

The Refugees' Right of Return and Israel's Right to Exist as a Jewish State

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A widely held Palestinian position is that Israel should first recognize the right of return as a matter of principle, and then Palestinians will work out with them a realistic compromise on implementation. Repeatedly, Palestinian leaders have made clear that they are not seeking the actual return of millions of refugees. However, they maintain that it is of great importance that the rights of the refugees be recognized, even if only limited implementation can occur.

Israeli negotiators, on the other hand, have firmly resisted any recognition of a right of return. To the extent that they are prepared to allow some refugees to return to Israel, they are insistent that this be done under a humanitarian framework, such as "family unification" rather than one of refugee rights. The Israeli concern is that were they to accept, even in principle, a right of return, they would be opening themselves to never ending pressure to admit higher and higher numbers. Further, they fear that acceptance of any right of return will bolster acceptance of Palestinian accounts of the events of 1948, accounts that they either reject or see as one-sided.

This issue is not at all new, and certainly was part of the interchange eight years ago in the Israeli-Palestinian negotiations of 2000. Both at that time and subsequently, little effort was made to clarify exactly what are the rights of the refugees. Rather, the phrase "right of return" is bantered around constantly, without adequate analysis or precision. In this regard the situation is similar to the other "rights" concept which has plagued efforts to negotiate an end to the conflict, "recognition of Israel's right to exist." In thinking about the right of return, it is useful to reflect of past experience with the "right to exist" concept.

In 1975, in an agreement between Henry Kissinger and Israel's Deputy Prime Minister, Yigal Allon, it was agreed that the United States would not engage in negotiations with the PLO until the PLO had recognized Israel's right to exist. And today, "recognition of Israel" serves as one of the Quartet's conditions that was imposed upon Hamas, which regularly announces that it will never "recognize Israel," or "Israel's legitimacy" or "Israel's right to exist," - three concepts which are not the same, but whose meaning remains to be clarified.

With respect to "Israel's right to exist" the most fundamental questions have never been answered. Are we talking about a moral right, or are we talking about a legal right? And are we talking about a right to have come into existence, or are we talking about a right of an existing country to remain in existence? Depending on how these questions are answered, the demand to recognize Israel's right to exist can mean affirming that Israel had a moral right to come into existence, or it can mean affirming that the existing State of Israel, under international law, has a legal right to live in peace and security. The first of these is a highly controversial ideological question about the moral validity of Zionism, while the second is a rather uncontroversial

question about the rights of all existing states under current international law. The point is that in the thirty-three years since the Kissinger-Allon agreement, no one has ever clarified the meaning of this concept.

I would suggest that in many ways the situation is analogous with respect to the right of return of Palestinian refugees. Here are some basic issues that are much in need of clarification:

1. Moral rights exist independent of whether they are recognized by governments. Often enough the failure of governments to recognize moral rights calls into question the legitimacy of governments themselves. Legal rights, by contrast, exist only insofar as they have been agreed to by governments. The scope and power of legal rights under international law may be quite different from their scope and power as moral rights. When Israel is asked to recognize that Palestinian refugees have a right of return, is it being asked to affirm that existing international law provides for such a right, or is it being asked to affirm that independent of what international law says or doesn't say, the refugees have such a right? Or if both, which is more important to Palestinians?

2. How strong a right is the right of return? Rights are not absolute. For instance, in democratic societies, it is widely accepted that there is a right to free speech, that no one can be imprisoned for simply speaking. Yet it is also widely accepted that the right of free speech is not absolute. It does not permit someone to yell "Fire" in a crowded movie theatre in which there is no fire. To do so would cause a riot in which many would be injured. One could put this in terms of a conflict between rights. In the crowded theatre, the right of free speech does not extend to acts that would violate the rights of other people to safety, and to not being unnecessarily endangered.

This kind of limitation on the strength of a particular right is not a compromise between justice and power, as if justice provided the right to say whatever one wanted, whenever one wanted to, but that out of prudence or weakness, one sometimes needs to compromise. Rather, the issue is about justice itself. It would be unjust to the others in the theatre to endanger them by issuing a false alarm.

When it comes to the right of return, such considerations have entered into key formulations under international law. For instance, in UN General Assembly Resolution 194, often viewed as basis in international law for the right of return, the text reads, "the refugees wishing to return to their homes and live at peace with their neighbors should be allowed to do so at the earliest practicable date." The phrase "and live at peace with their neighbors" serves as a qualifier on any general right of return. The General Assembly statement about refugees being allowed to return only spoke of those refugees "wishing . . . to live at peace with their neighbors." One might wonder about this restriction and ask if those refugees not wishing to live at peace with their neighbors, should also be allowed to return to their homes. It seems, however, that the General Assembly, by including the qualifier about "wishing to live in peace" took the position that the Israelis have a right which must be balanced against the right of return. Their right is to be able to live at peace within the Jewish State that was created pursuant to UN General Assembly Resolution 181, the Partition Resolution of 1947.

I give emphasis to this issue of living at peace within a Jewish State because this was the key issue in the period in which Resolution 194 was enacted. The 1948 war emerged out of the rejection of the Partition Resolution by the Palestinians and the Arab States. The Partition Resolution was the trigger for the fighting that began in late 1947 and for the war between Israel and the Arab states that began in May of 1948. Thus, the General Assembly, when it adopted Resolution 194 in 1949, was not referring to some general willingness of refugees to live at peace with Jewish neighbors, for instance, within a largely Islamic society. Rather, they were talking about a willingness to live at peace within the Jewish State that had just been created.

A word must be said about this term, "Jewish State." In the context that is relevant to understanding UN Resolutions 181 and 194, the term "Jewish State" has a limited meaning. It most certainly does not mean a state in which Judaism will be the state religion, or in which Jewish religious law will be enforced by the state, or in which Jewish religious authorities will have power over the governance of the state. A Jewish state is not a theocracy. Rather a Jewish State as envisioned in 1947 is a democratic state, with equal rights for all its citizens. It is, however, intended as a homeland for the Jewish people, and as a place where the Jewish people exercise their right of self-determination. Because it is also a democracy, in which the majority rules, implicitly, the Jewish state is intended to be a state in which a majority of its citizens are Jews. It is within such a state that the willingness of returning refugees to "live in peace" must be considered.

Today, with some 7 million Palestinian refugees, interpretation of the phrase "wishing to live in peace" is quite complex. It cannot be a matter of simply asking individual refugees, "are you willing to live at peace" with Jewish neighbors, within a Jewish Israel. On a one by one basis, it is quite possible that millions of refugees would say "yes, if I can return, I am willing to live in peace within the Jewish State." One must also ask whether that situation would change if large numbers actually returned. It is one thing for Israel to wrestle with the complexities of have a population that is 80% Jewish and 20% Palestinian. But what would it face if it were 60% Jewish and 40% Palestinian, or 40% Jewish and 60% Palestinian? Could one really expect that if a majority of the population were Palestinians, would be willing to live at peace within a Jewish State? And would they remain at peace if there were another war between Israel and the Arab states? And what if there were a war between Israel and the State of Palestine?

The larger point here is that the right of return is not an absolute right. In trying to determine what justice requires, that right must be balanced against other rights. But exactly what are those other rights, and how strong are they? These are basic and open questions. But there is no doubt that Israelis would maintain that one of the key balancing rights is the right of Israeli Jews to live in peace and security within a Jewish State.

Some Palestinians would vehemently reject this, but others would admit that this is indeed the whole point of the two-state solution, and that Palestinian refugees who are prepared to violently resist that solution, have no right of return, no right to go live in Israel and plan to overthrow it from within.

With this in mind, we can return to the original question: What exactly is Israel being asked to affirm when it is asked to recognize the rights of Palestinian refugees? Clearly it makes no sense to ask the Israelis to affirm that without qualification, even in principle, that justice requires that all Palestinian refugees have a right to return. The Israeli position would be that any Palestinian refugee who would, when the circumstances seemed advantageous, take up weapons to continue the struggle against Israel has no right to return. And one would not find anything in UN Resolution 194 to the contrary.

On the other hand, if the right of return is viewed as one right among many, as a right that needs to be balanced against rights that Israelis claim, either as moral or as legal rights under international law, then one can perhaps see a glimmer of a solution. For instance, might it not be possible to bring together an Israeli statement about the right of return, under international law, with a Palestinian statement about Israel's right, under international law, to live in peace and security as a Jewish state if it so chooses.

In saying this, I emphasize that here I am talking about a legal right under international law, and not about moral rights. It makes little sense to ask Palestinians to affirm that Israel has a moral right to exist as a Jewish State. The entire Palestinian understanding of the conflict is that the creation of Israel was a vast injustice to the Palestinians. Further, concern for the rights of the Palestinian citizens of Israel raises questions about the morality of Israel continuing to be a Jewish state. However, regardless of Palestinian views about the morality of a Jewish State, it remains possible for them to address the question of its legality under international law.

This dual position affirms that in moral terms the creation of Israel was unjust, but accepts that it was lawful, that Israel had a legal right to come into existence as a "Jewish State." This is exactly the position affirmed in the Palestinian Declaration of Independence of 1988. Thus the third paragraph of the Declaration addresses UN General Assembly Resolution 181. It notes, quite accurately, that UNGA Res. 181, "partitioned Palestine into two states, one Arab, one Jewish." Maintaining the distinction between morality and legality, the Declaration refers to "this historical injustice inflicted on the Palestinian people" yet maintains the international legitimacy of the Resolution and says that the Partition Resolution "ensures the right of the Palestinian people to sovereignty and national independence."

Along these lines it is possible for Palestinians to maintain that the creation of Israel as a Jewish State was morally unjust, but, nonetheless, legal under international law. This distinction makes it possible for negotiators to find a formulation which would provide both sides with some of the symbolism and recognition of rights they seek. The right of return would be affirmed, but recognized as qualified by Israel's legal right to have come into existence as a Jewish state, and by extension, its legal right to choose to remain a Jewish state so long as the choice is democratically made. This does not require Palestinians to say what they do not believe with respect to matters of justice. Palestinians can agree with the Palestinian citizens of Israel that Israel should not be a Jewish State, but they would recognize that in terms of international law this is up to Israel.

If Israel's legal right to be a Jewish State is brought into connection with discourse over the Palestinian right of return, the key question is how are these two rights to be balanced. And this brings us to a third basic question about the right of return that is rarely asked, and has never been adequately answered: Whose right is it? To whom does the term "refugees" refer? Or if it refers to all seven million refugees, does it refer to them in equal strength? Is the right of return a stronger claim when applied to some refugees than for others?

3. Which Refugees? A recent fact sheet, "Palestinian Refugees", published by the PLO Negotiations Affairs Department, says that there are more than 7 million refugees, including 6 million from 1948, one million from 1967 and 350,000 internally displaced refugees living inside Israel.

It further says, that in the occupied territories there are 1.8 million refugees, and that outside the territories, the largest refugee populations are in Jordan (2.4 million), Syria (465,000), and Lebanon (438,000).

Of these 7 million identified today as refugees, only a small proportion are among the 700,000 who either fled or were forced out of what became Israel in 1948. An infant from 1948 would be sixty years old today, and few who were adults in 1948 remain alive. It would be fairly safe to assume that the actual 1948 refugees remaining alive number around 200,000 - 300,000. From this it follows that of the 6 million refugees identified as 1948 refugees, roughly 5.8 million are descendants of those that once lived in what is today Israel.

Once one starts distinguishing among categories of refugees, it makes sense to similarly distinguish among the different refugee rights. These include, but are not limited to:

- The right to return to one's actual former home.
- The right to return to a home in which one never lived, but which was the home that one's parents or grandparents or great grandparents.
- The right to have that former home returned to you, whether or not you can live there now.
- The right to become a citizen of Israel.
- The right to be able to live in Israel, but as a Palestinian citizen.
- The right to be compensated financially for property that belonged to one's parents or grandparents.

Which categories of refugees have the strongest claims to which rights? This is a vital question, and it is the key to understanding how the rights of the refugees might be appropriately balanced against the rights of Jewish Israelis to live in security within a Jewish State.

Answering this question is beyond anything that I can attempt in this format, but attention can be called to a few points:

a) The right of refugees who actually once lived inside what is today Israel to return to their homes and land in Israel and to become Israeli citizens, is stronger than the right of their numerous grandchildren and great grandchildren.

b) Because the youngest individuals in the group of actual 1948 refugees are at least sixty years old, this group poses no threat to Israeli security nor to the demographics that underlie the Jewish majority within Israel.

c) Therefore, a final settlement can, at the very least, both affirm the right of return of the actual 1948 refugees and provide for the implementation of this right, should those refugees choose to do so.

d) To give some reality to this right of the actual 1948 refugees, some respect must be paid to the somewhat different rights of their descendants. For instance, attention should be paid to the right of the descendants of the 1948 refugees, to live in Israel as Palestinian citizens. By taking Palestinian citizenship and not Israeli, such descendants would not alter the demographics of Israeli elections.

e) Even if not Israeli citizens, a large number of Palestinian refugees returning to Israel does raise legitimate security concerns for Israel. Thus some balancing of rights would be necessary. Negotiators would have to agree on the actual number that could exercise this right at any given time. Furthermore, the right to live in Israel would be conditional upon behavior when in Israel. If a refugee residing in Israel engaged in violence, Israel would have the right to revoke the residency rights of Palestinian citizens who return to live in Israel.

On the above basis, it should be possible for Israeli and Palestinian negotiators to reach a framework which says:

"As a matter of international law, and drawing on two United Nations General Assembly Resolutions from the 1947-1949 period, Resolution 181 and Resolution 194, we recognize two rights, neither of which was formally stated in those resolutions, but both of which were implied, the right of Israeli-Jews to live in peace and security within a Jewish State and the right of those Palestinian refugees who fled or were forced from their homes during the 1948 war, and are prepared to live at peace with their Jewish neighbors, to return to those homes. Neither of these rights is absolute. Each must be exercised with respect for the rights of others. With respect to implementation of refugee rights, it is feasible to offer all surviving 1948 refugees an opportunity to relocate to Israel and to receive sufficient compensation to allow them to live in the areas from which they originated, and if available, with the funds provided, to regain possession of their properties. In addition, it is feasible to offer the opportunity to reside within Israel, as citizens of the State of Palestine, to some 200,000 descendants of the original refugees who will accompany their relatives. Because the balancing of rights, requires limitations on the numbers of descendants of 1948 refugees who will actually come to live in Israel, the implementation of the rights of most of the descendants of the 1948 refugees shall be limited to their right to have their properties (or the market value of their properties) returned to them, as distinct from their

returning to those properties."

On a basis of this sort, I believe, we can more towards resolution of the conflict.