

A Forgotten Detail: The Right of Return was a Condition of the Establishment of the State of Israel



[Shahd Hammouri is a Lecturer in Law at the University of Kent. She researches tensions arising at the intersection of the public and the economic in international law from a global south perspective using tools of critical theory. In the past few years, her focus has been corporate profiteering and war economies. She has experience as an international legal consultant with particular focus on the Arab region.]

When discussing the ongoing hostilities in Gaza, which many deem to be a genocide, most commentators seem to forget that 70% of the Gazan population are refugees. The right of return for these refugees is engraved in the document which founded the state of Israel. A reading of the official records on the admittance of Israel as a member of the United Nations, demonstrates that the recognition of the Palestinian right of return was a *condicio sine qua non* for the recognition of the state of Israel.

In 1949, the UN recognized Israel as a state but not Palestine. Notably at the time, a good part of the world was still colonized, and international organizations looked very different. Declaring that Israel is ‘peace-loving’ was an outright denial on the Nakba which devastated the indigenous Palestinian community. This was paralleled by the partition plan which provided unjust allocation of natural resources for the two parties.

In 1948, Count Bernadotte, the UN official mediator between Israel and Palestine [noted](#) (p. 14):

No settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which, under the Assembly resolution of 29 November [1947], was to be included in the Jewish State [...] It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries.

His position was reiterated by the French delegate Mr. Shuman at [the General Assembly on the 11th of December 1948](#) who stated: ‘It was unthinkable that the horrors perpetrated during the war against the Jewish populations in Europe should be repeated or should be reproduced in respect of the Arab population. Such a situation, which was a disgrace to mankind, must be brought to a close’ (p. 946). Shortly after, Count Bernadotte was assassinated by the paramilitary Zionist group Lehi in Jerusalem while on duty.

Reiterating these positions, [Resolution 194 III of the UN General Assembly \(1948\)](#) resolved that (para. 11):

[T]he 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.

In the course of the political committee’s subsequent discussion on admittance of Israel to the United Nations on 6 May 1949, the representative of El Salvador questioned Israel’s commitment to resolution 194 III. The representative of Israel [responded](#) (p. 276):

I can give unqualified affirmative answer to the second question [on resolution 194 III] as to whether we will co-operate with the organs of the United Nations with all the means at our disposal in the fulfillment of the resolution concerning refugees.

Similarly, [during](#) the discussion many state members insinuated that the recurrent notion of ‘just settlement’ presupposed the repatriation of refugees. Mr. Ibrahim, the representative of Yemen noted ‘The United Nations should not encourage the Zionists in their disregard of the rights of the displaced Arab refugees.’ In the same vein, the representative of Guatemala, Mr. García Bauer stated “The Commission had been instructed to exert every effort to facilitate the rapid repatriation and the economic and social rehabilitation of the refugees.” To the same end, the representative of the delegation of New Zealand Sir Carl Bebbenssen stressed that his delegation expects Israel to comply with UNSC resolutions regarding refugees. Further references to the importance of a justiciable response to the issue of refugees were made by representatives of Saudi Arabia, Uruguay; Bolivia; Cuba; Iceland; Peru; Ecuador; Poland; El Salvador; Iraq; Egypt; United States of America; Netherlands; Lebanon.

Later on, during the 47th meeting of the Ad Hoc Political Committee on the admittance of Israel to the United Nations, one member of the Committee [observed](#):

The representative of Israel had given an assurance that, if that country were admitted as a Member, such matters as the settlement of frontiers, the Internationalization of Jerusalem and the Arab refugee problem would not be regarded as within its domestic Jurisdiction and protected from intervention under the terms of Article 2, paragraph 7. He noted that those matters were being considered by the Conciliation Commission and that the admission of Israel would not change that situation ...

Subsequently, resolution 194 III was recalled in the preamble of resolution 273 (III) on the admission of Israel to membership of the United Nations. Over the years, resolution 194 III was repeatedly reaffirmed by the UNGA, where the right of return was seen as the ‘just solution’ to the problem of Palestinian refugees. For example, in 2015, the UNGA [stressed](#) ‘the need for a just resolution of the problem of Palestine refugees in conformity with its resolution 194 (III) of 11 December 1948’; similarly, in 2014, it [affirmed](#) that ‘a just resolution of the plight of the Palestine refugees in conformity with resolution 194 (III)’ UNGA Resolution 69/89 (2014).

Following 1967, the Security Council, in its Resolution 237, [urged](#) Israel to ‘facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities.’ In 1974, UNGA Resolution 3236 (XXIX) [reaffirmed](#): ‘the inalienable right of Palestinians to return to their homes and property from which they have been displaced and uprooted and calls for their return.’

In 1978, the Committee on the exercise of the inalienable rights of the Palestinian people [reaffirmed that](#):

[T]he inalienable rights of the Palestinian people to self-determination could be exercised only in Palestine. Consequently, the exercise of the individual right of the Palestinian to return to his homeland was a *conditio sine qua non* for the exercise by this people of its rights to self-determination, national independence and sovereignty.

In this respect, the committee stressed [in the report](#) that Israel was under a binding obligation to permit the return of all the Palestinian refugees displaced as a result of the hostilities of 1948 and 1967. The committee affirmed that this is obligation flowed from the unreserved agreement by Israel to honour its commitments under the Charter of the United Nations and its specific undertaking, when applying for membership of the United Nations, to implement General Assembly resolution 181 (II) of 29 November 1947 by safeguarding the rights of the Palestinian Arabs inside Israel, as well as resolution 194 (III) of 11 December 1948 concerning the right of Palestinian refugees to return to their homes or to choose compensation for their property. The Committee continued to clarify that this undertaking was also clearly reflected in General Assembly resolution 273 (III) on the admission of the state of Israel to the United Nations. The General Assembly endorsed the Committee’s report in resolutions 31/20 of 24 November 1976, and 32/40 of 15 December 1977.

Despite the fundamental nature of the Palestinian right of return at the core of Israeli admission to the UN, Israel never recognized it. The right of return also remains Israel’s responsibility as repatriation for an international wrong doing. The denial of the right of return is an international wrong which has caused harm to five generations of Palestinians.

Such denial has had economic consequences for the Palestinian people such destitution from land, natural resources, and cultural history. John Quigly [has previously argued](#) that the continued denial of the right of return may constitute the crime against humanity of prosecution. Outside the realm of law, this long-running denial of the affiliation of the Palestinian people with the land of historic Palestine is now framed as a symptom of Nakba denial. The prolongation of this wrong doing entails a third states the duty of non-recognition and cooperation towards ending the illegality.

As activists argue for the invocation of Article 6 of the UN Charter to question the membership of Israel as a 'peace-loving' member state, it is important to remember that the denial right of return is perplexingly at the heart of the Israeli state's ideology despite being a condition of its membership. Similarly, as Israel threatens once more to mass displace Palestinians (this time from Gaza to Sinai), we need to recall its historical denial of the right of return to deduce its intention of permanent displacement. Such displacement is deemed a war crime, and can be considered a genocidal act within the meaning of the Genocide convention [according to](#) a joint declaration of intervention by a number of states in the ICJ Gambia case.

The fulfillment of the right of return does not entail the displacement of Israelis. A constructive way forward would start by recognizing the Palestinian people's affiliation with the historic land of Mandate Palestine on an equal basis to that of Israel's Jewish Nationals. In practice this would require the recognition of the special status of the people of Palestine and their descendants beyond mere foreigners, and the facilitation of immigration routes to both Israel and Occupied Palestine, as well as the recognition of the status of the residents of East Jerusalem as citizens of the sovereign state of Palestine with civil and political rights. Such restitution would also require recession of the separation policy between the West Bank and Gaza, through the facilitation of travel routes, in a manner which recognizes: historic displacement, the ties between the Palestinians as peoples, the people's right of freedom of movement, and the right to family in a non-discriminatory fashion.