

LEGAL ASPECTS OF THE RIGHT TO RETURN

The right to return to one's own country, including the right to return of the Palestinians, does have solid foundations in international law. The right to return to one's own country is addressed in three of the major pillars of international law, which complement and reinforce one another: human rights law, refugee law, and resolutions and declarations by international bodies and authorities that affirm or clarify rules of international law. One principle emphasized by all three is that the right to return to one's own country is to be enjoyed without discrimination of any kind. In practice, States and intergovernmental organizations do invoke the right to return as a legal right in situations of mass displacement. They also implement the right to return in situations where territories have changed hands and even when the originating facts (those that created the displacement of the populations, for example) precede the existence of the specific legal norms addressing the right to return.

It would be useful to review some of the human rights legal sources and other references on the right to return to one's own country, in order to help clarify the different dimensions of this human right, to demonstrate how and why it is internationally recognized, and to explain why it is a valid legal principle applicable to the situation of the Palestinian refugees. This memo also includes some recent examples of practice by states or intergovernmental organizations in relation to the right to return, and suggests some general principles we should take into account when venturing into the field of legal interpretation.

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Human rights law

The Universal Declaration of Human Rights (UDHR), proclaimed by the UN General Assembly in 1948, sets out the guiding principles of the human rights movement. The rights and principles enshrined in the UDHR have been elaborated and codified in subsequent legally binding international human rights treaties, as well as in national constitutions and laws. The right to return is among these first principles; the UDHR states that: “*Everyone has the right to leave any country, including his own, and to return to his country.*”¹ Although there is some controversy among scholars about the juridical status of the UDHR, no one questions its moral force. The governments represented at the first global conference on human rights, held in Iran in 1968, agreed that *The Universal Declaration of Human Rights constitutes an obligation for the members of the international community.*² Moreover, it is not contentious to say that at least some of provisions of the Declaration reflect norms that are binding on all States.³

International treaties give force to the rights proclaimed in the UDHR. Becoming a party to international human rights treaties is one of the main means by which States accept legal obligations to promote and protect the rights enumerated in the treaty. One of the most important human rights treaties is the 1966 International Covenant on Civil and Political Rights (ICCPR). It affirms the right to return, stating that: “*No one shall be arbitrarily deprived of the right to enter his own country.*”⁴

¹ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, art 13.

² Proclamation of Teheran, Proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968, paragraph 2

³ Restatement of the Law, The Foreign Relations Law of the United States, Volume 2 , #702, p.167

⁴ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March

Technically speaking, the right to return to one's own country is a component of the right to freedom of movement. It differs from other components of this right -- such as the right to leave any country including one's own B in that the right to return cannot be subject to limitations because of "*national security, public order, public health or morals or the rights and freedoms of others.*"⁵ The right to return is Aderogable@, meaning that its enjoyment can be partially suspended in cases in which there is a *public emergency which threatens the life of the nation*@. However, for this Aderogation@ to be legitimate, it cannot go beyond what is *Astrictly required by the exigencies of the situation*@, and the measures taken by the State to resolve the situation cannot be *Ainconsistent with their other obligations under international law*" or *Ainvolve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*@⁶ Briefly, under international human rights law, the right to return to one's own country is a very strong right which accepts few qualifiers. Without suggesting a hierarchy of different human rights, one could say that in the ICCPR the right to return is Aweaker@ than the right to be free from torture, which cannot be derogated from even under circumstances that threaten the life of a nation,⁷ but it is Astronger@ than freedom of expression, which can be limited for reasons of national security, the rights and freedoms of others, etc.

The International Convention on the Elimination of All Forms of Racial Discrimination is another treaty that establishes legal obligations for the States parties. It says: "*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to 1/4 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.*"⁸

Israel is a State party to both of these treaties.⁹

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In becoming parties to a human rights treaty, States pledge to cooperate with the bodies that monitor the implementation of the treaty. The treaties mentioned above created bodies specifically mandated to monitor state compliance with their provisions. These bodies are the Human Rights Committee (HRC) for the ICCPR and the Committee on the Elimination of Racial Discrimination (CERD) for the respective Convention. Each Committee is composed of independent experts who are persons of high moral character and recognized competence in the field of human rights, and who are representative of different legal systems and traditions. The treaty bodies report annually to the UN General Assembly but they do not take specific instructions from any UN body or country. Under the treaties, States parties submit regular reports explaining what they have done to give effect to the rights recognized in the treaty and to guarantee the enjoyment of these rights to the people under their jurisdiction. These reports are examined

1976. Article 12.4

⁵ Ib. Article 12.3

⁶ Ib. Article 4.1

⁷ Other rights and guarantees in the ICCPR, which cannot be derogated from are: the right to live, the prohibition of slavery, the prohibition of detention for debts, the prohibition of retroactive criminal laws, the recognition of legal personality and the freedom of thought and conscience

⁸ International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969. Art 5 (d) (I)

⁹ Israel ratified the ICCPR and the ICESCR on October 3 1991 and the International Convention on the Elimination of All Forms of Racial Discrimination on January 3 1979.

by the treaty bodies in public meetings, and at the end of the examination the committees issue their Concluding Observations, where they express their concerns and make recommendations. The committees also issue General Comments that are not addressed to any particular government. The General Comments are used by the treaty bodies to interpret and clarify the meaning and content of the treaties, when necessary. The General Comments are also a useful means of establishing jurisprudence and are agreed by consensus by the members of the monitoring bodies. The role of the treaty monitoring bodies as guardians of their respective covenants is not in doubt.

Through its General Comment 27, the Human Rights Committee has given authoritative interpretation to the language of Art 12.4 of the ICCPR, which spells out the right to return. The HRC says: “*The right to return is of the utmost importance for refugees seeking voluntary repatriation.*” In relation to disputed territories or territories that have changed hands the General Comment includes unambiguous language; it says that individuals have the right to return to their own country even when their “*country of nationality has been incorporated to another national entity whose nationality is being denied to them.*”

The General Comment also explains the meaning of the expression "his own country" and gives examples of who is entitled to return to "his own country." The HRC states that the idea of "his own country" “*is broader than the concept ‘country of his nationality’. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.*” It has been questioned whether the descendants of those who were originally expelled or fled Palestine in 1948 or 1967 also have this right. On this theme, General Comment 27 says that the wording of art 12.4 “*may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality).*”¹⁰

The position adopted by the Human Rights Committee follows the well established concept that lasting connections between individuals and territory may well exist independently of the formal determination of nationality (or lack thereof) held by the individuals and even if those affected had never before been in a particular territory. Among the criteria which should be taken into account when determining whether or not an individual is a “mere alien” in relation to a given country are: language, religion, lasting residence, and race, as well the origin of the individual’s ancestors. The idea of the “genuine and effective links” between an individual and a country was first established by the International Court of Justice in the landmark *Nottebohm* case. These links are based on “*a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties*”, and are constituted by factors such as “*the habitual residence of the individual concerned but also the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.*”¹¹

It has also been suggested that General Comments do not have the same legal value as the HRC’s individual decisions. In the case of General Comment 27, however, the relevant wording was taken *verbatim* from the legal reasoning of an individual decision in a case against Canada.¹² Moreover, General Comments are widely recognized as a valuable tool in the implementation of the binding norms of human rights treaties. In February 2000, for example, the UN General Assembly declared that it “*welcomes the continuing efforts of the Human Rights Committee and the Committee on Economic, Social and Cultural*

¹⁰ Freedom of movement (Art.12) : 02/11/99. CCPR/C/21/Rev.1/Add.9, CCPR General comment 27 paras 19 and 20.

¹¹ International Court of Justice, *Nottebohm* case (Second Phase), Judgment of 6 April 1955

¹² Charles E. Stewart vs. Canada. Communication No 538/1993 : Canada. 16/12/96.

PR/C/58/D/538/1993)

*Rights to strive for uniform standards in the implementation of the provisions of the International Covenants on Human Rights, and appeals to other bodies dealing with similar human rights questions to respect those uniform standards, as expressed in the general comments of the Committees.*¹³

A *ratione temporis* objection has also been raised. It was argued that since the events that created the Palestinian diaspora took place before Israel became a state party to these international human rights instruments (and indeed, before the instruments were even written), neither the relevant provisions of these human rights treaties, nor the authoritative interpretations made by the treaty bodies, apply to Israel. However, it is well established in international human rights law that if a “*fact persists after the entry into force of the Covenant [and a fortiori any other international human rights treaties] its effects have to be examined, without regard to their original cause,*” provided that the effects constitute human rights violations in themselves.¹⁴ This is known as the doctrine of the “continuing violation.” In the case we discuss it means that Israel could not be held retroactively accountable under the ICCPR for the expulsion or exclusion of Palestinians from their territories. However, the right of the Palestinians to return persists, and continues to be violated, and Israel is bound to respect their right to return as a result of the obligations it undertook when it became a party to the treaty in 1991. Other international human rights bodies such as the European Court of Human Rights have also endorsed the concept of a “continuing violation.”¹⁵

In July 1998 the HRC examined Israel=s report on the implementation of the ICCPR, that is, how Israel ensures the rights contained in the ICCPR to those persons subjected to its jurisdiction. The Committee addressed only partially the right to return of the Palestinians while commenting on the restrictions on freedom of movement suffered by individuals who live in the Occupied Territories: “*...the Committee notes with regret the continued impediments imposed on movement, which affect mostly Palestinians travelling in and between East Jerusalem, the Gaza Strip and the West Bank, and which have grave consequences affecting nearly all areas of Palestinian life,*” and urged Israel to respect the right to freedom of movement provided for under article 12, including the right to return to one's country.”¹⁶

In August 1996 the Committee on the Elimination of Racial Discrimination issued a General Comment dealing specifically with refugees and internally displaced persons and the right to return. The CERD emphasized that: “(a) *refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;* (b) *refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them*”¹⁷ This General Comment obviously addresses both situations of mass displacement and those in which territory has been disputed.

The CERD has also referred to the right of return in relation to specific countries. For example in 1996, when dealing with Russia=s report on the implementation of the Convention, the CERD expressed deep

¹³ See UNGA Resolution: A/RES/54/157, 8 February 2000

¹⁴ See: Sandra Lovelace v. Canada:views of the Human Rights Committee, 30 July 1981, paras 11, 13

¹⁵ European Court of Human Rights. Judgment (Merits and just satisfaction) Case of Loizidou v. Turkey. Date 18/12/1996

¹⁶ Concluding Observations of the Human Rights Committee : Israel. 18/08/98. CCPR/C/79/Add.93. para 22

¹⁷ Article 5 and refugees and displaced persons : . 23/08/96. CERD General recom. 22. General Recommendation XXII

concern at the situation of large numbers of Ingush exiles who were “*being denied by the North Ossetian authorities the right to return freely to their regions of origin*”¹⁸

In March 1998 the CERD examined the report presented by Israel. In its Concluding Observations the CERD left no doubt as to the obligations of Israel under the Convention in relation to the right to return of the Palestinians. It stated: *“The right of many Palestinians to return and possess their homes in Israel is currently denied. The State party should give high priority to remedying this situation. Those who cannot repossess their homes should be entitled to compensation.”*¹⁹

Israel is also a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰ Compliance by State parties with the provisions of the ICESCR is monitored by the Committee on Economic, Social and Cultural Rights. This Committee was established in 1985 by the (UN) Economic and Social Council (ECOSOC). It is comprised of 18 experts with recognized competence in the field of human rights, who are independent and serve in their personal capacity, not as representatives of governments. The Committee performs the same monitoring functions as the CHR and the CERD.

In December 1998 the Committee examined Israel’s report on compliance with the ICESCR. The ICESCR contains no specific provision on the right to return to one’s own country. However, the impact of the denial of the right to return to Palestinians was deemed by the Committee to have important effects on the enjoyment by the Palestinians of those rights effectively protected by the Covenant. The Committee noted *“with concern that the Law of Return, which allows any Jew from anywhere in the world to immigrate and thereby virtually automatically enjoy residence and obtain citizenship in Israel, discriminates against Palestinians in the diaspora upon whom the Government of Israel has imposed restrictive requirements which make it almost impossible to return to their land of birth.”* The Committee recommended that: *“In order to ensure respect of article 1 (2) of the Covenant and to ensure equality of treatment and non-discrimination, the Committee strongly recommends a review of re-entry policies for Palestinians who wish to re-establish their domicile in their homeland, with a view to bringing such policies level with the Law of Return as applied to Jews.”*²¹

It has also been asserted that a consistent pattern of violations of the right to return to one’s country constitutes a violation of the customary international law of human rights, which is established when states follow general and consistent practices out of a sense of legal obligation to protect human rights, whether or not those practices are reflected in legal texts. “A ‘*consistent pattern of gross violations*’ generally refers to violations of those rights that are universally accepted and that no government would admit to violating as state policy.” Among these are : “*denial of freedom to leave a country; denial of the right to return to one’s country; mass uprooting of a country’s population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial and religious discrimination. A state party to the Covenant on Civil and*

18 Concluding Observations of the Committee on the Elimination of Racial Discrimination : Russian Federation. 28/03/96. CERD/C/304/Add.5.

19 Concluding observations of the Committee on the Elimination of Racial Discrimination : Israel. 30/03/98. CERD/C/304/Add.45.

²⁰ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

21 Concluding observations of the Committee on Economic, Social and Cultural Rights : Israel. 04/12/98. E/C.12/1/Add.27.

*Political Rights is responsible even for a single, isolated violation of any of these rights; any state is liable under customary law for a consistent pattern of violations of any such right as state policy.”*²²

UN Declarations, Resolutions and Studies

— Outside of the binding human rights treaties, the right to return has been repeatedly affirmed, both in general and with specific reference to the Palestinians, by the international community. This has been done through UN General Assembly declarations and resolutions, resolutions of the UN Security Council and the UN Commission on Human Rights, or resolutions and studies by other UN bodies. These declarations and resolutions (usually referred to as “soft law”) do not have the same legal significance as treaties. They do not explicitly create binding legal obligations, such as the obligations that Israel accepted with its ratification of the ICCPR, ICERD, and ICESCR. Some have argued that UN General Assembly resolutions are a source of international law, but there is no strong evidence of that, and the UN Charter gives them the value of recommendations.²³

The political value of the UN GA resolutions, and the fact that they frequently reflect an important degree of consensus by the international community, are not in question. It is also accepted that the so-called “soft law” declarations and resolutions, while not being legally binding as such, do have a bearing on the understanding, acceptance and interpretation of international human rights law. These resolutions frequently constitute valuable precedents in the process of law making, or reflect an existing rule of international law, or help to clarify the actual reach of the law. They can also reflect the practice of states, which might eventually lead to the adoption of a legal norm, or provide evidence that a large number of states accept a particular norm as the law.

The UN General Assembly has upheld the right to return in general terms. For example, in 1996 the GA reaffirmed that “.. *voluntary repatriation, when it is feasible, is the ideal solution to refugee problems, and calls upon countries of origin, countries of asylum, the Office of the High Commissioner and the international community as a whole to do everything possible to enable refugees to exercise their right to return home in safety and dignity;*”. In the same resolution the GA reiterated “*the right of all persons to return to their country, and emphasizes in this regard the prime responsibility of countries of origin for establishing conditions that allow voluntary repatriation of refugees in safety and with dignity and, in recognition of the obligation of all States to accept the return of their nationals, calls upon all States to facilitate the return of their nationals who are not recognized as refugees;*”.²⁴

The UN General Assembly has invoked the right to return in relation to both specific countries and specific groups of people, not only in relation to the Palestinians but also in the cases of Afghanistan and Cyprus.

Referring to Afghanistan earlier this year, the GA passed a resolution that calls on all parties to the conflict “*to cease hostilities immediately*¼ *with a view to achieving a ceasefire* ¼ *thus laying the foundation for a comprehensive political solution leading to the voluntary return of displaced persons to their homes in safety and with dignity*¼”²⁵

22 Restatement of the Law, The Foreign Relations Law of the United States, Volume 2 , #702, p.167.

²³ Charter of the United Nations, art 10

²⁴ UNGA Resolution A/RES/50/152 (1996)

²⁵ UNGA Resolution A/RES/54/185 (2000)

Since 1974 the General Assembly has called for the right to return of Cypriot refugees to be recognized. This case is particularly important for the case of the Palestinians since one of the objections frequently raised is that the right to return does not apply to situations where a specific territory is disputed or has changed hands. But in relation to Cyprus the UN General Assembly called in 1974 for "*the return of all refugees to their homes in safety,*"²⁶ and in 1978 called for "*the respect of the human rights of all Cypriots and the institution of urgent measures for the voluntary return of the refugees to their homes in safety.*"²⁷ And in 1983 the General Assembly called for "*respect of the human rights and fundamental freedoms of all Cypriots, including the freedom of movement, the freedom of settlement and the right to property and the instituting of urgent measures for the voluntary return of the refugees to their homes in safety.*"²⁸

The UN General Assembly has dealt specifically and consistently with the right to return of Palestinian refugees for the last 52 years. The original General Assembly Resolution on the right to return of the Palestinians "*resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.*"²⁹

26 UNGA Resolution 3212 (1974)

27 UNGA Resolution 33/15 (1978)

28 UNGA Resolution 37/253 (1983)

²⁹ UNGA Resolution RES/194 (III) 11 December 1948. This resolution was adopted by a roll-call vote of 35 to 15, with 8 abstentions, as follows: In favour: Argentina, Australia, Belgium, Brazil, Canada, China, Colombia, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, France, Greece, Haiti, Honduras, Iceland, Liberia, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Turkey, Union of South Africa, United Kingdom, United States, Uruguay, Venezuela. Against: Afghanistan, Byelorussian SSR, Cuba, Czechoslovakia, Egypt, Iraq, Lebanon, Pakistan, Poland, Saudi Arabia, Syria, Ukrainian SSR, USSR, Yemen, Yugoslavia. Abstentions: Bolivia, Burma, Chile, Costa Rica, Guatemala, India, Iran, Mexico.

Many more General Assembly resolutions (as well as resolutions of the Commission on Human Rights) that have followed since reiterate the principle of the right to return of the Palestinians. Many of these resolutions have been highly politicized and loaded with rhetoric. Resolution 194(III), however, was not passed in that kind of atmosphere; this resolution reacted to the report of a UN Mediator (who was assassinated while promoting a settlement of the situation in Palestine) and established a Conciliation commission that would later be formed by the United States, Turkey and France. In any event, even if the successive GA resolutions use a highly politicized language, this does not hide the fact that they do represent a very wide and consistent acceptance by the international community of the right to return of the Palestinians. The only states to vote against these resolutions are Israel and the United States, and occasionally Micronesia, the Marshall Islands, and Swaziland. The Security Council has also recognized the right to return in specific situations. In the case of the Palestinians who fled in 1967 the Security Council called on Israel *“to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities;”*³⁰ The preamble of the relevant resolution considered *“that essential and inalienable human rights should be respected even during the vicissitudes of war”*.

In the case of the former Yugoslavia, the Security Council likewise affirmed *“the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community.”*³¹

In a recent resolution on the situation in Georgia, the Security Council forcefully spelled out some of the legal characteristics of the right to return, referring to the right as *“imprescriptible,” “unconditional”* and *“in accordance with international law.”* The Council expressed *“its continuing concern at the situation of refugees and displaced persons, in particular those resulting from the hostilities of May 1998, reaffirms the unacceptability of the demographic changes resulting from the conflict and the imprescriptible right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law and as set out in the Quadripartite Agreement of 4 April 1994 on the voluntary return of refugees and displaced persons (S/1994/397, annex II), and calls upon the parties to address this issue urgently by agreeing and implementing effective measures to guarantee the security of those who exercise their unconditional right to return.”*³²

The United Nations Commission on Human Rights was originally set up to draft the Universal Declaration. Its mandate expanded over the decades to include the examination of violations of human rights in specific countries, the establishment of a human rights machinery in order to monitor compliance by states of the norms of international human rights law, and the provision of technical assistance (such as the training of public officials) to those Governments that require it. There are 53 governments with representatives on the Commission; governments serve on a revolving basis and there are no permanent members. The Special Rapporteurs of the Commission are experts appointed to monitor the human rights situation in a particular country, or to look globally at a particular human rights issue and report back to the Commission. The Special Rapporteur on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia is one of these experts. In his report to the Commission in 1999 he asserted: *“The Special Rapporteur unequivocally supports the right to return to one's home of origin as a fundamental human right. At the same time, it must be recognized that large and ever-increasing numbers of refugees and displaced persons are deciding not to return home. The Special Rapporteur agrees with UNHCR that those persons who have decided not to return need help to rebuild their lives and should not be left in limbo. It is of paramount importance that the choice of residence can be exercised freely and voluntarily without any manipulation or pressures. Such free choice cannot be*

30 S/RES/237 (1967) 14 June 1967

31 S/RES/947 (1994) 30 September 1994.

32 S/RES/1255 (1999) on the situation in Georgia. 30 July 1999

exercised unless obstacles to return are removed or at least significantly reduced."³³ The situation he refers to encompasses both disputed territories and the mass displacement of population.

Besides the declarations and resolutions of the UN bodies such as the General Assembly or the Security Council, solemn declarations of the international community are deemed to have considerable weight in asserting human rights, and more so if they are adopted by consensus. The World Conference on Human Rights was held in 1993 in order to review and assess progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights in 1948. The final document of the World Conference, the Vienna Declaration and Programme of Action, was adopted by consensus by the 171 states attending the Conference. It reaffirms the principles that have evolved since the proclamation of the Universal Declaration in 1948. In relation to the right to return, the document says that "*everyone, without distinction of any kind, is entitled to the right to return to one's own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments. It expresses its appreciation to the Office of the United Nations High Commissioner for Refugees for its dedication to its task. It also expresses its appreciation to the United Nations Relief and Works Agency for Palestine Refugees in the Near East.*"³⁴

The final document of the World Conference did not deal with the situation of specific countries but the link established in the text between the non-discrimination provision ("*without distinction of any kind*") and the right to return, as well as the reference to UNRWA, make it particularly relevant to the Palestinian case.

Some recent studies conducted within the United Nations have also affirmed the right to return to one's own country when this right has been violated in situations of international or national armed conflict, territorial changes, demographic manipulation as part of the consolidation or integration of statehood, transfers for development or other purposes, state succession, etc. In some of these studies the right to return to one's own country was not the main or original subject of the work.

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³³ E/CN.4/1999/42 , 20 January 1999 Report of the Special Rapporteur on Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia; para 13

³⁴ Vienna Declaration and Programme of Action, A/CONF.157/23 , 12 July 1993

The Sub-Commission on the Promotion and Protection of Human Rights is the main subsidiary body of the Commission on Human Rights. It is composed of 26 experts acting in their personal capacities, elected by the Commission, and representing all the regions and major legal systems of the world. Their mandate includes undertaking human rights studies, and making recommendations to the Commission. The Sub-Commission is frequently the starting point for standard-setting exercises that may lead to the adoption of a declaration or even a convention in relation to a specific human rights issue. Efforts to draft a declaration on the right to freedom of movement (including the right to return) started back in 1962, and have been renewed periodically, but so far have been inconclusive. In 1992 the Subcommission asked two of its experts to prepare a study on the human rights dimensions of population transfers (in a broad sense, including the implantation of settlers) and the application of international human rights instruments to this phenomenon.³⁵ The study was finalized in 1997.³⁶

The study elaborates the different human rights dimensions to the phenomenon of population transfers. Among the rights that the study lists as being violated by populations transfers are the right to remain (or right to one's homeland) as stated in Art.49, Fourth Geneva Convention³⁷ and the right to return as part of freedom of movement (art 12.4 of the ICCPR).

As for the remedies that correspond to these violations, the study concludes that the principle that should ideally inform the provision of remedies is *“restitutio in integrum which aims, as far as possible, at eliminating the consequences of the illegality associated with particular acts such as population transfer and the implantation of settlers.”* The study goes on to say: *“A crucial aspect of this involves the right to return to the homeland or the place of original occupation in order to restore the status quo and to reverse the consequences of illegality. This right is recognized, for example, in relation to Palestinians, in the Dayton Agreement, and in the Agreement on "Deported Peoples" of the Commonwealth of Independent States; it establishes a duty on the part of the State of origin to facilitate the return of expelled populations.”*³⁸

The Sub-Commission reacted to this study by affirming *“the right of refugees and internally displaced persons to return voluntarily, in safety and dignity, to their countries of origin and, within them, to their places of origin or choice, and urges Governments to assist in and facilitate such return;”*³⁹

In 1997 the Sub-Commission passed a Resolution on the Right to Return. It reiterated *“the fundamental right of refugees and internally displaced persons to return voluntarily, in safety and dignity, to their country of origin and/or within it to their place of origin or choice;”* and emphasized *“the crucial*

³⁵ Resolution 1992/28 of 27 August 1992 of the then Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

³⁶ The original resolution requested experts Awn Shawkat Al-Khasawneh and Ribot Hatano to carry out the study. The study was finalized by Awn Shawkat Al-Khasawneh.

³⁷ Art. 49.1 of the IV Geneva Convention reads: *Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.*

³⁸ Freedom of Movement, Human rights and population transfer, Final report of the Special Rapporteur, Mr. Al-Khasawneh. E/CN.4/Sub.2/1997/23, 27 June 1997

³⁹ E/CN.4/SUB.2/RES/1997/29, 28 August 1997, “Freedom of movement and population transfers”

*importance of the right to return voluntarily to one's country or place of origin as a principal means of long-term resolution of the plight of refugees and internally displaced persons ;”.*⁴⁰

In 1998 the Sub-Commission passed a Resolution on the issue of Housing and property restitution in the context of the return of refugees and internally displaced persons. It recognized “*that the right of refugees and internally displaced persons to return freely to their homes and places of habitual residence in safety and security forms an indispensable element of national reconciliation and reconstruction and that the recognition of such rights should be included within peace agreements ending armed conflicts,*” and reaffirmed “*...the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish;*”⁴¹

Another United Nations body that has dealt incidentally with the right to return is the International Law Commission (ILC). The ILC is mandated to promote the progressive development of international law and its codification. It comprises 34 members, elected by the General Assembly for terms of five years, who serve in their personal capacities. The ILC prepares draft conventions that either restate the rules of law or formulate new standards. These drafts are dealt with by the General Assembly or by international specialized conferences. The ILC deals with universally applicable standards, rather than specific legal topics related to individual countries.

In 1999 the ILC finalized a study on the issue of State succession and its impact on the nationality of natural and legal persons, and recommended to the General Assembly the adoption of a declaration on nationality of natural persons in relation to the succession of States.

The work of the ILC focused on the nationality of individuals in relation to the succession of States, provided that that succession has taken place *Ain conformity with international law* and in particular the Charter of the United Nations.⁴² Whether individuals have a right to a specific nationality is a much thornier matter than the right to return to one's own country, from the point of view of state obligations under international law. Nevertheless, the proposed declaration makes reference to the right to return of persons who had their habitual residence in a particular territory before the succession of States took place. *AA State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.* A related Commentary to this paragraph explains that it *Addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission feels that, in light of recent experience in Eastern Europe, it was desirable to address explicitly the problem of this vulnerable group of persons.*⁴³

Refugee law and the United Nations High Commissioner for Refugees

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⁴⁰ E/CN.4/SUB.2/RES/1997/31, 28 August 1997, AThe right to return@

⁴¹ E/CN.4/SUB.2/RES/1998/26. 26 August 1998, AHousing and property restitution in the context of the return of refugees and internally displaced persons@

⁴² Report of the International Law Commission on the Work of its Fifty-first Session, 3 May-23 July 1999 (A/54/10), Chapter IV, Nationality in relation to the Succession of States. Draft Article 3.

⁴³ Report of the International Law Commission on the Work of its Fifty-first Session, 3 May-23 July 1999 (A/54/10), Chapter IV, Nationality in relation to the Succession of States. Draft Article 14.2 and its Commentary.

Refugee law has long articulated and recognized the right to return of refugees under the concept of Voluntary repatriation⁴⁴. The ability to exercise the right to return to one's own country is a precondition for voluntary repatriation. The Convention relating to the Status of Refugees says that it will cease to operate for a person who has no nationality when, among other things he is "*able to return to the country of his former habitual residence.*"⁴⁴

The United Nations High Commissioner for Refugees (UNHCR) is the main international agency providing protection and assistance to refugees all over the world, and is widely regarded as the most authoritative international voice on the rights of refugees. The Executive Committee of the UNHCR is a body formed by members from more than 50 states. Its Conclusions⁴⁵ are adopted by consensus and are regarded as authoritative in the field of refugee rights. In 1985 it adopted the following Conclusion about the right to return in the context of voluntary repatriation: "*The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed.*"⁴⁵ There is nothing in either the theory or the practice of UNHCR which suggests that this right does not exist in situations of mass displacement or when an international conflict involves a dispute over territory.

Further examples of how the UNHCR regards the human rights dimension of the concept of voluntary repatriation are given in their Handbook on Voluntary Repatriation, and UNHCR Staff Training manual. The first states: "*In international human rights law, the basic principle underlying voluntary repatriation is the right to return to one's own country,*" while the second says that "*the rights of refugees to return to their country of origin is fully recognized in international law.*"

⁴⁴ Convention relating to the Status of Refugees , Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, art 1 © 5.

⁴⁵ EXCOM Conclusions: No. 40 (XXXVI) B 1985, Voluntary Repatriation .

Senior staff members of the UNHCR frequently assert the right to return of refugees, independently of whether their plight originated in a territorial dispute. In October 1989, for example, Denis McNamara, Director of the Division of International Protection of the UNHCR, said: *“Like all refugees, Bosnians have the right to return home and to enjoy freedom of movement in their own country.”*⁴⁶

The UNHCR does not deal directly with the situation of Palestinian refugees, as assistance to Palestinian refugees is carried out by UNWRA.⁴⁷ However, recognition of the rights of Palestinian refugees to return to their homeland was given by the High Commissioner for Refugees’s reaction to the recent spate of violence in Israel and the OT. A press release issued by her office on the 10th of October 2000 said that *“unless a solution is reached to end the violence quickly she fears that it will have a destabilizing effect in the region and produce an outflow of refugees and seriously affect the right of return of the Palestinian refugees.”*⁴⁸

The practice of states and intergovernmental organizations

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Regional intergovernmental organizations dealing with human rights issues frequently assert the right to return to one’s own country.

For example, the Committee of Ministers of the Council of Europe,⁴⁹ is the highest decision-making body of the Council, composed of the ministers of foreign affairs of each member State. The Committee passes recommendations to the States parties on those issues in which joint policies have been agreed. This year, the Committee of Ministers passed a recommendation that includes a reference to the right to return: *“The right to return to one’s own country should be respected by all states. Countries of origin should treat returning persons in a dignified manner and with full respect for their human rights.”*⁵⁰

The Parliamentary Assembly of the Council of Europe has also reaffirmed the right to return. For example, in 1997 addressing the situations of Nagorno-Karabakh and Abkhazia, the Parliamentary Assembly declared that *“the right of return of refugees and displaced persons and their reintegration respecting human rights”* should be one of the guiding principles of the political settlements for both conflicts.⁵¹

The Inter-American system of human rights has dealt with the right to return since the early 1970=s. This has been done mostly in reaction to legislation that allowed for the expulsion of nationals of several Latin-

46 1998 Conference of the International Association of Refugee Law Judges, The Law and the Protection of Refugees : The Way Ahead Statement by Dennis McNamara, Ottawa 16 October 1998.

⁴⁷ The United Nations Relief and Works Agency for Palestine Refugees in the Near East, was established by UN General Assembly in 1949. It carries out direct relief for Palestine refugees. UNRWA has been in operation since 1950 and its mandate has been renewed to June 2002.

48 Ogata voices concern about the situation in the Middle East, 10 October 2000

⁴⁹ Similar initiatives and declarations by the relevant bodies exist in the Inter-American and African human rights systems.

⁵⁰ Recommendation No. R (2000) 9 of the Committee of Ministers to member states on (Adopted by the Committee of Ministers on 3 May 2000 at the 708th meeting of the Ministers = Deputies)

⁵¹ Resolution 1119 (1997) of the Parliamentary Assembly of the Council of Europe on the conflicts in Transcaucasia.

American countries, but also in relation to situations of mass displacement.⁵² For example the Inter-American Commission on Human Rights in its 1971 Annual report deplored “*the limitations on the right of persons to return to their country of residence, after having left it voluntary or involuntarily.*”⁵³

In May 2000 the African Commission on Human and People's Rights found a violation of Article 12 of the African Charter⁵⁴ in the case of thousands of black Mauritians expelled from their country in 1989 as a result of a border dispute with Senegal. The Commission recommended to the Government: “*To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation of the deprivations of the victims of the above-cited events.*”⁵⁵

International initiatives and efforts show how the practice of States, and international and regional institutions deal with the right to return in the context of transitional processes, whether territorial claims have been at stake or not. These initiatives also show that States consider the recognition of the right to return as an integral part of the solutions in transitional or post conflict situations.

The International Conference on Central American Refugees (CIREFCA) started in September 1988, when the governments of Mexico, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua - with support from UNHCR - agreed to call the first CIREFCA meeting to deal with the situation of refugees and displaced people in Central America, which was clearly a situation of mass displacement across national borders. In May 1989 all of the Central American countries and Mexico adopted the CIREFCA Plan of Action, which included the following objective: “*To respect the right of refugees to return voluntarily to their countries to resume a normal life through the promotion of voluntary repatriation as the ideal solution*”^{1/4}”

⁵² As an example of the practical implementation of the right to return in a country where there were mass expulsions followed by alienation of property, see OEA/Ser.L/V/II.83 Doc. 31, 85th Session, Inter-American Commission on Human Rights, March 12, 1993, Report on the Situation of Human Rights in Guatemala, Chapter VII: the situation of refugees and displaced persons in Guatemala and their human rights.

⁵³ Inter-American Commission on Human Rights: Ten years of activities 1971 B 1981. P.325

⁵⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc.

_CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986:

_Article 12. 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 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 order, public health or morality

⁵⁵ Thirteenth Annual Activity Report of the African Commission on Human and People's Rights 1999 - 2000,

Annex IV, page 69

The 1992 Bishkek Agreement on “Deported Peoples” of the former Soviet Union ⁵⁶ reaffirmed in its Preamble “*the right of deported persons, national minorities and peoples to the restitution of historical justice and their right to return to places of their residence at the moment of deportation.*” Article 1 of the Bishkek Agreement says: “*The Parties will guarantee to the deported persons who voluntarily return to the places of their residence the same political, economic and social rights as to the citizens who live in those areas as well as create social conditions for their settlement, access to labour, education, national, cultural and spiritual growth.*” (unofficial translation, the original copy is in Russian). There are four points of interest for the Palestinian case in this important precedent : first, the Bishkek Agreement does not distinguish between individual deportees and mass population transfers at the time of restoring the right to return; second, the situations to which the Agreement refer predate the drafting of the legal instruments that conform the present international human rights law regime; third, the recognition of the right to return extends through more than one generation since it is afforded not only to deported individuals but to the members of the deported national minorities. Finally, deported individuals and minorities are recognized the right to return to their original places of *Aresidence*®, even if many of those places of residence are no longer located in the same countries as they were in the mid 1940s.

The Dayton General Framework Agreement for Peace in Bosnia and Herzegovina of 1995⁵⁷ contains Annex 7, Agreement on Refugees and Displaced Persons. Article 1 of Chapter One, Protection, states: “*All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.*” The Dayton Agreement applies to a situation of mass movements and territorial disputes in which new states were created. Note that the place to return is *Ato their homes of origin*®, regardless of the state in which the homes of origin are now situated. The philosophy that inspires the settlement embraces the same principle of “*restitutio in integrum*” referred to in the Subcommission study mentioned above.

56 Agreement on questions related to the restitution of rights of deported persons, national minorities and peoples. Bishkek October 9 1992. This agreement was signed by the Heads of States of Armenia, Belarus, Kazakstan, Kyrgystan, Moldova, the Russian Federation, Tajikistan, Ukraine, and Uzbekistan. It has been ratified by Armenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

⁵⁷ The General Framework Agreement for Peace in Bosnia and Herzegovina, Initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995

More recently, the failed Rambouillet Agreement dealing with the clear case of mass displacement and territorial dispute in Kosovo, tried to address the right to return as part of a *restitution in integrum* approach : Article 3 said : “*The Parties recognize that all persons have the right to return to their homes. Appropriate authorities shall take all measures necessary to facilitate the safe return of persons, including issuing necessary documents. All persons shall have the right to reoccupy their real property, assert their occupancy rights in state-owned property, and recover their other property and personal possessions. The Parties shall take all measures necessary to readmit returning persons to Kosovo.*”⁵⁸

Conclusion

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No further scholarly interpretation is needed to say that the right to return of the Palestinians is grounded in international law. In the first place, the letter of the law is clear, and for this reason it should not be subject to any interpretation that runs contrary to its clear intent or that might alter its plain and fundamental meaning. Moreover, there are already a series of authoritative interpretations and specific references that acknowledge the right of return of the Palestinians. These interpretations have been made by those international expert bodies whose role is precisely that of analysing and formulating interpretations and jurisprudence on the human rights treaties.

A last word about legal interpretation in general, and the role of a human rights organization in particular. How should a human rights NGO position itself when a legal interpretation of human rights norms is required? Apart from using the classical tools of legal interpretation, we should take into account that an international human rights treaty is what the European Court of Human Rights has called a *living instrument* which must be interpreted in the light of present-day conditions.⁵⁹ This means at least, that even if the situation under consideration did not exist at the time when the specific instrument was adopted, the effects of such a situation can be assessed and judged in the light of the provisions of that human rights treaty.

In addition, when NGOs engage in legal interpretation, their aims are not necessarily the same as those of academics and judges. Human rights organizations are not only seeking to untangle the deep meaning of the law and even less trying to administer justice; they are searching for the most effective tools to advocate in favour of the protection of human rights. When such tools are available, they should not deprive themselves of the opportunity to use them.

We should promote a generous reading of a human rights provision -- one that allows the provision to maximize its protective impact -- provided the interpretation is credible, corresponds logically to the letter of the instrument and is consistent with the object and purpose of the treaty. An interpretation that the right to return does not apply to a group of people simply because there are so many of them trying to exercise the right would mean placing each one of them beyond the protection of the law. This is clearly not consistent with the object and purpose of a human rights treaty. This is also no more than a common sense approach; it does not make sense for any human rights organization to opt for legal interpretations that, if adopted by specific States, would leave an entire class or group of people unprotected or negate the essential contents of a human right. On the contrary, if we find that there is more than one plausible interpretation of a given legal provision, we should, as a matter of principle and consistent with our mission, always choose the one that is the most sympathetic to human rights. We should strive to promote the application of human rights law to the largest possible number of persons, without discrimination or distinction of any kind.

58 Interim Agreement for Peace and Self-Government in Kosovo, February 23 1999

59 European Court of Human Rights, *Soering v. the United Kingdom*. Judgment of 7 July 1989, Series A no. 161, p. 40, para. 102

