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# *The Implications of the Acquisition of a New Nationality for the Right of Return of Palestinian Refugees*

Mazen MASRI\*

City University London, United Kingdom

*Mazen.masri.1@city.ac.uk*

## **Abstract**

This article examines the legal consequences of the acquisition of a new nationality for the right of return of Palestinian refugees. The article argues that since the right of return is independent of the refugee status, the cessation of the latter should not necessarily abrogate the former. By examining the underpinnings of the right of return to one's own country, especially the link between the individual and her territory, this article argues that this link is somehow weakened in a situation of naturalization in a different country. However, this weakening of the link should not automatically lead to the deprivation of rights. The circumstances that lead refugees to leave their country of origin, the circumstances preventing their return, and the decisions made by the individuals in view of their available options should be examined.

Much of the discussion about Palestinian refugees displaced in 1948<sup>1</sup> has focused on the question of their right to return to the areas they were displaced from (what is now Israel), which they see as their homeland. Many have made the case for the right of return based on a wide range of international law instruments, and emphasized the importance for this right as a central pillar for

\* PhD, Osgoode Hall Law School, York University. Lecturer, The City Law School, City University London. I wish to thank Obiora Okafor, Susan Akram, Jeff Handmaker, Ingrid Jaradat Gassner and Sujith Xavier for their comments on earlier drafts. Any errors or omissions are mine.

<sup>1</sup> Over the past 65 years, Palestinians have become the victims of many waves of displacement as a result of wars, political instability, and Israeli state policies. According to a survey, about 7.4 million Palestinians have been forcibly displaced since 1948.. Those displaced fall within four main categories: (1) those displaced during and as a result of the 1948 war (usually referred to as Palestinian refugees or Palestine refugees); (2) those displaced during and as a result of the 1967 war (usually referred to as “displaced persons”); and (3) those who were displaced outside the area of Palestine who are neither 1967 refugees nor 1948 refugees. The fourth category refers to Internally Displaced Persons (IDP), who were internally displaced within Israel in 1948, or in the Occupied Palestinian Territories during and after the 1967 war. See BADIL, “Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012: Volume VII” (2012), online: BADIL <<http://www.badil.org/en/press-releases/142-2012/3638-press-eng-53>> [*Survey of Palestinian Refugees*]. The focus of this article is the first category, that is, Palestinians displaced during and as a result of the 1948 war. As of 2012, this amounted to 5.8 million refugees, 4.8 million of whom are registered with the United Nations Relief and Works Agency for Palestine Refugees. For detailed historical accounts on the issue of Palestinian refugees, see Benny MORRIS, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge: Cambridge University Press, 2004); Walid KHALIDI, “Why did the Palestinians Leave, Revisited” (2005) 34 *Journal of Palestine Studies* 42; Ilan PAPPE, *The Ethnic Cleansing of Palestine* (Oxford: One World, 2007). For a detailed analysis of the political underpinnings of the Israeli policies, which led to the different waves of displacement, see Nur MASALHA, *Expulsion of the Palestinians: The Concept of ‘Transfer’ in Zionist Political Thought 1882-1948* (Washington D.C.: Institute of Palestine Studies, 1992); Nur MASALHA, *A Land Without a People: Israel, Transfer and the Palestinians 1949-96* (London: Faber and Faber, 1997).

resolving the Palestinian refugee problem and achieving a peaceful resolution of the Israeli-Arab conflict.<sup>2</sup> Others have argued that such a right does not exist, or, if it does exist, it does not apply to Palestinian refugees who were displaced in 1948 because of the particularities of their situation, the context of the war which led to their flight, the subsequent developments in the region, security considerations, and the demographic changes that have happened since then.<sup>3</sup> Sixty-five years have passed since the beginning of the Palestinian refugee problem, and due to the long period of time that has elapsed, many Palestinian refugees have since acquired a new nationality. Some had acquired their nationality according to the legislation of certain states.<sup>4</sup> Acquisition of a new nationality in the case of refugees results in the cessation of refugee status according to Article 1C of the 1951 Convention Relating to the Status of Refugees (1951 Convention).<sup>5</sup> When the refugee status is terminated as a result of the acquisition of a new citizenship, the question of the implications for the right of this group of people to return to their country of origin arises. This article, thus, aims at answering this question as it relates to Palestinian refugees expelled or displaced during the 1948 war.

International refugee law contemplates three possible solutions for the refugee problem: voluntary repatriation, resettlement, and assimilation.<sup>6</sup> The 1951 Convention provides that with the realization of one of these three solutions, the refugee status will come to an end, as prescribed in Article 1C. The last two solutions raise the issue of the implications of the acquisition of citizenship on the right of a refugee to return to her country of origin. This

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<sup>2</sup> *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, Study by W. Thomas MALLISON and Sally MALLISON published at the request of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, UN Doc. ST/SG/SER.F/4; Kathleen LAWAND, "The Right to Return of Palestinians in International Law" (1996) 8 *International Journal of Refugee Law* 532; John QUIGLEY, "Displaced Palestinians and a Right of Return" (1998) 3 *Harvard International Law Journal* 171; Susan AKRAM and Terry REMPLE, "Recommendations for Durable Solutions for Palestinians Refugees" (2000-2001) 11 *Palestine Yearbook of International Law* 1; Gail BOWLING, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem: BADIL Resource Center, 2007); Victor KATTAN, "The Nationality of Denationalized Palestinians" (2005) 74 *Nordic Journal of International Law* 67.

<sup>3</sup> See for example Kurt Rene RADLEY, "The Palestinian Refugees: The Right of Return in International Law" (1978) 72 *American Journal of International Law* 586; Ruth LAPIDOTH, "The Right of Return in International Law, with Special Reference to the Palestinian Refugees" (1986) 16 *Israel Yearbook of Human Rights* 103; Justus WEINER, "The Palestinian Refugees' 'Right to Return' and the Peace Process" (1997) 20 *Boston College International and Comparative Law Review* 1; Lewis SAIDEMAN, "Do Palestinian Refugees have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return" (2004) 44 *Virginia Journal of International Law* 829; Na'ama CARMI, "Immigration and Return: The Israeli Palestinian Case" (2005) 32 *Philosophia* 21; Yaffa ZILBERSHATS, "International Law and the Palestinian Right of Return to the State of Israel" in Eyal BENVENISTI, *et al.*, eds., *Israel and the Palestinian Refugees* (Heidelberg: Max Planck Institute, 2007), 191; Andrew KENT, "Evaluating the Palestinians' Claimed Right of Return" (2012-2013) 34 *University of Pennsylvania Journal of International Law* 149.

<sup>4</sup> Jordan, for example, bestowed nationality on Palestinian refugees according to the Jordanian Nationality Law of 1954. See Lex TAKKENBERG, *The Status of Palestinian Refugees in International Law* (Oxford: Oxford University Press, 1998) at 155.

<sup>5</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [1951 Convention].

<sup>6</sup> *Statute of the Office of the United Nations High Commissioner on Refugees*, GA Res. 427(V), U.N. Doc. A/1775 (1950), at para. 1.

question becomes more important and critical especially in situations in which the refugee has lost the citizenship of her country of origin, as in the case of the Palestinian refugees.<sup>7</sup>

Does the cessation of refugee status of a Palestinian refugee as a result of the acquisition of citizenship preclude the right to return to her country of origin? It could be argued that since refugee law merely requires the facilitation of the voluntary repatriation of refugees and does not explicitly create the right to return<sup>8</sup> the cessation of refugee status does not affect this right. Nowak, for example, asserts that:

As soon as the political situation in the country of origin of refugees or *displaced persons* improves, and these persons wish to return to their “original home country”, the establishment of a “second home country” must not be invoked for the purpose of preventing them from returning home, even if masses of people are claiming this right.<sup>9</sup>

On the other hand, it was argued, in the context of the Palestinian refugees who have acquired a new nationality, that the “[o]peration of Article 1C [of the Refugee Convention] (acceptance of new citizenship) terminates the right of return because the Palestinians’ ‘own country’ under article 12 (4) of the ICCPR is their country of new nationality, not Israel”.<sup>10</sup> The rationale behind this reasoning is:

Conventions and laws in general ought to be interpreted in a plain language manner that harmonizes them rather than in a manner that places them at odds with each other. If a refugee has accepted new nationality, he now has a place that he can “enter” and call home; his new state of protection is his “own country.” A previously stateless person who has accepted new citizenship should be seen as having a country he can call his “own.” Once he has a country he can call his own, the former refugee has a right of return to that new country of which he is a national, not his former country, in this case Israel.<sup>11</sup>

This position is based on a specific reading of two international law rules: one based on Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR),<sup>12</sup> while the second is based on the cessation clause of the 1951 Convention, in an approach which seeks to harmonize different provisions of international law in order to create a coherent body of rules. Another commentator, Yaffa Zilbershats, has argued, in the context of Article 12(4) of the ICCPR, that the lapse of time since the displacement of the Palestinian refugees has rendered any effective link to Israel artificial, and that “Palestinians have much more stronger effective links

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<sup>7</sup> Palestinian refugees were citizens of Mandate Palestine according to the *Palestine Citizenship Order*, Official Gazette, 16 September 1925, 460-78 [*Palestine Citizenship Order*]. According to the rules of state succession, persons who are habitual residents of a new state *ipso facto* become nationals of that state, and, therefore, Palestinians, who were habitual residents of territories that fell under Israeli control, a category which includes the Palestinian refugees, were entitled to Israeli nationality. The Palestinian refugees were denationalized *en masse* in 1952 in a discriminatory manner after Israel enacted the Citizenship Act-1952 [*Citizenship Act-1952*] which regulates matters related to nationality in Israel. See Kattan, *supra* note 2.

<sup>8</sup> See Art. 1 of the *Statute of the Office of the United Nations High Commissioner for Refugees*, Annex to GA Res. A/RES/428(V), UN Doc. A/1775 (1950) [*UNHCR Statute*].

<sup>9</sup> Manfred NOWAK, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel Verlag, 2005) at 288 (emphasis added).

<sup>10</sup> Saideman, *supra* note 3 at 863 (emphasis added).

<sup>11</sup> *Ibid.*

<sup>12</sup> *International Convention on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976) [*ICCPR*]. Israel signed the ICCPR on 19 December 1966 and ratified it on 3 October 1991.

to the states, in which they have resided for decades”.<sup>13</sup> This in turn means that Israel is not “their own country”, and, therefore, they do not have a right to enter Israel according to the ICCPR because such a right would apply only to those who have effective links with Israel, which Palestinian refugees lack.<sup>14</sup>

Only a very small number of authors, who argue that the 1948 Palestinian refugees do have the right to return based on international human rights law, have touched upon the issue of the acquisition of a new citizenship. Those who did touch upon the issue, however, did so in passing. Kathleen Lawand, for example, does not tackle the issue of the acquisition of citizenship directly, but provides an elaborate analysis of the meaning of the term “his own country”, based on the *Nottebohm* case and the effective link between the individual and the state.<sup>15</sup> Her focus is on the effect of time on the genuine link. In this regard, she sees the passage of time as a factor eroding the genuine link, but adds that the actions of the state of origin should also be taken into consideration.<sup>16</sup> Her article was published before the United Nations (UN) Human Rights Committee issued its General Comment on Article 12 of the ICCPR and its decision in *Charles Stewart v. Canada*.<sup>17</sup> John Quigley also deals with the issue only in the context of the Palestinian refugees in Jordan. While he states that “seeking nationality elsewhere might be taken as a waiver of the individual’s right to his original nationality”,<sup>18</sup> he argues, based on the circumstances in which Jordan had granted nationality to the Palestinian refugees, that there was no intention by the refugees to renounce their connection to Palestine.<sup>19</sup> His analysis of the issue, however, is limited and cannot be used to assess the rights of other Palestinian refugees or former refugees.

This article, thus, aims to provide an in-depth analysis of the impact of the acquisition of new nationality on the right of return of the Palestinian refugees. This question has arisen periodically, most recently in the attempts to admit the “State of Palestine” to the UN in 2011 and 2012. The impact of the admission to the UN on the Palestinian refugees and their rights was part of the debate on the effectiveness of this initiative and its potential shortcomings.<sup>20</sup>

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<sup>13</sup> Zilbershats, *supra* note 3 at 202.

<sup>14</sup> Zilbershats quotes Kathleen Lawand to demonstrate that the effective link between the Palestinian refugees and Israel has weakened because of the long period of time that has elapsed since displacement. She neglects to deal with the argument by Lawand that the lapse of time must take into account “the reasons for the non-exercise of return during the said period”. See Lawand, *supra* note 2 at 556.

<sup>15</sup> *Nottebohm Case (second phase) (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4 [*Nottebohm*].

<sup>16</sup> Lawand, *supra* note 2 at 557.

<sup>17</sup> *Charles E. Stewart v. Canada*, Human Rights Committee Communication No. 538/1993, UN Doc. CCPR/C/58/1993 (1996) [*Stewart v. Canada*].

<sup>18</sup> Quigley, *supra* note 2 at 216. Takkenberg asserts that Palestinian refugees in Jordan are no longer considered refugees under the 1951 Convention, but they are still eligible to exercise the right to return. However, he does not provide a detailed explanation as to why this is so. See Takkenberg, *supra* note 4 at 128.

<sup>19</sup> Quigley, *ibid.*, at 217.

<sup>20</sup> See e.g. Susan AKRAM, “The Palestinian Statehood Strategy in the United Nations: Lesson from Namibia” *Jadaliyya* (3 October 2011), online: <http://www.jadaliyya.com/pages/index/2797/the-palestinian-statehood-strategy-in-the-united-n->; Guy GOODWIN-GILL, “Opinion Re The Palestine Liberation Organization, the Future State of Palestine, and the Question of Popular Representation” *Jadaliyya* (31 August 2011), online: <http://www.jadaliyya.com/pages/index/2530/guy-s.-goodwin-gill-legal-opinion-on-palestinian-s->; Mutaz M. QAFISHEH, “Bases for the Palestinian Refugees’ Right of Return under International Law: Beyond General Assembly Resolution 194” *Cambridge Journal of International and Comparative Law Blog* (26 November 2012), online: <http://cjicl.org.uk/2012/11/26/bases-for-the-palestinian-refugees-right-of-return-under-international-law-beyond-general-assembly-resolution-194-2/>.

The article will examine the different sources of the right of return, and will focus on international human rights law, mainly Article 12(4) of the ICCPR, the general comments of the United Nations Human Rights Committee, and other applicable instruments. It will examine if there is a conflict between international refugee law and the ICCPR on this issue, and if there is one, a possible way to reconcile the conflict. The article will argue that the establishment of a new home country or the acquisition of a new citizenship does not nullify the right of return. It will provide a conceptual basis for this argument in relation to Palestinian refugees, and at the same time elucidate the relationship between international refugee law and general international human rights law. The issues dealt with in this article may be relevant to other refugee situations such as the Nepali-speaking refugees from Bhutan.<sup>21</sup>

Part I of the paper will begin with a brief discussion of the right of refugees to return to their country of origin and the different sources of law on which this right could be based. This part will focus on the right of return under international human rights law, in particular, Article 12(4) of the ICCPR because it appears to be the strongest and the least disputed source of this right. The concept of “one’s own country” in Article 12(4) will be examined in Part II. Part III will focus on the 1951 Convention, its applicability and relevance to the Palestinian refugees, and the meaning and implications of the cessation of refugee status. Finally, Part IV will sum up the discussion and provide a model that would cohere with international human rights law.

## I. THE SOURCES OF THE RIGHT OF RETURN

### A. *The Right of Return Under International Law*

The right of an individual to return to her country is part of the broader concept of freedom of movement. Freedom of movement encompasses a broad range of human rights that include the right to leave or enter a state, and the right to reside in a state. It is seen as “an indispensable condition for the free development of a person”.<sup>22</sup> Under international law, the right is based on a number of sources. A number of scholars have asserted that the right of return, of refugees especially, has attained the status of customary international law,<sup>23</sup> and as such applies to the Palestinian refugees. In this context, General Assembly Resolution 194 (III)<sup>24</sup> is widely seen as

<sup>21</sup> Tang Lay LEE, “Refugees from Bhutan: Nationality, Statelessness and the Right to Return” (1998) 10 *International Journal of Refugee Law* 118. See also Bill FRELICK, “For Bhutan’s Refugees, There’s No Place like Home” *Human Rights Watch* (30 March 2011), online: Human Rights Watch <<http://www.hrw.org/news/2011/03/30/bhutan-s-refugees-there-s-no-place-home>>.

<sup>22</sup> *General Comment No. 27: Freedom of Movement (Art. 12)*, UN Human Rights Committee, UN Doc. CCPR/C221/Rev.1/Add.9 (1999) [*General Comment*].

<sup>23</sup> Eric ROSAND, “The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?” (1997) 19 *Michigan Journal of International Law* 1121; Vic ULLOM, “Voluntary Repatriation of Refugees and Customary International Law” (2001) 29 *Denver Journal of International Law and Policy* 115; Alfred de ZAYAS, “The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context” (1990) 6 *Palestinian Yearbook of International Law* 17 at 34.

<sup>24</sup> Paragraph 11 of the *Palestine-Progress Report of the United Nations Mediator*, GA Res. 194 (III), UN Doc. A/RES/194(III) (1948) [*GA Res. 194 (III)*], which concerned the war situation in Palestine in 1948, provides that the General Assembly:

resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of

an affirmation of the existence of the right under customary international law.<sup>25</sup> Proponents of this view point to state practice as support for their position.<sup>26</sup> They also point to the fact that this right is expressly recognized in international human right instruments, state constitutions and local legislation, international humanitarian law, and resolutions of the UN organs.<sup>27</sup>

The flight of the Palestinian refugees occurred during an armed conflict. It was primarily the result of active expulsion by the Israeli army in what can be seen as population transfer or ethnic cleansing.<sup>28</sup> International humanitarian law, therefore, could be one of the sources for the right of return.<sup>29</sup> The main source for the right of return under humanitarian law is the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Article 45 of the Convention regulates the temporary transfer of protected persons, and requires their repatriation. Article 49 of the Fourth Geneva Convention explicitly prohibits “individual or mass transfer” of protected persons from an occupied territory to another territory or country. Article 49 also requires the repatriation of displaced persons “as soon as the hostilities in the area in question have ceased”.<sup>30</sup>

International law recognizes the obligation of states to readmit their nationals. This rule is known as the “readmission rule”. States are under the obligation to allow their nationals to return to their territory so that they would not impose a burden on other states hosting them. This obligation is not, however, owed to nationals or refugees. It is invoked in the context of relations between states, and the obligations states owe each other.<sup>31</sup> Accordingly, states cannot prohibit the readmission of their nationals by denationalizing them.<sup>32</sup> Several commentators have asserted that according to the law of state succession, and given their habitual residence in the territory which became Israel in 1948, Palestinian refugees had *ipso facto* acquired the nationality of

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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.

<sup>25</sup> Mallison and Mallison, *supra* note 2 at 28; Lawand, *supra* note 2 at 544; Bowling, *supra* note 2 at 15.

<sup>26</sup> The Office of the United Nations High Commissioner on Refugees (UNHCR) statistics show that between the years 1997 and 2006, about 11.6 million refugees were able to return home. These include 5.4 million Afghan refugees and 1 million refugees from Serbia and Montenegro. In the same period, 683,000 refugees returned to Liberia, 529,000 returned to Angola, 504,000 returned to Burundi, and 469,000 returned to Sierra Leone. In 2006 alone, an estimated 734,000 refugees were repatriated to their countries of origin. In contrast, during 1997-2006, approximately 838,000 refugees were accepted for resettlement programs in third countries. See UNHCR, “UNHCR Statistical Yearbook 2006: Trends in Displacement, Protection and Solutions” (December 2007), online: UNHCR <<http://www.unhcr.org/478cda572.html>> at 36-8. In other words, for every refugee who had been settled during that period, 14 refugees were repatriated. These figures reflect an overwhelming preference for return as a durable solution to the refugee problem, so much so that the then UN High Commissioner for Refugees, Ms. Sadako Ogata declared the period beginning in 1992 as the “decade of voluntary repatriation”. See UNHCR, “Introductory Statement by Ms. Sadako Ogata, United Nations High Commissioner for Refugees, to the Informal Meeting of the Executive Committee of the High Commissioner's Programme (ExCom)” (26 June 1992), online: UNHCR <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68fae1c&query=decade%20of%20repatriation>>.)

<sup>27</sup> Lawand, *supra* note 2 at 544.

<sup>28</sup> See Pappe, *supra* note 1.

<sup>29</sup> See Quigley, *supra* note 2 at 197. For a different opinion, see Rex J. ZEDALIS, “Right to Return: A Closer Look” (1992) 6 Georgetown Immigration Law Journal 499.

<sup>30</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950).

<sup>31</sup> Paul WEIS, *Nationality and Statelessness in International Law* (Alphen aan den rijn: Sitjhoff & Noordhoff International Publishers, 1979) at 45.

<sup>32</sup> *Ibid.*, at 54.



Israel as a successor state.<sup>33</sup> Their *en masse* denationalization in 1952 is, thus, a breach of international law, and Israel has an obligation, which is owed to its neighbouring states, to readmit the Palestinian refugees.<sup>34</sup>

International human rights law is the most explicit and elaborate source for the right of return. Human rights law instruments—which include conventions, general comments of the UN Human Rights Committee, the decisions of the committee in the communications submitted to it, and decisions by human rights courts and tribunals—delineate the content and contours of this right in a more detailed manner than other areas of law. This allows for a deeper and more focused analysis of the right, as opposed to the existence of the right as a broad concept or a general principle in other sources.

A number of human rights law instruments contain a provision that protects the right to return to, or to enter and remain in, the state of origin. The most important of these instruments are the Universal Declaration of Human Rights (UDHR),<sup>35</sup> the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.<sup>36</sup> Regional human rights conventions, such as the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms also recognize a right to return.<sup>37</sup>

Article 13(2) of the UDHR provides that “[e]veryone has the right to leave any country, including his own, and to return to his country”. Article 12(4) of the ICCPR provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country”. Although both provisions essentially deal with the same right, the provisions in both instruments are phrased somewhat differently. The former grants a right to “return”, while the latter grants a right to “enter”. The former states that the place where the individual should be allowed to return to is “his country”, while the latter uses the phrase “one’s own country”. These differences are not significant, and it is clear from the *travaux préparatoires* that by using the term “enter” and the phrase “one’s own country”, the drafters of the ICCPR had intended to broaden the scope of the right as compared to the right in the UDHR.<sup>38</sup>

<sup>33</sup> Kattan, *supra* note 2 at 90-2; Quigley, *supra* note 2 at 194.

<sup>34</sup> The denationalization was the outcome of the enactment of the Citizenship Act-1952 by the Israeli Parliament. According to this Act, the acquisition of citizenship by the non-Jewish residents of Israel was subject to proving uninterrupted residency from the day of the creation of the state in 1948 until 1952. This effectively meant that all refugees (and many Palestinians who were not refugees but who could not prove residency) were not entitled to citizenship. See *supra* note 7.

<sup>35</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN Doc. A/810 (1948), Art. 13.

<sup>36</sup> *ICCPR*, *supra* note 12, Art. 12; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969), Art. 5(d)(ii), which Israel signed on 7 March 1966 and ratified on 3 January 1979.

<sup>37</sup> Art. 22(5) of the *American Convention on Human Rights*, 21 November 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978); Art. 12(2) of the *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217 (entered into force 21 October 1986); Art. 3(2) of *Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 16 September 1963, Eur.T.S. 46 (entered into force 2 May 1968).

<sup>38</sup> See Hurst HANNUM, *The Right to Leave and Return in International Law and Practice* (Dordrecht: Martinus Nijhoff Publisher, 1987) at 59. The Commission on Human Rights, in its 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> sessions discussed the drafting of Art. 12(4) of the ICCPR, especially the issue of which terms to use—“return” or “enter”, and “country of which he is a national” or “one’s own country”. It decided to adopt the term “enter” because “[the ICCPR] was intended to cover cases such as those persons born abroad who had never been to the country of their nationality”. The phrase “one’s own country” was adopted because the phrase “country of which he is a national” would not require states to grant the right of entry to individuals, who had established their home there even though they were

As opposed to the UDHR, which is non-binding and declaratory in nature, and which was adopted as a UN General Assembly Resolution,<sup>39</sup> the ICCPR is a treaty that was signed and ratified by most states in the world,<sup>40</sup> and is, therefore, binding on those state parties.<sup>41</sup> The ICCPR, which was adopted in 1966, is a more recent source of law than the UDHR, which was adopted in 1948. Article 12(4) of the ICCPR deals with the right to enter one's own country. The right to return could be derived from the right to enter the country, since denying the entry or re-entry is the main barrier to return. It is arguable that if a refugee had only one nationality, even if she was stripped of her nationality, she would still have one place where she can call her "own country", which she should be allowed to enter. The acquisition of a new nationality creates a situation where there is another country that a refugee can call her "own country". The question then becomes whether the acquisition of a new nationality extinguishes the right to enter and return to the country of origin? This question will be discussed in Part II.

### B. A Note on the Time Frame and Relation to Applicable Law

Due to the long period of time since the flight of the Palestinian refugees in 1948, one of the issues that should be addressed at the outset is the question of the effect of time in relation to the law. Two relevant issues should be explored. The first is the temporal applicability of international legal norms: what legal rules or principles apply to the situation of the Palestinian refugees, bearing in mind that the displacement took place in 1948? Here, I will briefly discuss the rule of intertemporal law and the different views on the state of the law at the relevant time. Second, I will address the issue of the descendants of the refugees, who were expelled in 1947-1949, who are now second or third-generation refugees.

The main source articulating the rule of intertemporal law is the arbitral award in the *Island of Palmas Arbitration*.<sup>42</sup> Here, Judge Max Huber stated that "a juridical fact must be appreciated in the light of the law contemporary with it".<sup>43</sup> Judge Huber then added what is known as the second branch of the rule of intertemporal law, that:

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not nationals. See Marc J. BOSSUYT, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987) at 261.

<sup>39</sup> Nevertheless, it is widely accepted now that the right of return under the UDHR is customary international law. See *Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, [1980] I.C.J. Pleadings 182; Theodore MERON, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); Ullom, *supra* note 23. Other commentators, however, are of the view that there is no sufficient consensus on this point to draw conclusions. See Hurst HANNUM, "The Status of the Universal Declaration of Human Rights in National and International Law" (1995-1996) 25 *Georgia Journal of International and Comparative Law* 346.

<sup>40</sup> The ICCPR was signed by 167 states, and ratified by 160 states. The number of states that are members of the UN is 192. Israel signed the ICCPR on 19 December 1966 and ratified it on 3 October 1991.

<sup>41</sup> According to Article 38 of the *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), if the rules set forth in a treaty are recognized as customary rules of international law, these rules become binding upon a third state.

<sup>42</sup> *Island of Palmas Arbitration (United States v. The Netherlands)*, Award of 4 April 1928, [1928] II Reports of International Arbitral Awards 829.

<sup>43</sup> *Ibid.*, at 845.

[t]he same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.<sup>44</sup>

In the context of the Palestinian refugees and their right of return, Victor Kattan provides an elaborate analysis of the temporal issue.<sup>45</sup> He argues that in 1947-1949, international law norms banned deportations, in addition to a number of practices that triggered the flight of the Palestinian refugees, such as murder, massacre, rape, pillage, and destruction of property. This, he argues, rendered the expulsions and the acts that caused the flight of the refugees a breach of international law obligations under international law as it was then. Kattan supports his position by reviewing the jurisprudence of the military tribunals in the aftermath of the World War II, including the Nuremberg and the Tokyo Tribunals.<sup>46</sup> Kattan draws more support for his position by quoting a report prepared by the British Foreign Office regarding the 1948 war, which found that customary international law did apply to that war. This included the norms found in various conventions on international humanitarian law, even though Israel was not a party to them since most of the rules and principles enshrined in them reflected existing customary international law.<sup>47</sup> Given that the expulsion and the other associated atrocities were illegal at the time they were committed, he argues that Israel committed further violations by the subsequent acts of property confiscation, denationalization, and banning refugees from returning using violence and other legislative tools, and, therefore, Israel's actions amounted to a continuous wrongful act. According to the second branch of the intertemporal law rule, the relevant law that applies when the conflict is resolved is the law as it developed since the violation first occurred. This means that the sources mentioned earlier in this part are all relevant even though some of them came into force after the displacement. Kattan also draws further support for his position from Article 14 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. Sub section 2 of this Article deals specifically with breaches of international obligations that have a "continuing character", and states that such acts are considered breaches "for the entire period during which the act continues and remains not in conformity with the international obligation."<sup>48</sup> Kattan's position is also supported by state practice in the aftermath of World War II when the majority of the displaced persons were repatriated, some even forcibly.<sup>49</sup>

Contrary to Kattan's position, Andrew Kent argues that Palestinian refugees are not entitled to return because, amongst other reasons, the initial expulsion of 1947-1949 was not illegal.<sup>50</sup> Kent

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<sup>44</sup> *Ibid.*

<sup>45</sup> Victor KATTAN, *From Coexistence to Conquest: International Law and the Origins of the Arab Israeli Conflict* (London: Pluto Press, 2009) at 212-7.

<sup>46</sup> *Ibid.*, at 203-8.

<sup>47</sup> *Ibid.*, at 204.

<sup>48</sup> *Ibid.*, at 213. *Articles on Responsibility of States for Internationally Wrongful Acts*, Adopted by the International Law Commission at its 53rd session on 3 August 2001, Annex to GA Res. 56/83, U.N. Doc. A/56/83 (2001).

<sup>49</sup> Daniel COHEN, "Between Relief and Politics: Refugee Humanitarianism in Occupied Germany 1945-1946" (2008) 43 *Journal of Contemporary History* 437.

<sup>50</sup> Kent, *supra* note 3. In a long article, Kent argues that none of the sources discussed earlier do apply to Palestinian refugees. Here I will only focus on his approach to intertemporal law.

argues that the Hague Conventions of 1899 and 1907 did not apply to the war in 1948.<sup>51</sup> He further argues that even if Israel was bound by the norms found in the Hague Conventions as part of customary international law, none of the relevant provisions were applicable in the circumstances.<sup>52</sup> The Hague Conventions, Kent argues, did not apply because the Israeli army, and the pre-state military groups, could not be seen as a hostile occupying army, as per the language used in the conventions.<sup>53</sup> He also adds that the territories from which the refugees were expelled were not part of another hostile state that exercised legitimate authority in the area.<sup>54</sup>

There are strong reasons to prefer Kattan's position to Kent's. Kent's arguments suffer from a number of flaws. His reasoning regarding the applicability of customary international law on the laws of armed conflict is very highly formalistic that tries to avoid the substantive legal principles and norms by resorting to a high level of technicality and narrow interpretation. His reasoning is contrary to the spirit of the norms and the texts they are enshrined in, and the manner in which they were applied as early as the 1940s. If taken to their logical conclusion, Kent's arguments in effect mean that none of the norms, rules, conventions, or legal principles that govern armed conflict applied to the situation in Palestine in 1947-1948, with the result that Palestine was in some sort of legal vacuum. This was contrary to the reality at the time. Since the second decade of the twentieth century, there has been significant international interest in the legal status of Palestine, and Palestine has been the subject of numerous debates relating to international law, especially in the 1940s. Kent's discussion of whether the expulsions of the 1948 amounted to crimes against humanity is equally not compelling.

There are other grounds to prefer Kattan's position. The discussion here is focused on the issue of human rights. Many human rights violations, as in the case of expulsion and prohibiting return, are "continuing acts". Various human rights bodies and courts have noted that international human rights instruments should be interpreted as "living instruments", with flexible application of the intertemporal law rule. These bodies, which include the European Court of Human Rights and the Human Rights Committee,<sup>55</sup> have asserted jurisdiction over, and adjudicated upon violations that took place prior to the entry into force of various human treaties. This was based on the determination that these violations were "continuing acts" which extended over the whole period of time they continued to be in violation of international norms. This has led some scholars to conclude that in the case of human rights violations, the first branch of the intertemporal principle does not apply, or at least does not apply strictly.<sup>56</sup>

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<sup>51</sup> *Convention (II) Respecting the Law and Customs of War on Land*, 29 July 1899, 32 Stat. 1803, 1 Bevans 247 (entered into force 4 September 1900); *Hague Convention IV - Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force 26 January 1910).

<sup>52</sup> Kent, *supra* note 3 at 180-91.

<sup>53</sup> *Ibid.*, at 185-7.

<sup>54</sup> *Ibid.*, at 187-91.

<sup>55</sup> See e.g. *Liozidou v. Turkey* (App No 15318/89), [1995] E.C.H.R. 10, (23 March 1995); *Sandra Lovelace v. Canada*, Human Rights Committee Communication No. 24/1977, UN Doc. CCPR/C/13/D/24/1977 (1981); *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Human Rights Committee Communication No. 516/1992, UN Doc. CCPR/C/54/D/516/1992 (1995).

<sup>56</sup> Rosalyn HIGGINS, "Time and the Law: International Perspectives on an Old Problem" (1997) 46 *International and Comparative Law Quarterly* 501 at 517; Paul TRAVERNIER, "Relevance of the Intertemporal Law" in James CRAWFORD, Alain PELLET, and Simon OLLESON, eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 398 at 402; Jean SALMON, "Duration of the Breach" in James CRAWFORD,

The issue of time also arises in the case of the descendants of the first generation of refugees who were not born in the country of origin, in this case Palestine, or, after 1948, Israel. In the context of their right to return, Article 12(4) of the ICCPR uses the term “enter”, which is broader than “return”. The commentary by the United Nations Human Rights Committee provides that the right to enter one’s own country “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)”.<sup>57</sup> This understanding is also supported by the *travaux préparatoires* of the ICCPR.<sup>58</sup> This position is also supported by the fact that the nationality legislation that was valid in pre-1948 Mandate Palestine, and the Israeli Citizenship Law-1952 are based on the notion of *jus sanguinis* (nationality based upon the nationality of the parents). Since the denationalization of the Palestinian refugees was illegal under international law, one could argue that the right to return of their descendants is not extinguished by the fact that they were born abroad, and by the fact that they had never set foot in the country. While the passage of time and the fact that they were not born in the country makes their link weaker than the first-generation refugees, the descendants have maintained strong ties to the area of historic Palestine as will be explained later in Part III.

## II. THE MEANING OF THE PHRASE “ONE’S OWN COUNTRY”

The phrase “one’s own country” was discussed by the UN Human Rights Committee.<sup>59</sup> The General Comment states that the phrase “one’s own country” is broader than the concept of “the country of nationality”, and it is not limited to nationality in a formal sense. The Committee states:

It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, *because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien*. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.<sup>60</sup>

The General Comment does not explicitly address the consequences of the acquisition of a new nationality on entering the country of origin, but its special emphasis on special ties or relations to the country does provide some useful insights. The phrase “one’s own country” was examined in *The Charles Stewart v. Canada Communication*, and the *Oppenheim* and *Nottebohm* cases, which will be discussed below.

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Alain PELLET, and Simon OLLESON, eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 383 at 387-90.

<sup>57</sup> *General Comment*, *supra* note 22 at para. 19. See also Akram and Remple, *supra* note 2 at 50.

<sup>58</sup> Bossuyt, *supra* note 38 at 261.

<sup>59</sup> *General Comment*, *supra* note 22.

<sup>60</sup> *Ibid.*, at para. 20 (emphasis added).

### A. The *Charles E. Stewart v. Canada* Communication

The main case that precipitated the General Comment is the decision of the Human Rights Committee in the *Charles E. Stewart v. Canada* communication.<sup>61</sup> In this decision, the Committee decided that the term “one’s own country” is broader than the concept of “the country of nationality” and is not limited to nationality in a formal sense. The communication dealt with a situation in which Canada had decided to deport an immigrant, Stewart—a British national—who lived most of his life in Canada but did not acquire Canadian citizenship, even though there were no impediments to acquiring nationality by immigrants. The Committee decided that Canada could not be seen as “his own country” since Stewart did not apply for formal citizenship, although he was entitled to do so. The Committee, thus, focused on the fact that he opted not to apply for citizenship. The Committee, however, did not mention the fact that he was holding citizenship in another country as grounds for denying him the right to enter Canada.<sup>62</sup> The Committee stated that:

The question in the present case is whether a person who enters a given State under that State’s immigration laws, and subject to the conditions of those laws, can regard the state as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. *The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants.* But when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become “his own country” within the meaning of article 12, paragraph 4 of the Covenant.<sup>63</sup>

One could infer from the Committee’s statement that an immigrant could possibly regard her country of immigration as “her own country” if she was denied citizenship by unreasonable impediments, regardless of the fact that she still holds another citizenship. One could argue that if special ties and relations to a country are proven, the emphasis would shift to the actions of the individual when given the chance to strengthen her relations to “her own country”. This means that in order to examine the right of return under the ICCPR, three main factors should be examined. First is the presence of special ties to the country one claims to have the right to return to. The second factor, if special ties exist, is the choices that were available to the individual. That is, if the state had given her the choice of, or facilitated the strengthening of the special ties and relations. The third factor concerns the decisions and actions of the individual in light of the choices she was given.

It is argued that a similar rule should be applied to refugees. Refugees who had to flee from their countries and who were arbitrarily denied any chance of returning or re-acquiring their nationality still maintain special ties and claims to their country of origin. The emphasis should, therefore, be on the decisions they made on the basis of the choices that were available to them.

<sup>61</sup> *Stewart v. Canada*, *supra* note 17.

<sup>62</sup> *Ibid.* It should be mentioned that in an individual opinion in this Communication (by Elizabeth Evatt and Cecilia Medina Quiroga), the absence of ties to another state was mentioned as one of the factors that should be taken into consideration for deciding which is the “individual’s own country”. See *Charles E. Stewart v. Canada*, Individual Opinion by Ms. Elizabeth Evatt and Ms. Cecilia Medina Quiroga, co-signed by Mr. Francisco José Aguilar Urbina, Human Rights Committee Communication No. 538/1993, UN Doc. CCPR/C/58/1993 (1996).

<sup>63</sup> *Ibid.*, at para. 12.5 (emphasis added).

Could the acquisition of a new nationality in the case of refugees be seen as a choice not to “strengthen the special ties and relations”? This should be examined in view of the options that were available for them. If the refugee is likely to face the same risk of persecution, which had engendered their initial flight, it cannot be argued that the refugee has the option of returning. Indeed, in such a situation, if return is not voluntary in nature, it would be seen as a breach of Article 33 of the 1951 Refugees Convention which prohibits expulsion or return of a refugee to areas where her life or freedom are at risk. For example, in a case of a refugee whose country of origin is still in a state of war, a meaningful option of returning is denied. In such a case, it cannot be argued that this refugee has opted not to strengthen her relations with her state of origin, since this option does not exist in the first place. Another situation is when the reason of the flight does not exist anymore, but the government in control of the country of origin is preventing the return of the refugees, as in the case of the Palestinian refugees and the Nepali-speaking refugees from Bhutan. In such an instance, the option for the individual to strengthen the ties with the country does not exist, and, therefore, the acquisition of a new nationality should not affect her rights to enter her country of origin even if she has lost her formal nationality of that country.

### B. *The Oppenheim Case*

The notion of personal choice in view of the options available to an individual seeking return to her own country is also supported by another decision. In the *Oppenheim Case*,<sup>64</sup> the UK House of Lords, in its application of international law principles and the provisions of German legislation on nationality, decided that an illegal deprivation of nationality may become irreversible if the individual voluntarily establishes herself elsewhere at a point when the resumption of the original citizenship would have been possible. Meier Oppenheim, a German-born Jew who had fled to the United Kingdom in 1939, was deprived of his German nationality by a decree from 1941. Given the racist nature of the decree, which was to denationalize only German Jews, the decree was seen as illegal under international law. Oppenheim was subsequently naturalized in Britain. In 1949, as a result of a new provision in German nationality legislation, he was able to reclaim his nationality but opted not to do so. The case dealt with the question of whether Oppenheim was liable to pay United Kingdom income tax on certain pension payments, which he had received when he was a British national. According to a tax convention between the German Federal Republic and the United Kingdom, such payments would be exempted from tax if Oppenheim were a German national.

Although the deprivation of nationality was illegal under international law, the fact that Oppenheim chose not to reclaim his nationality rendered this illegal act irreversible. In this case, the decisions and the acts of the individual were taken into consideration, in light of the choices that the individual had. The case emphasizes the possibility of the resumption of the individual’s original citizenship. It would be reasonable to argue that without the ability to resume the individual’s nationality, the illegal denationalization would be seen as void, and the individual would still be seen as a national of her state of origin, even if she has subsequently acquired a new citizenship. Brownlie, for example, states that “an illegal deprivation of nationality (for example on a racial basis) may become irreversible if the individual voluntarily establishes herself elsewhere at a stage when ‘resumption’ of the original citizenship would have been

<sup>64</sup> *Oppenheim v. Cattermole* [1975] 2 W.L.R. 347 (H.L.).

possible”.<sup>65</sup> This means that as long as the resumption of the original citizenship is not possible, the irreversibility of the deprivation of nationality, and in turn the rights that nationality entails, is questionable. Once again, the individual’s actions in light of the options she has are the main points of focus in the analysis.

### C. *The Nottebohm Case and the “Effective Link Theory”*

Another area, which may assist in the determination of the scope of “one’s own country”, is nationality as understood and interpreted in the context of diplomatic protection. States may only exercise diplomatic protection in respect of their nationals. This highlights the importance of ascertaining the nationality of individuals before states exercise diplomatic protection. Here, issues similar to the one we are dealing with have arisen, namely, where it is not clear what nationality an individual has, or in situations where the individual has dual nationality and there is a need to ascertain which nationality would apply for the purpose of diplomatic protection. The authoritative decision of *Nottebohm* relied on the “effective link theory”.<sup>66</sup> Subsequent decisions on nationality have relied heavily on the “effective link theory”, making this theory a general norm of international law.<sup>67</sup>

Friedrich Nottebohm was German by birth. He settled in Guatemala for 34 years where he owned a business enterprise. In 1939, he applied for naturalization in Liechtenstein and was granted citizenship. In 1943, he was removed from Guatemala, and subsequently his assets and business were expropriated because he was seen as a national of an enemy state—Germany. In the case brought before the International Court of Justice (ICJ) by Liechtenstein, Liechtenstein claimed damages in respect of acts against Nottebohm, who bore its citizenship. Guatemala argued that the case was inadmissible on a number of grounds, including the claim that Nottebohm appeared to have solicited Liechtenstein nationality fraudulently, and with the sole object of acquiring a nationality of a state, which was neutral in World War II, and without having any intention to establish a genuine link to the country.

The ICJ decided that there was no bond of attachment between Nottebohm and Liechtenstein. The Court explained that nationality is:

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 may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.<sup>68</sup>

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<sup>65</sup> James CRAWFORD, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press, 2008) at 524.

<sup>66</sup> *Nottebohm*, *supra* note 15.

<sup>67</sup> Ruth DONNER, *The Regulation of Nationality in International Law* (New York: Transnational Publishers, 1994) at 119.

<sup>68</sup> *Nottebohm*, *supra* note 15 at 23.



Based on the existence of a “genuine” and “effective” link, the ICJ stated that preference should be given to the “real and effective” nationality. On the question of what is the individual’s “real” nationality, the ICJ answered:

the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as 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.<sup>69</sup>

The ICJ found that Nottebohm had no bond or attachment to Liechtenstein because his naturalization there was for the sole purpose of “coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life”.<sup>70</sup> On the other hand, the ICJ concluded that he had a long-standing connection with Guatemala although he did not carry its nationality, a connection which was not weakened by naturalization elsewhere. On an overall assessment of the case, and the principles that the case applies, it is safe to conclude that the focus for the determination of nationality is on the individual’s “genuine” connection. The genuineness of the connection does not necessarily mean nationality in the formal sense, but is assessed according to the quality and significance of the individual’s links to a given country. When naturalization—which is essentially the acquisition of citizenship—is involved, the ICJ placed special emphasis on the purpose and circumstances of the naturalization. Naturalization is not seen as evidence of the relinquishment of links with other countries that individuals have strong links with.

If such principles were adopted in the case of ascertaining nationality for the purpose of providing diplomatic protection, similar principles can arguably be used in order to ascertain the individual’s “own country” according to the ICCPR, since both cases rely on the connection between the individual and the country. Yet, such adoption of principles and rules should be done with caution. The determination of nationality for the sake of diplomatic protection should not be the same in international human rights law. Diplomatic protection falls within the realm of relations between states: the determination of nationality is in order to determine whether a state has the right to protect the individual, for example, by representing her in a legal action in an international forum, or by bestowing diplomatic immunity. On the other hand, the determination of nationality, or “one’s own country” in international human rights law, falls within the realm of relations between the individual and the state. States are treated as equals in their relations with each other; yet in the relations between the individual and the state, the balance of power always leans towards the state, and, hence, the need for human rights protection for the individual. Any analogy with other areas of law should be done with this asymmetry in mind, and in order to strengthen the protection of the individual’s human rights. In accomplishing this, the broad principle of “real or genuine link” can be adopted more generally.

#### D. “One’s Own Country” and the Palestinian Refugees

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<sup>69</sup> *Ibid.*, at 22.

<sup>70</sup> *Ibid.*, at 26.

This part of the article has thus far demonstrated that the notion of “one’s own country”, or even nationality, at least in the context of the ICCPR, is not limited to the formal sense, but is built on the link between the individual and the territory, and the nature of this link. Emphasis is placed on the strength of the link, the ability to strengthen this link, and on the decisions that the individuals has made, given the options they had. How do these conclusions apply to the issue of the Palestinian refugees, who were displaced in 1948 from Palestine, which no longer exists as a legal entity? In 1948, the new state of Israel was formed, and with the end of the war in 1949, Israel controlled all of the areas the refugees were expelled from, which became Israeli sovereign territory. This begs the question: what is the “country of origin” of these refugees?

A number of observations will be helpful in determining the “country of origin”. While Palestine as a legal entity under the mandate no longer exists, the geographical area or “the country”—present-day Israel—still exists. In this regard, international law on state succession,<sup>71</sup> the Mandate nationality legislation in Palestine which was repealed only in 1952,<sup>72</sup> and to some extent, some Israeli authorities up to the enactment of the 1952 Citizenship Act<sup>73</sup> support the assertion that these refugees should be entitled to Israeli citizenship. Even under Israeli law, the idea of “return” does exist and is enshrined in the Law of Return-1950, and does not require any strong links to the country but merely belonging to the Jewish faith.<sup>74</sup> The idea of return is even a major constitutional principle.<sup>75</sup> In this sense, the Palestinian refugees still have a strong link to the country which is now Israel, as the successor state of Mandate Palestine, which they see as their “own country”. Despite the long period of time since their displacement, most of them, even those who had been naturalized in host countries, still see themselves as Palestinian and many still hope to return to their country of origin. Even though many changes have taken place since 1948, and the social, political, and economic situations today differ considerably from the situation in Palestine of 1948, this does not mean that the refugees today do not have links to the country of Israel. Most of them still hold ownership deeds over the land that they were expelled from. Some even still have the keys to their houses they left in 1948. Most of them still identify with the town or village they or their parents used to live in, and many of them have family members from whom they were separated in 1948. The attachment to Palestine as a geographical

<sup>71</sup> See e.g. Kattan, *supra* note 2; Quigley, *supra* note 2.

<sup>72</sup> *Palestine Citizenship Order*, *supra* note 7. See Mutaz QAFISHEH, *The International Law Foundations of Israeli Nationality: A Legal Examination of Nationality in Palestine Under Britain’s Rule* (Leiden: Martinus Nijhoff Publishers, 2008).

<sup>73</sup> *Citizenship Act-1952*, *supra* note 7. Between 1948 and 1952, there was no citizenship legislation in Israel, and pursuant to section 11 of the *Law and Administration Ordinance*, No. 1 of 5708-1948, 19 May 1948, Official Gazette, No.2 (21.5.1948), the Palestine Citizenship Order was still valid. A number of decisions by Israeli courts provided conflicting positions on the question of citizenship before the 1952 law. In one case, for example, a judge of the Tel-Aviv District Court relied on public international law and ruled that (*A.B. v. M.B.*, CA 876/50, 3 PM, 263 at 271-2):

every individual who, on the day 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.

<sup>74</sup> According to the *Law of Return -1950* (Statutes Book, 5710, No. 51, (6.7.1950), page 159), any Jew has the right immigrate to Israel. A Jew is defined in section 4B as “anyone who was born to a Jewish mother, or has converted to Judaism, and is not a member of any other religion”.

<sup>75</sup> See e.g. the decision of the Supreme Court of Israel in *Toshbeim v. Minister of Interior*, H CJ 2597/99 (2005), IsrSC 59(3) 721.

area that Palestinians see as their homeland, which is now under Israeli sovereignty, has played an important role in the shaping and development of the Palestinian national identity.<sup>76</sup>

On the other hand, some commentators, such as Yaffa Zilbershatz, have argued that any link that the Palestinian refugees have with Israel is artificial and is superseded by links to the countries they reside in.<sup>77</sup> This argument, however, ignores the fact that about twenty per cent of the population of Israel are Palestinian, many of whom still maintain strong links with the Palestinian refugees, many of whom belong to the same families. It also ignores the fact that the links were weakened due to Israeli official policies and decisions and not because of choices that the refugees made. So far, Israel has been categorically denying the refugees the right to return to their country,<sup>78</sup> and, therefore, they cannot be seen as having the ability to strengthen their links with their country, which is now Israel.

It is important here to recall that the expulsion and the denial of return were part of a racially-motivated policy that translated into acts of expulsion and legislative measures to block the return of the refugees in order to maintain a strong Jewish majority in Israel. This goal of a Jewish majority could not have been possible without widespread expulsions, especially since at the time the UN had recommended the partition of Palestine in late 1947, there were more Palestinian Arabs than Jews in the area designated as the Jewish state.<sup>79</sup> After the displacement, Israel enacted laws in order to freeze the demographic situation at the time, which reduced the Palestinians to a minority of 13%. These included the Absentee Property Act-1950, which confiscated all of the property of the refugees; the Citizenship Act 1952, which officially denationalised all of the Palestinian refugees (even those who were internally displaced); and the Prohibition of Infiltration Ordinance-1954, which was meant to facilitate the expulsion of those refugees who had managed to make their way back to their homes.<sup>80</sup> This policy was accompanied by discriminatory policies in almost all areas of life against the Palestinian

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<sup>76</sup> See Rasheed KHALIDI, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 1997); Ahmad SA'DI and Leila ABU-LUGHOD, eds., *Nakba: Palestine, 1948 and the Claims of Memory* (New York: Columbia University Press, 2007); Efrat BEN-ZE'EV and Issam ABURAYA, "Middle-Ground' Politics and the Re-Palestinization of Places in Israel" (2004) 36 *International Journal of Middle East Studies* 639; Randa FARAH, "Palestinian Refugees: Dethroning the Nation at the Crowning of the 'Statelet'?" (2006) 8 *Interventions: International Journal of Postcolonial Studies Mediterranean Journal* 229; May SEIKALY, "Excavating Memory: Oral History and the Case of Suhmata" in Camille MANSOUR and Leila FAWAZ, eds., *Transformed Landscapes: Essays on Palestine and the Middle East in Honor of Walid Khalidi* (Cairo: The American University in Cairo Press, 2009) 159; Elias SANBAR, "Out of Place, Out of Time" (2001) 16 *Mediterranean Historical Review* 87; Mahmoud ISSA, "Resisting Oblivion: Historiography of the Destroyed Palestinian Village of Lubyā" (2003) 21 *Refugee* 14. For personal accounts, see Salim TAMARI and Rema HAMMAMI, "Virtual Returns to Jaffa" (1998) 27 *Journal of Palestine Studies* 65.

<sup>77</sup> Zilbershats, *supra* note 3 at 202.

<sup>78</sup> For a comprehensive review of Israeli positions and policies towards the Palestinian refugee problem, see Nur MASALHA, *Politics of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto Press, 2003).

<sup>79</sup> Kattan, *supra* note 45 at 164.

<sup>80</sup> *Absentees' Property Act-1950* (Statutes Book, 5710, No. 37(20.3.1950) page 86); *Citizenship Act-1952*, *supra* note 7; *Prevention of Infiltration (Offences and Jurisdiction) Act -1954* (Statutes Book, 5714, No. 161, (26.8.1954) page 160). It should be mentioned that in addition to expulsion, the Israeli policy was to deter returning refugees by the use of fatal force. Benny Morris observes that by 1956, 2700-5000 refugees were killed trying to return. See Benny MORRIS, *Israel's Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War* (Oxford: Oxford University Press, 1993) at 125-33, 145-7.

minority in Israel. Many of these policies still persist today and even intensified in some areas.<sup>81</sup> For example, in 2003, Israel enacted the Citizenship and Entry to Israel Act (temporary law)-2003, which effectively makes family reunification between Palestinians, who are Israeli citizens, and other Palestinians almost impossible.<sup>82</sup> The idea of creating and maintaining a Jewish majority is one of the main manifestations of Israel's definition as a Jewish state, and it is seen as one of the cornerstones of the constitutional edifice.<sup>83</sup> The policy has a strong racial emphasis, and the Committee on the Elimination of Racial Discrimination has found policies of a similar nature to be a violation of international law. The Committee emphasized that "any attempt to change or to uphold a changed demographic composition of an area against the will of the original inhabitants, by whatever means, is a violation of international law".<sup>84</sup>

After Israel occupied the West Bank and the Gaza Strip in 1967, it extended its racial policies to these areas. Although the occupation was not accompanied with large-scale expulsions as in 1948, many people left the West Bank and Gaza Strip, and were denied return.<sup>85</sup> Israel also embarked on a large-scale colonization process by settling its population in Jewish settlements in breach of Article 49 of the Fourth Geneva Convention. The settlements and the wall that was constructed to protect them led to further waves of displacement.<sup>86</sup> In 2004, the ICJ issued its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* declaring the wall and the settlements illegal, and added that they violated the right of the Palestinians to self-determination.<sup>87</sup> This strong emphasis on the racial aspects of Israel's policy has led some scholars to argue that the situation should be more accurately described as apartheid.<sup>88</sup> Given the policy of racial discrimination, the demographic policies, the ongoing and even increasing violations, and the obstacles that Israel has mounted in the way of those who want to return, the refugees' naturalization in the country of refuge or in a third country does not, absent the existence of the option to return to Israel, nullify their right of return.

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<sup>81</sup> See e.g. Sabri JIRYIS, *The Arabs in Israel* (New York: Monthly Review Press, 1976); Ilan PAPPE, *The Forgotten Palestinians: A History of the Palestinians in Israel* (New Haven: Yale University Press, 2011); Adalah, "The Inequality Report: The Palestinian Arab Minority in Israel" (February 2011), online: Adalah <[http://adalah.org/features/misc/Inequality\\_Report.pdf](http://adalah.org/features/misc/Inequality_Report.pdf)>; Uri DAVIS, *Apartheid Israel: Possibilities for the Struggle within* (London: Zed Books, 2003).

<sup>82</sup> *The Citizenship and Entry into Israel Law (temporary provision)*, 5763 – 2003, 31 July 2003; Mazen MASRI, "Love Suspended: Demography, Comparative Law and Palestinian Couples in the Israeli Supreme Court" (2013) 22 *Social & Legal Studies* 309.

<sup>83</sup> See the decisions of the Supreme Court of Israel in *Central Elections Committee for the Sixteenth Knesset v. Tibi*, EC 11280/02 (2003), IsrSC 57(4) 1; *Ben Shalom v. Central Elections Committee*, EA 2/88 (1989), IsrSC 43(4) 221; *Galon v. The Attorney General*, HCJ 466/07 (2012).

<sup>84</sup> *Report of the Committee on the Elimination of Racial Discrimination*, Committee on the Elimination of Racial Discrimination, UN Doc. A/50/18 (1995).

<sup>85</sup> *Survey of Palestinian Refugees*, *supra* note 1.

<sup>86</sup> *1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950); Mazen MASRI, "Israel's Wall, Displacement, and Palestinian Resistance in the West Bank" in Daniel Coleman, *et al.*, eds., *Countering Displacements: The Creativity and Resilience of Indigenous and Refugee-ed Peoples* (Edmonton: University of Alberta Press, 2012), 59.

<sup>87</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.

<sup>88</sup> John DUGARD and John REYNOLDS, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24 *European Journal of International Law* 867; Virginia TILLEY, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London: Pluto Books, 2012).

It is important here to highlight that despite the fact that issues of migration and nationality are matters of local law, they are still governed by principles of international law.<sup>89</sup> Israel cannot rely on its internal legislation, and even its constitutional basic laws that emphasize the idea of the Jewish state in order to evade its obligations under international law.<sup>90</sup> In any event, these issues are not expected to be addressed in any local Israeli court; instead, they are expected to be discussed in negotiations between Israel and the Palestine Liberation Organization, as the political representative of the refugees, and they, therefore, have to be decided in accordance with international law. Indeed, according to the Oslo agreement, the question of the refugees is one of the issues to be discussed in the “permanent status” negotiations.<sup>91</sup>

In this context, it is worthwhile noting the circumstances under which some Palestinian refugees had acquired a new citizenship. As a result of the displacement of 1948, Palestinian refugees fled mainly to neighbouring countries, such as Jordan (which after the war included the area known as the West Bank of the Jordan River, which in 1967 was occupied by Israel), Syria, Lebanon, Egypt (including the Gaza Strip which was under Egyptian occupation), and Iraq. Out of these countries, only Jordan granted citizenship to the Palestinians who resided in the Kingdom after the 1948 war. This category included refugees (who fled to Jordan and the West Bank) and non-refugees (residents of the West Bank).<sup>92</sup> In 1988, Jordan renounced its claim for sovereignty over the West Bank and severed its legal and administrative links with it, and as a result, Palestinians residing there lost their Jordanian citizenship, and Palestinian refugees residing in Jordan were able to maintain their Jordanian citizenship.<sup>93</sup> This is the biggest category of Palestinian refugees who now hold citizenship of a third state, and they number about 1.75 million.<sup>94</sup> Another significant group of Palestinian refugees who were given citizenship were wealthy Christian Palestinians in Lebanon. The Lebanese Government gave them citizenship in the 1950s in an attempt to maintain the demographic balance between Christians and Muslims in the country.<sup>95</sup> In the other host countries mentioned above and other countries that some Palestinian refugees have immigrated to or sought asylum in—mainly Europe, North American, and Australia—the grant of citizenship was done on an individual basis as part of the naturalization process.<sup>96</sup>

<sup>89</sup> Weis, *supra* note 31 at 88.

<sup>90</sup> *Ibid.*; see also *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, [1988] I.C.J. Rep. 12.

<sup>91</sup> Article XVII (1)(a) of the *Palestinian-Israeli Interim Agreement on the West Bank & Gaza Strip*, 28 September 1995, online: UNSCO <<http://www.unsco.org/Documents/Key/Israeli-Palestinian%20Interim%20Agreement%20on%20the%20West%20Bank%20and%20the%20Gaza%20Strip.pdf>>.

<sup>92</sup> Article 3 of the *Jordanian Nationality Law (1954)*, Official Gazette no. 1171, p.105 (16.2.1954). See Takkenberg, *supra* note 4 at 155.

<sup>93</sup> Takkenberg, *supra* note 4 at 156; Asem KHALIL, “Palestinian Refugees in Arab States: A Rights Based Approach”, CARIM Research Reports (Euro-Mediterranean Consortium for Applied Research on International Migration), 2008-2009, 22, online: SSRN <<http://ssrn.com/abstract=1523510>>.

<sup>94</sup> The total number of Palestinian refugees in Jordan registered with the United Nations Relief and Works Agency is about 1.98 million. See UNRWA, “In Figures as of 1 January 2012” (January 2012), online: UNRWA <<http://www.unrwa.org/userfiles/20120317152850.pdf>>. Out of this number, one should deduct about 150,000 to account for Palestinian refugees who came to Jordan from the Gaza Strip after the 1967 war. These refugees were not granted Jordanian citizenship. See Khalil, *ibid.*, at 23.

<sup>95</sup> Takkenberg, *supra* note 4 at 164.

<sup>96</sup> Khalil, *supra* note 93 at 19-28; Takkenberg, *supra* note 4 at 149-91.

### III. INTERNATIONAL REFUGEE LAW AND THE CESSATION OF THE REFUGEE STATUS

This part of the article will deal with the impact of the cessation of refugee status on the right of return of Palestinian refugees. It will begin by discussing the particular situation of Palestinian refugees under international law and the applicability of Article 1D of the 1951 Convention. A discussion on cessation under Article 1C of the 1951 Convention will follow. The rationale for Article 1C and Article 12(4) of ICCPR, and the possible ways of interpreting these provisions will be examined to ascertain whether the two provisions are contradictory. Based on this analysis, it will be argued that the cessation clause does not necessarily terminate the right of return.

#### A. *Palestinian Refugees and the 1951 Convention*

Before proceeding with the analysis of the cessation clauses of the 1951 Convention, one should examine the special situation of the 1948 Palestinian refugees under international law and the applicability of the 1951 Convention. This discussion is needed because opinions on when and how the 1951 Convention applies to Palestinian refugees vary.

Due to the circumstances that led to the creation of the Palestinian refugee problem, Palestinian refugees are treated in a unique manner under the international refugee regime.<sup>97</sup> With the mass exodus of refugees in 1948 and 1949, the UN General Assembly created two UN bodies to deal with the issue. The first body, created in 1948, was the United Nations Conciliation Commission on Palestine (UNCCP). Its mandate included, *inter alia*, the promotion of “a peaceful adjustment of the future situation in Palestine”<sup>98</sup> and:

[t]o facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.<sup>99</sup>

Thus, the UNCCP is supposed to have the mandate of protecting Palestinian refugees.<sup>100</sup> In 1949, the UN created the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). UNRWA’s mandate was to provide assistance by carrying out a “direct relief and works programme”.<sup>101</sup> UNRWA’s mandate was restricted to assistance, while protection fell within the mandate of UNCCP.<sup>102</sup> Although the UNCCP still exists officially, it has been defunct

<sup>97</sup> Akram and Rempel, *supra* note 2 at 9.

<sup>98</sup> *Appointment and Terms of Reference of a United Nations Mediator in Palestine*, GA Res. 186 (S-2), UN Doc. A/RES/186 (S-2) (1948).

<sup>99</sup> *GA Res. 194 (III)*, *supra* note 24.

<sup>100</sup> Akram and Rempel, *supra* note 2 at 19; Takkenberg, *supra* note 4 at 279. Takkenberg asserts at 280 that: it may be argued that UNRWA has been providing international protection to the ‘Palestine Refugees’ under its care from the very moment of its establishment. However, in the absence of an explicit protection mandate similar to that of UNHCR, the more traditional aspects of international protection, often referred to as legal and political protection, were for a long time not expressly addressed by the agency.

<sup>101</sup> *Assistance to Palestine Refugees*, GA Res. 302 (IV), UN Doc. A/RES/302 (IV) (1949).

<sup>102</sup> Akram and Rempel, *supra* note 2 at 17.

since the 1960s, and has ceased to fulfill its protection mandate.<sup>103</sup> This has left the Palestinian refugees with very little protection, creating “a protection gap”.<sup>104</sup>

According to Article 1D of the 1951 Convention, the Convention does not apply to refugees who receive protection or assistance from other UN agencies other than the United Nations High Commissioner on Refugees (UNHCR).<sup>105</sup> Since other UN bodies deal with the issue of Palestinian refugees, the applicability of the 1951 Convention to Palestinian refugees is unclear. The way this Article applies to Palestinian refugees can be interpreted in a number of ways.<sup>106</sup> Lex Takkenberg, for example, argues that the first sentence of Article 1D, known as the “exclusion clause”, means that the 1951 Convention applies to Palestinian refugees falling under the mandate of UNRWA as long as they have the possibility of receiving assistance from UNRWA. Takkenberg’s emphasis here is on the possibility of receiving assistance, and not the actual receipt of assistance. He asserts that the second clause, also known as the “inclusion clause”, applies only when the possibility of getting assistance from UNRWA ceases to be available.<sup>107</sup> In such situations, Palestinian refugees, as a category, will be entitled to the benefits of the 1951 Convention without making any determination whether the refugees meet the criteria of Article 1A(2).<sup>108</sup> The UNHCR offers a somewhat different interpretation. According to its revised note from 2009,<sup>109</sup> the UNHCR considers the 1948 Palestinian refugees, who are inside the area of operations of UNRWA, to fall within the exclusion clause in Article 1D, and if a refugee leaves the area of operation of UNRWA for any reason, the refugee will be included in the inclusion clause of Article 1D, without having to pass a new assessment under Article 1A, regardless of her ability to return to the area of operations of UNRWA.<sup>110</sup>

<sup>103</sup> *Ibid.*, at 21

<sup>104</sup> Susan AKRAM, “Palestinian Refugees and Their Legal Status” (2002) 31 *Journal of Palestine Studies* 42.

<sup>105</sup> Article 1D of the 1951 Convention, *supra* note 5 provides that:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

<sup>106</sup> For a detailed discussion of Art. 1D as it applies to Palestinian refugees, see BADIL, “Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention” (August 2005), online: BADIL <[www.badil.org](http://www.badil.org)>. See also Gug GOODWIN-GILL and Susan AKRAM, “Foreword to Amicus Brief on the Status of Palestinian Refugees Under International Refugee Law” (2000-2001) 11 *Palestine Yearbook of International Law* 185.

<sup>107</sup> Takkenberg, *supra* note 4 at 100.

<sup>108</sup> *Ibid.*, at 123.

<sup>109</sup> UNHCR, “Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees” (October 2009), online: UNHCR <<http://www.unhcr.org/refworld/docid/4add77d42.html>>. This Note replaced an earlier Note by UNHCR on this issue, see UNHCR, “Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to the Palestinian Refugees” (October 2002), online: UNHCR <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3da192be4>>. See also UNHCR, “UNHCR Revised Statement on Article 1D of the 1951 Convention” (October 2009), online: UNHCR <<http://www.unhcr.org/refworld/pdfid/4add79a82.pdf>>.

<sup>110</sup> This is a departure from UNHCR’s past interpretation of Article 1D as it applies to the 1948 Palestinian refugees. Before the 2002 and 2009 Statements, the UNHCR position was that refugees receiving protection and assistance from UNRWA are excluded by Article 1D. However, if the refugee is outside the area of operation of UNRWA, that person “may be considered for determination of his refugee status under the criteria of the 1951 Convention”, that is, under Article 1A, paragraph 2. See paras. 142-3 of UNHCR, “Handbook on Procedures and Criteria for Determining

Susan Akram and Terry Rempel, on the other hand, argue that the most appropriate interpretation of Article 1D is to view it as a contingent inclusion clause, which will be triggered by the cessation of either protection or assistance by the two UN agencies, UNRWA and UNCCP. Since the UNCCP ceased to fulfill its mandate in the 1950s, the 1951 Convention and all of the guarantees and the rights it provides should apply to Palestinian refugees under the inclusion clause in Article 1D.<sup>111</sup> Akram and Rempel further argue that Palestinian refugees should be entitled to the benefits under Article 1D of the 1951 Convention until their position is “being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations” as per the requirement of Article 1D, which in this case means that they are given the option to exercise their rights to return and compensation according to UN General Assembly Resolution 194(III).<sup>112</sup>

To sum up this point, different opinions have been voiced on the question of the applicability of the 1951 Convention to the Palestinian refugees, and the extent and limits of its applicability. Nevertheless, in the absence of a definitive answer on this issue, the 1951 Convention and the cessation clause remain relevant.

### B. *International Refugee Law and the Focus on Protection*

The main international law instruments that deal with refugees and refugee status are the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. The Statute of the Office of the United Nations High Commissioner on Refugees is also relevant.<sup>113</sup> The definition of refugee in Article 1A of the 1951 Convention includes three key components: fear of persecution, being outside the country of nationality or habitual residence, and lack of protection.<sup>114</sup> Refugee law is meant to deal with these three components. The principle of *non-refoulement* prohibits states from returning individuals who face an actual or well-founded fear of persecution. The other two components, alienage and the lack of protection, are addressed by the international community, which is working collectively to achieve durable solutions for refugees. Durable solutions are meant to provide options for refugees whereby the refugees can find permanent residence, and enjoy the protection of a state and cease to be a refugee. This obliges the international community to devote resources to deal with the problems created by the influx of people who are essentially aliens. International law, therefore, sees refugees as a problem for the international community, one that the international community should cooperate in resolving.<sup>115</sup> Refugee status should be seen as temporary since it is a problem that should be resolved. It should be seen

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Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (January 1992), online: UNHCR <<http://www.unhcr.org/3d58e13b4.html>> [*Handbook on Procedures and Criteria*].

<sup>111</sup> Akram and Rempel, *supra* note 2 at 67.

<sup>112</sup> *Ibid.*, at 68.

<sup>113</sup>; *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967); *UNHCR Statute*, *supra* note 8.

<sup>114</sup> Article 1A(2) of the *1951 Convention*, *ibid.* defines refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

<sup>115</sup> See Preamble to the *1951 Convention*, *ibid.*



as an exception to the rule that people should enjoy the protection of their countries. How does cessation affect the other rights of the refugee, especially the right to return to the country of origin? Does cessation terminate or limit that right? In order to answer this question, one needs to examine the meaning of cessation and situate the discussion within the objectives and rationale of International Refugee Law (IRL). The interaction between the right of return and IRL should also be examined for inconsistencies and contradictions.

At the heart of refugee law, and as its underlying rationale, lies the principle of protection. Refugee law is meant to determine when refugee status begins—a status which is triggered by alienage and the lack of protection by the state of origin. Once the status is determined, refugee law determines what kind of protection a refugee should be entitled to, the rights of the refugee and obligations of the host state until the status ceases.<sup>116</sup> James Hathaway has put it clearly and succinctly when he said that the main purpose of refugee law:

is to ensure that those whose basic rights are not protected (for a Convention reason) in their own country are, if able to reach an asylum state, entitled to invoke rights of substitute protection in any state party to the Refugee Convention.<sup>117</sup>

Since refugee law sees refugee status as a problem, which is also a temporary phenomenon, it seeks to find permanent solutions for the refugee problem, which would secure that refugees or former refugees enjoy the necessary protection.<sup>118</sup>

International law envisages three solutions for the refugee problem that would bring the refugee status to an end: integration in the country of refuge, resettlement in a third country, or voluntary repatriation, with the latter being the most desirable solution.<sup>119</sup> The emphasis is on bringing refugee status to an end by providing a place of residency and protection. None of these instruments explicitly grants refugees the right to return to their own countries or homes. Refugee law mainly calls upon the relevant states to facilitate a solution, be it repatriation or assimilation within new national communities.<sup>120</sup> Out of the three durable solutions, only repatriation represents an absolute obligation on a state, that is, the state of origin. No state is obliged to grant permanent status or citizenship to anyone other than “persons born in its territory who otherwise would be stateless”.<sup>121</sup> Resettlement and absorption, therefore, represent discretionary grants of “grace” by the state, not a state obligation, while repatriation is a state obligation.<sup>122</sup> The fact that return is seen as the most desirable solution does not mean that

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<sup>116</sup> See for example Arts. 12-43 of the *1951 Convention*, *ibid.*

<sup>117</sup> James HATHAWAY, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 5.

<sup>118</sup> Art. 1 of *UNHCR Statute*, *supra* note 8.

<sup>119</sup> Marjoleine ZIEK, *UNHCR Voluntary Repatriation of Refugees: A Legal Analysis* (The Hague: Martinus Nijhoff Publishers, 1997) at 123; Guy GOODWIN-GILL and Jane MCADAM, *The Refugee in International Law* (Oxford: Oxford University Press, 2007) at 489.

<sup>120</sup> Goodwin-Gill and McAdam, *ibid.*, at 492; Zilbershats, *supra* note 3 at 209.

<sup>121</sup> See Art. 1 of the *Convention on the Reduction of Statelessness 1961*, 30 August 1961, 989 U.N.T.S.175 (entered into force 13 December 1975).

<sup>122</sup> For a different opinion on this point, see Laura Anne REEDS, “Sixty Years in Limbo: The Duty of Host States to Integrate Palestinian Refugees Under Customary International Law” (2006) 81 *New York University Law Review* 351. See also Yaffa ZILBERSHATS, *The Human Right to Citizenship* (Ardley: Transnational Publishers, 2002) at 107.

refugee law is the sole source of that right. It is merely a reflection of what is usually seen as the desires of the refugees and the international community.<sup>123</sup>

Even in the search for permanent solutions for refugees, the focus is mostly on protection. In the area of voluntary repatriation, for example, the focus is on two main points: the voluntary nature of the repatriation,<sup>124</sup> and the refugee's return in safety and with dignity. Safe return encompasses legal safety, such as "amnesties and personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return".<sup>125</sup> It also includes physical and material security.<sup>126</sup> These are all elements of protection. In the area of resettlement and acquisition of a new nationality, two main points are important to note: the voluntary nature of the acquisition of the new nationality<sup>127</sup> and the effectiveness of the nationality, that is, that it confers protection and rights that are fundamental to nationality.<sup>128</sup> The voluntary nature of the acquisition of the nationality is important as involuntary acquisition of nationality does not result in the cessation of the refugee status.<sup>129</sup>

Refugee law, as such, does not explicitly create a right to return which is specific to refugees, but it assumes its existence *a priori*. Since it already exists under international law, the role of refugee law regarding return is merely to induce the relevant parties to facilitate the voluntary repatriation of the refugees. Therefore, in the absence of any explicit provision, international refugee law instruments cannot be seen as sources of authority to abrogate the right. In fact, the trend that can be identified in the area of refugee law is deference to general human rights law. To this end, the UNHCR Executive Committee has stated that "[s]tates must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice, bearing in mind the moral dimensions of providing refugee protection".<sup>130</sup> This is also consistent with the view that sees refugee rights as part of general international human rights law.<sup>131</sup> As Hathaway has put it: "[r]efugee rights do not exist as an alternative to, or in competition with, general human right. Nor, however, has the evolution of a broad-ranging

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<sup>123</sup> See Preface to the UNHCR, "Handbook on Voluntary Repatriation: International Protection" (April 1996), online: UNHCR <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4164f6404&query=Handbook%20on%20Voluntary%20Repatriation:%20International%20Protection>>; see also *Conclusion on Local Integration*, No. 104 (LVI) – 2005, EXCOM Conclusions, 7 October 2005, UN Doc. A/AC.96/1021 (2005).

<sup>124</sup> The reason for focusing on the voluntary nature of return is that in the past, prior to the 1951 Convention and the creation of the UNHCR, the general assumption was that all refugees would wish to return home. This was seen as the responsibility of the United Nations Relief and Rehabilitation Administration (UNRRA) that was created in 1943. Shortly after UNRRA started its operations, it began facing resistance to repatriation by refugees who had reasons to believe that their place of origin was not safe. This led to debates on the issue and the introduction of the principle that no one should be repatriated against her will. This is the underlying principle behind the focus on the voluntary nature of repatriation. On the evolution of the concept of voluntary repatriation, see generally Zeik, *supra* note 119 at 41.

<sup>125</sup> *Handbook on Procedures and Criteria*, *supra* note 110 at para. 2.4.

<sup>126</sup> *Ibid.*

<sup>127</sup> UNHCR, "The Cessation Clauses: Guidelines on Their Application" (April 1999), online: RefWorld <<http://www.refworld.org/docid/3c06138c4.html>>.

<sup>128</sup> Goodwin-Gill and McAdam, *supra* note 119 at 138.

<sup>129</sup> James HATHAWAY, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 210.

<sup>130</sup> UNHCR, "General Conclusion on International Protection No. 50 (XXXIX) – 1988 EXCOM Conclusions" (10 October 1988), online: UNHCR <<http://www.unhcr.org/3ae68c9510.html>> at para. C.

<sup>131</sup> Hathaway, *supra* note 117 at 5.

system of general human rights treaties rendered the notion of refugee-specific rights redundant”.<sup>132</sup>

Article 1C(3) of the 1951 Convention provides that the application of the Convention will cease if the refugee acquires a new nationality and enjoys the protection of the country of nationality. Again, we see that the emphasis is on the protection and the extent to which the new nationality can provide protection. This reinforces the assertion that the main focus in the 1951 Convention is on protection, and that the cessation of the refugee status only examines and deals with the protection and its quality.<sup>133</sup> Other paragraphs of Article 1C also highlight the issue of protection. For example, paragraph 1 states that the re-availment of the refugee of the protection of her country of nationality will bring the refugee status to an end. Paragraph 5 provides that compelling reasons, arising out of previous persecution, for the refugee’s refusal to avail herself of the protection of the country of nationality are an exception for the cessation of the refugee status because of the change of circumstances in the country of nationality. A similar exception also exists in paragraph 6, which deals with refugees who do not carry the nationality of the country of origin, but who are only habitual residences. Paragraph 2, which focuses the re-acquisition of nationality also implicitly deals with protection, since nationality and the re-acquisition of nationality constitute the supreme manifestation of the re-availment of protection of the country of origin.<sup>134</sup> It is clear that the underlying rationale behind this clause is to determine when a refugee ceases to be in need of international protection, and when the “refugee problem” comes to an end. It is not intended to have any implications on the rights the refugee had before becoming a refugee.

### C. *Interpretation of the 1951 Convention and the ICCPR: Contradiction or Harmony?*

As opposed to the 1951 Convention which deals with the relationship between the refugee and the country of refuge, Article 12(4) of the ICCPR deals with a right that is triggered by the arbitrary action of the refugee’s state of origin, which denies the refugee the right to enter the country. The Article’s focus is on the issue of freedom of movement and the relationship between the individual and the country she resides in, and the obligations that are imposed on states as a result of this link. The right, in this situation, is invoked *vis-à-vis* the state of origin. It is, therefore, clear that the 1951 Convention and the ICCPR are meant to serve different objectives and functions, and protect different interests, although there may be some, albeit minimal, overlap between them. Therefore, there is no contradiction in asserting that an individual retains the right to return even if her refugee status has been terminated. It may be the case that the lack of any apparent contradiction is the reason why authors who have written in support of the applicability of Article 12(4) of the ICCPR did not feel compelled to examine the impact of the cessation on the right of return. On the other hand, an argument can be made that the acquisition of a new citizenship terminates the right of return of the former refugee to her

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<sup>132</sup> *Ibid.*, at 75.

<sup>133</sup> 1951 Convention, *supra* note 5. See generally Joan FITZPATRICK, “The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection” (1999) 13 Georgetown Immigration Law Journal 343.

<sup>134</sup> 1951 Convention, *ibid.*; Goodwin-Gill and McAdam, *supra* note 119 at 138.

country of origin. Lewis Saideman argues, based on his perceived contradiction between two treaty provisions, that

[c]onventions and laws in general ought to be interpreted in a plain language manner that harmonizes them rather than in a manner that places them at odds with each other. If a refugee has accepted new nationality, he now has a place that he can “enter” and call home; his new state of protection is his “own country”.<sup>135</sup>

From the outset, it should be explained that, as shown above, there is no conflict between Article 12(4) of the ICCPR and Article 1C of the 1951 Convention, since the 1951 Convention contains no provision abrogating the right of return. Nevertheless, even if a conflict does exist, does the interpretation that Saideman offers, which terminates the right to return, adhere to the rules of interpretation of treaties under international law? As shown in the analysis below, the answer is no.

The interpretation of treaties is governed by the Vienna Convention on the Law of Treaties.<sup>136</sup> The treaty is seen, more or less, as a restatement of customary international law,<sup>137</sup> and is ratified by 108 states.<sup>138</sup> Article 31(1) of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31(2) stipulates that the context for the purpose of interpretation shall include, *inter alia*, the text, the preamble, and the annexes. The context of the ICCPR, as can be understood from its text and the preamble, is the guarantee, protection, and promotion of human rights in general, with a special emphasis on civil and political rights. Also, another leading principle in the interpretation of human right treaties, especially the ICCPR, is that provisions permitting derogations from rights and limitations on rights, should be construed in a strict and narrow manner.<sup>139</sup> So even if the cessation clause is treated as a limitation clause, its scope and interpretation should be construed in a strict and narrow manner.

With respect to the 1951 Convention, apart from the fact that it does not contain any provision indicating that cessation of refugee status can affect the right of return of the refugee, the preamble of the Convention begins by considering the “principle that human beings shall enjoy fundamental rights and freedoms without discrimination”.<sup>140</sup> It also considers the fact that the UN has “endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms”.<sup>141</sup> This emphasis on human rights shows that the object of the Convention is to provide humans with further rights, or create refugee-specific rights, but not to abrogate rights already in existence. Therefore, Article 1C of the 1951 Convention should not be construed in a way that limits and restricts human rights that were granted by other international law instruments.<sup>142</sup>

<sup>135</sup> Saideman, *supra* note 3 at 863.

<sup>136</sup> *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).

<sup>137</sup> Crawford, *supra* note 65 at 368.

<sup>138</sup> UN, “Multilateral Treaties Deposited with the Secretary General”, online: UN <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>>.

<sup>139</sup> Hannum, *supra* note 38 at 23.

<sup>140</sup> Preamble to the *1951 Convention*, *supra* note 5.

<sup>141</sup> *Ibid.*

<sup>142</sup> See e.g. *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Decision by the Court of Justice of the European Union, C-175/08, C-176/08, C-178/08, C-179/08 at paras. 53-4. See also *Suresh v. Canada (Minister of*

Saideman further elaborates on this issue, and argues that even if a refugee is seen as having two nationalities, the acquisition of a new citizenship brings to an end the right of return to the state of origin. His argument is based on the assertion that international law does not compel recognition of dual citizenship, and even tries to limit it.<sup>143</sup> He further argues that “the increasing phenomenon of toleration of dual citizenship does not indicate a widespread subjective sense of legal obligation on the part of states, but appears to be a gratuitous gesture by willing nations”.<sup>144</sup> Saideman concludes that since recognition of dual citizenship is only permissible under international law and is not a right, “Article 12(4) of the CCPR ought to be interpreted to grant an individual a right to call only one country ‘his own’”.<sup>145</sup> He does not, however, provide any reason as to why dual citizenship should not be recognized under the ICCPR even though it is permissible under international law. In addition, this argument seems to be outdated, and ignores the fact that nationality in the context of international human rights law is not nationality in the formal sense, but an effective and genuine link between the country and the individual. His assertions regarding dual citizenship do not reflect a rule of general international law. Although some treaties regard the restriction of the ability to have more than one nationality as desirable, and strive to reduce multiple nationalities,<sup>146</sup> there are other treaties that tolerate multiple nationalities, and others that even encourage dual nationality.<sup>147</sup> Thus, the treaties, which seek to restrict multiple nationalities, are seen as particular international law,<sup>148</sup> and cannot be seen as a rule of general international law. International law on this point appears to be neutral. The argument, therefore, that the right of return can only be limited to one state because international law does not create an obligation to recognize multiple citizenship is not supported by the recent trends in the area. Such an interpretation also ignores the human rights context. The argument becomes even harder to sustain given that Israel itself tolerates multiple citizenship.

In conclusion, the interpretation that Saideman provides cannot stand. The method of interpretation used, and the assertions and assumptions made, are contrary to universally

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*Immigration and Citizenship*), (2002) S.C.C. 1, [2002] S.C.R. 3. In this case, the Minister of Immigration and Citizenship was requesting the deportation of a Convention refugee from Sri Lanka, despite the fact that it was likely that the refugee would be subjected to torture if deported. On the issue of refugee-specific rules and general human rights, the Court said, at paragraph 72, that:

In our view, the prohibition in the ICCPR and the CAT [Convention Against Torture] on returning a refugee to face a risk of torture reflects the prevailing international norm. Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a ‘profound concern for refugees’ and its principal purpose is to ‘assure refugees the widest possible exercise of ... fundamental rights and freedoms’ (Preamble). This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone.

<sup>143</sup> Saideman, *supra* note 3 at 865.

<sup>144</sup> *Ibid.*, at 865.

<sup>145</sup> *Ibid.*

<sup>146</sup> See, for example, *The Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, 6 May 1963, 634 U.N.T.S. 221 (entered into force 28 March 1968). This Convention was later amended and the requirements for allowing multiple nationalities according to this Convention were relaxed. See also *Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, 2 February 1993, 1967 U.N.T.S. 338 (entered into force 24 March 1995).

<sup>147</sup> Donner, *supra* note 67 at 203.

<sup>148</sup> Weis, *supra* note 31 at 199.

accepted rules of interpretation, and contrary to the principles and objectives of both Conventions. In fact, the proposed interpretation (which supposedly would result in greater harmonization of international law) comes with many risks. Refugee law aims at providing protection to refugees till their “refugee problem” is solved. It is also seen as a temporary status, until the “refugee problem” is solved and adequate protection is provided. To this end, the reduction of the number of refugees in the world by offering durable solutions is described as one of the goals of the UNHCR.<sup>149</sup> At the same time, many refugees insist on returning to their state of origin, and refuse any other option that would risk their right to return. Harmonization in the manner proposed by Saideman may deter such refugees, who desire to return to their homes, from seeking to improve their situation and give up their status as refugees by acquiring a new nationality because this would compromise their ability to return to their country of origin.

If for the sake of harmonization, refugees who wish to acquire a new nationality would be deprived of their right to return to the state of origin, many refugees may opt not to acquire a new nationality, and thus preserve their status as refugees, a status that is seen as “a problem”, and that international law aims at eradicating. Harmonization in this manner would decrease the number of refugees who would opt to terminate their refugee status, which would be at odds with the object of the 1951 Convention itself. This kind of harmonization would punish the refugee for attempting to improve her situation. It is also in contradiction with the principles and goals of the international refugee law system. In addition, the position suggested is flawed because it ignores the other different sources of law of the right of return.<sup>150</sup>

#### IV. CONCLUSION

The issue raised in this article deals mainly with the relationship between international refugee law and general human rights law. Although the emphasis is on Palestinian refugees, this question is relevant in the context of refugees that have been in exile for a long period of time, and seek to improve their situation by being naturalized in another state. It arises in a more acute way in situations of ethnic cleansing, or situations where the state of origin is not interested in repatriation because of the ethnicity, race, or social or group class of the refugees. Classic examples are conflicts that are ethnic or national in nature, especially in the context of state succession where issues of nationality become complex.

The right of return to one’s own country, especially a refugee’s right of return, goes beyond the concept of citizenship or nationality. It is focused on the link between the individual and the territory, and on the interest of the individual in having a safe space to live in and thrive.

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<sup>149</sup> Art. 8(b) of the Statute of the Office of the United Nations High Commissioner for Refugees provides that (*UNHCR Statute, supra* note 8):

The High Commissioner shall provide for the protection of refugees falling under the competence of his office by:

...

(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number required protection.

<sup>150</sup> In his article, Saideman evaluates the different sources of law for the right of return, and concludes that the only one that applies in the case of the Palestinian refugees is the ICCPR, which is probably why he did not discuss the impact of the other sources law in his analysis. This position, in my opinion, is fundamentally mistaken.

Sometimes, like in the situation of naturalization in a different country, this link is somehow weakened. In such situations, the weakening of the link should not automatically lead to a deprivation of rights. This is especially true in the case of refugees. The circumstances that led the refugees to leave their country of origin, the circumstances blocking their return, and the decisions made by the individuals in view of their available options should be examined. If the country of origin did not allow, or facilitate, the strengthening of relations with it, it would be difficult to argue that the individual has lost her link with that country, and thus the right to enter it. The right to return, therefore, is not contingent on formal nationality, but on a strong link between the individual and the territory. The fact that this link is weakened due to restrictions and measures by the state cannot be used to abrogate the link and the rights that stem from this link.

The abrogation of the right of return, therefore, with all of the implications that it has for the link between the individual and the territory, is not a simple issue, and cannot be determined without taking into consideration the circumstances that caused the refugee's departure and those that are blocking her return. The right is independent of the refugee status, even though it becomes more important and relevant in the case of refugees. Since the right of return is independent of the refugee status, the cessation of the latter should not necessarily abrogate the former. Although the refugee status is governed by refugee law, and at the same time the refugee is entitled to exercise the right to return under the ICCPR, this overlap should not be seen as a contradiction that needs to be reconciled. Both tools aspire to achieve different ends and protect different interests, and hence do not clash. One cannot expect that with the cessation of the refugee status, the refugee would relinquish all legal, social, and spiritual links with her country of origin. It is hard to conceive of the legal status of individuals as encompassing all aspects of her life, and as the determinate factor in deciding her belonging and links. Similarly, it would be naive and even ridiculous to see the acquisition of a new nationality as an event that "resets" the human experience, and as an event that transcends human belonging, social links, culture, and life.

As James Hathaway argued, refugee law is not an alternative or a competitor to general human rights law. This notion is well-supported by the refugee law instruments and the practices of the international organizations dealing with refugees. This notion should be the guiding principle when dealing with the interaction between refugee law and general human right law.