

The 1948 Palestinian Refugees and the Individual Right of Return

An International Law Analysis



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for Palestinian Residency and Refugee Rights

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1

Introduction Basic Contours of the Individual's Right of Return

Under international law, all individuals have a right of return. The right of return guarantees all individuals a fundamental right to return to their homes – commonly referred to as their “homes of origin” – whenever they have become displaced from them due to circumstances beyond their control. Like the right to vote, the right of return is an inherent human right which all individuals possess even if, in actual practice, governments may deliberately obstruct the free exercise of that right. However, since the right of return is one accorded under international law, deliberate governmental obstruction of it – just like obstruction of the right to vote – would violate international law and can never be legal. Accordingly, the right of return exists independently of any given government's policy choice to allow the free exercise of it or not.

The purpose of this paper is to demonstrate that under international law, the 1948 Palestinian refugees have the right to return to their homes of origin inside what is now Israel.¹ To accomplish this, the paper surveys the four

1. While many useful analyses have been written about the individually-held right of return of the 1948 Palestinian refugees, several contributions stand out in particular for their invaluable insights into the juridical (legal) bases in international law of this right. For the most important among these, see, e.g., John Quigley, “Displaced Palestinians and a Right of Return,” *Harvard International Law Journal*, Vol. 39, No. 1 (Winter 1998) 171; John Quigley, “Mass Displacement and the Individual Right of Return,” *British Yearbook of International Law*, Vol. 68 (1997) 65; W.T. Mallison and S. Mallison, “The Right to Return,” 9 *Journal of Palestine Studies* 125 (1980); W.T. Mallison & S. Mallison, AN INTERNATIONAL LAW ANALYSIS OF THE MAJOR UNITED NATIONS RESOLUTIONS CONCERNING THE PALESTINE QUESTION, U.N. Doc. ST/SG/SER.F/4, U.N. Sales #E.79.I.19 (1979); W.T. Mallison & S. Mallison, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 174-188 (1986); Kathleen Lawand, “The Right to Return of Palestinians in International Law,” *International Journal of Refugee Law*, Vol. 8, No. 4 (October 1996) 532. For an analysis of the “right to return” of Palestinians to the Occupied

independent sources in customary international law of the individually-held right of return. State practice implementing the right of return is also reviewed. Through this survey, it becomes clear what the contours of the right of return are, including in state practice. This in turn clarifies specifically how the right of return must be implemented in the case of the 1948 Palestinian refugees,² who would be returning to their homes of origin inside Israel, in order for such a return to be consistent with international law. It further becomes clear that implementing the Palestinian refugees' right of return represents a necessary component for crafting a durable solution to their status as refugees,³ in conformity with other durable solutions designed by the international community under United Nations auspices for other refugee population groups, based upon principles of international law.

Palestinian Territories of the West Bank (including East Jerusalem) and Gaza Strip (which is a related topic but is not covered in this paper), see John Quigley, "Family Reunion and the Right to Return to Occupied Territory," 6 *Georgetown Immigration Law Journal* 223 (1992).

2. The "1948 Palestinian refugees" are those Palestinians who became displaced from their homes during the 1948-related conflict (or thereafter) and have never been permitted by the government of Israel to return to their homes of origin, which now lie inside the 1949 armistice lines (which serve as the *de facto* border for Israel).

The main period of hostilities during what is referred to in this paper as the 1948-related conflict lasted from December 1947 through mid-1949, when the four armistice agreements were concluded. However it should be noted that Israel did continue to displace (expel) Palestinians from within the 1949 armistice lines well after the armistice agreements had been concluded.

The boundaries delineated by the 1949 armistice agreements now constitute the *de facto* "borders" of Israel, since Israel still has no *de jure* borders for two reasons. First, Israel has never concluded final peace agreements with any of its neighboring Arab states, with the exception of Egypt and Jordan. Second, Israel has never enacted a constitution, which would have required delineating borders. (Israel's long-term occupation of the West Bank, including East Jerusalem, and the Gaza Strip point to the most probable reason for this unwillingness to delineate borders – expansionist goals vis-à-vis the remaining territory of historic mandate Palestine.)

Nevertheless, despite the foregoing, Israel has continued to police the 1949 armistice lines and has continued to obstruct the 1948 Palestinian refugees from exercising their right of return across these lines, which therefore effectively serve as *de facto* borders of Israel. Accordingly, the 1948 Palestinian refugees would therefore need to cross *de facto* international borders to exercise their right of return.

For details on the four 1949 armistice agreements demarcating the 1949 armistice lines, see, generally, the General Armistice Agreements, concluded in 1949 between Israel and Egypt (February 24, 1949 (UNTS, Vol. 42, p. 251)); Israel and Jordan (April 3, 1949 (UNTS, Vol. 42, p. 303)); Israel and Lebanon (March 23, 1949 (UNTS, Vol. 42, p. 287)); and Israel and Syria (July 20, 1949 (UNTS, Vol. 42, p. 327)).

3. The term "displaced persons" has gained prominence in the literature discussing the case

Several important aspects framing the contours of the right of return in customary international law can be highlighted at the outset of this discussion. The following enumerated points will be further elaborated upon in the course of this paper.

of persons whose right of return to their homes or origin is being obstructed by deliberate governmental policy. “Externally displaced persons” are persons who are trapped outside the geographical territory containing their homes of origin – generally as delineated by an international border (*de facto* or otherwise) – and thus are prevented from returning to them. Thus, externally displaced persons would generally be required to cross an international boundary (of some type) in order to exercise their right of return.

“Internally displaced persons,” in contrast, are persons who have remained inside the borders (again, *de facto* or otherwise) of a given state entity, but who nevertheless have been displaced from their homes of origin and are similarly being prevented from returning to them by deliberate governmental policy.

Displacement can happen through “peaceful” means (such as revoking residency rights or purportedly “denationalizing” certain segments of the population) or through “forcible” means (such as military targeting of civilian populations to “stampede” them from their homes). Regardless of the means used, the resulting displacement is a major violation of a wide variety of rights of the persons so affected. Accordingly, customary international law accords all displaced persons the right to return to their homes of origin.

For purposes of this paper, the phrase “1948 Palestinian refugees” will be used to refer to that group of externally displaced Palestinians (which now includes their offspring of several generations) who were initially displaced from their homes of origin during the 1948-related conflict and have remained trapped outside the 1949 armistice lines ever since. The term “refugee” will be used in this paper instead of the phrase “externally displaced person” because the former is the term most frequently used in common parlance. However, the 1948 Palestinian refugees are externally displaced persons, and the two terms are virtually synonymous.

In terms of population figures for the 1948 Palestinian refugees, it is estimated that at least over 700,000 persons were initially externally displaced during the 1948-related conflict, while higher-end estimates place the figure for the initial group of 1948 Palestinian refugees as approaching 1 million. See, e.g., “*General Progress Report and Supplementary Report of the United Nations Conciliation Commission for Palestine, Covering the Period from 11 December 1949 to 23 October 1950*,” U.N. GAOR, 5th Sess., Supp. No. 18, U.N. Doc. A/1367/Rev. 1 (23 October 1950) (Appendix 4 of which, titled “Report of the Technical Committee on Refugees,” which was submitted to the Conciliation Commission in Lausanne on 7 September 1949, listed an estimated figure of 711,000 for the “refugees from Israel-controlled territory,” a figure which the Technical Committee stated it “believed to be as accurate as circumstances permit”). See *also*, Janet Abu-Lughod, “The Demographic Transformation of Palestine,” in Ibrahim Abu-Lughod (ed.), *THE TRANSFORMATION OF PALESTINE: ESSAYS ON THE ORIGIN AND DEVELOPMENT OF THE ARAB-ISRAELI CONFLICT*, 139, 161 (1971) (an estimated 780,000 displaced Palestinians were trapped outside what became the 1949 armistice lines and were not allowed to return); Ilan Pappé, “Were They Expelled?: The History, Historiography and Relevance of the Palestinian Refugee Problem,” in Ghada Karmi and Eugene Cotran (eds.) *THE PALESTINIAN EXODUS 1948-1998*, at 52 (1999) (noting that some demographers put the figure of externally displaced

First, the obligation of states to respect the individual's right of return is a type of rule known as a "customary norm"⁴ of international law. Customary norms are legally "binding" upon all states and all states are therefore legally obligated to follow the rules codified by them.

Second— and it is a central purpose of this paper to demonstrate the following proposition — historically speaking, the right of return had achieved customary status in international law before 1948.⁵ Accordingly, the right of return has guaranteed the 1948 Palestinian refugees an absolute, unqualified right to return to their homes of origin continuously since the period of their initial displacement during the events surrounding the 1948 conflict.

Palestinians from this period at as high as one million persons).

The group of 1948 Palestinian refugees has grown in the intervening passage of five decades to number, with their descendants, roughly five million persons. This includes approximately 3.8 million refugees registered (according to need) with the UN Relief and Works Agency (UNRWA) residing in the five areas of operation: West Bank, Gaza Strip, Jordan, Lebanon, and Syria. For a detailed estimate, see, e.g., Table 7: The Distribution of Palestinians in 1998 (minimum estimate) in, Salman Abu Sitta, *THE PALESTINIAN NAKBA 1948, THE REGISTER OF THE DEPOPULATED LOCALITIES IN PALESTINE (1998)* at 16. The population estimate for 2000 can be derived based on an average per annum increase of approximately 3.5 percent.

In addition, there is currently a large population of "internally displaced" Palestinians inside Israel who also were displaced from their homes of origin and lands during the 1948-related conflict but remained inside what became the 1949 armistice lines and therefore ultimately became citizens of Israel. Nevertheless, despite their status as citizens, Israel has similarly refused to allow the internally displaced Palestinians to return to their homes of origin as well, despite the passage of over five decades since the initial displacement.

The 1948 internally displaced Palestinians initially numbered an estimated 75,000 persons. See, e.g., David Kretzmer, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 57 & n. 39 (1990).

In the intervening passage of time of over five decades since the period of initial displacement, the internally displaced Palestinians inside Israel, with their descendants, have grown to number over 250,000 persons.

4. See, e.g., Christian Tomuschat, "State Responsibility and the Country of Origin," in Vera Gowlland-Debbas (ed.) *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 61 (1996) (stating that "the right of a person to stay and live in his or her country" constitutes "customary international law").

5. See, e.g., "A Study of Statelessness," United Nations Department of Social Affairs, U.N. Doc. E/1112, U.N. Sales Pub. 1949.XIV.2 (August 1949) (wherein it is stated state that the "[e]xpulsion and reconduction [i.e., repatriation, or allowing to exercise the right of return] are universally recognized measures of order and security; in principle their implementation presents no difficulties in the case of nationals of any given country, since that country is obliged to receive its nationals and the expelled person is simply repatriated"). *Id.*, at 21.

Third, the individually-held right of return is anchored in four separate bodies of international law: the law of nationality, as applied upon state succession; humanitarian law; human rights law; and refugee law (a subset of human rights law which also incorporates humanitarian law). The right of return exists in these four bodies of law for all factual cases of involuntary displacement, and regardless of the circumstances of displacement. Accordingly, the right of return prohibits any type of deliberate governmental policy designed to block the voluntary return of persons to their homes of origin, including “peaceful” obstructions deliberately barring return after a temporary departure. For example, if individuals happened to travel outside their normal place of residence for a weekend picnic, the right of return guarantees that no governmental policy could be enacted to bar their voluntary return to their homes. The obligation under international law of the “state of origin” from which the involuntarily displaced person originated to receive back persons seeking to return to their homes of origin is absolute.

However, because international law has particularly strong prohibitions against “forcible expulsions” carried out by governments, a *fourth* major principle regarding the right of return can be noted here. Whenever the facts demonstrate that deliberate, forcible governmental expulsion has been practiced, a heightened obligation to implement the right of return exists. In other words, the factual element of deliberate, governmental forcible expulsion provides an additional, supplementary basis for the obligation for the state of origin (which in this case now also constitutes the expelling state) to implement the right of return. International law prohibits forcible expulsion even when practiced against a single individual. Therefore, the prohibition is accordingly stronger against expulsions practiced on a “mass” scale affecting large numbers of people. Similarly, since discrimination based upon racial, ethnic, religious or political criteria is independently prohibited by customary international law,⁶ the prohibition against forcible expulsions (“mass” or otherwise) is even stronger against expulsions

6. See, e.g., the non-discrimination provision in Article 2(1) of the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A, U.N. Doc. A/6316 (1966), 999 *UN Treaty Series* 171; the non-discrimination provision in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. No. 14531 (1976), p. 3; and the non-discrimination provisions in the Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, 660 *UN Treaty Series* 195.

practiced in a discriminatory manner, i.e., when targeting a particular ethnic or minority subgroup of the population based upon racial, ethnic, religious or political grounds. Accordingly, “mass” forcible expulsions carried out in a discriminatory manner based upon racial, ethnic, religious or political grounds would be the most strongly prohibited under international law, by virtue of being prohibited on three, independent bases. Each violation of any one of these three, independent prohibitions, therefore, would provide *additional, supplementary* grounds for the obligation of the expelling state to implement of the right of return of the wrongfully expelled persons. A “state of origin” (which an expelling state would necessarily be) already has an absolute obligation to allow displaced persons to return to their homes of origin (as was discussed in the preceding paragraph). However, an expelling state – by virtue of the additional illegality of the forcible expulsion (“mass” or discriminatory or otherwise) – accordingly would have an even greater obligation to repatriate (i.e., allow to exercise their right of return) wrongfully expelled persons. Thus the obligation of the expelling state of origin to implement the right of return of expelled persons is, from a legal perspective, even *greater* than absolute. This is so because, as was just outlined in the preceding paragraph, the obligation of a state of origin to allow the free exercise of the right of return is already absolute regardless of the circumstances of displacement, due to the customary status of the right of return in international law. Therefore, where forcible expulsion was an additional factual element in the circumstances leading to the displacement, it adds *additional* grounds for the implementation of the right of return. Hence, expelling states are not permitted to deviate from the obligation to readmit wrongfully expelled persons, which obligation may therefore be said to be “greater than absolute.”

Fifth, Israel is the *sole* state of origin with the binding obligation under international law to receive back the 1948 Palestinian refugees and thereby to implement their internationally guaranteed right to return to their homes of origin. This is so by virtue of the obvious simple fact that no other state geographically contains the homes of origin of the 1948 Palestinian refugees. Israel’s obligation to repatriate the 1948 Palestinian refugees is, accordingly, absolute and unqualified. Since no other state constitutes a state of origin for this particular group of refugees, no other state has any duty whatsoever to repatriate them.

Sixth, the United Nations, as the body representing the international community at the international level, has an obligation to ensure that Israel fully implements the 1948 Palestinian refugees' right of return. This is so because of the immense role which the United Nations played in the chain of events which led to the creation of the 1948 Palestinian refugee phenomenon in the first place.⁷ Because Israel's obligation to implement the right of return is required under a binding, customary norm of international law, Israel is not legally permitted – under international law – to derogate (deviate) from the obligation to ensure its implementation. Similarly, because of the massive scale on which Israel is currently violating this binding customary norm of international law, the United Nations also has a responsibility to act to ensure that Israel fully corrects its violation. This is so not only because of the need to encourage respect for international law generally, and thereby to expand the “rule of law” at the international level, but also because of the egregious severity of Israel's violation of fundamental rights of the 1948 Palestinian refugees. Violations of international law of this magnitude and severity give rise to the opportunity for and responsibility of the international community (generally) and individual nation states (separately) to take action at the international level to ensure that the violation is corrected.⁸ In this case, the United Nations – with particular emphasis on the Security Council, as the

7. The responsibility of the U.N. in permitting the series of events to unfold which created the Palestinian refugee phenomenon is huge and, unfortunately, commonly misunderstood. For example, U.N. General Assembly Resolution 181, of November 1947, which proposed “partitioning” Palestine actually not only had no basis in international law but, on the contrary, violated international law to a very high degree. This is so because “partition” of Palestine ran directly counter to the prior, legally vested national sovereignty rights of the Palestinian people in all of historic, Mandate Palestine, as was covenanted to them by the League of Nations Covenant in 1919. See, section 3.B.1, below, for a discussion of the Palestinian people's prior vested national sovereignty rights in all of historic Mandate Palestine, which inured to them by virtue of the League of Nations Covenant.

8. See, e.g., Christian Tomuschat, “State Responsibility and the Country of Origin,” in Vera Gowlland-Debbas (ed.) *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 76 (1996) (citing the “obligations *erga omnes*” legal concept developed by the International Court of Justice in the 1970 Barcelona Traction case for the proposition that “every State has legal standing to act – in some form – for the protection of basic human rights that have been breached,” and finding that this rule has been incorporated into Article 5 of the International Law Commission's Draft Articles on State Responsibility, which the author cites for the proposition that “in case of a violation of a human rights obligation under customary international law or if the breach attains by its seriousness the quality of an international crime, all other States are to be considered injured; in case of a human rights obligation based on treaty law, all other States parties. This gives them legal standing to participate in the enforcement process”) (footnotes omitted).

highest decision-making body in the U.N., and with even greater emphasis on the United States, as the most powerful member of the Security Council – has an extremely strong responsibility to hold Israel accountable for its mass-scale violation of international law and to ensure that the violation is remedied by implementing the 1948 Palestinian refugees’ right of return.

Seventh, the United Nations has already unambiguously called upon Israel immediately and fully to implement the 1948 Palestinian refugees’ internationally guaranteed right of return. This call came as early as December 1948 in the form of General Assembly Resolution 194 (III)⁹ [hereinafter “Resolution 194”], which stated categorically Israel’s obligation under customary international law to allow the 1948 Palestinian refugees¹⁰ to exercise their right of return. Resolution 194 specifically stated that the Palestinian refugees had the right to return to their homes of origin. Resolution 194 is critically important because it reflects the existence in December 1948 of the customary norm requiring that the 1948 Palestinian refugees be permitted to exercise their right of return – and this at the very same time when the events which were creating the Palestinian refugee phenomenon in the first place were still unfolding (since the armistice agreements were not concluded until mid-1949). Consequently, Resolution 194 demonstrates conclusively the historical grounding in international law of the 1948 Palestinian refugees’ right of return. The binding nature of the customary norm reflected in Resolution 194 requiring Israel to repatriate the Palestinian refugees has not diminished over time but rather has gained only greater strength, as the review in Sections 3 through 6, below, of the four relevant bodies of international law in which the right of return is grounded is intended to demonstrate.

Eighth, the individually-held right of return which is being discussed here is completely separate from any “collective” right of return, whose implementation might be viewed in some circumstances as a helpful

9. G.A. Res. 194 (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948) [hereinafter “G.A. Res. 194”].

10. G.A. Res. 194 also applies to the 1948 “internally displaced” Palestinians who remained inside what became the 1949 armistice lines and therefore became citizens of Israel but who Israel nevertheless similarly bars from returning to their homes of origin and lands. This paper does not address the topic of the internally displaced Palestinians. However, a forthcoming Brief #11 by BADIL will address the case of the internally displaced Palestinians who continue to remain barred from returning to their homes and lands inside Israel.

precondition for the realization of a peoples' collective human right to self-determination¹¹ (which is a universally-recognized human right). Individuals – as individuals – possess many separate rights guaranteed under international law. These rights complement each other and do not cancel each other out. Using a biological metaphor, it is like the various organs and systems of the body working together to ensure the healthy functioning of a human being. The fact that one has one's eyesight does not negate the necessity and usefulness of having one's hearing as well, in order to maximize one's overall health and social productivity. Individual rights are not mutually exclusive, under international law, but rather supplementary and complementary. The exercise of one right can never cancel out the exercise of another, and should never be viewed as doing so.

This paper, then, undertakes to examine the right of return as it existed as a customary binding norm of international law in 1948, the immediate and full implementation of which was called for by the U.N. General Assembly in December of 1948 in Resolution 194. Section 2 will examine the text and highlight some important elements of the drafting history of Resolution 194. Sections 3 through 6 will examine the right of return as anchored in four separate bodies of international law: the law of nationality as applied upon state succession; humanitarian law; human rights law; and refugee law (a subset of human rights law which also incorporates elements of humanitarian law). Section VI, in particular, will examine state practice according to which individuals – and in particular refugees – have been permitted, and indeed encouraged, by the international community to exercise their right of return. The review of state practice reflects the important element of *opinio juris* (a sense of legal obligation) on the part of states that implementation of the right of return constitutes a binding legal obligation under international law,

11. See, e.g., G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31 para. 2, U.N. Doc. A/9631, which mentions both the right of return and the "right of self-determination," thus signaling recognition of a "collective" right of return. The "collective right of return," under international law is not an alternative to the individual's right of return. See Section 6, below, where relevant examples from state practice are collected where the "individual" right of return was implemented under the auspices of the international community in conjunction with the "collective" right of return (i.e., exercise of the collective right of self-determination), and the latter was not viewed by the international community as a bar to implementation of the former. The purpose of this paper is to review the sources in international law of the individual right of return and accordingly, the collective right of return is not discussed at length, although its legal foundations are described briefly in Section 3.B.1, below.

and not merely a politically expedient policy choice. Section 7 will conclude by returning to Resolution 194 once more and analyzing – in light of the preceding review of principles and state practice – its continuing unshakable basis for implementing the right of 1948 Palestinian refugees to return to their homes of origin inside Israel.

2

U.N. G.A. Resolution 194: The Right of Return in the Customary Law of 1948¹²

In December 1948, the U.N. General Assembly passed Resolution 194 which, inter alia, established a mechanism known as the United Nations Conciliation Commission [hereinafter the “UNCCP”] to facilitate implementation of durable solutions for refugees in Palestine. Resolution 194 was closely based upon prior recommendations made by the U.N.-appointed Mediator for Palestine, Count Folke Bernadotte.¹³ Resolution 194 unambiguously declared – in reliance upon then-existing principles of customary international law – that Israel was obliged immediately to allow all Palestinian refugees displaced during the 1948 conflict to exercise their right of return.

Paragraph 11 of Resolution 194 sets forth the framework for a durable solution to the predicament of the 1948 Palestinian refugees. Paragraph 11(1) of Resolution 194 by its express terms identifies *three* distinct rights that all Palestinian refugees are entitled to exercise under international law

12. This section is based to a very large extent upon unpublished research by Terry Rempel, Coordinator of Research and Information at BADIL Resource Center, in which reports of the U.N. Mediator for Palestine and various Working Papers prepared by the U.N. Secretariat for the UNCCP are reviewed.

13. For the U.N. Mediator’s recommendations, see *Progress Report of the United Nations Mediator on Palestine*, U.N. GAOR, 3rd Sess., Supp. No. 11, U.N. Doc. A/648 (1948), passim [hereinafter referred to as the “*Mediator’s Progress Report*”]. The UNCCP was established under para. 2 of G.A. Res. 194. For more on the creation of the Commission and its broader mandate concerning Jerusalem and other outstanding issues see, Terry Rempel, BADIL Brief No. 5, *The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees* (June 2000).