



The Right of Return of Displaced Jerusalemites

**A Reminder of the
Principles and Precedents of
International Law**

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Shufat Refugee Camp sits inside Jerusalem's expanded municipal boundaries, but soon to fall on the West Bank side of the wall Israel is constructing. *Source: www.david-guerrero.org.*

In the negotiations that are to take place between Israel and the Palestine Liberation Organisation (PLO) over the status of Jerusalem, principal attention will focus on the questions of sovereignty and administration. However, the question of the fate of those Palestine Arabs who have been displaced from Jerusalem is important also.

The question of displaced Palestine Arabs is, of course, a separate issue that Israel and the PLO are supposed to address in their so-called 'final status' negotiations. But in resolving the question of the status of Jerusalem, the question of return of displaced Arabs is quite relevant. If displaced Arabs were to return, the city's population balance would be affected, and this in turn would have implications for administration and control.

The Israel-PLO negotiations, according to the Declaration of Principles signed by the two parties in 1993, are to be conducted on the basis of United Nations Security Council Resolution 242, which calls for "just settlement" of the question of Palestine

Arabs who have been displaced. These persons are referred to in the United Nations Security Council Resolution 242 of 1967 as “refugees”, but this term is inexact in this context. In international practice, the term “refugee” refers to a person who seeks the right to reside in a foreign country because he does not want to reside in his own country for fear of persecution. The United Nations Convention on Refugees, for example, defines “refugee” in this way.



An Israeli real estate company advertises prime property for sale in Ein Karem, Jerusalem, a Palestinian village depopulated in 1948.

The Palestine Arabs, however, seek to return to their own country. Thus, they do not fit the definition of ‘refugee’. It is more accurate to refer to them as ‘displaced persons’, that is, persons who, for reasons not of their own choosing, are living outside their own country. Such persons have, under international law, a right of return. This right is based on the attachment of the person to the person’s native territory. That attachment is given recognition in the law. Take, for example, a group of persons who flee a natural disaster, such as a flood, and in order to escape the flood they cross an international border. Once the waters have receded and it is safe for them to return to their country, they have a legal right to do so. If the government of their country decides, for any reason, not to re-admit them, it would be acting unlawfully.

The right of such persons to return is based on two separate bodies of law. The first body of law is the law relating to nationality. A country must allow its nationals to reside in the country’s territory. But a country in which aliens are sojourning has no obligation to permit them to reside permanently in its territory. In international practice, each state controls admission of persons to its territory and controls, in particular, the question of which persons shall have residency rights. Thus, if the person’s own country refuses to re-admit him, the rights of the other country are violated. The other country has a right to demand that the person be re-admitted.

The second body of law is the law of human rights. Under international law, rights are held not only by countries. They are held as well by individual persons. One of the rights held by persons is the right to reside in their own country. Thus, if a country refuses to re-admit one of its nationals, it violates the rights of that national. This right is found, in particular, in the International Covenant on Civil and Political Rights (article 12), which states that “no one shall be arbitrarily deprived of the right to enter his own country”. The Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948, states (article 13) that everyone has a right “to return to his country”.

This right is found as well in regional treaties on human rights. In three regions of

the world - Europe, Africa, and the Americas - a treaty has been concluded to enforce the protection of human rights. In all three of these treaties, the right of return is guaranteed. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 4, article 3) states that “no one shall be deprived of the right to enter the territory of the state of which he is a national.” The African Charter on Human and Peoples’ Rights states (article 12) that “every individual” is entitled “to return to his country”. The American Convention on Human Rights states (article 22) that “no one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.”

The government of Israel maintains that the displaced Palestine Arabs, including those from Jerusalem, have no right of return, despite these legal propositions. It argues that the country in question is Israel, and that for the displaced Palestine Arabs, Israel is not their country, and in particular that the displaced Palestine Arabs are not nationals of Israel.

As regards displaced Jerusalemites, this argument raises the question of whether Jerusalem is part of Israel. The government of Israel, to be sure, is in *control* of Jerusalem. In addition, it claims sovereignty in Jerusalem, over both the western and eastern sectors. However, the international community to date has not recognised this claim of sovereignty. As for the eastern sector, the United Nations has strongly condemned Israel’s extension of authority there. After the June 1967 war when Israel occupied eastern Jerusalem, its government decreed that Israeli law and administration would be effective there. The United Nations declared this action to be an annexation, and on this basis found it to be unlawful. The UN Security Council did so in its Resolution 252, and the UN General Assembly did so in its Resolution 2253. Israel held eastern Jerusalem as a belligerent occupant, and under the international law of belligerent occupation, such territory may not be annexed.

Israel had earlier claimed sovereignty over western Jerusalem. In 1950 Israel’s Knesset declared the western sector to be Israel’s capital, thus claiming sovereignty over it. In 1980 the Knesset decreed that “Jerusalem, complete and united” was “the capital of Israel”, thus claiming sovereignty over both sectors. This claim of sovereignty was rejected by the United Nations, the Security Council in Resolution 478 and the General Assembly in Resolution 35/169. Governments of other countries have refused to locate their diplomatic missions to Israel in Jerusalem, because they do not view the city (eastern sector or western sector) to be under Israel’s sovereignty.

As regards displaced Jerusalemites, Israel argues that they have no right to return because Jerusalem is now Israel’s. However, since Israel’s claim of sovereignty in Jerusalem is not recognized internationally, this argument is of doubtful validity.

However, even if Israel held sovereignty in Jerusalem, the displaced Jerusalemites would still have a right to return. The attachment of an individual to territory, as protected under international law, is such that it is not affected by a change in

sovereignty. Let us go back to the example given above of the victims of a flood who flee to another country. If while the flood victims are in the other country their own country is invaded and absorbed by a third country, these persons nonetheless have a right to return. The new sovereign must recognise their rights.

Under international law, this requirement is handled by a rule according to which the residents automatically gain the nationality of a new sovereign, unless they decide not to accept it. This proposition of law was recognised by an Israeli court in which the question arose, shortly after Israel was declared a state. The question arose as to whether Jews who were parties to a lawsuit were nationals of Israel. At the time, Israel had no legislation on nationality. The District court of Tel Aviv ruled that in the case of transfer of a portion of the territory of a state to another state, every individual and inhabitant of the ceding state becomes automatically a national of the receiving state'.¹ The court said that if this were not the case, Israel would have had no national prior to its legislation on nationality. It said that "every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel."

However, the government of Israel has refused to apply this proposition of law to the displaced Palestine Arabs, including the displaced Jerusalemites. Many Jerusalemites, to be sure, had already been displaced by the time Israel declared itself as a state. This fact, however does not negate their right to return. Israel is under an obligation to recognise as its nationals all who held Palestine nationality at the time of Israel's formation, even with respect to Palestine nationals who were absent at that time.

Israel has also argued that a return of Palestine Arabs to Jerusalem or elsewhere in territory under its control might undermine its authority or threaten its security. Such considerations are not deemed valid under international law as reasons to deny persons a right to return to their country. However, even if such considerations were valid, they are not relevant in the context of an agreement being negotiated between Israel and the PLO. In such an agreement, the PLO would be recognising that returning Palestine Arabs would live under whatever territorial arrangement is determined.

The right of return, as here explained, applies even if the government of the territory did not cause the departure of the displaced persons. Thus, in the example given above of the residents who leave because of a flood, the government did not force them to leave. Israel has also given, as a reason to deny return to Palestine Arabs, including Jerusalemites, that they left for reasons of their own, to join armies to oppose Israel, or because Arab leaders instructed them to leave. As the right of return is explained above, however, this question is not relevant to a right of return. Even if the displaced Palestine Arabs left for the reasons indicated by Israel, they would still have a right of return.

In fact, however, those reasons are not accurate. Israel precipitated the departure of most of those who were displaced. Some were forced out by the government of Israel

from the walled city in 1967, shortly after Israel came into control. Many more were forced out by violence and the threat of violence in 1948 by the Israel Defence Force and by the Jewish military units that operated in Jerusalem in the early months of 1948. These units committed violent acts designed to intimidate Palestine Arabs out of the western sector of Jerusalem, and their efforts were successful. A population of over 60,000 Palestine Arabs was reduced to only a few thousand. Jerusalemites who were displaced in this fashion have not only a right to return, but a right to compensation for hardships suffered during their departure, and for their inability to reside in their home area for the period of their displacement.

In 1948, Arabs began to flee the western sector of Jerusalem in the early months of the year, as a result of terror tactics aimed against them. In January 1948, the Haganah detonated a bomb in a hotel in Arab neighbourhood in west Jerusalem, killing 26 persons. The British government called the bombing a “dastardly and wholesale murder innocent people”.² During the same month, the Haganah launched rockets into Arab neighbourhoods in Jerusalem, with the apparent aim of frightening Arab residents into fleeing.

In a speech in February 1948, Jewish Agency leader David Ben Gurion expressed satisfaction over this exodus of Arabs from Jerusalem. He said, “Since Jerusalem’s destruction in the days of the Romans, it hasn’t been so Jewish as it is now.” In “many Arab districts” in west Jerusalem, he said, “one sees not one Arab. I do not assume that this will change.” The Haganah sent a van with a loudspeaker into Arab neighbourhoods in west Jerusalem, ordering them to leave.³

In April 1948, the Irgun and LEHI (Stern Gang) captured the village of Deir Yassin on the western outskirts of Jerusalem, and after suppressing armed resistance killed 250 civilians.⁴ The Irgun drove survivors of the Deir Yassin massacre through the streets of Jerusalem in trucks, in an apparent effort to frighten Jerusalem’s Arabs into fleeing. The Haganah operated loudspeaker vans in Jerusalem, announcing in Arabic, “unless you leave your homes, the fate of Deir Yassin will be your fate.”

Under international law, Israel is responsible for these acts of intimidation. A state is responsible for the acts of its military units, even if the state did not direct the units to act in this illegal way. Thus, Israel is responsible for forcing the exodus of the Arabs of Jerusalem even if there was no overall plan at the leadership level to force them out. It is responsible if acts of intimidation leading to departure were committed by its military units.

Many of the acts of intimidation in question, of course, occurred in the first months of 1948, before Israel existed as a state. Under international law, Israel is responsible for those acts. The rule in international law is that a new state is responsible for acts of insurgent or irregular military forces, where the efforts of those forces result in its creation as a state. Thus, Israel is responsible for acts of intimidation committed by the Haganah, the Irgun, and LEHI.

The government of Israel has rejected the idea of a return by Arabs, including Jerusalemites. Its argument has been that this issue cannot be addressed separately from that of an overall settlement between Israel on the one side, and the Palestinians and neighbouring Arab states on the other. Now that such an overall settlement is in process it has changed the reason for rejecting a return.

[Former] Prime Minister Benjamin Netanyahu has said that his government rejects “the right of return of Arab populations to any part of the Land of Israel west of the Jordan River”.⁵ [The] rationale for this position, as explained by a government spokesperson, is “demographic security”, by which it means that a return would dilute the Jewish numerical predominance.⁶ This rationale has no basis in law and amounts to discrimination on ethnic grounds.

In international conflicts in which displacement of population have occurred, the return of displaced persons is viewed by the United Nations as an essential component of a settlement agreement. The United Nations has taken this position regarding the conflict in Palestine. The General Assembly in its Resolution 194 of 1948 called on Israel to repatriate displaced Palestinians, and the Assembly has repeated this call in even stronger terms in more recent years. The Security Council adopted a resolution in the wake of the 1967 war, Resolution 237, in which it called on Israel to repatriate the Arabs displaced during that conflict.

In conflicts in other parts of the world, the United Nations has taken the same position. With the conflict in Bosnia, the Council said, in Resolution 779 (1992), that “all displaced persons have the right to return in peace to their former homes,” and in Resolution 787 (1992) insist(ed) that “all displaced persons be enabled to return in peace to their former homes.” Resolution 876 (1993) on Abkhazia, a territory from which Georgian inhabitants fled during civil warfare, affirmed the right of refugees and displaced persons to return to their homes. With Croatia, from which many Serb inhabitants fled, the Council, in Resolution 1009 (1995), demanded that Croatia “in conformity with internationally recognized standards ... respect fully the right of the local Serb population including their rights to remain, leave or return in safety ... (and) create conditions conducive to the return of those persons who have left their homes.” The Security Council in these resolutions thus not only calls on the government authorities in question to repatriate displaced persons, but indicates that the displaced have a *right* to return, and that the governmental authorities are legally *obligated* to repatriate them.

The United Nations, unfortunately, is for the moment not taking a central role in the Palestine question. Whereas in the conflicts in the former Yugoslavia and Abkhazia the Security Council is working to get displaced persons back to their home territories, with the displaced Palestinians it is leaving the matter to negotiations between the parties. It is to be hoped that the United Nations will reassert itself and become actively involved in working towards a return of displaced Jerusalemites as part of any agreement regarding the future of Jerusalem.

The recent Security Council's insistence on return of persons displaced in the course of military conflicts is based on the premise that displaced persons are entitled to return, and that if they are not afforded this opportunity, an issue of contention will be left unresolved. Thus, a political agreement that omits return for displaced persons does not resolve all outstanding issues. By leaving a key issue unresolved, such an agreement runs the risk of being an agreement only on paper. Any agreement about the future of Jerusalem must provide for the repatriation of the displaced Jerusalemites. This result is the only wise choice from the political standpoint, and is required by international law.

John Quigley teaches at Ohio State University and recently authored The Case for Palestine: An International Law Perspective (Duke University Press). This essay was excerpted from Western Scholarship and the History of Palestine, ed. Michael Prior (London: Melisende), a compendium of presentations from the Jerusalem Day Symposium in Amman (1996).

Endnotes

¹ Case of A.B. v. M.B., 6 April, 1951, *International Law Reports* 1950. vol. 17 (1956): 110.

² "Britain Condemns Haganah 'Murders'", *New York Times*, 7 January 1948, p. A1.

³ Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge: Cambridge University Press, 1987) 50-52.

⁴ "200 Arabs Killed, Stronghold Taken," *New York Times*, 10 April 1948, A6.

⁵ "Netanyahu hits first Crisis over Cabinet Line-up," *Independent* [London] 19 June 1996, 10.

⁶ "Religious Issues delay Coalition Deal", *Jerusalem Post*, 17 June 1996, 1.



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