

# PAST THE POINT OF NO RETURN? THE PALESTINIAN RIGHT OF RETURN IN INTERNATIONAL HUMAN RIGHTS LAW

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*[This article examines the interpretive ambiguity and political obfuscation surrounding the Palestinian right of return in international human rights law. As a bitterly contested site of discourse, it is a topic that penetrates both the Israeli and Palestinian social narratives. Historically, the right of return debate is intrinsically linked to the complexity of the Palestinian refugee crisis, and the conflict over its creation — the right of return is the lung through which the Israeli–Palestinian struggle breathes. In the legal arena, the right of return’s treatment in the resolutions of the United Nations General Assembly, international treaty obligations and customary law warrants close scholarly attention. The Palestinians as non-nationals, and as a group of mass displaced persons, face unique challenges under human rights instruments. In the wake of Oslo, and more recently with Israel’s disengagement from Gaza, the right of return continues to be at the forefront of political contestation. In light of the symbolic resonance of unqualified return, this article focuses squarely on the asserted right of the 1948 Palestinian refugees and their descendants to return to Israel proper.]*

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## I INTRODUCTION

Perhaps no topic raises as many questions related to justice, history, geography, and identity as the Palestinian right of return, the historic kernel of

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the Arab–Israeli conflict. This article therefore attempts to offer a non-polemical inquiry into the right of return by digging beneath the nationalistic narratives, and probing beyond the factual, legal and discursive layers in which it is deeply embedded. Each section of the article thus seeks to strip away another veneer of what remains a bitterly contested object of discourse in international human rights law.

Part II begins by exploring the magnitude and complexity of the historical origins of the 1948 Palestinian displacement. Although much ink has been spilled on the mass Arab exodus, the allocation of moral and legal responsibility for the refugee problem it created remains one of the most intractable obstacles to Palestinian return. Further, the moral and ideological content of the claimed Palestinian right begs conceptual examination. Beyond academia and legalism, the return to one's 'homeland' is an essentially symbolic right, a matter of principle inscribed in the communal memories and ethos of two competing nationalisms. For Palestinians and Israelis alike, narratives of return are inextricably bound to mutually exclusive political identities, and in a sense they constitute 'the bare bedrock upon which other layers of the conflict are mounted'.<sup>1</sup> In addition, consideration of the Palestinian refugee issue in Arab–Israeli negotiations is axiomatic to the political variables that shape the formulation of this right. Whether termed *isit'adah* (restoration), *awda* (return) or *tahrir* (liberation), the retrieval of Palestine has been the ultimate goal of successive generations of Palestinians since 1948. Nonetheless, developments over the past 20 years have led to a gradual shift in practical objectives and even an abandonment of demands for the actual return of all the refugees to Israel. Rather, the Palestinian leadership seeks some formal recognition of Palestinian rights 'in principle'.<sup>2</sup> In any event, increased Israeli opposition to refugee concessions coupled with the persistence of the Palestinian Intifada has once again brought the right of return to the political forefront.

Part III addresses the sources invoking and informing the Palestinian right of return under international human rights law. Scores of historians, commentators and Palestinian and Israeli leaders have interpreted the nature and content of the right divergently. Both Israelis and Palestinians attempt to buttress their respective positions by recourse to legal arguments. Indeed, the Palestinian side calls for international law to be the primary reference point in the conflict's resolution, and argues that the displaced Palestinians have a legally sanctioned right of return.<sup>3</sup> Whilst the concept of return is also reflected in humanitarian<sup>4</sup>

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<sup>1</sup> Adina Friedman, 'Unraveling the Right of Return' (2003) 21(2) *Refuge* 62, 62.

<sup>2</sup> Jerome Segal, 'Clearing up the Right-of-Return Confusion' (2001) 8(2) *Middle East Policy* 23, 24.

<sup>3</sup> Kurt René Radley, 'The Palestinian Refugees: The Right to Return in International Law' (1978) 72 *American Journal of International Law* 586, 587.

<sup>4</sup> Article 49 of the *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) forbids the permanent evacuation of areas occupied during international conflicts.

and refugee law,<sup>5</sup> this legal inquiry will be confined to the right's treatment in United Nations General Assembly resolutions, international treaty obligations and customary international law. Notably, there is no single, authoritative Palestinian definition of the right of return,<sup>6</sup> and the legal issues vary depending on whether the right is understood to involve return merely to the occupied territories, or to the territory of the Israeli State itself.<sup>7</sup> In light of the symbolic resonance of unqualified return, this article will focus squarely on the asserted right of the 1948 Palestinian refugees, and their descendants, to return to Israel proper.

Part IV acknowledges the need not only for a lasting commitment but also for painful political compromises that can comprehensively remedy the Palestinian refugee crisis. Thus, creative alternatives and the application of other legal principles will be considered in order to harmonise conflicting interests and rights, the balancing of which must be undertaken in the name of peace. In short, there is a difference between acknowledging that an expansive right to return exists in international human rights law, and recognising that in certain instances it may not be implemented due to the unresolved political situation.

## II THE FACTUAL FRAMEWORK

### A *Rupture and Return: The 1948 'Blame Game'*

Outlining the historical genesis of the Palestinian displacement is an undertaking fraught with perils, both political and analytical. The essentially contentious character of the right of return follows from the fact that the original cause of the refugee problem, rooted in the 1948–49 Arab–Israeli war, remains largely unresolved. More often than not, it is a question considered through the prisms of irreconcilable political and ideological narratives. Nevertheless, what is incontrovertible is that the 1948 hostilities, which began in the wake of the UN partition of Palestine in November 1947<sup>8</sup> and erupted into full-scale war with several Arab states after the Israeli *Declaration of Independence* in May 1948,<sup>9</sup> resulted in the exile of much of the Arab Palestinian population: '[t]hose twenty

<sup>5</sup> Refugee law, however, focuses on the voluntariness of repatriation; in other words on the right *not* to be returned, or forcibly repatriated, so long as the conditions that caused the original flight remain: see generally *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 33 (entered into force 22 April 1954).

<sup>6</sup> Rashid Khalidi, 'Observations on the Right of Return' (1992) 21(2) *Journal of Palestine Studies* 29, 29.

<sup>7</sup> Radley, above n 3, 586.

<sup>8</sup> The General Assembly adopted a plan to partition Palestine into separate states, one Jewish and the other Arab: see *Future Government of Palestine*, GA Res 181 (II), UN GAOR, 2<sup>nd</sup> sess, 128<sup>th</sup> plen mtg, UN Doc A/RES/181 (II) (29 November 1947) ('*Resolution 181*'); *Report to the General Assembly by the United Nations Special Committee on Palestine*, UN Doc A/364 (3 September 1947).

<sup>9</sup> *Declaration of the Establishment of the State of Israel* (1948) ('*Israeli Declaration of Independence*'). On 14 May 1948, the Jewish leaders declared the establishment of the State of Israel on the heels of the final withdrawal of British troops from Palestine. On the following day, the armies of Transjordan, Syria, Lebanon, Egypt, Saudi Arabia and Iraq invaded the newly declared State. Several successful Israeli military campaigns assured Israel's continued existence: Howard Sachar, *A History of Israel* (1987) 311, 315–53.

months transformed the political landscape of the Middle East forever'.<sup>10</sup> It is estimated that some 600 000–700 000 Palestinians departed, fled or were expelled from those regions in Palestine which are now territories within the State of Israel during the period from December 1947 to September 1949,<sup>11</sup> and established themselves in the West Bank (Jordan), the Gaza Strip (Egypt), Lebanon, Jordan and Syria.<sup>12</sup> Some 370 villages were left empty, and the dislocation of roughly half of the territory's population fundamentally altered the demographic composition of the newly-created State of Israel.<sup>13</sup> Approximately 150 000 of the Arab population of pre-1948 Palestine remained, becoming citizens of Israel.<sup>14</sup>

By the war's end in 1949, the vast majority of Palestinians were forced into makeshift refugee camps under Egyptian or Jordanian control, and the UN Relief and Works Agency for Palestine Refugees in the Near East ('UNRWA') was subsequently established to address the humanitarian needs of the Palestinian refugees.<sup>15</sup> Many of these refugees, whose numbers have grown considerably, continue to live in squalid camps where they were first relocated and are dependent on help from the UNRWA.<sup>16</sup> There exists a wide spectrum of figures for the total Palestinian refugee population since 1948. Conflicts over its demographic dimension and the precise definition of 'refugee' carry critical implications for the Palestinian return issue. By 2005 the UNRWA had registered more than 4.1 million Palestinians as refugees,<sup>17</sup> a figure that includes the descendants of those originally displaced in 1948.<sup>18</sup> *Prima facie*, they would be the potential beneficiaries of a right of return. Notably, the issue of the

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<sup>10</sup> Eugene Rogan and Avi Shlaim, 'Introduction' in Eugene Rogan and Avi Shlaim (eds), *The War for Palestine: Rewriting the History of 1948* (2001) 1, 1.

<sup>11</sup> See Benny Morris, *The Birth of the Palestinian Refugee Problem 1947–1949* (1987) 1. It should be noted that the exact number is contentious: Morris, 297–8. See also Yoav Tadmor, 'The Palestinian Refugees of 1948: The Right to Compensation and Return' (1994) 8 *Temple International and Comparative Law Journal* 403; Radley, above n 3, 587–95; Donna Arzt and Karen Zughaib, 'Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State' (1991–92) 24 *New York University Journal of International Law and Politics* 1399, 1420–2.

<sup>12</sup> Wadie E Said, 'Palestinian Refugees: Host Countries, Legal Status and the Right of Return' (2003) 21(2) *Refugee* 89, 89; Arzt and Zughaib, above n 11, 1421.

<sup>13</sup> Eyal Benvenisti and Eyal Zamir, 'Private Claims to Property Rights in the Future Israeli–Palestinian Settlement' (1995) 89 *American Journal of International Law* 295, 297.

<sup>14</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (1998) 14.

<sup>15</sup> *Ibid.* 6. The UNRWA was created by the General Assembly in *Assistance to Palestine Refugees*, GA Res 302 (IV), UN GAOR, 4<sup>th</sup> sess, 273<sup>rd</sup> plen mtg, [7], UN Doc A/RES/302 (IV) (8 December 1949).

<sup>16</sup> Ruth Lapidot, 'Legal Aspects of the Palestinian Refugee Question' (2002) <<http://www.jcpa.org/jl/vp485.htm>> at 1 October 2005.

<sup>17</sup> UNRWA, *Total Registered Refugees per Country and Area as at 31 March 2005* <[http://www.un.org/unrwa/publications/pdf/rr\\_countryandarea.pdf](http://www.un.org/unrwa/publications/pdf/rr_countryandarea.pdf)> at 1 October 2005. The figures on UNRWA registered Palestine refugees are not to be regarded as comprehensive demographic data.

<sup>18</sup> Lapidot, 'Legal Aspects of the Palestinian Refugee Question', above n 16.

Palestinians displaced in 1967 has proven to be less contentious, as it does not directly involve repatriation to Israel proper.<sup>19</sup>

As with any intractable ethno-national conflict, there is no authoritative determination of the immediate causes or motivations for the Palestinian exodus. Both sides, Israeli and Arab, traditionally ascribe responsibility for the mass displacement entirely to the other and maintain conflicting factual assessments in what Eugene Rogan and Avi Shlaim call ‘official history’.<sup>20</sup> It is worth pointing out that propagating a simplified and varnished version of the 1948 war has been integral to the pursuit of political and moral leverage with respect to the Palestinian right of return. In Israel, nationalist historians conventionally claim that the Palestinians either voluntarily fled, free from Jewish compulsion, due to a widespread confusion and panic, or that they were persuaded or forced to evacuate by leaders of the Arab states bent on Israel’s destruction.<sup>21</sup> Israeli Government sources also stress that hundreds of thousands of Jewish refugees simultaneously fled their homes in Arab countries to Israel as a direct consequence of the 1948 hostilities.<sup>22</sup> Accordingly, Israel contends that it was the Arabs who caused the Palestinian refugee problem, by rejecting the creation of the State of Israel and declaring war upon it — ‘a war which, like most wars, created refugee problems, including a Jewish one’.<sup>23</sup> Conversely, Palestinian and Arab accounts insist that the Israelis forcibly expelled the Palestinians as a part of a premeditated and prearranged ‘grand political–military design’.<sup>24</sup> Palestinian historians highlight the Deir Yassin massacre as reflective of the Jewish plot to decimate and drive out the Arab populace from Palestine.<sup>25</sup> Upon this historical construction, Palestinian refugees demand recognition of their right to return to their original homes, and insist that Israel alone is held morally accountable for their expulsion and present refugee status.<sup>26</sup> Both evaluations of 1948 thus

<sup>19</sup> Further Palestinian displacement occurred during the Six-Day War in 1967 ‘when approximately 500 000 Palestinians fled the West Bank and Gaza, of which over 200 000 were second-time refugees’ from the 1948 war: Kathleen Lawand, ‘The Right to Return of Palestinians in International Law’ (1996) 8 *International Journal of Refugee Law* 532, 536–7.

<sup>20</sup> Rogan and Shlaim, above n 10, 2.

<sup>21</sup> See generally Laurence Silberstein, *The Postzionism Debates: Knowledge and Power in Israeli Culture* (1999) 97–8; Israel Office of Information, *The Arab Refugees* (1953) 11, as cited in Tanya Kramer, ‘The Controversy of a Palestinian “Right of Return” to Israel’ (2001) 18 *Arizona Journal of International and Comparative Law* 979, 998. See also Rashid Khalidi, ‘The Palestinians and 1948: The Underlying Causes of Failure’ in Eugene Rogan and Avi Shlaim (eds), *The War for Palestine: Rewriting the History of 1948* (2001) 12, 14; Christopher Sykes, *Crossroads to Israel* (1965) 353–4.

<sup>22</sup> State of Israel, Government Press Office, ‘The Refugee Issue: A Background Paper’ (1994) 3, as cited in Takkenberg, above n 14, 14.

<sup>23</sup> Joseph Alpher et al, ‘Concept Paper: The Palestinian Refugee Problem and the Right of Return’ (1999) 6(3) *Middle East Policy* 167, 172.

<sup>24</sup> Morris, above n 11, 1. See also Justus Weiner, ‘The Palestinian Refugees’ “Right to Return” and the Peace Process’ (1997) 20 *Boston College International and Comparative Law Review* 1, 15; Nur Masalha, *A Land without a People: Israel, Transfer and the Palestinians 1949–96* (1997) xi.

<sup>25</sup> See Weiner, above n 24: ‘Deir Yassin, an Arab village located next to a major thoroughfare connecting Jerusalem to the coast, was attacked by Jewish members of the Irgun and Stern militias [Jewish fringe militant factions]. The attack, on 9 April 1948, resulted in the death of [around 250] Arab civilians’: at 16. See also Radley, above n 3, 592–3.

<sup>26</sup> Alpher et al, above n 23, 171.

subscribe to an uncritically partisan account of the Palestinian displacement; ‘the pretense of objectivity is particularly misplaced, if not totally unfounded’.<sup>27</sup>

Nevertheless, in recent decades, new scholarship has begun to subvert the foundational premises of these dominant narratives. The most significant reappraisals have emerged from mostly Israeli historians relying on newly discovered archival evidence.<sup>28</sup> Indeed, Benny Morris was the first Israeli historian to admit that mass expulsions of Palestinians occurred in 1948, and refute decisively the claim that Arab leaders ordered the Palestinians to flee and clear the way for impending armies.<sup>29</sup> He determined, however, that neither the expulsions nor the subsequent refugee problem was the result of a Jewish blueprint or ‘master plan’ but rather the consequences of war and associated circumstances.<sup>30</sup> In addition, several other Israeli historians such as Shlaim<sup>31</sup> and Ilan Pappé<sup>32</sup> have further undermined traditional Zionist positions on the creation of the refugees. Hailed as revisionist pioneers, they depict the 1948 war as ‘something other than a miraculous victory of beleaguered underdogs’.<sup>33</sup> Palestinian writers are also beginning to challenge Arab histories of 1948 that ‘have [hitherto] been marked by apologetics, self-justification, onus-shifting and conspiracy theories’.<sup>34</sup> Indeed, Rashid Khalidi exposes ‘the tendency in ... [Palestinian] historiography ... to focus on causes external to Palestinian society’ and even to create ‘a narrative ... that denies the Palestinian agency in what happened, or indeed any responsibility for their own fate’.<sup>35</sup> Disentangling myth from motive, Edward Said has also tackled sensitive subjects such as the Palestinian propensity to downgrade the Jewish Holocaust:

as Palestinians we demand consideration and reparations from them without in any way minimizing their own history of suffering and genocide ... [W]e must think our histories together ... free of any exclusionary, denial-based schemes ...<sup>36</sup>

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<sup>27</sup> Ilan Pappé, ‘Humanising the Text: Israeli “New History” and the Trajectory of 1948 Historiography’ (2003) 86 *Radical History Review* 102, 103.

<sup>28</sup> As a result of Israeli archival laws, hundreds of thousands of previously closed state papers became available to researchers in the early 1980s. Among these documents were correspondence, memoranda, minutes of official Government meetings, and the private papers of Israeli leaders.

<sup>29</sup> See Morris, above n 11. Morris has written critically, for example, of the expulsion of 50 000–60 000 Arab residents from the towns of Lydda and Ramle in July 1948: at 204–11. Simha Flapan, too, dismisses this contention as illogical: ‘The Arab armies, coming long distances and operating in or from the Arab areas of Palestine, needed the help of the local population for food, fuel, water, transport, manpower, and information’: Simha Flapan, *The Birth of Israel: Myths and Realities* (1987) 85.

<sup>30</sup> Morris, above n 11, 286–96.

<sup>31</sup> See, eg, Avi Shlaim, *Collusion across the Jordan: King Abdullah, the Zionist Movement and the Partition of Palestine* (1988).

<sup>32</sup> See, eg, Ilan Pappé, *Britain and the Arab–Israeli Conflict, 1948–51* (1988); Pappé, ‘Humanising the Text’, above n 27.

<sup>33</sup> Neil Caplan, ‘The “New Historians”’ (1995) 24(4) *Journal of Palestine Studies* 96, 96.

<sup>34</sup> Rogan and Shlaim, above n 10, 2.

<sup>35</sup> Khalidi, ‘The Palestinians and 1948’, above n 21, 16.

<sup>36</sup> Edward W Said, *The End of the Peace Process: Oslo and After* (2000) 208–9.

This mixture of historical development and epistemological transformation in academia has paved the ground for a reconceptualisation of Palestinian displacement.

Consequently, there is at present a much deeper consciousness of Israel's involvement in the flight of the Palestinians in 1948.<sup>37</sup> Contrary to the traditional reliance by Israel on the idea of voluntary Palestinian flight to deny responsibility for the plight of the refugees, and to avoid considering their return,<sup>38</sup> it is now well documented that the actions of the Israeli military and political leadership played a key role in provoking the Palestinian flight.<sup>39</sup> Radley concludes:

If there is any basis for Arab charges made through the years, it would seem not to exist in a general campaign of terror, but rather in a number of *de facto* expulsions which took place in several Arab villages in the latter stages of the war.<sup>40</sup>

Indeed, in June 1948, the Intelligence branch of Israel's army estimated that 84 per cent of the Palestinian Arab flight to that point was attributable to the army's military attacks on the Arabs.<sup>41</sup> For example, the mortar attack by the Irgun on Jaffa inspired terror in the inhabitants and provoked a mass exodus.<sup>42</sup> Whether the Palestinian refugees fled as a result of military intimidation, in the face of a disintegrating Palestinian society, or as is most likely the case, as a result of a combination of both, there can be no argument as to the existence of Israeli culpability. Even if the Arab states facilitated the expulsions by electing to wage war, and even if the expulsions were only then born of pragmatism rather than profundity of conviction, this in no way belies the fact that expulsions occurred, nor does it lessen the significance of Israel's role in executing them.

However, there are certain key historical issues that continue to complicate the allocation of moral responsibility for the 1948 displacement. Firstly, Israeli national survival was a pervasive concern. Whilst it is now well documented that Jewish soldiers were better armed and better trained than their Arab counterparts,<sup>43</sup> the Palestinians held several other advantages, including their numerical superiority, particularly in areas of strategic importance.<sup>44</sup> Given the

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<sup>37</sup> Takkenberg, above n 14, 16.

<sup>38</sup> Flapan, above n 29, 118.

<sup>39</sup> Morris, above n 11, 204–11, 287–8; Silberstein, above n 21, 98–102.

<sup>40</sup> Radley, above n 3, 594. Radley notes further that '[a]lthough the military exigencies have generally been given scant attention in the accounts of these incidents, they are attested to by a number of reliable authorities': see, eg, Sykes, above n 21, 354–6.

<sup>41</sup> Israeli Defence Force, Intelligence Branch, *The Emigration of the Arabs of Palestine in the Period 1/12/1947–1/6/1948* (30 June 1948), as cited in Morris, above n 11.

<sup>42</sup> Morris, above n 11, 96–8. Further, in the Galilee, the Palmach, an elite unit of the Haganah (which was later transformed into the Israeli Defence Force) shelled residential neighbourhoods in capturing the towns of Safad and Beisan: Morris, above n 11, 101–7.

<sup>43</sup> Morris, above n 11, 6–7.

<sup>44</sup> Khalidi, 'The Palestinians and 1948', above n 21, 15.

Arab League's overt opposition to any form of Jewish sovereignty<sup>45</sup> and the ensuing hostilities, the Arab inhabitants of Palestine inevitably came to be seen by the Israelis as a 'fifth column' in the war.<sup>46</sup> Khalidi affirms: '[i]f some Jews in Palestine perceived themselves as facing an uphill fight against the Arabs, this was certainly understandable'.<sup>47</sup>

Secondly, there were indirect causes of the flight. Although its extent has been exaggerated, the impact of the first stage of the Arab exodus, when an estimated 30 000 upper and middle class Arabs left for neighbouring countries, remains uncontroverted.<sup>48</sup> As Radley notes, the departure of so many Palestinians — many of them leaders in their communities — led to 'a serious breakdown in communications and economic and administrative services', leaving those who stayed 'to the mercy of rumor, anxiety, and fear'.<sup>49</sup> Finally, both sides, Zionist<sup>50</sup> and Arab alike,<sup>51</sup> made full and effective use of scare propaganda. For example, the Deir Yassin massacre — which, according to Morris, 'probably had the most lasting effect of any single event of the war in precipitating the flight of the Arab villagers from Palestine'<sup>52</sup> — was followed by Arab propaganda highlighting those atrocities and threatening more to come.<sup>53</sup> Accordingly, the multi-causal dimensions of displacement preclude foregone conclusions regarding unilateral responsibility.

Moreover, the magnitude of the refugee crisis and its intensification since 1948 are directly relevant to notions of liability. Accordingly, the Arab countries' involvement in the refugee problem is significant and problematises blanket calls for an unqualified right of return based on exclusive Israeli accountability. Commonly, responsibility for the plight of the Palestinian refugees is framed in zero-sum terms, with the present fate of the Palestinians entirely attributed to Israel's conduct in 1948.<sup>54</sup> However, the Arab states also played a decisive role and have used the refugee issue for their own political ends.<sup>55</sup> Whilst the Arab countries settled the refugees in temporary refugee

<sup>45</sup> Sabel, for example, highlights the open admission by Arab states that their armies were sent to Palestine 'to prevent the creation of the proposed Jewish State': Robbie Sabel, 'The Palestinian Refugees, International Law and the Peace Process' (2003) 21(2) *Refuge* 52, 53. On this point, see *Cable of 15 May 1948 from the Secretary-General of the League of Arab States to the Secretary-General of the UN*, UN SCOR, Supp, 83, UN Doc S/745 (May 1948).

<sup>46</sup> Hillel Cohen, 'Land, Memory and Identity: The Palestinian Internal Refugees in Israel' (2003) 21(2) *Refuge* 6, 7. See also Morris, above n 11, 280, citing Meir Grabovsky.

<sup>47</sup> Khalidi, 'The Palestinians and 1948', above n 21, 16.

<sup>48</sup> Radley, above n 3, 592.

<sup>49</sup> Radley, above n 3, 592.

<sup>50</sup> Radley observes that '[v]arious accounts attest to the Haganah's use of "psychological warfare" against the Arabs': *ibid* 593. See also George Kirk, *The Middle East 1945–1950* (1954) 264; Sykes, above n 21, 354; Cohen, above n 46; Radley, above n 3, 593–4.

<sup>51</sup> Radley, above n 3, 593.

<sup>52</sup> Morris, above n 11, 113. See also Weiner, above n 24, 16.

<sup>53</sup> Radley, above n 3, 593; Sykes, above n 21, 352–3.

<sup>54</sup> Segal, above n 2.

<sup>55</sup> BADIL Resource Center for Palestinian Residency and Refugee Rights, *The Right of Return: Campaign for the Defense of Palestinian Refugee Rights* (2<sup>nd</sup> ed, March 2000) 21. See also Yezid Sayigh, 'The Politics of Palestinian Exile' (1987) 9 *Third World Quarterly* 28, 30.



camps, all Arab states (with the exception of Jordan) refused citizenship to Palestinians residing within their borders. Instead, 'their lives and access to basic human and civil rights [were] determined almost solely by changing political circumstances'.<sup>56</sup> In Lebanon, the status of some 350 000 refugees is particularly sensitive both politically and socio-economically,<sup>57</sup> and 'the government is likely to insist that a solution to the refugee question involve their total removal'.<sup>58</sup> Justus Weiner notes that Ralph Galloway, the former Director of UNRWA, was so incensed at the Arab countries' unwillingness to accommodate the Palestinians that he declared in 1958: '[t]he Arab states do not want to solve the refugee problem. They want to keep it as an open sore, as an affront to the United Nations, and as a weapon against Israel. Arab leaders do not give a damn whether Arab refugees live or die'.<sup>59</sup> Nevertheless, the politicisation of the refugee crisis stems in part from the Palestinians themselves who have always forcefully insisted that they are not to be treated as 'refugees', but rather as a nation denied its collective rights. From this standpoint, the intractability of the Palestinian refugee problem is as much a consequence of the historical problem as it is a cause.

As crucial as these questions of moral and historical responsibility are to the context of the Palestinian right of return, they are not necessarily legally relevant to the source of the right.<sup>60</sup> On the other hand, some writers have insisted on the legal significance of the direct causes and circumstances precipitating the exodus.<sup>61</sup> John Quigley, for example, argues that there are particular legal consequences which may apply to a coerced departure, and that return might be required 'on the additional basis of a state's obligation to reverse the consequences of an unlawful act'.<sup>62</sup> Indeed,

[i]t is generally recognized that a state cannot legally expel a population under its control, if only because no other state is obliged to admit this population (except as refugees). Those expelled clearly have the right to reverse an illegal act, that is, to return to their homelands.<sup>63</sup>

Nevertheless, the absence of a definitive factual account of the events of 1948 renders problematic the application of legal formulations based on the assumption of a sole cause for the Palestinian displacement. Moreover, Alan Dowty suggests that it 'raises questions about cases, short of outright expulsion,

<sup>56</sup> BADIL Resource Center for Palestinian Residency and Refugee Rights, above n 55, 21.

<sup>57</sup> Rosemary Sayigh, 'Palestinian Refugees in Lebanon: Implantation, Transfer or Return?' (2001) 8(1) *Middle East Policy* 94, chronicles the deplorable conditions of Palestinian refugees in Lebanon where state oppression, social exclusion and unemployment are commonplace. See also Rosemary Sayigh, 'Palestinians in Lebanon: Harsh Present, Uncertain Future' (1995) 25(1) *Journal of Palestinian Studies* 37.

<sup>58</sup> Alpher et al, above n 23, 175.

<sup>59</sup> Ralph Galloway, as quoted in Weiner, above n 24, 32. For example, in 1955 the Arab states dismissed outright the US-led 'Johnston plan' which pioneered a joint irrigation initiative between Israel, Syria, Jordan and Lebanon: at 32 (fn 154).

<sup>60</sup> Lawand, above n 19, 537.

<sup>61</sup> See, eg, Radley, above n 3, 590–5.

<sup>62</sup> John Quigley, 'Displaced Palestinians and a Right of Return' (1998) 39 *Harvard International Law Journal* 171, 219–25.

<sup>63</sup> Alan Dowty, 'Return or Compensation: The Legal and Political Context of the Palestinian Refugee Issue' [1994] *World Refugee Survey* 26, 26–7 (citations omitted).

in which lesser ... forms of coercion may have been employed'.<sup>64</sup> Accordingly, if the right of return is formulated in terms of international human rights law, as opposed to refugee law, then concerns of causation become less determinative.<sup>65</sup> Thus, whilst an appreciation of the complex factual matrix of displacement is essential for scholarly engagement, the Palestinian legal entitlement to return does not hinge upon whether the Palestinians were forcibly expelled or upon the extent to which Israel remains accountable.

## B *The Resonance of Return: Competing Nationalisms*

For Jews, the word is *galut*; for Palestinians, it is *ghurba*. For both it means exile, a condition from which one returns to the Promised Land. Like the Jewish dream of return to Zion, 'Palestine, like Zion, has become an idyllic place of return, a force of national hope blessed with perfection'.<sup>66</sup>

Historical inquiry aside, the ostensible intractability of Palestinian return cannot be understood without a conceptual framework outlining its moral and ideological content. Thus, following the pioneering works of Edward Said<sup>67</sup> and James Young,<sup>68</sup> it is worth locating the right of return in the inter-subjective realm of constructed identity, where the worlds of reality and memory often converge.

### 1 *Palestinian Conceptions of Return*

Record!  
I am an Arab  
You have stolen the orchards of my ancestors  
And the land which I cultivated  
Along with my children  
And you left nothing for us  
Except for these rocks ...  
So will the State take them [also]  
As it has been said?!<sup>69</sup>

'Palestine' is more than nostalgic remembrance. For over 50 years, the right of return has been the central constituent of the Palestinian national narrative; the 'cornerstone' of their political struggle for recognition and their defiance of Israel.<sup>70</sup> Ever since 1948, Palestinians have continuously voiced their demand to return to their villages, and Palestinian 'refugee' identity remains firmly

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<sup>64</sup> Ibid 27.

<sup>65</sup> Ibid.

<sup>66</sup> Arzt and Zughuib, above n 11, 1427, citing David Shipler, *Arab and Jew: Wounded Spirits in a Promised Land* (1986) 59.

<sup>67</sup> Edward W Said, *Peace and Its Discontents: Gaza-Jericho 1993–1995* (1995).

<sup>68</sup> James Young, *The Texture of Memory: Holocaust Memorials and Meanings* (1993). See also Shipler, above n 66, 52–78; Robert Rowland and David Frank, *Shared Land/Conflicting Identity: Trajectories of Israeli and Palestinian Symbol Use* (2002) 14.

<sup>69</sup> Mahmoud Darwish, 'Identity Card', as quoted in Ahmad Sa'di, 'Catastrophe, Memory and Identity: Al Nakbah as a Component of Palestinian Identity' (2002) 7(2) *Israel Studies* 175, 185.

<sup>70</sup> Weiner, above n 24, 1.

anchored in collective experiences of dispossession and exile [*ghurba*], homelessness, insecurity, and uprootedness.<sup>71</sup> Accordingly, ‘the longing for the homeland, the house of the forefathers ... has become part of their inner life that cannot be taken away’.<sup>72</sup> Palestinian-American academic Khalidi insists that ‘[o]nly by understanding the centrality of the catastrophe of politicide and expulsion that befell the Palestinian people — *al nakba* in Arabic — is it possible to understand the Palestinians’ sense of the right of return’.<sup>73</sup> Indeed, the continued existence of the refugee crisis symbolises for Palestinians a profound sense of ‘historical injustice’ which ‘only a return to their original homes could remedy’.<sup>74</sup> Consequently, return not only carries moral connotations, but is also intimately connected with the Palestinian people’s sense of national and historical legitimacy.

Indeed, the consciousness of return as a source of shared beliefs and values is echoed in the cultural canons of the Palestinian experience. The very language of the ‘right of return’ (*Haq al-Awda*) is profoundly symbolic. According to Adina Friedman, ‘[t]he Arabic term for “Right” (*Haq*) also means, or connotes, justice/justness, truth (“definite”, real), and is one of God’s names’, thereby implying a strong non-negotiable concept.<sup>75</sup> The house key has, since 1948, also become a symbol for the realisation of return, synonymous with ‘the return not only to the house that was left behind but also a return to normality, to a life filled with dignity and warmth’.<sup>76</sup> Thus, return has been collectively internalised as the moral salve for the Palestinian wound of displacement. Accordingly, Israel’s prolonged unwillingness to even recognise the Palestinian right strengthened a holy principle of return, ‘which [has] united the refugees and preserved their identity’.<sup>77</sup> The right of return is the existential umbilical cord linking the Palestinian people to selfhood and nationalism.

The evolution of Palestinian return at a political level is also worthy of consideration. Originally, the Palestinian vision of return, post-1948, was subsumed under the idea of a total ‘liberation’ of Palestine via a dissolution of Israel and a recreation of Arab Palestine.<sup>78</sup> The collapse of Pan-Arabism, coupled with the addition of one million Palestinians under Israeli rule in 1967, made this goal particularly prominent in the emerging Palestinian polity.<sup>79</sup> Thus, the 1968 *Palestinian National Charter* enshrined ‘armed struggle’ as ‘the only way to liberate Palestine’, and defined as its objectives ‘the liberation of their country and their return to it’ by way of ‘an armed popular revolution’.<sup>80</sup>

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<sup>71</sup> Helena Lindholm, ‘Palestinian National Identities: Change and Continuity of the Palestinian as a Struggler’ in Helena Lindholm (ed), *Ethnicity, Nationalism, Formation of Identity and Dynamics of Conflict in the 1990s* (1993), as cited in Friedman, above n 1, 65–6.

<sup>72</sup> Hisham Sharabi, ‘Introduction’ in Dar al-Fata al-‘Arbai and Jaffa Research Center (eds), *Jaffa: The Perfume of a City* 13, 15, as cited in Sa’di, above n 69, 179.

<sup>73</sup> Khalidi, ‘Observations on the Right of Return’, above n 6, 30.

<sup>74</sup> *Ibid.*

<sup>75</sup> Friedman, above n 1, 66.

<sup>76</sup> Sa’di, above n 69, 181.

<sup>77</sup> Cohen, above n 46, 10.

<sup>78</sup> Yezid Sayigh, above n 55, 49.

<sup>79</sup> Friedman, above n 1, 65.

<sup>80</sup> *Palestinian National Charter* (1968) art 9.

By 1974, the Palestinian Liberation Organization ('PLO') had fundamentally altered its concept of return. Cognisant of Israel's military superiority, the PLO championed a ten-point Provisional Political Program (the 'phased plan'), endorsing the creation of an independent Palestinian entity on 'every part of Palestinian territory that is liberated'.<sup>81</sup> Divested of militant language, the plan's deferment of total liberation may have signified a policy in which the PLO aspired to the pre-1967 territories, rather than an unqualified return to the original homes.<sup>82</sup> Indeed, in 1988, the Palestinian National Council ('PNC')<sup>83</sup> adopted a *Declaration of Independence*,<sup>84</sup> which explicitly grounded the right of return within the context of UN resolutions (an option that was previously rejected).<sup>85</sup> According to Khalidi, the PLO was implicitly relinquishing its claim to the areas seized in 1948 and thereby accepting Israel's creation as a fait accompli.<sup>86</sup> This was the first time an authoritative Palestinian body had attempted to moderate the right of return and accept monetary recompense as a substitute for unfettered repatriation.<sup>87</sup> Nevertheless, Khalidi argues:

This is clearly meant to be an escape hatch: the politically impossible demand that all Palestinians made refugees in 1948 be allowed to return is dropped, without dropping the principle that such people have certain rights in the context of a negotiated settlement, and without abandoning the reading of history which is the basis of this principle.<sup>88</sup>

Indeed, Palestinian leaders such as Faisal Hussein and Nabi Shaath, whilst definitely insisting on return in principle, continue to describe its destination in ambiguous language.<sup>89</sup> Thus, notwithstanding the absence of explicit PLO approval, it is clear that the traditional Palestinian notion of return has been modified politically.

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<sup>81</sup> Palestinian National Council, *Phased Political Programme*, adopted at the 12<sup>th</sup> Session, Cairo, 9 June 1974, [2] available at <<http://www.iris.org.il/plophase.htm>> at 1 October 2005.

<sup>82</sup> Weiner, above n 24, 19.

<sup>83</sup> The PNC is a parliamentary body representing Palestinian communities and organisations. The PLO, a body with administrative-executive functions, was established by the PNC, and plays an instrumental role in international negotiations.

<sup>84</sup> *Declaration of Independence*, as contained in *Palestine National Council: Political Communique and Declaration of Independence* (15 November 1988) annex 3, 27 ILM 1668 (1988).

<sup>85</sup> The *Declaration of Independence* refers specifically to *Resolution 181* as well as to 'the resolutions of the United Nations since 1947': *ibid* 1670.

<sup>86</sup> Khalidi, 'Observations on the Right of Return', above n 6, 35.

<sup>87</sup> Weiner, above n 24, 20-1.

<sup>88</sup> Khalidi, 'Observations on the Right of Return', above n 6, 36.

<sup>89</sup> *Ibid*.

2 *Israeli Conceptions of Return*

By the rivers of Babylon,  
 There we sat down, yea, we wept,  
 When we remembered Zion ...  
 If I forget thee, O Jerusalem,  
 Let my right hand forget her cunning.<sup>90</sup>

Akin to the Palestinians, the historical Jewish right of return, institutionalised through Israel's *Law of Return* (1950), is a crucial component of the Jewish national ethos, the kernel of Zionism and a cardinal tenet upon which the State of Israel was created. The departure points of any discussion of Jewish return are 'the central place of Zion in the thoughts, the prayers, and the dreams of the Jews in their dispersion',<sup>91</sup> the concept of *Kibbutz Galu'ot* — the 'ingathering of the exiles'. Following two millennia of homelessness, the Jewish return to their ancient birthplace — *Eretz Yisrael* — was 'thought to heal a deformative rupture produced by exilic existence'.<sup>92</sup> Indeed, Zionism transformed 'the messianic conception of "return" ... into a secular notion of [Jewish] salvation on earth through state-building and reclamation of the [ancestral] land'.<sup>93</sup> The idea of Jewish return 'offered a teleological reading of Jewish history in which Zionism formed a redemptive vehicle for the renewal of Jewish life on a demarcated terrain, no longer simply spiritual and textual but rather national and political'.<sup>94</sup> Thus, early Zionist literature described Palestine as a wilderness during Jewish 'exile', after which the new Zionist settlements were said to revitalise and liberate the 'Land of Israel'.<sup>95</sup> In terms of rights, return was predicated on the biblical notion of divine right (God's promise to the Jewish people),<sup>96</sup> and on a historical claim derived from a continuous Jewish presence on the land since the Second Temple's destruction.<sup>97</sup> In addition, 'Zionist ideology is premised on the notion that anti-Semitism necessitates a sovereign [safe] haven for world Jewry', an issue that became symbolically amplified in the wake of the Holocaust.<sup>98</sup> Legally, Jewish return is embodied in the *Israeli Declaration of Independence*, the *Law of Return* and the *Nationality Law* (1952), which guarantee all Jews a virtually automatic right to Israeli citizenship.

A corollary of Jewish return is the staunch resistance to the notion of Palestinian return. Israel has consistently rejected proposals that advocate the

<sup>90</sup> Psalm 137, in A Cohen (ed), *The Psalms* (1945) 448.

<sup>91</sup> Walter Laqueur, *A History of Zionism* (1972) 40.

<sup>92</sup> Ella Shohat, 'Rupture and Return: Zionist Discourse and the Study of Arab Jews' (2003) 21(2) *Social Text* 49, 49.

<sup>93</sup> Alfred de Zayas, 'The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context' (1990–91) VI *The Palestine Yearbook of International Law* 17, 42.

<sup>94</sup> Shohat, above n 92, 49.

<sup>95</sup> See Norman Finkelstein, *Image and Reality of the Israel–Palestine Conflict* (2003) 96.

<sup>96</sup> Genesis XVII:8: 'And I will give unto thee, and to thy seed after thee, the land of thy sojournings, all the land of Canaan, for an everlasting possession': A Cohen (ed), *The Soncino Chumash* (1947) 79.

<sup>97</sup> de Zayas, above n 93, 41–2.

<sup>98</sup> *Ibid* 42.

unconditional repatriation of Palestinian refugees except for small numbers within the context of family reunification. Indeed, according to Kramer, the Israeli *Nationality Law* was expressly drafted to render the Palestinians displaced in 1948 ineligible for citizenship.<sup>99</sup> In Israeli eyes, the basis for the obstruction is deeply rooted. Firstly, the Palestinian refugee problem is perceived first and foremost as an ‘existential’ security issue.<sup>100</sup> Since 1948, the Israeli Government has insisted on the absurdity of expecting it to open its doors to multiple thousands of ‘openly hostile Arabs, who viewed Jewish sovereignty over any part of the former Palestine mandate as anathema’.<sup>101</sup> Indeed, from the successive Arab–Israeli wars, the rhetoric of Palestinian leaders, and the traditional Palestinian ‘liberation’ theory, Israelis ‘have not had difficulty concluding ... that the PLO, if not Palestinians in general, intends the total annihilation of the Israeli population’.<sup>102</sup> Such fears have not abated even with the PLO’s phased plan, which is viewed sceptically by some as a mere pragmatic attempt to destroy Israel by consolidating a territorial Palestinian entity.<sup>103</sup> Secondly, Israel has sought to preserve the economic stability and demographic character of the Jewish State. Indeed, it is believed that some 3 500 000 persons consider themselves Palestinian refugees and potential claimants of the right of return.<sup>104</sup> The influx of such large numbers of Palestinians ‘whose role could be that of a Trojan horse’<sup>105</sup> would arguably spell demographic suicide for the Jewish state.<sup>106</sup> Thus, for Israelis, the Palestinian goal of return is tantamount to calls for ‘the liquidation of Israel and its replacement by a Palestinian State’.<sup>107</sup>

Further, Palestinian return poses profound ideological and historical threats to the Israeli national narrative, as from an Israeli standpoint the acknowledgement of responsibility for the suffering of the Palestinian refugees and the recognition of a right for them to return would call the legitimacy of the state into question.<sup>108</sup> Israel, therefore, categorically rejects any suggestion that it was founded on ‘original sin’<sup>109</sup> or that its citizens subject themselves to collective brow-beating for the creation of the refugees.<sup>110</sup> Rather, Israel insists on preserving the integrity of its own narrative, particularly with regard to Arab responsibility for the refugee crisis, and has always maintained that the

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<sup>99</sup> Kramer, above n 21, notes that s 3 of the *Nationality Law* (1952) provides that ‘[a] person who resided in Palestine immediately prior to the establishment of the state is only automatically regarded as a resident if they were registered as a resident prior to the enactment’ of the *Nationality Law*: at 998.

<sup>100</sup> Weiner, above n 24, 2.

<sup>101</sup> State of Israel, Government Press Office, ‘The Refugee Issue: A Background Paper’ (1994) 4, as quoted in Takkenberg, above n 14, 17.

<sup>102</sup> Arzt and Zughaib, above n 11, 1432.

<sup>103</sup> Weiner, above n 24, 18–19.

<sup>104</sup> Sabel, above n 45, 54.

<sup>105</sup> Weiner, above n 24, 2.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> Jeffrey Ghannam, ‘Where Will They Go?’ (December 2000) 86 *American Bar Association Journal* 40, 43, discussing the approach of Gershon Baskin, then co-director of the Israel/Palestine Center for Research and Information.

<sup>109</sup> See below Part II(B)(3).

<sup>110</sup> Alpher et al, above n 23, 176.

resolution of the Palestinian question must be achieved through a conclusive peace agreement with the Arab states.<sup>111</sup> In the Israeli consciousness,

a parallel is drawn between the Jewish and Palestinian refugee problems, following which there are parallel expectations from the Palestinians and the Arab world to have resolved the Palestinian refugee problem, and corresponding demands from the Arab states to compensate the Jewish refugees ... The fact that the Palestinians are a different 'entity' than any given Arab country from which Jewish refugees fled is irrelevant. In fact, most Israeli Jews see Palestinians and Arabs as one and the same.<sup>112</sup>

In such circumstances, the notion of Palestinian return is antithetical to Zionist discourse.

### 3 *The 'Dialogue of the Deaf'*

Accordingly, each nationalist narrative on return is, in a sense, based on a fundamental negation of the other, such that the clash of mutually exclusive histories and symbolic repertoires elicits a 'dialogue of the deaf'.<sup>113</sup> The entanglement around the right of return is rooted in the rhetorical conflict over 1948. The meanings and implications derived from this event strike at the very heart of both parties' legitimacy on multiple discursive planes:

For the Israelis, to accept ... that Palestine was indeed populated by indigenous people who were gradually and systematically dispossessed ... means that the Jewish state was born in sin. For the Palestinians, to accept ... that the Jews are not to be seen as newcomers but a people returning to their own homeland ... means that the Palestinians were aliens in their own land, a view that they by definition reject.<sup>114</sup>

Historical realities aside, these incongruent paradigms both rigidly 'construct and delimit each peoples' own reality, as well as their interpretations of the other's reality'.<sup>115</sup> As Khalidi suggests, '[i]n a sense, each party to this conflict ... operates in a different dimension from the other, looking back to a different era of the past, and living in a different present, albeit in the very same place'.<sup>116</sup> Thus, each group conceives return as unquestionable and irrevocable with regard to itself, while illegitimate with regard to the other.<sup>117</sup> The right of return is as much about a clash of constructed discourses as it is a factual debate over entitlement to land. It might be contended that it is not really about soil but about soul, and this, above all, is the central symptom of the conflict over return, as well as a cause for its perpetuation.

In addition to irreconcilable narratives, there exists a chasm between the 'principle' and 'practice' of Palestinian return. Unsurprisingly, what the

<sup>111</sup> Weiner, above n 24, 27.

<sup>112</sup> Friedman, above n 1, 64.

<sup>113</sup> Ibid 63.

<sup>114</sup> Nadim Rouhana and Daniel Bar-Tal, 'Psychological Dynamics of Intractable Ethnonational Conflicts: The Israeli-Palestinian Case' (1998) 53(7) *American Psychologist* 761, 763.

<sup>115</sup> Friedman, above n 1, 67-8.

<sup>116</sup> Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (1997) as cited in ibid 68.

<sup>117</sup> Friedman, above n 1, 62.

Palestinians are voicing as return, and what the Israelis are in fact hearing, is markedly divergent. Jerome Segal contends that Israelis commonly confuse the moral content of the right with its actual implementation, and thereby conflate 'two quite different matters: the Palestinian *right* to return and the *actual* return of the Palestinians'.<sup>118</sup> According to Segal, '[t]he Palestinian leadership seeks some formal recognition of Palestinian rights. They are not seeking the return of millions of refugees to Israel. This, they understand is quite impossible. They are seeking a choice-based approach'.<sup>119</sup> Moreover, Palestinian human rights lawyer Jonathan Kuttub affirms: 'Many Palestinians insist on the right of return for the moral and legal aspects of it rather than out of any desire to return'.<sup>120</sup>

Nevertheless, whether the obstacles to Palestinian return are the byproduct of mutual deafness or political incongruence, the fact remains that the differences between the Palestinian and Israeli positions 'are about conceptualization rather than outcomes'.<sup>121</sup> Nadim Rouhana and Daniel Bar-Tal agree that even if both parties could have agreed on a certain number of refugees to return to Israel they could not decide on how to present the gesture to their respective publics.<sup>122</sup> Thus, political constructions of return are equally subverted by the ethno-national discursive stalemate.

### C *The Politics of Return: Arab–Israeli Negotiations*

It is useful to review the political framework in which the Palestinian return issue is negotiated. Although Israel, consistent with its narrative, has generally averted political initiatives, the principal known Israeli offer on return occurred in the summer of 1949 at the Lausanne Conference. Although the Ben-Gurion Government agreed to absorb 100 000 Arab refugees, the Arab delegations insisted on 'repatriation of all Arabs from Israeli controlled areas',<sup>123</sup> and refused to give any guarantees concerning a 'second round' against Israel.<sup>124</sup> Ultimately, the Arabs rejected the Israeli offer, after which Israel retracted it. Nevertheless, under the auspices of a family unification policy, Israel affirms that between 40 000–50 000 refugees were returned to Israel between the early 1950s and 1967, and that 'several additional thousands returned between 1967 and 1994'.<sup>125</sup> Importantly, however, the peace agreements between Israel and Egypt,<sup>126</sup> Israel and Jordan<sup>127</sup> and Israel and the Palestinians,<sup>128</sup> respectively, did not grant a formal right of return to Palestinian refugees.

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<sup>118</sup> Segal, above n 2, 23 (emphasis in original).

<sup>119</sup> Ibid.

<sup>120</sup> Jonathan Kuttub, as quoted in Ghannam, above n 108, 43.

<sup>121</sup> Segal, above n 2, 24.

<sup>122</sup> Rouhana and Bar-Tal, above n 114, 767–8.

<sup>123</sup> Radley, above n 3, 603.

<sup>124</sup> Kramer, above n 21, 999–1000, citing Aharon Cohen, *Israel and the Arab World* (1970).

<sup>125</sup> Alpher et al, above n 23, 174.

<sup>126</sup> See *A Framework for Peace in the Middle East Agreed at Camp David*, 17 September 1978, Egypt–Israel, 1138 UNTS 39 (entered into force 17 September 1978); *Treaty of Peace*, 26 March 1979, Egypt–Israel, 1136 UNTS 115 (entered into force 25 April 1979).

<sup>127</sup> *Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan*, 26 October 1994, Israel–Jordan, 2042 UNTS 395 (entered into force 10 November 1994).

<sup>128</sup> See Lapidoth, 'Legal Aspects of the Palestinian Refugee Question', above n 16.



Nevertheless, the historic conclusion of the Israeli–Palestinian *Declaration of Principles on Interim Self-Government Arrangements*<sup>129</sup> reconfigured the conflict’s political and ideological landscape. Thereafter, the Middle East peace process was initiated, heralding reciprocal acknowledgement of legitimacy between the two parties. Whilst the *Oslo Accords* established a framework for limited Palestinian autonomy, they postponed the question of the Palestinian right of return to ‘future negotiations’, which were initially to have been concluded within five years.<sup>130</sup> As a result, despite its consideration in the *Oslo Accords*, as well as in the later *Cairo*<sup>131</sup> and *Oslo II* agreements,<sup>132</sup> the question of Palestinian return has not been fully addressed, with negotiators largely sidestepping ‘the specific problems that will likely beset its implementation’.<sup>133</sup> Implicit in the *Oslo Accords*, however, was the inclusion of the 1948 refugees’ return in the bargaining for Palestinian statehood and the removal of the Jewish settlements from the occupied territories.<sup>134</sup> Further, Israel’s agreement to recognise the PLO was conditioned on the abandonment of UN resolutions regarding the 1948 refugees’ return.<sup>135</sup> As a consequence, the political skirting of the issue of return engendered significant disillusionment among Palestinians.<sup>136</sup> Edward Said castigates PLO leader Yasser Arafat for selling out refugee interests, and decries the entire peace process as a ‘massive abandonment of principles, the main currents of Palestinian history, and national goals’.<sup>137</sup> According to Rosemary Sayigh,<sup>138</sup> the PLO’s readiness to ‘de-prioritise’ the refugee issue was consolidated by the *Beilin–Abu Mazin Accords*<sup>139</sup> of October 1995, in which it was recognised that ‘the prerequisites of the new era of peace and coexistence, as well as the realities that have been created on the ground since 1948, have rendered the implementation of [the right of return] impracticable’.<sup>140</sup> Notably, the Israelis acknowledged the ‘moral and material suffering caused to the Palestinian people as a result of the war of 1947–49 ... the Palestinian refugees’ right of return to the Palestinian state and their right to compensation’.<sup>141</sup>

<sup>129</sup> Signed 13 September 1993, Israel–PLO, 32 ILM 1525 (1993) (entered into force 13 October 1993) (*‘Oslo Accords’*).

<sup>130</sup> See Takkenberg, above n 14, 35.

<sup>131</sup> *Agreement on the Gaza Strip and the Jericho Area*, signed and entered into force 4 May 1994, Israel–PLO, 33 ILM 626 (1994).

<sup>132</sup> The late Israeli Prime Minister Yitzhak Rabin and Palestinian Authority Chairman Yasser Arafat signed the *Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip*, signed and entered into force 28 September 1995, Israel–PLO, 36 ILM 557 (1997).

<sup>133</sup> Weiner, above n 24, 5.

<sup>134</sup> Rosemary Sayigh, ‘Palestinian Refugees in Lebanon’, above n 57, 96.

<sup>135</sup> The *Oslo Accords* do not so much as mention the Resolution of the General Assembly Palestine — *Progress Report of the United Nations Mediator*, GA Res 194 (III), UN GAOR, 3<sup>rd</sup> sess, 186<sup>th</sup> plen mtg, UN Doc A/RES/194 (III) (11 December 1948) (*‘Resolution 194’*).

<sup>136</sup> Friedman, above n 1, 64.

<sup>137</sup> Edward W Said, *Peace and Its Discontents*, above n 68.

<sup>138</sup> Rosemary Sayigh, ‘Palestinian Refugees in Lebanon’, above n 57, 96.

<sup>139</sup> *Framework for the Conclusion of a Final Status Agreement between Israel and the Palestine Liberation Organization*, 31 October 1995, available at <<http://www.beilin.org.il/Eng/Peace/bamdoceng.html>> at 1 October 2005.

<sup>140</sup> *Ibid* art 7(1).

<sup>141</sup> *Ibid* art 7(2).

Notwithstanding political inroads, significant shifts in the positions of both parties occurred in the shipwreck of the *Oslo* agreements. Perhaps the most notable transformation emerged from the Palestinian camp, where traditional rhetorical claims for unqualified return gained new momentum just prior to the second round of Camp David talks in July 2000.<sup>142</sup> Viewed skeptically by some Israeli commentators as strategising to strengthen Arafat's bargaining position,<sup>143</sup> or by others as deliberate boycotting,<sup>144</sup> this change on return was 'in fact imposed by popular mobilization, with Arafat following refugee and public opinion rather than leading it'.<sup>145</sup> Indeed, by December 1995 the right of return campaign was germinating in the West Bank camp of Farah; by late 1999 it had flowered into a 'major issue, the focus of conferences (Boston, April 2000), mass rallies (Washington and London, September 19, 2000), workshops and Internet petitions'.<sup>146</sup> Seven years of Palestinian disillusionment with the *Oslo Accords* may have also impacted Arafat's turnaround on the 1948 refugees. As a result, the offer of former Israeli Prime Minister Ehud Barak at Camp David II of 'symbolic return', involving up to 70 000 refugees over 10 years, did not even begin to meet the Arab negotiators' resurrection of the demand for unconditional return.<sup>147</sup> It is therefore no coincidence that *Oslo's* demise is commonly attributed to the political intractability over the right of return conundrum.<sup>148</sup> At any rate, the subsequent outburst of the al-Aqsa Intifada, as well as the current crisis of trust between the two parties, have only solidified the traditional Israeli and Palestinian positions and narratives on return. More recently, although the political consequences of Arafat's death and Israel's disengagement from Gaza are yet to be determined, they are unlikely to alter the stalemate on Palestinian return.

### III THE LEGAL QUESTION

There is no greater sorrow on earth than the loss of one's native land.<sup>149</sup>

In light of Euripides' lament, it is understandable that the right of return and its twin concept of repatriation are recognised in 'all major human rights documents as part of freedom of movement', and has 'acquired independent standing and justification'.<sup>150</sup> Indeed, the right of individuals to return to their place of origin has been a fundamental principle of human rights law since at

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<sup>142</sup> Rosemary Sayigh, 'Palestinian Refugees in Lebanon', above n 57, 97.

<sup>143</sup> See *ibid.*

<sup>144</sup> Weiner, above n 24, 6.

<sup>145</sup> Rosemary Sayigh, 'Palestinian Refugees in Lebanon', above n 57, 97.

<sup>146</sup> *Ibid.*

<sup>147</sup> Rosemary Sayigh, 'Palestinian Refugees in Lebanon', above n 57, 97.

<sup>148</sup> Friedman, above n 1, 64.

<sup>149</sup> Euripides, *Medea* (431 BCE).

<sup>150</sup> Ruth Lapidot, 'The Right of Return in International Law, with Special Reference to the Palestinian Refugees' (1986) 16 *Israel Yearbook on Human Rights* 103, 104. Freedom of movement includes the liberty to move and to choose a residence within a country, as well as the freedom to leave any country, including one's own, and the right to enter or return to one's country: see UN Human Rights Committee, *General Comment 27: Freedom of Movement (Art 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) ('*General Comment 27*').

least the time of the *Magna Carta*.<sup>151</sup> This innate yearning, so spiritual, so instinctive, as the desire to live where one belongs<sup>152</sup> and where one's cultural identity originated, is best defined antithetically: '[w]hy is the right to return so fundamental? It is because exile is a fundamental deprivation of homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective identities'.<sup>153</sup> Nevertheless, an actual obligation on governments to allow repatriation to one's homeland is but a nascent concept, and has not been codified.<sup>154</sup> Rather, human rights conventions tend to speak of a right to 'enter' one's country rather than 'return' to it, and considerable differences exist concerning the beneficiaries of the right as well as the limitations to which it may be subjected. Numerous international human rights scholars and UN bodies, however, claim the right of return as inalienable, an established juridical principle founded in 'natural law'<sup>155</sup> (notwithstanding the absence of proper enforcement) despite its interpretative and substantive ambiguity. The very existence and scope of this internationally formulated right in the Israeli-Palestinian context is subjected to fierce contestation and warrants close examination.

#### A *Relevant Palestinian-Specific Resolutions*

The UN resolution most frequently cited as an affirmation of the Palestinian right of return is *Resolution 194*,<sup>156</sup> adopted by the UN General Assembly in the wake of the report by Count Folke Bernadotte.<sup>157</sup> Paragraph 11, which is recited

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<sup>151</sup> The *Magna Carta*, signed in 1215, probably contained the first mention of a 'right' to enter one's own country with the concomitant obligation on the government to respect that right: see arts 41–2.

<sup>152</sup> Daniel Nseroko, 'The Right to Return Home' (1981) 21 *Indian Journal of International Law* 335, 336.

<sup>153</sup> Bill Frelick, 'The Right of Return' (1990) 2 *International Journal of Refugee Law* 442, 444.

<sup>154</sup> de Zayas, above n 93, 18.

<sup>155</sup> José Ingles, as quoted in Lapidoth, 'The Right of Return in International Law', above n 150, 103.

<sup>156</sup> *Resolution 194*, above n 135.

<sup>157</sup> *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to Members of the United Nations*, UN GAOR, 3<sup>rd</sup> sess, Supp 11, UN Doc A/648 (16 September 1948), partially reproduced in (1948) 483 *Department of State Bulletin* 436 ('Bernadotte Report').

and reaffirmed almost annually,<sup>158</sup> addresses the refugee issue, stating 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 ...<sup>159</sup>

Paragraph 11 also mandated the Conciliation Commission for Palestine ('CCP')<sup>160</sup> — an organisation created by the same resolution<sup>161</sup> — 'to facilitate repatriation, resettlement and economic and social rehabilitation of the refugees'.<sup>162</sup> Although the Arab states and Palestinian political groups originally rejected the resolution as legally void because it implicitly recognised Israel, it has since been invoked as an authority for an immediate, unconditional and wholesale repatriation of the refugees to their original homes.<sup>163</sup> According to Boling<sup>164</sup> and Tomeh,<sup>165</sup> return and compensation is enshrined in para 11 as a 'right', in particular by the phrase 'under principles of international law and equity'.<sup>166</sup> Proponents of Palestinian return also insist that para 11 entitles the refugees to choose whether they wish to return to Israel, and to be compensated whether or not they choose to return.<sup>167</sup> Upon this construction and based on its reappearance in subsequent UN resolutions, Boling concludes that the General Assembly unambiguously grants Palestinians an 'unqualified right to return to their homes of origin'.<sup>168</sup>

Nevertheless, opponents of the Palestinian position refute the binding nature of para 11. Firstly, some note that the resolution itself does not conceive of return as a matter of 'right', but rather uses discretionary language, and thus should be regarded as merely recommendatory.<sup>169</sup> Ruth Lapidoth, for example, affirms that

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<sup>158</sup> See, eg, GA Res 59/117, UN GAOR, 59<sup>th</sup> sess, 71<sup>st</sup> plen mtg, UN Doc A/RES/59/117 (10 December 2004); GA Res 58/91, UN GAOR, 58<sup>th</sup> sess, 72<sup>nd</sup> plen mtg, UN Doc A/RES/58/91 (9 December 2003); GA Res 57/117, UN GAOR, 57<sup>th</sup> sess, 73<sup>rd</sup> plen mtg, UN Doc A/RES/57/117 (11 December 2002).

<sup>159</sup> *Resolution 194*, above n 135, [11].

<sup>160</sup> The CCP ceased all efforts to repatriate Palestinian refugees in 1952, stymied by the conflicting positions of the Arab states and Israel: see CCP, *Twelfth Progress Report*, UN Doc A/2216 (8 October 1952).

<sup>161</sup> *Resolution 194*, above n 135, postscript.

<sup>162</sup> See also Kramer, above n 21, 1004.

<sup>163</sup> Radley, above n 3, 600. See also Takkenberg, above n 14, 244–5; BADIL Resource Center for Palestinian Residency and Refugee Rights, above n 55, 12.

<sup>164</sup> Gail Boling, BADIL Resource Center for Palestinian Residency and Refugee Rights, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (2001) 10 <[http://www.badil.org/Publications/Legal\\_Papers/RoR48.pdf](http://www.badil.org/Publications/Legal_Papers/RoR48.pdf)> at 1 October 2005.

<sup>165</sup> George Tomeh, 'Legal Status of Arab Refugees' (1968) 33 *Law and Contemporary Problems* 110. At the time, Tomeh was Permanent Representative of Syria to the UN. *Contra* Radley, above n 3, 601–2.

<sup>166</sup> *Resolution 194*, above n 135.

<sup>167</sup> Takkenberg, above n 14, 243.

<sup>168</sup> Boling, above n 164, 10.

<sup>169</sup> Kramer, above n 21, 1004. See also Tadmor, above n 11, 433–4; Lapidoth, 'Legal Aspects of the Palestinian Refugee Question', above n 16; Radley, above n 3, 601–2.

the inclusion of the word 'should' clearly indicates it is hortatory, not obligatory.<sup>170</sup> Further, it is argued that the reference to 'principles of international law and equity' relates to the clause on compensation only, and does not include the issue of return.<sup>171</sup> According to Kurt René Radley, any reading of this phrase which permits 'reference to both [compensation and repatriation] is disallowed by the most elementary rules of English construction'.<sup>172</sup> Secondly, critics of para 11 maintain that General Assembly resolutions do not normally constitute binding authority over sovereign states.<sup>173</sup> Indeed, Chapter IV of the *Charter of the United Nations* precludes the General Assembly from adopting binding resolutions except with regard to budgetary and internal UN affairs.<sup>174</sup> Thus, it is argued that Israel is not obliged to comply with *Resolution 194* and the fact of para 11's reiteration is of no legal consequence. As Prosper Weil has put it, '[n]either is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect'.<sup>175</sup> Finally, it is posited that to compel Israeli absorption of countless individuals would violate art 2(1) of the *UN Charter* by rendering meaningless the concept of 'sovereign equality' therein enshrined.<sup>176</sup>

Notwithstanding strident attempts to undermine the legal applicability of para 11, additional lines of argument are worthy of consideration. Indeed, irrespective of the exact phraseology utilised in para 11, and although General Assembly resolutions have no obligatory character, 'it seems inaccurate to dismiss the General Assembly resolutions that refer to return as nothing more than invalid and violative of the *Charter*'.<sup>177</sup> Rather, the notion that 'the adoption of a resolution of an international organization on a question of abstract legal principles constitutes important evidence of international law has gained increasing support'.<sup>178</sup> Yoav Tadmor argues that just 'because the General Assembly is a political body acting as the representative of the community of

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<sup>170</sup> Lapidoth, 'Legal Aspects of the Palestinian Refugee Question', above n 16. See also Geoffrey Watson, *The Oslo Accords: International Law and the Israel–Palestinian Peace Agreements* (2000) 282, as cited in Sabel, above n 45, 55.

<sup>171</sup> Sabel, above n 45, 55.

<sup>172</sup> Radley, above n 3, 602.

<sup>173</sup> Kramer, above n 21, 1002–3. See also Sabel, above n 45, 55.

<sup>174</sup> Lapidoth, 'Legal Aspects of the Palestinian Refugee Question', above n 16.

<sup>175</sup> Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 417.

<sup>176</sup> Radley, above n 3, 607, notes that

*Resolution 3236* goes even further to state that that displaced Palestinians have not only an absolute right to return to the Israeli state but also have the right to do so for the purposes of pursuing their separate nationalist identity. It is difficult to imagine how much closer the General Assembly could have come to endorsing the destruction ... of a member state.

On this point, see *Question of Palestine*, GA Res 3236 (XXIX), UN GAOR, 29<sup>th</sup> sess, 2296<sup>th</sup> plen mtg, art 2(1), UN Doc A/RES/3236 (XXIX) (22 November 1974) ('*Resolution 3236*').

<sup>177</sup> Rex Zedalis, 'Right to Return: A Closer Look' (1992) 6 *Georgetown Immigration Law Journal* 499, 511.

<sup>178</sup> Mitchell Knisbacher, 'Aliyah of Soviet Jews: Protection of the Right of Emigration under International Law' (1973) 14 *Harvard International Law Journal* 89, 98.

states, its role as prescriber of international law is not diminished'.<sup>179</sup> Moreover, '[t]he work of the International Law Commission and the adoption by General Assembly resolution of many declarations with significant impact on the development of customary international law are cases in point'.<sup>180</sup> At any rate, independent of the progressive and normative role played by the General Assembly, this method of creating laws is more aptly characterised as evidence of law, rather than law in and of itself.<sup>181</sup>

From this circular standpoint, several commentators have seized upon the conclusion that at the time *Resolution 194* was passed, the principle of the right of return had already gained customary international law status, and thus, every Palestinian refugee is ipso facto entitled to return to Israel.<sup>182</sup> Indeed, it should be noted that the *Bernadotte Report* recommended that the right of return be 'affirmed'<sup>183</sup> rather than established.<sup>184</sup> Nevertheless, whilst the inclusion of this language might reflect the UN's reference to return as a legal principle, it does not conclusively establish that general international law indeed possessed within its corpus a customary norm assuring the right of return as early as 1948. Rather, notwithstanding the passage of the *Universal Declaration of Human Rights*<sup>185</sup> referencing the right in art 13(2), the international community was at the time sanctioning population transfers involving millions of persons,<sup>186</sup> and international human rights law as a whole was in its infancy.<sup>187</sup> Apart from the *Bernadotte Report*, none of the commentators substantiate the right of return's customary law standing with clear and apposite evidence, but rather cite its existence in 1948 as self-evident and unambiguous.<sup>188</sup> Such foregone conclusions must be queried — in any case, the current customary legal status of the Palestinian right of return is an issue that calls for further attention.

What remains clear is that beyond questions of legal force, the language and context of *Resolution 194* appears to circumscribe significantly the nature of Palestinian repatriation. Notably, para 11 is but one element of a 15 paragraph resolution that foresaw 'a final settlement of all questions outstanding between'

<sup>179</sup> Tadmor, above n 11, 416. See also Luke Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80 *American Journal of International Law* 532, 544.

<sup>180</sup> Lee, above n 179, 544 (citations omitted).

<sup>181</sup> Tadmor, above n 11, 416–20.

<sup>182</sup> Boling, above n 164, 48; Lawand, above n 19, 544–6; Susan Akram and Terry Rempel, 'Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework' (2000–01) XI *The Palestine Yearbook of International Law* 1, 48.

<sup>183</sup> *Bernadotte Report*, above n 157, 437 (emphasis added).

<sup>184</sup> Zedalis, above n 177, 507–8.

<sup>185</sup> GA Res 217A (III), 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948) ('UDHR').

<sup>186</sup> For example, the *Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany*, opened for signature 5 June 1945, 68 UNTS 189 (entered into force 5 June 1945) ('*Potsdam Declaration*') issued by the Allies at the end of World War II provided for the transfer to Germany of 15 million Germans in Czechoslovakia, Poland, Hungary and Austria. The *Potsdam Declaration* failed to deal with the right of return or any other issues that might result from mass transfer: see Eric Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' (1997–98) 19 *Michigan Journal of International Law* 1091, 1116.

<sup>187</sup> Rosand, above 186, 1130.

<sup>188</sup> Akram and Rempel, above n 182, 48; Boling, above n 164, 48.

the parties.<sup>189</sup> In this context, para 11 also recommended the ‘resettlement and economic and social rehabilitation of the refugees and the payment of compensation’.<sup>190</sup> Thus, reliance on *Resolution 194* to claim unqualified return as the only legal remedy to the refugee problem would seem misplaced. Moreover, the wording of para 11 must be considered in its entirety. Nowhere is Israel obliged to ‘complete’ or ‘immediately and unconditionally effect’ return.

Rather, para 11 of *Resolution 194* carries within itself an ostensible condition that speaks of permission to individuals who wish to ‘live at peace with their neighbors’. That no explanation of this phrase exists in debates leading to the adoption of *Resolution 194* has rendered its textual certainty even more elusive.<sup>191</sup> Nevertheless, Weiner contends that persons wishing to live peacefully with Israel are those ‘refraining from terrorism and irredentist activities’<sup>192</sup> — a standard which some analysts have noted could be determined unilaterally by Israel.<sup>193</sup> Some Israeli voices have taken this phrase to mean ‘a commitment to lawfulness under very uncertain conditions’.<sup>194</sup> Yet this reading, which also cites fundamentalist rhetoric as evidence of the Palestinian unwillingness to live at peace,<sup>195</sup> is hardly satisfactory. Firstly, given the current Intifada and the fissure between Israel’s Jewish and Arab citizens, no one can guarantee the future behaviour of any group of returning Palestinian refugees. Secondly, while some extremely militant refugees might be excluded for obvious security reasons, there exists no reliable measure, capable of legal formulation, to gauge the subjective intentions of individual Palestinians. Gail Boling asserts: ‘Israel should not be permitted to use arbitrary or discriminatory “filters” based upon race, ethnicity, religion or political belief to screen out potential returnees’.<sup>196</sup> Quigley’s interpretation that those ‘not wishing to live in peace’ necessarily means Palestinians choosing to live abroad is equally questionable in that it renders this phrase’s inclusion in para 11 entirely redundant.<sup>197</sup> Consistent with the overall intent of *Resolution 194*; perhaps the most logical analysis is that the extent of permitted return is linked to a comprehensive peace settlement premised on peaceful co-existence.

According to some, the statement in para 11 that repatriation should be given effect to ‘at the earliest practicable date’ implies a further condition to the return of the refugees. As Takkenberg notes, the phrase was changed from ‘at the earliest *possible* date’ to ‘at the earliest *practicable* date’, this alteration being the only one made to the original wording of the document.<sup>198</sup> Thus, some commentators have argued that this formulation indicated something less than immediate return.<sup>199</sup> Indeed, the General Assembly at the time

<sup>189</sup> *Resolution 194*, above n 135, [5].

<sup>190</sup> *Ibid* [11].

<sup>191</sup> Quigley, ‘Displaced Palestinians and a Right of Return’, above n 62, 187.

<sup>192</sup> Weiner, above n 24, 42.

<sup>193</sup> See, eg, Tadmor, above n 11, 434.

<sup>194</sup> Segal, above n 2, 28.

<sup>195</sup> Kramer, above n 21, 1005.

<sup>196</sup> Boling, above n 164, 48.

<sup>197</sup> Quigley, ‘Displaced Palestinians and a Right of Return’, above n 62, 187.

<sup>198</sup> Takkenberg, above n 14, 244 (emphasis added).

<sup>199</sup> See Quigley, ‘Displaced Palestinians and a Right of Return’, above n 62, 188.

‘contemplated ... that the logistics of a return would require a period of time’.<sup>200</sup> Quigley, however, contends that ‘the phrasing [still] implies a sense of immediacy to the obligation’.<sup>201</sup>

In any event, notwithstanding what was envisaged in 1948, it seems clear more than five decades later that the issue of practicability has been significantly transformed. Both the Israeli resettlement of former Palestinian lands and the vast growth of the refugee population are cases in point.<sup>202</sup> Indeed, the original 1948 refugees constitute perhaps 10 per cent of today’s Palestinian refugee population<sup>203</sup> and there is no indication of whether *Resolution 194* would include their descendants. Accordingly, Dowty saliently reminds us that when the resolution was enacted ‘the war had not yet ended, demarcation lines were still fluid, ... so that simple return “to one’s country” would have had little meaning apart from return to places of residence’.<sup>204</sup> Thus, the CCP itself explained as early as 1951 that the physical conditions in this area had changed considerably since 1948 and ‘that unrestricted repatriation of refugees was neither a feasible option nor the preferred one’.<sup>205</sup> In effect, the magnitude of the refugee crisis arguably diminishes both the legal application and scope of *Resolution 194*.

The uncertainty of the legal claim to Palestinian return based on *Resolution 194* is reinforced by subsequent resolutions, which ostensibly depart from repatriation to Israel as the only durable solution. Thus, whilst it repeatedly reaffirmed *Resolution 194*, during the 1950s and 1960s the General Assembly also advocated programs insisting on resettlement of the refugees in Arab countries.<sup>206</sup> Rather than interpret this as a UN retreat from its insistence on Palestinian return, Quigley argues that ‘the Assembly viewed resettlement in Arab states as a complement, not an alternative, to repatriation’.<sup>207</sup> Indeed, whilst the General Assembly urged host governments to ‘support’ the displaced Palestinians, such calls were made ‘without prejudice to paragraph 11’ of *Resolution 194*.<sup>208</sup>

By contrast, however, Security Council *Resolution 242* only affirms ‘the necessity ... [f]or achieving a just settlement of the refugee problem’.<sup>209</sup> This wording has been seized upon by Israeli academics as it omits the word ‘Palestinian’ from the entire resolution, whilst the generic word ‘refugee’ can be

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<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Segal, above n 2, 26.

<sup>203</sup> Segal, for example, notes that approximately 30 000 of the 300 000 Palestinian refugees in Lebanon can be categorised as 1948 refugees: *ibid* 29.

<sup>204</sup> Dowty, above n 63, 30.

<sup>205</sup> Benvenisti and Zamir, above n 13, 326.

<sup>206</sup> ‘[I]n the years 1952 through 1968, [the General Assembly] annually reaffirmed *Resolution 513*, emphasising public works projects by which the refugees might be resettled and reintegrated into the Arab communities where they were’: Radley, above n 3, 604 (citations omitted).

<sup>207</sup> Quigley, ‘Displaced Palestinians and a Right of Return’, above n 62, 191.

<sup>208</sup> *Assistance to Palestinian Refugees*, GA Res 393 (V), UN GAOR, 5<sup>th</sup> sess, 315<sup>th</sup> plen mtg, UN Doc A/RES/393 (V) (2 December 1950).

<sup>209</sup> SC Res 242, UN SCOR, 22<sup>nd</sup> sess, 1382<sup>nd</sup> mtg, UN Doc S/RES/242 (22 November 1967) (*‘Resolution 242’*).



read to include Jewish refugees from Arab countries.<sup>210</sup> Moreover, Eyal Benvenesti and Eyal Zamir contend that *Resolution 242* ‘should be construed in light of the numerous prior UN resolutions that emphasized resettlement and compensation as two major options in lieu of repatriation’.<sup>211</sup> Thus, it is often argued that *Resolution 242* has effectively superseded General Assembly *Resolution 194*, particularly given that, unlike General Assembly resolutions, Security Council resolutions made under Chapter VII of the *UN Charter* are legally binding.<sup>212</sup> According to Quigley, however, ‘[t]he Security Council’s insistence on a “just settlement” is more plausibly read as affirming a right for the Palestinians to return’,<sup>213</sup> and thus substantively incorporates *Resolution 194*.<sup>214</sup> Whilst the language of *Resolution 242* seems inhospitable to an unequivocal endorsement of Palestinian return or of *Resolution 194*, it would be misplaced to assume that the various legal remedies in the Palestinian context are mutually exclusive. Indeed, rather than the words ‘just settlement’ heralding a repudiation of the General Assembly’s position on return, it seems more likely that they reiterate a global solution to the conflict, in which repatriation is but one of a series of options.

In any case, since 1969 the international position on the Palestinian question has been reconfigured by the General Assembly.<sup>215</sup> Resolutions adopted subsequently raised not only the issue of repatriation but also insisted on Palestinian self-determination.<sup>216</sup> General Assembly *Resolution 3236* characteristically provides that the ‘inalienable rights’ of the Palestinian people include ‘[t]he right to self-determination without external interference’ and ‘the right to national independence and sovereignty’.<sup>217</sup> The General Assembly thereby changed its conception of the issue from a humanitarian question of refugees to a political question concerning the rights of a people.<sup>218</sup> UN recognition of Palestinian selfhood coincided, paradoxically enough, with a weakening in the PLO’s position on the right of return.<sup>219</sup> As these resolutions passed, the PLO ‘was for the first time advocating a Palestinian state in only part

<sup>210</sup> Lapidoth, ‘The Right of Return in International Law’, above n 150, 118. See also Benvenesti and Zamir, above n 13, 327.

<sup>211</sup> Benvenesti and Zamir, above n 13, 327.

<sup>212</sup> Lapidoth, ‘The Right of Return in International Law’, above n 150, 118–19.

<sup>213</sup> Quigley, ‘Displaced Palestinians and a Right of Return’, above n 62, 192.

<sup>214</sup> See also Boling, above n 164, 49.

<sup>215</sup> Radley, above n 3, 604.

<sup>216</sup> Takkenberg, above n 14, 258, notes that explicit recognition of a Palestinian right to self-determination is first contained in *The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 2649 (XXV), UN GAOR, 25<sup>th</sup> sess, 1915<sup>th</sup> plen mtg, [5], UN Doc A/RES/2649 (XXV) (30 November 1970).

<sup>217</sup> Above n 176, [1(a)]–[1(b)].

<sup>218</sup> Lapidoth, ‘The Right of Return in International Law’, above n 150, 119. See also Radley, above n 3, 607.

<sup>219</sup> Lapidoth, Radley and Weiner all protest that these resolutions call into question the very existence of Israel as a sovereign entity, as they grant Palestinians an absolute right of return to the Israeli State with the purpose of pursuing a separate nationalist identity: Lapidoth, ‘The Right of Return in International Law’, above n 150, 119; Radley, above n 3, 607; Weiner, above n 24, 42–3.

of Palestine'.<sup>220</sup> Whether the Palestinian ideological shift was the by-product of the General Assembly resolutions or its precipitator is moot. Rather, what seems clear is that since 1948 a range of options including compensation, resettlement and self-determination have been advocated by the General Assembly as an adjunct to return in order to facilitate resolution of the conflict. It should finally be mentioned that the *Oslo Accords* contained no mention of *Resolution 194* but instead aimed to 'arrive at a permanent settlement based on Security Council *Resolutions 242* and *338*'.<sup>221</sup> This fact, coupled with the momentum of self-determination, calls into question the legal and political currency of wholesale repatriation.

Finally, the political instrumentalisation of General Assembly resolutions in the Israeli–Palestinian context warrants mention. According to Weiner,

the UN General Assembly, Security Council, and the various UN agencies have maintained a blatantly hostile attitude toward Israel for more than two decades, and there is reason to question whether 'political' resolutions should be given legal credence.<sup>222</sup>

Numerous Israeli analysts discount the UN's assessments of matters involving Israel as excessively politicised.<sup>223</sup> Even with the repeal in 1991 of the 1975 General Assembly resolution which equated Zionism with racism,<sup>224</sup> Israelis tend to denounce *Resolution 194* as 'an expression of the Arab political war against Israel'.<sup>225</sup> On the other hand, Palestinians and legal commentators have equally rejected Security Council *Resolution 242*. Henry Cattan, for example, believes 'it was concocted by the US and Israel as a formula designed to liquidate the Palestine Question'.<sup>226</sup> That the UN's political organs are not 'assemblages of judges or philosophers but of politicians'<sup>227</sup> has therefore undermined the legal authority of General Assembly and Security Council resolutions in both camps.

Nevertheless, perhaps as testament to the UN's international force, Israelis and Palestinians each still regard their own entitlement to rely on General Assembly resolutions as unequivocal, while dismissing the other side's reliance on the same instruments as legally unfounded. The adoption of double standards in interpreting the binding effects of General Assembly resolutions is particularly striking. For example, Israel consistently legitimates the partition plan in

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<sup>220</sup> Khalidi, 'Observations on the Right of Return', above n 3, 34.

<sup>221</sup> *Oslo Accords*, above n 129, art 1. See Takkenberg, above n 14, 248.

<sup>222</sup> Weiner, above n 24, 43.

<sup>223</sup> See, eg, Sabel, above n 45, 53–4. See generally Sidney Liskofsky and Donna Arzt, 'Incitement to National, Racial and Religious Hatred in United Nations Fora' (1987) 17 *Israel Yearbook on Human Rights* 41.

<sup>224</sup> *Elimination of Racism and Racial Discrimination*, GA Res 46/86, UN GAOR, 46<sup>th</sup> sess, 74<sup>th</sup> plen mtg, UN Doc A/RES/46/86 (16 December 1991) (repealing *Elimination of All Forms of Racial Discrimination*, GA Res 3379 (XXX), UN GAOR, 30<sup>th</sup> sess, 2400<sup>th</sup> plen mtg, UN Doc A/RES/3379 (XXX) (10 November 1975), which determined 'that zionism is a form of racism and racial discrimination': preamble).

<sup>225</sup> Alpher et al, above n 23, 174.

<sup>226</sup> Henry Cattan, *The Palestine Question* (1988) 283.

<sup>227</sup> Thomas Franck, *Nation against Nation: What Happened to the UN Dream and What the US Can Do about It* (1985) 244–50.

*Resolution 181* — which called for the creation of two states, thereby supporting its right to exist — yet regards *Resolution 194* as a legal nullity.<sup>228</sup> Similarly, whilst Palestinians insist on the legal force of repatriation in General Assembly resolutions, they continually refute the General Assembly's power to make binding rulings on territorial entitlements.<sup>229</sup> Accordingly, the strength of legal arguments based on the General Assembly resolutions is somewhat diminished by the UN's politicisation, the textual uncertainty of the resolutions themselves, and, with respect to repatriation, the encouragement of equally authoritative remedies at international law to resolve the refugee crisis.

### B *The Right of Return as a Treaty Obligation*

What then of the legal contention that a right of return can be founded on the *UDHR*, the *International Covenant on Civil and Political Rights*,<sup>230</sup> and the *International Convention on the Elimination of All Forms of Racial Discrimination*?<sup>231</sup> Each of these modern international human rights instruments unequivocally references such a right as a corollary of the right to freedom of movement. Article 13(2) of the *UDHR* reads: '[e]veryone has the right to leave any country, including his own, and to return to his country'.<sup>232</sup> The *ICCPR* states in art 12(4) that '[n]o-one shall be arbitrarily deprived of the right to enter his own country'. And art 5(d)(ii) of the *CERD* provides for a right to 'leave any country, including one's own, and to return to one's country'. Whilst Israel is a party and thereby legally bound by both treaties, the *UDHR* was adopted by the General Assembly and accordingly has uncertain legal authority. Nevertheless, it is 'widely regarded by international law scholars as representing principles reflective of customary international law'<sup>233</sup> and, given that its provisions echo those contained in the treaties on return, it is therefore worthy of legal consideration. At any rate, the difficulties with basing a Palestinian right of return on these documents are manifold and demand close scrutiny.

#### 1 *Nationality Nexus*

The meaning of the phrase 'own country' in the treaty-based documents, upon which the argument for a legal right to return is largely based, remains as textually elusive as it does legally contested. In particular, territorial changes since the creation of Israel and the 'severance of the [Palestinian] State-national bond' in 1948 raise particular problems for a Palestinian right of return.<sup>234</sup> Thus, the question is begged as to whether the 'country' to which an individual is entitled to return is the state of which one holds formal nationality, or whether it

<sup>228</sup> Tadmor, above n 11, 415.

<sup>229</sup> John Quigley, 'Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood' (1989) 7 *Boston University International Law Journal* 1, 21.

<sup>230</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). Israel ratified the *ICCPR* on 3 October 1991.

<sup>231</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'). Israel ratified the *CERD* on 3 January 1979.

<sup>232</sup> *UDHR*, above n 185.

<sup>233</sup> Weiner, above n 24, 38.

<sup>234</sup> Lawand, above n 19, 540.

connotes a link to a territory or land regardless of citizenship.<sup>235</sup> Arguably, Palestinian Arabs do not have the right to return to Israel, since they were displaced prior to the establishment of the State of Israel, and thus as non-nationals fall outside the ambit of the human rights provisions. Indeed, Kramer notes that ‘there was never a sovereign state of Palestine in which the Palestinian refugees were nationals’.<sup>236</sup>

Not surprisingly, some of Israel’s supporters and other scholarly reviews propagate this literal construction with some vehemence. According to Radley, art 13(2) of the *UDHR* “‘obliges” states to permit the return of their citizens or nationals only. The Palestinian refugees are, of course, not Israeli nationals, not by that state’s definition, and significantly, also, not according to the refugees’ own self-identity’.<sup>237</sup> Moreover, Sabel argues that most international law instruments granting a right to re-entry are premised on nationality, evidenced by state practice,<sup>238</sup> and the fact that the term ‘national’ is also used in *Fourth Protocol*<sup>239</sup> to the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>240</sup> and in the 1969 *American Convention on Human Rights*.<sup>241</sup> Finally, proponents of circumscribing the right point out that ‘return’ in art 13(2) was intended to focus on a right to depart, ‘rather than being significant in itself’.<sup>242</sup>

Nevertheless, the insistence on a narrow test of citizenship to invoke the right of return appears unduly stringent. Rather, an expansive construction of ‘own country’ asserts that the existence of a ‘close and enduring connection’ to one’s ‘homeland’ can be equally decisive.<sup>243</sup> Indeed, the International Court of Justice, in its landmark *Nottebohm* decision,<sup>244</sup> applied the criteria of ‘tradition’, ‘establishment’, ‘interests’ and ‘family ties’<sup>245</sup> to hold that it was the ‘substance of Nottebohm’s relationship to Liechtenstein and not the formality of Liechtenstein’s grant of citizenship which was the decisive factor under international law’.<sup>246</sup> It is worth noting that Knisbacher, in applying this criterion

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<sup>235</sup> Ibid.

<sup>236</sup> Kramer, above n 21, 1008.

<sup>237</sup> Radley, above n 3, 613 (citations omitted). See also Lapidoth, ‘The Right of Return in International Law’, above n 150, 108.

<sup>238</sup> ‘Apparently no government interprets the [*Convention for the Protection of Human Rights and Fundamental Freedoms*] as meaning that the right applies to persons other than nationals or persons who were nationals’: Sabel, above n 45, 54.

<sup>239</sup> Opened for signature 16 September 1963, ETS 46 (entered into force 2 May 1968). Article 3(2) states: ‘No one shall be arbitrarily deprived of the right to enter the territory of the state of which he is a National’.

<sup>240</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*‘European Convention on Human Rights’*). Israel is neither a Party to the *Convention* nor the *Protocol*.

<sup>241</sup> ‘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’: *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 143, art 22(5) (entered into force 18 July 1978).

<sup>242</sup> Radley, above n 3, 614 (fn 109).

<sup>243</sup> Takkenberg, above n 14, 236–7.

<sup>244</sup> *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 (*‘Nottebohm’*).

<sup>245</sup> Ibid 24.

<sup>246</sup> Knisbacher, above n 178, 97. The Court characterised this relationship as one of ‘reciprocal rights and duties’: *Nottebohm* [1955] ICJ Rep 4, 23.

to the claims of Soviet Jewry for migration to Israel during the 1970s, finds that '[t]his link should be sufficient to qualify their request to emigrate ... as a request to "return" to their "country"' under the *ICCPR*.<sup>247</sup> Accordingly, proponents of the broader interpretation draw comfort from the subjective element of the *Nottebohm* principle in the Palestinian context.<sup>248</sup>

Moreover, the comparative and contextual meaning of the phrase 'own country' has provided an additional source of support for a wider reading. Thus, unlike Sabel, other commentators argue that the dichotomy between 'national' and 'country' in human rights documents clearly comports with the expansive approach, whereby 'the broader term ("his country") was chosen to include both place of nationality and place of origin'.<sup>249</sup> Although academic scrutiny of the *travaux préparatoires* has not yielded any definitive evidence supporting the broader formulation of 'his own country',<sup>250</sup> there is equally no indication that the drafters intended to limit the application of art 12(4) only to citizens. Further, the scant attention given to the right of return was likely informed by contemporary considerations,<sup>251</sup> and after all does not necessarily detract from the fact that 'the right is explicitly provided for ... and is [thus] entitled to a stature all of its own'.<sup>252</sup>

In any case, consistent with basic principles of statutory interpretation, the ordinary meaning of the term 'his own country' appears to indicate more than a person's juridical status in their given context.<sup>253</sup> The *ICCPR* and the *CERD* provisions are based on the *UDHR* language and do not link the right of return to 'nationality' or 'state of nationality'. Rather, in each case the relevant language is generously drafted to refer to 'everyone' having a right, or 'no one' being arbitrarily deprived of entry.<sup>254</sup> Indeed, the language of art 2(1) of the *UDHR*, art 2(1) of the *ICCPR* and art 5 of the *CERD* provides that the rights guaranteed by the instruments are to apply without distinction as to 'national or social origin' or 'national or ethnic origin'.<sup>255</sup> Further, the actual phrasing of the right of return under art 12(4) of the *ICCPR* incorporates the term 'enter' in place of 'return'. According to several legal commentators, this 'accommodate[s] the situation of second-, third- or fourth-generation refugees' born outside their 'country',<sup>256</sup> giving them a right to *enter* the country — which is of considerable significance in the Palestinian context.<sup>257</sup>

<sup>247</sup> Knisbacher, above n 178, 97.

<sup>248</sup> Lawand, above n 19, 559; Takkenberg, above n 14, 237; Amnesty International, *Israel and the Occupied Territories/Palestinian Authority — The Right to Return: The Case of the Palestinians*, AI Index MDE 15/013/2001 (30 March 2001).

<sup>249</sup> Akram and Rempel, above n 182, 51; Lawand, above n 19, 548.

<sup>250</sup> Boling, above n 164, 37. See also Lawand, above n 19, 549.

<sup>251</sup> Rosand, above n 186, 1130.

<sup>252</sup> Zedalis, above n 177, 507.

<sup>253</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, arts 31–2 (entered into force 27 January 1980), for example, require that treaty provisions be given their ordinary meaning.

<sup>254</sup> Zedalis, above n 177, 505–6.

<sup>255</sup> *Ibid* 506.

<sup>256</sup> Boling, above n 164, 37.

<sup>257</sup> See, eg, *ibid*; Akram and Rempel, above n 182, 50; Dowty, above n 63, 27.

Such breadth seems all the more persuasive in view of the fact that a state-centred definition would defeat the object and purpose of protecting the right to return substantively. After all, in the words of Arzt and Zughaib, 'these are broad-based human rights treaties, not a technical set of immigration regulations'.<sup>258</sup> Moreover, in November 1999, the UN Human Rights Committee ('HRC') issued *General Comment 27* on art 12 of the *ICCPR*.<sup>259</sup> It asserted in para 20 that the phrase 'his own country' is not limited to 'nationality in a formal sense' but rather was intended to include

individuals whose country of nationality has been incorporated in or transferred to another national entity ... [and] stateless persons arbitrarily deprived of the right to acquire the nationality of [their long-term] residence.

Both enumerated categories of persons would appear to accommodate the factual complexity of the Palestinian refugees' plight. Although the HRC's *General Comment 27* does not necessarily resolve the interpretive ambiguity, it seems clear that the absence of formal nationality should not be granted substantive weight.

Nevertheless, critics refute the broader interpretation as excessively wide and thereby legally deficient because 'it does not place limits on *any* foreign person's claim to be a national of a country with which he or she has a substantial connection'.<sup>260</sup> Concern with opening the floodgates, however, is weakened by the fact that a uniform standard of assessment would inevitably determine what is 'one's country' (as manifested in *Nottebohm*), and, as a matter of course, 'non-nationals claiming a right to return may be expected to substantiate their claims'.<sup>261</sup> On the other hand, some legal scholars note that the narrower characterisation of 'country' would permit states to arbitrarily expel particular inhabitants, removing their nationality and then denying them the right to return on the pretext that they are non-nationals.<sup>262</sup> Indeed, in 1972, the non-governmental Uppsala Colloquium on freedom of movement noted: '[g]overnments come and go, and their political fluctuations and vagaries should not affect the fundamental rights of human beings, such as the right to return to one's own country and to have a homeland'.<sup>263</sup> Thus, Brownlie affirms that 'a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at the discretion of the government'.<sup>264</sup> However, the fact that many of the 1948 Palestinian refugees were abroad when Israel declared itself sovereign, and that Israel's creation did not involve the substitution of one sovereignty for another, but was rather a state emerging from a mandate,

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<sup>258</sup> Arzt and Zughaib, above n 11, 1445.

<sup>259</sup> HRC, *General Comment 27*, above n 150.

<sup>260</sup> Kramer, above n 21, 1010 (emphasis in original). See also Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (1987) 59.

<sup>261</sup> Takkenberg, above n 14, 238.

<sup>262</sup> Tadmor, above n 11, 428.

<sup>263</sup> Karel Vasak and Sidney Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–20 June 1972* (1976) 343.

<sup>264</sup> Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed, 1998) 659–60.

significantly complicates the applicability of this argument to Israel.<sup>265</sup> At any rate, the establishment of Israel should not automatically be deemed to defeat the Palestinian right of return by virtue of a tightly circumscribed view of ‘country’.

## 2 *Mass or Individual Rights?*

The question of a Palestinian right of return is further complicated by its collective or ‘national’ dimension, and therefore, the extent to which an individually held human right applies to situations of large-scale displacement. Several authors argue that mass movements of persons are beyond the freedom of movement provisions, and consequently that the right of return is inapplicable to displaced Palestinians.<sup>266</sup> Similarly, another perspective suggests that the only way to treat the issue of mass repatriation is within the narrow confines of political negotiations, or as a question of national self-determination rather than one of human rights law.<sup>267</sup> However, this line of argument appears tenuous insofar as it asserts that the right of self-determination and the right of return are mutually exclusive. In the words of Lawand: ‘[t]he implication is that the individual can only claim a right through the group ... [which] is contrary to the objects and purposes of the human rights instruments generally’.<sup>268</sup> Moreover, in practice, it would unjustly endorse the suspension of the refugees’ individual rights to freedom of movement pending the realisation of a Palestinian State. Similarly, the underlying political situation in a country to which return is sought should not necessarily bar an individual’s entitlement to a right under international law.

At any rate, what seems clear is that neither the text nor the *travaux préparatoires* of the relevant *UDHR*, *ICCPR* and *CERD* provisions actually support circumscribing return in this way. Firstly, there is no indication that the drafters considered the applicability of the freedom of movement principle to members of displaced populations.<sup>269</sup> And although it may have been assumed at the time that such a scenario would receive discussion in ‘some other body of law’,<sup>270</sup> this is not synonymous with an intention to limit these articles to isolated individuals. Secondly, nowhere in the actual text is the operation of the right of return qualified on the basis of group affiliation. Rather, in each instance, the relevant language refers to ‘everyone’. In addition, the HRC in *General Comment 27* affirms this reading in so far as it states: ‘[t]he right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies

<sup>265</sup> Controversies surrounding the law of state succession are beyond the scope of this article. See Ian Brownlie, above n 264, ch XXVIII; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law* (9<sup>th</sup> ed, 1992) 208–44.

<sup>266</sup> See, eg, Benvenisti and Zamir, above n 13, 324–6; Lapidoth, ‘The Right of Return in International Law’, above n 150, 114; Donna Arzt, ‘Palestinian Refugees: The Human Dimension of the Middle East Peace Process’ (1995) *American Society of International Law: Proceedings of the 89<sup>th</sup> Annual Meeting* 369, 372.

<sup>267</sup> Rosand, above n 186, 1128. See, also Lawand, above n 19, 542; Stig Jagerskiold, ‘The Freedom of Movement’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 166, 180; Lapidoth, ‘The Right of Return in International Law’, above n 150, 124.

<sup>268</sup> Lawand, above n 19, 543.

<sup>269</sup> *Ibid* 548–50.

<sup>270</sup> Quigley, ‘Displaced Palestinians and a Right of Return’, above n 62, 212.

prohibition of enforced population transfers or mass expulsions to other countries'.<sup>271</sup> Thirdly, whilst the right of return in art 12(4) of the *ICCPR* is presented as an individual right, Quigley confirms that 'this is also true of most rights in international human rights instruments'.<sup>272</sup> Indeed, the movement of people has historically taken on a collective dimension. Accordingly, to deny the availability of human rights simply because individuals form part of a mass group would render those rights illusory.

Finally, legal scholars argue that a conservative reading of the provisions is belied by international practice.<sup>273</sup> Thus, Rosand points out that

the 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.<sup>274</sup>

Conversely, other commentators cite the lack of returns following mass displacement during conflict as evidence that the right of return applies only to individuals.<sup>275</sup> In any event, it must be noted that whilst freedom of movement should be interpreted in a way that is substantively meaningful, 'the article is [nonetheless] not a formula for determining state legitimacy or for resolving territorial disputes ... its aims are in fact more modest'.<sup>276</sup> Further, the HRC in their most recent consideration of Israel's obligations under the *ICCPR* in 2003 makes no mention of the Palestinian right of return under art 12(3).<sup>277</sup> Nevertheless, in sum, a broad interpretation of the scope of the right of return, beyond nationals and individuals seems truest to the text of the articles.

### 3 Restricting the Right?

The difficulties with basing a Palestinian right of return to Israel on international human rights law is that these instruments are conditioned by language recognising the potential for exigencies that may neutralise the right's invocation. Article 29(2) of the *UDHR* speaks of the right being qualified by the 'freedoms of others, the just requirements of morality, public order and the general welfare in a democratic society'. Accordingly, this limitation

allows governments a significant degree of freedom to curtail human rights in the face of real or perceived threats to the national welfare, and provides a potential defense to the claim that a state has violated the provisions of the *Universal Declaration*.<sup>278</sup>

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<sup>271</sup> *General Comment 27*, above n 150, [19].

<sup>272</sup> Quigley, 'Displaced Palestinians and a Right of Return', above n 62, 211.

<sup>273</sup> See, eg, *ibid* 196–7; Lawand, above n 19, 543; Boling, above n 164, 39–40.

<sup>274</sup> Rosand, above n 186, 1131.

<sup>275</sup> Benvenisti and Zamir, above n 13, 325.

<sup>276</sup> Radley, above n 3, 614.

<sup>277</sup> HRC, *Concluding Observations of the Human Rights Committee: Israel*, UN Doc CCPR/CO/78/ISR (21 August 2003).

<sup>278</sup> Samuel Bleicher, 'The Legal Significance of Re-Citation of General Assembly Resolutions' (1969) 63 *American Journal of International Law* 444, 459–60.



Moreover, art 4(1) of the *ICCPR* permits derogations ‘in time of public emergency, which threatens the life of the nation’. Although Israel has not made any explicit derogation to art 12(4), it informed the UN of its state of emergency at the time of its ratification of the *ICCPR* and thus could be said to have done so by implication.<sup>279</sup> Notably, there is no language of derogation or limitation contained in the *CERD*. Whilst the language of the *ICCPR* is ostensibly more restrictive than that of the *UDHR*, both expressly endorse the existence of particular circumstances, in which departure from an otherwise enforceable right of return is permissible.<sup>280</sup> Thus, commentators defending the Israeli State’s refusal to repatriate the Palestinians regularly invoke these clauses to undermine the binding effect of return.

(a) *Limitations*

Scholars have marshalled the elasticity of art 29 of the *UDHR* to maintain that the influx of more than one and half million mostly hostile refugees would without doubt violate ‘the rights and freedoms of others’ in Israel and it would damage ‘public order and the general welfare in a democratic society’.<sup>281</sup>

Further, art 29(3), which specifies that *UDHR* ‘rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations’ is argued

to support Israel’s unwillingness to repatriate ... Palestinians ... This is because the *UN Charter*, *inter alia*, states in Article 1(1) the purpose of ‘maintain[ing] international peace and security’, a goal that would arguably not be served by mass repatriation of hostile Palestinians to Israel.<sup>282</sup>

Nevertheless, this popularly articulated contention seems somewhat diminished by the fact that it categorically presupposes the returnees’ ‘hostility’ and their ‘unrelenting’ desire to liquidate Israel. Whilst an undivided loyalty to the Israeli State seems equally doubtful, such speculation is irrelevant to the limitation clause, and should not be quoted as a self-evident fact in justifying a blanket denial of return to all members of the Palestinian population.

Rather more persuasively, Israel might legitimately argue that a mass return of Palestinian refugees would create a demographic existential threat to the ‘Jewish character and the viability and stability of the Jewish state’.<sup>283</sup> Thus, return, by reintroducing a significant Arab population, would undermine the ‘freedom of others’ and ‘general welfare’ of Israeli citizens by ‘call[ing] into question ownership of homes, villages, and other properties [long occupied by Israelis] and would thus be profoundly disruptive’.<sup>284</sup> In this regard, ‘a precise

<sup>279</sup> Vic Ullom, ‘Voluntary Repatriation of Refugees and Customary International Law’ (2000–01) 29 *Denver Journal of International Law and Policy* 115, 142; ‘*International Covenant on Civil and Political Rights*’ (8 September 2005) Status of Multilateral Treaties Deposited with the Secretary-General <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>> at 1 October 2005.

<sup>280</sup> Zedalis, above n 177, 504.

<sup>281</sup> Lapidot, ‘The Right of Return in International Law’, above n 150, 114–15.

<sup>282</sup> Weiner, above n 24, 39. See also Kramer, above n 21, 1008–9.

<sup>283</sup> Alpher et al, above n 23, 174.

<sup>284</sup> *Ibid.*

reversal of the initial dislocation could only be achieved at the cost of an even greater new dislocation'.<sup>285</sup> Further, there may be economic limits to the absorption of a massive influx of returnees.<sup>286</sup> Nevertheless, Wadie E Said contends the right of return 'should trump any demographic considerations, especially those rooted in racial discrimination and nothing more'.<sup>287</sup> However, this seems unfounded, considering that to a large extent Palestinian nationalism and Israel's entitlement to preserve its Jewish identity are both sides of the same coin. After all, the people of the country of return also have a right to self-determination, and repatriation of a sizable minority cannot be implemented in a vacuum. In short, no state should be required to take affirmative steps to undermine either its demographic character or its hitherto dominant cultural and ethnic identity, both of which constitute as valid a threat to 'general welfare' as there is likely to exist. Accordingly, Israel's retreat from mass Palestinian return with respect to the *UDHR*'s provisions might be justifiably mounted.

The right to return enunciated in art 12(4) of the *ICCPR*, however, is not subject to the more elaborate restrictions of art 12(3) based on national security, public order, and public health and morals, which mirror those in art 29 of the *UDHR*.<sup>288</sup> Presumably then, it is arguable that the *ICCPR* does not allow a state to condition the right of return on such considerations. Nevertheless, the incorporation of the modifier 'arbitrarily' in art 12(4) might afford Israel significant leeway in its qualification of a Palestinian right of return. Indeed, the phrase implies the state has a right to interfere with the right to enter, so long as the interference is not 'in the absence of due process'.<sup>289</sup> Not surprisingly, this term, unique to the *ICCPR* provision, is steeped in contestation and interpretative ambiguity. According to one construction, 'arbitrarily' as a limitation must be 'strictly and narrowly construed'<sup>290</sup> and thus 'refers only to one specific factual instance, that of the use of exile as a "penal sanction"'.<sup>291</sup> Given the inapplicability of this judicial measure to the Israeli-Palestinian context, a restricted interpretation of 'arbitrariness' therefore regards the Palestinian right of return as virtually absolute under art 12(4).

Conversely, Hannum opposes such a narrow formulation and instead cites with approval a 1964 UN study which, despite having been conducted prior to the adoption of the *ICCPR*, he believes 'probably offers the best definition of the

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<sup>285</sup> Dowty, above n 63, 29.

<sup>286</sup> *Ibid.*

<sup>287</sup> Wadie E Said, above n 12, 92.

<sup>288</sup> The qualifications listed in the *ICCPR*, above n 230, art 12(3) do not apply to art 12(4). This is because they precede art 12(4) and they refer only to the 'above-mentioned rights'.

<sup>289</sup> Lawand, above n 19, 547.

<sup>290</sup> See, eg. Louis Henkin, 'Introduction' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 26.

<sup>291</sup> Boling, above n 164, 38. See also Quigley, 'Displaced Palestinians and a Right of Return', above n 62, 202.

term'.<sup>292</sup> In sum, the study concluded that

'arbitrary' is not synonymous with 'illegal' and that the former signifies more than the latter ... [it] is 'arbitrary' if it is: (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provision of a law the purpose of which is incompatible with respect for the right to liberty and security of person.<sup>293</sup>

Extrapolating from this definition, Hannum finds that '[a]t a minimum, no denial of the right to return can be discriminatory in violation of art 2(1) of the [ICCPR]'.<sup>294</sup> Moreover, '[a]ny denial ... must be based on law ... as an illegal denial surely would be arbitrary under even the most narrow definition of the latter word'.<sup>295</sup> Thus, whilst the right of return could therefore not be denied simply on the basis that one is Palestinian or in contravention of international law, it is also clear that the *ICCPR* permits 'non-arbitrary' restrictions of return which go well beyond penal sanctions.

The HRC has stated, with regard to the meaning of 'arbitrary' in art 12(4),

even lawful interference provided for by law should be in accordance with the provisions, aims and objectives of the *Covenant* 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 ... arbitrarily prevent this person from returning to his or her own country.<sup>296</sup>

According to Boling, 'Israel ... has flagrantly violated the *ICCPR* Article 2(1) non-discrimination provision protecting the Article 12(4) right of return'<sup>297</sup> and Israel's *Nationality Law* (1952) 'effectively "stripped" this entire group of their status as presumed nationals of Israel'.<sup>298</sup> Consequently, in her view, there is no reasonable basis for obstructing Palestinian repatriation.<sup>299</sup>

Nevertheless, whilst states may not arbitrarily denationalise their citizens in order to deprive them of return, or do so contrary to the principle of non-discrimination, Boling's argument seems somewhat misplaced in the Israeli-Palestinian scenario. As the historical complexities of 1948 demonstrate, the Palestinian refugees were never Israeli citizens, and therefore could not have been said to be 'denationalised', arbitrarily or otherwise. This claim would be materially different were Israel to revoke on any grounds the citizenship of the one million Palestinians who already have Israeli citizenship. Moreover, rather than being racially driven, '[t]he right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty'<sup>300</sup> of which

<sup>292</sup> Hannum, above n 260, 44.

<sup>293</sup> *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, 7, UN Doc E/CN.4/826/Rev.1 (1964), as cited in *ibid* 45.

<sup>294</sup> Hannum, above n 260, 45.

<sup>295</sup> *Ibid* 45-6.

<sup>296</sup> *General Comment 27*, above n 150, [21].

<sup>297</sup> Boling, above n 164, 40.

<sup>298</sup> *Ibid* 39.

<sup>299</sup> *Ibid* 41-2.

<sup>300</sup> Paul Weis, *Nationality and Statelessness in International Law* (2<sup>nd</sup> rev ed, 1979) 65.

Israel's *Nationality Law* is an important expression. Indeed, just as a future Palestinian state could decide whether to grant citizenship to remaining Jewish settlers, Israel is entitled to determine to whom it grants Israeli citizenship.

In any event, '[t]erritorial sovereignty and the right to the native soil are two distinct concepts, with distinct juridical consequences' which must not be conflated.<sup>301</sup> Above all, the analysis hinges upon whether Israel's unwillingness to admit entry to Palestinian refugees is 'non-arbitrary' and the extent to which the implementation of the right of return may be lawfully qualified. As before, it is arguable that the demographic threat posed by the refugees as well as their descendants constitutes one of the few exceptional circumstances in which denial of a right to enter one's own country might be legitimately and indeed, non-arbitrarily, circumscribed. In sum, the interpretational questions with respect to the phrase 'arbitrary' illustrate that a Palestinian right of return to Israel under the *ICCPR* provisions is far from absolute.

(b) *Derogations*

There is also a question as to whether the public emergency clause of art 4(1) of the *ICCPR* applies to Israel and allows it to derogate from its treaty obligations under art 12(4). Notably, the state of emergency, which the provisional government of Israel declared in 1948, has remained in force until today. According to its formal communication to the UN in 1991, Israel maintains that

[s]ince its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.<sup>302</sup>

However, Quigley argues that human rights law prohibits countries from declaring an emergency for an indefinite period of time and that Israel's long-term declaration is 'without parallel in contemporary international practice'.<sup>303</sup> Indeed, the HRC confirms in *General Comment 29* that measures of derogation 'must be of an exceptional and temporary nature', 'designed to combat a serious public emergency'.<sup>304</sup>

Nevertheless, whilst derogations must without doubt be strictly required by the exigencies of the situation, it is arguable that both the duration and the intensity of the Palestinian–Israeli conflict have been as unprecedented as Israel's prolonged emergency. Indeed, Kramer contends that the fact Israel's emergency has lasted for over 50 years should not necessarily diminish its legitimacy.<sup>305</sup> Notably, *General Comment 29* 'does not deal with the ... situation

<sup>301</sup> Nsereko, above n 152, 343.

<sup>302</sup> 'International Covenant on Civil and Political Rights' (8 September 2005) Status of Multilateral Treaties Deposited with the Secretary-General <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>> at 1 October 2005 (declaration made by Israel 3 October 1991).

<sup>303</sup> Quigley, 'Displaced Palestinians and a Right of Return', above n 62, 204.

<sup>304</sup> HRC, *General Comment 29: States of Emergency (Article 4)*, [2], UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) ('*General Comment 29*').

<sup>305</sup> Kramer, above n 21, 1010–11.

where a terrorist emergency lasts for such a long time as to achieve a state of de facto normalcy'.<sup>306</sup>

Whilst this argument, bolstered by the recent violence and heightened terrorism in the Middle East, can and should be used to suspend mass Palestinian repatriation, it must not be broadly applied by Israel to justify blanket derogation from the *ICCPR* provisions. After all, '[i]t must be remembered that states of emergency have all too often acted as veils for gross abuses of human rights'.<sup>307</sup> Indeed, 'if the [derogation clauses] ... are not given narrow interpretations, the effect could be to deny or dilute the right' enshrined in the *ICCPR*.<sup>308</sup> However, what seems clear is that for the Palestinian refugees to return home safely and voluntarily there must be a significant change in the conditions which originally caused their flight. Nevertheless, '[a] state declaring that it need not permit a refugee entry is materially different from a state declaring it would permit entry were it not for security concerns'.<sup>309</sup> Accordingly, by invoking the derogation clauses, Israel must implicitly acknowledge a theoretical obligation to repatriate in the absence of these presently extreme conditions.

### C *The Right of Return in Customary International Law*

Many commentators argue that aside from specific provisions in international treaties, the right of return is binding under customary international law.<sup>310</sup> From this standpoint, Israel is legally obliged to repatriate the Palestinian refugees irrespective of its agreement, and even where the right of return is manifested in non-binding documents such as the General Assembly resolutions and the *UDHR*. One study has explicitly posited that there may now exist in international law a specific right of return of the Palestinian people recognised by 'the juridical opinions and the international instruments'.<sup>311</sup> However, the right of return's customary law status requires both consistent state practice and *opinio juris*; namely, that international practice was informed by an acknowledged sense of legal obligation.<sup>312</sup> Quigley notes that 'the pattern of Security Council resolutions referring to return as a right constitutes strong evidence of state practice that members of displaced groups are entitled to return to their home territory'.<sup>313</sup> Additionally, Boling cites the General Assembly's annual reaffirmation of *Resolution 194* for over five decades as indicative of the Palestinian right of return's incorporation into legal customary norms.<sup>314</sup> Nevertheless, 'despite the plethora of resolutions declaring the right to return

<sup>306</sup> Joseph, above n 304, 82.

<sup>307</sup> Ibid 98.

<sup>308</sup> Knisbacher, above n 178, 101.

<sup>309</sup> Ullom, above n 279, 141–2.

<sup>310</sup> Lawand, above n 19, 546. See also Boling, 164, 43. Cf Lapidoth, 'The Right of Return in International Law', above n 150, 113.

<sup>311</sup> UN Committee on the Exercise of the Inalienable Rights of the Palestinian People; Publication Submitted by a Special Unit on Palestinian Rights, UN Doc ST/LEG/SER (1978), as cited in Lapidoth, above n 150, 113.

<sup>312</sup> Brownlie, above n 264, 4–11.

<sup>313</sup> Quigley, 'Displaced Palestinians and a Right of Return', above n 62, 215–6.

<sup>314</sup> Boling, above n 164, 49.

following mass displacement',<sup>315</sup> in the vast majority (as in *Resolution 194*) 'the UN simply "encouraged" or "urged" the international community ... to "facilitate" ... return ... [and] [t]hus ... did not imply the existence of a legal obligation'.<sup>316</sup> Moreover, regardless of the source of a customary right of return, '[s]tates persistently objecting to the custom during its period of development ... will not be bound once the custom crystallises'.<sup>317</sup> Consequently, the continued refusal of Israel to accept UN resolutions aimed at Palestinian return would modify its obligations in so far as they include repatriation in customary law.

Furthermore, there are difficulties in asserting that General Assembly resolutions constitute state practice. As Vic Ullom notes, there is a material difference between 'agreeing that another country should repatriate its refugees' and 'repatriating one's own refugees'.<sup>318</sup> Rather, the existence (or absence) of widespread state practice in voluntary repatriation is best analysed in those states where violent conflict and mass dislocation occurred. Thus, both Boling and Ullom cite the 1995 *Dayton Peace Accords*<sup>319</sup> and the 1995 *Erdut Agreement*<sup>320</sup> as evidence of recent state practice in which displaced persons are voluntarily repatriated to their countries of origin as a matter of 'right'. On the other hand, commentators point to the lack of actual returns following mass dislocation as evidence that international practice fails to incorporate a customary norm of return, let alone the legal obligation to do so.<sup>321</sup> Notably, the initiation of mass return in the examples of the *Dayton Peace Accords* and the *Erdut Agreement* was in fact hailed by a comprehensive peace agreement, which is yet to be achieved in the Arab–Israeli context.

Accordingly, it is necessary to consider that, even if repatriation exists as a customary norm, the specific question of whether Palestinians have a right of return to Israel may be less certain. After all, it poses a unique dilemma which defies normative standards in both duration and demographic dimension. In contrast to the repatriation of some 2000 Serb refugees to Croatia,<sup>322</sup> or some 88 000 persons to Bosnia<sup>323</sup> within five years of ethnic clashes, potential Palestinian claimants are seeking return in the hundreds of thousands following

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<sup>315</sup> Rosand, above n 186, 1136.

<sup>316</sup> Ibid 1137 (citations omitted).

<sup>317</sup> Zedalis, above n 177, 512. See also *Anglo-Norwegian Fisheries (UK v Norway) (Merits)* [1951] ICJ Rep 116, 131, 138–9.

<sup>318</sup> Ullom, above n 279, 127.

<sup>319</sup> See the *General Framework Agreement for Peace in Bosnia and Herzegovina*, initialled 2 November 1995, signed 14 December 1995, 35 ILM 89 (1996) (entered into force 14 December 1995) ('*Dayton Peace Accords*'), annex 7 (*Agreement on Refugees and Displaced Persons*) art 1: 'All refugees and displaced persons have the right freely to return to their homes of origin'.

<sup>320</sup> See *Basic Agreement on the Region of Eastern Slavonia, Baranja, and Western Sirmium*, 12 November 1995, Croatia–Local Serbian Community, 35 ILM 186 (1996) ('*Erdut Agreement*') art 7: 'All persons have the right to return freely to their place of residence'.

<sup>321</sup> Sabel, above n 45, 55, notes that Muslims who fled to Pakistan from India do not have a right of return to India. See also Rosand, above n 186, 1137–38. Ullom mentions the non-repatriating countries of Bhutan, Western Sahara and Kenya: Ullom, above n 279, 134–7.

<sup>322</sup> Ullom, above n 279, 131–2.

<sup>323</sup> Boling, above n 164, 46.

five decades of refugee status. Moreover, while the customary legal basis of repatriation is arguably existent, its content remains far from certain. The scope of the right cannot be claimed to necessarily extend to a widely accepted custom of enforcement by non-nationals or mass groups of displaced persons.<sup>324</sup> Further, similar sovereignty and policy considerations raised by Israel with respect to the human rights limitations and derogations may apply.<sup>325</sup> Thus, in the absence of international consensus, it seems difficult to fashion a persuasive case of Palestinian return based on general customary law.

#### IV ENDURABLE SOLUTIONS: THE POLITICAL REALITY

An analysis of the Palestinian right of return presents formidable obstacles in terms of both its interpretive ambiguity and political obfuscation. Above all it is a question that inevitably invites speculation about its practicability: no matter how justified in principle, how feasible is the return of the 1948 refugees to Israel after more than five decades? Indeed, given the continuing conflict, the demographic and territorial transformations<sup>326</sup> and the de facto integration of refugees into the Arab states,<sup>327</sup> it appears that repatriating the Palestinians remains as complex as the causes underlying their original flight. Thus, whilst an examination of the international instruments could support an expansive right of return, the political and legal realities would seem to render mass Palestinian return impractical.<sup>328</sup>

Moreover, most legal commentators are in agreement that only a comprehensive political solution can effectively resolve the refugee crisis.<sup>329</sup> The framework of a two-state solution offers the possibility of dealing with broader issues related to citizenship and sovereignty based on equality and inclusivity, rather than on narrow legal or national parameters. Indeed, the application of the principle of self-determination is axiomatic to the Palestinian cause, and has arguably overshadowed return as the most desirable remedy. Bolstered by the General Assembly resolutions, establishing a Palestinian state in the West Bank and Gaza has increasingly become the focal point of the Palestinian

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<sup>324</sup> Zedalis, above n 177, 514.

<sup>325</sup> Ullom, above n 279, 142.

<sup>326</sup> Five decades of immigrant absorption, economic development, and urbanisation in present day Israel have significantly altered or completely enveloped entire towns and villages. See Calvin Goldscheider, *Israel's Changing Society: Population, Ethnicity and Development* (2<sup>nd</sup> ed, 2002) 93.

<sup>327</sup> For example, although Palestinians now encounter barriers to promotion in government positions in Jordan, Palestinians have nevertheless managed to occupy high political posts and prominent business positions in that country: Takkenberg, above n 14, 156.

<sup>328</sup> 'Indeed, UNHCR has conceded that repatriation is a difficult durable solution to implement': see Buhpinder Singh Chimini, 'The Meaning of Words and the Role of the UNHCR in Voluntary Repatriation' (1993) 5 *International Journal of Refugee Law* 442, 457; Takkenberg, above n 14, 250.

<sup>329</sup> See, eg, Lawand, above n 19, 568; Khalidi, 'Observations on the Right of Return', above n 6, 40.

leadership.<sup>330</sup> Mutual acceptance of both parties' collective rights and the creation of a viable Palestinian entity may provide the only workable basis for actualising a modified Palestinian right of return. From this desired endpoint, a Palestinian *Law of Return* (akin to Israel's) could provide for the reintegration of refugees into a meaningful national existence, while respecting Israel's demographic and security concerns. Thus, Arzt and Zughuib conclude, 'regardless of whether Palestinians have a right to return to Israel, they do have a right to return to Palestine'.<sup>331</sup>

A limited right of return to 'Palestine', however, is still incongruent with nationalistic demands to return to Israel proper, in which Palestinians are somewhat discursively and historically entrapped. However, most Palestinian commentators and leaders are well aware that Israel is unlikely to agree to the actual return of all the refugees and that repossession of their former 'homes' is but reverie.<sup>332</sup> For the most part, they seek an official and in principle acknowledgement of Palestinian rights.<sup>333</sup> Accordingly, some analysts have proposed 'a choice-based approach ... [with] a variety of structured options, of incentives and disincentives, such that only a small percentage of Palestinians will actually choose to return to Israel'.<sup>334</sup> Regulating the rate of return, focusing on the original 1948 refugees,<sup>335</sup> using land swaps, and establishing bi-national zones would operate within the larger context of compensation and resettlement alternatives. Thus, a wide range of options can be devised, accompanied by some form of regulatory structure both safeguarding Israel and respecting an 'in principle' Palestinian return.

Within this framework, the right to compensation for homes and properties possessed in 1948 is instrumental, given that in the absence of repatriation, rights without remedies are illusory.<sup>336</sup> A well conceived and internationally funded claims tribunal (to which Israel would contribute) provides the best mechanism through which to facilitate this objective.<sup>337</sup> Notably, this latter solution is distinguishable from Lee's widely cited proposal that states of origin compensate

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<sup>330</sup> The 1988 Palestinian *Declaration of Independence*, above n 84, accepted, without equivocation or ambivalence, the two-state formula within the 1967 borders. Formal recognition of Israel at Oslo also confirms that the PLO no longer envisages Palestinian self-determination within the territory of the State of Israel: see above n 82 and accompanying text.

<sup>331</sup> Arzt and Zughuib, above n 11, 1445.

<sup>332</sup> Khalidi, 'Observations on the Right of Return', above n 6, 38; Rosemary Sayigh, 'Palestinian Refugees in Lebanon', above n 57, 97.

<sup>333</sup> Segal, above n 2, 23.

<sup>334</sup> *Ibid.* See also Friedman, above n 1, 67; Alpher et al, above n 23, 172; Arzt, above n 266, 373.

<sup>335</sup> Segal notes that '[a] child of 15 in 1948 is today ... 68 years old. This elderly and dwindling population is well past child-bearing age [and] [t]heir return ... poses no long-term impact on Israeli demographics': Segal, above n 2, 29.

<sup>336</sup> See Lee, above n 179, 537, citing Richard Lillich (ed), *International Law of State Responsibility for Injury to Aliens* (1983) 61.

<sup>337</sup> Weiner, above n 24, 53. Nevertheless, Khalidi observes that '[s]ome types of compensation ... might be paid collectively rather than individually, on a state-to-state basis, to enable the Palestinian State to create the infrastructure necessary for successful integration of those returning to it in the context of a settlement': Khalidi, 'Observations on the Right of Return', above n 6, 39.



host states or the international community for the creation of refugees.<sup>338</sup> Such an approach would be overdrawn in the Arab–Israeli context since, as has been noted, responsibility for the Palestinian refugee crisis remains multidimensional and inhospitable to any singular allocation of compensatory liability.

Nevertheless, '[d]ue recognition', writes Charles Taylor, 'is not just a courtesy we owe people. It is a vital human need'.<sup>339</sup> Therefore, settlement of the return issue must also satisfy the Palestinian desire for an official acceptance of responsibility, albeit partial, on the part of Israel. Khalidi argues that the question of responsibility 'is so central to the national narrative and the self-view of the Palestinian people that any approach which tries to sweep history under the rug will fail utterly'.<sup>340</sup> If the confusion of wartime can perhaps obscure the historical record, it cannot deny the moral implication of Israel's involvement in the Palestinian displacement of 1948. In the words of Edward W Said: '[s]ecularisation requires demystification, it requires courage, it requires an irrevocably critical attitude towards self, society and the other'.<sup>341</sup> Still, the 'Road Map' to peaceful co-existence remains elusive in this unforgiving land of competing nationalisms. Thus, resolution of the right of return is not only desirable, but also presently critical for the international community, and in particular the refugees; otherwise their camps will continue to become flash points for militancy in the Middle East.

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<sup>338</sup> See generally Lee, above n 179.

<sup>339</sup> Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining The Politics of Recognition* (1994) 25, 26.

<sup>340</sup> Rashid Khalidi, CPAP, *Palestinian Refugees: Their Problem and Future — A Special Report* (1994) 22, as quoted in Takkenberg, above n 14, 334.

<sup>341</sup> Edward W Said, 'Afterword: The Consequences of 1948' in Eugene Rogan and Avi Shlaim (eds), *The War for Palestine: Rewriting the History of 1948* (2001) 206, 212.