

THE CONTROVERSY OF A PALESTINIAN “RIGHT OF RETURN” TO ISRAEL

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I. INTRODUCTION

The birth of modern day Israel was a result of the yearning and commitment of the Jewish people to return to the land that is sacred to their history and religion. However, the inception of the State of Israel led to the displacement of hundreds of thousands of Palestinians who were living on the land that became Israel and who now long to return. Consequently, the history of the new state has been marked by a conflict between the Israelis and the Palestinians, each believing that the land is rightfully theirs.

The issue of Palestinian displacement has been unresolved for over fifty years and may not be close to a final resolution. One of the main reasons for the lack of resolution is that the Israelis and the Palestinians have conflicting views on the matter. First, the two sides have conflicting historical assessments of Palestinian displacement and the refugee issue. Second, there is disagreement over the existence of a right of return of Palestinians to the land that is modern day Israel. The Palestinians believe that they have a right of return and that international law supports such a right. Meanwhile, the Israelis assert that Palestinians do not have a right of return under international law, or if there is a right, it does not apply to the case of the Palestinian refugees. Moreover, the various international law sources that purport to embody a Palestinian right of return are often ambiguous and open to different interpretations.

This Note analyzes, both historically and legally, the perspectives of Palestinians and Israelis concerning a Palestinian right of return to Israel. It takes the position that, although there may be a principle of return in various international documents, a Palestinian return *as a matter of right* is not clear and is subject to different interpretations. Furthermore, the Note concludes that future negotiations between Israel and the Palestinians should focus on the creation of a Palestinian State in the West Bank and the Gaza Strip. Already, the focus of the international community has shifted from a right of return to Israel itself to the principle of self-determination and a limited right of return to a portion of Palestine—the West Bank and Gaza Strip.

Section II of this Note presents a historical overview of the conflict, from its origins to the attempts at compromise. Section III analyzes the conflicting views of the Palestinians and Israelis with regard to their shared history. In

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particular, this section concentrates on the origins of the right of return. Section IV evaluates the various international instruments that purport to contain a principle or a right of return. This section concludes that such international documents do not clearly maintain a Palestinian right of return. Section V also sets forth the principle of self-determination and a limited right of return to the West Bank and Gaza Strip as the modern focus of the international community.

While this Note refers to the term “Palestinian refugees,” it does not adopt a strict definition of this term because no clear legal definition of “Palestinian refugee” exists.¹ For purposes of this Note, 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. However, there is another category of Palestinians known as “displaced persons.” This category refers to Palestinians who were displaced after the Six-Day War in 1967, during which Israel took control of the West Bank and Gaza Strip.² This war led to the further displacement of Palestinians, many of whom were Palestinian refugees from the 1947-1948 War.³ This Note includes references to Palestinian displaced persons to acknowledge that a right of return may apply equally to refugees and displaced persons.

II. HISTORICAL OVERVIEW

A. The Formation of the Israeli State and Palestinian Displacement

The formation of the modern Israeli State has its origins in antiquity. Some three thousand years ago, the Jewish people were living in Canaan, which encompassed the territory known as Israel today.⁴ In 722 BC, the Assyrian conquest precipitated the first of many expulsions of the Jews from their soil.⁵ Thereafter, the land underwent a continuous stream of conquests and expulsions: the Babylonians, Egyptians, Greeks, Syrians, Romans (who changed the name of Judea to Palaestina), Arabs, Crusaders, Tartars, Ottoman Turks, and finally, the British.⁶ However, more relevant to the modern time frame is the year 1897, when Theodor Herzl founded what would become the World Zionist Organization.⁷ The goal of the Organization was outlined in the Basle

1. See LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 68 (1998).

2. See *id.* at 17.

3. See *id.*

4. See MARTIN GILBERT, *EXILE AND RETURN: THE STRUGGLE FOR A JEWISH HOMELAND* 3 (1978).

5. See *id.*

6. See *id.* at 3-19, 109.

7. See TAKKENBERG, *supra* note 1, at 8; see also GILBERT, *supra* note 4, at 50.

Programme: "The task of Zionism is to secure for the Jewish people in Palestine a publicly recognized, legally secured homeland."⁸ The foundation behind this goal was the Jews' continual desire, after over two-thousand years of persecution and dispersal, to return to the Land of Israel.⁹

Numerous events during the late nineteenth century through the first World War fueled the goal of the Jewish people to return to the Land of Israel. Perhaps the most significant event was the rise and surge of European anti-Semitism, which made Jews uneasy in their European homelands. Books like Houston Stewart Chamberlain's *The Foundations of the Nineteenth Century*, which later influenced Adolf Hitler, asserted that the noble Nordic race should not mix with the "mongrel" Jews.¹⁰ As a result of this and similar anti-Semitic propaganda, many Jews throughout Europe began to rely on Zionism for the chance of a life of dignity and independence.¹¹

Also during that period, the Turks allowed small numbers of Jewish immigrants into Palestine.¹² The Jews who arrived to join those already living in Palestine were welcomed as if they were returning home.¹³ In November 1917, Great Britain declared in the Balfour Declaration that it advocated the establishment of a Jewish homeland in Palestine.¹⁴ Shortly thereafter, in the campaigns of 1917-1918, the Turks lost Palestine to Great Britain,¹⁵ and on July 24, 1922, the League of Nations Council approved the Palestine Mandate, entrusting Great Britain with control of the territory.¹⁶ The Mandate incorporated the pledge of a Jewish homeland in Palestine and instructed the Palestine Administration to facilitate Jewish immigration and to encourage Jewish settlement.¹⁷

Indigenous Arab Palestinians resented the British Government's commitment to the creation of a Jewish homeland in Palestine, and tensions

8. GILBERT, *supra* note 4, at 51.

9. *See id.* at 7, 11, 17, 22, 24, 28, 32-34, 41-43, 45-51, 54.

10. GILBERT, *supra* note 4, at 53.

11. *See id.* at 54, 70-71, 73.

12. *See* TAKKENBERG, *supra* note 1, at 8. Jews had been migrating to Palestine since the conquest of the territory by the relatively tolerant Ottoman Turks. *See* GILBERT, *supra* note 4, at 21.

13. GILBERT, *supra* note 4, at 55.

14. *See* HOWARD M. SACHAR, *THE COURSE OF MODERN JEWISH HISTORY* 448 (Vintage Books 1990) (1958) (memorializing the Balfour Declaration in which the British Government declared "sympathy with Jewish Zionist aspirations," viewed "with favour the establishment in Palestine of a national home for the Jewish people" and promised to use its "best endeavors to facilitate the achievement of this object" as long as the rights of the existing non-Jewish communities in Palestine were not impeded).

15. *See* TAKKENBERG, *supra* note 1, at 8.

16. AHARON COHEN, *ISRAEL AND THE ARAB WORLD* 173 (1970); *see also* Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 *DENV. J. INT'L L. & POL'Y* 27, 34-35 (1997).

17. *See* GILBERT, *supra* note 4, at 148.

between the Arabs and Jews led to violence in the land.¹⁸ After years of clashes, the British Government recognized “an irrepressible conflict” between the Palestinian and Jewish communities; as a result, in 1937, it recommended the partition of Palestine into Jewish and Arab states, the latter to be integrated into Transjordan.¹⁹ However, Great Britain abandoned this proposal because it aroused resentment of both the Zionists, who believed that the territory allocated to them was too small, and the Arab Palestinians, who contested Great Britain’s right to partition their territory in the first place.²⁰ By the outbreak of the second World War, Palestine was embedded in armed conflict among the Jews, Arabs, and British security forces.²¹

Despite the obstacles, Jews continued to immigrate into British Palestine. Before the start of the second World War, there was an organized program of “illegal” Jewish immigration into Palestine.²² The Jewish Agency, the recognized representative of the Palestinian Jews,²³ dispatched agents to Europe to organize an “underground railroad” to Palestine.²⁴ Even though Great Britain issued the “White Paper” in 1939, which attempted to limit Jewish immigration to Palestine, “illegal” Jewish immigrants fleeing from the Nazis entered Palestine in even larger numbers.²⁵

Although the Nazis’ program of murder slowed and then halted emigration to Palestine during the second World War, upon its end, Jewish refugees had a great need for asylum.²⁶ Consequently, Jews once again began to immigrate to the territory. The Jewish Agency encouraged immigration and sent agents with a mandate to smuggle as many displaced Jews as possible out of Europe.²⁷ In the American and British occupied zones of Germany alone, there were 100,000 liberated Jews.²⁸ Each month several thousand Jews “left the American and British zones of Germany, either walked or were transported to secret inlets on the Mediterranean, and, while harbor police deliberately looked the other way, were loaded onto the awaiting ships.”²⁹ In this way, a slow trickle of European Jews immigrated to Palestine.

18. *See* Dajani, *supra* note 16, at 37-38.

19. *Id.* at 38.

20. *Id.*

21. TAKKENBERG, *supra* note 1, at 9.

22. *See* SACHAR, *supra* note 14, at 566.

23. TOM SEGEV, *THE SEVENTH MILLION 40* (Haim Watzman, trans., Hill and Wang 1993) (1991).

24. *See* SACHAR, *supra* note 14, at 566.

25. *See id.*; *see also* TAKKENBERG, *supra* note 1, at 10.

26. *See* SACHAR, *supra* note 14, at 559, 566.

27. *See id.* at 566.

28. *See id.* at 559.

29. *Id.* at 567.

Apparently, many survivors of the Holocaust believed that only Palestine offered them the prospect to rebuild.³⁰ This belief was reinforced by a flood of Polish and other Eastern European Jews into the Western displaced persons camps, which held a quarter of a million Jewish refugees by 1946.³¹ In each camp, committees for education were formed for Zionist study and indoctrination.³² These Jews were determined to clear out of Europe and settle in Palestine.³³

In February 1947, Great Britain formally conceded that it "lacked the power to impose a settlement in Palestine and returned the Mandate to the United Nations, which assumed responsibility for the League of Nations trusteeships."³⁴ The United Nations General Assembly established a special committee of delegates from eleven member states—the United Nations Special Committee on Palestine (UNSCOP)—to evaluate issues regarding Palestine and recommend possible solutions.³⁵ After an investigation and extensive debate, UNSCOP recommended a partition plan that would divide Palestine into three territories—an Arab state, a Jewish state, and an internationally administered Jerusalem.³⁶

On November 29, 1947, the United Nations General Assembly adopted the partition plan in Resolution 181.³⁷ However, the partition plan never came into effect. Although the Zionists were grudgingly willing to accept it,³⁸ the Palestinian Arabs rejected it, "arguing that the United Nations had no right to allocate the majority of their territory to the Zionists."³⁹ The United Nations' endorsement of the partition plan led to violence and then war between the Jews and the Palestinians.⁴⁰ The Palestinians had the support of other Arab states. In 1945, the Arab states founded the Arab League, which took control of matters pertaining to Palestine.⁴¹ In declaring its support of the interests of Palestinians in the "Alexandria Protocol," the Arab League made known that Palestine was an important unit among the Arab nations and that infringement of the rights of Palestinians would threaten the peace and stability of the Arab world.⁴² Accordingly, during the 1947-1948 War, a "Rescue Army" of Arabs from

30. *See id.* at 559.

31. *See id.*

32. *See id.*

33. *See id.*

34. Dajani, *supra* note 16, at 38.

35. TAKKENBERG, *supra* note 1, at 11.

36. *See id.*

37. *See id.*; *see also* BENNY MORRIS, *RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881-1999* 184-186 (1999).

38. *See* ISRAEL OFFICE OF INFORMATION, *Government of Israel, THE ARAB REFUGEES* 6 (Nov. 1953); *see also* Dajani, *supra* note 16, at 39.

39. Dajani, *supra* note 16, at 39.

40. *See* TAKKENBERG, *supra* note 1, at 12.

41. COHEN, *supra* note 16, at 313.

42. *Id.* at 313-14.

different countries infiltrated into Palestine to fight the Jews and to prevent the implementation of the United Nations partition plan.⁴³

Nevertheless, on May 14, 1948, a provisional Zionist national council announced the establishment of the State of Israel on the portion of land that the partition plan had designated as the Jewish State.⁴⁴ Historian and scholar Howard Sachar observes:

The Declaration of Independence notified the world that the land of Israel had been the historic birthplace of the Jewish people, that the Zionist movement was enduring testimony to the role this land had played in Jewish history and religion, that the Balfour Declaration, the United Nations Partition Resolution, the sacrifice of Zionist pioneers, the unendurable torments suffered by Jews in recent years—all had laid the legal and moral foundations for the new state.⁴⁵

By the war's end and upon the declaration of a formal armistice in 1949, Israel was in control both of the land that was to be the Jewish State under the partition plan and the land that had been allocated to the Arab State; Israel's official boundaries encompassed most of the territory of former Mandate Palestine.⁴⁶ Territory that did not fall under Israeli control included the areas that would become known as the West Bank and the Gaza Strip, which were under the jurisdiction of Jordan and Egypt, respectively.⁴⁷ Estimates of the number of Palestinians who fled their homes as a result of the war range from one-half million to close to one million.⁴⁸ The exact number of Palestinians who became refugees is still the subject of disagreement between Israel and the Arab states.⁴⁹

After the 1947-1948 War, even though Palestinian refugees pressed to return to their homes and international sentiment mounted in favor of repatriation, the Israeli government decided to bar Palestinian return.⁵⁰ The rationale for the government's decision dealt with security concerns—Israel did not want hundreds of thousands of “openly hostile Arabs, who viewed Jewish sovereignty over any

43. *See id.* at 409.

44. Dajani, *supra* note 16, at 39.

45. SACHAR, *supra* note 14, at 581.

46. *See* Dajani, *supra* note 16, at 39; *see also* TAKKENBERG, *supra* note 1, at 12.

47. *See* TAKKENBERG, *supra* note 1, at 12.

48. *See id.* at 13 (stating that 750,000 Palestinians had fled); *see also* MORRIS, *supra* note 37, at 252 (stating that about 700,000 Palestinians had fled).

49. TAKKENBERG, *supra* note 1, at 18 (stating that numbers vary from 520,000 to 960,000, the Arabs arguing for the higher numbers, and the Israelis arguing for the lesser ones). *See also* MORRIS, *supra* note 37, at 252.

50. *See* TAKKENBERG, *supra* note 1, at 16.

part of the former Palestine mandate as anathema."⁵¹ The neighboring Arab states and the Palestinians living within them continually expressed their goal of obliterating Israel, and for years following the 1949 armistice, Arabs made incursions into Israeli territory, "burning, marauding, stealing, and killing."⁵² As a result, the Israeli government saw the return of the Palestinian refugees as suicidal, for it would have paralyzed Israel's economy and undermined the country's military security.⁵³

Thus, many of the Palestinian refugees remained in refugee camps, and from 1948 to 1957, the United Nations Relief and Works Agency (UNRWA), created specifically to deal with the Palestinian refugee problem,⁵⁴ spent nearly \$300,000,000 providing them with food, housing, and medical care.⁵⁵ While United Nations General Assembly Resolution 194 pressed Israel to allow the return of the Palestinian refugees,⁵⁶ United Nations missions visiting the refugee camps recommended that Palestinians resettle in neighboring Arab lands and seek compensation from Israel for the loss of their land.⁵⁷ The United States government supported this resettlement plan and offered to provide Israel a loan to help with the compensation.⁵⁸ While the Israeli government expressed a willingness to discuss compensation in the context of a general peace treaty, the Arab states rejected the idea and were determined to block all rehabilitation and resettlement schemes that might lead to a peace treaty.⁵⁹ Over the years, the possibility of return became more and more distant as the abandoned Arab villages were destroyed and Jewish immigrants settled in former Arab lands.⁶⁰

Today, over 3.6 million Palestinians are registered by UNRWA as refugees, a figure that includes Palestinians and descendants of those who were either expelled or fled from their homes in what is now Israel.⁶¹ Many of these refugees continue to live where they first relocated in the West Bank, the Gaza

51. *Id.* at 17 (quoting Government Press Office, State of Israel, The Refugee Issue: A Background Paper 4 (Oct. 1994)).

52. SACHAR, *supra* note 14, at 752; *see also* Louis Rene Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT'L L. 229, 250-51 (1999) (quoting Imad Mazen Izz al-Din, the Palestinian Authority's Political Instructor for National Guidance (Al-Hayat Al-Jadeeda, Apr. 30, 1997) and quoting a statement issued by the Palestinian Authority cabinet in Nablus on May 16, 1997 (Voice of Palestine, May 17, 1997)).

53. *See* Beres, *supra* note 52 at 250-51.

54. *See* TAKKENBERG, *supra* note 1, at 6.

55. SACHAR, *supra* note 14, at 752.

56. *See* G.A. Res. 194, U.N. GAOR, 3d Sess., para. 11, U.N. Doc. A/810 (1948) [hereinafter G.A. Res. 194].

57. *See* SACHAR, *supra* note 14, at 752.

58. *See id.*

59. *See id.*

60. *See* TAKKENBERG, *supra* note 1, at 17.

61. *See Rights and Refugees*, THE ECONOMIST, Jan. 6, 2001, LEXIS, News Library, CRNWS File. *See also* Jeffrey Ghannam, *Where Will They Go?*, 86 A.B.A. J. 40 (2000).

Strip, Jordan, Syria and Lebanon; many reside in squalid camps, dependent on help from UNWRA.⁶² Some of the worst-off refugees are the 200,000 or so still living in Lebanon, which cruelly discriminates against them.⁶³

B. The Peace Process—Past and Present

After the 1947-1948 War, the preservation of peace in the Middle East was of great interest to the international community. Aspiring to reduce the possibility of further warfare, Great Britain, France, and the United States issued a Tripartite Declaration in 1950, which guaranteed the borders of Israel and her Arab neighbors and warned that any violation of frontiers would be met with reprisal.⁶⁴ The United Nations also attempted to settle the Arab-Israeli conflict after the 1947-1948 War.⁶⁵ However, the United Nations did not have much success in its plans to restore the Palestinian refugees to their former homes, whether they were located within the newly-created State of Israel or in what remained of the lands that had been allocated to an Arab state by the partition plan.⁶⁶

Peace was not forthcoming. According to historian and scholar Benny Morris, although there were opportunities for peacemaking 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 neighbors to embark on, or even contemplate, peace unless it included substantial Israeli concessions.”⁶⁷ Instead, the Arab world waged political warfare against Israel, refusing to recognize its right to exist, closing frontiers to all traffic to or from Israel, voting *en bloc* against Israel in all international institutions, and refusing any association with Israelis in cultural and sports activities.⁶⁸ Meanwhile, to the dismay of the Arabs, the Israeli military killed or expelled large numbers of Arab infiltrators, who threatened the stability of the new state.⁶⁹ In 1967, the Egyptians deployed troops into the Sinai Peninsula and war erupted once more.⁷⁰

The first momentous hope for peace came in the 1970s, when a peace process underway between Egypt and Israel culminated in the signing of the

62. *Rights and Refugees*, *supra* note 61.

63. *See id.*

64. *See* SACHAR, *supra* note 14, at 754.

65. *See* TAKKENBERG, *supra* note 1, at 21-22.

66. *See* Dajani, *supra* note 16, at 40.

67. MORRIS, *supra* note 37, at 268.

68. *Id.* at 269.

69. *See id.* at 271, 273-75.

70. *See id.* at 302.

Camp David Agreements in 1978.⁷¹ "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 neighborly relations."⁷² 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."⁷³ However, the Palestine Liberation Organization (PLO),⁷⁴ which was formed in 1964 with the stated goal of righting the wrong done to Palestinians and dismantling the Zionist entity,⁷⁵ rejected the Camp David Agreements.⁷⁶ For more than a decade afterwards, there was very little progress in resolving the conflict.⁷⁷

The next significant attempt at peace came in 1991. After the Gulf War, United States Secretary of State James Baker embarked on a new diplomatic effort to fuel the peace process in the Middle East.⁷⁸ Baker's efforts resulted in the October 30, 1991 Madrid Conference—a set of peace talks co-sponsored by the United States and the Russian Federation.⁷⁹ For the next two years, representatives from Israel and the Arab states were involved in bilateral negotiations until there was a breakthrough in Israeli-Palestinian relations in Oslo.⁸⁰ At Oslo, the PLO recognized Israel's right to exist and Israel recognized the PLO as the representative of the Palestinian people.⁸¹ Thereafter, the two sides signed the Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements ("Declaration of Principles"), which entered into force on October 13, 1993.⁸²

The general principles agreed upon in the Declaration of Principles included an interim agreement on Palestinian self-rule and permanent status

71. See TAKKENBERG, *supra* note 1, at 33.

72. A Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Egypt-Isr., 17 I.L.M. 1466, 1467 [hereinafter Camp David Agreements]. See also TAKKENBERG, *supra* note 1, at 33 (discussing the Camp David Agreements).

73. Camp David Agreements, *supra* note 72, art. A(4), at 1468.

74. See TAKKENBERG, *supra* note 1, at 33.

75. See MORRIS, *supra* note 37, at 303.

76. See TAKKENBERG, *supra* note 1, at 33.

77. See *id.*

78. See *id.*

79. See *id.* at 34.

80. See *id.*

81. See *id.* at 35; see also MORRIS, *supra* note 37, at 621-22 (discussing mutual recognition of Israel and the PLO).

82. See TAKKENBERG, *supra* note 1, at 35 n.131.

negotiations.⁸³ The first step in the implementation of the Declaration of Principles was the withdrawal of Israeli forces from the Gaza Strip and the Jericho area of the West Bank to allow for Palestinian self-rule.⁸⁴ The second step was the signing of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (“Interim Agreement”) in September 1995, which included provisions on elections of a Palestinian Council and the redeployment of Israeli forces in the West Bank.⁸⁵ The final phase of the peace process, which has yet to be completed, is the creation of a Permanent Status Agreement finalized by the end of the Interim Period.⁸⁶ This agreement would cover remaining issues, including those regarding Palestinian refugees.⁸⁷

Unfortunately, the status of the Palestinian refugees was set aside during the 1990s, even though Israel and the Palestinians formally launched permanent status negotiations on May 5, 1996.⁸⁸ Shortly after the signing of the Interim Agreement, on November 4, 1995, Israeli Prime Minister Yitzhak Rabin was assassinated by an Israeli opposed to greater self-rule in the West Bank.⁸⁹ The Israeli elections of May 29, 1996 resulted in the victory of the Likud government, which was headed by Prime Minister Benjamin Netanyahu.⁹⁰ Even though the government officially asserted that it would continue the peace process, in practice, the Netanyahu government’s right-wing policies dampened hopes for progress on the refugee and displaced persons issues.⁹¹

Advocating a policy of increased Israeli settlement in the West Bank, the Gaza Strip and Jerusalem, the Netanyahu government rejected Palestinian claims to sovereignty over any part of these areas.⁹² Moreover, the government conditioned its continued participation in the peace process upon the Palestinian leaders’ fulfillment of their future commitments under the Permanent Status Agreement.⁹³ According to the Likud government’s published guidelines, it would “oppose ‘the right of return’ of Arab populations to any part of the Land of

83. See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., 32 I.L.M. 1525 (1993) [hereinafter Declaration of Principles]. See also TAKKENBERG, *supra* note 1, at 35 (discussing the Declaration of Principles).

84. TAKKENBERG, *supra* note 1, at 35; see also Declaration of Principles, *supra* note 83, art. V, at 1528-29.

85. See TAKKENBERG, *supra* note 1, at 35; see also Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 551 (1997).

86. See Declaration of Principles, *supra* note 83, arts. I, V, at 1527, 1528-29.

87. See *id.*, art. V, at 1529.

88. See Justus R. Weiner, *The Palestinian Refugees’ “Right to Return” and the Peace Process*, 20 B.C. INT’L & COMP. L. REV. 1, 10 (1997).

89. See TAKKENBERG, *supra* note 1, at 36.

90. See *id.*

91. See *id.*; see also Weiner, *supra* note 88, at 13.

92. Weiner, *supra* note 88, at 14.

93. *Id.*

Israel west of the Jordan River.”⁹⁴ A Palestinian Authority minister and Yasser Arafat, the Palestinian leader, claimed that, with these actions, the Israeli government declared war against the Palestinians.⁹⁵

Presently, relations between the Palestinians and Israelis continue to be unstable. There has been no signing of a Permanent Status Agreement or any final resolution of the Palestinian refugee issue. Ehud Barak, elected prime minister in May 1999 with the expectation of renewing the suspended peace process,⁹⁶ was ultimately unsuccessful in reaching a final settlement with the Palestinians.⁹⁷ Peace talks at Camp David in July 2000, during which Barak was willing to make concessions over the West Bank, the Gaza Strip and part of East Jerusalem, ended in failure over the question of East Jerusalem.⁹⁸ Arafat insisted on full control of East Jerusalem and ultimately rejected an American-backed compromise on a final settlement.⁹⁹ Subsequently, fall 2000 saw violent clashes between the Israelis and Palestinians, Palestinian revolts in the West Bank and the Gaza Strip, and rioting by Jewish mobs inside Israel.¹⁰⁰

As a result, before he left office and in a final attempt to have the two sides reach an agreement, former United States President Bill Clinton proposed that the Palestinian refugees accept a limited right of return—the return to a Palestinian homeland in the West Bank and Gaza Strip.¹⁰¹ In his proposal, Clinton urged Palestinians to accept the principle that “there is no specific right of return to Israel itself.”¹⁰² Additionally, Clinton’s proposal expected Israel would take in some refugees, but only “consistent with its sovereign decision” and in a way that would not “threaten the Jewish character of the state.”¹⁰³ Clinton’s proposal, which neither side ever formally adopted, ended with his presidency in January 2001. In February 2001, Likud Party’s Ariel Sharon was elected Prime Minister of Israel, facilitated by the continued violence of the Palestinians during the

94. *Id.* (quoting *The New Government’s Guidelines*, JERUSALEM POST, June 18, 1996, at 2).

95. *Id.* at 13-14.

96. See MORRIS, *supra* note 37, at 650-51.

97. See Jim Hoagland, *Back to Familiar Territory*, WASH. POST, Feb. 7, 2001, at LEXIS, News Library, CRNWS File.

98. See John Lancaster, *Mideast Peace Summit Ends With No Deal; Impasse Over Jerusalem Proves Pivotal*, WASH. POST, July 26, 2000, LEXIS, News Library, CRNWS File.

99. See *id.*

100. See *Arabs and Israelis Watch, Threaten and Kill*, ECONOMIST, Oct. 14, 2000, LEXIS, News Library, CRNWS File; see also Ghannam, *supra* note 61, at 40.

101. *The Palestinian Right of Return*, ECONOMIST, Jan. 6, 2001, LEXIS, News Library, CRNWS File.

102. Dan Ephron, *Arafat’s Choice*, NEWSWEEK, Jan. 8, 2001, LEXIS, News Library, CRNWS File.

103. *The Palestinian Right of Return*, *supra* note 101.

preceding months.¹⁰⁴ Only time will tell whether the conservative Israeli leader will help attain peace between the two sides.

III. CONFLICTING VIEWS OF HISTORY AND RETURN

A. Overview

One of the main reasons the Palestinian refugee issue is unresolved is that the Israelis and the Palestinians have different and conflicting views on the matter. First, the Palestinians and the Israelis have conflicting historical assessments of the refugee and displaced person issues. The actual number of Palestinians who became refugees and displaced persons after the 1947-1948 and 1967 wars, respectively, is the subject of dispute between the Israelis and Arabs.¹⁰⁵ Additionally, there is disagreement over the precise definition of “refugee” and “displaced person,” and to what extent each individual Palestinian has retained or acquired the refugee or displaced person status.¹⁰⁶ Moreover, true reasons for the massive displacement of Palestinians are issues of great controversy.¹⁰⁷ “Each side allocates the blame to acts by the other side, or alternatively attributes the origins of the problem to circumstances beyond its control.”¹⁰⁸

Second, along with different historical findings, there is disagreement over the existence of a right of return of Palestinian refugees and displaced persons. In general, the Palestinians believe they have a legal right to return to the land that is now Israel, that such a right is supported by international law, and that Israel is in violation of such law. Meanwhile, the Israelis assert Palestinians do not have a right of return under international law, or alternatively, if there is a right, it does not apply to the case of the Palestinian refugees.

B. The Palestinian Historical Perspective on the Refugee Question

1. The Palestinian View of the 1947-1948 Arab Exodus

Traditionally, Palestinians took the position that their evacuation during 1947-1948 resulted from a deliberate Jewish campaign to drive the Arabs out of

104. Deborah Sontag, *The Sharon Victory: The Overview; Sharon Easily Ousts Barak to Become Israel's Premier; Calls for Reconciliation*, N.Y. TIMES, Feb. 7, 2001, LEXIS, News Library, CRNWS File.

105. See Weiner, *supra* note 88, at 7-8.

106. See *id.*

107. See *id.* at 15; see also TAKKENBERG, *supra* note 1, at 14.

108. Weiner, *supra* note 88, at 15.

Palestine.¹⁰⁹ According to the Palestinian view, this plan had its origins in Zionism, which envisioned a "thorough judaization of Palestine."¹¹⁰ Fayez Sayegh, a Syrian historian, asserts that the grand strategy of Zionism involved the dispossession of the Arab inhabitants of Palestine—"a dual process of expelling the Arabs and promptly filling their place [with] incoming Jews."¹¹¹ Edward Said, a Palestinian scholar, states: "[T]he ideological and organizational preparations for the Zionist effort to win Palestine, as well as the military strategy adopted, envisioned taking over territory, and filling it with new inhabitants."¹¹² Thus, according to the Palestinians, the Zionists sought to take the land from the Palestinians and fill it with Jews.

After the start of the 1947-1948 War, the Arab Higher Committee for Palestine accused the Jewish militia of attacking Arab civilians in order to frighten them into departing the land.¹¹³ According to the Committee, "the aim of Jewish terrorism against the Arabs was to drive the Arabs out of their homes and their country."¹¹⁴ Furthermore, Sayegh writes:

The Zionist tactics for enforcing the displacement of the Palestinian Arabs consisted mainly of raids on isolated and defenseless villages, and terrorization of their inhabitants—with a view to promoting the inhabitants of other villages and cities to flee their homes at the approach of Zionist forces so as to escape a similar fate.¹¹⁵

In response to Israeli claims that Palestinians left pursuant to their leaders' orders, Said asserts, "[N]o one has produced any evidence of such orders sufficient to produce so vast and final an exodus."¹¹⁶

Indicative of a Jewish conspiracy to drive the Arabs out of Palestine, according to the Palestinian view, was the Deir Yassin massacre.¹¹⁷ The Irgun Zvai Leumi and LEHI, two Jewish militias, attacked the Deir Yassin village in April 1948, killing 250 civilians upon capture.¹¹⁸ As LEHI paraded Palestinian survivors in trucks through Jerusalem, the incident created fear in, and accelerated

109. *See id.*

110. FAYEZ A. SAYEGH, *THE PALESTINE REFUGEES* 6 (1952).

111. *Id.*

112. EDWARD W. SAID, *THE QUESTION OF PALESTINE* 101 (1979).

113. *See* John Quigley, *Displaced Palestinians and a Right of Return*, 39 *HARV. INT'L L.J.*, 171, 179 (1998).

114. *Id.* (quoting *Summary Records of Meetings 21 September-8 December 1948*, U.N. GAOR, 3d Sess., pt. 1, C.1 at 698, U.N. Doc. A/C.1/SR.207 (1948)).

115. SAYEGH, *supra* note 110, at 9.

116. SAID, *supra* note 112, at 101.

117. *See* Quigley, *supra* note 113, at 176; *see also* SAYEGH, *supra* note 110, at 9.

118. Quigley, *supra* note 113, at 175.

the flight by, the Arab population.¹¹⁹ The position supported by the Palestinians is that Deir Yassin was designed to induce terror among the Palestinian populace so that they would flee to neighboring Arab states; indeed, Deir Yassin did induce such terror and flight.¹²⁰ Additionally, Israeli forces used psychological warfare to promote flight, such as encouraging Jews to advise Palestinian neighbors to leave their homes for their own safety.¹²¹ Personnel of Haganah, the militia of the Jewish Agency, drove loudspeaker vans through the neighborhoods, ordering residents to evacuate.¹²²

Historians have held that expulsion from the land was carried out openly after the declaration of Israeli statehood and the withdrawal of Great Britain.¹²³ For example, provisional Prime Minister David Ben-Gurion ordered the expulsion of Ramleh and Lydda inhabitants, and the Israeli Defense Force executed this order by forcing out 60,000 Palestinians.¹²⁴ In addition, the Israeli Defense Force expelled the inhabitants of Galilee villages, demolishing many of them to prevent a return, and it also expelled many Arabs from the Negev desert.¹²⁵ Therefore, according to the view supported by Palestinians, they did not leave their homes “voluntarily,” but as a result of a planned campaign by the Zionists to drive them out of Palestine. The outcome resulted in a great number of refugees.

2. The Palestinian Goal of Return

The misery of Palestinian refugees in Jordan, Egypt, and Lebanon and the displacement of additional Palestinians after the 1967 War, the Lebanese Civil War, and the Gulf War contributed to Palestinian nationalism, which created and then sustained a belief in a right of return to their abandoned homes.¹²⁶ Originally, the Palestinians hoped their return would take place subsequent to the liberation of Palestine by the Arab armies.¹²⁷ The vision of return was subsumed under the idea of total liberation of Palestine by way of dissolving Israel.¹²⁸ The PLO Covenant outlined this goal before it was recanted at Oslo in 1993.¹²⁹

119. *See id.* at 175-76.

120. *See id.* (stating that LEHI paraded Palestinian survivors in trucks through Jerusalem); *see also* SAYEGH, *supra* note 110, at 10, 12.

121. *See* Quigley, *supra* note 113, at 180.

122. *See id.* at 175.

123. *See id.* at 177.

124. *See id.*

125. *See id.* at 177-78.

126. *See* Weiner, *supra* note 88, at 17.

127. *Id.* at 18; *see also* COHEN, *supra* note 16, at 409 (describing the creation of the “Rescue Army” and its infiltration into Palestine).

128. *See* TAKKENBERG, *supra* note 1, at 245 (citing R. Khalidi, *Observations on the Right of Return*, J.P.S. 82 (Winter 1992) 29, at 33)).

129. *See* MORRIS, *supra* note 37, at 621.

"Armed struggle is the only way to liberate Palestine The Palestinian Arab people assert their absolute determination and firm resolution to . . . work for an armed popular revolution for the liberation of their country and their return to it."¹³⁰

By 1974, there was a shift in the PLO's ideology. It called for a ten-point Provisional Political Program, authorizing the establishment of a Palestinian state on any liberated territory.¹³¹ For the first time, the PLO advocated a Palestinian state in only part of Palestine, rather than in all of it.¹³² This shift may have signified a policy in which the refugees aspired to create a distinct Palestinian state rather than return to their original homes.¹³³ However, the Palestinians did not discard the claim of a right of return.

In 1988, the Palestinian National Council, a legislative body of the PLO,¹³⁴ adopted a Declaration of Independence and a Political Statement, which stated that the right of return was to be achieved within the context of United Nations resolutions.¹³⁵ The Palestinian leaders departed from the long-standing position of refusing to accept certain United Nations resolutions because they regarded the predicament of the Palestinians as a refugee issue rather than as that of a people with a distinct identity whose national rights had been denied.¹³⁶ According to Said, "[T]he Palestinians have repeatedly insisted on their right of return, their desire for the exercise of self-determination, and their stubborn opposition to Zionism as it has affected them."¹³⁷

However, the issue of who is to be included in the category of Palestinians holding a right of return remains open. During the first session of the Multilateral Working Group on Refugees at the Madrid conference in 1992, the chairperson of the Palestinian side of the joint Palestinian-Jordanian delegation explained who was to be included in the category of refugees covered by United Nations resolutions regarding the right to return and compensation:

The Palestinian refugees are all those Palestinians (and their descendants) who were expelled or forced to leave their homes between November 1947 (Partition Plan) and January 1949 (Rhodes Armistice Agreements), from the territory controlled

130. See Weiner, *supra* note 88, at 18 (quoting The Palestinian National Charter of 1968, art. 9, reprinted in THE ARAB-ISRAELI CONFLICT 1087 (John N. Moore ed., 1977)); see also MORRIS, *supra* note 37, at 364-65 (discussing provisions of the Palestinian National Charter that denied Israel's right to exist).

131. See Weiner, *supra* note 88, at 18.

132. See TAKKENBERG, *supra* note 1, at 247-48.

133. See Weiner, *supra* note 88, at 19.

134. See Dajani, *supra* note 16, at 51.

135. See TAKKENBERG, *supra* note 1, at 248 (citing R. Khalidi, *Observations on the Right of Return*, J.P.S. 82 (Winter 1992) 29, at 35)); see also Weiner, *supra* note 88, at 19.

136. See Weiner, *supra* note 88, at 19-20.

137. SAID, *supra* note 112, at 47.

by Israel on that latter date. . . . Such a definition . . . includes all the 1967 and post-1967 displaced persons. . . . At the core of their status is land alienation and the denial of return to their country.¹³⁸

Although this definition may not be satisfactory from a legal point of view, many thought that it would be one that the PLO was likely to advance in claiming repatriation and/or compensation during the permanent status negotiations.¹³⁹

During Winter 2000-2001, when former United States President Clinton proposed that Palestinian refugees accept the principle that there is no specific right of return to Israel itself, Palestinian negotiator Nabil Shaath described the refugee section of Clinton's proposal as "very hard to swallow."¹⁴⁰ Many refugees protested the proposal, denounced Arafat, and vowed that anything he agreed to would not be binding on them.¹⁴¹ Bombs exploded in Tel Aviv and Gaza as a message from the Palestinian radicals.¹⁴²

Undoubtedly, many Palestinians are opposed to the abandonment of a right of return to Israel. For example, one Palestinian refugee, Sami Bid-Said, states "[I]f there is no return to pre-1948 Palestine, there should be no peace" and "[n]o Palestinian leader can sign an agreement that prevents us from going back to our land."¹⁴³ Abu Laban, another refugee, says "[N]o peace agreement will be durable without recognizing that refugees have a right to return to their villages of origin."¹⁴⁴ Many Palestinians claim the right to choose and do not accept that their Palestinian leaders have the authority to renounce that right.¹⁴⁵ Refugee activists do not want to compromise the right of return.¹⁴⁶ "If Yasser Arafat or any other Palestinian leader were to relinquish the right of return, I would lead the revolt against him," said Hussam Khader, a Fatah leader living in a refugee camp in the West Bank.¹⁴⁷ Already, there is a sense that refugees' rights have been marginalized in the peace process.¹⁴⁸

138. TAKKENBERG, *supra* note 1, at 84-85 (quoting statement of the chairperson of the Palestinian side of the joint Palestinian-Jordanian delegation to the Multilateral Working Group on Refugees, Ottawa, 13 May 1992; *text in* CPAP, FACTS AND FIGURES ABOUT THE PALESTINIANS 34, 38 (1992)).

139. *See id.* at 85.

140. Ephron, *supra* note 102.

141. *Id.*

142. *Id.*

143. *Id.*

144. Ghannam, *supra* note 61, at 45.

145. *Rights and Refugees*, *supra* note 61; *see also* Ghannam, *supra* note 61, at 46 (discussing Palestinians' desire to have a choice to return).

146. *See* Ghannam, *supra* note 61, at 46.

147. *The Palestinian Right of Return*, *supra* note 101.

148. *See* Ghannam, *supra* note 61, at 43.

Accordingly, it is evident there has been a continuous Palestinian goal to return to homes abandoned in the 1947-1948 War and that a right of return has been advanced by the Palestinians and Arabs. Don Peretz, a commentator on the Middle East, points out:

Since 1948, [the right of return] has acquired emotional connotations of such significance that the term became the basis of Palestinian nationalism in much the same way that the return to *Eretz Israel* became the foundation of Zionism. The concept of return permeates modern Palestinian literature; it is at the core of history taught to children in refugee camps throughout the region, and is usually the first thought expressed by average Palestinians when discussing Middle East problems. To many, the right of return is an important symbol; recognition would remove the stigma of second-class citizenship imposed on Palestinians. . . .¹⁴⁹

Moreover, Palestinian historian, Rashid Khalidi, asserts that for over forty years "the idea of 'return' has been central to the Palestinian national narrative of struggle against overwhelming odds, of expulsion from the ancestral homeland, of dispersion, and of national reconstitution."¹⁵⁰ Clearly, many Palestinians maintain the goal of returning to the land that is present-day Israel.

C. The Israeli Historical Perspective on the Refugee Question

1. The Israeli View of the 1947-1948 Arab Exodus

The conventional Israeli perspective is that the Palestinians evacuated due to a general sense of fear and confusion and because Arab leaders prompted the evacuation. First, the Palestinians fled because of a general sense of panic, according to the Israeli view. For example, during the weeks following the announcement of the United Nations' partition plan, in an atmosphere of fear and confusion, between 30,000 and 75,000 Palestinians—mostly comprised of members of the elite—abandoned their homes with the desire to escape war.¹⁵¹ This evacuation of the elite constituted a significant factor in the mass departure

149. TAKKENBERG, *supra* note 1, at 230 (quoting DON PERETZ, *PALESTINIAN REFUGEES AND THE MIDDLE EAST PEACE PROCESS* 72 (United States Inst. of Peace Press 1993)).

150. *Id.* (quoting R.I. Khalidi, *Observations on the Right of Return*, J.P.S. 82, (Winter 1992), at 29).

151. *See* Weiner, *supra* note 88, at 22 (estimating that 75,000 Palestinians fled); *see also* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 8 (estimating that 30,000 left the territory during the first three months of struggle). *See also* COHEN, *supra* note 16, at 457 (discussing the impact of the flight of the prosperous Arabs, who were the first to leave).

that followed because it led to the collapse of Palestinian political institutions.¹⁵² Don Peretz comments:

With the breakdown of all functions of government necessary to maintain law, order and well-being—water, electricity, posts, police, education, health, sanitation, and the like—Arab morale collapsed. The community became easy prey to rumour and exaggerated atrocity stories. The psychological preparation for mass flight was complete. The hysteria fed upon the growing number of Jewish military victories[;] . . . there remained no authoritative voice to inspire confidence among the Arab masses and to check their flight. As might be expected in such circumstances, the flight gathered momentum until it carried away nearly the whole of the Palestine Arab community.¹⁵³

The second reason the Palestinians evacuated, according to the Israeli perspective, is because Arab leaders prompted the evacuation. The Government of Israel stated in 1953: “The Palestine refugee problem is the direct outcome of the war of aggression launched in 1948 by the Arab League against Israel. Had it not been for this war, there would not be a single Arab refugee today.”¹⁵⁴ In June 1946, the Arab League passed the famous “secret” resolution on the intervention of the Arab League countries in Palestine.¹⁵⁵ By November 1947, the neighboring Arab countries were planning to assist the Palestinians.¹⁵⁶ The Arab Higher Committee declared, “In a very short time, the armies of our Arab sister countries will overrun Palestine, attacking from the land, the sea, and the air, and they will ‘settle accounts’ with the Jews.”¹⁵⁷ The result was a precipitation of panic and mass evacuation of the territory.¹⁵⁸ Palestinian Arab leaders and heads of neighboring Arab countries called to clear the way and allow for invading Arab forces.¹⁵⁹ “The general assumption was that a great blood-bath was approaching and the sooner one could get away, the better.”¹⁶⁰

Furthermore, the arrival of the “Rescue Army” of Arabs did little to motivate Palestinians to stay on the land. First, according to historian Aharon

152. See Weiner, *supra* note 88, at 23.

153. COHEN, *supra* note 16, at 462 (quoting DON PERETZ, THE MIDDLE EAST INSTITUTE, ISRAEL AND THE PALESTINIAN ARABS 7 (1958)).

154. ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 6.

155. COHEN, *supra* note 16, at 458.

156. *Id.*

157. *Id.* at 460.

158. See ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 11.

159. See Weiner, *supra* note 88, at 23; see also ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 8, 10.

160. COHEN, *supra* note 16, at 460.

Cohen, there were conflicts between Palestinians and the "Rescue Army" on matters of housing, supplies, and authority.¹⁶¹ Secondly, according to Cohen, the "Rescue Army" committed rape, violence, and murder against the local Arab population, and Arabs "began to fear the 'Rescue Army' more than they feared the Jews."¹⁶² Finally, the disappointments resulting from the "Rescue Army's" defeats after its arrival in Palestine convinced the Palestinians that the Jews were winning and compelled them to flee.¹⁶³

A related reason behind the Palestinian exodus, according to Jewish historians, is that Palestinians left their homes to protest the establishment of a Jewish state and the prospect of living under Jewish rule.¹⁶⁴ "Arab propagandists could not envisage the possibility of 'Arabs under Jewish rule.'"¹⁶⁵ For example, in Haifa in 1948, Jews and the local Arab leaders concluded a formal truce under which the local Arab population was to continue its normal life.¹⁶⁶ However, the Arab Higher Executive, refusing to have Arabs remain in the city under Jewish rule, pressured Haifa leaders to disavow their signatures and order evacuation.¹⁶⁷ According to the Israeli government, the Jews took numerous measures to urge Palestinians not to leave their homes, such as distributing leaflets and sending messages over the radio stations.¹⁶⁸

The Israeli position refutes the Arab allegation that there was a deliberate plan to drive the Palestinians from their homes. As evidence of the falsity of eviction, the Israeli government points to the Palestinians who stayed in Israel, particularly in Galilee.¹⁶⁹ Additionally, had the Jews, as alleged by Palestinians, pursued a policy of driving them out, they would have found it easier to evict the Palestinian villages of Abu Gosh and Fureidis, since these villages were in close proximity to strong Jewish settlements.¹⁷⁰ However, the Palestinians in these villages did not budge from their land, and thus, they were left in secure possession of their homes.¹⁷¹ The same is true of other Arab villages.¹⁷² With respect to Deir Yassin, the Government of Israel states:

161. *See id.* at 459.

162. COHEN, *supra* note 16, at 459.

163. *Id.* at 458, 460; *see also* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 11.

164. *See* Weiner, *supra* note 88, at 23-24.

165. COHEN, *supra* note 16, at 460; *see also* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 10, 12.

166. *See* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 12; *see also* Weiner, *supra* note 88, at 24.

167. *See* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 12; *see also* Weiner, *supra* note 88, at 24.

168. *See* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 13-14.

169. *See id.* at 14.

170. *See id.*

171. *See id.*

172. *See id.* at 12.

The one and only instance of a Jewish atrocity in this war, the destruction of the Arab village of Deir Yassin by a group of Jewish extremists acting throughout in defiance of the Jewish national and military authorities and sternly disowned by them, added fuel to the flames, the more so as it was widely exploited by the Arab press and radio—a tragic illustration of the boomerang effect of Arab propaganda on their own people.¹⁷³

2. The Israeli Bar of Return

Israel has consistently rejected proposals that advocate the unconditional repatriation of Palestinian refugees.¹⁷⁴ As already noted, security concerns have been and continue to be the primary reasons for not allowing the return of Palestinians.¹⁷⁵ “Fearful of being inundated with thousands of Palestinians whose allegiance to the State would be doubtful, Israeli immigration and nationality legislation has blocked the mass return to Israel by the Palestinian refugees.”¹⁷⁶ For example, under the Nationality Law of 1952, a person who resided in Palestine immediately prior to the establishment of the state is automatically regarded as a resident if he was registered as a resident before the enactment of the Nationality Law.¹⁷⁷ This legislation is specifically constructed to prevent awarding citizenship to Arabs who left the country during the 1947-1948 War and returned illegally thereafter.¹⁷⁸ Similarly, the Law of Entry of 1952 bars entry into Israel except for Israeli citizens or those the Israeli Interior Ministry authorizes to enter.¹⁷⁹ As a result of such legislation, it is illegal for Palestinian refugees to go into Israel without approval; accordingly, the government may deport unauthorized immigrants.¹⁸⁰

Immediately after the 1947-1948 War, the Israeli government based its security concerns on the official tone of Arab public opinion, which was “one of uncompromising hostility toward Israel.”¹⁸¹ Israel was always presented as the

173. *Id.* at 11.

174. Weiner, *supra* note 88, at 27; *see also* TAKKENBERG, *supra* note 1, at 16.

175. *See* ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 27-28.

176. Weiner, *supra* note 88, at 29; *see also* TAKKENBERG, *supra* note 1, at 231.

177. Nationality Law, 1952, 6 L.S.I. 50 (1951-52). *See also* Weiner, *supra* note 88, at 29 (discussing the Nationality Law).

178. Weiner, *supra* note 88, at 29.

179. Entry into Israel Law, 1952, 6 L.S.I. 159 (1951-52). *See also* Weiner, *supra* note 88, at 29 (discussing the Entry into Israel Law).

180. Weiner, *supra* note 88, at 29.

181. COHEN, *supra* note 16, at 477.

Arabs' first and foremost foe, and "the sources of Arab hostility were constantly replenished."¹⁸² For example, on June 28, 1949, Baghdad radio broadcasted:

[T]he Arabs will never cease to regard Israel as a hostile country. The Jews are our enemies irrespective of the degree of appeasement they may display toward us and of how peace-seeking their intentions may be. We do not pause for a single moment in our preparations for the day of vengeance.¹⁸³

An Egyptian Foreign Minister wrote in 1949: "Let it be known and appreciated that in demanding restoration of the refugees to Palestine the Arabs intend that they return as masters of the homeland and not as slaves. More explicitly: they intend to annihilate the State of Israel."¹⁸⁴ This Arab sentiment did not abate in the subsequent years, and many such statements were made, not only by propagandists but also by Arab statesmen and heads of state.¹⁸⁵

Furthermore, the Arabs initially refused to negotiate with the Israelis. The United Nations assigned the function of taking necessary steps in helping to achieve the final settlement of the outstanding problems between the Israeli and Arab governments to the Lausanne Conference, which convened on April 27, 1949.¹⁸⁶ The Arab delegations of Egypt, Syria, Lebanon, and Jordan made a joint statement "to the effect that they would not sit at the same table or in the same room as Israeli representatives" and refused to recognize Israel as a party to the negotiations.¹⁸⁷ In fact, during the five months of the conference, representatives of the Arab states never met the Israeli representatives on an official basis.¹⁸⁸ Meanwhile, the Israeli delegation showed willingness to negotiate. As Cohen states:

It expressed Israel's readiness to allow members of certain families who had been cut off from their relatives during the war to return to the country; it agreed to pay compensation for abandoned Arab lands that had been cultivated prior to the hostilities; it declared itself willing to discuss the release of Arab refugee accounts frozen in Israeli banks, as well as securities and precious possessions held for safekeeping in the safes of those banks. Finally, the Israeli delegation announced the government's willingness to repatriate to Israel up to

182. *Id.*

183. *Id.* (quoting Baghdad radio, June 28, 1949).

184. ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 2 (quoting Mohammed Salah ed Din, *Al Misri*, Oct. 11, 1949).

185. COHEN, *supra* note 16, at 477-78.

186. *Id.* at 478-79.

187. *Id.* at 479.

188. *Id.*

100,000 Arab refugees as a contribution to the solution of the problem.¹⁸⁹

Although the Arab delegations signed the Protocol of May 12, 1949, which contained a recognition in principle of the partition of Palestine, they failed to pursue other solutions to the problems presented at the conference, in part because there was much disagreement amongst them.¹⁹⁰ The Arab League Council further handicapped negotiations when it decided, on April 1, 1950, that “no member state would be permitted to conduct negotiations with Israel separately, or to sign a separate peace treaty or any other agreement”¹⁹¹

The issue of the Palestinian refugees was the major obstacle in the negotiations. According to Cohen, “The Arab delegates were not inclined to take notice of Israel’s declared willingness to repatriate 100,000 refugees, claiming that so long as the refugee problem in its entirety was not solved in accordance with the [United Nations General Assembly Resolution 194], there could be no negotiations for peace.”¹⁹² Resolution 194 states that those refugees who wished to return to their homes and live in peace with their neighbors should be enabled to return at the earliest possible date.¹⁹³ However, the Arab delegations insisted on the return of the refugees to Israel, but refused to give any guarantees to Israel that they would discard their policy of eternal hostility and their preparations for a “second round” against Israel. Meanwhile, the Israeli delegates expressed a willingness to discuss the refugee problem, but maintained that it could be solved only within the framework of a general peace agreement.¹⁹⁴

Furthermore, it appeared that the Arab states used the refugee issue as a bargaining card. Not only did the Arab delegations at the Lausanne Conference reject Israel’s declaration to take back 100,000 refugees without serious consideration, but they also displayed anger toward the Palestinian refugees, who became a pawn in the intra-Arab political game.¹⁹⁵ Cohen explains:

The impression was created that the Arab states were less interested in the repatriation of the refugees and the rehabilitation of their lives than in the political advantage that could be derived from their remaining in their tragic situation,

189. *Id.* at 479-80.

190. *Id.* at 480.

191. *Id.* at 481-82.

192. *Id.*; see also Quigley, *supra* note 113, at 183-84 (stating that Israel withdrew its offer after United Nations officials pressed Israel to admit a larger number, and not acknowledging that it withdrew its offer due to the Arab’s unwillingness to accept it).

193. G.A. Res. 194, *supra* note 56, para. 11.

194. COHEN, *supra* note 16, at 482; see also ISRAEL OFFICE OF INFORMATION, *supra* note 38, at 2-3.

195. See COHEN, *supra* note 16, at 483.

as a thorn in the flesh of Israel and a card for bargaining with her and the major powers.¹⁹⁶

All Arab states, except Jordan, refused citizenship to Palestinians residing within their borders.¹⁹⁷ "The Arab states preferred to maintain the Palestinian refugees in abject misery as a vehicle to torment, embarrass and undermine support for the Jewish state."¹⁹⁸

Arab hostility toward Israel did not abate in the 1950s and 1960s. Hostile acts included a boycott and embargo of Israel, armed incursions into Israeli land, acts of espionage and robbery, acts of sabotage and murder, and the creation of *Al Fatah* in 1965, which began to lay mines, blow up water pipes and bridges, and murder civilians.¹⁹⁹ In July 1957, a resolution adopted at a conference in Syria provided: "Any discussion aimed at a solution of the Palestine problem which will not be based on ensuring the refugees' right to annihilate Israel will be regarded as a desecration of the Arab people and an act of treason."²⁰⁰ Such acts and statements, along with Arab refusal to recognize the State of Israel, could only be interpreted as a hope to uproot Israel and destroy her in the future,²⁰¹ and thus they perpetuated Israel's bar of return.

The peace process during the 1990s did not convince Israel to allow Palestinian return, and the country continues to refuse to recognize a Palestinian right of return. In a live interview, former Israeli Premier Ehud Barak stated: "I believe that the Palestinians have rights and we also have rights. However, we cannot accept the Palestinians' right to return to Israel itself."²⁰² Most Israelis agree: "Even the most dovish Israelis reject a return of Palestinian refugees as demographic suicide for the Jewish state."²⁰³ Scholars and commentators realize that Israel will never accept the right of return. Joel Singer, a former legal adviser to the Israeli Foreign Ministry and an Israeli peace negotiator under Prime Minister Yitzhak Rabin, says, "Israel is not going to change the makeup of the population of Israel by accepting large numbers of refugees."²⁰⁴ Israeli Peace Now spokesman Didi Remez acknowledges that, in terms of historical justice, even if it is "right" that all the refugees return, it is not practical for Israel to

196. *Id.*

197. Weiner, *supra* note 88, at 31.

198. *Id.* at 33.

199. See COHEN, *supra* note 16, at 487-88.

200. Weiner, *supra* note 88, at 31 (quoting Marie Syrkin, *The Palestinian Refugees: Resettlement, Repatriation, or Restoration, in ISRAEL, THE ARABS, AND THE MIDDLE EAST* 157, 169 (Irving Howe & Carl Gershman eds., 1972)).

201. COHEN, *supra* note 16, at 488.

202. Interview by Muhammad Kurayshan with Ehud Barak, Prime Minister, Israel, in Doha Studio, Al-Jazeera, Qatar (Jan. 15, 2001), available at BBC WORLDWIDE MONITORING, Jan. 15, 2001, LEXIS, News Library, CRNWS File.

203. Ephron, *supra* note 102; see also Ghannam, *supra* note 61, at 45.

204. See Ghannam, *supra* note 61, at 45.

recognize the right of return because of the threats to internal security and to the character of the Jewish state.²⁰⁵

IV. INTERNATIONAL LAW

A. Overview

In evaluating whether a Palestinian right of return exists in international law, this section will focus on four sources: (1) United Nations General Assembly Resolutions, (2) the Universal Declaration of Human Rights, (3) the International Covenant on Civil and Political Rights, and (4) the Fourth Geneva Convention. 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 of return.²⁰⁶ 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.”²⁰⁷ Finally, it is important to keep in mind that even if the right of return is part of customary international law, as some scholars believe,²⁰⁸ the specific question whether there is a Palestinian right of return to the territory of modern-day Israel poses a unique issue that has been unresolved for over 50 years and that raises much controversy and emotion in the minds and hearts of not only Arabs and Jews, but also in much of the world.

B. United Nations General Assembly Resolutions

1. The Non-Binding Nature of United Nations General Assembly Resolutions

While several United Nations General Assembly resolutions are relevant to a Palestinian right of return, in general, such resolutions lack the force of law. General Assembly resolutions are not binding.²⁰⁹ Rather, they are recommendations that articulate general legal principles and approximate the sentiments of the international community.²¹⁰ Moreover, compliance with the

205. *See id.*

206. TAKKENBERG, *supra* note 1, at 244 (quoting R. Khalidi, *Observations on the Right of Return*, J.P.S. 82 (Winter 1992) at 29)).

207. *Id.*

208. *See id.* at 232-33.

209. *See* KELLY-KATE S. PEASE, INTERNATIONAL ORGANIZATIONS: PERSPECTIVES ON GOVERNANCE IN THE TWENTY-FIRST CENTURY 20, 22 (2000).

210. *See id.* at 22.

General Assembly's recommendations "is left to rest on a coincidence of national interests in particular UN policies and programs," and "where resolutions have depended on compliance by member states, the record is very checkered."²¹¹ No country has developed a strong tradition of customary obedience to General Assembly recommendations, and at times, states that lack a self-interested basis for observing such recommendations choose to ignore them altogether.²¹² For example, no United Nations recommendation could persuade the Soviet Union to withdraw from Afghanistan or convince the United States to pull out of Grenada before either country deemed it was ready to do so.²¹³ Nonetheless, United Nations resolutions represent the opinions and priorities of the member states, often form the basis of international law created through treaties, and may confer the legitimacy of majority approval.²¹⁴ Unlike General Assembly resolutions, Security Council resolutions that issue a formal "decision" are binding on member states.²¹⁵ Accordingly, members are obligated to abide by and help carry out such resolutions.²¹⁶

The non-binding nature of General Assembly resolutions may have led to their exclusion in the Declaration of Principles, signed at Oslo in 1993. The Declaration of Principles makes no reference to any General Assembly resolutions concerning the Palestinian issue; it only refers to United Nations Security Council Resolutions 242 and 338 as the basis for a permanent settlement.²¹⁷ Security Council Resolution 242 pertains to the withdrawal of Israeli armed forces from the West Bank and Gaza Strip,²¹⁸ and Security Council Resolution 338 calls on the parties to begin negotiations for "a just and durable peace in the Middle East."²¹⁹ Neither resolution specifically mentions a right of return.

2. General Assembly Resolution 194 and Related Resolutions

The General Assembly resolution most commonly associated with a Palestinian right of return is Resolution 194, which was adopted in December

211. LAWRENCE ZIRING, ET. AL., *THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS* 105, 106 (3d ed. 2000).

212. *See id.* at 105.

213. *Id.* at 106.

214. *See* PEASE, *supra* note 209, at 22; *see also* ZIRING, *supra* note 211, at 107.

215. PEASE, *supra* note 209, at 22.

216. *Id.*

217. TAKKENBERG, *supra* note 1, at 262.

218. *See* S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/INF/22/Rev.2 (1967); *see also* TAKKENBERG, *supra* note 1, at 247, 262 (discussing the resolution).

219. *See* MORRIS, *supra* note 37, at 429.

1948.²²⁰ However, it is unclear whether Resolution 194 explicitly sets forth a right of return. Paragraph 11 of the resolution states:

The General Assembly . . . resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible[.]²²¹

Resolution 194 also instructs the Conciliation Commission to facilitate repatriation [and] resettlement.²²²

The Arab stance on Resolution 194 has varied. Originally, the Arab states voted against Resolution 194, and Palestinian political groups rejected the resolution because it was based on a recognition of Israel as a state.²²³ However, by the spring of 1949, the Palestinians reversed their position and soon became the resolution's strongest supporters.²²⁴ In 1988, the nineteenth Palestinian National Council adopted a Political Statement along with its Declaration of Independence, which asserted that the right of return must be achieved within the context of United Nations resolutions,²²⁵ such as Resolution 194. The Palestinian point of view indeed may advocate that Resolution 194, which had been reaffirmed annually between 1952 and 1967 by the General Assembly,²²⁶ expresses the will of the international community and provides force to the Palestinian right of return.

On the other hand, opponents raise several arguments to challenge the claim that Resolution 194 recognizes a right of return of Palestinian refugees. First, as previously discussed, General Assembly resolutions normally do not constitute binding authority over sovereign states. As a related matter, scholars have noted that the language of the resolution does not recognize a clear right of return of the Palestinians, but merely *recommends* that the refugees "should" be "permitted to return."²²⁷ Accordingly, it seems that Israel is not legally bound, under Resolution 194, to allow for the return of the Palestinian refugees.

Second, Resolution 194 made the exercise of the right of return conditional on the willingness of the refugees to "live at peace with their

220. See G.A. Res. 194, *supra* note 56, para. 11.

221. *Id.*

222. *Id.*; see also TAKKENBERG, *supra* note 1, at 243.

223. TAKKENBERG, *supra* note 1, at 244 n.74.

224. See *id.* at 244; see also Weiner, *supra* note 88, at 42.

225. TAKKENBERG, *supra* note 1, at 248; see also Weiner, *supra* note 88, at 19.

226. See TAKKENBERG, *supra* note 1, at 246.

227. Weiner, *supra* note 88, at 41.

neighbours.”²²⁸ The Israeli point of view may advance the argument that at least some of the Palestinian refugees have not complied with this condition. The following statements from Palestinian officials illustrate that many Palestinians are not willing to “live at peace with their neighbours:”

We shall always stand against them, threaten their future, and not permit them to expand. We shall stand with all our might against any attempted settlement effort. If they do not implement the agreement, we shall determine what the essential locations are in each settlement, and we will turn the lives of the settlers into hell.²²⁹

The Zionist entity exists on seized land. The Jews remain enemies because they expropriate lands, build settlements and pay high sums to buy properties. They are the greatest enemies of us Muslims.²³⁰

We did not pay with the dear blood of thousands of martyrs so that the Israeli government could establish settlements on our land in the name of peace. We have sacrificed in the past and we will be ready to sacrifice again in the future for the sake of liberating our land and returning it to the bosom of the Palestinian nation and for the sake of establishing an independent Palestinian state whose capital is Jerusalem.²³¹

Moreover, there are perceived threats from radical Palestinian groups. Munir al-Maqdah, the commander of the Fatah gunmen in Lebanon, who is determined to fight for his family’s return to his grandfather’s soil in Galilee, comments:

I swear it is not a dream. It is going to happen sooner or later. As they (the Israelis) left like rats from south Lebanon, they will leave the holy land. They should leave it and save their lives before they go back in body bags If Arafat makes peace with the Jews, it will be bad. We can’t live with the

228. G.A. Res. 194, *supra* note 56, para. 11; *see also* Weiner, *supra* note 88, at 41-42 (discussing the conditional nature of the resolution).

229. Louis Rene Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT’L L. 229, 250 (1999) (quoting Imad Mazen Izz al-Din, the Palestinian Authority’s Political Instructor for National Guidance (AL-HAYAT AL-JADEEDA, Apr. 30, 1997)).

230. *Id.* at 250-51 (quoting interview with the Palestinian Authority’s Mufti Ikrama Sabri, N.Y. TIMES (May 18, 1997)).

231. *Id.* at 251 (quoting a statement issued by the Palestinian Authority cabinet in Nablus on May 16, 1997 (VOICE OF PALESTINE, May 17, 1997)).

Israelis. We can't trust them. They have to leave Israel and go back to where they came from. All my friends think like me.²³²

It would be very difficult to distinguish, on a case-by-case basis, those who reject the peace process and those who are willing to “live at peace with their neighbours.”²³³

John Quigley, a law professor at Ohio State University, provides an interpretation of the phrase “wishing to . . . live at peace with their neighbours” that is consistent with return as a right. He claims that the phrase refers to those Palestinians who were inclined to return to live under Israeli sovereignty, while those who did not wish to live in peace with their neighbors refers to those who would remain abroad.²³⁴ The validity of this interpretation is questionable. If the General Assembly had intended to refer to those Palestinians who chose to live abroad, it could have articulated the phrase as “refugees wishing to return to their homes” without the additional “and live at peace with their neighbours.” Furthermore, Quigley contends that the phrase does not determine whether the Palestinians have a right of return.²³⁵ He argues that General Assembly resolutions in later years omitted the phrase “wishing . . . to live at peace” and established that Palestinians may return to their homeland as a *matter of right*.²³⁶ However, as already discussed, such resolutions do not carry the force of law, and they also are subject to different interpretations. In summary, the non-binding nature of General Assembly resolutions, the unwillingness of some Palestinians to “live at peace with their neighbours,” as required by Resolution 194, and the different textual interpretations of Resolution 194 create uncertainty with respect to the existence of a Palestinian right of return and diminish the force of the claim to such a right.

Whether or not there is a right of return under Resolution 194, the resolution has been impossible to implement since Israel barred the return of Palestinian refugees, largely due to security and demographic concerns.²³⁷ As a result, the United Nations proposed resettlement of Palestinian refugees as a practical alternative to repatriation in General Assembly Resolution 513, which was adopted in 1952.²³⁸ Resolution 513 provided that the reintegration of the

232. Ewen MacAskill, *Home Truths that Drive Fight for Palestine: Right to Return*, THE GUARDIAN (London), Jan. 16, 2001, available at LEXIS, News Library, News Group File.

233. See Weiner, *supra* note 88, at 42.

234. See Quigley, *supra* note 113, at 187.

235. See *id.*

236. See *id.*

237. See TAKKENBERG, *supra* note 1, at 84, 246; see also Weiner, *supra* note 88, at 30.

238. See TAKKENBERG, *supra* note 1, at 243-44; see also Quigley, *supra* note 113, at 191.

displaced Palestinians was to be accomplished either by repatriation, as Resolution 194 proposed, or through resettlement elsewhere.²³⁹

The 1967 War resulted in the further and substantial displacement of Palestinians, including the 1948 refugees, and broadened the scope of the right of return.²⁴⁰ After the 1967 War, United Nations General Assembly resolutions dealt with the right of return of the 1948 refugees and the 1967 displaced persons separately.²⁴¹ The General Assembly's approach to the Palestinian refugee issue took a new turn after the war in another way. Subsequent resolutions not only raised the issue of the right of return, but also the role of Palestinian self-determination.²⁴² For example, Resolution 3236, adopted in 1974, was the first resolution not to make use of the term "refugee," "in accordance with the view, advocated for some time by the PLO and other Palestinian groups, that the problem of displaced Palestinians is essentially one of a people who have been denied their national rights, not a problem of refugees."²⁴³ Resolution 3236 provides that the "inalienable rights" of the Palestinian people include "the right to self-determination without external interference," "the right to national independence and sovereignty," and "the right of the Palestinians to return to their homes and property from which they have been displaced and uprooted."²⁴⁴

C. Universal Declaration of Human Rights

The Universal Declaration of Human Rights of 1948 ("Universal Declaration") is another document scholars rely on for a right of return. However, the Universal Declaration is a document the United Nations General Assembly adopted; therefore, it has no legally binding effect.²⁴⁵ Nevertheless, international law scholars widely regard the Universal Declaration as representing principles reflective of customary international law.²⁴⁶

Article 13 of the Universal Declaration reads: "(1) Everyone has the right to freedom of movement and residence within the borders of each state; (2) Everyone has the right to leave any country, including his own, and to return to his country."²⁴⁷ Since everyone has a right to "return to his country" under Article 13 of the Universal Declaration, proponents of the Palestinian position cite to

239. *See id.* at 244.

240. *See id.* at 246.

241. *See id.*

242. *See id.* at 247; *see also* Quigley, *supra* note 113, at 193.

243. TAKKENBERG, *supra* note 1, at 247.

244. G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, para. 29, U.N. Doc. A/9631 (1974).

245. Weiner, *supra* note 88, at 38.

246. *Id.*

247. *Universal Declaration of Human Rights*, G.A. Res. 217(A), U.N. GAOR, 3d Sess., 183d plen. mtg., art. 13, U.N. Doc A/810 (1948) [hereinafter *Universal Declaration*].

Article 13 as a source of international law sustaining the Palestinian right of return.²⁴⁸

However, proponents of the Israeli position claim that the Universal Declaration does not provide for a right of return of the Palestinians. First, the textual analysis of Article 13, paragraph 2 may fail to support repatriation of the Palestinians, because they were never citizens of Israel.²⁴⁹ In other words, the argument is that Article 13, paragraph 2 is irrelevant to the question of a 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.²⁵⁰ Moreover, there was never a sovereign state of Palestine in which the Palestinian refugees were nationals.

Second, the Universal Declaration has a limitations clause—Article 29, paragraph 2—which reads:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.²⁵¹

The elasticity of this clause allows a state to limit the exercise of rights in the Universal Declaration in certain situations.²⁵² Scholars recognize that “the influx of more than one and one-half million mostly hostile refugees would without doubt violate ‘the rights and freedoms of others’ in Israel, and it would damage ‘public order and the general welfare in a democratic society.’”²⁵³ Quigley argues that the practice of the United Nations has been to discourage invocation of security considerations to evade an obligation to repatriate.²⁵⁴ However, such practice of the United Nations neither constitutes the law nor detracts from the force of Article 29, paragraph 2.

Finally, Article 29, paragraph 3, which specifies that “[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations,”²⁵⁵ can support Israel’s aversion to repatriate hundreds of thousands or even millions of Palestinians. This is “because the U.N. Charter,

248. See SAID, *supra* note 112, at 47; cf. Quigley, *supra* note 113, at 195.

249. See Weiner, *supra* note 88, at 39.

250. See TAKKENBERG, *supra* note 1, at 249.

251. *Universal Declaration*, *supra* note 247, art. 29(2).

252. See Weiner, *supra* note 88, at 38; see also TAKKENBERG, *supra* note 1, at 234.

253. Quigley, *supra* note 113, at 200 (arguing that the United Nations’ practice has been to discourage invocation of security considerations to evade an obligation to repatriate).

254. See *id.* at 200-01.

255. *Universal Declaration*, *supra* note 247, art. 29(3).

inter alia, states in Article 1(1) the purpose of 'maintain[ing] international peace and security,' a goal that would arguably not be served by mass repatriation of hostile Palestinians to Israel."²⁵⁶ In summary, the non-binding nature of the Universal Declaration, the textual uncertainty in the language of Article 13, and the limitations placed on obligations by paragraphs 2 and 3 of Article 29 create much ambiguity with regard to the existence of a Palestinian right of return under the Universal Declaration.

D. International Covenant on Civil and Political Rights

The right of return also may be embodied in the International Covenant on Civil and Political Rights of 1966 ("International Covenant"). Article 12, paragraph 4 reads: "No one shall be arbitrarily deprived of the right to enter his own country."²⁵⁷ Article 12, paragraph 4 appears to lack a limitations clause.²⁵⁸ "According to the legislative history of Article 12 of the Covenant, its drafters felt that derogation clauses, similar to those in the Universal Declaration, should only apply to the right to leave and that the right to return should not be subject to the same limitations."²⁵⁹

Nevertheless, the International Covenant is subject to a host of interpretational issues. First, there is a question as to whether the Palestinian refugees were "arbitrarily" deprived of their right to return. Israel may claim that the Palestinian refugees were not "arbitrarily" deprived of entering Israel, since allowing return would threaten Israel's national security. In response to this argument, Quigley claims that the term "arbitrarily" has a narrow meaning; he further suggests that its purpose is to require a state to grant entry, with the exception of nationals who had been exiled.²⁶⁰ According to Quigley, "[M]any states deemed exile unlawful as a penal sanction and were unwilling to provide expressly that exile as a penal sanction was permitted [L]anguage was sought to accommodate the use of exile as a penal sanction but without saying so directly."²⁶¹ However, this is only one interpretation, which is based on an assumption. A 1964 United Nations study offers a different definition, although it predates the adoption of the Covenant:

[T]he 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

256. Weiner, *supra* note 88, at 39.

257. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 12(4).

258. *See id.*

259. TAKKENBERG, *supra* note 1, at 235.

260. *See* Quigley, *supra* note 113, at 202.

261. *Id.*

(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.²⁶²

Hence, the exact meaning of the term “arbitrarily” in Article 12, paragraph 4 is not clear.²⁶³

The second interpretational issue involves the meaning of the phrase “his own country” in Article 12, paragraph 4 of the International Covenant.²⁶⁴ Supporters of a Palestinian right of return may interpret the phrase broadly to include all persons who consider the country to be their homeland. Some scholars have advocated such an expansive interpretation of one’s “own country.”²⁶⁵ For example, one scholar reasoned that it is the *substance* of a person’s connection to the land rather than a formal grant of citizenship that is decisive in determining one’s “own country.”²⁶⁶ However, this broad interpretation is legally deficient because it does not place limits on *any* foreign person’s claim to be a national of a country with which he or she has a substantial connection. Sustaining the Israeli view, one might interpret the phrase “own country” narrowly to include only nationals of that country. Since Israel does not deem Palestinian refugees to be Israeli nationals,²⁶⁷ the argument is that Israel has never been the Palestinians’ “own country.” A counter to this argument, however, is that “a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at the discretion of government” and that “[t]he population goes with the territory.”²⁶⁸ Evidently, the phrase “own country” is quite ambiguous.

Furthermore, there is a question as to whether the emergency clause of the International Covenant applies to Israel. The emergency clause allows states to derogate from certain obligations of the International Covenant during a declared emergency.²⁶⁹ “The theory is that in certain extreme situations, a state is justified in taking measures that are not warranted in normal times.”²⁷⁰ Upon the establishment of the State of Israel in 1948, the provisional government declared a

262. TAKKENBERG, *supra* note 1, at 236 (quoting U.N. Dep’t of Economic & Social Affairs, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile at 7, U.N. Doc. E/CN.4/826/Rev.1, U.N. Sales No. 65.XIV.2 (1964)).

263. *See id.* at 235.

264. *See id.* at 236.

265. *See id.* at 236-37.

266. *See id.* at 237.

267. Quigley, *supra* note 113, at 205.

268. TAKKENBERG, *supra* note 1, at 239 (quoting PRINCIPLES OF PUBLIC INTERNATIONAL LAW 663 (I. Brownlie ed., Oxford Univ. Press 4th ed. 1990)).

269. *See* Quigley, *supra* note 113, at 202.

270. *Id.* at 202-03.

state of emergency, and that declaration continues to be in force.²⁷¹ In 1991, when Israel ratified the International Covenant, and in a formal communication to explain its emergency, it declared:

Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.²⁷²

Quigley asserts that since Israel derogated from its obligations only under Article 9 and did not mention Article 12, paragraph 4, it has not sought to justify a delay in repatriation of the displaced Palestinians on its declared emergency.²⁷³ However, merely because Israel did not expressly derogate from its obligations under Article 12, paragraph 4 in the above communication does not mean that it does not consider itself to be in a state of emergency. Indeed, it has declared itself to be in such a state, and keeping out millions of possibly hostile Palestinians may be "required by the exigencies of the situation."²⁷⁴

Additionally, Quigley argues human rights law prohibits countries from declaring an emergency for an indefinite period of time and that Israel's long-term

271. MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* 49 (1996); *see also* Quigley, *supra* note 113, at 203.

272. Quigley, *supra* note 113, at 203 (quoting Israel's declaration of Oct. 3, 1991 in *Multilateral Treaties Deposited with the Secretary-General* (status as of 31 December 1995), at 142, U.N. Doc. ST/LEG/SER.E/14 (1996)).

273. *Id.* at 203-04.

274. *Id.* at 204.

state of emergency is without parallel in contemporary international practice.²⁷⁵ However, the Palestinian-Israeli conflict is also without parallel in contemporary international history. Merely because Israel's emergency has lasted for over fifty years does not diminish its force. Considering the bloodshed that has occurred since fall 2000 and some Palestinians' persistent anti-Israeli sentiments and statements, it is not difficult to see why Israel continues to view itself as being in a state of emergency. Evidently, the interpretational questions with respect to the phrase "arbitrarily deprived of the right to enter his own country" illustrate that a Palestinian right of return to Israel is uncertain under the International Covenant. Moreover, even if the right does exist under the International Covenant, the emergency clause may make it inapplicable to Israel.

E. Fourth Geneva Convention

The final authority regarding a Palestinian right of return analyzed by this section is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"). Article 49 forbids the permanent evacuation or expulsion of occupied areas: "Individual or mass forcible transfers as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."²⁷⁶ Not surprisingly, there are conflicting views regarding the applicability of the Fourth Geneva Convention to the case of Israel and the Palestinians. Under the Palestinian view, Israel violated Article 49 when it expelled the Palestinians from the land. Quigley likewise argues that both the General Assembly and Security Council have declared Israel's "expulsion" of inhabitants from occupied territory to violate the Fourth Geneva Convention.²⁷⁷

However, in support of the Israeli view, the Convention's relevance to the Palestinian refugees and displaced persons is questionable.²⁷⁸ The Fourth Geneva Convention deals with belligerent occupation during a time of war.²⁷⁹ As Professor Justus Weiner points out, the Fourth Geneva Convention focuses on protecting civilians during war and has virtually nothing to say about resolving post-war refugee or displaced person issues.²⁸⁰ Moreover, as Weiner claims, the Israeli Supreme Court has held that the Geneva Conventions of 1949 do not automatically become part of the binding municipal law of Israel in the absence of a process of legal enactment by the Knesset, Israel's parliament.²⁸¹ Most

275. *Id.*

276. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3517, 3548, 75 U.N.T.S. 318.

277. See Quigley, *supra* note 113, at 221-22.

278. Weiner, *supra* note 88, at 40.

279. See TAKKENBERG, *supra* note 1, at 202.

280. Weiner, *supra* note 88, at 40.

281. *Id.*

importantly, the Fourth Geneva Convention does not specifically refer to a right of return. Primarily, it pertains to the issue of whether the West Bank and Gaza Strip are under belligerent occupation and subject to its provisions.²⁸²

F. Self-Determination and a Partial Right of Return

Analysis of the above international sources makes it clear that a question of Palestinian right of return is open to interpretation; the existence of such a right in international law is uncertain. Some scholars argue that the situation of the Palestinian refugees should be viewed as an issue related to self-determination rather than a right of return.²⁸³ Whether self-determination constitutes a "right" or a "principle," it "has become increasingly important, and it may even be argued that it has gradually overshadowed the right of return as the leading legal principle invoked by advocates of the Palestinian cause."²⁸⁴ The Palestinians recognize and support the principle of self-determination. In November 1988, the Palestinian National Council proclaimed the Palestinian Declaration of Independence.²⁸⁵ The Declaration of Independence depicts the United Nations partition plan of 1947, which was endorsed in General Assembly Resolution 181, as bestowing "international legitimacy" upon the Palestinian Arab people's claim to self-determination and sovereignty.²⁸⁶

The United Nations has been a proponent of the principle of self-determination, which is incorporated in the United Nations Charter. For example, Article 1 states that one purpose of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ."²⁸⁷ Moreover, the practice of the various United Nations organs has established the principle as a part of United Nations law, and it is depicted in numerous United Nations resolutions.²⁸⁸ The tenets behind self-determination also are evident in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.²⁸⁹

In 1969, the General Assembly began to focus on Palestinian self-determination and departed from its previous focus on the individual rights to repatriation and compensation of Palestinian refugees.²⁹⁰ General Assembly

282. See TAKKENBERG, *supra* note 1, at 205.

283. See *id.* at 239.

284. *Id.* at 250.

285. Dajani, *supra* note 16, at 57.

286. See *id.* at 58.

287. U.N. CHARTER art. 1, para. 2.

288. TAKKENBERG, *supra* note 1, at 252-53.

289. See *id.* at 255.

290. Dajani, *supra* note 16, at 42; see also Clovis Maksoud, *Autonomy and Minorities: The Status of the Kurds and the Palestinians*, 16 LOY. L.A. INT'L & COMP. L.J. 291, 294 (1994); see also TAKKENBERG, *supra* note 1, at 257.

Resolution 2535 reaffirmed “the inalienable rights of the people of Palestine.”²⁹¹ The General Assembly “thereby [] acknowledged that the Palestinians were more than stateless individuals and that their statelessness had resulted from a denial of their right to constitute themselves as a national community.”²⁹² Subsequent resolutions also recognized Palestinian self-determination.²⁹³

The principle of self-determination and the right of return are intertwined. In Resolution 3089 D, adopted in 1973, the General Assembly enunciated the relationship between the rights of self-determination and return by declaring:

[F]ull respect for and realization of the inalienable rights of the people of Palestine, particularly its right to self-determination, are indispensable for the establishment of a just and lasting peace in the Middle East, and that the enjoyment by the Palestine Arab refugees of their right to return to their homes and property . . . is indispensable . . . for the exercise by the people of Palestine of its right to self-determination.²⁹⁴

Conversely, the principle of self-determination and the right of return simultaneously may be at odds with each other. Although the United Nations supports Palestinian self-determination, an overwhelming majority of United Nations members, including two of Israel’s neighbors and the PLO, have recognized the State of Israel.²⁹⁵ “It is therefore clear that the General Assembly does not envisage Palestinian self-determination to be effectuated within the territory of the state of Israel.”²⁹⁶ Instead, the General Assembly probably envisions the *de jure* boundaries of a Palestinian state as to be determined in the future.²⁹⁷

Furthermore, the evocation of General Assembly Resolution 181 in the Palestinian Declaration of Independence “appears to represent a retroactive acceptance of the principle of dividing Palestine into two states.”²⁹⁸ Therefore, according to Dr. Clovis Maksoud, former Ambassador and Permanent Observer of the League of Arab States at the United Nations, the Palestinian Declaration “accepted, without equivocation or ambivalence, the two-state formula, with the 1967 line constituting the borders of Israel and Palestine.”²⁹⁹ Additionally,

291. Dajani, *supra* note 16, at 42; *see also* TAKKENBERG, *supra* note 1, at 257.

292. Dajani, *supra* note 16, at 42.

293. *See id.* at 43-44; *see also* TAKKENBERG, *supra* note 1, at 257-58.

294. TAKKENBERG, *supra* note 1, at 258 (quoting UNGA res. 3089 D (XXVIII), Dec. 7, 1973).

295. *See id.* at 259.

296. *Id.*

297. *See id.*

298. Dajani, *supra* note 16, at 58.

299. Maksoud, *supra* note 290, at 294.

subsequent to the adoption of the Declaration of Independence, the Palestinian National Council voted "to declare the territorial boundaries of the state of Palestine to be the West Bank (including East Jerusalem) and the Gaza Strip."³⁰⁰

Consequently, a Palestinian right of return may be a limited one. By virtue of the principle of self-determination, as outlined by the United Nations, Palestinians may achieve a partial right of return by having the ability to return to a portion of Palestine—the West Bank and Gaza Strip—rather than to Israel itself. The West Bank and Gaza Strip may be on the way to becoming a Palestinian state. At Oslo, along with formal mutual recognitions between Israel and the PLO, the two sides created a framework for long-term negotiations regarding the final status of the West Bank and Gaza Strip in the Declaration of Principles. "The Interim Agreement provides for the transfer of authority over the Palestinian population in the West Bank and Gaza Strip from Israel to the Palestinian Authority."³⁰¹

Furthermore, the PLO has consistently articulated its commitment to the establishment of a sovereign Palestinian state in the West Bank and Gaza Strip, and it has stressed the inadequacy of any proposed solutions that do not satisfy that goal.³⁰² According to Maksoud, the PLO's "recognition of Israel's right to exist was a clear disclaimer of any Palestinian territories beyond the June 1967 borders,"³⁰³ and "[s]ince the Arabs accepted U.N. Security Council Resolution 242, the Palestinian national patrimony has been confined to the West Bank, Gaza, and East Jerusalem."³⁰⁴

Therefore, it appears that the right to return to Israel itself has become, legally, a moot issue, and the focus has shifted to self-determination and a limited right of return to a portion of Palestine—the West Bank and Gaza Strip. The fact that the Declaration of Principles does not mention the right of return of the Palestinian refugees of 1948 supports this assertion. Former United States President Clinton's proposal that the Palestinians accept a limited right of return to the West Bank and Gaza provides similar support. Former Israeli Premier Barak said in an interview: "We are ready to reach a solution that would lead to the creation of a Palestinian state after the final-status negotiations and after reaching a final agreement. There will be two states living next to each other. We will be neighbours."³⁰⁵ However, Clinton and Barak are no longer in power, Israel has elected a conservative prime minister, and many Palestinians are unlikely to give up on a right of return to Israel. Nevertheless, the two sides should continue to focus on the creation of a Palestinian State in future negotiations. Without a Palestinian State, the issue of Palestinian refugees is unlikely to be resolved and peace is unlikely to be forthcoming.

300. Dajani, *supra* note 16, at 58.

301. *Id.* at 69.

302. *Id.* at 91.

303. Maksoud, *supra* note 290, at 294-95.

304. *Id.* at 294.

305. Interview with Ehud Barak, *supra* note 202.

V. CONCLUSION

Although the principle of a Palestinian return exists in various international documents, a Palestinian return to Israel *as a matter of right* is uncertain due to textual ambiguities in the international sources and the different interpretations set forth by historians, scholars, commentators, and officials. No international documents seem to legally bind Israel to repatriate Palestinians. Moreover, “[t]here is no consensus amongst legal scholars as to the applicability of the principles and provisions of international instruments concerning the right of return”³⁰⁶ As a result of conflicting views and interpretations, the issues relating to a right of return have been unresolved for over fifty years and may not be close to a final resolution, despite countless proposed “solutions.” As Weiner articulates, “[I]t is questionable whether international law in its present state of development is competent to address this intricate matter.”³⁰⁷ Presently, the prospect of a possible resolution seems most plausible in the principle of self-determination and a limited right of return to a portion of Palestine—the West Bank and Gaza Strip.

If the Palestinians are to have their own homeland, future negotiations between Israel and the Palestinians should focus on the creation of a Palestinian State in the West Bank and Gaza Strip. The true dilemma is not whether or not there is a right of return to the land that is modern-day Israel in international law sources, but whether or not the Palestinians and Israelis can forge a compromise. Even if there is a right of return in international law, and even if international law does not limit the ability of Palestinian refugees to exercise such a right, the reality is that Israel sees and will continue to see the return of hundreds of thousands, if not millions, of Palestinian refugees as a threat to its national security. As is known to the entire world, states often act contrary to international principles if they feel that it is in their security interests to do so. On the other hand, many Palestinians refuse to give up on a right to return to Israel. The challenge is not finding a solution in existing international law sources; it is formulating new law by overcoming a possible deadlock between the Palestinians and the Israelis and achieving compromise.

306. TAKKENBERG, *supra* note 1, at 249.

307. Weiner, *supra* note 88, at 43.