

The right to Return and its Practical Application

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Abstract

This article examines the right to return of refugees and displaced persons. After an historical overview, the author first interprets the right to return enshrined in the International Bill of Rights. It is argued that there is a growing support for a broad right to return applicable to cases where it is being claimed by mass groups of people, even when non-nationals are concerned.

The second part of the article focuses on the right to return in practice. The application of the right to return in the Middle East and Kosovo will be assessed. Arguments will be proposed for the Palestinian right to return. This right should not be made subject to political negotiations. The example of Kosovo serves as an illustration of international practice Kosovo where the right to return has been clearly articulated and accepted. This article is concluded by the argument that the passage of time between the creation of the refugee problem and its resolution should not deny the existence of the right to return.

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Introduction

There is no greater sorrow on Earth than the loss of one's native land.

Euripides' *Medea*, v. 650 – 651.

This article deals with the right to return¹ of refugees² and displaced persons.³ The right to return has been relevant to solve problems of displacement in countries in all regions of the world, including Bhutan, Bosnia-Herzegovina, Croatia, East Timor, El Salvador, Guatemala, Kosovo, Cyprus, Georgia, the Middle East and Rwanda.

Under international law, all individuals have a right to return to their homes - commonly referred to as their 'homes of origin'- whenever they have become displaced due to circumstances beyond their control.⁴ In order to achieve a just settlement of refugee or displacement problems, the first and obvious solution would be to facilitate the voluntary repatriation of the victims.⁵

Like all human rights, the right to return is an inherent human right that all individuals possess even if, in actual practice, governments deliberately obstruct its free exercise. Since the right to return is one accorded under international law, deliberate governmental obstruction of it would violate international law and will in principle be illegal.⁶

¹ The word 'return' is interpreted in this article sufficiently broadly to include the admission of persons who, for whatever reasons, may be making a first time entry. The use of the expression 'right to enter' in various human rights provisions clearly indicates that the right is not limited to persons who have actually been in their country.

² The term 'refugee' is used in this article in its broadest sense to describe a person who has been compelled to leave his or her country of origin as a result of the conditions in that country, either by reason of the deliberate action of the authorities in the country of origin (for example, expulsion, exile, refusal to readmit), or through the indirect unintentional action of the authorities (for example, armed conflict, internal disturbances); cf. K. Lawand, *The Right to Return of Palestinians in International Law*, in «International Journal of Refugee Law», vol. 8, no. 4, October 1996, p. 538.

³ Displacement may occur as well within the borders of a State, so-called internal displacement. Although the right to return under international law generally refers to the right to return to one's *country*, the General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Agreement, provides refugees and displaced persons with the right to return to their *home of origin* and repossess property wrongfully taken during the war. Annex Seven, Article 1 states that "all refugees and displaced persons have the right freely to return to their home of origin (...). The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina." The General Framework Agreement for peace in Bosnia and Herzegovina, 14 December 1995, annex Seven, Art. I., 35 *I.L.M.* 75.

Even though the right to return developed in the context of nationals seeking to return to their country, the right is also of relevance where there has been a mass internal displacement of the population, such as in Bosnia-Herzegovina. See also C. Meindersma, *Population exchanges International law and State Practice – Part I*, in «International Journal of Refugee Law» vol. 9, 1997, pp. 335-362 (arguing that the right to return is of relevance to the situation in Cyprus, where the major displacement has taken place within the territory of Cyprus). See also *infra* notes 79-82 and accompanying text. 'Internally displaced persons' have been defined as "persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife, or systematic violations of human rights, and who have not crossed an internationally recognized state border." See Art. 1 of the Declaration of International Law Principles on Internally Displaced Persons, Resolution 17/2000, adopted by the 96th Conference of the International Law Association, held in London, July 25-29, 2000.

⁴ G.J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, Bethlehem, BADIL Resource Center for Palestinian Residency and Refugee Rights, 2001, p. 5.

⁵ A.M. de Zayas, *Population: Expulsion and Transfer*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier, 1994, p. 1065.

⁶ Boling, *supra* note 4, p. 5.

The purpose of this article is, firstly, to outline the legal background of the right to return.⁷ Part I examines the existence and contemporary content of the right to return in human rights law.⁸ The article does not consider whether in a particular situation members of a displaced group may, additionally, have a collective right to return, allegedly on the basis of the principle of self-determination.⁹ It deals with the application of the right to *individuals* even if they are part of a group. The first part of the article will be concluded with an overview of soft law documents.

The second part of this article deals with state practice concerning the displacement of populations and the practical application of the right to return as an answer to such displacements. Although a right to return exists in theory, experience shows that this right is not being implemented in practice in a consistent manner. A detailed approach will be given to two conflict situations. Firstly, an examination will be made of the situation in the Middle East as an illustration of a failure to implement the right to return. Secondly, the situation in Kosovo with regard to the right to return will be dealt with. By comparing these two cases, one can examine the role of the right to return in a case of displacement caused by a recent conflict of relatively limited duration and the role of the right in a protracted conflict. The right to return had and has a prominent role in resolving the ethnic conflict in Kosovo. In the Middle East, on the other hand, the right to return is still a thickish affair without a prospect of practical application in the nearby future. The concluding section of the third part of the article consists of a comparison between the two cases.

PART ONE: The right to return: a legal analysis

1. Preliminary remarks

The human right to return has been included in a number of universal and regional instruments which are examined in this part of the article.

It has been advocated that the human right to return forms part of customary international law:

*For most individuals the actual practice of returning to one's home or country is so commonplace a part of every day living that the right of return as a legal concept is given little attention. The great majority of people in the world are able to exercise the customary right of return based upon state practice.*¹⁰

⁷ For a discussion of the right to leave and return in general, see H. Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhof, 1987. See also B. Frelick, *The Right of Return*, in «International Journal of Refugee Law», vol. 2, 1990, p. 442; J.D. Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, Geneva, UN, 1963, UN Sales no. 64.XIV.2, UN Doc E/CN.4/Sub.2/220/Rev.1 [hereinafter Inglés study]; C.L.C. Mubanga-Chipoya, *Analysis of the current trends and development regarding the right to leave any country, and some other rights or considerations arising therefrom*, Geneva, UN, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1988, UN doc. E/CN.4/Sub.2/1988/35 [hereinafter Mubanga-Chipoya study]; K. Vasak & S. Liskofsky (eds.), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-20 June 1972*, New York, The American Jewish Committee, 1976 [hereinafter Uppsala Colloquium].

⁸ International human rights instruments refer either to the 'the right to return' or 'the right to enter one's country.' In international refugee law and international humanitarian law, the term used is 'repatriation.' The article will use the term 'right to return,' unless the context dictates otherwise.

⁹ For a discussion of self-determination, see A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995; H. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, New York, UN, 1980, UN Doc. E/CN.4/Sub.2/405/Rev.1. Some authors argue that the issue of return of masses of dislocated people is either a political problem or one of self-determination (see *infra* note 66 and accompanying text).

¹⁰ W.T. Mallison and S. Mallison, *The Right to Return*, in «Journal of Palestine Studies» vol. 9, no. 3, 1980, p. 125. Lawand, *supra* note 2, p. 544, is also of the opinion that the right to return exists in customary

The first formal acknowledgement of the right to return in national law can be found in the *Magna Carta*. In 1215, at a time when rights were being questioned in England, the *Magna Carta* was agreed to by King John. It provided that “it shall be lawful in the future for anyone ... to leave our Kingdom and to return, safe and secure by land and water ...”.¹¹

The right to return is considered part of the right to freedom of movement. A general right to free movement can be traced back to 16th century publicists of international law who had upheld this right. The Spaniard Francisco de Vitoria said: “it was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would”.¹² During the 17th century Hugo Grotius postulated the principle that “every nation is free to travel to every other nation”.¹³ The relevant international documents deal with the right to return in this broader context of free movement. Freedom of movement contains two main aspects: an internal aspect, meaning freedom of movement within a country, and an external aspect, meaning freedom of movement between States.¹⁴ The latter aspect is usually referred to as the right to leave one’s country, either temporarily or permanently, and to enter or return to one’s country.¹⁵ It is said to be particular in that “unlike many other human rights and freedoms, its exercise does not produce effects only within a single State, but often affects at least two communities, that of the country to be left and that of the State to which ingress is sought”.¹⁶ While the rights to leave and return are closely connected, in that the existence of one allows for the effective exercise of the other, they respectively respond to different needs of the individuals exercising them. The person leaving his or her country may be doing so out of a desire to travel, to emigrate, or to seek refuge. The person seeking to return to his or her country is usually motivated by a desire to return home, to the place where he or she belongs, to his or her roots.¹⁷ This ‘natural desire for a base or homeland’ has been said to demonstrate ‘the logical connection’ of freedom of movement with the right to a nationality,¹⁸ and in this sense the right to return is closely connected with the legal concept of nationality. Besides, the right to return can be closely linked with other human rights, such as the right to property, the right to privacy and the right of admission for nationals.¹⁹

Although it has been argued that “the right of everyone to leave any country, including his own, and to return to his country is founded on natural law”,²⁰ the formal recognition and development of these rights have been slow and often delayed by frequent backlashes.²¹

2. Universal human rights documents

2.1. The Universal Declaration of Human Rights

international law. Art. 38(1)b of the Statute of the International Court of Justice refers, *inter alia*, to “international custom, as evidence of a general practice accepted as law” as a source of international law; cf. I. Brownlie, *Principles of Public International Law*, Oxford, Oxford University Press, 1990, p. 4.

¹¹ *Magna Carta*, Ch. 42. The translation quoted is from S.E. Thorne *et al.*, *The Great Charter: Four Essays on Magna Carta and the History of Our Liberty*, New York, Pantheon Books, 1965, p. 133.

¹² Quoted in the Inglés study, *supra* note 7, p. 2.

¹³ *Idem*.

¹⁴ S.A.F. Jagerskiold, *The freedom of Movement*, in L. Henkin, (ed.) *The International Bill of Rights*, New York, Columbia University Press, 1981 p. 167-70.

¹⁵ *Idem*, pp. 177 and 180.

¹⁶ A. Cassese, *The International Protection of the Right to Leave and to Return*, in «*Studi in Onore di Monlio Udina*», vol. 1, Milan, Guiffre, 1975, p. 220.

¹⁷ D.D.N. Nseroko, *The Right to Return Home*, in «*Indian Journal of International Law*», vol. 21, 1981, p. 336: “It is innate in human nature to yearn to be back home”.

¹⁸ M. Cranston, *The Political and Philosophical Aspects of the Right to Leave and to Return*, in «*Uppsala Colloquium*», *supra* note 7, p. 28.

¹⁹ Those rights have been connected with the right to return especially in the framework of the European Human Rights protection system, see *infra* Part I, section 3.

²⁰ Inglés study, *supra* note 7, p. 1.

²¹ Jagerskiold, *supra* note 14, p. 167-170. See also Jagerskiold, *Historical Aspects of the Right to Leave and to Return* in «*Uppsala Colloquium*», *supra* note 7, pp. 3-9.

The Universal Declaration of Human Rights,²² adopted by the UN General Assembly in 1948, is the 'foundation' of the right to return in human rights law. Article 13 of the Universal Declaration phrases the right to return broadly and simply, as follows:

Everyone has the right to leave any country, including his own, and to return to his country.

This provision recognises the inherent relationship between a person and his country and is termed in unconditional wording. The exercise of the right, like others in the Universal Declaration, is only subject under Article 29 to "such limitations as are determined by law solely for the purpose of seeking due recognition and respect for the right of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". However, the Universal Declaration is a resolution adopted by the United Nations General Assembly and, therefore, has no legally binding effect as such.²³ Nevertheless, it is widely regarded as representing principles reflective of customary international law.²⁴

Interestingly, the draft of the Universal Declaration was successively discussed in the Drafting Committee of the Commission on Human Rights, in the Sub-Commission on Prevention of Discrimination and Protection of Minorities and in the Commission of Human Rights, none of them suggesting that any reference should be made to a right to return. It was only during the discussion in the Third Committee of the General Assembly in 1948 that an amendment to that effect was introduced. The amendment was proposed by the representative of Lebanon, who stated that:

*The ideal would be that any person should be able to enter any country he might choose, but account had to be taken of actual facts. The minimum requirement was that any person should be able to return to his country. If that right were recognised, the right to leave a country, already sanctioned in the article, would be strengthened by the assurance of the right to return.*²⁵

Thus, it seems that the right to return was originally considered as a means for strengthening the right to leave, rather than being significant in itself.

The drafting took place in the aftermath of World War II, when millions of displaced persons sought admission to countries where they might resettle. Former Soviet-bloc States maintained strict restrictions on movement, generally forbidding their citizens from leaving. Thus, the focus of the drafters was on guaranteeing the right to leave. This practice continued throughout the Cold War,²⁶ as the West often used the language of human rights in ideological battles against the former Soviet Union and its satellites, encouraging dissidents to exercise their right to leave their country.²⁷ In this context, the right to return received little attention.

However, ever since the amendment was adopted, the right to return has appeared in all major human rights documents as part of the freedom of movement, and has acquired independent standing and justification.²⁸ Some even assert that the right to return may rise to the level of a peremptory norm, that is *ius*

²² Adopted by the United Nations General Assembly in resolution 217 A (III) of 10 December 1948 (hereinafter the Universal Declaration/ UDHR).

²³ See, *inter alia*, Brownlie, *supra* note 10, pp. 14-15; M. Dixon, Textbook on International Law, London, Blackstone Press, 1996, pp. 311-312.

²⁴ See also J.R. Weiner, *The Palestinian Refugees Right to Return and the Peace Process*, in «Boston College International and Comparative Law Review» vol. 20, 1997, p. 38 and K. Drezewicki, *The United Nations Charter and the Universal Declaration of Human Rights*, in R. Hanski and M. Suksi (eds.), *An introduction to the International Protection of Human Rights; A Textbook*, Åbo, Åbo Akademi University, Institute for Human Rights, 2002, pp. 74-76.

²⁵ Inglés study, *supra* note 7, p. 87.

²⁶ P. Kourula, *Broadening the Edges: Refugee Definition and International Practice Revisited*, The Hague, Martinus Nijhoff, 1997, p. 2 (noting that during this period the focus of the UNHCR was to safeguard the institution of asylum and the treatment of asylum seekers and refugee in accordance with refugee law).

²⁷ See, e.g., F.A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled Iron Curtain*, in «Tulane Law Review», vol. 65, 1991, p. 849.

²⁸ R. Lapidot, *The Right of Return in International Law, With Special Reference to the Palestinian Refugees*, in «Israel Yearbook of International Law», vol. 16, 1986, p. 104.

cogens, from which States cannot derogate.²⁹ There is broad agreement, then, that this right should be regarded as a rule of customary international law.

2.2. *The International Covenant on Civil and Political Rights*

2.2.1. General remarks

The International Covenant on Civil and Political Rights,³⁰ the instrument that was meant to give conventional binding force to many of the rights proclaimed in the Universal Declaration, incorporates the right to return, stating in Article 12(4):

No one shall be arbitrarily deprived of the right to enter his own country.

The Covenant is the most important universal human rights treaty concerned with the right to return and its interpretation may therefore provide the best means of identifying more precisely the contemporary content of the right to return under international law.³¹

Like Article 13 of the Universal Declaration, Article 12(4) of the Covenant is also termed in unconditional words. It is not subject to the derogation clauses of Article 12(3)³² which refer only to the rights mentioned in the previous two paragraphs, containing the right to liberty of movement and the right to leave. One may conclude therefore, that the right to return, as it is regulated in the Covenant, seems to have a more absolute nature than the other rights in Article 12.³³ It was even argued that the case of exile as punishment should be the only exception, although even this was not stated explicitly.³⁴

2.2.2. The meaning of the term 'arbitrarily'

The exact meaning of the word 'arbitrarily' is not clear. Understanding the precise intent of the drafters of the Covenant in incorporating the word 'arbitrarily' into the formulation of Article 12(4) is critical to understanding the scope of the provision because 'arbitrarily' is the only qualification on the right to return listed in Article 12(4). Without the use of the word 'arbitrarily,' the right to return would be absolute.³⁵

During the drafting process some delegations submitted that the term was equivalent to 'unlawful,' but according to Hannum it is clear that this narrow definition is not appropriate.³⁶ According to the same author the term has been mostly considered in the context of arbitrary arrest or detention. A lengthy 1964 UN study on this question offers a definition of the term, even though it predates formal adoption of the Covenant by the General Assembly in 1966:

²⁹ See, e.g., J. Quigley, Mass Displacement and the Individual Right of Return, in «British Yearbook of International Law», vol. 68, 1997, p. 122; Opinion: Legal Issues Arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974 (signatories: G. Abi-Saab, D. Blumenwitz, J. Crawford, J. Dugard, C. Greenwood, G. Hafner, F. Orrego Vicuna, A. Pellet, H.G. Schermers, C. Tomuschat, p. 4 (June 30, 1999) http://www.justice4cyprus.org/Archive_population.htm [hereinafter Opinion].

³⁰ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200 A (XXI), 16 Dec. 1966. Entry into force: 23 Mar. 1976, 999 U.N.T.S. 171 [hereinafter the Covenant/ ICCPR].

³¹ Cf. Hannum, *supra* note 7, p. 24. See on the interpretation of ICCPR, art. 12(4) also Lawand, *supra* note 2, p. 547 and M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Kehl, NP Engel, 1993, p. 219-221.

³² The paragraph states: *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.*

³³ R. Aybay, *The Right to Leave and the Right to Return: The International Aspect of Freedom of Movement*, in «Comparative Law Yearbook», vol. 1, 1977, p. 127.

³⁴ Hannum, *supra* note 7, p. 45; see also Inglés study, *supra* note 7, p. 38.

³⁵ Boling, *supra* note 4, p. 38.

³⁶ Hannum, *supra* note 7, p. 44.

...the Committee has come to the opinion that 'arbitrary' is not synonymous with 'illegal' and that the former signifies more than the latter.... [A]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provision of a law the purpose of which is incompatible with respect for the right to liberty and security of person.³⁷

According to Hannum, “[a]t a minimum, no denial of a right to return can be discriminatory in violation of article 2, paragraph 1, of the Covenant. Any denial must also be based on law (...) as an illegal denial surely would be arbitrary under even the most narrow definition of the latter word”.³⁸ Analysis of the *travaux préparatoires* is useful here, and the commentators are in uniform agreement that the word ‘arbitrarily’ refers to only one specific factual instance, that of the use of exile as a ‘penal sanction’ (i.e., sentencing a person charged with a criminal offense to exile or banishment).³⁹ Thus, the term ‘arbitrarily’ only applies to a small group of States for which penal exile is a permissible judicial sanction. Only for those States is it legally permissible in theory to obstruct the exercise of the right to return in the limited factual case where exile had been imposed as a judicial sentence.⁴⁰

In terms of the right to return, the Human Rights Committee, a body of experts which monitors the implementation of the Covenant, has given authoritative interpretation to the meaning of the term ‘arbitrarily’. General Comment 27 clarifies the meaning of this qualifying term stating the following principles categorically in paragraph 21:

The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.⁴¹

Since it has been demonstrated, especially by the body officially charged with interpreting the ICCPR, that the concept of ‘arbitrariness’ has such a restricted meaning, the scope of the right to return as articulated in Article 12(4) is subject only to the general qualification provisions of Article 4(1) of the Covenant, which itself only permits derogations which “are not inconsistent with ... other obligations under international law and do not involve discrimination solely on grounds of race, colour, sex, language, religion or social origin”.

It should be noted, finally, that both the European and American Conventions on Human Rights,⁴² like the Universal Declaration, make no mention of such a non arbitrary denial of entry and guarantee an unrestricted right to return.

2.2.3. The meaning of the phrase ‘his own country’

Another issue of interpretation concerns the meaning of the wording ‘his own country’ in Article 12(4) of the Covenant. Does it refer to the country of which one is a citizen or national only; to any country in which one has been granted the right of permanent residence; or to the country which one considers ‘home’ and to which

³⁷ *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, New York, Dept. of Economic and Social Affairs, 1964, UN sales no. 65.XIV.2, UN doc. E/CN.4/826/Rev.1, 7; quoted in Hannum, *supra* note 7, p. 45.

³⁸ Hannum, *supra* note 7, p. 45.

³⁹ Jagerskiold, *supra* note 14, p. 182. See also Nowak, *supra* note 31, p. 219.

⁴⁰ See, e.g., M. Bossuyt, *Guide to Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 1987, pp. 260-63. (quoting from the drafting history of Article 12(4) as discussed in various UN committees demonstrating that the goal of prohibiting arbitrary denial of entry was to guarantee entry in all cases except where an individual had been banished as a penal sanction). See also Nowak, *supra* note 28, p. 218.

⁴¹ General Comment 27, CCPR/C/21/Rev.1/Add.9 of 2 November 1999.

⁴² *Infra* notes 75 and 76.

one is connected through history, tradition, race, religion, residence, family or other ties?⁴³

As appears from the *travaux préparatoires*, the change from the formulation in article 13 of the Universal Declaration - which refers to the right to *return* to one's country - to the right to *enter* one's country was made in order to include nationals or citizens born outside the country and who have never lived therein.⁴⁴ Proposals to clarify the reference to 'one's country' by referring instead to the country of which one is a 'national' were rejected on the grounds that they would exclude the second group mentioned above, *i.e.* "those persons who under domestic law enjoy a right to 'return' or reside in a country even though they are not nationals of that country".⁴⁵

Hannum refers to a comment in the context of the Uppsala colloquium on the right to leave and return, where it was suggested that the language 'his own country' was purposely chosen to avoid subjecting the right to return to formal governmental determinations of nationality: "Governments come and go, and their political fluctuations and vagaries should not affect the fundamental rights of human beings, such as the right to return to one's own country and to have a homeland".⁴⁶

In this regard, it is important to note that the Covenant does not indicate that the right to return is linked to a person's juridical status.⁴⁷ Nowhere is it provided that a person's right is to 'return to his State'. Moreover, it is not stated that "a national has ... the right to return to his country." Such narrow formulation does not appear. The relevant language is drafted broadly to refer to 'no one' being arbitrarily deprived of the right to return to his 'country'. Such breadth seems all the more deliberate in view of the fact that the Covenant obligates States to give the right effect without regard to juridical status. Article 2(1) of the Covenant states that each party "undertakes to respect and to ensure to all individuals within its territory ... the rights recognized ... without distinction of any kind, such as ... national or social origin, birth or other status".

Yet apart from the use of broad rather than tightly circumscribed terms, there is another reason for rejecting the argument that return only applies to nationals or citizens. In particular, Article 12 also refers to a right of free movement within a 'State'. Given this, it would seem strange to interpret the Covenant as using 'country' in the context of the right to return to mean 'State'.⁴⁸

In terms of the right to return, the Human Rights Committee has also given authoritative interpretation to the meaning of the phrase 'own country.' The Committee states that the right applies even in relation to disputed territories, or territories that have changed hands. In paragraph 20 of General Comment 27, the Human Rights Committee determined that:

The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them.

In its policy statement about the right to return, Amnesty International asserts that the right to return applies not just to those who were directly displaced and their immediate families, but also to those of their descendants who have maintained what the Human Rights Committee calls 'close and enduring connections'

⁴³ Hannum, *supra* note 7, p. 56; on the interpretation of the term 'his own country', see also Lawand, *supra* note 2, p. 548-58 and Nowak, *supra* note 31, p. 219.

⁴⁴ Hannum, *supra* note 7, p. 56.

⁴⁵ *Idem.*

⁴⁶ Uppsala colloquium, *supra* note 7, Comment by M. Mazzawi on the Middle East, p. 343, quoted in Hannum, *supra* note 7, p. 58; see also Lawand, *supra* note 2, p. 551.

⁴⁷ See also Article 13 of the Universal Declaration and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter CERD], 660 U.N.T.S. 195, adopted and opened for signature and ratification by the United Nations General Assembly in resolution 2106 A (XX) of 21 Dec 1965. Entry into force: 4 Jan. 1969.

⁴⁸ R.J. Zedalis, *Right to Return: A Closer Look*, in «Georgetown Immigration Law Journal», vol. 6, October 1992, p. 506.

with the area.⁴⁹ Lasting connections between individuals and territory may exist independently of the formal determination of nationality (or lack thereof) held by the individuals. General Comment 27 (paragraph 19) explains that:

The right of a person to enter his or her own country recognizes the special relationship of a person to that country... It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality).

International law provides a standard for measuring the existence of a 'close and enduring connection' between a person and his or her 'own country' through a set of criteria established by the International Court of Justice in 1955. In the landmark *Nottebohm* case, which focused on the determination of nationality, the Court held that 'genuine' and 'effective' links between an individual and a state were based on "... a social fact of attachment, a genuine connection of existence, interests and sentiments..."⁵⁰ The Court also noted that:

*Different factors are taken into consideration, and their importance will vary from one case to the next: there is the habitual residence of the individual concerned but also the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.*⁵¹

Other criteria suggested by the Court include cultural traditions, way of life, activities and intentions for the near future. The criteria established by the Court are likewise appropriate when determining a person's 'own country' in that they are regarded as a standard measure of the effective existence of ties between the individual and the State.

However, according to Hannum, the above expansive interpretation to apply the right to return to non-nationals finds no support in the *travaux préparatoires* and:

*If accepted, [it] would be of such a wide scope that it would imply a right to 'return' or 'enter' to any number of persons who seek to return 'home', in addition to groups of particular interest to those arguing for such a broad interpretation. There is no evidence that mass movements of groups such as refugees or displaced persons were to be intended to be included within the scope of article 12 of the Covenant by its drafters, particularly where those seeking to return are not nationals of the state of destination.*⁵²

As will be argued in the following section of this article, the right to return does find application in refugee situations as well. Hannum's arguments for excluding refugees and displaced persons, even when non-nationals are concerned, are unconvincing. However, the 'ordinary meaning'⁵³ of the phrase 'his own country' remains to certain extent ambiguous. Nevertheless, it is clear that - as Hannum also admits - 'his own country' means something different from 'the country of which he is a national', thereby not excluding non-nationals *per se* to claim the benefits of article 12(4). Of course, non-nationals claiming a right to return may be expected to substantiate their claims. The criteria for the determination of nationality set out in the

⁴⁹ Policy statement of 30 March 2001, Amnesty International's position on forcible exile and the right to return.

⁵⁰ *Nottebohm Case (Liechtenstein v. Guatemala)*, Second Phase, Judgement of April 6th 1955, ICJ Reports (1955), p. 4. For a discussion of the principle of the 'effective link' and the judgement in the *Nottebohm* Case, see Brownlie, *supra* note 10, pp. 407-420; see also Lawand, *supra* note 2, pp. 553-7.

⁵¹ ICJ Reports (1955), p. 22.

⁵² Hannum, *supra* note 7, p. 59.

⁵³ According to Art. 31(1) of the 1969 Vienna Convention on the Law of Treaties, a treaty shall be interpreted "in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose" [emphasis added]. When such interpretation leaves the meaning ambiguous or obscure, according to Art. 32 "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." Convention on the Law of Treaties, signed at Vienna, 23 May 1969. Entry into force: 27 Jan. 1980, 1155 U.N.T.S. 331.

Nottebohm case can be used when determining the existence of an individual's 'own country', to the extent that they provide a standard measure of the effective existence of ties between the individual and the State to which he or she claims a right to return.

2.2.4. The scope of the right to return *ratione personae*

A third and final issue of interpretation has to do with the scope of the right. Although the right to return of the individual refugee does not seem to be contested in the doctrine, it is contested in case of large groups. Even though several scholars have recently argued that the right to return is also applicable when claimed by mass groups of people,⁵⁴ others assert that the abovementioned international human rights instruments do not recognise such a right. The latter and the older view maintains that, rather than falling under international human rights law, the issue of return of masses of dislocated people is either a political problem or one of self-determination.⁵⁵ For example, Stig Jagerskiold, writing about the scope of Article 12(4) of the Covenant, states that the right to return is intended to apply to individuals asserting an individual right:

There was no intention here to address the claims of masses of people who have been displaced as a by product of war or by political transfers of territory or population, such as the relocation of ethnic Germans from Eastern Europe during and after the Second World War, the flight of the Palestinians from what became Israel, or the movement of Jews from Arab countries... The Covenant does not deal with those issues and cannot be invoked to support a right to 'return.' These claims will require international political solutions on a large scale.⁵⁶

According to this view the right to return applies only to individual persons, or small groups, but when ethnic conflict leads to significant population displacement, the issue must be resolved as a matter of group rather than individual rights.⁵⁷

A third alternative seems to be presented by Hannum. On the one hand, he states that "there is no evidence that mass movements of groups such as refugees or displaced persons were intended to be included within the scope of Article 12 (4) by its drafters" and that in case of 'voluntary repatriation' the consent and the cooperation of the country of origin are required.⁵⁸ However, he adds that "such consent should be forthcoming as a part of every country's obligation to respect the right of its nationals to return."⁵⁹

Although political negotiations and the issue of self-determination may be appropriate in situations involving mass displacement, nothing in the text or *travaux préparatoires* of the relevant provisions of the Universal Declaration or the Covenant limits the application of the right to return to individual instances of refusals to repatriate. In fact, based on a close review of these documents, one could conclude that the drafters did not intend to except mass movement of refugees and displaced persons from this right, particularly since the Universal Declaration and the Covenant do not indicate that the right to return should be linked to one's group status.⁶⁰ In each instance, the relevant language refers to 'everyone' having a right to return.⁶¹ This has

⁵⁴ Lawand, *supra* note 2, p. 542; Nowak, *supra* note 31, p. 220; J. Quigley, *Displaced Palestinians and a Right of Return*, in «Harvard International Law Journal» vol. 39, no. 1, 1998, p. 212; E. Rosand, *The Right to Return under International Law following Mass Dislocation: The Bosnia Precedent?* in «Michigan Journal of International Law», vol. 19, 1998, p. 1129.

⁵⁵ See e.g. E. Benvenisti and E. Zamir, *Private Claims to Property Rights in the Future Israel and Palestinian Settlement*, in «American Journal of International Law», vol. 89, 1995, p. 325 and note 174; Lapidoth, *supra* note 28, p. 115.

⁵⁶ Jagerskiold, *supra* note 14, p. 180; likewise Benvenisti and Zamir, *supra* note 55, pp. 321-325.

⁵⁷ Hannum, *supra* note 7, pp. 59-60 & 169, note 175; Jagerskiold, *supra* note 14, p. 180. Cf. Lawand, *supra* note 2, p. 542. But see also Quigley, *supra* note 54, p. 216 (contesting this argument).

⁵⁸ Hannum, *supra* note 7, pp. 59-60, 66. In an accompanying footnote, Hannum adds that "the expulsion or flight of large numbers of persons from disputed territory is more appropriately viewed as an issue related to self-determination or national sovereignty, rather than forced into the constraints of the much more narrow question of whether or not there exists a right of entry or return" (p. 169).

⁵⁹ *Idem*, p. 66.

⁶⁰ Rosand, *supra* note 54, p. 1129.

been confirmed by the application of the provisions in the European and American Human Rights Conventions regarding the right to return in different cases to members of displaced groups.⁶²

To support their narrow interpretation of the right, commentators point out that the drafters of the Universal Declaration regarded the right to return in Article 13(2) as important merely as a means of strengthening the 'right to leave' one's country, rather than being significant in itself.⁶³ The drafters' lack of emphasis on the right to return, however, must be viewed in the context of the political and legal situation existing when the content of the Universal Declaration was being proposed – *i.e.*, the 1940's.⁶⁴ Not only was the international community sanctioning population transfers involving millions of persons, but human rights law as a whole was in its infancy and the prohibition of mass expulsions or population transfers was still decades away from being established.⁶⁵ The drafters were responding to the crisis of an immediate situation. They could hardly have anticipated that internal conflicts and the consequent massive dislocation would be a problem some fifty years later.

The restrictive view that the right to return only applies to individuals, and not to 'large groups' of people seeking to claim the right simultaneously is for several reasons not convincing. First, the argument does not make sense logically, since all rights enumerated in the Covenant are granted to individuals personally, regardless of how many others might be seeking to exercise the same right and at what time. Moreover, as a policy matter it is unappealing: it implies that one's right to return is somehow less compelling if others are in the same situation.

Second, various UN organs, including the UN High Commissioner for Refugees (UNHCR), have expressly found that large groups of people do have a right to return that is explicitly grounded in both Article 12(4) of the Covenant and its 'mother' Article 13(2) of the Universal Declaration,⁶⁶ thereby creating a precedent for a broadened right to return under international law.

Third, the right to self-determination and the right to return are not mutually exclusive. The right to return should be rather understood as an individual right that applies regardless of one's group affiliation and the right to self-determination as a collective right.⁶⁷

Fourth, the right to leave, which had been the cornerstone of the right to freedom of movement, has little relevance in a post-Cold War world in which forced international migration, including refugee flight, has reached disturbing proportions.⁶⁸ If one accepts the argument of those who assert that the right to return is applicable only to cases where small numbers of individuals are seeking to re-enter their countries and not to mass displacement, then the right to return would have little relevance for the 21st century. In an era characterised by an increase in the number of internal conflicts marked by ethnic cleansing campaigns that result in mass expulsions, and by the international community's desire to maintain or reconstitute multi-ethnic

⁶¹ See also Article 5(d) (ii) of the CERD, which states that "State Parties undertake... to guarantee the right of everyone, without distinction as to race, colour or national origin... to return to one's country".

⁶² See *infra* notes 81 and 86 and their accompanying text respectively. For example, the East African Asians case involved a substantial number of Ugandan Asians. See also De Zayas, *supra* note 5, p. 1063.

⁶³ See *supra* note 26 and accompanying text.

⁶⁴ During the drafting sessions of the ICCPR, the British delegation in the Human Rights Committee moved to strike Article 12 in its entirety from the Covenant, arguing that freedom of movement was not a fundamental right, but a secondary one. See Nowak, *supra* note 31, p. 198.

⁶⁵ During the first half of the century, populations were transferred throughout Europe. These population transfers took place under population exchange agreements. For example, the treaty of Neuilly of 1919, signed by Bulgaria and Greece, resulted in the relocation of 46,000 Greeks from Bulgaria and 96,000 Bulgarians from Greece. (See Benvenisti and Zamir, *supra* note 55, p. 321 fn. 140). Furthermore, the 1923 treaty of Lausanne provided for the compulsory exchange between part of the Muslim population of Greece and part of the Greek population living in Turkey. Treaty of Peace (Lausanne), July 24, 1923, Greece-Turkey, in *L.N.T.S.*, vol. 28, p. 11.

⁶⁶ UNHCR entered into agreements with States concerning the return of refugees and displaced persons that were explicitly based upon Article 12(4) of the ICCPR.

⁶⁷ E. Rosand, *The Kosovo Crisis: implications of the Right to Return*, in «Berkeley Journal of International Law», vol. 18, 2000, p. 237.

⁶⁸ A.C. Hetlon, *The Role of International law in the Twenty-First Century: Forced International Migration: A Need for New Approaches by the International Community*, in «Fordham International Law Journal», vol. 18, 1995, pp. 1623-1636.

societies, the right to return must be made applicable to all situations of displacement.⁶⁹

Last but not least, General Comment 27 (paragraph 19) unambiguously states the applicability of Article 12(4) to large groups of people:

The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.

According to Benvenisti, this growing support for the applicability of the right to return to cases of mass transfer of populations and a broad interpretation of the term ‘his own country’ should be seen in light of the atrocities in former Yugoslavia between 1991 and 1995.⁷⁰ The aim was to reverse the crime of ethnic cleansing. This impetus for invoking the law contributed to a shorter passage of time between the creation of the refugee problem and its resolution. The adverse consequences of a lengthy passage of time on the refugee problems allegedly require other kind of remedies than the ‘individual rights’ approach. However, as we shall see in the last part of this article, the distinction between these types of problems should not exclude a human rights based approach to both.

2.3. Other universal human rights instruments

Various specialised universal instruments adopted under the auspices of the UN specify the provision of the Covenant in different contexts. The CERD guarantees a right ‘to return to one’s country’ as an aspect of a State’s obligation to avoid racial discrimination; thus a State is forbidden to deny entry to a national on racial or ethnic grounds [Article 5(d)(ii)].⁷¹

The right to return is also incorporated in the Convention on the Rights of the Child (CRC).⁷² Article 10 states that in case the parents reside in different States, a child has the right to maintain contacts with both of them. Towards that end, the parties to the CRC shall respect, *inter alia*, the right of the child and his or her parent to enter their own country.

The Convention on the Suppression and Punishment of the Crime of Apartheid⁷³ and the international Convention on the protection of the Rights of All Migrant Workers and Members of their Families endorse the right to return within their own field of application.

3. Regional human rights instruments

3.1. The scope of the right to return

⁶⁹ Rosand, *supra* note 67, p. 238.

⁷⁰ E. Benvenisti, *The Right of Return in International Law: An Israeli Perspective*, paper presented at the Stocktaking Conference on Palestinian Refugee Research in Ottawa, Canada, June 17-20, 2003, p. 6.

⁷¹ *Supra* note 61.

⁷² Convention on the Rights of the Child, 28 *I.L.M.* 1448, adopted and opened for signature and ratification by the United Nations General Assembly resolution 44/25, UN Doc. A/44/49 of 20 November 1989. Entry into force: 2 Sept. 1990.

⁷³ Convention on the Suppression and Punishment of the Crime of Apartheid, 13 *I.L.M.* 50, adopted and opened for signature and ratification by the United Nations General Assembly resolution 3068 (XXVIII) of 30 November 1973. Entry into force: 18 July 1976 Article 2 states: “For the purpose of the present Convention, the term “the crime of apartheid”, which shall include similar policies and practices of racial segregation and democratisation as practiced in southern Africa, shall apply to the following inhuman act committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: [...]

Any legislative measures and other measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form a recognized trade unions, the right to education, *the right to leave and return to their country*, the right to a nationality, the right of freedom of movement and residence, the right to freedom of expression, and the right to freedom of peaceful assembly and association [...]

The right to return is also incorporated, although in terms providing less protection, in four regional human rights instruments. Like universal treaties, these provisions are open to interpretation by supervisory organs.⁷⁴ The right to return is included in Article 3(2) of Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;⁷⁵ Article 22(5) of the American Convention on Human Rights;⁷⁶ Article 12(2) of the African Charter on Human and Peoples' Rights⁷⁷ and Article 22 of the Arab Charter on Human Rights.⁷⁸

Comparing the provisions on the 'right to enter' of the European Protocol and the Covenant, the Council of Europe Committee of experts on Human Rights has commented:

*It might be thought that the Covenant text is wider in scope and it might possibly apply, e.g. to a stateless person or to an alien having very close ties by virtue, for example of birth or permanent residence in the territory concerned. But it might also be that the Covenant text is less precise in wording than its European counterpart.*⁷⁹

The difference in wording between some of the regional instruments and the Covenant relates to the wording 'his own country' of Article 12(4). Reference to an individual's 'country' in connection to the right to return can also be found in the African Charter and the Arab Charter. This is to be contrasted with the terms 'the State of which he is a national' which are used in the similar provisions of the ACHR and the European Protocol.

With respect to the permissible restrictions on the right to return, there are (except for the term 'arbitrarily') no considerable divergences between the Protocol and the Covenant. Under the European text, the right to return is subject only to the general derogation clause, and not to the specific limitations envisaged for the freedom of movement, nor to any particular limitation relating to the right to return. Moreover, the text states expressly that nationals may not be expelled. In the Arab Charter, the right to return is only subject to a general limitation clause. The AfCHPR contains no general derogation clause, but instead enumerates the duties of the individual (Articles 27-29) which include, *inter alia*, the duties, under Article 29(3) "not to compromise the security of the State whose national or resident he is" and, under Article 29(5) "to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its

⁷⁴ For example, the European Court of Human Rights in Strasbourg makes final determinations regarding violations of the European Convention on Human Rights. The Inter-American Commission and Court on Human Rights hear cases of alleged violations of the American Convention on Human Rights, while the African Commission on Human and Peoples' Rights examines claims regarding the African Charter on Human and Peoples' Rights. There is not yet an established body to rule on alleged violations of the Arab Charter on Human Rights.

⁷⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR] 213 U.N.T.S. 222, signed 4 Nov. 1950. Entry into force: 3 Sep. 1953. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and the first Protocol thereto, in «European Treaty Series», no. 59, signed 16 Sep. 1963. Entry into force: 2 May 1968. Article 3(2) states: *No one shall be deprived of the right to enter to the State of which he is a national.*

⁷⁶ American Convention on Human Rights [hereinafter ACHR] 1144 U.N.T.S. 123, signed 22 Nov. 1969. Entry into force: 18 Jul. 1978. Paragraph 5 states: *No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it.*

⁷⁷ African Charter on Human and Peoples' Rights [hereinafter AfCHPR] 21 I.L.M. 59, adopted 17 Jun. 1981. Entry into force: 21 Oct. 1986, OAU Doc. CAB/LEG/67/3/Rev 5 (1981). Article 12 paragraph 2 states: *Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.*

⁷⁸ Arab Charter on Human Rights, adopted by the League of Arab States on 15 September 1994 but has not entered into force, reprinted in «Human Rights Law Journal», vol. 18, 1997, p. 151. Article 22 reads: *No Citizen shall be expelled from his country or deprived from the right to return thereto.*

⁷⁹ See *Human Rights, Problems arising from the Co-existence of the UN Covenants on Human Rights and the European Convention on Human Rights*, Council of Europe, Doc. H (70) 7, as quoted in Abay, *supra* note 33, p. 127.

defense in accordance with the law". These duties could be interpreted as fulfilling the role played in the other Conventions by the general derogation or limitation clause. In addition, the AfCHPR contains certain specific limitations applying to all aspects of the right of movement, including the right to return.⁸⁰

3.2. Case law

The European Court of Human Rights has jurisdiction over both individual complaints and inter-State complaints and has developed the most comprehensive jurisprudence of any regional system. Although there is no jurisprudence concerning the right to return itself, sufficient case law exists on other related provisions which also involves the right to return.

In the case of *East-Africans v. UK*, the European Commission of Human Rights recognised a right of admission for nationals based upon the ECHR provisions forbidding degrading treatment and ethnic discrimination and guaranteeing security of the person,⁸¹ although Protocol No. 4 had not been ratified by the United Kingdom.

In the first inter-State case of *Cyprus v. Turkey*, regarding the expulsion of Greek Cypriots by the Turkish authorities in the occupied part of Northern Cyprus and their subsequent refusal to allow them to return to their homes, the Commission held that Turkey's refusal to permit the repatriation both of those expelled and those who left or were absent for any reason during the conflict constituted, *inter alia*, a violation of Turkey's obligation to respect for the home guaranteed in Article 8 of the European Convention.⁸²

In the fourth inter-State case brought by Cyprus against Turkey, the Court held that the respondent party violated Article 8 of ECHR and Article 1 of Protocol 1 by refusing to allow the return of Greek-Cypriot displaced persons to their homes in northern Cyprus, which effectively denied them the use and enjoyment of their property for which no compensation was paid.⁸³ The Court also found a violation of Article 13 in that the respondent failed to provide any remedies to contest interferences with their rights under Article 8 and Article 1 of Protocol 1 to Greek-Cypriots residing outside of northern Cyprus.⁸⁴

In *Loizidou v. Turkey* the European Court of Human Rights concluded in 1996 that Turkey had violated Article 1 of Protocol 1 of the Convention by preventing the Greek-Cypriot plaintiff from returning to her land in northern Cyprus for sixteen years. This, the Court held, interfered with this Article's guarantee of the right to enjoy possession of the land which one owns.⁸⁵

The jurisprudence under the ACHR and AfCHR is much less developed than under the ECHR and the Arab Charter on Human Rights has not been ratified yet. However, the Inter-American Commission of Human Rights applied the right to return in a case concerning internal displacement. It found that Nicaragua was required to repatriate a population of Miskito Indians that it had forced out of their native area.⁸⁶

⁸⁰ Article 12(2), *supra* note 77.

⁸¹ See *East African Asians v. United Kingdom*: Twenty-Five applications against the United Kingdom, (European Commission on Human Rights, 1971) (making a threshold finding that applicants have stated a case under the European Convention provisions on degrading treatment and race discrimination, as well as on security of the person and equality of treatment); *East African Asians v. UK*, Thirty-One Applications, in «Human Rights Law Journal», vol. 15, 1994, p. 215 [finding violations on the merits of Article 3 (degrading treatment) and Article 14 (race discrimination), but not of Article 5 (the security of the person or of the equality of treatment guarantees)].

⁸² *Cyprus v. Turkey*, European Commission on Human Rights, 1975, in «Yearbook of the European Convention on Human Rights», vol. 18, 1975, p. 82.

⁸³ *Cyprus v. Turkey*, European Court of Human Rights, Application no. 25781/94, 21 March 2001, paras. 175 and 189. Art. 1 of Protocol 1 provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

⁸⁴ *Idem*, para. 324.

⁸⁵ *Loizidou v. Turkey (Merits)*, European Commission on Human Rights, Application no. 40/1993/435/514, in «Human Rights Law Journal», vol. 18, pp. 50-56, 1997. For a discussion of the case, see Beate Rudolf, *International Decisions: Loizidou v. Turkey*, in «American Journal International Law», vol. 91, 1997, p. 532.

⁸⁶ Inter-American Commission on Human Rights, Report on the Situation of human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/ser.L/V/II.62, doc. 26 (1984), p. 112 (referring to the American Convention as standard to apply to the case); *idem*, p. 119 (stating that Nicaragua must allow the

4. Non-binding instruments

4.1. United Nations documents

The right to leave and return was the subject of an important study in 1963 by José Inglés, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁸⁷ However, the UN failed to follow up this study.⁸⁸ The Inglés study was updated by the Special Rapporteur Mubanga-Chipoya in 1988.⁸⁹ The subsequent Special Rapporteur on the right of everyone to leave any country, including his own, and to return to his country was Volodymyr Boutkevitch who submitted to the Sub-Commission a working paper on the right to freedom of movement and related issues on 29 July 1997.⁹⁰

In 1992, at the request of the UN Commission on Human Rights,⁹¹ the Secretary-General of the United Nations appointed Mr. Francis M. Deng as his Representative for a study on the problems of internally displaced persons. Working in close collaboration with a team of international legal experts, Deng prepared a 'Compilation and Analysis of Legal Norms' relevant to the needs and rights of the internally displaced and to the corresponding duties and obligations of States and the international community for their protection and assistance. The Compilation and Analysis was submitted to the Commission on Human Rights in 1996.⁹² In response to the Compilation and Analysis and to remedy the deficiencies in existing law, the Commission on Human Rights and the General Assembly requested Deng to prepare an appropriate framework for the protection and assistance of the internally displaced.⁹³ Accordingly, and in continued collaboration with the team of experts that had prepared the Compilation and Analysis, the drafting of guiding principles was undertaken. The Guiding Principles on Internal Displacement⁹⁴ completed in 1998, contain in section V, *inter alia*, principle 28 relating to the right to return:

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons.

2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

However, the most important document solemnly recognising the right to return within the UN framework is the 1993 Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights. The Declaration reaffirmed the right of everyone without distinction of any kind, to return to his or her own country⁹⁵ and further mentioned the dignified and safe voluntary repatriation as the preferred solution to displacement situations.

The Commission on Human Rights itself has also dealt with the right to return. For instance, the Commission has recently underscored in Resolution 2003/52 the importance of addressing protracted refugee situations and has called upon all States to promote conditions conducive to the voluntary return of refugees

return of those so desiring); *idem*, p. 120 (stating that "massive relocation of population groups may be juridically valid if done with the consent of the population involved").

⁸⁷ The Inglés study, *supra* note 7. The Sub-Commission has been renamed in 1999 by the Economic and Social Council to Sub-Commission on the Promotion and Protection of Human Rights.

⁸⁸ Hannum, *supra* note 7, p. 14.

⁸⁹ Mubanga-Chipoya study, *supra* note 7.

⁹⁰ UN Doc. E/CN.4/Sub.2/1997/22.

⁹¹ Resolution 1992/73 of 5 March 1992.

⁹² E/CN.4/1996/52/Add.2.

⁹³ Resolutions 50/195 of 22 December 1995 and 1996/52 of 19 April 1996, respectively.

⁹⁴ The guiding principles are annexed to report E/CN.4/1998/53/Add.2 of 11 February 1998.

⁹⁵ Vienna Declaration and Programme of Action, UN Doc. A/ CONF.157/23 (pt. I) at 20 (1993). The right to return is set out in paragraph 23: *The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to (...) the right to return to one's own country.*

in safety and with dignity and to support the other two durable solutions of local integration or resettlement where appropriate.⁹⁶ Here again is clearly visible the preference for the right to return in dealing with refugee problems.

The Sub-Commission on the Promotion and Protection of Human Rights has also reaffirmed the right to return in resolutions 1996/9 of 23 August 1996, 1997/31 of 28 August 1997 and 2002/30 of 5 August 2000. The Sub-Commission recognised the fundamental significance of the observance and promotion of the right to return as a principal means of resolving the problems and suffering of refugees and internally displaced persons. Moreover, it has confirmed that the exercise of the right to return is not conditional upon governmental permission or approval. Besides, the Sub-Commission urged parties to peace agreement and voluntary repatriation agreements to include implementation of the right to return in such agreements.

4.2. Expert conferences

In addition to the abovementioned authoritative interpretation of the right to return by the Human Rights Committee, other international bodies have also dealt with the content and the interpretation of this right. Following the adoption of the ICCPR, the right to return has been subsequently reaffirmed in academic conferences. In particular, the increasingly frequent denial of the right to emigrate in practice by countries such as the (former) Soviet Union led to the organisation by non-governmental organisations of an international colloquium on the right to leave and return in Uppsala Sweden, in 1972.⁹⁷ Drawing on the draft principles in the Inglés study, the colloquium adopted a Declaration on the Right to Leave and Return which set forth in greater detail the procedures and substantive norms which should govern exercise of the rights in question and permissible limitations on those rights.⁹⁸

Another meeting of experts on the right to leave and return was convened by the International Institute of Human Rights in Strasbourg in November 1986. The participants adopted a Declaration on the Right to Leave and Return which was largely based on the work of Inglés and the Uppsala Colloquium, also taking into account subsequent developments, such as the signing of the Helsinki Final Act in 1975,⁹⁹ the jurisprudence of international human rights bodies etc.¹⁰⁰ Interestingly enough, the Strasbourg Declaration contains a provision in which States are called upon to give 'sympathetic consideration' to permitting the return of persons who have maintained *bona fide* links with that State.¹⁰¹

Although the declarations have not been adopted under the auspices of the UN, they contribute to identify and clarify the legal content of the right to return.

Furthermore, the concluding documents of the subsequent Conferences on Security and Cooperation

⁹⁶ Resolution 2003/52 of 24 April 2003 on 'human rights and mass exoduses'.

⁹⁷ Hannum, *supra* note 7, p. 14.

⁹⁸ Uppsala Colloquium, *supra* note 7, p. xxi-xxvi. For the text and a commentary of the Uppsala Declaration, see: *The Uppsala Declaration on the Right to Leave and to Return*, in «Israel Yearbook on Human Rights», vol. 4, 1974, pp. 432-435. Chapter II codifies the right to return in Article 9. It reads: *Every person is entitled to return to the country of which he is a national.* Article 10 states: *No person shall be deprived of his nationality for the purpose of divesting him of the right to return to his country.* Moreover, Article 12 states: *The re-entry of long-term residents who are not nationals, including stateless persons, may be refused only in the most exceptional circumstances.*

⁹⁹ The Final Act of the Conference on Security and Cooperation in Europe, reprinted in *14 I.L.M. 1293*, recalls that "the participating States [...] make it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organisations of the participating States" and provides specific measures concerning travel for family, personal or professional reasons. The concluding documents of the subsequent Conferences on Security and Cooperation in Europe

¹⁰⁰ Strasbourg Declaration on the Right to Leave and Return, adopted by the meeting of experts, Strasbourg, France on 26 November 1986, reprinted in «American Journal of International Law», vol. 81, no. 1, pp. 432-438, 1987, and appendix F in Hannum, *supra* note 7, p. 154; [hereinafter Strasbourg Declaration]. For the text and a commentary of the Strasbourg Declaration, see: R. Hofmann, *The Right to Leave and Return to one's own Country, The Strasbourg Declaration on the Right to Leave and Return: Results of the Meeting of Experts Held in Strasbourg in November 1986*, in «Human Rights Law Journal», vol. 8, 1987, pp. 478-484.

¹⁰¹ Article 8 reads: *On humanitarian grounds, a state should give sympathetic consideration to permitting the return of a former resident, in particular a stateless person, who has maintained strong bona fide links with that state.*

in Europe recalls in unambiguous terms that the participating States undertake to implement and respect the principle “that everyone shall be free to leave any country, including his own, and to return to his country”¹⁰². Finally, the right to return has been reaffirmed in OAU/UNHCR symposium on displacement in Africa.¹⁰³ This formal endorsement enlarges and consolidates the already widespread recognition in other parts of the world.

**PART TWO:
The right to return in practice:
The cases of the Middle East and Kosovo**

1. The situation in the Middle East

Much has been written about the Palestinian question, including its legal aspects and the right to return.¹⁰⁴ The Palestinian refugee situation has been described as “one of the most intractable problems in the Middle East Peace Process” and a “focal point in the conflict between Israel and its Arab Neighbors”.¹⁰⁵ The Palestinian refugees are the world’s oldest and largest refugee population. A considerable number of them have lived as refugees for more than fifty years.

While this article refers to the term ‘Palestinian refugees,’ it does not accept a strict definition of this term because no clear definition of ‘Palestinian refugee’ exists.¹⁰⁶ For present purposes, the term ‘Palestinian refugees’ refers to indigenous Arab residents of Mandate Palestine who were displaced after the 1947-1948 War between the Jews and the Arabs and the indigenous Arabs’ descendants.¹⁰⁷ However, there is another category of Palestinians known as ‘displaced persons’. This category refers to Palestinians who were

¹⁰² See the Concluding Document of the Vienna Conference on Security and Cooperation in Europe held in 1989, reprinted in «Human Rights Law Journal», 270, 1989; and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, reprinted in 29 *I.L.M.* 1305. See also the 1991 Charter of Paris for a new Europe, reprinted in 30 *I.L.M.* 193, pp. 193-194 and pp. 199-200. *CSCE Concluding Document of the Vienna Meeting on the Follow-up to the Conference*, 15 Jan. 1989, reprinted in Council of Europe, *Human Rights in International Law: Basic Texts*, Strasbourg, Council of Europe Press, 1991, p. 20

¹⁰³ Recommendations of the OAU/UNHCR symposium on Refugees and Forced Population Displacements in Africa, EC/1994/SCP/CRP.7/Add.1, 21 September 1994.

¹⁰⁴ While many useful analyses have been written about the right to return of Palestinian refugees, several contributions stand out in particular for their invaluable insights into the legal bases in international law of this right. See, e.g. Boling, *supra* note 4; Quigley, *supra* note 54; Quigley, *supra* note 29; Mallison and Mallison, *supra* note 10; Lawand, *supra* note 2.

¹⁰⁵ D. Peretz, *Palestinians, Refugees, and the Middle East Peace Process*, Washington, US Institute of Peace Press, 1993, at vii and 3.

¹⁰⁶ L. Takkenberg, *The Status of Palestinian Refugees in International Law*, Oxford, Clarendon Press, 1998, p. 68. This term is not restricted to the three million Palestinian refugees registered with the United Nations Relief and works Agency for Palestine Refugees in the Near East [hereinafter UNWRA]. Its is also not to be confused with those refugees within the limited competence of the UNHCR, that is, persons who can show that they have fled their country of origin owing to a well-founded fear of persecution because of their race, religion nationality, membership of a particular social group or political opinion; See the Convention Relating to the Status of Refugees [hereinafter the Refugee Convention] 189 *U.N.T.S.* 137, signed 28 July 1951, entered into force 22 April 1954 and Protocol I relating to the status of Refugees, 606 *U.N.T.S.* 267 opened for signature 31 January 1967, entered into force 4 October 1967. Palestinians are excluded from the application of the Statute of the office of the UNHCR, 14 Dec. 1950, UN GAOR, 5th sess., Annex, UNGA res. 428(V) and of the Refugee Convention as these instruments do not apply to persons who receive protection or assistance from other organs or agencies of the UN: *UNHCR Statute*, par. 7(C) and Art. 1(D) of the Refugee Convention.

¹⁰⁷ Cf. T. Kramer, *The Controversy of Palestinian ‘Right of Return’ to Israel*, in «Arizona Journal of International and Comparative Law», vol. 18, Fall 2001, p. 980.

displaced after the Six-Day War in 1967, during which Israel took control of the West Bank and Gaza Strip.¹⁰⁸ This war led to the further displacement of Palestinians, many of whom were Palestinian refugees from the 1947-1948 War. This article includes references to Palestinian displaced persons to demonstrate that a right to return may apply equally to refugees and displaced persons.

1.2. *Brief history*

Until the defeat of the Turks at the close of the First World War, Palestine and its inhabitants, Muslim, Christian and Jewish, were under Ottoman rule and had been so for the previous five centuries. Palestine was then occupied by the British from 1918 to 1922, when the League of Nations assigned a Mandate for its administration to Great Britain. Palestine under the British Mandate was characterised by outbursts of violence between the Jewish and Arab populations, due to clashing national aspirations and the pressure of rapidly increasing Jewish immigration on the Arab population. On 29 November 1947, the UN General Assembly adopted resolution 181 recommending the termination of the Mandate and the partition of Palestine into 'independent Arab and Jewish States' and a 'Special International Regime for the City of Jerusalem' under the umbrella of an economic union.¹⁰⁹

The UN partition plan for Palestine in November 1947 was followed by fighting between Jews and Palestinians and already the day after the British withdrawal from the area in May 1948, a war between Israel and the Arab neighbor states broke out. It is estimated that 750,000 Palestinians fled their homes,¹¹⁰ the majority to Gaza, which at that time belonged to Egypt, and the West Bank, which was a part of Jordan. 130,000 took refuge in Lebanon, while Syria received nearly 100,000.

In 1967, Israel started the Six Day War by launching an air attack on Egypt, Jordan, Syria and Iraq. Israel occupied East Jerusalem, the West Bank and Gaza and 1,5 million Arabs, mostly Palestinians, came under Israeli occupation. More than 500,000 Palestinians fled their homes, some of them for the second time.¹¹¹ Israel is still occupying the territories.

In addressing the question of the right to return of Palestinians in international law, some authors have deemed it relevant to discuss the immediate causes or motivations of their flight.¹¹² The existence of the right to return, however, is not conditional on involuntary departure from one's own country. Whether the Palestinians left their country of their own volition or against their will is of no relevance to the issue of whether they can claim a right to return.¹¹³ The causes of flight¹¹⁴ may be relevant in the determination of whether the Palestinian exoduses of 1948 and 1967 amount to deliberate 'mass expulsion' or a 'population

¹⁰⁸ Takkenberg, *supra* note 106, p. 17.

¹⁰⁹ General Assembly resolution 181(II), UN Doc. A/519 of 29 November 1947.

¹¹⁰ B. Morris, *The birth of the Palestinian refugee problem, 1947-48*, Cambridge, Cambridge University Press, 1987, Annex I, The number of Palestinian refugees, pp. 297-298; see also *General Progress Report and Supplementary Report of the United Nations Conciliation Commission for Palestine, Covering the period from 11 December 1949 to 23 October 1950*, UN GAOR, 5th Sess., Supp. no. 18, UN Doc. A/1367/Rev.1 (23 October 1950) (Appendix 4 of which, titled *Report of the Technical Commission on Refugees*, which was submitted to the Conciliation Commission in Lausanne on 7 September 1949, listed an estimated figure of 711,000 for the "refugees from Israel-controlled territory, a figure which the Technical Committee stated it "believed to be as accurate as circumstances permit").

¹¹¹ *The Question of Palestine & the United Nations*, Published by the United Nations of Public information DPI 2276, March 2003, p. 8, also available at <http://www.un.org/Depts/dpi/palestine/ch10.pdf>.

¹¹² K.R. Radley, *The Palestinian Refugees: The Right to Return in International Law*, in «American Journal of International Law», vol. 72, no. 6, 1978, pp. 590-5; Quigley, *supra* note 54, pp. 173-182; T. Kramer, *supra* note 107, pp. 990-998.

¹¹³ Lawand, *supra* note 2, p. 537.

¹¹⁴ With respect to the causes of flight, the United Nations Mediator for Palestine reported in 1948 that "the exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion". See Progress Report of The United Nations Mediator on Palestine – Submitted to the Secretary-General for Transmission to the Members of the United Nations, UN Doc. A /648 (18 Sept. 1948) [hereinafter the Bernadotte Report], pp. 13-14. For a study of the immediate causes of the Palestinian exodus of 1948 based on declassified British and Israel documents, see Morris, *supra* note 110.

transfer' prohibited by international law. However, this question is beyond the scope of this article.¹¹⁵

1.3. The peace process

1.3.1 Early efforts

Some commentators assert that the question of the right to return of Palestinian refugees is a complicated political problem that does not concern the freedom of movement under international law.¹¹⁶ The return question, however, has been also left unanswered in the political negotiations.¹¹⁷

Since 1948, the Israeli government has viewed the possibility of the return of these Palestinian refugees as both a security and a demographic threat.¹¹⁸ Thus, despite the Palestinian Liberation Organization's (PLO) claim of a right of repatriation under international law for the Palestinian refugees, and despite numerous UN resolutions¹¹⁹ recognising such a right, Israeli fear about what might happen has resulted in a "long-standing policy of Israeli non-acquiescence to the Palestinian's comprehensive claims of a right of return."¹²⁰ Israel has disputed the existence of a norm of international law that would require it to repatriate and has refused to bear responsibility for the displacement of the Palestinians.

After the 1947-1948 war, peace was not forthcoming. According to scholar and historian Benny Morris, although there were opportunities for peace making between Israel and several of the Arab states during late 1948 through 1952, the opportunities were not exploited, in part "because Israel was unwilling to make concessions for peace, and the Arab leaders felt too weak and threatened by their own people and their neighbours to embark on, or even contemplate, peace unless it included substantial Israeli concessions."¹²¹

The first effort on the way to peace was made in the 1970's, when a peace process underway between Egypt and Israel culminated in the signing of the Camp David Agreement in 1978.¹²² "A framework for Peace in the Middle East Agreed at Camp David," which was signed by Israel and Egypt on September 17, 1978 in the context of the Camp David Negotiations, asserted that the parties were "determined to reach a just, comprehensive, and durable settlement of the Middle East conflict through the conclusion of peace treaties" and that their purpose was "to achieve peace and good neighbourly relations".¹²³ The agreement specifically addressed the Palestinian refugee problem. Israel and Egypt agreed that they would work together to establish "agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem."¹²⁴ However, the PLO, which was formed in 1964 with the stated goal of righting the wrong

¹¹⁵ Mass expulsion is prohibited under customary international law when practised in an arbitrary or discriminatory fashion, that is, in the absence of due process or when aimed at a particular group of persons. While universal human rights instruments do not expressly prohibit mass expulsion, this practice is clearly contrary to many of the provisions of the UDHR and the ICCPR, notably those prohibiting arbitrariness and discrimination, protecting the right to life, liberty and security of the person, and prohibiting inhuman and degrading treatment and arbitrary exile. So far as mass population transfers create a burden on the receiving State, which under international law is under no obligation to allow entry to aliens on its soil, they can also amount to a violation of that State's territorial sovereignty. See generally J Henckaerts, *Mass Expulsion in Modern International Law and Practice*, The Hague, Boston, London, Martinus Nijhoff Publishers, 1995.

¹¹⁶ Lapidot *supra* note 28, see also Benvenisti and Zamir, *supra* note 55.

¹¹⁷ For a detailed overview of the right to return in the Peace Process, see *Refugees in the Middle East Process*, available at http://www.arts.mcgill.ca/mepp/new_prrn/background/background_refugees.htm.

¹¹⁸ W.T. Mallison and S. Mallison, *The Palestine Problem in International Law and World Order*, London, Longman, 1986, p. 420.

¹¹⁹ See, e.g., General Assembly Resolution 3236, UN Doc. A/9631 of 22 November 1974; General Assembly Resolution 3089 (D), UN Doc. A/9030 of 7 December 1973 (referring to the Palestinians' inalienable right to return to their homes and property).

¹²⁰ Weiner, *supra* note 24, p. 30.

¹²¹ B. Morris, *Righteous victims: A history of the Zionist-Arab Conflict, 1881-1999*, New York, Knopf, 1999, p. 268.

¹²² Takkenberg, *supra* note 106, p. 33.

¹²³ A Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978 [hereinafter Camp David Agreements] 17 *ILLM*. 1466. See also Takkenberg, *supra* note 106, p. 33 (discussing the Camp David Agreements).

¹²⁴ Camp David Agreements, *supra* note 123, art. A (4), p. 1468.

done to Palestinians and dismantling the Zionist entity,¹²⁵ rejected the Camp David agreements.¹²⁶ For more than a decade afterwards, there was very little progress in resolving the conflict.

1.3.2. Oslo and beyond

The next significant step at peace came in 1991. After the Gulf War, the United States began a new diplomatic effort to support the Peace process in the Middle East. Those efforts resulted in a set of peace talks in the October 30, 1991 Madrid Conference.¹²⁷ For the next two years, representatives from Israel and the Arab states were involved in bilateral negotiations leading to a breakthrough in Oslo and the signing of a Declaration of Principles in 1993.¹²⁸ The Declaration of Principles called for the immediate negotiation of interim Palestinian self-government in portions of the West Bank and Gaza, with negotiations on 'permanent status' issues - refugees, along with borders, settlements and Jerusalem - to be delayed until 1996.¹²⁹ As one commentator has noted, this merely "commits the parties to no more than an obligation to negotiate in good faith a permanent agreement with respect to the refugee problem".¹³⁰

The Declaration of Principles did, however, call for immediate negotiations between Israel, the Palestinians, Jordan and Egypt on the "modalities of admission of persons displaced from the West Bank and Gaza in 1967." Subsequently, a Continuing (or 'Quadripartite') Committee was established to discuss these issues. The Committee first met in Amman in May 1995; subsequent meetings were held in Beersheba, Cairo, Gaza, Amman and Haifa. Work within the Committee was slow, with major differences over the definition of a 'displaced person' and hence the number of potential returnees.¹³¹ By 1997, deterioration in the peace process resulted in the end of the work in the Committee.

In addition, the Israeli-Palestinian Interim Agreement ('Oslo II') of September 1995 contained some clauses of relevance to the refugee issue, in particular those regarding residency rights for returnees.¹³² In May 1996, the final status negotiations were formally opened, but substantial negotiation was interrupted by Israeli elections, and the subsequent change in the Israeli government.¹³³ The Hebron redeployment agreement¹³⁴ called for final status negotiations to begin in March 1997. However, Israel's decision to proceed with new settlement activity in occupied territory near Jerusalem led to a deterioration in the peace process.

There has been no signing of a Permanent Status Agreement or any final solution of the Palestinian refugee issue ever since. Ehud Barak, elected prime minister in 1999 with the expectation of renewing the suspended peace process,¹³⁵ was ultimately unsuccessful in reaching a final settlement with the Palestinians. Peace talks at Camp David in July 2000, during which Barak was willing to make concessions over the West Bank, the Gaza Strip and East Jerusalem, ended in failure over the question of East Jerusalem. Arafat insisted on full control of East Jerusalem and ultimately rejected an American-backed compromise on a final settlement. This compromise proposed that the Palestinian refugees accept a limited right to return – the return to a Palestinian homeland in the West Bank and the Gaza Strip. In this proposal, Clinton urged

¹²⁵ Morris, *supra* note 121, p. 303.

¹²⁶ Takkenberg, *supra* note 106, p. 33.

¹²⁷ *Idem*.

¹²⁸ Declaration of Principles on Interim Self-Governments Arrangements, Sept. 13, 1993 [hereinafter Declaration of Principles] 32 *I.L.M.* 1525. See also Takkenberg, *supra* note 106, p. 35 (discussing the Declaration of Principles).

¹²⁹ Declaration of Principles, *supra* note 128, Art. V, Sec. 3 and Art. XII.

¹³⁰ Lawand, *supra* note 2, p. 533. Lawand notes that Israel and Jordan have in bilateral agreements "adopted a more principled approach to the problem of refugees and displaced persons by committing themselves to negotiations aimed at resolving the problem 'in accordance with international law.'" *Idem*, quoted in the first and fourth 'components' of the Israel-Jordan Common Agenda for the Bilateral Peace Negotiations, Sept. 14, 1993, 32 *I.L.M.* 1522, and quoted in the Treaty of Peace Between the Hachemite Kingdom of Jordan and the State of Israel, Oct. 26, 1994, 34 *I.L.M.* 43. According to Lawand, this is the first reference to international law in relation to the Resolution of the refugee problem that has appeared in any of the Arab-Israeli agreements. See Lawand, *supra* note 2, p. 533.

¹³¹ Weiner, *supra* note 24, p. 9.

¹³² See Interim Agreement, Annex III, Appendix 1, Art. 28(11) and (12); *Idem*, Annex II, Art. II(1)(g)(2).

¹³³ Weiner, *supra* note 24, p. 10.

¹³⁴ Protocol Concerning the Redeployment in Hebron, 17 January 1997, Israel-PLO, 36 *I.L.M.* 650.

¹³⁵ Morris, *supra* note 121, p. 651.

Palestinians to accept the principle that “there is no specific right of return to Israel itself.” Additionally, Clinton’s proposal expected that Israel would take in some refugees, but only as its “sovereign decision” and in a way that would not “threaten the Jewish Character of the state.” Clinton’s proposal, which neither side ever formally adopted, ended with his presidency in January 2001. In between, fall 2000 saw violent clashes between the Israelis and Palestinians, the outbreak of the second *Intifadah*,¹³⁶ and rioting mobs inside Israel.

Six months after the failure at Camp David, both sides nevertheless agreed to continue their negotiations in the Egyptian winter resort of Taba in late December 2000 and onward. Despite the raging violence in the occupied territories and the seemingly irreconcilable views on the refugee problem, both sides were able to negotiate a proposal that brought them closer together than ever before. The Moratinos Document¹³⁷ is the most authoritative and authentic reference that gives a clear and accurate assessment for the Taba talks. On the issue of refugees, “both sides suggested, as a basis, that the parties should agree that a just settlement of the refugee problem in accordance with Security Council Resolution 242 must lead to the implementation of Resolution 194(III)”.

In February 2001, Likud party’s Ariel Sharon was elected prime Minister of Israel facilitated by the continued violence of the Palestinians during the preceding months. His election victory resulted in the suspension of the Taba talks. Only time will tell whether the conservative leader will help attain peace between the two sides. The escalating violence in the Occupied Territories and Israel’s harsh repressive measures have significantly hardened attitudes on both sides. A compromise on the return of the refugees faded away indefinitely.

In a recent statement of April 14 2004, US President George Bush, following his meeting with Israeli Prime Minister Ariel Sharon, effectively denied the fundamental right to return of Palestinian refugees. Bush referred to the settlement of Palestinian refugees in the future Palestinian State ‘rather than in Israel.’ “In light of new realities on the ground, including already existing major Israeli population centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949”. He suggested the Palestinian refugees would not return to their lands, but to the future Palestinian State. US stated policy had hitherto been that the Palestinian refugee issue would be addressed in the context of the final status negotiations. This is the first time that the US has explicitly rejected the right to return for Palestinian refugees *a priori*.

1.4. The right to return applied to the case of the Palestinians

1.4.1 Introduction

The application of the right to return in the case of the Palestinian refugees¹³⁸ in this section will be evaluated in terms of UN documents and practice and human rights law. This section will first deal with the abovementioned UN resolutions and other relevant UN documents together with an assessment under general international law.

Scores of scholars, historians, commentators, and Palestinian and Israeli leaders have interpreted each of these sources differently. Moreover, there is no authoritative Palestinian definition of what constitutes the right to return.¹³⁹ Since the 1947-1948 War, “the right of return has been taken to mean many things, ranging from the right of all Palestinians or their descendants to return to their former homes and places of origin in Palestine, to a return of some of the Palestinians currently in exile to some limited part of Palestine”.¹⁴⁰ Finally, it is important to keep in mind that even if the right to return is part of customary

¹³⁶ Uprising.

¹³⁷ The European envoy was the only outsider to the talks and his document was reviewed several times by both parties. Although this paper has no official status, it has been acknowledged by the parties as being a relatively fair description of the outcome of the negotiations. For detailed view refer to the Moratinos Document: *The Peace that really was at Taba*, Eldar Akiva - Ha’aretz, 14 February 2002, available at http://www.arts.mcgill.ca/mepp/new_prn/research/research_papers.htm.

¹³⁸ The article deals only with the asserted right of Palestinian refugees to return to Israel proper. As long as there is no Palestinian state that satisfies the international legal criteria of statehood, the right to return applies in principle to the entire territory of the former British Mandate, Cf. Takkenberg, *supra* note 106, p. 243.

¹³⁹ R.I. Khalidi, *Observations on the Right of Return*, in «Journal of Palestine Studies», vol. 21, no. 2 (Winter, 1992), p. 29.

¹⁴⁰ *Idem*.

international law, the specific question whether there is a Palestinian right to return to the territory of modern-day Israel poses a unique issue that has been unresolved for over 50 years and still raises much controversy and emotion in the minds and hearts of not only Arabs and Jews, but also all over the world.¹⁴¹

1.4.2. United Nations documents and general international law

One of the earliest articulations of the right to return is found in the 1948 progress report of the United Nations mediator on Palestine to the General Assembly:

*The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations...*¹⁴²

This statement by Count Bernadotte can be interpreted as an affirmation of an existing right to return, rather than a right to emerge in the future.

Based on the recommendations of the Bernadotte report and in response to the first mass displacement across Palestine that spilled over into frontline Arab States, the General Assembly adopted Resolution 194(III) of 11 December 1948, which also recognises the right to return in paragraph 11:

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 ... 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.

Commenting on the original draft of this paragraph, the representative of the United States followed the same line of argumentation by stating that the operative paragraph 11 concerning the rights of 1948 refugees “endorsed a generally recognized principle and provided a means for implementing that principle...”¹⁴³

The first right enumerated in Resolution 194(III) is the right to return. It is recognised unambiguously by stating that “the refugees wishing to return to their homes... should be permitted to do so at the earliest practicable date.” The second right, closely connected to the first one, is the right of restitution, or the right to regain possession of private property belonging to the returning refugees. This is clearly spelled out in a Working Paper prepared by the UN Secretariat in March 1950.¹⁴⁴ The General Assembly reiterated the right to restitution in the Palestinian context in a 1974 resolution referring to the “inalienable rights of the

¹⁴¹ J. Quigley, *The right of Displaced Palestinians* in G. Karmi and E. Cotran (eds.) *The Palestinian Exodus 1948-1998*, Lebanon, Ithaca Press, 1999, p. 162.

¹⁴² Bernadotte Report, *supra* note 114, p. 32.

¹⁴³ *Compensation to Refugees for Loss of or Damage to Property to be Made Good under Principles of International Law or in Equity*, Working Paper Prepared by the UN Secretariat, UN Doc. W/30 (Restricted) (Original: English) (31 October 1949) (the quoted language appearing in paragraph 8 of the Working Paper).

¹⁴⁴ *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, Working Paper prepared by the UN Secretariat, Geneva, March 1950, UN Doc. A/AC.25/W.41/Rev. 2 (Annex 1) (1950). Paragraph 1 of the Working Paper clearly outlines the inclusion of the ‘right of restitution’ in the ‘right to return’:

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

Palestinians to return to their homes and property from which they have been displaced and uprooted".¹⁴⁵ Finally, the third right enumerated in Resolution 194(III) is the right to compensation either for returning or non-returning refugees.

To implement this resolution, the General Assembly set up what it called the Palestine Conciliation Commission, composed of representatives from Turkey, France and the United States. The three-member commission asked Israel to implement the General Assembly's call for the repatriation of the displaced Palestinians. Israel admitted 8,000 Palestinians on the basis of reuniting split families,¹⁴⁶ and offered to admit 100,000 more, but withdrew that offer when UN officials pressed Israel to admit a larger number.¹⁴⁷ In view of the Commission's failure to persuade Israel to cooperate, the General Assembly adopted Resolution 513(VI) on January 26, 1952 endorsing a programme proposed by the UNRWA, designed to expedite the reintegration of the displaced Arabs into the economic life of the area, without prejudicing, however, the repatriation provisions of Resolution 194(III).

The abovementioned paragraph 11 of Resolution 194(III) has been reiterated annually in subsequent General Assembly resolutions, with the support of the US and virtually every nation of the UN except Israel.¹⁴⁸ In addition, many other UN resolutions call expressly for the right to return of Palestinian refugees.¹⁴⁹

Resolution 194(III) does not address the status of Palestinian refugees displaced after 1948. It does not cover the 1967 refugees and those refugees displaced from the West Bank, East Jerusalem and the Gaza Strip after 1967. Resolutions concerning these refugees include UN Security Council 237 of 14 June 1967 and a series of resolutions concerning expulsion, deportation and denial of residency rights. A recent reaffirmation is found in General Assembly Resolution 52/59 of December 1997 which "[r]eaffirm[ed] the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967".

The right of Palestinians to return continues to be recognised by other authoritative bodies within the UN system for the protection of human rights. In March 1998 the Committee on the Elimination of Racial Discrimination examined the report presented by Israel. In its concluding observations the Committee was unequivocal about the obligations of Israel in relation to the right to return of the Palestinians. It stated:

*The right of many Palestinians to return and possess their homes in Israel is currently denied. The State party should give high priority to remedying this situation. Those who cannot repossess their homes should be entitled to compensation.*¹⁵⁰

The UN Commission on Human Rights has also been seized with the matter and has affirmed the right to return in numerous resolutions.¹⁵¹ The Economic and Social Council has also dealt with the situation in the Middle East. In Resolution 1982/18,¹⁵² it expressed its grave concern that the Palestinian people continue to be denied their inalienable rights, in particular their right to return to their homes and property from which they have been displaced and uprooted. Moreover, the Economic and Social Council appealed to all States and international organizations to extend all moral and material assistance to the Palestinian refugees and displaced persons in their struggle for the restoration of the right to return to their homes.

Israel has always taken the position that it is not legally obliged to repatriate the displaced Palestinians. Israel maintained that Resolution 194(III) did not speak of return as a matter of right for the Palestinians, by referring to the fact that General Assembly resolutions normally do not constitute binding

¹⁴⁵ General Assembly resolution 3236 (XXIX) of 22 November 1974.

¹⁴⁶ Radley, *supra* note 112, p. 603 and note 66.

¹⁴⁷ H. Cattani, *The Palestine Question*, London, Croom Helm, 1988, p. 65.

¹⁴⁸ Khalidi, *supra* note 139, p. 33.

¹⁴⁹ For a comprehensive review of the numerous General Assembly Resolutions on the right to return of Palestinians and the language used therein, see Zedalis, *supra* note 45, p. 508-510. See, e.g., Resolution 35/13 of 3 November 1980 described the "right of all displaced inhabitants to return to their homes or former places of residence" as 'inalienable.'

¹⁵⁰ See Israel 30/03/98, CERD/C/304/ Add.45.

¹⁵¹ Resolutions no. 6 (XXIV) of February 27, 1968, no. 3 (XXVIII) of March 22, 1972, no. 6 A (XXXI) of February 21, 1975, no. 1 A (XXXVI) of February 13, 1980, no. 1983/1 of February 15, 1983, and no. 1984/1 A of February 20, 1984

¹⁵² Resolution of 4 May 1982 on the situation of women and children in the occupied Arab territories.

authority over sovereign States. It pointed to the use of 'should' in the resolution as implying less than legal obligation.¹⁵³

However, during the debates in the General Assembly, the delegate of the United Kingdom, who drafted the resolution, called the provision on displaced persons a 'precise directive,' a characterization that makes sense only if it is a call for repatriation.¹⁵⁴ The US delegate said that the draft resolution 'aimed at facilitating the repatriation and resettlement of refugees.'¹⁵⁵ In the First Committee debate, no State other than Israel questioned repatriation as a right. Delegates who addressed the issue were consistent in either stating or assuming that Israel was required to repatriate the refugees.¹⁵⁶

Furthermore, Israel argued that since the Assembly called for repatriation only 'at the earliest practicable date,' repatriation was not legally required.¹⁵⁷ This argument is also unpersuasive. According to Quigley, it would seem that the General Assembly was concerned that Israel would not implement repatriation promptly.¹⁵⁸ The Assembly contemplated that return would be effectuated by diplomatic means through the UN Conciliation Commission for Palestine and assumed that the logistics of a return would require a period of time.¹⁵⁹ The UK draft resolution had used the phrase 'earliest possible date.'¹⁶⁰ After debate, it was changed to 'practicable' in order to clarify the intention of the proposal and as a partial response to concerns expressed by the Israeli delegation that a return prior to peace agreements would create security problems.¹⁶¹ This amendment took place only in the English text. Apparently, this was not deemed sufficiently important to change the French text as well. The final text merely seems to take practical implications of the actual return into account and does not influence return as a right as such.

Israel further argued that since it was being asked to repatriate only those Palestinians 'wishing to... live at peace', it was not being asked to repatriate them all, and that the Assembly had thus not viewed their return as obligatory.¹⁶² The phrase 'live at peace' was not explained in debates leading to the adoption of Resolution 194(III). Quigley argues that the phrase 'wishing to live at peace' is meant to refer to those who were inclined to live under Israel sovereignty. Refugees not wishing to live in peace with their neighbors were the ones who chose to live abroad.¹⁶³ Whatever the proper meaning in this regard, subsequent UN resolutions omitted the phrase 'wishing to live at peace'.

Finally, however, the abovementioned arguments do not prejudice the right to return as a generally recognised right. In any case, General Assembly Resolution 194(III) has been reaffirmed more than 110 times by the UN General Assembly and constitutes the primary authority for the Palestinian right to return. Such reaffirmations "are important because of their role in the codification and progressive development of international law".¹⁶⁴ When a resolution restates already existing law, as in the case of Resolution 194(III), it becomes binding on member States not necessarily *via* the resolution, but through the declared law.¹⁶⁵

1.4.3. Human rights law

¹⁵³ Lapidoth, *supra* note 28, p. 116; Radley, *supra* note 112, p. 601.

¹⁵⁴ See UN GAOR, 3d Sess. 184th mtg. P. 948, UN Doc. A/PV.184 (1948) (Mr. McNeill, U.K.).

¹⁵⁵ UN GAOR, 3d Sess., 184th mtg. P. 948, UN Doc. A/PV. 184 (1948) (Mr. Dulles, U.S.A.).

¹⁵⁶ See Summary Records of Meetings 21 September-8 December 1948, UN GAOR, 3d Sess., pt.1, C.1, p. 646, UN Doc. A/C.1/SR. 200 (1948) (MR. Shertok, Israel: "It [Israel] believed that serious thought should be given to the resettling of the Arab refugees in neighbouring territories.")

¹⁵⁷ Radley, *supra* note 112, p. 602.

¹⁵⁸ Quigley, *supra* note 54, p. 188.

¹⁵⁹ Mallison and Mallison, *supra* note 118, p. 179-180.

¹⁶⁰ Annexes to the Summary Records of Meetings, UN GAOR, 3d Sess., pt. 1 11, UN Doc. A/C.1/394.Rev.2 (1948).

¹⁶¹ See Summary Records of Meetings 21 September - 8 December 1948, UN GAOR, 3d Sess., pt.1, C.1, p. 906, UN Doc. A/C.1/SR.226 (1948) (Mr. Eban, Israel).

¹⁶² Radley, *supra* note 112, p. 602.

¹⁶³ Quigley, *supra* note 54, p. 187.

¹⁶⁴ L.T. Lee, *The Preventive Approach to the Refugee Problem*, in «Williamette Law Review» vol. 28, 1992, p. 829.

¹⁶⁵ R.H. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, London, Oxford University Press, 1963, p. 6.

Although Israel is a party to both the ICCPR¹⁶⁶ and the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁶⁷ proponents of the Israeli position claim that human rights law does not provide for a right to return of Palestinians. Partisans of the Israeli position argue that the Universal Declaration, the Covenant and CERD fail to ground the right of Palestinians to return.

Israel invokes the limitation clauses of Article 29(2) of the Universal Declaration and Article 4(1) of the Covenant to limit the exercise of the right to return. These clauses would seem to indicate that under certain circumstances the right to return can be compromised. Without attempting to pass judgment on the complex question of whether such occasions and circumstances exist with regard to the Palestinian refugees, it cannot be denied that in instances where it does exist the Universal Declaration and the Covenant allow departure from the rights they recognize. However, this argument should not be used to justify a denial of the return of all the members of a dislocated group. This would imply that each individual's right to return is trumped by a group right. This contravenes the objects and purposes of human rights instruments generally and renders superfluous most of the rights they were meant to protect.¹⁶⁸

There is no language of derogation contained in the CERD. Nonetheless, proponents of the Israeli position argue that the right to return as codified in those human rights documents is irrelevant to the question of the Palestinian right to return to Israel because the right is one of nationals to return to their country, and the Palestinian refugees are not Israeli nationals. However, this argument is not valid. Israel has not made any reservations to Article 12(4) of the Covenant. Consequently, Article 12(4) is fully binding upon Israel, as a matter of treaty law. The Human Rights Committee has interpreted the phrase 'own country' of Article 12(4) broadly. According to the Committee and in light of the other arguments mentioned before in support of a broad interpretation, the scope of this phrase is not limited to nationality in a formal sense. Therefore, the fact that the Palestinians do not have the Israeli nationality does not prevent them from exercising their right to return. It can be stated generally that all Palestinians who involuntarily left their country of origin or were forced to leave had, as all refugees do at the time of their departure, a genuine connection with their country of origin.¹⁶⁹

Besides, in accordance with the authoritative interpretation of Article 12(4) by the Human Rights Committee, "there are few, if any, circumstances in which deprivation of the right to one's own country could be reasonable". Applying this to the case of Israel's treatment of the Palestinian refugees, it becomes clear that Israel has violated the provision of Article 12(4). Israel's refusal to readmit the Palestinian refugees for over five decades is clearly intended to a population group specifically selected upon criteria of race, ethnicity, religion or political belief, and is therefore *prima facie* discriminatory.¹⁷⁰ The discriminatory nature of this refusal, which has prevented the Palestinian refugees from returning to 'their own country', places this policy directly within the definition of 'arbitrary' as set forth in General Comment 27.

1.5. Concluding remarks

In light of the foregoing discussion, several conclusions can be drawn. There is no question that the Universal Declaration and the Covenant may have become a part of the corpus of existing customary law.¹⁷¹ Besides, Israel is a party to the Covenant, having made a reservation only to an article which has no specific impact on the provision dealing with return.¹⁷² Consequently, whether examined from the perspective of customary law or conventional legal obligation, Israel is bound to accept the right of Palestinians to return. In addition, UN resolutions, including General Assembly Resolution 194(III) and subsequent ones, further reaffirm the right of Palestinians to return.

The right to return in the Middle East has major political ramifications, although the return question has been left unanswered in the political negotiations. The Palestinian refugee question, however, is no more political and no less legal than the issue of Hutu refugees to Rwanda or that of Bosnian refugees to Bosnia; it

¹⁶⁶ Ratified by Israel on 3 October 1991.

¹⁶⁷ Ratified by Israel on 3 January 1979.

¹⁶⁸ Lawand, *supra* note 2, p. 543.

¹⁶⁹ Lawand, *supra* note 2, p. 558.

¹⁷⁰ Boling, *supra* note 5, p. 39.

¹⁷¹ L.B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, «American University Law Review» vol. 32, no. 1, 1982, pp. 16-17.

¹⁷² See Multilateral Treaties deposited with the Secretary-General, 103 at 108, UN Doc. ST/LEG/SER.E/5 (1987).

no less deserves and requires the application of the right to return. The political controversy of the Palestinian refugee problem is irrelevant to that point. The right to return can not be made subject to political negotiations for peace.

2. The right to return in Kosovo

2.1. Brief history

Although the precise international law and constitutional status of Kosovo remains unresolved, until the adoption of UN Security Council Resolution 1244,¹⁷³ Kosovo was a province of the Republic of Serbia, one of the two remaining republics of the Federal Republic of Yugoslavia (FRY).¹⁷⁴ Kosovo has a mixed population of which the vast majority are ethnic Albanians. The history of the territory of Kosovo is marked by an almost everlasting competition for sovereign control between Kosovar Albanians and Serbs.¹⁷⁵ Until 1989, the region enjoyed a high degree of autonomy within the former Yugoslavia, when Serbian leader Slobodan Milosevic altered the status of the region, removing its autonomy and bringing it under the direct control of Belgrade. The Kosovar Albanians strenuously opposed the change.

The conflict in Kosovo erupted between Serbian forces and the Kosovo Liberation Army (KLA) in March 1998, following attacks by Kosovar Albanians on Serbian troops. During 1998, the conflict between Serbian forces and Kosovar Albanian forces resulted in the deaths of over 1,500 Kosovar Albanians. During the summer of 1998, a quarter of a million Kosovar Albanians were forced from their homes as their houses, villages and crops were destroyed.

The international community became gravely concerned about the escalating conflict, its humanitarian consequences, and the risk of its spreading to other countries. President Milosevic's disregard of diplomatic efforts aimed at peacefully resolving the crisis and the destabilising role of militant Kosovar Albanian forces was also of concern.¹⁷⁶ The North Atlantic Treaty Organization (NATO) members warned the Serbs that the alliance would conduct air strikes if Serbian forces did not comply with UN demands to cease the hostilities and to improve the humanitarian situation.¹⁷⁷ Under the threat of NATO air strikes Milosevic agreed to a ceasefire on October 13, 1998.¹⁷⁸ In 1998, the ceasefire was disrupted when fighting between Serbian troops and KLA guerilla units broke out. The agreement collapsed completely after the discovery of a mass grave site containing more than forty murdered Kosovar Albanians on January 15, 1999 in Racak. Renewed international efforts were made to reach a peaceful solution to the conflict. Officials from both sides and a six nations Contact group, consisting of the United States, Russia, United Kingdom, France, Germany and Italy, met in Rambouillet, near Paris, in February 1999 to find a peaceful resolution of the conflict, but the talks broke up without a signature from the Serbian delegation.¹⁷⁹

¹⁷³ Security Council resolutions 1239 of 14 May 1999, 1244 of 10 June 1999 and 1199 of 23 September 1998.

¹⁷⁴ Security Council 1244 (1999) refers to Kosovo as 'Kosovo, Federal Republic of Yugoslavia' and reaffirms the commitment of all Member States to "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia". The resolution also calls for "substantial autonomy and meaningful self-administration for Kosovo", and places Kosovo under an interim United Nations administration, "under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo" (Preamble and paragraph 10). Although the Resolution does not specify the goal of this 'transitional' process, it does state that one of the responsibilities of the international civil administration in Kosovo includes "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" (Paragraph 11(e)).

¹⁷⁵ See generally J.A. Mertus, *Kosovo: How Myths and Truths Started a War*, Berkeley, University of California Press, 1999 and T. Judah, *Kosovo: War and revenge*, New Haven, Yale University Press, 2000.

¹⁷⁶ For an historical overview of the situation in Kosovo and the military operations see <http://www.nato.int/kosovo/history.htm#B>.

¹⁷⁷ See Security Council resolution 1199, *supra* note 173.

¹⁷⁸ K.W. Alexander, *Nato's Intervention in Kosovo: The legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, in «Houston Journal of International Law», vol. 22, Spring 2000, p. 432.

¹⁷⁹ *Idem*, p. 435.

Immediately afterwards, Serbian forces increased their operations against ethnic Albanians in Kosovo, moving extra troops into the region in order to resolve the competition of sovereignty by ethnically cleansing Kosovo of its Albanian population.¹⁸⁰ In an alleged attempt to prevent this, NATO launched an air campaign on 24 March 1999. The capitulation by president Milosevic on June 3, 1999 brought an end to the NATO air campaign on June 10, 1999. On the same day, the UN Security Council adopted Resolution 1244, which provided the framework for the post-conflict administration of Kosovo.

After the end of the NATO air campaign, the repression that had led to the displacement of so many Kosovar Albanians was reversed. Widespread revenge killings, attacks and intimidation resulted in the flight of Serbs and other minority groups to Serbia, Montenegro and to minority enclaves outside the main towns and cities of Kosovo.¹⁸¹

2.2. *The right to return applied in Kosovo*

2.2.1. UN documents

Much of the focus of legal commentators has been on the violations of international law that defined the Kosovo crisis. Little attention has been given to its impact on the right to return.¹⁸² Kosovo, however, may serve as an example of international practice where the right to return has been clearly articulated and universally accepted. From the outset of the Serbian offensive in Kosovo, the right of those being dislocated to return assumed a prominent role in the UN statements¹⁸³ and resolutions.

In a series of resolutions between September 1998 and June 1999, the Security Council reaffirmed the right of all refugees and displaced persons, dislocated as a result of the Serbian offensive in Kosovo, to return to their homes in safety. In resolution 1199 adopted on 23 September 1998, the Security Council reaffirmed the right of all refugees and displaced persons to return, and underlined the responsibility of the Federal Republic of Yugoslavia for creating the conditions which would allow them to do so. In order to implement the right to return, the Security Council demanded that the Federal Republic of Yugoslavia facilitated, in agreement with the UNHCR and the International Committee of the Red Cross, the safe return of refugees and displaced persons to their homes. In resolution 1239, in the midst of the Kosovo crisis, the Council reaffirmed the right of the refugees and displaced persons to return to their homes, noting in the preamble that their return should be guided by, among other things, the Universal Declaration and other pertinent international conventions.

The Security Council also decided that the political solution to the crisis would be based on the general principles adopted on 6 May by the Foreign Ministers of the Group of Seven industrialised countries and the Russian Federation - the Group of 8 - and the principles contained in the paper presented in Belgrade by the President of Finland and the Special Representative of the Russian Federation which was accepted by the Government of the Federal Republic on 3 June. Both documents were included as annexes to the Resolution. The general principles and the paper refer also to the safe and free return of all refugees and displaced persons.

Finally, the strategy of the Special Representative of the Secretary General for determining the future status of Kosovo, emphasises various human rights goals and benchmarks, such as returns and integration.¹⁸⁴

¹⁸⁰ For the International Criminal Tribunal for the Former Yugoslavia's indictment detailing Milosevic's ethnic cleansing campaign see ICTY Prosecutor, IT-99-37, Indictment against Milosevic *et al.* (May 22, 1999) The latest amendment of this indictment has been made on 5 September 2002, available on <http://www.un.org/icty/cases/indictindexe.htm>.

¹⁸¹ Judah, *supra* note 175, pp. 286-96.

¹⁸² E. Rosand, *supra* note 67, p. 240.

¹⁸³ For example, Mary Robinson, the (former) United Nations High Commissioner for Human Rights, stated at the opening of the final meeting of the 55th Commission of Human Rights that "the right of refugees and displaced persons (from Kosovo) to return must be vindicated if we are to be true to the principle of human rights protection". Statement by M. Robinson, United Nations High Commissioner for Human Rights, to the final meeting of the 55th Commission on Human Rights (HC/K304, April 30, 1999) (<http://www.unhchr.ch>).

¹⁸⁴ UNMIK press statement of May 2002, 'Standards before status,' lists, *inter alia*, the following human rights goals: functioning democratic institutions; rule of law (police/judiciary); freedom of movement; returns and integration; property rights. The 'Standards for Kosovo' were launched on 10 December 2003.

Moreover, the 2004 'Strategy for Sustainable Returns' states that the return of displaced people will be a key indicator in the process to determine Kosovo's future.¹⁸⁵

2.2.2 Implementation by the UNHCR

One of the main stated aims of the NATO intervention in Kosovo was to safeguard the return of Kosovar Albanian refugees. During the conflict, however, many were skeptical regarding the feasibility of NATO's aim. Speaking shortly after the bombing had commenced, the (former) United Nations High Commissioner for Refugees, Sadako Ogata, stated that it "was difficult to even think of the future when the refugees and internally displaced persons will - as they firmly wish - return to their homes."¹⁸⁶

By the beginning of April 1999, the United Nations High Commissioner for Refugees estimated that the campaign of ethnic cleansing had resulted in 304,000 refugees in Albania, 122,000 in the former Yugoslav Republic of Macedonia, and 59,000 in Montenegro, 24,300 in Bosnia and 7,612 in Turkey. According to Yugoslav Government sources, 50,000 were in Serbia.¹⁸⁷ By the end of May 1999, over 230,000 refugees had arrived in the Former Yugoslav Republic of Macedonia, over 430,000 in Albania and some 64,000 in Montenegro. Approximately 21,500 had reached Bosnia and over 61,000 had been evacuated to other countries. Within Kosovo itself, an estimated 580,000 people had been rendered homeless.

Much to the surprise of the international community, less than two months after the fighting stopped in early June, 1999, the vast majority of Kosovar Albanian refugees and displaced persons had in fact returned to their preconflict homes.¹⁸⁸ This is in sheer contrast to number of returnees of Serb and other ethnicities. Few displaced persons are able or willing to return to their homes from Serbia proper or Montenegro. According to UNHCR statistics as at October 2002, 1,977 internally and externally displaced non-Albanians returned to Kosovo in 2002.¹⁸⁹ Between 2000 and 2002, 5,281 non-Albanians returned to Kosovo and between 2000 and March 2002, 10,000 newly displaced non-Albanians had registered with the Serbian authorities. These figures indicate a substantial net outflow in this period.

2.2.3 Regulations promulgated by the Interim Administration

Security Council Resolution 1244 (1999) provided, *inter alia*, for the establishment of "a secure environment in which refugees and displaced persons can return home in safety" and for the establishment of an interim administration in Kosovo. An interim civil administration was established under the authority of the Special Representative of the Secretary General (SRSG).¹⁹⁰ It assumed both legislative and executive authority and has also overseen the re-establishment of the judiciary. Legislative authority is exercised through regulations promulgated by the SRSG.¹⁹¹ Regulation 1999/1 on the Authority of the Interim Administration in Kosovo recorded that all legislative and executive authority in Kosovo, including administration of the judiciary, was vested in the United Nations Interim Administration Mission in Kosovo (UNMIK) and exercised by the SRSG.¹⁹²

A number of regulations have addressed the right to return. While Regulation 1999/1 initially retained the legal system in force on March 24, 1999, Regulation 1999/24 on 'The Law Applicable in

¹⁸⁵ *Strategy for Sustainable Returns*, UNMIK, Office of Returns and Communities, 15 December 2003, p. 12.

¹⁸⁶ Statement by Sadako Ogata to the Humanitarian Issues Working Group of the Peace Implementation Council, Geneva, April 6, 1999, quoted in Rosand, *supra* note 67, p. 230.

¹⁸⁷ M. Robinson, United Nations High Commissioner for Human Rights, Press briefing, 9 April 1999, Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia (HC/K094).

¹⁸⁸ As of December 1999, nearly all Kosovar Albanians who wished to return had been able to do so. US Department of State, *Ethnic cleansing in Kosovo: An Accounting, Overview*, December 1999, p. 2 (Dec. 1999) http://www.state.gov/www/global/human_rights/kosovoii/pdf/kosovii.pdf. According to UNHCR figures, as of 24 August, more than 761,000 Kosovars had returned to Kosovo while 6,800 Kosovars remained in Albania, 19,000 in the former Yugoslav Republic of Macedonia, 8,000 in Montenegro and 11,400 in Bosnia-Herzegovina.

¹⁸⁹ Being: Serbs (853); Roma (317); Ashkali Egyptian (635); Bosnian (117); Gorani (55); UNHCR *activities in Kosovo*, HIWG/02/02, 1 June 2002, fn. 1 on page 3.

¹⁹⁰ *Supra* note 173, para. 6.

¹⁹¹ The regulations can be found at <http://www.unmikonline.org/regulations/index.htm>.

¹⁹² Reg. 1999/1 Sec.1

Kosovo' determined that the applicable law would be that in force in Kosovo on March 22, 1989.¹⁹³ This was the legal system in force in Kosovo immediately prior to the intervention by the Serbian Republic in 1989 that resulted in the revocation of Kosovo's autonomy. The only exception to this turning back of the clocks was that where a situation arose, which was not covered by the 1989 legal system, a later law which regulated the situation would apply, provided that it was not discriminatory.¹⁹⁴ That regulation also requires all persons undertaking public duties in Kosovo to observe a number of internationally recognized human rights standards, including the Universal Declaration, the ECHR and the ICCPR and, as a consequence, the right to return.

2.3. *International criminal law*

It is generally accepted that, in addition to violating widely recognised provisions of international human rights and humanitarian law, the forcible expulsion of a people constitutes a crime under international law.¹⁹⁵ Deportation and forcible transfer are crimes against humanity punishable, *inter alia*, under Article 5 (d) and (i) respectively of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Milosevic and other high ranking Serbian officials have been accused by the Prosecutor of the ICTY of, amongst other things, forcible mass expulsion of a substantial portion of the Kosovo Albanian population carried out by the Serbian military and paramilitary forces in an effort to ensure continued Serbian control over Kosovo.¹⁹⁶ They are allegedly responsible for a deliberate and widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo. To facilitate the expulsions forces of the FRY and Serbia created an atmosphere of fear and oppression through the use of force, threats of force and acts of violence. Moreover, the military forces engaged in a series of operations of destruction of property owned by Kosovo Albanian civilians. As a result, villages and towns were made uninhabitable. In order to deter expelled Kosovo Albanians from returning to their homes, the Serbian military looted and pillaged the property belonging to displaced persons. In addition, personal identity documents were confiscated and destroyed. These actions were undertaken in order to erase any record of the deported Kosovo Albanians' presence in Kosovo and to deny them the right to return to their homes.

The criminal procedure against the Serbian officials is a clear indication that the forcible transfer of populations is considered as illegal. However, this way of dealing with ethnic cleansing is not the only means to act in response to the crimes committed. The appropriate remedy under international law for such an illegal practice and to reverse the forcible displacement is the return of all those dislocated to their homes.¹⁹⁷

2.4. *Concluding remarks*

The international community was willing to use force against the Serbs to reverse the ethnic cleansing, to enforce the right to return articulated by the Security Council and to prosecute those responsible for the displacement of the Kosovar Albanians. That willingness should be seen as an indication of the importance the international community increasingly places on upholding this right. Despite the fact that the Security Council has unambiguously indicated that all of those dislocated following displacements have the right to return, some would argue that the Serbs acquiesced to the return of the Kosovar Albanians only as a result of the NATO bombing campaign, rather than in a recognition of the existence of their right to do so. Kosovo, however, may serve as an example of international practice where the right to return has been clearly articulated and universally accepted.

¹⁹³ Reg. 1999/ 1 Sec. 1.1.

¹⁹⁴ *Idem*, sec. 2.

¹⁹⁵ See, e.g., Opinion, *supra* note 29; A.M. de Zayas, *The Right to Return to One's Homeland and Ethnic Cleansing*, in «Criminal Law Forum» vol. 6, 1995 p. 289.

¹⁹⁶ See the ICTY indictment, *supra* note 180.

¹⁹⁷ Takkenberg, *supra* note 106, p. 234.

PART THREE:
Comparison: the passage of time

One of the most striking differences between the situation in Kosovo and the situation in the Middle East is the actual exercise of the right to return by Kosovar Albanians and the denial of the right to the Palestinians. The clear will of the international community to enforce implementation of the right to return and the absence of such a will in the case of the Palestinians can not be justified on legal grounds and is deeply regrettable. The Palestinian refugee question is no more political and no less legal than the case of Kosovo; it no less deserves and requires the application of the right to return.

However, one of the arguments against a human rights based approach to issues of displacement is the passage of time between the creation of the refugee problem and its resolution. For the Palestinian refugees of 1967, the time differential is 37 years. For those of 1948, it is more than half a century. In Kosovo, to the contrary, most refugees were able to return home within a couple of months after the end of the conflict. One commentator argues that, in cases where a long period of time has passed, a human rights approach to resolve the problem might not offer the most appropriate solution and that such problems should rather be resolved by political means.¹⁹⁸

This leads to the practical consideration about the time period over which a right to return may exist. The right attaches to those individuals who depart, as well as to their descendants born abroad. However, the question arises as to whether, if the displacement continues for a period of decades, the right to return remains, or whether it 'expires' at some point in time. The answer given by the law here is that the right continues until such time as a displaced individual voluntarily abandons the attachment to the home area.¹⁹⁹ Thus, if a displaced person decides to reside permanently in a new State and naturalises there, the right to return to the State encompassing the home area is lost. This might occur, for example, if a refugee child marries a national of a host State, decides to lead his or her life there, and gains the nationality of that State.

However, there is no denying that, with the passage of time, sometimes spanning several generations and bringing with it both a transformation of the country of origin²⁰⁰ and of the refugee, what may have been a momentary rupture of the 'genuine connection,' of the 'social fact of attachment,' may become more or less permanent. The passage of time will inevitably erode the genuine link.

Where a significant period of time has passed since the departure of the refugee or displaced person from his or her country of origin, the reasons for the non-exercise of return during the said period must be taken into account.²⁰¹ If the reasons are due to factors beyond the control and against the will of the refugee, such factors must be weighed in favor of the refugee. This is especially so where the State to which the refugee wants to return has consistently and unjustifiably blocked the return. Such a State cannot plead the absence of a genuine link due to the passage of time because in doing so, it would be pleading its own wrongdoing. Allowing the time factor to weigh against the person seeking to return in such a case would result in the legitimisation of the State's arbitrary or discriminatory refusal to allow entry of the individual to his or her 'own country' in violation of article 12(4) of the ICCPR.²⁰²

It may occur, however, that a displaced person acquires the nationality of a new State in circumstances that do not reflect a voluntary abandonment of the attachment to the home area. An example is the Palestinians displaced in 1948 from areas that became part of Israel and who took refuge in the West Bank of the Jordan River. These Palestinians were extended nationality by Jordan, as part of Jordan's annexation of the West Bank in 1950. Jordan's extension of nationality to these Palestinians did not, however, affect Jordan's claim against Israel for the repatriation of these Palestinians. Jordan, as the host State for these displaced persons, continued to insist on Israel's obligation to repatriate. Jordan did not cease participating in the United Nations' demand on Israel to repatriate the refugees in accordance with General Assembly

¹⁹⁸ Benvenisti, *supra* note 70, p. 6.

¹⁹⁹ J. Quigley, *The right of Displaced Palestinians* in Karmi and Cotran (eds.), *supra* note 141, p. 162.

²⁰⁰ Most of the villages and the property left behind by the fleeing refugees in 1948 were destroyed, taken over by new settlers, or otherwise transformed such that the present day situation is a far cry from what it was when the refugee resided there, especially in those parts that have become Israel. See Peretz, *supra* note 102, p. 74 and Morris, *supra* note 110, p. 155. As early as 1948, the UN mediator for Palestine reported that 'the vast majority of the refugees may no longer have homes to return to,' Bernadotte Report, *supra* note 114, p. 14.

²⁰¹ Lawand, *supra* note 2, p. 556.

²⁰² *Idem*, p. 557.

Resolution 194(III). Jordan's grant of nationality was, moreover, of a conditional character. In approving the annexation of the West Bank, Jordan's parliament indicated:

*Arab rights in Palestine shall be protected. Those rights shall be defended with all possible legal means and this unity (of the West bank with the other territory of Jordan) shall in no way be connected with the final settlement of Palestine's just cause within the limits of national hopes, Arab Cooperation and international justice.*²⁰³

Jordan thus viewed its annexation as being subject to the West bank ultimately becoming part of a Palestine state. A commentator writing in 1970 said of the situation "that the Palestinians are only provisionally placed under Jordanian sovereignty".²⁰⁴

It is true that there may be cases of some difficulty, in which there might be legitimate controversy as to whether a particular displaced Palestinian has abandoned the connection to the home area by virtue of gaining nationality elsewhere. The existence of what may be certain hard cases does not, however, negate the basic right to return.

Concluding remarks

The legal analysis in the first part of this article points out to a number of conclusions and proposals. First, there is growing support to extend the right to return, as contained in the ICCPR, to cases of mass displacement. Such broad interpretation has been confirmed by the Human Rights Committee, UNHCR practice and many scholars. Besides, the right to return should apply to cases where non-nationals are involved. If these persons still have close and enduring connections (to be determined by the Nottebohm criteria) with the country they were displaced from, there is no reason to exclude non-nationals from exercising their human right to return.

Although the actual return of refugees and displaced persons may, in the end, be determined by political willingness and feasibility, this should not prevent the international community from grounding their return in international law. Such a right is an individual one, which should not be denied on the basis of group affiliation. Similarly, the individual should not be deprived of this right under international law because of the passage of time or an underlying political situation in the country to which return is sought. The expansive interpretation of the right to return is becoming a recognised norm of international law and needs unequivocal implementation. Therefore, the issue of the right of large groups of refugees to return home following a conflict should not become an obstacle to resolving the underlying dispute.

²⁰³ "Decision of the Council of Representatives and the Council of Notables in Joint Session on April 24, 1950, Concerning the Union of Eastern and Western Jordan" in H.M. Davis, *Constitutions, Electoral Law, Treaties of the States in the Near and Middle East*, Durham, North Carolina, Duke University Press, 1953, p. 265.

²⁰⁴G. Feuer, *Les Accords Passés par les Gouvernements Jordanien et Libanais avec les Organisations Palestiniennes (1968-1970)*, in «Annuaire Français de Droit International», vol. 16, 1970, p. 189.