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Voluntary Repatriation of Refugees and Customary International Law

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VOLUNTARY REPATRIATION OF REFUGEES AND CUSTOMARY INTERNATIONAL LAW*

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There is no greater sorrow on earth than the loss of one's native land.

Euripides, 431 B.C.[1]

Everyone has the right to leave any country, including his own, and to return to his country.

Universal Declaration of Human Rights, Article 13(2)[2]

I. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) keeps watch over some twenty-two million people that have fled the world's conflicts.[3] To address their plight, UNHCR seeks "durable solutions," primarily voluntary repatriation[4] and resettlement[5], in that

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1. UNHCR homepage, *at* http://www.unhcr.ch (last visited March 4, 2000).

2. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3rd Sess., art 13(2) U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

3. UNHCR by Numbers, *at* http://www.unhcr.ch/un&ref/numbers/table3.htm (last visited April 25, 2000). This number includes internally displaced persons (IDPs) as well as refugees, but does not include the almost two million "returnees," former refugees that are still under UNHCR's protection.

4. *See* MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS 1, for the definition of "Repatriation" as used in this paper. ("[T]he return of a national by a state either from an overseas part or from another state

order.[6] Yet, a refugee's return home is often as complex and difficult as the reasons underlying the conflict from which she fled. The level of destruction, the presence of mines, the attitude of neighbors, the state of the economy, the means of the refugee, the legal environment, the availability of information and the stability of the peace are all factors influencing repatriation considerations. Perhaps most important is the attitude of the receiving government; does it facilitate or hinder return?

The second half of the twentieth century has seen a shift in international refugee policy. Where population transfers used to be accepted as a means to settle ethnic conflict, today, forced population transfers are considered violations of international law.[7] Few international scholars contest that refugees should be allowed to repatriate to their home countries upon a stable cessation of hostilities. Still, an obligation on countries to accept back refugees remains uncodified. No text in the "International Bill of Rights"[8] specifically obliges a state to take back its *refugees* after hostilities.[9] Binding bilateral agreements on refugee repatriation reference a "right to return", but do so without invocation of codified authority.[10] Even the

following hostilities or worse.") Note that UNHCR proclaimed 1992 as the "Year of Voluntary Repatriation." *Id.* at 3-4.

5. Resettlement includes two subparts: 1) resettlement in the country of refuge, or 2) resettlement in a third country. *See id* at 3, n.5. *See also* UNHCR Mission Statement, *available at* http://www.unhcr.ch/un&ref/mission/ms1.htm (last visited April 4, 2000).

6. Zieck observes that a preference for voluntary repatriation over resettlement began to emerge in the text of United Nations General Assembly resolutions during the 1970s and was clear as early as 1983. *See* ZEICK, *supra* note 4, at 81. Note that UNHCR proclaimed 1992 as the "Year of Voluntary Repatriation," which it later extended into a decade. *Id.* at 3-4. UNHCR envisions voluntary repatriation as the "best solution." *See* , United Nations High Commissioner for Refugees, Opening Statement by the United Nations High Commissioner for Refugees at the Forty-fourth Session of Executive Committee of the High Commissioner's Program (October 4, 1993) *available at* http://www.unhct.ch/refworld/unhcr/hcspeech/4oc1993.htm. *See also* Conclusion no. 18(XXXI) of the Executive Committee of the UNHCR Programme, *reprinted in* UNHCR Doc. HCR/IP.2/REV.1982 (1982) at 39-40; *Report of the UNHCR to the Economic and Social Council*, UN Doc. E/1985/62 (1985) at 16-17.

7. Eric Rosand, *The Right To Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1120 (1998).

8. The International Bill of Rights comprises the Universal Declaration, The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 [hereinafter ICCPR], and The International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 [hereinafter ICESCR].

9. *But see* Ved Nanda, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, 1 DENV. J. INT'L L. & POL'Y 109, 113 (1971) (noting that "[t]he right to movement and travel . . . in the [Universal Declaration] is fairly comprehensive . . . encompass[ing] such diverse groups as tourists, *refugees*, immigrants and emigrants and stateless persons . . . .) (emphasis added). Professor Nanda also remarks that the actual practice of this right is "severely restricted." *Id.*

10. *E.g.*, The language in a March 9, 2000 agreement signed between the new Minister of Foreign Affairs in Croatia, Tonino Picula, and the President of the Bosnian Serb entity, Milorad Dodik, with US Secretary of State Madeleine Albright also present

Convention on the Status of Refugees, discussed below, operates primarily on those countries hosting refugees, placing remarkably few obligations on the country from which the refugees fled. Instead, Human rights instruments tend to speak of a right to "enter" one's country rather than "return."[11] Still, a growing number of international human rights scholars addressing this subject agree that the right to "enter," which is present in most human rights instruments, amounts to a right to "return."[12] As individuals, refugees possess the "human right" to return to the country from which they fled; a right to be guaranteed by their state.[13]

Human rights instruments operate as obligations upon states premised at the level of state-to-national. However, another level of obligation exists, state-to-state, that could also support the obligation.[14] This paper examines that second level by asking whether, in addition to a duty to protect the human rights of its citizens, states have a concomitant duty *vis-à-vis other states* to accept refugee nationals back home.[15] Stated otherwise, is a country that refuses to repatriate its nationals after a cessation of hostilities, in addition to violating a refugee's human rights, also violating *Customary International Law (CIL)*?[16] May a state simply declare that those who fled hostilities are no longer its responsibility,[17] or is there something in the "laws of

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makes such a reference. The agreement addressed return between those two governments: "It is confirmed that the right to one's own home and protection of property, as well as the right to return to one's home, are every man's basic rights. These rights are defined by relevant international conventions, the General Peace Accord Framework, as well as by the constitutions of Croatia, the Serb Republic and Bosnia-Hercegovina." *See* Appendix 2 for full text of agreement.

11. Examples include: the ICCPR, *supra* note 8; the Universal Declaration, *supra* note 2; and The European Convention of Human Rights and Fundamental Freedoms, 0Sept. 3, 1953 312 U.N.T.S. 222, among others. *See also* Ilias Bantekas, *Repatriation As A Human Right Under International Law And The Case Of Bosnia*, 7 D.C.L. J. INT'L L. & PRAC. 53.

12. *Id. See also* Bill Frelick, *Refugee Rights: The New Frontier Of Human Rights Protection*, 4 BUFFALO HUM. RTS. L. REV. 261 (1998) (arguing that one of UNHCR's obligation is "restoration of rights," one being the right to return.); John Quigley, *Displaced Palestinians And A Right Of Return*, 39 HARV. INT'L L.J. 171 (1998).

13. *See* Rosand, *supra* note 7, at 1117-18 n.103; Bantekas, *supra* note 11, at 55 n.19. The author purposefully uses the word "individual" as a somewhat different analysis is required for mass or group refugee rights. .

14. *See* Quigley, *supra* note 12, at 194.

15. Violations of customary international law vis-à-vis individuals are quite likely also human rights violations, but not all human rights violations are violations of customary law. For example, a state's participation in torture and slavery are violations of customary law, even *jus cogens* violations, but violating an individual's human right to "effective remedy before a court" is not likely a customary international law violation.

16. *See* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW (1989) [hereinafter "CIL"].

17. In this vein, a state may invoke the customary law doctrine, *Rebus Sic Stantibus.*

nations" that forbids a state from denying its refugees (re)entry?[18] The following discussion sets forth the basis for recognizing "voluntary repatriation of refugees" as an emerging customary international legal norm. States refusing to repatriate refugees once a stable peace exists stand in violation of customary international law.

Part Two of this paper examines the background of the obligation on countries to accept back their nationals. Throughout history, conventions, declarations, and treaties have facilitated the formulation of customary international rules. These instruments are gleaned for their content relevant to refugee repatriation. Part Two addresses both general and regional instruments. Part Three undertakes an analysis of the formation of CIL norms. The examination approaches each of the accepted elements of CIL formation in turn, applying them to "voluntary repatriation" as a principle. Part Four contains conclusions and recommendations.

II. BACKGROUND

A. The UN and Other International Instruments

Despite Euripides' lament quoted above, an obligation on governments to allow individuals entry, in terms of customary norms, is but a nascent concept. Some customary norms are thousands of years old. The Magna Carta, passed in 1215, probably contained the first mention of a "right" to enter ones' own country with the concomitant obligation on the government to respect that right. In Article 41 of that document, citizens possessed the freedom "to go out of our kingdom, and to return, safely and securely, by land or water, saving his allegiance to us."[19] Note that the right is only qualified by "allegiance."

Last century, the League of Nations addressed a similar question in its Havana Convention Regarding the Status of Aliens.[20] The Convention spoke of the obligation upon states to "receive their

18. At least two authors have so found. *See* Quigley, *supra* note 12, at 194 ("A state's refusal to admit its national may violate the rights of the state in which the national is present. The state of nationality bears an obligation toward a state where its absent national sojourns, because the state of sojourn is entitled to control residence in its territory by aliens.") (citing Richard Plender, INTERNATIONAL MIGRATION LAW 71 (1972) ("The proposition that every state must admit its own nationals to its territory is so widely accepted that it may be described as a commonplace of international law.")).

19. Bantekas, *supra* note 11, at 54 (citing H. HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 3-6 (1987)) (noting further "the French Constitution of 1791 also guaranteed the 'freedom of everyone to go, to stay or to leave, without being halted or arrested.'").

20. Convention Regarding the Status of Aliens, Havana, Feb. 20, 1928, art. 6, 46 Stat. 2753, 132 L.N.T.S. 301.

nationals expelled from foreign soil who seek to enter their territory."[21] For its part, the United Nations General Assembly ("UNGA") in 1948, by way of the Universal Declaration, obligated what is now 189 signing plenipotentiaries to its article 13(2): "Everyone has the right to leave any country, including his own, and to return to his country."[22] Immediately following the Universal Declaration, the United Nations ("UN") adopted the Convention Relating to the Status of Refugees, and in 1951, established the United Nations High Commission for Refugees.[23] These two institutions place the care of refugees squarely onto the shoulders of UN member states. The Refugee Convention's definition of "refugee" is pertinent to this discussion:

> Article 1
>
> (2) As a result of events occurring before 1 January 1951 and owing to 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, 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, unwilling to return to it. [24]

Note that since 1967, a protocol is available that removes the "events occurring before 1 January 1951" restriction.[25] For several years UNHCR's position has been that *not only* those in fear of persecution deserve protection, but also those fleeing *war-related conditions*.[26] The two slightly different definitions of "refugee" have not been without controversy, especially when the UNHCR considers which groups deserve protection. The debates focus on whether a particular

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21. Convention Regarding the Status of Aliens, Havana, Feb. 20, 1928, art. 6, 46 Stat. 2753, 132 L.N.T.S. 301.

22. Universal Declaration, *supra* note 2, art. 13(2).

23. *See* www.unhcr.ch/un&ref/un&ref.htm.

24. Convention Relating to the Status of Refugees, art. 1(2), July 28, 1951, 189 U.N.T.S. 150.

25. Protocol to the Convention Status of Refugees, art 1(2), 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) ("For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words '. . . as a result of such events', in article 1 A (2) were omitted.") To date, 135 countries have signed the protocol, while 136 countries have signed the Convention itself. *See* UNHCR webpage, *at* http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/51engsp.htm (visited Oct. 23, 2000).

26. *See* UNHCR homepage, *at* http://www.unhcr.ch/un&ref/who/whois.htm#war (last visited Apr. 25, 2000) ("UNHCR considers that persons fleeing war and war-related conditions, and whose state is unwilling or unable to protect them, are in need of international protection and should be considered refugees.").

group comprises "Convention refugees" or not.[27]

The United Nations Convention on the Elimination or Reduction of Future Statelessness does not mention any of the words "refugee," "return" or "repatriation."[28] Nevertheless, this Convention poses substantial obligations on its signatories regarding the loss of citizenship and, therefore, the loss of the right to enter. For example, Article Seven of that convention precludes any loss of citizenship unless the individual possesses another nationality.[29] But note the narrow exception in paragraph four:

> A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.[30]

Under this provision, a naturalized person who later becomes a refugee may lose his nationality should he stay abroad seven years or more.[31] But, he need only "declare . . . his intention to retain his nationality" and it is so.[32] In short, signatories to this Convention may not unilaterally declare that their refugee nationals living abroad, are no longer their citizens unless that citizen has acquired citizenship of another country.[33] This prohibition is not absolute, but the exceptions are sufficiently limited so as to reinforce the rule.[34] And even if a government were to make such a declaration, purporting to strip a former national of citizenship, one prominent scholar wrote as early as 1927 that the citizenship stripping government must still repatriate its

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27. For a thorough discussion of this controversy including the arguments for "Temporary Protected Status" applying to certain non-convention "refugees" *see* Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM.J. INT'L.L. 279 (2000).

28. Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, entered into force Dec. 13, 1975. Only 24 countries have ratified this convention as of November 1999. http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/v_boo/v_4.html (last visited Mar. 3, 2000).

29. Article 7 of the Convention on the Reduction of Statelessness, *supra* note 28, reads:

> 1. (a) If the law of a Contracting State entails loss or renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality; . . .. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. At the time of this writing, only twenty-six countries have signed this convention. Whether non-signatories may make this unilateral declaration is, in part, beyond the scope of this paper. An analysis of individual, domestic law of each non-signatory is required. This paper discusses whether customary obligations place similar restrictions on a country seeking to keep out its nationals.

34. *See* Bantekas, *supra* note 11, at 58-59.

national.[35]

The International Covenant on Civil and Political Rights[36] (ICCPR) bound its signatories not to arbitrarily deprive anyone of the right to enter his own country.[37] Despite its clear language, that obligation is derogable. Article 4(1) of the ICCPR allows countries to avoid the requirement when faced with a national emergency "threatening the life" of the nation.[38] The effect of derogation and its influence on the formation of CIL is discussed in Section E(iv) below.

The International Convention on the Elimination of All Forms of Racial Discrimination, to which 156 countries are party, ensures racial and ethnic equality with respect to the right to return to one's country.[39] In pertinent part, this Convention reads:

> [S]tates 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:
>
> . . .
>
> (ii) The right to leave any country, including one's own, and to return to

35. John Fischer Williams, *Denationalization*, 8 BRIT. Y.B. INT'L L. 45, 61 (1927) ("There will also be general agreement that a state is bound to receive back across its frontiers any individual who possesses its nationality."); *Id.* at 56 ("The duty of a state to receive back its own nationals is laid down by the accepted authorities in the most general terms and is in accordance with the actual practice of states.").

36. By 1994, 127 countries had ratified the ICCPR. RICHARD LILLICH AND HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE, 185 (3rd ed. 1995).

37. *See* ICCPR, *supra* note 8, art. 12(4) ("No one shall be arbitrarily deprived of the right to enter his own country.") *See also* Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary,* 219 (1993) ("In light of the historical background, there can be no doubt that the limitation on the right to entry expressed with the word 'arbitrarily' . . . is to relate exclusively to cases of lawful exile as punishment for a crime.").

38. ICCPR, *supra* note 8, at art. 4(1) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin").

39. International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S 195 (entered into force Jan. 4, 1969), *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp.

one's country . . . .[40]

Widespread ratification of this Convention, beginning in 1966, is no small evidence of states' acquiescence to international obligations vis-à-vis the return of their nationals.[41] While the Convention respects states using a legal framework to regulate transit across borders, it prohibits any discriminatory application in the law. A state party may find a legal mechanism to prohibit a refugee's return, but that mechanism may not relate to the refugee's ethnic or racial group.

Apart from these conventions, few early UN documents spoke in terms of repatriation *obligations* on states; rather, they "urged" states, or "encouraged" them to "assist. . . in voluntary repatriation."[42] Recent UN language, however, is growing increasingly firm.[43] While still "encouraging" countries to create conditions conducive to return, the past three years have seen the term "obligation" creep into numerous resolutions addressing repatriation.[44] "While UN bodies have not always made it clear whether they acted on the basis of human rights law or humanitarian law, language in UN documents indicates that the nations based their calls for return on the understanding of an international legal obligation to repatriate."[45] These texts support a conclusion that states are increasingly under a legal obligation to accept back their nationals upon the cessation of hostilities.

B. Regional Instruments

Numerous regional human rights conventions include in the list of protected rights, the right of nationals to enter their countries. No convention qualifies that right when a national becomes a refugee. For example, in 1950, the Council of Europe adopted The European

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40. *Id.* art. 5

41. *Id.*

42. *See* Bantekas, *supra* note 11, at n. 35. *See generally* Donna E. Arzt, *Palestinian Refugees: The Human Dimension of the Middle East Peace Process,* PROC. AM. SOC. INT'L L. 372 (1995) (arguing the use of "should" in UNGA Res. 194 (1948) and the non-use of "right" implies a lack of obligation). Appendix 1 contains a list of UN texts with language on point.

43. *See, e.g.,* S.C. Res. 1009, U.N. SCOR, 3563rd mtg., U.N. Doc. S/RES/1009 (1995) ("[I]n conformity with internationally recognized standards . . . respect fully the rights of the local Serb population including their rights to remain, leave or return in safety . . . [and] create conditions conducive to the return of those persons who have left their homes.").

44. *See* G.A. Res 54/146, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/146 (2000) ("Reiterates the right of all persons to return to their country of origin, emphasizes in this regard the *obligation* of all States to accept the return of their nationals) (emphasis added); *See also* G.A. Res. 53/125, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/125 (1999); G.A. Res. 52/103, U.N. GAOR, 52nd Sess., A/RES/52/103 (1998).

45. Quigley, *supra* note 12, at 214.

Convention of Human Rights and Fundamental Freedoms.[46] Thirteen years later, the Council added Protocol No. Four, to wit: "No one shall be deprived of the right to enter the territory of the State of which he is a national."[47] Neither the convention nor any of its protocols mentions the word refugee.[48] Like the ICCPR, this convention provides for derogation in time of emergency.[49]

The American Convention on Human Rights also obligates its signatories such that "[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."[50] This article, too, is derogable under article 27(1) in emergency situations.[51] Finally, The African Charter on Human and Peoples' Rights provides in Article 12(2) that "[e]very individual shall have the right to leave any country including his own, and to return to his country."[52] The language is unambiguous, but, like its contemporaries, this charter allows states to restrict application. The ability of state parties to derogate certainly weakens these provisions. Still, when countries face no national emergency, the obligation is unequivocal.

C. Other Instruments

The Geneva Conventions also impose obligations in the area of repatriation. Operating to protect civilians during wartime, the Fourth Convention states in Article 134 that "[t]he High Contracting Parties shall endeavor, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation."[53] The language obligates parties to "endeavor . . . to

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46. The European Convention on Human Rights and Fundamental Freedoms, *supra* note 11.

47. *Id.* Protocol 4, art. 3(2).

48. *See supra* note 46, Protocols 1 -11.

49. *Id.* art. 15(1) ("In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law").

50. American Convention on Human Rights "Pact of San Jose, Costa Rica", Art. 22(5), 9 I.L.M. 673, *found at* www.oas.org/juridico/english/treaties/b-32.htm.

51. *Id.* Art. 27(1) ("In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin")

52. The African Charter on Human and Peoples' Rights, Art. 12(2), OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982).

53. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 134, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

ensure the return . . .".[54] While the language could be interpreted as *requiring* repatriation upon the war's end, such a reading implicates questions of *refoulement*, an idea repugnant to international law.[55] The Geneva Conventions direct that Actors shall undertake efforts aimed at repatriation of internees.[56] The Conventions make no distinction between host countries and repatriating countries; the obligation rests on all parties.[57]

One of the few documents, regional or international, directly obligating a state to accept back refugees emerged in the Afro-Asian Legal Consultative Committee.[58] Its "Principles Concerning Treatment of Refugees" states in Article IV Right of Return that "A refugee shall have the right to return if he so chooses to the State of which he is a national or to the country of his nationality and in this event it shall be the duty of the State of Country to receive him."[59]

In the United States, the Restatement on Foreign Relations makes no mention whatsoever of return of refugees or repatriation.[60] It briefly mentions the "right of return" as one of a few "political rights" listed in the Universal Declaration.[61] The Restatement does not take a position on whether this right, or any, of the listed human rights have acquired CIL status.

Modern cease-fire agreements generally include a provision on "evacuee" return where relevant.[62]

> Evacuees . . . have a legal right to return to their homes at the conclusion of hostilities and the occupying power who evacuated them has a duty to transfer them back to their homes. The return of evacuees is of particular importance because it still may be an issue during the negotiation of the cease-fire agreement. Accordingly, the

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54. For an argument on the applicability of the Fourth Geneva Convention to the Palestinian situation, *see* Quincy Wright, *Legal Aspects of the Middle East Situation,* 33 L. & CONTEMP. PROB. 5 (1968).

55. Refoulement is the forcible return of refugees to their country of origin. *See* Dietrich Schindler, *Conference: Neutrality, Morality, And The Holocaust; Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AM. U. INT'L L. REV. 155, 160 (1998). *See also,* INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK, 660 (Weston et.al. eds. 1997).

56. *See* Geneva Conventions, *supra* note 54.

57. *Id.*

58. The Committee has official observer status with the United Nations. *See* U.N. Doc. A/53/PV.48 (1998).

59. Eighth Session of the Asian-African Legal Consultative Committee, Bangkok (Thailand) 8-17 August 1966. *Reprinted in* Refugee Abstracts, Vol. 7, No 2, 1988, pp. 73 – 83 Center for Documentation on Refugees, UNHCR, Geneva (No. 2, June 1988).

60. *See generally* Restatement of the Law, Third, Foreign Relations (1987) [hereinafter Restatement].

61. *Id.*

62. Major Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions In Cease-Fire Agreements*, 148 MIL. L. REV. 186 (1995).

cease-fire agreement should contain a provision allowing the voluntary transfer of these displaced persons home. [63]

In sum, a wealth of international, conventional law imposes obligations on states to repatriate their refugees. The ability to derogate offers a country's only potential escape. That limitation aside, a vast majority of the world's states are currently party to instruments that compel "a right to enter" or "right to return" obligation, and none of those instruments suggest refugees are subject to different treatment.

III. VOLUNTARY REPATRIATION AND CUSTOMARY INTERNATIONAL NORMS: AN ANALYSIS OF CIL FORMATION

A. A Definition of CIL

The Third Restatement of Foreign Relations contains one of the most concise definitions of Customary International Law: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[64] The International Court of Justice ("ICJ") has chosen a more thorough definition. The court analyzes whether a practice is 1) of "norm creating character;"[65] 2) whether either sufficient time has passed *or* the norm has achieved "a very widespread and representative participation;"[66] 3) whether it is "settled state practice;"[67] and 4) if it is a state practice, whether states follow that practice out of *opinio juris sive necessatatis*.[68] Thus, the ICJ adds "norm creating character" and "passage of time" to the definition contained in the Restatement. Concerning passage of time, the Restatement's view is that "[t]he

63. Ary, *supra* note 62, at 210.

64. Restatement, *supra* note 60 § 102(2). Comment (b) to section 102 explains "Practice of states," Subsection (2) includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example in organizations such as the Organization for Economic Cooperation and Development (OECD). Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights. The practice necessary to create customary law may be of comparatively short duration, but under Subsection (2) it must be "general and consistent." A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become "particular customary law" for the participating states.

65. North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 72 (1969) [hereinafter North Sea].

66. *Id.* para. 73.

67. *Id.* para. 75.

68. *Id.* para. 77.

practice necessary to create customary law may be of comparatively short duration . . . ."[69] After a brief discussion on the application of CIL to individuals, the paper applies the above-recognized elements of CIL formation to the principle of voluntary repatriation.

B. Customary International Law and Individuals

Today it is generally acknowledged that states have obligations toward individuals under CIL. One of the earliest recognized customs among nations offered diplomats a particular level of protection.[70] Today, both torture and slavery are firmly established violations of CIL.[71] A federal court in the United States held that "disappearances" and "summary execution or murder" constitute violations of CIL.[72] In all these cases, a state violates the "laws of nations" if it fails to treat individuals within recognized international norms.

International legal scholars have noted that some codified human rights norms have reached CIL status. A 1994 report authored by Richard Lillich and Hurst Hannun, writing for the International Law Association, remarked that while the Universal Declaration "in toto" had "insufficient state practice" for acceptance [as CIL], certain of its provisions did.[73] On the issue of UDHR's Article 13, *Freedom Of Movement And The Right To Leave And Return*, the report writers conclude, "there does not seem to be sufficient consensus on this point at present to draw firm conclusions."[74]

Is the Lillich and Hannun report accurate today, or has "consensus developed" since 1994 such that this provision joins the six other rights already recognized as CIL? Lillich and Hannun's conclusion is that the entire Article 13 is inconclusive, but the provision has multiple parts. Perhaps the "right to enter," standing alone, has achieved CIL status.

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69. Restatement *supra* note 60, § 102(2) comment (b).

70. MAX SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 396 (1968) ("International law confers on diplomats immunity from the exercise of jurisdiction by the receiving state. The principles governing diplomatic immunities are among the most ancient and universally recognized rules of international law.").

71. Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 441 (1999).

72. Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988); *See also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (1987).

73. International Law Association, Committee on the Enforcement of Human Rights Law, Final Report on the Status of the Universal Declaration of Human Rights in National and International Law, ILA, Report of the Sixty-Sixth Conference 525, (Buenos Aires 1994) (Lillich and Hannum eds). The report recognizes four provisions in the Universal Declaration as CIL, 1) equal treatment, 2) prohibition of slavery, torture, and arbitrary detention, 3) freedom of marriage, and 4) the principle of *non-refoulement.*

74. Final Report on the Status of the Universal Declaration of Human Rights in National and International Law, ILA, Report of the Sixty-Sixth Conference, *supra* note 73.

To consider the substance of this proposition, undertaken below is an application of the elements by which CIL develops.

C. Widespread and Representative State Participation[75]

Given the large number of General Assembly resolutions calling for voluntary repatriation in post-conflict areas, a simple conclusion is that most countries, indeed a comfortable majority, believe in the principle of voluntary repatriation.[76] But Assembly resolutions are not indicative of state practice. Agreeing that another country should repatriate its refugees is quite different that repatriating one's own refugees. And in the same way countries without coastlines cannot contribute to the equidistant principle in continental shelf cases, even if they concur, countries never having experienced refugee outflows cannot contribute state practice evidence of a voluntary repatriation principle.[77] Rather, proper analysis encompasses only those states where violent conflict occurred, nationals fled as refugees, and a durable cessation of hostilities reigns to the extent that return is practical. It is in these states that the existence (or absence) of "widespread state practice" in voluntary repatriation is best analyzed.[78]

To focus the discussion, those country situations that the United Nations, either by its General Assembly, Security Council, or the UNHCR, acknowledges as fitting the above criteria have been set forth in Table A below:[79]

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75. North Sea, *supra* note 65 para. 73.

76. *E.g.*, A/RES/48/117 para. 4 (1994) ("[the assembly] [r]eaffirms its conviction that the voluntary repatriation of refugees and the return of displaced persons to their countries or communities of origin continues to be a positive sign of the progress of peace in the region.").

77. North Sea, *supra* note 65, para. 73 (referring to "states whose interests are specially affected").

78. Conflicts which fit the criteria, but pre-date the UN system, are omitted. The author posits below that the fifty-five years since the UN will satisfy the "passage of sufficient time" element of CIL formation, and thus analyzing pre-UN conflicts is unnecessary. However, the author also acknowledges that pre-UN conflicts could also offer evidence of the norm's existence. Future research may be directed in this area. Also, research revealed approximately fifteen countries that have less than 500 refugees awaiting repatriation. For practical purposes, these countries are also omitted from the discussion.

79. *See* Appendix 1 for UN documentation in support. The UNHCR recognizes nearly 100 countries from which refugees have fled, approximately half fit the criteria. BOLD denotes countries where no repatriations are occurring. Asterisk (*) denotes countries that have re-erupted in violence since the UN sought repatriation. The time period has been limited to the 1990's with few exceptions.

Table A

1) Afghanistan	17) Ghana	33) Niger
2) Angola*	18) Guatemala	34) Rwanda
3) Bangladesh	19) Guinea-Bissau	35) Senegal
4) Bhutan	20) Indonesia/East Timor	36) Sierra Leone*
5)Bosnia & Herzegovina	21) Iraq	37) Somalia
6) Burundi	**22) Israel***	38) Sri Lanka*
7) Cambodia	23) Kazakhstan	39)Tajikistan
8) Chad	**24) Kenya**	40) Togo
9) Congo*	25) Kyrgyzstan	41) Turkey
10) Congo, Dem. Rep.*	26) Laos	42) Turkmenistan
11) Croatia	27) Liberia	43) Uganda
12) Cyprus	28) Mali	44) Vietnam
13) El Salvador	29) Mauritania	**45) Western Sahara**
14) Eritrea	30) Myanmar	46) Yugoslavia/Kosovo
15) Ethiopia*	31) Namibia	
16) Georgia	32) Nicaragua	

In these forty-six countries, the UN is cognizant of a refugee problem but believes that repatriation potential exists. Forty-two of the forty-six countries allowed voluntary repatriation between 1997 and 1999. Bhutan, Kenya, Israel, and Western Sahara are the four countries where no return took place despite arguably conducive conditions. This simple numerical analysis does not account for those countries where refugees come and go as the fighting waxes and wanes.[80] Yet, countries that allow refugees to return, only to have the returnees flee again with a new outbreak of hostilities, support state practice in the area of voluntary repatriation.

Thus, an initial conclusion is that forty-two out of forty-six countries with refugee situations hosted return over this recent three year period. Many of these returns occurred pursuant to an agreement between the host country, UNHCR, and the country of origin. The three parties sign a common document whereby the receiving country obligates itself to protect the refugees' return to the extent possible with UNHCR providing logistical assistance. In other instances, however, UNHCR simply records the repatriations without assisting.[81] Whether the countries chose to repatriate out of a sense of legal obligation, or for some other motive, is the subject of the next section.

80. *E.g.*, Angola, Sudan, and most recently, Israel.

81. *See* http://www.unhcr.ch/statist/99oview/tab202.pdf (visited Aug. 30, 2001).

D. Opinio Juris

Those involved with refugee return know it to be tremendously complex and not subject to simple cause-effect generalizations. Still, whether a refugee's country of origin is willing or not to accept return is a condition precedent.[82] Are the forty-two states listed above acquiescing to the return of their refugees because they feel a legal obligation? Are those four states that resist return doing so because they feel no obligation to allow it? Or, do those states excuse themselves, indicating they feel an obligation, but are immune for some specific reason(s)? The following discussion examines these questions, beginning with four situations where return is occurring. Second, a critical analysis is undertaken of the four countries where return is possible, but stagnant.

1. Currently Repatriating Countries

This section provides a brief background on the salient refugee issues in each situation, and then focuses on the receiving governments' sense of *opinio juris*.

a) Afghanistan

UNHCR is assisting the repatriation of Afghanis from neighboring Pakistan and Iran.[83] The repatriations are pursuant to a multi-lateral agreement that foresees the voluntary return of 200,000 Afghan refugees who fled Afghanistan's civil war.[84] Pakistan believes over 1.2 million Afghans currently reside in the country making the "Afghans . . . the largest refugee group in the world." [85] Note that Afghanistan is not a state party to any of the following conventions: the Convention Relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Reduction of Statelessness.[86]

82. Exception may be made for those situations where some larger power, say NATO/KFOR in Kosovo, force the repatriating country to accept back its nationals. These situations are beyond the scope of this paper except to the extent the host country's unwillingness to accept the return is evidence of contrary state practice.

83. *UNHCR Suspends Repatriation of Afghans to Kandahar,* AGENCE FRANCE-PRESSE, Apr. 7, 2000.

84. *Id.* On April 7, 2000, the repatriation effort was temporarily suspended when Taliban soldiers raided UNHCR's office.

85. Nadeem Yaqub, *Repatriation Starts Up After Bitter Winter,* INTER PRESS SERVICE, Mar. 30, 2000.

86. UNHCR homepage, *at* http://www.unhcr.ch/refworld/country/cdr/cdrafg02.htm#_Toc449943969 (visited April 12, 2000) (citing an unnamed United Nations report of 26 October 1998).

The *Taliban* regime recognizes only the validity of Islamic law[87] and does not accept the notion of secular law, nor binding international human rights norms.[88] It offered the proof to argue the regime was not intolerant of those with religious differences, attempting to bolster its damaged human rights image. By the close of 1999, UNHCR had recorded 446,200 returnees.[89] Despite its strict religious code, Afghanistan is properly characterized as a country that feels an international obligation to repatriate refugees.

b) Bosnia and Herzegovina

Bosnia is a party to *all* the major Human rights instruments and protocols.[90] That notwithstanding, refugees returning to Bosnia do so at least in part under the auspices of the 1995 Dayton Peace Agreement.[91] Indeed, refugee return was at that agreement's forefront:

> Article 1 Rights of Refugees and Displaced Persons
>
> 1. All refugees and displaced persons have the right freely to return to their homes of origin . . . The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.[92]

Thus, party signatories undertook the obligation to receive back all refugees. The agreement has the status of "Treaty"; binding under international law.

Return is taking place in Bosnia, although the process has been anything but smooth. At its best, repatriation occurs quietly, over a period of weeks or months.[93] A returning family repairs its looted or burned-out house and slowly begins life anew. At its worst, a refugee family attempts to return to an area where it is a minority, and a refugee family belonging to the ethnic majority occupies the house. Violent conflict erupts as the families and their supporters clash. Local police do little and frequently use the clashes to justify halting the return process. The NATO troops are ill equipped to intervene, as are

87. UNHCR country report, *at* www.unhcr.ch/world/mide/afghan.htm

88. *Id.* Note, however, that Afghanistan is still considered party to the ICCPR, the CESCR and even CEDAW, among others, by accession.

89. UNHCR country report, *at* www.unhcr.ch/world/mide/afghan.htm.

90. UNHCR country report, *at* www.unhcr.ch/world/euro/seo/bosnia.htm

91. Dayton Peace Agreement, Annex 7, Article 1 (1995)

92. *Id.*

93. This observation, and those that follow in this section, are the personal experience of the author who spent four years in former Yugoslavia between 1994-1998 and returned there in 2000.

the various international organizations. The families occupying the returnee's home often argue they will stay in the home until their own homes, in whatever other region of Bosnia from where they fled, are available for occupancy. A logjam exists where no one can return until everyone returns. Many refugees give up.[94]

By summer of 2000 that situation had begun to change. According to international sources in the area, property legislation passed by the respective parliaments and changes in the political leadership have expedited the process.[95] No longer is the question whether a refugee will be allowed to return, but when. The obligations accepted by the country's leadership at the time of the Dayton Agreement are finally taking hold.

c) Croatia

Like Bosnia, Croatia is also a party to all the major human rights instruments.[96] Signing them was a precondition to recognition in 1992.[97] The largest portion of refugees from Croatia are Serbs who fled in 1995 during two Croatian government offensives. The offensives took control of regions formerly under the *de facto* control of a Serb entity.[98] The World Refugee Survey estimates the number that fled in 1995 is 200,000,[99] while during the course of the entire war over 300,000 fled Croatia.[100]

Despite his signature, former Croatian President Tudjman never accepted the Dayton Accords as binding upon Croatia and returns to the country have been slow.[101] In 1999, however, the Croatian parliament "adopted a number of measures . . . indicating a lifting of legal barriers to return."[102] Croatia took these steps to avoid a "threat of

94. For a thorough examination of this conundrum and the International Community's inadequate answer, *see* Waters *supra* note 12.

95. This information is based upon the author's several in-country interviews with members of the OSCE and the Ombudsman's Office and NGOs during the summer of 2000.

96. *See* www.unhcr.ch/world/euro/seo/croatia.htm (visited Sept. 27, 2000).

97. *EC Recognition Of Croatia Stirs Anger In Serbia*, L.A. TIMES at 13, Dec. 18, 1991.

98. Serbs in the region called it "Republika Srbska Krajina" while the Croats referred to it as "the occupied territories."

99. World Refugee Survey 1999, U.S. Committee for Refugees, p. 185 [hereinafter Refugee Survey].

100. *Id.* (placing the number at 330,000) (a separate table in the book, p. 5 t.4, uses the number 309,000 but notes that the estimates vary widely). *See also* UNHCR by Numbers, *at* http://www.unhcr.ch/un&ref/numbers/table3.htm (last visited April 25, 2000) (estimating 340,000 refugees fled Croatia).

101. *See Bosnia: Serb refugee group demands speedier repatriation to Croatia,* BBC WORLDWIDE MONITORING, Mar. 4, 2000.

102. Refugee Survey, *supra* note 99, at 185.

international sanctions . . ."[103] that resulted after repeated diplomatic interventions failed to convince that government to allow repatriation.

After the death of President Tudjman in 2000, elections ushered in a new center-left government.[104] Almost immediately an agreement emerged between the Croatian government and the Bosnian Serb government focusing on refugee repatriation.[105] The agreement contains liberal return measures, including immediate repatriations of some 2,000 mostly Serb refugees. The text of the agreement is significant:

> It is confirmed that the right to one's own home and protection of property, as well as the right to return to one's home, are every man's basic rights. These rights are defined by relevant international conventions, the General Peace Accord Framework, as well as by the constitutions of Croatia, the Serb Republic and Bosnia-Herzegovina."[106]

That a document with this language is signed by the Minister of Foreign Affairs in Croatia, and the President of the Bosnian Serb entity, with United States Secretary of State Madeleine Albright also present, indicates the signatories are aware of international (human rights) obligations. At the time of this writing it remains unclear whether the new Croatian government will actually bolster Serb returns to Croatia. Of course, not all of the 300,000 Serb refugees have sought to return. By 1999, the "Program of Return" mechanism created by the Croatian Government had received only 97,000 applications.[107] The language in the above agreement and the "Program of Return" are indicative of Croatia's sense of obligation to repatriate its refugees.

d) Liberia

Liberia is a party to all of the major human rights instruments, though mostly by secession or accession.[108] Its refugee problems began in 1989 during a civil war between current President Charles Taylor, then dictator Samuel Doe, and several other factional leaders. The fighting decimated the country, and nearly 500,000 Liberians fled into

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103. Refugee Survey, *supra* note 99,. at 185.

104. *Yugoslav Minister, UNHCR Discuss Refugees From Kosovo, Bosnia, Croatia*, BBC WORLDWIDE MONITORING, Mar. 22, 2000 ("Ogata said that UNHCR was resolved to continue cooperation with relevant Yugoslav state bodies in offering assistance to the country, voicing hope that the newly-appointed Croatian government would improve conditions for the return of refugees to Croatia.").

105. *Thursday Bosnian Serbs, Croatia Sign Statement on Return of Refugees*, BBC WORLDWIDE MONITORING, Mar. 9, 2000.

106. *See* Appendix 2 for full text of agreement.

107. UNHCR statistics on returns, *available at* http://www.unhcr.ch/refworldrefbib/refstat/1998/98tab02.htm

108. UNHCR homepage, at www.unhcr.ch/world/afri/liberia.htm (visited Sept. 27, 2000).

neighboring countries.[109] The war ended in 1996 and by July of 1997, legislative and presidential elections were held for the first time since 1985.

At the UN in 1996, the Liberian representative, Mr. Bull, addressed the Security Council and requested "Resources . . . for voluntary repatriation."[110] The UN responded, and in 1997 the General Assembly reported, "the voluntary repatriation operations will take place within the framework of the Abuja Peace Settlement, and in accordance with the established timetable of activities."[111] UNHCR began assisting with voluntary repatriation almost immediately. "[The] Repatriation and Reintegration program for Liberians has assisted the return of over 120,000 refugees to their communities of origin since 1997."[112] UNHCR also reported that some 183,537 other Liberian refugees "spontaneously returned home from countries in the sub-region either entirely on their own or with only minimal assistance from the UNHCR."[113] In December of 1999, the remaining several hundred refugees returned as UNHCR began closing down its operations.[114]

Like many voluntary repatriations, the peace agreement hailed its initiation. Press reports vary on the level of Liberian government involvement in repatriation saying the government is hailing the return, while failing to lift a finger in assistance.[115] In February 1999, a senior Liberian parliamentarian called on those refugees in the Ivory Coast to return home, but he also warned "they should not expect support from the Government due to its financial problems."[116]

The Liberian government responded positively to return, although it remains unclear whether they did so out of a sense of legal obligation. They did not hinder the return and at least some of their representatives called for its occurrence.

2. Non-Repatriating Countries

This section examines the rationales offered by the four

109. *51,000 Liberian Refugees Return Home, Says UNHCR,* DEUTSCHE PRESSE-AGENTUR, June 29, 1998.

110. U.N. Doc. S/PV.3757 (1997).

111. U.N. Doc EC/47/SC/CRP.37 (1997).

112. UNHCR country Index, *at* http://www.unhcr.ch/world/afri/liberia.htm (visited Apr. 18, 2000).

113. DEUTSCHE PRESS, *supra* note 100 (citing UNHCR press conference of the same date).

114. Peter Kahler, *Liberia; Hundreds Of Liberians Returning as UNHCR Decline Nears*, PANAFRICAN NEWS AGENCY, AFRICA NEWS SERVICE, INC., Dec. 9, 1999.

115. *See also* J. Kpanneh Doe, *Liberian Refugees: A Nation In Exile,* AFRICA NEWS SERVICE, Jul. 29, 1999.

116. *Id.*

governments that have not allowed their refugee nationals to repatriate. A proper rendering of this subject is considerably difficult due to the sensitive, even covert, nature of a state's failure to repatriate. The difference between what a government says and what it actually does is perhaps nowhere more stark, but the fact that a state seeks to hide or justify its failure to repatriate is also evidence of a sense of legal obligation, just an obligation the country seeks to avoid. A country that feels no obligation would not seek to excuse its behavior.

a) Bhutan

The situation in Bhutan was not one of "armed conflict" from which the 125,000 refugees fled. Rather, it was forced exile at the hands of the Bhutanese government beginning in 1989. The Bhutanese government triggered the exodus of the mostly Hindu Bhutanese citizens of ethnic Nepali origin when it enacted a new citizenship law and enforced a citizenship code based on Buddhist values.[117] The bulk of the refugees now live in camps in Nepal and actively seek return.[118] Nepal and Bhutan have held seven rounds of ministerial talks but failed to reach agreement.[119] Even the entry of Sadako Ogata in late 1999 offering a compromise position failed to garner bilateral support.[120] UNHCR remains actively engaged and Nepal appears quite prepared to have the refugees return, but Bhutan is clearly dragging its feet.

Explanations from the Kingdom of Bhutan's government are not readily accessible. Their new citizenship law contains a provision to the effect that "once a Bhutanese citizen leaves Bhutan, he or she automatically forfeits the right to return,"[121] a position wholly at odds with the substantial body of human rights instruments cited above. Another explanation blamed lack of repatriation on frequent changes in the Nepali government.[122] Perhaps the most accurate justification for lack of repatriation is that Bhutan seeks to limit those that can return to refugees of "genuine Bhutanese origin."[123] In such case Bhutan violates the International Convention on the Elimination of All Forms

117. Binod Bhattarai, *Refugee Talks Deadlocked*, FIN. TIMES, Sept. 16, 1999. Among other things the laws banned Nepalese dress and language in Bhutanese schools. *See Nepal and Bhutan to Resume Talks on Repatriating Bhutanese Refugees*, AGENCE FRANCE-PRESS, May 11, 2000.

118. *Bhutanese Group To Organize Mass Return Of Refugees To Bhutan*, THE XINHUA NEWS AGENCY, June 8, 1999.

119. *Id.*

120. *See Bhutan Rejects Formula For Repatriation Of Refugees From Nepal*, BBC WORLDWIDE MONITORING.

121. *Nepal, Bhutan Talks on Refugees End Without Progress*, ASIAN POLITICAL NEWS, September 20, 1999.

122. UNHCR Country Report, Nepal, *at* http://www.unhcr.ch/world/asia/nepal.htm (visited Dec. 27, 2000).

123. *See* Bhutanese Group, *supra* note 118.

of Racial Discrimination.[124] The authorities in Bhutan have apparently begun resettling Buddhists on the land that the refugees in Nepal and India left behind.[125]

b) Israel[126]

Palestinians fled Israel on at least two occasions, first in 1948 when the State of Israel was created, and again in 1967, during the Arab-Israeli war.[127] The earlier exodus was a result of militia-like fighting between bands of Jews and Palestinians anticipating the UN partition of Palestine.[128] The latter exodus displaced approximately 350,000 Palestinians from the West Bank of the Jordon River and the southerly "Gaza Strip." While Israel denied causing this exodus, United States State Department information suggests that both bombings and loudspeaker campaigns expedited the departure.[129] Israel allowed 14,000 of these refugees to return when the war ended.[130]

Also in 1948, The UNGA passed Resolution 194 calling for the return of Palestinians to their homes.[131] The Assembly sent a conciliation commission to facilitate the return, but the move failed. The UN has since continually pressed for the return of Palestinians,[132] and annually reaffirms Resolution 194.[133] Regarding the 1967 war, Security Council Resolution 237 "urged" Israel to "facilitate the return without delay of those inhabitants who have fled the areas since the outbreak of hostilities."[134]

Israel cites security concerns as its main objection to the repatriation given the large numbers of displaced, now estimated at 1,500,000.[135] The Israeli government uses this threat to avoid compliance with human rights instruments. In fact, when Israel ratified the ICCPR, it sent a formal declaration to the UN declaring itself in a constant "State of Emergency." The status allowed it to

124. *See supra* text accompanying note 93. Bhutan signed the document in 1973 but has not ratified it. *See* http://www.unhchr.ch/pdf/report.pdf (visited Dec. 20, 2000).

125. From United States Committee for Refugees, Country Report for Bhutan, *available at* http://www.refugees.org/world/countryrpt/scasia/bhutan.htm (visited Nov. 30, 2000).

126. At the time of this writing, hostilities in Israel have re-erupted making any return impossible. Still, the analysis is helpful in understanding reasons a country disallows repatriation.

127. *See* Quigley, *supra* note 12, at 173.

128. *Id.*

129. *Id.* at 181-82.

130. *Id.* at 184.

131. *Id.*

132. *Id.* at 183-84. *See also* U.N. Doc. A/Res/3236 (1974); U.N. Doc. E/1987/18 (1987).

133. Quigley, *supra* note 12, at 190.

134. U.N. Doc. S/Res/237 (1967).

135. Quigley, *supra* note 12, at 200.

derogate from "right to entry" obligations that would arise under the human rights regime. Note that the very question of whether Palestinians fit the definition of refugee is hotly contested.

c) Western Sahara

Approximately 110,000 Western Saharan people, ethnically Sahrawi, were refugees in Algeria at the end of 1999.[136] They fled fighting between their political arm, the Polisario, and Moroccan and Mauritanian forces, all of which asserted control over Western Saharan territory.[137] A United Nations peacekeeping force monitors the tenuous cease-fire between the two parties, "and . . . supervise[s] preparations for the scheduled 1992 referendum."[138] The referendum, still pending, will purportedly decide whether Western Sahara will join Morocco or remain a separate country. The sticking point is over who will be allowed to vote. "The Polisario and many international observers charged that Moroccan leaders were attempting to pad the voter list with non-Sahrawis to tilt the referendum in Morocco's favor . . . . By year's end, UN officials announced that continued disagreements over voter eligibility would likely delay the referendum until 2002."[139]

No Sahrawi refugees repatriated during 1999, although they are prepared. The UN Security Council has encouraged the parties "to move ahead with the necessary discussions" to repatriate refugees.[140]Moreover, Morocco recently officially recognized the UNHCR as having a legitimate agenda in the area, a step that will undoubtedly bolster the prospects of voluntary repatriation. Additional steps in advance of repatriation have also been taken including assessment visits and pre-registration.[141]

There are three primary obstacles to return at this point. First, the area from which the Sahrawis fled is controlled by Morocco, which is hostile to return. Indeed, the Moroccans have settled some 100,000 of their own citizens in the region in addition to planting landmines along a makeshift line in the sand.[142] Second, in similar vein to the voter list

136. United States Committee for Refugees website, Country Report for Western Sahara, *available at* http://www.refugees.org/world/countryrpt/africa/western_sahara.htm (visited Nov. 30, 2000).

137. *Id.* Mauritania eventually renounced its bid for control, while Morocco continues to assert the claim.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Andrew Borowiec, *North African Unity Hobbled by Fight Over Strip of Sand*, WASH. TIMES, Nov. 15, 2000. This writer also suggests Morocco's foot-dragging is because it knows it will not only lose the election, but thereby also lose control of the mineral riches said to be buried under the rocks of Western Sahara.

dispute, exactly who is eligible to return has not been determined. These first two reasons have fostered the third reason pointed out in testimony to the House International Relations Committee:

The parties have not come to an agreement regarding the draft refugee repatriation protocol presented by the UN High Commission for Refugees. Without formal authorization from the Government of Morocco, and cooperation from the POLISARIO and Algeria (the latter as host country to the refugees), the UNHCR cannot proceed with refugee repatriation.[143]

In short, UNHCR has been unsuccessful in garnering a multilateral agreement. While no party suggests that refugees do not have the right to return or that they should be stopped from doing so, it is Morocco that has the most to lose. A loss in the referendum would not only force Morocco to give up mineral rich territory, it would also force an uprooting of the new settlers.

d) Kenya

Refugees from northern Kenya fled into Ethiopia in 1993 escaping localized, inter-ethnic fighting.[144] While some have returned, UNHCR's plans to repatriate the remaining 5,000 were halted by Kenyan authorities in 1999.[145] "Government officials questioned whether the refugees were Kenyan citizens and complained that Ethiopian officials had prevented Kenyan authorities from inspecting the refugees' camp in southern Ethiopia."[146] In addition to the government's citizenship concerns, ethnic tensions in the region are still high.[147]

3. Conclusions

The UN is engaged with at least forty-six countries from which substantial numbers of refugees have fled. Of those, forty-two countries are currently involved with repatriation, some subject to the ebbs and flows of conflict. The countries repatriate only upon prodding by UNHCR and the host country, but generally recognize their obligation to do so. When agreements are struck, the text normally acknowledges the obligation or at least the right of return.

Israel, Bhutan, Kenya and Western Sahara are the four countries

143. Allen L. Keiswetter testifying, Federal Document Clearing House Congressional Testimony, House International Relations Committee, Sept. 13, 2000.

144. *See* Horace Awori, *Horn Of Africa: Kenyans Join Cross-Border Movement*, INTER PRESS SERVICE, Jul. 2, 1993.

145. United States Committee for Refugees, Country Report for Kenya, *at* http://www.refugees.org/world/countryrpt/africa/kenya.htm (visited Dec. 20, 2000).

146. *Id.*

147. *Id.*

in the world where stability reigns, yet refugees are not returning. Bhutan seeks to justify nonrepatriation by blaming Nepal or citing discriminatory legal provisions. To the extent it relies on the latter, Bhutan violates the Convention on the Elimination of Racial Discrimination.[148] In Western Sahara, Morocco is seeking to maintain control of mineral-rich territory by keeping the security situation tenuous for refugee Sahrawis. Israel cites a recognized exception to the obligation, the invocation of "public order" or "national security" concerns.[149] Israel also contests whether or not the Palestinians fit the definition of refugee in the Convention. Kenya bases its delay of repatriation in citizenship disputes. In every case analyzed, the non-repatriating government seeks to justify its inaction. Research revealed no instance where a country did not at least attempt to explain away its failure to allow return. This evidence is strongly suggestive of *opinio juris sive necessatatis.*

E. Of Norm Creating Character

Emerging principles of Customary International Law must be of "norm creating character," according to the International Court of Justice, meaning they "could be regarded as forming the basis of a general rule of law."[150] Considering *potential* norms, the ICJ questions any "unresolved controversies as to the exact meaning and scope" of a norm as well as its prominence in agreements and conventions.[151] Is the practice considered optional, an equal choice among others? Or is the obligation fixed and consistent? Finally, may states derogate or make reservations?

1. Meaning and scope

"Repatriation" is relatively clear in definition,[152] while the adjective "voluntary" is more troublesome. Webster's Dictionary defines voluntary as, "performed . . . of one's own free will," "without obligation," and "choice."[153] The "UNHCR Handbook on Voluntary Repatriation" defines it in the negative, "the absence of measures which push the refugee to repatriate."[154] Voluntary repatriation for the

148. *See supra* text accompanying note 124. Bhutan signed the document in 1973 but has not ratified it. *See* http://www.unhchr.ch/pdf/report.pdf (visited Dec. 20, 2000).

149. *Rebus Sic Stantibus* situations offer yet another avenue of research. To what extent is it relevant that today's state (Israel) is not the one the refugee's left?

150. North Sea, *supra* note 65, at 41-42 para. 72 (1969) (failing to find the "equidistant principle" as "norm-creating").

151. *Id.*

152. *See supra* text accompanying note 1.

153. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2564 (3d ed. 1993).

154. UNHCR HANDBOOK ON VOLUNTARY REPATRIATION, §§ 2.2, 2.3. (1996). May pushing take various forms? Are economic incentives from the International Community

purposes of this discussion presupposes the refugee actually desires to return when conditions allow.[155] Thus, voluntary repatriation occurs when an individual, who fled from his country of origin under conditions making him or her a refugee, chooses from free will and without coercion, to return to his or her country of origin.[156]

Difficulties in defining the norm's scope emerge when a country attempts to exclude individuals or categories of refugees. The scope cannot be so broad as to force a country to accept back any and all who fled, simply because they are refugees. Acknowledging limited, legitimate exceptions to the scope does not undermine the overall effect of the emerging norm. In fact, recognizing exceptions allows the International Community to identify countries seeking to exclude refugees *not* fitting under any exception.

This author suggests the following two exceptions:

Individuals, the return of which will clearly provoke violence beyond the control of the local civilian authority.

Individuals who have declared their intention not to follow the laws or respect the constitution of the country of origin,[157] *provided that those laws or constitutions are in accord with international norms.*

Excluded from the list of exceptions are criminals, including war criminals, and those who have committed terrorist acts. The country of origin has the right, if not the obligation, to arrest upon return, those it believes have committed illegal acts. That arrest is subject to the norms of the international human rights regime. Under this rubric, countries refusing to repatriate such individuals violate the law of nations.[158]

2. The Norm's Preeminence

Before the 1970's, no discernible hierarchy existed within the UNHCR between the three durable solutions for refugees.[159] UNHCR worked for resettlement and integration under the presumption that

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a push to repatriate? What about the termination of refugee status? The Handbook leaves these questions unanswered.

155. This paper's focus is on the obligation of the country of origin, not on the refugee's choices. A discussion of what conditions might give rise to the choice, or who is the body competent to decide is beyond the scope of this paper.

156. Also beyond scope is the debate about whether "return" means return to the refugee's actual home (building, or town), or simply to the borders of the country.

157. Remember the Magna Carta contained the exception, "saving his allegiance to us." *See supra* text accompanying note 17.

158. This position assumes that all of the other elements of CIL are satisfied with respect to voluntary repatriation.

159. *See* ZEICK, *supra* note 4, at 81. The three "solutions" being resettlement, voluntary repatriation, and local integration.

return of post-World War II refugees was impractical. But emerging in the 1970's and without question since the mid-1980's, voluntary repatriation has become the preferred and primary solution for refugees.[160] Certainly that is UNHCR's position:

Voluntary repatriation, local integration and resettlement, that is, the traditional solutions for refugees, all remain viable and important responses to refugee situations, even while voluntary repatriation is the pre-eminent solution.[161]

UNHCR also believes voluntary repatriation is the "best solution."[162] In 1983, the High Commissioner's office "[e]mphasiz[ed] that voluntary repatriation is the most desirable and durable solution to problems of refugees and displaced persons . . . ."[163] Joan Fitzpatrick, refugee law expert at the University of Washington Law School, believes that "[v]oluntary repatriation at the cessation of conflict is seen as the ideal solution for massive flows of victims of armed conflict, whether the events occur in Rwanda or Bosnia-Herzegovina, and regardless of how distant resolution of the conflict may be."[164] Over sixty UN resolutions, declarations and reports call for voluntary repatriation as the solution to refugee problems.[165]

3. Optional or Obligatory

Apart from the well-recognized obligations under current human rights law, no codified obligations exist requiring countries to permit the voluntary repatriation of their refugees. That notwithstanding, some regional instruments do so require. For example, the 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa provides in Article V.1 that "the essentially voluntary character of repatriation shall be respected in all

160. *See* ZEICK, *supra* note 4, at 81. The three "solutions" being resettlement, voluntary repatriation, and local integration..

161. Report of the 49th Session of the Executive Committee of the High Commissioner's Programme, Report on the Work of the Standing Committee, U.N. GAOR, 49th Sess., para. 21 (gg); U.N. Doc. A/AC.96/911(1998), *reprinted at* http://www.unhcr.ch/refworld/unhcr/excom/reports/911.htm (visited May 17, 2000). *See also* ZEICK, *supra* note 4, at 81.

162. *See* "Opening Statement by the High Commissioner to the 44th Session of UNHCR's Executive Committee" (1993). *See also* Conclusion no. 18(XXXI) of the Executive Committee of the UNHCR Programme, *reprinted in* UNHCR Doc. HCR/IP.2/REV.1982 (1982) at 39-40; *Report of the UNHCR to the Economic and Social Council*, UN Doc. E/1985/62 (1985) at 16-17.

163. UN Doc. A/Res/38/121 (1983).

164. Joan Fitzpatrick, *Flight From Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations*, 35 VA. J. INT'L L. 13 (1994).

165. Search for terms "voluntary repatriation" in UN database, "Access UN." Most are included in Appendix 1.

cases . . . ."[166] That principle echoes those that the Afro-Asian Legal Consultative Committee proffered in the 1960's.[167]

A more significant source of obligation exists in a state's own law. Discussing whether a CIL obligation exists to admit aliens, one author found that, "[g]enerally, the [municipal] laws accommodate specific categories of aliens besides affirming a state's duty to readmit its own nationals."[168] In the United States, citizens cannot leave or enter without a passport[169] and can only receive a passport if they "owe allegiance,"[170] but are otherwise unrestricted.[171]

4. The Effect of Derogation and Exception

The ICCPR's derogation clause is strictly limited to those "public emergenc[ies] which threaten the life of the nation" and which are "officially proclaimed."[172] Similarly, albeit less stringent, the UNDHR allows the rights to be limited as "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[173] No mention is made of refugees and a plain reading of the instruments leaves no room for the position that refugees should be treated differently.

Still, states prohibiting refugee return may invoke "national security" or "public order" clauses should they legitimately believe the return is threatening.[174] But by invoking the derogation clauses, the state tacitly acknowledges an obligation to repatriate in the absence of those conditions. A state declaring that it need not permit a refugee

166. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. IV, 1001 U.N.T.S. 45, 8 I.L.M. 1288

167. *See* "Principles Concerning Treatment of Refugees," *supra* text accompanying note 54.

168. James A. R. Nafziger, *The General Admission Of Aliens Under International Law,* 77 A.J.I.L. 804, 833 (1983).

169. 8 USC § 1185(b) (2001) ("Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.").

170. 22 USC § 212 (2001). ("No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.")

171. Further analysis of domestic legislation in other countries, not undertaken here, would substantiate an emerging CIL norm to the extent it binds those countries to accept back nationals seeking to enter.

172. ICCPR, *supra* note 8, art. 4(1)

173. Universal Declaration, *supra* note 2, art. 29(2).

174. *E.g.* Israel. *See* Quigley, supra note 12, at 199-200.

entry is materially different from a state declaring it would permit entry were it not for security concerns.

Israel provides the well-known case-in-point. Commentators defending the Israeli government's refusal to repatriate the Palestinians regularly invoke the derogation clauses of applicable Human rights instruments,[175] the Universal Declaration in Article 29 and the ICCPR in Article 4(1),[176] respectively. When Israel ratified the ICCPR, it formally communicated its state of emergency to the UN.[177]

Whether the situation in Israel is properly categorized under a derogation clause is beyond the scope of this paper. But assuming, *arguendo*, that such a situation applies in a state, does that weaken the proposal that voluntary repatriation is CIL? The answer is no for two reasons. First, derogations permitted by international human rights instruments do not apply to customary norms unless they happen to coincide; the regimes are necessarily different. Second, exceptions exist under CIL norms as well. The author proposed two above, both of which happen to coincide with the human rights derogations.[178] The reason being that similar sovereignty and policy considerations underlying the human rights derogations can and should also apply to this emerging CIL norm. No state should be required to take affirmative steps certain to threaten its very existence. In practice, invoking these exceptions will be rare because the norm only requires repatriation upon the achievement of *stability* within a country. Thus, a "national emergency" allowing derogation under ICCPR would also be a sufficient lack of the stability necessary to invoke the CIL norm of voluntary repatriation.

But what if it is exactly the return of specific refugees that causes the instability or national emergency? The Universal Declaration would allow an abridgement of its Article 13(2) where the return threatens the "rights and freedoms of others" or "morality, public order and the general welfare."[179] Similarly, under the exceptions proffered above, the state would not be required under CIL to repatriate when the return would provoke violence beyond the control of local authority. Significantly, the CIL norm does not permit exclusion of refugees that threaten "morality," or "general welfare," so long as such a threat is controllable.

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175. Quigley, *supra* note 12, at 199-200.

176. *See* ICCPR, *supra* note 8.

177. Multilateral Treaties Deposited with the Secretary-General, at 142, U.N. Doc. ST/Leg/Ser.E/14 (1996) (Israel's declaration of Oct. 3, 1991).

178. *See supra* text Section III.E.1.

179. *See* Universal Declaration, *supra* note 2, art. 13(2).

F. Passage of Sufficient Time[180]

Some authors suggest that in the modern era, the "speed of normative change has accelerated substantially."[181] The Restatement cited above notes that "[t]he practice necessary to create customary law may be of comparatively short duration . . . ."[182] The ICJ remarked on the parameters of this requirement in the *North Sea* case:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law, . . . an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked . . .[183]

The ICJ held that the equidistant principle's brief ten-year history, combined with meager state practice, did not arise to CIL.[184]

For the principle of voluntary repatriation, tolling the passage of time could begin with the Magna Carta's first formalized obligation upon a government to allow re-entry.[185] But did the drafters intend the Magna Carta to apply to refugees? Such a conclusion is not inappropriate given that the only qualification of the right written into the document was the returnee's "allegiance."[186] Shortly after the signing of the Havana Convention Regarding the Status of Aliens noted earlier,[187] Sir Robert Jennings observed that while *"prima facie* the treatment accorded by a state to its own subjects . . . is a matter of purely domestic concern," the subject may have CIL implications when a state is "willful[ly] flooding other states with refugees."[188] "The evasion of the duty of a state to receive back its own nationals," can harm the "material interests of third states," thus invoking CIL.[189] While not spoken of in terms of "voluntary repatriation," Sir Jennings recognized that states may have a "duty" to accept back their refugees, or they risk violating customary norms.[190]

The terms "voluntary repatriation" emerged in formal UN

180. North Sea, *supra* note 65, para. 74.

181. *See, e.g.*, Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 909 (1998).

182. *See* Restatement, *supra* text accompanying note 60.

183. North Sea *supra* note 65, para. 74.

184. *Id.* para. 81.

185. *See supra* text accompanying note 19.

186. *See* Magna Carta, *supra* note 17.

187. *See supra* text accompanying note 18.

188. ZIECK, *supra* note 4, at 21.

189. *Id.*

190. *Id.*

documents in 1948.[191] In 1980, the Executive Committee of the UNHCR concluded that "voluntary repatriation . . . reflect[ed] international law and general international practice,"[192]thus accepting the Executive Committee's observation as true means considering the twenty years since as the proper measure of time passage.[193] If in 1980 voluntary repatriation was "general international practice," have the twenty years since seen the norm become "both extensive and virtually uniform?"[194] Certainly the "state practice" analysis above supports the conclusion. Virtually every state achieving a stable peace, and that had refugees awaiting return, allowed the return or sought to excuse itself. Exceptions to this rule are not of significant number. In sum, the "passage of sufficient time" element of CIL formation does not preclude a finding that "voluntary repatriation" has become a customary norm.

IV. CONCLUSIONS/RECOMMENDATIONS

The discussion above applied the elements of customary international law to the norm, "voluntary repatriation of refugees." It set forth the position that this norm is indeed emerging as a binding legal principle upon countries that have experienced refugee outflows during conflict. The norm is not contingent upon human rights instruments but is supported by them. "State practice" indicates that over ninety-percent of all countries fitting the criteria accept back their refugee nationals. Minor exceptions to this obligation, based on sovereignty and paralleling derogations recognized in human rights law, operate to define the norm's scope and allow the international community to assess compliance. Certainly there exist countries fitting the criteria that currently do not allow voluntary repatriation, but virtually all seek to justify their failure to return. Whether the excuses fit into the exceptions proffered herein is debatable, but the mere act of

191. UNHCR Mission Statement, *supra* note 5.

192. Executive Committee Of The High Commissioner's Programme, Sub-Committee Of The Whole On International Protection, Thirty-sixth session, 1 August 1985, Voluntary Repatriation, EC/SCP/4 para. 40 ("The Round Table reaffirmed the significance of the 1980 Executive Committee Conclusion on Voluntary Repatriation as reflecting international law and general international practice (Conclusion No. 18 (XXXI). It also welcomed the provisions contained in the Cartagena Declaration on Refugees of 22 November 1984, which adopted fully the provisions of the Contadora Act on Peace and Co-operation in Central America and affirmed the voluntary and individual character of voluntary repatriation and the need for it to be carried out under conditions of absolute safety and dignity, preferably to the refugee's place of residence in his country of origin.").

193. *Available at* http://www.unhcr.ch/un&ref/numbers/table2.htm (viewed March 25, 2000). Note also the UNHCR's comment on its web-page that "[t]he 1.9 million returnees whom UNHCR currently helps are only a small fraction of the total number of refugees or internally displaced persons who have returned to their place of origin since the creation of UNHCR in 1951." UNHCR homepage, *at* http://www.unhcr.ch (last visited March 4, 2000).

194. *See supra* text accompanying note 184.

justification lends support to the necessary finding of *opinio juris*.

In addition to the CIL formation principles, hard law bolsters the norm's status. States cannot discriminate on the basis of race or ethnicity should they seek to exclude a returnee. And binding human rights instruments contain a "right to enter" that has never been shown inapplicable to refugees. The Geneva Conventions contain similar principles. Finally, the recognized burden upon the host country to provide for and protect the refugees invokes the binding principles of interstate relations. Customary international law, subject to a few exceptions, dictates that countries must allow the voluntary repatriation of nationals who have fled their territory once a stable peace reigns.

APPENDIX 1

General Assembly and Security Council Resolutions on Repatriation

Country	Source
Afghanistan	A/RES/53/165 (1999)
Azerbijan/Armenia	S/RES/874 (1993)
Bosnia & Herzegovina	A/53/PV.72 (1998)
Burundi	A/RES/50/159 (1996)
Cambodia	S/RES/810 (1993)
Chad	A/RES/44/153 (1990) assist voluntary returnees
Congo, Dem. Rep.	A/53/PV.95 (1999) S/RES/1258 (1999)
Croatia	A/RES/53/163 (1999)
East Timor	S/RES/ /1272 (1999) S/RES/ /1264 (1999)
El Salvador	A/RES/48/117 (1994)
Ethiopia	A/RES/49/174
Georgia (Abkhazia)	S/RES/1255 (1999) S/RES/1097 (delinking return and the underlying conflict)
Guatemala	A/RES/48/117 (1994)
Guinea-Bissau	S/RES/1233 (1999)
Iraq	E/RES/1991/5 (1991)
Liberia	A/RES/50/149 S/RES/1014 (1995) S/RES/1100 (1997)
Myanmar	A/RES/53/162 (1999)
Nicaragua	A/RES/48/117 (1994)
Israel	A/RES/49/35 (1995)
Rwanda	A/RES/51/114 A/RES/50/200

	S/RES/1080 (1996)
Sierra Leone	S/RES/1270 (1999)
Somalia	A/RES/43/206 (1989)
South Africa	A/RES/45/176 (1991) A/RES/46/79 (1992)
Sudan	A/RES/51/112 (1997) and A/RES/54/182 (2000)
Tajikistan	A/RES/51/30 J (1997)
Togo	A/AC.96/199 (1963)
Uganda	A/RES/41/195 (1987)
Yugoslavia (Kosovo)	S/RES/1239 (1999) & A/S-21/PV.9 GA

APPENDIX 2

The full text of the joint statement of the Croatian Foreign Minister, Tonino Picula and the Bosnian Serb President, Milorad Dodik:

"It is confirmed that the right to one's own home and protection of property, as well as the right to return to one's home, are every man's basic rights. These rights are defined by relevant international conventions, the General Peace Accord Framework, as well as by the constitutions of Croatia, the Serb Republic and Bosnia-Hercegovina. "Furthermore, it is confirmed that the principle will be fully adhered to under which the right of the rightful owner of a property has priority over the right of the person currently in possession of or occupying that property. Accordingly, a proposal will be submitted to the government of Croatia and the Council of Ministers of Bosnia-Hercegovina to conclude an agreement within three months providing for the return of their citizens currently living as refugees in the other state. "Until the above agreement is concluded, the relevant bodies in Croatia and the Serb Republic entity will: - allow 2,000 persons from each side to return to their homes within three months; - coordinate the procedure for the return and reconstruction and take specific and urgent steps to make it easier for those refugees seeking to return to their homes to recover their property. These steps will, if necessary, include eviction and alternative temporary accommodation; - take effective measures to recover and vacate illegally occupied property; - exchange relevant data about the pace of reconstruction of residential property and the return of property to its rightful owners; - organize meetings between mayors in target areas in order to find solutions at the local level, especially the solutions relating to the implementation of the ruling of the Housing Commission; - facilitate visits to the areas of return by potential returnees and representatives of refugee associations; - gather requests for return; - run a coordinated radio-TV campaign about the process of cross-border return; - set up a mixed working group aimed at finding lasting solutions for Croats from Bosnia-Hercegovina who have decided to remain in Croatia, as well as for Serbs from Croatia who wish to remain in the Serb Republic. The above-mentioned working group will also organize working meetings every two months between the institutions responsible for return and reconstruction, alternating between Zagreb and Banja Luka.The meetings will discuss unresolved cases, as well as ways to remove obstacles to return. The mixed working group will also include in its work representatives of refugee associations from Croatia and the Serb Republic, as well as UNHCR representatives; - prepare joint proposals for projects within the framework of the Stability Pact, including the reconstruction of housing and infrastructure aimed at improving cross-border return. Serb Republic Prime Minister Dodik and Croatian Foreign Minister Picula

also agreed that the competent institutions of Croatia and the Serb Republic entity would: - encourage the development of economic cooperation and remove obstacles which prevent a harmoniuos development and widening of that cooperation in keeping with free-market principles;- endevour to normalize payment transactions through competent financial institutions, as a basic condition for developing significant trade and overall economic cooperation; - in accordance with the signed agreement on the border between Croatia and Bosnia-Hercegovina, to continue to solve outstanding problems in good faith; take measures to facilitate the free and safe movement of people and goods; make special efforts to open border crossings and allow passenger traffic; re-establish river transport; restore navigability of the Sava river and regulate cross-border rail traffic until an interstate treaty between Croatia and Bosnia-Hercegovina is concluded.