

Palestinian Nationality and “Jewish” Nationality

From the Lausanne Treaty to Today

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This chapter assesses the legal foundations of Zionist and Palestinian national claims over the land of Palestine since the British Mandate. It explores the legal basis and implications of the claim of Jewish nationality in Palestine and compares it with the claim of Palestinian nationality. The question of national rights, and who can claim them, is central to rethinking the statehood and residency rights of those living today in the area of historic Palestine. The law of nationality is at the core of the protections of peoples' right to self-determination, and understanding the principles underlying nationality law is essential to separating claims from rights in considering Palestinian and Jewish peoples' supposedly conflicting claims to residency and right of return.

The central premise in applying international nationality law to the conflict over territorial claims is that Palestinians possess a defined nationality that remains valid and legally cognizable today. Moreover, as a legal matter, Palestinian nationality is not negated by the claim of a Jewish state in Israel, or by an extraterritorial claim to Israel by Jews elsewhere in the world. In order to understand the difference between Israeli, Jewish, and Palestinian national statuses, it is critical to appreciate that the international law of nationality operates to protect a fundamental connection between peoples and their lands of origin: the territorial and direct “bloodline” connection, not a religious connection, determines national rights. This chapter will analyze the key norms of international nationality law, and apply them to the relevant legal instruments affecting the conflict over rights to territory in Palestine. It examines not only the application of the norms to this conflict, but also how (and whether) instruments such as the British Mandate, the Balfour Declaration, and the most relevant United Nations resolutions affected the claims of Jews and Palestinians to national status in the territory. In essence,

this short excursus into the legal and historical background of the conflicting claims of self-determination to and in Palestine illustrates how “getting the law right” paves the way for a different and more equitable shared future in the same land for Jews and Palestinians, both those now living there and those who have the right to return there.

INTERNATIONAL LEGAL DEFINITIONS OF NATIONALS AND CITIZENS

At the outset, it is important to define the meaning of the terms *citizen* and *national*. Although these terms are frequently used interchangeably, they have distinct legal meanings. *Nationality* has both a sociological meaning and a legal one; the sociological understanding is quite distinct from but more commonly understood than its legal definition. In sociological terms, nationality encompasses ethnonational identity, that is, self-identification with a particular group considered to have a common ethnic origin—for example, Bosnians, Serbs, Kurds, Tamils, or Armenians—regardless of the territory in which they are located. The legal meaning is quite different, however, and refers to a legal relationship between an individual and a particular state or territory. Under classical international law theory, nationality determines which state a person belongs to for purposes of disputes with other states. Since nationality is “the link between [international] law and the individual,” it is critical to determine who is a “national” of a state or territory, and hence what rights in and to that state or territory the individual has as a matter of international law.¹ From the legal perspective, the ethnonational identity of a person is irrelevant, as it is the connection the person has to a particular state or territory—that is, their membership in it—which defines a person’s legal nationality and political rights.²

Nationality as an international legal concept was defined as early as 1939 by the Permanent Court of International Justice as “the bond . . . between the State and the individual,” and further interpreted by the successor International Court of Justice (ICJ) as the “genuine link” between an individual and a territory.³ The core principle of which “genuine links” establish nationality was already incorporated in domestic laws and treaties by the late 1800s and included birth on the soil of the territory (*jus soli*), birth to a parent with the national status of the territory (*jus sanguinis*), and less frequently and with less certain rules, long-term residence on the territory (*jus domicilii*).⁴ By the early 1900s, nationality principles had solidified around these norms to exclude race, religion, language, or ethnic origin alone as the basis for national status. Birth on the territory, direct blood relationship through a parent holding the nationality, and/or long-term (“habitual”) residence were the key “genuine links” for nationality status to be recognized under international law.⁵ Equally important during the colonial era was the obligation

to conform any nationality legislation to binding treaties regulating the status of inhabitants of territories, whether such inhabitants were part of independent states or under colonial rule.⁶

The term *citizen* is of significance as a matter of the domestic law of states; that is, a state can determine through its internal laws who among its residents has the preferred status of citizenship, with its particular privileges and benefits, as well as its concomitant responsibilities. A state's prerogative to define its citizens, however, has normative limitations, as it cannot define citizens in an arbitrary or discriminatory way that is prohibited by treaty or international custom. In other words, a state's ability to pass domestic law on citizenship is circumscribed by certain international legal rules.⁷ The most important of these rules is the "genuine links" principle described above. Another key rule that was already recognized as customary international law by the time of the Harvard study on nationality laws in 1929 was that inhabitants of a territory undergoing a change of sovereignty automatically acquire nationality in the new state.⁸

A corollary to this principle, now codified in human rights treaties, is the principle that no state can denationalize an individual on an arbitrary basis—this prohibits, for example, denationalization or prevention of return to the territory of nationality for reasons of race, religion, or national or ethnic origin.⁹ The rule requiring states to conform to these treaty requirements is as absolute today as it was during the colonial or mandate era.¹⁰ Although in classical international law terms the nationality of a person is determined by international law and citizenship by domestic law, the distinction between the two has become less significant with the growing importance of human rights law. In the Palestinian case, and in most of the Arab world, however, the distinction between the two remains both relevant and critical, primarily because most of these states have not ratified the relevant treaties that would apply human rights law to nationality, citizenship, and related principles regarding stateless people and refugees.

One of the prime illustrations of the importance of distinguishing between the concepts of citizenship and nationality is with regard to the definition of statelessness. The international legal definition of a stateless person under the 1954 Stateless Persons Convention is one "who is not considered as a national by any State under the operation of its law," a definition clearly connected to domestic citizenship legislation.¹¹ However, if the relevant domestic citizenship law fails to conform to international principles, is the individual truly stateless? The 1961 Convention on the Reduction of Statelessness adopted a recommendation that persons who were effectively deprived of nationality should be treated as meeting the international definition of stateless persons *de jure*.¹² In the Palestinian case, it is the premise of this chapter that Palestinians remain nationals of Palestine today, but are effectively stateless because they have been wrongfully deprived of their nationality in violation of international law. Stateless nationals of Palestine number approximately twelve million persons worldwide today, all of whom are

entitled to return to their original homes and lands, and obtain either Palestine nationality or the nationality of the successor state regardless of race, religion, or ethnic origin.¹³

THE LEGAL STATUS OF PALESTINIANS AND JEWS IN PALESTINE BEFORE 1948

Palestinian Nationality

The legal history of Palestinian nationality begins with the Ottoman Empire. The area of historic Palestine was settled continuously by a majority Arab population and was under Arab rule from the seventh century onwards, throughout the Crusader and Turkish (Ottoman) periods, until British rule.¹⁴ During the Ottoman period, from 1516 to 1917, Palestinians obtained Ottoman citizenship under the Ottoman Nationality Law of 1869, which was largely based on *jus sanguinis* and *jus soli* principles discussed above, and not on religious or ethnic criteria.¹⁵ The British occupation of Palestine began on December 9, 1917, by which time Palestinians had a recognized nationality through the Ottoman Nationality Law, and carried internationally recognized Ottoman passports. Following Britain's imposition of civil administration through the "Government of Palestine," it took steps to recognize Palestinian citizenship, including issuing passports and travel documents to Palestinian citizens.¹⁶ Within the next ten years Palestinian nationality was attached to a territory with defined boundaries, distinct from its former Ottoman neighbors, which had attained statehood.¹⁷

The Palestine Mandate was adopted (and internationally "legalized") by the Council of the League of Nations on July 24, 1922 under the Covenant of the League of Nations.¹⁸ The Palestine Mandate had a unique provision that obliged the (British) Palestine Administration to enact a nationality law that included provisions "to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."¹⁹ This, of course, was the consequence of Zionist pressure, which also resulted in Britain's inclusion of the Balfour Declaration into the terms of the Palestine Mandate, as discussed below. Britain enacted various laws defining who were nationals and who were foreigners in Palestine, and regulated naturalization, entry, and egress from Palestine without passing formal nationality legislation until after the end of World War I.

The Treaty of Lausanne concluded World War I and was signed in Lausanne, Switzerland on July 24, 1923. It established the boundaries of modern Turkey and effectively ended the Ottoman Empire, as Turkey renounced all claims to territories outside the new boundaries. Article 30 of the Treaty of Lausanne specified: "Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory is transferred."²⁰ Under the terms of the Lausanne Treaty, Ottoman citizens

who resided in the territory of Palestine and were Turkish citizens (or Ottoman subjects) thus became Palestinian citizens on August 6, 1924, upon ratification of the treaty.²¹ As a matter of international law, Palestinian nationality was formed on this date. The Lausanne Treaty also fixed borders and established separate nationalities for Transjordan, Egypt, Syria, and Lebanon. Following the Lausanne Treaty, each of these territories, including Palestine, had a citizenship law that codified its respective nationality status.²²

One year after the Lausanne Treaty came into force, Palestinian citizenship was codified by British law in the Palestine Citizenship Order of 1925, which included the acquisition of Palestinian citizenship through birth in Palestine. Under the League of Nations mandate system, local people were not nationals of the mandate power that ruled their territory, although they could obtain diplomatic protection from the mandate country. Britain was under an obligation to conform its nationality law to the terms of the Lausanne Treaty. However, Britain sought to satisfy the demands of the Zionists, and to act consistently with provisions in the mandate, including a provision on nationality in Article 7: "The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine." The Palestine Citizenship Order afforded Palestinian citizenship to all those who were Turkish subjects or citizens at the time of the Lausanne Treaty, and who were habitually resident in Palestine.²³ This included Muslims, Christians, and Jews living in Palestine at the time of the 1925 Citizenship Order without regard to religion. Palestinians could obtain passports, and over seventy thousand Palestinian passports were issued by the mandate authorities.²⁴ However, the 1925 order significantly narrowed the terms by which Palestinians living abroad could assert or retain their Palestinian citizenship, by limiting the time within which they could return and claim nationality. It also deprived descendants of Ottoman subjects of their right to claim nationality on the basis of *jus sanguinis* if they were born abroad, and restricted the right of Palestinians temporarily traveling abroad to return and claim Palestinian nationality.²⁵ In contrast, the citizenship order included naturalization provisions specifically intended to grant Palestinian citizenship to Jewish immigrants who were either foreign residents or illegal immigrants who would not have qualified for Palestinian citizenship under the terms of the Lausanne Treaty. By proclamation of September 1922, the British government had provided that "any person of other than Ottoman nationality, habitually resident in Palestine on that date, might apply for Palestinian Citizenship." Approximately thirty-eight thousand people were granted Palestinian citizenship under the proclamation, mostly Jews.²⁶

Under the Lausanne Treaty, the recognition and codification of Palestinian nationality was consistent with international law: it attached to a majority population that was genuinely and intrinsically linked to a defined territory

with specified borders, and was passed through blood, residence, or birth on the territory (*jus soli*, *jus domicilii* or *jus sanguinis*).²⁷ It was consistent with the customary law that inhabitants found on a territory when there is a change of sovereignty should automatically acquire the nationality of the successor state.²⁸ The Palestine Citizenship Order, however, varied key terms of the treaty and sought to incorporate terms of the Balfour Declaration that discriminated against native Palestinians and in favor of immigrant Jews. The total population meeting the criteria of the Palestine Citizenship Order numbered 847,000 people. This population included, however, the foreign residents—mostly immigrant Jews—who had immigrated to Palestine between 1920–22 and obtained citizenship under the 1922 British proclamation.²⁹

*The Balfour Declaration and the Claim of Jewish Nationality under
British Mandate*

As is well known, Britain incorporated the Balfour Declaration in its mandate on Palestine, an incorporation that the League of Nations de facto accepted. The mandate preamble essentially restated the Balfour Declaration, while Article 2 stated: "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion." The Balfour Declaration was incorporated into the mandate and set the stage for a two-tiered system of rights in Palestine, but it did not mention a Jewish state.³⁰ Setting aside the intentions of Zionists within the British government—whose views cannot "control" the plain language of the declaration—a discriminatory nationality system based on race and/or religion was manifestly illegal under international law even as it stood at the time.³¹ In order to be consistent with international law, the Balfour Declaration must be interpreted as a proposal to provide for Jews a "home" in Palestine, but not a Jewish *homeland*, or Jewish *state*. This interpretation is affirmed by the language of the declaration itself and the history of its incorporation, Britain's preexisting obligations under the League of Nations Charter, the mandate's provision on minority treaties, and conformance with existing international law.³² Moreover, Britain recognized repeatedly in government letters, statements, and actions that it intended to provide a sanctuary for Jews in Palestine without violating the rights of Palestinian Arabs or the rights of Jews in any other country in the world.³³

Thus, despite the language of the Balfour Declaration and the inconsistent commitments of the British in exercising its the mandate, neither Balfour nor the terms of the Palestine Mandate itself disturbed the recognition of Palestine nationality as established in the Treaty of Lausanne. Nor did these instruments establish a Jewish nationality cognizable under international law.

THE UN AND THE QUESTION OF PALESTINIAN
NATIONALITY

Resolution 181 (1947)

United Nations Resolution 181, passed on 29 November 1947, is often considered the key legal document that affirmed Zionist and Palestinian claims to statehood by calling for the creation of a Jewish and Arab state in Palestine. However, a careful reading of this resolution and its drafting history reveals that it does not affirm a claim to nationality status for the Jewish people.

To start with, it is important to note that Resolution 181 was a General Assembly (GA) resolution, not a Security Council resolution, and under the UN Charter, the GA merely makes recommendations to the parties but has no authority to divide territory or enforce any kind of obligation on states or peoples.³⁴ The UN Secretariat issued an interpretation stating that Resolution 181 “had no obligatory character whatsoever.”³⁵

Second, it is important to understand the actual provisions of UN Resolution 181. On the nationality question, it is true that the British, in incorporating the Balfour Declaration into the mandate, had given preference in permitting immigration and granting Palestinian citizenship to Jews who had entered and remained illegally during the mandate period. However, the Jews given citizenship under the Palestine Citizenship Order and the 1922 Proclamation were those actually *residing in Palestine*, not outside it. Resolution 181’s recognition of a “Jewish” and an “Arab” state did refer to religious and racial criteria to identify territorial division, but referred to both peoples as the “two peoples of Palestine.” The Partition Plan stated that “Palestinian citizens residing in Palestine . . . as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine . . . shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights.”³⁶ In other words, the Plan’s principle was that regardless of religion, Palestinian citizens residing in the Arab state would become citizens of that Arab state, while Palestinian citizens residing in the Jewish state would become citizens of the Jewish state.³⁷ Finally, Resolution 181 required a one-year period of UN supervision prior to recognition of independence of either state, during which time both states had to incorporate constitutions that provided for *equal rights for all citizens* with no discrimination.³⁸ Thus, the Partition Plan, as detailed in Resolution 181, did not authorize either state to institutionalize superior rights for any religious or racial group.

In sum, up until 1948, the nationality law incorporated in the Lausanne Treaty, Palestinian citizenship (with the exception of naturalization provisions in the 1925 Palestine Citizenship Order), and Resolution 181 as applied to Jews and Palestinians living in Palestine largely conformed to the requirements of international law. Despite the preferential naturalization terms given to immigrant Jews during the British Mandate rule, the state of the law of nationality as applied to Palestine was that it granted equal nationality to all who lived in the territory

and qualified for it on the basis of either prior recognized Palestinian nationality or their residency in Palestine (or both), but not simply based on their ethnic or religious affiliation.

UN Resolution 194

The next critical instrument to consider on the question of nationality is UN General Assembly Resolution 194 of December 11, 1948.³⁹ Although Resolution 194 is commonly considered the main UN resolution on the rights of Palestinian refugees, its reference to refugees relates directly to the United Nation's view of Palestinian nationality as it stood by 1948. In passing Resolution 194, the GA framed the rights of Palestinian refugees in the context of their national claims; established the UN Conciliation Commission on Palestine (UNCCP) with a very broad mandate to resolve both the conflict and the massive refugee problem; defined the refugees "persons" for whom the UNCCP would provide "international protection"; and in paragraph 11, set out a legal formula for resolving the refugee problem.⁴⁰ Although there is no definition of "Palestine refugee" incorporated in the language of Resolution 194, the drafting history and subsequent UN Secretariat interpretations clarify exactly which people were defined by the term. The UNCCP's authoritative analysis of Paragraph 11 of Resolution 194 states that "the term 'refugees' applies to all persons, Arabs, Jews and others who have been displaced from their homes in Palestine."⁴¹ The UN legal advisor note to the UNCCP, issued on April 9, 1951, defined the categories of Palestinian refugees covered by the terms of Resolution 194 as:

1. Persons of Arab origin who, after 19 November 1947, left territory at present under the control of the Israel authorities and who were Palestinian citizens at that date;
2. Stateless persons of Arab origin who after 29 November 1947 left the aforementioned territory, where they had been settled up to that date;
3. Persons of Arab origin who left the said territory after 6 August 1924 and before 29 November 1947 and who at that later date were Palestinian citizens; and
4. Persons of Arab origin who left the territory in question before 6 August 1924 and who, having opted for Palestinian citizenship, retained their citizenship up to 29 November 1947.⁴²

In other words, the Resolution 194 definition of Palestine refugee as understood by the UN drafters meant the *entire group of persons who were covered by the Palestine nationality law of 1924*, emanating from the Lausanne Treaty. These were all habitual residents and citizens of Palestine defined as such by operation of these laws, as well as their descendants. Most important, this definition corrected the inconsistent changes made to the Lausanne Treaty provisions by the 1925 British Palestine Citizenship Order, which excluded Palestinians entitled to *jus sanguinis* or *jus soli* nationality who were either born abroad or residing abroad and unable

to perfect their citizenship due to the discriminatory terms set in the Order. It covers all “persons” eligible for Palestinian nationality as determined by the Treaty of Lausanne.

1948: ISRAEL’S REDEFINITION OF NATIONALITY
AND CITIZENSHIP IN PALESTINE

The Law of Return (1950) and the “Nationality Law” (1952)

Israel came into being on May 14, 1948 with a Declaration of Independence claiming that the new state would guarantee equal rights for all its citizens without discrimination.⁴³ However, shortly afterwards, Israel passed a series of laws that not only affected the rights and interests of the indigenous Palestinians to their property, but also permanently affected their legal connection to their homeland and purported to strip them of their nationality.⁴⁴ At the same time, the laws gave sweeping rights to Jews around the world who had neither the prior territorial connection or the “genuine link” to the country (*jus soli* or *jus sanguinis*) that international law recognizes as necessary for conferring nationality.⁴⁵ As noted earlier, a religious identity or ancient historical claim is not sufficient to grant nationality as an international legal matter.⁴⁶

Concerning the status of those who would be citizens of the new state, Israel passed two separate laws on nationality/citizenship. The first was the 1950 Law of Return (passed on July 5, 1950 and subsequently amended several times), which provides that “every Jew has the right to come to this country [i.e., Israel] as an *oleh*” (i.e., as a Jewish immigrant moving to Israel).⁴⁷ Immigration to Israel under the Law of Return is exclusively reserved for Jews, and all Jews around the world can automatically become “Jewish nationals” and part of the Israeli state.⁴⁸ No connection to the territory is required under the Law of Return, only that the immigrant be Jewish.⁴⁹

The second law is officially translated into English as the “Nationality Law” of 1952, but this is an erroneous translation as this law does not relate to nationality as legally understood, but to citizenship as determined exclusively on the basis of Jewish religious affiliation.⁵⁰ It was passed on July 14, 1952 and has remained central to Israel’s definition of who is entitled to nationality. Two main provisions of this law are relevant to this discussion; the provisions on “acquisition of nationality” and “loss of nationality.”

The Nationality Law specifies four methods for obtaining “Israel nationality”: return (for Jews only, under the 1950 Law of Return, even for Jews who entered or were born in the country before the state’s establishment); residence in Israel; birth; or naturalization.⁵¹ Since the first method governed the acquisition of nationality by Jews only, non-Jews had to qualify under one of the other three methods. To qualify through residence, a person had to be an inhabitant of Israel and registered with Israeli authorities by March 1, 1952 under the Registration of

Inhabitants Ordinance of 1949; and they had to have remained as "inhabitant[s] of Israel" from the day Israel was established until the day the Nationality Law was passed, or they had to be able to demonstrate that they had entered legally during that time.⁵² Not surprisingly, none of the 750,000 Palestinian refugees who were outside the country during the required residency period were able to satisfy these conditions.⁵³ Many of those Palestinians remaining in the country were also unable to satisfy the conditions since they had left the territory that became Israel at any time before the law was passed, or had been unable to meet the registration requirements. Another provision in the 1952 Nationality Law stated that only children born in the country of an Israeli national father or mother could become Israeli nationals.⁵⁴ Thus, the children of those Palestinians who remained but could not meet the registration requirement (and thus could not become "Israel nationals") were effectively denationalized and became stateless as a matter of common interpretation of the international legal definition.⁵⁵

Israel's Nationality Law of 1952 also has an explicit denationalization provision. The law retroactively repealed the Palestinian citizenship that had been granted under the Palestine Citizenship Orders of 1925 to May 14, 1948, the date that Israel was declared a state. Under its "Loss of Nationality" section, the law states, "Any reference in any provision of law to Palestinian citizenship or Palestinian citizens shall henceforth be read as a reference to Israel nationality or Israel nationals."⁵⁶ Thus all Palestinians who could not meet the stringent requirements for obtaining "Israel nationality" became stateless under Israeli law, a conclusion affirmed by decisions of the Israeli courts.⁵⁷

As a matter of international law, the Israeli law repealing the Palestine citizenship law and replacing it with one that denationalized the vast majority of Palestinians in 1952 was an illegal act. It violated two fundamental customary law principles: first, that all habitual residents of the territory of a state that succeeds another must be granted citizenship in the new state; and second, that no state can "arbitrarily" denationalize habitual residents of its state on the basis of protected grounds such as race, religion, ethnic, or national origin.⁵⁸

*"Israel" Nationality, Jewish "Nationality," and Two-tiered
Israeli Citizenship*

What is little understood about the so-called Israel Nationality Law is that it creates a legal fiction: in fact, there is no such thing as "Israel nationality," as even the Israeli High Court itself has confirmed.⁵⁹ Israeli law, official institutions, and records do not recognize an "Israel nationality" status. The Israeli Population Registry lists over one hundred nationalities; no "Israel nationality" is listed.⁶⁰ The only "nationality" to which the state's rights and privileges are attached is "Jewish nationality."⁶¹ Jewish nationality is restricted to those qualifying under the 1950 Law of Return (i.e., the global community of Jews seeking to exercise *aliya*) and its specific amendments relating to *olim*, or Jews immigrating into Israel. Thus, the

so-called “Nationality Law” of 1952 is in reality a *citizenship*, not a nationality law, as it defines who can obtain citizenship in Israel and how.⁶²

The Law of Return and the Nationality Law thus set up a two-tiered system for acquiring Israeli citizenship: one for Jews anywhere in the world, who are deemed “nationals” of Israel and can automatically become citizens (through the Law of Return); and another for non-Jews, who can become citizens (through the other routes specified in the “Nationality Law”—residence, birth, or naturalization), but because they are not Jewish, can never achieve the superior rights available only to Jewish nationals.⁶³

The superior rights that only Jewish nationals can enjoy include the exclusive rights to use, develop, reside on, and alienate the approximately 95 percent of the lands expropriated by Israel from Palestinians under a series of laws passed from 1948 onwards and codified in the Absentee Property Law.⁶⁴ These homes, lands, and public and agricultural areas were seized from Palestinians and converted into a land bank “owned” and operated by the Jewish National Fund and its affiliates as “Israel Lands” that remain exclusively for the use and enjoyment of Jews.⁶⁵ The discriminatory land laws and seizure of Palestinian land, the establishment of exclusive “Jewish-only” communities with superior housing rights, and Jewish settlements in the West Bank and Gaza have been legalized with the sanction of the Israeli Supreme Court.⁶⁶ The Absentee Property Law and its amendments are thus directly related to the distinction between “citizens” and “nationals” under Israeli law. However, Israel’s granting of two-tiered “citizenship” under its “nationality” law violates customary rules on nationality that have become increasingly well settled since 1948.⁶⁷

As an international legal matter, Israel could not define as its nationals persons who were nationals of other states with no connection to the territory, particularly if doing so did not require the specific consent of the individual foreign nationals and their states. The ICJ’s decision in the *Nottebohm* case in 1955 simply restated and interpreted the well-established principle discussed earlier that from the perspective of international law, a state’s granting of nationality must be based on some close connection between the state and the individual, and that decisions on nationality are not solely within the domestic purview of states.⁶⁸ In the *Nottebohm* case, contested between Guatemala and Lichtenstein, the ICJ established that a state cannot simply confer its nationality on persons of foreign nationality living in other states absent a close connection between the person and that state, even if the person accepts the nationality status.⁶⁹ Long before 1948, the question of who is a national was no longer within the sole discretion of states, and a conferred status of nationality could be denied international recognition if the requisite factors constituting a “genuine link” were missing.

This prohibition on granting nationality to those not resident in the country because of their religion or ethnicity is an ongoing, or “continuing” breach of international law since its consequences remain unredressed today. Continuing

breaches require laws to be amended to conform to international criteria, in this case, by granting nationality status to Palestinians who have been deprived of nationality, and implementing the right of return to denationalized Palestinians who were expelled from their homes and lands.⁷⁰ Although there are limited mechanisms that could address and provide remedies for the denial of return, deprivation of nationality, and dispossession, understanding the law suggests both how Palestinian rights should be framed and which Palestinians must be part of any final peace agreement.

It is thus important to emphasize that, as a matter of international law, Jewish claims of nationality and self-determination must be clearly distinguished from the claims of Israeli Jews to nationality and self-determination.⁷¹ Israel proclaimed her state on behalf of “the Jewish people,” a definition that grants rights to and within the state on an extraterritorial basis to Jews living anywhere in the world. Israel enacted its citizenship law of 1950 to grant “nationality” to Jews only. However, the people entitled to national status in the “Jewish state” defined under GA Resolution 181 included both Jews and Palestinians already residing in the territory, all of whom were to be granted equal rights under a constitution that was to be in force in both new states prior to UN recognition.⁷²

The United Nations, including its treaty bodies and the ICJ, has consistently called preferences for Jews under Israeli citizenship, property, and other laws a violation of the UN Charter and human rights treaties.⁷³ In other words, outside of Israel, there has been no international legal recognition of the “Jewish people” as a nationality concept that grants self-determination rights to Jews living outside of Israel. Nor is there legal support for the premise that Israel has a right to maintain a legal-preferencing system that grants superior rights to Jews as against other citizens of the Israeli state.⁷⁴

In 2018, Israel passed a new law on nationality and citizenship, the Jewish Nation-State Basic Law, which clarifies in unambiguous terms the identity of Israel as a nation-state exclusively for and of the Jewish people.⁷⁵ It is important to understand that the Nation-State Law is different from the Nationality Law and the Law of Return, in that it is a “basic law,” which in Israel is the equivalent of a constitutional provision.⁷⁶ The 2018 Jewish Nation-State Basic Law states: “The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established . . . the State of Israel is the nation-state of the Jewish people.”⁷⁷ There are three main aspects to this law of significance to Palestinian national rights. First is the provision that self-determination in Israel belongs exclusively to the Jewish people. This provision formally entrenches state discrimination against non-Jews, and particularly Palestinians, who today comprise 20 percent of the population within Israel. It formalizes the legal status of Palestinians as second-class citizens, that is, citizens who are not entitled to equal civil and political rights in the state.

Second is the establishment of Hebrew as the official language of Israel and the commitment to promoting only Jewish symbols and Jewish culture both within

Israel and in Jewish communities worldwide.⁷⁸ This provision reverses the long-standing status of Arabic as an official language along with Hebrew.

Third is the explicit promotion of Jewish settlement as a “national value” that the state will “encourage and promote.”⁷⁹ This provision legitimizes the Israeli settlement project in the Occupied Territories and East Jerusalem, which has independent international consequences from the issues of nationality. That is, aside from an act of formal annexation of occupied territory, which is uncontroversially illegal under international law, the extension of the Nation-State Law to the Occupied Territories formally entrenches an apartheid system.⁸⁰ The crime of apartheid involves policies and practices of “racial discrimination . . . based on race, colour, descent, or national or ethnic origin” for purposes of domination or systemic oppression by one group against another.⁸¹ The Nation-State Law expressly declares the intent to discriminate against Palestinians in every field, establishing preferential rights for Jews and Jewish settlers, and another lesser set of “rights” for Palestinians and Arabs in Israel. The law legitimizes discrimination in citizenship, language, culture, land ownership and use, and every other sphere of public and private life.⁸²

Israel “Nationality” and the Palestinian Right of Return

As explained above and as has been discussed by various scholars, Israel’s law of nationality was as much directed at attracting the largest number of Jewish migrants into Israel as it was at preventing Palestinians from claiming their political rights to return to their home. Its passage in the Israeli Knesset in 1952 does not, from an international legal point of view, abrogate UN Resolution 194, the customary international law norms on which that resolution rests, nor the laws pertaining to the rights of refugees and forcibly displaced persons more generally.⁸³

Since their forced departure and expatriation from their homeland by Israel, Palestinian refugees have continuously asserted that they have a legal right, popularly referred to as the “right of return.” Israel has contested the legal basis for this right on a number of grounds, including that it did not forcibly expel Palestinians, and that as a sovereign state it has the right to define who is entitled to enter its borders and who can remain.⁸⁴ From an international legal point of view, Israel’s position on each of its key arguments is either weak or simply without merit.⁸⁵ In general, the right of return represents a complex, interrelated set of rights grounded in distinct bodies of treaty and customary international law. For this discussion, however, the most important and relevant argument on right of return relates to the right of an individual to return to his place of origin or nationality.⁸⁶

Two core human rights treaties ground the critical aspects of the right of return, and are at the heart of the contest over whether Palestinians have such a right: the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of Racial Discrimination (CERD). The ICCPR states in Article 12(4) that “no one shall be arbitrarily deprived of the right to enter his own

country."⁸⁷ This language raises questions about the meaning of the phrase "his own country." Does it apply to someone who is a national of the country, someone who is a refugee, someone who was born outside "his" country, or to individuals in all these situations? The drafting history of this provision shows that the drafters rejected proposals to replace "his country" with "the country of which one is a national" because they wanted to include "those persons who under domestic law enjoy a right to 'return' or reside in a country even though they are not nationals of that country." The drafters also chose "enter" over "return" in order to ensure its application to those who were nationals or citizens of the country but had never lived there.⁸⁸

The other ambiguous term in ICCPR 12(4) is "arbitrarily." The drafting history reflects that "arbitrary" was used with a specific meaning.⁸⁹ The UN Study of the Right of Everyone To Be Free from Arbitrary Arrest, Detention and Exile differentiated "arbitrary" under international law from "illegal"; that is, an act could be legal under domestic law but would be arbitrary if it were discriminatorily applied or were otherwise incompatible with international norms.⁹⁰ There is legal consensus that an act such as denationalization, even if it conforms to domestic law, is arbitrary and thus prohibited if it violates principles of international law.⁹¹ "For international law purposes, states do not enjoy the freedom to denationalize their nationals in order to expel them as 'non-citizens.'"⁹²

The CERD's provision on return is found in Article 5(d)(ii), which requires states to prohibit and eliminate racial discrimination "in all its forms," and requires them to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . the right to leave any country, including one's own and to return to one's country." The CERD's provision on right of return also prohibits a state from establishing citizenship/nationality criteria that discriminate on these grounds. A state cannot prohibit someone from entering "his country" on the basis of race, nationality, or ethnic origin. The near-universal ratification of these instruments has now bound most states to the right as a matter of treaty.

In 1961, the UN Convention on the Reduction of Statelessness was adopted, which prohibits depriving anyone of nationality on the basis of race or ethnicity, religion, or political opinion.⁹³ In 1963, the UN Subcommission on Prevention of Discrimination and Protection of Minorities produced Draft Principles on the Right to Leave and Return. Section II of these principles states: "Everyone is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to return to his country; no one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country; no one shall be arbitrarily deprived of the right to enter his own country."⁹⁴ The Draft Principles informed the UN drafters and led to the adoption of the language in Article 12 of the ICCPR. One of the astonishing

features about the highly fractious debate on the right of return is that it questions a right that was almost universally accepted as state practice, though not codified until the first international humanitarian law treaties were drafted in the first part of the twentieth century.⁹⁵ But lack of codification did not affect state practice on individual return or organized repatriation, both of which occurred in every part of the globe long before the first treaties incorporated the principles, and without serious question about the underlying right of the individual returnee.

When one carefully examines the nature of the challenge to the right of return, one can conclude that the only serious attack on it as a principle or practice is in its application to the Palestinian refugees. The international community has never legitimized any other states' denial of its nationals the right to return to their homes on the basis of race or religion, even though many states persecute their nationals such that the latter are unable or unwilling to return.⁹⁶ It is sufficient to conclude here that the right to return to one's country is expressly recognized in most international and regional human rights instruments, and UN bodies have, on numerous occasions, asserted such a right. This, along with recent state practice, has led to the formation of a norm of customary international law that assures that an individual outside their own country has the right to return to it.⁹⁷

THE OSLO PEACE PROCESS AND PALESTINIAN NATIONALITY

With the occupation of the West Bank and Gaza Strip in the aftermath of the 1967 war, Israel created a separate set of laws, primarily through military orders, in the Occupied Territories to avoid bestowing citizenship rights on the Palestinian residents of these areas. While it was extending military occupation rules to Palestinians, Israel began its settlement project and extended Israeli domestic laws to the settlers in both the West Bank and Gaza. Palestinian residents in the West Bank and Jerusalem were allowed to retain the Jordanian nationality that Jordan had extended to Palestinians after the 1948 conflict, while those in Gaza were given Egyptian *laissez-passer*.⁹⁸ At the same time, Israel implemented various mechanisms for maximizing Israel's control over the land through settlement construction, land confiscation, and military control.

Three months after the 1967 conflict, in September 1967, Israel conducted a population census. The census counted the 954,898 Palestinians physically present in the West Bank and Gaza at the time, but did not include the at least 270,000 Palestinians who were absent, either because they had fled during the conflict or were abroad for other reasons.⁹⁹ Based on its census, Israel created a population registry and refused to recognize the right of those who were absent to return home. Palestinians registered on the census were granted resident status and the right to reside in the territory under military occupation, but Israel did not

confer any political rights on them. Any Palestinian who was not registered in the population registry could acquire residency only through a prescribed family reunification procedure.¹⁰⁰ This process was complex, prolonged, and often unsuccessful—and has become even more so today. Applications languish in the system for years. Until 1995, residents who remained outside the territories for more than six consecutive years had their residency revoked by Israel.¹⁰¹ Moreover, Palestinian residents of Jerusalem who travel abroad to study, work, or for other reasons are routinely stripped of their residency under a law that requires them to maintain their "center of life" in Jerusalem. The center of life law does not apply to Jews. About one hundred thousand Palestinians have lost their Jerusalem residency in this way.¹⁰²

The Oslo Peace negotiation process seemed to signal the possibility that Palestinians would finally achieve at least a partial implementation of their right to return and some semblance of statehood. The signing of the Declaration of Principles between Israel and the Palestine Liberation Organization (PLO) in 1993 accompanied a formal recognition by the PLO of Israel as a state and a concomitant recognition of the PLO's legitimacy by Israel. Israel's official recognition of the PLO as the legitimate representative of the Palestinian people seemed to imply recognition of their right to self-determination. However, the Oslo process precluded any rights-based solution for the Palestinians, and had limited, if any, reference to Palestinian refugee rights.¹⁰³

Although the past twenty-five years have not brought about an end to Israeli occupation, they have ushered in the establishment of a Palestinian Authority (PA) that in fits and starts has attempted to build the legal and economic basis of a Palestinian state in the West Bank and Gaza. The Oslo agreements gave the PA the authority to issue both identity cards and passports for Gazans and West Bankers, but only with the permission of Israel.¹⁰⁴ The PA was also able to grant permanent residence to persons residing in the West Bank and Gaza, as well as to limited categories of Palestinians returning from abroad, but again only with permission of Israel.¹⁰⁵ The Oslo agreements also defined who were West Bank and Gaza "citizens" for purposes of voting.¹⁰⁶

In 1997, the Palestinian Legislative Council passed the Palestinian Basic Law, intended to provide a temporary constitution until an independent Palestinian state could be established with a permanent constitution. The Basic Law was ratified by President Yasser Arafat in 2002, and has been amended twice (in 2003 and 2005).¹⁰⁷ However, the Basic Law addresses Palestinian nationality or citizenship in very limited fashion in three articles: 1, 4 and 7. Article 1 defines Palestine as "part of the larger Arab world, and the Palestinian people are part of the Arab nation. Arab unity is an objective that the Palestinian people shall work to achieve." In other words it defines Palestinian identity as synonymous with "Arab" identity. Article 7 states that "Palestinian citizenship shall be regulated by law."¹⁰⁸ Presumably, the "nationals" entitled to become citizens of the Palestinian state would

be those whose nationality was redefined under the Palestinian Basic Law, but that law makes no reference to Palestinian nationality as internationally defined. Absent such a reference, it is unclear whether the language of Article 1 of the Basic Law is intended to cover only those Palestinians residing within the 1967 borders of the West Bank and Gaza, or the global population of Palestinians entitled to Palestinian nationality as discussed earlier. Moreover, the PA has legitimacy to govern only approximately 30 percent of the global Palestinian population that voted for it—and even this is questionable, as it has long exceeded its term of office and has been replaced in Gaza by the Hamas government. Thus, the question of who is meant by the reference to the “Palestinian people” is ambiguous and highly contentious, both as a matter of politics and a matter of international law.

There have been two attempts at drafting a Palestinian citizenship law: one by the PA, and one on behalf of the PLO. In 1995, the Palestinian Ministry of the Interior drafted a citizenship law that was based on the 1925 Palestinian Citizenship Order and the 1954 Jordanian Citizenship Law. “In its twenty-five articles, the draft defined who is a Palestinian, fixed the modes of citizenship acquisition, naturalization, revocation and repatriation, covered issues such as the citizenship of spouses and children, and contained other provisions that normally exist in the citizenship legislation of independent States.”¹⁰⁹ This bill was not publicly disseminated and was never taken up for deliberation by the Palestinian Legislative Council.

In 2012, a citizenship law was also drafted for the PLO.¹¹⁰ The draft law incorporated a sophisticated legal understanding of the international legal underpinnings of Palestinian nationality. It recognized the conferment of nationality on the basis of eligibility stemming from the Treaty of Lausanne provisions and the individual choice to acquire (or reacquire) Palestinian nationality. Its basic “rule” for nationality states: “Palestinian citizens are those persons who acquired or had the right to acquire Palestinian nationality as of 6 August 1924, the date on which the Treaty of Lausanne that was signed by Britain . . . and Turkey . . . came into force whereby Palestine ceased to be part of the Ottoman Empire. In addition, this Draft Law is based on factors that have emerged since the signing of the said treaty; such factors can be found in international law and comparative nationality law.”¹¹¹ The draft law conferred citizenship on three general categories of people (while also breaking those into various subcategories): inhabitants of the West Bank and Gaza, refugees from Mandate Palestine, and Israeli inhabitants. The law was circulated among a few international experts for commentary and discussed internally within the PLO and certain members of the PA, but never tabled for debate by the Legislative Council. The effort to finalize and pass the citizenship law was stymied by the complex and fraught political and legal issues involved. The draft law, however, represented an initiative to conform a future Palestinian citizenship law with international legal standards and the international status of Palestinian nationality. A precise definition of Palestinian nationality remains as crucial under current conditions as ever, as it would identify the “nationals” to whom the right of return would apply.

RIGHT OF RETURN, ISRAEL'S NATIONALITY LAWS,
AND PALESTINIAN NATIONALITY TODAY

So, from an international law point of view, what is the status of Palestinian nationality today, and what relevance does that have to the right of return? On the one hand, there is an argument that Palestinians continue to retain Palestinian nationality to the present. This is based on the historical and legal facts described in this chapter, including that Israel's revocation of Palestinian citizenship and denaturalization of Palestinians was illegal, and its denial of Palestinian return is also illegal. This argument rests on the claim that Israel's illegal acts and laws that violate international norms do not affect Palestinian nationality as a matter of international law, and that Palestinian nationality is unbroken today, despite the inability of the majority of Palestinians to return to their homes.

Israel is a party to the major treaties that ground the right of return: the Fourth Geneva Convention, the ICCPR and ICERD.¹¹² Israel's massive denationalization of Palestinian Arabs on the basis of their national/ethnic origin was a violation of law at the time it occurred, and Israel remains bound today, despite the long passage of time, to remedy the denationalization and expulsion by implementing the right of return. UN General Assembly and UN Security Council resolutions over decades affirm and reaffirm the right of return for refugees to their homes in every part of the world.¹¹³ From state and international practice alone, it is evident that under international law, refugee return is the rule, and nonrecognition of Palestinian refugees' right to return is the aberration.¹¹⁴

On the other hand, there is the argument that Palestinians lost their nationality in 1948 and those unable to meet the criteria of Israel's Nationality Law became stateless.¹¹⁵ My contention is that Palestinians are stateless *nationals*, and framing Palestinians as only refugees or stateless persons is the weaker argument, both legally and in terms of its consequences for Palestinians, in particular with regard to the right of return. The argument that Palestinians are stateless does have the advantage of triggering UN High Commissioner for Refugees (UNHCR) protection under the two conventions on stateless persons, but this is irrelevant in the Arab states, which are not parties to either of these treaties, and which explicitly prohibit UNHCR from providing protection to Palestinians through memoranda of understanding with state governments.¹¹⁶ In the Western states, this is also only marginally helpful as UNHCR has not actually taken significant steps to advance the rights of Palestinians as stateless persons.¹¹⁷

From an international legal point of view, Palestinian nationality remains intact today, and their right of return is based squarely on their rights as *nationals* of Palestine, not only as refugees. Moreover, there is no parallel legal authority for a claim of Jewish nationality that negates Palestine national rights. Jews claim the right to return on the basis of historic religious claims to Palestine that are not cognizable under the international law of nationality, as religion and ancient "historic" claims are not "genuine links" for the purpose of nationality recognition. For Palestinians who have acquired a second citizenship, dual nationality is also no

barrier to a right of return, as most Jews in Israel have Israeli and a second citizenship. The strongest claim for right of return is based on Palestinians as nationals, not as stateless persons and not just as refugees, and should be clearly framed around the language of and principles underlying the Lausanne Treaty provisions from which Palestinian nationality stems. Palestinian nationality is not undermined by any aspect of Resolution 181, Resolution 194, or Israel's Nationality Law.

Nevertheless, fashioning a nationality law for Palestinians remains a complicated proposition in the two-state scenario. The multiple categories of Palestinians that must be taken into account in order to craft an equitable and legally justified Palestinian nationality law make this an exceedingly daunting task. Just within a Palestinian state that would include the West Bank, Gaza, and East Jerusalem, there are multiple categories to consider: "the inhabitants of East Jerusalem, refugees who were expelled from the territory of Israel since 1948 and settled in the West Bank or Gaza, West Bankers or Gazans who lost their residence in these two areas at any point since 1925 and were prevented by Britain (1917–1948) or by Israel (since 1967) to return, and Jewish-Palestinian natives of the West Bank or Gaza who lost their residence therein since 1948."¹¹⁸ The definition of nationality must also consider each category in the diaspora, including those with citizenship in Jordan and elsewhere who would be considered dual nationals, and refugees across the Arab world who are also Palestinian stateless nationals.

In the current climate, there is no serious prospect of implementing a citizenship law to codify Palestinian nationality for Palestinians outside Israel—whether in the West Bank, Gaza, the Arab world, or elsewhere in the diaspora. The PLO and PA have recognized, in the citizenship laws they have drafted and considered, that in the absence of independence accompanying statehood recognition, a Palestinian citizenship law remains aspirational. Although the right of return for Palestinians per se can be implemented in the absence of such a law, this is also unlikely under the current political conditions, particularly since passage of the Israeli Nation-State Law and the seeming official consensus that a two-state solution is still the only option. Ironically, Israel's passage of the Nation-State Law and its declaration that it intends to fully annex the West Bank make it evident that it has no intention to allow the establishment of any semblance of a Palestinian state. The right of return for all Palestinians no matter their location, and to their original homes and lands, is not acknowledged in the political discourse either.

If in a future changed political context it would be possible to contemplate a Palestinian nationality in a single state that would include equal citizenship with Jews in Israel, the "nationality" distinctions under current Israeli law would need to be repealed along with the denationalization provision of the 1950 Nationality Law and the Nation-State Law in its entirety. Palestinians in the West Bank and Gaza and all those in the diaspora could be included by applying the provisions of the Lausanne Treaty. In that sense, the general definition of who is a Palestinian is a simple one: all those who can claim nationality by *jus sanguinis* and/or

jus soli as fixed on August 6, 1924 by the terms of the Lausanne Treaty, and all their descendants, are nationals of Palestine with the right to return to their homes and the right to obtain restitution and other compensation as recognized under international law.

NOTES

The author is grateful for the outstanding research assistance of Boston University law student Kristina Fried in the completion of this chapter.

1. Lassa Oppenheim, *International Law: A Treatise* (London: Longmans, Green, and Co., 1905), 1:345.

2. Asbjorn Eide, “Citizenship and International Human Rights Law: Status, Evolution, and Challenges,” in *Citizenship and the State in the Middle East: Approaches and Applications*, edited by Nils A. Butenschön, Uri Davis, and Manuel Hassassian (Syracuse, NY: Syracuse University Press, 2000): 91–92.

3. See *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, Judgment, 1939 P.C.I.J. (ser. A/B/) No. 76, at 16 (Feb. 28). The International Court of Justice (ICJ) later referred to this as an established norm of international law and described the types of links between an individual and territory that conferred nationality: “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.” *Nottebohm (Liech v. Guat.)*, Second Phase, 1955 ICJ Report 1955, at 23 (April 6).

4. The 1929 Harvard Research on Nationality Laws study compiled information regarding the basis of nationality legislation around the world. The study concluded that seventeen such laws were based on *jus sanguinis* alone, two on a combination of *jus sanguinis* and *jus soli*, twenty-five primarily on *jus sanguinis* but partially on *jus soli*, and twenty-six primarily on *jus soli* and partially on *jus sanguinis*. “The nationality law of no country is based solely upon *jus soli*. A combination of the two systems is found in the laws of most countries.” See American Society of International Law, “The Law of Nationality” in “Draft Conventions and Comments on Nationality, Responsibility of States for Injuries to Aliens, and Territorial Waters, Prepared by the Research in International Law of the Harvard Law School,” supplement, *American Journal of International Law* 61, S5 (1929): 21–79.

5. For an exhaustive review of sources for these contentions, see Mutaz M. Qafisheh, *The International Law Foundations of Palestinian Nationality: A Legal Examination of Nationality under Britain’s Rule* (Leiden: Brill-Nijhoff, 2008).

6. Most critical for this discussion is that the post-World War I mandates were legally binding on the mandatory state, the populations in the mandate territories, and other states in their dealings with the mandate powers. This included the nationality/citizenship legislation passed by the mandate powers. See *Mavrommatis Palestine Concessions (Greece v. Gr. Brit.)*, Objection to the Jurisdiction of the Court, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 19); and *International Status of South-West Africa*, Advisory Opinion, 1950 ICJ Report 28 (July 11).

7. Oppenheim, *International Law*, 355; United Nations General Assembly, 1954 Convention Relating to the Status of Stateless Persons, September 28, 1954, Articles 12, 27, 28, 32, 360 United Nations Treaty Series 117.

8. “When a part of the territory of a state . . . becomes the territory of a new state, the nationals of the first state who continue their habitual residence in such territory lose the nationality of that state and become nationals of the successor state, in the absence of treaty provisions to the contrary”; American Society of International Law, “The Law of Nationality,” 61. This provision was incorporated into Article 5 of the International Law Commission’s Draft Articles on Nationality of Natural Persons in Relation to the Succession of States; International Law Commission, “Report on the Work of Its Fifty-First Session,” UN Document A/54/10 (1999).

9. See International Convention on the Elimination of all Forms of Racial Discrimination, March 7, 1966, Articles 5(d)(ii), 5(d)(iii), 660 United Nations Treaty Series 195 (hereinafter CERD).

10. See Vienna Convention on the Law of Treaties arts. 26, 27, Jan. 27, 1980, 1155 United Nations Treaty Series 331 (hereinafter VCLT). Article 26 states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” and Article 27 states that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” The VCLT codifies binding rules of treaty application and interpretation on all states, and most of the provisions of the VCLT have become customary international law and therefore binding even without state ratification.

11. United Nations General Assembly, 1954 Convention Relating to the Status of Stateless Persons, Article 1. The Article 1 definition has ripened into a binding rule of customary international law. See United Nations High Commissioner for Refugees, Guidelines on Statelessness, “No. 1: The Definition of ‘Stateless Person’ in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons,” paragraph 2, UN Document HCR/GS/12/01 (2012).

12. Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 United Nations Treaty Series 175; Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness, August 29, 1961, UN Document A/CONF. 9/14. The United Nations High Commissioner for Refugees (UNHCR), the UN agency entrusted with protection of stateless persons, has interpreted the language “under the operation of its law” to include both law on the books and state policies that as a practical matter deny an individual his/her nationality. See UNHCR, “Handbook on Protection of Stateless Persons,” UNHCR, 2014, 5, https://www.unhcr.org/dach/wp-content/uploads/Protection/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf. It advises that “persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country” should be treated as *de facto* stateless.

13. The author is indebted to her partners at the Tibet Justice Center for the phrase “stateless nationals.” See Tibet Justice Center, “Tibet’s Stateless Nationals: Tibetan Refugees in Nepal,” Tibet Justice Center, June 2002, <http://www.tibetjustice.org/reports/nepal.pdf>.

14. See John Quigley, *The Case for Palestine: An International Law Perspective* (Durham, NC: Duke University Press, 2005), 3–13.

15. “Ottoman Nationality Law Arts. 1–4, 9 (1869),” in *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties*, edited by Richard W. Flournoy and Manley O. Hudson, 568 (New York: Oxford University Press, 1929). Article 1 codified *jus sanguinis* nationality (“persons born to parents or a father of Ottoman nationality are Ottoman citizens”); Article 2 codified *jus soli* nationality (“any foreigner born in Ottoman territory may apply for Ottoman nationality within three years of attaining majority”); Article 9 codified *jus soli* and the presumption against statelessness principles (“every person residing in Ottoman territory shall be regarded as an Ottoman citizen unless foreign status is proved”). Under this provision, the presumption of citizenship applied to all children born in the territory with unknown or stateless parentage. Articles 3 and 4 codified *jus domicilii* principles (“any foreigner has the right to apply for Ottoman citizenship upon residing in Ottoman territory for at least five years” and “at its discretion the Ottoman government may waive the five year residence requirement and naturalize any foreigner”). Other provisions on expatriation are not on point here. Ottoman nationality was recognized abroad through the acceptance of Ottoman passports as well as identity documents. For a detailed examination of Palestinian nationality and the Ottoman Nationality Law, see Qafisheh, *International Law Foundations*, 25–44.

16. See the discussion of the Palestine Passports Regulations of 1920 in Qafisheh, *International Law Foundations*, 53–58. As an international legal matter, Britain was in belligerent occupation of Palestine, and under humanitarian law rules binding on Britain at the time, it could not change the laws in force prior to its occupation of the territory, nor could it implant settlers into occupied territory. See Hague Regulations Respecting the Laws and Customs of War on Land, July 22, 1899, Article 43, 32 Stat. 1803; see also Hague Regulations Concerning the Laws and Customs of Land Warfare,

Oct. 18, 1907, Article 43, 36 Stat. 2277. If Palestine was occupied territory, then Ottoman citizenship remained intact at least until 1925, despite the imposition first of British military law, then of civil (British) administration.

17. The borders of Egypt and Transjordan were drawn through bilateral agreement with Britain, and Egypt and Transjordan passed nationality legislation in 1926 and 1928, respectively. Syrian and Lebanese nationalities were codified in 1924. Mutaz M. Qafisheh, "Genesis of Citizenship in Palestine and Israel: Palestinian Nationality in the 1917–1925 Period," *Bulletin du Centre de recherche français à Jérusalem* 21 (December 2010), <http://journals.openedition.org/bcrfj/6405>.

18. See League of Nations, Mandate for Palestine, League of Nations Document C.529M.314 1922 VI (1922); and League of Nations Covenant, Article 22. Article 22 of the covenant established the mandates in order to supervise what was intended to be a transition to independence for the mandate territories.

19. League of Nations, Mandate for Palestine, Article 7.

20. League of Nations, Treaty of Lausanne, July 24, 1923, Article 30, 28 League of Nations Treaty Service 11.

21. Under the treaty, in order to obtain Palestinian citizenship an individual was required to be either a Turkish citizen or Ottoman subject (under the Ottoman Nationality Law) and a habitual resident of Palestine on August 6, 1924, the date of entry into force of the treaty. Palestinians outside of Palestine could opt for Palestinian citizenship based on the *jus sanguinis* principle under Article 34. The treaty language excluded foreigners who were not Ottoman or Turkish citizens residing in Palestine. League of Nations, Treaty of Lausanne, Article 34.

22. Transjordan's 1928 citizenship law retroactively extended Transjordanian nationality to all inhabitants who were Ottoman subjects residing in the area east of the Jordan river as of August 6, 1924. As noted above, Syria and Lebanon passed nationality regulations in August 1924, while Egypt passed its nationality law in 1926. Whether these populations were of indeterminate nationality during the Ottoman period or not, the Treaty of Lausanne definitely established separate and independent national identities, which were codified by the subsequent citizenship legislation of each country. See Qafisheh, "Genesis of Citizenship," 3, 4, 2.

23. Qafisheh, "Genesis of Citizenship," 15.

24. Qafisheh, *International Law Foundations*, 149.

25. Qafisheh, *International Law Foundations*, 87–103.

26. Mutaz M. Qafisheh, *Palestine Membership in the United Nations: Legal and Practical Implications* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013), 122.

27. See the principles established by the review of nationality laws in American Society of International Law, "The Law of Nationality."

28. Oppenheim, *International Law*, 355.

29. See Qafisheh, *International Law Foundations*, 66–67.

30. British policies created two de facto nationalities, as noted in a report by the League of Nations itself: "It was . . . found that a classification by 'race' (or nationality)—i.e., as Arabs, Jews or 'others'—had become a political necessity . . . the immigration and emigration statistics have been prepared on a racial basis. Of recent years, therefore, the population of Palestine has been classified according to the criteria both of religion and race." League of Nations, "The Mandate System: Origin—Principles—Application 78 (1945)," cited in Qafisheh, *International Law Foundations*, 255.

31. Since the Balfour Declaration is a legal instrument, interpreting its terms requires application of rules codified in the Vienna Convention on the Law of Treaties. Among the important aspects of these rules is which language "controls" or is determinative of the application of a treaty provision. Once a legal instrument has been signed, incorporated into law, or otherwise becomes operable, there is a hierarchy of interpretation to determine the "controlling" or "determinative" interpretation. The first hierarchy is that the ordinary legal interpretation of the language on its face is determinative ("controls") unless there is an ambiguity. In the case of the Balfour Declaration, the language speaks

for itself, and therefore any outside views are irrelevant and do not control its meaning.

32. Victor Kattan, *From Coexistence to Conquest: International Law and the Origin of the Arab-Israeli Conflict* (London: Pluto, 2009), 4 (“Article 22 of the Covenant of the League of Nations provided that the well-being and development of peoples placed under the mandatory system of administration ‘form a sacred trust of civilization.’”); Kattan, *From Coexistence to Conquest*, 56, 57 (Under the mandate, “Britain was arguably vested with fiduciary duties in relation to the beneficiaries of this trust who were the indigenous peoples of Palestine. Inherent in the notion of a ‘sacred trust’ is the principle that the fiduciary must not profit from its position and must not allow personal interest to prevail over the duty owed to the principal (in this case, the League) . . . In other words there was no principle of international law, provided in the mandates or in custom, which allowed a nation to expropriate the properties of another people on account of their colour, race or religion—for this would be tantamount to theft”).

33. Qafisheh, *Palestine Membership in the United Nations*, 363 (“The mandate required the British to create a law for the acquisition of Palestinian nationality for the Jews. This nationality would give certain rights and obligations not only to the Jewish immigrants, but also to the majority Arab population since the mandate also stipulated that the Jewish national home policy could not prejudice the civil or religious rights of the existing majority population”); Kattan, *From Coexistence to Conquest*, 5 (“Even Lord Balfour, with his strong sympathies for Zionist aspirations, said that he never wanted the indigenous Palestinian Arab population to be dispossessed or oppressed”); Kattan, *From Coexistence to Conquest*, 7 (“In 1919, Lord Curzon warned Lord Balfour, rather prophetically, about the perils of the contradictory policy their government was pursuing in Palestine, creating a Jewish national home in a land that was almost entirely Arab: ‘Personally, I am so convinced that Palestine will be a rankling thorn in the flesh of whoever is charged with its Mandate, that I would withdraw from this responsibility while we yet can.’”).

34. UN Charter, Articles 10–17, October 24, 1945, 1 United Nations Treaty Series XVI. The resolution language itself begins with the words “The GA ‘recommends.’”

35. UN Palestine Commission, “Relations between the UN Commission and the Security Council,” working paper by the Secretariat, February 9, 1948, Section 3, Paragraph 4, UN Document A/AC.21/13.

36. GA Resolution 181 (II), Plan of Partition with Economic Union, Part I, Section C, Paragraph 1.

37. UN Special Committee on Palestine, “Report to the General Assembly,” UN Document A/364 (1947); Ad Hoc Committee on the Palestinian Question; “Report of Sub-Committee 2,” UN Document A/AC.14/32, paragraph 64 (1947). Under the UNSCOP figures, the proposed Arab state would have comprised ten thousand Jews and almost one million Arabs, while the proposed Jewish state would have comprised 498,000 Jews and 407,000 Arabs. However, the UNSCOP figures were inaccurate, as they did not include the Bedouin population. British population data showed there were 509,780 Arabs and 499,020 Jews in the area of the Jewish state, which meant the Arabs would have remained a majority in both states; Kattan, *From Coexistence to Conquest*, 151–52.

38. GA Resolution 181 (II), paragraphs I(B)(10), I(C)(2)(2), I(C)(2)(3), I(C)(2)(8), I(C)(3)(1).

39. GA Resolution 194 (III), December 11, 1948.

40. GA Resolution 194, paragraphs 2, 11.

41. UN Conciliation Commission for Palestine, “Analysis of Paragraph 11 of the General Assembly’s Resolution of 11 December 1948,” UN Document W/45, May 15, 1950.

42. UN Conciliation Commission for Palestine, “Addendum to Definition of a ‘Refugee’ under Paragraph 11 of the General Assembly Resolution of 11 December 1948, Prepared by the Legal Advisor,” UN Document W/61/Add.1, May 29, 1951.

43. “It will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy

Places of all religions; and it will be faithful to the principles of the Charter of the United Nations”; Declaration of the Establishment of the State of Israel (1948).

44. These laws are the Law of Return, the Nationality Law, and the Absentee Property Law, discussed further below.

45. Claims that the Jewish people are a nation or a race lack empirical support, and in any event cannot supersede normative nationality principles. See Shlomo Sand, *The Invention of the Jewish People* (London: Verso, 2008); Roselle Tekiner, “Race and the Issue of National Identity in Israel,” *International Journal of Middle East Studies* 23, no. 1 (February 1991): 39–55.

46. Nottebohm (Liech. v. Guat.) ICJ Report 1955. A genuine link may be based on *jus soli* or *jus sanguinis*, as well as permanent residence acquired through legal migration. See Peter J. Spiro, “Citizenship Overreach,” *Michigan Journal of International Law* 38, no. 2 (2017): 173–200, 173, 178, 181.

47. The translator’s note in the official Israeli government translation states: “*Aliya* means immigration of Jews, and *oleh* (plural: *olim*) means a Jew immigrating, into Israel.”

48. Laws of the State of Israel, vol. 4 (1950), 114.

49. Nancy C. Richmond, “Israel’s Law of Return: Analysis of Its Evolution and Present Application,” *Penn State International Law Review* 12, no. 1 (1993): 95–133, 99, 109. Although the Law of Return requires only that an *oleh* be Jewish, the definition of who is a Jew for the purposes of the Law of Return is narrow and has been subject to controversy over the last few decades. The law was amended in 1970 to define a Jew as “a person born of a Jewish mother or having converted to Judaism, not being a person affiliated to some other religion.” At the same time, the law was extended to non-Jewish spouses and children. Current acceptable proof of being Jewish for the purposes of the Law of Return is listed on the website of the Israeli Ministry of the Interior. “Documents Needed for Aliyah—Guided Aliyah from within Israel,” Nefesh B’Nefesh, <https://www.nbn.org.il/aliyahpedia/aliyah-process/aliyah-processing-flight-logistics/documentation-requirements-aliyah-from-within-israel/>, accessed March 2019. Acceptable proof includes a letter from a recognized rabbi if you are Jewish by birth, otherwise, other proof of conversion is required.

50. Nationality Law, 5712–1952, Official Gazette (Israel) 93, no. 11 (1952).

51. Nationality Law, 5712–1952, sections 2–8.

52. Registration of Inhabitants Ordinance, 5709–1949. Nationality Law, 5712–1952, section 3.

53. Victor Kattan, “The Nationality of Denationalized Palestinians,” *Nordic Journal of International Law* 74, no. 1 (January 2005): 67–102. The condition “that the Arab must be an inhabitant of Israel on the day of the coming into force of this [1952] law . . . and the following provision, ensured no Arabs outside Israel . . . could claim its nationality . . . Only the few remaining Palestinian Arab inhabitants of the newly created State of Israel who resided there *continuously* from 14 May 1948 until 14 July 1952 could become Israel nationals. All those who had left in the meantime or who were resident abroad could not become nationals. This included 750,000 Palestinian Arab refugees.”

54. Anis Kassim, “The Palestinian: From Hyphenated Citizen to Integrated Citizen,” in *Citizenship and the State in the Middle East: Approaches and Applications*, edited by Nils A. Butenschön, Uri Davis, and Manuel Hassassian, 201–24 (Syracuse, NY: Syracuse University Press, 2000), 205–6. (“The second paragraph of Article 3 of the Nationality Law, subsection 3(b) . . . reads ‘A person born after the establishment of the State who is an inhabitant of Israel on the day of the coming into force of this Law, and whose father or mother becomes an Israel national under subsection (a), shall become an Israel national with effect from the day of his birth.’ . . . The exact outcome of the application of these two paragraphs was that . . . if a child is born to a Palestinian father or mother who was not a citizen of Israel, he or she will become stateless.”)

55. BADIL Resource Center, “Palestinian Refugee Children: International Protection and Durable Solutions,” BADIL Resource Center, January 2007, http://www.badil.org/phocadownloadpap/Badil_docs/publications/refugeechildren-en.pdf; “Israel’s 1952 Citizenship Law effectively denationalized 1948 Palestinian refugees and their descendants by establishing eligibility criteria for Israel citizenship that those refugees could not possibly fulfill—i.e. presence in Israel on the day the law was adopted.”

Susan M. Akram, “The Search for Protection for Stateless Refugees in the Middle East: Palestinians and Kurds in Lebanon and Jordan,” *International Journal of Refugee Law* 30, no. 3 (October 2018): 407–43; “All Palestinians who could not meet the ‘Israel nationality’ criteria were denationalized en masse, and their children who were born in the territory also became stateless.”

56. Nationality Law, 5712–1952, section 18.

57. See CA 8573/08 Ornan v. Ministry of the Interior (2013) (Isr.); CrimC (TA) Oseri v. Oseri; HCJ 174/52 Hussein v. Governor of Acre Prison 6 PD 897 [1952] (Isr.).

58. GA Resolution 55/153, annex, Nationality of Natural Persons in Relation to the Succession of States, January 30, 2001, Articles 5, 14, 15; CERD, Article 5(d)(ii); Oppenheim, *International Law*, 355 (“The inhabitants of the subjugated as well as of the ceded territory acquiring *ipso facto* by the subjugation or cession the nationality of the state which acquires the territory”).

59. George Rafael Tamarin v. State of Israel (1970) 26 PD I 197 (“There is no Israeli nation separate from the Jewish nation . . . composed not only of those residing in Israel but also of Diaspora Jewry.” According to High Court Chief Justice Agranat, recognizing an Israel nationality “would negate the very foundation upon which the State of Israel was formed.” Don Handelman, “Contradictions between Citizenship and Nationality: Their Consequences for Ethnicity and Inequality in Israel,” *International Journal of Politics, Culture and Sociology* 7, no. 3 (Spring 1994): 441–59; Joseph Schechla, “‘Jewish Nationality,’ ‘National Institutions’ and Institutionalized Dispossession,” *Al Majdal*, no. 24 (December 2004): 32–36, https://www.academia.edu/6585340/_Jewish_Nationality_National_Institutions_and_Institutionalized_Dispossession; Tekiner, “Race and Issue of National Identity.”

60. CA 8573/08 Ornan v. Ministry of the Interior (2013) (Isr.); Jay Rudderman and Yedidia Z. Stern, “Is ‘Israeli’ a Nationality,” *Israel Democracy Institute*, March 9, 2014, <https://en.idi.org.il/articles/6516>; Tia Goldenberg, “Supreme Court Rejects ‘Israel’ Nationality Status,” *Times of Israel*, October 4, 2013, <https://www.timesofisrael.com/supreme-court-rejects-israeli-nationality-status/>.

61. “On . . . [official identity] cards, which are issued by the Population Registry of the Interior Ministry, neither Jews nor non-Jews may indicate their *nationality* as ‘Israel.’ The Interior Ministry consequently denied all requests to do so, the acceptable response being either ‘Jew’ or other, such as ‘Arab’ or ‘Druse.’ ‘Israel’ is an acceptable response only to identify one’s *citizenship*”; Tekiner, “Race and Issue of National Identity.”

62. “Authoritative books written by reputable legal scholars . . . translate this law into English as ‘Law of Nationality’ . . . [t]hese erroneous translations imply that ‘nationality’ and ‘citizenship’ are interchangeable in Hebrew . . . but they are not Because the Law of Citizenship refers to both Jews and non-Jews, translating it as the ‘Law of Nationality’ conveys the false impression that nationality status in Israel is open to all.” Tekiner, “Race and Issue of National Identity,” 49.

63. Tekiner, “Race and Issue of National Identity,” 49–50.

64. The first such law is the Absentee Property Law of 1950, which defined as “absentees” all Palestinians who left their homes even for a short time to flee the violence during the conflict. Once declared an absentee, the Palestinian lost all claim of right to their property *in futuro*. Palestinian property thus confiscated was transferred into the bank of Israel Lands. The law also applies to “present absentees,” that is, Palestinians (but not Jews) who remained on their land but whose absence was fictionalized in order to seize their property. See Absentee Property Law, 5710–1950, Official Gazette (Israel) 4, no. 68 (1950).

65. Under the 1960 Basic Law, the Jewish National Fund and the state Development Authority ensured that “Israel Lands” would be reserved for the sole use and enjoyment of Jewish nationals in perpetuity. Similar legislation was passed to confiscate Palestinian property in the West Bank through military orders. Basic Law: Israel Lands, 5720–1960, Laws of the State of Israel 14, no. 48 (1960). For exhaustive treatment of the dispossession of Palestinian lands, the discriminatory Israeli laws that enabled the dispossession, and calculations of the magnitude of Palestinian losses, see Jeremy Forman and Alexandre Kedar, “From Arab Land to ‘Israel Lands’: The Legal Dispossession of the Palestinians Dispossessed by Israel in the Wake of 1948,” *Environment and Planning D: Society and Space* 22, no.

6 (December 2004): 809–30; Usama Halabi, “Israel’s Land Laws as a Legal-Political Tool: Confiscating and Appropriating Palestinian Arab Lands and Creating Physical and Legal Barriers in Order to Prevent Future Property Restitution,” BADIL Resource Center, December 2004, http://www.badil.org/phocadownloadpap/Badil_docs/Working_Papers/WP-E-07.pdf; Sami Hadawi, *Palestinian Rights and Losses in 1948: A Comprehensive Study* (London: Saqi Books, 1988).

66. Souad R. Dajani, “Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine,” Centre on Housing Rights and Evictions, BADIL Resource Center, 2005; Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Access to Land in Israel* (London: Zed Books, 2003).

67. For treaty and customary law support for these rules, see the Convention on Certain Questions Relating to the Conflict of Nationality Laws, April 13, 1930, 179 League of Nations Treaty Service 89; Protocol Relating to Military Obligations in Certain Cases of Double Nationality, April 12, 1930, 178 League of Nations Treaty Service 227; Protocol Relating to a Certain Case of Statelessness, April 12, 1930, 179 League of Nations Treaty Service 115; Special Protocol Concerning Statelessness, April 12, 1930; Convention on the Nationality of Married Women, January 29, 1957, 309 United Nations Treaty Series 65; Convention Relating to the Status of Stateless Persons; Convention on the Reduction of Statelessness; International Covenant on Civil and Political Rights, Article 12, December 16, 1966, 999 United Nations Treaty Series 171 (hereinafter ICCPR); CERD, Article 5; International Law Commission, Report on the Work of its Fifty-First Session. For authoritative treatises on nationality and international law by 1948 and today, see P. Weis, *Nationality and Statelessness in International Law*, (London: Stevens and Sons, 1956); Laura Van Waas, *Nationality Matters: Statelessness under International Law*, (Cambridge: Intersentia, 2008).

68. *Nottebohm (Liech. v. Guat.)*, ICJ Report 1955.

69. *Nottebohm (Liech. v. Guat.)*, ICJ Report 1955, 23–24.

70. International Law Commission, Report on the Work of its Fifty-Third Session, UN Document A/56/10, Article 27 (2001). International law requires reversing illegal legislation as well as compensating for any material losses caused by the wrongful acts.

71. Rebecca Kook, “Citizenship and its Discontents: Palestinians in Israel,” in *Citizenship and the State in the Middle East: Approaches and Applications*, edited by Nils A. Butenschön, Uri Davis, and Manuel Hassassian, 263–87 (Syracuse, NY: Syracuse University Press, 2000).

72. GA Resolution 181 (II), chapter 3, paragraph 1 (“Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights”).

73. See, for example, Report of the Committee on the Elimination of Racial Discrimination, Ninety-Third Session, Ninety-Fourth Session, Ninety-Fifth Session, UN Document A/73/18, (August 6, 2018), 11–12, which urges Israel to take action regarding “persisting discriminatory practices against Palestinians by Israel”; Human Rights Council, Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social, and Cultural Rights of Palestinian People throughout the Occupied Palestinian Territory, Including East Jerusalem, UN Document A/HRC/22/63, (February 7, 2013), 21–22, which describes extensive international law violations in Israel’s West Bank settlements, and finds that the settlements are “established for the exclusive benefit of Israeli Jews”; International Court of Justice, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinions,” International Court of Justice, July 9, 2004, <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>, which finds that the construction of a wall on Occupied Palestinian Territory reinforces “the Israeli settlements illegally established on the Occupied Palestinian Territory” and was “aimed at ‘reducing and parceling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination’”; Committee on Economic, Social and Cultural Rights, “Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel,”

UN Document E/C.12/1/Add.27, paragraph 10 (1998), in which “the Committee expresses concern that excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens . . . apparent in the lower standard of living of Israeli Arabs as a result, inter alia, of lack of access to housing, water, electricity and health care and their lower level of education.”

74. See, for example, reports from the UN human rights bodies and mechanisms: Committee on Economic, Social and Cultural Rights, “Concluding Observations, Israel,” UN Document E/C.12/ISR/CO/3 (2012); UN Human Rights Committee, “Concluding Observations, Israel,” UN Document CCPR/C/ISR/CO/4 (2014); Human Rights Council, “Ninth Special Session: The Grave Violation of Human Rights in the Occupied Palestinian Territory Including the Recent Aggression in the Occupied Gaza Strip,” UN Document A/HRC/S-9/2 (2009); Committee on the Elimination of Racial Discrimination, “Concluding Observations, Israel,” UN Document CERD/C/ISR/CO/14–16 (2012).

75. English Translation of the Hebrew Original Text of the Basic Law of 26 July 2018 [1] (2018) Basic Law: Israel—The Nation State of the Jewish People (hereinafter Basic Law: Nation State of the Jewish People [English translation]); see also Miriam Berger, “Israel’s Hugely Controversial ‘Nation-State’ Law, Explained,” *Vox*, July 31, 2018, <https://www.vox.com/world/2018/7/31/17623978/israel-jewish-nation-state-law-bill-explained-apartheid-netanyahu-democracy>, which notes that the vote passed by a 62–55 vote and that Israeli Arab members of parliament decried the law as “apartheid” following the vote.

76. Knesset, Basic Laws of the State of Israel, <https://main.knesset.gov.il/en/activity/pages/basiclaws.aspx>, accessed September 2020 (“Since the Constituent Assembly and the First Knesset were unable to put a constitution together, the Knesset started to legislate basic laws on various subjects. After all the basic laws will be enacted, they will constitute together, with an appropriate introduction and several general rulings, the constitution of the State of Israel”).

77. Basic Law: Nation State of the Jewish People (English translation), 1(b).

78. The key provisions of the law state that: the land of Israel is the historic home of the Jewish people, and self-determination rests solely in the Jewish people (Article 1); the symbols of the state are exclusively Jewish (Article 2); the capitol of Israel is Jerusalem, including East Jerusalem (Article 3); the official language of the state is Hebrew (Article 4); automatic citizenship through immigration is exclusively reserved for Jews (Article 5); the state will promote ties between Israel and Jewish people around the world and preserve the cultural heritage of Jews in the diaspora (Article 6); Jewish settlement is a national value, and the state will promote and encourage it (Article 7); Basic Law: Nation State of the Jewish People. See also Adalah: The Legal Center for Arab Minority Rights in Israel, “The Basic Law: Israel—The Nation-State of the Jewish People,” Adalah, November 2018, https://www.adalah.org/uploads/uploads/Final_2_pager_on_the_JNSL_27.11.2018%20.pdf.

79. Basic Law: Nation State of the Jewish People (English translation), Article 7.

80. The annexation of occupied territory, whether de facto or de jure, is illegal. See GA Resolution A/73/447, Situation of Human Rights in the Palestinian Territories Occupied Since 1967 (Oct. 22, 2018). Establishing civilian settlements of the population of the occupier in occupied territory is a war crime and grave breach of the Fourth Geneva Convention; Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Article 49, 6 UST 3516, 75 United Nations Treaty Series 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 85(4)(a), June 8, 1977, 1125 United Nations Treaty Series 3; Rome Statute of the International Criminal Court, Article 8(2)(b)(xiii), 2187 United Nations Treaty Series 3 (July 17, 1998). The International Court of Justice, in its Advisory Opinion on Legal Consequences of the Construction of a Wall, of July 9, 2004, found that Israel’s construction of the Separation Wall on Occupied Palestinian Territory was a violation of self-determination and of the prohibition against annexation of and settlement construction in occupied territory.

81. International Convention on the Suppression and Punishment of the Crime of Apartheid, Articles 1, 2, November 30, 1973, 1015 United Nations Treaty Series 243.

82. See Richard Falk and Virginia Tilley, "Israeli Practices towards the Palestinian People and the Question of Apartheid," United Nations Economic and Social Commission for Western Asia, March 15, 2017, https://www.middleeastmonitor.com/wp-content/uploads/downloads/201703_UN_ESCWA-israeli-practices-palestinian-people-apartheid-occupation-english.pdf; Virginia Tilley, ed., "Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law," Human Sciences Research Council, May 2009, <http://www.hsrc.ac.za/en/research-data/view/4634>.

83. Interestingly, Israel has contested the claim of Palestinian right of return based on GA Resolution 194, claiming that Resolution 194 is nonbinding because it is only a General Assembly and not a Security Council resolution. At the same time, Israel has claimed its right to establish its state on the basis of Resolution 181, also a General Assembly and not a Security Council resolution. In fact, Resolution 194 has a unique character under international law for two reasons: (1) it is customary international law and rests on already established customary international law norms (in other words the norms in it are independently obligatory as a matter of state practice that has become customary international law); and (2) unlike any other UN resolution it has been reaffirmed overwhelmingly by the General Assembly every year since its passage (indicating that it remains the authoritative statement of what international law requires). See Susan Akram and Terry Rempel, "Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees," *Boston University International Law Journal* 22, no. 1 (2004): 1–162.

84. Generally, Israel claims that there is no legal basis in international human rights, humanitarian, or refugee treaty or customary law that applies specifically to Palestinian refugees, and that only persons who are nationals of a country have a right to return there. As for Resolution 194, Israel claims that it does not have the force of law under the UN Charter and that in any event Palestinians have not met the preconditions to return cited in Resolution 194. Ruth Lapidot, "Do Palestinian Refugees Have a Right to Return to Israel?" Israeli Ministry of Foreign Affairs, January 15, 2001, <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to.aspx>.

85. Among a very large body of literature on the right of return under international law, see, for example, W. Thomas Mallison and Sally V. Mallison, "An International Law Analysis of the Major United Nations Resolutions Concerning the Palestinian Question," UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, 1979, <https://www.un.org/unispal/document/auto-insert-196128/>; Gail J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem: BADIL Resource Center, 2007); Kathleen Lawand, "The Right to Return of Palestinians in International Law," *International Journal of Refugee Law* 8, no. 4 (October 1996): 532–68. John Quigley, "Mass Displacement and the Individual Right of Return," *British Yearbook of International Law* 68, no. 1 (1997): 65–125; see also Susan Akram and Terry Rempel, "Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework," in *The Palestine Year Book of International Law Online*, edited by Ardi Imseis, vol. 11, xiii–71 (Leiden: Brill-Nijhoff, 2000), <https://doi.org/10.1163/221161401X00020>; Akram and Rempel, "Temporary Protection," 4; and GA Resolution 2535 (XXIV), UN Document A/RES/2535(XXIV)A-C (December 10, 1969, which notes Israel's refusals to implement prior resolutions to ensure the return of Palestinians).

86. A full discussion and analysis of all the arguments contesting the right of return for Palestinians is beyond the scope of this chapter. As I noted, the right of return as a legal matter rests on at least three different bodies or sources of law. In this piece I analyze in detail only one source of law on the right of return: the law of nationality and state succession. This analysis does not cover all of the law that supports the right of return in general or the right of return for Palestinians.

87. ICCPR, Article 12(4).

88. For the drafting history of these provisions, see Marc J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987). For the authoritative interpretation by the Human Rights Committee itself of the broad reading of the “country” and “enter” phrases in the ICCPR, see UN Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), paragraphs 19–21, UN Document CCPR/C/21/Rev.1/Add.9 (November 2, 1999). See also Lawand, “The Right of Return,” 548–58.

89. Quigley, “Mass Displacement,” 202 (“Even though exile as a penal sanction would appear to be permitted under art. 12, it is questionable whether it is permitted in light of the human right to a nationality, at least if exile would render the person stateless. In addition, a state may, by exiling a person as a penal sanction, require another state to accept the person”).

90. UN Commission on Human Rights, Committee on the Rights of Everyone to Be Free from Arbitrary Arrest, Detention, and Exile, Preliminary Report, UN Document E/CN.4/826 (1962); Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Boston and Dordrecht: Martinus Nijhoff, 1987), 156.

91. See Hannum, *Right to Leave and Return*, citing the Strasbourg Declaration on the Right to Leave and Return, Article 6 (b), (Nov. 26, 1986), which reads “No person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country.”

92. Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), 242.

93. Convention on the Reduction of Statelessness, Article 9.

94. The draft principles and accompanying study of state practice on the rights to leave and return were prepared by the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination, Jose Ingles. See Jose Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country* (New York: United Nations, 1963). The study and draft principles led to the issuance of the Strasbourg Declaration on the Right to Leave and Return, which clarified the absolute nature of the rights and the expansive definition of “own country” and informed the interpretations by the Human Rights Committee. See Hannum, *Right to Leave and Return*.

95. Ingles, *Study of Discrimination*, 1–5.

96. Lawand, “The Right to Return,” 539–41 (discussing the generally recognized right of return and the complexities in the case of Palestinian refugees); and UNHCR, “The State of the World’s Refugees: In Search of Solidarity,” UNHCR, 2012, 12, <https://www.unhcr.org/publications/sowr/4fc5cec9/state-worlds-refugees-2012-search-solidarity.html>. Israel’s objections to a Palestinian right of return cannot be claimed as a matter of “persistent objection” because Israel has claimed the same right for Jews in all aspects of the right of return. Israel has claimed, for example, that Jews have a right to return to the territory of Israel because of an ancient right as original “Israelites” (nationals of the territory); that they have a right to the land due to victory during the 1947–49 conflict; and that they were given the territory by GA Resolution 181 in fulfillment of Jewish self-determination.

97. Eric Rosand, “The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?” *Michigan Journal of International Law* 19, no. 4 (1998): 1,094–1,138.

98. Kassim, “The Palestinian,” 69–71.

99. Bill Van Esveld, *“Forget about Him, He’s Not Here”: Israel’s Control of Palestinian Residency in the West Bank and Gaza* (New York: Human Rights Watch, 2012).

100. Van Esveld, *“Forget About Him.”*

101. Human Rights Watch, “Israel: Jerusalem Palestinians Stripped of Status,” Human Rights Watch, August 8, 2017, <https://www.hrw.org/news/2017/08/08/israel-jerusalem-palestinians-stripped-status#>.

102. Harriet Sherwood, “Israel Stripped 140,000 Palestinians of Residency Rights, Document Reveals,” *The Guardian*, May 11, 2011, <https://www.theguardian.com/world/2011/may/11/israel-palestinians-residency-rights>.

103. Susan M. Akram, “The Legal Trajectory of the Palestinian Refugee Issue: From Exclusion to Ambiguity,” in *Palestine and the Palestinians in the Twenty-First Century*, edited by Rochelle Davis

and Mimi Kirk, 121–41 (Bloomington: Indiana University Press, 2013), 120, 123–24. The Oslo Process resulted in the 1993 Declaration of Principles, which sought to recognize “mutual legitimate and political rights”; the 1994 Gaza-Jericho Agreement refers to “‘internationally accepted norms and principles of human rights’ as governing the ‘powers and responsibilities’ of the parties.” However, none of these make any direct reference to internationally recognized legal rights and references to the core UN resolutions protecting individual Palestinian rights—particularly the right of return—are absent. The 1995 Interim Agreement between Israel and the PLO requires Palestinians to respect rights “concerning government and absentee property acquired by Israelis in the Occupied Territories,” without reciprocity for Palestinian rights.

104. See Interim Agreement on the West Bank and the Gaza Strip, Article 28, paragraph 7, Isr.-oPt., September 28, 1995.

105. Interim Agreement on the West Bank and the Gaza Strip, Article 28, paragraph 7, Isr.-oPt., September 28, 1995.

106. Interim Agreement on the West Bank and the Gaza Strip, Annex II, Article II, paragraph 1(g).

107. 2003 Amended Basic Law, Palestinian Basic Law, <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>.

108. 2003 Amended Basic Law.

109. Cited and discussed in Mutaz M. Qafisheh, “Who Has the Right to Become a Palestinian Citizen? An International Law Analysis,” in *Yearbook of Islamic and Middle Eastern Law*, edited by Martin Lau, vol. 18, 112–49 (Leiden: Brill, 2017). This draft has not been made public.

110. The law was drafted by Mutaz Qafisheh for the PLO Negotiation Affairs Department in January 2012 but not published; the draft is on file with Qafisheh. Qafisheh, “Who Has the Right,” 113n5.

111. Qafisheh, “Who Has the Right,” citing PLO, Draft Palestinian Citizenship Law, January 2012; unpublished draft, on file with this author.

112. “UN Treaty Body Database: Ratification Status for Israel,” UN Office of the High Commissioner on Refugees, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=84&Lang=EN, accessed May 2019; “Treaties, States Parties, and Commentaries: Israel,” International Committee of the Red Cross, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL, accessed May 2019.

113. See, for example, GA Resolution 72/150, paragraph 50 (January 17, 2018); GA Resolution 55/74, paragraph 17 (February 12, 2001); GA Resolution 48/116 (March 24, 1994); SC Resolution 2003, paragraph 18 (July 29, 2011); SC Resolution 1716, paragraphs 9–10 (October 13, 2006); SC Resolution 1120, paragraph 3 (July 14, 1997); UNHCR, “Handbook on Housing and Property Restitution for Refugees and Displaced Persons,” Food and Agriculture Organization, March 2007, 27, <http://www.fao.org/3/aI131e/aI131e01.pdf> (“A variety of UN resolutions dating back to 1948 confer housing and property restitution rights on displaced Palestinian refugees”).

114. Committee on Human Rights, Report on the Work of its Fifty-Fourth Session, Guiding Principles on Internal Displacement, section V, UN Document E/CN.4/1998/53/Add.2 (February 11, 1998); UNHCR, “Handbook: Voluntary Repatriation: International Protection,” UNHCR, 1996, https://www.unhcr.org/bg/wp-content/uploads/sites/18/2016/12/Handbook_Voluntary-Repatriation_1996.pdf.

115. Abbas Shibliak, “Stateless Palestinians,” *Forced Migration Review* 26 (August 2006): 8–9, <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/palestine/shibliak.pdf> (“Today more than half of the eight million or so Palestinians are considered to be *de jure* stateless persons”).

116. Susan M. Akram, “Assessing the Impact of the Global Compacts on Refugees and Migration in the Middle East,” *International Journal of Refugee Law* 30, no. 4 (December 2018): 691–95.

117. BADIL Resource Center, “Closing Protection Gaps: A Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention,” BADIL Resource Center, August 2011, 11, 14–15, http://www.badil.org/phocadownload/Badil_docs/publications/handbook/update2011/country%20profile/handbook2010.pdf.

118. Qafisheh, “Who Has the Right,” 149.

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