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FROM DISPLACEMENT TO REPATRIATION: IS THERE A RIGHT OF RETURN?

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From Displacement to Repatriation: Is There a Right of Return?

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Abstract

From Displacement to Repatriation: Is There a Right of Return?

This thesis examines the legal status of the right of return for forcibly displaced persons under international law. It delves into the complexities and evolving nature of international legal frameworks that govern the right of return, arguing that it is also a Customary International Law (CIL) norm.

The research utilizes a doctrinal methodology to analyze treaties, declarations, resolutions, and case law pertaining to forced displacement and the right of return. It explores the philosophical backgrounds and practical applications of the right of return, highlighting its significance in resolving the challenges faced by displaced populations. The thesis examines different viewpoints among scholars and legal practitioners regarding the enforceability and recognition of the right of return.

Key findings suggest that while the right of return is widely recognized in various international legal instruments, its application and enforcement remain inconsistent across different jurisdictions and circumstances. The study highlights the importance of enhancing legal mechanisms and international cooperation to facilitate the safe and dignified return of refugees to their places of origin, advocating for a balance between state sovereignty and the universal rights of displaced individuals.

Through an exploration of historical precedents, current jurisprudence, and state practices, the thesis contributes to a deeper understanding of the right of return, advocating for its recognition as an essential component of a sustainable solution to global displacement crises. This research aims to inform policymakers, legal scholars, and international organizations, fostering a more effective and humanitarian approach to addressing the needs of forcibly displaced populations.

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Table 1. Partial List of Mass Expulsions, Compulsory Transfers, or Coerced Flights of Ethnic Minority Groups, 1900-2024

Criteria:

1. Officially instigated or organized
2. Directed at masses of people, collectively
3. 100,000 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 2000

| N | Date | State(s) | 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 Czar for reforms, scapegoating jews led to officially-tolerated pogroms, killing hundreds and driving more than 300,000 Jews to emigrate |
| 2 | 1913 | Bulgaria, Greece | War time massacres and expulsion of foreign nationals in occupied territory | As Greeks armies drove into Bulgaria in Second Balkan War, Bulgarian civilians were massacred and about 150,000 fled deeper into Bulgaria |
| 3 | 1914-16 | Ottoman Empire/Turkiye | Eve of War and wartime expulsions of own nationals | Ottomans killed thousands of ethnic Greeks and expelled approx. 150,000 |
| 4 | 1914-17 | Russian Empire, Austro-Hungarian Empire | War time massacres and expulsion of own and foreign nationals | During WW I, Russian military expropriated and drove home, deported, approximately 500,000 to 600,000 Jews in its own territory and occupied enemy territory. |
| 5 | 1915-16 | Serbia, Bulgaria, Austro Hungarian Empire | Wartime massacre and expulsion of foreign nationals in occupied territory | Bulgarian and Austro-Hungarian armies invade and occupy Serbia; Serbian civilians massacred, and very large unknown number of Serb refugees fled; Then during formal military occupation more than 150,000 people were deported |
| 6 | 1915-18 | Ottoman Empire/Turkiye | Armenian genocide wartime murder and expulsion of own | More than 600,000 Armenians died and more than 400,000 fled or were expelled |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|---|-------------|---|---|---|
| | | | nationals | |
| 7 | 1920 | Hungary, Romania, Yugoslavia, Czechoslovakia | Post-war, post cession expulsions of alien ethnic group in newly acquired territory | By 1920 Treaty of Trianon Hungary lost its territory; Romania, Yugoslavia and Czechoslovakia expelled some 300,00 ethnic Magyar from their new territories |
| 8 | 1922 -33 | Turkey, Greece | 1923 Convention of Lausanne for compulsory population exchange | Compulsory exchange treaty when signed, more than million Greek refugees from Türkiye had already fled following Greek's defeat, approx. 190,00 additional Greeks removed from Türkiye and 356,000 Turks removed from Greek Macedonia and Epirus |
| 9 | 1925 -39 | Bulgaria, Türkiye | 1925 convention for bilateral voluntary exchange | Increasing Bulgarian repression of Turkish minority caused many to leave; approx. 130,000 Turks left Bulgaria; additional agreements provided that the refugees who wished to return to the place of origin could not do so without consent of respectively, Bulgaria and Turkey |
| 1 | 1933 | USSR | Peacetime expulsion of own nationals | Approx. 200,000 nomadic Kazakhs expelled from Kazakhstan |
| 1 | 1933 -39 | Germany, Austria | Peacetime forced flight of denationalized people | Nazi denationalizations and other measures against Jews caused approx. 350,000 to flee. |
| 1 | 1937 | USSR | Peacetime expulsion of own nationals | Approx. 170,000 ethnic Koreans deported from sensitive border area |
| 1 | 1939 | Poland, Germany | Wartime expulsion of population of occupied territory | More than 1,000,000 Poles expelled by Germany into central Poland |
| 1 | 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 |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|---|---------|-------------------------------------|---|---|
| 1 | 1939-40 | Japan, Korea | Wartime deportation of population of occupied territory | Approx. 400,000 Koreans deported to Japan to work, often in horrific conditions |
| 1 | 1941-44 | Croatia | Wartime massacres and expulsions | Croatia killed approx. 300,000 Serbs and expelled that many more |
| 1 | 1944 | USSR, Finland | Post-conquest transfer | After USSR re-conquered Karelia from Finns who had invaded in 1940 at the 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 |
| 1 | 1944-45 | USSR, Baltic States | Wartime expulsion of people claimed as own nationals | After USSR “liberated” Baltics from Germans, approx.. 150,000 ethnic Baits were deported |
| 1 | 1944-47 | USSR, Ukraine | Civil war expulsion of own nationals | More than 200,000 ethnic Ukrainians deported from Ukraine to Siberia |
| 2 | 1944-47 | USSR, Poland | Compulsory population exchange agreements | Approx. 510,000 ethnic Ukrainians, Byelorussians, and Lithuanians removed from Poland to USSR, approx. 1.5 million ethnic Poles and Polish Jews expelled from USSR to Poland |
| 2 | 1945 | USSR, Japan | Forced expulsion of ethnic Japanese | Approx. 400,000 ethnic Japanese removed by USSR after it conquered Sakhalin Island |
| 2 | 1945 | USSR | Post-war forced “repatriation” | About 2,000,000 “displaced persons” in Germany at the end of the war were claimed by USSR as its nationals; shipped to USSR for execution, gulag, labor camps; 15-20% survived |
| 2 | 1945 | Greece, Yugoslavia | Post-war expulsion | 120,000 ethnic Bulgarians expelled from Greece, Yugoslavia |
| 2 | 1945 | Romania, Yugoslavia, Czechoslovakia | Post-war expulsion | 185,000 ethnic Hungarians expelled or fled from Romania, Yugoslavia and Czechoslovakia |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|---|---------|--|--|---|
| 2 | 1945-46 | Germany, Poland, Hungary, Czechoslovakia | Post-war expulsion to Germany of ethnic German populations | Authorized in principle by U.S., USSR and UK agreement at Potsdam in 1945, 3.5 million Germans expelled from Poland, 3.2 million Germans expelled from Czechoslovakia and about 225,000 from Hungary and the expelled were resettled in Germany |
| 2 | 1946-48 | China, Japan | Post WW II 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 |
| 2 | 1946-54 | USSR, Baltic States | Intra-state war; expulsion of own nationals | During Baltic guerrilla wars against Soviets, USSR expelled approx. 200,000 Lithuanians, 160,000 Latvians and 60,000 Estonians |
| 2 | 1947-49 | UK-controlled Palestine, Israel, Arab States | End of British mandate; civil war in Palestine; Israeli war independence | The end of the British Mandate and the ensuing Arab-Israeli conflict in 1947-49 led to the Nakba, where approximately 700,000 Palestinian Arabs were displaced, marking a significant instance of forced migration. \ |
| 2 | 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 |
| 3 | 1948-49 | Burma | Peacetime expulsion of de facto 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 |
| 3 | 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. |
| 3 | 1950-51 | Bulgaria | Peacetime expulsion | Approx. 140,000 to 160,000 ethnic Turks expelled from Bulgaria |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|---|------------|-------------------------------|--|---|
| 3 | 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 ⁷⁵ and many thousands were deported. ⁷⁶ |
| 3 | 1959-62 | Rwanda | Intra-state war; expulsion of own nationals | 1959 revolution ousted Tutsi monarchy, replaced Hutu government; approx. 120,000 - 200,000 Rwandans fled or expelled to neighboring countries. |
| 3 | 1962 | Burma | Peacetime expulsion of own nationals | Burma persecuted and drove out perhaps as many as 1,500,000 Burmese of Indian descent. |
| 3 | 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. |
| 3 | 1965, 1970 | Ghana | Peacetime expulsion of foreign nationals | Ghana expelled several hundred thousand foreigners. |
| 3 | 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. |
| 3 | 1969 | Ghana | Peacetime expulsion of foreign nationals | Approx. 200,000 to 500,000 non-Ghanian Africans, primarily Nigerians, expelled from Ghana |
| 3 | 1970 | Libya | Peacetime expulsion of foreign nationals | During “Day of Vengeance”, Khaddafi government some 150,000 Italians |
| 4 | 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 |
| 4 | 1971 | East and West Pakistan, India | Intra-state war, with Indian intervention | India entered civil war because believed West Pakistan was India 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 |
| 4 | 1972 | Burundi | Intra-state war | Hutu revolt against Tutsi government led to killings of 100,000 to 200,000 Hutus by government and flight/expulsion of approx. 300,000 |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|---|-----------|-------------------------|---|---|
| 4 | 1974 | Cyprus, Greece, Turkiye | Intra-state war | Inter-communal violence started in 1963; in 1974, Türkiye invaded on behalf of ethnic Turks and imposed partition; approx. 150,000 to 170,000 ethnic Greeks and 45,000 to 50,000 ethnic Turks fled across de facto partition line |
| 4 | 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 |
| 4 | 1975 | Iraq | Intra-state war | 250,000 Kurds fled from Iraqi forces to Iran |
| 4 | 1976 | Cambodia | Intra-state war | When Khmer Rouge took city of Phnom Penh, approx. 2,000,000 people expelled, including many of the persecuted ethnic Vietnamese minority |
| 4 | 1976 | Libya | Peacetime expulsion of foreign nationals | Libya expelled for political reasons some 130,000 foreigners, mainly Egyptians |
| 4 | 1977-78 | Somalia, Ethiopia | Ogaden War | After Somalia under Siad Barre regime invaded the Ogaden region of Ethiopia 1,000,000 ethnic Somalis forced to flee |
| 4 | 1978 | Cambodia | Intra-state war | 170,000 ethnic Vietnamese forced to flee |
| 5 | 1978 | Burma, Bangladesh | Intra-state war | Approx. 2 million Bengali Muslims were expelled |
| 5 | 1978-79 | Vietnam | Intra-state war | Some 450,000 ethnic Chinese left Vietnam were expelled |
| 5 | 1978 | Ethiopia | Eritrean War of Independence forced flight of own nationals | Well over 500,000 ethnic Eritreans fled from Ethiopia to Sudan |
| 5 | 1980-1988 | Iran, Iraq | Iraq-Iran war | About 350,000 of the Iraqi refugees in Iran were expelled from Iraq at the time of the Iraq-Iran war because of their origin |
| 5 | 1983 | Nigeria | Peacetime expulsion of foreign nationals | Approx. 1,300,000 to 2,000,000 alleged illegal immigrants from African nations expelled from Nigeria |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|--------|-----------|-----------------------------|--|--|
| 5 | 1988 | USSR (Armenia, Azerbaijan) | Peacetime expulsion | Armenia expelled 300,000 Azerbaijanis; Several thousand ethnic Armenians fled from Azerbaijan to Armenia |
| 5 | 1989-1990 | Bulgaria, Turkiye | Peacetime expulsion | Approx. 350,000 Turks/Muslims fled Bulgaria |
| 5 | 1990 | Sri Lanka | Intra-state war | The Liberation Tigers of Tamil Eelam forcibly expelled the ethnic Muslim population (approx. 100,000) |
| 5 | 1990 | Iraq, Egypt | First Iraq war | Iraq expelled approx. 500,000 Egyptians and other migrant workers |
| 5 | 1990-91 | Saudi Arabia, Yemen | Post First Iraq War | Approx. 400,000 Yemenis expelled from Saudi Arabia to Yemen |
| 6 | 1991 | Iraq | Intra-state war | Approx. 1,400,000 Kurds fled to Iran and Turkiye |
| 6 | 1991-92 | Kuwait | Peacetime expulsion | Kuwait expelled approx. 350,000 Palestinians |
| 6 | 1991-92 | Burma | Peacetime expulsion of own nationals | Burmese persecution caused approx. 270,000 Rohingya Muslims flee to Bangladesh |
| 6 | 1991-95 | Yugoslavia, Croatia, Bosnia | Intra-state war accompanying independence of Croatia | Approx. 350,000 Serbs and 400,000 Croats fled |
| 6 | 1992-93 | Georgia | Intra-state war results in de facto partition of Georgia | Ethnic Cleansing by Abkhazian militias lead approx. 250,000 ethnic Georgians to flee disputed region |
| 6 | 1993-96 | South Africa, Mozambique | Peacetime expulsion of foreign nationals | South Africa “forcibly deported” approx. 310,000 refugees from the Mozambique civil war |
| 6 | 1994 | Rwanda | Genocide and flight | Approx. 500,000 to 1,000,000 Rwandans killed in 6 weeks |
| 6 | 1996 | Tanzania, Rwanda | Peacetime expulsion of foreign nationals | Tanzania expelled approx. 500,000 Rwandan refugees |
| 6 8 | 1996 | United Arab Emirates | Peacetime expulsion of foreign nationals | The U.A.E. expelled approx. 145,000 illegal residents |

| N | Date | State(s) | Event | Refugee group, approximate number of refugees |
|--------|---------|-----------------------|--|---|
| 6 9 | 1997 | Iraq | Peacetime expulsion of own nationals | Approx. 120,000 Kurds were expelled |
| 7 | 1999 | Indonesia, East Timor | Intra-state war | Approx. 300,000 East Timorese were internally displaced |
| 7 | 2001 | Iraq | Peacetime expulsion of own nationals | As many as 100,000 people, mostly Kurds, Assyrians, and Turkomans were expelled |
| 7 | 2003 | Djibouti | Peacetime expulsion of foreign nationals | Djibouti expelled approx. 100,000 allegedly illegal immigrants |
| 7 | 2003-05 | Libya | Peacetime expulsion of foreign nationals | Libya deported approx. 150,000 people |
| 7 | 2003-09 | Sudan | Intra-state war | From 2003-05 at least 200,000 ethnic Africans in Darfur, Sudan were killed and at least 2,000,000 driven into exile |
| 7 | 2004-05 | Angola | Peacetime expulsion of foreign nationals | Angola expelled from 150,000 to 250,000 foreigners |
| 7 | 2005 | Malaysia | Peacetime expulsion of foreign nationals | When Malaysia expelled 380,000 foreign laborers |
| 7 | 2006 | Angola | Peacetime expulsion of foreign nationals | During 2006, Angola reportedly expelled hundreds of thousands of illegal migrants without meaningful screening for refugees |
| 7 | 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 |
| 7 | 2007-08 | Iran, Afghanistan | Expulsion of foreign nationals to country at war | Iran expelled more than 720,000 Afghan refugees |
| 8 | 2009 | Yemen | Peacetime expulsion of foreign nationals | Likely that tens of thousands of Ethiopian refugees were forcibly deported by Yemen |

Table 2. Various definitions of forced displacement

| Organization | Definition |
|---|---|
| United Nations High Commissioner for Refugees | Individuals fleeing across international borders due to persecution, war, or violence, unable to return due to well-founded fear of persecution. |
| International Organization for Migration | Movement compelled by armed conflict, violence, human rights violations, or disasters, encompassing both internal and cross-border displacement. |
| Office of the United Nations High Commissioner for Human Rights | Emphasizes the involuntary nature of movement due to human rights violations, without a concise definition but focusing on human rights protections. |
| The World Bank | Involuntary relocation due to development projects, conflict, violence, or natural disasters, including a focus on economic and development-induced displacement. |
| Internal Displacement Monitoring Centre | Movement within a country caused by conflict, violence, human rights violations, or disasters, focusing on internally displaced persons (IDPs). |

Table.3 International Legal Frameworks regarding Right of Return

| Year | Name of international agreement and related article. |
|------|--|
| 1899 | 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, Article 20. |
| 1948 | Universal Declaration of Human Rights, Article 13. |
| 1949 | Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 49. |
| 1951 | Convention Relating to the Status of Refugees, Article 1 (c). |
| 1966 | International Covenant on Civil and Political Rights, Article 12(4). |
| 1969 | Convention on the Elimination of All Forms of Racial Discrimination, Article 5d (ii). |

Table 4. Right of Return in Soft Law

| N | NAME |
|---|--|
| 1 | General Assembly resolutions |
| 2 | The Guiding Principles on Internal Displacement |
| 3 | Vienna Declaration and Programme of Action |
| 4 | Resolution 2003/52 of 24 April 2003 on 'human rights and mass exoduses'. |
| 5 | The Uppsala Declaration on the Right to Leave and to Return |
| 6 | The Strasbourg Declaration on the Right to Leave and Return |
| 7 | Concluding documents of the subsequent Conferences on Security and Cooperation |
| 8 | Recommendations of the OAU/UNHCR symposium on Refugees and Forced Population Displacements in Africa |

Table 5. Various interpretations of Right of Return

| | |
|-----|--|
| R 1 | Individuals who have been in S for extended periods and have the right to permanent residency, regardless of their citizenship status. |
| R 2 | Individuals who have resided in S for extended periods, regardless of possessing a formal legal right to do so. |
| C 1 | All individuals who are legal citizens of S, regardless of their residency status in S. |
| C 2 | Individuals who are closely linked to S by inheritance, culture, etc., to the extent that they are considered a national of S, regardless of their legal citizenship status or residency in S. |

Chapter 1: Introduction

A. Background

Forced displacement stands as a defining humanitarian challenge of our time, compelling individuals and communities to flee their homes due to conflict, persecution, violence, human rights violations, or other disturbances that imperil their safety and freedom. The scale of forced displacement has escalated to a record high, with the UNHCR reporting over 108.4 million forcibly displaced people globally by the end of 2022.¹ This represents an increase of 19 million people compared to the end of 2021. UN High Commissioner for refugees Filippo Grandi said that he had worked in humanitarian crisis for 40 years and he had rarely seen such an incredible fast rising exodus of people.²

The phenomenon of forced displacement affecting millions globally indicates the urgency of addressing the legal mechanisms that facilitate the safe and dignified return of displaced populations to their original habitats or places of habitual residence. This thesis highlights a crucial aspect often overlooked in discussions on refugee rights: the imperative of facilitating the return of refugees to their places of origin as a resolution to underlying issues. While *non-refoulement* rights dominate the discourse on refugee protections,³ this research posits the essentiality of promoting the right of return. This perspective is grounded in the understanding that resolving the causes of forced displacement and supporting refugees' repatriation often presents a more sustainable solution than long-term asylum in host countries. Given that the presence of refugees can generate additional challenges in host states,⁴ encouraging their safe and dignified return, once the conditions that forced their displacement are addressed, becomes paramount.

¹ United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2022* (2023).

² UNHCR, *UNHCR's Global Trends Report: 110 Million Displaced*, YouTube, 1:02, (June 2023), <https://www.youtube.com/watch?v=UUIfCKoPe68>.

³ Jerry Vang, *Limitations of the Customary International Principle of Non-refoulement on Non-party States: Thailand Repatriates the Remaining Hmong-Lao Regardless of International Norms*, 32 Wis. Int'l L.J. 355 (2014); Jean Allain, *The jus cogens Nature of non-refoulement*, 13 Int'l J. Refugee L. 533 (2001); Walter Kälin et al., Article 33, para. 1, in *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* 1345 (Andreas Zimmermann ed., Oxford University Press 2011); Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 Int'l J. Refugee L. 5 (2003); Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 Int'l Rev. Red Cross 727 (Sept. 2001), available at <https://international-review.icrc.org/articles/history-international-protection-refugees>; Timothy E. Lynch, *Refugees, Refoulement, and Freedom of Movement: Asylum Seekers' Right to Admission and Territorial Asylum*, 36 Geo. Immigr. L.J. 74 (2021); Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement*, 80 Fordham L. Rev. 73 (2011); Julius Epstein, *Operation Keelhaul: The Story of Forced Repatriation from 1944 to the Present* (Devin-Adair Publishing 1973); Rodolfo Marques, *Non-refoulement under the Inter-American Human Rights System*, RLI Working Paper Series No. 6 (Mar. 6, 2017).

⁴ Viktoria Fajth, Özge Bilgili, Craig Loschmann et al., *How Do Refugees Affect Social Life in Host Communities? The Case of Congolese Refugees in Rwanda*, 7 Cooperative Migration Studies 33 (2019); United Nations General Assembly, *Special Difficulties Faced by Refugee Host Countries Highlighted as Third Committee Debates Refugee and Displaced Person Issues*, GA/SHC/3315/Rev.1 (9 November 1995).

B. Research Question

Scholars continue to engage in a discourse concerning the right of return's status as a legally binding obligation, notwithstanding its widely acknowledged significance. Divergent viewpoints exist among specialists, as some contend that the right of return for displaced persons is unquestionably supported by international law,⁵ whereas others argue that such assistance remains ambiguous or contingent.⁶ Given the existence of these contrasting viewpoints, the objective of this thesis is to investigate the extent to which the right of return for displaced individuals is recognized and mandated by international law. The objective of this study is to provide a deeper understanding of the legal frameworks and principles that regulate the right of return, thereby enhancing our knowledge of its ramifications and enforceability in the context of international law.

C. Methodology

This thesis employs doctrinal⁷ research methods to investigate some aspects of the right of return in the context of international law. The main focus of this work revolves around the doctrinal methodology, which serves as the fundamental basis for analyzing the philosophical and legal underpinnings of the right of return. It also shortly mentions its practical implementation, difficulties, and effects of this right in real-life situations.

The thesis conducts a comprehensive analysis of international treaties, declarations, resolutions, and case law that are relevant to the legal concepts of the right of return and forced displacement. A comprehensive examination of legal language,

⁵ 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)

⁶ Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (1981); Ruth Lapidoth, *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* 52 (2003).

⁷ Doctrinal research, also known as "legal scholarship" or "library-based research," is defined as a methodology that focuses on the systematic examination of statutes, case law, treaties, and legal principles as found within legal texts. Its aim is to interpret and analyze legal rules and principles to construct a coherent legal framework. This approach relies on primary and secondary legal sources to formulate arguments or conclusions about specific legal issues. See generally, Jason N. E. Varuhas, *Mapping Doctrinal Methods*, in *Researching Public Law in Common Law Systems* (Paul Daly & Joe Tomlinson eds. 2023)

provisions, and ideas that directly pertain to or cover the right of return is crucial. This study critically examines scholarly papers, books, and reports written by major scholars of international law and refugee studies to enhance and expand the analysis. Its objective is to capture the prevailing narratives, arguments, and viewpoints on the right of return. The interpretation of international legal instruments is heavily reliant on the application of treaty interpretation rules as outlined in the Vienna Convention on the Law of Treaties. This covers an emphasis on the original meaning of texts, the surrounding circumstances, and the intended objectives and purposes of the treaties.

The present study aims to examine the implementation and understanding of the right of return in particular instances resolved by international judicial institutions including the International Court of Justice and regional human rights courts. This doctrinal investigation seeks to determine whether international law requires displaced individuals to enjoy the right to return. Acknowledging the inherent constraints associated with doctrinal research, the objective of this thesis is to offer a systematic legal examination that makes a contribution to the wider legal and scholarly conversation surrounding the right of return.

This thesis delves into the development of forced displacement as a violation of international law, analyzing historical events through the collection of data. It scrutinizes the real-life applications of the right of return, with a particular focus on examining state practices to ascertain whether the right of return has evolved into CIL norm. Through this analytical process, the study aims to uncover the extent to which states adhere to or deviate from the principles associated with the right of return, especially in the context of addressing forced displacement.

The research critically analyzes the legal foundations and evolution of the right of return, embedded in international humanitarian, human rights, and refugee law. By navigating through the historical developments, key legal instruments, and current jurisprudence, the thesis aims to delineate the scope and application of this right. Ultimately, that scope includes the conditions under which individuals can exercise their right to return, the obligations of states to facilitate such returns, and the interplay between individual rights and state sovereignty.

D. Structure

This thesis is organized into a structured examination of forced displacement and the right of return within the framework of international law, aiming to provide a comprehensive understanding of their historical development, legal definitions, and practical implications. The structure is designed to guide the reader logically through the complexities of these topics, ensuring a deep understanding of both theoretical and practical aspects.

Chapter 2 begins with a clear definition of forced displacement to set the foundation for further discussion. It then explores the historical legality of displacement, illustrating how perceptions and legal treatments of forced displacement have evolved from being sometimes permissible to predominantly illegal under current international norms. Dedicated to the right of return, chapter 3 explores its foundations and traces its recognition and development within international law. It discusses the normative status of the right of return as CIL, the development of legal frameworks supporting this right, and practical aspects such as its interpretation, implementation, and the challenges and limitations faced in actualizing this right for displaced persons.

The final chapter synthesizes the insights gained from the detailed analyses provided in the previous chapters. It highlights the interconnected nature of historical precedents and modern legal frameworks and discusses their implications for the protection and enforcement of rights for displaced individuals. This chapter also suggests avenues for future research and policy-making to enhance the effectiveness of international laws concerning forced displacement and the right of return.

Chapter 2: Forced Displacement

A. Definition of Forced Displacement

The formal definition of forced displacement is critical for understanding its scope and the international response it necessitates. This significance stems not only from the need to identify and quantify the affected populations accurately but also to tailor humanitarian interventions, legal protections, and policy responses to their specific needs and rights. The complexities surrounding forced displacement are further compounded by the varied and sometimes competing definitions provided by key international organizations, each shaped by their unique mandates, operational focuses, and perspectives on migration, human rights, and humanitarian assistance.⁸

| Organization | Definition |
|---|---|
| United Nations High Commissioner for Refugees | Individuals fleeing across international borders due to persecution, war, or violence, unable to return due to well-founded fear of persecution. |
| International Organization for Migration | Movement compelled by armed conflict, violence, human rights violations, or disasters, encompassing both internal and cross-border displacement. |
| Office of the United Nations High Commissioner for Human Rights | Emphasizes the involuntary nature of movement due to human rights violations, without a concise definition but focusing on human rights protections. |
| The World Bank | Involuntary relocation due to development projects, conflict, violence, or natural disasters, including a focus on economic and development-induced displacement. |
| Internal Displacement Monitoring Centre | Movement within a country caused by conflict, violence, human rights violations, or disasters, focusing on internally displaced persons (IDPs). |

Examining forced displacement from the perspective of several international organizations uncovers a diverse picture. The many definitions, although based on a shared goal of addressing and reducing the difficulties faced by displaced persons, emphasize the need for a detailed understanding and specific measures to effectively

⁸ United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2022 (2023)*; *Migration Data Portal, Forced Migration or Displacement Data (2023)*; The World Bank, *Forced Displacement: Refugees, Internally Displaced Persons and Host Communities (2023)*

tackle this worldwide problem.

Prior to the establishment of the United Nations High Commissioner for Refugees (UNHCR) and the adoption of the 1951 Refugee Convention's definition, the international community's approach to refugees was tailored to crises. In the interwar period, international efforts concentrated on providing assistance to distinct groups, like those fleeing turmoil in Germany and Russia, through specialized agreements crafted to address those unique situations.⁹ Formed in 1947 under the United Nations, the International Refugee Organization (IRO) also pursued a focused strategy, with a mandate that addressed the needs of particular groups of displaced people.¹⁰ The 1951 convention was the first global agreement that aimed to help all refugees instead of just certain groups.¹¹ The definition of a refugee as provided by the 1951 Convention is thought to be deeply influenced by the political circumstances prevailing after the conclusion of World War II.

The formulation of the Convention's language reflects the immediate historical context of Europe, marked by widespread persecution and mass atrocities that resulted in the death of millions, often targeted for inherent characteristics or identities. The 1951 Convention's perspective mirrors the political interests of its principal authors, which included Western European nations and the United States. In contrast, states aligned with the Communist bloc abstained from contributing to the drafting process and ultimately did not participate in the ratification vote.¹² Consequently, the definition primarily emphasizes civil and political rights by setting forth that a refugee is an individual who:

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.¹⁷

Until 1967, when the protocol removed the temporal and geographical restrictions,¹³ the convention only applied to individuals escaping occurrences in Europe before

⁹ Goodwin-Gill, G. S. *The Refugee in International Law* 4-7(Oxford Univ. press 2007); Hathaway, J. C. *The Law of Refugee Status* 2-6 (Butterworths 1991)

¹⁰ Musalo, K., Moore, J., & Boswell, R. A. *Refugee Law and Policy: Cases and Materials*. 1997, at 29 (excerpts of the Constitution of the IRO).

¹¹ Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150.

¹² Hathaway, J. C. *A Reconsideration of the Underlying Premise of Refugee Law*. Harvard International Law Journal 31 (1990): 129, at 145.

¹³ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

January 1, 1951. The 1951 convention was intentionally designed to have limited scope because states aimed to keep the conferral of refugee status as an exceptional occurrence. I won't delve into a comprehensive analysis of the 1951 refugee definition in this context, as it has been thoroughly examined by others in different sources.¹⁴ In brief, to secure refugee status, the asylum seeker needs to prove a "justifiable concern of facing persecution based on factors like race, religion, nationality, affiliation with a specific social group, or political beliefs."¹⁵ This phrase has sparked extensive debates due to its susceptibility to diverse interpretations by various entities, including states and other actors.¹⁶ Frequently, states have interpreted it in a restrictive way, going against the guidance provided by UNHCR.¹⁷ The UNHCR defines forced displacement as:

movements of refugees and internally displaced persons who flee "areas of armed conflict or generalized violence, as well as people who have been forced to flee due to human rights violations, natural or human-made disasters, and other causes seriously disturbing public order."¹⁸

This definition sets the stage for international protection and assistance mechanisms that are vital for the survival and dignity of millions of displaced individuals worldwide. The International Organization for Migration (IOM) expands on this definition by including not only the involuntary nature of the movement but also the scale and significance of migration flows that are driven by "conflict, persecution, environmental degradation, and lack of human security and development."¹⁹ The IOM's definition acknowledges the multifaceted causes of displacement, reflecting the complex interplay between development, environmental change, and human security.

The Guiding Principles on Internal Displacement provide a comprehensive framework for the rights and protections of IDPs, emphasizing that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction.²⁰ These principles are instrumental in shaping the policies and responses of governments and international organizations towards the

¹⁴ James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 2nd ed. (Cambridge Univ. Press 2014).

¹⁵ *Id.*

¹⁶ Jean-Yves Carlier et al. eds., *Who's a Refugee? A Comparative Case Law Study* (Kluwer Law Int'l 1997).

¹⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva: UNHCR, 1979.

¹⁸ United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2022 (2023)*.

¹⁹ International Organization for Migration, *Key Migration Terms*, IOM, <https://www.iom.int/key-migration-terms>

²⁰ UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109, available at UNHCR Refworld, <https://www.refworld.org/docid/3c3da07f7.html>

internally displaced. By establishing clear definitions, these organizations create a common language and understanding for policymakers, aid workers, and legal practitioners to address the needs of displaced populations effectively. The clarity of these definitions is important, as it directly impacts the legal status, rights, and assistance that displaced persons are entitled to receive. Forced migration are derived by:

1. Conflict and War: Threats and violence force civilians to flee.
2. Persecution: Discrimination against specific groups necessitates escape.
3. Human Rights Violations: Abuses like torture and denial of freedoms displace individuals.
4. Environmental Events: Natural disasters and climate change trigger relocation.

The distinction between forced displacement and other types of migration is pivotal in international policy and response. While economic migrants make a conscious choice to move in order to improve their lives, forced migrants are compelled to move to avoid a threat to their lives or freedom. This distinction is recognized by the UNHCR, which differentiates between people fleeing persecution and conflict (refugees) and those moving for reasons related to poverty and opportunity (economic migrants).²¹ The differentiation is crucial for determining eligibility for international protection and the type of assistance provided. The concept of 'environmental migrants,' who move due to environmental change or natural disasters, often overlaps with forced displacement but lacks a formal definition under international law.

The IOM has attempted to conceptualize this category, suggesting that environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.²² The legal status of those displaced by environmental factors remains a contentious issue, as they do not neatly fit into the legal categories of refugees. The Nansen Initiative, launched in 2012, seeks to address the needs of those displaced across borders in the context of disasters and climate change, aiming to fill the gap in international policy for

²¹ Giulia Scalettaris, *Refugees or Migrants? The UNHCR's Comprehensive Approach to Afghan Mobility into Iran and Pakistan*, in *Afghan Migration to Iran and Pakistan: Beyond the Refugee Label* (2010).

²² International Organization for Migration, *Migration, Environment and Climate Change: Assessing the Evidence* 19 (2009).

such individuals.²³

Forced displacement also includes those fleeing generalized violence, which is not specifically targeted but poses a risk to civilians indiscriminately. The UNHCR acknowledges that such individuals may also need international protection, even though they may not fit the traditional definition of a refugee fleeing targeted persecution.²⁴ The evolving nature of global threats and the increasing visibility of mixed migratory flows necessitate a dynamic understanding of forced displacement. It is essential to recognize the changing patterns of movement and the need for protection that extends beyond the traditional refugee framework, as noted by scholars and policymakers.²⁵

B. Historical Legality of Displacements

The normative status of population transfers or mass expulsions in international law has undergone changes over time and shifted depending on the specific circumstances. By the early 1900s, the international community was increasingly acknowledging the unlawful nature of forcibly removing the inhabitants of a foreign territory by an occupying military force during warfare.²⁶ However, beyond this limited scope, international law had not established any restrictions on mandatory population relocation or large-scale expulsion. Contrary to popular belief, the forced relocation of populations to resolve long-standing ethnic conflicts was widely acknowledged as lawful. According to Professor Ewa Morawska:

[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 internationally sanctioned as the lesser evil to continued interethnic turmoil.²⁷

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

²³ The Nansen Initiative, Int'l Org. for Migration, <https://environmentalmigration.iom.int/nansen-initiative> (last visited April 9, 2024).

²⁴ Adelman, H., *From Refugees to Forced Migration: The UNHCR and Human Security*, 35 Int'l Migr. Rev. 7 (2001)

²⁵ Sawant, N. H. & Sanjeev, A., *Climate Refugees in India: A Wake-Up Call for an Inclusive Policy*, 78 India Q.: A.J. Int'l Aff. 371 (2022)

²⁶ Convention (IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

²⁷ 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).

"throughout the 1920s, 1930s, and 1940s."²⁸ During the inter-war years, the problem of refugees in Europe became acute, and the seeds of the later international legal and 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.²⁹ In this period, "three norms characterized the international refugee regime: asylum, assistance, and burden-sharing."³⁰ Further population transfer agreements were reached following the Treaty of Lausanne in 1923, providing additional evidence of the recognized legitimacy of ethnic transfer. The bilateral agreements that repatriated ethnic Germans to Germany at the beginning of World War II were predominantly obligatory.³¹

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.³² 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...³³

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..."³⁴ 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

²⁸ Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HuM. RTS. Q. 817, 825 (1998).

²⁹ CLAUDENA M. SKRAN, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME*, 16-20 (1995).

³⁰ *Id.* at 68

³¹ The Exchange of Minorities and Transfers of Population in Europe Since 1919-Part II, 21 BULLETIN INTL NEWS 657, 661-64 (1944)

³² *Id.*

³³ ALFRED DE ZAYAS, *NEMESIS AT POTSDAM: THE ANGLO-AMERICANS AND EXPULSION OF THE GERMANS I* (1979).

³⁴ Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HuM. RTS. Q. 817, 828 (1998).

transfer was an unpleasant but sometimes necessary tool to resolving certain ethnic conflicts, which had defied other solutions.³⁵ "[P]opulation exchange" was the "diplomatic solution of last resort..."³⁶ The Allied powers, "from 1942 onwards, saw compulsory population transfer as a potential solution to the problem of rendering nation and state co-terminous. . ." ³⁷ 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 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.³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹ None of these compulsory transfers or mass expulsions was authoritatively declare 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.

³⁵ JOSEPH B. SCHECHTMAN, *POSTWAR POPULATION TRANSFERS IN EUROPE, 1945-1955*, at 389-95 (1962);

³⁶ Donald Bloxham, *The Great Unweaving: The Removal of Peoples in Europe, 1875-1949*, in *REMOVING PEOPLES: FORCED REMOVAL IN THE MODERN WORLD* 167, 206-207 (Richard Bessel & Claudia B. Haake eds., 2009).

³⁷ KARL CORDELL & STEFAN WOLFF, *GERMANY'S FOREIGN POLICY TOWARDS POLAND AND THE CZECH REPUBLIC* 109 (2005).

³⁸ 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)

³⁹ See *infra* Appendix Table 1, (cases 14,17,18).

⁴⁰ See *infra* Appendix Table 1 (case 26).

⁴¹ See *infra* Appendix Table 1 (case 27).

However, as the century comes to an end, the global community today aims to preserve or establish diverse communities with several ethnicities. Currently, the international community considers population transfers and mass expulsions to be in violation of international law.⁴² As a result, the focus of refugee policy has shifted towards promoting voluntary return and repatriation as a crucial aspect.⁴³

International human rights law includes a general prohibition against the forced removal (mass or otherwise) of individuals from their home or place of origin.⁴⁴ Expelling someone forcefully violates numerous rights outlined in human rights law and specifically infringes upon the freedom of movement. The UN report to the Sub-commission on the Prevention of Discrimination and Protection of Minorities defines forced population transfer as any action that displaces people from their chosen place of residence, such as displacement, settlement, internal banishment, or evacuation. This directly impacts the right of free movement and choice of residence within States, constituting a restriction on this right.⁴⁵

⁴² *Supra note*, at 1123

⁴³ *Id*

⁴⁴ Special Rapporteur on Adequate Housing, *Forced Evictions*, U.N. Hum. Rts. Off. High Commissioner, <https://www.ohchr.org/en/special-procedures/sr-housing/forced-evictions>.

⁴⁵ Awn Shawhat Al-Khasawneh, Special Rapporteur, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers: Progress Report*, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 8, para. 17, U.N. Doc. E/CN.4/Sub.2/1994/18 (1994).

Chapter 3: Right of Return

The concept of return evolved through the years and was influenced by various international norms, customs and legal instruments.⁴⁶ The right of return is enshrined in a wide variety of international legal instruments. These are represented in international treaties, conventions, and resolutions, guidelines each highlighting the right of return from a different aspect and collectively encapsulating the essence and universality of the right to return.⁴⁷ This chapter explores the concept of the right to return, examining its evolution from a fundamental principle of international law to a clearly defined right under contemporary legal systems. The discussion examines the importance of the right's role in the wider framework of human rights and personal freedom.

The evolution of right of return is marked by the establishment of several key frameworks, starting with the Universal Declaration of Human Rights in 1948,⁴⁸ which laid the foundational stone for recognizing the right to return as a fundamental human right.⁴⁹ Following this, international agreements in the late 1940s set standards for individual protection during conflicts.⁵⁰ Later, a specific focus on the challenges faced by refugees was introduced, enhancing the legal framework.⁵¹ Moreover, numerous resolutions by a global organization have underscored and expanded upon these principles, emphasizing their relevance in various situations.⁵² This chapter aims to map out the trajectory of these key legal instruments and their collective impact on the development of the right to return⁵³, setting the stage for a more detailed exploration of each framework and its contributions to international law.

⁴⁶ S. Aglerhuis, *The Right to Return and Its Practical Application* (citing Magna Carta, ch. 42 (1215), in S.E. Thorne et al., *The Great Charter: Four Essays on Magna Carta and the History of Our Liberty* 133 (1965)).

⁴⁷ The 1933 League of Nations' Convention relating to the International Status of Refugees and the 1938 Convention concerning the Status of Refugees coming from Germany were developed, but provided limited protection for uprooted peoples; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), U.N. GA Res. 2106 (XX); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 1.C

⁴⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/3/217A (Dec. 10, 1948).

⁴⁹ Id., art. 13(2),

⁵⁰ Geneva Convention I: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31. Geneva Convention II: Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85. Geneva Convention III: Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. Geneva Convention IV: Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

⁵¹ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

G.A. Res. 194 (III), U.N. Doc. A/RES/194(III) (11 Dec. 1948); ⁵² SC Res 237, UN SCOR, UN Doc S/RES/237 (1967) (14 June 1967).

⁵³ See H. Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhof, 1987. See also B. Frelick, *The Right of Return*, in «International Journal of Refugee Law», vol. 2, 1990, p. 442; J.D. Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to*

A. Foundations of Right of Return

The right to return is a human right, rooted in both international human rights law⁵⁴ and international humanitarian law,⁵⁵ which allows individuals who have been displaced from their countries to return home safely and with dignity. This right is recognized across various international instruments and has evolved to become a cornerstone of refugee law.⁵⁶ The right to return traces its origins to both legal and philosophical texts that have shaped the contours of this fundamental principle over centuries.⁵⁷ This part explores the early mentions and conceptual underpinnings of the right to return to illustrate its historical development.

One of the earliest codifications of this right can be traced back to the Magna Carta⁵⁸ of 1215, a foundational document in the development of constitutional law and human rights.⁵⁹ Clause 42 of the Magna Carta explicitly states, "It shall be lawful in future for anyone, without prejudicing his allegiance to us, to leave our kingdom and to return, safe and secure by land and water . . ." ⁶⁰ It underscored the principle that individuals should not be arbitrarily denied entry into their own country, a notion that resonates with contemporary understandings of the right to return.⁶¹ The significance of the Magna Carta's provision on the right of return extends beyond its immediate historical context. It represents an early acknowledgment of the importance of mobility and the inherent

Return to His Country, Geneva, UN, 1963, UN Sales no. 64.XIV.2, UN Doc E/CN.4/Sub.2/220/Rev.1; C.L.C. Mubanga-Chipoya, *Analysis of the current trends and development regarding the right to leave any country, and some other rights or considerations arising therefrom*, Geneva, UN, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1988, UN doc. E/CN.4/Sub.2/1988/35; K. Vasak & S. Liskofsky (eds.), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-20 June 1972*, New York, The American Jewish Committee, UDHR, *supra note 48*, at art. 13(2), G.A. Res. 217 (III) A, 3 U.N. GAOR Supp. (No. 13) at 71, U.N. Doc. A/810 (Dec. 10, 1948).

⁵⁴ The foundational framework of international human rights law is anchored by the Universal Declaration of Human Rights (UDHR) and further solidified by the two pivotal International Covenants on Human Rights, all of which have paved the way for the development of a comprehensive suite of treaty-based and other instruments within the United Nations system and its specialized agencies, UDHR, *supra note 48*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁵⁵ The humanitarian law covers the conduct of military operations as well as the protection of the victims of armed conflicts.

⁵⁶ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267

⁵⁷ J. Felix Gaertner, *Writing Exile: The Discourse of Displacement in Greco-Roman Antiquity and Beyond*, 89 (BRILL 2006).

⁵⁸ The Magna Carta, or "Great Charter," was initially intended to protect the rights and privileges of the nobility but has since been recognized for its broader implications for justice and individual rights.

⁵⁹ S. Aglerhuis, *The Right to Return and Its Practical Application* (citing Magna Carta, ch. 42 (1215), in S.E. Thorne et al., *The Great Charter: Four Essays on Magna Carta and the History of Our Liberty*, 133 (1965)).

⁶⁰ English translation of Magna Carta, BRITISH LIBR. ¶ 42 (Jul. 28, 2014), <https://www.bl.uk/magnacarta/articles/magna-carta-english-translation#> (last visited Apr. 19, 2021)

⁶¹ Id.; B. Stojanović, *The Role of the United Nations High Commissioner for Refugees (UNHCR) in the Protection of Refugees and Asylum Seekers in International Organizations*, 313 (2022).

connection between individuals and their homeland.⁶² This acknowledgment has evolved over the centuries into a broader recognition of the right of return in international law, particularly in the aftermath of conflicts and displacements. In conclusion, the Magna Carta's codification of the right of return more than eight centuries ago marks a critical point in the historical trajectory of this right.⁶³ Over the centuries, this foundational idea found resonance in various legal instruments and political treaties, evolving in scope and application.

Moreover, the right to return is considered part of the right to freedom of movement. A general right to free movement can be traced back to 16th century publicists of international law who had upheld this right. The Spaniard Francisco de Vitoria, one of the fathers of international law⁶⁴ said, "it was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would."⁶⁵ During the 17th century, Hugo Grotius⁶⁶ postulated the principle that "every nation is free to travel to every other nation."⁶⁷ The relevant international documents deal with the right to return in this broader context of free movement.

Freedom of movement contains two main aspects: an internal aspect, meaning freedom of movement within a country, and an external aspect, meaning freedom of movement between States.⁶⁸ The latter aspect is usually referred to as the right to leave one's country, either temporarily or permanently, and to enter or return to one's country.⁶⁹ It is said to be particular in that "unlike many other human rights and freedoms, its exercise does not produce effects only within a single State, but often affects at least two communities, that of the country to be left and that of the State to which ingress is sought".⁷⁰ The French constitution of 1791, established on 15 December 1790, was an

⁶² Magna, *supra* note 15, at 42

⁶³ *Id*

⁶⁴ Francisco de Vitoria, recognized as one of the founding fathers of international law, was a pivotal Spanish theologian and jurist whose work laid the groundwork for modern principles of international relations and human rights. His influential doctrines, notably concerning the rights of indigenous peoples and the legal framework governing the interactions between sovereign states, established him as a pioneering figure in shaping the ethical and legal foundations of what would become international law.

⁶⁵ J. Ingés, quoted in The Strasbourg Declaration on the Right to Leave and Return, *supra* note 10, at 2.

⁶⁶ Hugo Grotius, known as the "father of international law," was a Dutch jurist whose 1625 work, "De Jure Belli ac Pacis," laid foundational principles for international law, including natural law and the rights of nations. His theories significantly influenced the legal and ethical conduct of international relations.

⁶⁷ *Idem*

⁶⁸ S.A.F. Jagerskiold, *The Freedom of Movement*, in *The International Bill of Rights 167-70* (Louis Henkin ed., Columbia Univ. Press 1981).

⁶⁹ *Idem*, pp. 177 and 180.

⁷⁰ Antonio Cassese, *The International Protection of the Right to Leave and to Return*, in *Studi in Onore di Monlio Udina*, vol. 1, 220 (Guiffre 1975)

early instance of national law acknowledging the right of return: “The freedom of everyone to go, to stay, or to leave, without being halted or arrested unless in accordance with procedures established by the Constitution.”⁷¹ This example also illustrates that foundations of the right to return derives from the freedom of movement.

By the 19th and early 20th centuries, amidst the upheavals of national revolutions and the formation of new states, the right to return began to emerge as a principle of international concern, particularly as it pertained to the protection of minorities and displaced persons.⁷² The aftermath of World War I and the creation of the League of Nations further underscored the need for international cooperation in addressing the challenges of displacement and repatriation, leading to more structured efforts to protect individuals' rights to return to their homeland.⁷³ The interwar period⁷⁴ marked a significant phase in addressing the rights of refugees and stateless persons on an international scale.⁷⁵ With the dissolution of empires and the redrawing of national boundaries, millions found themselves displaced or stateless.⁷⁶ The League of Nations⁷⁷ initiated efforts to tackle this issue, recognizing the need for collective action to protect individuals uprooted by geopolitical changes.⁷⁸ The League of Nations supervised the creation of minority protection treaties, aimed at safeguarding the rights of ethnic, linguistic, and religious minorities within the newly formed or expanded states in Europe.⁷⁹ These treaties were instrumental in establishing legal obligations for states to protect minority rights, including provisions that implicitly or explicitly supported the right of these groups to return to their ancestral lands.⁸⁰ Though their effectiveness was varied, these treaties represented an early attempt to codify international obligations towards individuals based on their identity, contributing to the later development of

⁷¹ The Editors of Encyclopaedia Britannica, Constitution of 1791, Encyclopaedia Britannica (May 13, 2016),

⁷² Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century*, 20 (Patrick Camiller trans., Princeton University Press 2014).

⁷³ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 Int'l J. Refugee L. 238 (2002)

⁷⁴ The interwar period refers to the timeframe between the end of World War I and the beginning of World War II.

⁷⁵ A. Irfan, *Petitioning for Palestine: Refugee Appeals to International Authorities*, 5 Contemp. Levant 79 (2020)

⁷⁶ Z. Steel, T. Chey, D. Silove, C. Marnane, R.A. Bryant & M. v. Ommeren, *Association of Torture and Other Potentially Traumatic Events with Mental Health Outcomes Among Populations Exposed to Mass Conflict and Displacement*, 302 JAMA 537 (2009).

⁷⁷ The League of Nations, established in 1920 following World War I, was the first worldwide intergovernmental organization whose principal mission was to maintain world peace. Despite its efforts to prevent another global conflict, it ultimately failed to stop the aggression of Axis powers, leading to its dissolution and the establishment of the United Nations in 1945.

⁷⁸ S.I. Degtyarev & Y. Samoilenko, *League of Nations and Protection of National Minorities in Eastern European States (1919 – 1946)*, 0 Східноєвропейський Історичний Вісник 94 (2019).

⁷⁹ Harald Christian Scheu, *The Heritage of the League of Nations' Minority Protection System*, 61 Hungarian J. Legal Stud. 356 (2020).

⁸⁰ Id

human rights law.⁸¹ At that time⁸² scholars and jurists began to articulate the idea that certain rights, including the right to return, were inherent to all individuals, regardless of their citizenship or nationality.⁸³

These discussions paved the way for the development of a more structured international human rights regime in the aftermath of World War II.⁸⁴ The war resulted in millions of people being forcibly uprooted from their homes, becoming refugees or stateless, a crisis on an unprecedented scale that highlighted the inadequacy of existing mechanisms to protect the rights of displaced individuals.⁸⁵ Although limited by the era's political complexities and the absence of a universal human rights framework, these efforts laid the foundational stones for the development of international refugee law and the principle of the right to return.⁸⁶ Even before the formal establishment of the United Nations, NGOs began to play a crucial role in advocating for the rights of displaced persons and refugees.⁸⁷

Accordingly, the development of the right to return is an evidence of the durable importance of connecting individuals with their homeland, evolving from the foundational principles laid out in the Magna Carta⁸⁸ to a recognized fundamental human right within the modern international legal framework.⁸⁹ Through historical shifts, including the establishment of the League of Nations and contributions from various NGOs, this right has become integral to international human rights and refugee law, incorporating the collective commitment to dignity and safe return for displaced persons. We have a right to our homeland -- to live in peace and security in the places of our birth, of our ancestors, our culture, our heritage.⁹⁰

⁸¹ Id

⁸² This period saw the seeds of universal human rights principles being sown, influenced by the catastrophic human consequences of statelessness and mass displacement observed during World War I.

⁸³ Shorter Articles, Comments, and Notes: *Restoring Property Rights in the Aftermath of War*, 53 Int'l & Comp. L.Q. 429 (2004).

⁸⁴ Z. Steel, C.R.B. Steel & D. Silove, *Human Rights and the Trauma Model: Genuine Partners or Uneasy Allies?*, 22 J. Traumatic Stress 358 (2009).

⁸⁵ B. Stojanović, *The Role of the United Nations High Commissioner for Refugees (UNHCR) in the Protection of Refugees and Asylum Seekers, in International Organizations* 313 (2022).

⁸⁶ M.F.N. Franke, *Refugee Registration as Foreclosure of the Freedom to Move: The Virtualisation of Refugees' Rights within Maps of International Protection*, 27 Env't & Plan. D: Soc'y & Space 352 (2009).

⁸⁷ Stephanie J. Nawyn, Faith, *Ethnicity, and Culture in Refugee Resettlement*, 49 Am. Behav. Sci. 1509, 1509-27 (2006).

⁸⁸ Magna, *supra* note 1, 133

⁸⁹ UDHR, *supra* note 3, art. 13

⁹⁰ Bill Frelick, *The Right of Return*, 2 Int'l J. Refugee L. 442, 444 (1990).

B. The Right of Return as a Customary International Law

CIL embodies rules and principles those arise from the consistent and general practice of states, driven by a recognition of those practices as legally binding obligations.⁹¹ The elements of customary international law include:⁹²

1. the widespread repetition by States of similar international acts over time (State practice);
2. the requirement that the acts must occur out of a sense of obligation (*opinio juris*); and
3. that the acts are taken by a significant number of States and not rejected by a significant number of States.⁹³

Historically speaking, some argue that the right of return had achieved customary status in international law by 1950 and is fully recognized in international law.⁹⁴ However others assert that it had achieved customary status during the 1990s.⁹⁵ To establish the right to return as a principle of CIL, it is essential to demonstrate both state practice (actual behavior of states indicating the recognition of a principle as legally binding) and *opinio juris* (the belief that such behavior is obligatory under international law) ⁹⁶ . The International Law Commission listed as evidence of CIL: treaties, decisions of national courts and international tribunals, national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations.⁹⁷ Below are specific cases, treaties, and examples that collectively provide evidence of the right to return being recognized as CIL through consistent state practice and *opinio juris*.⁹⁸ State practices involving bilateral or multilateral mechanisms for repatriating refugees serve as strong evidence of a customary norm that obligates countries of origin to welcome back individuals who have been displaced or expelled from their territories.⁹⁹

⁹¹ Shabtai Rosenne, *Practice and Methods of International Law* 55 (1984).

⁹² Id

⁹³ Id

⁹⁴ J.G. Boling, *Palestinian Refugees and the Right of Return: An International Law Analysis*, in Badil, Information and Discussion Brief Issue No. 8 (2001).

⁹⁵ Monica Duffy Toft, *The Myth of the Borderless World: Refugees and Repatriation Policy*, 24 CONFLICT MGMT. & PEACE SCI. 139, 144 (2007)

⁹⁶ Id

⁹⁷ Report of the International Law Commission to the General Assembly (Part II): *Ways and Means of Making the Evidence of Customary International Law More Readily Available*, [1950] 2 Y.B. Int'l L. Comm'n 367, ILC Doc. A/1316.

⁹⁸ R. Luby, *Toward an Econometric Model of Guzman's Theory of Customary International Law*, 56 *Am. Economist* 98 (2011).

⁹⁹ Eric, *supra note 38*

Large numbers of displaced persons have returned with the international community and the conflicting parties recognizing their right to do so. Notable examples include the 1994 Bosnia agreement, the 1995 Dayton Accord, the 1995 Croatia agreement, and the 1994 Guatemala agreement. The four agreements state that refugees and displaced individuals have a fundamental right to return to their original homes, as outlined in Resolution 194. This widespread inclusion of the right to return in various international agreements, alongside explicit acknowledgment in resolutions such as Resolution 194, reflects not only a consistent state practice but also a collective understanding and acceptance among states that facilitating the return of refugees and displaced individuals is not merely a matter of policy preference but a legal obligation under international law, embodying the principle of *opinio juris*.

UNHCR has successfully assisted a large number of refugees in voluntarily returning and reintegrating into their home countries as part of creating long-lasting solutions within comprehensive peace agreements.¹⁰⁰ Between 1994 and 1995, almost three million refugees repatriated to their home countries, with the highest numbers returning to Afghanistan, Mozambique, and Myanmar. In late 1996 and early 1997, more than one million Rwandan refugees returned after fleeing during the four-year civil conflict.¹⁰¹ In the 1990s, almost 12 million refugees returned to their homes and places of origin.¹⁰² During the same year, almost 1.3 million refugees and individuals of interest to the UNHCR were resettled voluntarily.¹⁰³ Following the 1994 genocide, Rwanda's government facilitated the return of refugees from neighboring countries, exemplified by the Joint Communiqué between Rwanda and the Republic of Uganda on the repatriation of Rwandan refugees in 1996.¹⁰⁴

Azerbaijan also provides safe and dignified return of Armenians.¹⁰⁵ The ICJ approved the right of Armenians to return their homes in Karabakh.¹⁰⁶ The ICJ also reaffirmed the right of Palestinian refugees to return to their homes, according to

¹⁰⁰ Id

¹⁰¹ Eric, *supra* note 38

¹⁰² Oliver Bakewell, *Returning Refugees or Migrating Villagers? Voluntary Repatriation Programmes in Africa Reconsidered*, Working Paper No. 15, UNHCR (December 1999).

¹⁰³ Refugee Resettlement in Selected Countries, 1990-99, Table V.20, in *Refugees and Others of Concern to the UNHCR 1999, Statistical Overview* (UNHCR 1999).

¹⁰⁴ Id

¹⁰⁵ <https://reintegration.gov.az/> This website provides a platform for ethnic Armenians to register and return to Azerbaijan.

¹⁰⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 17 Nov. 2023, ICJ.

General Assembly resolution 194 (III).¹⁰⁷ European Court of Human Rights cases law also aligns with right of return. Although there is no jurisprudence concerning the right to return itself, sufficient case law exists on other related provisions which also involves the right to return. For instance, the ECHR has addressed issues related to the right to return in cases like *Cyprus v. Turkey*, where it recognized the rights of Greek Cypriots displaced by the Turkish invasion of Cyprus to return to their homes.¹⁰⁸ In *Loizidou v. Turkey* the European Court of Human Rights concluded in 1996 that Turkey had violated Article 1 of Protocol 1 of the Convention by preventing the Greek-Cypriot plaintiff from returning to her land in northern Cyprus for sixteen years. This, the Court held, interfered with this Article's guarantee of the right to enjoy possession of the land which one owns.¹⁰⁹ Moreover, the Inter-American Commission of Human Rights applied the right to return in a case concerning internal displacement. It found that Nicaragua was required to repatriate a population of Miskito Indians that it had forced out of their native area.¹¹⁰ To conclude, it is clear that rulings consistently uphold the right of return for displaced individuals, emphasizing its significance as a fundamental human right essential for peace and reconciliation in post-conflict settings. UN General Assembly Resolution 194 specifically addresses the Palestinian refugees' right to return to their homes and to live at peace with their neighbors.¹¹¹ Security Council Resolution 237 Calls on Israel to facilitate the return of those who fled areas during the Six-Day War, reflecting international concern and recognition of the right to return in specific conflict contexts.¹¹²

The combination of these treaties, resolutions, judicial decisions, and specific instances of state practice and *opinio juris* illustrates the international community's broad recognition of the right to return. This evidence supports the argument that the right to return has indeed become a principle of customary international law, upheld by a wide range of legal instruments and practices across diverse geopolitical contexts. The

¹⁰⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004.

¹⁰⁸ *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (Grand Chamber), Judgment of 10 May 2001, reported in 2001-IV Eur. Ct. H.R. 1; (2002) 35 E.H.R.R. 731; [2001] ECHR 331; (2002) 35 E.H.R.R. 30; 11 B.H.R.C. 45; IHRL 3076 (ECHR 2001).

¹⁰⁹ *Loizidou v. Turkey (Merits)*, 18 Hum. Rts. L.J. 50 (1997) (Eur. Comm'n on Hum. Rts., Application no. 40/1993/435/514). For discussion: Beate Rudolf, *International Decisions: Loizidou v. Turkey*, 91 Am. J. Int'l L. 532 (1997).

¹¹⁰ Inter-Am. Comm'n H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 26, at 112 (1984).

¹¹¹ GA Res 194 (III), UNGAOR, 3d Sess., UN Doc A/RES/194(III) (11 December 1948).

¹¹² SC Res 237, UN SCOR, UN Doc S/RES/237 (1967) (14 June 1967).

right of return's ubiquity and its codification in CIL stem from the collective understanding of the profound impact of displacement on individuals and communities.

In the end, the right of return is a widely acknowledged norm firmly established in numerous fields of international law, such as humanitarian law, human rights law and refugee law.

C. Development of Legal Framework

The development of international legal frameworks has played a crucial role in tackling complex global issues, especially in the areas of human rights and displacement. Creating legal frameworks to ensure the right of return for people displaced by conflict or persecution is crucial in the global effort to uphold this right. Although recognized as CIL and based on the principle that everyone has the right to leave and return to their nation, this right's specifics have been continuously debated.¹¹³ This section examines both the "hard law," which refers to international conventions that establish the right to return, and the "soft law," such as U.N. SC and GA resolutions concerning this matter.¹¹⁴ I will analyze the extent to which legal commentators have provided a narrow view of this right within the norms. "International humanitarian law, refugee law and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact."¹¹⁵ This chapter will explain right of return in international humanitarian law, human rights and refugee law. The table below outlines different international agreements that have established the right of return, demonstrating its fundamental importance in international law:

¹¹³ Ingles, *supra note 53*; United Nations, Committee on the Exercise of the Inalienable Rights of the Palestine People; Publication Submitted by Special Unit on Palestinian Rights, U.N. Doc. ST/LEG/SER (1978), in Ruth Lapidoth, *supra note 15*, at 113

¹¹⁴ According to one commentator, [h]ard law encompasses rules of customary international law that are universally binding, conventions (*lex lata* or law that has been laid down) insofar as they bind the parties (although some treaty law may also be considered customary and hence universally binding), and international case law at least as to the parties to a contentious dispute before the International Court of Justice. Soft law, or developing law (*lex ferenda*), includes declarations, certain resolutions, recommendations, and reports of UN organs and other international organizations and has persuasive but not binding force.

¹¹⁵ Emanuela-Chiara Gillard, Statement at the International Association of Refugee Law Judges World Conference (Apr. 21-23, 2005).

| Year | Name of international agreement and related article. |
|------|--|
| 1899 | 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, Article 20. |
| 1948 | Universal Declaration of Human Rights, Article 13. |
| 1949 | Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 49. |
| 1951 | Convention Relating to the Status of Refugees, Article 1 (c). |
| 1966 | International Covenant on Civil and Political Rights, Article 12(4). |
| 1969 | Convention on the Elimination of All Forms of Racial Discrimination, Article 5d (ii). |

1. The Right of Return in International Humanitarian Law

The evolution of international humanitarian law has been a crucial element of the global attempt to reduce the atrocities of armed conflict.¹¹⁶ The right of return is also expressed in International humanitarian law.¹¹⁷ The right to return is embodied in its two branches: the Hague and the Geneva Law.¹¹⁸ The Hague Conventions and the four Geneva Conventions, both recognize the right to return after the cessation of the hostilities.

A) Right of Return Under the Hague Regulations

The Hague Regulations, which were attached to the 1907 Hague Convention Respecting the Laws and Customs of War on Land, as well as the 1949 Geneva Civilians Convention, both provide the right of displaced individuals to return to their homes once the hostilities have ended. According to international humanitarian law, all displaced persons have a “general” right to return, regardless of the circumstances that led to their displacement during times of conflict.¹¹⁹ The initial codification of this rule can be found

¹¹⁶ U. Nnawulezi & S.B. Magashi, *Evolving Roles of the International Institutions in the Implementation Mechanisms of the Rules of International Humanitarian Law*, 9 *Kutafin L. Rev.* 684 (2023).

¹¹⁷ International Humanitarian Law governs the actions that states are allowed to take during times of war.

¹¹⁸ *Id*

¹¹⁹ Gail J. Boling, *Palestinian Refugees and the Right of Return: An International Law Analysis*, *BADIL - Information & Discussion Brief*, No. 8, at 8 (January 2001).

in Article 43 of the Hague Regulations.¹²⁰ Under this rule, a belligerent occupant is required to maintain the existing legal and social conditions in the occupied area as much as feasible, until a definitive legal resolution of the dispute (such as a peace agreement) is reached.¹²¹ The official text of Article 43 has a larger scope compared to the English translation. In its English translation, Article 43 of the 1907 Hague Regulations lays down that:

[t]he 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.¹²²

By contrast, the authentic French text of Article 43 of the 1907 Hague Regulations reads:

[l]'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.¹²³

The two versions differ particularly with relation to the expression “public order and safety.” The authoritative French text does not mention safety but refers to “*ordre et vie publics*”¹²⁴ which includes also social and economic aspects of community life and hence is much broader than the English version. Essentially, it requires a hostile occupant to allow the inhabitants to carry on with their regular lives with minimal disruption.¹²⁵ This would obviously entail a prerequisite that the local people be granted the right to either stay in or go back to their original location after the cessation of hostilities

However, international humanitarian law instruments also include a second type of the right to return, which specifically focuses on circumstances when individuals have been forcibly expelled and displaced. International humanitarian law strictly prohibits the involuntary transfer of any anyone, such as by deportation.¹²⁶ In addition, Article 20 of

¹²⁰ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277, 1 Bevans 631.

¹²¹ Id.

¹²² M. Siegrist, *Positive and Negative Obligations Due to the Mere Fact of Occupation*, in *The Functional Beginning of Belligerent Occupation*, at para. 4-7. (Graduate Institute Publications 2011)

¹²³ Id.

¹²⁴ “*Ordre et vie publics*” is a legal concept employed both in domestic and international law to safeguard fundamental societal norms. In the French Civil Code (Article 1162), it restricts the freedom of contracts to ensure compliance with imperative public norms. Similarly, in the New York Convention (Article V(2)(b)), it allows states to refuse the enforcement of foreign arbitral awards that conflict with national public policy. Thus, “ordre public” serves as a crucial tool to protect essential legal and moral principles, ensuring that neither domestic agreements nor international legal decisions undermine the foundational values of a society.

¹²⁵ Id.

¹²⁶ Boling, J.G., *Palestinian Refugees and the Right of return: An International Law Analysis*. BADIL, Information and Discussion Brief Issue No.8, 2001. Available on www.badil.org/Publications/Briefs/Brief-No-08.htm.

the Hague Regulations, require that prisoners of war are swiftly return to their home countries at the conclusion of conflict, establishing a standard for a broader application of this principle.¹²⁷ This provision has been interpreted to extend the right of return to civilians displaced during conflicts. It indicates that if combatants are promptly repatriated after peace is achieved, then civilians, who are less involved in the hostilities, should also be given the same right.¹²⁸ Civilians, often the most affected and least involved in the decisions leading to conflicts, face displacement risks that can be as severe as those faced by POWs. By extending the right of return to displaced civilians, IHL acknowledges the universal need for safety and the restoration of normalcy post-conflict.¹²⁹ This extension is not only a legal adaptation but also an ethical imperative, aligning the treatment of non-combatants with the evolving standards of human rights and dignity. The main objective of the Hague Regulations and IHL is to reduce the harshness of conflict and protect the local population as much as possible.¹³⁰ This approach is in line with the advancing comprehension of international humanitarian law and human rights law, which is placing more emphasis on safeguarding and respecting the dignity of all those impacted by conflict.¹³¹ Extending the right of return from prisoners of war to displaced civilian demonstrates a wider humanitarian motivation. Thus, the right of return is established under Hague Regulations, emphasizing the importance of upholding human dignity and rights during and after conflicts.

B) The Right of Return under the Geneva Conventions

Shifting from the Hague Regulations to the Geneva Conventions, we see a deeper focus on the right to return, better addressing the realities of war and occupation, we see a nuanced expansion of the right to return, tailored to address the harsh realities of war and occupation.¹³² The provisions within the Geneva Conventions of 1949, specifically tailored to safeguard the right of return or repatriation during armed conflict and

¹²⁷Convention (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, art. 20, July 29, 1899, 32 Stat. 1803, 1 Bevans 631.

¹²⁸ Gail J. Boling, *Palestinian Refugees and the Right of Return: An International Law Analysis*, BADIL Info. & Discussion Brief, No. 8 (Jan. 2001).

¹²⁹ Id

¹³⁰ The Martens Clause in the final paragraph of the preamble to the Hague Convention emphasizes that the Hague Regulations should be interpreted in consideration of their primary goal, which is to minimize the suffering of civilians during war. It also states that any errors in the regulations should be supplemented by fundamental principles of international law.

¹³¹ Id

¹³² Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

belligerent occupation, underscore a collective international commitment to uphold human dignity and rights even in the midst of warfare.¹³³ The Fourth Geneva Convention establishes the right of return in Article 4, Article 6(4), and Article 158(3). Article 4 delineates the individuals who are considered protected people under the Convention.¹³⁴ The Convention includes provisions for their return in two distinct paragraphs. Article 6(4) includes the first repatriation clause, which specifies the end dates when the Convention is applicable.¹³⁵ Article 6(4) specifies that the Convention will continue to be valid for protected individuals seeking repatriation, even after the end of hostilities. Article 158 of the Convention outlines the process by which a state can terminate its participation in the agreement. Article 158(3) specifies that a denunciation cannot become effective until after the repatriation of protected individuals has been completed.¹³⁶

Article 45 of the Fourth Geneva Convention restricts when protected individuals can be temporarily shifted to another state party and mandates that they must be returned to their usual residence once hostilities end.¹³⁷ Article 49 clearly prohibits the act of forcibly removing protected individuals from occupied territory to the territory of the Occupying Power or any other country, regardless of the reason.¹³⁸ Similar to Article 45, Article 49 mandates the immediate return "to their homes" of all individuals (including those temporarily relocated during extraordinary circumstances) at the end of hostilities.¹³⁹

Moreover, Article 147 of the Fourth Geneva Convention defines "grave breaches" as severe violations of humanitarian law that must be punishable by criminal sanctions by all states that have signed the Convention.¹⁴⁰ Under the theory developed by the prosecutors at the IMT in Nuremberg, intentionally preventing forcibly expelled individuals from returning is considered a serious violation of the Fourth Geneva

¹³³ Id, Art. 158(3).

¹³⁴ Id, Art. 4

¹³⁵ Id, Art. 6(4)

¹³⁶ Id, Art 158 (3).

¹³⁷ Id, Art. 45.

¹³⁸ Id, Art. 49

¹³⁹ Id

¹⁴⁰ Id, Art. 147

Convention.¹⁴¹ In addition to this Article 17 of Protocol II to the Fourth Geneva Convention also prohibits forcible deportation in non-international armed conflicts.¹⁴²

The enshrinement of the right of return within international humanitarian law, therefore, as seen in the Hague Regulations and the Geneva Conventions, reflects a profound international consensus on the importance of safeguarding human dignity and facilitating the restoration of displaced individuals to their homes following conflicts.

2. The Right of Return in International Human Rights Law

The right of return is also firmly rooted in international human rights law. On that score, the right of return is a customary norm of international human rights law and is included in numerous international and regional human rights treaties.¹⁴³ The development of the right to return for refugees within international law demonstrates a significant evolution, linking international refugee law with human rights principles. This shift towards a more inclusive understanding of human rights, particularly the right to return, gained further momentum in the aftermath of World War II. The devastation and mass displacements caused by World War II played a pivotal role in shaping the international community's approach to human rights. This post-war period of reflection and reconstruction marked a significant turning point, leading to the establishment of legal frameworks designed to safeguard human rights across the globe.

A) The Right of Return under the UDHR

The Universal Declaration of Human Rights (UDHR), adopted in 1948, laid a foundational stone for the modern understanding of human rights, including the right to return "Everyone has the right to leave any country, including his own, and to return to his country."¹⁴⁴

¹⁴¹ TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBURG, 1945-46, at 49 (42 Vols. 1947-49).

¹⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 17, 1125 U.N.T.S. 609. A Non-International Armed Conflict (NIAC) refers to a situation of armed conflict that occurs within the territory of a single state, involving either regular armed forces fighting groups of armed insurgents, or armed groups fighting each other. The Second Protocol to the Geneva Conventions (Protocol II), adopted on June 8, 1977, specifically addresses the protection of victims in NIACs, setting forth rules and humanitarian standards in conflicts not of an international character, including the treatment of non-combatants and the conduct of hostilities.

¹⁴³ See, e.g., American Convention on Human Rights, art. 22(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); African Charter on Human and Peoples' Rights (Banjul Charter), art. 12(2), June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Feb. 3, 1953); Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto, art. 2, Sept. 16, 1963, E.T.S. No. 46 (entered into force May 2, 1968).

¹⁴⁴ UDHR, *supra note 48*, Art. 13(2), Resolutions at 71-77, U.N. Doc. A/810 (21 Sept.-12 Dec. 1948).

The broad ambit of the quoted language, including the terms "everyone" and "country" requires some emphasis. Unless the right of return is interpreted with appropriate breadth, it would require no more than a legalistic trick to expel certain inhabitants and then to deny them return on the false grounds that they are not nationals of the expelling State. Thus, the right to return, as enshrined in the UDHR, stands as a safeguard against displacement and statelessness, reflecting a global commitment to human rights forged from the lessons of World War II. Since the right to return was first enunciated in the Universal Declaration of Human Rights in 1948, scholars generally have viewed it to apply only to an individual but not to individuals belonging to a mass group.¹⁴⁵ Commentators argue that the drafters of the UDHR considered the right of return in Article 13(2) to enhance the "right to leave" a country, rather than as an important right on its own.¹⁴⁶ The phrase "and to return to his country" was added as an afterthought by a Lebanese amendment to strengthen the right to leave a country with the assurance of the right to return.¹⁴⁷ The drafters' minimal focus on the right to return should be considered within the political and legal circumstances of the 1940s when the declaration was being formulated.¹⁴⁸ Not only was the international community then sanctioning population transfers involving millions of persons, but human rights law as a whole was in its infancy; the prohibition of mass expulsions or population transfers was decades away from being established. Thus one should not expect the right to return to have been a focus of the drafters.

In fact, the draft of the UDHR was discussed in the Drafting Committee of the U.N. Commission of Human Rights, in the U.N. Sub-Commission on Prevention of Discrimination and Protection of Human Rights, and in the U.N. Commission on Human Rights, without any suggestion that even a reference should be made to a right to return.¹⁴⁹ Simultaneously, there has been a significant rise in the amount of displaced individuals and refugees, frequently caused by deliberate actions aimed at establishing ethnically

¹⁴⁵ Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 Am. J. Int'l L. 294 (1995); Hurst Hannum, *The Right to Leave and Return in International Law and Practice* 7-16 (1987); Ruth Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 Isr. Y.B. Hum. Rts. 103 (1987); Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 Am. J. Int'l L. 586 (1978).

¹⁴⁶ The UDHR serves as the source of the right to return in both the ICCPR and the ICERD.

¹⁴⁷ Ingles, *supra* note 53

¹⁴⁸ During the drafting sessions of the ICCPR, the British delegation in the Human Rights Committee moved to strike Article 12-containing the right to return-in its entirety from the Covenant, arguing that freedom of movement was not a fundamental right, but a secondary one; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 198 (1993).

¹⁴⁹ See generally *supra* part III

uniform nations by forcibly removing entire ethnic communities from their residences. For the international community to address this issue properly and efficiently, the right to return should be expanded to include all individuals even members of the entire displaced population.¹⁵⁰ The exercise of the right, like others in the Universal Declaration, is only subject under Article 29 to “such limitations as are determined by law solely for the purpose of seeking due recognition and respect for the right of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. However, the Universal Declaration is a resolution adopted by the United Nations General Assembly and, therefore, has no legally binding effect as such.¹⁵¹ Nevertheless, it is widely regarded as representing principles reflective of CIL.¹⁵²

In conclusion, the inclusion of the right to return in the Universal Declaration of Human Rights marks an important moment in international law, establishing a fundamental human right designed to protect individuals from displacement and statelessness, showing the necessity of interpreting this right broadly to cover not just individual cases but also mass displacements.

B) The Right of Return under ICCPR

Another essential human rights treaty is the International Covenant on Civil and Political Rights (ICCPR). Article 12(4) of the ICCPR phrases the right of return: “No one shall be arbitrarily deprived of the right to enter his own country.”¹⁵³ Article 12(4) of the ICCPR employs the term “enter” instead of “return,” making the right of return broader compared to the UDHR. Thus, the ICCPR wording of the right of return would apply to second-, third-, or fourth-generation refugees. Article 12(4) of the ICCPR specifies that the right of return is to be exercised in “his own country.” Research suggests that the drafters of the ICCPR intentionally left the definition of “country” vague.¹⁵⁴ It broadens the scope of who is entitled to the right of return by deliberately avoiding narrow terms

¹⁵⁰ For purposes of this article, “population” refers to ethnic or religious groups of at least several thousand individuals, established over a long period of time in a particular area. See, e.g., Alfred de Zayas, *Population, Expulsion and Transfer*, in 8 *Encyclopedia of Pub. Int’l L.* 438 (1985).

¹⁵¹ M. Dixon, *Textbook on International Law* 311-312 (Blackstone Press 1996).

¹⁵² J.R. Weiner, *The Palestinian Refugees Right to Return and the Peace Process*, 20 *B.C. Int’l & Comp. L. Rev.* 38 (1997). K. Drezewicki, *The United Nations Charter and the Universal Declaration of Human Rights*, in *An Introduction to the International Protection of Human Rights: A Textbook* 74 (R. Hanski & M. Suksi eds., Åbo Akademi University, Institute for Human Rights 2002).

¹⁵³ International Covenant on Civil and Political Rights art. 12(4), Dec. 16, 1966, 999 U.N.T.S. 171; G.A. Res. 2200A (XXI), at 49-60, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

¹⁵⁴ Kathleen Lawand, *The Right to Return of Palestinians in International Law, 8 international refugee law*, 532, 549-50 (1996).

such as "nationals" and "state," thereby extending protection to a wider group of individuals, including stateless persons and those who may not traditionally fit within the strict legal definitions of citizenship.¹⁵⁵

General Comment No. 27¹⁵⁶ to Article 12(4) establishes that the phrase "his own country" applies to a much broader group of persons than merely "nationals" of a state. The language is intended to include: "nationals of a country who have been stripped of their nationality in violation of international law, individuals whose country of nationality has been incorporated in or transferred to another entity, whose nationality is being denied them [...and] stateless persons arbitrarily deprived of the right to acquire the nationality of the country of [their long-term] residence."¹⁵⁷ This inclusive approach underlines the covenant's commitment to universal human rights, emphasizing the fundamental nature of the right to return as inherent to all individuals, irrespective of their legal or national status. By framing the right in such broad terms, the ICCPR reinforces the principle that the right to return is a universal human right, integral to the dignity and freedom of every person, and underscores the obligation of states to ensure this right is respected and facilitated without arbitrary restrictions.

It is crucial to understand the particular intent of the ICCPR drafters when included the term "arbitrarily" in ICCPR Article 12(4) as it is the sole condition placed on the right of return outlined in that article.¹⁵⁸ Analysis of the drafting history is valuable. Commentators unanimously agree that the term "arbitrarily" specifically pertains to the practice of sending those charged with criminal offenses to exile or banishment. The right of return stated in Article 12(4) is unconditional, except for the limitations outlined in Article 4(1) of the ICCPR. These limitations allow derogations that are in line with international law and do not discriminate based on race, color, sex, language, religion, or social origin.

In conclusion, the broad construction of Article 12(4) of the ICCPR, reinforced by General Comment No. 27 and scholarly commentary, establishes the right of return not

¹⁵⁵ Id

¹⁵⁶ UN Human Rights Committee, General Comment No. 27: Freedom of Movement (Art.12), 2 Nov. 1999, U.N. Doc. CCPR/C/21/Rev.1/Add.9.

¹⁵⁷ Id

¹⁵⁸ The qualifications listed in ICCPR Article 12(3) do not apply to Article 12(4) because they precede Article 12(4) and refer only to "above-mentioned rights," which would not include the "right of return" which instead follows Article 12(3) in Article 12(4).

merely as a principle but as a fundamental human right. This interpretation ensures its applicability to both individuals and mass populations.

C) The Right of Return under CERD

Another major international human rights convention, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁵⁹ similarly incorporates the right of return in its Article 5(d)(ii), phrasing it as "[t]he right to leave any country, including one's own, and to return to one's country."¹⁶⁰ Article 5 broadly mandates States Parties to eliminate racial discrimination and guarantee equality before the law without distinctions based on race, color, or national or ethnic origin.¹⁶¹ This holistic approach links the right of return with a wide array of other rights such as the right to freedom of movement, the right to nationality, and the right to reside anywhere within the state, all of which are essential for the full realization of an individual's civil, political, and social rights. CERD also lists the right of return as an enumerated right subject to the categorical non-discrimination rule of the opening paragraph of Article 5:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.¹⁶²

It makes explicit that any restrictions on this right must not only comply with general international human rights standards but also must be scrutinized through the lens of anti-discrimination. This dual requirement enhances the enforceability of the right of return by attaching it to the robust monitoring mechanisms and international scrutiny associated with racial discrimination, thereby offering a stronger recourse for individuals facing violations of this right.

In conclusion, by framing this right within the context of combating racial discrimination, CERD not only provides a legal basis for its protection but also reinforces the principle that human rights are indivisible.

¹⁵⁹ The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is a key international treaty that mandates the eradication of racial discrimination and affirms the right of every individual to return to their country, free from discrimination based on race, color, or national or ethnic origin.

¹⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(ii), Dec. 21, 1965, 660 U.N.T.S. 195.

¹⁶¹ *Id.* art. 5

¹⁶² *Id.*

D) The Right of Return under regional human rights conventions

Moreover, the inclusion of the right to return is also seen in four regional human rights conventions, albeit with a slightly lower degree of protection. Like universal treaties, these provisions are open to interpretation by supervisory organs.¹⁶³ The right to return is included in:

- Article 3(2) of Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;¹⁶⁴
- Article 22(5) of the American Convention on Human Rights;¹⁶⁵
- Article 12(2) of the African Charter on Human and Peoples' Rights;¹⁶⁶ and
- Article 22 of the Arab Charter on Human Rights.¹⁶⁷

Comparing the provisions on the 'right to enter' of the European Protocol and the Covenant, the Council of Europe Committee of experts on Human Rights has commented:

It might be thought that the Covenant text is wider in scope and it might possibly apply, e.g. to a stateless person or to an alien having very close ties by virtue, for example of birth or permanent residence in the territory concerned. But it might also be that the Covenant text is less precise in wording than its European counterpart.¹⁶⁸

The difference in wording between certain regional treaties and the Covenant relates to the phrase "his own country" as stated in Article 12(4). The African Charter and the Arab Charter likewise include mention of an individual's 'country' in relation to the right to return. The terms 'the State of which he is a national' are used in the ACHR and the European Protocol to compare and contrast with this. The European Convention on Human Rights, Protocol 4, Article 3(2) declares that "No one shall be deprived of the right to enter the territory of the State of which he is a national."¹⁶⁹ Comparing the wording of

¹⁶³ For example, the European Court of Human Rights in Strasbourg makes final determinations regarding violations of the European Convention on Human Rights. The Inter-American Commission and Court on Human Rights hear cases of alleged violations of the American Convention on Human Rights, while the African Commission on Human and Peoples' Rights examines claims regarding the African Charter on Human and Peoples' Rights. There is not yet an established body to rule on alleged violations of the Arab Charter on Human Rights.

¹⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those already included in the Convention and the First Protocol Thereto, E.T.S. No. 59 (entered into force May 2, 1968), art. 3(2).

¹⁶⁵ American Convention on Human Rights, 1144 U.N.T.S. 123, art. 5 (entered into force July 18, 1978).

¹⁶⁶ African Charter on Human and Peoples' Rights, 21 I.L.M. 59, art. 12(2) (entered into force Oct. 21, 1986), OAU Doc. CAB/LEG/67/3/Rev. 5 (1981).

¹⁶⁷ Arab Charter on Human Rights, 18 Hum. Rts. L.J. 151, art. 22 (1997) (adopted Sept. 15, 1994, not yet in force).

¹⁶⁸ Council of Europe, *Problems Arising from the Co-existence of the UN Covenants on Human Rights and the European Convention on Human Rights*, Doc. H (70) 7, at 127.

¹⁶⁹ European Convention on Human Rights, Protocol No. 4, art. 3, ¶ 2, Sept. 16, 1963.

this Article with the UDHR Article mentioned earlier, we observe that it is more inclusive in protecting the entry rights of nationals who have never lived in the state but qualify as its nationals. However, it is less inclusive as it excludes individuals who may have lived in the state and consider it their home but are not nationals. It excludes individuals who have had their citizenship revoked by the state to which they want to return. (For the current discussion, the difference between nationality in the legal context and citizenship is not significant. I shall consider "national" and "citizen" to have the same meaning in the following text).

It is uncertain if international law documents fully acknowledge the distinction between "country" and "nationality" in their wording. For instance, consider the phrasing in section II of the UN Draft Principles:

(a) Everyone is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to return to his country.

(b) No one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country.

(c) No one shall be arbitrarily deprived of the right to enter his own country.¹⁷⁰

Clauses (a) and (c) interpret the right of return to apply to individuals returning to a place they can rightfully claim as their own country, irrespective of their legal citizenship status there. Clause (b) upholds the freedom of nationals to return and prevents nations from denationalizing persons they are unwilling to readmit. Defending both versions of the right simultaneously, by interpreting it broadly to encompass both genuine returnees and nationals of the state, is not strictly incoherent. However, it is somewhat curious to see the latter positioned between two assertions of the former, suggesting a lack of recognition of ambiguity or an intentional attempt to blur it by the drafters. Regarding the permissible limitations on the right to return, there are no significant differences between the Protocol and the Covenant, except for the term 'arbitrarily'. The right to return, as outlined in the European text, is solely subject to the

¹⁷⁰ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (1987).

general derogation clause. It is not subject to the specific constraints outlined for the freedom of movement, nor is it subject to any special limitation.¹⁷¹

Furthermore, the law explicitly specifies that citizens cannot be expelled. The Arab Charter imposes an expansive limiting clause on the right to return. The African Convention on Human and Peoples' Rights (AfCHPR) does not include a broad derogation clause. Instead, it outlines the responsibilities of individuals, as outlined in Articles 27-29. These responsibilities include, among others, the obligation, as stated in Article 29(3), to "not compromise the security of the State whose national or resident they are." Additionally, Article 29(5) mandates individuals to "preserve and strengthen the national independence and territorial integrity of their country and contribute to its defense in accordance with the law." These responsibilities may be perceived as assuming the function performed in the other Conventions through the inclusion of the general derogation or limitation provision. Furthermore, AfCHPR has certain constraints that are applicable to all facets of the right of travel, encompassing the right to return.¹⁷²

In conclusion, the articulation of the right of return across various international human rights law instruments, from the UDHR to the ICCPR, and extending to the ICERD, shows a fundamental commitment within international human rights law to safeguard this right. The broad and inclusive interpretation of this right across different legal frameworks highlights the international community's duty to facilitate the return of displaced populations.

3. The Right of Return in International Refugee Law

The right of return appears in a particular section of human rights known as refugee law.¹⁷³ The legal foundation for refugees' right to return in refugee law is derived from human rights law, with the Office of the UNHCR responsible for its implementation. Article 1 of the 1950 Statute of the UNHCR defines the Agency's mandate as facilitating

¹⁷¹ Id

¹⁷² Arab Charter, *supra* note, at art. 12 (2).

¹⁷³ Refugee law is a branch of international law that outlines the rights and protections for individuals who flee their countries due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. This body of law obligates states to provide asylum seekers with access to fair and efficient asylum procedures, and ensures that recognized refugees are granted a minimum standard of treatment in host countries, including access to education, work, and travel rights.

the voluntary repatriation of refugees or their integration into new national communities.¹⁷⁴

The General Assembly¹⁷⁵ assigned to the Office of the UNHCR a crucial role in the development of international refugee law.¹⁷⁶ The legal basis for UNHCR's responsibilities, which are related to the development of international refugee law represents UNHCR's Statute adopted by the General Assembly as an annex to resolution 428 (V) of 14 December 1950.¹⁷⁷ The primary document that regulates the rights of refugees and the responsibilities of states towards them is the 1951 Convention Relating to the Status of Refugees and the accompanying 1967 Protocol.¹⁷⁸ 1951 Convention is significant because it provided in its Article 1 general definition of refugee.¹⁷⁹ A refugee is defined as:

someone outside his or her own country and unable to return as a result of a well founded fear of persecution on grounds of race, religion, nationality, political opinion or membership of a social group, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁸⁰

This means that internally displaced persons do not meet the international legal criteria to be classified as refugees.¹⁸¹ Secondly, it acknowledges that individuals meeting the criteria for refugee status are entitled to specific rights, and that assisting refugees should not solely be viewed as an act of humanitarian goodwill and for political advantage.¹⁸² The Convention imposes duties on States that are parties to it, with the most fundamental being the concept of "non-refoulement."¹⁸³

Key components in defining a refugee include a legitimate fear of persecution as outlined, being outside one's country of origin, nationality, or usual residence, and a

¹⁷⁴ United Nations General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

¹⁷⁵ UNHCR was created as a subsidiary organ of the UN General Assembly

¹⁷⁶ C. Lewis, *UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution*, Oxford University Press, 2005, at 69.

¹⁷⁷ Id

¹⁷⁸ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267

¹⁷⁹ Id, Article 1

¹⁸⁰ Id

¹⁸¹ Id

¹⁸² Id

¹⁸³ UNHCR, *The State of the World's Refugees: 50 Years of Humanitarian Action 2* (2000).

demonstrated unwillingness to return to that country.¹⁸⁴ The well-founded fear of persecution is the most crucial factor in determining refugee status.¹⁸⁵ Other aspects of the definition, such as being beyond the country of origin, nationality, or habitual residence, together with the unwillingness to return, are mostly factual questions.¹⁸⁶ The documents provide proof of the claimants' fear of persecution in their country of origin, nationality, or habitual residence, and indicate that they no longer have the protection of that country.¹⁸⁷

The standard of a well-founded fear of persecution is a legal criterion that relies on objective facts for its application. Grahl-Madsen observed that the term 'well-founded' implied a fear of persecution based on legitimate grounds.¹⁸⁸ He believes that refugee status should not be determined solely based on the individual's mindset, but rather by a more objective standard.¹⁸⁹ Other writers have suggested similar ideas. The term 'well founded' indicates that there must be ample evidence to support the decision that the individual applying for refugee status is likely to experience persecution if they return to their home country.¹⁹⁰ Some sources suggest that a "well-founded fear" requires the applicant to provide a credible explanation for their fear of persecution or to demonstrate a valid reason for fearing persecution by presenting proof of an actual risk.¹⁹¹ These perspectives align with rulings made by higher courts in prominent common law jurisdictions.

Judicial agreement has expanded the definition of 'well-founded fear' of persecution within the parameters of the conditions outlined in the Convention Relating to the Status of Refugees. In *I.N.S. v Cardoza-Fonseca*, the Supreme Court of the United States established the standard of reasonable possibility of persecution to define the concept of well-founded fear of persecution.¹⁹² Judge Stevens explained that if the evidence shows an actual condition, it is not necessary to prove that persecution will likely

¹⁸⁴ Paul Weis, *Commentary on the Travaux Préparatoires of the 1951 Refugee Convention*, at 6 (1951).

¹⁸⁵ *Id*

¹⁸⁶ *Id*

¹⁸⁷ In the second scenario, further supporting documentation may be necessary, such as the absence of a passport from their place of origin, nationality, or usual residence.

¹⁸⁸ A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1 (Leyden: A.W. Sijthoff, 1966) at 173. See further at 176, 188-189.

¹⁸⁹ *Id*

¹⁹⁰ Guy S. Goodwin-Gill, "Transnational Legal Problems of Refugees," *Michigan Yearbook of International Legal Studies* 1982, at 299.

¹⁹¹ Richard Plender, *International Migration* 416-417; *Supra* note 65.

¹⁹² *I.N.S. v. Cardoza-Fonseca*, 467 U.S. 407 (1987).

occur, but rather that persecution is a realistic possibility.¹⁹³ The House of Lords in England accepted this approach in the case of *R v Secretary of State for the Home Department, ex parte Sivakuniaran*.¹⁹⁴ The six asylum petitioners were Sri Lankan nationals from the Tamil ethnic group.¹⁹⁵ The Secretary of State denied the applications because, based on the information available to him, the applicants had no valid reason to be scared if they return to Sri Lanka.¹⁹⁶

The House of Lords determined that Article 1 (A)(2) of the Convention necessitated an applicant for refugee status to show a 'well-founded fear' of persecution upon return to their own country, indicating a reasonable likelihood of facing persecution.¹⁹⁷ The Court ruled that the Secretary of State could consider information known to him, even if unknown to the applicant, to assess the validity of the applicant's fear of persecution. The Court concluded that the Secretary of State was justified in denying the application because the information available to him suggested that there was no evidence of persecution towards Tamils in general, specific groups of Tamils, or the applicants in Sri Lanka.¹⁹⁸ Overall, these cases highlight the issues arising from stricter interpretations of the criteria for refugee status. The consistency of the tests applied is crucial in presenting evidence that the standard of a well-founded fear of persecution is broadly applicable in international law. The standards of reasonable possibility, reasonable likelihood, and reasonable chance share comparable material and are utilized to objectively assess a well-founded fear of persecution. Reliably, there is not an apparent disparity in the legal implementation of these tests.¹⁹⁹

Moreover, persecution is not explicitly defined in either the Convention Relating to the Status of Refugees or in the preparation work for the Convention.²⁰⁰ There may have been an underlying reason for this.²⁰¹ The legal perspective is that persecution

¹⁹³ Ibid, Per Judge Stevens, at 453.

¹⁹⁴ *R v Secretary of State*, [1988] 1 All E.R. 193.

¹⁹⁵ Id

¹⁹⁶ Id

¹⁹⁷ Id

¹⁹⁸ Id

¹⁹⁹ *R v Governor of Pentonville Prison, ex parte Fernandez*, [1971] 2 A.E.R. 691, 697 (Eng.). In this case, the Court was engaged in a construction of S.4 (1) (c) of the Fugitive Offenders Act 1967 which stated that a person shall not be returned under the Act if it appears that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reasons of his race, religion, nationality, or political opinion. In determining the likelihood of such an eventuality, the Court made reference to reasonable chance, substantial grounds or serious possibility of the likelihood of the detention or restriction of the fugitive on his return.

²⁰⁰ Refugee convention; Paul Weis, *Commentary on the Travaux Préparatoires of the 1951 Refugee Convention*, at 6 (1951).

²⁰¹ James C. Hathaway, *The Law of Refugee Status* 7 (London: Butterworths, 1991).

involves harmful or oppressive behavior.²⁰² Narrow and literal interpretations of persecution can confine the institution of asylum and endanger the humanitarian principles of the Convention.²⁰³ It has been suggested that the persecution feared by the refugee is primarily in the nature of a serious disadvantage, including jeopardy to life, physical integrity or liberty within the meaning of Articles 31 and 33 of the Convention Relating to the Status of Refugees.²⁰⁴ Article 31 relates, threats to life or freedom, to persecution in Article 1 of the Convention. The UNHCR views voluntary repatriation as the most suitable alternative among the three enduring options for addressing refugee issues.²⁰⁵ UNHCR recognizes the right of all individuals to return their country of origin, even under adverse circumstances.²⁰⁶ Voluntary repatriation is the only privilege granted to the individual, with a corresponding obligation on the country of origin that produced the refugee flow.²⁰⁷ Other solutions do not pertain to the rights of refugees or the responsibility of receiving states. Ms. Sadako Ogata, the previous High Commissioner for Refugees, stated that:

the ultimate objective of the international protection of refugees is not to institutionalize exile, but to achieve solutions to refugee problems. Voluntary repatriation, whenever possible, is the ideal solution. [This is why] ... I have stressed the refugees' right to return home safely and in dignity.²⁰⁸

By emphasizing voluntary repatriation as the optimal solution, this approach advocates for the safe and dignified return of refugees to their homeland.

In conclusion, the right of return is indirectly established within international refugee law, grounded in the legal principles set forth by the 1951 Convention Relating to the Status of Refugees, its 1967 Protocol, and further explained by the mandate of the UNHCR. This body of law not only defines who is considered a refugee but also emphasizes the protection of these individuals, including their fundamental right to return to their country of origin safely and with dignity. The emphasis on voluntary repatriation

²⁰² Id

²⁰³ Fourth Convention, *Supra* note 65, at 7.

²⁰⁴ Richard Plender, *International Migration* 417-418 (2nd ed., Dordrecht: Martinus Nijhoff Publishers, 1988).

²⁰⁵ UNHCR Executive Committee, Conclusion No. 18 (XXXI) on Voluntary Repatriation, 1980; UNHCR Executive Committee, Conclusion No. 40 (XXIX) on Voluntary Repatriation, 1985.

²⁰⁶ United Nations High Commissioner for Refugees (UNHCR), Voluntary Repatriation Update (July 31, 2024), <https://www.unhcr.org/media/update-voluntary-repatriation>.

²⁰⁷ Id

²⁰⁸ Statement by the UN High Commissioner for Refugees, World Conference on Human Rights, Vienna, June 16, 1993.

as the most preferred solution reflects a broader commitment to resolving refugee situations not by prolonging exile, but by facilitating the reintegration of refugees into their national communities.

4. The Right of Return in Soft Law

We are unable to fully understand the right of return by just referring to the appropriate international legal framework. However, we must start with these, especially given the current philosophical literature on the topic is limited.²⁰⁹ It can be assumed that the right of return is clearly established and well defined as a human right under international law.²¹⁰ However, that would be an error. International lawyers are confused concerning the nature and status of the supposed right. Subtle differences in phrasing among the different documents may mask distinct interpretations of the right of return. We must consider not only the binding treaties but also the soft law, the actual conduct of states and the moral foundation of the right in order to fully understand it.²¹¹

Soft law plays a crucial role in the international legal framework by filling gaps in legal documentation, providing clarity on the application of rights, and establishing common understandings among states and other actors.²¹² Soft law sources related to the right of return cover a broad range of materials and instruments established by different international bodies, agencies, and regional organizations, going beyond specific declarations and guidelines.²¹³ These sources, frequently derived from international consensus reached through conferences, expert panel discussions, and the hard work of special rapporteurs, embody developing norms and standards designed to tackle intricate human rights matters.²¹⁴

These encompass United Nations General Assembly resolutions, detailed guidelines established by the UNHCR, and principles supported by other regional institutions.²¹⁵ Furthermore, these tools integrate perspectives and suggestions from

²⁰⁹ Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (2013); Mollie Gerver, *The Ethics and Practice of Refugee Repatriation* (2018).

²¹⁰ *Id.*

²¹¹ The concept of the right of return within the context of soft law involves the examination of various non-binding instruments, guidelines, resolutions, and declarations that, while not legally enforceable, significantly influence the development and interpretation of international law.

²¹² Kenneth Abbott & Duncan Snidel, *Hard and Soft Law in International Governance*, 54 *Int'l Org.* 421 (2000).

²¹³ *Id.*

²¹⁴ Choudhury, B., "Balancing Soft and Hard Law for Business and Human Rights," 67 *Int'l & Comp. L.Q.* 961 (2018)

²¹⁵ G.A. Res. 194 (III), U.N. Doc. A/RES/194(III) (Dec. 11, 1948); G.A. Res. 2452 (XXIII), U.N. Doc. A/RES/2452(XXIII) (Dec. 19, 1968); G.A. Res. 2535 (XXIV), U.N. Doc. A/RES/2535(XXIV) (Dec. 10, 1969); G.A. Res. 2963 (XXVII), U.N. Doc. A/RES/2963(XXVII) (Dec. 13, 1972);

global human rights groups, non-binding decisions from international legal forums, and scientific interpretations of international humanitarian law. Together, these various sources enhance our comprehension of the right of return within the context of international law.

The table below outlines the soft law sources related to right of return:

| N | NAME |
|---|--|
| 1 | General Assembly resolutions |
| 2 | The Guiding Principles on Internal Displacement |
| 3 | Vienna Declaration and Programme of Action |
| 4 | Resolution 2003/52 of 24 April 2003 on ‘human rights and mass exoduses’. |
| 5 | The Uppsala Declaration on the Right to Leave and to Return |
| 6 | The Strasbourg Declaration on the Right to Leave and Return |
| 7 | Concluding documents of the subsequent Conferences on Security and Cooperation |
| 8 | Recommendations of the OAU/UNHCR symposium on Refugees and Forced Population Displacements in Africa |

TABLE 4

First, United Nations General Assembly (UNGA) resolutions regarding the right of return are a significant part of soft law. UNGA resolutions on the right of return typically reflect the international community's consensus or the majority opinion regarding the importance of this right for refugees and displaced persons.²¹⁶ Over the years, the General Assembly has adopted numerous resolutions concerning the rights of refugees and internally displaced persons worldwide, reiterating the importance of the right of return under safe and dignified conditions.²¹⁷

²¹⁶ Although not legally enforceable, UNGA resolutions carry significant moral and political weight. They can exert pressure on states to adhere to the norms and principles they articulate, including those related to the right of return.

²¹⁷ Id

Furthermore, the Guiding Principles on Internal Displacement (GPID)²¹⁸ are indeed considered a form of "soft law" in the context of the right to return. GPID contain in section V, inter alia, principle 28 relating to the right to return:

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.²¹⁹

The Guiding Principles on Internal Displacement (GPID) effectively highlight the importance of a safe, voluntary, and dignified return for internally displaced persons, particularly through Principle 28. Their success indicates the necessity for a similar, comprehensive framework specifically tailored for refugees, addressing the evolving challenges of displacement in today's world. While refugees are covered under the 1951 Refugee Convention and its 1967 Protocol, the unique and complex displacement scenarios of the 21st century call for updated guidelines. A new document, akin to the GPID but for refugees, would fill existing gaps by addressing modern issues such as climate-induced displacement and the nuances of reintegration in post-conflict settings. It would advocate for the rights of refugees to participate in planning their return or resettlement, ensuring their return is safe, voluntary, and dignified.²²⁰

Moreover, the Vienna Declaration and Programme of Action, which was adopted by the UN World Conference on Human Rights in 1993, is a significant document that explicitly acknowledges the entitlement of every person to return to their country of origin.²²¹ The significance of this declaration lies in its dual role of reaffirming the inherent entitlement to repatriation, regardless of any distinctions, and establishing an

²¹⁸ The GPID were introduced in 1998 by the United Nations and are intended to provide an international standard to guide governments, international organizations, and other actors in providing assistance and protection to internally displaced persons (IDPs). These principles cover all phases of displacement: from prevention, to protection and assistance during displacement, to eventual return, resettlement, and reintegration.

²¹⁹ GPID, *supra note 20*, at principle 28.

²²⁰ Such a document would reinforce the principle of international cooperation, highlighting the collective responsibility to support refugees in a manner that respects their dignity and rights.

²²¹ Concluding Document of the Vienna Meeting on the Follow-up to the Conference," 15 January 1989, reprinted in *Human Rights Law Journal* 270 (1989).

international standard for the circumstances in which repatriation ought to take place—in a voluntary manner, ensuring safety, and upholding dignity.²²²

Next, the Commission on Human Rights has actively engaged with the right to return, especially in the context of refugee issues. In its Resolution 2003/52, the Commission highlighted the critical need to address protracted refugee situations.²²³ This resolution calls upon states to foster conditions that enable the voluntary return of refugees to their countries of origin in a manner that is both safe and dignified. The emphasis on voluntary repatriation within this resolution reaffirms the fundamental principle that individuals should have the autonomy to choose their return, ensuring that such decisions are made without coercion and under conditions that respect their safety and dignity. Furthermore, the resolution acknowledges the importance of other durable solutions, namely local integration and resettlement, as viable options for refugees when return is not feasible or desired.²²⁴ By advocating for a range of solutions, the Commission asserts the complexity of refugee situations and the need for flexible, context-specific responses. The preference for the right to return, however, remains evident, positioning it as the most desired outcome in addressing the challenges faced by refugees.

Following the adoption of the ICCPR, the right to return has not only been a focus of authoritative bodies like the Human Rights Committee but has also been a subject of discussion and reaffirmation in various academic and international forums. Notably, the issue gained prominence due to the increasing instances where countries, such as those within the (former) Soviet Union, frequently denied their citizens the right to emigrate. This situation stated the importance of the right to leave one's country and return to it as fundamental human rights that were being obstructed in practice.²²⁵

In response to these challenges, non-governmental organizations took a proactive role in addressing the limitations imposed on the right to emigrate by organizing an international colloquium on the right to leave and return.²²⁶ This event took place in Uppsala, Sweden, in 1972, highlighting the global concern over the restrictions being

²²² Id

²²³ Commission on Human Rights, *Human Rights and Mass Exoduses*, Res. 2003/52, U.N. Doc. E/CN.4/RES/2003/52 (Apr. 24, 2003).

²²⁴ Id

²²⁵ Gail J. Boling, *Palestinian Refugees and the Right of Return: An International Law Analysis*, BADIL Info. & Discussion Brief, No. 8 (Jan. 2001).

²²⁶ Id

placed on individuals' mobility by their own countries.²²⁷ The colloquium was a pivotal moment for the international community's engagement with the right to return, as it drew upon the foundational work of the Inglés study, which had previously outlined draft principles related to this right.

The Declaration on the Right to Leave and Return, adopted at the Uppsala colloquium, was significant for several reasons. First, it elaborated in greater detail the procedures and substantive norms governing the exercise of the right to leave and return, providing a more nuanced understanding of these rights.²²⁸ Second, it outlined the permissible limitations on these rights, offering a framework for when and how states could justifiably restrict the right to emigrate and return in a manner consistent with international law.²²⁹ This Declaration served as an important supplement to the principles established in the ICCPR, contributing to the evolving discourse on human rights by clarifying and expanding upon the conditions under which individuals should enjoy the freedom to leave any country, including their own, and to return to their country of citizenship.

The Strasbourg Declaration on the Right to Leave and Return represents another example of soft law in the context of right of return.²³⁰ The International Institute of Human Rights hosted another expert discussion on the right to leave and return in Strasbourg in November 1986.²³¹ The Declaration on the Right to Leave and Return was adopted by the participants, drawing heavily from the research conducted by Inglés²³² and the Uppsala Colloquium.²³³ Additionally, the Declaration took into consideration subsequent developments, including the adoption of the Helsinki Final Act in 1975²³⁴ and the legal decisions made by international human rights bodies. The declaration outlines

²²⁷ The Uppsala Declaration on the Right to Leave and to Return, in «Israel Yearbook on Human Rights», vol. 4, 1974, pp. 432-435. Chapter II codifies the right to return in Article 9. It reads: Every person is entitled to return to the country of which he is a national. Article 10 states: No person shall be deprived of his nationality for the purpose of divesting him of the right to return to his country. Moreover, Article 12 states: The re-entry of long-term residents who are not nationals, including stateless persons, may be refused only in the most exceptional circumstances

²²⁸ Id

²²⁹ Id

²³⁰ Hannum, Hurst. "The Strasbourg Declaration on the Right to Leave and Return." *The American Journal of International Law* 81, no. 2 (1987): 432-38.

²³¹ R. Hofmann, *The Right to Leave and Return to One's Own Country, The Strasbourg Declaration on the Right to Leave and Return: Results of the Meeting of Experts Held in Strasbourg in November 1986*, 8 Human Rights L.J. 478 (1987).

²³² Inglés, *supra* note 53, at 87.

²³³ Convention, *Supra* note 178

²³⁴ The Final Act of the Conference on Security and Cooperation in Europe, reprinted in 14 I.L.M. 1293, recalls that "the participating States [...] make it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organisations of the participating States" and provides specific measures concerning travel for family, personal or professional reasons.

principles concerning the right of individuals to leave any country, including their own, and to return to their country.²³⁵

The declaration affirms the right of individuals to freely leave any country, including their own, and to return to their home country. It mentions the importance of this right in the context of personal freedom, family reunification, and the ability of individuals to seek better life opportunities.²³⁶ While recognizing these rights, the declaration also acknowledges that certain restrictions may be applied, such as those necessary for national security, public order, or public health. However, it emphasizes that such restrictions must be lawful, necessary, and proportionate, and should not be used as a means to prevent individuals from exercising their fundamental rights.²³⁷ Interestingly enough, the Strasbourg Declaration contains a provision in which States are called upon to give ‘sympathetic consideration’ to permitting the return of persons who have maintained *bona fide* links with that State.²³⁸ This provision recognizes the significance of maintaining meaningful connections with one's homeland, advocating for flexibility in the right of return based on such enduring ties.

Despite its significance, the declaration, like other soft law instruments, faces challenges in terms of enforceability and compliance. Although the declarations have not been adopted under the auspices of the UN, they contribute to identify and clarify the legal content of the right to return. Without the binding force of hard law, their implementation relies heavily on the political will of states and the effectiveness of international and domestic advocacy to push for adherence to its principles. Moreover, the concluding documents of the subsequent Conferences on Security and Cooperation in Europe explicitly state that the participating States commit to implementing and upholding the principle that individuals have the freedom to leave from any nation, including their own, and to return to their country.²³⁹ This recognized support expands and strengthens the already wide acknowledgment in other regions of the world.

²³⁵ Id

²³⁶ Id

²³⁷ Id

²³⁸ Strasbourg Declaration, art. 8, On Humanitarian Grounds, a State Should Give Sympathetic Consideration to Permitting the Return of a Former Resident, in Particular a Stateless Person, Who Has Maintained Strong Bona Fide Links with That State (1986).

²³⁹ Concluding Document of the Vienna Meeting on the Follow-up to the Conference on Security and Cooperation in Europe (CSCE), Jan. 15, 1989, reprinted in Human Rights Law Journal 270 (1989). Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, reprinted in 29 Int'l Legal Materials (I.L.M.) 1305 (1990). Charter of Paris for a New Europe, reprinted in 30 I.L.M. 193, at 193-194, 199-200 (1991). Concluding Document of the Vienna Meeting on the Follow-up to the Conference, Jan. 15, 1989, reprinted in Council of Europe, Human Rights in International Law: Basic Texts (Strasbourg: Council of Europe Press, 1991), at p. 20.

In conclusion, the role of soft law in reinforcing the right of return cannot be overstated. Through a mosaic of non-binding instruments, such as UNGA resolutions, the Guiding Principles on Internal Displacement, and declarations like the Vienna Declaration and the Strasbourg Declaration, soft law fills critical gaps in international legal frameworks, providing both clarity and a consensus on the application of this right.²⁴⁰

D. Interpretation of Right of Return

International legal experts disagree on the precise meaning of the right of return.²⁴¹ Some claim that the right of return is linked to nationality, and they justify this by pointing out that states have an obligation not to undermine this right by arbitrarily taking away citizenship from their residents. (C1).²⁴² Others assert that the right applies to all those lawfully present in a country, regardless of citizenship status. To enhance clarity, I suggest differentiating between four potential methods of specifying who is eligible to claim the right of return. The major difference is in the distinction between residence-based (R) and citizenship-based (C) notions, which can both be interpreted in a narrower or broader sense.

The right of return to State S may be possessed by:

| | |
|-----|--|
| R 1 | Individuals who have been in S for extended periods and have the right to permanent residency, regardless of their citizenship status. |
| R 2 | Individuals who have resided in S for extended periods, regardless of possessing a formal legal right to do so. |
| C 1 | All individuals who are legal citizens of S, regardless of their residency status in S. |
| C 2 | Individuals who are closely linked to S by inheritance, culture, etc., to the extent that they are considered a national of S, regardless of their legal citizenship status or residency in S. |

²⁴⁰ These instruments, while not legally enforceable, carry significant moral and political weight, influencing state behavior and international norms.

²⁴¹ Jeremie Bracka, *Past the Point of No Return? The Palestinian Right of Return in International Human Rights Law*, 6 Melbourne J. Int'l L. 272, 298-302 (2005).

²⁴² Paul Sieghart, *The International Law of Human Rights* 179 (1983); Ruth Lapidot, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, in 16 Israel Yearbook on Human Rights 103 (Yoram Dinsteine ed., 1986).

Table 5

Once a state grants someone permanent residence, they cannot often deny reentry if the person leaves, unless there are extraordinary circumstances (R1).²⁴³ Support for evaluation R2 can be derived from several documents related to the peace settlement in Bosnia/Herzegovina, such as Security Council Resolution 947, which “affirms the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community.”²⁴⁴ The term “homes of origin” suggests that those who have previously lived in a region have the right to return back there, regardless of changes in citizenship or legal status such as the dissolution of the Yugoslavian state. Some commentators support the broad interpretation C2 by referring to the *Nottebohm* decision of the International Court of Justice.²⁴⁵ This decision used different criteria to establish an individual’s “substantive” connection to a country and the “effective” nationality they held. The justification for this interpretation of the right of return was explained by a participant at the 1972.²⁴⁶

While some scholars contend that the right to return applies to mass groups of individuals,²⁴⁷ most scholars believe that international human rights techniques do not acknowledge this right.²⁴⁸ The dominant perspective argues that the matter of repatriating large groups of displaced individuals is considered a political issue or one related to self-determination, rather than being governed by international human rights law.²⁴⁹ For example, Stig Jagerskiold, a distinguished Swedish legal scholar and diplomat writing about the scope of Article 12(4) of the ICCPR, states that:

The right to return is intended to apply to individuals asserting an individual right. There was no intention here 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, such as the relocation of ethnic Germans from Eastern Europe during and after the Second World War, the flight of Palestinians

²⁴³ Stig Jagerskiold, *The Freedom of Movement, in The International Bill of Rights: The Covenant on Civil and Political Rights* 180-81 (Louis Henkin ed., 1981).

Hannum, *supra* note 4, at 56-60.

²⁴⁴ Alfred-Maurice de Zayas, *The Right to One’s Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 *Crim. L. F.* 257, 311 (1995); Megan Bradley, *Liberal Democracies’ Divergent Interpretations of the Right of Return: Implications for Free Movement, in Democratic Citizenship and the Free Movement of People* (Willem Maas ed., 2013).

²⁴⁵ *Nottebohm Case* (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6).

²⁴⁶ UDHR, *supra* note 48

²⁴⁷ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 219 (1993).

²⁴⁸ The discussion regarding the scope of the right to return focuses on the UDHR and the ICCPR

²⁴⁹ Eyal, *supra* note 145; Ruth Lapidot, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 15 *Isr. Y.B. Hum. Rts.* 103 (1987); Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 *Am. J. Int’l L.* 586 (1978).

from what became Israel, or the movement of Jews from the Arab countries. ... The ICCPR does not deal with those issues and cannot be invoked to support a right to "return". These claims will require international political solutions on a large scale.²⁵⁰

The argument is irrational because all rights listed in the ICCPR are individually granted to people, regardless of the number of others trying to exercise the same right and when they are doing so. Esteemed critics have dismissed the notion that Article 12(4) cannot be applied to substantial populations.²⁵¹ Various UN bodies, such as the UN High Commissioner for Refugees, have specifically determined that significant populations have a right to return, which is based on Article 12(4) of the ICCPR and its related provision, Article 13(2) of the UDHR. One commentator pointed out that the right to return in the UDHR and ICCPR served as the foundation for ensuring this right in peace agreements negotiated lately to address wars in Rwanda and Georgia, which resulted in large numbers of refugees and displaced individuals.²⁵²

Another commenter states that there is no proof that large migrations of people like refugees or displaced individuals were meant to be included by Article 12 of the ICCPR by those who created it.²⁵³ According to this perspective, the right to return is applicable to individuals or small groups. However, in cases of substantial population displacements due to ethnic war, the topic should be addressed as a group right rather than an individual one.²⁵⁴ It seems clear to some that if every individual of a group has the right to return, this right should be applicable whether they are acting solely or as part of a broader movement. As Lawand states:

The fact that an individual left his or her country as part of a mass movement does not prejudice his or her rights as an individual. To subsume an individual's rights into those of the displaced group is contrary to the objects and purposes of human rights instruments generally and would render illusory most of the rights which they are intended to protect.²⁵⁵

²⁵⁰ Stig Jägerskiöld, *The Freedom of Movement, in The International Bill of Rights* 166, 180 (Louis Henkin ed., 1981).

²⁵¹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* 220 (1993); Christian Tomuschat, "Das Recht auf die Heimat, Neue rechtliche Aspekte," in *Des Menschen Recht zwischen Freiheit und Verantwortung – Festschrift für Karl Josef Partsch* 191 (J. Jekewitz et al. eds., 1989).

²⁵² Eric, *supra* note 38

²⁵³ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* 69-70 (1987). He adds: the expulsion or flight of large numbers of persons from disputed territory is more appropriately viewed as an issue related to self-determination or national sovereignty, rather than forced into the constraints of the much more narrow question of whether or not there exists a right of entry or return.

²⁵⁴ Yoram Dinstein, *Book Review*, 17 *Isr. Y.B. Hum. Rts.* 318, 319 (1987).

²⁵⁵ Kathleen Lawand, *The Right to Return of Palestinians in International Law*, 8 *Int'l J. Refugee L.* 542 (1996).

The UN Sub commission has referenced Article 12(4) of the ICCPR and Article 13(2) of the UDHR to address the issue of mass expulsions.²⁵⁶ General Comment No. 27 explicitly affirms that ICCPR Article 12(4) is relevant in situations of "enforced population transfers or mass expulsions," so strengthening the applicability of Article 12(4) to significant populations, as previously mentioned.

In my personal opinion, the right of return should indeed be applicable both to individuals and to collective groups. This perspective finds strong support not only in the literal wording of key human rights documents like Article 12(4) of the ICCPR and Article 13(2) of the UDHR but also in their subsequent interpretations and applications. The fact that these rights are granted on an individual basis does not preclude their collective application, especially when large groups of individuals simultaneously assert this right under similar circumstances, such as in the aftermath of conflicts or political upheaval.

Therefore, separating the individual right from the group dynamic in the context of the right of return would not only undermine the effectiveness of international human rights laws but also ignore the historical and social complexities that often accompany large-scale human movements. The inclusive interpretation that recognizes both individual and collective dimensions is more aligned with the spirit of international human rights norms and better suited to addressing the challenges posed by large-scale displacements.

E. Implementation of Right of Return

Major repatriations typically occur after a formal cessation of hostilities or a full peace treaty, rather than during a state of war (often after a decisive military resolution has been achieved). In the Bosnian War (1992-95), Slobodan Milosevic's efforts to establish a "Greater Serbia" resulted in the forced relocation of over 1.8 million people, which accounted for almost thirty-nine percent of the Bosnian population.²⁵⁷ The military defeats he experienced, along with the involvement of the North Atlantic Treaty Organization (NATO) and the signing of the Dayton Peace Accords, enabled the return of

²⁵⁶ U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, Res. 1995/13, U.N. ESCOR, 50th Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11/Add.3 (1995).

²⁵⁷ Henry Kamm, *Yugoslav Refugee Crisis Europe's Worst Since 40's*, N.Y. TIMES, July 24, 1992, at A1.

Bosnian people.²⁵⁸ Within the initial three years following the establishment of peace, approximately 226,000 individuals returned to Bosnia. In 2004, around 194,000 Iraqis repatriated following the overthrow of Saddam Hussein by a coalition led by the United States.

The Mozambican civil war was concluded with a peace deal in 1992.²⁵⁹ A total of 159,000 refugees repatriated in that particular year, followed by an additional 1,408,000 in the subsequent two years.²⁶⁰ In 1999, the United Nations oversaw a widely supported referendum in which the people of East Timor voted in favor of separating from Indonesia and gaining independence.²⁶¹ During the period of the U.N.'s Transitional Administration in East Timor (UNTAET), around 128,000 individuals returned to their previous residences in the newly established nation. The UNHCR has documented numerous cases of large-scale, voluntary repatriation of refugees after the conclusion of a conflict and the signing of a peace treaty.²⁶² Among the twenty-one significant refugee repatriations that took place between 1992 and 2008, only in Mali, Togo, and Myanmar did repatriation happen without the need for a comprehensive peace treaty to resolve widespread conflicts. Togo and Mali had internal unrest, but did not escalate to the level of civil or interstate conflict.

Following political liberalization and transitions to new governments, repatriations took place. In Myanmar, the majority of refugees went back to their home country during a short break in the military junta's intense suppression. Instances of returning to communities without a significant and widespread military conflict, either

²⁵⁸ 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)).

²⁵⁹ 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)).

²⁶⁰ Id

²⁶¹ 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)

²⁶² HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS, supra note 249, 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)).

through peace agreements or other means, should not be considered as strong evidence for a return in the absence of peace.²⁶³

Moreover, the time elapsed between displacement and return varies, but in the last three 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 20 years. They include Azerbaijan (three decades) Cyprus (four decades), Kashmir (six decades), and, Palestinians, who were displaced some seven 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.²⁶⁴ As time goes on, return is less plausible.

1. Bosnia and Herzegovina

One notable success story in implementing the right of return is the situation in Bosnia and Herzegovina following the Balkan wars of the 1990s. The post-conflict agreement, achieved in Dayton in 1995, also reflects the right of those forced to leave their homes during the struggle to be returned to their previously owned lands and after those attempts made by international organizations, including UNHCR, promoted the return of millions of just refugees and persons who were displaced to their own places of habitation.²⁶⁵

The right of return and the off-related issues in Bosnia and Herzegovina were very complex and were addressed by different categories of actors. However, it was the essential role of UNHCR, serving as the agency that implemented all the organized and coordinated repatriation efforts, that truly made a difference. Their provision of assistance to returnees, as far as rights protection is concerned, was instrumental in the successful implementation of the right of return.²⁶⁶ Returning local authorities and non-governmental organizations also played a crucial role in creating conducive conditions by removing legal and administrative barriers and promoting community healing plus cohesion.²⁶⁷

²⁶³ Id

²⁶⁴ Id

²⁶⁵ Id

²⁶⁶ Robert Black, *Return and Reconstruction in Bosnia-Herzegovina: Missing Link, or Mistaken Priority?*, 21 SAIS Rev. (1989-2003) 177, 177-199.

²⁶⁷ Id

Restoring the properties to the people from whom they were taken back was one of the fundamental elements of the implementation procedure. Through the joint efforts of the Bosnian government, which the international organizations supported, the programs were established to solve property disputes and return the private property of its denotative owners. These initiatives played a crucial role in regaining ownership, working towards reconstructing the settlements, and promoting positive living standards.²⁶⁸ The forthcoming assignee stage also promoted reconciliation and community dialogue. Initiatives aimed at fostering inter-ethnic cooperation and understanding were instrumental in overcoming the deep divisions created by the war.²⁶⁹

While evident strides were noticeable in returning refugees to their native lands, challenges were not entirely overcome in Bosnia and Herzegovina. In returnees' cases, property restitution procedures were frequently complicated and time-consuming, and they called forth adverse reactions on their side, like frustration or disappointment. Security worries in co-ethnic communities also contributed to the unstable situation, and the return needed to be more sustainable. The case of Bosnia and Herzegovina, which concerns comprehensive approaches, the cooperation of the international community, and the continuing efforts of state institutions, proves how the right of return can be implemented successfully.²⁷⁰ Although some good deeds have been achieved, further steps remain to tackle the problems more thoroughly and afford the full implementation of the right to go back to one's native home and neighborhood.

2. Rwanda

The government of Rwanda then put measures in place for those affected by the genocide in 1994 to be repatriated to the neighboring countries. The Rwandan government, assisted by the international community and the United Nations High Commissioner for Refugees, initially designed programs to encourage the return to Rwanda by voluntary willing refugees.²⁷¹ Those actions focused on postnatal care problems, land conflicts, and pushing for peace processes. The government of Rwanda did not hesitate to act promptly to create conditions suitable for the refugees' coming home. It embarked on a program to address issues arising from the uneven distribution of

²⁶⁸ Id

²⁶⁹ Robert Black, *Return and Reconstruction in Bosnia-Herzegovina: Missing Link, or Mistaken Priority?*, 21 SAIS Rev. (1989-2003) 177, 177-199.

²⁷⁰ Id

²⁷¹ Helen Hintjens, *Reconstructing Political Identities in Rwanda*, 22 *Ethnicities* 48 (2001).

land resources, for example, by establishing land commissions to decide on land disputes and the equitable distribution of land resources.²⁷² To this end, the government included rehabilitation support for those who returned, with the aid dedicated mainly to housing and expertise in agriculture, education, and health care. The process of returning to the home country was enabled through international organizations, such as the UNHCR, which facilitated the return home with logistical support, humanitarian aid, and technical help. They formed an active partnership with the Rwandan government to ensure that homecoming refugees could live safely and with respect and honor throughout the post-war period. Treatment measures, such as community dialogues and trauma counseling systems, were among the programs instituted to segregate, heal, and enhance the social cohesion among the returnees and the more excellent residency.²⁷³

Eventually, these measures culminated in many Rwandan refugees living in their homeland. The repatriation process was essential to improving relations between the nations because it helped countries rebuild and stabilize communities after wars and diseases by developing a sustainable infrastructure. Immigrants became a crucial part of the reconstruction process, deploying their experience, know-how, and various resources to bring township infrastructure back to life, reactivate the neighborhood economy, and promote peace. Despite the significant accomplishments, uncertainties lurked in the guarantee of the full reintegration of the returnee. A lack of space and economic rivalry, compounded by social tension, impeded some people's ability to return, making them argue at home.²⁷⁴ Moreover, the psychological stress the displaced people have passed through for a long time makes it necessary that the returns need appropriate assistance in the after-effects of traumas and losses.²⁷⁵

The Rwanda case illustrates the joint work of the national government and international agencies and their capacity to provide the right of return when implemented as a common interest. The way Rwanda achieved that was by, among other things, resolving land conflicts, promoting reconciliation, and ensuring rehabilitation of the

²⁷² Bruce E. Whitaker, *Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania*, 21 *Refugee Surv. Q.* 1/2 (2002), 328-344, <https://www.jstor.org/stable/45053473>.

²⁷³ Id

²⁷⁴ Id

²⁷⁵ Jennifer L. Melvin, *The Role of Repatriation in the Reintegration of Refugees: Lessons from Rwanda*, 18 *International Migration* 37 (2006).

refugees, which, in turn, contributed to Rwanda's post-conflict recovery and reconciliation process.²⁷⁶

3. Mozambique

Mozambique showcases a remarkable case of how the right of return can be successfully implemented if it is applied appropriately. Thousands of human beings who had to seek asylum elsewhere, for the most part in neighboring countries, will be able to go back after just a few years of war; when it was concluded, peace treaties signed in the early 1990s officially ended the civil conflict.²⁷⁷ International assistance provided by organizations, including, but not limited to the UNHCR, had a decisive impact on helping the returners get to their home countries and adapt to their communities.²⁷⁸ Humanitarian aid by the international community has helped deal with immediate needs after return.²⁷⁹ They include shelter, food, medical care, and others to which the UN and its agencies have direct access.

Additionally, conscious measures were taken to eliminate the problems that might negatively impact the prisoners' smooth reintegration into society, like the issues of mobility and social connection.²⁸⁰ Land reform is driven by implementing equality measures that rearrange land occupied by the returning people and the existing residents fairly, ensuring that the resources are acquired somewhat and reducing inequalities.²⁸¹ Community development programs were also tapered into the existing framework in social movements to promote economic empowerment and social integration among returnees and host communities, resulting in more cohesion and belonging. Educational platforms and vocational training centers were created to enable returnees to possess these life skills and knowledge that are so important for reconstructing their lives and developing their communities.²⁸²

²⁷⁶ Id

²⁷⁷ John A. Marcum, *Repatriation and Reintegration in Post-War Mozambique*, 24 *Journal of Refugee Studies* 276 (2011).

²⁷⁸ Sarah Norfolk & Claire Tanner, LEP Working Paper, *Workshop for Sub-Saharan Africa, Food and Agriculture Organization of the United Nations, Support to the Legal Empowerment of the Poor (LEP), Improving Tenure Security for the Rural Poor, with the Financial Assistance of Norway under a Programme Cooperation Agreement, Mozambique - Country Case Study*, Food & Agric. Org. U.N. (2007).

²⁷⁹ Id

²⁸⁰ Pauline Peters, *Reintegration of Refugees and Displaced Populations: A Case Study of Mozambique*, 31 *Journal of Modern African Studies* 311 (1993).

²⁸¹ Id

²⁸² Eric, *supra note 38*

The effective fulfillment of the right of return under the UNHCR and Mozambique's full cooperation in this regard brings clearly to the fore the necessity of cooperation on an international level, political will, and target-oriented interventions as means of voluntary repatriation and reintegration of refugees. Mozambique presented a pathway to address the root causes of displacement and allowed the course of community development to change.²⁸³ It was the sure way returnees could rebuild their lives and actively participate in sustaining the country's post-conflict reconstruction and reconciliation strategies.²⁸⁴

F. Challenges and Limitations

1. Legal and Administrative Barriers

The right of return, while a fundamental principle under international human rights law, is not absolute and may be subject to lawful restrictions. As mentioned in ICCPR Article 12(3) and general comment 27:²⁸⁵

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

Accordingly, a three-part test should be applied to assess such restrictions:

1. **Legality** – Whether the interference is prescribed by law.²⁸⁶
2. **Legitimacy** – What rights are protected.²⁸⁷
3. **Necessity and Proportionality** – Whether the restriction is necessary and proportionate to achieve legitimate aims.²⁸⁸

The concept of state sovereignty plays a crucial role in the discussion of the right of return and its potential restrictions. Sovereignty entails a state's authority to govern itself and control its own affairs, including who may enter or reside within its borders.²⁸⁹ This sovereign right is recognized in international law and allows states to

²⁸³ Id

²⁸⁴ Id

²⁸⁵ ICCPR, *supra* note 153, art. 12

²⁸⁶ Sarah Joseph, *Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36*, 19 Hum. Rts. L. Rev. 347 (2019).

²⁸⁷ Manuel Urbina, *Justifying Limitations on the Freedom of Expression: The Proportionality Test*, 32 Hum. Rts. Rev. 173 (2014).

²⁸⁸ Id

²⁸⁹ Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Etc.*, 68 Fordham L. Rev. 1 (1999).

implement measures that ensure the safety, security, and stability of their nation.²⁹⁰

Therefore, while the right of return is a fundamental human right, it must be balanced against the sovereign rights of states to protect their territorial integrity and national security. Restrictions on the right of return are thus not automatically deemed violations of international law, provided they meet the criteria of legality, legitimacy, and proportionality.²⁹¹

Applying this test to Israel,²⁹² it becomes evident that Israel would have strong grounds to restrict the right of return on the basis of national security. Such a limitation would protect Israel's right to exist, considering the substantial demographic changes that could result from the return of a large number of Palestinians, many of whom do not recognize Israel's right to exist. The significant influx of returnees could potentially destabilize the social and political fabric of Israel, thus posing a threat to national security. In this context, the legitimate aim of national security is clear and necessary.²⁹³

However, addressing the question of proportionality is more complex. Proportionality requires that any restrictive measures must not be excessive in relation to the intended legitimate aim.²⁹⁴ Denying the right of return to second and third-generation refugees, who have never lived in Israel and may have only a tenuous connection to the land, could be deemed proportionate. This measure could be justified on the grounds that their return could impose significant strains on resources and social cohesion without necessarily fulfilling a direct need for personal restitution. Conversely, denying the right of return to the displaced individuals themselves, those who were directly expelled or fled due to the conflict, would not be proportionate. These individuals have a direct and personal connection to the land, and their right to return is more compelling from both a moral and legal standpoint. Completely denying their return could be seen as an excessive measure that fails to adequately balance the rights of individuals against the state's security concerns.²⁹⁵

²⁹⁰ Vincent Chetail, *International Migration Law* 35-37 (2019).

²⁹¹ ICCPR, *supra* note 153, art. 12

²⁹² Oxford Human Rights Hub, *Palestinian Refugees and the Right of Return in International Law*, 23 Oxford Hum. Rts. Hub J. 305 (2023). This article traces the recognition of the Palestinian right of return in international refugee law, human rights law, and various UN resolutions. It elaborates on the legal and practical challenges posed by Israeli security policies and argues for the inalienability of the right of return, despite these challenges.

²⁹³ Basic Law: *Israel as the Nation-State of the Jewish People*, 5778-2018, SH No. 2741 p. 34

²⁹⁴ Urbina, *supra* note 287

²⁹⁵ Guy S. Goodwin-Gill, *The Right to Return and Its Practical Application*, 3 Int'l J. Refugee L. 282, 295-97 (1991)

Furthermore, certain limitations on the political rights of returnees could be considered proportional. For instance, returnees could be subject to specific conditions or restrictions that mitigate potential security risks while still allowing them to resettle. These conditions could include vetting procedures, restrictions on participation in political activities that could destabilize the state, or other measures designed to integrate returnees in a manner that respects both their rights and the state's security needs.²⁹⁶

In conclusion, while Israel may justifiably restrict the right of return on national security grounds, such restrictions must be carefully calibrated to ensure they are proportionate, balancing the legitimate aim of security with the individual rights of returnees.

Although many leaps forward have been achieved regarding the realization of the right of return in certain circumstances, much still needs to be done to eliminate the minefields of legal and practical questions that obstruct the travel of refugees to their homeland. One major problem resides in the fact that the restrictive citizenship laws may leave groups out, especially in the ethnic bases, those who were not accepted into the citizenship project on their return. Racist regulations in citizenship and ownership legalities may underlie the lengthening of the process of regaining land and property, aiding in the exposing of returnees to their weaving coils of exploitation, thereby perpetuating the displacement of the returnees.²⁹⁷

Bureaucratic obstacles also hinder refugees' ability to return and reintegrate into their communities. Bureaucratic procedures, long document processing periods, and, on the one hand, the absence of legal assistance, as well as, on the other hand, delays or barring of refugees from necessary services and rights after return may stand in their way. Along with that, there are no effective strategies designed to resolve land disputes and property disregards, which contribute to security gaps and make it hard for the refugees to resettle in their countries of origin.

2. Security Concerns

Security considerations, particularly for those regions included in the conflict or those going through political instability, present an additional barrier to the right of return implementation. The risk of reprisals, violence, and persecution can hinder refugees from

²⁹⁶ Eyal Benvenisti, *The Right to Leave, the Right to Return and the Right to Remain: A Preliminary Overview of Global Forced Migration*, 6 UCLA J. Int'l L. & Foreign Aff. 299 (2001).

²⁹⁷ Eric, *supra* note 38

returning to their places of origin and exercising their right to do so; however, if the state has a legal agreement, it gradually introduces the peaceful return of those who oversaw persecution in the state.²⁹⁸ On top of this, the inadequacy of security measures and the presence of an armed group and militias could intensify dangerous conditions, which act as obstacles interrupting the process of safe and voluntary return.

On many occasions, the returning refugees might be attacked and or murdered by both state and non-state actors. This significantly interrupts their peace and blessing of life. The absence of efficient law enforcement and a lack of protection mechanisms gives no protection to returnees, who can be subjected to various human rights violations such as unlawful detention, harassment, and discrimination.²⁹⁹ Furthermore, the landmines and unexploded ordnances that exist in post-conflict areas indicate the danger to the safety and welfare of people who are coming back home, the land access, and the habitat in which they can engage in and perform agriculture.

3. Proposals for Enhancement

The development of legal mechanisms and international cooperation is imperative due to the increasing occurrence of displacements and the resulting high number of victims.³⁰⁰ As some conflicts come to an end, a growing number of displaced individuals express the desire to voluntarily return to their places of origin. Returning home often represents the most desirable solution for refugees, as it allows them to rebuild their lives in familiar surroundings and contribute to the recovery of their home countries.³⁰¹ Although the right to return is implied in various international human rights instruments, it lacks explicit codification within the context of refugee law. This omission poses significant challenges to displaced persons' ability to return to their homes, as states may interpret these provisions in ways that deny refugees the right of return. General Comments and recommendations, as living instruments of international human rights law (IHRL), play a crucial role in developing IHRL to better adapt to emerging needs.³⁰²

²⁹⁸ Bruce E. Whitaker, *Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania*, 21 *Refugee Surv. Q.* 1/2 (2002), 328-344, <https://www.jstor.org/stable/45053473>.

²⁹⁹ Id

³⁰⁰ Louis Henkin, *Strengthening the International Rule of Law: Global Governance and the Emergence of Global Institutions for the 21st Century* 211, 231-232 (Cambridge University Press 2021).

³⁰¹ Id

³⁰² Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and their Legitimacy*, in *UN Human Rights Treaty Bodies* 116, 116-198 (Helen Keller & Geir Ulfstein eds., Cambridge University Press 2012).

Given the increasing displacement of individuals and the willingness of refugees to return to their places of origin, it is necessary for the UN Human Rights Committee to issue a new general comment on ICCPR Article 12(4). This comment should aim to better define the terms "nationals" and "arbitrarily" to include displaced persons, regardless of their citizenship or residency status. Such a clarification would enable all displaced individuals to assert their right to return, aligning with the UNHCR's stance that all individuals have the right to return to their country of origin. While this new interpretation would bolster their claims, it would still lack mechanisms to ensure a safe and dignified return. Therefore, it would be ideal to adopt an additional protocol to the 1951 Refugee Convention specifically addressing repatriation, which would outline the necessary mechanisms and procedures for a safe and dignified return. Historically, the Refugee Convention was established to provide safety to displaced persons following the Second World War.³⁰³ However, in the contemporary context, where some conflicts have concluded, there are inadequate mechanisms to facilitate the safe return of those wishing to go back. Furthermore, secondary displacement of returnees has become a significant issue. Thus, a new protocol is essential to address these modern challenges and ensure the right to return is both recognized and practically achievable.

A new protocol to the 1951 Refugee Convention addressing repatriation is the best option because it would compel states to implement policies ensuring the safe and dignified return of refugees. This is crucial given that refugee crises often exacerbate existing problems in host states, including altering their demographics and potentially leading to parallel societies. Currently, the principle of non-refoulement prevents states from sending refugees back to potentially dangerous conditions.³⁰⁴ However, if states were mandated to provide conditions for safe and dignified return, the context would shift, rendering the principle of non-refoulement less applicable. Even though establishing such a protocol might be practically challenging, the adoption of guiding principles for repatriation, similar to the Guiding Principles on Internal Displacement, would be a feasible alternative.³⁰⁵

³⁰³ Alexander Betts, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, 29 *Int'l J. Refugee L.* 1 (2017).

³⁰⁴ Jenny Poon, *Non-Refoulement in the International Refugee Law Regime: A Lex Specialis?*, 6 *Cornell Int'l L.J.* 457, 457-480 (2018).

³⁰⁵ Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2004).

A globally acknowledged legal structure that not only establishes but also ensures the implementation of the right to return is imperative for several reasons. First, the right to return is a fundamental human right enshrined implicitly in various international instruments, yet it lacks explicit codification and enforcement mechanisms in refugee law.³⁰⁶ This gap allows states to interpret their obligations in ways that may deny refugees their right to return, leaving many displaced individuals in prolonged limbo.³⁰⁷

Second, a formalized legal structure would provide clarity and consistency in the application of the right to return, reducing the arbitrary denial of this right by states.³⁰⁸ This would contribute to greater stability and predictability in international relations, as states would be bound by clear and enforceable norms.³⁰⁹ It would also alleviate the burden on host countries by providing a structured pathway for the voluntary repatriation of refugees, helping to address demographic changes and the social tensions that can arise from prolonged refugee presence.

Third, the establishment of a legal framework for the right to return would ensure that the process of repatriation is conducted in a manner that respects the dignity and safety of the returnees. Currently, many refugees face significant risks upon return, including violence, lack of access to basic services, and secondary displacement.³¹⁰ A legally binding protocol would mandate the creation of comprehensive repatriation programs that address these risks, providing support for reintegration and ensuring that returnees can rebuild their lives in a stable environment.

Lastly, such a framework would reinforce the international community's commitment to human rights and humanitarian principles. It would signal a collective acknowledgment of the plight of displaced persons and a commitment to resolving their situations through cooperative and legally sound measures.³¹¹ This would not only benefit the refugees but also enhance the credibility and effectiveness of international human rights and refugee protection regimes.

³⁰⁶ Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 *Int'l J. Refugee L.* 443 (2011).

³⁰⁷ Id.

³⁰⁸ James C. Hathaway, *The Rights of Refugees Under International Law*, 553 (2005).

³⁰⁹ Id.

³¹⁰ Megan Bradley, *The Conditions of Return: Addressing the Vulnerabilities of Refugees During Repatriation*, 34 *Refugee Surv. Q.* 43 (2015).

³¹¹ François Crépeau, *International Human Rights Law and the Challenges of Global Migration*, 12 *Hum. Rts. Rev.* 249, 259-260 (2011).

Conclusion

This study aims to offer a comprehensive examination of the legal frameworks and principles governing the right of return, thereby enriching our understanding of its implications and enforceability within the context of international law. The exploration of varying definitions of forced displacement highlights a significant challenge in the international legal community—the absence of a consistent framework that can universally apply across various legal systems and political contexts. This inconsistency not only complicates the enforcement of the right of return but also affects the accuracy and effectiveness of humanitarian responses to displacement crises.

Researchers are still discussing whether the right of return is legally obligatory, with some claiming that it does not have binding force, while others advocate for its recognition. The disparity between the theoretical acknowledgement and its actual implementation highlights the necessity for a more explicit agreement and more robust legal recognition.

This thesis finds that there is no clear consensus among scholars and legal frameworks regarding the right of return on the following issues:

1. Who has the right of return?³¹²
2. When does the right of return become a binding obligation?³¹³
3. How strong are the right of return arguments within different legal frameworks?³¹⁴
4. To what extent are limitations allowed?³¹⁵

The diverse interpretations of the right of return make its implementation more complex. There is disagreement among legal experts about whether the right of return is solely an individual right or also extends collectively to groups displaced by conflicts and political upheavals.³¹⁶ In my view, it should be interpreted as both an individual and a collective right, recognizing the practical realities and enhancing the effectiveness of international human rights law. Specifically, under the UDHR, "everyone has the right to return to his own country." While some interpret this to include non-nationals, others

³¹² Gail, *supra* note 117

³¹³ Boling, *supra* note 94

³¹⁴ Lawand, *supra* note 154

³¹⁵ Sarah, *supra* note 286

³¹⁶ Nowak, *supra* note 247

argue it excludes them. In contrast, the ICCPR uses the term "enter" instead of "return," broadening the scope of this right compared to the UDHR and ICERD, and extending it to second-, third-, or fourth-generation refugees. The ECHR's wording is more inclusive in protecting the entry rights of nationals who have never lived in the state but are its nationals, yet it is less inclusive as it excludes individuals who have lived in the state and consider it their home but are not nationals. These are my most important findings, highlighting the complexity and the varied legal interpretations of the right of return across different international legal frameworks.

The right of return became a binding obligation under international law with the 1949 Geneva Conventions. Although the 1948 UDHR mentions the right of return, it is not legally binding. Prior to this, the Hague Regulations of 1907 might be interpreted to include the right of return, but this view is not widely accepted. Scholars agree that the right of return had not crystallized as CIL by the 1940s, so individuals displaced before this period do not have an enforceable right of return under international law. However, the desire for return is enduring and can be claimed morally or personally, even if forced displacement before the recognition of the right does not constitute a violation of international law due to non-retroactivity principles. Additionally, descendants of those displaced in the early 1900s might claim a right of return if they can establish a significant link to their ancestral country, though this view is not widely supported in legal circles.

The right of return is established as an external aspect of freedom of movement under various legal frameworks.³¹⁷ The most compelling argument for the right of return is its status as CIL. While some scholars argue that the right of return achieved CIL status by 1950, this thesis presents stronger evidence indicating that state practice and acceptance only solidified in the 1990s. The second most robust argument derives from the ICCPR Article 12(4) and General Comment 27, which unequivocally affirm the right to enter one's own country. Additionally, regional human rights treaties provide a critical basis for this right. Arguments under the ICERD and the Geneva Conventions also recognize the right of return. However, these arguments are less potent due to their limited practical application and scope. The UDHR, while influential, is not legally binding and therefore does not constitute a strong argument for this issue. Interestingly, the 1951

³¹⁷ Jagerskiold, *supra note 68*

Refugee Convention does not explicitly establish the right of return. However, under soft law instruments, the right of return has been recognized within international refugee law.

Furthermore, the realization of this right is frequently obstructed by legal, administrative, and security obstacles, as well as economical difficulties that limit the complete reintegration of returnees into their respective communities. Notwithstanding these challenges, there have been significant achievements in implementing the right of return, as evidenced by the experiences of Bosnia and Herzegovina, Rwanda, and Mozambique. These examples emphasize the crucial importance of global collaboration and the necessity for comprehensive approaches that tackle the underlying reasons for displacement and enable long-lasting return and reintegration procedures.

While states may justifiably restrict the right of return on national security grounds, such restrictions must be carefully calibrated to ensure they meet three-part test, balancing the legitimate aim of security with the individual rights of returnees.³¹⁸ This thesis is the first to assert that the scope of proportionality and necessity diminishes with each successive generation of refugees. Denying the right of return to second and third-generation refugees, who have never lived in the country and may have only a tenuous connection to the land, could be deemed proportionate due to the potential strains on resources and social cohesion. Conversely, denying the right of return to those directly expelled or who fled due to conflict is less justifiable, as their direct and personal connection to the land makes their right more compelling. Furthermore, certain limitations on the political rights of returnees could be considered proportional, such as vetting procedures or restrictions on political activities that could destabilize the state. Therefore, while national security remains a legitimate and necessary concern, measures to restrict the right of return must not be excessive and should consider the varying degrees of connection and impact among different generations of refugees.

The absence of a globally acknowledged definition impedes the capacity to consistently and fairly apply this right. This thesis argues for the need to develop an internationally recognized definition of forced displacement and the right of return. These standards would establish a stronger basis for international laws and policies, guaranteeing

³¹⁸ Manuel, *supra* note 287

that displaced individuals possess a reliable and legally binding rights to safe and dignified return to their residences.

Given the increasing displacements and refugees' desire to return home, it is imperative to develop robust legal mechanisms and international cooperation. The current lack of explicit codification of the right to return in refugee law allows states to deny this right, posing significant challenges for displaced individuals. Therefore, I advocate for the UN Human Rights Committee to issue a new general comment on ICCPR Article 12(4) to include all displaced persons, regardless of citizenship, aligning with the UNHCR's stance. Furthermore, adopting an additional protocol to the 1951 Refugee Convention focused on repatriation would ensure safe and dignified returns, addressing modern challenges and reinforcing the right to return. A new protocol to the 1951 Refugee Convention addressing repatriation is essential as it would compel states to implement policies ensuring the safe and dignified return of refugees. This is crucial because refugee crises exacerbate existing issues in host states, such as altering demographics and potentially creating parallel societies. Currently, the principle of non-refoulement prevents states from sending refugees back to dangerous conditions.³¹⁹ However, mandating conditions for safe and dignified return would shift the context, making non-refoulement less applicable. Although establishing such a protocol may be challenging, adopting guiding principles for repatriation, akin to the Guiding Principles on Internal Displacement, would be a feasible alternative.

One of the limitations of this research is that it does not include an in-depth analysis of specific case studies, which could provide valuable insights into the practical application and challenges of ensuring the right of return. Future research could address this gap by examining detailed case studies to evaluate the effectiveness and feasibility of implementing the right of return in various contexts. Such studies would offer a more nuanced understanding of the complex dynamics at play and help determine whether the right of return can be effectively ensured, considering the unique socio-political and economic conditions of different regions.

Ultimately, the thesis emphasizes the necessity of a globally acknowledged legal structure that not only establishes but also ensures the implementation of the right to

³¹⁹ Jerry, *supra note 3*

return. A globally acknowledged legal structure ensuring the implementation of the right to return is imperative. This right, though implicitly enshrined in various international instruments, lacks explicit codification and enforcement in refugee law, allowing states to arbitrarily deny it. A formalized legal structure would provide clarity and consistency, reducing arbitrary denials and contributing to greater international stability. It would also alleviate host countries' burdens by providing a structured pathway for voluntary repatriation, addressing demographic changes and social tensions.

Additionally, it would ensure repatriation respects the dignity and safety of returnees, reinforcing the international community's commitment to human rights. The development of a globally acknowledged legal structure for the right of return is not just a legal necessity but a humanitarian imperative. As global displacement reaches unprecedented levels, ensuring a clear, enforceable right of return addresses not only the immediate needs of displaced individuals but also the long-term stability and security of host and home countries. The absence of such a framework exacerbates humanitarian crises, perpetuates suffering, and undermines international law's credibility.



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