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Article

Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective

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One proposal suggested for resolving the Israeli-Palestinian conflict is the redrawing of the border between Israel and the future Palestinian State to include those territories densely populated by Palestinian citizens of Israel, west of the “green line,” within the Palestinian State. The suggestion has stirred lively debate in Israel. This Article examines the idea of the transfer of sovereignty over populated territories from Israel to Palestine in light of international law. Following a discussion of historical precedent, international conventions, and international court decisions, it concludes that Israel has the right, from the international law perspective, to modify its borders, through agreement with a future Palestinian State.

Nonetheless, international law does impose some strict conditions for the implementation of such a treaty. The most important of these is granting a “right of option” to the Israeli citizens in the transferred territory. The authors argue that Israel will be expected to grant a “broad” right of option, i.e., allow the affected persons to choose to move and live within Israel’s new borders or to remain in their current residences

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while continuing to maintain their Israeli citizenship.

FOREWORD

The U.N. General Assembly's November 29, 1947 decision¹ regarding the partition of Palestine between Arabs and Jews triggered the outbreak of the war over Palestine. The war, which lasted eighteen months, concluded with the Arab world's failure to prevent the establishment of the State of Israel. In 1949, a string of cease-fire agreements between Israel and its neighbors came into effect, including the general armistice agreement between Israel and Jordan, commonly referred to as *the Rhodes Agreement*.² Within the framework of the Rhodes Agreement, cease-fire lines were drawn that would eventually become known as *the green line*. The green line functioned effectively as an international border that guaranteed clear separation between the populations on each side.³ Portions of the green line coincided with or approximated Palestine's border during the British mandate,⁴ whereas other portions—in the Gaza Strip, Judea, and Samaria—significantly differed from the lines drawn in the 1947 U.N. partition agreement. The Rhodes Agreement assigned to Israel control over a strip of territory that included a string of Arab villages and towns extending from Umm el-Fahm in the north to Kafr Kassem in the south. The border's modifications significantly increased the number of Arabs who found themselves under Israeli control and somewhat blurred the ethnic separation that characterized the war's outcome.

In recent years, various proposals to solve the Israeli-Palestinian conflict have been a part of the Israeli political discourse. The majority of these proposals are based on the "two states" solution: the division of Mandatory Palestine into two nation-states—one Palestinian, the other Jewish—based on

1. G.A. Res. 181(II), U.N. DOC. A/RES/181(II) (Nov. 29, 1947).

2. See Israel-Jordan Armistice Agreement, Apr. 3, 1949, 42 U.N.T.S. 303.

3. The parties to the agreement specifically declared that they did not view the line as political, but rather the product of military constraints. *Id.* art. II(2) ("It is also recognised that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.").

4. Between 1917 and 1948, Palestine was under the rule of the United Kingdom pursuant to the mandate Britain received from the League of Nations after World War I.

mutual recognition by each party of the other's right to live in an autonomous, sovereign state.⁵ Two principles are shared by almost all the proposals: first, the Rhodes Agreement and the green line are treated as starting points for the determination of a permanent border between the two states; and second, in recognition of the reality that has been created in the field, especially after Israel's occupation of the West Bank in the 1967 Six-Day War, adjustment of the green line is warranted.⁶ Such adjustments are likely to shift territory now found to the west or north of the green line to the future Palestinian state, and territory now found to the east or south of that same line to Israel.

Among these proposals, several were offered in which adjustment of the green line would entail the transfer of territory to the future Palestinian state that was populated by those Palestinians whose homes and villages were placed within Israel's borders by the Rhodes Agreement, and have subsequently become citizens of Israel. These proposals were originally raised by academics.⁷ Proximate to the 2003 general

5. This solution is widely accepted by the international community as it resembles the basis of the 1947 partition program. See ALEX JACOBSON & AMNON RUBINSTEIN, *YISRA'EL U-MISHPAHAT HE-'AMIM—MEDINAT LE'OM YEHUDI' U-ZEKHUYOT HA-ADAM* [ISRAEL AND THE FAMILY OF NATIONS—THE JEWISH NATION-STATE AND HUMAN RIGHTS] 24–44 (2003) (Hebrew); Ruth Gavison, *Implications of Seeing Israel as Jewish (and Democratic) State* (Ctr. for the Study of Rationality, Jerusalem, Isr.) Feb. 2005 (Hebrew), available at <http://ratio.huji.ac.il/dp/dp383.pdf>.

6. The need to recognize the demographic reality created in the field and to consider this reality within the framework of negotiations for a permanent settlement have been discussed during negotiations between the two sides, as well as after the talks at Camp David in 2000, in hopes of introducing stability into the area by maintaining national majorities in the two nation-states. The necessity of taking such a step also appears in the letter dated April 14, 2004, addressed from the President of the United States, George W. Bush, to Israel's former Prime Minister, Ariel Sharon. The contents of the letter were confirmed by both houses of the U.S. Congress and reflect the administration's position. Letter from George W. Bush, President, U.S., to Ariel Sharon, Prime Minister, Isr. (Apr. 14, 2004), available at <http://www.pmo.gov.il/PMO/Archive/Speeches/2004/04/Speeches9340.htm>.

7. See ARNON SOFER, *ISRAEL: DEMOGRAPHY, 2000–2020: DANGERS AND OPPORTUNITIES* (2001); Sergio Della Pergola, *Demographic Trends in Israel and Palestine: Prospects and Policy Implications*, 103 AM. JEWISH Y.B. 3 (2003); Uzi Arad, *Swap Meet: Trading Land for Peace (Israeli-Palestinian Dispute)*, NEW REPUBLIC, Nov. 28, 2005, at 16; Uzi Arad, *Territorial Exchanges and the Two-State Solution for the Palestinian-Israeli Conflict* (Aug. 2005) (working paper, submitted to the Herzeliya Conference, Jan. 21–24, 2006). For the first comprehensive attempt to analyze these proposals, see SHAUL ARIELI, DOUBI SCHWARTZ & HADAS TAGARI, *INJUSTICE AND FOLLY: ON THE PROPOSALS TO CEDE ARAB LOCALITIES FROM ISRAEL TO PALESTINE* (2006), <http://fips.org.il/Fips/Site/System/UploadFiles/DGALLERY/>

elections, however, a similar program was proposed by a political party, and aroused harsh responses, clearly divided along partisan lines. The harshness of the criticism could not be divorced from the identity of the party that had incorporated this program within its platform: *Israel Beiteynu*, chaired by Avigdor Lieberman.⁸ Irrespective of the proposals' current political coloration, the authors of this article believe that they are worthy of further consideration, in isolation from the political arena.

In international law, the transfer of sovereignty over territories from one state to another is known as "state succession." Two interrelated features characterize the issue of state succession in populated territories. The first, judicial in nature, pertains to the step's legality; the second, moral-ethical in essence, deals with the step's appropriateness, worth, or wisdom. Despite this complexity, the present article confines itself to the judicial aspects of the proposals raised.⁹ Such a discussion is likely to develop along two dimensions: that of international law and that of constitutional law of the respective parties to the agreement. We focus here on international law. Israeli constitutional law raises additional intricate questions of fact and law; it therefore requires a separate discussion. In our conclusions we will state some of the issues that we anticipate will arise in a discussion conducted from the perspective of constitutional law.

Two questions rest at the core of our discussion: the first

Injustice.pdf; Yuval Shany, *A Mixed Blessing: On Exchange of Populated Territories and Self-Determination—A Comment to 'The Blessing of Departure'*, J.L. & ETHICS HUM. RTS. (forthcoming), available at <http://www.rg-law.ac.il/workshops/2007/articles/shany.pdf>; Timothy William Waters, *The Blessing of Departure—Exchanged Populated Territories: The Lieberman Plan as an Abstract Exercise in Demographic Transformation*, J.L. & ETHICS HUM. RTS. (forthcoming), available at <http://www.rg-law.ac.il/workshops/2007/articles/waters.pdf>.

8. For the party's platform, see Israel Beytenu, <http://beytenu.org> (last visited Oct. 13, 2007). Lieberman, an Israeli politician of Russian origin and founder of this ultra-right wing party is known as an extreme nationalist; hence, the identification of the idea of territorial exchanges with his persona clearly marked who would support or oppose the program.

9. The proposals noted above pertain to the exchange of territories in the Wadi Ara and Triangle regions. The current article does not deal with the possibility of territorial exchanges in East Jerusalem and the Golan Heights. Such transfers—to a Palestinian state and to Syria, respectively—raise questions similar to those discussed in this article. Nonetheless, the potential differences between the status of areas' residents (whether or not they accepted Israeli citizenship) and those of Palestinian citizens of Israel, as well as the possible legal status of the territories in question, require special consideration and research.

relates to whether within the framework of border-delineating treaties, country *A* is entitled to transfer territory populated by its citizens to the sovereignty of country *B*, and if so, under what conditions can such an action take place? Second, what are the implications, if any, of such actions for the civil status of the inhabitants of the respective territory?

The thesis presented here is that from the perspective of international law, nothing in principle can prevent a mutual agreement between the State of Israel and a future Palestinian state altering the border beyond the green line, or proscribe an act of state succession in the populated territories for the purpose of transferring those territories from one side to the other. Numerous cases of state succession in populated territories have transpired, many of which involved democratic states; therefore, they cannot be considered unusual or manifestly undemocratic. In order for such a step to be implemented, however, modern international law demands that several especially rigid conditions be met, the heart of which is a dual right of option that should be available to the residents of the transferred territory: first, the right of option to remain in the sovereign territory of the State of Israel; second, the possibility of retaining Israeli citizenship should an individual wish to remain in the territory to be transferred to the future Palestinian state.

The conclusion we reach is that in all instances of state succession, the population cannot be forcibly transferred with territory to another state's sovereignty. Given that the succession is a demographically oriented measure meant to sustain Israel's Jewish majority, the duty to comply with these conditions, as stipulated by international law, is likely to considerably weaken the prospects of realizing the proposals' declared intentions. Further, the future Palestinian state's agreement to the action is among the requisite (pre)conditions for the exchange of territories. We can assume that the likelihood of reaching a consensus on these conditions depends considerably on the positions taken by those Arab citizens of Israel residing in the respective areas.¹⁰

10. Proposals voiced referred to exchanges of populated territory on the *two* sides of the border—of "Palestinian" territory to Israel and of Israeli territory to the future Palestinian state. In order to simplify this highly complex debate, we ignore the possibility that the territories to be transferred to Israel in the framework of an agreement are likely to contain Palestinian (subjects of the Palestinian Authority) in addition to Jewish inhabitants.

I. STATE SUCCESSION BETWEEN NATIONS

Instances of state succession by means of peaceful border changes, including the transfer of sovereignty over populated territories, are much more common than one might assume. During the last 200 years—a period witnessing consolidation of the European nation-state—more than 350 such changes were introduced.¹¹ The basic feature shared by all these cases is that when a territory under the sovereignty of country *A* is transferred to the sovereignty of country *B*, in the majority of cases, the territory's population is not given the opportunity to democratically influence the process. As might be expected, significant factors distinguish the cases, whether they be the historical circumstances, the size of the population affected, or the relationships maintained between the inhabitants of the territory about to undergo succession with the respective countries, to name a few. Instances of state succession under conditions of decolonization are obviously very different than instance of state succession between two independent states.

The Vienna Convention on Succession of States in Respect of Treaties defines state succession as “the replacement of one State by another in the responsibility for the international relations of territory[.]”¹² Subsequent international documents dealing with state succession issues have employed the same definition.¹³ The proposed scenarios regarding transfer of sovereignty from Israel to the future Palestinian state in areas west and north of the green line also comply with this definition;

11. For a detailed survey of such cases, see ARIE MARCELO KACOWICZ, *PEACEFUL TERRITORIAL CHANGE* (1994). The author lists 327 cases of state succession prior to 1990. Further, during the 1990s, many instances of such changes were made following the fall of the Iron Curtain and the dissolution of Yugoslavia; whereas in other parts in the world, border modifications were determined within the framework of arrangements to end international disputes.

12. Vienna Convention on Succession of States in Respect of Treaties art. 2, para. 1(b), Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter *Convention on Succession of States in Respect of Treaties*].

13. See G.A. Res. 55/153, annex art. 2, U.N. DOC A/RES/55/153 (Jan. 30, 2001); European Convention on Nationality, explanatory report art. 104 (1997) (ETS No. 166) [hereinafter *European Convention on Nationality*] (using the phrase “territorial relations” instead of “relations of territory”); European Commission for Democracy Through Law, Declaration on the Consequences of State Succession for the Nationality of Natural Persons art. I, para. 2 (CDL-INF, 1997, 001E) (Sept. 13–14, 1996) [hereinafter *Venice Declaration*]; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts art. 2, para. 1(a), Apr. 8, 1983, 22 I.L.M. 306 [hereinafter *Convention on Succession of States in Respect of State Property, Archives and Debts*].

it therefore appears that the international law of state succession should be applied to this case.

As stated, each incident of state succession is unique. Some involve the separation of a territory from an existing state—as in the case of East Timor—while others occur within the framework of decolonization—as in the case of Algeria. Some cases refer to the partition of one country into two or more states, as in the cases of Czechoslovakia and Yugoslavia. The proposals discussed in relation to the Israeli-Palestinian case apparently belong to the category where sovereignty in a given area is consensually transferred between two states.

When deciding territorial disputes between states, the International Court of Justice (ICJ) in The Hague, like the Permanent Court of Arbitration, also in The Hague, has in several cases issued rulings that caused the transfer of sovereignty over a given area from one state to another. The court was not ignorant of the implications of state succession for the inhabitants in the areas affected (especially when the respective territory was populated). Such an instance occurred in 1992, when the court was asked to rule on the border dispute regarding the Bolsones region, lying between El Salvador and Honduras.¹⁴ Its review of the circumstances revealed that in some portions of the disputed territory, it was patently clear which of the two states practiced effective sovereignty, provided services, and granted citizenship to its population. With respect to each of those areas, one of the states concerned argued that the historic boundaries of the Spanish Empire required that the area effectively ruled by the other, be transferred to its sovereignty. The court was alert to the fact that its decision would impose a new sovereign power on the areas' inhabitants against their will. In the court's words, "the situation may arise in some areas whereby a number of the nationals of one Party will . . . find themselves living in the territory of the other . . ."¹⁵

14. The court was required to decide where the border between the two states passed. *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. Intervening)* 1992 I.C.J. 351, 380 (Sept. 11).

15. *Id.* at 400. The Eritrea-Ethiopia Boundary Commission decided another case of state succession regarding populated territory. *Eritrea-Ethiopia Boundary Commission: Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eri. v. Eth.)*, Apr. 13, 2002, 41 I.L.M. 1057. The boundary adjustment resulted in the transfer to Eritrea of territory under the effective control of Ethiopia. *Id.* This area was populated by the Irob tribe, which considered itself as belonging to Ethiopia. The tribe protested the border adjustment. See IRROB.org, Irob Relief and Rehabilitation Operations Brotherhood Inc., <http://www.irrob.org> (last visited Oct. 13, 2007). Professor W.

Another ICJ decision regarding an event of state succession addressed the border dispute between Cameroon and Nigeria over the Bakassi peninsula, an oil-rich region under Nigerian control, whose inhabitants were Nigerian citizens of Nigerian origin.¹⁶ The court ruled that sovereignty over the peninsula was to be immediately transferred from Nigeria to Cameroon even though hundreds of thousands of Nigerians are said to live in the area.¹⁷ Implementation of the decision was completed only recently; on August 14, 2006, the area was transferred to Cameroon in a military ceremony. Details of the succession were fulfilled according to the agreement signed between the presidents of the two states under the auspices of the U.N. Secretary-General on June 12, 2006.¹⁸

A previous case of consensual state succession of populated territory arose in 1997, when the United Kingdom transferred its sovereignty over Hong Kong to China. Part of the area transferred had been under British rule by virtue of a leasing agreement signed between the two states in 1898, whereas the other part had been conquered by Britain years earlier. As the lease agreement's expiration approached, Britain decided that it had no reason to retain the conquered part of the territory and chose to transfer it to China despite the local inhabitants' objections.¹⁹

To summarize, no legal document limits, in principle, the right of states to introduce consensually-concluded adjustments

Michael Reisman, a member of the Boundary Commission, wrote that despite the great general interest in the problem of citizenship raised by the transfer of an area's inhabitants, the issue must be decided solely by the countries involved. E-mail from W. Michael Reisman to Roy Peled (Apr. 26, 2006) (on file with author).

16. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea Intervening) 2002 I.C.J. 303 (Oct. 10).

17. See Ruben de Koning, *Bearing the Bakassi: Local Livelihoods and Natural Resource Management Under Military Stalemate 2* (2006) (paper, presented at the Gecorev Symposium, University of Versailles, June 26–28, 2006), available at <http://www.c3ed.uvsq.fr/cdgecorev/fr/pdf/t2/DeKoning.pdf>.

18. See Press Release, Department of Public Relations, Nigeria, Cameroon Sign Agreement Ending Decades-Old Border Dispute; Sets Procedures for Nigerian Withdrawal from Bakassi Peninsula, U.N. DOC. AFR/1397 (June 12, 2006).

19. We should note here that as a result of the state succession, the local inhabitants acquired Chinese citizenship in place of their lost British citizenship. In response to heavy political pressure, Britain passed a law permitting the respective Hong Kong inhabitants to request and receive a new British civil status, created especially for them, that cannot be inherited. For a history of British rule in Hong Kong and the state succession to China, see FRANK WELSH, *A HISTORY OF HONG KONG* (1993). For a detailed description of the negotiations between China and Great Britain regarding the succession, see ROGER BUCKLEY, *HONG KONG: THE ROAD TO 1997*, at 104–126 (1997).

to their mutual borders. The historical precedents, a few of which are mentioned here, cover a wide range of state succession cases. The international covenants that systematize the outcomes of these measures in effect represent an additional indicator of the lack of legal barriers to state succession. Nonetheless, strict conditions applied to state succession of populated territory do exist. As we shall see, these restrictions emerge from the practices introduced during the human rights era, born in the wake of World War II.

The core question we explore is: Can these conditions be imposed on the Israeli-Palestinian case? Generally speaking, the international community views the green line as a border demarcating the territory belonging to the State of Israel, the contours of which will determine the borders of the future Palestinian state.²⁰ Accordingly, from the perspective of international law, there is nothing to prevent a potential agreement between the State of Israel and a future Palestinian state regarding any potential border adjustments (revisions to the green line), including the transfer of populated territories from one party to the other.

II. THE STATUS OF REFERENDUMS REGARDING STATE SUCCESSION AGREEMENTS

In the debate on state succession in populated territories executed through agreements between autonomous states, it has been frequently argued in public debate that the territory's population should be allowed to express its preferences by means of a referendum. Such an instrument may produce significant political and civil advantages.²¹ Irrespective of the validity of these arguments, the crucial question in the current

20. See S.C. Res. 242, U.N. DOC. S/RES/242 (Nov. 22, 1967); S.C. Res. 338, U.N. DOC. S/RES/338 (Oct. 22, 1973). It has been reinforced by International Court of Justice opinions with respect to the separation wall, which in effect recognizes the green line as a border. See *Legal Consequences of the Construction by Israel of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131 (July 9); Eyal Benvenisti, *The Hague Recognizes the Green Line*, HAARETZ, July 12, 2004, at 2B (Hebrew).

21. For a survey on the use of referendums for determining sovereignty in territories under contention, see Gary Sussman, *When the Demos Shape the Polis—The Use of Referendums in Settling Sovereignty Issues*, available at <http://iandrinstitute.org/Studies.htm>. For an international survey of referendums conducted on territorial issues—including state succession—between 1552 and 1993, see *REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* 285–295 (David Butler & Austin Ranney eds., 1994).

context is whether the holding of a referendum as a condition in the state succession of populated territories is in fact required by international law. Such a requirement could derive from three different sources: a covenant, decisions handed down by an international tribunal (considered a secondary source because precedents have no binding force in international law), or customary international law.

Regarding the *primary source*, we can state quite simply that no *international covenant*, whether general or regional in scope, has yet been articulated that requires holding a referendum where sovereignty is transferred between states.

With respect to the *secondary sources (decisions)*, the two examples previously cited were taken from ICJ decisions handed down during the past fifteen years; both state successions were carried out in the absence of any consultation with the affected populations. It is interesting to note that Nigeria's Constitutional Court is reviewing an appeal presented by Nigerian nationals from the Bakassi Peninsula (transferred to Cameroon, as described in the preceding), which contends that the treaty signed between the governments of Cameroon and Nigeria regarding implementation of the ICJ decision is null and void on two grounds: first, that it violates international law because the decision to impose Cameroon's sovereignty was made without any consultation with the residents; and second, that the decision runs contrary to the Constitution of Nigeria because it was not ratified by the parliament.²² A judgment is expected shortly, although it is doubtful that the local court will nullify an agreement reached under U.N. auspices for the purpose of implementing an ICJ decision.

The *third source* that can support the requirement to hold a referendum in situations of state succession in populated territories is customary international law. The conventional method for considering some behavior as a legal custom is described in Article 38(1)(b) of the Statute of the International Court of Justice: in deciding disputes according to international law, "international custom, as evidence of a general practice accepted as law[.]" shall apply.²³ According to the article's interpretation, in international law, a legal principle can emerge

22. See Laurence Ani, *Bakassi: Cameroon Takes Charge, Nigeria Lowers Flag*, THIS DAY, Aug. 15, 2006, available at <http://www.thisdayonline.com/nview.php?id=55766>.

23. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1060, available at <http://www.globelaw.com/icjstat.htm>.

as a compulsory customary rule when: (1) the legal principle enjoys agreement among states, expressed in the practices of those states that have anchored it in their laws; and (2) this behavior flows from a sense of national commitment to the compulsory features (*opinio juris*) of that custom.²⁴

After the conclusion of World War I, the referendum became more popular as an instrument for resolving border adjustment disputes.²⁵ Referendums came to be incorporated in numerous arrangements within the framework of the Treaty of Versailles.²⁶ Nonetheless, even in this period, the majority of changes in territorial sovereignty were decided without consulting the affected population.²⁷ One precedent from this period is the referendum held in the region of Schleswig, located between Germany and Denmark. For purposes of voting, the region was divided in two, the northern and central regions; 80% of central Schleswig's residents voted to remain part of Germany whereas 75% of the region's northern residents voted to transfer sovereignty to Denmark. In the predominantly German communities among the north's rural population, however, 75% voted to remain part of Germany.²⁸ Despite their preference, the entire region was transferred to Denmark. Although the decision was made on the basis of majority vote, we note that Danish sovereignty was imposed on the German minority.

Surprisingly, the referendum's status declined after World War II; contrary to previous practice, treaties signed after the war usually did not stipulate the holding of a referendum to

24. MALCOLM N. SHAW, *INTERNATIONAL LAW* 64, 66 (3d ed. 1997).

25. See MARKKU SUKSI, *BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM* 243 (1993).

26. See Treaty of Versailles, June 29, 1919, 42 Stat. 1939 [hereinafter *Treaty of Versailles*].

27. SUKSI, *supra* note 25, at 243.

28. The Prussians had conquered the Danish region of Schleswig in 1864. Following World War I, the Treaty of Versailles stipulated that the region's future would be determined in a referendum. *Treaty of Versailles, supra* note 26, art. 109. Two referendums were held in 1920. It is interesting to note that whereas central Schleswig allowed every individual village and town to express its wish as to incorporation into Denmark or to remain in Germany (all chose to remain German), northern Schleswig declared itself to be a unitary zone. This decision led to a situation where villages and towns having a majority of German residents voted to remain in Germany but were forced to accept Danish sovereignty because the majority of voters in the zone, taken as a whole, were Danish. See Jørgen Kuehl, *The National Minorities in the Danish-German Border Region* 9–10, <http://www.jur.ku.dk/Balticlaw/PDF/Kuehl.PDF> (last visited Oct. 28, 2007).

decide border adjustments and state succession.²⁹

Before concluding this segment of the discussion, we find it appropriate to devote some space to a brief review of selected, fairly recent cases of state succession that entailed referendums as core components. All the cases were decided in democratic countries.

The Rock of Gibraltar, originally ruled by Spain, was captured by Britain in 1704 during the War of the Spanish Succession. In 1713, Spain officially and consensually ceded Gibraltar to Britain within the framework of the Treaty of Utrecht.³⁰ Article 10 of the treaty stipulated that should Britain decide to free itself of the responsibilities of exercising sovereignty over Gibraltar, the first right to sovereignty over the territory would be offered to Spain. The introduction to the Gibraltar Constitution Order of 1969, however, states that Her Majesty's government would never be party to any such arrangement unless Gibraltar's residents freely and democratically expressed their acquiescence to the succession.³¹

During the 1960s, Spain began to demand return of the territory, based on U.N. General Assembly Resolution 1514,³² pertaining to the granting of independence to territories under colonial control. Among other things, the resolution stated that any injury to the national unity and territorial integrity of a nation contradicted the U.N. Charter. In response, Britain held a referendum in 1966 among Gibraltar's residents, which resulted in a 99.5% vote against the peninsula's transfer to Spanish sovereignty.³³ The referendum was denounced by the

29. SUKSI, *supra* note 25, at 248.

30. Treaty of Peace and Friendship, Gr. Brit.-Spain, July 13, 1713, available at <http://www.gibnet.com/texts/utrecht.htm> (includes English, Latin, and Spanish translations).

31. GIBRALTAR CONST. ORDER 1969, available at http://www.gibnet.com/texts/gib_con.pdf. The opening paragraph of the British Order that adopts the Gibraltar Constitution reads as follows:

Whereas Gibraltar is part of Her Majesty's dominions and Her Majesty's Government have given assurances to the people of Gibraltar that Gibraltar will remain part of Her Majesty's dominions unless and until an Act of Parliament otherwise provides, and furthermore that Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes

Id.

32. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. DOC. A/4684 (Dec. 14, 1960).

33. According to the official website of the Gibraltar government, 12,138 voters

General Assembly, as noted in Resolution 2353, because the referendum negated previous resolutions that called for the British and Spanish governments to end Gibraltar's colonial status through dialogue, while "safeguarding the interests of the population."³⁴ In this case, the General Assembly preferred that the matter be decided through negotiations between the parties and not through popular vote.³⁵

During the 1980s, after Spain's transformation into a democracy and improvement of its relations with the U.K., the idea of ending British rule in Gibraltar arose anew. The issue was officially discussed in meetings between representatives of the two states.³⁶ On July 12, 2002, Britain's Foreign Secretary Jack Straw notified Parliament of a pending agreement regarding shared control of the peninsula.³⁷ In response, Gibraltar's local authorities announced the holding of an additional referendum—an idea that was now totally rejected by Her Majesty's government.³⁸ Despite this opposition, the referendum was held in November 2002; 98.97% of the participants rejected the proposed shared sovereignty plan.³⁹ Although the British government reiterated that this was a "local initiative,"⁴⁰ it is widely conceded that the referendum's results delayed negotiations between Britain and Spain. Negotiations were renewed only two years later, with Gibraltar's elected government as an independent party. Britain's representatives were, moreover, forced to repeatedly stress that when a comprehensive agreement on Gibraltar's status was concluded, it would be brought before the inhabitants for ratification by referendum, as required by the

voted to retain the link with Britain, while forty-four preferred Spanish sovereignty. Official Government of Gibraltar London Website, Political Development, <http://www.gibraltar.gov.uk/int/political.asp> (last visited Oct. 13, 2007).

34. Question of Gibraltar, G.A. Res. 2353, U.N. GAOR, 22nd Sess., Supp. No. 16, U.N. DOC. A/7013 (Dec. 19, 1967).

35. *Id.*

36. These meetings are known as the "Brussels process."

37. The Straw Statement on Joint Sovereignty, U.K.-Spain, July 12, 2002 [hereinafter *Westminister Declaration*], available at <http://www.liberal.gi/straw.asp>.

38. See HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, GIBRALTAR, 2001–02, H.C. 973, art. 24, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmcaff/973/973.pdf>.

39. Press Release, Special Committee on Decolonization, Decolonization Committee Considers Situations of Gibraltar, Cayman Islands, U.N. DOC. GA/COL/3084 (June 4, 2003).

40. Norman Ho, *A Rocky Road: The Political Fate of Gibraltar*, HARV. INT'L REV. (Winter 2004), <http://hir.harvard.edu/articles/1177/>.

Gibraltar Constitution Order of 1969.⁴¹

Today it is quite obvious that the fate of Gibraltar's sovereignty will be determined as announced in 2004, in a referendum meant to approve a draft agreement concluded between the parties. Two sources rest at the heart of this commitment: first, the Gibraltar Constitution, which includes, as stated, a commitment to this effect made by Her Majesty's government; and second, the British government's political commitments, which involve the need to respond to the aggressive public campaign waged by Gibraltar's government and its inhabitants. The British government's stance demonstrates the political benefits offered by the referendum, although at no stage was it argued that international law demands such an action.

Another example is the referendum held in Quebec during the province's attempt to secede from Canada. The referendum became the main issue in the historic decision handed down by the Supreme Court of Canada in 1998.⁴² The decision was delivered in reply to a request for an advisory opinion made by the Federal Government of Canada. The request was delivered following two referendums held at the initiation of Quebec's government for the purpose of declaring its secession from the Canadian confederation. A contributing factor was the commitment made by Quebec's political leaders, who supported the secession, to conduct a third referendum, after the second one was decided by a margin of only one percent of the votes. In these circumstances, the decision was made by the Federal Government of Canada to turn to the courts for an advisory opinion regarding Quebec's right, under Canadian constitutional law or to international law, to unilaterally declare its secession from the confederation. The court responded in the negative on both accounts. It determined that a referendum, even if decided by an overriding majority, does not enjoy the same legal status as the constitution; therefore, a referendum does not have the power to override the authority enjoyed by federal institutions, a power anchored in the Constitution of Canada:

Quebec could not, despite a clear referendum result, purport to invoke

41. See RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, 2003, cm. 5714, available at <http://www.fco.gov.uk/Files/kfile/Cm%205714.0.pdf> (response of the British Foreign Office to the disappointing report, HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, *supra* note 38).

42. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.⁴³

Yet the Canadian court did declare that the federal government could not ignore the legitimacy of the demand that the constitution should be revised in order to allow for the secession, so long as the demand was supported by a clear public majority.⁴⁴ The referendum was, therefore, considered to be the medium through which the population could express its preferences. The court also declared that should such a situation—i.e., a pro-secession vote—arise, the federal government, together with the provincial governments, would be obligated to negotiate with the Quebec government on the issue of revising the constitution as to allow the action.⁴⁵ Crucially, the court unequivocally stated that the duty to engage in negotiations in the wake of a referendum's results did *not* imply that the government was required to comply with its outcome. The Court recognized that such negotiations may fail, with no agreement reached regarding Quebec's secession.⁴⁶ Yet the court refrained from speculating about the legal implications of failed negotiations.⁴⁷

By means of its decision, the Supreme Court of Canada had in effect introduced a new constitutionally-bound duty, previously unrecognized, which has since come to be referred to as "the constitutional duty to negotiate."⁴⁸ This duty is based on the democratic principle that government cannot remain indifferent to clear public preferences. The court's

43. *Id.* at 221.

44. *Id.* at 265.

45. The Court declared, *inter alia*, that

[t]he federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.

Id. at 265. The court also declared that "the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada." *Id.* at 221.

46. *Id.* at 269.

47. *Id.* at 270.

48. See, e.g., Dan Usher, *The New Constitutional Duty to Negotiate*, 20 POL'Y OPTIONS 41 (Jan./Feb. 1999), available at <http://irpp.org/po/archive/jan99/usher.pdf>.

pronouncement of this duty, however, was severely criticized by Canadian jurists.⁴⁹

The Canadian court based its decisions (the first, rejection of the legal status of the referendum; the second, the duty to negotiate on the basis of the referendum's outcomes) solely on an analysis of the Canadian Constitution. The decision contained no reference to the referendum's status in international law.

Another interesting feature of the decision pertained to the issue of Quebec's indigenous minorities. These tribal communities had argued before the court that Quebec's independence could not be recognized—even with Canadian federal government agreement—without their consent.⁵⁰ Their announcement introduced a new factor into the case. The original case related to the potential agreement reached between two states (Canada and the new state of Quebec) over the transfer of territory to Quebec's sovereignty. The tribes argued that Canada had a duty to obtain the consent of segments of the population living in the region's north: indigenous peoples whose lands had been annexed to Quebec at the end of the nineteenth and the beginning of the twentieth century. The court refused to hear this contention, and even though it prepared an outline of the fundamental conditions to be fulfilled for Quebec's secession to occur, it contented itself with stating that the issue of indigenous peoples should be raised during the negotiations.⁵¹

Significant differences mark the Canadian from the Israeli-Palestinian case. In the Canadian case, one group was intent on undermining the state's sovereignty by means of a referendum that would override the recognized right of territorial integrity. In the Israeli-Palestinian case, the situation is diametrically different: should an agreement be reached with respect to the exchange of territory, the State of Israel will be exercising its sovereignty for the purpose of border adjustments. Hence, the relevant question becomes whether, for the purpose of introducing such revisions, the state is duty-bound to conduct a

49. For scholarly criticism of this duty, *see id.*

50. Andrew Orkin & Joanna Birenbaum, *The Aboriginal Argument: The Requirement of Aboriginal Consent*, in *THE QUEBEC DECISION: PERSPECTIVES ON THE SUPREME COURT RULING ON SECESSION* 83–84 (David Schneiderman ed., 1999). For a different view of the implication of this decision for indigenous peoples, *see* Paul Joffe, *Quebec Secession and Aboriginal Peoples: Important Signals from the Supreme Court*, in *THE QUEBEC DECISION*, *supra*, at 137.

51. Orkin & Birenbaum, *supra* note 50, at 84.

referendum among the area's residents. An additional important distinction refers to the legal status of Quebec—a province exhibiting a distinctive culture and language—as one of thirteen provinces comprising the Canadian confederation.⁵² Supporters of Quebec's secession argue that they are a "separate people." In the Israeli-Palestinian case, the area's residents belong to a people that do not enjoy—at least at present—any autonomous legal status.

The final example to be discussed here is the referendum that played a key role in the enactment of the Good Friday Agreement. This agreement was meant to put an end to the bloody, decades-old conflict regarding British rule over Northern Ireland.⁵³ The agreement itself included an article obligating its ratification in two simultaneous referendums—to be held in Northern Ireland as well as in the Republic of Ireland (necessary because the agreement's implementation required revision of the Constitution of Ireland). In the referendums held in May 1998, the agreement was resoundingly approved.⁵⁴

Three issues were at the focus of the agreement: creation of new democratic institutions for Northern Ireland; construction of a framework to strengthen Northern Ireland's ties with the Republic of Ireland; and state succession in Northern Ireland, involving the transfer of sovereignty from Britain to the Republic of Ireland should the majority of Northern Ireland's population approve this action in a public referendum.⁵⁵ The agreement delegated the authority to announce such a referendum to the British government. More specifically, referendums could be held once every seven years if the British Foreign Secretary was convinced that the majority of voters preferred separation from Britain accompanied by the transfer of sovereignty to the Republic of Ireland.⁵⁶ To date, such a referendum has not been held, with the source of the "delay" being the agreement's implicit, mutually agreed-upon

52. Quebec is the sole Canadian province in which French rather than English is the only official language.

53. Agreement Reached in the Multi-Party Negotiations, U.K.-N. Ir., Apr. 10, 1998, 37 I.L.M. 751 [hereinafter *Good Friday Agreement*], available at <http://www.nio.gov.uk/the-agreement>. The agreement is also known as the Belfast Agreement, or, more rarely, the Stormont Agreement.

54. For a summary of results for both referendums, see University of Ulster CAIN Web Service, Results of the Referenda in Northern Ireland and Republic of Ireland, Friday 22 May 1998, <http://cain.ulst.ac.uk/issues/politics/election/ref1998.htm> (last visited Oct. 13, 2007).

55. *Id.* annex A, para. 1(2).

56. *Id.* sched. 1.

assumption that the public wishes to remain under British rule.⁵⁷

Like the case of Gibraltar, the case of Northern Ireland rests on a previous commitment made by Her Majesty's Government not to alter the area's status without first obtaining the population's approval. The specific stipulation appears in Article 2 of the 1949 Ireland Act,⁵⁸ which states that any revision in Northern Ireland's status would be carried out only after approval by Northern Ireland's Parliament. In 1973, Britain initiated the first referendum held in the area to garner support for its continued rule.⁵⁹ The referendum lost its force, however, when nationalists supporting unification with the Republic of Ireland boycotted it.⁶⁰ In Northern Ireland, like Gibraltar, the British government repeatedly stressed its commitment to accepting the popular will regarding the sovereignty issue in order to dissipate tension among supporters of unification with Britain whenever rumors about an impending agreement began to circulate.⁶¹

Northern Ireland is therefore a special case of the use of referendums because the respective dispute is rooted in a bloody conflict maintained between two factions whose members live in the affected area. It is our analysis that the application of this instrument was possible for two basic reasons: first, the referendum was viewed as the sole mechanism available for peacefully ending the conflict; second, its choice sprang from British government commitments and its political interests, coupled with the constitutional constraints effective in Northern Ireland at the time.

What is important to our discussion is that, with respect to all the states (Canada, Britain, and Ireland) and territories (Quebec, Gibraltar, and Northern Ireland) involved, the referendum was recognized as an instrument of internal, constitutional law, and not as a result of a perceived international law obligation.⁶² The referendum's

57. *Id.* at Constitutional Issues, para. 1(iii).

58. The Ireland Act, 1949, 12, 13 & 14 Geo. 6 c. 41, available at <http://www.uniset.ca/naty/IrelandAct1949.pdf>.

59. See MICHAEL CUNNINGHAM, BRITISH GOVERNMENT POLICY IN NORTHERN IRELAND, 1969–2000, at 13 (2001).

60. See *id.* at 13–14.

61. See *id.* at 96.

62. It should also be noted that these examples were chosen for sake of the discussion on referendums. Many other cases of state succession exist, some discussed in this paper, where no referendum took place, and therefore they cannot

appropriateness in the Israeli constitutional framework goes beyond the limits of the present article.⁶³

In summarizing this section, we find it impossible to point to any duty or requirement to hold a referendum within the framework of any international covenants or legal decisions touching upon state succession.⁶⁴ Our historical review has indicated that referendums have generally been employed as responses to political constraints or stipulations found in local law. These cases, when added to the others mentioned that did not involve referendums, such as the transfer of the Bakassi Peninsula from Nigeria to Cameroon and the transfer of sovereignty in Hong Kong from Britain to China, demonstrate that it is impossible to argue for the existence of customary international law regarding this issue.

We should mention here another important point regarding the relationship between a referendum and state succession: if, as argued by those objecting to state succession, we should find that this action inflicts a prohibited injury to the human rights to be enjoyed by an area's inhabitants, then conduct of a referendum cannot repair that injury, at least as far as those who voiced their objection to the transfer by means of the referendum are concerned. A majority cannot impose a prohibited injury to a minority's rights, even by means of a referendum. The acute question is therefore whether transfer of a populated territory entails prohibited injury to human rights, and not whether the succession is approved by proper means.

The recent past has, as discussed previously, provided instances of referendums slated for state succession cases as well as state succession treaties, concluded between independent states, free of any mention of referendums. The feature shared throughout is international law's deference to state sovereignty in everything connected with border determination, including the reliance on local law when ratifying border adjustments.⁶⁵ International law entrusts the

be seen as suggesting state practice.

63. For a detailed, up-to-date discussion of the subject see Elizabeth Garrett, *International Human Rights Law in Practice: Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 CHI. J. INT'L L. 159 (2001).

64. For a concurring opinion, see AMNON RUBINSTEIN & BARAK MEDINA, HA-MISHPAT HA-HUKATI SHEL MEDINAT YISRA'EL [THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL] 914-915 (6th ed. 2005) (Hebrew).

65. As will be shown, this attitude differs from the attitude governing discussions regarding the fate of the people living in the affected territories. See *infra* Parts III, V, VI.

determination of borders to the states themselves by employing the mechanism of treaties. Similarly, international law offers no restrictions to state succession if peacefully concluded between the states, even when the respective territories are populated. Stated simply, no legal duty has yet been defined requiring the conduct of a referendum. This, of course, does not mean that a referendum cannot be held on other foundations, such as internal legal requirements.

The argument can also be posed such that a referendum is morally compelled on civic grounds: referendums in general, but especially on territorial issues, are increasingly being held. Nonetheless, the position taken here is from a purely legal perspective; it is impossible to rest such a requirement on international law. The discussion on the justification of such a step is thus reserved for the political-civic arena. It should be clear, however, that additional conditions to a state succession agreement must be examined, especially given growing recognition of the priority of human rights on the international law agenda. This we do below. We first examine the fate of the inhabitants of the territories undergoing state succession from the perspective of a human rights regime.

III. THE HUMAN RIGHT TO CITIZENSHIP AND THE STATE'S DUTY TO PREVENT STATELESSNESS

Transfers of sovereignty between independent states have exposed a long list of problems in international law. Due to the complexity of the issues, two conventions regulate such events.⁶⁶ The respective stipulations cover, for instance, everything touching upon the successor state's responsibility to abide by all the terms of any agreements signed by the predecessor state,⁶⁷ and the successor state's rights and duties regarding property,

66. *Convention on Succession of States in Respect of Treaties*, *supra* note 12; *Convention on Succession of States in Respect of State Property, Archives and Debts*, *supra* note 13.

67. *Convention on Succession of States in Respect of Treaties*, *supra* note 12. We should note that very few countries have joined the convention. The crux of this convention is not considered part of customary international law. See George Miron, *Memorandum of Law: Did the ABM Treaty of 1972 Remain in Force After the USSR Ceased to Exist in December 1991 and Did It Become a Treaty Between the United States and the Russian Federation?*, 17 AM. U. INT'L L. REV. 189, 255 (2002); Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 299, 300 (1993).

archives, and the financial debts of the predecessor state.⁶⁸ Of these, the most sensitive human rights issue for individuals residing in the territory subject to transfer is citizenship. The fact that no solution for this issue has yet been formulated in one convention indicates its complexity, contentiousness, and international law's caution regarding intervention in local laws on this matter.

The idea of citizenship as a legal relationship between a person and the state to which he belongs evolved during the nineteenth century, together with the idea of the nation-state as a political framework that grants rights and exacts duties.⁶⁹ A further significant development of the concept occurred in the twentieth century, when "citizenship" was recognized as a human right as well. Citizenship in its expanded meaning first appeared in the Universal Declaration of Human Rights,⁷⁰ its Article 15 states that "[e]veryone has the right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality."⁷¹

It is commonly accepted that questions of citizenship lie primarily within the state's purview, to be treated within by internal law. Nonetheless, local state arrangements with respect to all aspects of citizenship must comply with the conditions imposed by international law's various conventions.⁷² One of these conditions refers to the deprivation of citizenship (i.e., statelessness). As recognition of the right to citizenship spread, with citizenship acknowledged as a "right to enjoy rights," international law increasingly demanded that situations of statelessness be prevented. This demand obtained legal force in the 1961 Convention on the Reduction of Statelessness,

68. *Convention on Succession of States in Respect of Treaties*, *supra* note 12.

69. For a general discussion of nationality, see YAFFA ZILBERSHATS, *THE HUMAN RIGHT TO CITIZENSHIP* (2002).

70. The Universal Declaration of Human Rights, 1948, U.N. GAOR, 3rd Sess., U.N. DOC. A/810, available at <http://www.un.org/Overview/rights.html>.

71. The determination of "nationality rights" raises significant difficulties because it is commonly accepted that the existence of a right imposes the duty to fulfill that right on some entity. In this case, it is difficult to identify the specific entity on which to impose the duty to implement a stateless person's right to nationality. See José Francisco Rezek, *Le Droit International de la Nationalité*, in 198(III) COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 333, 354 (1986).

72. See *European Convention on Nationality*, *supra* note 13, art. 3; *Venice Declaration*, *supra* note 13, art. I, para. 2; see also G.A. Res. 55/153, annex, para. 2 of preamble, U.N. DOC A/RES/55/153 (Jan. 30, 2001) ("[N]ationality is essentially governed by internal law within the limits set by international law[.]"); Johannes M. M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. L.J. 1 (1991).

signed by Israel that same year.⁷³ Article 10 of the convention contains the first reference to the implications of state succession on citizenship having legal force in international law.⁷⁴ This article states that every agreement pertaining to state succession of territories lying between states that are signatories of the convention is required to include arrangements guaranteeing that no person will be denied citizenship as a result of the succession. Further, any state having signed the convention as well as a state succession agreement with a state not belonging to the convention is duty-bound to do its utmost to introduce such arrangements into the said agreement.⁷⁵

After review of several documents and decisions, it appears that from the perspective of international law, the main injury to human rights likely to arise in cases of state succession is the imposition of statelessness on the territory's inhabitants. For example, one finds the following statement in the explanatory report for the European Convention on Nationality: "The main concern, although not the only one, is the avoidance of statelessness This chapter aims to reinforce existing treaty provisions on the avoidance of statelessness, such as Article 10 of the 1961 Convention on the Reduction of Statelessness."⁷⁶

Based on the above, as well as the wording of the Convention on the Reduction of Statelessness signed by Israel, it is clear that in any case of state succession to which Israel may be a party, it will be obligated to take the steps necessary

73. United Nations Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175. Israel signed this convention but never ratified it.

74. The text of Article 10 is as follows:

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires such territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

Id. art. 10.

75. *Id.* art. 10 ("A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.")

76. *European Convention on Nationality*, *supra* note 13, explanatory report para. 107; *see also* G.A. Res. 55/153, annex art. 4, U.N. DOC A/RES/55/153 (Jan. 30, 2001) (prevention of statelessness).

to ensure that the treaty signed prevents situations in which Israeli citizens will become stateless as a result of the succession. It is therefore quite clear that any proposal regarding the transfer of populated territories goes contrary to international law if it contains features that induce statelessness.

IV. IMPLICATIONS OF STATE SUCCESSION FOR THE CITIZENSHIP OF A TERRITORY'S INHABITANTS: THE "DEFAULT" CONDITION

A common assumption made in international law is that the immediate consequence of state succession is the attribution of the succeeding state's citizenship to the territory's inhabitants. The European Commission for Democracy Through Law, an advisory arm of the Council of Europe, gave greater credence to this assumption when it issued the "Declaration on the Consequences of State Succession for the Nationality of Natural Persons" in 1996. The high place this issue attained on the commission's agenda was prompted by the desire to provide legal assistance to new states that emerged in Central and Eastern Europe after the fall of the Iron Curtain. Article 8(a) of the declaration⁷⁷ repeats this assumption, which is based on the "the presumption under international law that the population follows the change of sovereignty over the territory in matters of nationality."⁷⁸

This presumption apparently entails two features: attribution of the successor state's citizenship, and withdrawal of the original, predecessor state's citizenship. Some view withdrawal of citizenship as the predecessor state's obligation, derived from its duty to recognize the successor state's sovereignty over the transferred territory. In its notes, the Venice Declaration states that "[a]n obligation by the predecessor State to withdraw its nationality from inhabitants of the transferred territory may be seen as a corollary of the obligation to recognise the validity of the transfer[.]"⁷⁹

77. Known as the "Venice Declaration," after the city in which the commission is located.

78. *European Convention on Nationality*, *supra* note 13, para. 108 of the notes; *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 628 (6th ed. 2003).

79. European Commission for Democracy Through Law, *Consequences of State Succession for Nationality: Draft Report art. III(2)*, para. 84 (Aug. 30, 1996)

We should recall that the Venice Commission was an advisory body, meaning that its proposals carry no force of law. Nonetheless, all the states belonging to the Council of Europe, as represented by their senior jurists, participate as its members, and its opinions are commonly held by legal scholars.⁸⁰ Further, even when disputes arise over whether the accumulated experience has reached the point of being considered as customary international law,⁸¹ there is little doubt that an automatic change in citizenship represents the default solution in the overwhelming majority of state succession cases. This assumption has also been anchored in agreements defining what are considered deviations from the default.

In 1999, the U.N. International Law Commission adopted draft articles on nationality of natural persons in relation to the succession of States. The following year, the U.N. General Assembly adopted a resolution recommending that in situations of state succession, states act according to the Draft Articles.⁸² This document also assumes that the transfer of sovereignty automatically entails the transfer of citizenship. Article 5 of the proposed convention, addressing "Presumption of Nationality," obligates only the automatic attribution of the succeeding state's citizenship (it makes no reference to the withdrawal of the preceding state's citizenship). Article 20, however, which deals with the transfer of segments of a state's territory, is entitled: "Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State," that is, withdrawal of the citizenship associated with state *A* and attribution of the citizenship associated with state *B*. Yet, as opposed to earlier documents, the proposed article stresses the

[hereinafter *Venice Declaration Draft Report*], available at [http://www.venice.coe.int/docs/1996/CDL-NAT\(1996\)005rev3-e.asp](http://www.venice.coe.int/docs/1996/CDL-NAT(1996)005rev3-e.asp).

80. See, e.g., PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 147–52 (2d ed. 1979) ("[I]n the absence of an obligation specifically undertaken by treaty, the predecessor State is bound by international law to withdraw its nationality from the inhabitants of the transferred territory").

81. For the position stating that no such automatic rule having the force of law exists, see *id.* at 143; Yasuaki Onuma, *Nationality and Territorial Change: In Search of the State of the Law*, 8 YALE J. INT'L L. 1, 2 (1981–1982); A. Randelzhofer, *Nationality*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 501, 505 (Rudolf Bernhardt ed., 1997). For a similar stance taken by the Constitutional Court of Germany, see Kay Hailbronner, *Legal Aspects of the Unification of the Two German States*, 2 EUR. J. INT'L L. 18 (1991). Alternatively, for a review of the position in favor of recognizing this rule of automatic transfer of citizenship, see BROWNLIE, *supra* note 78, at 628; D.P. O'CONNELL, THE LAW OF STATE SUCCESSION 246 (Press 1956); Chan, *supra* note 72, at 11; Onuma, *supra*, at 1.

82. See G.A. Res. 55/153, U.N. DOC A/RES/55/153 (Jan. 30, 2001).

possibility of deviating from this principal, an issue we turn to later.

We can conclude from the above that based on the practice of contemporary international practice, unless otherwise agreed upon by parties to a treaty, situations of state succession generally lead to the attribution of citizenship by the successor state to the inhabitants of the territory, and the withdrawal of citizenship by the predecessor state. This outcome, however, is only a default solution; it is possible—and sometimes necessary—to digress from this practice, as we demonstrate next.

V. RIGHT OF OPTION AND THE RIGHT TO RETAIN THE CITIZENSHIP OF THE PREDECESSOR STATE

A. FROM AN “OLD” RIGHT OF OPTION TO A “NEW” RIGHT OF OPTION

In the clear majority of agreements and conventions pertaining to state succession in populated areas, instructions were included regarding the granting of the right of option to the transferred territory’s population. This right gives people the opportunity of opting for either acquisition of the citizenship of the successor state or retention of the citizenship of the predecessor state (often at the cost of migrating from the territory). Despite its frequent use, the concept “right of option” is imprecise; it has therefore acquired numerous meanings in international law. The concept expresses different ideas regarding its scope, the conditions under which it can be enjoyed, the persons who can enjoy it, and the states obligated to grant it (as well as the conditions that generate such an obligation). Regarding international practice, the right of option has been granted in the vast majority of cases of state succession although there have been exceptions.⁸³ Yet, in all

83. Hence, for example, the right of option was not granted in one of history’s major cases of state succession: the transfer of Alsace-Lorraine to France following World War I. See Onuma, *supra* note 81, at 8. This region, which had been transferred to German sovereignty in 1871, was populated by more than 1.5 million people. The Treaty of Versailles states that Alsace is to be transferred to French sovereignty. See *Treaty of Versailles*, *supra* note 28, art. 51. The agreement determined that every French national who lived in the territory prior to its 1871 transfer to Germany, as well as every person born in the region whose nationality was unknown or undetermined, would automatically acquire French nationality. See

these cases, the very granting of this right and its provisions was subject to the consent of the states involved. Similarly, despite the customary practice to grant a right of option, international tribunals have so far avoided intervening in bipartite agreements over its granting and content.⁸⁴

This version of the right of option—what may be considered the basis of future developments—also called the “old” right of option in the literature,⁸⁵ was regularly mentioned in agreements concluded from the eighteenth to the mid-twentieth century. The right was meant to give a transferred territory’s residents the option of rejecting the successor state’s citizenship, expressed through physical exit from the said territory. Although the right was not anchored in international law at the time, the custom that evolved in the majority of agreements was to allow it. As O’Connell writes in his 1956 book:

It cannot be said with any authority that international law imposes a duty upon the successor State to permit the inhabitants of absorbed territory to repudiate its nationality by removing themselves to a foreign country, or by opting for an alternative nationality. It has been customary, however, since at least 1785, to permit such option[.]⁸⁶

Articles referring to the right of option were especially common in the agreements signed after the two world wars. For instance, the Treaty of Versailles⁸⁷ and the Treaty of Trianon,⁸⁸ both signed at the end of World War I, included a considerable number of state successions including, among others, those from Germany to Denmark, Poland, Italy, and Belgium, as well as from Hungary to Czechoslovakia and Serbia. In each of these cases, articles were introduced that granted the right of option to residents interested in retaining their previous citizenship

id. annex to art. 79. Germany, for its part, pledged never to claim, at any time or place, that the residents of Alsace-Lorraine (whose Germany nationality was now withdrawn) were German citizens. See *id.* art. 52. These persons, comprising the majority of Alsace’s population, were never permitted to exercise any right of option; attribution of French nationality and withdrawal of German nationality were automatically executed. German nationals were the only persons given the right to leave the territory. Although Germany pledged to absorb these persons, the new German citizens of French origin were never given the same right.

84. WEIS, *supra* note 80, at 157.

85. *Id.* at 156.

86. O’CONNELL, *supra* note 81, at 259 (citations omitted).

87. *Treaty of Versailles*, *supra* note 28.

88. Treaty of Peace Between the Allied and Associated Powers and Hungary, June 4, 1920, 6 L.N.T.S. 188 [hereinafter *Trianon Treaty*], available at <http://www.lib.byu.edu/~rdh/wwi/versa/tri1.htm>. The treaty determined modern Hungary’s borders after the Austro-Hungarian defeat in World War I.

under the condition that they physically depart from the area within a fixed period of time. For example, Article 113 of the Treaty of Versailles, which deals with the transfer of Schleswig from Germany to Denmark, stipulates that: “[p]ersons who have exercised the above right to opt must within the ensuing twelve months transfer their place of residence to the State in favour of which they have opted.” In the peace treaty signed between France and Italy in 1947,⁸⁹ which included the transfer of territory from Italy to France, a paragraph was introduced that grants the right to retain Italian citizenship so long as persons electing to do so leave the region.⁹⁰ Again, the 1954 treaty transferring the region of Trieste from Italy to Yugoslavia included an identical arrangement.⁹¹

It is doubtful, however, that the demand to leave one’s home as a consequence of state succession, and the wish to retain one’s original citizenship, complies with currently accepted international standards regarding the protection of human rights.⁹² In light of the great importance attached to a person’s ties with his home and physical environment, we can establish a person’s clear interest in not being uprooted from his home.⁹³ It is for this reason that international law expressly and persistently prohibits population transfers⁹⁴ but does not take the same position regarding changes of citizenship—as stated, it only prohibits the creation of conditions conducive to statelessness or the withdrawal of citizenship.

In the modern context, it appears more appropriate to speak of the right of option as a right attached to the resident of an area undergoing state succession to retain his previous citizenship *while continuing to live in that area*. Nonetheless, the European Convention on Nationality (1997) continued the policy of avoiding any explicit discussion of the right of option.

89. Treaty of Peace with Italy, Feb. 10, 1947, 49 U.N.T.S. 3.

90. See *Venice Declaration Draft Report*, *supra* note 79, art. II(3), para. 55; see also *id.* art. II (a comprehensive list of cases of state succession concluded in Europe).

91. *Id.* art. III(3), para. 91.

92. *Id.* art. 89.

93. For a discussion of a person’s right not to be uprooted from his place of residence, see Patrick McFadden, *The Right to Stay*, 29 VAND. J. TRANSNAT’L L. 1, 23–24 (1996).

94. For a comprehensive survey of the issue of population transfers in international law, see the report of the U.N. Commission on Human Rights: A.S. Al-Khasawneh & R. Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers* (1993, 2/1993/17 Sub/4. CN/E). See also A.S. Al-Khasawneh, *Freedom of Movement: Human Right and Population Transfer* (E/CN.4/Sub.2/1997/23, 1997).

The only reference to this right made in the convention, found in paragraph 5 (State Succession and Nationality), notes that in any decision regarding the attribution of a new citizenship or the retention of a previous citizenship in territory undergoing succession, each of the states involved is required to *consider* four factors, one of which is the inhabitants' preferences.⁹⁵ The convention therefore leaves the decision in the hands of the parties to the agreement. In contrast, the Venice Declaration includes a direct reference to the right of option. Article V assigns to the successor state the duty to grant the inhabitants the right to opt for the citizenship of the predecessor state: "In all cases of State succession, when the predecessor State continues to exist, the successor State(s) shall grant the right of option in favour of the nationality of the predecessor State."⁹⁶ The same convention openly declares that such a choice does not reduce the obligation to leave the transferred territory.⁹⁷

Hence, the "new" right of option, which is compatible with widely accepted and modern rules of international law, obligates the predecessor as well as the successor state to grant the persons affected a dual right of option: *first*, the right to opt to transfer her place of residence to the sovereign territory of the predecessor state or to accept, together with the territory, the sovereignty of the successor state; *second*, in cases where the citizenship of the successor state is accepted, the right to opt to retain the citizenship of the predecessor state concurrently. Although the granting of the "new" right of option has not been duly institutionalized in contemporary law, a trend appears to be developing to recognize this right, thanks to the Venice Commission and other events to which we will refer shortly. We can therefore assume that if the subject should arise in the Israeli-Palestinian case, the granting of the "new" right of option will be among the demands met by any arrangement between the parties.

95. The resident's preferences are listed as the third factor. The other factors are: a genuine and effective link of the person with the respective state, the person's place of residence at the time of the succession, and the territorial origins of the person involved.

96. *Venice Declaration*, *supra* note 13, art. V, para. 13(a).

97. *Venice Declaration*, *supra* note 13, art. V, para. 16. ("The exercise of the right to choose the nationality of the predecessor State . . . shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State[.]").

B. WHO CAN EXERCISE THE RIGHT OF OPTION?

The right of option is not automatically granted to every inhabitant of a transferred territory. The relevant article in the Trianon Treaty (1920) states that a resident of the territory to be transferred could opt only for the citizenship of the state in which the majority of the population belonged to his own race and spoke his own language.⁹⁸ The Italian peace treaties signed in 1947 made use of the language test as the sole criterion for granting the right of option. It openly stated that a resident of the area could opt for the citizenship of the state in which the majority of the population spoke the person's language.⁹⁹

The Venice Declaration, dated 1996, is, as stated, the first legal document to explicitly mention the "new," modern right to option. Article V of the Declaration asserts that the granting of this right depends on the existence of an "effective link" between the area's inhabitants and the respective state.¹⁰⁰ The article details the possible features of an "effective link" as requiring ethnic, linguistic, or religious ties. This implies that, just as in the Venice Declaration, the right of option can be granted exclusively to persons preferring the citizenship of the state with which they have linguistic, ethnic, or religious affiliations. This text illustrates the considerable weight given to national ties and the desire to avoid severing people from their national environment. Article 18 of the European Convention on Nationality (1997) makes mention of a person's "genuine and effective link" with the state whose citizenship he prefers as one of the criteria to be considered when deciding whether to attribute the successor state's citizenship or to allow the inhabitants to retain that of the predecessor state.¹⁰¹ The source of the "genuine and effective link" test itself is found in the decision handed down by the ICJ in the *Nottebohm* case,¹⁰²

98. *Trianon Treaty*, *supra* note 88, art. 64.

99. WEIS, *supra* note 80, at 158; Editorial Comment, *The Progressive Development of International Law*, 41 AM. J. INT'L L. 611, 627 (1947).

100. *Venice Declaration*, *supra* note 13, art. V, para. 14 ("The successor States may make the exercise of the right of option conditional on the existence of effective links, in particular ethnic, linguistic or religious, with the predecessor State[.]").

101. *European Convention on Nationality*, *supra* note 13, art. 18(2)(a).

102. *Nottebohm* (*Lichtenstein v. Guatemala*), 1955 I.C.J. 4 (Apr. 6). In this decision, it was declared that no state was authorized to pass citizenship laws as it saw fit; a state cannot expect those laws to be validated by international law if they do not capture the general intent of granting citizenship, based on the effective links maintained between the state and the individual. According to the decision, the concept of citizenship is a legal translation of the fact that individuals have strong ties with the population in the respective state.

which was incorporated, verbatim, into the European Convention on Nationality.¹⁰³

At this point we should mention that some doubt exists as to whether avoiding disconnecting a person from his national affiliation-group can be employed as a relevant justification in the Israel-Palestinian case. This case appears to be the reverse, a case of anti-irredentism. The proposals raised within the framework of the Israeli debate on the subject relate to the transfer of territory currently held by Israel, in which a Jewish national majority exists, but inhabited by an Arab-Palestinian population, to a future Palestinian state, in which the national majority will be Palestinian. The main arguments raised by the transfer's opponents are not rooted in application of the national affiliation-group criterion, but instead focus on problems emanating from the injury to political, citizenship, and socio-economic rights, in addition to the Arab population's severance from Israel and its internal Arab social-communal environment.¹⁰⁴ Arguments reflecting this perspective can readily be targeted at demonstrating the existence of a "genuine and effective connection" between the Arab inhabitants of the territory to be transferred and Israel, due to residential and cultural connections maintained with Israel's Arab-Palestinian minority.

Without plunging into a detailed analysis of this complex issue, we should state that even if we accept this argument, the relevant international documents¹⁰⁵ view this "effective connection" as only one of several to be considered when deciding to grant the right of option; it does not, therefore, present a barrier to any state succession agreement. Further, there is little doubt that even if some previous successions

103. *European Convention on Nationality*, *supra* note 13, explanatory report art. 113.

104. In a survey conducted by Mada al-Carmel Arab Center for Applied Social Research, 91% of the respondents (Arab Israeli residents of the "Triangle" region in Israel) objected to the territorial exchange program "announced by the Israeli government." For our purposes, it is interesting to note the reasons for their objection. According to the Center's website, of those opposing the plan, 43% feared that they would be forced to leave their homeland; 33% believed that residence in the Palestinian Authority would lower their standard of living; 22% feared they would lose their place of employment; 17% did not want to lose their rights as Israeli citizens; 12% were concerned by the Palestinian Authority's tentative future; and 11% cited separation from friends and family. A description of the survey can be found at http://www.mada-research.org/sru/press_release/survey_landPop.shtml.

105. See, e.g., *Venice Declaration*, *supra* note 13, art. V, para. 14; *European Convention on Nationality*, *supra* note 13, art. 18.

affected the economic conditions of the transferred territory's population to a lesser degree than that anticipated in the Israeli-Palestinian case, economic welfare was never at the focus of discussions on the succession's implications for nationality.

One exception to this rule is the ICJ's decision regarding the border between Cameroon and Nigeria.¹⁰⁶ In this case, the inhabitants argued that the transfer would reduce the social services that they received from the government. The court was unmoved by the argument, and contented itself to calling for cooperation between the states in order to maintain the previous level of service delivery. It also noted the commitment to cooperate expressed by Cameroon's representative:

[T]he implementation of the present Judgment will afford the Parties a beneficial opportunity to co-operate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently enjoys. . . . The Court takes note with satisfaction of the commitment thus undertaken in respect of these areas where many Nigerian nationals reside.¹⁰⁷

It is difficult to avoid the conclusion that if a practical discussion is ever held on the various proposals regarding the transfer of populated territory between Israel and the future Palestinian state, similar appeals will be heard. We would even argue that a positive response to such a request is mandatory given the State of Israel's responsibility for its citizens.

The 1999 Draft Articles of the International Law Commission Convention, which address the same subject, go one step further and include an article that attends to the "respect for the will of persons concerned" in everything associated with the right of option: "Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States."¹⁰⁸ The article therefore limits the duty to grant the right of option to those cases of succession where people may find themselves in a situation of statelessness. The concept of "appropriate connection," as it appears in this statement, is meant to cover a wider range of conditions than those previously

106. See *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea Intervening)* 2002 I.C.J. 303 (Oct. 10).

107. *Id.* arts. 316–17.

108. G.A. Res. 55/153, annex art. 11, U.N. Doc A/RES/55/153 (Jan. 30, 2001).

referred to by the phrase "genuine and effective connection."¹⁰⁹

The U.N. International Law Commission's choice of wording resulted from the desire to avoid instances of statelessness, even if doing so implied expanding eligibility for the right of option.¹¹⁰ The commission would later propose an even more far-reaching stipulation. In the article dedicated to cases of state succession in which only a part of a state's territory is transferred, the commission asserted that the successor state was to extend its citizenship to the area's inhabitants, whereas the predecessor state was to withdraw its citizenship from those same persons, excluding cases to be decided through the exercise of the right of option by the inhabitants.¹¹¹ This wording implies that the right to opt would be granted to *all* the affected area's inhabitants. This proposal, which extends eligibility for the right of option to an entire territory's inhabitants, represents an attempt to modify customary international law; it does not reflect current international law. Indeed the International Law Commission has stated in the article's explanatory notes that this is its position, "even if this were to entail a progressive development of international law."¹¹²

The implications of the gap between the European approach expressed in the Venice Declaration, and the U.N. Commission approach just cited, erupted in all their force at the June 1997 meeting of the U.N. Commission, at which the Draft Articles were slated for discussion.¹¹³ Constantine Economides, a member of the U.N. Commission and the person responsible for preparing the Venice Declaration, argued that the proposal represented a significant deviation from customary practice. He also argued that eligibility for the right of option is to be narrowly defined; too broad a definition "not only goes against custom, it also contains implicit dangers."¹¹⁴ The rapporteur, Vaclav Mikulka, agreed that some justice could be found in this argument and even noted that other sources had criticized the commission's "generosity" in this matter. Yet, after initial hesitation, he argued that he believed that this position was more appropriate for the close of the twentieth century,¹¹⁵ and

109. See *supra* note 102 and accompanying text.

110. G.A. Res. 55/153, annex art. 11, U.N. Doc A/RES/55/153 (Jan. 30, 2001).

111. *Id.* art. 20.

112. *Id.* art 5, para. 20.

113. For the substance of the discussion, see *Summary Records of the 2489th Meeting*, [1997] 1 Y.B. Int'l L. Comm'n 102, U.N. Doc. A/CN.4/ Ser.A/1997.

114. *Id.* at 103.

115. *Id.*

that the European version of the “effective connection” can be discriminatory.¹¹⁶ We should mention that in the end, the original version of the U.N. Commission report was approved by the U.N. General Assembly as an annex to the resolution, with the recommendation that member states act accordingly.¹¹⁷ In 2004, the General Assembly received comments from member states regarding the document’s wording, as well as the appropriateness of introducing a mandatory instrument into international law.¹¹⁸

The preceding review of the issues leads us to the conclusion that when the transfer of territory between Israel and the future Palestinian state reaches the discussion level, the right of option with respect to retaining Israeli citizenship will certainly arise. In the current state of international law, no convention legally obligates the granting of the right of option in its broader form to all the inhabitants of an area undergoing succession. Judging from past experience, the granting of the right to opt to retain Israeli citizenship will ultimately depend on the agreement reached between the parties. Nonetheless, as we have seen, two trends currently coexist, both of which deserve consideration: *first*, the sincere intention (if we can judge from the U.N. International Law Commission’s proposal) to anchor a state’s duties to the population of a territory being transferred in a binding convention, especially regarding its scope; *second*, broadening the scope and availability of the right of option to all of a transferred area’s inhabitants. Even if we were only speaking of trends open to disagreement, we must be aware of them and pay them the necessary respect during any debate. As we see it, from the perspective of the European as well as the International Law Commission approach, it will be expected that a right of option be extended to an area’s entire population in future instances of state succession.

C. RESTRICTIONS TO THE RIGHT OF OPTION: TIME AND DUAL CITIZENSHIP

Even when the right of option is available to a succeeded territory’s inhabitants, it is usually subject to technical and substantive restrictions. The most common technical restriction

116. *Id.* at 105.

117. See G.A. Res. 55/153, U.N. DOC A/RES/55/153 (Jan. 30, 2001). Notice that the decision does not have the force of law.

118. G.A. Res. 59/43, U.N. DOC. A/RES/59/43 (Dec. 16, 2004).

is time. This right is neither fixed nor permanently available with the period of its enjoyment—usually ranging from a few months to three years¹¹⁹—set by the parties involved. The implications of not exercising this right within a defined period usually mean resorting to the default condition previously noted: loss of the person's status as a citizen of the predecessor state.¹²⁰

A more substantive restriction on the exercise of the right of option is dual citizenship. Every state can decide its own legal position regarding whether its nationals can hold the citizenship of other states in addition to its own. In the past, the international community attempted to reduce the phenomenon of dual or multiple citizenship.¹²¹ Although many states began displaying an increasing willingness to recognize dual citizenship after the fall of the Iron Curtain, many democracies—including the Scandinavian countries, Germany, and Estonia, to name a few—continue to refuse to permit such a status.¹²²

Even if the duty to grant a transferred territory's population the right to opt for citizenship of the predecessor as opposed to the successor state, this duty does not in itself compel recognition of dual citizenship. The notes to the Draft Articles of the U.N. International Law Commission (1999) do not encourage a universal policy of dual or multiple citizenships;

119. Past experience has shown that a wide range of time limits have been set in decisions related to the right of option. We cite a few examples: in the treaty reached by France and Algeria regarding the granting of independence to Algeria, the respective time period was set at three years; in the agreement between Spain and Morocco regarding transfer of the Sidi Ifni region to Morocco, the time period was limited to three months; the Treaty of Versailles set a time limit of two years in the majority of cases; the Italian peace treaties signed in 1947 defined the length of that period as one year. See O'CONNELL, *supra* note 81, at 263 (providing additional examples of time limitations on the right of option).

120. This led to the withdrawal of French citizenship from French citizens of Algerian origin who had lived in Algeria during the French departure and who had not exercised their right to declare their preference for French citizenship during the three-year interim period allotted by French law. For a detailed discussion of the case of a French resident of Algerian origin who lost his citizenship and then claimed that he was informed of this loss only after France requested his extradition as a result of a series of felonies he had committed, see *Beldjoudi v. France*, 234 Eur. Ct. H.R. 6, 8–17 (1992). The court prohibited the extradition on the grounds of the immeasurable injury to the plaintiff's family life and to his wife (a French citizen of French origin), although it did not disagree with France's right to deport the plaintiff in order to protect public order and prevent crime. *Id.* at 26–28.

121. See Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, May 6, 1963, Europ. T.S. No. 43.

122. See *Venice Declaration Draft Report*, *supra* note 79, art. III(6), para. 105.

instead, they leave it to each state to independently decide which position it will take.¹²³ Articles 9 and 10 of the convention explicitly establish each state's right to condition the attribution of citizenship on renunciation of the predecessor state's citizenship, and the right of the predecessor state to withdraw citizenship from those residents of the transferred territory who accept the citizenship of the successor state.

We can conclude from this discussion that from the perspective of international law, several events are likely to transpire should the Israelis and the Palestinians arrive at a comprehensive agreement regarding the transfer of populated territory. If the populations of the areas to be transferred to the future Palestinian state should choose to retain their Israeli citizenship, it increasingly appears that their right to do so will be recognized. Nonetheless, the option of dual citizenship—i.e., the holding of Israeli parallel with Palestinian citizenship—will be subject to the approval of the parties and influenced by the internal laws of the respective states. Enjoyment of this right will be restricted to a set period of time, after which Palestinian citizenship will automatically be attributed to the inhabitants at the price of the loss of their Israeli citizenship. During the period in which the right to opt is in effect—so long as Israeli law, which currently permits dual citizenship is not revised¹²⁴—Arab Palestinian residents of the respective territories will be allowed to hold dual Israeli-Palestinian citizenship. This situation will also be subject to the laws of the future Palestinian state, that is, whether Palestine will be amenable to permitting *its* nationals to hold Israeli citizenship. In such a case, a Palestinian choosing to retain his Israeli citizenship will acquire the status of an Israeli citizen residing outside Israel's borders, with all that implies: loss of the right to vote in Knesset elections,¹²⁵ loss of the possibility of bequeathing citizenship

123. See G.A. Res. 55/153, annex art. 9, U.N. DOC A/RES/55/153 (Jan. 30, 2001).

124. Israeli citizens are not required to cancel their foreign citizenship as a condition of receiving Israeli citizenship. Should Israel request withdrawal of Israeli citizenship from those residents of the transferred territories who refuse to renounce their Palestinian citizenship, Israel will be required to present a persuasive justification for its differentiation between these persons and those allowed to maintain some other foreign citizenship. In the absence of such a justification, demands for rescinding the Arabs' Israeli citizenship will be treated as unwarranted discrimination.

125. An Israeli citizen's basic right to vote is subject to him or her being registered as a voter. The main condition for inclusion in the voting registry is an individual's inclusion in the population registry. A person who does not reside in Israel is not listed in the voting registry and is therefore ineligible to vote. Knesset

beyond one generation,¹²⁶ and so forth.

VI. THE RIGHT TO SELF-DETERMINATION

An additional issue lying within the sphere of international law concerns self-determination: Does the right to self-determination affect the prospects of state succession in populated territories? One possible argument is that the very fact of the transfer of populated territories undermines the right to self-determination of the inhabitants (in this case, Israeli citizens of Palestinian origin).¹²⁷

The right to self-determination is recognized by Article 1(1) of the International Covenant on Civil and Political Rights: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."¹²⁸ The right to self-determination thus reflects the aspiration to ensure that all people enjoy the opportunity to express their cultures within the civil arena in addition to the readiness to promote the interests of future generations.¹²⁹ Given that, international law distinguishes between two separate dimensions of this right. On the *first*, external dimension, the goals of self-determination are attained by defining a group as an autonomous political entity (primarily by establishing an independent state in the geographic area in which the group resides) where the group's members can make the major decisions. On the *second*, internal or intra-state dimension, national minorities are given the opportunity to enjoy selected aspects of self-determination, such as the right to a unique culture.¹³⁰ The need to protect a minority's culture becomes

Elections Law (Consolidated Version), art. 28 (1969) (Isr.) (Hebrew).

126. RUBINSTEIN & MEDINA, *supra* note 64, at 1103 (Hebrew).

127. The inhabitants' preferences can be ascertained by means of a referendum. For the reasons stated, however, we believe that such a step is not required by international law. See *supra* Part I.

128. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 1(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (ratified by the State of Israel in 1992); see also U.N. Charter arts. 1(2), 55; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the State of Israel in 1992).

129. See RUBINSTEIN & MEDINA, *supra* note 64, at 324 (Hebrew); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1278 (2d ed. 2000).

130. For more on the issue of external and internal self-determination, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 67-140

particularly acute within the framework of the nation-state. The more that a state openly and intensively encourages the majority culture, and the more that the majority culture dominates the civil arena, the greater the need to create arrangements for preserving and reinforcing the minority culture.¹³¹ These arrangements include: the granting of limited rights to self-management, the freedom to publicly express the group's culture (especially the group's distinctive language), and government assistance in preserving group culture (particularly in the sphere of education). These arrangements can be allowed so long as they do not significantly deviate from the fundamental principles of the state in question.¹³²

We think that the right to self-determination does not impede conclusion of any agreement regarding the transfer of populated territories. The practice of international law shows that the right to self-determination was never treated as a mechanism directed at allowing a minority group to veto any such action. Obviously, the right to self-determination in its external sense (the right to establish an independent state) is not available to the Arab minority within the framework of the State of Israel. Such a right can be granted only to national groups subjugated to the rule of colonial regimes or national minorities suffering at the hands of a dictatorial regime that denies them any avenue for self-expression within the state's boundaries.¹³³ If, however, a final peace agreement between Israel and a future Palestinian state should be conditioned on the transfer of populated territories, it will, as stated earlier, do so only to promote a "two states solution" that is inherently rooted in the right of self-determination. In this sense, the

(1995).

131. See Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 71 SOC. RES. 529, 530 (2004); Tibor Várady, *Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav Case*, 19 HUM. RTS. Q. 9, 47 (1997).

132. See RUBINSTEIN & MEDINA, *supra* note 64, at 332 (Hebrew); see also CHAIM GANS, *THE LIMITS OF NATIONALISM* 67–70 (2003) (presenting an interesting theoretical discussion on the right to self-determination).

133. See the following comment made by the Supreme Court of Canada:

[A] right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 222 (Can.).

exchange of populated territory within the framework of a comprehensive peace agreement will effectively strengthen rather than weaken the right to independent self-determination.

Moreover, agreement to the exchange of populated territory does not—in theory—interfere with the exercise of the right to self-determination on the internal, intra-state dimension. As previously stated, the right of option allows persons living in an area subject to succession to opt for their preferred national identity and thereby exercise the right of self-determination. In the Israeli-Palestinian case, one route for doing so is to opt to remain in the transferred territory and join the future Palestinian state which will be characterized by a Palestinian national identity. The other direction for exercising self-determination is to opt to remain in Israeli territory as part of the Arab minority in Israel—a group that already enjoys the right to preserve its national culture and language within Israel's current political framework as a Jewish and democratic state.

VII. THE PROHIBITION AGAINST DISCRIMINATION

The final issue that may rise in the Israeli-Palestinian context is the application of the principle of equality and the prohibition against discrimination. The prohibition against discrimination was spelled out in Article 1(a) of the International Convention on the Elimination of All Forms of Racial Discrimination¹³⁴ as well as in other major conventions.¹³⁵ Article 1 defines "racial discrimination" as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

With respect to our subject, the pertinent argument appears to claim that territorial exchanges between Israel and the future Palestinian state, if they include the transfer of areas populated by Israeli citizens of Palestinian nationality, represent acts of

134. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX), 660 U.N.T.S. 195 (Dec. 21, 1965) (signed by Israel on Mar. 7, 1966).

135. See also International Covenant on Economic, Social and Cultural Rights, *supra* note 128, art. 2(1); International Covenant on Civil and Political Rights, *supra* note 128, art. 2(1).

prohibited discrimination resting on national identity.¹³⁶ This argument assumes that the act of transfer itself hinders the enjoyment of human rights and fundamental freedoms; if no such injury occurs, there is no prohibited discrimination.¹³⁷

In our opinion, the granting of a dual right of option—i.e., the area's inhabitants can opt to continue residing within Israel's boundaries as Israeli citizens as well as reside in the future Palestinian state as Palestinian citizens so long as the agreements signed by the parties guarantee the enjoyment of these rights¹³⁸—will avoid committing the said injury. The frequency of exchanges of populated territory observed, as well as the practice's anchoring in international covenants indicate that international law does not consider transfers implemented according to the rules—that is, they include the right of option—as instances of prohibited discrimination. It may be argued that a discriminatory motive for an act of state succession may constitute prohibited discrimination. Nonetheless, we believe that a peace treaty that delineates borders along ethnic lines is legitimate, as it fulfills a legitimate end, which is often the basis of such agreements.

EPILOGUE

Within the context of the public and academic debate on proposals for initiating a state succession action in territories lying within Israel's borders to the benefit of a future Palestinian state, two polar approaches have been applied: the first refers to the idea as legally feasible and desirable from other points of view, as long as it is fulfilled through agreement between the parties; the second refers to proposals as patently illegal and verging on racism. As described, the legal reality—at least according to international law—rests on much more complex values.

Based on the analysis conducted, we can arrive at a number of conclusions. *First*, states are entitled to decide their mutual borders between themselves. There appear to be no judicial

136. ARIELI ET AL., *supra* note 7, at 68.

137. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 134 (prohibiting discriminatory acts).

138. This excludes those rights conditioned on residence in Israel, such as the right to vote in Knesset elections, which is granted only to those persons who opt to remain in Israel. See Knesset Elections Law (Consolidated Version), art. 28 (1969) (Isr.) (Hebrew); *supra* note 125 and accompanying text.

constraints, at least in international law, on transferring populated territories from the sovereignty of one state to another. *Second*, according to developing trends in international law, such a move demands that all the persons involved be granted a broad right of option in order to allow them to retain their Israeli citizenship (in this case) even if they opt to accept Palestinian sovereignty. *Third*, it is quite doubtful that such a step, which was originally meant to maintain a Jewish majority in the respective areas¹³⁹ (in addition to ensuring the greatest recognition of the reality characterizing both sides of the “green line”), can achieve its objective—given the possibility that the Palestinian residents of these areas may choose to relocate to within the new borders of Israel. Under these conditions, the political and legal rug will be pulled from under the initiative. Finally, some doubt has been raised regarding the desirability of this step—even assuming that it will accomplish its objectives—on the basis of other considerations. The damage it may arguably cause to the delicate network of relations constructed between Jews and Arabs in Israel may exceed the benefits to be gained. Moreover, we cannot be at all sure that the future Palestinian state will agree to this move, implying that a firm consensus represents a necessary condition for such a move to gain any validity within the framework of international law. Therefore, in the absence of broad agreement on the part of the affected persons—an agreement that would provide an adequate response to this issue—it would be inappropriate to promote such a solution as far as its sole intent remains continuation of a Jewish majority in the State of Israel.

139. National planning, which embodies the aspiration to sustain a Jewish majority, is a legitimate and fitting goal in Israeli law. The real issues remain, as always, the means selected to accomplish this aim. For more on this issue, see the discussion in Amnon Rubinstein & Liav Orgad, *Human Rights, State Security and the Jewish Majority: The Case of Migration for Purposes of Marriage*, HAPRAKLIT 315, 341–46 (2006) (Hebrew); HCJ 6427/02 *The Movement for Quality Government in Israel v Knesset* (awaiting publication, decision handed down on May 11, 2006), para. 16, (decision of Justice Heshin) (Hebrew). For a contrary opinion, see Guy Davidov, Jonatan Yovel, Ilan Saban & Amnon Reichman, *State or Family? The Citizenship and Entry to Israel Act (Temporary Order) 2003*, MISHPAT U MIMSHAL 643 (2005) (Hebrew).