The Right to Return of Palestinians in
International Law

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"Tu vas me demander, poursuivit Khâli, pourquoi j'ai dit à ces gens qui étaient
là le contraire de la vérité. Vois-tu, Hassan, tous ces hommes ont encore,
accrochée à leurs murs, la clé de leur maison de Grenade. Chaque jour, ils la
regardent, et la regardant ils soupirent et prient. Chaque jour reviennent à leur
mémoire des joies, des habitudes, une fierté surtout, qu'ils ne retrouveront pas
dans l'exil. Leur seule raison de vivre, c'est de penser que bientôt, grâce au
grand sultan ou à la Providence, ils retrouveront leur maison, la couleur de ses
pierres, les odeurs de son jardin, l'eau de sa fontaine, intacts, inaltérés, comme
dans leurs rêves. Ils vivent ainsi, ilsmourront ainsi, et leurs fils après eux. Peut-
être faudra-t-il que quelqu'un ose leur apprendre à regarder la défaite dans les
yeux, ose leur expliquer que pour se relever il faut d'abord admettre qu'on est
à terre. Peut-être faudra-t-il que quelqu'un leur dise la vérité un jour. Moi-même
je n'en ai pas le courage."

Amin Maalouf, Léon l'Africain

Abstract

This article examines the question of whether Palestinian refugees and displaced persons
can claim a right to return to either or both Israel and Palestine, assuming the existence
of a Palestinian State in the territories of the West Bank and Gaza. After an historical
overview, the author first interprets the right to enter one's country enshrined in the
International Covenant on Civil and Political Rights, with particular regard to the
meaning of the term, 'his own country'. Following an examination of the travaux préparatoires
and of the concept of nationality in international law, it is argued that 'his own country'
refers not only to the country of de jure nationality, but also to the country with which
the claimant has a 'genuine link' similar to that described in the Nottebohm case. The
effect of the passage of time on the 'genuine link' is then analyzed and a set of criteria
applicable to claimants of the right to return generally is proposed. These criteria are
then applied to potential Palestinian claimants. The second part of the article focuses on
the effect of changes of sovereignty in the territories of what was Palestine on the
déjure nationality of Palestinian refugees and displaced persons, and thus on their possible claim

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of the author's masters' thesis submitted to the London School of Economics in 1995. The author
wishes to express her thanks to Professor Rosalyn Higgins for her helpful comments on earlier drafts,
and to Michael Byers for much appreciated suggestions and encouragement. The views expressed
are the author's own.
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Introduction

In September 1993, the Palestine Liberation Organization and Israel concluded a framework agreement for the establishment of a Palestinian autonomous authority in the Gaza Strip and Jericho. While this was a tremendous achievement given the history of the parties, a number of key contentious issues were left out of the agreement. Notable among these is the question of the rights, if any, of the Palestinians of the 'diaspora', and in particular of Palestinian refugees. The agreement effectively postpones the resolution of the refugee issue by delegating it to future negotiations which are to lead to 'a permanent settlement based on Security Council resolutions 242 and 338'. This reference to resolutions 242 and 338 commits the parties to no more than an obligation to negotiate in good faith a permanent agreement with respect to the refugee problem. In contrast, in their recent bilateral agreements, Israel and Jordan have adopted a more principled approach to the problem of refugees and displaced persons by committing themselves to negotiations aimed at resolving the problem 'in accordance with international law'. This article similarly proposes a principled approach to the refugee question based on international law.

The Palestinian refugee problem has been described as 'one of the most intractable', and 'a focal point in the conflict between Israel and its Arab neighbours'. The proposed solutions have centred around

1 Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, Government of Israel-Palestine Liberation Organization, [1993] ILM 1525 (hereinafter the 1993 DOP), also reproduced in The Palestinian-Israelis Peace Agreement, A Documentary Record (Washington: Institute of Palestine Studies, 1994) (hereinafter Peace Agreement) at 117. Since then, the parties have negotiated several interim agreements setting up self-government arrangements in the West Bank and Gaza pending a permanent settlement to be achieved through 'permanent status negotiations', which were due to begin in May 1996.

2 This commitment to the implementation of resolution 242 (22 Nov. 1967: 33 ILM 1460) and of resolution 338 (22 Oct. 1973: 12 ILM 1537) is reaffirmed in the preamble of the Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area, 4 May 1994: 33 ILM 622, which deals with interim self-government arrangements in partial fulfilment of art. VII of the 1993 DOP. Note that resolutions 242 and 338 also serve as the basis for peace in the Camp David Accords: see 17 ILM 1466 (1978) and 18 ILM 362 (1979).

3 With respect to refugees, resolution 242 merely '[a]ffirms further the necessity ... for achieving a just settlement of the refugee problem', while the relevant portion of resolution 338 '[c]alls upon the parties concerned to start ... the implementation [of Resolution 242] in all its parts'.

4 See the first and fourth 'components' of the Israel-Jordan Common Agenda for the Bilateral Peace Negotiations, 14 Sept. 1993: 32 ILM 1522, and art. 8 of the Treaty of Peace Between the Hashemite Kingdom of Jordan and the State of Israel, 26 Oct. 1994: 34 ILM 43. This reference to international law in relation to refugees is a first as far as any of the Arab-Israeli agreements are concerned.

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repatriation, compensation and resettlement. This article focuses on the first solution, specifically on whether Palestinians of the diaspora can claim a right to return to what was formerly Palestine.

Some authors assert that the question of the right to return of Palestinian refugees is an exceptional 'political problem' falling outside the realm of the international law of freedom of movement. The Palestinian refugee question, however, is no more political and no less legal than the issue of repatriation of Hutu refugees to Rwanda or that of Bosnian refugees to Bosnia, to name but a few. It no less deserves the application of international law, and the level of political controversy surrounding the origins and rights of the Palestinian diaspora is irrelevant to that point. Thus, the putative right to return of Palestinians will be approached from the perspective of international law, and not that of political feasibility, although this factor may determine the practical outcome of the problem.

The apparent chasm between theory and practice belies the importance of a principled approach to this precedent-setting problem. If the Palestinian refugees 'have suffered displacement longer than any other refugee group of comparable size', then the application of international standards to the question of their return will, at the very least, provide a case-study which may contribute to the further development of principles and norms of international law applicable to similar refugee problems.

This article begins by determining who are the potential bearers of the right to return and from which State they can claim such a right. These threshold questions in turn require a brief review of events relating to the origin of the Palestinian refugee problem. Given limitations of space, the debate will be circumscribed by imposing definitions of terms, of

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potential categories of claimants, and of the States to which they may claim a right to return.

The question of a right to return of Palestinian refugees can be approached from several legal angles. This article focuses on the right to return as protected by international human rights law. International refugee law and international humanitarian law are used, but only so far as the principles developed therein respecting the repatriation of refugees can assist in the interpretation of the right to return in international human rights law.

This article next examines the right to return in customary international law and in the international human rights instruments applying in the Middle East. It then attempts to flesh out the substantive content of the right to return as enshrined in article 12(4) of the International Covenant on Civil and Political Rights (ICCPR66), particularly the meaning of the term 'his own country'. By definition, this term implies a bond between the claimant and the State to which he or she is claiming the right to return, and in this connection, the importance of the concept of nationality is apparent. The more restrictive articulation of the right to return confines the right to the State-national relationship. Other interpretations extend the right to permanent residents or to persons having a close connection to the country in question. In this context, the concept of nationality in classical international law is examined with a view to interpreting the right to return, possible criteria for such a right within the meaning of article 12(4) are considered, as is the passage of time.

Over the last 80 years, the territory of Palestine has been subjected to a succession of sovereigns, and this may have altered the nationality of former citizens of Palestine. Thus, the effect of State succession on the nationality of Palestinians is also examined with a view to determining whether Palestinian refugees who were formerly citizens of Palestine may claim a right to return to a country on the ground that they are in fact nationals of that country. The article concludes by applying the criteria and principles thus identified to potential Palestinian claimants of the right to return.

1. Circumscribing the issue

1.1 Brief history of the Palestinian refugee problem

Until the defeat of the Turks at the close of the First World War, Palestine and its inhabitants, Muslim, Christian and Jewish, were under Ottoman

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10 In this article, the terms 'nationality' and 'citizenship' are used synonymously. See generally C. Batchelor, 'Stateless Persons: Some Gaps in International Protection', 7 IJRL 232 (1995).
rule and had been for the previous five centuries. Palestine was then occupied by the British from 1918 to 1922, when the League of Nations assigned a Mandate for its administration to Great Britain. Palestine under the British Mandate was characterised by outbursts of violence between the Jewish and Arab populations, owing to conflicting national aspirations and the pressure of rapidly increasing Jewish immigration on the Arab population.

On 29 November 1947, the UN General Assembly adopted resolution 181 recommending the termination of the Mandate and the partition of Palestine into ‘independent Arab and Jewish States’ and a ‘Special International Regime for the City of Jerusalem’ under the umbrella of an economic union. It was followed by an escalation of violence between the Arab and Jewish communities. The State of Israel declared its independence on 14 May 1948 on the heels of the final withdrawal of British troops from Palestine. On the same day, full-scale war erupted between the Arabs of Palestine and neighbouring Arab States on the one hand, and the Jewish forces on the other.

The first major exodus occurred between approximately December 1947 and September 1949 as a result of the first Arab-Israeli conflict following the United Nations partition of Palestine. It is estimated that approximately 750,000 Palestinians fled their homes in the area of Palestine that was to become Israel. The vast majority fled to the Gaza Strip (Gaza, then under Egyptian occupation), the West Bank of the River Jordan (West Bank, then under Jordanian occupation), Lebanon, Jordan and Syria. The second major flight took place in 1967 with the Six Day War (the 1967 war), when approximately 500,000 Palestinians fled the West Bank and Gaza, of which over 200,000 were second-time...


13 The term ‘Arab’ is misleading when used in opposition to ‘Jew’ in that the latter term essentially refers to a religious identity and the former to an ethnic identity. In this regard, it may have been preferable to describe the conflict between the communities of Palestine as one between Jews (and even then, one must qualify this by adding ‘Zionist’ Jews) and non-Jews, although this would depart from the overwhelming practice of modern authors on the subject. To complicate matters, the term ‘Palestinian Arab’ is also misleading in that not all Palestinians are ethnically Arab. Indeed, many are of Armenian, Turkish, or Balkan ancestry, to name but a few. While bearing these distinctions in mind, this article will conform with convention and use the terms ‘Arab’ and ‘Palestinian’, as the context may require.


16 Ibid., at 297–8; The UN and the Question of Palestine, above note 11, at 7.
refugees. Most refugees fled to Jordan. The result of the 1967 war was
the military occupation by Israel of the remaining territory of mandatory
Palestine, that is, the West Bank (including East Jerusalem) and Gaza,
as well as the Syrian Golan Heights, which continues to this day, subject
to limited Palestinian autonomy over the Gaza and Jericho Area.

In addressing the question of the right to return of Palestinians in
international law, some authors have deemed relevant the immediate
causes or motivations of their flight. The existence of the right to return,
however, is not conditional on involuntary departure from one’s country.
Whether the Palestinians left their country of their own volition or against
their will is of no relevance to the issue of whether they can claim a right
to return pursuant to the international law of freedom of movement,
examined below. Where the causes of flight may be relevant is in the
determination of whether the Palestinian exoduses of 1948 and 1967
amount to deliberate ‘mass expulsion’ or a ‘population transfer’ prohibited
by international law, a question which is beyond the scope of this article.

17 See The UN and the Question of Palestine, above note 11, at 27; L. Takkenberg, ‘The Protection
18 The term ‘mandatory Palestine’ will be used throughout this article to refer to the whole
of the territory of Palestine, as delimited by the League of Nations Mandate.
19 See for example K.R. Radley, ‘The Palestinian Refugees: The Right to Return in International
20 With respect to the causes of flight, the United Nations Mediator for Palestine reported in
1948 that ‘[t]he exodus of Palestinian Arabs resulted from panic created by fighting in their
communities, by rumours concerning real or alleged acts of terrorism, or expulsion’: Bernadotte
Report, above note 6, at 13–14. For a study of the immediate causes of the Palestinian exodus of
1948 based on declassified British and Israeli documents, see Morris, above note 15. Morris concludes,
at 286, that ‘[t]he Palestinian refugee problem was born of war, not by design, Jewish or Arab. It
was largely a by-product of Arab and Jewish fears and of the protracted, bitter fighting that
characterised the first Israeli-Arab war; in smaller part, it was the deliberate creation of Jewish and
Arab military commanders and politicians’.
21 Mass expulsion is prohibited by customary international law when practised in an arbitrary or
discriminatory fashion, that is, in the absence of due process or when aimed at a particular group
of persons. While universal human rights instruments do not expressly prohibit mass expulsion, this
practice is clearly contrary to many of the provisions of the UDHR and the ICCPR, notably those
prohibiting arbitrariness and discrimination, protecting the right to life, liberty and security of the
person, and prohibiting inhuman and degrading treatment and arbitrary exile. So far as mass
population transfers create a burden on the receiving State, which under international law is under
no obligation to allow entry to aliens on its soil, they can also amount to a violation of the receiving
State’s territorial sovereignty. See generally J.-M. Henckaerts, Mass Expulsion in Modern International
Cleansing, and the International Criminal Tribunal for the Former Yugoslavia’, 6 Criminal Law
of Population Transfers and the Application of Emerging International Norms in the Palestinian
and Transfer’, in Encyclopedia of Public International Law, vol. 8 (Amsterdam, Elsevier Science
1.2 Definition and description

Today, there are over six million Palestinians worldwide. Over two and a half million live within the borders of mandatory Palestine, in either the West Bank (including East Jerusalem), Gaza, or Israel proper. At least two million Palestinians live in Jordan, and this figure includes the 300,000 who were forced out of Kuwait following the Gulf War. Approximately 400,000 Palestinians reside in Lebanon, and 350,000 in Syria. Several hundred thousand still live in the Gulf States, most of them in Saudi Arabia, while many more are spread throughout the Middle East, with substantial numbers in Egypt and Iraq. The rest are spread throughout the world.

The term 'refugee' is used in this article in its broadest sense to describe a person who has been compelled to leave his or her country of origin as a result of the conditions in that country, either by reason of the direct, deliberate action of the authorities in the country of origin (for example, expulsion, exile, refusal to readmit), or through the indirect, unintentional action of the authorities (for example, armed conflict, internal disturbances). As such, the term 'refugee' is used synonymously with involuntary 'exile'. Thus, this definition is not restricted to the three million Palestinian refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). It also is not to be confused with those refugees within the limited competence of the United Nations High Commissioner for Refugees (UNHCR), that is, persons who can show that they have fled their country of origin owing to a well-founded fear of persecution because of their race, religion, nationality, membership of a particular social group or political opinion.

22 The term 'Palestinian' can be said to refer to 'Arab inhabitants of mandatory Palestine or their descendants': Peretz, above note 5, at 11.

23 Ibid., at 16.


25 Report of the Commissioner-General of the United Nations Relief Works Agency for Palestine Refugees in the Near East — 1 July 1993–30 June 1994, UN GAOR, 49th Sess., Supp. 13, UN doc. A/49/13 (1994) at 10. UNRWA defines the 'Palestine refugee' for its purposes as including 'a person whose normal residence was Palestine for a minimum of two years preceding the conflict in 1948, and who, as a result of this conflict, lost both his home and his means of livelihood and took refuge in 1948 in one of the countries where UNRWA provides relief [that is, Lebanon, Syria, Jordan, West Bank and Gaza]. Refugees within this definition and the direct descendants of such refugees are eligible for Agency assistance if they are: registered with UNRWA; living in the area of UNRWA operations; and in need': UN Relief Works Agency for Palestine Refugees in the Near East, UNRWA 1950–1990: Serving Palestinian Refugees (Vienna, April 1990) (Mimeo.) at 6.

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Most potential claimants of a right to return consist of Palestinians who took flight from war, notably the wars of 1948 and 1967. Others are habitual residents of the West Bank and Gaza who were temporarily abroad during the 1967 war, usually for purposes of work or study.27 Still others are individuals who have been forcibly exiled or 'deported' from the territories occupied by Israel since the 1967 war.28 All these Palestinians are included in this article's broad definition of 'refugees'. In the analysis that follows, the existence of a sovereign Palestinian State on the territories occupied by Israel since 1967, that is, the West Bank and Gaza, will be assumed. Accordingly, the putative Palestinian returnee will have a choice to claim against the State of Israel or against the State of Palestine. Thus, this article will not deal with a potential return to occupied territories.

2. The right to return in international law29 and its application to Palestinian refugees

2.1 Preliminary remarks

Freedom of movement comprises two main aspects: an internal aspect, meaning freedom of movement within a country; and an external aspect, meaning freedom of movement between States.30 The latter aspect is


29 International human rights instruments alternately refer to ‘the right to return’ or to ‘the right to enter’ one’s country. In international refugee law and international humanitarian law, the term used is ‘repatriation'. For the purposes of the following discussion, this article will use the term ‘right to return’, unless the context dictates otherwise.

30 See Jagerskiold, above note 7, at 166.
usually referred to as the right to leave one's country, either temporarily or permanently, and to enter or return to one's country. It is said to be special in that 'unlike many other human rights and freedoms, its exercise does not produce effects only within a single State, but often affects at least two communities, that of the country to be left and that of the State to which ingress is sought'. As will be seen, this raises questions concerning State sovereignty and State responsibility in connection with the transboundary movement of persons.

While the right to leave and to return are closely connected, in that the existence of one allows for the effective exercise of the other, they respectively respond to different needs of the individuals invoking them. The person leaving his or her country may be doing so out of a desire to travel, to emigrate, or to seek refuge. The person seeking to return to his or her country is usually motivated by a desire to return home, to the place where he or she belongs, to his or her roots. This 'natural desire for a base or a homeland' has been said to demonstrate the 'logical connection' of freedom of movement with the right to a nationality, and in this sense the right to return is closely connected with the legal concept of nationality.

In the case of Palestinian refugees, as for example in the case of persons fleeing Yugoslavian breakaway republics, the determination of a right to return is complicated by the severance of the State-national bond brought about by a change of borders and sovereign affecting the territory of origin. This begs the question, whether the 'country' to which an individual

31 Ibid., 177 and 180.
33 See for example the motivation behind the Lebanese amendment to the draft of paragraph 2 of art. 13 of the Universal Declaration on Human Rights, UNGA res. 217A(III), UN doc. A/810 (1948) 71 (hereinafter UDHR48), whereby the draft text reading 'Everyone has the right to leave any country including his own' was supplemented with the phrase 'and to return to his country'. The Lebanese representative stated that 'the right to leave a country, already sanctioned in the article, would be strengthened by the assurance of the right to return': J.D. Ingles, Study of Discrimination in Respect of the Right of Everyone to Leave any Country including His Own, and to Return to His Country (New York, 1963) (UN doc. E/CN 4/Sub. 2/229/Rev. 1), at 87. See also R. Higgins, 'The right in international law of an individual to enter, stay in and leave a country' (1973), 49 International Affairs at 342.
34 Hannum, above note 7, at 46–56.
37 See Higgins, International Affairs, above note 33, at 342: 'When individuals claim human rights relating to freedom of movement, they are referring to the same facts and situations that states are concerned with when they assert jurisdiction over their own nationals ...' On the relevance of the concept of nationality to the right to return, see subsection 2.4.3 below.

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is entitled to return is the State of which one holds formal nationality, or whether it connotes a link to a territory or land regardless of nationality. This question will be examined in detail later.

The question of the right to return of Palestinians raises prima facie difficulties not so much because of its political nature, as its practical implementation. In discussing the problems associated with the repatriation of refugees generally, one author rightly observes that:

\[\text{[t]he right to return, no matter how justified in principle, may be impractical in execution when the causes of the original refugee flow remain. Even defining the country of origin may be a problem when boundaries and regimes have changed; the predominant view is that the right of return applies to those who have been citizens or permanent residents of a country, but not to others. Other complications include continuing states of war, \textit{de facto} population exchanges, and questions of national loyalty.}\]

This remark is of direct relevance to the potential repatriation of Palestinian refugees, for there is a problem in defining their country of origin, the boundaries and regimes of which have most definitely changed since the main flight of 1948. Until recently, it could be said that there was a 'continuing state of war' between Israel and its Arab neighbours, rendering the repatriation of refugees difficult, if not impossible. The mass movement of Palestinians in 1948 from the territories which are now Israel and from the Occupied Territories in 1967, the massive immigration of Jews to Israel and their settlement on Palestinian lands and property, and the large scale settlement of Israelis in the Occupied Territories could be deemed a \textit{de facto} population exchange. Finally, the repatriation of Palestinian refugees raises 'questions of national loyalty' of all parties involved.

Thus, the central question to be resolved with respect to a Palestinian right to return is: Return to which country? Has Palestine, the Palestinian's country of origin, been so transformed that it cannot be said to exist as his or her 'own country'?

### 2.2 Collective dimension of the Palestinian right to return

The question of the right to return of Palestinians is further complicated by its collective or 'national' dimension, as manifested by its inextricable link with, among others, the right of self-determination of the Palestinian

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38 See above text accompanying note 7.
people. One view is that the restoration of the right to return is a precondition to the exercise of the right to self-determination. Another is that the realization of the right to self-determination will bring about that of the right to return. The question of which right will pave the way to the other will in practice be determined by future political developments. Evidently, the exercise of the right to self-determination before the repatriation of Palestinians of the diaspora would exclude the latter, as the right would in principle attach only to the population of the territories in question. The question of the right to return of Palestinians nevertheless merits analysis on its own, bearing in mind that its collective dimension ultimately makes this analysis unsatisfactory. For the purposes of this article, the right of return of the Palestinians must be approached as an individual right, supported by an important collective dimension.

Some authors have sought to remove the Palestinian refugee issue from the realm of the international law of freedom of movement precisely because of its collective dimension. In particular, Hannum argues that mass movements of persons are not covered by the freedom of movement provisions of ICCPR and that:

[the expulsion or flight of large numbers of persons from disputed territory is more appropriately viewed as an issue related to self-determination or national sovereignty, rather than forced into the constraints of the much more narrow question of whether or not there exists a right of entry or return. One must in particular query whether events such as the expulsion of Greeks and Armenians from Turkey, ethnic Germans from eastern Europe, Arabs from Israel, or Lithuanians and others from the Baltic states, should be judged by subsequent human rights standards, despite the trauma and destruction that inevitably accompany such mass movements.]

A similar view is expressed by Jagerskiold, on the basis that the right to enter one's own country 'is intended to apply to individuals asserting an individual right' and 'was not intended to address the claims of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population'.

42 The Right to Return, above note 40, at 1.
43 C.L.C. Mubanga-Chipoya, 'Analysis of the current trends and developments regarding the right to leave any country including one’s own, and to return to one’s own country, and some other rights or considerations arising therefrom', UN ESC, Commission on Human Rights, 40th Sess., UN doc. E/CN.4/Sub.2/1988/35 (20 Jun. 1988) at 27.
44 International Covenant on Civil and Political Rights, 19 Dec. 1966; 999 UNTS 171.
45 Hannum, above note 7, at 59 and at note 175. See also E. Benvenisti and E. Zamir, 'Private Claims to Property Rights in the Future Israeli-Palestinian Settlement', 89 AJIL 295, at 325 (1995).
46 Jagerskiold, above note 7, at 180.
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This seems to miss the point, so far as it suggests that the right of self-determination of a people and the right to return of the individual member of the ‘people’ are mutually exclusive. The implication is that the individual can only claim a right through the group. However, the fact that an individual left his or her country as part of a mass movement does not prejudice his or her rights as an individual. To subsume such an individual’s rights into those of the displaced group is contrary to the objects and purposes of human rights instruments generally and would render illusory most of the rights which they intend to protect. More persuasive is Quigley’s argument that ‘the view that large-scale displacement is excluded from the right to return is belied by international practice’, particularly the practice of United Nations organs which have consistently called for the return of refugees and displaced persons resulting from mass movement of persons across international boundaries, notably in the cases of Greek Cypriots and Afghan refugees.47

When freedom of movement is raised in the context of mass movements of persons, particularly that of mass movements of ‘populations’,48 it inevitably takes on a collective dimension. However, this does not alter the character of the right to leave and to return (or to enter) one’s country as an individual right and the need to determine the existence of the right on a case-by-case basis in accordance with the relevant criteria. The right to return within the meaning of the ICCPR66 and other human rights instruments is an individual right and is not to be applied without distinction to an entire people.49

2.3 The right to return as applicable in the Middle East

In determining the law applicable to the Middle East, and more specifically to the parties to the Arab-Israeli conflict, the rules of customary international law, if any, with respect to the right to return must first be established, and then the international instruments providing specifically for that right as apply to the region. The commitments of the parties to the Arab-Israeli accords on the refugee issue have been dealt with briefly above.50

48 As defined by de Zayas, ibid. at 438: ‘“Population” . . . refers to ethnic or religious groups of at least several thousand individuals, established over a long period of time in a particular area’.
49 R. Higgins, ‘La liberté de circulation des personnes en droit international’ in M. Flory & R. Higgins, eds., above note 35, at 19: ‘D’après la Convention on pourrait déduire que ce droit appartient plus à des individus qu’à des peuples dans leur ensemble. S’il en était ainsi, il faudrait étudier cas par cas le droit d’un individu palestinien à “retourner” en Israël et non pas appliquer ce droit sans discernement à tout un peuple’.
50 See Introduction.
2.3.1 The right to return as part of customary international law

The fact that the right to return is expressly recognized in most international human rights instruments and that the constitutions, laws and jurisprudence of many States formally recognize it, that it is expressly protected in international humanitarian law instruments, and that it is consistently referred to in resolutions of UN organs dealing with the rights of refugees generally, supports the argument that the right exists in customary international law, although its precise content is difficult to define. At the very least, State practice indicates that a resident national will not be refused the right of re-entry.

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


53 See for example art. 49, Fourth Geneva Convention of 1949 (repatriation of displaced persons ‘back to their homes’ at the end of hostilities), art. 134 of the same Convention (return of ‘all internees to their last place of residence’).

54 See for example UNGA res. 36/148, 16 Dec. 1981, creating the UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, which ‘emphasizes the right of refugees to return to their homelands ...’; UNGA res. 49/10, 3 Nov. 1994, on the Situation in Bosnia and Herzegovina: ‘Reaffirms once again the right of the refugees and displaced persons from the areas of conflict in the territory of the former Yugoslavia to return voluntarily to their homes in safety and dignity ...’; Conclusion of the Executive Committee of the High Commissioner’s Programme, 1985, No. 40 (XXXVI) Voluntary Repatriation, in which the Executive Committee reaffirms ‘(a) The basic rights of persons to return voluntarily to the country of origin ...’; Conclusions on International Protection and Related Issues, 45th Session of the UNHCR Executive Committee (Oct. 1994), General Conclusions on International Protection, at (v): ‘... calls upon countries of origin, countries of asylum, UNHCR and the international community as a whole to do everything possible to enable refugees to exercise freely their right to return home in safety and in dignity’. Higgins, International Affairs, above note 33, at 348. See also Mubanga-Chipoya, above note 43, at 18, para. 87.
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[The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations. . . .]

He based this conclusion on the following 'basic premise':

Right of repatriation

(e) The right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return.

Based on these recommendations, the General Assembly passed resolution 194(III) on 11 December 1948, in which it resolved, among others, at paragraph 11:

... that 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 and in equity, should be made good by the Governments or authorities responsible.

This paragraph has been reiterated annually in subsequent General Assembly resolutions, 'with the support of the United States and virtually every member nation of the UN except Israel'. In addition, many other UN resolutions call expressly for the right to return of Palestinian refugees. One study has explicitly posited that there may now exist in international law a specific right of return of the Palestinian people.

57 Bernadotte Report, above note 6, at 32.
58 Ibid., at 30. These conclusions were later reaffirmed by acting mediator Ralph Bunche, at a meeting of the First Committee of the General Assembly on 25 Nov. 1948, in the following terms: 'affirmation of the right of Arab refugees to return to their homes if they chose to do so, with just compensation for those who could not or would not return, or whose homes had been destroyed'; quoted in L.T. Lee, 'The Right to Compensation', above note 6, at 534.
59 Reproduced in Peace Agreements, above note 1, at 199.
60 Khalidi, above note 8, at 33. In 1993, for the first time, the US abstained from voting in favour of the resolution: N. Salam, 'Quel avenir pour les Palestiniens du Liban?' (1994), 1 Revue d'études palestiniennes (novembre-décembre) 9 at 11.
recognized by ‘the comity of nations’. At the very least, the General Assembly resolutions are declaratory of international law and do not create a ‘new’ right of return. This seems to have been the intention behind the UN Mediator on Palestine’s recommendation that the right to return of the Palestinians be ‘affirmed’. That the right to return was recognized as early as 1948 supports the argument that it has existed at least since then, and that it has been consistently reiterated thereafter supports the view that it exists in customary international law.

2.3.2 The right to return in international treaties

Israel, Jordan, Lebanon, Egypt and Syria are all parties to the ICCPR. The right to return is guaranteed by article 12(4), ‘No one shall be arbitrarily deprived of the right to enter his own country’, to which none of these States have made reservations. The said States are also parties to CERD. None has made any reservations to article 5(d)(ii) thereof, pursuant to which they undertake:

[...] to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...] (d) other civil rights, in particular;

[...] (ii) the right to leave any country, including one’s own and to return to one’s country.

In addition, article 1 of the recent Arab Declaration on the Protection of Refugees and Displaced Persons in the Arab World provides for ‘the right of individuals to leave and to return to their own countries’. Article 9 expressly provides for the right of Palestinians to return to Palestine.

62 The Right to Return, above note 40, at 7. Khalidi further comments that ‘[t]his resolution has represented the consensus of the international community on the subject since 1948’, above note 8, at 33.

63 Israel ratified on 3 Oct. 1991, Jordan on 28 May 1975, and Egypt on 14 Jan. 1982; Lebanon acceded on 3 Nov. 1972; Syria on 21 Apr. 1969. However, none has ratified the First Optional Protocol giving competence to the Human Rights Committee to hear individual complaints, nor have they issued declarations under art. 41 recognizing the competence of the Committee to hear inter-State claims.

64 Israel ratified on 3 Jan. 1979, and Egypt on 1 May 1967; Jordan acceded on 30 May 1974, Lebanon on 12 Nov. 1971, Syria on 21 Apr. 1967. However, all except Jordan have declared themselves not bound by art. 22, pursuant to which unsettled disputes between the parties shall be referred to the International Court of Justice, nor have any of them recognized the competence of the Committee on the Elimination of Racial Discrimination to hear complaints from individuals pursuant to art. 14.

65 The Declaration was issued following a seminar held in Cairo in November 1992 and attended by, among others, representatives of the Arab States and the Arab League. See K. Elmadmad, ‘An Arab Declaration on the Protection of Refugees and Displaced Persons in the Arab World: Report on the Cairo Seminar, 19 November 1992’, 6 JRS 173.
2.4 Interpretation of article 12(4) of ICCPR66

The text of article 12(4) of ICCPR66 raises several questions: What is the meaning of 'his own country'? How, if at all, does the term 'enter', compared with 'return', colour the right? How does the term 'arbitrarily' affect the right? As mentioned above, the first question is fundamental to the determination of whether Palestinians of the diaspora have a right to return, and if so, to where. The second and third questions may provide clues concerning the answer to the first.

The meaning of 'to enter' is uncontroversial. It is wider than the term 'return', in that it would apply to persons who were born outside of their 'country'. It would thus allow these persons to 'enter' their country for the first time, and the travaux préparatoires of ICCPR66 clearly support this interpretation. This is important with respect to a potential Palestinian right to return, to the extent that many of the claimants may be second and third generation refugees born outside of their 'country'. Because article 12(4) enshrines the generic 'right to return', this article will continue using that phrase in what follows, unless the context dictates otherwise.

The term 'arbitrarily' in article 12(4) is a limitation on the right to return, and implies that a State may interfere with the right to enter one's country so long as it does not do so in an arbitrary fashion, that is, in the absence of due process. As a limitation, it must be 'strictly and narrowly construed'. The right to leave a country guaranteed in article 12(2) is subject to the more elaborate restrictions of paragraph 3, which include lawful restrictions based on national security, public order, and public health or morals. A contrario, the right to return is not so restricted and the rationale behind this may have to do with the special responsibility of a State towards its nationals who, as shown below, are the primary beneficiaries of the right to return.

66 See Mubanga-Chipoya, above note 43, at 21 (para. 98); Ingles, above note 33, at 39; A.C.J. de Rouw, 'Some Aspects of the Right to Leave and to Return With Special Reference to Dutch Law and Practice' (1981), 12 Netherlands Yearbook of International Law 45 at 50.


68 On the effect of the passage of time on the right to return, see below, subsection 2.4.6.


70 Para. 2 of art. 12 of the ICCPR66 reads: 'Everyone shall be free to leave any country, including his own.'

71 Para. 3 of art. 12 of the ICCPR66 reads: 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'

72 This view is supported by the travaux préparatoires, Bossuyt, above note 67, at 262.

73 Mubanga-Chipoya, above note 43, at 51, para. 252.
It has been suggested that the term 'arbitrarily' in article 12(4) indicates that 'the right to enter one's country may be denied or restricted according to law provided that such denial or restriction is not basically incompatible with the right to personal liberty and freedom of movement'. This is to be compared with the Human Rights Committee's position on the concept of arbitrariness, whereby interference with the right should be lawful, 'should be in accordance with the provisions, aims and objectives of [ICCPR66] and should be, in any event, reasonable in the particular circumstances', which leaves less room for manoeuvre to States.

The phrase 'his own country' is slightly perplexing in that it does not lend itself to a neat legal definition. Applying the rules of construction of treaties, the 'ordinary meaning' of the words must first be determined, taken in their context and in light of the object and purpose of ICCPR66.

2.4.1 'his own country' — comparative and contextual meaning

Reference to an individual's 'country' in connection with the right to leave and return is also found in CERD65, UDHR48, and the African Charter. This is to be contrasted with the terms 'the State of which he is a national' which are used in the similar provisions of the American Declaration, the American Convention and Protocol 4 of the European Convention. The difference in wording between article 12(4) of ICCPR66 and article 3(2) of Protocol 4 of the European Convention prompted the Committee of Experts of the Council of Europe to conclude that the former is wider in scope, such that it may include stateless persons and nationals of another State who have very close ties with the country in question.

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74 Ingles, above note 33, at 39.
75 This was in the context of a General Comment on article 17 of the ICCPR66 which prohibits 'arbitrary or unlawful interference' with a person's privacy, family, home or correspondence: 'General Comment 16 (Article 17)', in General Comments adopted by the Human Rights Committee under Article 40, paragraph 4 of the International Covenant on Civil and Political Rights (up to April 1989): UN doc. CCPR/C/21/Rev.1, 19 May 1989, at 19-20.
76 Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331 (hereinafter the Vienna Convention), art. 31(1).
77 Art. 5(3)(b), reproduced above.
78 Art. 13(2): 'Everyone has the right to leave any country, including his own, and to return to his country.'
79 Art. 12(2): 'Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and public order.'
80 Art. VIII: 'Every person has the right to fix his residence within the territory of the state of which he is a national ... and not to leave it except by his own will.'
81 Art. 22(5): 'No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.'
82 Art. 3(2): 'No one shall be deprived of the right to enter the territory of the State of which he is a national.'
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A closer look at article 12 of ICCPR66 as a whole is also telling. Paragraph 1, which provides for internal freedom of movement, refers to the right of 'everyone lawfully within the territory of a State'. UDHR48 and CERD65 contain similar references to freedom of movement within the borders of the 'State'. In contrast, the provisions of these instruments which protect the right to leave and to return use the term 'country'. Assuming that ICCPR66 was drafted coherently, and that the parties intended the consistent use of language, the term 'country' would indicate something different than the 'State', arguably something wider than the State of which one is a national. In this connection, it is significant that the international human rights instruments which expressly restrict the right to leave and to return to nationals do so in reference to the 'State' and not to a 'country'.

The wording of paragraph 4, read in context and in comparison with the above-mentioned instruments, thus suggests that 'the right to enter his own country' is not restricted to 'nationals' in the formal sense of the term. If 'his own country' means more than the 'State of which he is a national', what is its precise content? This is where the interpretation becomes ambiguous, such that recourse may be had to the travaux préparatoires of ICCPR66. However, they are far from conclusive as to the precise meaning of 'one's own country'.

2.4.2 The travaux préparatoires

The draft provision of ICCPR66 dealing with the right of entry was discussed in three separate sessions of the UN Commission on Human Rights before being submitted to the 14th Session of the Third Committee of the General Assembly in 1959, where it was amended and adopted in its final version. The early drafts before the 5th (1949) and 6th (1950) sessions of the Commission referred to the right of entry into 'the country of which he is a national'. The summary of the discussions indicates that '[d]ifficulties arose in connexion with this provision concerning the right to enter one's country for States in which the right to return was governed, not by rules of nationality or citizenship, but by the idea of a permanent home'. And later, '[s]uch a formula was not satisfactory for a State which granted the right of "return" to persons who were not nationals but who had established their home in the country'. Thus, at the 8th Session (1952), '[a] compromise was reached, based on article 13, paragraph 2, of the Universal Declaration of Human Rights, by replacing the reference

84 See art. 13(1), UDHR48 and art. 5(d)(i), CERD65.
85 Art. 32 of the Vienna Convention allows for recourse to the preparatory works of a treaty as a supplementary means of interpretation in two cases: (1) in order to confirm the meaning resulting from the interpretation pursuant to article 31, or (2) to determine the meaning when the interpretation pursuant to article 31 results in a meaning which is 'ambiguous or obscure' or which is 'manifestly absurd or unreasonable'.
Kathleen Lawand

to “country of which he is a national” by the words “his own country”.86

The provision was thus presented to the Third Committee where most
of the debate centred on the acceptable limitations to the right of an
individual to enter his own country.

Significantly, some State delegates in the Third Committee raised the
question ‘regarding the meaning of the phrase “his own country”’, and
‘the view was expressed that “his own country” should be taken to mean
the country of which the individual concerned is a national or a citizen’.87

This view has been used by some authors to support their position that
article 12(4) is restricted to nationals.88 However, two points must be
stressed. First, it appears from the debates in the Third Committee
that the considerations which had induced the Commission on Human Rights
to use the words ‘his own country’ were unknown to the delegates. In
other words, members of the Third Committee were unaware of the fact
that the Commission’s text was ‘itself already the result of a compromise’,
and consequently they put forward their own interpretation of ‘his own
country’, including that expressed above.89 Secondly, a closer look at the
discussions in the Third Committee indicates that this ‘view’ was far from
unanimous.90 It was further observed that ‘his own country’ could be the
subject of various interpretations, but ‘no steps were taken to eliminate
this imprecision, from which might be inferred a tacit agreement to leave
the matter of the precise meaning of the words “one’s own country” to
future international developments’.91

The travaux préparatoires thus do not support a restriction of ‘his own
country’ to the country of which he or she is a national, but neither do
they indicate the exact content of the phrase. In any event, the application
of the rules of construction in articles 31 and 32 of the Vienna Convention
on the Law of Treaties do not permit such a restriction through the use
of the travaux préparatoires, as this interpretation would not confirm the
meaning resulting from the application of the ordinary meaning of the
terms ‘his own country’ taken in their context which indicates something
more than the State of which one is a national.

86 Bossuyt, above note 67, at 261.
87 Ibid., 262.
88 Weis, Uppsala Colloquium, above note 7, at 318; and Ingles, above note 33, at 38–9.
89 M.Y.A. Zieck, ‘Voluntary Repatriation: An Analysis of the Refugee’s Right to Return to His
difference in consideration of the subject in the Commission and in the Third Committee’, above
90 Witness the opposition of Saudi Arabia to the narrowing of the right to nationals, on the
ground that ‘to include that idea of being a national would open the way to arbitrary action and
help increase the number of refugees’: UN doc. A/C.3/SR.957, para. 25, quoted in Zieck, above
note 89, at 146.
91 Ibid., at 146, referring to UN doc. A/C.3/SR.957, para. 1. See also Mubanga-Chipoya, above
note 43, at 20, para. 93, where he notes: ‘it seems that there was a prevailing opinion in favour of
the restriction of the right to nationals’, he concludes that ‘the drafters of the provisions were not
willing to decide this question and left it to future practice and interpretation’.
2.4.3 Interpretation of 'his own country'

The Human Rights Committee has yet to offer guidance on the meaning of this phrase, but its interpretation has been the subject of considerable scholarly discourse. At a minimum, based on the travaux préparatoires and on the opinion of many jurists, the phrase 'his own country' includes, in addition to the State of which the individual is a national, the country in which he or she permanently resides. It has also been suggested that one's 'country' is to be equated with 'a country which one considers "home" and to which one is connected through history, race, religion, family, or other ties', or, as some authors have put it, with one's 'homeland'.

Another author has posited that a person's 'country' is not that of which he or she has formal nationality, but that with which he or she has a 'genuine link' within the meaning of the Nottebohm case.

The term 'his own country' implies the existence of a bond between the individual claiming the right to return and the State to which he or she is claiming the right. Accordingly, the concept of nationality, being the existence of a legal tie between the individual and the State giving rise to mutual rights and obligations, constitutes the starting point for the interpretation of 'his own country'. However, the concept of nationality in international law generates problems in the context of the right to return. Because the determination of who is a national is in principle a matter within the sole purview of a State's domestic jurisdiction, narrowing the scope of article 12(4) of ICCPR to the State of which one is a national effectively sets up the State as the final arbiter of who may benefit from its application. Such a State-centred definition would


93 See Hannum, above note 7, at 56.


defeat the object and purpose of the protection of the right to return under the ICCPR. This observation also applies to the restriction of a person’s ‘country’ to the country in which he or she has been granted the right of permanent residence to the extent that such a right is based on a formal grant of permanent residence and not on de facto permanent residence.

It might be argued that the power of a State to regulate nationality is not absolute, that it is subject to inherent limits providing sufficient protection against abuse. At the very least, the sovereignty of a State over the conferment of its nationality is limited by the sovereignty of other States. In this connection, customary international law imposes a duty on States to admit their nationals, being the corollary of the right of States to expel foreign nationals. A State must readmit its nationals, the argument goes, because to refuse readmission would be to force other States ‘to retain on their soil aliens whom they have the right to expel under international law’, thus violating their ‘territorial supremacy’. It follows from the duty of admission that States are precluded from resorting to the denationalization of nationals abroad ‘solely for the purpose of denying them readmission or to prevent their return’, as such action would amount to ‘a direct infringement of the sovereign rights of the State of residence’. These principles have been raised in the context of the admission of refugees, where it has been argued that the duty of admission forms the basis of the legal relationship between the country of refuge and the country of origin, and in this regard, ‘[t]he state of origin may choose to ignore the link of nationality and to ‘write off’ those who have fled, but this potentially involves a breach of obligation to the state of refuge and perhaps also to the international community’. In particular, in the context of the Middle-East, one author has raised the argument that ‘insofar as the refugees fled or were expelled from Palestine and are not permitted to return to their homes, [the Arab States may

\[^{99}\text{The European Court has confirmed this principle in Van Duyn v Home Office, (1974) ECR 1337 at 1351: ‘it is a principle of international law ... that a State is precluded from refusing its own nationals the right of entry or residence’.}


\[^{101}\text{P. Weis, Nationality and Statelessness in International Law (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) (hereinafter Weis, Nationality and Statelessness) at 45-7.}

\[^{102}\text{Defined as ‘deprivation of nationality by unilateral action of the State’: ibid., at 54.}

\[^{103}\text{Ibid., 57.}

\[^{104}\text{Goodwin-Gill, Voluntary Repatriation, above note 100, at 261. See also Nsereko, above note 35, at 339-40; Plender, above note 53, at 149; Hannum, above note 7, at 60-1.}
rightly protest] on the ground that they constitute a burden on the state of refuge.\textsuperscript{105}

These limits on the State's sovereignty over nationality constitute obligations between States and are not \textit{per se} invocable by an aggrieved individual. The underlying purpose of the concept of nationality in international law is the allocation of jurisdiction, and thus of responsibility, to States over individuals. International law measures the existence of such jurisdiction and responsibility through the application of a standard set of criteria as developed in the \textit{Nottebohm} case. Thus, while the rules of international law regarding nationality do not in and of themselves provide a guarantee of the individual's right under article 12(4), the criteria for the determination of nationality set out in \textit{Nottebohm} are appropriate when determining the existence of an individual's 'own country', to the extent that they provide a standard measure of the effective existence of ties between the individual and the State to which he or she claims a right to return.

It is submitted here that the term 'his own country' refers to the country of which a person has formal nationality (\textit{de jure} nationality, as recognized by municipal law) or, in the absence of formal nationality, the country with which he or she has a 'genuine' or 'effective' link as defined by the International Court of Justice in the \textit{Nottebohm} case. Here, the Court ruled that, as between States, the conferment of nationality on an individual must correspond with the factual situation of that individual, based on such factors as his or her habitual residence, centre of interests, family ties, participation in public life, and attachment shown for a given country. The Court went on to define nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'. It is the 'juridical expression of the fact that the individual upon whom it is conferred is more closely connected with the population of the conferring State than with any other State'.\textsuperscript{106}

\textbf{2.4.4 The 'genuine link' as evidence of 'his own country'}

The above-mentioned limits of international law on the State's jurisdiction with respect to nationality are based on the concept of nationality as a


\textsuperscript{106} \textit{Nottebohm} case, above note 96, at 23.
de facto nexus between the individual and the State which the latter cannot arbitrarily sever or ignore. This objective measure of the link between State and individual is precisely what is required for the purpose of interpreting 'his own country' within the meaning of article 12(4) of ICCPR. Thus, the absence of formal nationality is not to be taken at face value when determining whether a person can benefit from the right to return. Further evidence of this appears from the treatment of voluntary repatriation in international refugee law. For example, the UNHCR Executive Committee Conclusion No. 18, in dealing with the voluntary repatriation of refugees, calls upon the governments of countries of origin to provide repatriating refugees with the necessary travel documents, visas, entry permits and transportation facilities and, if refugees have lost their nationality, to arrange for such nationality to be restored in accordance with national legislation. The implication is that refugees who have 'lost' their nationality, either through denationalization or otherwise, have not thereby lost their bond with their country of origin and consequently their right to return. The government of the country of origin continues to have obligations in their regard, not only to allow repatriation, but also to restore their former nationality.

In sum, for the purposes of an individual's right to return, a fundamental distinction is to be made between nationality in municipal law and nationality in international law within the meaning of Nottebohm. The term 'country' in article 12(4) thus includes, in addition to the country of which one has formal nationality, the country of which one is a national in the sense of having a 'genuine connection', that is, a de facto national. This interpretation conforms with the object and purpose of the right to return. In the context of repatriation of refugees, it has been said that the aim of repatriation is the 're-establishment of an effective relationship between citizen and state', or the 'normalization of the relationship between the country of origin and the refugee'. The objective of return 'derives from the conception of nationality in international law, being

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107 See for example the resolutions referred to in note 55. The definitions of 'refugee' in the CSR51 and in the 1969 OAU Convention do not distinguish between nationals and non-nationals for the purposes of protection. The CSR51 provides for protection to be afforded to any person who is outside the State of his or her nationality or, if he or she has no nationality, the country of former habitual residence. The 1969 OAU Convention, art. 1(2), provides protection for a person who, due to circumstances in 'his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality' (emphasis added).

108 Executive Committee of the High Commissioner's Programme Conclusion No. 18(XXXI), Voluntary Repatriation (1980), (emphasis added). In adopting further conclusions on voluntary repatriation in its 1985 Conclusion No. 40 (XXXVI), the Executive Committee reaffirmed 'the significance of its 1980 conclusion on voluntary repatriation as reflecting basic principles of international law and practice' (emphasis added).

109 Goodwin-Gill, Voluntary Repatriation, above note 100, at 255.

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coterminous with the notions of attachment and belonging. Thus, return implies the re-establishment of a pre-existing link with the country of origin, usually evidenced by formal nationality. This is the primary purpose of the right to return in international law.

Accordingly, the right to return guaranteed by article 12(4) would prohibit the State from withdrawing its nationality from a former citizen where ‘the purpose or primary effect of the denationalization is to prevent a former citizen from returning to his country’. In such a case, not only would the State’s action amount to an ‘act aimed at the destruction of any of the rights and freedoms recognized’ in ICCPR, contrary to article 5(1), but, to the extent that it is arbitrary, it would also amount to an unlawful deprivation of the right to return to one’s country contrary to article 12(4). The prohibition against denationalization thus prevents the State from arbitrarily severing the tie with its citizen when the facts do not support such a severance. In addition, where denationalization is grounded on race or ethnic origin, it constitutes a violation of the general principles of non-discrimination in customary international law, of articles 2 and 26 of ICCPR, and article 5(d)(ii) of CERD.

2.4.5 The effect of time on the genuine link

The Nottebohm case has been said to indicate the ‘fundamental importance of the relationship between people and territory, and the implication which that has both for sovereignty and for the responsibility of the state’. In this regard, repatriation implicitly assumes that a ‘natural identity exists between people and places’. Brownlie describes the essential connection between territory and people as follows:

Territory, both socially and legally, is not to be regarded as an empty plot: territory (with obvious geographical exceptions) connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of humanity, or, if one is tolerant of the metaphor, an organism. To regard population, in the normal case, as related to particular areas of territory is ... to recognize a political reality which underlies modern territorial settlements.

This definition of the territory or the ‘country’ reveals the central difficulty

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111 Goodwin-Gill, Voluntary Repatriation, above note 100, at 270.
112 Hannum, above note 7, at 62. See also Higgins, International Affairs, above note 33, at 350, where she cautions that ‘... it is all too easy for a government to deprive a citizen of his nationality, thus depriving him of his right to return to the country of which he is a national. There is no avoiding a contextual examination of the circumstances in which nationality was lost.’
113 Hannum, above note 7. The travaux preparatoires seem to indicate that use of the terms ‘his own country’ instead of ‘country of which he is a citizen’ was also meant to avoid such situations: Plender, above note 53, at 147.
114 Goodwin-Gill, Voluntary Repatriation, above note 100, at 259.
in defining the 'country' of the Palestinians. If a territory is an 'organism' in Brownlie's analogy, then by definition it changes over time. The 'political reality' underlying the territory of what was mandatory Palestine is that the 'organism' has been transformed such that its 'population, ethnic groupings, loyalty patterns' and 'national aspirations' are a far cry from what they were when the refugees resided there, especially in those parts that have become Israel. Indeed, most of the villages and property left behind by the fleeing refugees in 1948 were either destroyed, taken over by new settlers, or otherwise transformed beyond recognition, such that they have lost their 'Arab identity'.

In this sense, the return of Palestinian refugees to their homes is made just as difficult as that of the German post-World War Two refugees and expellees to their homes in East Prussia, Pomerania or Silesia, which territories have been under Polish administration since 1945 and where two generations of Polish citizens have been born.

This is not to imply that the right to return is a form of *restitutio in integrum*, but rather to acknowledge the subjective element in the definition of one's 'country' in the sense of one's 'home and community'. In this regard, there is a gap between what the claimant, individually and in community with others, imagines as his or her country, and the reality in the country of origin which evolves and changes over time. The main criticism levelled at UNHCR's policy of voluntary repatriation of refugees is precisely that it ignores this 'temporal element'.

There is no denying that, with the passage of time, sometimes spanning several generations and bringing with it both a transformation of the country of origin and of the refugee, what may have been a momentary rupture of the 'genuine connection', of the 'social fact of attachment', may become more or less permanent. The passage of time will inevitably erode the genuine link. For the Palestinian refugees of 1967, the time differential is 28 years. For those of 1948, it is almost half a century.

Where a significant period of time has passed since the departure of the claimant from his or her country of origin, there must be taken into account the reasons for the non-exercise of return during the said period. If the reasons are due to factors beyond the control and against the will of the claimant, such factors must be weighed in the claimant's favour.

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117 Peretz, above note 5, at 74. See also Morris, above note 15, at 155ff. As early as 1948, the UN Mediator for Palestine reported that 'the vast majority of the refugees may no longer have homes to return to': Bernadotte Report, above note 6, at 14.

118 de Zayas, 'Population', above note 21, at 443.

119 See generally D. Warner, 'Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics', 7 JRLS 160 (1994). At 171, he states: 'The nostalgia for home and going back is more than just a confusion between place and home. There is a fundamental nostalgia about return itself, about preserving something that was there in the past or imagined in the past, and that cannot possibly be re-created'. See also B.S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', 5 IJRL 442, 457 (1993).
This is especially so where the State against which the claimant seeks the right to return has consistently and, assuming all other criteria are met, unjustifiably blocked the return of the claimant through arbitrary or discriminatory measures. Such a State cannot plead the absence of a genuine link due to the passage of time because in doing so, it would be pleading its own turpitude. Allowing the time factor to weigh against the claimant in such a case would result in the legitimization of the State's arbitrary or discriminatory refusal to allow the entry of the individual to his or her 'own country' in violation of article 12(4) of the ICCP.

2.4.6 Criteria for determining ‘his own country’

The determination of what is one’s ‘country’ must be based on some uniform standard of assessment applicable equally to all claimants and not dependent on the particularities of municipal laws. While formal or *de jure* nationality as recognized by municipal law will constitute prima facie evidence of one’s ‘country’, in its absence a claimant may still invoke a right to return to a country upon fulfillment of a combination of objective and subjective criteria indicating his or her close ties with the country in question and based on those developed by the International Court of Justice in *Nottebohm*. The most important of these criteria is habitual residence.\(^{120}\) They would also include property, family ties, centre of interests, attachment to the country in question, and expressed intentions for the future. What the claimant must show is that a close link based on these criteria existed in the past, that it has been arbitrarily severed, and that consequently, he or she has a right to its restoration through the right to return. It may be that a person has such a ‘genuine connection’ with more than one State.\(^{121}\) Where a claim to return is weakened by the prolonged absence of the claimant due to factors beyond his or her control, including those resulting directly or indirectly from action by the government of the country of origin, these factors will weigh in the claimant’s favour against an otherwise weakened ‘genuine link’.

As stated above, these criteria will be applied on a case-by-case basis to each Palestinian claiming a right to return. This formidable task is quite obviously beyond the scope of this article. It may even be beyond practical feasibility. However, while bearing in mind Higgins’ caution not to apply these criteria wholesale and without discrimination to a group,\(^{122}\) it can be stated generally that all Palestinians who involuntarily left their country of origin or were forced to leave had, as all refugees do...

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\(^{121}\) This attachment to more than one State can find formal expression in the existence of dual nationality.

\(^{122}\) Above, text accompanying note 49.
at the time of their departure, a genuine connection with their country of origin.

However, as mentioned above in section 2.1, the Palestinian refugees problem is compounded by the fact that the state of origin had ceased to exist in 1948. This begs the question whether the country to which a person is entitled to return includes a successor State. This issue has not been directly addressed by jurists, or by the drafters of ICCPR. It is dealt with in the next section.

3. The effect of State succession

Applying this article's general conclusions in respect of the right to return, the Palestinian claimant will be entitled to return to Israel and Palestine as successor States to mandatory Palestine, (1) if he or she is a national, in the formal sense, of either or both States, or (2) if he or she otherwise has a 'genuine connection' with either or both States. If the answer to (1) is affirmative, this would resolve the question, both under classical international law in the sense of a duty owed by Israel and/or Palestine to the host States to readmit their respective nationals, and under international human rights law in the sense of a duty owed to the individual nationals to allow them to enter their 'own country'.

During the British Mandate, all inhabitants of Palestine were 'Palestinian citizens' pursuant to the Palestine Citizenship Order 1925. The question of how their status was affected by the changes in sovereignty over Palestine after 1948 requires a review of the legal history of nationality in Palestine, and the application of the laws of State succession.

3.1 The effect of State succession on nationality

State succession arises 'when there is a definitive replacement of one state by another in respect of sovereignty over a given political territory in conformity with international law.' This also applies to the replacement of a mandate or trusteeship by a sovereign State, as was the case with Palestine. The assumption is that there is a lawful succession of States, such that belligerent occupants are excluded from the definition. Thus, the issue of the effect of State succession on nationality arises with regard to the creation of the State of Israel, but not in connection with the West

124 Brownlie, above note 116, at 654.
125 Although in such a case, what is replaced is not the 'sovereignty' of the predecessor State, but rather 'a special type of legal competence': ibid.
126 Ibid.
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Bank and Gaza, over which there has been no lawful sovereign pursuant to international law since the end of the British Mandate.  

It is generally agreed, based on the Nottebohm principle, that international law restricts a successor State from claiming certain persons as its nationals where those persons do not have a sufficient link with it.  This does not resolve the more pertinent question for the purposes of this article of whether the successor State is under a duty to confer its nationality on the nationals of the predecessor State or, put another way, ‘whether it is legitimate for a State to refuse deliberately to recognize as one of its nationals a person who in fact belongs to its population’.  The concern inherent in this question underlies Brownlie’s position that ‘the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality’.  This appears to be the predominant view, although it is not unanimous.  In support of his position, Brownlie further argues that

[s]overeignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at the discretion of the government. The population goes with the territory: on the one hand, it would be illegal, and a derogation from the grant, for the transferor to try to retain the population as its own nationals, and, on the other hand, it would be illegal for the successor to take any steps which involved attempts to avoid responsibility for conditions on the territory, for example by treating the population as de facto stateless . . .

On the other hand, O’Connell holds that there is no automatic change of nationality with the territory and that international law does not impose a duty on the successor State to grant its nationality to the inhabitants

127 Close to fifty years after the termination of the British Mandate, the people of these territories have yet to exercise their right of self-determination, although some have argued that the 1993 DOP, in addition to providing for internal self-determination, ‘is grounded upon, and logically presupposes, the idea of the final attainment by Palestinians of external self-determination’: A. Cassese, ‘The Israel-PLO Agreement and Self-Determination’, 4 EJIL 564, at 569 (1993). On Palestinian self-determination, see also Quigley, ‘Self-Determination’, above note 41.


129 H.F. Van Panhuys, The Role of Nationality in International Law (Leiden: A.W. Snyhoff, 1959) at 30. He later states, at 173, that whether there exists such a rule in international law is an ‘open question’, but that ‘[a]n affirmative answer might seem plausible’ with respect to the question as to whether a State is ‘bound to admit’ into its territory a person ‘who in fact belongs to its population’.

130 Brownlie, above note 116, at 560 and note 37, and at 663 and note 38. See also the Harvard Research Draft on Nationality (1929) 23 AJIL 26, at art. 18(a) and (b); R.Y. Jennings, The Acquisition of Territory in International Law (Manchester: Manchester University Press, 1963) at 2–3: ‘A territorial change means not just a transference of a portion of the earth’s surface and its resources from one regime to another; it usually involves, perhaps more importantly, a decisive change in the nationality, allegiance and way of life of a population’.

131 Chan, above note 120, at 11–12. See also Randelzhofer, above note 97, at 420.

of the territory in question.\textsuperscript{133} Weis also holds this view, although he acknowledges that, '\[a\]s a rule, States have conferred their nationality on the former nationals of the predecessor State, and in this regard one may say that there is, in the absence of statutory provisions of municipal law, a \textit{presumption} of international law that municipal law has this effect.'\textsuperscript{134} Crawford suggests the following reconciliation: 'in the absence of provision to the contrary, persons habitually resident in the territory of a new State automatically acquire the nationality of that State, for all international purposes, and lose their former nationality, but this is subject to a right in the new State to delimit more particularly which persons it will regard as its nationals.'\textsuperscript{135}

Chan similarly submits that upon change of sovereignty, all persons who have a genuine and effective link with the new State will automatically acquire the nationality of the new State. It is primarily within the competence of each State to determine what constitutes a genuine and effective link in the conferment of its nationality, subject to the presumption of avoidance of statelessness and the duty not to enact or apply any law on a discriminatory basis. Habitual residence will give rise to the presumption of a genuine and effective link.\textsuperscript{136}

Again, the concept of the 'genuine connection' arises.

Chan's position is very close to Brownlie's, in that it addresses his main concern, namely, that the successor State may attempt to prevent persons having a genuine connection with the territory, usually habitual residents, from becoming its nationals. This interpretation would prevent a State from exercising such an exclusion. This is not a novel interpretation, as international law already provides such safeguards in the form of limits on the State's powers with respect to the conferment of nationality in general and denationalization in particular, as shown above.\textsuperscript{137} Brownlie's view reflects the application of these limits in the context of State succession, which is the appropriate one in the present context.

In sum, the foregoing suggests that nationality passes automatically with territory, subject to the successor State's competence to regulate the conferment of its nationality, which in turn is subject to restrictions based on the duties owed to other States and on the rules against arbitrary denationalization and discrimination.

\section*{3.2 The nationality of the Palestinian and its transformation}

After the First World War, a practice arose whereby treaties effecting the transfer of territory would include express provisions regarding the
nationality of the inhabitants. Article 30 of the 1923 Treaty of Lausanne, for example, provided that Ottoman citizens who were 'habitual residents' in the territory of Palestine were to become ipso facto nationals of Palestine. In addition, article 7 of the 1922 Palestine Mandate provided for the enactment of a 'nationality law'. Accordingly, Great Britain, as Mandatory Power, enacted the Palestine Citizenship Order 1925, regulating citizenship in Palestine and declaring that all habitual residents of Palestine regardless of their religion were to become Palestinian citizens.

The citizenship of the inhabitants of Palestine was also a matter of concern to the UN following the end of the British Mandate. UN General Assembly resolution 181, which recommended the partition of Palestine into an Arab State and a Jewish State, provided that the provisional government of each of these States was to submit to the UN a 'Declaration' stating, among others, that all residents of its State, Arab and Jewish, are its citizens and enjoy full civil and political rights.

3.2.1 Nationality of Palestinians originally from the territory which is now Israel

The Jewish State was the only one that came into existence, proclaiming independence on 14 May 1948. However, it did not issue the Declaration required by resolution 181. No legislation respecting Israeli nationality was enacted until 1952. This legal vacuum gave rise in the Israeli courts to conflicting views on the effect of the termination of the Mandate upon the nationality of former citizens of Palestine who became resident in Israel. According to one view, the Palestine Citizenship Order 1925 ceased to have effect following the termination of the Mandate, so that

138 Parry, C., ed., A British Digest of International Law, Part VI, The Individu in International Law, Chapter 15, Nationality and Protection (London: Stevens & Sons, 1965) at 30, quoting from Fitzmaurice, Recueil des Cours, 1949, II, at 29–30. This practice is codified in art. 10, 1961 United Nations Convention of the Reduction of Statelessness (1975) 989 UNTS 175 (No. 14458), which further provides that in the absence of an express treaty provision on the subject, the successor State 'shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition'.

139 (24 July 1923), 28 LNTS 15.

140 Under the Ottoman Caliphate, before 1917, all inhabitants of Palestine were Ottoman citizens by virtue of the Ottoman Nationality Law of 1869: Kassim, above note 12, at 25. The Law is reproduced in Ghali, above note 123 at 335–6; see also Chapter II therein.

141 See G.J. Tomes, 'Legal Status of Arab Refugees' (1968), 33 Law and Contemporary Problems 110 at 113. Art. 7 also provides for the facilitation of the naturalization of Jewish immigrants to Palestine: see Ghali, above note 123, at 207.

142 See particularly section 1 thereof, reprinted in Ghali, above note 123, at 367 et ss. See also Kassim, above note 12.

143 See above note 15.

144 The following clause was to appear in the Declaration: 'Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights.'
Palestinian citizenship no longer existed, and all inhabitants of what became Israel were stateless. The other view was expressed as follows:

... the point of view according to which there are no Israel nationals is not compatible with public international law. The prevailing view [based on Oppenheim, Schwarzenberger, and Lauterpacht] is that, in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitant of the ceding State becomes automatically a national of the receiving State ... If that is the case, is it possible to say that the inhabitants of part of a State which is transformed into an independent State are not ipso facto transformed into the nationals of that State? So long as no law has been enacted providing otherwise ... every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals — a phenomenon the existence of which has not yet been observed.

This view of the effect of the transfer of territory on nationality accords with that expressed above, and is cited as the correct interpretation of international law by certain jurists. At least until 1952, citizens of Palestine who were habitual residents of those parts of Palestine that became Israel during the 1948 war automatically became Israeli nationals. The fact that many of them fled or were expelled and became refugees does not change this conclusion, to the extent that their departure was involuntary and that it was, from their perspective at least, temporary.

In 1952, Israel enacted its Nationality Law whereby it repealed the Palestine Citizenship Order 1925. All Jewish residents, including those born in the country, acquired Israeli citizenship automatically 'by way of return'. All non-Jewish residents who were formerly Palestinian citizens were eligible for Israeli citizenship if they met three specific conditions,
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namely, that they were in Israel on the day of its establishment, that they were residents of Israel on the day the Nationality Law came into force, and that they were registered as residents on 1 March 1952 under the Registration of Inhabitants Ordinance. The effect of these conditions was to prevent former Arab citizens or residents of Palestine who fled from their homes in 1948 from acquiring Israeli citizenship. The Supreme Court of Israel's ruling in Naqara v. Minister of the Interior meant that Palestinian refugees of the 1948 war who were formerly citizens of Palestine did not ipso facto have a right to return as Israeli nationals and could only return to Israel as immigrants. When Israel enacted its Nationality Law in 1952, it exercised its sovereign right to 'delimit more particularly which persons it would regard as its nationals'. However, international law also limited Israel's power to do so through the duty not to cause a burden on the State to whose soil former Palestine citizens had been displaced, and through the duty of non-discrimination.

According to the principles of State succession, Palestinian citizens automatically became Israeli nationals in 1948. In principle, as nationals they would have had an automatic right to return. In 1952, Israel effectively denationalized them through the Nationality Law. It can be argued that, in 'writing off' the former citizens of Palestine who fled their homes in 1948, Israel breached its obligations to the States of refuge. It is untenable in the context of international human rights law if its effect is to deprive persons having a genuine connection with Israel of their right to return. The fact that those persons being so deprived are of a particular group identifiable by reference to race or ethnic origin, namely Palestinian Arab, further makes this law discriminatory.

3.2.2 Nationality of Palestinians originally from the territory which is to become Palestine

The territories that are to become the State of Palestine, that is, the West Bank and Gaza, have a distinct history, thus raising different considerations with regard to State succession. These territories have effectively been the object of belligerent occupation since 1948. From 1948 to 1967, the West Bank was under Jordanian occupation. Jordan purported to annex the West Bank in 1950 and all non-Jewish Palestinian residents of Jordan

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151 Section 3 of the Nationality Law. See Kretzmer, above note 149, at 37; and Rosenne, above note 149, at 37ff. The 1980 reform does away with the first condition: Kretzmer, at 39.
153 Above, note 145.
154 Crawford, above note 135, at 41. See discussion in subsection 3.1 above.
155 See above, text accompanying note 100ff.
and of the West Bank were given Jordanian citizenship. From 1967 to 1988, Jordan continued to issue passports to Palestinians residing in the West Bank. As of 31 July 1988, the Jordanian Government no longer considered them to be Jordanian citizens, but citizens of ‘Palestine’, although it continued to issue them travel documents. Israel has issued identity cards to the Palestinian residents of the West Bank on which the indicated ‘nationality’ is ‘Jordanian’, and the ‘residence’, ‘Judea and Samaria’.

Since the end of the British Mandate, Palestinians in the Gaza Strip have been stateless. From 1948 to 1967, the Gaza Strip was under Egyptian administration which issued identity cards to each Palestinian inhabitant indicating that their residence was the Gaza Strip and that their nationality was ‘Palestinian’. This effectively rendered them stateless. Since 1967, Israel has issued identity cards to Palestinian residents of Gaza indicating their status as ‘Palestinian refugees’ and their nationality as ‘undefined’.

A State of Palestine on the West Bank and Gaza would be the first legitimate successor to Great Britain as mandatory of those territories, to the extent that all previous ‘sovereigns’ were belligerent occupants. Indeed, the principle is that use of force by military conquest, whether leading to occupation or annexation, does not effect a change of nationality because it does not amount to a valid change of sovereignty. This means that all present habitual residents of the West Bank and Gaza would automatically become nationals of the new State of Palestine. All former residents who can show a ‘genuine connection’ with their country of origin, applying the criteria outlined above could claim the right to return to Palestine. Thus the conferment by Jordan of its nationality on the West Bank inhabitants from 1950 to 1988 was illegal, and is of no effect on potential right of return to the State of Palestine.

The legal status of the Palestinians of the diaspora varies from host country to host country. Most notable are the situations of Jordan, Lebanon, and Syria where most of them live. Palestinians living in Jordan proper are Jordanian nationals and have in principle full rights of citizenship equal to other Jordanians. Palestinian refugees in Lebanon are issued special identity documents on which the ‘nationality’ indicated is ‘Palestinian’. They have no special rights as Palestinian refugees, but are treated like all other resident aliens. They are not issued passports.

156 See Kassim, above note 12, at 28; Destremau, above note 27, at 47.
157 Destremau, above note 27, at 48.
158 Ibid., at 43.
159 Ibid., at 44.
160 See Donner, above note 128, at 215; Randelzhofer, above note 116, at 419; Brownlie, above note 116, at 654. See also Crawford, above note 135, at 407, where he states the principle that ‘belligerent occupation does not affect the continuity of the State’.
161 Jordan is the only ‘host country’ in which there are officially no ‘Palestinians’.
but special travel documents. Like the Gaza Strip Palestinians, they are stateless. Palestinian refugees in Syria also possess identity and travel documents mentioning their status as refugees and their 'nationality' as 'Palestinian'. However, unlike the Lebanese Palestinians, they generally enjoy the same civil rights, 'or lack thereof', as Syrian nationals and benefit from a 'high degree of integration'.

In applying the criteria set out earlier to the Palestinians in the diaspora, it may be determined that many of them have a 'genuine connection' with their host States. This is especially so in Jordan and Syria where they are more 'connected' with the populations and more integrated in the life of those countries than in Lebanon. But this alone does not bar them from claiming Israel or Palestine as their 'country' to which they can return. Again, the degree of 'integration' in the host country is directly proportionate to the length of time during which their right to return was denied, and as such it should not be used against them.

Conclusion

This article has attempted to take a principled approach to a politically charged issue: whether Palestinians of the diaspora, or 'refugees', have a right to return to the State of Israel and/or to the State of Palestine, assuming the existence of the latter in what is now the West Bank and Gaza.

The right to return as a human right is by definition an individual right, and as such it must be applied to Palestinian refugees as individuals. In this regard, it must be distinguished from the collective rights, if any, of the Palestinians as a group or people, including the right of self-determination.

The right to return exists in customary international law, although its precise scope is unclear. Numerous General Assembly resolutions since 1948 show that the international community has recognized that the right to return, as customary international law, applies to Palestinian refugees.

Israel and its neighbouring States are bound by article 12(4) of ICCPR66, which provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'. The determination of who can benefit from the right to return under article 12(4) turns on the interpretation of the terms 'his own country'. In the absence of any firm meaning to be drawn from these words taken in their context, from the travaux préparatoires and from the writings of publicists, they must be interpreted in a manner consistent with the objects and purposes of ICCPR66 as a human rights

162 Destremau, above note 27, at 55-7.
163 Peretz, above note 5, at 66-7; Destremau, above note 27, at 61.
treaty. In this regard, the proper interpretation of article 12(4) is one that identifies a standard set of criteria uniformly applicable to all claimants. Such criteria was established by the International Court of Justice in the \textit{Nottebohm} case, albeit in a different context. These criteria are appropriate in defining the human right to return in that they constitute objective measurements and do not depend on the whim of States.

The right to return, as part of the human right of freedom of movement, is inextricably linked with the concept of nationality in international law. In this sense, nationals are the primary beneficiaries of the right to return. However, because the State is in principle sovereign with respect to the conferment and withdrawal of its nationality, restricting the right to return to nationals effectively sets up the State as final arbiter of who may benefit from the right. Thus, while formal nationality is prima facie evidence of one's 'own country', its absence is not to be taken at face value when determining whether a claimant has a right of return. A non-national may still claim a country as his or her 'own' by showing that he or she has a 'genuine connection' with the said country. The criteria for the determination of 'his own country' within the meaning of article 12(4) are based on those developed in the \textit{Nottebohm} case and include habitual residence, property, family ties, centre of interests, attachment to the country in question and expressed intentions for the future.

It follows from this that, for the purposes of the right to return, the withdrawal of nationality by the State, or denationalization, will be of no effect if the facts do not support such a withdrawal. Such action would amount to an arbitrary deprivation of the right to return contrary to article 12(4) of the ICCPR.\textsuperscript{66}

The passage of time transforms the identity of both the claimant and the country of origin, and consequently erodes the 'genuine connection'. In the assessment of the right to return, the reasons for the non-exercise of the right over a significant period of time must be taken into account. Where prolonged exile is due to factors beyond the control and against the will of the claimant, these will be balanced in his or her favour against the weakened 'genuine connection' with the country of origin. The factors accounting for the prolonged exile will weigh particularly heavily in the claimant's favour when they are due to the persistent and, assuming all other criteria are met, unjustifiable refusal of the State in question to allow the return. In other words, the State cannot invoke its own unlawful act to block a claim to return. On the other hand, a claimant cannot rely solely on factors beyond his or her control to support a claim to return. He or she must show some form of existing attachment to the country of origin, no matter how weak.

These criteria for the application of the right to return under article 12(4) can only be applied on a case-by-case basis to individual claimants and, accordingly, it is impossible to draw a precise conclusion as to
whether all Palestinians will succeed in claiming a right to return to Israel or to Palestine. However, the following general conclusions can be drawn with regard to the Palestinian refugees claiming against the State of Israel and the State of Palestine, respectively.

Palestinians claiming a right to return to Israel, most of whom have been living in exile for close to 50 years, may have difficulty grounding their claim on a ‘genuine connection’. This is especially so for those whose homes, property and villages have been destroyed or otherwise transformed over time, and who have no remaining family or social ties there. The ‘genuine connection’ may be even more tenuous for second- and third-generation refugees, although they would not be barred per se from claiming the right to ‘enter’ their country for the first time within the meaning of article 12(4).

However, the existence of a nexus with Israel, no matter how weak, and if only on the basis of factors such as the place of former habitual residence, the consistently expressed intention to return to such place, and the absence of substantial integration in the population of another country, may be sufficient to ground a claim to return to the extent that the transformation of the Palestinian’s ‘country’ over time can be said to be the direct result of the persistent denial by Israel of the right to return.

Palestinian refugees from the territory that is now Israel may further claim the right to return on the ground that they are in fact nationals of Israel, pursuant to the international law of State succession. The latter provides that nationality passes automatically with territory, subject to the successor State’s competence to regulate the conferment of its nationality, which in turn is limited by its duties to other States and by its duty of non-discrimination. Based on this principle, Palestinian Arabs who were habitual residents of Palestine and held Palestine citizenship before partition automatically became nationals of Israel with the creation of that State in 1948. This also applies to those Palestinian Arabs who fled or were expelled from the parts of Palestine that became Israel, and as nationals they had the right to return to Israel as their ‘country’. In 1952, Israel enacted its Nationality Law, through which these Palestinian Arab nationals were effectively denationalized. It has been argued that, in effect, this legislation constituted an arbitrary deprivation of their right to return.

The Palestinian refugees from the West Bank and Gaza have been exiled for 28 years, at the most. Most of them may be able to show a genuine connection with a Palestinian State on the West Bank and Gaza based on the above-mentioned criteria. Accordingly, their claim is much stronger than that of Palestinians displaced in 1948 and now claiming a return to Israel. This is all the more so because, despite Israeli attempts at transforming the territory through expropriation and settlements, the West Bank and Gaza have, on the whole, remained essentially Palestinian
Arab in character. Thus, a 'natural identity' can be said to exist between Palestinian claimants and the new State of Palestine.

In addition, Palestinian refugees seeking to return to the new State of Palestine may have a claim to return as nationals thereof, pursuant to the laws of State succession. This is so because since 1948, all sovereigns over the West Bank and Gaza have been illegal occupants and, for the purposes of international law, Palestinian citizenship, as validly held under the British mandate, remains in force until transferred with the lawful change of sovereignty.

Although some Palestinians may successfully claim a right to return to Israel or to the new State of Palestine, the successful implementation of the right is another matter. It will depend on the goodwill of the States involved and the recent Arab-Israeli agreements represent a first step in this direction.

The question of a Palestinian return ultimately raises conflicting interests and conflicting rights, the balancing of which must be undertaken in the name of peace. Perhaps the current development toward greater interdependence in the world may eventually lead to the increased permeability of national frontiers and allow the settlement and coexistence of these neighbours.\(^{164}\)

In the end, it may be that the only prospect for Palestinian refugees lies in the realization of Palestinian self-determination in the West Bank and Gaza leading to the establishment of a Palestinian State that, in the exercise of its sovereign right over the conferment of its nationality, would be free to legislate their return. As such, the State of Palestine may constitute the Palestinian's only true 'country'.

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\(^{164}\) de Zayas, 'Populations', above note 21.