

## EVALUATING THE PALESTINIANS' CLAIMED RIGHT OF RETURN

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### ABSTRACT

This Article takes on a question at the heart of the longstanding Israeli-Palestinian dispute: did Israel violate international law during the conflict of 1947–49 either by expelling Palestinian civilians or by subsequently refusing to repatriate Palestinian refugees? Palestinians have claimed that Israel engaged in illegal ethnic cleansing, and that international law provides a “right of return” for the refugees displaced during what they call *al-Nakbah* (the catastrophe). Israel has disagreed, blaming Arab aggression and unilateral decisions by Arab inhabitants for the refugees’ flight, and asserting that international law provides no right of the refugees to return to Israel. Each side has scholars and advocates who have supported its factual and legal positions. This Article advances the debate in several respects. First, it moves beyond the fractious disputes about who did what to whom in 1947–49. Framed as a ruling on a motion for summary judgment, the Article assumes *arguendo* the truth of the Palestinian claim that the pre-state Jewish community and later Israel engaged in concerted, forced expulsion of those Palestinian Arabs who became refugees. Even granting this pro-Palestinian version of the facts, however, the Article concludes that such an expulsion was not illegal at the time and that international law did not provide a right of return. A second contribution of this Article is to historicize the international

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law relevant to the dispute. Many relevant areas of international law have changed significantly since 1947–49—such as the law of armed conflict, refugee law, human rights law, and law regarding nationality, statelessness, and state succession. Previous scholarship and advocacy finding that international law requires return of Palestinian refugees have impermissibly sought to hold Israel to legal standards developed decades after the relevant events. This Article’s third contribution is to assemble detailed data, summarized in several tables in the Appendix, on the actual practices of states regarding expulsions of ethnic groups and repatriation of refugees. Analysis of these data sets allows the Article to conclude that Israel’s actions regarding the refugees of 1947–49 was legal and consistent with the actions of many other members of the international community.

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## 1. INTRODUCTION

The two-year war which gave birth to Israel also made refugees of approximately 600,000 to 760,000 Palestinian Arabs. Starting in 1947, the Yishuv, the pre-statehood Jewish community in Palestine, and its Palestinian Arab neighbors fought a guerilla war against each other. That year, the Yishuv had accepted a two-state solution proposed by the United Nations—called “partition,” just like the contemporaneous partition of India and Pakistan. The Arab states and Palestinians rejected partition because they would not abide a Jewish state in any part of Palestine. After Israel declared independence in May 1948, a more conventional war ensued, pitting Israel against invading armed forces of Egypt, Lebanon, Trans-Jordan, Syria, Iraq, and other Arab countries. That conflict ended in 1949 with armistice agreements but no comprehensive peace. Since then, Palestinians displaced by the conflict of 1947-49 have claimed that international law provides them a “right of return” to their homes and lands in what became Israel. Israel disagrees, placing the blame for the refugees’ flight on Arab aggression and denying that international law requires return. Though tens of millions of other people made refugees by twentieth-century conflicts resettled in new lands—including many hundreds of thousands of Jews who fled oppression in Arab lands in the 1940s and 1950s—the Arab leaders decided that most Palestinian refugees would neither be granted citizenship nor permanently resettled in the Arab states where they found refuge.

The claimed “right of return” to Israel has been a crucial stumbling block in the series of failed Israeli-Palestinian peace negotiations in recent decades.<sup>1</sup>

This Article evaluates whether the Palestinians’ claim of a “right of return” to Israel is supported by international law—international treaties or customary international law (“CIL”).<sup>2</sup> It concludes that no binding source of international law prohibited expulsion of Palestinians or requires that Israel allow Palestinians who fled or were expelled during the conflict of 1947–49 to return to Israel. The basic legal issues have been debated for years,<sup>3</sup> and given the passions that this issue arouses, it is perhaps the case that few minds can be changed purely by legal arguments. Nevertheless, this Article seeks to advance the legal debate in several ways. Stale factual disputes are put aside, where doing so helps sharpen the legal issues. The legal debate is situated in a broader historical and legal context. And the actual practices of

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<sup>1</sup> See, e.g., DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* 3–4, 624, 655, 663–64, 812 (2005) (discussing the “right of return” as among the concessions that were required to end the conflict between Israelis and Palestinians); Akram Hanieh, *The Camp David Papers*, 30 J. PALESTINE STUD., no. 2, Winter 2001, at 75, 82 (stating that Israelis would not discuss a right of return for the Palestinians as it would amount to “declaring a war of destruction” on Israel).

<sup>2</sup> CIL is the consistent practice of states performed from a sense of legal obligation, which crystallizes over time into norms that bind all states. See *infra* notes 124–26 and accompanying text.

<sup>3</sup> Leading works contending that international law supports a right to return include VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT 1891–1949* (2009); W. THOMAS MALLISON & SALLY V. MALLISON, *AN INTERNATIONAL LAW ANALYSIS OF THE MAJOR UNITED NATIONS RESOLUTIONS CONCERNING THE PALESTINE QUESTION*, U.N. Doc. ST/SG/SER.F/4, U.N. Sales No. E.79.I.19 (1979) (published at the request of the U.N. Committee on the Exercise of the Inalienable Rights of the Palestinian People); Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 6 PALESTINE Y.B. INT’L L. 17 (1990–1991); Kathleen Lawand, *The Right to Return of Palestinians in International Law*, 8 INT’L J. REFUGEE L. 532 (1996); John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT’L L.J. 171 (1998); Lewis Saideman, *Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return*, 44 VA. J. INT’L L. 829 (2004); LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* (1998). Leading works denying that international law supports a right to return include JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* (1981); Ruth Lapidot, *The Right of Return in International Law, With Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103 (1986); Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT’L L. 586 (1978); Robbie Sabel, *The Palestinian Refugees, International Law, and the Peace Process*, 21 REFUGEE, no. 2, 2003 at 52.

nations are examined far more comprehensively than in any previous study.

This Article does not base its legal analysis on an attempted resolution of disputed facts. Instead, in the sections applying law to fact, I assume the truth of the Palestinian version of history—that most or all of the Palestinian refugees from the conflict of 1947–49 fled as a result of Israeli force or threats. This assumption is made for the purpose of separating legal disputes from factual disputes and focusing on the former. Think of this Article as a judicial ruling on a motion for summary judgment.<sup>4</sup> The Palestinian legal arguments fail even when their version of the facts is credited. This helps move the Article beyond the current state of the literature—almost all previous analyses explicitly or implicitly stake out positions on contested factual issues about the reasons for the refugees’ flight, thereby muddying their legal analysis.<sup>5</sup>

Previous studies finding that the expulsion of Palestinians was illegal, or that international law supplies a right of return for Palestinian refugees, have committed a number of common errors. The most significant error is temporal. Recent treaties, declarations, and state practice are used to derive a right of return for refugees displaced by war or other crises, and that right is then retroactively applied by fifty or sixty years to the conflict in 1947–49, when very different legal rules applied. A second, and related error, is methodological. Instead of looking to treaties or CIL to

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<sup>4</sup> In American civil procedure, a litigant may ask the court to assume the version of the disputed facts most favorable to the other side and then rule on whether there is a viable legal claim based on those facts and any undisputed facts. See Fed. R. Civ. P. 56.

<sup>5</sup> Compare, e.g., KATTAN, *supra* note 3, at 170 (characterizing “the manner in which some 750,000 Palestinian Arabs were forced to flee their homes” as “an act of expulsion” by Israel); Quigley, *supra* note 3, at 173–80 (claiming to demonstrate near total Israeli responsibility for Palestinian refugees’ flight); de Zayas, *supra* note 3, at 35 (charging the Israelis with “the displacement of the indigenous Palestinian population from their homeland and the implantation of settlers in their territory”), and Wadie E. Said, *Palestinian Refugees: Host Countries, Legal Status and the Right of Return*, 21 REFUGE, no. 2, 2003 at 89, 90 (2003) (“The only real scholarly debate now is whether the ethnic cleansing of that part of Palestine that became Israel was deliberate or merely the result of battlefield decisions.”), with Lapidoth, *supra* note 3, at 111–12 (stating that “[i]n the wake of the 1948–49 Arab-Israeli war, many Palestinian Arabs . . . fled to the neighbouring Arab countries,” and subsequently failing to consider whether international law might have been violated by any expulsions of Palestinians); Radley, *supra* note 3, at 592–95 (claiming to demonstrate that many Palestinian Arabs left for reasons other than direct Israeli coercion).

locate binding law, proponents of a Palestinian right of return often rely on so-called “soft law,” such as norms announced in nations’ formally non-binding political statements in international diplomatic forums—primarily the U.N. General Assembly—or in the pronouncements of international commissions or conferences.<sup>6</sup> The lexical status of soft law is quite unsettled and controversial today.<sup>7</sup> About the kind of soft law most relevant to this Article—U.N. General Assembly Resolutions—there has been for decades, and still is today, persistent disagreement about whether or how it can function as binding law.<sup>8</sup> This Article notes these debates but ultimately moves beyond them because there was no agreement or even widespread opinion in 1947–49 that relevant forms of soft law could constitute binding legal obligations. The claim that soft law binds states has only been made in recent decades; at the time of the 1947–49 conflict and for many years afterward, a positivism prevailed that located binding international law only in sources to which states had consented, namely treaties and CIL.

There is a third common problem in previous studies of international law as applied to Palestinian refugees, closely related to the temporal and methodological issues just discussed. Though advocates of the Palestinian view claim otherwise, there is in fact very little relevant state practice on which to base a CIL right to return in the unique circumstances of the Israeli-Palestinian conflict. A few of the factors which distinguish this conflict from situations where legal norms of return have developed in recent years include its longevity (more than sixty years), the fact that the refugees are noncitizens of the state to which they seek admittance,<sup>9</sup> the size of the refugee population compared to the

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<sup>6</sup> See *infra* Section 4.5. While there is no single accepted definition of “soft law,” the phrase is generally used to refer to (1) statements of norms or obligations made in formally non-legally binding texts, and (2) vague provisions adopted in legally binding texts. See, e.g., C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 851 (1989); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 292 (2006). We are here dealing with the first kind of soft law.

<sup>7</sup> See generally Daniel Thürer, *Soft Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011), available at [www.mpepil.com](http://www.mpepil.com) (last updated Mar. 2009).

<sup>8</sup> See *infra* Section 4.5.

<sup>9</sup> Supporters of the Palestinian right of return seek to overturn or render irrelevant Israel’s municipal law decision about Palestinian non-citizenship by resorting to an international law argument about state succession. As discussed in Section 4.4, *infra*, this argument is unavailing.

population of the state to which they seek admittance, and the fact that there has been no comprehensive peace settlement between the warring parties or even a permanent cessation of violence. Even if these factual differences are not thought to make the case of the 1947–49 Palestinian refugees unique, general CIL norms favoring a right of return have only solidified in the last two decades. Up through the time of the 1947–49 conflict and beyond, forced transfers or expulsions of ethnic minorities were common and, in many instances, legal, and there was no norm requiring repatriation in the aftermath of a forced expulsion.

A few caveats are in order, to clarify what this Article covers and what it does not. The Article is concerned solely with the *legal* rights, if any, of Palestinian refugees created by the 1947–49 conflict. The legal rights of the much smaller number of refugees from the later Arab-Israeli wars are not considered;<sup>10</sup> thus, the status of the West Bank and Gaza, and the rights of Palestinian refugees to return there, are beyond the scope of this Article. Religious, moral, philosophical, and other non-legal considerations are similarly omitted; this Article takes no position on the morality or justice of the competing Jewish and Arab claims to the disputed land.<sup>11</sup> By now, more than half a century removed from the events of 1947–49, many of the refugees from that conflict are no longer living. The Article does not directly address the question whether, as many Palestinians claim, second-generation or later descendants of the original refugees may assert the rights of their forbearers;<sup>12</sup> but,

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<sup>10</sup> The number of refugees displaced by the 1967 war is disputed. Probably about 200,000 to 300,000 Palestinians were displaced from the West Bank and Gaza, many of whom were already refugees from the 1947–49 conflict. See BENNY MORRIS, *RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881–2001*, 327 (2001).

<sup>11</sup> I do not question that, for many, the claimed “right of return” “has become a major part of Palestinian identity and symbolizes Palestinian historical narratives.” Abbas Shibliak, *The Palestinian Refugee Issue: A Palestinian Perspective 1* (Chatham House, Briefing Paper MENAP/PR BP 2009/01, 2009), available at [http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/bp0209\\_pri\\_shibliak.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/bp0209_pri_shibliak.pdf). My caveat is not meant to suggest that concerns of morality and justice are entirely absent from the analysis. Human rights law, which embodies many such concerns, is discussed in detail in Section 4.3.

<sup>12</sup> Since the 1960s, the U.N. Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) has taken the position that descendants of original refugees are themselves refugees entitled to its protection and services. See BENJAMIN N. SCHIFF, *REFUGEES UNTO THE THIRD GENERATION: U.N. AID TO PALESTINIANS 7* (1995). On the basis of this UNRWA definition, Palestinian spokesmen now claim that anywhere from 3.5 million to 5.5 million Palestinians

since the legal rights of descendants regarding expulsion and return are derivative of the rights of their ancestors alive in 1947–49, the Article's analysis of the original refugees' claims is dispositive for everyone. A final caveat: this Article addresses the return of people, not questions of property restitution, a related but separate issue.<sup>13</sup>

This Article's argument proceeds in four main parts. Section 2 is a historical overview of the Arab-Israeli conflict and the creation of the refugee problem. Several contemporaneous population transfers are discussed to provide factual context for assessing the legality of the events of 1947–49 in Palestine and Israel. Section 3 addresses important background issues, notably, the inter-temporal problem with applying changed law to preexisting events. Section 4 examines treaty-based law – refugee law, human rights law, the law of armed conflict (international humanitarian law), the law of state succession, and immigration and nationality law – and relevant U.N. resolutions, and concludes that none of these provides a right of return for Palestinians. Section 5 examines the question under CIL through analysis of data sets I collected of similar ethnic conflicts, expulsions or transfers of ethnic groups, and repatriations of refugees.<sup>14</sup> State practice in these conflicts shows no right of return that could be applicable to the Palestinians.

## 2. HISTORICAL OVERVIEW

At the root of the Palestinian-Israeli conflict is the fact that two peoples claim the same land. History provides support for both claims. For significant parts of the first millennium B.C.E., the Hebrews or Jews governed and were a majority of the population in the area later known as Palestine.<sup>15</sup> Persians, Greeks, and others ruled at times as well. Romans invaded in the first century A.D., and had killed or exiled the largest part of the Jewish population by the second century.<sup>16</sup> After the Roman Empire disintegrated,

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are refugees who have a right of return to Israel. See Sabel, *supra* note 3, at 54; Said, *supra* note 5, at 89.

<sup>13</sup> The leading treatment of this topic is Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295 (1995).

<sup>14</sup> See *infra* Appendix Tables 1, 3.

<sup>15</sup> MORRIS, *supra* note 10, at 4.

<sup>16</sup> *Id.*



the area was governed by a rotating cast of invaders—Mongols, Crusaders, Arabs, Turks, and others—for a millennium and a half.<sup>17</sup> From the mid-sixteenth century until World War I, the area was under the nearly unbroken rule of the Ottoman Turks,<sup>18</sup> and “Palestine” was a unit in the Ottoman administrative district of greater Syria.<sup>19</sup>

Around the beginning of the nineteenth century, Palestine had a total population of about 275,000 to 300,000, the vast majority of which were Muslim Arabs; Jews numbered only about seven to ten thousand.<sup>20</sup> Starting in the 1880s, waves of Jewish settlers began to arrive in Palestine. Many fled pogroms in Russia and Eastern Europe; they were also driven by “age-old millenarian impulses and values of Jewish religious tradition,” and the political ideology of ethnic-national self-determination that was developing in the latter part of the nineteenth century.<sup>21</sup> A Zionist movement emerged at this time under the leadership of Theodor Herzl, and Jews began to purchase large amounts of land in Palestine.<sup>22</sup> At the outset of World War I—a conflict that would have profound consequences for the Jews’ and Arabs’ national aspirations—about sixty thousand Jews were living in Palestine.<sup>23</sup>

To gain Arab support against the Ottoman Turks during World War I, Great Britain made territorial promises to the Arabs concerning the Arabian Peninsula and the Levant.<sup>24</sup> In the Balfour Declaration of 1917, Britain also, perhaps inconsistently, promised Zionist Jews that it “view[ed] with favour the establishment in Palestine of a national home for the Jewish people, and [would] use [its] best endeavours to facilitate the achievement of this object,” provided that “nothing shall be done which may prejudice the civil

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 4, 7.

<sup>19</sup> See, e.g., Bernard Lewis, *Palestine: On the History and Geography of a Name*, 2 INT’L HIST. REV. 1, 5–6 (1980); George J. Tomeh, *Legal Status of Arab Refugees*, 33 L. & CONTEMP. PROBS. 110, 112 (1968).

<sup>20</sup> MORRIS, *supra* note 10, at 4.

<sup>21</sup> *Id.* at 14–19, 24–25.

<sup>22</sup> *Id.* at 20–24, 38.

<sup>23</sup> *Id.* at 37.

<sup>24</sup> British promises were embodied in the McMahon-Hussein correspondence of 1915–16. For this correspondence and the British High Commissioner in Egypt, Sir Henry McMahon’s subsequent explanation of its meaning, see THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 2–19 (Ruth Lapidot & Moshe Hirsch eds., 1992).

and religious rights of existing non-Jewish communities in Palestine . . . .”<sup>25</sup>

With the war over, Britain, France, Russia, Arabs, and Jews all sought their piece of the former Ottoman Empire’s Middle Eastern territory. President Woodrow Wilson’s calls for an “association of nations” committed to pursuing lasting peace and self-determination for formerly oppressed peoples<sup>26</sup> had far-reaching effects on the resolution of this territorial dispute. The victorious powers—minus the United States after the Senate blocked U.S. entry—formed a League of Nations with power to appoint and oversee a “Mandatory” (trustee) nation which would govern various territories “on behalf of the League” with the goal of eventual independence for previously oppressed nationalities.<sup>27</sup> France became the Mandatory power for the land comprising modern-day Syria and Lebanon, while Britain took up the Mandate in a territory covering modern-day Jordan, Israel, the West Bank, and the Gaza Strip—denominated Palestine.<sup>28</sup>

The Palestine Mandate required Britain to administer the territory to “secure the establishment of the Jewish national home,” “develop[ ] self-governing institutions,” and “safeguard[ ] the civil and religious rights of all inhabitants of Palestine, irrespective of race and religion.”<sup>29</sup> Soon Britain decided to subdivide the Mandate, and granted by far the larger piece, the sparsely inhabited desert stretching from the Jordan River east toward Mesopotamia, to a son of the Sharif of Mecca.<sup>30</sup> The “Jewish national home” provision of the Palestine Mandate was declared

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<sup>25</sup> Letter from Lord Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), reprinted in *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 24, at 20. See generally JONATHAN SCHNEER, *THE BALFOUR DECLARATION: THE ORIGINS OF THE ARAB-ISRAELI CONFLICT* (2010).

<sup>26</sup> See, e.g., 53 CONG. REC. 8854 (1916) (reprinting Wilson’s speech).

<sup>27</sup> Covenant of the League of Nations, art. 22 (June 28, 1919), reprinted in, *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 24, at 23 (authorizing Mandate regimes for “[t]hose colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world”).

<sup>28</sup> QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 46 (1930).

<sup>29</sup> Terms of the British Mandate for Palestine, art. 2 (July 24, 1922), reprinted in *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 24, at 25, 26.

<sup>30</sup> See Marvin B. Gelber, *The Palestine Mandate: Story of a Fumble*, 1 INT’L J. 302, 304 (1946).

inapplicable to this separated territory,<sup>31</sup> which comprised three-quarters of the original Mandate. This territory would become the independent Kingdom of Trans-Jordan in 1946 (later Jordan). The remaining piece, to which Jewish emigration was still allowed, thus comprised about one-quarter of the original Palestine Mandate.<sup>32</sup>

Fleeing violence and uncertainty in Europe, and encouraged by the Mandate's requirement that "a nationality law" be framed "so as to facilitate the acquisition of Palestinian citizenship by Jews who take up permanent residence,"<sup>33</sup> waves of European Jews rolled into Palestine. Arab inhabitants reacted angrily. During a terrible week of riots in 1929, Arabs killed 133 Jews and wounded hundreds.<sup>34</sup> In the early 1930s, both sides armed themselves into small paramilitaries. The British overlords were losing control of the situation.

In 1937, Britain's Peel Commission reported that the burgeoning conflict was "irrepressible" and recommended a partition of land and an "exchange of population."<sup>35</sup> Without the transfer of 225,000 Arabs and 1,250 Jews, said the Peel report, the prospective Jewish state would have as many Arabs as Jews. The "exchange" should occur through agreement but if Arabs objected, the report advised the British "in the last resort" to compel partition and population exchange.<sup>36</sup> The Peel Commission's population exchange recommendation was based on the view that population exchange had recently resolved other long simmering ethnic conflicts in the area.<sup>37</sup> After World War I, war had broken

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<sup>31</sup> See MUTAZ M. QAFISHEH, *THE INTERNATIONAL LAW FOUNDATIONS OF PALESTINIAN NATIONALITY* 46-47 (2008) (describing the Council of the League of Nations' approval of Britain's request to exclude Trans-Jordan from the scope of Palestine's territory and hence from the "Jewish national home" provision of the Palestinian Mandate).

<sup>32</sup> See EFRAIM KARSH & P.R. KUMARASWAMY, *ISRAEL, THE HASHEMITES, AND THE PALESTINIANS* 55 (2003).

<sup>33</sup> Terms of the British Mandate for Palestine, art. 7 (July 24, 1922), reprinted in *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 24, at 25, 26.

<sup>34</sup> See MORRIS, *supra* note 10, at 116.

<sup>35</sup> *Id.* at 138-39 (quoting Peel Commission report).

<sup>36</sup> *Id.* at 139.

<sup>37</sup> Some Zionists had long thought that a population transfer was the only way to establish a viable Jewish state in Palestine. See *id.* at 139-42. Morris concludes that "[i]t is reasonable to assume that the Zionist leaders played a role in persuading the Peel Commission to adopt the transfer solution." *Id.* at 142.

out between Turkey and Greece. Turkey killed or expelled hundreds of thousands of Christian Greeks within its borders and within former Ottoman lands granted to Greece under the Treaty of Sevres of 1920.<sup>38</sup> With mediation by the representatives of the victorious Allied powers, Turkey and Greece signed the 1923 Treaty of Lausanne, which mandated a *compulsory* population exchange to “unmix the populations” to “secure the true pacification of the Near East.”<sup>39</sup> Either individually or pursuant to treaty mechanisms, approximately 1.3 million ethnic Greeks transferred from Turkey to Greece and nearly 400,000 ethnic Turk Muslims in Greece were sent in the opposite direction.<sup>40</sup> The Peel Commission hoped that the parties to the Palestine dispute “might show the same high statesmanship as that of the Turks and the Greeks and make the same bold decision”—compulsory population exchange—“for the sake of peace.”<sup>41</sup> The British government endorsed the Peel plan, and the League of Nations—the supervisor of Britain’s mandate over Palestine—concurred that partition and population transfer should be studied.<sup>42</sup>

Zionist leaders agreed that population transfer might be necessary, but no part of the Peel plan was acceptable to the Palestinians and Arab states, which “stridently opposed the Jews’

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<sup>38</sup> See Christa Meindersma, *Population Exchanges: International Law and State Practice*, 9 INT’L J. REFUGEE L. 335, 338 (1997).

<sup>39</sup> The quotation is from the League of Nations’ representative to the treaty talks. *Id.* at 339–40. According to the treaty: “[T]here shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion [residing in] Turkish territory, and of Greek nationals of the Moslem religion [residing in] Greek territory.” Convention Concerning the Exchange of Greek and Turkish Populations, art. 1, Jan. 30, 1923, 32 L.N.T.S. 75, reprinted in 18 SUPP. AM. J. INT’L L. 84 (1924) [hereinafter *Treaty of Lausanne*].

<sup>40</sup> Meindersma, *supra* note 38, at 346. See generally STEPHEN P. LADAS, *THE EXCHANGE OF MINORITIES: BULGARIA, GREECE AND TURKEY* (1932). During approximately the same time, Britain had partitioned Ireland in an attempt to settle the ethnic-religious conflict there. The largely Catholic South was granted independence in 1921, while Northern Ireland was separated and kept part of Britain. With the population of Northern Ireland comprising about two-thirds Protestant and one-third Catholic residents and characterized by “irregular and commingled settlement patterns,” this partition did not in fact “separate the antagonistic communities” and hence did not stop the conflict. See Chaim D. Kaufmann, *When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century*, 23 INT’L SECURITY 120, 126–28 (1998) (arguing that mixed demography was central to the relationship between the partition of Ireland and violence in the early 1920s).

<sup>41</sup> JOSEPH B. SCHECHTMAN, *POPULATION TRANSFERS IN ASIA* 87 (1949) (quoting the Peel Commission report).

<sup>42</sup> *Id.* at 88–90.

getting any part of the country they viewed as rightfully theirs, and as sacred Muslim soil."<sup>43</sup> The Arab Higher Committee (AHC), the chief organ of the Arab residents of Mandate Palestine, rejected both partition and the prospect of living under a Jewish state.<sup>44</sup> When Arab gunmen assassinated a British official in 1937, the British declared the AHC illegal and sought to arrest its members.<sup>45</sup> Arab militias responded with more than four hundred attacks on British police and Jewish settlements.<sup>46</sup> The next year, over fifteen hundred Arab attacks left 77 Britons and 255 Jews dead.<sup>47</sup> This Arab violence made the British government and the League of Nations suddenly wary of partition and population transfer.<sup>48</sup>

In 1939, on the eve of war in Europe, about 1,070,000 Arabs and 460,000 Jews lived in Palestine.<sup>49</sup> By now, the looming peril of Germany, Italy, and Japan had become paramount for the British Empire. The Middle East was strategically important because it contained huge oil reserves and many British military bases. To protect these assets, Arab and Muslim public opinion needed to be propitiated.<sup>50</sup> As a result of these considerations, the partition and population exchange option, put on the table by the Peel Commission, was taken off by the British government's "White Paper" in November; Jewish immigration was curtailed at this especially inauspicious time.<sup>51</sup> Churchill called the reversal of Britain's pledge to create a Jewish homeland another "Munich" and a "surrender to Arab violence."<sup>52</sup> The AHC resisted even greatly limited Jewish immigration.<sup>53</sup> In October 1941, Churchill, now prime minister, pledged that if the British won the war, the "creation of a great Jewish state in Palestine inhabited [sic] by millions of Jews will be one of the leading features of the Peace

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<sup>43</sup> See MORRIS, *supra* note 10, at 138, 143.

<sup>44</sup> *Id.* at 144.

<sup>45</sup> *Id.* at 145.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 150-51.

<sup>48</sup> SCHECHTMAN, *supra* note 41, at 90-91.

<sup>49</sup> MORRIS, *supra* note 10, at 122.

<sup>50</sup> See *id.* at 155.

<sup>51</sup> *Id.* at 155, 158. Many other countries, including the United States, also did little to help Jews seeking to immigrate to escape the Nazis. See generally DAVID S. WYMAN, *THE ABANDONMENT OF THE JEWS* (1984).

<sup>52</sup> MORRIS, *supra* note 10, at 159.

<sup>53</sup> "The English to the sea and the Jews to the graves" remained the slogan. *Id.* at 158.

Conference discussions.”<sup>54</sup> Roosevelt, for his part, managed to avoid any commitment to a Jewish state; there was “the plight of European Jewry” on one hand, but oil and *realpolitik* on the other.<sup>55</sup> In 1944, Roosevelt did declare that “full justice will be done to those who seek a Jewish national home,”<sup>56</sup> and just before the war in the West ended, Roosevelt, at Yalta, declared himself a Zionist, as did Stalin.<sup>57</sup> “The growing Zionist orientation of American public opinion” found a surer champion in the next president, Harry Truman, who advocated resettling Jewish displaced persons from Europe in Palestine, even as the Arab League warned that this could cause a religious war.<sup>58</sup>

At the Potsdam Conference of 1945, the victorious Allied powers approved a massive population transfer. “The polyethnic nature of East European states and territorial incongruity in the region, where frontiers failed to conform to the natural boundaries of ethnolinguistic communities, were considered particularly troublesome.”<sup>59</sup> Indeed, many considered them to be a leading cause of two world wars. At the conference, Poland, Czechoslovakia, and Hungary received the approval of the United States, the Soviet Union and Great Britain to expel to Germany their ethnic German populations, which had proved so unmanageable in the inter-war years and in World War II.<sup>60</sup>

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<sup>54</sup> *Id.* at 168.

<sup>55</sup> *Id.* at 171.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 171-72. Stalin, a murderous anti-Semite, added that Jews were “parasites.” *Id.* at 172.

<sup>58</sup> *Id.* at 172. The seven-nation Arab League, founded in fall 1945 in Alexandria, had assumed control of the Palestine negotiations.

<sup>59</sup> Bohdan Kordan, *Making Borders Stick: Population Transfer and Resettlement in the Trans-Curzon Territories, 1944-1949*, 31 INT’L MIGRATION REV. 704, 704 (1997).

<sup>60</sup> See, e.g., TONY JUDI, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 25-26 (2005); Joseph B. Schechtman, *Postwar Population Transfers in Europe: A Survey*, 15 REV. POLITICS 151 (1953) (specifying the number of German groups that were resettled in Europe between 1944 and 1951); Timothy William Waters, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, 47 VA. J. INT’L L. 63, 75-76 (2006) (explaining that parties to the Potsdam Protocol were aware of German expulsions and offered no fundamental objections). Article 13 of the Potsdam Protocol provided: “The three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner.” Alfred-Maurice de Zayas, *A Historical Survey of Twentieth Century Expulsions*, in REFUGEES IN THE AGE OF TOTAL WAR 15, 24 (Anna

Moreover, as the border between Poland and the Soviet Union was to be delimited, populations of different ethnic groups were relocated. Pursuant to the Potsdam agreement and unilateral decisions of victorious Allied nations or nations freed by Allied armies, approximately twenty million people belonging to ethnic minorities were transferred and resettled between 1944 and 1951.<sup>61</sup> The prevailing view of statesmen was that “the policy of compulsory transfer of population [was a] solution of the minorities problem.”<sup>62</sup>

After the war, in spring 1946, an Anglo-American Committee of Inquiry toured European displaced-person camps and the Middle East to hear testimony from all sides about the future of Palestine.<sup>63</sup> Despite this and further efforts, no compromise was reached. Arab leaders insisted on independence and majority (i.e., Arab) rule for the entire Mandatory territory.<sup>64</sup> Britain was ready to rid itself of the bother. In February 1947, the exhausted British handed the matter to the United Nations,<sup>65</sup> the new and improved international organization born out of the League of Nations, which had collapsed from America’s absence and the inability to restrain Axis aggression.

Violence was nearly out of control in Palestine, especially once Britain began to evacuate its troops and civil officials.<sup>66</sup> In early 1947, the U.N. General Assembly, in special session in New York, formed a U.N. Special Committee on Palestine to forge a settlement. The Palestinian leadership boycotted it,<sup>67</sup> while the Arab League, meeting with the U.N. mediators, rejected partition. The Arab League and Palestinian leadership claimed that the U.N. lacked legal competence to order partition<sup>68</sup> and sought a unified

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C. Bramwell ed., 1988) (offering political explanations for German population transfers).

<sup>61</sup> See *infra* Appendix Table 1 (cases 40, 41, 43–48, 50). A very large but still disputed number of transferees died en route.

<sup>62</sup> J.R., *The Exchange of Minorities and Transfers of Population in Europe Since 1919: II. Repatriation of Germans by Agreement*, 21 BULLETIN INT’L NEWS 657, 657 (Aug. 1944).

<sup>63</sup> MORRIS, *supra* note 10, at 177.

<sup>64</sup> SCHECHTMAN, *supra* note 41, at 93; Henry Cattan, *Recollections on the United Nations Resolution to Partition Palestine*, 4 PAL. Y.B. INT’L L. 260, 260–61 (1987–1988).

<sup>65</sup> MORRIS, *supra* note 10, at 180.

<sup>66</sup> *Id.* at 183.

<sup>67</sup> Cattan, *supra* note 64, at 261.

<sup>68</sup> FRED J. KHOURI, *THE ARAB-ISRAELI DILEMMA* 49 (3d ed. 1985); Cattan, *supra* note 64, at 262.

state from which illegal Jewish immigrants would be expelled and where most of the remaining Jews would have no political rights.<sup>69</sup> In November 1947, Resolution 181 came before the General Assembly.<sup>70</sup> It proposed, along the Committee's recommended lines, a second partition of Mandate Palestine. The plan was to give fifty-five percent of the territory remaining in the Mandate to the prospective Jewish state, with about 500,000 Jews and a large Arab minority of more than 400,000.<sup>71</sup> About 100,000 Jews and an approximately equal number of Arabs would live in Jerusalem, which would be placed under international control.<sup>72</sup> The proposed Arab state would have about 800,000 Arabs and 10,000 Jews.<sup>73</sup>

When the partition plan came to a vote, thirty-three nations voted "yes" in favor of partition, thirteen voted "no," and ten abstained.<sup>74</sup> The Zionists had won this round. But Arab states declared the Resolution invalid and began to prepare for war.<sup>75</sup> A Jewish state itself, and a Muslim minority living under Jewish rule, was unacceptable to the Arabs.<sup>76</sup> The Yishuv indicated that it accepted the U.N.'s two-state partition plan, but Britain refused to implement it because of the Arab rejection. Instead, Britain insisted it would simply terminate the Mandate and speedily complete its withdrawal by May 1948, leaving events on the ground to take their course. Thereafter, the U.N. Security Council deadlocked over whether to enforce the partition plan,<sup>77</sup> and an Arab attempt to refer the matter to the new International Court of Justice ("ICJ") failed.<sup>78</sup>

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<sup>69</sup> MORRIS, *supra* note 10, at 182; SCHECHTMAN, *supra* note 41, at 97.

<sup>70</sup> MORRIS, *supra* note 10, at 186; *see also* Resolution on the Future Government of Palestine, G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

<sup>71</sup> KHOURI, *supra* note 68, at 54; MORRIS, *supra* note 10, at 184.

<sup>72</sup> KHOURI, *supra* note 68, at 47; MORRIS, *supra* note 10, at 184.

<sup>73</sup> KHOURI, *supra* note 68, at 53.

<sup>74</sup> The ayes were the United States, the British Commonwealth states, Western Europe, the Soviet bloc, and most of Latin America. Abstainers included Britain, Argentina, Mexico, Chile, and China. The nays were the Arab and Muslim states, Cuba, and India. MORRIS, *supra* note 10, at 186.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See* Statement of Mr. Austin (U.S.), U.N. SCOR, 3d Sess., 271st Mtg., U.N. Doc. S/PV.271 (Mar. 19, 1948) (memorializing the events that occurred up to, and including, the negotiations regarding the partition of Palestine).

<sup>78</sup> *See* Victor Kattan, *The Nationality of Denationalized Palestinians*, 74 NORDIC J. INT'L L. 67, 70 (2005).



Though Britain ultimately rejected this solution for Palestine, its troops and administrators used territorial partition elsewhere, in a different colonial possession, to solve an ethnic-religious conflict. When World War II ended and independence seemed inevitable, India was about twenty-two percent Muslim and sixty-eight percent Hindu, with Sikhs and smaller groups accounting for the remainder. The Muslim community decided that, without British control and protection, it needed its own state to protect its interests. In the summer of 1947, Britain and Muslim and Hindu representatives agreed to partition, which would begin in just a few months.<sup>79</sup> A new Muslim state of Pakistan would be created out of majority-Muslim areas on both the western and eastern edges of India, a secular Hindu-majority state would remain in the middle, and Hindus or Muslims left in the area granted to the other group would be allowed to transfer.

As it happened, the partition of India was exceptionally bloody. Much of the violence occurred in, and around, Punjab Province, home to most of India's population of six million Sikhs.<sup>80</sup> The wealthy and powerful Sikh community did not want to live under Muslim rule, but it was denied an independent state in the negotiations leading to partition.<sup>81</sup> Muslims would not give political or security guarantees to Sikhs, and thousands of Sikhs were being killed by organized and unorganized Muslim violence.<sup>82</sup> Refugee flight and retaliatory Sikh violence began, and violent chaos soon engulfed the province and spread to surrounding areas. Overall, hundreds of thousands died and perhaps twelve million people were exchanged between India and West Pakistan.<sup>83</sup> Most refugees fled on their own accord and without assistance; however, some governmental and civil society organizations assisted their own people's flight or, less frequently, helped to expel other groups.<sup>84</sup> In the east of the country, where

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<sup>79</sup> Kaufmann, *supra* note 40, at 134-36.

<sup>80</sup> *Id.* at 135.

<sup>81</sup> *Id.* at 136-38.

<sup>82</sup> *Id.* at 138.

<sup>83</sup> *Id.* at 138-40; ANDREW BELL-FIALKOFF, *ETHNIC CLEANSING* 41 (1996).

<sup>84</sup> See SCHECHTMAN, *supra* note 41, at 9-28, 41-42 (describing the Hindu-Muslim exchange of population); Gyanendra Pandey, "Nobody's People": The Dalits of Punjab in the Forced Removal of 1947, in *REMOVING PEOPLES: FORCED REMOVAL IN THE MODERN WORLD* 297, 307 (Richard Bessel & Claudia B. Haake eds., 2009) (explaining the circumstances that lead to the expulsion of thousands of Muslims in Bihar).

the partition lines had fairly neatly separated the Muslim and non-Muslim populations of Bengal—part of which became East Pakistan and later, after an intra-Muslim civil war, the independent state of Bangladesh—there was relatively less violence.<sup>85</sup> After the mass refugee flights of 1947, some changed their minds and attempted to return home.<sup>86</sup> Both the Pakistani and Indian governments immediately regulated this—allowing only the holders of special permits to return,<sup>87</sup> and then setting a strict time limit.<sup>88</sup>

Back in Palestine, blood was flowing. From 1947 to 1949, the Jews in Palestine fought Palestinian Arabs and armed forces from a number of Arab nations for control of Palestine. A guerrilla or civil war began in November 1947, immediately after the U.N. vote for partition and the Arabs' rejection. True to its word, in May 1948, Britain formally ended its control of Palestine and soon completed the withdrawal of its military and civil personnel. At the same time, the Yishuv proclaimed itself the independent State of Israel, and a more conventional war began between Israel and armed forces from Syria, Trans-Jordan, Egypt, Lebanon, and Iraq.<sup>89</sup> Atrocities were committed on both sides during the war.<sup>90</sup> In all, about six thousand Jews and ten thousand Arabs—both combatants and civilians—were killed or died.<sup>91</sup> Though smaller in numbers, the Jewish forces proved stronger. They razed some Arab villages and expelled a still-disputed number of Palestinian civilians.

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<sup>85</sup> Kaufmann, *supra* note 40, at 138–41.

<sup>86</sup> Schechtman estimates that 52,000 Muslims returned to India from Pakistan in spring 1948. See SCHECHTMAN, *supra* note 41, at 41.

<sup>87</sup> *Id.*

<sup>88</sup> See *infra* Appendix Table 1 (case 54 & n.69).

<sup>89</sup> See MORRIS, *supra* note 10, at 215–18. In addition, small numbers of troops from Yemen, Saudi Arabia, Libya, Morocco, Tunisia, and Sudan came to fight the Jews. See DAVID TAL, *WAR IN PALESTINE 1948*, 288 (2004); EDGAR O'BALLANCE, *THE ARAB-ISRAELI WAR 1948*, 77–78 (1957).

<sup>90</sup> Two are infamous. At Deir Yassin, investigations indicate that 100 to 110 Arab villagers, including women, children and other noncombatants, were massacred by Jewish irregular forces. Then, days later, at Mount Scopus, Arab guerillas burned alive in their vehicles a large group of Jewish civilians, including nurses and doctors heading to Hadassah Hospital. Seventy or more were killed in the attack. See MORRIS, *supra* note 10, at 207–09.

<sup>91</sup> Kaufmann, *supra* note 40, at 144.

Israel's declaration of independence had avoided specifying the borders of the state;<sup>92</sup> Israel did not want to publicly reject the U.N. partition boundaries, for fear of upsetting the U.N., the United States, and other key players, but it also desired "to leave open the possibility of expansion beyond the United Nations borders."<sup>93</sup> The war's end found Israel in control of most of the territory allotted to it under the U.N. partition plan as well as some territory that the U.N. had allocated to the Palestinian Arabs or to international control (Jerusalem and some suburbs).

Previously separated into three population clumps—Jerusalem, eastern Galilee, and the coastal area from Haifa to Tel Aviv—with Arab areas in between, the Jewish community of Palestine was consolidated by war into a contiguous whole.<sup>94</sup> Some 600,000 to 760,000 Palestinian Arabs were either expelled or fled of their own accord from territory controlled by Israel.<sup>95</sup> As noted at the outset, the legal analysis in this Article assumes the truth of the Palestinian claim that the refugee flight was wholly the fault of Israeli misdeeds. Somewhat more than 100,000 Palestinian Arabs remained in Israel.<sup>96</sup> Many refugees settled in the West Bank and the Gaza Strip, controlled by Arab armies.<sup>97</sup> The bulk of the rest went to Trans-Jordan, Syria and Lebanon, while much smaller

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<sup>92</sup> See Declaration of the Establishment of the State of Israel, May 14, 1948, reprinted in *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 24, at 61–62 (declaring that "a Jewish state" was established "in Eretz-Israel"—meaning in part of the entirety of the God-given Land of Israel—"on the strength of the resolution of the United Nations General Assembly," but not specifying the new state's boundaries).

<sup>93</sup> AVI SHLAIM, *THE POLITICS OF PARTITION* 169 (1990). In fact, the Israeli diplomat in Washington informed the United States that "the state of Israel has been proclaimed as an independent republic within the frontiers approved by the General Assembly of the United Nations in its Resolution of November 29, 1947." Letter from Eliahu Epstein, Agent of the Provisional Gov't of Isr., to Harry Truman, President of the U.S. (May 15, 1948), reprinted in *S. COMM. ON FOREIGN RELATIONS, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941–1949*, S. Doc. No. 123, 81st Cong., 1st Sess., at 843 (1950). Epstein made an identical statement in a contemporaneous letter to the President of the U.N. Security Council. See TAL, *supra* note 89, at 163–64 (quoting letter).

<sup>94</sup> Kaufmann, *supra* note 40, at 144–46.

<sup>95</sup> See, e.g., MICHAEL DUMPER, *THE FUTURE FOR PALESTINIAN REFUGEES* 37 (2007); BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED* 602–04 (2d ed. 2004); Benvenisti & Zamir, *supra* note 13, at 297; Sabel, *supra* note 3, at 53.

<sup>96</sup> MORRIS, *supra* note 95, at 603.

<sup>97</sup> *Id.* at 602–03. Trans-Jordan ended up annexing the West Bank, and Egypt occupied Gaza. During the 1967 war, Israel took possession of both territories. See MORRIS, *supra* note 10, at 329, 605; SHLAIM, *supra* note 93, at 368.

numbers reached Egypt, Iraq and the states of the Arabian Peninsula.<sup>98</sup> During 1949, approximately 900,000 Jews lived in Israel.<sup>99</sup> The Palestinian refugees left behind a great deal of real and personal property in Israel, which has been held by Israel or disposed of through a complicated series of domestic Israeli legal regimes, discussion of which is beyond the scope of this Article.<sup>100</sup> Given the scale of the personal and financial tragedy for the Palestinian people, and the negative impact on their national aspirations, one can understand why Palestinians mourn these events as a catastrophe (*al-Nakbah*).

In 1950, the Israeli parliament enacted the Law of Return, which provided that “[e]very Jew” had the right to emigrate to Israel and become a citizen.<sup>101</sup> Because the parliament enacted the Law of Return but has refused to recognize a Palestinian right of return, Israeli citizenship and immigration policies are denounced by many Palestinians and their supporters as racist.<sup>102</sup> In 1952, Israel enacted nationality legislation providing that only those former citizens of Mandatory Palestine who remained in Israel from its establishment in 1948 until the enactment of the law could become Israeli citizens.<sup>103</sup> Because almost all Palestinian refugees abroad did not fit those criteria, they were not Israeli citizens under

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<sup>98</sup> MORRIS, *supra* note 10, at 252. According to Dumper, in 1949, 34% of Palestinian refugees were in the West Bank, 26% in Gaza, 10% in Jordan, 14% in Lebanon, 10% in Syria, and 1% or fewer in Egypt, Libya, Iraq, Saudi Arabia, Kuwait, and other Arab countries. DUMPER, *supra* note 95, at 46 tbl.2.3.

<sup>99</sup> I am citing the average Jewish population for the year 1949. Mainly because of immigration from post-war Europe, the Jewish population increased from approximately 759,000 at the end of 1948 to approximately 1,014,000 at the end of 1949. For all of this data, see *Statistical Abstract of Israel, No. 61, subject 2, tbl.2, Population, By Religion*, ISR. CENT. BUREAU STAT., available at [http://www1.cbs.gov.il/reader/shnaton/shnatone\\_new.htm?CYear=2010&Vol=61&CSubject=2](http://www1.cbs.gov.il/reader/shnaton/shnatone_new.htm?CYear=2010&Vol=61&CSubject=2).

<sup>100</sup> Benvenisti & Zamir, *supra* note 13, at 297-98, 300-01.

<sup>101</sup> See Shlomo Guberman, *The Law of Return, 1950*, ISR. MINISTRY OF FOREIGN AFF., (Aug. 20, 2001), available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2001/8/The%20Law%20of%20Return-%201950](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/8/The%20Law%20of%20Return-%201950).

<sup>102</sup> See, e.g., HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW* 222 (1973); Ali Abunimah & Hussein Ibish, *The Palestinian Right of Return*, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC Issue Paper No. 30, at 15 (2001).

<sup>103</sup> See, e.g., Don Peretz, *The Arab Minority of Israel*, 8 MIDDLE EAST J. 139, 146 (1954) (stating residency requirements to obtain Israeli nationality); see also *Acquisition of Israeli Nationality*, ISR. MINISTRY OF FOREIGN AFF., (Aug. 20, 2001), available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2001/8/Acquisition%20of%20Israeli%20Nationality](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/8/Acquisition%20of%20Israeli%20Nationality) (explaining the implications of Israeli nationality legislation for Palestinians). Here and elsewhere when I note the views of the parties to this dispute, I do not mean to endorse them as my own.

Israel's municipal law. Trans-Jordan, which, after its 1950 annexation of the West Bank, was home to about 500,000 Palestinian refugees,<sup>104</sup> enacted nationality legislation in 1954 giving citizenship to resident Palestinians "except the Jews."<sup>105</sup> For various reasons, with political and diplomatic considerations foremost, all other Arab states besides Trans-Jordan resolved that Palestinian refugees would retain their nominal Palestinian nationality and not be naturalized in their states of refuge.<sup>106</sup>

For years, different tales about the reasons for the Palestinian refugees' flight were told by Israelis and Arabs. The Israeli position was that almost all of the Arabs left voluntarily, urged or ordered by leaders to make way for the conquering Arab armies. Immediately after the war, some Arab journalists and government officials told the same story that Israelis did. The shame of losing a war to the Jews mandated that the Palestinians' flight had been voluntary and driven by military tactics or a principled refusal to live a single day under Jewish rule.<sup>107</sup> Arab states and Palestinian leaders maintained that Israel had no legitimate, legal existence and would soon be swept away by their resurgent armies. They demanded that the U.N., Israel, and other nations of the world recognize and enforce a right of the Palestinian refugees to return to their homes and lands, and often made clear that this meant the

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<sup>104</sup> TAKKENBERG, *supra* note 3, at 20, n.62 (providing statistical data regarding distribution of refugees).

<sup>105</sup> The law stated: "Any person with previous Palestinian nationality except the Jews before the date of May 14, 1948 residing in the Kingdom during the period from December 20, 1949 and February 16, 1954 is a Jordanian citizen." HUMAN RIGHTS WATCH, *JORDAN: THE SILENT TREATMENT: FLEEING IRAQ SURVIVING IN JORDAN*, at 78 n.240 (2006).

<sup>106</sup> See Jalal Al Hussein, *The Arab States and the Refugee Issue: A Retrospective View*, in *ISRAEL AND THE PALESTINIAN REFUGEES* 435 (Eyal Benvenisti et al. eds., 2007); OROUB EL-ABED, *UNPROTECTED: PALESTINIANS IN EGYPT SINCE 1948* (2009); Benvenisti & Zamir, *supra* note 13, at 298; Abbas Shiblak, *Residency Status and Civil Rights of Palestinian Refugees in Arab Countries*, 25 *J. PALESTINE STUD.* 36, 38-39 (1996); Georgiana G. Stevens, *Arab Refugees: 1948-1952*, 6 *MIDDLE E. J.* 281, 287, 294 (1952). The collective decision that Palestinians in Arab states would not be naturalized was formalized in the 1965 Casablanca Protocol. See TAKKENBERG, *supra* note 3, at 141. In recent years, Jordan, the only Arab state to grant citizenship to significant numbers of Palestinians, has been withdrawing it. See HUMAN RIGHTS WATCH, *JORDAN: STATELESS AGAIN: PALESTINIAN-ORIGIN JORDANIANS DEPRIVED OF THEIR NATIONALITY* (2010).

<sup>107</sup> See, e.g., JON & DAVID KIMCHE, *A CLASH OF DESTINIES* 122 (1960); SCHECHTMAN, *supra* note 41, at 124-25; Radley, *supra* note 3, at 587 n.7, 589 (citing CHRISTOPHER SYKES, *CROSSROADS TO ISRAEL* 420 (1965)).

destruction of Israel.<sup>108</sup> It was only somewhat later that the unanimous Arab narrative was that Palestinian flight had resulted from a systematic and brutal expulsion by Jewish forces.<sup>109</sup>

Neither side's explanation for the refugees' flight is entirely accurate, says Professor Benny Morris, the leading historian of the Palestinian refugee problem.<sup>110</sup> Morris's revisionist history, which found no Zionist master plan to expel Arabs but asserted that numerous actions taken by Jewish forces, often with official political connivance, caused the flight of many Palestinians,<sup>111</sup> has not been universally accepted. Professor Efraim Karsh, for example, has argued that Morris misinterpreted the evidence and that Palestinian Arabs fled for many reasons of their own besides feared or actual Jewish violence.<sup>112</sup> On the other hand, there are those who claim that the Yishuv and then Israel planned and implemented an illegal "ethnic cleansing."<sup>113</sup> Nevertheless, for purposes of clarity, the following legal analysis of the Palestinians' alleged right of return will assume the truth of the Palestinian version of events—that the Palestinian refugees' flight was the direct or indirect result of Jewish violence or threats of violence.

Spurred by tensions in Palestine, in 1948 the ancient Jewish communities in many Arab states began to flee or be expelled. Overall, about half a million or more Jews eventually left Arab states, such as Iraq and Egypt, and many came to Israel.<sup>114</sup> In many cases, the Jewish refugee exodus was accompanied by Arab violence against Jews and official or unofficial property confiscation. When Palestinian refugees and Arab states began to demand post-war that refugees be allowed to return to Israel, Israel responded that a *de facto* "population exchange" had taken place between Arab countries and Israel and that this separation of the

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<sup>108</sup> See, e.g., Radley, *supra* note 3, at 602 n.64 (quoting Mohammad Sala el Din Bin Bey, Foreign Minister of Egypt in 1949, as stating, "More clearly, they envisage the liquidation of Israel.>").

<sup>109</sup> See, e.g., Stevens, *supra* note 106, at 282-83; Tomeh, *supra* note 19, at 122. Some Arabs did say contemporaneously with events that Jewish atrocities had caused the flight of the Palestinian Arabs. See SCHECHTMAN, *supra* note 41, at 123 (quoting Henry Cattani of the Arab Higher Committee in 1948 that Arabs were forced to flee through "Zionist terror and horror from their homeland . . .").

<sup>110</sup> MORRIS, *supra* note 10, at 253.

<sup>111</sup> See generally MORRIS, *supra* note 95.

<sup>112</sup> See generally EFRAIM KARSH, PALESTINE BETRAYED (2010).

<sup>113</sup> See, e.g., ILAN PAPPE, THE ETHNIC CLEANSING OF PALESTINE (2006).

<sup>114</sup> See *infra* Appendix Table 1 (cases 58 & 59).

communities would not be reversed by Palestinian refugee repatriation.

No Arab state agreed to formally end its state of war against Israel, but under U.N. supervision, bilateral armistices were reached in 1949 between Israel and Egypt, Lebanon, Trans-Jordan, and Syria. These armistices declared that they were made without prejudice to future negotiation of the status of refugees and borders.<sup>115</sup>

A U.N.-appointed mediator, the Swedish aristocrat Count Folke Bernadotte, had reported mid-war his view that Palestinian "Arab refugees" had a "right" to return to their homes inside Israel.<sup>116</sup> Neither Bernadotte nor his vision for an Arab-tilting settlement survived; the Count was assassinated by Jewish terrorists soon after his report to the U.N., and the complex resolution on Palestine drafted and approved by the U.N. General Assembly in December 1948 did not describe the return of Palestinian refugees as a "right." Resolution 194 (III) created a Conciliation Commission for Palestine empowered to "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation," and:

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<sup>115</sup> Egypt, Trans-Jordan, and Syria each stipulated in their respective armistice agreements with Israel that the territorial lines referenced were military armistice lines rather than permanent political boundaries, and that the agreement about military lines was without prejudice to later discussions of political matters. See Israeli-Syrian General Armistice Agreement, Isr.-Syria, arts. II.2, IV.2 & V.1, July 20, 1949, No. 657, 42 U.N.T.S. 327, available at [http://avalon.law.yale.edu/20th\\_century/arm04.asp](http://avalon.law.yale.edu/20th_century/arm04.asp); General Armistice Agreement Between the Hashemite Jordan Kingdom and Israel, Jordan-Isr., arts. II.2, IV.2, VI.8 & VI.9, Apr. 3, 1949, No. 656, 42 U.N.T.S. 303, available at <http://unispal.un.org/UNISPAL.NSF/0/F03D55E48F77AB698525643B00608D34>; Egyptian-Israeli General Armistice Agreement, Egypt-Isr., arts. IV.3, V.2 & V.3, Feb. 24, 1949, No. 654, 42 U.N.T.S. 251, available at [http://avalon.law.yale.edu/20th\\_century/arm01.asp](http://avalon.law.yale.edu/20th_century/arm01.asp). Lebanon agreed to call the boundary between its territory and the former Palestine Mandate an "international boundary," even while insisting that agreement itself only concerned military armistice lines and did not prejudice later discussions of political matters. See Lebanese-Israeli General Armistice Agreement, Isr.-Leb., arts. II.2, IV.2 & V.1, Mar. 23, 1949, No. 655, 42 U.N.T.S. 287, available at [http://avalon.law.yale.edu/20th\\_century/arm02.asp](http://avalon.law.yale.edu/20th_century/arm02.asp).

<sup>116</sup> See Progress Rep. of the U.N. Mediator on Palestine, 3rd Sess., at 18, U.N. Doc. A/648 (Jan. 1, 1948) ("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.").

*Resolve[d]* 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[.]<sup>117</sup>

Israel did not outright accept or reject Resolution 194 (III) but publicly indicated that it believed that resettlement in Arab countries was required for the majority of Palestinian refugees; privately, Israeli leaders had decided months earlier that no return of any substantial size would take place.<sup>118</sup> The Palestinians and Arab states rejected Resolution 194 (III) because it presupposed the legitimate existence of Israel and did not provide a total, unconditional right to return—any return of refugees was made conditional on peace and perhaps subject to Israeli approval.<sup>119</sup> For many Arabs at that time, the Palestinians would return only, as the then Egyptian foreign minister put it, “as master of their country and not as slaves,” and in the context of “the liquidation of Israel.”<sup>120</sup> For this reason, the Arab states voted against Resolution 194.<sup>121</sup>

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<sup>117</sup> G.A. Res. 194 (III), ¶ 11, U.N. Doc. A/RES/194(III) (Dec. 11, 1948).

<sup>118</sup> See generally MORRIS, *supra* note 95, at 549–51, 559–60. Under pressure from the United Kingdom, United States, and others, Israel in 1949 offered to take back up to 100,000 Palestinian refugees as part of a comprehensive peace settlement, but the Arabs rejected this offer. See *id.* at 570–78.

<sup>119</sup> But today, some advocates of the Palestinian position on refugees claim that the U.N. resolution required a right of “unconditional return” for the refugees. See, e.g., PAPPE, *supra* note 113, at 188.

<sup>120</sup> Radley, *supra* note 3, at 602 n.64 (citing *Al Misri* (Oct. 11, 1949), quoted in Talmon, *Israel and the Arabs* and in THE ISRAEL-ARAB READER 284 (Laqueur ed., 1971)).

<sup>121</sup> To obtain the vote tally, see, <http://unbisnet.un.org>, (follow “Voting Records” hyperlink; then search “U.N. Resolution Symbol” for “A/RES/194(III)” and search “Keyword” for either “Egypt,” “Iraq,” “Lebanon,” “Saudi Arabia,” “Syria,” “Yemen,” or other non-Arab states which voted against the resolution; then follow red arrow hyperlink). Trans-Jordan was not yet a U.N. member state, but almost certainly would have voted ‘no.’ The Arab states’ vote against the resolution on refugee return does not appear in the histories written by some supporters of the Palestinian side. See, e.g., PAPPE, *supra* note 113, at 188 (touting the significance of the supposedly “unconditional return” of refugees demanded by Resolution 194 by noting that it “was overwhelmingly supported by most of the member states” of the United Nations).



### 3. BACKGROUND LEGAL PRINCIPLES

A “right of return” under international law for Palestinian refugees has been asserted since Israeli independence in 1948. Different substantive areas of treaty-based or customary law potentially apply, namely refugee law, nationality and immigration law, the law of armed conflict (also known as international humanitarian law), law concerning state succession, and human rights law. Some Palestinian advocates also claim that the United Nations has created binding international law that requires return through repeated General Assembly resolutions specifically directed at the Palestinian refugee issue. Moreover, some Palestinians claim that general CIL requires return.

This Section first sets out certain background principles that must be kept in mind during discussion of the right of return. Next it addresses the temporal question: does the law as it existed in 1947-49 govern, or does international law as it has changed and developed through the present day govern?

#### 3.1. Legal Framework

There are three primary sources of international law: treaties, CIL, and “general principles of law recognized by civilized nations.”<sup>122</sup> Since World War II, numerous multilateral treaties have come into force and treaties have become the most important source of international law. “General principles” are the least important and will not be considered here.<sup>123</sup> CIL is a significant source of international law but quite controversial. For centuries it has been thought that binding international law can result from the universal or at least general practices of states over time, if performed from a sense of legal obligation (*opinio juris*) rather than

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<sup>122</sup> See, e.g., Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 1033 U.N.T.S. 993 (listing these three as the primary sources of international law).

<sup>123</sup> There is no agreement on what are considered “general principles.” See G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 133 (1983) (describing contrasting opinions about the meaning and relevance of the “general principles” in the ICJ Statute). The leading view is that “general principles” are gap-filling principles or presumptions, and are identified because they are used universally or nearly universally in domestic courts. See *id.* at 139-41; Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT’L L. 734, 736 (1957). Many commentators hold that “general principles” are applicable only in international courts and, perhaps, in international organizations. See *id.* at 734-36 (discussing the vagueness of how general principles are determined in international tribunals).

for reasons of self-interest, comity, tradition, or the like.<sup>124</sup> To constitute CIL, consistent state practice over time must be done under a “conscious[ness] of having a duty” to so act.<sup>125</sup> But accurately identifying which state practices have been consistently performed over a sufficient period of time because of a state’s sense of legal obligation has often proved difficult.<sup>126</sup> Despite these difficulties, CIL has been and continues to be recognized as a crucially important form of international law. “Soft law” is sometimes said to be a fourth kind of international law, in addition to treaties, CIL, and general principles.<sup>127</sup> Though the term soft law has various meanings, here it is used to describe statements of norms or obligations which, even though announced in non-legally

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<sup>124</sup> See generally PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 44 (Routledge 7th rev. ed. 2007) (describing how customary international law has traditionally been located: for a rule imposing a duty, state practice must be “accompanied by the conviction that it reflects a legal obligation,” rather than, for example, conduct motivated by “courtesy or tradition,” while for permissive rules, state practice must be accompanied by “a conviction felt by states that a certain form of conduct is *permitted* by international law.”); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 27 (H. Lauterpacht ed., 8th ed. 1955) (“Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary [i]nternational [l]aw.”).

<sup>125</sup> *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7); see also *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

<sup>126</sup> See generally ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 58 (1971) (“[T]he literature contains no standards or criteria for determining how much time is necessary to create a usage that can qualify as customary international law . . . .”); MARK WESTON JANIS, *INTERNATIONAL LAW* 57 (5th ed. 2008) (observing that CIL “is ordinarily found by a more or less subjective weighing of the evidence, and subjective scales tilt differently in different hands.”); Michael Akehurst, *Custom as a Source of International Law*, 47 *BRIT. Y.B. INT’L L.* 1, 1 (1975) (“[I]nternational lawyers . . . invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition . . . .”). Recent literature suggests that much state practice which has been assumed to be done from a sense of legal obligation can often be more parsimoniously explained as based on rational choices about national interest. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). When states take actions simply to suit their interests, it is theoretically difficult to explain why other states should be legally bound to follow the same rules of conduct. For a sophisticated response to Posner and Goldsmith and an attempt to provide a firmer foundation for CIL, see ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

<sup>127</sup> See *supra* note 6 and accompanying text (describing “soft law” as either: (1) standards and obligations created from formal but non-legally binding agreements or (2) ambiguous terms of legal binding documents).

binding texts, are said to have, or to have acquired over time, some kind of binding legal quality. This Article will address one specific form of soft law—formally nonbinding U.N. General Assembly resolutions.

### 3.2. *The Temporal Issue*

Non-retroactivity is a foundational principle in both domestic and international law. It is a default rule of treaty interpretation<sup>128</sup> and a core component of the customary rules regarding the responsibility of states for international wrongs: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”<sup>129</sup> Human rights bodies<sup>130</sup> and international courts apply this rule.<sup>131</sup> As the Vice President of the ICJ wrote, “acts should be judged in the light of the law contemporary with their creation.”<sup>132</sup>

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<sup>128</sup> See Vienna Convention on the Law of Treaties art. 28, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT] (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”). On the customary nature of this rule, see *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30); *Ambatielos* (Greece v. U.K.), Preliminary Objection, 1952 I.C.J. 28, 40 (July 1).

<sup>129</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 13, U.N. Doc. 10 A/56/10 (2001). “Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation,” and is thus “a guarantee against the retrospective application of international law in matters of State responsibility.” International Law Commission, *Commentary on Article 13 of Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. 10 A/56/10 (2001).

<sup>130</sup> See, e.g., *X. and Y. v. Portugal*, App. No. 8560/79, 8613/79, 16 Eur. Comm’n H.R. Dec. & Rep. 209 (1979) (refusing to apply a right gained from the European Convention on Human Rights to an action occurring before the Convention came into force).

<sup>131</sup> See *Phosphates in Morocco* (It. v. Fr.), Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74 (June 14) (dismissing a dispute where the French government engaged in conduct *prior* to an agreement prohibiting such conduct); *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17) (determining British sovereignty over the islets after analyzing claims of title dating back to the fourteenth century).

<sup>132</sup> T. O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT’L L. 285, 286 (1980); see also Anthony D’Amato, *International Law, Intertemporal Problems*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1234, 1235 (1992) (“Clearly, when changes occur in rules of international law, the changes are normally expected to apply prospectively and not retroactively.”); Inst. de Droit Int’l, *The Intertemporal*

Most legal analyses finding a Palestinian right of return do not acknowledge the temporal problem in seeking to hold Israel's conduct in 1947-49 to legal standards developed decades later.<sup>133</sup> In a few instances where right-of-return proponents have addressed the temporal problem, they have sought to evade it by a strained application of the so-called "continuing violations" doctrine,<sup>134</sup> which originated in domestic law. In domestic law, this doctrine is widely deplored for its theoretical confusion and doctrinal instability,<sup>135</sup> and it seems exceedingly unlikely that it has somehow solidified into fixed and universally binding CIL. Notwithstanding this, the doctrine on its own terms does not help the Palestinian refugees. The doctrine has traditionally been

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*Problem in Public International Law* ¶ 1 (Aug. 11, 1975) ("Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it.").

<sup>133</sup> See, e.g., Quigley, *supra* note 3, at 196-98, 201-02 (assessing the right to return under treaties subsequent to the 1947-49 conflict). The attempt to hold Israel responsible today based on contemporary international law for actions more than sixty years ago contrasts with the recognition by EU governments and EU institutions that Czechoslovakia's expulsion of its ethnic German minority after World War II must be judged in light of law contemporaneous with the expulsion. See generally Waters, *supra* note 60.

<sup>134</sup> See, e.g., KATTAN, *supra* note 3, at 212-14 (arguing that if one views the Palestinian expulsions of 1948 as part of a larger continuing offense on the part of Israel, then the governing law is the law in force at the time the dispute is settled); Gail J. Boling, *The Question of "Timing" in Evaluating Israel's Duty under International Law to Repatriate the 1948 Palestinian Refugees*, in ISRAEL AND THE PALESTINIAN REFUGEES 219, 231 (Eyal Benvenisti et al. eds., 2007) (arguing that, under the continuing violation doctrine, if an issue is not resolved before the signing of a new treaty, then the new treaty governs the continuing situation once it comes into force). A partial exception is Saideman, who acknowledges that non-retroactivity is the default rule for treaties and that CIL by definition cannot apply retroactively. See Saideman, *supra* note 3, at 846-47. But he then asserts that a treaty post-dating 1947-49 by many years (the International Covenant on Civil and Political Rights, ICCPR), binds Israel retroactively "because Israel could have asserted otherwise by filing a reservation," but did not. *Id.* at 847. This cannot be right. The relevant articles of the ICCPR give no indication that they are meant to apply retroactively, and non-retroactivity is a universally-recognized default rule of treaty interpretation. Thus no special reservation was needed for the ICCPR to apply only prospectively.

<sup>135</sup> See, e.g., *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983) (stating that, in the Title VII employment discrimination context, "the precise contours and theoretical bases" of the continuing violation doctrine "are at best unclear"); *Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 183 (Cal. 2001) ("A review of federal case law regarding the continuing violation doctrine reveals the doctrine to be, as one leading treatise has noted, 'arguably the most muddled area in all of employment discrimination law.'" (citation omitted)).

applied with regard to statutes of limitations in tort or employment discrimination cases—if a wrong was repeated or continuing, sometimes a plaintiff’s time to sue was extended.<sup>136</sup> But note that the initial act needed to be wrong at the time it was committed.<sup>137</sup> If there was no initial wrongful act, then there could be no continuation of anything sufficient to toll a plaintiff’s obligation to timely file suit.<sup>138</sup> This part of the doctrine is ignored by some proponents of the right of return, who argue that even if Israel committed no wrong in 1947–49 under the law then in force, the “situation” of the refugees being denied the ability to return has continued in time – until today.<sup>139</sup>

Thus, it is concluded, Israel’s conduct in 1947–49 and any rights of the refugees which arose from that must be evaluated under the international law in force today—which happens to be after decades of unprecedented growth and change in human rights law and other relevant areas of international law. But treaties do not apply retroactively unless their text specifies it. As discussed below, relevant treaties post-dating 1947–49 do not contain language indicating that they apply retroactively. And CIL by definition does not apply retroactively.

Right-of-return proponents’ slippery inter-temporal claims help them less than one might suppose. Since World War II, some areas of international law have extended their scope dramatically and grown very detailed; have been extensively codified in binding legal instruments; have developed important international and regional enforcement institutions; and have seen marked improvements in compliance in state practice. This development has failed to happen in other substantive areas of the law. In other areas, there is still relatively little substantive coverage, states have been wary about making binding written commitments, enforcement institutions are few and relatively powerless, and

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<sup>136</sup> See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982) (concluding that, under § 812(a) of the Fair Housing Act, a claim of a continuing violation is not barred, even if some conduct occurred outside of the limitations period, as long as “the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice”).

<sup>137</sup> *Id.*

<sup>138</sup> Continuing consequences are not sufficient to toll a statute of limitations. See generally *McGregor v. L.S.U. Bd. of Supervisors*, 3 F.3d 850 (5th Cir. 1993). This rule does not hold in the complicated area of Title VII hostile work environment. See generally *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

<sup>139</sup> *Boling*, *supra* note 134, at 231.

state practice has generally not come close to conforming to already-existing written commitments, much less the aspirations of NGOs and other proponents of broader rights and greater enforcement. The bodies of law most applicable to the issue of the return of Palestinian refugees fall into this latter category. States have been reluctant to make binding commitments about the treatment of refugees in general. In particular, the major treaty on refugees does not even address the issue of repatriation, much less create any kind of specific and binding right.<sup>140</sup> In the areas of immigration and nationality law, most states have persisted in zealously guarding what they see as a domestic, sovereign prerogative to determine who will enter their borders and be deemed citizens.<sup>141</sup> States have been similarly loath to bind themselves to rules governing state succession. The laws of war governing *international* conflicts have been extensively codified in the four Geneva Conventions of 1949, which essentially every state has agreed to, and in other important instruments. By contrast, there is a much smaller amount of written, binding law governing non-international conflicts, and such as there is did not develop until the 1970s through Additional Protocols of the Geneva Conventions. As to CIL, even if the continuing violations doctrine did somehow allow current CIL to be applied retroactively, I show below in Section 5 that even today it is far from clear that CIL would recognize a right of return for refugees in the highly unusual circumstances of the Palestinian refugees from 1947–49.

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<sup>140</sup> See *infra* Section 4.2 (analyzing the Refugee Convention of 1951 and the reason why it does not create a right of return for Palestinians).

<sup>141</sup> See *infra* Section 4.4 (exploring the Palestinian argument that international laws of state succession should supersede Israel's domestic immigration laws that deny citizenship to Palestinian refugees from 1947–49); see also Jan Penrose, *The U.N. Convention Relating to the Status of Refugees: The Case For and Against Reform*, in FORCED MIGRATION AND THE CONTEMPORARY WORLD: CHALLENGES TO THE INTERNATIONAL SYSTEM 17, 17–18 (Andrzej Bolesta ed., 2003) (“[A] world of nation states which zealously guard their right to determine who shall gain entry to their territory and enjoy state protection and the benefits of the social, cultural and economic life of that country. . . .”). The statement in the main text above is subject to limitations and qualifications. Within the European Union, for example, there has been a remarkable move to drop internal barriers to movement and to render citizenship unimportant. But the EU still vigorously protects its outer boundary and its common citizenship from outsiders.

#### 4. TREATIES AND U.N. RESOLUTIONS DO NOT PROVIDE A RIGHT OF RETURN

No positive laws—treaties or legally-obligatory U.N. resolutions—were violated by Israel’s expulsion of Palestinians during the 1947–49 conflict; nor does any positive law source provide a right of return for Palestinian refugees. Because the 1947–49 Palestinian refugees were expelled or fled during armed conflict, it makes sense to first examine the international law of armed conflict. This Section then reviews treaties embodying refugee law, human rights law and law governing nationality and state succession, as well as U.N. General Assembly and Security Council resolutions. Where relevant, CIL norms interstitial to written law are discussed. However, the discussion of whether CIL in general provides a right of return is not taken up until Section 5.

##### 4.1. *Law of Armed Conflict*

###### 4.1.1. *Geneva Conventions of 1949*

The Fourth Geneva Convention of 1949, which governs the treatment of civilians in war (hence the ‘Civilians Convention’), is cited as recognizing a right of return applicable to the case of the Palestinians.<sup>142</sup> Specifically, Article 49 of the Convention bars “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country . . . .”<sup>143</sup> But this does not apply to the 1947–49 Palestinian refugees because Israel only became a party to the treaty in June 1951,<sup>144</sup> well after the 1947–49 conflict had generated the Palestinian refugee problem. As discussed in Section 3.2 above, absent treaty language to the contrary, the substantive provisions of the treaty cannot be applied retroactively to judge prior conduct. Nothing in the Civilians Convention indicates that the relevant provisions are meant to

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<sup>142</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Civilians Convention*].

<sup>143</sup> *Id.*

<sup>144</sup> See *State Parties, Geneva Conventions of 12 August 1949*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Oct. 17, 2012) [hereinafter *State Parties Geneva*] (listing dates of signature, ratification, and reservation by states to the 1949 Geneva Conventions).

have retroactive effect. In any event, the prohibition on deportations is inapplicable to what occurred during the conflict over Palestine because the treaty provision applies only in “occupied territory.” As discussed below as part of the analysis of the applicability of earlier treaties, the Hague Conventions of 1899 and 1907 concerning rules for land warfare in inter-state wars, Israel was not a military occupier of a hostile nation’s territory during the 1947–49 conflict.

#### 4.1.2. *Hague Conventions of 1899 and 1907*

In 1899, delegates to an international conference at The Hague negotiated and signed the Convention with Respect to the Laws and Customs of War on Land, which contained an Annex of Regulations Concerning the Laws and Customs of War on Land.<sup>145</sup> A second peace conference in 1907 adopted a revised but nearly identical treaty and annex of regulations.<sup>146</sup> But because some state parties to the 1899 convention did not adopt its replacement, both conventions have remained in force. Neither Israel nor its adversaries during the 1947–49 conflict—Egypt, Yemen, Iraq, Trans-Jordan, Lebanon, Syria, Saudi Arabia—were parties to either treaty.<sup>147</sup> During the time that it governed the Palestine Mandate, the United Kingdom was a party to the 1907 Hague Convention. Because Israel was created out of part of the territory of the Mandate, it might be argued that Israel was a “successor state” and succeeded to the United Kingdom’s obligations under the Hague Convention. As discussed in more detail in Section 4.4 below, Israel has consistently denied that it was the successor to U.K.

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<sup>145</sup> Convention (II) Respecting the Law and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention].

<sup>146</sup> Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]. On the two conferences and conventions, see James L. Tryon, *The Hague Conferences*, 20 YALE L.J. 470, 471 (1911) (discussing the history behind the conventions).

<sup>147</sup> See *State Parties, Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907*, INT’L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P> (last visited Oct. 17, 2012) (listing dates of signature, ratification, and reservation by states to the 1907 Hague Convention); *State Parties, Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899*, INT’L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=150&ps=P> (last visited Oct. 17, 2012) (listing dates of signature, ratification, and reservation by states to the 1899 Hague Convention).



treaties or any other obligations of the United Kingdom or the Mandate, and there is no basis, under international law in force at the time, to question this.

But even if one believes that Israel somehow succeeded to the U.K.'s treaty obligations, there is an alternative reason why Israel was not directly bound by the 1907 Hague Convention. The Convention's "general participation clause" provides that the Convention and the annexed regulations "do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."<sup>148</sup> The war over Palestine involved many states that were not parties to the 1907 Hague Convention, such as Egypt and Saudi Arabia.<sup>149</sup> As a result, even if it had succeeded to the United Kingdom's obligations under the Convention, Israel was not directly bound by the Convention's provisions and regulations during the 1947-49 conflict.

Even though Israel was not directly bound by the Conventions' provisions and their annexed regulations, Israel might still have been bound indirectly, by virtue of the 1899 and 1907 Hague Conventions' contents having become part of CIL at some time before the 1947-49 conflict. In 1946, the International Military Tribunal in Nuremberg judging Nazi war crimes declared that the Hague rules had, by 1939 when World War II started, become CIL. The Tribunal rejected the German defendants' argument that the general participation clause and the presence of non-parties among the belligerents in World War II relieved Germany of its

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<sup>148</sup> 1907 Hague Convention, *supra* note 146, art. 2 (specifying when regulations in the Convention apply).

<sup>149</sup> Two of Israel's adversaries—Trans-Jordan and Iraq—might possibly have succeeded to the United Kingdom's obligations under the 1907 Hague Convention. Both states were created out of Mandate territory overseen by the United Kingdom—Iraq in 1932 and Trans-Jordan in 1946. Upon independence, both countries signed treaties with the U.K., which contained provisions governing which treaty obligations of the United Kingdom's would be deemed to descend upon the newly independent states. *See, e.g.*, Treaty of Alliance, U.K.-Trans-Jordan, art. 8, Mar. 22, 1946, U.K.T.S. No. 32 (providing that Trans-Jordan succeeded to (1) any treaty "obligations and responsibilities devolving on [the U.K.] in respect of Trans-Jordan," and (2) "[a]ny general international treaty, convention or agreement which has been made applicable to Trans-Jordan by [the U.K.] as mandatory"). Whether or not the United Kingdom had done anything during the mandate to make the 1907 Hague Convention "applicable to Trans-Jordan," that Convention still would not have applied during the war over Palestine because, as noted in the main text above, other parties to the conflict like Egypt had not signed the Convention.

obligations to follow Hague rules.<sup>150</sup> One might perhaps quibble about the strength of this precedent with regard to a non-party to the Hague Conventions, such as Israel.<sup>151</sup> The Israeli government apparently did not believe that the Hague provisions and regulations bound its actions during the conflict.<sup>152</sup>

But even assuming that Israel was, during the war, bound by the Hague rules as CIL, an analysis of the provisions of the Conventions shows that none was applicable to the unique factual and legal situations presented by the conflict over Palestine. The only arguably relevant provisions of the 1899 and 1907 Conventions are their essentially identical provisions on the military occupation of "the territory of [a] hostile state."<sup>153</sup> In the context of such a military occupation, both Conventions declare that "the lives of persons" and "private property" "must be respected;" that "[p]rivate property cannot be confiscated;" that "public order and safety" must be "restore[d] and ensure[d], as far as possible;" and that the occupying military force must "respect [ ], unless absolutely prevented, the laws in force" in the occupied territory.<sup>154</sup> Note that these provisions of the Hague Conventions do not expressly prohibit the expulsion of enemy civilian populations from occupied territory. And no right of return is mentioned in either Convention for expellees. A number of proponents of a Palestinian right of return explain the absence in

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<sup>150</sup> See International Military Tribunal (Nuremberg), Judgment, Oct. 1, 1946, reprinted in 41 AM. J. INT'L L. 172, 248-49 (1947) (holding The Hague rules applicable to Germany, a signatory, as of 1939).

<sup>151</sup> Holding a treaty party like Germany to obey the parts of the Hague Convention as CIL is arguably supported by the Martens Clause, a consideration which does not apply to a non-party like Israel. See *infra* notes 157-58 and accompanying text.

<sup>152</sup> The legal adviser to the Israeli Ministry for Foreign Affairs wrote in 1951, while analyzing legal issues arising during the war, that he relied on provisions of the 1907 Hague Convention "by way of exemplification only," because "[n]one of the states involved in the fighting in Palestine was signatory or had adhered to this Convention." SHABTAI ROSENNE, ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES 25 n.1 (1951). Rosenne did not expressly state that the Hague provisions were not CIL, but had Israel considered them to be binding CIL, Rosenne would not have said that they were relied upon "by way of exemplification only." I have been unable to determine whether any of the Arab states took a position on the applicability of the Hague rules as CIL.

<sup>153</sup> 1907 Hague Convention, *supra* note 146, § III (enumerating actions that are forbidden during military occupation of a hostile state).

<sup>154</sup> *Id.* arts. 42, 43, 46. Essentially identical provisions of the 1899 Hague Convention, *supra* note 145, are found in articles 42, 43 and 46 (specifying what defines occupied territory and how to deal with private property in this territory).

the Hague Conventions of treaty terms providing a right of return with the mistaken historical claim that no nation in that era even considered engaging in population transfers or forcible expulsions and that therefore transfers were not on the minds of the treaty-makers.<sup>155</sup> In fact, forced population transfers occurred in many armed conflicts in the nineteenth and early twentieth centuries,<sup>156</sup> and the learned delegates who drafted the treaties were surely aware of this.

Nevertheless, there is reason to conclude that the Hague provisions on military occupation of enemy territory should be read expansively to prohibit the expulsion of civilians and, perhaps, by implication, to require return of civilians illegally expelled. The so-called Martens Clause of the Hague Conventions is the reason for favoring a very broad construction of the treaty terms.<sup>157</sup> Though “there is no accepted interpretation of the Martens Clause,”<sup>158</sup> it should be uncontroversial to use the clause

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<sup>155</sup> See generally MALLISON & MALLISON, *supra* note 3, at 28 (“Historically, the right of return was so universally accepted and practiced that it was not deemed necessary to prescribe or codify it in a formal manner.”); Abunimah & Ibish, *supra* note 102, at 21 (quoting and agreeing with Mallison & Mallison’s statement). It would have seemed equally unnecessary, wrote one, “to the delegates convened at The Hague in 1907 to draft special articles to prohibit cannibalism or human sacrifices.” Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT’L L.J. 207, 211 (1975).

<sup>156</sup> Forced expulsion of civilian populations occurred during the American Civil War (for instance, in parts of Missouri) and in many U.S. wars against Indians. Russia’s conquest of the Caucasus was accompanied by the killing and expulsion of Chechens, Circassians and other local peoples. After achieving independence from the Ottoman Empire in 1878, Bulgaria forcibly expelled hundreds of thousands of ethnic Turks. Britain in the Second Boer War (1899–1902), Spain in putting down the Cuban revolution (1895–1898), and the United States in putting down the Filipino revolt (1899–1902) all used the technique of expelling the civilian population from areas where guerrillas drew their support and then “concentrating” the civilians in camps or towns under armed guard. The list could go on. Suffice it to say that diplomats, generals, and other officials were well aware of the military use of forced expulsion of civilians when the Hague Conventions were negotiated.

<sup>157</sup> See 1907 Hague Convention, *supra* note 146, pmb. (“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”).

<sup>158</sup> Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. RED CROSS 125, 126 (1997).

as a reason to liberally interpret the humanitarian protections in the Hague Conventions.

Assuming that the Hague Conventions are best read to prohibit the expulsion of civilians from occupied territory and implicitly require return of civilians illegally expelled, the question is, therefore, whether any of the territory from which Palestinian refugees were expelled was: (1) "territory of [a] hostile state," and specifically territory in which that hostile state had been "the legitimate power," and; (2) which territory Israel had "occupied" and over which "the authority of" Israel's "army" had "been established and [was being] exercised."<sup>159</sup> The applicability of the relevant Hague Convention rules thus turns on two inquiries about the factual and legal status of territory from which Israel (or pre-statehood Jewish forces) expelled Palestinian refugees: First, did any state besides Israel, and "hostile" to Israel, have legitimate sovereign authority over the territory at the time of the expulsions; and, second, had the Yishuv's armed forces or, after independence, Israeli forces, displaced that legitimate authority and established and exercised the authority of a military occupier, prior to the expulsion of Palestinians from that territory.<sup>160</sup>

To analyze whether these two requirements for the applicability of Hague regulations were met, it is helpful to look at two distinct periods of time during which refugees fled. Upon careful analysis, it emerges that the Hague rules regarding

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<sup>159</sup> See 1907 Hague Convention, *supra* note 146 (describing Convention guidelines for military occupation by a hostile army). The relevant provisions of the 1907 Convention are the following:

SECTION III. MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

<sup>160</sup> In a recent case, the International Court of Justice construed the CIL of occupation, as evidenced by the 1907 Hague Convention, in conformity with my description of the governing law. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶172-73 (Dec. 19) (interpreting Articles 42 and 43 of the Hague Convention as reflected in CIL).

occupied territory were not binding on the Yishuv or Israel, and were not violated by the Yishuv or Israel, during either period.

*4.1.2.1. Period 1. From the U.N. General Assembly Partition Resolution until the End of the Palestine Mandate: November 29, 1947 to May 15, 1948*

A civil war in Palestine started when the U.N. voted for partition in November 1947. During this period there was a legitimate sovereign government in Palestine—the United Kingdom—exercising authority under the Palestine Mandate and the supervision of the League of Nations. During the civil war, prior to Israeli independence, Jewish paramilitary units fought Arab paramilitary units. Approximately 350,000 Palestinian Arabs became refugees during this time period.<sup>161</sup> The Hague regulations (as CIL) did not apply during this period, for several reasons. First, the Hague Conventions were not applicable to civil wars or to non-state actors like the Yishuv.<sup>162</sup> At the time, there was substantial disagreement about which rules of international law, if any, regulated internal conflicts in which one or more parties were not recognized as formal “belligerents” under the laws of war.<sup>163</sup> There was nothing approaching a consensus which could have bound the Yishuv at the time. As it turned out, not until 1977, through Additional Protocol II to the 1949 Geneva Conventions, was there a clear prohibition on expulsion of civilians in non-international armed conflicts.<sup>164</sup>

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<sup>161</sup> Morris estimates that 100,000 Palestinian Arabs fled their homes in the period from the U.N. partition resolution through the end of March 1948. See MORRIS, *supra* note 10, at 67. Another 250,000 to 300,000 fled in April and May 1948. See *id.* at 262. Because I am seeking an estimate for a period two weeks shorter than Morris’ (until May 15, instead of the end of May), I used the lower number, 250,000.

<sup>162</sup> See de Zayas, *supra* note 155, at 220.

<sup>163</sup> See LAURA PERNA, *THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS* 50 (2006) (noting that before World War II, “states were not yet ready to accept binding legal obligations restraining their action *during the conduct of hostilities* in internal armed conflicts. . . . Even later, after the Second World War, when there was a growing international concern for the protection of human rights . . . states clearly showed their reluctance to accept international legal obligations during the conduct of hostilities in internal armed conflicts”); *id.* at 52 (stating that during the draft of what became Common Article 3 of the Geneva Conventions of 1949, there was great disagreement between states about whether international rules should govern internal armed conflicts).

<sup>164</sup> Article 17 provides that “1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the

Second, the United Kingdom, the Mandatory power that had *de jure* sovereign control of the territory from which the refugees were expelled, was not a “hostile” state whose territory could be deemed occupied by the Yishuv forces, as would be required for the Hague rules on belligerent occupation to be applicable. Although Britain’s role in trying to maintain a chaotic and rapidly deteriorating status quo sometimes brought it into conflict with the contending parties, it is fair to say that the armed forces of the Yishuv were fighting Palestinian Arab guerillas and some infiltrated armed forces of the Arab Liberation Army, not the United Kingdom.<sup>165</sup>

Finally, the Palestinian Arabs who fled appear to have done so in advance of or during pitched battles for control of territory;<sup>166</sup> they had already fled by the time armed forces of the Yishuv consolidated control and could possibly have been said to constitute an occupying army. Recall that Hague regulations apply only once “[t]he authority of the legitimate power having in fact passed into the hands of the occupant,” the occupying army’s “authority has been established and can be exercised.”<sup>167</sup> As a British commentator on the Hague rules put it, the law “distinguishes between the invasion and the occupation. . . . Invasion ripens into occupation when the national troops have

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civilians involved or imperative military reasons so demand. . . . 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 17, June 8, 1977, 1125 U.N.T.S. 609. Israel is not a party to this Protocol. See *State Parties, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited Nov. 25, 2012) (listing dates of signature, ratification, and reservation by states to Protocol II). Common Article 3 of the 1949 Geneva Conventions, to which Israel is a party, is applicable to “conflict[s] not of an international character.” See *Civilians Convention*, *supra* note 142, art. 3. Even if this treaty is somehow retroactively applicable to the 1947–49 conflict—which it is not—there is no reason to think that it required a right of return for the refugees of 1947–49. Even as late as 1975 a proponent of the right of return had to concede that “[i]nternational law is silent on the question whether mass deportations in the course of a civil war constitute a violation of article 3 common to the Geneva Conventions of 1949.” See *de Zayas*, *supra* note 155, at 221.

<sup>165</sup> See MORRIS, *supra* note 10, at 191–204 (describing the first stage of the war between Palestinian Arabs and the Yishuv, from November 1947 to May 1948).

<sup>166</sup> See, e.g., *id.* at 181–262.

<sup>167</sup> 1907 Hague Convention, *supra* note 146, arts. 42 and 43.

been completely ousted from the invaded territory and the enemy has acquired control over it.”<sup>168</sup> The period of mere invasion, as distinguished from occupation, is “the period of resistance, of combats,” in which “neither belligerent was complete master of the theatre of war.”<sup>169</sup> Any refugees who were expelled during the period of combat, or before combat began, are not protected by the Hague rules on belligerent occupation. The great majority of Palestinian refugees appear to have fled prior to or during combat operations, not after the establishment of control by the Yishuv’s armed units. Even though the facts are relatively clear about this, I recognize that some might disagree and then point out that the “summary judgment” posture of this Article requires taking the pro-Palestinian view of all relevant disputed facts. And even if readers accept that the great majority of Palestinian refugees left before or during the military conflict, that still leaves some small numbers who may have been expelled or fled after the Yishuv’s forces established control. These two objections are ultimately not necessary to resolve, however, because the prior points—that the Hague rules did not apply to civil wars, and that the armed forces of the Yishuv could not be described as a hostile occupying army vis-à-vis the United Kingdom—are dispositive.

4.1.2.2. *Period 2. From the End of the Palestine Mandate until the Armistice Agreements: May 15, 1948 until Mid-1949*

The day after Israel declared independence, May 15, 1948, armies from Egypt, Lebanon, Trans-Jordan, Syria, and Iraq, assisted by small units and individuals from other Arab states,

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<sup>168</sup> J.M. SPAIGHT, *WAR RIGHTS ON LAND* 321 (1911); *see also* WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 72 (3d ed. 1914) (interpreting the Hague Conventions as holding that military occupation begins “only from the time when, the original governmental authorities having been expelled, the commander of the occupying army is able to cause his authority to be respected.”); PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 297-98 (1908) (“Occupation exists only where the authority of the invading belligerent can be effectively exercised. . . . The accepted criterion of the commencement of occupation exists in the cessation of local resistance.”).

<sup>169</sup> SPAIGHT, *supra* note 168, at 321; *see also* GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 28 (1957) (noting that territory is not considered occupied under the Hague Conventions when “the invading forces have not yet solidified their control to the point that a thoroughly ordered administration can be said to have been established”); JUDGE ADVOCATE GEN. U.S. ARMY, *FIELD MANUAL 27-10: RULES OF LAND WARFARE* 74 (1940) (to the same effect).

entered the territory that had been Mandatory Palestine. The Arab states declared that they were acting to prevent partition, i.e., the creation of a Jewish state; to protect Arab civilians from massacre; restore law and order; and to prevent refugees and disorders from crossing into neighboring Arab countries and destabilizing them.<sup>170</sup> The armed forces of Israel resisted the invasions and pressed offensive operations to expand the territory of the state and neutralize internal Arab resistance. During this phase of the war, approximately 300,000 to 400,000 additional Palestinian Arab refugees fled or were expelled. As noted above, the legal analysis in the Article will be based on that version of the facts most favorable to the Palestinians—that the refugees fled directly or indirectly as a result of Israeli military actions.

The Hague regulations (as CIL) did not apply during this period, for several reasons. First, notwithstanding the end of the Palestine Mandate, withdrawal of U.K. civil and military personnel, and declaration of independence by Israel, the conflict might still have been best characterized as an internal or civil war, rendering the Hague rules inapplicable, for the reasons discussed above.<sup>171</sup> This legal view of the conflict—that it remained a civil war even after May 15, 1948—is premised on the claim that Israel did not then exist as an independent state. As Michael Akehurst explains:

Arab states have always regarded the formation of the state of Israel as a nullity from the point of view of international law because it infringed the legal rights of the population of Palestine (or, rather, of the Arabs who formed the majority of the population of Palestine). In Arab eyes, the struggle of 1947-1949 was more in the nature of a civil war than of an international war . . . ; a minority of the population [the Jews], with foreign assistance, was trying to secede from or dominate or expel the majority.<sup>172</sup>

By summer 1949, there can really be no question that Israel existed as an independent nation. In May 1949, Israel was

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<sup>170</sup> See Arab League Declaration on the Invasion of Palestine (May 15, 1948), reprinted in 1 ISRAEL'S FOREIGN RELATIONS, SELECTED DOCUMENTS, 1947-1974, 135-38 (Meron Medzini ed., 1976).

<sup>171</sup> See *supra* notes 162-63 and accompanying text (explaining the inapplicability of the Hague regulations to a civil war).

<sup>172</sup> Michael Akehurst, *The Arab-Israeli Conflict and International Law*, 5 N. Z. UNIV. L. REV. 231, 236 (1973).



admitted to the U.N.<sup>173</sup> During the spring and summer of 1949, Israel signed armistice agreements with its principal military adversaries, Egypt, Lebanon, Trans-Jordan and Syria. By that time, Israel had been diplomatically recognized by many countries, including the two superpowers, the United States and the Soviet Union, and by the United Kingdom, the former Mandatory power and the principal diplomatic supporter of the Arab states during the conflict. Though Egypt, Trans-Jordan, and Syria refused to confirm the political legitimacy and permanence of Israel's borders with them, the *de facto* borders were stable and conformed to the agreed upon armistice lines; moreover, no other possible borders had any international legitimacy. Therefore, by summer 1949 at the latest, Israel met the four-part test for international statehood, as specified by the Montevideo Convention: a permanent population; a defined territory; an effective government; and the capacity to enter into relations with the other states.<sup>174</sup> However, prior to summer 1949—and it was during this prior period that essentially all of the refugees were expelled or fled—the question of Israel's *de jure* statehood is closer and more difficult to resolve, particularly because of the lack of clarity about whether Israel had a “defined territory.”<sup>175</sup> If the Arab states were right that, while the military conflict raged in 1948-49, Israel had not yet achieved full-fledged independent statehood, then Israel was not bound by the Hague rules as CIL because it was still a non-state actor fighting in a conflict, which was primarily a civil or internal one, even though outside states—Syria, Egypt, and the other Arab nations—had invaded and were giving military assistance to the Palestinian population.

When Israel became a *de jure* independent state is a difficult question that need not be definitively answered because the Hague regulations (as CIL) did not apply during this period for a second, alternative reason. In order for relevant Hague regulations to apply during this time period, it must be found that Israeli forces were military occupiers that expelled refugees from territory over which another “hostile” state had previously exercised “legitimate” authority. This cannot be done. Although the precise legal status

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<sup>173</sup> See G.A. Res. 273 (III), U.N. Doc. A/RES/273 (III) (May 11, 1949) (documenting Israel's official membership to the United Nations).

<sup>174</sup> See Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (enumerating the four qualifications for an international state).

<sup>175</sup> See *supra* note 115 and accompanying text.

of the territory of former Mandate Palestine was complicated and to some extent ambiguous during this time period, there is no plausible claim that any state besides Israel had actual and "legitimate" authority over territory of the former Mandate which was then displaced by an Israeli occupation.

As noted above, Israel's declaration of independence had avoided specifying the borders of the state, but Israel indicated to the United States that its borders were those of the U.N. partition resolution.<sup>176</sup> Nevertheless, Israel's position was that the partition resolution was a dead letter because the British and the Arab states had rejected it, and the Security Council had declined to enforce it. Israel announced that the partition plan borders were "an irreducible minimum" and that it intended to take and incorporate into the state more territory during the war.<sup>177</sup> The United Nations' mediator for the conflict, as well as key players such as the Arab states, the United States and the United Kingdom, concurred that the partition resolution's demarcation of borders had no legal effect; final borders would be determined by war and diplomacy.<sup>178</sup>

During the relevant time period, no other state besides Israel existed in Palestine. Trans-Jordan had territorial designs on part of the area, but did not effectuate those until 1950, when it annexed the territory now known as the West Bank.<sup>179</sup> This action was not recognized by other Arab states. To counter Trans-Jordan's designs, Egypt supported the creation of an Arab government for Palestine. At the end of September 1948, the Arab League, acting at Egypt's behest, announced the creation of the All-Palestine Government, to be based in Gaza, and with a writ purporting to extend over all of the territory of former Mandatory Palestine, including the part held by Israel.<sup>180</sup> During its brief and essentially

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<sup>176</sup> See *supra* notes 92–93 and accompanying text.

<sup>177</sup> See Representative of the Provisional Government of Israel [to the U.N.], Letter dated July 7 1948 from the Representative of the Provisional Government of Israel [to the United Nations] addressed to the Secretary-General Containing Israel's Reply to the United Nations Mediator's Suggestions (Document S/863), U.N. Doc. S/870 (July 8, 1948).

<sup>178</sup> See, e.g., SHLAIM, *supra* note 93, at 161, 198, 215–17 (detailing the difficulties of recognizing the demarcation of borders and the difficulty in implementing the scheme peacefully).

<sup>179</sup> See MORRIS, *supra* note 10, at 605 (describing Trans-Jordan's annexation of the West Bank in 1950).

<sup>180</sup> See SHLAIM, *supra* note 93, at 219 (discussing the formation of the All-Palestine government and the new administration).

notional existence, the All-Palestine Government had “no civil service, no money, and no army of its own.”<sup>181</sup> Trans-Jordan rejected the validity of this government, and attempted to organize a council of Palestinians in Amman as a competing power center.<sup>182</sup> No nation besides members of the Arab League recognized the All-Palestine Government.<sup>183</sup> Soon after it was proclaimed, the government had to leave Gaza because of Israeli military pressure.<sup>184</sup> The All-Palestine Government never met the four Montevideo criteria for independent statehood—permanent population, defined territory, effective government and the capacity to enter into relations with the other states.<sup>185</sup> Therefore, the Hague rules as CIL did not apply because Israel was not occupying the territory owned by another legitimate sovereign nation. In any event, by the time the All-Palestine Government was proclaimed, in late September 1948, the vast majority of Palestinian refugees had already left their homes.<sup>186</sup>

In sum, neither the 1949 Geneva Conventions nor the earlier Hague Conventions rendered the expulsion of Palestinian refugees illegal at the time it occurred or required that they be returned.

#### 4.1.3. *War Crimes and Crimes Against Humanity*

Some proponents of the Palestinian right of return claim that the charter of the post-World War II Nuremberg war crimes tribunal and the tribunal’s judgments, by treating forced expulsion of civilian populations as a “war crime” or “crime against humanity,” implicitly recognized a customary international right to remain in or return to one’s home country, applicable to the Palestinian

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<sup>181</sup> *Id.* (characterizing the All-Palestine government as a “farce” in claiming jurisdiction over Palestine, but having no civil or armed services).

<sup>182</sup> *See id.* at 219–20 (detailing Trans-Jordan’s resistance and denunciation of the All-Palestine government).

<sup>183</sup> The All-Palestine government was given diplomatic recognition by Egypt, Syria, Lebanon, Iraq, Saudi Arabia, Yemen and Afghanistan. *See* JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 109 (2010).

<sup>184</sup> SHLAIM, *supra* note 93, at 244.

<sup>185</sup> *See* Montevideo Convention, *supra* note 174 and accompanying text.

<sup>186</sup> An unknown number of Palestinian Arabs, including many Bedouins, probably numbering 20,000 to 40,000, fled or were expelled after October 1948 in border-consolidating military operations by Israel. *See* MORRIS, *supra* note 95, at 536. Subtracting these numbers from the total of 600,000 to 760,000 refugees (*see supra* text accompanying note 95), means that approximately 580,000 to 720,000 total refugees fled or were expelled by October 1948.

refugees of 1947–49.<sup>187</sup> The Nuremberg charter's grant to the tribunal of jurisdiction over war crimes, however, was limited to "violations of the laws or customs of war,"<sup>188</sup> which in 1947–49, as previously shown, did not contain rules governing expulsion of civilians in civil wars like the conflict in Palestine. Moreover, the charter's jurisdictional grant covers only expulsion of civilians from "occupied" territories,<sup>189</sup> and, as discussed above, in the relevant territory Israel was not a belligerent occupier of another sovereign's territory.

The charter's jurisdictional grant over "crimes against humanity" was broader, however, including "murder, extermination, enslavement, *deportation*, and other inhumane acts committed against any civilian population, before or during the war,"<sup>190</sup> and thus might potentially have been applicable to Israeli actions. At the time of Nuremberg, there were significant concerns that the concept of "crimes against humanity" had been created as an international wrong only after the fact and applied retroactively to Nazi defendants, violating the maxim *nullum crimen sine lege*.<sup>191</sup> One prominent justification for enforcing a seemingly newly-invented and somewhat amorphous international criminal law was that the Nazis' crimes had been so massive and immoral that justice was served by punishing them even under impermissibly retroactive or otherwise defective legal rules.<sup>192</sup> Another

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<sup>187</sup> See, e.g., BADIL RESOURCE CENTER FOR PALESTINIAN RESIDENCY AND REFUGEE RIGHTS, SURVEY OF PALESTINIAN REFUGEES AND INTERNALLY DISPLACED PERSONS 2008–2009, at 96 (2010).

<sup>188</sup> Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288 [hereinafter London Charter].

<sup>189</sup> Cf. de Zayas, *supra* note 3, at 25 ("[T]he Nuremberg judgment held that population transfers and colonisation in occupied territory constituted both a war crime and a crime against humanity.").

<sup>190</sup> London Charter, *supra* note 188, art. 6 (emphasis added).

<sup>191</sup> See, e.g., Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085, 1089, 1092 (2010). See also William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L. & PUB. POL'Y 36, 50 (2010) ("[F]or crimes against humanity . . . the Tribunal produced no real authority, nor did it even seriously try to demonstrate that such acts had been punishable under international law in the past.").

<sup>192</sup> See, e.g., Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153, 165 (1947) ("[I]ndividual criminal responsibility [was] certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, [so]

justification was that the crimes actually alleged in the Nuremberg indictments were penal under domestic law in most civilized countries, and hence there was no surprise or prejudice from applying them to the Nazis.<sup>193</sup> Recognizing the legal problems associated with “crimes against humanity,” the Nuremberg tribunal decided that such crimes would be punished only when they occurred in connection with recognized war crimes or crimes against the peace.<sup>194</sup> In sum, it was recognized that the legality and justice of Nuremberg’s punishment of “crimes against humanity” was intimately bound up with the exceptional scale and barbarity of the Holocaust and other Nazi atrocities, and their connection to Nazi war crimes.<sup>195</sup> The link of “crimes against humanity” to specific and astoundingly widespread Nazi atrocities is seen in the fact that the post-World War II Tokyo tribunal for Japanese crimes essentially ignored “crimes against humanity,” though its charter allowed those to be punished, and focused instead on non-retroactive international wrongs like war crimes based on preexisting law-of-war treaties.<sup>196</sup> As discussed elsewhere in this Article, in the post-World War II period, Western statesmen and international lawyers thought that the compulsory transfer of ethnic minorities for the purpose of preserving international peace was legal and morally justified.<sup>197</sup> Given all of this, it seems

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the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.”).

<sup>193</sup> See, e.g., Leslie Mansfield, *Crimes Against Humanity: Reflections on the Fiftieth Anniversary of Nuremberg and a Forgotten Legacy*, 64 NORDIC J. INT’L L. 293, 295 (1995) (quoting Justice Jackson’s argument for the recognition of crimes against humanity); Max Radin, *Justice at Nuremberg*, 24 FOREIGN AFF. 369, 375 (1946) (“Every one of the acts described in the indictment as crimes against humanity would be punishable by the penal codes of every one of the United States, the penal codes of France and of the Soviet Union, and of the eight other nations which with France took part in the London Conference, the penal codes of the British Dominions and of India which were guests at that Conference.”).

<sup>194</sup> See Mansfield, *supra* at 193, at 307; Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 205 (1946).

<sup>195</sup> See, e.g., Mansfield, *supra* note 193, at 309 (stating that “a central feature of ‘Crimes Against Humanity’ . . . [is] . . . the scope or magnitude of the crime. ‘War Crimes’ were already defined at the time of the Charter; however, the systematic, large-scale effort to exterminate millions of people, which characterized the Nazi war effort and set it apart from previous war crimes, demanded a separate category of war crimes.”).

<sup>196</sup> Sellars, *supra* note 191, at 1092. A “decisive factor[] must have been the Allies’ tacit recognition that nothing committed by Japan could compare to German crimes . . .” *Id.*

<sup>197</sup> See *supra* notes 59–62 and *infra* Section 5.1.

extremely unlikely that statesmen or international lawyers in 1947–49 would have thought that expulsion of civilians in the *sui generis* context of partition of Palestine and the Israeli-Palestinian conflict, accompanied as it was by very small-scale and isolated atrocities by Jewish or Israeli military forces, would have constituted “crimes against humanity.”<sup>198</sup>

#### 4.2. Refugee Law

For two basic reasons, the Refugee Convention of 1951<sup>199</sup> does not create or recognize a right of the 1947–49 Palestinian refugees to return to live in Israel. First, the Convention was drafted, at the behest of Arab states and Palestinian representatives, to exempt most Palestinians from its coverage.<sup>200</sup> Second, even if Palestinian refugees from the 1947–49 conflict were not excluded from the

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<sup>198</sup> Recall that only about ten thousand Arabs total (combatants and civilians) were killed or died during the conflict, and no one contends that more than a fraction of those deaths can be attributed to intentional Jewish or Israeli attacks on civilians. Compare the scale to Nazi atrocities: depending on the definitions used, as many as seventeen million civilians and prisoners were killed by the Nazi regime, including five to six million Jews. DONALD NIEWYK & FRANCIS NICOSIA, *THE COLUMBIA GUIDE TO THE HOLOCAUST* 45 (2000). Of course any deaths are tragic; nothing said here is intended to deny or minimize that. My point is about the factual predicate for invoking new legal rules concerning war crimes in 1947–49.

<sup>199</sup> Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

<sup>200</sup> Article 1(D) excludes from the protections of the treaty “persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.” *Refugee Convention*, *supra* note 199. In 1949, the U.N., acting at the behest of Arab states and Palestinian representatives, created an entirely separate agency to serve only Palestinian refugees, called the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (“UNRWA”). See *Assistance to Palestinian Refugees*, G.A. Res. 302 (IV), ¶ 7, U.N. GAOR, 4th Sess., Supp. No. 12, U.N. Doc. A/1251, at 23 (1949) (establishing the UNRWA). It has operated since that time, and currently works in Jordan, Syria, Lebanon, the West Bank and Gaza. These actions have effectively removed from the jurisdiction of the 1951 Convention the vast majority of Palestinian refugees from the 1947–49 conflict. See U.N. High Comm’r for Refugees, Revised Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees, para. 1 (Oct. 2009), available at <http://www.unhcr.org/refworld/pdfid/4add77d42.pdf> (“[Article 1D] excludes from the benefits of the 1951 Convention those Palestinians who are refugees as a result of the 1948 or 1967 Arab-Israeli conflicts, and who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”).”). See generally Sabel, *supra* note 3, at 54 (“[D]ue to political pressure from Arab States, Palestinian refugees were excluded from the U.N. Convention definition of refugees.”).

Refugee Convention, it still would not support a right of return because the Convention does not purport to grant such a right to any type of refugee in any situation. In fact, the Convention does not address the issue of a right of return at all. The parties that drafted the treaty could not or would not agree to that kind of provision. The Convention is primarily concerned with *preventing the return* of refugees to their state of origin and guaranteeing their rights in the state to which they fled. The Convention was only acceptable once it promised states “the right ultimately to decide which, if any, refugees, would be allowed to resettle in their territories” on a permanent basis.<sup>201</sup> Notwithstanding the exclusion from the Convention of any right related to refugee return, some assert that a right of return is a fundamental background principle of refugee law, or a rule of “customary refugee law,” and therefore binds Israel to allow the Palestinian refugees to return.<sup>202</sup> As discussed below, even in 2012, when CIL norms against expulsion and in favor of repatriation are so much more robust compared to 1947–49, it is debatable whether CIL would require return in the unique circumstances of the Palestinian refugees. As of 1947–49, it is clear that CIL did not provide any such right.<sup>203</sup>

#### 4.3. Human Rights Law

##### 4.3.1. Universal Declaration of Human Rights

In 1948, the U.N. General Assembly announced the Universal Declaration of Human Rights (“UDHR”). Article 13, providing that “[e]veryone has the right to leave any country, including his own, and to return to his country,”<sup>204</sup> is cited by advocates of a

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<sup>201</sup> James C. Hathaway, *The Meaning of Repatriation*, 9 INT’L J. REFUGEE L. 551, 552 (1997). It is also not clear that Palestinians, even were they not specifically exempted from coverage of the 1951 Convention, would be covered by its definition of “refugee.” A person is a refugee under the Convention only if he or she is currently outside the country of residence “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” and is unable to seek the protection of the home country on account of such a fear. Refugee Convention, *supra* note 199, art. 1(A)(2).

<sup>202</sup> See, e.g., TAKKENBERG, *supra* note 3, at 233 (declaring that refugees’ rights of returning to the places of their origin should be recognized as a general principle of international law).

<sup>203</sup> See *infra* Section 5.1.

<sup>204</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 13(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

right of return for Palestinian refugees.<sup>205</sup> But by the terms of the U.N. Charter, General Assembly resolutions like the UDHR are not legally binding.<sup>206</sup> In fact the non-binding, non-legal nature of the UDHR was stressed repeatedly in the U.N. debates prior to voting.<sup>207</sup> Many commentators have urged that some or all parts of the UDHR have *subsequently* become binding customary international law. But in 1994, a report for the International Law Association concluded that there was not “sufficient consensus” on whether Article 13, regarding return, had yet become a customary norm.<sup>208</sup> If not in 1994, “the UDHR surely was not a binding instrument” at the time of the 1947–49 conflict.<sup>209</sup>

The UDHR does not by its terms ban the individual or mass expulsion of foreign nationals. It only speaks to the issue of “exile,” that is, expulsion of a national, and only bans “arbitrary” exile.<sup>210</sup> The lack of a ban on collective expulsions is explained by the fact that the Allied powers at the time thought that mass expulsion of German minorities from Eastern Europe was

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<sup>205</sup> See, e.g., FRANCIS A. BOYLE, *PALESTINE, PALESTINIANS AND INTERNATIONAL LAW* 69, 156–57 (2003) (claiming that the UDHR requires the “absolute right of return” for Palestinian refugees and viewing it as a legal obligation which Israel must fulfill before it can allow more Jewish settlers to settle).

<sup>206</sup> See Dinah Shelton, *Commentary and Conclusions*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* 449 (Dinah Shelton ed., 2003) (stating that the UDHR is “non-binding,” though it was hoped that, as a “first step,” it might “lead to a binding agreement”). On the general question of the binding nature of General Assembly resolutions, see *infra* Section 4.5.

<sup>207</sup> H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 *BRIT. Y.B. INT'L L.* 354, 354 (1948) (citations omitted) (reporting the statement of the President of the General Assembly that the UDHR “does not provide by international convention for States being bound to carry out and give effect to these rights”). Eleanor Roosevelt, the United States’ spokesperson on the issue, told the General Assembly that the proposed declaration on human rights “is not and does not purport to be a statement of law or of legal obligation.” *Id.* at 358. Some delegates thought UDHR’s wording was not important because it was not a legal document. *Id.* at 360.

<sup>208</sup> *COMM. ON THE ENFORCEMENT OF HUMAN RIGHTS LAW, INT'L LAW ASS'N, FINAL REPORT ON THE STATUS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW*, in 66 *INT'L L. ASS'N REP. CONF.* 525, 547 (1994).

<sup>209</sup> JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* 89 (1995).

<sup>210</sup> UDHR, *supra* note 204, art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”).



necessary to achieve lasting peace and hence had to be considered legal.<sup>211</sup>

#### 4.3.2. *International Covenant on Civil and Political Rights*

Article 12(4) of the International Covenant on Civil and Political Rights (“ICCPR”) provides in full: “No one shall be arbitrarily deprived of the right to enter his own country.”<sup>212</sup> Proponents of a Palestinian right of return frequently assert that Article 12(4) gives refugees from the 1947–49 conflict the right to return to their homes in what is now Israel, because they were citizens of the Palestine Mandate and thus the territory that became Israel was their “own country.”<sup>213</sup> Article 13 of the ICCPR is relevant to the Palestinian refugees on a somewhat different theory, that even if Palestinians were not nationals of the newly-created state of Israel, they were lawfully present there because of their habitual residence. Article 13 provides that:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority . . . .<sup>214</sup>

The ICCPR entered into force in March 1976, after it had been ratified by enough states. Israel became a party in 1991.<sup>215</sup> It

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<sup>211</sup> HENCKAERTS, *supra* note 209, at 8–9. See also *supra* notes 59–62 and *infra* notes 305–17 and accompanying text (discussing the views and actions of the victorious Allied powers regarding the compulsory transfer of ethnic minority populations).

<sup>212</sup> International Covenant on Civil and Political Rights, art. 12, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>213</sup> See, e.g., Saideman, *supra* note 3, at 848–54 (defining “own country” as “place of habitual residence” and adding that first generation Palestinian refugees also had British-authorized passports naming them as citizens of Mandatory Palestine).

<sup>214</sup> ICCPR, *supra* note 212, art. 13.

<sup>215</sup> Data on states parties to this and other multilateral treaties is available at *Multilateral Treaties Deposited with the Secretary General*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/pages/ParticipationStatus.aspx> (last visited Nov. 25, 2012).

would be extraordinary if, by Israel's 1991 ratification, the words of Articles 12(4) or 13 reached back retroactively more than forty years and implicitly overturned Israel's consistently maintained legal position that it had no obligation to allow the return of refugees from the 1947-49 conflict. Yet that claim is made repeatedly by supporters of the Palestinian right of return.<sup>216</sup> It is not persuasive. As discussed above in Section 3.2, non-retroactivity is a default rule of treaty interpretation. Non-retroactivity is also a core component of the customary rules regarding the responsibility of states for international wrongs.<sup>217</sup> Nothing in the ICCPR suggests that Articles 12 or 13 are meant to have retroactive effect.<sup>218</sup> As of 1991 when Israel became bound by the ICCPR, Article 13 had no applicability to Palestinian refugees from the 1947-49 conflict because they were not "lawfully in the territory of" Israel, but rather were abroad.

Even assuming that Article 12 can be retroactively applied to the events of 1947-49, it does not necessarily provide those refugees with a right of return. According to a leading expert, "[t]here is no evidence that mass movements of groups such as refugees or displaced persons" – rather than individuals asserting an individual right – "were intended to be included within the scope of article 12 of the Covenant by its drafters, particularly where those seeking to return are not nationals of the state of destination."<sup>219</sup> This "individual only" reading may be correct, but

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<sup>216</sup> See, e.g., BADIL, *supra* note 187, at 96; Lawand, *supra* note 3, at 546-53; Quigley, *supra* note 3, at 202-04; Saideman, *supra* note 3, at 848-54.

<sup>217</sup> This rule is eminently sensible. Egypt, Libya, and Tunisia, for example, which joined the ICCPR regime in 1982, 1970 and 1969, respectively (*see supra* note 214), would no doubt be quite surprised to learn that Article 12(4) retroactively requires *them* to repatriate or compensate the Jews they drove out in the 1940s, 1950s and 1960s. Certainly Israel (and presumably many Arab states parties too) would have acceded to the ICCPR only with a specific reservation regarding Article 12(4) if it has the retroactive meaning that is ascribed to it by some proponents of the Palestinian right of return. Similarly, Poland, Czechoslovakia, Hungary and other Eastern European states did not expect that their accessions to the ICCPR (in 1977, 1975 and 1974, respectively, *see supra* note 215) required them to repatriate or compensate the hundreds of thousands of German nationals they expelled at the end of World War II.

<sup>218</sup> Compare ICCPR, *supra* note 212 (showing no reference to retroactive application), with Refugee Convention, *supra* note 199, art. 1(A)(2) (stating explicitly that the term "refugee" applies retroactively to individuals with certain characteristics).

<sup>219</sup> HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 59-60 (1987). See also Stig Jagerskiold, *The Freedom of Movement, in THE INTERNATIONAL BILL OF RIGHTS* 166, 180 (Louis Henkin ed., 1981) (determining

it must be conceded that it is not compelled by the text. There are other reasons, however, to find Article 12 unavailing for Palestinian refugees from 1947–49. By its terms, Article 12 does not purport to announce an absolute right of return. It only speaks of return to one’s “own country,” suggesting that the right may only apply to citizens. Even if the article extends beyond citizens, it is hard to see how it covers noncitizens who have not been in a country for forty years by the time that country joined the ICCPR and became bound by Article 12. Article 12 also contemplates the legality of denials of return not considered “arbitrary.” It is not a stretch to think that reasonable demographic or national security concerns could be a non-arbitrary basis to refuse entry to Palestinian refugees or their descendants.

#### 4.3.3. *International Convention on the Elimination of All Forms of Racial Discrimination*

Under this multilateral human rights treaty, member states pledge to eliminate all forms of racial discrimination and guarantee certain enumerated rights without distinction as to race, ethnicity, and the like. Among the guaranteed rights is the “right to leave any country, including one’s own, and to return to one’s country” – taken verbatim from the UDHR.<sup>220</sup> Israel became a party to this convention only in 1979.<sup>221</sup> The relevant provision contains no indication that it is meant to apply retroactively to events occurring before ratification, so Israel’s conduct in 1947–49 cannot be measured by this convention. Moreover, in 1979, Israel was not “one’s country” to Palestinians who were not Israeli citizens and had not been in the territory of Israel for forty years.

#### 4.4. *Nationality and Citizenship Law and the Law of State Succession*

Since enactment of its nationality legislation in 1952, Israel has taken the position that only those former citizens of Mandatory Palestine who remained in Israel from the establishment of the

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that the ICCPR’s right of return was “intended to apply to individuals asserting an individual right” and was not intended “to address the claims of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population”).

<sup>220</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(ii), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

<sup>221</sup> See *supra* note 215.

State in 1948 until the enactment of the law became Israeli citizens.<sup>222</sup> Because almost all Palestinian refugees from the 1947–49 conflict did not fit those criteria, they were not Israeli citizens or nationals under municipal law. Therefore, Israel concludes that the return of Palestinian refugees is not mandated because international law gives it full sovereign discretion to decide whether or not to admit non-citizens into its territory.

The primary Palestinian response to this reasoning is to assert that international law overrides Israel's municipal law decision to bar Palestinian refugees from citizenship. In legal terms, the core claim is that Israel is the "successor" state to the British Mandate in Palestine and that international obligations to the Palestinians flow from this status.<sup>223</sup> From independence, Israel took the position that it was "in no sense a successor of the Palestine [Mandate] administration,"<sup>224</sup> and in 1950 announced that it was not the successor to Mandate Palestine with regard to treaties.<sup>225</sup> Nevertheless, according to the argument made on behalf of the Palestinians, (1) international law requires that a successor state grant citizenship to all citizens, nationals or permanent inhabitants of the predecessor state; and (2) because many or most Palestinian Arabs were citizens of Mandate Palestine,<sup>226</sup> Israel was and is required by international law to grant citizenship to refugees from the 1947–49 conflict who, before flight or expulsion, lived within the territory that became Israel.

On the contrary, in 1947–49, and arguably even today, there was no such obligation in international law. There has never been much agreement among states about the international rules governing state succession and, as a result, there is little binding

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<sup>222</sup> See Peretz, *supra* note 103, at 146. Before 1952, Israeli courts had taken inconsistent positions on whether former citizens of the Palestine Mandate automatically acquired Israeli citizenship. See U.N. Secretariat, *Digest of Decisions of National Courts Relating to Succession of States and Governments*, Int'l Law Comm'n, U.N. Doc. A/CN.4/157 (1963), reprinted in [1964] 2 Y.B. Int'l L. Comm'n 95, at 98, U.N. Doc. A/CN.4/Ser.A/1963/ADD.1.

<sup>223</sup> See, e.g., BADIL, *supra* note 187, at 96; Lawand, *supra* note 3, at 558–63; Quigley, *supra* note 3, at 206–10; Saideman, *supra* note 3, at 850–51.

<sup>224</sup> D.P. O'Connell, *Secured and Unsecured Debts in the Law of State Succession*, 28 BRIT. Y.B. INT'L L. 204, 217 (1951).

<sup>225</sup> See Anthony Lester, *State Succession and Localized Treaties*, 4 HARV. INT'L CLUB J. 145, 153 (1962).

<sup>226</sup> See Mutaz Qafisheh, *Genesis of Citizenship in Palestine and Israel: Palestinian Nationality During the Period 1917–1925*, 11 J. HIST. INT'L L. 1 (2009), for a general overview of citizenship in Mandate Palestine.

law. Only a handful of relatively unimportant states are parties to the Vienna Convention on Succession in Respect of Treaties.<sup>227</sup> Before, during and after the 1947–49 conflict, there were no fixed state practices regarding state succession and nationality that were consistently followed from a sense of legal obligation. In other words, there was no CIL on point. During the nineteenth and early twentieth centuries, it was often held by treatise writers that “the inhabitants of ceded territory automatically lose their old political allegiance and acquire that of the annexing state.”<sup>228</sup> But modern problems posed by the rise of nationalism and self-determination greatly complicated things. In the wake of World War I, various international agreements were made regarding transfer of ownership of territory and nationality of inhabitants. Rather than follow any supposed rule of CIL that all inhabitants in the successor state automatically receive its nationality,

new principles were introduced as a solution of some of the problems peculiar to the peace settlements. An effort was made to adapt the acquisition of new nationality to existing conditions with the predominant purpose of uniting on the same territory and under a national government individuals of the same race, language, and civilization. . . . [N]ationality was acquired *ipso facto* only in certain cases; by reclamation and by naturalization in others; and in still other cases, only in accordance with conditions prescribed by the local laws.<sup>229</sup>

The mid-twentieth century’s leading expert on the effect of state succession on nationality wrote—essentially contemporaneously with enactment of Israel’s nationality law—that there were then three different, competing theories about state succession and nationality in the conventional context where an existing country absorbs a new territory: (i) the nationality of inhabitants automatically becomes that of the successor state; (ii)

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<sup>227</sup> See *supra* note 215. Similarly, the Vienna Convention on Succession in Respect of State Property, Archives and Debts is not now in force and likely will never be due to lack of agreement about the relevant rules of conduct. By stipulation in the treaty, only fifteen states need to ratify before it goes into force, but as of 2012, only seven had done so. See Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, U.N. Doc A/Conf. 80/31, 17 I.L.M. 1488 (1978).

<sup>228</sup> C. Luella Gettys, *The Effect of Changes of Sovereignty on Nationality*, 21 AM. J. INT’L L. 268, 268 (1927).

<sup>229</sup> *Id.* at 269.

“the inhabitants in question acquire the nationality of the successor state only by an express or tacit submission to the new sovereign”; or (iii) “[t]he more recent and widely accepted theory regards nationality as a matter solely of domestic jurisdiction, and contends that the successor State has a discretion as to the manner in which it extends its nationality to the inhabitants . . . .”<sup>230</sup> If the rules were disputed in conventional contexts, there surely could have been no CIL consensus of how they should apply in the novel context of the death of the British Mandate, the aborted U.N. partition of territory abandoned by the Mandatory power, and the subsequent birth of Israel through war in part of that territory.<sup>231</sup>

In 1968, Mohammed Bedjaoui, the International Law Commission’s Special Rapporteur on the Succession of States in Respect of Rights and Duties Resulting from Sources other than Treaties, considered it an open question “whether, if no agreement [between predecessor and successor state] exists, the successor State has unlimited sovereign power to undertake the ‘denaturalization’ of persons or groups of persons, resulting in their expulsion *de facto* . . . or *de jure* (through mass transfers).”<sup>232</sup> Even as late as 1995, the International Law Commission (“ILC”) conceded that, with regard to state succession and its impact on nationality, “the rules of customary law are still at the elementary stage and provide a merely rudimentary basis.”<sup>233</sup> “According to the predominant opinion, the role of international law with respect to nationality is very limited,” and it is the recognized “principle

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<sup>230</sup> D.P. O’CONNELL, *THE LAW OF STATE SUCCESSION* 245 (H.C. Gutteridge et al. eds., 1956).

<sup>231</sup> Cf. 5 J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: NATIONALITY AND OTHER MATTERS RELATED TO INDIVIDUALS* 37 (1972) (“The national status of the Palestinian refugees . . . is extremely difficult to define juridically. Various theoretical constructions are possible.”).

<sup>232</sup> Special Rapporteur, *First Rep. on Succession of States in Respect of Rights and Duties Resulting from Sources Other Than Treaties*, ¶ 133, Int’l Law Comm’n, U.N. Doc. A/CN.4/204 (Apr. 5, 1968) (by Mohammed Bedjaoui), reprinted in [1968] 2 Y.B. Int’l Law Comm’n 94, A/CN.4/SER.A/1968/Add.1. A leading expert concluded in 1956 that “there is no rule of international law under which the nationals of the predecessor State acquire the nationality of the successor State . . . .” Additionally, “[t]here is no basis in present international law for a right to a nationality; . . . nor does international law prohibit loss of nationality after birth by deprivation or otherwise.” See P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 149, 249 (1956).

<sup>233</sup> Special Rapporteur, *First Rep. on State Succession and its Impact on the Nationality of Natural and Legal Persons*, ¶ 70, Int’l Law Comm’n, U.N. Doc. A/CN.4/467 (Apr. 17, 1995) (by Václav Mikulka), reprinted in [1995] 2 Y.B. Int’l L. Comm’n 157.

that it is for each State to determine under its own law who are its nationals . . . .”<sup>234</sup> In 1999, the ILC drafted rules on state succession and nationality, providing: “When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to . . . [p]ersons concerned having their habitual residence in its territory.”<sup>235</sup> In short, only in the late 1990s was the international community beginning to develop a rule of CIL that, had it existed half a century before, might have required that Israel grant citizenship to Palestinian Arabs expelled by war.

There are several international conventions dealing with statelessness, but none of them compelled Israel to treat Palestinian Arabs who fled the 1947–49 conflict as citizens of Israel. At the time the Mandate ended, Great Britain was party to the 1930 Protocol Relating to a Certain Case of Statelessness, but, as noted above, Israel took the position that it did not succeed to any of Britain’s treaty obligations. In any event, the 1930 Protocol says nothing about the effect of state succession on nationality and grants no rights relevant to the dispute about the Palestinian right of return. In 1958, Israel ratified the 1954 Convention Relating to the Status of Stateless Persons, but this treaty has no application to the Palestinian refugee situation discussed in this Article.<sup>236</sup> Israel

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<sup>234</sup> *Id.* at 167–68, ¶¶ 52, 61.

<sup>235</sup> Draft Articles on Nationality of Natural Persons in Relation to the Succession of States with Commentaries, [1999] 2 Y.B. Int’l L. Comm’n 22, pt. II, art. 22, U.N. Doc. A/54/10. Because “the divergence between States was too considerable,” the ILC drafted only “principles” rather than “exact rules.” Roland Schärer, *International Law and Nationality, in Particular in the Context of State Succession*, in CITIZENSHIP AND STATE SUCCESSION 88, 96, ¶ 29 (Sci. & Technique of Democracy Ser. No. 21, 1998).

<sup>236</sup> First, Israel’s acceptance of the treaty post-dates the creation of the refugee situation, and nothing in the treaty suggests it is retroactive. Second, the treaty contains the same exemption of Palestinian refugees from its coverage as does the 1951 Refugee Convention. *See* Convention Relating to the Status of Stateless Persons art. 1(2)(i), Sept. 28, 1954, 360 U.N.T.S 117 (stating that persons presently receiving assistance from a United Nations organ or agency other than the United Nations High Commissioner for Refugees do not qualify as stateless). Third, the rights granted by the treaty have no bearing on the right of return. Generally, states that become party to the Convention only agree to grant stateless persons within their borders the same rights as other aliens. *See id.* arts. 7(1), 13–19. In some instances, for example, regarding public elementary education, state parties agree to treat stateless persons in their territory the same as nationals. *See id.* art. 22.

has signed but not ratified the 1961 Convention on the Reduction of Statelessness.<sup>237</sup> This treaty grants certain rights which are theoretically relevant to the dispute regarding the 1947–49 Palestinian refugees—for instance, a prohibition of depriving a person of nationality “if such deprivation would render him stateless,” and a prohibition of group denationalization “on racial, ethnic, religious or political grounds.”<sup>238</sup> However, these rights do not accrue to the 1947–49 Palestinian refugees. Israel never ratified the treaty, but its 1961 signature did create an obligation to refrain from acts that would defeat the objects of the treaty.<sup>239</sup> Nevertheless, the treaty did not enter into force until 1975 and the relevant provisions contain no suggestion that they are retroactive; they therefore do not apply to the events of 1947–49. Relatively few populous or important states have ratified this treaty,<sup>240</sup> making it exceedingly difficult to imagine that its provisions represent CIL. There can be no serious argument that in 1947–49—or for decades thereafter—there was any settled rule of CIL requiring that Israel treat Palestinian refugees *no longer in its territory* as Israeli citizens. Many Arab and Muslim states, for example, have often acted as if international law does not impose obligations on them to treat as citizens those people *in their territories*—such as the Palestinian refugees—who would otherwise be stateless.<sup>241</sup>

Since international law did not require that Israel treat the Palestinians expelled during the 1947–49 conflict as Israeli citizens, Israel was within its rights to consider them aliens under domestic law. As non-citizens, Israel could refuse them admittance to its territory under its sovereign power over immigration. Furthermore, as the ILC has reported, international law did not begin to put real limits on the “collective expulsion of aliens” —

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<sup>237</sup> Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975) [hereinafter *Statelessness Convention*]; for state parties, see *supra* note 215.

<sup>238</sup> *Statelessness Convention*, *supra* note 237, arts. 8(1) and 9.

<sup>239</sup> Under the Vienna Convention on the Law of Treaties, “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty. . . .” VCLT, *supra* note 128, art. 18(a).

<sup>240</sup> See *supra* note 215 (providing instructions to find data showing that the United States, China, Japan, India, Pakistan, Indonesia, Mexico, Egypt, Iran, Nigeria, Poland and South Africa are not parties to the *Statelessness Convention*).

<sup>241</sup> On the lack of citizenship for Palestinian refugees in Arab states, see *supra* notes 105–06 and accompanying text. On other incidents of statelessness in Arab and Muslim nations, see, for example, *infra* Appendix Table 1, cases 58, 59, 77, 97.



apart from specialized contexts involving the belligerent occupation of enemy territory or the refugees covered under the 1951 Convention on Refugees—until the 1960s, at the earliest.<sup>242</sup> A country's collective expulsion of enemy aliens who are present in its territory during wartime was considered lawful at least until the latter part of the twentieth century.<sup>243</sup> This will be considered in more detail in Section 5 below. Even if, contrary to both international and Israeli law, the Palestinian refugees had somehow automatically become Israeli citizens in 1948, international law at that time likely would not have prohibited Israel from in turn deeming them denationalized.<sup>244</sup> Therefore, international law concerning state succession, immigration, nationality and statelessness did not prohibit expulsion of Palestinian refugees in 1947–49 or require their return.

#### 4.5. U.N. General Assembly Resolutions

Many proponents of a Palestinian right of return place great weight on some resolutions of the General Assembly about the Palestine conflict, implying or contending that they represent binding law.<sup>245</sup> The most cited is Resolution 194 (III) of 1948, which “[r]esolve[d]” that “refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date.”<sup>246</sup> As noted above, Palestinians and Arab states at the time rejected this resolution because it implicitly recognized Israel's right to exist and did not require immediate return of all refugees.<sup>247</sup> After repeated failure to solve the refugee problem by destroying Israel with military force, it seems a bit too

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<sup>242</sup> Special Rapporteur on the Expulsion of Aliens, *Third Rep. on the Expulsion of Aliens*, ¶¶ 101–03, Int'l Law Comm'n, U.N. Doc. A/CN.4/581 (Apr. 19, 2007) (by Maurice Kamto).

<sup>243</sup> *Id.* ¶¶ 116–31, 134 (tracing the history of the lawfulness of expulsion of enemy aliens during wartime).

<sup>244</sup> *Cf.* HERSH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 301 (1933) (“There is no clear rule of international law at present which limits the freedom of action of States [with respect to denationalization]. . . .”).

<sup>245</sup> *See, e.g.,* Lawand, *supra* note 3, at 545–46; Quigley, *supra* note 3, at 185–90.

<sup>246</sup> *See supra* note 117 and accompanying text (quoting resolution).

<sup>247</sup> MALLISON & MALLISON, *supra* note 3, at 26 (“The Arab States not only voted against partition, but they initially took the position that it was invalid.”); Menachem Klein, *Between Right and Realization: The PLO Dialectics of 'The Right of Return,'* 11 J. REFUGEE STUD. 1, 1–2 (1998) (noting that Arab states rejected the U.N. Partition Resolution “because it conditioned return upon making peace”).

bold (an example of profoundly “unclean hands”) to claim the benefit of the Resolution that the Palestinians and Arab states rejected. Moreover, the Palestinians and Arab states clearly did not consider the General Assembly competent to make binding law – and they were right. In rejecting the 1947 Partition Resolution, the Arab states claimed that it was not legally binding because the General Assembly, and even the Security Council, lacked authority to legislate under the U.N. Charter.<sup>248</sup> The General Assembly, they noted, could only make non-binding recommendations about how to settle international disputes.<sup>249</sup> The only way that resolutions and declarations of the Assembly became binding was if the Security Council determined that there existed a threat to international peace and security and issued orders to implement General Assembly resolutions. The Council did not do this with the Partition Resolution and so, according to the Arab states and Palestinians, there was no legal authority to enforce the partition plan.<sup>250</sup> The reasoning of the Arab states and Palestinians, about the limits of the General Assembly’s authority regarding the Partition Resolution, applies fully to Resolution 194 on return.

The Arab states were quite correct in their legal analysis about the General Assembly’s lack of binding authority over these issues.

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<sup>248</sup> See, e.g., Cattan, *supra* note 64 at 265 (noting that the Arab states opposed the Partition Resolution for a variety of reasons, including that it “violated the principles of the Charter of the United Nations” and was beyond “the legal competence of the United Nations”); John W. Halderman, *Some International Constitutional Aspects of the Palestine Case*, 33 L. & CONTEMP. PROBS. 78, 86–88 (1968) (explaining that the Arab states contended that the Partition Resolution was a mere recommendation because of the limited authority of the General Assembly); see also HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 196 n.8 (1950) (citing statements from the 128th meeting of the General Assembly by delegates from Saudi Arabia, Pakistan, Iraq, Syria, Yemen, Lebanon and Egypt to the effect that the General Assembly lacked authority to make binding decisions on issues related to Palestine).

<sup>249</sup> See, e.g., Nabil Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*, 33 L. & CONTEMP. PROBS. 97, 102–03 (1968); Halderman, *supra* note 248, at 80, 86–88. In rejecting the Partition Resolution, the U.N. representatives of Saudi Arabia, Syria, Iraq and Yemen each stated to the plenary meeting of the General Assembly that the Resolution was illegal and non-binding. The statements are reprinted in *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 24, at 57–60.

<sup>250</sup> See *supra* note 68 and accompanying text; see also Elaraby, *supra* note 249, at 102–03 (stating that the U.N. General Assembly lacked authority to order partition and Arab states did not violate international law in rejecting the plan); Halderman, *supra* note 248 at 86 (reiterating that the Arab states who rejected the partition plan saw it as a mere recommendation and not as binding international law).

Though there is today a substantial academic literature devoted to arguing that the General Assembly can create binding international law,<sup>251</sup> “few governments have taken up international lawyers’ suggestions that the Assembly has actually acquired some degree of legislative authority over states.”<sup>252</sup> Moreover, a recent study concluded that, apart from narrow circumstances not relevant to the Palestinian refugee situation, the International Court of Justice has not understood the General Assembly to have the power to issue legally binding commands.<sup>253</sup> And even the academic commentary is by no means one-sided; there is persistent disagreement about whether or how General Assembly resolutions can be binding law. On an issue of such supreme importance to the world community—whether the U.N. Charter has been implicitly amended by custom such that the General Assembly may now issue binding pronouncements about things the Charter says it may only discuss and opine about—something approaching consensus among states should be required before concluding that a new rule is in place. Even today, there is nothing approaching consensus. And at the time of the 1947–49 conflict, the newly-written U.N. Charter was understood to mean what is said regarding the General Assembly: apart from certain primarily internal or housekeeping matters, it had only a power to debate and recommend.<sup>254</sup> This interpretation of the plain text of the

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<sup>251</sup> On the debates about this issue, see, for example, JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAWMAKERS* (2005); JORGE CASTEÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (Leland M. Goodrich & William T.R. Fox eds., Alba Amoia trans., 1969); EDWARD MCWHINNEY, *UNITED NATIONS LAW MAKING* (1984); Rosalyn Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, in *INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM* 21 (W.E. Butler ed., 1987); Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 *AM. J. INT’L L.* 444 (1969); Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT’L L.* 529 (1993); Oscar M. Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 *AM. SOC’Y INT’L L. PROC.* 324 (1979); D.H.N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 *BRIT. Y.B. INT’L L.* 97 (1955–1956); Marko Divac Öberg, *The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 *EUR. J. INT’L L.* 879 (2005).

<sup>252</sup> M.J. Peterson, *General Assembly*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 97, 103 (Thomas G. Weiss & Sam Daws eds., 2007) (discussing the General Assembly’s role and power as part of the U.N.).

<sup>253</sup> See Öberg, *supra* note 251.

<sup>254</sup> See, e.g., U.N. Charter art. 10 (“The General Assembly may discuss any questions or any matters within the scope of the present Charter . . . and, except as provided in Article 12, may make recommendations to the Members of the United

Charter was buttressed by the positivism prevailing at that time, which located binding international law only in sources to which states had consented, namely treaties and CIL.<sup>255</sup> A 1949 work on the United Nations stated: "Although the General Assembly may make recommendations both to Members of the United Nations and the Security Council, it should be kept in mind that recommendations have no obligatory character, as has been shown in the Palestine case, although they may be of the greatest political importance."<sup>256</sup> Other leading commentators concurred.<sup>257</sup>

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Nations or to the Security Council or to both on any such questions or matters.") (emphasis added); *id.* art. 11(2) ("The General Assembly may *discuss* any questions relating to the maintenance of international peace and security . . . and, except as provided in Article 12, may *make recommendations* with regard to any such questions to the state or states concerned or to the Security Council or to both.") (emphasis added); *id.* art. 14 ("Subject to the provisions of Article 12, the General Assembly may *recommend* measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations. . . .") (emphasis added). The Article 12 limit referred to in each of these quoted articles is the following: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." *Id.* art. 12(1).

As noted in the main text above, the General Assembly does have binding power with regard to certain housekeeping or internal functions. *See, e.g., id.* art. 4(2) ("The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."); *id.* art. 17(1) ("The General Assembly shall consider and approve the budget of the Organization."). The General Assembly also had certain binding powers regarding the so-called international trusteeship system (*see id.* chs. XII & XIII), the successor to the Mandate system of the League of Nations, but Palestine was never a trust territory under the U.N. Charter.

<sup>255</sup> *See* José E. Alvarez, *Legal Perspectives*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS, *supra* note 252, at 58, 59 (contrasting the mid-twentieth century's positivism and narrow view of the General Assembly's powers under the U.N. Charter with twenty-first century claims that international organizations, like the United Nations, have some legislative power).

<sup>256</sup> LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 151-52 (2d ed. 1949).

<sup>257</sup> A 1950 discussion of the U.N.'s handling of the Palestine issue noted: "The decision of the General Assembly on Palestine took the form of recommendations, since the General Assembly itself has no executive authority." EUGENE P. CHASE, THE UNITED NATIONS IN ACTION 151 (1950). Hans Kelsen's influential 1950 work on the law of the United Nations system was quite clear that, apart from specific exceptions, such as resolutions about internal or housekeeping matters, General Assembly resolutions were "political" rather than "legal" because the General Assembly was not empowered to create binding legal "obligations, rights or competences." KELSEN, *supra* note 248, at 193-94; *see also id.* at 195-96 (regarding the Charter power of the General Assembly to make "recommendations," stating

Besides the general problem of relying on formally nonbinding General Assembly resolutions to support the right of return, there are problems with claims made on the Palestinians' behalf about specific General Assembly resolutions, particularly Resolution 194. For instance, it is implied that Resolution 194, itself, states that CIL requires the return of the refugees.<sup>258</sup> This is false, as perusal of the text demonstrates.<sup>259</sup> Additionally, the claim that the General Assembly's repeated references to and reenactments of Resolution 194 have transformed the Resolution from non-binding to binding cannot be correct because even today there is no consensus that valid CIL forms in that manner—that is, *solely* through non-binding votes in a diplomatic forum, the U.N. General Assembly. This is particularly the case here, with the issue of refugee return. The chief proponents of the theory that the General Assembly has binding, legislative authority regarding Israel and Palestinian refugees—the Arab and Muslim states—have declared for decades in diplomatic forums that international law requires the return of Palestinian refugees to Israel.<sup>260</sup> At the same time, many of these proponents have expelled large numbers of their own nationals

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that “[r]ecommendations, by their very nature, do not constitute a legal obligation to behave in conformity with them”); *id.* at 199–200 (“The intention was to establish the General Assembly as ‘town meeting of the world,’ the ‘open conscience of humanity,’ that is to say, as a deliberative and criticising organ. Hence, legal functions [defined by Kelsen as the power to impose or create legally binding obligations or rights] of the Assembly are to be considered as exceptions and require special provisions in the Charter.”) (citing *The Yearbook of the United Nations*, 1946–47 U.N.Y.B. 51, U.N. Sales No. 1947 I.18).

<sup>258</sup> See, e.g., GAIL J. BOLING, *THE 1948 PALESTINIAN REFUGEES AND THE INDIVIDUAL RIGHT OF RETURN: AN INTERNATIONAL LAW ANALYSIS* 15 (2d ed. 2007) (“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.”).

<sup>259</sup> See G.A. Res. 194(III), *supra* note 117.

<sup>260</sup> See, e.g., G.A. Res. 2535 (XXIV), U.N. Doc. A/RES/2535(XXIV) (Dec. 10, 1969), pt. B, pmb. (claiming that “the Palestine Arab refugees” have been denied “their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights”); *Arab League Stresses on the Palestinian Refugees’ Right of Return*, OCCUPIEDPALESTINE.COM (May 16, 2012), <http://occupiedpalestine.wordpress.com/2012/05/16/nakba64-arab-league-stresses-on-the-palestinian-refugees-right-of-return/> (reporting that the Arab League voted and decided that Palestinian refugees have a right to return to Israel).

and resident aliens, including Palestinians;<sup>261</sup> have refused to agree to minimal international standards regarding the treatment of refugees;<sup>262</sup> and have denied Palestinian refugees who reside in their countries citizenship and some of the most basic of human rights.<sup>263</sup> "Cheap talk"<sup>264</sup> in diplomatic forums that is contradicted by states' actual behavior when their own interests are at stake does not create CIL binding on *other* states.

Proponents of the Palestinian right of return also assert that Israel's 1949 admission to membership in the U.N. was conditioned on compliance with Resolution 194, including its provisions on refugee return.<sup>265</sup> Thus, it is said, even if Resolution 194 lacks inherently binding force (recall that General Assembly declarations of this kind are undisputedly treated by the U.N. Charter as non-binding), nevertheless the General Assembly's power to decide whether or not to admit new member states has made return of the 1947-49 refugees a binding obligation.<sup>266</sup> The factual assertion underlying this claim—that the membership vote on Israel was conditional—is false. In fact, Arab representatives at the General Assembly meeting on May 11, 1949, concerning the admission of Israel, complained that Israel was admitted without having to

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<sup>261</sup> For some examples, see *infra* Appendix Table 1 (cases 58, 59, 62, 64, 67, 71, 74, 75, 77, 78, 81, 84, 86-88, 91-92, 94, 97, 99-102, 107, 113, 114, 117, 120, 126, 133, 136, 138, 143-50, 152, 155-56, 159).

<sup>262</sup> Among the states that have declined to sign any of the major treaties concerning refugee rights (the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol, or the Convention Relating to the Status of Stateless Persons) are: Bahrain, Brunei, Eritrea, Indonesia, Iraq, Jordan, Kuwait, Lebanon, Malaysia, Oman, Qatar, Pakistan, Saudi Arabia, Syria and the United Arab Emirates. Israel is a party to all three treaties. For data on states parties to these conventions, see *supra* note 215.

<sup>263</sup> See, e.g., TAKKENBERG, *supra* note 3, at 131-71.

<sup>264</sup> A term borrowed from economics that is used to contrast cost-free actions that are unlikely to reveal the actor's true preferences with "costly" actions or signals which, because they are not free to make, are more likely to reveal true preferences. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1204 & n.139 (2007).

<sup>265</sup> See, e.g., BOYLE, *supra* note 205, at 69 ("[A]s yet another express consideration for its admission to the United Nations Organization, the government of Israel officially endorsed and agreed to carry out the aforementioned U.N. General Assembly Resolution 194(III) of 1948, which determined that Palestinian refugees have the right to return to their homes . . . ."); see also BOLING, *supra* note 258, at 22-23 (to the same effect); Abunimah & Ibish, *supra* note 102, at 7, 23 (same).

<sup>266</sup> Voting on the admission of new member states is one of the few areas where the U.N. General Assembly has binding authority. See U.N. Charter art. 4(2).

commit to refugee return, despite their attempts to make Israel comply.<sup>267</sup> Moreover, those supporters of a Palestinian right of return who tie return to the vote on Israel's U.N. membership ignore that the power of the General Assembly to make membership conditional on factors not mentioned in the Charter was debated in 1947, soon before Israel petitioned for membership and the Arab states' position was rejected. At the request of the General Assembly, the International Court of Justice issued an advisory legal opinion on the subject in May 1948, two weeks after Israel proclaimed its independence. According to the Court, a U.N. member called upon to vote on a state's petition for membership is not "juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph [1]" of Article 4 of the Charter.<sup>268</sup> The relevant Charter provision provides in full: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."<sup>269</sup> On the basis that Israel fulfilled these written requirements, the Security Council advised that Israel be admitted,<sup>270</sup> and the General Assembly approved Israel's admission.<sup>271</sup> The claim that a right of return for Palestinians was created by the vote on Israel's U.N. membership is incorrect.

#### 4.6. U.N. Security Council Resolutions

Since "ethnic cleansing" became a topic of international concern with the conflicts in the former Yugoslavia in the 1990s,

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<sup>267</sup> See INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 180-81 (1955) (discussing the circumstances surrounding Israel's application for membership in the United Nations).

<sup>268</sup> Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 65 (May 28); see also Yuen-Li Liang, *Notes on Legal Questions Concerning the United Nations: Conditions of Admission of a State to Membership in the United Nations*, 43 AM. J. INT'L L. 288 (1949) (introducing state membership admission questions that were addressed to the ICJ for resolution).

<sup>269</sup> U.N. Charter art. 4(1).

<sup>270</sup> S.C. Res. 69, U.N. Doc. S/1277 (Mar. 4, 1949).

<sup>271</sup> G.A. Res. 273 (III), U.N. Doc. A/RES/273(III) (May 11, 1949). Afghanistan, Burma, Egypt, Ethiopia, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, and Yemen voted to deny Israel's admission to the United Nations. U.N. GAOR, 2nd Sess., 207th plen. mtg. at 330-31, U.N. Doc. A/PV.207 (May 11, 1949).

the Security Council has repeatedly instructed or urged certain states that, in the aftermath of an armed conflict, they should or must allow refugees to return to their homes.<sup>272</sup> Proponents of the Palestinian right of return often contend that these Security Council resolutions are evidence that CIL requires refugee repatriations. However, these resolutions, coming decades after the 1947–49 conflict, do not create CIL retroactively binding on Israel in the war of independence, because by definition CIL cannot be retroactive.<sup>273</sup>

The Security Council has never demanded that Israel allow repatriation of the 1947–49 refugees.<sup>274</sup> In May 1948, the Security Council ordered a ceasefire, directed truce and mediation negotiations to occur,<sup>275</sup> and ordered the demilitarization of Jerusalem.<sup>276</sup> In 1949, Israel concluded bilateral military truces with Egypt, Lebanon, Trans-Jordan, and Syria—each specifically designated as provisional and military only, with all parties reserving all rights regarding non-military matters (such as permanent borders and refugees).<sup>277</sup> Under these truce agreements, bilateral “mixed commissions” were created to exchange prisoners of war, demilitarize certain border zones, negotiate the movement of forces to new positions behind the truce

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<sup>272</sup> For examples concerning the conflict in the former Yugoslavia, see S.C. Res. 947, ¶ 7, U.N. Doc. S/RES/947 (Sept. 30, 1994) (The Security Council “[a]ffirms the right of all displaced persons to return voluntarily to their homes of origin”); S.C. Res. 820, ¶ 7, U.N. Doc. S/RES/820 (Apr. 17, 1993) (“[The Security Council r]eaffirms its endorsement of the principle[] that . . . all displaced persons have the right to return in peace to their former homes and should be assisted to do so . . . .”); S.C. Res. 787, ¶ 2, U.N. Doc. S/RES/787 (Nov. 16, 1992) (“[The Security Council] insists that all displaced persons be enabled to return in peace to their former homes . . . .”). See Vic Ullom, *Voluntary Repatriation of Refugees and Customary International Law*, 29 DENV. J. INT’L L. & POL’Y 115 app. 1 (2001) (listing Security Council resolutions on repatriation elsewhere).

<sup>273</sup> For discussion of the non-retroactivity issue, see *supra* Section 3.2.

<sup>274</sup> Cf. MALLISON & MALLISON, *supra* note 3, at 37 (describing the Security Council’s involvement with the Palestinian refugee situation as “at the most, a minor role”).

<sup>275</sup> See S.C. Res. 50, U.N. Doc. S/801 (May 29, 1948) (specifying the duration of the ceasefire and activities that would constitute violations of the ceasefire); S.C. Res. 49, U.N. Doc. S/773 (May 22, 1948) (requesting a ceasefire and for all parties involved to enter into negotiations for a truce).

<sup>276</sup> See S.C. Res. 54, U.N. Doc. S/902 (July 15, 1948) (calling for “continue[d] . . . efforts to bring about the demilitarization of the City of Jerusalem”).

<sup>277</sup> See *supra* note 115 and accompanying text.



lines, and the like.<sup>278</sup> After Egypt complained to the Security Council in 1950 that Israel had expelled some civilians during these truce implementation processes, the Security Council “[r]equest[ed]” that the Egyptian-Israeli Mixed Armistice Commission take up the issue, and “[c]all[ed] upon” the two governments to implement any repatriation orders that might be made by the Commission and “to take in the future no action involving the transfer of persons across international frontiers or armistice lines” without consulting the Commission.<sup>279</sup> That was the full extent of the Security Council’s contemporaneous statements regarding refugees. The Security Council did not take up the refugee issue again until the Six-Day War of 1967, when in the aftermath it “[c]all[ed] upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities”<sup>280</sup> and later affirmed the necessity of all parties “achieving a just settlement of the refugee problem . . . .”<sup>281</sup> Note the omission of any express mention of the refugees from the 1947–49 conflict. Given the Security Council’s studied refusal to urge or order the repatriation of the hundreds of thousands of refugees from the 1947–49 conflict,<sup>282</sup> it is a bit odd to find advocates for the Palestinians citing after-the-fact Security Council resolutions from different conflicts, which contain directives about

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<sup>278</sup> See, e.g., Egyptian-Israeli General Armistice Agreement, *supra* note 115, arts. VIII(1), IX(1), (4), X (indicating the requirements as to the demilitarization of El Auja village and the vicinity, the exchange of prisoners of war, the search for and exchange of missing persons, and the formation and operations of the Mixed Armistice Commission).

<sup>279</sup> S.C. Res. 89, ¶¶ 3, 4, 6, U.N. Doc. S/1907 (Nov. 17, 1950).

<sup>280</sup> S.C. Res. 237, ¶ 1, U.N. SCOR, 22d Year, U.N. Doc. S/INF/22/Rev.2 (June 14, 1967).

<sup>281</sup> S.C. Res. 242, ¶ 2(b), U.N. SCOR, 22d Year, U.N. Doc. S/RES/242 (Nov. 22, 1967).

<sup>282</sup> The Security Council was clearly willing to recommend or even order repatriation when it wanted to. For instance, in regard to the India-Pakistan conflict over Jammu and Kashmir, in April 1948—the same month that Israel declared independence—the Council “[r]ecommend[ed]” that India take certain actions in conformity with the principle that “[a]ll citizens of the State who have left it on account of disturbances are invited, and are free, to return to their homes . . . .” S.C. Res. 47, ¶ 14(a), U.N. Doc. S/726 (Apr. 21, 1948).

return that the Security Council specifically chose not to issue regarding Israel and the Palestinians.<sup>283</sup>

More generally, viewing Security Council resolutions as declarations of the requirements of international law can be a mistake. The U.N. Charter does not empower the Security Council to legislate as such, but rather to solve disputes and deal with threats to international peace and security.<sup>284</sup> Thus, when the Council urges or demands the repatriation of refugees, it is not thereby stating that repatriation is required by international law, but rather that the repatriation is conducive to solving the dispute and resolving the threat to international peace and security.<sup>285</sup>

##### 5. NO RIGHT OF RETURN IN CUSTOMARY INTERNATIONAL LAW

To date, analysis of whether there is a rule of CIL requiring the return to Israel of Palestinian refugees from the 1947–49 conflict has tended to be unsystematic, overly general, and focused on state

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<sup>283</sup> See, e.g., BOLING, *supra* note 258, at 79–81 (citing U.N. Security Council resolutions on the Bosnia and Croatia, Georgian, and Namibian conflicts in support of the argument that all refugees have a right to return to their places of origin); Quigley, *supra* note 3, at 200–01, 215–16 (describing U.N. Security Council resolutions positing the right of return for refugees in Namibia, Croatia, and Georgia); Abunimah & Ibish, *supra* note 102, at 25 (referring to U.N. Security Council Resolution 1255 proclaiming the right of all refugees and displaced persons to return to their homes in Georgia).

<sup>284</sup> See U.N. Charter art. 24(1) (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”); *id.* art. 37(2) (“If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.”); *id.* art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”). Chapter I of the Charter, describing the organization’s “purposes and principles,” declares that the U.N.’s dispute settlement function is to be exercised “in conformity with the principles of justice and international law . . .” U.N. Charter art. 1(1). However, saying that U.N. organs should follow principles of international law is very different than saying that those organs’ pronouncements themselves constitute binding international law.

<sup>285</sup> It should always be the case that the Security Council directs conflicts to be solved in ways that accord with international law. And consistent Security Council action over time on a given issue contributes greatly to the development of norms of CIL. But the relationship between Security Council action and CIL is oblique.

practice substantially post-dating the conflict which created the Palestinian refugee problem.<sup>286</sup> This Section demonstrates that, at the time of the 1947–49 conflict, there was no established CIL requiring that a state in Israel’s position allow refugees, situated as the Palestinian refugees were—that is, refugees from an unsettled ethnic conflict, who lacked the nationality of the state to which they sought to return—to return to their homes. In addition, this Section shows that CIL did not prohibit the transfer or expulsion of civilian populations situated as the Palestinian population was in 1947–49. CIL norms against forced movement of populations and in favor of refugee repatriation developed only in the decades after the 1947–49 conflict. Even then, there are reasons to question whether CIL has crystallized in a way that applies to the highly unique facts of the case of Palestinian refugees from 1947–49. It is not necessary to answer this definitively, however, because CIL is not retroactive. This Section discusses these issues primarily through discussion of several sets of data I have collected on state practice related to mass population expulsions and refugee repatriation. An extraordinary amount of human suffering was caused by the many mass expulsions and compulsory population transfers of the twentieth century that are discussed in this section. My conclusions about legality under CIL at the time of the 1947–49 conflict are not meant to somehow deny or minimize that fact.

5.1. *Compulsory Transfer, Mass Expulsion or Coerced Flight of Ethnic Groups*<sup>287</sup>

According to an expert on ethnic conflict in Europe, “forcibly moving populations defined by ethnicity (race, language, religion, culture, etc.) to secure a particular piece of territory . . . has been an instrument of nation-state creation for as long as homogeneous

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<sup>286</sup> See, e.g., BOLING, *supra* note 258, at 12–17; TAKKENBERG, *supra* note 3, at 230–50; Abunimah & Ibish, *supra* note 102, at 21–25; Quigley, *supra* note 3, at 211–26.

<sup>287</sup> These are not legal terms of art. By “compulsory transfer,” I mean a movement of a mass of people across an international border pursuant to an international agreement. By “mass expulsion,” I mean a movement of a mass of people across an international border by the unilateral action of one government, accomplished by official force or compulsion. By “coerced flight,” I mean a movement of a mass of people across an international border, caused by actions of government officials or private citizens acting with their connivance, which created fear in the affected population.

nation-states have been the ideal form of political organization.”<sup>288</sup> This actually substantially understates the longevity of the practice. Long before the nation-state emerged, rulers forcibly removed ethnic or religious groups for political, military or other reasons of state. While population transfer or ethnic cleansing became particularly prevalent after the birth of the modern nation-state, as noted by the U.N.’s special rapporteurs of the 1993 report *The Human Rights Dimension of Population Transfer*, “population transfer has prevailed as an instrument of State-craft in every age in recorded history . . . .”<sup>289</sup>

The normative status of population transfers or mass expulsions in international law has changed over time and has varied by factual context. By the first decade of the twentieth century, the international community was generally recognizing the illegality of the deportation of the population of *foreign* territory by a wartime *occupying army*.<sup>290</sup> But outside this narrow context, international law had not developed prohibitions on compulsory population transfer or mass expulsion. On the contrary, compulsory transfer of populations in order to solve longstanding ethnic disputes was generally recognized as legal. As Professor Ewa Morawska has noted:

[A]t the beginning of the twentieth century and still in the early post-World War II era ethnic homogeneity was perceived by international organizations and governments of the Western world as beneficial for nation-states, and the step toward this purpose—forced unmixing of people—as

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<sup>288</sup> Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. Q. 817, 818 (1998).

<sup>289</sup> Special Rapporteurs on the Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers and Settlements, *Preliminary Report on the Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, ¶ 10, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/17 (July 6, 1993) (by Awn Shawkat Al-Khasawneh & Ribot Hatano). Indeed, the history of the Jewish people provides many examples of the prevalence of ethnic cleansing and forced migration over the millennia.

<sup>290</sup> As noted above, the 1907 Hague Convention about the laws of war on land contained general principles which seem to prohibit such deportation. See *supra* Section 4.1.2. These principles were substantially strengthened by the 1949 Geneva Conventions and the post-World War II war crimes prosecutions.

internationally sanctioned as the lesser evil to continued interethnic turmoil.<sup>291</sup>

Another expert on population transfers and ethnic cleansing concurs:

[The post-World War I] boundaries unavoidably created both new nation-states and with them new national minorities that could potentially threaten the territorial division of the postwar settlement through separatism or irredentism. Ethnic cleansing—then [referred to as] population transfer—was viewed as a legitimate means of overcoming these national discrepancies (i.e., of improving the fit between national boundaries and the ethnic composition of the population within them).<sup>292</sup>

During the inter-war period, the 1923 Treaty of Lausanne, with its provisions for the compulsory return of Greek and Turkish populations to their ethnic homelands, “became an oft-cited precedent” for the legality and desirability of population transfer “throughout the 1920s, 1930s, and 1940s.”<sup>293</sup> The League of Nations’ approval of the compulsory Greece-Turkey population exchange treaty in 1923 was discussed above.<sup>294</sup> The Greece-Turkey population exchange

was hailed by many as a legal measure intended to bring peace on the basis of an international treaty and under the auspices of the League of Nations. Thus, State interests were given priority over human rights and mass expulsions gained international respectability as a legitimate solution of demographic problems . . . .<sup>295</sup>

During the inter-war years, the problem of refugees in Europe became acute, and the seeds of the later international legal and

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<sup>291</sup> Ewa Morawska, *Intended and Unintended Consequences of Forced Migrations: A Neglected Aspect of East Europe’s Twentieth Century History*, 34 INT’L MIGRATION REV. 1049, 1067 (2000).

<sup>292</sup> Preece, *supra* note 288, at 823.

<sup>293</sup> *Id.* at 825. (citing Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT’L L.J. 207, 222–23 (1975).

<sup>294</sup> See *supra* notes 39–41 and accompanying text. See also *infra* Appendix Table 1 (case 13).

<sup>295</sup> de Zayas, *supra* note 60, at 20. See also Benvenisti & Zamir, *supra* note 13, at 321 (“This [Treaty of Lausanne] approach to potential interethnic violence was later praised as the optimal solution . . .”).

institutional regime for handling refugee flows started to develop. Refugees came from the great “unmixing of populations” in the Balkans and Eastern Europe; the disappearance of the Ottoman, Austro-Hungarian and Russian empires and emergence of new territorial states; the Bolshevik revolution in Russia and the rise of fascism in Italy and Nazism in Germany.<sup>296</sup> In this period, “three norms characterized the international refugee regime: asylum, assistance, and burden-sharing.”<sup>297</sup> Repatriation was not a significant part of the regime that actually developed in practice. Respect for the sovereignty of states was still high, and a state’s decisions to expel or admit peoples were more or less sacrosanct.<sup>298</sup> Many refugee host states did view voluntary “repatriation as the best solution to their refugee problems.”<sup>299</sup> This was not because repatriation was viewed as legally obligatory, but for practical reasons; financial considerations were important, as was concern about the potentially disruptive social and political effects of armed, irredentist, politically radicalized or otherwise troublesome refugee populations.<sup>300</sup> Prejudice, particularly against Jewish refugees, also motivated some host governments’ preference for repatriation.<sup>301</sup> But despite a preference for repatriation,

[it] did not play a significant part in the achievement of durable solutions for refugees in the Inter-war Period. More often than not, refugee-producing countries would not accept refugees back into their territories, and the refugees did not want to return to their home countries because of the danger of persecution there.<sup>302</sup>

Additional compulsory population transfer agreements were concluded after the Treaty of Lausanne in 1923, further demonstrating the perceived legality of the practice of ethnic transfer. The bilateral agreements that brought ethnic Germans back to Germany at the beginning of World War II were generally compulsory.<sup>303</sup> The Craiova Agreement of September 1940,

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<sup>296</sup> See CLAUDENA M. SKRAN, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME* 16–20 (1995).

<sup>297</sup> *Id.* at 68.

<sup>298</sup> *See id.* at 67–68, 72, 156.

<sup>299</sup> *Id.* at 148.

<sup>300</sup> *See id.* at 38–39, 149–50, 153.

<sup>301</sup> *See id.* at 40.

<sup>302</sup> *Id.* at 148.

<sup>303</sup> *See infra* Appendix Table 1 (cases 22–27).

concluded by Bulgaria and Romania, also provided for the compulsory transfer of ethnic minorities.<sup>304</sup> The massive compulsory transfers of Sudeten Germans and other ethnic minorities approved by the victorious allied powers at the 1945 Potsdam conference was introduced above.<sup>305</sup> With the approval of the victorious powers, approximately twenty million people belonging to ethnic minority populations in Eastern Europe were transferred at the end of World War II. This was considered a legal and rational way to align ethnic nations with territorial boundaries and, it was hoped, to thereby resolve one of the causes of the conflicts that had so badly scarred Europe.

Of the post-World War II expulsion of German minorities from newly-liberated Eastern Europe, Churchill said:

[E]xpulsion is the method which, so far as we have been able to see, will be the most satisfactory and lasting. There will be no mixture of populations to cause endless trouble . . . A clean sweep will be made. I am not alarmed by these large transferences . . .<sup>306</sup>

Roosevelt agreed that the Allies “should make some arrangements to move the Prussians out of East Prussia the same way the Greeks were moved out of Turkey after the last war . . . [;] while this is a harsh procedure, it is the only way to maintain peace . . .”<sup>307</sup>

Thus, during and after both world wars, but particularly World War II, many statesmen and international lawyers in the West had come to believe that compulsory population transfer was an unpleasant but sometimes necessary tool to resolving certain ethnic conflicts, which had defied other solutions.<sup>308</sup> In the wake of both world wars,

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<sup>304</sup> See *infra* Appendix Table 1 (case 31).

<sup>305</sup> See *supra* notes 59–62 and accompanying text; see also *infra* Appendix Table 1 (case 45). In recent years, the Czech government reaffirmed the legality of the transfers of Sudeten Germans, and although groups of surviving expellees and their descendants claimed that the Czechs should make some kind of reparations before being allowed to join the European Union, no EU member state or institution endorsed that view. See Waters, *supra* note 60, at 86, 90, 93–97.

<sup>306</sup> See Preece, *supra* note 288, at 828 (citing ALFRED DE ZAYAS, NEMESIS AT POTSDAM: THE ANGLO-AMERICANS AND EXPULSION OF THE GERMANS 1 (1979)). Cf. Benvenisti & Zamir, *supra* note 13, at 322 n.146 (citing 406 PARL. DEB. H.C. (5th ser.) (1944) 1484 (U.K.)) (noting that Churchill was influenced by the view that the Greek-Turkish population exchange had been a success).

<sup>307</sup> Preece, *supra* note 288, at 828 (citing DE ZAYAS, *supra* note 306, at 8).

<sup>308</sup> See JUDT, *supra* note 60, at 25–28; JOSEPH B. SCHECHIMAN, POSTWAR POPULATION TRANSFERS IN EUROPE, 1945–1955, at 389–95 (1962); see also J.R., *The*

sizeable minorities were viewed as sources of instability . . . by the great continental and world powers.

Discontented minorities could either be a focal point in themselves for the interventionist or irredentist goals of neighbouring states with some ethnic or religious affinity, or a cause of internal disturbance which might, if severe enough, again trigger external intervention. Either eventuality might lead to inter-state warfare, the avoidance of which was the main concern of statesmen . . . .<sup>309</sup>

Diplomats saw two means of dealing with this problem: "guaranteed minority protection" and "internationally sanctioned minority eviction."<sup>310</sup>

"[P]opulation exchange" was the "diplomatic solution of last resort . . . ." <sup>311</sup> The Allied powers, "from 1942 onwards, became enamoured of compulsory population transfer as a potential solution to the problem of rendering nation and state co-terminous . . . ." <sup>312</sup> At the time of the Israeli-Arab conflict of 1947-49, far from being illegal, large-scale involuntary population transfers were an accepted feature of international statecraft. According to Stefan Wolff:

[O]nly in the post-Cold War period has there been universal condemnation of ["ethnic cleansing"]. For almost 100 years prior, many states in their search for internal

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*Exchange of Minorities and Transfers of Population in Europe Since 1919*, 21 BULL. INT'L NEWS 657, 657 (1944) (noting that during World War II both democratic and autocratic countries of Europe were coming to the view that "the policy of compulsory transfer of population [was a] solution of the minorities problem . . . ."); Preece, *supra* note 288, at 826-27 ("Enthusiasm for ethnic cleansing as a solution to outstanding minority problems was not confined to the Axis powers. As World War II progressed, both the British and US governments also came to believe that population transfers would play a key role in the postwar settlement.").

<sup>309</sup> Donald Bloxham, *The Great Unweaving: The Removal of Peoples in Europe, 1875-1949*, in REMOVING PEOPLES: FORCED REMOVAL IN THE MODERN WORLD 167, 199 (Richard Bessel & Claudia B. Haake eds., 2009).

<sup>310</sup> *Id.* at 200. Cf. CLAUDE, *supra* note 267, at 191 ("The wartime trend toward the general acceptance of the principle of transfer of populations as a solution for difficult minority problems has continued during the early years of United Nations activity, and has to some extent been fostered by the world organization.").

<sup>311</sup> Bloxham, *supra* note 309, at 206-07.

<sup>312</sup> KARL CORDELL & STEFAN WOLFF, GERMANY'S FOREIGN POLICY TOWARDS POLAND AND THE CZECH REPUBLIC 109 (2005).



stability and external security have sought to minimize the political impact of ethnic minorities . . . by expelling them or exchanging them for ethnic kin of their own.<sup>313</sup>

In the wake of World War II, the Soviet Union engaged in compulsory population exchanges of ethnic minorities with Czechoslovakia, as did the Soviet Union with Poland, and Hungary with Czechoslovakia.<sup>314</sup> At the same time, approximately one million Japanese emigrants in China were transported back to Japan by the Chinese government operating with U.S. military support.<sup>315</sup> The Soviet Union engaged in ethnic cleansing on a massive scale, expelling hundreds of thousands of ethnic minorities from new territories it incorporated by war. For instance, approximately 400,000 ethnic Japanese were removed from Sakhalin Island, about 400,000 ethnic Finns from Soviet-incorporated Karelia, and about 420,000 Estonians, Latvians, and Lithuanians during the armed resistance to Soviet rule of the Baltics.<sup>316</sup> The Soviets also expelled approximately 1.5 million ethnic Poles and surviving Polish Jews.<sup>317</sup>

None of these compulsory transfers or mass expulsions was authoritatively declared or widely understood to be illegal at the time it occurred. On the contrary, as described above, international institutions and powerful states approved many of these actions. Nor was a requirement of a “right of return” for the expelled or transferred authoritatively enunciated with regard to these actions. What was declared illegal at the time was the Nazi practice of deporting—often to their death in work camps or death camps—the civilian populations of wartime occupied countries. But as discussed, that does not describe the situation in Palestine in 1947–

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<sup>313</sup> STEFAN WOLFF, *ETHNIC CONFLICT: A GLOBAL PERSPECTIVE* 141 (2006). Cf. Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT’L L. 1091, 1120 (1998) (“Whereas in the first half of the twentieth century population transfers were accepted as a means of resolving and avoiding ethnic conflicts, as the century draws to a close, the international community now seeks to maintain or recreate multi-ethnic communities. Population transfers and mass expulsions are now deemed to violate international law, and voluntary return and repatriation have come to occupy a fundamental part of refugee policy . . .”).

<sup>314</sup> See *infra* Appendix Table 1 (cases 47, 40 and 48, respectively).

<sup>315</sup> See *infra* Appendix Table 1 (case 50).

<sup>316</sup> See *infra* Appendix Table 1 (cases 41, 37 and 52, respectively).

<sup>317</sup> See *infra* Appendix Table 1 (case 40).

49, and so the international legal rules developed in that context did not apply.<sup>318</sup>

### 5.2. *Ethnic Armed Conflict and the Creation of New States*

To get another view of potentially relevant state and international practice, in order to help determine whether the expulsion of the Palestinian refugees in 1947–49 was illegal or whether return was required, I sought to create a data set of conflicts similar in relevant respects to the Israeli-Palestinian conflict. This has proved a difficult task because the Israeli-Palestinian conflict is, in some respects, *sui generis*. Decolonization has created many new states, and has often been associated with ethnic armed conflict. However, Britain's decision to simply withdraw from its international trusteeship over Mandate Palestine before any new states were created—and hence before borders or rules of citizenship settled—made the conflict of 1947–49 unique. The “decolonization” created by the collapse of the Austro-Hungarian, Ottoman, and Russian empires during and after World War I was managed by the victorious Allied powers through multilateral and bilateral treaties and agreements, which provided the international borders within which citizenship norms could be applied.<sup>319</sup> The decolonization of Africa, Asia, and the Middle East after World War II almost everywhere followed the rule of *uti possidetis*, a norm of territorial integrity—that is, stability of previous boundaries.<sup>320</sup> Hence, when colonial regimes fell or were removed, there were clearly designated international boundaries in place, even if groups within those states contested their continued inclusion in the state. But from the outset, Mandate Palestine was pledged to two peoples, both of whom wanted exclusive states within the same territory. From the outset, and to this day, there has been no definitive agreement about whether one or two states should exist within the territory of the

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<sup>318</sup> See *supra* Section 4.1.

<sup>319</sup> See, e.g., *infra* Appendix Table 1 (case 10).

<sup>320</sup> See SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *UTI POSSIDETIS* 3–4 (2002) (defining *uti possidetis* as a principle for maintaining territorial stability and preexisting borders in the creation of new states, whether through decolonization, dissolution of a state, or separatism); see also Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, ¶ 62–63 (Dec. 22); Land, Island and Maritime Frontier Dispute (El Sal. v. Hond: Nicar. intervening), 1992 I.C.J. 351, ¶ 67, 95–96 (Sept. 11) (showing the court's resistance to altering established boundaries).

former Mandate, and, if two, where the international borders should lie. This fundamental and persistent uncertainty over sovereignty, authority, borders, and citizenship has rendered the Israeli-Palestinian conflict unique, and international norms developed in more ordinary circumstances arguably inapplicable.

To create a set of situations potentially analogous to the conflict over the emergence of Israel, I focused only on civil or internal wars where the parties disputed control over a piece of territory. I also looked only at ethnic or ethnic-religious civil wars, as opposed to ones driven primarily by political or ideological commitments. The intense desire to create a national home for their own ethnic group<sup>321</sup> was a commitment shared by both Jews and Arabs in 1947–49. Because the conflict was ethnic and territorial, each side directed its force not only against the enemy's combatants, but, occasionally, at the opposing civilian population as well.<sup>322</sup> Conflicts sharing these characteristics are fundamentally different than the many ideological or political civil wars that disfigured the second half of the twentieth century. These ideological or political civil wars were often settled when one side agreed to live under the political-social system preferred by its adversary, or when both sides compromised and created a new unity-type government. Political beliefs and governmental structures are mutable, unlike ethnicity.<sup>323</sup> This is crucial to the development of CIL, because the intention of the government allowing or refusing the return of refugees is key. A government might well be perfectly happy to invite home the civilian population of a rival political movement that had given up the struggle and now desired peace and

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<sup>321</sup> Cf. Charles King, *The Benefits of Ethnic War: Understanding Eurasia's Unrecognized States*, 53 *WORLD POL.* 524, 527 (2001) ("Ethnic groups may feel that a particular piece of real estate is historically theirs and that allowing it to be controlled by an alien group would be tantamount to national betrayal.").

<sup>322</sup> Cf. Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Wars*, 20 *INT'L SECURITY* 136, 139 (1996) ("War hardens ethnic identities to the point that cross-ethnic political appeals become futile, which means that victory can be assured only by physical control over the territory in dispute.").

<sup>323</sup> See *id.* at 138–40 (asserting that ethnic conflicts are fundamentally distinct from ideological ones because "ideological loyalties are changeable and difficult to assess," whereas ethnic loyalties "are both rigid and transparent"); Carter Johnson, *Partitioning to Peace: Sovereignty, Demography, and Ethnic Civil Wars*, 32 *INT'L SEC.* 140, 147 (2008) ("In contrast to ideological wars, where loyalties are more fluid both during and after combat, in ethnic wars, members of one ethnic group are far less likely to fight for the opposing side, dividing communities and making post-war reconciliation in an intermingled state very difficult—some would argue impossible.").

political-ideological conformity. A voluntary repatriation like that does not have the *opinio juris* that CIL requires to make a rule binding against the will of the government, especially in other dissimilar contexts.

Once I assembled a set of potentially analogous ethnic conflicts in which groups fought over the creation of a new state—found in Table 2 of the Appendix—I analyzed the events and circumstances of the conflicts to determine whether there were large-scale expulsions of ethnic opponents and, if so, whether and under what circumstances refugees were repatriated. Most importantly, I looked for evidence that states (or ethnic groups in the process of creating states) *refrained* from expelling their ethnic opponents, even if noncitizens, *because of the belief that it would be illegal* under CIL, or for evidence that states *allowed the repatriation* of their expelled ethnic opponents, even if noncitizens, *because of a belief that it was legally required* by CIL.<sup>324</sup> I found no evidence of these occurrences in the conflicts predating the 1947–49 Israeli-Palestinian conflict.<sup>325</sup> As discussed above, during the period from World War I through the aftermath of World War II, repatriation was not a significant part of the international regime for handling refugees; moreover, compulsory transfer of ethnic minority groups was considered legal and desirable in many circumstances. This is additional evidence that neither the expulsion of nor the refusal to repatriate the Palestinians was illegal at the time it occurred. As the twentieth century progressed and human rights law and other forms of international law developed stronger protections for rights, customary norms against expulsion and in favor of repatriation emerged. This evidence is discussed in the next part.

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<sup>324</sup> See MALANCZUK, *supra* note 124, at 44 (describing how evidence of customary international law for restrictive versus permissive rules is located and analyzed).

<sup>325</sup> I recognize that being unable to locate evidence does not prove that no evidence in fact exists. But it is noteworthy that the voluminous literatures on ethnic cleansing and refugee repatriation do not appear to document any prominent cases of the described phenomenon occurring, and my review of historical monographs about the individual conflicts and individual states also did not locate any. In any event, even if my research missed some instances of states suggesting that they believed themselves required by international law to refrain from expelling persons or to allow them to return, these events would have been insufficient to create a rule of CIL. A widespread and general practice of many states over time is required for CIL to develop, and this plainly had not occurred as of 1947–49.

### 5.3. Major Repatriations of Refugees, 1992–2008

A legal norm requiring repatriation of refugees has emerged only at the end of the twentieth century, and its development was driven by powerful non-legal forces. Wealthier Western countries were increasingly loath to take in large numbers of refugees from the Third World, and poorer countries lacked the financial means to deal with the burdens imposed by hosting large refugee populations.<sup>326</sup> There were many reasons for this. The end of the Cold War is frequently cited as one reason why the developed world changed its views about the desirability of taking in refugees.<sup>327</sup> For less developed and stable host states, a primary reason they came to favor repatriation is that refugees, “especially when remaining in border regions, frequently become politically active against their home government,” and not infrequently launch or continue guerilla wars from their state of refuge.<sup>328</sup> In addition, the presence of refugees can “create an unstable ethnic balance in the receiving state that encourages a previously oppressed minority to confront the state.”<sup>329</sup> Ideological and legal changes were also important, as international norms against statelessness, deprivation of nationality, forced removal from one’s home territory, and ethnic separatism gained strength. But the powerful non-legal motives driving changes in state behavior

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<sup>326</sup> See, e.g., B. S. Chimni, *Post-Conflict Peace-Building and the Return of Refugees: Concepts, Practices and Institutions*, in *REFUGEES AND FORCED DISPLACEMENT: INTERNATIONAL SECURITY, HUMAN VULNERABILITY, AND THE STATE* 195, 195 (Edward Newman & Joanne van Selm eds., 2003) (noting the de-emphasis on “[l]ocal integration and resettlement” due to the global North not accepting the evolving demographic and political profiles of refugees and the global South not having the resources to care for refugee populations); Rosand, *supra* note 313, at 1105–06 (explaining the European Community’s effort to limit refugees from the former Yugoslavia in the early 1990s through increased funding for programs meant to care for the refugees within that territory and thereby keep them there).

<sup>327</sup> See, e.g., Monica Duffy Toft, *The Myth of the Borderless World: Refugees and Repatriation Policy*, 24 *CONFLICT MGMT. & PEACE SCI.* 139, 144 (2007) (citation omitted) (“The end of the Cold War had magnified every variable of the refugee equation. Instead of trickles of skilled, educated, and enterprising refugees, OECD countries would soon be bracing to receive floods of peoples of all ages, skills, and backgrounds.”).

<sup>328</sup> John R. Rogge, *Africa’s Resettlement Strategies*, 15 *INT’L MIGRATION REV.* 195, 200 (1981); cf. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 662 (2005) (“Particularly in Africa, the expulsion of refugees is often linked to the fear that their presence will embroil the host state in armed conflict, or retaliatory attack.”).

<sup>329</sup> Sarah Kenyon Lischer, *Security and Displacement in Iraq: Responding to the Forced Migration Crisis*, 33 *INT’L SEC.* 95, 101 (2008).

counsel caution before assuming that a state's view that refugee repatriation is desirable reflects requisite *opinio juris*—belief that the action is legally required, as must be true if CIL is to develop.

Accurate and comprehensive data about refugee movements have always been hard to obtain.<sup>330</sup> The best sources of data on historical refugee flows and refugee repatriation are the statistical yearbooks produced by the United Nations High Commissioner for Refugees (“UNHCR”). Comprehensive UNCHR data on the number of refugees voluntarily repatriating in a given year is readily available going back only to 1992. I assembled the available data into Table 3 of the Appendix. According to the UNHCR data, sizeable voluntary repatriations have occurred in twenty-one countries since 1992. I define this as a repatriation of ten thousand or more refugees in a given year, and 100,000 or more during the 1992–2008 period.<sup>331</sup>

CIL is by definition not retroactive, and therefore a norm emerging only in the 1990s—if that is what the UNHCR data show—will not be binding in 1947–49. But looking at the data set from the 1990s and 2000s is still instructive because, as discussed below, each of these repatriations in recent decades involved circumstances that arguably can be distinguished from those of the Palestinian refugees. Each major voluntary repatriation is marked by differences that make any analogy to the Israeli-Palestinian situation strained if not inapposite. As a result, even today, CIL may not have developed to a point where it is fully applicable to the precise situation of the Palestinian refugees of 1947–49. My claim is not that CIL must have developed in precisely similar prior contexts in order to bind states, but rather that the Israeli-Palestinian situation is so dissimilar in so many ways that there is a

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<sup>330</sup> Refugee flows are typically produced by violent and chaotic events that are, by their nature, opaque to outsiders. Whereas militaries have an interest in keeping track of their own, typically no one in a conflict zone is charged with identifying and counting refugees. Refugees do not all flee in the same directions, or end up in obvious or known places of refuge, making behind-the-front-lines counting inaccurate. Many refugee flows are produced by internal conflicts in which the regime in power denies outsiders access to the battlefield and to affected civilian populations. Often, all sides in a conflict—and perhaps NGOs as well—have an interest in under- or over-counting refugees, or counting some but not other fleeing populations as actual refugees. It has always been difficult to distinguish between actual refugees fleeing violent conflict or other persecution, on the one hand, and economic migrants, perhaps opportunistically using the chaos to flee, on the other.

<sup>331</sup> See *infra* Appendix Table 3.

serious question whether today's CIL covers it—even if CIL were retroactively applicable, which it is not.

The reasons why the twenty-one major repatriations documented by the UNHCR differ from the situation of the Palestinian refugees are numerous. First, a chief difference between any envisioned Palestinian return and the actual returns that have occurred worldwide since 1992 is that, unlike the refugees involved in modern returns, virtually all of the Palestinian refugees from 1947–49 were and are not citizens of the country to which they desire to return.<sup>332</sup>

Second, another important distinguishing factor is the size of the returning refugee population as a percentage of the population of the receiving state. In 1949, the number of Palestinian refugees was close to equal to the total number of Jews in Israel.<sup>333</sup> But in every case of a sizeable refugee repatriation since 1992, even the largest repatriations (measured by size of returning refugee populations relative to the population of the receiving state) do not approach such equivalence. Consider Bosnia, to which about 1.7 million refugees returned, representing about thirty-seven percent of the population.<sup>334</sup> A more representative case, in percentage terms, is Afghanistan, to which about five million refugees returned, representing about eighteen percent of the population.

Third, major repatriations almost always occur not during a state of war, but instead following a formal cessation of hostilities or comprehensive peace treaty (often after a decisive military resolution has been achieved). During the Bosnian War (1992–95), Slobodan Milosevic's campaign to create a "Greater Serbia" led to the internal displacement of some 1.8 million (perhaps thirty-nine

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<sup>332</sup> For a discussion of the Palestinian refugees' lack of Israeli citizenship, see *supra* note 103 and accompanying text, and Section 4.4. There is an additional complicating factor making return difficult, which is that the Palestinian Arab refugees are ethnically and religiously different from Jewish Israelis, and that many members of each group have ethnically and religiously centered notions of what their homeland should be and who should govern it.

<sup>333</sup> Palestinian refugees outside Israel numbered about 600,000 to 760,000; well over 100,000 Palestinians remained in Israel after the war; and the 1949 population of Israel contained about 900,000 Jews. See *supra* notes 95–96, 99 and accompanying text.

<sup>334</sup> For the total population, see *The World Factbook: Bosnia and Herzegovina* CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html> (last visited Oct. 17, 2012).

percent of the Bosnian population).<sup>335</sup> His military reverses, armed intervention by the North Atlantic Treaty Organization (“NATO”), and the Dayton Peace Accords allowed a Bosnian return;<sup>336</sup> some 226,000 returned in the first three years after peace. Some 194,000 Iraqis returned home in 2004, after Saddam Hussein’s defeat by U.S.-led coalition forces. Civil war in Mozambique ended with a peace treaty in 1992.<sup>337</sup> About 159,000 refugees returned that year; and 1,408,000 did in the two years after that.<sup>338</sup> In 1999 the U.N. supervised a popular referendum in which the East Timorese voted for independence from Indonesia.<sup>339</sup> Under the administration of the U.N.’s Transitional Administration in East Timor (UNTAET),<sup>340</sup> that year some 128,000 returned to old homes in a new nation.<sup>341</sup> There are many other instances of this—large-scale, voluntary repatriation of refugees documented by the UNHCR following the end of a conflict and signing of a peace treaty.<sup>342</sup> Out of the twenty-one major refugee repatriations from 1992 to 2008, only in Mali, Togo, and Myanmar did repatriation

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<sup>335</sup> See Henry Kamm, *Yugoslav Refugee Crisis Europe’s Worst Since 40’s*, N.Y. TIMES, July 24, 1992, at A1.

<sup>336</sup> See HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS: LAWS, CASES, AND MATERIALS 31 (Scott Leckie ed., 2007) (excerpting the refugee right of return provisions of the General Framework Agreement on Peace in Bosnia-Herzegovina (Dayton Peace Agreement)—Annex 7: Agreement on Refugees and Displaced Persons (1995)).

<sup>337</sup> See HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS, *supra* note 336, at 30 (excerpting the repatriation and reintegration provisions of The Rome Process: General Peace Agreement for Mozambique (1992)).

<sup>338</sup> See *infra* Appendix Table 3.

<sup>339</sup> See, e.g., Jose Gusmao, *Reconciliation, Unity and National Development in the Framework of the Transition Toward Independence*, in GUNS AND BALLOT BOXES: EAST TIMOR’S VOTE FOR INDEPENDENCE 1 (Damien Kingsbury, ed., 2000).

<sup>340</sup> See S.C. Res. 1272, ¶ 12, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (establishing and describing the role of the transition government in East Timor).

<sup>341</sup> See *infra* Appendix Table 3.

<sup>342</sup> See HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS, *supra* note 336, at 30–31, 36–38, 41–43 (excerpting the repatriation provisions of the Cotonou Agreement (1993) (Liberia); Arusha Peace Agreement (1993) (Rwanda); Erdut Agreement (1995) (Croatia); Arusha Peace and Reconciliation Agreement (2000) (Burundi); Agreement between the Federal Democratic Republic of Ethiopia and the State of Eritrea (2000); Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties (2003); and Comprehensive Peace Agreement—Agreement on Wealth Sharing during the Pre-Interim and Interim Period (2004) (Sudan)).



occur without a comprehensive peace treaty that ended large-scale hostilities. Togo and Mali had faced internal turmoil but not full-blown civil or inter-state war; repatriations followed political liberalization and transitions to new governments.<sup>343</sup> In Myanmar, most of the refugees returned during a brief respite in the military junta's active repression. Returns following peace agreements – or returns to societies where no wide-spread armed conflict calling for a comprehensive peace has occurred – are not robust precedent for a return in the absence of peace.

Fourth, from 1992 to 2008 internationally sanctioned military forces were present for eighteen out of the twenty-one major repatriations.<sup>344</sup> United Nations peacekeeping forces were deployed at the relevant times in Angola, Bosnia and Herzegovina, Burundi, Croatia, the Democratic Republic of Congo, Eritrea, Ethiopia, Macedonia, Liberia, Mozambique, Rwanda, the Federal Republic of Yugoslavia, Sierra Leone, Somalia, and East Timor.<sup>345</sup>

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<sup>343</sup> See JENNIFER C. SEELY, *THE LEGACIES OF TRANSITION GOVERNMENTS IN AFRICA: THE CASES OF BENIN AND TOGO* (2009); SUSSANA D. WING, *CONSTRUCTING DEMOCRACY IN AFRICA: MALI IN TRANSITION* (2010).

<sup>344</sup> Again, only in Mali, Myanmar, and Togo was this not the case.

<sup>345</sup> The U.N. peacekeeping missions were:

- i. United Nations Angola Verification Mission II (UNAVEM II) (1991–1995) and UNAVEM III (1995–1997)
- ii. United Nations Operation in Burundi (ONUB) (2004–2006)
- iii. United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (1999–present)
- iv. United Nations Mission in Ethiopia and Eritrea (UNMEE) (2000–2008)
- v. United Nations Mission in Liberia (UNMIL) (2003–present)
- vi. United Nations Operation in Mozambique (ONUMOZ) (1992–1994)
- vii. United Nations Assistance Mission for Rwanda (UNAMIR) (1993–1996)
- viii. United Nations Mission in Sierra Leone (UNAMSIL) (1999–2005)
- ix. United Nations Operation in Somalia I (UNOSOM I) (1992–1993) and (UNOSOM II) (1993–1995)
- x. United Nations Transitional Administration in East Timor (UNTAET) (1999–2002)
- xi. United Nations Protection Force (UNPROFOR) (initially in Croatia and extended to Bosnia and Herzegovina, the Federal Republic of Yugoslavia (Serbia and Montenegro) and the former Yugoslav Republic of Macedonia) (1992–1995)
- xii. United Nations Confidence Restoration Operation (UNCRO) (replaced UNPROFOR in Croatia) (1995–1996).

*Current Peacekeeping Operations*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/operations/current.shtml> (last visited Oct. 17, 2012). *Past*

African Union peacekeeping forces were deployed in Somalia and Sudan. Repatriations in Bosnia and Herzegovina, Macedonia, Afghanistan, and Sudan took place, in part, under the aegis of NATO armed forces.<sup>346</sup> In Iraq, the U.S.-led international military coalition operated under the authority of the U.N. Security Council from 2003 through 2008.<sup>347</sup>

Fifth, the time elapsed between displacement and return varies, but in the last two decades, most major refugee repatriations have occurred shortly after displacement. Only a handful of extant conflicts in the world today feature refugee populations claiming a right of return, or a right to territory, after more than fifteen years. They include Cyprus (four decades), Kashmir (six decades), and, of course, Palestinians, who were displaced some six decades ago. By contrast, most Bosnians returned within three years of their displacement. Most Eritrean refugees returned home within four years of the peace agreement with Ethiopia and arrival of U.N. peacekeepers.<sup>348</sup> As time goes on, return is less plausible. For instance, the Burundi Civil War (1993–2005), between the Tutsi-dominated government and Hutu rebels, left an estimated 250,000

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*Peacekeeping Operations*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/operations/past.shtml> (last visited Oct. 17, 2012).

<sup>346</sup> In Bosnia and Herzegovina, NATO's Operation Deliberate Force (1995) was followed by a U.N.-mandated "Implementation Force" (IFOR) comprised of nearly sixty thousand troops. A NATO "Stabilization Force" (SFOR), with thirty-two thousand troops, was deployed in December 1996. EU forces took over in December 2004. *Peace Support Operations in Bosnia and Herzegovina*, N. ATL. TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_52122.htm](http://www.nato.int/cps/en/natolive/topics_52122.htm) (last updated June 5, 2012). In Macedonia, three operations took place between August 2001 and March 2003. See *Peace Support Operations in the Former Yugoslav Republic of Macedonia*, N. ATL. TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_52121.htm](http://www.nato.int/cps/en/natolive/topics_52121.htm) (last updated Mar. 5, 2012) (explaining NATO's role in subduing tensions between ethnic Albanians and the Skopje government). In Afghanistan, NATO's largest commitment, the International Security Assistance Force (ISAF), with 130,000 troops, has operated since August 2003. *NATO and Afghanistan*, N. ATL. TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_8189.htm](http://www.nato.int/cps/en/natolive/topics_8189.htm) (last updated Dec. 3, 2012). In Sudan, NATO assisted the African Union peacekeeping forces between June 2005 and December 2007, coinciding with the first mass repatriation in a decade. *NATO Assistance to the African Union*, N. ATL. TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_8191.htm](http://www.nato.int/cps/en/natolive/topics_8191.htm) (last updated Mar. 30, 2012).

<sup>347</sup> See S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) (noting the role of and calling on member states and parties in Iraq to cooperate with the military occupation forces headed by the United States and United Kingdom); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) (extending the multi-national force-Iraq mandate until December 31, 2008).

<sup>348</sup> See *supra* notes 342 (citing peace agreement) and 344 (citing U.N. mission)

dead and displaced hundreds of thousands of people.<sup>349</sup> Those displaced during the war have since trickled home, except for a small group of thirteen thousand people who were first displaced in 1972.<sup>350</sup> In 2006, this group was resettled in the United States, after officials realized that their time abroad—many of them, of course, had never seen Burundi—would make it difficult to reintegrate.<sup>351</sup> This shows what difference a generation abroad can make—let alone, as with the Palestinians, two or more generations.<sup>352</sup>

Sixth, and finally, any consideration of whether a repatriation can serve as evidence of the development of a CIL right of return must account for the intent of the repatriating state. In many instances, it is questionable whether the nation resettling substantial numbers of refugees did so primarily out of a belief that international law required it. In the absence of this intent (*opinio juris*) by the states and other relevant actors involved, CIL does not form. Many states which “voluntarily” accept the return of their refugees are pressured to do so by neighbors who cannot or will not continue to bear the burdens and risks of supporting large refugee populations, by powerful outside states seeking to impose settlements on conflicts, and by the UNHCR or other international organizations.<sup>353</sup> Alternately, some states do, in truth, welcome back refugees voluntarily, motivated not primarily by legal norms, but by a desire to shore up support for a new, post-conflict regime or some other motives. This Article does not deny that *opinio juris*

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<sup>349</sup> *Burundi Rebel Group Expected to Disarm*, N.Y. TIMES, Sept. 12, 2006, at A10.

<sup>350</sup> *See Burundi Refugees to Settle in US*, BBC NEWS, Oct. 17, 2006, <http://news.bbc.co.uk/2/hi/africa/6058288.stm>.

<sup>351</sup> *See id.*

<sup>352</sup> In a 2003 report, U.N. Secretary-General Kofi Annan discussed proposals for property restitution between displaced Greek and Turkish Cypriots. U.N. Secretary-General, *Report of the Secretary-General on His Mission of Good Offices in Cyprus*, U.N. Doc. S/2003/398 (Apr. 1, 2003). He acknowledged that the preferred solution of the Greek Cypriots, full restitution of property, as opposed to the Turkish scheme of liquidation and exchange, prevailed in the former Yugoslavia, and further explained that the Cyprus situation was different because of “the fact that the events in Cyprus happened 30 to 40 years ago and that the displaced people (roughly half of the Turkish Cypriots and a third of the Greek Cypriots) have had to rebuild their lives and their economies during this time.” *Id.* at 24.

<sup>353</sup> *See, e.g.,* Jeff Crisp, *The Politics of Repatriation: Ethiopian Refugees in Djibouti*, 1977-83, 30 REV. AFR. POL. ECON. 73, 75 (1984) (scrutinizing the motives for cooperation between the governments of Djibouti and Ethiopia for attempting to repatriate Ethiopian refugees who had fled to Djibouti in order to escape war at home).

about refugee repatriation has been present in these conflicts, but simply points out the mixed motives which have driven preferences for repatriation by states and international organizations.

Analyzing the sizeable repatriations characterized as “voluntary” by the UNHCR reveals complex interactions between refugees, host states, states of origin, international organizations, and NGOs, with few instances where concerns about international legality seem to have played the dominant motivating role. Take Mozambique, for example, the largest repatriation to occur at the outset of the 1992–2008 period.<sup>354</sup> A long, bloody civil war ended in 1992 with an agreement between the government and the Resistência Nacional Moçambicana (RENAMO) rebel movement. The agreement guaranteed political and civil rights for all Mozambicans and allowed RENAMO and its leaders to participate in domestic politics without persecution.<sup>355</sup> The U.N., the government of Italy, and leaders of neighboring countries sponsored the peace talks and brokered the necessary deals. The civil war had wound down to the point of being resolvable because the Soviet Union, patron of the Mozambique government, and the white South African government, patron of the rebels, dramatically reduced assistance to their clients because of more pressing domestic exigencies—both regimes would soon fall. In October 1992, the U.N. Security Council authorized a peacekeeping force to oversee the cease-fire and the transition to a more democratic government in Mozambique.<sup>356</sup> In the first year after peace, approximately 200,000 refugees who had been camped in Malawi spontaneously crossed the border and returned home to Mozambique, without having been notified or assisted by any national or international organizations.<sup>357</sup> While this was occurring, the UNHCR and certain refugee host states—Malawi

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<sup>354</sup> See *infra* Appendix Table 3.

<sup>355</sup> See HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS, *supra* note 336, at 30 (excerpting The Rome Process: General Peace Agreement for Mozambique (1992) which pronounced the directives under which Mozambican refugees and displaced persons would be repatriated and reintegrated into society).

<sup>356</sup> S.C. Res. 782, U.N. Doc. S/RES/782 (Oct. 13, 1992). The U.N. force deployed in December of that year. See *Mozambique—ONUMOZ, Facts and Figures*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/onumozF.html> (last visited Oct. 17, 2012).

<sup>357</sup> See MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS 398 (1997).

and South Africa (the two states with the largest populations of refugees from Mozambique), as well as Zimbabwe—negotiated plans for refugee repatriation.<sup>358</sup> After the initial spontaneous return, however, fewer refugees agreed to return to Mozambique because food rations were available in refugee camps, but relatively less food was available to returnees in Mozambique.<sup>359</sup> So the UNHCR and cooperating NGOs stopped providing food to refugees in Malawi and South Africa.<sup>360</sup> As one author euphemistically puts it, this “encouraged” the return of refugees to Mozambique.<sup>361</sup> In these complex and untidy circumstances, it is difficult to discern a dominant role for *opinio juris*.

One might think this is an exceptional case. But take another massive refugee repatriation touted by the UNHCR as voluntary—the case of Rwandan refugees. In December 1996, Tanzania forcibly expelled approximately 500,000 Rwandan refugees, mainly Hutus, into Rwanda; Tanzania was concerned with military activities emanating from refugee camps and believed that many who had committed genocide were sheltered in the camps.<sup>362</sup> Burundi also forcibly expelled Rwandan refugees into Rwanda in 1996.<sup>363</sup> The new Tutsi-dominated Rwandan government had earlier agreed to accept the return of refugees,<sup>364</sup> because it hoped to protect fellow Tutsis, discover and arrest Hutu participants in

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<sup>358</sup> See Chris Dolan, *Repatriation from South Africa to Mozambique—Undermining Durable Solutions?*, in *THE END OF THE REFUGEE CYCLE? REFUGEE REPATRIATION AND RECONSTRUCTION* 85, 87 (Richard Black & Khalid Koser eds., 1999) (discussing UNHCR’s agreement with South Africa); *HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS*, *supra* note 336, at 47 (excerpting the Agreement for the Voluntary Repatriation of Mozambican Refugees from Zimbabwe (1993), an agreement between Zimbabwe, Mozambique, and UNHCR to grant “returnees . . . the right of return to return [sic] their former places of residence or to any other places of their choice within Mozambique”); ZIECK, *supra* note 357, at 398–99 (describing UNHCR’s work with Malawi to encourage voluntary repatriation into Mozambique).

<sup>359</sup> See ZIECK, *supra* note 357, at 399–401.

<sup>360</sup> See Dolan, *supra* note 358, at 87 (recounting the intentional reduction of food provisions available to refugees in South Africa); ZIECK, *supra* note 355, at 400–13 (detailing the plan to cut food supplies in Malawi).

<sup>361</sup> ZIECK, *supra* note 357, at 412–13.

<sup>362</sup> See *infra* Appendix Table 1 (case 134).

<sup>363</sup> See *infra* Appendix Table 1 (case 135).

<sup>364</sup> See *HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS*, *supra* note 336, at 51 (excerpting the Agreement on the Voluntary Repatriation of Rwandese Refugees from Tanzania (1995), which held that “the Republic of Rwanda shall take all measures possible to allow returnees to settle in areas of their origin or choice”).

genocide who were hiding among refugees, and obtain the international legitimacy that would come from doing what the U.N. and UNHCR desired.<sup>365</sup> For the states involved, the return of refugees seems not to have been motivated primarily by a desire to abide by international legal norms for their own sake.

While it is clear that CIL norms against expulsion and in favor of repatriation have gained substantial strength in the last two decades, the considerations detailed in this subsection suggest the difficulties of making a precise analogy between the 1947–49 Palestinian situation and the recent cases in which a right of return has developed as a CIL norm. CIL does not impose retroactive obligations, but even if it did, it is debatable whether CIL has developed rules requiring return in the unique circumstances of the 1947–49 Palestinian refugees.

## 6. CONCLUSION

This Article is framed as a ruling on a motion for summary judgment. It seeks to move beyond factual debates about what exactly happened during the 1947–49 Arab-Israeli conflict and who is responsible for the outflow of Palestinian refugees. I have assumed the truth of the Palestinian claim that Israel is entirely to blame, in order to sharpen the analysis of the applicable international law. In this posture, it becomes clear that the claimed Palestinian “right of return” for refugees from the 1947–49 conflict has no substantial legal basis. While the aspirations of the displaced to return to their homeland are understandable and compelling, the data compiled for this Article show that tens of millions of people were expelled from their countries during the twentieth century before international law began to recognize that practice as always illegal, and before international law began to require that refugees be able to return home in some circumstances.

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<sup>365</sup> On the background circumstances and factors motivating the Rwandan government, see generally Beth Elise Whitaker, *Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania* (United Nations High Comm’r for Refugees, Working Paper No. 53, 2002), available at <http://www.unhcr.org/3c7528ea4.pdf>; *Deadlock in the Rwandan Refugee Crisis: Repatriation Virtually at a Standstill*, DOCTORS WITHOUT BORDERS (July 20, 1995), [http://www.doctorswithoutborders.org/publications/article\\_print.cfm?id=1467](http://www.doctorswithoutborders.org/publications/article_print.cfm?id=1467).

It is a bit surprising to discover that the Palestinian refugees' *legal*<sup>366</sup> claims for repatriation to their homes of 1947–49 are not well grounded in law. For it has long been reported that Palestinian statesmen have thought it advantageous to introduce considerations of international legality into their periodic “peace process” dialogues with the Israelis, while the Israelis by contrast have preferred to frame the issue of refugee return (and other contested questions) in non-legal, pragmatic terms.<sup>367</sup> Palestinians have sought to retroactively judge Israeli actions in the 1940s under new norms developing in the late twentieth and early twenty-first centuries. But international law does not work like that. Though it is no doubt deeply unsatisfying to Palestinians and their many supporters, the correct legal answer to the question of whether the 1947–49 refugees have a right of return under international law goes something like this: even if (or assuming that) the Israelis did intentionally expel every Palestinian refugee, it was not illegal when it occurred, though it almost certainly would be if done today under the same circumstances; and the law at the time did not require repatriation of the refugees to Israel, though it most likely would if the expulsion were to occur today.

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<sup>366</sup> Again, I emphasize that I do not seek to judge the morality or justice of Israel's and the Palestinians' competing claims, nor do I question the reality of the Palestinians' view that the 1947–49 conflict was a catastrophe—*al-Nakbah*, as they call it—for their national aspirations and for many individuals and families.

<sup>367</sup> On this topic, see generally Omar M. Dajani, *Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT'L L. 61 (2007).

## APPENDIX

*Table 1. Partial List of Mass Expulsions, Compulsory Transfers, or Coerced Flights of Ethnic Minority Groups, 1900–2010*

## Criteria:

1. Officially instigated or organized
2. Directed at masses of people, collectively
3. 25,000 or more persons displaced
4. Not voluntary: ranging from overt use of force during armed conflict to intimidation causing flight
5. Ethnically-based expulsion or targeting
6. From 1900 to 2010

Case No.	Date	State(s) Involved	Event	Refugee group, approximate number of refugees
1	1905–07	Russian Empire	Pogroms lead to coerced flight of own nationals	After Russia's defeat in Russo-Japanese war and failed attempt by liberals to pressure the Czar for reforms, scapegoating of Jews led to officially-tolerated pogroms, killing hundreds and driving more than 300,000 Jews to emigrate <sup>1</sup>
2	1912–13	Bulgaria, Ottoman Empire	Wartime massacres and flight; Convention of Adrianople of Nov. 1913 for voluntary population exchange	Approx. 45,000 ethnic Bulgarians from Turkish Thrace exchanged for 49,000 Muslims from Bulgaria; <sup>2</sup> in light of massacres and flights of hundreds of thousands during Balkan Wars of 1912–13, <sup>3</sup> "voluntary character" is "questionable" <sup>4</sup>
3	1913	Bulgaria, Greece	Wartime massacres and expulsions of foreign nationals in occupied territory	As Greek armies drove into Bulgaria in Second Balkan War, Bulgarian civilians were massacred and about 150,000 fled deeper into Bulgaria <sup>5</sup>



4	1914 -16	Ottoman Empire/ Turkey	Eve of war and wartime expulsion of own nationals	Ottomans killed thousands of ethnic Greeks and expelled approx. 150,000 <sup>6</sup>
5	1914 -17	Russian Empire, Austro- Hungarian Empire	Wartime expulsion of own nationals and foreign nationals	During World War I, Russian military expropriated and drove from home, deported, approx. 500,000 to 1,000,000 Jews in its own territory and occupied enemy territory <sup>7</sup>
6	1915 -16	Serbia, Bulgaria, Austro- Hungarian Empire	Wartime massacres and expulsion of foreign nationals in occupied territory	Bulgarian and Austro-Hungarian armies invade and occupy Serbia, including newly-annexed Albania; Serbian civilians massacred and very large, unknown number of Serb refugees fled; then during formal military occupation "[b]etween 150,000 and 180,000 people were deported, most of them to camps in Hungary, and others to Austria. . . ." <sup>8</sup>
7	1915 -18	Ottoman Empire/ Turkey	Armenian genocide: wartime murder and expulsion of own nationals and aliens	Perhaps 1,000,000 Armenians died and another 1,000,000 fled or were expelled <sup>9</sup>
8	1916 -17	Bulgaria, Greece	Wartime massacres and deportation of foreign nationals in occupied territory	Bulgaria invaded and occupied part of Greece; massacred civilians; deported approx. 42,000 to 100,000 Greek men to Bulgaria for forced labor <sup>10</sup>
9	1920	USSR	Post-civil war expulsion of own nationals	After Reds won the civil war, approx. 45,000 Cossacks expelled from Donbass region <sup>11</sup>

10	1920	Hungary, Romania, Yugoslavia, Czechoslovakia	Post-war, post-session expulsions of alien ethnic group in newly-acquired territory	By 1920 Treaty of Trianon, Hungary lost three-quarters of territory; Romania, Yugoslavia, and Czechoslovakia expelled some 300,000 ethnic Magyars from their new territories <sup>12</sup>
11	1919-26	Greece, Bulgaria	Convention of 1920 on Voluntary Reciprocal Emigration, signed after peace treaty of Neuilly-sur Seine	Treaty for voluntary population exchange; when few on either side voluntarily emigrated, force was used; approx. 30,000 to 35,000 ethnic Greeks left Bulgaria and approx. 55,000 to 92,000 ethnic Bulgarians and Macedonians left Greece <sup>13</sup>
12	1922	Germany, Poland	Expulsion during border dispute	Germany expelled approx. 25,000 ethnic Poles from disputed border area <sup>14</sup>
13	1922-33	Turkey, Greece	1923 Convention of Lausanne for compulsory population exchange	Compulsory exchange treaty; <sup>15</sup> when signed, more than 1 million Greek refugees from Turkey had already fled following Greek army's defeat in 1922; after treaty, approx. 190,000 additional Greeks removed from Turkey and 356,000 Turks removed from Greek Macedonia and Epirus; <sup>16</sup> those who fled or were transferred "were prohibited from returning" <sup>17</sup>

14	1925 -39	Bulgaria, Turkey	1925 convention for bilateral voluntary population exchange, supplemented in 1936 and 1937	Increasing Bulgarian repression of Turkish minority caused many to leave; in all, approx. 125,000 Turks left Bulgaria; <sup>18</sup> additional agreement provided that Turks of Bulgaria who previously emigrated to Turkey and wished to return to Bulgaria, and Bulgarians of Turkey who previously emigrated to Bulgaria and wished to return to Turkey, could not do so without consent of, respectively, Bulgaria and Turkey <sup>19</sup>
15	1933	USSR	Peacetime expulsion of own nationals	Approx. 200,000 nomadic Kazakhs expelled from Kazakhstan <sup>20</sup>
16	1933 -39	Germany, Austria	Peacetime forced flight of denationalized people	Nazi denationalizations, expropriations and other civil measures against Jews caused approx. 360,000 to flee <sup>21</sup>
17	1936	Turkey, Romania	1936 convention for voluntary transfer of population	By 1936 agreement, the Muslim and Turkish-speaking population of the Dobruja were transferred to Turkey; in all approx. 61,000 <sup>22</sup>
18	1937	USSR	Peacetime expulsion of own nationals	Approx. 172,000 ethnic Koreans deported from sensitive border area <sup>23</sup>
19	1939 +	Poland, Germany	Wartime expulsion of population of occupied territory	More than 1,000,000 Poles expelled by Germany from Warthegau into central Poland <sup>24</sup>
20	1939 -40	USSR, Poland	Wartime deportation of population of occupied territory	USSR removed approx. 330,000 Poles from occupied territory to Central Asia and Siberia <sup>25</sup>
21	1939 -40	Japan, Korea	Wartime deportation of population of occupied territory	Approx. 440,000 Koreans deported to Japan to work, often in horrific conditions <sup>26</sup>

22-27	1939-44	Germany, Italy, USSR, Estonia, Latvia, Lithuania, Yugoslavia, Romania	Brink of war and wartime population transfer agreements demanded by Hitler: Berlin Accord of June 1939 and Italo-German Agreement of Oct. 1939; Russo-German Agreement of Nov. 1939 on the Evacuation of Ukrainians and Belorussians from Polish Territory (Treaty of Moscow); Treaty of Prague (Germany-Hungary) of May 1940; Note Exchanged Sept. 1940 with Romanian Government Regarding the Transfer of Bessarabia and Bukovina (Moscow Accord); Soviet-German Frontier Treaty of Jan. 1941 (Convention of Moscow); German-Estonian Protocol of Oct. 1939 on the Resettlement of the German Folk-group in the German Reich; German-Latvian Treaty of Oct. 1939 on the Resettlement of Latvian Citizens of German Nationality in the German Reich	Under bilateral treaties, several granting option to remain, <i>Volksdeutsche</i> (ethnic Germans) and <i>Reichsdeutsche</i> (German expatriates) emigrated or were transferred to Germany or German occupied Poland: approx. 185,000 from Italy, 49,000 from Latvia, 13,000 to 16,000 from Estonia, 26,000 to 33,000 from Yugoslavia, 66,000 from Romania, at least 135,000 from Soviet Union (including USSR-occupied Poland, Lithuania, Bessarabia, and North Bukovina (former Romania)); <sup>27</sup> also 30,000 to 40,000 Ukrainians and Byelorussians expelled from German- to Soviet-occupied territory; <sup>28</sup> despite option clauses, "[i]t is more accurate to categorize these events as a forced population transfer" <sup>29</sup>
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## PALESTINIAN RIGHT OF RETURN

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28	1939 -45	Germany, much of Europe	Wartime genocide of own nationals and populations of occupied territory	Germany committed genocide against Jews of Europe; approx. 6 million killed; wartime governments of France, Romania, Poland, etc. helped out; also approx. 200,000 to 1.5 million Gypsies (Roma) killed <sup>30</sup>
29	1940	USSR, Finland	Post-conquest population transfer treaty	After Finland lost Soviet-Finnish war, forced to cede Karelia; treaty gave any desiring to leave a short time to do so; more than 400,000 Karelians fled <sup>31</sup>
30	1940 -41	USSR, Latvia, Lithuania, Estonia	Wartime expulsion of population of occupied territory	After conquering Baltic states, USSR expelled approx. 85,000 to 130,000; only stopped because Germans drove out Soviets <sup>32</sup>
31	1940 -41	Bulgaria, Romania	Transfers under compulsory population exchange convention	By Craiova Agreement of Sept. 1940, compulsory exchange of 61,000 ethnic Bulgarians from N. Dobrudja for 100,000 to 110,000 Romanians from S. Dobrudja <sup>33</sup>
32	1940 +	France, Germany	Wartime deportation of population of occupied territory	More than 100,000 French Alsations expelled by Germany into Vichy France <sup>34</sup>
33	1941 -44	Bulgaria, Hungary, Yugoslavia	Wartime expulsion of population of occupied territory	After occupying parts of former Yugoslavia with German consent, Bulgarian and Hungarian governments expel approx. 190,000 Yugoslavs, primarily Serbs; <sup>35</sup> "Many of the expelled . . . did not return to Kosovo at the end of the Second World War, but were instead settled in Vojvodina in the homes of Germans and Hungarians who were killed or expelled by the post-war communist regime" <sup>36</sup>

34	1941 -44	Albania	Wartime massacres and expulsions	Fascist Albanian state (annexed to Italy) annexed part of Yugoslavia and killed 10,000 Serbs and Montenegrins and expelled approx. 70,000 to 100,000 <sup>37</sup>
35	1941 -44	Croatia	Wartime massacres and expulsions	During war, Croatia killed approx. 300,000 Serbs and expelled that many or more <sup>38</sup>
36	1941 -44	USSR	Wartime deportation of own nationals	After invasion by Germany, USSR forcibly transferred approx. 182,000 to 200,000 Crimean Tartars, 393,000 to 400,000 Chechens, 120,000 to 135,000 Kalmyks, 92,000 Ingush, 38,000 to 43,000 Balkars, 70,000 to 76,000 Karachais and 92,000 to 200,000 Meskhetians from western to eastern USSR <sup>39</sup>
37	1944	USSR, Finland	Post-conquest transfer	After USSR re-conquered Karelia from Finns who had invaded in 1940 at same time as Nazis, purportedly "voluntary" transfer of approx. 400,000 ethnic Finns from Soviet-incorporated Karelia to Finland; many of refugees had also fled in 1940, briefly returning with successful Finnish counterattack <sup>40</sup>
38	1944 -45	USSR, Baltic states	Wartime expulsion of people claimed as own nationals	After USSR "liberated" Baltics from Germans, approx. 150,000 ethnic Balts were deported <sup>41</sup>
39	1944 -47	USSR, Ukraine	Civil war expulsion of own nationals	More than 200,000 ethnic Ukrainians suspected of supporting the nationalist insurgency deported from Ukraine to Siberia <sup>42</sup>

40	1944 -47	USSR, Poland	Compulsory population exchange agreements	Approx. 518,000 ethnic Ukrainians, Byelorussians and Lithuanians removed from Poland to USSR; <sup>43</sup> approx. 1.5 million ethnic Poles and Polish Jews expelled from USSR to Poland <sup>44</sup>
41	1945 +	USSR, Japan	Forced expulsion of ethnic Japanese	Approx. 400,000 ethnic Japanese removed by USSR after it conquered Sakhalin island <sup>45</sup>
42	1945 +	USSR	Post-war forced "repatriation"	About 2,270,000 "displaced persons" in Germany at end of war were claimed by USSR as its nationals; shipped to USSR for execution, gulag, labor camps; 15-20% survived <sup>46</sup>
43	1945 +	Greece, Yugoslavia	Post-war expulsion	120,000 ethnic Bulgarians expelled from Greece, Yugoslavia <sup>47</sup>
44	1945 +	Romania, Yugoslavia, Czecho- slovakia	Post-war expulsion or flight	185,000 ethnic Hungarians expelled or fled from Romania, Yugoslavia, Czechoslovakia <sup>48</sup>
45	1945 -46	Germany, Poland, Hungary, Czecho- slovakia	Post-war expulsion to Germany of ethnic German populations	Authorized in principle by U.S., USSR and UK agreement at Potsdam in Aug. 1945, <sup>49</sup> 3.5 million Germans expelled from Poland; approx. 3.2 million Germans expelled from Czechoslovakia, <sup>50</sup> and about 225,000 from Hungary; <sup>51</sup> the expellees were resettled in Germany <sup>52</sup>

46	1945 -46	Romania, Yugoslavia, USSR	Wartime and post-war expulsions and deportations	Without permission from Allied powers, approx. 70,000 ethnic Germans expelled from Romania and approx. 100,000 from Yugoslavia; <sup>53</sup> in addition, the USSR forcibly removed some 70,000 ethnic Germans from Romania and 100,000 from Yugoslavia to the USSR <sup>54</sup> for "reconstruction work" <sup>55</sup>
47	1945 -46	USSR, Czechoslovakia	Protocol for compulsory population exchange, attached to treaty signed at Moscow in June 1945; agreement of July 1946 for repatriation of Czechs from Soviet Volhynia	Approx. 4500 to 50,000 ethnic Russians and Ukrainians transferred from Czechoslovakia to USSR, approx. 42,000 ethnic Czechs and Slovaks from USSR to Czechoslovakia <sup>56</sup>
48	1945 -48	Hungary, Czechoslovakia	Forced expulsion of ethnic Hungarians from Czechoslovakia; also population exchange treaty of Feb. 1946	Approx. 25,000 to 30,000 ethnic Hungarians, including many Nazis and Nazi sympathizers, expelled; <sup>57</sup> Treaty of 1946 between Hungary and Czechoslovakia agreed to exchange ethnic Hungarians of Czechoslovakia for ethnic Slovaks of Hungary; anywhere from 60,000 to 400,000 people ultimately exchanged; <sup>58</sup> treaty of exchange was "compulsory for the Hungarians living in Czechoslovakia and optional for Slovaks living in Hungary" <sup>59</sup>
49	1946	Yugoslavia, Hungary	Population exchange treaty of Sept. 1946	1946 agreement for the exchange of 10,000 Magyars and 40,000 Serbs and Croats between Yugoslavia and Hungary <sup>60</sup>



50	1946 -48	China, Japan	Post World War II (inter-state war) expulsion of foreign nationals	Approx. 1 million Japanese emigrants in China were transported back to Japan by the Chinese government operating with U.S. military support <sup>61</sup>
51	1946 -49	Greece	Intra-state war; flight or expulsion of own nationals	During Greek civil war, attacks on ethnic minority Macedonians killed 17,000 and forced approx. 50,000 to flee; <sup>62</sup> refugees and descendents "are denied permission to regain their citizenship, to resettle in, or even to visit, northern Greece" <sup>63</sup>
52	1946 -53	USSR, Baltic states	Intra-state war; expulsion of own nationals (USSR claimed sovereignty over Baltics)	During Baltic guerilla wars against Soviets, <sup>64</sup> USSR expelled approx. 200,000 Lithuanians, 160,000 Latvians, 60,000 Estonians <sup>65</sup>
53	1947	USSR	Peacetime expulsion	Approx. 58,000 ethnic Greeks removed from Black Sea coastal area <sup>66</sup> to cleanse area of "politically unreliable elements" <sup>67</sup>
54	1947 -49	India, Pakistan	"Partition;" 1947 agreement between Indian National Congress, Muslim League and British	See main text for details. "Neither country expected the refugees to return home and each with varying degrees of success resettled its refugees;" <sup>68</sup> post-partition New Delhi Accord of 1950 regulated repatriation <sup>69</sup>
55	1947 -49	UK- controlled Palestine, Israel, Arab states	End of British Mandate; civil war in Palestine; Israeli War of Independence	See main text for details

56	1948	Sri Lanka (Ceylon), India	Expulsion/flight of denationalized people	Following independence, Sri Lanka enacted laws to disenfranchise, denationalize and otherwise drive out Indian Tamils; this begins a several-decades long process, in part coordinated with India, in which nearly 9 million leave under duress for India <sup>70</sup>
57	1948-49	Burma	Peacetime expulsion of <i>de facto</i> denationalized people	After independence in 1948, Burma granted citizenship to few of country's 9,000,000 ethnic Indians and took other measures to drive them out of the country; at least several million left <sup>71</sup>
58	1948-51	Iraq, Israel	Wartime (Israeli War of Independence) and post-war expulsion or flight of own nationals and denationalized persons	Pogroms, harassment, seizure of property and other anti-Jewish laws made life precarious for Jews of Iraq; more than 120,000 fled to Israel, many during Israeli airlift <sup>72</sup>
59	1948-52	Egypt	Wartime (Israeli War of Independence) and post-war expulsion or flight of own nationals and denationalized persons	Due to property seizures during the war, official and private harassment, and tenuous rights due to lack of citizenship, approx. 20,000 Jews left Egypt <sup>73</sup>
60	1950-51	Bulgaria	Peacetime expulsion	Approx. 140,000 to 160,000 ethnic Turks expelled from Bulgaria <sup>74</sup>

61	1952	Japan	Peacetime expulsion of denationalized people	During WW II, Japan moved approx. 2 million Koreans to Japan; after war, encouraged them to leave; about 700,000 remaining in 1952 were stripped of Japanese citizenship <sup>75</sup> and many thousands were deported. <sup>76</sup>
62	1956-58	Egypt	Peacetime expulsion of foreign nationals	As a result of Suez War, Nasser government expelled about 13,000 French and British citizens <sup>77</sup> and expropriated and caused to flee approx. 23,000 to 25,000 Jews <sup>78</sup>
63	1956-59	China, Tibet	Intra-state war; forced flight or expulsion of conquered people	80,000 Tibetans fled Chinese invasion and repression, resettled in India <sup>79</sup>
64	1957-58	Indonesia, Netherlands	Denouement of anti-colonial struggle	After Indonesia gained independence from Holland, and after several years of voluntary departure from Indonesia of native Dutch and mixed race "Indos," Indonesia government expelled approx. 40,000 to 50,000 remaining Dutch <sup>80</sup>
65	1959-62	Rwanda	Intra-state war; expulsion or forced flight of own nationals	1959 revolution ousted Tutsi monarchy, replaced with Hutu government; approx. 120,000 - 200,000 Rwandans (primarily ethnic Tutsi) fled or expelled to neighboring countries <sup>81</sup>
66	1960	Belgian Congo/Zaire	Denouement of anti-colonial struggle	Expelled approx. 100,000 whites after Belgian colonial regime fell <sup>82</sup>
67	1961-62	Egypt	Peacetime expulsion of foreign nationals	Egypt expelled about 40,000 ethnic Greeks <sup>83</sup>
68	1962+	Burma	Peacetime expulsion of own nationals	Burma persecuted and drove out perhaps as many as 1,500,000 Burmese of Indian descent <sup>84</sup>

69	1964	India, Sri Lanka	Peacetime expulsion of own nationals	"India and Sri Lanka agreed to 'repatriate' hundreds of thousands of so-called Indian Tamils to India, which most of them had never seen" <sup>85</sup>
70	1965, 1970	Ghana	Peacetime expulsion of foreign nationals	Ghana "expelled several hundred thousand foreigners, many of them Nigerian, including children born in the country"
71	1965	Indonesia	Peacetime massacre and flight of own nationals	Ethnic Chinese minority and indigenous communists in Indonesia are attacked, approx. 200,000 to 500,000 killed, many thousands fled or expelled <sup>86</sup>
72	1969	Honduras	Wartime expulsion of own nationals and foreign nationals	Longstanding tensions erupted in massacre of ethnic Salvadorans in Honduras followed by brief war between El Salvador and Honduras and expulsion or flight of approx. 130,000 ethnic Salvadorans from Honduras <sup>87</sup>
73	1969	Ghana	Peacetime expulsion of foreign nationals	Approx. 200,000 to 500,000 non-Ghanaian Africans, primarily Nigerians, expelled from Ghana <sup>88</sup>
74	1969 -72	Iraq, Iran	Peacetime expulsions of own nationals and foreign nationals	As relations soured over issues like navigation of Shatt-al-Arab River and militarization of a disputed border, Iraq expelled approx. 60,000 Iranians <sup>89</sup>
75	1970	Libya	Peacetime expulsion of foreign nationals	During "Day of Vengeance," Khaddafi government expelled some 150,000 Italians
76	1971	Zambia	Peacetime expulsion of foreign nationals	"In 1971 Zambia expelled all aliens – about 150,000 nationals of Zimbabwe, Botswana, Zaire, Tanzania and Somalia – without valid work permits" <sup>90</sup>

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77	1971	Iraq	Intra-state war (against Kurds)	Iraq expelled as many as 40,000 Faily Kurds. <sup>91</sup> In the next decade, more than 100,000 more were expelled after being declared non-nationals <sup>92</sup>
78	1971	East and West Pakistan, India	Intra-state war, with Indian intervention	India entered civil war because believed West Pakistan was intentionally driving millions of Hindus out of East Pakistan into India; after West Pakistan surrendered and East (now Bangladesh) declared independence, most of the 9,000,000 refugees returned <sup>93</sup>
79	1971 -72	Uganda	Peacetime expulsion	More than 40,000 people of Indian or Pakistani descent expelled for racial and economic reasons <sup>94</sup>
80	1972	Burundi	Intra-state war	Hutu revolt against Tutsi government led to killing of 100,000 to 200,000 Hutus by government and flight/expulsion of approx. 300,000 <sup>95</sup>
81	1972 -74	Bangladesh, Pakistan	Post-war agreement	When Bangladesh became independent from Pakistan in 1972 after the war, it desired to remove Urdu-speaking Biharis, some of whom had collaborated with Pakistan in the war; several massacres of Biharis occurred; in 1974, Pakistan agreed to take 170,000; <sup>96</sup> Biharis in Bangladesh were <i>de facto</i> stateless <sup>97</sup>

82	1974	Cyprus, Greece, Turkey	Intra-state war; inter-state war	Inter-communal violence started in 1963; in 1974, Turkey invaded on behalf of ethnic Turks and imposed partition; approx. 160,000 to 200,000 ethnic Greeks and 40,000 to 45,000 ethnic Turks fled across the <i>de facto</i> partition line <sup>98</sup>
83	1974 -76	Angola	Denouement of anti-colonial struggle	As Angola gained independence, Portuguese lost political rights and had property confiscated; more than 505,000 fled to Portugal <sup>99</sup>
84	1975	Iraq	Intra-state war; flight of own nationals	After Kurdish rebellion against Iraqi government failed, approx. 250,000 Kurds fled from Iraqi forces to Iran; many returned in next several years after amnesty offered <sup>100</sup>
85	1975	Cambodia	Intra-state war; expulsion of own nationals and foreign nationals	When Khmer Rouge took city of Phnom Penh, approx. 2,000,000 people expelled, including many of the persecuted ethnic Vietnamese minority; additionally, the Khmer Rouge killed between 1,000,000 and 3,000,000 people before being overthrown <sup>101</sup>
86	1976	Morocco, Western Sahara	Wartime expulsion of population of disputed territory	Invasion and subsequent abuses by Moroccan troops drove out more than 50,000 ethnic Sahrawi people from Western Sahara <sup>102</sup>
87	1976	Libya	Peacetime expulsion of foreign nationals	Libya expelled for political reasons some 130,000 foreigners, mainly Egyptians, Mauritians, and Tunisians <sup>103</sup>

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88	1977 -78	Somalia, Ethiopia	Ogaden War (inter-state and intra-state war)	After Somalia under Siad Barre regime invaded the Ogaden region of Ethiopia where many ethnic Somalis lived, more than 1,000,000 ethnic Somalis forced to flee <sup>104</sup>
89	1978	Cambodia	Intra-state war; expulsion of own nationals and foreign nationals	Khmer Rouge atrocities caused flight of additional 170,000 ethnic Vietnamese (and many Cambodians as well) <sup>105</sup>
90	1978	Burundi	Peacetime expulsion of foreign nationals	"In 1978, Burundi expelled 40,000-50,000 Zaireans, mostly Bembe refugees, from the 1964 Mulelist rebellion, and jobless migrant workers" <sup>106</sup>
91- 92	1978	Burma, Bangladesh	Intra-state war; expulsion of own nationals	Burmese military operation against insurgency expelled or put to flight approx. 2,000,000 ethnic Bengali Muslims, called Rohingya, to Bangladesh; <sup>107</sup> Bangladesh in turn expelled approx. 200,000 back to Burma; <sup>108</sup> years later after conflict winds down Burma agreed to allow return of those remaining abroad, and many did <sup>109</sup>
93	1978 -79	Vietnam	Inter-state war (Sino-Vietnamese War); expulsion of own nationals and foreign nationals	"[B]order war with China . . . resulted in a deliberate policy to encourage the departure of ethnic Chinese from Vietnam. In 1978-9, some 450,000 ethnic Chinese left Vietnam or were expelled across the land border with China" <sup>110</sup>

94	1978 -81	Bangladesh	Intra-state war; expulsion of own nationals	Accused of collaborating with Pakistan in the war and discriminated against by government, Chakmas – an indigenous hill tribe – launched insurgency; Bangladeshi military persecution drove approx. 40,000 civilians to India <sup>111</sup>
95	1978 -81	Ethiopia	Eritrean War of Independence (intra-state war); forced flight of own nationals	Well over 500,000 ethnic Eritreans fled from Ethiopia to Sudan because of brutal counter-insurgency tactics by Ethiopian army <sup>112</sup>
96	1979	Thailand, Cambodia	Peacetime expulsion of foreign nationals (refugees who had fled Khmer Rouge in Cambodia)	"[F]orced repatriation . . . of 40,000 Kampuchean refugees by the Thai government" <sup>113</sup>
97	1980 -88	Iran, Iraq	Iraq-Iran War (inter-state war); wartime expulsion of alleged foreign nationals	"About 350,000 of the Iraqi refugees in Iran were expelled from Iraq at the time of the Iraq-Iran war because of their suspected Iranian origin, and have lived in the western region of Iran for almost two decades. In many cases, their citizenship is disputed by both Iran and Iraq, in effect, rendering many of them stateless." <sup>114</sup>
98	1982	Uganda	Peacetime expulsion of own nationals	75,000 to 80,000 minority Bayarwanda people were expelled <sup>115</sup>
99	1983	Nigeria	Peacetime expulsion of foreign nationals	Approx. 1,300,000 to 2,000,000 alleged illegal immigrants from African nations expelled from Nigeria <sup>116</sup>
100	1985	Nigeria	Peacetime expulsion of foreign nationals	Approx. 100,000 Ghanaians expelled by Nigeria <sup>117</sup>



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101	1985	Libya	Peacetime expulsion of foreign nationals	Libya expelled approx. 20,000 Egyptians and 30,000 Tunisians <sup>118</sup>
102	1988	Iraq	Genocide and forced flight of own nationals	During Iraq's genocidal "Anfal" campaign against Kurds, approx. 100,000 Kurds fled to Iran and 27,000 to Turkey <sup>119</sup>
103	1988	Ethiopia	Intra-state war (Eritrean War of Independence); wartime massacre and forced flight of own nationals	Ethiopian army killed ethnic Eritrean civilians; 40,000 fled to Sudan <sup>120</sup>
104	1988	USSR (Armenia, Azerbaijan)	Peacetime expulsions/flight of foreign nationals	In response to attacks on ethnic Armenians in Azerbaijan, Armenia expelled approx. 200,000 Kurds and ethnic Azeris; <sup>121</sup> several hundred thousand ethnic Armenians fled from Azerbaijan to Armenia <sup>122</sup>
105	1988-89	USSR (Armenia, Azerbaijan)	Intra-state war (Nagorno-Karabakh war); wartime expulsions and flight of own nationals	In response to Armenian separatist rebellion in Nagorno-Karabakh, Azeri government launches punitive attacks; <sup>123</sup> approx. 180,000 ethnic Armenians fled to Armenia; <sup>124</sup> more than 200,000 ethnic Azeris fled rebels <sup>125</sup>
106	1989	USSR (Uzbekistan)	Peacetime expulsion/flight of own nationals and stateless people	Persecution by Uzbeks caused flight of approx. 63,000 to 70,000 Meskhetian Turks (whom Stalin had displaced there from Georgia during World War II) <sup>126</sup>
107	1989	Mauritania	Peacetime expulsion of own nationals and foreign nationals	Inter-ethnic conflict lead to expulsion of 40,000 to 75,000 Senegalese and Mauritians of Senegalese descent <sup>127</sup>

108	1989	Bulgaria, Turkey	Peacetime expulsion or forced flight of own nationals	Long-running conflict between Christian Bulgarian government and Muslim minority; after Bulgarian government crackdown on ethnic Turkish demonstrations, including killing and expulsion of activists, approx. 300,000 to 350,000 ethnic Turks/Muslims fled Bulgaria; <sup>128</sup> after 1990, political opening in Bulgaria allowed approx. 110,000 to return <sup>129</sup>
109	1989 -90	USSR (Georgia)	Intra-state war (against separatists in South Ossetia); wartime expulsion or flight of own nationals	Bitter civil war over South Ossetia's desire to secede from Georgia; approx. 50,000 S. Ossetians fled to join kinsmen in Russia (N. Ossetia), 23,000 S. Ossetians in Georgia proper displaced to S. Ossetia and 23,000 Georgians in S. Ossetia fled/expelled to Georgia proper <sup>130</sup>
110	1989 -90	Liberia	Intra-state war; wartime expulsion or flight of own nationals and foreign nationals	The Doe government's Armed Forces of Liberia (AFL), mainly ethnic Krahn, fought the rebel National Patriotic Front of Liberia (NPFL), mainly Gio and Mano; both sides committed ethnic massacres; about 730,000 Liberians fled to neighboring countries <sup>131</sup>
111	1990	Sri Lanka	Intra-state war; wartime expulsion of own nationals by <i>de facto</i> government of part of Sri Lanka	In October 1990, the Liberation Tigers of Tamil Eelam (LTTE), forcibly expelled the ethnic Muslim population (approx 75,000) from the Northern Province of Sri Lanka <sup>132</sup>
112	1990	Senegal	Peacetime expulsion of foreign nationals	"In 1990, Senegal deported approximately 500,000 Mauritanians" <sup>133</sup>

113	1990	Iraq, Egypt	First Iraq War (inter-state war), expulsion of foreign nationals	Prior to and during the First Gulf War, Iraq expelled approx. 500,000 Egyptians (Egypt joined anti-Iraq military coalition) and other migrant workers <sup>134</sup>
114	1990 -91	Saudi Arabia, Yemen	post-First Iraq War (inter-state war); expulsion of foreign nationals	Large number of Yemenis expelled from Saudi Arabia to punish Yemen's support for Iraq; estimates range from 350,000 to more than 700,000 <sup>135</sup>
115	1990 -95	Bhutan, Nepal	Peacetime expulsion and flight of denationalized people	Bhutan denationalized the Lhotsampas (ethnic Nepalis); more than 100,000 fled Bhutan <sup>136</sup>
116	1991	Dominican Republic	Peacetime expulsion of alleged foreign nationals	Dominican Army rounded up and trucked to Haiti approx. 35,000 "suspected Haitians," claiming they were illegal immigrants <sup>137</sup>
117	1991	Iraq	Intra-state war after First Iraq War; massacre and expulsion or flight of own nationals	After failed Shi'a and Kurd uprising against Saddam Hussein government, Iraq killed approx. tens of thousands of Kurds and approx. 1,500,000 fled to Iran or Turkey; <sup>138</sup> thousands of Shi'a "Marsh Arabs" killed and approx. 40,000 fled to Iran <sup>139</sup>
118	1991	Ethiopia, Sudan	Post-intra-state war (Ethiopia); expulsion of foreign nationals	"Following the overthrow of Ethiopia's Mengistu regime in May [1991], approximately 285,000 Sudanese refugees from the United Nations High Commissioner for Refugees (UNHCR) camps in southwestern Ethiopia were forced to return to Sudan" <sup>140</sup>

119	1991	D.R. Congo	Peacetime expulsion of foreign nationals	"Tens of thousands of Zairians have been expelled from neighboring Congo ... as the Government here has ordered them out as illegal aliens" <sup>141</sup>
120	1991-92	Kuwait	post-First Iraq War; peacetime expulsion	After Iraqi forces removed from Kuwait by U.S.-led coalition, Kuwait expels approx. 300,000 to 380,000 Palestinians because they were thought to have supported Iraq, <sup>142</sup> at same time, expels about 150,000 <i>bidun</i> <sup>143</sup>
121	1991-92	Burma	Peacetime expulsion of own nationals	Burmese persecution caused approx. 270,000 Rohingya Muslims flee to Bangladesh <sup>144</sup>
122	1991-95	Yugoslavia, Croatia, Bosnia	Intra-state war accompanying independence of Croatia	After Croatia declared independence in 1991, the Yugoslav army (primarily Serb) began ethnic cleansing of ethnic Croats; Croats mobilized and resisted; Bosnian Croat paramilitaries ethnically cleansed areas of Bosnian Serbs; approx. 300,000 to 350,000 Serbs and perhaps more than 400,000 Croats fled <sup>145</sup>
123	1992-93	Georgia	Intra-state war results in <i>de facto</i> partition of Georgia	Ethnic cleansing by Abkhazian militias lead approx. 200,000 to 270,000 ethnic Georgians to flee disputed region <sup>146</sup>
124	1992-93	Zaire	Peacetime expulsion of own nationals	In bid to cling to power, Mobutu regime incited Shaban people to attack and expel Kasaians; several hundred thousand fled or were expelled <sup>147</sup>

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125	1992 -95	Bosnia, Yugoslavia, Croatia	Intra-state war accompanying independence of Bosnia & Herzegovina	After Bosnia & Herzegovina prepares to declare independence in 1992, Yugoslav army (Serb), Bosnian Serb paramilitaries and Bosnian Croat paramilitaries attack Muslims and each other; widespread genocide and ethnic cleansing of Bosnian Muslims by Serbs and Croats and ethnic cleansing of Bosnian Serbs by Croats; inside Yugoslavia, Serbian paramilitaries also attack Muslims; NATO intervenes against Serbs in 1994 <sup>148</sup>
126	1992 -97	Tajikistan	Intra-state war	During civil war sparked by revolt by ethnic minority Pamiris from Gorno-Badakhshan region and other minority groups, approx. 60,000 refugees fled to Afghanistan in 1992-93 and nearly 200,000 to other countries <sup>149</sup>
127	1993	Cambodia, Vietnam	Intra-state war; massacre and flight of own nationals and foreign nationals	After massacre of ethnic Vietnamese by Khmer Rouge army, approx. 30,000 fled to Vietnam <sup>150</sup>
128	1993 -96	South Africa, Mozambique	Peacetime expulsion of foreign nationals	South Africa "forcibly deported" approx. 310,000 refugees from the Mozambique civil war <sup>151</sup>
129	1994	Greece, Albania	Peacetime expulsion of foreign nationals	30,000 Albanians declared to be illegal immigrants and expelled by Greece <sup>152</sup>

130	1994	Rwanda	Genocide and flight	Approx. 500,000 to 1,000,000 Rwandans killed in 6 week period, mostly Tutsis killed by Hutus; approx. 250,000 fled to Tanzania; as Tutsi rebel group began to take over country, Hutu government organized mass flight of 800,000 Hutu to Zaire <sup>153</sup>
131	1994	Greece	Peacetime expulsion of foreign nationals	In retaliation for criminal conviction in Albania of Greek dissidents, Greece expelled more than 30,000 Albanians <sup>154</sup>
132	1994-95	Gabon	Peacetime expulsion of foreign nationals	Gabon expelled approx. 55,000 foreign workers <sup>155</sup>
133	1995	Libya	Peacetime expulsion of foreign nationals	"Libya expelled 30,000 Palestinians in 1995 to express its opposition to the Middle East peace process" <sup>156</sup>
134	1996	Tanzania, Rwanda	Peacetime expulsion of foreign nationals	In Dec. 1996, Tanzania expelled approx. 500,000 Rwandan refugees, mainly Hutus; Tanzania was concerned with military activities emanating from refugee camps and believed that many who committed genocide were sheltered in them; <sup>157</sup> the UNHCR approved Tanzania's demand for immediate repatriation <sup>158</sup>
135	1996	Burundi, Rwanda	Expulsion of foreign nationals	Burundi expelled approx. 75,000 Rwandan refugees <sup>159</sup>
136	1996	United Arab Emirates	Peacetime expulsion of foreign nationals	The U.A.E. expelled approx. 145,000 illegal residents, mainly from India, Pakistan and Bangladesh <sup>160</sup>
137	1997	Dominican Republic	Peacetime expulsion of alleged foreign nationals	Dominican Army rounded up and trucked to Haiti approx. 25,000 "suspected Haitians," claiming they were illegal immigrants <sup>161</sup>

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138	1997	Iraq	Peacetime expulsion of own nationals	Deportations pursuant to Iraq's Arabization campaign in the predominantly Kurdish cities of Kirkuk, Khanaqin, and Douz increase; <sup>162</sup> estimated about 120,000 to 140,000 expelled during 1990s, mostly Kurds but also Turkmen and Assyrians <sup>163</sup>
139	1997	Tanzania, Rwanda, Burundi, Congo/Zaire	Peacetime expulsions of foreign nationals	Tanzania expelled tens of thousands of refugees from Rwanda, Burundi, and Congo/Zaire <sup>164</sup>
140	1998-99	Yugoslavia, Kosovo	Intra-state war preceding independence of Kosovo	In response to Kosovar Albanian's move for independence, murder and ethnic cleansing of Kosovar Albanians committed by Serb military, paramilitary and police forces; approx. 30,000 Kosovar Albanians killed, approx. 850,000 to 900,000 expelled and 550,000 internally displaced; NATO intervened against Yugoslavia (Serbs) in 1999, and transferred control of province to Albanians; <sup>165</sup> at this point, most displaced Albanians return to Kosovo but retaliatory violence and insecurity caused approx. 160,000 Serbs and 90,000 Roma to flee <sup>166</sup>
141-42	1998-2000	Eritrea, Ethiopia	Eritrean-Ethiopian War (inter-state war); expulsion of own nationals and foreign nationals	Ethiopia denationalized and deported 67,000 to 75,000 Ethiopians of Eritrean ethnicity; as many as 70,000 Ethiopians expelled from Eritrea <sup>167</sup>

143	1998 – 2001	Afghanistan	Intra-state war	As Taliban advance north taking Northern Alliance territory, Taliban murdered approx. 3,000 to 6,000 Hazara (Persian speaking Shi'a Muslims) men and boys in 1998; other massacres in 1999, 2001; approx. 60,000 Hazaras were internally displaced and many times that number fled to Iran and Pakistan <sup>168</sup>
144	1999	Indonesia, East Timor	Intra- (or inter-?) state war accompanying independence of East Timor	After East Timorese voted for independence in a 1999 referendum, Indonesian military and military-backed militias retaliated, murdering some supporters of independence and leveling most towns; approx. 300,000 East Timorese were internally displaced and 200,000 either fled or were forcibly expelled to West Timor, Indonesia <sup>169</sup>
145	2001	Iraq	Peacetime expulsion of own nationals	"[A]s many as 100,000 people, mostly Kurds, Assyrians, and Turkomans, [were] recently expelled from central-government-controlled Kirkuk and surrounding districts in the oil-rich region bordering the Kurdish-controlled north" <sup>170</sup>
146	2002	Malaysia	Peacetime expulsion of foreign nationals	Malaysia "expelled hundreds of thousands of undocumented Indonesian workers" <sup>171</sup>
147	2003	Iran	Expulsion of foreign nationals to country at war	Iran expelled 50,000 to 60,000 Afghan refugees, whom it describes as illegal immigrants <sup>172</sup>
148	2003	Djibouti	Peacetime expulsion of foreign nationals	Djibouti expelled approx. 100,000 allegedly illegal immigrants, mostly Ethiopians, Somalis, and Yemenis <sup>173</sup>



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149	2003 -05	Libya	Peacetime expulsion of foreign nationals	Libya deported approx. 145,000 people, mainly sub-Saharan Africans; Libya claimed were all illegal economic migrants and that most went willingly; both claims are suspect <sup>174</sup>
150	2003 -09	Sudan	Intra-state war; massacre and expulsion of own nationals	From 2003-05, at least 200,000 ethnic Africans in Darfur, Sudan, were killed by Sudan government-backed Arab "janjaweed" militias, and at least 2,000,000 driven into exile <sup>175</sup>
151	2004 -05	Angola	Peacetime expulsion of foreign nationals	In Operation <i>Brilhante</i> , Angola expelled from 125,000 to 250,000 foreigners <sup>176</sup>
152	2005	Malaysia	Peacetime expulsion of foreign nationals	"When Malaysia expelled 380,000 foreign labourers in 2005, most of them from impoverished Indonesia, . . . those that did not leave before the deadline were hunted by 300,000 vigilantes recruited and armed by the government and forcibly expelled" <sup>177</sup>
153	2006	Angola	Peacetime expulsion of foreign nationals	"During 2006, Angola reportedly expelled hundreds of thousands of illegal migrants without meaningful screening for refugees or asylum seekers" <sup>178</sup>
154	2007 -09	Angola, D.R. of Congo	Expulsion of foreign nationals to country at war	More than 200,000 Congolese refugees expelled by Angolan government <sup>179</sup>
155	2007 -08	Iran, Afghanistan	Expulsion of foreign nationals to country at war	Iran expelled more than 720,000 Afghan refugees <sup>180</sup>
156	2009	Saudi Arabia, Yemen	Peacetime expulsion of foreign nationals	In December 2009, <i>Saudi Arabia expelled 54,000 Yemeni workers</i> <sup>181</sup>

157	2009	D.R. of Congo	Peacetime expulsion of foreign nationals	"Tens of thousands" of Angolans, many with refugee status, expelled by D.R. Congo; total expelled plus those who left to avoid expulsion was approx. 50,000 <sup>182</sup>
158	2009	Angola	Peacetime expulsion of foreign nationals	Angola "expelled tens of thousands of allegedly irregular migrants and their families-most of them from the Democratic Republic of Congo," including many refugees and asylum seekers <sup>183</sup>
159	2009	Yemen	Peacetime expulsion of foreign nationals	Likely that tens of thousands of Ethiopian refugees were forcibly deported by Yemen <sup>184</sup>

*Table 2. 1900–1950: Instances of the Emergence of Independent States During or After Ethnic Armed Conflict<sup>185</sup>*

Case #	New State	Lost Territory	Year	Ethnic Conflict	Year(s)
1	Poland	Germany, Russia, Austro-Hungarian Empire	1918	Poles v. Germans, Ukrainians, Russians	1917–19
2	Czechoslovakia	Austro-Hungarian Empire	1918	Czechs v. Sudeten Germans (1918), Poles (1919)	1918–19
3	Estonia	Russia	1918	Estonians v. Baltic Germans	1918–20
4	Ukraine	Russia	1918	Ukrainians v. Ukraine Poles, Russians	1918–19
5	Armenia	Russia, Ottoman Empire	1918	Armenians v. Turkey, Azerbaijani Tatars, Kurds	1917–18
6	Azerbaijan	Russia	1918	Muslim Azeris, Turkey v. Armenians, Dashnaks	1918

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7	Hungary	Austro-Hungarian Empire	1919	"White Terror": Anti-communist Hungarians, aided by Romania, kill or drive out communists and Jews	1919-20
8	Ireland	UK	1922	Irish Catholics v. UK, Irish Protestants	1916, 1919-23
9	Czechoslovakia	Germany	1945	Czechs, Slovaks v. Sudeten Germans	1945-46
10	Albania	Italy	1945	Fascist Albanians v. Serbs, Montenegrins; simultaneously, Albanian communists fought Italian and then German invaders, and non-communist Albanian resistance	1941-46
11	Pakistan	India/UK	1948	Sikhs, Hindus v. Muslims	1946-48
12	Israel	UK	1948	Jews v. Arabs	1947-49
13	Indonesia	Netherlands	1949	During independence struggle, the Dutch co-opted Sundanese, Madurese, Dayaks and other ethnic groups; Islamic groups rejected both Dutch rule and independence under a secular government	1945-50

*Table 3. Major "Voluntary" Refugee Repatriations,  
by Country of Origin*

1. Time period 1992 to 2008
2. Data from UNHCR yearly statistical reports; voluntariness of return asserted by UNHCR<sup>186</sup>
3. Numbers given in 1000s, rounded to nearest 1000
4. Threshold to list is 10,000 in given year, and 100,000 or more total during 1992–2008 time period

1992–2000

	92	93	94	95	96	97	98	99	00
<b>Afghanistan</b>	1577		329	348	159	87	107	253	292
<b>Angola</b>	85			13		54	22	20	
<b>Bosnia &amp; H.</b>	10				101	121	129	32	19
<b>Burundi</b>	48		271		108	91	24	12	
<b>Croatia</b>	29					16	25	11	19
<b>Dem. Repub. of Congo</b>	15					45	66	17	14
<b>Eritrea</b>	70			22					51
<b>Ethiopia</b>	12	57	40	35	28	10	13		
<b>Iraq</b>	18			18	82	10	12	21	
<b>Liberia</b>	81	16		10		15	240	104	42
<b>Macedonia</b>									
<b>Mali</b>				39	22	35	27		
<b>Mozambique</b>	159	604	804	159					
<b>Myanmar</b>		46	85	66	23	10			
<b>Rwanda</b>			120	241	141	221	11	38	26
<b>Fed. Rep. of Yugoslavia</b>								807	125
<b>Sierra Leone</b>	13						195		41
<b>Somalia</b>		67	61	43		52	52	26	46
<b>Sudan</b>						63			
<b>Timor-Leste (East Timor)</b>								128	49
<b>Togo</b>			126	79	66	12			

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2001-2008

	01	02	03	04	05	06	07	08
<b>Afghanistan</b>	26	1958	646	880	752	388	373	278
<b>Angola</b>	13	88	133	90	54	47	12	13
<b>Bosnia &amp; H.</b>	19	42	14					
<b>Burundi</b>	28	53	82	90	68	48	40	95
<b>Croatia</b>	12	17	10					
<b>Dem. Repub. of Congo</b>		14		14	39	41	59	54
<b>Eritrea</b>	33	20	10	10				
<b>Ethiopia</b>	10							
<b>Iraq</b>			55	194	56	20	45	26
<b>Liberia</b>		22	21	57	70	108	44	11
<b>Macedonia</b>	90	11						
<b>Mali</b>								
<b>Mozambique</b>								
<b>Myanmar</b>								
<b>Rwanda</b>	22	39	23	14	10			11
<b>Fed. Rep. of Yugoslavia</b>	26	14						
<b>Sierra Leone</b>	92	76	33	26				
<b>Somalia</b>	51	32	10	18	12			
<b>Sudan</b>					19	42	130	90
<b>Timor-Leste (East Timor)</b>	18	32						
<b>Togo</b>								

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<sup>1</sup> See BENJAMIN LIEBERMAN, TERRIBLE FATE: ETHNIC CLEANSING IN THE MAKING OF MODERN EUROPE 42-44 (2006).

<sup>2</sup> See JOSEPH B. SCHECHTMAN, POSTWAR POPULATION TRANSFERS IN EUROPE, 1945-1955, at 22 (1962).

<sup>3</sup> LIEBERMAN, *supra* note 1, at 58-67; VLADIMIR ORTAKOVSKI, MINORITIES IN THE BALKANS 117-18 (2000).

<sup>4</sup> Dimitrije Djordevic, *Migrations During the 1912-1913 Balkan Wars and World War One*, in MIGRATIONS IN BALKAN HISTORY 115, 120 (Radovan Samardzic & Dimitrije Djordevic eds., 1989).

<sup>5</sup> LIEBERMAN, *supra* note 1, at 69-72.

<sup>6</sup> NORMAN M. NAIMARK, FIRES OF HATRED 27-28 (2001).

<sup>7</sup> LIEBERMAN, *supra* note 1, at 88-91; Eric Lohr, *The Russian Army and the Jews: Mass Deportation, Hostages, and Violence During World War I*, 60 RUSSIAN REV. 404, 404 & n.1 (2001).

<sup>8</sup> LIEBERMAN, *supra* note 1, at 83-85.

<sup>9</sup> PERTTI AHONEN ET AL., PEOPLE ON THE MOVE: FORCED POPULATION MOVEMENTS IN EUROPE IN THE SECOND WORLD WAR AND ITS AFTERMATH 7 (2008); NAIMARK, *supra* note 6, at 29-37, 40-41.

<sup>10</sup> LIEBERMAN, *supra* note 1, at 86-87.

<sup>11</sup> PAVEL POLIAN, AGAINST THEIR WILL: THE HISTORY AND GEOGRAPHY OF FORCED MIGRATION IN THE USSR 59-60 (2004).

<sup>12</sup> CLAUDENA M. SKRAN, REFUGEES IN INTER-WAR EUROPE 31-32 (1995).

<sup>13</sup> See SCHECHTMAN, *supra* note 2, at 22; SKRAN, *supra* note 12, at 44; ORTAKOVSKI, *supra* note 3, at 119-20; Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. Q. 817, 824 (1998).

<sup>14</sup> Special Rapporteur on the Expulsion of Aliens, *Third Rep. on the Expulsion of Aliens*, ¶ 100, Int'l Law Comm'n, U.N. Doc. A/CN.4/581 (Apr. 19, 2007) (by Maurice Kamto).

<sup>15</sup> Convention Concerning the Exchange of Greek and Turkish Populations, Jan. 30, 1923, 32 L.N.T.S. 75, reprinted in 18 AM. J. INT'L L. (SUPPLEMENT: OFFICIAL DOCUMENTS) 84 *et seq.* (1924) (providing in Article 1 that "there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory").

<sup>16</sup> See SCHECHTMAN, *supra* note 2, at 22-23.

<sup>17</sup> Preece, *supra* note 13, at 824.

<sup>18</sup> SCHECHTMAN, *supra* note 2, at 341-43. The 1925 agreement is reprinted as Convention Between Bulgaria and Turkey Respecting Conditions of Residence, Oct. 18, 1925, 54 L.N.T.S. 137 (1926).

<sup>19</sup> See Protocol Annexed to the Treaty of Friendship Between Bulgaria and Turkey, Oct. 18, 1925, 54 L.N.T.S. 129, 131 (1926).

<sup>20</sup> POLIAN, *supra* note 11, at 328.

<sup>21</sup> SKRAN, *supra* note 12, at 48-49, 54.

<sup>22</sup> J.R., *The Exchange of Minorities and Transfers of Population in Europe Since 1919 – Part I*, 21 BULLETIN INT’L NEWS 579, 588 (1944). The 1936 agreement is reprinted as Convention Between Roumania and Turkey Regulating the Emigration of the Turkish Population of Dobrudja, Sept. 4, 1936, 195 L.N.T.S. 431 (1939).

<sup>23</sup> See POLIAN, *supra* note 11, at 98-100.

<sup>24</sup> Alfred-Maurice de Zayas, *A Historical Survey of Twentieth Century Expulsions*, in REFUGEES IN THE AGE OF TOTAL WAR 15, 21 (Anna C. Bramwell ed., 1988).

<sup>25</sup> Philipp Ther, *A Century of Forced Migration: The Origins and Consequences of “Ethnic Cleansing,”* in REDRAWING NATIONS: ETHNIC CLEANSING IN EAST-CENTRAL EUROPE, 1944-1948, at 43, 51 (Philipp Ther & Ana Siljak eds., 2001).

<sup>26</sup> POLIAN, *supra* note 11, at 36-37.

<sup>27</sup> ROBERT CONQUEST, THE NATION KILLERS: THE SOVIET DEPORTATION OF NATIONALITIES 64-65, 210 (1970); SCHECHTMAN, *supra* note 2, at 265, 271; de Zayas, *supra* note 24, at 21; Joseph B. Schechtmann, *The Option Clause in the Reich’s Treaties on the Transfer of Population*, 38 AM. J. INT’L L. 356, 357 (1944); J.R., *The Exchange of Minorities and Transfers of Population in Europe Since 1919 – Part II*, 21 BULLETIN INT’L NEWS 657, 661-64 (1944) [hereinafter Exchange Part II]; Special Rapporteurs on the Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers and Settlements, *Preliminary Report on the Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, ¶ 10, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/17 (July 6, 1993) (by Awn Shawkat Al-Khasawneh & Ribot Hatano) [hereinafter Preliminary Al-Khasawneh and Hatano Report]. The Germany-Latvia treaty is reprinted as Treaty Between Germany and Latvia Regarding the Repatriation to Germany of Latvian Citizens Ethnically of German Nationality, Oct. 30, 1939, 200 L.N.T.S. 231 (1940).

<sup>28</sup> Preece, *supra* note 13, at 826 & n.46.

<sup>29</sup> Emily Haslam, *Population Expulsion and Transfer*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 7, available at [http://www.mpepil.com/sample\\_article?id=/epil/entries/law-9780199231690-e861&recno=18&](http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e861&recno=18&) (last updated Nov. 2008).

<sup>30</sup> ANDREW BELL-FIALKOFF, ETHNIC CLEANSING 35 (1996).

<sup>31</sup> Nurit Kliot, *Resettlement of Refugees in Finland and Cyprus: A Comparative Analysis and Possible Lessons for Israel*, in POPULATION RESETTLEMENT IN INTERNATIONAL CONFLICTS 57, 58 (Arie M. Kacowicz & Pawel Lutomski eds., 2007).

<sup>32</sup> BELL-FIALKOFF, *supra* note 30, at 30; Dariusz Stola, *Forced Migrations in Central European History*, 24 INT’L MIGRATION REV. 324, 333-34 (1992).

<sup>33</sup> SCHECHTMAN, *supra* note 2, at 23, 30, 377; Exchange Part II, *supra* note 27, at 665.

<sup>34</sup> de Zayas, *supra* note 24, at 21; Preece, *supra* note 13, at 825.

<sup>35</sup> BELL-FIALKOFF, *supra* note 30, at 46.

<sup>36</sup> KLEJDA MULAJ, POLITICS OF ETHNIC CLEANSING 37 (2008).

<sup>37</sup> ORTAKOVSKI, *supra* note 3, at 133; BERND J. FISCHER, ALBANIA AT WAR: 1939-1945, at 87, 238 (1999).

<sup>38</sup> BELL-FIALKOFF, *supra* note 30, at 46.

<sup>39</sup> de Zayas, *supra* note 24, at 28.

<sup>40</sup> SCHECHTMAN, *supra* note 2, at 23; POLIAN, *supra* note 11, at 331-32; Klot, *supra* note 31, at 58-59.

<sup>41</sup> BELL-FIALKOFF, *supra* note 30, at 30; Stola, *supra* note 32, at 335.

<sup>42</sup> Orest Subtelny, *Expulsion, Resettlement, Civil Strife: The Fate of Poland's Ukrainians, 1944-1947*, in REDRAWING NATIONS, *supra* note 25, at 155, 156; POLIAN, *supra* note 11, at 166.

<sup>43</sup> POLIAN, *supra* note 11, at 166.

<sup>44</sup> *Id.* at 166; Subtelny, *supra* note 42, at 155-56. See also Konstantinos Tsitselikis, *Population Exchange: A Paradigm of Legal Perversion*, in EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, THE PROTECTION OF NATIONAL MINORITIES BY THEIR KIN-STATE 135, 143 (2002) (stating that the agreement was for "compulsory population exchange").

<sup>45</sup> BELL-FIALKOFF, *supra* note 30, at 39.

<sup>46</sup> Stola, *supra* note 32, at 336.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Timothy William Waters, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, 47 VA. J. INT'L L. 63, 71-75 (2006).

<sup>50</sup> See BELL-FIALKOFF, *supra* note 30, at 37-38.

<sup>51</sup> Stola, *supra* note 32, at 336. The actual number of Germans expelled exceeded what the victorious Allied powers had authorized. See BELL-FIALKOFF, *supra* note 30, at 37. Moreover, the Allied powers approved the transfers of ethnic Germans in large part because it was already occurring anyway and they wanted to attempt to regularize the process and protect innocent civilians. See Joseph B. Schechtman, *Postwar Population Transfers in Europe: A Survey*, 15 REV. POLITICS 151, 153-54 (1953).

<sup>52</sup> *The Resettlement of Expellees and Refugees in the Federal Republic of Germany and Austria*, 68 INT'L LAB. REV. 166, 167 (1953).

<sup>53</sup> See Stola, *supra* note 32, at 335.

<sup>54</sup> SCHECHTMAN, *supra* note 2, at 268-69, 273.

<sup>55</sup> Schechtman, *supra* note 51, at 162-63.

<sup>56</sup> See SCHECHTMAN, *supra* note 2, at 43-47; Stola, *supra* note 32, at 337. See also Tsitselikis, *supra* note 44, at 143 (stating that the agreement was for "compulsory population exchange").

<sup>57</sup> BELL-FIALKOFF, *supra* note 30, at 38-39.

<sup>58</sup> See de Zayas, *supra* note 24, at 27; BELL-FIALKOFF, *supra* note 30, at 38-39; POLIAN, *supra* note 11, at 42; Preliminary Al-Khasawneh and Hatano Report, *supra* note 27, at ¶ 140.

<sup>59</sup> Tsitselikis, *supra* note 44, at 143.

<sup>60</sup> Preliminary Al-Khasawneh and Hatano Report, *supra* note 27, at ¶ 140.

<sup>61</sup> See PAUL K. MARUYAMA, *ESCAPE FROM MANCHURIA*, at xvi (2010) (estimating that 1 million were repatriated).

<sup>62</sup> ORTAKOVSKI, *supra* note 3, at 179, 326.

<sup>63</sup> *Id.* at 181.

<sup>64</sup> See BELL-FIALKOFF, *supra* note 30, at 30.

<sup>65</sup> Stola, *supra* note 32, at 335-36.

<sup>66</sup> See POLIAN, *supra* note 11, at 168-69.

<sup>67</sup> *Id.*



<sup>68</sup> Myron Weiner, *Rejected Peoples and Unwanted Migrants in South Asia*, 28 *ECON. & POL. WKLY.* 1737, 1738 (Aug. 21, 1993).

<sup>69</sup> See Agreement Between the Governments of India and Pakistan Regarding Security and Rights of Minorities (Nehru-Liaquat Agreement), art. B, Apr. 8, 1950, Indian Treaty Series, available at <http://www.liiofindia.org/in/other/treaties/INTSer/1950/9.html> (providing that refugees “from East Bengal, West Bengal, Assam and Tripura, where communal disturbances have recently occurred,” may return and reclaim their landed property if they do so by December 31, 1950). Note that this provision of the Agreement did not cover refugees from the Punjab region, where most of the violence and refugee flows originated. In any event, India’s legislature soon enacted the Immigrants (Expulsion from Assam) Act of 1950, which gave the government discretion to remove any person who had come into Assam from “any place outside India,” undercutting the repatriation rights in the Nehru-Liaquat Agreement. See VIVEK CHADHA, *LOW INTENSITY CONFLICTS IN INDIA*, at Appendix I (2005) (reprinting the act).

<sup>70</sup> Weiner, *supra* note 68, at 1738-39.

<sup>71</sup> *Id.* at 1738.

<sup>72</sup> See MOSHE GAT, *THE JEWISH EXODUS FROM IRAQ, 1948-1951*, at 1 (1997); Esther Meir-Glitzstein, *Iraqi Jews in Israel: From “Refugees” to “Zionists” and Back Again*, in *POPULATION RESETTLEMENT IN INTERNATIONAL CONFLICTS*, *supra* note 31, at 115, 116-27.

<sup>73</sup> See MICHAEL R. FISCHBACH, *JEWISH PROPERTY CLAIMS AGAINST ARAB COUNTRIES* 39-42 (2008).

<sup>74</sup> See INIS L. CLAUDE, *NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM* 192 (1955); SCHECHTMAN, *supra* note 2, at 345-54, 363; ORTAKOVSKI, *supra* note 3, at 170; Schechtman, *supra* note 51, at 174-75; Huey L. Kostanick, *Turkish Resettlement of Refugees from Bulgaria, 1950-1953*, 9 *MIDDLE E. J.* 41, 41 (1955).

<sup>75</sup> JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* 89 (1995).

<sup>76</sup> *RUTLEDGE LIBRARY OF MODERN JAPAN, SHOWA JAPAN* 204 (Stephen S. Large ed., vol. 2 1998).

<sup>77</sup> JOEL BEININ, *THE DISPERSION OF EGYPTIAN JEWRY* 87 (2005).

<sup>78</sup> MICHAEL R. FISCHBACH, *RECORDS OF DISPOSSESSION* 174 (2003).

<sup>79</sup> Rachel Lostumbo, *Tibetan Refugees in Nepal: From Established Settlements to Forcible Repatriation*, 9 *GEO. IMMIGR. L.J.* 911, 911 (1995). “Since 1959, over 130,000 refugees have escaped Tibet.” *Id.*

<sup>80</sup> See JOSEPH B. SCHECHTMAN, *THE REFUGEE IN THE WORLD* 303-05 (1963); Andrea Smith, *Coerced or Free? Considering Post-Colonial Returns*, in *REMOVING PEOPLES: FORCED REMOVAL IN THE MODERN WORLD* 395, 401 (Richard Bessel & Claudia B. Haake eds., 2009).

<sup>81</sup> See U.N. HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD’S REFUGEES* 1995, at 32 (1995) [hereinafter UNHCR 1995]; CASSANDRA R. VENEY, *FORCED MIGRATION IN EASTERN AFRICA* 8 (2007); *MINORITIES AT RISK PROJECT, CHRONOLOGY FOR HUTUS IN RWANDA* (2004), available at <http://www.unhcr.org/refworld/docid/469f38d51e.html>.

<sup>82</sup> BELL-FIALKOFF, *supra* note 30, at 40.

<sup>83</sup> Nii Lante Wallace-Bruce, *The Collective Expulsion of Foreign Nationals*, *AUSTL. INT’L L. NEWS* 70, 72 (1985).

<sup>84</sup> Weiner, *supra* note 68, at 1738.

<sup>85</sup> DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 198 (1985).

<sup>86</sup> BELL-FIALKOFF, *supra* note 30, at 43.

<sup>87</sup> *Id.* at 43.

<sup>88</sup> See Aderanti Adepoju, *Illegals and Expulsion in Africa: The Nigerian Experience*, 18 INT'L MIGRATION REV. 426, 430 (1984); de Zayas, *supra* note 24, at 32.

<sup>89</sup> See DANIEL PIPES, *THE LONG SHADOW: CULTURE AND POLITICS IN THE MIDDLE EAST* 83 (1989); BBC News, *On This Day: December 30, 1971, Iranians Deported from Iraq*, [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/30/newsid\\_2547000/2547551.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/30/newsid_2547000/2547551.stm).

<sup>90</sup> Adepoju, *supra* note 88, at 430.

<sup>91</sup> INTERNAL DISPLACEMENT MONITORING CENTRE & NORWEGIAN REFUGEE COUNCIL, *IRAQ: LITTLE NEW DISPLACEMENT BUT IN THE REGION OF 2.8 MILLION IRAQIS REMAIN INTERNALLY DISPLACED* 44 (2010), available at <http://www.unhcr.org/refworld/pdfid/4b90da1d2.pdf> [hereinafter IDMC & NRC IRAQ].

<sup>92</sup> *Id.* at 43; On the denationalization of Feili Kurds, see Philippe Leclerc & Rupert Colville, *In the Shadows: Millions Seek to Escape the Grim World of the Stateless*, REFUGEES MAGAZINE, Sept. 25, 2007, at 4, 5.

<sup>93</sup> Weiner, *supra* note 68, at 1740-41.

<sup>94</sup> de Zayas, *supra* note 24, at 31-32.

<sup>95</sup> VENEY, *supra* note 81, at 50.

<sup>96</sup> Weiner, *supra* note 68, at 1739.

<sup>97</sup> Sumit Sen, *Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part I*, 11 INT'L J. REFUGEE L. 625, 625 (1999).

<sup>98</sup> See generally, BELL-FIALKOFF, *supra* note 30, at 140-41; U.S. COMM. FOR REFUGEES, 1981 WORLD REFUGEE SURVEY 27 (1981); Klot, *supra* note 31, at 59; Preece, *supra* note 13, at 830.

<sup>99</sup> Smith, *supra* note 80, at 403.

<sup>100</sup> HUM. RTS. WATCH, *WHATEVER HAPPENED TO THE IRAQI KURDS?* (1991), available at <http://www.hrw.org/legacy/reports/1991/IRAQ913.htm>. [hereinafter HRW KURDS].

<sup>101</sup> BELL-FIALKOFF, *supra* note 30, at 44.

<sup>102</sup> HUM. RTS. WATCH, *HUMAN RIGHTS IN WESTERN SAHARA AND IN THE TINDOUF REFUGEE CAMPS* 23-25 (2008).

<sup>103</sup> HELEN CHAPIN METZ, *LIBYA* 231 (2004).

<sup>104</sup> See VENEY, *supra* note 81, at 8; Ismail I Ahmed & Reginald Herbold Green, *The Heritage of War and State Collapse in Somalia and Somaliland: Local Level Effects, External Interventions and Reconstruction*, 20 THIRD WORLD Q. 113, 118 (1999).

<sup>105</sup> BELL-FIALKOFF, *supra* note 30, at 44.

<sup>106</sup> Aderanti Adepoju, *The Politics of International Migration in Post-Colonial Africa*, in *THE CAMBRIDGE SURVEY OF WORLD MIGRATION* 167 (Robin Cohen ed., 1995).

<sup>107</sup> Weiner, *supra* note 68, at 1739.

<sup>108</sup> Rony Brauman, *Foreward* to *WORLD IN CRISIS: THE POLITICS OF SURVIVAL AT THE END OF THE TWENTIETH CENTURY*, at xxiii (Doctors Without Borders ed., 1997).

<sup>109</sup> Weiner, *supra* note 68, at 1740.

<sup>110</sup> Minority Rts. Grp. Int'l, *World Directory of Minorities and Indigenous Peoples – Vietnam: Chinese (Hoa)* (2008), available at <http://www.unhcr.org/refworld/docid/49749c7f8.html>.

<sup>111</sup> Weiner, *supra* note 68, at 1740.

<sup>112</sup> See AFR. WATCH, *EVIL DAYS: 30 YEARS OF WAR AND FAMINE IN ETHIOPIA* 114-17, 125 (1991) [hereinafter *EVIL DAYS*].

<sup>113</sup> HENCKAERTS, *supra* note 75, at 107.

<sup>114</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, *Iraqi Refugees in Iran*, 20 REFUGEE REPS. (June 1999), available at <http://reliefweb.int/report/iran-islamic-republic/iraqi-refugees-iran>.

<sup>115</sup> See HENCKAERTS, *supra* note 75, at 117; Alan Dowty, *Emigration and Expulsion in the Third World*, 8 *THIRD WORLD Q.* 151, 172 (1986).

<sup>116</sup> See MICHEL BEN ARROUS & LAZARE KI-ZERBO, *AFRICAN STUDIES IN GEOGRAPHY FROM BELOW* 269 (2009); de Zayas, *supra* note 24, at 32.

<sup>117</sup> Micah Bump, *Country Profiles: Ghana: Searching for Opportunities at Home and Abroad*, MIGRATION INFORMATION SOURCE (March 2006), <http://www.migrationinformation.org/USFocus/display.cfm?ID=381>.

<sup>118</sup> Michael Goldsmith, *Tunisians Expelled from Libya Tell of Jail, Beatings*, *HOUSTON CHRON.*, Oct. 10, 1989, available at [http://www.chron.com/CDA/archives/archive.mpl/1985\\_43339/tunisians-expelled-from-libya-tell-of-jail-beating.html](http://www.chron.com/CDA/archives/archive.mpl/1985_43339/tunisians-expelled-from-libya-tell-of-jail-beating.html)

<sup>119</sup> HRW *KURDS*, *supra* note 100; IDMC & NRC *IRAQ*, *supra* note 91, at 61.

<sup>120</sup> *EVIL DAYS*, *supra* note 112, at 237, 240.

<sup>121</sup> U.S. DEP'T OF STATE, U.S. DEP'T OF STATE COUNTRY REP. ON HUM. RTS. PRACTICES 1993—AZERBAIJAN (Jan. 30, 1994), available at <http://www.unhcr.org/refworld/docid/3ae6aa472c.html>.

<sup>122</sup> See Claire Messina, *Refugee Definition in the Countries of the Commonwealth of Independent States*, in *REFUGEE RIGHTS AND REALITIES* 136, 138 (Frances Nicholson & Patrick Twomey eds., 1999).

<sup>123</sup> See Charles King, *The Benefits of Ethnic War: Understanding Eurasia's Unrecognized States*, 53 *WORLD POLITICS* 524, 529-530 (2001).

<sup>124</sup> *Id.* at 529.

<sup>125</sup> See Messina, *supra* note 122, at 138-39.

<sup>126</sup> See, Robert J. Kaiser, *Ethnic Demography and Interstate Relations*, in 2 *THE INTERNATIONAL POLITICS OF EURASIA: NATIONAL IDENTITY AND ETHNICITY IN RUSSIA AND THE NEW STATES OF EURASIA* 248-49 (Roman Szporluk ed., 1994); COMM. ON MIGRATION, REFUGEES AND POPULATION, COUNCIL OF EUR., *The Situation on the Deported Meskhetian Population*, Doc. No. 10451 (2005), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10451.htm>.

<sup>127</sup> See HENCKAERTS, *supra* note 75, at 82-83; U.S. COMM. FOR REFUGEES AND IMMIGRANTS, *WORLD REFUGEE SURVEY 1998—MAURITANIA* (1998), available at <http://www.unhcr.org/refworld/docid/3ae6a8b548.html>.

<sup>128</sup> See HENCKAERTS, *supra* note 75, at 110-11; ORTAKOVSKI, *supra* note 3, at 173-74; VENEY, *supra* note 81, at 87; Preece, *supra* note 13, at 830.

<sup>129</sup> ORTAKOVSKI, *supra* note 3, at 174.

<sup>130</sup> Sarah Cross, *Unique Movements in the Caucasus: The Soviet Legacy in Current Migration Crises*, in *FORCED MIGRATION AND THE CONTEMPORARY WORLD* 47, 51 (Andrzej Bolesta ed., 2003).

<sup>131</sup> BUREAU OF REFUGEE PROGRAMS, U.S. DEP'T OF STATE, *WORLD REFUGEE REPORT 33* (1992) [hereinafter *WORLD REFUGEE REPORT 1992*].

<sup>132</sup> B. Muralidhar Reddy, *Sri Lanka: Muslim Concerns*, FRONTLINE (Aug. 11–24, 2007), available at <http://frontlineonnet.com/fl2416/stories/20070824505104200.htm>.

<sup>133</sup> Aderanti Adepoju et al., *Promoting Integration Through Mobility: Free Movement Under ECOWAS*, 29 REFUGEE SURVEY Q. 120, 136 n.31 (2010).

<sup>134</sup> Author Name, *Cycles of Conflict in the Middle East and Africa*, in CENTER FOR SCIENCE AND INT'L AFFAIRS, HARV. U., THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT 227 (Michael Edward Brown ed., 1996).

<sup>135</sup> BELL-FIALKOFF, *supra* note 30, at 47; INT'L LABOUR ORG., *Social and Labour Issues Concerning Migrant Workers in the Construction Industry* 34 (1995).

<sup>136</sup> Mahendra P. Lama, *Bhutanese Refugees in Nepal*, in PROTRACTED REFUGEE SITUATIONS 277 (Gil Loescher et al. eds., 2008); HUM. RTS. WATCH, LAST HOPE: THE NEED FOR DURABLE SOLUTIONS FOR BHUTANESE REFUGEES IN NEPAL AND INDIA (2007), available at <http://www.hrw.org/en/reports/2007/05/16/last-hope-0>; REFUGEES INT'L, LIVES ON HOLD: THE HUMAN COST OF STATELESSNESS 37 (2005), available at <http://www.unhcr.org/refworld/docid/47a6eba00.html>.

<sup>137</sup> HUM. RTS. WATCH, "ILLEGAL PEOPLE": HAITIANS AND DOMINICAN-HAITIANS IN THE DOMINICAN REPUBLIC 16 (2002) [hereinafter ILLEGAL PEOPLE], available at [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:5405](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5405).

<sup>138</sup> IDMC & NRC IRAQ, *supra* note 91, at 61.

<sup>139</sup> HUM. RTS. WATCH: THE IRAQI GOVERNMENT ASSAULT ON THE MARSH ARABS 1–3, 8–9, 13–15 (2003), available at <http://www.hrw.org/en/reports/2003/01/25/iraqi-government-assault-marsh-arabs>.

<sup>140</sup> WORLD REFUGEE REPORT 1992, *supra* note 131, at 47.

<sup>141</sup> Kenneth B. Noble, *Congo Expelling Zairian Citizens*, N.Y. TIMES, Dec. 13, 1991, available at <http://www.nytimes.com/1991/12/13/world/congo-expelling-zairian-citizens.html>.

<sup>142</sup> BELL-FIALKOFF, *supra* note 30, at 47; HUM. RTS. WATCH, JORDAN: THE SILENT TREATMENT: FLEEING IRAQ, SURVIVING IN JORDAN 92 n.292 (2006), available at <http://www.hrw.org/en/reports/2006/11/27/silent-treatment-0> [hereinafter SILENT TREATMENT].

<sup>143</sup> SILENT TREATMENT, *supra* note 142, at 92 n.292.

<sup>144</sup> UNHCR 1995, *supra* note 81, at 23; WORLD REFUGEE REPORT 1992, *supra* note 131, at 82.

<sup>145</sup> NAIMARK, *supra* note 6, at 156–58, 173–74; Paul Prettitore, *Return and Resettlement as a Result of Ethnic Cleansing in Post-Conflict Former Yugoslavia*, in POPULATION RESETTLEMENT IN INTERNATIONAL CONFLICTS, *supra* note 31, at 79, 80.

<sup>146</sup> BELL-FIALKOFF, *supra* note 30, at 47; Cross, *supra* note 130, at 47, 49.

<sup>147</sup> FREEDOM HOUSE, FREEDOM IN THE WORLD 1993–1994, at 596 (1994); IMMIGRATION AND REFUGEE BD. OF CANADA, ZAIRE: UPDATE TO RESPONSE TO INFORMATION REQUEST ZAR1271 ON THE SITUATION OF KASAIENS TODAY (1993), available at <http://www.unhcr.org/refworld/docid/3ae6aac41c.html>.

<sup>148</sup> NAIMARK, *supra* note 6, at 159–73.

<sup>149</sup> Messina, *supra* note 122, at 139.

<sup>150</sup> UNHCR 1995, *supra* note 81, at 67.

<sup>151</sup> Chris Dolan, *Repatriation from South Africa to Mozambique: Undermining Durable Solutions*, in THE END OF THE REFUGEE CYCLE? 85, 98–99 (Richard Black & Khalid Koser eds., 1999).

<sup>152</sup> HENCKAERTS, *supra* note 75, at 100.

<sup>153</sup> VENEY, *supra* note 81, at 42; UNHCR 1995, *supra* note 81, at 32.

<sup>154</sup> HENCKAERTS, *supra* note 75, at 18.

<sup>155</sup> NICHOLAS SHAXSON, POISONED WELLS: THE DIRTY POLITICS OF AFRICAN OIL 66 (2008); *Migrants Expelled from Gabon*, 2 MIGRATION NEWS, no. 3, March 1995, available at [http://migration.ucdavis.edu/mn/more.php?id=600\\_0\\_5\\_0](http://migration.ucdavis.edu/mn/more.php?id=600_0_5_0).

<sup>156</sup> Farzaneh Roudi, POPULATION REFERENCE BUREAU, *Final Peace in the Middle East Hinges on Refugee Population*, available at <http://www.prb.org/Articles/2001/FinalPeaceintheMiddleEastHingesonRefugeePopulation.aspx?p=1>; see also HUM. RTS. WATCH, LIBYA: STEMMING THE FLOW: ABUSES AGAINST MIGRANTS, ASYLUM SEEKERS AND REFUGEES 25 (2006) [hereinafter STEMMING THE FLOW] (also estimating 30,000).

<sup>157</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 1997 – TANZANIA (1997), <http://www.unhcr.org/refworld/docid/3ae6a8a637.html>.

<sup>158</sup> JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 933 (2005).

<sup>159</sup> AMNESTY INT’L, GREAT LAKES REGION: STILL IN NEED OF PROTECTION: REPATRIATION, REFOULEMENT AND THE SAFETY OF REFUGEES AND THE INTERNALLY DISPLACED 3 (1997), available at <http://www.unhcr.org/refworld/docid/3ae6a98c3.html>.

<sup>160</sup> Michael S. Teitelbaum, *International Migration as a Pivotal Issue*, in THE PIVOTAL STATES 270, 283 (Robert Chase et al. eds., 1999).

<sup>161</sup> ILLEGAL PEOPLE, *supra* note 137, at 16.

<sup>162</sup> IDMC & NRC IRAQ, *supra* note 91, at 62.

<sup>163</sup> *Id.* at 222; HUM. RTS. WATCH, IRAQ: FORCIBLE EXPULSION OF ETHNIC MINORITIES 2–4 (2003), available at <http://www.hrw.org/en/reports/2003/03/13/iraq-0>.

<sup>164</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 1998 – TANZANIA (1998), <http://www.unhcr.org/refworld/docid/3ae6a8c5c.html>.

<sup>165</sup> NAIMARK, *supra* note 6, at 175–82.

<sup>166</sup> ORTAKOVSKI, *supra* note 3, at 266–67; Prettitore, *supra* note 145, at 80–81.

<sup>167</sup> HUM. RTS. WATCH: THE HORN OF AFRICA WAR: MASS EXPULSIONS AND THE NATIONALITY ISSUE 3, 5, 33, 36 (2003), available at <http://www.hrw.org/en/node/12364/section/1>; U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2000 – ETHIOPIA (2000), <http://www.unhcr.org/refworld/docid/3ae6a8cc1c.html>.

<sup>168</sup> HUM. RTS. WATCH, MASSACRES OF HAZARAS IN AFGHANISTAN 2–5 (2001), available at <http://www.hrw.org/legacy/reports/2001/afghanistan/>; Hum. Rts. Watch Backgrounder, *Afghanistan: Ethnically-Motivated Abuses Against Civilians* (Oct. 2001), <http://www.hrw.org/legacy/backgrounder/asia/afghan-bck1006.htm>; Ahmed Rashid, *Taliban Killed 4,000 in Ethnic Cleansing Drive*, Electronic Telegraph (Pakistan), Sept. 10, 1998, available at <http://www.rawa.org/mazar6.htm>.

<sup>169</sup> HUM. RTS. WATCH, INDONESIA/EAST TIMOR: FORCED EXPULSIONS TO WEST TIMOR AND THE REFUGEE CRISIS 2 (1999), available at <http://www.hrw.org/en/reports/1999/12/01/east-timor-forced-expulsions-west-timor-and-refugee-crisis>.

<sup>170</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2001 – IRAQ (2001), <http://www.unhcr.org/refworld/docid/3b31e16413.html>.

<sup>171</sup> HUM. RTS. WATCH, ACEH UNDER MARTIAL LAW: PROBLEMS FACED BY ACEHNESE REFUGEES IN MALAYSIA 8 (2004), available at <http://www.hrw.org/en/node/12153/section/5>.

<sup>172</sup> UNHCR, CHRONOLOGY OF EVENTS IN IRAN, APRIL 2004 (July 2004), available at <http://www.unhcr.org/refworld/docid/4133432c4.html>.

<sup>173</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2004 — DJIBOUTI (May 25, 2004), available at <http://www.unhcr.org/refworld/docid/40b45938c.html>; IMMIGRATION AND REFUGEE BD. OF CANADA, DJIBOUTI/ETHIOPIA: FORCED DEPORTATION OF OROMO REFUGEES FROM DJIBOUTI TO ETHIOPIA (2004), available at <http://www.unhcr.org/refworld/docid/41501c7723.html>.

<sup>174</sup> STEMMING THE FLOW, *supra* note 156, at 3–4, 52–53.

<sup>175</sup> HUM. RTS. WATCH, CHAD: “THEY CAME HERE TO KILL US”: MILITIA ATTACKS AND ETHNIC TARGETING OF CIVILIANS IN EASTERN CHAD 14 (2007), available at <http://www.hrw.org/en/node/11075/section/9>; HUM. RTS. WATCH, DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN (2004), available at <http://www.hrw.org/en/node/12133/section/1>.

<sup>176</sup> Institute for Human Rights and Development in Africa v Angola (2008) AHRLR 43, <http://www.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/198-angola-institute-for-human-rights-and-development-in-africa-v-angola-2008-ahrlr-achpr-2008-.html>.

<sup>177</sup> SATVINDER SINGH JUSS, INTERNATIONAL MIGRATION AND GLOBAL JUSTICE 6 (2006).

<sup>178</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2007 — ANGOLA (2007), <http://www.unhcr.org/refworld/docid/46963879c.html>.

<sup>179</sup> UN News Service, U.N. Agency Monitors Mass Expulsion of Congolese Living in Angola (Aug. 22, 2008), <http://www.unhcr.org/refworld/docid/48b287c71a.html>; U.N. Secretary-General, *Thirtieth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, ¶ 27, U.N. Doc. S/2009/623 (Dec. 4, 2009), available at <http://www.unhcr.org/refworld/docid/4b2224182.html>.

<sup>180</sup> U.S. COMM. FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2009 — IRAN (2009), <http://www.unhcr.org/refworld/docid/4a40d2a84a.html>; see also Waliullah Rahmani, *Iran's Decision to Expel Refugees May Destabilize Western Afghanistan*, JAMESTOWN FOUNDATION (May 8, 2007), [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews\[tt\\_news\]=4141](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=4141).

<sup>181</sup> Henry Smith, *Yemen's Next Steps*, NEW STATESMAN, Jan. 28, 2010, available at <http://www.newstatesman.com/middle-east/2010/01/saudi-arabia-yemen-conference>.

<sup>182</sup> Press Release, UNHCR, UNHCR Airlifts Emergency Relief Items for Expelled Refugees in Angola, (Nov. 3, 2009), available at <http://www.unhcr.org/4af04ee49.html>.

<sup>183</sup> HUM. RTS. WATCH, ANGOLA: EVENTS OF 2009, <http://www.hrw.org/en/world-report-2009/angola-0>.

<sup>184</sup> HUM. RTS. WATCH, YEMEN: HOSTILE SHORES: ABUSE AND REFOULEMENT OF ASYLUM SEEKERS AND REFUGEES IN YEMEN 11–12, 24–25, 34–38 (2009), available at <http://www.hrw.org/en/reports/2009/12/21/hostile-shores-0>.

<sup>185</sup> To find newly independent states, I used version 4.01 of the Correlates of War, Territorial Change data set. See Jaroslav Tir, Philip Schafer, Paul Diehl & Gary Goertz, *Territorial Changes, 1816–1996: Procedures and Data*, 16 CONFLICT MANAG. & PEACE SCI. 89 (1998). This version provided data for the time period

1816 through 2008. I used other sources to determine whether the independence struggle leading to the creation of a new state was an ethnic conflict or, if not, whether the independence struggle nevertheless took place at the same time as an armed ethnic conflict in the same territory. First, I used the Ethnic Armed Conflict (EAC) data set. See Lars-Erik Cederman, Brian Min & Andreas Wimmer, *Ethnic Armed Conflict Dataset*, [http://dvn.iq.harvard.edu/dvn/dv/epr/faces/study/StudyPage.xhtml?studyId=36583&tab=files&studyListingIndex=0\\_97b9ed8df80ed0b9756e3b8ce034](http://dvn.iq.harvard.edu/dvn/dv/epr/faces/study/StudyPage.xhtml?studyId=36583&tab=files&studyListingIndex=0_97b9ed8df80ed0b9756e3b8ce034) (click on tab "Data & Analysis"). As described in the codebook (download "Ethnic Armed Conflict Coding"), the EAC coding of wars: "is based on the UCDP/PRIO Armed Conflicts Data Set (ACD) (Gleditsch et al. 2002). ACD defines armed conflict as any armed and organized confrontation between government troops and rebel organizations, or between army factions, that reaches an annual battle-death threshold of 25 people. Massacres and genocides are not included because the victims are neither organized nor armed; communal riots and pogroms are excluded because the government is not directly involved." An armed conflict passing this screen was defined as ethnic by EAC using the following criteria:

*Ethnic/nonethnic conflicts* are distinguished by the aims of the armed organizations and their recruitment and alliance structures, in line with other ongoing coding projects (Sambanis 2009). Ethnic wars typically involve conflicts over ethnonational self-determination, the ethnic balance of power in government, ethnoregional autonomy, ethnic and racial discrimination (whether alleged or real), and language and other cultural rights. We define all other war aims as nonethnic. . . . Regarding recruitment and alliance structures, we define ethnic wars as those fought by armed organizations that recruit fighters predominantly among their own ethnic group and who forge alliances on the basis of ethnic affiliation. For a conflict to be classified as ethnic, armed organizations have to both explicitly pursue ethnonationalist aims, motivations, and interests *and* recruit fighters and forge alliances on the basis of ethnic affiliations.

*Id.* Because the EAC data set begins only in 1946, for the period 1900-1945 I coded conflicts as ethnic/non-ethnic myself, using the same definition of ethnic conflict as EAC. To determine whether a conflict met these criteria, I relied on a range of sources, most significantly Library of Congress Country Studies, <http://lcweb2.loc.gov/frd/cs/>, U.S. Department of State Country Reports on Human Rights Practices, <http://www.state.gov/g/drl/rls/hrrpt/>, the CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/>, the International Institute for Strategic Studies' Armed Conflict Database, [http://acd.iiss.org/armedconflict/MainPages/dsp\\_WorldMap.asp](http://acd.iiss.org/armedconflict/MainPages/dsp_WorldMap.asp), reports from GlobalSecurity.org and Human Rights Watch, and, where necessary, historical monographs covering specific countries or conflicts.

<sup>186</sup> See 2001 U.N.H.C.R Stat. Y.B., Stat. Annex tbl.A.14; 2005 U.N.H.C.R Stat. Y.B., Stat. Annex tbl.B.7; 2006 U.N.H.C.R Stat. Y.B., Stat. Annex tbl.4; 2007 U.N.H.C.R Stat. Y.B., Stat. Annex tbl.17; 2008 U.N.H.C.R Stat. Y.B., Stat. Annex tbl.19, available at <http://www.unhcr.org/pages/4a02afce6.html>. Where refugee numbers for a given year were later revised by UNHCR, the most recent data was used.