

The Palestinians' Right of Return

by Hussein Ibish and Ali Abunimah*

Palestinians are the largest and most long-suffering refugee population in the world. There are more than 3.7 million Palestinians registered as refugees by the United Nations Relief and Work Agency (UNRWA), the UN agency responsible for them. During the 1948 war, these people and their descendants were expelled or fled from their homes in what is now Israel. Their future and the status of their right of return has become one of the most contentious issues in the effort to find a lasting peace between Palestinians and Israelis.

Right of Return in International Law

The right of refugees to return to their homes is embedded deeply in customary international law and the most fundamental human rights instruments. According to prominent legal scholars Mallison and Mallison, “[h]istorically, the right of return was so universally accepted and practiced that it was not deemed necessary to prescribe or codify it in a formal manner.”

Perhaps the most basic expression of the right, however, is contained in the Universal Declaration of Human Rights (Declaration), Article 13, which states that “[e]veryone has the right to leave any country, including his own, and to return to his country.” It is a generally recognized principle of international

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law that when sovereignty or political control over an area changes hands, there is a concurrent transfer of responsibility for the population of that territory. Therefore it cannot be argued that Palestinians, who were expelled or fled from what became Israel during a period of conflict, no longer had any

The Controversy Over the Right of Return

In 1947, after a wave of Jewish immigration, the United Nations voted to divide Palestine into Arab and Jewish sectors, with Jerusalem administered as an international enclave. Despite Arab opposition, the Jews began to build their own state. On May 14, 1948, Israel declared its independence. Shortly thereafter, the War of Independence broke out when Egypt, Syria, Jordan, and Lebanon refused to accept the partition of Palestine. After nearly 15 months of fighting, Israel emerged victorious and expanded its borders. As a result, an estimated 700,000 Palestinians fled to refugee camps in Lebanon, Jordan, and Egypt. According to the United Nations Relief and Works Agency for Palestinian Refugees, Palestinian refugees are persons whose normal place of residence was Palestine between 1946 and 1948, who lost their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict, and who took refuge in Jordan, Lebanon, Syria, the Jordanian ruled West Bank, or the Egyptian-administered Gaza Strip. This displacement of refugees is still an issue today, with the number of registered refugees estimated at 3.7 million.

rights with regard to the country in which they had lived simply because of a change in the nature of the state or government in that territory. Moreover, where expulsion or prevention from return results in denationalization and statelessness, Article 15 of the Declaration, which stipulates that “[e]veryone has the right to a nationality,” becomes a further relevant protection of the right of return. And certainly, where a population has been forcibly expelled, as Lex Takkenberg, the Chief of Field Relief and Social Services for UNRWA, points out “the right of return derives from the illegality of the expulsion itself” because “those expelled clearly have the right to reverse an illegal act, that is to return to their homeland.”

The four Geneva Conventions (Conventions) assume the right of return in numerous articles and provisions. For example, all four Conventions provide that any formal denunciation of one state by another for violating provisions of the Conventions “shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation,” and in the case of Convention IV, Article 158, re-establishment “of the persons protected by the present

Convention have been terminated.” (Convention I, Article 63; Convention II, Article 62; Convention III, Article 142; Convention IV, Article 158). The underlying assumption of these provisions, and the numerous prohibitions in international law against involuntary repatriation under conditions of danger, can only be that of an absolute and universally accepted right of return.

In 1948, the UN adopted Resolution 194, which specifically applies the right of return to the Palestinian refugees. Paragraph 11 states “that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.” The UN has reaffirmed this resolution practically every year since its adoption with near unanimity.

It is sometimes argued by opponents of the right of return that because Resolution 194 is a General Assembly res-

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olution, rather than a Security Council resolution, it is “non-binding.” The general principle of when and if a General Assembly resolution can be “binding” need not be debated to invalidate this argument. Israel’s admittance to the UN as a member state, through Resolution 273, was conditioned on acceptance and implementation of Resolution 194. Therefore, Israel is bound, as a condition of membership in the UN, to implement 194 and to facilitate the return of the Palestinian refugees.

Despite this commitment, Israel has consistently denied the right of return. In the late 1940s and early 1950s, Israel passed laws forbidding the return of refugees and expropriating their property. Israel also routinely killed in cold blood Palestinians who attempted to cross its borders in order to return to their homes.

Resolution 194 is particularly noteworthy in that it provides for the return of the refugees not simply to “their country” or homeland, but to “their homes.” The former UN Mediator for

Obviously, if the property rights of Jewish Europeans survive after more than 56 years following expropriation, those of Palestinian refugees must similarly survive after 53 years or less. Moreover, if such property rights survive after so many years and pass from one generation to the next, surely the more fundamental right of return and residence in one’s own home and country cannot more easily expire.

Palestine, Count Folke Bernadotte, recommended in his Progress Report of September 16, 1948, submitted the day before he was murdered by the Stern Gang, that “the right of the Arab refugees to return to their homes in Jewish controlled territory at the earliest possible date should be affirmed by the United Nations” His Report was the basis for much of the text of Resolution 194 and, as Takkenberg points

out, “[i]t should be noted that the UN Mediator recommended that the right to return be *affirmed* rather than be *established*. Although the issue is not explicitly addressed in the report, Count Bernadotte was apparently of the opinion that the right of refugees to return already formed part of existing international law.”

The Right of Return in Other Conflicts

These assumptions—that the right of refugees to return is an established and universally accepted principle of international law and that this right is linked to homes and property, not just to a country or homeland—formed the basis for much of the discourse of the United States, NATO, and the UN during the Kosovo conflict in 1999. Indeed, this conflict appears to have been a massive reaffirmation of the right of return as a general principle of international law, and even a valid *casus belli* for “humanitarian intervention” in the internal affairs of sovereign states, as well as being inextricably linked to specific homes and property rights.

During the Kosovo crisis, on April 6, 1999, former U.S. president Clinton declared that “[w]e cannot say, well, ‘we’ll just take all these folks and forget about their rights to go home.’ The refugees belong in their own homes on their own land. Our immediate goal is to provide relief. Our long-term goal is to give them their right to return.” Similar sentiments were expressed by British Prime Minister Tony Blair on May 19, 1999, who said, “[t]hese people have been driven from their homes and their homeland. . . . Our mission is very simple and very clear. It is to make sure that they return and are able to live in peace and security as should be the right of any civilized human being.”

NATO spokesman Jamie Shea told reporters at an April 24, 1999, briefing that “what is absolutely clear are our key preconditions which we are not going to negotiate on, which is the right to the return of refugees, access to humanitarian organizations, withdrawal of Serb forces, deployment of a very robust international force, and a political process.” On April 5, 1999,



Photo courtesy of UNRWA

UNRWA emergency food distribution center in Beach refugee camp, Gaza Strip, 2001.

Shea told the press that “[t]he most important thing is that at the end of the day... that those people should be able to exercise their right to return....”

United Nations humanitarian officials agreed with NATO political and military leaders that the right of return was a fundamental aspect of international human rights law as demonstrated by the crisis in Kosovo. On April 19, 1999, Dennis McNamara, Director of Protection at the Office of the United Nations High Commissioner for Refugees (UNHCR) said of the Kosovo conflict, “[h]uman rights were at the heart of the exodus—the right to asylum was critical to saving thousands of lives, and the right to return would have to be honored for any lasting solution to be achieved.”

The principle of the right of return was also expressed in the context of other recent conflicts. With regard to the conflict in and around the former Soviet republic of Georgia, the UN Security Council, in Resolution 1255 (1999), “reaffirms the unacceptability of the demographic changes resulting from the conflict and the intransigent right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law and as set out in the Quadripartite Agreement of April 4, 1994, on the voluntary return of refugees and displaced persons (S/1994/397, annex II), and calls upon the parties to address this issue urgently by agreeing and implementing effective measures to guarantee the security of those who exercise

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their unconditional right to return.” The discourse and debate in the Security Council surrounding the impact of this conflict on refugees referred repeatedly to the precedent set in the international reaction to the Kosovo crisis, which implicitly constituted a significant precedent regarding the right of return.

The work of the Clinton Administration’s deputy treasury secretary, Stuart Eizenstat, with regard to the property rights of refugees and other victims of the Nazi Holocaust in Europe has great significance for the property rights of Palestinian refugees. Moreover, because the right of return is so intimately linked to property rights and original homes, the principles laid out by Eizenstat have profound implications for the right of return as well as property rights. Eizenstat’s testimony before the Commission on Security and Cooperation in Europe (Commission) in March 1999 is of particular relevance. He told the Commission that “the basic principle that wrongfully expropriated property should be restituted (or compensation paid) applies to them all [every country in Eastern and Central Europe], and their implementation of this principle is a measure of the extent to which they have successfully adopted democratic institutions, [and] the rule of law with respect to property rights.” Eizenstat presented a “list of principles and best practices we would like to see adopted.” Among these principles were that “[o]wners or their heirs should be eligible to claim personal property on a non-discriminatory basis, without citizenship or residence requirements,” and that “[r]estitution of property should result in a clear title to the property, generally including the right of resale, not simply the right to use property, which could be revoked at a later time.”

These principles for the return of, and compensation for, refugee property obviously must be applicable generally and not confined to the largely Jewish Holocaust assets claims to which Eizenstat is specifically referring. Obviously, if the property rights of Jewish Europeans survive after more than 56 years following expropriation, those of Palestinian refugees must similarly survive after 53 years or less. Moreover, if such property rights survive after so many years and pass from one generation to the next, surely the more fundamental right of return and residence

in one’s own home and country cannot more easily expire.

Supporters of Israel often claim that the creation of a Palestinian state would obviate the need for implementing the right of return of Palestinian refugees. This was reflected in Clinton’s peace proposal of December 2000, which sought to replace the right of return to actual homes and properties with a Zionist-like attitude that would see “return” as being satisfied by physical presence in any part of historic Palestine. Instead of return to their homes, Clinton would “allow them to return to

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a Palestinian state that will provide all Palestinians with a place they can safely and proudly call home.” This is the equivalent of asking Kosovo Albanians to be satisfied with a “return” to Albania and renunciation of the right to go back to their homes in Kosovo. By this logic, Poland and other European states could argue that the creation of Israel obviates its duty to restore Jewish property.

Conclusion

What Palestinians expect is that the right of refugees to return to their homes should be recognized by Israel, and that the choice be given to refugees as required by Resolution 194. It is likely that hundreds of thousands might well choose to return, especially Palestinian refugees in Lebanon. But some, perhaps many, Palestinians would likely accept compensation for the simple reason that the homes and villages they may wish to return to no longer exist. Others might hesitate to decide to live as Arabs in an Israeli state. Once Israel accepts the right of return, Palestinians and Israelis will then have to negotiate modalities for the orderly administration of a return program. This could include limits on the number of refugees returning each year, although

not a cap on the total who would have the right to return, among many other administrative options. However, fundamental elements of a just settlement must include full recognition of the right of return, a real choice for refugees between return and adequate compensation, and restitution and modalities to ensure that return occurs at a rate that refugees can be absorbed into Israel with priority given to those refugees most in need of return.

If we are ever to resolve this conflict, we must reject the notion that the refugees “are an obstacle to peace” whom, with their stubborn demands for their rights, are spoilers at everyone else’s party. The essence of peace is minimal justice, and the essence of justice for the Palestinians is justice for the refugees. Israeli concerns and questions about the right of return are understandable and must be addressed, but Israel’s absolute rejection of the rights of refugees cannot be the final word.

We have to start the discussion from a point that can lead to a settlement with which both Israelis and Palestinians can live, that meets the requirements of justice, and respects refugees’ human rights. If the right of return is permanently abrogated, it is not just the Palestinian refugees who would suffer. Humanity in general would be deeply impoverished if we start renouncing and repudiating rights long since upheld as inviolable, and our slow and painful quest to build a world that provides equal protection to all human beings will be dealt a crippling blow. 🌐

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