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An Investigation into the Right of Return* of the Palestinian Refugees from the Perspective of International Human Rights Law

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ABSTRACT

The return of Palestinian refugees to their ancestral lands remains a pressing human, political and legal issue in the third millennium. The present study aims at exploring the legal status of Palestinian refugees as well as investigating their right of return to their lands in an international law framework. In so doing, the role of nationality and the principle of genuine link between claimants of the right of return and the country of origin are examined. It is concluded that considering the historical context of the Palestinian territories, part of which is now called Israel and the other part is under the control of the Palestinian state, Palestinian refugees can pursue and demand their right of return. Obviously, neither the passage of time nor the refusal of the Israeli side undermines the existence and validity of their claim for the right of return. Library data and field studies are used in delineating concepts, analyzing theories and confirming research hypothesis in the study.

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* "right of return" and "right to return" are used in this paper interchangeably to mean the same.

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Introduction

Palestine-related issues have been controversial for decades. Current status of Palestinian refugees is one of the compounded unresolved issues in the international arena and a pivotal point of dispute between Israel and its neighboring Arab countries[1]. The chronicle is a nebulous long story to recount, though, the present study zeroes in exclusively on whether the Palestinians scattered around the world deserve a legitimate claim to a right of return to the lands that were called Palestine before the rise of the Israeli regime. The issue has been investigated from a variety of perspectives. Most notably, some scholars have argued that the right to return of Palestinian refugees is predominantly a political issue which falls outside the scope of freedom of entry and exit in international law[2]. However, and to the contrary, this is not as *much* a political issue as it is for the Hutu refugees in Rwanda[3] nor for the Bosnian refugees in Bosnia[4]. Apparently, it is also not as *less* a legal issue as they are. In the same vein, excluding the political perspective, the present study examines the issue in light of the international law paradigms. Notably, the decisive role such factor plays in the objective reality of the issue cannot be neglected[5]. Palestinian refugees have suffered more forced displacement and homelessness than any other comparable group[6], therefore, the application of international law standards to the return of Palestinian refugees brings us to a case study that can be effective in the development and transformation of these rights to be applied in similar cases. In examining the legitimacy

1 . Don Peretz, Palestinians, Refugees, and the Middle East Peace Process (Washington: US Institute of Peace Press 1993), 3.
2 . Paul Weis, Nationality and Statelessness in International Law (Alphen aan den Rijn: Sijthoff & Noordhoff 1979), 318.
3 . From April 1994, between 500,000 and one million Rwandan Tutsi were systematically exterminated by militiamen under Rwandan Armed Forces (FAR in French) control. The genocide was the culmination of long-standing strategies practiced by politico-military extremists who roused ethnic resentments against the Tutsi. The extremists also killed many Rwandan Hutu who opposed the massacres. See: Medecins Sans Frontieres MSF Speaks Out, Rwandan Refugee Camps in Zaire and Tanzania, 1994-1995, p. 8. April 2004- April 2014, visited on 1 December 2022 at msf.org/sites/default/files/2019-04/MSF%20Speaking.
4 . In April 1992, a second, more bloody conflict broke out in Bosnia-Herzegovina when it, too, declared independence after Slovenia and Croatia— pitting Bosnia's three main constituent communities, ethnic Serbs, Croats and Muslims, against each other. The war resulted in massive displacement. In less than three months, the number of Bosnian refugees and internally displaced persons reached 2.6 million. See: Kirsten Young, UNHCR and ICRC in the former Yugoslavia: Bosnia – Herzegovina, p. 782. RICR September 2001, vol. 83, No. 843, p. 782, visited on 1 DESEMBER 2022, at icrc.org/en/doc/assets/files/other/781-806-Yougoslavia.pdf.
5 . Don Peretz, Palestinians, Refugees, and the Middle East Peace Process (Washington: US Institute of Peace Press 1993), 69 – 85.
6 . UNHCR Report, 1993, P: 47.

of their claim to the right of return, we first present a succinct overview of the events underlying the origins of the Palestinian refugee case. The right of return, as deployed in the current study is enshrined in the international human rights system. International Refugee Law (IRL) and International Humanitarian Law (IHL) will also be resorted to insofar as the Principles of Repatriation, as a facilitative base to the right of return, has been developed and thrived with deference to these two law systems. The right to return will then be discussed in customary international law and human rights instruments governing the Middle East. An attempt is made to discuss the main subject matter of the right of return as set out in Article 12 (4) of the International Covenant on Civil and Political Rights (hereinafter the Covenant or ICCPR), particularly the meaning of the phrase "to one's own country". The concept of "nationality" is of particular importance because the term "country" by definition refers to the relationship between the claimant and the state from which he/she claims the right to return.

1. Scope of the Subject

1.1. Historical Review of the Palestinian Refugees Case

Historically, Palestine was home to Muslim, Christian, and Jewish inhabitants who were ruled by the Ottoman Empire for centuries[1]. As the Empire waned in the wake of the overwhelming defeat of the Ottoman Turks at the end of World War I, Palestine was occupied by the British, and the League of Nations declared British trusteeship over the land. Meanwhile, an incremental wave of Jewish migration on the Arab nation began which triggered unprecedented hostility and bellicosity between the Jewish and Arab populations[2]. Eventually, the British trusteeship was called a halt under Resolution 181 (adopted by the UN General Assembly on November 29, 1947). The Resolution also stipulated the partition of the Arab and Jewish states, while Jerusalem was governed by an international system and all three regions formed a united economy[3].

Enactment of the Resolution aggravated the conflict between the Arab and Jewish communities. As the British withdrew their troops from Palestine, the conflict culminated to its highest point when the State of Israel declared its independent existence on May 14, 1948. The Palestinian Arabs engaged in full-scale wars with the neighboring Arab countries *and* the Jewish forces on the same day of the Declaration[4]. After the secession of the United Nations in Palestine and as the Arab-Israeli tension escalated, a large wave of forced migration emerged from December 1947 to September 1949[5]. "It is estimated that approximately 750,000 Palestinians fled their homes in the Palestinian territories that were to be under Israeli rule under the resolution"[6]. The second large-scale migration took place in 1967, following the Six-Day War, during

1 . The Ottoman Empire ruled Palestine from early sixteen century (1516) to the end of First world war (1918), see: International Journal of Humanities Social Sciences and Education (IJHSSE) Volume 6, Issue 1, January 2019, PP 43-51 ISSN 2349-0373 (Print) & ISSN 2349-0381 (Online) http://dx.doi.org/10.20431/2349-0381.0601005 www.arcjournals.org

2 . Jacob Tovy, Israel and the Palestinian Refugee Issue: The Formulation of a Policy, 1948-1956; (Routledge 2014), 15.

3 . UNGA Res. 181(11), (1947), P: 173.

4 . Francesca Albanese, 'Lex Takkenberg; Palestinian Refugees in International Law', (Oxford University Press 2020), 51.

5 . Benny Morris, The Birth of the Palestinian Refugee Problem 1947-48 (Cambridge: Cambridge University Press 1987), 285.

6 . Ibid, 297 – 298.

which approximately 500,000 Palestinians fled the West Bank and Gaza, more than 200,000 of whom were second-time refugees[1]. Of course, the tragedy of Palestinian displacement is much worse than figures can represent. Particularly, after many years of displacement their population has increased significantly.

All Palestinians deserve compensation for the sufferings and losses they have endured for many decades away from their homes and homeland. Most evidently, they hold a legitimate right to return.

The right of return of the Palestinian refugees cannot be simply rendered invalid in light of claims for reparation on account of past injustices. As Meyer duly puts it "[n]either the questions arising from the non-identity problem nor those arising from the supersession thesis significantly undermine the Palestinian refugees' claims to reparations and their right of return."

1.2. Concept and Scope of "Refugee"

The term "refugee" in this study, is used in its broadest sense to denote to a person who was forced to leave his/her home country due to untenable circumstances which could be the result of the direct and deliberate actions (such as expulsion, deportation or refusal to readmit) or equally indirect and unintentional actions (such as armed conflict or internal unrest) of the authorities of a given country[2]. According to the 1951 Convention Relating to the Status of Refugees- which also defines a refugee in reference to previous international instruments, including the Charter of the International Organization for Refugees- a displaced person or refugee is a person who, for a well-founded fear, due to the occurrence of war or any other justified reason- is outside the country of which he is a citizen or has normally resided. Similarly, the term is used interchangeably with involuntary deportation. Thus, this definition is inclusive but not limited to the three million Palestinian refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (ANRWA)[3]. Nor should it be confused with those refugees who fall under the limited jurisdiction of the United Nations High Commissioner for Refugees (UNHCR) i.e. people who are able to show that they have fled their country of origin for fear of persecution, or because of race, religion, nationality, or membership in a particular social group, or because of political beliefs[4].

The case of the Palestinian refugees is a multifaceted phenomenon which has been investigated from multiple perspectives. Some scholars, including Radley[5], have analyzed the case on grounds of the reasons and voluntary motives of refugees in the international law framework. The Right of return of the Palestinian refugees, however, may not be conditional on or subjected to involuntary migration from the country. Whether the Palestinians have left their country voluntarily or against their will is not conclusive in this case. Indeed, they preserve the right in accordance with the international law on freedom of movement.

1 . Quincy Wright, 'Legal Aspects of the Middle-East Situation', (1969), 33 Law & Contemporary Problems, 3 – 8.
2 . GJ.L. Coles, The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry in A.E. Nash, ed., Human Rights and the Protection of Refugees Under International Law (Halifax: Institute for Research on Public Policy 1988), 198.
3 . UN docs. A/49/13, (1994), P: 10.
4 . Convention relating to the Status of Refugees, 28 Jul., (1951), P: 189.
5 . Kurt Rene Radley, 'The Palestinian Refugees: The Right to Return in International Law', (1978), 72 AJIL, 586 – 595.

In the same vein, Abu Sitta[1] contends that "[a]ll Palestinians who fled the war- especially the 1948 and 1967 wars- as well as ordinary residents of the West Bank and Gaza who temporarily lived abroad during the 1967 war, mostly for work or study or those who were forcibly deported or expelled from Israeli-occupied lands in the 1967 war" hold a right to return.

2. The Right to Return

2.1. Fundamentals and Resources of the Right to Return

2.1.1. The Right to Return from the Perspective of Customary International Law

The right to return is indefeasible and inalienable to all mankind as enshrined in international human rights instruments and declarations, as well as in the constitutions, laws and judicial procedures of many countries. Also, several resolutions passed by various UN bodies have consistently referred to it with deference to the general rights of displaced persons. It is thereby well-enshrined in customary international law, although the perfect definition of its content may seem difficult[2]. At the very least, the general trend of governments shows that the right of a resident to return to his or her home country should not be denied[3]. One of the first statements on the right to return can be traced back to the UN mediation report to the General Assembly in 1948 where it says:

> *"[t]he 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"*[4].

On the basis of this proposal, the General Assembly adopted Resolution 194 (3) (Peace Agreement, 1994: 199) on December 11, 1948, which stipulated in paragraph 11:

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

The paragraph is repeated annually in subsequent General Assembly resolutions and is endorsed by the United States and virtually all UN member states except Israel[5]. Furthermore, the return of Palestinian refugees is explicitly called for in many other UN resolutions[6]. One study explicitly states that international law may grant a special right to the return of the Palestinian people to their homeland which is recognized on the basis of the principle of "good relations be-

1 . Salman, Abu Sitta, 'The Implementation of the Right of Return', (2009), Palestine-Israel Journal, 6.
2 . Hurst Hannum, The Right to Leave and Return in International Law and Practice, (Dordrecht Martinus Nijhoff 1987), 139 – 141.
3 . Rosalyn Higgins, 'The right in international law of an individual to enter, stay in and leave a country', (1973), 49 Internaa tional Affairs, 348.
4 . UN docs. A/648, 18 Sept., (1948).
5 . Rashid Khalidi, 'Observations on the Right to Return', (1992), 21 Journal of Palestine Studies, 33.
6 . RJ Zedalis, 'Right to Return: A Closer Look', (1992), 6 Georgetown Immigration Law Journal, 508 – 513.

tween nations"[1]. The recognition *and* repetition of the right of return since early 1984 confirm its existence, more specifically in customary international law, ever since.

2.1.2. The Right to Return in International Treaties

The right to return is also enshrined in Article 12 (4) of the Covenant where it is stated: "[n]o one shall be arbitrarily deprived of the right to enter his own country". Israel, Jordan, Egypt and Syria are all parties to the Covenant and none has voiced reservations about this article. The countries are also members of the Committee on the Elimination of Racial Discrimination and have not voiced reservations about Article 5 (d) (ii) of the Committee's statute either, under which:

> *"States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
>
> *[…] (d) Other civil rights, in particular:*
>
> *[…] (ii) The right to leave any country, including one's own, and to return to one's country…"*

2.2. Interpretation of Article 12 (4) of the Covenant

The words in the Article 12 (4) are rather open-textured which leave ambiguity in their readings. Several questions might be raised in this regard: What is the meaning of the phrase "his own country"? What does the word "entry" mean to the right in comparison with the word "return"? What effect does the word "arbitrary" have on the right in question? As mentioned above, the first question to determine is whether the Palestinians scattered around the world have the right to return, and if so, where to return?

The meaning of "entry" is not a point of contention. It has a broader meaning than the word "return" and is used in reference to people who were born abroad. Therefore, it allows such people to "enter" their country for the first time[2]. The travaux preparatoires for preparing the text of the Covenant indicate the same interpretation[3]. This is important in the case of Palestinians who have the potential to return, as many of the second and third generation refugees are living abroad.

The term "arbitrary" in Article 12 (4) implies a restriction on the right of return. It implies that the government can interfere in a person's right to enter his country as long as he does not do so arbitrarily, that is, outside the legal formalities. As a limitation, this "must be interpreted strictly and narrowly"[4]. The right to leave the country guaranteed by Article 12 (2) is subject to the stricter restrictions of paragraph 3[5] appearing right under it, which include legal restrictions

1 . UN docs. ST/SG/SER.F/2, P: 7.

2 . Chipoya Mubanga, 'Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom', (1988), UN ESC, Commission on Human Rights, 40th Sess., UN doc. E/CN.4/Sub.2/1988/35 (20Jun), 21.

3 . Marc Bossuyt, 'Grade to the Traoaux Preparatories' of the International Covenant on Civil and Political Rights' (Dordrecht: Martinus Nijhoff 1987), 261.

4 . Louis Henkin, ed., The International Bill of Rights, The Covenant on Civil and Political Rights (New York: Columbia University Press 1981), 26.

5 . "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 recognized in the present Covenant."

based on national security, public order or health, and ethics. However, the right to return is "not subject to such restrictions"[1]. The main reason could be related to "a state's special responsibility to its nationals"[2] which are in fact the main beneficiaries of the right of return. As it was previously mentioned, the term "right of return" in Article 12 (4) indicates that persons may be deprived or restricted of the right to enter their own country in accordance with the law provided that such deprivation or restriction is not "fundamentally incompatible with the right to personal liberty and the right to freedom of movement"[3].

2.2.1. The Meaning of the Phrase "His Own Country"

References to the term "country" in connection with the right to leave and to return may be found in the Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (d) (ii))[4], the Universal Declaration of Human Rights (Article 13 (2))[5] and the African Charter on Human and People's Rights (Article 12 (2))[6]. This phrase differs from the phrase used in the provisions of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and in the Fourth Protocol to the European Convention on Human Rights and Fundamental Freedoms i.e. "the State of which he is a national". Differences in the wordings of Article 12 (4) and Article 3 (2)[7] of Protocol IV to the European Convention led the Committee of Experts of the Council of Europe to conclude that the semantic scope of the former was broader such that it may "include stateless persons and nationals of another State who have very close ties with the country in question"[8].

A more meticulous look into Article 12 of the Covenant reinforces this conclusion. The provisions of the documents that refer to the right to leave and return use the word "country". Assuming that the Covenant has been coherently drafted and that the Contracting Parties have considered the common use of language, the term "country" has a various meaning from "state" and certainly a broader meaning than that of which a person is a national[9]. In this regard, the important point is that international human rights instruments restrict the right of nationals to leave and return, and they do so by referring to the "state" and not the "country". The wording of paragraph 4, which means in the context of the text and in comparison with the above-cited documents, indicates that "the right to enter one's own country" in the official sense of the term is not limited to nationals.

1 . Marc Bossuyt, 'Grade to the Traoaux Preparatories' of the International Covenant on Civil and Political Rights' (Dordree cht: Martinus Nijhoff 1987), 262.
2 . Chipoya Mubanga, 'Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom', (1988), UN ESC, Commission on Human Rights, 40th Sess., UN doc. E/CN.4/Sub.2/1988/35 (20Jun), 51.
3 . Ingles, J.D., 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country including His Own, and to Return to His Country', (1963), New York, (UN doc. E/CN.4/Sub. 2/229/Rev., 39.
4 . "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to proo hibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: d (ii): The right to leave any country, including one's own, and to return to one's country."
5 . Everyone has the right to leave any country, including his own, and to return to his country.
6 . 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.
7 . No one shall be deprived of the right to enter the territory of the state of which he is a national.
8 . Pieter Van Dijk. and Godefridus van Hoof, Theory and Practice of the European Coraxntion on Human Rights, 2nd ed. (Deventen Kluwer Law and Taxation Publishers 1990), 147.
9 . Jalal Al Husseini and Riccardo Bocco, 'the status of the Palestinian refugees in the near east: the right of return and unrwa in perspective', (2010), at Universite de Geneve on March 29, http://rsq.oxfordjournals.org, 263.

If the phrase "one's country" has a meaning more than the country to which one belongs, a question arises: what is its exact meaning in this phrase? This is where the interpretation of the phrase becomes so ambiguous which makes it necessary to refer to the travaux preparatoires of the Covenant and to examine the legal basis of the nationality requirement.

2.2.2. Legal Grounds of the Nationality Requirement

According to Lawand[1], the draft provisions of the Covenant on the right of entry were discussed in three separate sessions of the UN Commission on Human Rights before being presented to the Fourteenth Session of the Third Committee of the General Assembly in 1959, where the final version was adopted. Initial drafts before the fifth (1949) and sixth (1950) sessions of the Commission referred to the right to enter "the country of which he is a national". The summary of the discussions indicated that there were problems with the provisions of the right of entry into country for countries where the right of return is governed not by the rules of nationality and citizenship but by the idea of permanent residence[2]. Thus, at the Eighth Session (1952), "pursuant to Article 13, paragraph 2, of the Universal Declaration of Human Rights, it was agreed to replace the 'country of which he is a national' with the phrase 'his own country'[3].

Some state representatives raised questions in the Third Committee about the meaning of the phrase "one's own country" and finally, it was decided that "one's own country" should mean the country of which the person is a national. Some scholars have used this view to reinforce their position that Article 12 (4) is limited to nationals only[4]. Nevertheless, two points should be emphasized. First, the discussions of the Third Committee show that the considerations that led the Human Rights Commission to use the term "his own country" were unknown to the representatives of the states. In other words, the members of the Third Committee as Zieck[5] contends were oblivious of the fact that the text of the commission itself was the result of an agreement, so they have given their interpretation of the phrase "one's own country" as stated above. The second point is that a more attentive look at the issues of the Third Committee clearly shows that this view was not a point of unanimous agreement[6]. Ultimately, it can be seen that the phrase "one's own country" can be subject to various interpretations but since no action has been taken to remove this ambiguity, there may have been an implicit agreement to leave the exact meaning of the words to future international developments.

Therefore, the preliminary discussions of the Covenant are not bound to limit the phrase "one's own country" to one's national country nor do they express the precise meaning of the

1 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 549.
2 . Luigi Achilli, Palestinian Refugees and Identity: Nationalism, Politics and the Everyday, (Bloomsbury Publishing 2015), 33.
3 . Marc Bossuyt, 'Grade to the Traoaux Preparatories' of the International Covenant on Civil and Political Rights' (Dordrecht: Martinus Nijhoff 1987), 262.
4 . Paul Weis, "The Middle East", in K. Vasak and 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 (Ann Arbour, The American Jewish Committee 1976), 318.
5 . Marjoleine Zieck, 'Voluntary Repatriation: An Analysis of the Refugee's Right to Return to His Own Country', (1992), 44 Austrian J. PuiL lnd. Law, 146.
6 . UN docs. A/C.3/SR.957, para: 25.

phrase. In any case, the application of the rules set forth in Articles 31[1] and 32[2] of the Vienna Convention to the Law of Treaties does not allow such a restriction on interpretation using the preconditions for the formation of a convention. Because this interpretation is not consistent with the meaning that is usually construed by the phrase "one's own country".

2.2.3. Interpretation of the Phrase "One's Own Country"

As stated earlier the phrase “one’s own country” is elusive and no clear proposition has been made so far on the meaning of the phrase by the Human Rights Council. The phrase is left to much academic debate for interpretation. Some jurists maintain that the phrase is applicable to the country of origin as well as the country where an individual is a permanent resident of[3]. Yet some argue that it is applicable as well to the country an individual is connected through history, race, religion, family, etc.[4]. According to Randelzhofer[5], the phrase entails a connection between a claimant and the country he/she claims the right to. He continues the concept of nationality- which implies the existence of a legal bond between the individual and the state and creates mutual rights and obligations- is then the starting point for the interpretation of the phrase. The concept of nationality, though, raises problems with the right to return, in the international law settings.

In light of the fact that the determination of nationality is basically and inherently a matter of internal jurisdiction of states, curbing the interpretation of Article 12 (4) of the Covenant to the State to which the individual has effective nationality repositions the State as the determining factor in the individual's enjoyment of the benefits of nationality. Such a state-centric definition could jeopardize the purpose and subject matter of protecting the right to return under the Covenant. The same considerations apply to restricting a person's country to the country in which he or she has acquired the right of permanent residence. Because this right can be based

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1 . General rule of interpretation

1.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 the light of its object and purpose.

2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3.There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.4.A special meaning shall be given to a term if it is established that the parties so intended.

2 . Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

3 . Rosalyn Higgins, ‘The right in international law of an individual to enter, stay in and leave a country’, (1973), 49 International Affairs, 349 – 350.

4 . Hurst Hannum, The Right to Leave and Return in International Law and Practice, (Dordrecht Martinus Nijhoff 1987), 56.

5 . Albrecht Randelzhofer, "Nationality", in Encyclopedia of Public International Law, vol. 8 (Amsterdam: Elsevier Science Publishers B.V. 1985), 416.

on the official grant of the right of permanent residence and not the actual residence of the person in that country.

A state's authority in determining the nationality of its citizens is questioned in that the states are essentially and inherently representatives of their people and the sovereign lies in the people. There are accordingly inherent limitations with state jurisdiction that provide the necessary protection against possible abuse. At the very least, the sovereignty of one state in granting its nationality is limited by the that of other states. According to the customary international law, states have a duty to accept the nationality of their citizens, a preliminary concomitant of their right to deport foreign nationals[1]. This argument is built on the premise that a state must accept its citizens because refusing to accept them is forcing other countries to "keep aliens on their territory who have the right to expel them under international law" and this is a clear violation of "their territorial sovereignty"[2]. These principles are set out in the context of the issue of refugee reception, which states that the duty of admission forms the basis of the legal relationship between the country of destination of the refugee and the country of origin. In this respect, the State of origin may ignore the link of nationality and ignore those who have left that country, which in turn violates the commitment to the refugee destination country and even the international community[3].

Restrictions on state sovereignty over nationality only impose requirements on and among states, and cannot be invoked by the victims themselves. The concept of nationality in international law is primarily aimed at assigning jurisdiction and responsibility to states over individuals. Therefore, since the rules of international law on nationality do not guarantee the right of the individual under Article 12 (4), the criteria for determining nationality to determine the existence of "one's country" are so appropriate for individuals that there is the standard criterion between effective interpersonal relations and the country to which he/she claims the right to return. Thus, the term "own country" refers to the country of which a person has official nationality or, in the case of non-official nationality, the country with which he or she has a genuine or effective link.

2.2.4. "Genuine Link" and the Concept of "One's Own Country"

The above-cited restrictions in international law on the capacity of the state in relation to nationality are in line with the concept of nationality as an actual link between the individual and the state that cannot be frivolously neglected. Such objective criterion of the link between the State and the individual is conclusive in an interpretation of the phrase "one's own country" within the scope of Article 12 (4) of the Covenant. Therefore, the non-determination of official nationality does not play a role in determining whether or not a person can exercise the right to return. A yet more warranted evidence could be detected in the application of the rules of voluntary return to international law of refugees[4]. For example, UNHCR Executive Committee Resolution 18 on the voluntary return of refugees requires the government of the country of

1 . Guy Goodwin-Gill, 'Voluntary Repatriation — Legal and Policy Issues', (1989), in G. Loescher & L. Monahan, eds., Refugees and International Relations, Oxford: Clarendon Press, 259.
2 . Paul Weis, Nationality and Statelessness in International Law (Alphen aan den Rijn: Sijthoff & Noordhoff 1979), 45 – 47.
3 . Guy Goodwin-Gill, 'Voluntary Repatriation — Legal and Policy Issues', (1989), in G. Loescher & L. Monahan, eds., Refugees and International Relations, Oxford: Clarendon Press, 261.
4 . UNGA res. 36/148, 16 Dec. 1981.

origin to provide refugees with the necessary travel documents, visas, entry permits and transportation facilities and if the refugees have lost their nationality, make arrangements to return it in accordance with national law (Executive Committee, 1980: No. 18(XXXI)). This means that refugees who have lost their nationality because of the revocation of nationality or otherwise maintain their connection to the country of origin and as a result, they enjoy the right to return. The government of the country of origin is also obliged to not only allow them to return to the country, but also restore their official nationality.

In general, to achieve the goal of the right to return, one must differentiate between the concept of nationality in domestic and international law in the sense presented in the case of Nottebohm. Therefore, the term "country" in Article 12 (4), in addition to the country of which there is official nationality, also includes the country with which a person has actual "nationality" and he/she has a "genuine link". This conclusion is consistent with the subject matter and purpose of the right to return. The intent in the heart of repatriation of refugees and internally displaced persons (IDPs) is allegedly to re-establish an effective relationship between the citizen and the government[1] or to normalize the relationship between the country of origin and the refugee[2]. Associated with the concepts of attachment and belonging, the purpose of return, in effect, derives from the concept of nationality in international law. Return, therefore, refers to the re-establishment of a pre-existing relationship with the country of origin, which is typically witnessed by official nationality. Accordingly, the right of repatriation guaranteed by Article 12 (4) of the Covenant prohibits the government from depriving a former citizen of his or her nationality, where the primary aim and effect of this deprivation of nationality is to prevent the former citizen from returning to his or her country[3]. Thus, the prohibition of deprivation of nationality when there is a lack of plausible reasons averts the arbitrary severing of the government's relationship with its citizen. In addition, deprivation of nationality on the basis of race or ethnic origin constitutes a violation of the general principles of non-discrimination in customary international law and Articles 2[4] and 26[5] of the Covenant as well as Article 5 (d) (ii) of the Convention on the Elimination of All Forms of Racial Discrimination.

1 . Guy Goodwin-Gill, 'Voluntary Repatriation — Legal and Policy Issues', (1989), in G. Loescher & L. Monahan, eds., Refugees and International Relations, Oxford: Clarendon Press, 255.

2 . Peter Van Krieken, 'Repatriation of Refugees under International Law', (1982), 13 Netherlands Yearbook of International Law, 99.

3 . Hurst Hannum, The Right to Leave and Return in International Law and Practice, (Dordrecht Martinus Nijhoff 1987), 62.

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

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

5 . All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2.5. The Effect of Time on the Concept of "Genuine Link"

The Nottebohm case is said to reflect the fundamental importance of the relationship between the people and the land, and to reflect the implications for both state sovereignty and accountability (Goodwin-Gill, 1989: 259). In this regard, the right to return implies that there must be a natural identity between people and places (Plender, 1988: 147). The political reality in what was called the Occupied Palestinian Territories is that the organism has changed in such a way that populations, ethnic groups, patterns of affiliation, and national aspirations are no longer what they once were when the refugees settled[1]. In fact, most of the villages and property left by the refugees who fled in 1948 have either been demolished, occupied and looted by new immigrants, or considerably changed so that they have lost their Arab identity[2]. This does not mean that the right to return is a form of the concept of "full return". Rather, recognizing the mental and credit element in the definition of "one's own country" means the home and society to which one belongs. In this regard, there is a gap between what the claimant considers as an individual or in relation to others as his own country and the fact that the country of origin has changed over time. The main criticism of the UNHCR policy on the voluntary return of refugees is that it ignores this "element of time"[3].

It is undeniable that sometimes the passage of time involves several generations and brings about changes in the country of origin and the country of residence of the refugees which may in turn cause a time lag in the "genuine link" and "real social relationship" of the person, and this will become more or less a permanent issue. Time will certainly undermine the "genuine link". On the other hand, the passage of time does not legitimize the situation resulting from the occupation. For the Palestinian refugees of 1967 and 1948, the time difference is more than half a century. Whenever a significant period of time has elapsed since the departure of right holders from their country of origin, the reasons for non-return during this period should be considered. If these reasons are due to factors that are beyond the control and will of the right holders, they should be analyzed in favor of these right holders. This is especially the case where a country to which they are claiming the right to return has consistently and unjustifiably prevented their return by arbitrary or discriminatory measures, assuming that other criteria are met. Such a country cannot claim that there is no genuine link between the individual and the country due to the passage of time; because, by doing so, it is in fact showing its incompetence. The arbitrary and discriminatory refusal of a government in allowing a person to enter "his/her country" and denying the claimant of his right to return merely on account of the time factor is clearly contrary to Article 12 (4) of the Covenant[4].

2.2.6. Criteria for Determining "One's Own Country"

It is logical that the determination of a person's country be based on a unified and cogent assessment standard that applies equally to all claimants and is not vulnerable to specific features of domestic law. Whereas formal citizenship or legal recognition by domestic law is incontest-

1 . Benny Morris, The Birth of the Palestinian Refugee Problem 1947-48 (Cambridge: Cambridge University Press 1987), 155.
2 . Don Peretz, Palestinians, Refugees, and the Middle East Peace Process (Washington: US Institute of Peace Press 1993), 74.
3 . Daniel Warner, 'Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics', (1994), 7 JRS, 171.
4 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 556.

able evidence of "one's own country", the individual's claim to the right of return to the country is still legitimate upon meeting of a number of objective and subjective criteria that reflect his close ties with the country in question and based on the criteria accepted by the International Court of Justice (ICJ) in the Nottebohm case. A determining criterion in this regard is permanent residence[1]. The existence of assets, family relationships, the center of important affairs, dependence on the country in question and a clear intention to have a relationship with that country in the future are other legitimizing criteria. The claimant thereupon has to demonstrate that these criteria existed in the past and were arbitrarily terminated, and as a result he has the right to revive them by claiming the right to return.

These criteria are applicable on a case-by-case basis to any Palestinian claiming the right to return. Furthermore, it is undeniable in general that all Palestinians who were forced to leave their country involuntarily, as like IDPs, do possess a genuine relationship with their country. Nevertheless, as noted earlier, the problem of Palestinian refugees has been compounded by the fact that there has been no state of origin since 1948[2].

3. The Nationality of the Palestinian and Its Changes

After World War I, there was a practice whereby treaties relating to the transfer of land included explicit provisions on the nationality of the inhabitants[3]. For example, Article 30 of the 1923 Treaty of Lausanne[4] ((24 July 1923), 28 LNTS 15) required that Ottoman citizens who were ordinary residents of the Palestinian Territories be ipso facto nationals of Palestine. In addition, Article 7 of the 1922 Palestinian Mandate[5] provided for the enactment of the nationality law[6]. Accordingly, in 1925, Britain, the trusteeship country granted Palestinian citizenship which regulated the issue of Palestinian citizenship and declared that ordinary Palestinians are considered Palestinian citizens, regardless of their religion[7].

The United Nations was wary of the citizenship issue of the Palestinians after the end of the British mandate pursuant to UN General Assembly Resolution 181. It was recommended in the Resolution that Palestine be partitioned into an Arab state and a Jewish state. Moreover, it was provided that it behooves the interim government of each state to submit a declaration to the UN in which they stipulate that all residents of the respective government, whether Arab or Jewish, are citizens of the country and enjoy full civil and political rights.

1 . Johannes Man Chan, 'The Right to a Nationality as a Human Right', (1991), 12 Human Rights Law Journal, 12.
2 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 557.
3 . Clive Parry, ed., A British Digest of International Law, Part VI, The Individual in International Law, Chapter 15, Nationality and Protection (London: Stevens & Sons 1965), 30.
4 . "Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipsofacto, in the conditions laid down by the local law, nationals of the State to which such territory is transferred."
5 . "The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."
6 . George Tomeh, 'Legal Status of Arab Refugees', (1968), 33 Law and Contemporary problems, 113.
7 . Paul Ghali, La Nationality ditachees de l'Empire Ottoman a la suite de la Gurre, (Paris, Domat-Montchrestien 1934), 367.

3.1. Nationality of Palestinians Who Were Originally from the Current Territories of Israel

The Jewish state emerged with a declaration of independence on May 14, 1948. However, the declaration did not conform to the requirements of the Resolution 181. By 1952 no law on Israeli nationality had been passed. This legal vacuum has led to conflicting views in Israeli courts on the impact of the end of the trusteeship regime on the nationality of Palestinian citizens residing in Israel. According to one view, the Palestinian Citizenship Order of 1925 lost its effect after the end of the trusteeship regime and, as a consequence, Palestinian citizenship no longer existed, and in effect the Palestinian inhabitants of the lands which were now under Israeli territory were considered stateless.

Lawand[1] contends that "in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitant of the ceding State becomes automatically a national of the receiving State". In other words, all the inhabitants in the territory which today constitutes the State of Israel on its establishment date are in also ipso facto a national of Israel. That is, the residency is transformed into the nationality of the new state. He continues that the idea of a state without nationals is unprecedented, ahistorical and "absurd".

This view of the effect of land transfer on nationality is consistent with what has been cited by some jurists as a correct interpretation of the rules of international law. At least until 1952, citizens who were normal residents of areas of Palestine that later became Israel during the 1948 war were automatically considered Israeli citizens. The fact that many of them have fled or been deported and displaced insofar as their migration was involuntary and interim at least from their own point of view does not change this conclusion. In 1952, Israel passed a new nationality law, repealing the 1925 citizenship order. The new law read that all Jewish residents, including those born in the country, automatically acquired Israeli nationality through the right to return[2].

Plus, all non-Jewish residents who were previously Palestinian citizens were now eligible to be considered as Israeli nationals should they meet three specific conditions: Israeli citizenship at the time of its establishment, Israeli residency at the time the Citizenship Law enters into force, and registration of residency under the March 1, 1952 instruction[3]. When Israel passed its citizenship law in 1952, it exercised its sovereignty to impose further restrictions on the conditions for the citizenship of that country[4]. The legitimacy of this law can be questioned in light of the fact that the law enacted by the occupying government, which deprives the displaced indigenous people of their rights, is not an original law in the first place, but a situation resulting from the occupation.

3.2. Nationality of Palestinians Belonging to the Palestinian Territories 1948

The territories that were to become the Palestinian state, namely the West Bank and Gaza, have a definite history, and so there are various considerations regarding the succession of states. These lands have been practically occupied by war since 1948. A decisive epoch occurred pursuant to the Jordan government in the region. From 1948 to 1967, the West Bank

1 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 561.
2 . David Kretzmer, The Legal Status of the Arabs in Israel, (Boulder West view Press 1990), 36.
3 Ibid, 38.
4 . James Crawford, The Citation of States in International Law, (Oxford: Clarendon Press 1979), 41.

was occupied by Jordan. Since 1950, Jordan has sought to annex the West Bank to the entire non-Jewish Palestinian population of the West Bank and grant them Jordanian citizenship[1]. From 1967 to 1988, Jordan continued to issue passports to Palestinians living in the West Bank. As of July 31, 1988, the Jordanian government no longer recognized them as Jordanian citizens; but as Palestinian citizens. Meanwhile, Jordan issued travel documents for them[2].

After the end of the British rule, the Palestinians in the Gaza Strip were stateless. From 1948 to 1967, the Gaza Strip was under the administration of the Egyptian government, which issued ID cards to each Palestinian living there, indicating their residence in the Gaza Strip and their Palestinian nationality[3]. Since 1967, Israel has issued ID cards to Palestinian residents of Gaza stating their status as "displaced Palestinians" and their nationality as "undefined"[4]. The Palestinian Authority in the West Bank and Gaza Strip was considered Britain's first legal successor to rule the territories, and all previous rulers were considered "rebel occupiers". In fact, the principle is that the use of force by military conquest, whether it leads to occupation or annexation, does not change nationality because it does not mean a valid change of government[5]. This means that all ordinary residents of the West Bank and Gaza Strip will automatically become citizens of the new Palestinian government. All former residents who are able to demonstrate their true connection to their country of origin by the above criteria can claim the right to return to Palestine. Thus, granting Jordanian citizenship to residents of the West Bank between 1950 and 1988 was illegal and had no effect on the right of possible return to Palestine.

1 . Anis Kassim, 'Legal Systems and Developments in Palestine', (1984), 1 Palatine Yearbook of International Law 19, 28.
2 . Blandine Destremau, 'Le statut juridique des Palestiniens vivant au Proche-Orient', (1993), 48 Revue d'etudes palestiniennes, 48.
3 . Ibid, 43.
4 . Ibid, 44.
5 . Ruth Donner, 77K Regulation of Nationality in International Law (Helsinki: The Finnish Society of Sciences and Letters 1983), 215.

Conclusion

Although its exact scope is not clear, the right to return exists in customary international law. Since 1948, numerous resolutions of the General Assembly have stated that the international community recognizes the right to return of Palestinian refugees as part of customary international law.

The Israeli regime and its neighboring countries are bound by Article 12 (4) of the Covenant, according to which “no one shall be arbitrarily deprived of the right to return to his country.” Establishing the legitimacy of the claim to the right of return under this Article is bound to the interpretation of the phrase "one's own country". In the absence of a clear-cut interpretation in the context of the relevant texts, it follows from the preliminary provisions and writings of the jurists that the phrase should be interpreted as a human rights treaty in accordance with the purpose and subject matter of the Covenant. In this regard, the preferred interpretation of Article 12 (4) is an interpretation that provides a standard set of uniform criteria applicable to all claimants of the right to return. Such criteria have been set by the ICJ in the Nottebohm case, albeit in different contexts.

The right to return, as part of the right to freedom of movement, is inextricably linked to the concept of nationality in international law. In this sense, nationals are the main beneficiaries of the right to return. However, since it has in principle the right to grant and deny nationality by restricting the right of return to nationals, the government is considered the final arbiter as to who would enjoy the right. Thus, although official nationality is at first glance evidence of the meaning of "one's own country", in its absence it has no bearing on whether one has the right to return. A person who is not a citizen of a particular country can continue to claim the right to return to hiscountry by showing that he has a "genuine link" with that country. The criterion for determining "own country" means that Article 12 (4) is based on the criteria set out in the Nottebohm case, which include normal residence, the existence of property, family relations, the center of important affairs, dependence on that country and a clear intention to have a relationship with that country in the future.

The passage of time changes the status and identity of the claimant and the country of origin, thus destroying the "genuine link". In assessing the right to return, the reasons for the impossibility of exercising this right in a significant period of time should be considered. In cases where a person's long-term deportation is due to factors beyond his control and against the will of the claimant, these factors should be analyzed in favor of the claimant of the right to return in the face of a weakened link with the country of origin. The claimant, on the other hand, cannot rely solely on factors beyond his control to confirm his right of return. He must show that he has a weak allegiance to the country of origin. It should be noted that the passage of time and the prolongation of the occupation do not affect the situation of the displaced and do not legitimize the situation resulting from the occupation and any legislation in this regard.

Regarding the Palestinians, factors such as the existence of a weak relationship with the occupied territories (the whole of Palestine), even if it is only based on previous normal residence and the continuous expression of their intention to return to it, as well as the absence of fundamental integration in another country's population can be sufficient to substantiate the claim of the right to return. In a way, it can be said that the transformation of the "state of Palestine" over time is the result of Israel's constant denial of the right to return.

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