

Palestinian Refugees and the Right of Return: An International Law Analysis

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***BADIL-Briefs* aim to support the Palestinian-Arab and international debate about strategies for promotion of Palestinian refugees' right of return, restitution, and compensation in the framework of a just and durable solution of the Palestinian/Arab - Israeli conflict.**

Background

Brief No. 8 is the first of three Briefs (covering the right of return, restitution, and compensation), that examine the basis in international law for a framework for durable solutions for Palestinian refugees. This Brief examines the *individual* right of return of Palestinian refugees displaced in 1948 as set forth in UN General Assembly Resolution 194(III) of 11 December 1948 as grounded in international law. It is important to note that the individual right of return is completely separate from any collective right of return. However, individual and collective 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.

In this Brief, the author argues that the right of refugees to return to their homes and properties had already achieved customary status (binding international law) by 1948. UN Resolution 194, therefore, simply reaffirms international legal principles that were already binding and which required states to allow refugees to return to their places of origin, and prohibited mass expulsion of persons - particularly on discriminatory grounds. UN Resolution 194's consistency with international law and practice over the past five decades further strengthens its value as a normative framework for a durable solution for Palestinian refugees today.

NOTE: Brief No. 8 is based on a longer legal analysis prepared by Gail J. Boling, Coordinator of BADIL's Legal Unit. To make the subject of this Brief accessible to the widest possible audience, we have chosen a summarized format with minimal legal citations. The full legal analysis with a complete set of legal citations is available from BADIL upon request.

Introduction

For more than fifty years, Israel has based its refusal to allow Palestinian refugees to exercise their right of return on a number of key arguments. These include: the lack of physical space, the desire to maintain a demographic Jewish majority, state security, and international law. This Brief addresses the right of return in international law.^[1] While supporters of the Israeli position try to attack the right of return as articulated in General Assembly Resolution 194(III)^[2] – for example, by attempting to argue that the right of return is not mandatory, that it does not apply to mass groups and that it is only reserved for “nationals” of Israel - these claims, in fact, have no basis in international law.

The right of refugees to return to their homes and properties – sometimes referred to as their place of last habitual residence - 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 applies in cases where persons have been deliberately barred from returning after a temporary departure *and* in cases of forcible expulsion (on a mass scale, or otherwise). In the latter case, the obligation of the state of origin under international law to receive back illegally expelled persons is even stronger. Any type of governmental policy designed to block the voluntary return of displaced persons is strictly prohibited.

Historically speaking, the right of return had achieved customary status in international law by 1948.^[3] Customary norms are legally binding upon all states, and states are, therefore, legally obligated to follow the rules codified by these norms. The United Nations reaffirmed the status of the right of return as a customary norm applicable to Palestinian refugees in General Assembly Resolution 194. The obligation of the United Nations to uphold the rule of law and to ensure the immediate and full implementation of the right of return is even greater due to the role that the UN played (for example, through General Assembly Resolution 181 proposing “partition” of Palestine) in the chain of events that led to the creation of the Palestinian refugee situation in the first place. Israel, however, as the sole “state of origin,” is the only state with the binding obligation under international law to receive back the 1948 Palestinian refugees.

This Brief examines the right of return of Palestinian refugees as grounded in the four relevant bodies of international law. The first section of the Brief examines the right of return as set forth in UN Resolution 194. After reviewing each relevant body of international law, the Brief reviews Resolution 194 once more, in light of international law principles and state practice. The conclusion demonstrates that the responsibility of the international community to ensure that Israel immediately and fully implements the Palestinian refugees’ right of return has not diminished but has, on the contrary, gained even greater weight with the intervening passage of more than fifty years since the period of initial displacement.

UN General Assembly Resolution 194 (III) and the Right of Return^[4]

In December 1948, the UN General Assembly established a mechanism, the United Nations Conciliation Commission (UNCCP), to facilitate implementation of durable solutions for refugees in Palestine, based on recommendations of the UN Mediator Count Folke Bernadotte.^[5] UN General Assembly Resolution 194, paragraph 11, sets forth the framework for a solution to the plight of Palestinian refugees. Resolution 194, paragraph 11, sub-paragraph 1, by its express terms, identifies three distinct rights that Palestinian refugees are entitled to exercise under international law - return, restitution, and compensation. Resolution 194 further affirms that those refugees

choosing not to exercise their right of return are entitled to be resettled and receive compensation for their losses. Paragraph 11, sub-paragraph 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.

Of primary relevance to this Brief is the right of return. Paragraph 11, sub-paragraph 1 of Resolution 194 states the right of return clearly, declaring 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)

The emphasis on repatriation as the preferred solution for Palestinian refugees reflects several principles, including the right of displaced persons to return to their homes, as well as the prohibitions against arbitrary denationalization and mass expulsion (explained in the sections below), that were customary norms of international law by 1948. This is reflected in the language of the UN Mediator's recommendation for a solution to the plight of the refugees, which acknowledges the fact that no new rights were being created.^[6] “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....”^[7] (emphasis added).

The UN Mediator's recommendation was subsequently incorporated into Resolution 194. Commenting on the original draft of paragraph 11, the representative of the United States acknowledged that the General Assembly was creating no new rights, stating that paragraph 11 “endorsed a generally recognized principle and provides a means for implementing that principle....”^[8] By contrast, it is important to note that sub-paragraph 1, which delineates the rights of the refugees, does not include resettlement. Resettlement is only included in sub-paragraph 2, which *instructs* the UNCCP to facilitate implementation of the rights affirmed in sub-paragraph 1 according to the choice of each individual refugee. The emphasis on repatriation was consistent with the mandates of several international agencies established to facilitate solutions for other groups of refugees predating the events of 1948.^[9]

The UN Mediator clearly regarded the right of return as the most appropriate remedy to correct the mass expulsion of Palestinians and the massive violation of their fundamental human rights. “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,” wrote Count Bernadotte in his September 1948 report. “There have been numerous reports from reliable sources of large-scale pillaging and plundering, and of instances of destruction of villages without apparent necessity.... It would be an offence against the principles of elemental justice,” Bernadotte

concluded, “if these innocent victims of the conflict were denied the right to return to their homes....”

Several principles are relevant to the implementation of the right of return as delineated in Resolution 194. *First, the Resolution clearly identifies the exact place to which refugees are entitled to return - i.e., to their homes.* The drafting history of this provision is instructive. In choosing the term “to their homes,” the UN Secretariat stated that the General Assembly clearly meant the return of each refugee specifically to “his house or lodging and not [just generally to] his homeland.”^[10] The General Assembly rejected amendments that referred generally to “the areas from which they [i.e. the refugees] have come.”

Second, the Resolution affirms that return must be guided by the individual choice of each refugee. According to the UN Mediator’s report, it was an “unconditional right” of the refugees “to make a free choice [which] should be fully respected.” Reviewing the drafting history of Resolution 194, the UN Secretariat stated that paragraph 11 “intended to confer upon the refugees as individuals the right of exercising a free choice as to their future.” The legal advisor to the UN Economic Survey Mission reached the same conclusion: “The verb ‘choose’ indicates that the General Assembly assumed that the principle [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.”^[11] The principle of refugee choice had also recently been incorporated into the mandate of the International Refugee Organization, 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. Based on the drafting history and debate, the UN Secretariat concluded that “the 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.*

Fourth, Resolution 194 imposes an obligation on Israel to re-admit the refugees. The UN Secretariat held the view that Israel was obligated under the provisions of Resolution 194 to create the conditions that would facilitate 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 UN Secretariat noted that the injunction imposed an obligation “to ensure the peace of the returning refugees and protect them from any elements seeking to disturb that peace.”

Finally, Resolution 194 was drafted to apply to all refugees in Palestine. While the first two drafts of paragraph 11 used the term “Arab refugees” the final draft approved by the General Assembly on 11 December 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 were to be applied on a *non-discriminatory* basis.

The fact that the General Assembly made Israel's admission as a member to the United Nations conditional upon implementation of Resolution 194 clearly indicates that the Assembly considered Israel to be fully bound to ensure full implementation of the Palestinian refugees' right of return.^[12] The UN General Assembly has reaffirmed Resolution 194 annually without diminution since its original promulgation in 1948. The right of return, as set forth in Resolution 194, continues to conform with binding norms of international law as explained below, strengthening its relevance as a durable solution for Palestinian refugees.

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 first major principle of relevance to the right of return is that while states do have some domestic discretion in regulating their nationality status (i.e., determining who is a national of their country) such discretion has clear limits under international law. *The domestic discretion of states to regulate their nationality status will only be recognized at the international level to the extent that it complies with international law.*

This principle is universally recognized and has been reaffirmed by a 1923 advisory opinion rendered by the Permanent Court of International Justice, in the authoritative 1930 Hague Convention on Certain Questions relating to Conflict of Nationality Laws, and by the International Court of Justice in 1955.^[13] It has also been clearly formulated by various United Nations bodies, including the General Assembly's Sixth (Legal) Committee and the UN High Commissioner for Refugees.^[14] Under the law of nationality, states are limited in their domestic discretion to regulate their own nationality status by several additional binding obligations under international law, as described in the following section.

The Law of State Succession

The law of state succession applies whenever one state (a predecessor state) is followed in the international administration of a geographical territory by another state (the successor state). In the case of Palestinian refugees, the predecessor state was the embryonic state of Palestine^[15] for which, under international law, the British Mandate for Palestine constituted a “stand-in,” “custodian” or “guarantor,” and was succeeded, in part, by the state of Israel. *When territory undergoes a change of sovereignty, the law of state succession requires that habitual inhabitants of the geographical territory coming under new sovereignty be offered nationality by the new state.* Furthermore, this rule applies regardless of whether the habitual residents of the territory so affected are actually physically present in the territory undergoing the change of sovereignty on the actual date of the change or not. This rule represents a customary norm of international law and is binding upon all states.

Article 14(2) of the Articles on Nationality of Natural Persons in Relation to the Succession of States^[16] drafted by the International Law Commission and adopted verbatim by the General Assembly, specifically enumerate a right of return in the law of state succession for all habitual residents of a territory undergoing a change in sovereignty.^[17] Three aspects of Article 14

are significant in clarifying the rules the mandatory obligation of the successor state (Israel) to implement the right of return of Palestinian refugees in this specific context of state succession. *First*, nationality status is completely *irrelevant* to (in other words is not a required element for) for habitual residents of a territory undergoing a change of sovereignty to have a right to return to that geographical area. *Second*, Article 14(2)'s right of return applies by its express terms to all habitual residents of a given 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). Article 5 reiterates the rule of Article 14(2).

Under these rules, the presumption that habitual residents of a territory undergoing a change of sovereignty will acquire the nationality status of the successor state can only be rebutted by nationality procedures, which are themselves in conformity with international law. This rule was recognized by the legal advisor to the UN Economic Survey Mission in 1949^[18] and by a Tel Aviv district court in a 1951 case,^[19] in which the judge's opinion expressly stated that international law and the 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 was rendered in 1951, Israel had not yet enacted its 1952 Nationality Law), all Palestinians who remained inside the 1949 armistice lines should automatically be considered nationals of the state of Israel, through the automatic operation of international law. The law of state succession requires the same result as well for all Palestinian refugees who were temporarily outside the territory on the date of succession.

There are two more provisions of the Articles on Nationality, which are extremely relevant to the case of the Palestinian refugees: Article 15, which prohibits governments from practicing discrimination in the conferral of nationality status; and Article 16, which requires that adequate due process safeguards be provided in the determination of nationality status. Israel has violated Article 15 by drafting its 1952 Nationality Law for "non-Jews" (explained in the section on the prohibition against denationalization below) in such a way as to effectively denationalize Palestinian refugees, while allowing Jews from anywhere in the world to acquire "nationality" status through the much more generous terms of Israel's Law of Return for Jews (also explained below). Israel has violated Article 16 by failing to allow Palestinian refugees to re-enter Israel, 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.

Implementing the Right of Return Is an Obligation Owed by a State to All Other States

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 (i.e., allow to exercise their right of return) their own nationals - including temporarily displaced persons in cases of state succession - because to refuse to do so would impose on some other state a resulting obligation to receive, or to host, the rejected individual. 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. Under international law, states may not burden each other in this way.

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 above. The prohibition against denationalization prevents a state from using revocation of nationality status (i.e., 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. The prohibition against denationalization exists in an authoritative draft international convention dating from 1930^[20], various regional declarations (such as the 1986 *Strasbourg Declaration on the Right to Leave and Return*), in resolutions by UN organs^[21], and numerous respected commentators have written of the prohibition against denationalization as a binding norm of customary law since as early as 1927. The entry for "Population, Expulsion and Transfer" in the authoritative *Encyclopedia of Public International Law* puts the rule categorically, stating that nationals may not be denied re-admission on the rationale that they are no longer nationals.

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. Israel's 1952 Nationality Law (for "non-Jews") completely violates the rule of the law of nationality prohibiting denationalization. While the 1952 Nationality Law carefully avoids the use of the term "non-Jew" in describing the narrowly defined^[22] categories of persons who might be eligible for Israeli citizenship thereunder, it was clearly *intended* to apply to non-Jews only because Jews would obviously avail themselves of the easier terms and procedures under the Law of Return (for Jews).^[23] The vast majority of Palestinian refugees are factually incapable

of meeting the strict requirements of Israel's 1952 Nationality Law and have therefore been effectively denationalized.

The Right of Return in Humanitarian Law

The right of return is also anchored in humanitarian law, the body of law regulating what states are permitted to do during war. Both the Hague Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (which are universally recognized, including by Israel, to have achieved customary status by 1939) and the 1949 Geneva Civilians Convention (to which Israel is a signatory) provide for the right of return of displaced persons to their homes following the cessation of hostilities. The provisional government of Israel (through responsibility for its army and the Zionist paramilitary forces which preceded it) was fully bound by the rules of humanitarian law when Zionist forces unilaterally embarked upon the enterprise of trying to establish a state through military means. Palestinian communities were progressively displaced in 1948 as Zionist/Israeli forces established successive "zones of military occupation" as they gained control over specific geographical areas.

The "General" Right of Return in Humanitarian Law

Under humanitarian law, there is a *general* right of return, which applies to all displaced persons, irrespective of how they came to be displaced during the period of conflict. This rule was first codified in Article 43 of the Hague Regulations (and incorporated into all subsequent customary humanitarian law, including the Geneva Conventions and their related Protocols). According to this rule, 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 rule of Article 43, which is broader in the official (French) version than in the unofficial English translation, means, in practical terms, that a belligerent occupant must let the population continue its normal existence with a minimum of interference. This would logically include a requirement that the local population be permitted to remain in, or return to, their place of origin following the cessation of hostilities.

While the Hague Regulations do not specifically articulate the obligation of a state to repatriate (i.e., allow to exercise their right of return) *civilian* residents of the territory who may have become temporarily displaced during the conflict, 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 to the maximum extent possible.^[24] *Accordingly, it must be logically obvious that the rule of humanitarian law requiring the repatriation of prisoners of war following the cessation of hostilities (which is stated in Article 20 of the Hague Regulations) must necessarily include a rule requiring the repatriation of civilian residents to their place of origin following the cessation of hostilities.*

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 protected persons who are covered by the Convention. 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. 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.

The Right of Return in Cases of Forcible (Mass) Expulsion

There is a second type of right of return provided for in humanitarian law. This 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). The involuntary transfer of even a single individual – e.g., through deportation – is conclusively prohibited under humanitarian law. Deliberate, forcible expulsion – when carried out on a mass scale – is therefore even more strongly prohibited under humanitarian law. The only appropriate corrective remedy for forcible expulsion, under international law, is implementation of the right of return.

The prohibition against forcible expulsion has its basis in Article 46(1) of the Hague Regulations. Pierre Mounier, an assistant prosecutor for the Allies in the criminal prosecution of the Nazi leaders in the International Military Tribunal (IMT) at Nuremberg, stated in his opening arguments on November 20, 1945 that deportation violated Article 46 of the Hague Regulations, as well as customary international law in general.^[25] For that reason, the Charter of the International Military Tribunal 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). Barring the return of forcibly expelled persons was similarly condemned as illegal.

The prohibition against forcible expulsion – and the related remedy of repatriation (the right of return) – appear in three articles of the Fourth Geneva Convention. Article 45 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 of protected persons to their (habitual) residence following the cessation of hostilities. Article 49 prohibits forcible expulsion 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.” Like Article 45, Article 49 also requires immediate repatriation “to their *homes*” of *all* persons (including those temporarily evacuated during extreme necessity) following the cessation of hostilities.

Article 147 of the Fourth Geneva Convention defines “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., states which have signed the Convention). Deportation and forcible population transfer are classified as grave breaches. Under the theory developed by the prosecutors at the IMT in Nuremberg, deliberately blocking the right of return of persons forcibly expelled also falls well within the scope of a grave breach of the Fourth Geneva Convention. Yet another

prohibition against forcible expulsion appears in Article 17 of Protocol II to the Fourth Geneva Convention, which applies in cases of non-international armed conflict.

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. Every individually-held right recognized under human rights law imposes a corresponding duty upon states to recognize that enumerated right. The right of return is a customary norm of international human rights law and is found in a vast array of international and regional human rights treaties.^[26] The Universal Declaration of Human Rights (UDHR), which the General Assembly adopted in 1948 one day prior to Resolution 194, is the foundation for the right of return in human rights law. Article 13(2) of the UDHR phrases the right of return broadly and simply, as follows: "Everyone has the right to leave any country, including his own, and to return to his country." Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) phrases the right of return fairly similarly: "No one shall be arbitrarily deprived of the right to enter his own country." Israel has signed and ratified the ICCPR and has not made any reservations to Article 12(4), containing the right of return.

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. Thus, the ICCPR phrasing of the right of return would accommodate the situation of second-, third- or fourth-generation Palestinian refugees. 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. General Comment No. 27^[27] to Article 12(4) establishes that the phrase “his own country” applies to a much broader group of persons than merely “nationals” of a state. The language is intended to include: “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.” Palestinian refugees as a group fit factually into *each* of the three enumerated categories listed in General Comment No. 27.

Understanding the precise intent of the ICCPR drafters in incorporating the word “arbitrarily” into the formulation of the ICCPR Article 12(4) is critical to understanding the scope of right guaranteed because “arbitrarily” is the *only* qualification on the right of return listed in Article 12(4).^[28] Analysis of the drafting history is useful, 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). Otherwise, the right of return as articulated in Article 12(4) is absolute, subject only to the general qualification provisions of Article 4(1) of the ICCPR (which themselves only permit 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”).

Some commentators have tried to argue that Article 12(4) only applies to individuals, and not to large groups of people seeking to claim the right simultaneously. This 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. Respected commentators have rejected the concept that the Article 12(4) cannot apply to large groups of people.^[29] Additionally, various UN organs, including the UN 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 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.”^[30]

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.” Returning to Israel’s two nationality laws – the 1950 Law of Return (for Jews) and the 1952 Nationality Law (for “non-Jews”) – 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” as *filters* for administering the conferral of Israeli nationality status. *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 already should have been considered nationals of Israel (the successor state) by automatic operation of international law as detailed above – constitutes prima facie discrimination expressly prohibited by the ICCPR and a violation of Israel’s treaty obligations under the ICCPR.*

Another major international human rights convention, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), similarly incorporates the right of return in its Article 5(d)(ii), phrasing it as “[t]he right to leave any country, including one’s own, and to return to one’s country.” Israel has signed and ratified CERD and has made no reservation to this Article. CERD also lists the right of return 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.” Israel’s use of prohibited criteria to confer its nationality status therefore also violates its treaty obligations under CERD.

International human rights law also incorporates the general prohibition against forcible expulsion (mass or otherwise) from one's home or place of origin. Forcible expulsion violates a vast host of specifically enumerated rights contained in the broad corpus of human rights law generally, and specifically violates the protection of freedom of movement. "[Any] form of forced population transfer from a chosen place of residence, whether by displacement, settlement, internal banishment, or evacuation," states a UN report to the Sub-commission on the Prevention of Discrimination and Protection of Minorities, "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."³¹¹ Similarly, the UN Sub-commission has invoked both Article 12(4) of the ICCPR and Article 13(2) of the UDHR regarding the inadmissibility of mass expulsions.³²¹ Finally, General Comment No. 27 specifically states that ICCPR Article 12(4) applies in cases of "enforced population transfers or mass expulsions" and, therefore, reinforces Article 12(4)'s applicability to large groups of people as discussed above.

The Right of Return in Refugee Law and State Practice (*Opinio Juris*)

The right of return also exists in a special sub-set of human rights law, which is the law relating to refugees. The primary instrument governing rights of refugees and states' obligation towards them is the 1951 Convention Relating to the Status of Refugees and its related 1967 Protocol. The juridical source of refugees' right of return in refugee law is human rights law (see above for the foundation of the right of return in human rights law), while actual implementation of the right of return is through the Office of the UN High Commissioner for Refugees (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."³³¹

Under refugee law, the principle of refugees' absolute right of return on a voluntary basis to their place of origin (including to their homes of origin) is central to the implementation of durable solutions designed by the international community to address refugee flows. Of the three durable solutions – voluntary repatriation (i.e., return), voluntary host country integration, and voluntary resettlement – the UNHCR considers voluntary repatriation to be the most appropriate solution to refugee problems.³⁴¹ Only voluntary repatriation represents a right accorded to the individual (and a corresponding obligation on the part of the country of origin, from which the refugee flow was generated). The other solutions are neither rights of refugees nor obligations of receiving states. According to the former High Commissioner for Refugees, Ms. Sadako Ogata:

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.³⁵¹

State practice regarding implementation of bilateral or multilateral mechanisms for repatriation of refugees provides rich precedent for – and evidence of *opinio juris* (which is a sense of binding legal obligation on the part of states) regarding – the existence of a customary norm requiring countries of origin to receive back persons displaced or expelled therefrom.^[36] Returns of mass groups of displaced persons have occurred in conjunction with the express acknowledgment of the international community – as well as the explicit recognition by the parties to the underlying conflict themselves – that the persons returning are doing so as a matter of right.

Prominent examples include the 1994 Bosnia agreement, the 1995 Dayton Accord, the 1995 Croatia agreement, and the 1994 Guatemala 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*. 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 Palestinian refugees in Resolution 194 – namely: (1) the right of return (repatriation); (2) the right of restitution (repossession); and (3) the right of compensation.

The sheer magnitude of the numbers of refugees whose voluntary return and reintegration into their respective places of origin UNHCR has proactively facilitated as an integral part of crafting durable solutions as part of comprehensive peace settlements is impressive. “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.”^[37] During the 1990’s, an estimated 12 million refugees exercised their right to return to their homes and places of origin.^[38] By comparison some 1.3 million refugees and persons of concern to the UNHCR were voluntarily resettled during the same period.^[39]

Numerous UN resolutions relative to other refugee cases reaffirm the right of return for displaced persons. The UN 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, for example, the Security Council has issued numerous resolutions affirming this particularly relevant formulation of the right of return.^[40] 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 made by any of the parties to the conflict).^[41]

Finally, in another 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.”^[42] The General Assembly also 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.”^[43]

Conclusion

Discussion of the implementation of the right of return of Palestinian refugees raises all sorts of questions regarding the nature of the state of Israel and the legality of its actions vis-à-vis Palestinian refugees, including barring their right of return, subsequent mass denationalization and the illegal confiscation of their entire private property and land-holdings.^[44] 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 – as noted at the beginning of this Brief - to challenge the legal validity of Resolution 194. Following are responses to some of the most prevalent arguments, which have been raised to challenge and argue against the binding nature of Resolution 194.

First, the argument is raised that Resolution 194 is not binding because the word “should” 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, 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” or the fact that the resolution was issued by the General Assembly. Moreover, 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.*

Second, the argument is raised that Israel is not expressly mentioned by name in Resolution 194 and therefore that the call to repatriate the 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 the refugee situation 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,” 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 Palestinian refugees realize full well that they are seeking to return to the 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. Israel should not be permitted to use arbitrary or discriminatory filters to screen out potential returnees, especially filters that do not conform to normal due process guarantees or other requirements of international law, such as are practiced in other existing nation states.*

Fourth, the argument is raised that Resolution 194 has somehow been superceded, amended or annulled by Security Council Resolution 242, 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 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 into Resolution 242 and must be read as part of it. 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” to the plight of Palestinian refugees. 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 and the very same remedies, which have been articulated in numerous other peace agreements.*

The Palestinian refugees’ right of return has not diminished since the UN General Assembly adopted Resolution 194 in December 1948 but rather, has, on the contrary, gained even greater weight with the intervening passage of more than fifty years since the period of initial displacement of the Palestinian refugees. The right of return, as set forth in Resolution 194, conforms with binding principles, codified in the four separate bodies of international law as explained above, strengthening its relevance as a durable solution for Palestinian refugees. Implementation of the right of return – and the other associated rights enumerated in Resolution 194 (i.e., restitution and compensation) – is, therefore a logical necessity for a just and *legal* peace agreement between Israel and the Palestinians, under international law.

[1] 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.

[2] G.A. Res. 194, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

[3] *See, e.g.*, *A Study on Stateless*, U.N. Doc. E/1112 (1949), *reprinted in* I THE COLLECTED TRAVAUX PREPARATOIRES OF THE 1951 GENEVA

CONVENTION RELATING TO THE STATUS OF REFUGEES 10-79 (Lex Takkenberg & Christopher L. Tahbaz, eds. 1989).

^[4] This section is based on unpublished research by Terry Rempel, Coordinator of Research and Information, BADIL Resource Center, that reviews the reports of the U.N. Mediator and working papers prepared by the U.N. Secretariat for the UNCCP.

^[5] 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 at 51, U.N. Doc. A/648 (1948). The UNCCP was established under para. 2, U.N. Res. 194(III), *supra* 2. 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).

^[6] This interpretation is addressed 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).

^[7] See *Progress Report of the United Nations Mediator on Palestine*, *supra* 5.

^[8] 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, 31 October 1949. The final draft of paragraph 11 included the term, "under principles of international law and in equity" in reference to those refugees choosing to exercise their right of return. The drafting history and discussion indicate that while the principle of compensation for refugees choosing not to return was accepted by all parties to the conflict, the legal status of returning refugees was unclear (i.e., Israel had yet to draft a nationality law), and their ability to make claims under Israel's domestic law was therefore still uncertain. The reference to international law, therefore, provided refugees with an additional or heightened degree of protection in the event that Israel's domestic laws relating to compensation failed to accord internationally guaranteed standards.

^[9] These include, for example, the Office of the High Commissioner for Russian Refugees, the U.N. Relief and Rehabilitation Administration and the International Refugee Organization.

^[10] See *Analysis of Paragraph 11 of the General Assembly Resolution of 11 December 1948*, Working Paper Prepared by the U.N. Secretariat, U.N. Doc. A/AC.25/W.45, 15 May 1950.

^[11] See Paolo Contini, *Legal Aspects of the Problem of Compensation to Palestine Refugees*, 22 Nov. 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*. U.N. Doc. W/32, 19 January 1950. The Economic Survey Mission was established by the UNCCP in August 1949 as a subsidiary body of the Commission to examine the economic situation in the countries affected by the conflict in Palestine and make recommendations for economic

programs to address the existing, and future economic aspects of a solution to the conflict.

[12] See U.N. General Assembly Resolution 273 (1949) of 11 May 1949.

[13] See, respectively, *Tunis and Morocco Nationality Decrees* advisory opinion, *PCIJ*, Series B, No. 4 (1923) at 24; Convention on Certain Questions relating to the Conflict of Nationality Laws, *League of Nations Treaty Series*, vol. 179, 89 (1930), art. 1; and, *Nottebohm* case, *ICJ Reports*, 1955, 1 at 23.

[14] See, respectively, GAOR, 51st Session, International Law Commission, 48th Session, Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons, 9 (Vaclav Mikulka, Special Rapporteur) U.N. Doc. A/CN.4/474 (1996); 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).

[15] The League of Nations, as early as 1919, “provisionally” recognized Palestine’s “existence” as a fully sovereign “independent nation” in Article 22 of its Covenant. The Covenant of the League of Nations both predated the appointment of Britain as the Mandatory Power in Palestine by the League of Nations and served as the juridical basis for Britain’s authority to serve as the Mandatory Power. This being so, Britain assumed the Mandate for Palestine subject to the terms of Article 22 of the Covenant of the League of Nations. In particular, Britain assumed the role of Mandatory power with the clear understanding that its responsibility, and in fact its very *raison d’être* as a Mandatory Power in the first instance, was to bring 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 their achievement of full, independent sovereign statehood.

[16] See, e.g., G.A. Res. A/RES/55/153 (December 12, 2000). The Articles on Nationality of Natural Persons in Relation to the Succession of States reflect binding customary international law, since their purpose is to *clarify* the status of certain rules from the law of state succession. They were prepared by the International Law Commission (ILC), which is a UN body of legal experts charged with developing and codifying specific topics of international law assigned to it for study by the General Assembly. The General Assembly requested states to follow the ILC Articles on Nationality in their state practice regarding nationality conferral in the context of state succession. According to the ILC’s “Official Commentary,” Article 14(2) was drafted to deal with the “specific case where the succession of States is the result of events leading to the displacement of a large part of the population.”

[17] Article 14(2) states the rule: “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 in its territory to return thereto.”

[18] See Paolo Contini, *Legal Aspects of the Problem of Compensation to Palestine Refugees*, *supra* 11, who states that “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.” Based on a memorandum by Dr. G. Meron for the Government of Israel to the UNCCP Technical Committee (28 July 1949), Contini further notes that the Israeli government had indicated that refugees re-admitted to Israel would be considered as having the same status as citizens of Israel.

[19] *A.B. v. M.B.*, 17 *ILR* 110 (Tel Aviv District Court, 6 April 1951, Zeltner, J.).

[20] *See, e.g.*, 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).

[21] *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) 44, 46 (paragraph II(b)).

[22] 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 4th 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), § 3.

[23] 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.”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).

[24] 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., where the rules do not specifically address a particular factual situation) are to be “filled” with general principles of international law.

[25] *See* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBURG, 1945-46, at 49 (42 Vols. 1947-49).

[26] *See, e.g.*, 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); 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); 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; and specifically, 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.

[27] UN Human Rights Committee, General Comment No. 27 (2 November 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9. The Comment was issued by the Human Rights Committee, which is the official body charged with interpreting the ICCPR.

[28] 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).

[29] *See, e.g.*, Manfred Nowak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 220 (1993); *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).

[30] Eric Rosand, “The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?” 19 *Michigan Journal of International Law* 1091, 1130-31 (Summer 1998).

[31] *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, 46th Sess., Agenda Item 8, para. 17, U.N. Doc. E/CN.4/Sub.2/1994/18 (1994).

[32] *See, e.g.*, U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, Res. 1995/13, U.N. ESCOR, 50th Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11.Add.3 (1995).

[33] 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; *also see*, Susan M. Akram and Guy Goodwin-Gill, *Brief Amicus Curiae*, *supra* 6.

[34] *See, e.g.*, Executive Committee Conclusion No. 18 (XXXI) 1980, Voluntary Repatriation; Executive Committee Conclusion No. 40 (XXIX) 1985, Voluntary Repatriation.

[35] Statement by the UN High Commissioner for Refugees at the *World Conference on Human Rights*, Vienna, June 16, 1993.

[36] For an especially thorough analysis of the right to return including specifically the right to return to one's "home of origin" (which includes, thereby, an associated right of restitution, or repossession) as articulated by the international community in various contexts of state practice, *see, generally*, Rosand, 1091, *supra* note 24.

[37] 1997 UNHCR BY NUMBERS 11, cited in Rosand, "The Right of Return," 1091, 1120 & n. 111.

[38] Figure cited in Oliver Bakewell, *Returning Refugees or Migrating Villagers? Voluntary Repatriation Programmes in Africa Reconsidered*, Working Paper No. 15, UNHCR (December 1999).

[39] Refugee Resettlement in Selected Countries, 1990-99, Table V.20, *Refugees and Others of Concern to the UNHCR 1999, Statistical Overview*, UNHCR (1999).

[40] *See, e.g.*, S.C. Res. 1145, U.N. SCOR, 52d Sess., 3843d mtg., preamb. & para. 7, U.N. Doc. S/RES/1145 (1997); S.C. Res. 1088, U.N. SCOR, 51st Sess., 3723d mtg. at para. 11, U.N. Doc. S/RES/1088 (1996); S.C. Res. 1079, U.N. SCOR, 51st Sess., 3712th mtg., para. 4, U.N. Doc. S/RES/1079 (1996); S.C. Res. 1019, U.N. SCOR, 50th Sess., 3591st mtg., paras. 6-7, U.N. Doc. S/RES/1019 (1995); S.C. Res. 820, U.N. SCOR, 48th Sess., 3200 mtg., preamb. & para. 7, U.N. Doc. S/RES/820 (1993).

[41] *See, e.g.*, S.C. Res. 1097, U.N. SCOR, 51st Sess., 3712th mtg., at para. 8, U.N. Doc. S/RES/1097 (1996). 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 was calling 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 combatants or not. *See, e.g.*, S.C. Res. 385, U.N. SCOR, 31st Sess., *Res. & Decs.* 8, para. 11(d), U.N. Doc. S/INF/32 (1977).

[42] *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).

[43] *See, e.g.*, U.N. G.A. Res. 35/124 (11 December 1980) and U.N. G.A. Res. 36/148 (16 December 1981), cited in Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW*, 269 & n. 117 (2d ed. 1996).

[44] For a recent discussion of Israel’s illegal confiscation of refugee property, *see, e.g.*, Gail J. Boling, “Israel’s Use of ‘Absentees’ 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).