Regulations.<sup>110</sup> Pierre Mounier, an assistant prosecutor for the Allies in the criminal prosecution of the Nazi leaders in the IMT at Nuremberg, stated in his opening arguments on 20 November 1945 that

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<sup>108</sup> See Fourth Geneva Convention. Article 158(3) reads:

.... [A] denunciation ... shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

*Id.*, art. 158(3).

<sup>109</sup> See Eric Rosand, "The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?" 19 *Michigan Journal of International Law* 1091, 1117 (Summer 1998) (footnote omitted) [hereinafter Rosand, "Right to Return"]. The author is a legal advisor with the United States Department of State.

<sup>110</sup> See Hague Regulations. Article 46(1) reads:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

*Id.*, art. 46(1).

"deportation" violated **Article 46** of the Hague Regulations, as well as customary international law in general.<sup>111</sup> For that reason, the Charter of the International Military Tribunal<sup>112</sup> [hereinafter the "**IMT Charter**"] included "deportation" in the definition of both "war crimes" (in **Article 6(b)** of the IMT Charter) and "crimes against humanity" (in **Article 6(c)** of the IMT Charter) (see below). Barring the return of forcibly expelled persons was similarly condemned as illegal.<sup>113</sup> Consequently, the Hague Regulations were definitively interpreted by the prosecutors of the IMT to include a forcible (mass) expulsion right of return under customary humanitarian law.

The Fourth Geneva Convention incorporated the forcible (mass) expulsion right of return under customary humanitarian law which it inherited from the Hague Regulations. The prohibition - and the related remedy of repatriation (right of return) - appears in three articles - **Article 45**, **Article 49** and **Article 147**. In addition, rules for repatriating "internees" are spelled out in **Article 134**.

**Article 45** of the Fourth Geneva Convention strictly limits the circumstances under which protected persons may be temporarily transferred (i.e., only to the care of another state party to the Fourth Geneva Convention) and categorically requires repatriation (i.e., implementation of the right of return) to their habitual residence (i.e., homes of origin) of *all* such transferred persons following the cessation of hostilities.<sup>114</sup>

**Article 49** of the Fourth Geneva Convention formulates the forcible (mass) expulsion humanitarian law right of return - which it inherited from the customary humanitarian law norms of the Hague Regulations - in quite express terms: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."<sup>115</sup> Like **Article 45**, **Article 49** also requires the mandatory immediate repatriation "to their *homes*" of *all* persons (including those temporarily evacuated during extreme

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<sup>111</sup> See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 1945-46, at 49 (42 vols. 1947-49) (statement of Pierre Mounier, assistant prosecutor for the French Republic, in opening remarks on 20 November 1945: "These deportations were contrary to the international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the Charter [of the International Military Tribunal at Nuremberg]").

<sup>112</sup> See Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, reproduced in D. Schindler & J. Toman (eds.), THE LAWS OF ARMED CONFLICT 911 (3d ed. 1988) [hereinafter "**IMT Charter**"].

<sup>113</sup> See 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 1945-46, at 596 (42 vols. 1947-49) (Captain S. Harris, assistant prosecutor for the United States, introduced evidence on 14 December 1945 on the illegality of preventing the return of forcibly expelled persons: "The first expulsion action was carried out in Alsace in the period from July to December 1940; in the course of it, 105,000 persons were either expelled or prevented from returning").

<sup>114</sup> See Fourth Geneva Convention. Article 45 reads:

Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

*Id.*, art. 45.

<sup>115</sup> See Fourth Geneva Convention, art. 49.

necessity) following the cessation of hostilities.<sup>116</sup> Such repatriation is mandatory, as is indicated by use of the word "shall" in **Article 49's** repatriation provision.

**Article 147** of the Fourth Geneva Convention is the important article defining "grave breaches" of the Convention, which are violations of humanitarian law of such egregious severity that they are required to be made subject to penal (criminal) sanctions by all other "Contracting Parties" to the Convention (i.e., all other states which have signed the Convention). Most significantly for purposes of this discussion, "deportation" and forcible population "transfer" are classified as "grave breaches"<sup>117</sup> under **Article 147**.

Under the theory developed by the prosecutors at the IMT in Nuremberg, deliberately obstructing the exercise of the right of return<sup>118</sup> of persons forcibly expelled (in a "mass" expulsion or otherwise) also falls well within the scope of a "grave breach" of the Fourth Geneva Convention.

Finally, **Article 134** of the Fourth Geneva Convention contains a general repatriation provision for "internees," requiring *all* of them to be allowed to exercise their right of return to "their last place of residence" upon the cessation of hostilities.<sup>119</sup>

Yet another prohibition against forcible (mass) expulsion appears in **Article 17** of Protocol II to the Fourth Geneva Convention,<sup>120</sup> which applies in cases of non-international armed conflict.

Finally, as is generally well known, the International Military Tribunal at Nuremberg, convened in 1945 to prosecute Nazi and other Axis war criminals, successfully prosecuted the forcible (mass) expulsion of local population groups and the transferring in of settlers into occupied territories as both "war crimes" and "crimes against humanity."<sup>121</sup> The IMT continues to stand as a landmark precedent for the successful prosecution for such offenses.

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<sup>116</sup> See Fourth Geneva Convention. Article 49 reads:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

*Id.*, art. 49.

<sup>117</sup> See Fourth Geneva Convention. Article 147 reads:

Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: ... unlawful deportation or transfer ... of a protected person....

*Id.*, art. 147.

<sup>118</sup> See, e.g., 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 1945-46, at 596 (42 vols. 1947-49) (Captain S. Harris, assistant prosecutor for the United States, introduced evidence on 14 December 1945 on the illegality of preventing the return of forcibly expelled persons).

<sup>119</sup> See Fourth Geneva Convention. Article 134 reads:

The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

*Id.*, art. 134

<sup>120</sup> See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 125 *United Nations Treaty Series* 609 (entered into force 21 October 1978). Article 17 reads:

Article 17: Prohibition of forced movement of civilians:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

*Id.*, art. 17.

<sup>121</sup> See, generally, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 1945-46 (42 vols. 1947-49).

**Article 6** of the IMT Charter,<sup>122</sup> concluded in London on 8 August 1945 and upon which the IMT's jurisdiction was based, set out three main categories of crimes under humanitarian law for which individual responsibility attaches: **Article 6(a)** defined "Crimes Against Peace"; **Article 6(b)** defined "War Crimes"; and **Article 6(c)** defined "Crimes Against Humanity." The United Nations General Assembly subsequently unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" in a 1946 resolution.<sup>123</sup> Similarly, in 1950 the International Law Commission affirmed the statutorily defined crimes, as set out by the IMT. Accordingly, the IMT Charter's Article 6 definitions of crimes under humanitarian law are now part of customary international humanitarian law, binding upon all nations as of 1945.

The definition of "war crimes" contained in **Article 6(b)** of the IMT Charter includes the following: "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory..."<sup>124</sup>

Similarly, the definition of "crimes against humanity" contained in **Article 6(c)** of the IMT Charter includes the following: "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war."<sup>125</sup>

Consequently, based upon the foregoing IMT charter definitions, deportation (i.e., forcible expulsion) conclusively constitutes both a "war crime" and a "crime against humanity" under customary humanitarian law as of 1945. Forcible expulsion would therefore give rise to even greater levels of criminal responsibility where it was practiced on a mass scale or on discriminatory grounds based upon the prohibited criteria of race, ethnicity, religion or political belief.

In concluding this review of the right of return in customary humanitarian law, it is clear that the right of return is extremely solidly grounded in this body of law and exists in two forms. First, there is a general customary humanitarian law right of return, which provides for the immediate, mandatory repatriation of *all* displaced persons at the cessation of hostilities (even prisoners of war and certainly including all civilians) regardless of the circumstances under which they initially became displaced. Second, there is a forcible (mass) expulsion customary humanitarian law right of return, which provides additional, supplemental grounds for the immediate, mandatory repatriation upon the cessation of hostilities of *all* persons forcibly displaced (through a "mass" expulsion, or even in a single instance of forcible displacement). The obligation to repatriate is even greater in cases where the forcible expulsion(s) were carried out on discriminatory grounds based upon race, ethnicity, religion or political belief. Consequently, the binding obligation under customary humanitarian law of states to ensure the immediate and full implementation of the right of return of *all* displaced persons upon the cessation of hostilities is unqualified. Accordingly, Resolution 194 is fully implementable upon the basis of customary humanitarian law alone.

However, we turn now to consideration of a third body of international law - international human rights law - which provides yet a third basis for the immediate and full implementation of the 1948 Palestinian refugees' right of return under Resolution 194.

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<sup>122</sup> See IMT Charter, art. 6.

<sup>123</sup> See "Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal," G.A. Res. 95, U.N. GAOR, 1<sup>st</sup> Sess., at 188, U.N. Doc. A/64/Add.1 (11 December 1946).

<sup>124</sup> See IMT Charter, art. 6(b).

<sup>125</sup> See IMT Charter, art. 6(c).

## 5. The Right of Return in Human Rights Law

Human rights law - which confers rights directly upon individuals and not through states - also contains the right of return. The right of return which exists as an obligation binding upon states in the law of nationality as applied upon state succession and in humanitarian law accordingly has its corollary as an individually-held right under international human rights law. The individually-held right of return is found in a vast array of international and regional human rights treaties. The right of return is a customary norm<sup>126</sup> of international human rights law, which means that because it is a right of such importance to the individuals holding it, there is a corresponding binding obligations upon all states to ensure its full implementation.

The Universal Declaration of Human Rights<sup>127</sup> [hereinafter the "**UDHR**"], which the General Assembly adopted in 1948, is the "foundation" for the individually-held right of return in human rights law. **Article 13(2)** of the UDHR phrases the right of return broadly and simply, as follows:

**Article 13(2):** Everyone has the right to leave any country, including his own, and to return to his country.<sup>128</sup>

The International Covenant on Civil and Political Rights<sup>129</sup> [hereinafter the "**ICCPR**"] incorporated the individually-held right of return which it inherited from the UDHR. **Article 12(4)** of the ICCPR phrases the right of return fairly similarly:

**Article 12(4):** No one shall be arbitrarily deprived of the right to enter his own country.<sup>130</sup>

Another major international human rights convention, the Convention on the Elimination of All Forms of Racial Discrimination<sup>131</sup> [hereinafter "**CERD**"], similarly incorporates the individually-held right of return in its **Article 5(d)(ii)**, and lists it as an enumerated right subject to the categorical non-discrimination rule of the opening paragraph of Article 5: "...States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights,"<sup>132</sup> which includes, in **Article 5(d)(ii)**:

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<sup>126</sup> See, e.g., Kathleen Lawand, "The Right to Return of Palestinians in International Law," vol. 8, no. 4 *International Journal of Refugee Law* 532, 544 (October 1996) (stating that "[t]he fact that the right to return is expressly recognized in most international human rights instruments and draft declarations, that the constitutions, laws and jurisprudence of many States formally recognize it, that it is expressly protected in international humanitarian law instruments, and that it is consistently referred to in resolutions of UN organs dealing with the rights of refugees generally, supports the argument that the right [of return] exists in customary international law....") (footnotes omitted). See also the following authoritative commentators, who agree that the right of return has achieved customary status: Louis Sohn and Thomas Buergenthal, *THE MOVEMENT OF PERSONS ACROSS BORDERS* 39-40 (1992); Stig Jagerskiold, "The Freedom of Movement," in L. Henkin (ed.), *THE INTERNATIONAL BILL OF RIGHTS* 166, 181-2 (1981); Hurst Hannum, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 7-16 (1987). See also Rosand, "Right to Return," 1091, 1121 & n. 115 (stating that state practice reaffirms that the "right of return" is a customary norm of international law and collecting extensive authority for this proposition).

<sup>127</sup> See Universal Declaration of Human Rights, adopted December 10, 1948, GA Res. 217A, UN Doc. A/810, at p. 71 (1948) [hereinafter the "Universal Declaration of Human Rights"].

<sup>128</sup> See Universal Declaration of Human Rights, art. 13, para. 2.

<sup>129</sup> See International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A, U.N. Doc. A/6316 (1966), 999 *UN Treaty Series* 171 [hereinafter "International Covenant on Civil and Political Rights"] (ratified by Israel on 3 October 1991).

<sup>130</sup> See International Covenant on Civil and Political Rights, art. 12, para. 4. (Israel has made no reservation to this article.)

<sup>131</sup> See Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, 660 *UN Treaty Series* 195 [hereinafter the Convention on the Elimination of All Forms of Racial Discrimination"] (ratified by Israel on 3 January 1979).

<sup>132</sup> See Convention on the Elimination of All Forms of Racial Discrimination, art. 5.

**Article 5(d)(ii):** The right to leave any country, including one's own, and to return to one's country.<sup>133</sup>

The three regional human rights treaties also incorporate the individually-held right of return. The American Convention on Human Rights contains the right of return in **Article 22(5)**.<sup>134</sup> The African [Banjul] Charter on Human and Peoples' Rights contains the right of return in **Article 12(2)**.<sup>135</sup> Finally, the European Convention for the Protection of Human Rights and Fundamental Freedoms contains the right of return in **Article 3(2)** of Protocol No. 4.<sup>136</sup>

Israel has signed and ratified the ICCPR and it has not made any reservations to **Article 12(4)**, which contains the right of return. Consequently, **Article 12(4)** is fully binding upon Israel, as a matter of treaty law, *in addition to* the fact that Israel is in any case already bound by the general international obligation binding upon all states to implement the right of return due to its universally recognized status as a customary norm of international law (with sources in four independent bodies of international law, as is being demonstrated in Sections 3 through 6 of this paper).

The phrasing of the right of return under **Article 12(4)** of the ICCPR - which uses the term "enter" rather than "return" - is broader than the phrasing of the right under the UDHR (which uses the term "return"). Thus, the ICCPR phrasing of the right of return would accommodate the situation of second-, third- or fourth-generation refugees whose families - such as in the Palestinian case - have been seeking to exercise their internationally guaranteed right of return for over five decades. Once the 1948 Palestinian refugees - including their offspring - are finally permitted to exercise their individually held right of return, the refugee offspring would actually be "entering" the territory of their families' homes of origin inside the 1949 armistice lines for the first time in their lives. Thus the enormity and severity of the scope of Israel's violation of the right of return in the case of the 1948 Palestinian refugees can well be appreciated.

**Article 12(4)** of the ICCPR uses the phrase "his own country" to specify the destination or location where the right of return is to be exercised. While examination of the "*travaux préparatoires*" (i.e., the drafting history) of the ICCPR does not conclusively establish the meaning of the phrase "his own country," it is possible to say with certainty that the drafters of the ICCPR did *not* intend to limit the application of **Article 12(4)** only to "nationals" of a "state" concerned.<sup>137</sup>

That this is so has been conclusively determined by the U.N. Human Rights Committee, which is the official body established under the ICCPR charged with interpreting the ICCPR. In November of 1999, the Human Rights Committee issued "General Comment No. 27"<sup>138</sup> interpreting the meaning of **Article 12**, generally, and addressing the **Article 12(4)** right of return specifically. General Comment No. 27 definitively confirms the applicability of the **Article 12(4)** right of return to the case of the 1948 Palestinian refugees. General

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<sup>133</sup> See Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii). (Israel has made no reservation to this article.)

<sup>134</sup> See The American Convention on Human Rights, signed 22 November 1969, entered into force 18 July 1978, OEA/SER.L/V/II.23, doc. 21, rev. 6 (1979), art. 22(5): "No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it."

<sup>135</sup> See African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, art. 12,(2): "Every individual shall have the right to leave any country including his own, and to return to his country."

<sup>136</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 *UN Treaty Series* 221, signed 4 November 1950, entered into force 3 February 1953; Protocol No. 4 [Protecting Certain Additional Rights] to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 46 *European Treaty Series*, adopted 16 September 1963, entered into force 2 May 1968, art. 3, para. 2: "No one shall be deprived of the right to enter the territory of the State of which he is a national."

<sup>137</sup> See, e.g., Kathleen Lawand, "The Right to Return of Palestinians in International Law," Vol. 8, No. 4 *International Journal of Refugee Law* 532, 549-550 (October 1996) (examining thoroughly the drafting history of Article 12(4)).

<sup>138</sup> See "General Comment No. 27: Freedom of Movement (Art. 12)," U.N. Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999) [hereinafter "General Comment No. 27"].

Comment No. 27 establishes that the phrase "his own country" as used in **Article 12(4)** applies to a much broader group of persons than merely "nationals" of a state. Rather, the language "his own country" is intended to include, according to General Comment No. 27: "nationals of a country who have been stripped of their nationality in violation of international law, [] individuals whose country of nationality has been incorporated in or transferred to another entity [] whose nationality is being denied them [and] stateless persons arbitrarily deprived of the right to acquire the nationality of the country of [their long-term] residence."<sup>139</sup> All three of the enumerated categories of persons are guaranteed the right of return to their homes of origin under **Article 12(4)**, according to the authoritative interpretation of the U.N. Human Rights Committee. Most significantly, for purposes of this discussion, is that the 1948 Palestinian refugees as a group *fit factually into each of the three enumerated categories* listed in General Comment No. 27. Consequently, it can be stated conclusively that the ICCPR Article 12(4) right of return most definitely *does* apply to the case of the 1948 Palestinian refugees. Accordingly, the refugees hold an absolute entitlement to exercise their right of return immediately and unconditionally - as originally articulated in Resolution 194 over five decades ago.

Understanding the precise intent of the ICCPR drafters in incorporating the word "arbitrarily" into the formulation of the ICCPR **Article 12(4)** right of return is critical to understanding the scope of the right guaranteed because "arbitrarily" is the *only* qualification on the right of return listed in **Article 12(4)**.<sup>140</sup> Without the use of the word "arbitrarily," the right of return would be absolute - for the formulation of Article 12(4) would read categorically "no one shall be deprived of the right to enter his own country" (in other words, no one shall *ever* be deprived of this right, under any circumstances whatsoever).

Analysis of the travaux préparatoires is useful here, and the commentators are in uniform agreement that the word "arbitrarily" refers to only one specific factual instance, that of the use of exile as a "penal sanction" (i.e., sentencing a person charged with a criminal offense to exile or banishment). Thus the term "arbitrarily" *only* applies to those states for which "penal exile" is a permissible judicial sanction (which is a very small group of states). For those states - and for those states only - it is theoretically legally permissible to obstruct the exercise of the right of return only in the limited factual case where exile had been imposed as a judicial sentence (irrespective of the ethical dimensions of such a proposition, which would seem to argue otherwise).<sup>141</sup>

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<sup>139</sup> See *General Comment No. 27*. The quoted language comes from the following excerpt from paragraph #20 of General Comment No. 27, addressing the interpretation of Article 12(4):

The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country." The scope of "his own country" 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. This would be the case, for example, for nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

*Id.*, para. 20.

<sup>140</sup> The qualifications listed in ICCPR Article 12(3) do not apply to Article 12(4) because they *precede* Article 12(4) and refer only to "above-mentioned rights," which would not include the "right of return" which instead *follows* Article 12(3) in Article 12(4). See, e.g., Christian Tomuschat, "State Responsibility and the Country of Origin," in Vera Gowlland-Debbas (ed.), *THE PROBLEMS OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW* 62 (1996) (stating that the "limitation clause of paragraph 3 [of ICCPR Article 12] ... as such does not apply to paragraph 4 [of ICCPR Article 12]").

<sup>141</sup> See, e.g., Marc Bossuyt, *GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 260-63 (1987) (quoting from the drafting history of Article 12(4) as discussed in various U.N. committees and demonstrating that the goal of prohibiting arbitrary denial of entry was to guarantee entry in all cases except where an individual had been banished as a penal sanction). See, also, Manfred Nowak, *UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 218 (1993).

<sup>142</sup> See *General Comment No. 27*, para. #21.

General Comment No. 27 also clarifies the meaning of the qualifying term "arbitrarily," stating the following principles categorically in paragraph 21:

The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. *A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.*<sup>142</sup> (emphasis added)

Because the concept of "arbitrariness" contained in **Article 12(4)** has been conclusively demonstrated - and most especially by the official ICCPR-created body officially charged with interpreting the ICCPR - to have such a restricted meaning (relating to penal sanction only), the scope of the right of return as articulated in **Article 12(4)** is wide, and virtually absolute, admitting of little or no exception. In fact, **Article 12(4)**'s right of return is subject only to the general qualification provisions of **Article 4(1)** of the ICCPR, which itself only permits derogations which are "not inconsistent with [] other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin."<sup>143</sup>

Applying the rules articulated in the quoted excerpt from paragraph 21 of General Comment No. 27 to the case of Israel's treatment of the 1948 Palestinian refugees, it becomes clear that Israel has violated the prohibitions contained therein in three ways. First, Israel's purported denationalization of the 1948 Palestinian refugees, through its 1952 Nationality Law, effectively "stripped" this entire group of their status as presumed nationals of Israel (as discussed earlier in Section 3 on the law of nationality, above). Second, Israel's policy decision to refuse to readmit the 1948 Palestinian refugees for over five decades is clearly intended to apply to a specific population group specifically selected based upon prohibited criteria of race, ethnicity, religion or political belief, and is therefore *prima facie* discriminatory. The discriminatory nature of this governmental policy, which has served to prevent the entire group of 1948 Palestinian refugees from returning to "their own country" despite their clear desire to do so, therefore places the policy squarely within the definition of "arbitrary" as set forth in General Comment No. 27. Third, Israel's initial expulsion of this population subgroup in the 1948-related conflict specifically violates the prohibition against forcible expulsion, as framed so unequivocally by the U.N. Human Rights Committee in the context of interpreting the ICCPR.

Some commentators have tried to argue that the ICCPR **Article 12(4)** right of return only applies to individuals, and not to "large groups" of people seeking to claim the right simultaneously. This argument is weak for several reasons. First, the argument does not make sense logically, since all rights enumerated in the ICCPR are granted to individuals personally, regardless of how many other people might be seeking to exercise the same enumerated right, and at what point in time. Second, other respected commentators have rejected the concept that the **Article 12(4)** right of return cannot apply to large groups of people.<sup>144</sup>

Third, various U.N. organs, including the U.N. High Commissioner for Refugees, have expressly found that large groups of people do have a right of return that is explicitly grounded in both **Article 12(4)** of the ICCPR and its "mother" article, **Article 13(2)** of the UDHR. As one commentator has noted, "[T]he right

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<sup>143</sup> See International Covenant on Civil and Political Rights, art. 4(1).

<sup>144</sup> See, e.g., Manfred Nowak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 220 (1993) (stating that Article 12 applies "even if masses of people are claiming this right"); see, also, Christian Tomuschat, "Das Recht auf die Heimat, Neue rechtliche Aspekte", in J. Jekewitz et al. (eds.), DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG - FESTSCHRIFT FÜR KARL JOSEF PARTSCH 191 (1989).

<sup>145</sup> See Rosand, "Right to Return," 1091, 1130-31.

to return in both the UDHR and the ICCPR was the basis for guaranteeing this right in recently signed peace agreements in order to resolve conflicts in Rwanda and Georgia, both of which produced hundreds of thousands of refugees and displaced persons."<sup>145</sup> In the case of Rwandan refugees, the governments of Rwanda and Zaire entered into a tripartite agreement with the UNHCR<sup>146</sup> on 24 October 1994 for the voluntary return of Rwandan refugees from Zaire which was specifically based upon **Article 12** of the ICCPR and **Article 13(2)** of the UDHR (as well as **Article 5** of the 1969 OAU Convention on Civil and Political Rights, which also contains the right of return). In the case of persons displaced during the Georgian conflict, the UNHCR entered into a similar Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons<sup>147</sup> with the governments of Georgia, Abkhazia and Russia on 4 April 1994 which again explicitly "recogniz[ed that] the right of all citizens to live in and to return to their country of origin is enshrined in the UDHR and ICCPR."<sup>148</sup>

Fourth - and this is the most conclusive rebuttal to the argument attempting to bar application of **Article 12(4)** to large groups of people - General Comment No. 27 itself unambiguously states the applicability of the **Article 12(4)** right of return to large groups of people, in paragraph 19:

The right to return is of the utmost importance *for refugees seeking voluntary repatriation*. It also implies *prohibition of enforced population transfers or mass expulsions to other countries*.<sup>149</sup> (emphasis added)

Finally, it must be noted that the ICCPR contains a general non-discrimination provision in **Article 2(1)**, which categorically prohibits governmental interference with ICCPR-guaranteed rights based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>150</sup> Consequently, this common general non-discrimination provision of Article 2(1) is yet another clear limitation upon a state's ability to interfere with the ICCPR Article 12(4) right of return, and it is clearly binding upon Israel.

Israel, however, has flagrantly violated the ICCPR **Article 2(1)** non-discrimination provision protecting the **Article 12(4)** right of return. This places Israel in gross violation of its treaty obligations under the ICCPR. This egregious treaty violation becomes apparent from reviewing again - in the context of ICCPR treaty obligations, specifically, and customary human rights law, generally - the operative effect of Israel's two nationality laws: the 1950 Law of Return (for Jews) and the 1952 Nationality Law (for non-Jews) (which were already discussed in Section 3.D.1, above, in the context of the law of nationality). Returning to this topic, it becomes immediately obvious that the *intended result* of these two laws working together in tandem is *precisely* to use "race, colour, [] language, religion, political or other opinion, national or social origin, [] birth or other status" (i.e., discriminatory grounds *specifically prohibited* by ICCPR **Article 2(1)** for official use by governments) as "filters" for administering the conferral of Israeli nationality status, and hence as a purported basis for obstructing the **Article 12(4)** right of return.

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<sup>146</sup> See Rosand, "Right to Return," 1091, 1131 & n. 162 (the parties agreed that all Rwandan refugees voluntarily wishing to return had the right to do so).

<sup>147</sup> See Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons [part of political settlement of Georgia/Abkhazia civil war], Annex II, para. 1, U.N. Doc. S/1994/397 (1994), cited in Rosand, "Right to Return," 1091, 1131 & n. 162.

<sup>148</sup> See Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons [part of political settlement of Georgia/Abkhazia civil war], Annex II, para. 1, U.N. Doc. S/1994/397 (1994), cited in Rosand, "Right to Return," 1091, 1131 & n. 162.

<sup>149</sup> See *General Comment No. 27*, para. #19.

<sup>150</sup> See International Covenant on Civil and Political Rights. Article 2(1) reads:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.*, art. 2(1).

<sup>151</sup> See Kathleen Lawand, "The Right to Return of Palestinians in International Law," Vol. 8, No. 4 *International Journal of Refugee Law*

Such a blatant use of ICCPR-prohibited criteria to "screen in" and "screen out" prospective nationals - particularly when the millions of persons thus "screened out" should already have been regarded as having acquired, through the automatic operation of the law of state succession - the nationality status of Israel, and then using the resulting effective denationalization as a purported grounds for obstructing the **Article 12(4)** right of return, constitutes *prima facie* discrimination based on grounds *expressly prohibited* by ICCPR **Article 2(1)**.

As one commentator has noted, employing an interesting combination of the rules of human rights law and the law of nationality: "[T]he right to return guaranteed by [ICCPR] **Article 12(4)** would prohibit the State from withdrawing its nationality from a former citizen where 'the purpose or primary effect of the denationalization is to prevent a former citizen from returning to his country'."<sup>151</sup> Thus, Israel's 1952 Nationality Law (resulting as it did in the effective denationalization of the large group of 1948 Palestinian refugees virtually in its entirety) constitutes a clear violation of Israel's treaty obligations under the ICCPR, both as a violation of the blanket non-discrimination provision of **Article 2(1)** and also as a flagrant, mass-scale violation of the right of return provision of **Article 12(4)**. These actions would in any case be illegal under human rights law generally, and irrespective of Israel's binding treaty obligations under the ICCPR, due to the customary status of the right of return as a customary norm of human rights law generally, as well as the prohibition in customary human rights law generally against discrimination practiced on racial, ethnic, religious or political grounds. (The prohibition against selective denationalization was already discussed in Section 3.D.1 in the context of the law of nationality; however, as has just been pointed out, the prohibition against denationalization is also grounded in human rights law because of the negative effect of denationalization upon the free exercise of the right of return, as well as the discriminatory character of *selective* denationalization.)

Finally, it probably scarcely needs mentioning, but international human rights law also incorporates the general prohibition against forcible (mass) expulsion. Forcible expulsion from one's home of origin violates a vast host of specifically enumerated rights contained in the broad corpus of human rights law generally. Focusing on the issue of forcible expulsion as it impacts upon the specific right of return (which is considered a subset of the broader human rights category of "freedom of movement"), one U.N. Special Rapporteur writing on the topic in 1994 phrased the human rights prohibition against forcible expulsion ("mass" or otherwise) as follows: "[any] form of forced population transfer from a chosen place of residence, whether by displacement, settlement, internal banishment, or evacuation, directly affects the enjoyment or exercise of the right of free movement and choice of residence within States and constitutes a restriction upon this right."<sup>152</sup> The report concluded that:

international law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because [such transfers] are subject to consent, this principle reinforces the prohibition against such transfer.<sup>153</sup>

Similarly, the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities invoked both Article 12(4) of the ICCPR and Article 13(2) of the UDHR in the following 1995 resolution regarding

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532, 555 (October 1996) (citing H. Hannum, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 62 (1987), and also citing R. Higgins, "The Right in International Law of an Individual to Enter, Stay in and Leave a Country," 49 *International Affairs* 341, 350 (1973) (stating: "... it is all too easy for a government to deprive a citizen of his nationality, thus depriving him of his right to return to the country of which he is a national. There is no avoiding a contextual examination of the circumstances in which nationality was lost.")).

<sup>152</sup> See "The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers: Progress Report," by Awn Shawhat Al-Khasawneh, Special Rapporteur, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 46<sup>th</sup> Sess., Agenda Item 8, para. 17, U.N. Doc. E/CN.4/Sub.2/1994/18 (1994).

<sup>153</sup> *Id.*, para. 131.

<sup>155</sup> For an especially thorough analysis of the right to return including specifically the right to return to one's home of origin (which

the inadmissibility of mass expulsions: "[P]ractices of forcible exile, mass expulsions and deportations, population transfers, 'ethnic cleansing' and other forms of forcible displacement of populations within a country or across borders deprive the affected populations of their right of freedom of movement."<sup>154</sup>

In concluding this review of the right of return in international human rights law, it becomes abundantly clear that the right of return constitutes a binding customary norm of human rights law. Consequently, Israel is bound to implement the individually-held right of return in the case of the 1948 Palestinian refugees both as a matter of treaty obligation under the ICCPR (and specifically under its Article 12(4)), as well as being bound generally, like all other states, by the general customary status of the right of return in human rights law (as well as the sources in three other independent bodies of customary international law discussed in other sections of this paper). Accordingly, Resolution 194 is fully implementable upon the basis of customary and treaty-based human rights law alone.

However, we turn now to consideration of yet another aspect of international law - state practice implementing the right of return of refugees - which provides yet a fourth basis for the immediate and full implementation of the 1948 Palestinian refugees' right of return under Resolution 194.

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<sup>154</sup> See U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, Res. 1995/13, U.N. ESCOR, 50<sup>th</sup> Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11.Add.3 (1995).

## 6. State Practice (*Opinio Juris*) Implementing the Right of Return of Refugees

There is a rich body of precedent and authority stemming from state practice reflecting the existence of *opinio juris* (a sense of legal obligation) on the part of states that they are obligated under customary international law to allow displaced individuals, including refugees, to exercise their right of return to their homes of origin<sup>155</sup> (which confers upon them the related right of restitution, or repossession, of private property by the displaced original owner). The obligation of states to allow refugees to return to their homes of origin was solidly established well before the events of 1948 and continues to gain greater weight with each additional instance of state practice implementing the right of return.

Thus the right of return also exists in a fourth independent body of international law, which is the law relating to refugees (a subset of human rights law which incorporates principles of humanitarian law). The primary instrument governing rights of refugees and states' obligation towards them is the 1951 Convention Relating to the Status of Refugees<sup>156</sup> and its related 1967 Protocol.<sup>157</sup> The juridical source of refugees' right of return in refugee law is human rights law<sup>158</sup> (see Section 5, above, for the foundation of the right of return in human rights law), while actual implementation of the right of return is carried out through the Office of the U.N. High Commissioner for Refugees [hereinafter "**UNHCR**"]. Article 1 of the 1950 Statute of the UNHCR delineates the mandate of the Agency as being to "facilitate the voluntary repatriation of [] refugees, or their assimilation within new national communities."<sup>159</sup>

Under refugee law, the principle of refugees' absolute right of return on a voluntary basis to their homes of origin is central to the implementation of the most preferred of the three "durable solutions" designed by the international community to address refugee population flows, this solution being "voluntary repatriation."<sup>160</sup> The three main durable solutions - voluntary repatriation, voluntary absorption and voluntary resettlement - are to be implemented under the auspices of the UNHCR. Of the three durable solutions, only voluntary repatriation represents a right (the right of return) accorded to the individual<sup>161</sup> and a corresponding binding obligation (the duty to readmit) on the part of the "country of origin" from which the refugee flow was

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includes, thereby, an associated right of restitution) as articulated by the international community in various contexts of state practice, see, generally, Rosand, "Right to Return," 1091, *passim*.

<sup>156</sup> See Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, signed 28 July 1951, entered into force 22 April 1954.

<sup>157</sup> See Protocol I Relating to the Status of Refugees, 660 U.N.T.S. 195, opened for signature 31 January 1967, entered into force 4 October 1967.

<sup>158</sup> See United Nations High Commission for Refugees, HANDBOOK ON VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION (1996) (available in cd-rom format). Subsection 2.1, titled "International Human Rights Instruments and the Right to Return," details the sources in human rights law of refugees' right of return, drawing the following conclusions:

The right of refugees to return to their country of origin is fully recognized in international law.... In international human rights law, the basic principle underlying voluntary repatriation is the right to return to one's own country. As a corollary of this right, states are duty-bound to admit their nationals and cannot compel any other state to keep them through measures such as denationalization.

*Id.* See, also, Guy Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW 271 (2d ed. 1996) ("Both the facilitation and promotion of voluntary repatriation fall within the province of UNHCR, while the right to return to one's own country locates such efforts squarely in the human rights context") (footnotes omitted).

<sup>159</sup> See G.A. Res. 428(V) of 14 December 1950, Annex: "Statute of the Office of the United Nations High Commissioner for Refugees."

<sup>160</sup> See, e.g., Lex Takkenberg, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 233 (1998) (stating "[v]oluntary repatriation is considered by UNHCR, as well as by many others, the best of the 'three durable solutions' to deal with refugee problems") (footnote omitted); *Id.*, 320 (stating "[v]oluntary repatriation in peace and dignity is by far the preferred solution to any refugee situation" (footnote omitted)); *Id.* (stating "[t]he prominent place that voluntary repatriation presently takes in the search for solutions is clearly recognized by the international community," and citing extensive authority for this proposition). The author is a field officer with the United Nations Relief and Works Agency.

<sup>161</sup> *Id.* (stating "[t]hat refugees ... in principle have a right to return to their country of origin should be considered as one of the underlying general principles of international refugee law," and citing extensive authority for this proposition) (footnote omitted).

<sup>162</sup> See, e.g., the policy decisions taken by the highest decision-making body of the United Nations High Commissioner for Refugees,

generated. In contrast, the other two durable solutions (absorption or resettlement) are neither rights of refugees nor obligations of receiving states.<sup>162</sup>

Looking first at the "rights" side of this two-sided relationship, it becomes clear that the right of refugees to return to their homes continues to hold primary position in the hierarchy of solutions. Voluntary return and repatriation have consistently constituted the central policy objectives of all U.N. institutions seeking to remedy mass displacements (forcible or otherwise).<sup>163</sup> The General Assembly has issued resolutions in the context of its initiative on state cooperation to avert new flows of refugees which have reaffirmed "the right of refugees to return to their homes in their homelands."<sup>164</sup> In a 1991 speech, the then-U.N. High Commissioner for Refugees, Ms. Sadako Ogata, said that of the three traditional options for dealing with refugees - repatriation, absorption or resettlement - repatriation had become the most viable option.<sup>165</sup> Similarly, in 1993, Ms. Ogata stated that:

the ultimate objective of the international protection of refugees is not to institutionalize exile, but to achieve solutions to refugee problems. Voluntary repatriation, whenever possible, is the ideal solution.[This is why]...I have stressed the refugees' right to return home safely and in dignity.<sup>166</sup>

Turning now to an examination of the "obligation" side of this two-sided relationship, as a question of international law, only the "country of origin" is obliged as a legal matter to receive back the refugees who were originated from within its boundaries (*de facto* borders or otherwise). Other states (including "receiving" or "host" states) are *not* under an obligation to absorb other countries of origins' refugees permanently (although there is a legal obligation to harbor refugees temporarily if, by returning them to their country of origin before conditions of safety have been established there, they might face persecution). The absolute obligation of the country of origin to receive back its refugees<sup>167</sup> (when they voluntarily wish to return there) follows directly from the traditional rule of readmission based in the international law of nationality, as has been discussed in Section 3.C, above.

Articulating the responsibility of a country of origin whose policies are generating large refugee population flows which thereby burden the resources of other states<sup>168</sup> in blunt monetary terms, one commentator has suggested that "one is on safe ground in concluding that the UN, as the legal person to which UNHCR belongs, has a right to recover the costs disbursed by it from a State of origin that has willfully caused massive departures of its citizens through a policy of systematic human rights violations."<sup>169</sup> This comment

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the Executive Committee, regarding durable solutions, their order of priority of implementation, and the legal obligations of states concerned to participate in crafting and implementing "durable solutions." See, *in particular*, (EXCOMM) Conclusion No. 15 (XXX), Refugees without an Asylum Country (1979); EXCOMM Conclusion No. 18 (XXXI), Voluntary Repatriation (1980); EXCOMM Conclusion No. 40 (XXXVI), Voluntary Repatriation (1985); EXCOMM Conclusion No. 67 (XLII) Resettlement as an Instrument of Protection (1991).

<sup>163</sup> See, e.g., Rosand, "Right to Return," 1091, 1120.

<sup>164</sup> See U.N. G.A. Res. 35/124 (11 December 1980) and U.N. G.A. Res. 36/148 (16 December 1981).

<sup>165</sup> See Rosand, "Right to Return," 1091, 1119 & n. 109.

<sup>166</sup> See Statement by the U.N. High Commissioner for Refugees at the *World Conference on Human Rights*, Vienna, 16 June 1993.

<sup>167</sup> For detailed elaboration on the obligation of a state of origin to receive back (i.e., implement the right of return of) all those displaced persons whose refugee status was created by the policies of the state of origin, as well as the related obligations of compensation and restitution, see "Declaration of Principles of International Law on Compensation to Refugees," approved by consensus by the International Law Association (ILA) at its 65<sup>th</sup> Conference in Cairo in April 1992, text reproduced in ILA, *Report of the Sixty-Fifth Conference: Cairo* (1992).

<sup>168</sup> See, e.g., Christian Tomuschat, "State Responsibility and the Country of Origin," in Vera Gowlland-Debbas (ed.) *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 77 & n. 64 (1996) (stating that "on more than one occasion the General Assembly has stressed that flows of refugees unleashed by one country affect the entire international community" and citing three General Assembly resolutions: G.A. Res. 48/139 of 20 December 1993, preamb. para. 5 (general proposition); G.A. Res. 48/152 of 20 December 1993, op. para. 12 (regarding Afghanistan), and G.A. Res. 48/118 of 20 December 1993, op. para. 6 (regarding Africa)).

<sup>169</sup> See Christian Tomuschat, "State Responsibility and the Country of Origin," in Vera Gowlland-Debbas (ed.) *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 78 (1996).

<sup>170</sup> See Washington Agreement, Signed By Bosnian Prime Minister Haris Silajdzic, Croatian Foreign Minister Mate Granic, Bosnian

would seem to be particularly relevant to the case of Israel, which has deliberately barred the readmission of the large group of 1948 Palestinian refugees - and has even gone to the extent of purportedly denationalizing them, in complete violation of international law - in a systematic and deliberate policy of keeping them in forced exile for over five decades, during which time they have been "hosted" by a variety of receiving states.

State practice regarding implementation of bilateral or multilateral mechanisms for repatriation of refugees provides rich precedent for - and evidence of *opinio juris* regarding - the existence of a customary norm requiring countries of origin to receive back persons displaced or expelled therefrom. Returns of mass groups of displaced persons to their homes of origin have occurred in conjunction with the express acknowledgment by the international community - as well as the explicit recognition by the parties to the underlying conflict themselves - that the persons returning to their homes of origin are doing so as a matter "of right." Prominent examples include the 1994 Bosnia agreement,<sup>170</sup> the 1995 Dayton Agreement, Annex 7,<sup>171</sup> the 1995 Croatia agreement,<sup>172</sup> and the 1994 Guatemala<sup>173</sup> agreement. All four agreements describe the right of refugees and displaced persons to return to their "*homes of origin*" (just as the right was phrased in Resolution 194) as being *unqualified*. Another example is the final peace agreement for Cambodia, which stated that "Cambodian refugees and displaced persons located outside Cambodia shall have the right to return to Cambodia."<sup>174</sup>

Looking at the Dayton Accord, in particular, one notes immediately that the primary rights accorded to displaced persons in that agreement mirror *exactly* the three rights articulated for the 1948 Palestinian refugees in Resolution 194 - namely: (1) the right of return (repatriation); (2) the right of restitution (repossession); and (3) the right of compensation.<sup>175</sup>

The sheer magnitude of the numbers of refugees whose voluntary return to their homes of origin the UNHCR has proactively facilitated as an integral part of crafting durable solutions as part of comprehensive peace settlements is impressive. The success of these repatriation efforts argues strongly for the active involvement

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Croat Representative Kresimir Zubak: Confederation Agreement Between The Bosnian Government and Bosnian Croats, Washington, DC, March 1, 1994 (Article V(2): "All refugees and displaced persons have the right freely to return to their homes of origin.")

<sup>171</sup> See The Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, 21 November 1995 (between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska) (Article 1: All refugees and displaced persons have the right to return to their homes of origin...).

<sup>172</sup> See The Erdut Agreement, Signed in Erdut, Croatia and in Zagreb, Croatia, November 12, 1995 (between Serbian and Croatian negotiators) (Article 4: "The Transitional Administration shall ensure the possibility for the return of refugees and displaced persons to their homes of origin. All persons who have left the Region or who have come to the Region with previous permanent residence in Croatia shall enjoy the same rights as all other residents of the Region..."; Article 7: "All persons have the right to return freely to their place of residence in the Region and to live there in conditions of security. All persons who have left the Region or who have come to the Region with previous permanent residence in Croatia have the right to live in the Region.")

<sup>173</sup> See Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Oslo, 17 June 1994 (regarding Guatemala). The entire agreement concerns procedures for reintegrating "uprooted" (refugee/displaced persons) population groups. The five points listed under the heading "Principles" are illustrative of the detail into which the agreement goes for implementing the "right of return" in the Guatemalan context, while the first principle articulates the actual right of return:

The Parties agree that a comprehensive solution to the problem of uprooted population groups should be guided by the following principles:

1. Uprooted population groups have the right to reside and live freely in Guatemalan territory. Accordingly, the Government of the Republic undertakes to ensure that conditions exist which permit and guarantee the voluntary return of uprooted persons to their places of origin or to the place of their choice, in conditions of dignity and security.

*Id.*, "Principles," principle no. 1.

<sup>174</sup> See Final Act of the Paris Conference on Cambodia, art. 20.1, pt. V, U.N. Doc. A/46/608 (1991).

<sup>175</sup> See, e.g., Rosand, "*Right to Return*," 1091, 1102 (stating that the Dayton Accord "pledg[ed] to support the right to return, but also 'the right to have restored to [refugees and displaced persons] property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them'...") (footnotes omitted).

<sup>176</sup> See Rosand, "*Right to Return*," 1091, 1120.

of the UNHCR in facilitating the successful repatriation of the 1948 Palestinian refugees to their homes of origin inside the 1949 armistice lines:

During 1994 and 1995, some three million refugees returned to their countries, the largest numbers to Afghanistan, Mozambique, and Myanmar. Late 1996 and early 1997 saw a massive return of over one million Rwandan refugees who fled during the more than four years of civil war.<sup>176</sup>

Similarly, "[i]n 1996, the UNHCR's ten largest voluntary repatriation movements by destination were: 1,301,000 people to Rwanda, 477,000 people to Afghanistan, 219,000 people to Myanmar, 115,000 people to Iraq, 1-6,000 to Vietnam, 88,000 to Bosnia, 73,000 to Mali, 73,000 to Togo, 71,000 to Burundi, and 59,000 to Angola."<sup>177</sup> During the 1990's, an estimated 12 million refugees exercised their right to return to their homes of origin.<sup>178</sup> By comparison, some 1.3 million refugees and persons of concern to the UNHCR were voluntarily resettled during the same period.<sup>179</sup>

The U.N. Security Council has unambiguously declared that the right of refugees (and displaced persons) to return to their "*homes of origin*" (which is strikingly similar to the way the right of return is phrased in Resolution 194) is absolute. In the context of the conflict in Bosnia and Croatia, the Security Council issued the following resolutions affirming this particularly relevant formulation of the right of return:

- Security Council Resolution 1145<sup>180</sup> (1997): "reaffirming the right of all refugees and displaced originating from Republic of Croatia to return to their homes of origin throughout the Republic of Croatia"
- Security Council Resolution 1088<sup>181</sup> (1996): "[w]elcom[ing] the commitment of the parties to the right of all refugees and displaced persons to return to their homes of origin in safety"
- Security Council Resolution 1079<sup>182</sup> (1996): "reaffirm[ing] the right of all persons originating from the Republic of Croatia to return to their homes of origin through the Republic of Croatia"
- Security Council Resolution 1019<sup>183</sup> (1996): demanding that the government of Croatia "respect fully the rights of the local Serb population including their right to remain [in] or return [to their homes of origin] in safety"
- Security Council Resolution 947 (1994): "[a]ffirm[ing] the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community"
- Security Council Resolution 820<sup>184</sup> (1993): "[r]eaffirms once again that any taking of territory by force or any practice of 'ethnic cleansing' is unlawful and totally unacceptable... insisting that all displaced persons have the right to return in peace to their former homes"

Similarly, in the case of the conflict in Georgia, the Security Council again affirmed the right of refugees to return to their homes of origin. In a further strong resemblance to another important aspect of Resolution 194, the Security Council specifically stated that in the case of Georgia, the right of the refugees to return was independent of any final political solution (and therefore could not be conditioned upon political demands

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<sup>177</sup> See 1997 UNHCR BY NUMBERS 11, cited in Rosand, "Right to Return," 1091, 1120 & n. 111.

<sup>178</sup> See Oliver Bakewell, *Returning Refugees or Migrating Villagers? Voluntary Repatriation Programmes in Africa Reconsidered*, Working Paper No. 15, UNHCR (December 1999).

<sup>179</sup> See Refugee Resettlement in Selected Countries, 1990-99, Table V.20, *Refugees and Others of Concern to the UNHCR 1999, Statistical Overview*, UNHCR (1999).

<sup>180</sup> See S.C. Res. 1145, U.N. SCOR, 52d Sess., 3843d mtg., preamb. & para. 7, U.N. Doc. S/RES/1145 (1997).

<sup>181</sup> See S.C. Res. 1088, U.N. SCOR, 51<sup>st</sup> Sess., 3723d mtg. at para. 11, U.N. Doc. S/RES/1088 (1996).

<sup>182</sup> See S.C. Res. 1079, U.N. SCOR, 51<sup>st</sup> Sess., 3712<sup>th</sup> mtg., para. 4, U.N. Doc. S/RES/1079 (1996).

<sup>183</sup> See S.C. Res. 1019, U.N. SCOR, 50<sup>th</sup> Sess., 3591<sup>st</sup> mtg., paras. 6-7, U.N. Doc. S/RES/1019 (1995).

<sup>184</sup> See S.C. Res. 820, U.N. SCOR, 48<sup>th</sup> Sess., 3200 mtg., preamb. & para. 7, U.N. Doc. S/RES/820 (1993).

<sup>185</sup> See S.C. Res. 1097, U.N. SCOR, 51<sup>st</sup> Sess., 3712<sup>th</sup> mtg., at para. 8, U.N. Doc. S/RES/1097 (1996).

made by of any of the parties to the conflict):

- Security Council Resolution 1097<sup>185</sup> (1996): "*reaffirm[ed]* the right of all refugees and displaced persons affected by the conflict to return to their homes... in accordance with international law [and]...stress[ed] the *unacceptability of any linkage of the return of refugees and displaced persons with the question of the political status of Abkhazia, Georgia.*" (emphasis added)

Another strong parallel to Resolution 194 is the case of Namibia, where the Security Council affirmed the right of return (repatriation) of Namibians, again *independent* of any political solution (and therefore as an absolute right which could not be conditioned upon political considerations). Furthermore, many of the Namibians whose return the Security Council called for *as of right* had been actively fighting against South Africa's occupation of Namibia and hence were in the position of combatants. However, the Security Council called for implementation of the right of return of all Namibians, regardless of their status as former combatants or not:

- Security Council Resolution 385<sup>186</sup> (1977): stating that repatriation of Namibians should be implemented by South Africa "pending the transfer of power" without awaiting a political settlement

Finally, in another significantly important parallel to the Palestinian case, in both the Bosnia and Kosovo repatriation schemes devised by the international community, individual and collective rights were jointly protected. In both Bosnia and Kosovo,

the collective rights to an independent entity or statehood were preserved, along with a mechanism for individual refugees to assert their claims to repatriate and obtain restitution and/or compensation. Each of these situations involved the establishment of claims commissions as part of a negotiated settlement, but the right of the individual to assert his/her claim was preserved independently of the outcome of the self-determination issue.<sup>187</sup>

The issue of the official "classification" of the 1948 Palestinian refugees as "refugees" under the international refugee conventions<sup>188</sup>- which would make them eligible for "protection" services provided by the UNHCR (including proactive facilitation of voluntary repatriation, which is part of UNHCR's official mandate) - has already been addressed in previous briefs by BADIL.<sup>189</sup>

Finally, given the extent to which principles of refugee law derive directly from human rights law, it should come as no surprise to learn that a "forcible expulsion" right of return exists in refugee law as well:

In cases where refugees were forcibly expelled, the right to return derives from the illegality of the expulsion itself. It is generally recognized that a state cannot legally expel a population under its control. Those expelled clearly have a right to reverse an illegal act, that is, to return to their homeland.<sup>190</sup>

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<sup>186</sup> See S.C. Res. 385, U.N. SCOR, 31<sup>st</sup> Sess., Res. & Decs. 8, para. 11(d), U.N. Doc. S/INF/32 (1977).

<sup>187</sup> See Susan M. Akram and Terry Rempel, "Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework," *Palestine Yearbook of International Law* (forthcoming volume for 2000-2001).

<sup>188</sup> For further clarification of the issue of the official "classification" of Palestinian refugees as "refugees" under the relevant international conventions, see, generally, Susan Akram and Terry Rempel, "Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework," *Palestine Yearbook of International Law* (forthcoming volume for 2000-2001).

<sup>189</sup> The status of Palestinian refugees under the 1951 Convention and the protection function of the UNHCR have been addressed in previous Briefs by BADIL. See, in particular, Brief No. 1, Susan M. Akram, REINTERPRETING PALESTINIAN REFUGEE RIGHTS UNDER INTERNATIONAL LAW, AND A FRAMEWORK FOR DURABLE SOLUTIONS; see also, Susan M. Akram and Guy Goodwin-Gill, *Brief Amicus Curiae*, Board of Immigration Appeals, Falls Church, Virginia, published in *Palestine Yearbook of International Law* (forthcoming, 2000-2001).

<sup>190</sup> See Lex Takkenberg, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 234 (1998) (footnote omitted).

<sup>191</sup> For a recent discussion of Israel's illegal confiscation of refugee property, see, e.g., Gail J. Boling, "Israel's Use of 'Absentees'

## 7. Conclusion - Resolution 194: Continuing to Shape the Right of Return

Discussion of the implementation of the right of return of the 1948 Palestinian refugees raises all sorts of questions regarding the nature of the state of Israel and the legality of its actions vis-à-vis the 1948 Palestinian refugees, including obstruction of their right of return, the subsequent purported denationalization and the illegal confiscation of their entire massive private property and land-holdings.<sup>191</sup>

Consequently, it will come as no surprise to learn that supporters of the Zionist position (who hold that all these actions are perfectly legitimate) have labored long and hard to challenge the legal validity of Resolution 194, and specifically paragraph 11(1) which delineates the right of return. Following are responses to some of the most prevalent arguments which have been raised to challenge and argue against the binding nature of paragraph 11(1) of Resolution 194.

First, the argument is raised that paragraph 11(1) of Resolution 194 is not binding because the word "should"<sup>192</sup> is used, instead of a stronger term, for example the word "shall." A related argument is that since General Assembly resolutions are only "recommendatory" in nature anyway, as a General Assembly resolution, Resolution 194 could not be binding. Both of these arguments fail to take into consideration that by 1948, the right of return had already gained customary status under international law. Therefore, implementation of the right of return in 1948 was in any case mandatory upon all states, regardless of the use of the word "should" in Resolution 194 or the fact that the resolution was issued by the General Assembly. That Resolution 194 was intended to be read in light of then-prevailing norms of customary international law is unambiguously indicated by the explicit reference to "principles of international law or [] equity" which appears in paragraph 11(1).<sup>193</sup>

Second, the argument is raised that Israel is not expressly mentioned by name in Resolution 194 and therefore that the call to repatriate the 1948 Palestinian refugees is somehow not necessarily binding upon Israel. This argument fails to take into consideration the obvious point that Israel was the *only* country of origin whose policies (including refusal to readmit) generated and maintained the 1948 Palestinian refugee phenomenon in the first place. Therefore, the call to repatriate the refugees constituted a binding obligation, under international law, on the *sole* country of origin - which was, and remains, Israel.

Third, the argument is raised that Resolution 194 describes the returning refugees as being those who "wish[] to ... live at peace with their neighbors,"<sup>194</sup> and that this somehow implies that Israel has the right to "screen out" returning refugees according to its own internally defined criteria. This argument fails to take into consideration the obvious point that the 1948 Palestinian refugees realize full well that they are seeking to return to the currently existing state of Israel, and they realize that they will be fully subject to its laws and regulations, as is normal in all cases of naturalized citizens. Every single 1948 Palestinian refugee seeking to return who is willing to follow naturalization procedures which comply with international law - as are found in other existing nation states - should be permitted to do so. Therefore, Israel should not be permitted to use arbitrary or discriminatory "filters" based upon race, ethnicity, religion or political belief to screen out potential returnees, especially filters which do not conform with normal due process guarantees or other requirements of international law such as are practiced in other existing nation states.

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Property' Laws to Confiscate Private Property inside the Green Line from 1948 Displaced Palestinians: A Violation of U.N. General Assembly Resolution 194 and International Law," *Palestine Yearbook of International Law* (forthcoming volume for 2000-2001).

<sup>192</sup> See G.A. Res. 194, para. 11(1).

<sup>193</sup> See G.A. Res. 194, para. 11(1).

<sup>194</sup> See G.A. Res. 194, para. 11(1).

<sup>195</sup> See S.C. Res. 242, U.N. SCOR, 22d Sess., at 8, U.N. Doc. S/INF/22/Rev.2 (1967).

Fourth, the argument is raised that Resolution 194 has somehow been "superceded," "amended" or "annulled" by Security Council Resolution 242,<sup>195</sup> which calls for "a just settlement of the refugee problem" without specifying exactly what would constitute a "just settlement." The obvious response here is that Resolution 194 - since it preceded S.C. Resolution 242 and because it spelled out in such specificity exactly what legal remedies would be required for a "just settlement of the refugee problem" (i.e., return, restitution and compensation) - is necessarily *incorporated* by necessary reference *into* S.C. Resolution 242 and must be read as part of it. Certainly Resolution 194 has never been annulled, repealed, diluted or overturned in any way. On the contrary, Resolution 194 has been reaffirmed annually by the United Nations every year since it was initially passed in 1948. Given the binding customary status of the legal norms contained in Resolution 194, it is logically impossible to attempt to argue that ignoring its terms could somehow constitute a "just settlement of the refugee problem."

Further proof that Resolution 194 has not been diluted is evidenced by the extremely strong parallels which exist between the remedies articulated in Resolution 194 (return, restitution and compensation) and the very same remedies which have been articulated in the Dayton Accords (return, restitution and compensation) and other peace agreements negotiated under the auspices of the international community, and specifically under UNHCR auspice (as has just been discussed in Section 6, above). State practice over the past five decades has only *solidified* the binding force of Resolution 194.

In conclusion, it becomes abundantly clear from the foregoing analysis that the 1948 Palestinian refugees' right of return has not diminished since the adoption of Resolution 194 in December 1948 but rather has, on the contrary, gained even greater weight with the intervening passage of over five decades since the period of the refugees' initial displacement. The right of return, as set forth in Resolution 194, continues to conform with binding customary norms of international law as codified in four independent bodies of international law, thus strengthening its relevance as a framework for crafting a durable solution for the situation of the 1948 Palestinian refugees. Full implementation of the right of return is the only possible legal remedy under international law for Israel's massive, long-standing violation of the 1948 Palestinian refugees' individually-held right of return because it is the only remedy which comes closest to restoring the *status quo ante* prior to Israel's internationally wrongful act by attempting to restore the 1948 Palestinian refugees to the original position they would have been in had Israel not committed its internationally wrongful act in the first place. Therefore, full implementation of the right of return - and the other associated rights enumerated in Resolution 194 (i.e., restitution and compensation) - is clearly a logical necessity for both a just and *legal* peace agreement between Israel and the Palestinians, under international law.

Because the United Nations breached in totality its fundamental "sacred trust" - as stated in **Article 22(1)** of the Covenant of the League of Nations - to safeguard through fruition the Palestinian people's prior, legally vested right to full national sovereignty in all of historic, mandate Palestine (which responsibility it had inherited from the League of Nations in the form of an oversight role for the British Mandate for Palestine), the United Nations has a particularly heavy responsibility to ensure that the Palestinian people are accorded the maximum protection of their human rights possible under the circumstances which have resulted *as a direct consequence* of the U.N. *breach* of its obligations to the Palestinian people. In this case, the rights of the 1948 Palestinian refugees to return to their original homes and to have all of their private property - the vast entirety of which has been confiscated illegally (under international law) by the government of Israel - restored to them in its entirety is at least a *minimum requirement* for some amount of remedial justice to be accorded to these refugees, who have been living in exile for over five decades. It is for this reason that the United Nations collectively - with particular emphasis on the Security Council, and even greater emphasis on the United States, as the most powerful member of the Security Council - are all jointly under an extremely

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<sup>196</sup> See *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (Merits), 1970 ICJ Reports 3, 32.

strong moral obligation to act to ensure that the 1948 Palestinian refugees' right of return is implemented without any further delay, in full accordance with international law. Under the *erga omnes* doctrine articulated by the International Court of Justice in the *Barcelona Traction*<sup>196</sup> case, all three entities currently have the legal capacity to do so.



**BADIL aims to provide a resource pool of alternative, critical and progressive information and analysis on the question of Palestinian refugees in our quest to achieve a just and lasting solution for exiled Palestinians based on the *right of return*.**