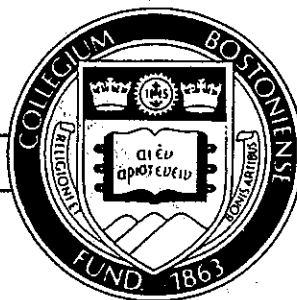


**BOSTON COLLEGE
INTERNATIONAL AND COMPARATIVE
LAW REVIEW**



VOL. XX, No. 1

WINTER, 1997

ARTICLE

**THE PALESTINIAN REFUGEES' "RIGHT TO RETURN" AND
THE PEACE PROCESS**

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The Palestinian Refugees' "Right to Return" and the Peace Process†

Justus R. Weiner*

INTRODUCTION

Both Palestinians and Israelis are ideologically committed to the return of their brethren from the diaspora. While Israel has substantially fulfilled this goal with the "aliyah" (immigration) of more than two million Jews since 1948, a similar Palestinian yearning has yet to be realized.

For Palestinians, the claimed "right to return" is the cornerstone of their struggle against Israel.¹ It is bound up in their yearning for international recognition of a separate Palestinian national identity which they assert is based, in part, on their residence in British Mandatory Palestine prior to the establishment of the State of Israel. If this national identity is accepted by Israel, self-determination in the form of statehood and its recognition by the entire international community would be virtually guaranteed. By contrast, the return of Palestinians

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¹ Marie Syrkin, *The Palestinian Refugees: Resettlement, Repatriation, or Restoration*, in ISRAEL, THE ARABS AND THE MIDDLE EAST 157, 157 (Irving Howe & Carl Gershman eds., 1972). The Palestinians are unique among groups of refugees in that they have aspired to repatriation while the political conditions that caused them to be refugees persist. Generally refugees have sought asylum rather than repatriation. Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 611 (1978). Hence their aspirations find little support in the international law on refugees, principally the Convention on the Status of Refugees. See *id.* at 609-11; see also Convention on the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189, U.N.T.S. 137.

poses direct ideological and existential threats to Israel. Zionism, the modern movement for the return of Jews to their ancient homeland, views a Palestinian "right to return" as antithetical to the special, even God-given, historical and religious relationship Jews have with the land. These concerns have been exacerbated by the rhetoric of Palestinian leaders who have traditionally advocated the return of their diaspora as a means or step toward the liquidation of Israel and its replacement by a Palestinian state.² Moreover, the demographic balance between Jews and Arabs would be influenced by an influx of large numbers of Palestinians whose role could be that of a Trojan horse.³

In view of the fundamental nature of this conflict, a successful settlement of the Palestinian refugee and displaced persons issue is imperative to the success of the final status Israeli-Palestinian peace talks. These negotiations began on May 5, 1996 and are scheduled to be concluded within three years. This article seeks to analyze the legal and historical bases of the opposing Palestinian and Israeli viewpoints on the return issue that are likely to emerge during the final status peace talks and to suggest options for overcoming this controversy.

This article is divided into three major sections. The first reviews recent efforts to solve the Palestinian refugee and displaced persons problems in the context of the interim peace agreements, and details the differing perspectives on the origin and nature of the conflict. This section also assesses the political significance of these issues to Palestinians, Israelis and others. Section II applies principles of international law to the Palestinian return question. The author's suggestion, namely, that an international arbitral forum be devised to resolve Palestinian and Jewish financial claims, is submitted in Section III. The

² According to a statement by Yasser Arafat to a closed meeting of Arab ambassadors in Stockholm on January 30, 1996:

Within five years we will have six to seven million Arabs living on the West Bank and Jerusalem. All Palestinian Arabs will be welcomed by us. If the Jews can import all kinds of Ethiopians, Russians, Uzbekians, and Ukrainians as Jews, we can import all kinds of Arabs. We plan to eliminate the State of Israel and establish a Palestinian state. We will make life unbearable for Jews by psychological warfare and population explosion. Jews will not want to live among Arabs.

Andreas Vistnes, *Arafat Talle om å Tilintetjøre Israel [Arafat Spoke About Eliminating Israel]*, DAGEN, Feb. 16, 1996, at 1, 2. The report was denied by Arafat's office in Gaza, but was confirmed by Israel Television's Arab Affairs correspondent Ehud Ya'ari. Regardless of its accuracy, both its content and strident rhetoric increased Israeli apprehensions about the direction of the peace process. Justus R. Weiner, *The Peace Process And the "Right of Return,"* SURV. OF ARAB AFF., May 15, 1996, at 5.

article concludes with a discussion of the centrality of the Palestinian return issue to final status peace negotiations.

I. BACKGROUND

A. Recent Efforts to Resolve the Palestinian Refugee Problem

1. The Palestinian Goal of "Return" in the Interim Peace Agreements

At the outset it is useful to review the legal framework in which the return issue is being negotiated. Since the commencement of the current Israeli-Palestinian peace process five agreements have been reached. The first was the Declaration of Principles on Interim Self-Government Arrangements (D.O.P.).⁴ It established the overall framework for negotiations in view of reaching interim agreements and, thereafter, a final status agreement. Second, the Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area (Cairo Agreement)⁵ provided for the partial withdrawal of Israeli administration and military forces in the Gaza Strip and Jericho area and the assumption of most local control by the Palestinian Authority (PA). The third, the Agreement on Preparatory Powers and Responsibilities (Erez Agreement),⁶ allows the transfer of authority to the PA in certain limited spheres such as health, social welfare, direct taxation, tourism, education and culture in the parts of the West Bank outside of the Jericho area. The fourth agreement, The Protocol on Further Transfer of Powers and Responsibilities (Further Transfer Protocol),⁷ provides for the transfer of powers in the West Bank to the PA in the following civil spheres: labor, industry and commerce, gas, petroleum, agriculture, local government, statistics and postal services.

The late Israeli Prime Minister Yitzhak Rabin and PA Chairman Yasser Arafat signed the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip⁸ (Oslo II) in Washington, on September 28,

⁴ Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., 32 I.L.M. 1525 [hereinafter D.O.P.].

⁵ Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-P.L.O., 33 I.L.M. 622 (1994) (signed in Cairo) [hereinafter Cairo Agreement].

⁶ Agreement on Preparatory Powers and Responsibilities, Aug. 29, 1994, Isr.-P.L.O., 34 I.L.M. 455 (signed at the Erez checkpoint between Israel and the Gaza Strip).

⁷ Protocol on Further Transfer of Powers and Responsibilities, Aug. 27, 1995, Isr.-P.L.O. (on file with author).

⁸ Interim Agreement on the West Bank and Gaza Strip, Sept. 28, 1995, Isr.-P.L.O. (on file with author).

1995. Oslo II was formulated as the final interim agreement between the Israelis and the Palestinians and, as such, supersedes all previous agreements concluded between the parties except the D.O.P.⁹ The Oslo II agreement gave PLO Chairman Yasser Arafat and his appointed administration limited territorial, functional and personal jurisdiction over most of the West Bank and Gaza Strip. Moreover, pursuant to Oslo II, the PA has assumed powers in a vast array of fields touching upon the daily life of all Palestinian residents in these areas. This agreement set forth the framework for the election of the Palestinian Interim Self-Government Authority (Council) and the *Ra'ees* (Chairman) of its Executive Authority. These elections were carried out on January 20, 1996. Council candidates affiliated with the Fatah PLO faction¹⁰ won most of the seats and Yasser Arafat was overwhelmingly elected as the Chairman¹¹ of what is still generally referred to as the PA.

The five above-mentioned agreements, together with their annexes, accompanying letters and maps encompass hundreds of detailed pages. Yet only cursory and ambiguous references to the issues covered in this article appear therein. Due to the delicate nature of the Palestinian-Israeli negotiations, the primary strategy taken since the D.O.P.¹² has been to sidestep the issue of Palestinian "return," in order to avoid complicating an already formidable task and interrupting the momentum of the peace process.¹³ As a result, although the issue of Palestinian

⁹ *Id.* art. XXX(2).

¹⁰ Fatah is the largest faction of the PLO. Headed by Yasser Arafat, Fatah, which literally translates to mean "victory" or "conquest," is the only major faction within the PLO which supports the current peace process. See NEIL C. LIVINGSTONE & DAVID HALEVY, *INSIDE THE PLO* 72 (1990); DAVID MAKOVSKY, *MAKING PEACE WITH THE PLO: THE RABIN GOVERNMENT'S ROAD TO THE OSLO ACCORD 2* (1996).

¹¹ Amira Has & Uri Nir, *Arafat to Be Sworn In Today as President of Council*, HA'ARETZ, Feb. 12, 1996, at A1 (Hebrew original).

¹² A year and a half prior to the D.O.P., and pursuant to the Madrid peace talks, multilateral negotiations on the refugees were begun in Moscow. Few substantive developments have emerged. JOEL PETERS, *BUILDING BRIDGES: THE ARAB-ISRAELI MULTILATERAL TALKS* 1, 18 (1994). For the multilateral approach to the Arab-Israeli peace process, and in particular the working group on refugees, see generally *id.* at 1-41; Rex Brynen & Jill Tansley, *The Working Group of the Middle East Multilateral Peace Negotiations*, PALESTINE-ISRAEL J. OF POL., ECON. & CULTURE, Autumn 1995, 53-58. Despite the fact that the multilateral talks are an integral part of the peace process, little is known about them. These multilateral talks were designed to bring together Israel, its immediate Arab neighbors and the wider circle of Arab states in the Persian Gulf and the Maghreb region to discuss issues of regional concern. PETERS, *supra*, at 3.

¹³ For a discussion of the "Principled Negotiation" technique used in the interim agreements to emphasize common interests, see Justus R. Weiner, *Peace and Its Discontents: Israeli and Palestinian Intellectuals Who Reject the Current Peace Process*, 29 CORNELL INT'L L.J. (forthcoming Fall 1996).

"return" appears in the D.O.P.,¹⁴ as well as in the Cairo¹⁵ and Oslo II¹⁶ agreements, it is not dealt with in a comprehensive manner. Moreover, even where the agreements touched upon the question of "return," they largely ignored the specific problems that will likely beset its implementation.

a. *The 1948 Refugees in the Interim Agreements*

The 1948 refugees, their spouses and offspring pose perhaps the thorniest problem in the entire peace process. This problem stems from the large number of people involved, possibly millions, and from their aspiration to return to homes and lands within the pre-1967 Six Day War (1967 War) frontiers of Israel. Wary of establishing precedents concerning the Palestinian refugees from the 1948 War, both sides have staunchly adhered to their original positions, which will be discussed *infra* in Section II(B) of this article. As a consequence, neither the D.O.P. nor any of the four subsequent interim agreements substantively address the issue of the 1948 refugees. Instead, consideration of this issue was postponed to the permanent status negotiations.

Some fifteen years previously, on September 17, 1979, Egyptian President Anwar Al-Sadat and Israeli Prime Minister Menachem Begin signed the "Framework for Peace in the Middle East" (Framework Agreement) in context of the Camp David negotiations.¹⁷ Pursuant thereto it was agreed, "Egypt and Israel will work with each other and with other interested parties to establish agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem."¹⁸ Professor Yehuda Z. Blum observed, "While this provision apparently refers to the refugees of 1948, it is rather vague in that it seems to commit the parties only to the establishment of

¹⁴ See D.O.P., *supra* note 4, art. V, at 1528-29.

¹⁵ See Cairo Agreement, *supra* note 5, art. XVI(2), at 634.

¹⁶ The Final Clauses section of the Oslo II Agreement states:

Permanent status negotiations will commence as soon as possible, but not later than May 4, 1996, between the Parties. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.

Oslo II, *supra* note 8, art. XXXI (emphasis added).

¹⁷ A Framework for Peace in the Middle East Agreed at Camp David, *reprinted in* THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 195, 195 (Ruth Lapidoth & Moshe Hirsch eds., 1992) [hereinafter Framework Agreement].

¹⁸ *Id.* art. A(4), at 198.

agreed *procedures* rather than to the resolution of the refugee problem itself.¹⁹ In any event this never came to fruition as the Palestinians boycotted the entire Camp David process.²⁰

b. *The 1967 Displaced Persons²¹ in the Interim Agreements*

The D.O.P. provides a general structure for approaching the issue of the Palestinians displaced during the 1967 War.²² It states in Article XVI(2), "The Continuing Committee shall decide by agreement on the modalities of admission of persons displaced from the West Bank and the Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder."²³ Its language on the outcome, however, is inexplicit and fails to provide any detail on the resolution of the displaced persons issue.²⁴ Moreover, the negotiators were unable to reach agreement on even preliminary matters such as the definition of "displaced person" and the modalities for their absorption and repatriation. Even so, pursuant to the D.O.P. the parties formed a Continuing Committee made up of members from Israel, the PLO, Egypt and Jordan to consider the various aspects of the displaced persons issue.

Interestingly Section A(3) of the above-mentioned Framework Agreement from the Camp David era provides, "During the transitional period, representatives of Egypt, Israel, Jordan, and the self-governing authority will constitute a continuing committee to decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza in 1967"²⁵ For the reason mentioned the committee was never constituted until the idea was revived in the D.O.P.²⁶

¹⁹ Yehuda Z. Blum, *From Camp David to Oslo*, 28 *Isr. L. Rev.* 211, 219 (1994) (emphasis in original) [hereinafter Blum, *From Camp David*].

²⁰ Justus R. Weiner, *Human Rights in the Israeli Administered Areas during the Intifada: 1987-1990*, 10 *Wis. Int'l L.J.* 185, 191 (1992).

²¹ The Palestinians who moved from the West Bank to Jordan were not, technically, refugees because they held Jordanian citizenship. Hence they are referred to as "displaced persons." See *infra* notes 79-98 and accompanying text.

²² See D.O.P., *supra* note 4, art. XVI(2), at 1534.

²³ *Id.*

²⁴ See *id.*

²⁵ Framework Agreement, *supra* note 17, art. A(3), at 198.

²⁶ D.O.P., *supra* note 4, art. XII, at 1532.

c. *Defining the Magnitude of the Problem: Counting Refugees and Displaced Persons*

The dispute over the refugee and displaced persons issues is not restricted to their circumstances and causes. Israel and the Palestinians have consistently disagreed as to the magnitude of the return issue. Indeed, determining the criteria for inclusion is a *sine qua non* for calculating the number of persons whose fate is at stake. This number must be approximated as a necessary first step towards resolution of the return issue.

Estimates of the number of 1948 refugees and 1967 displaced persons as well as the total number of Palestinians with bona fide claims today diverge significantly. According to U.N. estimates the number of 1948 refugees was approximately 604,000, about half of the Palestinian population living in Israel at the time.²⁷ Independent researchers, however, claim that the number is closer to 540,000.²⁸ Arab states argue that the figure reaches 900,000.²⁹

Regarding the displaced persons, Israeli government reports maintain that only 250,000 people relocated to Jordan in the context of the 1967 War,³⁰ and further argue that this number includes a significant amount of "old" 1948 refugees who evacuated their residences for a second time. This differs from estimates of the U.N. Relief and Works Agency (UNRWA), however, which claims that there were 250,000 "new" displaced persons, namely, people displaced for the first time in 1967, a number which is further augmented by the displacement of 175,000 "old" refugees who had settled in the West Bank after the 1948 War.³¹

The disparity between the various calculations of 1948 refugees and 1967 displaced persons has widened over the decades. Conflicts over the precise definition of "refugee" and "displaced person," and the extent to which these Palestinians or their descendants and relatives

²⁷ SHLOMO GAZIT, *THE PALESTINIAN REFUGEE PROBLEM* 3 (1995).

²⁸ TERENCE PRITTE & BERNARD DINEEN, *THE DOUBLE EXODUS: A STUDY OF ARAB AND JEWISH REFUGEES IN THE MIDDLE EAST* 8-9 (n.d.). Of this number it is argued that 40,000 emigrated to distant states and never claimed refugee status or United Nations' (U.N.) aid, while a further 70,000 successfully integrated into neighboring Arab countries. Consequently, it is argued that there was only a balance of 430,000 genuine refugees from the 1948 conflict. See *infra* text accompanying notes 30-36 (elaboration of the numbers controversy).

²⁹ PRITTE & DINEEN, *supra* note 28, at 8.

³⁰ STATE OF ISRAEL GOVERNMENT PRESS OFFICE, *THE REFUGEE ISSUE: A BACKGROUND PAPER* 9 (Oct. 1994) [hereinafter *THE REFUGEE ISSUE*].

³¹ PRITTE & DINEEN, *supra* note 28, at 10.

by marriage have retained or acquired their refugee or displaced person status are crucial to the negotiations on the Palestinian return issue. UNRWA, for example, estimated that as of 1992 there were 2.7 million Palestinian refugees.³² Israel, however, has disputed this figure because it fails to distinguish between 1948 refugees and 1967 displaced persons and does not deduct those refugees who either obtained Jordanian citizenship or who were allowed to return to their homes under humanitarian programs initiated by Israel.³³ Consequently, one Israeli researcher estimated that as of 1992, there were 1.9 million Palestinian refugees.³⁴ At the other extreme, Palestinian-American Professor Edward Said has claimed that there are almost four million refugees, although he offers no facts to substantiate his assertion.³⁵ The Palestinian position in the Continuing Committee negotiations has been that the displaced persons and their offspring now number some 800,000.³⁶

2. The Political Reality Since the Declaration of Principles

a. *The Present Status of the Refugee and Displaced Persons Issues*

The foreign ministers and representatives of the members of the Continuing Committee first convened in Amman in March, 1995. Although the ministerial committee was supposed to meet every three months, it has yet to reconvene.³⁷ Meanwhile the working meetings of

³² GAZIT, *supra* note 27, at 3.

³³ *Id.* Various forms of fraud occur on a large scale basis. For example, there is a widespread practice of not reporting the death of family members to UNRWA so as not to lose ration cards. Moreover, Arab states have consistently opposed the checking of the relief rolls for false or duplicate registrations. See Syrkin, *supra* note 1, at 168-69.

³⁴ GAZIT, *supra* note 27, at 3. He obtained this figure by deducting from the UNRWA total the approximately 800,000 Palestinians who live in Jordan, as Jordanian citizens, and in outside refugee camps. *Id.*

³⁵ EDWARD W. SAID, *PEACE AND ITS DISCONTENTS: ESSAYS ON PALESTINE IN THE MIDDLE EAST* PEACE PROCESS 131 (1995).

³⁶ Jon Immanuel, *Refugee Talks Could Set Precedent*, JERUSALEM POST, Mar. 7, 1995, at 2 [hereinafter *Refugee Talks*]. Israel claims that only Palestinians exiled in person as a result of the war should be considered displaced. Conversely, the Palestinian side stresses that a right of return which does not include spouses, descendants, and other close relatives is meaningless. *Palestinians Displaced as a Result of the 1967 War*, ARTICLE 74, Apr. 1995 (published by the Alternative Information Center/Project for Palestinian Residency & Refugee Rights) [hereinafter *Palestinians Displaced*].

³⁷ Interview with Yael Ronen, Member of the Israeli Delegation to the Committee of Technical Experts at the Talks on Displaced Persons, in Jerusalem (June 17, 1996) [hereinafter *Ronen Interview*].

the Continuing Committee have, for the most part, been marked by acrimony regarding all the issues on the agenda, i.e., the definition of "displaced persons," determining the number of displaced persons, the modalities for their admission, and the deadline for their return.³⁸ Moreover, given that these talks will establish precedents liable to impact future negotiations concerning the 1948 refugees, both sides have shown little flexibility.

At the initial meeting the Arab delegations attempted unsuccessfully to ground the talks in international law and U.N. General Assembly and Security Council resolutions on the matter.³⁹ At Israel's insistence, however, the parties agreed that the frame of reference for the talks would be the D.O.P., as well as relevant provisions in the Jordanian-Israeli Peace Treaty and the Camp David Accords.⁴⁰ In an effort to make headway on the refugee issue, the Committee divided the 1967 displaced persons into four categories: (1) those who temporarily left the West Bank and Gaza Strip immediately prior to the war; (2) those who became refugees as a result of the war; (3) those expelled by Israel during its administration of the West Bank and Gaza Strip; and (4) those that have not been granted entry and claim that they lost their permits or identity cards while abroad.⁴¹ While the Palestinian negotiators claim that those in all four of these classes should be characterized as "displaced persons," Israel limited its definition to those in the second category, i.e., those refugees who resided in the West Bank and Gaza Strip during 1967 and were displaced during the war as a result of the fighting.⁴² Moreover, the first six meetings of the Committee

³⁸ Jon Immanuel, *Talks on Displaced Palestinians Open in Beersheba*, JERUSALEM POST, June 8, 1995, at 2 [hereinafter *Talks on Displaced Palestinians*]; *Palestinian Refugee Talks in Egypt Make Progress*, JERUSALEM POST, Feb. 15, 1996, at 3 [hereinafter *Palestinian Refugee Talks*].

³⁹ Uri Nir, *Disappointment Among Palestinian Delegation Regarding Final Statement of Committee on 1967 Displaced Persons*, HA'ARETZ, Mar. 8, 1995, at A1 (Hebrew original).

⁴⁰ STATE OF ISRAEL GOVERNMENT PRESS OFFICE, *QUADRILATERAL MEETING IN AMMAN: STATEMENT OF THE MEETING* (Mar. 8, 1995) (press bulletin).

⁴¹ See *Fate of Refugees Still in Doubt*, JERUSALEM TIMES, Dec. 30, 1994, at 8.

⁴² *Palestinian Refugee Talks*, *supra* note 38, at 3; Yossi Turpstein & Dan Abitan, *Progress in Latest Round of Talks on 1967 Displaced Persons*, DAVAR RISHON, Feb. 15, 1996, at 2 (Hebrew original). The Israeli argument is that since the D.O.P. defines the mandate of the Continuing Committee as establishing the "modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967," categories three and four are automatically excluded. Ronen Interview, *supra* note 37 (emphasis added). As for category number one, Israel claims that, strictly speaking, these persons were not "displaced" as a result of the war, and that therefore they do not fall within the scope of the Committee's mandate. *Id.* In addition, following the Committee's mandate, it must also agree upon the "necessary measures to prevent disruption and disorder." *Id.* This supports Israel's claim that security considerations must figure prominently in the negotiation of an

stalemated over the issue of defining a displaced person. Consequently, the Committee was unable to arrive at a clear estimate of the number of displaced Palestinians entitled to return.

The Palestinians contend that the number of displaced persons, including their offspring, far exceeds the number that Israel has been willing to countenance.⁴³ However, progress was achieved in February, 1996 when the Committee agreed to assess the number of displaced persons based on estimates produced by Israel, Jordan, Egypt and the PLO, as well as international groups active in the region such as UNRWA and the International Committee of the Red Cross.⁴⁴ Headway has not been made toward determining the number of displaced persons, the procedures for their admission, or the deadline for their return.⁴⁵

Despite the fact that the parties formally launched permanent status negotiations on May 5, 1996,⁴⁶ as scheduled in the previous agreements, no substantial progress has been achieved regarding the status of the Palestinian refugees. Indeed the negotiations were almost immediately adjourned and have yet to be reconvened.⁴⁷ In fact, the parties have not officially held any talks regarding the status of the 1948 refugees. This inactivity is mainly the result of political uncertainty in the wake of Binyamin Netanyahu's election victory on May 29, 1996, less than a month after the opening of the negotiations.

arrangement concerning the displaced persons. Hence, there is a need, from Israel's standpoint, to limit the number of persons entitled to return to the West Bank and Gaza Strip during the interim period. As an informed Israeli observer remarked:

[T]here's no clear border between these areas [the West Bank and Gaza Strip] and Israel [E]verything that happens there immediately affects what happens in Israel Even today, part of the problem with Gaza is that there are too many people there, no infrastructure, not enough work . . . they cannot survive; the first place they turn to is Israel, whether it be for work or terrorist activities.

Id.

⁴³ See *Refugee Talks*, *supra* note 36, at 2. Israel claims that only Palestinians exiled in person as a result of the war should be considered displaced. Conversely, the Palestinian side stresses that a right of return which does not include spouses, descendants, and other close relatives is meaningless. *Palestinians Displaced*, *supra* note 36; see also *infra* text accompanying notes 60–63.

⁴⁴ *Palestinians Displaced*, *supra* note 36.

⁴⁵ *Talks on Displaced Palestinians*, *supra* note 38, at 2; *Palestinian Refugee Talks*, *supra* note 38, at 3.

⁴⁶ Guy Bechor, *Palestinians Require State with Jerusalem as its Capital at Permanent Status Negotiations*, HA'ARETZ, May 6, 1996, at A1 (Hebrew original).

⁴⁷ Ragheb Maraya, *Likud Snubs Oslo Retrospective*, JERUSALEM TIMES, Aug. 23, 1996, at 3.

b. *Israel's Policy Towards Palestinian Repatriation*

Despite the fact that under the present interim agreements, Israel has not allowed the PA to adopt its own immigration and repatriation policies,⁴⁸ since the signing of the D.O.P. Israel has generally acquiesced to Palestinian demands for repatriation to the PA-administered areas.⁴⁹ Pursuant to this liberal policy,⁵⁰ Israel not only allowed thousands of Palestinians who overstayed their visitor permits to remain in the PA-controlled territories, but has permitted numerous displaced persons to reenter, including a number of persons expelled for security offenses.⁵¹ Thus far, over 84,000 Palestinians have been granted residency (including 15,000 who have overstayed their visitor's permit) in the self-governing areas during the interim period.⁵² The most conspicuous example of this policy was Israel's granting of residency to virtually all of the members of the Palestinian National Council (in-

⁴⁸ Oslo II, *supra* note 8, annex III, art. 28(11). Indeed, the PA is forbidden to grant permanent residency in the self-ruled areas without the prior approval of Israel. *Id.*

⁴⁹ *The Silent Migration to 1967 Occupied Palestine*, ARTICLE 74, Apr. 1996 (published by the Alternative Information Center/Project for Palestinian Residency & Refugee Rights). Many Palestinians who fail to obtain Israeli approval for an extension of their visitor's permit choose nonetheless to remain illegally in the West Bank and Gaza Strip. Many of these do so because they are unable to return to the country of their previous domicile, like Libya or Kuwait. Others have been denied family reunification by the Israeli authorities. These illegal immigrants are willing to take the risk of staying because they know that Israel will not enter the Gaza Strip and the populated centers in the West Bank in order to carry out massive expulsions. *Id.*; Interview with Ingrid Jaradat, Alternative Information Center/Project for Palestinian Residency & Refugee Rights, in Jerusalem (June 18, 1996) [hereinafter Jaradat Interview].

⁵⁰ Examples of this policy include Israel's allowance of six hundred Palestinian refugees to immigrate from Lebanon; its incorporation of two hundred Palestinians stranded on the Egyptian-Lebanese border by Libyan leader Muammar Qaddafi (in an effort to punish and humiliate the PLO for reaching an agreement with the Jewish state) to enter into the autonomous areas; and its policy over the last three years of repatriating approximately two thousand families a year (close to ten thousand people) within the framework of family reunification to return to the autonomous areas. See Miles Crawford, *Qaddafi Expels 30,000 Workers*, JERUSALEM TIMES, Sep. 15, 1995, at 7; *Refugee Talks*, *supra* note 36, at 2; *Israel Allows 177 Palestinians Expelled from Libya to Enter Strip*, DAVAR RISHON, Sep. 28, 1995, at 3 (Hebrew original); Uri Nir, *Palestinian Authority to Reconsider its Opposition to Bypass Roads: 8 Expelled Families from Libya Allowed to Enter Strip as a "Humanitarian Gesture"*, HA'ARETZ, Nov. 1, 1995, at A3 (Hebrew original); *Palestinians from Lebanese Refugee Camps Are Going to Israel*, DAVAR RISHON, Jan. 29, 1996, at 1 (Hebrew original); *Mubarak Asks Qaddafi to Reconsider Expulsion of Palestinians* (BBC shortwave broadcast, Arab Republic of Egypt Radio, May 29, 1996).

⁵¹ Included in this number are several hundred persons expelled for security offenses who now work as Palestinian policemen and PA officials. *Refugee Talks*, *supra* note 36, at 2; Eytan Rabin & Gideon Alon, *Security Apparatus Considering Possibility of Evacuating Six Cities in West Bank by End of 1995*, HA'ARETZ, July 4, 1995, at A1 (Hebrew original); Danny Rubinstein, *The Little Return*, HA'ARETZ, Sep. 23, 1994, at B3 (Hebrew original).

⁵² Jaradat Interview, *supra* note 49.

cluding unrepentant terrorists opposed to the peace process and the existence of Israel) to attend its meeting held in April, 1996. At this assembly the articles of the Palestinian National Covenant that are inconsistent with the peace process were ostensibly amended.⁵³

Even if one disregards the security implications, Israel does have legitimate concerns regarding prospects for returning hundreds of thousands of mostly destitute persons from abroad to Palestinian-governed areas. Namely, the returnees would exacerbate the already dangerous shortage of employment and housing. Recent reports from PA,⁵⁴ Israeli,⁵⁵ and U.N.⁵⁶ sources indicate that Arafat's administration is teetering on the edge of economic collapse with, in relative terms, a huge budget deficit and very high unemployment.⁵⁷ The PA currently cannot properly provide for the existing population in the areas it administers. It follows, therefore, that the peace process can only become more precarious if Israel were to acquiesce in the return of large numbers of additional homeless and indigent people that the PA appears unable to absorb.

c. *The Beilin-Abu Mazen Agreement—An Abortive Blueprint for Compromise*

Despite meager progress in the formal channels, a document outlining the main points of a tentative final agreement on the return issue was secretly negotiated prior to the Labor Party's loss in the May 29, 1996 Israeli elections. This agreement, which has not been made

⁵³ Alouf Ben et al., *Israel Will Allow PNC Members to Enter Territories for Vote on Amending Covenant*, HA'ARETZ, Jan. 21, 1996, at A1 (Hebrew original); see also *Covenant Puzzles*, JERUSALEM POST, Apr. 26, 1996, at 4; Amira Hess & Sami Soukol, *PNC Annuls Articles in Palestinian Covenant Negating Israel's Right to Exist*, HA'ARETZ, Apr. 25, 1996, at A1 (Hebrew original); Jon Immanuel, *Fatah Report: Covenant Frozen not Amended*, JERUSALEM POST, May 22, 1996, at 1.

⁵⁴ David Harris, *PA: Closure Will Cost \$600m. in 1996*, JERUSALEM POST, Aug. 25, 1996, at 2. According to a report of the Palestinian Economic Council for Development and Reconstruction, unemployment stands at 40 percent in the West Bank and 51 percent in Gaza. This unemployment has caused a reduction in tax revenues for the PA. *Id.*

⁵⁵ According to an Israeli journalist who visited Gaza to meet with Arafat, "The depressing economic deprivation that we saw—primarily the result of overpopulation, PA fecklessness and corruption, and the six-month-long closure—is a problem that can only be addressed effectively with a large measure of Israeli cooperation and goodwill." Yosef Goell, *Chueless in Gaza*, JERUSALEM POST, Aug. 23, 1996, at 4.

⁵⁶ Jon Immanuel, *UN Coordinator: PA Near Financial Collapse*, JERUSALEM POST, Aug. 15, 1996, at 2 [hereinafter *UN Coordinator*].

⁵⁷ *Id.*

public, was negotiated between Abu Mazen⁵⁸ and Yossi Beilin.⁵⁹ According to reports of the Beilin-Abu Mazen agreement, Israel agreed to recognize a Palestinian "right of return" on the condition that the returning Palestinians would reside in the future Palestinian entity.⁶⁰ Under this understanding, Israel agreed to offer financial assistance to help resettle Palestinian refugees in neighboring countries and to compensate Palestinians for property lost during the 1948 War.⁶¹

Given the seeming irreconcilability of the Israeli and Palestinian positions during the preceding decades, however, it is surprising that even a tentative agreement was reached.⁶² Although then Foreign Minister Shimon Peres did not condone the tentative agreement, his disapproval stemmed from reservations about the possibility of eventual Palestinian sovereignty over the Jordan River Valley, Jerusalem and the future Palestinian entity's ties with Jordan, and not the provisional resolution of the refugee issue.⁶³ Although the Labor Party was defeated at the polls, this agreement may shed some light on the parties' capacity for compromise on the issue of the 1948 refugees.

d. *The Policy of the New Netanyahu Government*

The election victory of Israeli Likud Party Chairman Binyamin Netanyahu and the formation of his right-wing coalition government dampened hopes that the Beilin-Abu Mazen understanding would lead to progress on the refugee and displaced persons issues. Under Israel's present government, it may prove more difficult to achieve progress in the permanent status talks in general, and on the 1948 refugee issue, in particular. Following the new government's guidelines, which one PA minister characterized as a "declaration of war"⁶⁴ against the Pales-

⁵⁸ Mahmoud Abbas, better known as Abu Mazen, was named the head of the Palestinian negotiating team at the permanent status talks. He is also Arafat's most senior deputy in the PA. Pinchas Inbari, *Abu Mazen Moves Up the PA Ladder*, JERUSALEM POST, May 29, 1996, at 4.

⁵⁹ Yossi Beilin was the Israeli Minister of Finance during this stage of the Rabin-Peres government.

⁶⁰ See *Beilin: Israel was Ready to Accept a Palestinian State*, JERUSALEM POST, Aug. 1, 1996, at 12 [hereinafter *Beilin*]; Steve Rodan & Bill Hutman, *Of Talks & Traps*, JERUSALEM POST, May 3, 1996, Magazine, at 8.

⁶¹ See *UN Coordinator*, *supra* note 56, at 2.

⁶² Abu Mazen and Beilin are leading doves of the respective camps.

⁶³ *Beilin*, *supra* note 60, at 12.

⁶⁴ Jon Immanuel & Sarah Honig, *PA Ministers: Likud's New Guidelines Declaration of War*, JERUSALEM POST, June 9, 1996, at 1.

tinian people, the Netanyahu government rejected Palestinian claims to sovereignty over any part of the West Bank, Gaza Strip or Jerusalem, advocated a policy of increased Israeli settlement in these areas and conditioned the continuation of the peace process upon the fulfillment by the Palestinian side of its commitments under the agreement.⁶⁵ Arafat himself recently made a similar claim before a special session of the Palestinian Legislative Council when he asserted that the Netanyahu government had "declared war against the Palestinians."⁶⁶

Rhetoric aside, with regard to the issue of "return," the Netanyahu government's initial position was categorical. According to the guidelines it published when it took office, the new government "will oppose 'the right of return' of Arab populations to any part of the Land of Israel west of the Jordan River."⁶⁷ Fidelity to this position would make it difficult to reach a compromise to ameliorate the plight of the Palestinian refugees and displaced persons.

Given this general trend, it is unlikely that the terms of the Beilin-Abu Mazen agreement will be implemented in the near future. Despite the fact that the Beilin-Mazen understanding was reached during the term of the previous government, the possibility that it will still form the basic framework for resolution of the refugee issue should not be ruled out. Nevertheless, the complex nature of the peace process requires the careful consideration of the terms of any agreement between the parties, even if it was reached by members of the party who are no longer in power.

In reality, however, there is no difference between the previous Labor government's position and that of Netanyahu's Likud government regarding the Palestinian refugees.⁶⁸ Following a number of

⁶⁵ *The New Government's Guidelines*, JERUSALEM POST, June 18, 1996, at 3. The new Israeli government's insistence that the PA keep to all its commitments is perceived as a pretext to stall the peace talks. Indeed, in spite of the public and private urging by the previous Labor government, the PA repeatedly violated the agreements it signed with Israel. See Justus R. Weiner, *Hard Facts Meet Soft Law—The Israel PLO Declaration of Principles and the Prospects of Peace: A Response to Katherine W. Meighan*, 35 VA. J. INT'L L. 931, 948–51 (1995) [hereinafter Weiner, *Hard Facts*]; Evelyn Gordon, *Peace Watch: Arafat Never Banned Hamas, Islamic Jihad*, JERUSALEM POST, Aug. 6, 1996, at 2; see also *supra* note 53 and accompanying text. It must be said that Israel too, albeit to a lesser extent, violated the interim agreements during the course of the peace process. See PEACE WATCH, LEGAL OPINION: OSLO DOES NOT ESTABLISH LINK BETWEEN ISRAELI PULLOUT FROM HEBRON AND AMENDING OF PALESTINIAN COVENANT (Mar. 28, 1996); Weiner, *Hard Facts*, *supra* at 951–52.

⁶⁶ Jon Immanuel & Michael Yudelman, *Arafat: Israel has Declared War On Us*, JERUSALEM POST, Aug. 29, 1996, at 1.

⁶⁷ *The New Government's Guidelines*, *supra* note 65, at 2.

⁶⁸ One Israeli authority observed, "The [Israeli] political establishment is unanimous in denying

recent declarations, the Likud government indicated a willingness to pursue talks on all of the issues addressed by Oslo. As a result, there is a strong chance that Netanyahu's hard-line rhetoric merely represented preliminary posturing in order to strengthen his negotiating position.⁶⁹ Therefore the Likud government is more likely to be flexible on this issue than its initial statements indicated.

B. Differing Perspectives on the Refugee Question

1. The Palestinian Position

a. The Palestinian Version of the 1948 Arab Exodus

The dispute over the source of the Palestinian refugees and displaced persons is reflected in conflicting historical assessments. Each side allocates the blame to acts by the other side, or alternatively attributes the origins of the problem to circumstances beyond its control. Professor Avi Schlaim remarked, "But the point . . . is that there can be no agreement on what actually happened in 1948."⁷⁰ It is worth pointing out that "modern Arab historiography . . . is fueled by the vast gap between reality and self-image, and between the memory of a glorious past and a dissatisfying present that evokes neither pride nor self-esteem."⁷¹

The traditional Palestinian position is that Israel is totally responsible for the Palestinian exodus of 1947–1948. Most pro-Palestinian narratives claim that the Palestinian evacuation resulted from a carefully designed Israeli campaign to drive the Arabs out of Palestine.⁷² Pales-

any "right" to return to Israel. GAZIT, *supra* note 27, at 9. A Palestinian academic involved in the negotiations wrote, "On the issue of refugees, however, there seems to be a consensus among both Likud and Labor to reject any substantive concessions towards the Palestinians." Salim Tamari, *Refugees Under the Likud*, JERUSALEM TIMES, June 28, 1996, at 5.

⁶⁹ See, e.g., David Makovsky, *How the Secret Talks Unfolded*, JERUSALEM POST, Sept. 2, 1996, at 1.

⁷⁰ Avi Schlaim, *The Debate About 1948*, 27 INT'L J. MIDDLE EAST STUD. 287, 287 (1995).

⁷¹ Avraham Sela, *Arab Historiography of the 1948 War: The Quest for Legitimacy*, in NEW PERSPECTIVES ON ISRAELI HISTORY 124, 124 (Lawrence J. Silberstein ed., 1991) (citing Elie Kedourie).

⁷² See, e.g., Walid Khalidi, *The Fall of Haifa*, MIDDLE EAST FORUM, Dec. 1959, at 22–32 [hereinafter *The Fall of Haifa*]; I.F. Stone, N.Y. REV. OF BOOKS, Aug. 3, 1967, at 10. "It was, in fact, less of a miracle than it was the culmination of over half a century of effort, plans, and (in the end) brute force." NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF "TRANSFER" IN ZIONIST POLITICAL THOUGHT, 1882–1948*, at 175 (1993). "[I]t is difficult—in light of the systematic nature of the 'clearing out' operations and the sheer magnitude of the exodus (not to mention the careful efforts to prevent the return of the refugees)—not to see a policy at work."

tinian historians place particular emphasis on the Deir Yassin massacre which they assert was indicative of a Jewish conspiracy to rid Palestine of its Arab inhabitants.⁷³ Deir Yassin, an Arab village located next to a major thoroughfare connecting Jerusalem to the coast, was attacked by members of the Irgun and Stern militias.⁷⁴ The April 9, 1948 attack resulted in the death of many Arab civilians. The incident and the panic and fear it generated was compounded by Arab distortions regarding the extent of their casualties⁷⁵ and the threat of future violence.⁷⁶ They claimed that Deir Yassin was a deliberate Israeli ploy to evoke terror among the Palestinian populace and convince them to flee to neighboring Arab states. This claim, however, is undermined by noting that the evacuation of the Sharon coastal plain, following the order of the Arab Higher Committee, was completed prior to the attack on Deir Yassin.⁷⁷ Whether by design, distortion or confusion, the story of Deir Yassin had a devastating effect on Arab morale and is recognized as a significant cause of the later stages of Palestinian flight.⁷⁸

The plight of the 1948 Palestinian refugees was exacerbated by the outbreak of the 1967 War. A significant number of these refugees had settled in territory which came under Israeli control during the 1967 War. The hostilities, particularly in the West Bank, caused many of these refugees to evacuate their homes for a second time and move to refugee camps in neighboring Arab countries, principally Jordan. At the same time additional Palestinian Arabs who had originally been living in the West Bank and the Gaza Strip were uprooted from their

Arab Palestinians—the notion of forcible ‘transfer’—is inherent in Zionism from its very inception, and that in 1948 the Zionists simply seized the opportunity to displace and dispossess the Arab inhabitants of the country. See Schlaim, *supra* note 70, at 295; Sela, *supra* note 71, at 145.

⁷³ See PRITTIE & DINEEN, *supra* note 28, at 7.

⁷⁴ These groups were right-wing Jewish militias.

⁷⁵ The Irgun and Stern Militias have consistently denied the atrocities of which they have been accused by the Arabs of Deir Yassin. Apologists have claimed that the loss of life in Deir Yassin resulted from Arab opposition to the attack and the failure to heed the call made by the Jewish forces to evacuate the village. See J. BOWYER-BELL, TERROR OUT OF ZION 366–72 (1977); LARRY COLLINS & DOMINIQUE LAPIERRE, O JERUSALEM! 266–76 (1973); DAN KURZMAN, GENESIS 1948, at 138–49 (1970). The Israeli government repeatedly condemned the killings at Deir Yassin and imprisoned the Jewish leaders responsible for them. See HOWARD SACHAR, THE COURSE OF MODERN JEWISH HISTORY 589 (1990). Moreover, although frequently proffered as evidence of Jewish atrocities, its notoriety is actually attributable to its rarity in the history of Jewish relations towards the Arabs in Palestine. Radley, *supra* note 1, at 593. By contrast, Arab propaganda from that period often boasted of atrocities committed and threatened further similar attacks. *Id.*

⁷⁶ CHRISTOPHER SYKES, CROSSROADS TO ISRAEL, 1917–1948, at 352–53 (1973).

⁷⁷ Syrkin, *supra* note 1, at 161.

homes, creating a new problem commonly referred to as the “displaced persons” issue.⁷⁹ The distinction between “refugees” and “displaced persons” is that the 1948 refugees evacuated their homes and entered a different sovereign entity, while the West Bank residents in 1967 did not enter a different sovereign entity.⁸⁰ As with the 1948 exodus, Palestinian explanations offered as to the cause of the displacement of persons in the 1967 War claim that these residents were forcibly removed from their homes in the context of an Israeli campaign to expand its borders.⁸¹

b. *The Role of Return in Palestinian Nationalism*

In the decades following the 1948 Arab-Israeli War, the misery of Palestinian refugees in Jordan, Egypt and Lebanon served as the primary catalyst for Palestinian nationalism. The Palestinian nationalist movement grew as additional Palestinians became displaced during and following the 1967 War, the Lebanese Civil War and the Gulf War of 1990–1991. These and other factors led to the widespread emergence among Palestinians of a belief in a right to return as the act of faith which, until the D.O.P., unified the diverse factions of the Palestinian movement. Recent developments, however, indicate that the Palestinian “return” question has taken on a more divisive tone. Since the signing of the D.O.P., the Palestinian left has regularly accused Arafat of selling out the interests of the Palestinian refugees.⁸² As a

⁷⁹ The origin of the term “displaced persons” traces back to the aftermath of World War II in the context of the work done by international relief organizations to assist people who had been deported from their own countries. In 1975 the U.N. General Assembly, in Resolution 3455, used the term to refer to humanitarian aid provided by the U.N. High Commissioner in the Indo-Chinese Peninsula. Professor Goodwin-Gill explains that the term’s use (as in 1967) to refer to people who had crossed an international frontier was somewhat of a misnomer and that “displaced persons” is commonly accepted as describing people who have been displaced within their own country. Blum, *From Camp David*, *supra* note 19, at 219 (citing G.S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 8–10 (1983)). The rights of the 1967 displaced persons are further diluted by the effects of the Jordanian Citizenship Law which granted Jordanian citizenship to Palestinian “refugees” residing in Jordan, and thereby, it is argued, the 1967 displaced persons forfeited whatever refugee “rights” they may have claimed on account of their exodus in 1947–1948, or their displacement in 1967.

⁸⁰ It is important to note that between 1948 and 1967 Jordan claimed sovereignty over the West Bank. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 283 (1968). As a result, there is a significant distinction between the refugees of 1948 and those Palestinian residents of the West Bank who in 1967 relocated from the West Bank to the eastern side of the Jordan River.

⁸¹ See PETER VOUGHS, THE JORDANIAN CITIZENSHIP LAW 1967–1968 (1968).

result, conflict over this issue plays a major role in both Israeli-Palestinian and intra-Palestinian politics.⁸³

c. *The Evolution of the Palestinian Goal of Return*

The Palestinians originally hoped that their return would take place following the "liberation" of Palestine by the Arab armies.⁸⁴ This goal is clearly expressed in the PLO Covenant, which states that: "Armed struggle is the only way to liberate Palestine The Palestinian Arab people assert their absolute determination and firm resolution to . . . work for an armed popular revolution for the liberation of their country and their return to it."⁸⁵ June, 1974, however, witnessed a major shift in the PLO's ideology. Recognizing the apparent futility of their campaign to destroy Israel militarily, the PLO called for a ten-point Provisional Political Program (also known as the 'plan of phases' or 'stages'), authorizing the establishment of a Palestinian state on "any [piece of] Palestinian territory that is liberated."⁸⁶

This "phased" plan penetrates to the heart of Israeli concerns as to the Palestinians' ultimate motives regarding the current peace process in general and the refugee issue in particular. Opponents of the peace process contend that the Palestinian leadership secretly view the agree-

⁸³ *Id.* at 131-34.

⁸⁴ GAZIT, *supra* note 27, at 4-5.

⁸⁵ The Palestinian National Charter of 1968, art. 9, reprinted in *THE ARAB-ISRAELI CONFLICT* 1087 (John N. Moore ed., 1977). It is unclear to what extent this article still forms part of the PLO Charter. Under the D.O.P. and subsequent Palestinian-Israeli agreements the Palestinian side is obligated to amend the Charter so as to reflect recent developments. In this context, the Palestinian National Council (PNC) convened on April 24, 1996, ostensibly in order to amend all articles of the Charter that denied Israel's right to exist or were inconsistent with commitments made by the Palestinians in the recent agreements. There is some dispute, however, as to whether as a matter of fact or law the necessary amendments were made. Justus R. Weiner, *An Analysis of the Oslo II Agreement in Light of the Expectations of Shimon Peres and Mahmoud Abbas*, 17 MICH. J. INT'L L. 667, 690-95 (1996).

⁸⁶ Resolution of the Arab Summit Conference, reprinted in *THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 17, at 156, 156. The idea of a Palestinian state alongside Israel was not a radical departure from the PLO's original ideological position, as put forth in the Covenant, but rather was a new way to achieve their central goal, i.e., the "liberation" of Palestine. This new state would serve as a basis for launching attacks against the State of Israel. As Professor William V. O'Brien explains:

Under the "two-phase" plan the PLO would, first, establish a Palestinian state in any part of Palestine it could obtain—phase one. Thereafter, this Palestinian state would serve as the base for a continued armed struggle, ultimately leading to the recovery of all of Palestine and the liquidation of Israel, as demanded by the covenant.

WILLIAM V. O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 9 (1991).

ments with Israel establishing a Palestinian autonomous entity in parts of the West Bank and Gaza Strip as the fulfillment of only the first phase of their strategy.⁸⁷ Despite international commitments to the contrary, it is argued that once such an entity is consolidated, it will become a base for attacks aimed at the destruction of the State of Israel and the creation in its place of a Palestinian state. Similarly, the claim to a "right of return" is evidence of a Palestinian intention to put into motion their "phased" plan.

This plan, however, can also be understood as a moderation of Palestinian "return" aspirations. Thus, although it states that "the right of return is at the forefront of Palestinian rights,"⁸⁸ Israeli academic Shlomo Gazit⁸⁹ notes that efforts to achieve recognition for a right of return as the Palestinians' primary goal, together with the PLO's postponement of the total liberation of Palestine, heralded the beginning of a new Palestinian policy, in which the refugees no longer aspired to return to their original homes and lands, but rather, to a distinct future Palestinian entity.⁹⁰ Another indication that the Palestinian stance on refugees and displaced persons had significantly softened came in 1988. That year the nineteenth Palestinian National Council (PNC) adopted a Declaration of Independence which anchors the Palestinian "right of return" in the resolutions of the U.N. and states that a "[s]olution to the Palestine refugee problem [is to be reached] in accordance with United Nations resolutions on that subject."⁹¹ By accepting these resolutions, the Palestinian leadership significantly departed from its longstanding position according to which it refused to

⁸⁷ YECHIEL M. LEITER, *CRISIS IN ISRAEL: A PEACE TO RESIST* 24-27 (1994).

⁸⁸ The acceptance of the first stage, a Palestinian entity on that part of their claimed territory that is initially obtained, is conditioned on the continuation of the struggle against Israel. Article 3 of the PNC program adopted in Cairo in 1974 reads:

The PLO will struggle against any plan for the establishment of a Palestinian entity the price of which is recognition, conciliation, secure borders, renunciation of the national right, and our people's deprivation of their right to return and their right to determine their fate on the national soil.

YEHOSHAFAT HARKABI, *ARAB STRATEGIES AND ISRAEL'S RESPONSE* 38 (1977).

⁸⁹ Gazit is a Senior Research Associate at the Jaffee Center for Strategic Studies at Tel Aviv University. During his previous career in the IDF he served as Coordinator of Israeli Activities in the West Bank and Gaza Strip and Director of Military Intelligence.

⁹⁰ See GAZIT, *supra* note 27, at 5-6; Rashid I. Khalidi, *Observations on the Right of Return*, J. PAL. STUD., Winter 1992, at 29, 34 [hereinafter Khalidi, *Observations*].

⁹¹ *Political Communiqué and Declaration of Independence by Palestine National Council*, reprinted in *THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS*, *supra* note 17, at 344, 349.

accept key U.N. resolutions on the Arab-Israeli conflict (*inter alia*, Security Council Resolutions 242 and 338)⁹² because they related to the Palestinian plight as a refugee problem rather than as that of a people with a distinct identity whose national rights had been denied.⁹³

At the nineteenth PNC meeting, the Palestinians began to accept a number of compromises which circumscribed their "right" of return. Two of the most significant of these compromises stem from the Palestinian leadership's acceptance of U.N. General Assembly Resolution 194 as establishing the framework for the exercise of this "right." This resolution, which was adopted on December 11, 1948, affirms:

The General Assembly . . . resolves that the [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 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.⁹⁴

Palestinian acceptance of this resolution is significant on two levels. First, the Palestinian leadership no longer insists upon world recognition of an absolute right of return and no longer rejects financial

⁹² S.C. Res. 338, U.N. SCOR, 28th Sess., 1747th mtg., at 10, U.N. Doc. S/INF/29 & Add.1 (1973); S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., at 8, U.N. Doc. S/INF/22/Rev.2 (1967) [hereinafter S.C. Res. 242].

⁹³ Point Four of the Seven Points Passed by the Central Committee of Al Fatah in January, 1969 explains the Palestinian rejection of U.N. Resolutions:

Al Fatah, the Palestine National Liberation Movement categorically rejects the Security Council Resolution of 22 November 1967 and the Jarring Mission to which it gave rise.

This resolution ignores the national rights of the Palestinian people—failing to mention its existence. Any solution claiming to be peaceful which ignores this basic factor, will thereby be doomed to failure.

In any event, the acceptance of the resolution of 22 November 1967, or any pseudo-political solution, by whatsoever party is in no way binding upon the Palestinian people, which is determined to pursue mercilessly its struggle against foreign occupation and Zionist colonisation.

WALTER LAQUEUR, *THE ISRAEL-ARAB READER* 372-73 (3rd ed., 1976).

⁹⁴ G.A. Res. 194, U.N. GAOR, 3d Sess., pt. 1, at 21, U.N. Doc. A/810 (1948) (concerning the report of the U.N. Mediator and establishing a Conciliation Commission) [hereinafter G.A. Res. 194]. Interestingly enough, the Arab states voted against the resolution, out of a concern that their support would be interpreted as an acceptance of Israeli sovereignty and a willingness to negotiate a peace agreement, albeit through the conciliation commission. SHAMAI CAHANA, *THE CLAIM OF A "RIGHT TO RETURN" FOR PALESTINIANS AND ITS MEANING FOR ISRAEL* 13 (1993) (d pamphlet published by the Leonard Davis Institute of International Relations, Hebrew Univer-

compensation as a possible alternative to resettlement.⁹⁵ Second, the Palestinian leadership accepted that only those who are willing "to live at peace with their neighbors," i.e., in accordance with Israeli law and international law, will be granted the right to return to their homes.⁹⁶ This acceptance demonstrates a more realistic approach because it implies acceptance of Israel as both a present and future *fait accompli*.

In addition to acquiescing to the pre-conditions of U.N. General Assembly Resolution 194, Palestinian leaders such as Faisal Husseini and Nabil Shaath, while definitively insisting on the recognition of the principle of a "right" of return for all Palestinian refugees, deliberately use ambiguous language to describe the destination of their return. Largely as a result of this ambiguity, it can be inferred that they recognize that repatriating large numbers of Palestinians within Israel is unfeasible and that the Palestinians will not "return" to their original villages and homes, but instead to a future Palestinian state.⁹⁷ Even so, this position has never been officially approved by the PNC, and a number of contradictory claims regarding the return of the Palestinians into Israel have been voiced by prominent members of the Palestinian leadership.⁹⁸

2. The Israeli Position

a. *The Israeli Version of the 1948 Exodus*

The traditional view held by Israeli policy-makers and academics is that most Palestinians left their homes during the 1948 War either

⁹⁵ GAZIT, *supra* note 27, at 5-6; Khalidi, *Observations, supra* note 90, at 35-36. Ziad Abu Zayyad, a member of the Palestinian Council wrote the following concerning the Palestinian "right to return" and the peace process:

The 1948 refugees . . . realize that the current peace process will not allow them to return to their homes and lands inside Israel. They know the limitation of this process. It is for this very reason that some of them are reluctant to support it. Others would accept a return to national dignity and statehood barring an actual return to a specific geographic location. But no refugee will be ready to forget the private property left behind. If no actual return to homes and lands is possible, no one has the right or the authority to give up these homes and lands on their behalf.

Ziad Abu Zayyad, *Seeking Justice*, PALESTINE-ISR. J. OF POL., ECON. & CULTURE, Autumn 1995, at 6, 7.

⁹⁶ GAZIT, *supra* note 27, at 6; Khalidi, *Observations, supra* note 90, at 36.

⁹⁷ GAZIT, *supra* note 27, at 6; Khalidi, *Observations, supra* note 90, at 36; see also DANNY RUBENSTEIN, *THE FIG TREE EMBRACE* (1989) (affirming that this generation of Palestinians does not aspire to return to their old homes in Israel but rather to a new Palestinian state) (Hebrew original).

because of a general sense of fear and confusion⁹⁹ or because they were prompted to evacuate by Arab leaders. Israeli historians generally begin their analysis of the flight of the 1948 refugees with a discussion of U.N. General Assembly Resolution 181¹⁰⁰ (Partition Resolution), which recommended the partition of Palestine into Jewish and Arab states following the withdrawal of the British Mandatory authorities. The Partition Resolution was rejected by the Arabs of Palestine and Arab leaders throughout the Middle East¹⁰¹ but was accepted, albeit reluctantly, by the Jewish community.¹⁰² Disgruntled with this Resolution, Palestinian Arabs increased attacks against Jewish targets. The violence which erupted after the Partition Resolution, while not in itself a unique occurrence, was significant because it contributed to the outbreak of the 1948 War.

Some Israeli historians suggest that the escalation of hostilities in November, 1947, and the premonition that the violence would intensify, created an atmosphere of panic and confusion amongst the Arabs of Palestine.¹⁰³ During the weeks following the Partition Resolution, an estimated 75,000 Arabs evacuated their homes. These Arabs constituted members of the Palestinian Arab community's elite and their exodus, which was motivated by a desire to escape the dangers of an imminent war, helped to set the stage for the more significant evacuation that followed. There is evidence that the Arabs who departed Palestine in late 1947 and early 1948, i.e., the Arab elite,¹⁰⁴ which was comprised of businessmen, doctors, lawyers, teachers and other pro-

Palestine, "MA'ARIV, July 7, 1995, at 9 (Hebrew original); Dafna Verdi et al., *Shaaht: Israel Will Have to Consent to Return of 100,000 1948 Refugees to the Galilee*, HA'ARETZ, Feb. 7, 1995, at A1 (Hebrew original).

⁹⁹ The fear and panic that surfaced among Arab civilians was in large part a result of exaggerated reports, disseminated by Arabs sources, of violent acts perpetrated by the Jews. See BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM* 114 (1987); SYKES, *supra* note 76, at 352.

¹⁰⁰ G.A. Res. 181, U.N. GAOR, 2d Sess., 128th plen. mtg., at 131, U.N. Doc A/519 (1948).

¹⁰¹ See, e.g., SYKES, *supra* note 76, at 325.

¹⁰² See NADAV SAFRAN, *ISRAEL: THE EMBATTLED ALLY* 32 (2d. ed., 1981).

¹⁰³ COLLINS & LAPIERRE, *supra* note 75, at 338; HOWARD SACHAR, *A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME* 333 (1993) [hereinafter *HISTORY OF ISRAEL*]; SYKES, *supra* note 76, at 331-32.

¹⁰⁴ On January 30, 1948 the Palestinian Arab newspaper *As Shaab* chastised the first wave of refugees comprised of wealthy individuals as follows:

The first group of our fifth column consists of those who abandoned their houses and business premises to go to live elsewhere. Many of these lived in great comfort and luxury. At the first sign of trouble they took to their heels in order to escape sharing the burden of the struggle, whether directly or indirectly.

fessionals, were instructed to do so by the local Palestinian commanders as well as the Higher Arab Committee. This initial and voluntary exodus indubitably constituted a significant factor in the subsequent flight of Arab civilians, since "it sapped morale, rent the fabric of Palestinian society, and set the scene for an expanding exodus ahead."¹⁰⁵ Professor Howard Sachar observed:

The most obvious reason for the mass exodus [prior to the Declaration of the State of Israel] was the collapse of Palestine Arab political institutions that ensued upon the flight of the Arab leadership—at the very moment when that leadership was most needed. The departure of mukhtars, judges, and cadis from Haifa and the New City of Jerusalem, from Jaffa, Safed, and elsewhere, dealt a grave blow to the Arab population. The semi-feudal character of Arab society rendered the illiterate fellah almost entirely dependent on the landlord and cadi, and once this elite was gone, the Arab peasant was terrified by the likelihood of remaining in an institutional and cultural void.¹⁰⁶

According to the classical Israeli view, the subsequent flight of several hundred thousand Palestinian Arabs can be attributed to the panic at the time and to the call by Palestinian Arab leaders¹⁰⁷ and heads of neighboring Arab states¹⁰⁸ to clear the way for Arab invasion forces.¹⁰⁹ Israeli historians also note instances in which Palestinian Arabs evacu-

¹⁰⁵ MARK TESSLER, *A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT* 303 (1994).

¹⁰⁶ *HISTORY OF ISRAEL*, *supra* note 103, at 332; see also BENNY MORRIS, *Debate on the 1948 Exodus: Response to Finkelstein and Masalha*, J. PAL. STUD., Autumn 1991, at 98, 100 [hereinafter *Morris, Debate*]; Shabtai Tevet, *The Palestine Arab Refugee Problem and Its Origins*, MIDDLE EASTERN STUD., Apr. 1990, at 214, 224.

¹⁰⁷ Syrkin, *supra* note 1, at 159-66. One contemporary American observer who in 1948 interviewed Israeli Arabs and their leaders that had not departed wrote, "The Arabs agreed that the villagers who had fled could have stayed as they themselves had stayed, but the refugees had 'listened to the mufti' [Haj Amin al-Husseini, the mufti of Jerusalem and president of the Supreme Muslim Council, was the preeminent Palestinian leader from the 1920s to the 1940s]" *Id.* at 159.

¹⁰⁸ Professor Syrkin noted:

Apparently, what began as a calculated move degenerated into irrational frenzy. The development of the exodus as well as Arab statements indicate that the flight was at first stimulated by the Arab leadership An additional reason was no doubt the desire to evacuate Arab civilians from territory which the Arab states expected to bomb. But the smooth functioning of this scheme was impaired by the very completeness of its success. A planned evacuation turned into a hysterical stampede.

ated their homes as an expression of opposition to the establishment of a Jewish state¹¹⁰ and to the prospect of living under Jewish rule.¹¹¹ In Haifa,¹¹² for example, negotiations between Jewish and Arab leaders over the terms of Arab surrender of the town in April, 1948 concluded with an Arab refusal to remain in the city under Jewish rule, despite pleading on the part of the Jewish leadership for them to remain.¹¹³ Further, the panic which precipitated the departure of some 70,000 Arabs from Haifa undermined the morale of the entire Arab population of Palestine.¹¹⁴ This contributed to an atmosphere of hysteria in which whole villages were abandoned even before they were threatened by the progress of the war.¹¹⁵

There was no overall Israeli plan to drive the Arabs from their homes.¹¹⁶ In recent years, however, a number of Israeli historians have offered a revised explanation of the Palestinian exodus. The main argument of these "revisionists" is that Israel had a role in spurring the Palestinian departure in certain locales. One such historian is Benny Morris. Morris has written critically, for example, of the expulsion of 60,000 Arab residents from the towns of Lydda and Ramle.¹¹⁷ He acknowledges, however, that the expulsion was strategically motivated

6, 1954: "The Arab governments told us, 'Get out so that we can get in.' We got out, but they did not get in." *Id.* at 166.

¹¹⁰In time of war "adherence to the enemy" is generally a capital offense, even in western democracies. See Julius Stone, *Self-Determination and the Palestinian Arabs*, in *ISRAEL, THE ARABS AND THE MIDDLE EAST* 200, 215 (Irving Howe & Carl Gershman eds., 1972).

¹¹¹CONOR C. O'BRIEN, *THE SIEGE* 301 (1986); *HISTORY OF ISRAEL*, *supra* note 103, at 332; *TESSLER*, *supra* note 105, at 302; Morris, *Debate*, *supra* note 106 at 98, 100; Teveth, *supra* note 106, at 223. Evidence for official Jewish encouragement for Palestinian Arabs to remain in Palestine is also found in Israel's proclamation of independence which calls for "the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship . . ." Declaration of the Establishment of the State of Israel, *reprinted in* *THE ARAB-ISRAELI CONFLICT*, *supra* note 85, at 934, 937.

¹¹²O'BRIEN, *supra* note 111, at 301; *HISTORY OF ISRAEL*, *supra* note 103, at 332; *TESSLER*, *supra* note 105, at 302; Morris, *Debate*, *supra* note 106, at 98, 100; Teveth, *supra* note 106, at 223.

¹¹³DAVID KIMCHE, *A CLASH OF DESTINIES* 122 (1960); see also SYKES, *supra* note 76, at 353-54; Syrkin, *supra* note 1, at 162-63.

¹¹⁴Syrkin, *supra* note 1, at 163-64.

¹¹⁵See *id.* at 164. Beginning in April, 1948 the Arab populations of Haifa, Jaffa, Tiberias and Safad as well the Arabs residing in numerous smaller towns and villages voluntarily evacuated. Radley, *supra* note 1, at 589.

¹¹⁶*Id.* at 594; Syrkin, *supra* note 1, at 165. Had there been such a plan it is unlikely that, immediately following the cessation of hostilities in 1948, approximately 30,000 refugees would have infiltrated Israeli-held territory and remained. See DON PERETZ, *ISRAEL AND THE PALESTINE ARABS* 55 (1958).

¹¹⁷BENNY MORRIS, *1948 AND AFTER* 1-5 (1994).

by military exigencies.¹¹⁸ It should be mentioned, however, that many historians reject the views of the revisionists as politically motivated.¹¹⁹ Moreover, they argue that the extent of the expulsions by Israeli forces was limited,¹²⁰ that the Arab forces did not permit any Jews to remain in the areas they captured,¹²¹ and that decisions to evacuate certain locales were made by individual commanders rather than at the higher echelon.¹²²

Contemporary reports absolved Israel of responsibility for the Palestinian exodus during and after the 1967 War. For example, a New York Times reporter reporting from Jordan wrote, "At no time during a number of long talks with Arabs in this area was anything said to support Arab charges at the United Nations that thousands had been forced to cross the Jordan River from the West Bank area occupied by the Israelis."¹²³ Another reporter in Amman wrote, "The refugees said

¹¹⁸First, Lydda and Ramle were located next to the Jerusalem-Tel Aviv highway and the residents of these towns regularly interdicted Jewish traffic. Second, augmented by elements of the Jordanian Arab Legion, these towns constituted a springboard from which the Arabs intended to attack Tel Aviv. Third, the unit of the Israel Defense Forces that captured Lydda numbered only several hundred, yet was surrounded by tens of thousands of Arabs. Fourth, many of the homes in these towns were being used as sniping positions. *Id.* at 2. Also, this occurred during the siege of Jerusalem in which the Jordanian Arab Legion had cut off the city's main water supply. Syrkin, *supra* note 1, at 164.

¹¹⁹See Efraim Karsh, *Rewriting Israel's History*, MIDDLE E.Q., June 1996, at 19, 19.

¹²⁰These forcible expulsions were isolated incidents, occurred late in the fighting, and involved numbers too small to affect the scope of the mass flight or to explain it. Syrkin, *supra* note 1, at 163.

¹²¹According to Netanel Lorch, who founded the Military History Division of the Israel Defense Forces, far from being the result of some dark conspiracy, the Arab refugee problem arose from the inexorable nature of the struggle. Whoever decided to use force to cut the Gordian knot "had to be aware—in fact, was aware—that a refugee problem would result . . . of Jewish refugees should the Arabs prevail, of Arab refugees in the contrary event. It was the Arab side that took that fateful decision." Alex Berlyne, *Shield of Zion: The Israel Defense Forces*, JERUSALEM POST, May 28, 1993, Magazine, at 26 (reviewing NETANEL LORCH, *SHIELD OF ZION: THE ISRAELI DEFENSE FORCES* (1993)). However many Arabs stayed on in the areas conquered by the Jews while no Jews were permitted to remain in Arab-occupied areas. Thus, for example, every Jewish resident was driven out of Beit Ha'arava, Kalya, Gush Etzion, Hartuv, Mishmar Ha'yarden, Masada, Nitzanim and Yad Mordechai. *Id.* Lorch observed,

Indeed they [the Jews] rightly considered themselves lucky to be able to get out alive. One wonders what role was played by Arab projection of patterns of conduct. Did they expect that their fate under Jewish rule would not be different from that which would have befallen Jews if the situation were reversed?

Id. By contrast, in places where the Arabs did not flee they came to no harm. Radley, *supra* note 1, at 594.

¹²²See Syrkin, *supra* note 1, at 165.

¹²³Sydney Gruson, *War Brings Problems for '48 Palestinian Refugees*, N.Y. TIMES, June 15, 1967, at 12.

that they had not been driven out but that the Israelis had merely let it be known that buses were available to take them to the bridge.¹²⁴ Other commentators have claimed that the majority of West Bank residents who fled to Jordan left in the midst of the panic and confusion that surrounded the outbreak of the 1967 War.¹²⁵ Additional displaced persons continued to stream out weeks after the shooting stopped.¹²⁶

Considering the political advantages that a voluntary exodus poses to Israeli interests, it is hardly surprising that Israeli policy makers have traditionally promoted this understanding of history.¹²⁷ If the exodus is interpreted as purely voluntary, Israel can avoid moral accountability

¹²⁴ Dana A. Schmidt, *Jordanians Count 200,000 Refugees*, N.Y. TIMES, June 17, 1967, at 3.

¹²⁵ See DAVID PRYCE-JONES, *THE FACE OF DEFEAT: PALESTINIAN REFUGEES AND GUERRILLAS* 10-12 (1972). The correspondent for the English newspaper during the 1967 War who interviewed departing Palestinians at the Allenby Bridge observed:

[T]he claims and the counter-claims of 1967 are as far beyond resolution as those of 1948. In the last resort, even present facts right there on the Allenby Bridge depended upon trust In some cases they [the departing Palestinians] had explanations: husbands or breadwinners were in other Arab countries and the families would be reunited over there; some did not want to live under the Jews; some had heard of the destruction of the Latrun villages and thought their turn would come. It was not that they were immediately afraid of the Israelis for as often as not they had met none until that very day.

Id. at 10-11.

¹²⁶ Syrkin, *supra* note 1, at 111. A journalist observing the departing Palestinians wrote:

If the Israelis permitted the refugees to trek on foot, they were accused of callous indifference, and when they provided transport they were accused of systematic eviction. Had they forbidden departures, they would have been tyrants. In such a position nothing they did could be right

Id.

¹²⁷ Palestinian sources insist that the departure of the Palestinians was the result of a calculated effort of the Jews to drive them out. See, e.g., *The Fall of Haifa*, *supra* note 72, at 22-32. But see a contemporary British article in the London *Economist* on October 2, 1948, which stated:

During the subsequent days the Israeli authorities who were now in complete control of Haifa . . . urged all Arabs to remain in Haifa, and guaranteed them protection and security. So far as I know, most of the British civilian residents whose advice was asked by Arab friends told the latter they would be wise to stay. Various factors influenced their decision to seek safety in flight. There is but little doubt that far the most potent of these factors was the announcements made over the air by the Arab Higher Executive urging all Arabs in Haifa to quit. The reason given was that upon the final withdrawal of the British, combined armies of the Arab States would invade Palestine and drive the Jews into the sea, and it was clearly intimated that those Arabs who remained in Haifa and accepted Israeli protection would be regarded as renegades.

Syrkin, *supra* note 1, at 163 (quoting a British eyewitness account).

for the refugees' plight. This places Israel in a far stronger negotiating position than if it incited or augmented the Palestinian exodus.

b. *Israel's Position on the 1948 Refugees*

Israel's position on the 1948 Palestinian refugees has remained constant. Israel has always held that the refugee issue should be resolved within the framework of a comprehensive peace settlement with the Arab world.¹²⁸ As a result, Israeli governments have consistently rejected proposals which advocated the unconditional repatriation of Palestinian refugees. Moreover, to the extent that Israel was willing to consider Palestinian financial losses, it simultaneously sought reciprocal compensation for the property left behind by the hundreds of thousands of Jewish refugees who were forced to leave Arab countries during the 1940s and 1950s.¹²⁹ In this regard, Israeli Prime Minister David Ben-Gurion declared on August 1, 1948:

When the Arab states are ready to conclude a peace treaty with Israel this question [of refugees] will come up for constructive solution as part of the general settlement; and with due regard to our counterclaims in respect of the destruction of Jewish life and property, the long-term interest of the Jewish and Arab populations, the stability of the State of Israel and the durability of the basis of peace between it and its neighbors, the actual position and fate of the Jewish commu-

¹²⁸ THE REFUGEE ISSUE, *supra* note 30, at 4.

¹²⁹ An important, though often neglected dimension of the refugee issue is the plight of Jewish refugees from Arab states that fled to the newly-established State of Israel in the 1940s and 1950s. Jews from Yemen, Iraq, Libya and Syria were all victims of anti-Jewish riots and looting, as well as police measures specifically directed against them, such as arrests and imprisonments. The intense and pervasive nature of these measures led to a virtual disappearance of the Jewish communities in every Middle Eastern country except Morocco and Turkey (whose Jewish communities declined dramatically but did not vanish). In this regard it should be noted that these communities were large and long-established, many predating the advent of Islam in the seventh century and some dating back to Biblical times.

The large majority of the new Jewish immigrants to Israel arrived in their ancestral homeland destitute as a result of the widespread policy among Arab rulers of either expropriating their property or conditioning their departure upon its forfeiture to the state. In some instances the Jewish community was compelled to sell its property at distress prices due to economic measures that were discriminately imposed upon them by the local governments, thereby suffering tremendous financial loss. See NOAH LUCAS, *THE MODERN HISTORY OF ISRAEL* 272-73 (1974); MAURICE M. ROUMANI, *THE CASE OF THE JEWS FROM ARAB COUNTRIES: A NEGLECTED ISSUE* 1-8 (1983); HISTORY OF ISRAEL, *supra* note 103, at 396-403; NORMAN STILLMAN, *THE JEWS OF ARAB LANDS IN MODERN TIMES* 149-75 (1991).

nities in the Arab countries, the responsibilities of the Arab governments for their war of aggression and their liability for reparation, will all be relevant in the question whether, to what extent, and under what conditions, the former Arab residents of the territory of Israel should be allowed to return.¹³⁰

It is important to note that no form of compensation has ever been offered by these Arab states for the weighty losses inflicted upon the Jews. This is true even in the current era when diplomatic and trade relations have been established with many of these states.¹³¹ Furthermore, it should be remembered that the D.O.P. speaks of refugees generally, not just Palestinian refugees.¹³² Interestingly, the Israel-Jordan Peace Treaty supports this more two-sided approach. It states that the parties, "recognizing the massive human problems caused to both parties by the Arab-Israel conflict" undertook to "seek to . . . alleviate those problems . . . [and] resolve them in appropriate forums, in accordance with international law."¹³³

A crucial distinction exists between the treatment that Jewish refugees received in Israel and that received by Palestinian Arabs who fled to neighboring Arab states. While the former group was welcomed and successfully absorbed, the latter group was isolated and, for the most part, kept in refugee camps until the present.¹³⁴ As a result, it will no doubt be contended by some Israeli policy-makers that Israel should not, after voluntarily bearing the cost of successfully rehabilitating and integrating the Jewish refugees, now be called upon to incur the expense and security risk of solving the Palestinian refugee and displaced person problems. The Israeli position is further bolstered by the fact that Arab states, often motivated by political considerations, failed to exhibit corresponding generosity towards Palestinian refugees within their borders¹³⁵ and thus should shoulder some of the burden of resolving the issue.

¹³⁰ THE REFUGEE ISSUE, *supra* note 30, at 5.

¹³¹ GAZIT, *supra* note 27, at 10-11.

¹³² See D.O.P., *supra* note 4. According to Professor Yehuda Z. Blum, the "language of the D.O.P. . . . may be construed as applying both to the Palestinian Arab refugees displaced in 1948 and the Jewish refugees displaced from Arab lands who left their countries of residence either in the course of the Arab-Jewish (and subsequently Arab-Israel) hostilities of 1947-9 or in their wake" Blum, *From Camp David*, *supra* note 19, at 220.

¹³³ *Id.*

¹³⁴ See *infra* text accompanying notes 152-56.

¹³⁵ The Arab states had great resources which Israel lacked. Also, the Palestinian refugees often

Fearful of being inundated with thousands of Palestinians whose allegiance to the State would be doubtful, Israeli immigration and nationality legislation has blocked the mass return to Israel by the Palestinian refugees.¹³⁶ Thus, for example, under the Nationality Law of 1952,¹³⁷ a person who resided in Palestine immediately prior to the establishment of the state is automatically considered a resident only if he was registered as a resident before March 1, 1952. This legislation was specifically designed to avoid awarding citizenship to Arabs who had left the country during the 1948 War and had returned illegally thereafter.¹³⁸ Similarly, the Law of Entry of 1952¹³⁹ directly prohibits entry into Israel except for Israeli citizens or those authorized to enter by the Israeli Interior Ministry. In this way, the return of refugees to Israel without approval is rendered illegal under Israeli law, which allows for the deportation of unauthorized immigrants pursuant to the above-mentioned legislation.

The Israeli legal system has also sought to deal with the demographic dimension of the refugee problem by seeking to encourage the immigration to Israel of Jews from the diaspora. In accordance with the Law of Return of 1950,¹⁴⁰ citizenship is acquired automatically upon immigration by a "Jew" as that term is defined within the legislation. These immigrants are entitled to special benefits directed at assisting their absorption into Israeli society. Not surprisingly, Palestinians object strenuously to this enticement for additional Jewish immigration.¹⁴¹

resettled not far from their original homes, had kin in the country where they were situated, spoke the language and knew the culture. This was not the case for the Jewish refugees. This disparity is all the more apparent given the rhetorical assertions of the Arab states that claimed "solidarity . . . unites them with their Palestinian brethren." *Seminar of Arab Jurists on Palestine*, in 1 THE ARAB-ISRAELI CONFLICT: READINGS 259, 359 (John N. Moore ed., 1974) [hereinafter *Seminar*].

¹³⁶ See, e.g., Ariel Bin-Nun, THE LAW OF THE STATE OF ISRAEL 15 (1992). The reasonableness of this statute is analyzed by Professor Ruth Lapidoth. See Ruth Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. ON HUM. RTS. 103, 121-23 (1986) [hereinafter *The Right of Return*].

¹³⁷ Nationality Law, 1952, 6 L.S.I. 50 (1951-52).

¹³⁸ Bin-Nun, *supra* note 136, at 41.

¹³⁹ Entry into Israel Law, 1952, 6 L.S.I. 159 (1951-52).

¹⁴⁰ Law of Return, 1950, 4 L.S.I. 114 (1949-50).

¹⁴¹ Palestinian opposition to Jewish immigration has taken various forms over the decades, including denying the historical authenticity of the Jewish claim to the land, isolating and condemning Israel at the U.N., pressuring governments to prevent their citizens from emigrating to Israel, staging terrorist attacks against immigrants en route to Israel, and most recently, in February, 1995, issuing a paper entitled *Jewish Immigration to Palestine and its Devastating Effects on the Peace Process*. It is significant that this paper, written long after the D.O.P. and the Cairo Agreement were signed, was issued by the Palestinian Authority's Ministry of Information. Struc-

In sum, since 1948, the possibility of Palestinian "return" has been viewed by the Israelis as both a security¹⁴² and a demographic threat.¹⁴³ This fear has translated into a long-standing policy of Israeli non-acquiescence to the Palestinians' comprehensive claims of a right of "return."¹⁴⁴ The favored Israeli solution was to permanently settle refugees in neighboring Arab countries and to offer them compensation for their property losses.¹⁴⁵ This "solution," however, has proven impossible to implement. Despite Israel's fears and reservations, the Israeli government has already readmitted over 100,000 refugees and displaced persons as a humanitarian measure, under the framework of

tured around the new organizing idiom of the peace process, the paper repeats the claim that, "This task [*aliyah*] cannot be accomplished without the confiscation of more Palestinian land in the West Bank and Gaza." PALESTINIAN NATIONAL AUTHORITY MINISTRY OF INFORMATION PRESS OFFICE, PUB. NO. 5, JEWISH IMMIGRATION TO PALESTINE AND ITS DEVASTATING EFFECTS ON THE PEACE PROCESS (Feb. 1995); see also Joel Bainerman, *Russians, Da, Palestinians, La*, JERUSALEM POST, Apr. 12, 1991, at 16; Jonathan Kuttab, *Why the Immigration of Soviet Jews Must be Opposed*, MIDDLE EAST INT'L., Mar. 30, 1990, at 16.

¹⁴² According to one assessment:

That the Arab refugee chose to cast his lot with the Arab invaders of Israel is a matter of record. The aggression in which he joined in defiance of the partition resolution of the United Nations created new circumstances, and by no rational, legal, or moral standard could the fledgling unexpectedly victorious, be asked to welcome its enemies. There are, after all, some historical comparisons that are worth making.
[It is] instructive to recall the attitude of the American revolutionaries toward the Tories who fled the thirteen colonies and made cause with the British. The founding fathers, notably Ben Franklin, objected not only to their return but to the granting of compensation for their confiscated estates. So long as the young republic was in danger, Franklin, who conducted the negotiations with the British in regard to the Tory refugees, refused to countenance their return. In 1789, he wrote of a group of loyalists who had settled in what was then British territory: "They have left us to live under the government of their King in England and Nova Scotia. We do not miss them nor wish their return." Though the loyalists were of the same stock as the revolutionaries and there was no scarcity of land for them to return to, the Americans were not disposed to trust in their good faith: "I believe the opposition given by many to their re-establishing among us is owing to a firm persuasion that there could be no reliance on their oaths."

Syrkin, *supra* note 1, at 167-68 (quoting Benjamin Franklin in a letter dated June 26, 1785).

¹⁴³ GAZIT, *supra* note 27, at 8-10. In 1978, in assessing the validity of the Palestinian right to return under the Universal Declaration of Human Rights, Kurt Radley observed:

[I]t can be fairly stated that the return of potentially some one and one-half million Palestinians of doubtful allegiance to a state whose population itself numbers only somewhat more than three million is as valid a threat to that state's "general welfare" as there is likely to exist.

Radley, *supra* note 1, at 613.

¹⁴⁴ GAZIT, *supra* note 27, at 9-10.

¹⁴⁵ 72 -- 10

family reunification.¹⁴⁶ At this point, it remains unclear whether this policy will be continued by the Netanyahu government.¹⁴⁷

3. The Arab States' Position on the Palestinian Refugees and Displaced Persons

Although frequently critical of the Palestinians for fleeing,¹⁴⁸ for decades the Arab countries insisted upon nothing less than the return of all Palestinian refugees from the 1948 War to their original homes and villages. This return was to take place following the so-called "liberation" of Palestine by either the Arab countries or the Palestinian populace. The essence of the Arab states' original position on the refugees is expressed in a statement by the Egyptian Foreign Minister in 1949: "In demanding the restoration of the refugees to Palestine, the Arabs intend that they shall return as the masters of their homeland, and not as slaves. More explicitly, they intend to annihilate the State of Israel."¹⁴⁹ A resolution adopted at a conference in Syria in July, 1957 stated, "Any discussion aimed at a solution of the Palestine problem which will not be based on ensuring the refugees' right to annihilate Israel will be regarded as a desecration of the Arab people and an act of treason."¹⁵⁰ In the same vein, Egyptian President Nasser declared in 1961: "If the refugees return to Israel, Israel will cease to exist."¹⁵¹

Using this rationale, all Arab states with the exception of Jordan¹⁵² refused citizenship to Palestinians residing within their borders. Most Arab leaders reasoned that resettling Palestinians was tantamount to

¹⁴⁶ CAHANA, *supra* note 94, at 20-22, 28, 32.

¹⁴⁷ See *supra* text accompanying notes 64-69.

¹⁴⁸ On July 9, 1948 Egyptian King Farouk stated his criticism of "the Palestinian Arabs who ran away leaving their houses and lands behind. . . ." Syrkin, *supra* note 1, at 166.

¹⁴⁹ ISI LEIBLER, THE CASE FOR ISRAEL 45 (1972).

¹⁵⁰ Syrkin, *supra* note 1, at 169.

¹⁵¹ M.S. ARNONI, RIGHTS AND WRONGS IN THE ARAB-ISRAELI CONFLICT 129 (1968); see also TESSLER, *supra* note 105, at 308.

¹⁵² ADDITIONAL LAW TO [JORDANIAN] CITIZENSHIP LAW, art. 2 (Feb. 16, 1954), reprinted in 3 STATUTES IN ARAB COUNTRIES 2 (Israel Military Advocate General's Office trans., 1974) (Hebrew original); [JORDANIAN] CITIZENSHIP LAW, art. 3(3) (Dec. 20, 1949), reprinted in 3 STATUTES IN ARAB COUNTRIES, *supra*, at 5. It is widely understood that Jordan's decision to grant citizenship to the refugees stemmed not from charitable intentions toward them, but rather from its government's traditional ambition to achieve recognition for its efforts to annex the land designated for the Palestinian Arabs in the Partition Resolution. The Hashemite Kingdom's policy to absorb the refugees was thus established in order to assimilate the Palestinian Arabs and to, as a result, eradicate the concept of a Palestinian people. See Amira Shagev, *Who Wants the Refugees, the Displaced Persons and Those Late in Coming Back*, HA'ARETZ, July 25, 1994, at B2 (Hebrew original).

renouncing Arab claims to Palestine. Out of an overt hostility toward Israel, they deliberately refused to resettle Palestinian refugees in an effort to maintain their refugee status and to keep the Palestinian issue alive in the world's consciousness.¹⁵³ In 1958, the former Director of UNRWA, Ralph Galloway, was so disgusted with the Arab countries' refusal to resettle and absorb the Palestinian refugees that he declared: "The Arab states do not want to solve the refugee problem. They want to keep it as an open sore, as an affront to the United Nations, and as a weapon against Israel. Arab leaders do not give a damn whether Arab refugees live or die."¹⁵⁴ In this regard, Professor Bernard Lewis observed:

In what then does this uniqueness [of the Arab-Israeli conflict] lie—this special sense of outrage which after almost forty years is still unappeased? Some see its cause in the displacement of the Palestinians from their homes to the neighboring Arab countries, where great numbers of them still live in refugee camps. Whatever the causes—whether they were expelled by the Israelis, urged to go by their own leaders, or simply fled in panic as the war exploded around their homes—there can be no doubt about the immensity of the human tragedy which befell them, and about the suffering which they have endured from then till now.

But the intractability of the Palestinian refugee problem is a consequence, not a cause, of the political problem. That the problem was not solved, like others elsewhere in our brutal century, by a combination of resettlement and some repatriation, was due to an act of will on the part of the Palestinian leadership and of the Arab states. It was indeed a considerable feat to have preserved the refugee camps and their unhappy

¹⁵³ CAHANA, *supra* note 94, at 17–18.

¹⁵⁴ Terence Prittie, *Middle East Refugees*, in *THE PALESTINIANS: PEOPLE, HISTORY, POLITICS* 71, 71 (1975). In 1949, within the framework of the Conciliation Commission, the Arab states refused to consider implementing an economic development program advanced by the United States that would have provided new financial opportunities for the refugees as well as facilitated their absorption. Similarly, in 1955, the Arab countries rejected the United States-initiated Johnston Plan which called for a joint irrigation project between Israel, Syria, Jordan and Lebanon. This project would have promoted employment for the refugees and encouraged their resettlement. Finally, in 1960, the United States, the principal donor of funds to UNRWA, attempted to no avail to persuade the Arab countries to take part in an economic development program to rehabilitate the refugees as well as foster growth in the region's overall economy. CAHANA, *supra* note 94, at 90–94.

inhabitants for so long, and prevented their absorption into the expanding economies of the oil-rich Arab states, at a time when these were attracting and employing millions of guest workers from Egypt and Yemen, from Africa, from India and Pakistan and Sri Lanka, and even from as far away as Korea and the Philippines.¹⁵⁵

Instead the Arab states preferred to maintain the Palestinian refugees in abject misery as a vehicle to torment, embarrass and undermine support for the Jewish state.¹⁵⁶ Moreover, despite the improvement in relations between Israel and various Arab States, no Arab state has been willing to underwrite any of the significant costs that will likely be incurred in resolving the Palestinian return issue. This situation has persisted despite strong arguments indicating the multilateral nature of this issue following the Arab states' perpetuation of the Palestinians' misery as refugees and displaced persons.

Although in the aftermath of the 1948 War certain Arab countries expressed a willingness to resettle Palestinian refugees in exchange for land acquired by the newly formed State of Israel,¹⁵⁷ Palestinians have always forcefully insisted that they not be treated as "refugees," but as a nation that has been denied its collective rights. From this standpoint, certain Palestinian academics have argued that the Palestinians

¹⁵⁵ BERNARD LEWIS, *SEMITES AND ANTI-SEMITES* 237–238 (1986). According to estimates of the refugee commissions of the League of Nations and the U.N. there have been about 100 million refugees worldwide since 1900. Preuss, *supra* note 3, at 6. Yet only the Palestinians continue demanding to return long after the wars in which they were displaced ended. *Id.*

¹⁵⁶ See Julius Stone, *Peace and the Palestinians*, in *THE ARAB-ISRAELI CONFLICT*, *supra* note 85, at 136, 141.

¹⁵⁷ CAHANA, *supra* note 94, at 5–6. Had resettlement been politically feasible it might have averted the decades of misery and uncertainty that have been the fate of many of the 1948 refugees. One authority wrote:

I hold the view that, political issues aside, the Arab refugee problem is by far the easiest postwar refugee problem to solve by integration. By faith, by language, by race and by social organization, they are indistinguishable from their fellows of their host countries. There is room for them, in Syria and Iraq. There is a developing demand for the kind of manpower they represent. More unusually still, there is the money to make this integration possible. The United Nations General Assembly, five years ago, voted a sum of 200 million dollars to provide, and here I quote the phrase, "homes and jobs" for the Arab refugees. That money remains unspent, not because these tragic people are strangers in a strange land, because they are not, not because there is no room for them to be established, because there is, but simply for political reasons which, I re-emphasize, is not my business to discuss.

Syrkin, *supra* note 1, at 170 (quoting COMMISSION OF THE CHURCHES ON INTERNATIONAL AFFAIRS AND WORLD COUNCIL OF CHURCHES' ADVISER ON REFUGEES, REPORT OF DR. ELKAN REES (1957)).

have a "right to return" based on the "injustice" they suffered in 1948. In the words of prominent Palestinian-American academic Professor Rashid Khalidi:

It may be difficult to grasp the extent to which the question of "return" is perceived by Palestinians as a moral issue, one of rights in the abstract, rather than one of a specific set of rights in the contractual sense. Acknowledgment of the right of return is seen as an acceptance in principle of the fact that the Palestinians are a people with national rights, among them the natural right to live in their ancestral homeland, and that a wrong was done to them as a people in preventing them from doing so. On the other hand, rejection of the right of return is seen as a denial of the Palestinians' peoplehood and rootedness in their homeland, and thus of the injustice they have suffered.¹⁵⁸

4. The Position of the United States on the Palestinian Refugees

Since 1948 the U.S. position on the return issue has wavered between a firm support for partial repatriation of the Palestinian refugees to a neutral approach in which they sought only to help the parties resolve the problem between themselves. One example of the former policy occurred after the 1948 War, when the United States pressured Israel to agree to the recommendations of Count Folke Bernadotte,¹⁵⁹ the U.N. Mediator on Palestine who stated that:

The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission . . .¹⁶⁰

To the dismay of the international community, Bernadotte was assassinated in September, 1948 by Jewish terrorists.¹⁶¹ Because of this assass-

¹⁵⁸ Khalidi, *Observations*, *supra* note 90, at 31-32.

¹⁵⁹ CAHANA, *supra* note 94, at 12.

¹⁶⁰ *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations*, reprinted in 3 THE ARAB-ISRAELI CONFLICT:

sination, what began as merely another conventional report issued by a U.N. mediator was now viewed by many as the "political testament" of a man who had sacrificed his life for peace in the Holy Land.¹⁶² This view was reflected in the U.N. General Assembly vote on December 11, 1948, which drafted Resolution 194 on the basis of the suggestions of Bernadotte,¹⁶³ when the vast majority of its members, including the United States, solemnly and unreservedly approved Bernadotte's program.¹⁶⁴

At the Conciliation Commission mandated by U.N. General Assembly Resolution 194, the United States assumed a key role in the proceedings, particularly with regard to progress on the refugee issue.¹⁶⁵ Working documents of the U.S. State Department from this period reveal that American officials earnestly believed that Israel could eventually be persuaded to accept the repatriation of approximately a quarter of a million refugees.¹⁶⁶ That this aspiration was unrealistic was poignantly demonstrated in Israel's response to President Truman's threat on May 29, 1949 that "the U.S. will regretfully be forced to the conclusion that a revision of its attitude towards Israel has become unavoidable."¹⁶⁷ Ben-Gurion retorted that due to security considerations, Israel could not consent to the repatriation of such a large amount of persons hostile to its existence while even an armistice agreement, let alone a comprehensive settlement, had yet to be finalized between it and its neighbors.¹⁶⁸ Israel's economic hardship caused by its being compelled to absorb hundreds of thousands of Jewish refugees fleeing from persecution in Arab countries was also adduced by the Israeli leader as further grounds for its refusal to repatriate Palestinian refugees.¹⁶⁹

This episode signalled a turning point in the Truman administration's policy concerning the Palestinian refugees. Following the Israeli government's dissention, the United States ceased to pressure Israel to comply with its views. As one-time U.S. Ambassador to Israel James MacDonald attests in his memoir: "The [next] American note aban-

¹⁶² *Id.*

¹⁶³ Radley, *supra* note 1, at 600.

¹⁶⁴ CAHANA, *supra* note 94, at 13; HISTORY OF ISRAEL, *supra* note 103, at 338-39.

¹⁶⁵ CAHANA, *supra* note 94, at 17-19.

¹⁶⁶ Donald Neff, *U.S. Policy and the Palestinian Refugees*, J. PAL. STUD., August 1988, at 96, 104.

¹⁶⁷ *Id.* at 106-07. In addition, the State Department had warned that loan funds would be withheld from the Jewish state if it did not agree to the return of 200,000 Palestinian refugees. *Id.* at 107.

¹⁶⁸ CAHANA, *supra* note 94, at 19.

doned completely the stern tone of its predecessor More and more, Washington ceased to lay down the law¹⁷⁰ to Tel Aviv.

After the 1967 War, the United States resumed its active peacemaking role within the Israeli-Arab conflict. Following the war, President Johnson's administration fully supported¹⁷¹ Security Council Resolution 237, which, *inter alia*, called "upon the Government of Israel . . . to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities."¹⁷² Then Secretary of State William P. Rogers echoed this position when he declared in an address given on December 9, 1969 that:

There can be no lasting peace without a just settlement of the problem of those Palestinians whom the wars of 1948 and 1967 have made homeless. This human dimension of the Arab-Israeli conflict has been of special concern to the United States for over 20 years We are prepared to contribute generously along with others to solve this problem. We believe its just settlement must take into account the desires and aspirations of the refugees and the legitimate concerns of the governments in the area. The problem posed by the refugees will become increasingly serious if their future is not resolved. There is a new consciousness among the young Palestinians who have grown up since 1948 which needs to be channelled away from bitterness and frustration toward hope and justice.¹⁷³

Rogers recognized the importance of allowing the refugees a role in the resolution of their predicament. He cautioned, however, that this solution must be weighed against the legitimate security and demographic interests of both Israel and the Arab countries. This position reflected the continued U.S. policy of supporting U.N. General Assembly Resolution 194 and the principles it set forth for solving the prob-

lem of the Palestinian refugees.¹⁷⁴ Even so, it did not signify an intention by the Nixon Administration to urge Israel to repatriate large numbers of Palestinian refugees. As Nixon pledged in a secret letter to Israeli Prime Minister Golda Meir: "[The U.S.] will not pressure Israel to accept a solution that could undermine the Jewish character of the State of Israel and endanger its security."¹⁷⁵

Subsequent U.S. efforts to facilitate negotiations on the Palestinian refugees such as the Reagan Plan and the Schultz Initiative placed less emphasis on the political aspects of the refugee issue, and chose to limit their focus to the necessity of providing the refugees with financial assistance and urging an amelioration of their living conditions. This policy further reflects the neutral position adopted by the United States over the past two decades, in which the United States agreed to approve any solution to this issue that has been mutually agreed upon between Israel and the Arab countries.¹⁷⁶

In 1992, a senior official in the administration of President Bush clarified the U.S. view by saying that General Assembly Resolution 194 had been "superseded" by Security Council Resolutions 242 and 338, thereby rendering it invalid.¹⁷⁷ This reinforced an earlier U.S. statement that General Assembly Resolution 194 was not the basis for the Madrid Peace Conference which led to the current Oslo peace process.¹⁷⁸

II. THE RETURN QUESTION EXAMINED UNDER INTERNATIONAL LAW

A. Repatriation Under International Law

The PLO has often claimed a right of repatriation under international law for the Palestinian refugees and displaced persons to which

¹⁷⁰ JAMES MACDONALD, *MY MISSION IN ISRAEL 179-84* (1951).

¹⁷¹ CAHANA, *supra* note 94, at 27.

¹⁷² Security Council Resolution 237 Concerning Humanitarian Protection for Civilians and Prisoners of War in the Area of the Middle East Conflict, in *THE ARAB-ISRAELI CONFLICT*, *supra* note 85, at 1056, 1057. Israel opposes Security Council Resolution 237 on the grounds that it requires the Israeli military government to ensure the return of the inhabitants which fled the area without any regard whatsoever for Israel's security. The resolution is thus perceived as one-sided since it grants an absolute right of return to the displaced persons of 1967. Ronen Interview, *supra* note 37.

¹⁷³ William P. Rogers, *A Lasting Peace in the Middle East: An American View*, in *THE ARAB-ISRAELI CONFLICT*, *supra* note 85, at 779, 777-78 (emphasis added).

¹⁷⁴ CAHANA, *supra* note 94, at 33.

¹⁷⁵ GAZIT, *supra* note 27, at 14-15.

¹⁷⁶ *Id.* at 14. A particularly embarrassing incident occurred in connection with the Refugee Working Group established at the Madrid peace conference. In response to a question concerning the U.S. position on the question of whether or not the Palestinian refugees have a right to return, the State Department's spokesman said that the United States favors that option as a solution to the problem. Israel protested this expression of U.S. policy and the American representative at the talks of the Group was compelled to reconcile the above-mentioned formulation of American policy and stressed that it is the U.S. view that the refugee issue, together with each of the methods for solution (repatriation, compensation and resettlement) should be negotiated in direct talks between the parties. CAHANA, *supra* note 94, at 66-67.

¹⁷⁷ David Makovsky, *US: "Right of Return" Superseded*, JERUSALEM POST, July 1, 1992, at 1.

¹⁷⁸ *Id.*

Israel has consistently objected.¹⁷⁹ The PLO has supported this claim by referring to both international law and to specific resolutions of the U.N. General Assembly and Security Council.¹⁸⁰

International law has developed a number of general standards for returning and repatriating persons dislocated from their country or land of origin.¹⁸¹ Worthy of examination in this regard are the Universal Declaration of Human Rights (Universal Declaration),¹⁸² the Fourth Geneva Convention of 1949,¹⁸³ and Article 12(4) of the 1966 U.N. Covenant on Civil and Political Rights.¹⁸⁴ It is doubtful for the reasons discussed *infra*, however, whether these instruments provide a basis for specific Palestinians' claims for repatriation.

Although widely regarded by international law scholars as representing principles and norms that are reflective of customary international law,¹⁸⁵ the origins of the Universal Declaration should not be disregarded. Initially adopted by the U.N. General Assembly, it has no legally binding effect in that resolutions of the General Assembly are merely recommendations to states.¹⁸⁶ Moreover, the elasticity of its Article 29(2) allows every state to limit the exercise of rights in the Universal Declaration where necessary to ensure "respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹⁸⁷

¹⁷⁹ See, e.g., David Makovsky, *Palestinian Right of Return Will Never Happen: Shamir*, JERUSALEM POST, May 14, 1992, at 2.

¹⁸⁰ See, e.g., G.A. Res. 2851, U.N. GAOR, 26th Sess., Supp. No. 29, at 48, U.N. Doc. A/8429 (1971); G.A. Res. 2792, U.N. GAOR, 26th Sess., 2001st plen. mtg., at 46, U.N. Doc. A/8429 (1971); G.A. Res. 2672, U.N. GAOR, 25th Sess., Supp. No. 28, at 35, U.N. Doc. A/8028 (1970); G.A. Res. 2535, U.N. GAOR, 24th Sess., Supp. No. 30, at 25, U.N. Doc. A/7630 (1969); G.A. Res. 2452, U.N. GAOR, 23d Sess., Supp. No. 18, at 21, U.N. Doc. No. A/7218 (1968).

¹⁸¹ IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 558-59 (4th ed. 1990).

¹⁸² *Universal Declaration of Human Rights*, G.A. Res. 217(A), U.N. GAOR, 3d Sess., 183d plen. mtg., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

¹⁸³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

¹⁸⁴ Covenant on Civil and Political Rights, art. 12(4), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 54, U.N. Doc. A/6316 (1966) [hereinafter Covenant on Civil and Political Rights].

¹⁸⁵ RICHARD B. LILICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 65 (1979). International law can be divided into two categories: customary and conventional. In general, customary international law binds all nations. Conventional law has more limited applicability in that it binds only those states that have ratified it and, if required by the local legal system, transformed the treaty into municipal law.

¹⁸⁶ *INTERNATIONAL HANDBOOK OF HUMAN RIGHTS* 7 (Jack Donnelly & Rhoda E. Howard eds., 1987).

¹⁸⁷ *Universal Declaration*, *supra* note 182, art. 29(2), at 77.

Likewise Article 29(3) of the Universal Declaration, which specifies that "[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations," can be marshalled to support Israel's unwillingness to repatriate hundreds of thousands or even millions of Palestinians. This is because the U.N. Charter, *inter alia*, states in Article 1(1) the purpose of "maintain[ing] international peace and security," a goal that would arguably not be served by mass repatriation of hostile Palestinians to Israel.¹⁸⁸

Even a textual analysis of Article 13(2), which proclaims, "Everyone has the right to leave any country, including his own, and to return to his country"¹⁸⁹ fails to support the Palestinian case for repatriation.¹⁹⁰ This follows from the fact that the Palestinian refugees were never citizens of Israel.¹⁹¹ Nor do their offspring, most of whom have never

¹⁸⁸ U.N. CHARTER art. 1 ¶ 1. Other relevant objectives of the U.N. include the "removal of threats to the peace" (art. 1 ¶ 1), the preservation of "sovereign equality" (art. 2 ¶ 1), the settlement of disputes "by peaceful means" (art. 2 ¶ 3), protecting the "territorial integrity" and "political independence" of all member states (art. 2 ¶ 4) and not interfering with "matters which are essentially within the domestic jurisdiction of any state" (art. 2 ¶ 7). See U.N. CHARTER arts. 1-2. All of these purposes could arguably be threatened by a mass return of Palestinians.

¹⁸⁹ *Universal Declaration*, *supra* note 182, art. 13(2), at 74 (emphasis added). It may be beneficial to consider the PA as a sovereign entity because only then can it be subject to international law and censure, i.e., be held liable for human rights violations. Then there would be a clear international law grounding for insisting that the PA prevent dissident Palestinian factions from committing terrorist acts against Israel. As a result, in this respect at least, it would be beneficial for Israel to treat the Palestinian entity as a sovereign state even if it would strengthen Palestinian claims for repatriation.

However, it is possible to argue that in light of the evolving international law norms prohibiting terrorism and the frequent Palestinian claims of statehood, conditioning of the Palestinian return on "living at peace" with Israel may be superfluous. See, e.g., European Convention on the Suppression of Terrorism, Nov. 10, 1976, Europ. T.S. No. 90 (1976) (entered into force Aug. 4, 1978).

¹⁹⁰ Despite this, every attempt to make a case for the right of Palestinian repatriation invariably cites this provision of the Universal Declaration. See Sami Hadawi, *The Arab Refugees*, in CRESCENT AND STAR 199, 201 (Yonah Alexander & Nicholas N. Kittrie eds., 1973); See Issa Nakhleh, *The Liberation of Palestine is Supported by International Law and Justice*, in 1 THE ARAB-ISRAELI CONFLICT: READINGS, *supra* note 135, at 566, 572-73; Radley, *supra* note 1, at 612 (citing Vojin Dimitrijevic, *Legal Position of Palestine Refugees*, 19 REV. OF INT. AFF. 18 (1968)); Seminar, *supra* note 135, at 363; see also HENRY CATTAN, *PALESTINE, THE ARABS AND ISRAEL* (1969).

¹⁹¹ See *supra* text accompanying notes 136-40. Most international law instruments are premised on state sovereignty. This poses a particular problem for the Palestinian refugees because the Palestinians constitute an emerging national entity that are not nationals of a current or displaced sovereign state. As to the displaced persons who moved across the Jordan River in 1967, they held Jordanian citizenship and were merely relocating within what was then claimed to be the boundaries of that state. Hence, they fall outside the ambit of Article 13(2) of the Universal Declaration.

Based on the text of the interim agreements, there is a strong argument that the sole source of the PA's authority and legitimacy are the accords it concluded with Israel. See generally Justus R. Weiner, *Human Rights in Limbo During The Interim Period of The Israel-Palestinian Peace Process*:

visited Israel, meet the "return to his country" test. Finally, the Universal Declaration posits an individual right and not one that applies to masses of people.¹⁹²

Also proffered as authority is Article 49 of the Fourth Geneva Convention.¹⁹³ This provision forbids the permanent evacuation of areas occupied during international conflicts.¹⁹⁴ Its relevance to the Palestinian refugees and displaced persons is doubtful, however, for several reasons. First, Article 49 presupposes an international conflict and therefore would have no applicability to the civil conflict between Jews and Arabs in Palestine prior to the Declaration of Independence of the State of Israel on May 15, 1948.¹⁹⁵ The regular armies of Egypt, Transjordan, Syria, Iraq and Lebanon then officially entered into Palestine,¹⁹⁶ precipitating the international stage of the conflict. Thus, refugees who fled after that date as well as displaced persons from the 1967 War may clear this hurdle. Second, this Convention focuses on protecting civilians during war and has virtually nothing¹⁹⁷ to say about resolving post-war refugee or displaced person issues. Third, the Israel Supreme Court has held that the Geneva Conventions of 1949, which constitute conventional international law, do not automatically become part of the binding municipal law of Israel in the absence of a process of legal adoption (enactment) by the Knesset (parliament).¹⁹⁸ Fourth and finally, the Fourth Geneva Convention came into force on October

Review, Analysis & Implications, 27 N.Y.U. J. INT'L L. & POL. 761 (1996). The logical interpretation of the interim agreements is that the West Bank and Gaza remain occupied by the Israeli military with the PA acting as nothing more than a delegate of the Israeli occupation administration. See, e.g., Cairo Agreement, *supra* note 5, art. XXIII(7), at 637; D.O.P., *supra* note 4, art. IV, at 1528; see also Oslo II, *supra* note 8, arts. XI(1), XXXI(8). Among the necessary qualifications for statehood which the PA lacks is the capacity to enter into relations with the other states. See Oslo II, *supra* note 8, art. IX(5)(a); Cairo Agreement, *supra* note 5, art. VI(2)(a), at 630. On the subject of the legal criteria of statehood see, e.g., BROWNIE, *supra* note 181, at 72-79.

¹⁹² *The Right of Return*, *supra* note 136, at 114.

¹⁹³ Fourth Geneva Convention, *supra* note 183, art. 49, at 318-19. For a general argument favoring applicability of the Fourth Geneva Convention, see Quincy Wright, *Legal Aspects of the Middle East Situation*, 33 L. & CONTEMP. PROB. 5 (1968).

¹⁹⁴ Fourth Geneva Convention, *supra* note 183, art. 49, at 318-19. Article 49 stipulates that persons temporarily evacuated (where the military situation so requires) be "transferred back to their homes as soon as hostilities in the area in question have ceased." *Id.*

¹⁹⁵ See Radley, *supra* note 1, at 596-97.

¹⁹⁶ See *id.* at 590.

¹⁹⁷ But see Fourth Geneva Convention, *supra* note 183, art. 44, at 316.

¹⁹⁸ H.C. 785/87, 845/87, 27/88, Affo v. IDF Commander of Judea and Samaria, reprinted in THE RULING OF THE ISRAEL HIGH COURT OF JUSTICE ON THE EXPULSION OF PALESTINIAN AGITATORS 36 (April 1988) (unofficial translation) (available from Israeli Ministry of Justice, Human Rights and International Relations Department).

21, 1950,¹⁹⁹ and hence cannot be applied to the 1948 refugees, although this cannot be said about the displaced persons of 1967.

Another arguably relevant instrument is the 1966 U.N. Covenant on Civil and Political Rights, which in Article 12(4) affirms, "No one shall be arbitrarily deprived of the right to enter his own country."²⁰⁰ Israel, however, could justify its refusal to permit repatriation under the "public emergency" provision in Article 4.²⁰¹ Furthermore, as with the Universal Declaration, the right of return created by the U.N. Covenant is limited to nationals (or at most, permanent residents) and is not applicable to masses of displaced people.²⁰²

B. U.N. Resolutions Endorsing Repatriation

Palestinians frequently cite a variety of U.N. General Assembly resolutions which address the subject of the Palestinian refugees and purport to establish a Palestinian right of return. The most important resolution relating to this issue is U.N. General Assembly Resolution 194, adopted on December 11, 1948.²⁰³ The problem with accepting General Assembly resolutions as an authorization for Palestinian repatriation is that they do not normally constitute binding authority over sovereign states.²⁰⁴ Regarding Resolution 194, for example, Professor Ruth Lapidoth notes that the language of the resolution does not recognize a clear right for the Palestinians to return, but merely "recommends that the refugees 'should' be 'permitted' to return."²⁰⁵ General Assembly Resolution 194 limits permission to individuals that wish to return and are willing to "live at peace with their neighbors."²⁰⁶ In other words, even if one ignores the non-binding nature of General Assembly resolutions, Resolution 194 limits the return of Palestinian

¹⁹⁹ DOCUMENTS ON THE LAWS OF WAR 272 (Adam Roberts & Richard Guelff eds., 1982).

²⁰⁰ Covenant on Civil and Political Rights, *supra* note 184, art. 12(4), at 54.

²⁰¹ *Id.* art. 4, at 53.

²⁰² *The Right of Return*, *supra* note 136, at 114.

²⁰³ "The General Assembly resolves that the [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, 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." See G.A. Res. 194, *supra* note 94, para. 11, at 24.

²⁰⁴ BROWNIE, *supra* note 181, at 14.

²⁰⁵ *The Right of Return*, *supra* note 136, at 116 (emphasis added).

²⁰⁶ *Id.* (citing G.A. Res. 194, *supra* note 94, para. 11, at 24).

refugees to those who wish to live peaceably with Israel, i.e., by refraining from terrorism and irredentist activities.

The question that now arises is how such persons can be, on a case-by-case basis, distinguished from others who reject the peace process.²⁰⁷ It should not be overlooked that Resolution 194 also posits the option of paying "compensation" for lost or damaged property to refugees who do not return. Notwithstanding the particular language of Resolution 194, however, it illustrates the opportunistic use of particular resolutions by the Arab states and Palestinians. For example, every Arab state voted against Resolution 194 but decades later it became a cornerstone of their efforts to secure repatriation or compensation for the Palestinian refugees.²⁰⁸

During the years from 1952 until 1968, the General Assembly annually reaffirmed²⁰⁹ its Resolution 513.²¹⁰ This resolution favored a solution involving public works projects as a vehicle to resettle and integrate the refugees in the Arab countries where they were located.²¹¹ In the immediate aftermath of the 1967 War the U.N. Security Council adopted Resolution 237²¹² which stated, *inter alia*, that Israel should "facilitate the return of those inhabitants who have fled the areas [where hostilities occurred] since the outbreak of hostilities."²¹³ Shortly thereafter it adopted Resolution 242 in which the Security Council "[a]ffirm[ed] further the necessity . . . [f]or achieving a just settlement of the refugee problem."²¹⁴ No means to achieve these goals were specified, however.

During the ensuing years, particularly after the Arab, Moslem, Third World and Soviet Block states began to dominate the General Assembly, numerous resolutions were adopted.²¹⁵ These resolutions invariably

²⁰⁷ Persons convicted of security offenses against Israel since the D.O.P. took effect would clearly fall into the latter category. It would be more difficult to arrive at this determination for persons who had been imprisoned or administratively detained during the Intifada, but who claim to now support the peace process.

²⁰⁸ *Seminar*, *supra* note 135, at 364-65.

²⁰⁹ See Radley, *supra* note 1, at 604.

²¹⁰ G.A. Res. 513, U.N. GAOR, 6th Sess., Supp. No. 20, at 12, U.N. Doc. A/2119 (1951).

²¹¹ See *id.*

²¹² S.C. Res. 237, U.N. SCOR, 22d Sess., 1361st mtg., at 5, U.N. Doc. S/INF/22/Rev.2 (1967).

²¹³ *Id.*

²¹⁴ S.C. Res. 242, *supra* note 92.

²¹⁵ See, e.g., G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974); G.A. Res. 2963(E), U.N. GAOR, 27th Sess., Supp. No. 30, at 27, U.N. Doc. A/8730 (1972); G.A. Res. 2792(D), U.N. GAOR, 26th Sess., Supp. No. 29, at 46, U.N. Doc. A/8429 (1971); G.A. Res. 2672(C), U.N. GAOR, 25th Sess., Supp. No. 28, at 35, U.N. Doc. A/8028 (1970); G.A. Res. 2556(D), U.N. GAOR, 24th Sess., Supp. No. 26, at 35, U.N. Doc. A/7550 (1969).

endorsed Palestinian repatriation and linked it to self-determination in such a manner as to raise doubts whether they were consistent with Israel's continued sovereign existence.²¹⁶ Furthermore, the U.N. General Assembly, Security Council, and the various U.N. agencies have maintained a blatantly hostile attitude toward Israel for more than two decades, and there is reason to question whether "political" resolutions should be given legal credence.²¹⁷ Most Israelis and many other observers²¹⁸ discount the U.N. assessments of matters involving Israel. Even with the repeal of the resolution equating Zionism with racism in 1991,²¹⁹ the U.N. still has yet to demonstrate an impartial attitude towards Israel.²²⁰ However, even if the Palestinian "right of return" does not have a definite basis in international law, considering its immense importance to the overall dynamic of the peace process, the Palestinians may be able to claim a "right" of return given both their continued presence in the land and as a primary way to alleviate the prolonged misery of the refugees and displaced persons.

C. Developments in International Law

The political and technical complexity of the Palestinian return issue has largely prevented its resolution at both the political and legal level. Moreover, it is questionable whether international law in its present state of development is competent to address this intricate matter. One conspicuous deficiency is that the present regime of international law regulating this area largely fails to consider who has international responsibility for rehabilitating refugees and displaced persons. On one hand, there seems to be an assumption that this responsibility

²¹⁶ *The Right of Return*, *supra* note 136, at 120; Radley, *supra* note 1, at 604.

²¹⁷ See HARRIS O. SCHOENBERG, A MANDATE FOR TERROR: THE UNITED NATIONS AND THE PLO 251-327 (1989).

²¹⁸ One observer noted that "[b]y equating Israel's temporary deportations with very permanent ethnic massacres in Bosnia, or with Iraq's territorial marauding, persecution of Kurds and continuous military defiance of the U.N., the U.N. members and the Secretary General are conniving in a distortion of history, reality and morality." A.M. Rosenthal, *Dances With Wolves*, N.Y. TIMES, Jan. 29, 1993, at A27; see also Mortimer B. Zuckerman, *The PLO as Image Maker*, U.S. NEWS & WORLD REP., Jan. 22, 1990, at 76.

²¹⁹ G.A. Res. 46/86, U.N. GAOR, 46th Sess., 74th plen. mtg., at 1, U.N. Doc. A/Res/46/86 (1992) (repealing G.A. Res. 3379 (1975), determining "that Zionism is a form of racism and racial discrimination").

²²⁰ Meir Rosenne, *Double Standard*, JERUSALEM POST, Jan. 11, 1993, at 6 (U.N. never condemns violence directed at Jews or Israelis); see, e.g., Marilyn Henry et al., *Israel, US Reject UN Kana Report*, JERUSALEM POST, May 9, 1996, at 1; *The UN and Its Allies*, JERUSALEM POST, May 10, 1996, at 4.

should be shouldered by the state from which the refugees fled. This assumption, however, seems inequitable given that, as in the Palestinian situation, the reason for the Palestinian flight in 1948 can be attributed to the conduct of several states (not to mention a non-state entity, i.e., the local Palestinian leadership). Moreover, following the Palestinian exodus of 1948 and the subsequent displacement in 1967, it is possible to hold the refugees themselves, some of whom fled voluntarily, partially accountable for their plight. Furthermore, as the Palestinian situation also highlights, it is probably inequitable to require the country of origin to bear the entire burden of rehabilitating refugees when for decades these refugees could have been absorbed in the countries to which they fled were it not for local political objectives.

A comparison to municipal law, however, may shed some light on the lacunae presented by an international legal analysis. One possible improvement would be the adoption in international law of a fault liability principle. Under this approach, the duty to rehabilitate a refugee population would be shared both by those states that created the problem in the first place and the countries who failed to mitigate the plight of the refugees when they had the opportunity and the means to do so.

It must be noted, however, that most analogies from municipal law to international law are dangerous. The inherent differences between these regimes do not facilitate a straightforward transferral of doctrines. Even so, in this case, international refugee law has much to gain from a municipal law-based fault liability approach. Adoption of such a rule would not only lead to the rehabilitation of refugees but to the just allocation of responsibility for such rehabilitation. Moreover, a system that attempts to pursue an equitable apportionment of international duties is likely to be politically feasible and thus have greater potential for actually solving a given refugee situation.

In practical terms, a resolution of the plight of refugees and displaced persons will only be achieved if Israel, the Palestinian leadership, the neighboring Arab states and international sources of funding combine their efforts. The issue is too complicated and too protracted to be solved without extensive cooperation. This presents both a challenge and an opportunity since, as stated above, it is unlikely that the Israeli-Palestinian conflict will reach a meaningful resolution without significant advances toward refugee and displaced person rehabilitation. Consequently, it becomes necessary to go beyond simply analyzing these issues under international law. It is worthwhile to consider

whether it is possible to tailor a framework for the resolution of the political aspects of the claims.

III. RESOLVING CLAIMS BY AN INTERNATIONAL ARBITRAL TRIBUNAL

One method²²¹ of addressing the refugee and displaced persons issues would be to establish a bilateral²²² or multilateral²²³ claims commission to arbitrate the financial claims of not only Palestinian refugees and displaced persons, but also of Jewish refugees. An interesting analogue for such a commission was established pursuant to the international agreements that led to a settlement of the Iran hostage crisis on January 19, 1981.²²⁴ The Algiers Accords,²²⁵ the collective term for these agreements, provided, in part, for the creation of an arbitral forum in the Hague under the title of the Iran-United States Claims Tribunal (Tribunal).²²⁶ The Tribunal's jurisdiction included an explicit authorization of Article II(1) of the Claims Settlement Declaration to decide "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," arising "out of debts, contract . . . expropriations or other measures affecting property rights"²²⁷

²²¹ For a discussion of various methods of approaching this problem, see generally Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L., 295, 331-35 (1995).

²²² Generally international claims involve two sovereign entities. See WILLIAM W. BISHOP JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 742-43 (3d ed., 1971). Since the PA is not a nation state a conceptual hurdle would have to be overcome, although this same issue has not prevented the conclusion of the D.O.P. and the four interim agreements between Israel and the PLO, albeit with international sponsorship (i.e., the United States, the Russian Federation, the European Union, Norway and Egypt signed as witnesses of the Oslo II Agreement).

²²³ Ideally such a tribunal would be multilateral. This is because Jewish refugees have claims against countries such as Egypt, Libya, Morocco, Iraq and Syria, while Palestinian refugees settled in Jordan, Lebanon, Syria, etc. The participation of Jordan would be particularly helpful in that the largest number of exiled Palestinians hold Jordanian citizenship. See GAZIT, *supra* note 27, at 6.

²²⁴ During the past 195 years international arbitration and adjudication of claims has been widely employed to determine state responsibility for wrongs to aliens. See BISHOP, *supra* note 222, at 742-841.

²²⁵ JOHN A. WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 4 (1991).

²²⁶ It must be said that, with the exception of a few tribunals established under post-World War II peace treaties, the Tribunal was the only tribunal to have been established in the last fifty years. Benvenisti & Zamir, *supra* note 221, at 332.

²²⁷ Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the

The circumstances of the claims brought before this Tribunal were in some respects comparable to those that could be brought by the Palestinian refugees, Palestinian displaced persons and Jewish refugees. In particular, nearly the entire population of Americans living in Iran prior to Khomeini's rise to power fled Iran during a period of four months, beginning November 1, 1978 and ending February 28, 1979, never to return.²²⁸ Their flight was apparently due not merely to revolutionary upheaval, but also to the anti-American posture of Khomeini's forces, which was manifested in the Ayatollah's pronouncement that the U.S. government was the enemy of the Iranian people.

By the end of March, 1991, American parties were awarded a sum total of nearly 1.8 billion U.S. dollars and Iranian parties were awarded approximately 600,000 U.S. dollars.²²⁹ All of these awards were paid in full.²³⁰ Of the 40,000 Americans who were forced to leave Iran, only 1500 actually filed claims at the Tribunal alleging that they had been "wrongfully expelled" by the Iranian Government or by revolutionary forces that became the Iranian government.²³¹ These 1500 cases constituted forty percent of the entire caseload of the Tribunal.²³² The successful use of the Tribunal as a legal framework removed from the political area to resolve financial claims on a case-by-case basis warrants consideration as a model.²³³ Perhaps a similar tribunal could arbitrate the property claims of the refugees from 1948 and the displaced persons of 1967.

Government of the Islamic Republic of Iran, Jan. 19, 1981, art. II(2), *reprinted in* 1 IRAN-U.S. CLAIMS TRIBUNAL 9 (1983).

²²⁸ Charles N. Brower, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 VIR. J. INT'L L. 421, 426 (1992) [hereinafter *Lessons*].

²²⁹ These sums refer to all the financial settlements finalized by the Tribunal, including government-against-government contractual-commercial claims as well as claims filed by individual claimants. These sums do not include any interest payable after the award. Tribunal Communique No. 91/4, *reprinted in* AIDA AVANESSIAN, IRAN-UNITED STATES CLAIMS TRIBUNAL IN ACTION 310-12 (1993).

²³⁰ *Lessons*, *supra* note 228, at 422.

²³¹ Interestingly, the Tribunal agreed that wrongful expulsion need not arise from the application of force or a direct governmental order, but also "constructively," a term applicable "if the circumstances in the residence are such that the alien cannot reasonably be regarded as having any real choice." *See id.* at 427.

²³² Other claims included government-against-government and contractual-commercial claims. *See AVANESSIAN*, *supra* note 229; *Lessons*, *supra* note 228, at 427.

²³³ It is the author's conviction that the success of the proposed tribunal would not be irrelevant, even though its greatest viability would be in resolving commercial disputes, like the Tribunal. *Centro Benvenuti & Zamir*, *supra* note 291 at 333.

During its ten years of operation, the Tribunal managed to resolve about ninety-five percent of all the claims submitted to it by the two governments and their respective nationals.²³⁴ The success of the Tribunal prompted Tribunal arbitrator Charles N. Brower to declare that, "the record of history . . . will judge the Tribunal to have been a remarkable institution that successfully met the substantial challenges it faced and managed both to apply and advance principles of international law in the context of international arbitration."²³⁵ Furthermore, by agreeing to this method of dispute settlement, the release of the diplomatic hostages held by Iranians in the United States Embassy in Tehran was facilitated, over four billion dollars of loans made by U.S. banks to Iran were repaid, and the United States provided its nationals with a forum to obtain effective relief for their claims.²³⁶ Iran, on the other hand, saved face on the domestic front, had a substantial amount of its blocked assets returned and received much needed funds.²³⁷ The accomplishments of the Tribunal are underscored by the fact that its success was achieved in the absence of diplomatic relations between Iran and the United States and, in fact, against the background of marked hostility between the governments and peoples.²³⁸ The Tribunal functioned despite language differences, a profound cultural conflict and dissimilar legal traditions. Moreover, although relations between Iran and the United States have not warmed during the years since the Tribunal concluded its task,²³⁹ neither government has questioned the legitimacy or finality of the Tribunal's decisions.

It is significant, however, that the population of Palestinian refugees and displaced persons is considerably larger than the 40,000 Americans who fled Iran. Hence, the number of claimants would likely far exceed the number who filed with the Tribunal and the claims would be much more difficult to conclude in a timely fashion if each were

²³⁴ Charles N. Brower, *Settling Iraqi Reparations*, FIN. TIMES, Apr. 11, 1991, *available in* LEXIS, News Library, Majpap File.

²³⁵ Charles N. Brower & Mark D. Davis, *The Iran-United States Claims Tribunal After Seven Years: A Retrospective View From the Inside*, ARB. J., Dec. 1988, at 16, 30.

²³⁶ *See AVANESSIAN*, *supra* note 229, at 1-4.

²³⁷ *See generally id.*

²³⁸ Specific manifestations of this hostility include the sinking of the *Iran Ajor* in 1987 by U.S. military forces, the Iran-Contra Affair, the shooting down of an Iranian airbus civilian aircraft in 1988 by U.S. naval forces, and alleged Iranian complicity in the taking and holding of American hostages in Lebanon. *See Lessons*, *supra* note 228, at 421-22.

²³⁹ *Containing Iran*, JERUSALEM POST, May 2, 1995, at 6; *see also* GEOFFREY KEMP, FOREVER ENEMIES? AMERICAN POLICY & THE ISLAMIC REPUBLIC OF IRAN 75-79 (1994); Dan Oberdorfer, et al., *Iran Paid for the Release of Hostages*, WASH. POST Jan. 19, 1999 at A-1.

examined individually.²⁴⁰ The U.N. faced a similar dilemma in its efforts to resolve the claims of the nearly one million people who, during 1990 and 1991, became refugees as a result of Iraq's unlawful invasion and occupation of Kuwait.²⁴¹ The U.N. Security Council responded by establishing the U.N. Compensation Commission (Commission) with a mandate to consider "consolidated claims" by category submitted by governments representing individual claimants.²⁴² Categories were to be based on criteria established by the Commission and awards were to be drawn from the U.N. Compensation Fund to be given to governments for distribution to individual claimants.²⁴³ The claims that were to be justiciable before the Commission include personal injury, including "mental pain and anguish," as well as death, and "losses of income, support, housing or personal property, or medical expenses or cost of departure from Iraq or Kuwait."²⁴⁴ In essence, measures were taken to maximize the likelihood that individuals who had really suffered would be able to obtain compensation once funding was secured.

In the opinion of this author, a arbitral tribunal established to resolve the claims of Palestinian refugees and displaced persons as well as Jewish refugees from Arab countries could facilitate the timely settlement of most outstanding grievances.

Of course numerous vital preliminary issues would have to be settled before the proposed tribunal could begin its deliberations. For example, its structure²⁴⁵ (including, of course, how the arbitrators are to be selected) and procedures²⁴⁶ should be stipulated in the terms of refer-

²⁴⁰ Due to the rules of procedure and evidence, it is not likely that hundreds of thousands of Israeli and Palestinian claims will be filed. Furthermore, although resolving claims in a timely fashion is desirable, the interest of peace favors careful and well-reasoned rulings. *But see* Benvenisti & Zamir, *supra* note 221, at 333.

²⁴¹ See Justus R. Weiner, *Israel's Expulsion of Islamic Militants to Southern Lebanon*, 26 COL. HUM. RTS. L. REV. 357, 394 (1995).

²⁴² *Lessons*, *supra* note 228, at 424.

²⁴³ *Id.* This U.N. Compensation Fund was an innovative structure, combining elements both of international claims commissions and national commissions. Benvenisti & Zamir, *supra* note 221, at 333.

²⁴⁴ Letter from the President of the Governing Council of the U.N. Compensation Commission to the President of the Security Council, Aug. 2, 1991, 30 I.L.M. 1711, 1712 (1991). Significantly, the U.N. Security Council only recently approved the Iraqi sales which would furnish the Compensation Commission with the necessary funds to pay claims. *See Lessons*, *supra* note 228, at 423; *UN Ready to Implement Oil-for-Food Plan*, JERUSALEM POST, Dec. 9, 1996, at 9. This is because 70 percent of the revenues raised by such sales would be at the disposal of Saddam Hussein's government, something the United States has regarded as unacceptable in light of Iraq's domestic conduct. *Id.*

²⁴⁵ If large numbers of claims, including many with complex proof problems, are anticipated

ence of the tribunal. The method(s) for funding the substantial sums necessary to operate the tribunal and to compensate successful claimants will have to be worked out at the political level.²⁴⁷ Once funds are available, detailed mechanisms for assessing the value of property, especially real property, and calculating the amount of compensation need to be established. Unfortunately, as has been noted, "In the context of refugees' property, there is too little practice to support any conclusion as to the lawful standard of compensation."²⁴⁸ For obvious reasons the idea of "adequate compensation," in contrast to full compensation, seems better suited to the refugee problem. Indeed, as has been noted, "[t]he current value of the property may be influenced by investments, both public and private, that may have increased or decreased its value [T]he payment of full compensation could drain the resources of the state and create instability during a delicate transitional period."²⁴⁹

In the same negotiations that set up the tribunal it would be desirable to reach an agreement on the numbers and permitted destination(s) of the returning Palestinians. This might be resolved by resurrecting the Beilin-Abu Mazen Agreement,²⁵⁰ which provided that any returning Palestinians would be absorbed by the Palestinian entity. In the alternative, Israel might agree to absorb a specified number of displaced Palestinians, provided they do not present a security threat, on the condition that all others are settled and naturalized in the Arab states where they reside or in the PA-governed areas if it becomes a sovereign entity. Whatever arrangement is negotiated, Israel should insist on the PA and PLO leadership publicly renouncing their claim to a "right of return" and agreeing that the amounts awarded by the

of accessing records from 30 or 50 years ago, the placement of the burden may dictate the outcome of most claims), the survivability of claims, how the tribunal will function if certain states refuse to cooperate and whether losses due to acts of war (or of a mob) are compensable.

²⁴⁷ Lump sum settlement of claims has become increasingly prevalent since World War II. BISHOP, *supra* note 222, at 743. This led Richard Lillich and Burns Weston to the conclusion that "in the last forty years this procedural device has become, without doubt, the paramount vehicle for settling international claims." Benvenisti & Zamir, *supra* note 221, at 334.

²⁴⁸ *Id.* at 330. For example, disagreements over the actual appraisal of property, as well as political difficulties, frustrated the implementation of the compensation system between India and Pakistan in 1949. *Id.*

²⁴⁹ *Id.* at 331. For these authors, the principle of "adequate compensation" is analogous to the notion of equitable compensation, calling for an *ad hoc* appraisal of the various interests and constraints involved. *Id.*

²⁵⁰ See *supra* text accompanying notes 59-63. Interestingly, a recent public opinion poll among Hebrew-speaking Israelis indicated that approximately twice as many people favor as oppose the Beilin-Abu Mazen understanding. See Irit Collins, *Poll: Majority Favors Beilin-Abbas Plan*, *YERU-*

arbitral tribunal constitute a full and final settlement of all financial claims.

It is recommended that such a tribunal be guided, *inter alia*, by the need to attribute responsibility for compensation on the party or parties at fault.²⁵¹ The application of a fault liability principle to claims brought before the tribunal would take into account not only the cause of the flight of a given refugee but also the reasons that the refugee was not rehabilitated subsequently. Thus, it is conceivable, in ideal terms, that a given Palestinian refugee would be compensated with funds from a variety of sources including Israel and the Arab states.

While tribunal adjudication on a case-by-case basis would guarantee the most equitable resolution of the return issue, the sheer number of claims and the contemporary political environment suggest that such a structure may be, at present, politically unrealistic. It is unlikely that Arab states or the PA would agree to the establishment of a tribunal that would assign to them even part of the blame for creating or neglecting the Palestinian refugee and displaced persons problems. Moreover, the Arab states have, thus far, shown no willingness to admit historical responsibility for, or consider compensating, their Jewish refugees. In practical terms, it may only be possible for the tribunal to initially discuss Palestinian claims and Israeli responsibility, and not deal directly with the duties of Arab states or Jewish refugee claims. However, the tribunal may be able to implicitly place the onus for compensating and rehabilitating some refugees on Arab states merely by rejecting their claims against Israel.

As far as the number of Palestinian claims is concerned, in practice these would likely only be brought by persons residing in countries that have diplomatic relations with Israel. Relatively affluent, educated individuals with some evidentiary basis, i.e. title registered in the land registry office, would be more likely to bring claims than others. It might be, therefore, that the number of actual claims would not be as great as some might fear.²⁵² For those Palestinians unable to submit specific claims, the tribunal would perhaps fund efforts in their countries of residence to improve their living standards. In the alternative

a set per capita or per family unit amount²⁵³ could be offered without requiring any proof of individual property loss or suffering.

In agreeing to a set per capita or per family unit amount, the PA would face both advantages and disadvantages. The former would include the PA's physical proximity to the Palestinian refugees and displaced persons living in the West Bank and Gaza, and the likelihood that its role in distributing funds would engender additional political support. The drawbacks would include the likelihood that corruption or nepotism, characteristic of the PA's administration, would taint the operation and that Arafat's strained relations with the leaders of Syria, Libya, Lebanon or Kuwait would prevent large numbers of claimants from applying for or receiving the sums due to them. Indeed, "[t]he present political situation in the Middle East does not hold much promise that the concerned Arab governments will agree to entrust a Palestinian authority with administering funds to the Palestinian refugees situated in their respective territories."²⁵⁴ Clearly the very existence of a tribunal, even one that cannot provide any compensation for many of the refugees and displaced persons, would enable this contentious issue to be removed from the final status talks agenda and thereby clear the way for the advancement of the peace process.

It must be stressed that even if the tribunal cannot provide any compensation for many of the refugees and displaced persons, it would represent a milestone. Putting the issue of refugee property claims into historical perspective, the Tribunal was revolutionary. Previously, "in no case of massive relocation . . . have the refugees regained the property they left behind."²⁵⁵ Germans transferred from Eastern Europe lost title to the property that they left behind; the Czech government rejected the claim to compensation for Sudeten German property; after the mass relocation of millions of Indians and Pakistanis in 1947, their abandoned immovable property was seized by the governments; and in the aftermath of the Turkish invasion in 1974, the right to property remains a major obstacle to reconciliation between the Greek and Turkish Cypriot refugees.²⁵⁶

It should be noted that even if such a tribunal is not established, negotiation regarding the return issue should be guided by the sug-

²⁵¹ This differs from the so-called lump sum agreements, where the paying state usually does not admit responsibility. Benvenisti & Zamir, *supra* note 221, at 334.

²⁵² Due to the rules of procedure and evidence, it is not likely that hundreds of thousands of Israeli and Palestinian claims will be filed. Furthermore, although resolving claims in a timely fashion is desirable, the interest of peace favors careful and well-reasoned rulings. *But see id.* at 333.

²⁵³ Another option is that claims could be considered on a group rather than an individual basis, divided, for example, according to locale.

²⁵⁴ *Id.* at 339.

²⁵⁵ *Id.* at 324.

²⁵⁶ *Id.* at 322-24.

gested fault liability principle. In other words, it may be possible for Israel, as a preliminary measure, to compensate and permit the return (to the PA) of those refugees and displaced persons for which it accepts primary responsibility. In return, the Arab states and the PA could agree to negotiate at a later date their responsibilities for Palestinian rehabilitation and for Jewish refugee claims.²⁵⁷ In this way, the refugee issue could be seen as moving toward resolution, while Israel would earn international recognition for the principles of multilateral responsibility for the resolution of these problems.

CONCLUSION

Given the divergent positions taken by the parties regarding the refugee issue since the inception of the State of Israel, settlement of the return issue in the context of the permanent status negotiations would be a remarkable achievement. Selective references to the history of the refugee and displaced persons problems will no doubt persist as the sides pursue political and moral leverage in the final status negotiations. Yet, the fate of Palestinian refugees and displaced persons is a fundamental concern for all parties involved in the peace process, and not merely for its obvious humanitarian dimension. Indeed, the return issue is perhaps the most sensitive and contentious issue on the table in the final status negotiations. Many of these issues do not demand, nor can they await, a comprehensive and final settlement to the Arab-Israeli conflict before they are addressed. Water, environment, regional economic development, arms control and regional security and refugees are precisely the five tracks of the multilateral negotiations of the Middle East peace process.²⁵⁸ Likewise, the losses incurred by the Jewish refugees from Arab countries deserve to be

²⁵⁷ Even Palestinian-American Professor Rashid Khalidi states "if compensation for property lost is the basis for part of these reparations . . . then Jews who left or were forced to leave Arab countries in and after 1948 similarly have a perfectly legitimate claim, one which might conceivably be resolved in tandem with reparations to the Palestinians." Rashid Khalidi, *Toward a Solution*, in *PALESTINIAN REFUGEES: THEIR PROBLEM AND FUTURE* 23, 24 (Ctr. for Pol'y Analysis on Palestine ed., 1994) (adapted from Khalidi's comments at the Georgetown Center for Contemporary Arab Studies' symposium, *Palestinian Refugees: Their Problem and Future*, Oct. 6, 1994).

²⁵⁸ Also in the multilateral talks, the refugee issue "is at the core of the conflict and is the most politically—and emotionally—laden question of the multilaterals." Brynen & Tansley, *supra* note 12, at 55. Indeed, in the working group on refugees of the multilateral negotiations, the Palestinians saw the group as a forum for addressing the substantive concerns and the political rights of the refugees. Israel, on the other hand, regarded the discussion of the humanitarian aspects and the improvement in the welfare of the refugees solely as a confidence-building measure and

addressed. Failure to resolve these claims may jeopardize the entire peace process. Moreover, the outcome of this controversy will intersect a wide range of other matters such as water needs, election results, land usage, city planning, job creation, budgets, ecological impact, political stability, and, of course, security.²⁵⁹

The Palestinian refugee and displaced persons issue began as one of providing relief in the wake of wars. Instead of being solved by compensation for property losses, resettlement in one or more of the Arab states, partial repatriation to Israel, or some combination of these methods, the problem was cultivated and enhanced for political reasons. Driven by the desire to "liberate their homeland," the immediate needs and realistic options of the Palestinian refugees and displaced persons were ignored during the decades that preceded the D.O.P. Whatever the causes for their departure, once across the frontier they became pawns in the zero-sum game of Israeli-Palestinian politics.

While it is impossible to satisfy the pecuniary and political aspirations of every claimant, this author believes their claims can be resolved as an international issue. That is to say that the claims can be removed from the long and contentious agenda of the final status peace negotiations by setting up a claims tribunal.²⁶⁰ To be successful such a entity will have to be adequately funded and have clear terms of reference regarding the destination(s) of returning individuals. Clearly it is in the interest of Israel, the Palestinian leadership and the world community to make an effort to close this unhappy chapter of the Arab-Israel conflict. A carefully structured arbitral claims tribunal offers the greatest hope for achieving this aim and thereby would contribute to the overall objective of a comprehensive peace.

the duplication of efforts raise serious questions about the continuing value of maintaining a separate and distinct working group on refugees. *Id.* at 18.

²⁵⁹ See *id.* at 3.

²⁶⁰ This, by itself, furnishes the parties a substantial incentive to set up a tribunal.