

*Position Paper*

# **Return of Palestinian Refugees to the State of Israel**

**Yaffa Zilbershats and Nimra Goren-Amitai**

Editor: **Ruth Gavison**

Translated from Hebrew



**The Metzilah Center  
for Zionist, Jewish, Liberal and Humanist Thought**

Jerusalem, 2011

## **Return of Palestinian Refugees to the State of Israel**

Yaffa Zilbershats and Nimra Goren-Amitai

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# Executive Summary

## Introduction

The return of the Palestinian refugees and their descendants to the State of Israel is one of the most difficult issues facing the parties as they seek to resolve the Israeli-Palestinian dispute. According to the Palestinians, the refugees and their descendants have a right to return to the homes which they left between the years 1947-1949. In contrast, the State of Israel vehemently opposes recognizing the right of return and extensive entry of Palestinian refugees into its territory as part of the solution to the dispute. The State of Israel sees this as an existential danger to the national home in which the Jewish people seek to implement their right to self-determination.

This document presents the historical and legal background of this issue. It rests on the argument that the sources of international law do not support the legal right of the Palestinian refugees to return to the State of Israel. A review of the cases of other refugees in regions around the world where ethnic disputes are underway shows that the return of refugees who are members of one national ethnic group to territory which is controlled by another group is generally not the appropriate solution for ending a prolonged ethnic dispute. A discussion of this loaded issue within the framework of a discourse of rights is likely to make it difficult for the parties to resolve the dispute. Accordingly, Israel must insist that the issue of the Palestinian refugees will be dealt with in the framework of political negotiations. Israel must refrain from discussing this issue within the framework of the discourse of rights.

## Chapter One: The problem of the Palestinian refugees: basic facts

The purpose of this chapter is to present the factual and historical background that lies behind the claim to return made by the Palestinian refugees and their descendants. Many of the country's Arab inhabitants fled or

were deported in consequence of hostilities which erupted in Mandatory Palestine following the UN General Assembly decision on the partition of the territory into two states—Jewish and Arab—and following the War of Independence of the State of Israel. Many became refugees in the neighboring Arab states. These refugees were excluded from the application of the Convention Relating to the Status of Refugees of 1951 and from the protection of the UN High Commission for Refugees. As of 1950 they have been protected, by virtue of a UN resolution, within a special framework, namely, the UN Relief and Works Agency for Palestine Refugees in the Near East—UNRWA. Over the course of time UNRWA has become an organization which functions as a huge relief agency. It handles approximately 4.7 million people yet refrains from rehabilitating the refugees. This figure stems from the organization's broad definition of a Palestinian refugee. The UNRWA definition, unlike the definition given in the Refugees Convention, includes the descendants of the refugees who left Mandatory Palestine as well as those who have received citizenship in the countries in which they have since settled. In addition, many Palestinians who live outside UNRWA's area of operation see themselves as Palestinian refugees who are entitled to return to the territory of the State of Israel.

### **Chapter Two: The right of return viewed through the prism of international law**

The Palestinians base the refugees' right of return on international law. The discourse of rights in this area largely developed following the Second World War. The UN adopted many conventions on human rights and the signatory states undertook to safeguard these rights within their territory. Concurrently, monitoring and supervising mechanisms were established to implement the conventions. This step led to limitations on the sovereignty of states. Against this background, Chapter Two considers the various sources of international law concerning related issues with the purpose of examining whether they vest the Palestinian refugees and their descendants with a *right* to return.

- *UN resolutions relating to Palestinians* do not vest the Palestinian refugees with a right to return to the State of Israel. The primary resolution upon which the Palestinians base their claim to a right to return is UN General Assembly Resolution 194(III) of 1948. This resolution sought to set out a general strategy for resolving the dispute through the establishment of a Conciliation Commission. Indeed, the return of the refugees is mentioned in Article 11 of the resolution, but this must be seen as part of the general strategy and not as an independent right vested in the Palestinians, particularly in light of the fact that the resolution does not refer to the term “right.” Subsequent resolutions of the UN General Assembly recognize the right of the Palestinian people to self-determination and the right of the Palestinians to return to their homes. In contrast, the Security Council resolutions 237 and 242 of 1967 and 338 of 1973 call for a “just” solution to the Palestinian problem but make no reference whatsoever to their “right to return.” It is these decisions of the Security Council which are binding in the relations between the Israelis and the Palestinians, as the Oslo agreements signed by the two parties vest them with binding force following their adoption by the parties.
- *International human rights laws* do not provide uniform definitions regarding the scope of the right to freedom of movement, on which, on occasion, the right to return is allegedly based. One of the important documents pertaining to this subject relied on by the Palestinians, is the International Covenant on Civil and Political Rights of 1966. Article 12(4) of the Covenant prohibits the imposition of arbitrary restrictions on the right of a person to enter his own country. This position paper shows that the Palestinian refugees do not satisfy the terms of the article and therefore it too does not vest them with a right to return to the State of Israel. For the Palestinians, Israel is not “their country” and even if it is regarded as their country, the restriction on their entry is not arbitrary. The State of Israel is entitled to prevent the entry of the Palestinians into its territory, and *a fortiori* the entry of their descendants, as such a development might endanger the existence of the state and the exercise of

the Jewish people's right to self-determination within it. This reasoning is also relevant in relation to restricting the entry into Israel of a Palestinian who has married a citizen of the country and wishes to settle in the country within the framework of family unification.

Nor too, do international *nationality laws* impose a duty on the State of Israel to grant citizenship to Palestinian refugees. The general international conventions and those dealing specifically with the question of citizenship provide for the right of every person to citizenship, but there is no express obligation on the part of any particular state to grant such citizenship. Arrangements for the granting of citizenship to those leaving the state in cases of *uti possidetis*—*i.e.*, in situations where large movements of people are generated as a result of war which has led to border changes—have not yet been formulated in binding rules, and therefore are not legally binding in the context of the issue of Palestinian refugees.

- *International refugee law* is primarily defined by the Convention Relating to the Status of Refugees of 1951. This convention provides for the right of the refugees not to be deported to the country from which they escaped and in which their lives or freedom are in danger. Global practice over the years testifies to the fact that states have not interpreted this right as indirectly providing for the duty of the original state to permit the return of the refugees. Similarly, the Statute of the Office of the UN High Commission for Refugees of 1950 provides that return is merely one of the possible ways of resolving refugee problems. Irrespective of the above, the Refugees Convention has excluded the Palestinian refugees from its purview and in accordance with UN decisions has made them the responsibility of UNRWA. At the same time, the latter agency has not been tasked with dealing with the return of the Palestinians.
- *Humanitarian law and international criminal law* which concern the protection of civilians and combatants in time of war and in its aftermath do not contain a provision regarding the right of return of refugees. They do prohibit forcible deportation. However, even if the problem of refugees was caused in part by the deportation of a population from the area

of Mandatory Palestine, international law does not contain any norm which requires the refugees to be allowed to return to the original country as a remedy for illegal deportation.

### **Chapter Three: Resolution of political and ethnic disputes in mixed societies: separation versus reintegration**

An examination of precedents from around the world relating to the resolution of ethnic disputes in which the fate of many refugees is involved reveals a variety of solutions for dealing with this issue as part of the attempt to resolve or stabilize national disputes.

Until the end of the Cold War, the legitimate and even preferred solution for ethnic disputes was the forced exchange of populations. The premise was that such a solution contributed to the stabilization of the states suffering from ethnic tensions. This was the case in relation to the peace agreements between Greece and Bulgaria in 1919 and between Turkey and Greece in 1923. The Peel Commission of 1937 called for the partition of Mandatory Palestine into two states and recommended the exchange of populations in reliance on the Greek-Turkish precedent. A similar solution of the forcible transfer of populations was adopted in the Potsdam Declaration of 1945 which declared that millions of Germans would be uprooted from areas in Eastern Europe and would be transferred to Germany. Similarly, at the time of the partition of India into India and Pakistan in 1947, an exchange of populations involving millions of people was carried out with the aim of separating two disputing ethnic groups.

Thus, when the problem of the Palestinian refugees arose, the exchange of populations, particularly in cases of ethnic disputes, was regarded as a legitimate and even appropriate solution. In retrospect, it is possible to regard the absorption of hundreds of thousands of Jewish refugees from the Arab states in Israel, which took place at the same time as the escape or deportation of Palestinian refugees to the neighboring Arab states, as such an exchange of populations. The new reality which evolved could have provided a fitting infrastructure for the settlement of the dispute. However, unlike

the State of Israel, the Arab states in general did not take measures to absorb the refugees and resettle them but rather encouraged the preservation of the refugee situation and the aspiration to return to the territory of the State of Israel.

Following the end of the Cold War the process of population exchange was defined as ethnic cleansing and was absolutely prohibited by international law. Return was adopted by the states—particularly by the states absorbing refugees—as the preferred solution for the problems of refugees which had been created by ethnic disputes. However, in many cases this policy encountered difficulties and sometimes was not capable of being implemented at all. This, for example, was the situation in *Bosnia and Herzegovina*, which had formed part of the former Yugoslavia. The war in the region gave rise to an increased movement of refugees. The Dayton Agreement of 1995 provided for their right to return to their homes. In practice, the return of these refugees has encountered numerous obstacles to this day, including ethnic hostility which on occasion has turned into severe violence. In Ethiopia, the problem of refugees was solved by their return to *Ethiopia*, albeit to an area largely separated geographically and ethnically from the area from which they had fled. In *Cyprus* the Secretary General of the UN Kofi Annan made a proposal to the populations in the two sections of the island in an effort to resolve the refugee problem which had been created about thirty years earlier. His proposal included a minimal return of refugees, so that each ethnic community could remain a majority in its own territory. This proposal shows that the international community concurs that even at this time a legitimate solution to an ethnic dispute which had resulted in many refugees will not necessarily include the extensive return of refugees to their original place of residence. The working premise in this paper is that this is the appropriate way to act in the case of the Palestinian refugees as well.

This view is supported by a recent judgment of the European Court of Human Rights which in March 2010 decided the issue of the property rights of Greek Cypriots who had lived in northern Cyprus and moved to

the south of the island following the Turkish occupation. In view of the importance and relevance of this judgment to the issue of the Palestinian refugees, its main elements are set out in *Annex B* to this paper.

### **Postscript**

Discussion of the return of the Palestinian refugees to the State of Israel is essential to ensure the best possible handling of this issue by the state within the framework of the political measures and agreements which are expected to be signed by Israel and the Palestinians. In view of the fact that international law does not vest the Palestinian refugees with the right to compel Israel to permit them to settle in its territory, and in view of the practice of states regarding the return of refugees in areas of ethnic dispute, it is recommended that the discussion on return be shifted from the discourse of rights to the domain of political negotiations. The State of Israel should not be tempted to recognize the right of return of the refugees by a proposed guarantee or understanding to the effect that the recognition will not result in *de facto* return. Israel should not be misled into thinking that recognition of the right is only a symbolic gesture aimed at acknowledging the suffering of the refugees. The alleged right may have much more than symbolic significance. It may be the right of individual refugees, and it is not at all clear that the representatives of the Palestinians are entitled to waive such rights. Indeed, the claim that this right cannot be waived is made expressly by those asserting it. Thus, any recognition of the *right* of return may bring mass claims to return in its wake. The sweeping solution of return is incompatible with the interests and the rights of the State of Israel as the state of the Jewish people. Of course it is important to bring an end to the suffering of the Palestinian refugees. Yet extensive return to the State of Israel of a population with cultural and social characteristics which differ so sharply from those of the Jewish population, where there is such deep hostility between the two groups, is certainly neither the proper solution to the suffering of the refugees, nor the way to achieve stability in the region.

## Introduction

Three main issues have yet to be discussed in the interim agreements between Israel and the Palestinians, in view of the intention to reserve them for final status negotiations: the status of Jerusalem; the borders between the State of Israel and the Palestinian entity; and the issue of the return of the Palestinian refugees and their descendants to the territory of the State of Israel. This position paper deals with the third matter: the question of return (*al awda* in Arabic). The issue of return is of great importance; it is highly sensitive and difficult and if not dealt with properly the Israel-Palestinian dispute will become intractable. The solution offered today to end the dispute—namely, two states for two peoples—cannot be put into effect if the Palestinian right to return to the territory of the State of Israel is implemented, as the outcome will be that Israel will cease to be a state with a significant and stable Jewish majority.

The Palestinians' fundamental argument is that it is the *right* of the refugees and their descendants to return to their actual homes. The very characterization of the refugees' aspiration to return to their homes as a "right" and not only as a "claim" is of importance and has theoretical, political and legal implications. Thus, for example, the phrase "right of return" casts doubt upon whether, in the context of negotiations, the Palestinian leaders would display a willingness to moderate the demand and waive the exercise of this right. Likewise, it is not clear if waiver of this right would garner the support of the Palestinian people and whether it will not be argued that this is a personal right which the leadership cannot waive. Both the Arab peace initiative and the Geneva initiative take a vague approach to this issue.

The official Israeli position refers to two aspects of the subject. First, Israel argues that the Palestinian refugees (and in particular their descendants) have no right to return either as a matter of general public international law or by virtue of the instruments dealing specifically with their affairs. Second,

Israel asserts that there is no precedent for the situation where, in the framework of a solution to a prolonged dispute between two ethnic groups, recognition has been given to the return of the members of one ethnic group to the territory of the absorbing state in which the other ethnic group seeks to realize its right to self determination, in a manner which might interfere with the majority-minority ratio in that country and undermine its stability. Israel also argues that the fact that the Palestinian refugees have not been rehabilitated or absorbed in other countries ensues from the refusal to recognize the State of Israel, and there is no justification for rewarding that refusal with the imposition of an obligation on Israel to absorb the refugees.

Israel therefore vehemently objects to three types of arrangements: (a) political arrangements between it, the Palestinians and the Arab states which recognize the right of return; (b) arrangements which enable the Palestinians themselves to choose whether or not to be absorbed within the borders of the State of Israel; (c) arrangements which permit extensive entry of such refugees into Israel.

Unlike many other matters, the official Israeli position on the issue of return is held by a considerable majority of the Israeli political leadership. This issue has even been the subject of special legislation in the Knesset.<sup>1</sup> Nonetheless, it would seem that Israeli negotiators are not sufficiently aware of the historical, factual, legal and political background of the issue. A similar lack of awareness is apparent among the Israeli public, especially regarding the central role which the claim to return plays among the Arabs in general and the Palestinian population in particular. The aim of this position paper is to supply this information so that the discussion of the issue of the correct policy which Israel should take toward the Palestinian claim to return will be solidly based and well informed.

*The first chapter* reviews the factual background of the discussion regarding the right to return of the Palestinian refugees and their descendants. This chapter deals with three issues: The first issue is the historical background of the Palestinian refugee problem created by the acts of hostility and war

launched following the refusal of the Palestinians and the Arab states to accept the UN Plan of November 29, 1947 to divide Mandatory Palestine (*Filastin* in Arabic) into two states: Jewish and Arab. The acts of violence and the victory of the Jews in the war led on the one hand to the establishment of the Jewish state—Israel—on a greater portion of territory than had been designated for it under the Partition Plan, and on the other hand to the annexation by Jordan of the areas allocated to the Arab state (“the West Bank”) or to their transfer to Egyptian control (“the Gaza Strip”). Thus, only the Jews exercised their right to self-determination. Many of the Palestinian inhabitants of the territory of the State of Israel—600,000–700,000 people—fled or were deported from it. A considerable number became refugees, who reside to this day in the West Bank, the Gaza Strip or in the neighboring Arab states.

The second part of the chapter describes the special temporary framework created to help the Palestinian refugees in accordance with UN resolutions, namely, the UN Relief and Works Agency for Palestine Refugees in the Near East—UNRWA. This framework distinguishes and isolates the Palestinian refugees from all the other refugees worldwide who are protected by the UN High Commission for Refugees. The aim of the UN High Commission for Refugees is to rehabilitate the refugees in a variety of different ways, including by returning them to their country but also through absorption in other countries. In contrast, UNRWA has become a huge organization functioning to this day as a relief agency, and it refrains from rehabilitating the refugees as a result of political pressure exerted by the bloc of Arab states.

The third issue in this chapter concerns the question who is a refugee according to the UNRWA documents. The definition given there is broader than that given under the general laws of refugees as set out in the Refugees Convention and in the basic documents of the UN High Commission for Refugees. In contrast to the general law, the UNRWA definition includes persons who left the territory of the State of Israel even if they eventually received citizenship in the country of refuge, as well as their descendants.

This broad definition has led to the situation where today 4,718,899 people are registered as refugees with UNRWA, some of whom hold citizenship of other countries. In addition, there are Palestinians who are not registered with UNRWA but who meet the general definition of refugees from Palestine. These people too see themselves as refugees who are entitled to return to the territory of the State of Israel.

*Chapter Two* analyzes the international law relevant to the Palestinian claim that refugees and their descendants have been vested with a legal right to “return” and settle in the territory of the State of Israel. The reference is to the territory of the state in the pre-1967 borders. The chapter presents general criteria for identifying norms of international law and determining rights in accordance therewith. It also presents the sources of international law relevant to the issue of refugees in general and the Palestinian refugees in particular. The chapter directly examines these sources and discusses the main arguments adduced in supporting the claim that the right of return is recognized by customary international law, whether the subjects are Palestinians or members of other nationalities who fled or were deported from their homes in similar circumstances.

Initially, an examination is conducted of UN resolutions which deal directly with the matter of the Palestinians and relate to the issue of return, chief of which is Resolution 194(III). The conclusion drawn from this examination is that these instruments do not support a legal right to the return of the Palestinian refugees to the territory of the State of Israel. In the second stage an examination is made of general international conventions which do not deal directly with the question of the Palestinians but rather address human rights, nationality laws, refugee laws and humanitarian law. An analysis of the relevant provisions of these legal sources, especially in view of the situation prevailing when these instruments were adopted and their original purpose, also leads to the conclusion that they do not support the legal right of the Palestinian refugees to return to the territory of the State of Israel.

*The third chapter* considers the question whether in ethnic disputes which have erupted over the last hundred years, the return of members of one group who escaped or fled from their homes has formed a component of the solution to the dispute. In most of the cases the answer is “no.” Between the beginning of the twentieth century and the end of the Cold War an exchange of populations was seen as a legitimate measure, which was likely to contribute significantly to the stabilization of the states suffering from ethnic tensions. In other circumstances when civilians belonging to minority groups in the country of origin fled or departed for a state of refuge in which they subsequently became the majority, the state of refuge did not demand their return to their country of origin. The state of refuge absorbed the refugees and concurrently transferred citizens belonging to ethnic minorities to the country with which they were identified. This practice sought to create geographical regions characterized by ethnic uniformity and thereby contribute to the amelioration of tensions or the resolution of the dispute.

Following the conclusion of the Cold War, international law prohibited the exchange of populations undertaken to create homogenous regions. Return was adopted as the preferred solution for the problems of refugees, but in many instances this practice encountered difficulties and sometimes was not implemented at all. This was the case in former Yugoslavia and in Cyprus. It follows that now as well, practical experience shows that return is not the preferred solution for resolving ethnic disputes. The reason for this is that the return of refugees to the territory of the state, while ethnic tensions continue to exist, may in fact ignite the spark of war rather than douse it. Where many years have passed since the creation of the refugee problem, restoring the former situation would *a fortiori* lead to numerous severe problems and in many cases would be almost impossible to carry out.

*In the final chapter* we deal with the manner in which the State of Israel is required to deal with the Palestinian claim to return both within the framework

of political agreements between Israel and the Palestinian Authority and within the framework of possible measures which might be taken in the absence of such agreements.

Undoubtedly, it is essential to find a humane and politically suitable response to the issue of the refugees. This is particularly true of communities of refugees living in difficult conditions in countries that are not prepared to absorb or naturalize them or enable them to become appropriately integrated socially and economically. One manifest example of this is the community of Palestinian refugees in Lebanon. It is also essential for Israel—its leaders and Jewish population—to understand the strength of the dream of return embraced within the Palestinian identity and the sense of injustice which affects a considerable proportion of the Palestinian people.

At the same time, it must be understood that recognition of return as a right may, sooner or later, lead to the broad implementation of Palestinian return to the State of Israel. Such return, certainly for the foreseeable future, while the two communities are engulfed by mutual animosity and suspicion, may lead to further tension and instability. Mass return of the refugees may also undermine the existence of a Jewish majority in the State of Israel and thereby endanger the continued existence of the state in which the Jewish people exercises its own right to national self-determination.

In view of the implications of the discourse of rights and in view of the analysis offered here, whereby international law itself does not recognize the right of return, Israel must refrain from recognizing this right in domestic legislation or in declarations or international agreements. In our opinion, Israel does not have to volunteer such recognition. Israel also does not have to acknowledge sole responsibility for the creation of the problem. Nothing in the analysis offered here, however, is inconsistent with declarations which recognize the fact that the Palestinians, as individuals and as a group, have been caused enormous suffering as a result of being displaced from their homes, nor does it negate support for a broad international and Israeli attempt to help to rehabilitate them.

## *Chapter One*

# **The Problem of the Palestinian Refugees: Basic Facts**

### **A. The background to the creation of the Palestinian refugee problem**

The “right of return” claimed by the Palestinians is an outcome of the Palestinian refugee problem which arose following the War of Independence waged in Palestine from the end of 1947 to the beginning of 1949. On November 29, 1947, the UN General Assembly adopted Resolution 181 regarding the termination of the British Mandate and the partition of Mandatory Palestine into two states—Jewish and Arab—on the basis of the nationality of their population.<sup>2</sup> The Arab inhabitants of the land and the Arab states, apart from King Abdullah of Jordan, rejected the partition plan. As long as the British Mandate continued, their rejection of the plan was expressed by a violent struggle within the area of western Palestine. Upon the termination of the Mandate, the leadership of the Jewish Yishuv declared the establishment of the State of Israel, and the armed forces of the Arab states invaded it. These events led to the departure of hundreds of thousands of Arabs from the territory of Mandatory Palestine occupied by the Jews. UNRWA has estimated the number of people who left at about 700,000. Other estimates are 500,000-900,000.<sup>3</sup> About 150,000 Arabs remained within the boundaries of the State of Israel. In the area of Palestine which remained under Arab control, not a single Jew stayed behind. All the Jewish inhabitants fled, or were killed or captured.

The reasons for the departure of the Palestinian Arab inhabitants of Palestine are disputed: there are those who argue that the refugees fled because they feared the fighting or heeded the calls of local leaders or the leaders of the neighboring Arab states to leave their homes in order not to

interfere with the fighting, and intended to return home following victory. In contrast, the Palestinians claim that these people were expelled by force from the areas controlled by the State of Israel. There are even those who claim that deportations were carried out on the basis of a predetermined plan. Today, the detailed description given by Benny Morris is commonly accepted, to the effect that some of the refugees indeed fled and others were deported, even though these acts of deportation were not part of a preordained plan.<sup>4</sup>

Most of the refugees settled in the neighboring Arab states: Jordan (including the West Bank), Lebanon, Syria and the Gaza Strip which was under Egyptian control. Some of the refugees became stateless as they had left the territory of the British Mandate which now ceased to exist, but did not receive citizenship of the host state. Others, particularly in Jordan, received the citizenship of the absorbing state.<sup>5</sup> The 1948 refugees were joined in 1967 by the refugees of the Six Day War,<sup>6</sup> most of whom moved to Jordan.

An important element of the Palestinian refugee issue today is not only the question of what caused the refugees to leave their homes, but also why they were not allowed to return to their homes after the fighting died down. There are those who base both Israel's responsibility for resolving the problem today and the right of return asserted by the Palestinians on the fact that Israel prevented most of the Palestinians from returning to their homes following the end of the war and did not grant them citizenship or residency in the country. Israel did this by carrying out a population census at the end of the war: The law specified that rights to residence and citizenship in Israel would only be given on the basis of presence within the territory of the State of Israel on the determinative date of the census.<sup>7</sup>

The issue of the Palestinian refugees was discussed on many occasions in the UN institutions. The UN feels a special responsibility for events in the territory that had been formerly Mandatory Palestine by reason of the fact that the violent events stemmed from its own decisions regarding the termination of the British Mandate and the partition of the territory into

a Jewish and an Arab state. The Israeli-Arab dispute, and in particular the Palestinian issue, therefore drew great attention on the part of the UN; this was reflected in numerous decisions adopted by the General Assembly and the Security Council over the years.

The principal resolution on which the Palestinians base their claim to a right of return is Resolution 194(III) which was adopted by the UN General Assembly on December 11, 1948, and in particular Article 11 therein, which deals with the issue of refugees.<sup>8</sup> Here we should note that Article 11 of the resolution indeed stated that the refugees interested in returning to their homes and living in peace with their neighbors would be permitted to do so as soon as practicable; however, we should recall that alongside this article the resolution contained additional provisions which dealt with a range of matters relating to the end of the dispute between Israel and the Arab states, underlying which was the notion of reconciliation.<sup>9</sup> For our purposes we should state that the discussion regarding the return of the refugees was part of the discussion regarding the end of the state of war and hostilities between the parties and that it was understood that return would form part of a process which would include the institution of peaceful relations between the parties and recognition of the Jewish state by its Arab neighbors. Resolution 194(III) led to the establishment of a mechanism for resolving the dispute although its activities did not produce a settlement.

The Arab states voted against the resolution which, as noted, sought to chart a path for ending the dispute by means of the establishment of a conciliation committee, because they objected to the very existence of the state and would not deal with the question what would be its borders or what would be the status of Jerusalem. According to their perspective, accepting the resolution might be interpreted as recognition of the State of Israel.<sup>10</sup> The State of Israel did not participate in the vote because it had not yet been admitted as a member of the UN. The Palestinians base the claim that Israel is bound by Resolution 194(III) on Resolution 273(III) of the UN General Assembly of May 11, 1949 which deals with the admission of Israel into the UN. The latter resolution states as follows:

[The General Assembly] Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representative of the Government of Israel before the Ad Hoc Political Committee in respect of the implementation of the said resolutions,<sup>11</sup>

An examination of the language of Resolution 273(III) shows that it does not make the admission of Israel to the UN contingent upon an undertaking to comply with Resolutions 181 and 194(III), but refers to the statements of the Israeli representative in that connection. Accordingly, it is possible to regard the statements made by Abba Eban, Israel's representative in the discussions concerning Israel's admission into the UN, before the Ad Hoc Political Committee, as a legitimate reading of the UN General Assembly's own interpretation of these decisions. A perusal of his remarks shows that from the beginning Israel indeed saw itself as bound by the Partition Plan; however, the Arab opposition to the plan led to a change of circumstances which in turn required changes to be made to the original plan. The State of Israel was committed to reaching a peace arrangement which would reflect the spirit of the Partition Plan in the light of the change of circumstances. Accordingly, the debate concerning the fate of the refugees would only take place within the framework of a peace agreement. Within the framework of this agreement the State of Israel did not exclude the possibility of return; however, it believed that the refugee issue was a political problem which had to be resolved in discussions between states. According to the State of Israel, return was not necessarily the only solution to the problem; another practical solution was settlement of the refugees in the neighboring countries.<sup>12</sup> In any event, Israel did not think it proper to permit the return of refugees so long as a political agreement regarding future relations between Israel and its neighbors had not been reached. Even at this early stage, Israel insisted that this issue was one that had to be negotiated, and did not belong within the discourse of rights.

It should also be recalled that Resolution 194(III) was preceded by the UN decision of May 14, 1948 regarding the appointment of a UN mediator to deal with the Israeli-Palestinian dispute.<sup>13</sup> Swedish Count Folke Bernadotte was appointed to this position. Although from the beginning the mediator's principal effort was devoted to attempting to achieve a ceasefire between the parties in accordance with his UN mandate, he also dealt with the problem of the Palestinian refugees. In a progress report submitted by Bernadotte on September 16, 1948 he proposed that the right of the refugees to return to their homes had to be affirmed despite the opposition of the government of Israel. At the same time, Bernadotte did not ignore the changes which had taken place within the State of Israel and stated that “[i]t must not be supposed, however, that the establishment of the right of refugees to return to their former homes provides a solution to the problem. The vast majority of the refugees may no longer have homes to return to and their resettlement in the State of Israel presents an economic and social problem of special complexity.”<sup>14</sup> A day after the submission of the report Bernadotte was murdered in Jerusalem by *Lechi* (Stern Group) fighters.<sup>15</sup> Three months later, the essential points of Bernadotte's recommendations were adopted in Resolution 194(III); however, Article 11 of the resolution which relates to the return of the refugees does not describe it as a right, contrary to Bernadotte's recommendation. This is of great importance. We shall deal with this matter in the next chapter of this position paper, but we would note here that Israel indeed refused to allow the refugees to return to its territory in the absence of peace agreements between it and the Arab countries. The refusal of the Arab countries to sign peace agreements with Israel meant that only a long-term ceasefire was achieved. Likewise, in the Rhodes ceasefire talks Israel agreed, within the framework of a peace agreement, to accept only about 100,000 refugees into its territory. However, this commitment was not fulfilled because the talks did not generate binding agreements. It clearly follows from the Israeli proposal that even at this time Israel took the position that the Palestinians had no “right” to return, that this was an issue subject to political

negotiations and that the peace arrangements would not include the full or even significant return of refugees to the territory of the state.

### **B. The UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)**

The Second World War and its aftermath generated a great wave of refugees and displaced persons in Europe as well as in other parts of the world. It therefore became necessary to create institutions which would provide comprehensive aid to the refugees. From the early 1940s, a number of international organizations were created and charged with the task of dealing with refugee problems. On December 3, 1949 the UN General Assembly decided on the establishment of the UN High Commission for Refugees (the High Commission) which was to coordinate the handling of refugees worldwide.<sup>16</sup> The High Commission was indeed established on December 14, 1950.<sup>17</sup> The aims of the High Commission are based on the Refugees Conventions of 1933 and 1938 and the Protocol to these Conventions of 1939.<sup>18</sup> As of the beginning of 2009, the High Commission has been responsible for about 10.5 million refugees around the world.<sup>19</sup> It should be noted that the High Commission helps additional populations which are not included within the definition of refugees such as displaced persons who were moved from their homes within their own countries as well as former refugees who have returned to their countries of origin. In the beginning of 2009 the High Commission had about 32 million refugees and non-refugees under its protection.<sup>20</sup> At that time the High Commission employed 6,650 employees, of whom 4,900 were locals of the countries in which the aid was being given. The High Commission's budget for that year was about 2 billion dollars. Of the people helped by the High Commission, 50% lived in Asia and 20% in Africa.<sup>21</sup>

Even though the problem of the Palestinians was created after other refugee problems and after the establishment of these international entities,

the Palestinian refugees are not protected by the High Commission but by a special body: the UN Relief and Works Agency for Palestine Refugees in the Near East (hereinafter: UNRWA).<sup>22</sup> A refugee under the protection of the High Commission is subject to the Convention Relating to the Status of Refugees of 1951 (hereafter: the Refugees Convention).<sup>23</sup> Article 1D of the Refugees Convention states that the Convention shall not apply to persons who are at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commission for Refugees,<sup>24</sup> and Article 7 of the Statute of the Office of the High Commission provides that the High Commission will not assist refugees being dealt with by other organizations of the UN.<sup>25</sup> As the fate of the Palestinian refugees is within the responsibility of UNRWA, these refugees are not dealt with by the High Commission for Refugees and therefore, in general, the Refugees Convention also does not apply to them. The Convention only applies to Palestinian refugees who fled to regions which fall outside the responsibility of UNRWA.<sup>26</sup> The area of activity of UNRWA is limited to the Near East: Jordan, Syria, Lebanon, the Gaza Strip and the West Bank.<sup>27</sup>

The *travaux préparatoires* of the High Commission and of the Refugees Convention disclose the reasons why it was decided that the population of Palestinian refugees would be handled by a separate body of the UN and be directly subordinate to it, and not be handled by the High Commission which provides protection and assistance to all other refugees in the world. The documents disclose the huge influence exerted by the delegates of the Arab countries on the wording of the Statute of the High Commission and the Refugees Convention even though ultimately some of these countries did not ratify the Convention. From the statements of the delegates of the Arab countries in the committees preparing the Refugees Convention and the Statute of the High Commission, particularly those of Saudi Arabia, Lebanon and Egypt, it appears that the reasons for their non-accession to the Convention were political. These states feared that the inclusion of the Palestinian refugees in the general definition of “refugees” would lead to their being engulfed by the other refugees in the world and consequently

marginalized. The Arab states were interested in obtaining external help for the refugees until the time would come when the only solution possible from their point of view was achieved—return. They opposed the solution of resettlement in their territory. Accepting a definition which would include the Palestinian refugees among the entire body of refugees worldwide was interpreted by them as a waiver of their claim that return was the sole solution.<sup>28</sup> According to Saudi Arabia, Lebanon and Egypt, it was necessary to distinguish between the majority of cases of refugees in the world which had not been caused directly by the UN and the Palestinian refugee problem which, in their view, stemmed directly from Resolution 181 of the UN General Assembly. Accordingly, they were of the view that the UN's responsibility for the fate of the Palestinian refugees meant that it was under an obligation to establish a separate independent UN organization which would deal only with them.<sup>29</sup> This distinction also allowed limitations to be imposed on UNRWA's mandate to provide temporary assistance to the refugees as opposed to the mandate given to the UN High Commission to bring about their rehabilitation.

UNRWA was established on December 8, 1949 by virtue of UN General Assembly Resolution 302(IV), a few days after the decision had been taken to establish the High Commission for Refugees.<sup>30</sup> In the spring of 1950 UNRWA began its work and since then it has been operating under a mandate which is renewed by the General Assembly every three years. The mandate was last extended on June 30, 2008.

The decision to establish UNRWA discloses that the goal was to establish a body which would provide temporary assistance and complete its functions toward the end of 1950.<sup>31</sup> The Relief Agency saw UNRWA's main function as providing direct assistance to the refugees and preparing infrastructure which would help to strengthen the economy of the absorbing countries so that the refugees would be able to become integrated there and independent, when UNRWA ended its work.<sup>32</sup>

However, the majority of the refugees and Arab states did not cooperate with the Agency to achieve this aim, as they objected to a solution which

preferred integration in their countries of residence and instead insisted on the return of the refugees to Israel. In general, the Arab states did not absorb the refugees in their domestic work markets and even in its first year UNRWA reported that the list of refugees being supported by it had not diminished. UNRWA did not criticize the refugees or the Arab states for their lack of cooperation in resettling the refugees in those states; instead, over the years it was transformed from a body originally designed, as noted, to resettle the refugees, reintegrate them into society and provide temporary aid, to a body which acts as a quasi government and which is occupied with developing health, education, urban planning services and the like. This was the work plan of UNRWA from inception and until the Six Day War as well as subsequently.<sup>33</sup> There is no dispute that in practice UNRWA has become a huge welfare agency which by its policies has extended and deepened the refugees' dependence on the benefits and services it provides. In this way, UNRWA has perpetuated the refugee problem and entrenched the idea of return.<sup>34</sup>

According to UNRWA figures, the number of Palestinian refugees registered on June 30, 2009 was about 4.7 million. The official reports of UNRWA show that at the beginning of 2009 the organization employed 29,000 persons, 99% of whom were local Palestinian residents, primarily refugees.<sup>35</sup> The budget of the organization for 2008 was about \$542 million; however, in practice the budget is double that figure, as the organization also receives funds and products by way of direct donations.<sup>36</sup>

Compared to the budget of the High Commission, we can see that UNRWA's budget per person is considerably higher. On the assumption that the High Commission assists about 32 million persons with a budget of about 2 billion dollars,<sup>37</sup> the budget per person supported by UNRWA is approximately triple that designed to help a person supported by the High Commission.

Likewise, the number of persons employed by UNRWA—in absolute and relative terms—is much higher than the number of persons employed by the High Commission. UNRWA employs 29,000 workers who deal with

about 4.7 million Palestinian refugees<sup>38</sup>—*i.e.*, a ratio of one worker per 160 refugees. In contrast, the High Commission only employs 6,650 workers who deal with 32 million persons<sup>39</sup>—*i.e.*, one worker per 4,800 refugees. The ratio between the number of employees and the number of refugees is 30 times higher in UNRWA than in the High Commission.

### C. Who is a refugee?

An additional important distinction between UNRWA and the Refugees Convention and the High Commission is the definition given to the term “refugee” in their respective basic documents. The definition of who is a refugee is important for a number of reasons. From a legal point of view, this definition determines the entitlement to aid from the High Commission or UNRWA. In connection with the Palestinian refugees this definition may also be relevant to the issue of return or to the issue of compensation to which the refugees may be entitled. This definition is particularly important for determining their numbers. It also influences issues of self-image and identity, including feelings of injustice or victimization. It is important to note that the definitions of key concepts may be dependent on their contexts and rationale. It is possible that the underlying logic of the concept “refugee” will be perceived differently in different contexts. We shall review here a number of these definitions in international documents and consider the differences between them.

#### 1. *The Refugees Convention*

The Refugees Convention 1951 defines a “refugee” in Chapter 1, Article 1 A. (2) as follows:

Any person who... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of

his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>40</sup>

The original definition of a refugee in Chapter I of the Convention was limited in time and geographical application: protection of refugees in Europe following the Second World War. According to a literal interpretation of the Convention, in the light of the historical context in which it was formulated following the Second World War, a person persecuted for economic or cultural reasons is not transformed into a refugee; a refugee is only one whose civil and political rights have been violated. Likewise, the definition does not apply to a person fleeing armed conflict within his state or from a dispute being conducted between his state and another state. Accordingly, the Convention does not see a person who flees his country because of war as a refugee. Subsequently, the definition was expanded by means of a 1967 protocol to the Convention which removed the limitation of time and place from the definition of a refugee,<sup>41</sup> and through a purposive interpretation of the Convention which led to an expansion of the interpretation given to the term “refugee.” The legislation and case law in various countries also extended the protection afforded by the Convention to persons persecuted for reasons not listed in the Convention—for example, victims of discrimination regarding access to medical treatment, or persons whose economic or social rights have been seriously harmed because, for example, they are unable to obtain education for their children.<sup>42</sup>

We should note that the Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>43</sup> expanded the definition so as to also include persons who were compelled to leave their country of origin because of external aggression, occupation, foreign domination or events seriously disturbing public order.<sup>44</sup> Likewise, the Cartagena Declaration on Refugees, which was adopted in 1984 by the countries of Latin America, expanded the definition given by the Convention on Refugees to the term “refugees” so as to also include persons who flee their countries because their lives, safety or freedom have been threatened by generalized

violence, foreign aggression, internal conflicts or massive violation of human rights.<sup>45</sup>

As noted, the 1951 Refugees Convention only applies to refugees under the protection of the High Commission and therefore does not apply to most of the Palestinian refugees dealt with by UNRWA. Only Palestinians who meet the definition set out in Chapter 1 in the Refugees Convention and who are outside the area of operation of UNRWA, will receive the aid of the High Commission.<sup>46</sup> However, an examination of the provisions of the Convention reveals that the Palestinian refugees do not meet the criteria set out in the definition of a refugee in the Convention, as the individuals concerned did not flee because of persecution for the reasons listed in Chapter 1. The Palestinians did not leave Israel because of personal persecution for the reasons listed in Chapter 1 but as a group because of a situation of war. Some of them wish to return, but their return has been prevented for reasons not listed in the Convention. At the same time we saw that notwithstanding the narrow definition in the Refugees Convention, in practice there is a tendency to extend the scope of its applicability. This is reflected in the fact that the UN High Commission for Refugees, which is subject to the definition given in the Refugees Convention, has also extended it to war refugees.<sup>47</sup> For these reasons our working hypothesis here is that it is appropriate to discuss most Palestinians who left Israel during the war and soon after it as if they are refugees under international law.

## *2. Definition of a refugee in UNRWA documents*

The UNRWA definition of a “refugee” has never been adopted in a formal decision of the UN General Assembly. Its source lies in UNRWA’s documents themselves.<sup>48</sup> The definition of a refugee in UNRWA documents is much broader than the definition in the Refugees Convention. UNRWA has always insisted that its definition is a practical one designed to allow it to fulfill the specific goals which it has set—*i.e.*, to determine who is entitled to receive its assistance. This definition is not binding from a legal point of view and, according to UNRWA, it is not intended to determine broader

issues, such as the number of persons entitled to return or to compensation.<sup>49</sup>

The definition of a refugee in UNRWA documents has undergone a number of changes. In 1951, shortly after UNRWA was established, the definition determined who was entitled to receive help—*i.e.*, who met the definition of a Palestinian refugee. Initially, it declared that a refugee was a needy person who as a result of the war in Palestine had lost his home and means of livelihood.<sup>50</sup> At the end of that year the definition was limited to some extent and it was held that a refugee was a needy person “normally resident in Palestine” who had lost his home and his livelihood as a result of the hostilities.<sup>51</sup> The purpose of the introduction of the words “normally resident in Palestine” was to remove from the list of recipients of benefits a group of Lebanese who had worked in Mandatory Palestine and lived there temporarily but following the events of 1948 had found refuge in Lebanon. As a result of the amendment these people were no longer considered UNRWA refugees.<sup>52</sup>

In 1952, the wording was changed yet again. On the one hand, the definition of a refugee was expanded so that it no longer included the condition of neediness while, on the other hand, it was restricted so as to only include permanent residents of Palestine. According to this definition, a refugee was regarded as someone who had normally resided in Palestine for at least two years prior to the 1948 war, and as a result of the war had lost his home and means of livelihood. All these people could register as refugees and they had no need to prove neediness in order to obtain this status. Likewise, the guidelines set by UNRWA in 1993 regarding the registration of refugees did not require neediness to be shown as a precondition for registration.

UNRWA also defines those entitled to obtain its welfare benefits. Not all refugees are entitled to receive these benefits but only those refugees who meet all the following criteria: (a) neediness; (b) residence in one of the countries in which UNRWA has been providing relief since the conflict began; (c) registration in UNRWA documents for the purpose of receiving aid.<sup>53</sup> The principal difference in the definition since 1952 has therefore

been the removal of the requirement of neediness from the definition of “refugee” and its attachment solely to the criteria for receiving welfare benefits from UNRWA; it may be assumed that the vast majority of these people are also included within the definition of a refugee under the Refugees Convention.

Over the years UNRWA has focused on the provision of quasi-governmental services, in the areas of education and health, city planning and welfare services, and not on the provision of welfare to needy refugees.<sup>54</sup> The entitlement to the broad services supplied by UNRWA is not dependent on neediness. Likewise, the requirement that the person registered as a refugee be resident since 1948 in one of the countries in which UNRWA provides welfare has been removed.<sup>55</sup> This change has also enabled the registration of those who in the past had their registration invalidated because they did not remain in UNRWA’s area of operations. Today, a person registered as a refugee is regarded as protected by UNRWA and his neediness or place of residence are not checked at all.<sup>56</sup> According to the present definition of UNRWA, Palestinian refugees are people and their descendants who lived in Mandatory Palestine between June 1946 and May 1948 and lost both their homes and their livelihoods as a result of the war between the Arab countries and Israel.<sup>57</sup>

It should be noted that the definition of a refugee according to UNRWA also applies to the descendants of the refugees of 1948.<sup>58</sup> Initially, the application of the definition was confined solely to descendants of the father (the descendants of female refugees who married persons who were not refugees were not considered refugees). However, as a result of criticism of the discrimination being shown to women, the definition was expanded so as to also include descendants in the female line.<sup>59</sup>

As a result of these measures expanding the definition, the number of Palestinian refugees registered today with UNRWA is 4,718,899, with the following distribution:

## Return of Palestinian Refugees to the State of Israel

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Area of Activity	Official Refugee Camps	Registered Refugees in Refugee Camps	Registered Refugees
Jordan	10	339,668	1,967,414
Lebanon	12	224,194	421,993
Syria	9	126,453	467,417
West Bank	19	195,770	771,143
Gaza Strip	8	499,231	1,090,932
Total	58	1,385,316	4,718,899

From: [http://www.un.org/unrwa/hebrew/in\\_numbers/june09.pdf](http://www.un.org/unrwa/hebrew/in_numbers/june09.pdf)

Apart from the registered refugees, UNRWA's working assumption is that there are two additional groups of people who may be deemed to be Palestinian refugees even though they are not registered as such. The first group includes Palestinians and their descendants who live in countries in which UNRWA operates but who are not registered in its documents. According to a survey carried out in the West Bank and in the Gaza Strip, this group numbers about 36,000 Palestinians in these territories.<sup>60</sup> The second group refers to Palestinians permanently living in other countries. It is estimated that this group comprises about 5 million people, in the words of the UNRWA Commissioner:

The population of four and a half million in UNRWA's records does not account for those refugees within the region but not registered with UNRWA, or the estimated five million refugees who have made their homes elsewhere in the world...<sup>61</sup>

It would seem that here the UNRWA Commissioner has used the term "refugee" in its customary sense, as distinct from the meaning given to this term in the Refugees Convention. As noted, the Convention does not define someone who has received citizenship in his state of residence as a refugee nor does it regard a refugee's descendants as refugees. This statement therefore shows the dangers inherent in the multiplicity of definitions of a

refugee in this context, and the tendency to apply refugee laws also to those whose life circumstances do not justify it.

This phenomenon is also reflected in the fact that the number of Palestinian refugees according to UNRWA records is huge even in comparison to the total number of refugees in the world (excluding the Palestinians) who are under the protection of the High Commission for Refugees. According to UNRWA figures, the number of Palestinian refugees is equivalent to almost half the number of refugees in the entire world dealt with by the High Commission for Refugees: about 4.7 million Palestinian refugees dealt with by UNRWA compared to 10.5 million refugees dealt with by the High Commission.

As noted, the huge proportion of Palestinian refugees compared to the entire refugee population in the world is explained by comparing the definition of the term “refugee” given by UNRWA to that given by the High Commission which is based on the Refugees Convention and the Protocol to the Convention. This comparison reveals three principal distinctions:

The first distinction relates to the *descendants*. The definition given by the High Commission does not regard the descendants of refugees as refugees, whereas the UNRWA definition includes them and even expands the definition to the descendants of women refugees who have married persons who are not refugees.

The second distinction relates to the *refugees who received citizenship in their countries of residence*. The High Commission, relying on the Refugees Convention, excludes from its protection those persons who received citizenship in their countries of residence, whereas UNRWA has stated in its definition that obtaining citizenship of the absorbing state does not terminate a person’s refugee status. It follows therefore that the Palestinian refugees in Jordan and some of the refugees in Syria and Lebanon who have received citizenship are included in the definition of refugees.

The third distinction is derived from the *deeds of the refugees*. According to the Statute of the Office of the High Commission of Refugees, a refugee who has committed war crimes or crimes against humanity is removed from

the status of refugee. If this restriction would be applied to UNRWA refugees, Palestinian terrorists would lose their refugee status.

It is difficult to assess what would be the number of Palestinian refugees (all of whom, according to the Palestinian view, are candidates for return to Israel) if use was made of the definition applied in the Refugees Convention and the High Commission guidelines; however, it is clear that the figure would not be higher than the number of refugees who left at the time of the war. If we deduct the number of refugees who have died in the interim period and those who have received citizenship in other countries (we should note that the majority of refugees who settled in Jordan received Jordanian citizenship at the time), it is clear that the figure is considerably less than the 700,000 Palestinian refugees who left the territory of the State of Israel. The fact that UNRWA today handles about 5 million Palestinians clearly illustrates the discrepancies ensuing from the different definitions.

#### **D. Conclusion: The unique characteristics of the Palestinian refugee issue**

The Palestinian refugee issue has unique characteristics compared to cases of other refugees and they reflect the fact that this group was expressly excluded from the ordinary structures dealing with refugees:

- 1. Definition of a Palestinian refugee:* The definition of a Palestinian refugee is important for determining their numbers and may be relevant to the issues of return and compensation of the refugees. The definition is highly problematic and leads to the unreasonable conclusion whereby today there are about 10 million Palestinian refugees. This result ensues from the fact that inclusion in the group of Palestinian refugees is based both on the broad definition in the UNRWA documents and on the more elastic definition given to the term “refugee” in general in the Refugees Convention of 1951.
- 2. Prolongation of refugee status:* The Palestinian refugees have retained the status of refugees, and their descendants have joined them, irrespective

of the individuals' living conditions, the degree to which they have integrated in their places of residence or their legal status in the absorbing countries. The Palestinian refugee situation has now continued for more than sixty years, and this has created a situation of multi-generational refugees over four generations. The prolongation of the refugee period may have contradictory results. On one hand, it generates more opportunities for integration into society and the economy and for absorption into the host state. On the other hand, leverage is created for strengthening the sense of nationalism and community solidarity accompanied by feelings of injustice and a greater willingness to struggle against that perceived injustice in order to rectify it. These feelings are intensified in foreign environments and in the light of the political circumstances. This is particularly true where the absorbing states do not allow full integration of the refugees, as has occurred in some cases in relation to the Palestinian refugees. As we have stated, one of the principal reasons for this situation is the political desire of the Arab states and the Palestinians to preserve, expand and perpetuate the refugee problem in order to avoid the need to recognize the State of Israel as a Jewish state. For this reason, the Palestinian refugees were excluded by placing them under the responsibility of UNRWA. UNRWA's actions have played a role in strengthening this trend by expanding the definition of the Palestinian refugee and focusing on quasi-governmental activities, which have prolonged the refugees' dependence on its services and have impaired their ability to develop independent lives in the countries of refuge. For the sake of accuracy, it should be noted that in some of their places of residence, particularly in the West Bank and Jordan, there is no significant difference between the living conditions of the Palestinian refugees and the living conditions of the general population among whom they live. Nonetheless, these people continue to be included within the definition of Palestinian refugees.

3. *The body providing protection to the refugees:* The majority of Palestinian refugees are registered with UNRWA and are subject to its exclusive care.

Accordingly they are not subject to the protection of the High Commission for Refugees, and the Refugees Convention does not apply to them. UNRWA's budget and the number of its employees are particularly high in comparison to the High Commission for Refugees, which contends with all the other refugee cases in the world. A significant proportion of UNRWA employees are themselves defined as Palestinian refugees, but the fact that they are employed to deal with refugees does not change their status. Clearly, this situation is illogical and incompatible with the substantive definition of a refugee.

4. *The political circumstances:* Many refugee cases around the world are the outcome of the flight of citizens from an existing state which continues to exist even after they have fled. However, the events which led to the creation of the Palestinian refugee problem developed against a different background. The Palestinian refugees fled or were deported from Mandatory Palestine during the course of a dispute which developed around the decision to establish two states in the region—Jewish and Arab. With the end of the Mandate period, their Mandatory citizenship expired, and in pursuance of its own laws the State of Israel did not grant them citizenship because they were not present within Israel's territory but, in many cases, were living in enemy states. It should be recalled that these people were not citizens of the State of Israel who had become refugees and now sought to return to their country of nationality, but refugees who had never been citizens of the state. The state, in which most of these people were due to live, did not exist at the time they fled, and they now sought to return to the territory of a state which had never been theirs.<sup>62</sup>

Moreover, this point is not merely a quasi-formal one but one which goes to the root of the history of the dispute. At the end of the Second World War about 1.2 million Arabs and about 600,000 Jews lived in the territory of the Mandate. The principle of partition was based on the desire to establish two national homes, in each of which one of the peoples—Jews or Arab-Palestinians—would have a majority while the minority, consisting of members of the second ethnic group who chose

to stay there, would enjoy full civil and political rights. The Partition Plan stated that the Jewish state would receive about 55% of the territory of Mandatory Palestine and in that territory Arabs were supposed to make up about 40% of the population. At that time only a few thousand Jews lived in the territory in which the Arab state was supposed to be established. The assumption was that the Jewish state would take measures to swiftly bring in many Jews, so that the small Jewish majority would grow and stabilize. However, as a result of the war which followed the refusal of the Arabs to accept the Partition Plan, Israel retained about 78% of the area of the Mandate. The full return of the Arab refugees to this territory would have immediately created an Arab majority in that territory and thereby undermined the rationale of the Partition Plan itself.

**5. Demography:** The number of Palestinians refugees according to UNRWA records in 2008 was about 4.7 million.<sup>63</sup> According to reports of the UN High Commission for Refugees, the number of all other refugees in the world stands at 10.5 million.<sup>64</sup> The Palestinians are therefore the largest group of refugees in the world.

The ratio of refugees to the entire Palestinian population is huge. The number of Palestinians in the world stands at 10 million, and therefore half the Palestinians in the world are defined by UNRWA as refugees.<sup>65</sup> Likewise, among the approximately 5 million Palestinians who are not registered with UNRWA, because they permanently reside outside its area of operation or because they live in its area of operation but have not registered with UNRWA, the majority see themselves as belonging to the group of Palestinian refugees. It is clear, therefore, that the issue of Palestinian refugees is not merely a humanitarian one. It has a far reaching practical political significance which influences the characteristics of the possible solution to the Arab Israeli dispute. This political significance was also behind the declared intention to treat the Palestinians in an exceptional manner and perpetuate their refugee status.

**6. Influence on the character of the State of Israel:** Resolution 181 adopted by the UN General Assembly provided for the partition of Mandatory

Palestine into two national states: Arab and Jewish. The State of Israel was established, therefore, by virtue of a decision of the international community as the state of the Jewish people. It is a condition for the exercise of the right to self-determination of a group within a state that that group has a stable majority in the territory. We have seen that if, immediately after the War of Independence, full return of the Palestinian refugees would have been permitted to the territory under the control of Israel, an Arab majority would have been created in the country. The factors which led to the perpetuation of the refugee issue and the huge increase in their numbers are still valid today. The return of a large Palestinian population to the territory of the State of Israel would prejudice the existence of a stable Jewish majority in the state and would endanger both the realization of Jewish self-determination in the State of Israel and the stability of the entire region. According to the records of the Central Bureau of Statistics on December 31, 2008 the population of Israel stood at 7.373 million people: 75.5% of them Jewish (5.567 million), 20.2% Arabs (1.487 million) and 4.3% others (319,000).<sup>66</sup> Based on these figures, full realization of the Palestinian right to return would lead to the potential increase of the population of the State of Israel by 62.6%. Such an increase would lead the Arab community's proportion of the population to rise to 50.9% of the entire population. Full realization of the right to return would therefore negate the rationale behind the Partition Plan and undermine the realization of the self-determination of the Jews and the Arabs respectively in separate states.

We shall discuss these issues more extensively in the next chapter which deals with the question: Is the Palestinian claim to return indeed recognized as a right?

## Chapter Two

# The Right of Return Viewed Through the Prism of International Law

### A. Introduction

#### 1. *International law: basic concepts*

International law is distinguished from the domestic law of countries in two principal ways: First, international law contains binding primary norms that are not fixed by a legislature. Second, international law does not have a law enforcement mechanism equivalent to those existing in the legal systems of democratic states.<sup>67</sup>

The United Nations is an extremely important international organization, though it too does not enact international law. One of the organs of the United Nations is the International Court of Justice which sits in The Hague, but its manner of operation is different from that of the courts in the states because the consent of the parties is a precondition to the exercise of its jurisdiction. The UN has powers to enforce international law in certain situations, but these powers of enforcement are more limited and differ in nature and scope from those existing in the internal legal systems of states.

In international law there are two binding normative sources—conventions and customs;<sup>68</sup> they acquire their binding force by virtue of the principle of agreement between nations. *Conventions* are written agreements between states which are relatively easy to identify, to define in terms of their scope and determine who is bound by them. A *custom* is a “general practice accepted as law”<sup>69</sup>—*i.e.*, clear and consistent conduct on the part of many states, over a period of time, which is accepted by them as binding law. By its nature, it is more difficult to identify and prove the existence of a custom.

A party claiming the existence of a custom must prove that states have acted in a particular way over a lengthy period of time, thereby testifying to the fact that they accept this conduct as binding on them. A state that objects to a custom in a clear and persistent manner from the moment of its inception is not bound by it.<sup>70</sup>

Conventions and customs are equal in rank and normative importance. They are not subject to a hierarchy such as exists in the legal systems of states in relation to constitutions, statutes and regulations. An obligation under a convention is equal to an obligation under a custom. A custom is not subordinate to a convention and a convention is not more important or binding than a custom. At the same time, a convention only binds those countries that have acceded to it, whereas a custom binds all the countries in the world save those which opposed it from the outset.

Decisions of the International Court of Justice, like decisions reached by other international tribunals, are not a binding source of norms. Similarly, decisions of international organizations and the scholarly theses of jurists are not regarded as binding sources of norms in international law. All of these are merely tools for determining the rules of international law.<sup>71</sup> Likewise, decisions of the UN General Assembly are also not binding norms of international law. They are merely regarded as auxiliary means.<sup>72</sup>

## *2. International law and the discourse of rights*

International conventions and customs, like the judgments of the international courts and the decisions of international organizations, deal with many different issues such as taxation, sea and air law, environmental law and international trade. One of the areas which became highly developed in the years following the Second World War was human rights law. The United Nations, which was established at the end of the war in 1945, focused on two main principles: a complete prohibition on the use of force as a means of achieving goals in interstate relations and the international protection of human rights. The concepts which underpinned the international protection of human rights were that human rights should not be left within the

exclusive jurisdiction of the sovereign states and that the states would mutually undertake to safeguard human rights within their territory. A state's violation of the human rights of the people living within its territory was seen as not only causing harm to these individuals but also as causing harm to the states which had undertaken the international obligation to safeguard human rights.

The legal regime which developed following the Second World War created mechanisms for monitoring the level of protection given to human rights in states party to the human rights conventions. Within this framework, mechanisms have been developed for reporting breaches of the conventions; these reports are submitted to the committees established by the conventions. In certain cases the conventions have created a mechanism that enables states which so wish to permit their citizens to directly address these committees following a violation of their human rights by their state.<sup>73</sup>

Most human rights represent binding conventional international law only in relation to those states that have acceded to the relevant conventions; nonetheless, the logic of the discourse of human rights which positions these rights above the political will of the member states enables public criticism to be voiced in the spirit of the conventions against even those states which have not acceded to the conventions. Such criticism is pursued through the sweeping attribution of a customary nature to the norms set out in the conventions—in other words, by means of also applying these norms to states which are not parties to the conventions. The criticism becomes even more effective when it is made part of a broad campaign by national and international human rights organizations and in view of the fact that some states use standards which protect human rights in their diplomatic activities.

Clearly, the concept of international human rights erodes the principle of state sovereignty. This erosion was one of the declared goals of the development of the discourse of human rights itself. The effectiveness of the discourse of human rights has led to the situation where a state cannot act as it sees fit within its own territory because the violation of rights is seen

as a violation of obligations towards the other states in the world. In some cases such violations even lead to the implementation of economic and diplomatic pressure on the wrongdoing state. In addition, the domestic courts of many states have expanded their reliance on international norms linked to human rights.<sup>74</sup>

The desire not to leave the issue of human rights to the exclusive discretion of states spurred the revolution of human rights and is of huge moral importance. At the same time, this revolutionary process, which restricts the sovereignty of states and limits the scope of their activity, by imposing an obligation on states to entrench norms of human rights in their internal law and subordinating the states to international mechanisms designed to ensure compliance with these international norms in their territory, must be pursued cautiously and responsibly. This is true both of the definition of the norms of human rights and their adoption in the internal legal system of states, and of the international mechanisms which monitor their implementation. Sweeping expansion of the list of recognized human rights in international law may lead to the transfer of overly broad powers from the governments of the sovereign states to international bodies and decision-makers. This may impair the effectiveness of the democracy in these states as well as the ability of the regimes to adapt their laws and arrangements to the needs of state and society.

This danger is increased by the fact that the international enforcement agencies will inevitably be politically motivated and apply different standards to different countries. There is a risk that it will not be possible to achieve equal enforcement of binding moral norms for every country but rather a situation will be created in which human rights will provide a political weapon to be wielded by some states against others.

Accordingly, we support a “narrow” cautious approach to international human rights that only favors the adoption of minimal and universal human rights which apply to all states in all situations. International law in general and human rights law in particular must assist in the resolution of disputes by peaceful means and protect human rights on the assumption

of the existence of independent and effective states. The unique characteristics of human rights, which enable them to override the wishes of states and even their laws and constitutions, require increased caution to be used both in terms of the recognition of such rights and in terms of their interpretation and application. The interpretation and application of the rights must meet a test which will determine whether the demand addressed to a particular state is right and reasonable not only for that state in the situation in which it finds itself but for all states in similar circumstances. Only when this stringent demand is satisfied can the norm be vested with a status which overrides the express will of the legislative body of the sovereign state concerned. This is particularly true when the state concerned is a democracy.

It is important to note that because of the great success of the human rights discourse, the disputing parties tend to present their claims not only as an interest or wish but also as a right. This is the case in internal law and it is particularly the case in international law. The portrayal of claims as a right, if successful, can found a claim that the negotiations should be confined solely to implementation of the right and the mode of such implementation, and not stray to discussions dealing with its actual existence or scope. The distinction may have practical implications. It is always the case that the general public in a state in political negotiations with another may object that its leaders are too flexible on a particular matter, but when the issue involves what is seen as a genuine right—any concession on the part of the leaders regarding full implementation of the right may be perceived by the public as an act which is unacceptable, verging on betrayal or treason.

In view of all this, when discussing fundamental issues such as the proper way for the parties and the international community to confront the issue of the Palestinian refugees, it is important first to examine whether the issue is suitable for discussion in terms of the discourse of rights or whether it would be more appropriate to discuss and decide it within the framework of political negotiations. The more the issue deals with fundamental and basic human interests that must be protected against the arbitrary use of force,

the more intense becomes the tendency to perceive that issue as a right and not as a matter of negotiation.

However, it is natural for a party to a dispute, particularly a party which feels weak, to insist on the portrayal of its claim as a matter of rights. Indeed, the discourse of rights is designed to help the weak to demand the implementation of their essential interests without being dependent on the good will of the strong. At the same time, the wider the scope of what is perceived to be subject to determination by the discourse of rights, the less possible it becomes to find solutions which can be adjusted to complex social and political realities.

International law is currently characterized by a complex approach toward the discourse of rights. On one hand, caution is used toward the expansion of documents dealing with human rights. In the spirit of this trend, UN institutions attach importance to the fact that particular states have not signed certain conventions and therefore they are not bound by the rights set out in them. On the other hand, there is a tendency to widen the discourse of rights by asserting the existence of various rights through an expansive interpretation of the provisions of the principal conventions of human rights and through sweeping recognition of these norms as customary norms of international law. This tendency is largely found among international rights organizations, but it can also be seen in some of the professional bodies of the UN. The Commission of Human Rights has been recognized as a political body and it is not clear whether recent changes to it and its transformation into the Human Rights Council have improved the situation in this area. Similarly, the more professional committee which was intended to monitor the implementation of the Covenant on Civil and Political Rights (the Human Rights Committee) is not free of the tendency to compel states to take actions, in the name of human rights, which clearly not every state can be required to take, irrespective of its special circumstances.<sup>75</sup>

Because the discourse of international human rights has become such a powerful tool, it is being exploited not only by political movements and

human rights organizations but also by states. This phenomenon is reflected in both judicial and quasi-judicial decisions as well as in the decisions of international organizations, including the UN, regarding the interpretation of conventions and their implementation. The genuine attempts on the part of conventions to distinguish between the universal—which is binding on all—and the spectrum of legitimate political arrangements, sometimes becomes a process which furthers the private interests of the stronger states or blocs of states that enjoy considerable numerical superiority in terms of votes in international institutions.<sup>76</sup>

Against this background we shall now turn to an examination of the Palestinian claim that international law vests the Palestinian refugees and their descendants with the right to return to the territory of the State of Israel or, more precisely, to their homes in the territory of Israel. There is no doubt that the status of the claim to return as a right is of crucial importance in the Palestinian discourse. We shall argue that a meticulous examination of the basis of this claim, and all the reasons given for it, reveals that the Palestinian claim to the effect that the refugees and their descendants have a legal right in terms of international law to return and settle within the territory of Israel, lacks legal foundation.

## **B. UN resolutions on the Palestinian issue**

### *1. Resolution 194(III)*<sup>77</sup>

The first UN resolution relating to the Palestinian issue was Resolution 194(III) which was adopted by the General Assembly on December 11, 1948. This resolution was adopted following the submission of the Bernadotte report, within the framework of the UN attempt to end the fighting between the parties and reach a political solution which would settle the conflict and end hostilities. The resolution deals with a proposal for mediation and conciliation between Jews and Arabs and mentions the issue of the refugees in Article 11. Usually, Article 11 is quoted alone and out of context. In order to understand the contents of this article it is essential to recall

the context of the period and look at the resolution as a whole. The full text of the resolution is attached as Annex A to this position paper.

The principle emphasized by the Palestinians in current discussions is that Article 11 of this resolution grants the *refugees themselves* the right to decide whether or not to return. They assume that some refugees will not want to return. Thus, those who base the right to return on Resolution 194(III) argue that the resolution does not give the *State of Israel* any discretion regarding the question whether or not to allow the refugees to return. The compromise which some Palestinian spokesmen are willing to make is that the State of Israel will immediately declare that the right to decide whether or not to return belongs to the refugees themselves, while concurrently creating economic and other incentives for the Palestinians to choose to remain where they are.

This position is completely unacceptable to Israel and there are strong reasons for not adopting it. It is perfectly clear that Resolution 194(III) as a whole deals with an overall attempt to contend with the violence and unrest that prevailed in the region following the war. The main portion of the resolution was devoted to an attempt to create a Conciliation Commission that would seek to bring the parties to the negotiating table and agree to a permanent arrangement. In the interim, the resolution sought to create calm and preserve the peace. The resolution paid considerable attention to a proposed special international regime in Jerusalem (within fairly broad boundaries) and access to other Holy Places in the region. In consequence of the resolution efforts were indeed directed at mediation and conciliation, but important parts of the resolution were not implemented, such as the demilitarization of Jerusalem, guaranteeing free access to it, and imposition of an international regime there. Equally, Article 11 which is concerned with the problem of the refugees was not implemented. Today, no one would contemplate continuing the mediation efforts of the Conciliation Commission nor persist in treating Jerusalem as an international city without the consent of both sides. It would seem therefore that Article 11 too should be seen as a part of the resolution that was not implemented

and is open for re-examination and not as a declaration which will stand alone for ever.

However, beyond this critical context, a perusal of Article 11 itself fails to support the argument that the article recognizes the *right* of the Palestinian refugees to return to their homes.

*The first argument* supporting the assertion that Resolution 194(III) does not establish the right of return is based on the source of the resolution. International law states that a UN resolution is a recommendation only and is not a binding legal norm.<sup>78</sup> Accordingly, a General Assembly resolution cannot vest the Palestinians with rights nor can it compel the State of Israel to absorb refugees against its will.

There are those who argue that even though Resolution 194(III) is only a recommendation, it is nevertheless binding because it expresses norms of international law which were binding at the time when it was adopted.<sup>79</sup> This argument has no legal basis. A review of the language of the resolution shows that only the payment of compensation for damage to property—*i.e.*, one of the economic aspects of the refugee problem—is based on international law and on principles of equity and justice. There is no statement in the resolution to the effect that the return itself is based on international law and on principles of equity and justice. In addition, the conduct of states testifies to the fact that in 1948, when the resolution was adopted, there was no international custom which bound states to enable the return of refugees to their territory. In fact, the custom of states proves the opposite: Directives were published requiring refugees to be absorbed in the states of refuge and not in the states of origin, while members of minority groups were transferred to their state of nationality.<sup>80</sup>

Notwithstanding the importance of meticulously conforming to the means of creating international law, in our opinion the source of the resolution is not a decisive consideration in this case, because in the context of the dispute in Mandatory Palestine there was very large involvement on the part of the UN. Moreover, even Resolution 181, which directed the partition of the territory into a Jewish and Arab state, was adopted by the General

Assembly.<sup>81</sup> In such circumstances it would not be wise to argue that the non-binding nature of UN resolutions is conclusive here.

*The second argument* supporting the assertion that this resolution does not create a basis for the right to return stems from a scrutiny of the wording of Article 11 itself, which provides that the UN General Assembly:

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

*Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations;*

First, Article 11 states that refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so “at the earliest practicable date.” It is important to note that the provision does not use the language of rights, even though Bernadotte’s recommendations included a recommendation to recognize such a right. In other words, there was a clear appreciation of the distinction between the language used by the article and the determination that it was the *right* of the refugees to return to their homes.<sup>82</sup> In addition, it should be recalled that in 1948, when the resolution was adopted, international law was not recognized as vesting individuals with rights.

The resolution states that refugees who wish to do so will be permitted to return and thereby creates a requirement that they be allowed to do so. However, while the corollary of every right is an obligation, not every obligation gives rise to a right. As noted, the decision to use permissive language and not the language of rights was express and made in the knowledge that

it was incompatible with Bernadotte's recommendation which explicitly mentioned the *right* to return.

Second, the UN resolution includes a condition whereby only refugees wishing to "live at peace with their neighbours" should be allowed to return to the State of Israel. The Palestinians denied the legitimacy of Resolution 194(III) for many years because of this condition, on the ground that obligating them to live in peace with the Israelis would also indirectly compel them to recognize the existence of the State of Israel.<sup>83</sup> Israel, for its part, interpreted this condition as releasing it from the duty to allow return of the Palestinian refugees to its territory. In Israel's view, so long as comprehensive peace has not been attained with all the Arab countries in the region, and so long as the return of the Palestinian refugees may endanger its security, the issue of return should not be discussed.<sup>84</sup> The inclusion of this condition in the language of the article greatly weakens the argument that it relates to the right to return. It is clear that the refugees have an interest in returning to their homes, yet the fact that their ability to return is dependent on the position they take toward the conflict indicates that what is involved is not a full right but the ordinary expectation of people who have been displaced as a result of a particular event and aspire to return home when the storm has subsided. The tension and violence which created the refugee problem could only have been resolved, at least in part, if the refugees would have undertaken not to cause unrest and desist from acting against the peace and against the existence of the state.

Third, the construction whereby the return of the refugees to their homes is part of a political process which will create a broader change of the political reality is also supported by the provision that permission to return will be given "at the earliest practicable date." The Palestinians interpret these words as imposing an immediate obligation on Israel to allow the return of the Palestinians. In contrast, the State of Israel insists that so long as peace has not been achieved between it and the Arab world, and in particular so long as the dispute over the territory of Mandatory Palestine has not been resolved, it cannot be argued that such a practicable date has arrived.<sup>85</sup> The

fact that the demand to permit the return of the Palestinians to their homes was made dependent at the time on the fact of its practicability implies that at the time Resolution 194(III) itself was adopted, these conditions had not yet come about. In other words, it is also possible to learn from this phrase that it was not intended to declare that it was the right of the refugees to return to their homes at all times but that such return would be part of a political reality that at that time had not yet materialized.

Fourth, the resolution refers to the return of the refugees to their *homes*. In the case of mass displacement, the first step toward stabilizing the situation and reducing human suffering is the restoration of “normal” life. It would seem that the goal of the resolution was to prevent the continuation of the destruction and suffering caused by the war by restoring the former position in so far as possible. We would emphasize again that this was an important human and political interest; however, it was not a right. Moreover, the phrase “at the earliest practicable date” naturally makes it very difficult to rely on Resolution 194(III) at any time which is removed from the time proximate to the period of the fighting and displacement. As the Palestinians argue that everyone who has been defined as a refugee by UNRWA is entitled to return, it follows that the majority of Palestinians defined today as “refugees” are not persons who fled from their homes but rather are the descendants of those people. Accordingly, the return of the majority of these refugees cannot meet the condition of “return to their homes” because, as noted, the persons concerned are not the refugees themselves but their descendants.<sup>86</sup>

Fifth, such an interpretation of Article 11 of Resolution 194(III) is also consistent with the second part of the article which deals with the Conciliation Commission’s function not only of aiding the return of the refugees but also aiding their resettlement and social and economic rehabilitation. The goal was to deal appropriately with the refugee problem that had arisen and certainly not to perpetuate the problem in such a way that not a single refugee would be allowed to be absorbed or resettled elsewhere.

*The third argument* in support of the fact that basing the right to return on Resolution 194(III) rests on shaky ground stems from the manner in which the resolution was perceived at the time it was adopted. We have seen that the Arab states and the Palestinians rejected the resolution because they saw it as a demand to recognize the State of Israel. At the time that the resolution was adopted they still pursued the fundamental approach which led them to reject the Partition Plan and launch a war in order to prevent its implementation. The attempt to isolate the provision in the resolution dealing with the grant of permission to the Palestinian refugees to return to their homes in order to reduce the violence and end the war through the creation of two states, and give that provision a construction which undermines the logic of two states, is unreasonable. Similarly, the State of Israel took the view that the resolution was not binding on it when the resolution was adopted by the General Assembly.<sup>87</sup> It is illogical to argue years later that a resolution which was rejected by the Palestinians and the Israelis at the time when it was adopted is the source of law which binds these parties today. It should be clarified that the State of Israel did not reject from the outset the possibility of absorbing a limited number of refugees into its territory, but argued throughout the years that the real solution to the problem of the refugees had to be their resettlement in the Arab states. Israel's more general argument was that this was a political problem that had to be resolved through negotiations between the parties.<sup>88</sup>

The discussion concerning Resolution 194(III) set out in this chapter is important because this resolution is not merely a historical document. The Palestinian struggle to enlist the UN institutions and public opinion in its favor rests in part on the resuscitation of Resolution 194(III) as founding a Palestinian right to return by virtue of international law as well as citing new resolutions on this matter, some of which reiterate this resolution. We shall now turn to these latter resolutions.

## *2. Other UN resolutions*

We have seen that the decisions of international organizations are not binding international norms in international law but are regarded merely as tools for determining the rules of international law which are set out in conventions and customs. Nonetheless, an approach has recently been developing whereby reiteration of a particular norm in a large number of conventions or UN resolutions, testifying to acceptance of the norm as a law, supports the creation of a customary norm.<sup>89</sup> This assertion is only possible if the conventions or if the UN resolutions reiterate and establish exactly the same norm. Accordingly, a custom may be created if the reiteration of the norm is identical.<sup>90</sup> It should also be recalled that the State of Israel has from the beginning and up to the present declared its express opposition to the adoption of the concept of return every time this concept has been mentioned in a UN resolution. Accordingly, Israel cannot be compelled to act in accordance with this custom even if it was created in the interim.<sup>91</sup>

Despite all this, we wish to refer to the argument that other UN resolutions or resolutions which resuscitate Resolution 194(III) create an international legal basis for the Palestinian “right” of return. The Israeli-Arab conflict has led to numerous UN resolutions, including resolutions adopted by the Security Council. In addition, since the Yom Kippur War in 1973 there has been a consistent tendency on the part of the General Assembly to adopt resolutions regarding the Palestinian issue. As a result of these developments it is important to examine additional UN resolutions which refer to the Palestinian refugee issue in order to determine whether customary international laws have been generated or whether a binding resolution has been adopted which recognizes the “right to return” in the Palestinian case or in other similar cases. In our view, an examination of the entire body of resolutions shows that the opposite is true.

The General Assembly continued to deal with the issue of the Palestinian refugees. Thus, for example, in 1950 UN General Assembly Resolution 393(V) Article 4 stated that the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement in the

countries of refuge, was essential both as a preparation for the time when international assistance would no longer be available and for the realization of conditions of peace and stability in the area.<sup>92</sup> The article emphasized that this provision was not intended to prejudice the provisions of UN Resolution 194(III), Article 11.

Indeed, this resolution strengthens the interpretation of Resolution 194(III) offered above, as it again asserted that it was essential to resolve the refugee problem not only by means of return to the country of origin but also through the integration and absorption of the refugees in the state of refuge. This idea was reiterated in additional UN resolutions up to the Six Day War in June of 1967.<sup>93</sup> Israel persisted in its opposition to these resolutions because, *inter alia*, they again referred to Resolution 194(III).<sup>94</sup> At the same time, the international approach to the issue reveals a clear and consistent trend: the need to achieve peace and stability. This need would be met, among other things, by means of considered measures to rehabilitate and resettle the refugees. Indeed, these resolutions are consistent with the argument that there is a “right of return,” but they clearly recommend immediate considered actions for dealing with the refugee crisis through measures other than return as well. The resolutions do not invalidate Resolution 194(III), but they do not reiterate it precisely. Accordingly, they cannot make 194(III) an international custom. At the same time, it should be clarified that even precise reiteration would not have been sufficient here in view of Israel’s consistent opposition to these references.<sup>95</sup>

Following the Six Day War, a change took place in the UN resolutions. This change became even more noticeable following the Yom Kippur War of 1973. The change was reflected in the UN General Assembly resolutions which for the first time referred to the Palestinian collective, and declared the right of the *Palestinian people* to self-determination, national independence and sovereignty, while abandoning the personal reference to Palestinian refugees. In its “new” resolutions, the General Assembly expressly affirmed “the inalienable right” of the Palestinians to return to the homes from which they had been displaced and called for the return of their property.<sup>96</sup>

The Security Council took a completely different approach to the issue. Resolution 237 of June 14, 1967,<sup>97</sup> sought to assist in the return of residents who had fled from the area since the outbreak of hostilities. The language of the resolution is therefore soft and refers only to refugees from the West Bank and from the Gaza Strip who fled from the region as a result of the Six Day War. The resolution makes no mention at all of the refugees of 1948. Following Resolution 237, Security Council Resolution 242 was adopted on November 22, 1967.<sup>98</sup> This resolution was again adopted following the Yom Kippur War in Security Council Resolution 338 of October 22, 1973.<sup>99</sup> These resolutions call for the withdrawal of Israel from territories occupied in the conflict, the end of the state of belligerency, respect for the sovereignty of every state in the region (including Israel) and achieving a “just settlement” of the refugee problem. The phrase “just settlement” in relation to the refugee issue does not impose any obligation to arrive at a solution which is based on Resolution 194(III).<sup>100</sup> Accordingly, the emphasis here is on the need to find a practical solution to the problem within the framework of a comprehensive political package which would ensure the existence of Israel, its recognition and defensible borders.

The issue of the Palestinian refugees arose in the discussions leading to the peace agreements signed by Israel with Egypt, Jordan and the Palestinians. Unlike the UN resolutions, these agreements create binding legal norms. Each of them contains an agreement regarding the right of the Palestinian refugees who had fled from the West Bank or from the Gaza Strip to return to those areas. There is no agreement in them regarding the return of the refugees of 1948 or 1967 to the territory of the State of Israel.<sup>101</sup>

In the Oslo agreements which were signed in 1993, the PLO, which was recognized as the representative of the Palestinian people, undertook to adopt Security Council Resolutions 242 and 338 and repeal the sections in the Palestinian Charter calling for the destruction of the State of Israel.<sup>102</sup> Resolutions 242 and 338 which, as noted, determine the need for a “just settlement” of the refugee problem but do not mention the right to return of the Palestinian refugees, are the only UN resolutions referred to in the

Oslo Agreements. Accordingly, only these resolutions, and not Resolution 194(III), create binding legal arrangements between Israel and the Palestinians regarding the refugees.

### **C. International human rights laws and the right of return**

The Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 as well as the International Covenant on Civil and Political Rights of 1966 and regional conventions on human rights in Europe, America and Africa, refer to the right of a person to enter his own country as part of the right to freedom of movement. This right is not defined in a uniform manner in these instruments. Whereas the Universal Declaration and the African Charter on Human Rights deal with the right to “return,” all the other sources deal with the right to “enter” the state.<sup>103</sup> The term “entry” is much wider than the term “return” because it includes not only those who were in the state and now wish to return to it, but also those who had never been there and now wish to enter it for the first time.<sup>104</sup>

As the basis for the discussion of the concept of “return” we shall refer to Article 12(4) of the International Covenant on Civil and Political Rights of 1966 because this is a universal covenant to which most countries of the world, including the State of Israel, have acceded. At the same time it is not at all clear whether this convention, which came into force in 1976 and was ratified by the State of Israel in 1991 and to which, of course, the Palestinians are not party, reflects customary law, and if so—from when. Accordingly, it is also not at all clear that the term “just settlement,” on which Security Council Resolutions 242 and 338 are based, requires compliance with the provisions of the covenant. Nonetheless, these provisions of the covenant are now the accepted framework for discussing issues of freedom of movement. We shall thus turn to a substantive analysis of the relevant articles.

Article 12(4) of the covenant states: “*No one shall be arbitrarily deprived of the right to enter his own country.*” The Palestinian claim, that the Palestinian refugees and their descendants have a right to return based on this

article, relies on the following two elements: (1) The territory of the State of Israel is “his own country” from the point of view of the refugee and therefore this article vests him with the right to enter it, at his will, creating the “right” to return; (2) preventing the return of Palestinian refugees (and their descendants) to the State of Israel is arbitrary deprivation of this right.

We shall set out three arguments against the Palestinian interpretation of the article: (1) Neither of the two statements applies to someone who left the territory of the State of Israel during the war and was not present there at the time of the determinative census; (2) the article deals with the rights of individuals but is not intended to apply in cases of the mass displacement of people because of an ethnic conflict; (3) there is no ground for the argument that this article vests a right of return or entry to the descendants of those who left their homes.

*1. A person's entry into "his own country"*

The right to return is based first and foremost on the right of a person to enter his own country. Accordingly, in the case of the Palestinian refugees it must first be concluded that the State of Israel is their country. For the purpose of the discussion we shall distinguish between the refugees who left Mandatory Palestine during the war and those who lived there prior to the war but could not return to it, on the one hand, and the descendants of these refugees, who have never lived in the territory of the State of Israel, on the other hand. We should recall that from a legal point of view, the refugees were citizens and residents of Mandatory Palestine. Their citizenship expired upon the termination of the Mandate and Israel never granted them its citizenship. We should also emphasize that some refugees attained citizenship of other countries while others remained stateless.

The question of how to interpret the term “his own country” in Article 12(4) of the International Covenant on Civil and Political Rights has been given fairly thorough consideration. Within this framework an effort has been made both to examine the intention of the drafters of the covenant and to find the interpretation which would be most appropriate in the light

of the rationale of the covenant in general and the logic of the right to freedom of movement in particular.

With regard to the issue of the intention of the drafters, there is a dispute among the scholars who have analyzed the *travaux préparatoires* (preparatory work) leading up to the covenant. Two of them, Inglès and Sieghart, have concluded from the preparatory work for the International Covenant on Civil and Political Rights that the right of entry into a state is vested in citizens alone,<sup>105</sup> whereas a third scholar, Nowak, has stated that the preparatory work reveals that the term includes every person who believes that this is his own country, including permanent residents and people who feel that the state is their homeland.<sup>106</sup> There is also a scholar who supports an intermediate position. Hurst Hannum is of the opinion that the term “his own country” referred to in Article 12(4) of the covenant contains more than the phrase “country of which he is a national” stated in other international documents dealing with entry into the state. However, in his opinion, the term should not be extended so as to also include a person who sees the country as his home. Relying on the preparatory work leading to the International Covenant on Civil and Political Rights, he concludes that the intention of the drafters when using the phrase “his own country” was to include permanent residents (as an addition to the nationals) but not every person who sees the state as his homeland.<sup>107</sup>

It should be emphasized that in the view of most of the commentators, the issue of the nexus between a person and his own country (or homeland) is not solely a subjective matter but has factual characteristics. This position is reasonable in the context of the right under discussion, as it is clear that a person cannot compel a state to allow him entry and settle there merely on the basis of the argument that he feels that the state is his homeland.

The Committee for Human Rights was established on the basis of the International Covenant for Civil and Political Rights. In its decisions on individual complaints regarding Article 12(4) of the covenant and in the general comment regarding the same article, it held that the term “his own country” used in the article regarding the right of entry is broader than the

term “country of which he is a national” used in other international documents. It concluded that the section relates to citizens and possibly also to permanent residents. In order to determine what is included in the extension, the committee adopted the test of *effective nexus between the person and the state*, which is intended to determine whether this is indeed the individual’s own country, which he has the right to enter.<sup>108</sup> The test of effective nexus was established in the leading judgment in the *Nottebohm case*, whereby the true nexus between a person and his country is determined by the degree of the connection between him and the country, in the sense of residence, work, the location of his family in it and his participation in community life there.<sup>109</sup> According to this test there is no need for a person to be a citizen of the country which he wishes to enter. He must prove, however, that his primary substantive ties are with that state. This is therefore an objective test.

On the assumption that today we are examining the Palestinians’ claim that Israel is their country and that therefore they have the right to enter it, and if we also adopt the narrow construction of the term “his own country,” to the effect that entry by right is vested only in citizens or permanent residents, it becomes clear that Palestinian refugees who were never citizens of the State of Israel nor permanent residents there cannot be vested with a right of entry. However, even if we were to apply a broader construction, it would not necessarily lead to an obligation to allow the “return” of Palestinian refugees due to their effective tie to Israel. Their strong effective link is to the place where they have lived their lives, and even if dozens of years of living outside Israel have passed with a great expectation of returning to it, that does not create a reality in which the strongest effective connection of these individuals is to Israel.

An examination of the force of the refugees’ claim to return in the immediate aftermath of the fighting makes the issue a more difficult one. Indeed, the Palestinian refugees did not hold Israeli citizenship at that time either. Such citizenship was only conferred a few years after the establishment of the state, in accordance with the Nationality Law, 5712-1952.

Nonetheless, it is fairly clear that at that stage the territory of Israel in which they had lived before the war was indeed “their own country.” True, the covenant which was drafted in 1966 and which was ratified by Israel in 1992 was not valid at the time; however, if the human rights in the covenant are merely declarative of permanently existing human rights—it would be difficult to conclude what land was their land and what country was their country apart from that which was established on the territory in which their homes had been located.

At the same time, even if immediately after the end of the fighting it was possible to regard the territories from which the refugees came as “their country” or “their land,” that determination weakened with the passing of the years and with the development of a new political and social reality and *a fortiori* could not be applied to the descendants of the refugees who had never lived in the territory of the State of Israel. Apparently, Article 12 itself was not designed to deal with the situation of state succession or *uti possidetis—i.e.*, situations where mass movements of people are generated as a result of a war which has led to border changes. (As we shall see below, to this day international law does not provide an adequate response to the issues arising from such processes.)

So—Who is entitled to enter a particular place on the ground that it is “his country”? The Palestinian argument is that it was unjust at the time to prevent the re-entry of those who had left and therefore it is required today to correct the wrong that had been performed, in part by allowing the descendants of the refugees to return to their homes. In our opinion this argument is weak. Even if Israel was initially under an obligation to allow the refugees to enter the country and return to their homes, the enormous amount of time which has elapsed and the severance of the effective ties have weakened their claim that this is “their own country.” We should recall that we are not focusing here on the question whether it would be right or just to let the refugees settle in Israel, but rather on whether they have been vested with the *right* to enter Israel on the ground that this is “their own country.”

The Palestinian claim asserts that the State of Israel dispossessed the Palestinians and expropriated their land and that the realization of the right of return rectifies this wrong by restoring the land to its real owners—the Palestinians. This is a political and ideological argument. It has undoubtedly underpinned the Palestinian claims since the beginning. It is difficult to see how it is consistent with the right to freedom of movement which assumes that sovereign states have control over entry into their territory and with international recognition of the State of Israel as a state that has the right to give effect to its sovereignty over its territory.

The final argument voiced by the Palestinians relates to the contradiction between Israel's refusal to regard the territory of the state as the country of the Palestinian refugees and Israel's perception of the state (and perhaps all of Eretz Israel, according to some) as the homeland and country of all Jews *per se*. We concede that the Palestinian refugees have deep historical ties to their homes in Israel, and that these ties should be recognized just as the historical ties of the Jews to Eretz Israel should be recognized. However, the immigration policy of a state is not based on historical right but on sovereignty. The desire to give Jews control over immigration to part of Eretz Israel was a decisive element of the Partition decision. The Palestinians will be able to express their historical right to their country in a law of "return" which they can enact in their own country when they achieve sovereignty. They do not now have this type of right to enter the territory of the State of Israel. The refusal by the Mandatory authorities to allow the entry of Jews who wished to come into their "homeland" was abhorrent to the Jews, but it was a decision taken by exercising the legal, and especially political, powers of the Mandatory authorities.

## *2. Arbitrary restrictions on entry*

Accepting, for the purpose of argument, the idea that the territory of the State of Israel which the Palestinian refugees left was "their own country," is Israel's refusal to allow them to enter a case of "arbitrary deprivation"?

The accepted definition of the term “arbitrary deprivation” in this context is that the prevention of entry will not be deemed to be arbitrary if it is imposed on a person by a court as an alternative punishment to imprisonment. The prevailing view is that any other restriction on the right to entry, which is not a substitute for imprisonment, is arbitrary and constitutes a violation of the right.<sup>110</sup> This, of course, is based on the assumption that the legal system recognizes the punishment of deportation or exile, and that the punishment was lawfully imposed.

Nonetheless, this narrow interpretation of the exception is directed at the ordinary case which is contemplated by the article: when there is no real problem identifying the connection between the person and “his own country” or “his own state” yet the government of that state remains unwilling to allow him entry. One of the aspects of the principle of citizenship (or effective connection) is that when there is no other state whatsoever which is obliged to allow a person to enter, his own state is required to do so. If the particular state has complaints against that person it must examine them internally. Indeed, when contemplating the right of a citizen (or of a permanent resident or of a person who has resided in the state for a prolonged period of time) to enter, it is difficult to think of fundamental grounds which would justify the state’s refusal to allow him to do so. It is difficult to think of legitimate conflicts between rights and interests which could justify preventing a person’s entry. If the entry of such a person endangers or threatens the state or its residents, the state is entitled to neutralize the risk or threat in accordance with its laws in other ways.

This, however, is not the situation in the case of the claim to return to the State of Israel asserted by the Palestinian refugees and their descendants. The uniqueness of the situation which was created by the War of 1948-1949 and other similar situations supports the conclusion that this narrow construction of the term “arbitrary deprivation” which appears in Article 12(4) is not applicable to the claim of Palestinian refugees. The narrow interpretation is acceptable only if it does not relate to the grant of rights to a large

group of people. When mass migration is at issue, “lack of arbitrariness” assumes a different significance. The permission to prevent entry when such prevention is not arbitrary is designed to enable a state to restrict entry when such entry poses a threat or endangers other rights or interests that cannot be dealt with in ways other than through prevention of entry. The prevention of entry will be regarded as “non-arbitrary” if it becomes apparent that the prejudice to important rights and interests which is likely to occur by reason of the entry is much more severe than would ensue by the prevention of entry itself, and that prohibition of entry is the only way to deal with these threats.

Return to the territory of the State of Israel of many of those who regard themselves as Palestinian refugees might severely prejudice the right of the Jewish people in Israel to national and cultural self-determination, public order in the state, the welfare of its citizens, irrespective of nationality or religion, and even the character of the state, its democratic spirit and its level of development. Accordingly, denying the right of the Palestinian refugees to decide whether or not they will exercise their “right of return” is essential to the existence of the State of Israel and the welfare of its citizens and residents. Taking such an essential step for the peace and identity of a state cannot be regarded as an arbitrary deprivation of a right.

A series of international documents supports the perception of the State of Israel as a place in which the Jewish people are realizing their right to national self-determination and gives effect to the Jewish people’s right to maintain a full and independent national life in Eretz Israel: the Balfour Declaration of November 2, 1917; Churchill’s White Book of 1922; the Peel Commission Report of 1937; the UN Committee Report which recommended the Partition Plan of 1947; and UN General Assembly Resolution 181 regarding the partition of Mandatory Palestine into two nation-states.

The idea of self-determination evolved into a legal right in the UN Charter and human rights treaties. The right was recognized in Articles 1(2) and 55 of the UN Charter of 1945 as well as in Article 1 of the two primary conventions on human rights of 1966: the International Covenant on Civil

and Political Rights and the International Covenant on Social, Economic and Cultural Rights.<sup>111</sup>

One aspect of the right to self-determination is the nation-building, which is accompanied by the possibility of establishing and developing the national culture. In order to fully implement the self-determination of a people, the latter must be allowed to live as a majority in its own country. Indeed underlying Partition Resolution 181 adopted by the UN General Assembly on November 29, 1947<sup>112</sup> was the concept of two nation-states, in each of which one of the nations would have a majority. One of the principal tools for preserving future majorities as well—a Jewish majority in the Jewish state and an Arab majority in the Arab state—is control over those entering into the state.<sup>113</sup> This was indeed one of the reasons for the enactment of the Law of Return in the State of Israel, a law which explicitly prefers Jews in immigration into Israel.<sup>114</sup>

In view of these facts and because of the need of the Jewish people to preserve its majority in its country in order to continue to survive nationally and culturally, the State of Israel is entitled to prevent the entry of a population group which is potentially huge, possesses a national and cultural hue that is manifestly different from that of the majority of the population and pursues an agenda which seeks to change the character of the state. The entry into the state of such a population would pose a real danger to the existence of the State of Israel and its self-determination as a Jewish state, even to the extent of its destruction as such. This is *a fortiori* the case in the face of a conflict which has deteriorated into violence between the two parties.

In summary, not only must the conclusion that the Palestinians preserve a right to return by virtue of the general freedom of movement be valid today but it must also have been valid throughout the conflict, from its very first moment. We have seen that in the period immediately after the creation of the refugee problem, no recognition was given to the refugees' "right of return" because Israel was admitted to the United Nations without allowing return or even undertaking to allow it in the future. This approach took firmer hold over the years and is even more valid today, when the

original number of refugees has been multiplied 6 or 7 times, when hostility and suspicion still prevail between the two populations and when the physical infrastructure left by the Palestinians is completely different to that existing today.

There are those who argue that Israel's position—non-recognition of the “right of return” of the Palestinian refugees and their descendants and consistent opposition to the broad implementation of such return—is even more unjust in view of the preference given to the immigration of Jews who have never lived in Israel. This is not the place to elaborate on the justification for the Law of Return and the preference given to Jewish immigration under it.<sup>115</sup> We would only state that for many years the Jews lived as a minority throughout the world; they were persecuted, deported and destroyed; and were unable to bring about national independence. Accordingly, they are justified in rectifying this wrong by giving preference, in terms of immigration, to Jews who wish to enter the only country in which they can exercise their right to self-determination. This justification is also based on considerations of corrective justice, which may create a justified exception to the principle of equality.<sup>116</sup> According to the Partition resolution, the exercise of the Jews' right to self-determination did not involve the deportation or displacement of the Arab inhabitants of the area designated for the Jewish state. It will be recalled that the problem of the Palestinian refugees was created as a result of the war launched by the Arabs with the object of thwarting the establishment of the Jewish state. Even after the end of the War of Independence, Israel was unable to reach a peace agreement with its neighbors (in the framework of which the refugee problem would also have been resolved). The Arab states preferred a ceasefire which did not entail recognition of the State of Israel. This was the background to the fact that Israel was not required to allow the return of the Palestinian refugees to their homes. This was also the background to the fact that upon its establishment Israel was not required to grant these people residence or citizenship. Today, more than sixty years after the war, this is even more clearly the case. The relevant Palestinian population is very large and has been largely educated to

feel bitterness and anger toward the Jews and toward the State of Israel. Allowing this population to enter Israel, in numbers which are likely to make the Palestinians the majority group in the State of Israel, may undermine the right of the Jews to live as free persons in a state where the culture governing the public domain is Jewish, and dramatically change the nature of the regime and culture of the state.

For these reasons, restricting the entry of the Palestinian refugees to the territory of the State of Israel should not be deemed to be arbitrary deprivation of the right to entry according to Article 12(4) of the International Covenant on Civil and Political Rights. This is *a fortiori* the case in respect of their descendants.

### *3. Family unification*

The Palestinian claim regarding the right of return to Israel is also voiced in another context—namely, that Palestinians have a right to enter Israel when they are family members of citizens or of residents of Israel. Critics of these processes concede that there is indeed a trend toward marriage between (primarily Arab) citizens of Israel and Palestinians who are not Israeli citizens, and that in the past the non-Israeli spouses were allowed to enter Israel and become naturalized citizens. They add that this is a broad trend today, and warn that it may expand even further in the future. They see this process as a gradual implementation of the “right of return.” The supporters of granting Palestinians married to Israeli citizens the right to enter the country and become naturalized citizens believe that this is a case of protecting the right to family. At times they also note that the Palestinians who are married to Israeli citizens are not “foreign” in the full sense of the word, as Israel was their country, and therefore they can be expected to become integrated into their original national community.

Whatever law should apply to Palestinian marriage migration, there is no clear basis for claiming that international human rights law vests such a right. International law does not deal expressly with the right to family unification within the territory of a particular country. International law

distinguishes between the right of a person to enter his own country and the right to establish a family, and does not link the two. In other words, international law does not state that the right to family also includes the right to enter the country of the spouse. Accordingly, the Palestinian claim to return as of right as part of the process of family unification is also unfounded.<sup>117</sup>

Even if we assume that the provisions protecting the right to a family include, under normal circumstances, the right of a citizen of one country to bring into the country an alien spouse or descendants, the state may restrict this right on the grounds of preserving important public interests. While enmity and hostility prevail between Israel and the Palestinian Authority, Israel may restrict entrance, including family migration, from “enemy territory.” Indeed, international human rights laws allow the imposition of restrictions on such entry if it poses a security risk. Article 4 of the International Covenant on Civil and Political Rights of 1966 provides that a state may derogate from its obligations to maintain the majority of human rights in time of public emergency the existence of which is officially proclaimed and to the extent required by the exigencies of the situation.<sup>118</sup> Neither the right to family nor the right to enter a state is included in the list of rights which may not be derogated from. The State of Israel is in a prolonged conflict with the majority of states in the region and with the Palestinians, and it has officially declared a state of emergency.<sup>119</sup> So long as this is the situation, the State of Israel may, by virtue of the international law of human rights, restrict the entry into it of people who may threaten the existence and security of the state within the framework of family migration as well.

Even in time of peace, after the conflict has ended, Israel may still restrict the settlement of large groups of Palestinians within the territory of the State of Israel, including for the purpose of marriage. If marriage migration were to threaten the existence of the Jewish majority, the democratic character or the welfare of the citizens of the State of Israel, and fears were to arise that the state might become destabilized and incapable of implementing the Jews’ right to national self-determination in the State of Israel, then too the state may restrict such migration.

#### D. The right of return and citizenship laws in international law

All those who belonged within the territory of Mandatory Palestine before 1948 were its citizens, Jews and Arabs alike. The Palestinian refugees, who lived within the territory of the State of Israel, argue that by virtue of this citizenship they are entitled to citizenship of the State of Israel which, of course, gives rise to a right of entry into the territory of the state.<sup>120</sup> It is difficult to find justification for this argument.

It should be recalled that the State of Israel did not *deprive* the Palestinians of their Mandatory citizenship, since this citizenship automatically expired upon the termination of the Mandate on Palestine-*Eretz Israel* on May 15, 1948. At the time of the establishment of the state, most of the refugees did not live within the territory of the state and none of them were its citizens. Accordingly, from a legal point of view, it is necessary to consider whether international law compels the State of Israel to grant citizenship to Palestinians who were never citizens of the State of Israel merely because they had held the Mandatory citizenship which expired and they lived in Israel before the date of the determinative census. An examination of the nationality laws in international law reveals that the answer to this is no; the State of Israel is not compelled to grant these individuals citizenship, since the existing law does not deal with a situation such as that in which the Palestinian refugee problem was created—*i.e.*, the displacement of numerous people as a result of an ethnic conflict in circumstances of state succession (*uti possidetis*).

International law deals directly with the issue of citizenship in three principal sources: general human rights laws, specific conventions which deal with the issue of citizenship and the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States.

Article 15 of the Universal Declaration of Human Rights<sup>121</sup> states that everyone has the right to a nationality; however, this article does not impose a clear obligation on states to ensure that every person in the state will have a nationality. Moreover, other human rights conventions use moderate

language regarding the right to citizenship,<sup>122</sup> and refrain from compelling the state to grant citizenship.<sup>123</sup> Likewise, it is not possible to find an explicit obligation on states to grant citizenship in conventions dealing specifically with nationality law.<sup>124</sup> This reality is derived from the desire of states to safeguard their sovereignty, including by preserving the right to decide to whom to grant citizenship.

The question of nationality in the context of the succession of states gathered steam in the last decade of the 20<sup>th</sup> century because of the changes which had taken place, primarily in Europe, as a result of the fall of the former Soviet Union. This matter was dealt with in the European Nationality Convention of 1997, but that convention too does not contain strict provisions requiring the successor state to grant nationality to people living within its territory and certainly not to those who have left it.<sup>125</sup> The matter was reconsidered extensively in the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States formulated by the UN Committee on International Law. The draft was adopted by the UN General Assembly,<sup>126</sup> but has not yet become a binding international treaty. This draft calls for the return of a person who has been forced to leave his habitual residence because of events connected with the succession of states as well as the grant of nationality to people who have their habitual residence in the territory affected by the succession of states.<sup>127</sup> However, these arrangements are not legally binding in the context of the Palestinian refugees because they have not yet become binding rules of international law. Even if the draft is ultimately adopted as a binding convention, it will apply to future events and not retroactively to problems created many years ago.

We can see that international law has only recently sought to deal with the problems of nationality ensuing from state succession, even though broad problems of a similar type have arisen in the past and certainly during the period in which the Palestinian refugee problem was created.<sup>128</sup> This new awakening stems from the desire to rehabilitate the streams of displaced persons and refugees created by disputes and boundary and sovereignty changes wherever possible within the territory where these changes

have taken place and not allow them to overflow into other countries. This relates, therefore, not only to the displaced persons' *right* to return but critically the *duty* of the new states to absorb them. At the same time, as we shall see, this attempt is not always successful on account of the reality which has evolved in these territories. In addition, for reasons connected with the numbers of refugees, the considerable amount of time which has elapsed since the creation of the problem and the ramifications of enforcing the broad entry of Palestinian refugees into the territory of the State of Israel, it would not be right to implement these changes in relation to the issue of the Palestinian refugees.

## **E. The right of return and the law of refugees**

### ***1. The Refugees Convention***

Following the Second World War, international law saw the formation of treaties dealing with the rights of refugees and stateless persons. The principal document dealing with these matters is the Convention Relating to the Status of Refugees of 1951.<sup>129</sup> The main protection granted by the convention to the refugees is the right not to be deported from the state of refuge and returned to the state from which they have fled (non-refoulement) if such a return would endanger their lives or freedom for reasons of race, religion, nationality or membership of a particular social group or political opinion.<sup>130</sup> The country of refuge may send the refugee to a third state which is willing to give him refuge, on condition, however, that the third state is committed to the principle of non-refoulement.

The rationale of the convention suggests that this principle requires the refugee to return to his country of origin, when the reasons for seeking refuge have ceased to exist. In practice, however, this principle had not been implemented via an obligation requiring states to reabsorb refugees who had fled their territory. During the decades which elapsed following the Second World War the absorbing states did not demand of the refugees that they return to their countries of origin. They allowed them to stay in their

territory permanently and even gave them the opportunity to obtain the nationality of the refuge state despite being under no obligation to do so. The states did not act as if the Refugees Convention required the countries of origin to allow the refugees to return to their territory, and in practice no widespread return actually took place. It is not surprising that the Protocol Relating to the Status of Refugees of 1967 made no mention whatsoever of the issue of return.<sup>131</sup>

## *2. UN Commission for Refugees*

An additional important document relating to the issue of refugees is the Statute of the United Nations Office of the High Commissioner for Refugees which was adopted by the UN General Assembly in 1950. The Statute formed the basis for the establishment of the UN Commission for Refugees.<sup>132</sup>

Article 1 of the Statute of the Commission for Refugees defines its purposes as follows: "To facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."<sup>133</sup> The Statute proposes three alternative ways of resolving the problem of the refugees: voluntary repatriation, absorption in their place of residence or resettlement in a third country. Over the years, the High Commissioner for Refugees was of the opinion that repatriation was the preferred solution and therefore tried to implement it as broadly as possible. Nonetheless, in many cases the countries of origin did not allow the return of the refugees, and the High Commissioner could not compel them to do so.

## *3. UNRWA*

We have seen that the Refugees Convention does not apply to the Palestinian refugees and that they are not dealt with by the High Commission for Refugees. As noted, the Palestinian refugees are under the protection of UNRWA which was established by virtue of UN General Assembly Resolution 302(IV) of 1949.<sup>134</sup>

According to Article 7 of the resolution, it is the function of UNRWA to provide temporary relief and work programs for the Palestinian refugees and prepare them for the day on which UNRWA will terminate its activities.<sup>135</sup> The resolution indeed refers to Resolution 194(III), but does not impose on UNRWA responsibility for repatriating the Palestinians as part of its functions.

#### **F. The “right of return” under humanitarian law and under international criminal law**

International humanitarian law deals with the protection of combatants and civilians in time of war and in its aftermath. This law developed extensively in the aftermath of the Second World War in two ways: (1) increasing the protection given to combatants and civilians through the adoption of the four Geneva Conventions of 1949 as well as the protocols additional to the conventions in 1977; (2) imposing personal liability on individuals who commit war crimes, crimes against the peace, crimes against humanity and additional serious breaches of the Geneva Conventions through the establishment of international criminal law.

These documents do not contain a general provision regarding the right to return of refugees. All that can be found are provisions regarding the repatriation of prisoners of war<sup>136</sup> and provisions relating to respect for the right to family and family unification.<sup>137</sup> It should be noted that the principle of family reunification does not impose an express duty on the state to allow family members who are not citizens of the state or residents to enter, and therefore cannot provide an indirect route to repatriation.<sup>138</sup>

Deportation and forcible expulsion are prohibited according to international criminal law even if the territory from which the deportation has been carried out is not occupied territory. This principle was established in the London Agreement of 1945,<sup>139</sup> which set up the International Military Tribunal in Nuremberg to prosecute Nazi war criminals, and in other

international instruments such as the Fourth Geneva Convention,<sup>140</sup> the Statute of the International Tribunal for former Yugoslavia,<sup>141</sup> the Statute of the International Tribunal for Rwanda<sup>142</sup> and the Rome Statute of 1998 which established the International Criminal Court.<sup>143</sup>

However, even if we were to accept the Palestinian argument that at least part of the problem of the Palestinians was created as a result of the deportation of the population from the State of Israel which was established upon the termination of the British Mandate, and even if we were to agree that in 1949 deportation was regarded as a crime against humanity, this would not mean that Israel is obliged to allow the return of the refugees to its territory or that the refugees (and their descendants) have a right to return which imposes an obligation on Israel—either then or now. Even though international law prohibits forcible deportation, the remedy which it provides in such cases does not include the imposition of a direct or indirect obligation on the state to take the deportees back. At the same time, a state which forcibly deports people from its territory is subject to state responsibility for its actions and the persons carrying out the deportation may be subject to personal liability.<sup>144</sup> Nonetheless, international law does not contain any norm which requires a state to allow return as a remedy for a prohibited act of deportation. The practice of states is proof of this assertion. Supporting examples relate to the remedies given to refugees following the Second World War. Perpetrators of crimes during this war, including crimes of forcible deportation and exile, were prosecuted in state courts and international tribunals. In many cases they were convicted and punished. Germany was held liable to pay compensation to victims, but was not subjected to any obligation to return the refugees to its territory. Similarly, no such obligation was later imposed on the countries of Eastern Europe. Indeed, the Jews, for example, claimed compensation for their lost property in East Europe, but did not demand to return to the states from which they had been deported. At the same time, international law did not require the states of origin to repatriate these refugees within the framework of refugee law.

### G. Conclusion

Return in the sense of going back to the country of origin of the refugees is not a legal right derived from the way international law developed over time. It is not a right granted by the general laws of human rights, nationality laws, refugee laws or humanitarian law. Accordingly, the Palestinian claim that they possess a right of return by virtue of international law is unfounded.

Further, the Palestinians cannot base their “right of return” on the international instruments dealing with the Palestinian problem itself. These instruments are the resolutions of the UN General Assembly or the Security Council which are not *per se* a binding source of law in international law. Likewise, their content is disputed and alongside the option of return, alternative solutions are being proposed such as resettlement or a just settlement. All negotiations between Israel and the Palestinians must take into account the fact that the State of Israel is not legally bound as a matter of international law to allow the Palestinian refugees to choose whether or not they wish to return to its territory, or to respect their choice if they indeed wish to “return.”

Furthermore, broad implementation of the return of Palestinian refugees and their descendants into Israel will create an untenable situation. Hence, it is unreasonable to discuss this issue in terms of rights rather than as a matter of political negotiations. Indeed, history teaches that in ethnic conflicts involving the fate of many refugees, the issue of refugees was discussed as part of the effort to resolve or stabilize the conflict. Surely, every dispute should be examined within the context of its unique characteristics. It is very important, however, to examine precedents in other parts of the world relating to the resolution of refugee problems in cases of ethnic conflicts. This will be the subject of the next chapter.

## *Chapter Three*

# **Resolution of Political and Ethnic Conflicts in Mixed Societies: Separation Versus Reintegration**

A review of ethnic conflicts throughout the world from the beginning of the twentieth century to the present shows that there have been two principal periods characterized by two different modes of solution: The first period lasted until the end of the Cold War and was characterized by solving refugee problems primarily through the exchange of populations and encouraging ethnic homogeneity. The object was to create maximum correspondence between political borders and the ethnic identity of the population. During the second period, which began in the 1990s and has continued to the present, efforts have been made to suggest repatriation as the primary solution to the problem of refugees and within that framework to create mechanisms for reintegration, even though in practice implementing repatriation has encountered numerous problems. It appears, therefore, that return cannot be regarded as the sole and exclusive solution to the refugee problem in the context of ethnic conflicts.

### **A. Ethnic conflicts from the beginning of the twentieth century until the end of the Cold War: separation through population exchange**

At the time when the Palestinian problem arose (1948), the forcible transfer of populations following political upheavals and agreements between states was not considered illegal under international law. On the contrary, until the end of the Cold War, the solution to ethnic conflicts through the exchange or transfer of populations was regarded as legitimate and even

just. This was even the preferred solution in cases of ethnic conflicts. Exchanges of population which were intended to achieve ethnic homogeneity by means of agreements following war were accepted as a means of preventing the renewed eruption of hostilities.

Thus, for example, in the peace agreement signed between Greece and Bulgaria in 1919, it was agreed that there would be an exchange of populations. 46,000 Greek citizens of Bulgaria were forced to move to Greece, whereas 96,000 Bulgarian citizens of Greece were transferred to Bulgaria.<sup>145</sup>

Another example is the peace agreement signed between Turkey and Greece in 1923 following a long war between Greece and Turkey which ended with the defeat of Greece. This defeat led to a large wave of Greek refugees fleeing from their homes in Turkey to Greece. The peace agreement between the two states included the forcible exchange of populations of 1.2 million Greeks who were Turkish citizens and 600,000 Turks who were citizens of Greece who were forced to move to Turkey. The forced exchange of population was set out in Article 1 of the agreement:

As from 1st May, 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory.

These persons shall not return to live in Turkey or Greece respectively without the authorization of the Turkish Government or of the Greek Government respectively.<sup>146</sup>

Notwithstanding the severe personal harm caused to all those forcibly moved, the exchange of populations was perceived as the best solution to the ethnic tension which prevailed between the communities.

It is interesting to note that this was expressly reflected in the British Peel Commission report of July 1937 which sought to offer a solution to the conflict between the Jews and the Arabs in Mandatory Palestine. The commission stated that in view of the wide gulf between the two national

groups and in view of the great differences between them it would be impossible to resolve the dispute between them within the framework of a single state, and therefore recommended the partition of the territory into two states—Arab and Jewish—as well as the exchange of populations and land between the two states.

The report described the circumstances of the dispute between the Jews and the Arabs in Mandatory Palestine in the following terms:

An irrepressible conflict has arisen between two national communities within the narrow bounds of one small country. About 1,000,000 Arabs are in strife, open or latent, with some 400,000 Jews. There is no common ground between them. The Arab community is predominantly Asiatic in character; the Jewish community is predominantly European. They differ in religion and in language. Their cultural and social life, their ways of thought and conduct, are as incompatible as their national aspirations [...] The War and its sequel have inspired all Arabs with the hope of reviving in a free and united Arab world the traditions of the Arab golden age. The Jews similarly are inspired by their historic past. They mean to show what the Jewish nation can achieve when restored to the land of its birth. National assimilation between Arabs and Jews is thus ruled out. [...] The National Home, as we have said before, cannot be half-national. In these circumstances to maintain that Palestinian citizenship has any moral meaning is a mischievous pretence. Neither Arab nor Jew has any sense of service to a single State.<sup>147</sup>

In view of this situation the commission believed that the only possible solution to the conflict would be the partition of the land into two states. In addition, the commission recommended the transfer of land and population. According to the commission, the exchange of populations and land was necessary in order to settle the conflict in an efficient and final manner: “*If Partition is to be effective in promoting a final settlement it must mean more than drawing a frontier and establishing two States. Sooner or later there should be a transfer of land and, as far as possible, an exchange of population.*”

According to the Peel Commission report, it was referring to the transfer of 225,000 Arabs and 1,250 Jews. Without such a transfer the number of Arabs in the Jewish state would be almost equal to the number of Jews.<sup>148</sup>

The Peel Commission assumed that there would be areas in which the exchange of populations would be performed voluntarily and others where the transfer would have to be forcible: “*But as regards the Plains, including Beisan [Bet She’an] and as regards all such Jewish colonies as remained in the Arab State when the Treaties came into force, it should be part of the agreement that in the last resort the exchange would be compulsory.*”<sup>149</sup>

The commission expressly stated that its proposal relied on precedents created by the Greek-Turkish conflict:

Dr. Nansen [the inspiration behind the idea of exchange of populations in the Greek-Turkish conflict—Y.Z. and N.G.] was sharply criticized at the time for the inhumanity of his proposal, and the operation manifestly imposed the gravest hardships on multitudes of people. But the courage of the Greek and Turkish statesmen concerned has been justified by the result.

And therefore:

In view of the present antagonism between the races and of the manifest advantage to both of them of reducing the opportunities of future friction to the utmost, it is to be hoped that the Arab and the Jewish leaders might show the same high statesmanship as that of the Turks and the Greeks and make the same bold decision for the sake of peace.<sup>150</sup>

The Arabs, apart from King Abdullah of Eastern Trans-Jordan, rejected the Peel Commission report, while the Zionist leadership was also divided about whether to accept it. Ultimately, the British government repudiated the Peel Commission recommendations and it was not put into effect.

An additional example illustrating how ethnic conflicts following hostilities have been resolved by means of the compulsory transfer of populations is the Potsdam Declaration adopted by the Allies in 1945 at the end of

the Second World War. In this declaration agreement was reached to uproot millions of Germans who were living in Poland, Czechoslovakia and Hungary and transfer them to Germany.<sup>151</sup> The transfer of these people involved huge suffering on the part of the deportees. Many, about two million, died on the journey to the West, from disease or acts of revenge. During the years 1945-1947—*i.e.*, at about the period when Israel's War of Independence was taking place—about 12 million people were displaced from these countries. The policy of the government of West Germany which absorbed most of the deportees was directed from the beginning at their swift social and economic integration and did not raise any claim regarding their right of return to the countries from which they had been deported. The deportees were immediately granted German citizenship and by the autumn of 1949 West Germany had already established a federal department for refugees. The function of this department was to coordinate activities aimed at integrating the deportees into German society and economy and assist them to obtain accommodation, education, compensation and grants. In order to ease the integration of the deportees, the states of West Germany established industrial sectors in which the deportees had specialized in their countries of origin. By the 1960s the task of integration was complete. One of the clearest signs of their integration in their new homeland was the disappearance of the bloc of refugees and deportees political party from the political map.<sup>152</sup> In the 1990s, with the collapse of the communist regimes in Eastern Europe, the German deportees, without the support of the German government, again demanded that the governments of their countries of origin recognize their property rights to assets left behind as well as their national rights. Their demands encountered general opposition. The government of Czechoslovakia rejected every demand for the repeal of the decrees issued by the President of Czechoslovakia Edward Beneš after the Second World War. These decrees had created the legal framework for confiscating the property and deporting the ethnic Germans from Czechoslovakia.<sup>153</sup> Moreover, the European Union decided not to make the admission of the Czech Republic into the Union in 2004 dependent on the repeal of the Beneš decrees.

Population exchanges also took place in India. In 1947, when the British left British India, it was divided into two states: India and Pakistan. The division was intended to separate the Hindus, who originated from India, from the Muslims, who originated from Pakistan, in order to prevent violent conflicts between the two groups. This division led to an exchange of populations in vast numbers. Estimates put the figures at between 12-30 million people. The hope of achieving peace between the parties by separating the groups was doomed to disappointment. Notwithstanding the exchange of populations, minority groups were left in each of the countries and immediately upon the grant of independence the majority groups launched acts of violence against members of the minority communities: Muslims murdered Hindus in Pakistan and Hindus and Sikhs attacked Muslims in India.<sup>154</sup> It should be noted that the Indian constitution expressly declares that Muslims who had emigrated to Pakistan after March 1947, would not be allowed to return to India.<sup>155</sup>

This pattern of activity, consisting of the exchange of populations and compulsory transfer, which was once regarded as desirable and legitimate, is now regarded as “ethnic cleansing” and is completely prohibited by international law. However, it should be recalled that in 1948, when the Palestinian refugee problem was created, the exchange of populations was regarded as an appropriate solution in the case of ethnic conflicts in general and after war in particular. This solution was even more legitimate in the case of the Palestinian refugees. It should be recalled that the problem of the Palestinian refugees was caused by their flight (or unplanned deportation resulting from the exigencies of the situation) to the nearby Arab countries, primarily Jordan, Syria, Lebanon and the Gaza Strip, because of the war that they and the Arab states had launched in order to thwart the establishment of the Jewish state. At the same time, masses of Jewish refugees came to Israel from Arab states in numbers similar to those of the Palestinian refugees who left Mandatory Palestine. In retrospect, the process which took place can be interpreted as an exchange of populations. It might have been expected that this exchange of populations would help to create an appropriate solution

to the ethnic conflict in the region. This did not occur because of the asymmetry between the conduct of the State of Israel and that of its neighbors. The State of Israel invested enormous effort in absorbing and resettling Jewish refugees, whereas the Arab states to which the Palestinian refugees fled generally chose not to follow the same course. As noted, their goal was to create pressure on Israel and on the international community in the hope of forcing the return of the refugees and thereby undermining the stability and existence of the Jewish state.<sup>156</sup>

### **B. From population exchange to ethnic cleansing: return as a solution**

In the 1990s many political changes took place that magnified the significance of the refugee phenomenon around the world. In Africa and Asia numerous ethnic conflicts took place, sometimes accompanied by violence against members of a minority national group living in territory controlled by a majority group. In Europe, as a result of the fall of communism, large countries such as the Soviet Union and Yugoslavia were dismantled into numerous nation-states. The process of dismantlement created new borders. At times, the changes were the result of agreement, but at other times the changes were accompanied by violence. As a result, various regions in the world witnessed large-scale brutality and atrocities including genocide and the flight of masses of people from their homes in search of refuge. Thus, the phenomenon of refugees grew more prevalent and the number of refugees in the world grew.

To handle such events, the international community sought to look beyond solving the humanitarian or other problems that resulted from these wars. Rather, it sought to prevent or at least regulate the actual development of the ethnic conflicts themselves. The goal was, among other things, to generate an international legal regime which would prevent the eruption of violent ethnic disputes *ab initio* by creating norms preventing the victorious party from benefiting from the “ethnic cleansing” which it had created. Accordingly, the solution of creating ethnically homogeneous geographical

areas by means of the compulsory transfer of citizens belonging to a particular ethnic group was prohibited. “Ethnic cleansing” was broadly referred to in the context of the war in former Yugoslavia in the 1990s. In the Rome Statute which created the International Criminal Court, ethnic cleansing is defined as a crime against humanity.<sup>157</sup> Accordingly, actions designed to create ethnically homogeneous areas by means of a forcible exchange of populations are no longer regarded as a legal solution to the problem of refugees created as a result of a national or ethnic conflict.

This significant change in the stance toward dealing with mass refugee issues created as a result of violent ethnic conflict can be attributed to the fact that the political reality of the 1990s differed greatly from that prevailing in Europe in the aftermath of the Second World War. The political reality following the Second World War was characterized by waves of refugees who, before the war, had been minorities in their countries of residence. These people had fled during the war or after it to their countries of nationality within Europe or to countries outside Europe which had an interest in absorbing the refugees. This process reflected a powerful interest in rebuilding and rehabilitating Europe on a stable basis, so that the countries would not include minorities who might cause instability or war as had happened in the case of the German minorities in the Czech Republic and Poland during the period leading up to the Second World War. In pursuit of this aim, broad support was expressed not only for the absorption of refugees in their countries of nationality or third states interested in immigration, but also in the forcible transfer of people to states in which they might be absorbed within their national or cultural community. Moreover, forcibly uprooting Germans from the countries of Europe and their transfer to Germany was perceived to be part of the price which defeated Germany had to pay because of the war which it had forced on Europe and the entire world. This process was possible in view of the fact that, as noted, the refugees who wanted to leave Europe found refuge in countries which were interested in absorbing them and which did not perceive the absorption of the refugees as a threat or danger to their existence.<sup>158</sup>

In the 1990s, however, the dismantling of the Soviet bloc and Balkans caused large streams of refugees to flow from Eastern Europe, which was less developed, toward the more developed countries of Central and Western Europe. The refugees did not necessarily belong to minorities in the states that they were fleeing. More important—they did not belong ethnically or culturally to the countries to which they were fleeing. The developed states of Europe were neither prepared nor interested—economically or culturally—in absorbing large numbers of refugees in their territory. The developed and developing states at which the refugees arrived suffered from a severe economic situation which was reflected, *inter alia*, by high levels of unemployment. The refugees were a heavy burden on their economies and therefore they refused to absorb them. In addition, in many cases, the inundating waves of refugees threatened the character and culture of the absorbing states. For these reasons the majority of asylum seekers in the world are now unable to obtain official refugee status.<sup>159</sup> The absorbing states assert that the majority of these asylum seekers do not meet the formal criteria set out in the Refugees Convention of 1951. The states tend to interpret these criteria stringently on the ground that the asylum seekers are not subject to persecution which endangers their lives but rather that they seek to exploit the refugee status in order to evade immigration laws. Thus, a policy favoring the return of the refugees to their countries of origin has developed, usually accompanied by a declaration that this is the preferred solution. The right of return of individuals is in fact an insistence on the “duty to return” of the refugees as well as their country of origin.

Against the background of limits on the desire and willingness to absorb refugees around the world, the return of the refugees to their countries of origin has been adopted as a solution preferable to alternative solutions to the problem of the refugees: integration in the absorbing countries or transfer to a third country. This preference was reflected in the UN General Assembly Resolution of 1994 regarding the functions of the UN High Commission for Refugees. The resolution stated that return, if it could be carried out, was “the ideal solution to refugee problems.”<sup>160</sup> Thus, following

the dismantling of the Soviet Union and the creation of new states on its territory,<sup>161</sup> the International Law Commission drafted a document in 1999 dealing with the issue of nationality in relation to the succession of states. The draft was adopted by the UN General Assembly.<sup>162</sup> Article 14 of the draft calls for states to take all necessary measures to allow persons who were forced to leave their habitual residence because of events connected with the succession of states, to return thereto, whereas Article 5 of the document declares that persons having their habitual residence in the territory affected by the succession of states are presumed to acquire the nationality of the successor state on the date of such succession.<sup>163</sup>

When the states of origin also have a clear interest in encouraging return, the return is in fact put into effect. Two examples can be given: the first, the Rwanda crisis where, following the victory of the Rwandan Patriotic Front (RPD) in 1994, the huge community of refugees outside the country (mostly in Zaire) threatened to overwhelm the regime in Rwanda. The fear that the Rwandan refugees would attack the regime led the Rwandan government to exert pressure on the absorbing governments to return the refugees in order to increase government supervision over their activities.<sup>164</sup> The second example is the agreement reached between Switzerland and Sri Lanka to return Tamil exiles to Sri Lanka. Switzerland promised economic assistance to Sri Lanka which would aid in its recovery in exchange for the return of the refugees. Sri Lanka accepted the offer.<sup>165</sup>

When the conflict is temporary and superficial, and it is possible to settle it in such a way as to guarantee stability and public order in the country of origin, it is reasonable to assume that people would prefer to return to their homes and culture and not become refugees. However, in regions where there are active ethnic conflicts, the desire of the absorbing states to repatriate the refugees is not sufficient. Additional measures are required to stabilize the situation and rehabilitate the refugees. Consequently, return is not always practicable or desirable, despite the fact that we live at a time in which the call to return the refugees to their homes has gathered steam within the political discourse and within international bodies responsible

for the refugees. This is particularly true in cases where its implementation may cause tension and conflict between the returnees and the absorbing population.

We shall refer to three cases which testify to the fact that return is not always the appropriate solution for a refugee problem created by ethnic conflict. In these cases return was proposed as a partial or complete solution, but its implementation was difficult and complex:

*1. Bosnia and Herzegovina:* This case illustrates how return as a solution to a refugee problem ensuing from an ethnic conflict cannot in fact be implemented even though it has been agreed upon.

Bosnia and Herzegovina was one of the six republics making up Yugoslavia. It had a population of 4.3 million people. As a result of the collapse of communism in Eastern Europe, Yugoslavia was dismantled and war broke out among ethnic groups in Bosnia and Herzegovina. By 1992, 95% of the Muslims and Croats living in Bosnia had fled their homes. About one million people were displaced. During the course of the war, the state collapsed economically and its infrastructure was destroyed. The state was partitioned according to ethnic boundaries leading to a huge movement of refugees. By 1995 about 4.4 million persons had been displaced from their homes, of whom 1.2 million fled to neighboring states and to Western Europe.<sup>166</sup>

The Dayton Agreement of 1995,<sup>167</sup> which was signed by Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia,<sup>168</sup> ended the violent conflict in this region of former Yugoslavia.

The agreement expressly provided for the right of the refugees to return to their homes.<sup>169</sup> In this way the Dayton Agreement reflected the present tendency of the international community to encourage the repatriation of people who leave their homes following wars which involve ethnic cleansing.

However, contractual obligations alone cannot dictate reality. Notwithstanding the legal recognition of return as a solution and as a right, the process of implementing it encountered difficulties. A recent announcement made by the UN High Commissioner for Refugees reveals that many

obstacles still stand in the path of implementing the repatriation.<sup>170</sup> Many refugees whose right to return has been acknowledged are not interesting in pursuing this route because of their fears that their human rights will be violated, their apprehension that they will not be able to earn a living in the areas from which they fled and their need to contend with acts of hostility amounting to severe violence by members of other ethnic groups. In Croatia, for example, almost no Serbs returned to their previous places of residence.<sup>171</sup> The UN reports show that some process of return is underway; however, it has encountered difficulties raised by Croatia. The returning refugees suffer from discrimination, their homes have been seized, they cannot find work and they suffer from numerous acts of reprisal.<sup>172</sup> In addition, the Dayton Agreement only succeeded in bringing about a limited cessation of the violence and the resulting fragile stability is based on the continued presence of international forces.

*2. Ethiopia:* The case of Ethiopia exemplifies an attempt to resolve a refugee problem by means of repatriation to the country of origin, but to an area both geographically and demographically different from the area from which the refugees had fled. Ethiopians belonging to an ethnic group from the Tigray region fled from their country as a result of starvation and internal wars and lived in refugee camps in eastern Sudan. In 1993, after eight years of exile, the first wave of repatriation to Ethiopia took place, followed two years later by the second wave. In the first wave of repatriation in 1993, the refugees were allowed to return to Ethiopia but not to the original area which they had left in eastern and central Tigray. The reason for this restriction was that the land which they had left behind had already been allocated to others and no vacant land remained in the area. Notwithstanding the bond felt by the returnees to their original regions, including the land, the wider family and the local community, they were prevented from returning to these areas. The government of Ethiopia sought to settle the west of the country in order to integrate this region, which was occupied by a mixed Tigray and Amharic population, with the Tigray region left by the refugees. The refugees, who numbered about 15,000 people, ultimately agreed to

settle in the west of the country. After about two years, in 1995, the government changed its policy and enabled the return of additional refugees to Ethiopia on condition that they return to their places of birth or to the places where they had lived prior to fleeing, but without receiving land for agricultural use. For most of the refugees the significance of this decision was to return to a land plagued by starvation and without the possibility of working. Accordingly, most settled in the cities and did not realize their right to return to the area from which they had fled and with which they felt a strong bond.<sup>173</sup>

Laura Hammond, an anthropologist who has studied the Ethiopian situation, has concluded that the best possible solution to the refugee problem is not necessarily repatriation to their original areas of residence. When repatriation creates ethnic, cultural and economic tensions by reason of the situation in the country of origin or by reason of the changes that have taken place there, and where there are significant differences between the refugee community and the majority population, repatriation cannot be implemented.<sup>174</sup> In her view, the most suitable solution for refugees in such circumstances is actually a new beginning and not reviving the past.<sup>175</sup> Accordingly, in these cases it is better for the refugees to return to another area in the country of origin or remain in the countries of refuge or even find their way to third countries in which they can rehabilitate and rebuild their lives. Such solutions serve both the interests of the refugees and the wishes of the state of origin to avoid undermining the latter's own stability and inflaming ethnic, cultural and economic tensions.

**3. Cyprus:** A refugee problem was created in Cyprus as a result of the prolonged conflict between the Muslim Turkish-Cypriots and the Christian Greek-Cypriots which began in 1965. In 1974, Turkey invaded Cyprus and occupied a region in the north of the island. This action led about 200,000 Greek Cypriots who lived in the north of the island to flee to the southern half in which the Greek majority lived, whereas about 65,000 Turkish-Cypriots who lived in the south left for the north and took over the vacated homes of the Greek-Cypriots. In both halves of the island

immediate broad measures were taken to deal with and absorb the refugees. By September 1974, the Greek-Cypriot government, which had to absorb most of the refugees, had already established an agency to deal with the displaced persons and rehabilitate them. Shortly afterward they were transferred from the refugee camps which housed most of them to permanent homes. Likewise, they were granted social services and economic assistance to aid in their rehabilitation and allow them to establish businesses. Over the course of three years, most of the refugees were rehabilitated, integrated and beginning to contribute to the economic and social life of Greek Cyprus, even though they did not stop regarding themselves as refugees or as entitled to compensation.<sup>176</sup>

On April 1, 2003, Kofi Annan, Secretary General of the UN, published a report regarding his mission to Cyprus.<sup>177</sup> In this report Annan referred to the difference between the refugee issue in Bosnia and Herzegovina and that in Cyprus and explained why repatriation and the restitution of property, which had been suggested as a suitable solution in Bosnia and Herzegovina, were not suitable to resolve the refugee problem in Cyprus.

Annan noted in the report that a distinction had to be drawn between the problem of the refugees in Cyprus and the problem in Bosnia and Herzegovina and stated that it would be inappropriate to apply the solution of sweeping repatriation, adopted in the Dayton Agreement, to Cyprus. Annan explained the difference in identifying the appropriate solution by emphasizing that it had to do with the lapse of time—*i.e.*, the fact that the events in Cyprus had taken place 30–40 years previously and that during the interim period the displaced persons had rebuilt their homes and become integrated into society and the economy. Accordingly, he asserted, it was impossible to restore the previous situation. Repatriation was only possible where it was proposed in response to a recently generated refugee problem.

The details of the proposed arrangement reflected recognition of the demographic uniqueness of each part of the island and suggested very limited repatriation. According to Annan, two political entities should be established in Cyprus—Greek and Turkish.<sup>178</sup> Each would absorb refugees while

ensuring that they would not be given more than 10% of the residential and agricultural land in the constituent state, and not more than 20% of the residential and agricultural land in each town.<sup>179</sup> This proposal clearly shows that the international community was of the opinion that under some circumstances, a solution that did not entail widespread repatriation of the refugees was called for.

It is important to recall that Annan's proposal was rejected by the Greek-Cypriots, *inter alia*, because of the fact that his proposal did not contain a wider recognition of their "right of return." Since then Greek Cyprus has been admitted to the European Union, and it would seem that today the Greeks do not have an incentive to reach an agreement which will change the existing situation.

### C. Conclusion

The Palestinians assert that the solution to the problem of the refugees is to be found in their return to the territory of the State of Israel. In this chapter we produced many diverse precedents, from the beginning of the twentieth century to this day, which prove that return cannot be a suitable solution to refugee problems in cases where there is an ongoing ethnic conflict. The problem of the Palestinian refugees was created in an era when the exchange of populations was an acceptable resolution of ethnic conflicts: Jews moved from the Arab states to Israel, and Palestinian-Arabs left the State of Israel for Arab states. The practical solution to their problems should have been their settlement in the states of refuge, in the same way that the State of Israel absorbed the Jews who arrived there from the Arab states. This was the routine and legitimate solution to problems of this type at the time when the Palestinian refugee problem arose in 1948.

Even today, when the worldwide trend is to regard the encouragement of repatriation as the best possible solution to refugee problems, it is difficult to implement such a solution in places characterized by profound ethnic conflicts, because repatriation may spark repeated hostilities between the

opposing parties. The attempt to resolve the refugee problem in some of the countries of former Yugoslavia proves that under some conditions this is a solution which cannot be implemented. The repatriation of the refugees there reignited the enmity between the ethnic groups and led to acts of violence and retaliation on the part of the majority group. It must be concluded, therefore, *a fortiori* that in the context of the Israeli-Palestinian conflict such a measure cannot be implemented in view of the depth of the conflict and the fact that it has persisted for so many years. The enmity between the parties has become more extreme over time, and therefore return is likely to aggravate the tension and the violence between them. In addition, it should be recalled that the two populations are different ethnically and culturally. The refugees wishing to return to Israel do not aspire to be integrated there as a minority alongside the country's Jewish majority but rather seek to transform Israel into a Palestinian state and prevent the Jewish people from realizing their national self-determination in the State of Israel. This is a violation of the sovereignty of the State of Israel and the right to self-determination of its citizens.

The proposal offered by the former Secretary General of the UN, Kofi Annan, to resolve the conflict in Cyprus included recognition of two political entities, where the governing ethnic group of each entity would preserve its majority. Preservation of the majority was required in order to maintain the unique character of each of the entities. Accordingly, it became necessary to restrict the scope of repatriation of the refugees belonging to the minority group to the territory from which they had fled. This rationale was also at the heart of the Partition Plan of November 1947 regarding Mandatory Palestine. This was also the logic of the vision of two states west of the Jordan River which currently attracts broad international support. Within the framework of this vision the Palestinians will implement their right to return to the Palestinian state. It should be recalled that Annan suggested that none of the parties would be able to acquire ownership of more than 10% of the residential and agricultural land of the other side. This was, of course, intended to preserve the majority of each of the entities. The Annan

report, endorsed by the international community, recommended maintaining the two ethnic and cultural entities by limited repatriation, referring to the lapse of time and demography. The same considerations—when applied to the issue of Israel and the Palestinian refugees—suggest that the international community will not endorse the massive return of Palestinian refugees to Israel.

## Postscript

The claim to return lies at the heart of issues in dispute between the Israelis and the Palestinians. The Palestinians demand that the claim be recognized as a right. They vehemently oppose any proposed solution that does not include Israeli recognition of the right of the refugees and their descendants to return to their homes within the territory of the State of Israel.

In this position paper we have not proposed solutions to the refugee issue. Rather, we wanted to respond to the Palestinians' attempt to extract the refugee issue from the domain of political negotiations and transfer it to the arena of the discourse of rights. Rights trump politics and are inalienable. If the Palestinian position asserting that this is a right were to be accepted, then the negotiations regarding the refugees would be subject to this right. The right might be a tool to undermine the negotiations themselves. Alternatively, Palestinians attempt to ameliorate the Israeli fear of the recognition of return as a right by proposing that such recognition will be coupled with arrangements that would in practice restrict the implementation of the return. Thus, for example, it has been proposed that Israel would recognize the right of return but that the agreement would also specify that the right would not be fully implemented. Another proposal is that the agreement would grant the refugees and their descendants the right to choose whether or not to return, but that it would also include a set of economic and political incentives which would encourage the Palestinians not to choose to return. These arguments are based on the claim that it is critical for the Palestinians for the right to be recognized, and that once this happens they will be flexible on the detailed arrangements. The further claim is that Palestinians can be sympathetic to the need of Jews to maintain a stable majority, and that there is nothing in the recognition of the right of return that might endanger this interest. Anyway, the argument goes, the right to return is recognized by international law. Recognizing it in the agreements is thus

not a further concession by Israel. In addition, such recognition would increase the likelihood of a settlement by creating a better atmosphere for the necessary conciliation.<sup>180</sup>

There is no doubt that a harmonious atmosphere provides an important background for reaching agreements. Symbolic agreements and recognition of suffering may make it easier for the parties to reach a solution to the conflict and assist them in overcoming past antagonism. It is important for both parties to express willingness to take such steps. However, in relation to the “right of return” it is very important to distinguish between celebratory declarations and recognition of the right of return of the Palestinian refugees by virtue of international law. Our position in this policy paper is that Israel *should not* recognize such a right within the framework of agreements between it and the Palestinians, and that it *should not* include such recognition in its official positions in international forums. Israel may of course agree to absorb a limited number of Palestinians in its territory as part of a comprehensive deal; however, an agreement to this effect should not be based on recognition of a right.

This unequivocal position is based on three principal grounds. *First*, the legal analysis which we offered proves definitively that international law *does not* grant the Palestinian refugees a right to compel Israel to allow them to settle in its territory. Accordingly, Israeli recognition of the right to return would impose *a new duty* on Israel to which it is not subject without Israel’s agreement. *Second*, there are those who argue that recognition of the right to return may help to create a more harmonious atmosphere for a settlement; however, in our opinion it is more likely that it would actually cause the parties’ positions to become more intransigent and strengthen the tendency of the Palestinian camp to refuse to compromise on this issue and continue to demand the implementation of the right as a matter of justice. *Third*, the Palestinian claim that recognition of the right will have no effects on implementation is totally unpersuasive and unrealistic. Let us explain: The provision of economic incentives to the refugees to spur them to remain outside Israel would not necessarily be effective in preventing their

return. The political motivation of the refugees to “liberate Palestine from the Zionist Israelis” might well be stronger than the economic temptation offered to them. Financial motivations, in any event, may be provided in all directions. In addition, it is not at all clear that the representatives of the Palestinians have the power to waive the rights of individual refugees. What is presented as a declaratory symbolic affirmation of a right may well lead to a large number of personal claims on the part of the Palestinians.<sup>181</sup>

A reality in which Palestinian refugees and their descendants enter the territory of the State of Israel in large numbers, or acquiescence to the principle vesting the refugees and their descendants with the right to choose whether or not they wish to return to its territory, are not acceptable solutions to the problem. Such solutions would be contrary to the rights and interests of Israel, the Jewish majority in the country and indeed its entire population. Nor would they be in the best interests of the refugees themselves, who possess personal and group characteristics that differ significantly from those of the population in the State of Israel and who aspire to their own self-determination. A political solution will only be acceptable if it allows both peoples to live separately, independently, in peace and dignity, as determined time and again by the Peel Commission and by UN resolutions.

An acceptable solution must relate to all the economic, cultural and political elements of the conflict and offer an overall settlement which will respect the rights and the basic interests of all the parties. Considerable efforts have been invested in this direction by various working groups, in some of which both Jews and Palestinians have participated. Surely, it is high time to put an end to the human and social suffering of the Palestinian refugees and their descendants. Nonetheless, the determination that international law recognizes their *right* of return, and that therefore this issue is not subject to negotiations, will not bring such a solution closer but rather will strengthen the tendency to reject approaches which might lead to agreement and rehabilitation.

The historical precedents presented here also show that the solution to acute ethnic conflicts requires common sense and political wisdom. It would be a pity to let these virtues fall victim to the notion that core elements of the conflict ought ultimately to be determined as if they are non-negotiable *rights*.

The profound fear of the implementation of the “right” of return felt by the Jews in Israel, which led to the hasty and misguided enactment in the Knesset of a statute requiring a special majority for such an agreement, is neither wise nor right. It is important to understand the central role played by “return” in the Palestinian narrative. It is also right to express recognition of—and identification with—Palestinian suffering. This suffering is a reality notwithstanding the fact that it was the Arabs who launched the war with the purpose of frustrating the establishment of Israel as the nation-state of the Jewish people. Similarly, it is important to discuss the moral, historical and legal arguments raised by the Palestinians. At the same time, it is critical to be clear and uphold the conclusion offered in this position paper: These arguments do not confer upon the Palestinian refugees and their descendants a *right* to return to the territory of the State of Israel.

This is the only perspective which will allow Israel to contend with the Palestinian claims in international diplomacy and in the course of negotiations. Let us repeat: The problem of the Palestinian refugees was created as a result of a war launched by the Arabs against the existence of the Jewish state. In 1947, the nations of the world supported the existence of a national home for the Jewish people in part of Mandatory Palestine and they continue to do so to this day. Israel as the nation-state of Jews will not exist if there is a broad return of Palestinian refugees to the territory of the State of Israel. This fact supports our position that the provisions of Article 12 of the Covenant on Civil and Political Rights is not applicable to the situation of these refugees. The State of Israel is not “their own country” of the Palestinian refugees, and preventing their entry to its territory is not “arbitrary deprivation.”

# Annexes

## Annex A:

### The full text of UN General Assembly Resolution 194(III) dated 11.12.1948

194(III). Palestine—Progress Report of the United Nations Mediator  
The General Assembly,

*Having considered further* the situation in Palestine,

1. *Expresses* its deep appreciation of the progress achieved through the good offices of the late United Nations Mediator in promoting a peaceful adjustment of the future situation of Palestine, for which cause he sacrificed his life; and Extends its thanks to the Acting Mediator and his staff for their continued efforts and devotion to duty in Palestine;

2. *Establishes* a Conciliation Commission consisting of three States members of the United Nations which shall have the following functions:

(a) To assume, in so far as it considers necessary in existing circumstances, the functions given to the United Nations Mediator on Palestine by resolution 186 (S2-) of the General Assembly of 14 May 1948;

(b) To carry out the specific functions and directives given to it by the present resolution and such additional functions and directives as may be given to it by the General Assembly or by the Security Council;

(c) To undertake, upon the request of the Security Council, any of the functions now assigned to the United Nations Mediator on Palestine or to the United Nations Truce Commission by resolutions of the Security Council; upon such request to the Conciliation Commission by the Security Council with respect to all the remaining functions of the United Nations Mediator on Palestine under Security Council resolutions, the office of the Mediator shall be terminated;

3. *Decides* that a Committee of the Assembly, consisting of China, France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America, shall present, before the end of the first part of the present session of the General Assembly, for the approval of the Assembly, a proposal concerning the names of the three States which will constitute the Conciliation Commission;

4. *Requests* the Commission to begin its functions at once, with a view to the establishment of contact between the parties themselves and the Commission at the earliest possible date;

5. *Calls upon* the Governments and authorities concerned to extend the scope of the negotiations provided for in the Security Council's resolution of 16 November 1948 and to seek agreement by negotiations conducted either with the Conciliation Commission or directly, with a view to the final settlement of all questions outstanding between them;

6. *Instructs* the Conciliation Commission to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them;

7. *Resolves* that the Holy Places—including Nazareth—religious buildings and sites in Palestine should be protected and free access to them assured, in accordance with existing rights and historical practice; that arrangements to this end should be under effective United Nations supervision; that the United Nations Conciliation Commission, in presenting to the fourth regular session of the General Assembly its detailed proposals for a permanent international regime for the territory of Jerusalem, should include recommendations concerning the Holy Places in that territory; that with regard to the Holy Places in the rest of Palestine the Commission should call upon the political authorities of the areas concerned to give appropriate formal guarantees as to the protection of the Holy Places and access to them; and that these undertakings should be presented to the General Assembly for approval;

8. *Resolves* that, in view of its association with three world religions, the Jerusalem area, including the present municipality of Jerusalem plus the

surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern, Shu'fat, should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control;

*Requests* the Security Council to take further steps to ensure the demilitarization of Jerusalem at the earliest possible date;

*Instructs* the Conciliation Commission to present to the fourth regular session of the General Assembly detailed proposals for a permanent international regime for the Jerusalem area which will provide for the maximum local autonomy for distinctive groups consistent with the special international status of the Jerusalem area;

The Conciliation Commission is authorized to appoint a United Nations representative, who shall co-operate with the local authorities with respect to the interim administration of the Jerusalem area;

9. *Resolves* that, pending agreement on more detailed arrangements among the Governments and authorities concerned, the freest possible access to Jerusalem by road, rail or air should be accorded to all inhabitants of Palestine;

*Instructs* the Conciliation Commission to report immediately to the Security Council, for appropriate action by that organ, any attempt by any party to impede such access;

10. *Instructs* the Conciliation Commission to seek arrangements among the Governments and authorities concerned which will facilitate the economic development of the area, including arrangements for access to ports and airfields and the use of transportation and communication facilities;

11. *Resolves* that the refugees wishing to return to their homes and live at peace with their neighbors 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;

*Instructs* the Conciliation Commission to facilitate the repatriation, re-settlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations;

12. *Authorizes* the Conciliation Commission to appoint such subsidiary bodies and to employ such technical experts, acting under its authority, as it may find necessary for the effective discharge of its functions and responsibilities under the present resolution;

The Conciliation Commission will have its official headquarters at Jerusalem. The authorities responsible for maintaining order in Jerusalem will be responsible for taking all measures necessary to ensure the security of the Commission. The Secretary-General will provide a limited number of guards to the protection of the staff and premises of the Commission;

13. *Instructs* the Conciliation Commission to render progress reports periodically to the Secretary-General for transmission to the Security Council and to the Members of the United Nations;

14. *Calls upon* all Governments and authorities concerned to co-operate with the Conciliation Commission and to take all possible steps to assist in the implementation of the present resolution;

15. *Requests* the Secretary-General to provide the necessary staff and facilities and to make appropriate arrangements to provide the necessary funds required in carrying out the terms of the present resolution.

\* \* \*

At the 186<sup>th</sup> plenary meeting on 11 December 1948, a committee of the Assembly consisting of the five States designated in paragraph 3 of the above resolution proposed that the following three States should constitute the Conciliation Commission: France, Turkey, United States of America. The proposal of the Committee having been adopted by the General Assembly at the same meeting, the Conciliation Commission is therefore composed of the above-mentioned three States.

**Annex B:**  
**Judgment of the European Court of Human Rights**  
**regarding Cyprus**  
**dated 5.3.2010**

After this position paper was submitted for editing, the European Court of Human Rights delivered its judgment on the issue of the property rights of Greeks who had lived in northern Cyprus and moved to the south following Turkish occupation.<sup>182</sup> We referred to Cyprus in Chapter Three of this position paper as an example of a long-lasting refugee problem (about 35 years, since 1974). We saw that the UN proposed a solution to the problem which included only a limited return of the refugees. This proposal shows that the international community prefers the stabilization of different zones of ethnic majority to the implications of allowing the return of substantial numbers of refugees. This attitude is further strengthened by the judgment. In this important ruling one of the most prestigious and respected international tribunals has addressed the relevance of the human rights discourse to the issue of the return of refugees within the context of a long-lasting ethnic conflict. We therefore make a special note in this Annex of the principal elements of the judgment and indicate some of its ramifications for the matter at hand.

The European Court of Human Rights (hereinafter: the Court) is an international court which was established by virtue of the European Convention on Human Rights of 1950 (hereinafter: the Convention), with the object of monitoring the protection of human rights in the countries of Europe which are signatories to the Convention.

On March 5, 2010, the Court gave judgment on the petition of Greek-Cypriot petitioners who had fled south from the northern part of the island following its occupation by Turkey in 1974 (a brief description of the events in Cyprus is given in Chapter Three above).

The seventeen petitioners claimed to be allowed to exercise ownership of their homes and land inside the Turkish Republic of Northern Cyprus. They complained that upon the occupation of the island they had been denied their right to peaceably enjoy their homes and lands and had become the victims of discrimination. Their petition relied on the right to protection of property (Article 1 of the First Protocol to the Convention), the right of a person to respect for his home (Article 8 of the Convention) and the prohibition against discrimination (Article 14 of the Convention). As a result of previous proceedings, and following demands by the international courts, the Turkish-Cypriot government had created a statutory framework containing provisions for the submission of such claims and establishing mechanisms for claims for specific performance (*i.e.*, the actual return of the property claimed) to be rejected, if subsequent circumstances justified compensation instead of specific performance. The Greek petitioners preferred to petition the Court and not to exercise their right under the North-Cyprus law to submit a claim to the Claims Commission. They based their refusal on the ground that the Turkish Cypriot government was an illegal entity. The Court dismissed the petitions and held that irrespective of the standing of the Turkish Cypriot government under international law, this government was the effective power in the area. Accordingly, fundamental principles required that its laws and regulations be complied with, including those which allowed the expropriation of the property rights of the Greek refugees in consideration for the payment of compensation in appropriate circumstances. We should note in particular some of the principal points in the judgment which are relevant to our discussion:

1. *The considerable amount of time which had elapsed since the creation of the refugee problem had a significant impact on the manner in which the Court interpreted and implemented the provisions of the Convention* (Paras. 84-85 of the judgment).

The Court held that it was bound to examine the cases presented to it from the point of view of the changed reality which had been created as

a result of the complex and dynamic political and historical situation. Its interpretation could not be static and it could not ignore the changed circumstances. The judges pointed out that during the 35 years which had elapsed since the events of 1974 generations had passed, and the local population had changed. Turkish Cypriots who had come from the south of the island were now settled in the north. Turks who had come from Turkey had also settled in the north of the island. A considerable portion of the property of the Greek-Cypriots had changed ownership as a result of donations, sale or inheritance. The lapse of time had therefore weakened the links between those who claimed rights in the property and the property itself. This had implications for the nature of the remedy which would be regarded as meeting the conditions of the Convention: when restoration of the property was not possible, compensation would be regarded as appropriate. In this way the Court expressed its recognition of the rights of state parties to the Convention to choose the manner in which they protect the rights entrenched in it (Paras. 113-114).

2. *Alongside the rights of the refugees, other parties had rights and interests which may be taken into account, such as the rights of the present occupants or users of the assets, or the fact that the assets were being used for public purposes or for essential security purposes* (Paras. 111-113, 116).

The Court not only examined the violations of the rights of the petitioners but also asked: Was the right to property and the expectation of enjoying the full benefit issuing from it consistent with actual reality? In view of this reality, was it appropriate to allow the petitioners to exercise their rights? The judgment upheld the argument put forward by the Turkish Cypriot government and stated that it would be arbitrary, dangerous and unreasonable after 35 years to expect the Court to order the unconditional restoration of the petitioners' property. A state was entitled to take additional factors into account, including in particular the status of additional parties who had occupied many of the assets for many years. If the Court would have ordered the unconditional return of the property,

this would have disregarded the rights of those now living there, or those making essential use of the property for public purposes. Accordingly, the Court emphasized that it was not interpreting the Convention in such a manner as to impose a sweeping and unqualified obligation on the government to forcibly remove and expel the inhabitants in order to resettle those who asserted a right to the property, even if this would protect the rights of the petitioners as entrenched in the Convention (Para. 116). In the view of the Court, it was not possible to rectify earlier violations of property rights (of the Greek-Cypriots) by implementing subsequent non-proportional injustices toward the Turkish Cypriots (Para. 117). The harm caused to the petitioners could be rectified by the provision of alternative property (land belonging to a Turkish Cypriot who had moved from the south of the island to the north would be exchanged for the land of a Greek-Cypriot who had left the north of Cyprus) or by means of compensation. In this way the Court expanded the scope of the discretion of states and even of effective governments occupying territory following a conflict, despite the fact that the very legality of the political situation was challenged. The Court allowed the effective government to determine the manner of settling property claims of persons displaced from territories as a result of conflict, even though that conflict had not yet ended.

3. *The Court defined the term “home” in a dynamic manner* (Paras. 136-137). As noted, one of the principal arguments put by the petitioners concerned the right of a person to respect for his connection with his home. When considering the claims of one of the petitioners for the restoration of her father’s home which she had left at the age of two, the Court held that the petitioner’s assertion that the particular property was her home was insufficient. She had the burden of proving that she had a concrete and continuous connection to the particular land or home. Accordingly, if the petitioners had never occupied the property or had only occupied it for a short period, it might be assumed that her ties to the property were

so weak as to make it impossible to hold that there had been a violation of her right to respect for her home, within the meaning of Article 8 of the Convention.

The Court held that the term “home” should not be seen as a synonym for the term “family roots” which was emotional and hazy. In the particular case, the claimant had been very young when she left the property claimed, and she had lived most of her life with her family in another place. Today she had no concrete ties to the home, and accordingly the Court did not accept the argument that the facts revealed a significant violation of the petitioner’s right to respect for her home.

4. *The Court assumed that the parties’ claims reflected first and foremost the years of conflict between Greek-Cyprus and Turkey regarding the future of the island and regarding the manner of resolving the problem of the property of the refugees. The solution to the problem of the refugees was primarily connected to the political solution which would be achieved in negotiations between the parties to the conflict* (Para. 83).

The judgment reviewed the measures which had been taken until then to resolve the conflict in Cyprus and emphasized the plan put forward by the former Secretary General of the UN, Kofi Annan (Paras. 4-16; see also Chapter Three of this position paper).

The judges expressed an attitude at odds with the process we have described in international law, according to which, beginning in the 1990s, the right of refugees to return to their homes is recognized as a personal right, which states cannot waive in the name of individuals. We said that states and UN agencies now see return as the preferred solution to mass refugee problems. In contrast, the judgment of the European Court is based on the premise that in addition to the rights of individual refugees and their descendants, account must also be taken of the interests of the states and the present inhabitants of properties. This is *a fortiori* the case when restoration of refugee property is incompatible with changes that affected the use of the same property (Para. 111). Moreover, the court

expressly stated that private law aspects of mass refugee movement should be handled within the framework of political negotiations, taking into account changes in the reality, and not be decided on the basis of non-negotiable private law rights. The Court noted that the petitioners did not have to apply to the North Cyprus Claims Commission in order to exercise their property rights. They could also wait for the political resolution to the conflict, which would presumably also include a response to their concerns (Para. 128).

*5. The Court distinguished between inter-state relations and human rights and their implementation* (Paras. 92-95).

The Court stated that the arrangements and institutions implemented by the effective government in the territory should be respected even if its occupation was illegal, because such respect was a necessary condition for the continuation of daily life. Accordingly, even though the international community saw Turkey as an illegal occupier of northern Cyprus and did not recognize the independence of Turkish Cyprus, the decisions made by the occupying power had to be respected, especially when those decisions sought to protect human rights. As noted, in 2005 Turkish Cyprus had established a quasi-judicial committee (the Immoveable Property Commission—IPC) to deal with refugees' claims. The Commission dealt with claims respecting immovable property which had been registered in the name of the claimants in the area of Turkish Cyprus in 1974, and chattels which had been owned by the claimants until 1975. The Commission had the duty and the power to investigate the cases brought before it, gather testimony and summon witnesses. Its decisions were binding and enforceable. It had the power to order the restoration of the property or the provision of compensation in return for it, or propose its exchange for another property. The Commission was a legitimate body, even though recognition of it did not confer indirect legitimacy on the regime which had not been recognized as legitimate by the UN. The Court held that the mechanism of the Claims Commission was efficient and available,

and therefore the petitioners had to try and exhaust the remedies offered to them by the Turkish Cypriot Claims Commission (as provided by Article 35 of the Convention) prior to applying to the Court. Alternatively, they should have waited for a general political resolution to the conflict between the parties. As they had chosen not to act in this way, the Court held that the petitions were inadmissible.

While it is true that the rulings of the Court bind only the European community, they may provide guidelines and inspiration for thinking about the issue of the return of the Palestinian refugees in the context of the Israeli-Palestinian conflict on at least five points.

*First*, the events which led to the creation of the Palestinian refugee problem took place 62 years ago. The decision of the European Court giving weight to the lapse of time and changed conditions regarding a thirty-five-year-old refugee situation is even more applicable to one which has already lasted more than sixty years. In the many years that have elapsed, our region has seen historical and political changes which have greatly affected the reality in the State of Israel and the region as a whole. We must examine the problem of the refugees and the acceptable ways of resolving it in the light of these changes. Acknowledging the plight of the refugees does not mean that return is the one and only solution. In all likelihood it is no longer possible and it certainly is undesirable.

*Second*, the refugees' claim to return to "their homes" should not be treated as a matter of human rights unrelated to the background of the political conflict. The Court held that the Greek-Cypriots had to choose between instituting their claim according to the north Cyprus law (which takes into account changing circumstances when deciding on the suitable way to respond to the claim of property by either restitution or compensation) and waiting until all such issues were resolved in the context of the political resolution of the conflict.

*Third*, the Court stated that the issue of property rights of Greeks in the North should be decided against the background of the political reality:

The military activity in Cyprus had caused the movement of Greeks from the north to the south and the movement of Turks from the south to the north. The compromise offered by the former Secretary-General of the UN entailed significant restrictions on the implementation of Greek return to the north (or Turkish return to the south), in order to preserve the ethnic majority of each of the communities in their respective territories. It should be recalled that since the State of Israel was established it has absorbed in its territory Jews who became refugees as a result of the War of Independence as well as the large waves of Jews from the Arab world and from many other countries. It has integrated these people in ordinary civilian frameworks and resettled them throughout the country, some in regions and houses which were previously populated by the Palestinians. Moreover, some Palestinian citizens of Israel have been resettled in some of the houses and villages which once belonged to Palestinian refugees. The return of Palestinian refugees and their descendants to their actual homes or to the land on which they once lived within the territory of the State of Israel, would severely prejudice the rights of those now living in these places. According to the Court, specific implementation of the right to property in this context cannot compel the perpetration of an injustice upon the present occupiers of the houses or lands which once belonged to the refugees.

*Fourth*, the provisions of international law dealing with the right to return do not specifically refer to the houses of the people concerned. In contrast, UN Resolution 194(III) which was discussed extensively in this position paper provided that the Palestinian refugees had to be allowed to return “*to their homes*” as soon as practicable (subject to conditions). For this reason, the Court’s attitude toward the proper interpretation to be given in such contexts to “the right to respect for his home” is important. The Court clarified that the rationale behind this right is the need to protect the concrete ties between a person and the house in which he himself lived for a lengthy period of time. That particular right does not protect more abstract ties between persons and their “home.” This interpretation is very important in the context of the problem of the Palestinian refugees, a considerable

proportion of whom—and in particular the descendants of those who left their homes in 1948—have never lived in the houses or lands or even in the state to which they wish to return. A historical and emotional link to houses or land, however important, does not provide a basis for a right “to protect one’s home,” especially if such protection requires disregarding the reality and interests of those living in these places during the long absence of the claimants. This limitation is valid even if the departure from the home and the inability to live in it are of disputed legality.

*Fifth*, it is impossible to exaggerate the importance of the Court’s finding that no analogy can be drawn between handling claims of violations of human rights in situations of peace and handling such claims within the framework of an unresolved political and ethnic conflict. The Court rightly preferred that detailed decisions concerning the use of property in a territory be regulated by the effective government operating in the territory concerned. It followed the practice of international law that such detailed determinations are not proper for international human rights tribunals, which lack the capacity to make detailed fact findings, and certainly the power to implement any resulting judgment. The Court refused to substitute legal proceedings before it and the discourse of rights for political proceedings which should be undertaken to resolve the conflict and the ensuing disputes. This approach squares well with the State of Israel’s consistent assertion that the Palestinian refugee problem must be resolved within the framework of a comprehensive peace agreement, which will safeguard the rights and interests of all the parties involved in the conflict. The judgment supports the argument that no recognition should be given today to the “right” of the Palestinian refugees to return to “their own homes,” as such recognition may intensify the intransigence surrounding the conflict, and may hinder attempts to reach a settlement and rehabilitation.

## Notes

1. Entrenchment of the Negation of the Right to Return Law, 5761—2001, S.H. 1772, p. 116. Section 2 of the law states: “*Refugees will not be returned to the territory of the State of Israel save with the approval of the majority of the Knesset Members.*” Section 1 of the law defines a refugee as a person who “*left the borders of the State of Israel at a time of war and is not a citizen of the State of Israel, including, persons displaced in 1967 and refugees from 1948 or a family member.*”

2. A/Res/181 of November 29, 1947, <http://www.un.org/documents/ga/res/2/ares2.htm>.

3. Morris 1991, 397-399; Gazit 1995, 2; Soffer and Shiloh 2004, 6; Morris 2003, 240; UNRWA 1983; Lindsay 2009, 3 n. 7.

4. Morris 2003, 240-245; Morris 1991, particularly pp. 65-86, 91-183.

5. In Jordan, most of the Palestinian refugees obtained citizenship; however, their citizenship did not negate their status as refugees, according to Section 3 of the Jordanian Nationality Law, <http://www.un.org/unrwa/refugees/jordan.html>. In Syria the Palestinian refugees were granted the same rights as other citizens, except for the right to vote and be elected. Furthermore, their right to purchase property was restricted. The Syrian law No. 260 of October 7, 1956 emphasizes that the refugees are granted all rights save for citizenship, in order to preserve their original Palestinian citizenship, <http://www.unhcr.org/refworld/pdfid/467006c22.pdf>. In Lebanon, about a quarter of the refugees obtained Lebanese citizenship through marriage to Lebanese citizens or following pressure by various ethnic groups (Sunni, Shi'ites and Maronites) to naturalize members of their groups. However, the majority of the Palestinian refugees in Lebanon are regarded as aliens under the law, and therefore are almost completely devoid of rights and suffer from social and economic restrictions. They are not entitled to perform numerous government and professional jobs, including those which require academic qualifications. Restrictions are placed on their freedom of movement. Entry into the state and departure from it involve obtaining limited visas. The refugees do not enjoy the benefit of government education and health services or social insurance. See <http://www.un.org/unrwa/refugees/lebanon.html>. See also Ravid 2001.

6. About 300,000 people. See Gazit 1995, 2. Some of the refugees of 1967 are also refugees of 1947-1949.

7. Section 3 of the Nationality Law, 5712-1952, S.H. 95, p. 146.

8. <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>. For the text of the resolution and a detailed discussion of this and other resolutions see Chapter Two below, Section B, as well as Annex A.

9. Principally, Articles 1-6 of the Resolution, *id.*

10. Gelber 2004, 473.

11. “*Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representative of the government before the Ad Hoc Political Committee in report of the implementation of the said resolutions*” A/Res/273(III) in <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/044/44/IMG/NR004444.pdf?OpenElement>.

12. See the summary of Abba Eban’s speech of 5 May, 1949 before the Committee, A/AC.24/SR.45 <http://www.unispal.un.org/unispal.nsf/vDateDoc?OpenView&Start=1&Count=270&Expand=61.8#61.8>. See the discussion of Abba Eban’s speech in Eyal Benvenisti’s lecture of November 30, 2009, “Abba Eban’s speech in the debate on the admission of Israel to the UN” (as yet unpublished). Eban gave the following explanation in the debate of May 6, 1949:

The statement of Mr. Ben-Gurion to the Conciliation Commission makes it quite clear that he rejected no principle laid down by the General Assembly, but that the question of return hinged upon two factors: first, the restoration of peace, after which the Arabs would return to their homes in such conditions as would enable them to live at peace with their neighbours; in other words, not a truce or an armistice, but real peace between Arabs and Jews; and, secondly, there is the question of the extent to which the return of the refugees is practicable. This aspect of the problem is acknowledged by the resolution of the General Assembly itself. Those are the two qualifications to the right of return to which Mr. Ben-Gurion drew attention, but he certainly did not lay down or encourage a rejection of the principle of repatriation.

Eban further explained Israel’s position in response to the Danish representative’s insistence on understanding whether Israel was not rejecting but also not accepting the idea of return in Article 11 of Resolution 194(III). Israel’s position was that the return of the refugees was one way to resolve their problem, but consideration should also be given to resolving the problem by resettling them in the neighboring Arab states.

Return of Arab refugees was one of the methods of settling this problem. It considers, as the Conciliation Commission considers and as one of the Governments represented in the United Nations, the opinion of which I quoted this morning seems also to consider, that another method of settling the question would be resettlement of the refugees in neighbouring countries.

A/AC.24/SR/47, [http://www.un.org/french/documents/view\\_doc.asp?symbol=A/AC.24/SR.47&TYPE=&referer=/french/&Lang=E](http://www.un.org/french/documents/view_doc.asp?symbol=A/AC.24/SR.47&TYPE=&referer=/french/&Lang=E). In a meeting held the next day, on May 7, 1949, Eban asserted in relation to Article 11 of Resolution 194(III) that this issue concerned relations between states and peoples and that problems had to be resolved through negotiations, A/AC/SR.48

[http://www.un.org/french/documents/view\\_doc.asp?symbol=A/AC.24/SR.48&TYPE=&referer=/french/&Lang=E](http://www.un.org/french/documents/view_doc.asp?symbol=A/AC.24/SR.48&TYPE=&referer=/french/&Lang=E).

13. See EA/Res/186 (S-2), <http://domino.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/a9a8da193bd46c54852560e50060c6fd?OpenDocument>

14. <http://www.unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/ab14d4aafc4e1bb985256204004f55fa?OpenDocument>.

15. Ariel 1960; *Encyclopaedia Britannica*, <http://www.britannica.com/EBchecked/topic/62357/Greve-Folke-Bernadotte-af-Wisborg>

16. See UN General Assembly Resolution 319 (IV) of December 3, 1949 <http://www.un.org/documents/ga/res/4/ares4.htm>. Article 1 of the Resolution provided for the establishment of the UN High Commission for Refugees (UNHCR). The organization was accorded the powers of the International Refugee Organization (IRO) which had been established in 1946 by the UN, but ceased operations in 1952, [http://www.avalon.law.yale.edu/20th\\_century/decad053.asp](http://www.avalon.law.yale.edu/20th_century/decad053.asp). It was preceded by the United Nations Relief and Rehabilitation Administration, which had been set up in 1943 to provide assistance to refugees and civilians of the Allies during the Second World War. This organization continued its activities even after the war until it was closed in 1948, after transferring some of its tasks to other international organizations, see: <http://www.usmmm.org/wlc/article.php?ModuleId=10005685>

17. See UN General Assembly Resolution 428 (V) of December 14, 1950, <http://www.un.org/documents/ga/res/5/ares5.htm>

18. Article 6(i)(A) of the Statute of the Office of the High Commission, *id.* Reference is to the Convention Relating to the International Status of Refugees of 1933, the Convention Relating to the Status of Refugees who came from Germany of 1938 and the Protocol Additional to them of 1939.

19. <http://www.unhcr.org/pages/49c3646c1d.html>

20. <http://www.unhcr.org/4922d43a0.html>

21. <http://www.unhcr.org/pages/49c3646c1d.html>

22. The United Nations Relief and Works Agency for Palestine Refugees in the Near East. The UNRWA definition of Palestine refugees also includes the Jewish refugees who escaped from the territory of Palestine which was occupied by the

Arabs as well as the Arabs who were left in Israel but lost their houses and livelihoods as a result of the war. However, Israel reached an agreement with UNRWA whereby those living in Israel would not be regarded as “refugees” and Israel would be responsible for their welfare. UNRWA is not responsible for Jewish refugees or the Palestinian “internal displaced persons” in Israel. Accordingly henceforth we shall use the expression “Palestinian refugees” as the correct reference to “Palestine refugees.”

23. Convention Relating to the Status of Refugees, 1951, Treaty Series 3, 5.

24. Id., Article 1D of the Convention states that “*The Convention does not apply to those refugees who are the concern of United Nations agencies other than UNHCR, such as refugees from Palestine who receive protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA),*” <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

25. “The competence of the High Commissioner shall not extend to a person: [...] (c) Who continues to receive from other organs or agencies of the United Nations protection or assistance,” [http://www.unhcr.se/en/Publications/Pdf/UNHCR\\_statute.pdf](http://www.unhcr.se/en/Publications/Pdf/UNHCR_statute.pdf)

26. For example, Palestinian refugees have been living in Iraq since 1948. Iraq, which is not a signatory to the Refugees Convention, refused to grant them the status of refugees and also refused to grant them citizenship. They do not receive assistance from UNRWA because of the government’s refusal to allow the organization to operate in that country. Accordingly, these refugees are recognized as refugees by the High Commission. Large groups of Palestinian refugees, according to the UNRWA definition, live in the United States, Chile, Germany and Saudi Arabia. Most of these people are not classified as refugees in the official statistics of asylum seekers in these countries, and therefore there are no official figures in respect of them. For numerical estimates, see <http://www.palestineremembered.com/download/Badil/pal-ref-idp-world-2006.pdf>

27. See the map of UNRWA’s activities in the organization’s website: <http://www.un.org/unrwa/refugees/images/map.jpg>

28. UN General Assembly Official Records, 5th session, 3rd comm., 328th meeting, para. 52. See also Takkenberg 1998, 57-63. We should note that Article 1D of the Refugees Convention was proposed by the Egyptian delegate.

29. Id., para. 47. This reasoning ignores the Palestinians and Arab states’ violation of UN Resolution 181 regarding the partition of the territory into two states for two peoples.

30. A/Res/302(IV) of December 8, 1949, <http://www.un.org/documents/ga/res/4/ares4.htm>

31. See Articles 5, 6 of the Resolution, id.

32. “Evolve a development programme aiming at the economic integration of the refugees in host countries, which would strengthen the economy of the host countries while providing employment to refugees, and thus make them self sufficient to a point where their names could be deleted from the relief rolls,” UNRWA 1983, p. 59.

33. Lindsay 2009, 15-16.

34. *Id.*, 37.

35. <http://www.un.org/unrwa/organization/staff.html>

36. <http://www.un.org/unrwa/finances/index.html>

37. See *supra* text accompanying notes 20-21.

38. See *supra* note 35 and accompanying text.

39. See *supra* text accompanying notes 20-21.

40. See *supra* note 23.

41. Protocol to the Convention relating to the Status of Refugees, Treaty Series 21, 23 (signed in 1967), Articles 1(2), 1(3).

42. See Foster 2007, 109-110. See there details of additional cases. For example, a New Zealand court held that discrimination may be a form of persecution in the context of the Refugees Convention: Refugee Appeal No. 74665/03[2005] NZAR 60. In the United States the case law has held that persecution which might lead to the grant of refugee status may include severe deprivation of freedom, food, accommodation or employment: *Kovac v. INS* 407 F.2d .102, 105-106 (9th Cir. 1969). As a result of the case law, a statute was enacted which interpreted persecution as including these severe types of deprivation—Refugee Act, 1980, HR REP NO., 95-549 at 5 1978. See also Kritzman-Amir 2008, 115-117, 129-154.

43. The Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa, a regional treaty adopted in 1969, [http://www.africa-union.org/root/au/Documents/Treaties/Text/Refugee\\_Convention.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/Refugee_Convention.pdf)

44. Article 1(2) of the Convention, *id.*, provides: “The term ‘refugee’ shall also apply to every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

45. Cartagena Declaration on Refugees adopted at Cartagena, Colombia, November 1984, <http://www.asylumlaw.org/docs/international/CentralAmerica.PDF>. Article III(3) provides that refugees include “*Persons who flee their countries because*

*their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*"

46. See the position paper published by the High Commission in October 2009 in which it set out guidelines for determining the status of a Palestinian refugee—"Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, Article 8," <http://www.unhcr.org/refworld/pdfid/4add77d42.pdf>

47. See the site of the High Commission: "Refugee Status Determination—Identifying who is a refugee" <http://www.unhcr.org/cgi-in/texis/vtx/search?page=search&docid=43144dc52&query=definition%20of%20refugee> .

48. <http://www.unrwa.org/htemplate.php?id=89>

49. Id.

50. "A needy person, who, as a result of the war in Palestine, has lost his home and his means of livelihood." UN Doc. A/1451/Rev.1, Interim Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, October 6, 1950, para. 15.

51. "A person normally resident in Palestine who has lost his home and his livelihood as a result of the hostilities, and who is in need," in Report of the Director of UNRWA, 1950-1951, U.N. GAOR, 6th Sess., Supp. No. 16, at 3, para. 16, U.N. Doc. A/1905, 1951.

52. Takkenberg 1998, 71.

53. "A person whose normal residence had been Palestine for a minimum of two years preceding the 1948 conflict and who, as a result, had lost both his home and means of livelihood. A refugee is now deemed to be eligible for UNRWA relief if: (1) he is in need, (2) he has been residing since the conflict in one of the countries where UNRWA is providing relief, and (3) he is officially and currently registered with UNRWA," UNRWA 1962. See also Cervenak 1994, fn 41 and associated text.

54. UNRWA's relief budget is about 10% of the organization's budget, see UNRWA 2007.

55. "Under UNRWA's operational definition, Palestine refugees are people whose normal place of residence was Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 conflict," <http://www.unrwa.org/htemplate.php?id=86>.

56. Lindsay 2009, 24-25; Cervenak 1994, fn 14 and associated text.

57. According to the UNRWA site in English: <http://www.unrwa.org/etemplate.php?id=86>. This definition is similar to the definition accepted in 1952, apart from a minor change which more precisely delineates the period of residence required in Palestine.

58. "The descendants of the original Palestine Refugees are also eligible for registration," <http://www.un.org/unrwa/refugees/whois.html>; see also Lindsay 2009, 25, 35.

59. Lindsay 2009, 25, <http://www.unrwa.org/userfiles/20100118134924.pdf> (para 80[b]).

60. Al-Shikaki 2004, 28-29.

61. Abu Zayd 2008. There are those who estimate the number of Palestinian refugees not cared for by UNRWA as lower. See, for example, <http://www.palestineremembered.com/download/Badil/pal-ref-idp-world-2006.pdf>, where the number in 2006 was estimated to be 1.5 million.

62. This is what distinguishes the situation of Israel and Palestine from that of India and Pakistan. There too, there was a mass flight of refugees as a result of a war which led to the division of one entity into two separate ethnic states; however, the Hindus fled to a country which had a Hindu majority (India), while the Muslims from India fled to a Muslim country and obtained its citizenship (Pakistan).

63. Others estimate the figure at 7 million, among them refugees who are not registered with UNRWA, see Dumper 2006.

64. See *supra* text accompanying note 19.

65. With regard to this figure and reservations regarding it, see notes 60-61 and the accompanying text. Clearly, if the number of Palestinians around the world is lower, the percentage of Palestinian refugees out of the world population of Palestinians will be higher.

66. <http://www.cbs.gov.il/www/population/profil.pdf>.

67. Indeed, in recent years there have been the first signs of international tribunals enforcing international law by means of international tribunals for human rights and by means of international criminal tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and Yugoslavia (ICTY) and the International Criminal Court (ICC); nonetheless, it is still the case that there are no mature systems of policing, adjudication and enforcement on the international plane which are equivalent to those that exist on the domestic state level.

68. Article 38(1) of the Statute of the International Court of Justice: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

69. *Id.*, Article 38(1)(b).

70. See Shaw 1997, 89-90; Brownlie 1990, 10; Jennings and Watts 1992; Akehurst 1997, 47-48.

71. Article 38(1) of the Statute of the International Court of Justice, *supra* note 68.

72. See Akehurst 1997, 378; Shaw 1997, 89; Brownlie 1990, 14, 699.

73. For example, the optional Protocol to the Covenant on Civil and Political Rights of December 16, 1966 authorizes the Human Rights Committee to deal with the complaints of individuals against states which have adopted the Protocol. Similar mechanisms also exist in the following conventions: International Convention on the Elimination of All Forms of Racial Discrimination (1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Elimination of All Forms of Discrimination against Women (1967); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). For a general survey of the reporting mechanisms and the monitoring of human rights, see Ben Naphtali and Shany 2006, 209-210, 227-232.

74. See Francioni and Conforti 1997. With regard to the State of Israel, see Benvenisti 1997, 207-221; Shany 2006, 341.

75. Gavison (2010).

76. The debate concerning the universality of human rights waged between the leaders of the developing world who claim that universality is intended to enforce Western values on the entire world has still not waned. Indeed, while the Vienna Convention again proclaimed, with broad agreement, the emphasis on universality, claims regarding Western imperialism—and now regarding anti-Western coercion—continue to be voiced within the human rights discourse.

77. For the background to the adoption of the resolution see *supra* in Chapter One. For the discussions in the UN General Assembly which preceded the adoption of the resolution, see United Nations 1950, 166-176.

78. See *supra* text accompanying note 72.

79. Boling 2001, 10; Quigley 1998, 211.

80. See below, Chapter Three, Section A.

81. See Gavison 2009, 15-16.

82. For the Bernadotte Report, see *supra* note 14.

83. Radley 1978, 586, 600.

84. This was the assertion made by Israel's Prime Minister David Ben-Gurion in his speech before the UN Conciliation Commission for Palestine on April 7,

1949. See Freundlich 1984, 561. See also Radley 1978; Tadmor 1994, notes 403, 424; For a study conducted by the UN see: The Right of Return of the Palestinian People, Study prepared by the special unit on Palestinian Rights, 1.11.1978, ch. V, text accompanying footnote 2, ch. VI, text accompanying footnote 6. <http://www.unispal.un.org/unispal.nsf/0/805c7314520.35912852569d1005c1201?OpenDocument>.

85. Id., Chapter V, text accompanying note 4; Tadmor 1994, 424; Boling 2001, 13 note 36.

86. It is difficult to accept the succession claim in this context because a large portion of the houses no longer exist and new houses have been built in their place, and because it is not clear who the inheritors are and which laws of succession must be adopted.

87. Radley 1978, 599-601; Lapidoth 2001, 211, 235; Klein 1998, 6; Arzt and Zughuib 1992, 1399, 1437. See also the UN study, id., Chapter V. On occasion, the Palestinians claim that Abba Eban, Israel's ambassador to the UN, had declared his acceptance of Resolution 194(III). This claim is not accurate. For Abba Eban's declaration regarding the refugees dated May 4, 1949, see Rosenthal 1986.

88. The State of Israel's position was clearly expressed in the UN hearings which preceded the admission of Israel as a member of the organization. See *supra* note 12 and the accompanying text.

89. See Jennings and Watts 1992, 48-49; Shaw 1997, 75-76; Akehurst 1997. In the Nicaragua case in 1986, the International Court of Justice held: "*Opinio juris* may, though with all caution be deduced from, inter alia, the attitude of the Parties... and the attitude of States towards certain General Assembly Resolutions, and particularly Resolution 2625(xxv) entitled 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN,'" I.C.J. Reporters, 1986, 14, 76 ILR, at 349.

90. Id., p. 98; Akehurst 1997, 41-42.

91. See *supra* text accompanying note 70.

92. "*Without any prejudice to the provisions of paragraph 11 of General Assembly Resolution 194(III) of 11 December 1948, the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement, is essential in preparation for the time when international assistance is no longer available, and for the realization of conditions of peace and stability in the area,*" A/RES/393(V) of December 2, 1950, <http://www.unispal.un.org/unispal.nsf/0aad6036b6377e6d0525672e0058609e/ab0321085344ab2a852560eb006a51fa?OpenDocument>.

93. A/Res/513 (VI) of January 26 1952; A/Res/ 614 (VII) of November 6, 1952; A/Res/1456 (VII) of December 9, 1959; A/Res/394(V) of December 14, 1950; A/Res/1191 (XII) of December 12, 1957; A/Res/1315 (XIII) of December

12, 1958; A/Res/1018(XI) of February 28, 1957; A/Res/916 (X) of December 3, 1955. For the text of the resolutions see <http://www.un.org/documents/resga.htm>. See also Benvenisti and Zamir 1998, 59-61; Radley 1978, 603-604; Lindsay 2009, 14.

94. See Klein 1998, 2.

95. For the development of customs in international law, see *supra* text accompanying note 69.

96. These resolutions expressly confirmed the right of the Palestinians of return to their homes. See, for example, Resolution 3236 (XXIX) of November 22, 1974, Article 2 of which provides: “[*The General Assembly*] Reaffirms also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.” The UN General Assembly reconfirmed this resolution and the Palestinian right to return in additional resolutions. For example, 3376 (XXX) of November 10, 1975; 33/28 of December 7, 1978; 35/207 of December 16, 1980; 36/226 of December 17, 1981; 40/25 of December 29, 1985; 46/87 of December 16, 1991; 56/33 of December 3, 2001; 57/107 of February 14, 2003; 59/28 of January 31, 2005; 60/36 of February 10, 2006; 62/80 of January 21, 2008; 63/26 of January 22, 2009; see [www.un.org/documents/resga.htm](http://www.un.org/documents/resga.htm).

97. S/RES/237 of June 14, 1967, [www.un.org/documents/scres.htm](http://www.un.org/documents/scres.htm).

98. *Id.*, S/RES/242 of November 22, 1967.

99. *Id.*, S/RES/338 of October 22, 1973.

100. It should also be noted that reference is to refugees in general and not only to Arab refugees, and therefore a just solution will also include reference to Jewish refugees from the Arab states.

101. Lapidoth 2001, 238.

102. See the Introduction and Article XXX (9) to the Israeli-Palestinian Interim Agreement relating to the West Bank and the Gaza Strip, September 28, 1995. <http://knesset.gov.il/process/docs/heskemb.htm>.

103. Article 12(4) of the International Covenant on Civil and Political Rights, 1966, Treaty Series 31, 269; Article 3(2) of the Fourth Protocol of the European Convention on Human Rights of 1950 in Brownlie 1992, 347; Article 22(5) of the American Convention on Human Rights of 1969, *id.* 504; Article 13(2) of the Universal Declaration of Human Rights, 1948, <http://www.un.org/Overview/rights.html>; Article 12(2) of the African Charter of 1981, in Brownlie 1992, 556. The International Covenant on Civil and Political Rights, the African Charter and the Universal Declaration on Human Rights deal with entry “into his own

country.” The European and American Conventions on Human Rights use the term “the country of which he is a national.”

104. Hannum 1987, 56.

105. Sieghart 1985, 115; Ingles 1963.

106. Nowak 1993, 219-220.

107. “The only additional category besides citizenship or nationality to which reference is made in the travaux is that of permanent residence.” See Hannum 1987, 59.

108. UN Doc. CCPR/C/21/Rev.1/Add 9, 2.11.1999, at 5-6. See also Lawland 1996, 532, 551-555.

109. “The Nottebohm Case (Liechtenshtein v. Guatemala) 1955, ICJ 4,” American Journal of International Law 396 (1955).

110. Zilbershats 2002, 48; Lawland 1996, 547.

111. The Covenant on Civil and Political Rights, 1966 (*supra* note 103) and the Covenant on Economic, Social and Cultural Rights, 1966, Treaty Series 31, 205. Both were ratified by the State of Israel in 1991. The article provides that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

112. *Supra* note 2.

113. Gavison 2010, 29-33.

114. Law of Return, 5710—1950. For the text of the law see: [http://www.knesset.gov.il/laws/special/heb/chok\\_hashvut.htm](http://www.knesset.gov.il/laws/special/heb/chok_hashvut.htm).

115. For this see Gavison (*forthcoming a*), 29-33.

116. Gavison refers to this argument in the context of the justification of the Law of Return (*id*). See also Gans 1998, 341-342.

117. The issue of family unification or family migration is not expressly regulated in international law. Relevant norms may possibly be derived from the articles of international covenants which entrench the right to family, such as Article 16(3) of the Universal Declaration of Human Rights of 1948 (*supra* note 103). The article states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” See also Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966 and Article 23 of the International Covenant on Civil and Political Rights, 1966 (*supra* note 103). In the State of Israel, Section 2 of the Nationality and Entry into Israel (Temporary Provisions) Law 5763 -2003, S.H. 1901, p. 544 states that residents of the occupied

territories may not in general migrate to Israel for purposes of marriage (the law was recently extended by order until July 21, 2010. Collection of Regulations 2008, p. 113). The legality of this law was considered by the High Court of Justice in HCJ 7052/03 *Adala v. Minister of Interior* (as yet unpublished, 2006). An expanded panel of 11 justices of the Supreme Court dismissed the petitions against the Nationality and Entry into Israel Law. See also Zilbershats 2006.

118. Article 4 of the International Covenant on Civil and Political Rights, 1966 (supra note 103).

119. A state of emergency was declared in the State of Israel starting at its inception in May 15, 1948 until 1997. Beginning in 1997, relying on Section 49 of Basic Law: The Government 1992, S.H. 1396, p. 214, and the Basic Law which replaced it (Section 38 of Basic Law: the Government 2001, S.H. 1780, p. 158), a state of emergency has to be declared every year, and this is indeed done as a matter of course. For the position taken by Israeli law toward family unification, see HCJ 7052/03 (supra note 117).

120. See Quigley 1998, 210.

121. The Universal Declaration of Human Rights (supra note 103).

122. International Convention on the Elimination of All Forms of Racial Discrimination, 1965 660 UNTS 195, European Convention on Nationality, 1997 E.T.S. No. 005.

123. The European Convention on Human Rights (supra note 103); International Covenant on Civil and Political Rights, 1966 (supra note 103); International Convention Relating to the Status of Refugees (supra note 23); Convention Relating to the Status of Stateless Persons 1954, 360 UNTS 117.

124. Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, L.N.Doc.C.24M.13 1931 V; Convention on Nationality of Married Women, 1957, 309 UNTS 65; Convention on the Reduction of Statelessness, 1961, 989 UNTS 175; Article 3 of Declaration of the Rights of the Child, 1959, U.N. G.A.Res. 1386(XIV) of 20.11.1959; Harvard Draft Convention on Nationality, 1929, 23 Am. J. In'l. L 11(Special Supp.) 1929; Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 1015 UNTS 243; Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13; Articles 7, 8 of the Convention on the Rights of the Child, 1989, 1577 UNTS 3. These conventions impose a duty on states to grant nationality to stateless people based on the place of birth of the stateless person, and make the grant of nationality to the stateless person conditional upon him reaching a certain age while being a resident in the state in which he was born.

125. The European Convention on Nationality of 1997 (supra note 122) adopted the approach taken by the Convention on the Reduction of Statelessness 1961. It provides that in the event of the succession of states, the state parties concerned shall endeavour to regulate matters relating to nationality by agreement among themselves and, where applicable, by agreements with other relevant states. Where an agreement is not reached, the parties will seek to prevent statelessness. These conventions provide a flexible regime in respect of nationality. They recommend that states reach agreement on a voluntary basis. If they do not succeed in reaching agreement, the states retain broad discretion to resolve the problem of statelessness. The factors considered relate to the history of the person, such as his place of birth and residence at the time of state succession, as well as matters connected to the nexus of the person to the state in the present.

126. Draft Articles on Nationality of Natural Persons in Relation to the Succession of States. The draft was adopted by UN General Assembly Resolution: A/Res/55/153, 12 December 2000 <http://www.un.org/Depts/dhl/resguide/r55.htm>.

127. Article 14 of the draft convention, id., calls for people who were forced to leave their habitual place of residence following events connected to the succession of states to be allowed to return: "A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto." Article 5 of the draft, id., provides that "subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the Successor State on the date of such succession."

128. See below, Postscript.

129. Supra note 23.

130. Section 33 of the Refugees Convention, id. The principle of non-refoulement is also entrenched in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and today its status is that of a binding principle of customary international law. In 1955 the Supreme Court held that the principle applies in Israel and is binding within the framework of the protection of human dignity and the sanctity of life. See H CJ 4702/94 *El Tayi v. Minister of the Interior* 49(3) P.D. 843, 848 (1995).

131. Supra note 41.

132. Supra note 17.

133. "To facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

134. See supra note 30. For the history of UNRWA, see supra Chapter One, Section B.

135. “7. [The General Assembly] Establishes the United Nations Relief and Works Agency for Palestine Refugees in the Near East: (a) To carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission; (b) To consult with the interested Near Eastern Governments concerning measures to be taken by them preparatory to the time when international assistance for relief and works projects is no longer available.” UNRWA has interpreted the essence of its function as assisting the refugees and preparing them for the time when external assistance will cease after the refugees become integrated in the countries of refuge—i.e., to “evolve a development programme aiming at the economic integration of the refugees in host countries, which would strengthen the economy of the host countries while providing employment to refugees, and thus make them self sufficient to a point where their names could be deleted from the relief rolls,” UNRWA 1983.

136. Articles 6, 118, 134 of the Fourth Geneva Convention—Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm>.

137. *Id.*, Article 85.

138. See *supra* notes 117-119 and the accompanying text.

139. Article 6(c) of the Charter of the International Military Tribunal (IMT) in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8.8.1945, 82 U.N.T.S. 280.

140. Article 147 of the Fourth Geneva Convention (*supra* note 136).

141. Article 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, S.C.Res. 827, 25.5.1993, U.N. Doc.S/RES/827.(1993), 32 I.L.M. 1203 (1993).

142. Article 3 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1.1.1994 and 31.12.1994, S. C. Res. 955, 8.11.1994, U.N. Doc.S/RES/955(1994), 33 I. L. M.1598(1994).

143. Article 7 of the Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998).

144. With regard to state responsibility, see Chapter III of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 which refers to serious violations of unequivocal norms of international law: [http://www.untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://www.untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf). The basis for

personal responsibility is set out in Article 6 of the London Charter (*supra* note 139).

145. Treaty of Neuilly, 27.11.1919, [http://www.wi.lib.byu.edu/index.php/Treaty\\_of\\_Neuilly](http://www.wi.lib.byu.edu/index.php/Treaty_of_Neuilly).

146. Convention Concerning the Exchange of Greece and Turkish Populations, July 30 1923, 32 L.N.T.S. 75, see [www.jstor.org/pss/2212847](http://www.jstor.org/pss/2212847); see also Benvenisti 2003, 7; Benvenisti and Zamir 1995, 295, 321-322; Rosand 1998, 1091, 1115-1116. There is a dispute regarding the number of people involved in the population exchange. It has been claimed that the majority of Greeks in Turkish territory fled before the agreement came into effect and that many of them died on the way or were killed by the Turks. As a result only 190,000 Greeks were transferred from Turkish territory to Greece as a result of the agreement. See, for example, Gibney 2005, 377.

147. The Report of the Palestine Royal Commission was submitted to the UK Parliament by the Secretary of State for the Colonies, at the order of His Majesty in July 1937. For a Summary of the Report see League of Nations, Mandates, Palestine, Report of the Palestine Royal Commission Presented by the Secretary of State for the Colonies to the United Kingdom Parliament (July 1937), Summary of Report. See also the Peel Commission Report in Morris, 2003, 136-143.

148. *Id.* 283-284.

149. *Id.*, 285.

150. *Id.*, 284-285.

151. Potsdam Declaration. See Article XII of the Declaration, [http://www.valon.law.yale.edu/20th\\_century/decade17.asp](http://www.valon.law.yale.edu/20th_century/decade17.asp)

152. Benz 1998, 229, 230—234; Marrus 1985, 327—330.

153. Benvenisti and Zamir 1995, 51-53. With regard to Germany's position, see, for example, the statement made by German Chancellor Gerhard Schröder on November 19, 2004 regarding Germany's rejection of the property claims in the Czech Republic made by the deported Germans, and asserting that this matter would not pose an obstacle to relations between the two states: <http://www.encyclopedia.com/doc/1P2-16638430.html>.

154. Weiss 2003, 455.

155. See the Indian constitution (Part II, Article 7, <http://www.lawmin.nic.in/coi/coiason29july08.pdf>).

156. For the chronology of political events in the region, see *supra* Chapter One, Section A.

157. Article 7 of the Statute of the International Criminal Court (*supra* note 143); Article 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in Former Yugoslavia (*supra* note 141). See also Article 3 of the International Tribunal for the Prosecution of Persons Responsible for Genocide in the Territory of Rwanda (*supra* note 142).

158. Indeed, the displaced Jews of Europe proved to be a heavy burden because there was no country in or outside Europe which was prepared to absorb them.

159. According to publications issued by the High Commission in 2007, about 654,000 people sought refuge in 154 countries. 210,000 received the status of refugee under the Refugees Convention or received alternative protection under the domestic laws of the country even though they did not meet the criteria of a refugee under the Refugees Convention. The proportion of people receiving asylum as refugees or for other humanitarian reasons under the domestic laws of the countries concerned out of the entire population of people whose applications were considered during that year, was about 45%, see <http://www.unhcr.org/4981c37c2.html>. In 2006, 605,000 new applications for asylum were submitted in 151 countries around the world. During that year, 196,000 people were recognized as refugees under the Refugees Convention (or received alternative protection in the state concerned). The proportion of people receiving asylum as refugees or for other humanitarian reasons under the domestic laws of the countries concerned out of the entire population of people whose applications were considered during that year, was about 39%, see: <http://www.unhcr.org/478ce2bd2.html>.

160. "The ideal solution to refugee problems." See GA Res. 49/169, 23 Dec. 1994, Article 9 of the Resolution: <http://www.un.org/Depts/dhl/res/resa49.htm>. See also: Resolution 50/152 of 21 Dec. 1995; Takkenberg 1998, 319-320.

161. The disintegration of the former Soviet Union in 1991 and the subsequent establishment of new states created violent confrontations between the majority in these countries and ethnic minorities resident there. As a result, a great wave of refugees ensued. This was the case in 1991 in Georgia following the ethnic struggle between the majority and the minority in Ossetia. In 1992, Tajik refugees fled Tajikistan for Afghanistan, Kazakhstan and Kyrgyzstan. Armenian Christian refugees fled Nagorno-Karabakh in Azerbaijan for Armenia (where they were resettled) and Muslims fled to other areas under the control of Azerbaijan (the majority live in refugee camps). When the Baltic States (Lithuania, Estonia and Latvia) gained independence and enacted laws designed to restrict the status of the minorities living there, huge numbers of citizens of Russian origin who had originally been moved there by the Soviet authorities, left. Fearing for their lives as ethnic minorities and motivated by economic difficulties they now fled to Russian territory. For refugee movements in the area of the former Soviet Union, see the High Commission website: <http://www.unhcr.org/pub/PUBL/3b55832f4.html>.

162. See *supra* note 126.

163. See *supra* note 127.

164. Black and Koser 1999, 5.

165. McDowell 1999, 126, 127-129.

166. UNHCR 2000, 218.

167. Dayton Peace Agreement, <http://www1.umn.edu/humanrts/icty/dayton/daytonannex7.html>.

168. The Federal Republic of Yugoslavia included Serbia and Montenegro at the time of the signing of the accord. In 2006, Serbia separated from Montenegro.

169. Article 1(1) of Annex VII of the Agreement (*infra* note 170) states:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

170. UNHCR report of 2009—<http://www.unhcr.org/publ/PUBL/4922d4300.pdf>. See also European Forum for Democracy and Solidarity report dated December 30, 2007—[http://www.europeanforum.net/country/bosnia\\_herzegovina\\_u](http://www.europeanforum.net/country/bosnia_herzegovina_u).

171. See report of Adv. Partitur, working in Bosnia on behalf of the Organization for Security and Co-operation in Europe: <http://www.hagada.org.il/hagada/html/modules.php?name=News&file=article&sid=550>. See also Human Rights Watch report of 2003: <http://www.hrw.org/en/node/12271/section/1>.

172. Additional examples of ethnic clashes against the backdrop of the return of refugees may be seen in other places in the world. One example is that of Rwanda, where a refugee problem was created as a result of the genocide in 1994, following which the mostly Hutu refugees settled in neighboring countries. The return of the refugees was allowed after two years and continued for many years after that. Many dreaded to return for fear of violence on the part of the Tutsis and indeed many returnees encountered severe acts of violence committed both by the Tutsis and by the authorities. See the report of the UN Secretary General dated September 17, 1999 regarding human rights in Rwanda, *A/54/359*, <http://www.unhcr.org/refworld/country,RWA,456d621e2,3ae6af334,0.html>

Another example is Guatemala, where a guerrilla war took place between the years 1960-1996, leading to the flight of many to Mexico, the United States, Belize and other places. Following an agreement signed between the exiles and the

Guatemalan government, the refugees began returning home. Their return, which began in 1996, was met with acts of murder committed by the army and reprisals committed by the local population. It should be noted that the background to this conflict was not ethnic but political: The returnees came from democratic countries with a deep awareness of human rights and therefore were suspected of collaboration with the guerrilla forces and were feared and opposed by the government. See the UN High Commission Report of 2000: Refugee Repatriation and Reintegration in Guatemala. Lessons Learned from UNHCR's Experience: [http://www.repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:3637](http://www.repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3637).

173. Hammond 1999, 227; 2004, 36, 37-46.

174. Hammond 1999, 227.

175. Id., at p. 229. She suggests:

I offer an alternative to the 'repatriation = homecoming' model. I show that the assumption that it is desirable and possible for returnees to regain that which they had before becoming refugees is flawed. Whether a returnee comes back to his or her birthplace or settles in an entirely new environment, he/she considers return to be more of a new beginning than a return to the past.

176. See the website of the Research Dept. of the American Library of Congress, 1991: <http://www.country-data.com/> as well as: <http://www.country-data.com/cgi-bin/query/r-3502.html> <http://www.country-data.com/cgi-bin/query/r-3478.html>.

177. UNSC, S/2003/398, Report of the Secretary General on his mission of good office in Cyprus [http://www.un.org/en/peacekeeping/missions/unficypr/rep\\_mgo.shtml](http://www.un.org/en/peacekeeping/missions/unficypr/rep_mgo.shtml). The Security Council affirmed Annan's plan in Resolution S/2003/398 of April 1, 2003. It should be noted that the Greek majority in Cyprus rejected the UN Secretary General's proposal in a referendum, on the ground that the proposal gave too much weight to the Turkish minority.

178. Annan concluded his proposal, id., with the following comment:

This approach, particularly when married to the territorial adjustment described below, strikes a fair balance between competing legitimate interests and individual human rights and respects the principle of bi-zonality and international law (including international human rights law and the fourth Geneva Convention).

We can see, therefore, that in Annan's view the proposed arrangement contained a fair balance between the legitimate interests of the parties and human rights. According to him, the arrangement was consistent with the legitimate principle of bi-zonality, where each area would be controlled by one of the parties (Turkish or Greek), and with international law, including human rights law and humanitarian law.

179. Article 109 of the Annan Report (supra note 177) proposes:

In addition, reinstatement would not be possible for more than 20 per cent of the residences and land in any village or town (with the exception of a few specific cases) and for more than 10 per cent of the residences and land in either constituent state. According to United Nations estimates, the absolute maximum number of current users in the Turkish Cypriot State who might have to move from where they currently live under the property arrangements would be 15,000 to 18,000 persons.

180. See, for example, Abu Sitta 1997.

181. It should be recalled that some of the leaders of the Arab population in Israel are reluctant to accept the assertion that they are a minority in the state, because in their view the Palestinian refugees and their descendants have a right to enter the state and obtain citizenship, and therefore, they are in fact the majority in Israel.

182. See the judgment in the website of the European Court of Human Rights: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=864000&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

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