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RIGHT TO RETURN: A CLOSER LOOK

REX J. ZEDALIS*

I. INTRODUCTION

In an excellent article appearing in a recent issue of this *Journal*, a colleague, John Quigley of Ohio State University, argues that a right to return for Palestinians displaced during the 1967 war exists¹ on the basis of humanitarian law (i.e. law of belligerent occupation),² human rights law,³ general international law,⁴ and United Nations law.⁵ Though I have long agreed with Professor Quigley's ultimate conclusion on the existence of such a right, it must be recognized that there are several problems with basing the right on the foregoing sources. A thoroughly persuasive argument directed at convincing others that any of these sources will indeed support the right acknowledges this fact and sedulously disposes of each problem.

What follows will present what I hope is a fair and accurate representation of the essence of Professor Quigley's stated position with regard to the right to return and each of the four sources he invokes, as well as an identification and appraisal of some of the most significant problems with establishing those sources as the bases of a right of such importance. The expectation is that an even stronger case for a right of return than developed by Quigley will emerge from a candid acknowledgement and analysis of the weaknesses confronting the reliance on humanitarian law, human rights law, general international law, and United Nations law as sources of such a right. A lucid and articulate exposition on any issue always has its place, but one should not lose sight of the necessity for structured and careful assessment.

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1. John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIGR. L.J. 223 (1992).

2. *Id.* at 229-31.

3. *Id.* at 231-34.

4. *Id.* at 234.

5. *Id.* at 238-40.

II. HUMANITARIAN LAW

Professor Quigley states that Article 43 of the 1907 Hague Regulations,⁶ and Article 49 of the Geneva Civilians Convention of 1949⁷ contain terminology that support a right of return for Palestinians.⁸ Article 43 addresses this by requiring a belligerent occupant to take all measures in its power to restore and ensure, in the words of the Israeli Supreme Court itself, order and normal community life, respecting, unless absolutely prevented, the laws in force in the country occupied.⁹ Normal community life is seen as implicitly connoting a prohibition on expulsion, and the directive to respect the laws in force at the time of occupation is seen as prohibiting any refusal to recognize residency rights of all entitled to claim them. Article 49 provides additional support by explicitly proscribing expulsions of protected persons from occupied territory.¹⁰ Furthermore, while the entire Civilians Convention has been found inapplicable to local cases because of the Knesset's refusal to incorporate the provisions into Israeli domestic law, on an international level Israel is bound to observe this Convention by virtue of its status as a state-party.¹¹

Several difficulties exist with invoking Articles 43 and 49 as bases for a right to return. Quigley alludes to an interpretation of the Civilians Convention as presupposing that territory occupied by a belligerent be formerly under the "legitimate sovereignty" of another state.¹² If one accepts that prior to the 1967 war the West Bank and Gaza Strip were illegitimately controlled by Jordan and Egypt, respectively,¹³ then such a presupposition entirely undercuts reliance on Article 49. Thus, something more must be said than simply that this position has not reflected the views of other states or the positions enunciated in U.N.

6. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2277 (1910), 1 Bevans 631 (1968) [hereinafter Hague Regulations].

7. Convention Relative to the Treatment of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilians Convention].

8. Obviously, since the 1949 Civilians Convention post-dated the 1948 Arab-Israeli War, refugees of that conflict would seem unable to rely on Article 49 of that later Convention. *But see* QUINCY WRIGHT, *THE MIDDLE EAST: PROSPECTS FOR PEACE* 24 (Isaac Shapiro ed., Oceana Publications, Inc. 1969), *reprinted in* 2 *THE ARAB-ISRAELI CONFLICT* 119 (Moore ed. 1974) (arguing applicability to pre-1949 refugees as well).

9. Hague Regulations, *supra* note 6, at 2306.

10. Civilians Convention, *supra* note 7, at 3548.

11. Quigley, *supra* note 1, at 229-31.

12. *Id.* at 230 n.53. Of the sources cited for this proposition, the most authoritative is Dr. Yehuda Z. Blum, former lecturer on international law at Hebrew University and Permanent Representative of Israel to the United Nations. Dr. Blum formulated the "legitimate sovereignty" arguments, later embraced by the Israeli government, for opposing the application of the Civilians Convention to the West Bank and Gaza. *See* Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279 (1968).

13. Blum, *supra* note 12, at 283-88 (Jordan and Egypt controlled that land as a result of illegal acts of aggression).

resolutions.¹⁴

From the standpoint of the purely legal argument, a couple of rather straightforward responses can be made to counter the assertion that Article 49 of the Civilians Convention is inapplicable. The most significant is that nowhere in the Civilians Convention,¹⁵ nor in the record of its negotiation¹⁶ can there be found the requirement of occupation of lands formerly under the "legitimate sovereignty" of another state. Article 2, second paragraph of the agreement applies the Convention to belligerent occupation, and its only reference is to territory of a high Contracting Party.¹⁷ Nothing suggests that this is defined as meaning land over which a state-party to the Convention has complete and formal title. Indeed, it seems few have doubted the reference may well apply to lands under a *de facto* claim to sovereignty, thus encompassing the West Bank and Gaza Strip.¹⁸

The eminent good sense of this conclusion is especially apparent in view of the other response that can be made to the inapplicability of the Civilians Convention. Specifically, while the claim of no "legitimate sovereign" implies that the Convention is designed to guard the interests of an ousted state as much as the interests of individuals affected by the belligerent engaged in the ousting, it is clear that the parties to the Convention had in mind only the latter. The Convention's Preamble declares that the parties met at Geneva "for the purpose of establishing a Convention for the Protection of *Civilian Persons* in Time of War."¹⁹ Indeed the official *Commentary* of the International Committee of the Red Cross indicates the Convention was devoted "not to State interests, but *solely* to the protection of the individual."²⁰ Thus, to understand the Convention as inapplicable whenever occupation is of lands under *de facto* sovereignty alone completely frustrates the goal of the states-parties in committing themselves to the Convention's obligations.

There is yet another difficulty with regard to invoking the Civilians Convention that Professor Quigley did not mention. That is the contention that the Convention only applies in situations of normal occupation, and any occupation that has continued for more than a quarter of a century cannot be considered normal.²¹ By the terms of Article 1,

14. Quigley, *supra* note 1, at 230 n.53.

15. See Civilians Convention, *supra* note 7.

16. See Final Record of the Diplomatic Conference of Geneva of 1949, Vols. I, IIA, IIB, and III.

17. See Civilians Convention, *supra* note 7, at 3518.

18. See W. MALLISON AND S. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 254-55 (1986).

19. See Civilians Convention, *supra* note 7, at 3518 (emphasis added).

20. 4 I.C.R.C. *Commentary on the Civilians Convention* 77 (Pictet ed. 1958) (emphasis added).

21. See *The Colonization of the West Bank Territories by Israel: Hearings Before the Subcommittee on Immigration and Naturalization of the U.S. Senate Committee on the Judiciary*,

however, the parties to the Civilians Convention committed themselves to respect the Convention "in all circumstances."²² Presumably, then, the exceptions to its obligations do not extend beyond those for which provision may have been made. As if to reiterate its inclusive ambit, the second paragraph of Article 2, in making the Convention applicable to situations of belligerent occupation, provides that it shall "apply to all cases of partial or total occupation."²³ The synergism of these two provisions suggests that the parties to the Civilians Convention bound themselves in advance to refrain from raising novel exceptions of the sort here invoked.

An entirely different situation exists with regard to Article 43 of the 1907 Hague Regulations and its implicit prohibition of expulsion and explicit direction to respect residency rights. The language of the provision contains references that would appear to make its invocation at least problematic. The most obvious one is that both the requirement to restore and ensure order and normal community life, as well as to respect the laws in force in the occupied territory, are subject to a proviso.²⁴ Quigley references the proviso by excerpting the relevant language "unless absolutely prevented," but then rapidly proceeds instead to focus on the scope of Article 43's obligations. The generally accepted understanding, however, is that the proviso means to permit departures from those obligations where dictated by military necessity.²⁵ Without addressing the complicated and difficult fact assertions that would undoubtedly be involved in any dispute regarding the existence of military necessity on the West Bank and Gaza, there is little question that the concept should include consideration of the principal reasons for recognizing the authority of the occupying belligerent: assurance of the security of the occupying forces, preservation of governmental structure and order, and maintenance of stable community life. In this regard, a distinguished international authority has indicated that article 43 contemplates an occupying power restricting freedom of movement in relation to the occupied territory.²⁶

95th Cong., 1st Sess. 42 (1977) (statement of Yehuda Z. Blum).

22. Civilians Convention, *supra* note 7, art. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

23. *Id.* at art. 2.

24. *See supra* text accompanying note 9.

25. *See* H. LEVIE, 2 THE CODE OF INTERNATIONAL ARMED CONFLICT 715 (1985).

26. According to this authority:

There are certain types of municipal law prescriptions whose continued operation is commonly regarded as inconsistent in varying degrees with the military security interests of the occupant and which, consequently, no one expects the occupant to respect and continue in effect. Perhaps the clearest illustrations are the laws . . . which define the civil and political rights and duties of the inhabitants vis-a-vis the legitimate sovereign, and which include laws relating to . . . the right to leave the country or to travel freely within it.

See M. McDUGAL AND F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 757-58 (1961) (citations omitted). The fact that leaving is referenced necessarily touches on returning.

There is an even more compelling reason to find the invocation of Article 43 troublesome in connection with a right to return for 1967-War Palestinians. Specifically, if one accepts that Jordan and Egypt were unlawfully in control of those areas when the conflict began in June of 1967, then there is language in Article 43 that would seem to render the provision completely inapplicable. The opening words of the article provide "[t]he authority of the legitimate power having in fact passed into the hands of the occupant. . . ." ²⁷ Professor Quigley does not even obliquely allude to this notion. Unlike in Article 49 of the Civilians Convention, ²⁸ however, it is clear the occupant's obligation under Article 43 of the Hague Regulations relates to a "legitimate power." In light of the fact that the reasons for recognizing an occupying belligerent's authority include the preservation of governmental structure and order, this requirement of "legitimacy" makes some sense. After all, if forces from states A, B and C were engaged in conflict with each other, and state C's forces overran B through the use of aggression, it is the laws of B, and not those of C, that should be restored when and if A later ousts C and itself occupies B. ²⁹

This idea of the imperativeness of a connection between the laws restored and a state with a legitimate claim to sovereignty is made all the more apparent by the fact that the provision immediately following Article 43 does not link a belligerent occupant's obligation with the need for the territory occupied to be "territory of a legitimate power." ³⁰ The right of the ordinary citizen in occupied territory to be free from force designed to compel disclosure of information about the army of the other belligerent is so important it does not depend on the ousted power having been legitimately in control of the territory. Conversely, the restoration of the laws in force in a country is so bound up with notions of proper authority that legitimacy takes on paramount importance.

Further evidence of "legitimate power" being interpreted to require that the ousted power has been lawfully in control of the territory now occupied is found in the historical record of the development of Article 43. Beginning with the so-called Brussels Declaration of 1874, ³¹ and

27. Hague Regulations, *supra* note 6, art. 43.

28. See *supra* text accompanying note 11.

29. In regard to whose laws apply during occupation, it is stated that:

The result of belligerent occupation, then, is that three distinct systems of law apply in territory under an enemy occupant: the indigenous law of the *legitimate sovereign*, to the extent that it has not been necessary to suspend it; the laws (legislation, orders, decrees, proclamations, regulations) of the occupant, as such are gradually introduced; and the applicable rules of customary and conventional international law.

G. VON GLAHN, *LAW AMONG NATIONS* 669 (1965) (emphasis added). If one of the sources of applicable law is the law of the "legitimate sovereign," then the law of one not in that position has no applicability.

30. See Hague Regulations, *supra* note 6, at 2306.

31. D. SCHINDLER AND J. TOMAN, *LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVEN-*

continuing to the 1899 Hague Regulations,³² the conventional law leading up to Article 43 uniformly referred to the occupant's obligation as one concerning the "legitimate power." This suggests that there was no confusion on the part of the drafters of these statements, such that the ousted power's legitimacy may not have been deemed essential. By repeatedly using the identical terminology, it would appear the predecessors of Article 43 made clear that the provision means what it says.

III. HUMAN RIGHTS LAW

What about the contention that a right of return can be based on the Universal Declaration of Human Rights (Declaration),³³ the International Covenant on Civil and Political Rights (Covenant),³⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (Convention)?³⁵ To be sure, each of these venerable statements of international human rights unequivocally and categorically references such a right. Article 13, paragraph 2, of the Declaration provides "[e]veryone has the right to leave any country, including his own, and to return to his country."³⁶ The 1966 Covenant states in Article 12(4) that "[n]o one shall be arbitrarily deprived of the right to enter his own country."³⁷ And the language of the fifth article of the Convention provides in paragraph (d)(ii) for a right "to return to one's country."³⁸

The difficulties with basing a right of return for West Bank and Gaza Strip Palestinians on these statements are twofold. First, as with the previously discussed Article 43 of the Hague Regulations, two of the statements of the right are conditioned by language recognizing the

TIONS, RESOLUTIONS, AND OTHER DOCUMENTS 25 (1973). Article 2 of the Brussels Declaration states:

The authority of the legitimate Power being suspended and 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.

Id. at 27.

32. Convention with Respect to the Law and Customs of War on Land, July 29, 1899, Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43, 32 Stat. 1803, 1821, 1 Bevans 247, 259. Article 43 provides:

The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force.

Id.

33. G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d mtg., at 71, U.N. Doc. A/810 (1948) [hereinafter Declaration].

34. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter Covenant].

35. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Convention].

36. Declaration, *supra* note 33, art. 13, para. 2, at 74.

37. Covenant, *supra* note 34, art. 12(4), at 176.

38. Convention, *supra* note 35, art. 5(d)(ii), at 220.

potential for exigencies that may neutralize the right's invocation. Article 29, paragraph 2, of the Declaration speaks of the right being conditioned by the "requirements of morality, public order and the general welfare. . . ."39 And article 4(1) of the Covenant alludes to derogations "[i]n time of public emergency which threatens the life of the nation."⁴⁰ Though the phraseology of the Covenant is much more limiting than that of the Declaration, both would seem to acknowledge that on some occasions and in certain circumstances the right to return can be compromised. Without attempting to pass judgment on the complex question of whether such occasions and circumstances exist with regard to 1967-War Palestinians, it cannot be denied that in instances where they do exist the Declaration and the Covenant allow departure from the rights they recognize.⁴¹

There is no language of derogation contained in the Convention on the Elimination of Racial Discrimination. Nonetheless, it faces the second of the difficulties troubling Quigley's reliance on human rights law. Specifically, that difficulty concerns the fact that each of the previously referenced provisions dealing with the right of return speaks in terms of the right applying to the returnee's own country. That is to say, the right seems to be one that can be invoked by nationals or citizens of the state to which return is sought.⁴² Accepting that the Palestinians who fled or were removed from the West Bank and Gaza during the 1967 conflict are not or do not desire to become Israelis, the chances of successfully invoking the right of return would appear minimal.

While the appeal of this argument is clear, it must nonetheless be rejected. To begin with, neither the Declaration, nor the Covenant, nor the Convention indicates that the right of return is linked to a person's juridical status. Nowhere is it provided that a person's right is to "return to his *state*." Nowhere is it provided that "a *national* has the right . . . to return to his country." Such narrow formulations do not appear. In each case the relevant language is drafted broadly to refer to "every-

39. G.A. Res. 217A, *supra* note 33, art. 29, para. 2, at 77. For a statement showing that return under article 13, paragraph 2, can be conditioned by article 29, paragraph 2, see *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including His Own, and to Return to His Country*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub. 2/229/Rev. 1 at 38 (1963) [hereinafter *Study*].

40. Covenant, *supra* note 34, art. 4(1), at 174.

41. On derogations from human rights standards, see generally INTERNATIONAL COMM'N OF JURISTS. STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1983). Professor Quigley's discussion of the problem of nationality or citizenship, *supra* note 1, at 235-36, is not tied to specific language from the various human rights documents. Rather, the discussion seems to be in regard to general international law. As a result, the reasons for his rejection of this as an insuperable problem fail to extend much beyond citation to statements by New York Law School Professor Lung-chu Chen at the 1973 Conference of the American Society of International Law. See Quigley, *id.* at 235, note 83 and accompanying text.

42. See Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. ON HUM. RTS. 103, 114 (1986).

one" having a right to return to his "country," or "no one" being arbitrarily deprived of the right to return to his "country." Such breadth seems all the more deliberate in view of the fact that each of the documents referencing the right obligates states to give the right effect without regard to juridical status. Article 2, paragraph 1 of the Declaration says "[e]veryone is entitled to all the rights [in the Declaration], without discrimination of any kind, such as . . . national or social origin, . . . birth or other status."⁴³ Article 2(1) of the Covenant says each party "undertakes to respect and to ensure to all individuals within its territory . . . the rights recognized . . . without distinction of any kind, such as . . . national or social origin, . . . birth or other status."⁴⁴ And the opening language of Article 5 of the Convention provides that parties "undertake to . . . guarantee the right of everyone, without distinction as to . . . national or ethnic origin . . ." to return to his country. Again, breadth is abundantly apparent.

Yet apart from the use of generous rather than tightly circumscribed terms, there is another reason for rejecting the argument that return only applies to nationals or citizens. More particularly, in each of the very articles referencing the right of return, there is also reference to a right of free movement within a "state." Articles 13, paragraph 1, of the Declaration, 12(1) of the Covenant, and 5(d)(i) of the Convention all provide that everyone shall have freedom of movement and residence within a "state."⁴⁵ Given this, it would seem strange to interpret any of these human rights documents (especially after the documents had just used the term "state" in the context of free movement) as using "country" in the context of the right of return to mean state. By attributing a broader meaning to the latter term, one not only hits upon an interpretation which comports with the dichotomy between "country" and "state," but also an interpretation consistent with the overall thrust of some of the other provisions referenced above.

The final reason for rejecting the claim that the right to return enunciated in the Declaration, Covenant, and Convention is applicable only to nationals or citizens involves the negotiating record of Article 13, paragraph 2, of the 1948 Universal Declaration, the seminal statement of that right in human rights law. In particular, it appears that the right of return was added to the Declaration more as a way of strengthening the right to leave, than as a statement of a right having its own independent significance. Nevertheless, as the right is explicitly provided for, it is entitled to a stature all its own. When it was added to

43. Declaration, *supra* note 33, art. 2, para. 1, at 72.

44. Covenant, *supra* note 34, art. 2(1).

45. Convention, *supra* note 35, art. 5.

46. See Declaration, *supra* note 33, art. 13, para. 1, at 74; see also Covenant, *supra* note 34, art. 12(1); see also Convention, *supra* note 35, art. 5(d)(i).

the Declaration, a statement made by the proposing delegate from Lebanon explained that it was offered so that "the right to leave a *country*, already sanctioned in the article, would be strengthened by the assurance of the right to return."⁴⁷ Of importance is the fact that the delegate spoke of the right as applicable to a returnee's "country." Not only does this track the very language of the Declaration's text, it indicates the refusal to endorse formulations that base the right upon its invocation by one seeking to return to one's state of nationality or citizenship.

IV. GENERAL INTERNATIONAL LAW

Another source for the right of return is said to be general international law.⁴⁸ The idea put forward is that return of individuals to the lands they have left is a right because the state to which the person has gone has no obligation to accord them residency, and refusal to retake the person inflicts a legal wrong on the state of refuge.⁴⁹

The clearest and most explicit source of general international law can be found in the customary legal practice of the states comprising the community of nations. Inferences drawn from correlative principles, like those on residency and refugees, can prove important, but can never replace statements that directly and unequivocally touch the matter of relevance. When it comes to the right of return, a wonderfully explicit exposition of that right is to be found in the *Progress Report* of 16 September 1948, prepared by Count Folke Bernadotte, the United Nations Mediator for Palestine following the 1948 Arab-Israeli War.⁵⁰ Attesting to both the existence of a right of return and its position as an established customary norm, the *Report* refers, under the appellation of "Right of Repatriation," to the fact that, "[t]he right of innocent people . . . to return to their homes, should be *affirmed* . . ."⁵¹ by the United Nations (emphasis added). And later it again states, "[t]he right of the Arab refugees to return to their homes in Jewish-controlled territory . . . should be *affirmed* by the United Nations" (emphasis added).⁵²

Apparently, as early as 1948, it was recognized by some that general international law possessed, within its corpus, a customary principle assuring those who leave their homeland of a right to return. The *Report* by Count Bernadotte did not speak of the right of innocent people to return being created by future legislative action of the United Nations.

47. See *Study*, *supra* note 39, at 87.

48. See Quigley, *supra* note 1, at 234-35.

49. *Id.*

50. U.N. GAOR, 3d Sess., Supp. No. 11, at 1-19, U.N. Doc. A/648 (1948).

51. *Id.* at 17.

52. *Id.* at 18.

It spoke of the right being affirmed.⁵³ The *Report* did not speak of the right of Arab refugees to return being proclaimed by subsequent resolutions of the United Nations. It spoke of the affirmation of the right.⁵⁴ In this sense, then, one can say some clear and apposite evidence of the right of return long being acknowledged as a vibrant and extant part of international law does indeed exist.

V. UNITED NATIONS RESOLUTIONS

There are also difficulties that must be acknowledged when reliance is placed on United Nations resolutions to support the existence of a right of return. It is simply not enough to cite the appropriate resolutions and quote the pertinent language.⁵⁵ The first of the difficulties is that there is reason to believe that some of the U.N. resolutions referenced by Quigley do not effectively speak to a right of return for Palestinians who would like to return to the West Bank and Gaza Strip. Even allowing that the basic Security Council Resolution on return is binding and concerns 1967-War refugees, it fails to bind member states to accept return, let alone return as a right. All that paragraph 1 of Security Council Resolution 237 provides is that "Israel . . . *facilitate* the return of those inhabitants who have fled the area since the outbreak of hostilities."⁵⁶ Nowhere is Israel obligated to "complete" or "immediately and unconditionally effect" return. Nowhere is what Israel must facilitate characterized as a "right" of return of those inhabitants who have fled. In fact, it appears from the discussion surrounding the unanimous adoption of 237 that the Security Council sought to avoid any language that could be construed as an unequivocal endorsement of a right of return.⁵⁷

In regard to the numerous General Assembly resolutions cited by my colleague,⁵⁸ some contain language of undoubted concern. A few, like Resolution 42/69G, speak of the right of return for those "displaced" from homes or former places of residence in territories occupied by Israel since 1967.⁵⁹ Others, like 3240A, speak of Israeli acts of "evacu-

53. See *supra* notes 51 and 52.

54. *Id.*

55. See Quigley, *supra* note 1, at 238-39.

56. S.C. Res. 237, U.N. SCOR, 22d Sess., 1361st mtg. at 5, U.N. Doc. S/INF/22/Rev. 2 (1967).

57. See 1967 U.N.Y.B. 185-89 for discussion of resolution 237. During the deliberations on what became 237, some spoke strongly in favor of "rights" of Palestinian Arabs. See *id.* at 186 (remarks of delegate from Saudi Arabia). Others spoke only of "Exerting every effort" on Israel to allow Palestinians to return, see *id.* (remarks of delegate from the U.S.). The U.S.S.R. wished for clear condemnation of Israeli aggression and forced withdrawal. See *id.* at 185, 188. In the end, it was the proposed draft of Argentina, Brazil, and Ethiopia, that was accepted. *Id.* at 187.

58. See Quigley, *supra* note 1, at 239, nn.110-18.

59. G.A. Res. 42/69G, U.N. GAOR, 42d Sess., Supp. No. 49, at 111, U.N. Doc. A/42/49 (1988).

ation, deportation, expulsion, displacement and transfer of Arab inhabitants of the occupied territories and the denial of their right to return."⁶⁰ Irrespective of the exact phraseology utilized, resolutions in both groups apparently perceive the right to return as invocable by individuals who can demonstrate dispossession or ouster from property or residence. Clearly, the resolutions do not envision a right that is generally available to all Palestinians. Thus, to the extent that one claiming a right of return is unable to show he or she has somehow actually and personally been removed from the territory to which return is sought, reliance on resolutions like 42/69G or 3240A would seem misplaced. Unlike the situation with Security Council Resolution 237,⁶¹ however, that should not prove an insurmountable hurdle. Another entirely separate line of General Assembly resolutions provides for a right of return simply on the basis of being a Palestinian.⁶² As a consequence, relief may well be available to those who can assert no stronger reason for return than that they are of Palestinian heritage and desire to resettle in their homeland.

The second of the difficulties concerns that other separate line of General Assembly resolutions dealing with Palestinians and the right to return that was alluded to above.⁶³ The most important of the resolu-

60. G.A. Res. 3240, U.N. GAOR, 29th Sess., Supp. No. 31, at 34, U.N. Doc. A/9631 (1975).

61. See *supra* note 56 and accompanying text.

62. See *infra* note 63.

63. Almost none of these resolutions are cited by Professor Quigley. Quigley, *supra* note 1. See e.g., G.A. Res. 194, U.N. GAOR, 3d Sess., at 21, U.N. Doc. A/810 (1948); G.A. Res. 513, U.N. GAOR, 5th Sess., Supp. No. 20, at 12, U.N. Doc. A/2119 (1951); G.A. Res. 614, U.N. GAOR, 6th Sess., Supp. No. 20, at 7, U.N. Doc. A/2364 (1952); G.A. Res. 720, U.N. GAOR, 8th Sess., Supp. No. 17, at 6, U.N. Doc. A/2630 (1953); G.A. Res. 818, U.N. GAOR, 9th Sess., Supp. No. 21, at 8, U.N. Doc. A/2890 (1954); G.A. Res. 916, U.N. GAOR, 10th Sess., Supp. No. 19, at 7, U.N. Doc. A/3116 (1955); G.A. Res. 1018, U.N. GAOR, 11th Sess., Supp. No. 17, at 6, U.N. Doc. A/3572 (1957); G.A. Res. 1191, U.N. GAOR, 12th Sess., Supp. No. 18, at 8, U.N. Doc. A/3805 (1957); G.A. Res. 1315, U.N. GAOR, 13th Sess., Supp. No. 18, at 9, U.N. Doc. A/4090 (1958); G.A. Res. 1456, U.N. GAOR, 14th Sess., Supp. No. 16, at 8, U.N. Doc. A/4354 (1959); G.A. Res. 1604, U.N. GAOR, 15th Sess., Supp. No. 16A, at 6, U.N. Doc. A/4684 Add. 1 (1961); G.A. Res. 1725, U.N. GAOR, 16th Sess., Supp. No. 17, at 11, U.N. Doc. A/5100 (1961); G.A. Res. 2002, U.N. GAOR, 19th Sess., Supp. No. 15, at 6, U.N. Doc. A/5815 (1965); G.A. Res. 2052, U.N. GAOR, 20th Sess., Supp. No. 14, at 15, U.N. Doc. A/6014 (1965); G.A. Res. 2154, U.N. GAOR, 21st Sess., Supp. No. 16, at 21, U.N. Doc. A/6711 (1966); G.A. Res. 2452A and B, U.N. GAOR, 23d Sess., Supp. No. 18, at 21, U.N. Doc. A/7218 (1968); G.A. Res. 2535A and B, U.N. GAOR, 24th Sess., Supp. No. 30, at 25, U.N. Doc. A/7630 (1969); G.A. Res. 2963A and D, U.N. GAOR, 27th Sess., Supp. No. 30, at 27, U.N. Doc. A/8730 (1972); G.A. Res. 3089B, C and D, U.N. GAOR, 28th Sess., Supp. No. 30, at 26, U.N. Doc. A/9030 (1973); G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974); G.A. Res. 3331A and D, U.N. GAOR, 29th Sess., Supp. No. 31, at 39, U.N. Doc. A/9631 (1974); G.A. Res. 3376, U.N. GAOR, 29th Sess., Supp. No. 34, at 39, U.N. Doc. A/10034 (1975), reprinted in 1975 U.N.Y.B. 248; G.A. Res. 3419B and C, U.N. GAOR, 30th Sess., Supp. No. 34, at 39, U.N. Doc. A/10034 (1975); G.A. Res. 31/15A and D, U.N. GAOR, 31st Sess., Supp. No. 39, at 48, U.N. Doc. A/31/39 (1976); G.A. Res. 31/20, U.N. GAOR, 31st Sess., Supp. No. 39, at 21, U.N. Doc. A/31/39 (1976), reprinted in 1976 U.N.Y.B. 245-46; G.A. Res. 32/90A and E, U.N. GAOR, 32d Sess., Supp. No. 45, at 66, U.N. Doc. A/32/45 (1977); G.A. Res. 33/28A, U.N. GAOR, 32d Sess., Supp. No. 45 at U.N. Doc. A/33/45 (1978), reprinted in 1978 U.N.Y.B. 342-43; G.A. Res. 34/70, U.N. GAOR, 34th Sess., Supp. No. 46, at 21, U.N. Doc. A/34/46 (1979), reprinted in 1979 U.N.Y.B. 375; G.A. Res. 35/169A, U.N. GAOR, 35th

tions in the series can be read to provide a right to return to not only the West Bank and Gaza Strip, but also to that part of Israel outside those lands partitioned to it by the General Assembly in late 1947.⁶⁴ As this would compel the acceptance of individuals Israel is understandably not interested in taking in, the resolutions violate Article 2(1) of the U.N. Charter by rendering meaningless the concept of "sovereign equality" and are, therefore, invalid.⁶⁵

The rationale for the argument of invalidity rests on Assembly resolution references to "Palestine." This position was advanced a number of years ago with regard to such a reference in Resolution 3236⁶⁶ and could continue to be maintained today in light of Resolution 35/169A's⁶⁷ repeated recollection by other General Assembly resolutions.⁶⁸ The basic idea is that in the former Resolution, return is applied to "Palestine," and "Palestine" can be read as referring to the areas taken by Israel during the 1948 War, as well as to the West Bank and Gaza Strip.⁶⁹ In the latter resolution, the applicability to both areas is made absolutely explicit. Paragraph 5 reaffirms the "inalienable right of the Palestinians to return to their homes and property *in Palestine* . . ." and paragraph 7 "[s]trongly reaffirms" portions of a report from the Committee on the Exercise of the Inalienable Rights of the Palestinian People setting forth a two phase return program; the first phase for the West Bank and Gaza Strip, and the second for return to lands taken from 1948 to 1967.⁷⁰

Sess., Supp. No. 48, at 26, U.N. Doc. No. A/35/48 (1980), *reprinted in* 1980 U.N.Y.B. 393-95; G.A. Res. 36/120D, U.N. GAOR, 36th Sess., Supp. No. 51, at 26, U.N. Doc. A/36/51 (1981), *reprinted in* 1981 U.N.Y.B. 268; G.A. Res. 37/86E, U.N. GAOR, 37th Sess., Supp. No. 51, at 36, U.N. Doc. A/37/51 (1982), *reprinted in* 1982 U.N.Y.B. 414; UNITED NATIONS GENERAL ASSEMBLY, ES-7/9, Question of Palestine, U.N. Doc. A/ES-7/14/Add.1 (1982), *reprinted in* 1982 U.N.Y.B. 477; G.A. Res. 41/43A, U.N. GAOR, 41st Sess., Supp. No. 52, U.N. Doc. A/41/53 (1986), *reprinted in* 1987 U.N.Y.B. 271; G.A. Res. 42/66A, U.N. GAOR, 42d Sess., Supp. No. 49, at 47, U.N. Doc. No. A/42/49 (1987), *reprinted in* 1987 U.N.Y.B. 265.

64. On the partition, *see* G.A. Res. 181, U.N. GAOR, 2d Sess., at 131, U.N. Doc. A/519 (1947) (partitioning British-Mandated Palestine).

65. *See* Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 606-07 (1978) (making this argument with regard to G.A. Res. 3236).

66. G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974). *See also* Radley, *supra* note 65, at 606-08.

67. G.A. Res. 35/169A, *supra* note 63.

68. *See e.g.*, G.A. Res. 41/43A, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53 (1987), *reprinted in* 1986 U.N.Y.B. 271 ("Recalling . . . 35/169").

69. The argument is essentially that resolution 3089D explicitly cross references resolution 194. Assembly resolution 194 provides in paragraph 11 that refugees of the 1948 war "wishing to return . . . should be permitted to do so." G.A. Res. 194, *supra* note 63, at 24. Since Paragraph 3 of 3089D declares that peace in the Middle East depends upon the "enjoyment by the Palestine Arab refugees of their right to return to their homes and property, recognized by the General Assembly in resolution 194 . . .," the suggestion is that what might be characterized as an earlier hortatory call for return by the Assembly was converted by 3089D into a "right." *See* G.A. Res. 3089D, *supra* note 63. The effect has been to apply the right to areas outside 181-Israel captured during the 1948 War, as resolution 194 itself had applicability to such areas.

70. G.A. Res. 35/169A, *supra* note 63, at 26-27.

Despite the unequivocal applicability of the right of return to portions of present-day Israel, it seems inaccurate to dismiss the General Assembly resolutions that refer to the right as nothing more than invalid and violative of the Charter. The primary reason for this has to do with the fact that the very notion of "sovereign equality," endorsed by the Charter, is conditioned in this case by the 1947 General Assembly partition instrument, Resolution 181.⁷¹ That is to say, in return for the creation of an Independent Arab State and a Jewish State, to take the place of the former British-Mandate, the principals involved agreed to accept certain obligations. In this regard, the Plan of Partition with Economic Union required each state to draft a constitution that would, among other things, provide for: (1) universal suffrage; (2) settlement of international disputes through peaceful means; (3) acceptance of the obligation to refrain from the threat or use of force against territorial integrity or political independence; (4) basic civil, political, economic, religious, and human rights; and (5) freedom of transit and visit.⁷² Implicit in these obligations is the idea that land allotted to the principals involved was to be respected. That seems to be the essence of the requirement to refrain from acts against territorial integrity and political independence. Thus, the degree of equality among sovereigns that can be expected in lands taken by Israel during the 1948 War seems reduced by what was originally envisioned for those lands.

VI. CONCLUSION: RIGHT TO RETURN LARGELY BASED ON CUSTOMARY LAW

In light of the foregoing discussion of the right of return for West Bank and Gaza Strip Palestinians, several preliminary conclusions would seem warranted. Initially, although Article 43 of the 1907 Hague Regulations is inapplicable, Article 49 of the Geneva Civilians Convention of 1949 would appear to apply, thus allowing claims that it implicitly provides for a right of return. Next, the Universal Declaration, the Covenant, and the Convention all seem to apply and allow invocation of the right of return which human rights law recognizes. As to general international law, there would certainly seem to be some support for return as an established and long existing right. And finally, there is no doubt that many General Assembly resolutions have declared the right of return for Palestinians interested in resettling on the West Bank or in the Gaza Strip.

Notwithstanding the conclusions just enumerated, the case for return is much less convincing than one might be led to believe. In large measure, this is because two of the three human rights documents relied on,

71. G.A. Res. 181, *supra* note 64.

72. *Id.* at 132-35.

the Declaration and the Covenant, as well as all the General Assembly resolutions on return, obtain their legal force through the concept of customary international law. Yet it is incontrovertible that in assessing whether such instruments from international organizations make customary international law, reference must be made to the following: (1) the number of states voting in support of the measure; (2) the number and importance of those opposed; (3) the distribution of the states on both sides and the directness of their interest in the matter concerned; and, (4) the extent or likely practice of states in relation to their voting position.⁷³ Furthermore, measures not creating customary law when adopted may, over time, pass into the corpus of customary legal norms.⁷⁴ States persistently objecting to the custom during its period of development, however, will not be bound once the custom crystallizes.⁷⁵

Judged by standards of this sort, it would seem virtually impossible to demonstrate that the General Assembly resolutions referred to herein create a customary law obligation, relative to return, which the State of Israel is required to respect.⁷⁶ At the very least, there can be

73. See Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 45-46 (1976). See also generally ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); JORGE CASTANEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969); OBED Y. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966).

74. See RESTATEMENT OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES (Revised), §102 at 36-38 (Tent. Draft No. 6, 1985).

75. For the two International Court of Justice decisions endorsing the idea of persistent objection, see *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18); *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 277-78 (June 13).

76. See e.g., the voting on the resolutions addressing the West Bank and Gaza Strip: G.A. Res. 32/40A, U.N. GAOR, 32d Sess., Supp. No. 45, at 24, U.N. Doc. A/32/45 (1978) (100 to 12, with 29 abstentions — Israel and the U.S. voting "no"; Canada, France, W. Germany, Italy, Japan, U.K. and others "abstaining"); G.A. Res. 3525A, U.N. GAOR, 30th Sess., Supp. No. 34, at 41, U.N. Doc. A/10034 (1975) (87 to 7, with 26 abstentions — Israel and U.S. "no"; France, W. Germany, Canada, Italy, Japan, U.K. and others "abstaining"); G.A. Res. 33/112F, U.N. GAOR, 33d Sess., Supp. No. 45, at 69, U.N. Doc. A/33/45 (1979) (115 to 4, with 22 abstentions — much the same distribution as earlier resolutions); G.A. Res. 34/52E, U.N. GAOR, 34th Sess., Supp. No. 46, at 74, U.N. Doc. A/34/46 (1980) (121 to 3, with 16 abstentions — again, similar distribution); G.A. Res. 35/169A, U.N. GAOR, 35th Sess., Supp. No. 48, at 26, U.N. Doc. A/35/48 (1980) (98 to 16, with 32 abstentions — same pattern); G.A. Res. 36/120D, U.N. GAOR, 36th Sess., Supp. No. 51, at 27, U.N. Doc. A/36/51 (1981) (111 to 13, with 20 abstentions — same pattern); G.A. Res. 37/88C, U.N. GAOR, 37th Sess., Supp. No. 51, at 93, U.N. Doc. A/37/51 (1982) (112 to 2, with 21 abstentions — same pattern); G.A. Res. 38/79D, U.N. GAOR, 38th Sess., Supp. No. 47, at 95, U.N. Doc. A/38/47 (1983) (115 to 2, with 27 abstentions — same pattern, Israel and U.S. continuing to vote "no"); G.A. Res. 40/165G, U.N. GAOR, 40th Sess., Supp. No. 53, at 129, U.N. Doc. A/40/53 (1985) (127 to 2, with 23 abstentions — similar pattern); G.A. Res. 42/69G, U.N. GAOR, 42d Sess., Supp. No. 49, at 111, U.N. Doc. A/42/49 (1987) (125 to 2, with 27 abstentions — same pattern). The only marked departures with respect to this series of resolutions were G.A. Res. 31/15D, U.N. GAOR, 31st Sess., Supp. No. 39, at 49, U.N. Doc. A/31/39 (1976) and G.A. Res. 32/90E, U.N. GAOR, 32d Sess., Supp. No. 45, at 68, U.N. Doc. A/32/45 (1977). In the case of the former, the vote was 118 to 2, with 2 abstentions — U.S. and Israel voting "no"; and only Malawi and Papua New Guinea abstaining. In the case of the latter resolution the vote was 125 to 1, with 0 abstentions — U.S. voting "yes" and Israel "no." Even if one were to argue for a limited customary right of return on the basis of these two

no doubt that it has repeatedly resisted efforts directed at the adoption

resolutions, there would be difficulties deriving not only from Israel's continuous refusal (as evidenced by its voting pattern) to recognize return as a right, *see infra* text accompanying note 77, but also from the fact that a number of the states voting in favor of such a right either have, or most likely would, refrain from giving effect to a similar right were they in a position of taking in displaced peoples with strong ideological differences.

As to the voting on the line of more general resolutions dealing with return, the record since 1975 is as follows: G.A. Res. 3376, U.N. GAOR, 30th Sess., Supp. No. 34, at 3, U.N. Doc. A/10034 (1975) (93 to 18, with 27 abstentions — Canada, W. Germany, U.K., U.S. and Israel "no"; France, Italy, Japan, Ireland, Sweden and/others "abstaining"); G.A. Res. 31/20, U.N. GAOR, 31st Sess., Supp. No. 39, at 21, U.N. Doc. A/31/39 (1976) (90-16-30 — much the same pattern); G.A. Res. 32/40A, U.N. GAOR, 32d Sess., Supp. No. 45, at 24, U.N. Doc. A/32/45 (1977) (100-12-29 — same pattern); G.A. Res. 33/28A, U.N. GAOR, 33d Sess., Supp. No. 45, at 16, U.N. Doc. A/33/45 (1978) (97-19-25 — same pattern, U.S. and Israel "no"); G.A. Res. 34/70, U.N. GAOR, 34th Sess., Supp. No. 46, at 21, U.N. Doc. A/34/46 (1979) (102-17-20 — same pattern); G.A. Res. 34/65A, U.N. GAOR, 34th Sess., Supp. No. 46, at 19, U.N. Doc. A/34/46 (1979) (117-14-16 — pattern continues); G.A. Res. 35/169A, U.N. GAOR, 35th Sess., Supp. No. 48, at 26, U.N. Doc. A/35/48 (1980) (98-16-32 — similar distribution, with US and Israel voting "no"); G.A. Res. 36/120D, U.N. GAOR, 36th Sess., Supp. No. 51, at 27, U.N. Doc. A/36/51 (1981) (111-13-20 — same pattern); G.A. Res. 37/86E, U.N. GAOR, 37th Sess., Supp. No. 51, at 36, U.N. Doc. A/37/51 (1982) (123-2-19 — U.S. and Israel voting "no"); UNITED NATIONS. GENERAL ASSEMBLY: ES-7/9, Question of Palestine; U.N. Doc. A/ES-7/14/Add.1 (1982) *reprinted in* 1982 U.N.Y.B. 477. (147-2 — only U.S. and Israel not voting "yes"); G.A. Res. 41/43A, U.N. GAOR, 41st Sess., Supp. No. 53, at 52, U.N. Doc. A/41/53 (1986) (121-2-21 — same pattern); G.A. Res. 42/66A, U.N. GAOR, 42d Sess., Supp. No. 49, at 47, U.N. Doc. A/42/49, (1987) (131-2-22 — same pattern).

For resolutions adopted prior to 1975 the record looks like this: G.A. Res. 513, U.N. GAOR, 6th Sess., Supp. No. 20, at 12, U.N. Doc. A/2119 (1952) (47-0-7: no roll call); G.A. Res. 614, U.N. GAOR, 7th Sess., Supp. No. 20, at 7, U.N. Doc. A/2361 (1952) (48-0-6: no roll call); G.A. Res. 720A, U.N. GAOR, 8th Sess., Supp. No. 17, at 6, U.N. Doc. A/2630 (1953) (52-0-5: no roll call); G.A. Res. 818, U.N. GAOR, 9th Sess., Supp. No. 21, at 8, U.N. Doc. A/2890 (1954) (48-0-7: no roll call); G.A. Res. 916, U.N. GAOR, 10th Sess., Supp. No. 19, at 7, U.N. Doc. A/3116 (1955) (38-0-17: no roll call); G.A. Res. 1018, U.N. GAOR, 11th Sess., Supp. No. 17, at 6, U.N. Doc. A/3572 (1957) (68-0-1: no roll call); G.A. Res. 1191, U.N. GAOR, 12th Sess., Supp. No. 18, at 8, U.N. Doc. A/3805 (1957) (52-0-19: no roll call); G.A. Res. 1315, U.N. GAOR, 13th Sess., Supp. No. 18, at 9, U.N. Doc. A/4090 (1958) (57-0-20: no roll call); G.A. Res. 1456, U.N. GAOR, 14th Sess., Supp. No. 16, at 8, U.N. Doc. A/4354 (1959) (80-0-1: no roll call); G.A. Res. 1604, U.N. GAOR, 15th Sess., Supp. No. 16A, at 6, U.N. Doc. A/4684/Add.1 (1961) (37-17-38: Israel voting "no," Canada, Japan, Italy, etc. "abstaining"); G.A. Res. 1725, U.N. GAOR, 16th Sess., Supp. No. 17, at 11, U.N. Doc. A/5100 (1961) (62-0-37: Israel voting "yes"). With regard to the resolutions spanning the years 1951-1961, Israel would sometimes abstain and sometimes vote affirmatively. For an affirmative vote in a non-roll call setting, *see* 6 YB. of U.N. 260-61 (1952) (Israeli representative indicating an affirmative vote). The reach of the resolutions adopted during this time frame, however, only covers supporting efforts to obtain repatriation, compensation or resettlement. The resolutions did not deal with Palestinian "rights." On the Israeli understanding that this was the case, *see e.g.*, 1953 U.N.Y.B. 242-43; 1963 U.N.Y.B. 158. Thus, the fact that it did not vote "no" on each of these resolutions, does not operate in favor of the creation of a custom binding Israel.

From 1961 to 1975 the record shows voting on the more general resolutions was as follows: G.A. Res. 2002, U.N. GAOR, 19th Sess., Supp. No. 15, at 6, U.N. Doc. A/5815 (1965) (no objections) (resolution does not speak of "rights"); G.A. Res. 2052, U.N. GAOR, 20th Sess., Supp. No. 14, at 15, U.N. Doc. A/6014 (1965) (91-1-7: U.S. voting "yes," Israel "no") (resolution parallels those from 1951-61, however); G.A. Res. 2154, U.N. GAOR, 21st Sess., Supp. No. 16, at 19, U.N. Doc. A/6316 (1966) (68-0-39: no roll call) (again, no mention of "rights"); G.A. Res. 2452A, U.N. GAOR, 23d Sess., Supp. No. 18, at 21, U.N. Doc. A/7218 (1968) (101-1-6: no roll call); G.A. Res. 2452B, U.N. GAOR, 23rd Sess., Supp. No. 18, at 22, U.N. Doc. A/7218 (1968) (105-0-3: no roll call) (resolution is another to not mention "rights"); G.A. Res. 2535A, U.N. GAOR, 24th Sess., Supp. No. 30, at 25, U.N. Doc. A/7630 (1969) (no objections) (basically replicates resolutions not mentioning "rights"); G.A. Res. 2535B, U.N. GAOR, 24th Sess., Supp. No. 30, at 25, U.N. Doc. A/7630 (1969) (48-22-47: Israel voting "no"); G.A. Res. 2963D, U.N. GAOR, 27th Sess., Supp. No. 30, at 28, U.N. Doc. A/8730 (1972) (93-5-26: Israel voting

of resolutions containing such a right.⁷⁷ Thus, even accepting that the resolutions speak of a right for all Palestinians to return to areas that include the West Bank and Gaza, they really prove little more beneficial than Article 43 of the 1907 Hague Regulations.

Reliance on general international law to support a right of return is not without problems of its own. Specifically, the customs and practices of which it is comprised are not uniformly regarded as having established a principle that can be invoked by aliens or non-nationals. It is beyond dispute that statements of the establishment of such a principle can be found.⁷⁸ But occasionally even the sources relied on have proffered conflicting statements,⁷⁹ and others have made it crystal clear that they do not believe a right of return exists in general international law for those who are unable to demonstrate a nationality link.⁸⁰ The breadth of the language used in human rights documents like the Universal Declaration, the Covenant on Civil and Political Rights, and the Convention on the Elimination of Racial Discrimination (e.g., "everyone" and "country") may suggest movement away from any tight linkage required by the traditional law.⁸¹ Furthermore, to some extent it may be that commentators who speak in terms of coverage for non-nationals express an aspiration as much as anything else. Nonetheless, in the absence of some consensus about the right of return being applicable to individuals situated like the Palestinians, it would seem difficult to fashion a persuasive case on the basis of general international law.

Having said all of this, arguments for return therefore have to be based on inferences drawn from Article 49 of the Civilians Convention, or from the explicit provisions for return found in the aforementioned

"no," U.S., Portugal, and others "abstaining"); G.A. Res. 3089C, U.N. GAOR, 28th Sess., Supp. No. 30, at 27, U.N. Doc. A/9030 (1973) (110-4-12: Israel voting "no," U.S., Canada, Portugal, and others "abstaining"); G.A. Res. 3089D, U.N. GAOR, 28th Sess., Supp. No. 30, at 27, U.N. Doc. A/9030 (1973) (87-6-33: Israel and U.S. voting "no," Canada, France, W. Germany, U.K. and others "abstaining"); G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974) (89-8-37: U.S. and Israel "no," U.K., France, W. Germany, and others "abstaining").

77. See *supra* note 76.

78. Quigley cites *Expulsion and Expatriation in International Law: The Right to Leave, to Stay, and to Return*, 67 PROC. AM. SOC'Y INT'L L. 122, 127-31 (1973) (remarks of Lung-chu Chen stating that the "prime exception is to allow long-term residents (non-nationals) to return to the land of domicile").

79. See *id.* at 130 (Lung-chu Chen noting 1972 Uppsala Declaration directed at extending existing law so as to include non-nationals). See also *id.* at 132 (Lung-chu Chen noting "present state of practice . . . leaves much to be desired. Pending the achievement of a world commonwealth . . . the right to return . . . should be extended from nationals to all other persons who have significant ties" with a community).

80. See *id.* at 137, 138 (comments of Sidney Liskofsky stating that the "existing international standard . . . limits the right to return to nationals").

81. See generally McDougal, Lasswell and Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432, 456-67 (1976).

Declaration, Covenant, and Convention. With particular regard to these three human rights documents, one might with some degree of confidence conclude that the evidence supporting return is stronger than under either general international law or the United Nations resolutions. This does not mean, however, a clean and unavoidable case can be made from these sources.

There is no question that the Declaration and the Covenant may have become a part of the corpus of existing customary international law.⁸² And while the Declaration was adopted by the United Nations prior to the time of the membership of the State of Israel, the Covenant was adopted thereafter with a vote of approval being cast by that state and many others.⁸³ As for the Convention, Israel has accepted its terms, taking a reservation only to an article which has no specific impact on the provision dealing with return.⁸⁴ Consequently, whether examined from the perspective of customary or conventional legal obligation, Israel would seem bound to accept the right of Palestinian return. However, to the extent that the constant refusal of the State of Israel to accept U.N. resolutions aimed at the return of Palestinians, a refusal voiced repeatedly from at least the time of Israel's acquisition of membership in the United Nations,⁸⁵ is seen as evidence of an unequivocal and distinct position regarding the requirements of the Declaration, Covenant and Convention, it might well be that Israel's refusal serves to modify its international legal obligations. Under traditional analysis, persistent objection frees one from customary standards, and bona fide reservation works the same effect on standards of a conventional sort. During an era when the formulation and development of international law has shifted away from an emphasis on state practice towards an emphasis on the promulgation of declarations, resolutions and multilateral conventions by international organizations, the fact that a clear and constant opposition has been voiced in one context to a concept that is somehow implicated in an entirely different context may be sufficient to stand in place of persistent objection or reservation.⁸⁶ If it is,

82. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 16-17 (1982); F. NEWMAN AND D. WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 617 (1990) (citing *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)).

83. On approval from all states then in being, see W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 471 (3d ed. 1971).

84. See *Multilateral Treaties Deposited with the Secretary-General*, 103 at 108, U.N. Doc. ST/LEG/SER.E/5 (1987).

85. See *The Origins and Evolution of the Palestine Problem, Pt. II: 1947-1977*, at 51, U.N. Doc. ST/SG/SER.F/1 Part II (1978) (referencing Israel's refusal as early as 1949 to concede on the return question). See also F. KHOURI, THE ARAB-ISRAELI DILEMMA 127 (1968) (indicating that as early as June of 1948 Prime Minister Ben-Gurion was taking a "no return" position).

86. The question raised by this speculation is well beyond the scope of the present Comment. For similar questions raised with regard to persistent objection alone, see Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 475-81 (1985).

then Palestinian return to the West Bank and Gaza must rest exclusively on Article 49 of the Civilians Convention. If it is not, then human rights law may be invoked as well.

ANNEX



