

**AN APPRAISAL OF THE RIGHT OF RETURN AND
COMPENSATION OF JORDANIAN NATIONALS OF
PALESTINIAN REFUGEE ORIGIN AND JORDAN'S RIGHT,
UNDER INTERNATIONAL LAW, TO BRING CLAIMS RELATING
THERE TO, ON THEIR BEHALF TO AND AGAINST ISRAEL AND
TO SEEK COMPENSATION AS A HOST STATE IN LIGHT OF THE
CONCLUSION OF THE JORDAN-ISRAEL PEACE TREATY OF
1994**

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T H E S E S

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ABSTRACT

This thesis is concerned with examining the right of return and compensation, under international law, of Jordanian nationals who are of Palestinian refugee origin exclusively and Jordan's right as their state of nationality to bring claims on their behalf to and against Israel. It does not concern itself with other categories of Palestinian refugees who are not Jordanian nationals although the two rights of return and compensation arguably apply to all Palestinian refugees.

The thesis also aims at examining Jordan's right as a host country, under international law, to bring compensation claims to and against Israel for creating the Palestinian refugee problem. It examines the legal bases for such a right, under international law in the context of State Responsibility for wrongful acts along with relevant provisions of the 1994 Jordan-Israel Peace Treaty.

The thesis attempts to critically assess, analyze and examine major claims that Jordan can bring to and against Israel against principles of international law both on behalf of its nationals of Palestinian refugee origin and in relation to the right of return and compensation and claims of its own as a host state to and against Israel. It also critically assesses and examines the procedures and mechanisms available for the pursuit of such claims that are available to Jordan in the context of the 1994 Jordan-Israel Peace Treaty along with non Peace Treaty based procedures and mechanisms.

SELECTED ABBREVIATIONS

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CPAP	Center for Policy Analysis on Palestine
ECHR	European Convention for the Protection Of Human Right and Fundamental Freedoms
EJIL	European Journal of International Law
GAOR	United Nations General Assembly, Official Records
GILJ	Georgetown Immigration Law Journal
HILJ	Harvard International Law Journal
HRLJ	Human Rights Law Review
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
IJRL	International Journal of Refugee Law
ILM	International Legal Materials
ILR	International Law Reports
IMR	International Migration Review
IPS	Institute for Palestine Studies
Iran-US CTR	Iran-United States Claims Tribunal
IYHR	Israeli Yearbook on Human Rights
JPS	Journal of Palestine Studies
LNTS	League of Nations Treaty Series
MEF	Middle East Forum
MEI	Middle East International
MEJ	Middle East Journal
MER	Middle East Review
MES	Middle Eastern Studies
NILR	Netherlands Yearbook of International Law
PCIJ	Permanent Court of International Justice
PIJ	Palestine-Israel Journal
PLO	Palestine liberation Organization
PYIL	Palestine Yearbook of International Law
RSQ	Refugee Survey Quarterly
SJIL	Stanford Journal of International Law
TILJ	Texas international Law Journal
UDHR	Universal Declaration of Human Rights
UNTS	United Nation Treaty Series

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INTRODUCTION

The number of Palestinian refugees, both that were rendered refugees as a result of the 1948 Arab-Israeli War, the prelude to it and its aftermath and those who were rendered refugees as a result of the 1967 Arab-Israeli War and its aftermath (Commonly referred to a 'Displaced Persons') and the descendants of each of those two categories, is estimated to be today in the range of 6,890,000.¹

One third of this total number of Palestinian refugees live in the Hashemite Kingdom of Jordan (Jordan). The overwhelming majority of those are full fledged Jordanian Nationals today.²

Jordan had been the most hospitable country for Palestinians who became refugees both during and after the 1948 and 1967 Arab-Israeli wars. It is the only country that has granted Palestinian refugees full Nationality and extended to them the full privileges attached to nationality. Palestinian Refugees and their descendents constitute today almost 50% of the total population of the Hashemite Kingdom of Jordan. Other Arab countries did not confer nationality upon Palestinian refugees and their descendents and have granted them travel documents and formal residency status only.

¹ See, Takkenburg, L. *The Status of Palestinian Refugees in International Law*, Clarendon Press 1998, pp. 20-21.

² *Ibid.*,

The context in which Jordan has opted to confer upon Palestinian refugees nationality arose in the wake of Jordan's incorporation of the West Bank in 1950. In that year Jordan, formally incorporated the West Bank as part of the Hashemite Kingdom of Jordan. Jordan had contended then, when its decision to incorporate the West bank was challenged by many including the Arab League, that it was heeding the call to unity which was announced by a gathering of West Bank Notables in a conference that they Held in Jehrico to unite the West Bank with the East bank of Jordan under the reign of Kind Abdullah I of Jordan. A lot has been said regarding the lawfulness and legality or illegality of this unity and Jordan's status in the West Bank between 1950 and 1967 when the latter was occupied by Israel in the wake of the 1967 War. Jordan's status in the West Bank is not however the focus of this study. It will suffice to say in this context that after Jordan's formal incorporation of the West Bank in 1950, Jordan enacted a new nationality law in 1954 in which it conferred the Jordanian nationality upon all Palestinian refugees and their descendants who were 'habitually resident in Jordan between 1949 and 1954.³

Jordan has been shouldering the burden of Palestinian refugees for many decades now and it is estimated that Jordan has spent over the years almost 40 Billion US dollars to provide for and care for Palestinian Refugees.⁴

³ See, *Jordanian Nationality Law*, law number (6) (1954), in *the Official Gazette of Jordan*, issue Number 1171 (16 February 1954), p. 105.

⁴ See, *Cost of Influx of Palestinian Refugees Into Jordan*, a detailed study conducted by the Refugees' Study Unit at the Peace Process Coordination Bureau at the Jordanian Foreign Ministry dated 21 December 2002.

In 1988 Jordan announced its legal and administrative disengagement with the West Bank to allow for the Palestine Liberation Organization to assume its position as the sole legitimate representative of the Palestinian People. This was, especially the case in light of what seemed to be the prelude to the inception of a political process aimed at bringing the Arab-Israeli War to an end peacefully and through negotiations.

Nevertheless, Jordan had never abdicated what it has perceived as its exclusive right⁵ to defend and present claims on behalf of its nationals who are of Palestinian refugee origin to return to their homes and receive compensation. When the Arab League adopted its Resolution in the Arab League Summit in Rabat in 1974 recognizing the PLO as the sole legitimate representative of the Palestinian People, Jordan accepted that resolution and decision but made a reservation to the effect that the resolution in question does not prejudice Jordan's exclusive rights in relation to all national thereof.⁶

The 1988 decision of legal and administrative disengagement with the West Bank preserved the citizenship status of all Palestinian refugees who were granted nationality in 1954 with the exception of those who were still residents of the West Bank at the time of the Disengagement.⁷

⁵ Interview with Dr. Hani Mulki Head of Jordan's Negotiations Delegation with Israel and later Jordan's Foreign Minister, Amman, 6 February 2006 [hereinafter referred to as *Interview with Mulki*].

⁶ For the text of the Resolution of the Arab League Rabat Summit Meeting and the text of Jordan's reservation in the authentic Arabic text see, *MAJMUAT ALWATHAIK ALURDUNYA* (the Official Compilation of Jordanian Documents), (1975), p. 243-245 [hereinafter referred to as "*MAJMUAT ALWATHAIK*"]

⁷ See *MAJMUAT ALWATHAIK*, *ibid*, (1988), P. 56-58.

Jordan has been consistent in its position that it possesses the exclusive right to bring claims relating to its nationals of Palestinian refugee origin to and against Israel. The Jordan-Israel Peace Treaty of 1994 contains provisions that address the issue of Palestinian refugees, resolving their problem and providing for mechanisms and procedures to address such matters.

Jordan viewed the issue of solving the problem of Palestinian refugees as one of its four central objectives for negotiating a peace treaty with Israel, the other three issues being water rights in shared trans-boundary water resources and the issues of borders and Jerusalem.⁸

Furthermore, Jordan firmly stands by the position that it has a right to seek compensation as a host country for costs that it has incurred as a result of shouldering the burden of Palestinian refugees for decades in Jordan.⁹

This thesis aims at appraising the right of return and right to compensation of Jordanian nationals of Palestinian refugee origin and Jordan's right, under international law, to bring claims to and against Israel in relation to those two rights on behalf of such nationals, in addition to its right as a host country to bring compensation claims to and against Israel for generating refugees that fled to Jordan and settled therein in light of the signing of the Treaty of Peace between Jordan and Israel in 1994.

⁸ *Interview with Mulki*, op.cit.

⁹ *Ibid.*,

The analysis in the thesis pertaining to the right of Palestinian refugees to return and their right to compensation, naturally applies to all Palestinian refugees, irrespective of whether they are Jordanian nationals or not. As a matter of fact, it applies equally, in terms of the treatment of international law of the issue of the right of return and right to compensation also to Jews who were expelled from Arab Countries in the wake of the Arab-Israeli conflict.

This thesis however, does not attempt to assess or examine the right of return of all Palestinian refugees and their right to compensation under international law. It aspires to appraise the right of return and compensation, under international law, of the limited group of Palestinian refugees who are nationals of Jordan.

Members of this group of Palestinian refugees are in effect and in reality nationals of a State, i.e, Jordan. Their, right of return and right to compensation, as will be demonstrated, is firmly established under international law. They have the advantage of being nationals of a country since 1954. Accordingly, and unlike other Palestinian refugees in other countries today, they have the nationality of a country that can extend diplomatic protection to them in a manner that meets the substantive and procedural requirements of the 'nationality of claims' rule. Furthermore, they are nationals of a country which has signed a Treaty of Peace with Israel which includes provisions that address the issue of Palestinian refugees, thus giving Jordan another clear *locus standi* in relation to bringing claims on their behalf to and against Israel.

The thesis attempts to also examine the bases of Jordan's right, under international law to bring claims on behalf of its nationals of Palestinian refugee origin and its right as a host country to seek compensation from Israel relating to the costs that it has incurred as a result of hosting Palestinian refugees.

As indicated previously, the issue of Palestinian refugees in Jordan, their right to return and right for compensation had been one of the major objectives that have led Jordan to enter into a Peace Treaty with Israel. When the Peace Treaty was signed in 1994, almost everyone expected that the Arab-Israeli conflict would have been resolved peacefully and comprehensively in a few years to follow. This was also Jordan's expectation back then.

Today after the lapse of 12 years from the signing of the Jordan-Israel Peace Treaty, the Arab-Israeli Conflict remains unresolved, the Palestinian-Israeli negotiations are dormant since the year 2000 and the Articles of the Jordan-Israel Peace Treaty relating to refugees remain in the realm of treaty provisions that have not been implemented or executed. This is partially ascribed to the fact that some of the central provisions of the Jordan-Israel Peace Treaty indicate that some of the aspects of the issues of refugees are to be settled in negotiations that are to be held in conjunction with and at the same time as final status negotiations between the Palestinians and Israel. Such final Status negotiations have not seriously materialized thus far.

The Peace Process has been stagnant for the past 5 years and the Israeli government has opted, over the past few years, towards implementing unilateral non negotiated withdrawals from Gaza and parts of the West Bank under the pretext that there is no Palestinian Partner committed to Peace that it can negotiate with currently and thus, according to this Israeli position, there would not be any 'final status' negotiations between the Palestinians and Israel in which Jordan can negotiate matters pertaining to Palestinian refugees with Israel at and in conjunction with.

Unlike many other Arab countries, Jordan has never had a Jewish community living in it that was expelled or forced to leave in the wake of the creation of the State of Israel and at the aftermath of its creation. This reality should operate in favor of Jordan, since Israel would not be able, in relation to Jordan, to demand, as it would likely do in relation to other Arab Countries the return of and compensation to their Jewish communities who fled such countries during the years of the Arab-Israeli conflict. Jordan never had a Jewish community at all and accordingly, it may well be advisable for Jordan not to bundle its claims on behalf of its Palestinian refugee population in relation to the right of return and compensation with claims of other Arab Countries related to Palestinian refugees.

Jordan is already at formal Peace with Israel and in light of the fact that a solution to the issue of Refugees had been a central objective for Jordan in the context of the Peace Treaty with Israel and as a result of the fact that the a solution in the form of exercising the right of return and/or receiving compensation by the refugees has not taken place yet,

neither has Jordan formally requested compensation from Israel for hosting Palestinian refugees generated by the latter, largely as a result of the long hiatus that has befallen the Middle East Peace Process, this thesis aims at appraising the rights in question and is structured in a manner that may be viewed as a 'roadmap' or 'blueprint' for presentation of claims by Jordan to and against Israel in relation to the right of return and compensation of its nationals of Palestinian refugee origin and Jordanian state compensation claims to and against Israel in relation to hosting Palestinian refugees who were generated and created by Israel once the Peace Process is resumed or in the context of a Jordanian decision to pursue this issue with and in relation to Israel regardless of the status of the Peace Negotiations.

Accordingly, Chapter 1 of this thesis will provide a historical and factual background that is indispensable for demonstrating that the generation of Palestinian refugees was the product of deliberate Israeli policy endorsed at the highest level of decision making in Israel both in 1948 and 1967. Furthermore, it will shed light and give appreciation to Jordan's relationship with the Question of Palestine and the issue of Palestinian refugees and provide a necessary contextual underpinning for the remainder of the thesis.

Chapter 2 of the thesis will examine the right of Palestinian Refugees to return and their right to compensation under international law. It will survey the right of return within the United Nations system, the law of Nationality, human rights law and humanitarian law. It will also explore the right to compensation, in international law in detail. It will then proceed to identify and examine the legal bases available to Jordan to present claims to

and against Israel on behalf of its nationals who are of Palestinian refugee origin relating to the right of return and compensation and the legal bases for its right to present claims for compensation as a host state to and against Israel. Those bases, that underline both Jordan's right to bring claims on behalf of its nationals of Palestinian refugee origin and its right to compensation as a host state, are the doctrine of State Responsibility and the relevant provisions of the Jordan-Israel Peace Treaty of 1994. The chapter will explore the requirements of 'nationality of claims rule' and exhaustion of local remedies. It will also highlight the *erga omnes* character of certain aspects of such claims.

Chapter 3 attempts to highlight and assess the major potential claims that Jordan may present to and against Israel in detail. It will examine each and every head of possible major claim and assess its strengths and weaknesses in light of relevant principles of international law. This chapter will provide an in depth analysis of violations that Israel has committed in relation to both Palestinian Refugees of the period of 1947-1949 and Palestinian refugees of the 1967 Arab-Israeli War. The heads of claims are divided into two time frames; one relating to possible heads of claims relating to the 1947-1949 refugees and the other related to the 1967 refugees (commonly referred to as Displaced persons in the context of the Arab-Israeli conflict and literature related thereto). This is particularly the case owing to the fact that certain developments of international law rules had evolved and developed between the two Palestinian refugee generating events in the context of the Arab-Israeli conflict. New rules would inevitably thus, apply to the 1967 refugees that do not necessarily apply to the refugees of 1947-1949. The Chapter will examine thoroughly Israeli legislation pertaining to property and demonstrate that the

combined effect of this legislation constitutes expropriation of individual property of Palestinian refugees. It will also illustrate Israel's continued obstruction of the right of Return of Palestinian refugees and point to existing continued breaches committed by Israel of Article 11.1 of the Jordan-Israel Peace Treaty which has a direct bearing on providing Jordanian Nationals of Palestinian refugee origin with remedies by Israel in relation to its discriminatory national legislation. The Chapter also addresses the issue of claims relating to injury suffered by Jordan as a host state and attempts to outline and briefly assess the remedies that Jordan may seek.

Finally, Chapter 4 examines in detail the relevant provisions in the Jordan-Israel Peace Treaty addressing the issue of refugees and financial claims in general, in addition to the dispute settlement provision contained in the Treaty. The chapter assesses procedures and mechanisms offered by such Article that could serve Jordan in bringing claims to and against Israel. It provides a critique of those articles, their strengths and weaknesses and the impact of the Treaty on Jordan's standing and right to present claims to and against Israel on behalf of its national who are of Palestinian refugee origin. The chapter also examines non Peace Treaty mechanisms and procedures that are available to Jordan such as recourse to the International court of Justice and other peaceful settlement of disputes procedures in addition to possible participation in Israeli-Palestinian Mechanisms. Such mechanisms would not have been procedurally or even theoretically conceivable had Jordan and Israel not concluded the Peace Treaty perhaps with the exception of seeking an advisory opinion from the ICJ through competent United Nations Organs.

As stated previously, the aspiration of this thesis has been to serve at some point in the future as a 'roadmap' or 'blueprint' of practical utility to Jordan when or should it decide to present claims to and against Israel on behalf of its nationals of Palestinian refugee origin. Hence, the structure of the thesis has been profoundly influenced by this aspiration of rendering the thesis a potential instrument that has a functional utility in the future for Jordan.

Had this not been the aspiration of the thesis and had the thesis been one that is intended to remain in the realm of academic studies, it may well have been structured in a way that would have been different from its current structure. By way of illustration, it may have been structured in a manner that would have placed the issue of General Principles of State Responsibility and the right of return and right to compensation under one single chapter, addressing the issue of Jordan's standing to bring a claim under another, assess major heads of claims under a third and assess the effects of the Peace Treaty under a fourth. However, and after grappling with this issue for a considerable time, the conclusion was that such an approach would severely compromise the integrity of what the aspiration is for this thesis to be, namely as indicated above, a 'roadmap' or 'blueprint' that can and may be used by Jordan in the future if and when it chooses to present claims to and against Israel on behalf of its nationals of Palestinian refugee origin in relation to their right of return and right to compensation and claims as a host state for hosting and providing for Palestinian refugees for many decades.

While the issue of Palestinian refugees, in general terms, and their right to return and right to compensation has been the subject of intense scholarly legal analysis and critique, very little legal literature, analysis and writings-if any- has been produced that relates to Jordan's unique circumstance and that of its nationals of Palestinian refugee origin in spite of the fact that Jordan is by far the country that hosts the overwhelming majority of Palestinian refugee population in the Diaspora. This thesis, it is hoped, would constitute a meaningful contribution to international legal literature in a manner that would provide this specific and complicated subject matter with some scholarly justice.

The thesis relies on a wealth of United Nations documents. It also relies on outstanding legal research and books on a range of topics on international law such as State Responsibility, Human rights law, Humanitarian Law and the law of nationality. It also draws heavily on Permanent Court of International Justice (PCIJ) cases and advisory opinions, International Court of Justice (ICJ) cases and advisory opinions, European Court of Human Rights (ECHR) cases, Iran-US claims Tribunal cases, Israeli court cases and other case law of courts and arbitral awards. It also draws on many documents of the Foreign Ministry of Jordan and Its archives. It also benefited from an interview with His Excellency Dr. Hani Mulki who was the Head of Jordan's negotiating team with Israel during Peace talks leading to the conclusion of the Peace Treaty.

This thesis has benefited from the insights offered as a result of the official capacity of its author as the Legal Advisor of the Jordanian Foreign Ministry and as the Director of the Peace Negotiations Coordination Bureau. Access was readily available to many valuable

documents that are otherwise not accessible to academic researchers. The author's official capacity as an official in Jordan's Foreign Ministry, on the other hand, placed limitations-dictated by legal and administrative prohibitions of disclosing privileged official information-on the thesis and in many instances did not allow citation of extremely useful material.

It is appropriate to state that this thesis does not in any manner, fashion or way represent the official position or view of the Hashemite Kingdom of Jordan. The views expressed therein are solely those of the author who is fully and exclusively responsible for the content of the thesis.

Chapter (1)

The Expulsion and Displacement of Palestinians

The aim of this chapter is to provide a context for the subject matter of this thesis. It will give an appreciation to the circumstances surrounding the displacement of Palestinian refugees. The chapter will probe and highlight literature that clearly indicates that expulsion of Palestinian Arabs constituted deliberate policy adopted at the highest level of decision making within the annals of the Israeli Political establishment that was carried out with intent and careful planning and that was conducted by entities that constitute agents of the state or that have evolved to become the new state within the meaning given in the context of the International Law Commission's final Articles on State responsibility in the case of the events of 1947-1949 and clearly acts of the official Israeli army in the context of the 1967 war and its aftermath and that such acts were sanctioned by and are attributable to the State of Israel.

While the Legal analysis of these issues is carried out in the ensuing chapters, and in particular in Chapter 3, this chapter is the chapter that attempts to uncover the facts and the evidence that expulsions were part and parcel of deliberate policy adopted at this highest political level, that it was conducted and sanctioned by the state of Israel and was fully condoned by it and is attributable to it factually.

The chapter, through the highlighted literature, will illustrate that the exodus of Palestinian Arabs was triggered by forcible measures undertaken by Israeli entities,

including massacres, destruction of villages and instilling fear of persecution in the minds of Palestinian Arabs.

The chapter will also shed light on the numbers of Palestinian refugees. It will also briefly explain the status of Palestinian Refugees in Jordan and certain necessary facets of Jordan's relationship with the Palestine Problem.

All these issues are very important in the context of rendering this thesis resemble a possible 'roadmap' or 'blueprint' for presentation of claims by Jordan to and against Israel on behalf of its nationals who are of Palestinian refugee origin.

a. Political and historical background

Apart from the period of Ottoman rule (1517-1917), Palestine was an Arab populated region until 1948. In the last days of the First World War, when the majority of the population was Arab, the Ottoman Empire lost the territory of Palestine to British troops. During the latter part of the 19th century, the Ottoman Empire had permitted a small number of Jewish immigrants into the country. By 1918 their numbers had risen to 56,000, out of a total population of 680,000¹⁰

Britain had conflicting aims or goals in the period 1915-1918, and thereafter during the mandate period. In 1915-1916, the British authorities assured Sherif Hussein, the Emir of Mecca, that it would 'support the independence of the Arabs in all the regions within the

¹⁰ British census figures — the Israeli government puts the number of Jews living in Palestine in 1914 at 83,000; see Minority Rights Group Report (MRG): *The Palestinians*. Report No.24, London. 1984 (hereinafter, Minority Rights Group, 1984).

limits demanded by the Sherif of Mecca.’ Yet shortly thereafter, the British Foreign Secretary, Mr. Balfour, stated that Britain favored the establishment in Palestine of a ‘homeland’ for the Jewish people, which would not ‘prejudice the civil and religious rights of existing non-Jewish communities’.¹¹ Balfour’s words were incorporated into the League of Nations Mandate for Palestine, which was signed in London on 24 July 1922 and entered into force on 29 September 1922.¹² Arab protest against increased Jewish immigration (and the Balfour Declaration) erupted in the 1920s. In 1936, the British Government’s Peel Commission recommended the partitioning of Palestine into Arab and Jewish States. This recommendation was accepted by the Zionists as a basis for negotiations with the British Government¹³, but rejected by Palestinian leaders.¹⁴ Avi Shlaim has explained why the then Chairman of the Jewish Agency Executive, David Ben Gurion, accepted the Peel Commission Plan:

“Although Ben Gurion accepted partition, he did not view the borders of the Peel Commission plan as permanent. He saw no contradiction between accepting a Jewish state in part of Palestine and hoping to expand the borders of this state to the whole land of Israel.”¹⁵

In a letter to his son Amos on 5 October 1937, Ben Gurion wrote: ‘I am certain we will be able to settle in all other parts of the country, whether through agreement and mutual understanding with our neighbors or in another way. Erect a Jewish state at once, even if

¹¹ See United Nations, *The Origins and Evolution of the Palestine Problem: 1917-1988*, New York, 1990, (hereinafter UN, *Origins*), 8, for the full text of the Balfour Declaration. See also Cassese, A. *Self Determination of Peoples: A Legal Reappraisal*. Cambridge University Press, 1995. pp. 232-3, and sources there cited.

¹² Mandate for Palestine, Text: UN, *Origin*, Ibid., p.48.

¹³ See Shlaim, A. *The Iron Wall*, W.W. Norton & Company, 2000. p. 19.

¹⁴ See Minority Rights Group, 1984, op.cit, p.3 and note 12.

¹⁵ See Shlaim, A. *The Iron Wall*, op.cit, p. 21.

it is not in the whole land. The rest will come in the course of time.’¹⁶

In 1939, the British Government published a ‘White Paper’ proposing a maximum of 17,000 Jewish immigrants into Palestine over a five-year period, with future numbers to be decided in co-operation with the Arabs.¹⁷ After the issue of the White Paper and as a result of increased immigration pressure, hostilities erupted again. During the first part of the Second World War, a truce was initially agreed between the Zionists and the British security forces, but because of the increased volume of Jewish migration into Palestine, conflict continued between Palestinian Arabs and Jews. Soon, however, two Zionist guerrilla groups, *Irgun Zevai Le’umi* and *Lohamei Herut Yisrael*¹⁸, began systematically attacking British security forces and Palestinian civilians in retaliation for, amongst other things, the 1939 ‘White Paper’. As the Second World War progressed and moved to its conclusion, immigration pressure increased once more, particularly as a result of the Holocaust and political developments in Europe.

With the end of the war, Britain continued as the responsible mandatory power for Palestine. However, faced with an apparently irresolvable conflict, in 1947 Britain requested that a special session of the United Nations General Assembly (UNGA) prepare a study on the question of Palestine, to be deliberated at its next session.¹⁹

¹⁶ See Ben-Gurion, D. *Letters to Paula*, New York. University of Pittsburg Press.

¹⁷ For the “White Paper”, see UN, *Origins*, op.cit, p. 53.

¹⁸ The *Irgun Zevai Le’umi* was an armed Jewish underground organization that was founded in 1931 by a group of *Haganah* (The ‘official’ military forces of the emergent state of Israel) who had quit the latter in protest of its defensive mandate. Subsequently, in 1937 the group split again and half its members returned to the *Haganah*. The *Lohamei Herut Yisrael* emerged from yet another split of the *Irgun Zevai Le’umi* that occurred at outset of the outbreak of the Second World War.

¹⁹ See, *the United Nations and the Question of Palestine*, p.5, UN Department of Public Policy. New York 1994.

Formed in April of that year, the United Nations Special Commission for Palestine (UNSCOP) completed its work on 31 August 1947. Co-operation with the Commission was uneven, with the Jewish organisations generally assisting and the Palestinian leaders refusing to participate on the basis that the natural rights of the Palestinian Arabs were self-evident and should be recognized, not investigated.

The Commission's report contained a majority recommendation for partition with economic union, and for Jerusalem to be placed under the administrative authority of the United Nations.²⁰ The Partition Plan recommended that fifty-four per cent of the land area of the former Palestine be allocated to the proposed Jewish State and the rest to the proposed Arab State, despite the fact that the Jewish population was less than one third of the whole population and that Arab lands accounted for over 80% of the land area of Israel.²¹ The Jewish Agency accepted the Plan, but the Arabs did not and protested that it violated the provisions of the United Nations Charter, which granted people the right to decide their own destiny.²²

On 29 November 1947, the General Assembly adopted Resolution 181(II)²³ which, with some slight changes, endorsed the Commission's majority recommendation for the adoption and implementation of the 'Plan of Partition with Economic Union. With the resulting impasse, violence broke out in several parts of Palestine, accompanied by rising

²⁰See, *Report of the United Nations Special Commission on Palestine*, 31 August 1947. United Nations General Assembly Official Records (GAOR), 2nd Session, Supplement 11, UN doc. A/353, vols. i-iv.

²¹ See Minority Rights Group, *op.cit.* p. 6.

²² See Takkenberg, L. *The Status of Palestinian Refugees in International Law*, Clarendon Press. Oxford. 1998, [hereinafter, Takkenberg, *Palestinian Refugees*]

²³

death tolls. Such was the intractable nature of the conflict that when the British withdrew in May 1948, the first Arab-Israeli war began.

When a formal armistice was finally declared just over a year later, the emergent Israeli State had control over most of the territory of the former Mandate Palestine with the exception of the areas known as the West Bank and the Gaza Strip, which were respectively under the control of Jordan and Egypt. The new State of Israel was established on the entirety of the then Jewish state envisioned in the United Nations Partition Resolution, most of the Arab State envisioned and a significant part of the International zone envisioned in the resolution including West Jerusalem. As a direct result of the war, there were 6,000 reported Jewish deaths, but no accurate figure of Arab deaths.²⁴ An estimated 750,000 Palestinians fled and/or were forced to leave their homes or were expelled and were living in refugee camps in the Gaza Strip, the West Bank, Jordan, Lebanon and Syria.²⁵

The emergence of the State of Israel:

The political goal of the establishment of a State to be called Israel was continuously supported not only in the rhetoric of the Zionist movement, but also in military preparations on the ground, which significantly pre-date the founding of the State of Israel. The most well-known military organization is the *Haganah*, which was founded in 1920 and operated until 1948. Originally a loose network of 'defense' groups, it expanded its membership in the late 1920s, initiated military and officers' training,

²⁴ See Minority Rights Group, *op.cit.*, p. 4.

²⁵ *Ibid.*,

established arms depots, imported weapons from Europe, and laid the basis for the underground production of arms. In the period 1936-39, the *Haganah* evolved from militia to a military body, and was active during the disturbances of this period, supporting illegal immigration and anti-British demonstrations.

In 1938, the Jewish Agency Executive decided to appoint a nationwide leader for the *Haganah*, and in September 1939 it was decided to appoint a professional Military General Staff. From 1941 onwards, the *Haganah* emphasized its national and Zionist character. It identified its basic principles to include responsibility to the World Zionist Organization, and its functions to include defending the Jewish community, defending the Zionist enterprise in the 'Land of Israel', and resisting 'enemy action' from outside. In this period, it stated that it served the entire *yishuv*, (that is, the Jewish community in Palestine, especially the Zionists), and saw itself as 'absolved' from the laws of the non-Jewish government (i.e. the British Mandatory authorities).

During the Second World War, however, the *Haganah* co-operated with the British war effort, and supplied volunteers for the British army. Simultaneously, it strengthened its own base, setting up the *Palmach* - or 'strike force', an abbreviation of *Palugot HaMachatz* - in 1941. One of the founders of the *Palmach* was Yigal Allon, later Minister of Labour (1961-1968), and appointed Deputy Prime Minister and Minister of Education and Culture after the 1969 General Election. The so-called 'Allon Plan' was an unofficial plan for a solution to Israel's border problems after the 1967 War. It proposed new border lines to combine maximum security with a minimum of Arab population.

Yitzhak Rabin was another member of the *Palmach*, and took part in armed action against the British Mandatory authorities from 1944 onwards. He was appointed Deputy Commander in 1947 and commanded the 'Harel Brigade' in the 1948-49 war. Ariel Sharon was also a member of the *Haganah*, which he joined at the age of fourteen in 1942. He commanded an infantry company in the Alexandroni Brigade during 1948. The brigade participated in the occupation, depopulation and destruction of, among others, the Palestinian coastal village of *Tantura* on 22-23 May 1948, during which large numbers of civilians were reported to have been killed.

At the end of the Second World War, the *Haganah* again involved itself in the anti-British struggle, in association with terrorist groups such as *Irgun Zevai Le'umi* and *Lohamei Herut Yisrael*.²⁶

The *Irgun Zevai Le'umi* was an armed Jewish underground organization founded in 1931 by a group of *Haganah* commanders who had quit in protest at the *Haganah's* defensive mandate. In April 1937, the group itself split, with half of its members returning to the *Haganah*. The new *Irgun Zevai Le'umi*, known by its abbreviation, *Etzel*, was ideologically linked to the 'Revisionist Zionist Movement' and accepted the authority of its leader, Vladimir Jabotinsky. It also received support from factions of the right-wing General Zionists.

The *Irgun* rejected the 'restraint' policy of the *Haganah*, and adopted a policy of intimidation and terror against the Arab population and, after the British White Paper in

²⁶ See, footnote 9, *supra*.

1939, also against the Mandatory authorities. A truce was called at the outbreak of the Second World War, leading to another split and the emergence of the *Lohamei Herut Yisrael*. From 1943, *Irgun* was led by Menachem Begin (later to be Prime Minister of Israel from 1977-1984), and in February 1944 it began armed attacks against the British administration, including government offices and police stations. It joined the Jewish Resistance Movement and when this disintegrated in August 1946, *Irgun* continued its terrorist activities against the British. The *Irgun*, the *Lehi* and the *Palmach* were responsible, in various degrees, for the massacre at *Deir Yassin*.²⁷

Lohamei Herut Yisrael, or *Lehi*, its acronym, was an underground organization which operated from 1940 to 1948. Also known as the 'Stern Gang', from its leader, Abraham 'Yair' Stern, it broke away from the *Irgun* in 1940. The reasons for the split were the group's insistence that the armed struggle against the British should be continued, notwithstanding the war with Nazi Germany, its opposition to service with the British army, and its readiness to collaborate with anyone who supported the fight against the British Government. Its objectives included, among others, a Hebrew kingdom from the Euphrates to the Nile.

After Stern was killed in February 1942, the new leaders of the group (Natan Yellin-Mor, Yitshak Shamir and Yisrael Eldad) reorganized the movement. Because of its relatively limited strength, *Lehi* engaged in full-scale terrorism, including the assassination in Cairo on 6 November 1944 of Lord Moyne, the British Minister for Middle East Affairs. *Lehi*

²⁷ See Isseroff, A. *Coming to Terms with Deir Yassin*. www.ariga.com/peacewatch/dv. See also Milstein, U. *The War of Independence*. Vol. IV: *Out of Crisis Came Decision*. Zamora-Bitan, Tel-Aviv 1991, pp. 255-276.

was briefly a part of the Jewish Resistance Movement (from November 1945 to mid-1946). When this broke up following the *Irgun* bombing of the King David Hotel, *Lehi* continued its terrorist campaign, particularly in Jerusalem in 1947, where it sought to prevent implementation of the partition plan and the internationalization of the city.

On 14 May 1948 the independent State of Israel was proclaimed by a Provisional State Council. It was recognized immediately by the USA and shortly thereafter by the Soviet Union, but only gradually by other States, with Arab States in particular withholding recognition for many years (and some still refusing recognition to this day). Israel was admitted to membership of the United Nations on 11 May 1949, and a permanent Government was established following elections held in that year.

On 26 May 1948, the Provisional Government of Israel transformed the *Haganah* into the regular armed forces, known as *Zeva Haganah Le-Yisrael* -the Israel Defense Force. *Irgun* offered to disband and to integrate its members into the Israeli Defense Force, and this was achieved in September 1948. *Lehi* mostly disbanded and its members also enlisted in the IDF. It continued to be active in Jerusalem, however, and its members are considered responsible for the murder of Count Folke Bernadotte, the United Nations Mediator, in Jerusalem on 17 September 1948. Although the leaders of *Lehi* were sentenced to long jail terms by an Israeli military court, they were released in a general amnesty.

It is not seriously disputed that the military and other armed elements engaged in the

fighting and expulsion of the Palestinian population were subsequently incorporated into the official organs of the State of Israel,²⁸ or that the actions of those units were subsequently adopted by the State of Israel, in the sense understood by the International Court of Justice in the *US Hostages in Tehran Case* in 1979.²⁹

b. Causes of the Expulsions of Palestinians

(i) The 1947-1949 Conflict

The reasons behind the expulsions have been disputed. Israel's official position has been that the Arabs fled voluntarily, not as a result of compulsion, coercion or threat on the part of the Israelis, but because of the combination of requests by Arab leaders for the population to seek safety and the collapse of Arab institutions with the departure of the Arab elite.³⁰ Count Bernadotte, United Nations Mediator for Palestine, reported differently in September, 1948. He stated that 'the exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumors concerning real or alleged acts of terrorism, or expulsion'.³¹

²⁸ Official Israeli Government publications explicitly recognize the continuity between armed elements which engaged in activity before the founding of the State of Israel and the organs of the State. Before the establishment of the State of Israel, a number of armed Jewish defense organizations operated. In addition to the *Haganah* and *Palmach*, which answered to the elected leadership of the Jewish national institutions. Other armed defense groups, namely the *lehi* and the *Irgun* operated independently. It was only natural that when the independence of the State of Israel was declared the new, legal Government would decide to establish a single, unified armed force loyal to the Government of the State of Israel: The Israel Defense Forces. <http://www.idf.il/english/history/history.stm>.

²⁹ See, *Case concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Reports, 1980, pp. 3, 34-36. The Court, after taking note of various statements and acts by the Iranian authorities, stated as follows: "The approval given.., by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible." (Paragraph 74)

³⁰ See, *The Refugee Issue: A Background Paper*. State of Israel, Government Press Office, October 1994, p.3.

³¹ See, *Progress Report of the UN Mediator for Palestine*, GAOR, 3rd session, Supp.11, UN doc.A/648, p.14. [hereinafter, *UN Mediator Report*].

The most detailed account of the expulsion of the Palestinians is provided by Israeli historian Benny Morris in his 1987 study, *The Birth of the Palestinian Refugee Problem, 1947-1949*, which was based on the then recent declassification and opening of most Israeli state and private political papers from 1947.³² The Arab flight from the countryside began with a trickle from a handful of villages in 1947, and became a steady though still small-scale emigration over the period December 1947- March 1948 with the departure of many of the country's elite, especially from Haifa and Jaffa.³³ This wave is estimated in the several tens of thousands. Between April and August 1948, the rural emigration turned into a massive displacement. According to Morris:

“Jewish pressure on the Arab villages of the Coastal Plain, and the *Haganah* conquest of parts of Arab Jerusalem and the Jewish Corridor, Tiberias, Haifa, the Hula Valley in Galilee Panhandle, Jaffa and its environs, Beisan and Safad sent some 200,000-300,000 urban and rural Palestinian Arabs fleeing to the safety of the surrounding Arab States (Lebanon, Syria, Egypt, and Transjordan) and the Arab population centres of Gaza, Nablus, Ramallah and Hebron.”³⁴

In general, the displacements were a direct response to attacks and retaliatory strikes by the Zionist settlers' defense force; (the *Haganah*) and to fears of such attacks.³⁵

Reference should be made, in particular, to the *Haganah*'s Plan D, the objective of which was to secure all areas allocated to Israel under the UN partition resolution, as well as

³² See, Morris, B. *The Birth of the Palestinian Refugee Problem, 1947-1949*, Cambridge University Press, 1987 [hereinafter referred to as Morris, *Birth*].

³³ See, Minority Rights Group, op.cit, p. 4.

³⁴ See, Morris, *Birth*, op.cit, p. 254.

³⁵ Ibid.,

Jewish settlements outside these areas and corridors leading to them. Avi Shlaim notes:

“Although the wording of Plan D was vague, its objective was to clear the interior of the country of hostile and potentially hostile Arab elements, and in this sense provided a warrant for expelling civilians. By implementing Plan D in April and May (1948) the Haganah thus directly contributed to the Birth of the Palestinian refugee problem.”³⁶

The above indicates clearly that there was a policy of expulsion. Benny Morris writes:

“Plan D was not a political blueprint for the expulsion of Palestine’s Arabs: it was a military plan with military and territorial objectives. However, by ordering the capture of Arab cities and the destruction of villages, it both permitted and justified the forcible expulsion of Arab civilians.”³⁷

In January 1948, the Zionist forces began an organized expulsion of Arab communities,³⁸ and the potential boost which this displacement represented to the goal of ‘Eretz Israel... without Arabs’ was not lost on Israel’s leaders. On 31 March 1948, Weitz, the director of the JNF’s Lands Department, noted that ‘[t]here is a tendency among our neighbours... to leave their villages’.³⁹ In fact, however, and contrary to Israeli claims that Arab Leaders urged the population to flee for their own safety, Benny Morris reports many instances of Palestinian leaders and Arab States urging the population to remain in their towns and villages.⁴⁰ This ‘tendency’ to leave, or rather, the pressure to leave, was promoted and

³⁶ See, Shlaim, *The Iron Wall*, op.cit, p. 31.

³⁷ See, Morris, *Birth*, op.cit, pp. 62-63.

³⁸ Ibid., p. 54 (quoting HHA. 66.10, protocol of the meeting of the Mapam Political Committee, statement by Galili. 5 Feb. 1948. Mapam (United Workers’ Party), a socialist-zionist party, was the second largest political party in the early years of the State. Mapam joined the labor alignment from 1969-1984, ran independently in 1988, and returned to Labor in 1992.

³⁹ Ibid.,

⁴⁰ Ibid.,

expanded in part by Weitz himself, who was responsible for the land acquisition and, in great measure, for the establishment of new settlements. The conditions of war and anarchy of early 1948 enabled the *yishuv*, the Jewish community in Palestine, to take physical possession of these tracts of land.⁴¹

Benny Morris further observes that clear traces of an expulsion policy on both national and local levels' existed from the beginning of April 1948.⁴² Sometime between 8-10 April, orders went out from the *Haganah* General Staff to the *Haganah* units involved to clear away and, if necessary, expel most of the remaining Arab rural communities.

According to historian and researcher Ariel Yitzhaqi, *Haganah* and *Palmach* troops carried out dozens of operations against Palestinians by raiding their villages and blowing up as many houses as possible. 'In the course of these operations, many old people, women and children were killed wherever there was resistance.'⁴³

Yitzhaki cites some ten major massacres committed by Jewish forces in 1948-49, and many more smaller ones. 'Major massacres' are described as involving an assault by Zionist troops resulting in more than fifty victims. Among those cited by Yitzhaki and others are: the *Deir Yassin* massacre, 9 April 1948, in which over 250 unarmed villagers were murdered;⁴⁴ the expulsions from *Lydda* and *Ramle* on 12-13 July 1948, in which

⁴¹ *Ibid.*,

⁴² *Ibid.*, p. 64.

⁴³ See, Yitzhaqi, A. *The Journal of Palestine Studies*, Vol. 1, n.4, Summer 1972, p144, citing Yediot Aharanot; Hadawi, S. *Palestine Rights and Losses in 1948: A Comprehensive Study*, London: Saqi Books, 1988

⁴⁴ *Ibid.*,

over 60,000 Palestinians were expelled from the two towns in an operation approved by Ben-Gurion and carried out by senior army officers, including Yigal Allon, Yitzhak Rabin, and Moshe Dayan;⁴⁵ and the massacre at *Al-Dawayma*, an unarmed village captured on 29 October 1948, in which 80-100 villagers were killed *after* the capture.

In an analysis of these events, *Hagana's* intelligence branch explained that 'British withdrawal freed our hands' to resolve the Arab question. In Jerusalem on 15 May 1948, *Haganah* loudspeaker vans urged the Arab population to flee. 'Take pity on your wives and children and get out of this bloodbath', they proclaimed. 'Surrender to us with your arms. No harm will come to you. If you stay, you invite disaster'. 'The Jericho road leads to Jordan.' 'The evacuation of Arab civilians had become a war aim,' observed *Haganah* officer Uri Avnery, who would later become a member of Israel's parliament.⁴⁶

The Palestinians were 'ejected and forced to flee into Arab territory'.⁴⁷ 'wherever the Israeli troops advanced into Arab country, the Arab population was bulldozed out in front of them. It typically sufficed, recalled Avnery, 'to fire a few shots in the direction of Arab villages to see the inhabitants, who had not fought for generations, take flight'.⁴⁸

Massacres of Arab populations continued even after the 1947-1949 expulsions. Other

⁴⁵ Both towns were intended to be in the Arab State called for in the UN partition plan, and were defended by small contingents of the Arab Legion. These were withdrawn on 9-10 July, as being too small to stand against the large Jewish force, which attacked on 12 July. Substantial civilian casualties resulted in the resulting expulsion, which had the express approval of Ben-Gurion. *The Rabin Memoirs*, University of California Press, 1996, pp. 383-4.

⁴⁶ See, Quigley, J. *The Palestinian Question in International Law: A Historical Perspective*, 10 Arab Studies Quarterly, pp. 44, 82, (1988).

⁴⁷ *Ibid.*, pp. 82-83.

⁴⁸ *Ibid.*, quoting Avnery, U. *Les refugies arabes-obstacle a la paix*, *Le Monde*, 9 May 1964, p. 2.

similar incidents after the end of the 1948 war include the expulsion of the *Negev Bedouin* in the period 1949-1959; the *Azazme Tribe* massacre in March 1955; and the massacre at *Kafr Qassim*, an Israeli Arab village in the little triangle bordering the West Bank on 29 October 1956.

(ii) The 1967 War and its aftermath

The mid-1960s saw the rise of independent Palestinian guerrilla groups (known in Arabic as the *fedayeen*), the most notable of which was Yasser Arafat's Fatah movement. Various governments in the region encouraged guerrilla raids into Israel, particularly from Lebanon or Jordan. The Israeli reprisals to these militarily futile raids were predictably harsh. Responding to a *fedayeen* raid, on 13 November 1966, Israel launched a major attack on the Jordanian West Bank border village of *Samu*, rounding up villagers and destroying their houses. A Jordanian armored column which sought to repel the attack was defeated by superior firepower. By the spring of 1967, the situation had become extremely tense.

On 13 May 1967, President Nasser of Egypt at that time received a Soviet intelligence report which claimed that Israel was massing troops on Syria's border. According to Avi Shlaim, Nasser responded with 'three successive steps' which made war virtually inevitable:

"he deployed his troops in Sinai near Israel's border; he expelled the United Nations Emergency Force from Sinai; and, on 22 May, he closed the Straits of Tiran to Israeli shipping..."⁴⁹

⁴⁹ Schlaim, A. *The Middle East: The Origins of Arab-Israeli Wars*, in Woods, N. *Explaining International Relations since 1945*, Oxford, 1996, pp. 219, 227.

Both Egypt and Jordan were parties to the multilateral 1964 Arab Defense Pact but, sensing that war was now likely, King Hussein suggested an Egyptian-Jordanian Mutual Defense Treaty. President Nasser immediately accepted the idea, and the treaty was signed on 30 May. The treaty stipulated that Jordan's forces were to be placed under the command of Egyptian General Abdul Moneim Riad.

On 5 June 1967, Israel launched a surprise attack, virtually eliminating the Egyptian air force in a single blow. In response to the Israeli attack, to the Israeli build-up and incursions across its border, and in accordance with its obligations under the Pact with Egypt, Jordanian forces launched an offensive into Israel, but were soon driven back as the Israeli forces counterattacked into the West Bank and Arab East Jerusalem. Israel now had complete control of the skies, and after a spirited defense of Arab East Jerusalem, the outnumbered and outgunned Jordanian army was forced to retreat to preserve the East Bank heartland against further Israeli expansion. When the final UN cease-fire was imposed on 11 June 1967, Israel stood in possession of a wide swath of Arab land, including the Egyptian Sinai, Syria's Golan Heights, and, most significantly, what remained of Arab Palestine -the Jordanian West Bank, including Arab East Jerusalem, and the Egyptian-occupied Gaza Strip.

At no time was Israel's existence threatened and, leaving aside the rhetoric on both the Israeli and the Arab sides, there is no convincing evidence that any of the Arab States in the region had any intention of attacking Israel. Israel's invasion and occupation of the West Bank correspondingly lacked any legal basis in international law.

Of the States participating in the conflict, Jordan paid by far the heaviest price. As a result of the war, more than 300,000 Palestinian Arabs were displaced and fled to Jordan, or were forced to leave or were expelled, many of them uprooted for the second time in less than two decades. Jordan's economy was also devastated. About 70% of Jordan's agricultural land was located in the West Bank, which produced 60 to 65% of its fruit and vegetables. Half of Jordan's industrial establishments were located in the West Bank, while the loss of Jerusalem and other religious sites devastated the tourism industry. Altogether, the areas now occupied by Israel had accounted for some 38% of Jordan's gross national product.

After the cease-fire was secured, the Security Council adopted resolution 237 (1967), calling upon Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations had taken place, and to facilitate the return of the displaced persons. The Governments concerned were asked to respect scrupulously the humanitarian principles governing the protection of civilian persons in time of war contained in the Fourth Geneva Convention of 1949. At its fifth emergency special session in 1967, convened after the fighting began, the General Assembly called upon Governments and international organizations to extend emergency humanitarian assistance to those affected by the war. The Assembly asked Israel to rescind all measures already taken and to desist from taking further action which would alter the status of Jerusalem.⁵⁰

⁵⁰ See UNGA Resolution 2252 (ES-V), 4 July 1967, confirmed by Resolution 2341 B(XXII), 19 December 1967.

Later that year, on 22 November, the Security Council unanimously adopted, after much negotiation, resolution 242 (1967), laying down principles for a peaceful settlement in the Middle East. The resolution stipulates that the establishment of a just and lasting peace should include the application of two principles: ‘withdrawal of Israel armed forces from territories occupied in the recent conflict’, and ‘termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force’. The resolution affirms the need for ‘achieving a just settlement of the refugee problem’.

Egypt and Jordan accepted resolution 242 (1967) and considered Israeli withdrawal from all territories occupied in the 1967 war as a precondition to negotiations. Israel, which also accepted the resolution, stated that the questions of withdrawal and refugees could be settled only through direct negotiations with the Arab States and the conclusion of a comprehensive peace treaty.⁵¹

Since 1967, the Security Council has continued to express its concern about the situation on the ground, declared null and void the measures taken by the Israeli government to change the status of Jerusalem, called for the cessation of Israeli settlement activity, which it determined to have no legal validity, reaffirmed the applicability of the Fourth

⁵¹ A potentially problematic difference results from apparent variations in the French and English texts of SC resolution 242. with one implying withdrawal from “all territories” and the other leaving open the possibility of it meaning only “some territories”.

Geneva Convention to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem, and called for the return of Palestinians.⁵²

c. Numbers of Palestinians who sought refuge and who were forced to leave

(i) Displacement: Some global figures

For a variety of reasons, including the absence of any census after 1931, considerable migration from rural areas to the towns, and significant population growth in the 1930s and 1940s, the numbers of Palestinian Arabs who became refugees or were displaced in 1947-1949 range between 726,000 and 900,000.⁵³ On the Arab side, they are numbered between 900,000 and one million, while Israel generally cites 520,000. The United Nations Relief and Works Agency for Palestine Refugees in the Near East⁵⁴ (UNRWA), which includes statistics from its predecessor, the United Nations Relief for Palestine Refugees, cites 960,000, while the United Nations Economic Survey Mission puts the figure at 726,000.⁵⁵

UNRWA figures of Palestinian refugees and where they settled are useful but not wholly accurate or comprehensive as a demographic record. For example, these figures reflect those who registered but who may no longer be in one or other of the territories in which UNRWA operates. Also, they do not reflect the numbers of those who fled or were

⁵² See, Masalha, N. *Imperial Israel and the Palestinians: The Politics of Expansion*, London, Pluto Press, 2000, on Israel's expansionist policies, particularly from June 1967 onwards.

⁵³ See, Takkenberg, *Palestinian Refugee*, op.cit, p. 19.

⁵⁴ See, UNGA Resolution, No. 302 (IV), adopted on 8 December 1948 establishing The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

⁵⁵ Center for Policy Analysis on Palestine, *Facts and Figures about the Palestinians*, Information Paper No.1. Washington. D.C.,1992, 13 (Table 3). The PLO Negotiations Affairs Department cites 804,766 Palestinians dispossessed in 1948, and numbers the present 'refugee' population at 5,248,185: <http://www.nad-pio.org/permrmanent/refug5.html>.

forced to leave or were expelled in 1948, but who did not register. They may, nevertheless, constitute a provisional guide to the numbers and distribution of both UNRWA registered and non-refugee Palestinians.

(ii) Displacement in 1947-1949

The UN Mediator, Count Folke Bernadotte, reported in 1948 that 'almost the whole of the Arab population fled or was expelled from the area under Jewish occupation'.⁵⁶ The majority of refugees settled in the Gaza Strip and the West Bank, within the territory of the former mandate Palestine.

The directions of flight of the waves of refugees were various, and are reflected in their reported rates of reception into the Arab host communities. According to Benny Morris,

“The population of the northern part of Palestine (Haifa, Acre, Safad and Galilee) fled northward into Syria and Lebanon, while the refugees from Jaffa and the Gaza and Beersheba districts of the south crowded into the Gaza Strip. The Arab population of the coastal area of Palestine, including some from Haifa and Jaffa and most Arab inhabitants of Ramleh and Jerusalem districts, fled to the hilly country on the west bank of the river Jordan. [An additional] 150,000-200,000 Palestinians [fled as a result of offensives] in October and December 1948 to January 1949, most of them to the Gaza area. About 150,000 of the Arab population of pre-1948 Palestine remained behind. They became Israeli citizens, an Arab minority in a Jewish state.”⁵⁷

⁵⁶See, *UN Mediator Report*, op.cit, p. 14.

⁵⁷ Morris, as quoted in Takkenberg, L. *Palestinian Refugees*, op.cit, p 265. See also Morris, B. *The Initial Absorption of the Palestinian Refugees in the Arab Host countries, 1948-1949*, in Bramwell, AC. (ed.) *Refugees in the Age of Total War*, London: Unwin Hyman, 1988; Morris, B. *Israel's Border Wars, 1949-1956*; Morris, B. *Arab Infiltration Israeli Retaliation, and the Countdown to the Suez War*. Oxford: Clarendon Press, 1993; Morris, B. *1948 and After: Israel and the Palestinians*, Oxford Clarendon Press, 1994.

(iii) Displacement after June 1967

The distribution of Palestinian refugees and displaced persons was further upset by the 1967 War, when large numbers of refugees and other displaced persons were forced to leave or were expelled, and fled to Jordan and elsewhere, including Lebanon, Syria, Egypt, Iraq, Kuwait, Libya and Saudi Arabia. Some 115,000 people in Syria were displaced when Israeli forces occupied the Golan Heights and the *Quneitra* area. Among this group were approximately 16,000 Palestinian refugees who were uprooted for the second time. Many of these moved towards Damascus and some to *Dera'a*, further south. About 162,500 refugees from the West Bank and some 15,000 refugees from the Gaza Strip were forced to leave or were expelled and fled to the Jordanian Eastern Bank, where they were joined by another 240,000 non-refugee former residents of the West Bank and the Gaza Strip fleeing for the first time. The latter are referred to as displaced persons.

The displacement of the Palestinian population continued even after the cessation of hostilities; already in June 1967, the Israeli authorities evicted the population and destroyed the quarter of *al-Magharbe* in the Old City of Jerusalem, while the 'transfer' of some 100,000 from the West Bank was implemented by Chaim Hertzog, the first military Governor of the West Bank after the 1967 war.⁵⁸

d. Israeli Policy and practice post-flight and/or expulsion.

d(1). Preventing Return of the Refugees

The flight and/or the expulsion of the Arab inhabitants from Palestine was seen as a great

⁵⁸ See, Masalha, N. *Israel's Moral Responsibility Towards the Palestinian Refugees*: <http://www.nad-plo.org/permanent/refug7a.html>.

triumph for Zionism, the Jewish Agency and other Jewish organizations, and within their overall political aims.

(i) The evidence of historical intent

It is not seriously disputed that the policy of conquest and/or possession of Palestinian lands has long historical roots, and that it did not begin with the events of 1947-1949.⁵⁹

Writing in 1885, Theodor Herzl, the founder of political Zionism, though publicly promoting a future Jewish country in which Arabs and Jews would live as equals, indicated privately his endorsement of expropriation and removal.⁶⁰

The same views were maintained through the twentieth century. Thus, Moshe Sharett, Ben-Gurion's chief deputy, Israel's first Foreign Minister and later Prime Minister, wrote from Istanbul to friends in Tel Aviv on 12 February 1914 that, despite newspaper stories that Arabs and Jews might live together in peace in Palestine,

“we must not be deluded by such illusive hopes... for if we cease to look upon our land, the Land of Israel, as ours alone and we allow a partner into our estate, all content and meaning will be lost to our

⁵⁹ See, for example, letters from Ben Yehuda, 1882, cited in Be'eri, E. *The Beginnings of the Israeli-Arab Conflicts*, Sifriat Po'alim, Haifa University Press, 1985, pp. 38-9.

⁶⁰ ‘We must expropriate gently the private property on the estates assigned to us. We shall try to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment in our own country’: diary entry 12 June 1895; see Patai, R. ed., *The Complete Diaries of Theodor Herzl*, vol.1, Harry Zohn, trans.. New York: Herzl Press and Yoseloff, T, 1960, pp.88-89. See also the views of another founder of political Zionism, Zangwill, I. cited in various places, including Flapan, S. *Zionism and the Palestinians*, p.56; Gornv, *Zionism and the Arabs 1882-1948*, p. 217; Alsberg, P. *The Arab Question in the Policy of the Zionist Executive before the First World War*, (Hebrew), Shivat Tzion, Jerusalem. (1955-56), pp.206-2077; Masalha, N. *Expulsion of the Palestinians: The Concept of ‘Transfer’ in Zionist Political Thought. 1882-1948*, Washington, D.C., Institute for Palestinian Studies, 1992.

enterprise.”⁶¹

‘Transfer’, ‘force’, and ‘expulsion’, appear repeatedly in the writing of Zionist politicians and activists. In the words of Vladimir Jabotinsky, founder of the Revisionist Zionist party and ideologue both of *Irgun*, and of the Likud Party, ‘The Islamic soul must be broomed out of Eretz Yisrael’.⁶² Menahem Ussishkin, chairman of the Jewish National Fund and member of the Jewish Agency Executive, put it thus in 1930: ‘We must continuously raise the demand that our land be returned to our possession... If there are other inhabitants there, they must be transferred to some other place. We must take over the land. We have a greater and nobler ideal than preserving several hundred thousands of Arab fellahin’.⁶³

David Ben-Gurion, leader of the Zionist movement and head of the MAPI party during the 1930s, favored various forms of ‘transfer’ at various times. In June 1938, he wrote:

“The Hebrew State will discuss with the neighbouring Arab States the matter of voluntarily transferring Arab tenant farmers, workers and fellahin from the Jewish State to neighbouring states. For that purpose the Jewish State, or a special company... will purchase lands in neighboring States for the resettlement of all those workers and fellahin.”⁶⁴

Three years later, in 1941, he wrote:

⁶¹Quoted in *Haaretz*, Friday supplement, 1 December 1995.

⁶² Cited in Shavit, Y. *The Attitude of Zionist Revisionism Towards the Arabs*, in *Zionism and the Arab Question*, Hebrew, p .74.

⁶³ *Daor Hayom*, Jerusalem, 28 April 1930.

⁶⁴ See, Protocol of the Jewish Agency Executive, Meeting, 7 June 1938, Jerusalem, confidential, no. 51, Central Zionist Archives, vol. 28, Jerusalem.

“We have to examine, first, if this transfer is practical and secondly, if it is necessary. It is impossible to imagine general evacuation without compulsion, and brutal compulsion... The possibility of a large-scale transfer of a population by force was demonstrated when the Greeks and the Turks were transferred [after the First World War]. In the present war [Second World War] the idea of transferring a population is gaining more sympathy as a practical and the most secure means of solving the dangerous and painful problem of national minorities. The war has already brought the resettlement of many people in eastern and southern Europe, and in the plans for post-war settlements the idea of a large-scale population transfer in central, eastern, and southern Europe increasingly occupies a respectable place.”⁶⁵

Yosef Weitz, who was to become head of the Israeli government’s official Transfer Committee in 1948 and Director of the Jewish National Fund’s Settlement Department noted the following in his diary in 1940:

“Amongst ourselves it must be clear that there is no room for both peoples in this country. No “development” will bring us closer to our aim to be an independent people in this small country. After the Arabs are transferred, the country will be wide open for us; with the Arabs staying the country will remain narrow and restricted... There is no room for compromise on this point.., land purchasing... will not bring about the State... The only way is to transfer the Arabs from here to neighbouring countries, all of them, except perhaps Bethlehem, Nazareth, and Old Jerusalem. Not a single village or a single tribe must be left. And the transfer must be done through their absorption in Iraq and Syria and even in Transjordan. For that goal, money will be found — even a lot of money. And only then will the country be able to absorb millions of Jews... There is no other solution.”⁶⁶

It is also clear that what might have been described as political or idealistic rhetoric was

⁶⁵ See, Ben Gourion, D. *Lines of Zionist Policy*, 15 October 1941.

⁶⁶ See, Weitz Diary, A247/7, entry for 20 December 1940. pp. 1090-1091, Central Zionist Archives, Jerusalem; see also entries for 20 February 1948, 17 July, *Ibid.*, p. 1204.

in fact translated into military policy on the ground:

“[W]e [the *Haganah*] adopt the system of aggressive defense; during the assault we must respond with a decisive blow: the destruction of the [Arab] place or the expulsion of the residents along with the seizure of the place”.⁶⁷

(ii) The intention to expel: From words to actions-1948 Onwards

It is clear from the evidence that expulsions of Palestinian populations were intentionally undertaken, and that they were not dictated by military necessity, but by policy decisions taken at the highest levels of the Israeli government in waiting and the Israeli State after 14 May 1948. In a Memorandum dated 10 May 1948, Aharon Cohen wrote:

“There is reason to believe that what is being done..., is being done out of certain political objectives and not only out of military necessities... In fact, the “transfer” of the Arabs from the boundaries of the Jewish State is being implemented... the evacuation/clearing out of Arab villages is not always done out of military necessity. The complete destruction of villages is not always done because there are “no sufficient forces to maintain garrison”.⁶⁸

These political/military objectives appear repeatedly in the statements of those responsible for the development and implementation of Zionist and later Israel policy. In the words of David Ben-Gurion again, in April 1948:

⁶⁷ Ben Gurion’s advice on 19 December 1947, on the eve of the 1948 War, cited in Flapan, S. *The Birth of Israel: Myth and Reality*, New York: Pantheon Books, London, Croom Helm, 1987, p. 90.

⁶⁸ Cohen, A. Memorandum, *Our Arab Policy During the War*, 10 May 1948, in Giva’at Haviva, Hashomer Hatza’ir Archives, 10.10.95 (4).

“We will not be able to win the war if we do not, during the war, populate under and lower, eastern and western Galilee, the Negev and Jerusalem area...I believe that war will also bring in its wake a great change in the distribution of the Arab population.”⁶⁹

Moshe Sharett, Foreign Minister of Israel from 1948 onwards, was similarly insistent, stating in August 1948:

“As for the future, we are equally determined.., to explore all possibilities of getting rid, once and for all, of the huge Arab minority, which originally threaten us. What can be achieved in this period of storm and stress will be quite unattainable once conditions get stabilised. A group of people from among our senior officers [i.e., the Transfer Committee] has already started working on the study of resettlement possibilities in other lands.”⁷⁰

As the Palestinian population was forcibly removed, special measures were considered necessary in order to preserve this new *status quo*. During March and April 1948, Josef Weitz oversaw the implementation of a policy which mainly focused on measures to ensure that there could and would be no return.⁷¹

The first unofficial Transfer Committee-composed of Weitz, Ezra Danin and Elias Sasson,⁷² later to become the head of the Middle East Affairs Department of the Foreign Ministry-came into being at the end of May, following Danin's agreement to come in on the scheme in mid-May and the Foreign Minister's (Moshe Sharett) unofficial sanction of

⁶⁹ David Ben Gurion to the Zionist Actions Committee, 6 April 1948, Ben Gourion, *Behilahem Yisrael [As Israel Fought]*, Tel Aviv: Mapai Press, 1952, pp. 86-87.

⁷⁰ Moshe Sharett to Chaim Weizmann, President of the Provisional Council of the State of Israel, 18 August 1948, cited in Morris, *Birth*, op.cit, pp. 149-150.

⁷¹ See, Morris, *Birth*, op.cit, p. 245.

⁷² *Ibid.*, p 30

the Committee's existence and goals on 28 May 1948.⁷³ Danin suggested that as a matter of policy, they should destroy Arab houses, 'settle Jews in all the areas evacuated', and expropriate Arab property.⁷⁴

On 5 June 1948, Weitz presented Ben-Gurion with a three page memorandum, signed by himself, Danin and Sasson, and entitled, 'Retroactive Transfer, A Scheme for the Solution of the Arab Question in the State of Israel'. The memorandum stated that the war had brought about 'the uprooting of masses [of Arabs] from their towns and villages and their flight out of the area of Israel... This process may continue as the war continues and [the Israeli army] advances'. The war and the expulsions had so deepened Arab enmity 'as perhaps to make possible the existence of hundreds of thousands of inhabitants who bear that hatred'. Israel therefore must be inhabited largely by Jews so that there will be in it very few non-Jews, and that 'the uprooting of the Arabs should be seen as a solution to the Arab question in the State of Israel and, in line with this, it must from now on be directed according to a calculated plan geared towards the goal of 'retroactive transfer'.

To consolidate and amplify the transfer, the Committee proposed that action be taken to prevent the Arabs from returning to their places of origin, and to extend help to the Arabs to be absorbed in other places. To prevent Arab return, the Committee further proposed the destruction of villages as much as possible during military operations; prevention of any cultivation of land, including reaping and harvesting of crops, picking olives and so

⁷³ Weitz Diary, *op.cit.*, entry for 28 May 1948, p 2403.

⁷⁴ *Ibid.*,

on, also during times of cease-fire, the settlement of Jews in a number of towns and villages so that no 'vacuum' was created; legislation to prohibit return, and propaganda to discourage return.⁷⁵

The Committee proposed that it oversee the destruction of Arab villages and the renovation of other sites for Jewish settlement, negotiate the purchase of Arab land, prepare legislation for expropriation, and negotiate the resettlement of the Arabs in Arab countries. According to Weitz, Ben-Gurion 'agreed to the whole line'⁷⁶ Ben-Gurion also approved the Committee's start of organized destruction of the Arab villages, about which Weitz informed him. Using his Jewish National Fund (JNF) apparatus and network of landpurchasing agents and intelligence operatives, Weitz immediately set in motion the levelling of Arab villages. His agents toured the countryside to determine which villages should be destroyed and which should be preserved as suitable for Jewish settlement.⁷⁷

Morris recounts that on 18 August 1948, Ben-Gurion called a meeting to review Israeli policy on the issue of return, which was attended by the country's senior political leaders and senior political and Arab affairs officials. According to one official who was present, 'The view of the participants was unanimous, and the will to do everything possible to prevent the return of the refugees was shared by all'. Renewed orders went out to all IDF

⁷⁵ Ibid., p. 36.

⁷⁶ However, Ben-Gurion thought that the Yishuv should first take care of the destruction of the Arab villages, establish Jewish settlements and prevent Arab cultivation and only later worry about plans for the organized resettlement of the refugees in Arab countries.

⁷⁷ Morris, *Birth*, op.cit, p. 137.

units to 'prevent the return of refugees'.⁷⁸

The political decision to bar return was repeatedly reaffirmed at various levels of government over the following months, as successive communities of exiles asked to be allowed back.⁷⁹ In January 1949, the Israeli Cabinet voted to 'encourage introducing *olim* (new Jewish immigrants) into all abandoned villages in the Galilee'.⁸⁰

Archival evidence confirms the impact of policy at ground level. In April 1949, for example, in regard to villages which had come under Israeli rule as a result of the Armistice Agreement with Jordan (3 April 1949) and which were specifically protected by Article VI, paragraph 6, Ben-Gurion called a meeting to discuss whether the Arab inhabitants should be allowed to remain.⁸¹ Later the same month, Foreign Minister Sharett indicated at a meeting of the MAPAI members of the Knesset that, 'the intention is to get rid of them. The interests of security demand that we get rid of them.'⁸²

The right to return has been consistently rejected by Israeli representatives in the Knesset (Moshe Sharett, 15 June 1949), the UN General Assembly (Abba Eban, 17 November 1958; Tekoah, 13 December 1972), and the UN Special Political Committee (Comaj, 9 December 1968).

⁷⁸ Ibid., pp.148-149.

⁷⁹ Ibid., p. 154.

⁸⁰ See, David Ben-Gourion, *The War Diary, 1948-1949*, op.cit, entry for 9 January 1949, p. 926.

⁸¹ Political Consultations, 4 December 1949, State Archives, Foreign Ministry, 2447/3.

⁸² MAPAI party Members of Knesset meeting, Labor Party Archive, section 2, 11/1/1. MAPAI (Mifleget Poalei Eretz Israel -land of Israel Workers Party) was established in 1930 as a Zionist-socialist party and served as the dominant political party in the pre-State and early post-State years.

The official Israeli position on the origins of the Palestinian refugee problem explained previously, thus fails to accord with the historical record set out by Benny Morris and other Israeli scholars, such as Avi Shlaim and Ilan Pappé, who recognize Israel's responsibility for the flight of the Palestinians.⁸³ This issue of responsibility remains central to the resolution of individual and inter-State claims.

d(2). Changing the demographic and physical character of Palestine

During 1948 and the first half of 1949, a number of processes definitively changed the physical and demographic character of Palestine. Taken collectively, they steadily rendered the practical possibility of an Arab return more and more remote. These processes were the gradual destruction of the abandoned Arab villages, the cultivation and destruction of Arab fields, the share-out of 'abandoned' Arab lands to Jewish settlements, and the settlement of Jewish immigrants in empty Arab housing in the countryside and in urban neighbourhoods. Together, these events ensured that there would be nowhere and nothing to which the refugees could return.⁸⁴

(i) Destruction of villages

As explained, the General Assembly's Resolution 181 (II) of 29 November 1947 gave the Jews some 54 per cent of Palestine land. Then a minority, largely urban population owning no more than 6-7 per cent of the land, it made tactical sense for the Zionists to

⁸³ See, among others, Flapan, S. *The Birth of Israel: Myths and Reality*, London, Croom Helm, 1987; Segev, T. *The First Israelis*. New York, The Free Press, 1986; Pappé, I. *The Making of the Arab-Israeli Conflict 1947-1951*, London: I. B. Tauris, 1992.

⁸⁴ See, Morris, *Birth*, op.cit., p. 155.

accept partition, just as much as it did for the Palestinian majority to reject it. They resisted from the next day, and so began Israel's 'war of independence' and the Palestinian *nakba* (catastrophe). The Zionists were comparatively ready, well-organized and equipped for the resistance and the war that was to come; the Palestinian community, however, was not. It lacked cohesion, was subject to clan rivalries, various external pressures, and lack of military training and expertise.

While the Palestinians resisted partition, Zionist defense and retaliation operations began to merge into an offensive strategy by early 1948. After December 1947, the dynamiting of Arab houses and parts of villages became a major component of most *Haganah* retaliatory strikes.⁸⁵ About 350 Arab villages and towns were depopulated in the course of the 1948-49 war and during its immediate aftermath. By mid-1949, the majority of these sites were either completely or partly in ruins and uninhabitable. The destruction in the 350 villages was due to vandalism and looting, and to deliberate demolition, with explosives, bulldozers and, occasionally, hand tools, by *Haganah* and IDF units or neighbouring Jewish settlements in the months after their conquest.

The destruction of villages became a major political enterprise.⁸⁶ During the second half of 1948, and through 1949 and the early 1950s, the destruction of forcefully abandoned Arab sites, usually already half-destroyed, continued.⁸⁷

(ii) Takeover and allocation of Palestinian lands

⁸⁵ Ibid., pp.155-156.

⁸⁶ Ibid., p. 160.

⁸⁷ Ibid.,

The Jewish takeover of Arab property in Palestine began with the *ad hoc*, more or less spontaneous, reaping of crops in forcefully abandoned Arab lands by Jewish settlements in the Spring of 1948. This was encouraged by the entry into Palestine of Oriental Jews and Jewish immigrants. The summer crop ripened first in the Negev, which is where Jewish reaping of Arab fields began. As the summer crops ripened and as the Arab evacuation gained momentum, Jewish harvesting of Arab fields spread to other parts of the country.

During late April and early May, as requests from settlements and regional councils to harvest abandoned fields poured into the Committee for Abandoned (Arab) Property, headed by Gad Machnes, the Committee's Yitzak Gvirtz began to organize the cultivation. The committee for Abandoned Property-which soon became the Arab Property Department and then the Villages Department in the Office of the Custodian for Abandoned Property-regarded the forcibly abandoned crop as Israeli state property and sold the right to reap it to Jewish farmers and settlements. By 10 October 1948, the Ministry of Agriculture had formally leased or approved the leasing for cultivation of 320,000 dunums (a dunum is approximately a quarter acre) of 'abandoned' land, and Ministry Secretary Avarham Hanuki expected that another 80,000 dunums would soon be approved for Jewish cultivation. The ministry anticipated leasing a further one million dunums during the second half of 1949.⁸⁸

⁸⁸ Ibid., p. 179.

(iii) Establishment of new settlements

There were 279 Jewish settlements in Palestine on 29 November 1947. Between the start of Arab-Jewish hostilities and the beginning of March 1949, 53 new Jewish settlements were established, followed by 80 more at the end of August 1949. Almost all these settlements were established on Arab-owned lands and dozens were established on territory earmarked in the 1947 United Nations Partition Resolution for the Palestine Arab State. As Foreign Minister Sharett noted in a statement to the Knesset on 15 June 1949, 'a flood of immigration had set in and a large part of the geographical and economic vacuum created by the exodus was filled.'⁸⁹ The settlements, mostly kibbutzim, expanded and deepened the Jewish hold on parts of Palestine.⁹⁰

The accommodation of new immigrants in abandoned Arab housing began in the towns in 1948, starting almost immediately with the forced flight of Arab families from mixed Jewish-Arab districts in the mixed cities. An early trace of the policy can be found in Ben-Gurion's instructions to the newly-appointed *Haganah* commander in Jerusalem, David Shaltiel, at the end of January 1948. Some Arab districts in western Jerusalem had already been abandoned, and Ben-Gurion ordered Shaltiel 'to settle Jews in every house in abandoned, half-Arab neighbourhoods...'

The Transfer Committee first proposed that the government adopt the settlement of new immigrants in abandoned Arab houses as part of a coherent and multi-faceted program to

⁸⁹ He added, '[W]e shall help in the resettlement of these displaced persons. We shall not follow the example of other nations in every respect. We shall pay compensation for abandoned lands...' <http://www.israel.org/mfa/go.asp?MDAH01at0>.

⁹⁰ See, Morris, *Birth*, op.cit., p. 179.

bar return of the refugees.⁹¹ In April 1949, Yosef Tal reported that of 190,000 immigrants who had arrived since the establishment of the State, 110,000 had been settled in abandoned Arab houses.⁹²

(iv) Palestinian/Israeli Citizenship

The Palestinian refugees were not only barred from returning to their homes, but were also effectively and retroactively deprived of their citizenship. Under Ottoman rule, the inhabitants of Palestine were considered Turkish nationals. Under the British mandate, and pursuant to League of Nations policy, the inhabitants of such territories were not considered nationals of the administering powers, although they benefited from the exercise of diplomatic protection.⁹³ Accordingly, Palestinian citizens were treated in Great Britain as British Protected Persons, although not as British Subjects.⁹⁴ Mandate citizenship was regulated by the Palestinian Citizenship Order 1925-41⁹⁵ and included acquisition by birth.⁹⁶ Palestinian citizens were eligible for a British passport issued by the government of Palestine. The passport referred to the national status of its holder as 'Palestinian citizen under Article One or Three of the Palestinian Citizenship Order,

⁹¹ *Ibid.*, p. 190.

⁹² *Ibid.*, p. 195.

⁹³ See League Council Resolution of 22 April 1923, Official Journal, 604, quoted in Weis, P. *Nationality and Statelessness in International Law*, (2nd edn., 1979), p.20.

⁹⁴ See, Weis, *Nationality and Statelessness*, *ibid.*, p.18-20, 22; *R v. Ketter* [1940]1 KB 787, where it was held that the appellant, a native of Palestine born when that territory was under Turkish sovereignty, but holding a passport marked 'British Passport-Palestine', had not become a British subject by virtue of art. 30 of the Treaty of Lausanne of 24 July 1923 (UKTS, No.16/1923), or under the terms of the Mandate agreement of 24 July 1922, since Palestine was not transferred to and consequently, was not annexed by Great Britain by either Treaty or Mandate. See also, Goodwin-Gill, G. "A Note on Nationality Issues affecting Palestinians", in *The Refugee in International Law*, (2nd edn., 1996), p. 241-6.

⁹⁵ S.R. & O 1925. No. 25.

⁹⁶ Art. 3, Palestinian Citizenship Order.

1925-41.⁹⁷

Palestinian citizenship as a construct of British legislation terminated with the mandate, and with the proclamation of the State of Israel on 15 May 1948. Under international law, citizenship and other laws *can* continue to apply, even after a territory has been annexed or abandoned; this is generally a matter for the ‘new’ sovereign, or is settled by agreement between the States. However, only one (Israeli) court has come to such a conclusion in the Palestinian context, and that was soon overtaken by municipal legislation.⁹⁸

Thus, the Palestinians’ nationality status fell within a legal lacuna. Although Israel had no nationality legislation until 1952, Israeli courts held that on the termination of the mandate, former citizens of Palestine lost their citizenship without acquiring any other.⁹⁹ For purposes of Israeli municipal law, the issue was resolved by a Supreme Court decision¹⁰⁰ and by the Nationality Law.¹⁰¹ The 1952 Law confirmed repeal of the Palestinian Citizenship Orders 1925-41 retroactively to the day of the establishment of the State of Israel.¹⁰² It declared itself the exclusive law on citizenship, which was

⁹⁷ See, Takkenberg, *Palestinian Refugees*, op.cit, p. 180, citing a copy of a passport on file.

⁹⁸ See, *A.B. v. M.B.*, 17 ILR 110 (1950), (holding that ‘So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel, was resident in the territory which today constitutes the State of Israel, is also a national of Israel.’)

⁹⁹ See *Oseri v. Oseri* (1953) 8 PM 76; 17 ILR (1950); *Estate of Shifris* (1950-51) 3 PM 222.

¹⁰⁰ See, *Hussein v. Governor of Acre Prison*, (1952) 6 PD 897, 901; 17 ILR 111 (1950). holding that Palestinian citizenship ceased to exist, in the territory of Israel and in other parts of the former mandated territory of Palestine, after the establishment of the State of Israel and the annexation of the other parts to neighbouring States. See also *Nakara v. Minister of Interior* (1953) 7 PD 955:20 ILR 49 (1953).

¹⁰¹ Nationality Law, 5712/1952, p.93, *Official Gazette* 22 (1952).

¹⁰² Section 18 (A)

available by way of return, residence, birth and naturalization.¹⁰³ Former Palestinian citizens of Arab origin were eligible for Israeli nationality provided that they met the conditions of section 3:

(a) A person who immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israeli national under section 2, shall become an Israeli national with effect from the day of the establishment of the State if:

(1) he was registered on the 4th Adar, 5712 (1 March 1952) as an inhabitant under the Registration of Inhabitants Ordinance, 5709-1949; and

(2) he is an inhabitant of Israel on the day of the coming into force of this Law; and

(3) he was in Israel, or in an area which became Israeli territory after the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.

(b) 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 Israeli national under subsection (a), shall become an Israeli national with effect from the day of his birth.

These strict requirements meant that the vast majority of those who, as a result of the 1948 war, left the territory of what became Israel, were effectively denied Israeli citizenship.

(v) Palestinian/Jordanian citizenship

At the same time that the majority of Palestinian refugees were denied Israeli citizenship, citizenship in their respective countries of refuge, for the most part, was also not

¹⁰³ Section 1.

available, except in Jordan. It is estimated that of some 6,375,800 Palestinians, only approximately 2,640,000 have been granted citizenship elsewhere in the world.¹⁰⁴ This lack of citizenship occurred for a variety of reasons. First, Palestinian refugees were admitted to neighbouring countries on what was expected to be a temporary basis, and thus citizenship appeared unnecessary.¹⁰⁵ Additionally, there was and continues to be a political consensus in the Arab world that the acceptable solution to the Palestinian refugee problem is repatriation and self-determination. As a consequence, many refugees decided against either becoming Israeli citizens, even if eligible under the limited criteria, or to take up citizenship, if permitted, in their host countries. Each of these solutions was viewed as tantamount to acquiescence in the legitimacy of the State of Israel and denial of the right of the Palestinian people to self-determination.

Jordan has been by far the most hospitable country of refuge for Palestinian refugees, and at first granted full citizenship to all Palestinian refugees and their descendants who were 'habitually resident' in the Kingdom between 1949 and 1954¹⁰⁶. It did not matter whether they lived on the East or West Bank, because at that time Jordan incorporated the East and West Banks, and Palestinians moved freely between the two. Many families had businesses and homes on both sides of the river. However, once Israel occupied the West Bank, movements were restricted. In 1983, the Jordanian government created a dual system for the administration of residence rights: yellow cards, which represented full

¹⁰⁴ Most of the information on citizenship is taken from a recent study by Arzt, D. *Refugees to Citizens*, Council on Foreign Relations, 1997.

¹⁰⁵ Benny Morris states: 'In any case, no one regarded the exodus as permanent; surely the refugees would within weeks return to their homes.' See Morris, *Birth*, op.cit, p. 66.

¹⁰⁶ See, *Jordanian Nationality Law*, law number (6) (1954), in *the Official Gazette of Jordan*, issue Number 1171 (16 February 1954), p. 105.

residency and full Jordanian citizenship rights for persons who had left the West Bank for the East Bank before 1 June of that year; and green cards, providing a renewable two-year Jordanian 'passport' with no right of residence in Jordan for those who left the West Bank after 1 June 1983. Green card holders can visit Jordan for up to one month at a time. Egypt, Syria, Lebanon and Israel issue similar documents to Palestinians. Jordan permits Palestinian bearers of green cards to apply for five year passports, but these do not constitute entitlement to formal citizenship in Jordan.

The main category of Palestinians in Jordan who are not Jordanian citizens are those displaced from the Gaza Strip in 1967 (approximately 70,000 persons). They require official permission to work, and are restricted to employment in the private sector. They are permitted to apply for and use Egyptian travel documents to travel abroad and require return visas to ensure they are permitted re-entry into Jordan.¹⁰⁷

Until 1988, most West Bank residents automatically held Jordanian citizenship. After Jordan announced its 'Decision of Administrative and Legal Disengagement'¹⁰⁸ for the West Bank in July 1988, it began to regard the Palestinians residing there before 31 July 1988 as non-Jordanians. Effectively, Palestinians residing in the West Bank lost their Jordanian citizenship. Jordanian citizens of Palestinian origin, who have been allowed by Israel to 'return' to the autonomous areas of the Gaza Strip and parts of the West Bank, have also lost their Jordanian citizenship.

¹⁰⁷ See, Morris, *Birth*, op.cit, p. 43-44.

¹⁰⁸ See, "MAJMUAT ALWATHAIK ALURDUNYA" (the Official Compilation of Jordanian Documents), (1988), pp. 56-58, [hereinafter "MAJMUAT ALWATHAIK"]

(vi) Palestinian travel documents

Though the Jordanian authority continued to issue West Bank residents with travel documents, they were valid only for two years. Since other Arab States viewed the two-year travel document solely as a refugee document, many refused to grant entry visas to their holders. In October 1995, the Jordanian Department of Civil Affairs and Passports announced that under new regulations, West Bank residents who had a passport before July 1988 could replace their two-year documents with a regular five-year passport, even if they had lost their right to residence in the West Bank. The new passport does not confer renewed Jordanian citizenship on West Bank residents.

In addition, until the Palestinian Authority began issuing its own travel documents in November 1995, West Bank residents who traveled abroad had to acquire permits from the Israeli civil administration. If they overstayed the date of return, they lost their right of return. Further, the legal status of spouses of non-Palestinians and of family members who do not reside in the West Bank remains a complex, generally unresolved issue.¹⁰⁹ Of 1,200,000 Palestinians in the West Bank, only about 7,500 have full Jordanian citizenship.¹¹⁰

e. The Hashemite Kingdom of Jordan and Palestine

In April 1950, the King of Jordan signed a resolution, passed to him for signature by the National Assembly of the Hashemite Kingdom of Jordan (representing both East and

¹⁰⁹ See Arzt, *Refugees to Citizens*, op.cit, p. 40.

¹¹⁰ *Ibid.*, p. 60.

West Banks), which supported the unity of the two Banks as one nation State called the Hashemite Kingdom of Jordan. Several Arab States, members of the Arab League, refused to recognize Jordan's right to sovereignty over part of Palestine and Jerusalem. On 16 May 1950, the Political Committee of the Arab League decided unanimously that the unity of the Arab part of Palestine was in violation of its previous resolutions on the subject.¹¹¹

A crisis amongst Arab States was averted, however, when the Government of Jordan formally announced that unity with the Palestinian territory was 'without prejudice to the final settlement' of the Palestinian problem.¹¹²

On 16 February 1954, Jordan enacted the "Jordanian Nationality Law"¹¹³ Article 3(2) of this law stipulates that 'every non-Jewish person who had held the Palestinian Nationality prior to 15 May 1948 and is habitually residing in the Hashemite Kingdom of Jordan during the period extending from 20 December 1949 to 16 February 1954 is a Jordanian National'.¹¹⁴

The effect of this Article had been to render all the inhabitants of the West Bank and Palestinian refugees who had been residing therein between 20 December 1949 and 16 February 1954 as Jordanian nationals.

¹¹¹ Mazzawi, M. *Palestine and the Law*, 'Palestine and Jordan : Merger and Separation', Garnet Publishing, 1997, p. 264.

¹¹² See, "MAJMUAT ALWATHAIK", op.cit, (1951), p. 414.

¹¹³ See, "Jordanian Nationality Law", op.cit, p. 105.

¹¹⁴ Ibid., Article. 3.

The Palestine Liberation Organization (PLO) was created in Jerusalem in 1964, following a decision of the League of Arab States. The Palestine National Council (PNC), made up of 422 leading Palestinian representatives, adopted the Palestinian National Charter and formally created the PLO, headed by a Palestinian lawyer, Ahmed Shuquairy.

The PNC is the supreme body in the PLO, and appoints the Executive Committee which handles regular business between sessions. Several changes were introduced after the 1967 war, in order to reduce the PLO's dependency on the Arab States, and to rationalize relations with many parallel organizations. Two such organizations, the Fatah and the PFLP joined the PLO and as of 1968 had one half of the seats in the PNC. Following the resignation of Ahmed Shuquairy, Yasir Arafat, the leader of Fatah, was appointed Chairman of the Executive Committee of the PLO and, in 1971, became the General Commander of the Palestine Forces.

The PLO was recognized as the sole representative of the Palestinian people by all Arab States at the 1974 Summit in Rabat, Morocco. The PLO was given observer status at the United Nations the same year, and in 1976 became a full member of the League of Arab States in its own right.

It must be stressed in this context that, when the Arab Summit recognized the PLO as the sole legitimate representative of the Palestinian People, Jordan made a clear reservation regarding this resolution of the Summit to the effect that this is 'without prejudice to the

full and exclusive right of the Hashemite Kingdom of Jordan in relation to all nationals thereof¹¹⁵

On 15 November 1988, the Nineteenth Session of the PNC adopted the Declaration of Independence of Palestine, as well a political communique. The Declaration accepted General Assembly resolution 181(11) of 1947 and the communique accepted Security Council resolution 242 of 1967.

In 1991, the PNC approved the Palestinian participation in the Madrid Peace Conference based on the principle of land for peace, and Security Council resolutions 242 and 338. The Central Council met in Tunisia in October 1993 to consider the Declaration of Principles, which was accepted by a large majority. The Council also authorized the Executive Committee to form the Council of the Palestinian National Authority for the transitional period, and chose Yasir Arafat as President of the Council of the National Authority.

In 1993, the PNC held its session in Gaza City in Palestine for the first time since 1966. The session voted, by majority, to 'abrogate the provisions of the PLO Charter that are contrary to the letters exchanged between the PLO and the Government of Israel of 9 and 10 September 1993.' On 9 September 1993, in letters to Israeli Prime Minister Rabin and Norwegian Foreign Minister Holst, PLO Chairman Arafat had committed the PLO to cease all violence and terrorism. On 13 September 1993, the Declaration of Principles on

¹¹⁵ See for the text of the Resolution of the Arab League Rabat Summit Meeting and the text of Jordan's reservation in the authentic Arabic text, "*MAJMUAT ALWATHAIK*", (1975), op.cit, p. 243-245.

Interim Self-Government Arrangements between Israel and the Palestinians was signed in Washington, D.C.

Following the adoption of the 1993 Declaration of Principles. Israel agreed to recognize the PLO 'as the representative of the Palestinian people', and Mr Arafat recognized the right of the State of Israel to exist in peace and security, and undertook that the PLO constitution provision to the contrary would be deleted.

At the request of the PLO and in the interests of 'enhanc[ing] the Palestinian national orientation and highlight[ing] the Palestinian identity', King Hussain of Jordan announced in July 1988 'the dismantling of the legal and administrative links between the two Banks of Jordan'.¹¹⁶ This statement opened the door for Palestinians and coincided with United States recognition of the PLO as the 'sole representative' of the Palestinian people, but may yet be without prejudice to some at least of the rights of Palestinians.

It has also been argued that dismantling the legal and administrative links between the Banks of the Jordan was unconstitutional, precisely because it meant surrendering part of the sovereign territory of Jordan. It is by no means clear that the 'dismantling' has effectively meant that those Palestinian refugees given citizenship as a result of the unity of the two Banks, lost their nationality, or that Jordan has been deprived of its normal right to exercise protection on behalf of its nationals. This may in part have been the intention of the PLO, but the consequential effects of this decision are yet to be determined.

¹¹⁶ See, "*MAJMUAT ALWATHAIK*", op.cit, (1988), p. 56-58.

The announcement of Jordan's 'Administrative and Legal Disengagement' was followed on 22 August 1988 by a Decree signed by Yasir Arafat, in his capacity as Chairman of the Executive Committee of the Palestine Liberation Organization, in which the PLO assumed responsibility for the Palestinians of the West Bank. Arafat's decree clearly defines the nature and extent of the responsibility being taken on by the PLO:

"The Chairman of the Executive Committee:

By virtue of the powers vested in him, and in response to the superior demands of national interest, and in conformity with the decision of the Executive Committee dated 21/8/1988 equivalent to 9 Murharram 1409 (Hijra Era), and following the decision of the Hashemite Kingdom of Jordan to terminate the legal and administrative relationship with the West Bank and the measures taken by it, decrees as follows:

One: All laws, regulations and decrees in operation in the occupied Palestinian territories up to 31/7/1988 shall remain in operation until amended or repealed by the appropriate Palestinian legislative authorities.

Two: Officials functioning in public departments, utilities and organizations in the occupied Palestinian territories, and who have been covered by recent Jordanian decisions and processes, shall remain in office and exercise their functions.

Three: The Palestine Liberation Organization shall assume full responsibility towards the officials and the workers in regard to whom this Decree applies, in accordance with the rights accruing to them, and on the basis of the regulations and rules pertaining to their appointments."¹¹⁷

The legal effects of Jordan's 1988' administrative and legal disengagement from the

¹¹⁷ Ibid., p. 270. Original in Arabic entitled, 'Palestinian Historic Decree', *Selected Documents on the Palestine Problem* (in Arabic) for the First Conference of Palestinian Economic Activists held in Tunis 12-14 April 1990

West Bank remain unclear, especially from an international law perspective. There are a number of arguments available which support the view that Jordan, technically and in strict law, still retains sovereignty over the West Bank, in addition to the fact that Jordan has made no formal, constitutional relinquishment of sovereignty, these arguments include the following:

- (a) there have been no protests at the extension or application of Jordanian treaties to the West Bank;
- (b) Israel's incursion into the West Bank in (alleged) self-defence, even if initially justified because of a Jordanian attack, is not justified as a continuing feature once the original attacks have ceased;
- (c) Jordan was admitted to the United Nations as a State which included the West Bank, and Israel -already a Member - did not object;
- (d) any argument that the West Bank is, after the 1988 Jordanian Declaration (or even earlier), *terra nullius* would be relying on a concept which is now outmoded;
- (e) UN resolutions have condemned Israel for its activities in the West Bank, thus recognizing that it is not Israeli territory;
- (f) Israel has accepted its West Bank status as a belligerent occupant, and thus that it does not have sovereignty over the West Bank.

Despite what appeared to some the first step towards self-determination for the Palestinians, the Decree made little impact on the situation of those Palestinian refugees living in camps in the West Bank who, for extended periods, had been under the *de facto* control of the Palestinians during the time of Jordanian rule.¹¹⁸

As things stand today, and taking into consideration the measures taken after Jordan's

¹¹⁸ See Takkenberg, *Palestinian Refugees*, op.cit, p. 133.

1988 administrative and legal disengagement from the West Bank,¹¹⁹ all the residents of the West Bank are no longer Jordanian Nationals. The legality or illegality of this measure is extraneous to the scope of this study.

Palestinian refugees who were displaced in the Period 1947-1949 (including their descendants), who are registered with the United Nations Relief and Works Agency (UNRWA) and who are full Jordanian Nationals total in number 1, 609,566 people.¹²⁰ Of those 1,345,640¹²¹ reside outside the 10 official Palestinian refugee camps in the Kingdom and 266926¹²² still reside in the 10 camps.¹²³

Additionally, 169040¹²⁴ Palestinian refugees who had been 'original residents' of the West Bank (including their descendants) and were displaced as a result of the 1967 War,¹²⁵ are full Jordanian nationals and live in Jordan today.

There are also 209242¹²⁶ Jordanians of Palestinian origin (including descendants) who

¹¹⁹ See, "MAJMUAT ALWATHAIK", op.cit, (1988), p. 56-58.

¹²⁰ Ibid., (2001), p. 588.

¹²¹ Ibid.,

¹²² Ibid.,

¹²³ The ten camps are *Wihdat, Talbyia, Hussein, Baqa'*, in Amman, *Irbid, Hussun, Souf and Jerash* in Irbid, *Zerqa and Marka* in Zerqa.

¹²⁴ See, "MAJMUAT ALWATHAIK", op.cit, (1988), p. 56-58

¹²⁵ Those are commonly referred to in the literature and legal instruments in the context of the Arab-Israeli conflict and Peace making efforts as "*Displaced Persons*" to distinguish them from Palestinian refugees who were displaced as a result of the 1947-1949 situation from areas that became part of the State of Israel as a result of the 1948 first Arab-Israeli War, who are referred to commonly as "*1948 Refugees*". The term "*Displaced Persons*" in this literature and those legal instruments does not include Palestinians who were displaced in 1947-1949 and took the West Bank as their residence thereafter until the outbreak of the 1967 war and were displaced again as a result to the Diaspora. Thos are still part and parcel of the "*1948 Refugees*".

¹²⁶ See, "MAJMUAT ALWATHAIK", op.cit, (1988), p. 56-58

were not registered with UNRWA¹²⁷ and who had been displaced in the 1947-1949 period. Those are also full Jordanian nationals.

Additionally, there are 153496¹²⁸ Palestinians from Gaza residing and holding Jordanian travel passports in Jordan and 72000¹²⁹ Palestinians from Gaza residing in Jordan without holding even Jordanian travel passports.

All the categories mentioned above with the exception of the last category (Palestinians from Gaza), are full Jordanian Nationals. They enjoy all the privileges of nationality and perform all the obligations associated with it.¹³⁰

It should be noted in this context that Arab Countries including Jordan are not Parties to the Convention Relating to the Status of Refugees of 28 July 1951(1951 Convention).¹³¹

This is despite that fact that Article 1(D) of the Convention States that:

“ This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than

¹²⁷ UNRWA only registers “1948 Refugees”. Palestinians displaced from the West Bank as a result of the 1967 war are not within the scope of UNRWA activities and registration. The objective for registration had been for purposes of providing services, relief and works for “1948 Refugees”. UNRWA currently define Palestine Refugees in the context of its jurisdiction and competence as follows: ‘[Palestine refugee] shall mean any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict.’, cited in Takkenberg, Lex., “*Palestinian Refugees*”, op.cit, p. 77. Tekkenberg makes it clear, in pp. 81-83 that UNRWA has never expanded its working definition of a Palestine refugee and that the abovementioned definition is one that confines refugees status, in the context of UNRWA’s mandate and jurisdiction to those Palestinian who fled ‘ as a result of the 1948 conflict.’, “1948 Refugees” And that as the West Bank Was part of Jordan, those who fled that territory were considered ‘internally displaced’ and registered as such by the Jordanian Government.

¹²⁸ See, “*MAJMUAT ALWATHAIK*” , op.cit, (1988), p. 56-58

¹²⁹ Ibid.,

¹³⁰ These nationals benefit from all privileges associated with nationality such as free education, subsidies, employment rights and all the political rights.

¹³¹ See. For the text of the 1951 Convention, 189 UNTS and Brownlie, I *Basic Documents on Human Rights*, Third Edition, 1992, p.64, [Hereinafter Brownlie, *Basic Documents*].

the United Nations High Commissioner for Refugees protection or assistance.”¹³²

The main reason why Jordan did not sign the 1951 Convention is ascribed to the fact that the convention contains ‘cessation clauses’ in its Article 1(C) that spell out conditions under which a person ceases to be a refugee. Of particular concern to Jordan, who has granted a large number of Palestinian refugees nationality, is the ‘cessation clause’ contained in Article 1(C), paragraph 3 which provides that the 1951 Convention shall cease to apply to any person if “He has acquired a new nationality.”¹³³ Jordan maintains the view that signing the 1951 Convention would inevitably dilute the rights of its Palestinian refugee community and eradicate their status as refugees.¹³⁴

The subject matter of this study is exclusive to the above mentioned Palestinian refugees with the exception of the last category (those from Gaza). Palestinian refugees who are currently Jordanian nationals constitute almost a third of the Palestinian refugee community living in the Diaspora. Jordan is the only country which granted them full nationality. The other two thirds of Palestinian refugees who are not Jordanian nationals now and who live in many Arab and foreign countries, while broadly sharing the same rights in relation to return, repatriation and compensation, are not the focus of this study.

¹³² Ibid., Article. 1(D).

¹³³ Ibid., Article. 1 (C).

¹³⁴ See, *Position Paper Regarding the 1951 Convention*, Archive of the Jordanian Ministry of Justice, 23 April 1977, No. MOJCL88,

Chapter (2)

The Rights of Return and Compensation

For Palestinian Refugees of Jordanian Nationality and Jordan's Right to Bring Claims On Their Behalf And Its Right As a Host State to Compensation

This chapter will address the issue of the Right of Return/Right to compensation of Jordanian citizens of Palestinian origin who were either displaced during the 1947-1949 Arab-Israeli hostilities or during the 1967 war. It will, inevitably examine the legal bases for the right of return/compensation for Palestinian refugees in general, since the bases for the right of return and compensation are the same for all Palestinian refugees whether they are Jordanian nationals or not. It will then proceed to analyze Jordan's right to bring possible claims to and against Israel on behalf of its Palestinian refugee community who are today Jordanian nationals. It will then assess Jordan's right to seek compensation, from Israel, as a refugee host country.

The chapter will outline the bases allowing Jordan, under international law, to present claims to and against Israel on behalf of its nationals who are of Palestinian refugee origin in relation to their right of return and right to compensation. It will also outline and examine the bases of Jordan's right to seek compensation as a host country for providing for and shouldering the burden of a massive number of Palestinian refugees for many decades.

While this chapter will outline these bases and assess them with reference to United Nations resolutions addressing these issue, the law of nationality, human rights law, humanitarian law, State responsibility and the Jordan-Israel Treaty of Peace, all being the genesis allowing for the exercise of this right by Jordan should it decide to do so, the ensuing chapters 3 and 4 will then examine and assess consecutively firstly in chapter 3, the major heads of claims that Jordan may present to and against Israel and analyze them in the context of principles of international law and secondly chapter 4 will outline, examine and analyze the mechanisms and procedures that are available to Jordan to initiate such claims both in the context of mechanisms and procedures available in the context of the Jordan-Israel Treaty of Peace and its related specific provisions and other mechanisms outside the scope of the provisions of the Treaty of Peace.

This chapter is the one that will probe and highlight the foundational bases, in international law, available to Jordan that would enable it to present the relevant claims in general. The ensuing two chapters are the ones that consecutively sketch out and assess specific heads of claims and their legal strengths and shortcomings and the mechanisms and procedures available to pursue them. Such an approach is influenced by the utilitarian approach of this thesis in serving, at some point in time as a 'guide' or 'roadmap' or 'blueprint' that could influence or possibly guide Jordan's approach towards the issue of presenting claims to and against Israel.

(a) The Rights of Return and Compensation for Palestinian refugees.

Under international law, individuals have a right of return.¹³⁵ The right of return guarantees all individuals a fundamental right to return to their homes of origin whenever they have become displaced from them due to circumstances beyond their control. It is argued that the right of return is an inherent human right which all individuals possess even if, in actual practice, governments may deliberately obstruct the free exercise of that right.¹³⁶ However, since the right of return is one accorded by international law,

¹³⁵ See, UN doc, ST/SG/SER. F/2, *The Right of Return of the Palestinian People*, (1 November 1978). P 1. The document refers to the person's right to return to his home in his native country as as one that "traditionally has been included among an individuals fundamental rights". The document also in p. 3 sites the *Magna Carta* of 1215 A.D. as one of the first recoded legal codifications of the natural right to return with the guarantee therein of the freedom "...to go out of our Kingdom and to return, safely and securely, by land or by water...". See also Article 13 of the Universal Declaration of Human Rights of 1948 which states that "1. Everyone has a right to freedom of movement and residence without within the borders of each state. 2. Everyone has the right to leave any country, including his own and to return to his Country.", cited in Brownlie, *Basic Documents*, op.cit, p. 23. Also, Article 12 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) states that " 2. Everyone shall be free to leave any country including his own. 4. No one shall be arbitrarily deprived of the right to enter his own country." Cited in Brownlie, *Basic Documents* , ibid., pp 129-130. The International Court of Justice (ICJ) in its advisory opinion given in 1971 on the issue of Namibia, took the view that the Universal Declaration of Human Rights' codification of the Fundamental right of equality, from which all other human rights flow, gives it the force of customary international law. The ICJ's vice President stated that "although the affirmations of the Declaration are not binding qua international convention within the meaning of Article 38, Paragraph 1(a), of the Statute of the Court , they can bind states on the basis of custom through a general practice accepted as law, in the words of Article 36, paragraph 1 (b), of the Statute. One right which must certainly be considered a preexisting binding customary norm which the Universal Declaration codified, is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature. " It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: 'All human beings are born free and equal in dignity and rights'". " From this first principle flow most rights and freedoms, the ground was thus prepared for the legislative and constitutional process which began with the first declarations or bills of rights in America and Europe, continued with the constitutions of the nineteenth century, and culminated in positive international law in San Francisco, Bogota, and Addis Ababa charters, and in the Universal Declaration of Human Rights which has been confirmed by numerous resolutions of the United Nations..", *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports (1971), pp 77-78. Additionally, a study by the International Commission of Jurists with the title *Loss of Nationality and Exile* published in the Review of the International Commission of Jurists, No. 12 (June 1974), supports the view that both the Universal Declaration on Human Rights and The ICCPR form sources of international law.

¹³⁶ See, Boling, G. *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*. BADIL Resource Center for Palestinian Residency and refugee Rights. BADIL Brief No.8 (January 2001), p. 5. [hereinafter, Boling, *1948 Palestinian Refugees*]

deliberate government obstruction of it 'would violate international law and can never be legal.'¹³⁷ Accordingly, the right of return exists independently of any government's policy choice to allow the free exercise of it or not.¹³⁸

The right of return normally would be a personal, an individual right. Only when large groups might have been displaced from their homes would it assume a collective dimension. But it is rare that the right of return should be invoked on a national scale, that there should be a situation where the greater part of an entire nation should be uprooted from its land, be exiled and then denied the right to return. In our times a notable exception in this dimension is that of the Palestinian people, forced to flee their ancestral land by reason of military and political action and then to find the right of return denied to them.¹³⁹

In the case of the Palestinian People, the individual or personal right of return¹⁴⁰ assumes a special significance for without its restoration, the exercise of the collective or national right of self-determination, itself guaranteed by a variety of international instruments and

¹³⁷ Ibid.,

¹³⁸ Ibid.,

¹³⁹ See, UN doc, ST/SG/SER. F/2, *The Right of Return of the Palestinian People* (1 November 1978), op.cit, p 2.

¹⁴⁰ While many useful analyses have been written about the individually held right of return of the Palestinian refugees, several contributions stand out in particular for their invaluable insights into the legal bases in international law of this right. For the most important among these, see, e.g., Quigley, J. *Displaced Palestinians and the Right of Return*, Harvard International Law Journal, Vol. 39, No. 1 (Winter 1998), p 171; Quigley, J. *Mass Displacement and the individual Right of Return*, British Yearbook of International Law, Vol. 68 (1997), p 65; Quigley, J. *Family Reunion and the Right to Return to Occupied Territory*, 6 Georgetown Immigration Law Journal (1993), p 223; Mallison, W.T and Mallison, S. *The Right of Return*, 9 Journal of Palestine Studies (1980), p 125; Mallison, W.T and Mallison, S. *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, UN doc. ST/SG/SER.F4 (1979); Mallison, W.T and Mallison, S. *The Palestine Problem in International Law and World Order*, (1986), pp 174-188; Lawland, K. *The Right of Return of Palestinians in International Law*, International Journal of Refugee Law, Vol. 8, No. 4 (October 1996), p 532.

arguably having the status of *jus cogens*¹⁴¹, would be compromised. Unable to exercise the fundamental right of self-determination during the period of the mandate, although recognized by the Covenant of the League of Nations as a provisionally independent nation,¹⁴² the Palestinian People have struggled to regain this right since 1947, when the United Nations became involved in the Palestine issue and recommended the partition of Palestine into two states, one Palestinian Arab and the other Jewish.¹⁴³ While Israel declared independence on 14 May 1948¹⁴⁴, on the basis of the United Nations Partition resolution¹⁴⁵, the Palestinian Arab State envisioned in the resolution did not come into existence. Instead, 'the first great exodus of Palestinians fleeing from their homeland took

¹⁴¹ See the ruling of the International Court of Justice (ICJ) in the *East Timor Case*, ICJ Reports, 1995, pp 90, 102. The ICJ noted in the case that Portugal's assertion the right of peoples to self-determination, as it evolved from the United Nations practice, has an *erga omnes* character, is 'irreproachable' and 'one of the essential principles of contemporary international law'.

¹⁴² The League of Nations, at the behest of the victorious Allied and Associated Powers, initiated a new system in regard to some of the territorial possessions of which Germany and Turkey had been divested as a result of their defeat in World War I. This system was called the mandate system and was formulated in Article 22 of the League of Nations' Covenant which was adopted on 28 June 1919. this provided that:

" 1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formally governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League...

4. Certain communities formally belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such a time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory..." cited in, The Mandate for Palestine was entrusted to Britain and was confirmed by the Council of the League of Nations on 24 July 1922. For The Mandate system in General and in details see, Wright, Q. *Mandates Under the League of Nations*, The University of Chicago Press (June 1930).

¹⁴³ See General Assembly Resolution 181 (II), U.N. GAOR, 128th Plenary Meeting at UN DOC. A/519 (1948). Cited in Bassioni, C.(ed), *Documents on the Arab -Israeli Conflict*, Volume 1, Transnational Publishers, New York (2005), pp 300-316. [hereinafter, Bassiouni, *Documents*]

¹⁴⁴ Declaration of the Establishment of the State of Israel, available at website: <http://mfa.gov.il> , cited in Bassiouni, *Documents*, *ibid.*, p 335.

¹⁴⁵ General Assembly Resolution 181 (II), U.N. GAOR, 128th Plenary Meeting at UN DOC. A/519 (1948). Cited in Bassiouni, *Documents* , *ibid.*,

place in 1948, and the second great wave followed in the 1967 Middle East War'.¹⁴⁶ From then on the majority of the Palestinian People have been in exile, unable to return to their homes, despite the fact that the right of those 'wishing to return to their homes and live at peace with their neighbors have been endorsed repeatedly by the General Assembly since 1948'.¹⁴⁷

The legal bases for the Right of Return of Palestinian Refugees are found in the United Nations Resolutions, law of Nationality, Human Rights Law, Humanitarian law, Support by State Practice in other refugee situations and customary international law. Each of these bases will be examined in detail

On the other hand refugees have a right to receive, from the country generating refugees, and the latter is under a duty to provide '...compensation, whether pursuant to the principle of tort, unjust enrichment, abuse of rights or unconstitutionality'¹⁴⁸. Similarly, the United Nations system and state practice reinforce and confirm the right of refugees to receive compensation from countries generating refugees and the duty of such countries to provide it.¹⁴⁹ This right clearly applies to Palestinian refugees too.

¹⁴⁶ See, UN doc, ST/SG/SER. F/2 *The Right of Return of the Palestinian People*, (1 November 1978), op.cit, p 2.

¹⁴⁷ Ibid., quoting the language used in the United Nations' General Assembly Resolution 194 (III), UN doc. A/810 (1948) [hereinafter referred to as "G.A. Res. 194"]. Successive General Assembly Resolutions used the same language or referred to "G.A. Res. 194". See for example G.A. Res. 3236 of 1974, U.N. GAOR, 29th Session., Supp. No. 31 para. 2, UN doc. A/9631 which mentions both the right of return and the right to self-determination; G.A. Res. 54/69 (1999) which states that paragraph 11 of the G.A. res. 194 has not yet been effected; G.A. Res. 55/55 (2000) which stresses the need for "resolving the problem of the Palestinian Refugees in conformity with.,, Resolution 194(III)".

¹⁴⁸ See, Lee, L. *The Right to Compensation: Refugees and Countries of Asylum*, 80 AJIL 1986, p. 538. Hereinafter, Lee, *The Right to Compensation*]

¹⁴⁹ See, in general, ibid.,

(i) The Recognition of the Right of Return and compensation of Palestinian Refugees by the United Nations.

In December 1948, the United Nations' General Assembly (UNGA) passed Resolution 194(III)¹⁵⁰ which, *inter alia*, established a mechanism known as the United Nations Conciliation Commission (UNCCP) to facilitate implementation of durable solutions for refugees in Palestine. Resolution 194 was closely based upon prior recommendations made by the U.N-appointed Mediator for Palestine, Count Folke Bernadotte.¹⁵¹ 'Resolution 194 unambiguously declared -in reliance upon then existing principles of customary international law – that Israel was obliged immediately to 'allow all Palestinian refugees displaced during the 1948 conflict to exercise their right of return',¹⁵².

Paragraph 11 of Resolution 194 sets forth the framework for a durable solution to the predicament of the Palestinian refugees. Paragraph 11(1) of Resolution 194 by its express terms identifies the distinct rights that all Palestinian refugees are entitled to exercise under international law - return, restitution, and compensation.¹⁵³ Paragraph 11(1) further affirms that those refugees choosing *not* to exercise their priority rights of return and restitution are nevertheless also entitled to receive full compensation for their losses. After extended debate, the General Assembly selected the following language to

¹⁵⁰ See, United Nations' General Assembly Resolution 194 (III), UN doc. A/810 (1948).

¹⁵¹ See, for the U.N. Mediator's recommendations, "*Progress Report of the United Nations Mediator on Palestine*", U.N. GAOR, 3rd Sess, Supp. No. 11, UN doc. A/648 (1948).

¹⁵² See, Boling, *1948 Palestinian Refugees*, op.cit, p. 10.

¹⁵³ *Ibid.*,

enumerate these three separate, but interrelated 'fundamental rights'¹⁵⁴ of the 1948 Palestinian refugees, stating that the General Assembly:

“Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.”¹⁵⁵

As stated previously, the adoption of resolution 194 by the GA was the culmination of a process that traces back its origins to a progress report that was prepared by Count Folke Bernadotte the United Nations Mediator on Palestine on 16 September 1948, one day before he was assassinated by Jewish armed elements.

The report which was submitted to the GA, took full account of the significant change of circumstances since the adoption on 29 November 1947 of UNGA resolution 181 (II), which had proposed the creation of two States, one Arab and one Jewish, in economic association and with the international status of Jerusalem assured. The most substantial development, which the Mediator recognized, was the establishment of the State of Israel in 1948.¹⁵⁶

¹⁵⁴ Ibid.,

¹⁵⁵ See, *United Nations' General Assembly Resolution 194 (III)*, para. 11(1), UN doc. A/810 (1948), op.cit.

¹⁵⁶ The most significant development in The Palestine scene since last November is the fact that the Jewish State is a living, solidly entrenched and vigorous reality. That it enjoys *de jure* or *de facto* recognition from an increasing number of States, two of which are permanent members of the Security Council, is an incidental but resting fact. The Provisional Government of Israel is today exercising, without restrictions on its authority or power, all the attributes of full sovereignty. The Jewish State was not born in peace as was hoped for in the resolution of 29 November, but rather, like many other States in history, in violence and bloodshed. The establishment of this State constitutes the only implementation which has been given to the resolution, and even this was accomplished by a procedure quite contrary to that envisaged for the purpose

In setting out his recommendations to the General Assembly, the Mediator included the following among the 'seven basic premises' which formed the foundation for his conclusions:

"Right of reparation

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

International responsibility

(g) International responsibility should be expressed where desirable and necessary in the form of international guarantees, as a means of allaying existing fears, and particularly with regard to boundaries and human rights.¹⁵⁷

The Mediator also came to a number of specific conclusions which he considered would provide 'a reasonable, equitable and workable

in the resolution. In establishing their State within a semi-circle of gunfire, the Jews have given a convincing demonstration of their skill and tenacity, *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations*. UN doc. A/648, Section II, para. 5

¹⁵⁷See, *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations*, UN doc. A/648, Section VIII, Conclusions, para. 3. p, 17. The seven basic premises in full were: Return to peace: (a) Peace must return to Palestine and every feasible measure should be taken to ensure that hostilities will not be resumed and that harmonious relations between Arab and Jew will ultimately be restored. The Jewish State: (b) A Jewish State called Israel exists in Palestine and there are no sound reasons for assuming that it will not continue to do so. Boundary determination: (c) The boundaries of this new State must finally be fixed either by formal agreement between the parties concerned or failing that, by the United Nations, Continuous frontiers: (d) Adherence to the principle of geographical homogeneity and integration, which should be the major objective of the boundary arrangements, should apply equally to Arab and Jewish territories, whose frontier should not, therefore, be rigidly controlled by the territorial arrangements envisaged in the resolution of 29 November. Right of reparation: (e) The right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes should be affirmed and made effective with assurance of adequate compensation for the property of those who may choose not to return. Jerusalem: (f) The City of Jerusalem, because of its religious and international significance and the complexity of interests involved, should be accorded special and separate treatment. International responsibility: (g) International responsibility should be expressed where desirable and necessary in the form of international guarantees, as a means of allaying existing fears, and particularly with regards to boundaries and human rights.

basis for settlement.’ These included:

“(i) The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the *United Nations*, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations Conciliation Commission...”¹⁵⁸

In a section dealing with the problem of Arab refugees in so far as that problem entered into his functions as mediator, Count Bernadotte recalled that his proposal to permit such refugees to return to their homes in Jewish-occupied parts was rejected by the Provisional Government of Israel on security grounds. The Mediator added:

“5. ...notwithstanding the views expressed by the Provisional Government of Israel, it was my firm view that the right of the refugees to return to their homes at the earliest practicable date should be affirmed.

6. It is not yet known what the policy of the Provisional Government of Israel with regard to the return of Arab refugees will be when the final terms of settlement are reached. It is, however, undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which, under the Assembly resolution of 29 November, was to be included in the Jewish State. The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion. It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries.

¹⁵⁸ Ibid., para. 4(i)

7. There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity. The liability of the Provisional Government of Israel to restore private property to its Arab owners and to indemnify those owners for property wantonly destroyed is clear, irrespective of any indemnities which the Provisional Government may claim from the Arab States,

8. It must not be supposed, however, that the establishment of the right of refugees to return to their former homes provides a solution of the problem. The vast majority of the refugees may no longer have homes to return to and their resettlement in the State of Israel presents an economic and social problem of special complexity. Whether the refugees are resettled in the State of Israel or in one or other of the Arab States, a major question to be faced is that of placing them in an environment in which they can find employment and the means of livelihood. But in any case their unconditional right to make a free choice should be fully respected.”¹⁵⁹

Following consideration of the Mediator’s Report in the First Committee and then in plenary, the General Assembly adopted Resolution 194 (III)¹⁶⁰ on 11 December 1948. A number of amendments were made during the debate. None, however, was intended to or did in any way qualify the basic premises set out in the Mediator’s Report. Rather, the intent of the amendments was to raise the level of agreement in the General Assembly, by removing elements of the language which might appear politically controversial.

It was also clear that the General Assembly intended a role for the Conciliation Commission in the matter of compensation.¹⁶¹

¹⁵⁹ Ibid., Section VIII, Section V, Refugees, paras. 5-8.

¹⁶⁰ See, United Nations’ General Assembly Resolution 194 (III), UN doc. A/810 (1948), op.cit

¹⁶¹ See the proposed amendment submitted by the United States, UN doc. A/C.1/379, 23 November 1948, paras. C,D to the UK’s draft resolution, UN doc. A/C.1/394, 18 November 1948, Palestine Progress Report of the United Nations Mediator on Palestine, United Kingdom: Draft Resolution.

Paragraph 11 of the United Kingdom's draft resolution proposed that the General Assembly,

“[*Endorse*] the principle stated in Part I, Section V, Paragraph 7 of the Mediator's Report and [*Resolve*] that the Arab refugees should be permitted to return to their homes at the earliest possible date and that adequate compensation should be paid for the property of those choosing not to return and for property which has been lost as a result of pillage, confiscation or of destruction; and [*Instruct*] the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the Arab refugees and the payment of compensation.”

The United Kingdom draft resolution, which drew clearly on the Mediator's conclusions described above, was revised twice during discussions in the First Committee, in the light of the debate. The second revision eliminated the paragraph endorsing aspects of the Mediator's report,¹⁶² and avoided specific reference to the various causes of loss and damage; it included the following version of paragraph 11, under which the General Assembly,

“*Endorses* the conclusions stated in Part I, Section VIII, paragraph 4(I) of the Progress Report of the United Nations Mediator on Palestine, and

“*Resolves* that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest possible date, and that compensation should be paid for the property of those choosing not to return, and for loss or damage to property which under principles of international law or in equity should be made good by the governments or authorities responsible; and

¹⁶² See, UN doc. A/776, Report of the First Committee, 7 December 1948, para. 15

“*Instructs* the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees..”¹⁶³

During discussions in the First Committee, the United States endorsed the general principles of the seven basic premises stated in the Mediator’s report.¹⁶⁴ It proposed the following amendment, which would have the General Assembly,

“*[Resolve]* that the Arab refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest possible date and that adequate compensation should be paid for the property of those choosing not to return; and *[Instruct]* the Conciliation Commission to facilitate the repatriation, resettlement, and economic and social rehabilitation of the Arab refugees and the payment of compensation...”¹⁶⁵

However, this proposal was withdrawn, the United States representative accepting that the final United Kingdom text achieved the desired balance and was adequate to achieve the desired objective.¹⁶⁶ The US thus implicitly accepted the correctness of the United Kingdom formula for compensation as extending beyond compensation for the property of those choosing not to return.

A Guatemalan amendment, containing a similar limitation to paragraph 11 of the second

¹⁶³ See, UN doc. A/C.1/394/Rev.2, 30 November 1948.

¹⁶⁴ See, UN doc. A/776, Report of the First Committee, 7 December 1948, op.cit, para. 8.

¹⁶⁵ See, UN docs. A/C.1/397, 23 November 1948; A/C.1/397/Rev.1, 25 November 1948; see also UN doc A/C.1/398/Rev.2, 1 December 1948 (*Guatemala: Revised Amendment to the Second Revised Draft Resolution of the United Kingdom*)

¹⁶⁶ See, UN doc. A/776, Report of the First Committee, 7 December 1948, op.cit, para. 15.

revised draft resolution, was rejected by 37 votes to 7 with 5 abstentions.¹⁶⁷ Paragraph 11, with the substitution of the words ‘earliest practicable date’ for ‘earliest possible date’, and the following words added at the end ‘and through him with the appropriate organs and agencies of the United Nations’, was adopted by 29 votes to 6, with 13 abstentions. The draft resolution as a whole was adopted by 25 votes to 21, with 9 abstentions.

In the version which the First Committee recommended for adoption by the General Assembly, paragraph 11 thus read as follows:

“Endorses the conclusions stated in Part I, Section VIII, paragraph 4(i) of the progress report of the United Nations Mediator on Palestine;

“Resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss or damage to property which under principles of international law or in equity should be made good by the Governments or authorities responsible;

“Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations...”¹⁶⁸

The Report of the First Committee was considered by the General Assembly in plenary on 11 December 1948, with amendments to the draft resolution proposed by Australia,

¹⁶⁷The Guatemalan proposal used language similar to the US amendment, and would have limited the payment of ‘adequate compensation’ for the ‘property of those choosing not to return’ (UN doc A/C.1/398/Rev.2, 1 December 1948.

¹⁶⁸ See, UN doc. A/776, Report of the First Committee, 7 December 1948, op.cit, para. 29.

Brazil, Canada, China, Colombia, France and New Zealand.¹⁶⁹ The Australian representative noted that the debates in the Committee had been 'prolonged and heated'¹⁷⁰. The adoption of the draft by a very narrow margin had led to informal discussions with a view to finding common ground, the object being to 'modify the resolution without destroying its essential purpose, so as to specify more clearly what its intention was and to delete from it any polemical references.'¹⁷¹

The Canadian representative noted that the amendments proposed for paragraph 11 removed instructions which appeared elsewhere; the first part of the paragraph was redundant 'for the objective it stated was adequately elaborated in the course of the paragraph which followed'¹⁷².

The United Kingdom reiterated its view that the conclusions reached by the Mediator, 'formed a reasonable, just and workable solution for the Palestine problem, and had in no way been shaken as a result of the debate in the First Committee'¹⁷³.

The New Zealand representative likewise concurred, and stated that 'by passing the draft resolution and the amendments the Assembly would not be annulling or weakening the resolution of 29 November 1947. Neither would it be setting aside the Mediators report. But it would be making an attempt to obtain conciliation.'¹⁷⁴

¹⁶⁹ See, UN doc. a/789, 9 December 1948.

¹⁷⁰ U.N. GAOR, 184th plenary meeting, 11 December 1948, pp. 936-940.

¹⁷¹ Ibid.,

¹⁷² Ibid., pp. 942-943

¹⁷³ Ibid., p. 948.

¹⁷⁴ See, U.N.GAOR, 185th plenary meeting, 11 December 1948, p. 978.

The proposal to amend paragraph 11 by deleting the reference to the conclusions of the Mediator was adopted by 44 votes, with 8 abstentions; the draft resolution, as amended, was adopted by 35 votes to 15, with 8 abstentions.

The drafting history of UNGA resolution 194 (III), and of paragraph 11 in particular, leads to a number of conclusions. Firstly, the right of return is considered of paramount importance; it was strongly endorsed by the Mediator, and is stated clearly and unequivocally in this paragraph. Secondly, the right to compensation has two aspects: (1) it is due in respect of the property of those who choose not to return; and (2) it is payable also, and irrespective of return, for loss or damage to property. Thirdly, the loss or damage is to be 'made good' by the Governments or authorities responsible, in accordance with principles of international law or in equity. Fourthly, the Conciliation Commission among its other responsibilities, is to facilitate the payment of compensation.

The 'ordinary meaning' of paragraph 11 is clear, and is confirmed by the *travaux préparatoires*. Resolution 194 (III) is not a treaty, but is an international instrument adopted by the United Nations General Assembly; as such, the rules of treaty interpretation can be applied by analogy. Thus, the 1969 Vienna Convention on the Law of Treaties¹⁷⁵ confirms the rule of customary international law that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms

¹⁷⁵ See, *The Vienna Convention on the Law of Treaties*, (23 May 1969), UNTS, vol. 1155, p.331.

of the treaty in their context and in the light of its object and purpose”¹⁷⁶ The rules permit recourse to “supplementary means of interpretation” including the *travaux préparatoires* in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31, “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”.¹⁷⁷

The United Nations Conciliation Commission for Palestine (UNCCP), in a 1949 Working Paper on “Compensation to Refugees for Loss of or Damage to Property to be made good under Principles of International Law or in Equity”, explains the fact that paragraph 11 deals with two distinct matters:

“(1) the right of refugees to return to their homes and (2) the payment of compensation to them. It will also be seen that the question of payment of compensation presents itself under two different aspects: (a) payment of compensation to refugees not choosing to return to their homes and (b) payment of compensation to refugees for loss of or damage to property which under principles international law or in equity should be made good by the Governments or authorities responsible.”¹⁷⁸

There is nothing in the history of resolution 194 (III) to suggest that paragraph 11 was to be read otherwise than in accordance with its ordinary meaning; or that anything but the normal rules of international law governing compensation for injury and loss were to apply. The context, to which reference can and should be made, shows (1) that

¹⁷⁶ Ibid., Article 31(1).

¹⁷⁷ Ibid., Article 32

¹⁷⁸ See, *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, UN doc. W/30, 31 October 1949, para. 2.

international law and the concept of responsibility were clearly in the minds of the drafters; (2) that the reference to causes (pillage, confiscation, destruction)¹⁷⁹ in the Mediator's Report and in the first draft resolution shows recognition of an existing legal context; and (3) that the mention of 'equity' was intended to ensure that compensation should not be denied on technical legal grounds.¹⁸⁰

Clearly, the first right enumerated in Resolution 194 is the right of return. Paragraph 11(1) of Resolution 194 states the right of return unambiguously, in the phrasing "the refugees wishing to return to their homes., should be permitted to do so at the earliest practicable date."¹⁸¹ It should be noted here that Resolution 194 was drafted to apply to all persons displaced during the 1948 related conflict and therefore covers both the 1948 Palestinian refugees (the externally displaced) and the 1948 internally displaced Palestinians. Both groups of displaced Palestinians therefore have the unqualified right to return to their homes of origin and their lands, despite Israel's continued obstruction of this right vis-à-vis both groups of 1948 displaced Palestinians. This point was clarified by a Working Paper prepared by the U.N. Secretariat in Geneva in May of 1950.¹⁸²

The emphasis in Resolution 194 on repatriation - i.e. implementation of the right of return

¹⁷⁹ Despite the fact that these references were dropped in the final text of paragraph 11 in order to promote agreement on the essential purpose of the resolution.

¹⁸⁰ See. Goodwin-Gill, Guy, *Palestinian Refugees: An International Framework for Compensation*, unpublished study (2003), p. 19, available at the Jordanian Foreign Ministry Archives, Document Number Z2811. [hereinafter, Goodwin-Gill, *International Framework*]

¹⁸¹ Ibid.,

¹⁸² See, UN doc A/AC.25/W.45, "Analysis of Paragraph 11 of General Assembly Resolution of 11 December 1948", Working Paper Prepared by the U.N. Secretariat (15 May 1950). Section 1, titled "Who are the Refugees?" states in paragraph 3 that:

"According to the above interpretation the term "refugees" applies to all persons, Arabs, Jews and others who have been displaced from their homes in Palestine. This would include Arabs in Israel who have been shifted from their normal places of residence".

- as the preferred solution for Palestinian refugees reflects 'several customary norms of international law which existed in 1948'¹⁸³. That this is so is reflected in the language of the U.N. Mediator's recommendation for a solution to the plight of the refugees - subsequently incorporated into Resolution 194 - which acknowledged the fact that no new rights¹⁸⁴ were being created: "The *right* of the Arab refugees to return to their homes in Jewish controlled territory at the earliest possible date should be *affirmed* by the United Nations...."¹⁸⁵ Commenting on the original draft of paragraph 11 (proposed by Great Britain), the representative of United States similarly acknowledged that the General Assembly was creating no new rights, stating instead that the operative paragraph concerning the rights of the 1948 refugees "endorsed a generally recognized principle and provided a means for implementing that principle.."¹⁸⁶

By contrast, it is important to note that Paragraph 11(1), which delineates the rights of the refugees, does not include resettlement. Resettlement is only included in Paragraph 11(2), which instructs the UNCCP to facilitate implementation of the rights affirmed in Paragraph 11(1) according to the choice of each individual refugee. Thus Resolution 194 placed the emphasis on repatriation. This emphasis was consistent with the mandates of several international agencies established prior to 1948 to facilitate solutions for other groups of refugees.¹⁸⁷

¹⁸³ See, Boling, *1948 Palestinian Refugees*, op.cit, p. 11.

¹⁸⁴ See, Takkenberg, *Palestinian Refugees*, op.cit, p. 243 noting that "Count Bernadotte was apparently of the opinion that the right of refugees to return already formed part of existing international law'.

¹⁸⁵ See, *Progress Report of the United Nations Mediator on Palestine*, U.N. GAOR, 3rd Sess, Supp. No. 11, UN doc. A/648 (1948), op.cit, part I ("The Mediation Effort"), sect VIII ("Conclusions"), No. 4 ("Specific Conclusions"), subsection (i), containing the quoted language.

¹⁸⁶ See, *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, UN doc. W/30, 31 October 1949, op.cit, paragraph 8.

¹⁸⁷ See, Boling, *1948 Palestinian Refugees*, op.cit, p. 11.

The U.N. Mediator whose thinking the General Assembly so closely tracked in drafting Resolution 194, clearly regarded the right of return as the most appropriate remedy to correct what he clearly viewed as the ‘mass expulsion’¹⁸⁸ of the 1948 Palestinian refugees.

“It is, however, undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict....The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumors concerning real or alleged acts of terrorism, or expulsion... There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering and of instances of destruction of villages without apparent military necessity.. It would be an offence against the principles of elemental justice, if these innocent victims of the conflict were denied the right to return to their homes..”¹⁸⁹

The second right enumerated in Resolution 194, which is closely connected to the first, is the right of restitution, or the right to regain possession of private property belonging to the returning 1948 Palestinian refugees. This right is stated in the language of Resolution 194 indicating the specific “destination” or “location” where the General Assembly declared the refugees had the right to exercise their right of return, which was clearly stated as being the right “to return to their homes”¹⁹⁰. That the General Assembly intended to *incorporate* the right of restitution *within* the right of return in Resolution 194 is clearly spelled out in a Working Paper prepared by the U.N. Secretariat dated March

¹⁸⁸ Ibid.,

¹⁸⁹ See, *Progress Report of the United Nations Mediator on Palestine*, U.N. GAOR, 3rd Sess, Supp. No. 11, UN doc. A/648 (1948), op.cit, part I(“The Mediation effort”), sect. V (“Refugees”), subsections 6 and 7, containing the quoted language.

¹⁹⁰ See, *United Nations’ General Assembly Resolution 194 (III)*, para. 11(1), UN doc. A/810 (1948), op.cit.

1950.¹⁹¹ The General Assembly reiterated the right to restitution in the Palestinian context in a 1974 resolution referring to the “inalienable rights of the Palestinians to return to their homes and property from which they have been displaced and uprooted.”¹⁹²

The third right enumerated in Resolution 194- the right of compensation - entitles *two groups* of Palestinian refugees to monetary compensation for certain categories of their private property. The *first* group of refugees comprises those who might choose to exercise their right of return. *Returning* refugees in this group are entitled to receive compensation for all private property which had been damaged or destroyed, because this is property which these refugees would otherwise be entitled to regain repossession of under the second enumerated right - the right of restitution - if the property had not been damaged or destroyed. The *second* group of refugees comprise those who might *voluntarily* choose *not* to exercise their priority of return and restitution. This group of *non-returning* refugees is also entitled to receive compensation for *all* of their property, irrespective of whether it had been damaged or destroyed, because they had been wrongfully displaced from it in violation of international law. Again, that this is the correct interpretation of the General Assembly’s language in Resolution 194 is clearly

¹⁹¹ See, *Precedents for Restitution of Property or Payment of Compensation to Refugees*, Working Paper prepared by the U.N. Secretariat, Geneva, March 1950, UN doc. A/AC.25/W.81/Rev. 2 (Annex I) (1950). Paragraph 1 of the Working Paper clearly outlines the inclusion of the right of restitution in the right of return. it states that:

“ 1.The underlying principle of paragraph 11, sub-paragraph 1. of the resolution of the General Assembly of 11 December 1948, is that the Palestine refugees shall be permitted either to return to their homes and be reinstated in the possession of the property which they previously held or that they shall be paid adequate compensation for their property. The purpose of the present paper is to furnish some background for this principle and to recall similar historical situations where claims of restitution of property or payment of compensation were put forward”.

¹⁹² See, UNGA. Res. 3236, U.N. GAOR, 29th Sess, Supp. No. 31, para. 2, UN doc. A/9631 (1974).

spelled out in a Working prepared by the U.N. Secretariat dated October 1949.¹⁹³

In this context, it is relevant and helpful for understanding the scope, extent and subject matter of compensation referred to in UNGA Resolution 194, to note that the UNCCP suggested that the substitution of the expression, 'loss of or damage to property which under principles of international law or in equity should be made good', brought the wording closer to that generally used in Mixed Claim Conventions¹⁹⁴, and suggested that the General Assembly consequently did not wish to limit refugee claims for compensation to instances of war damage; a 'somewhat wider application' was called for, with each case being considered on its merits.¹⁹⁵

This view is supported elsewhere in the work of the UNCCP¹⁹⁶, which stressed the need to distinguish between three categories of claims: (a) compensation claims for property of refugees not choosing to return; (b) compensation claims for loss of or damage to property, which, under principles of international law or in equity should be made good;

¹⁹³ See, *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, Working Paper Prepared by the U.N. Secretariat, Geneva, October 1949, UN doc. A/AC25/W.81/Rev. 2 (Annex II) (1949), op.cit, paragraphs 12 and 13.

¹⁹⁴ Ibid., footnote 63 at p. 19 where Goodwin-Gill sites, for example Article 1 of the United States-Mexican General Claims Convention, which provided that the Commission were to decide 'in accordance with the principles of international law, justice and equity'.

¹⁹⁵ See, *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, UN doc. W/30, 31 October 1949, op.cit, para. 13.

¹⁹⁶ See, the series of working papers prepared by the United Nations Secretariat and the UN Conciliation Commission for Palestine in the years immediately following the adoption of resolution 194 (III). These include: *The Refugee Problem in Concrete Terms*, UN doc. W/3, 17 March 1949; *Initial Steps on the Question of Compensation*, UN doc. W/24, 7 September 1949; *Note on Certain Conservatory Measures*, UN doc. W/25, 8 September 1949; *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, UN doc. W/30, 31 October 1949; *the Question of Compensation for Palestine Refugees*, UN doc. W/33, 25 January 1950; *Returning Refugees and The Question of Compensation*, UN doc. W/36, 7 February 1950; *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, UN doc. W/41, 18 March 1950; *Note on Compensation for the Property of Refugees who Decide Not to Return*, UN doc. W/43, 22 April 1950.

and (c) compensation claims for ordinary war damages.¹⁹⁷ In its view, only the first two categories were dealt with by resolution 194 (III):

“The compensation claims for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible, is an intermediate group of claims between the compensation claims under A and C. The claims in question do arise out of the military events in Palestine but only in an incidental way and they cannot be considered as claims for ordinary war-damages. From the legislative history of paragraph 11 of the resolution of the General Assembly it will appear that the cases which the Assembly particularly had in mind were those of looting, pillaging and plundering of private property and destruction of property and villages without military necessity. All such acts are violations of the laws and customs of war on land laid down in the Hague Convention of 16 October 1907, the rules of which, as stated in the Nuremberg Judgment in 1939 ‘were recognized by all civilized nations and were regarded as being declaratory of the law and customs of war.’”¹⁹⁸

That ‘ordinary war damages’ fell outside the scope of resolution 194 (III) was also maintained in a later UNCCP document.¹⁹⁹ It was accepted that war damage was separate from the refugee problem, should not be dealt with by the Commission, but in the peace treaty. In the view of the Commission, however,

“10. With regard to the compensation claims of... refugees not choosing to return to their homes.. Not only does paragraph 11, sub-paragraph 1, lay down a clear, direct and unconditional obligation to pay compensation, but the legislative history shows clearly.. that the General Assembly intended to leave the question of ordinary war damages aside.

¹⁹⁷ See, *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, UN doc. W/30, 31 October 1949, op.cit, para. 4.

¹⁹⁸ Ibid., para. 13.

¹⁹⁹ See, *Compensation to Refugees and the Question of War Damages*, UN doc. W/50, 4 August 1950.

“11. The same conclusion is reached when a comparison is made of the respective character of the claims of compensation for abandoned property on the one hand and claims for ordinary war damage on the other hand. In the first place it should be noted that *the right to compensation for abandoned property is an individual right granted to each refugee by the resolution of the General Assembly*, whereas the question of war damages directly is a question between the Governments concerned, to be settled in the Peace Treaty... Finally, it should be remembered that claims for abandoned property refer only to losses sustained by refugees, whereas the claims for ordinary war damage are generally attributed to all persons having suffered damage as the direct result of enemy action.”²⁰⁰

The important issue in relation to international law and equity is their *conjunction*, which implies a role for both law and justice. International law is relevant to the determination of questions such as the attribution of the acts of non-State entities, the extent of liability (direct injury), the measure of damage, or the payment of interest. Equity, on the other hand, may require the disregard of rules which might apply in normal cases (such as exhaustion of local remedies, nationality of claims, continuous nationality etc), but which would tend to defeat the objective of compensation if applied to the particular circumstances of the Palestinian losses.²⁰¹

The fact that the General Assembly made Israel’s admission as a member to the United Nations conditional upon its implementation of Resolution 194 clearly indicates that the General Assembly considered Israel fully bound to ensure full implementation of the

²⁰⁰ Ibid., paras. 9, 10. In view of the particular circumstances, the Commission recommended at the 1951 Paris Conference that ‘ a mutual waiver of war damage claims would be consonant with the general principles and purposes of the United Nations’; see, “*Historical Survey of Efforts of the United Nations Conciliation Commission for Palestine to Secure the Implementation of Paragraph 11 of General Assembly Resolution 194 (III), Question of Compensation*”, UN doc. A/C.25/W.81/Rev.2, 2 October 1961, paras. 76-83.

²⁰¹ See, Goodwin-Gill, *International Framework*, op.cit, p 21, available at the Jordanian Foreign Ministry Archives, Document Number Z2811.

Palestinian refugees' right of return and liable for compensating those returning and those not wishing to return.²⁰²

Despite the clarity of the formulation of the legal obligations contained in Resolution 194, which the General Assembly has reaffirmed annually²⁰³ without diminution since its original promulgation in 1948, Israel has completely ignored its obligations under it. Rather than immediately and fully repatriating the 1948 Palestinian refugees, as required by international law, Israel has instead deliberately blocked their return. Nevertheless, the right of return as articulated in Resolution 194 has remained, in the succeeding five decades of its initial promulgation, entirely consistent with binding norms of customary international law. This fact only strengthens the relevance of Resolution 194 as a framework for crafting a durable solution for the situation of the 1948 Palestinian refugees²⁰⁴.

While it could be contended that General Assembly resolutions are not themselves directly binding in law, they are not, however, devoid of legal effect. In particular, where they are adopted by consensus or unanimity, or at least by large majorities, and there is evidence that their language was intended to reflect a legal conclusion, it may be argued that they represent customary international law;²⁰⁵ this argument is greatly strengthened where, as in the context of Palestinian refugees, the substance of the resolutions has been

²⁰² See, Boling, *1948 Palestinian Refugees*, op.cit, p. 14.

²⁰³ Ibid.,

²⁰⁴ Ibid.,

²⁰⁵ See, Boling, *1948 Palestinian Refugees*, op.cit; Goodwin-Gill, *International Framework*, op.cit, p 21, available at the Jordanian Foreign Ministry Archives, Document Number Z2811, op.cit, p. 28; Quigley, J. *Displaced Palestinians and the Right of Return*, Harvard International Law Journal, Vol. 39, No. 1 (Winter 1998), op.cit

repeated on numerous occasions over more than 50 years. While UNGA resolution 194(III) may have been adopted by a vote of 35 in favour, 15 against, and 8 abstentions, successive later resolutions have been adopted by very large majorities.

It is important to stress that paragraph 11 of UNGA Resolution 194(III) also makes it clear that return and compensation are complementary, not exclusive. Palestinians exercising their right of return are thus also entitled to compensation for loss of or damage to property ‘...under principles of international law or in equity’. The General Assembly has recognized that ‘Palestinians are entitled to their property and to the income derived from their property in conformity with the principles of justice and equity’²⁰⁶. The principle of return to land and property is complemented by the right to compensation for damage and loss.²⁰⁷

On 14 June 1967, the Security Council issued Resolution 237. In this resolution the Council called upon Israel, among other things, to facilitate the return of the inhabitants of the West Bank²⁰⁸ who had fled the area since the outbreak of hostilities on 5 June 1967.²⁰⁹ Israel has also blocked the return of this category and did not implement this resolution to date. Additionally, The General Assembly has reiterated ‘the inalienable

²⁰⁶ See, *UNGA Resolution 34/146C*, 16 December 1981, A/RES/36/146 (A-H) available at the United Nations’ Information System on Palestine (UNISPAL), website: <http://domino.un.org/UNISPAL.NSF>

²⁰⁷ See, Goodwin-Gill, *International Framework*, op.cit, p. 27.

²⁰⁸ The term inhabitants of the West Bank covers both the original residents of the West Bank, which until it was occupied as a result of the outbreak of the 1967 Arab-Israeli War, had been part of the Hashemite Kingdom of Jordan since 1948, in addition to Palestinian refugees who had fled to the West Bank and resided therein in the period of 1947-1949. In the literature of the Arab-Israeli conflict, original residents of the West Bank who fled as a result of the 1967 War are referred to as “Displaced Persons” while those inhabitants of the West Bank who ended residing therein and in other Arab countries as a result of the 1947-1949 conflict are referred to as “Refugees”.

²⁰⁹ See, *Security Council Resolution 237*, S/RES/237 (1967), available at available at the United Nations’ Information System on Palestine (UNISPAL), website: <http://domino.un.org/UNISPAL.NSF>

right' of displaced persons to return to their previous places of residence in the areas that Israel occupies since 1967 and declared that any attempt to diminish the freedom to exercise this right would or attaching any conditions thereto are not consistent with the 'inalienability' of this right. It also called on Israel to take all necessary steps needed for the return of all displaced persons, to cease all measures that may hinder such return including measures that affect the natural and demographic structure of the Occupied Territories.²¹⁰

(ii) The Right of Return in the Law of Nationality.

The Law of Nationality is a subset of the larger "law of nations", which regulates state to state obligations.²¹¹ The law of state succession is also a subset of the law of nations, which has particular implications for the application of the rules of the law of nationality. While questions of nationality are largely regulated by the domestic laws of respective states, international law is nevertheless applicable and can "trump domestic law if there is conflict between the two".²¹²

1- States' Domestic Discretion to regulate Nationality Status is Limited by International Law.

While states have discretion in regulating their nationality status, this discretion has clear limits under international law and the actions of states in this regard will only be

²¹⁰ See, *UNGA Resolution 37/120*, dated 16 December 1982.

²¹¹ See, Boling, *1948 Palestinian Refugees*. op.cit, p. 15.

²¹² Ibid.,

recognized at the international level 'to the extent that they comply with international law'.²¹³ This principle is 'universally recognized'.²¹⁴ The Permanent Court of International Justice (PCIJ) articulated this principle in 1923.²¹⁵ The rule was also articulated in the authoritative 1930 Hague Convention on certain Questions Relating to Conflict of Nationality Laws.²¹⁶ The International Court of Justice (ICJ), in the *Nottebohm Case* reaffirmed this principle.²¹⁷ Many United Nations bodies, including the General Assembly's Sixth (Legal) Committee²¹⁸ and the United Nations High Commissioner For Refugees²¹⁹, have also taken this view.

Nevertheless, Israeli legislation pertaining to nationality status does not conform to international law on this matter. The two Israeli laws governing citizenship are the Law

²¹³ Ibid.,

²¹⁴ Ibid.,

²¹⁵ See, *Tunis and Morocco Nationality Decrees Advisory Opinion*, PCIJ, Series B, No. 4 (1923), p24. The PCIJ stated that "in the present state of international law, questions of nationality are, in the opinion of the Court, *in principle* within the reserved [domestic jurisdiction of states]," but qualifying that statement with the phrase "in principle" to provide for cases where international law would be relevant to determinations of nationality status and could overturn domestic law determinations.

²¹⁶ See, *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, League of Nations Treaty Series (LNTS), vol. 179 (1930), p. 89. Article I stated the Principle as Follows:

"It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law recognized with regard to nationality".

²¹⁷ See, *Nottebohm Case*, (Guatemala v. Liechtenstein) ICJ Reports (1955), pp 1, 23, stating that the principle that a state's determination regarding conferral of nationality status can only be recognized by other states if the determination has fallen within international standards regarding the existence of "genuine link" between the individual and the State.

²¹⁸ See, GAOR, 51st Session, International Law Commission, 48th Session, *Second Report on State Succession and its Impact on the Nationality of natural and Legal Persons*, (Vaclav Mikulka, Special Rapporteur), UN doc. A/CN.4/474 (1996), p. 9 observing that in the UN General Assembly Sixth Committee debate, "it was generally recognized that, while nationality was essentially governed by internal law, certain restrictions on the freedom of action by States derived from international law".

²¹⁹ See, U.N. High Commissioner For Refugees, Regional Bureau for Europe, Division of International Protection, *The Czech and Slovak Citizenship Laws and the Problem of Statelessness*, (February 1996), stating that "nationality matters fall within the sovereign domain of each State and it is for each state to define the rules and principles governing the acquisition and loss of nationality *provided* these rules do not contradict international law".

of Return²²⁰, which provides for automatic Israeli citizenship for any Jew in the world who wishes to immigrate to Israel²²¹ thus ‘casting a wide arc, to grant Israeli citizenship to the largest number of Jews possible’.²²² And the other Law is the 1952 Nationality Law²²³, which is for ‘non-Jews’.²²⁴ This law was drafted with the obvious purpose of excluding the largest number of the 1948 Palestinian Refugees from eligibility for Israeli citizenship. While this law carefully avoids the use of the term ‘non-Jew’ in describing the narrowly defined categories²²⁵ of persons who became eligible for Israeli citizenship based upon the 1952 Nationality Law, it becomes clear the law was obviously intended to apply to non-Jews only because Jews would evidently avail themselves of the far easier terms and procedures of the Law of Return. In contrast, the 1952 Nationality Law, imposes very narrow and strict conditions and requirements on persons applying for nationality (or citizenship status) based on the law including the need to have been physically present inside the 1949 armistice lines between certain dates, which in effect rendered the vast majority of the 1948 Palestinian Refugees ‘factually incapable of meeting these strict physical presence requirements of Israel’s 1952 Nationality Law’.²²⁶ Hence, this entire large group of persons was denationalized by that law. It is on the basis of this purported denationalization that Israel asserts having a purported basis for obstructing the right of return of virtually the entire class of persons comprising the 1948 Palestinian Refugees.

²²⁰ See, 4 *Laws of The State Of Israel* (1950), p. 114.

²²¹ *Ibid.*, Section I on the Law states that: “Every Jew has the right to come to his country[Israel] as an *oleh* [Jewish immigrant]”.

²²² See, Boling, *1948 Palestinian Refugees*. op.cit, p. 26.

²²³ *Nationality Law, 5712/1952, 93 Official Gazette 22* (1952). op.cit.

²²⁴ See, Boling, *1948 Palestinian Refugees*. op.cit, p. 26.

²²⁵ For example, former citizens of the Palestine Mandate of Arab origin could only qualify for Israeli nationality(citizenship) under the 1952 Nationality Law if they met the stringent criteria under section 3 of the law outlined in detail in Chapter 1.

²²⁶ See, Boling, *1948 Palestinian Refugees*. op.cit, p. 26.

This law however completely violates the rule of the law of nationality prohibiting denationalization, thus it is completely illegal under international law.²²⁷ This is more so, since such a large number of persons was purported to be denationalized by this law. Additionally, the group chose for 'selective denationalization was clearly selected on discriminatory grounds (i.e., racial, ethnic, religious or political criteria) prohibited by human rights law in particular and international law in general.²²⁸

The obligation to admit nationals by a state of nationality exists at two levels. First the State to State level, it is an obligation upon the State of nationality to the States where the absent nationals are located. Secondly, it is an obligation running from the State to its nationals as a protected human right.²²⁹

The obligation to admit a national, it must be noted, has become "an inherent duty of States resulting from the conception of nationality".²³⁰ Therefore, a State's refusal to admit its national may violate the rights of the State in which the national is present, the State of nationality bears an obligation toward a State where its absent national sojourns, because the State of sojourn is entitled to control residence in its territory by aliens.²³¹

Accordingly, if the State of nationality refuses to admit its national, it is liable to the state

²²⁷ Ibid.,

²²⁸ Ibid.,

²²⁹ See, Quigley, J. *Displaced Palestinians and the Right of Return*, Harvard International Law Journal, Vol. 39, No. 1 (Winter 1998), [hereinafter, Quigley, *Displaced Palestinians*], p. 194.

²³⁰ See, Weis, P. *Nationality and Statelessness in International Law*, op.cit, p. 47.

²³¹ See, Plender, R. *International Migration Law*, (1973), p. 71, in which he attes that " The proposition that every state must admit its own nationals to its territory is so widely accepted that it may be described as a commonplace of international law".

of sojourn and has an obligation to restore the *status quo ante*,²³² specifically, to admit its national. A State's obligation to admit its nationals applies even if the national has never set foot in the State's territory.²³³

Also, this obligation of the State of nationality to admit its national applies as well if the state revokes nationality, as is the case on the impact of Israel's 1952 nationality law on Arab Palestinians. Additionally, if a State revokes the nationality of a national located abroad, it must repatriate the person despite the revocation.

2- The Law of State Succession.

The law of state succession applies whenever a predecessor state is followed in the international administration of a geographical territory by a successor state.²³⁴

In the case of the 1948 Palestinian Refugees, it can be argued that the predecessor state was 'the embryonic state of Palestine for which under international law, the British Mandate for Palestine constituted at most only a custodian or guarantor'.²³⁵ The successor State was Israel.

Under the law of state succession, when territory undergoes a change in sovereignty, the

²³² See, Eagleton, C. *The Responsibility of States in International Law*, (1928), p. 182; *Chorzow Factory Case*, (Germany v. Poland) 1928 PCIJ (ser. A) at P. 47. [Hereinafter *Chorzow Factory Case*]; see also *Final Articles on State Responsibility*. Article 35.

²³³ See, Weis, P. *Nationality and Statelessness in International Law*, op.cit, p. 53 in which he states that "the State of nationality is also under an obligation to admit a national born abroad who never resided on its territory if his admission should be demanded by the state of residence".

²³⁴ See Boling, *1948 Palestinian Refugees*, op.cit, p. 17.

²³⁵ Ibid.,

law of state succession requires that inhabitants (commonly referred to as “habitual residents”²³⁶) of the geographical territory coming under new sovereignty be offered nationality by the new state.²³⁷ This rule represents a customary international norm and is binding upon all states.²³⁸ What this rule means in practical terms is that when a change in sovereignty occurs over territory, the habitual residents thereof automatically acquire the nationality status in the successor state because it geographically contains their homes of origin, whose location remains unchanged. This rule applies regardless of whether the habitual residents of the territory in question are actually physically present within the territory undergoing the change of sovereignty on the actual date of the change or not.²³⁹

²³⁶ “Habitual residents” are inhabitants of a particular geographical area whose long term residence there has established that area as their place of permanent residence, containing their homes of origin. Regarding the selection of the concept of ‘habitual residents’ as the operative concept upon which to base the rules of the law of state succession, see General Assembly Resolution A/RES/55/153 (12 December 2000). *Articles on Nationality of Natural Persons in Relation to the Succession of States*, which endorsed the International Law Commission’s (ILC) choice of “habitual residents” as the operative concept. The official commentary to Article 5 states:

“As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, “the juridical relationship of nationality should not be based on formality or artifice, but on real connection between the individual and the State. Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. This is explained by the fact that the population has ‘territorial’ or local status, and this is unaffected whether there is a universal or partial successor and whether there is cession, i.e., a ‘transfer’ of sovereignty, or a relinquishment by one state followed by a disposition by international authority. Also in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), there is substantial connection with the territory concerned through residence itself’.

²³⁷ See, in General, Oppenheim, L, “*International Law*” (7th ed., 1948), stating that “inhabitants of the subjugated and ceded territory acquire *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory”. And referring to this rule as being “settled by the customary law of Nations”; Brownlie, I. *The Relations of Nationality in Public International Law*, 39 *British Yearbook of International Law (BYIL)* (1963), pp. 284, 320 [hereinafter, Brownlie, *Relations of Nationality*] in which he states that “the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality”; Mann, F.A. *The Effect of Changes of Sovereignty upon Nationality*, 5 *Modern Law Review* (1941-1942), pp. 218, 221 in which he states that “The modern rule of customary international law may be formulated as follows: The Nationality of the predecessor state is lost and that of the successor state is acquired by such inhabitants of the ceded or annexed territory as were subjects of the superceded sovereign”.

²³⁸ See, Boling, *1948 Palestinian Refugees*. op.cit, p. 17. See also, *ibid.*,

²³⁹ See, Quigley, *Displaced Palestinians*, op.cit, p. 210.

The issue of nationality of new, or newly configured, states arose in the wake of World War I. States were carved out of territories of defeated parties, and substantial minority populations resulted in many of them.²⁴⁰ The allies conferring in Versailles over the new dispensation for Europe understood that the governments of these new states might not look favorably on some of their minorities.²⁴¹ The allies demanded hence, that these States conclude treaties in which they agreed to protect their minorities. A major element in that protection was recognition of the link between these populations and their territory. Minority rights treaties following World War I recognized this link, giving the minorities a right to nationality²⁴², and requiring the newly created states to extend their nationalities to the minorities.²⁴³

When there is a change of sovereignty, the state taking a territory in question, or a new state if it is as such, must respect the nationality rights of the inhabitants. Also, a state achieving sovereignty in a territory may not deprive the inhabitants of nationality by refusing to offer them its nationality, which in effect is what the Israeli Nationality Law of 1952 does. The obligation of a state acquiring territory to extend its nationality has been affirmed by a working group established by the International Law Commission

²⁴⁰ Ibid., p. 206

²⁴¹ See, *Advisory Opinion on Certain Questions Arising out of the Application of Article 4 of the Polish Minorities Treaty*, 1923 Permanent Court of International Justice (PCIJ), (ser.B) No. 7 at p. 15 in which the PCIJ states that “ One of the first problems which presented itself in connection with the protection of minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States”.

²⁴² See, *Advisory Opinion on Certain Questions Arising out of the Application of Article 4 of the Polish Minorities Treaty*, 1923 Permanent Court of International Justice (PCIJ), (ser.B) No. 7, *ibid*, at p. 16. The Opinion States: “ Though, generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to Treaty obligations referred to above”.

²⁴³ See, Quigley, *Displaced Palestinians*, *op.cit*, p. 208, in which he refers to the stipulation to this effect of Article 4 of the Minorities Treaty between the Principal Allied and Associated Powers and Poland signed at Versailles on 28 June 1919.

(ILC) to analyze nationality upon state succession.²⁴⁴ The working group stated as a preliminary conclusion that a new state must extend its nationality to the inhabitants.²⁴⁵

Under this rule, an inhabitant of territory coming under new sovereignty acquires the nationality of the new sovereign, unless the inhabitant opts for the nationality of the former sovereign.²⁴⁶ If the new state declines to offer its nationality, international law infers it.²⁴⁷ This proposition was accepted even by the Tel Aviv District Court in a 1951 case, in which the Court stated that “every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of the State of Israel”.²⁴⁸ The Court further stated that following the transfer of territory, “every individual and inhabitant of the ceding State becomes automatically a national of the receiving State”²⁴⁹. One purpose of the rule that nationality transfers is to avoid statelessness.²⁵⁰ Another is to accord fair treatment to the inhabitants.²⁵¹

²⁴⁴ See, *Report of the International Law Commission on the work of its Forty Seventh Session*, U.N. GAOR, 50th Session., Supp. No. 10. p. 68, UN doc. A/50/10 (1995); see also, Rosenstock, R. *The Forty seventh Session of the International Law Commission*, 90 *American Journal of International Law (AJIL)* (1996), pp. 106, 113-114.

²⁴⁵ See, *Report of the International Law Commission on the work of its Forty Seventh Session*, U.N. GAOR, 50th Session., Supp. No. 10, op.cit, pp. 271, 272-275.

²⁴⁶ See, Quigley, *Displaced Palestinians*, op.cit, p. 207.

²⁴⁷ See, *Research in International Law*, Harvard University Law School, *Nationality, Responsibility of States, Territorial Waters: Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930*, The Law of Nationality, Article. 20, 23 (AJIL), (Supp. 1929), pp. 13, 16, hereinafter referred to as *The Law of Nationality*.

²⁴⁸ See, *A.B. v. M.B.*, op.cit, 3 P.M. p. 263, 272 (1950-1951) [District Court, Tel Aviv] 17 *International Law Reports (ILR)* (1950) pp. 110, 111.

²⁴⁹ *Ibid.*,

²⁵⁰ See, *The Law of Nationality*. op.cit.

²⁵¹ See, Brownlie, *Relations of Nationality*, op.cit, pp. 284, 325 in which he states that “Sovereignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at the discretion of the government”; see also Nsereko, D.N. *The Right to Return Home*, 21 *Indian Journal of International Law* (1981), pp. 335, 343 stating that “the fact that territorial sovereignty over territory has, whether rightly or wrongly, changed and should not affect the inhabitants’ right to reside therein or return thereto”.

The law of Human Rights reinforced the principle that inhabitants of a certain territory, assume the nationality of the new or newly configured States.²⁵² With the treatment of the law of Human Rights of individuals as bearers of rights, the inhabitants of a territory undergoing a sovereignty change are viewed as possessing the right to a nationality. Thus, the International Convention on the Elimination of All Forms of Racial Discrimination guarantees a “right to a nationality”²⁵³, meaning that a denial of nationality grounded on a racial distinction, as Israel did towards the Majority of 1948 Palestinian Refugees, is invalid as a violation of the rights of the individual. Also, the Universal Declaration on Human Rights guarantees “a right to nationality” and states that no one may be arbitrarily deprived of it.²⁵⁴ The attachment of the individual to the territory provides the basis for such a right. A right based on that attachment ‘is not circumvented by a political change resulting in the creation of a new state.’²⁵⁵

The preceding analysis of the acquisition of nationality by inhabitants depends on a change in sovereignty from a predecessor state to a successor state. The formation of Israel, however, did not involve the acquiring of sovereignty by one state from another, but the creation of a state in territory under a Mandate from the League of Nations.²⁵⁶

This factual difference does not produce any difference in result as regards the

²⁵² See, Quigley, *Displaced Palestinians*, op.cit, p. 207.

²⁵³ See, *The International Convention on the Elimination of All Forms of Racial Discrimination*, Article 5(d) (iii) cited in Brownlie, *Basic Documents*, op.cit, p. 153.

²⁵⁴ See also Article 15 of the Universal Declaration of Human Rights of 1948, cited in Brownlie, *Basic Documents*, op.cit, p 24.

²⁵⁵ See, Quigley, *Displaced Palestinians*, op.cit, p. 208.

²⁵⁶ See, General Assembly Resolution 181 (II), U.N. GAOR, 128th Plenary Meeting at UN DOC. A/519 (1948). Cited in Bassioni, *Documents*, , op.cit, pp 300-316.

acquisition of nationality. When a state emerges from mandate territory, the rationale for requiring an offer of nationality is stronger.²⁵⁷ The nationality status of the inhabitants of a League of Nations Mandate territory was a topic on which the authorities struggled for clarity.²⁵⁸ On the one hand, these inhabitants were not nationals of the administering power, which served as a “trustee” caring for the territory and its population pending their acquisition of a future new status. The new status in the case of “A” class Mandates, of which Palestine was one, was to be political independence.²⁵⁹ Britain followed this rule in Palestine and thus did not deem inhabitants of Palestine to be British nationals.²⁶⁰

However, the inhabitants of mandate territory were not stateless. The administering power could provide diplomatic protection for them in any controversy involving another state,²⁶¹ and some kind of nationality.²⁶² Britain did so for the inhabitants of Palestine, who previously had been nationals of the Ottoman Empire, but who lost that status following the defeat of the Empire in World War I and its withdrawal from Palestine.²⁶³

Britain created a Palestine nationality and issued passport denominated “British passport—Palestine”.²⁶⁴

²⁵⁷ See, Quigley, *Displaced Palestinians*, op.cit.

²⁵⁸ Ibid.,

²⁵⁹ See, Article 22 of the Covenant of the League of Nations cited in Mazzawi, Musa E, *Palestine and the Law*, Itacha Press (1997), op.cit, p 26.

²⁶⁰ See, *The King v. Ketter*, 1 K.B. (1940), cited in Quigley, J. *Displaced Palestinians*, op.cit, footnote 213. the Court found that status as citizen of Palestine did not make the appellant a British subject.

²⁶¹ See, Brownlie, *Relations of Nationality*, op.cit, p 317.

²⁶² See, *Mandate for Palestine*, Articles. 7, 8, republished by the United Nations, UN doc. A/70 (1946).

²⁶³ See, Kunz, J. *L'Option de Nationalite*, 31 Hague Academy of International Law, *Recueil Des Cours* (1930), p 135, stating that “as for ‘A’ Mandates[of which Palestine was one], it is certain that the inhabitants of these countries lost their Turkish nationality; but in turn they did not acquire the nationality of the mandatory power; they possess a separate nationality;....Palestinian nationality”.

²⁶⁴ See, *Nationality Law*, 5712/1952, 93 *Official Gazette of Israel* 22 (1952). op.cit, Article 3 referring to “a person who, immediately before the establishment of the state, was a Palestinian citizen”, thus recognizing a Palestinian Citizenship during the mandate period; see also, Benwich, N. *Nationality in Mandated Territories detached from Turkey*, 7 BYIL (1926). pp 97, 102.

Sovereignty in territory under mandate, it was said, was “in abeyance”.²⁶⁵ But a community under mandate was a “subject of international law”, as the beneficiary of the trust arrangement.²⁶⁶ This is evidenced by the fact that Palestine was, in its own name, a party to a number of treaties during the two and a half decades of its existence.²⁶⁷

The creation of Israel and its formation involved the emergence of actual sovereignty in territory in which sovereignty was suspended.²⁶⁸ Accordingly, the rule of customary international law that, upon a substitution of sovereignty, the inhabitants acquire the nationality of the new state, obtains as well when a state is formed in Mandate territory.²⁶⁹ Israel’s 1952 Nationality Law²⁷⁰ followed this practice with respect to Arab nationals of mandate Palestine who were physically present at the time of transfer and who remained there after the transfer.²⁷¹

Israel’s 1952 Nationality Law,²⁷² however did not extend nationality to Palestinian Arab nationals of Palestine who were abroad at the time of the emergence of the State of Israel, or who left between the emergence of Israel and the enactment of the 1952 Nationality

²⁶⁵ See, separate opinion of Judge McNair in *the International Status of South-West Africa Advisory Opinion*, ICJ Reports (1950).

²⁶⁶ See, Institute of International Law, Resolution on Mandates, 1931, para. 6, in Brown Scott, J. *The Two Institutes of International Law*, 26 AJIL (1932), pp. 87, 91.

²⁶⁷ See for example, Exchange of Notes constituting a Provisional Commercial Agreement between Egypt and Palestine (80 League of Nations Treaty Series(LNTS) 277); Agreement Concerning Exchange of Postal Parcels between Palestine and Switzerland (95 LNTS 395).

²⁶⁸ See, *the International Status of South-West Africa Advisory Opinion*, ICJ Reports (1950), op.cit stating that “ if and when the inhabitants of the territory obtain recognition as an independent State....sovereignty will revive and vest in the new State”.

²⁶⁹ See, , op.cit, p 210.

²⁷⁰ See, *Nationality Law*, 5712/1952, 93 *Official Gazette of Israel* 22 (1952). op.cit

²⁷¹ See, Quigley, *Displaced Palestinians* , op.cit.

²⁷² See, *Nationality Law*, 5712/1952, 93 *Official Gazette of Israel* 22 (1952). op.cit

Law.²⁷³

State practice suggests that the inference of nationality applies to all who carry the nationality of the prior State, regardless of their whereabouts on the date of transfer of sovereignty.²⁷⁴ The ILC's working group has maintained that the inference of nationality applies to all nationals of the former state, regardless of where they reside.²⁷⁵ The inference would thus seem to also apply to Palestinians absent at the time Israel assumed sovereignty.

The manner by which the United Nations' General Assembly (GA) treated the issue of nationality in its proposal for two states in Palestine, one Jewish and one Arab, supports the preceding conclusion. The GA anticipated that Jews living in the Arab State would hold its nationality, and that Arabs living in the Jewish State would hold its nationality.²⁷⁶ The GA anticipated that the Jewish State would include substantial numbers of Arabs.²⁷⁷ The constitution of each state, according to the proposal, was to guarantee "equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms".²⁷⁸ One such right would inevitably have been that to nationality.

²⁷³ See, Quigley, *Displaced Palestinians*, op.cit.

²⁷⁴ Ibid.,

²⁷⁵ See, *Report of the International Law Commission on the work of its Forty Seventh Session*, U.N. GAOR, 50th Session., Supp. No. 10, op.cit, pp, 271,272-275 (Annex: Report of the Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons).

²⁷⁶ See, Rosenne, S. *The Israeli Nationality Law and the Law of Return 5710-1950*, 81 *Journal Du Droit International* (1954), p 9.

²⁷⁷ See, *Estimated Population of Palestine as of December 1946*, (Appendix I), Ad Hoc Committee on the Palestine Question, Summary Records of Meetings, 25 September-25 November 1947, U.N. GAOR, 2d Sess., UN doc. A/AC.14/32 (1947), p. 304, estimating that in the proposed Jewish State there would be a large number of Arabs.

²⁷⁸ See, U.N General Assembly Resolution 181, U.N. GAOR, 2nd Sess., Pt. 1B, art. 10, p d, UN doc A/519 (1947).

(iii) The Right of Return Under Human Rights Law:

Human rights law, which confers rights directly upon individuals and not through a State, contains the right of return.²⁷⁹ This individually held right is found in a broad body of international and regional human rights instruments and, arguably, constitutes a customary norm of international human rights law.²⁸⁰

The Universal Declaration of Human Rights²⁸¹ (UDHR), which was adopted by the General Assembly of the United Nations in 1948, constitutes the ‘foundation’²⁸² for the individually held right of return in human rights law. Article 13(2) of the UDHR states that:

“Everyone has the right to leave any country, including his own, and to return to his country”²⁸³

The International Covenant on Civil and Political Rights²⁸⁴ (ICCPR) also incorporated the individually held right of return, stating in Article 12(4) that:

“No one shall be arbitrarily deprived of the right to enter his own country”²⁸⁵

²⁷⁹ See Boling, *1948 Palestinian Refugees*, op.cit, p 36; see also Quigley, *Displaced Palestinians*, op.cit, p 196.

²⁸⁰ See, Lawland, K. *The Right to Return of Palestinians in International Law*, vol. 8, no.4 International Journal of Refugee Law (October 1996), op.cit, 532, 544.

²⁸¹ For the full text of (UDHR) see, Brownlie, *Basic Documents*, op.cit, p 21-27.

²⁸² See, Boling, *1948 Palestinian Refugees*, op.cit.

²⁸³ See, Brownlie, *Basic Documents*, op.cit, p. 24.

²⁸⁴ For the full text of the ICCPR see, *ibid*, pp. 125-144.

²⁸⁵ *Ibid.*, p. 130.

Similarly, the Convention on the Elimination of All Forms of Racial Discrimination²⁸⁶ (CERD), incorporates the individually held right of return in Article 5(d)(ii),²⁸⁷ and lists it as an enumerated right subject to the categorical no-discrimination rule of the opening paragraph of Article 5 which states that:

“State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...d(ii) The right to leave any country, including one’s own, and to return to ones country”

Additionally, the American Convention on Human Rights contains the right of return in its Article 22(5).²⁸⁸ The African Charter on Human and People’s Rights refers to the right of return in Article 12(2).²⁸⁹ The European Convention for the Protection of Human Rights and Fundamental Freedoms also contains the right of return in Article 3(2) of Protocol No. 4.²⁹⁰

Israel is a signatory to the ICCPR and ratified it too without making any reservations to Article 12(4), which addresses the right of return. Consequently, this article is fully binding for Israel being a multilateral treaty obligation.²⁹¹

It must be noted that the phrasing of the right of return in Article 12(4) of the ICCPR,

²⁸⁶ For the full text of the CERD see *ibid*, pp. 148-162.

²⁸⁷ *Ibid.*, p. 151-152.

²⁸⁸ *Ibid.*, p. 504.

²⁸⁹ *Ibid.*, p. 554.

²⁹⁰ See, *European Convention for the Protection of Human rights and Fundamental Freedoms*, 213 UNTS 233; see also “*Protocol No.4*”, in 46 European Treaty Series.

²⁹¹ See Boling, *1948 Palestinian Refugees*,. *op.cit*, p 37; see also Quigley, *Displaced Palestinians*, *op.cit*. p 196.

which uses the term 'enter' is broader than the term 'return' which is used in Article 13(2) of the UDHR. This phrasing of the ICCPR would cover the situation of second, third or fourth generation of Palestinian (and other) refugees whose families have been seeking to exercise their right of return.²⁹²

The United Nations Human rights Committee, which is the official body established under the ICCPR and charged with its interpretation, issued in November 1999 "*General Comment No. 27*,"²⁹³ interpreting the meaning of Article 12 of the ICCPR, generally and addressing the Article 12(4) right of return specifically. It confirms definitively the applicability of the Article 12(4) right of return to the case of Palestinian refugees in general and the 1948 refugees in particular. It establishes that the phrase "his own country" as used in Article 12(4) applies to a much broader group than merely "nationals" of a state. The term "his own country" according to the comment,²⁹⁴ is intended to include "nationals of a country who have been stripped of their nationality in violation of international law, individuals whose country of nationality has been incorporated in or transferred to another country, whose nationality is being denied to them and stateless persons arbitrarily deprived of the right to acquire the nationality of their long term residence".²⁹⁵ Palestinian refugees in general and the 1948 refugees in particular, fit actually into each of the three above mentioned categories listed in *General Comment No. 27*. Consequently, it can be stated that the Palestinian refugees hold an absolute right of return under Article 12(4) of the ICCPR.

²⁹² See, Boling, *1948 Palestinian Refugees*, Ibid.,

²⁹³ See, *General Comment No. 27: Freedom of Movement (Art. 12)*, U.N. Human Rights Committee, UN doc. CCPR/C/21/Rev.1/ Add.9 (2 November 1999) [hereinafter *General Comment No. 27*].

²⁹⁴ Ibid.,

²⁹⁵ Ibid.,

It must be mentioned, that some legal commentators have argued that Israel's invocation of security considerations is legitimate grounds for refusing to admit the Palestinians at least with respect to their right of return under human rights law. They argue that the general limitation clause of Article 29(2) of the UDHR which states that

:

“In exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society,”²⁹⁶

permits the non-application of the right of return of Palestinians, arguing that “the influx of more than one and a half million mostly hostile refugees would without doubt violate the “rights and freedoms of others” in Israel and would damage “public order and the general welfare in a democratic society”²⁹⁷

In the United Nation's practice however, invocation of security considerations to evade an ‘obligation’²⁹⁸ to repatriate has been discouraged. With Namibia, which like Palestine, had been under a League of Nations Mandate, a process for the return of displaced Namibians was set in motion by the United Nations Security Council (SC), even though many of these Namibians had gone abroad to take up arms to drive South Africa out of

²⁹⁶ See, Brownlie, *Basic Documents*, op.cit, p. 27.

²⁹⁷ See, Lapidot, R. *The Right of Return in International Law*, 16 *Israeli Yearbook on Human Rights* (1967), p. 116; see also, Radley, K. *The Palestinian Refugees: the Right of Return in International Law*, 72 *AJIL* (1978), p. 613.

²⁹⁸ See, Quigley, *Displaced Palestinians*, op.cit. p. 200.

Namibia.²⁹⁹ The SC specified by resolution that repatriation of Namibians should be implemented by South Africa “pending a transfer of power without awaiting a political settlement”³⁰⁰

Additionally, The ICCPR, unlike the UDHR, has no general limitations clause. The ICCPR allows for the suspension of certain rights, including those found in Article 12(freedom of movement) during a declared emergency.³⁰¹ in certain Articles of the ICCPR, one finds limitations provisions applicable to the concerned article alone. Article 12 contains some limitations language. The Article states that:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

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

4. No one shall be arbitrarily deprived of the right to enter his own country.”³⁰²

It is evident from the structure of Article 12 that the limitations language found in paragraph 3 applies only to the rights enumerated in paragraphs 1 and 2. it does not apply

²⁹⁹ See, *Letter dated 10 April 1978 from the Representatives of Canada, Federal Republic of Germany, France, The UK and the USA to the President of the Security Council*, U.N. SCOR, 33rd Sess., Supp. For Apr-June 1978, p 17, 18 at Paragraphs 7(c), (d). UN doc. S/12636 (1978). These five states which had been asked by the UNSC to make recommendations, said that displaced Namibians should be allowed to return.

³⁰⁰ See, *Security Council Resolution 385*, paragraph 11(d), U.N. SCOR, 31st Sess, Resolutions and Documents, UN doc. S/INF/32 (1977).

³⁰¹ See Article 4 of the ICCPR cited in Brownlie, *Basic Documents*, op.cit, p. 127.

³⁰² *Ibid.*, p. 129.

to the right to enter one's country contained in paragraph 4. Hence, the ICCPR, unlike the UDHR, does not permit a State to condition the right of admission based on security considerations.

The only qualification to the obligation to permit entry and return, in accordance with 12(4) of the ICCPR, is if the refusal is not arbitrary. The qualification has been pointed to in support of Israel's refusal to admit displaced Palestinian.³⁰³ The term 'arbitrarily' potentially gives a State of nationality great latitude to exclude nationals. However, the drafting history of the Article 12 suggests that this was not the intent.³⁰⁴

The term 'arbitrarily' had been inserted into Article 12(4) for, a particular purpose that leaves its meaning narrow. Some States that had participated in the drafting used exile as a penal sanction in their domestic law and where, thus unwilling to accept a blanket obligation to grant entry. It was proposed then to compel a State to grant entry with an exception regarding nationals who had been exiled.³⁰⁵

On the other hand many States who had been participating in the drafting viewed exile as being unlawful as a penal sanction and were, thus unwilling to expressly state that exile as a penal sanction was permitted.³⁰⁶ Consequently, compromise language was sought to accommodate the use of exile as a penal sanction without spelling it out expressly or

³⁰³ See, Lapidot, *The Right of Return in International Law*, op.cit, p. 115.

³⁰⁴ See, Quigley, *Displaced Palestinians*, op.cit. p. 202.

³⁰⁵ Ibid.,

³⁰⁶ Ibid.,

directly and the word 'arbitrarily' was inserted to serve this purpose exclusively.³⁰⁷

It was also argued, regarding Israel's obligation, under human rights law, that Israel may legally delay repatriation of Palestinian refugees while it is still in a state of emergency.³⁰⁸

The ICCPR allows States to derogate from certain obligations, including the freedom to leave or enter a country, during a declared emergency.³⁰⁹ This is based on the argument that in certain extreme situations, a State can be justified in taking measures that are not warranted in normal times.³¹⁰

Israel's provisional parliament had declared, in May 1948 a state of emergency³¹¹, and that declaration remains in force. In 1991, when Israel ratified the ICCPR, it made a formal declaration to explain its emergency and announcing that it thereby derogates from its obligations under Article 9 only of the ICCPR, which relates to detention and arrest.³¹² The Israeli declaration did not mention Article 12(4) guaranteeing the right to enter one's country. To avail of the option of derogating from ICCPR protected rights, a

³⁰⁷ See, Novak, M. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (1993), p 219 where he states that: " In light of the historical background, there can be no doubt that the limitation on the right to entry expressed with the word 'arbitrarily' is to relate exclusively to the cases of lawful exile as punishment for a crime"; see also Bossuyt, M. *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987), pp. 260-263.

³⁰⁸ See, Lapidot, R. *The Right of Return in International Law*, op.cit, p. 115.

³⁰⁹ See, Article 4 of the ICCPR, cited in Brownlie, *Basic Documents*, op.cit, p. 127.

³¹⁰ See, Quigley, *Displaced Palestinian*, op.cit. p. 203.

³¹¹ See, *Law and Administration Ordinance*, Article 9(a), 1 Laws of The State of Israel 7 (1948).

³¹² See, *Multilateral Treaties Deposited With the Secretary-General on the United Nations*, at UN doc. ST/LEG/SER.E/14 (1996), p. 142.

State must indicate in its declaration, the specific provision from which it derogates.³¹³

The fact that Israel did not mention Article 12(4) in its declaration indicates that its refusal to allow Palestinian refugees is not related or based on its declared emergency.³¹⁴

Nevertheless, Israel in principle can file a new communication in which it can indicate a need to derogate from Article 12(4). The ICCPR permits such a course of action so long as the State choosing to take this path is able to recite appropriate reasons for such a new communication regarding both, the existence of an emergency and to the need to derogate from particular provisions.³¹⁵

In the event that Israel does in fact file such a new communication, the validity of such a communication would be open to doubt. Israel would have to explain in such a communication why keeping the Palestinian refugees out was 'required by the exigencies of the emergency situation'³¹⁶, an assertion that might be difficult to sustain.

It must be noted also that Israel's long term state of emergency is without parallel in contemporary international practice³¹⁷, and in human rights law, a state of emergency must be temporary.³¹⁸ The Human Rights Committee that administers the ICCPR has said that an emergency may not be declared for an indefinite period or lengthy period as a pretext for the lengthy imposition of restrictions.³¹⁹

³¹³ See, Article 4(3) of the ICCPR, cited in Brownlie, *Basic Documents*, op.cit, p. 127.

³¹⁴ See, Quigley, *Displaced Palestinians*, op.cit. p. 204.

³¹⁵ Ibid.,

³¹⁶ See, Article 4 of the ICCPR, cited in Brownlie, *Basic Documents*, op.cit, p. 127.

³¹⁷ See, Quigley, *Displaced Palestinians*, op.cit. p. 204.

³¹⁸ Ibid.,

³¹⁹ See, *Report of the Human Rights Committee*, U.N. GAOR, 34th Sess., Supp. No. 40, UN doc. A/34/40

The situation on which other States have declared emergencies, and which have been ascertained by decision making bodies as appropriate, have involved ongoing civil armed conflict of limited duration. The European Court of Human Rights (ECHR), administers the European Convention for the Protection of Human Rights and Fundamental Freedoms³²⁰, which contains derogation provisions similar to those contained in the ICCPR.³²¹ The ECHR has defined an emergency as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”.³²² The Court found a validly declared emergency in Ireland in 1956-1957, because of the activities of the Irish Republican Army (IRA) activities over a nine month period.³²³ In a later case, the ECHR found a validly declared emergency in Northern Ireland, again on the basis of military activities of the IRA.³²⁴ In a third case, however, the European Commission of Human Rights, which also adjudicates violations under the European Convention for the Protection of Human Rights and Fundamental Freedoms,³²⁵ found invalid a declared emergency in Greece, owing to the fact that, unlike the situations referred to above in

(1979), p. 20.

³²⁰ See, *European Convention for the Protection of Human rights and Fundamental Freedoms*, 213 UNTS 233, op.cit, Article. 19.

³²¹ Ibid., Article 15 states that “ In the time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”

³²² See, *Lawless Case*, (Republic of Ireland), 1961 Yearbook of the European Convention on Human Rights, pp. 472-474.

³²³ Ibid., p. 474.

³²⁴ See, *Ireland v. United Kingdom Case*, 1978 Yearbook of the European Convention on Human Rights, pp. 602, 608.

³²⁵ See, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 233, op.cit, Article. 19.

Northern Ireland, there was no military activity at the time.³²⁶

Judging by the standard reflected in the abovementioned European cases. A new Israeli declaration of emergency would probably be invalid. The factual assertion on which Israel's continuing declaration of emergency may rely, namely, that Israel has on a continuing basis been the object of armed attacks from outside, would be difficult to sustain. Even if this assertion were accurate for the earlier period of Israel's existence, it would not seem to be so in an era of actual and anticipated peace agreements with neighboring Arab States.³²⁷

(iv) the Right of Return under International Humanitarian law:

The territory to which some of the displaced Palestinians seek return; namely the West Bank, is territory that falls under Israel's belligerent occupation. Another body of law, humanitarian law, guarantees a spectrum of rights to persons who inhabit territory that is occupied by a foreigner. One such right is repatriation of those entitled to it.³²⁸ Both the Hague Regulations annexed to the 1907 Hague Convention (IV) Respecting the laws and Customs of War on Land³²⁹ [hereinafter the "Hague Regulations"], (which are universally

³²⁶ See, *Greek Case*, cited in Quigley, *Displaced Palestinians*, op.cit, footnote 188.

³²⁷ See, Quigley, J. *Palestine and Israel: A Challenge to Justice*, (1990), pp. 57-65, 156, 161-167, 195, 159-200 (Making the, controversial and heavily contested argument, that Israel had not been the target of aggression in the hostilities of 1948, 1956, 1967 and 1982).

³²⁸ See, Wright, Q. *Legal Aspects of the Middle East Situation*, 33 *Law and Contemporary Problems* (1968), pp, 5, 19, stating , with reference to Palestinians displaced from occupied territories in 1967 that "the law of war, applicable to all *de facto* hostilities, requires the occupant to spare the civil population , and refusal to allow repatriation ... would violate international law".

³²⁹ See, Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land: *Regulations Respecting the Laws and Customs of War on Land*" [hereinafter *Hague Regulations*], in Roberts, A and Guelff, R. *Documents on the Laws of War*, third edition (2000) [hereinafter, Roberts and

recognized, including by Israel³³⁰, to have achieved customary status by 1939) and the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in the Time of War³³¹ [hereinafter the “IV Geneva Convention”] (to which Israel is a signatory) provide for the right of return of displaced persons to their homes following the cessation of hostilities. Thus the right of return exists as a binding norm of humanitarian law, and Israel is under a corresponding positive obligation to ensure its implementation.

The Hague Regulations on law of war require an occupant to respect and maintain the “public life” of territory.³³² The repatriation of nationals or non-national residents who happen to be abroad for whatever reason when the occupant enters into control would seem necessary in regard.

The sources of the right of return in the IV Geneva Convention are Article 4, Article 6(4) and Article 158(3). Article 4 defines the “protected persons” who are covered by the Convention as:

“...those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of

Guelf, *Laws of War*], p. 73.

³³⁰ The Israeli High Court has ruled routinely, beginning with the famous *Eichmann* case, that the Hague Regulations constitute customary international law binding upon Israel. See, *Attorney-General of Israel v. Adolf Eichmann*, 36 International Law reports (ILR), (29 May 1962), p. 293. This ruling has been consistently upheld since then by the Israeli High Court.

³³¹ See, *the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in the Time of War* [hereinafter the *IV Geneva Convention*], in Roberts and Guelf, *Laws of War*, op.cit, p. 299.

³³² See, Article 43 of the *Hague Regulations*, in Roberts and Guelf. *Laws of War*, op.cit, p. 80. the Article requires the occupier to maintain *la vie public* in the occupied territory. The French text of the Hague regulations is the only official text. The term used in the erroneous English translation of the Article “public order and safety” is simply incorrect. See, Schwenk, E. *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 Yale Journal of International Law (1945), pp. 393, 398 constructing *l'ordre et la vie public* to mean “general safety and social functions and ordinary transactions which constitute daily life”. See also Dinstein, Y. *The Israel Supreme Court and the Law of Belligerent Occupation: Deportations*, 23 Israeli Yearbook on Human Rights (1993), pp. 1, 19-20, noting that the Israeli Supreme court has stated that the English text is wrong.

a Party to the conflict or Occupying Power of which they are not nationals”³³³

This definition of protected persons cover *all* habitual residents of a territory who may have become temporarily displaced from their place of origin during the conflict (for whatever reason), and provision for their repatriation has been made in two separate Articles of the Convention. The first repatriation provision appears in Article 6(4), which states that:

“Protected persons whose release, repatriation or re-establishment may take place after [the Convention would otherwise cease to be applicable] shall meanwhile continue to benefit by the present Convention”³³⁴

This provision covers “end dates” of the applicability of the Convention. Specifically, it states clearly that the Convention shall remain in effect even after the cessation of hostilities for those protected persons.

The second repatriation provision appears in Article 158, which states:

“...a denunciation ...shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.”³³⁵

This second repatriation provision covers the procedures whereby a state may denounce the Convention. Specifically, Article 158(3) states that a denunciation may not take effect

³³³ See Article 4 of *IV Geneva Convention*, in Roberts and Guelf, *Laws of War*, op.cit, p. 302.

³³⁴ See, Article 6, Paragraph 4 *IV Geneva Convention*, in Roberts and Guelf, *Laws of War*, ibid., p. 304.

³³⁵ See, Article 158 *IV Geneva Convention*”, in Roberts and Guelf, *Laws of War*, ibid., p. 354.

until repatriation of protected persons has occurred.

It is clear from the foregoing that the drafters of the IV Geneva Convention intended for the unqualified voluntary repatriation to their homes of origin of any and all habitual residents of a territory undergoing conflict temporarily displaced (for whatever reason) during that conflict. Thus the IV Geneva Convention incorporated the general customary humanitarian law right of return, which it inherited from the Hague Regulations

It should be noted that there is a second right of return in humanitarian law, that relates to “forcible (mass) expulsion” humanitarian law right of return. The issue of Forcible expulsion will be dealt with elsewhere in this study.³³⁶

It will suffice at this stage to state that this type of right of return found in humanitarian law exists as a legal remedy (corrective action) in cases where states have forcibly expelled populations in violation of international law. Forcible expulsions cases where displaced persons have been deliberately forced out of their homes (e.g., at gunpoint or by deliberate military “stampeding” of any type) and then subsequently have been prevented from returning to them.³³⁷

Even a single case of forcible expulsion is prohibited under humanitarian law. The prohibition is accordingly magnified when large numbers of people are forcibly displaced. Because the rights of more people are adversely affected in cases of “mass”

³³⁶ See Chapter (III) of this study.

³³⁷ See, Boling, *1948 Palestinian Refugees*, op.cit, p.32.

forcible expulsion, the illegality of that action is even greater, under international law. Further, forcible expulsions carried out on a discriminatory basis are even more strongly prohibited because of the general customary norm of international law prohibiting governmental discrimination based upon race, ethnicity, religion or political belief generally. However, the involuntary (i.e., forcible) transfer (i.e., expulsion) of even a single individual - e.g., through deportation - is conclusively prohibited under humanitarian law.³³⁸

The outcome of a forcible expulsion is a population of habitual residents deliberately transferred away from, and prevented from returning to, their homes of origin - all against their will. The rule is quite simple: “deliberate mass expulsions of a population and population transfers are ... prohibited under international law.”³³⁹

(v) The Right of Palestinian Refugees to compensation:

In addition to the firm right of return that Palestinian refugees enjoy on the bases explained above, they also have the right to compensation. This right is explicitly stated in UNGA Res. 194(III) as explained previously in this study.

There is no doubt that in international law the breach of an international obligation carries with it the obligation to make adequate reparation, while the precise identification of the applicable law has some important consequences. That law is international law, but

³³⁸ Ibid.,

³³⁹ See, Rosand, E. *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 Michigan Journal of International Law (Summer 1998), pp. 1091, 1117.

potential Palestinian claims arise not merely in a purely 'civil' context, such as the expropriation of property without compensation, but in a context which is *delictual*; in particular, the context involved the use of force in breach of the United Nations Charter and general international law. The measure of damages will therefore need to reflect this basis of liability and the imputability to Israel of the consequences of its unlawful actions.³⁴⁰

Among others, the test of remoteness of damage will require to be applied favourably, where there has been a deliberate intention to injure. The expulsion of Palestinians and the expropriation of their property, among others, were the result of policies and intentional acts adopted at the highest political level.³⁴¹ As a leading authority, Professor Bin Cheng, observes:

“While, however, the objective criterion of normality and the subjective criterion of reasonable foreseeability generally coincide in the determination of proximate causality, the subjective criterion alone applies *in the case of exceptional consequences intended by the author of the act. If intended by the author, such consequences are regarded as consequences of the act for which reparation has to be made, irrespective of whether such consequences are normal, or reasonably foreseeable....* The duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, *as well as all intended damages.*”³⁴²

The governing principle of effective reparation requires extensive compensation in the

³⁴⁰See, Goodwin-Gill, *International Framework*, op.cit, p. 30.

³⁴¹ See, Chapter I of this study.

³⁴² See, Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals*, (London, 1953, reprinted, 1987), pp. 251, 253 and the authorities there cited.

case of an unlawful act.³⁴³ Already in 1949, Israel recognized the principle of *full compensation*, inter alia, to be paid to villagers for land they had left, as a consequence of the establishment of the Demarcation Line.³⁴⁴

It also must be stressed in this regard that the legal authority of General Assembly resolution 194 (III) in relation to the ‘general international law of compensation’ and its impact on the obligations of States, particularly Israel, cannot be ignored. Paragraph 11 refers to compensation for the property, among others, for ‘those choosing not to return’. Although the resolution leaves open important questions, such as *who* should compensate *and how*, clearly the option (compensation for property in the event of non-return) is one which can only be exercised by the displaced and the dispossessed themselves. Compensation is due, ‘for loss of or damage to property... under principles of international law or in equity’, and the General Assembly has recognized that Palestinians ‘are entitled to their property and to the income derived from their property in conformity with the principles of justice and equity’³⁴⁵

In the *Chorzow Factory* case in 1923, the Permanent Court of International Justice, on an issue involving expropriation emphasized that reparation ‘must, as far as possible, wipe

³⁴³ See, *Chorzow Factory Case*, op.cit, para. 34; see also, *International law Commission ‘Final Articles on State Responsibility for Internationally Wrongful Acts*, adopted in July, 2001 and annexed to UNGA Resolution A/RES/56/83, 28 January 2002 [Hereinafter *ILC, Final Articles on State Responsibility*]: Article 31: Reparation.”1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.” Article 37: Compensation. “1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

³⁴⁴ See, *General Armistice Agreement between Jordan and Israel*, (3 April 1949), 42 UNTS, p. 303.

³⁴⁵ See, *United Nations’ General Assembly Resolution 194 (III)*, para. 11(1), UN doc. A/810 (1948), op.cit.

out all the consequences of the illegal act and establish the situation which would, in all probability, have existed if that act had not been committed.’ This could be achieved by way of restitution in kind, or, if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, or the payment of damages for loss sustained which would not be covered by restitution in kind.³⁴⁶ In this case, the Court emphasized the priority of restitution (*restitutio in integrum*). Only if this is not possible does the obligation become that of paying the value of the property and compensation for resulting loss.

Central to the Court’s reasoning was the distinction between a lawful expropriation, which required fair compensation and the ‘seizure of property, rights and interests which could not be expropriated even against compensation’. In the *Chorzow Factory* case, the act of expropriation was illegal because it violated a treaty provision; in the case of Palestinian property claims, the dispossession is illegal among others things, because it violates the rights of individuals and groups, including a ‘recognized self-determination unit’³⁴⁷, to property and territory.

The International Law Commission (ILC) has maintained these basic principles in its Final Articles on State Responsibility adopted in July 2001 and annexed to General Assembly Resolution 56/83 of 28 January 2001. According to article 31, ‘injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State’ and the responsible State is ‘under an obligation to make full reparation for the

³⁴⁶ See, *Chorzow Factory Case*, op.cit.

³⁴⁷ See, Goodwin-Gill, *International Framework*, op.cit, p. 31.

injury caused by the internationally wrongful act.’³⁴⁸, The ILC further notes that full reparation for injury ‘shall take the form of restitution, compensation and satisfaction, either singly or in combination.’³⁴⁹

Specifically in relation to restitution, the ILC Articles recognize that the responsible State is obliged ‘to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution...’ is not materially impossible, and would not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.³⁵⁰ So far as damage is not made good by restitution (and, indeed, in practice, compensation tends to enjoy priority over restitution), then the responsible State is obliged to compensate, such compensation to cover ‘any financially assessable damage including loss of profits insofar as it is established’³⁵¹; interest is also payable.³⁵² In the words of the Permanent Court in *Chorzow Factory Case*, compensation means the ‘payment of a sum corresponding to the value which a restitution in kind would bear.’³⁵³

Also, in practice, States have paid compensation to and on behalf of refugees from their territory and of victims of persecution and other human rights violations.³⁵⁴ As the

³⁴⁸ See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 31.

³⁴⁹ Ibid., Article. 34.

³⁵⁰ Ibid., Article. 35

³⁵¹ Ibid., Article. 36(2), Note Article 31, which provides that injury consists of ‘ any damage, whether material or moral’.

³⁵² Ibid., Article. 38.

³⁵³ See, *Chorzow Factory Case*, op.cit, at Para. 47. the duty to make reparation also applies where there is no direct taking of property, but such an interference with property rights as to render them useless, such as deprivation of the effective use, control and benefits of property, *Tippets v. TAMS-ATTA*, 6 Iran-US Claims Tribunal (1985), pp. 219,225.

³⁵⁴ According to Principle 4 of the International Law Associations Cairo Declaration of Principles of

UNCCP recorded in a 1950 working paper:

“8. After World War II, most of the former Axis and Axis-occupied countries passed laws in favour of such persons who had been persecuted or forced to leave the country. In the US occupied zone of Germany on 10 August 1949, a General Claims Law was passed. Article I of this law provides:

‘Those persons shall be entitled to restitution pursuant to this law who, under the National Socialist dictatorship (30 Jan 1933 to 8 May 1945), were persecuted because of political convictions or on racial, religious or ideological grounds and have therefore suffered damage to life and limb, health, liberty, possessions, property or economic advancement.’

Machinery is set up under this law for the filing of individual claims and provisions are made for the payment of compensation. In the British zone of occupation in Germany, Law No. 59 entitled Restitution of identifiable Property to Victims of Nazi Oppression was passed on 12 May 1949. Article 1 of this law provides:

“The purpose of this Law is to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible) to persons whether natural or juristic who were unjustly deprived of such property between 30 January 1933 and 8 May 1945 for reasons of race, religion, nationality, political views, or political opposition to National Socialism,’

This law also establishes a procedure for the filing of individual claims for restitution

International Law on Compensation to Refugees, ‘a State is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated to compensate an alien’: 87 AJIL (1986), p. 532. Although no international mechanisms presently exist through which refugees may seek compensation. There are a number of relevant precedents including, for example, the compensation arrangements established by the Federal Republic of Germany for those persecuted under the Nazi regime. Article 3 of the Hague Convention respecting the Laws and Customs of War on Land provides that ‘a belligerent party which violates.., the (Regulations) shall, if the case demands, be liable to pay compensation’: in Hague Regulations annexed to Convention No. IV respecting the Laws and Customs of War on Land, 1907 cited in Roberts and Guelff, *Laws of War*, op.cit, p. 80. It has also been argued that violations of human rights entail the obligation to provide for compensation as a means to ‘repair’ a wrongful act or a wrongful situation; see Van Boven. T., *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*: UN doc. E/CN.4/Sub.2/1990/10; see also 1984 United Nations Convention Against Torture cited in Brownlie, *Basic Documents* op.cit, p. 38. See also UNCCP, *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*. Working paper prepared by the Secretariat). UN doc. W/41, 18 March 1950.

with appropriate provision for compensation

9. Even before these acts for individual restitution in Germany, the Allied Governments in the Final Act of the Paris Conference on Reparations of 21 December 1945 and the Agreement of 14 June 1946 provided for a lump sum payment into a fund for non-repatriable victims of German action”³⁵⁵

More recent and related examples of States providing compensation to refugees, are also found in the mechanisms for recovery of property established in Bosnia and Herzegovina, further to the Dayton Accords, and compensation for Asians expelled from Uganda in 1970.³⁵⁶

(b) bases of Jordan’s right to bring compensation claims, on behalf of its nationals who are of Palestinian refugee origin, to and against Israel and to seek to implement the right of return and its right to seek compensation as a host country.

Palestinian refugees in Jordan³⁵⁷ and Jordan as a host country are analogous to other victims that have sustained injuries as a result of a State’s violation of international law³⁵⁸ and the other bodies of law identified previously in this chapter. As early as 1646, Grotius enunciated the legal maxim that every ‘fault creates the obligation to make good

³⁵⁵ See, UNCCP. *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, (Working paper prepared by the Secretariat). UN doc. W/41, 18 March 1950. op.cit. paras. 8-9.

³⁵⁶ See, Goodwin-Gill, *International Framework*, op.cit, p. 32-33.

³⁵⁷ The term Palestinian Refugees is used despite the fact that the overwhelming majority of Palestinian refugees in Jordan are full Jordanian national as explained in Chapter (1).

³⁵⁸ See, Lee, L. *The Right to Compensation: Refugees and Countries of Asylum*”, 80 AJIL (1986), p. 536. [Hereinafter. Lee, *The Right to Compensation*]

the loss.³⁵⁹ To deny the liability of a State for wrongs it has committed would in effect abolish the duty of a State to observe the rules of international law.³⁶⁰ The most common remedy for the breach of an international obligation is adequate compensation, which may be defined as “the payment of such a sum as will restore the claimant to the position the claimant would have enjoyed had not the breach occurred”.³⁶¹ The duty to make reparation is based on the fact that ‘in international law, as in domestic law, rights without remedies are illusory, i.e., ‘no rights’ at all’.³⁶²

Eagleton described state responsibility as follows:

“Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent State....Whether reparation be made through diplomacy or in any other manner is a matter of procedure, and an entirely distinct problem.”³⁶³

Over the centuries, this fundamental principle has been a cornerstone of interstate relations.³⁶⁴ Article 1 of the International Law Commission’s (ILC) final articles on Responsibility of States for internationally wrongful acts³⁶⁵ (Part One) reflects the importance of this principle by providing that “Every internationally wrongful act of A State entails international responsibility of that state.”³⁶⁶

³⁵⁹ See, Grotius, Hugo, *De Jure Belli Ac Pacis*, book. II, chapter. XVII, p. 430 (1646 ed., Carnegie Endowment Translation. 1925.). Three elements must be present: (1) possible fault on part of the respondent government, (2) loss sustained, and (3) reparation to make good the loss.

³⁶⁰ See, Lee, *The Right to Compensation*, op.cit.

³⁶¹ See, Oliver, *Legal Remedies and Sanctions*, in Lillich, R, *International Law of State Responsibility for Injuries To Aliens*, (1983), pp. 61, 71.

³⁶² *Ibid.*, p. 61

³⁶³ See, Eagleton, C, *The Responsibility of States in International Law*, (1928), p. 23-24. [hereinafter, Eagleton, *The Responsibility of States*]

³⁶⁴ See, Lee, *The Right to Compensation*, op.cit, p. 537.

³⁶⁵ See, ILC, *Final Articles on State Responsibility*, op.cit.

³⁶⁶ *Ibid.*, Article. 1.

The right of return and right to compensation which Jordan may seek to bring into effect on behalf of its Palestinian Refugee population is founded on the premise of Israel's responsibility for the wrongful act of generating refugees, its failure to repatriate them, and failure to compensate them. Jordan's right to seek compensation as a host country also emanates from Israel's aforementioned internationally wrongful acts that caused injury to Jordan.³⁶⁷ This chapter will proceed to explore in further detail the issue of Israel's responsibility owed to Jordan, and in certain aspects to the international community, at large as a result of its internationally wrongful act of creating the circumstances leading to the exodus of Palestinian Refugees and also owed to Jordan as a host State.

It will then proceed to assess the procedures and mechanisms provided by the Jordan-Israel Peace Treaty of 1994³⁶⁸ that would give Jordan the right to seek to enforce the right of return/compensation for its Palestinian refugee population and its right to seek compensation as a host State.

(i) State Responsibility:

Every internationally wrongful act of a certain State entails the international

³⁶⁷ See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 42

³⁶⁸ See, *Treaty of Peace between the Hashemite Kingdom of Jordan and the State of Israel*, signed on 26 October 1994, in 34 *International Legal Materials (ILM)* (1995), p. 43. [Hereinafter "Jordan-Israel Peace Treaty"].

responsibility of that State.³⁶⁹ This international responsibility of a State arises when there is ‘a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of the origin or character’.³⁷⁰ Therefore a State would be in breach of an international obligation when its act or omission in question is not in conformity with what is required by the obligation concerned³⁷¹ “regardless of its origin or character.”³⁷² Such an international obligation may arise from a customary international law rule, a treaty, a general principle applicable within the international order, or by a unilateral act.³⁷³

States act through entities and individuals. Accordingly, a wrongful act would only occur when conduct (action or omission) of the entity or individual is attributable to the State concerned under international law and when the conduct constitutes a breach of an international obligation of that State³⁷⁴ regardless of the origin or character of the obligation in question.

Every State is injured through the materialization of an internationally wrongful act is entitled to invoke responsibility of another State if the obligation breached is owed to the State concerned individually or a group of States including that state, or the international

³⁶⁹ See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 1.

³⁷⁰ *Ibid.*, Article. 12.

³⁷¹ See, Crawford, J. *The International Law Commission Articles on State Responsibility: Introduction, Text and Commentaries*, (2002), p. 127 [hereinafter, Crawford, *The International Law Commission*]

³⁷² See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 12. Additionally, in the *Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia)*, the ICJ stated that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect, ICJ Reports (1997), p. 38, para. 47.

³⁷³ See, Crawford, *The International Law Commission*, op.cit

³⁷⁴ See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 2.

community as a whole, and the breach of the obligation specifically affects that State.³⁷⁵

Applying these rules to the specific subject matter of this study, clearly demonstrates, as has been shown previously in this chapter, that Israel has in fact breached international obligations through the systematic measures and conduct that it had adopted with the intention to expel Palestinian Arabs in 1947-1949 period, taking their land and property and failure to repatriate them and compensate them in a manner that was-and still is-inconsistent with international obligations arising primarily from customary international law rules that were, at the time binding, upon Israel. It also clearly demonstrates that Israel has breached international obligations emanating from customary international law rules and from treaties that were binding upon it through its occupation of the West Bank in 1967 and the deliberate policies adopted by Israel with the intention of expelling residents of the West Bank, including, the establishment of settlements, land confiscation and moving large portions of its civilian population to the West Bank, in addition to its failure to repatriate them and compensate them until now. The nature of these breaches by Israel is one that has a continuing character.³⁷⁶

The acts committed during the 1947-1949 period by Jewish paramilitary groups such as the *Haganah*, *Palmach*, *Irgun* are acts that are attributable to the State of Israel. Article 10 of the ILC final articles on State Responsibility states that:

“2. the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be

³⁷⁵ Ibid., Article. 42.

³⁷⁶ Ibid., Article 14.

considered an act of the new State under international law”³⁷⁷

Clearly, this article applies to the Jewish paramilitary groups that operated in mandate Palestine, primarily under the direction of the Jewish Agency, prior to the establishment of the state of Israel. The Jewish Agency and those groups subsequently became the main governmental and Army apparatus of the New State of Israel. They are clearly within the scope of Article 10(2) of the Final Articles on State Responsibility which ‘focuses on the continuity of the movement concerned and the eventual new government or State, as the case may be’.³⁷⁸

Issues of attribution are even clearer regarding the conduct of the State of Israel from 1948 onwards.

Clearly Jordan is an injured state within the meaning of Article 42 of the ILC final Articles on State Responsibility for the obligations breached by Israel regarding the issue of Refugees ‘specifically affected Jordan’ and the obligations breached by Israel, or some of them at least are owed the ‘international community as a whole’. The fact the almost half of Jordan’s population today is of Palestinian refugee origin demonstrates clearly that the generation of refugees by Israel ‘specifically affected Jordan’. This unnatural growth in population has indeed taken its heavy toll on Jordan. Jordan’s inherent meager water resources were further exhausted by this unnatural growth in population emanating from the influx of Palestinian Refugees in the 1947-1949 and the post June 1967 era.

³⁷⁷ Ibid., Article. 10.

³⁷⁸ See, Crawford, *The International Law Commission*, op.cit, p. 119 (Commenting on Article 10(2))

Jordan's meager economic, financial and natural resources have been adversely affected by this unnatural growth in population.

Israel's failure to repatriate and compensate those Jordanian nationals of Palestinian refugee origin is a breach of international obligations owed to Jordan by Israel in the context of State Responsibility. Equally, it is a breach that has affected Jordan as a host state for these refugees as explained above that would entitle Jordan for reparation.

Palestinian Refugees in general, including those who are Jordanian nationals face formidable as well as procedural obstacles under international law to seeking to implement the right of return or compensation. They do not inherently have a standing to nor is there a forum³⁷⁹ in which they can directly bring claims to or against Israel. In the case of Palestinian Refugees who are Jordanian nationals, Jordan can extend diplomatic protection to them by espousing their claims emanating from the wrong that was done to them by Israel and elevating it to an interstate level. Such a possible Jordanian action would have, for admissibility purposes to be in conformity with applicable rules relating to the nationality of claims and the claims in question would have to be ones to which the rule of exhaustion of local remedies that are available and effective have in fact been exhausted.³⁸⁰

1- Nationality of Claims.

³⁷⁹ See, Lee, *The Right to Compensation*, op.cit, p. 537.

³⁸⁰ See, ILC, *Final Articles on State Responsibility*, op.cit, Article. 44.

Jordan is the State of Nationality for those Palestinian refugees who are Jordanian nationals. The issue of nationality, which is traditionally central to the exercise of diplomatic protection, is far from straightforward in the unique circumstances of Palestinian claims. The existing rules, which are based on State practice in typical situations of loss or injury suffered by citizens abroad, could present difficulties in negotiations, related forums or in litigation before a tribunal applying international law. In the following paragraphs, it is attempted to set out as clearly as possible the problems, and the scope for solutions. The argument for, Jordan's protection can be made with a reasonable chance of success, but in the circumstances there still remains an area of uncertainty.

Jordan is in principle entitled to present claims on behalf of its nationals. In practice, this means that the Kingdom of Jordan is entitled to put forward claims to and against Israel on behalf of, or in respect of injury suffered by, Palestinian Arabs who now have Jordanian nationality. There is thus no reason why Jordan should not proceed to put forward claims on behalf of *present* Jordanian nationals. The categories of claimants would also include the heirs of those who were killed in the massacres of 1948-1949 or 1967 and subsequently, as well as Jordanians who had to flee the West Bank after 1967. The simple presentation of such claims, however, is not the end of the matter, and Israel can be expected to make counter-arguments, particularly on Jordan's legal entitlement to exercise protection.

Among those counter-arguments, Israel will likely argue that Jordan is not entitled to

present claims in respect of injury to its *present* nationals unless they *also* had Jordanian nationality at the time they suffered injury. International law generally requires that the claimant State's nationality must be possessed not only at the time the claim is made, but also at the time the injury is suffered (the rule of 'continuous nationality'). If, as is probable, Israel does so argue, it will then be for Jordan to counter that argument. This it can possibly do by arguing, either separately or in combination, that:

(a) In many cases (especially as regards displaced persons) the injured person was a Jordanian national at the time of the injury as well as being one now; this will be a matter to be demonstrated in each individual case.

(b) Even if they were not Jordanian nationals at the time of the injury, and although the international rule invoked by Israel is the general rule, it is not an absolute rule.

(c) In particular, it has no application to mass expulsions of people who at the time they suffered injury had no other State entitled to protect them and who had fled to, had established close, enduring and effective links with, but were now nationals of, the State which is not seeking to protect them.

(d) By Article 8 of the Peace Treaty³⁸¹, Jordan's *locus standi* in relation to both refugees and displaced persons, with no mention of nationality, has been accepted by Israel, which is now estopped from denying Jordan's right to protect them. The framework within the Jordan-Israel Peace treaty will be addressed in more detail later in

³⁸¹ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8 which addresses the issue of Palestinian Refugees.

this chapter and in chapter 4 of this study.

- (e) There are also *erga omnes* aspects to Jordan's claims. Such claims emanate from the nature of the breach of the international obligation in question by the state committing the wrong and the fact that the breach would be one that gives rise to state responsibility "which is entailed by serious breach by a State of an obligation arising under a peremptory norm of general international law"³⁸². Such breach of obligations *erga omnes* give rise to 'aggravated State Responsibility'.³⁸³ 'Ordinary responsibility' arises in the context of breaches of bilateral or multilateral treaties, or general rules laying down 'synallagmatic'³⁸⁴ obligations, meaning rules protecting reciprocal interests of States. The consequence of any breach of such rule creates a 'bilateral relation'³⁸⁵ between the delinquent State and the injured State. Thus, the whole relation remains a private bilateral matter between the two. 'Aggravated Responsibility', on the other hand has markedly distinct features from 'ordinary responsibility'. It arises when a State violates a general rule laying down a community obligation; that is a customary obligation *erga omnes* protecting fundamental international values such as peace, human rights and self determination of peoples, or an obligation *erga omnes contractantes* laid down in a multilateral treaty safeguarding those fundamental values and accordingly entitling 'any State or any other party to a multilateral treaty, can invoke the responsibility of the wrong doer, thus acting on behalf of the whole world community or the collectivity of State parties to a multilateral treaty in what is a 'public

³⁸² See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 40(1).

³⁸³³⁸³ See, Cassese, A. *International Law*, (2001), p. 184-206 [Hereinafter, Cassese, *International Law*]

³⁸⁴ *Ibid.*, p. 185.

³⁸⁵ *Ibid.*,

relationship'.³⁸⁶

The right of Palestinians to self-determination is arguably one of the peremptory norms, whose breach would lead to the rise of 'aggravated State Responsibility'.³⁸⁷ The right of return, taking into consideration the fact that most of the Palestinian population today is in the Diaspora, is indeed a necessary prelude to the exercise of the right of self-determination. Israel's refusal to allow Palestinian refugees to return would, inevitably impair their right to self-determination. Accordingly, a possible claim by Jordan to or against Israel in relation to allowing Palestinian Refugees to return and linking this to the right to self-determination would give Jordan a standing, owing to the peremptory nature of the right to self-determination.

Also the measures that were adopted by Israel against Palestinian Arabs leading them to flee, failing to repatriate them and the inherent discrimination in Israel's nationality legislation which was explained before in this chapter could qualify as 'racial discrimination' measures. Prohibition of racial discrimination is arguably a peremptory norm within the meaning of Article 40(1) of the ILC final Articles on State

³⁸⁶ Ibid.,

³⁸⁷ See, *Vienna Convention on the Law of Treaties*, (23 May 1969), UNTS, vol.1155, p.331. [Hereinafter, "*Vienna Convention*"]. Article 53 of the of the Convention defines a peremptory norm as one which is "...accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; see also, Crawford, *The International Law Commission*, op.cit, p. 247, commenting on the right to self-determination as one of the obligations arising under a peremptory norm of general international law. See also, *East Timor Case* (Portugal v. Australia), ICJ Reports (1995), p.102, para.29 stating that "the principle of self-determination ...is one of the essential principles of contemporary international law"; see also, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among State in Accordance with the Charter of the United Nations*", UNGA Resolution 2625 (XXV) of 24 October 1970, fifth principle; see also "*ILC, Final Articles on State Responsibility*", op.cit, Article. 40(1).

Responsibility.³⁸⁸

Basic rules of international humanitarian law are also peremptory norms.³⁸⁹ These rules clearly apply to Palestinian Refugees too. Breaches of peremptory norms give rise to ‘aggravated State Responsibility’. Thus, the nationality of claims rule becomes less relevant if the obligation breached is one that has a peremptory character.

Historically, the doctrine and practice of diplomatic protection have been linked to that of State responsibility for injury caused to aliens. This focus entailed certain consequential rules, for example, in regard to the connection required to exist between the party injured and the State seeking to exercise diplomatic protection. In the *Mavrommatis Concessions* case,³⁹⁰ the Permanent Court of International Justice ruled that:

“By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.”

Again, in *Mavrommatis*, the Permanent Court said:

“it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to

³⁸⁸ See, , Crawford, *The International Law Commission*, op.cit, p. 246 commenting on Article 40(1) in which he refers to ‘the prohibition against racial discrimination’ as a peremptory norm within the meaning of Article 40(1) of the ILC final Article on State responsibility.

³⁸⁹ Ibid.,

³⁹⁰ *Mavrommatis Palestine Concessions Case* (Greece v. United Kingdom), PCIJ, Ser. A. No.2,12 (30 Aug. 1924)

international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.”³⁹¹

In the present context, Israel may be expected to raise various objections to the entitlement of Jordan to exercise diplomatic protection on behalf of Jordanian citizens of Palestinian origin and other Palestinians connected with Jordan (that is, to take up their cause and to act for their benefit by reason of their having suffered injury and/or denial of justice in another State). These objections are likely to be based on, among others, aspects of the traditional doctrine relating to the ‘nationality of claims’.

In particular, Israel may argue that, at the time of their loss, the potential claimants were not in fact citizens of Jordan, or that they were stateless, or that they have ceased to be citizens of Jordan.

Various counter arguments may be made to such objections. First, in any agreement on the mechanisms for a final claims settlement, the parties - Jordan and Israel - may expressly provide for individual access to a compensation procedure for individuals, irrespective of their precise national status at the time of loss or at any time thereafter. Israel may also simply concede Jordan’s right to exercise protection on behalf of Jordanian Palestinians, or, in a lump sum settlement, it may be left to Jordan to decide how to award compensation and how to define the beneficiaries.³⁹²

³⁹¹ Ibid., See also Art. 3, 1961 Vienna Convention on Diplomatic Relations: Art. 5, 1963 Vienna Convention on Consular Relations.

³⁹² See Jennings, R and Watts, A. (eds.), *Oppenheim’s International Law*, 9th edn. (1992), I.513, for examples of treaties allowing the exercise of diplomatic protection of non-nationals [hereinafter, Jennings

Under the rules of the United Nations Compensation Commission, a government may submit claims on behalf of its nationals and, 'at its discretion, of other persons resident in its territory.'³⁹³

Israel may also be expected to seek to rely on the fact that, at the 1974 Summit in Rabat, Morocco, the Arab States recognized the PLO as the 'sole' representative of the Palestinian people. It may be argued that this recognition applied only to the political purpose of Palestinian self-determination and the struggle for independent statehood, and that it cannot therefore deprive Jordan of its normal right to protect its own nationals. Also, It must be stressed in this context that, when the Arab Summit recognized the PLO as the sole legitimate representative of the Palestinian People, Jordan made a clear reservation regarding this resolution of the Summit to the effect that this is 'without prejudice to the full and exclusive right of the Hashemite Kingdom of Jordan in relation to all nationals thereof'³⁹⁴

In any event, in relation specifically to refugees and displaced persons Israel is estopped from denying Jordan's entitlement to exercise protection by virtue of Article 8 of the Peace Treaty.

and Watts, *Oppenheim's*; See also *Encyclopedia of Public International Law*. 'Diplomatic Protection, pp1067-70' 'Agreement between Chile and the United States'. 11 June 1990: 30 ILM 412 (1991). 'Decision of the Chile-United States Commission with regard to the dispute concerning responsibility for the deaths of Letelier and Moffit', 11 Jan. 1992:31 ILM 1 (1992); Separate Concurring Opinion of Commissioner Francisco Orrego Vicuna, noting that the protecting State was not substituting its own rights, but was acting on behalf of the families protected: *ibid.*, Art. 5.2.

³⁹³ United Nations Compensation Commission. 'Provisional Rules for Claims Procedure', 1992. Art. 5(11(a). Note also that provision is made for the protection of persons not otherwise able to involve the assistance of a government; the Governing Council of the UNCC may appoint a person. authority or body for this purpose: *ibid.* ..Art. 5.2.

³⁹⁴ See for the text of the Resolution of the Arab League Rabat Summit Meeting and the text of Jordan's reservation in the authentic Arabic text, *MAJMUAT ALWATHAIK*, (1975), *op.cit.*, p. 243-245.

The rule relating to the continuity of nationality has been put as follows:

“From the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward.”³⁹⁵

Israel may argue that Jordan’s entitlement to exercise protection depends upon the individual having possessed Jordanian nationality at the time of injury, and of having retained such nationality to the moment at which any claim is finally determined, or at least until it is presented for settlement.

The rationale for this limitation is said to be the need for stability and certainty. However, in the context of the settlement of claims between Jordan and Israel, questions of stability and certainty are not so critical as they would be in determining a rule of general application.³⁹⁶ Also The International Law Commission’s Special Rapporteur on diplomatic protection considers that there is a need to reassess the continuity of nationality rule.³⁹⁷

³⁹⁵ See, Jennings and Watts, *Oppenheim’s*, op cit, p 512.

³⁹⁶ See Draft Convention on International Responsibility prepared by Louis II. Sohn and Richard R. Baxter for Harvard Law School; text in F. V. Garcia-Amador, *The Changing Law of International Claims*, Vol. II, p858, Art 23(6): ‘A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to that injury.’

³⁹⁷ ‘First report on diplomatic protection’, John R. Dugard, Special Rapporteur, International Law Commission: UN doc. A/CN.4/506/Add.1, 29 Apr. 2000, paras. 1, 18, 21: Jennings and Watts *Oppenheim’s*, op.cit p 426-7. See also Sir Gerald Fitzmaurice. Separate Opinion. *Barcelona Traction Light and Power Limited Case*, 1970 ICJ Reports, p. 101-102: [T]oo rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected. claimants unsupported and injuries unredressed, not on account of any thing relating to their merits, but because purely technical

Israel may also argue that Jordanian Palestinians injured by the events of 1947-49 were stateless persons, and therefore not within the protection of any government; or, though this is less likely in view of the policies of dispossession and transfer, that at that time they were (*de facto*) nationals of the (emergent) State of Israel, and that the 'new' State of nationality is not entitled to claim against the former State of nationality for wrongs which the individual may have suffered under the formers' jurisdiction at the time they suffered injury.

In fact, Palestinians, including those who subsequently fled to Jordan, were not stateless. At least initially during the conflict of 1947-1949, they were citizens of Palestine under British mandate and, as 'British protected persons, entitled to the protection of the Crown. With the termination of the British mandate on 14/15 May 1948, their nationality status may have become uncertain from a municipal law perspective, although from an international law perspective, their 'link' to the territory remained.³⁹⁸

With one exception only, Israeli courts held that Palestine citizens lost their citizenship

considerations bring it about that no State is entitled to act. This situation is the less defensible at the present date in that what was always regarded as the other main justification for the continuity rule (and even sometimes thought to be its real fons et origo), namely the need to prevent the abuses that would result if claims could be assigned for value to nationals of States whose Governments would compel acceptance of them by the defendant State, has largely lost its validity.

³⁹⁸ UN General Assembly resolution 194 (III) recognizes this principle; moreover, the international status of Palestinians as mandate citizens arguably entails a right of representation and protection in favor of countries of refuge, on behalf of the international community and on the basis of UN General Assembly and Security Council resolutions. In the absence of any such protection function, the attainment of the compensation and related goals established internationally would be unlikely and the relevant resolutions rendered ineffective.

without acquiring any other.³⁹⁹ Thus, in *Hussein's* case, the Court agreed that Palestinian citizenship had come to an end, and that former Palestine citizens had *not* become Israeli citizens.⁴⁰⁰

The Israeli Nationality Law confirmed the repeal of the Palestine Citizenship Orders 1925-42, retroactively to the day of the establishment of the State of Israel. It declared itself the exclusive law on citizenship, which was available by way of return (Law of Return, 5710-1950), residence, birth, and naturalization (Nationality Law, 5712-1952, s. 1).

Former Palestinian citizens of Arab origin might be incorporated in the body of Israeli citizens, but had to meet stringent conditions: they must have been registered under the Register of Inhabitants Ordinance on 1 March 1952; have been inhabitants of Israel on the day of entry into force of the Nationality Law (14 July 1952); and have been in Israel, or an area which became Israel, from the day of establishment of the State to the day of entry into force of the law, or have entered legally during that period.

The majority of those displaced by the events of 1947-1949 were thus denied Israeli citizenship and the possibility of returning to their land. Moreover, under section 30(a) of the Prevention of Infiltration (Offences and Jurisdiction) Law 1954, the Minister of Defence is empowered to order the deportation of an infiltrator, defined by section 1 as a

³⁹⁹ See, *Oseri v. Oseri*, op.cit (1953) 8 PM 76; 17 ILR 111 (1950). Compare *A.B. v. MB*. 17 ILR 110(1950), but note the retroactive effect of the Israeli Nationality Law.

⁴⁰⁰ See, *Hussein v. Governor of Acre Prison*, op.cit (1952) 6 PD 897, 901; 17 ILR 111 (1950). See also *Nakara v. Minister of the Interior* (1953) 7 PD 955; 20 ILR 49.

person who has entered Israel knowingly and unlawfully, and who, at any time between 29 November 1947 (the date of the UN decision to partition Palestine) and his entry was a national, resident or visitor in the Arab countries hostile to Israel, or a former Palestine citizen or resident who had left his ordinary place of residence in an area which became part of Israel.⁴⁰¹

By contrast, the Jordanian Nationality Law of 4 February 1954 (following a 1949 amendment of the 1928 Trans-Jordan Nationality Law) conferred citizenship on all inhabitants of the West Bank and on residents who had been Palestinian citizens before 15 May 1948, were ordinarily resident in Jordan, and not Jewish.⁴⁰²

Israel has never objected to the conferment of Jordanian nationality on Palestinian refugees.

The Jordanian nationality of the claimants and Jordan's right to exercise protection on their behalf are therefore opposable to the State of Israel. Israel cannot argue that it is not responsible because 'the person injured or the person on behalf of whom the claim is made was or is its own national'.⁴⁰³ In any event, Israel has never claimed and does not now claim that expelled or exiled Palestinians were in fact its nationals. On the contrary, by refusing the right of return and by insisting that Palestinians could only re-enter as

⁴⁰¹ See, *Jordanian Nationality Law*, law number (6) (1954), in the *Official Gazette of Jordan*, issue Number 1171 (16 February 1954), p. 105.

⁴⁰² See generally, *Laws concerning Nationality*. UN Leg. Ser., 1954, 1959.

⁴⁰³ Harvard Draft Convention on Responsibility of States for Damages Done In Their Territory to the Person or Property of Foreigners, Art. 16(a): (1929) 23 AJIL Special Supplement 22.

immigrants , it has purported to treat them as aliens.⁴⁰⁴

Jordan's entitlement to exercise protection over persons who are now its nationals but who were not at the time of the injury finds further support in the general principles and practice applicable in cases of dual nationality.⁴⁰⁵ While in detail there is room for a lot of controversy as to the applicable rules in this situation, the general trend in international practice is for the State with which the dual national has the closest real connections to be entitled to protect him, even as against the State of his other effective nationality.⁴⁰⁶ The weight thus given to real and effective links with a State, as was emphasized by the International Court of Justice in the *Nottebohm Case*⁴⁰⁷ rather than reliance on formal considerations of national status, is of obvious help to Jordan.

Jordan does have an effective, genuine and sufficient link with the Palestinians who found refuge within its territory, and with their descendants who are now citizens or residents. In many cases, Jordan will therefore be entitled to pursue the claims of refugee and displaced Palestinians for injuries resulting from the expulsion, including loss of and damage to property.

Some individual cases, or groups of cases, may prove problematic for the preceding

⁴⁰⁴ See, *Naqara v. Minister of the Interior*, op.cit, p. 49.

⁴⁰⁵ See, Goodwin-Gill, *International Framework*, op.cit, p. 27.

⁴⁰⁶ See cases cited in Jennings and Watts. *Oppenheim.s*, op.cit, pp. 515-517; Aldrich, R., *The Jurisprudence of the Iran-United States Claims Tribunal*, (1996), 55ff.

⁴⁰⁷ *Nottebohm Case*, op cit. ICJ Reports, 1955, 4, 23. The Court explained the notion of 'genuine connection' in terms of a relationship, 'having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with existence of reciprocal rights and duties.., the juridical expression of the fact that the individual.., is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'

reasons. In these instances, it will be necessary for Jordan to defend its claim to protect, or to show the inapplicability of the general rule in the particular circumstances.

Hence, and bearing in mind the above, Jordan is entitled to pursue compensation claims of displaced Palestinians in relation to property expropriated, directly or indirectly, by Israel.

As indicated before, traditional doctrine has tended to describe diplomatic protection in terms of the injury supposedly done to the protecting State, through the person of its national.⁴⁰⁸

The circumstances in which injury was suffered by Palestinian Jordanians, however, do not fit the pattern for which the traditional rules of diplomatic protection were intended, namely, injury caused to the person or property of an alien. Those who suffered loss by reason of the events of 1947-1949 were clearly not aliens (in the sense of being foreigners in relation to the local area), but individuals with an historic claim to the land from which they were dispossessed, at least initially, by the militant forces of a State *in statu nascendi*. Those actions were subsequently adopted and approved by the State of Israel, which consolidated their effects through local legislation in order to confirm expropriation.

In this case, Jordan exercises protection on behalf of the displaced and dispossessed

⁴⁰⁸ 'First report on diplomatic protection', John R. Dugard, Special Rapporteur, International Law Commission: UN doc .A/CN.4/506, 7 Mar. 2000, paras. 61-74.

individuals linked to it by residence and citizenship. Jordan acts also as the representative of the international community, in furtherance of the objectives laid down, among others, in UNGA resolution 194 (III). What matters is not the indeterminate, *sui generis* status of those injured in 1947-1949, but the fact that they are now the citizens and/or residents of Jordan, or the descendants of such persons, on whose behalf protection is exercised.

2- Exhaustion of local remedies.

Hundreds of thousands of complaints have been made by Palestinian refugees who are Jordanian Nationals to the Jordanian Foreign Ministry.⁴⁰⁹ Those complaints increased immensely in number after the signing of the Jordan-Israel Treaty of Peace.⁴¹⁰ Clearly, the overwhelming majority of Jordanian Nationals of Palestinian refugee origin have sought remedies in the context of the domestic Israeli system whether in the land of the State of Israel or in the West Bank. Their efforts were in vein and none of their complaints have been addresses effectively. Thus the issue of exhaustion of local remedies is “not a procedural hurdle facing Jordan in the event that it decides to bring claims to or against Israel on behalf of those Jordanian National.”⁴¹¹

⁴⁰⁹ The Foreign Ministry has a department named the Department of Palestinian Affairs. This department has the institutional jurisdiction over Palestinian Refugees camps in Jordan and over protecting the interests of Jordanian Nationals of Palestinian Refugee origin. Although the exact number of documented complaints presented by Palestinian refugees over the issue of the issue of denial of justice, discriminatory treatment by Israel and the lack of any effective remedy for them in the Israel domestic system to address their rights even in the Judicial field, is classified, I can confirm that there are hundreds of thousands of such complaints that I have been to see the inventory in my official capacity. I have also seen the content of some sample complaints in which the issue of denial of Justice is very evident and confirmed.

⁴¹⁰ See, *Jordan-Israel Peace Treaty*, op.cit,

⁴¹¹ See, Opinion rendered by H.E Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996.

Israel is also internationally responsible towards Jordan in the latter's capacity as a host State for Palestinian refugees. It is clearly 'delinquent in its duty towards, the right of other states'⁴¹²; in this case Jordan through the means of, not only allowing the flight of massive numbers of refugees into Jordan, but also adopting policies and actions deliberately intended to produce such a result. The flight of Palestinian refugees to Jordan has indeed 'specifically affected Jordan'⁴¹³ and it does constitute a breach by Israel of an obligation 'owed to Jordan.'⁴¹⁴ Jordan had to provide for those refugees and exhaust its resources to cover their needs. Their expulsion have caused injury to persons and property situated in Jordan and to the State of Jordan itself by stretching its inherently meager resources to provide for Refugees for almost 60 years.

In the *Trail Smelter* Arbitration,⁴¹⁵ which was concerned with the diffusion of deleterious gases from a factory in Canada thus damaging agricultural land in the United States. The tribunal in this arbitration maintained that

"No state has the right to use or permit the use of its territories in such a manner as to cause injury by way of fumes in or to the territory of another or properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".

Although refugees are not fumes, nevertheless drawing an analogy here is possible since the essence of the issue was the causation of injury to another state or properties and persons therein, thereby implying that a similar restriction would be applicable in the case

⁴¹² See, Lee, "*The Right to Compensation*", op.cit, p. 553.

⁴¹³ See, *ILC, Final Articles on State Responsibility*, op.cit, Article. 42(b)(i).

⁴¹⁴ *Ibid.*, Article 42(a).

⁴¹⁵ See, Harris, D.J, *Cases and Materials on International Law* p 245.

of generating refugees, thus causing injury to another State in this case Jordan. Also refugees, like 'fumes' in the *Trail Smelter* may cross international boundaries from countries of origin and like 'fumes' such crossings are preventable by the country of origin, the crossings are not made, in both cases, with the voluntary consent of the receiving country and finally such crossings impose economic and social burdens upon the receiving State (Jordan in our case), for which the country of origin (Israel) is responsible.⁴¹⁶

One major difference with the *Trail Smelter* lies in the fact that while States cannot prevent fumes from crossing into their territories, they can, prevent or deter the entry of refugees into through a variety of measures.⁴¹⁷ The exercise of such measures, is increasingly being considered as inimical to respect for minimum standards of humane treatment or human rights⁴¹⁸, which are epitomized in the Declaration on Territorial Asylum⁴¹⁹: which States that:

“ No person...shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state...”⁴²⁰

It would be deeply ironic if source States could evade responsibility for their own inhumanity by arguing that host States could avoid their burdens “by being equally

⁴¹⁶ See, Lee, *The Right to Compensation*, op.cit, p. 553.

⁴¹⁷ Ibid., p. 554.

⁴¹⁸ Ibid.,

⁴¹⁹ See, *The Declaration on Territorial Asylum*, adopted by UNGA Resolution. 2312 (XXII) (14 December 1967).

⁴²⁰ Ibid., Article 3(1).

inhumane”⁴²¹.

Such a limitation is also to be found in the *Corfu Channel* case,⁴²² in which the International Court of Justice maintained in its judgment that “Every state is under an obligation not to allow knowingly its territory to be used for acts contrary to the rights of others”. Like the *Trail Smelter* Award, this case was not concerned with the generation of refugees, however, the analogy seems appropriate since the underlying principle in both cases, that one country in exercising its alleged sovereign rights should not harm or injure the corresponding rights of other countries, is of relevance to the issue of Injury done to Jordan as a result of measures and actions conducted by Israel that led to the influx of Palestinian refugees into Jordan.

Israeli nationality legislation⁴²³ produced the effect of denationalizing Palestinian Refugees in general and those who are Jordanian nationals now in particular. The right of return in laws on nationality is owed to the country of sojourn⁴²⁴, in this case Jordan. Israel’s unilateral termination of nationality of Palestinian Refugees and the consequent result of their settlement in Jordan and inability to return as a result of Israel’s obstruction makes Israel incur responsibility. It is clear in this case that “the withdrawal of nationality was itself part of the delictual conduct facilitating the result”⁴²⁵.

⁴²¹ See, Lee, *The Right to Compensation*, op.cit, p. 555.

⁴²² See, 1949 *ICJ Reports* at para 4, p 22.

⁴²³ See, *Israel Law of Return, 4 Laws of The State Of Israel* (1950), p. 114. and the *Nationality Law*, op.cit, 5712/1952, 93 *Official Gazette* 22 (1952). op.cit.

⁴²⁴ See, Quigley, *Displaced Palestinians*, op.cit, p. 194.

⁴²⁵ See, Brownlie, Ian, *Principles of Public International Law*,

It is significant to point to the fact that the Committee on International Assistance to Refugees, had presented a report to the League of Nations on 20 June 1936 stating that:

“in view of the heavy burden placed on the countries of refuge, The Committee considers it an international duty for countries of origin of refugees at least to alleviate to some extent, the burdens imposed by the presence of refugees in the territory of another State”⁴²⁶

Israel, owing to the fact that its conduct leading to the generation of refugees was illegal, is thus, under a duty to assist Jordan as a state of settlement in the problem of refugees which it (Israel) has given rise to.⁴²⁷

(ii) The Jordan-Israel Peace Treaty

Article 8 of the Jordan Israel Peace Treaty States that:

- “Recognizing the massive human problems caused to both Parties by the conflict in the Middle East, as well as the contribution made by them towards the alleviation of human suffering, the parties will seek to further alleviate those problems arising on a bilateral level.
1. Recognizing that the above human problems caused by the conflict in the Middle East cannot be fully resolved on the bilateral level, the Parties will seek to resolve them in appropriate forums, in accordance with international law, including the following:
 - a. In the case of displaced persons⁴²⁸, in the quadripartite committee⁴²⁹ together with Egypt and the Palestinians.

⁴²⁶ See League of Nations Document. C.2 M.2 (1936) XII quoted in Jennings, R., *Some International Law Aspects of the Refugee Question*, 20 BYIL (1939), pp. 98, 102.

⁴²⁷ See, Jennings, R.. “*Some International Law Aspects of the Refugee Question*”, 20 BYIL (1939), *ibid.*, p. 113.

⁴²⁸ Those are, as explained before in this study, Palestinians who are original inhabitants of the Occupied West Bank and who were rendered refugees as a result of the 1967 war and Israel’s occupation of the West Bank which still exists to date.

⁴²⁹ This Committee finds its basis in Article XII of the Declaration of Principles on Interim Self – Government Arrangements signed between the Palestine Liberation Organization and the State of Israel on

- b. In the case of refugees,
 - (i) In the framework of the Multilateral Working Group⁴³⁰ on Refugees;
 - (ii) In negotiations, in a framework to be agreed, bilateral or otherwise in conjunction with and at the same time as the permanent status negotiations pertaining to the territories referred to in Article 3 of this treaty;
- c. Through the implementation of agreed United Nations programs and other agreed international economic programs concerning refugees and displaced persons, including assistance to their resettlement.”⁴³¹

This procedural mechanisms contained in this article in which Jordan can present claims and discuss solutions in relation to Palestinian refugee of the 1947-1949 period and the ones from the 1967 period (commonly referred to as displaced persons) will be examined in detail in the ensuing chapter. For the purposes of this chapter, which deals with the legal bases which can serve Jordan in presenting claims to and against Israel, it will suffice to say at this stage that this Article clearly gives Jordan a formal standing and an additional legal base to address issues pertaining to Palestinian Refugees with Israel in many ways and through different mechanisms.⁴³² The solution envisaged in this Article is

13 September 1993, 32 ILM (1993), p. 1525. Article XII reads as follows: “ Liaison and Cooperation with Jordan and Egypt: The two Parties will invite the Government of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives, on the one hand, and the Governments of Jordan and Egypt, on the other hand, to promote, Cooperation between them. These arrangements will include the constitution of a Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. Other matters of concern will be dealt with by this Committee.”

⁴³⁰ The Multilateral Working Group is the product of the design of the Madrid Peace Process. the US-Soviet letter of invitation to the Peace Conference in Madrid which was sent to Jordan, Syria, Lebanon, Israel and the Palestinians (within the Jordanian Delegation) contained the following paragraph: “ ...Those Parties who wish to attend multilateral negotiations will convene two weeks after opening the conference to organize those negotiations. The co-sponsors believe that those negotiations should focus on region-wide issues such as arms control and regional security, water, refugees issues, environment, economic development and other subjects of mutual interest”, cited in Tekkenberg, *Lex, Palestinian Refugees*, op.cit, p. 34.

⁴³¹ See, Article 8 of *The Jordan-Israel Peace Treaty*, op.cit.

⁴³² See Chapter (4) of this study for a detailed analysis of Article 8.

to be based on 'international law'.

While Article 8 confirms Jordan's *locus standi* in relation to Palestinian refugees in general and those who are nationals of Jordan in particular, it does not address the issue of Jordan's right to compensation as a host State.

However, the Peace Treaty stipulates in Article 24 that "The Parties agree to establish a claims commission for the mutual settlement of all financial claims".⁴³³ This Article will be addressed in detail in another part of this thesis. It will suffice to say that this Article provides a basis for Jordan to seek compensation from Israel in relation to the losses that it has incurred as a result of hosting Palestinian refugees for the past 60 years. Again, in the context of the current chapter, this article is highlighted as the article which Jordan can argue is the one that provides a legal basis for it to bring compensation claims as a host country to and against Israel in relation to the financial losses that it has been incurring for caring and shouldering Palestinian refugees. This article will be examined thoroughly in the context of the ensuing chapter in the context of it providing a Jordan-Israel Peace treaty based mechanism and procedure for the pursuit of possible claims by Jordan to and against Israel in relation to Jordan as a host country and in relation to Jordanian Nationals of Palestinian refugee origin.

It is clear that Palestinian refugees have a right of return, under international law, and that Israel continues to obstruct this right. They also have a right to compensation which is a complementary and not exclusive right in relation to the right of return. Israel has failed

⁴³³ *The Jordan-Israel Peace Treaty*, op.cit, Article 24.

to pay compensation to Palestinian refugees too. This failure continues to date. No effective local remedies are available before those refugees owing to the fact the Israeli legislation on nationality and on property and other matters discriminates against them and provides them with no remedy to be exhausted.⁴³⁴

International law provides no forum or standing for Palestinian refugees to directly bring claims in relation to their right of return and compensation.

Jordan is the only State in which Palestinian refugees are officially nationals since 1954. Also Jordan almost one third of the entire Palestinian refugee population in the Diaspora are Jordanian nationals. There seems to be sufficient legal bases available to Jordan as the State of nationality, thus, to bring claims on behalf of those refugees to and against Israel for its wrongful act of displacing them, failing to repatriate them, expropriating their property and failing to compensate them.

Jordan is also an injured State itself in the context of State responsibility as indicated in the preceding analysis. While there is little, if any State practice on the issue of an existing right to host State to seek compensation from refugee generating states, still, in the peculiar circumstances of the Palestinian refugee problem, there is a case for Jordan, to seek compensation as a host State from Israel for generating refugees who settled in Jordan forcing it to provide for them for decades.

⁴³⁴ See, Opinion rendered by H.E Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996.

The Jordan-Israel Peace Treaty confirms Jordan's standing in relation to solving the problem of Palestinian refugees. It also contains provisions that would provide Jordan with forums outlined in the provisions concerned in which it can bring claims on behalf of its nationals of Palestinian refugee origin and compensation claims, as a host State, to and against Israel. As indicated, these article will be highlighted and assessed in detail in chapter 4 of this thesis in the context of them providing mechanism and procedures for the pursuit of claims by Jordan.

Chapter (3)

Legal Assessment of Major Claims that Jordan Can Make:

In light of the factual background and context explained and highlighted in chapter 1 and the legal bases available that would allow Jordan to bring claims to and against Israel explained in the chapter 2, Jordan has a number of possible Major Claims in relation to the issue of refugees and displaced Palestinian persons in Jordan and compensation for Jordan as the host state thereto.

While the preceding chapter explained and examined the legal bases available to Jordan for presenting claims to and against Israel, this chapter attempts to highlight and assess the major specific claims that Jordan could bring to and against Israel, in accordance with international law. The chapter will highlight the claims and critically assess them. Again in the context of this thesis' ambitious attempt to constitute a 'roadmap' or 'blueprint' that could guide the process of Jordan's potential future presentation of claims to and against Israel, the highlighting of the specific heads of claims is imperative as is the issue of the need to assess such claims and their legal merits.

The chapter is structured in a manner that places the heads of claims separately dealing with claims that Jordan can bring on behalf of its nationals of Palestinian refugee origin who had fled in the 1947-1949 period and their descendents under one heading. Heads of claims that Jordan could bring on behalf of Palestinian refugees who fled as a result of

the 1967 war and their descendents are placed under a separate heading. This is the case owing to the fact that certain international law principles apply to one category while they do not necessarily apply to or are not relevant to the other or certain rules of international law were not in existence in relation to the former category and became developed and acquired a binding nature in relation to the other category 20 years later. It ought to be pointed out however, in advance that the issue of Israeli legislation whose cumulative effect, it is argued, in this chapter amount to unlawful expropriation of Palestinian owned property and does not provide for compensation or effective redress applies equally to both categories of Palestinian refugees. This is the case because Israel extended the application of this legislation to all territories that it occupied in the 1967 war. Israel's breaches of Article 11 of the Jordan-Israel Peace treaty are placed under a third heading in this chapter as a possible head of claims. This article deals with an obligation undertaken by both Jordan and Israel to repeal all discriminatory references and legislation that discriminates against the nationals of either country. This violation is very pertinent in relation to Israeli legislation discussed in the chapter because Israel did not in effect until now amend this legislation in a manner that would provide effective redress and remedy to Jordanian nationals of Palestinian refugee origin in recovering their property or exercising return or receiving compensation. Claims relating to direct losses suffered by Jordan as a host State are placed under another separate heading and finally a brief and concise assessment of remedies Jordan could seek is placed under the last heading.

However, before examining and assessing these claims and prior to analyzing their legal

bases, strengths, problems, weakness and validity, four issues ought to be highlighted.

The first is that there is a close connection between all or most of the possible approaches to potential or possible claims and the use of force by Israel or by entities or agents for whose actions Israel is accountable. As a general proposition, that use of force was unlawful either *ab initio* or by reason of its unlawful purpose or disproportionate nature. While these issues are, as specific grounds of complaint, beyond the scope of this study, they inevitably color the analysis of the consequences which that unlawful use of force produced for the refugees and displaced persons. In particular, the fact that the situation of refugees and displaced persons has its origins in unlawful uses of force has implications for the measure of damages which may be claimed.

The second matter is that the approaches to possible claims being considered in this thesis are to be resolved on the basis of international law. This not only follows as a matter of general principle, but also as a consequence of the agreed stipulation in Article 8⁴³⁵ of the Jordan-Israel Peace Treaty in which the Parties undertook to seek to resolve the human problems caused by the conflict in the Middle East 'in accordance with international law'. The human problems referred to in Article 8 clearly include the problems of refugees and displaced persons - those two terms being terms of art (that is, terms having a particular meaning) in both general international law and in the Jordan-Israel context.

The third issue is the question of exhaustion of local remedies. The rule relating to local

⁴³⁵ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8.

remedies states that a claim will not be admissible at the international level unless the injured party has first exhausted the legal remedies available in the State which is alleged to be the author of the injury. It may be that Israel would seek to invoke the rule should Jordan present a claim at the international level, but it is not an absolute requirement. First, it does not apply to direct State-to-State claims, nor does it apply if there are no local remedies to exhaust. It is the opinion of the author that, the local remedies rule is not a substantial, or an across-the-board obstacle in the way of Jordanian potential claims against Israel.

The fourth issue concerns the 'nationality of claims' which was explained in the previous chapter of this thesis, meaning that such claims must satisfy this procedural requirement.

a. Injury and loss arising out of the events of 1947-1949

The events of 1947-1949 are often characterized as 'the first Israeli-Arab war'. As a general description of the circumstances of the time this characterization has some value. Israel was conceived in conflict and born in active hostilities with its Arab neighbors, whose lands they regarded as being forcefully torn from them. Yet notions of 'war' and 'belligerency' in their traditional international law meanings must be used circumspectly. Although the Arab States and Israel regarded themselves as being 'at war', and some of them (including Jordan) have signed a 'Peace' Treaty with Israel⁴³⁶, many other States have regarded the traditional concept of a state of war as inconsistent with the legal order

⁴³⁶ See, *Jordan-Israel Peace Treaty*, op.cit,

established by the UN Charter.⁴³⁷

Nevertheless, the conflict surrounding the creation of the State of Israel produced a situation typical of the chaos and fluidity of warfare. The circumstances surrounding the various matters in relation to which claims by Jordan against Israel may be possible were accordingly not in any way clear-cut or tidy.

(i) Expulsion of the Palestinian population

As explained in Chapter 1 of this thesis⁴³⁸, the evidence is overwhelming that Israel (including entities and agents for whose acts Israel is responsible) intentionally arranged the expulsion of large parts of the Palestinian population of the territory which became part of the State of Israel, and that this expulsion was part of a conscious and long-standing policy to create a Jewish State in which there was to be no room for significant other religious or ethnic communities.⁴³⁹

The fact that there was in 1948-1949 an intentionally organized Jewish-Israeli coerced expulsion of the local Arab population of Palestine, is clearly established. Accordingly, there remain for consideration only certain important legal arguments which may affect Jordan's right to present a claim against Israel for the wrongful expulsion of the Arab Palestinians. These arguments are the following, whether the coerced expulsion of a large

⁴³⁷ See, Charter of the United Nations, in Evans, Malcolm D, *Blakstone's International Law Documents*, 1999, p. 8. [hereinafter *UN Charter*]

⁴³⁸ See Chapter 1.

⁴³⁹ *Ibid.*,

local population is contrary to international law; whether Israel is responsible for acts of Jewish entities active in Palestine before the State of Israel was proclaimed on 14 May 1948 and subsequently recognized, or for acts of parastatal entities after the creation of the State; and whether Jordan is entitled to present claims against Israel in respect of the expulsion of the Arab Palestinians.

1- Coerced expulsions in international law

It must first be noted that as a matter of general principle a juridical fact must be appreciated in the light of the law contemporary with it (the so-called intertemporal law).⁴⁴⁰ Thus the legality of the expulsions must be assessed in the light of international law as it stood in 1947-1949.

The law relating to expulsion was less clear in 1947-1949 than it is today. It was then generally accepted that a State has a broad discretion regarding the expulsion of aliens, although that discretion was not absolute and, for example, was not to be exercised arbitrarily but only for good reasons connected with the alien's behavior. But that broad rule was developed in the context of individual expulsions, and it was widely accepted that the same considerations did not necessarily apply to the mass expulsion of aliens of a particular nationality or other group, if only because mass expulsions were less likely to

⁴⁴⁰ Judge Huber in *Island of Palmas* case stated that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled", in United Nations Reports of International Arbitral Awards (RIIA) (1949), vol. II, p. 845; see also generally on intertemporal law, the resolution of the Institute of International law, *Annuaire de l'institute de Droit International*, vol. 56 (1975), pp. 536-540; see also, Karl, W, "the Time Factor in the Law of State Responsibility", in Spinedi, M and Simma, B (eds.), *United Nations Codification of State Responsibility*, (1987), p. 95.

be defensible on the basis of the conduct of the expelled persons.

In relation to the expulsion of individuals, the expelling State may be in breach of its international obligations both in respect of the fact of the expulsion and in respect of the *circumstances* in which it took place.⁴⁴¹ There seems to be no reason why this same duality of responsibility should not apply equally in the case of mass expulsions. Moreover, the circumstances of the expulsions may not only be in themselves a basis of claim, but they will also affect the reparation which may be due.

A complication which is relevant in the present context is that it has long been established that a belligerent may in the event of hostilities expel all hostile nationals residing in its territory. Given that the circumstances surrounding the 1948-1949 expulsions were those of Israeli-Arab hostilities, an Israeli argument based on an analogy with this common practice of belligerents cannot be ruled out: indeed, Israel's rejection of any right of return on the ground, *inter alia*, of the continued existence of a state of war with some Arab States, makes it likely that this line of argument will be used. Yet even in those circumstances, a belligerent is not entitled to expel hostile aliens with the brutality which characterized the expulsions of 1948-1949.⁴⁴²

A further complication is that at the time of their expulsion, it is far from clear that the Palestinians were to be regarded as aliens. To the extent that they should be regarded as

⁴⁴¹ See, Goodwin-Gill. *International Framework*. op.cit, p. 41.

⁴⁴² See, Opinion rendered by H.E Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996.

still being local nationals, whatever that may mean in the peculiar circumstances of Palestine at that time, their mass expulsion is that much more difficult for Israel to defend.⁴⁴³

At the same time, however, it has to be borne in mind that it is not enough to find an international obligation of which Israel may be said to be in breach. It must also be established that that obligation is one which is owed to Jordan, and which Jordan may consequently invoke as against Israel. This link to Jordan is usually established by there being some link of national status between Jordan and the individuals affected, by there being in force between Jordan and Israel some relevant treaty, noting that there was no such treaty which could be relied on in 1948-1949⁴⁴⁴, or by the obligation in question being one which is owed by every State *erga omnes* (i.e. an obligation of such a kind that all States have an interest in the protection of the right involved and may thus raise a claim in respect of their violation even if the 'nationality of claims' rule is not satisfied).⁴⁴⁵ This last possibility could be helpful in relation to mass expulsions in circumstances such as those of 1948-1949, although it has to be noted that the general and express recognition that some rules of international law apply *erga omnes* is relatively recent (and probably post-1948), and is a still-developing part of international law.

2- Israel's responsibility for the acts of various entities both before and after the

⁴⁴³ Ibid.,

⁴⁴⁴ However, the Jordan-Israel Peace Treaty 1994 contains relevant provisions which would assist an argument that Israel accepts Jordan's standing to raise, as against Israel, matters affecting the position of the refugees

⁴⁴⁵ See, for the treatment of the nationality of claims issue, Chapter 2 of this thesis.

creation of the State of Israel

There is no doubt that Israel may be held responsible for acts of the State of Israel, including acts of State organizations such as the army, and police and security forces.

More open to argument is whether Israel is responsible for acts of entities which were active before the State of Israel came into existence, and whether Israel is responsible for acts committed after the State came into existence by organizations which were not an official part of the structure of the State. As a matter of general principle, the conduct of a person or group of persons may be attributed to the State if it is established that such person or group of persons was in fact acting on behalf of that State.⁴⁴⁶

The dispossession and expulsion of Palestinians occurred both during the initial stages of the establishment of the State of Israel, and at various periods thereafter. Responsibility for harm caused during the initial period exists by analogy with the rule that 'the government set up by successful revolutionists must accept responsibility for their acts as insurgents from the beginning, a conclusion logically deducible from the fact that the acts of the insurgents have now become the acts of the government, for which it must now accept responsibility'.⁴⁴⁷

The preceding analysis also demonstrates that, irrespective of the question of attribution

⁴⁴⁶ See, *ILC Final Articles on State Responsibility*, op.cit, Articles 5, 3. 9,

⁴⁴⁷ Eagleton, C. *Responsibility of States*. 1928, p. 147, also cited in Brownlie. I. *System of the Law of Nations - State Responsibility, Part I*, Oxford: Clarendon Press, 1983. pp.177-178 [Hereinafter, Brownlie, *State Responsibility*. See also the cases cited in Jennings, and Watts, *Oppenheim'*, op.cit , I, p. 554, n. 19.

during the early period, the acts of militant forces have since been adopted and approved by the State of Israel, through the enactment of laws and the actions of officials.⁴⁴⁸ In relation to events subsequent to the establishment of Israel, responsibility may be attributed by reason of the actions of the armed forces as agents of the State, as well as those of organizations, volunteers and others 'associated with the government as combatants'.⁴⁴⁹

In this whole context the applicable legal rules are reasonably well-established. It is largely a question of fact and evidence to establish who carried out the acts complained of, whether those persons acted as State organs of the State of Israel, whether those persons were not part of the official structure of the State of Israel but were nevertheless persons for whose conduct Israel is internationally responsible, and whether the State of Israel subsequently approved and adopted the conduct in question. The evidence in the vast majority of instances is likely to show that the conduct being complained of is conduct for which Israel is responsible in international law.

(ii) Loss of, damage to, and expropriation of Palestinian property

1- Loss and damage

The property of expelled Palestinians (and also of many non-expelled Palestinians) was severely damaged during the process of expulsion. Houses and their contents were

⁴⁴⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (1980) ICJ Reports, pp. 3, 29-30, 33-36.

⁴⁴⁹ Brownlie, *State Responsibility*, op.cit., p 140.

burned or otherwise destroyed, property was looted, and so on.⁴⁵⁰ Whether such loss and damage involves a violation of international law for which Israel is responsible is a difficult question. The first issue is whether such loss or damage was the result of actions for which Israel can now be held responsible. The considerations relevant to this question of attribution have been set out previously.

Questions as to the national status of the owners of the property are probably more significant in this context than in that of the mass expulsion of individuals, since questions of loss or damage must be considered on an individual basis. It must be established that the owners were not, at the time of the loss or damage, Israeli nationals.

Moreover, not all loss or damage to property gives rise to responsibility on the part of the State in whose territory the loss or damage occurs. A State's duty to protect the property of aliens (or at least, non-nationals) is not absolute. In particular, loss or damage occurring during the normal course of hostilities, and not as a result of the specific targeting of civilian or particular ethnically-owned property, or as the result of the territorial State failing to exercise due diligence to protect such property,⁴⁵¹ likely does not give rise to responsibility on the part of the territorial State.

A particular further consideration concerns the extent to which loss or damage to property in the circumstances obtaining in 1948-1949 can be regarded as a breach of the then-existing human rights of the persons concerned. The right to own property, and the

⁴⁵⁰ See, *Records of the Palestinian Affairs Department*, (1953), pp.423-501.

⁴⁵¹ This standard is dependent on the factual context; the degree of diligence 'due' in the normal times and times of armed conflict will differ.

right to not be arbitrarily deprived of it, are included in Article 17 of the Universal Declaration of Human Rights 1948⁴⁵², but this does not quite extend to guarantee property from loss or damage. Later developments in human rights law, which may give greater protection to the owners of private property, are not directly relevant to the situation as it was in 1948-1949. Equally, it must be noted that the loss or damage constitutes for the owner a continuing situation, with the result that even if international human rights law does assist the owner with regard to the original loss or damage, the evolution of that law over the last half century may help with regard to the continuing situation to which the original loss or damage still gives rise.

Moreover, given the linkage between the Palestinian situation and the principle of self-determination, the losses suffered by Palestinian refugees are distinguishable from those of 'normal' aliens whose property has been lost or damaged.⁴⁵³

In any event, if loss or damage to property is to be the basis for a claim against Israel, the loss or damage must to be substantiated. This is no light task, particularly after the passage of over half a century. It will be necessary to establish the ownership (including national status) of the property and its value, along with the facts and circumstances of its loss or damage.

If such substantiation materializes, and the loss or damage can be proved to be a part of the expulsion process and governed by the same motivation, it can in principle be argued

⁴⁵² See, Brownlie. *Basic Documents* . op.cit, p. 24.

⁴⁵³ See. Goodwin-Gill. *International Framework*, op.cit, p. 55.

to involve a violation of international law for which Israel is responsible.

Successive United Nations General Assembly (UNGA) resolutions have acknowledged the right of the Palestinians to compensation for their lost or damaged property and that they are entitled to the income derived from their property.⁴⁵⁴

These General Assembly resolutions are helpful, but are not without their weaknesses when looked at carefully. Thus, Resolution 194 (III)(1948) is based on '*principles of international law or in equity*', which suggests some hesitation as to whether there were binding rules of international law to the required effect. Similarly, Resolution 55/128 (2000) referred to the refugees' entitlement to their property and its income as being in conformity with the '*principles of justice and equity*', which is much weaker than stating that it was based on rules of international law.

2- Expropriation

In addition to the loss of or damage to Palestinian property, one result of the 1948-1949 conflict was that much Palestinian property was in effect expropriated. This has

⁴⁵⁴ See, for example UNGA Resolutions; 194 (III) (1948) which recognizes, in paragraph 11, that the payment of compensation 'for loss or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible'; Resolution 34/146C (1981) recognizing that Palestinians 'are entitled to their property and to the income derived from their property in conformity with the principles of justice and equity'. Resolution 54/69 (1999) noting 'with regret that... compensation of the refugees, as provided for in paragraph 11 of its resolution 194(111) has not yet been effected' (paragraph 1); Resolution 55/128(2000) reaffirming 'that the Palestinian Arab refugees are entitled to their property and to the income derived therefrom, in conformity with the principles of justice and equity', and recalled 'that the Universal Declaration of Human Rights and the principles of international law uphold the principle that no one shall be arbitrarily deprived of his or her property. (preambular paragraphs).

principally been the result of the application of various Israeli laws providing for the treatment of Palestinian property in form, as a 'custodianship' of the property of 'absentee' Palestinian owners, but in substance an effective expropriation by Israel of property owned by Palestinian refugees.

Palestinian refugee land property constitutes some eighty per cent of the land area of Israel. Out of a total land area of some 20,300 sq. km, around 17,300 sq. km represent refugee lands.⁴⁵⁵ Much of the land continues to be held by the State of Israel or by quasi-State bodies such as the Jewish National Fund (JNF),⁴⁵⁶ and administered under the Israel Lands Authority (ILA).⁴⁵⁷

During the 1948-1949 war and immediately afterwards, a large amount of movable property and assets was looted and destroyed.⁴⁵⁸ Refugee property was effectively expropriated under a series of laws adopted after 1948, particularly the Absentees' Property Law 1950.⁴⁵⁹ By 1954, some 4.6 million dunums of refugee land had been

⁴⁵⁵ The United Nations Conciliation Commission completed an individual documentation and evaluation of Palestinian refugee lands in 1964, consisting of some 453,000 records and 1.5 million individual holdings. These records comprise the most comprehensive collection of refugee property documentation to date.

⁴⁵⁶ The JNF was first established and incorporated in Great Britain in the early 1900s for the purpose of purchasing land in Palestine for the settlement of Jews. Following the creation of Israel, a second JNF was incorporated in Israel. The original fund in Great Britain continued to operate and manage lands held in other parts of the Arab world, like Syria. According to the terms of its statute, the JNF cannot sell land and is not permitted to grant long-term leases to non-Jews. See generally Kretzme, David. *The Legal Status of the Arabs in Israel*. Boulder, CO: Westview Press, 1990. pp63-4; Lehn, Walter. *The Jewish National Fund*. London: Kegan Paul International, 1988.

⁴⁵⁷ Under the Israel Lands Administration Law 1960, land held by the Custodian of Absentee Property, the Development Authority and the Jewish National Fund, was brought under one government body, the Israel Lands Authority (ILA). According to the law, these lands cannot be transferred.

⁴⁵⁸ Tom Segev, an Israeli researcher, has reported that Israel State Archives include files still inaccessible to researchers with index titles such as Plunder of Abandoned Arab Property, Looting, Possession without Permit, and Robbery. Segev, T. *1949: The First Israelis*. New York: Henry Holt and Company. Inc., 1986, p 72.

⁴⁵⁹ *Laws of the State of Israel*. Authorized Translation from the Hebrew. Vol. IV, 5710-1949/50, pp.68-82: see further below.

transferred to the State under this law.⁴⁶⁰ In 1953, the government decided to sell urban absentee property. The income was returned to the Development Authority for immigrant absorption.⁴⁶¹ Later laws made some provision for compensation,⁴⁶² but Palestinian refugees fell outside the rules, as explained below.

New Jewish immigrants were settled in refugee homes and on refugee land. According to Ezra Danin, a Senior Israeli Intelligence Officer in 1948, Palestinian Arab refugees had to be confronted with *faits accomplis* to prevent their return. In a letter to Joseph Weitz in May 1948, Danin noted that this included 'settling Jews in all the area evacuated' and 'expropriating Arab property'.⁴⁶³ Palestinian refugee towns and villages were renamed with Hebrew names to reflect the new demographic composition of the area and to eradicate all signs of the original inhabitants.⁴⁶⁴ The occupation or acquisition in fact of Palestinian refugee property was followed by legislation and legal processes designed to effect and consolidate the 'transfer' of title.

3- Absentee Property Legislation.

It should be noted here that all Israeli absentee property legislation that are examined

⁴⁶⁰ Cano, J. *The Question of Land in the National Conflict Between Jews and Arabs 1917-1990* [Hebrew] Poalim Library, 1992. p102. By the end of 1952. the Custodian of Absentee Property claimed to hold 1.5 million dunums of land and at the end of 1956 had transferred 2.3 million dunums to the Development Authority and sold under the terms of a 1953 agreement between the Jewish National Fund and the Custodian. Peretz, D. *Palestinian Refugee Compensation*. Washington. DC: The Center for Policy Analysis on Palestine, 1996, p7

⁴⁶¹ Peretz, *Palestinian Refugee Compensation*, *ibid.*, p8.

⁴⁶² Land Acquisition (Validation of Acts and Compensation) Law 1953 .Absentees Property (Compensation) Law 1973, Absentees' Property (Compensation) Amendment Law 1976.

⁴⁶³ Yosef Weitz Papers (Institute for the Study of Settlement, Rehovot). Danin to Weitz. 18 May 1945, cited in Morris, *Birth*, *op.cit.*, p135.

⁴⁶⁴ See Benvenisti, M. *Sacred Landscape, The Buried History of the Holy Land Since 1948*. Los Angeles: University of California Press, 2000, ch. 1.

hereunder were extended in application by Israel to all territories that it had occupied in the 1967 war. Therefore the effects of these legislation extends to and applies to the displacements and Palestinian refugee owned property of Jordanian nationals of Palestinian refugee origin who fled as a result of the 1967 war from the West Bank to Jordan. These legislation also extended to Jordanian Government owned property in the West Bank.

(a) Absentees' Property Law, 5710-1950⁴⁶⁵

The following summarizes key features in Israel's 'absentee property' legislation. The summary identifies such property in general terms, and shows how it may pass from original ownership into Israeli government and private hands.

Apart from various measures taken under the Trading with the Enemy Ordinance 1939, the first substantive legislation to deal with Palestinian Arab property following the establishment of the State of Israel was the Absentees' Property Law, 5710-1950. It provided that 'property' should include 'immovable and movable property, moneys, a vested or contingent right in property, goodwill and any right in a body of persons or in its management' (section 1(a))⁴⁶⁶. An absentee was defined as,

(1) a person who, at any time during the period between [29 November 1947] and the day on which a declaration is published.., that the state of emergency... has ceased to exist, was a legal owner

⁴⁶⁵ See, Saleh, Nael A, *Qawanin Dawlat Israel* (The Laws of the State of Israel), (1998), p. 115 [hereinafter, Saleh, *Qawanin Israel*]

⁴⁶⁶ Ibid., p.116.

of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period - was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or the Yemen, or

(ii) was in one of these countries or in any part of Palestine outside the area of Israel, or

(iii) was a Palestinian citizen and left his ordinary place of residence in Palestine,

(a) for a place outside Palestine before [1 September 1948]; or

(b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment...⁴⁶⁷

The Law defined 'absentees' property' as property -the legal owner of which- at any time between 29 November 1947 and the day on which the state of emergency was declared to be over, 'was an absentee, or which, at any time as aforesaid, an absentee held or enjoyed, whether by himself or through another...'.⁴⁶⁸ It further defined 'vested property' as property vested in the Custodian under this law, and 'held property' as vested property actually held by the Custodian, including property acquired in exchange for vested property.⁴⁶⁹

Under section 4(a) and subject to the provisions of the Law,

(1)all absentees' property is hereby vested in the Custodian as from the day of publication of his appointment or the day on which

⁴⁶⁷ Ibid., Absentees' Property Law, 5710-1950. s. 1(b)(1). A Palestinian citizen was defined to mean a person who on 29 November 1947, 'was a Palestinian citizen according to the provisions of the Palestine Citizenship Orders. 1925-1941, Consolidated., and includes a Palestinian resident who, on the said day or thereafter, had not nationality or citizenship or whose nationality or citizenship was undefined or unclear.' Ibid., s. 1(c).

⁴⁶⁸ Ibid., s. 1(e).

⁴⁶⁹ Ibid., s. 1(f), (g).

it becomes absentees' property, whichever is the later date;

(2) every right an absentee had in any property shall pass automatically to the Custodian at the time of the vesting of the property; and the status of the Custodian shall be the same as was that of the owner of the property.⁴⁷⁰

Moreover, 'vested property', which may be taken over by the Custodian (wherever he may find it, shall remain such so long as it has not become 'released property under section 28, or ceased to be absentees' property under section 27).⁴⁷¹

Under section 27, if the Custodian is of the opinion that someone, whom it is possible to define as an absentee under section 1, left his place of residence, either 'for fear that the enemies of Israel might cause him harm, or... otherwise than by reason or for fear of military operations'⁴⁷² he may provide such person with written confirmation that he is not an absentee. However, it is not open to a person to claim that he is not an absentee by reason only that he had no control over the causes for which he left his place of residence.⁴⁷³

In relation to 'vested property', the Custodian enjoys full rights of ownership, including, in the case of businesses, the power of winding up or liquidation.⁴⁷⁴ The Law provides for anyone in possession of absentees' property to hand it over to the Custodian⁴⁷⁵ who is to

⁴⁷⁰ Ibid., s. 4(a).

⁴⁷¹ Ibid., s. 4(c).

⁴⁷² Ibid., s. 27(a), (b).

⁴⁷³ Ibid., s.30(i), Moreover, the Custodian may *not* exercise his powers under s. 27, or his powers to 'release' vested property under s. 28. unless this has been recommended, 'in respect of each case or a particular class of cases', by a special committee to be appointed by the Government.

⁴⁷⁴ Ibid., s. 8.

⁴⁷⁵ Ibid., s. 6.

take care of such property 'either himself or through others having his consent.'⁴⁷⁶ Where property is mistakenly dealt with as absentees' or vested property, no liability attaches and transactions in relation to such property are not invalidated.⁴⁷⁷

In the case of immovable property, the Custodian shall not sell it or grant a lease exceeding six years, except to the Development Authority, and then only at a price 'not less than the official value of the property.'⁴⁷⁸ Although the Law provides a basis for calculating 'official value' by reference to the net annual value determined in the last assessment before 15 May 1948, subject to a multiplier (16 2/3), it also provides that the Minister of Finance may reduce any of the governing rates where the possibilities of use are, in his opinion, limited 'owing to damage or neglect or for other similar reason.'⁴⁷⁹

Section 21 requires any person or body holding 'vested property' to provide the Custodian with details (whether of land, securities, partnership shares), and to provide returns and accounts from time to time. All dealings, including acting as legal representative, require the consent of the Custodian,⁴⁸⁰ and an absentee's representation by an advocate requires the written consent of the Attorney General.⁴⁸¹

A 'transfer or handing-over of property to an absentee or to another for the benefit of an absentee' in the relevant period is null and void, and the Law creates a presumption

⁴⁷⁶ Ibid., s. 7.

⁴⁷⁷ Ibid., ss. 16,17; 34.

⁴⁷⁸ Ibid., s. 19.

⁴⁷⁹ Ibid., s. 19(d).

⁴⁸⁰ Ibid., s. 22

⁴⁸¹ Ibid., s. 22(a).

against the bona fide character of any such transfer.⁴⁸²

The Custodian enjoys broad discretionary competence to determine that a person or body of persons is an absentee, or that property is absentee property,⁴⁸³ and any certification in point prevails, 'so long as the contrary has not been proved'. A certificate by the Minister of Defense that 'a place in Palestine was at a particular time held by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment shall be conclusive evidence of its contents'.⁴⁸⁴ The Custodian's written confirmation of matters within the scope of his functions is to be accepted as prima facie evidence of the facts stated therein⁴⁸⁵, and there is no duty on the Custodian to produce any 'book, file or other document', the contents of which can be 'proved' by such written confirmation.⁴⁸⁶

The State remains entitled to 'remuneration' equal to four per cent of the value of the property at the time of transfer.⁴⁸⁷ The value of immovable property is to be calculated on the basis of the criteria set out in section 19, and the value of other property is to be 'the price which in the opinion of the Custodian it would have been possible to obtain for it... if it had been sold on the free market by a willing seller to a willing buyer'.⁴⁸⁸ In addition to remuneration, the Custodian may recover 'all expenses'.

⁴⁸² Ibid., s. 23.

⁴⁸³ Ibid., s. 22(a), (b).

⁴⁸⁴ Ibid., s. 30(c).

⁴⁸⁵ Ibid., s. 30(e).

⁴⁸⁶ Ibid., s. 30(f).

⁴⁸⁷ Ibid., s. 32(a).

⁴⁸⁸ Ibid., s. 32(b).

(b) Absentees' Property (Compensation) Law, 5733-1973⁴⁸⁹

The Absentees' Property (Compensation) Law 5733-1973, makes provision for the payment of some compensation in relation to certain immovable property vested in the Custodian, or transferred by him to the Development Authority, or validly expropriated from him.⁴⁹⁰ The compensation provisions are limited to persons resident in Israel on the entry into force of the law, or who become resident thereafter.⁴⁹¹ In general, claims for compensation must be filed within three years, and advisory committees were to be established to clarify claimants' rights and to determine value.⁴⁹² Any award not exceeding 10,000 pounds was payable in cash,⁴⁹³ with any greater amount payable in bonds redeemable, with interest, over fifteen years.⁴⁹⁴

More significant than the limited provisions on compensation, however, are the terms of section 18, entitled 'Abrogation of right of claim against the Custodian'. This provides that:

"From the date of the coming into force of this Law, an absentee's claim for a right in property, or for the release of property under section 28 of the Absentees' Property Law 5710-1950... shall not be heard save in accordance with this Law."

The Law came into force on 1 July 1973. Since it is limited to claims by *residents*, the

⁴⁸⁹ See, Absentee' Property (Compensation) Law, 5733-1973, in , Saleh, *Qawanin Israel*, op.cit, p. 324.

⁴⁹⁰ Ibid., s. 1.

⁴⁹¹ Ibid., s. 2.

⁴⁹² Ibid., s. 5.

⁴⁹³ Ibid., s. 10.

⁴⁹⁴ Ibid., s. 15.

effect of this provision is effectively to complete the process of expropriation without compensation of all property whose owners were compelled or constrained to leave the area of Palestine now occupied by Israel, and who have been refused permission to return. One theoretical saving clause is to be found in section 20. which enables the Government, 'with the approval of the Finance Committee of the Knesset [to] designate categories of holders of a right in immovable property vested in the Custodian who shall be entitled to compensation... although they are not claimants within the meaning of this Law.' This power does not appear ever to have been exercised.

(c) Administrator-General Law, 5738-1978⁴⁹⁵

The Administrator-General Law 5738-1978, provides for the administration of 'abandoned property', that is, property in respect of which 'no one has been found who is authorized and able to deal with it as an owner or to manage it, or its owner is not known', and who is in Israel or, if abroad, is owned by an Israeli national, a resident of Israel or a body corporate registered or established in Israel.⁴⁹⁶ As in the case of absentees' property, those in possession of property known or believed to be abandoned must notify the Administrator-General.⁴⁹⁷

The Administrator-General is obliged to collect and administer such property for the benefit of the persons interested therein,⁴⁹⁸ and is required to make an inventory and to

⁴⁹⁵ See, Administrator-General Law, 5738-1978, in Saleh, *Qawanin Israel*, op.cit, p.579.

⁴⁹⁶ Ibid., s. 1.

⁴⁹⁷ Ibid., s. 5.

⁴⁹⁸ Ibid., s. 9.

keep accounts of such property.⁴⁹⁹ If, after fifteen years, no person appears who establishes that he is authorized to receive it, the court may order the Administrator-General to transfer the property to the State,⁵⁰⁰ subject to an interested person's continuing entitlement to claim its value.

Property subject to administration under the Law includes property vested in the Custodian of Enemy Property under the Trading with the Enemy Ordinance 1939.⁵⁰¹

(d) Cumulative effect of Absentees' Property legislation

There seems to be little doubt that an impartial dispute settlement mechanism or international tribunal would find that this sequence of laws, and the manner of their implementation, constituted expropriation. Expropriation represents the deprivation of a person's use and enjoyment of his property, either as the result of a formal act having that consequence, or as the result of other actions which *de facto* have that effect.

It has long been accepted that expropriation involves 'the deprivation by State organs of a right of property either as such, or by permanent transfer of the power of management and control'.⁵⁰² Again, in international law, the obligation to make full reparation is

⁴⁹⁹ Ibid., s. 11.

⁵⁰⁰ Ibid., s. 15.

⁵⁰¹ Ibid., s. 21.

⁵⁰² See Brownlie, I., *Principles of Public International Law*, 6th edn., Oxford University Press, 2003, p. 53; 3rd edn., 1979, p. 532; see also Christie, *British Year Book of International Law*, Vol. 38 (1962), p. 307-38. The point has been made succinctly by a NAFTA Tribunal in *S.D. Myers v. Canada* when the Tribunal states that 'expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights'; Partial Award, 13 November 2000, para. 283. The same point has been made by the Iran-US Claims Tribunal in *Amoco International Finance Corporation v. The Islamic Republic of Iran* with

premised on liability, that is, the attribution or imputability of an internationally wrongful act to the responsible State.

Expropriation alone, however, does not constitute a breach of international law. For that it is usually regarded as required that the expropriation should not be discriminatory, should be for a public purpose, and should be accompanied by adequate compensation. While Israel might have a plausible argument that the purpose of its Absentee Property laws was 'public' in that it was intended to protect that property in the absence of its owners (although in the circumstances even that argument is scarcely self-evident), it seems clear that the actions taken by Israel through its legislation were (in practice if not in form) discriminatory against Palestinian Arab refugees and were not accompanied by any compensation.⁵⁰³ Consequently, it can be said that the application of Israeli legislation regarding the property of Palestinian refugees constituted expropriation in breach of the requirements of international law.

Once again, however, there arise the two questions already discussed previously in other contexts, namely the right of Jordan to present claims in respect of the expropriation of Palestinian property, and the need for expropriations to be substantiated by evidence. This will be no light task, given the passage of time. It will be necessary to establish the ownership (including national status) of the property and its value, and the facts and

regard to the question whether the rights created under a joint venture agreement could be the object of expropriation: 'Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e. freely sold and bought, and thus has a monetary value': (1987) 15 *Iran-U.S. C.T.R.* 1S9, para. 108; see also Aldrich, G. *The Jurisprudence of the Iran-United States Claims Tribunal.* (1996), 217, p 238-9.

⁵⁰³ See, *Records of the Palestinian Affairs Department*, (1953), op.cit, p.505.

circumstances of its expropriation.

(iii) Denial of the right to return

The right to return to one's own country has a clear international legal dimension. At the level of State-to-State relations, one State's obligation to admit its nationals is the correlative to another's right of expulsion. Additionally, the State's right of protection over its citizens abroad is matched by its duty to receive those of its citizens who are not allowed to remain on the territory of other States. To this inter-State, reciprocal relationship of rights and duties may now be added a human rights dimension: the individual's right to return to the State of which he or she is a national. As an incident of nationality, the duty to allow return thus encompasses both the rights of other States (who themselves have no general duty to accommodate foreign citizens), and the right of the individual to be admitted to his or her own country. The human right to return to one's own country is implied in Article 9⁵⁰⁴ of the Universal Declaration of Human Rights, prohibiting 'arbitrary arrest, detention or exile', and in the prohibitions on the expulsion of nationals, and it is expressly recognized in Article 13⁵⁰⁵ and in Article 12⁵⁰⁶ of the 1966 Covenant on Civil and Political Rights.

The existence of the right to return and the duty to admit are beyond dispute. Instances in which return has been denied or heavily qualified have generally been part of broader contexts involving persecution, other violations of human rights, or situations in which

⁵⁰⁴ See, Brownlie. *Basic Documents*, op.cit, p. 23.

⁵⁰⁵ Ibid., p.130.

⁵⁰⁶ Ibid., p. 129.

political issues have prevailed over legal entitlements, as has been the case with Palestinians expelled from Israel and subsequently refused permission to return.

It is a matter of record that Israel has persistently refused to allow Palestinians to return, and that it has invoked a number of reasons. These have included the ground that it was still at war with a number of Arab States⁵⁰⁷ or because of the lack of space due to the settlement of new Jewish immigrants in refugee homes,⁵⁰⁸ and the desire to maintain post-war demographic changes and the composition of the State.⁵⁰⁹ In addition, Israel has claimed that, as the Palestinians expelled or forced to leave in 1948-1949 were never nationals of the State of Israel, there was therefore no obligation on the State to admit them.

The legal situation described previously is that of the 'normal' situation and does not translate easily to the facts of the Palestinian expulsions and/or the entitlement of Jordan

⁵⁰⁷ See, Reply of the Provisional Government of Israel to the Proposal Regarding the Return of Arab Refugees: UN doc. A/468, 1 Aug. 1948, Annex II. In June 1948, the Director of the IDF Intelligence Department warned the Foreign Ministry's Political Division that the return of Palestinian refugees would constitute a serious danger and a potential fifth column: Israel State Archives, FM2426/9, Director, IDF Intelligence Department, to Shiloah, 16 June 1948 cited in Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949, op cit* (1987), 139.

⁵⁰⁸ According to Israeli comments submitted to the United Nations, 'The question of housing the [Jewish] newcomers was partly solved by placing them in the habitable houses in abandoned Arab towns and villages... [The] individual return of Arab refugees to their former places of residence is an impossible thing... their houses have gone, their jobs have gone: UN doc. A/1367/Rev.1, 23 Oct. 1951. Israeli officials acknowledged that with the homes and property of Palestinian refugees, it would have been impossible to absorb the large number of new Jewish immigrants to the country. The cost of placing an immigrant family in a refugee home for example, was around 31.300 as compared to between \$7,000 and \$9,000 for placing the immigrants in a new settlement. The estimate was provided by Joseph Schechtman, an expert in population transfer, cited in Simha F. *The State of Israel: Myths and Realities*, op.cit, London: Croom Helm, 1987, p 108.

⁵⁰⁹ A typical view is that expressed by Joseph Weitz, the Zionist official who headed several so-called transfer committees. In his June 1948 transfer plan, entitled, 'Retroactive Transfer, A Scheme for the Solution of the Arab Question in the State of Israel', Weitz wrote that the new state was to be a state 'inhabited largely by Jews, so that there will be in it very few non—Jews': cited in Morris. *Birth*, op.cit, p 136.

to 'protect' their right of return. Indeed, the 'traditional' approach is characterized by certain pitfalls. If the right of return is premised on Israel's duty to readmit its 'nationals', then they would fall outside Jordan's right of protection.⁵¹⁰ On the other hand, if such persons are classified as aliens or non-nationals, then no State apart from their State of nationality is obliged to admit them.⁵¹¹ However, an equally traditional approach to the consequences of an international wrong is to look to the restoration of the *status quo ante* as the primary remedy for the breach. In this context, a right of return clearly emerges, since the expulsions were unlawful in international law.

Given the different ways of looking at the problem as a matter of broad principle, it is difficult to be sure how an international tribunal would react to the assertion of a right of return, were that to be advanced by Jordan on behalf of certain Palestinians. It should also be stressed that Jordan is not seeking to vindicate the right of return for all Palestinian refugees, which is a matter within the competence of the Palestinian Authority, but only for those who now have a sufficient link with Jordan.

It would thus seem that, there are good grounds for arguing for such a right, in which the following elements would be emphasized.

⁵¹⁰ The American and European Conventions both provide that citizens shall not be deprived of the right to enter their own country: Art. 3, Protocol 4, European Convention on Human Rights; Art. 22 (5), American Convention on Human Rights.

⁵¹¹ See, Article 13(2) of the Universal Declaration of Human Rights and Article 12(4) of the 1960 International Covenant on Civil and Political Rights., cited in Brownlie. *Basic Documents*, op.cit.

1- The Illegality of the Expulsion

The expulsions were illegal in international law, and therefore the appropriate international law remedy is, in principle, a return to the *status quo ante*, requiring that the expellees be allowed to return. The required remedy is thus one which restores the situation to that which it would have been had the unlawful act not occurred. The question of the appropriate reparation to be made for the unlawful acts of expulsion is considered further later on in this chapter but the starting point, in principle, is as just stated.

2- The entitlement of Palestinians to Self-Determination

The Palestinian situation is distinguished from other situations of population displacement by its linkage to the principle of self-determination.⁵¹² After the departure of the British, the Palestinians were a people entitled to the right of self-determination. Israel, however, denied them the exercise of that right by, *inter alia*, a systematic pattern of expulsions.

The right of self-determination derives from a rule of international law having the status of *ius cogens*. Moreover, the International Court of Justice noted in the *East Timor Case* that 'Portugal's assertion that the right of peoples to self-determination, as it evolved

⁵¹² See, for example, UNGA Resolution 3236 (XXIX). 22 November 1974. reaffirming the 'inalienable rights of the Palestinian People... including... the right to self-determination without external interference... (and)... to return to their homes and property from which they have been displaced and uprooted.' See also Chapter 2 of this thesis.

from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable', and 'one of the essential principles of contemporary international law'.⁵¹³

Israel is thus under an inescapable obligation to allow the right of self-determination to be exercised, and a *sine qua non* for the exercise of the right is the return of the population which constitutes the 'people' in question, i.e. the Palestinians.

The link to self-determination shows clearly that the situation of the Palestinians is quite different, as a matter of law, from a typical situation involving the expulsion of aliens, so that the 'normal' rules about a State's right to expel and its duty to receive back only its own nationals, are beside the point. Moreover, so far as return is linked to territory, national identity and self-determination, then as a matter of principle, the objective of 'restitution' would *not* be satisfied by an award of equivalent land elsewhere or monetary compensation.

3- Recognition of the Palestinians' right of return by the United Nations

The Palestinians' right of return has been repeatedly affirmed by the General Assembly, including in, by way of example, the following resolutions.

(a) Resolution 194 (III) (1948) refers to the refugees' right 'to return to their homes'.

(b) Resolution 3236 (XXIX) (1974) reaffirms the 'inalienable rights of the Palestinian people... including the right to self-determination without external interference... [and]... to return to their homes and property from which they have been displaced and

⁵¹³See, *East Timor Case* (Portugal v. Australia) ICJ Reports, 1995, op.cit, pp. 90, 102.

uprooted'.⁵¹⁴

(c) Resolution 54/69 (1999) noted 'with regret that repatriation as provided for in paragraph 11 of its resolution 194(III), has not yet been effected' (paragraph 1).

The last-mentioned resolution, which was adopted by a vote of 155-1-2, not only reaffirmed the right of return/repatriation, but did so by express reference to Resolution 194 (III). The General Assembly thereby clearly underlined the continuing relevance and applicability of the principles for solution first laid down fifty-three years before, in 1948.⁵¹⁵

Although United Nations General Assembly resolutions, as indicated previously in chapter 2, are not themselves directly binding in law. They certainly are not without legal effect. This is especially true where such resolutions, as explained previously, are adopted by consensus, unanimity, or by large majorities. This is also the case when there is evidence that the language of such resolutions is intended to reflect a legal conclusion and may be argued to represent customary international law.

Therefore, a strong argument can be made that the refugees are entitled to return to their homes, both as a matter of general principle and as a consequence of consistent practice of States in the adoption of General Assembly resolutions

⁵¹⁴ Admittedly, there are certain weaknesses in the language of relevant General Assembly resolutions must be noted; resolutions 194 (III) (1948) and 3236 (XXIX) (1974), for example, in referring to the right to return 'to their homes', are not capable of strict application when those homes no longer exist.

⁵¹⁵ See also General Assembly resolution 55/55, adopted on 1 December 2000 by a vote of 149-2-3, which stresses the need for 'resolving the problem of the Palestinian refugees in conformity with., resolution 194 (III).'

over a period of more than 50 years. Nevertheless, as indicated previously, a word of caution must be expressed pertaining to the attitude which might be adopted by an impartial international tribunal, should such a case arise before it. Such a tribunal would be likely to attach considerable weight to two factors in particular. First, that the expulsions took place over half a century ago, and that, when many of the original refugees will have either established new lives elsewhere or will have died, there could be something unreasonable in now seeking to return to the *status quo ante* for the diminishing numbers of survivors and the many descendants of the original expellees. Second, that the sudden influx of a very large number of people into Israel would have a seriously disruptive effect upon the social and economic fabric of the country.

While, therefore, Jordan is entitled to claim, on the basis of international law, that the refugees have a right to return to their homes (or at least to the lands on which their homes were located), and that Jordan should not hesitate to advance a claim on that basis, it is probable that that claim is more likely to be upheld *and given effect in practice* (perhaps in part) in diplomatic negotiation, rather than before a tribunal applying international law. A tribunal might well accept that in principle the denial of the right of return is a breach of an international obligation, but would be more likely to seek to remedy that breach by the payment of compensation or some other remedy, rather than by imposing on Israel an obligation to accept all refugees into its territory.

b. Injury and loss arising out of the events of 1967 and thereafter

Israel's occupation of Arab territory in the 1967 war must be understood against the background of Israel's territorial origins. Although there is no intention or room for contesting Israel's current status as a lawful member of the international community of States, it should be noted that Israel was created in armed conflict against the will of the local (i.e. Palestinian) inhabitants and its origins were of doubtful international legitimacy. As Professor James Crawford notes, 'Israel was created by the use of force, without the consent of any previous sovereign and without complying with any valid act of disposition.'⁵¹⁶

With the United Kingdom's relinquishment of the Mandate, Israel secured its effective *de facto* existence by establishing, by force, a stable and effective government over the territory under its control.⁵¹⁷

Israel's effective territorial control extended over much more territory than that accorded to it under the UN partition plan endorsed by General Assembly Resolution 181 (II), and its territorial extent is not therefore based on that Resolution. Rather, Israel's original territorial extent was based on the armistice agreements of 1949, which brought Arab-Israeli hostilities to an end. It follows that the territory of Israel, at the date of its

⁵¹⁶ Crawford, J. *Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States*, in Goodwin-Gill, G. & Talmon, S., *The Reality of International Law: Essays in Honor of Ian Brownlie*. Oxford: Clarendon Press, 1999, pp. 95-124, 108. [hereinafter, Crawford, *Israel and Palestine*]

⁵¹⁷ In Crawford's view, Israel's qualification for statehood derived from the fact that, as an entity in possession of stable and effective government over a territory, it was a seceding State from Palestine, 'which must be regarded as a single self-determination unit', and that its secession from Palestine was effectively established by about January 1949: Crawford, *Israel and Palestine*, Ibid.

admission to membership of the United Nations following the decision of the Security Council on 4 March 1949,⁵¹⁸ was no greater than that area, and what was left of the Mandate territory of Palestine was and is not open to conquest, accession or settlement by Israel or any other State, and Israel had (and has) no latent or putative claim to sovereignty over that territory.

The legal status of that part of Palestine which was outside Israel's 'armistice territory', particularly the West Bank, was at that time ambiguous. However, it would seem in one way or another to be attributable to the indigenous people of Palestine, who can be regarded as at that time having some sort of transitional and residual ownership of it.

The effective and *de facto* protecting authority in relation to the West Bank was Jordan from the time of its administration by Jordan in 1948 during the 1948-1949 war followed by its formal incorporation through unity into the Kingdom took place in April 1950. The uncertain legal effects of Jordan's 'administrative disengagement' from the West Bank in 1988 have already been adverted to previously.⁵¹⁹

The 1967 conflict involved fierce but brief hostilities between 5-11 June, as a result of which Israel occupied territories in Jordan, Egypt and Syria, including in particular East Jerusalem and the West Bank. The circumstances surrounding Israel's use of force have

⁵¹⁸ SC res S/RES/70, 4 Mar. 1949 (9-1-1); UNGA res. 273 (III), 11 May 1949 (37-12-9)

⁵¹⁹ Following Jordan's disengagement in 1988, it may be that the sovereign in effect is the Palestinian people and its representatives. See Crawford, *Israel and Palestine*, op.cit. p 109: '...the Jewish people had a right of self-determination in respect of Palestine as a whole. But so too did the Palestinian people. Israel could be regarded as an expression of the principle of self-determination for the Jewish people of Palestine as at 1948... but there was no equivalent expression for the Palestinian population.' However, there are weights' arguments to show that Jordan has not yet been shown to have relinquished its previous sovereignty.

commonly been presented as an instance of (pre-emptive) self-defense. However, it is disputed whether Egypt, Syria or Jordan, individually or collectively, ever intended or planned to attack Israel, or that Israel's existence was threatened at any time, or that there was any substantial or imminent armed attack on Israel such as would justify Israel's use of force in self-defense, or that the use of force by Israel was in any event proportionate in the circumstances.⁵²⁰

For the purpose of this study, it is sufficient to recall that at the relevant time, Jordan and Egypt were parties to the 1964 Arab Defense Pact and a bilateral 1967 Mutual Defense Treaty⁵²¹, committing each to assist the other in the event of an attack. In the days preceding the outbreak of hostilities, Israel border positions with Jordan were reinforced, and included the introduction of tanks into the demilitarized zone around Jerusalem, in violation of the 1949 Armistice Agreement⁵²² (Article 111.2; Annex 11.2). Random small arms fire against Jordanian positions in Jerusalem was also reported in the early hours of 5 June 1967. When Jordan learned of Israel's attack on Egypt, it acted under its mutual defense obligations and opened fire on Israel positions. Israel responded by invading Jordan, and occupied the West Bank and East Jerusalem, where it remains to this day.

However one might characterize that conflict, by the time it occurred the Geneva Conventions of 1949⁵²³ had been concluded and had entered into force, and it was clear that they applied to any international armed conflict whether or not it was formally

⁵²⁰ See generally Parker, R., ed.. *The Six Day War: A Retrospective*. University of Florida Press. 1996.

⁵²¹ See, *Arab League Treaties*, (1977), Arab League Publication.

⁵²² See, General Armistice Agreement between Jordan and Israel, (3 April 1949), 42 UNTS, p. 303.

⁵²³ See, for the text of the Geneva Conventions, Roberts and Guelff, *Laws of War*, op.cit.

characterized as 'war'. It follows that Israel's subsequent presence in the territories which it occupied as a result of that conflict has to be regarded as involving only occupation with certain limited rights of administration in those occupied territories, and does not involve Israel having sovereignty over them. In particular, Israel's rights and obligations are governed by the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949,⁵²⁴

(i) Displacement of Palestinian and Jordanian populations

There is no doubt that, as a result of the 1967 hostilities, large numbers of inhabitants of the West Bank in particular moved from that part of Jordan to other places. There seems also, no doubt that this was largely the result of the same policies of expulsion which Israel had applied at the time of the 1948-1949 conflict.

Equally, there is no doubt that Jordan is entitled to raise with Israel the situation of those who were displaced from the West Bank in 1967, as a result of the hostilities. Article 8(2) (a)⁵²⁵ of the Jordan-Israel Peace Treaty 1994 recognizes Jordan's standing in this respect.

As to the other two questions which fell to be considered in this respect in relation to the 1948-1949 expulsions, it is clear that in 1967 the actions taken were taken by the State of Israel or by those authorized by it. There is thus no shadow of doubt over attribution.

⁵²⁴ Ibid., p. 299.

⁵²⁵ See, *Jordan-Israel Peace Treaty*, op.cit.

The other question concerned the degree to which the coerced displacement of people was contrary to international law. Very little doubt exists that whatever doubts there may have been as to the position in international law in 1947-1949, by 1967 the coerced displacement of large populations from territory under 'belligerent' occupation was contrary to international law.⁵²⁶ United Nations Security Council Resolution 237, adopted on 14 June 1967, is specifically directed at those displaced by the Six Day War. It requires Israel to ensure their safety and welfare, and endorsed the application of the IV Geneva Convention.⁵²⁷

At the time of that conflict, Israel was legally bound by the 1949 Fourth Geneva Convention. Article 49⁵²⁸ of that Convention expressly prohibits 'individual or mass forcible transfers, as well as deportations of protected persons' (that latter term includes, by virtue of Article 4⁵²⁹, the inhabitants of a territory under occupation). A compelling case could be made out by Jordan to the effect that what occurred was either a 'mass forcible transfer' or a 'deportation' within the meaning of Article 49.

(ii) Loss of, damage to, and expropriation of Palestinian and Jordanian property

That arguments made the context of assessing a claim for loss of, damage to and expropriation of Palestinian and Jordanian property in the context of the 1947-1949

⁵²⁶ See, among others, General Assembly resolution 55/125 on 'Persons displaced as a result of the June 1967 and subsequent hostilities'. Adopted by a vote of 156-2-2, this resolution refers expressly to the right of such persons to return to their homes or former places of residence (paragraph 1).

⁵²⁷ The Camp David accords also called for the phased return of displaced persons.

⁵²⁸ See, Roberts and Guelff, *Laws of War*, op.cit, p. 317.

⁵²⁹ Ibid., p. 302.

period applies here too. Additionally, quantifying the losses is also clearer owing to the fact that Jordan during its control over the West Bank that extended from 1950 to 1967 had maintained real estate and land registers that are still to date in the possession of the Jordanian government.

It should be restated here again here that the Israeli Legislation pertaining to property was extended in its application to the West Bank after Israel's occupation. Thus, again the cumulative effect of Israel property legislation in relation to refugees, which had been thoroughly examined in the context of the 1947-1949 period in a previous part of this chapter apply to the West Bank too.

(iii) Violations of the human rights of residents of the West Bank

Accountability for violations of human rights and of international humanitarian law derives from the fact of control over territory and/or control over the agents of the State responsible for the acts in question.⁵³⁰ In *Loizidou v. Turkey* (Preliminary Objections), the European Court of Human Rights held that the concept of jurisdiction under Article 1 of the European Convention was not restricted to the national territory of the parties. Their responsibility could be invoked because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory, or as a consequence of military action - whether lawful or unlawful - where a State exercises effective control of an area outside its national territory.

⁵³⁰ See, See. Goodwin-Gill. *International Framework*, op.cit, p. 57.

“The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”⁵³¹

Although arising within the context of a regional treaty regime not otherwise applicable to the present circumstances, the statement of principle is nevertheless of general application.⁵³²

(iv) Violations of international humanitarian law

Israel’s obligations as an occupying power are clear as regards Jordanian territory and the population of such territory that came under Israeli authority in 1967. Israel’s responsibilities extend to persons who fled the war and who have not been allowed to return, and to persons whose property was expropriated or damaged as a result of the invasion and occupation, and/or of events in the succeeding years. The Occupying Power’s obligations, based in treaty, are *independent international humanitarian obligations*. They do not depend for their force on reciprocity (see, for example, Article 2, Fourth Geneva Convention), nor are they contingent on the existence of some prior sovereign.⁵³³

⁵³¹ Preliminary Objections, para. 62; (40/1993/435/514). 23 March 1995.

⁵³² It is a generally recognized principle of international law that every State is responsible for ensuring and protecting the human rights of everyone within its territory and subject to its jurisdiction. Article 1, 1950 European Convention on Human Rights; European Court of Human Rights, *Loizidou v. Turkey*, (Merits), (40/1993/435/514), Judgment, Strasbourg, 18 December 1996. Article 1, 1969 American Convention on Human Rights; Article 2(1), 1966 Covenant on Civil and Political Rights; United Nations Human Rights Committee, *De Lopez v. Uruguay*; *de Casanego v. Uruguay*; also, *Kuchenmeister v. Home Office* [1958] 1 QB 496.

⁵³³ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. 12 August 1949: 75 UNTS 287. Dinstein, Y. *Laws of War*, pp 212-3; Roberts, A. *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*. in Playfair, E., ed., *International Law and the Administration of*

The 1949 Geneva Conventions are concerned neither with the origins of conflict nor the status of territory. Article 2⁵³⁴ of the Fourth Convention provides that the Convention shall ‘apply to all cases of partial or total occupation of the territory of a High Contracting Party’, while Article 1⁵³⁵ calls for respect of the Convention ‘in all circumstances’, (and not, therefore, on a basis of reciprocity). Article 4⁵³⁶ provides further that the inhabitants of a territory under occupation shall be ‘protected persons’:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

In 1976, the President of the UN Security Council, after consulting all the members and concluding that the majority agreed, stated that, ‘The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967.’⁵³⁷

Occupied Territories, Oxford: Clarendon Press. 1992, p 25-85, 43-9. Cf. arguments raised by defendants but rejected in the war crimes tribunals set up after the Second World War, to the effect that they were not bound by the law of belligerent occupation since the territories in question had been annexed to Germany: cited in Mallison, S. V. & Mallison, W. T., *Settlements and the Law: A Juridical Analysis of the Israeli Settlements in the Occupied Territories*. Washington. DC American Educational Trust, 1983, p 2-3.

⁵³⁴ See, Roberts and Guelff, *Laws of War*, op.cit, p. 301.

⁵³⁵ Ibid., p. 300.

⁵³⁶ Ibid., p.302

⁵³⁷ UN SC Presidential Statement: UN doc. S/PV.1922, 26 May 1976. The statement deplored, ‘the measures taken by Israel in the occupied territories which alter their demographic composition or geographical character, and in particular establishment of settlements.’ Four years later, the Security Council unanimously adopted resolution 465 (1980), in which it, ‘*Determines* that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and that Israel’s policy and practices of settling parts of its population and new immigrants in these territories constitute a flagrant violation of the Fourth Geneva Convention...’

In 1980, by a vote of 14 to none, with one abstention, the Security Council censured the enactment by Israel of a 'basic law' on Jerusalem, which it found to constitute a violation of international law that did not affect the continued application of the Fourth Convention. The Security Council reaffirmed that the acquisition of territory by force is inadmissible - a principle of international law older than the State of Israel.⁵³⁸ It decided not to recognize the 'basic law' and other actions seeking to alter the character and status of Jerusalem.⁵³⁹

The applicability of the Fourth Convention has also been maintained by the International Committee of the Red Cross (which enjoys a special status in the interpretation and supervision of application of the conventions and of international humanitarian law at large), and has even been recognized at certain periods by the Government of Israel itself.⁵⁴⁰

The applicability of the Fourth Geneva Convention to the territories occupied by Israel in 1967 has been consistently upheld by the international community of States. The Government of the United States has observed, for example, that,

⁵³⁸ See, Article 2(4), *UN Charter* 1945; UN SC resolution 242 (1967).

⁵³⁹ UN doc. S/RES/478, 20 Aug. 1980; under Art. 25 of the United Nations Charter, all Member States 'agree to accept and carry out the decisions of the Security Council...'. The UN General Assembly has taken the same position on the applicability of the Fourth Convention; see, among many others. UNGA res. 35/122A, 3 Nov. 1980; UNGA res. 54/77, 6 Dec. 1999; UNGA res. 55/131. 8 Dec.2000.

⁵⁴⁰ See Boyd, *The Applicability of International Law to the Occupied Territories*, (1971) *Israeli Yearbook of Human Rights*, p. 259; Kassem, *Legal Systems and Developments in Palestine*, (1980) *Palestine Yearbook of Int'l Law* 19, p. 20. The arguments attempted by Blum, Y. *The Missing Reversionary: Reflections on the Status of Judea and Samaria*, 3 *Israel Law Review* (1968), p.279, and Rostow.E. *Palestinian Self-determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 *Yale Studies in World Public Order* 147 (1979)) have received no scholarly or political support. other than within the Government of Israel; see Mallison & Mallison, *Settlements and the Law*, op.ci, pp 10-20: Cassese. A. *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge University Press, 1995, p 35-7.

“the paramount purposes [of the Convention] are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territory and the territory of other contracting parties, and ‘in all circumstances’ (Article 1), in ‘all cases’ of armed conflict among them (Article 2) and with respect to all persons who ‘in any manner whatsoever’ find themselves under the control of a party of which they are not nationals (Article 4).”⁵⁴¹

The United States concluded that, while Israel may undertake actions necessary to meet its military needs and to provide for orderly government during the occupation, ‘the establishment of civilian settlements in those territories is inconsistent with international law.’⁵⁴²

During the period of occupation, Israel has violated and continues to violate provisions of the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* of 1949. The following are illustrative examples;

First, Article 27⁵⁴³ of the IV Convention declares that ‘protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs.’ While paragraph 4 permits control measures against protected persons where ‘necessary’ for security

⁵⁴¹ *Digest of US Practice in International Law*, 1978, pp 1575-8.

⁵⁴² Ibid. See also Mr. McHenry (USA) in debate in the Security Council on SC resolution 465. 1 Mar. 1980: UN doc. S/PV.2203, para.19; US Department of State. *Human Rights Report, 1988: The Occupied Territories*. P 1376 (1988); to similar effect, see statement by US Representative Mr. Charles Yost in the Security Council on 1 Jul. 1969: Department of State Bulletin. 28 Jul. 1969, p 76-7. Other States, including the United Kingdom, have expressed similar views.

⁵⁴³ See, Roberts and Guelff, *Laws of War*, op.cit, p. 311.

reasons, Israeli government and military practice has consistently employed this limited exception to justify collective detention and community punishment, inhumane conditions, and denial of judicial control.⁵⁴⁴

Second, Article 33⁵⁴⁵ of the Fourth Geneva Convention provides that, 'No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited... Reprisals against protected persons and their property are prohibited.

Third, Article 49⁵⁴⁶ of the IV Geneva Convention prohibits 'individual or mass forcible transfers, as well as deportations of protected persons'. It further provides in paragraph 6 that 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'⁵⁴⁷ While temporary transfers of civilian populations in aid of the military might be acceptable, the establishment and peopling of permanent settlements is unlawful. Such settlements, in the case of the West Bank, have been intended to effect basic demographic change in the population of the territory.⁵⁴⁸

⁵⁴⁴ See, Pacheco, A. *Occupying an Uprising*, 532-52; Al-Haq, *Punishing a Nation: Human Rights violations during the Palestinian Uprising, December 1987-December 1988*; US Department of State, *Human Rights Report 1988*, 1379ff; Amnesty International, 'Report on Administrative Detention'. 1988.

⁵⁴⁵ See, Roberts and Guelff, *Laws of War*, op.cit, p.312; see also Article 50 of the *Hague Regulations* at p. 81.

⁵⁴⁶ Ibid., p. 317.

⁵⁴⁷ Pictet, J., ed. *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*. Geneva: ICRC, 1958, p 283.

⁵⁴⁸ See, for example, Benvenisti, M and Khayat, S. *The West Bank and Gaza Atlas*. Jerusalem. West Bank Database Project. 1988, pp 58-9, 94, describing the 1983 Likud Government settlement plan calling for the establishment of Jewish settlements housing 800.000 persons in the West Bank. The occupation of territory in wartime is essentially temporary: Pictet. *Commentary*, Ibid, p 275. The US Government has expressed the view that Israeli civilian settlements 'thus appear to constitute a 'transfer of parts of its own civilian population into the territory it occupies' within the scope of paragraph 6'.

Article 46⁵⁴⁹ of the 1907 Hague Regulations prohibits the confiscation of private property, and while Article 52⁵⁵⁰ allows the Occupying Power to take land against compensation, this is limited by the requirement of military needs. Where government property is concerned, Article 55⁵⁵¹ of the 1907 Hague Regulations provides only for limited rights of use, since the occupier is not sovereign and may not do any act amounting to unilateral annexation of the territory or any part thereof.⁵⁵²

The only permanent changes permitted are those which are intended to benefit the local population. Israeli Government activities, on the contrary, have involved ‘the expansion of existing colonies and the establishment of new ones, the construction of by-passes to isolated colonies and the confiscation of land..., the uprooting of olive trees and the forced transfer of Bedouin...’⁵⁵³

The Occupying Power has duties towards the local civilian population and may not, among others, detain persons outside the occupied territories. In its *Annual Report 1999*, the International Committee of the Red Cross noted that. ‘Throughout 1999. an average of 3,500 Palestinians were being held by the Israeli authorities at any one time. The rate of arrest remained unchanged at about 300 people per month, a quarter of them for security reasons. All Palestinian detainees were imprisoned in places of detention on Israeli territory, in violation of the Fourth Geneva Convention.’⁵⁵⁴

⁵⁴⁹ See, Roberts and Guelff, *Laws of War*, op.cit, p. 81.

⁵⁵⁰ Ibid., p. 82.

⁵⁵¹ Ibid.,

⁵⁵² Dinstein, Y., *Laws of War*, op.cit, pp 211, 220.

⁵⁵³ International Committee of the Red Cross. *Annual Report 1999*, ‘Israel, the occupied territories and the autonomous territories’: <http://www.icrc.org>.

⁵⁵⁴ Ibid.

The conditions of detention over the years have been widely criticized,⁵⁵⁵ while the Israeli High Court of Justice has also recognized that Israeli security forces have employed, as a matter of administrative practice, methods of interrogation incompatible with the standards of international law.⁵⁵⁶

The Occupying Power has specific responsibilities towards the population under its control. Among others, these include ‘the duty of ensuring’ food and medical supplies⁵⁵⁷, and ‘the duty of ensuring and maintaining’ medical and hospital establishments and services, public health and hygiene. The Occupying Power is obliged not to requisition ‘foodstuffs, articles or medical supplies’, save for limited purposes, ‘and then only if the requirements of the civilian population have been taken into account’⁵⁵⁸; the Occupying Power must also ensure that ‘fair value is paid for requisitioned goods’.⁵⁵⁹

According to Article 147⁵⁶⁰, ‘extensive destruction and appropriation of property, not justified by military necessity’ is a ‘grave breach’ of the Convention, for which no State party ‘shall be allowed to absolve itself’, or any other State party, of liability. The Government of Israel has repeatedly ordered and implemented policies involving the willful destruction of Palestinian rural and urban property.

⁵⁵⁵ Pacheco, A. *Occupying an Uprising*, op.cit; *The Geneva Law and Israeli Administrative Detention Policy during the First Year of the Palestinian General Uprising*, 21 *Columbia Human Rights Law Review*, pp 515-63 (1990).

⁵⁵⁶ Public Committee Against Torture in Israel and others v. The State of Israel and The General Security Service and others, High Court of Israel. 6 September 1999

⁵⁵⁷ See, Article 55 of IV Geneva Convention in Roberts and Guelff, *Laws of War*, op.cit, p. 319.

⁵⁵⁸ Ibid., para 2.

⁵⁵⁹ Ibid, para 3.

⁵⁶⁰ See, Roberts and Guelff, *Laws of War*, op.cit, p. 352.

The Israeli courts have shown themselves unwilling or unable to review governmental actions against the standards of international law. Consequently, the rights of Jordan and of the citizens and residents of the Occupied Territories have been violated, contrary to international law.⁵⁶¹

As indicated previously, the liability of the Occupying Power for its unlawful occupation and the consequences thereof are determined by the general principles of law.

(v) Denial of the right of return

What has been previously argued regarding the right of return in relation to refugees of the 1947-1949 period applies even more strongly in the case of Palestinian refugees displaced as a result of the 1967 war (Displaced Persons), given the express provision in Article 49 of the IV Geneva Convention.⁵⁶² Their removal by Israel or as result of Israeli actions was unlawful, and consequently the effects of that unlawful act should be remedied by their return to the places from which they were displaced.

The United Nations General Assembly has expressly affirmed the right of return of displaced persons. In resolution 55/125 (2000), adopted by a vote of 156-2-2 it reaffirmed 'the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel

⁵⁶¹ Ginbar, Y. *Israeli Settlements in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects*. B'Tselem, Jerusalem. Mar. 1997.

⁵⁶² See, Roberts and Guelff, *Laws of War*, op. cit, p. 317.

since 1967' (paragraph 1). Similarly, the Camp David accords also called for the phased return of displaced persons.

Jordan is clearly entitled to invoke such statements of principle recognizing the right of return, and to base a claim against Israel on Israel's refusal to give effect to that right. As noted above, an international tribunal might be reluctant to require Israel to give effect to a right of return, but it should feel able (a) to recognize that such a right exists, (b) to find that Israel is denying that right, and (c) to order some other form of reparation than full enforcement of the right to return.⁵⁶³

c . Israel's Breaches of Obligations under the Jordan-Israel Peace Treaty 1994

It must be noted that the Jordan-Israel Peace Treaty 1994 does not contain any provision of the kind which is often included in peace treaties, to the effect that the two parties mutually waive all their outstanding claims against each other. The mere fact of concluding a peace treaty does not bring about such a consequence, and such claims are accordingly still 'alive' and may still be pursued.

In the general context of refugee problems there are respectable arguments that Israel is in breach of its obligations under the Peace Treaty, namely: Israel has failed to fulfill its obligations under Article 11.1(b)⁵⁶⁴ (reinforced by Article 26)⁵⁶⁵ 'to repeal all adverse or

⁵⁶³ Perhaps through partial application of the right, and/or compensation, and/or other provisions whereby Israel may make good the consequences of its refusal to honor the right to return.

⁵⁶⁴ See, *Jordan-Israel Peace Treaty*, op. cit.

discriminatory references and expressions of hostility in [its] legislation, Israel has also failed to fulfill its obligations under Article 11.1(d)⁵⁶⁶ to allow Jordanian citizens ‘due process of law within [Israel’s] legal systems and before [Israel’s] courts, and Israel has failed to fulfill its obligations under Articles 25⁵⁶⁷ and 8⁵⁶⁸ to negotiate in good faith a settlement of the human problems involving the position of refugees and displaced persons.

(i) Article 11.1(b) of the Peace Treaty

Although Israel has enacted certain amendments to the Absentee Property Law, Section 6 of the Implementing Act⁵⁶⁹ does not go as far as a reasonable interpretation of that Article requires. However, by enacting Section 6 of the Implementing Act, Israel has acknowledged that the Absentee Property Law comes within the scope of its obligations under Article 11.

While the obligation under Article 11.1(b)⁵⁷⁰ is to repeal ‘adverse or discriminatory’ legislation, and it is not entirely beyond argument what ‘discriminatory’ means, there is a sound argument that on any reasonable interpretation of that term there remain, in Israeli legislation, provisions which are to be regarded as discriminatory. Moreover, whatever doubts there may be about ‘discriminatory’, there can be very few about ‘adverse’: the

⁵⁶⁵ Ibid.,

⁵⁶⁶ Ibid.,

⁵⁶⁷ Ibid.,

⁵⁶⁸ Ibid.,

⁵⁶⁹ See, *Israel’s Implementing Act of the Jordan-Israel Peace Treaty*, Jordanian Foreign Ministry Archive Document 1117 dated 22/2/ 1995.

⁵⁷⁰ See, *Jordan-Israel Peace Treaty*, op.cit.

inclusion of people with a Jordanian connection within the scope of the Absentees' Property Law is clearly 'adverse' to their interests.

Israel's obligation under Article 11 is to repeal 'references' in its legislation, rather than to repeal the legislation itself. The Article, however, leaves unclear the extent of such a repeal. Even if the legislation as a whole is repealed (in its application, say, to Jordan and Jordanian nationals), there is a question whether that repeal has to apply only to actions occurring after the date of the repeal, or whether it must also be to some extent retroactive, and constitute an attempt to undo matters carried out under the said legislation.

Section 6 of Israel's Implementing Act adopts a minimalist interpretation of Israel's obligations under Article 11.1(b). It provides that property is not to be considered absentee property 'only' on the basis that a person with a right to it was a 'a citizen or a subject of Jordan', or was present in Jordan *after* 10 November 1994.⁵⁷¹

Very little, if any property has become absentee property in recent years or would (but for the Implementing Act) acquire that status in the future. Generally most Jordan-linked property will already have become absentee property by virtue of being owned by a Jordanian national or a person present in Jordan before 10 November 1994. If this is the case, then the practical effect of Section 6 of Israel's Implementing Act is minimal. The great bulk of absentee property still remains absentee property, unaffected by the

⁵⁷¹ See, *Israel's Implementing Act of the Jordan-Israel Peace Treaty*, Jordanian Foreign Ministry Archive Document 1117 dated 22/2/ 1995, op.cit.

provisions of Article 11 of the Peace Treaty.

A maximalist interpretation of Article 11 would require that all absentee property which was treated as such because of its Jordanian connection should no longer be treated as absentee property and should be placed at the free disposal of its owners. If disposed of by the Custodian it should be recovered and returned to its owners - and if such recovery is now impossible, compensation should be paid.

While Israel will presumably not be ready to accept any such maximalist interpretation of its obligations under Article 11, Jordan need not on that account give up such a maximalist position.⁵⁷² First, it is not an unreasonable interpretation of the language used in Article 11; secondly, it would be consistent with the general concept of 'custodianship' usually associated with enemy property in time of war, or absentee property in the present instance (i.e. that property has to be looked after by the 'custodian' and when peace is restored it is returned to its owners, subject to any provision for its retention with or without compensation made in the peace treaty). Thirdly, if Jordan is entering into negotiations under Article 11.3, or a financial claim under Article 24, the option should be retained as a bargaining chip.

The language of Article 11 clearly supports an interpretation which goes well beyond Israel's minimalist position. It requires Israel to 'repeal all adverse or discriminatory references in [... its...] legislation'.

⁵⁷² Interview with Dr. Hani Mulki. Head of the Jordanian Negotiating team and later Foreign Minister of Jordan. (6 February 2006), [Hereinafter, *interview with Mulki*].

(a) Treaties are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose;⁵⁷³ Article 11 is part of a peace treaty, the object and purpose of which is to restore peace between the parties and improve relations between them;

(b) 'All' adverse or discriminatory references have to be repealed;

(c) 'Repeal' means 'repeal', and not some sort of special and limited interpretative rule like that embodied in Section 6 of the Implementing Act. The offending references should disappear from the statute book;

(d) In terms of the Absentee Property Law, Section 1(b)(i),⁵⁷⁴ includes Trans-Jordan in the list of 'offending' countries; this is clearly an 'adverse' reference, and arguably also a 'discriminatory' one, which has to be repealed. If this took place, the whole structure of the Law would cease to apply to Jordanian nationals or persons present in Jordan.

Overall, there is a strong case for Jordan to maintain that Israel's Implementing Act falls far short of what is needed to comply with Article 11 (although there is room for argument regarding the extent of Israel's obligations under that Article with reference to the 'maximalist' position outlined above). Jordan is entitled to request from Israel the complete fulfillment of its obligations under Article 11.1(b) and Article 26 of the Peace Treaty, which involves primarily the proper 'repeal' of 'all' the offending references in

⁵⁷³ See, *Vienna Convention on the Law of Treaties*, op.cit. Article 31.

⁵⁷⁴ See, Absentee's Property Law, 5710-1950, in Saleh, *Qawanin Israel*, op.cit p. 115.

the Absentees' Property Law covered by Article 11.1(b).

(ii) Article 11.1(d) of the Peace Treaty

Notwithstanding the conclusion of the Peace Treaty between Jordan and Israel, Jordanian citizens are still not enjoying due process of law within Israel's legal system and before Israeli courts, as required by Article 11.1 (d).⁵⁷⁵ This is particularly the case for those Jordanian citizens who are 'absentee owners' of property or otherwise fall within the scope of Israel's Absentee Property Law. This is a matter which requires further investigation. If such denial of due process can be established, it may also comprise an element in a comprehensive claim by Jordan against Israel.

(iii) Israel's failure to negotiate in good faith

As a matter of both customary international law and the terms of the Peace Treaty, Israel is under an obligation to negotiate in good faith. As for the Peace Treaty, Article 25.2 stipulates that 'The Parties undertake to fulfill in good faith their obligations under this Treaty...'⁵⁷⁶ Israel's lack of good faith in conducting the negotiations provided for in Article 8 can be substantiated.

⁵⁷⁵ The Jordanian Foreign Ministry has a department named the Department of Palestinian Affairs. This department has the institutional jurisdiction over Palestinian Refugees camps in Jordan and over protecting the interests of Jordanian Nationals of Palestinian Refugee origin. Although the exact number of documented complaints presented by Palestinian refugees over the issue of the denial of justice, discriminatory treatment by Israel and the lack of any effective remedy for them in the Israel domestic system to address their rights even in the Judicial field, is classified, I can confirm that there are hundreds of thousands of such complaints that I have been to see the inventory in my official capacity. I have also seen the content of some sample complaints in which the issue of denial of Justice is very evident and confirmed. Many such complaints continued after the signing of the Peace Treaty.

⁵⁷⁶ See, *Jordan-Israel Peace Treaty*, op.cit.

The burden of the Jordanian argument would be that:

(a) In various respects Article 8 of the Peace Treaty imposed on Jordan and Israel obligations to negotiate a settlement of the human problems involving refugees and displaced persons;

(b) These obligations were to be met through the Quadripartite Committee, the Multilateral Working Group, in conjunction with the 'permanent status' negotiations, and through UN and other international programmes;

(c) In practice Israel has either prevented those procedures from starting or has ensured that, once discussions in those fora have begun, they have failed to make progress; and

(d) Israel is therefore in breach of its obligations (1) to apply Article 8 as it must be reasonably interpreted and (2) to negotiate in good faith as required by Article 25.2 and by customary international law.

d. Direct losses Suffered by Jordan and remedies that Jordan might seek.

Jordan is entitled to claim for losses of State-owned property which may have resulted from the movements of refugees across its borders at various periods since 1947-1949. There does not appear to be any case on record in which a State of asylum or refuge has

sought damages from the country of origin by reason of the losses suffered in receiving and according protection to refugees. However, States *have* paid compensation to and on behalf of refugees from their territory and of victims of persecution and other human rights violations.⁵⁷⁷ The relatively few examples in practice suggest that political considerations may have weighed against the making of such claims, but the general principles of liability are nevertheless well-established in other areas where the State is responsible for events within its own territory or jurisdiction which result in injury and loss to and in another State.

In relation to the expulsion of Palestinians and Jordanians, it is necessary to account separately for the loss and damage suffered by the individuals concerned as a result of their unlawful expulsion and for the loss and damage suffered by Jordan in taking in, caring for and absorbing the refugees.

In so far as Jordan can substantiate claims against Israel, the question then arises of the reparation (including compensation) which Jordan can seek.

⁵⁷⁷ According to Principle 4 of the International Law Association's Cairo Declaration of Principles of International Law on Compensation to Refugees, 'a State is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated to compensate an alien': 87 AJIL(1986), p.532. Although no international mechanisms presently exist through which refugees may obtain compensation, there are a number of relevant precedents including, for example, the compensation arrangements established by the Federal Republic of Germany for those persecuted under the Nazi regime. Article 3 of the Hague Convention respecting the Laws and Customs of War on Land provides that a 'belligerent party which violates... the (Regulations) shall, if the case demands, be liable to pay compensation': Hague Regulations annexed to Convention No. IV respecting the Laws and Customs of War on Land, 1907: in Roberts and Guelff, *Laws of War*, op.cit. It has also been argued that violations of human rights entail the obligation to provide for compensation as a means to 'repair a wrongful act or a wrongful situation': see van Boven, T., *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*: UN doc. E/CN.4/Sub.2/1990/10: see also article 14, 1984 United Nations Convention against Torture.

There is no doubt that in international law the breach of an international obligation carries with it the obligation to make adequate reparation, while the precise identification of the applicable law has some important consequences. That law is international law, but the claims of Jordan arise not merely in a purely 'civil' context, such as the expropriation of property without compensation, but in a context which is *delictual*, involving, in particular, the use of force in breach of the United Nations Charter and general international law. The measure of damages will therefore need to reflect this basis of liability and the imputability to Israel of the consequences of its unlawful actions.

Among others, the test of remoteness of damage will require to be applied favourably to the claimant, Jordan, where there has been a deliberate intention to injure. This applies in relation to direct injury to the claimant State, injury to the nationals or other persons within the protection of the claimant State, and violations generally of the law of human rights and international humanitarian law. As the events described in Chapter 1 have shown, the expulsion of Palestinians and the expropriation of their property, among others, were the result of policies and intentional acts adopted at the highest level.

The injured or dispossessed as a result of the events the 1967 war, particularly as they affected the West Bank, were not injured as aliens, but as lawful citizens and inhabitants of a territory taken under military occupation. In this case, Jordan exercises protection on behalf of its citizens who suffered loss, as citizens, in the territory under the sovereign authority of Jordan and in consequence of its military occupation by Israel.

Jordan also can claim by reason of direct injury to itself as a sovereign. In relation to Israeli acts affecting the West Bank and its population, the Government of Jordan has been directly affected and its rights violated. Thus, it had to receive the very many hundreds of thousands of Palestinians expelled by Israel during the 1947-1949 events, and has been obliged further to meet the costs of maintaining substantial numbers of refugees, as a direct consequence of Israel's refusal to re-admit the displaced population.

Jordan is thus entitled to compensation and other appropriate remedies in regard to, *inter alia*, hosting and maintaining Palestinian refugees who fled during the 1947-1949 period, the invasion and occupation, by Israel, of the West Bank, the establishment of settlements on the West Bank, the costs incurred by Jordan in receiving substantial number of persons displaced from the West Bank by the 1967 war and thereafter, the injuries suffered by Palestinian and Jordanian citizens resident in the West Bank as a result of the occupation, by Israel, and its unlawful administration of the West Bank, the willful destruction by Israel of Jordanian and Palestinian property and breaches of international humanitarian law.

e. Remedies that Jordan may seek.

The remedies that Jordan might seek may include some or all of the following, whether separately or in combination:

(a) finding/acknowledgement that Israel has acted in breach of specific international obligations owed to Jordan;

- (b) declaration that Israel must immediately cease such unlawful conduct;
- (c) compensation for Jordan;
- (d) compensation for Jordanian nationals;
- (e) return of refugees and displaced persons to their places of origin;
- (g) return of property taken from refugees and displaced persons.

There are various refinements for several of these possible remedies, particularly as regards the question whether the persons to be protected by the remedy sought are only Jordanian nationals, or cover also other Palestinians resident or domiciled in Jordan, or even Palestinians not so resident or domiciled. There are clearly important issues of both law and policy in this area, particularly as regards the interplay of the interests of Jordan and the Palestinian Authority.

So far as concerns compensation for losses suffered by individuals, an important question is whether Jordan should seek to have those claims dealt with at the international level on an individual basis, or whether on a lump sum basis. This question has a direct bearing on the resources which Jordan will have to devote to the processing of claims.

Particular matters which will have to be addressed in this context are considered in greater detail in a later part of this thesis, but for present purposes it may be helpful to indicate some general considerations which bear on the outcome.

If Jordan seeks and obtains a lump sum payment of compensation, the nature of both the

negotiation with Israel and the payment of compensation to individuals would be directly affected. So far as concerns negotiations with Israel, the matter would in practice be likely to be decided on a fairly general and rounded basis, rather than as a detailed calculation of specific claims. While Jordan would have to have a good basis for whatever lump sum claim it puts forward, the actual agreement on whatever lump sum is to be paid would be likely to be reached on a political/ diplomatic basis-\$x million, or \$y million. This will make the negotiation with Israel easier (in the sense of being less complicated), and should enable a final solution (at the international level) to be reached more quickly. But Jordan would assume responsibility for the adequacy of the lump sum received from Israel, against a background of perhaps high expectations on the part of affected individuals. The principal practical consequence of the 'lump sum' approach would be that the burden of arranging the distribution of the compensation to individuals would fall on the Jordanian authorities. Individuals would have to present claims to those authorities, which would have to decide how to distribute the lump sum to the claimants. Handling claims could prove a very lengthy and complex process.

On the other hand, if Jordan were to seek to have claims dealt with on an individual basis at the international level, the situation would be very different. The negotiation with Israel would be directed principally at deciding upon (i) the categories of claims to be covered, and (ii) the procedures for dealing with them (almost certainly some kind of claims commission). The sums to be awarded as compensation to individuals would not be decided in the agreement with Israel, but by the claims commission. The presentation of the individual claims could either be done by the persons concerned submitting their

claims directly to the claims commission, or by the claims being submitted by them to the Jordanian authorities for onward transmission to the commission. Clearly a procedure whereby claims would be determined and assessed by a claims commission would relieve the Jordanian authorities of much of the work which would otherwise be involved in the processing of claims, but at the same time Jordan would have less control of (and of course less responsibility for) the outcome of individual claims, not only in respect of the amounts which might be awarded but also in respect of the time taken by the whole process.

A 'mixed' procedure could also be envisaged for a given category of claims, whereby the Jordan-Israel agreement would provide for a lump sum payment of compensation, but leave that lump sum to be distributed by an international, or mixed Jordan-Israel, claims commission. In those circumstances the lump sum would in effect be a 'cap' on the total amount of compensation, leaving individual claimants with the probability of getting less than 100% of the sums to which they might be entitled.

In deciding between these broad alternatives, two general considerations need to be borne in mind. First, the great majority of the individual claimants are likely to be relatively unsophisticated people, for whom complex and expensive claims procedures would be inappropriate. Second, different categories of claims could be dealt with in different ways. For example, personal injuries claims could be dealt with by a lump sum payment to Jordan for distribution to affected claimants, while property claims could be referred to a claims commission.

This chapter has surveyed, examined and assessed the major heads of claims that Jordan may realistically present to and against Israel and that are claims emanating from breaches by Israel of international legal obligations that it has towards Jordan. Furthermore it has briefly and concisely sketched out for illustrative purposes remedies that Jordan could seek.

Indeed such heads of claims and their procedural pursuit require the existence mechanisms and forums in which such claims are to be made. Without such existing or perceived mechanisms and forums, such claims along with the legal bases remain in the realm of theoretical rights and theoretical claims.

The next and final chapter, again in the context of the attempt of this thesis to serve as a 'roadmap' or 'blueprint' for presentation of claims by Jordan, will examine the available mechanisms both in the context of the express provision of the Jordan-Israel Peace treaty and other mechanism not provided for in the Treaty of Peace.

Chapter (4)

Mechanisms and Procedures available to Jordan for Pursuit of Claims To and Against Israel

The Palestinian refugee problem and its solution had been viewed as a central objective for Jordan in the context of the Jordan-Israel Peace negotiations leading to the signing of the Jordan Israel Treaty of Peace.⁵⁷⁸ The Jordanian Government, in its campaign to mobilize support for the Peace Treaty, stated that the Peace Treaty accomplishes, among other things for Jordan, “ensuring the rights of refugees and displaced persons in determining their fate and giving them the right to return and compensation.”⁵⁷⁹

This chapter aims at examining the provisions of the Jordan-Israel Peace Treaty that provide for procedures and mechanisms for the pursuit of claims relating to Jordanian nationals who are of Palestinian refugee origin and their right of return and compensation and Jordan right to present claims on their behalf to and against Israel and its right, as a host state to claim compensation from Israel. The Chapter will examine and analyze each of the provisions that could provide a mechanism and forum for presenting and bringing claims in the Peace Treaty. It will also examine and analyze mechanisms that, while are not contained in the Peace Treaty, were rendered possible and available as a result of its conclusion such as reference to the ICJ and mediation and conciliation.

⁵⁷⁸ Interview with Mulki, op.cit.

⁵⁷⁹ See, Jordan Media Group Publication Number 18, November 1994, titled “The Jordan-Israel Peace Treaty: What is It ”? this document was used by the Jordanian government as the main instrument for mobilizing support in Jordan for the Peace Treaty. Some Jordanian officials who were part of the Peace negotiations believe this statement to be fully true and accurate. Dr. Hani Mulki the Head of the Negotiations Team with Israel at some point in the negotiations believes this statement to be accurate and stated it in an interview by the author with him on 6 February 2006 in Amman, Jordan.

Certainly the approach and structure of this thesis and its endeavor to serve as a possible 'blueprint' or 'roadmap' to Jordan for presenting and bringing claims to and against Israel would not be complete and maintain its utility and integrity without highlighting, scrutinizing and analyzing the mechanisms, procedures and avenues that are available to Jordan to present and bring claims to and against Israel.

The Jordan-Israel Peace Treaty, as explained previously in other chapters of this thesis, gave Jordan an additional standing and opposability in relation to claims that it may bring to or against Israel through the fact that Article 8 recognized such a standing for Jordan. Article 8⁵⁸⁰ in specific, it should be noted, did not only clearly indicate and stipulate that Jordan has a *locus standi* in relation to the refugees, it also provided for explicit and specific mechanisms and procedures in which issues pertaining to refugees are to be addressed and discussed. Such mechanisms and procedures are of a bilateral and multilateral character, namely - bilateral negotiations, a quadripartite Jordan-Israel-Egypt-Palestinian committee, the Multilateral Working Group on Refugees. Also Article 24⁵⁸¹ of The Peace Treaty contains reference to another procedure and mechanism, namely a claims commission. However, nothing in Articles 8 and 24 excludes other processes that are not treaty-based also from being used for the pursuit of claims.⁵⁸²

Before examining the Peace Treaty-based mechanisms for the pursuit of possible claims

⁵⁸⁰ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8.

⁵⁸¹ Ibid.,

⁵⁸² See, Opinion rendered by H.E Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996.

to and against Israel, it must be stressed that the signing of the Peace Treaty in itself and the termination of the state of war between the Jordan and Israel and the advent of the era of Peace would allow Jordan to also use other non Treaty based mechanisms. This option was impossible during the war era, owing to the fact that two states at war would never even appear before a dispute settlement mechanism in relation to issues such as the one discussed in this thesis.

Article 8 of the Peace Treaty does not exhaustively list the procedures which the parties might regard as appropriate for the settlement of their disputes concerning refugees and displaced persons. Certain other procedures through which claims might be pursued must therefore also be considered. These include: reference to the International Court of Justice, arbitration, mediation and conciliation, and participation in Israel-Palestinian claims arrangements agreed as part of the peace process. Different procedures may be appropriate for different categories of claims.⁵⁸³

Jordan's procedural preferences are, of course, not decisive, since the final decision as to which procedure(s) to adopt will be a matter for agreement between Jordan and Israel. Nevertheless Jordan needs to be aware of what the various alternatives involve, both in deciding upon its own preferences and in resisting undesirable preferences expressed by Israel.

The first step for Jordan, upon presentation of claims to Israel, will be to invite Israel to enter into negotiations upon the matter. Unless this emerges as part of wider Middle East

⁵⁸³ Ibid.,

negotiations, this will require a formal Diplomatic Note. It will be necessary to allow Israel a reasonable time in which to study the Jordanian communication. But it will be important not to allow Israel to cause delay. It is as well to note that the negotiating process is not solely a matter of policy and diplomacy. It has a significant legal dimension of some significance.⁵⁸⁴

This includes, the fact that for the most part negotiation is voluntary; but in some circumstances States are under a legal obligation to negotiate with other States (e.g. when there is a treaty provision to that effect). Where parties are under an obligation to reach an agreement, that implies that they are under an obligation to enter into negotiations.⁵⁸⁵

Additionally, there may be a need to determine, from a legal point of view, what “negotiations” means (e.g. it may be a condition precedent to recourse to the pacific settlement procedures set out in a treaty)⁵⁸⁶. It is, however, a difficult concept to confine within the terms of a strict definition, because its most important characteristic is its flexibility, leaving to the parties much scope for adapting the process to suit their particular needs and circumstances.

Also, a State may not, by prolonging negotiations deprive an otherwise competent court of jurisdiction over a dispute. The active current pursuit of negotiations does not necessarily by itself prevent there being in existence a dispute capable of being referred

⁵⁸⁴ Many of the relevant considerations are set out more fully in an article entitled “Negotiation and International Law” by Sir Arthur Watts in *Dimensao internacional Do Direito* (2000), pp. 519-536.

⁵⁸⁵ See, *North Sea Continental Shelf Cases*. ICJ Reports 1969, pp. 3, 47 (para. 85).

⁵⁸⁶ See, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ Reports 1988, pp. 69, 94(para. 62)

to a court, or prevent the court exercising jurisdiction over it.⁵⁸⁷

However, an obligation to negotiate does not normally involve an obligation to reach an agreement. In this context it must be pointed to that if an obligation to negotiate exists, it cannot be ignored. A State refusing to negotiate in good faith would then be in breach of its international obligations.

The negotiating process must be characterized by good faith. This involves at least that each party must acknowledge the rights of the other party, the negotiations must be meaningful, and they must involve a genuine attempt to reach a positive result.

Also, reference has been made by an arbitral tribunal to “the general principles that ought to be observed in carrying out an obligation to negotiate - that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise.”⁵⁸⁸ The ICJ has similarly noted that where States are under an obligation to enter into negotiations in order to reach an agreement on maritime delimitation, the negotiations are to be “with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement”. The Court added that “they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon

⁵⁸⁷ See, *Aegean Sea Continental Shelf Case*, ICJ Reports 1978, pp. 3, 12-13; *Military and Paramilitary Activities Case*, ICJ Reports 1984, pp. 392, 440.

⁵⁸⁸ See, *Government of Kuwait v. American Independent Oil Co. (Aminoil)*, ILR. Vol 66, pp. 519, 578.

its own position without contemplating any modification of it”⁵⁸⁹.

Negotiations with Israel on the claims will either make some progress, or will get nowhere: they may indeed never get started, since Israel may simply refuse to negotiate. Failed negotiations, or a refusal to engage in negotiations, may have political implications. It will also have legal implications since it will serve to crystallize the existence of a legal “dispute”, which can be important in relation to the operation of other dispute settlement procedures. If negotiations do make progress, it may be in only limited areas, leaving other areas as ‘no progress’ areas. To the extent that no progress is made in negotiations, Jordan will then have to turn to other ways of reaching a settlement. Several options are available.

a. Jordan-Israel Peace Treaty Based Mechanisms and Procedures.

The first set of options available to Jordan that will be considered are those provided for in the Jordan-Israel Peace Treaty of 1994. There are two directly relevant provisions—Articles 8 and 24⁵⁹⁰—and one that is indirectly relevant, Article 29.⁵⁹¹

At the outset it must be said that these provisions are, as will be explained in detail later in this chapter, neither as clear nor as helpful as they might appear. All three Articles, and particularly Articles 8 and 24, show signs of having been prepared in order to give the appearance of resolving issues of substance. However, in reality they do little more than

⁵⁸⁹ See, *North Sea Continental Shelf Cases*. ICJ Reports 1969, pp. 3, 47.

⁵⁹⁰ See, *Jordan-Israel Peace Treaty*, op.cit, Articles 8 and 24.

⁵⁹¹ Ibid., Article 29.

avoid prejudicing either Parties' positions on matters of substance, which are left open for future negotiation and resolution. Nevertheless, Articles agreed between Jordan and Israel which far from offering a real procedural or substantive settlement of the matters dealt with in them, they represent at least an agreed framework. It is probably in Jordan's interest to try to make as much use of them as possible. They therefore need careful scrutiny. It is necessary to look closely and carefully at the texts of these Articles since it may be assumed that Israel will seek to invoke any point which can be used to its advantage: to be forewarned of what those points might contain is to be forearmed in dealing with them.

Before considering each Article in turn, however, it is necessary to recall that they are part of a treaty. Their interpretation is therefore to be determined in accordance with those rules of international law which apply to the interpretation of treaties, and in particular Articles 31-33 of the Vienna Convention on the Law of Treaties 1969.⁵⁹² Although neither Jordan nor Israel is to date a party to the Vienna Convention, the International Court has held at least Articles 31 and 32 to reflect customary international law.⁵⁹³ They therefore embody the applicable rules even as between States which are not bound by the Vienna Convention itself.

Articles 31-33 of the Vienna Convention are as follows:

“Article 31: General rule of interpretation

⁵⁹² See, *The Vienna Convention on the Law of Treaties*, op.cit

⁵⁹³ See, e.g. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* ICJ Reports 1994, pp. 6, 21-22; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* ICJ Reports 1995, pp. 6, 18; *Oil Platforms Iran v. USA (Preliminary Objections)* ICJ Reports 1996, pp. 803, 812; *Case Concerning Kasivili/Sedudu Island* ICJ Reports 1999, at para 18.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meanings to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”⁵⁹⁴

“Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure;

(b) leads to a result which is manifestly absurd or unreasonable.”⁵⁹⁵

⁵⁹⁴ See, *the Vienna Convention on the Law of Treaties*, op.cit, Article 31.

⁵⁹⁵ *Ibid.*, Article 32.

“Article 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁵⁹⁶

In the context of these Articles, a number of observations may be made. First; as regards Article 31.2, there has been no “agreement” or “instrument” between Jordan and Israel of the kind referred to in that provision;⁵⁹⁷ second, as regards Article 31.3, there has been no “subsequent agreement” or “subsequent practice” between Jordan and Israel of the kind referred to in that provision too;⁵⁹⁸ third; as regards Article 31.4, it seems that Jordan and Israel have not agreed to any special meaning to be given to a term of the Peace Treaty (except perhaps, as noted later in relation to “refugees” and “displaced persons”).⁵⁹⁹ As for Article 33.1, the relevant provision of the Jordan-Israel Peace Treaty stipulates that it

⁵⁹⁶ Ibid., Article 33.

⁵⁹⁷ Interview with Mulki. op.cit.

⁵⁹⁸ Ibid.,

⁵⁹⁹ Ibid.,

was concluded in Arabic, Hebrew and English, all texts being equally authentic; in case of divergence of interpretation, the English text prevails.⁶⁰⁰

An additional general point to be made at the outset is that both parties to the Peace Treaty are under a clear legal obligation to apply it in good faith. This is both a matter of general international treaty law, and a matter of specific provision in the Peace Treaty.

Article 26 of the Vienna Convention⁶⁰¹ reads:

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

Article 25.2 of the Peace Treaty⁶⁰² begins with the statement that:

“the Parties undertake to fulfill in good faith their obligations under this Treaty...”

(i) Article 8 of the Jordan-Israel Peace Treaty.

This Article is the one dedicated in the Peace Treaty to the issue of refugees and as indicated in preceding parts of this thesis. This article is the one that gives Jordan a *locus standi* in relation to Israel and in connection with addressing refugees’ rights.

This long Article also outlines mechanisms and procedures through which the issues pertaining to refugees are to be addressed in the context of the Middle East Peace negotiations.

⁶⁰⁰ See, *Jordan-Israel Peace Treaty*, op.cit, Article 30.

⁶⁰¹ See, *Vienna Convention on the Law of Treaties*, op.cit. Article 26.

⁶⁰² See, *Jordan-Israel Peace Treaty*.op.cit,

It is therefore important to analyze this Article in Detail. The Article reads as follows:

“Recognizing the massive human problems caused to both Parties by the conflict in the Middle East, as well as the contribution made by them towards the alleviation of human suffering, the parties will seek to further alleviate those problems arising on a bilateral basis.

1. Recognizing that the above human problems caused by the conflict in the Middle East cannot be fully resolved on the bilateral level, the Parties will seek to resolve them in appropriate forums, in accordance with international law, including the following:

a. In the case of displaced persons, in a quadripartite committee together with Egypt and the Palestinians;

b. In the case of refugees,

(i) In the framework of the Multilateral Working Group;

(ii) In negotiations. in a framework to be agreed, bilateral or otherwise in conjunction with and at the same time as the permanent status negotiations pertaining to the Territories referred to in Article 3 of this Treaty;

c. Through the implementation of agreed United Nations programs and other agreed international economic programs concerning refugees and displaced persons, including assistance to their settlement.”⁶⁰³

This Article is not free from problems of interpretation and application. It provides a series of procedures to be adopted in varying circumstances, and since those procedures are prescribed in a binding treaty there is probably value in invoking them if possible and if, on examination, the procedures are likely to meet Jordan’s requirements.

The background to Article 8 is relevant to its interpretation. What is now Article 8

⁶⁰³ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8.

evolved from section IV of the Jordan-Israel Common Agenda⁶⁰⁴ signed by them on 14 September 1993. That Common Agenda did not stand alone. In the first place, its 'Goal' records at the outset that it flows from "the Madrid invitation" - a reference to the Madrid Conference on the Middle East of 1991.⁶⁰⁵

In the second place, and again as indicated in the 'Goal', the Jordan-Israel Common Agenda formed part of the overall Middle East peace process, of which there was also a Palestinian-Israeli element, in particular the Palestinian-Israel Declaration of Principles on Interim Self-Government Arrangements, of August 1993. These two aspects of the peace process came to be referred to as the Jordan-Israel track and the Palestinian-Israel track.⁶⁰⁶

In accepting the Jordan-Israel Common Agenda, the Head of the Jordanian Delegation noted recent developments on the Palestinian-Israel track and emphasized, in a formal statement, that "The announcement of an agreed agenda on the Jordan-Israel track however does not prejudice the concept of comprehensiveness. It has been agreed among the Arab parties to the negotiations that the variation in the pace on different tracks does not nullify the principle of comprehensiveness."⁶⁰⁷ He added that in the light of these developments "Jordan views that certain negotiation modalities and formats need to be

⁶⁰⁴ See, *Jordan-Israel Common Agenda*, (14 September 1993, Washington DC), in Jordan Media Group, publication number 18, November 1994, [hereinafter *Common Agenda*].

⁶⁰⁵ *Ibid*,

⁶⁰⁶ See, the Declaration of Principles on Interim Self-Government Arrangements signed between the Palestine Liberation Organization and the State of Israel on 13 September 1993, 32 ILM (1993), p. 1525. [hereinafter *Palestinian-Israeli DOP*]

⁶⁰⁷ See, Statement by Dr. Abdulsalam Majali, Head of the Joint Jordanian- Paletinian delegation to the Peace Process (15 September 1993), in *MAJMUAT ALWATHAIK*, op.cit (1994), p. 798. [hereinafter *Majali Statement*].

acknowledged and acted upon in future rounds.”⁶⁰⁸ He further noted that while the Palestinians would pursue their negotiations on a separate and independent track, “there will be a need to classify the issue among Jordanians, Palestinians and Israelis as those which require either a bilateral or a trilateral negotiation without prejudicing the integrity and independence of any of the three negotiating delegations.”⁶⁰⁹ It was apparent that Jordan was, from the outset, aware of and made known the importance of not letting the Palestinians and Israel settle on a bilateral basis matters which were properly of trilateral concern.

The Jordan-Israel Common Agenda identified “Components of Jordan-Israel Peace Negotiations”.⁶¹⁰ These were set out in eight numbered sections. The legal status of the Common Agenda is not clear. Although signed by both Jordan and Israel it does not constitute an international agreement, but is rather in the nature of a ‘heads of agreement’, i.e. a document setting out in broad terms the ground to be covered in a future agreement which they will in due course negotiate, and sometimes also containing an indication of the substantive way in which that ground is to be covered.

The Common Agenda set out the elements of an eventual peace agreement, and included three Common Sub-Agendas.⁶¹¹ These covered Borders and Territorial Matters, Security, and Water, Energy, and the Environment: there was no separate Common Sub-Agenda on refugees and displaced persons. Section IV of the Common Agenda reads:

⁶⁰⁸ Ibid.,

⁶⁰⁹ Ibid.,

⁶¹⁰ See, *Common Agenda*, op.cit, p. 1.

⁶¹¹ Ibid.,

“Refugees and Displaced Persons

Achieving an agreed just solution to the bilateral aspects of the problem of refugees and displaced persons in accordance with international law.”⁶¹²

Section IV thus established that the solution was to be “just” and “agreed”, that it was to cover “the bilateral aspects of the problem”, and that it was to be “in accordance with international law”.

The final provision in the Common Agenda stated that “It is anticipated that the above endeavor will ultimately, following the attainment of mutually satisfactory solutions to the elements of this agenda, culminate in a Peace Treaty”. The fact the a Peace Treaty was actually reached a year later between Jordan and Israel may suggest that the outcome on refugees and displaced persons was a “mutually satisfactory solution” to that element of the Agenda.

The Jordan-Israel Common Agenda needs to be seen in the light of the following parts of the Israel-Palestinian Declaration of Principles of August 1993.⁶¹³

(a) In the Middle East Peace Conference (Madrid, 1991) there was a combined Jordanian-Palestinian delegation. The preamble to the Declaration of Principles refers to the Palestinian team in that delegation as “representing the Palestinian people”.⁶¹⁴

⁶¹² *Ibid.*, Section IV, p. 2.

⁶¹³ See, *Palestinian-Israeli DOP*, op.cit.

⁶¹⁴ *Ibid.*, Preamble.

(b)The Declaration provides for a transitional/interim period and a permanent settlement, and that the negotiations on the permanent status will lead to the implementation of Security Resolutions 242 and 338.⁶¹⁵;

(c)The permanent status negotiations “between the Government of Israel and the Palestinian people representatives” will cover, *inter alia* (“including”), “...refugees, settlements, ... and other issues of common interest.”⁶¹⁶

(d)Israel and the Palestinians are to invite Jordan and Egypt to join in establishing further liaison and cooperation arrangements between, on the one hand, Israel and the Palestinians and, on the other, Jordan and Egypt. to promote cooperation between them. These arrangements are to include a “Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, ...Other matters of common concern will be dealt with by this Committee.”⁶¹⁷ It is not clear in this context whether "matters of common concern means matters of concern to the two parties to the Declaration of Principles (i.e. Israel and the Palestinians) or matters of concern to all four parties which will constitute the Continuing Committee.

Although Article 8 reflects the outcome on one of the elements included in the Common

⁶¹⁵ Ibid., Article I.

⁶¹⁶ Ibid., Article V.3.

⁶¹⁷ Ibid., Article XII.

Agenda of 14 September 1993⁶¹⁸, it emerged late as a text for inclusion in the Peace Treaty. This may have been because of the difficulty of the subject.

A draft Israeli text of 25 September 1994, presented just a month before the conclusion of the Treaty, contained only a brief text on refugees, as draft Article 24.⁶¹⁹ Another revised draft presented by Israel the following day (26 September) contains that same brief text, but this time placed where it was eventually to be, as draft Article 7 A.⁶²⁰

A revised Jordanian draft of the Peace Treaty dated 28 September 1994 set out a fuller version of an Article 7A.⁶²¹ A further Jordanian draft dated 28 September contains a similar (but not identical) version of Article 7A.⁶²²

A further revised draft dated 29 September (Draft 3 of the Treaty) sets out the current Israeli draft (in roman type) and Jordanian draft (in italic type).⁶²³

A further Jordanian revised draft dated 3 October and one that was prepared for Jordanian internal consideration, contains at Article 7A a brief note on this part of the negotiations, sets out in n.1 on p.4 the current negotiating texts as in Draft 3 of the Treaty, and puts forward (for internal Jordanian consideration) a new form of words. It is notable that at this stage, 3 weeks before the Peace Treaty was concluded, Jordan was being advised that

⁶¹⁸ See, *Common Agenda*, op.cit.

⁶¹⁹ See, *Jordan-Israel Peace Treaty Documentary History*, (1996) available at Jordanian Foreign Ministry Archives, p. 177.

⁶²⁰ Ibid., p. 179.

⁶²¹ Ibid., p. 183.

⁶²² Ibid., p. 190.

⁶²³ Ibid., p. 204.

the refugee issue should be kept open while attention turns to other matters (boundaries and water).⁶²⁴ The last draft of Article 7A is that set out in an internal Jordanian paper (prepared by Professor James Crawford) on 9 October.⁶²⁵

It is apparent from this series of drafts that at least up to a couple of weeks before the conclusion of the Peace Treaty the two sides were a long way apart on the question of refugees and displaced persons. In general Jordan wanted a degree of precision as to the basis for settling these problems, while Israel was content with some very general undertaking to settle matters on a bilateral basis. The text finally agreed as Article 8 was the result of last-minute political compromise, without careful thought being given to the particular language used.⁶²⁶

A preliminary question about Article 8⁶²⁷ is whether it allows for the pursuit of claims at all. The procedures are set out in paragraph 1 of the Article which is numbered 1 (but it should be noted that there is no paragraph numbered 2, 3, etc.).⁶²⁸ Paragraph 1 identifies the issues and goes on to state that “the Parties will seek to resolve them in appropriate forums”. The word “them” refers back to “the above human problems caused by the conflict in the Middle East.” This in turn refers back to the introductory sentence of Article 8 which notes “the massive human problems caused to both Parties by the conflict

⁶²⁴ Ibid., p.207.

⁶²⁵ Ibid., p.213. Also, all of these drafts were presented to me by Dr. Hani Mulki the head of the Jordanian negotiating team in the interview with him in Amman. op.cit.

⁶²⁶ *Interview with Mulki*, op.cit. Dr. Mulki confirms this conclusion.

⁶²⁷ See, *Jordan-Israel Peace Treaty*, op.cit. Article 8.

⁶²⁸ Ibid., Mulki contends that Article 8 of the Israel-Jordan Peace Treaty, as finally agreed, was a truncated version of what had earlier been envisaged (at least on the Jordanian side) as a text with several numbered paragraphs.

in the Middle East”.⁶²⁹

The scope of that clause is wide. By virtue of paragraph 1(a) and (b) these “massive human problems”⁶³⁰ clearly include the problems associated with refugees and displaced persons; but it does not follow that they are limited to them. Any other matter which can be categorized as a “massive human problem” and which was caused by the Middle East conflict comes in principle within the scope of Article 8.

Limiting consideration to the clear case of the problem of refugees and displaced persons, the question which arises is what aspects of the problem are within the scope of Article 8. Is the Article only concerned with the socioeconomic-humanitarian aspects of the problem, or does it also concern the legal, and particularly the compensatory, aspects of the problem?

Taken by itself, the text of Article 8 suggests that it is primarily concerned with the former. It refers to the “human”⁶³¹ problems which exist, and the “human suffering” involved. It also mentions the intention to “alleviate” those problems (which is not a term the normal meaning of which, in this kind of context, would refer to claims, as distinct from, say, humanitarian assistance). Also, The Article refers to others as equal parties in the resolution of the problem (which would not be usual if the Article were intended to deal with Jordan-Israel claims). Finally, it refers to UN and other economic programs concerning refugees and displaced persons, and assistance with their settlement.

⁶²⁹ See, *Jordan-Israel Peace Treaty*, op.cit. Article 8.

⁶³⁰ Ibid.,

⁶³¹ See, *Jordan-Israel Peace Treaty*, op.cit. Article 8.

On the other hand, Article 8 stipulates that the problems are to be resolved “in accordance with international law.”⁶³² The significance of this reference in the present context is ambiguous. It is noteworthy that the reference to international law came late into the Peace Treaty, even though it was included in the Common Agenda it was not included in the Jordanian draft of 9 October, or in earlier drafts dated 29 September and 28 September, or Israel’s drafts of 25 and 26 September.

The reference to international law could simply mean that the socioeconomic-humanitarian aspects of the problem are to be solved in accordance with international law. This in turn could mean either that the solution found must be consistent with international law, or that the solution must adopt whatever solution is required by international law. The former, in so far as it says little more than that the solution must not be unlawful, does not really advance matters much. The latter, which Jordan can interpret as providing that the solution must comply with Jordan’s right in international law to insist on Israel taking back the refugees and displaced persons whom it expelled, is of much more substantive significance.

Alternatively, the reference to international law could be taken as adding a legal dimension to the scope of Article 8 and of the task to be performed by the “appropriate forums” through which a resolution of the problems is to be sought: this legal dimension would embrace such matters as claims, compensation and reparation, so that those ‘legal’

⁶³² Ibid.,

aspects of the “massive human problems” fall within the scope of Article 8⁶³³. Indeed, it is arguable that, given the origins of Article 8 in section IV of the Common Agenda, the legal dimension predominates over the socioeconomic-humanitarian dimension. Section IV would thus be seen as the primary statement of the parties’ intention, according to which a settlement in accordance with international law is one of the three settlement standards mentioned (the other two being that the solution must be “just” and “agreed”)⁶³⁴. Moreover, section IV is clear and specific that a solution in accordance with international law is to be sought not just in relation to the general human problems of the region but in relation to “the bilateral aspects of the problem of *refugees and displaced person*”. To sustain such an argument it would be necessary to establish that the Common Agenda was more than just an ordinary piece of *travaux preparatoires* (whose relevance in interpreting Article 8 is limited), but this would be possible on the basis that a document in the nature of a ‘heads of agreement’ has a more substantial significance.

Against attributing to Article 8 a predominantly, or even partially, legal dimension, it might be argued that claims are dealt with elsewhere (in Article 24)⁶³⁵, and therefore within the structure of the Peace Treaty would not have been intended to fall within Article 8. It may be replied that Article 8 is specifically about refugees and displaced persons and that therefore all aspects of those problems, including therefore the ‘legal’ aspects, are appropriate to be dealt with within the framework of that Article, while Article 24 is concerned solely with financial claims, without qualification, and so would

⁶³³ See, Opinion rendered by H.E. Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996. op.cit.

⁶³⁴ Ibid.,

⁶³⁵ See, *Jordan-Israel Peace Treaty*, op.cit, Article 24.

include claims having their origins in other circumstances. To the extent that refugee and displaced person claims might fall within both Article 8 and Article 24, there is nothing wrong or unusual in providing alternative or complementary procedures for the settlement of claims (so long as no single claim is settled twice, or more, by recourse to each of the available procedures).

The language of Article 8 does not take this issue to a clear conclusion. It would seem that the two elements, the legal and the socio-economic humanitarian, ought to be mutually supportive, rather than contradictory. The language of Article 8, read with section IV of the Common Agenda, provides a firm peg on which to hang a “legal” view of the scope of the Article.

Apart from the particular terms of Article 8, there is a practical consideration. There is no doubt that Article 8 can indeed be used as the framework for the discussion of the general problem of refugees and displaced persons. It was specifically intended to be used for that purpose.⁶³⁶ Once *general* discussions are started within the framework of the Article, there could well in practice be a natural progression from discussion of the general problem to a discussion of particular modalities of a settlement of substantive problems, including therefore questions of claims and compensation and a momentum may build which Jordan can steer so as to lead to discussion of related ‘legal’ questions. If that was the way in which Jordan wished to play its negotiating hand, the burden would be on Israel to call ‘stop’ at some mid-way point in the discussion, and that might be politically difficult for Israel to do.

⁶³⁶ *Interview with Mulki*, op.cit. Mulki confirms this interpretation.

Even so, such a practical momentum might be able to cover only certain parts of the 'legal' issues, namely those directly related to the general problem of refugees and displaced persons and the 'right to return', but not, perhaps, claims for lost or damaged property. Much would depend on the way discussions developed.⁶³⁷

Assuming that, one way or the other, 'legal' matters can be discussed within the framework of Article 8, it then becomes necessary to look more closely at the procedures which Article 8 provides for those discussions, and to consider whether those procedures are likely to help Jordan's cause.

In its first sentence, the Article states that Jordan and Israel "will seek to further alleviate those [massive human] problems arising on a bilateral basis"⁶³⁸. The words "further alleviate" refer to the earlier reference to the contribution already made by Jordan and Israel towards the alleviation of human suffering. In other respects the clause is not free from ambiguity.

Ambiguity arises regarding the phrase "arising on a bilateral basis."⁶³⁹ Does it refer (implicitly) to the problems arising from the Middle East conflict which are to be further alleviated on a bilateral basis? Does it commit the parties to seek to further alleviate only those problems which arise on a bilateral basis (thus excluding problems of plurilateral,

⁶³⁷ Meaning that the focus in the context of Article 8 may end up being on the issue of the right of return, capacity to absorb and resettlement prospects.

⁶³⁸ See, *Jordan-Israel Peace Treaty*, Article 8.

⁶³⁹ *Ibid.*,

or unilateral, concern) i.e. does the phrase “arising on a bilateral basis” qualify the process of further alleviation, or does it qualify the problems which are to be further alleviated? Both the natural meaning of the text, and the recognition in paragraph 1 that the problems “cannot be fully resolved on the bilateral level.”⁶⁴⁰ support the former meaning for the clause.

A further element of ambiguity is found in the words “those problems”⁶⁴¹. On a straightforward reading of the text those words refer back to the only other “problems” previously referred to, namely the “massive human problems caused...by the conflict in the Middle East”⁶⁴². But it is not beyond argument that the reference should have a more limited scope and be taken to be a reference to the problems arising out of the “human suffering” mentioned earlier.

Another element of ambiguity is whether the massive human problems “caused to both Parties”⁶⁴³ includes only those problems which are common to or shared by both Parties, or whether they cover problems caused to either one of them, even if not shared by the other.

Despite such ambiguities, the natural meaning of the clause is probably that it calls for Jordan and Israel to work together to further alleviate the human problems arising for the Parties, separately or together, as a result of the conflict in the Middle East.

⁶⁴⁰ Ibid.,

⁶⁴¹ Ibid.,

⁶⁴² Ibid.,

⁶⁴³ Ibid.,

This opening provision is thus concerned less with questions of claims than with humanitarian questions which Jordan and Israel are to seek to [further] alleviate. Indirectly, however, questions of claims and the right to return can be legitimately considered as part of the solution to the 'human' problems which exist. Put bluntly, payment of compensation would undoubtedly help to alleviate the human problem and human suffering; as would agreement on settlement, re-settlement or return of the refugees and displaced persons.

Jordan need not, therefore, hesitate to use bilateral 'alleviation' discussions as a forum in which to raise those aspects of Jordan's potential claims which can be fairly directly linked with 'human [suffering] problems'.

There is a question about the extent of the commitment to embark upon these bilateral 'alleviation discussions'. The text states that the parties "will seek to further alleviate those problems". In three respects this is less than a firm legal obligation to alleviate the problems referred to.

Firstly, the Parties are to "seek to" alleviate them further: i.e. they must try in good faith, but they are not obliged to succeed.⁶⁴⁴ Secondly, the Parties "will" seek, etc. "Will" is a slippery word. It may be intended to convey a legal obligation to do what is referred to (although in English usage the sense of obligation is more appropriately conveyed by

⁶⁴⁴ See, Opinion rendered by H.E. Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996. *op.cit.*

“shall”, and its use in that sense is the regular treaty practice of many English-speaking States). Equally it may be intended to convey simply a statement of future conduct, as something which it is expected will in practice occur without there necessarily being any legal obligation that it should do so. Finally, the Parties will seek to “further” alleviate the problems; i.e. their commitment (such as it is) is to do more than they have already done. However, this does not commit them to going the whole way to solving the problems. Indeed, they recognize in the introductory words (the ‘chapeau’) to paragraph 1 that a full resolution of the human problems referred to cannot be achieved bilaterally.

This chapeau makes clear that Jordan and Israel accept that bilateral ‘alleviation discussions’, even if fruitful, are only at best going to contribute partially in resolving the human problems being referred to. They recognize that the human problems “cannot be fully resolved on the bilateral level”. For that reason paragraph I goes on to refer to the Parties seeking to resolve them in appropriate forums.

This raises the question whether resorting to these other forums is conditional upon Jordan and Israel having first started their ‘alleviation’ discussions. The language of Article 8 gives no clear answer. From one perspective the ‘alleviation’ discussions and resort to other ‘appropriate forums’ appear to be separate and self-contained processes, involving no particular chronological priority. On the other hand, there is some weight in the argument that recourse to the other ‘appropriate forums’ for a full resolution of the problems pre-supposes the achievement of at least some partial progress in the bilateral ‘alleviation’ discussions, since otherwise the scope of what still remains for resolution by

resort to the ‘appropriate forums’ would be unclear. It may be unnecessary to decide this issue, since at least the ‘other forums’ referred to in sub-paragraphs (a) and (b) (i.e. the quadripartite committee, and the Multilateral Working Group on Refugees) have in fact already been activated, and in any case there would seem to be no reason why Jordan should not initiate ‘alleviation’ discussions *at the same time as* it seeks to initiate talks in other ‘appropriate forums’. The two processes could be carried forward concurrently.⁶⁴⁵

The process involving the other ‘appropriate forums’ calls for several preliminary comments before detailed consideration is given to the particular forums identified in sub-paragraphs (a), (b) and (c) of paragraph 1,⁶⁴⁶ which are the following

For the reasons already given, there may be a question as to whether the Parties’ commitment that they “will” seek to resolve the problems referred to amounts to a legal obligation to do so. Similarly, the Parties’ commitment is only to “seek to” resolve those problems.

Also, the Parties’ endeavor goes further than the earlier endeavor to ‘alleviate’ the problems, and extends to resolving them: given the Parties’ intention that the problems cannot be “fully resolved” on the bilateral level, their endeavor to resolve them through the ‘appropriate forums’ could potentially extend to their *complete* resolution by those means;

⁶⁴⁵ Ibid.,

⁶⁴⁶ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8.

Additionally, the resolution of the human problems in appropriate forums is to be sought “in accordance with international law”: the significance of this phrase has already been considered

The ‘appropriate forums’ identified in paragraph 1 are not exhaustive. They only “include” those subsequently identified.

It is not clear also from the text whether the parties must have recourse to the forums illustratively identified in Article 8.1. i.e. is their commitment simply to have recourse to ‘appropriate forums’, it being entirely up to them to decide which forums are appropriate, although they have at least agreed that those mentioned are appropriate if they wish to use them; or is their commitment to have recourse to ‘appropriate forums’, included among which are those identified to which they *must* have recourse, although they are free *also* to use other forums if they think them ‘appropriate’? The fact that Article 8.1(b) contains two distinct forums for refugee problems suggests that a ‘pick and choose’ approach was intended.

Article 8.1(a) and (b), and arguably also (c) of the Peace Treaty draws an express distinction between “refugees” and “displaced persons”. This was intentional. “Refugees” being used to refer to those affected by the events of 1947-1949 which resulted in large numbers of people leaving Israel and crossing the frontier into Jordan. and “displaced persons” being used for those affected by the events of 1967 which resulted in large numbers of people moving from one part of Jordan (the West Bank) to another part of the same State (predominantly the East Bank). Such a specific interpretation of the terms

would be in accord with Article 31.4 of the Vienna Convention on the Law of Treaties⁶⁴⁷, if both parties intended them to have those particular meanings.⁶⁴⁸

The first 'appropriate forum' to be identified concerns only displaced persons. The relevant forum is a "quadripartite committee together with Egypt and the Palestinians."⁶⁴⁹

The reference in Article 8 to this Committee builds upon the provisions of section A.1.e of the Framework for Peace in the Middle East (the Camp David Accords)⁶⁵⁰ of 17 September 1978, and Article 12 of the Palestinian-Israeli Declaration of Principles of August 1993⁶⁵¹. The former provided that "representatives of Egypt, Israel, Jordan, and the self-governing authority" [i.e. the Palestinians] would constitute a continuing committee to deal with certain displaced persons' problems. Although the subsequent Egypt-Israel Peace Treaty of 1979 contained no elaboration of this commitment, the preamble did reaffirm the parties' adherence to the Framework, and a side-letter envisaged Jordan being invited to join negotiations on certain matters and allowed for the Egyptian and Jordanian delegations to include Palestinians. The Declaration of

⁶⁴⁷ See, *the Vienna Convention on the Law of Treaties*, op.cit, Article 31.

⁶⁴⁸ See, *Interview with Mulki*, op.cit. Mulki confirms that this is indeed the accepted usage of these terms, although there are occasional exceptions, as for example in the context of Camp David I. where the words "displaced persons" were intended also to refer to the 1948 refugees

⁶⁴⁹ This Committee finds its basis in Article XII of the Declaration of Principles on Interim Self – Government Arrangements signed between the Palestine Liberation Organization and the State of Israel on 13 September 1993, 32 ILM (1993), p. 1525. Article XII reads as follows: " Liaison and Cooperation with Jordan and Egypt: The two Parties will invite the Government of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives, on the one hand, and the Governments of Jordan and Egypt, on the other hand, to promote, Cooperation between them. These arrangements will include the constitution of a Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. Other matters of concern will be dealt with by this Committee."

⁶⁵⁰ See, *Camp David Framework for Peace*, signed by Egyptian President Sadat and Israeli Prime Minister Begin and witnessed by US President Carter on 17 September 1978 [hereinafter *the Camp David Accords*], in Laquer, W. and Rubin, B. (eds.) *The Israel-Arab Reader: A Documentary History of the Middle East Conflict*, (1995), p. 404

⁶⁵¹ See, *Palestinian-Israeli DOP*, op.cit, Article 12.

Principles, as explained previously, referred to the two parties inviting Jordan and Egypt to participate in establishing cooperative arrangements, including the constitution of a continuing committee to deal with certain matters affecting displaced persons.

It is usual that before parties to a treaty involve other entities in procedures established by the treaty they seek the agreement of those other entities to participate in the manner envisaged. However, in the present situation, it appears to have been considered that the establishment of a quadripartite committee in both of those instruments was a sufficient manifestation of the consent of both Egypt and the Palestinians to participate in a similar committee established under the Peace Treaty, especially since it too was limited to the concerns of displaced persons. Therefore no specific request was made to either Egypt or the Palestinians to participate in the parallel committee established under the Peace Treaty.

The Committee convened at ministerial level on 7 March 1995⁶⁵², and agreed that it would meet periodically at ministerial and technical levels. The Committee took as its terms of reference the Declaration of Principles, and the parallel clauses on displaced persons in the Jordan-Israel Peace Treaty and the Camp David Accords.⁶⁵³ Although in theory there might be seen to be three separate Continuing (quadripartite) Committees, the Committee has met as a single Committee for displaced persons, combining its functions under the three separate instruments.

⁶⁵² See, Takkenberg. *Palestinian Refugees*, op.cit, p. 37; see, also official Archives of the Jordanian Foreign Ministry. Document. A22/222NG. 30 December 2000. the Committee met at the Ministerial level three times in 1995 and one final time in January 2000 in Moscow. It has not met since then.

⁶⁵³ See, *the Palestinian-Israeli DOP, the Jordan Israel Peace Treaty and the Camp David Accords*, op. cit

The first meeting of the Committee at the technical level was held on 7 June 1995.⁶⁵⁴ The four parties agreed on the agenda of the Committee as being: the definition of displaced persons, figures of displaced persons, agreed modalities and mechanisms of admission, necessary measures to prevent disruption and disorder, and other matters of common concern and relevant confidence-building measures.⁶⁵⁵

The Committee has met several times since 1995, most recently, in April 2000.⁶⁵⁶ It has, however, achieved little if any substance, devoting most of its time (without success) to the first item of its agenda, the definition of displaced persons. Thus the fulfillment of the purpose for which the quadripartite Committee was set up by Article 8 of the Peace Treaty has been largely frustrated. It appears that this may be primarily the responsibility of Israel, which has continuously hindered the Committee's work.⁶⁵⁷

Jordan is not obligated nor would it be well advised to allow the prolonged recess of the Quadripartite Committee which has not even convened since February 2000.⁶⁵⁸ It is open to Jordan unilaterally to propose to the other three partners in the quadripartite committee that it must resume its work and get down to practical work in accordance with Jordan's and Israel's obligations in the Peace Treaty. Such a proposal ought to include some basic ideas about how this should be done, and could be coupled with a statement that if the

⁶⁵⁴ See, official Archives of the Jordanian Foreign Ministry. Document. A22/222NG. 30 December 2000. op.cit, p. 67. The Committee has met at the technical level seven times in Amman, Beir Sheva, Cairo, Gaza, Amman, Haifa and Finally in Cairo in 2000. It has not convened since then.

⁶⁵⁵ Ibid., The second meeting of the Committee held in *Beir Sheva* in 1995.

⁶⁵⁶ 7th Meeting of The Committee, Cairo, February, 2000.

⁶⁵⁷ *Interview with Mulki*. op cit.

⁶⁵⁸ The last time the Committee met was in February, 2000.

Committee cannot work in the way intended by the Peace Treaty, as interpreted and applied in good faith, then Jordan might consider resorting to dispute settlement procedures contained in the Jordan-Israel Peace Treaty. In taking such a step Jordan must do so in a way which protects Jordan from two separate risks. The first is to avoid Jordan being open to the charge that it is acting in violation of its treaty obligation (Jordan can do this by presenting its action as a response to Israeli breach of Israel's obligation to implement Article 8 in good faith). The second is that Jordan's political position must be defensible.

Multilateral initiatives could well not be successful. Even so, utilizing them would have a political dimension which could usefully serve (e.g. as regards the USA) to demonstrate Jordan's readiness (and Israel's unwillingness) to comply with commitments undertaken in the Treaty of Peace. It would also serve to establish a positive position for Jordan, and put Israel politically and legally on the defensive.

It would, of course, be necessary for Jordan, before moving in this direction to have a clear idea of the purpose(s) to be achieved by seeking to rejuvenate, reorganize and redirect this quadripartite committee. In the light of those Jordanian aims, there would also be a political judgment to be made as to whether a revived, reorganized and redirected Jordan-Israel-Egypt-Palestinian quadripartite committee would be likely, at the present time, to serve Jordan's interests.

The second 'appropriate forum' identified in Article 8.1 concerns only refugees.⁶⁵⁹ It involves action "in the framework of the Multilateral Working Group on Refugees."⁶⁶⁰ This relates to a body established by the Madrid Conference on the Middle East, 1991. Given the circumstances in which the Multilateral Working Group was established it can probably be assumed that its members were ready in principle to help in the search for a solution to the refugee problem. However, the Madrid Conference was held some three years before the conclusion of the 1994 Jordan-Israel Peace Treaty, and it would have been prudent, and normal practice, for the treaty parties to have sought confirmation from the Multilateral Working Group and/or its individual members that it was still willing to participate in the way envisaged in the Peace Treaty. At the very least the Multilateral Working Group should have been notified of its involvement in Article 8.1(b) of the Peace Treaty. Such notification did not occur.⁶⁶¹

Assuming that the Multilateral Working Group was willing in 1994 to participate as envisaged in Article 8.1(b), there must be a question to what extent the members of the Group are, many years later, still willing to do so. Indeed, there is a question as to whether that Group can still be regarded as in effective existence.⁶⁶² The Multilateral

⁶⁵⁹ As opposed to the other Category of Palestinian Refugees referred to in the Peace Process literature as Displaced Persons who are original inhabitants of the West Bank and who fled as a result of the 1967 war and Israel's occupation of the West Bank.

⁶⁶⁰ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8. The Multilateral Working Group is the product of the design of the Madrid Peace Process. the US-Soviet letter of invitation to the Peace Conference in Madrid which was sent to Jordan, Syria, Lebanon, Israel and the Palestinians (within the Jordanian Delegation) contained the following paragraph: "...Those Parties who wish to attend multilateral negotiations will convene two weeks after opening the conference to organize those negotiations. The co-sponsors believe that those negotiations should focus on region-wide issues such as arms control and regional security, water, refugees issues, environment, economic development and other subjects of mutual interest", cited in Tekkenberg. *Palestinian Refugees*, op.cit, p. 34.

⁶⁶¹ *Interview with Mulki*, op.cit.

⁶⁶² The Multilateral Working Group on Refugees which was shepherded by Canada has not met since early 2000.

Working Group has met periodically, but that, taken overall, its contribution to the resolution of Jordan's refugee problems has been minimal. If not yet formally defunct,⁶⁶³ the Group seems at least to be a broken reed in the task of constructing a refugee settlement.

The question is then whether Jordan should let the Group wither away, or try to revive and strengthen its role in resolving refugee problems. If the Group continues to exist and meet, there would seem no reason in principle why Jordan should not use it as a forum in which to pursue its claims, e.g., by tabling a paper setting out its claims in relation to refugees and request that it be discussed in the Group. The outcome, of course, would not be a matter solely in Jordan's hands: the members of the Group would perhaps be the key players. It would certainly be open to them to revive it and make it more substantively relevant if they were inclined to do so - this is really a question of their present political will to get seriously involved once more in the Middle East refugee problem.

If Jordan was minded to seek to revive and strengthen the Multilateral Working Group, it would be as well for Jordan to take soundings (e.g. through diplomatic channels) to discover whether this would be likely to be acceptable to its members.

Whether Jordan would wish to work through the Multilateral Working Group in seeking to resolve the refugee problem is a matter for political judgment, and an assessment whether recourse to that particular forum would be likely to serve Jordan's interests. One relevant consideration is clearly whether the membership of the Multilateral Working

⁶⁶³ Ibid.,

Group is likely to allow it to play a constructive role.

The two particular legal factors in any political judgment whether the Multilateral Working Group would be a desirable forum are the following. First, so long as the Multilateral Working Group continues to exist, however marginal its current contribution might be, Jordan (like Israel) has a commitment (which may or may not amount to a legal obligation) to seek to resolve the refugee problems in the framework of the Multilateral Working Group. Second, the commitment, such as it is, is to have recourse to “the framework of” the Multilateral Working Group. It is wholly unclear what this means in practice, e.g. as regards such matters as venue, chairmanship, composition, voting procedure and agenda. Without clarification of such matters the reference to the Multilateral Working Group in the Peace Treaty is pretty well empty of substance. Before this particular forum could be rendered really effective, there would almost certainly have to be preliminary discussion between Jordan, Israel and the chairman of the Multilateral Working Group in order to establish a basis on which its work would in future be conducted more effectively.

Of course, Israel or the general membership of the Multilateral Working Group might be unwilling to let the Group take on a more active role. Jordan would then be faced with the choice between continuing with a process which was serving no substantive purpose, and refusing to continue to participate in a process which was evidently not being allowed to fulfill the functions envisaged in the Peace Treaty. Considerations similar to those concerning a possible walk-out from the quadripartite committee apply here also.

The third ‘appropriate forum’ identified in Article 8.1 and again only in respect of refugees - is negotiation in a very specific context. The terms of Article 8.1(b) (ii) are:

“In negotiations, in a framework to be agreed, bilateral or otherwise in conjunction with and at the same time as the permanent status negotiations pertaining to the Territories referred to in Article 3 of this Treaty.”⁶⁶⁴

This provision is not entirely clear, since the significance of the cross-reference to Article 3 of the Peace Treaty is uncertain. Article 3 does not refer directly to any “permanent status negotiations”. Article 3 has nine paragraphs, and the most likely to be relevant is paragraph 2 which is the only provision in Article 3 which refers to “status” and “territories” in a single context. After paragraph 1 delimited the Jordan-Israel boundary, paragraph 2 reads:

“The boundary, as set out in Annex 1(a). is the permanent, secure and recognized international boundary between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government control in 1967”.⁶⁶⁵

The qualification ‘without prejudice’ at the end of Article 3.2 has its origin in Section V of the Common Agenda of 1993.⁶⁶⁶ The territories in question include the West Bank. The implication is that the status of the West Bank territories was to be determined on a permanent basis in some future, unspecified negotiations. These future negotiations are “permanent status negotiations” referred to in Article 8 1(b)(ii) In fact, the ‘permanent

⁶⁶⁴ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8.

⁶⁶⁵ Ibid., Article 3.

⁶⁶⁶ See, *Common Agenda*, op.cit, p. 2.

status negotiations' derived from the earlier Israel-Palestinian Oslo Agreement,⁶⁶⁷ and were simply picked up in the Peace Treaty as a timing 'peg' on which to hang certain Peace Treaty provisions.

That this was the parties' intention is confirmed by the consideration that the Israel-Palestinian Declaration of Principles, which was adopted just 2 months before the conclusion of the Peace Treaty, referred in terms to "permanent status negotiations" (to follow negotiations on certain interim arrangements).⁶⁶⁸ This identification of the negotiations referred to in Article 8.1(b)(ii) still, however, leaves a number of questions open. In particular, and first, it is not clear who the parties in these 'permanent status negotiations' are to be. It is clear that the permanent status of the territories in question will involve other parties, particularly the Palestinians, and perhaps others. In fact, Israeli-Palestinian talks for a Middle East peace settlement (the 'peace process') have concerned themselves with the permanent status of those territories and may be regarded as constituting the 'permanent status negotiations'⁶⁶⁹ referred to in Article 8.1(b)(ii) of the Peace Treaty. This, however, involves excluding Jordan from the 'permanent status negotiations' referred to. Accordingly, Jordan must not allow any negotiations relating to refugees to proceed without its full engagement as an equal partner.

Against that background, Article 8.1(b)(ii) establishes a commitment on Jordan and Israel

⁶⁶⁷ See, *Palestinian-Israeli DOP*, op.cit.

⁶⁶⁸ Ibid., see, Article I, para 2, and Article V. Although not expressly linked to "territories that came under Israeli military government control in 1967", it is apparent that those negotiations were intended to cover the West Bank territories: it is also clear from Article V.3 that they were to include the question of refugees.

⁶⁶⁹ Palestinian Leader Yasser Arafat and Israeli Prime Ministers Itzhak Rabin and Benjamin Netanyahu had conducted marathon negotiations under the auspices of US President Bill Clinton in 2000 and thence Palestinian and Israeli officials held meetings in Taba, Egypt with the view of reaching a final settlement.

to seek to resolve the human problems in question “in the case of refugees in negotiations, in a framework to be agreed, bilateral or otherwise in conjunction with and at the same time as” those permanent status negotiations. This raises a number of questions.

The ‘refugee negotiations’ have to be held “in conjunction with and at the same time as” the “permanent status negotiations” (but not, it may be noted, as ‘part of’ those negotiations’). Apart from those required links with the permanent status negotiations the nature of the refugee negotiations is wholly unclear. In particular, their framework was still to be agreed, and no such agreement has yet been reached to date.⁶⁷⁰ Additionally, it is not even clear who the parties to the negotiations are to be, since the negotiations may be “bilateral or otherwise”: and while the normal reading of that phrase in a bilateral Jordan-Israel treaty is that the negotiations will either be bilateral between Jordan and Israel or ‘otherwise’ between Jordan, Israel and one or more other parties, it cannot be excluded that “otherwise” might be construed (e.g. by Israel) to allow for negotiations between Israel and other parties *not* including Jordan.

The commitment is, in short, one which (were the concept known in international law) might be regarded as close to being void for uncertainty. In effect, it is left to Jordan and Israel to agree upon the basis for whatever negotiations there might be, including the closeness of the relationship between the refugee negotiations and the permanent status negotiations, and the parties to be involved in the refugee negotiations.

⁶⁷⁰ *Interview with Mulki, op.cit.*

The uncertainties in this part of Article 8 are partly a consequence of the timing of the conclusion of the Peace Treaty in October 1994. At that time it was too early to be able to predict the outcome of the Palestinian-Israeli interim agreements (which stipulated *inter alia* that the final status negotiations would include the issue of refugees⁶⁷¹). Article 8 was therefore designed to keep Jordan's and Israel's options open in terms of the solutions to be adopted for the refugee problem. Thus the stipulation that the Jordan-Israel refugee negotiations were to be "in conjunction with and at the same time as the permanent status negotiations" reflected the parties' wish to avoid legal and political complications which could arise if a Jordan-Israeli agreement on refugee problems preceded the permanent status settlement between Israel and the Palestinians.

In their joint Advice of 3 October 1994 Professors Crawford and Graefrath suggested, in their comment on this text (then draft Article 7A), that the words "in conjunction with and at the same time as the permanent status negotiations" were intended to guard against an Israel-Palestinian deal not to involve Jordan on the refugee issue and were therefore included so as to allow for the possibility of Jordanian participation.⁶⁷² It was clearly understood at the time on the Jordanian side that ways needed to be developed in which Jordan would be involved in discussing issues affecting its citizens during the permanent status negotiations.⁶⁷³

Despite the uncertainties in Article 8, the provision is not without value, since by it

⁶⁷¹ *Interview with Mulki*, op.cit; see, also *Palestinian-Israeli DOP*, op.cit, Article V.3.

⁶⁷² See, *Jordan-Israel Peace Treaty Documentary History*, (1996) available at Jordanian Foreign Ministry Archives, op.cit, p. 183.

⁶⁷³ *Interview with Mulki*, op.cit.

Jordan and Israel have both agreed that these refugee negotiations are to take place in a very close relationship with the permanent status negotiations. Article 8.1(b)(ii) thus offers a clear legal basis for Jordan to request that Israel should agree to establish a negotiating forum as agreed by Israel in that provision of the Peace Treaty.

In taking the initiative with such a proposal Jordan will need to have its own ideas as to how this negotiating forum should be composed, what it would do, and how it would work. It is presumably just such matters which were intentionally left undecided by the formula “in a framework to be agreed, bilateral or otherwise”.

It needs to be noted that, since the Peace Treaty expressly stipulates that an appropriate forum for refugee negotiations is bilateral or other negotiations in close relationship to the permanent status negotiations, there is a risk that if those permanent status negotiations continue without Jordan (or Israel) taking the initiative in invoking the Peace Treaty provisions of Article 8.1(b) (ii), then they might be taken to have lost (e.g. by implied waiver) their right to invoke that particular forum. This situation has not yet arisen, but as time passes the risk increases. Clearly, once the permanent status negotiations have reached a successful conclusion and have terminated, Article 8.1(b) (ii) will no longer be capable of being applied since there will then no longer be any permanent status negotiations “in conjunction with and at the same time as” which the refugee negotiations can be held.

The fourth ‘appropriate forum’ to be identified in Article 8 is that referred to in Article

8.1(c), involving action;

“[t]hrough the implementation of agreed United Nations programs and other agreed international economic programs concerning refugees and displaced persons, including assistance to their settlement.”⁶⁷⁴

This forum applies to both refugees and displaced persons. There is, however, a question as to whether in this provision the terms “refugee” and “displaced persons” are to be given the somewhat special meaning attributed to them in the specific Jordan-Israel context, i.e. linked respectively to the events of 1948 and 1967, or whether they are to be given perhaps more general meanings which they might bear in United Nations and other similar international practice. There is room for argument about this, and it is not without substance since it affects the determination of which UN and other agreed international economic programmes are being referred to as providing the forum for the resolution of the human problems resulting from the conflict in the Middle East. Does Article 8.1(c) refer only to those UN (and other international) programmes which relate specifically to the refugees who fled in the aftermath of the 1948 events or the displaced persons who were the consequence of the 1967 events, or does it refer to *any* programmes relating generally to those who might be regarded as refugees or displaced persons? In that context, however, it may be noted there are no UN programmes specifically dealing with the 1967 displaced persons, unless they were also 1948 refugees.

Applying the rules of interpretation set out in the Vienna Convention on the Law of

⁶⁷⁴ See, *Jordan-Israel Peace Treaty*, op.cit, Article 8.

Treaties, and noting in particular Article 31.4,⁶⁷⁵ the context of the Peace Treaty in general and of Article 8 in particular suggests that the terms should be given their special Jordan-Israel meaning. Against that is the fact that Article 8.1(c) places the matter squarely in a UN context, in which it would be appropriate to give terms whatever may be their normal UN meanings.

Whichever programs are within the scope of Article 8.1(c), it would seem that they have to be “economic” programs. This would seem implicit in the reference to UN and “other ... economic programs”, thereby suggesting that the UN programmes themselves must be of an economic character.

The negotiating records of the Peace Treaty does not provide clarification as to which particular UN/international programmes were in mind as fitting the description in Art. 8.1(c).

The ‘forum’ provided by these UN and other international programmes also appears to be of a different character from the other forums referred to in Article 8. Whereas the other forums are institutional in nature, these economic programmes are more functional. Although UN economic programmes can have an institutional base which could be used as a forum for negotiation, it may be that the parties were envisaging recourse to these economic programmes as a way of providing assistance in realising whatever arrangements they could agree upon, rather than as seeing them as offering an institutional framework

⁶⁷⁵ See, *the Vienna Convention on the Law of Treaties*, op.cit, Article 31.

within which those arrangements themselves could be agreed. This is borne out by the opening and closing words of Article 8.1(c) – “Through the *implementation* of agreed ... programs”, and “including assistance to their settlement.”

It is useful to note that in the phrase “assistance to their settlement”. “Settlement” suggests that the assistance being referred to relates to the settlement of the refugees in the places where they currently are, as distinct from their resettlement elsewhere or their return to Israel. While this suggestion in the text is unhelpful, it may not matter greatly since the implementation of the agreed programmes only “includes” the assistance referred to, and therefore does not exclude their implementation by e.g. assistance to the refugees’ or displaced persons’ resettlement or return.

The particular forums identified in Article 8.1 - the Quadripartite Committee, the Multilateral Working Group, and international economic programmes - are not an exhaustive identification of the forums to which the parties may have recourse. Article 8.1 refers to the Parties seeking to resolve the problems in question “in appropriate forums, in accordance with international law, *including* the following..”. Thus it is open to the parties to agree upon other “appropriate forums” in which to resolve the refugee problems.

Several things about this possibility should be noted.

First, it will be necessary for Jordan and Israel to agree that some particular forum is

“appropriate”. It would be open to Jordan to make a proposal, which Israel would have to consider.

Second, the other forums in which the parties might seek to resolve the problems would be forums which would act “in accordance with international law”. While the significance of that phrase is somewhat uncertain, it clearly leaves open the option of having recourse to legal dispute settlement mechanisms, such as judicial settlement, arbitration and mediation.

Third, the problems to be resolved are the human problems caused by the conflict in the Middle East. Since the particular forums illustratively identified in the subsequent provisions of Article 8.1 cover both refugees and displaced persons, it follows that the scope of the general introductory reference to “appropriate forums” covers both categories of persons.

Fourth, Article 8 says nothing about the composition of such other forums: they merely have to be “appropriate”. Thus while Jordan-Israel bilateral forums may perhaps primarily be intended, trilateral forums (e.g. involving the Palestinians) are not excluded.

(ii) Article 24 of the Jordan-Israel Peace Treaty.

The focus of Article 8 of the Peace Treaty is the resolution of the human problems arising from the conflict in the Middle East, including therefore the refugee problem and that of the displaced persons. In contrast, the focus of Article 24 is the settlement of financial

claims. The Article is short and states that;

“The parties agree to establish a claims commission for the mutual settlement of all financial claims.”⁶⁷⁶

Once again, this provision is ambiguous. The parties have agreed to establish a claims commission - but its actual establishment is left for the future,⁶⁷⁷ and raises numerous problems which will have to be solved in negotiation between Jordan and Israel.

Although Article 24 is brief and general, it should be noted that in the negotiation of the Peace Treaty, Jordan put forward a much fuller proposal, covering the kinds of issues which are necessary if the obligation to establish a claims commission is to be workable in practice. The Israeli draft Peace Treaty of 26 September 1994⁶⁷⁸ contained no provision for settlement of claims. The Jordanian draft of 28 September,⁶⁷⁹ however, contained a draft of Article 22B and its associated Annex XI which dealt with the matter in some detail. In what appears to be a Jordanian Commentary on that draft it is observed, in relation to Article 22B that

“It is established practice for a peace treaty to deal with outstanding claims between the parties. In the present case two categories of claim require to be taken into account: claims arising from the use, exploitation or occupation of lands returned under the Treaty and claims relating to the costs of dealing with the influx and rehabilitation of refugees and displaced persons. It is envisaged that global settlement of these claims be reached by

⁶⁷⁶ See, *Jordan-Israel Peace Treaty*, op.cit, Article 24.

⁶⁷⁷ The Claims Commission envisaged in Article 24 was never formed.

⁶⁷⁸ See, *Jordan-Israel Peace Treaty Documentary History*, (1996) available at Jordanian Foreign Ministry Archives, op.cit, p. 178.

⁶⁷⁹ *Ibid.*, p. 180.

negotiation, failing which a claims settlement procedure would operate in accordance with [the Jordanian proposal for an] Annex XI.”⁶⁸⁰

In the draft Peace Treaty (Draft 3) of 29 September 1994⁶⁸¹ Article 22B appears as proposed by Jordan, with the annotation that Jordan was prepared to accept mutual renunciation of claims other than those referred to in paragraphs 2 and 3 (which paragraphs needed to be seen in the context of the boundary and refugee issues respectively), and that Israel could not accept the Article and would prefer no claims clause but would be prepared to see a simple claims clause along the lines ‘The Parties agree to establish a claims commission for the mutual settlement of all financial claims’. In their Advice on Unresolved Clauses, dated 3 October 1994, Professors Crawford and Graefrath noted, in relation to draft Article 22B that “The parties are far apart on the issue of claims ... [T]he claims issue is one of Israel’s vulnerabilities.”⁶⁸²

Ultimately, nothing better than the formula preferred by Israel could be negotiated, notwithstanding its evident deficiency. Given that that language was exactly the same as the language previously adopted in the equivalent provision of the Israel-Egypt Peace Treaty of 26 March 1979 perhaps nothing better was to be expected.

Given the text of Article 24 as finally agreed, the first issue to be noted is that the parties’ agreement relates to “all financial claims”. This is not self-evident. It might, for example, mean those claims which arise out of financial matters (e.g. seized bank accounts), or it

⁶⁸⁰ Ibid.,

⁶⁸¹ Ibid., p. 180.

⁶⁸² Ibid., p. 184.

might mean any claim for redress expressed in financial terms (e.g. compensation for seized houses, or for unlawful expulsion). In the context of refugees and displaced persons, it is presumably in Jordan's interest to give the term "financial claims" as broad a meaning as possible, i.e. the latter of the two examples just given. The meaning of "financial claims" is likely to be considerably influenced by the course of the negotiations leading to agreement upon Article 24.

It is possible that in the negotiations the parties presented various specific claims, and that it proved impossible to agree upon their settlement in the Peace Treaty itself, Article 24 being agreed instead. In such circumstances, there would be a strong argument that the parties intended that Article 24 should take care of only those claims which had been discussed in the negotiations. It does in fact seem that Jordan was at least contemplating two specific categories of claims, along with a catch-all reference to all other claims. It is unclear in what if any detail these various categories of claims were presented or discussed.

An alternative possibility is that no particular claims were presented and discussed in the negotiations, but that both parties asserted that they had various (unspecified) claims which would have to be dealt with, and in the end they agreed to Article 24 for that purpose. In such circumstances, there would be a strong argument that Article 24 was intended to take care of all those unspecified claims, whatever they may be and whatever their basis, so long only as they can be regarded as "financial" claims.

However, the natural and ordinary meaning of the words used favours a broad view of

“financial claims”, and that the party asserting that only certain claims were to be covered (e.g. those raised in negotiations) has the burden of producing evidence to that effect.

Another question which arises regarding the language of Article 24 is whether the claims commission can deal only with “financial” claims, or whether it has competence for claims which *in addition to* having a financial element also have some other element. In other words, is the claims commission limited to claims expressed *solely* as a request for financial redress, or can it also hear claims which seek financial redress in the alternative (e.g. the return of property or compensation instead of its return) or in combination with other redress (e.g. the return of property *and* compensation for loss of use for the past 60 years)? It is again probably in Jordan’s interest to contend for the widest meaning of “financial”, so that all claims which include an element of financial redress are within the scope of the claims commission.

It may be noted that Article 24 in dealing with “all” financial claims, does not distinguish between those involving refugees, those involving displaced persons, and those others involving neither - e.g. Jordanian State claims.

A final point on the use in Article 24 of the words “all financial claims” is whether those claims are only inter-State claims, or whether they also include claims by individuals. It would seem that there is nothing in Article 24 to restrict its scope to inter-State claims. On the contrary, “all” financial claims suggests a broad meaning for the phrase, within the normal limits of international law regarding such matters as the nationality of claims.

The claims commission is to be established “for the mutual settlement” of all financial claims. The word “mutual” suggests that the financial claims to be dealt with by the claims commission are claims by Jordan against Israel and claims by Israel against Jordan. Although it is probably in Jordan’s interest that Article 24 should be given a wide interpretation, much depends on the nature and size of the potential Israeli financial claims against Jordan if any.

Whatever the scope of the financial claims to be settled by reference to a claims commission, that commission has to be set up. Jordan and Israel have agreed “to establish a claims commission”. That is a clear treaty obligation on the two States.

The establishment of a claims commission requires agreement between Jordan and Israel, which in turn requires that the two States should enter into negotiations to that end. So far, no such negotiations have taken place. Jordan has a clear right under the Peace Treaty to take the initiative in proposing the opening of negotiations for the establishment of a claims commission. Particularly given Article 25.2⁶⁸³ of the Treaty, Israel cannot reject such an initiative without being in breach of its obligations under the Peace Treaty.

This is not to say that Israel is legally bound to agree with whatever proposals for a claims commission which Jordan may put forward, but simply that the principle of opening negotiations cannot be rejected by Israel. In fact, in proposing the opening of

⁶⁸³ See, *Jordan-Israel Peace Treaty*, op.cit, Article 25. 2 states that “ The parties undertake to fulfill in good faith their obligations under this Treaty, without regard to action or inaction of any other party and independently of any instrument inconsistent with this Treaty....”

negotiations on this subject it is not necessary for Jordan to put forward any detailed proposals for how the claims commission might work. A minimal proposal would be enough to start the process of negotiation.

Of course, if Jordan is to embark on this course, it ought first to have a reasonably clear idea of the sort of proposals it would *eventually* put forward for the establishment of the claims commission. Relevant matters to be covered in this context include the composition of the claims commission, whether there will be a single commission, or several (equal) chambers of a commission, the commission's rules of procedure, the commission's decision-making rule, the seat of the commission, the commission's secretariat/registry, the commission's financing and the commission's jurisdiction (i.e. what claims it may deal with).⁶⁸⁴

The draft Annex XI which Jordan prepared for its draft Peace Treaty of 28 September 1994 could be a useful starting point.⁶⁸⁵

(iii) Article 29 of the Jordan- Israel Peace Treaty.

Article 29 of the Peace Treaty reads as follows:

“Disputes arising out of the application or interpretation of this Treaty shall be resolved by negotiations.

⁶⁸⁴ See, Opinion rendered by H.E Mr. Awn Al-Khasawneh, Advisor of State for International Legal Affairs, contained in The Foreign Ministry of Jordan Classified Archive documents, Document number FMSC/281139, dated 25 December 1996. op.cit.

⁶⁸⁵ See, *Jordan-Israel Peace Treaty Documentary History*, (1996) available at Jordanian Foreign Ministry Archives, op.cit, p. 190.

Any such dispute which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.”⁶⁸⁶

This provision is clearly in a different category from Articles 8 and 24. It does not directly provide for the settlement of substantive problems affecting the refugees and displaced persons or the settlement of claims, as does Articles 8 and 24, but instead provides for the resolution of disputes arising out of the application or interpretation of those Articles (as well as of other Articles of the Peace Treaty). As previous parts of this chapter have illustrated, there are a considerable number of potential difficulties which could arise out of the interpretation or application of Articles 8 and 24. Examples of such difficulties are, the meaning of ‘displaced persons’, the non-fulfillment by Israel of the obligation to ‘negotiate’ in Articles 8 and 24, paragraph 1, the meaning of “financial claims”,

In addition to those differences arising out of Articles 8 and 24, there are others arising out of other Articles of the Treaty, such as Israel’s failure to fulfill its obligations to repeal adverse or discriminatory references in its own legislation,⁶⁸⁷ and Israel’s failure to accord “due process of law within [its] legal systems and before [its] courts”.⁶⁸⁸

Article 29 requires that there be a “dispute”. It may seem that this is a term the meaning of which is self-evident, but in fact it has been the occasion of much international litigation, particularly concerning when a dispute may be said to arise or exist, which in turn has required some analysis of what constitutes a dispute. The jurisprudence of the

⁶⁸⁶ See, *Jordan-Israel Peace Treaty*, op.cit, Article 29.

⁶⁸⁷ Ibid., Article 11.1(b).

⁶⁸⁸ Ibid., Article 11.1(d).

ICJ may be summarized as requiring that for a dispute to exist for the purposes of the institution of proceedings before the Court, first, there must be “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,”⁶⁸⁹ second, the issue as to “whether there exists an international dispute is a matter for objective determination”⁶⁹⁰, third, consequently it is not enough to establish the existence of a dispute for one party to say that there is a dispute any more than it is enough to prevent the existence of a dispute for the other party to deny its existence.⁶⁹¹ Fourth, “It must be shown that the claim of one party is positively opposed by the other.”⁶⁹² Fifth, there is no particular formal requirement for the expression of the opposing views of the parties⁶⁹³, and finally, “where one party to a treaty protests against the behavior or decisions of another party, and claims that such behavior or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitude of the parties from giving rise to a dispute concerning the application of the treaty”⁶⁹⁴. Undoubtedly, Jordan will be able to establish in a number of areas the existence of a dispute to which Article 29 applies.

Under Article 29, such disputes must concern either the “interpretation” or the “application” of the Peace Treaty, and thus in particular in the present context of Articles 8 or 24. “Interpretation” refers essentially to the meaning to be given to a provision in the

⁶⁸⁹ See, *Mavromatis Palestine Concession Case* (1924), op.cit, PCIJ Ser. A, No.2, p.11.

⁶⁹⁰ See, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, at p.74.

⁶⁹¹ See, *South West Africa Cases*, ICJ Reports 1962, at p.328.

⁶⁹² Ibid.

⁶⁹³ See, *Tunisia-Libya Continental Shelf (Revision)*, ICJ Reports 1985, at p. 192.

⁶⁹⁴ See, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports 1988, at p. 28.

Peace Treaty, and “application” refers to the way in which that provision, bearing whatever meaning it is held to bear, is to be applied, i.e. put into operation. *Both* aspects of Article 29 could be relevant in the present context.

Disputes of the nature covered by Article 29 are to be resolved by recourse to three possible procedures for dispute settlement, first negotiations, and if they cannot settle the dispute, then conciliation or arbitration. The difference is essentially between a procedure which involves only Jordan and Israel (negotiation) and a procedure which involves a third party or parties (conciliation or arbitration).

1- Negotiation

Apart from identifying the procedures to which recourse is to be had, Article 29 says nothing at all about the content which has to be given to them. In the case of negotiations this is not a serious matter, since the concept of negotiation between the parties involved is well enough understood and is essentially a flexible bilateral process allowing the parties to construct their negotiations in whatever way best suits their purposes. Apart from observing that under Article 29 negotiations are a mandatory first step, there is little to be added.

2- Conciliation and arbitration

Third party involvement through conciliation or arbitration is, however, a different

matter. There are three points to be noted; First, conciliation or arbitration are to be invoked only when a dispute “cannot” be settled by the mandatory first step of negotiations. There can obviously be much room for argument as to whether the stage has been reached when negotiations “cannot” settle the dispute. Second, Article 29 does not give either conciliation or arbitration preference over the other. They are equal alternatives. No weight is to be attached to the fact that conciliation is mentioned first: *something* has to be mentioned first, and traditionally conciliation is listed before arbitration, without thereby giving it any necessary priority.⁶⁹⁵ Third, Article 29, in committing the parties to conciliation or arbitration should negotiations be unsuccessful, in no way completely disposes of the matter: all the important and difficult issues are still left to be settled by agreement between the parties.

As with Article 24, concerning financial claims, so too with Article 29 Jordan was prepared in the Peace Treaty negotiations to deal with this disputes settlement provision more fully than was agreed in the final text. Article 27 of the Israeli draft Treaty of 26 September 1994⁶⁹⁶ provided only that disputes arising out of the interpretation or application of the Treaty “shall be settled by negotiations”. The Jordanian draft of 28 September 1994 included a much fuller provision for Article 27.⁶⁹⁷ It added to the Israeli reference to settlement by negotiation the words “wherever possible”, and went on to provide that disputes which cannot be settled within three months by negotiation shall be referred to conciliation in accordance with Annex XII (which set out appropriate details

⁶⁹⁵ See, for example, Article 33 of *the UN Charter*, cited in Evans, Malcolm D. *Blakstone's International Law Documents*, (1999) op. cit, p. 14,

⁶⁹⁶ See, *Jordan-Israel Peace Treaty Documentary History*, (1996) available at Jordanian Foreign Ministry Archives, op.cit, p. 178.

⁶⁹⁷ *Ibid.*, p. 180.

for this procedure), and that if a dispute cannot be settled by conciliation within six months (or longer if agreed) either party may refer it to arbitration in accordance with Annex XIII (again, setting out the necessary details). As a last resort, either party might refer a dispute unsettled by other means to the ICJ.

In the draft Peace Treaty (Draft 3) of 29 September 1994⁶⁹⁸ Article 27 appears as proposed by Jordan, with the annotation that Israel does not want to see any form of dispute settlement other than negotiation, but would be prepared to accept a clause to the effect that disputes not settled by negotiation may be referred to mediation or arbitration; and that Jordan is not wedded to particular procedures or courts but has a very strong preference for a third party mechanism which would be available after every effort at a negotiated settlement had been made and exhausted. In the revised draft suggested by Professor Crawford with his paper of 9 October 1994,⁶⁹⁹ he proposed a simplified version of the Jordanian draft, consisting of a shortened draft Article 27 plus a single draft Annex X setting out, at least the essential elements of the procedures envisaged (which still involved negotiation, conciliation, arbitration and ultimately the ICJ).

This was of no avail. In the event the final text of Article 29 followed the simple form set out previously. It follows exactly the equivalent provision of the Israel-Egypt Peace Treaty of 1979. To some extent it involved a compromise since it provided for conciliation and arbitration and made them obligatory (“shall”) if negotiation was unsuccessful (neither of which Israel wanted) but omitted the kind of detailed procedural

⁶⁹⁸ Ibid., p. 204.

⁶⁹⁹ *ibid.*, p 213

prescriptions which Jordan had wanted. Its net effect was to leave all the crucial details still to be negotiated as and when occasion arises, in the light of general international practice regarding procedures for conciliation and arbitration.

Conciliation has been defined as “the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and ... to make a report containing proposals for a settlement, but not having the binding character of an award or judgment”.⁷⁰⁰

Another definition refers to conciliation as “A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested”.⁷⁰¹

Although the first of these definitions makes it a requirement of conciliation that there be a “commission of persons” to undertake the task, this is not essential if the parties are ready to agree to a single person acting as conciliator.

Whether involving a commission or a single person, the task of the conciliator(s) is to

⁷⁰⁰ Brierly, *The Law of Nations* (4th ed.), p. 271, quoting in turn Oppenheim, *International Law* (5th ed), vol. ii, p. 12.

⁷⁰¹ Regulations on the Procedure of International Conciliation, Art. 1, adopted by the Institute de droit international in 1961 (*annuaire*, 49 (1961) ii, pp. 385-391)

clarify the facts of the dispute, and then to make nonbinding proposals for a settlement. It is the non-binding quality of conciliation proposals which distinguishes them from an arbitral or judicial award, both of which involve binding awards.

Under Article 29 conciliation is an equal alternative to arbitration, either of which may be resorted to once it is established that negotiations cannot settle the dispute. The first task for Jordan will be to determine whether, in the circumstances of the particular dispute which has arisen, conciliation is to be preferred to arbitration. Jordan's preference is not, however, dispositive: the choice between conciliation and arbitration will require agreement between Jordan and Israel. If conciliation is to be the chosen procedure, the second task is to determine the identity(ies) of the conciliator(s). This, too, is not a matter solely within Jordan's power to decide since it will require agreement with Israel. Jordan will have to establish its preferences as regards both the number of conciliators, and how they are to be appointed. The third task is to determine - again in agreement with Israel - the terms of reference for the conciliation body. The fourth task is to determine - again in agreement with Israel - the manner in which the conciliation body will perform its functions, and its timetable for doing so.

Arbitration amounts in effect to an *ad hoc* judicial process. It involves the appointment of an arbitral tribunal comprising one or more persons, which has the task of determining the facts and applying the law which the parties agree should be applied to the matter in dispute, resulting in an award which is binding upon the parties.

As with conciliation, the first task for Jordan will be to determine whether, in the circumstances of the particular dispute which has arisen, arbitration is to be preferred to conciliation. The second task for Jordan is to seek agreement with Israel upon that preferred choice. As with conciliation, if arbitration is the preferred option it will be necessary - in agreement with Israel - to determine the number of arbitrators, and how they are to be appointed. The third task is to determine - again in agreement with Israel - the terms of reference for the arbitration tribunal, involving both the question(s) which it is to be asked to decide and the law to be applied in reaching its decision. The fourth task is to determine - also in agreement with Israel- the manner in which the arbitration tribunal will perform its functions, and its timetable for doing so. For both arbitration and conciliation there are numerous precedents which can be drawn on as a basis for an agreement to be reached with Israel.

b. Other non Peace-Treaty based Mechanisms and Procedures.

In addition to the various mechanisms and procedures within the framework of the Jordan Israel Peace Treaty previously identified, there are a number of other international possibilities for reaching a settlement, either in whole or in part of the refugee problems addressed in this thesis.

It is important to stress the significance of the phrase “in whole or in part”: a settlement does not have to be reached within the framework of a single process, and it is entirely possible that parts of it may be settled by recourse to one procedure while others may be

settled by recourse to others. A settlement may in practice only be achieved by way of a package of processes, each mutually supporting and reinforcing the others. The way in which the various elements in the package are put together will be largely dependent upon the strategy adopted by Jordan; in the final analysis the elements will probably have to be agreed with Israel, but at least at the outset there are some elements which might be invoked unilaterally by Jordan, as a means of demonstrating Jordan's determination to achieve a settlement and as a way of exerting pressure on Israel.

(i) The International Court of Justice (ICJ)

It is in that light that it may be possible for Jordan to consider the possibility of referring at least some of the issues which arise to the International Court of Justice. The ICJ can only deal with legal questions to which it is appropriate to apply rules of international law. However, the Court has made it clear that a legal question is still a legal question even though it may have strong political overtones,

Proceedings before the ICJ can either be contentious (i.e. a dispute between two or more States) or advisory (i.e. advice by the Court on a legal question put to the Court by an international organization). These two kinds of proceedings involve different considerations.

If a case is referred to the ICJ, it will normally be heard by the full Court, composed of

fifteen Judges (one of whom is at present Jordanian).⁷⁰² Israel, not having a Judge on the Court, would be entitled to appoint an *ad hoc* Judge,⁷⁰³ so making a Court of 16 Judges. It is however possible for the parties to request that a case be heard by a Chamber of three or more Judges (in practice usually five).⁷⁰⁴ This does not noticeably speed up or simplify the Court's procedures, but it does in practice provide a means whereby parties can avoid their dispute being heard before some of the Judges whose likely attitudes they might believe not to be sympathetic. This is a consideration which on balance might be more likely to be relevant for Israel than for Jordan.

1- Contentious Proceedings.

The principal difficulty in referring a case to the ICJ is that its jurisdiction in any particular matter depends upon the consent of the parties.⁷⁰⁵ Both Israel and Jordan would have to agree to refer the matter in question to the Court. Such an agreement can be manifested in various ways. It can be given *ad hoc* in relation to a particular matter, through the conclusion of a special agreement between the parties to that effect or a party can give its consent by participating in a case already commenced by the other party (*forum prorogatum*) or consent can be given in advance in relation to certain general categories of matters - most usually by way of declarations submitted under Article 36.2⁷⁰⁶ of the Statute (the so-called 'optional clause'). Finally, consent can be given in

⁷⁰² Judge Awn Al-Khasawneh is currently the Vice President of the ICJ. He was elected in 2000.

⁷⁰³ See, Statute of the International Court of Justice, cited in cited in Evans, Malcolm D. *Blakstone's International Law Documents*, (1999) op. cit, p. 26, Article 31.2, p. 30.[Hereinafter, *ICJ Statute*].

⁷⁰⁴ *Ibid.*, Article 26.2.

⁷⁰⁵ *Ibid.*, Article 36, p.32.

⁷⁰⁶ *Ibid.*,

advance by way of agreement given in a treaty on a particular topic that disputes about the interpretation or application of that treaty will be referred to the Court.

If Jordan considers instituting proceedings against Israel before the ICJ, it must act within the framework of Article 40⁷⁰⁷ of the Statute of the Court. This provides that cases are brought before the Court either by the notification of a special agreement or by a written application. In practical terms, since neither Jordan nor Israel has made a declaration under the so-called “optional clause” accepting the Court’s jurisdiction, this means that Jordan must either conclude a special agreement with Israel for the submission of an identified dispute or disputes to the Court, or file with the Court an Application in reliance on a treaty providing that disputes arising out of the interpretation or application of the treaty may be referred to the Court, or file with the Court an Application which leaves it to Israel to decide whether or not to consent to the Application forming the basis for the Court’s jurisdiction.

The possibility of concluding a special agreement with Israel to refer a particular matter to the ICJ is dependent upon Jordan and Israel being willing to reach such an agreement. It is probably unlikely that Israel will agree to refer to the ICJ any of the central and politically-charged refugee-related issues in dispute. However, the option may become more realistic at a later stage in negotiations with Israel, when there may be sufficient political pressure to lead Israel to agree to conclude a special agreement in relation at least to a specified part of the matters in dispute between Jordan and Israel, particularly as a way of resolving some otherwise intractable legal problems which may be left over at

⁷⁰⁷ Ibid., p. 33.

the conclusion of an otherwise successful negotiation.

A more likely possibility is the institution of proceedings before the ICJ by way of Application. This would be the way forward either on the basis of submitting an Application and waiting for Israel to accept the Court's jurisdiction on that basis (the *forum prorogatum* option), or on the basis of invoking a relevant treaty obligation which commits Israel and Jordan to accept the ICJ's jurisdiction in disputes arising out of the interpretation or application of the treaty.

The first option involves Jordan submitting to the ICJ an Application commencing proceedings against Jordan on a stated legal matter. The scope of the Application can be as wide as Jordan wishes to make it (so long as it concerns a dispute to which it is appropriate to apply international law). The onus is upon Israel either to respond to the Application and participate in the ensuing proceedings before the Court or (which is more probable) decline to do so, in which case the matter will not proceed.

This course is not unknown, but its value is primarily tactical and political. For example the United States lodged a unilateral Application against the USSR and Hungary in 1954 in respect of the *Treatment of US Aircraft and Crews in Hungary*, while the United Kingdom lodged a unilateral Application against Argentina in 1956 in relation to the dispute between those two States over certain territories in *Antarctica*.

This course is unlikely to lead to substantive proceedings before the Court and a

judgment by the Court. However, it does have certain non-legal advantages, including raising the international profile of the dispute, demonstrating the determination of the applicant to pursue it and its confidence in its legal position. It also puts the other party on the defensive and may create a useful bargaining chip in future negotiations.

If Jordan pursues this option, the necessary procedural steps are laid down in the Statute⁷⁰⁸ and Rules of the Court.⁷⁰⁹ In practice, the Application needs to be sufficiently detailed to give the Court, and the intended respondent State, a clear idea of what the case is about. The Application is an important document in the case, since it establishes the basic legal limits of the case, and once submitted the essential character of the case cannot be changed, although details can be and usually will be developed as the case proceeds.

Currently, Jordan has a Judge of its nationality on the Court, and therefore would appear in principle to have no scope for appointing an *ad hoc* Judge. However, the Jordanian Judge had been, prior to his election to the ICJ, closely associated with advising Jordan on a wide range of Palestinian/Israeli/refugee matters.⁷¹⁰ It may be, therefore, that the Jordanian Judge would be excluded by Article 17.2 of the Court's Statute from participating in the decision of a case referred to the Court: that provision applies to any member of the Court who:

“has previously taken part as agent, counsel, or advocate for one of

⁷⁰⁸ See, *ICJ Statute* cited in cited in Evans, Malcolm D. *Blakstone's International Law Documents*, (1999) *op. cit.*, p. 26.

⁷⁰⁹ See, International Court of Justice, Rules of the Court, adopted on 14 April 1978 and entered into force on 1 July 1978, available on ICJ website [http:// www.icj-cij.org](http://www.icj-cij.org). [hereinafter *ICJ Rules*]

⁷¹⁰ Judge Al-Khasawneh had been Jordan's Senior Legal Advisor during the Peace Negotiations.

the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.”⁷¹¹

The last four words are very wide. Whether or not Article 17.2 would apply to the Jordanian Judge could only be determined when the particular case to be put to the Court is known. If he considers that the Article does apply so as to exclude his participation, or if any doubt on the point is settled against him by decision of the Court,⁷¹² he will have to stand down for the particular case, and Jordan will then be able to appoint a Judge *ad hoc* under Article 31.3⁷¹³ of the Statute. Subject to the conditions prescribed by Article 31.6⁷¹⁴ Jordan has a fairly free hand in appointing an *ad hoc* Judge. Two noteworthy points are that the Judge would not have to be a Jordanian national, and that Jordan’s appointment would not require Israel’s consent. Israel would be able to avail itself of the right to appoint an *ad hoc* Judge, since Israel has no Judge of its nationality on the Court.⁷¹⁵

Once the Application is submitted, the Court will take further action on it as provided for in the Statute and Rules of the Court. In particular where the Application depends on the yet-to-be-given consent of Israel, the Court will transmit it to Israel, but will otherwise take no action on it until Israel’s consent is forthcoming.⁷¹⁶

Once (if) that consent has been given, the President of the Court will as soon as possible invite the Parties’ Agents to a meeting at which questions of procedure will be

⁷¹¹ See, *ICJ Statute*, op.cit, Article 17.2, p. 29.

⁷¹² Ibid.,

⁷¹³ Ibid., Article 31.1.

⁷¹⁴ Ibid., Article 31.6.

⁷¹⁵ It must be noted that the issue of Jordan having a Judge of its Nationality at the Court would become a relevant matter only if Jordan were to institute proceedings before the ICJ while the Jordanian Judge is still a member of the Court.

⁷¹⁶ See, *ICJ Rules*, op.cit, Article 38.5

discussed.⁷¹⁷ In practice, this meeting will constitute the basis on which the Court will make orders fixing the time-limits for the first round of written pleadings in the case.⁷¹⁸ Depending on the nature of the case before the Court, it is likely that the Court would require Jordan, as the Applicant, to file a Memorial in about 9-12 months, and would require Israel to file a Counter-Memorial within a similar time limit thereafter. These time-limits can be extended. The timings for subsequent written pleadings (Reply, Rejoinder) would be left until later.

Israel would be entitled to present counter-claims which are “directly connected with the subject-matter of [Jordan’s] claim”, provided that they fall within the Court’s jurisdiction.⁷¹⁹ Any such counter-claims must be made in Israel’s Counter-Memorial.

The final method of taking a contentious case to the ICJ is on the basis of a provision in a treaty in which the parties have agreed that disputes about its interpretation or application should be referred to the ICJ. Many multilateral treaties contain such provisions, but most are not directly relevant to the present problems.

The scope of a treaty-based Application will be limited to the scope of the treaty provisions whose interpretation or application is in dispute. An Application based on some treaty provision relating to disputes about the interpretation or application of the treaty will need to cover the same ground as in the more general Application discussed above, with the addition of a reference to the treaty provision on the basis of which

⁷¹⁷ Ibid., Article 31.

⁷¹⁸ Ibid., Article 41.1.

⁷¹⁹ Ibid., Article 80.

Jordan contends that the Court has jurisdiction. The scope of the Application will inevitably be less wide-ranging, being limited by the permitted scope of the treaty provision in question, and since the treaty will have established the Court's jurisdiction the Application will be less for political/diplomatic effect and will be more a realistic first step in litigation.⁷²⁰

Where the Application is based on a treaty provision, the Court will notify the Secretary-General of the UN, Members of the UN, and other States entitled to appear before the Court.⁷²¹

With a treaty-based Application it would be open to Israel to file preliminary objections to the Court's jurisdiction or to the admissibility of the Application.⁷²² Indeed, Israel can be expected to do so. Thus, for example, Israel might argue that the application before the Court related to a dispute which fell outside the dispute-resolution provision in the treaty. A preliminary objection would have to be made within three months after the delivery of Jordan's Memorial.⁷²³ If Israel were to raise preliminary objections, the effect in practice would be to delay the proceedings for a considerable time, and of course, in so far as the objections might be upheld by the Court, Jordan's case would be correspondingly diminished.

It would be open to Jordan, after (or contemporaneously with) submitting a treaty-

⁷²⁰ This scenario is for illustrative purposes as no such agreement to which both Israel and Jordan are both parties thereto exists.

⁷²¹ See, *ICJ Rules*, op.cit, Article 42.

⁷²² *Ibid.*, Article 79.

⁷²³ *Ibid.*, Article 79.1 as amended.

based⁷²⁴ Application to request the Court to “indicate ... any provisional measures which ought to be taken to preserve the respective rights of either party”⁷²⁵ Jordan’s request would need to specify the reasons for which it is made, the possible consequences if it is not granted, and the measures requested.⁷²⁶ A request for provisional measures has priority over all other cases.⁷²⁷ The protection is “interim” since it is granted only pending the final outcome of the merits of the case, and is without prejudice to what that outcome might be.

According to the Court’s decisions on requests for provisional measures, a Jordanian request to protect Jordan’s rights would have to be limited to the preservation and protection of rights which would otherwise be irremediably damaged if they were not granted such protection. This would clearly cover such acts as the killing of people, or bulldozing of settlements, provided of course that the prohibition of such killing and destruction could be brought within the legitimate scope of a Jordanian Application. A well-constructed and successful Jordanian request for interim measures of protection would be a valuable weapon in Jordan’s hands.

2- Advisory Proceedings.

Proceedings for obtaining an Advisory Opinion from the ICJ are quite different from

⁷²⁴ In practice, a request for provisional measures submitted on the basis of a general Application dependent on Israel’s consent would be ineffective unless Israel’s consent were to be forthcoming, although as part of the political/diplomatic game the making of such a request would underline the urgency of doing something to put a stop to Israel’s unlawful actions.

⁷²⁵ See, *ICJ Statute*, op.cit, Article 41, p. 33, See, also, *ICJ Rules*, op.cit, Articles 73-78.

⁷²⁶ See, *ICJ Rules*, ibid., Article 73.2.

⁷²⁷ Ibid., Article 74.1.

those relating to contentious proceedings brought by one State against another. Essentially, instead of Jordan deciding to institute proceedings against Israel, an Advisory Opinion involves an appropriate international organ or organization requesting such an Opinion from the Court. Advisory Opinions can only be sought by certain UN organs and international organizations (generally speaking, the specialized agencies).

The UN General Assembly and Security Council can request Advisory Opinions “on any legal questions”. Other UN organs may also do so if so authorized, as may authorized specialized agencies. However, in these cases they may only request Advisory Opinions “on legal questions arising within the scope of their activities.”⁷²⁸ While it is perhaps natural to think first of Advisory Opinions being requested by the General Assembly and Security Council, it is important not to neglect the possibility of using specialized agencies for such requests if there are particular difficulties in the way of using the UN organs and if some particular aspect of the refugee problem falls within the scope of an agency’s activities.

In practice the distinction between the two formulae governing the scope of the legal questions on which an Advisory Opinion may be sought is minimal in the present context, since, given the involvement of the General Assembly and Security Council with Middle East refugee issues, any such question posed by those two organs would almost inevitably arise within the scope of their activities. The language does, however, serve to underline the need for any request by a specialized agency for an Advisory Opinion to arise within the scope of that agency’s activities, a point emphasized by the ICJ in

⁷²⁸ See, *UN Charter*, op.cit, Article 96, p. 24.

rejecting the request for an Advisory Opinion presented by the World Health Organization on *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.⁷²⁹

What is required is a decision of the organ or organization in question, usually in the form of a resolution adopted by the majority provided for in the organization's constitution. In practice, the most relevant bodies authorized to seek Advisory Opinions are the General Assembly and Security Council of the UN. What follows concentrates on the position in respect of those two bodies.

The task for Jordan would thus be to persuade the Security Council or the General Assembly to request an Advisory Opinion, i.e. to adopt a resolution in which such a request is formulated. Two questions would immediately arise. First, on what specific question should an Advisory Opinion be requested? Second, what are the chances of success of such a resolution resulting in the adoption of a request?

With regard to the latter issue, the situation in the Security Council and the General Assembly calls for separate consideration. In the Security Council the first concern is that Jordan, not being a member of the Security Council, would in practice have to find a friendly State which is a member of the Council and which would table the necessary draft resolution, and would need to work with that State to build up support for and co-sponsorship of the draft. Assuming that this can be done, it may then prove difficult to get

⁷²⁹ See, *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, p. 66.

a resolution requesting an Advisory Opinion adopted by the Security Council. Such a resolution on refugee-related issues could scarcely be regarded as a merely procedural matter,⁷³⁰ and would therefore almost certainly require an affirmative vote of nine members including the concurring votes of the permanent members.⁷³¹ In light of past practice it is possible that a request initiated by or on behalf of Jordan would be defeated by a veto: however, this may not be inevitable.

The most obvious organ to request an Advisory Opinion on refugee-related issues is probably the UN General Assembly, since it has the widest general competence and has over the years dealt with virtually all aspects of the refugee problem. It would be easy to frame a request for an Advisory Opinion in such a way as to raise a legal question which was directly relevant to the exercise of the Assembly's functions. (for although this may not be a strictly necessary requirement, it would in practice be highly desirable, if only as a basis for attracting enough votes in support of a request).

The problems are more likely to be political than legal. The Member States of the UN do not lightly seek Advisory Opinions, and it would be necessary to persuade a substantial majority that a request should be made. Article 18⁷³² of the Charter does not specify requests for Advisory Opinions among those "important" questions which require a two-thirds majority, which therefore suggests (perhaps surprisingly) that it would be an

⁷³⁰ A different view has been expressed, to the effect that co-operation between organs of the UN (and thus the giving of an advisory opinion by the ICJ to the Security Council) is inherently procedural in nature: De Arechaga J., *Voting and Handling of Disputes in the Security Council*, p. 8. In the present context such a view would be unlikely to prevail.

⁷³¹ See, *UN Charter*, op.cit, Article 27.3, p. 13. It should be mentioned that the one Security Council request so far made for an Advisory opinion (concerning Namibia) was adopted by 12-0-3, the 3 abstaining states being, Poland, USSR and the UK.

⁷³² *Ibid.*, Article 18, p. 11.

“other” question for which a simple majority would be sufficient⁷³³ Requests by the General Assembly for an Advisory Opinion have usually⁷³⁴ been adopted by substantially more than a two-thirds majority, and that is obviously the sort of majority for which, for political reasons, it would be as well to aim even if it may not be strictly necessary. Whether such a majority is attainable is a matter for political judgment: in principle, however, there see, ms no reason why it should not be.

It is worth recalling two previous attempts to obtain Advisory Opinions on questions relevant in the present context. In 1952 Syria proposed to refer a series of questions on the refugee issue to the Court for an Advisory Opinion, but this proposal was rejected 21 (for)-13 (against) - 24 (abstaining) in the *ad hoc* Political Committee.⁷³⁵ The Syrian proposal would have referred to the ICJ the questions as to whether Palestinian Arab refugees were entitled as of right to be repatriated to their former homes and to exercise their rights to their properties and interests, the Syrian proposal would have secondly asked whether Israel was entitled to deny refugees these rights. Thirdly, it would have asked whether these rights should be observed by themselves or required to be negotiated by States, the refugees not being nationals thereof. Finally, it would have asked whether Member States were entitled in law to enter into any agreement in relation to these rights.

In 1991 the Sub-Commission on Prevention of Discrimination and Protection of Minorities suggested that the Commission on Human Rights should recommend to

⁷³³ Ibid.,

⁷³⁴ Notably, however, Resolution 49/75K requesting an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons was only adopted by a simple majority of States present and voting: 78-43, with 38 abstentions.

⁷³⁵ See, UNYB, 1952, pp. 251-2.

ECOSOC that it request an Advisory Opinion on the question of the legal consequences for States arising from the building by Israel of settlements in the territories occupied since 1967, notwithstanding various Security Council resolutions.⁷³⁶ The Commission postponed consideration of the suggestion, since it appeared that there was a consensus that the Commission should not decide on this question.

The question to be referred to the International Court for an Advisory Opinion will need careful drafting. It will need to be phrased in terms which can plausibly be presented as posing a question the answer to which will assist the General Assembly to carry out its functions. A straight question as to whether Israel's actions are a violation of Israel's international obligations towards Jordan would almost certainly *not* be appropriate. A more generally phrased question is called for: for example (and in substance, rather than precise legal drafting), "is Israel's conduct in relation to displaced persons in breach of the Fourth Geneva Convention?", "what are Israel's international legal obligations in relation to refugees and displaced persons?", "what are the legal consequences for other States of Israel's conduct in relation to the occupied territories?".

It will not be difficult to prepare a resolution putting forward a question on which an Advisory Opinion could appropriately be sought. The draft resolution could be prepared and tabled by Jordan, which could undertake the task of gathering support for the draft and attracting co-sponsors. Jordan could thus expect to keep general control of the initiative, although the process of attracting support and co-sponsors would inevitably lead to some compromises on points of textual detail. Deciding upon the terms of the

⁷³⁶See, UNYB, 1991, p.612.

question will thus in the first place be a matter for Jordan, in the light of legal advice and relevant political considerations; thereafter it will be a matter for discussion with Jordan's supporters.

If a resolution is adopted by the General Assembly, the subsequent procedure is relatively simple.⁷³⁷ The Court may treat the request as a matter requiring urgent treatment and as therefore calling for an accelerated procedure (and can be expected to do so if the Assembly itself asks for its request to be treated as a matter of urgency).⁷³⁸ States are entitled to submit written statements to the Court on the question put in the request for an Advisory Opinion, and usually to comment on statements made by others; and there will usually be an oral hearing at which oral statements may also be made.⁷³⁹ The Court prescribes the time-limits for these various statements: they are usually considerably shorter than those applicable to the various stages of contentious proceedings.

Given that the initiative for requesting an Advisory Opinion will have come from Jordan, which will have been able to begin to prepare any statement which it might wish to present to the Court well before the request is formally put to the Court, there will be adequate time for Jordan to put together a full statement of its views for consideration by the Court.

⁷³⁷ In particular, and compared with contentious proceedings discussed above, there is in advisory proceedings no room for a formal Application, appointment of *ad hoc* Judges, preliminary objections, counter-claims or provisional measures of protection. The Statute of the court, however, provides generally for the Court to be guided by the Statute's provisions which apply in contentious proceedings "to the extent to which it recognizes them to be applicable" (Article 68).

⁷³⁸ See, *ICJ Rules*, op.cit, Article 103.

⁷³⁹ *Ibid.*, Article 105; see, also *ICJ Statute*, op.cit, Article 66, p. 35.

Although technically only “advisory”, an Advisory Opinion from the ICJ would carry a lot of weight. For the purposes of the organization which has sought it the Court’s Opinion is for most practical purposes equivalent to a binding decision. As a basis for further action against Israel it could be extremely significant (comparison may be made with the influence upon South Africa of the several Advisory Opinions relating to South West Africa/ Namibia). An Advisory Opinion would be quicker to get from the Court than a Judgment in contentious proceedings, and would be vastly less expensive for Jordan. Against those considerations, it would only answer the particular legal question put to the Court, it would not be able to provide remedies for action found to be unlawful (although it might be able to indicate what the consequences should be), and the whole process of seeking and acting on the Advisory Opinion would not be solely in Jordan’s hands.

In short, it is a possible option to be considered, but is probably more relevant as part of a wider strategy for dealing with the refugee problems than being in itself a solution to them.

(ii) Arbitration

Arbitration as a possible method of resolving disputes has already been referred previously in this part, in the limited context of disputes arising out of the application or interpretation of the Peace Treaty. In the present context, however, the scope for arbitration is much wider, and comprises virtually any dispute which the parties might

agree to submit to arbitration. Primarily these are disputes which are best resolved by the application of law, and in particular international law, but they may also include disputes which would be more appropriately settled on some other basis.

Determining what some such "other basis" might be, however, is not easy. In practice it would be likely to amount to leaving the arbitrator(s) to settle the dispute in whatever way makes most sense to the arbitrator. This leaves much discretion to the arbitrator, and makes the outcome difficult to predict, which in turn makes it difficult to come to an informed conclusion whether to opt for such a non-legal arbitration. It is largely for this reason that arbitrations are usually based on international law, which limits the arbitration tribunal's discretion and makes the outcome more susceptible to rational prediction.

Arbitration based on international law is in effect a form of *ad hoc* judicial process. Its advantages and disadvantages are usually stated in comparison with recourse to the ICJ. They include the following: first, in terms of the tribunal's jurisdiction, there is little difference between them. They both require consent of the two parties, and if consent is forthcoming to arbitration it might just as easily be forthcoming for a reference to the ICJ. Second, there is little difference between the two as regards the formulation of the question to be submitted to arbitration. Third, Arbitration is, however, more flexible, since the parties can agree upon whatever they wish. Fourth, whereas the ICJ is an established and functioning institution, with arbitration the parties must create everything for themselves (although there are many precedents which can be drawn on). Finally, where States are willing to refer a dispute to judicial settlement but prefer arbitration to

the ICJ, it is usually because, either they have political objections to the ICJ as an institution, or they prefer to select the members of the tribunal rather than take the 15-Judge ICJ as it stands, or they can give an arbitral tribunal specific directions as to the law to be applied, whereas the ICJ is bound by Article 38 of the Statute to apply international law as there set out. Also, they may believe that they can exercise greater control over the timetable of their own arbitral tribunal than over the schedule to be adopted by the ICJ. They also may believe that an arbitral tribunal can be more flexible in the decisions it reaches than is the case with the more strictly judicial ICJ.

If Jordan is to seek to refer any outstanding disputes to arbitration, the first and unavoidable requirement is to obtain Israel's agreement. This will be essentially a political matter. It is necessary to bear in mind that arbitration does not have to cover all outstanding issues about which there is dispute: it would be entirely appropriate for only some issues to be referred to arbitration, while others are settled in some other way, e.g. by direct agreement.

Assuming, therefore, that both States agree to refer one or more issues to arbitration, there will need to be an agreement to that effect, usually taking the form of a bilateral arbitration treaty. The content of such a treaty is primarily a matter for the parties: as a matter of international law they have considerable flexibility as to how to organize the process of arbitration.

However, certain elements are essential to a practically effective arbitration treaty. These

are; the question(s) to be submitted to arbitration, the basis on which the question is to be decided (e.g. by the application of international law; or international law, and equity; and/or taking into account certain specified legal and practical considerations), the composition of the tribunal, both as regards the number of arbitrators and as regards the manner of their appointment, the number, order and timing of written pleadings, the need for oral proceedings, the applicable procedural provisions (or at least a stipulation that the Tribunal can decide its own rules of procedure), and the majority needed for the Tribunal's Award, and its binding quality.

There is no need for arbitration to be initiated by the submission of an Application. The conclusion of the arbitration agreement is enough to begin the process. Also, there is usually no scope for preliminary objections since the parties will have agreed *ad hoc* to the arbitration. Whether or not counter-claims are permitted will depend upon the agreed terms of the reference of the dispute to arbitration, and the provision made as regards the tribunal's rules of procedure. Whether provisional measures of protection may be sought will depend also upon the arbitration agreement and the rules of procedure adopted by the tribunal.

(iii) Mediation and Conciliation: non-binding third party assistance

Conciliation has already been referred to in relation to disputes as to the interpretation and application of the Jordan-Israel Peace Treaty. It is here convenient to consider conciliation at the same time as mediation, since there is no sharp dividing line between

them - or indeed between them and other forms of non-binding third party assistance.

Conciliation, as already noted, involves a process where the conciliator makes a report containing proposals for a settlement. Mediation, on the other hand, involves the mediator helping the parties to negotiate between themselves but himself taking part in the negotiations. Good offices, which is classically another such form of third party assistance, involves the third party helping the disputing parties to negotiate a settlement between themselves, but without the third party itself getting involved in the negotiations.⁷⁴⁰

However, none of these definitions is definitive. These modes of settlement are very flexible, both as to what each mode may involve, and as to the dividing lines between them. The classification is inherently one of convenience rather than one of real substance; labels rather than content. The forms of non-binding third party assistance may take other forms than mediation and conciliation, and virtually the only limit to those forms is that imposed by limits upon the ingenuity of the States concerned. The essential elements are simply that the results are not binding, that they involve assistance by third parties. and that “the intervention of the third party aims, not at *deciding* the quarrel *for* the disputing parties, but at inducing them to decide it for themselves”.⁷⁴¹

As already noted in relation to conciliation within the framework of Article 29 of the

⁷⁴⁰ See, Brierly, *Law of Nations* (4th ed.), p. 269. And see generally, Merrills, *International Dispute Settlement* (3rd ed., 1998), pp.27-43, 62-87); Collier and Lowe. *The Settlement of Disputes in International Law* (1999). pp. 27-31.

⁷⁴¹ *Ibid.*, pp. 269-271.

Peace Treaty, the first task is to determine whether one of these nonbinding third party forms of settlement is desirable from Jordan's point of view. Jordan cannot impose such a form of settlement on Israel, since Israel's agreement would be needed: but at least Jordan needs however to decide whether such a procedure would serve Jordan's interest and therefore whether it would be appropriate to propose it to Israel.

The second task would be to choose the identity of the third party to exercise the task. This may be either a State (leaving that State to identify a particular individual to perform the task) or an individual (e.g. Senator George Mitchell of the USA, who helped in this way in relation to problems in Northern Ireland, as well as more recently in relation to the Middle East). Choosing an individual is probably safer, although the support of the State to which the individual belongs would be very desirable. However, even if a State is chosen, it is almost certain that the State would not appoint an individual unless it knew in advance that that person would be acceptable to the parties. The choice would need to be agreed with Israel, but Jordan would be best served if it had a clear idea in advance of a short list of people to whom it would be ready to entrust the task.

The identity of the mediator will be closely linked to the scope of the mediation. Depending on what aspect of the Jordan-Israel dispute is the subject of the mediation the kind of person it will be necessary to look for may be, e.g. an international political figure, an internationally distinguished lawyer or economist, an expert in humanitarian affairs, an experienced diplomat, and so on.

The third task would be to settle the terms of reference for the third party assistance. Again, Israel's agreement would be needed, but Jordan must have a clear idea of what it would want before embarking on the necessary negotiation with Israel.

The mediator's terms of reference will need to clearly set out the matter on which he is expected to help, and the end-result to be aimed for (e.g. an agreement between Jordan and Israel on the matter in question; or simply some formula for narrowing the gap between the parties' positions so as to make an agreement more attainable). If some measure of initial agreement with Israel on those lines can be achieved, it will be necessary to discuss then the proposed terms of reference with the person who has been identified as a possible mediator: he or she may well have other elements to add.

The fourth task would be decide how the third party should perform its functions, and within what timetable. As before, Israel's agreement would be necessary, but Jordan should from the outset have a clear idea of what its preferences would be.

With regard to the mediator's *modus operandi*, Jordan and Israel will have to reach a preliminary agreement and then discuss it with the mediator-designate. Matters which will need to be settled include such matters as the location of meetings, whether meetings are always to be with both parties or whether the mediator can see the parties separately, the frequency of meetings, the submission of papers to the mediator, confidentiality, physical security, administrative/secretarial support for the mediator, and payment of the mediator's fees and expenses.

Once a mediation process has been established, the internal Jordanian preparation for participation in the mediation will depend upon the subject of the mediation. Generally speaking, the burden on Jordan will be much less than a case before the ICJ or an arbitration tribunal. Nevertheless, well-prepared presentations of Jordan's position presented to the mediator will be essential if the mediation is to be able to take full account of Jordan's requirements.

(iv) Participation in Israel-Palestinian mechanisms

It may be that negotiations between Israel and the Palestinians will, if and when they resume, eventually result in some agreement which could provide a mechanism through which refugee problems, or certain of them, would be resolved. That mechanism could in terms envisage eventual participation by Jordan (and perhaps others with an interest in the refugee problems); or, if not, Jordan could nevertheless seek to join in what would be a purely Israeli-Palestinian procedure.

In these circumstances Jordan will have a difficult political choice to make. On the one hand, it will presumably not want to undermine a potential Israeli-Palestinian agreement; on the other hand, there are obvious dangers in participating in a mechanism in the negotiation of which Jordan has played no part.

One possibility which might be considered is for Jordan, if it learns on good authority

that Israel and the Palestinians are making real progress towards a settlement on refugee issues which impinges on Jordan's rights and interests, is to request the parties to be allowed to participate in the Israeli-Palestinian discussions, in substance to the extent that they directly affect Jordan's position. From the point of view of Israel and the Palestinians, such a request could be regarded as adding a possible complication to what would already be delicate negotiations. A Jordanian participation might be seen as a way of minimizing Jordanian objections once an agreement is reached.

Israel and the Palestinians might find it difficult to refuse such a request given that refusal would almost certainly provoke an eventual Jordanian objection to the final settlement.

From Jordan's perspective, the request would in itself demonstrate Jordan's real interest in the refugee question and Jordan's determination to stand up for its rights. Also, participation would give Jordan up-to-date and first-hand information about what was being discussed. Jordan's participation could also give Jordan an opportunity to explain its views and a degree of influence over the outcome. It would also have the potential disadvantage of politically tying Jordan into whatever the final settlement might be and make it more difficult for Jordan to stand aside from it.

Refusal of a request to participate would, however, pave the way for Jordan subsequently to reject any involvement with the settlement arrived at between Israel and the Palestinians.

A variant of this kind of arrangement which might be worth considering by Jordan would be one whereby Jordan and the Palestinians cooperate over certain aspects of the refugee and displaced persons problem, with the Palestinians taking the lead in negotiating with Israel, but with it being agreed between Jordan and the Palestinian Liberation Organization that any gains which it may achieve will be shared proportionately between the it and Jordan. Thus, the right of return for *all* Palestinians (even Jordanian nationals) might be left for negotiation by the Palestinian Authority, and to the extent that return could be agreed then Jordanian nationals would share in that benefit, while to the extent that all that could be agreed was compensation in place of actual return then that compensation should be shared between Jordan and the Palestinian Authority. Such an approach need not apply to all aspects of the refugee/displaced persons problem. For example, it need not apply to the right of such persons to compensation for loss or damage to their property that would, in the case of Jordanian nationals), remain a matter for Jordan to negotiate directly with Israel, as would any question of redress for any loss or damage suffered directly by Jordan. As with the first-mentioned possibility of Jordanian involvement in Palestinian-Israel negotiations, there are various pros and cons to be considered, and Jordanian involvement in such negotiations, at least as an observer but preferably (since Jordanian interests would be in issue) as a substantive participant, would be highly desirable and probably essential.

Subject to those possibilities of seeking to participate in the Israel-Palestinian negotiations, Jordan's best strategy, from a legal point of view, would seem to be to take

the position that Jordan has its own specific national interest in the way in which the refugee problem is resolved, that no other State or entity has the right to negotiate on Jordan's behalf, and that Jordan's acquiescence in any settlement affecting Jordan's claims which others might arrive at between themselves cannot be taken for granted. Such a stand would be firmly based on unassailable principles that were highlighted previously in this thesis, and should commend itself to all other States.

The fact that such is Jordan's position should be made known at the highest level in all relevant quarters before any Israeli-Palestinian negotiations are concluded, and indeed before they get too far advanced. Moreover, if all relevant quarters are put on early notice that that is going to be Jordan's position, it would be important to keep repeating Jordan's position at periodic intervals during the continuation of Israeli-Palestinian negotiations, so that those parties are not under any illusion that Jordan does not really mean what it says. A firm statement, and repetition, of such a Jordanian position would have a greatly enhanced effect if at the same time Jordan were to take positive action to pursue its own refugee claims against Israel, of the kind discussed elsewhere in this chapter.

That said, however, it cannot be ruled out that Israel and the Palestinians might establish arrangements which could in practice, and at least in part, have some attractions for Jordan. It would therefore be unwise for Jordan to reject any such Israeli-Palestinian arrangements in advance and in principle, without further consideration. Jordan *might* find something of advantage in Israeli-Palestinian arrangements, especially if they are being backed by substantial internationally-funded resources. The option should be kept

open, until the details of any such arrangements are known.

It should be added that the author of this thesis has been shown some papers which indicate how the Israeli-Palestinian negotiations on this issue were, in June 2001, progressing. On a quick reading of those papers, and bearing in mind that they reflect only an incomplete set of ideas under discussion, it can be said that a settlement along the lines set out in those papers would not be fully acceptable to Jordan. There are elements in them which could be attractive to Jordan as a settlement of part of the refugee problem, but there would still remain a number of issues on which Jordan would continue to have rights as against Israel.

It must be stressed that, regardless of the scope of the claims to be pursued and irrespective of whether they are to be pursued through negotiation or instead through one of the other processes and dispute settlement mechanisms described above, the claims will require investigation and preparation for presentation in accordance with international norms. Inevitably, the Jordanian Government must play a role in this process. While the precise nature and scope of the Government's role in the claims preparation process will be influenced, although not necessarily determined, by the types of claims to be pursued and the process through which they are to be pursued, the most basic claims development process must in fact take place even before any such decisions are made.

To reduce the matter to its simplest form, how can the Government even know how much

it should be seeking, and on behalf of whom, if it has not first taken an inventory of possible claims and thereby determined, insofar as practicable as a preliminary matter, the existence, nature and amount of all of the claims its nationals, as well as the Government itself, may wish to assert against Israel. Absent such a review the Government would assume a potentially very high risk of negotiating with Israel for either too much or too little. In addition, without such basic data, it could wind up expending efforts to establish a forum for the resolution of claims that in light of the number and character of the actual claims would be far less suitable than feasible alternatives.

It is for these reasons that the United States, for example, by a regulation of its Department of the Treasury required all United States nationals during the Iranian hostage crisis that commenced 4 November 1979 to register with it within a stated time basic details of any claims they might wish to assert against the Islamic Republic of Iran by virtue of the successful Islamic Revolution. Based in part on the data thus assembled, the United States then negotiated with Iran and ultimately concluded the Algiers Accords establishing (in The Hague) the Iran-United States Claims Tribunal, which for over 20 years has been adjudicating claims of those two states and their nationals arising from those events.

Thus the first step that the Government must take in this entire process of preparing for the assertion of claims against Israel must be to acquire sufficient knowledge of all potential claims. The manner by which this is best accomplished depends upon a number

of points that must be discussed within the Government. Clearly the process of inventory-taking as regards the Government's own claims must be distinguished from what may be involved in acquiring the necessary knowledge regarding claims of individual Jordanian nationals. In both situations one must proceed in consciousness of the fact that the very process of collecting claims information necessarily will have two effects. On the one hand, it can raise initial expectations, potentially not fully justified, regarding future Government action in respect of claims and amounts that might eventually be paid (or otherwise realized). On the other hand, the very fact that the Government is collecting claims information will, to the extent it becomes known to Israel, become an element in any bilateral negotiating process that touches on claims matters, however tangentially. Moreover, other states and the Palestinian Authority may have their own reactions to knowledge of such a process.

For these reasons, Jordan will need to consider carefully the degree of confidentiality with which it will proceed in gathering necessary claims data, which in turn raises the issue of how much control it will exercise over the process. Clearly the degree of control it can bring to bear, and the level of confidentiality consequent thereon, will be greatest insofar as the Government is preparing its own claims against Israel, and hence involves in that process only Government employees subject to Government discipline. As soon as, and to the extent that, nationals are brought into the process, however, e.g., by requesting through a public notice that all potential said claimants come forward with details of their claims, Government control becomes less, both over internal expectations, and hence over such actions as may be driven thereby, and over Israeli reactions

generated, or at least influenced, by knowledge of such process. Hence, the Government may wish, to the greatest extent possible in light of relevant political imperatives, and consistent with effective claims preparation, to minimize reliance on participation of prospectively claiming nationals themselves in the process of taking inventory of possible claims.

As decisions eventually are made regarding the scope of the claims to be asserted and the process by which they are to be pursued - i.e., by negotiation, or under the provisions of Articles 8 or 24 of the Jordan-Israel Peace Treaty of 1994, or before an existing international court or tribunal, or by establishing a new tribunal or commission, the shape of the process for preparing the claims will begin to emerge. The information and evidence required to support bilateral diplomatic negotiations for a lump sum settlement is likely to be considerably less, in volume, detail and refinement, than that needed to support a scheme whereby the Government itself would present claims both of itself and of individual nationals to an international tribunal or claims commission that hears them one at a time and requires a high standard of proof. The following paragraphs will deal first with state-to-state claims and then with claims of nationals.

The history of international claims indicates that specific claims of one state against another for a breach of international law, if they are to be adjudged favorably to the claiming state, invariably must meet a certain standard of proof. They must take into consideration, however, the age of the claims and the circumstances in which they arose, either (or both) of which can affect the quality and availability of evidence. Currently

valid statements of such standard include those of the United Nations Compensation Commission (“UNCC”) (handling all claims against Iraq for “any direct loss, damage... or injury.., as a result of its unlawful invasion and occupation of Kuwait [starting 2 August 1990]⁷⁴², the Iran-United States Claims Tribunal, and the International Court of Justice (“ICJ”):

UNCC Provisional Rules for Claims Procedure, Article 35 states that:

“1) Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim..., is eligible for compensation...

3) With respect to claims [of, *inter alia*, “Governments and International Organizations”]..., such claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.”⁷⁴³

The Iran-United States Claims Tribunal, Final Tribunal Rules of Procedure, Article 24(1)states that:

“Each party shall have the burden of proving the facts relied on to support his claim or defence.”⁷⁴⁴

⁷⁴² See, UNSC Resolution 687 (1991), para. 16, available at www.unog.ch

⁷⁴³ See, Provisional Rules for Claims Procedure, Annex to UNCC Governing Council Decision No. 10, UN doc. S/ AC.26/1992/10 (26 June 1992), available at [http:// www.unog.ch/uncc](http://www.unog.ch/uncc), at Art. 35.

⁷⁴⁴ See, Iran-U.S. Cl. Trib., Final Tribunal Rules of Procedure (3 May 1983), reprinted in 2 Iran-U.S. C.T.R. 405. It should be noted that this is identical to the same Article of the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”), promulgated by the United Nations General Assembly in 1976 (UNGA Resolution 31/98), and authorized for use in numerous bilateral and multilateral investment treaties around the world. See, for example, Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, 2 July 1997, available at <http://www.state.gov/www/issues/economic/bit-jordan.pdf>. Article IX 3.(a)iii. Other international claims institutions are likely to follow the Tribunal’s example.

As to the ICJ, its practice is described as follows:⁷⁴⁵

“Generally, in application of the principle *actori incumbit probatio* the Court will formally require the party putting forward a claim to establish the elements of facts and of law on which the decision in its favour might be given. If in the final submissions both parties lay claim to the same object, for instance disputed territory, each will have to establish its case. As the Court has said: “Ultimately... it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved (*Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility) case, [1986] 387 (para. 65)).”

While these statements of the rule give no direct guidance as to precise level or standard of proof that may be deemed “sufficient,” experience indicates that international courts, tribunals and commissions in fact almost invariably require convincingly “high,” levels of actual proof before sustaining a claim against a sovereign (whether or not the claim is that of another sovereign). This point is difficult to discern from the texts of actual decisions, and is not easily apparent even from the writings of learned publicists. Nonetheless it is a fact commonly accepted among experienced practitioners in the field. The level of proof actually required is likely to be in direct proportion to the political sensitivity of the claim. Hence it may be anticipated that as a practical matter the burden of proof against which Jordanian claims against Israel, especially those of a particularly controversial character, will be tested will not be a relaxed one.

There are, as previously indicated, however, two qualifications to this principle. The age of claims (in the present case well over half a century as to a number of potential claims) generally is understood to affect the availability and quality of proof, i.e., witnesses have

⁷⁴⁵ Rosenne, S. *The Law and Practice of the International Court, 1920-1996*, (1997). p. 1083

died and documents have been lost or destroyed. Further, it often is inherent in the circumstances in which claims have arisen, e.g., revolution, political upheaval or war (as in the present case), that the availability and quality of proof will be similarly affected. In other words, international adjudicators tend to evaluate evidence against the background of what they believe is or should be available to the claimant. As was noted by Professor Michel Virally, sitting as Chairman of Chamber Three of the Iran-United States Claims Tribunal, in a memorandum excerpted in the *Buckamier* award:

“The Tribunal has, in the past, adopted a pragmatic and moderate approach... by deciding, on a case by case basis, whether the burden of proof has been properly sustained by each contending party, taking into consideration [the parties’] declarations together with all other evidence submitted in the case, the particulars of the case and the attitude of both parties in the proceedings.

[I]t must be recognized that in many claims filed with the Tribunal, claimants face specific difficulties in the matter of evidence, for which they are not responsible. Such is particularly the case when U.S. claimants were forced by revolutionary events and the chaotic situation prevailing in Iran at the time, to rush out of Iran without having the opportunity or the time to take with them their files, including documents which normally should be submitted as evidence in support of their claims. In many instances, the situation in Iran between the establishment of the Revolutionary Islamic Government on 11 February 1979 and the taking of the American Embassy on 4 November 1979 was not sufficiently settled to permit a return in Iran or, in case of return, ... to recover the files left behind. After 4 November 1979, and up to the critical dates of 19 January 1981 [the date of the Algiers Accords establishing the Tribunal] and 19 January 1982 [the deadline for filing claims], collection of documents in Iran by U.S. nationals was almost impossible. Obviously, these facts made it very difficult for the claimants who did not keep copies of their files outside Iran to sustain their burden of proof in the ways which would be expected in normal circumstances. In view of these facts, the Tribunal could not apply a rigorous standard of evidence to the claimants without injustice. In adopting a flexible approach to this issue, however, it must not lose sight of its duty to protect the respondents against

claims not properly evidenced. At any rate, it must be satisfied that the facts on which its awards rely are well established and fully comply with the provisions of... its Rules of procedure.

In order to keep an equitable and reasonable balance between those contradictory requisites, the Tribunal must take into consideration the specific circumstances of each case, as well as all the elements which can confirm or contradict the declarations submitted by the Claimants. The list of such elements is practically unlimited and varies from case to case. The absence or existence of internal contradictions within these declarations, or between them and events or facts which are known by other means, is obviously one of them. Explicit or implied admission by the other party is another, as well as the lack of contest or the failure to adduce contrary evidence, when such evidence is apparently available or easily accessible. In relation to this last element, however, the Tribunal must not disregard the fact that destruction due to revolutionary events or to the war, the departure from Iran of persons responsible for the conduct of the business at the time of the facts referred to in the claim, changes in the direction or the management of the undertakings concerned, can also impair the Respondents' ability to produce evidence. It is often a delicate task to determine if and to what extent respondents would be responsible for such a difficulty."⁷⁴⁶

Thus a comparatively modest showing from a party having to contend with "old facts" that, in addition, became such in an environment of fast-moving violence may succeed in securing an award or a judgment where the same showing might well be deemed insufficient to justify a very fresh claim for an asserted loss occurring in a peaceful, if not altogether normal, political context.

In summary, then, on this point, Jordan's own claims (for the losses of the state,

⁷⁴⁶ See, *W. Jack Buckamier and The Islamic Republic of Iran, et al.*, Award No. 528-941-3 (6 Mar. 1992), reprinted in 28 Iran-U.S. C.T.R. 53, 74-76; see also *Sola Tiles, Inc. and The Government of the Islamic Republic of Iran*, Award No. 298-317-1 (22 Apr. 1987), reprinted in 14 Iran-U.S. C.T.R. 223, 238.

excluding any losses of its nationals) must be prepared so as to provide a high level of proof. While the “upward” effect on the level required that is caused by the presumably highly contentious nature of Jordan’s claims is likely to be ameliorated to the extent those claims are rooted in the events of 1948, the net result, it should be anticipated, is likely to be still that a high level of proof must be adduced if success is to be achieved. In any event, it must always be kept in mind that there is no such thing as proving one’s case too strongly, too well. Of course a point hypothetically can be reached beyond which further proof is simply so cumulative of an already convincing case as not to be even remotely worth the effort of collecting and submitting it. Short of such an obvious situation, however, in matters of proof it almost invariably is true that “more is better.” A judge, arbitrator or negotiator naturally is more easily prone to accept a contested proposition that he sees is proven credibly three different ways than he is to endorse one of two contending theories pitted against each other.

The approach to large masses of claims of individuals pioneered by the UNCC has been emulated by the Claims Resolution Tribunal for Dormant Accounts in Switzerland and others. It may well recommend itself to Jordan, whether in the context of a negotiated claims commission or tribunal, or as part of the process of negotiating and distributing an eventual lump sum settlement. Such a scheme may be particularly suited to the processing of claims of Jordanian nationals against Israel, given the fact, as is shown previously, that there appear to be natural categories of claimants (e.g., 1948 and 1967 departees), some of whom appropriately might be compensated on a UNCC-style basis, particularly given the numbers involved and the length of time that has passed since the

events giving rise to such claims. It is clear that to the extent such “mass claims” treatment appears to be a possibility, the claims preparation process may be pursued, correspondingly, in less depth. On this basis, too, it might be justified for the inventory-taking process discussed previously to be conducted with little (or possibly no) direct participation of prospectively claiming nationals. Without judging the issue on this point, it should be considered, having regard for the facts and sources set forth before in this chapter, whether information already available to the Government of Jordan may be sufficient for present purposes.

The Treaty of Peace between Jordan and Israel contains provisions that provide for mechanisms, forums and procedures which could serve as avenues in which claims can be brought by Jordan on behalf of its nationals who are of Palestinian refugee origin relating to their right of return and compensation. The Treaty also contains, as explained provisions that could provide a forum for Jordan to bring and present compensation claims to and against Israel as a host state.

Those provisions are not however watertight and problem free. Article 8 of the Treaty provides, as explained in detail, for forums and procedures that have in reality been dormant for many years now and involve other parties. This is especially the case in relation to the quadripartite committee and the Multilateral working Group on refugees. Additionally, this Article, while not excluding the possibility of resorting to other procedural mechanisms and forums as stipulated in its chapeau, links the inception of aspects of the discussion aimed at resolving the Problem of refugees and their rights to

return and compensation to the inception of permanent status negotiations between Israel and the Palestinians. Such negotiations, in spite of the fact that they were envisioned to begin in 1998, did not begin to date.

Additionally, the claims commission whose establishment is stipulated in Article 24 and who is entrusted, in accordance with the article, with “the mutual settlement of all financial claims” has not even been set up after 12 years of signing the Peace Treaty between Jordan and Israel. There has been no discussion on its establishment, composition, mandate, terms of reference or the nature of claims that fall within its jurisdiction.

Jordan could be well advised to initiate formal diplomatic contacts with Israel requesting to initiate the bilateral talks pertaining to refugees as envisioned in Article 8. Equally, it would be advisable that the Jordanian government begin discussion without any further delay on setting up the claims commission provided for in Article 24 and developing, in agreement with Israel, its composition, competence, jurisdiction and identify with precision the types of claims that fall within its mandate.

It would not be practical, feasible or advisable for Jordan to attempt to invoke article 29 relating to dispute settlement before it takes diplomatic steps to activate articles 8 and 24. It is the activation of the those two articles and discussions conducted in their context that could give rise to a “dispute” in the context of the “application and interpretation” of the Peace Treaty that would in turn allow for dispute settlement mechanisms contained in

Article 29 to come into operation.

This very same rationale would apply to non Peace Treaty based mechanisms. Jordan would be well advised to first engage Israel formally in the context of bilateral talks referred to in Article 8 relating to refugees. It will also have to engage in talks to set up the claims commission provided for in Article 24 and test the waters and scope of satisfaction that is provided in the context of those two provisions before it seeks to resort to non treaty based mechanisms such as contentious or advisory proceedings before the ICJ or non Peace Treaty based dispute settlement, although possible, procedures such as conciliation, mediation and arbitration.

CONCLUSION

Palestinian refugees have a right to return to their homes of origin in Israel and to the West Bank. They also have a right to compensation. The two rights, as indicated throughout this thesis are complementary and not mutually exclusive. The right of return and right to compensation naturally apply to Jordanian nationals who are of Palestinian refugee origin from the period of 1947-1949 and its aftermath or the 1967 war and its aftermath and their descendants. This right of return is clearly established in the context United Nations Resolutions, the law of nationality, human rights law and humanitarian law. It is also implied in certain provisions of the Jordan-Israel Treaty of Peace. The right of compensation for Palestinian refugees, including ones who are Jordanian nationals, is also well established in international law. Naturally, Jews who fled certain Arab countries and who were nationals of such countries in the context of the Arab-Israeli conflict have the right to return to their homes of origin in such countries and have a right to compensation, especially when the circumstances of their flight are similar to the ones in which Palestinian refugees were forced to leave predominantly under coercion.

Jordan is rather unique in the manner by which it has treated Palestinian refugees. It has conferred upon them its nationality as early as 1954 unlike all other host countries. Palestinians who were original inhabitants of the West Bank also became Jordanian nationals when Jordan incorporated the West Bank in 1950. They continued to be Jordanian nationals after the occupation of the West Bank by Israel in 1967. Those

original inhabitants of the West Bank who left and came to Jordan as a result of and after Israel's occupation in 1967 continue to be Jordanian Nationals to date. The only exception to this is that Jordanian nationality was revoked from inhabitants of the West Bank who were still physically residents there and not in Jordan when it enacted its legal and administrative disengagement with the West Bank in 1988.

Jordan is also unique in terms of it being the host country of almost two thirds of the entire Palestinian refugee population. Almost half of the population of Jordan today is of Palestinian refugee origin.

Jordanian nationals of Palestinian refugee origin, unlike Palestinian refugees elsewhere, have the advantage of possessing the nationality of a state almost from the date of their expulsion or forced departure. While there are procedural and legal hurdles for Palestinian refugees to bring and present claims to and against Israel in relation to return to their homes and to compensation, owing to the fact that as individuals they do not have available forums to bring claims against a state with the exception of Israeli courts who in turn have not been providing any effective remedies. Palestinian refugees who are Jordanian nationals have the benefit of being nationals of a state that can bring claims on their behalf to and against Israel in the context of diplomatic protection. Their nationality link to Jordan is well established, genuine and effective and most certainly not one that is acquired for purposes of exercising diplomatic protection. They have been nationals of Jordan for decades.

Jordan undoubtedly has the right to present and bring claims to and against Israel on behalf of its nationals who are of Palestinian refugee origin in the context of extending Diplomatic Protection to them. This is particularly possible and legitimate owing to the fact that Israeli legislation either does not provide for any effective remedies for those individuals neither in relation to compensating them or allowing them to return nor does it allow, in the majority of cases, for any form of recourse to a satisfactory procedure altogether.

Indeed, while Jordan can extend Diplomatic Protection to its nationals who are of Palestinian refugee origin, obstacles pertaining to 'nationality at the time of injury' could arise. This is particularly the case in relation to Jordanian nationals of Palestinian refugee origin from the period of 1947-1949 owing to the fact that they only became Jordanian nationals after passing the Jordanian Nationality law in 1954. Having said this, it must be noted that the issue pertaining to 'nationality at the time of injury' may not be fully relevant in the context of the particular circumstances surrounding the 1947-1949 events. Additionally, there are, as illustrated and explained in this thesis *erga omnes* aspects that would be of utility to Jordan in relation to bringing claims on behalf of its nationals who are of Palestinian refugee origin of the 1947-1949 period and their descendants in the event that problems arise in certain cases where the issue of 'nationality at the time of injury' may prove problematic.

Obstacles of the nature described in the preceding paragraph do not arise in the context of Jordanian nationals of Palestinian refugee origin who were original inhabitants of the

West Bank and fled to Jordan and continue to reside therein after Israel occupied the West Bank in 1967. Those have been Jordanian nationals from the date Jordan incorporated the West Bank in 1950.

This right that Jordan has to present claims on behalf of its nationals who are of Palestinian refugee origin is exclusive in nature. No other party, including the PLO, can claim to have such a right in relation to Jordanians of Palestinian refugee origin without Jordan's explicit consent. The exclusive nature of this right emanates from the fact that Jordan has clearly indicated, as explained in chapter 1 of this thesis, that the decision of the Arab League Rabat Summit of 1974, recognizing the PLO as the sole and legitimate representative of the Palestinian People is 'without prejudice to the full and exclusive right of the Hashemite Kingdom of Jordan in relation to all nationals thereof.'⁷⁴⁷

Jordan's right and *locus standi* in relation to its nationals of Palestinian refugee origin is reinforced by Article 8 of the Jordan-Israel Peace Treaty. The Article recognizes, throughout its various paragraphs, Jordan's standing in relation to Palestinian refugees.

Jordan also stands in a unique position in an adverse sense. It hosts, as explained previously, the largest number of Palestinian refugees in the Diaspora. It extends to the overwhelming majority of them its nationality with its full benefits. The number of Palestinian refugees in other Arab countries and elsewhere is at the most in the range of three hundred thousand refugees in each of such countries and pales when compared to

⁷⁴⁷ See for the text of the the Resolution of the Arab League Rabat Summit Meeting and the text of Jordan's reservation in the authentic Arabic text ' *MAJMUAT ALWATHAIK*', (1975), op.cit, p. 243-245.

their number in Jordan which is in excess of two and a half million. Therefore, Jordan as a result of the huge number of Palestinian refugees who were forced to leave their homes by Israel to Jordan and have been residing therein and whose majority are nationals, have incurred immense financial losses directly associated with absorbing, catering and providing for Palestinian refugees in terms of services, subsidies, infrastructure and pressures on the natural and already scarce water resources. Jordan was forced to incur such immense financial costs not by choice but as a direct result of unlawful Israeli actions leading to the generation of refugees and their flight to Jordan predominantly and to other countries. Accordingly, Jordan being the host state of large numbers of Palestinian refugees is entitled to seek compensation from Israel, being the country whose unlawful actions led to the generation of Palestinian refugees. Such a right is premised on Israel's state responsibility for wrongful acts.

Israel's international responsibility provides a basis for Jordan's right to bring claims on behalf of its nationals who are of Palestinian refugee origin to and against Israel regarding their right of return and right to compensation. It also provides a basis for Jordan's right to seek compensation as a host state from Israel being the state whose wrongful actions created the refugee generation. The wrongful actions and measures, as highlighted in the thesis, are of a nature that is clearly attributable to the State of Israel.

Jordan has a number of well founded claims that it can consider bringing to and Against Israel on behalf of its nationals who are of Palestinian refugee origin relating to their right of return and right to compensation and to bring compensation claims, as a host state, for

financial losses that it has been incurring as a host state. Such claims indeed require that availability of mechanisms and forums for their pursuit.

The Jordan-Israel Peace Treaty contains certain provisions that provide for mechanisms and procedures which could serve as appropriate avenues for bringing such claims. Article 8 of the Treaty, as explained in the thesis in detail, provides for bilateral discussions, a Quadripartite Committee, a Multilateral Working Group and UN Programmes. Article 24 provides for the establishment of a claims commission that deals with all financial claims. Regrettably, the mechanisms provided for in both Articles have not achieved any meaningful progress. No bilateral talks of any substance have taken place between Jordan and Israel relating to solving the problem of Jordanian Nationals who are of Palestinian refugee origin in terms of return and compensation. The Quadripartite Committee and Multilateral Working Group have not convened for the past eight years as a result of the overall stagnant status of the Peace Process and no permanent status negotiations have begun between Israel and the Palestinians which would allow Jordan, as stipulated in Article 8 of the Peace Treaty to hold talks with Israel relating to refugees “in conjunction with and at the same time as”. The financial claims commission that was provided for in Article 24 has not come to life either.

Additionally, assuming that mechanisms and procedures provided for in Article 8 had been functioning, and as noted in preceding chapters, the language of the Article is not watertight and does not give clear and explicit guidelines or terms of reference for solving the problem. This Article and other Articles that may have relevance to the issue

of Palestinian Refugees in the Peace Treaty do not appear to substantiate or serve the contention of Jordan that the Peace Treaty, among other accomplishments, “ensures the rights of refugees and displaced persons in determining their fate and giving them the right of return and compensation.”⁷⁴⁸

The financial claims commission whose establishment is provided for in Article 24, was not established either. Its establishment, composition, competence, Jurisdiction and scope of activity are not clarified in the Article and are left for the two parties to agree upon in later talks. Such talks have not occurred and when they do, the process of setting up such a commission and agreeing on its composition, competence, Jurisdiction and scope of activity is not likely going to be an easy process or one with clear outcomes.

Nevertheless, the provisions of the Peace Treaty are not devoid of any meaning or utility. They still provide for broad and general mechanisms and procedures for the presentation of potential claims and could prove useful if forums such as the quadripartite committee and Multilateral Working Group resume their work or in the case of Article 24, if a claims committee is set up. Article 8, although very generic, still stipulates that human problems caused by the conflict in the Middle East are to be resolved ‘in accordance with international law.’ Furthermore it does not preclude the possibility of resorting to other procedures and mechanisms for the presentation of claims that are not provided for in the Article or the Treaty. Such procedures and mechanisms could conceivably be in the form

⁷⁴⁸ See, Jordan Media Group Publication Number 18, November 1994, titled “The Jordan-Israel Peace Treaty: What is It?,” op.cit.

conciliation, mediation, arbitration or recourse to advisory or contentious proceedings at the ICJ. They will also require agreement of both parties to resort to them.

The Peace Treaty reiterated, reinforced and confirmed Jordan's standing vis-à-vis the issue of Jordanian Nationals who are of Palestinian refugee origin. This in itself is an accomplishment. Also, it did not exclude the possibility of, and may have paved the way for a possible and imaginable potential recourse to other procedures not provided for in the Treaty itself. Such procedures would not have been even conceivable had there not been a Treaty of Peace signed between the two countries. It would not have been imaginable or realistic to ponder the possibility of two states at war resorting to conciliation, mediation, negotiation, arbitration or International Judicial Proceedings. Such possibilities were only rendered possible and available to Jordan as a result of the Peace Treaty.

Jordan would be well advised to initiate without any further delay formal diplomatic contacts with Israel requesting to launch formal bilateral negotiations, in the context of Articles 8 and 24. The aim of such negotiations would be to agree on a detailed bilateral framework in which the issue of claims on behalf of Jordanian Nationals of Palestinian refugees in relating to their right of return and compensation can be brought by Jordan and the issue of its compensation claims as a host state. Also, Jordan ought to request setting up the claims commission provided for in Article 24 and insist that it should be established. Jordan must seek to bring all the major claims that it has under the jurisdiction and competence of this commission. All of this requires Israel's consent.

If Jordan is not satisfied by Israel's reaction to its formal diplomatic communications or if Israel's engagement does not lead to an agreement that is satisfactory to Jordan and a 'dispute' arises then in the context of 'application' or 'interpretation' of the Peace Treaty, Jordan then can formally request from Israel to enter into negotiations aiming at resolving such a 'dispute' within the context of Article 29 of the Peace Treaty and if such negotiations fail recourse then can be made to conciliation or submitted to arbitration as stipulated in Article 29. Israel and Jordan will again have to both agree to the conciliation and arbitration details.

Alternatively, Jordan could seek agreement with Israel to resort to non Peace Treaty based mechanisms and set up mediation, conciliation, arbitration, special claims tribunal or institute international Judicial Proceedings to deal with claims enumerated in this thesis specifically. It is unlikely that Israel would consent to participate in an international Judicial settlement procedure in any event regarding issues pertaining to the right of return of Refugees.

While the right of return of Palestinian refugees, including those who are Jordanian nationals, is solidly established in international law, it is not likely that all or even the majority of Palestinian refugees would be allowed to return to what is today recognized Israeli territories. This is ascribed to the fact that there is general recognition that massive scale return of Palestinian refugees to Israel would in fact endanger and dilute the Jewish character of the State of Israel. It is unlikely, that any international tribunal would

actually give effect to the right of return on a massive scale to Palestinian refugees to what is today recognized as Israeli territory.

Ultimately, the solution of the Palestinian refugee problem will predominantly be one that would allow the exercise of the right of return to a Palestinian State that emerges from the Peace Process when resumed subject to absorption capacity. Some refugees, in limited numbers, may be allowed to return to Israel. The solution of the Problem of the overwhelming majority of Palestinian refugees who do not return to such a Palestinian state will most likely be through their settlement in countries in which they currently live or to third countries that are willing to resettle them. This would be coupled with paying compensation to those returning and non returning refugees.

Therefore, for realistic and practical purposes, Jordan would be advised to focus its claims to matters of compensation of its nationals of Palestinian refugee origin and compensation as a host country predominantly.

Jordan should not wait until the Peace Process resumes before it initiates a process of negotiations with Israel and would indeed be better advised to delve into such a process without any further delay.

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