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## Israel's Conflicted Existence as a Jewish Democratic State: Striking the Proper Balance Under the Citizenship and Entry into Israel Law

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# ISRAEL'S CONFLICTED EXISTENCE AS A JEWISH DEMOCRATIC STATE: STRIKING THE PROPER BALANCE UNDER THE CITIZENSHIP AND ENTRY INTO ISRAEL LAW

## I. INTRODUCTION

States once had unfettered discretion over whom may become their citizens. That discretion was thought to be unfettered because it was regarded as an element of sovereignty. Indeed, it was not uncommon for States to exercise it even by excluding foreigners on the basis of race, color, or national origin.

The past fifty years have changed all that. International law now limits a State's discretion over matters of citizenship. The growth and recognition of democracy and human rights since World War II obligates States to guarantee equal, fundamental rights to citizens and non-citizens alike, without distinction on the grounds of race, color, religion, or national origin. Hence, democratic<sup>1</sup> States have not typically been founded or predicated upon maintaining a certain racial or religious character; to do so externally by denying entry into the State on grounds of race or ethnicity is no more legitimate than implementing an internal system of systematic racial discrimination such as apartheid.

Israel, thus occupies an anomalous position among democratic states. On May 15, 1948, the State of Israel was founded on two fundamental yet irreconcilable principles. It was established as a Jewish State which, as held by Israel's highest court, embodied "three tenets: 1) the right of return, i.e., the right of every Jew to immigrate to Israel; 2) the maintenance of a Jewish majority in the State, and 3) a connection between the Dias-

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1. The term "democracy" is defined as a "[g]overnment by the people, exercised either directly or through elected representatives" and "the principles of social equality and respect for the individual within the community." THE AMERICAN HERITAGE DICTIONARY 380 (2d College ed. 1982).

pora and the State of Israel.”<sup>2</sup> Yet, Israel was also founded as a democratic State which aimed to ensure “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.”<sup>3</sup> This paradoxical combination of commitments to a racial and religious character and to democracy and human rights initially went unquestioned, in part, because of the resurgence of the Zionist movement after the Nazi holocaust, and, in part, because of the Arab-Israeli conflict. Israel has thus, for its relatively brief existence, tried to pursue these irreconcilable goals.

The recent enactment of the Citizenship and Entry into Israel Law, 5763-2003 was Israel’s attempt to balance the Jewish character of Israel against the democratic principles upon which it was founded. The law denies Palestinians in the Occupied Territories Israeli citizenship and residency. It also prohibits Palestinian spouses of Israeli citizens from obtaining Israeli citizenship or residency, thus separating inter-racially married couples or those contemplating marriage. In addition to stopping “terrorism,” the purpose of the law is to preserve the Jewish majority in Israel by preventing the influx of Palestinians from the Occupied Territories. It therefore seeks to serve one of Israel’s defining principles while contradicting the other. This Note will argue that the Citizenship and Entry into Israel Law represents Israel’s inability to exist as a Jewish democratic State in conformance with its human rights obligations.

Part II of this Note will survey several Israeli citizenship laws which constitute Israel’s citizenship policy. Part III will recount the evolution of Israel’s citizenship policy and its effects upon Palestinians residing in the Occupied Territories. Part IV

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2. See David Kretzmer, *Constitutional Law*, in INTRODUCTION TO THE LAW OF ISRAEL 39, 42 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995) (citing Ben Shalom v. Central Elections Committee for the Twelfth Knesset, 43(4) P.D. 221, 248 (1989)). It is often argued that “Israel is Jewish only in the sense that England is English, so that those who (vainly) insist on the facts are uniquely rejecting the rights of Jewish nationalism...” NOAM CHOMSKY, FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, & THE PALESTINIANS 157 (Updated ed., 1999) [hereinafter CHOMSKY, FATEFUL TRIANGLE]. However, this argument is flawed, since a “citizen of England is English, but a citizen of Israel may not be Jewish,” a situation described by Professor Chomsky as “a non-trivial fact, much obscured in deceptive rhetoric.” *Id.* (footnote omitted).

3. The Declaration of the Establishment of the State of Israel, 5708-1948, 1 L.S.I. 3 (1948).

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will examine the level of discretion accorded to the State in devising its own citizenship policy and the possible limitations placed upon the State by international law. Part V will analyze the legality of the Citizenship and Entry into Israel Law under international human rights law and Part VI will conclude the Note with some possible solutions that may be implemented to bring Israel into conformance with its international legal obligations.

## II. THE BIRTH OF ISRAEL: THE LAW OF RETURN AND THE NATIONALITY LAW

Israel's citizenship policy is based on two pieces of legislation, the Law of Return, 5710-1950 and the Nationality Law, 5712-1952.<sup>4</sup> In a statement by Prime Minister David Ben-Gurion to the Knesset, Israel's parliament, before the passage of the two laws, he stated that:

The Law of Return and the Nationality Law which are before you are closely connected and have a common ideological basis, that derives from the historical uniqueness of the State of Israel, a uniqueness that relates to the past and the future.... These two laws determine the special character and purpose of the State of Israel which carries the message of the redemption of Israel....<sup>5</sup>

### A. *The Law of Return*

The Law of Return grants "every Jew ... the right to come to [Israel] as an *oleh*."<sup>6</sup> The status of an *oleh* is granted to any Jew

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4. Law of Return, 5710-1950, 1 L.S.I. 114 (1949-1950); Nationality Law, 5712-1952, 6 L.S.I. 50 (1951-1952).

5. DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 31 n.3 (1990) (quoting D.K. (1950) 2036-37). The "historical uniqueness" Prime Minister Ben-Gurion speech was not discovered until 1942, the year in which the Zionist movement was "officially committed to the establishment of a Jewish State." CHOMSKY, *FATEFUL TRIANGLE*, *supra* note 2, at 160. Indeed, prior to that time, "Prime Minister Ben-Gurion and others declared that they would never agree to a Jewish state, 'which would eventually mean Jewish domination of Arabs in Palestine.'" *Id.* (quoting NOAM CHOMSKY, *TOWARDS A NEW COLD WAR* 439 (1982)). These concerns, however, were "reduced to a minority" in the midst of World War II and the Nazi holocaust. *Id.*

6. Law of Return § 1, 5710-1950, 1 L.S.I. 114. "*Oleh*" as defined in the Law of Return "means a Jew immigrating, into Israel." *Id.* While the definition of an *oleh* does not make a direct reference to a right of citizenship, it will

who immigrated to Israel prior to 1950 and any Jew who was born in Israel, before or after 1950.<sup>7</sup> A 1970 amendment to the Law of Return liberalized the immigration policy in Israel by conferring the rights of an *oleh* to “a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew.”<sup>8</sup> However, in keeping with the founding principles of Israel as a Jewish state, “a person who has been a Jew and has *voluntarily* changed his religion” is disallowed from obtaining citizenship in Israel.<sup>9</sup> The Law of Return is often viewed “as a fundamental principle of the State of Israel, possibly even its very *raison d’etre* as a Jewish state.”<sup>10</sup>

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be seen below that attaining the status of an *oleh* greatly enhances, if not conclusively establishes the ability of an individual to become an Israeli citizen under the closely related Nationality Law. *See infra* text accompanying note 13.

7. Law of Return § 4, 5710-1950, 1 L.S.I. 114.

8. Law of Return (Amendment No. 2) § 1, 5730-1970, 24 L.S.I. 28 (1969-1970) (amending Law of Return, 5710-1950, 1 L.S.I. 114 (1949-1950)). Since 1995, the Ministry of Interior has narrowly interpreted section 4(A) in its application to non-Jewish spouses of Israeli nationals:

Under the new interpretation, the Law of Return will not ... apply to the Non-Jewish spouse of a person who already is an Israeli national, so that he or she will no longer receive the benefits of a Jewish new immigrant, including the right to automatically acquire Israeli citizenship.

Thus, the Ministry of Interior no longer favors Jewish Israeli nationals by automatically granting a citizenship to their foreign national spouses. At present, the foreign spouses of persons who are already Israeli national, whether Jewish or Non-Jewish may attain Israeli nationality by way of naturalization.

*Second Periodic Report of Israel under article 40 of the Covenant*, U.N. Hum. Rts. Comm., 66th Sess., ¶17, at 7, U.N. Doc. CCPR/C/ISR/2001/2 (2001), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase> [hereinafter 2001 Israel ICCPR Report]. It is notable that the 1970 Amendment to the Law of Return introduced, for the first time, a statutory definition of the term “Jew” as “a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.” *Id.*

9. *Id.* (emphasis added).

10. *See* KRETZMER, *supra* note 5, at 36. Several other fundamental Israeli laws such as the Declaration of the Establishment of the State of Israel, 5708-1948, and the World Zionist Organisation – Jewish Agency (Status) Law, 5713-1952, also reaffirm the principle that Israel is a state created for the Jewish people where “[t]he commitment to Jewish immigration [is] the function of [Israel].” *See id.* at 32, n.7, 45 n.5; *see also* ARIEL BIN-NUN, THE LAW OF THE STATE OF ISRAEL 56 (1990) (stating that “[t]he unconditional conferral

2004] *CITIZENSHIP AND ENTRY INTO ISRAEL LAW* 1349*B. The Nationality Law*

The Nationality Law<sup>11</sup> passed two years after the Law of Return, expands on the requirements for obtaining citizenship in Israel for Jews and non-Jews.<sup>12</sup> In particular, section 2 of the Nationality Law automatically grants an *oleh*, as deemed under the Law of Return, the right to Israeli citizenship by return.<sup>13</sup> However, non-Jews generally cannot acquire citizenship by return and can only do so by residence, birth or naturalization.<sup>14</sup>

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upon every Jew, everywhere, of the right to immigrate is a peculiarity of the Israeli Constitution and virtually unparalleled in other rule-of-law states... The Zionist idea of the State and the special circumstances of its establishment prompted the lawmaker to promulgate [the Nationality Law].”).

11. The meanings of both “nationality” and “citizenship” have been distinguished among commentators. See BIN-NUN, *supra* note 10, at 40 n.15 (distinguishing “citizenship” from “nationality” in which the former refers to the status of “Israeli” while the latter refers to a “Jew[ ], Arab, Druze, Samaritan, etc.”); ARYEH GREENFIELD, *ENTRY, RESIDENCE, AND CITIZENSHIP* 2 (1996) (distinguishing “nationality” as carrying an “ethnic rather than legal connotation” which is more accurately reflected by the terms “citizenship”); Norman Bentwich, *Nationality in Mandated Territories Detached From Turkey*, 7 BRIT. Y.B. INT’L L. 97, 102 (1926) (HeinOnline, Brooklyn Law School Library) (differentiating between “citizenship” which describes one’s “allegiance to the state” and “nationality” which is “a matter of race and religion”). For the purposes of this Note the terms “nationality” and “citizenship” will be used interchangeably, defined as “[a person’s] quality of being a subject of a certain state and therefore its citizen.” P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 6 (Sijthoff & Noordhoff International Publishers B.V., 1979) (1956) [hereinafter WEIS, *STATELESSNESS*] (quoting L.V. OPPENHEIM, *INTERNATIONAL LAW* 642–43 (8th ed. 1955)). The primary purpose of using the two terms interchangeably is to adhere to the differing official English translations of the same terms provided by the Israeli Government. For example, the Nationality Law as translated officially in the Laws of the State of Israel (L.S.I.) is called the “Nationality Law” while the Knesset has recently referred to the same law as the “Citizenship Law.” See *Citizenship and Entry into Israel Law* (temporary provision) § 1, 5763-2003, at [http://www.knesset.gov.il/laws/special/eng/citizenship\\_law.htm](http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm) (unofficial translation) (last visited Apr. 11, 2004).

12. See generally Nationality Law, 5712-1952, 6 L.S.I. 50.

13. See *id.* § 2; see also KRETZMER, *supra* note 5, at 36.

14. See Nationality Law §§ 3–5, 5712-1952, 6 L.S.I., at 51. Sections 3 and 5, which govern the conferral of citizenship vis-à-vis residence and naturalization respectively, contain various criteria that must *all* be met before a non-Jew is allowed to obtain Israeli citizenship. *Id.* This is a marked difference from the ability of Jews to automatically obtain citizenship by way of return without having to satisfy any such conditions. *Id.* § 2. See also KRETZMER, *supra* note 5, at 36. The discriminatory treatment between Jews and non-

While acquiring citizenship by naturalization is difficult due to the requisite criteria, which must all be met in addition to its discretionary nature, the Nationality Law provides an alternative avenue for non-Jewish spouses to obtain citizenship in Israel as a means of facilitating family unification. Section 7 of the Nationality Law allows for a “spouse of a person who is an Israel national...[to] obtain Israel nationality by naturalization ...even if he does *not* meet the requirements [otherwise required for obtaining Israeli citizenship by naturalization].”<sup>15</sup>

The legislation governing Israeli citizenship policy, namely the Law of Return and the Nationality Law, overtly discriminates<sup>16</sup> between Jews and non-Jews.<sup>17</sup> However, a non-Jew,

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Jews in granting a right of return to Jews has been alleviated somewhat by section 4 of the Nationality Law in which non-Jews as well as Jews born in or out of Israel to a parent who is an Israeli citizen may obtain citizenship by birth. *See* Nationality (Amendment No. 2) Law § 4(A), 5728-1968, 22 L.S.I. 241, 242 (1967-1968) (amending Nationality Law §4, 5712-1952, 6 L.S.I. 50 (1951-1952)). Thus, as Kretzmer rightly concludes, “there is no discrimination in the method of acquiring citizenship for Jews and non-Jews born to parents one of whom is a citizen,” and “the real ‘citizenship beneficiaries’ of section 4(a)(1) regarding citizenship by birth are Arabs born to parents one of whom is an Israeli citizen.” KRETZMER, *supra* note 5, at 39. However, for a Jew born in Israel, the right of return as a means of attaining Israeli citizenship still remains if obtaining citizenship by birth is not a viable alternative. *Id.*

15. *See* Nationality Law § 7, 6 L.S.I., at 52 (emphasis added). The naturalization process under section 5 of the Nationality Law requires compliance with the following six conditions before Israel citizenship is granted:

- (1) he is in Israel;
- (2) he has been in Israel for three out of the five years that preceded the submission of his application;
- (3) he is entitled to reside in Israel permanently;
- (4) he has settled or intends to settle in Israel;
- (5) he has some knowledge of the Hebrew language;
- (6) he renounced his prior citizenship or proved that he will cease to be a foreign citizen when he becomes an Israel citizen.

*Id.* §§ 5(a)(1)-(6).

16. The characterization of the Nationality Law and the Law of Return as overtly discriminating between Jews and non-Jews is not meant to denote a sense of illegality in the present context but rather to describe a legally significant distinction premised upon Israel’s foundation as a Jewish state. *See* W. A. McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT’L. L. 177, 177–78 (1970) (distinguishing between

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while subject to more restrictive conditions than those applied to a Jewish immigrant, is still afforded access to the legal means of attaining Israeli citizenship.<sup>18</sup> Whether, as a practical matter, Israeli authorities actually confer citizenship on non-Jews, particularly Palestinians born or residing in the West Bank and Gaza, is not clear since the majority of these Palestinians must be naturalized and the Interior Minister has discretionary authority in granting citizenship to naturalized individuals.<sup>19</sup> While the means by which one obtains citizenship in Israel, i.e., return, residence, birth, or naturalization, has no

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the several meanings attached to “discrimination.” One being a neutral term meaning “distinction” or “differentiation” and the other being more restrictive term denoting “an unfair, improper, unjustifiable or arbitrary distinction,” the definition which is commonly employed in the international law context.)

17. See KRETZMER, *supra* note 5, at 36 (“The right given in the Law of Return to Jews to immigrate to Israel is one of the only cases in which an *overt distinction* is made between the rights of Jews and non-Jews.”) (emphasis added), 89 (“[The Law of Return and the Nationality Law] are the only instances of legislation that expressly uses the criterion of ‘Jew’ as a condition for a right or privilege.”); see also sources cited *supra* note 10. From a domestic perspective, the constitutional principle of equality may be infringed by the will of the Knesset without adverse legal consequences, as Israel adheres to the doctrine of parliamentary supremacy:

As the Israeli parliament and embodiment of its sovereignty, the Knesset is supreme over the other branches of the State. On the legislative level, this supremacy means that the will of the Knesset, under the cloak of law, obligates all other authorities of the State. It also indicates that the source of power of the other branches stems, directly or indirectly, from the Knesset.

Allen Zysblat, *The System of Government*, in PUBLIC LAW IN ISRAEL 1, 6 (Itzhak Zamir & Allen Zysblat eds., 1996). See also KRETZMER, *supra* note 5, at 89. An official state of emergency also provides the Knesset and Government with substantial authority in enacting restrictive measures. See text accompanying *infra* note 164.

18. See KRETZMER, *supra* note 5, at 40 (noting that “today the law grants the *right* of citizenship to virtually all Arab residents of [Israel].”) (emphasis added).

19. See Nationality Law § 5(b), 5712-1952, 6 L.S.I., at 52 (“Where a person has applied for naturalisation, and he meets the requirements of [naturalisation in subsection (a)], the Minister of the Interior, *if he thinks fit to do so*, shall grant him Israel nationality....”) (emphasis added). See also Ammon Rubinstein, *Citizenship*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 275, 281 (Alon Kaplan & Paul Ogden eds., 1996) (“The number of cases in which the Minister [of Interior] is prepared to grant citizenship through naturalization is very small and it is only in exceptional cases that the request is granted.”).



bearing on the rights which may be exercised such as the right to vote or seek employment in civil service,<sup>20</sup> several fundamental Israeli laws only confer certain benefits upon Jews who obtain Israeli citizenship automatically by virtue of their status as an *oleh*.<sup>21</sup>

This unique citizenship policy reflects Israel's commitment in establishing a State for the Jewish people. It is evident, however, that as of result of this commitment, Israel's foundation of democracy, guaranteeing equal, fundamental rights to citizens and non-citizens, has begun to erode. And as the non-Jewish population continues to grow, externally (immigration) or internally (birth), Israel will need to adopt increasingly restrictive measures to preserve its Jewish identity, bringing into question the viability of Israel as a democratic state.

### III. EVOLUTION OF ISRAEL'S CITIZENSHIP POLICY

On July 31, 2003 the Knesset passed the Citizenship and Entry into Israel Law, 5763-2003<sup>22</sup> which severely restricted the ability of Palestinians to obtain citizenship or residence in Israel.<sup>23</sup> The Citizenship and Entry into Israel Law codified the

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20. See Rubinstein, *supra* note 19, at 283–86; see also BIN-NUN, *supra* note 10, at 41 (“The right to vote for and be elected to the Knesset, and employment in the civil service, are reserved to citizens.”).

21. See generally Basic Law: Israel Lands, 5720-1960, 14 L.S.I. 48 (1960) and World Zionist Organisation – Jewish Agency (Status) Law, 5713-1952, 7 L.S.I. 3 (1952-1953). Kretzmer also reports of other instances of *de facto* as well as *de jure* discriminatory policies in which rights or benefits are conferred depending on whether an individual is Jewish or non-Jewish, the former being the beneficiaries of rights solely because of their religious faith. See generally KRETZMER, *supra* note 5, at 89–134; see also CHOMSKY, FATEFUL TRIANGLE, *supra* note 2, at 157–60.

22. See Citizenship and Entry into Israel Law (temporary provision) § 1, 5763-2003, at [http://www.knesset.gov.il/laws/special/eng/citizenship\\_law.htm](http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm) (unofficial translation) (last visited Apr. 11, 2004).

23. While much of the discussion on the beneficiaries of Israel's citizenship policy has focused on the dichotomy between Jews and non-Jews, the Citizenship and Entry into Israel Law establishes an additional classification scheme by delineating certain “areas,” collectively known as the Occupied Territories (Gaza and the West Bank), in which inhabitants thereof are prohibited from citizenship or residency in Israel. See *infra* text accompanying note 67.

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restrictive immigration policy which had been implemented in Government Decision 1813 in May 2002.<sup>24</sup>

A. *The Beginnings of the Freeze on Family Unification Requests and Its Justifications*

The change in Israel's immigration and citizenship policy implemented by Minister of the Interior, Eli Yishai since May 2002, effectively "[froze] all family unification requests involving Palestinians...."<sup>25</sup> The freeze created two classifications of

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24. See Draft Bill of Proposed Nationality and Entry into Israel (Temporary Order) Law, Jun. 4, 2003, Reshumot (2003), available at [http://www.adalah.org/eng/features/famuni/2003family\\_uni\\_prop\\_bill\\_rev.pdf](http://www.adalah.org/eng/features/famuni/2003family_uni_prop_bill_rev.pdf) (last visited Apr. 11, 2004) (explaining that the proposed bill is enacted "in accordance with Government Decision 1813, of 12 May 2002" to limit the granting of residents of designated areas citizenship in Israel). The Government, which may be characterized as the executive branch in Israel's governmental system, is authorized to enact "subsidiary legislation." See Asher Maoz, *The Institutional Organization of the Israeli Legal System*, in INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 2, at 11, 22–23. The Government's authority to promulgate legislation stems from Israel's relatively liberal adherence to the doctrine of separation of powers. See *id.* at 23 ("[T]he most serious deviation from the doctrine of separation of powers concerns the authority that is vested in the ministers to promulgate emergency regulations, which may alter, suspend, or modify any law of the Knesset."). The overriding oversight mechanism is the principle of legality which is an "extension of the rule of law" where "the Government must base its actions on a law authorizing it to act, or its activities will not have the force of law." Zysblat, *supra* note 17, at 8.

25. Haim Shapiro, *Yishai Freezes Arab Naturalization Requests*, JERUSALEM POST, May 13, 2002, at 1, available at LEXIS, News Library, Jpost File; see also Peter Beaumont, *Israel Fears Wave of Immigrants*, THE OBSERVER, June 16, 2002, at 19, available at LEXIS, News Library, Obsrvr File; Matthew Kalman, *Why Isn't My Baba at Home?*, TIMES (London), Sept. 2, 2002, at 8, available at LEXIS, News Library, Ttimes File; Davan Maharaj, *Israeli Ruling Puts a Freeze on Family Ties; Mideast: The Decision, Called Racist By Some, Keeps Palestinians from Israeli Arab Spouses*, L.A. TIMES, May 24, 2002, at 3, available at LEXIS, News Library, Lat File. It should be noted that the Government has, for some time prior to its May 2002 decision, been denying a substantial number of Palestinian applications seeking residency permits for family reunification purposes. See Glenn Frankel, *Israel Assailed for Family Separation; Palestinians Barred From Joining Relatives in Occupied Areas*, WASH. POST, Feb. 8, 1987, at A25, available at LEXIS, News Library, Wpost File; *Israeli Visa Policy on Arabs Keeps Families Apart*, N.Y. TIMES, July 13, 1987, at A11, available at LEXIS, News Library, Nyt File ("In recent years, Israeli military officials said only hundreds out of thousands of applications [for family reunification] submitted annually had been ap-

Israelis married to non-Israelis adversely affected by the government's policy.<sup>26</sup> The first group consisted of "non-Israelis (mainly Palestinians) who have received a permit to live in Israel and [were] in the midst of a two-phase naturalization process lasting four-and-a-half years."<sup>27</sup> As a result of the freeze, applications currently pending in the naturalization process would be frozen, but the applicants would not be forced to leave Israel.<sup>28</sup> The second group consisted of "non-Israelis who have married Israelis but had not applied for family unification before the" May 2002 freeze of applications.<sup>29</sup> Those constituting the second group were barred from applying for family unification and were considered illegal residents who had to leave Israel regardless of the whereabouts of their families.<sup>30</sup>

In justifying the restrictive measure Israel claimed that "some 100,000 Palestinians have fraudulently received [Israeli] citizenship, and tens of thousands of others have attempted to do so."<sup>31</sup> Particularly, the freeze was allegedly aimed at pre-

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proved."); Doug Struck, *Israeli Shift Breaks Up Families; Non-Jewish Spouses Told To Leave And Apply For Immigration*, WASH. POST, Mar. 9, 1998, at A16, available at LEXIS, News Library, Wpost File. The systematic expulsion of Palestinians from the Occupied Territories, resulting in the separation of families, is also a long-standing practice. See, e.g., Jackson Diehl, *Israeli Officials Announce Easing of Rule for Residing in Territories; Policy of Expelling Spouses, Children Had Drawn Criticism*, WASH. POST, June, 7, 1990, at A30, available at LEXIS, News Library, Wpost File; Jackson Diehl, *Israel Said To Be Expelling Palestinians; About 20 Women Ordered To Leave Occupied Land, Groups Report*, WASH. POST, Aug. 15, 1991, at A37, available at LEXIS, News Library, Wpost; Jackson Diehl, *'Non-Resident' Palestinians Forced Out; Rights Groups Assail Deportation As Being Politically Motivated*, WASH. POST, Jan. 30, 1990, at A1, available at LEXIS, News Library, Wpost File.

26. David Izenberg, *Court Hears Petitions Against Palestinian Naturalization Freeze*, JERUSALEM POST, July 18, 2003, at 6A, available at LEXIS, News Library, Jpost File.

27. *Id.* For an in-depth look at this four-year process, see Brief for Petitioner para. 40, at 13–14, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03).

28. Izenberg, *supra* note 26.

29. *Id.*

30. *Id.*

31. Shapiro, *supra* note 25 (statement by Herzl Gedj, Director of the Interior Ministry's Population Registry); see also Izenberg, *supra* note 26 (according to a Ministry of Justice attorney "after the signing of the [Oslo Accords in 1993], when Israel began to impose regular closures on the disputed territories and import foreign workers, Palestinians began to value citizenship,

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venting a situation in which “a Palestinian marries an Israeli, brings in children from a previous marriage, then fictitiously divorces the Israeli and brings in another Palestinian spouse.”<sup>32</sup> In addition, the Interior Minister justified the decision by citing to 1) demographic, 2) security, and 3) economic concerns.<sup>33</sup>

### 1. The Demographic Justification: Maintaining a Jewish Majority

There is a growing concern in Israel that its Jewish majority may become a Jewish minority within thirty years.<sup>34</sup> This concern is compounded by claims of “a right of return” to areas of Israel from which Palestinians were displaced during the Arab-Israeli conflict in 1948 and 1967.<sup>35</sup> Israel has consistently rejected such claims.<sup>36</sup> It is feared that “allowing a ‘right of return’ for Arabs would amount to the suicidal destruction of Israel.”<sup>37</sup> Minister of the Interior Yishai confirmed the demographic concerns of the Israeli community, stating that it may be a “deliberate policy on the part of [Yasser Arafat’s] Palestinian Authority, to change in a sophisticated way the demographic structure of Israel” by “[realizing] ‘the right of return’ through the back door [of family unification].”<sup>38</sup>

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which allowed them to receive [various benefits],” thus resulting in many sham marriages between Israelis and Palestinians since 1993).

32. Shapiro, *supra* note 25.

33. See *id.* (statement by Interior Minister Eli Yishai) (“The [freeze] is motivated by demography, security, and economics in equal measure,” in addition to the corresponding concerns of “the increasing number of Palestinians becoming Israelis, that this population could become a base for terrorism, and about the increasing cost of payments to Palestinian families.”).

34. See Beaumont, *supra* note 25.

35. See John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT’L L. J. 171, 173 (1998) (“Palestinians were displaced from their home areas at various times beginning in 1948, with two major episodes of hostilities marking the greatest periods of Palestinian flight in 1948 and 1967.”) [hereinafter Quigley, *Right of Return*].

36. See *id.* at 184–93 (describing Israel’s justifications for its non-conformance with the U.N. General Assembly Resolution 194 which explicitly recognized “‘that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date...’”) (quoting G.A. Res. 194, U.N. GAOR, 3d Sess., pt. 1, ¶ 11, at 24, U.N. Doc. A/810 (1948)).

37. See Maharaj, *supra* note 25.

38. *Id.*

The potential displacement of Israel's Jewish majority has been viewed, from a legal perspective, as a security threat to the State.<sup>39</sup> Classified as such, Israel would have greater flexibility in complying with its international legal obligations, limiting the exercise of human rights to preserve national security.<sup>40</sup> However, a national security justification based primarily on demographic concerns necessarily contravenes principles of non-discrimination – a non-derogable obligation in international human rights law.<sup>41</sup> Moreover, international humanitarian law requires that any policies directed at areas under military occupation be enacted for purposes of terminating such occupation rather than prolonging it.<sup>42</sup> Thus, Israel's demographic justification for its “freeze” is contrary to international law.

## 2. The Security Justification: Saving the Lives of Israelis

On March 31, 2002, a suicide bomber attacked a restaurant in Haifa, resulting in fifteen deaths.<sup>43</sup> It was later discovered that the suicide bomber had been granted an Israeli residence permit because his mother was married to an Israeli national.<sup>44</sup>

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39. Quigley, *Right of Return*, *supra* note 35, at 200 n.163 (quoting Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 613 (1978)) (“[I]t can fairly be stated that the return of potentially some one and one-half million Palestinians of doubtful allegiance to a state whose population itself numbers only somewhat more than three million is as valid a threat to that state's ‘general welfare’ as there is likely to exist.”).

40. *See id.* (citing as an example, Article 29 of the Universal Declaration which provides a State with authority to limit the applications of certain human rights provisions to meet the needs of national welfare).

41. *See* text accompanying *infra* notes 168–71.

42. *See* text accompanying *infra* notes 54–55.

43. *See* Beaumont, *supra* note 25.

44. *See* Maharaj, *supra* note 25; Beaumont, *supra* note 25. Non-citizens can legally enter and/or reside in Israel under a visa or residence permit, issued by the Minister of Interior under the Entry into Israel Law. Entry into Israel Law, § 1(b), 5712-1952, 6 L.S.I. 159 (1951-52) (“The residence in Israel of a person other than an Israel citizen and other than the holder of an *oleh* visa or *oleh* certificate shall be by residence permit under [the Entry into Israel Law].”). However, in issuing visas and residence permits under the Entry into Israel Law, the Minister of the Interior is granted wide discretion to establish:

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This incident prompted the Interior Ministry to stop considering Palestinian requests for residence permits,<sup>45</sup> thus preventing the infiltration of prospective suicide bombers into Israel.<sup>46</sup>

In a larger context, Israel has often invoked national security as a justification for its “legally dubious policies.”<sup>47</sup> It is beyond dispute that Israel has a legitimate concern for the security of its inhabitants as well as its very existence as a state.<sup>48</sup> However, it is equally clear that any restrictive practices taken against the Palestinian inhabitants of the West Bank and Gaza must conform to the mandates of international humanitarian law, namely the Hague Regulations and the Geneva Conventions, which require any such measures be necessary and proportional to the provoking actions.<sup>49</sup> Moreover, “interference with legally protected rights imposes a heavy burden upon an occupying power to connect its use of force and other suppressive policies with the requirements of occupation *per se*.”<sup>50</sup>

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(1) categories of persons who are disqualified from receiving visas or residence permits...;

(2) conditions to be met before a visa is granted, or before a residence permit is granted, extended or substituted...;

[...]

(4) fees for granting different categories of visas and permits...;

[...]

*Id.* §§ 14(1)-(2) & (4). The discretion accorded the Minister of the Interior thus increases the potential for the enactment of discriminatory entry policies. *See, e.g.*, Beaumont, *supra* note 25 (reporting that after the suicide bombing in Haifa the Interior Ministry increased “sixfold” the application fee for residents of the West Bank and Gaza seeking residency and citizenship for ‘family reunification,’ from \$100 to \$600, an equivalent of six weeks salary for a mid-level Palestinian civil servant.).

45. *See* Maharaj, *supra* note 25 (“The Interior Ministry said it decided to stop considering residency requests for Arabs after a suicide bomber attack March 31 in a restaurant in the northern port city of Haifa, killing 15 people and injuring 44 others.”).

46. *Id.*

47. Richard A. Falk and Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 125, 138–39 (Emma Playfair ed., 1992) [hereinafter Falk & Weston].

48. *Id.* at 137–38.

49. *Id.* at 137.

50. *Id.* In this context, it is stated by Falk and Weston that:

However, the increasingly repressive policies directed at the Occupied Territories have often been associated with Israel's annexationist designs in the West Bank and Gaza rather than with protecting the security of Israelis and Palestinians.<sup>51</sup> In addition, the institutionalized nature of Israel's restrictive practices in the Occupied Territories coupled with the unprecedented length in which such measures have been in place "virtually invalidate any Israeli claim to use force for any reason other than the discriminating and proportionate requirement of direct defence against attack."<sup>52</sup> Thus, the "freeze", as a blanket measure directed against the millions of Palestinians in the Occupied Territories without addressing the specific problem of "direct defence against attack," cannot be shielded by a claim of military necessity.<sup>53</sup>

Even if the "freeze" of all family unification requests is necessary and proportional to the security threat posed by the Palestinian population, an additional requirement must also be met before Israel's practices are to pass muster. The doctrine of "justness or fairness" requires that Israel's actions necessitated by its role as a belligerent occupier must not be "an expression of unreasonable or illegitimate purpose."<sup>54</sup> In essence, the re-

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The whole point of the framework of belligerent occupation is to remove this status from the more wide-ranging tolerance of force associated with belligerent operations in general – and the more this is true the more the occupation is prolonged. Whatever security concerns Israel may raise in defence of its policies and practices, they must bend to this fundamental precept.

*Id.* at 139.

51. Some examples of restrictive Israeli practices directed towards the Palestinians are:

[E]xtra-judicial demolition and sealing of suspect houses; indiscriminate administrative detention of individuals without charge or trial for renewable periods of six months; intensive interrogations by prison personnel coupled with serious beatings and other forms of maltreatment and humiliation; the prevention of reunification of families; the confiscation of land; the destruction of crops ... and the diversion of scarce water resources.

*Id.*

52. Falk & Weston, *supra* note 42, at 139.

53. *Id.* For a factual basis of the Citizenship and Entry into Israel Law, codifying the "freeze," see *infra* p. 1389.

54. *Id.* at 140. This requirement may be predicated on "the modern-day version of the just war doctrine or in some general principal of estoppel recog-

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quirement of “justness or fairness” may prevent a State from “bootstrapping the defence of military necessity to exonerate acts meant to advance improper or illegal objectives.”<sup>55</sup>

Providing evidence of one suicide bombing resulting in fifteen fatalities is insufficient to justify a sweeping measure placed upon thousands of Palestinians who may not be affiliated with any criminal acts against Israel. Indeed, such violent acts may be an invariable response to the suppressive measures implemented by the Israeli Government for the purpose of combating such acts. Therefore, the security justification advanced by the Israeli Government may not pass muster as “Israel is estopped from pleading a defence in respect of acts that, for the most part, its own illegality has provoked, and for which it has ultimately itself to blame.”<sup>56</sup>

### 3. The Economic Justification: Preventing Further Public Expenditures

Palestinian families successfully entering and residing in Israel are entitled to certain financial and social benefits.<sup>57</sup> Thus, it is claimed that the growth in payments will present a strain on Israel’s economy.<sup>58</sup> However, the validity of such a justification is limited since any payments made to Israeli citizens or residents are largely discretionary.<sup>59</sup> In addition, the negative

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nized by civilized nations that insists upon ‘clean hands’ in the assertion of justificatory claims.” *Id.*

55. *Id.*

56. *Id.* at 142.

57. See Hisham Jabr, *Financial Administration of the Israeli-Occupied West Bank*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, *supra* note 47, at 377, 395 (enumerating examples of social benefits paid to Israeli residents such as “payments for widowhood, dependent children, general disability, and unemployment....”).

58. See Shapiro, *supra* note 25.

59. See, e.g., KRETZMER, *supra* note 5, at 117 (“Unless bound by statute in allocation of benefits, the ministries enjoy a wide degree of discretion in the detailed allocation of funds approved in the budget. Room is thereby created for budgeting policies which discriminate between different sectors of the population.”). In terms of local government funding, Kretzmer cites the findings of research conducted by al-Haj and Rosenfeld which “found that in recent years the average ratio of ordinary central government contributions to local government budgets in the Jewish and Arab sectors was 3:1. The ratio in development grants was 5:1.” *Id.* at 118 (citing M. Al-Haj and H. Rosenfeld, *Arab Local Government in Israel* (Tel Aviv: International Center



economic impact allegedly created by an increased immigration of Palestinians to Israel is potentially absorbed by Israel's lopsided collection and expenditure policy.<sup>60</sup> While the source of funding for such benefits is derived equally from Palestinian as well as Israeli workers only the latter are entitled to receive any benefits.<sup>61</sup> Moreover, the Jewish settlements located in the Occupied Territories are also accorded preferential financial benefits in relation to the rest of the Occupied Territories.<sup>62</sup> Therefore, the claim that Israel's economy will suffer from a growing Palestinian population is subject to many variables, the majority of which weigh in favor of Israel.

*B. The Citizenship and Entry into Israel Law*

Continued concerns by Israelis over their physical, demographic, and economic security lead to the enactment of the

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for Peace in the Middle East 1988)). Once the focus is directed solely at Israeli residents the services rendered between the Jewish and Arab sectors are presumably unequal. The Arab community constitutes 12 percent of the Israeli population but only receives 2.3 percent of the funds distributed to local governments from the central government, controlled by the Ministry of Interior. *Id.* at 118.

60. See Jabr, *supra* note 45, at 394 (inferring that the inability of the Minister of Finance to provide statistics on the annual revenues collected from the Israeli occupation is actually due to the widely-held belief that "not only is the occupation financed by the inhabitants, but that the fiscal burden of occupation of the West Bank is negative, and that Israel has in fact benefited from the occupation").

61. See Jabr, *supra* note 45, at 395-96. It is estimated that, since 1970, approximately 20 percent of the income of Palestinian workers from the Occupied Territories and employed in Israel, is collected by the Government Employment Service to pay for social benefits, to which the Palestinian workers are not entitled. *Id.* at 395.

62. Jabr, *supra* note 45, at 397 ("In 1981 alone, when 30,000 settlers lived in Judea and Samaria and Gaza, more money was invested on their behalf than had been invested for all the Arabs in the previous decade and a half.") (quoting Haim Ramon, West Bank Data Project, *Press Release: Study on Population and Public Funding on the West Bank* 10 (1985)). While the current analysis of governmental expenditures focuses on Israel proper (Israeli territory excluding the Occupied areas), reviewing evidence of lopsided governmental funding in the Occupied Territories between the Jewish settlements and the local Arab populations is instructive, as providing further indication of Israel's treatment of the Jewish and Arab populations.

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Citizenship and Entry into Israel Law.<sup>63</sup> The Citizenship and Entry into Israel Law was passed by a vote of 53 in favor and 25 against, with one abstention.<sup>64</sup> The law states in pertinent part:

During the period in which this law shall remain in force, despite what is said in any legal provision, including article 7 of the Citizenship [Nationality] Law, the Minister of the Interior shall not grant the inhabitant of an area citizenship on the basis of the Citizenship [Nationality] Law, and shall not give him a license to reside in Israel on the basis of the Entry into Israel Law, and the Area Commander shall not grant a said inhabitant, a permit to stay in Israel, on the basis with the security legislation in the area.<sup>65</sup>

The Citizenship and Entry into Israel Law applies to “inhabitants” of certain areas, namely “Judea, Samaria, and the Gaza Strip.”<sup>66</sup> An “inhabitant of an area” is defined as “anyone residing in the area ... *excluding* the inhabitant of an Israeli settle-

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63. See generally James Bennet, *New Law Raises Obstacles to Israeli-Palestinian Marriages*, N.Y. TIMES, Aug. 1, 2003, at A3, available at LEXIS, News Library, Nyt File; Nina Gilbert, *Palestinians Who Wed Israelis Will No Longer Receive Citizenship*, JERUSALEM POST, Aug. 1, 2003, at 4A, available at LEXIS, News Library, Jpost File; Peter Hirschberg, *Israeli Law on Residency Criticised as Discriminatory*, IRISH TIMES, Aug. 15, 2003, at 10, available at LEXIS, News Library, Itimes File; Justin Huggler, *Israel Imposes 'Racist' Marriage Law; Palestinian-Israeli Couples Will Be Forced to Leave or Live Apart*, INDEPENDENT (London), Aug. 1, 2003, at 1, available at LEXIS, News Library, Indpnt File; Laura King, *New Law Aims to Keep Out Palestinian Spouses of Israelis; The Measure Passes the Knesset By More Than a 2-1 Ratio. Critics Denounce it as Racist*, L.A. TIMES, Aug. 1, 2003, at 3, available at LEXIS, News Library, Lat File; Chris McGreal, *Israeli Law Will Split Families, Say Critics*, GUARDIAN (London), at 15, available at LEXIS, News Library, Guardn File; Joshua Mitnick, *Israeli Law Targets 'Mixed' Families*, WASH. TIMES, Aug. 18, 2003, available at <http://www.washtimes.com/world/20030818-122330-9856r.htm>.

64. See Bennet, *supra* note 63.

65. Citizenship and Entry into Israel Law § 2, 5763-2003 (emphasis added).

66. *Id.* § 1. The Judea and Samaria region is defined by the Israeli government as “identical in meaning for all purposes ... to the term ‘the West Bank Region.’” Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 47, at 25, 41. The Israeli government’s adherence to the historical titles of Samaria and Judea stems from its “rejection of a name that was seen as implying Jordanian sovereignty over the area.” *Id.*

ment....”<sup>67</sup> The ban on obtaining citizenship and residence permits is subject to several exceptions. Permission to reside in Israel may be granted by the Minister of the Interior or Area Commander “for the purpose of work, or in order to receive medical treatment, [or] for some other temporary purpose” with the length of stay limited to six months.<sup>68</sup> In order to facilitate family unification, residency may also be granted to an “inhabitant of an area” with a child, aged up to twelve, in Israel.<sup>69</sup> This reservation, however, does not apply to a parent who is illegally residing in Israel.<sup>70</sup> The other exception to the ban is the discretionary conferral of citizenship or a residence permit by the Minister of Interior to an “inhabitant of an area” who identifies with the State of Israel and its goals, and has (or a member of his family has) “performed a significant act to promote the security, economy, or some other important matter of the State,” or if the grant is otherwise in the “special interest” of Israel.<sup>71</sup> It should also be emphasized that the law is only valid for one year, and must be reexamined by the Knesset at the end of each year in which case the law may be extended for additional one-year periods.<sup>72</sup> In essence, the Citizenship and Entry into Israel Law prohibits the inhabitants of certain geographical regions, namely the West Bank and Gaza, from obtaining citizenship or a permit to reside in Israel. The Law does not however, facially discriminate on the basis of race, religion or sex.<sup>73</sup>

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67. Citizenship and Entry into Israel Law §1, 5763-2003 (emphasis added).

68. *Id.* § 3(1).

69. *Id.*

70. This exception would most likely exclude the majority of applicants seeking to take advantage of the family unification reservation, *id.* § 3(1), since anyone affected by the Citizenship and Entry into Israel Law is presumably without Israeli citizenship or a valid residence permit and the law suspends the application for such methods of entry for all other persons, thus rendering them illegal residents of Israel. In other words, anyone staying legally in Israel would not be affected by Citizenship and Entry into Israel Law.

71. *Id.* §3(2).

72. *See id.* § 5.

73. The Law’s racial motivations and effects will be discussed in further detail below. *See infra* Part V.A.2.

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The law also makes an express reference to section 7 of the Nationality Law as a now prohibited basis for obtaining citizenship in Israel.<sup>74</sup> Section 7 of the Nationality Law provides:

The spouse of a person who is an Israel national or who has applied for Israel nationality and meets or is exempt from the requirements of section 5(a), [acquiring citizenship by naturalization] may obtain Israel nationality even if she or he is a minor or does not meet the requirements of section 5(a).<sup>75</sup>

Prior to the enactment of the Citizenship and Entry into Israel Law, a non-Israeli marrying an Israeli citizen could obtain citizenship in Israel by virtue of a spouse being Israeli.<sup>76</sup> Furthermore, the non-Israeli spouse seeking Israeli citizenship would not be required to meet the conditions otherwise required for those seeking Israeli citizenship by naturalization.<sup>77</sup> This liberalized considerably the scope of persons who were able, legally and practically, to acquire citizenship in Israel.<sup>78</sup> Thus, the passage of the Citizenship and Entry into Israel Law struck a fatal blow to the hopes of Palestinians seeking unification with their spouses in Israel.<sup>79</sup>

Proponents of the new law, while conceding the “tragic reality” associated with having to pass such a harsh measure, nevertheless justified its enactment as “a contingency forced by the

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74. See Citizenship and Entry into Israel Law §2, 5763-2003.

75. Nationality Law § 7, 5712-1952, 6 L.S.I., at 52.

76. A differentiation is made between a Jewish and non-Jewish citizen for purposes of obtaining Israeli citizenship vis-à-vis, section 7 of the Nationality Law. In particular, the spouse of a Jewish citizen is “vested” with the rights of an *oleh* under the 1970 Amendment to the Law of Return and thus able to acquire citizenship automatically. See Law of Return (Amendment No. 2) § 1, 5730-1970, 24 L.S.I., at 28 (amending Law of Return § 4, 5710-1950, 1 L.S.I. 114 (1951-52)). The spouse of a non-Jewish citizen, however, “must obtain a resident’s visa to live in the country and may acquire citizenship only by way of naturalization.” See KRETZMER, *supra* note 5, at 47 n.17.

77. This applies primarily to persons marrying a non-Jewish citizen since a spouse of a Jewish citizen obtains the rights of an *oleh* and is conferred citizenship automatically. See Law of Return (Amendment No. 2) § 4(A), 5730-1970, 24 L.S.I. 28 (1969-70). See also Jules L. Coleman & Sarah K. Harding, *Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders*, in JUSTICE IN IMMIGRATION 18, 33 (Warren F. Schwartz ed., 1995).

78. Nationality Law § 7, 5712-1952, 6 L.S.I., at 52.

79. See Citizenship and Entry into Israel Law § 2, 5763-2003.

brutality of the Israeli-Palestinian conflict.”<sup>80</sup> The justifications advanced in support of the Israeli government’s freeze on Palestinian family unification requests were relied upon in defense of the newly enacted law. Thus, the Government again raised its security<sup>81</sup>-demographic<sup>82</sup> shield to ward off attacks upon the legality of the Citizenship and Entry into Israel Law. And, to further enhance its credibility the Government cited to the statistic that approximately 20 suicide bombing attacks killing 49 Israelis were attributed to “Palestinians who had entered Israel through family unification.”<sup>83</sup>

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80. King, *supra* note 63 (reporting the view of Yuri Stern, the head of the “parliamentary panel” that advanced the Citizenship law toward its eventual passage). In attempting to downplay the harsh nature of the new Citizenship law, Yuri Stern stated that “[t]his is merely a law that for one year restricts the right of Palestinians to settle in our midst. We are at war. I hope the war will end during this year, but I am not optimistic.” *Id.*

81. Gideon Starr, a representative of the dominant Likud party and supporter of the new Citizenship Law, cast the law as a “necessary bulwark against infiltration by terrorists.” Bennet, *supra* note 63. Another supporter of the Citizenship Law, Gideon Ezra, an Israeli cabinet minister, stated that “[t]his law comes to address a security issue. Since September 2000 we have seen a significant connection, in terror attacks, between Arabs from the West Bank and Gaza and Israeli Arabs.” Huggler, *supra* note 63. The Interior Minister, Avraham Poraz sponsored the legislation despite his uneasiness associated with the sweeping nature of the law. Mitnick, *supra* note 63. Speaking through an aide, Mr. Poraz acknowledged that the “law doesn’t distinguish between those really involved in terrorism and those not involved. But because it’s impossible to filter there needs to [be] something sweeping.” *Id.*

82. Indeed, many of the arguments made in support of the Government’s May 2002 decision to freeze all family unification requests have arisen once again as Yuval Steinitz, a Likud party member, reaffirmed the Israeli concern that the Palestinians are deliberately attempting to “change the demographic balance in Israel in order to destroy [the Jewish majority in Israel].” Bennet, *supra* note 63; Mitnick, *supra* note 63 (“Some analysts say the law’s significance goes beyond national security. Though designed as a bulwark in Israel’s war against Palestinian militants, the [Citizenship and Entry into Israel Law] will also serve to limit the growth of Israel’s Arab minority, which makes up just under 20 percent of the population.”). According to MK Azmi Bishara, the law “has no connection to security” and “is tied to demography [in which it attempts to] limit the number of Arabs in Israel.” Hirschberg, *supra* note 63.

83. Bennet, *supra* note 63; Hirschberg, *supra* note 63. The Jerusalem Post reports that “19 cases of Palestinians, especially in east Jerusalem, who used blue identity cards obtained through family reunification to carry out terrorist attacks [have] claimed the lives of 87 people.” Gilbert, *supra* note 63.

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Critics have referred to the Citizenship and Entry into Israel Law as “a racist measure that threatened to divide thousands of families or force them out of Israel.”<sup>84</sup> Furthermore, opponents claim that the bill contravenes domestic<sup>85</sup> and international law.<sup>86</sup> Indeed, criticism of Israel’s citizenship policy as violating international law has come from the highest levels. The United Nations Committee on the Elimination of Racial Discrimination, examining the Citizenship and Entry into Israel Law, adopted a decision which called for Israel to “revoke [the law] and reconsider its policy with a view of facilitating family unification on a non-discriminatory basis.”<sup>87</sup> In particular, the

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84. Bennet, *supra* note 63; Gilbert, *supra* note 63 (statement of MK Muhammad Barakei) (“[The Israeli people who have] suffered so much from racism should be ashamed to bring such a bill.”); Huggler, *supra* note 63 (statement of Hanny Megally of Human Rights Watch) (“This law blatantly discriminates against Israelis of Palestinian origin and their Palestinian spouses.”).

85. See Gilbert, *supra* note 63 (statement of MK Ahmed Tibi) (describing the law as “inhumane” as it “bans marriage between Palestinians and Israelis,” contravening the Basic Law: Human Dignity and Liberty); Hirschberg, *supra*, note 63 (describing the argument of human rights groups that the new citizenship law violates fundamental Israeli laws and principles such as the Basic Law: Human Dignity and Freedom and certain principles enunciated in Israel’s Declaration of Independence). Adalah, an independent human rights organization in Israel, testified before the Knesset Committee prior to the passage of the Citizenship and Entry into Israel Law, challenging the constitutionality of the proposed bill. Press Release, Adalah: The Legal Center for Arab Minority Rights in Israel, Adalah Testifies Before Knesset Committee: Proposed Government Bill Imposing Severe Limitations on Family Unification is Unconstitutional (July 16, 2003), available at [http://www.adalah.org/eng/pressreleases/pr.php?file=03\\_07\\_16](http://www.adalah.org/eng/pressreleases/pr.php?file=03_07_16). Adalah’s challenge against the proposed bill was premised with several points, including the disproportionate nature of the law’s potential effects, the lack of a clear factual basis for imposing such a measure, and the illicit (demographic) motives behind drafting the law. *Id.*

86. See Huggler, *supra* note 63 (statement by Amnesty International) (“A law permitting such blatant racial discrimination, on grounds of ethnicity or nationality, would clearly violate international human rights law and treaties which Israel has ratified and pledged to uphold.”).

87. Press Release, U.N. CERD, 63rd Sess., Committee on the Elimination of Racial Discrimination Concludes Sixty-Third Session: Issues Observations on Reports of 11 Countries (Aug. 22, 2003), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase>. See also Press Release, U.N. CERD, 63rd Sess., Committee on Elimination of Racial Discrimination Considers Periodic Reports From Latvia: Committee Calls on Israel to Revoke Nationality and Entry into Israel Law; Appeals to States Parties to Adopt Amendments to

Committee stated in its decision that the Citizenship and Entry into Israel Law “raises serious issues under the International Convention on the Elimination of all Forms of Racial Discrimination” and the restrictive policy implemented by Israel in May 2002 has already “adversely affected many families and marriages.”<sup>88</sup> Therefore, while Israel’s restrictive citizenship and immigration policies have passed muster with the Knesset, its foundation remains unstable.<sup>89</sup>

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Article 8 (Aug. 14, 2003), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase>.

88. U.N. CERD, 63rd Sess., Decision 2 (63), U.N. Doc. CERD/C/63/Misc.11/Rev.1 (Aug. 14, 2003), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase>. For information regarding Israel’s status as a state party to the Convention on the Elimination of All Forms of Racial Discrimination, see *infra* text accompanying note 144.

89. Several court challenges against the Citizenship and Entry into Israel Law as well as the government’s May 2002 “freeze” on family unification applications are currently pending in the High Court of Justice. See, e.g., Ina Friedman, *Three Groups Urge Supreme Court to Strike Down Citizenship Law*, JERUSALEM REP., Sept. 8, 2003, at 6, available at LEXIS, News Library, Jport File; Izenberg, *supra* note 26; Moshe Reinfeld, *ACRI Petitions Court on Palestinian Citizenship Amendment*, HAARETZ, Sept. 8, 2003, available at <http://www.haaretz.com>. See also Press Release, ACRI: The Association for Civil Rights in Israel, ACRI Petitioned Supreme Court Against Amendment to Law of Citizenship (Nov. 10, 2003) (emphasizing in its petition to the Court that the new citizenship law “results in a sweeping denial of new requests by Israeli citizens for legal status for the Palestinian spouse, and dictates a forced separation on numerous families.”), available at <http://acri.org.il/english-acri/engine/story.asp?id=152>; Press Release, Adalah: The Legal Center for Arab Minority Rights in Israel, Supreme Court to Hear Petitions Challenging New Law Banning Family Unification (Nov. 6, 2003) (arguing in its petition filed on August 4, 2003 that the Citizenship and Entry into Israel Law “violates the constitutionally protected rights of equality, personal liberty to maintain a family life, privacy, and due process”), available at [http://www.adalah.org/eng/pressreleases/pr.php?file=03\\_11\\_06](http://www.adalah.org/eng/pressreleases/pr.php?file=03_11_06); Press Release, Adalah: The Legal Center for Arab Minority Rights in Israel, Supreme Court to Hear Family Unification Cases Tomorrow (July 16, 2003) (petitioning against the government’s May 2002 decision to freeze naturalization requests which “severely harms Palestinian citizens of Israel, as overwhelmingly it is they who marry Palestinians from the Occupied Territories”), available at [http://www.adalah.org/eng/pressreleases/pr.php?file=03\\_07\\_16-2](http://www.adalah.org/eng/pressreleases/pr.php?file=03_07_16-2).

The High Court of Justice, recognizing the potential illegality associated with the Citizenship and Entry into Israel Law, has issued an interim order mandating the Israeli government to set forth its reasons for amending the citizenship policy and preventing the unification of families by prohibiting a Palestinian spouse of an Israeli citizen from obtaining residency or citizenship status in Israel. See Yuval Yoaz, *Court Orders States to Explain Amend-*

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#### IV. THE INTERPLAY BETWEEN DOMESTIC AND INTERNATIONAL REGULATION OF CITIZENSHIP

Before embarking on a substantive legal discussion of the Citizenship and Entry into Israel Law it is necessary to lay the proper foundation for such an analysis. The premise of this Note relies upon the proposition that a State's ability to confer citizenship on certain individuals is not unfettered, but must conform to certain international legal norms.<sup>90</sup> This section will examine the developments which have contributed to the increasing limitations international law has placed upon domestic citizenship matters. It will be argued that international law, at its present stage, requires that citizenship policies conform to certain international legal norms, particularly international human rights law.

##### A. *The Traditional View: Exclusive State Jurisdiction in Matters Relating to Citizenship*

At the end of the Nineteenth Century, authorities and commentators of international law recognized the State as the sole arbiter of citizenship.<sup>91</sup> Most notably, Oppenheim declared that

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*ment to Citizenship Law*, HAARETZ, Nov. 9, 2003, available at <http://www.haaretz.com>. Petitions were lodged against the Israeli government in the High Court of Justice by Adalah – The Legal Center for Arab Minority Rights, ACRI – The Association for Civil Rights in Israel, and Knesset members from the Meretz and various Arab parties. *Id.* Additionally, the Court issued an injunction preventing the deportation of three Palestinian spouses of Israeli citizens who have been illegally residing in Israel since the passage of the new citizenship law. *Id.* Due to the importance of the issue, the Court will convene “a special session of ‘as broad a panel as possible’ [to] hear the petition within a month [from its rulings of November 9, 2003].” *Id.*

90. This is not advanced as a bright-line rule but as an evolving norm within the international community.

91. See RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 26–28 (2d ed. 1994) (stating that international law commentators from the end of the nineteenth century to the early twentieth century adopted the position that “the determination of nationality is held to be one of the discretionary powers of the sovereign state.”); WEIS, *STATELESSNESS*, *supra* note 11, at 65 (“Nationality is one of the subjects which are considered as falling within the domestic jurisdiction, within the legislative competence, of the individual State. That rule is recognized by both customary and conventional international law.”). Justice Gray accurately summarized the view of the international legal community at this time:



“[i]t is not for international law but for municipal law to determine who is and who is not to be considered a subject.”<sup>92</sup> This rule was based on a logical<sup>93</sup> and historical foundation.<sup>94</sup>

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[I]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 63–64, 70–75 (2d ed. 1988) (quoting *Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

92. YAFFA ZILBERSHATS, *THE HUMAN RIGHT TO CITIZENSHIP* 8 (2002) (quoting LASSA F. OPPENHEIM, *INTERNATIONAL LAW – A TREATISE* 348 (1905)). *Cf.* OPPENHEIM’S *INTERNATIONAL LAW* 852 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“In principle, and *subject to any particular international obligation which might apply*, it is not for international law but for the internal law of each State to determine who is, and who is not to be considered its national.”) (emphasis added), *quoted in* ZILBERSHATS, *supra*, at 8.

93. The logical premise of reserving the right to determine the identity of its citizens to the State is expounded upon by Professor Weis:

There cannot be any doubt that [the right of a State to determine who are its nationals] is a concomitant of State sovereignty. Sovereignty, in its modern conception, is described as the supreme and independent authority of States over all persons and things in their territory; independence and territorial and personal supremacy are considered as the elements of sovereignty. Personal supremacy is the power exercised by a State over its nationals wherever they may be. The right to delimit this group of individuals termed nationals, and to determine their status in the sense of their rights and duties, is indeed – unless personal supremacy were to become co-extensive with territorial supremacy – a prerequisite of personal supremacy and therefore, of sovereignty.

WEIS, *STATELESSNESS*, *supra* note 11, at 65. *See also* PLENDER, *supra* note 91, at 63 (deconstructing the Grotian theory of the principle of sovereignty in relation to the just war doctrine, in which “[o]ne of the two legitimate causes for which a sovereign might...engage in war was the defence of the sovereign’s own subjects.” Thus, “[i]t followed *a fortiori* that a sovereign might exclude foreigners from his kingdom in defence of the personal or proprietary rights of his people.”).

94. *See* PLENDER, *supra* note 91, at 62–63. *See also* DONNER, *supra* note 91, at 6–8 (discussing the doctrine of independence and nonintervention in a state’s affairs); WEIS, *STATELESSNESS*, *supra* note 11, at 65 (“The right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty. This is recognized by theory and practice.”); Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L. L. 1141, 1151 (1998) (“[I]t has long been axiomatic that under international law ...

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Granting States sole discretion in matters of nationality had several effects, politically and legally.<sup>95</sup> In the political context, a State would be shielded from “intervention” by international organizations such as the United Nations for its actions relating to nationality.<sup>96</sup> Similarly, in the legal context, the State would not be subject to the scrutiny of international tribunals and would essentially have an affirmative defense for actions which may offend other States.<sup>97</sup> Hence, under the traditional view, a State had, for better or worse,<sup>98</sup> unfettered authority in the governance of matters concerning nationality.

1. The Traditional View as Evidenced in Treaties and Conventions

The notion that the sovereign state has sole discretion in determining the identity of its citizens is also evidenced in several primary sources of law. For example, Article 1 of the 1930 Geneva Convention on Certain Questions relating to the Conflict of Nationality Laws (hereafter “1930 Hague Convention”) states that “[i]t is for each State to determine under its own law who are its nationals.”<sup>99</sup> In addition, Article 2 provides that “[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.”<sup>100</sup> The Protocol Relating to Military Obligations in Certain Cases of Double Nationality which accompanied the 1930 Convention also emphasizes the states’ sovereign power to determine the scope and extent of its citizenship policy.<sup>101</sup>

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questions of nationality fall within the domestic jurisdiction of individual states.”).

95. GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 52 (1978).

96. *Id.*

97. *Id.*

98. Some of the negative effects produced by the traditional conception of regulating nationality, aside from the inevitably discriminatory citizenship policies which were implemented by States, were “the anomalies of dual and multiple nationality and statelessness.” *Id.* at 6.

99. Apr. 12, 1930, 179 L.N.T.S. 89, 99 (1937).

100. *Id.* at 101.

101. See Apr. 12, 1930, art. 2, 3, 178 L.N.T.S. 227, 231 (1937). However, the Protocol Relating to a Certain Case of Statelessness, Apr. 12, 1930, 179 L.N.T.S. 115 (1937), signed together with the 1930 Hague Convention, does not contain any assertion regarding a state’s discretion in citizenship matters.

## 2. The Traditional View as Evidenced in Judicial Authorities

The international legal community's recognition of a state's discretion in devising its own citizenship policy was not only evidenced in legislation. Several decisions handed down by the Permanent Court of International Justice (hereafter "PCIJ") also affirmed the orthodox approach of international law. In its advisory opinion concerning the Nationality Decrees in Tunis and Morocco,<sup>102</sup> the PCIJ stated, albeit with qualification, its position with respect to a state's freedom to regulate matters of nationality:

The question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.<sup>103</sup>

In another advisory opinion issued the same year, the PCIJ reaffirmed its previous position, concluding that "generally speaking ... a sovereign state has the right to decide what persons shall be regarded as its nationals...."<sup>104</sup> Hence, it is readily

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*See also* Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 1, 360 U.N.T.S. 117, 136 ("[T]he term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.") (emphasis added).

102. Advisory Opinion No. 4, Nationality Decrees in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24. The question to be answered in the Nationality Decrees case was whether "the nationality Decrees issued in Tunis and Morocco [enacted by France] and their application to British nationals" was a matter to be regulated by international law or rather, within the exclusive domestic jurisdiction of France. WEIS, STATELESSNESS, *supra* note 11, at 71. While the PCIJ held that the issue in the Tunis and Morocco Nationality Decrees case was not solely a matter of domestic jurisdiction, its holding was based exclusively on the facts of the case and thus, was not a general pronouncement on the state of international law. *See* WEIS, STATELESSNESS, *supra* note 11, at 71-73. For further analysis on the Nationality Decrees in Tunis and Morocco case see text accompanying *infra* notes 119-21.

103. It should be noted that the quoted statement "is concerned with the competence of the Council of the League of Nations and not with relations of nationality in general international law." Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L. L. 284, 286 (1963).

104. Advisory Opinion No. 7, Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 16. *See also* Advisory Opinion No. 10, Exchange of Greek and Turkish Populations, 1923 P.C.I.J. (ser. B) No. 10, at 19 ("[T]he national

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apparent that the maxim of state sovereignty over matters of nationality had received wide recognition among the international legal community during the late-nineteenth, early twentieth century.

Domestic case law did not deviate much from the view of the international tribunals. A leading British case that dealt with nationality in the context of international law was *Stoeck v. Public Trustee*.<sup>105</sup> In *Stoeck*, the plaintiff sought a declaratory judgment that he was not a German national within the meaning of Article 297 of the Treaty of Versailles and Section 1 of the Treaty of Peace Order, thus allowing the plaintiff to dispose of certain property without incurring certain additional charges.<sup>106</sup> In holding that the plaintiff was not a German national under German or English law, Lord Russell analyzed the underpinnings of the traditional view regarding a state's power to regulate matters of nationality:

Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law....<sup>107</sup>

Lord Russell's view was shared by other jurisdictions. In *United State v. Wong Kim Ark*, the United States Supreme

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status of a person belonging to a State can only be based on the law of that State.”).

105. [1921] 2 Ch. 67. The *Stoeck* case is also notable for its recognition of the phenomenon of the possibility of “statelessness.” *Id.* at 79–82. *See also* *Musgrove v. Chun Teeong Toy*, 1891 App. Cas. 272, 282–83 (appeal taken from Vict.) (holding that an alien had no “legal right, enforceable by action, to enter British territory,” in part because rendering such a decision would involve “delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of [Britain] to her self-governing colonies.”).

106. *Stoeck*, [1921] 2 Ch., at 70.

107. *Id.* at 82.

Court announced a similar rule, recognizing “the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what classes of persons shall be entitled to its citizenship....”<sup>108</sup>

*B. The Diminishing Freedom of the State to Govern Matters Concerning Nationality*

The armor of domestic sovereignty protecting the State from the limitations of international law began to erode during the early-to-mid 1900's. This section will analyze the gradual establishment of international law as a recognized restriction upon the State's discretion in determining the identity of its citizens, arriving at the conclusion that a State must now adhere to certain international legal norms, especially those associated with international human rights, when devising its citizenship policies.

1. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

As the “first comprehensive convention to be devoted entirely to issues of citizenship”<sup>109</sup> the events preceding the codification of the 1930 Hague Convention can be seen as “highly indicative of the attitude of States ... to the question of the relationship between municipal and international law in the field of nationality law.”<sup>110</sup> The Preparatory Committee for the Hague Conference of 1930 for the Codification of International Law requested several State governments to provide their view of whether any restrictions existed on a state's sovereign authority to legislate

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108. 169 U.S. 649, 668 (1898). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 705–08 (1893); Chae Chan Ping v. United States (The Chinese Exclusion Act cases), 130 U.S. 581, 609 (1889); Inglis v. Sailors' Snug Harbor, 28 U.S. 99, 162 (3 Pet. 99) (1830) (“Each government [has] a right to decide for itself who should be admitted or deemed citizens.”). It should be noted that these cases have not been overruled by the Supreme Court and is still considered good law. *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–7 (1998) (explaining that the “plenary power doctrine” espoused by the Court in the Chinese Exclusion Act cases “is said to make racial discrimination in the immigration context lawful per se.”).

109. ZILBERSHATS, *supra* note 92, at 12.

110. *See* WEIS STATELESSNESS, *supra* note 11, at 82.

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with respect to matters of nationality.<sup>111</sup> The government of the United Kingdom replied:

The mere fact ... that nationality falls in general within the domestic jurisdiction of a State does not exclude the possibility that the right of the State to use its discretion in legislating with regard to nationality may be restricted by duties which it owes to other States [citing the Nationality Decrees in Tunis and Morocco case]. [...] It is only in exceptional cases that this divergence between the right of States to legislate at its discretion with regard to the enjoyment or non-enjoyment of its nationality and the duty of other States to recognise such legislation would occur. The criterion is that the legislation must not infringe the *rights* of the State as apart from its *interests*.<sup>112</sup>

In response to the same question, the United States government answered:

While, as indicated, the Government of the United States has always recognised the fact that the acquisition or loss of the nationality of a particular State are matters which pertain primarily to domestic policy and are therefore to be determined by the domestic law of that State, it does not admit that a State is subject to no limitations in conferring its nationality on individuals. [...] [N]o State is free to extend the application of its laws of nationality in such a way as to reach out and claim the allegiance of whomsoever it pleases. The scope of municipal laws governing nationality must be considered as limited by consideration of the rights and obligations of individuals and of other States.<sup>113</sup>

The above statements as well as those of the majority of the other responding States represents the budding acceptance of

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111. *Id.* The following statements by the governments of the United Kingdom and the United States while not itself a source of international law constitutes “proof of the practice of individual States in matters of nationality which itself is a source for the *ascertainment* of international law. [In addition the statements also] contain important information as to existing international law in the field of nationality.” *Id.* at 28 (emphasis added).

112. *Id.* at 82 (quoting League of Nations, Hague Conference for the Codification of International Law, Bases of Discussion drawn up by the Preparatory Committee (1929), League of Nations Doc. C. 73, M. 38, at 118).

113. *Id.* at 83 (quoting League of Nations, Hague Conference for the Codification of International Law, Bases of Discussion drawn up by the Preparatory Committee (1929), League of Nations Doc. C. 73, M. 38, at 16, 145–46).

the principle “that [a State’s] right to determine nationality was not unlimited.”<sup>114</sup>

The 1930 Hague Convention itself also provides evidence of the diminishing authority of a State regarding questions of nationality. As stated above, Article 1 of the 1930 Hague Convention affirms the age-old principle that “[i]t is for a State to determine under its *own* law who are its nationals.”<sup>115</sup> However, in an important reservation immediately following this statement, the Convention also mandates that “[t]his law shall be recognised by other States *in so far as it is consistent with international conventions, international custom, and the principle of law generally recognised with regard to nationality.*”<sup>116</sup> Thus, taken as a whole, Article 1 explicitly provides for a limitation,

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114. Brownlie, *supra* note 103, at 298. See also WEIS, STATELESSNESS, *supra* note 11, at 83 (listing Austria, Czechoslovakia, Denmark, France, Germany, the Netherlands, Norway, Poland, and South Africa as States “recognis[ing] [explicitly] that the right to determine nationality was not unlimited.”). Article 2 of the Harvard Research Draft Convention on the Law of Nationality, 1929, prepared in anticipation of the International Conference on the Codification of International Law, provides:

Except as otherwise provided in this convention, each state may determine by its law who are its nationals, *subject to the provisions of any special treaty to which a state may be a party; but under international law the power of a state to confer its nationality is not unlimited.*

23 AM. J. INT'L. L. SPEC. SUP. 1, 13 (1929). The explanatory comments accompanying Article 2 delineate certain situations in which matters of nationality may be ripe for regulation by international law, i.e., when the nationality laws of one State conflicts with another state or when States voluntarily enter into treaties governing the conferral of nationality among the State parties. See *id.* at 24–25. In its most general statement regarding the relationship between international law and State law in the field of nationality law the explanatory comments on Article 2 of the Draft Convention provides:

It may be difficult to precise the limitations which exist in international law upon the power of a state to confer its nationality. *Yet it is obvious that some limitations do exist.* They are based upon the historical development of international law and upon the fact that different states may be interested in the allegiance of the same natural persons.

*Id.* at 26 (emphasis added).

115. Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, *supra* note 99, at 99 (emphasis added).

116. *Id.* (emphasis added).

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through international law, on a State's discretion in determining its nationals.<sup>117</sup>

It is evident from the work of the Preparatory Committee as well as the resulting 1930 Hague Convention that the international community no longer regarded the State as the sole arbiter in matters relating to nationality. Moreover, both the views of the various States elicited by the Preparatory Committee and the subsequent codification of such views in the 1930 Hague Convention constitute evidence of the prevailing relevance of international law in matters of nationality.

2. Opinions of the Permanent Court of International Justice and the International Court of Justice – Limiting a State's Ability to Devise Its Own Citizenship Policy

During the period in which the opinions of the PCIJ cited above were handed down<sup>118</sup> international law emphasized the traditional view of exclusive domestic jurisdiction over matters of nationality. Nonetheless, one must recognize that the PCIJ, in the same opinions, qualified the potential reach of the traditional rule. For example, in its advisory opinion concerning the Nationality Decrees issued in Tunis and Morocco, the PCIJ found that whether France had exclusive domestic jurisdiction over the conferral of French nationality upon residents of Tunis and Morocco was “essentially a *relative question*; depend[ing] upon the development of international relations.”<sup>119</sup> While the PCIJ found that questions of nationality were indeed within the sole jurisdiction of the State during the period in which the case was decided, it emphasized that “the right of a State to use its discretion [in matters of nationality was] restricted by obligations which it may have undertaken towards other States.”<sup>120</sup>

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117. Brownlie, *supra* note 103, at 299. It should be noted that the 1930 Hague Convention and its accompanying Protocols “make law only as between the contracting States” and do not make “general or universal, international law.” WEIS, STATELESSNESS, *supra* note 11, at 27. Nonetheless, the “indirect significance [of the 1930 Hague Convention] is considerable, as [it] may be taken to reflect the views of two-thirds, or at least of the majority, of the Governments represented at the [International Conference on the Codification of International Law].” *Id.*

118. *See supra* text accompanying notes 102–04.

119. 1923 P.C.I.J. (ser. B) No. 4, at 24 (emphasis added).

120. *Id.*



Therefore, it can be said that even though situations exist where a State, "in principle," retains sole jurisdiction to regulate certain matters, such discretion is invariably "limited by rules of international law."<sup>121</sup> In its advisory opinion on the Acquisition of Polish Nationality, the PCIJ reaffirmed its position regarding the ability of international law to limit a state's discretion in determining who shall be a national.<sup>122</sup>

One may notice two important aspects of the advisory opinions cited above. First, it is evident that during the period in which the cases were decided the international community still regarded the regulation of nationality as within the exclusive domain of the State. However, it should be no less apparent that the PCIJ, during the same period, also regarded international law, not as *de minimis* in its limiting effect, but as a viable check upon a State's discretion in the field of nationality law, in which the strength of any such limitation is governed by the evolution of international relations.<sup>123</sup>

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121. *Id.* There are two important corollaries regarding the holding and statements of the PCIJ in the Nationality Decrees in Tunis and Morocco case. First, as stated above, the PCIJ's holding is limited to the facts of the case which involved the scope of sovereignty exercised by a Protecting State in a Protectorate and the invocation of international agreements. WEIS, STATELESSNESS, *supra* note 11, at 73. Second, the resolution of the dispute reached after the issuance of the PCIJ opinion is indicative of an emerging limitation vis-à-vis international law on a domestic discretion in regulating matters of nationality. *Id.* at 75. An agreement was reached between Britain and France, providing the residents of Tunis and Morocco, who would have been subjected to France's "unilateral imposition" of French nationality, the right of an "option" to choose between British or French nationality. *Id.* at 74-75. This resolution signified an emerging limitation imposed by international law emerged on a State's discretion in the "compulsory conferral" of nationality. *See id.* at 75, 107.

122. 1923 P.C.I.J. (ser. B) No. 7, at 16 ("Though, generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the [relevant] Treaty obligations [of the disputing States].").

123. *See* 1923 P.C.I.J. (ser. B) No. 4, at 24. For an examination of the decisions of other international courts regarding the question of nationality see WEIS STATELESSNESS, *supra* note 11, at 75-78. *See also* Brownlie, *supra* note 103, at 301 (listing several eminent jurists who adopt the view that matters of nationality are regulated by international law).

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## 3. Opinions of the Regional Courts – An Emerging Human Rights Approach to Regulating Citizenship Policies

The position of the PCIJ and the ICJ is also echoed in the several opinions of regional courts concerning nationality laws. Most notably, in the Advisory Opinion concerning the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, the Inter-American Court of Human Rights upon request by the Costa Rican Government, issued an advisory opinion on whether certain proposed amendments to the Constitution of Costa Rica governing nationality were in conformance with article 17 (rights to family), article 20 (right to nationality), and article 24 (right to equal protection) of the American Convention on Human Rights.<sup>124</sup> Before determining whether the proposed amendments contravened any relevant provision in the American Convention on Human Rights, the Court provided a brief survey of the evolving relationship between international law and domestic regulation of nationality matters:

[D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights. [Thus,] [t]he classical doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to

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124. Advisory Opinion concerning Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Inter-Am. Ct. H.R. paras. 1-8, OC-4/84/ser. A/No. 4 (1984). The proposed amendments to the Costa Rican Constitution essentially allowed members of certain racial and ethnic groups preferential treatment in obtaining Costa Rican citizenship over other aliens. *Id.* at para. 39. Thus, the Court noted the possible motivations in Costa Rica's drafting of the proposed amendments, which may have involved a "negative nationalistic reaction...to the problem of refugees, particularly Central American refugees." *Id.* at para. 40.

the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.<sup>125</sup>

This statement by the Inter-American Court on Human Rights is indicative of the current trend in international law requiring domestic compliance with human rights norms in matters of nationality and immigration.

The European Court of Human Rights as well as its predecessor, the European Commission of Human Rights, have also attempted to reconcile the conflict between domestic jurisdiction over citizenship policies with the possible limitations imposed

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125. *Id.* at paras. 32, 33. In proceeding to “reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state ... with the further principle that international law imposes certain limits on the state’s power, which limits are linked to the demands of [international human rights law]” the Court ultimately struck the balance in favor of Costa Rica, stating that:

[I]t is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain *reasonable differentiations based on factual differences which, viewed objectively*, recognize that some applicants have a closer affinity than others to Costa Rica’s value system and interests.

*Id.* at para. 59 (emphasis added). Thus, the Court found that “the preferential treatment in the acquisition of Costa Rican nationality ... which favors Central Americans, Ibero-Americans and Spaniards over other aliens, does not constitute discrimination contrary to the [American Convention on Human Rights].” *Id.* at para. 2 (conclusion of opinion). One may argue that the Court’s holding seems to undermine the force of its statements regarding the increasing role of international law in regulating a State’s implementation of its citizenship policies in a human rights context, and thus, supports the proposition that States may continue to enact restrictive citizenship policies. However, the Court reached its holding primarily on the basis of its concern that Costa Rica should be allowed to determine who would have the closest “historical, cultural, and spiritual bonds” with the Costa Rican people, and hence would be conferred expedited naturalization procedures to obtain Costa Rican citizenship over other aliens. *Id.* at para. 60. The Court did not opine upon a State’s outright refusal to admit persons of a certain ethnic or racial group with presumably a strong bond, i.e., a spouse in the naturalizing country, due to demographic, economic, or national security concerns and whether such a policy would potentially be subject to greater scrutiny or be deemed *per se* discriminatory under international human rights law. Moreover, the Court was steadfast in its insistence that any differential treatment with relation to citizenship policies be supported by factual differences which are objectively reasonable, the touchstone of the principles of non-discrimination and equal protection of the law. *See id.* at paras. 57–60.

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upon such policies by international human rights law.<sup>126</sup> Two opinions handed down by the Commission and the Court in 1973 and 1985 respectively, provide evidence that State discretion in devising citizenship policies is not unfettered but subordinate to its treaty obligations. The Commission, in *East African Asians v. United Kingdom*, considered the applications of several residents of former British colonies in East Africa who were refused admission to the United Kingdom even though the applicants were British citizens.<sup>127</sup> In ruling against the United Kingdom, the Commission found that the citizenship and immigration policies at issue contravened the European Convention on the Protection of Human Rights and Fundamental Freedoms as discriminatory on the basis of race and sex, interfering with the right to respect for family life.<sup>128</sup>

Similarly, in the leading case of *Abdulaziz v. United Kingdom*, the Court found that the British government breached Articles 8 and 14 of the European Convention on Human Rights by implementing a discriminatory immigration policy which infringed upon the applicants' right to respect for their family lives.<sup>129</sup> It is important to emphasize however, that even though the Court found Britain's various immigration policies illegal, the Court continued to adhere to the traditional notion that "as a matter of well-established international law and subject to its

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126. See generally Nicola Rogers, *Immigration and the European Convention on Human Rights: Are New Principles Emerging*, 2003 EUR. HUM. RTS. L. REV. 53 (2003).

127. See *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 4422/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70, 4526/70-4530/70, 3 Eur. H.R. Rep. 76 (1973) (Commission report).

128. See *id.* at 83, 91.

129. See *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81 and 9474/81, 7 Eur. H.R. Rep. 471, 499-504, paras. 74-83 (1985) (Court judgment). The Court found that the effect of the 1980 Immigration Rules as applied to the applicants, which made it "easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the [United Kingdom] for settlement," to be in contravention with the European Convention on Human Rights. *Id.* at 499, para. 74. In considering the admissibility of the applications the European Commission of Human Rights reached a similar holding as the Court, finding a violation of Article 8 (right to respect for family life) in conjunction with a violation of Article 14's prohibition on sexual discrimination. See *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81 and 9474/81, 6 Eur. H.R. Rep. 28, 41, para. 109 (1983) (Commission Report).

treaty obligations, a State has the right to control entry of non-nationals into its territory.”<sup>130</sup> However, the Court’s later jurisprudence signaled a retreat from the traditional position, broaching the idea that a State must adhere to human rights norms in enacting its citizenship and immigration policies:

[T]he Convention does not in principle prohibit Contracting States from regulating the entry and length of stay of aliens. Nevertheless, the Court also reiterates that, while [Article 8] contains no explicit procedural requirements, the decision making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by [Article 8].<sup>131</sup>

The *East African Asians* and *Abdulaziz* opinions also laid the foundation for the Court to consider subsequent cases involving challenges to the legality of the Contracting States’ citizenship and immigration policies as violating the right to respect for family life under Article 8 of the European Convention on Human Rights.<sup>132</sup>

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130. *Abdulaziz*, Eur. H.R. Rep., at 497, para. 67. In further restricting the applicability of its decision, the *Abdulaziz* court stated that “[t]he duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. *Id.* at 497, para. 68. This led to the eventual creation, in the Court’s jurisprudence, of a distinction between a State’s negative obligation to refrain from expulsion of non-nationals already residing within a State and a State’s positive obligation to admit a non-national to reside within a State, in which the latter duty was “less established,” according to the States a “margin of appreciation in determining the steps to be taken to ensure compliance.” *See Rogers*, *supra* note 126, at 59 (footnote omitted).

131. *See Rogers*, *supra* note 126, at 60 (quoting *Ciliz v. Netherlands*, App. No. 29192/95, para. 66 (Eur. Ct. H.R. Jul. 11, 2000), available at <http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200207/ciliz.batj.doc>).

132. *See, e.g.*, *Yildiz v. Austria*, App. No. 37295/97, 36 Eur. H.R. Rep. 32 (2002) (finding breach of Article 8); *Amrollahi v. Denmark*, App. No. 56811/00 (Eur. Ct. H.R. Jul. 11, 2002) (finding breach of Article 8), available at [http://www.sbg.ac.at/oim/orig/02\\_4/Amrollahi%20v%20DK.PDF](http://www.sbg.ac.at/oim/orig/02_4/Amrollahi%20v%20DK.PDF); *Sen v. Netherlands*, App. No. 31465/96, 36 Eur. H.R. Rep. 7 (2001) (finding breach of Article 8); *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 50 (2001) (finding breach of Article 8); *Ahmut v. Netherlands*, App. No. 21702/93, 24 Eur. H.R. Rep. 62 (1996) (finding no breach of Article 8); *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996) (finding no breach of Article 8); *Gül v. Switzerland*, App. No. 23218/94, 22 Eur. H.R. Rep. 93 (1996) (finding no breach of Article 8).

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## 4. The Present State of International Law in Regulating a State's Citizenship Policies

The central argument of this Note is that the Citizenship and Entry into Israel Law is in direct contravention with legal duties imposed upon Israel vis-à-vis its treaty obligations and also customary international law, and thus, must be amended or perhaps more practically, repealed. As a result, the threshold question of whether international law imposes any limitations at all upon a State's discretion in the determination of who may or may not become its national must be answered. One may arrive at several conclusions from the preceding survey and analysis of the various international legal authorities dealing with the extent international law may be able to circumscribe nationality policies. First, States still retain considerable authority in regulating matters of nationality which necessarily result in measures based on race or ethnicity. Second, domestic jurisdiction over nationality policies is not impermeable and will, in certain situations, bend to the mandates of international legal norms. Third, a State, at a minimum, must not breach its treaty obligations when devising and implementing its citizenship policies. And fourth, international human rights law is emerging as an effective supplement to treaty obligations in piercing the State's veil of domestic jurisdiction over nationality matters.

## V. EXAMINING THE CITIZENSHIP AND ENTRY INTO ISRAEL LAW UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. *The Citizenship and Entry into Israel Law: Potential Violation of Specific Rights Under International Human Rights Law*

Whereas traditional international law focused primarily on the rights and duties of the State,<sup>133</sup> the basic premise underly-

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133. Professor Henkin, describing the development of international human rights law, offered the following characterization of the state of international law prior to the establishment of the modern human rights regime:

[F]or hundreds of years international law and the law governing individual life did not come together. International Law, true to its name, was law only between States, governing only relations between States on the State level. What a State did inside its borders in rela-

ing human rights law is that the “*individual* is to have direct rights and duties in international law.”<sup>134</sup> The focus upon promoting human rights intensified after the discovery of the numerous atrocities which took place during World War II.<sup>135</sup> Thus, the United Nations which came into being after World War II, declared as one of its purposes, “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, or religion.”<sup>136</sup> While

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tion to its own nationals remained its own affair, an element of its autonomy, a matter of its ‘domestic jurisdiction.’

Louis Henkin, *International Law: Politics, Values and Functions*, in 216 COLLECTED COURSES OF HAGUE ACADEMY OF INTERNATIONAL LAW (vol. 4) 13, 209 (1989).

134. DONNER, *supra* note 91, at 183 (emphasis added). In a particularly powerful statement by Judge Tanaka concerning the universality and uniqueness of human rights as a body of law that is separate and distinct from any other body of law which may require recognition from States it was stated:

Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons must not be deprived of them. [...] There must be no legal vacuum in the protection of human rights. Who can believe, as a reasonable man, that the existence of human rights depends upon the internal or international legislative measures, etc., of the State and that accordingly they can be validly abolished or modified by the State?

South West Africa Cases (Second Phase) (Eth. v. S. Afr. & Liber. v. S. Afr.), 1966 I.C.J. 6, 297–98 (July 18) (dissenting opinion of Judge Tanaka).

135. The birth of the modern human rights movement can be traced to the London Agreement and the accompanying Nuremberg Charter, signed by the Allied Powers on August 8, 1945, which allowed for the imposition of “individual responsibility” against persons violating certain international crimes perpetrated during World War II. See Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics respecting the prosecution and punishment of the major war criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, E.A.S. No. 472 [hereinafter Nuremberg Charter]. See also JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 408 (2002) (explaining that in the context of human rights violations “[r]eliance on the doctrine of state responsibility was clearly insufficient to deal with abuses committed by a state against its own nationals since no state could be expected to bring an action against itself.” Thus, the post-World War II decision by the Allied Powers to bring to justice those individuals who committed atrocities during the war “marked a turning point in attitudes toward the individual’s status in international law.”).

136. U.N. Charter art. 1 para. 3.

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the Charter does not enumerate the various “human rights” which are to be protected by the Member States it has been said that the Universal Declaration of Human Rights<sup>137</sup> (hereafter “Declaration”) is an amendment to the U.N. Charter in this respect.<sup>138</sup> Thus, it may be argued that a violation of a right enumerated in the Declaration is *a fortiori* a violation of the U.N. Charter. Moreover, certain human rights obligations, especially those prohibiting State sponsored “systematic racial discrimination” have attained the status of customary international law.<sup>139</sup>

As the seminal document on human rights, The Declaration shall provide a framework for the ensuing analysis of the legality of the Citizenship and Entry into Israel Law. In particular it will be argued that the Citizenship and Entry into Israel Law violates the right of equal protection and prohibition against

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137. See generally G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Resolutions, at 71-79, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html> [hereinafter Declaration]. It is still debated whether the Universal Declaration of Human Rights is legally binding, as evidenced in the language of the Preamble where the States are called upon to “teach,” “educate,” and “promote” respect for human rights rather than “safeguard,” “protect” and “guarantee” human rights, see DONNER, *supra* note 91, at 191, as well as its nature as a General Assembly resolution. Nonetheless, the Universal Declaration of Human Rights “has force as a morally ... binding document [in which] its authority is enhanced by the universality of its acceptance by Members of the United Nations.” *Id.* If any question remains regarding the significance of the Universal Declaration of Human Rights the statement by Vere Evatt of Australia, President of the General Assembly, made at the time of the adoption of the Declaration may put the matter to rest: “It is the first occasion on which the organized community of nations has made a declaration of human rights and fundamental freedoms, and it has the authority of the body of opinion of the United Nations as a whole...” *Id.* at 189 (quoting The Impact of the Universal Declaration of Human Rights, U.N. Dep’t of Social Affairs, at 7, U.N. Doc. ST/SOA/5/Rev.1 (June 29, 1953)).

138. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 cmt. d (1987) (“Almost all states are parties to the United Nations Charter, which contains human rights obligations. There has been no authoritative determination of the full content of those obligations, but it has been increasingly accepted that states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.”).

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(f). In clarifying the scope of the “systematic racial discrimination” covered under customary international law of human rights, the Restatement provides that “[r]acial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa.” *Id.* § 702 cmt. i.



discrimination on the basis of race, color, or national origin<sup>140</sup> as applied to the right against arbitrary interference with the family;<sup>141</sup> and the right to protection of the family as the fundamental unit of society.<sup>142</sup>

Since there is no definitive answer on whether the Declaration is legally binding, this Note will also focus upon two human rights conventions governing the legality of the Citizenship and Entry into Israel Law; the International Covenant on Civil and Political Rights (hereafter "ICCPR")<sup>143</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "CERD").<sup>144</sup>

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140. Declaration, *supra* note 137, art. 2 & 7.

141. Declaration, *supra* note 137, art. 12.

142. Declaration, *supra* note 137, art. 16.

143. *See generally* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Israel became a signatory to the ICCPR on December 19, 1966 and ratified the ICCPR on October 3, 1991. *See* Multilateral Treaties Deposited With the Secretary-General, Status as at Dec. 31, 2002 at 164, U.N. Doc. ST/LEG/SER.E/21, U.N. Sales No. E.03.V.3 (2002). Israel also indicated its reservation with Article 23:

With reference to Article 23 of the [ICCPR], and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned.

To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.

*Id.* at 169. Article 23 provides in pertinent part:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

[...]

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.

ICCPR, *supra* note 143, at 179.

144. *See generally* International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]. Israel became a signatory to the CERD on March 7, 1966 and ratified the CERD on January 3, 1979. *See* Multilateral Treaties Deposited With the Secretary-General, Status as at Dec. 31, 2002 at 131, U.N. Doc. ST/LEG/SER.E/21, U.N. Sales No. E.03.V.3 (2002). Israel also

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## 1. Application of Human Rights Law to Territories Under Military Occupation

Since the Citizenship and Entry into Israel Law is directed at persons residing within certain “areas,”<sup>145</sup> which are deemed Israeli-occupied territories resulting from the Arab-Israeli War of June 1967,<sup>146</sup> one must determine whether human rights law is applicable in circumstances of military occupation in which armed conflict may be present. The overriding concern with the application of human rights law to regions under military occupation is that “human rights law – unlike international humanitarian law – applies in peacetime, and many of its provisions may be suspended during an armed conflict.”<sup>147</sup>

One issue that arises is the “convergence of humanitarian law and human rights law” in the context of military occupation.<sup>148</sup> Whereas the applicability of humanitarian law in situations of military occupation is undisputed,<sup>149</sup> it is less clear whether hu-

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submitted a reservation upon ratification, stating that “[t]he State of Israel does not consider itself bound by the provisions of article 22 of the [CERD].” *Id.* at 135. Article 22 of the CERD provides:

Any dispute between two or more States Parties with respect to interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

CERD, *supra* note 144, at 238.

145. As stated above, the Citizenship and Entry into Israel Law applies exclusively to an “inhabitant of an area” in which the “area” is designated in the law as the West Bank and Gaza. Citizenship and Entry into Israel Law § 1, 5763-2003.

146. See Roberts, *supra* note 66, at 40–41.

147. International Committee of the Red Cross, Fact Sheet: What is International Humanitarian Law? (“Fact sheet providing a summary description of the sources, content and field of application of international humanitarian law.”), available at [http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian\\_law:IHL\\_in\\_brief?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:IHL_in_brief?OpenDocument) [hereinafter ICRC Fact Sheet].

148. John Dugard, *Enforcement of Human Rights in the West Bank and the Gaza Strip*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 47, at 461, 467.

149. International humanitarian law is defined by the International Committee of the Red Cross as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.” ICRC Fact Sheet, *supra* note 147. The Geneva Conventions of 1949 which mark an important milestone in the codification of international humanitarian law and may be viewed, with its

man rights law exudes an equally strong legal force.<sup>150</sup> In particular, occupying States must often derogate from its obligations under human rights law because of the threat to public safety in times of armed conflict.<sup>151</sup> Thus, the *raison d'être* of enforcing human rights law, to protect the fundamental rights of individuals, is essentially compromised where a State is allowed to and often does derogate from its obligations during armed conflict.

Indeed, the Israeli Government has seized upon the deficiencies in sustaining a viable military occupation while protecting fundamental human rights to advance its preference for applying only humanitarian law to the Occupied Territories.<sup>152</sup> In

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almost universal acceptance, as customary international law, see Roberts, *supra* note 66, at 35, expressly provide for its application "to all cases of partial or total occupation ... even if the said occupation meets with no armed resistance." See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T.S. 3114, 75 U.N.T.S. 287, 288. [hereinafter Fourth Geneva Convention]. The other three Geneva Conventions of 1949 all contain the same Articles 1 through 4 including Article 2 as cited above.

150. For an analysis of the applicability of human rights law to military occupations, and more specifically, to the Israeli Occupied Territories see Roberts, *supra* note 66, at 53–57. The U.N. General Assembly has consistently stated that the Universal Declaration of Human Rights is applicable to the territories occupied by Israel. See, e.g., G.A. Res. 3005, U.N. GAOR, 27th Sess., Supp. No. 30, at 30–31, U.N. Doc. A/8730 (1972); G.A. Res. 2851, U.N. GAOR, 26th Sess., Supp. No. 29, at 48–49, U.N. Doc. A/8429 (1971); G.A. Res. 2727, U.N. GAOR, 25th Sess., Supp. No. 28, at 36–37, U.N. Doc. A/8028 (1970); G.A. Res. 2443, U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7218 (1968).

151. See ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES: 1967-1982 5 (1985).

152. In support of its position that only humanitarian law applies to the occupied territories, the Israeli government has viewed the "unique political circumstances" in addition to the "emotional realities" existing in the occupied territories as "clearly not a classical situation in which the normal components of 'human rights law' may be applied...." Roberts, *supra* note 66, at 55 (quoting Memorandum from the Office of the Legal Adviser of the Israeli Foreign Ministry (Sept. 12, 1984) (written in response the author's inquiry concerning the applicability of various human rights conventions to the occupied territories). In the view of the Israeli government, the lack of "the relationship between the 'citizen' and his government present in "any standard, democratic system" renders the occupied territories as unsuited for the application of human rights law. *Id.* It argued further that only humanitarian law, "which balances the needs of humanity with the requirements of international law to

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addition, the absence of any definitive opinion regarding the compatibility of human rights law to situations of military occupation substantiates the Israeli position.<sup>153</sup>

Nonetheless, the unique nature of Israel's prolonged occupation of the West Bank and Gaza warrants a reconsideration of the argument that the "classical" situation for applying human rights law does not exist in the Israeli-occupied territories, or at least, the situation as it currently stands is ill suited for the application of human rights law. The traditional conception of a military occupation was that the occupying state would temporarily control the occupied state until the disputing parties reached a mutual agreement or some other shift occurred in the

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administer the [occupied territories] whilst maintaining public order, safety, and security" should be applied. *Id.*

153. Two notable cases before international tribunals lend tacit support to the proposition that international human rights law is applicable in situations of military occupations. First, in the advisory opinion issued by the ICJ on the legal consequences of South Africa's occupation of Namibia member States of the United Nations were advised to refrain "from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia" and also abstain from "invoking or applying" any existing bilateral treaties entered into "by South Africa on behalf of or concerning Namibia which involve active intergovernmental cooperation." *Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 55, ¶ 122 (Advisory Opinion of Jun. 21)*. However, the ICJ added an important exception to the above prohibitions stating that "certain general conventions such as those of humanitarian character" in which "the non-performance of may adversely affect the people of Namibia" should continue to be recognized and adhered to. *Id.* (emphasis added). The European Commission of Human Rights's ruling in the admission of applications by the Cyprus government regarding the Turkish occupation of Cyprus also affirms the applicability of human rights law in situations of military occupations. *Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 4 Eur. H.R. Rep. 482, 509, para. 83 (1976) (Commission Report)* (finding that under Article 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, Turkey was responsible for its obligations under the Convention as long as Turkish armed forces "brought any persons or property [in Cyprus] within the jurisdiction of Turkey ... to the extent that they exercise[d] control over such persons or property.") (internal quotation marks omitted). *See also Cyprus v. Turkey, App. No. 8007/77, 15 Eur. H.R. Rep. 509, 522-23, para. 63 (1983) (Commission Report)* (reaffirming the responsibility of Turkey to comply with the Convention in its military occupation of Turkey).

sovereign control of the occupied state.<sup>154</sup> This was the scenario envisioned by the drafters of the Geneva Conventions of 1949, which “was designed to protect the civilian population under an essentially temporary occupation.”<sup>155</sup> However, the situation *sui generis* created by the Israeli occupation of the West Bank and Gaza requires that the application of humanitarian law be supplemented with human rights law in order to adequately protect the rights of those under occupied rule.<sup>156</sup>

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154. See Roberts, *supra* note 66, at 28 (concluding that the applicability of the law of occupations assumes “that military occupation is a provisional state of affairs, which may end as the fortunes of war change, or else will be transformed into some other status through negotiations conducted at or soon after the end of the war”). See also COHEN, *supra* note 151, at 189 (“[T]he occupant’s power is circumscribed by the conventional law of belligerent occupation and by the underlying customary principle that the occupant is not the sovereign in the occupied territory and may not annex it.”).

155. COHEN, *supra* note 151, at 29.

156. See Dugard, *supra* note 148, at 466–67 (citing International Center for Peace in the Middle East, *Human Rights in the Occupied Territories 1979–1983* (study conducted by the International Center for Peace in the Middle East) (Tel Aviv, 1985)). To be sure, many other situations of prolonged occupation, which Roberts tentatively defines as “an occupation that lasts more than five years and extends into a period when hostilities are sharply reduced, i.e., a period approximating peacetime,” have taken place throughout history. See generally Roberts, *supra* note 66, at 29–32 (enumerating and describing situations of prolonged occupation, most notably the Allied occupation of Germany and Japan after World War II and the South African occupation of Namibia after the termination by the United Nations of its international mandate in 1966). However, very few if any of the previous “prolonged military occupations” have approximated the length, and more importantly, the extensiveness, i.e., settlement activity, quasi-independent governmental administrative structures, that is exemplified by the Israeli occupation of Palestinian territories, especially the West Bank, which is often viewed as territory under de facto annexation by Israel. See RAJA SHEHADEH, *OCCUPIER’S LAW: ISRAEL AND THE WEST BANK* 11 (1985) (“While the [West Bank] as a whole is not in theory annexed to Israel the settlements are subject to de facto annexation and apply Israeli law and are served by the Israeli infrastructure and administrative structure.”). With the harsh conditions confronting the Palestinian residents of the occupied territories, those who are not able to tolerate such conditions will eventually be forced to move thus allowing Israel to accomplish its eventual goal of annexing the occupied territories. *Id.* Indeed, the United States has already given the green-light to an eventual annexation of portions of the Occupied Territories by Israel:

In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to

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First, Israel has occupied the West Bank and Gaza for over thirty-five years which cannot be described as a temporary situation.<sup>157</sup> Second, while the occupation still involves use of force by both the occupying state and the occupied state, it cannot be said that the force perpetrated has consistently reached the scale of an armed conflict throughout the thirty-six years of the occupation.<sup>158</sup> Thirdly, the prospects for political compromise from Israel or Palestine are bleak if not non-existent.<sup>159</sup> Therefore, the protections offered by humanitarian law are insufficient and not contemplated to protect the fundamental rights of individuals in all aspects of life; an imperative in any long-term governance by one state over another.<sup>160</sup>

The case for applying human rights law to the Occupied Territories is even stronger when reference is made to views of the

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the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.

The White House, President Bush Commends Israeli Prime Minister Sharon's Plan (Apr. 14, 2004) (letter from President Bush to Prime Minister Sharon), available at <http://www.whitehouse.gov/news/releases/2004/04/20040414-3.html>.

157. See Dugard, *supra* note 148, at 466 ("There is undoubtedly much validity in the argument that belligerent occupancy is intended as a temporary, provisional measure and not one that continues for over twenty years."); Roberts, *supra* note 66, at 42 ("For the most part, the Israeli occupation of territories since 1967 does belie the assumption that occupation is temporary").

158. See Dugard, *supra* note 148, at 467.

159. See Roberts, *supra* note 66, at 43 (analyzing the substantial political obstacles involved in reaching a potential peace agreement between Israel and Palestine).

160. See Dugard, *supra* note 148, at 467. The inadequacy of the protections offered by humanitarian law in a regime of prolonged occupation is also asserted by one commentator as a possible basis for the application of human rights law:

While the [Geneva Conventions] remain[s] applicable to a large extent during the prolonged occupation phase, it is insufficient to ensure adequate protection for the needs of the civilian population during that phase. Further protection is called for. It is submitted that the Universal Declaration and the International Covenants on Human Rights may be used to guide the belligerent occupant in the administration of the territory occupied, just as civilian governments may be guided by these laws in the administration of their own territories.

COHEN, *supra* note 151, at 29.

various Committees established by the human rights conventions to which Israel is a State party. In particular, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination established by the ICCPR<sup>161</sup> and the CERD<sup>162</sup> respectively to monitor and enforce compliance with the conventions have recognized the applicability of human rights law to the occupied territories.<sup>163</sup>

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161. ICCPR art. 28, *supra* note 143, at 179.

162. CERD art. 8, *supra* note 144, at 224.

163. In the Concluding Observations of the Human Rights Committee with respect to Israel's compliance with its legal obligations under the ICCPR issued in 1998 it was emphasized that "the applicability of rules of humanitarian law does not by itself impede the application of the [ICCPR]" and its application must be extended to "the occupied territories and those areas ... where Israel exercises effective control." Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 63d Sess., 1694th mtg., at ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (July 28, 1998), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase> [hereinafter 1998 ICCPR Concluding Observations]. The Committee reaffirmed its position with regard to the applicability of the ICCPR to the Israeli occupied territories in 2003:

The Committee reiterates the view...that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the [ICCPR]...Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties...for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the [ICCPR] and fall within the ambit of State responsibility of Israel under the principles of public international law."

Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 78th Sess., 2128th – 2130th mtgs., at ¶ 11, U.N. Doc. CCPR/CO/78/ISR (2003), available at <http://www.unhchr.ch/tbs/doc.nsf>.

The Committee on the Elimination of Racial Discrimination has adopted a similar view of whether human rights law should apply to the Israeli-occupied territories. In its Concluding Observations issued in 1998, the Committee on the Elimination of Racial Discrimination stated, under the heading of "The Occupied Palestinian Territories," that "Israel is accountable for implementation of the [CERD] ... in all areas over which it exercises effective control." Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, U.N. CERD, 52d Sess., 1272d mtg., ¶12, U.N. Doc. CERD/C/304/Add.45 (1998), available at <http://www.unhchr.ch/tbs/doc.nsf>; see

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As a related yet distinct matter is the effect of an official declaration of a state of emergency upon the declaring state's human rights obligations. Israel has, since May 19, 1948, four days after it was established, been in an official state of emergency.<sup>164</sup> The original declaration of emergency was based primarily on the war then existing between Israel and its neighboring states in addition to the continuing insurgencies of the Jewish and Arab populations.<sup>165</sup> However, the official state of emergency still remains in effect for reasons of, as expressed by the Israeli government, "the ongoing conflict between Israel and its neighbors, and the attendant attacks on the lives and property of its citizens."<sup>166</sup> Indeed, upon ratifying the ICCPR on October 3, 1991, Israel submitted a notice of derogation stemming from its state of emergency.<sup>167</sup>

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*also* Concluding Observations/Comments, Prevention of Racial Discrimination Including Early Warning and Urgent Procedures, U.N. CERD, 45th Sess., 1067th mtg., paras. 83, 86, U.N. Doc. CERD/A/48/18 (1994) (advancing a similar "position of principle that, since Israel is a party to the [CERD], the Committee is competent to examine the manner in which Israel is fulfilling its obligations under the [CERD] with respect to everyone falling under the jurisdiction of Israel including all persons living in the territories occupied by Israel." In a more general statement the Committee emphasized Israel's obligation "to protect fully the life and security of the Palestinian civilians in the occupied territories."), *available at* <http://www.unhchr.ch/tbs/doc.nsf>.

164. *See* Initial Report of States Parties due in 1993 Addendum submitted by Israel, U.N. Hum. Rts. Comm., 63d Sess., ¶106, at 31, U.N. Doc. CCPR/C/81/Add.13 (1998), *available at* <http://domino.un.org/UNISPAL.NSF?OpenDatabase> [hereinafter 1998 Israel ICCPR Report]. The Government's authority to declare a state of emergency is based upon Basic Law: Government § 38, (2003) (replacing Law and Administration Ordinance § 9(a)-(d), 5708-1948, 1 L.S.I. 7, 8-9 (1948)). While the Government, particularly through its ministers, is granted substantial authority in promulgating emergency regulations, such measures must not infringe upon "human dignity." *See* Maoz, *supra* note 24, at 23-24. *See also* Basic Law: Government § 39(d) ("Emergency regulations may not...allow infringement upon human dignity.").

165. *See* 1998 Israel ICCPR Report, *supra* note 164, para. 106, at 31.

166. *Id.*

167. *Id.* It is instructive for one to read the full text of Israel's notice of derogation under the ICCPR as it provides the reader with an analogue of the often-advanced "security justification" for Israel's conduct:

Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.



Numerous human rights conventions allow for the derogation from certain legal duties in times of “public emergency.”<sup>168</sup> For purposes of the ensuing discussion a “public emergency” may be defined as a state of affairs “which threatens the life of the nation.”<sup>169</sup> A state derogating from its human rights obligations must adhere to several requirements. First, it must only take measures “strictly required by the exigencies of the situation.” Second, such measures taken by the State may not violate its other obligations under international law. And third, the derogation cannot be discriminatory.<sup>170</sup> Furthermore, a declaration of an emergency under human rights law must be temporary.<sup>171</sup>

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These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the [ICCPR]. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercises of powers of arrest and detention. Insofar as any of these measures are inconsistent with article 9 of the [ICCPR], Israel thereby derogates from its obligations under that provision.

*Id.*

168. See, e.g., American Convention on Human Rights, Nov. 22, 1978, art. 27, 1144 U.N.T.S. 143, 152 (entered into force July 18, 1978) [hereinafter American Human Rights Convention]; ICCPR art. 4, *supra* note 143, at 174; Convention Relating to the Status of Stateless Persons art. 9, *supra* note 101, at 140; European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221, 232, 234 (entered into force Sept. 3, 1953) [hereinafter European Human Rights Convention]; Declaration art. 29(2), *supra* note 137.

169. ICCPR art. 4(1), *supra* note 143, at 174. This definition is in accord with those existing in other human rights conventions and opinions of international tribunals. See John Quigley, *The Right to Form Trade Unions under Military Occupation*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 37, at 295, 310–12 [hereinafter Quigley, *Trade Unions*].

170. The derogation provision of the ICCPR provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measure derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not

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Bearing the above requirements in mind, Israel would be unable to rely upon its officially proclaimed *de facto* emergency situation to justify non-adherence to its human rights obligations. While Israel, including the Occupied Territories, has been the site of continuing conflict, it is hard to concede that the same areas have been under a public emergency situation in which the life of the State has been threatened for almost half a century. Of course, taking into account the Arab-Israeli War of 1948 following the establishment of the State of Israel,<sup>172</sup> the Arab-Israeli War of 1967 resulting in the Israeli occupation of the West Bank and Gaza,<sup>173</sup> the peak periods of the 1987 and 2000 *intifada*,<sup>174</sup> and other instances of armed conflict within Israel, a state of public emergency may have existed for twenty to thirty years. However, this would still leave another twenty to thirty years unaccounted for in which a state of “public emergency” could not have existed under the strict standards mandated by international authorities.<sup>175</sup> Furthermore, by officially pronouncing a state of “public emergency” for the past fifty-five years, Israel has violated the requirement in human rights law that an emergency be temporary.<sup>176</sup>

Derogation provisions require that all restrictive measures taken by a State be limited “to the extent strictly required by the exigencies of the situation....”<sup>177</sup> It follows that even if the situation in Israel rises to the level of a “public emergency” the

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inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.

ICCPR art. 4(1), *supra* note 143, at 174. The CERD does not have any derogation provision which may indicate the universal rejection of any state-sanctioned racial discrimination even in times of national emergency. *See generally* CERD, *supra* note 144. *See also* COHEN, *supra* note 151, at 3 (“If a government did succeed in establishing the existence of [an] emergency, it would remain bound ... by its obligation not to discriminate on grounds of race, colour, sex, language, religion or social origin.”).

171. *See* Quigley, *Right of Return*, *supra* note 35, at 204.

172. Emma Playfair, *Introduction*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF THE OCCUPIED TERRITORIES*, *supra* note 47, at 1, 4.

173. *Id.* at 4–5.

174. WENDY PEARLMAN, *OCCUPIED VOICES* 37–40, 59–62 (2003).

175. *See* Quigley, *Trade Unions*, *supra* note 169, at 312.

176. *See* Quigley, *Right of Return*, *supra* note 35, at 204.

177. ICCPR art. 4(1), *supra* note 143, at 174. *See also* sources cited *supra* note 168.

restrictive measures adopted during such periods must be limited in "scope and territorial application," proportional to the seriousness of the "public emergency."<sup>178</sup>

As demonstrated above, Israel has not been in a *de facto* state of "public emergency" for the *entire* fifty-five years of its existence. Therefore, any action taken by Israel which may contravene its obligations under human rights law must be struck down as illegal since no derogation is possible in a non-emergency situation.

## 2. Articles 12 and 16 of the Declaration: The Protection of the Family as the Fundamental Unit of Society

The family<sup>179</sup> is recognized in the Declaration and the ICCPR as "the natural and fundamental group unit of society ... entitled to protection by society and the State."<sup>180</sup> As such, States

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178. See 1998 ICCPR Concluding Observations, *supra* note 163, at para. 11.

179. The U.N. Human Rights Committee, states that it is "not possible to give the concept [of family] a standard definition" under Article 23 of the ICCPR, which often differs "from State to State, and even from region to region within a State." See Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23): CCPR General Comment 19, U.N. Hum. Rts. Comm., 39th Sess., para. 2 at 29, U.N. Doc. HRI/GEN/1/Rev.3 (Jul. 27, 1990) [hereinafter ICCPR General Comment 19], *available at* <http://www.unhchr.ch/tbs/doc.nsf>. However, a family should, at a minimum, consist of "spouses and minor children." ZILBERSHATS, *supra* note 92, at 46; THE AMERICAN HERITAGE DICTIONARY 488 (2d College ed. 1982) (defining "family" as a "fundamental social group in society consisting [especially] of a man and woman and their offspring."). Israel has acknowledged the difficulty in defining "family" due to the "significant demographic changes in the structure of families in Israel. 1998 Israel ICCPR Report, *supra* note 164, para. 694, at 219. However, the liberal interpretation by Israel of the types of relationships, including single-parents, non-marital cohabitants, and homosexual couples, which may fall under the rubric of family in terms of entitlement to benefits and recognition by Israeli law, is at least an implicit concession that the traditional structure of spouses and their minor children be included within the definition of "family." See *id.* para. 694-97, at 219-21. Moreover, the Citizenship and Entry into Israel Law, in one of its exceptions, defines a "member of family" as consisting of a "spouse, parent, [and] child." Citizenship and Entry into Israel Law, § 3(2), 5763-2003.

180. Declaration, art. 16(3), *supra* note 137; ICCPR art. 23(1), *supra* note 143, at 179. This principle is contained in other international and regional human rights conventions. See, e.g., African Charter on Human and People's Rights, June 27, 1981, art. 18(1), 1520 U.N.T.S. 217, 249 (entered into force Oct. 21, 1986) [hereinafter African Human Rights Charter]; American Human Rights Convention art. 17(1), *supra* note 168, at 150; International Covenant

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are required to maintain and facilitate the creation of the family which includes the negative obligation of protecting against the unlawful and arbitrary interference with the family<sup>181</sup> as well as the positive obligation of ensuring persons within the State the right to marry and found a family.<sup>182</sup> These rights are to be guaranteed to all individuals without distinction as to race, colour, religion, national origin, birth, or other such status.<sup>183</sup>

The Citizenship and Entry into Israel Law creates substantial limitations on the right of Palestinians to marry Israeli nationals and vice-versa.<sup>184</sup> Section 2 of the Citizenship and Entry into Israel Law prohibits Palestinian spouses of Israeli citizens from obtaining Israeli citizenship or from acquiring an Israeli

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on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 10(1), 993 U.N.T.S. 3, 7 (entered into force Mar. 23, 1976). In its Initial ICCPR Report, Israel recognized that “the family is firmly acknowledged, under both religious and civil law, as the basic, natural group unit in Israeli society....” 1998 Israel ICCPR Report, *supra* note 164, ¶ 694, at 219.

181. *See, e.g.*, ICCPR art. 17(1), *supra* note 143, at 177 (“No one shall be subjected to arbitrary or unlawful interference with his ... family....”); Declaration art. 12, *supra* note 137 (“No one shall be subjected to arbitrary interference with his ... family.... Everyone has the right to the protection of the law against such interference or attacks.”). Similar provisions are provided in other international and regional conventions. *See, e.g.*, American Human Rights Conventions art. 10(2), *supra* note 168, at 148; European Human Rights Convention art. 8(1), *supra* note 168, at 230.

182. *See, e.g.*, CERD art. 5(d)(iv), *supra* note 144, at 220 (States Parties undertake to ... guarantee the right ... without distinction as to race, colour, or national or ethnic origin ... to marriage and choice of spouse.”); ICCPR art. 23(2), *supra* note 143, at 179 (“The right of men and women of marriageable age to marry and to found a family shall be recognized.”); Declaration art. 16(1) *supra* note 137 (“Men and women of full age, without any limitation due to race nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.”). Similar provisions exist in other international and regional human rights conventions. *See, e.g.*, African Human Rights Charter art. 18(1)-(2), *supra* note 146, at 249; American Human Rights Convention art. 17(2), *supra* note 168, at 150; International Covenant on Economic, Social, and Cultural Rights art. 10(1), *supra* note 156, at 7; European Human Rights Convention art. 12, *supra* note 168, at 232.

183. *See* CERD art. 5(d)(iv), *supra* note 144, at 220; ICCPR art. 2(1), *supra* note 143, at 173.

184. *See generally* Citizenship and Entry into Israel Law, 5763-2003. *See also* text accompanying *supra* notes 74–79.

residence permit<sup>185</sup> — both of which were previously available to Palestinians as a means of facilitating their marriages with Israeli citizens.<sup>186</sup> In order to appreciate the restrictive nature of the Citizenship and Entry into Israel Law, one must consider the practical effects emanating from the implementation of the Law. First, for Palestinian spouses of Israeli nationals planning to apply for citizenship or residency in Israel, their applications will no longer be considered, barring access to the only legal means of entry into Israel.<sup>187</sup> Second, for Palestinian spouses of Israeli citizens who have already begun the application process, their statuses will be undetermined as long as the new Citizenship Law is in effect.<sup>188</sup> Third, for Palestinian spouses currently residing in Israel on a residence permit (many of whom are also in the process of applying for Israeli citizenship), the new law

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185. Citizenship and Entry into Israel Law § 2, 5763-2003. For the full text of section 2 of the Citizenship and Entry into Israel Law see *supra* text accompanying note 60.

186. See Entry into Israel Law, §§ 1-6, 5712-1952, 6 L.S.I. 159 (1951-52), reprinted in GREENFIELD, *supra* note 11, at 11 (granting of Israeli residence permits); Nationality Law § 7, 5712-1952, 6 L.S.I., at 52 (providing that “the spouse of a person who is an Israel national ... may obtain Israel nationality by naturalization even if she or he is a minor or does not meet the [criteria otherwise required for obtaining Israel nationality by naturalization]”).

187. See Citizenship and Entry into Israel Law § 2, 5763-2003. The story of Zuhdi Samada represents such a predicament:

Zuhdi Samada is not certain when his wife, Siam, and their six-week-old daughter will be back living with him in their home in [Israel]. For now they are with Siam’s family in the West Bank.... Mr. Samada, an Israeli-Arab, says his wife and child went for a three-week visit. But he is not sure how Siam, who does not have a permit to live in Israel, will get through the West Bank army roadblock she will have to traverse on her way back to [Israel]. Even if she succeeds, and returns to her husband, she will be breaking the law. If she is not willing to do that, then Siam and Zuhdi have two other alternatives – separate or live abroad.

Hirschberg, *supra* note 63.

188. An example of such a situation is detailed in Brief for Petitioner paras. 15–22, at 8-9, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03), in which one of the petitioners, a Palestinian woman, married an Israeli citizen, and applied for “a status in Israel.” *Id.* at 8, para. 19. The petitioner’s application was rejected as mandated by Government Decision 1813. *Id.* In a separate attempt in July 2003 to renew her residence permit, the Government stated in its rejection letter that the request could not be considered “until approval of family unification by the Ministry of Interior was obtained.” *Id.* at 8, para. 20.

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prevents them from renewing their residence permits, thus requiring them to leave Israel.<sup>189</sup> As a result, the family will have to relocate outside Israel or abandon the prospect of living together.

These prohibitions, directed specifically at the inhabitants of the Occupied Territories (West Bank and Gaza excluding Israeli settlements),<sup>190</sup> have effectively denied Israelis and Palestinians the right to marry and found a family in contravention with article 23(2) of the ICCPR.<sup>191</sup> Moreover, the restrictions imposed by the Citizenship and Entry into Israel Law also violate article 17 of the ICCPR, which protects the family from arbitrary and unlawful interference.<sup>192</sup>

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189. See Entry into Israel Law §§ 13, 13A(b), 5712-1952, *reprinted in* GREENFIELD, *supra* note 11, at 13 (providing for the conditions under which persons without a valid residence permit may be deported and expelled from Israel).

190. See Citizenship and Entry into Israel Law § 1, 5763-2003.

191. See ICCPR art. 23, *supra* note 143, at 179. Protection of the family under article 23 requires a State party to “adopt legislative, administrative or other measures” which may be implemented by the State itself or through other social institutions. ICCPR General Comment 19, *supra* note 179, at para. 3, at 29. In clarifying and expanding upon the principle of the “right to found a family” the U.N. Human Rights Committee stated:

The right to found a family implies, in principle, the possibility to procreate and live together. When States parties [to the ICCPR] adopt family planning policies, they should be compatible with the provisions of the [ICCPR] and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic, or similar reasons.

*Id.*

192. Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

ICCPR art. 17, *supra* note 143, at 177. The term “family” under article 17 is “given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.” The Right to Respect of Privacy, Family, Home, and Correspondence, and Protection of Honour and Reputation (Art. 17): CCPR General Comment 16, U.N. Hum. Rts. Comm.,

It may be argued that historically, States have had the right to control the entry of non-nationals into their respective territories and the Citizenship and Entry into Israel Law is a product of this wide-ranging discretion.<sup>193</sup> Moreover, the situation *sui generis* confronting Israel, in its prolonged military occupation of the West Bank and Gaza, should provide it with even greater discretion in matters of immigration and nationality.<sup>194</sup> Indeed, Israel has defended its enactment of the Citizenship and Entry into Israel Law on such grounds.<sup>195</sup>

It is not disputed that Israel may take decisive action to protect its national welfare, especially where the threat of violence is omnipresent. Indeed, human rights conventions allow States to legislate according to their security needs even if it may result in the *de facto* violation of human rights law.<sup>196</sup> However, any State action which potentially violates fundamental human rights on the basis of fortuitous traits such as race, ethnicity, or sex, must be supported by a factual foundation that provides an

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32d Sess., at 21, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 8, 1988) [hereinafter ICCPR General Comment 16], *available at* <http://www.unhchr.ch/tbs/doc.nsf>. Furthermore, an official, State-sponsored interference with family may still be "arbitrary or unlawful" if the interference does not comply with the "provisions, aims, and objectives of the [ICCPR]." *Id.* It is notable that the duties imposed on a State party under article 17 also fall within the rubric of the protection of the family under article 23 of the ICCPR. *See* ICCPR General Comment 19, *supra* note 179.

193. *See supra* Part IV.A.1 & 2.

194. *See supra* Part V.A.1.

195. The Ministry of Foreign Affairs advanced the following as part of its defense of the Citizenship and Entry into Israel Law:

Inasmuch as no sovereign nation permits the entry into its territory of foreign nationals who may pose a danger to its security, nor to take up residency, so is Israel entitled to restrict its immigration policies. Similarly, no rule of international law obligates a state to grant legal status to nationals of other nations or entities when such nations or entities are in a state of armed conflict or war with that state and when there exists a genuine threat that they would pose a danger to the security of the state and its citizens.

Israel Ministry of Foreign Affairs, Israeli Legislation Regarding Citizenship and Residence Rights for Palestinian Residents of the Territories (Aug. 10, 2003), *at* <http://www.mfa.gov.il/mfa/go.asp?MFAH0nqf0>.

196. *See, e.g.*, ICCPR art. 4, *supra* note 143, at 174; European Human Rights Convention art. 15, *supra* note 168, at 232, 234.

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objectively reasonable basis for the proposed limitations.<sup>197</sup> To couch the measure as a means of furthering State security may strike the balance in the State's favor, but it does not eliminate the need for an objectively, reasonable justification altogether.<sup>198</sup>

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197. See, e.g., *Beharry v. Reno*, 183 F.Supp.2d 584, 604 (2002) (finding that the "summary deportation of [the petitioner] a long term legal alien without allowing him to present the reasons he should not be deported violates the ICCPR's guarantee against arbitrary interference with one's family...."), *rev'd sub nom. on unrelated grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2003); *Maria v. McElroy*, 68 F.Supp.2d 206, 232 (E.D.N.Y. 1999) ("[T]he ICCPR prevents a nation from separating families in a manner that, while in accordance with its domestic law, is nonetheless unreasonable and in conflict with the underlying provisions of the ICCPR."); *Yildiz v. Austria*, App. No. 37295/97, 36 Eur. H.R. Rep. 32, 561 (2002) ("[A State's] power to deport aliens convicted of criminal offenses ... must, in so far as [it] may interfere with [the right to respect for family life guaranteed under Article 8 of the European Convention of Human Rights] be necessary in a democratic society, that is to say justified by a pressing social need and, in particular proportionate to the legitimate aim pursued.").

198. During World War II, the United States Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), considered the constitutionality of several laws which operated to exclude persons of Japanese ancestry from designated military areas in the United States for the "protection against espionage and against sabotage." The petitioner in *Korematsu*, an American citizen of Japanese heritage, was convicted of remaining in a restricted military area where his home was located. *Id.* at 215–16. Prior to assessing the constitutionality of the law at issue, the Court stated:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

*Id.* at 216. Noting that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [the exclusion of persons of Japanese ancestry from a threatened area]" the Court upheld the law as a valid exercise of the war power by Congress and the Executive necessarily relying on the expertise of military authorities in a time of war. *Id.* at 218, 223–24. Justice Murphy, in his dissent, reiterated the importance of assessing governmental actions, even those taken in a time of war, for reasonableness:

Individuals must not be impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must be subject itself to



Even assuming that the Citizenship and Entry into Israel Law is effective in enhancing Israel's security, the factual basis advanced by Israel to support the sweeping nature of the law is insufficient. The Ministry of Interior, in a submission to the Knesset Internal Affairs Committee which considered the justifications for the Citizenship and Entry into Israel Law, reported that 20 out of 140,000 persons entering Israel for family reunification purposes were involved in terrorist-related activities (including those involved in weapons trade).<sup>199</sup> This statistic represents the Government's primary factual justification for the Citizenship and Entry into Israel Law as a means of protecting the Israeli population from threats of terrorism.<sup>200</sup> The restriction of a population of almost 1.3 million Palestinians in the Occupied Territories<sup>201</sup> from applying for an Israeli residence permit or Israeli citizenship on the basis of twenty terrorist-related cases involving Palestinians cannot be viewed as a measure reasonably commensurate to the security risk confronting Israel.

Claims that the Citizenship and Entry into Israel Law is based on geography, and hence not discriminatory should fail, since there is clear evidence that the Law is racially motivated.

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the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

[...]

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.

*Id.* at 234 (citations omitted).

199. Brief for Petitioner paras. 61–63, at 20, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03).

200. Throughout the Knesset Internal Affairs Committee hearings on the Citizenship and Entry into Israel Law, the Government repeatedly failed to provide requested information regarding the factual background of the Law. *See id.* paras. 61–76, at 19–24.

201. The 1997 First Palestinian Census taken by the Palestinian Central Bureau of Statistics reports a total of 1,286,947 Palestinians between ages 15 – 64 residing in the West Bank and Gaza, which constitutes 49.5% of the entire Palestinian population in Occupied Territories. *See* Palestinian Central Bureau of Statistics, *Population by Age Groups in Years, Region, and Sex*, at <http://www.pcbs.org/inside/selcts.htm> (last modified May 12, 2002).

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On its face, the application of the law is directed at specific geographic “areas” namely the Occupied Territories of the West Bank and Gaza.<sup>202</sup> To be sure, Palestinians are not the only residents of these “areas,” which also includes many Jewish settlers.<sup>203</sup> However, as an almost implicit admission of the law’s racial motivations, the definition of “areas” excludes Israeli settlements, essentially restricting its application to Palestinians.<sup>204</sup> Moreover, members of the Knesset have expressly stated that the Law specifically targets the Palestinians who pose a security threat to Israel.<sup>205</sup> The Citizenship and Entry into Israel Law, thus, limits the exercise of fundamental, human rights based solely on distinctions of race and national origin.

As a racially discriminatory measure, the justifications for the law are subject to a more searching inquiry.<sup>206</sup> The proof offered in support of the law cannot sustain this heavy burden.<sup>207</sup> Therefore, Israel has breached its obligations under the ICCPR and CERD to guarantee the exercise of fundamental human rights, without distinction as to race, national origin, or religion.<sup>208</sup>

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202. Citizenship and Entry into Israel Law § 1, 5763-2003.

203. According to the latest Israeli population census, there are approximately 228,000 Jewish settlers residing within the Occupied Territories. Central Bureau of Statistics of the State of Israel, Population in Urban Localities and Other Geographical Divisions, (Sept. 30, 2003) (table providing population data by district, sub-district and area), available at [http://www.cbs.gov.il/population/popul\\_eng.htm](http://www.cbs.gov.il/population/popul_eng.htm) (last modified Sept. 30, 2003).

204. Citizenship and Entry into Israel Law § 1, 5762-2003.

205. See text accompanying *supra* notes 81-82.

206. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.... Such classifications are subject to the most exacting scrutiny.”) (citations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications especially suspect in criminal statutes, be subject to the ‘most rigid scrutiny.’”) (citation omitted); *Abdulaziz v. United Kingdom*, App Nos. 9214/80, 9473/81, 9474/81, 6 Eur. H.R. Rep. 28, 39, para. 103 (1983) (Commission Report) (“It is generally recognised that classifications based on sex are to be carefully scrutinised, in order to eliminate invidious disadvantages.”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

207. See text accompany *supra* note 199.

208. See CERD art. 5(d)(iv), *supra* note 144, at 220; ICCPR art. 2(1), *supra* note 143, at 173.

## VI. THE FINAL RECONCILIATION: A JEWISH DEMOCRATIC STATE

As the one-year deadline<sup>209</sup> for the Citizenship and Entry into Israel Law approaches, Israel must decide whether to renew a law, discriminatory in nature and purpose, or whether to preserve Israel's democratic principles by amending or repealing it. It is apparent that Israel's democratic foundation cannot support a measure which restricts, on a large-scale, the exercise of fundamental human rights based on fortuitous traits of race and ethnicity.

The Citizenship and Entry into Israel Law should be amended, affording Palestinian applicants for residency or citizenship in Israel an individualized screening process. Indeed, such a practice had been in place until the passage of the new citizenship policy<sup>210</sup> and there is no indication that the outright ban on citizenship and residency in Israel has enhanced its overall security.<sup>211</sup>

By prohibiting Palestinians from seeking citizenship and residency in Israel solely because of race and national origin the measure violates principles of non-discrimination enshrined in the Universal Declaration of Human Rights, ICCPR, and the CERD. Moreover, the law prevents Palestinians from joining their spouses in Israel thus infringing on the right to the establishment and protection of the family. And, without further justification, the racially discriminatory motive and effect of the law constitutes an arbitrary interference with the family. Thus, Israel is in breach of its international human rights obligations.

However, it is not only Israel's increasingly restrictive citizenship policy which is problematic. These discriminatory,

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209. Section 5 of the Citizenship and Entry into Israel Law provides:

This law shall remain in force until the end of a year from the day on which it is published, but the Government is entitled, with the approval of the Knesset, to prolong its validity by order, from time to time, for a period that shall not exceed one year on each occasion.

Citizenship and Entry into Israel Law § 5, 5763-2003.

210. See Brief for Petitioner para. 40, at 113-14, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03).

211. Since the implementation of the "freeze" under Government Decision 1813 in May 2002 there have been thirty-six "terrorist attacks" in Israel proper and Jerusalem resulting in 272 deaths and 1,300 injured. Anti-Defamation League, *Recent Terrorist Attacks In Israel*, available at [http://www.adl.org/Israel/israel\\_attacks.asp](http://www.adl.org/Israel/israel_attacks.asp) (last visited Apr. 11, 2004).

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anti-democratic measures are inherent in Israel's character as a Jewish state and will continue to propagate as long as the status quo is maintained. Israel must decide whether its democratic principles are worth sacrificing to preserve its Jewish character, thus creating an apartheid-like State, or whether its Jewishness shall give way to the security of racial harmony and social equality. If history may be a guide, the answer is clear.

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\* B.S., New York University – Leonard N. Stern School of Business (2001); J.D. Brooklyn Law School (expected 2005). I would like to thank my family for their continued support and encouragement throughout the law school process. Moreover, I am appreciative of the guidance given to me by Professors Nathaniel Berman and Samuel Murumba in writing this Note. And finally, I would like to thank my dear friend, Ms. Mary Geday, who needs no reminder that her cause is just, and given time, justice will prevail.