**Bases for the Palestinian Refugees’ Right of Return under International Law: Beyond General Assembly Resolution 194**

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The legal bases for return can be found in eight branches of international law: (1) inter-State nationality law, (2) law of State succession, (3) human rights law, (4) humanitarian law, (5) law of State responsibility, (6) refugee law, (7) UN law, and (8) natural/customary law. These legal foundations are briefly highlighted here.

Inter-State nationality law is the starting point for refugees’ right of return. The key basis for the right of return is derived from the individual’s nationality. The individual’s possession of Palestinian nationality prior to 14 May 1948, i.e. before the establishment of Israel, constitutes the first basis for the right of return. The other bases presented in this note are derived from the bond of nationality between the refugee and the territory in which s/he habitually resided before displacement. Palestinian citizens who left the area that became Israel have the right to return, that is to recover their nationality. Each citizen who became a refugee has an individual right to acquire Israeli nationality. Descendants of these refugees have an identical right. Negotiations between Israel and the Palestinian leadership might yield a political solution to the refugee problem by, for example, allowing these refugees to return to a State of Palestine established in the 1967 territory. Such a solution would not alter the right of refugees to return to Israel. The right of return based on pre-1948 nationality can be exercised exclusively by each individual who once held Palestinian nationality.

The law of State succession reflects the practice of States in regard to nationality. In almost all peace treaties reached in modern history, individuals belonging to a former State have ipso facto acquired the nationality of the succeeding State. The 1923 Treaty of Lausanne, under which Turkey relinquished its title to Palestine, provided the basis for the Palestine inhabitants’ nationality. It stipulated that Turkish subjects habitually residing in territories detached from Turkey would acquire the nationality of the new State, namely Palestine. The inhabitants were granted Palestinian nationality when such detachment took place. Israel cannot, according to international law, deny the nationality of Palestinians who were residing in the parts of Palestine that became Israel. In 1950, the Israel Law of Return granted Israeli nationality to any Jew who was present in or immigrated to Israel. This was applicable regardless of whether the Jew was a Palestinian citizen or not. The Arab inhabitants of Israel, who had previously held Palestinian nationality, were gradually granted Israeli citizenship based on the 1952 Israel Nationality Law. Israel could, however, decide that Palestinian nationality had ceased to exist in the area under Israel’s jurisdiction. But Israel could not withdraw the nationality from Palestinian citizens who were displaced from their places of habitual residence in the territory of Palestine in which Israel was established. The right to obtain Israeli nationality by the citizens of Mandate Palestine entails the right of return to Israel. Article 14(2) of the International Law Commission Draft Articles on Nationality of Natural Persons in relation to the Succession of States stated: ‘A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.’

The human rights law offers the third basis. Article 13(2) the Universal Declaration of Human Rights provides: ‘Everyone has the right to leave any country, including his own, and to return to his country.’ This provision represents a declaration of binding international law recognized by almost all States. It entails the freedom of Palestinians to leave their country, regardless of whether they have left that country (i.e. Mandate Palestine) as refugees or travelers, and to return thereto. Israel or any other State established in Mandate Palestine would definitively be the country of Palestinian refugees to which they are entitled to return. Likewise, Article 12(4) of the International Covenant on Civil and Political Rights stated: ‘No one shall be arbitrarily deprived of the right to enter his own country.’ Palestine or any of its successor States, including Israel, is considered for each refugee as his own country. These explicit rules govern the return for Palestinian citizens, including refugees.

International humanitarian law is the fourth basis for the right of return. Civilian citizens should not be removed from the occupied territory. If they leave the territory willfully or as a result of the armed conflict, civilians should be readmitted. This is an obligation incurred by the authority exercising power in the territory. Article 49(1) of the Geneva Convention IV provided: ‘Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to … any other country, occupied or not, are prohibited, regardless of their motive.’ The right of return has been incorporated in Article 26 (family reunification), Article 35 (right to leave), and Article 45 (transfer to other countries). ‘The prohibition [of deportation] is absolute and allows of no exceptions,’ as pointed out by the commentator on the cited article. Even when the occupier undertakes total or partial evacuation of a given area, as paragraph 2 of the same article puts it: ‘Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.’ ‘This clause naturally applies both to evacuation inside the territory and to cases where circumstances have made it necessary to evacuate the protected persons to a place outside the occupied territory,’ the aforementioned commentator adds. The denial of return to one’s home constitutes, in effect, deportation. Deportation is considered, by Article 147 of the same Convention, as one of the grave breaches or war crime.

When the State denies refugees the right to return, it means that other States are forced to accept them. No State has an absolute obligation to accept citizens of other States. The admission of a foreigner is rather a privilege that the State may grant or withhold. Any State may, with certain restrictions, expel foreigners from its territory. If the State refuses to admit its citizens, or those who ought to be recognized by that State as its citizens, such a State commits an internationally wrongful act against the receiving State. These general principles apply to Palestinian refugees as rights holders, and to Israel as a duty bearer. Israel would be internationally responsible vis-à-vis the States in which Palestinian refugees end up. This responsibility entitles such States to adopt countermeasures to remedy damages sustained as a result of the Israeli refusal to readmit refugees, including restitution (return) and compensation.

A key role for international refugee organizations, particularly the UN Office of the High Commissioner for Refugees (UNHCR) is the repatriation, or return, of refugees to their countries of nationality. This is obvious from provisions 1, 8, and 9 of the UNHCR Statute of 14 December 1950. One of UNHCR’s major functions has been to assist governments in repatriating refugees. Although the 1951 Convention relating to the Status of Refugees provides alternative solutions to repatriation for refugees, such alternatives are mainly ‘humanitarian’ and were stipulated for providing options for the protection of refugees by any State willing to assume such protection in lieu of the State of nationality. Such solutions by no means eliminate the ‘legal right’ of return.

UN law renders the right of return unquestionable. It should first be noted that the question of Palestine is the responsibility of the General Assembly (GA) as the successor to the Council of the League of Nations, which issued and supervised the Palestine Mandate. The GA recognized the existence of two States in Palestine, an Arab State and a Jewish State, in Resolution 181(III) of 29 November 1947. In the same resolution, the GA imposed an obligation on both States to extend their nationality to their habitual residents, regardless of their religion or race. Israel, ‘the Jewish State,’ and the new State of Palestine, ‘the Arab State,’ were required to grant their nationality to all their inhabitants, Jews and Arabs. This right of nationality, as prescribed by the GA, imposes an obligation on the new States to readmit citizens who had left their territory. The right of return has been consistently confirmed by many GA resolutions relating specifically to this right, the first of which is Resolution 194 of 11 December 1948. Paragraph 11 of this resolution states that ‘the refugees wishing to return to their homes and live at peace with their neighbours 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.’ This resolution has been reaffirmed by the GA on an annual basis. The most recent of these resolutions, just to give an indication, is Resolution 65/101 of 10 December 2010. The Security Council has also advocated the right of return, including in its Resolution 237 of 1967.

All these international legal bases indicate that the right of return for refugees is a customary rule. Such a right has long been deemed to constitute a natural entitlement for any citizen. The right of return has not during the course of history been subjected to questioning by States. It could possibly be concluded that, due to the recognition of this right as part of inter-State nationality law, the law of State succession, human rights law, humanitarian law, refugee law and domestic migration law, the right of return has become a peremptory norm of general international law. Assuming that the denial of return is a grave breach of international humanitarian law, third States may be entitled to prosecute those who violate this right if minimal jurisdictional requirements are met. Besides, unlawful deportation or transfer has recently been considered as a ‘crime against humanity’ if committed in peacetime, or as a ‘war crime’ if committed during an armed conflict, according to Articles 7 and 8 of the 1998 Rome Statute of the International Criminal Court. It may be safely concluded that the right of return for Palestinian refugees generates an obligation erga omnes for States. If this is the case, the wrongfulness of conduct in breach of this obligation can be invoked by third States. In view of the importance of the rights derived from the right of return, all States can be held to have a legal interest in its enforcement. States are consequently required to meet a set of obligations regarding the right of return. These obligations include, inter alia, the ongoing recognition of the right of return, assisting Palestinian refugees legally at the domestic level (e.g. by providing identity documentations, travel and work facilities, refugee status, and refraining from their deportation) and financially until such time as the refugees can exercise their right of return. All States must express support for the right of return.

The purpose of this discussion is to show that responsibility for the refugee problem lies with the State of Israel and with the international community. The Palestinian leadership cannot be legally held accountable if it reaches an agreement with Israel that does not include the right of return. The utmost that the Palestinian leadership can do is to grant Palestinian refugees its nationality once the State of Palestine is established, to protect them abroad, and to politically defend their right of return.