

The Plight of the Refugees and Resolution 242

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The plight of the Palestinian refugees is a grave human problem. During the 1947–48 period many Arabs “left, ran away, or were expelled.”¹ At the same time, Jews escaped from Arab countries. While the Jews were integrated into the countries in which they arrived, the Arab refugees were deliberately denied integration into most Arab countries (except Jordan) in order to prevent any possible accommodation with Israel. The refugees have been receiving support and assistance from the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), established by the UN General Assembly in 1949.²

According to various estimates, the number of refugees in 1948 was between 538,000 (Israeli sources), 720,000 (UN estimates), and 850,000 (Palestinian sources). By 2001 the number of refugees registered with, and supported by, UNRWA had grown to about 3.8 million, since UNRWA also registered the children, grandchildren, and great-grandchildren born to the refugees. Another reason for this increase is that UNRWA does not systematically delete all deceased persons from its registry.

According to UNRWA, in 2000 there were about 550,000 refugees in the West Bank, 800,000 in the Gaza Strip, 1,500,000 in Jordan, 350,000 in Lebanon, and 350,000 in Syria. Not all of these were living or had lived in refugee camps. The situation of the refugees has been particularly severe in the Gaza Strip and in Lebanon.³

In this brief paper, three legal questions are examined, with a particular emphasis on the ramifications of Resolution 242:

1. Who should be considered a refugee?
2. Do the Palestinian refugees have a right to return to Israel?
3. Do they have a right to compensation?

1. Who Should Be Considered a Refugee?

The question which arises is whether all those registered with UNRWA are to be considered refugees. The 1951–1967 Convention Relating to the Status of Refugees has adopted the following definition:

[A]ny person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside

The original Convention Relating to the Status of Refugees did not include descendants, spouses, or those who acquired a new nationality in its definition of refugees. Under this definition, the number of Palestinians qualifying for refugee status would be well below half a million.

the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.⁴

There is no mention in this definition of descendants or spouses. Moreover, the convention ceases to apply to a person who, *inter alia*, "has acquired a new nationality, and enjoys the protection of the country of his new nationality."⁵

Under this definition, the number of Palestinians qualifying for refugee status would be well below half a million. However, the Arab states managed to exclude the Palestinians from this definition by introducing the following provision into the 1951–1967 Refugees Convention:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection and assistance.⁶

In no official document have the Palestinian refugees been defined, and UNRWA has adopted varying definitions, such as:

A Palestinian refugee is a person whose normal residence was Palestine for a minimum of two years preceding the conflict in 1948 and who, as a result of this conflict, lost both his home and his means of livelihood and took refuge in one of the countries where UNRWA provides relief. Refugees within this definition and the direct descendants of such refugees are eligible for Agency assistance if they are: registered with UNRWA; living in the area of UNRWA operations; and in need.⁷

This is a very broad definition under which the number of refugees increases markedly. It may be appropriate for UNRWA purposes in order to decide who qualifies for assistance, but it is hardly suitable for other purposes. It follows that the parties should agree on a more suitable definition.

2. Do the Palestinian Refugees Have a Right to Return to Israel?

Another legal controversy concerns the question of whether the refugees, however they are to be defined, have a right to return to Israel. This subject will be discussed from three viewpoints: general international law, the most relevant UN resolutions, in particular Resolution 242, and various agreements between Israel and its neighbors.

Several international human rights treaties deal with freedom of movement, including the right of return.⁸ The most universal provision is to be found in

the 1966 International Covenant on Civil and Political Rights which states that “[n]o one shall be arbitrarily deprived of the right to enter his own country.”⁹ Of course, this provision in turn raises the question of who has the right of return, or rather, what kind of relationship must exist between the state and the person who wishes to return to it. A comparison of the various texts and an analysis of the discussions which took place before their adoption lead to the conclusion that the right of return is probably reserved only for nationals of the relevant state, and perhaps also for “permanent legal residents.”¹⁰ Even the right of nationals is not absolute, but may be limited on condition that the reasons for the denial or limitation are not arbitrary.

Moreover, according to Stig Jägerskiöld,

the right to return or enter one’s country in the 1966 International Covenant...is intended to apply to individuals asserting an individual right. There was no intention here to address the claims of masses of people who have been displaced as a by-product of war or by political transfers of territory or population, such as the relocation of ethnic Germans from Eastern Europe during and after the Second World War, the flight of the Palestinians from what became Israel, or the movement of Jews from the Arab countries.¹¹

In the context of general international law one must also observe that humanitarian law conventions (such as the 1949 Geneva Conventions for the Protection of Victims of War) have not dealt with a right of return.

The first major UN resolution that refers to the Palestinian refugees was General Assembly Resolution 194(III) of December 11, 1948.¹² This resolution established a Conciliation Commission for Palestine and instructed it to “take steps to assist the governments and authorities concerned to achieve a final settlement of all outstanding questions.” Paragraph 11 deals specifically with refugees:

The General Assembly...resolves 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.

Though all the Arab states originally rejected this resolution because it assumed recognition of Israel, later they relied on it heavily and have considered it to be recognition of a wholesale right to repatriation.

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However, this interpretation does not seem warranted. The paragraph does not recognize a “right,” but recommends that the refugees “should” (not “shall”) be “permitted” to return. Moreover, that permission is subject to two conditions — that the refugee wishes to return and that he wishes to live at peace with his neighbors. The violence and mistrust between Israelis and the Palestinians forecloses any hope for a peaceful coexistence between Israelis and masses of returning refugees. Moreover, the Palestinians have linked the request for return to a claim for self-determination. If returning refugees were to have a right to external self-determination, this would mean the end of the very existence of the State of Israel. Under the 1948 resolution, the return should take place only “at the earliest practicable date.” The use of the term “should” in regard to the permission to return underlines that this is only a recommendation — it is “hortatory.”¹³ One should also remember that under the UN Charter the General Assembly is not authorized to adopt binding resolutions, except in regard to budgetary matters and its own internal rules and regulations.

Finally, the reference to principles of international law or equity refers only to compensation for property and does not seem to refer to permission to return.

Likewise, it must be borne in mind that the provision concerning the refugees is but one element of a resolution that foresaw “a final settlement of all questions outstanding between” the parties. The Arab states, on the other hand, have always insisted on the implementation of paragraph 11 (in accordance with the interpretation favorable to them) independently of all other matters.

In this context one should remember that the General Assembly has also recommended the “reintegration of the refugees into the economic life of the Near East, either by repatriation or *resettlement*.”¹⁴ [emphasis added]

About 200,000 Palestinian displaced persons (i.e., persons who had to leave their homes and move to another place in the same state) resulted from the Six-Day War in 1967. These were dealt with by Security Council Resolution 237 of June 14, 1967,¹⁵ which called upon the government of Israel “to facilitate the return of those inhabitants [of the areas where military operations had taken place] who had fled the areas since the outbreak of hostilities.” The resolution does not speak of a “right” of return and, like most Security Council Resolutions, is written as a recommendation. Nevertheless, Israel has agreed to their return in various agreements, to be discussed below. Some 30 percent of the displaced persons of 1967 had already been counted as refugees of 1948.¹⁶

Highly significant in this respect is Security Council Resolution 242. In its second paragraph, the Security Council “affirms further the necessity...[b] for achieving a just settlement of the refugee problem.” The Security Council did

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not propose a specific solution, nor did it limit the provision to Arab refugees. There is no basis for the Arab claim that Resolution 242 incorporates the solution recommended by General Assembly Resolution 194 of 1948, which was discussed above. The Security Council simply recommended achieving a “just settlement,” without stating what exactly this would consist of, and without referring to any other UN resolution. It was deemed a matter to be settled by negotiation between the parties. Furthermore, since the resolution speaks in general terms of “the refugee problem,” it is not limited to the Palestinian problem. The just settlement to be negotiated must also take into account the right of the Jews who fled Arab states to compensation. Security Council Resolution 242 has superseded General Assembly Resolution 194(III).

Turning now to agreements between Israel and her neighbors, the refugee problem has been tackled by Israel and Egypt in the Framework for Peace in the Middle East agreed upon at Camp David in 1978.¹⁷ There it was agreed that a “continuing committee,” including representatives of Egypt, Israel, Jordan, and the Palestinians, should “decide, by agreement, on the modalities of admission of persons displaced from the West Bank and Gaza in 1967” (Article A, 3). Similarly, it was agreed that “Egypt and Israel will work with each other and with other interested parties to establish agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem” (Article A, 4).

In the 1993 Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestinians it was again agreed that the modalities of admission of persons displaced in 1967 should be decided by agreement in a “continuing committee” (Article XII).¹⁸ The issue of refugees should be negotiated in the framework of the permanent status negotiations (Article V, 3). The 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip adopted similar provisions (Articles XXXVII, 2 and XXXI, 5).¹⁹

Somewhat more detailed is the relevant provision (Article 8) in the treaty of peace between Israel and Jordan of 1994.²⁰ While displaced persons are the object of a text similar to those above, the peace treaty mentions the need to solve the refugee problem both in the framework of the Multilateral Working Group on Refugees, established after the 1991 Madrid Peace Conference, and in conjunction with the permanent status negotiations. The treaty also mentions “United Nations programs and other agreed international economic programs concerning refugees and displaced persons, including assistance to their settlement.”²¹

It is clear from this survey of the agreements concluded over the past four decades that none of the agreements between Israel and Egypt, the Palestinians, and Jordan respectively has granted the refugees a right to return to Israel.

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Thus neither under the general international conventions, the major UN resolutions, including Resolution 242, nor the relevant agreements between the parties, do Palestinian refugees have a right to return to Israel. As was noted above, in 2000 there were about 3.8 million Palestinian refugees registered with UNRWA. Allowing all of them to return to Israel would be tantamount to self-destruction of the State of Israel; and no state can be expected to destroy itself. On the other hand, at least some of the refugees would object to, and try to delegitimize, any agreement that did not grant a wholesale right of return.²² Moreover, some of them threaten those who would like to settle for a different solution, thus creating a vicious circle.

The solution may include a right to return to the new Palestinian state after its establishment, settlement and integration in various other states (Arab and non-Arab), and possible return to Israel of a small number if compelling humanitarian reasons are involved, such as family unification.²³

3. Do They Have a Right to Compensation?

The third legal problem regarding the refugees is the question of the right to compensation for lost property and a subsidy for rehabilitation (i.e., integration, resettlement, or return).²⁴ General international law recognizes the obligation to pay compensation in the case of confiscation of property belonging to foreigners. There is, however, disagreement about the amount that should be paid. Two experts have suggested a standard of "adequate compensation," taking into account the value of the property and the needs of the specific refugee.²⁵ If a definitive solution to the problem is sought, one should consider paying — either by law or *ex gratia* — not only compensation for lost property, as mentioned in General Assembly Resolution 194 (III), but also a reasonable subsidy for rehabilitation and perhaps compensation to the host country in which the refugee has lived and may perhaps settle. Since Israel did not initiate the 1947-48 war, but was attacked by its neighbors, it was not responsible for the creation of the refugee problem; hence it is under no obligation to recruit the necessary sums. Preferably an international fund should be established for this purpose, to which other countries, as well as Israel, would contribute. The difficulty is the enormous sums involved.²⁶

It would perhaps be advisable to resort to a lump sum arrangement which would settle all financial claims between the parties and preclude any further claims. An international commission could be in charge of registering all claims and distributing appropriate sums. Likewise, it would be essential to bind not only Israel and the Palestinian Authority, but also all the refugees, to the arrangement. One could envision a provision under which the Palestinian Authority would replace Israel with regard to any claim which might be submitted beyond the implementation of the agreement.

In conclusion, it is desirable that the parties involved in the refugee problem agree on a reasonable definition of the Palestinian refugees, and not automatically adopt that used by UNRWA. The refugees do not have a right to return to Israel, neither under general nor special international law. Rather, the adequate solution seems to be either return to the Palestinian state once it is established, resettlement and absorption in other countries (preferably according to the wishes of each refugee), and the return of a small number to Israel on humanitarian grounds. A prompt and adequate solution will also involve the payment of compensation for lost property and a subsidy for rehabilitation. These proposals are in conformity with Resolution 242, which affirmed the necessity for achieving a just settlement of the refugee problem.

Notes

- 1 Eyal Benvenisti and Eyal Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement," *American Journal of International Law* 89 (1995): 295–340, at 297.
 - 2 UN General Assembly resolution 302 (IV) of December 8, 1949, adopted at the 273rd plenary meeting.
 - 3 Yitzhak Ravid, *The Palestinian Refugees* (Ramat-Gan: Bar-Ilan, 2001), 1–12 [Hebrew].
 - 4 UN Treaty Series, vol. 189, no. 2545, (1954), at 152–156, Article 1A (2).
 - 5 Ibid., Article 1C (3).
 - 6 Ibid., Article 1D.
 - 7 Don Peretz, *Palestinians, Refugees, and the Middle East Peace Process* (Washington, D.C.: U.S. Institute of Peace Press, 1993), 11–12.
 - 8 The 1948 Universal Declaration of Human Rights, Article 13(2); The 1966 International Covenant on Civil and Political Rights, Article 12(4); The 1963 Protocol IV to the European Convention on Human Rights, Article 3(2); The 1969 American Convention of Human Rights, Article 22 (5); The 1981 Banjul Charter on Human and Peoples' Rights, Article 12 (2); See Sir Ian Brownlie (ed.), *Basic Documents on Human Rights* (Oxford, 4th edition, 2002), 20, 186, 443, 678, 730–1; for additional examples, see Paul Sieghart, *The International Law of Human Rights* (Oxford: Oxford University Press, 1985), 174–178.
 - 9 Article 12(4).
 - 10 Sieghart, 179; Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreement* (Oxford: Oxford University Press, 2000), 283; Ruth Lapidoth, "The Right of Return in International Law, With Special Reference to the Palestinian Refugees," *Israel Yearbook on Human Rights* 16 (1986): 103–125, at 107–108.
- Some experts are of the opinion that the right of return applies also to "permanent legal residents." See, for example, the discussion that took place in the sub-commission on

Prevention of Discrimination and Protection of Minorities, as reported in the Report by Chairman-Rapporteur Mr. Asbjorn Eide, UN Doc. E/CN.4/Sub.2/1991/45, of August 29, 1991, 5. The Human Rights Committee established under the International Covenant on Civil and Political Rights has adopted an interpretation according to which the right of return belongs also to a person who has “close and enduring connections” to a certain country — UN Doc. CCPR/C/21/Rev. 1/Add. 9 of November 2, 1999, 5–6.

- 11 Stig Jagerskiold, “The Freedom of Movement,” *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin (New York: Columbia University, 1981), 166–184, at 180. For a different opinion, see Watson, 283.
- 12 GAOR, 3rd session, part I, 1948, Resolutions, 21–24.
- 13 Watson, 281.
- 14 UN General Assembly Resolution 393 (V) of December 2, 1950, adopted at the 315th plenary meeting. See also the second paragraph of UN GA resolution 194 (III) of December 1948, and Resolution 513 (VI) of January 26, 1952, adopted at the 365th plenary meeting.
- 15 SCOR, 22nd year, Resolutions and Decisions 1967, 5.
- 16 Salim Tamari, “The Future of Palestinian Refugees in the Peace Negotiations,” *Palestine-Israel Journal* 2 (1995): 8–14, at 12.
- 17 UN Treaty Series, vol. 1138 (1987), no. 17853, 39–45.
- 18 *International Legal Materials* 32 (1993): 1525.
- 19 *International Legal Materials* 36 (1997): 551 (excerpts). For the full text see *Kitvei amana* (Israel’s official publication of treaties), vol. 33, no. 1071, 1.
- 20 *International Legal Materials* 34 (1995): 43–66.
- 21 Article 8, paragraph 2(c), at 49–50.
- 22 Tamari, 1–12.
- 23 For possible solutions, see Watson, 286–290; Donna E. Arzt, *Refugees Into Citizens: Palestinians and the End of the Arab-Israeli Conflict* (New York: Council on Foreign Relations Press, 1997); Joseph Alpher and Khalil Shikaki, *The Palestinian Refugee Problem and the Right of Return* (Cambridge, MA: Harvard University Weatherhead Center for International Affairs; Working Paper no. 97–8, 1998). See also the principles proposed by Ami Ayalon and Sari Nusseibeh, 2002; the Peace Plan of the Arab states, 2002 and 2007; the Roadmap, 2003; the Beilin-Abed Rabbo text (“the Geneva Initiative”), 2003.
- 24 Watson, 286–290; See also Benvenisti and Zamir.
- 25 Watson, 331 and 338.
- 26 Ravid, at 36–40.