

## **BADIL Occasional Bulletin No. 23**

December 2004

### **Rights of return and self determination asserted in all international law**

*This Bulletin aims to provide a brief overview of issues related to Palestinian Refugee Rights*

---

On 11 December 1948, the United Nations adopted Resolution 194 which set up the UN Conciliation Commission for Palestine (UNCCP) and “resolved that (Palestinian) 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...”

A day earlier (10 December 1948), member states of the UN had adopted the Universal Declaration of Human Rights (UDHR), marked as Human Rights Day. The UDHR, regarded by most states as the authoritative international standard for human rights, calls for fundamental human rights including the right to leave any country, including his own, and to return to his country. The Charter of the United Nations enshrines both self-determination and the right of return, with all other human rights conventions, covenants and declarations flowing from the aims and ideals set out in Charter.

The individual right to self-determination requires States to respect all rights in human rights conventions they have agreed to including the right of (Palestinian) refugees and displaced persons to return to their homes and repossess their properties. But this doesn't always happen. The US and Israel often vote with a few others against United Nations resolutions, otherwise passed unanimously, that include provision for basic human rights. The following looks at the rights of return and self determination in international law.

#### **A fundamental right—individually and collectively**

The right to self-determination is a fundamental human right, both individually and collectively. People may exercise the right individually or opt to exercise the collective right of return by establishing a state. Individual and collective rights to self-determination are therefore complementary. The exercise of one does not negate or substitute exercising the other. So Palestinians may choose to exercise a collective right establishing a state in part of historic Palestine and, at the same time, Palestinian refugees may choose to exercise their individual right to self-determination by returning to their homes and villages of origin.

In short, there is no legal contradiction between the two-state solution to the Israeli-Palestinian conflict and the right of refugees to return. The policies of the Palestine Liberation Organization (PLO) are consistent with this legal principle and it has been affirmed by the United Nations in the following resolutions, plans and rulings. The right of self-determination was also further underlined by the Vienna Declaration adopted by the World Conference on Human Rights in June 1993.

**1947 UN Partition Plan, (Resolution 181, 29 November 1947)** asserted the Palestinian right to collective self-determination in at least part of Palestine. *However*, even the UN committee that drafted the plan admitted that “the Jewish National Home and the... Mandate for Palestine run *counter*” to the principle of self-determination of the inhabitants of Palestine. This is why some states challenged the legality of the UN Plan and asked the General Assembly to obtain an advisory opinion from the International Court of Justice.

The UN Plan did not promote the establishment of an exclusive Jewish state as defined by Israel. The Jewish state in the Partition plan had an almost equal number of Jews and Arabs. It was supposed to adopt a constitution that affirmed the right of all to citizenship, including Palestinian Arabs, and to their property, non-discrimination, and human rights protections

regardless of race, ethnicity, language or religion. Thus, the Jewish state under the Partition Plan was, like the Arab state, to be a state of all its citizens, on the ground it was a bi-national entity. See [BADIL Bulletin No. 22: Resolution 181: A state for some, occupation for others](#).

**General Assembly Resolution 2535** (10 December 1969), passed after the second Nakba (catastrophe of the Palestinian people) in 1967 and five years after the establishment of the PLO as the representative of the Palestinian people, recognized that “the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the UN Charter and the Universal Declaration of Human Rights.” **The US and Israel voted against the resolution.**

**General Assembly Resolution 2649** (30 November 1970) reaffirmed “the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal; [and] condemns those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine.” **The US and Israel voted against the resolution.**

**General Assembly Resolution 3236** (22 November 1974) defined the rights of Palestinians (Res. 2535 above) as “the right to self-determination without external interferences and the right to national independence and sovereignty” *AND at the same time (i.e., these rights are complementary)* “the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.” The resolution was adopted in response to the Political Program of the 12<sup>th</sup> Palestine National Council in which the PLO and recognized that the collective right to self-determination could be exercised in any part of Palestine that is liberated. **The US and Israel voted against the resolution.**

**1976 UN Plan for a Two-State Solution:** After a series of hearings the Committee on the Exercise of the Inalienable Rights of the Palestinian People, developed a program to implement Resolution 3236 (above), a plan for a two-state solution and resolution of the refugee question. In phase one, a Palestinian state would be set up in the 1967 occupied territories, including eastern Jerusalem, with a UN peacekeeping and transition regime, enabling the return of 1967 displaced persons (refugees). In phase two, 1948 refugees would be able to return to homes inside Israel. *Again, the right to self-determination and the right to return are complementary.*

In the committee hearings on the Plan, as part of developing the Plan, the Acting Permanent UN Observer of the PLO reaffirmed this principle: “The inalienable rights are welded and fused and inseparable. The realization of one set of rights is no substitute for the other set.” He also defined the PLO’s understanding of the right of return within the context of a two-state solution. “By the right of return we mean that Palestinians should return to their homes and property--to their homeland--as of right and not on sufferance...we mean that the right to choose between returning and not returning is a right vested in each Palestinian, and is not subject to curtailment by any authority.” **The US vetoed the plan in the UN Security Council.**

**General Assembly Resolution 43/177** (15 December 1988) affirmed “the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967.” It was adopted after the Declaration of Independence issued at the 19<sup>th</sup> Palestine National Council affirming that the PLO would accept a political compromise limiting the exercise of the collective right of the Palestinian people to self-determination within only part of historic Palestine. The Political Communique issued after the 19<sup>th</sup> session calls for withdrawal of Israeli military forces from the 1967 occupied Palestinian territories and an international conference based on UN Security Council Resolutions 242 and 338. The broader vision of a two-state solution, however, is firmly entrenched in the vision originally in Res. 181, which is referred to exclusively in the PLO Declaration of Independence. In other words, two states in historic Palestine, both of which are states of all their citizens.

Both the Declaration and the Political Communique further reaffirm the right of return. In other words, the 1988 Declaration affirms both the collective and individual right of self-determination. There is no contradiction in the Declaration between the two-state solution and the right of return to homes and villages of origin inside Israel. This is consistent with the PLO idea put forward in 1976 at the UN. **The US and Israel voted against the resolution.**

**General Assembly Resolution 48/94** (20 December 1993) asks States to implement all “relevant resolutions of the UN regarding the exercise of the right to self-determination and independence by peoples under colonial and foreign domination; reaffirms the inalienable right of the Palestinian people and all peoples under foreign occupation and colonial domination to self-determination, independence and sovereignty and calls upon Israel to refrain from violation of the fundamental rights of the Palestinian people and from denial of its right to self-determination.”

The resolution was adopted after the 1993 Declaration of Principles (Oslo) was signed. The Declaration neither rejects nor recognizes the right of the Palestinian people to self-determination and to return to their homes of origin. However, the PLO’s signature must be seen in light of a consistent policy from 1964 to the date of the signing that affirmed both collective and individual rights of Palestinians to self-determination. Official statements after the Oslo agreement and the PLO negotiating position at final status talks in Camp David (2000) and Taba (2001) further reaffirm this point. **The US and Israel voted against the resolution.**

**Security Council Resolution 1397** (12 March 2002), recalling Security Council Resolutions 242 and 338, it affirmed “a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders.” The Resolution affirms the general principle of two states. Nowhere does the resolution or the international ‘Road Map’ affirm the principle of one of the states being an exclusively Jewish state. In fact UN human rights treaty bodies, including the UN Committee on Social, Economic, and Cultural Rights and the Committee on the Elimination of All Forms of Racial Discrimination, concluded that Israel’s excessive emphasis on itself as a ‘Jewish state’ leads to discrimination and have further asked Israel to reform its nationality and citizenship laws to enable Palestinian refugees to return to their original homes in Israel.

The letter of assurance from US President Bush to Prime Minister Ariel Sharon (jointly drafted by Dov Weisglass, an advisor to Sharon and Condoleezza Rice, incoming US Secretary of State), refers to Israel as a Jewish state in reference to the two-state solution. This language is inconsistent with the two-state vision as developed since 1947. It is also inconsistent with the general principle of the right to self-determination. Israel cannot use the collective right to self-determination to deny Palestinian refugees the individual right to self-determination.

**International Court of Justice** (9 July 2004), the UN’s highest judiciary body ruled that “the right of the Palestinian people to self-determination is no longer in question. Construction of the wall (along with measures previously taken) severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.”

While the ruling is limited to the occupied territories, it reaffirms the general legal principle that Israel has a responsibility to restitute and compensate all persons displaced as a result of conquest and annexation, whether through the construction of the wall or other means. In other words, the international consensus is that Palestinians must be able to exercise their collective right to self-determination in the 1967 occupied Palestinian territories, including eastern Jerusalem, and refugees must be permitted to exercise their individual right to self-determination, including return and restitution.

The ICJ ruling is not binding on anyone and Israel is trying to distance itself from it. Others, including the United States, will not accept the ruling although even the U.S. Judge Buergenthal who is on the ICJ and dissented from the opinion accepts “that the wall is causing deplorable suffering to many Palestinians...” He shared the Court’s conclusion that “international humanitarian law, including the 4<sup>th</sup> Geneva Convention, and international

human rights law are applicable to the Occupied Palestinian Territory, and must be faithfully complied with by Israel." Judge Buergenthal added, "I accept that the Palestinian people have the right to self-determination" and that this right should be fully protected.

### **Annex: Response to arguments against the right of return**

*The following is a summary of the response to Israeli arguments against the right of return by the Acting Permanent Observer of the PLO, 5th meeting, Committee on the Exercise of the Inalienable Rights of the Palestinian People (UN Doc. A/AC.183/2, 9 March 1976)*

**Argument 1:** "The clock cannot be turned back."

**Response:** Those unfamiliar with the history of the question of Palestine may think this objection is now being raised, 28 years after displacement of Palestinians, in view of the practical difficulties in reversing changes of the past three decades. But those who have followed the evolution of the problem know that Israelis and Zionists raised the same objection, in the same words, immediately after the exodus of Palestinians and before any basic changes in Palestine.

On 28 July 1949, the Israeli Government told the Technical Committee on Refugees of the Palestine Conciliation Commission: "The clock cannot be put back." (A/1367/Rev.I, appendix 4, para. 36). Even a year earlier, the late Moshe Shertok (later Sharrett), then Minister of Foreign Affairs of the Provisional Government of Israel, wrote to the UN Mediator on Palestine, 1 August 1948: "The Palestinian Arab exodus of 1948 is one of those cataclysmic phenomena which, according to the experience of other countries, change the course of history." (A/648, part I, annex II, para. 9).

Thus the argument of alleged irreversibility of the demographic changes which overtook Palestine is not a statement describing conditions judged impossible to alter: it is, rather, a reflection of the opposition to the alteration of the new, contrived situation--a determination to prevent the restoration of rightful conditions, a confession of an unwillingness to envisage or effect restoration, and not an objective assessment of inability to do so.

If the return of Palestinians to their homes and property and homeland should be declared impossible by virtue of the passage of time since their dislodgement, a few months., a year, or 28 years later, how much more persuasive should that same argument have been in 1947/48 against the attempt to restore Jewish presence in Palestine 1,900 years after the expulsion of the Hebrews from Palestine? 1947/78, the United Nations was not daunted by the prospect of erasing 1,900 years of history: should it, in 1976, be daunted by the prospect of correction of 28 years of injustice?

The UN declared that Palestinians should be permitted to return immediately after their displacement, before any basic changes had occurred in their homeland. It repeated that declaration, year in and year out, while changes were being illegally created, in defiance of international law and the will of the international community. If it now accepted the argument that those changes were sufficient and valid reason for nullifying the right of Palestinians to return and obstructing their exercise of that right, the UN will in effect give the green light to any potential law-breaker to do the same. "Defy the will of the international community obstinately enough, long enough, and then come and declare that the clock cannot be turned back--and you will get away with it" will be the message to any potential aggressor coveting someone else's homeland or territory.

If Israelis and its supporters say that the Palestinian exodus is final and irreversible and oppose their return by peaceful and orderly means then they are paving the way for, and making inevitable, the determination of Palestinians and other Arabs, to restore Palestinian rights other than peaceful means, by creating new "cataclysmic phenomena" in the same way the 1948 Palestinian exodus was brought about.

**Argument 2:** "There is no room in Palestine, and less room in those parts of Palestine occupied by Israel before 1967, for all the displaced Palestinians and the Jews now resident there," runs another Israeli/Zionist argument against return.

**Response:** Throughout the British Mandate, the Zionists argued that the "absorptive capacity" of Palestine was elastic and flexible; and that modern technology and organizational techniques could be relied upon to expand considerably the limited absorptive capacity of the land.

Even now, the same Israelis and Zionists who argue that Palestine cannot accommodate both displaced Palestinians and Jews now in Israel are clamouring for the immigration of millions of Jews from all over the world. They must assume that there is room for all these additional millions or they would not urge them to uproot themselves and come to Israel. And if there is room for millions of Soviet, American, West European and other Jews (who had never been to Palestine before), should not that space be assigned first--as a matter of rightful priority--to the indigenous Palestinians who are not refugees outside Palestine?

**Argument 3:** "One wrong cannot right another...You cannot correct one injustice by inflicting another injustice...The plight of a displaced Palestinian cannot be remedied by displacing an Israeli". This is the third--quasi-moral--objection to their return.

**Response:** In the aftermath of Hitler, Zionism played on the sympathies of a rightly outraged world by arguing that the gross injustice done by Hitler to the Jews should be corrected by giving Jews a homeland of their own. Observers then protested that an injustice against a Jew by a Nazi German could not be righted by inflicting an injustice on a third party--the Palestinian Arab. The Zionists are now borrowing the same argument but with a big change. They say: "An injustice against a Palestinian Arab by an Israeli could not be righted by an injustice against that same Israeli".

The Israeli living in the home of a Palestinian--a home from which the rightful owner fled or was forcibly evicted and to which he is not permitted to return--is a usurper, not an innocent third party. His transfer to another place in Palestine to permit the rightful owner to return, may be an inconvenience but it is not an injustice. Palestinians demand their own return, and not the departure from the country of the alien Jews who have immigrated into the country.

An important point must be kept in mind. The Israeli who now lives on land rightfully and legally belonging to the displaced Palestinian Arab is not recognized, even by the Government of Israel as the owner of that land. He is only a tenant, leasing the land from the Government or one of its agencies (eg. Custodian of Absentee Property or the Jewish National Fund), to whom some of that land was transferred by the Israeli Government. Even the dubious title to the land which the Israeli Government claims it can bestow on him, it has been withheld from him!

An official publication of the Jewish National Fund (the JNF, Keren Kayemeth LeIsrael) in 1949, Jewish Villages in Israel, admits that the land in question (the bulk of the land occupied by Israel) is legally the property of Palestinian Arabs. In reading the following from p. xxi, remember that the total area occupied by Israel in 1949 was over 8,000 square/miles or 20 million dunams (a dunam is roughly one-quarter of an acre): "Of the entire area of the State of Israel only about 300,000-400,000 dunams--apart from the desolate rocky area of the southern Negev, at present quite unfit for cultivation--are State domain which the Israel Government took over from the Mandatory regime. The JNF and private Jewish owners possess under two million dunams. Almost all the rest belongs legally to Arab owners, many of whom have left the country. The fate of these Arabs will be settled when the terms of the peace treaties between Israel and her Arab neighbors are finally drawn up. The JWF, however, cannot wait until then to obtain the land it requires for its pressing needs." It is, therefore, acquiring part of the land abandoned by the Arab owners, through the Government of Israel, the sovereign authority in Israel.

The juridical situation of title to property in Israel is complex but can be simplified by referring to three institutions which control all property of the displaced Palestinians:

1. the State itself, which has taken title to "State domain", the collective property of the entire people;
2. the Jewish National Fund (JNF), which, as the shown above, has "acquired" part of the land of the displaced Palestinians, is prohibited by its Charter from selling any of the land it acquires and
3. the Custodian of Absentee Property, established by the Absentees' Property Law of 1950. Under section 4 (a), "all absentees' property is vested in the Custodian" who may transfer such property to the Development Authority, established by the Development Authority Law of 1950 but the Authority is prohibited by section 3 (4) (a) of the same law from selling or otherwise transferring the right of property ownership except to the State, JNF or municipalities and other local authorities.

**Argument 4:** The Palestinian Arabs were not forcibly displaced; they fled of their own accord, or at the behest of their leaders. Therefore, they have no right to return.

**Response:** If I were teaching logic, I could not choose a better illustration of a "grotesque syllogism"! This argument can be stated in the form of the following syllogism. Major premise (explicit): Palestinian Arabs left their homes freely and voluntarily. Minor premise (implicit): Whoever leaves his home loses his right to it. Conclusion: Therefore, Palestinian Arabs have forfeited their right to return. The explicit major premise is a purported statement of fact which is patently false; the implicit minor premise is a purported statement of moral law which is equally false and the conclusion from these two false premises is no less false than the premises themselves.

The explicit major premise is known to be false. So much has been written about why and how the Palestinians were displaced, there is no need to go into it again. It is enough to quote the report of the late Count Folke Bernadotte, the UN Mediator assassinated by Israeli terrorists in Jerusalem in 1948. paras. 6 and 7). He wrote (document A/648, part I, chap. V): "The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, 'by rumours concerning real or alleged acts of terrorism, or expulsion...There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity'."

But assume, for the sake of the argument, that the Palestinians fled of their own accord or at the behest of their leaders during warfare. Would that make the implicit, minor premise true? Would it deprive them of their right to return when the immediate cause of their flight ended? Would a man who flees his home because of fire, and in pursuit of self-preservation, lose his right to return to it when the fire has been put out?

The real Zionist opposition to return is that that return would alter the demographic balance in Israel so much that it would destroy Israel's Zionist, exclusionist character. This, of course, is true. But the preservation of this character of Israel is neither an international responsibility nor a moral-juridical-political fact that outweighs in importance the restoration of the inalienable rights of the Palestinian people.

There is some confusion over this issue. Some people think that, in supporting the establishment of Israel in 1947, the United Nations endorsed the Zionist conception of Israel as a "State of Jews" or as an exclusionist Judenstaat. Neither the UN nor the League of Nations did anything of the sort. Nor did the Balfour Declaration. Nor did any country that extended recognition to Israel as a "normal State". The Zionist conception of Israel is a unilateral Israeli idea with no binding effect upon, and no relevance to, the UN, which is morally and legally committed, at the same time, to the restoration of the inalienable rights of the Palestinian people, including their right to return to their homes and property from which they were uprooted (paras. 1 and 2, Res. 3236 (XXIX)).

In its own "proclamation" of 14 May 1948, Israel invoked: the Balfour Declaration, the League of Nations Mandate and the Partition Resolution (GA181). Whatever the true legal value of

these international documents, however it is evident that none endorsed the Zionist idea. On the contrary, each of them in effect rejected that idea by making two conditions: (1) safeguarding the rights of the Palestinian Arabs inside the proposed "Jewish State" or "National Home" and (2) the status of Jews outside it.

(a) **The Balfour Declaration**, Britain's announcement that it "view/s/ with favour establishment in Palestine of a National Home for the Jewish People", was balanced by the remaining part of the Declaration which stated, "...it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of the existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country".

The meaning of this clause was explained in the White Paper of 1922: "Unauthorized statements have been made to the effect that the purpose in view is to create a wholly Jewish Palestine. Phrases have been used such as that Palestine is to become 'as Jewish as England is English'. His Majesty's Government...have no such aim in view. Nor have they at any time contemplated...the disappearance or the subordination of the Arabic population, language or culture in Palestine." (Command 1700, pp. 12-21).

Zionist consent to this interpretation was requested, and received, before the Mandate was confirmed. Writes Weizmann: "It was made clear to us that confirmation of the Mandate would be conditional on our acceptance of the policy as interpreted in the White Paper, and my colleagues and I therefore had to accept it, which we did, though not without some qualms." (Chaim Weizmann, Trial and Error, p. 208.)

(b) **League of Nations Mandate**: It reproduced the safeguard clause of the Balfour Declaration and added more explicit and more far-reaching guarantees, particularly in articles 2 and 6. These articles stipulated the Mandatory Power's responsibility, among other things for "safeguarding the civil and religious rights of all the inhabitants of Palestine and for "ensuring that the rights and position of other sections of the population are not prejudiced". Let it be remembered that Palestinian Arabs at that time were the preponderant majority of the population.

(c) **United Nations Partition Resolution**: Far from endorsing the Zionist idea of an exclusivist Judenstaat, or "State of Jews", the Partition Plan for Palestine recommended by the General Assembly on 29 November 1947 saw a "Jewish State" whose population then consisted of 499,020 Jews and 509,780 Arabs (A/AC.14/32, para. 59); it recommended that: "in the appraisal of the Palestine question, it be accepted as incontrovertible that any solution for Palestine cannot be considered as a solution of the Jewish problem in general" (A/AC.13/82, chap. V, section B, recommendation XII); and it stipulated that, before independence, the provisional government of the proposed "Jewish State" make a declaration to the United Nations with specific and precise guarantees of the rights of the Palestinian Arab population in the territory, which were detailed in chapter II.

The requested Declaration contained also a general provision stating:

*"The stipulations contained in the Declaration are recognized as fundamental laws of the State and no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them."*

All of this is in part I, section C, of the Partition Plan recommended by the General Assembly which Israel invokes as the legal foundation for its statehood. This section concludes with chapter IV, which declares: "The provisions of chapters I and II of the Declaration shall be under the guarantee of the United Nations, and no modifications shall be made in them without the assent of the General Assembly..."

### **UN obligated to restore Palestinian rights, not safeguard Zionism**

This analysis of the last, almost 60 years of history and international law shows:

- (a) The international community, including the UN, has never given its consent to the Zionist concept of Israel;
- (b) On the contrary, the United Nations, in its Partition Recommendation--as the League of Nations before it--prohibited the actions which led Israel to approximate its own unilateral Zionist conception of itself;
- (c) The UN has no obligation to protect or safeguard the Zionist character of Israel, particularly in its demographic aspect;
- (d) On the contrary, the United Nations is a guarantor of the rights whose denial was a prerequisite of the Zionization of Israel; and
- (e) The UN is obligated to the Palestinian Arabs to restore their rights and to undo the actions of Israel which led to the denial of those rights.

\*\*\*\*\*