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Palestinian Refugees

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Introduction

Palestinian Refugees

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"Due recognition," writes Charles Taylor, "is not just a courtesy we owe people. It is a vital human need."[1] The history of Palestinian refugees is very much about the vital yet elusive quest for recognition. Palestinian refugees have struggled to be heard and understood since approximately one-half of the Palestinian population was displaced from historic Palestine in 1948. Though they remain scattered around the world, Palestinian refugees have steadfastly refused to allow their individual or collective identities to be swept into the dustbin of history.

Refuge's decision to dedicate this volume to Palestinian refugees represents a scholarly landmark in Canada. To the best of my knowledge, this is the first Canadian journal to focus an issue on Palestinian refugees. With this fact in mind, the editors of *Refuge* had two goals in bringing together the authors represented in this volume. First, we sought to create a space where Palestinian refugee voices might be heard. Second, we sought to create a place where contested narratives and policies can be examined. Taken collectively, the papers that comprise this volume testify that recognition is indeed more than a due courtesy we owe people. Recognition is intimately connected to identity, narrative, time, space, power, justice, and nation.

Hillel Cohen focuses on identity, narrative, time, space, and power with his examination of the policies governing the lives of Palestinian refugees who remained within Israel after 1948. Although they eventually took up Israeli citizenship, many of the displaced who remain within Israel have not cast off their refugee or Palestinian identities. Cohen documents how Palestinian history and geography was obliterated from Israeli textbooks in an attempt to obliterate "Palestinianness" from the minds of the Palestinian citizens of Israel. He also points to ways in which the Israeli national identity is inextricably linked with denial of Palestinian identity. Such denial, however, has proven impossible in part because it has met with resistance within Palestinian communities who have demanded recognition of their complex identities.

While Cohen writes from a perspective that is external to the Palestinian refugee experience, Mahmoud Issa situates himself squarely within it. A son of Palestinian refugees, Issa's roots are in Lubya, a small Gallilee village that was demolished in 1948 when its Palestinian inhabitants were uprooted and dispersed. Drawing on interviews with over seven hundred individuals as well as archive material, Issa documents the narrative of Lubya's refugees. He concludes that "for teenagers, the middle-aged, and the elderly alike, Lubya is an identical central image, a theoretical and subconscious point of reference, a cultural framework, and a past and present mental image that shapes, inspires, and impacts their personal lives today." At the same time that Issa's paper documents the Lubyans' "struggle to preserve the history of the self against the ravages of time and forgetfulness," it also clearly participates in that struggle.

Mohamed Kamel Doraï builds on the themes of geography, identity, and history. His study reveals how Palestinian identities, developed in local Palestinian space, transcend both time and state borders to endure as transnational migratory networks. Specifically, his paper analyzes how Palestinian refugees living in Lebanese camps have used migration to develop new forms of solidarity with Palestinian communities scattered in different regions of the world. Doraï's work identifies the extent to which local identity structures such as village and familial groupings intersect with and negotiate the increasingly complicated social, temporal, and spatial borders of our globalized word.

While Doraï focuses on the structures that allow Palestinians to exchange information and resources between them, Catherine Burwell deals with Palestinian attempts to control the information that is conveyed about them. Taking up the theme of power, narrative, memory, and identity, Burwell explores *Frontiers of Dreams and Fears,* an independent documentary film by the Palestinian Mai Masri. This film focuses on two young girls living in Shatila and Dheisheh refugee camps. Burwell sees Masri's work as

"a radical intervention into current Western reporting on the Intifada and the experiences of Palestinian refugees." She examines how Masri's narrative techniques restore the lost voices of refugee children and thereby provides an essential alternative to the exploitative images of Palestinians presented by institutionalized media.

Perhaps no topic raises questions related to justice, power, history, geography, and identity like the Palestinian Right of Return. My own contribution to this volume takes up the question of the Right of Return as a way of examining the role of gender in forging recognition of the "other." I examine the work of Jerusalem Link, a joint project between two feminist organizations, one Palestinian and the other Israeli. In their negotiations around the Right of Return, these two organizations have constructed gender as a bridge across the national divide that separates Israeli and Palestinian analysis of the Right of Return. I argue that the work of women's groups like Jerusalem Link should be given greater attention by scholars and decision makers, especially in light of a recent United Nations Security Council resolution pertaining to women and peace-building.

Robbie Sabel also focuses on the Right of Return. He develops his analysis within the framework of international law, a contested site of Palestinian-Israeli discourse. A former legal advisor to the Israel Ministry of Foreign Affairs, Sabel offers a particular perspective on the Palestinian right of return. He argues that no legal right of return exits for Palestinian refugees and "that implementation of such a right would be impractical" largely because it would undermine the Jewish character of the Israel as a nation.

While Sabel provides a particular legal analysis, Adina Friedman seeks to reorient the debate over the Right of Return along the axis of recognition. Rather than explicitly situating herself on either side of the debate, Friedman aims instead to explore what it means to recognize the perspective of the other through the lens of the right of return. She suggests that Israelis and Palestinians understand the issue of Return differently and identifies factors that she believes influence the different Palestinian and Israeli understandings.

Gail Boling, a senior researcher at Birzeit University in Palestine, reaches back into history to give context and depth to the question of Palestinian refugee rights. Boling examines the proposed Trusteeship Agreement for Palestine that was circulated by the United States in the United Nations in 1948. She provides a brief survey of the history leading up to the Trusteeship proposal, examines the salient features of the proposal, and analyzes the proposal in light of international legal norms. Boling notes that an analysis of the Trusteeship Agreement is more than hypothetical musings about "what might have been." The Agreement remains important because it consciously incorporated norms of the United Nations human rights regime in 1948 and serves as a benchmark that can be used to help map out a solution to the Palestinian refugee question as it stands today.

Like Boling, Wadie Said explores the relationship between justice, nationhood, history, and identity. Said grounds his comments on the Right of Return in an analysis of the lived reality of Palestinian refugees' lives. He argues that the precarious legal status of Palestinian refugees in their host countries makes it clear that recognition of the Right of Return is not only viable but also crucial for the establishment of a just and lasting peace in the Middle East. Ultimately, Said insists, "Israel must not be exempt from being held accountable under international legal norms and standards for a refugee population it clearly created."

No doubt both Boling's and Said's analyses will prove unsettling for some because Boling's and Said's work implicates the current debate over binationalism even though neither squarely addresses it. Binationalism, or the creation of a single state as home to both the Jewish and Palestinian peoples, is considered a taboo subject by Israelis and Palestinians alike. Nonetheless, it is increasingly discussed by at least some leaders and intellectuals. For example, Lama Abu-Odeh makes the case for binationalism in a relatively recent article[2] while Meron Benvenisti, former Deputy Mayor of Jerusalem, has suggested that "perhaps an open debate about binational arrangements, even if it's only theoretical, will do more for reconciliation than sticking to ethno-nationalist separation."[3]

Michael Lynk orients us away from questions of nationhood and the Right of Return. He reminds us that recognition of the wrongs done to Palestinian refugees across time and space raises issues around compensation as well as repatriation or resettlement. Lynk's carefully researched and detailed analysis of the right to compensation under international law represents an important contribution to the evolving literature concerning corrective justice not only for Palestinians, but for all refugees.

Both Haideh Moghissi and Arthur C. Helton insist on the need for continuing investigation into the themes of recognition, identity, narrative, time, space, power, justice, and nation in relation to Palestinian refugees. In her contribution, Moghissi introduces the main themes that inform an ongoing study of gender relations among Islamic communities, including Palestinians. This work explores how Islamic practices and beliefs alter both religious and gender identities across time and space. It also examines how religious and gender identities are recognized and received within their host societies. A particularly intriguing and timely segment of the study will examine the extent

to which changing gender dynamics in diasporas are linked to the unwillingness of the host countries to grant due recognition to Muslim identities.

In his review of Michael R. Fischbach, *Palestinian Refugee Property and the Arab-Israeli Conflict*, Helton reinforces that the Palestinian refugee issue will be a key aspect of any settlement of the Arab-Israeli conflict. Yet, he notes that relatively little attention has been paid to modeling a settlement of the refugee issue, including compensation criteria and mechanisms. Helton regards Fischbach's book as a useful work in this regard.

Clearly, the contributors to this issue of *Refuge* speak from diverse perspectives. They come from within Palestine, Israel, and beyond. They represent disciplines such as sociology, law, geography, and peace studies. While they differ in their allegiances and philosophies, they agree on one thing: finding a lasting solution to the question of Palestinian refugees is key to building peace in the Middle East. Our hope is that the papers presented in this volume will go towards creating greater understanding of the complex layers of politics, history, geography, and longing that inform the lives of Palestinian refugees. More importantly, our hope is that the papers presented in this volume reinforce that, like all refugees, Palestinian refugees cannot be regarded simply as objects of sympathy. They must be recognized as bearers of rights, makers of history, and holders of dreams.

Notes

1. C. Taylor, "The Politics of Recognition," in A. Gutmann, ed., *Multiculturalism: Examining The Politics of Recognition* (Princeton: Princeton University Press) at 26.
2. L. Abu-Odeh, "The Case for Binationalism: Why One State – Liberal and Constitutionalist – May Be the Key to Peace in the Middle East" *Boston Review* volume 26 December 2001–January 2002. Available online: <http://www.one-state.org/articles/abu-odeh1.htm> (date accessed: 9 March 2003).
3. M. Benvenisti, "The Binational Option" *Ha'aretz* (7 November 2002), available online: <http://www.one-state.org/articles/benvenisti1.htm> (date accessed: 9 March 2003).

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Land, Memory, and Identity: The Palestinian Internal Refugees in Israel

Hillel Cohen

Abstract

This article describes and analyzes the processes the Internal Refugees have experienced since the establishment of the state till this day from the perspective of the struggle over the "refugee identity." While the state has tried to undermine this identity as part of its policy against the Right of Return, activists from the refugees' communities have done their best to preserve it. In the late 1980s it looked as if the state's goal of uprooting the refugee identity was achieved, but the last decade witnessed an awakening of this identity. This has a lot to do with the Israeli-Palestinian peace talks, but also, it is suggested here, with the very nature of "refugee identity," which has two components, of which one is positive ("my roots are there") and one is negative ("I am not from here").

Résumé

Cet article décrit et analyse les processus vécus les réfugiés internes depuis l'établissement de l'État (d'Israël), jusqu'à aujourd'hui et ce, à travers de leur lutte pour leur « identité comme réfugié ». Bien que l'État se soit efforcé de saper cette identité dans le cadre de sa politique contre le Droit au retour, les militants des camps de réfugiés ont tout fait pour la préserver. Vers la fin des années 80, il a semblé que l'État avait effectivement réussi à atteindre son but, soit de déraciner l'identité des réfugiés; mais la dernière décennie a vu une renaissance de cette identité. Les négociations de paix israélo-palestiniennes ont grandement contribué à cet état de chose, mais l'article suggère, qu'en plus, cela se rapporte à la nature même de « l'identité du réfugié », qui comporte deux aspects, l'un positif (« mes racines sont ici ») et l'autre négatif (« je ne suis pas d'ici »).

The Internal Refugees in Israel are Palestinians who were uprooted from their villages in the course of the 1948 war, but found refuge within the borders of the state and became its citizens. From 1948, up until today, they have continuously voiced their demand to return to their villages, only to be met by the refusal of all Israeli governments. For the most part, their lands were allocated to Jewish settlement. While constituting a part of the general refugee problem, the moral, political, and practical controversy about the Internal Refugees is one of the most concrete expressions of the structural conflict between the state of Israel and its Arab citizens.

This article aims to analyze the relations between the State of Israel and the Palestinian Internal Refugees from the perspective of the struggle over the "refugee identity" from 1948 war onwards. After introducing the roots of the problem of the Internal Refugees and the legal mechanisms through which Israel took over their lands, the article deals with the Israeli policy of abolishing their identity, and with the resistance of groups within these communities. The last decade is witnessing a revival of the "refugee identity," which will be presented and analyzed at the end of the paper.

The Roots of the Problem and the Denial of Return

The roots of this phenomenon are to be found in the way in which Palestinian Arabs were uprooted from areas conquered by Jewish forces in the 1948 war. Terrified by the advancing Israeli army, whole communities had left their villages and sought refuge in neighbouring villages, which had not yet been conquered, or in large towns, which they believed would never be taken by the Israelis. But most of these villages and towns were indeed conquered, and their inhabitants, as well as their "guests," were uprooted. In the rare cases where the host communities had stayed in place, the refugees from the neighbouring villages stayed with

them, or at least tried to.[1] That was the case with thousands of villagers from the eastern Galilee, who concentrated in the town of Nazareth prior to its occupation. The same goes for many refugees who, relying on the close ties between the Druze leadership and the Israeli army, fled to Druze villages, hoping they would be allowed to stay. Many others found asylum in villages which had surrendered later to the Israeli army without battle, and became parts of the new state of Israel with their inhabitants.[2]

The first reaction of the Israeli Defense Force (IDF) was to drive the refugees who remained in the state of Israel over the border, in order to prevent them from returning to their villages. Thousands of refugees were thus expelled from the region of Ramah and Peqi'in (in upper Galilee) and from the town of Majdal (Ashkelon, on the southern coast of the state). Similarly, Israel has pressured refugees who had settled in villages in the Arab triangle to leave their new homes prior to the allocation of this area to the state of Israel (as was agreed upon in talks with Jordan held in Rhodes).[3]

In spite of the forced expulsion, according to official estimates some twenty-five thousand Internal Refugees remained within the borders of the newborn state, mainly in the Galilee, constituting about one-sixth of the total Arab population.[4] Unable to carry on extensive acts of deportation after the war, Israel now had to tackle the task of preventing them from returning to their villages and reoccupying their lands.

One can find three reasons for the Israeli refusal to allow the return of the Internal Refugees to their villages and lands. The first was the will to expand Jewish settlement. In this context the uprooting of Arab residents was seen by Israeli Zionist leaders as a golden opportunity, after years of restrictions on Jewish land acquisition. The expected mass immigration of Jewish refugees from all over the world increased the need for land, and existing settlements were also demanding more agricultural land.[5] Thus in the course of war, old and new immigrants were settled in abandoned Arab villages, including those whose original inhabitants had found refuge in a neighbouring village.[6] In that period, among other such projects, kibbutz Megiddo was established on the lands of Lajjun, some of whose residents moved to Umm el Fahm. Kibbutz Yas'ur in western Galilee was established on the lands of el-Birweh, whose residents moved to Majd el-Kurum, Makr, and Jdeideh, while kibbutz Beit Ha'emek was established on the lands of Kweikat in western Galilee, some of whose former residents found refuge in Abu Sinan.[7] The settlement of new immigrants in abandoned Arab villages was to continue during the 1950s.

The second reason was security. The dominant concept among Israeli leadership at the time was that the Palestinians and the Arab states were preparing themselves for a second round of warfare in order to remove the disgrace of their defeat in 1948 and destroy the state of Israel. The Arab citizens of Israel were perceived as a fifth column, waiting for such a move and preparing to help it. This assumption resulted in the evacuation of Arab villages from border areas (Ikrit and Bir'am were the best-known examples). Thus the Bedouin of the Zbedat tribe in lower Galilee were evacuated under the accusation that they were delivering intelligence information from Jordan to Lebanon. Residents of small villages in the Triangle were transferred to larger villages.[8] The same kind of reasoning led to the decision to forbid resettlement of abandoned villages. Instead, the Internal Refugees were concentrated in towns or villages and were distanced from strategically important areas, such as main roads and highways.

The third reason can be seen as vengefulness or, alternatively, as a refusal to reward those who were conceived of as the agressors. The Jewish community perceived the 1948 war as one which was forced on its peace-loving members, so in the aftermath many of them supported an Iron Fist policy toward the Arab citizens, and particularly toward villagers who participated actively in the fighting. Those who started the war, so was the consensus, had to pay the price. Moreover, some believed that allowing the Internal Refugees to return to their villages in spite of their past aggression would be perceived by them as an indication of weakness and would cause them to disparage the state of Israel. This notion is illustrated in Prime Minister Ben-Gurion's reply to a question put by the communist member of the Knesset (the Israeli parliament), Tawfik Tubi:

> The village of Birweh is an abandoned village destroyed in the battles. Its residents cooperated with the Qawuqji gangs [the term used by Israeli officials for the Arab Liberation Army, organised by the Arab Leauge to Assisst Palestinian Arabs in the war]. The IDF and the government dealt generously with them and permitted them to stay in villages near Birweh and to be residents of Israel.[9]

After the war, which took the life of six thousand Jews, one per cent of the Jewish population, the Zionist leadership saw no moral fault in refusing to allow the Internal Refugees to return home. Permitting them to remain in nearby villages was presented as a humanitarian gesture. Israel, aided by UNWRA, provided basic welfare in food and housing, while the refugees' land was settled by Jews.

The Appropriation of Land: Legal Mechanisms

Parallel to the denial of return, the state authorities began to undertake legislative measures designed to legally establish

the appropriation of the refugees' lands. In June 1948, the first version of regulations transferring the lands of the refugees to the ownership of the State was published. Toward the end of 1949 the formulation of a more comprehensive law, the Law of Absentees' Property, was drafted for presentation to the Knesset. The newly established Authority for the Rehabilitation of the Refugees, composed of experts in land and Arab affairs, worked to define the Internal Refugees as absentees though they have remained in Israel, and hence have their lands given to the state. In October 1949, in the sixth meeting of the Committee, the Prime Minister's advisor, Zalman Lif, said: "The revised law would also include evacuated Arabs. According to the law every Arab who was not in his place of residence on a certain date, whatever the reason (plight, evacuation, transfer), is considered an absentee."[10]

Thus in 1950, the Knesset accepted the Law of Absentees' Property, replacing emergency regulations on the subject. The definition of an absentee included "every Israeli citizen who left his regular abode in Israel (a) to a place outside Israel before 1948 or (b) for a place in Israel which was at that time occupied by forces which sought to prevent the establishment of the state of Israel or fought against it after its establishment."[11] Thus the Internal Refugees were defined as absentees even though they were present in the State on the relevant date and are legal citizens. This anomalous situation granted them (along with additional population groups) the title "present absentees." The legislation denied the Internal Refugees any possibility of winning legal assistance and made the transfer of their assets to the state completely legal. Appeals to the Supreme Court, based on claims that leaving their residence was temporary, now became irrelevant.

Along with this, the authorities encouraged the absorption of the refugees in the villages which they had fled to. They were given priority in leasing abandoned lands in places where they were concentrated. In few villages (mainly Makr, Jedeida, and Sha'ab in western Galilee, and Wadi Hamam and Akbara in eastern Galilee) houses were built for the Internal Refugees, but only on condition that they sign a document renouncing their assets in their villages of origin. Despite initial resistance, some refugees eventually agreed to settle in these villages.[12]

The 1952 Land Acquisition Law (LAL) gave absolute and retroactive confirmation to the transfer of the lands of the Internal Refugees to state ownership. This law included also lands of Internal Refugees who from a legal point of view were not absentee, for example those who had left their villages for others already conquered by the IDF, or who were sheltering near their village. On the other hand, the law determined a compensation mechanism for the Internal Refugees, in money or alternative lands. It was left to persuade the refugees to accept the compensation money, to make them sign a document renouncing any claim to their lands, and to help them resettle in one of the populated villages.

Landless: Stages in State-Refugee Relations

The introduction of the LAL marked a new era for the Internal Refugees. Alongside the 1952 decision to transfer UNRWA's authorities regarding the refugees to the Israeli government, the new law ended the period of the creation of the refugee problem and the appropriation of their lands. The vast majority of Internal Refugees were now dwelling in temporary housing in the outskirts of villages in the Galilee and the Triangle.

The law heralded the second phase of relations between Israel and the Internal Refugees, which lasted until 1958. After 1952, there was no more forced transfering of Arab citizens nor more land allocation by the state without some legal procedure. A reparation mechanism in the framework of the LAL was established during these years, yet most of the refugees upheld their demand to return to their villages, with only a few of them agreeing to give up their original homes and lands. During this period the refugees still perceived the prospect of returning to their villages as realistic. Only a few of them started to build permanent houses, frequently without permits. Toward the end of the period, families of Internal Refugees who had spread in different parts of Israel had began to voluntarily move to one chosen "temporary" village, in order to live alongside each other. In retrospect, this could be seen as a first sign of their coming to terms with the fact that they would probably not be allowed to reunite in their original home.

The third period, from 1958 to 1967, marked the settlement of the Internal Refugees in the villages in which they were absorbed. The reasons for their tendency to accept permanent settlement at that time were threefold. First, they realized that the refugee problem was not likely to be resolved by a "second round" of war between Israel and the Arab states, especially in light of Egypt's defeat in the 1956 Suez War. A second reason was the improvement and updating of the state's reparation mechanism, involving paying higher sums to the refugees in return for their lands and speeding up public building in the villages where they were living. The final reason was the extensive usage by Israel of the Internal Refugees' lands, which deepened their recognition that they will never get it back.

A new era began after the war of 1967, when the issue of the Internal Refugees was almost entirely removed from the public agenda. The main reason for this was that the burning personal problems of most of the refugees were settled,

both for those who accepted reparations and for those who managed to cope by themselves. Public attention was now drawn to the territories conquered in 1967 and their inhabitants. This development was reflected in Knesset debates. Until 1967 the demand for returning the Internal Refugees to their villages was raised almost in every Knesset session. Since 1967 the subject has hardly been mentioned in Knesset debates.[13]

In recent years, and most intensively since the 1990s, the subject is once again emerging on the public agenda of the Arab population in Israel. The Arab parties and Hadash party[14] demanded a solution to the problem in their election platforms of 1996 and 1999. Dozens of committees were established by former inhabitants of abandoned villages and their descendants, under the umbrella of a national committee and organizing events in the villages. Last but not least, commemorating the Nakba (the Palestinian disaster of 1948) in abandoned villages has turned into a tradition among Palestinian citizens of Israel in recent years, under the slogan of returning the Internal Refugees to their villages.

The State and the Uprooting of Refugee Identity

The activities of refugee committees provide the clearest indication of the revival of refugee identity among the Internal Refugees. This relatively new phenomenon is viewed unfavourably by the state of Israel, which has spent years in efforts to uproot this identity. In effect, over and above the legislation aimed at appropriating the lands of the Internal Refugees, the main state activity regarding this population was in the realm of identity. This is not a special characteristic of state activity among the refugees; state intervention in creating and neutralizing sub-identities[15] constituted a central element in controlling and supervising the population. Through varied bureaucratic and legal means, including use of force, the state authorities acted to uproot the collective refugee identity of this population on the assumption that this would weaken the refugees' demand to return to their villages of origin.

Analyzing "refugee identity" is essential to fully comprehand this point, and it reveals that this identity has two faces; one is positive, the other negative. The positive one is being native to a certain settlement which no longer exists, cherishing its abandoned pathways, destroyed houses, and lost scents. This aspect of identity can be called "I was there." It was pointedly expressed by Mahmoud Issa in his research on the refugees of the village of Lubya (which was located on the Tiberias-Nazareth road): "For youngsters, middle-aged or old, Lubya constitutes a basic identity image, a source to relate to in thought and sub-consciously, a model of cultural framework."[16]

The other aspect of refugee identity is the negative one, the self-conception, and the image of one in the eyes of others as a refugee, a foreigner who doesn't belong to his present place of dwelling. This image could be summed up in the notion: "I am not from here." This notion is expressed through a sense of alienation from the place of refuge, sometimes stressed by rejection projected by the absorbing community. This characteristic of identity was shown by Hasan Musa in the mid-1980s in his research concerning Internal Refugees from four Galilee villages. Twenty-eight out of eighty Internal Refugees who were asked about their sentiments reported feelings of alienation and a notion of being outsiders.[17]

Israel's main struggle was naturally directed against the positive identity, which preserved the connection between the refugees and their original villages. The action taken by the state consisted of physical activity aimed directly at the refugees and their lands, and indirect activity intended to influence both their consciousness and the general public discourse on the issue. The direct activity consisted of preventing the refugees from approaching their abandoned villages, as well as providing reparations or alternative housing. Among the measures taken to influence the refugee consciousness were obliterating the names of the abandoned villages from state maps; removing the Internal Refugees from UNWRA figures; registering them in the Population Registry as inhabitants of their host villages rather than their original ones; and excluding the abandoned villages and the refugee problem from the school curriculum, including that used for Arab pupils.

Preventing any access to the abandoned villages was primarily intended to create a complete break between the refugees and their villages, in order to enable handing over their lands to Jewish settlement. Accordingly, the first step to be taken by Israel was the total evacuation of the abandoned villages (in most of them there remained between five and ten percent of the original residents).[18] Subsequently the authorities were strict about repeatedly evacuating refugees who tried to get hold of their lands, with IDF units patrolling the abandoned villages in order to make sure that the residents were not to return. Anyone found in the abandoned villages was removed to neighbouring villages or expelled from the country.[19] In 1951 the sites of the abandoned villages were declared security areas, permitting legal measures to be taken against anyone entering them.[20] This was an intermediary step toward turning them into Jewish villages.

However, even after the transfer of the lands to Jewish settlement, the state continued to ensure that the refugees would be cut off from their former lands. The relevant Israeli authorities laid down that "under no circumstances

must land be leased to Arabs formerly from that village, or originally from there." Moreover, they were not permitted to work, even not as labourers, in their former lands. In addition, Jews or Arabs leasing land in an abandoned village had to commit not to employ refugees whose origins were in that village.[21]

This was how the state took its primary step in the course of uprooting the positive refugee identity. The new generation born after the war, it was thought, would be unable to develop an emotional connection to the parental village, or claim "I am from there." Neither could the older generation go to their place of origin and point concretely at their homes. The destruction of the villages during the 1950s and 1960s was to symbolize forever the lack of any prospect of materializing the refugees' yearning to return home. But yet, the authorities assumed that even this was not enough if the "community of memory" remained intact.

Here, the reparation mechanism came to force. Internal Refugees were put under enormous pressure to accept compensation arrangements and give up their land. Most Internal Refugees abstained from demanding reparation for their lost lands. They perceived such an agreement as cutting themselves off from the ideal of return, on the personal, communal, and national levels. Moreover, this norm of refusal constituted a principle, which united the refugees and preserved their identity. Breaking it would lead to the disintegration of their communities.

Conscious of all that, the Israeli establishment was striving to split the refugee consensus. The Israeli authorities realized that undermining the holy principle of "no compensation" would break the social solidarity of the refugees and their collective identity. This explains why the Israeli authorities decided in September 1954 to seek individual refugees who would agree to accept reparations. They thought this was the way to break the opposition of the refugee community to the proposed arrangement.[22] As shown by data from the Israel Land Authority, this activity proved fruitful.[23] The number of Internal Refugees requesting reparations and giving up their land constantly grew, and the refugee identity began to disintegrate. The state's success in spreading the refugees in different villages hastened the collapse of the old community frameworks which had preserved the refugee identity.

Alongside those activities, the state kept aiming to penetrate the refugee consciousness. In his book, Imagined Communities, Benedict Anderson presents the role of Population Census, maps, and museums in the construction of national identities.[24] The same institutions were used by Israel for uprooting the refugee identity. Israel did not mention the origins of the Internal Refugees in the formal statistics; they were not included in the UNWRA registry and the abandoned villages did not appear on maps. It goes without saying that no museum was established in Israel to commemorate life in the villages which no longer existed. Altogether these facts are aimed at emphasizing the message that the refugees are no longer connected to their original villages, and that they do not constitute a distinct community.

In Israeli Arab schools, neither the Nakba and the refugee problem in general, nor the problem of the Internal Refugees in particular, was ever mentioned. Teachers trying to present these issues were subjected to the scrutiny of the Security Service, as was the case of a teacher from the northern town of Acre who said: "The government robbed us of our lands and drove us from our villages though the holy books of three faiths – the Jewish, the Muslim and the Christian – state that it is forbidden." His words were relayed to the Security Service which passed them on to the Ministry of Education.[25]

In the mid-1980s, it looked as if the goal of uprooting the refugee identity was achieved. In the conclusions of his research published in 1986, the Israeli-Palestinian sociologist, Majid al-Haj, wrote: "There is nothing distinguishing the refugees from other Arabs in the general community. Unlike refugees in other places, who established voluntary societies and other social frameworks, the internal Arab refugees have no organizational frameworks of any sort."[26] Similarly, Alexander Bligh could present the settlement of the refugees in the state of Israel as a successful example of such a project.[27] Al-Haj added, however, that half of his interviewees reported a "feeling of being a refugee" although this had no concrete expression, at least not in the position taken by these refugees toward Israeli society or the state's establishment.[28]

The Refugee Identity: Renewed Awakening and Opposition

The reality described above changed completely in the early 1990s. The political discourse of the Palestinians in Israel regarding the Internal Refugees was in upheaval. The reawakening of the refugee identity invoked identification among the masses. This process kept accelerating with the establishment of over twenty local associations of Internal Refugees, under the umbrella of a national committee.

The speedy revival of the "refugee identity" shows that even without social, institutional, and organizational frameworks, it was preserved not only by the first generation, the refugees themselves, but by their descendants as well. It proves that an internal stratum maintained itself over the years in spite of the described governmental policies. We can assume that the preservation of the refugee identity was fed during the first years by the struggle to

return to the original villages, and was later reinforced by the alienation felt by the refugees in their new homes.

This feeling was the result of the objective situation in these villages, aggravated by a shortage of land. "I generally try to forget I am a refugee," al-Haj quotes one of his interviewees, "but when I see the local people going with their families to their fields, while I, like the other refugees, have no property, I feel very strongly that I am different from the other sons of the village." Many other interviewees expressed similar sentiments.

In this situation it is no wonder that the negative refugee identity was preserved into the second generation and became the basis of the refugees' identity. But the refugee committees which were established in the 1990s are not satisfied with only this part of the refugee identity. Most of their activity aims to reconstruct the positive components of it. Committee activists, along with some members of the second and third refugee generations, are renewing physical contact with the abandoned villages through work camps and restoration activities, thus strengthening refugee consciousness and identity. Those activities mirror and compete to an extent with the measures taken by the state over the years, regarding maps, museums (or, in fact, their absence), and population census. The participation of second and third generations in those activities helps to strengthen their contact with their villages of origin and does away in practice with the separation which the state had tried to enforce.

In addition, the refugee identity is strengthened by a series of symbolic and educational means intended to construct a new discourse. In recent years quite a few books concerning the abandoned villages were published by Palestinian citizens of Israel and in other Palestinian communities. Some, like *All That Remains* by Walid Khalidi, document all the villages,[29] while the majority survey particular villages or districts in pre-1948 Palestine. Written by refugees, internal or external, in the framework of academic research or as a private initiative, these books constitute a mobile written museum.

The refugees' committees are now planning a census of Israel's Internal Refugees. In addition to strengthening identity, this will constitute the factual basis for planned legal and public struggles. Another move aimed at reconstituting lost communities is the rehabilitation of those who accepted reparations in the past.

All in all, it appears that the attempts by the Israeli establishment to neutralize refugee identity have failed, just as the supreme goal for which it strove – the creation of an Arab-Israeli identity cut off from maternal Palestinian identity – did not succeed. Perhaps it shoes how limited external factors are in the process of crystallization of identities.

However, in order to present a full picture, one must examine the reawakening of the refugee identity in its historical context, along with the beginning of negotiations between Israel and the Palestinian political leadership. As the political dialogue proceeded, it seemed that the contradiction between the focal points of identity among Palestinians in Israel – Israeli civic identity on one hand and Palestinian national identity on the other – was diminished. This process brought about a strengthening of Israeli identity among the Palestinians in Israel (along with, and not instead of, their Palestinian identity). It has been acknowledged by the P.L.O. and the Israeli government, who agreed not to include the Internal Refugee problem in the discussion (yet to take place in the unforseeable future) of the general Palestinian refugee problem. The Internal Refugees have decided to carry on with their struggle as Israeli citizens, demanding the correction of an injustice done to them. The Internal Refugees, as the other Palestinian citizens of Israel, hoped that the peace process would encourage Israel to come to terms with them as well as with the P.L.O. and the Palestinians in the occupied territories and the diaspora.[30]

Another explanation for renewal of the refugees' struggle is one suggested by Arnon Sofer. Sofer believes that it is a result of a feeling among Israeli Arabs that Israeli sovereignty in areas of dense Arab population was weakened through prolonged Israeli compromise. He claims that the demands of the Internal Refugees are part of a process aiming to transform Israel from a Jewish state to a state of all its citizens.[31] According to this concept, strengthening the Palestinian identity of Arab Israeli citizens, like the reinforcement of refugee identity, represents a threat to the Jewish-Zionist identity of Israel.

The demographic factor should also be considered. As years went by, the refugees' descendants were more and more distressed by the problem of land shortage. Israel kept appropriating land from villages which were not destroyed during the 1948 war. However, the land and housing problems of the Internal Refugees (especially those who refused to accept reparations) were much graver than those of the rest of the population. The hope voiced by activists that the lands could be returned by a political struggle gave some new hope.

The above-mentioned factors complement one another, and each of them had its influence on the revival of the refugee identity. Nevertheless, in spite of this revival of identity, and activities in the abandoned villages, it is still too early to determine to what extent the revival incorporates the whole refugee population (some villages have not organized at all, others have only symbolic representation). Neither is it clear to what extent they will persist in their

struggle and how successful it will be. The answers to those questions depend greatly on the position to be adopted by the state. For the time being one can hardly observe any sign of change in Israel's old policies, opposing any expression of the right of return for refugees, internal or external. The armed conflict between Israel and the Palestinian National Authority since the outburst of the Al-Aqsa Intifada in October 2000, as well as the crisis of trust between the state and its Arab citizens in the wake of these events, has only resulted up to now in strengthening the traditional Jewish-Israeli position rejecting any change in the status quo. Hence the Israeli Cabinet's decision in October 2001 not to allow the Ikrit and Bir'am refugees to return to their homes (contrary to former recommendations). To justify that decision, it was argued that in spite of the special circustances of those refugees, their return would set a precedent, strengthening the demands of return voiced by the rest of the 150,000 Internal Refugees all over the country.

The failure of negotiations between Israel and the Palestinians at Camp David (in 2000), which was explained in the official Israeli political discourse as stemming from Palestinian obstinacy over "the Right of Return," only increased Israeli opposition to any concessions for the Internal Refugees. The reasoning for that approach varies between explanations regarding security and a declared wish to maintain the Jewish-Zionist character of the state.

Naturally, the Internal Refugee committees are conscious of the fears of the Jewish public and the Israeli establishment concerning their demands, and are aware that there is little hope of achieving a return to the pre-1948 situation. Therefore, in general, they are not demanding the return of all their land, but only the parts of it which are not worked or settled. According to their initial surveys, a substantial part of the lands in many abandoned villages is deserted. It is those lands that they demand to get back. However, even limiting their demands did not yield a change in the state's position. Most of the committees' activities are therefore directed at present toward internal organizational work and raising the subject of the Internal Refugees in the overall Israeli political discourse.

To conclude, one could establish that during the last decade the internal refugees have undergone two major political developments. The first was re-establishing their collective refugee identity (including its positive component) as a tool of activity, and the second was coming to terms with their status as Israeli citizens, hence defining their struggle as a civic rather than a national one. To their dismay, they have not witnessed any significant change in the attitude of the Israeli government toward their demands. Furthermore, the current crisis in the Israeli-Palestinian relationship in general, and between Israel and its Arab citizens in particular, led Israel to harden even further its position regarding their problem. It seems at the moment that only a process of reconciliation between Israel, the Palestinians, and the Palestinian citizens of Israel might enable a change in the Israeli point of view on this matter. Without such a change, the problem of the Internal Refugees will remain unsolved.

Notes

1. Only 20 per cent of the Palestinian population in the area to become the state of Israel have remained within the borders of the state. Eighty per cent were uprooted and settled down mainly in Jordan (including the area to be annexed by it in 1950, the "West Bank"), in Gaza Strip, in Lebanon and in Syria.
2. "Report of the Activities of the Military Government in Nazareth and Region, 17 July 1948 to 17 October 1948," Israel State Archives [hereinafter ISA], Foreign Office files, 2564/11.
3. For further material on the expulsion and evacuation of Internal Refugees during and after the war, see the author's *The Present Absentees: Palestinian Refugees in Israel since 1948* (Jerusalem: the Center for Research on Arab Society in Israel, 2000): 37–41 (in Hebrew).
4. This figure is only for urban and rural refugees and does not include the Bedouin in the Negev, many of whom were forced to leave their places of residence for areas determined by the IDF. The sources are a report to the Ministry of Labor, 29 June 1952, ISA, Ministry of Labor files, 6178/2924, and also a Jewish National Fund census for 1949–50, dated 15 February 1950, from the Central Zionist Archives [hereinafter CZA], file KKL 5/18875.
5. Thus the Committee of western Galilee settlements demanded that "all abandoned land north of the Acre-Safed road will be available for dividing up between western Galilee Jewish settlements." It claimed that plans for resettling refugees on these lands would damage the development possibilities of their settlements. See their letter to the Ministry of Agriculture and others in ISA, Ministry of Agriculture files, 581/2180 and the reply of the Ministry of Agriculture, which did not wholly accept their position.
6. Benny Morris, *The Birth of the Palestinian Refugee Problem* (Tel-Aviv: Am Oved, 1991): 28–30 (in Hebrew).
7. See Hillel Cohen, "On One Expulsion Which Was Prevented," *Mitsad Sheni* (May 1999): 28–30 (in Hebrew). The article deals with an initiative which arose in January 1949 to expel the refugees of Kweikat since they removed the Israeli flag from the gate of kibbutz Beit Ha'emek.
8. "Minutes of the Third Sitting of the Transfer Committee," March 1949, ISA, Ministry of Minorities files, 1322/22. The evacuation of small villages from the the Triangle continued for two years after the war; see the meeting of the Committee for Refugee Affairs 11.1.1950, IDF Archives, file 721/2-843 and also the Communist daily *Al Ittihad*, 10 February 1951 (in Arabic).
9. *Divrey Haknesset* [The Israeli Parliament's Minutes] 1 (1949): 1634.

10. "A Minute of the Sixth Meeting of the Committee for Refugee Affairs," 12 October 1949, IDF Archives [hereinafter IDFA], file 721/2-83.
11. The proposed law is found in the *Divrey Haknesset* [The Israeli Parliament's Minutes] 2 (1950): 921.
12. "Report of the Authority for Settling Arab Refugees," 1 August 1950, CZA, file KKL 5/18875.
13. This does not mean that the subject was not dealt with at various levels, community or family, but these are outside our present study.
14. Hadash, The Democratic Front for Peace and Equality, is a Jewish-Arab party based on members of the Israeli communist party and independent activists.
15. In the term "sub-identity," the intention is to indicate identities constituting part of a wider identity, without relating to the degree of importance or centrality of each of these sub-identities for the people belonging to them. Thus, for example, the overall Palestinian identity includes Christian and Muslim Palestinians and also Palestinians in the Diaspora, in the state of Israel, in the areas of the Palestinian Authority, etc.
16. Mahmoud Issa, "Decoding the Silencing Process in Modern Palestinian Historiography" (paper presented at the Conference "Worlds and Visions, Perspectives of the Middle East Today," University of Rhus, Denmark, 5 December 1977).
17. Hasan Musa, "The Geographical Distribution of the Refugees in Their Homeland" (Haifa: M.A. thesis submitted to Haifa University, 1988; in Hebrew). Musa suggests differentiation between a sense of "strangeness" and a sense of being a refugee, finding that among those who reported that they have a sense of being a refugee, there are people who feel like "locals" and others who feel like foreigners. This can be explained when we deconstruct the "refugee identity" into a negative component ("I am not from here") and a positive one ("I am from there").
18. The figure concerning the percentage of Arabs remaining in western Galilee after the war was sent from the offical in charge of the western Galilee in the Ministry of Agriculture, Aharon Dror, to the Executive of the Ministry, September 1949, ISA, Ministry of Agriculture files, 2174/546.
19. On the decision to expel the refugees from Tsipori see "The Transfer of an Arab Population," [the military governor of the Galilee, January 1949], ISA, Ministry of Minorities files, 279/59.
20. The Military Governor in Galilee declared abandoned villages as closed military areas during 1951. IDFA, file 7/54-54.
21. Letter from the Advisor to the Prime Minister on Arab Affairs, Yehoshua Palmon, to the Military Governors, 28 February 1950. ISA, Ministry of Agriculture files, 2181/5821. See also a letter from the Military Governor of the Galilee to the office of the Custodian of Enemy Property, 13 July 1950, IDFA, file 68/55-68.
22. "Summary of the First Meeting of the Regional Galilee Committee", 2 September 1954, ISA, Israeli Police files, 2314/6.
23. Cohen, 86–89.
24. Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, revised ed., (London and New York: Verso, 1991), 163–86.
25. Head of unit 490 (General Security Service) to the security officer of the Ministry of Education, ISA, police files, 236/17.
26. Majid al-Haj, "Adjustment Patterns of the Arab Refugees in Israel," *International Migration* 24 (1986): 657.
27. Alexander Bligh, "Israel and the Refugee Problem: From Exodus to Resettlement 1948–1952," *Middle Eastern Studies* 34 (1998): 123–47.
28. Al-Haj, p. 659.
29. Walid Khalidi, *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, D.C.: Institute for Palestine Studies, 1992).
30. Conversations with the activists of the Internal Refugees' committees, Wakim Wakim and Daoud Bader, Nahariya and Sheikh Danoun, July 1996.
31. Arnon Sofer, "The Israeli Arabs and the Peace Process," *Nativ* 51:4 (April 1996): 134 (in Hebrew). According to this concept, strengthening the Palestinian identity of Arab Israeli citizens, like strengthening refugee identity, presents a danger to the Zionist-Jewish identity of the state, and therefore one must continue to struggle against it.

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Resisting Oblivion: Historiography of the Destroyed Palestinian Village of Lubya

Mahmoud Issa

Abstract

The following article "Resisting Oblivion" is part of a long research on a Palestinian demolished village, Lubya, and its historiography before and after its demolition in 1948. This article is part of a forthcoming book, due to be published in both Danish and English in Denmark this year. The article is based mainly on the oral accounts of the elderly generation from the village – 700 people were interviewed – and archival documents, pieced together to produce this microcosmic piece of modern Palestinian historiography, and to show the power of past memory acounts in shaping the lives of people, even after fifty-four years in exile.

Résumé

L'article qui suit, intitulé « Resisting Oblivion » (« Résister à l'oubli »), fait partie d'un long projet de recherche sur un village palestinien démoli, du nom de Lubya, ainsi que sur son historiographie avant et après sa démolition en 1948. L'article est inclus dans un livre qui paraîtra bientôt et qui sera publié au Danemark cette année en danois et en anglais. L'article repose principalement sur le témoignage oral de la génération d'anciens du village – 700 personnes furent interviewées – et sur des documents d'archives reconstitués élément par élément, pour produire ce microcosme de l'historiographie palestinienne moderne et pour montrer la capacité des comptes-rendus du passé, tirés de la mémoire, d'influer sur la vie des gens, et cela même après cinquante-quatre années d'exil.

> *There is no greater sorrow on earth than the loss of one's native land.*
>
> *— Euripides, 43 B.C.*

Why Lubya?

The idea to research Lubya's history began stirring in me long ago while I was still living in a refugee camp in Lebanon. In 1948, my parents and thousands of others from Lubya and the surrounding villages in the Tiberias district arrived at Wavel Refugee Camp, in Baalbek, Lebanon. Like other Palestinians who were expelled or otherwise forced to leave their homes and villages during the 1948 war in Palestine – an experience known to Palestinians as al-Nakba or "the catastrophe" – my parents refused to settle in "proper" houses, hoping that they would soon return to their home in Palestine. Although they faced extremely cold weather when they first arrived, they preferred to live in tents distributed by the Red Cross. My father's wife, her son, and many other refugee children died that year.

For more than five decades, resolutions concerning the right of return of Palestinian refugees have shelved in the archives of the United Nations. Every year the same resolutions affirming the right of Palestinian refugees to return to their homes, mainly UN General Assembly Resolution 194,[1] have been voted on and passed unanimously, with the exception of a single state that votes against them – Israel. Protests have not helped; the result remains the same. The "temporary status" of Palestinian refugees has seemingly turned out to be "permanent."

A Palestinian child born in Wavel Refugee Camp soon begins to pose the normal, if naive questions: Who am I? Why are we refugees? Why are we not allowed to attend

military classes in the Lebanese schools? Why do we live such a transitory life? Why does father refuse to buy a refrigerator, television, or washing machine, commenting that it will be easier, when the time comes, to return home without these cumbersome belongings? Why don't we have the same rights as the people we live among – the right to work, the right to a nationality or a passport? Why do the authorities close the gates of the camp and prevent us from leaving every time an official guest from abroad comes to visit the historical ruins of Baalbek? Why are we treated differently even though we speak the same language and share a common history? Where do we originally come from?

It was all these questions; the stories about Lubya recounted by my parents and relatives; the discriminatory policies of the authorities, and my long life of forced displacement from one country to another, that motivated me to visit Lubya in 1994. The visit became possible only after I had obtained Danish citizenship. For the first time in forty-three years, I was finally able to carry my own official passport, a document that gave me official status. Even with that status, however, I was forbidden to write the name of Lubya, my place of origin, in my passport. (In my refugee documents, my place of birth reads: Lubya-Tiberias). For the Danish authorities, Lubya had ceased to exist; they could only agree to write Tiberias, refusing even to include the word Palestine. Nevertheless, the passport enabled me to finally visit my homeland; but only as a tourist and not as a local or a citizen.

That first visit was followed by a second one on which I was accompanied by my parents and a Danish television crew, in order to film a documentary about Lubya's history. The documentary was entitled "Den Faedrene Land (Our Ancestors' Land)" (31 March 95), and was followed by a working paper on the more than one thousand Lubyans currently residing in Denmark.[2] The documentary and the subsequent working paper became the foundation of a much larger research project about Lubya based on seven hundred interviews with refugees from the village.[3] In addition to a narrative report, the project includes more than one thousand pages of pictures, maps, and film on Lubya. A future exhibition about Lubya will comprise the entire research material, including a reconstruction of a model of the village as it was before 1948, along with agricultural tools, genealogical trees, embroidery, household articles, costumes, maps, etc. Danish and German ethnographic museums, among others, have already agreed to host the exhibition in 2004.

Fieldwork: The Research Process

My relationship to Palestinians, both personal and public, which arose from my work within the Palestinian trade union movement and other institutions, has given me the opportunity to be in daily and direct contact with most Lubyans all over the world. Therefore, the usual difficulties that face ethnographers at the onset of their anthropological research, to directly reach to the crux of the matter, did not apply to me. My Palestinian origin, my involvement in the Palestinian cause, and my long stay in Europe provided me with a dual vision, placing me between the Oriental culture in which I was born and brought up, and the Western one in which I have lived for the past twenty years. I can also say that my knowledge of, and contact with, those Lubyans who remained in Israel, as well as with the "others" who have occupied the village and obliterated its geographical and historical narrative, could be considered as my "first contacts" with my new horizons and my new field of study.

The information and experience I accumulated during almost ten years of working in grassroots organizations in Lebanon, Jordan, and Europe were vital to this research. In addition, I spent fourteen months living as a participant-observer among Lubyans in Israel and Jordan, and later on an additional nine months in Syria, Lebanon, Gaza, and the West Bank. Innovative and diverse approaches were necessary to cope with the widespread network of Lubyans, from Gaza and Ramallah in the Palestinian self-rule areas, to Deir Hanna, Nazareth, Umm al-Fahm, and al-Makr in Israel. The network also stretched from Irbid and Amman in Jordan, and Wavel camp, 'Ain al-Hilwe, Bourj al-Shimali, and Bourj al-Barajneh in Lebanon, to Lubyans in Berlin, Denmark, and Sweden.

Although there is a pattern of a common historical narrative and plight that traverses this wide spectrum, the responses to the questions were at times as different as the geographical locations in which the respondents live. Interviewing Lubyans in Denmark is different from interviewing those in Israel, or in Jordan. Therefore, the social situation and personal status of the interviewee, as well as the political situation in the country in which he or she resides, played a vital role in the narrative. To overcome some of these obstacles, earlier taped information was compared with new material; and, in some cases, meetings would be held bringing together two or three of the interviewees.

Different psychological factors, such as fear and insecurity, also played a vital role in the narrative, especially in countries where Palestinians face discrimination, whether in Israel or in some Arab countries. While recalling their past, present fears were a dominant factor in the interviews. An interview with a Palestinian who visited his village, Lubya, in 1994, for example, resulted in his being barred from ever returning because of what he said in the interview. These feelings complicated the interview process. Only when assured of anonymity would the interviewee

start to speak, and only a few consented to their full name being given. This was not a problem for the Israeli officers interviewed for the project. They spoke with confidence and without reservation. Unlike their Palestinian counterparts, they were not afraid to speak of the past.

Exile and life as refugees have left a heavy toll on Lubyans in terms of oppression and marginalization, in both their private and public lives. Without the elderly, modern history would lack its foundation, namely the social history of the oppressed, the marginalized, the exiled, the "others," and the defeated. The victors write most modern history; thus, it can never relay the "truth" or the "reality" in all their aspects. The untold history, which is that of the conquered and the defeated, should therefore be studied independently within its own socio-historical context. When I met refugees from the village of Safsaf in 'Ain al-Hilwe camp, for example, a teacher from the village gave me a list of all those who had been killed in the massacre in the village. The names on the list outnumbered the figures in the diary of Yosef Nachmani, a prominent member of the Haganah and director of the Jewish National Fund office in Tiberias, published in the most recent book by Israeli historian Benny Morris.[4] It was the job of the "others" to write their own version of history themselves; this kind of account could be classified under the broad modern terminology of "opposition literature."

"Memory Is a Battlefield"

Fifty years of displacement and exile have not obliterated Lubya's history, neither from the minds of its inhabitants, nor from the minds of those who uprooted them. The stream of memories about bygone days still flows through the minds of Lubya's older generation; men and women in their sixties, seventies, and eighties still reminisce about their past, both for their own sake as well as that of their children. The latter still pass on, more or less accurately, those same stories and traditions to their own sons and daughters. In the words of Swedenburg, "Memory is a battlefield."[5]

While the recounting of historical and social facts and anecdotes changes from one generation to another, the main stream of memories and images of the past – even though these images are no longer as crystal clear as they were before the diaspora – still dominates, until today, the subconscious, as well as various aspects of the lives of present day Lubyans, old and young alike. The image of the past, the "common sense," to use Gramsci's words, is "ambiguous, contradictory . . . multiform and strangely composite"[6] in the minds of the new generation. But that is not the case for the older generation whose memories are still coherent and reliable. Although time and displacement are vital factors to be considered when reconstructing the past, these have not dimmed the villagers' recollection of their history prior to 1948.

For teenagers, the middle-aged, and the elderly alike, Lubya is an identical central image, a theoretical and subconscious point of reference, a cultural framework and a past and present mental image that shapes, inspires, and impacts their personal lives today. In the late sixties, they joined in their hundreds what was then a promising Palestinian revolution; ninety-two of them died since its onset in 1965. Again in the late eighties and early nineties, their dreams ended in frustration and despair with another wave of displacement and exile to various Arab, Scandinavian, and other European countries, a new generation of children, ironically, reliving the experience of their uprooted parents.

Nevertheless, and even in the diaspora, whether in Denmark, Lebanon, Jordan, Kuwait, Germany, or Israel, the common foundation upon which their present lives were built, as well as their "concept of the self," continues to be nourished by that central image. Their past history became the basis on which their plans for the future were based, in spite of half a century of time and distance from their land of origin. Reminiscences, eyewitness accounts, recollections of events, and collective historiography, based on lore and traditions, became the chief source of inspiration for the elderly and the cornerstone of the young generations' identity.

Of all the hundreds of Palestinian villages, Lubya was recreated in Wavel Refugee Camp, a camp in Lebanon named after a British officer. For the refugees, 'Ain al-Hilwe in Lebanon, Yarmouk in Syria, Baka'a Camp in Jordan, and, later, the suburbs of Berlin, Copenhagen, and Stockholm all became substitutes for Lubya. In their exile after 1948, Lubyans continued to establish different societies, committees, and clubs to deal with the serious and urgent problems that arose among them.[7] The former identity of Lubyans, which was strongly connected to their village, continued until the late 1960s when it began to be replaced by a new national identity, which emanated from their strong support for the Palestine Liberation Organization (PLO). With time, the patriarchal identity also started to wane, but was not entirely obliterated.

After the evacuation of the PLO forces from Lebanon in 1983, a new wave of emigration among Lubyans started, especially following the Sabra and Shatila massacres. That is when the religious identity started to edge the national one and dominate inside the refugee camps, as well as to gain ground in the Arab countries and abroad as a valid national movement. Mosques and religious clubs were established in all the communities where Palestinian refugees are now living, whether in Germany, Denmark, Sweden, or

anywhere else. Thus, the modern Palestinian identity became a mosaic of several moral commitments, or a multiple foci of identities, such as regional, Arab, religious, familial, tribal, and various national loyalties that often overlapped. Defining identity, therefore, is becoming more and more complicated and controversial, especially when all the factors mentioned above, to which should be added tradition, customs, culture, and history, converge to form both a construct and a process of identity, to use Anthony Smith's definition of a modern nation.[8]

Wherever they lived, "Displaced Refugees" was the broad category under which Lubyans, like other refugees, were identified. Documents bestowing citizenship providing asylum, or just the required identity cards for alien residents, were taken for what they were, practical tools to facilitate daily life. In reality, however, and through their shrouded memories, whether fresh or withered, they were still attached to this piece of land called Lubya and to its history. Never mind that it was erased from the map; it still existed, albeit in ruins, both in its past physical form, in the remaining debris of wells, caves, the cemetery, and the olive and cactus groves, and as mere mental images of its past social, cultural, and historical life.

Memorial Landmarks of the Past: The History of Lubya as Told by Lubyans

By any account, Lubya was a small Galilee village. In 1945, 2,730 people lived in Lubya. Nevertheless, Lubya was the largest village in the district of Tiberias during the period of the British Mandate in Palestine (1922–48). Lubya was totally demolished in 1948 and its inhabitants uprooted and dispersed to as many as twenty-three countries, some within Palestine itself and others in nearby countries or in other far-flung places. Before its destruction, this village had its own vibrant history, its gentle culture, and its intricate social network.

It amazed me to realize, while interviewing a number of elderly Lubyans, that some historical events, such as Salah al Din's (Saladin's) battle of Hittin in 1187, as told by the Arab Muslim historian Ibn al-Atheer and the detailed description of it in the diaries of a teacher from Lubya, as well as the death of Damascus Governor Suleiman Pasha in Lubya (1743) and Napoleon's march through the village on his way to besiege Akka (Acre), are events that they enthusiastically recounted as part of their own personal heritage. Abu Sameeh al-Samadi, who lives in Yarmouk camp near Damascus, is one of them; he has managed to assemble a private library that fills the walls of three rooms in his house. The library contains detailed documents from old Arabic manuscripts that recount different historical events that took place in and around Lubya.

Such strong awareness of one's heritage, when interlinked with a state of permanent exile, helps to strengthen the individual's psychological and mental balance, as well as his ability to cope with the refugee experience and huge loss suffered that nothing can compensate for. It is also a struggle to preserve the history of the self against the ravages of time and forgetfulness. Moreover, it is a spiritual piece of bread by which refugees manage to overcome and surpass their dilemma and the hardships of exile, and ultimately find the resilience to rebuild their shattered lives in a refugee camp. Abu Sameeh got his high school degree when he was over fifty years old. His library is visited by many researchers looking for documents about Arab and Islamic history. He has also written several small booklets about historical figures as well as a long interpretation of the holy Kor'an. Less than one hour after I entered his home, all the relevant books that mentioned Lubya, directly or indirectly, were piled up in front of me. To my astonishment, my name and that of my brother were there as part of a detailed genealogical tree of the family, going back to the seventh century and to Caliph Ali's sons, Hassan and Hussein.[9]

Another elderly man, Karzoon, who also resides in Yarmouk camp, woke up one night and started drawing the village of Lubya on a piece of paper until he had drawn all of its houses and marked down the names of all its inhabitants. At the end of the interview he said to me: "Excuse me if I have missed two or three names which I am not quite sure about, but I will write them in the new version of the map." When I gave him an aerial photograph of Lubya taken by British forces in 1945, before the village was demolished, he held it as he would his own child and silently wept and kissed it. As he placed it beside the map he had drawn, it was very difficult to distinguish between the "imagined" Lubya he had drawn from memory after fifty years, and the real one.

A third example of the strength of memories is the case of Abu Majid; he recounted to me, as if by rote, all the historical events that took place in Lubya in the past two hundred years. He remembered who arrived first and who followed, as well as all that happened in and around the village. He talked for hours, and when I had no more cassettes to tape on, he said to me, "If you are tired now you are welcome to come back tomorrow." More than twelve hours of taping over a two-week period had not tired him out. The people who come to listen to him highly enjoy the emotional way in which he recounts the history of the village; his narrative is interspersed with singing and entertaining episodes from the lives of the people of the village. On the occasion of the fiftieth anniversary of al-Nakba, many newspapers and radio stations interviewed him, and when at times he could not remember certain dates, there

was always Abu Sameeh standing on guard, ready to immediately correct him.

The five historical events that elderly Lubyans most vividly remember and most often recount include:

1. The battle of Hittin that took place on the fields of Lubya in the year 1187

The name Lubya appears as early as the Middle Ages as the battlefield where the European Crusaders were defeated on 4 July 1187. Although named after the heights of Hittin, the actual battle was fought on the land of Lubya. After this decisive battle, other cities fell to the Muslim forces, one after the other, including Jerusalem, which fell on Friday, 2 October 1187. Lubya was well known for its water resources, as was nearby Hittin. Salah al-Din, the Kurdish Muslim leader, had established his headquarters south of Lubya, in Kufr Sabt, where he could clearly observe the battle. Actually, when the Crusaders no longer had access to the water sources of Lubya, Hittin, and Tiberias, they surrendered after losing a fierce final battle that weakened the power of their attack. The Crusaders had attempted during the battle to reach the large reservoirs in both Tur'an and Lubya, but found them empty.[10] "Damia," one of the famous fields of Lubya, is said to get its name from the blood which watered the fields ("dam" in Arabic means blood).

The famous historian, Ibn al-Athir (1160–1232; 555–630 hijri), described the battle as follows: "Those who saw the dead thought that there were no prisoners, and those who saw the prisoners thought that there was no one killed."[11] The battle plan shows the paths of withdrawal of the Crusaders and the road Salah al-Din followed to Tiberias, which he conquered on July 5, to Akka, which he conquered on July 10, and to Jerusalem, which he conquered on Friday 2 October 1187.

A teacher from Lubya, Abu Isam, provided me with another geographical and historical reference to the battle Salah al-Din fought on Lubya's land:

> North of Lubya is a land called al-Rik where the battle between Salah al-Din and the Crusaders took place. This is what was written by Hilal Ibn Shaddad in his book *Tarikh Salah al-Din* [The History of Salah al-Din]. Hilal accompanied Salah al-Din on all his battles, and in the battle of Hittin, he wrote in detail of the tactics Salah al-Din employed, for example, how cutting off the water supply from the springs of Hittin played a fundamental role in the victory, because the army of the Crusaders was thirsty and the weather was hot. Among the prisoners was Arnaud, leader of the castle at al-Karak (located today in Jordan), from where he used to harass the pilgrims, and once imprisoned the sister of Salah al-Din. That was the reason why Salah al-Din killed him, refusing him the mercy he granted to other imprisoned leaders.

2. Lubya as the birthplace of Abu Bakr al-Lubyani

Lubya is the birthplace of Abu Bakr al-Lubyani (Abu Bakr Abdel-Rahman Bin Rahhal Bin Mansour Al-Lubyani), a famous Muslim scholar of the fifteenth century, who taught Islamic religious sciences in Damascus. He was known as the "Fikhist and Muslim's Mufti," according to the Tarajim al-Siyar.

3. The death of Damascus Governor Suleiman Pasha in Lubya in 1743

The third important historical incident was the death of the leader of the province of Damascus, Suleiman Pasha al-Atheem. He died on 24 August 1743 while on his way to Deir Hanna to challenge the dissident Dhahir al-Omar, who had refused to pay taxes to the central government in Damascus.[12] (Ironically, the majority of Lubyans who stayed in Israel after Lubya's destruction are now living in Deir Hanna.) Dhahir al-Omar became one of the most powerful leaders in the area, especially after annexing Akka, Haifa, Jaffa, and the whole area around Lubya, Safforia, Shafa-'Amr, Tiberias, and 'Ajloun. One of the titles of Dhahir al-Omar was "The Prince of Galilee."

4. Napoleon's march through Lubya en route to Akka

Napoleon Bonaparte's attack on Egypt and Syria (1798–1801) marked the beginning of the struggle between the French and British in the Middle East, which lasted more than a century. The successor to Dhahir al-Omar, Ahmad Basha al-Jazzar (1722–1804), succeeded in defending Akka against the French (the British sided with al-Jazzar), who succeeded in occupying Safad and Nazareth. The Ottoman forces, arriving from Damascus, occupied Tiberias and the village of Lubya, but were defeated near Mount Tabor (southwest of Lubya). The French burned many villages on their way through the Lubya area to besiege Akka. Nine consecutive attacks failed to defeat al-Jazzar. (The first attack on Akka took place on 28 March 1799).[13] Napoleon gave up the siege, and ordered his forces to return to Egypt. It was the beginning of a new era of conflict in the region, between the emerging powers of the industrial revolution in Europe.[14]

5. Lubya and Khalil Ibrahim Azzam

The leader of al-Jazzar's artillery forces, Khalil Ibrahim Azzam, was an officer from Lubya; Abu Isam wrote the following story concerning the family of the officer, al-Shanashri, to which he also belongs:

> The al-Shanashri family was known because of its influence in the area; for example, Khalil Ibrahim Azzam was an artillery officer in the army of al-Jazzar.[15] He was well known for his role in the battle of the latter against Napoleon, but later on disagreed with him and al Jazzar imprisoned his father Ibrahim

> Azzam for a ransom, which Azzam refused to pay. While in prison his father met the prince Yousef al-Shihabi, then governor of Lebanon. The guards found a paper in the latter's food on which Azzam promises to free both the prince and his father from captivity. Azzam deserted and fled with a contingent of soldiers, and al Jazzar followed him to Lubya, partly destroying the village in revenge. I [Abu Isam wrote] have been told by elderly people who were present when Lubya was destroyed by al Jazzar forces that the villagers have always been able to communicate with each other by mimicking the sound of birds and animals so as to escape from al Jazzar's men.

Lubya and Lubyans Today

Today, Lubya has become a "Promenade Park" named "South African Forest." Forestation of the land was financed by South African and Rhodesian donors as part of a wider strategy to erase and conceal the memory of hundreds of Palestinian villages destroyed during and after the 1948 war in Palestine. As with other villages, demolition followed by dense forestation became the best way to obliterate Lubya's narrative and history.

The name "Lubya," which had existed for hundred of years, was transformed to "Lavie." On 8 February 1949, Y .A. Arikha, secretary of the special committee established by the Israeli government to replace Arabic place names with Hebrew names, addressed the religious "pioneers" at the agricultural centre of the Poel Ha Mizrahi:

> We have the honour of informing you that at its meeting yesterday, the names committee discussed the selection of an appropriate name for your settlement which is going to be established on the land belonging to Lubya in Lower Galilee. After a thorough discussion, the committee decided to select for your settlement the historical place name from the Second Temple period "Lavie". . . . It is worth noting that aside from the historical considerations, the name Lavie symbolizes the revival of the Jewish people and the establishment of Israel their land.[16]

While the original inhabitants of Lubya were barred from returning to their village, the new kibbutz built on land where Lubya once stood absorbed Jewish immigrants from Britain.

The reinvention and reinterpretation of religious mythology is an ever-available tool to justify one's actions and to abolish, for pure political reasons, the heritage of others. Israeli historiographers sought to justify, through their victorious narrative, the suppression of another people's history, the razing of Lubya's houses, and the severance of the link between a people's identity and origin, and the obliteration of its historiography. The natural response of the defeated and the repressed is to struggle to revive, reshape, and retain the past, through reliving its social and cultural experiences, recounting its oral history through anecdotal reminiscences, and passing on songs, proverbs, and jokes from one generation to the other.

Although two generations have not been born in Lubya, in exile their main objective is still to return one day to their original land. This was the answer given by the majority of the seven hundred young, middle-aged, and elderly people from Lubya. What are the present and past social and historical factors and experiences that influenced this desire? Many Lubyans who had never seen their village now return to visit the village; this is possible, as it was for me, only because they are newly naturalized as Danes, Canadians, Americans, Swedes, Germans, and other nationalities. In an interview with Denmark's radio, standing amid the ruins of his house in Lubya, an old man who had returned after forty-six years in exile said: "I will never exchange the chance to pitch a tent on the ruins of my house here with all the palaces of the Queen of Denmark . . . and if there is one wish I would want fulfilled, it would be to die here right now, where I am standing, rather than to leave this place again."[17] The old man, who had spent thirty years of his life in his village, had obtained from the Israeli Embassy a tourist visa valid for only one month. To obtain another, he would have had to leave Israel and apply for a new visa, which would have taken six to nine months to process, if he was lucky enough to be granted one again.

Research and statistics on Lubya have clearly shown that the grounds on which Lubya stood, and 93 per cent of its land, are still vacant and unused. Its fields, however, are planted for the benefit of a few hundred settlers living in Kibbutz Lavie.[18] According to international law and UN resolutions, all the contracts of sale which were signed and sealed by two official Jewish organizations and based on the Law of Absentees of 1950, do not legally deprive Lubyans and their descendants of their right to their property, even if they left their county to escape war and for fear for their lives. The list of the people whose land was confiscated (240 people) is a documentary witness to the rights of those concerned. There were a few people (not exceeding ten individuals, according to the interviewees) who sold their land, either by mortgaging it, or directly to one of the Jewish organizations. Documents and interviews revealed that only 8 per cent of Lubya's land was owned by Jews during the Ottoman period and under the British Mandate.[19] This percentage is what the Jews themselves quoted when claiming their share during the first act of sale concluded between Jewish buyers and Abdel-Ghani Beidoun in 1886, without the direct consent of the Lubyans.

Concerning the peace process, 81 per cent of those interviewed abroad were not satisfied with the Declaration of

Principles signed between the PLO and Israel in 1993. On the other hand, the majority of Lubyans inside Israel (75 per cent) were more positive towards the eventual establishment of a Palestinian state and the implementation of the right of return. There was unanimous agreement among all generations of Lubyans, inside and outside Israel, concerning the right of return to Lubya and the rejection of the idea of compensation. Those who were optimistic about the peace process expected a positive outcome from the negotiations between the Committee on the Rights of Refugees and Israel. The pessimistic outlook was more prevalent among the older generation than the young one; however, the hope of returning one day to their homeland overall has diminished dramatically in the last few years.[20]

Although they all came from the same village, the daily life of Lubyans in Israel, for example, is different from the life of those in Denmark, Jordan or Lebanon. Lubyans living in Israel were totally isolated from their families in the diaspora for the first eighteenyears after the Nakba, i.e. from 1948 until the end of emergency military rule in Palestine in 1966. Prior to 1967, very few persons, not exceeding ten in total, were granted visas to visit their families in Israel. Now, however, Lubyans from the second and third generations are visiting their families as well as the ruins of their village, thanks to their new European citizenship that makes it possible for them to travel without the need for prior permission from the Israeli authorities. The majority of some five hundred Lubyans living inside Israel work in construction and still hold onto traditional family connections as the basic unit at the heart of their social network. Marriages still take place among Lubyan families, with very few exceptions to the rule.

After the Oslo Agreement, a conference that brought together Palestinians living in Israel, also called Arab Israelis, was convened to ask for the right of the refugees living inside Israel to their property. Being Israeli citizens, they are trying to achieve their goals through legal means. (A Lubyan is an elected member of this committee).[21]

The majority of the Lubyans who had settled in Lebanon emigrated to Europe in the past ten years. There are now about two thousand of them living mainly in Denmark, Sweden, and Germany. After their settlement in these foreign countries, the main question that still worries them is that of their personal and cultural identity. The official policies of these countries, if any, have fallen short of achieving their declared goal of integrating the refugees. Following the interviewees' accounts, the following points emerged as the major concerns and worries of Lubyans in particular, and other Palestinian refugees in general:

1. The refugees now live in a political and cultural vacuum after leaving an actively revolutionary society to settle into a remote and detached one. This vacuum was filled with religious discourse, which produced the Islamist phenomenon, in lieu of the nationalistic atmosphere that dominated their lives in the sixties, seventies, and eighties.
2. The little information in the official Danish school curricula about the roots of the Palestinian problem and the plight of the refugees has caused tremendous frustration among the young generation. It would be very helpful to start teaching the history of Palestine in a more objective manner that would involve Palestinian students in talking about and rewriting their own history. This would also give them the chance to air their own version of events, and would undoubtedly play a fundamental role in creating a more stable social and psychological atmosphere for the young refugees and help ease their frustrations.
3. The lack of collective traditional, national, and cultural activities among the refugees is strengthening their feeling of isolation at the expense of more involvement in local European social activities. Only the young and the students have a real possibility of breaking the ice of integration, through language and direct contact. The only outlet available for the older and middle generations is the consolidation of their internal social networks. It may be true that the inclination among the refugees to live in close communities seems to be contradictory to the spirit of integration; nevertheless, it is a necessary development at this stage. It helps them fill the gap between the generations, on the one hand, and between them and the Europeans, on the other. The eventual possible disintegration of families and the weak personalities that could emerge as a result of alienation will not contribute positively to the process of integration. The few tragic episodes in which some refugees were implicated in Denmark show that a weakness in the internal social structure of the refugee family and community could result in violence towards "the others." The study I have conducted on the three tragic episodes that took place in Denmark shows the existence of deep rifts within the family unit itself, and in the relationships of those involved in the incidents.
4. The sanctity of the traditional family unit is diminishing drastically, especially among the young. The struggle between the young and their parents, under the liberal laws of Europe, pushes many refugee parents to insist on more conservative lifestyles. Religion, for example, is seen as a means of personal protection against an alien culture and against a

general tendency among the young to forge and consolidate their own characters and personal identity. Young women are generally more inclined to follow their parents' model, except in a very few cases where Danish social authorities had to give protection to fleeing Palestinian girls. Young men, on the other hand, are split between the two modes of life; the majority, 82 per cent, chose to abide by the dictates of Islamic religious practice and discourse, while a few, 3 per cent, chose to delve into the "liberal" life of European cities. (I have conducted interviews with 150 persons, both male and female, about their religious beliefs and practices.) In the Århus community in Denmark, 0.7 per cent out of two thousand Palestinians showed signs of, and tendencies towards, violence.

5. The decision by the Lebanese authorities in 1995 to prevent any Palestinian holding a Lebanese refugee document to return to Lebanon without a visa had a very negative impact on Palestinian refugees in general. (This decision was cancelled in 1999.) The impossibility of returning to their original homes in Palestine, compounded by the decision of the Lebanese authorities and the lack of any social or political structure to deal with their daily problems in exile, has created a state of scepticism and instability among the refugees. The compliments the refugees express about their host countries conceal their despair and frustration towards the authorities that close the door on their personal and collective rights. Insecurity and depression are predominant in the Palestinian community in exile. Out of approximately fifteen thousand Palestinian refugees in Denmark alone, only 6 per cent are officially registered as employed.

Conclusion

The reconstruction, albeit on a small scale, of the structure of a demolished village, Lubya, which is also a process of reconstructing a microcosmic piece of historiography, took almost three and one-half years to complete and has not been an easy task to accomplish. Various pieces of information were collected and pieced together like a mosaic.

Modern history, especially of the Middle East, involves many controversial issues and divergent claims by Palestinians and Israelis about the issue of land and the interpretation of historical events. Nevertheless, through my research on Lubya I have tried to present Lubya's history objectively, basing my conclusions on information I acquired from more than seven hundred interviews (primarily with Lubyans, but also with Israeli Jews who fought in the 1948 war), the literature on Lubya, British Mandate documents, and Israeli archives.

The brief historical incidents, such as Salah al-Din's battle on Lubya's fields in 1187, the death of Suleiman Pasha in Lubya in 1743, Napoleon's march through it to besiege Akka in 1799, and the partial destruction of Lubya by Ahmad Basha al-Jazzar as revenge for the desertion of a Lubyan officer from his army, were presented to give the reader an idea about the historical importance and the social continuity that underlies the village's history.

The past peaceful coexistence between the Palestinians and the original Jews of Palestine prior to 1948, and its implications for the future, were clearly demonstrated through interviews with Jews and Palestinians. Interviews with two former Hagana soldiers who were involved in the occupation of Lubya, and the accounts of the main leaders of the Jewish force that occupied the village, clearly show that the Lubyans fought with all they had in terms of simple and basic weaponry against a well-equipped army supported by airplanes, cannons, and armoured vehicles.[22] The official story of the fall of Lubya that appears in *The History of the War of Independence* erroneously reads: "Lubya fell without fighting, and the road to Tiberias was open to us." Lubya's struggle to defend itself and its existence is yet more contradictory evidence to the official Israeli story that the Palestinians left their homes following orders from Arab leaders.

Memories of these battles and their annual commemoration by both Palestinians and Israelis have acted as a historical register of events and also as an education for both peoples. The steps on the road to a permanent and peaceful solution, and the cornerstone of future reconciliation between the parties, must be built on the recognition of the facts and the events as they happened, and not on the slanted narrative of politicians and their self-interested interpretation of them. Therefore I recorded with utmost accuracy, and to the best of my ability, facts about the events that took place in and around the village of Lubya up to the time of its demolition, as they were narrated to me.

Finally, I hope that this study fulfils a regional, national, and international need for additional historical, social, legal, political, and cultural data on the status of the Palestinian refugees. There is still room for more research on the same subject and it is sorely needed, especially since some central topics, such as cultural identity and integration, need more time to research and investigate. The issue of the Palestinian refugees was, and still is, one of the main sources of unrest in the Middle East, and without serious attempts at addressing it the circle of violence will continue unabated, not only in the Middle East, but eventually also in Europe. Out of twenty-two million refugees in the world today (according to UNHCR), five million are Palestinians.

Notes

1. UNGA 194(III), 11 December 1948. Operative paragragh 11 reads: " . . . 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." Zafarul-Islam Khan, *Palestine Documents* (India: Pharos Media & Publishing LTD, 1998), 279.
2. Mahmoud Issa, *Palestinians from Lubya in Denmark: Dreams and Realities* (Copenhagen: The Documentation Centre, 1995).
3. The project was supported by the Humanistic Research Committee in Denmark (twenty months worth of work) and the Danish Institute in Damascus (nine months worth of work).
4. Benny Morris, *Tikkun Ta'ut* (Tel Aviv: Am Oved Publishers, 2000). Israeli forces entered the village of Palestinian Safaf on 30 October 1948. According to Morris's description fifty-two men were tied with a rope and dropped into a well and shot. There are also reported cases of rape. Benny Morris, *The Birth of the Palestinian Refugee Problem 1947–49* (Cambridge: Cambridge University Press, 1987), 350.
5. Ted Swedenburg, *Memories of Revolt: The 1936–1939 Rebellion and the Palestinian National Past* (Minneapolis, MN: University of Minnesota Press, 1995), 27.
6. *See* Edward Said, *Orientalism* (New York: Vintage, 1978), 6–7.
7. One of the donors is Hans Riesenfield from Zimbabwe (previously Rhodesia).
8. Swedenburg, 5, quoting Alistair Thomson.
9. To what extent this map is correct, how credible it is, and what role it played in the collective consciousness of the community and the self is discussed in a special section in the larger narrative report about genealogical claims.
10. *Al-Maosoa'a al-Falastinia* (Beirut: Encyclopedia Palaestina Cooperation, 1990), Vol. II, 408.
11. *Ibid.*, 511, cited from *Ibn al-Athir: Alkamil*, Vol. II, 532–37.
12. *Ibid.*, 834, quoting al-Bidairi: *The Daily Incidents of Damascus*, 42–47.
13. Mohammad Omar Hamada, *A'lam Filastin*, Part I (Dar Kutaiba, 1985), 162–63.
14. *Ibid.*, 720–27.
15. Ahmad Pasha al-Jazzar was known in history as the man who fought against Napoleon and prevented him from taking Akka.
16. Letter by Y.A. Arikha, secretary of the "Names Committee," dated 8 February 1949, Central Zionist Archives (in Hebrew; on file with the author).
17. Quoted from the documentary film "Our Ancestor's Land," which appeared on Danish Television DR, on 31 March 1995. (The film is on file with the author).
18. Recent research shows that most of the land that belongs to the refugees is still empty or used by only 2.7 per cent of the Israeli population. For more details, see Salman Abu Sitta, *The Right of Return: Sacred, Legal and Possible* (London: Palestinian Return Centre, 2000).
19. The land ownership map of 1944–45 shows that out of a total of 39,629 dunums of land belonging to Lubya, Palestinian Arabs owned 32,895; the Jews, 1,051; and 5,683 was public property. Stein W. Kenneth confirmed in his book *The Land Question in Palestine 1917–1939* (Chapel Hill, NC: University of North Carolina, 1984), that only 2 million dunums out of a total of 26.3 million dunums, which is the estimated area of Palestine, were bought by Jewish organizations by 1948. Different sources also put the percentage of land sold to Jews since the beginning of the land purchase process at the end of nineteenth century and up to 1948 at approximately 6.3 per cent.
20. In an interview with the head of the Palestinian Refugee Committee, Elias Sanbar, he admitted that four years of negotiations with Israel ended with nothing. Palestinians had insisted on the implementation of UN resolutions, especially 194, and Israel continued to refuse to recognize the validity of those resolutions concerning the right of return of the 1948 refugees. Interview, conducted by Nuri al-Jarrah, in *al-Hayat*, nos. 12350–12451, 18 and 19 December 1996.
21. The meeting took place on 11 March 1995 in Kasr al-Salam. Representatives from twenty-nine villages participated. The elected committee is comprised of fifteen members.
22. *The Battles of 1948* (Tel Aviv: Ministry of Defence, 1955), 216–41. The assessment by the leader of the attack on Lubya, Jacov Dror, however, demonstrates that the Lubyans themselves, without support from the Arab Salvation Army, and before the arrival of help from other villages, had succeeded in repulsing the first main Jewish attack on their village. According to the Israeli military assessment of the battle, Lubya was the first place in Palestine to have repulsed the Jewish forces. Only on the third attempt, and after the occupation of the nearby cities of Tiberias and Nazareth, was Lubya conquered after three consecutive days of shelling (18–21 July 1948).

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Palestinian Emigration from Lebanon to Northern Europe: Refugees, Networks, and Transnational Practices

Mohamed Kamel Doraï

Abstract

Palestinians in Lebanon are one of the most important communities living in the Middle East, with nearly 350,000 refugees according to UNRWA figures. Since the 1980s about 100,000 Palestinians have emigrated from Lebanon to the Gulf countries and northern Europe, mainly Germany, Sweden, and Denmark. The Palestinian case leads us to reconsider the classical distinction between forced and voluntary migration. Migration has to be considered not only as forced, but also as the result of new forms of transnational solidarity between the different scattered Palestinian communities. This paper aims to demonstrate how refugee communities, like Palestinians, but also Kurds or Eritreans, use their social capital (i.e., solidarity networks) in order to adapt to new situations with strong constraints and to develop new forms of transnational solidarities.

Résumé

Les Palestiniens vivant au Liban constituent l'une des plus importantes communautés au Moyen Orient. Selon les chiffres de l'UNRWA, leur nombre s'élèverait à 350 000 réfugiés. Depuis les années 80, environ 100 000 Palestiniens ont émigré du Liban vers les pays du Golfe et vers le nord de l'Europe, principalement en Allemagne, en Suède et au Danemark. Le cas des Palestiniens permet de remettre en question la distinction traditionnelle entre migration forcée et migration volontaire. La migration doit être considérée non seulement comme étant forcée, mais aussi comme étant l'expression d'un nouveau type de solidarité transnationale entre les différentes communautés palestiniennes dispersées dans le monde. Cet article vise à démontrer comment les communautés de réfugiés, comme par ex. les Palestiniens – ainsi que les Kurdes ou les Erythréens – utilisent leur capital social (c.à-d. leurs réseaux de solidarité) afin de s'adapter à de nouvelles circonstances comportant de fortes contraintes, et développent ainsi de nouvelles formes de solidarités transnationales.

Palestinians in Lebanon are one of the most important Palestinian communities in the Middle East, with nearly 350,000 refugees according to the 2001 statistics given by the United Nation Relief and Work Agency (UNRWA) for Palestine Refugees in the Near East. Most of them arrived in 1948, and more than half of them still live in one of the thirteen refugee camps administrated by the UNRWA, whilst a substantial number live in informal gatherings. The Palestinian community has faced several difficulties since its arrival in Lebanon. First, there have been legal restrictions concerning obtaining work permits, owning land or constructing housing, movement across borders, and accessibility to social welfare and education. Second, refugees have suffered from the insecurities of the Lebanese civil war (1975-1991) and the Israeli invasions of 1978 and 1982.[1] Since the 1980s about 100,000 Palestinians have emigrated from Lebanon to the Gulf countries and northern Europe, mainly Germany, Sweden, and Denmark. Migration has to be considered not only as forced, but also as the result of new forms of transnational solidarity between the different scattered Palestinian communities. This paper aims to demonstrate how refugee communities, such as the Palestinians, but also the Kurds or the Eritreans,[2] use their social capital (i.e., solidarity networks) in order to adapt to new situations despite

great constraints, and succeed in developing new forms of transnational solidarity.

This paper is structured as follows. Firstly, I will examine the different stages of Palestinian emigration from Lebanon to Europe from the 1970s to the present day. Secondly, I will explore the mechanisms that sustain this mobility, based on the setting up of migratory networks between the two areas. Thirdly, I will stress the importance of the camps and the gatherings in the structuring of a transnational migratory field. This work is primarily based on fieldwork studies in Lebanon between 1997 and 1999, specifically in South Lebanon and in Sweden, and on interviews with Palestinian refugees in these two areas.

1. The Four Main Stages of Palestinian Emigration from Lebanon

1.1 The Analytical Framework

Seteney Shami[3] notes that in the Middle East the distinction between *forced migration* and *voluntary migration* is not always relevant. The author suggests that "*displacement often leads to labour migration as a coping strategy.*" Palestinian emigration is a good illustration of this. Firstly, they are considered as refugees in Lebanon because they had been expelled from their homeland in 1948. Then civil war, economic difficulties, and legal discrimination have led them to emigrate from Lebanon to find work, asylum, and a stable juridical status as in Europe. Gil Loescher[4] notes that "in practice, the question of who exactly is a refugee is a major point of contention. . . . In today's interdependent world, more people are migrating for a wide variety of reasons".

This assumption is also developed by Anthony H. Richmond,[5] who stresses that

> the distinction between movements of population that are voluntary and involuntary, or forced and free, is of doubtful validity. There is a convergence of these two forms, and differences depend on relationships to the state.

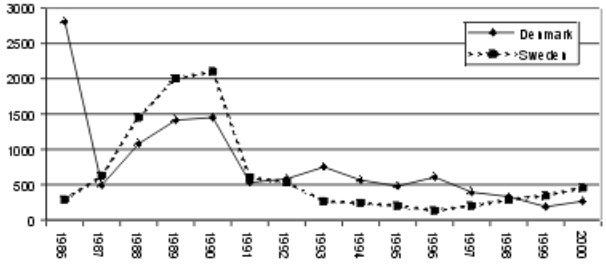
In the case of the Palestinians, three kinds of mobility can be distinguished: (1) labour migration in the 1960s and the beginning of the 1970s, (2) asylum seekers looking for safety in a third country, which took place between the 1982 Israeli invasion of Lebanon and the War of the Camps (1985–87), and (3) illegal "refugee-migrants" to Europe seeking both asylum and a better economic situation, which began in the early 1990s.

1.2 From Lebanon to Europe: The Development of Emigration

Palestinian emigration from Lebanon to Europe occurred in four main stages. During the first stage a few dozen Palestinian students from Lebanon, as well as from Syria and Jordan, came to Sweden to complete their professional training. This mobility resulted from a co-operation between UNRWA and Swedish companies such as Volvo. Some of them stayed in Sweden, while the rest returned home.[6] In the 1970s, a large number of Palestinians could not find work in Lebanon, due to legal restrictions in the Lebanese labour market. Hence, a group of refugees entered western Europe, via East Berlin, and asked for asylum in the Federal Republic of Germany. Most of them obtained asylum and were able to settle in West Germany. They were not considered as political refugees, but as *de facto* refugees, a legal status created during the eighties.[7]

The mass arrival of asylum seekers into northern Europe occurred during the 1980s (see Figure 1). The Israeli invasion (1982) and the War of the Camps (1985–87) displaced thousands of Palestinians inside Lebanon, and some of them searched for asylum abroad. During this period Sweden and Denmark opened their boundaries to a large proportion of them. Today, about fifteen thousand Palestinians live in Sweden, and nearly twenty thousand have settled in Denmark.[8]

Figure 1: Arrivals of Palestinian Asylum Seekers in Sweden and Denmark (1986–2000)



Sources:
Sweden: Migrationsverket, 2000
Denmark: Eurostat (1994), Danish Immigration Service, 2001.

The 1990s brought the development of illegal migration. Towards the end of the 1980s the European countries closed their boundaries to asylum seekers.[9] Nevertheless, a large number of Palestinians from Lebanon still wished to emigrate. Four main reasons led to the development of illegal migration: (1) the end of the civil war in Lebanon increased the discrimination against the Palestinian community at the political and economic levels, (2) the Oslo agreement did not give any solution, nor any perspective, to the 1948 refugees,[10] (3) the economic situation in Lebanon was getting worse by 1993, and (4) Palestinians were competing with Syrian and Egyptian workers in the labour

market. In the absence of the implementation of their "right of return," Palestinians from Lebanon searched for a better economic situation, a recognized legal status, and a country where they could build a "normal" life for their children. Europe was considered by most of them as a good alternative.

2. *Migratory Networks and Transnational Solidarity Networks: The Resources Used by Palestinian Refugees*

Compared to the high rate of migration in the Palestinian community from Jordan, those living in Lebanon were less mobile until the 1980s. Nowadays, more than a quarter of the Palestinians from Lebanon live abroad. What are the mechanisms that lead to this mass emigration? Thomas Faist[11] proposes an interesting theoretical framework, using network analysis and the use of transnational resources, in order to understand how migration takes place. Two levels of analysis must be taken into consideration, the macro-level (economic, political, and legal environments in the departure and host countries) and the meso-level (the migrants' networks). The key question is: how do local networks set up by Palestinians in Lebanon develop in a transnational space through migration?

For Palestinians are refugees, and their transnational activities are strongly determined by their departure and destination countries' attitudes.

> It can be argued that the social relations of refugees create a transnational community not bound by the geographical borders of either the countries of origin or the countries of settlement". […] However, there are some significant differences between ordinary migrants and refugees in the form and content of the transnational social relations. It can be argued that refugees have a distinctive relationship with both the country they have been forced to flee from and the country in which they have involuntarily settled.[12]

The family solidarity networks play a significant role in the organization and the development of the migrations of the Palestinians, in both the country of departure as well as in the host country. Their action is determined by various stages of a migratory process: (1) they permit the mobilization of the funds necessary to pay for the trip, (2) they provide information on the country of destination circulated throught the network and spread to the potential migrants, (3) they facilitate the adaptation of the newcomer in the host country, (4) they also have a function in the selection of the migrant from the departure country to fit the specific needs of host country, (5) they help to circumvent the legal constraints in the host countries, and (6) they influence the destination location of the migrants.[13] I will first analyze the emergence of the migratory networks between Lebanon and Europe. I will then examine the structuring role of the family and village gatherings in the country of departure. And I will indicate how the migratory field set up by Palestinians between Lebanon and Europe is constructed around family and village networks.

Transnational migratory networks set up by Palestinian refugees, based on family and village solidarity, are built on the same logic that the networks of sociability developed on a local scale in the refugee camps and Palestinian gatherings. It is their geographical extension which has spread out, from a local to a transnational field. The Palestinians who were settled in Europe since the sixties were used as a spearhead for the migratory networks, which developed in the eighties. This migratory strategy has been developed to circumvent the legal border closures in Europe.

2.1 From the Refugee Camps to Europe: The Development of Transnational Practices

A multitude of resources are developed in the refugee camps and the Palestinian gatherings by their inhabitants to improve their living conditions. Thomas Faist notes that:

> social capital denotes the transactions between individuals and groups that facilitate social action, and the benefits derived from these mechanisms. It is primarily a local asset and can be transferred cross-nationally only under specific conditions.[14]

The author also notes that resources like solidarity, information flow, and social capital first develop locally. The development of migratory networks permits the transfer of these resources from a local field (e.g., a refugee camp) to a transnational one, such as a migratory field. Resources can then be potentially used by the migrants. A transnational social field emerges in which migration – i.e., migrant workers or refugees - generates an exchange between the country of departure and the country of arrival. This circulation includes migrants, but also goods, information, money, and cultural practices.

The author observes that the analysis of migrations in terms of migratory networks suffers from two deficiencies: first, it does not explain the relative immobility of the major part of the potential migrants, and second, it does not tackle the question of the emergence of the migratory networks. He considers that initially social capital is a factor which limits mobility; then when the migratory networks develop, it becomes a driving force in the emigration. This framework of analysis is relevant for the comprehension of the Palestinan migratory dynamics from Lebanon to Europe. Until 1982, Palestinian refugees in Lebanon were not very mobile because of the strength of the solidarity networks

and mutual aid, based on family and/or village networks, which developed in the camps and the gatherings. The destruction of these camps during the Israeli invasion of 1982 led to the departure of many refugees towards northern Europe. New forms of solidarity then developed in a transnational migratory field, which supported and accelerated the emigration. Also, Thomas Faist notes that the installation of earlier migrants is a central element that permits the development of migratory networks because they condense the social capital. The migration develops when the social capital does not function only on a local scale, but also as a *transnational transmission belt*.

The factors that led to the setting up and the development of these transnational migratory networks are the following. Until the beginning of the eighties, the restrictive legal context that touched the Palestinians in Lebanon was counterbalanced by the strong presence of the PLO. The Palestinian institution provided work and welfare to the most underprivileged Palestinians. The Palestinian national movement, then strongly structured, also proposed a political solution to the refugees by making "right of return" the spearhead of its combat. The dismantling of the PLO and its geographical dispersion in 1982, and nowadays the Oslo peace process, which relegates the problem of the refugees to future negotiations, reduced the effectiveness of the networks of solidarity at a local level. Emigration became an objective for many refugees, because it made possible an escape from a situation perceived as insoluble by most refugees. Emigrating to Europe was then considered by refugees as an alternative solution to an increasingly improbable return to their homeland, or to a durable settlement in Lebanon in an increasingly hostile context.

Efficiency and permanence of transnational networks are based on a shared identity, common to all Palestinian migrants. The overwhelming need to belong to the same group is related to three factors, namely: the shared and transmitted experience of the *Nakba*, an Arabic term that means catastrophe, used by the Palestinians to designate the 1948 exodus; living in the camps that are considered as a symbol of the exodus; and the gatherings based on village origin, making it possible to recreate the geography of Palestine in exile. All these elements, with strong symbolic contents, structure the Palestinian solidarity networks at a local level as well as at a transnational one.

2.2 The Origin of the Migratory Networks: The First Palestinians in Northern Europe

The first Palestinians from Lebanon arrived in northern Europe, primarily in Germany and Sweden, in the sixties and seventies. They decided to emigrate, because they could not manage to find work in their host country in the Middle East due to their refugee status. A few hundreds stayed in Sweden and a few thousand in Germany. Their presence, however, played an important role in the organization of the migratory networks which were set up in the eighties and developed in the nineties. Several refugees who arrived in the eighties, or later, explain their choice of destination by the presence of one or more members of their family, their camp, or their gathering of origin in the host country.

The first Palestinian migrants, often young male graduates, benefited from a favourable reception in northern Europe and quickly obtained residency rights, even the nationality of their host country, as well as work. The majority of the refugees whom I met were married to German or Swedish wives. Their good knowledge of their host society has facilitated the arrival of new migrants. One must note the importance of the *weak ties* – e.g., diffuse relations with the host society – in the operation of the networks, which permits the construction of *bridges* between the migrant community and its host society.[15] In Germany, for example, several individuals of Palestinian origin are now lawyers. They give assistance to the Palestinians who ask for the regularization of their situation in Germany. In Sweden, several Palestinian refugees I met in Göteborg and Stockholm work as social workers, as translators, or in non-governement organizations. Their knowledge of the Swedish legal system facilitates the arrival of new Palestinian refugees.

The adaptation of the newcomers is also facilitated by the presence of Arab or Palestinian employers, such as the case in Berlin. The Palestinians easily find work in restaurants, in small businesses, or on construction sites, where the presence of foreign manpower is large and is easily accessible to undocumented migrants. Considerable numbers of Palestinians without paperwork fit this segment of the black market for labour. I also noticed during the interviews with migrants returning to Lebanon after a stay in Germany, the development, certainly marginally, of illicit activities such as the traffic of narcotics, which were strongly remunerative. With the money received from these illicit incomes the people I met were involved in the black-market Western clothing trade in Lebanon.

3. The Role of the Camps and the Gatherings in the Structuring of a Transnational Migratory Field

The family and village migratory networks are the main supports for the emigration from Lebanon towards northern Europe. They play a significant role in four principal fields: (1) collection of the funds necessary to emigrate, (2) the "family reunification" migratory strategy, (3) infor-

mation flow between country of destination and country of departure, and (4) the adaptation of the newcomers.

3.1 Transnational Migratory Networks and Collection of the Funds Necessary to Emigrate

The sums invested in the trip, and the remuneration of the intermediaries, lie between $4,000 and $7,000 (in U.S. dollars), depending on the destinations. Some families I met in South Lebanon invested more than $15,000 in certain cases, and lost this money for those who failed to emigrate. Several families I met, especially in Borj Shemali refugee camp, the most underprivileged of the Tyre area, sold all their goods, including their dwellings and their furniture, to leave. A failure to emigrate put them in a very difficult socio-economic situation. It should be recalled that the major part of the Palestinian refugees do not have fixed incomes, since they work as daily workers. They earn around $200 per month. Very few refugees can thus pay alone the price needed for emigration, taking into consideration their monthly income. The people who wish to emigrate generally borrow the money from their family and village networks. Khalil,[16] a Palestinian refugee met in Tyre, explains the way he collected the money necessary to emigrate: "I have borrowed the money from my sister, my parents and other relatives who live here in the camps. My brother who lives in Germany for five years now also sent me money."

The collection of the funds from close relatives represents several advantages. First of all, in the majority of the cases, the potential migrants are insolvent, so no financial organization would lend them money. It is thus necessary to find alternative solutions. The sums concerned are significant, since they represent several thousands of dollars for each individual. The extended family, even the members of the same village of origin, must get together to gather the necessary amount. It is rare that one or two people have this sum. It is a collective loan. Once he has gathered the money, the debtor migrates and lives abroad. Only membership of the migrant in a family or communitity network, strongly structured and identified, guarantees to the creditors the refunding of the lent sum. It is a matter of trust. Arriving at his destination, the migrant repays his debt by sending money back to his creditors. Generally, the money is sent with a relative or a friend visiting from Lebanon. The importance of the relationship between the sending community and the expatriate group is of prime importance in the operation of this system of financial solidarity.

This mechanism is very efficient when the basis of the network is family. The broader the basis is, the less is the effectiveness. The case most commonly observed is the following: the father leaves to work in Germany; then, when his income allows, his elder son comes, followed by the others sons (or brothers); and then the rest of the family comes, i.e., the spouse (or mother) and the daughters (or sisters).

3.2 Migratory Networks, Marriage and Gender Inequalities

The financial resources, even if they cover the cost of migration, do not give a right of legal residence in Europe. It is useful to recall that since the end of the eighties, it has been very difficult for Palestinians to obtain refugee status in Europe. Most of the Palestinian refugees thus try to enter Europe clandestinely, hoping to be regularized thereafter. The family or village migratory networks became a very significant resource for the migrants who want to obtain legal residency in Europe.

Certain Palestinians who arrived in the sixties, but more especially during the seventies, founded a family in their host country. Most of the parents I met preferred that their daughters marry Moslems, preferably Palestinians originating from the same camp or gathering in Lebanon. This kind of marriage is facilitated by the fact that the daughters carry German, Swedish, or Danish nationality. During a summer visit to Lebanon, they marry. Then their husband returns with them to settle in Europe. A young Palestinian woman responsible for the union of women in the gathering of Chabriha explains the way in which these marriages take place:

> Young Palestinian refugees living here manage to emigrate by marrying Palestinian women living in Europe who carry European citizenship. They choose a husband, and then he obtains a residency permit. Every year you have such weddings. The parents prefer to marry their daughters here rather than within European society.

Questioned on the nature of the marriages, her answer is without ambiguity, that they are effective marriages, and not unconsummated marriages. The goal of getting correct papers is only one of the advantages of this type of union, and it is not the only goal:

> They are true marriages, how could it be different? People who live here are all distantly related, it is not conceivable to make a unconsummated marriage. The girl comes and chooses a husband, she cannot leave him over there. Unconsummated marriages exist, but that has never occurred here at Chabriha. This situation creates problems for the girls who live here in South Lebanon. For they do not find husband, they must work. Because of the economic situation young male prefer to marry with a girl who lives abroad.

Zoubeir, a young refugee of Al Buss camp, testifies as to the way he left Lebanon to settle in Germany:

> I was born in 1972. I lived here in the Al Buss camp until I married my cousin who has German nationality. She was born in Germany. Her family lived there for 22 years. She came here each summer. I married her, then I went to live in Germany in 1994. I have obtained a residence permit for one year renewable, and I obtained the right to work.

His experience, however, was a failure. His wife left him and took their daughter. He could not obtain the renewal of his residence permit. He had to leave Germany in March 1999 and return to Lebanon, where he resided before. This shows the legal precariousness of the newcomers. However, the cases of divorce remain rare, according to Dima Abdulrahim.[17] In Sweden, I met young Palestinians forced to make an unconsummated marriage to obtain papers. It seems, however, that this practice is not usual.

The local effects of emigration on the country of departure are significant. Emigrants are often young men. Therefore, in south Lebanon there are more young women then men of same marriageable age. Thus, many young Palestinian women do not get married. They remain in their parents' house and work as agricultural workers. Hence, transnational practices tend to increase gender inequalities in poor Palestinian areas.

3.3 Migratory Networks and Information Flow

The links created and maintained between migrants and their community of origin are connected by two main aspects. First, migration is often the result of a communal or family strategy to increase their income or to minimize risk of fluctuation of their incomes. Thus, the need for strong bilateral contacts between migrants and non-migrants is necessary to ensure the control of the migrant and the sending of an income home. Second, the execution of such goals requires a constant flow of resources, information, and migrants, to ensure the operation and the continuity of the system.[18]

In the case of the Palestinians from Lebanon living in Europe, these two aspects can be verified. In the economic crisis which strikes the Palestinian refugees, the emigration of one or more members of the family makes it possible to ensure the sending of funds in a more regular way. Thus, according to my observations, old people who remained in south Lebanon and have relatives abroad manage to have a monthly average income ranging between $100 and $200. Palestinian communities in Europe can also provide more significant funds in case of a specific expenditure such as a surgical operation. Thus, in Jall Al Bahr, a family succeeded in collecting in less than one week the funds necessary for a surgical operation for one of their family members, equivalent to $2,500. They received about $2,000 from Germany and Denmark, where more than half of the family lives. The use of the telephone permits fast circulation of information. The money is sent by bank transfer or by specialized private organizations.

The information flow generally passes by immaterial channels (i.e., fax, e-mail, telephone) and by people holding European citizenship or residence permits who are able to travel freely. Palestinians settled for many years in Europe with correct papers traditionally make annual visits home. E-mail is now frequently used as a tool of communication, as it is less expensive than the telephone, and more reliable and rapid that the traditional post office. In one of the refugee camps near Tyre, where the installation of a telephone line is prohibited by the Lebanese authorities, a grocer secreted a telephone line from outside the camp and connected a computer to the Internet in order to send and receive e-mail. The inhabitants of the camp could thus send e-mail to their family in Europe for 1,500 Lebanese pounds (approximately $1.00), which is only 500 LP more expensive than the price of a local call.

The networks of solidarity between the Palestinians of Europe and those remaining in Lebanon are still steadfast since the most significant arrivals took place in the eighties, and are thus relatively recent. The Palestinians born in Europe are, however, increasing. Until the present time, and according to the interviews which I carried out with this category of the population in Stockholm and with those returning to Lebanon for holidays, they still attach a great deal of importance to the maintenance of the relationship with their camps or gatherings of origin. It is, however, difficult to foresee the modes of solidarity that will develop in the future, if they manage to exist at all. The development of clandestine emigration represents a great obstacle to the circulation of information and people. During my interviews with clandestine migrants, the relationship with the country of origin (i.e., Lebanon) is weak, or non-existent, until the migrant obtains a residency permit. However, it is important to emphasize the intense need of Palestinian young people living legally in Europe to be connected with the home base and to guard against losing the "right of return" on the creation of a Palestinian State.

3.4 Migratory Networks and Adaptation of the Migrants in the Host Country

The success of adaptation of the migrants was often measured by the ability of the migrant to activate his/her family and/or community networks in the host country. The importance of the role of these networks in the country of

departure must also be emphasized. One of the uses of the network is in the reduction in the "cost of migration," in all the senses of the term.[19]

In the country of arrival, the close relations maintained by people of the same village of origin in Palestine or the same refugee camp in Lebanon play a significant role in the success of the adaptation of the newcomers. I have observed such relations in Sweden. These networks help the newcomers to find employment or housing on their arrival. The adaptation aspect comes out as a very important factor in the interviews with those who wish to emigrate. Most of the potential migrants benefit in Lebanon from family and village solidarity networks which enable them to overcome the daily difficulties and guard against economic risks. Migration is seen as a viable solution by potential migrants because it does not question the advantages already developed from this system of solidarity. Once arrived in Europe, they find the same kind of mutual assistance. It takes the form of free accommodation with members of the family or people originating from the same camp, as well as loans of money and assistance in searching for employment.

On the one hand solidarity networks play a major role in the adaptation of migrants due to the multiplicity of weak ties developed between the migrants already installed and the host society. On the other hand, the solidarity networks cannot deal with all the problems faced by the newcomers, especially legal restrictions. As they are stateless refugees, obtaining a stable and recognized legal status or nationality of their host country is one of the conditions necessary to enhance their adaptation. Only a recognized legal status enables them to find employment, housing, and the right to circulate freely.

3.5 The Evolution of a Transnational Migratory Field: The Case of the Palestinians from Al Buss Camp

The migratory networks set up in response to the asylum policies in Europe have an influence on the geographical distribution of the migrants. Migratory flows thus move in a preferential way towards particular regions, where long term previous migrants live. In the Palestinian case, it is legal status constraints which govern the "choice" of the country of destination. It is thus the combination of legal factors, depending on State policies, and also socio-spatial factors, which makes it possible to understand how the Palestinian migratory field is structured from Lebanon towards Europe, and its current geographical reconstruction.

I will take the example of the Al Buss camp, which clearly illustrates migratory dynamics developed by Palestinian refugees and their recent change. In the seventies, a group of Palestinian graduates decided to leave Lebanon. They had three principal objectives: (1) to find work, which was difficult in Lebanon because of the legal constraints, (2) to obtain an internationally recognized legal status, and (3) to flee the civil war that had started in Lebanon. West Germany seemed to them a favourable place because of its favourable asylum policy and because entry via East Berlin did not require a visa. Settling in West Germany was helped both by a flexible asylum policy and by good opportunities for employment.[20] These Palestinians found work easily and were able to spread into several towns of West Germany. Once their legal situation became stable, many settled in West Berlin. They concentrated on working in the catering and the construction sectors. They still, however, maintained close connections with their country of departure by sending money to their families remaining in Lebanon. When they acquired German citizenship or valid residence permits they were able to visit their families in Lebanon. Afterwards, as their savings grew, they were able to facilitate the arrival of close relatives (e.g., brother, parent, sister). In many cases, their integration into German society was further enhanced by marriage with Germans.

In the eighties, following the Israeli invasion, the migratory field of the Palestinians from Al Buss was totally changed. The camp was destroyed by the Israeli shelling and refugees were forced to move inside Lebanon. Some of the refugees, in particular those who were injured or whose dwellings were completely destroyed, sought to leave Lebanon indefinitely. Connection between internal migration and international migration was effected at that time. Denmark and Sweden agreed to accept these refugees. Germany too continued to receive some of them. The migratory field thus extended to new countries further north, whilst Germany, the previous principal recipient country, now became primarily a country of transit towards Scandinavia. Whereas in the seventies, the networks set up by the migrants determined the geographical extension of the migratory field, in the first half of the eighties it was the asylum policies of the European countries which determined the main countries of destination.

Thereafter, the economic and political situation of the Palestinians in Lebanon was eroded further, and the rate of emigration increased. The European countries changed their policies of asylum in the second half of the eighties in a more restrictive way. Migration became more clandestine, or took the form of tighter family reunification. The Palestinian communities already installed in Europe played a significant role in the maintenance of migratory flows. Flows of information, money, and weak ties, were still the principal elements which allowed the arrival of new refugees. A transnational field emerged with the circulation of information, and, to a lesser extent, of people, between the Palestinians still residing in Al Buss and those of Europe.

The migratory field was then strongly structured and effective, and it made it possible to circumvent to some extent the legal and financial constraints which challenged potential migrants.

In the nineties, the migratory field of the Al Buss Palestinians underwent yet another change. The European borders were becoming increasingly difficult to cross. Moreover the economic situation in Europe worsened. The Taëf Agreements (1989) marginalized the Palestinian community even further, and the Oslo peace process did not offer any long-term solutions to the 1948 refugees. The economy of Lebanon also plummeted at this time. Palestinians sought to migrate to a third country to obtain a recognized legal status and a right of access to basic social services. Many tried to emigrate towards Europe. The communities already installed there were used as a conduit for the new migrants, disseminating information on the countries likely to take in Palestinians. The geographical extension of the migratory field widened and touched countries such as the United Kingdom and Belgium. The three principal host countries (Germany, Sweden, and Denmark) continued to play a central role in this migratory system, but increasingly as transit countries.

Similar geographical extension of the migratory field of the Palestinians was also observed in other regions of Lebanon. The place occupied by remittances and information flow was dominant compared to the movement of individuals. The migratory field of the Palestinians was structured in an unusual way since it combined elements related to their refugee status and dynamics generated by the Palestinian networks of solidarity. Two important factors shape Palestinian migratory dynamics:

1. The political, economic, and legal context in Lebanon and in the Middle East Asylum policies of the receiving European countries
2. Palestinian solidarity networks, developed in a transnational space

Conclusion

Palestinian refugees' emigration from Lebanon must be analyzed at the macro-level in order to understand the factors that determine migratory flows. Special attention must be given to war, legal status, destruction of houses, and internal displacement. All those elements are often cited by refugees in the interviews to explain why they left Lebanon. Destination countries have not been "chosen" by refugees. The attitude of those countries toward asylum seekers, and especially Palestinian refugees, is a determinant factor in the "choice" of country of residence. For instance, Palestinians "easily" found refuge in Sweden and Denmark from 1982 to 1987.

Although the 1982 Israeli invasion set off Palestinian emigration from Lebanon, this cannot explain its duration or its amplitude. How can Palestinian refugees, deprived of passports and financial resources, manage to leave their country of residence and enter western Europe? One of the key answers could be the following: Palestinian refugees in Lebanon have reconstructed, in the refugee camps and in the informal gatherings, systems of solidarity based on village and family networks. These networks, developed at a local level, have now been turned into transnational networks of solidarity by migrant communities, building bridges between Palestinians in Lebanon and migrants abroad. Resources such as social capital, money, and information on the destination country, legal constraints, and opportunities circulates through these networks, linking potential migrants to Palestinians settled in Europe. This facilitates their mobility, in a context of high legal constraints in Europe and lack of financial resources in Lebanon.

In a context where the policies of asylum and immigration are increasingly restrictive in Europe, the development of transnational networks is becoming more difficult. A growing number of Palestinians reside in Europe with precarious and provisional status which marginalizes them. As noted by Richard Black:[21]

> Focusing on the role played by refugees in transnational activities could help to dispel some of the more idealistic notions of transnationalism from below as a people-led process, which take advantage of processes of globalization and ease of travel in the modern world.

Even if Palestinians develop transnational practices in order to adapt to a new environment in Lebanon and Europe, they are still refugees and/or asylum seekers, their choices strongly determined by the political context in the Middle East and asylum policies in Europe.

Notes

1. See Souheil Al-Natour, "The Legal Status of Palestinians in Lebanon," *Journal of Refugee Studies* 10, no. 3 (1997): 360–77; and Rosemary Sayigh, *Too Many Enemies: The Palestinian Experience in Lebanon* (London and New Jersey: Zed Books, 1994).
2. Those two communities have been studied respectively by Östen Wahlbeck, "The Concept of Diaspora as an Analytical Tool in the Study of Refugee Communities," *Journal of Ethnic and Migration Studies* 28, no. 2 (2002): 221–38; and Khalid Koser, "From Refugees to Transnational Communities?" in *New Approaches to Migration: Transnational Communities and the Transformation of Home*, ed. Nadje Al Ali and Khalid Koser (London: Routledge, 2001).

3. Seteney Shami, "The Social Implications of Population Displacement and Resettlement: An Overview with a Focus on the Arab Middle East," *International Migration Review* 101 (1993): 4–33.
4. Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York and Oxford: Oxford University Press, 1993).
5. Anthony H. Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Toronto, New York, and Oxford: Oxford University Press, 1994).
6. See Selma Assar, "The Palestinian Refugees: Analysis and Comparison of Two Recipient Countries' Behaviour, Sweden and Jordan, 1948–1991," (Vaxjö, Sweden: University of Vaxjö, Institute of Social Sciences, 1995; unpublished).
7. Johan Cels, "Responses of European states to *de facto* refugees," in *Refugees in International Relations*, ed. Gil Loescher and Laila Monahan (Oxford: Clarendon Press, 1990).
8. See Mohamed Kamel Doraï, "Les parcours migratoires des réfugiés vers la Suède et l'Europe du Nord," *Revue d'études palestiniennes* No. 23, nouvelle série (2000): 38–52; Brian MacGuire, "Lebanese Asylum Applicants in Denmark, 1985–1988: Political Refugees or War Emigrants," in *The Lebanese in the World: A Century of Emigration*, ed. Albert Hourani and Nadim Shehadi (London: Centre for Lebanese Studies and I.B. Tauris, 1992); and Mahmoud Issa, *Palestinians from Lubya in Denmark: Dreams and Realities* (Copenhagen: Danish Refugee Council, 1995).
9. See François Crépeau, *Droit d'asile: De l'hospitalité aux contrôles migratoires* (Bruxelles: Editions Bruylant & Editions de l'Université de Bruxelles, 1995); Anita Böcker and Tetty Havinga, *Asylum Migration to the European Union: Patterns of Origin and Destination* (Luxembourg: Office for Official Publications of the European Communities, 1997).
10. See Nasser H. Aruri, ed., *Palestinian Refugees: The Right of Return* (London: Pluto Press, 2001).
11. Thomas Faist, *The Volume and Dynamics of International Migration and Transnational Social Spaces* (Oxford: Clarendon Press, 2000).
12. Östen Wahlbeck, *supra* note 2.
13. See Douglas T. Gurak and Fe Caces, "Migration Networks and the Shaping of Migration Systems," in *International Migration Systems. A Global Approach*, ed. Mary M. Kritz *et al*., (New York: Oxford University Press, 1992); Monica Boyd, "Family and Personal Networks in International Migration: Recent Developments and New Agendas," *International Migration Review* 23, no. 87 (1989): 638–69; Ivan Light *et al*., "Migration Networks and Immigrant Entrepreneurship," in *Immigration and Entrepreneurship: Culture, Capital and Ethnic Networks*, ed. Ivan Light *et al*., (New Brunswick, N.J.: Transaction Publishers, 1993).
14. Thomas Faist, *supra* note 11.
15. See Gurak and Caces, *supra* note 13; and Monica Boyd, *supra* note 13.
16. All the names used in this paper are pseudonyms.
17. Dima Abdulrahim, "Defining Gender in a Second Exile: Palestinian Women in West Berlin," in *Migrant Women: Crossing Boundaries and Changing Identities*, ed. Gina Buijs (Oxford: Berg, 1993).
18. Gurak and Caces, *supra* note 13.
19. Gurak and Caces, *supra* note 13; and Monica Boyd, *supra* note 13.
20. See Johan Cels, *supra* note 7; and Gil Loescher, *supra* note 4.
21. Richard Black, "Fifty Years of Refugee Studies: From Theory to Policy," *International Migration Review* 35, no. 1 (2001): 57–78.

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"I Want to Tell You about My Life Now": The Voice of Palestinian Refugees in *Frontiers of Dreams and Fears*

Catherine Burwell

Abstract

Many individuals and institutions – from scholar Edward Said to media watchdog Fairness & Accuracy in Reporting *– have noted the Western media's imbalance in presenting the struggles of the Palestinian people, particularly during the ongoing Al-Aqsa Intifada. Yet as the mainstream media continue to under-report violence against Palestinians and misrepresent the occupation of Palestinian lands, Palestinian filmmakers have begun to generate their own images, often through the genre of the documentary. This article examines one such documentary, Mai Masri's* Frontiers of Dreams and Fears, *a study of the daily lives of children living in Shatila and Dheisheh refugee camps. It argues that Masri's film, through its restoration of the lost voice of the refugee child and its insistence on Palestinian narrative, provides an essential alternative to the exploitative images of the institutionalized media.*

Résumé

Bon nombre de personnes et d'organismes, parmi lesquels l'intellectuel Edward Saïd et le groupe de surveillance des médias Fairness & Accuracy in Reporting *– ont eu l'occasion de souligner le déséquilibre qui caractérise la façon dont les médias occidentaux présentent la lutte du peuple palestinien, tout spécialement durant la période en cours de l'Intifada Al-Aqsa. Toutefois, alors même que la presse continue de sous rapporter les violences commises contre les Palestiniens et de donner une fausse image de ce qu'est réellement l'occupation des terres palestiniennes, des réalisateurs palestiniens ont commencé à produire leurs propres images, souvent sous forme de films documentaires. Cet article examine un tel documentaire – « Frontiers of Dreams and Fears » («* Frontières entre rêves et frayeurs *») – de Mai Masri, qui est une étude de la vie quotidienne d'enfants habitant les camps de réfugiés de Shatila et de Dheisheh. L'article soutient qu'en redonnant sa voix perdue à l'enfant réfugié et en privilégiant le récit palestinien, le film de Masri fournit une précieuse alternative aux images exploitées par les médias institutionnalisés.*

> *We are here near there, the tent has thirty doors.*
> *We are here a place between the pebbles and the shadows.*
> *A place for a voice.*
> *— Mahmud Darwish, "We Are Here Near There"*

Writing in September 2001, almost one year after Ariel Sharon entered Jerusalem's Haram al-Sharif and sparked the second Palestinian intifada, Edward Said suggested that "never have the media been so influential in determining the course of war as during the Al-Aqsa Intifada, which, as far as the Western media are concerned, has essentially become a battle over images and ideas."[1] And as many critics have pointed out, it is a battle that the Palestinians are losing. In their survey of U.S. media coverage of the uprising, Ali Abunimah and Hussein Ibish highlight a number of distressing patterns, including the under-reporting of violence against Palestinians, a refusal to acknowledge Israeli occupation of Palestinian territories, and the demonization of Yasser Arafat.[2] Their examination of editorials over a three-month period reveals the extent of the imbalance. In the *New York Times*, for example, twenty-

five of thirty-three op-ed pieces devoted to the issue of Palestinian-Israeli relations strongly supported Israel's position.[3] A recent survey by the American Arab Anti-Discrimination Committee (ADC) shows just what effect such media representations have on the U.S. public: only 4 per cent of Americans surveyed knew there was an Israeli occupation, and most viewed Palestinians as "uncompromising" and "aggressive."[4] All of these trends form part of what Said sees as the overall dehumanization of Palestinians and the erasure of their stories through the mainstream media.

But voices do emerge from what Homi Bhabha has called the spaces in between,[5] between the pebbles and the shadows, the fences and the guns. For even while the intifada closes in on the people of Palestine, leaving them literally confined to their own homes, and narrows the spectrum of dominant media opinion, the range of Palestinian cultural expressions still grows and shifts. Committed, political art of the twentieth century sought, in Kyo MacLear's words, new "passages into events" and struggled with "representational clichés which condense[d] history;"[6] now, for a Palestine of the twenty-first century, such a commitment means struggling to create narratives beyond the endlessly repeating images of stone-throwing boys and flag-draped martyrs. And just such a struggle is taking place, in the work of Palestinian poets, diarists, filmmakers, curators, and artists. The Sakakini Cultural Centre in Ramallah, for example, is currently hosting a memorial exhibit that aims to give a name and face to each of the first one hundred people killed in the intifada. The Sixth Biennale of Arab Cinema in Paris in July 2002 included an extensive program of Palestinian film, and earlier, in May 2001, the Al-Jana Arab Centre for Popular Culture in Beirut hosted the Palestinian film festival "Between Two Intifadas." In the U.S., American-based internet sites such as the Electronic Intifada provide analysis, photographs, and war diaries from the ground. In many different locations – in exile, in Israel, in the occupied territories and refugee camps – Palestinians are resisting their own erasure by filling silences with sound and replacing simplified icons with a plurality of images and stories.

Amongst those resisting oppression, documentary filmmaking has had a historically significant place. While documentary makers and theorists in recent years have argued over concepts of reality, authenticity, and form, the importance of the independent documentary as a tool to interrupt the flow of dominant visual norms and reimagine more radical forms of democracy remains. Fittingly, independent documentary has played an important role within Palestinian artistic communities since the start of the intifada. Both David Tresilian, reviewing the Sixth Biennale of Arab Cinema, and Viola Shafik, reviewing the Al-Jana Film Festival, note the large number of documentaries being produced by Palestinian directors. In the catalogue of the Sixth Biennale, coordinator of the Palestinian program Michket Krifa considers the reasons for this new flourishing of documentary, and suggests that "the younger generation has now moved in to occupy the field of visual creativity, due to its vital need to express the reality of Palestinian life. To correct images provided of Palestine by foreign television, these young people have decided to produce their own images of a region sometimes called the most mediatised on the planet."[7]

Palestinian-American filmmaker Mai Masri, who has in a short time built a significant body of work, must be counted among this new generation of documentary makers intent on producing their own images. Since the 1980s, Masri has directed or co-directed seven documentaries. These include *Wildflowers: Women of South Lebanon*, a biography of Palestinian intellectual and political leader Hanan Ashrawi, and three films focused specifically on refugee children – *Children of Fire*, *Children of Shatila*, and *Frontiers of Dreams and Fears*. Masri has garnered several awards for her documentaries, which have been broadcast on television stations around the world, including Channel Four, France2 and PBS. Her most recent work, *Frontiers of Dreams and Fears*, focuses on the friendship that develops between two Palestinian girls, both third-generation refugees. Mona Zaaroura, living in Shatila Camp in Beirut, and Manar Majed Faraj, living in Dheisheh Camp in Bethlehem, form a friendship through e-mail and letters. As the girls' friendship – and the filming of it – progress, two historic events occur. The first is the Israeli army's withdrawal from South Lebanon, which allows many of the refugees of Shatila Camp to see their homeland for the first time. The second event is the beginning of the intifada, which disrupts the girls' already chaotic existences. Although many children appear and speak in the film, and even become minor characters, the film's loose narrative structure is based on the evolution of the friendship between Mona and Manar, and the two girls provide all its voice-over narration.

In considering the large number of documentaries presented at the Al-Jana Film Festival, Viola Shafik divides the offerings into two broad categories: those films which "operated rhetorically, underlining the emotional repercussions of the occupation" and those which she deems more analytical and self-reflexive, and which favour irony or a sense of absurdity over realism.[8] *Frontiers of Dreams and Fears* she places firmly in the category of the rhetorical film, noting what she calls the "director's desire to promote sympathy and solidarity" and even referring to the film as "tear-jerking."[9] Yet such a categorization – and even covert dismissal – of Masri's film overlooks the film's political pur-

poses and its radical content. Admittedly, *Frontiers of Dreams and Fears* does not use Brechtian "distancing" techniques of filmmaker intervention employed in many postmodern productions and favoured as a way of "demystifying" the documentary and countering false realism. On the other hand, Masri does use anti-realism techniques such as music, impressionistic sequences, voice-over, and symbolism to create what she calls "lyrical layers."[10] These techniques are, in fact, as Shafik suggests, used to create sympathy and identification with the children's lives, but as Diane Waldman and Janet Walker write in *Feminism and Documentary*, a stance that encourages identification and a spectorial response is not always objectionable, especially when the subjects are suffering from oppression.[11] Certainly, Masri does not shy away from either the emotional reactions of her subjects, nor from the intent to create emotional responses in her audience; as a long-time advocate of the rights of Palestinian refugees, she seems to embrace emotion as a vehicle for change. But perhaps the most important element missing from Shafik's categorization of Masri's work is "the significant nuance of who is doing the talking."[12] *Frontiers of Dreams and Fears* gives voice to a group of people – adolescents, and in particular adolescent girls – whose words are rarely heard and who are mostly inaudible in mainstream ideological constructions of national identity – be they Palestinian or otherwise. If *Frontiers of Dreams and Fears* is about advocating for change – and it is – then Masri is clearly showing us that these young women's complex experiences as refugees, and their personal histories of poverty, politics, friendship, family hardship, and violence – histories rendered almost invisible by the Western media – must be taken into account.

This article, then, is an examination of Masri's film as a radical intervention into current Western reporting of the intifada and the experiences of Palestinian refugees. The article itself is divided into three strands, which consider representations of Palestinian children, Palestinian histories, and Palestinians' relationship to the land. Though these broad bands provide the structure of the essay, I also try to weave in other important considerations, such as nation, identity, and gender. Each of the three main strands is divided into two parts. In the first, I analyze how the mainstream Western media have represented the Palestinian-Israeli conflict in general, and the Al-Aqsa Intifada in particular – how they have framed, fetishized, omitted, or denied various elements of the Palestinians' uprising. In the second half of each strand, I consider the way that *Frontiers of Dreams and Fears* confronts such representations, providing an alternative point of view through its restoration of lost voices and images and its insistence on narrative and history. Ultimately, what I want to suggest is that Masri's film *is* a corrective (as Michket Krifa suggests) *and* an emotionally charged work of advocacy (as Viola Shafik suggests) but that it is also more than that. It is a means of interjecting story in a media environment obsessed with 10-second clips; a way of creating spectorial identification against an institutionalized discourse that consistently pathologizes and "otherizes" Palestinians; a strategy of honouring historical memories at a moment when the Palestinian past is in danger of being erased; and, finally, a way of interjecting the unheard voice of the child refugee into formulations of nation and national identity.

The Contested Image of Palestinian Childhood

Perhaps most disturbing amongst the host of misrepresentations of the Palestinian struggle is the creation of a new symbol of "Palestinian violence" – the Palestinian child. Indeed, Palestinian children – their activities, their lives, their bodies – have become contested ground. In the militaristic battle that has transformed the streets of the occupied territories, countless children and youths have lost their lives at the hands of Israeli soldiers, deadly shootings that many believe are deliberate.[13] But the children of Palestine are not only the targets of military warfare; they are also markers in the corresponding war over "images and ideas." In the Western media, young Palestinians are often portrayed as the instigators of violence. Filmed and frozen in the act of throwing rocks, their desperate gestures are rarely contextualized to include the heavily armed Israeli soldiers at the end of the street. "Terrorists" and "attackers," writes Omar Barghouti, are the words commonly applied to these young people.[14] When the flow of horrific images won't allow this portrait, the mainstream media reconfigures the Palestinian child not as perpetrator but victim of violence. Such was the case with twelve-year-old Muhammad Al-Durra, whose death in his father's arms was caught on film and broadcast internationally. Immediately, Muhammad (who, unusually, was granted a name and an age) became a symbol of Palestinian suffering. Yet even the dubious distinction of victimhood can be easily erased; within days of showing the damning, tragic footage, American news outlets began to report that the boy had earlier been throwing stones, as if to justify his murder.[15] Moreover, another disturbing distortion concerning the assignation of blame is also occurring in the West. As a number of media watchers, including Abunimah, Ibish, and Said have noted, the American media have made widespread claims that Palestinian parents are deliberately sacrificing their children, pushing them into the line of fire in order to further the Palestinian cause. Such accusations not only absolve the Israeli soldiers of responsibility for the children's deaths, but work to dehumanize the Pales-

tinians; such accusations, says Hanan Ashrawi, are "the essence, the epitome of racism."[16] Yet whether as terrorist, victim, or sacrificial pawn, the Palestinian youth, in the lens of the Western media, is always caught in a present moment of violence, never permitted to live inside her own, unfolding narrative.

In *States of Emergency: Documentaries, Wars, Democracies*, Patricia Zimmerman regards this category of violent, static, repetitive visuals as iconic "fetishes," suggesting the obsessive nature of the Western viewer, in need of a nightly "fix" of spectacle. These fetishized images, which thrive during times of war, exist outside of time and place, in a space of "non-sense and antinarrative,"[17] and are used as a means of pacifying the viewer and silencing rational debate. In the case of Western coverage of the Palestinian intifada, these fetishized images are, as Michket Krifa describes them, "a series of stereotypes in viewers' minds – the child martyr, the suicide-bomber, the stone-thrower, the mother-in-tears,"[18] images of the child-at-war. Without context such images have become emptied of meaning; rather than sparking dialogue, they appear as definitive answers to questions we were never able to ask.

If such fetishized images produce a mute collective trance, then the way to break open that trance is through speech. Zimmerman suggests that it is the voice of testimony, a voice that embodies history, memory, and narrative, that can break through the non-sense of the spectacle. And this is precisely what *Frontiers of Dreams and Fears* does. Confronted with images of children caught in an endless cycle of destruction, Masri excises these visuals by resuscitating the story and speech of the Palestinian child, and in doing so releases the confined image into the open space of narrative, and dispels the limiting binary of victim/ victimizer.

One of the ways in which this liberation is conducted is through Masri's profound commitment to the words of the Palestinian refugee child. Simply by choosing to place the child's voice foremost in her documentary, Masri performs a corrective of the silent, anonymous images of the mainstream media. But Masri goes beyond this, celebrating the girls' language, and allowing it to give rise to their own individuality. Indeed, Masri chose to focus on Mona and Manar chiefly because of their use of language, Mona for her poetic voice, and Manar for her articulate political expression.[19] As each girl is introduced to the viewer, her characteristic speaking voice is heard through voice-over: Mona, walking through the muddy, garbage-strewn alleys of Shatila Camp, says, "I wish I were a bird. At first I wanted to be a butterfly, but, then a butterfly is so beautiful that people catch it and imprison it in their notebooks. I don't want anyone to shut me in. The camp is like a bird's cage. A bird that's cut off from freedom. No electricity, no water. Nothing. This bird would die of loneliness." Manar, walking through the streets of Dheisheh Camp, past graffitied walls that declare in English and Arabic "No peace without the exercise of our right of return," narrates, "I'd like to photograph the writing of the walls of the camp. I'd like to photograph the streets and the downtrodden people and the children who have nowhere to play but the streets." In "Mechanical Eye, Electronic Ear, and the Lure of Authenticity," Trihn T. Minh-Ha warns against the danger of a documentary form that cuts out "language as voice and music – grain, tone, inflections, pauses, silences, repetitions" and replaces it with "a commentary that will objectively describe/interpret the images."[20] But Masri never gives in to this objective impulse, instead allowing the emotion, political urgency, and defiance in the children's voices to guide the audience's visual experience of the camps.

But perhaps the most important element in Masri's commitment to the radical potential embodied in the child's act of speech is her strategy of allowing Mona, Manar, and their friends to comment on their own experience of significant political events. When the intifada begins, for example, and Dheisheh Camp is involved in the uprising, no adult voice or "outside expert" intervenes to explain this historical moment. Instead, we understand the rapid and often simultaneous series of events through the girls' lived experiences. Manar, filmed writing a letter to Mona, narrates, "I want to tell you about my life now. I'm very worried these days. I've changed a lot. I don't know whether it's fear or sadness. Our school is in the war zone. Every time we hear a plane we're frightened and we scream. I don't sleep properly anymore." Mona replies with details from her own life in Lebanon; "Manar we've been demonstrating but we're not achieving anything. We're under so much pressure that we feel we're going to explode." And it is also the girls who *interpret* the events of the intifada, giving them their meaning. As Manar is filmed throwing stones, she explains, "If we have to live under occupation and injustice, then why live at all? When I throw a stone, it means I reject injustice. I want to be free, safe." As she flings each stone, she proclaims, "This one is for Samar. This one is for Mona." With these words, Manar – and Masri – reclaim the oft-seen image of the Palestinian youth throwing stones by explaining the political intent, solidarity, and resistance embodied within the gesture.

While this displacement of the mainstream representation of the Palestinian child is mostly created through spoken language, it is also reinforced through a number of short distinct scenes focused on the children's activities. Two of these are worth mentioning. The first of these scenes shows the children of Shatila involved in a group project.

Using cardboard, string, and pens, but most importantly the words and memories of other children, the children create "keys to Palestine." After cutting out the cardboard keys, they circulate amongst their peers and ask them to write down details of their home villages. "What do you know of your town? What is Jaffa famous for?" Mona asks a younger girl. What they don't know the children look up in books. After filling up their keys with words and history, the children display them around their necks. Here, the act of making the keys becomes a process of retrieving memory to create an imagined home, a place where one is "free, safe," and takes the children out of the realm of violence to show them in innovative, imaginative acts of change. The second scene also shows children acting creatively. Here, Manar films Mona's village using a digital camera. Masri's camera – and the viewer – follow Manar as she films the abandoned village. This simple scene echoes Edward Said's words in *After the Last Sky*. Commenting on Jean Mohr's photograph in which two Palestinian girls hold the camera and direct it at the photographer standing above them, Said writes, "we too are looking, we too are scrutinizing, assessing, judging. We are more than someone's object. We do more than stand passively in front of whoever, for whatever reason, has wanted to look at us."[21] Manar walks through the village, comments on the destruction, records what is left, and in the end announces, "Mona, you have a beautiful village." Holding the camera, not held by it, she looks, assesses, judges – not the object of the media's gaze but the subject of her own, Palestinian eyes. No longer trapped at the violent checkpoints of the Western gaze, the child pictured here actively creates, forging for herself a story that includes a past and a future, and building friendship, solidarity, and a community of peers.

Telling Omissions: The Restoration of History

A recent study undertaken by the Glasgow University Media Group reveals the Western media's distortion of the Palestinian past. Published in *The Guardian* under the headline "Missing in Action," an article by director of research Greg Philo summarizes the group's findings. These include an analysis of eighty-nine television news stories collected during the first days of the intifada, which reveal that of 3,536 lines of text, only seventeen explained the history of the conflict between Palestinians and Israelis. Not surprisingly, when a sample audience of young adults aged seventeen to twenty-two was later asked where Palestinian refugees had come from and how they had become refugees, 80 per cent did not know. As well, the study found that while British journalists (unlike their American counterparts) sometimes used the word "occupation," they did not explain that it was the Israelis occupying Palestinian land. Again, this omission appeared to have a direct impact on audiences' perceptions; in the focus group, 71 per cent did not realize that Israelis were occupying the territories. In fact, 11 per cent believed that the Palestinians were occupying the territories, while only 9 per cent knew it was the Israelis. Philo suggests that without discussion of its origins, the intifada appears to audiences as a disruption of normal life caused only by Palestinian bombs or riots.[22] It becomes clear, then, that what is "missing" in the "action" of television coverage is history itself.

The findings of the Glasgow University Media Group underline the complex anti-historicism of coverage of the intifada, an anti-historicism that not only omits the occurrence of events such as the 1948 *Nakba*, or catastrophe, the 1967 occupation of Gaza and the West Bank, and the 1982 invasion of Lebanon but also denies the experiences of exile, dispossession, occupation, and life in the refugee camps. While the Western media has failed to provide adequate context in its coverage of the Palestinian struggle for many years, this failure has deepened during the second intifada. Many observers, including Ali Abunimah and Hussein Ibish, link this crisis in history with a rise in the "clash of civilizations" notion popularized by Samuel Huntington in his eponymous 1997 book. As described by Abunimah and Ibish, the clash of civilizations is an inherently racist and reductionist cliché which sees the West as a coherent, distinct and superior segment of humanity that is being increasingly challenged by inferior but highly dangerous "Islamic" and, to a lesser degree, "Confucian" civilizations. In the case of the intifada, Israel is represented as an outpost of the West surrounded by the rival civilization, as represented by Palestinian protesters.[23]

The application of this theory to recent events in Palestine denies any notion of a historical basis for the intifada, claiming instead that Palestinians are acting out of instinctual and inexplicable behaviour inculcated by their "volatile" Arab and Islamic civilization. Mostly ahistorical in its suppositions, the clash of civilizations occasionally dresses up as history, but only of the most diaphanous kind, often referring to vague notions of the ancient past, or introducing old images from the crusades. In the *New York Times*, for example, Reuel Marc Gerecht, a former CIA official, says that "the Muslim reluctance to concede that 'Muslim lands' can ever legitimately be relinquished to infidels is age-old, imbedded into Islamic law and custom."[24]

Ervand Abrahamian has also suggested that the "clash of civilizations" cliché has not only been used to cover up Palestinian history, but has, since September 11, been used to cover up any mention of Palestine at all. He notes that "by placing the September 11 crisis in particular and the question 'Why is the U.S. so unpopular in the Middle East?'

in general within the framework of Islam and the clash of civilizations, one can avoid the dreaded P word – Palestine – and the even more dreaded term 'Occupied Territories.'"[25] He suggests that the press has deliberately avoided linking September 11 to the U.S.'s economic and political support of Israel, and their rejection of Palestinian claims. "This severance of the Palestinian plight from September 11," he writes, "fitted in nicely with the official mantra that 'we are attacked not because of what we do but because of who we are.'"[26] In such an atmosphere, the intifada becomes severed from its precedents – including the increase in Israeli settlements during the peace process, the continued denial of the right of return for Palestinian refugees, and the steady weakening of the Palestinian economy – and instead typified as an outburst of irrational "hatred."

In light of such distortions, one of the most important functions of Masri's *Frontiers of Dreams and Fears* is its role in the process of restoring Palestinian histories. Masri undertakes two projects in this regard. First, in the historical void created by the mainstream media, she asserts the importance of Nakba as a marker in contemporary Palestinian experience. In "Palestine's Tell-Tale Heart," Omar Barghouti notes that the Nakba, in which 750,000 Palestinians were driven from their homes, has dominated political discourse since the start of the second intifada, and that many Palestinians, young and old, feel a renewed link with the past.[27] Though it rarely makes its way into the mainstream media, 1948 plays an important role in Palestinian constructions of identity and self. In her narrative of "generational intersections," for example, Isis Nusair writes, "Both my grandmother and mother related to the year 1948 as a demarcating event in their lives. In 1948, my grandmother's life was turned upside down. My mother would subsequently bear the results of that new situation of poverty and fear of the unknown." Nusair goes on to note "the continuity between the experiences of my grandmother, mother and myself" and the way she herself is linked back to that date.[28] The narrative of *Frontiers of Dreams and Fears* also returns to 1948. The film begins with a short text that reads, "This is the story of 2 Palestinian refugee girls whose grandparents were forced to flee from their homes in Palestine in 1948." Thus, Masri makes it clear that the girls' refugee status is a direct result of the actions their grandparents were forced to take in 1948. The next two sequences, in which a map traces the grandparents' route out of Palestine, followed by a wide sweep showing the crowded squalor of the refugee camps, reinforce the link between 1948 and 2000. Later, as Manar and her grandfather are filmed making a trip to their village, a title appears reading, "Ras Abou Ammar village, destroyed by Israel army in 1948." Once there, the two of them walk through the remains of the mostly destroyed family home. As her grandfather takes her through the ruined rooms and narrates his life there and the eventual loss of the family home, Manar is filmed in tears. She – and the audience through her – understand that the 1948 dispossession has also had an impact on her, particularly when the beauty of the overgrown village and wide valley nearby are compared with earlier shots of the cramped streets of Dheisheh Camp and later shots of the violence that erupts in those same streets.

Masri's second restorative project is her recognition of family memories as a means of understanding and honouring the past. As both Isis Nusair's narrative and Manar's filmed excursion suggest, one way to make the link back to 1948 is through family history. In Masri's documentary of the first intifada, *Children of Fire*, eleven-year-old Hannah recounts a complex family narrative of loss and disruption that rings with the political history of occupation left out of mainstream representations: "My mother was told not to nurse me when I was a baby because she was depressed. They had arrested her brother and sister and demolished the house. My grandpa, her father, died of grief. And when my mum gave birth to my brother my father was in jail."

In *Frontiers of Dreams and Fears*, too, Masri chooses to emphasize the importance of family history. Mona's, Samar's, and Manar's family histories are all recounted by the girls near the beginning of the film. Mona, speaking to the camera, explains how she lost her father to a heart attack when she was two, a speech that ends in tears; Samar, reading her diary to her friend Mona, reveals that her father was killed in a massacre and that her mother abandoned her; and Manar, in a voice-over, explains that her father was in prison when she was born. The revelations of the girls' family histories encapsulate the past experiences of many Palestinians – depression, trauma, arrest, loss of home, loss of family, imprisonment, death. These family histories also posit a connection between past and present, but what we see here is more than just continuity – the events of the past resurface forcefully in the girls' lives, often as waves of difficult emotion or memory. The Palestinian past in *Frontiers of Dreams and Fears* not only exists, and impinges on the current moment, but is experienced as recurring memory that troubles any simple understandings of the present. It is these memories, these links with the past constructed through family history – and their public expression through documentary – that have the power to displace the distortions and disfigurations of Western media, and to reveal the exploitative nature of images that flatten history, memory, and culture into one-dimensional, consumable spectacle.

The Censorship of Geography

History and geography, temporality and space –these are of course deeply intertwined in the plight of Palestinian refugees, for it is the Palestinians' connection to *place* that has been radically disrupted through time. Geography, then – as land, people, and their relationship – requires some examination here, particularly as Edward Said has noted an almost total "censorship of geography" in mainstream American media representations of Palestine. This censorship occurs on a number of levels. The first is the simple but profound absence of maps. Said notes that during the first months of the intifada, none of the print or broadcast reports in the U.S. showed a map to help explain the crisis.[29] Yet there are many maps that could reveal a great deal about the conflict. Maps of historical Palestine, maps of Israeli settlements and barricades, maps showing the complex system of governance set down under the Oslo agreement, maps showing distribution of wealth, water, or employment – all would reveal the source of the Palestinians' discontent and help to contextualize the intifada, yet all are strangely absent from media discourse, constituting, in Said's words, not simply an omission but a deliberate "misrepresentation."[30]

A second misrepresentation circulated by the American media concerns the relationship of the people to the land. Palestine in the first half of the twentieth century was constructed by many Zionists as a wasteland, a desert in which only a few nomads – a term used pejoratively – straggled across the barren land. In such a configuration, with the land seen as empty, the new Israelis were not colonists, or even settlers, but pioneers intent on making the desert "bloom." The production of this image continues today through the selective use of geographical terms, or what Israeli new historian Ilan Pappé has called "lexical weapons."[31] For example, Fairness & Accuracy in Reporting has noted that, in the American media, Israeli settlements are called "neighbourhoods,"[32] thus disguising the fact that they are settlements built on the land confiscated by Israel in 1967. Similarly, the words "occupied" and "occupation," which once had some circulation, have become taboo. Words such as "bantustan" and "segregation," sometimes used in independent media to link Israel to apartheid South Africa, never make an appearance. Again, these representations appear to have an impact on public opinion; the recent survey undertaken by the ADC showed that most Americans believed Israelis to be a "pioneering" people[33] rather than settlers, colonizers or occupiers, legitimizing and honouring the settlers' link to what is, under the Geneva Convention, illegally occupied land.

The third geographical misrepresentation concerns Palestinian immobility, and is perhaps the most complex. Since the start of the second intifada, the already limited movement of the Palestinians has become even more restricted, yet the full effects of barricades, bypass roads, checkpoints, security zones, curfews, road closures, and travel permits are not fully reported. While individual aspects of this network – such as checkpoints or curfews – may be shown, they are never revealed in their totality as a system which confines people in their homes, leaving them unable to attend schools, universities, or workplaces. Ironically, in fact, many North Americans may have exactly the opposite image of Palestinians. Stephen Prince's study of Hollywood representations after the Persian Gulf War shows that the people of the Middle East are depicted as an enemy which "occupies no terrain specifiable on a map's coordinates but is rather a hazy, nebulous, threatening Other;"[34] in other words, the Middle Eastern "enemy" is depicted with limitless boundaries to commit "terror," and vast powers of movement and subterfuge, an image that is even more pervasive after the events of September 11. And now, as the media attempts to equate Palestinian protesters and PLO leaders with members of the Al-Qaeda network,[35] the true restriction of the Palestinian people becomes even less apparent, lost to an image of the "international" terrorist.

These layers of obscurity around the relationship of Palestinians to the land of Palestine are dense and seemingly deliberate, but in *Frontiers of Dreams and Fears* Masri employs powerful visual strategies to reilluminate that relationship and reveal the media's powerful "lexical weapons." The first of these visual strategies is a straightforward corrective to the absence of maps. Masri uses maps throughout the film, both as a pedagogical tool for audiences and as a visual symbol of the connection between Palestinians and the land. The initial and most prominent map appears within the first two minutes of the film. Fittingly, this map and the people signified on it undergo change and movement in a series of steps. In the first step, a map shows the historical shift from Palestine in 1948, before the Nakba, to its division into Israel, the West Bank, and Gaza. In the second, the movement of the girls' grandparents out of Palestine and into the West Bank and Lebanon is traced with arrows. Finally, the girls' birthplaces in Shatila Camp and Dheisheh Camp are located on the map. Though simple, this sequence clearly illustrates the original expulsion of the Palestinians and explains the girls' refugee status. It also suggests the limited space on which Palestinians now live, a suggestion reinforced photographically by the wide pan of the crowded buildings of Shatila in the following shot. But maps make at least two more significant appearances in the film. In the first of two closely linked scenes, Manar and her friends research the location of Mona's village. In order to find it, they take down a large, framed map entitled "Palestine, 1948" from the walls of

the family home. In a follow-up scene, the girls plan the journey Manar will take to reach Mona's village of Saffouri. A close-up shot converges on the map and follows the girls' hands as they trace the route and, together, recite the names of the towns and regions Manar will pass through. The initial scene, in which the family map is framed and publicly displayed, presents the land as both treasured memory and a source of identity; the second scene, uniting the map and the girls' hands, implies a physical connection to the land, a connection that appears in many Palestinian narratives. In her meditative essay "Yaffawiyya [I am from Jaffa]," for example, Souad Dajani asks "Are the sights, sounds and smells of Jaffa encoded in my genes?"[36] –a question that suggests a connection to the terrain that is historic, familial, even bodily.

Masri's second visual symbol – the heavily guarded barbed-wire fence that separates Lebanon from Israel – is depicted in three major scenes throughout the documentary, and evolves into a potent and complex representation of Palestinian refugees' longing for the land, restricted movement, and familial separation. The first of these scenes is a celebratory one, in which Mona and her peers arrive at the border just after the Israeli evacuation. Mona, ecstatic, declares that it is the first time she has ever seen Palestine. Much of this hopeful scene focuses on groups on the Lebanese side dancing and singing; seeing the land for the first time produces a joyous, kinesthetic reaction. The second scene is made up of a series of vignettes. Families reunite, kissing, hugging, and holding hands. The two groups of children from Shatila and Dheisheh Camps meet and discuss their lives, joking, flirting, and searching for common ground. Gifts – watches, fruit, t-shirts, necklaces, bread – are exchanged. Yet each of these joyful encounters holds a visual paradox; the routine acts of affection between friends and family are punctuated by the fence, which restricts movement and defers the attainment of union. The final scene, after the start of the intifada, is the darkest. A young girl looks at the border and cries, asking, "Is this the fence separating us?" A montage of hands is shown gripping the rolls of barbed wire and, this time, the reunions are met with an anguish that causes people to cry, yell, even faint. In the progression of these scenes, the fence becomes a symbol loaded with the weight of separation from land and from others, producing not just grief but a visceral, bodily reaction. We are taken back to the start of the film in which Mona announces, "I don't want anyone to shut me in," snapping her hands shut for emphasis, a gesture and a sentiment which reinforce the confinement and separation experienced by many so Palestinian refugees, yet so rarely acknowledged in the mainstream media.

Conclusion

"In this country, we all get filmed," says filmmaker Azza Al-Hassan in her experimental documentary *News Time*. "Cameras are running all the time, recording every move we make. Camera people come from all over the world. From France, Italy, Germany and other places. They say we make good news." Palestinian refugees have much to struggle with, politically and economically, but how to counter this callous foreign insistence that Palestinians "make good news" is surely a central question. As Michket Krifa suggests, one solution is the production of uniquely Palestinian images. And Palestinians have shown there are many ways to do this. In *News Time*, after commenting on the constant presence of the media, Al-Hassan declares, "Still, we try to look our best," and follows with a montage in which ordinary Palestinians primp and preen before having their picture taken in front of various "exotic" backdrops. A similar send-up is used in Sobhi Al-Zobaidi's mock documentary *Looking Awry*, in which American television producers in Jerusalem search for perfectly framed shots of a mosque, synagogue, and church, even as the second intifada erupts in another part of the city. This ironic impulse is an important tool in deflating the power of the mainstream media to control the images and lives of Palestinians, but there are other methods too. In her documentary about the first intifada, *Children of Fire*, Mai Masri includes numerous scenes in which she is forced to turn off her camera by Israeli soldiers, revealing the fact that only some views of the uprising make it to the screen. And in the final sequence of *Chronicles of a Disappearance*, Elia Sulieman suggests the very problem of Palestinian apathy to the importance of media images, as a couple sleeps in front of a television screen flying the Israeli flag and playing the Israeli anthem.

All of these various representations – whether verbal or visual, satirical or direct – are necessary attacks on an institutionalized media that has routinely misrepresented Palestinians throughout the course of the second intifada. And their variety is essential. Edward Said, still one of the few to comment on a unique Palestinian cultural presence, says in an interview with Salman Rushdie, "There are many different kinds of Palestinian experience, which cannot all be assembled into one. One would therefore have to write parallel histories of the communities in Lebanon, the occupied territories, and so on. . . . It is almost impossible to imagine a single narrative."[37] Plurality, then, is the key to Palestine, as shown in the new variety and energy of Palestinian filmic voices. Amongst such voices, *Frontiers of Dreams and Fears* is an important contribution. It is, in Masri's words, a "lyrical" attempt to counter the mainstream media's powers of representation with a combination of symbolic visuals and the voices of that most

under-represented group, adolescent girls. With an intelligence that vibrates with emotion, the film shows the girls addressing the most urgent issues of Palestinian refugees – homelessness, poverty, violence, family disintegration – in a way that both underlines the loss and affirms the possibility of a changed future. Bringing to the surface suppressed memory, imagination, and longing, it enters new narratives in the changing frontiers of Palestine.

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Security Council Resolution 1325: Practice and Prospects

Reem Bahdi

Abstract

United Nations Security Council Resolution 1325 calls for a more active role for women in the prevention and reconciliation of conflicts. Focusing on the Palestinian Right of Return and the work of a feminist organization called the Jerusalem Link, this paper examines Resolution 1325's premise that women can make a unique contribution to peace building. As "transfer" or the ethnic cleansing of Palestinians from the West Bank and Gaza looms on the horizon, scholars, advocates, and policy-makers must pay more attention to the work of women peace-builders because they might be able to help chart a path towards a real and just solution on seemingly intractable issues such as the Right of Return.

Résumé

La résolution 1325 du Conseil de sécurité des Nations Unies recommande un rôle plus actif pour les femmes dans la prévention des conflits et la recherche de la paix et de la sécurité. Cet article se penche sur la question du Droit au retour des Palestiniens ainsi que sur le travail accompli par une organisation féministe du nom de Jerusalem Link, et étudie la prémisse de la résolution 1325, qui présume que les femmes sont capables d'apporter une contribution unique au maintien de la paix. Alors que pointe à l'horizon le « transfert » ou, purification ethnique des Palestiniens de Cisjordanie et de la bande de Gaza, chercheurs, défenseurs et responsables politiques se doivent de porter plus d'attention au travail des femmes pour la consolidation de la paix, car elles pourraient très bien pouvoir contribuer à l'élaboration d'une voie menant vers une solution réelle et juste aux questions d'apparence insoluble, comme par exemple celle du Droit au retour.

On October 21, 2000, the United Nations Security Council adopted Resolution 1325 to promote a more active role for women in the prevention and reconciliation of conflicts. Resolution 1325 calls for "equal participation and full involvement of women in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution."[1] This paper examines Resolution 1325's premise that women can make a unique contribution to peace building while focusing on one of the most contested aspects of the Israeli-Palestinian conflict, the Palestinian Right of Return.

Not surprisingly, the Palestinian Right of Return represents a hard case for Security Council 1325. Debates over the Right of Return have generated controversy and anger on both sides of the conflict. Palestinians contend that refusal to recognize the Right of Return forms part of a consistent pattern of Israeli colonialization and determination to deny Israel's responsibility for massive refugee suffering.[2] Israelis tend to argue that Palestinian insistence on the Right of Return represents a cynical plot to destroy Israel through the back door.[3] If women can help build the conditions necessary for peace and coexistence in the Israeli-Palestinian context, then they should be able to live up to the expectations of Security Council Resolution 1325 in other contexts.

This paper draws on interviews and discussions held with Israeli and Palestinian women in August 2002.[4] Emphasis is placed on a joint Israeli-Palestinian initiative called Jerusalem Link. Jerusalem Link's work with respect to the Right of Return suggests that, despite the odds, women can make and have made a unique contribution to shaping coexistence with and understanding of the "other." Jerusalem Link's efforts not only point to the possibility of an alternative framework for approaching the Palestinian Right of Return, but also suggest the efficacy of Security Council Resolution 1325.

Part I of this paper provides a brief overview of Jerusalem Link's work on the Palestinian Right of Return. Part II delineates the reasons why the women of Jerusalem Link believe that they have succeeded in continuing dialogue on the Right of Return despite the failure of the region's politicians. Part III extrapolates from the work of Jerusalem Link to draw conclusions about the nature of Security Council Resolution 1325. Ultimately, with the Palestinians sitting on the precipice of yet another refugee crisis under the current Israeli administration, scholars, policy analysts, or citizens concerned with the Middle East can no longer afford to ignore the work of Jerusalem Link or the Security Council's call for women's equal participation in promoting peace and security.

I. Jerusalem Link's Unique Contribution Regarding the Right of Return

Following a series of meetings first convened in Brussels in 1989, Jerusalem Link was formed in 1994 as a coordinating body of two independent women's centres: Bat Shalom, which is located in Israel, and the Jerusalem Center for Women, which is located in Palestine. Although each organization is autonomous and focuses on its own national constituency, the two organizations run joint programs promoting peace, democracy, human rights, and women's leadership. On August 2, 1996, the two organizations issued the "Jerusalem Link Declaration of Principles." The Declaration sets out the organizations' joint commitment to certain principles, including recognition of the right of self-determination for both Israelis and Palestinians, the sharing of Jerusalem as two capitals for two states, recognition of the illegality of Israeli settlements, respect for international law, and the involvement of women in the development of a just and viable peace between the Israeli and Palestinian people.[5] In its original formulation, the "Jerusalem Link Declaration of Principles" made no mention of the Palestinian Right of Return.[6]

Inevitably, however, the two organizations embarked on the long, painful, and often frustrating path of discussing the Right of Return. Levels of trust between the Jerusalem Center for Women and Bat Shalom reached an all-time low in 2001 and early 2002.[7] Although the organizations maintained some level of communication, they came close to ending their long-standing relationship. Despite their best efforts, the women of Jerusalem Link were not able to come to full agreement on the Right of Return. Instead, they articulated their differing positions in the "Jerusalem Link Declaration of Principles." The Declaration states the following with respect to the Right of Return:

> Palestinian: Israel accepts its moral, legal, political and economic responsibility for the plight of Palestinian refugees and thus must accept the Right of Return according to relevant UN resolutions.
>
> Israeli: Israel's recognition of its responsibility in the creation of the Palestinian refugees in 1948 is pre-requisite to finding a just and lasting resolution of the refugee problem in accordance with relevant UN resolutions.[8]

While the Palestinian position clearly sets out the Right of Return as an aspect of corrective justice, the Israeli formulation stops short of accepting Israel's "moral, legal, political and economic responsibility" for the creation of the Palestinian refugee problem in 1948. The Israeli position, however, does acknowledge that Israel had a role to play in driving out the refugees. Moreover, while the Israeli version acknowledges the need for a just and lasting resolution, it does not explicitly recognize the Right of Return as an appropriate remedy, let alone *the* appropriate remedy.

Although the Right of Return has challenged the relationship between Israeli and Palestinian women's organizations, there are fundamental features of Jerusalem Link's discussions that distinguish their stance from those adopted by their societies at large. Perhaps most obviously, the "Jerusalem Link Declaration of Principles" moves beyond the simplistic and politically convenient claim that all Palestinians want to "drive Jews into the sea"[9] and seeks, instead, to see Palestinians as human beings with claims to equal rights and dignity. To this end, the Declaration acknowledges the wrongs done to Palestinian refugees in 1948 and further recognizes that the state of Israel bears some level of responsibility for those wrongs. In the same vein, the Palestinian formulation, while insisting on the Right of Return for Palestinian refugees, simultaneously reaffirms the rights of both peoples to self-determination and peaceful coexistence. For example, article 1 of Jerusalem Link Declaration of Principles recognizes "the right to self-determination of both peoples in the land, to the establishment of a Palestinian state alongside Israel on the June 4, 1967 boundaries."

Seemingly, against all odds, members of Jerusalem Link have remained committed to continuing the dialogue and changing the current orientation towards violence that pervades the political and popular discourse within their respective societies. The commitment to reaching a just solution through words rather than weapons can be attributed in part to the sheer determination of the individual women involved in the process. The women of Jerusalem Link also insist, however, that their dialogue must be structured in gendered ways that both reflect and reinforce the manner in which women tend to interact with each other. As Terry Greenblatt of Bat Shalom put it:

> [w]omen's characteristic life experience gives us the potential for two things: a very special kind of intelligence, social intelligence, and a very special kind of courage, social courage. We have developed the courage to cross the lines of difference drawn between us, which are also the lines drawn inside our heads. And the intelligence to do it safely, without a gun or a bomb, and to do it productively. And most importantly, we are learning to shift our positions, finding ourselves moving towards each other, without tearing out our roots in the process. Even when we are women whose very existence and narrative contradicts each other, we will talk – we will not shoot.[10]

Although they recognize that they have not always been true to these ideals in the past, the women of Jerusalem Link indicate a willingness to examine and re-examine themselves at the same time that they question their partners in dialogue. In particular, the women prove willing to examine themselves rather than simply or exclusively blaming others for breakdowns in both trust and communication.[11]

In addition to their willingness to engage in introspection, the women of Jerusalem Link have recognized that a power imbalance characterizes the relationship between Bat Shalom and the Jerusalem Center for Women. They have sought to identify how such an imbalance might interfere with their own negotiations and interactions.[12] Accordingly, they do not seek to "negotiate" in the traditional adversarial, zero-sum model that stresses "what I win from you is my gain." Again, the path to this realization has not always been easy. Although they have not fully addressed the power imbalance that exists between them, the women of Jerusalem Link are increasingly aware of the way in which the power imbalance may inhibit the development of long-term, meaningful solutions.[13] They understand the need to develop lasting agreements based on recognized principles that strive to have due regard for the common humanity of both peoples.[14] Perhaps Maha Abu-Dayyeh Shamas expressed these points best when she reminded representatives of the United Nations Security Council that:

> [t]he two parties, Palestinian and Israeli are not equal, and should not be left on their own, otherwise the imbalance of power will dictate the process, which characterized the Oslo negotiation process that we are now witnessing the bloody consequences of.
>
> Honourable representatives, peace is made between peoples and not between leaders. A process that should lead to a political solution that is sustainable and consequently permanent should be just, and should not be left to the confines of generals…[15]

When seen in light of their willingness to examine themselves and the power imbalances that exist between them, the fact that Jerusalem Link includes two principles, one Israeli and the other Palestinian, represents an expression of strength, commitment, and perseverance rather than an admission of despair. The two formulations reflect an understanding of the importance of accepting the other narrative as a starting point for authentic dialogue and meaningful negotiation. As Sumaya Farhat Nasser explained:

> [w]omen understand the importance of narrative and that they may begin with two different narratives. They have learned to listen with compassion and understand that others have the right to make mistakes. They have learned to bear (but not accept) painful words. Women do not force dialogue.[16]

Women's ability to continue discussions around the Right of Return is neither a chimera nor is it an inexplicable phenomenon.[17] On the contrary, it has both theoretical and practical roots that are inextricably linked and sometimes difficult to disentangle, but that are nonetheless knowable and worthy of analysis. Anyone interested in finding a just solution for Palestinian refugees must ask how women can remain committed to continuing dialogue in the face of rising violence and intransigence around the Right of Return. The women of Jerusalem Link begin their discussions around the Right of Return with a few key, shared assumptions.

II. Shared Assumptions

A. Human Rights Framework

First, the women of Jerusalem Link adopt human rights and justice as their prevailing metaphors.[18] Their discussions, therefore, take place within a framework that recognizes justice as a prerequisite to any lasting peace and that further requires individuals and states to take responsibility for their actions. In this regard, women see the importance of giving effect to human rights claims even though they may not necessarily or immediately agree on the substantive content of those claims. Accordingly, "Jerusalem Link Declaration of Principles" recognizes that:

> [t]he realization of political peace will pave the way for mutual understanding, trust, genuine security, and constructive cooperation on the basis of equality and respect for the national and human rights of both people.[19]

Women understand that human rights represent those things that recognize, respond to, and protect dignity and equality, and that these qualities are dialogical in nature. Any attempt to suppress the rights of others ultimately amounts to a personal tragedy[20] and a devaluation of hu-

man rights generally.[21] Thus, although the women's groups may not have developed a shared set of principles in relation to the Right of Return, they nonetheless remain committed to continuing their efforts in light of the simple fact that they are committed to negotiating towards justice, not injustices.

Significantly, the women of Jerusalem Link refuse to isolate the question of Palestinian refugees from the larger context of human rights issues that have plagued the Israeli-Palestinian conflict. Bat Shalom expressed this point in a public letter to the Palestinian people published in *Al Qud's*, a major Palestinian newspaper, on June 4, 2002:

> We call for the removal of Israeli settlements, for Jerusalem to serve as two capitals for two states, and for the acknowledgement by Israel of its part in creating the refugee problem and a mutually agreed upon resolution of the problem grounded in relevant UN resolutions. We insist that our humanity and commitment to justice not only connect us, Israelis and Palestinians, but also impel us to jointly continue our struggle for a just peace.[22]

By contrast, the mainstream discourse around the Right of Return tends to trivialize the rights claims of Palestinian refugees.[23] At least some Israelis invoke Palestinian refugees as objects of sympathy rather than bearers of rights.[24] Others weave the Palestinian Right of Return into a more hardened political discourse that aims to dehumanize Palestinians and their quest for self-determination.[25] The possibility that the human rights of Palestinian refugees might have been violated and that the refugees have valid human rights claims barely enters into either of these calculations if at all.

Bat Shalom's position on Palestinian refugees stands in marked contrast to both the official and mainstream Israeli discourse on the Right of Return because it acknowledges the plight of the Palestinian refugees while invoking concepts of "humanity and justice." For this reason, a letter by Bat Shalom to the Palestinian people was well-received by the Jerusalem Center for Women even though it may have fallen short of meeting the Center's full expectations on the Right of Return. Bat Shalom's letter ultimately reflected the organization's willingness to understand the refugee issue as a long-standing and real human rights tragedy rather than a "faux" issue that Palestinian's representatives invented to circumvent the negotiations with Israel.[26]

B. Gender and Security

Jerusalem Link adopts a gendered, wholistic definition of security that informs initiatives across issues, including the difficult question of the Right of Return. The women of Jerusalem Link implicitly reject the conventional theoretical assumptions about the meaning and nature of "security" that inform much of the popular and political debate in the region. Security, especially in Israeli society, is traditionally understood as military security and freedom from foreign threats, both real and perceived.[27] Indeed, to the extent that they recognize Palestinian refugees were driven from their homeland, Israeli historians tend to justify the expulsion of Palestinian refugees in the name of Israeli state security.[28]

Women who find themselves embroiled in wars and conflict across the globe have adopted an increasingly skeptical stance towards the military's ability to provide security in any meaningful sense.[29] This is true for several reasons. In the first place, women understand that "security" means more than freedom from foreign attack. "Security" also encompasses such things freedom from domestic violence, the ability to feed one's children, and the right to adequate, affordable housing. Israeli women, for example, question whether the military will in fact generate greater security for Israeli society when, as the Israeli military budget spirals out of control, women are effectively told that there is no money in the budget for social services because the military has eaten it all.[30] The emphasis on military security actually undercuts women's security in other important spheres.

Traditional understandings of security derive from Thomas Hobbes's social contract theory.[31] Hobbes argued that free, rational individuals prefer order to chaos and will trade in their freedom as a means of overcoming chaos and obtaining security.[32] Women's peace-building often challenges the Hobbesian premise that security and human rights must be traded off against each other. Women work under the premise that "security" can be achieved through, as opposed to limited by, an emphasis on human rights. In contrast to the traditional Hobbesian model, leaders in the women's peace-building movement understand the efficacy of responses based on horizontal social bonds rather than vertical state powers.[33] They recognize that security is not a purchasable commodity but a relationship that must be cultivated.[34]

For the women of Jerusalem Link, the recognition that security is not a commodity requires them to tackle seemingly intractable political and social issues, like the Right of Return, by first recognizing the logic and efficacy of building lasting relationships with the individuals and communities that affect one's life. Increasingly, the women of both Israel and Palestine recognize that their fates are intimately linked with the fates of Palestinian refugees, most of whom live in squalid refugee camps sprawled across the Middle East. While the current Israeli leadership aims to build a security wall between the two peoples, the women of Jerusalem know that Israeli and Palestinian lives cannot be segregated in this way because in the end, security is built,

not with bricks and mortar, but through negotiated agreements that respect the dignity and worth of all parties involved.[35] To this end, "Jerusalem Link Declaration of Principles" acknowledges that any agreement that dismisses the suffering of the Palestinian refugees is neither legitimate nor sustainable in the long term.

Jerusalem Link's normative shift around the meaning of security also challenges the premise that security analysis should remain specialized in the hands of the military and intelligence services that have a bias in favour of military-style solutions. [36] Women peace-builders around the globe appreciate that military-style solutions may aggravate security threats rather than ameliorate them, and that such professed solutions limit the national capacity to consider creative responses to crises.[37] For this reason, the women of Jerusalem Link worry that Israel's leaders are promoting a new "transfer" policy.

Perhaps one of the clearest and most disturbing indications of the growing political and popular divide between Israelis and Palestinians lies in the increasingly popularity of "expulsion" or "transfer" among Israeli politicians and the general populace.[38] These terms represent the politically correct alternative to ethnic cleansing or the forced expulsion of Palestinians from the West Bank and Gaza. Even some Palestinian women who are committed to ongoing dialogue and who have dedicated their lives to finding common ground with Israel see "transfer" looming on the horizon.[39] The women of Jerusalem Link know that "transfer" will not only signal the moral degeneration of the state of Israel, but will also create another generation of disenfranchised and despairing Palestinian youth, who will seek suicidal revenge against Israelis for the ongoing and escalating violence wrought upon Palestinians.[40] Fearful of the rising spectre of "transfer" and escalating violence, both Israeli and Palestinian women have rallied around the slogan, "We have tried war already."[41]

Globally, women's commitment to solutions beyond the military derives from their knowledge that they have been and will continue to be excluded from decision making when the military steps in.[42] Some Israeli and Palestinian women, at least, have arrived at the same realization. In Israel, a movement called "Women Refuse!" aims for the demilitarization of Israeli society and calls for women to stop cooperating with the Israeli military government and its policies:

> Women Refuse calls upon all women to stop being traditionally silent and to dare to raise their voices by opposing their loved ones' participation in military action. This new form of protest opposes a deeply rooted national tradition of unquestioned support for the Israeli military…It calls on the Israeli public to refuse to be the enemy and to develop a new national dialogue. By starting within our homes and then moving out into wider public domains, Women Refuse is attempting to create a new national agenda.

Palestinian women find their political participation has diminished in the wake of the second Intifada in part because this Intifada, as opposed to the first, regards armed struggle as the source of freedom.[44] While Palestinian women remain divided on the efficacy of adopting a military-style form of resistance to Israeli occupation, they nonetheless tend to recognize this tendency excludes them from public or political participation.[45]

C. Understanding Structural Violence

Finally, women have proven themselves able to continue the difficult dialogue around the Right of Return because they conceptualize violence through their own vulnerability. They understand that the violence in their homes is intimately connected to violence on the streets. They know violence not only as the act of individuals but as a structured event that grows out of social institutions and organizational models. In other words, women know and have felt the hand of structural violence. Occupation in all its manifestations has taken a heavy toll on women in both Israeli and Palestinian societies. Although the necessary research has not been conducted to determine the full effects of occupation and militarization on women in both Israel and Palestine, it is clear that "women suffer most from the conflict."[46] This paper can only provide a glimpse into the daily lives of Israeli and Palestinian women.[47]

In Israel, the Sharon government remains committed to an expensive military machine while the Israeli economy suffers its deepest recession in fifty years.[48] Women suffer disproportionately because they traditionally have not enjoyed equal status with men within Israeli society. For example, the United Nations Committee on the Elimination of Discrimination against Women, in its last review of Israel, noted with concern that a marked disparity existed between the average earnings of women and men in many sectors, that a large number of women were arrested for prostitution, and that violence against women occurred frequently, owing in large measure to traditional ideas of the roles of women within Israeli society. The Committee also noted with concern that non-Jewish women had worse living conditions than Jewish women. They received a lower level of education, participated less in the government service, and occupied limited decision-making posts.[49]

In Palestine, women and their babies die because they are not permitted by Israeli soldiers to pass through checkpoints so that they can receive necessary medical treatment at hospitals.[50] Women and girls are also sexually assaulted

by Israeli soldiers with impunity.[51] Palestinian women see their children shot, wounded, and traumatized by the occupying Israeli army.[52] In Gaza, the concept of honour, previously associated with land, is now increasingly tied to women's virginity within Palestinian society.[53] As a result, so called "honour crimes" have risen over the last decade.[54] Indeed, domestic violence in general has also risen dramatically in both Israeli and Palestinian society.[55]

In addition, women are further traumatized by the violations, indignity, and cruelty suffered by their family members as a result of occupation. These violations are rarely acknowledged outside of Palestinian society. As one leading Israeli journalist put it, "cruelty against Palestinians has grown gradually and this means that it is accepted within Israeli society."[56] For example, one woman recounted a chilling story about the siege of Jenin by the Israeli army. Israeli soldiers encircled a community centre and ordered all the men to leave the building with their hands in the air. They then ordered all the women and children to leave the building in a separate group. However, the Imam of the community remained behind with the women and children so that he could assist his disabled elderly mother exit the building; he therefore did not leave with the men when ordered out of the community centre by the soldiers.[57] Upon seeing the Muslim cleric, a number of Israeli soldiers began to laugh and joked that he clearly did not know if he was a man or a woman. They ordered the cleric to strip naked and then forced him to carry his elderly mother out of the building into a waiting vehicle that was full of women. This intentional infliction of mental anguish and humiliation upon the cleric amounts to psychological torture[58] and has produced untold anguish for the cleric and his family. His wife, who was forced to witness the incident, remains traumatized.

Feminist advocates around the world know that although they may appear unrelated, forms of structural violence may be intimately connected.[59] In Israel and Palestine, the violence of occupation, the Intifada, and Israeli military repression merge with the violence visited upon women in the so called "private" sphere and thrive upon each other. As Maha Abu-Dayyeh Shamas explains, women, because they are most vulnerable to violence, tend to see the spectrum of domination more readily and tend to appreciate that domination cannot produce lasting coexistence:

> Policies based on mistrust and domination are not sustainable, and we women know this – we know it too well. Such policies are not sustainable in the private sphere, nor are they sustainable in the public sphere.[60]

Because women have experienced structural violence, women are more willing to see and question the structural violence committed against Palestinian refugees in the name of state security. They tend to be skeptical about the claim that it was necessary to drive the refugees from their historic homes in the name of Israel's national security.[61] They know that the violence that was visited upon the refugees decades ago continues to haunt the state of Israel, and continues to affect the lives of both Israeli and Palestinian women who live in the region in tragic yet ultimately predictable ways. In short, women understand that the violence favoured by politicians and military against the "other" rebounds onto their own societies and that women, as a result, are disproportionately disempowered and harmed.[62] In the end, though the Palestinian refugees may have been driven out of their homes to foreign lands, the violence that drove them out remains and continues to haunt those who live in both Israel and Palestine. Neither religion nor nationality acts as a complete shield to the violence born of past wrongs.

Disproportionately linked by their gender through their vulnerability to violence, the women of Jerusalem Link also understand that the bonds of gender can prove a source of creativity, energy, humanity, and hope.[63] In this regard, Jerusalem Link represents a microcosm of a larger movement within Israel and Palestine, which seeks to construct gender in general and motherhood in particular as a bridge to help span divides, including those built on nationality and religion.[64] As women throughout the ages have turned to their motherhood status to help subvert the status quo, individual women in both Israel and Palestine recognize that they are connected by motherhood even though they may be divided by nationality, religion, or other elements of identity.[65]

This possibility of seeing and sympathizing with the "other" through the lens of motherhood is eloquently and passionately expressed in the wounded yet powerful words of a Palestinian mother who wrote:

> I wept today and you will weep tomorrow
>
> Maybe you've wept for your husband and
> Tomorrow you'll weep for your son.
> Let me tell you,
> I've already wept for both my son and my husband
>
> I wish I could walk into every house around carrying within me
> Anguish and heartache and mourning.
> Come mother of Ibrahim and mother of Itzhak,
> Let's weep together, you and me.
>
> Longing for our loved ones unites us, you and me.
> Motherhood unites us, you and me.
> The heart aches.

Let's remember if in life there is no place for us on this earth,
We have place enough under it.
Let's pray together mother of Ibrahim and mother of Itzhak.

I and you are the conscience.
I and you are the love and bridge.
I and you are the bridge to truth.[66]

These sentiments of Palestinian motherhood find their echo in the words of an Israeli mother whose daughter was killed by a suicide bomber:

In the kingdom of death,
Israeli children lie beside Palestinian children,
soldiers of the occupying army beside the suicide bombers,
and no one remembers
who was David and who was Goliath.[67]

III. Gender and Peace-Building: Challenges and Prospects

Women's groups in Israel and Palestine face formidable obstacles. Women peace-builders represent voices in the wilderness in an increasingly polarized political and popular landscape. Both Bat Shalom and the Jerusalem Center for Women oscillate between maintaining legitimacy within their own societies and seeking to press the public discourse.[68] They cannot stray too far from their respective public opinion or they risk alienating most of their supporters. Yet, as agents of change, they must seek to challenge popular perceptions and point to barely imaginable alternative ways of seeing and doing. As Terry Greenblatt of Bat Shalom put it, "women's groups dance between acceptance and challenging our own societies."[69]

Some might dismiss "Jerusalem Link Declaration of Principles" as a trivial or meaningless document because it was not drafted in the halls of power. They might argue that the dialogue nurtured between Bat Shalom and the Jerusalem Center for Women represents an easy accomplishment because not much rests on such dialogue. This objection, however, misses the mark in part because the relationship between Bat Shalom and the Jerusalem Center for women has proven to be anything but easy. The women of Jerusalem Link place themselves at personal, professional, and political risk by signing the Declaration and taking a public stance in support of the values articulated therein.[70] They have been personally threatened and denounced as traitors in their own societies.[71] Israeli women in particular saw many of their allies within the mainstream peace movement and political parties, including some women, take a dramatic turn to the political right with the outbreak of the Second Intifada.[72] Women's peace groups have also seen funding from progressive Jewish organizations around the world dry up since September 11.[73] Palestinian women, for their part, face increasing political isolation in the face of rising violence associated with the Second Intifada.[74]

Moreover, as the Oslo process has demonstrated, the solutions of military and political leaders must have some resonance within civil society. Accords cannot lead to peace or coexistence on their own. One must also be attentive to the reality "on the ground."[75] The women of Jerusalem Link clearly appreciate that peace-building must take place at the level of civil society. They are not escapists or idealists. They are advocates who are intimately connected to and concerned about their societies. Terry Greenblatt of Bat Shalom emphasized, "We are struggling to maintain credibility in an increasingly divided political situation. The key question for us is 'how do we as women provide direction out of here?'"[76]

Yet, the women of Jerusalem Link cultivate empowerment rather than power.[77] This fact should emphasize their political legitimacy and underscore the viability of their efforts to develop an alternative political discourse. In the end, the official negotiations between Israelis and Palestinians failed in part because the leaders proved more concerned about securing power through elections than remaining adequately attentive to those voices muted by the political process. The women of Jerusalem Link have demonstrated that it is possible to frame discussions around the Right of Return that recognize the narratives, hopes, and fears of both the Israeli and Palestinian people. While they have yet to reach full agreement, their efforts at developing an alternative discourse around the Right of Return reinforces that agreement between negotiators and political leaders may be necessary but not sufficient for political success.

Undoubtedly, there are lessons to be drawn from Jerusalem Link's Declaration and the difficult path of dialogue around the Right of Return. Jerusalem Link's activities also prove significant because they help shed light on the conditions necessary to promote women's contribution to peace-building as contemplated under Security Council Resolution 1325. This resolution draws upon diverse and sometimes contradictory strands of feminist theory including cultural feminism, dominance theory, and liberal feminism. It has only just begun to attract significant attention from feminist scholars. Yet, the women of Jerusalem Link have been putting the principles of Resolution 1325 into practice for close to a decade.

Jerusalem Link's experience suggests that Security Council Resolution 1325 cannot imply a simple "add women and stir" approach to peace building. Simply seating more women at negotiating tables or within the ranks of the military will not necessarily lighten the path to coexistence and understanding. Women are already included in the military

and government decision-making processes, albeit in relatively small numbers. Yet, when they are included in the halls of power as currently constituted, women inevitably come to share in the masculine military culture. The need is to recast the military culture and recast the national military metaphors.[78] Second, negotiations must start with an understanding of the present lived realities of the refugees and an agreement over the historical context that produced the refugee problem. This need to understand history does not amount to some nostalgic desire to turn back the hands of time, but acknowledges that true understanding cannot be had without understanding of context and narratives.[79] Third, negotiations are not successful when "the winner takes all." Rather, they must aim to produce just and lasting solutions that are attentive to the stories that have been papered over and silenced by official accounts of history just as women's voices have been silenced. Finally, women are victims of war and occupation, yet they are not helpless. On the contrary, women are leaders in their communities. During times of war and conflict, they help preserve a degree of civility and their work can affirm the need for recognition of the "other's" common humanity. Resolution 1325 must not simply bring more women to the negotiating table. It must instead bring the brokers of power who sit at the negotiating table to understand the lived realities of Palestinian refugees, those whose individual and collective lives are torn asunder by conflict.

Conclusion

Jerusalem Link's success in charting a just agreement on the Right of Return is by no means guaranteed. Women have found themselves on the edge of the precipice on several occasions but nonetheless found their way back to former ground. They have learned that one cannot address the Right of Return unless one adopts a broader framework based on the principles of justice and recognition of the common humanity of Palestinian refugees. As "transfer" looms on the Palestinian horizon, scholars, advocates, and policy-makers in Israel, Palestine, and beyond must pay more attention to the work of women peace-builders because they might be able to help chart a path towards a real and just solution on seemingly intractable issues such as the Right of Return.

Notes

1. UN SC Res. 1325 (2000), adopted by the Security Council at its 4213th meeting, 31 October 2000; available online: <http://www.un.org/events/res_1325e.pdf> (date accessed: 28 February 2003).
2. See, for example, B. Abushagra, "The Palestinian Refugee Problem and the Right of Return," online: The Palestinian Initiative for the Promotion of Global Dialogue and Democracy Homepage <http://www.miftah.org/Display.cfm?DocId=1198&CategoryId=21 > (date accessed: 28 February 2003).
3. As Danny Rubinstein explains, the Palestinian Right of Return "represents, to most Israelis, the destruction of Israel because it threatens the forcibly maintained Jewish majority, or, as it is often put the 'Jewish character' of the state." D. Rubinstein, "The Return of the Right of Return," online: *Ha'aretz* Homepage <http://www.un.org/events/res_1325e.pdf> (date accessed: 28 February 2003).
4. These interviews were conducted by a cross-disciplinary team of Canadian women. The team included both Jewish and Arab women. Members of the team were Leilani Farha, Rula Sharkawi, Audrey Macklin, Reem Bahdi, Judith Weisman, Hanadi Lubani, Kemi Jacobs, Isabel Selon-Helal, and Kathy Wazana. The opinions and conclusion expressed in this paper are those of the author and do not necessarily reflect the individual or collective opinions of the women who attended this mission.
5. The full text of the "Jerusalem Link Declaration of Principles of Principles" [hereinafter "Declaration"] can be found online: Bat Shalom of the Jerusalem Link Homepage <http://www.batshalom.org/2002/The%20Jerusalem%20Link%20Declaration%20of%20Principles.htm> (date accessed: 28 February 2003).
6. The August 1996 version of "The Jerusalem Link Declaration" can be found on-line: Bat Shalom of the Jerusalem Link Homepage <http://www.batshalom.org/JerLinkDecl.htm> (date accessed: 28 February 2003).
7. Interview of Terry Greenblatt, Executive Director of Bat Shalom (5 August 2002), Jerusalem [hereinafter "Interview, Greenblatt"]; Interview of Amneh Badran, Executive Director of the Jerusalem Center for Women, Jerusalem (5 August 2002), Jerusalem [hereinafter "Interview, Badran"].
8. Declaration, *supra* note 5.
9. Interview, Greenblatt, *supra* note 7: "We are attempting to produce an alternative discourse to challenge the prevailing Israeli perception that Palestinians are all maniacs who want to drive us to the sea."
10. Terry Greenblatt also made this point in a speech to members of the United Nations Security Council. Terry Greenblatt, "Terry Greenblatt, Director of Bat Shalom, Speaks Before UN Security Council," online: Coalition of Women for Peace Homepage <http://www.coalitionofwomen4peace.org/articles/terrybeforesecuritycouncil.htm> (date accessed: 28 February 2003 [hereinafter "Greenblatt, Security Council"].
11. Interview, Badran, *supra* note 7; Interview, Greenblatt, *supra* note 7. See also the Jerusalem Center for Women, "Summary Annual Report 2001," online: The Jerusalem Center for Women Homepage <http://www.j-c-w.org/annual_report_2001.htm> (date accessed: 28 February 2003).
12. *Ibid.*
13. Interview, Greenblatt, *supra* note 7.
14. Several women interviewed emphasized that Israelis and Palestinians see each other through the lens of those in power; there is little personal interaction. Interview, Greenblatt, *supra*

note 7; Interview of Amira Hass (9 August 2002), Jerusalem [hereinafter Interview, Hass]; Interview of Sumaya Farhat Nasser (11August 2002), Bir Zeit, Palestine [hereinafter Interview, Nasser].

15. Maha Abu-Dayyeh Shamas, "Maha Abu-Dayyeh Shamas, Executive Director of the Jeruselum Women's Centre for Legal Aid and Counselling, to the UN Security Council," online: Margie Adam – A Woman's Music Homepage <http://www.margieadam.com/action/mashamas.htm> (date accessed: 28 February 2003) [hereinafter Shamas, Security Council]. Maha Abu-Dayyeh Shamas is also a board member of the Jerusalem Center for Women.
16. Interview, Nasser, *supra* note 14.
17. Greenblatt, Security Council, *supra* note 10.
18. Article 7 of the Jerusalem Link Declaration of Principles reads: "Respect for international conventions, charters and laws and the active involvement of the international community in the peace process are crucial to its success." Declaration, *supra* note 5.
19. Declaration, *supra* note 5 at Article 8.
20. Terry Greenblatt writes: "And perhaps the greatest fear of all, the one that lives inside my Jewish closet and that I rarely share publicly is that because I might ultimately be unable to live with so much fear and contradiction – because I fear for my family's survival, my nation's survival – that one day, possibly tomorrow, I will read another short article in the newspaper about another woman, another birth, at another checkpoint, in another city. And I will rinse my coffee cup in the sink, set it to dry on the drain – and no longer be outraged and afraid." The above statement is from the keynote presentation by Terry Greenblatt of Bat Shalom (preceded by Maha Abu-Dayyeh Shamas of the Jerusalem Center for Women, Women's Centre for Legal Aid and Counseling) at A Day of Dialogue: A World of Women for World Peace. The day was organized by Congresswoman Eddie Bernice Johnson, and held at the Library of Congress on May 9, 2002. The presentation is available online: <http://www.beyondblame.info/organizations/jerusalemlink/gr eenblatt.html> (date accessed: 28 February 2003).
21. April 2002 Joint Declaration, available online: <http://www.batshalom.org/2002/DECLARATIONS%20&%20POLITICAL %20STATEMENTS> (date accessed: 28 February 2003).
22. Bat Shalom, "A Public Letter to the Palestinian People," online: Bat Shalom of the Jerusalem Link, <http://www.batshalom.org/2002/jerusale-link_current_activities.htm> (date accessed: 28 February 2003).
23. See, for example, M. Bard, "The Palestinian Refugees," online: Bat Shalom of the Jerusalem Link, <http://www.us-israel.org/jsource/History/refugees.html> (date accessed: 28 February 2003). Bard describes the Palestinian people largely in military terms.
24. See, for example, the interviews conducted by E. Farnsworth, "Debating the Right of Return," online: PBS Homepage <http://www.pbs.org/newshour/bb/middle_east/july-dec00/palestinians_8-29.html> (date accessed: 28 February 2003).
25. See, for example, A. Afak, "What Right of Return?" online: IsraelForum.com Homepage <http://www.israelforum.com/board/showthread.php3?s=e6fe139 353059acfbd57d92b9472ebc0&postid= 39793#post39793> (date accessed: 28 February 2003). Abu Afak quotes Alan Dershowitz.
26. A. Gresh, "The Middle East: How the Peace Was Lost," online: *Le Monde Diplomatique* Homepage <http://mondediplo.com/2001/09/01middleeastleader> (date accessed: 28 February 2003). Gresh observes that:

    > [f]or the overwhelming majority of Israelis, when Yasser Arafat rejected the 'generous offer' made at the [Camp David] summit, he 'exposed his true face', as Ehud Barak put it. And by supporting Arafat, the Palestinian people were confirming their barely-concealed intent to destroy Israel.

27. R. Hiller, "Chipping Away at the Core," online: New Profile Homepage <http://www.newprofile.org/english/> (date accessed: 28 February 2003). Hiller talks about her experience of working with groups that challenge two of Israeli society's deep foundations: militarism and patriarchy. See also L. Raz, "From the Cradle to the Grave," online: New Profile Homepage <http://www.newprofile.org/english/> (date accessed: 28 February 2003). Raz explains how ideals of heroism, strength and security, conspire to create an "inhumanly" militarized existence for Israeli men.
28. See, for example, B. Morris, "A New Exodus for the Middle East," online: Guardian Unlimited <http://www.guardian.co.uk/israel/comment/0,10551,803417,00 .html> (date accessed: 28 February 2003).
29. B. Muthien, "Women's Security Is Human Security: Southern Dimension," online: Copenhagen Peace Research Institute Homepage <http://www.copri.dk/ipra/Conf-papers/muthiengenderedsecur ity.doc> at 6 (date accessed: 15 January 2003).
30. In May 2002, Ariel Sharon introduced an austerity package of tax increases and welfare cuts designed to help pay for Israel's military operations against the Palestinians. See "Sharon Gets Crucial Budget Vote," online: BBC News Homepage <http://news.bbc.co.uk/1/hi/world/middle_east/2001340.stm> (date accessed: 28 February 2003).
31. M. Valverde, "Governing Security, Governing through Security," in R. Daniels *et al*., eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001) at 83.
32. T. Hobbes, *Leviathan* (New York: Penguin Classics, 1968 (1651)). See especially Chapter 17, "Of The Causes, Generation, And Definition Of A Commonwealth," where Hobbes describes the Leviathan:

    > I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner. This done, the multitude so united in one person is called a COMMONWEALTH; in Latin, CIVITAS. This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence. For by this authority, given him by every particular man in the

> Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad. And in him consisteth the essence of the Commonwealth; which, to define it, is: one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence.

33. Interview, Badran, *supra* note 7. "Women have different concerns than men. Rather than speaking of traditional conceptions of security or definitions of sovereignty, women's issues relate to family and social justice."
34. Valverde, *supra* note 31 at 84, 87.
35. See, for example, "Response from the Jerusalem Center for Women," online: Bat Shalom of the Jerusalem Link Homepage <http://www.batshalom.org/2002/jerusale-ink_current_activities.htm> (date accessed: 28 February 2003).
36. See Valverde, *supra* note 31 at 87 for a discussion of the relationship between "security professionals" and true security.
37. See generally S.N. Anderlini, *Women At The Peace Table: Making A Difference* (New York: UNIFEM, 2000).
38. See, for example, Moledet's website, which proclaims:

> Moledet ("homeland" in Hebrew) is an ideological political party in Israel that embraces the idea of population transfer… Moledet has successfully raised the idea of transfer in the public discourse and political arena in both Israel and abroad, within the framework of achieving comprehensive peace in this region. Moledet is also actively involved in establishing these facts on the ground, by encouraging the emigration of displaced and hostile elements from our Land. Over the years, Moledet had worked to strengthen Jewish settlement in all parts of the land of Israel and to establish high quality of life for its residents, based on Jewish and democratic values and a true caring for the future of our State.

Available online: Moledet Homepage <http://www.moledet.org.il/english/moledet.html> (date accessed: 28 February 2003).

39. One Palestinian woman interviewed by the Canadian Women's Mission to Israel and Palestine, August 2002, said that she has already packed her family's suitcase. Others insist that there is no value in speaking about "transfer" because speaking about the issue simply gives it greater currency as a subject of legitimate "debate" in popular and political circles.
40. Interview, Greenblatt, *supra* note 7.
41. This was the message on a sign at a Bat Shalom Sukkat (Peace Tent). See Sukkat HaShalom "Rocks Land Like Messages Sent in a Bottle," online: Women Waging Peace Homepage <http://www.womenwagingpeace.net/content/whatwedo/newsevents/2hashalom.asp> (date accessed: 28 February 2003).
42. Interview of Miftah (10 August 2002), Ramallah, Palestine [hereinafter Interview, Miftah].
43. Hiller, *supra* note 27. Hiller talks about her experience of working with groups that challenge two of Israeli society's deep foundations: militarism and patriarchy. See also Raz, *supra* note 27. Raz explains how ideals of heroism, strength, and security conspire to create an "inhumanly" militarized existence for Israeli men.
44. Interview, Miftah, *supra* note 42.
45. Interview, Miftah, *supra* note 42.
46. Interview, Badran, *supra* note 7.
47. For a fuller account, see *Report of the Canadian Women's Mission to Israel and Palestine*, August 2002 (forthcoming).
48. E. Clark, "Israel's neglected economy," online: BBC News Homepage <http://www.news.bbc.co.uk/1/lowin_depth/world/2002/september_11_one_year_on/2207071.stm> (date accessed: 20 February 2003).
49. "Committee on the Elimination of Discrimination against Women, Concluding Observations: Israel, U.N. Doc. A/52/38/Rev.1, Part II paras.132–183 (1997)," online: University of Minnesota Human Rights Library Homepage <http://www1.umn.edu/humanrts/cedaw/cedaw-israel.htm> (date accessed: 28 February 2003).
50. Interview of Zahira Kamal (6 August 2002), Jerusalem.
51. *Ibid*.
52. Interview of Shadia El Serraj (8 August 2002), Gaza City, Palestine.
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. Interview, Hass, *supra* note 14.
57. Children, the elderly, and the disabled were disproportionately killed by the IDF in its attack on Jenin in 2002. See, for example, Human Rights Watch, "The Bulldozing Death of Jamal Fayid, April 6" in *Jenin: IDF Military Operations*, online: Human Rights Watch Homepage <http://www.hrw.org/reports/2002/israel3/index.htm#TopOfPag e>. The report documents the efforts to save a young disabled man from an Israeli army bulldozer:

> Despite the shouting, the bulldozer continued. The women ran out as the house swayed and crumbled around them, crushing the paralyzed Fayid in the rubble. The soldier in the bulldozer cursed at them, calling them bitches. The women ran into another house for safety.

58. The plucking of the beard of an Orthodox priest can constitute torture. See C. Giffard, "The Torture Reporting Handbook" at 3.3, online: The Torture Reporting Handbook Homepage <http://www.essex.ac.uk/torturehandbook/handbook/part_i_3.h tm#pti_3_3> (date accessed: 28 February 2003).
59. See generally Anderlini, *supra* note 37.
60. Maha Abu-Dayyeh Shamas, "Statement by Maha Abu-Dayyeh Shamas, Executive Director of Women's Center for Legal Aid and Counseling, at the Library of Congress, May 9, 2002," online: Bat Shalom of the Jerusalem Link <http://www.batshalom.org/2002/Maha_Congress.htm> (date accessed: 28 February 2003).

61. Interview, Greenblatt, *supra* note 7. The skepticism is not widely shared, however.
62. Interview, Badran, *supra* note 7.
63. Greenblatt, Security Council, *supra* note 10.
64. See Bat Shalom, "They Shoot Pregnant Women, Don't They?" online: Peace Women Homepage <http://www.peacewomen.org/campaigns/featured/middle%20east /statsindex.html#> (date accessed: 28 February 2003). This press release documents the shooting of two pregnant women on the same day. A Palestinian woman was shot by the Israeli army at the entrance to Nablus while an Israeli settler woman was shot by Palestinian snipers.
65. In Israel, for example, four mothers concerned about the safety of their children who were required to serve in the Israeli army brought an end to the relative silence concerning Israel's invasion and occupation of Lebanon when they demanded to know why, after seventeen years, Israel was still sending soldiers to Lebanon. Their protests gave birth to an organized movement. As Linda Ben Zvi, International Co-ordinator of the Four Mothers Movement reported, "These Four Mothers immediately received tremendous public attention. It touched a vital nerve inside Israel. The Four Mothers questioned a central national orthodoxy, namely that the sacrifice of one's children is sometimes necessary in the name of duty." L. Ben Zvi, "Mothers against Military Might: Activism in Israel," (International Conference on Women, Violence Conflict and Peacebuilding: Global Perspectives, London, May 5–7, 1999) at 46; the conference proceedings are available online: <http://www.international-alert.org/women/confrep.pdf)> (date accessed: March 12, 2003). Ben Zvi notes that this is a variation of the biblical story of Abraham, who was asked by God to sacrifice his son, Isaac…. One of the Four Mothers said, "[I]f God had asked Sarah to sacrifice Isaac, the answer would have been very different! God must have known that, so he didn't ask her." Ben Zvi, at 46. See also the tragic and compelling story of the Elhanan family in West Jerusalem. Smadar Elhanan was killed by a suicide bomber on September 4, 1997. Her mother does not shrink from laying at least part of the blame on the military and the Israeli government for the death of her daughter. "They make us die and get killed for nothing." S. Armstrong, "Speaking Peace" *Chatelaine Magazine* (January 2003) at 107.
66. A Palestinian Mother, "I and You." On the second day of the Sukkat Bat Shalom, a Palestinian woman from the Ramallah was visiting her sister in the area. She saw the Sukkah (Bat Shalom Peace Tent), and she stopped and asked to read a poem to those assembled. She read the poem in Arabic, and a Bat Shalom activist read the translation in Hebrew that the woman gave her. The poem is a translation by another Bat Shalom activist into English; available online <http://buyorganic.org/pipermail/peace-presence/2002q4/0004 24.html> (date accessed: 28 February 2003).
67. N. Elhanan cited in Armstrong, *supra* note 65 at 114.
68. Interview, Greenblatt, *supra* note 7 and Interview, Badran, supra, note 7.
69. Interview, Greenblatt, *supra* note 7.
70. One woman relayed her fear of being caught smuggling into Tel Aviv to deliver a message of peace to Israeli women's groups. She worried that she might be tortured as her son had been tortured by the Israeli military. Interview details withheld.
71. Terry Greenblatt reports receiving threatening e-mails that read like the following: "I know you are an enemy of Israel and Jews everywhere. As the God of Israel has promised, your bones will be crushed, and your name will be forgotten. Blessed is the God who crushes the enemies of Israel." She goes on to say,

    > We are scared as we protest in the streets of Tel Aviv and in Palestinian villages under siege. We have stood huddled in small groups of 6 or 7, as well as with the thousands of women and men in 150 cities and towns around the world who stand in solidarity with us. We are harassed and cursed, spat upon and arrested.

    The speech also describes how women exchange emergency phone numbers knowing that they put their lives at risk when they participate in practices like monitoring Israeli checkpoints. Spotlight, Greenblatt, *infra* note 75.
72. Interview, Badran, *supra* note 7.
73. Interview, Greenblatt, *supra* note 7.
74. Interview, Miftah, *supra* note 42.
75. As Terry Greenblatt put it,

    > The spirit of Oslo was never tested, and therefore it is unacceptable to say that a negotiated settlement is impossible. Oslo didn't fail, we did. I am terrified to know that our leadership was aware of the profound shift in consciousness and public education for peace that were necessary to attempt a negotiated agreement, and was unable to, or chose not to, risk authentically acknowledging the other side as an integral partner for our own success. We never sat down together on the same side of the table and TOGETHER LOOKED at our common and complex joint history, with the commitment and intention of not getting up until-in respect and reciprocity-we could get up together and begin our new history as good neighbors…" "Spotlight on Terry Greenblatt," online: Women Waging Peace Homepage <http://www.womenwagingpeace.net/content/intheirownvoi ces/spotlight/greenblatt.asp> (date accessed: 28 February 2003).
76. Interview, Greenblatt, *supra* note 7.
77. Greenblatt, Security Council, *supra* note 10.
78. On the "Double Binds and Dilemmas of Difference," see M. Chamallas, *Introduction to Feminist Legal Theory* (Aspen: Aspen Law & Business, 1998) at 17.
79. Shamas, Security Council, *supra* note 15.

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The Palestinian Refugees, International Law, and the Peace Process

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Abstract

The article reviews recent Israel-Palestinian negotiations on the issue of the Palestinian refugees. It examines legal aspects of the major issues that were involved in the negotiations including who was responsible for the plight of the refugees, the definition of who is a refugee, the existence of a right of return, and the question of restitution and compensation. The article reaches the conclusion that, in the context of the Arab-Israeli conflict, no legal "right of return" exists, implementation of such a right would be impracticable and UN General Assembly Resolution 194 does not impose such a right. The article shows, however, that despite deep differences on legal positions, the parties have endeavoured to draft language that will enable them to proceed with a practical solution.

Résumé

L'article passe en revue les récentes négociations israélo-palestiniennes sur la question des réfugiés palestiniens. Il examine les aspects légaux des principales questions examinées durant les pourparlers, y compris la question de savoir qui était responsable du problème des réfugiés, la définition de qui est un réfugié, la reconnaissance du droit au retour et la question de restitution et de compensation. L'article conclut que dans le contexte du conflit israélo-arabe, il n'existait pas, légalement parlant, de « droit au retour », que la mise en vigueur d'un tel droit serait pratiquement impossible et que la résolution 194 de l'Assemblée générale des Nations Unies n'imposait pas un tel droit. L'article montre cependant que malgré le grand fossé séparant la position légale des deux parties, elles se sont évertuées à utiliser un langage dans les projets de règlement qui laisse la voie ouverte à une solution pratique.

The continuing plight of the Palestinian Arab refugees is a human tragedy that has lasted for more than fifty years and it is clear that without a resolution of the issues involved there can be no final settlement of the Arab-Israeli conflict.

At the Camp David talks held in July 2000 and in talks held at Taba in January 2001, Israelis and Palestinians for the first time attempted to negotiate a solution to the refugee problem. There had been innummerable previous polemic exchanges but here, for the first time, the parties attempted to reach an agreed-upon solution. The negotiations, however, did not reach a successful conclusion. The various reports and accounts of the discussions[1] show that there were five major areas of disagreement, namely: who was responsible for the plight of the refugees, the definition of who is a refugee, the existence of a right of return, the question of restitution and compensation, and the relevance of the issue of Jews who fled Arab States.

The Arab-Israeli conflict, although minuscule on a world scale, nevertheless has captured the attention of world opinion, and the international press follows with fascination the minutiae of the conflict. The fact that the land is the land of the Bible and the presence of sites holy to Christianity, Islam, and Judaism no doubt are factors in the world's fascination with the issue.

International law continues to play a major role in all attempts to resolve the Arab-Israeli conflict. This role can be attributed to a number of factors. Both the Arabs and the Jews come from societies based on written legal codes (the Koran and the Bible), and the obligation to comply with legal norms permeates their everyday life. The League of Nations and its successor, the United Nations, have been actively involved in Arab-Israeli affairs in their legal context since the 1923 Mandate for Palestine called for the establishment of "a Jewish national home" in Palestine.[2] Both Israelis and Palestinians attempt to buttress their respective

positions by recourse to legal arguments.[3] World public opinion will not support a position that is regarded as illegal under international law and hence both parties attempt to brand the other side's positions as illegal. Agreement between the parties, if reached, will take the form of binding agreements that will then themselves be subject to the international law of treaties.

Both sides had their international lawyers involved in preparing papers for their negotiators and, in most cases, the lawyers participated in the actual negotiations. An assessment of the legal aspects of the four issues involved is therefore germane both to examining what went wrong and to possible future solutions.

Responsibility for the Refugee Problem

During the Camp David and Taba talks, Palestinian negotiators demanded that Israel accept responsibility for the creation of the Arab refugee problem. The Palestinians have stated that it was the issue of East Jerusalem ". . . and Israel's refusal to accept legal and moral responsibility for turning more than 3 million Palestinians into refugees that brought the summit to an end."[4]

Hundreds of thousands of Palestinian Arabs fled their homes as a result of the 1948 war. Whether these refugees fled as a result of intimidation by Israeli forces,[5] at the instigation of the invading Arab armies,[6] or, as is most likely, as a result of a combination of both, there can be no argument as to the human tragedy of this exodus. It does not, however, appear to be equitable or historically correct to place the responsibility with Israel. The root cause of the fighting that caused such tragedy to the Palestinian Arabs and such loss of lives to Israel[7] was the rejection by the Arab States of the 1947 UN Proposal to partition Palestine into an Arab and a Jewish State. The Arab States openly declared that they were sending their armies into Palestine to prevent the creation of the proposed Jewish State.[8] The decision to send in the Arab armies had in fact been made in 1947, prior to the establishment of Israel.[9] In May 1948, the U.S. representative to the UN Security Council, commenting on the Jordanian admission that the Arab Legion had invaded Palestine, stated, "We have here the highest type of evidence of the international violation of the law: the admission by those who are committing the violation."[10] The Russian representative to the Security Council, Gromyko, stated even more bluntly, "What is happening in Palestine can only be described as a military operation organised by a group of States against the Jewish State."[11]

The preamble to the only decision ever taken under Chapter VII of the Charter by the UN Security Council in relation to the Arab-Israeli conflict explicitly stated:

> Taking into consideration that the Provisional Government of Israel has indicated its acceptance of a prolongation of the truce in Palestine; that the States members of the Arab League have rejected successive appeals of the UN Mediator and of the Security Council in its resolution of 7 July 1948 for the prolongation of the truce in Palestine; and that there has consequently developed a renewal of hostilities in Palestine.[12]

Most telling of all, perhaps, is the 2002 official website of the Arab League, which states, "Among the goals the League set for itself were winning independence for all Arabs still under alien rule, and to prevent the Jewish minority in Palestine (then governed by the British) from creating a Jewish state."[13]

Prior to the Arab invasion there were no Palestinian Arab refugees. Issa Nakhleh, who was the Permanent Representative of the Arab Higher Committee for Palestine in New York and Chairman of the Palestine Arab delegation, writes:

> It is an historic fact that prior to the month of April 1948 Palestine Arabs were winning the fight against the Jews throughout the country, Arabs dominated more than 82% of the area of Palestine, Jews were unable to travel on highways between important cities. All Jewish quarters in Jerusalem were about to surrender. Jews lost every battle they fought against Palestine Arabs.[14]

There are presumably two reasons for the Palestinians making such a concerted effort to cause Israel to accept the moral and legal responsibility for the creation of the refugee problem. The first is to achieve vindication of what the Palestinians feel has been an injustice and the second is to lay the foundations for a subsequent claim for compensation from Israel.

The unofficial understanding reached between Yossi Beilin from Israel and Abu Mazen of the PLO avoids the issue by using language whereby "the Israel side acknowledges the moral and material suffering caused to the Palestinian people as a result of the war of 1947–1949."[15] The Clinton plan uses nearly identical language.[16]

Who Is a Palestinian Refugee?

The most common estimate is that in 1947–48 some 700,000[17] Arab Palestinians fled their homes.[18] Other estimates vary from 400,000[19] to 900,000.[20] In accordance with the 1967 UN Refugee Convention, a person ceases to be a refugee if "he has acquired a new nationality, and enjoys the protection of the country of his new nationality."[21] If one were to apply this criterion, together with the rule that only persons who actually fled their homes are refugees, then the

authentic number of refugees today would be some two or three hundred thousand at most. However, due to political pressure from Arab States, Palestinians refugees were excluded from the UN Convention definition of refugees and UNRWA granted status of refugees to all direct descendants of refugees.[22] It is believed that this extension of refugee status is unprecedented in international law. It has led to a situation where some 3,500,000 persons are now considered Palestinian refugees and Palestinian spokesmen claim that all 3,500,000 have the "right of return." Needless to say, over 90 per cent of these persons have never lived in the territory that is now Israel.

"Right of Return"

Palestinian negotiators demand that "Israel must recognize the right of the Palestinian refugees to return to their homes" in what is now Israel in accordance with "a well-established norm in international law and practice, namely the right of return."[23] The existence of such a right under international law in the circumstances of the Arab-Israeli conflict is, however, in dispute. Palestinian demands for a right of return are coupled with their call for self-determination. Dividing historical Palestine into two states, Israel and an Arab State of Palestine, is incompatible with then granting an "inalienable" right to the same Palestinian Arabs to move to Israel. Benvenisti and Zamir found that "international practice . . . does not support the claim that the right of return following mass relocation of population is recognized under international law. This observation of state practice is enhanced by the lack of support in legal literature for the right of refugees to return to the country they have fled."[24]

If such a "right of return" were to exist, it would need to be based on one of the two accepted sources of international law, namely, an international treaty to which Israel is a party or a rule of customary international law.[25]

Does the "Right of Return" Exist as a Treaty Obligation?

In the UN treaties that deal specifically with refugees, there is no reference to a "right of return."[26] Israel is a party, however, to two general human rights treaties that refer to a right to return: The *Convention on the Elimination of All Forms of Racial Discrimination*,[27] in which Article 5-(d)(ii) refers to "the right to leave any country, including one's own, and to return to one's country," and the 1966 *International Covenant on Civil and Political Rights*,[28] in which Article 12(4) states: "No one shall be arbitrarily deprived of the right to enter his own country."

The question arises as to the meaning of the phrase "one's country" or "his own country" in the two treaties. There are writers who believe the phrases should be understood as applying, in addition to nationals, to permanent residents of a country and other persons with ties to the country. State interpretation of a right to re-entry, however, appears overwhelmingly to be applied only to nationals of the State. This is the phrase used in the 1969 *American Convention on Human Rights*, Article 22(5): "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."[29] The word "national" is also used in the 1950 *European Human Rights Convention, Protocol No.4*, Article 3(2): "No one shall be deprived of the right to enter the territory of the State of which he is a national."[30] Apparently no government interprets the Convention as meaning that the right applies to persons other than nationals or persons who were nationals. Guy S. Goodwin-Gill writes, "The 'right to return', in particular, is accepted as a normal incident of nationality."[31]

Mass or Individual Rights

The human rights conventions referred to, insofar as they grant rights, do so to individuals and were not intended to deal with population exchanges such as occurred in the Arab-Israeli conflict. According to Stig Jagerskiold, the right of return or the right to enter one's country in the 1966 International Covenant:

> . . . is intended to apply to individuals asserting an individual right. There was no intention here to address the claims of masses of people who have been displaced as a by-product of war or by political transfers of territory or population, such as the relocation of ethnic Germans from Eastern Europe during and after the Second World War, the flight of the Palestinians from what became Israel, or the movement of Jews from the Arab countries.[32]

It is also apparent that the right of return applies to individuals who wish to live as citizens of the State to which they wish to return. It is clearly not realistic to suggest that hundreds of thousands of Palestinian Arab refugees feel such strong ties with Israel that they wish to become loyal Israeli citizens. An Egyptian Foreign Minister explained, "In demanding the return of the Palestinian refugees, the Arabs mean their return as masters, not slaves: or, to put it quite clearly – the intention is the extermination of Israel."[33] Six years later, the Prime Minister of Lebanon declared, "The day on which the Arabs' hope for the return of the refugees to Palestine is realized will be the day of Israel's extermination."[34] A leading Arab Palestinian lawyer put it bluntly when he stated, "The Palestinian Arab refugees have certain inalienable rights including the right of sovereignty over Palestine."[35]

UN Resolution 194

Although Arab States voted against UN Resolution 194 (III) of 11 December 1948[36] and although Israel was not a mem-

ber of the UN at the time the Resolution was adopted,[37] it is now claimed that the Resolution obliges Israel to recognize a right of return. Paragraph 11 of the Resolution states that the UN General Assembly:

> Resolve that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which under principles of international law or in equity, should be made good by the Government or authorities responsible.

Some writers claim, "Paragraph 11 recognized that under international law the Palestinian people were entitled to return to their homeland and receive economic compensation."[38] Further General Assembly Resolutions have repeatedly referred to Resolution 194 and described Palestine refugee rights as "inalienable."

UN General Assembly resolutions cannot, however, create international law. With the exception of resolutions dealing with budget and internal UN affairs, States are not obliged to comply with resolutions of the UN General Assembly. The UN General Assembly is not a law-making body and neither the UN Charter nor any other legal instrument has empowered it with a law-making capacity.[39] The fact that the UN may repeat or reaffirm a resolution does not empower it with legal force. In Weil's eloquent phrase, "Neither is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect.[40]

As to the actual text of the Resolution, the word "right" is not used, although Arab spokesmen repeatedly and incorrectly attribute the word "right" to its text. The Resolution uses the word "should" and not "shall." In UN documents the word "should" is regarded as recommendatory language and is not used where an obligation is set out. "The term 'should' is clear on its face: it is hortatory, not obligatory."41 The reference to international law is as regards the clause on compensation and not on the issue of "return."[42]

The Beilin-Abu Mazen understanding makes no explicit reference to Resolution 194. The Clinton proposal in regard to the Resolution states: " The parties would agree that this implements Resolution 194."

The Saudi-initiated Arab League peace plan of 28 March 2002 refers to "achievement of a just solution to the Palestinian refugee problem to be agreed upon in accordance with UN General Assembly Resolution 194."[43] This text, by using the word "agreed," attempts to soften the earlier Arab position that Resolution 194 was mandatory.[44] Were Israel to accept the wording of the Arab League proposal, however, it would then be bound to act in accordance with the substance of UN Resolution 194, a demand Israel has rejected for reasons set out above.

The "Right of Return" in Customary International Law

Some writers, aware of the fact that UN General Assembly Resolutions cannot create international law, claim that paragraph 11 of Resolution 194 reflected customary international law at the time.[45] If a right of return were a rule of customary international law then it would, of course, be binding on Israel, irrespective of Israeli agreement or recognition of the rule.

The existence of a rule of customary international law requires both State practice[46] and *opinio juris*,[47] namely, that the State practice was part of a general recognition that a legal obligation is involved. It has been claimed that such a customary rule can be ascertained from the 1948 Universal Declaration of Human Rights, which states, in Article 13(2): "Everyone has the right to leave any country, including his own, and to return to his country."

The Universal Declaration is a universally respected statement of ideals and has inspired much human rights legislation, including legislation in Israel. It is not, however, binding law. Elements of the declaration have indeed been set out in various human rights treaties and they are binding on the parties to those treaties. Those elements of the Universal Declaration that have not been incorporated into international treaties remain lofty hortatory call to States; they are not, however, binding international law.

Article 13(2) of the Universal Declaration refers to "his country." Article 21 of the Universal Declaration uses the same phrase and refers to the fact that "everyone has the right to take part in the government of *his country*."(emphasis added). This is clearly a right attributable only to citizens and since the same phrase is used in Article 13(2), it is logical to deduce that Article 13(2) also refers to citizens.[48]

State experience shows that States have indeed often allowed the return of their citizens who fled during wars. However, where there has been a division of a territory into two States on an ethnic or religious basis, there has been no such "right of return." The Muslims who fled India for Pakistan have no "right of return" to India, the same being true for Hindus who fled from what is now Pakistan to India. The Sudeten Germans have no "right of return" to the Czech Republic. Julius Stone points out that in fact:

> Resettlement . . . has been the effective solution for the far greater and more complex refugee problems in Europe after World War II. It is a melancholy fact that this more humane course came to so little in the Middle East over so long a time

that, for the Arab States concerned, the refugee problem was more useful than its solution.[49]

Right of Return in the Post-Oslo Peace Process

In formal presentations, Arab representatives demanded an unconditional right of return. They pointed out, however, that not all refugees would choose to return but insisted that the individual refugee make the choice. During a meeting with President U.S. President Bill Clinton, the Palestinian representative, Nabil Shaat, estimated that 10 to 20 per cent of the refugees would choose to return. President Clinton responded that, according to that estimate, the number of refugees Israel would have to absorb would be between four and eight hundred thousand.[50]

The formula used in the Beilin-Abu Mazen understanding was:

> 1. Whereas the Palestinian side considers that the right of the Palestinian refugees to return to their homes is enshrined in international law and natural justice, it recognizes that the prerequisites of the new era of peace and coexistence, as well as the realities that have been created on the ground since 1948, have rendered the implementation of this right impracticable. The Palestinian side, thus, declares its readiness to accept and implement policies and measures that will ensure, insofar as this is possible, the welfare and well being of these refugees.
>
> 2. Whereas the Israeli side acknowledges the moral and material suffering caused to the Palestinian people as a result of the war of 1947–49. It further acknowledges the Palestinian refugees' right of return to the Palestinian state and their right to compensation and rehabilitation for moral and material losses.
>
> 3. and 4. (The Articles deal with the establishment of an international fund.)
>
> 5. Deals with Israeli willingness to allow family reunification and absorption of refugees in "specially defined cases."
>
> 6. Deals with the absorption of refugees in the West Bank and Gaza Strip.
>
> 7. The PLO considers the implementation of the above a full and final settlement of the refugee issue in all its dimensions. It further undertakes that no additional claims or demands arising from this issue will made upon the full implementation of this Framework agreement.[51]

On the question of the refugees, U.S. President Bill Clinton's comments, presented orally to both parties, were:

> I sense that the differences are more relating to formulations and less to what will happen on a practical level. I believe that Israel is prepared to acknowledge the moral and material suffering caused to the Palestinian people as a result of the 1948 war and the need to assist the international community in addressing the problem. . . . The fundamental gap is on how to handle the concept of the right of return. I know the history of the issue and how hard it will be for the Palestinian leadership to appear to be abandoning the principle.
>
> The Israeli side could not accept any reference to a right of return that would imply a right to immigrate to Israel in defiance of Israel's sovereign policies and admission or that would threaten the character of the state. Any solution must address both needs. The solution will have to be consistent with the two-state approach. . . the state of Palestine as the homeland of the Palestinian people and the state of Israel as the homeland of the Jewish people.
>
> Under the two-state solution, the guiding principle should be that the Palestinian State should be the focal point for the Palestinians who choose to return to the area without ruling out that Israel accept some of these refugees.
>
> I believe that we need to adopt a formulation on the right of return that will make clear that there is no specific right of return to Israel itself but that does not negate the aspiration of Palestinian people to return to the area.
>
> I propose two alternatives
>
> 1. both sides recognize the right of Palestinian refugees to return to historic Palestine, or
> 2. both sides recognize the right of Palestinian refugees to return to their homeland.
>
> The agreement will define the implementation of this general right in a way that is consistent with the two-state solution. It would list the five possible homes for the refugees:
>
> 1. The State of Palestine
> 2. Areas in Israel being transferred to Palestine in the land swap
> 3. Rehabilitation in host country
> 4. Resettlement in third country
> 5. Admission to Israel
>
> In listing these options, the agreement will make clear that the return to the West Bank, Gaza Strip and area acquired in the land swap would be right [*sic*] to all Palestinian refugees, while rehabilitation in host countries, resettlement in third countries and absorption into Israel will depend upon the policies of those countries.
>
> Israel could indicate in the agreement that it intends to establish a policy so that some [*sic*] the refugees would be absorbed into Israel consistent with Israel sovereign decision.
>
> I believe that priority should be given to the refugee population in Lebanon.
>
> The parties would agree that this implements Resolution 194.[52]

Compensation for Abandoned Property of Palestinian Refugees

The Palestinian Arab refugees left behind, in what is now Israel, large amounts of property. Most of the property was used by Israel to settle Jews who fled from Arab states. Benvenisti and Zamir point out that this is normal international procedure and that during population transfers in India, Pakistan, and cases in Europe that they enumerate, "immovable property left by expellees was seized by the Governments, which then used it to settle the incoming refugees."[53] They add that in no case of massive relocation "have the refugees regained the property they left behind."[54] There are, however, examples of States paying compensation for such property[55] and Israeli negotiators have agreed to pay compensation for the property Arab refugees left in what is now Israel. Clearly, so long as a state of war or armed conflict continues, Israel is entitled to freeze the right to such property. However when a final settlement of the conflict is reached, the refugees will be entitled to receive compensation for property they possessed. The terms and conditions for such compensation will have to be agreed upon. Israel also demanded that, when negotiations commence on the question of compensation, account must be taken of the property of Jews who fled Arab countries and who were forced to leave all their property behind.

Compensation for the Suffering of the Refugees

Above and beyond the right of compensation for property, Palestinian negotiators demand compensation to the refugees for their suffering. Such a demand is linked to the demand that Israel accept responsibility for causing the refugee problem. Since Israeli negotiators see the invasion by Arab States as the primary cause of the Palestinian refugee problem, needless to say Israel is not willing to accept responsibility or the consequent obligation to compensate. Benvenisti and Zamir point out, "Claims for reparations are rarely pursued. Since such claims are based on fault, the other side must be persuaded to concede its aggression or this issue must be litigated for the claim to succeed."[56]

Clearly, neither side in the Arab-Israeli conflict is willing to see itself as the aggressor. The Beilin-Abu Mazen understanding deals with the issue of compensation for the refugees by stating that Israel "acknowledges . . . their right to compensation and rehabilitation for moral and material losses" and proposing that an international fund be set up to help resettlement of the Palestinian Arab refugees and that Israel participate in such a fund.

Compensation to Jews Who Fled from Arab Countries

Some 700,000 Jews fled Arab countries in the years 1948–49.[57] They have been successfully absorbed by Israel and now form an integral part of the fabric of Israeli society. They do not regard themselves as refugees nor are they regarded as such. Needless to say there is no talk of their "right to return to Arab countries." On immigrating to Israel they were often forced to leave their property behind and in many cases, such as in Iraq, special laws were passed depriving them of all rights to their property. It is Israel's position that when discussing issues of compensation, the property rights of the Jews who fled Arab countries be taken into account.

The Issue of Refugees in the Legal Instruments of the Peace Process

The first agreed framework for a peace settlement was the 1967 UN Security Council Resolution number 242.[58] The Resolution was not adopted under Chapter VII of the Charter and therefore was not binding as such, but all parties to the conflict have subsequently accepted it as a framework; hence its binding character derives from the agreement of the parties to the conflict. Resolution 242 refers to the necessity of "achieving a just settlement of the refugee problem." The Resolution makes no reference to UNGA Resolution 194, or to a "right of return." Furthermore, the Resolution refers to refugees without limiting the term to Palestinian refugees, thus enabling the issue of compensation for the property of Jews from Arab countries to come within its ambit.

The 1978 Camp David Framework for Peace in the Middle East stated: "Egypt and Israel will work with each other and with other agreed parties to establish agreed procedures for a prompt and permanent implementation of the resolution of the refugee problem."[59]

The 1993 Declaration of Principles on Interim Self Government – the Oslo Agreement – reaffirmed UN Security Council Resolution 242 and stated that the issue of refugees should be dealt with as part of "permanent status negotiations."[60]

The 1994 Treaty of Peace with Jordan states that the Parties will seek to resolve the refugee problem, in accordance with international law, in appropriate forums, including the framework of the Multilateral Working Group on Refugees, and in negotiations, in a framework to be agreed, bilateral or otherwise, in conjunction with and at the same time as the permanent status negotiations pertaining to the Territories that came under Israeli military government in 1967.[61]

The agreements with Egypt, with the PLO, and with Jordan contain no reference to UNGA Resolution 194 or to

a "right of return." The agreement with the PLO received worldwide support; the Secretary of State of the United States and the Foreign Minister of the Russian Federation signed it as witnesses. The authors of the Israel-PLO agreement shared the Nobel Peace Prize and the agreement was welcomed by a special Resolution of the UN General Assembly.[62] The 1995 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip agreement was signed by representatives of the United States, the Russian Federation, Egypt, Jordan, Norway, and the European Union as witnesses.

A valid argument can be made that, by making these agreements, none of which mentions a "right of return," the PLO and the Arab States, with the blessing of the world community, implicitly acknowledged the reality that a "right of return" is not an option in the Arab-Israeli dispute.

The Future

For some sixty-five years, commencing with the 1937 (Peel) Palestine Royal Commission, the consensus among political and international legal observers has been that historic Palestine needs to be divided into two States, an Arab State and a Jewish State. Such a division is premised on the notion of the right of Palestinians to self-determination in their territory and a similar right for Israel in its territory. The border between two such States needs to be negotiated but, whatever the border, such self-determination is incompatible with a demand for the recognition of a right of Palestinians to settle in Israel. Ruth Lapidoth summarizes the legal position under international law as being that "neither under the general international conventions, nor under the major UN resolutions, nor under the relevant agreements between the parties, do the Palestinian refugees have a right to return to Israel."[63]

Thirty years ago William Fulbright commented, "For the majority of refugees, repatriation would probably be neither feasible nor desired."[64] In January 2001, President Clinton declared that Israel should absorb some refugees but that ". . . you cannot expect Israel to acknowledge an unlimited right of return to present day Israel. . . . We cannot expect Israel to make a decision that would threaten the very foundations of the State of Israel and would undermine the whole logic of peace."[65]

Some one million of the Arab refugees who claim a right of return reside, at present, in the West Bank and Gaza. Their claim therefore is not to have a right of return to what was historically Palestine, for they are already live there, but to that part of Palestine that is present-day Israel.

The Beilin-Abu Mazen understanding is premised on the reality that a right of return will be to a Palestinian State and not to Israel. The understanding states that although the Palestinians believe "that the right of the Palestinian refugees to return to their homes is enshrined in international law and natural justice . . . the realities that have been created on the ground since 1948, have rendered the implementation of this right impracticable." Israel "acknowledges the Palestinian refugees' right of return to the Palestinian State and their right to compensation and rehabilitation for moral and material losses."[66] Allowing refugees in camps in Arab countries to "return" to a Palestinian State in the West Bank and Gaza would be allowing their return to what historically was Palestine. In 2001 the chief U.S. negotiator for the Middle East pithily summarized the issue: "The right of return of Palestinians to their State makes perfect sense, the right of return to Israel made no sense if you are going to have a two-state solution."[67]

Echoes of the Beilin-Abu Mazen understanding are found in President Clinton's peace plan where he refers to "the right of return to their homeland where it is clearly established that their homeland means the Palestinian State."[68] At the September 2000 Taba talks between Israel and the Palestinians the refugee problem was perhaps the major issue. The Israeli proposal during the Taba talks[69] again echoed the Beilin-Abu Mazen understanding that the Palestinians would have the right of return to the future Palestinian State together with the further options of being absorbed in the host states or immigrating to third states willing to absorb them. A further proposal was that Israel would agree to accept an as-yet-unarticulated number of refugees on the humanitarian basis of family reunification. An international fund would be set up to help cover the cost of resettlement and rehabilitation. The final settlement would be considered as implementation of all relevant international resolutions. A settlement of claims would also deal with the question of the property of Jews who fled Arab countries.

It has been said that the saddest phrase in the English language is "if only." This year Israel celebrates fifty-five years of independence. For many Palestinians, however, this year means fifty-five years since the creation of the refugee problem. It need not have been so. With wise Arab leadership at the time, it could now have been fifty-five years of independence for both Israelis and Palestinians. The Beilin-Abu Mazen "understanding" and the Clinton "comments" could well be a blueprint for a practical, pragmatic solution to the Palestinian refugee problem. It is to be hoped that, this time, a Palestinian leadership will grasp the opportunity and not, as has occurred so often in the past, discard it in the chimeric hope that a *deus ex machina* will somehow turn back the clock of history.

Notes

1. On the most recent Israeli-Palestinian attempts to reach a solution, see "The Refugee Problem at Taba, Akiva Eldar

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2. Article 2 of the British Mandate for Palestine, confirmed by the Council of the League of Nations, 24 July 1922, *League of Nations Official Journal*, August 1922, p. 1007.
3. For recent legal analyses, see G.J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return, An International Law Analysis* (Bethlehem: Badil Resources Center for Palestinian Residency and Refugee Rights, 2002), online: <http://www.badil.org/publications/legal papers/RoR48.pdf> (date accessed: 19 November 2002); T. Kramer, "The Controversy of a Palestinian 'Right of Return' to Israel" (2000) 18 *Arizona Journal of International and Comparative Law* 979; R. Lapidoth, "Legal Aspects of the Palestinian Refugee Question" (2002) 485 *Jerusalem Viewpoints, Jerusalem Center for Public Affairs,* online: <www.jcpa.org/jl/ vp485.htm> (date accessed: 20 October 2002).
4. *Camp David Summary, supra* note 1.
5. B. Morris, *The Birth of the Palestine Refugee Problem 1947–1949* (Cambridge: Cambridge University Press, 1987). It is relevant to point out that Morris, in his book, which is highly critical of the behaviour of the Israeli army in 1948, nevertheless states that the Israeli army did not, as a rule, take any action to encourage refugees to flee from villages unless the villagers had actually participated in the fighting.
6. The London weekly *Economist* reported on October 2, 1948: "Of the 62,000 Arabs who formerly lived in Haifa not more than 5,000 or 6,000 remained. Various factors influenced their decision to seek safety in flight. There is but little doubt that the most potent of the factors were the announcements made over the air by the Higher Arab Executive, urging the Arabs to quit. . . . It was clearly intimated that those Arabs who remained in Haifa and accepted Jewish protection would be regarded as renegades." Emil Ghoury, Secretary of the (Palestinian) Arab Higher Committee, stated: "The fact that there are those refugees is the direct consequence of the Arab States in opposing partition and the Jewish state" ([London] *Daily Telegraph*, 6 September 1948).
7. Approximately 6000 Israelis were killed in the 1948 war. The total Jewish population of Palestine at the time was some 600,000.
8. See cable of 15 May 1948 from the Secretary General of the League of Arab States to the Secretary General of the UN, UN SCOR, Supp., May 1948, p. 83, UN Doc. S/745 (1948).
9. B.Y. Boutros-Ghali, *The Arab League, International Conciliation,* No. 498 (New York: Carnegie Endowment for International Peace, 1954) 411.
10. *UN Security Council Official Records*, No. 72, 302nd meeting, p. 43 (1948).
11. *UN Security Council Official Records*, 309th meeting (1948).
12. UN Security Council Resolution No. 54, of 15 July 1948, UN Document S/902 (1948).
13. Online: <http://www.arabji.com/ArabGovt/ArabLeague.htm> (date accessed: 23 November 2002). The parenthesis is in the original text.
14. I. Nakhleh, "The Liberation of Palestine Is Supported by International Law and Justice" in J.N. Moore, ed., *The Arab-Israeli Conflict, vol I: Readings*, sponsored by the American Society of International Law (Princeton, N.J.: Princeton University Press, 1974) 570.
15. The text is from Annex 1 to Y. Beilin, *supra* note 1, English from "A Look at the Beilin-Abu Mazen Agreement," *supra* note 1.The text was never officially acknowledged by the Palestinians as even constituting an understanding.
16. "Minutes of U.S. President Bill Clinton's comments at a meeting with Israeli and Palestinian representatives at the White house on December 23, 2000, as given to *Ha'aretz* by Palestinian sources," online: *Ha'aretz Online, Archives* <http:// www.haaretzdaily.com/arch/objects/data/logonEng. jhtml> (date accessed: 23 November 2002).
17. G.J. Tomeh, "Legal Status of Arab Refugees", in J.N. Moore, ed., *supra* note 14, 670.
18. This paper discusses the issue of the refugees from the 1948 war. The issue of persons displaced from the West Bank in the 1967 war has proven to be less contentious as the Palestinians will be free to admit them back to the West Bank when the final status of the West Bank is agreed upon.
19. J.E. Katz, *Arab Refugees, and the "Right of Return,"* online: <http://www.eretzyisroel.org/~samuel/refugees.html> (date accessed: 17 November 2002).

20. *Final Report of the United Nations Economic Survey Mission for the Middle East, UN Publications 28, December 1949, Part I*, p. 18.
21. Article 1(C)(3) *Convention Relating to the Status of Refugees* 1951, entered into force 22 April 1954, 189 UNTS 150.
22. See G.S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford and New York: Oxford University Press, 1998) 220.
23. *Refugees, Background*, Palestine Liberation Organization, Negotiations Affairs Department, Permanent Status Issues, online: <http://www.nad-plo.org/permanent/refugees.html> (date accessed: 18 November 2002).
24. E. Benvenisti and E. Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement" (1995) 89: 295 AJIL 325.
25. These sources of international law, together with "the general principles of law recognized by civilized nations," to be applied by the ICJ, are set out in Article 38 (1) of the Statute of the International Court of Justice.
26. *Convention Relating to the Status of Refugees* 1951, entered into force 22 April 1954, 189 UNTS 150; *Protocol Relating to the Status of Refugees*, 1967, entered into force 4 October 1967, 606 UNTS 267. Israel is a Party both to the Convention and to the Protocol.
27. *Convention for the Elimination of All Forms of Racial Discrimination* 1965, entered into force 4 January 1969, 660 UNTS 195. Israel is a Party.
28. *International Convention on Civil and Political Rights* 1966, entered into force 23 March 1976, 999 UNTS 171. Israel is a Party.
29. *American Convention on Human Rights* 1969, entered into force 18 July 1978, 9 ILM 673 (1970).
30. *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, entered into force 3 September 1953, 213 UNTS 221; *Protocol No.4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1963, entered into force 2 May 1968, ETS 46. Israel is a Party to neither the Treaty nor the Protocol.
31. G.S. Goodwin-Gill, *supra* note 22, 16; see G.S. Goodwin-Gill, "Comments on: The Right to Leave, The Right of Return and the Question of a Right to Remain," in V. Gowlland-Debbas, ed., *The Problem of the Refugees in Light of Contemporary International law Issues* (The Hague: Martinus Nijhoff, 1996) 101. That the right of return is restricted to nationals is also reflected in the "Declaration of Principles of International Law on Mass Expulsion" (1986) 62:13 *International Law Association Conference Report* (ILA), Articles 1,2,3,7.
32. S. Jagerskiold, "The Freedom of Movement", in L. Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press, 1981) 180.
33. Egyptian Foreign Minister, Salah-el-Din, The Egyptian daily newspaper *Al-Misri*, Cairo (11 October 1949), quoted from N. Feinberg, *Studies in International Law, with a Special Reference to the Arab-Israel Conflict* (Jerusalem: Hebrew University, Magnes Press, 1979) 506.
34. Abdullah el-Yafi, Prime Minister of Lebanon, the Lebanese daily newspaper *El-Hayat*, Beirut (29 April 1966), quoted from Feinberg, *ibid.*
35. G.J.Tomeh, "Legal Status of Arab Refugees" in J.N. Moore, ed., *supra* note 14.
36. GAOR, 3rd session, part I, 1948, *Resolutions*, pp. 21–24.
37. Some Arab spokesmen claim that Israel's acceptance as a member of the United Nations was conditional on acceptance of UNGA Resolution 194 and that Israel did indeed agree to abide by all UN General Assembly Resolutions when it applied for membership. The UN Charter does not, however, make any provisions for such conditional membership and Israel did not make any unconditional assurance. Inis Claude comments on this issue: "The best evidence that Israel had made no such commitments was provided by the speeches of Arab delegates in the plenary meeting at which the resolution was voted; they regarded the admission of Israel as a repudiation of their demand for capitulation on the repatriation issue by the applicant state, and they asserted with bitterness that Israel 'had given no definite assurances';" see I.L. Claude Jr., *National Minorities, An International Problem* (Cambridge, Mass.: Harvard University Press, 1955) 181. See also N. Feinberg, supra note 33, 438.
38. M.S. Bassiouni and E.M. Fisher, "The Arab-Israeli Conflict – Real and Apparent Issues: An Insight into Its Future from the Lessons of the Past" in J.N. Moore, ed., *supra* note 14, 645.
39. See K. Skubiszewski, "The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective, Resolutions of the General Assembly of the United Nations, Definitive Report and Draft Resolution" 61 *Yearbook of the Institute of International Law* [1984 I] 311.
40. P. Weil, "Towards Relative Normativity in International Law" (1983) 77:413 AJIL 417.
41. G.R. Watson, *The Oslo Accords. International Law and the Israel-Palestinian Peace Agreements* (Oxford and New York: Oxford University Press, 2000) 282.
42. See R. Lapidoth, *supra* note 4.
43. *Arab League, Arab Gateway*, Arab Peace Initiative, 2002, online: <http://www.al-bab.com/arab/docs/league/peace02.htm> (date accessed: 20 November 2002).
44. An earlier draft of the plan called for the solution to be "in conformity with UN General Assembly Resolution 194;" *ibid.*
45. See for example G.J. Boling, *supra* note 3, 10.
46. "The practice of states; that is to say, we must look at what states do in their relations with one another." J.L. Brierly, *The Law of Nations*, 6th ed. (Oxford: Oxford University Press, 1963) p. 59.
47. Defined in James Fox, *Dictionary of International and Comparative Law* (Ocana Publications, 1992) as "opinion that an act is necessary by rule of law."
48. See R. Lapidoth, "The Right of Return in International Law," Background Paper No. 10 (in Hebrew) (Jerusalem: Jerusalem Institute for Israel Studies, 1993) 3.
49. J. Stone, *Israel and Palestine, Assault on the Law of Nations* (Baltimore and London: The John Hopkins University Press, 1981) 68.
50. G. Sher, *supra* note 1, 216.
51. *Supra* note 15.
52. *Supra* note 16

53. E. Benvenisti and E. Zamir, *supra* note 24.
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55. See examples in S.P. Ladas, *The Exchange of Minorities: Bulgaria, Greece and Turkey* (New York: Macmillan, 1932).
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57. See generally M.M. Roumani, *The Case of the Jews from Arab Countries: A Neglected Issue* (Tel Aviv: World Organization of Jews from Arab Countries, 1983).
58. SCOR, 22nd year, *Resolutions and Decisions*, 1967, p. 5.
59. 1138 UNTS 39 (1978). Article A, 4.
60. 32 *ILM* 1525 (1993), Article V (2) (3). A similar clause appears in the 1995 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, 36 *ILM* 551 (1997) (extract) full text in 33 *Kitvei Amana* No. 1071 pp. 1–400. (Official Israel Treaty Series).
61. 34 ILM 43 (1995). Articles 3, 8 (b)(c). The text quoted is a composite text from the Articles referred to.
62. UN General Assembly Resolution A/RES/48/58 (1993).
63. R. Lapidoth, "Israel and the Palestinians: Some Legal Issues" *Die Friedens-Warte, Journal of International Peace and Organization*, (2001) Band 76, Heft 2–3, 211, 238.
64. J.W. Fulbright, "Old Myths and New Realities II: The Middle East" in J.N. Moore, ed., *The Arab-Israeli Conflict, vol. 2: Readings*, sponsored by the American Society of International Law (Princeton, N.J.: Princeton University Press, 1974) 1062.
65. U.S. President Bill Clinton's speech on Middle East peace at the Israel Policy Forum in New York, *supra* note 1.
66. "A look at the Beilin-Abu Mazen agreement," *supra* note 1.
67. Ambassador Dennis Ross, *supra* note 1.
68. B. Aluf, *supra* note 1. The article states that it is based on notes taken by Israel Foreign Minister Ben-Ami of the President's proposal.
69. *Supra* note 50 at 430.

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Unraveling the Right of Return

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Abstract

The notion of Return in many ways epitomizes the Israeli-Palestinian conflict. The Palestinian Right of Return, one embodiment of this notion, has constituted a hurdle in the parties' attempts to reach a sustainable agreement. Rather than regard the conflict as of zero-sum nature, this paper assumes that Palestinians and Israelis, in their negotiations on the Right of Return and other issues, do not hear each other, and in fact are seldom speaking the same language even when it seems they are discussing the same issue. It examines the ways in which Israelis and Palestinians understand the issue of Return, and suggests a number of factors that influence their different understandings – as well as what each is able to hear from the other. A sustainable agreement would have to take these factors into account in its formulation and in the way in which it is delivered to both peoples.

Résumé

La notion de Droit au retour incarne le conflit israélo-palestinien de plusieurs manières. Le Droit au retour des Palestiniens est l'une des incarnations de cette notion, et il s'est révélé être un obstacle dans la recherche d'un accord durable entre les deux parties. Plutôt que de considérer le conflit comme étant de nature « jeu à somme nulle », cet article propose la thèse que dans leurs négociations sur le Droit au retour et sur d'autres questions, Palestiniens et Israéliens n'entendent pas vraiment ce qu'ils se disent l'un l'autre. En fait, ils parlent rarement le même langage même lorsqu'ils semblent discuter de la même question. L'article examine la manière divergente dont Palestiniens et Israéliens comprennent la question du Retour, et propose comme explication un certain nombre de facteurs qui pèse aussi bien sur leur compréhension divergente que ce qu'ils arrivent à entendre les uns des autres. Tout accord durable devra prendre ces facteurs en ligne de compte, aussi bien dans sa formulation que dans la façon dont il sera présenté aux deux peuples.

Introduction

The notion of "Return" is central in the collective memories and national ethos of Jews and Palestinians. For Jews it has, for millennia, carried mainly religious connotations, while in more recent history its meaning has become – for Jews and Palestinians alike – mostly political, in many ways epitomizing the Israeli-Palestinian conflict and embodying its very essence. The issue has thus far constituted a hurdle in the two peoples' attempts to reach a sustainable, peaceful agreement. Notions of Return are closely linked to the concepts of "Diaspora" and "refugees," and all are, in the given context, most clearly embodied in the idea of the "Right of Return," as it applies to Jews and Palestinians alike.

While there is much to say about Jewish Return, this paper will focus on the Palestinian Right of Return as an important issue in Palestinian-Israeli negotiations and a central concept in the conflict. However, it will make reference to Jewish notions of Return, which have existed for millennia, in order to help clarify Jewish attitudes towards, and understandings of, the Palestinian Right of Return.

In the eyes of some, the Right of Return constitutes, in a sense, the bare bedrock[1] upon which other layers of the conflict are mounted, and discourse and discursive processes surrounding it mirror larger processes taking place within the context of the conflict.

On the one hand, the Jewish Right of Return – institutionalized through Israel's Law of Return – is a central element of the Jewish national ethos (at the core of Zionism) and a main tenet upon which the State of Israel was established. Similarly, the Palestinian Right of Return is a central constituent of Palestinians' collective identity and national aspirations. Each people views the right as unquestio-

nable and irrevocable with regard to itself, while illegitimate at best with regard to the other.

A resolution, or agreement, concerning the Right of Return is essential to any future sustainable peace, though it is still one of the main stumbling blocks on the road to reaching an agreement.[2] One of the many myths prevalent during the Oslo Peace Process, mainly among Israelis, was that the "occupation" (of the West Bank and Gaza) was all that stood in the way of reconciliation.[3] Recent events, especially the Intifada raging since September 2000, suggest that the Right of Return, in fact intrinsically related to the eruption of the Intifada in the first place, is very much alive and still very pertinent.

In Palestinian-Israeli negotiations in Taba, in December 2000-January 2001, an agreement regarding Palestinian Refugees was almost reached, yet for a number of reasons it was not signed. In spite of this very significant breakthrough, those who might have signed such an agreement would have likely had a very difficult time delivering it to their respective constituencies.

A Dialogue of the Deaf?

The conflict's intractability is often attributed to mutual misconceptions, though some claim that in fact Palestinians and Israelis know exactly what the other side wants, and that this is incongruent with what they themselves want.[4] This may explain some of what takes place, mainly, perhaps, at the top leadership level. But it does not, I believe, account for the whole story.

The Right of Return is one of the most difficult and sensitive topics for Palestinians and Israelis to deal with because it hits at the very heart of the conflict. It cannot be truly addressed without tackling other core issues, such as the parties' legitimacy and right to exist as sovereign in the land, and the responsibility for the events of 1948. While much of the discussions and agreements reached in the context of the Oslo Accords consider 1967 as a reference point, the Right of Return forces the parties to deal with the history and consequences of 1948, and possibly even earlier.

The different understandings of and reactions to the Right of Return stem not only from the different political realities in which Palestinians and Israelis live, but largely from the different symbolic repertoires, manifested through culture and language, in which Israelis and Palestinians are immersed and operate.[5]

The conflict is usually seen as one of zero-sum nature, and the Right of Return, more than anything else perhaps, embodies this mutual exclusivity of claims and existence. The impasse with regard to the Right of Return is thus significantly related to its practical ramifications, as well as to the different understandings of the issue (based on cultural and linguistic contexts) and its place at the very heart of the conflict. The nature of the interaction between these factors, and their relative salience, must be better understood if an agreement or resolution of some sort is to be reached.

Whether being "deaf" is a circumstantial phenomenon or a strategic choice, a "dialogue of the deaf" seems to be taking place around the Right of Return, related to and indicative of Palestinian-Israeli communication at large. Some leaders have been close to reaching an agreement of some sort. They have, perhaps, come a long way in trying to untangle the difficult knot the issue constitutes. However, Israeli and Palestinian societies at large are still not really hearing anything but themselves. Some of the crucial questions remaining are why this is the case: Why does the issue indeed constitute such a hurdle? Is it really of zero-sum nature? Why does it seem that neither side is able to hear what the other is saying, or see the issue in shades of gray, rather than in black or white?

In order for any progress to be made, it is essential to understand why neither people hears the other, what might enable them to hear each other better, and ultimately what might be an outcome that both peoples could accept and live with. If we somehow unravel the issue, decipher what each people is actually saying, what dynamics influence the discourse on the Right of Return, and why each people seems to be "deaf" to the other, we could perhaps come up with a resolution that not only addresses the issue, but words and delivers it in a way that can be heard and accepted by both.

The Right of Return: Some Legal and Historical Landmarks

The Palestinian Right of Return is based on UN Resolution 194, which states that:

> [T]he refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practical date, and…compensation should be paid for the property of those choosing not to return and for loss or damage to property which, under principles of international law or in equity, should be made good by the governments or authorities responsible.[6]

The centrality of the Right of Return in the conflict has gone through several stages. At the end of the 1948 War the Israeli government expressed its willingness to absorb one hundred thousand refugees, approximately 15 per cent of the Palestinian refugees in 1949. Around thirty thousand returned through "family reunification," but the problem of all the rest was left unresolved. Until 1967 the refugee issue was at the top of the agenda of the Palestine Liberation

Organization (PLO) (since its establishment) and the Arab states. However, after the 1967 war and the ascent of the PLO as the sole representative of the Palestinian people, the refugee issue became less openly prominent; instead, the issue of Palestinian self-determination was now central. In reality, however, the PLO continued to demand the Right of Return and the refugees' plight was one of its main sources of power.[7]

The Middle East peace process, initiated in Madrid in 1991, recognized the issue of refugees as one which must be addressed on both regional (Arab-Israeli) and bilateral (Palestinian-Israeli) levels. In the framework of the Oslo Accords of 1993, the issue of refugees, along with those of Jewish settlements, borders, water, and Jerusalem, was to be addressed at the "final status" negotiations, which were initially to have been concluded within five years.[8]

The Refugee Working Group (RWG) was established in 1992, under the framework of the Arab-Israeli multilateral peace talks generated in Madrid, and later on, in 1995, the Continuing Committee for Displaced Persons was established.[9] Ever since, the refugee issue has been addressed in various forums, mainly in second-track diplomatic efforts (these included participants from Israeli and Palestinian NGOs, as well as policy and opinion makers).

Understanding the issue's complexity, discussions concerning it were left to the final stages of negotiations between Israelis and Palestinians in the framework of the Oslo Accords.[10] Not surprisingly, the collapse of the Oslo talks in the summer of 2000 was closely linked to impasses between the parties with regard to the Right of Return.[11]

At the Taba negotiations in late 2000 and early 2001 a breakthrough was made, though mostly on an individual level, by a few negotiators who did not necessarily represent the general feelings among their respective two peoples and who, at that point, may not have been able to deliver such an agreement had it been signed.[12]

Furthermore, the centrality of the refugees and refugee camps in the Palestinian struggle and steadfast resistance during the current Intifada, on the one hand, and the harsh Israeli "reprisals" particularly in recent months, geared mainly at the camps, on the other hand, is not coincidental. The refugee camps have always served as one of the main "hotbeds" of Palestinian nationalism, and much of the Palestinian resistance has thus emanated from the camps. The refugees in many ways epitomize the essence of the Palestinian struggle, and the refugees were the ones who feared being forsaken by the Palestinian leadership were unsatisfactory agreements to be signed which would have relinquished their rights. In addition, since the signing of the Oslo Accords, the situation on the ground for refugees had worsened, mainly in that the per capita income (via UNRWA) was lower than it had previously been, because of the new ways in which moneys were being funneled. Overall, disillusionment among refugees was extremely high. The centrality of the refugee issue and refugee camps in the September 2000 Intifada is a result of all of the above, and the Israeli reprisals aimed mainly at the camps serve to heighten and perpetuate their centrality.

Jewish/Israeli Notions of "Return," "Refugees," and "Right"

Modern political Zionism drew upon existing religious notions of a Jewish Return to Zion, which many Jews had harbored over the centuries. For many centuries Jews, who had previously been expelled from the Land of Zion – Israel – saw themselves as living in the Diaspora and awaiting their return to their land. Zionism, which managed to mobilize Jews based on these and other sentiments, and which culminated in the establishment of the State of Israel, remained the hegemonic state ideology. The Return of Jews to their ancestral land, rather than just a religious notion, became one of the cornerstones of the Jewish State.

Notions of "refugee-ness" heightened among Jews following World War II and the Holocaust, and Israel, more than before, came to be viewed a safe haven for Jews around the world. Shortly following the establishment of the State of Israel, thousands of Jewish refugees poured into Israel from various Arab countries due to hostilities and persecution. Israel, in fact, organized campaigns (such as airlifts) aimed at rescuing Jews from these countries. In the early 1950s there were many "transitory" camps (*Ma'abarot*) in Israel, which were, in essence, refugee camps.

Thus, in the minds of most Jewish Israelis the notion of refugees refers not only, or even mainly, to Palestinian refugees of 1948 – a loaded and controversial issue in itself – but rather to what they see as a parallel phenomenon of Jewish refugees: first from Europe, and later from Arab lands. Since these Jewish refugees were absorbed into the Jewish state, thereby obliterating the Jewish "refugee problem," there is a refusal to understand or accept that the same was not done on the Arab side. In other words, a parallel is drawn between the Jewish and Palestinian refugee problems, following which there are parallel expectations from the Palestinians and the Arab world to have resolved the Palestinian refugee problem, and corresponding demands from the Arab states to compensate the Jewish refugees. The Palestinian refugee issue is thus linked to the larger issue of Middle East refugees, and a solution is perceived only in some larger context. The fact that the Palestinians are a different "entity" than any given Arab country from which Jewish refugees fled is irrelevant. In fact, most Israeli Jews see Palestinians and Arabs as one and the same.

Jews and Jewish refugees "returned" to their historical homeland – and "home" is perceived as anywhere that Jewish sovereignty exists. It is difficult, therefore, to understand that "home" may mean something slightly different (perhaps much more specific, e.g., a village or town) to most Palestinians.

The closest referent in the Jewish-Israeli national psyche to the concept of the Right of Return is the Israeli "Law of Return" (based on the Jewish Right of Return), which allows any Jew to immigrate to Israel and become a citizen of the state. This law, adopted by Israel in 1950, was a form of "affirmative action," allowing Jews, previously persecuted and denied rights in other countries, to seek a safe haven in Israel.

The Hebrew word for "Right" (*Zekhut*) seems to have a legalistic, implementation-based undertone. The combination of the Hebrew words "Right" (*Zekhut*) and "Return" (*Shvut, Shiva*), which clearly connote the Law of Return in the minds of most Israeli Jews, strengthens this implementation-based notion. Hence, perhaps this exacerbates Israelis' difficulty or inability to conceive of a right as having a modified implementation or being separate from its complete actualization, and thus they seemingly cannot avoid the conflation of two (possibly) quite different matters: the Palestinian Right to Return and the actual return of the Palestinians.[13]

Palestinian Notions of "Refugees," "Return," and "Right"

To Palestinians, May 1948 marked a crucial watershed in their personal and collective history. In the process of population displacement, which continued until the conclusion of the armistice agreements between Israel and Egypt, Jordan, Lebanon, and Syria in 1949, half of Palestine's 1.4 million Arabs were uprooted from their homes and became refugees. The traditional political and social leadership was scattered, and the Palestinian social web was destroyed. These traumatic events of 1947–49, which cost the Palestinian their majority status in Palestine and their hope of controlling the country, and cost half of them their homes, land, and property, are inscribed in Palestinian memory and historiography as al-Nakba, "the Catastrophe."

One of the main elements of Palestinian identity (before 1948 and thereafter) was the attachment to a specific locale – a home, a village, or a city. Given this fact, the impact of the events of 1947–49 was even more powerful. By 1949 more than four hundred cities, towns, and villages had been depopulated, incorporated into Israel and settled with Jews, and most of their Arab inhabitants became refugees, dispersed throughout the region.

The Catastrophe of 1948, rather than causing the absorption of Palestinian refugees into neighbouring Arab countries, reinforced pre-existing elements of self-definition that were already present. In spite of the existence of a variety of different identities, the shared events of 1948 brought the Palestinians closer together in terms of their collective consciousness, even though physically they were dispersed all over the Middle East and beyond. 1948 erased many pre-existing differences, and the Nakba thus came ultimately to serve as one of the most important aspects of Palestinian identity and a source of shared beliefs and values.[14]

The 1967 war was yet another watershed in Palestinian identity, and served to reinforce the Palestinian national movement. On the one hand, the Arab armies had been defeated by Israel, disillusioning many Palestinians who had hoped their salvation would come from neighbouring Arab countries. In effect, 1967 symbolized the end of Pan-Arabism. The Arab countries exhibited and emphasized more localized identities, in line with nation-state boundaries and frames of reference. This change in ideology did not leave much choice for the Palestinians, who had anyway ceased to put their faith in the hands of other Arab leaders and states. The end of Pan-Arabism was therefore a significant factor in enhancing an independent Palestinian national identity.[15]

On the other hand, the entire West Bank, previously under Jordanian rule, and in fact all of mandatory Palestine, were now under Israeli control (including the Gaza Strip, previously under Egyptian military rule). This ended efforts to "Jordanize" the Palestinians, and eventually the pro-Jordanian elite in the West Bank gave way to a Palestinian nationalist elite. It also brought previously separated Palestinian communities together. The PLO, which was officially formed in 1964, now became a broad-based national movement organized as a proto-state.[16]

For over fifty years there has been an ongoing struggle over the preservation and re-creation of the Palestinian identity, which has taken place in a few loci: the refugee camps in the West Bank, Gaza Strip, Lebanon, Syria and Jordan, which preserved the identity of displaced refugees intending to return to their homes; the population in the major Palestinian cities, such as Nablus; and the "satellite" Palestinian communities in the Diaspora, which eventually served as a hotbed for national and rebellious activities.

Memories of destroyed villages and towns, and of the events of 1948, play a central role in Palestinian consciousness. The Deir Yassin massacre, committed by Irgun forces in 1948, was crucial in heightening Palestinian fears at the time and in heightening the flow of refugees. It has been, ever since, a central theme in the narration of Palestinian history, and has had a great impact on how Palesti-

nians saw (and still see) their enemies. Palestinian identity has, ever since 1948, been in many ways constructed of the experience of dispossession, homelessness, insecurity, and uprootedness.[17]

No one embodies these feelings more than the refugees themselves. Indeed, the concept of *Ghurba*, or exile, is a major component of Palestinian identity. In addition, a distinct identity and character developed in the camps themselves, and in those outside the mandatory borders of Palestine the situation was different than that in the West Bank and Gaza Strip camps. A major agent in instilling Palestinian consciences among the camp refugees was the educational system established by the United Nations Relief and Work Agency (UNRWA). For many Palestinians, the core of the conflict, from which all else flows, is the refugee issue. They see their dispossession by Israel in 1948 as the defining element in the modern history of their people, as well as in the entire Arab-Israeli conflict.[18]

The term "refugee" does not, in the Palestinian mind, refer only to those living in and around camps and defined by UNRWA as refugees. The concept is a central theme in the personal and collective identity of many Palestinians, and applies to anyone who fled or was forced out of their home, regardless of their official "status" today. Thus, there are in fact many more Palestinians who would identify themselves as refugees than any UN or other figures might show, and "refugee" is more a matter of identity than an operational definition.

The Arabic term for "Right of Return" (*Haq al-'Awda*) resonates very strongly among Palestinians, not merely because of its clear political meaning. The Arabic word for "Right" (*Haq*) also means, or connotes, justice/justness, truth ("definite," real), and is one of God's names. Thus, the connotations the word itself evokes are of a strong, non-negotiable concept. Its connection to direct implementation is another question, but, regardless, it is a concept over which one cannot conceive of negotiating or compromising; it is simply a "given." The Right of Return has been a central principle in Palestinian collective identity, and is in fact a central element in the personal identity of many. The refugee issue and the Right of Return are at the heart of the Palestinian national ethos and struggle and enfold memories of the Nakba and the feelings of historical injustice brought upon the Palestinian people.

What Are Palestinians and Israelis Saying and Hearing?

Palestinian and Israeli narratives of the past are, more often than not, mutually exclusive. The debate over the Right of Return epitomizes these mutually exclusive narratives, and any principal position-shift on the issue is perceived by each people to have potential detrimental consequences, on both practical and symbolic levels. On the practical level this is perceived to mean "flooding" Israel with refugees and thus destroying it, on the one hand, or leaving unresolved the condition of millions of refugees on the other. On a symbolic level such a position-shift would strike at the core of each people's national narrative and collective identity, challenging at once well-established self-perceptions and deeply held beliefs about the "other."

For most Israelis, the Right of Return has traditionally been a taboo, and means nothing less than four million refugees at Israel's doorstep the next day. Israelis show little ability to conceptualize a right separate from its full actualization, and their main reasoning against the Right of Return is that it will indeed destroy the State of Israel as a Jewish state, and perhaps altogether. In other words, it has both demographic and security-related consequences. Palestinians' insistence on their right to return casts them, in the eyes of Israelis, as seeking to overwhelm Israel with refugees – in other words, seeking Israel's destruction.[19] If they do refer to 1948, Israelis for the most part cast the blame for the creation of the refugee problem on the Palestinians themselves and on the Arab regimes, taking little blame, if any, for themselves. At best, the events of 1948 are viewed as natural, or excusable, wartime occurrences.

Following this rationale, Israeli discourse has tended for many years to treat the refugee issue as a humanitarian one first and foremost, and any possible action by Israel on this issue, such as admitting a small number of refugees into Israel, is framed as a humanitarian act or favour which Israel is willing to grant the Palestinians as a gesture of good will. Indeed, such a gesture can only be considered if it is framed by Israel as such, explicitly denying any Israeli responsibility, even partial, for the creation of the refugee problem. This position was reiterated and emphasized once again by Israeli Prime Minister Barak in the summer of 2000.

Even among Israel's traditional "peace camp" it is difficult to find proponents of the Right of Return. A few months into the current Intifada some of Israel's leading intellectuals (all from the Israeli peace camp) issued, in the Israeli press, a letter to the Palestinian leadership. After noting that they have struggled for over thirty years for the two-state solution, the signers forcefully stated that they shall never be able to agree to the return of the refugees to within the borders of Israel. Instead, they affirmed that "the refugees will have the right to return to their homeland, Palestine, and settle there." Here again, the letter's signatories appear to be understanding the issue no differently from the general public: confusing the issues of the right and its actual actualization, and rejecting the key Palesti-

nian demand for recognition of their *right* to return to their homes in Israel as well as in the Occupied Territories.

Palestinians, on the other hand, emphasize the political nature of the problem, and the need for principle recognition by Israel of its responsibility, whole or partial, for the events of 1948 and the fate that consequently befell the Palestinians. To justify and anchor their claims, Palestinians refer to various UN resolutions (mainly 194) and to concepts of international law in general.

Importantly, notions of "Justice" (also inherent in the word *Haq*) are central to Palestinian claims, while the concept is usually absent in Israeli discourse. There is a great emphasis on the righting of a grave historical wrongdoing. While Israelis highlight the notion of "symmetry" between Jewish and Arab refugees, Palestinians emphasize the notion of "equality" and the lack thereof in the relationship between Israelis and Palestinians. If symmetry is referred to by Palestinians, it is in a different context, mostly comparing Israeli claims and retributions from Germany to Palestinian claims from Israel.

Palestinians also stress the notion of "choice," referring to a personal choice of each refugee. A choice not to return to one's home would not imply "giving up" the Right of Return, but rather would mean that while the right is a given, the mode of its exercise is a matter of choice. This concept is mostly absent in Israeli discourse, since in the concept itself lies one of Israel's greatest fears – the fear that all four million refugees would in fact chose to return to their homes within the 1967 borders of Israel.

Embedded in this concept of choice is the notion that the Right of Return is a *personal* right before it is a *collective* right. Moreover, to Israelis, "being home" implies, for most people, living under Israeli sovereignty. In other words, sovereignty is an attribute of a collective, and Return of the Jews (both a collective and a personal right) is to this collective, sovereign entity. It is difficult for Israelis to conceptualize the much more salient attachments Palestinians have to their particular place (city, village, house) of origin. While notions of nationality, statehood, and sovereignty are dynamic and ever evolving, it is still difficult to say at this point that most Palestinian refugees regard anywhere under Palestinian national sovereignty as "home."

Some Palestinians and Israelis go as far as devising a concrete plan for the return of all refugees, and claim to prove that such a solution is entirely feasible and does not pose any threat to Israel, or that such a threat, if it exists, is irrelevant.[20] This claim, while perhaps "technically" convincing, is not entirely useful. Just as Israelis tend to underestimate or completely overlook the meaning Palestinians attribute to the issues of "refugees" and "Return," so do such plans tend to ignore, or deem unimportant, Israeli fears (demographic and security-related). The issue of "physical space" to absorb the refugees is hardly the most central concern of most Israelis.

The general run of Palestinians for the most part hold (or at least widely express outwardly) maximalist demands with regard to the actualization of the Right of Return.[21] In a sense, the Palestinians are entrapped in their demand to recognize the Right of Return. They have invested too much in trying to secure this right, and would lose face (to others as well as to themselves) if they did not achieve a satisfactory agreement of some sort. However, most Palestinian leaders and intellectuals (as well as others) are well aware that Israel is unlikely to agree to the actual return of *all* refugees. For the most part, the Palestinian leadership seeks some formal and principle recognition of Palestinian rights and a choice-based approach which will provide the refugees with a variety of structured options. These options, which would be accompanied by a variety of incentives and disincentives, may be formulated in a way such that only a few will actually choose to return to Israel.[22] The formulation of this approach, however, must also satisfy (at least to some degree) the Palestinians' need, or demand, for an official acceptance of responsibility on the part of the state of Israel.

Another important difference between Palestinian and Israeli discourses is that while Israelis tend to be forward-bound – taking historical points of reference (mostly 1967) as "instrumental" (mainly to themselves, since preserving some sort of status quo better serves the stronger party in the conflict) in reaching a future solution – Palestinians are still very much bound to the past, to the events of 1948. Moreover, while Israelis emphasize an "end to the conflict," Palestinians express more concern with historical justice.

What Does All This Tell Us?

Conflict, in effect, can be conceptualized as a constructed discourse. Conceptualizing the "Right of Return" as such places it within the wider discursive and institutional continuities within which it is embedded.[23] Thus, discourse regarding the Right of Return must be examined in relation to discourses about the conflict at large, as well as discourses on identities, history, etc., prevalent among Palestinians and Israelis. Examining the nature of, and reasons for, the apparent impasse with regard to the Right of Return may indeed shed light on, and be informed by, the larger context of the conflict.

Discussion between Israelis and Palestinians on the Right of Return in particular, and on the conflict in general, takes place on different discursive planes, since the different realms of meaning upon which the discourses draw have little, if anything, in common. These separate discourses both construct and delimit each peoples' own reality, as well as

their interpretations of the other's reality. As Khalidi puts it:

> In a sense, each party to this conflict, and every other claimant, operates in a different dimension from the other, looking back to a different era of the past, and living in a different present, albeit in the very same place.[24]

The "Dialogue of the Deaf" between Palestinians and Israelis, or the entanglement surrounding the Right of Return, is the result of a number of different factors and most likely a combination of them all: their worlds of meaning are incongruent with one another, and concepts reverberate very differently – linguistically, culturally and otherwise – within both communities. Language, culture, and discourse all have features in common, as claims Foucault: they belong, within a given context, to the same system of formation and serve to construct and delimit the way people make meaning of the world around them.

At face value it seems that when discussing the Right of Return Palestinians and Israelis are talking about the same thing and simply not agreeing on it; in other words, that the demands, or aspirations, of both sides with regard to the Right of Return are simply irreconcilable and that the conflict is indeed of zero-sum nature. A closer look, however, reveals that not only is each side often not really hearing what the other is saying but that this "Dialogue of the Deaf" is one of the central symptoms of the conflict, as well as a main cause for its perpetuation.

"Peace talks" between Palestinians and Israelis mostly regard 1967 as the significant point of reference. This symbolizes a "compromise" and mutual recognition between Palestinians and Israelis, and supposedly constitutes a workable framework for future political arrangements. However, this framework also enables the parties (mostly Israel, for whom the "status quo" is more convenient) to avoid confronting the origins and core of the conflict – which in the eyes of Palestinians in fact lie further back in history. Withdrawal of Israeli troops from the West Bank and Gaza and even the dismantling of settlements in those areas are more technicalities, or "cosmetics," which treat the actual physical occupation of Palestinians civilians by Israelis as the main source of the overall conflict. While most may agree that this is the most immediate source of conflict, and especially of its escalation over the past two years, for Palestinians 1948 still constitutes the formative event in their collective national history as well as in the personal history and memory of many, and the real core of the conflict.

The difference in interpreting the Right of Return portrays, among other things, the debate over responsibility for the events of 1948,[25] as well as the different historical landmarks to which each party is alluding. The recognition by Israel of a Palestinian Right of Return even in principle is problematic, since it would challenge the Israeli national identity and meta-narrative by implying responsibility for the fate of the Palestinians, and possibly cast a shadow on Israel's righteousness and legitimacy (cornerstones of the Jewish/Israeli national ethos). Not only are the issues of the war or the fate of the refugees problematic, but the fact that Israel possibly could not have come into being, or survived, without the drastic demographic shift in its favour due to the expulsion and fleeing of so many Palestinians, is a hard issue for Israel to confront. Thus, for Israelis, accepting the Palestinian Right of Return (together with a share of the responsibility for the formation of the Palestinian refugee problem) is seen as having detrimental consequences. For Palestinians, relinquishing the Right of Return would render over fifty years of struggle meaningless. In fact, the very core of the Palestinians' identity and plight would be left unanswered.

Conveniently, it has been possible to discuss, albeit somewhat superficially, all other technicalities while evading the core of the conflict. In other words, being "deaf" has often been a strategic choice consciously made by Israelis and Palestinians (mostly the leaders), which has served their different agendas, and has not prevented them from reaching a number of agreements. However, the sustainability of these agreements is in question so long as other core issues, such as the Right or Return and all it entails, remain unresolved. Real reconciliation can begin only once the weight of history has been shouldered.[26] Once the conflict's bedrock lies bare there may be no choice left but to finally confront it.

Mutual deafness, or blindness, in fact exists between Israelis and Palestinians throughout their relationship and negotiations at large, with regard to most issues pertaining to the conflict and the peace process. To overcome this obstacle, the importance of which is usually underestimated, it is necessary to recognize that Israelis and Palestinians indeed do not hear each other, do not see each other, and do not understand each other's realities. Even when they are seemingly discussing the same issue, they may in fact attribute to it entirely different meanings. Currently, Palestinians and Israelis operate in completely different realms of meaning, with hardly any overlap. While shared meaning may be too much to ask for at this point, compatible meanings are more attainable. A sustainable agreement would thus need to be worded and delivered in a way that addresses the core concerns of Palestinians and Israelis and resonates well with both peoples.

In trying to reach a sustainable agreement it is also important to recognize that meaning is dynamic, subject to

the workings of discursive and other processes, and that the past as well as the future are looked at from within the context of the present. What seems unbridgeable and inconceivable today may well be possible tomorrow, if we better understand these processes. The Right of Return, too, may come to mean something different than it currently does to Palestinians and to Israelis once their respective political realities change.

Overcoming existing hurdles will also require new and creative ways of thinking and the continuous challenging of long-held myths and deep-seated taboos. Not only will the past have to be re-examined, so will the range of conceivably possible future scenarios.

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The U.S.-Proposed "Trusteeship Agreement" for Palestine: The UN-Styled Plan That Could Have Avoided Forcible Displacement of the Palestinian Refugees in 1948

Gail J. Boling

Abstract

In this article, the author examines the U.S.-proposed "Trusteeship Agreement for Palestine," circulated by the U.S. in the UN Security Council and in subcommittees of the General Assembly from March through May of 1948. The U.S. proposed a UN trusteeship for Palestine as a possible means to provide for a peaceful transition from the end of the British Mandate for Palestine into a new governmental entity that would provide equality under the law for all of its citizens. Notably, the proposed trusteeship arrangement would have avoided partition of Palestine. The author asserts that this, in turn, could have avoided the forcible displacement of three-quarters of a million Palestinian refugees in 1948, as well as Israel's subsequent refusal to repatriate them. The author argues that the U.S.-proposed Trusteeship Agreement for Palestine sheds light on important norms of international law that existed in 1948 and that could, and should, have been followed by the United Nations in providing for the welfare and legal rights of all the inhabitants of mandate Palestine as the clock ticked down on the announced British withdrawal from Palestine as mandatory authority as of 15 May 1948.

Résumé

Dans cet article, l'auteure examine la proposition intitulée « Trusteeship Agreement for Palestine » (« Accord de tutelle pour la Palestine ») qu'avait fait circuler les États-Unis au Conseil de sécurité des Nations Unies et dans les sous-comités de l'Assemblée générale pendant la période allant de mars à mai 1948. Les États-Unis avaient proposé une tutelle des Nations Unies pour la Palestine comme solution possible pouvant fournir une transition pacifique entre la fin du mandat britannique sur la Palestine et l'émergence d'une nouvelle entité gouvernementale qui aurait garanti l'égalité de tous ses citoyens devant la loi. En particulier, ce plan de tutelle aurait évité la partition de la Palestine. L'auteur affirme qu'un tel plan aurait à son tour évité le déplacement forcé de trois-quarts de million de réfugiés palestiniens en 1948, aussi bien que le refus d'Israël par la suite de les rapatrier. L'auteur soutient que la proposition américaine d' « Accord de Tutelle des Nations Unies pour la Palestine » jette la lumière sur des normes importantes en matière de droit international qui existaient en 1948 et qui auraient pu, et auraient dû, être mises en vigueur par les Nations Unies pour garantir le bien-être et les droits légaux de tous les habitants du mandat de la Palestine alors qu'avait commencé le compte à rebours pour le retrait annoncé de la Grande Bretagne de la Palestine en tant qu'autorité mandataire, le 15 mai 1948.

I. Introduction

This article will examine an important but often overlooked document that had the potential peacefully to forestall the outbreak of interstate hostilities in the Israeli-Palestinian conflict in 1948. This document is the U.S.-proposed "Trusteeship Agreement for Palestine"[1] (hereinafter the Trusteeship Agreement), drafted by the U.S. and circulated first in the UN Security Council and then in subcommittees of the General Assembly from March through May of 1948. Had this plan been adopted by the UN Security Council in a timely manner in 1948, it could quite possibly have avoided[2] or reversed[3] the forcible displacement of the Palestinian refugee population in 1948. Consequently, study of the Trusteeship Agreement sheds light on certain important international law aspects of the Palestinian refugee dilemma, both at its origins and also at the heart of the current stalemate in the stalled peace negotiations between the Israelis and the Palestinians.

The Trusteeship Agreement would have legally obliged United Nations member states to ensure the *peaceful* transition of the "British Mandate for Palestine" – which the British had announced they would terminate on 15 May 1948 – into a newly created entity to be known as the "UN Trusteeship for Palestine" (hereinafter the Trusteeship). This new Trusteeship would have been supervised under the UN Trusteeship Council pursuant to Article 75 of the Charter of the United Nations.[4]

The potential impact of the Trusteeship Agreement in changing the course of history of the Israeli-Palestinian conflict cannot be underestimated. Had it come into effect, there would have been no division of mandate Palestine into more than one state. The government that would have been set up – under the direct supervision of the United Nations – would have been a government for all its citizens. Because it was premised on a peaceful transition of government, forcible displacement of habitual residents from the territory of former mandate Palestine and subsequent refusal to repatriate them simply was not contemplated in the setting up of such a Trusteeship, nor could it have been justified under the terms of the Trusteeship Agreement. This is because the Trusteeship Agreement incorporated certain fundamental human rights norms that have come to be recognized as forming the bedrock core of human rights law today. Seen in this light, the importance of the Trusteeship Agreement becomes clear. From the viewpoint of the Palestinians who became refugees, it could have protected them from forcible displacement and Israel's subsequent refusal to repatriate them. From the viewpoint of the *Yishuv* – the pre-state, Zionist politically oriented and immigrant-based leadership operating in Palestine – implementation of the Trusteeship Agreement would have been an unmitigated disaster and could well have spelled the end of the Zionist enterprise. The stakes surrounding the fate of the Trusteeship Agreement, then, were a "winner takes all" proposition.

In its most basic outlines, the Trusteeship Agreement would have instituted a secular and democratic model of government in all the geographic area of former mandate Palestine. Thus, "partition" – or separation of the two peoples, Jewish *vs.* Palestinian Arab – simply was not contemplated under Trusteeship. This commitment to geographic unity alone would have avoided the creation of the Palestinian refugee population. Under Trusteeship, there could have been no possible justification for forcible displacement and subsequent refusal to repatriate refugees whose habitual residences lay inside the geographic boundaries of the Trusteeship entity. Furthermore, the Trusteeship Agreement incorporated fundamental human rights principles that would have protected Palestinians, including: democratic rule through the ballot;[5] equality under the law for all citizens of the Trusteeship; protection of property rights for all citizens of the Trusteeship; and a secular government, following the U.S. model of "separation of church (religion) and state." A tripartite system of government was proposed, with legislative, judicial, and executive branches.

Review of the Trusteeship Agreement, then, is not mere hypothetical speculation about what "might have been" or an idle exercise in "rewriting history" for purely conjectural reasons. Rather, the analysis is important because it provides an actual historical example of a governmental model that was actually proposed at the highest levels of the United Nations and could have been used for the peaceful transition of mandate Palestine into a new governmental entity – Trusteeship – which in turn was intended to lead to full self-government or independence. This model is critically important because it was drafted within the framework of the United Nations system and consciously incorporated fundamental norms of the United Nations human rights regime existing in 1948 to define the contours of the type of government envisioned for post-mandate Palestine. Thus the Trusteeship Agreement serves as a standard-setting model that incorporates 1948 legal norms that should have guided the fate of post-mandate Palestine.

Viewing the issue in terms of the present-day impasse facing negotiations between the Israelis and the Palestinians, analysts on both sides of the table agree unanimously that if a solution to the Palestinian refugee problem could be found, then a solution to the Israeli-Palestinian conflict could be found. Israel's refusal to offer the choice of voluntary repatriation to the 1948 refugees and their descendants remains the most intractable of the so-called "final status"

issues still on the negotiating table between the Israelis and the Palestinians today.

Does the past hold any keys to solving the perplexing dilemma of the Palestinian refugee question, which has such monumental consequences for achieving peace and stability in the Middle East in these troubled times? Do the legal norms incorporated into the 1948 UN Trusteeship Agreement for Palestine offer any guidelines or benchmarks that could be used in mapping out a solution to the Palestinian refugee question today?

This article will attempt to suggest some possible answers to these questions. First, a brief survey of the history leading up to the official U.S. proposal for the Trusteeship Agreement will be presented. Then, the more salient features of the Trusteeship government itself will be examined. Then the Trusteeship proposal will be examined in light of light of international law. It will then be possible to arrive at some concluding observations.

II. Historical Background

The Covenant of the League of Nations: Mandates as a "Sacred Trust of Civilization"

To understand the particularities of the British mandate for Palestine, established in 1922, it is first necessary to review the mandates scheme devised by the League of Nations following World War I and set out in the 1919 Covenant of the League of Nations (hereinafter the Covenant).[6] The victorious allied powers envisioned a scheme of "administering" various colonies that had previously been under the control of Germany and Turkey until their defeat during the war. Three classes of mandates were envisioned: "Class A," "Class B," and "Class C" mandates. The "Class A" mandates were intended for the most "developed" peoples, which were therefore deemed capable of achieving independence the soonest. "Class B" mandates were for "less developed" peoples, and "Class C" mandates were for the "least developed" peoples. The League of Nations envisaged that "Class A" mandates would achieve full independence first, followed by the "Class B" mandates, and then by the "Class C" mandates. However, no specific timetables or "road maps" for achieving independence were laid out in the Covenant.[7]

Article 22(4) of the Covenant contains the language that specifically addresses the sovereignty rights of peoples under "Class A" mandates. The language defining the legal contours of the mandate concept generally is contained in the first four paragraphs of Article 22, which read as follows:

> Article 22:
>
> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a *sacred trust* of civilization and that *securities* for the *performance* of this *trust* should be *embodied in this Covenant.*
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be *entrusted* to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories *on behalf of the League.*
>
> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their *existence* as *independent nations* can be *provisionally recognized* subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. *The wishes of these communities must be a principal consideration in the selection of the Mandatory.* [emphasis added][8]

There are three main points to be made here. First, the mandates system was envisaged, as early as 1919, as a "sacred trust of civilization." The legal concept of "trust" (or trusteeship) in Anglo-Saxon common law is specifically invoked in Article 22 in paragraphs 1 and 2, through use of the words "sacred trust," "securities for the performance of this trust," "tutelage of such peoples should be entrusted," and "advanced nations [undertake the tutelage]… on behalf of the League."

According to the Anglo-Saxon common-law understanding of "trust" in property and estate law (equity), a "trustee" who is charged with custodial responsibilities for managing property that belongs to one party (the "grantor") for the benefit of another party (the "beneficiary") does not (and legally cannot) acquire actual ownership of that property (the "corpus" of the trust). Rather, the trustee has strict obligations to manage the property responsibly and can be held legally liable for mismanagement. The management responsibilities of the trustee are known as "fiduciary" duties and the duty of care is extremely high. There are very few circumstances in which mismanagement or waste by a trustee is excused by common law courts.[9]

The use of the "trust" language in Article 22 of the Covenant is significant for this reason. Britain was obligated to perform its trust obligations under any League of Nations mandate in a responsible fashion, so as not to violate its strict common law fiduciary duties as "trustee."

The "property" in this case is the concept of "national sovereignty" of the local inhabitants of the mandated territory, whose sovereignty rights were to be temporarily "managed" by the mandatory "trustee" until full independence would be achieved.[10] Article 22 makes it clear that the mandates are a "trust" arrangement in which the "beneficiaries" are the peoples of the mandated territories themselves.[11] Britain's "fiduciary duties" and strict duty of care becomes significant when analyzing its decision to incorporate the Balfour Declaration into the British Mandate for Palestine (see below).

The second point to be made here is that Article 22(4) specifically refers to the geographical area that formerly had been occupied by the Turkish Empire. This area, which included Palestine, was ultimately divided into five separate mandate areas – Palestine, Trans-Jordan, Lebanon, Syria, and Iraq – all of which were denominated "Class A" mandates because they were deemed to be the most ready to achieve their full sovereign independence and were expected to do so sooner than the "Class B" or "Class C" mandates. Of the five "Class A" mandates, Palestine was the only one that did not achieve the full sovereign independence promised to it in Article 22(4). Iraq achieved independence first, in 1932, when it was admitted to the League of Nations. Jordan achieved independence in 1946. The French mandates over Syria and Lebanon ended during World War II.

At least one author has disputed the clarity of the geographical reference contained in Article 22(4), arguing that use of the words "certain communities" – without specifying exactly which ones – is vague and leaves open the possibility that not all "communities formerly belonging to the Turkish Empire" were "provisionally recognized" as "independent nations." That commentator argues that Palestine was the exception, and that the local indigenous inhabitants of Palestine did not receive provisional recognition in Article 22(4) of their status as an independent nation because of the vagueness of the wording.[12] However, this argument fails to address the fact that Palestine was expressly grouped in the "Class A" mandates by the League of Nations along with all the other territories formerly occupied by the Ottoman Turks. Since there is no language in Article 22(4) to separate Palestine out for disparate treatment, it should logically be considered to have been included in the Covenant's provisional recognition of sovereignty as an independent nation.

The Balfour Declaration: Propriety of Incorporation into the British Mandate for Palestine

The third point to be made concerns the Balfour Declaration, which preceded the drafting of the Covenant of the League of Nations. The Balfour Declaration was a letter written in 1917 by Britain's Foreign Secretary, Arthur Balfour, to a prominent leader of the Zionist movement, Lord Rothschild, stating that Britain would "view with favour the establishment in Palestine of a national home for the Jewish people."[13] The Balfour Declaration was a letter written by a representative of the British government to a private person and therefore could not be considered binding upon any other states (and some Britons questioned whether it could even be considered binding upon Britain). Importantly, however, the Balfour Declaration did contain a "savings clause" which preserved the rights of the local, indigenous inhabitants of Palestine: "it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine."[14]

In contrast, the Covenant of the League of Nations, as discussed above, was an agreement made between states two years later, in 1919. The Covenant served as the juridical basis for the mandates which the League subsequently set up. Britain, which ultimately assumed the mandate for Palestine in 1922, did so subject to the express terms of the Covenant. Thus, Article 22 of the Covenant must serve as the benchmark for measuring Britain's performance of its fiduciary trust obligations to the "beneficiaries" of the Covenant trust, *i.e.*, the local indigenous inhabitants of Palestine. Britain notably acted against this people's interests by incorporating the terms of the Balfour Declaration into the British Mandate for Palestine in 1922.[15] It can be argued that Britain's actions in so doing were *ultra vires* to the express terms of Article 22 of the Covenant. Indeed, the Palestinian Arab population was quite vocal about its opposition to the incorporation of the Balfour Declaration into the British Mandate for Palestine and persistently questioned the legality of this incorporation throughout the twenty-five years that Britain served as the mandatory authority. The historical record is replete with examples of the Palestinian Arab population raising legal challenges to this incorporation and the *Yishuv* preferring to avoid having these challenges heard by bodies capable of making a conclusive legal judgment.[16]

Britain essentially attempted to do the impossible. On the one hand, it attempted to satisfy the fiduciary requirements of the Covenant, which entailed safeguarding the sovereignty rights of the local indigenous population over whom it had assumed mandatory authority. That is why the terms of the British Mandate for Palestine included numerous "savings clauses," intended to protect this people's rights.[17] However, on the other hand, Britain gave the wink and nod to another group of people – notably immigrants from outside the region – and gave them permission to settle in Palestine to create a new society or "homeland"

(which the immigrant population interpreted as permission to try to establish their own state). The indigenous population never accepted the notion that the immigrants could set up their own state at the expense of the rights of the indigenous population.

Twenty-Five Years Later, Britain Announces Withdrawal from Palestine: What Will Fill the Gap?

For twenty-five years – from 1922 to 1947 – Britain played the game of trying to square the circle by attempting to satisfy the political demands of two different groups competing over the same territory. Eventually, however, realizing the impossibility of such a proposition, Britain threw up its hands in despair and in April 1947 announced its intention of withdrawing as mandatory authority in Palestine (originally giving an exit date of 1 August 1948, but subsequently moving the exit date up to 15 May 1948). This threw the matter of devising a substitute government structure for Palestine squarely into the purview of the United Nations.

General Assembly Recommends "Partition" of Palestine – 29 November 1947

The United Nations General Assembly initially proposed in November 1947 that Palestine be "partitioned," in effect proposing to cut the proverbial Solomonic baby in half. On 29 November 1947, the General Assembly adopted Resolution 181,[18] known as the "Partition Resolution," which recommended dividing mandatory Palestine into two states, which were inaccurately denominated the "Jewish state" and "Arab state."[19] However, the General Assembly has only recommendatory powers under Articles 10, 11, and 14 of the Charter of the United Nations.[20] Only Security Council resolutions can bind UN member states. Therefore Resolution 181 never could, and never purported to, convey sovereign title to any part of mandatory Palestine to any party.[21]

Furthermore, the term "Jewish state" was actually a misnomer. In fact, the (misnamed) "Jewish state" would have had rough demographic parity between Jews and Arabs, under the terms of the Partition Plan, with a population of 499,020 Jews and 509,780 Palestinian Arabs.[22] Thus importantly, and contrary to popular belief, the Partition Resolution never proposed that Jews should constitute a demographic majority in the (misnamed) "Jewish state."

Finally, consistent with all the major legal instruments that had preceded it – *i.e.*, the Balfour Declaration, the British Mandate for Palestine, and, of course, the Covenant of the League of Nations (which, as has already been discussed, is the cornerstone of the entire mandate enterprise and is, therefore, the most authentic and valid of the three instruments listed) – the Partition Resolution also contained "savings clauses" that were intended to protect the rights of the indigenous Palestinian inhabitants in the geographical area that was proposed for the (misnamed) "Jewish state."[23] Failure by the General Assembly to include such "savings clauses" would have run directly counter to the principles of equal rights and non-discrimination which featured so prominently in Articles 1(2) and 1(3) of the 1945 Charter of the United Nations, by which all members states of the United Nations were bound. (The relevance of the UN Charter to the final acts of the drama played out in Palestine is discussed below, in Section IV.)

Upon Reconsideration, the U.S. Backtracks on "Partition": Trusteeship Is Proposed

As soon as the General Assembly passed the Partition Resolution in November 1947, violent unrest erupted in Palestine. The Jewish Agency, on behalf of the *Yishuv*, accepted the Partition Plan. The local indigenous Palestinian population (who comprised the overwhelming majority of inhabitants at that time) rejected it. In such a scenario, "partition" could only be imposed forcibly and against the will of the majority of inhabitants. The *Yishuv* opted to use force to try to impose partition.

The *Yishuv* apparently hoped to be able to create a state in which Jews would constitute a demographic majority – a notion which ran expressly counter to the provisions of the Partition Plan (as discussed above). Benny Morris and other "revisionist" historians have meticulously documented – using material from the official Israeli state archives – that the various militias of the *Yishuv* embarked upon systematic and premeditated military campaigns in the early months of 1948 deliberately designed to depopulate Palestinian villages and urban centres in the geographic area that had been designated in the Partition Plan for the (misnamed) "Jewish state."[24] As noted in endnotes 3 and 4, to the opening paragraphs of this article, some 300,000 Palestinians had been forcibly displaced from their homes of origin as a result of these military campaigns even before the provisional government of Israel unilaterally declared its independence on 14 May 1948, which is when interstate hostilities broke out. By the time the armistice agreements were concluded in 1949, some three-quarters of a million Palestinian refugees had been forcibly displaced from their homes of origin in the territory that would become the state of Israel. These expulsions were the result of preplanned military campaigns that under today's rubric would likely be termed "ethnic cleansing," since they were designed to manipulate the ethnic demographic composition of what would become the state of Israel.

In the face of these violent disturbances, the United States itself quickly backtracked on the Partition Resolu-

tion. The U.S. realized the legal and practical impossibility of dividing mandate Palestine into two states against the wishes of the local indigenous Palestinian population without resorting to bloodshed.

Notably, the State Department's Policy Planning Staff reported to the U.S. Secretary of State as early as 19 January 1948 that imposition of the partition plan by force would appear to violate the Palestinians' right to self-determination under international law.[25] Regrettably, this same 19 January memo also expressly recommended that the U.S. administration deliberately block any attempt to submit the question of the legality *vel non* of partition to the International Court of Justice.[26] Such a call had been made many times by UN delegates in the various UN debates leading up to the adoption of the General Assembly's Partition Resolution.

The U.S. Submits Its Trusteeship Proposal to the UN Security Council – 19 March 1948

On 19 March 1948, Warren Austin, the U.S. ambassador to the UN, announced to the UN Security Council that the U.S. – after viewing the facts on the ground in Palestine (referring to the militia warfare then currently raging) – deemed "partition" of Palestine to be totally impossible to implement without resort to force of arms.[27] Accordingly, the U.S. recommended to the Security Council that the General Assembly be asked to institute a provisional Trusteeship for the whole territory of mandate Palestine, under which the two communities would live together under a single "Government of Palestine" until a mutually satisfactory final agreement could be achieved. Under the U.S.-proposed Trusteeship Agreement, the United Nations itself, acting through its Trusteeship Council established under Article 75 of the Charter of the United Nations,[28] would have constituted the "Administering Authority for Palestine," thereby replacing Britain as the mandatory authority.

On 19 March 1948, the U.S. circulated a summary of the main principles of the proposed Trusteeship Agreement to other members of the Security Council. These summarized principles were released to the public as a "digest" on 5 April 1948 and published in the press on 6 April 1948. The principles are reproduced as an Annex to a pamphlet dated 16 April 1948 that the Jewish Agency prepared for the special session of the General Assembly convened at the request of the U.S. to discuss the political future of Palestine (see below).[29] The "digest" of principles comprise 15 points.[30]

The political and diplomatic whirlwind that the U.S. initiated on 19 March 1948 was like opening a Pandora's box. The U.S. had acted at the highest levels of the UN – as a permanent member of the Security Council – to call openly for a complete UN policy reversal on the idea of partition for Palestine. Most importantly, the U.S. was openly calling into question the legality of partition. The debate, outcry, and political fallout reverberated throughout the entire world. The diplomatic record – both from the UN internal records, and from the capitals of nations around the globe – is voluminous.[31]

The Jewish Agency and Zionist Circles React with Alarm to Trusteeship

The Jewish Agency reacted with extreme alarm to the Trusteeship proposal. Their opposition was quite openly based upon the perception that the proposed Trusteeship arrangement would have: (1) avoided partition;[32] (2) instituted a democratic electoral form of government in Palestine (majority rule);[33] (3) resulted, in all probability, in the restriction of future immigration to Palestine;[34] and (4) provided protection for local, indigenous landowners.[35]

U.S. Internal Disagreement over Trusteeship: Legal vs. Pragmatic Considerations

The U.S. State Department – staffed with legal experts – was the strongest proponent of Trusteeship. In contrast, the executive and congressional branches faced political pressures that weighed against Trusteeship. As the State Department saw it, since partition was legally and pragmatically not possible, Trusteeship was a viable alternative that could buy time until a peaceful settlement of the conflict could be achieved. On the other hand, the White House was facing a tough election that year and did not want to alienate that segment of U.S. domestic opinion that favoured partition. A series of opinion polls were taken in February 1948 in order to gauge domestic sensitivities on the issue.[36] Weighing against the influence of domestic proponents of partition, there was a natural countervailing domestic reluctance to commit U.S. ground troops[37] to Palestine to implement partition. Thus pragmatic military analysis reinforced the legal view that partition was unworkable. The State Department view – that Trusteeship was the most likely option to buy time until a peaceful (and therefore legal) resolution to the conflict could be found – won out.

As debate in the Security Council and on the U.S. domestic front swirled on, the clock was ticking. The British had announced unequivocally that they intended to withdraw as mandatory power by 15 May 1948 and they had absolutely no intention of staying on, even in a newly transformed role as "Trusteeship Administrator." As already noted above, the militias of the *Yishuv* were engaged in a full-scale systematic campaign aimed at "pacifying" and depopulating Palestinian population centres in the area designated in the Partition Plan as being for the (misnamed) "Jewish

State." The Jewish Agency made no effort to hide the effects of the *Yishuv* militias' anti-Palestinian depopulation military campaigns and referred to their effects as support for the proposition that partition was already "irreversible."[38]

The U.S. Submits Its Trusteeship Proposal to a Special Session of the General Assembly, Convened to Discuss the Future of Palestine – 16 April 1948

On 1 April 1948, the Security Council, on U.S. urging, passed a resolution requesting the Secretary-General to convene a special session of the General Assembly to "consider further the question of the future government of Palestine,"[39] and specifically its proposed trusteeship agreement. On 16 April 1948, the UN General Assembly convened in special session to discuss the U.S. proposal for a provisional trusteeship for Palestine.

It was at this 16 April 1948 special session of the General Assembly that the U.S. officially presented a more fleshed-out version of the its proposed Trusteeship Agreement – some forty-seven articles long.[40]

The U.S.-proposed Trusteeship Agreement had received input from a wide variety of domestic sources, primarily from the executive branch, including: the State Department, and in particular the Department of Near Eastern Affairs; the National Security Council; the Joint Chiefs of Staff; the Policy Planning Staff; and President Harry Truman himself, who gave official approval to the final version.[41]

Significantly, the Trusteeship for Palestine proposed by the U.S. would have established a secular, democratic trusteeship government with a bicameral legislature comprising a "Senate" and a "House of Representatives."[42] It also would have provided for an independent judiciary, including a "Supreme Court."[43] The executive functions would have been carried out by a "Governor-General,"[44] who would have been appointed by the UN Trusteeship Council. (More specific details of the U.S. draft Trusteeship Agreement are discussed in the next section, below.)

The General Assembly submitted the U.S.-proposed Trusteeship Agreement as a "working paper" to its "First Committee," charged with considering matters relating to "Disarmament and International Security." On 20 April 1948, at its 118th meeting, the General Assembly's First Committee officially embarked upon debate of the U.S.-proposed Trusteeship Agreement. At the 120th meeting of the First Committee, on 21 April 1948, the U.S. introduced a resolution recommending referral of the U.S.-proposed Trusteeship Agreement to the General Assembly's Fourth Committee, charged with considering matters falling under the heading "Special Political and Decolonization" (including Trusteeship); however, this recommended was not adopted. Following a period of general debate, the First Committee decided at its 128th meeting to embark upon a detailed discussion of the U.S.-proposed Trusteeship Agreement for Palestine, concentrating on a list of specific sub-topics. The First Committee was to meet a total of twenty-five times during the special session of the General Assembly convened to discuss the question of the future government of Palestine. During the course of its work, the First Committee divided into two subcommittees, to deliberate upon specific aspects of the issue.

The Clock Runs out on a Peaceful Transition from Mandate to Trusteeship

As is plainly evident, time weighed heavily against adoption of the Trusteeship Agreement. With the British-announced withdrawal date from Palestine of 15 May 1948, the General Assembly had less than one month – from 20 April 1948 – to devise a way to construct an entirely new system of government for Palestine, which would be considered an exceedingly short timetable even in today's digital environment. Furthermore, the intense militia warfare raging in Palestine did not whet the appetite of any member state of the United Nations to volunteer for peacekeeping duties in the area to help ensure a peaceful transition from mandate to Trusteeship. The clock was ticking, and the *Yishuv* militias kept up the military pressure to try to impose partition by force.

In the critical weeks that followed, the discussions about Trusteeship ground on in General Assembly committee and subcommittee debates. Meanwhile, the militia warfare raged on, and the Security Council issued a string of resolutions calling for peace in the area. On 1 April 1948, the Security Council unanimously passed a resolution[45] calling for a truce between the *Yishuv* and Palestinian Arab communities in Palestine. In similar fashion, Security Council Resolution 46 of 17 April 1948 likewise called for "the immediate cessation of acts of violence in Palestine, and [the] establish[ment of] conditions of peace and order in that country."[46] Security Council Resolution 48 of 23 April 1948 followed up by establishing a truce commission in Palestine.[47] Finally, on 14 May 1948, the General Assembly passed a resolution[48] recommending the appointment of an official United Nations mediator in Palestine, to try to resolve the dispute between the *Yishuv* and the indigenous Palestinian population.

However, by 14 May 1948, the clock had finally run out. While discussion of the U.S.-proposed Trusteeship Agreement had wound its complex way through numerous General Assembly committee and subcommittee debates, no final agreement had been reached. Meanwhile, the *Yishuv* seized the initiative and unilaterally declared the inde-

pendence of the (provisional) state of Israel on 14 May 1948, one day before the British were officially scheduled to withdraw. Interstate hostilities broke out, and the chance for a peaceful transition from mandate to Trusteeship was lost forever.

The UN Security Council reacted to Israel's 14 May 1948 unilateral declaration of independence by issuing a string of resolutions calling for truces and cessation of hostilities.[49] It is clear from this response that the Security Council preferred a peaceful transition from mandate and not a violent partition of Palestine or forcible displacement of its habitual residents.

Thus, review of the historical record reveals that from a legal perspective, the UN Security Council, the highest policy-setting body for the United Nations, clearly rejected partition of Palestine, as proposed in Resolution 181. Rather, as early as March and April of 1948, the Security Council and the General Assembly were jointly engaged in seeking a peaceful transition from mandate to Trusteeship, for all of Palestine.

III. The Trusteeship Agreement Itself

Key Characteristics of the U.S.-Proposed Trusteeship Agreement

The U.S.-proposed Trusteeship Agreement for Palestine was premised on several key legal concepts which today are recognized as forming the bedrock core of human rights law. This was in conformity both with the standards embedded in the 1945 Charter of the United Nations, as well as the Universal Declaration of Human Rights, which then currently being drafted and which was finally adopted a mere nine months later by the General Assembly in December 1948. (Section IV, below, will address the international law aspects of the Trusteeship Agreement.)

Due to limitations of space, it is not possible to reproduce the entire text of the U.S.-proposed Trusteeship Agreement here, nor is it necessary for purposes of this discussion. For interested readers, however, it is available on the internet.[50] Rather, for purposes of this article, it is more useful to highlight the most important features of the U.S.-proposed Trusteeship Agreement. Six points are of particular importance. They are summarized below, with cross-references to their original source in the Trusteeship Agreement itself:

(1) *Territorial Unity:* Under Trusteeship, Palestine would not be partitioned into two states but instead would continue to exist as a single geographic and political entity under a new form of government called Trusteeship. (Trusteeship Agreement, Preamble and Article 5, "Territorial Integrity.")[51]

(2) *"Majority Rule" Democracy*: The Trusteeship entity would follow a democratic system of government. Specifically, the democratic principle of "majority rule," premised on "one person, one vote," would prevail. (Article 20, "Legislature," and "Article 21, "Elections to the Legislature.")[52]

(3) *Equality under the Law for all Citizens*: The Trusteeship Agreement proposed equality under the law for all its citizens. No *de jure* discrimination whatsoever was contemplated, whether "positive" discrimination or "negative" discrimination. (Article 9, "Fundamental Human Rights and Freedoms, excerpted below. Also, Article 32, "Educational System and Cultural and Benevolent Institutions.")[53]

(4) *Citizenship for All Habitual Residents of Palestine*: No ethnic demographic manipulation of any kind was contemplated under Trusteeship. The Trusteeship for Palestine was to be a government for all its citizens. Forcible displacement of habitual residents from Palestine and subsequent refusal to repatriate them was simply not even contemplated under the Trusteeship Agreement. Such actions simply could not be justified under the human rights protections incorporated into the Trusteeship Agreement. (See Article 8, on "Citizenship," reproduced in full below.)

(5) *Protection of Rights of Tenant Farmers*: Specific provisions were included to protect the land rights of local, indigenous tenant farmers. (See Article 31, on "Land Policy," reproduced in full below.)

(6) *Limited Immigration to Palestine*: Immigration to Palestine was to be limited by quotas for a period of several years and would be limited by Palestine's absorptive capacity. (Article 29, "Immigration.")[54]

In viewing the relevance of the Trusteeship Agreement from the perspective of the Palestinian refugees who were forcibly displaced by the *Yishuv* militias and subsequently denied re-entry by the state of Israel, the Trusteeship Agreement's article on citizenship is perhaps the most significant (since Israel bases much of its legal argument against repatriation of the Palestinian refugees on grounds of "citizenship"[55]):

> *Article 8. Citizenship*
>
> Without prejudice to the provisions of legislation which may subsequently be enacted in Palestine, the following categories of persons shall be regarded as citizens of Palestine:
>
> (1) Persons *resident in Palestine on 1 July 1947*, who were not on that date nationals of any State outside of Palestine;
>
> (2) Persons *resident in Palestine on 1 July 1947*, who were nationals on that date of a State outside of Palestine, if they have filed with the Government of Palestine at any time before 1 November 1948 a declaration, in such form as may be provided

by the Government of Palestine, that they renounce their former nationality in favour of Palestinian citizenship.

(3) Persons who have *resided in Palestine for three months* and who, while continuing to be residents of Palestine, file with the Government of Palestine a declaration that they renounce the nationality of any State outside of Palestine of which they may be nationals, and take an oath of allegiance to the Government of Palestine;

(4) *Children of Palestinian citizens*, wherever born (provided such children have not at birth or subsequently acquired the nationality of a State outside of Palestine). [emphasis added][56]

In viewing the relevance of the Trusteeship Agreement from the perspective of the Palestinian refugees whose entire landholdings and property were subsequently confiscated by the state of Israel and turned over for exclusive use by Jewish citizens of the state of Israel,[57] the Trusteeship Agreement's nine clauses on "Fundamental Human Rights and Freedoms" – of which clauses (2), (3), and (5) are most relevant to the issue of non-discrimination with respect to property rights – are also extremely important:

Article 9. Fundamental Human Rights and Freedoms

. . .

Article 9(2): No discrimination of any kind on grounds of race, religion, language or sex shall be made against any person in Palestine.

Article 9(3): All persons in Palestine shall be entitled to equal protection of the laws.

. . .

Article 9(5): No person or property within Palestine shall be subject to search or seizure except according to legal process.[58]

Concerning the protection of the land rights of local, indigenous farmers, the Trusteeship Agreement contained Article 31, titled "Land Policy," which read as follows:

Article 31. Land Policy

1. The Governor-General shall establish and maintain a land system appropriate to the needs of Palestine, in which there shall be no limitation on the sale, purchase, lease or use of land which discriminates on grounds of race, nationality, community or creed. However, under the authority of the Governor-General, adequate measures shall be taken to assure protection for the interests of small owners or tenants in cases of transfer of arable or grazing lands.

2. The Governor-General shall appoint a commission of impartial experts, who shall be neither Arab nor Jew, to recommend the criteria upon which the land system described in paragraph 1 shall be based.[59]

Thus the governmental model suggested by the U.S. in its proposed Trusteeship Agreement envisioned the creation through peaceful means of a secular, democratic government in all of Palestine whose entire community of inhabitants would have enjoyed full equality under the law.

IV. The Trusteeship Agreement Viewed in Light of International Law

The Legal Principles of "Trust" and Fiduciary Duties of the "Trustee" Were Continued from the Mandate Concept and Expanded into Trusteeship

The notion of "trust" that was well-enough developed under the Covenant of the League of Nations mandate system received even greater emphasis under the proposed Trusteeship system.

The United Nations trusteeship system was set up under Chapter XII and XIII of the Charter of the United Nations, which provide for UN supervision and administration of certain territories placed under the trusteeship regime. Under Article 77 of the Charter, it was envisioned that former League of Nations mandates that had not terminated by the dissolution of the League of Nations, in 1946, would naturally come within the trusteeship system.[60] However, the process was not automatic, since the consent of the administering state was required under Article 79 of the Charter.

Under the new UN's new trusteeship system, Article 73 of the UN Charter unambiguously stated that "the interests of the *inhabitants* of these [trust] territories are *paramount*" [emphasis added].[61] The inhabitants of the territories were clearly the intended "beneficiaries" of the trusteeship system, and, accordingly, the "fiduciary" obligations of the administering "trustee" authorities were made stricter.

Among the "basic objectives" of the Trusteeship system as stated in Article 76 of the UN Charter are:

Article 76(b): to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their *progressive development towards self-government or independence* as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned…

Article 76(c): to encourage *respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language, or religion*…. [emphasis added].[62]

It must be noted that the UN has achieved a fairly good track record as far as securing the eventual independence of all the other "Class A" mandates (apart from Palestine), as well as all the other "Class B" and "Class C" mandates that were transformed into UN trusteeships. As has already been noted, above, all four of the other "Class A" mandates had already achieved full independence by the end of World War II, so there was no need to transform any of them into UN trusteeships. Notably, of the other "Class B" and "Class

C" mandates that were converted to UN trusteeships, all did gain self-government and independence under international supervision.[63]

Thus Palestine is the clear exception to the established pattern. The fact that Palestine did not convert to Trusteeship and eventually achieve independence indicates that the League of Nations' and UN's intended goals and purposes were subverted.

Trusteeship Viewed under International Law: UN Charter Norms

There are three primary norms of the Charter of the United Nations that are particularly relevant to analysis of the U.S.-proposed Trusteeship Agreement for Palestine. All three are found in Article 1 of the Charter, which states the fundamental "purposes" of the United Nations.

The first principle is equality under the law, which has as its corollary the prohibition against discrimination. This principle is stated in two places: Article 1(2)[64] and Article 1(3).[65] The second principle is self-determination of peoples. This principle is stated in Article 1(2).[66] These purposes are repeated in Articles 55[67] and 56[68] of the Charter.

The third principle is the prohibition against aggression, and its corollary, the inadmissibility of the acquisition of territory by force. This principle is stated in Article 1(1).[69] This third principle receives reinforcement from Article 2 of the Charter, which states how Member States will act to achieve the purposes stated in Article 1.[70]

Having already examined previously in this article the sharp differences in outcome between partition and Trusteeship, it seems rather self-evident that partition violated all three of the above-stated principles. Trusteeship, on the other hand, held out the possibility of conforming with all three of the above-stated principles.

Furthermore, Article 76 of the Charter, as was discussed in the preceding section, spells out the specific purposes of the UN Trusteeship system itself. The two principles which are most relevant to analysis of the U.S.-proposed Trusteeship for Palestine include promotion of "self-government or independence" of peoples, stated in Article 76(b), and respect for "human rights" and "fundamental freedoms," stated in Article 76(c).

It is therefore noteworthy that the U.S.-proposed Trusteeship Agreement for Palestine specifically concluded with Article 47, on "Termination of Trusteeship." This article specifically laid out the "road map" to independence for Palestine, even though no specific timetable was given.[71] Therefore, on this point as well, the Trusteeship is much more in conformity with Charter norms that partition.

Finally, Article 80[72] of the Charter of the United Nations specifically stated that the UN, as successor organization to the League of Nations, did not have the legal capacity to alter to the detriment of indigenous peoples any obligations that had been made to them by its predecessor organization, the League of Nations. Consequently, any attempt by the UN to alter the terms of the Palestine Mandate to the detriment of the Palestinian people (which the Partition Plan clearly proposed doing) would be contrary to the Charter of the United Nations. Once again, Trusteeship proves to be the model more in conformity with the purpose and goals of the United Nations than partition.

Trusteeship Viewed under International Law: The Universal Declaration of Human Rights

The U.S.-proposed Trusteeship Agreement – and most importantly, its very significant differences from the General Assembly's Partition Plan, which had preceded it – must be read in light of the fact that during that exact same period (1947–48), one of the most important human rights instruments ever drafted – the Universal Declaration of Human Rights[73] (hereinafter UDHR) – was being prepared and reviewed by the UN General Assembly. The Trusteeship Agreement itself incorporates certain fundamental human rights norms that were included in the UDHR and which are viewed today as forming the bedrock core of human rights law.

The UDHR was drafted in two years, between January 1947 and December 1948. The UN Commission on Human Rights supervised the drafting process, including the incorporation of comments from Member States of the UN, before submitting the draft text to the General Assembly. The General Assembly reviewed the UDHR draft text very thoroughly, with the fifty-eight Member States voting a total of 1,400 times on virtually every word and every clause of the text. In the end, the UDHR was adopted unanimously by the General Assembly on 10 December 1948 (with eight abstentions).[74]

The UDHR contains many provisions which are relevant to the events of 1948 and the forcible displacement of habitual residents of Palestine (and Israel's subsequent refusal to repatriate them). The Trusteeship proposal, if adopted, could have avoided the phenomenon of forcible displacement and refusal to repatriate. The articles of the UDHR that are most relevant to the 1948 fact-pattern include the following:

> *Article 13*:
> (1) Everyone has the right to freedom of movement and residence within the borders of each State.
> (2) Everyone has the right to leave any country, including his own, *and to return to his own country.*

Article 9: No one shall be subjected to arbitrary arrest, detention or *exile*.

Article 15:
(1) *Everyone has the right to a nationality*.
(2) *No one shall be arbitrarily deprived of his nationality* nor denied the right to change his nationality.

Article 17:
(1) Everyone has the right to own property alone as well as in association with others.
(2) *No one shall be arbitrarily deprived of his property*.

Article 21:
(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
. . .
(3) The will of the people shall be the basis of the authority of government; *this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage* and shall be held by secret vote or by equivalent free voting procedures.

Article 29:
. . .
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and 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*.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. "*Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-selfgoverning or under any other limitation of sovereignty*." [emphasis added][75]

V. Conclusion

In conclusion, the legal value of the U.S.-proposed Trusteeship Agreement must be viewed in the international law context in which it was drafted.

First, the U.S. Trusteeship Agreement succeeded to, and expanded upon, the concept of "trust" and "trusteeship" that it had inherited from the League of Nations' mandate system. Thus Britain had fiduciary duties to the local, indigenous population of Palestine, which were breached. It was the responsibility of the international community to remedy this breach. The Trusteeship Agreement held the potential to remedy that breach. It held out the very real possibility of forestalling the outbreak of interstate violence on 15 May 1948 and of bringing about a peaceful transition from mandate to Trusteeship in Palestine. For these reasons alone, it should have been adopted.

Second, the Trusteeship Agreement conformed with important norms of international law that had been enshrined in the Charter of the United Nations, as well as in the UDHR, which was well into the final drafting stages when the U.S. proposed Trusteeship for Palestine and was passed a mere nine months later. Compared to the crude Partition Plan proposed by the General Assembly – which blatantly violated fundamental norms of both the Charter and the UDHR –the U.S.-proposed Trusteeship agreement conformed exceptionally much better with the fundamental norms expressed in both documents. It is indisputable that the norms of the Charter were binding upon all states at the time. The norms of the UDHR were, if not binding in a technical sense, at least evidence of a growing consensus that states should respect human rights and not abuse them, and especially not on a mass scale.

In conclusion, the U.S.-proposed Trusteeship Agreement had the potential to avoid or reverse the mass forcible displacement of Palestinian refugees in 1948 and Israel's subsequent refusal to repatriate them. Fifty-four years of forcible displacement and exile might have been avoided for one of the world's largest and longest-standing refugee population groups. It is to be regretted that this peaceful transformation of Palestine to Trusteeship was subverted.

Perhaps, however, the Trusteeship Agreement can serve as a guidepost for a peaceful future solution for the Palestinian refugees, one where habitual residents are allowed to choose the option of voluntary return to their homes of origin, even after a fifty-four-year absence, and one where government is designed to be for the benefit of all its citizens. The value of the Trusteeship Agreement in the context of the current search for a negotiated settlement between the Israelis and Palestinians is that it conformed with fundamental norms of the UN Charter and emerging human rights law that were recognized to exist in 1948. It

not only conformed with these norms but it serves as an important historical confirmation and evidence of the existence of these norms. These norms have only been strengthened in the intervening passage of time since 1948. Thus these norms could, and logically should, be used as baseline starting points if one were proposing to undertake the design of a legal settlement of the Palestinian refugee question that would conform with international law.

Notes

1. "Draft Trusteeship Agreement for Palestine: Working Paper Circulated by the United States Delegation," UN Doc. A/C.1/277 (1948), appearing in Official Records of the Second Special Session of the General Assembly, Annex to Volumes I and II (1948); also available on the UNISPAL website [hereinafter "Trustee Agreement"].
2. It is estimated that at least 700,000 Palestinian refugees were externally displaced during the 1948-related conflict, while higher-end estimates place the figure for the initial group of 1948 Palestinian refugees as approaching 1 million. See, *e.g., General Progress Report and Supplementary Report of the United Nations Conciliation Commission for Palestine, Covering the Period from 11 December 1949 to 23 October 1950*, UN GAOR, 5th Sess., Supp. No. 18, U.N. Doc. A/1367/Rev. 1 (23 October 1950) (Appendix 4 of which, titled "Report of the Technical Committee on Refugees," which was submitted to the Conciliation Commission in Lausanne on 7 September 1949, listed an estimated figure of 711,000 for the "refugees from Israel-controlled territory," a figure which the Technical Committee stated it "believed to be as accurate as circumstances permit"). See also J. Abu-Lughod, "The Demographic Transformation of Palestine," in I. Abu-Lughod, ed., *The Transformation of Palestine: Essays on the Origin and Development of the Arab-Israeli Conflict* (Evanston: Northwestern University Press, 1971) 139, 161 (an estimated 780,000 displaced Palestinians were trapped outside what became the 1949 armistice lines and were not allowed to return); I. Pappé, "Were They Expelled?: The History, Historiography and Relevance of the Palestinian Refugee Problem," in G. Karmi and E. Cotran, eds., *The Palestinian Exodus 1948-1998* (Reading: Ithaca Press, 1999) at 52 (noting that some demographers put the figure of externally displaced Palestinians from this period at as high as one million persons).
3. It is estimated by reliable sources that by 14 May 1948 (when Israel unilaterally declared its independence) an estimated 300,000 Palestinian refugees had already been forcibly displaced from their homes of origin due to systematic *Yishuv* militia attacks. See, *e.g.*, B. Morris, "The Causes and Character of the Arab Exodus from Palestine: The Israeli Defense Forces Intelligence Branch Analysis of June 1948" (1986) 22 Middle Eastern Studies 5, 6-7; E. B. Childers, "The Wordless Wish: From Citizens to Refugees," in I. Abu-Lughod, ed., supra note 2, 165, 193; M. Akehurst, "The Arab-Israeli Conflict in International Law" (1973) 5 *New Zealand University Law Review* 231, 233.
4. *Charter of the United Nations*, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, art. 75 [hereinafter "Charter of the United Nations"].
5. This principle of electoral democracy is now termed "internal self-determination" by some international law scholars. See, *e.g.*, D. Raic, *Statehood and the Law of Self-Determination* (The Hague, London, and New York: Kluwer Law International, 2002).
6. *Covenant of the League of Nations*, 28 June 1919, reprinted in H. Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (London: Longman, 1973) 259 [hereinafter "Covenant of the League of Nations"].
7. See, generally, League of Nations, *The Mandates System: Origin – Principles – Application* (Geneva: League of Nations Publications, 1945).
8. "Covenant of the League of Nations," *supra* note 6, art. 22(4).
9. See, *e.g.*, A.N. Yiannopoulos, "Property," in Clark and Ansay, eds., Introduction to the Law of the United States.
10. See, *e.g.*, J. Quigley, *Palestine and Israel: A Challenge to Justice* (Durham and London: Duke University Press, 1990), 15 and n. 5, citing H. D. Hall, *Mandates, Dependencies, and Trusteeships* (London: Stevens for the Carnegie Endowment for International Peace, 1948) 81 ("The League of Nations' Permanent Mandates Commission, which oversaw mandate administration, said that mandatory powers had no right of sovereignty but that the people under the mandate held ultimate sovereignty").
11. See, *e.g.*, Q. Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930) at 535 (stating that both the League of Nations and the mandatory authority are "joint trustees" with fiduciary duties toward the inhabitants of the mandated territory, by analogy "to the conception of trust in Anglo-American law").
12. See N. Feinberg, *Some Problems of the Palestine Mandate* (Tel Aviv, Palestine: Shoshani's Printing Co., 1936) at 90 ("We have seen that Palestine is not mentioned by name in Paragraph 4 [of Article 22 of the Covenant]. That Paragraph relates only to 'certain communities formerly belonging to the Turkish Empire', – *certain* but not *all* communities'.").
13. Balfour Declaration," letter from Arthur James Balfour (then Britain's Foreign Secretary) to Lord Rothschild dated 2 November 1917, reproduced as a frontispiece in L. Stein, *The Balfour Declaration* (London: Vallentine, Mitchel & Co., 1961).
14. *Id.*
15. "Mandate for Palestine," (1922) 8 *Official Journal* (League of Nations) 1007; also in *Terms of League of Nations Mandates: Republished by the United Nations*, UN Doc. A/70 (1946), reprinted from Permanent Mandates Commission No. 466, League of Nations Doc. C.529.M.314.1922.VI; also available on the UNISPAL website [hereinafter "British Mandate for Palestine"].
16. See, *e.g.*, N. Feinberg, *supra* note 12 at 73 (discussing a petition submitted to the League of Nations' Mandates Commission by the Palestine Arab Women Congress in 1932 in which they "claimed self-government in order to obtain the abrogation of

the Balfour Declaration, the abolition of the Mandate and the establishment of a national government with a view to attaining complete independence within an Arab Federation"; and discussing also the decision of the Mandates Commission not even to comment publicly on the proposal of establishing a [democratic electoral] Legislative Council in mandate Palestine due to the volatile political situation there).

17. See "British Mandate for Palestine," *supra* note 15. The British Mandate contained the following numerous "savings clauses": (1) second preambular paragraph (repeating the "savings clause" of the Balfour Declaration); (2) Article 2 ("The Mandatory shall be responsible for … the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion"); (3) Article 5 ("The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power"); (4) Article 6 ("The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced…"); (5) Article 9 ("The Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights. Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs [religious charitable trusts] shall be exercised in accordance with religious law and the dispositions of the founders."); (6) Article 11 ("The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country…"); (7) Article 15 ("The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. *No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.*"); (8) Article 16 ("The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality."); (9) Article 22 ("English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew and any statement or inscription in Hebrew shall be repeated in Arabic."); and (10) Article 23 ("The Administration of Palestine shall recognise the holy days of the respective communities in Palestine as legal days of rest for the members of such communities.") [emphasis added].
18. GA Res. 181, UN GAOR, 2d Sess., UN Doc. A/519 (1947) (resolution of 29 November 1947, recommending partition of Palestine) [hereinafter "Partition Resolution"].
19. As has been well documented, Jews only owned 6 per cent of the land in Mandate Palestine and only constituted 30 per cent of the population in the mandate area at the time the Partition Resolution was passed. However, the Partition Plan nevertheless would have allotted 56 per cent of the territory of Mandate Palestine to the (misnamed) "Jewish state." The Palestinian Arabs, who constituted 70 per cent of the population and who owned or on whose behalf the remaining 94 per cent of the land was being administered through the "Class A" status of the Palestine Mandate established by the League of Nations, felt that the partition proposal was fundamentally unfair to them. The land ownership and demographic statistics are given in the Report of Sub-Committee 2 to the Ad Hoc Committee on the Palestinian Question, *GAOR*,, 2d sess., UN Doc. A/AC.14/32, November 11, 1947, Appendix I, "Estimated Population of Palestine as at 31 December 1946," 304 [hereinafter "UN Land and Demographic Statistics"].
20. "Charter of the United Nations," *supra* note 4, art. 10 ("The General Assembly… may make recommendations to the Members of the United Nations or to the Security Council or to both…."); art. 11 ¶ 1 ("The General Assembly … may make recommendations … to the Members or to the Security Council or both"); art. 11 ¶ 2 ("The General Assembly … may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both…."); art. 14 ("…the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations….").
21. On 24 February 1948, the U.S. representative stated in a Security Council debate on Resolution 181 the U.S. view that UN General Assembly resolutions are recommendatory and have "moral force" only, but cannot be considered legally binding. Therefore, the U.S. representative stated, the UN Charter "does not empower the Security Council to enforce a political settlement made pursuant to a recommendation of the General Assembly." *UN SCOR*, 3d year, 253d mtg., p. 267, February 24, 1948, UN Doc. S/PV/253 (1948).
22. See "UN Land and Demographic Statistics," *supra* note 19, at 304.
23. See "Partition Resolution," *supra* note 18, which contains the following "savings clauses":

    Part I, Section B "Steps Preparatory to Independence," Paragraph 10: The Constituent Assembly of each State shall draft a democratic constitution for its State and choose a provisional government … The Constitutions of the States *shall* embody Chapters 1 and 2 of the Declaration provided for in section C below [Chapter 1 being on "Holy Places, Religious Buildings and Sites" and Chapter 2 being on "Religious and Minority Rights"] and include, *inter alia*, provisions for: (a) Establishing in each State a legislative body elected by universal suffrage and by secret ballot on

the basis of proportional representation… (d) Guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association.);

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

Part I, Section C "Declaration," Chapter 2 "Religious and Minority Rights":
(1) Freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, shall be ensured to all.
(2) *No discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex.*
(3) *All persons within the jurisdiction of the State shall be entitled to equal protection of the laws.*
(4) The family law and personal status of the various minorities and their religious interests, including endowments, shall be respected.
(5) Except as may be required for the maintenance of public order and good government, no measure shall be taken to obstruct or interfere with the enterprise of religious or charitable bodies of all faiths or to discriminate against any representative or member of these bodies on the ground of his religion or nationality.
….
(8) No expropriation of land owned by an Arab in the Jewish State (by a Jew in the Arab State) shall be allowed except for public purposes. In all cases of expropriation full compensation as fixed by the Supreme Court shall be paid previous to dispossession.
Part I, Section C "Declaration," Chapter 3 "Citizenship, International Conventions and Financial Obligations":
(1) *Citizenship:* Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem *shall*, upon the recognition of independence, *become citizens of the State in which they are resident and enjoy full civil and political rights.* Persons over the age of eighteen years may opt, within one year from the date of recognition of independence of the State in which they reside, for citizenship of the other State, providing that no Arab residing in the area of the proposed Arab State shall have the right to opt for citizenship in the proposed Jewish State and no Jew residing in the proposed Jewish State shall have the right to opt for citizenship in the proposed Arab State. The exercise of this right of option will be taken to include the wives and children under eighteen years of age of persons so opting….[emphasis added].

24. See, *e.g.*, B. Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge: Cambridge University Press, 1987).
25. "Report by the Policy Planning Staff on Position of the United States with Respect to Palestine, January 19, 1948" (1976) 5 *Foreign Relations of the United States 1948* 546 at 549, 553. Michael Cohen reports that "George Kennan, head of the recently formed Policy Planning Staff, observed that the United Nations had not clarified certain problems concerning the *legality* of partition [emphasis added]," citing a 19 January 1948 memorandum by Kennan on this topic. See M. J. Cohen, *Palestine and the Great Powers: 1945-1948* (Princeton, New Jersey: Princeton University Press, 1982) at 346 [hereinafter "Palestine and the Great Powers"].
26. Paragraph 33 of the (top secret) 19 January 1948 Policy Planning Staff memo reads: "We [the U.S. government] should oppose referring to the International Court [of Justice] the question of the U.N. recommendation on Palestine on the grounds that the fundamental issue, *i.e.*, whether the two communities involved will cooperate to make the partition plan effective, is not a proper question for the Court." See M. J. Cohen, ed., *The American Trusteeship Proposal 1948*, vol. 38 in a series titled "The Rise of Israel: A Documentary Record from the Nineteenth Century to 1948 – A Facsimile Series" (New York & London: Garland Publishing, 1987) at 22 [hereinafter "American Trusteeship Proposal"]. It should be noted here that the proper question to have been submitted to the International Court of Justice was not "whether the two communities would have *cooperated*" with partition, but rather "whether partition itself was *legal* under international law." The first formulation is a question of mere speculation, upon which the court would not likely have passed judgment anyway. The second formulation is an important question of international law, which should have been heard by a competent adjudicator.
27. *Foreign Relations of the United States 1948*, vol. 5, p. 801 (1976). *UN SCOR*, 3rd year, 271st mtg., 19 March 1948, UN Doc. S/PV.271, 31; *New York Times* (20 March 1948) A2.
28. "Charter of the United Nations," *supra* note 4, art. 75.
29. See The Jewish Agency for Palestine, *Memorandum on Trusteeship for Palestine: Observations on a Temporary Trusteeship for Palestine as Proposed by the United States (April 5, 1948)* (submitted to the special sessions of the UN General Assembly convened at the recommendation of the U.S. to discuss the political future of Palestine on 16 April 1948) [hereinafter "Jewish Agency Memorandum"].
30. *Id.* Following is the text of the fifteen points contained in the "Digest":

    Digest of United States Trusteeship Plan as Released to the Press and Published April 6 [1948]:

    (1) A temporary trusteeship agreement for Palestine should be without prejudice to the rights, claims or position of the

parties concerned or to the character of the eventual political settlement.

(2) The agreement should be of indefinite duration. However, it should be subject to prompt termination whenever the Arab and Jewish communities of Palestine agree on the future government of their country.

(3) The trusteeship agreement might designate the United Nations itself as the administering authority, and the responsibility for this should be placed in the Trusteeship Council of the United Nations. Administrative, legislative and judicial powers, should be exercised in Palestine through a separate body called "the Government of Palestine."

(4) The temporary trusteeship agreement could include many of the features already developed by the Trusteeship Council for its draft statute for the proposed International Territory of Jerusalem.

(5) The Government of Palestine should be headed by a Governor General who would be appointed by and responsible to the Trusteeship Council.

(6) The Government of Palestine should include a cabinet and a democratically elected legislature, preferably bi-cameral.

(7) The trusteeship agreement should provide for the maintenance of law and order within Palestine. The Government of Palestine should be responsible for law and order within Palestine through its locally recruited policy and volunteer forces under Article 84 of the Charter of the United Nations.

When the forces of the Government of Palestine are insufficient for this purpose, then the Governor General should be authorized to call upon such states as would be specified in the agreement to assist in the maintenance of security in Palestine. A separate protocol to the trusteeship agreement would be concluded which would contain an undertaking by those named to accept the responsibility on specified conditions.

(8) The Government of Palestine should be enabled under the agreement to take over on a temporary basis existing arrangements in Palestine pending the establishment of the organs specified in the agreement.

(9) The agreement should make specified provisions for immigration and land purchase. This should be negotiated in consultation with representatives of the Jewish and Arab communities.

(10) The standard of living in the public services under the temporary trusteeship should be such as to be supported by the resources of Palestine itself, and large United Nations subsidies should not be expected.

(11) The expenditures which arise in connection with the employment of forces of members of the United Nations to assist in the defense of Palestine and the maintenance of law and order should be defrayed by those members who are supplying the forces.

(12) The United Nations itself should pay the salaries of the principal officials, such as the Governor General and Chief Justice, and possibly others.

(13) Should the General Assembly on the recommendation of the Trusteeship Council believe that it was necessary to raise funds in addition to those required for normal purposes by the Palestine Government, these additional funds should be supplied as subsidies, or as recoverable loans from the United Nations. These would be advanced on the same basis as contributions to the budget. Such a Palestine budget should be handled by the United Nations as a separate budget.

(14) The trusteeship agreement should contain adequate guarantees for the safeguarding of the holy places.

(15) The temporary trusteeship should terminate as soon as a majority of the members of each of the two principal communities in Palestine has agreed upon a plan of government. The Governor General should take all steps possible to bring about such an agreement.

31. See, *e.g.*, *Palestine and the Great Powers*, *supra* note 25, and especially Chapter 13; *American Trusteeship Proposal*, *supra* note 26; United Nations, *Yearbook of the United Nations 1947-1948* (New York: UN Dept. of Public Information, 1948), also available in excerpted form on the UNISPAL website.
32. See "Jewish Agency Memorandum," *supra* note 29, Paragraphs 12-14.
33. See "Jewish Agency Memorandum," *supra* note 29 at 9, containing the Jewish Agency's comments on the notion of electoral democracy:

    > The provision for a "democratically elected legislature" is the *gravest feature* of the entire [Trusteeship] proposal, and raises disquieting questions as to its intentions. This provision appears to involve *the application of majority rule to Palestine as a whole*, and to ignore the dual character of its national composition. *The most widely accepted principle in the Palestine question is the irrelevance of formal democracy, based on majority domination*, to a country composed of two separate nations which do not hold the ends of life in common or agree on the central purposes of the state. In such conditions, to apply democracy to the population as a whole is to deny it to the Jews entirely, by subjecting them to minority status. The essence of the Palestine question lies in the need to apply self-determination not to a fictitious single entity, but to the two separate groups, so that each is free and sovereign within the widest limits compatible with the freedom and sovereignty of the other. [Emphasis added.]

34. See "Jewish Agency Memorandum," *supra* note 29 at 12. The Jewish Agency noted that the Trusteeship's proposed principle of majority rule logically "must operate against the authorization of any substantial immigration or land purchase by Jews." The Jewish Agency viewed this with alarm, due to the "inseparable connection between the concepts of Jewish statehood and Jewish immigration."
35. *Id.*
36. See *Palestine and the Great Powers*, *supra* note 25 at 350.
37. In late January 1948, U.S. Col. Harold Hoskins warned "that if the United States helped implement partition, either indirectly, or with its own troops, Middle East oil supplies to the West would

be cut drastically, and its action might 'without exaggeration, be the spark that lights the fire of World War Three'," cited in *Palestine and the Great Powers*, *supra* note 25 at 348.

38. *See* "Jewish Agency Memorandum," *supra* note 29. Paragraph 13 of the memorandum describes the "spectacular impetus to this partition tendency" which occurred in Palestine since 29 November as a process of British withdrawal from "certain zones" and Jewish "assertion of authority" in those zones. The Memorandum, which is addressed to the United Nations, naturally does not go into detail regarding the practices of the *Yishuv* militias' military campaigns against Palestinian population centres – which have been so aptly documented by Israeli historian Benny Morris, among others – but instead refers to the *results* of those campaigns:

> 13.The disintegration of the Mandatory regime since November 29 has given a spectacular impetus to this partition tendency, both in its functional and its territorial aspects. As the Mandatory relinquishes an essential governmental service in the Jewish area, *the Jews begin to operate it*. As the Mandatory *virtually evacuates a certain zone, Jewish authority asserts itself*. There are large populated areas of the country, both Jewish and Arab, in which the writ of the central administration does not run at all. The degree to which this process had developed can best be appreciated from the fact that the Jews themselves exercise full responsibility in their community for the most vital governmental function – that of defence. Meanwhile an existing tendency of Jewish autonomy has been accentuated in every field. In the coming days and weeks the Mandatory's disintegration will leave a widening vacuum in food supplies, communications, postal and telegraphic services, currency, police, etc., etc. The Jews, anticipating chaos, have worked out plans and prepared machinery to assure continuity and order in the daily routine of life. The entire Jewish population reposes its trust and obedience *not in any central government* of the entire country, but *in its own authorities, on the understanding that they will set up the administration for the Jewish State area*. The provisional Jewish authorities are already endowed with that effective *internal* recognition which is the most vital test of independent nationhood [Emphasis added].

Similarly, Paragraph 12 of the Memorandum asserts that any prospective Trustee for Palestine would "be faced with a process of virtual partition which has gathered such momentum in recent weeks that not even considerable armed force could now arrest it." In the same vein, paragraph 14 of the Memorandum states: "Palestine is moving forward inexorably towards Partition in a pattern of growing decentralization." Perhaps most revealingly, paragraph 8 contains a direct reference to the military attacks the *Yishuv* had been systematically directing at the British mandatory troops, in an effort to drive them out: "[A]ny prolongation of British rule must involve a resumption of the 'squalid war' whose disastrous effects forced the Palestine issue upon the attention of the United Nations. The war will be all the more squalid because both British and Jewish opinion have been recently buoyed up by the hope of imminent separation." This last passage appears to amount to no less than a thinly veiled threat by the Jewish Agency that the *Yishuv* would continue military attacks against any UN-appointed Trustee, in an effort to achieve partition through force of arms.

39. SC Res. 44 (1 April 1948).
40. See "Trusteeship Agreement," *supra* note 1.
41. See "Palestine and the Great Powers," *supra* note 25, chapter 13.
42. "UN Trusteeship Agreement," *supra* note 1, articles 20, 21, 22, 23, 24, 25, 26.
43. "UN Trusteeship Agreement," *supra* note 1, articles 27, 28.
44. "UN Trusteeship Agreement," *supra* note 1, articles 11, 12, 13, 14, 15, 16, 17, 18, 19.
45. SC Res. 43 (1948) of 1 April 1948.
46. SC Res. 46 (1948) of 17 April 1948.
47. SC Res. 48 (1948) of 23 April 1948.
48. GA Res. 186 (S-2) (14 May 1948).
49. See SC Res. 49 (1948) of 22 May 1948; SC Res. 50 (1948) of 29 May 1948; SC Res. 53 (1948) of 7 July 1948; SC Res. 54 (1948) of 15 July 1948; SC Res. 56 (1948) of 19 August 1948; SC Res. 61 (1948) of 4 November 1948; SC Res. 62 (1948) of 16 November 1948; SC Res. 66 (1948) of 29 December 1948.
50. See the UNISPAL website, maintained by the United Nations.
51. See "Trusteeship Agreement," *supra* note 1. The "Preamble" reads as follows:

> *Preamble*
>
> *Whereas* the territory known as Palestine has been administered by the United Kingdom under a Mandate confirmed by the Council of the League of Nations; and
>
> *Whereas* the United Kingdom was selected as Mandatory for Palestine by agreement of the principal allied and associated Powers; and
>
> *Whereas* Article 75 of the Charter of the United Nations provides for the establishment of an International Trusteeship System for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements; and
>
> *Whereas* under Article 77 of the said Charter the International Trusteeship System may be applied to territories now held under mandate; and
>
> *Whereas* in accordance with Articles 75 and 77 of the said Charter, the placing of a territory under the International Trusteeship System is to be effected by means of a Trusteeship Agreement,
>
> *Now therefore*, without prejudice to the rights, claims, or position of the parties concerned or to the character of the eventual political settlement, the General Assembly of the United Nations hereby resolves to approve the following terms of trusteeship for Palestine.

Article 5, on "Territorial Integrity," reads as follows:

> *Article 5. Territorial Integrity*
>
> 1. The territorial integrity of Palestine and its status as defined in this Agreement shall be assured by the United Nations.

2.The Governor-General shall inform the Trusteeship Council of any situation relating to Palestine the continuance of which is likely to endanger the territorial integrity of Palestine, or of any threat of aggression or act of aggression against Palestine, or of any other attempt to alter by force the status of Palestine as defined in this Agreement. If the Trusteeship Council is not in session and the Governor-General considers that any of the foregoing contingencies is of such urgency as to require immediate action by the United Nations, he shall bring the matter, through the Secretary-General of the United Nations, to the immediate attention of the Security Council.

52. "Trusteeship Agreement," *supra* note 1. Articles 20 and 21 set out the structure of the Legislature. Note that the "Senate" would have comprised 50 per cent Jews and 50 per cent Arabs, which is the only anti-majoritarian aspect of the political system proposed.

Article 20. Legislature

1.The Legislature shall consist of two chambers.

2.The House of Representatives shall be composed of Palestinian citizens twenty-five years of age or older elected from single-member districts, each of which districts shall be a geographical unit with a population approximately equal in number to that of every other electoral district.

3.The Senate shall be composed of thirty Palestinian citizens twenty-five years of age or older elected in equal numbers by the registered members of the Arab and Jewish communities in Palestine. The Arab representation shall consist of Moslems, Christians, and Druses in proportion to their numbers in the Arab population.

4.Legislative provision may be made as to disqualification for election to or membership in either chamber of the Legislature resulting from loss of legal capacity.

5.Remuneration of members of both chambers of the Legislature shall be determined by legislation.

Article 21. Elections to the Legislature

1.The members of both chambers of the Legislature shall be elected by the citizens of Palestine, twenty-one years of age and over, on the basis of universal suffrage and by secret ballot.

2.Legislative provision may be made as to disqualification from voting resulting from loss of legal capacity.

53. "Trusteeship Agreement," *supra* note 1. The full text of Article 9, on "Fundamental Human Rights and Freedoms," reads as follows:

Article 9. Fundamental Human Rights and Freedoms

1.All persons in Palestine shall enjoy freedom of conscience and shall, subject only to the requirements of public order, public morals and public health, enjoy all other fundamental human rights and freedoms, including freedom of religion and worship, language, education, speech and Press, assembly and association, and petition, including petition to the Trusteeship Council.

2.No discrimination of any kind on grounds of race, religion, language or sex shall be made against any person in Palestine.

3.All persons in Palestine shall be entitled to equal protection of the laws.

4.No person within Palestine may be arrested, detained, convicted, or punished except according to legal process.

5.No person or property within Palestine shall be subject to search or seizure except according to legal process.

6.The legislation of Palestine shall ensure that accused persons shall have adequate rights of defence.

7.The legislation of Palestine shall neither place nor recognize any restriction upon the free use by any person of any language in private intercourse, in religious matters, in commerce, in the Press or in publications of any kind, or at public meetings.

8.Except as may be required for the maintenance of public order, good government and public health, no measure shall be taken to obstruct or interfere with the enterprise of religious or charitable bodies of all faiths. No measure shall be taken which discriminates on grounds of religion or nationality against any representative or member of such bodies.

9.The family law and person status of the various persons and communities and their religious interests, including endowments, shall be respected.

Article 32, on "Education System and Cultural and Benevolent Institutions," contains Paragraph 1, that reads as follows:

Article 32. Educational System and Cultural and Benevolent Institutions

1.Education in Palestine shall be directed to the full physical, intellectual, moral and spiritual development of the human personality, *to the strengthening of respect for human rights and fundamental freedoms and to the combating of the spirit of intolerance and hatred against other nations or racial or religious groups* [emphasis added].

54. "Trusteeship Agreement," *supra* note 1. Article 29, on "Immigration," reads as follows:

Article 29. *Immigration*

1.Immigration into Palestine shall be permitted, without distinction between individuals as to religion or blood, in accordance with the absorptive capacity of Palestine as determined by the Governor-General, and shall be subject to the requirements of public order and security and of public morals and public health.

2.As a temporary measure, the immigration of _____ [*N.B.*: blank space appears in original draft text] Jewish displaced persons per month, for a period of two years, shall be permitted into Palestine. The selection and administration of the immigration of Jewish displaced persons into Palestine shall be conducted by the Governor-General in consultation with the International Refugee Organization and representatives of the communities in Palestine.

55. For analysis of the international law bases of the individually held right of return of the 1948 Palestinian refugees – including refutation of the Israeli claim that return is barred on grounds of "citizenship" – see, *e.g.*, J. Quigley, "Displaced Palestinians and a Right of Return" (Winter 1998) 39:1 Harvard International Law Journal 171; J. Quigley, "Mass Displacement and the Individual Right of Return," in *British Yearbook of International Law*, Vol. 68 (1997) 65; G. J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem: BADIL, 2001). For further analysis of the right of return under international law generally, see W.T. Mallison and S. Mallison, "The Right to Return" (1980) 9 Journal of Palestine Studies 125; W.T. Mallison and S. Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, UN Doc. ST/SG/SER.F/4, U.N. Sales #E.79.I.19 (1979); W.T. Mallison and S. Mallison, *The Palestine Problem in International Law and World Order* (Essex: Longman, 1986) 174-188; K. Lawand, "The Right to Return of Palestinians in International Law" (1996) 8:4 International Journal of Refugee Law 532.
56. "Trusteeship Agreement," *supra* note 1, art. 8.
57. For useful discussions of Israel's land confiscation laws, used to confiscate the entire land and property holdings of the 1948 Palestinian refugees, which were subsequently transferred to exclusive use by Jewish citizens of Israel, see S. Jiryis, "Settlers' Law: Seizure of Palestinian Lands" 2 *Palestine Yearbook of International Law* 17 (1985); S. Jiryis, "The Legal Structure for the Expropriation and Absorption of Arab Lands in Israel" (1973) 8 *Journal of Palestine Studies* 82; D. Peretz, *Israel and the Palestine Arabs* (Washington, D.C.: Middle East Institute, 1958); D. Peretz, *Palestinian Refugee Compensation* (Washington, D.C.: Center for Policy Analysis on Palestine, 1995); J. Quigley, *Palestine and Israel: A Challenge to Justice* (Durham and London: Duke University Press, 1990); G. J. Boling, " 'Absentees' Property' Laws and Israel's Confiscation of Palestinian Property: A Violation of U.N. General Assembly Resolution 194 and International Law," 11 *Palestine Yearbook of International Law* 73 (2000-2001).
58. "Trusteeship Agreement," *supra* note 1, art. 9(2), art. 9(3), and art. 9(5).
59. "Trusteeship Agreement," *supra* note 1, art. 31.
60. See, *e.g.*, "Trusteeship Agreement," *supra* note 1. The preamble specifically cites Article 77 of the Charter of the United Nations: "*Whereas* under Article 77 of the said Charter [of the UN] the International Trusteeship System may be applied to territories now held under mandate…"
61. "Charter of the United Nations," *supra* note 4, art. 73.
62. *Id*., art. 76(b), art. 76(c).
63. For analysis and comparative studies on the UN Trusteeship system, generally, see R.N. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (The Hague: Martinus Nijhoff, 1955); J. N. Murray, Jr., *The United Nations Trusteeship System* (Urbana: University of Illinois Press, 1957); G. Thullen, *Problems of the Trusteeship System: A Study of Political Behavior in the United Nations* (Geneva: Librairie Droz, 1964); E. J. Sady, *The United Nations and Dependent Peoples* (Washington, D.C.: The Brookings Institution, 1956); C. V. Lakshmi-Narayan, *Analysis of the Principles and System of International Trusteeship in the Charter: A Study of the Origin, Principles and Application in International Law* (Geneva: Imprimeries Popularies, 1951).
64. "Charter of the United Nations," supra note 4, art. 1(2) ("To develop friendly relations among nations based on *respect for the principle of equal rights* … of peoples…" [emphasis added]).
65. *Id.*, art. 1(3) ("…and in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language or religion*…" [emphasis added]).
66. *Id.*, art. 1(2) ("To develop friendly relations among nations based on *respect for the principle of … self-determination of peoples*…" [emphasis added]).
67. *Id.*, art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of *equal rights* and *self-determination of peoples*, the United Nations shall promote: … (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." [emphasis added])
68. *Id.*, art. 56 (all member states of the UN "pledge themselves to take joint and separate action in cooperation with the [UN] Organization for the achievement of the purposes set forth in Article 55.")
69. *Id.*, art. 1(1) ("To maintain international *peace* and security, and to that end: *to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustments or settlement of international disputes or situations which might lead to a breach of the peace*." [emphasis added]).
70. *Id.*, art. 2(3) ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."); art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")
71. "Trusteeship Agreement," *supra* note 1, art. 47. Article 47 reads as follows:

    Article 47. *Termination of Trusteeship*

    1. In order to enable the inhabitants of Palestine to attain full self-government as soon as possible, it shall be the responsibility of the Governor-General to take all possible steps to bring about agreement between the Palestinian Jewish and Arab communities, acting through their representatives in the Legislature, upon a plan of government for Palestine.

2. This Agreement shall terminate (*a*) as soon as the General Assembly has approved a plan of government agreed upon in accordance with paragraph 1 above and such plan of government is established, or (*b*) whenever, after the expiration of three years from the effective date of this Agreement, the General Assembly, upon recommendation of the Trusteeship Council, shall agree upon a plan of government for Palestine, which is approved by a minority [sic] of both the Arab and Jewish communities of Palestine by means of a plebiscite conducted by the Governor-General.

72. "Charter of the United Nations," *supra* note 4, art. 80(1) ([N]othing in this Chapter [Chapter XII, titled "International Trusteeship System] shall be construed in or of itself to alter in any manner the rights whatsoever of any states *or any peoples or the terms of existing international instruments* to which Members of the United Nations may respectively be parties" [emphasis added]).
73. "Universal Declaration of Human Rights," GA Res. 217A (III), UN Doc. A/810, at 71 (1948), adopted 10 December 1948 [hereinafter "Universal Declaration of Human Rights"].
74. For a detailed account of the drafting history ("Travaux Préparatoires") of the UDHR, see J. Morsink, *The Universal Declaration* of Human Rights: Origins, Drafting, and Intent (Philadelphia: University of Pennsylvania, 1999). For other historical studies of the UDHR, including detailed commentaries on it, see, *e.g.*, G. Alfredsson and A. Eide, eds., *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999); F. M. baron van Asbeck, *The Universal Declaration of Human Rights and Its Predecessors (1679-1948)* (Leiden: E. J. Brill, 1949); A. Eide, *et al*., *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press and Oxford, 1992).
75. "Universal Declaration of Human Rights," *supra* note 63, art. 13, art. 9, art. 15, art. 17, art. 21, art. 29, art. 30, art. 7, art. 2.

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Palestinian Refugees: Host Countries, Legal Status and the Right of Return

Wadie E. Said

Abstract

Given the Palestinian refugees' precarious legal status in their host countries, recognition of the Palestinian right of return is not only legally viable, but also crucial for the establishment of a just and lasting peace in the Middle East. That racially driven demographic considerations have been employed up until now to derail binding and directly applicable laws and practices, as well as keep the refugees in a state of legal limbo in their host countries, cuts to the heart of the fundamental injustice currently plaguing the Middle East. No amount of obfuscating the facts and the law can tarnish the applicability and relevance of the right of return, and Palestinian refugees and their advocates remain in both a strong moral and legal position to continue to call for the recognition of that right.

Résumé

Considérant la précarité du statut légal des réfugiés palestiniens dans leur pays hôte, la reconnaissance du Droit au retour des Palestiniens est non seulement légalement viable mais aussi un facteur essentiel pour qu'une paix juste et durable soit établie au Moyen Orient. L'usage – d'inspiration raciste – de facteurs démographiques pour faire échouer jusqu'à présent les lois et les pratiques exécutoires directement applicables et ainsi maintenir les réfugiés dans un état juridique incertain dans leur pays hôte, est au cœur de l'injustice fondamentale qui empoisonne la situation au Moyen-Orient. Toutes les tentatives en vue d'obscurcir les faits et la loi n'arriveront jamais à ternir l'applicabilité et la pertinence du Droit au retour. Les Palestiniens et leurs défenseurs restent donc en position forte, aussi bien au plan moral que légal, pour continuer leur revendication pour la reconnaissance de ce Droit.

Palestinians, like Israelis, want a national existence. On this both Yasser Arafat and those Palestinians who oppose Arafat agree. But Palestinians are, in the main, refugees who long for repatriation – the right of return. These are fighting words, both between Israelis and Palestinians and, in certain cases, between Palestinian and Palestinian. Accordingly, it is best to begin slowly, to go over again the situation which has brought us where we are today.

In 1948, as a result of the first Arab-Israeli war, approximately 750,000 out of an estimated 900,000 Palestinian Arabs who were then living in the area that now comprises the state of Israel – which was, in turn, some 77 per cent of the area of Palestine as established by the 1922 League of Nation Mandate – were driven from their homes.[1] The remaining 23 per cent of Mandatory Palestine was apportioned between Jordan, which took control of the area now known as the West Bank, and Egypt, which took control of the Gaza Strip.[2] Of those 750,000 who were displaced, approximately 360,000 fled to the West Bank, 200,000 went to the Gaza Strip, 110,000 fled to Lebanon, 100,000 went to Jordan (the East Bank), and 82,000 went to Syria.[3] Smaller numbers of refugees made their way into Egypt proper.

Those numbers have now grown considerably. There are currently some 3.97 million refugees from Palestine registered with the United Nations: 1,679,623 in Jordan, 878,977 in the Gaza Strip, 626,532 in the West Bank, 401,185 in Syria, and 387,043 in Lebanon, according to the most recent figures.[4] An additional 1.5 million Palestinian refugees are not registered with the United Nations.[5]

The official Israeli position is that the Palestinians fled of their own accord in 1948 and consequently Israel has no obligation to repatriate them.[6] However, "revisionist" historians, both Palestinian and Israeli, have debunked the theory that the Arab states were responsible for the refugees' flight.[7] Archival research has revealed that the expulsion of the Palestinians was an explicit goal of leaders of the *Yishuv*,

the Jewish community in Palestine – David Ben-Gurion, Moshe Dayan, and Yitzhak Rabin.[8] The only real scholarly debate now is whether the ethnic cleansing of that part of Palestine that became Israel was deliberate or merely the result of battlefield decisions.[9] That the Palestinians were made refugees as a result of Israeli military action is no longer really debatable.

To ensure basic levels of care for the Palestinians, the UN in 1949 created UNRWA, the United Nations Relief Works Agency for the Palestine Refugees.[10] Its task was, and still is, to "prevent conditions of starvation and distress among [the refugees] and to further conditions of peace and stability,... [C]onstructive measures should be undertaken at an early date with a view to the termination of international assistance for relief."[11] To this day, UNRWA operates the majority of recognized refugee camps, while continuing to provide essential education, health, relief, and social services to Palestine refugees in Lebanon, Syria, Jordan, the West Bank, and the Gaza Strip.[12] Ironically, since the refugees are considered to be "at present receiving [protection and assistance] from organs or agencies of the United Nations other than the United Nations High Commission for Refugees," namely UNWRA, the Palestinians are not subject to the protections and safeguards of the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol Relating to the Status of Refugees.[13] While some scholars and advocates have argued that the Refugee Convention and Protocol, along with other international agreements concerning stateless persons, should apply to the Palestinians and that they should receive the protection of UNHCR, that position has yet to be put into practice.[14] The ostensible reasoning behind this policy choice, one that enjoys at least some support from the Palestinians themselves, is that the Palestinian refugees, unlike most refugees around the world, seek repatriation only and not the option of asylum in a third country.[15] While there are strong arguments in favour of allowing Palestinians to enjoy the rights and benefits of these international treaties, most notably the right to represent themselves (as opposed to being represented by the Palestine Authority created for them by other nations) in any negotiations on their final status, it seems as if the current legal predicament of the Palestinian refugees *vis-à-vis* the UN will not change in the foreseeable future.

With respect to the legal status of Palestinian refugees, each region in which refugees currently reside presents a different picture. Refugees in the West Bank and Gaza Strip enjoy the same legal rights as do the non-refugee Palestinian population, except that refugees in the West Bank are eligible for Jordanian passports, but those passports are for travel purposes only and do not confer Jordanian citizenship.[16] Thus, the holder can be refused entry by Jordan as by any other country in the world under each nation's immigration laws and policies. Refugees in both the West Bank and Gaza Strip are also eligible for a passport issued by the Palestinian Authority, but are permitted to travel on it only if Israel has granted permission, since Israel retained control over borders under the terms of the Oslo accords.[17] West Bank refugees traveling on a Palestinian Authority passport may also lose the right to Jordanian citizenship – a policy adopted by Jordan in 1995.18 For everyday purposes, West Bank and the Gaza Strip refugees hold identity cards issued by the Palestinian Authority that also display the number of the holder's previous Israeli-issued identity card.

Around 1.68 million refugees reside currently in Jordan, a figure that represents some 42 per cent of the Palestinian refugees registered with UNRWA.19 In addition, there are in Jordan an estimated 800,000 refugees who were displaced in 1967, when they fled the Israeli army's advance on the West Bank.[20] Of the total figure, around 293,000 live in refugee camps, amounting to no more than 17 per cent of the total Palestinian refugee population of Jordan.[21] The remaining 82 per cent live outside the camps. All Jordanian refugees whether living in or outside camps enjoy the beneits of full Jordanian citizenship, including the right to vote.[22] However, a recent book by Joseph Massad, a professor of political science at Columbia University, details, among other things, the discrimination Palestinians in Jordan suffer, especially in regard to employment in the public sector and representation in government.[23] In addition some 150,000 refugees who made their way to Jordan following the 1967 war from the Gaza Strip do *not* enjoy full citizenship in Jordan and cannot vote or hold jobs in the public sector.[24] These Gaza Strip refugees are eligible to travel on Jordanian passports that are only valid for two years, as opposed to the standard five years.[25] Were the Palestinian refugees in Jordan covered by the 1951 Refugee Convention or the 1967 Protocol – which they are not because of their protection under UNWRA – they would lose their designation as "refugees" by virtue of accepting citizenship in Jordan.[26] However, the fact that refugees in Jordan become Jordanian citizens does not terminate their refugee status under UNRWA regulations.[27] As a result they continue to be entitled to return to the lands from which they were driven and to receive compensation for their dispossession.

With respect to Syria, out of the 401,000 Palestinian refugees, around 116,000 currently live in UNRWA-recognized refugee camps.[28] In general, Palestinians enjoy many of the same rights as Syrian citizens, although they are not eligible for Syrian citizenship.[29] They enjoy equal rights in labour and employment, where they are allowed

to work and join trade unions.[30] They are allowed to own more than one business or commercial enterprise.[31] They are also allowed to serve in the Syrian military.[32] Palestinians can move freely within Syria and are not limited in where they can reside within the country.[33] Palestinian refugees can leave and re-enter Syria on a government issued travel document or *laissez-passer*.[34] By way of contrast, the 50,000 or so Palestinian refugees currently residing in Egypt are not allowed to leave the country without first obtaining a return visa, which is issued at the discretion of the Egyptian authorities.[35] Palestinians in Syria cannot own more than one home, however, and cannot purchase arable land.[36] Nor can the refugees in Syria vote in parliamentary or presidential elections or run as candidates for political office.[37]

In Lebanon the situation of Palestinian refugees is the most grave. Fifty-six percent of the total of 387,000 Palestinian refugees in Lebanon live in the twelve refugee camps run and recognized by UNRWA.[38] Over 75,000 other refugees live in unrecognized camps or temporary shelters, bringing the total percentage of refugees living in camp-like dwellings to 75 per cent of the refugee population.[39] The Department of Affairs of the Palestinian Refugees, an office within the Lebanese Ministry of the Interior, is responsible for administering the Palestinian presence in Lebanon.[40] All births, deaths, and marriages must be registered with the Department, which also must approve any changes in residence.[41] The Department decides whether or not to issue travel documents for the refugees and must approve financial aid transferred to them from abroad.[42] The Department maintains a profile on each refugee and assesses for the Ministry the security risk the refugee may pose.[43]

Palestinians are classified as foreigners in Lebanon and may not work without a work permit, which is rarely granted except in a few limited sectors.[44] The vast majority of Palestinian refugees in Lebanon can only work in UNRWA, the Palestinian Red Crescent Society, NGOs, or unsteady, low-paying, dangerous, and unregulated work, primarily in construction and seasonal agriculture.[45] Palestinians are excluded from certain professions. To be admitted to the Lebanese Bar or to obtain work in a government agency, a person must have been a Lebanese citizen for at least ten years.[46] Even with a work permit Palestinian refugees remain ineligible for social service benefits, although deductions are made for such benefits from their pay.[47] Nor may the Palestinian refugees join trade unions as full-fledged members or officers.[48] Finally, last year the Lebanese government passed a law decreeing that Palestinians could not own real property.[49] In short, Lebanon is in gross violation of its obligations under both the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, each of which guarantees the right of work, the right to form and join trade unions, and the right to receive social services and benefits on the same terms as a country's citizens.[50]

The legal situation of the Palestinian refugees in Lebanon explains in part why an estimated 80 per cent live in poverty.[51] Other factors include the elimination of the Gulf countries as a source of potential employment, as a result of the PLO's siding with Iraq, and, ironically, the PLO's cessation of most forms of aid to Jordanian refugees following the signing of the Oslo Accords in September 1993.[52] In this connection, a high-ranking Palestinian Authority Minister remarked in March 1995 that the Palestinians in Lebanon should be considered the responsibility of UNRWA, which has concentrated its aid on the West Bank and Gaza.[53] The rise in poverty has also created a health crisis, as Palestinians are not allowed access to Lebanese government hospitals and other health services.[54] Official and unofficial hostility to Palestinians runs high in Lebanon, with one minister referring to them in 1995 as "human waste."[55]

Essentially, the only real, long-term, solution to the Arab-Israeli conflict is to solve the refugee issue. Resettlement in countries bordering Israel, the West Bank, and Gaza will only see the refugee situation shunted off onto the host countries, the refugee populations of which naturally will never settle in knowing that the country that displaced them borders their country of resettlement.[56] It is only within this context that one can begin to understand the right of return – that is, the right of the refugees to return to the areas of their origin which are now within the state of Israel – a right that has broad support both within the Arab world and among refugees. Currently, Israel refuses to allow the Palestinian refugees to return, except within the narrowly limited confines of family reunification, while at the same time allowing every person meeting Israel's definition of a Jew, regardless of country of birth, to immigrate and obtain citizenship in Israel based on [the] Law of Return, passed by the Knesset in 1950.[57] The legal basis of the *Palestinian* right of return is not in any doubt and derives from several independent but mutually enforcing sources of international law.[58] Article 11 of UN General Assembly Resolution 194, ratified on December 11, 1948, states that:

> ...the refugees wishing to return to their homes and live in 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 the loss of or damage to property which, under the principles of international

> law or in equity, should be made good by the Governments or authorities responsible.[59]

This resolution has been reaffirmed by the General Assembly every year since its passage.[60] The resolution also created the Conciliation Commission for Palestine, which was directed to "facilitate" implementation of the Palestinian right of return.[61] However, the Conciliation Commission ceased all efforts to repatriate Palestinian refugees in 1952, stymied by the conflicting positions of the Arab states and Israel.[62] The former demanded full repatriation, while the latter refused any attempts at repatriation in any degree. Nevertheless, GA Resolution 194 remains as valid today as it was in 1948 and later resolutions reaffirm "the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return."[63] Additionally, it should be noted that Israel's admission to the United Nations in GA Resolution 273 of 1949 was conditioned upon its full implementation of the provisions of Resolution 194.[64]

The principle of the right of return has been upheld by none other than former U.S. President Bill Clinton, who stated on April 5, 1999, in referring to the Kosovar refugees and a final peace settlement, that: "The refugees belong in their own homes, in their own land."[65] Clinton added that: "Our immediate goal is to provide relief; our long-term goal is to give them their right to return."[66] In another context, in 1996, the European Court of Human Rights ruled, in a case involving a Greek Cypriot woman who had been dispossessed following the 1974 invasion and occupation of part of Cyprus by the Turkish army – an occupation that saw 200,000 Greek Cypriots made refugees who are, incidentally, still waiting to return – that she remained the rightful owner of her property and was entitled to compensation for its use for the period of its occupation.[67] A subsequent decision by that same court found that the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus represented a violation by Turkey of the European Convention on Human Rights.[68] Finally, numerous peace accords over the last twenty years, covering conflicts from Bosnia to Indochina to Guatemala and El Salvador, have affirmed the property rights of refugees and, of course, their right of return.[69]

The principle of a right of return for displaced refugees is also found in international humanitarian law, which governs the conduct of states during war and occupation. The Fourth Geneva Convention of 1949 states that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[70] The Universal Declaration of Human Rights states that "[e]veryone has the right to leave any country, including his own, and return to his own country," and that "[n]o one should be arbitrarily deprived of his own property."[71]

Current Israeli opposition to the right of return is based not on legal but on demographic and, to be blunt, ethnic bias. Two arguments are advanced here. First, the claim is sometimes made that the areas currently comprising the state of Israel cannot possibly support the influx of large numbers of Palestinian refugees. A study of the demography of Israel shows that 78 per cent of Israelis are living in 14 per cent of Israel and that the bulk of the refugees fled from the remaining 86 per cent of the land in Israel on which only 22 per cent of Israelis live.[72] Incidentally, the total number of refugees from Gaza and Lebanon is more or less equal to the total number of immigrants from the former Soviet Union who came to Israel starting in the late 1980s to live in the refugees' homes and/or on their lands and elsewhere within Israel.[73]

Some also argue that if the Palestinian refugees are allowed to return to Israel, then the Jewish nature of the state would be altered.[74] Leaving to one side the paradox that in the Jewish state of Israel over 20 per cent of its citizens are non-Jews, demographic concerns are entirely premature at this stage, given that Israel shows no signs of accepting the right of return and that the exact number of refugees wanting to return is unknown at this time. Regardless, the nature and universal acceptance of the principle of the right of return should trump any demographic considerations, especially those rooted in racial discrimination and nothing more. In any event, what exempts Israel from being held accountable under international legal norms and standards for a refugee population it clearly created? As one study on this subject has noted, "[t]he United Nations is under no more of a legal obligation to maintain Zionism in Israel than it is to maintain apartheid in South Africa."[75] With respect to the anti-Arab bias behind Israel's invocation of an ethnically pure Jewish state, suffice it to note that the process of encouraging immigration from the former Soviet Union has resulted in at least 200,000 – and possibly as many as 400,000 – non-Jews from that region settling in Israel. [76]

Currently, as is now well known, not only Israel but also the Palestinian Authority are the chief opponents of the Palestinian right of return. The Oslo Agreements deal only with the aftermath of the 1967 and 1973 Arab-Israeli wars and do not so much as mention General Assembly Resolution 194.[77] Yasser Arafat himself, in a *New York Times* op-ed article, called for a settlement of the refugee issue that would

eliminate Israel's demographic concerns.[78] The former PLO representative in Jerusalem, Sari Nusseibeh, has called on Palestinians to give up the right of return in order to see the goal of a Palestinian state in the West Bank and Gaza realized and has worked out a proposed peace plan with former Israeli Shin Bet chief Ami Ayalon that reflects that position.[79] In September 2002, the Israeli daily *Ha'aretz* reported the PLO executive committee member Abu Mazen had give a speech at a refugee camp in Syria in which he intimated that the refugees should give up calling for their right of return.[80] The most recent reports have the same Abu Mazen commenting on a draft peace plan that gives only "lip service" to the right of return and guarantees that Israel's demographic balance will not be upset.[81] Further, news of a draft Palestinian constitution currently in the works reveals that the language contemplated does not refer to a mass return of refugees, a position that is likely to meet with Israel's favour.[82] Not surprisingly, the Israeli government and press agree: the total elimination of the Palestinian right of return is non-negotiable.

Given the Palestinian refugees' precarious legal status in their host countries, it should be therefore clear that a recognition of their right of return is not only legally viable, but also crucial for the establishment of a just and lasting peace in the Middle East. That racially driven demographic considerations have been employed up until now to derail binding and directly applicable laws and practices, as well as keep the refugees in a state of legal limbo in their host countries, cuts to the heart of the fundamental injustice currently plaguing the Middle East. No amount of obfuscating the facts and the law can tarnish the applicability and relevance of the right of return, and Palestinian refugees and their advocates remain in both a strong moral and legal position to continue to call for the recognition of that right.

Notes

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3. *Id*.
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8. *Id.*
9. *Id.*
10. GA Res. 302, UN GAOR, 4th Sess., UN Doc. A/1251 (1949).
11. *Id.*
12. UNRWA web page, online: <http://www.un.org/unrwa/about/index.html> (date accessed: 27 November 2002).
13. *Convention Relating to the Status of Refugees*, 28 July 1951, art.1(D), 189 U.N.T.S. 150, 137.
14. See, *e.g.*, S. Akram, "Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution" (Spring 2002) J. Palestine Stud. 36–51.
15. GA Res. 428(V), Annex: "Statute of the Office of the United Nations High Commissioner of Refugees."
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17. *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, art. XXVI(1) 28 September 1995.
18. *Supra* note 16.
19. *Supra* note 4.
20. *Supra* note 16.
21. *Supra* note 4.
22. *Supra* note 16.
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24. *Supra* note 16.
25. *Id*.
26. *Id*.
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28. *Supra* note 4.
29. U.S. Committee for Refugees, "Country Report: Syria," available online: <http://www.refugees.org/world/countryrpt/mideast/Syria.htm > (date accessed: 10 February 2003).
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31. *Id*.
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36. *Supra* note 30.
37. *Id*.
38. *Supra* note 4.
39. M. Abbas, "The Socio-Economic Conditions of the Palestinians in Lebanon: The Housing Situation of the Palestinians in Lebanon" (1997) 10 J. Refugee Stud. 379 at 380–81.
40. Al-Marsoum Al-Ishtirai' [Legislative Decree] No. 42 (1959) (Leb.); Legislative Decree No. 927 (1959) (Leb.); see also W.E. Said, "The Palestinians in Lebanon: The Rights of the Victims

of the Palestinian-Israeli Peace Process" (1999) 30 Colum. Hum. Rts. L. Rev 315 at 325–27 for a more detailed discussion of this topic.

41. *Id*.
42. *Id*.
43. *Id*.
44. Law Pertaining to the Entry Into, Residence In and Exit From Lebanon, art. 1 at 2 (1962) (Leb.) (classifying Palestinian refugees as foreigners by omission); Lebanese Law No. 87/25, art. 1§2, 6/18/1987; Decree No. 17561 Regulating Foreigner Work, art. 11–14 at 22–23 (Leb.).
45. H. Shaaban, "Unemployment and Its Impact on the Palestinian Refugees in Lebanon" (1997) 10 J. Refugee Stud. 384 at 385–86.
46. Souheil Al-Natour, awDa' ash-Sha'b al-Filastini fi Lubnan [The Predicament of the Palestinian People in Lebanon] 125 (1993); Legislative Decree No. 112 (1959), in S. Abi-Nader, ed., 6 *Majmu'at at-Tashri' al-Lubnani* [Anthology of Lebanese Legislation], 1.
47. Social Security Law, art. 9, ¶ 4 in Qanun aD-Daman al-Ijtimai' wa Qanun Tasheel al-Iskan fi Lubnan [The Social Security Law and the Housing Facilitation Law in Lebanon] 13–14 (compiled and edited by Iskandar Saqr).
48. Qanun al-Amal al-Lubnani [Lebanese Labor Law], arts. 91, 92, reprinted in S. Abi-Nader, ed., 4 Majmua'at at-Tashri' al-Lubnani (1962) 1.
49. U.S. Committee for Refugees, "Country Report: Lebanon," available online: <http://www.refugees.org/world/countryrpt/mideast/lebanon.htm> (date accessed: 10 February 2003).
50. See generally Said, supra note 40 at 329–41 for a lengthier discussion of Lebanon's dereliction of its duties to Palestinian refugees under international law.
51. Shaaban, *supra* note 45 at 387.
52. R. Sayigh, *Too Many Enemies: The Palestinian Experience in Lebanon* (London: Zed Books, 1994) at 326.
53. R. Sayigh, "Palestinians in Lebanon: Harsh Present, Uncertain Future" (Autumn 1995) J. Palestine Stud. at 41 ("At UNRWA's emergency meeting last March [1995], PA delegate Nabil Shaath stated emphatically that Palestinians in Lebanon were not the PA's responsibility but UNRWA's").
54. *Id*. at 44; Y. Besson, "UNRWA and Its Role in Lebanon" (1997) 10 J. Refugee Stud. 335 at 339.
55. F. Nasrallah, "Lebanese Perceptions of the Palestinians in Lebanon: Case Studies" (1997) 10 J. Refugee Stud. 349, 356. For more discussion of the history of the Palestinians in Lebanon and Lebanese attitudes towards them, see Said, *supra* note 40 at 320–24, 341–44.
56. It is often argued that the Arab countries keep the refugees in a state of misery to make Israel look bad. Aside from being a simplistic argument devoid of legal basis, such a contention ignores the complex political and factual characteristics of each of the host countries. The experience of the refugees in Lebanon, Syria, and Jordan, respectively, to a great degree mirrors each country's history, demography, and social and political evolution since 1948. To argue that these states, to name the most obvious, have somehow colluded to "make Israel look bad" is to argue that there has been a kind of comprehensive strategy *vis-à-vis* the refugees that each country has implemented. Even readers with only a mild background in the history of the modern Middle East know that such an assertion finds no support in the region's recent past and present.
57. J. Massad, "On Zionism and Jewish Supremacy," *New Politics* (Winter 2002) at 95.
58. The purpose of this paper is not to engage in a lengthy legal discussion of the right of return and the applicability of UN GA Res. to Israel, since many human rights and international legal scholars have already undertaken such studies in detail. See, *e.g.*, G.J. Boling, "The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis," accessible online: <http:// www.badil.org/Publications/Legal_Papers/RoR48.pdf> (date accessed: 10 February 2003); J. Quigley, "Displaced Palestinians and a Right of Return" (1998) 39 Harv. Intl. L. Journal 171; see also Human Rights Watch, "Policy on the Right to Return," online: <http://www.hrw.org/ campaigns/israel/return> (date accessed: 10 February 2003).
59. GA Res. 194, UN GAOR, 3rd Sess., UN Doc. A/810, at 24 (1948).
60. S. Akram, "Reinterpreting Palestinian Refugee Rights Under International Law," in N. Aruri, ed., *Palestinian Refugees: The Right of Return* (Sterling, Va: Stylus, 2001), at 190 n. 67.
61. *Supra* note 59.
62. Akram, *supra* note 14 at 41–42.
63. GA. Res. 3236, UN GAOR, 24th Sess., UN Doc. A/Res/3236 (1974).
64. GA Res. 273 (1949) GA Res 273(III) 11 May 1949; see also Boling, *supra* note 58 at 14 n. 39. It is also important to note that at the time Resolution 194 was passed, the principle of the right of return had already found acceptance in customary international law, which is by its nature binding on all states. See Boling, *supra* note 58 at 10–14, 48.
65. "Clinton Makes Appeal for Kosovar Relief Donations," on CNN.com, April 15, 19990; online: <http://www.cnn.com/US/9904/05/us.refugees.02/> (date accessed: 10 February 2003).
66. *Id*.
67. Case of *Loizidou* v. *Turkey*, Application No. 40/1993/435/514, European Court of Human Rights, Judgment of November 28, 1996; see also A. El Fassed, "*Loizidou* v. *Turkey*: A Precedent for Palestinian Refugees?" available online: <http://www.palestinecenter.org/cpap/pubs/20010223ib.html> (date accessed: 10 February 2003).
68. Case of *Cyprus* v. *Turkey*, Application No. 25781/94, European Court of Human Rights, Judgment of May 10, 2001, at Holding §III.
69. Akram, *supra* note 14, at 46.
70. *Geneva Convention Relating to the Protection of Civilian Persons in the Time of War*, 12 August 1949, art. 40, 6 U.S.T. 3516, 75 U.N.T.S. 287.

71. *Universal Declaration of Human Rights*, arts. 13(2) & 17(2), GA Res. 217A, UN GAOR, 3rd Sess., UN Doc. A/810 (1948).
72. S. Abu-Sitta, "The Right of Return: Sacred, Legal, Possible," in N. Aruri, ed., *supra* note 60 at 195–207.
73. *Id*. at 200.
74. I. Pappe, "Israeli Perceptions of the Refugee Question," in N. Aruri, ed., supra note 60 at 71–76.
75. W.T. Mallison & S.V. Mallison, *The Palestine Problem in International Law and World Order* (London: Longman, 1986) at 186.
76. U. Avnery, "Israel: the Jewish Demographic State," *Counterpunch* (11 October 2002), available online: <www.counterpunch.org/avnery1011.html> (date accessed: 10 February 2003).
77. For a discussion of this topic, *see* Said, *supra* note 40, at 351–54.
78. Y. Arafat, "The Palestinian Vision of Peace" *New York Times* (3 February 2002), OpEd at D15.
79. A. Eldar, "A Hard Bargain about Rights" *Ha'aretz* (13 February 2002); also Ran Edelist, "Ami Ayalon's Practical Wisdom" *Ha'aretz* (17 September 17 2002); both available online: <http://www.haaretzdaily.com/hasen/ pages/arch/ArchSearch Eng Art.jhtml> (date accessed: 10 February 2003).
80. A. Eldar, "Marwan Barghouti's New Year's Wishes" *Ha'aretz* (5 September 5 2002), available online: <http://www. haaretzdaily.com/hasen/pages/arch/ArchSearchEng Art.jhtml (date accessed: 10 February 2003).
81. A. Eldar, "A Time for Testing, and a Testing Time" *Ha'aretz* (6 February 2003), available online: <http://www.haaretzdaily.com/hasen/pages/arch/ArchSearch Eng Art.jhtml> (date accessed: 10 February 2003). At this point, I think it important to stress that the remnants of the nearly defunct Palestinian Authority – a deeply unpopular entity that, at the very least, does not enjoy a mandate to negotiate on behalf of the refugees outside the West Bank and Gaza, if any, for that matter – are in no position to bargain away a right as fundamental and inalienable as the right of return.
82. A. Benn, "Israel Criticizes Draft Palestinian Constitution" *Ha'aretz* (4 March 2003), available online: <http://www.haaretzdaily.com/hasen/pages/arch/ArchSearchEng Art.jhtml (date accessed: 10 February 2003).

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The Right to Restitution and Compensation in International Law and the Displaced Palestinians

Michael Lynk

Abstract

In any final settlement between Israel and the Palestinians, compensation for the material and moral losses of the Palestinian refugees will be a central feature. The parties have ostensibly agreed that compensation will be paid, but differ significantly on the principles that will determine the global amount of compensation, the valuation of losses, and the method of distribution to the recipients. Compensation for refugees, for victims of human rights violations, and for property loss have become well-grounded features in contemporary international law. The author argues that these international law principles should shape the compensation agreement that will settle the conflict, because fairness and transitional justice, rather than unequal bargaining power, will more readily hasten the healing of the many wounds that the Palestinians and Israelis have endured.

Résumé

Un aspect central de tout accord final entre Israël et les Palestiniens sera la compensation pour les pertes matérielles et morales subies par les réfugiés palestiniens. En apparence, les deux parties sont d'accord pour que des compensations soient être versées, mais un certain écart les sépare encore sur la question des principes qui serviront à déterminer la somme globale de la compensation, la façon d'évaluer les pertes et les méthodes de distribution aux bénéficiaires. Le droit international contemporain reconnaît pleinement aujourd'hui le droit aux compensations pour les réfugiés, les victimes de violations des droits humains et pour ceux qui ont subi des pertes de biens. L'auteur soutient que ce sont ces mêmes principes de droit international qui devront façonner l'accord de compensation qui clôturera le conflit, car c'est l'équité et la justice transitionnelle plutôt que le pouvoir de marchandage inégal, qui ont le plus de chances de guérir les nombreuses blessures que Palestiniens et Israéliens ont eu à subir

I. Introduction

Reaching a final, durable, and equitable resolution of the Middle East conflict requires the comprehensive settlement of the Palestinian refugee issue.[1] In its cornerstone pronouncement on the conflict, the United Nations Security Council in 1967 called for the just settlement of the refugee problem.[2] Israel and the Palestine Liberation Organization acknowledged, in their 1993 Declaration of Principles, that the refugee issue is one of the most intractable problems at the heart of their aspirations for peace, and postponed its resolution until the future initiation of final status negotiations.[3] Israel has agreed, in its 1994 peace treaty with Jordan, that the persistence of the refugee issue over the past five decades has caused massive human problems in the region, and the settlement of the issue is to be in accordance with international law.[4] Beyond this, there has been little substantive progress by the parties towards a final settlement of the fate of the Palestinian refugees, and little consensus between them as to the requirements of international law. At the centre of the issue is the national and individual status of the majority of the estimated 7.6 million Palestinians in the world today: the 3.9 million Palestinian refugees who were displaced, personally or by family lineage, from their homes, properties, and lands by the 1947-49 and 1967 Middle East wars. The irresolution

of their fate perpetuates the largest, longest-running and most destabilizing refugee problem in the world today.

Contemporary legal, political, and diplomatic analyses of the Palestinian refugee issue have focused on three principal components: repatriation, resettlement, and compensation. In current settlement proposals, these three components are intimately interlinked, but they are each capable and deserving of stand-alone analysis. *Repatriation* focuses on the generally accepted right in international law of refugees to choose whether to return to their homeland and their homes following the cessation of conflict or persecution.[5] Palestinians claim their capacity to exercise this right of return extends to Israel as well as to a future state of Palestine,[6] while the most liberal position articulated by official and semi-official Israeli spokespersons have argued that any more than a very modest number of refugees returning to their ancestral homes within its borders would threaten its existential character as a Jewish state.[7] *Resettlement* is the strongly maintained Israeli solution, which would see all, or almost all, of the estimated 3.9 million registered Palestinians refugees required to accept permanent civil status of some form in their present homes in Syria, Lebanon, and Jordan, return to a truncated Palestinian state, or accept relocation elsewhere.[8] Palestinians resist this option, arguing that it would abolish their legal right to return and negate their decades of suffering in exile.[9]

The third issue, *compensation*, focuses on the individual and collective claims of the Palestinian refugees and the displaced for the restitution of, and/or indemnification for, their lost homes and properties in present-day Israel, as well as monetary damages for related losses. Both sides agree that compensation should be part of a final peace agreement, but for quite different reasons which would lead to quite different results. Israel prefers a global collective fund that would be primarily used for refugee resettlement elsewhere and financed largely by international donors. Its contributions would be made *ex-gratis*, without assuming any official liability.[10] On the other hand, the Palestinians advance the compensation issue as a right recognized in international law that would obligate Israel to return, or pay for, the refugee properties expropriated or destroyed in 1948 and afterwards. As well, they argue that Israel must pay damages for pain and suffering, and for its use of Palestinian properties over the past five decades.[11]

These differences on compensation are significant. The gap between the parties goes to a number of issues, including: (i) the legal basis for compensation; (ii) the number of potential claimants; (iii) the range of compensation categories; (iv) methods of calculation; (v) whether restitution forms part of the compensation issue; (vi) whether the compensation should be awarded collectively or individually; and (vii) the status of related issues, such as the compensation claims of (a) the Arab countries that have hosted the Palestinian refugees for five decades, and (b) the Arab Jews who left behind property in their home countries such as Iraq and Egypt in the 1950s. The differences on compensation have never been publicly expressed in dollar figures by Israel or the Palestine Liberation Organization, but recent assessments by scholars and researchers range from $5-10 billion (US) by Shlomo Gazit,[12] to $15-20 billion in a Harvard refugee project led by Joseph Alpher and Khalil Shikaki,[13] to $271 billion by Atif Kubursi.[14]

This article focuses on the issue of compensation, which for these purposes includes restitution.[15] Whether the Palestinian refugee issue is eventually resolved through repatriation or resettlement, or some combination of both, compensation will inevitably be a significant feature of the final agreement. However, if this final agreement is to be durable, it must reflect the fair aspirations of both parties. As such, it will have to be anchored in the principles of international law, and not simply reflect the starkly unequal bargaining strengths between Israel and the Palestinians. Indeed, if compensation and restitution are to play a forward-looking role towards healing the transparent wounds of the decades-long conflict, and building the foundation for a prosperous and secure future in the region, then the available rules found in international law are both the principled and the most constructive road to follow.[16]

II. The Dimensions of the Issue

A. An Historical Précis to 1948

On 29 November 1947, with the British Mandate in Palestine collapsing, the United Nations General Assembly passed Resolution 181(II).[17] It recommended the termination of the Mandate, the partition of Palestine into independent Arab and Jewish states, and a special international status for Jerusalem. Following months of civil violence, the State of Israel declared its independence on 14 May 1948, and a larger war involving the neighbouring Arab countries ensued. This larger war alternated between periods of intense conflict and unstable truces until the signing of the Rhodes armistice agreements in 1949. At the conclusion of the war, Israel was victorious and its land size had expanded from the 54 per cent of Mandate Palestine allocated to the Jewish state by UNGA resolution 181(II) to 78 per cent of the territory.

Between December 1947 and September 1949, approximately 725,000 Palestinians – more than half of the Arab population of Palestine – were driven from, or fled, their homes in that part of Palestine that became Israel.[18] They sought refuge primarily in the neighbouring Arab coun-

tries, including the West Bank of the Jordan River (occupied by Jordan after 1949), Jordan, Syria, Lebanon, and the Gaza Strip (administered by Egypt after 1949). The first UN Mediator for Palestine[19] and modern historians of the period[20] have observed that the Palestinians fled for the same mixture of reasons that have caused most mass population displacements in the twentieth century: forced expulsions, a widespread fear of harm from advancing armies, and panic after credible reports of civilian massacres by Israeli militias.

In his September 1948 progress report to the UN Secretary-General, the Mediator for Palestine, Count Folke Bernadotte, urged the United Nations to affirm that the Palestinian refugees had the right to return to their homes at the earliest practicable date: "It is, however, undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine."[21] In his listing of the basic premises for an equitable resolution of the conflict, Count Bernadotte recommended that those refugees choosing not to return should be paid "adequate compensation" for their properties.[22] (This echoed the United Nations' stipulation in Resolution 181(II) the year before that "full compensation" was to be paid for the expropriation of any Arab land by the Jewish state.)[23] Moreover, he added in his report that Israel bore the responsibility to indemnify those owners whose property had been wantonly destroyed during the conflict, with no qualification as to whether they returned from their exile or not.[24] The day after delivering his report, Count Bernadotte and an aide were assassinated by the Stern Gang, an extremist Jewish militia.

The United Nations General Assembly adopted the thrust of the Bernadotte report in December 1948 in UNGA Resolution 194.[25] In Paragraph 11, the General Assembly endorsed the report's recommendations on the right of return and compensation:

> The General Assembly, having considered further the situation in Palestine…[r]esolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.

In its resolution, the General Assembly spoke to four primary features of the compensation question, all of which flowed directly from the Bernadotte report. First, it stated that those refugees willing to live at peace with their neighbours were entitled to the restitution of their homes at the earliest practicable time. Second, those refugees not returning home should be entitled to compensation for their lost property. Third, those refugees who do return home and find their properties damaged or destroyed should be compensated for their losses. And fourth, it explicitly grounded its direction that the refugees were entitled to repatriation, restitution, and compensation based upon the principles of international law and equity. Ironically, while these features of Resolution 194 would significantly influence the rights in international law that refugees and victims of human rights abuses elsewhere could claim in the years to come, these entitlements have been largely unavailable for the intended recipients.

B. After 1948

The homes, lands, and properties left behind by the flight of the Palestinians between 1947 and 49 were substantial. The United Nations Conciliation Commission for Palestine (created by Resolution 194 to resolve the outstanding issues between Israel, the Palestinians, and the neighbouring Arab countries)[26] estimated in 1951 that almost 80 per cent of Israel's total area of 20,850 square kilometres represented abandoned Arab lands, although only about 28 per cent of that land was cultivable.[27] Approximately 400 Arab villages and towns, representing most of the Palestinian communities in the territory assigned to, or captured by Israel, were occupied and depopulated during the war.[28] The transfer of wealth to Israel in the form of Palestinian lands, homes, assets, and property was crucial to the new state's ability to survive and develop in its formative years.[29] Between 1948 and 1953, 350 of the 370 new Jewish settlements created in Israel were on former Arab property. Don Peretz has estimated that, by 1954, more than one-third of the Israeli Jewish population were living on former Arab lands, and an additional 250,000 Israeli Jews, including one-third of the new immigrants, lived in abandoned Arab urban property.[30] In the countryside, where most Palestinians had lived prior to 1948, enormous tracts of citrus, olive, and other cultivable properties were expropriated by Israel and turned over to Jewish agricultural settlements. The importance of these agricultural lands was critical to the fledging Israeli economy: to cite one example, exports of citrus products from expropriated Arab groves provided nearly 10 per cent of Israel's foreign currency earnings in 1951.[31]

Israel subsequently legalized the land and property expropriations through legislation that vested broad powers in the state-appointed Custodian of Absentee Property, who was to hold all of the abandoned properties of the "absentees" in trust.[32] An absentee was defined expansively as any Arab in Palestine who left his or her home after 29

November 1947, and the burden of proof that a claimant was not an absentee fell on the former owner.[33] Eventually, much of the expropriated Palestinian lands and properties held by the Custodian were transferred via a purchase agreement to an Israeli state development authority, which allowed the Israeli government to maintain that these properties were acquired legally (*i.e.*, through payment), even though the Palestinians owners never received any money.[34] This authority, in turn, turned these properties over to the Jewish National Fund, whose charter explicitly prohibited it from selling, leasing, or returning the lands to non-Jews. These steps had the effect of completely severing the proprietary link between the absentees and their lands.[35] Although Palestinian refugees living in exile and even those displaced within Israel sought to have their properties returned to them, very few ever succeeded.[36] By the early 1950s, Israel had so significantly transformed the emptied Palestinian properties through irreversible steps – such as the levelling of villages, the settlement of Jewish immigrants into abandoned homes, and the establishment of *kibbutzim* and *moshavim* (Jewish agricultural settlements) on cultivated Arab farms – that there was increasingly little of the lands and homes of the displaced Palestinians which remained in its original state.[37]

During these early years, Israel was prepared to address the question of compensation for the abandoned Palestinian properties, but tied its commitment to a number of pre-conditions that amounted to deal-breakers.[38] At the centre of its position was its insistence that it would not accept the return of the refugees, and that there would be no restitution of abandoned Palestinian properties. After 1950, the Israeli authorities developed the argument that the Jews who left behind their properties in Iraq and other Middle East countries when they emigrated to Israel constituted a population exchange, which settled any compensation or restitution obligations which it might have owed to the displaced Palestinians.[39] The position of the Arab countries on compensation was starkly different.[40] At the heart of their argument was the fulfilment of Resolution 194 and the right to repatriate. Only after the free choice of refugees as to whether to return was exercised, the Arab states maintained, could the subsequent issue of compensation be determined and implemented. There should be no linkage with the compensation claims of the Arab Jews, since their claims had no direct nexus with the Palestinians. Thus, while both sides accepted the premise of compensation, no progress was made towards a settlement because of the larger, intractable issue of repatriation.[41] With no agreement, the unresolved fate of the displaced Palestinians was left to fester as an open political sore that would spark four more wars, two sustained popular uprisings, and chronic regional instability over the next five decades.[42]

III. The Right to Compensation and Restitution in International Law

A. Introduction

Compensation for refugees and displaced persons, and for victims of the abuse of internationally recognized human rights, has evolved into the status of a right in international law. It has acquired that status because it satisfies the criteria that are commonly accepted as the formal sources of international law.[43] Applying these criteria, the obligation to pay compensation to refugees and displaced persons is evident in the requirements of regional treaties, conventions, and agreements; in the domestic and international practice of states; in the rulings of international judicial bodies; in the consensus among scholars of international law; and in the repeated pronouncements of the international community as expressed in the relevant bodies and organs of the United Nations. While the modern body of rights for refugees and displaced persons emerged only after the Second World War, the antecedents of the right to compensation and restitution are evident even in the nascent years of international law.

The policy justifications for articulating the principle of compensation and restitution as a right for refugees and displaced persons in international law are at least five-fold. First, since modern international law forbids the mass expulsion of civilian populations even during wars and civil conflict[44] and prohibits the domestic conditions of persecution that create large-scale refugee displacements,[45] compensation is regarded as a potent tool to deter potential states of origin from domestic actions that would generate refugees.[46] Second, as a principle of equity, countries should not benefit from proceeds reaped through violating the human rights of minorities or the nationals of other countries.[47] Third, compensation and restitution serve to repair some of the individual and/or group dignity lost by the refugee through the violation of her or his human rights by mass displacement.[48] Fourth, where compensation is assessed and collected against a refugee-generating state, both the international community and the individual refugees will have their financial burdens reduced. This would be a particularly important benefit for refugees, whose movable and immovable property they lost through the conflict or persecution they fled from invariably represents the sum total of their meagre personal wealth.[49] And fifth, the compensation principle may assist with the reconciliation of the parties or groups to the conflict that sparked the mass population displacement, as part of a broader range of restorative remedies, such as a frank apology, the revelation of the truth, substantial reforms to political and social institutions, public educational campaigns to transform attitudes, and substantial changes to employment patterns.[50]

B. The Origins of the Right to Compensation in International Law

Prior to the emergence of modern human rights, humanitarian, and refugee law in the immediate aftermath of the Second World War, compensation and restitution for displaced persons had already been a regular practice in international treaties and state practice (although not in a consistent manner nor with the agreed-upon compensation obligations always being honoured). For example, in the aftermath of the American War of Independence, 60,000 American colonialists loyal to the British crown fled their homes and properties in the newly independent United States. In the 1794 *Treaty of Amity, Commerce and Navigation* (the "Jay Treaty")[51] between Great Britain and the United States, the Americans agreed that the Loyalists could claim either the restitution of their properties or compensation for their property and commercial losses.[52] However, the subsequent deterioration of political relations between the two countries resulted in the American abdication of any responsibility to pay the Loyalist claims.

Similar examples of early European and international treaties and laws that recognized compensation and/or restitution claims for displaced civilians include the 1648 *Treaty of Westphalia* that ended the Thirty Years War;[53] the 1678 *Treaty of Nimmegeun* between Spain and France that ended the war over the Spanish Netherlands;[54] and the 1839 *Treaty of London* that guaranteed the independence and neutrality of Belgium,[55] among others.[56] Even treaties that legitimized mass displacement of civilians and population exchanges (actions that are now prohibited by international law[57]) – such as the 1920 *Treaty of Neuilly* between Greece and Bulgaria,[58] and the 1923 *Treaty of Lausanne* between Greece and Turkey[59] – contained provisions to compensate civilians who lost properties.

The modern basis for compensation and restitution in international law has been decisively shaped by the seminal 1928 ruling of the Permanent Court of International Justice in *Chorzow Factory*.[60] In the aftermath of World War One, the Polish government expropriated a German-owned factory on Polish territory, and the German government sought reparations on behalf of the owners. In its lead ruling on the merits, the World Court stated that state responsibility applies in the case of an act or omission in violation of an international legal obligation:

> It is a principle of international law, and even a general conception of law, that any breach of an engagement invokes an obligation to make reparation. [R]eparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.[61]

Regarding damages, the Court endorsed the principle of restitution first, and full compensation for the property owners where restitution was unobtainable. In addition, it stated that awards for other damages not covered by restitution and compensation were also available:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[62]

Although *Chorzow Factory* was decided as a commercial property action in private international law, its articulation of the principles on compensation have since been widely endorsed in various public international law decisions. These endorsements include leading judgments on damages for injuries to United Nations personnel[63] and reparations for human rights violations,[64] as well as by a seminal United Nations study on compensation for human rights violations.[65]

C. Resolution 194 and the Articulation of the Right to Compensation

United Nations General Assembly Resolution 194, which established the availability of return, compensation, and restitution for the Palestinian refugees, was the world community's first affirmation of these principles in the context of a displaced population. Resolution 194 is commonly cited by refugee law scholars as a primary international law source for the right of refugees and displaced persons anywhere in the world to compensation and restitution.[66] Two particular features of Resolution 194 embed it with an international law importance that distinguishes it from the limited legal scope of an ordinary General Assembly resolution.

First, Resolution 194 explicitly states that the repatriation, compensation and restitution of the refugees should be made according to "… principles of international law or in equity." Luke Lee argues that, by deliberately choosing this particular drafting, the General Assembly clearly signalled that it was *restating* pre-existing law on the principle of compensating wrongs in international law, rather than simply establishing a new legal obligation.[67] As such, the

resolution moves beyond the recommendatory and political character of most General Assembly resolutions and acquires a legal, binding nature. Its binding effect arises not from the resolution itself, but from the declared law, which is then obligatory upon all states, whether they voted in favour of the resolution or not.[68]

Second, the resolution has been repeatedly affirmed by the General Assembly. Since 1948, Resolution 194 has been reaffirmed or referred to, by near unanimous majorities, at least 140 times.[69] For instance, UNGA Resolution 53/51, voted on 3 December 1998, expressly cited Resolution 194 when endorsing the entitlement of Palestinian refugees "to their property and to the income derived therefrom, in conformity with the principles of justice and equity."[70] Resolution 53/51, like its many predecessor resolutions, was passed by an overwhelming majority, in this case 156 member countries in favour and only two (Israel and the United States) in opposition. International law scholars have stated that, in specific circumstances, the repeated affirmation of a resolution by unanimous or overwhelming majorities of the General Assembly endows it with an acquired legal character, particularly when it reflects the parallel development of state practice on the issue.[71] Leading judgments of the World Court have endorsed this approach.[72]

D. General Principles of Domestic Law

A leading source for international law are the general principles of domestic law widely accepted by the developed legal systems, insofar as they apply to international rights and obligations.73 The principles of compensation and restitution have been cornerstone features of most domestic legal systems for centuries,[74] and constitute the primary remedial response to repair proven damages and instances of unjust enrichment. For example, the English common law courts have long applied the principle; in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd*., Lord Wright stated in 1943 that:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.[75]

Similarly, the American Law Institute, in its seminal restatement of the domestic law on restitution, has established that: "A person who has been unjustly enriched at the expense of another is required to make restitution to that other."[76]

E. International Treaties and Conventions

Through treaties and conventions, international law has accepted the cornerstone principle that a state which has violated a legal obligation is required to end the violation and to make reparation, including restitution and compensation for loss and injury in the appropriate circumstances.[77] These international instruments also stipulate that those whose human rights have been breached are to have access to meaningful remedies. Article 8 of the *Universal Declaration of Human Rights* states that every individual is entitled to an "effective remedy,"[78] a requirement that is repeated in the *International Covenant on Civil and Political Rights*[79] and the *Declaration on the Elimination of all Forms of Racial Discrimination*.[80] Other human rights instruments are even more specific: the *American Convention on Human Rights* refers to a "right to be compensated in accordance with the law"[81] and provides that "no one shall be deprived of his property except upon payment of just compensation,"[82] while the *African Charter on Human and Peoples' Rights* establishes the "right to an adequate compensation."[83] The *International Covenant on Civil and Political Rights*[84] and the *European Convention on Human Rights*[85] both refer to the "enforceable right to compensation." The 1998 *Treaty of Rome*,[86] which established the International Criminal Court, has directed the new court to establish principles of restitution, compensation, and rehabilitation for victims of international war crimes. Other international treaties and conventions contain similar remedial requirements.[87]

Theo van Boven, a Special Rapporteur for the United Nations Commission on Human Rights, issued a comprehensive final report in 1993 on international law remedies arising from the violation of human rights norms.[88] After reviewing a number of international treaties and conventions, he stated: "the principal right [that human rights] victims are entitled to under international law is the right to effective remedies and just reparations."[89] In his conclusion, the Special Rapporteur said: "it is…an imperative norm of justice that… the rights of the victims be sustained to the fullest possible extent."[90] These remedies included restitution, compensation, rehabilitation and guarantees of non-repetition,[91] and would be claimed against the state perpetrating the violations. Among the human rights and fundamental freedoms – whose gross violation would trigger a claim for remedies under international law – that van Boven listed were "deportation or forcible transfer of population".[92] The Special Rapporteur also maintained that international law contains no statute of limitations for claims regarding human rights reparations.[93]

F. Contemporary International Law Rulings

Decisions by international legal courts and tribunals, particularly since the 1980s, have affirmed that compensation and restitution are available remedies for displaced persons and victims of human rights abuses. Using both the 1928 World

Court decision in *Chorzow Factory* and international human rights treaties as the legal foundation for the principle, such international judicial bodies as the Inter-American Court of Human Rights and the European Court of Human Rights have ruled that violations of international obligations which result in harm create an obligation to compensate for and repair the damages. The Inter-American Court has stated that:

> It is a principle of international law, which jurisprudence has considered "even a general concept of law", that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing it.[94]

In 1989, the Inter-American Court ruled in *Velasquez-Rodriguez* v. *Honduras*,[95] a case under the *American Convention on Human Rights*[96] involving state responsibility for the disappearance of Honduran citizens, that international law requires restitution of the *status quo ante* where possible, and compensation where it is not possible.[97] After finding Honduras liable for human rights violations, the Court held that the claimants were entitled to a broad range of compensation headings under international law, as per the "fair compensation" criteria in Article 63(1) of the *Convention*. These headings included damages for lost salaries, based on probable future earnings, and moral damages, based upon the emotional harm suffered by the families of the victims. The Court emphasized that the "fair compensation" criteria must be applied in "sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered."[98] These compensation principles have been regularly applied by the Inter-American Court in subsequent decisions.[99]

In a similar manner, the European Court of Human Rights has ruled under the *European Convention on Human Rights*[100] that the deprivation of property and human rights obligates the offending state to provide restitution and compensation for the claimant. In *Loizidou* v. *Turkey*,[101] a Greek Cypriot national with property holdings in the northern part of Cyprus occupied by Turkey since 1974 complained that she was prevented from returning to her lands and peacefully enjoying them. The Court found that Turkey was responsible, as the occupying power, for breaching the *Convention*, and rejected its arguments that its stated need to rehouse displaced Turkish Cypriot refugees justified the negation of Ms. Loizidou's property rights. At the remedial stage,[102] the European Court ruled that the claimant was still the legal owner of the property, and entitled to reclaim her lands at any time. As reparations, it awarded compensation for ground rent (based on the market value earnings that could have been realized but for the occupation), moral damages for the loss of property enjoyment, and costs and interest.

More recently, the European Commission of Human Rights issued a 1999 report[103] on Cyprus, where it applied the principles in *Loizidou* regarding the claims of other displaced Greek Cypriots to property restitution and compensation. The Commission unanimously found that Turkey remained in continuing breach of the *European Convention on Human Rights* because of its ongoing refusal to allow Greek Cypriots to return to their homes in northern Cyprus. It also ruled that Turkey's refusal to pay compensation for its interference with the claimants' property rights breached the *Convention*. Turkey's defence that property succession legislation enacted by the Turkish Republic of North Cyprus invalidated the property claims was rejected by the Commission, as was its argument that property restitution and compensation should await a future global settlement of the Cyprus issue.[104]

G. Contemporary State and International Practice

Recent state and international practice have provided rich examples of restitution and compensation for violations of property and human rights. Many modern treaties and agreements that ended international or national conflicts have included these principles in the final settlement. Similarly, most countries in Eastern and Central Europe in the 1990s have offered restitution and compensation for those who lost properties or suffered human rights abuses under fascism or communism. As well, there are a number of contemporary domestic examples where these remedial principles have been applied as a restorative step to address a troubled history between majority and minority populations.

The template for the modern international obligation to compensate for unilateral property confiscations and wide-scale human rights abuses has been the post-war German and European reparations for Jewish and other victims of Nazi persecution.[105] Following the 1952 *Luxembourg Agreement*[106] between the Federal Republic of Germany, Israel, and the Conference on Jewish Material Claims against Germany, the West German government enacted a series of laws to provide compensation for gross violations of human rights (such as loss of life, loss of health, forced labour, deportation, imprisonment, maltreatment, and degradation) and for property losses (including immovable and moveable property, capital, income, securities, mortgages, pensions, copyright and patents) for victims or their heirs.[107] These compensation payments have amounted to DM 100 billion up to the year 2000, payable to Holocaust survivors, both individually and through the State of Israel. The range of compensable claims for Nazi victims has been

steadily widened through the decades to include Swiss bank accounts, European insurance policies, looted works of art, and slave labour.[108] Other European countries, such as Austria, Norway, Denmark, and the Netherlands have also undertaken to offer compensation to Jewish and other victims of Nazism.[109] And with the fall of communism in Eastern Europe, procedures have been created in a number of countries – including Hungary, Poland, Slovakia, and the Czech Republic – to restore property confiscated either by fascist or communist regimes to Jewish and other dispossessed owners.[110] After German reunification in 1990, the German parliament enacted legislation to restore confiscated Jewish properties in the former East Germany to their original owners or heirs, and to award the proceeds from the sales of communal and unclaimed Jewish property to the Jewish Claims Conference in order to aid needy Holocaust survivors worldwide.[111]

In Bosnia, a centrepiece of the 1995 *Dayton Peace Agreement*[112] that brought the first war in the former Yugoslavia to an uneasy end was the provision that all refugees and displaced persons would have the right to return home and have their properties restored to them. Alternatively, compensation for properties was available for those that either could not, or did not wish to, return to them.[113] The *Dayton Agreement* established a Commission for Displaced Persons and Refugees, later renamed the Commission for Real Property Claims of Displaced Persons and Refugees, to adjudicate real property claims, including the return of the confiscated property, or, in lieu of return, the awarding of "just compensation."[114] Compensation may be awarded in the form of money or in the form of a bond for the future purchase of real property elsewhere in Bosnia. For a variety of international and inter-ethnic reasons, the Dayton compensation provisions have been only implemented in a piecemeal fashion, as the legal structures to adjudicate the claims await the realization of political will.[115] In a related legal process, an international human rights chamber in Sarajevo has declared that displaced property owners in Bosnia are entitled to be compensated for the unlawful eviction from their residence, through declaratory relief and moral damages, based upon the *European Convention on Human Rights*.[116]

As part of the recent resolution of other international and domestic conflicts, compensation and restitution have been integral parts of the settlement process. In the aftermath of the Second Gulf War in 1990–91, the United Nations established a compensation commission to process claims and pay out compensation for property, personal, and moral losses resulting from the Iraqi invasion and occupation of Kuwait.[117] The Iraq-Kuwait compensation experience built upon the lessons of the Iran-United States Claims Tribunal, created in 1981 to adjudicate the American claims for property and material losses following the 1979 Islamic revolution in Iran.[118] In Guatemala, the agreements in the early 1990s that brought an end to the four-decades-old civil war stipulated property restitution and compensation to land owners who fled the country during the armed conflict.[119] Domestically, compensation has played a role in repairing the civil rights violations of Japanese-Americans[120] and Japanese-Canadians[121] for their arbitrary detention and property confiscation during the Second World War. Similarly, the tools of compensation and property restoration have shaped the modern attempts of the United States,[122] Canadian,[123] Australian,[124] and New Zealand[125] governments to restitute their aboriginal peoples for the centuries of land alienation and social harm that these states inflicted upon them. After the fall of oppressive military dictatorships in Chile, Argentina, Uruguay, and Uganda, the new democratic governments enacted legislation that offered compensation and, where possible, restitution for victims of human rights abuses and property losses by the previous regimes.[126]

IV. *Restitution, Compensation and the Palestinians*

International law authoritatively establishes that restitution and compensation are available remedies for those who have been displaced or turned into refugees through acts contrary to international treaties and conventions, for those who have suffered gross violations of their internationally recognized human rights, and for those who have lost homes or property through the breach of internationally established standards. In the case of the Middle East conflict, the Palestinians who became refugees, who lost properties, or who suffered other legally recognized damages as a consequence of the various upheavals in the region – and particularly the 1947–49 and 1967 wars – also have an established legal grounding for restitution and compensation in the substantial body of United Nations resolutions that specifically refer to their claims. Indeed, it would be difficult to find another community of disadvantaged people for whom the modern principles of international law – especially in the fields of human rights and refugee law – so clearly buttress their claim either to have their properties restored to them or to receive appropriate compensation for their losses.

Establishing the entitlement to compensation and restitution as a right in international law is one matter. Articulating the detail of substance and procedure that must invariably accompany the realization of this right is quite another. As a body of principles, international law has become a mature legal system, deserving of the considerable respect it enjoys in the modern world because of its

impressive assembly of the values that the international community has declared it wishes to live by. But, as a guide to the efficacious application of these principles, the practice of international law has been considerably less sophisticated. Its application of these principles has been an inchoate array of uneven experiences, shaped by two primary factors: (i) the poverty of political will to implement these principles in a manner consistent with the international rule of law; and (ii) the wide variety and real differences among the many contemporary experiences where the application on international law has been attempted. Developing the practical rules to implement an international right – such as the entitlement to restitution and compensation – has, in many cases, been an original creation, an *ad hoc* arrangement. Yet, increasingly, this need not be so. The accumulation of international experience has reached the point where sufficient precedents and rules exist, particularly on restitution and compensation, to productively and equitably craft their implementation in any contemporary situation.

The Palestinian claims for restitution and compensation are neither exceptional nor insurmountable. The only substantive obstacle is political will. While the circumstances of the Palestinians present some particular challenges – which is unsurprising, given their massive displacement, their enormous personal, property, and moral losses, the subsequent transformation of their homes and lands, the array of international political actors involved, and the extraordinary length of time involved – recent international and domestic practice from elsewhere points to applicable rules that can be successfully adapted to untie this Gordian knot. In anticipation that the negotiations between the Israeli and Palestinian representatives will eventually turn to the issues of compensation and restitution, five aspects of the issue stand out that will form a significant feature of the parties' final settlement of the rights of the Palestinians. While these five aspects are all worthy of an extended discussion, they can, for the purposes of this essay, only be reviewed briefly.[127]

A. Return and Compensation

Modern international law, beginning with the proclamation of the *Universal Declaration of Human Rights* in December 1948, has insisted that refugees and displaced persons, as well as their descendants, have the right to return to their homes, if that is their freely determined choice.[128] The Human Rights Committee, the United Nations body responsible for interpreting the *International Covenant on Civil and Political Rights*, stated in 1999 that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."[129] The right to return survives even when sovereignty over the lands from where the displaced had fled is contested or has changed hands. Those unable to return to a former home because it is occupied by an innocent third party or has been destroyed are entitled to choose return to the vicinity or to receive compensation. However, international law holds that compensation is not a substitute for the right to return to one's home.[130] To that end, the ensuing discussion on restitution and compensation is to be seen in the context of remedies adjacent to the right to return, not in place of it.

B. Types of Compensation

According to international law and practice, the Palestinians eligible for restitution and compensation have a range of remedies available to them, including: (i) the restitution of their confiscated movable and immovable properties; (ii) compensation for the damages to their restituted properties; (iii) compensation for the income derived from the use of their restituted properties; (iv) compensation for those refugees and displaced who choose not to return; and (v) damages for a spectrum of non-material losses, including lost earnings and opportunities, and social and moral damages. In addition, collective restitution claims are available for: (i) expropriated religious, educational, communal, and public lands; and (ii) the use and depletion of natural resources, such as water, minerals, and forests. Technically, the accomplishment of these remedies within the regional context is feasible, because the extensive historical documentation on property and ownership in Palestine has been largely preserved. The land records assembled by the British Mandate authority, the United Nations CCP, the Israeli Custodian of Absentees' Property, and the Israeli Lands Authority, as well as the personal records of the families of the displaced and refugees, would make compensation an easier technical task in comparison to the successful claims achieved in recent years by victims of European fascism and by the aboriginal nations in North America, Australia, and New Zealand.

Politically, the types of compensation awarded would depend on the prior determination of how many of the displaced Palestinians would achieve the right to return to Israel and have their original properties restored to them. Palestinian researchers have maintained that the total compensation pricetag would be significantly reduced if a greater number of displaced and refugees were able to return to their homes inside Israel.[131] However, discussions within the *status quo* framework indicate that a final settlement on the Palestinian refugee issue will consist largely of compensation in exchange for the negation of the large-scale right to return. The leading example is the 1995 Beilin-Abu Mazan agreement,[132] where a future Israeli justice minister and a senior advisor to the Palestinian Authority developed

an unofficial, but influential, template for a final status settlement. It accepted the right of the displaced Palestinians to compensation and rehabilitation for their material and moral losses, while excluding any significant return of, or to, their properties within Israel. The issue of restitution was raised at the January 2001 final status talks in Taba, where the Israelis rejected any return of refugee property.133 How the parties to the final status negotiations will square any agreement that dissolves the right of Palestinian refugees to return to their original lands with the cornerstone principle in international refugee and human rights law that refugees have a right to freely choose repatriation back to their homeland will be a closely observed matter.

C. *Valuation of Losses*

International law requires that compensation for internationally recognized losses should, as much as remedies can, place the claimants back in the position that they would have been in, had the breach of the legal right not occurred. Beyond that, it has not spoken with particular clarity regarding the precise formula to use, employing at different times the terms "full," "just," "fair," and "adequate" to describe the compensation required. While "full compensation" is an appropriate yardstick in international claims of small and medium size, large-scale claims – because their size creates problems of efficiency, fairness, and cost – have tended towards less-than-global "attainable justice" standards. Indeed, the larger and more complex the potential claim, the more likely it has been that the final compensation arrangement will be a judicious mixture of political feasibility (*i.e.*, available financial resources and domestic public reaction) and the requirements of justice (*i.e.*, international legal obligations, international pressure, and the cost of ongoing dissent by the aggrieved party). "Attainable justice," while necessarily falling short of "full compensation," is an acceptable and appropriate standard in large-scale international claims where: (i) the aggrieved party freely agrees to the settlement or it is the result of a legal process that the aggrieved party has freely agreed to adhere to; (ii) the compensation addresses all of the recognized losses; (iii) internationally accepted means of valuation for the losses are employed; and (iv) the party responsible for the compensation of the losses undertakes a guarantee of non-repetition. However, with whatever valuation standard is chosen, international law requires that it is to be given a broad application, so that the restorative purposes of human rights remedies – which include justice, equity, acknowledgement of responsibility, deterrence, reconciliation, and social harmony – are achieved.

D. *Creating an Appropriate Compensation Regime*

A number of issues arise in choosing the modalities of a compensation regime for resolving the Middle East conflict. The principal issues include:

1. *The group of claimants*. The choices for appropriate claimant groups would include:
   a. The 1948 property owners and their heirs, which would award those who suffered direct losses, but would disproportionally benefit land-owners, and disadvantage the poor and women (who frequently could not own or inherent property),[134] as well as require personal documentary evidence which may not always exist;
   b. The extended family or villages, which reflects the traditional rural social units and may resolve some problems surrounding claims over collective lands, but could create problems in determining membership, and would not address the landless or gender inequity issues;
   c. Per capita awards for all the displaced, regardless of property ownership, which would address the inequality and gender issues, but would still require a determination of eligibility; or
   d. A collective claim made on behalf of the displaced by the Palestinian state, which would create a national fund for future public works, but would not likely provide the kind of political and emotional closure for the displaced that an individual compensation scheme should provide.
2. *Formula*. The choices among appropriate compensation formulas would include:
   a. A claims-based system that bases compensation upon the value of the lost property, which would most directly link the financial remedies to the actual losses, but would also likely recreate the inequalities of pre-1948 Palestinian society;
   b. A modified claims-based system that creates several compensation categories based upon size of claim, which would be more efficient and award more progressive remedies than the pure claims-based system, but would also still be biased towards larger property owners;
   c. A pure per capita payment system that would award equal payments to all refugees, thereby achieving efficiency and eliminating the social inequalities of the previous proposals, but would diminish the link between payments and scale of losses; or
   d. A modified per capita payment system that would create several categories of claimants based upon a generational or returnee v. non- returnee status, which would still be efficient and relative equitable,

but which could also create social tension between the categories.

3. *Mechanism*. What forms would compensation be awarded? Among the choices would be:
   a. Cash payments, which are efficient to administer, but may not have significant macro-social or economic benefits;
   b. Services or vouchers for individuals or families, which can be directed towards more focused public benefits plans, but are less flexible for the recipients and weaken the link between the compensation and actual losses;
   c. Investment in community development, which also promotes public benefit plans, but weakens the link between the displaced and the purpose of the compensation; or
   d. A equity scheme involving refugee ownership in collective development projects, which more directly connects the displaced to public plans, but does not strongly address the personal needs for closure.
4. *Administrative Process*. How should the compensation fund be administered and distributed? Several politically feasible types of bodies are possible, including:
   a. Palestinian state, which may build up the governing expertise of the future state, but which also raises issues of accountability and fairness;
   b. A bilateral body made up of Palestine and Israel, which would involve the main parties to the conflict, but would invite administrative gridlock because of their historical animosity;
   c. A trilateral commission, involving Palestine, Israel and another party, which would lessen but not likely eliminate the problems of a bilateral commission; or
   d. An international commission of parties acceptable to Palestine and Israel, or a United Nations commission, which would likely avoid gridlock, but would not be directly accountable to the direct stakeholders.
4. *Compensation Determination*. How should a global figure be determined? Among the approaches would include:
   a. A politically determined number that is largely shaped through the course of the final status negotiations by the amount of money that the international community and Israel are willing to pay. While this is doubtlessly the easiest method to achieve a global figure, it would have little to do with the international legal obligation to provide fair compensation;
   b. A macro-economic survey that would evaluate the assets as a prelude to determining an estimated value. While this approach would approximate a fair value of the Palestinian losses, it also underestimates the degree of economic loss by minimizing the appreciation of value over the years since dispossession, as well as downplaying moral losses; or
   c. A multiplier approach, which would start with the estimated value and scale of the confiscated properties in 1948, and then add accepted appreciation factors to determine present-day value. This approach would come the closest to the "fair compensation" requirements, but, given the scale of Palestinian losses, it would doubtlessly be the most difficult method to fund.

At the unsuccessful Taba final status talks in January 2001, the Palestinian and Israeli negotiators agreed on several of the less contentious issues pertaining to compensation.[135] Within the context of a comprehensive agreement, an International Commission and an International Fund would be created to conclusively settle all outstanding compensation issues pertaining to Palestinian material and non-material losses. Also agreed upon would be a multi-track assessment system, where smaller claims below a certain monetary ceiling would be determined through a fast-track procedure. As well, Israel would accept some moral and financial responsibility for compensation, although no amount was seriously discussed. However, left unsettled by the time the Taba talks broke down was any agreement on the central questions of how the overall amount of compensation would be calculated, who would fund it, how the funds would be equitably distributed, and whether there would be separate parcels of funds for individual compensation and national projects.

E. Who Should Pay?

International law provides that the state, body, or individual who causes the damage or harm in breach of an internationally recognized obligation is liable for the restitution and compensation. In this case, Israel would bear the primary responsibility for compensation, because it either created and perpetuated the Palestinian refugee problem in defiance of international law, or on the lesser ground that – regardless of moral blame – it has been unjustly enriched through its expropriation and use of Palestinian properties, homes, and lands. Payments by Israel to meet its compensatory obligations could take the form of direct restitution (the return of homes and properties, which would likely lessen its potential total liabilities), the handing over of the settlements, roads, and other structures built in the West Bank and Gaza, and the financial contribution to a compensation fund. While Israel is an economically advanced nation – with a per capita income of over $18,000 (U.S.), it is almost twenty times the

level of the Palestinian economy – even its financial capacity is unlikely to entirely satisfy the requirements of a final compensation fund by itself. For a variety of complex *real-politik* and practical reasons, the international community (primarily Europe and North America) would likely contribute to a compensation fund, which would enhance their voice in shaping the modalities of the compensation regime.

V. Conclusion

To satisfy the direction of the international community that the Palestinian refugee problem is to be settled in accordance with the principles of justice and equity, international law mandates that they are entitled to restitution and compensation for their losses. These losses attributable to Israel in violation of its international law obligations are substantial, and arise from: the expulsion or flight of over half of the Palestinian population; the confiscation of approximately 16,000 square kilometres of land, representing almost 80 per cent of Mandate Palestine; the large-scale expropriation or destruction of Palestinian property; the refusal to allow the refugees to return to their homes; the suffering caused by the losses and the decades in exile; and unjust enrichment from the use of the confiscated properties. Although international law does not speak with precision regarding the formulas to be applied in such a large-scale and complex claim, it has clearly stipulated a number of principles that are directly applicable in any future final-status agreement between Palestine and Israel, including: (i) Restitution of the wrongly acquired property enjoys primacy, with compensation available for property damage and unjust enrichment; (ii) Compensation in place of restitution is acceptable, but only where restitution has become impossible for practical reasons; (iii) Compensation is available for both individual and community losses, and covers remedies for the loss or damage to immovable and movable property; for loss of actual income and future earning potential; for moral damages, including emotional harm; for unjust enrichment; for the costs of rehabilitation; and for an undertaking that such actions will not be repeated; (iv) however the legal formula for compensation has been phrased – be it "full," "fair," "adequate," etc. – it is to be given a sufficiently broad application so that the restorative purposes of human rights remedies are fulfilled; (v) The state actor that displaced the indigenous population and unjustly benefited from the confiscated properties is the party responsible for restitution and compensation; and (vi) The responsible state actor cannot argue that the difficulties of process – those caused by the passage of time, the magnitude of potential claimants, the determination of worthy claimants, the calculation of outstanding damages, the existence of subsequent domestic legislation that has transferred legal title, the hostile mood among the domestic political constituency, or the lack of a comprehensive settlement to the wider conflict – are justifiable barriers to satisfying an otherwise established claim for restitution and compensation.

The lessons of reconciliation in the modern world are profound. Those on both sides of an historical wound benefit immensely from a genuine effort to acknowledge, remember, and restore. While full justice may not have been achieved even in the template cases of post-war Europe or contemporary South Africa, the transformation of relations and the flourishing of new values among these former nemeses have been substantially aided by the restorative remedies of restitution and compensation. In the Middle East, the closure of the decades-long conflict will require no less. For Israelis, offering these remedies will finally allow a reckoning with the uncomfortable history that still stares out from among the ruined homes and wild olive groves that can be found in every corner of their country. For Palestinians, accepting the remedies of restitution and compensation will not return some past Eden, but it will address not only the sufferings they have endured and the material possessions they have lost, but also provide the tools for a productive national future. The requirements of an enduring regional peace require no less.

Notes

1. This essay uses the term "displaced Palestinians" to include the Palestinian refugees of the 1948 and 1967 wars and their descendants, as well as those Palestinians, whether refugees or not, who suffered compensable losses arising from the conflict in Israel/Palestine. While the Palestinian refugees will likely be the primary beneficiary of any compensation plan that emerges from a settlement of the Middle East conflict, there are Palestinians who do not qualify as refugees within the applicable United Nations definition who nevertheless have claims for lost lands and properties that were expropriated by Israel at some point over the past five decades.
2. UNSC Res. 242, 22 November 1967: "The Security Council…affirms further the necessity…(b) for achieving a just settlement of the refugee problem."
3. *Declaration of Principles on Interim Self-Government Arrangements*, 13 September 1993, Government of Israel – Palestine Liberation Organization [1993] 33 I.L.M. 1525.
4. *Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan*, 26 October 1994, [1994] 34 ILM 43. See Article 8(2), where the parties commit to resolving the "massive human problems" of the refugees and displaced persons "in accordance with international law."
5. The centrepiece of the right to return is generally cited as Article 13(2) of the *Universal Declaration of Human Rights*, U.N. Doc. A/811: "Everyone has the right to leave any country, including his own, and to return to his country." On the

application of the right to the Palestinian/Israeli conflict, see J. Quigley, "Displaced Palestinians and a Right to Return" (1998) 39 *Harvard International Law Journal* 171; and K. Lawand, "The Right to Return of Palestinians under International Law" (1996) 8 *International Journal of Refugee Law* 533.

6. The current Palestinian position is expressed in the Palestinian negotiating paper submitted during the final status talks with Israel at Taba, Egypt, in January 2001: "In accordance with the United Nations General Assembly Resolution 194 (III), all refugees who wish to return to their homes in Israel and live at peace with their neighbours have the right to do so"; online: <www.monde-diplomatique.fr/cahier/proche-orient/refugespal -en> (date accessed: 18 December 2002).
7. See the "non-paper" produced by the European Union envoy Miguel Moratinos (the "Moratinos Document") which summarized the discussions between the Israeli and Palestinian delegations at the Taba talks in January 2001; online: <http://www.arts.mcgill.ca/MEPP/PRRN/papers/moratinos.html (date accessed: 18 December 2002). For a summation of the Israeli position on the right to return, see S. Gazit, *The Palestinian Refugee Problem* (Tel Aviv: Jaffee Center for Strategic Studies, 1995).
8. Gazit, *ibid*. at 27.
9. Palestinian National Authority, *Palestinian Refugees and the Right to Return* (Jerusalem: Ministry of Information, 1995). Also see E. Zureik, *Palestinian Refugees and the Peace Process* (Washington, D.C.: Institute for Palestine Studies, 1996).
10. See "Private [Israeli] Response on Palestinian Refugees;" online: <http://www.monde-diplomatique.fr/cahier/proche-orient/israelrefugees-en> (date accessed: 18 December 2002).
11. The Palestinian negotiating paper issued at the Taba talks in January 2001 called for the restitution of real property, and compensation in today's values for loss of property, for moral suffering, and for rehabilitation. The paper maintained that: "The rights of return and compensation are independent and cumulative. A refugee's exercise of his or her right of return to Israel shall not prejudice his or her right to receive compensation [for loss of property], nor shall a refugee's receipt of compensation prejudice his or her right of return…." *Supra* note 6.
12. *Supra* note 7.
13. J. Alpher & K. Shikaki, *The Palestinian Refugee Problem and the Right of Return* (Cambridge, Mass.: Weatherhead Center for International Affairs, 1998).
14. A. Kubursi, "Palestinian Losses in 1948 in 1999 Dollars" (unpublished, 1999). For an overview of earlier cost estimates, see T. Rempel, "The Ottawa Process: Workshop on Compensation and Palestinian Refugees" (1999) 29 *Journal of Palestine Studies* 36.
15. For definitions of compensation and restitution, see V. Condé, *A Handbook of International Human Rights Terminology* (Lincoln: University of Nebraska Press, 1999). (Compensation: "Money…paid…to extinguish a state's legal obligation by the payment of monetary damages to those whose human rights have been…violated under international law"; Restitution: "A judicial remedy…to return property to another person from whom it was unlawfully taken or damaged.")
16. Other recent studies of the Middle East final status negotiations on the Palestinian refugees emphasize the same point. For example, see the 1998 report of the Harvard Joint Working Group on Israeli-Palestinian Relations: J. Alpher & K. Shikaki, *The Palestinian Refugee Problem*, *supra* note 13.
17. Unless otherwise noted, this historical précis is drawn from the following: W. Khalidi, ed., *All That Remains* (Washington, D.C.: Institute of Palestine Studies, 1992); B. Morris, *Righteous Victims* (New York: Knopf, 1999); B. Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (Cambridge: Cambridge University Press, 1987); I. Pappé, *The Making of the Arab-Israeli Conflict, 1947–1951* (London: I.B. Tauris, 1992); and A. Shlaim, *The Iron Wall* (New York: W.W. Norton & Co., 1999).
18. The 1948 Palestinian refugee figures are highly contested. Official Israeli estimates place the number of refugees at 590,000. Palestinian estimates range from 745,000 to 850,000, while British and American estimates in the early 1950s put the number between 810,000 and 875,000. The United Nations adopted a figure of 726,000 in 1949, and has commonly used figures in that vicinity since. For the purposes of this essay, I rely on the United Nations figure. See E. Zureik, *Palestinian Refugees*, *supra* note 9 at 17.
19. F. Bernadotte, "Progress Report of the United Nations Mediator on Palestine," UN GAOR, 3rd sess., Supp. No. 11, UN Doc. A/648, at 16.
20. See in particular the writings of Israeli historian Benny Morris cited in note 16.
21. Bernadotte, *supra*, note 18 at 16.
22. *Ibid*., at p. 20: "The right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return."
23. UN GA Res. 181(II), 29 November 1947, Part I, C, chap. 2, para. 8.
24. *Supra* note 19 at 16:

    > There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity. The liability of the Provisional Government of Israel to restore private property to its Arab owners and to indemnify those owners for property wantonly destroyed is clear, irrespective of any indemnities which the Provisional Government may claim from the Arab States.

25. UN GA Res. 194 (III), 3 UN GAOR, pt. 1, Res. at 21, 24, UN Doc. A/810 (1948).
26. For a general history of the UNCCP, see: D. Forsythe, *United Nations Peacekeeping: The Conciliation Commission for Palestine* (Baltimore: Johns Hopkins University Press, 1972).
27. UNCCP, *Historical Survey of Efforts of the United Nations Conciliation Commission for Palestine to Secure the Implemen-*

tation of Paragraph 11 of General Assembly Resolution 194 (III), A/AC.25/W.81/Rev.2, 2 October 1961, at para. 92. Also see M. Fischbach, "The United Nations and Palestinian Refugee Property Compensation" (2002) 31 *Journal of Palestine Studies* 35.

28. Estimates of the number of Palestinian villages emptied between 1947–49 vary. See B. Morris, *The Birth of the Palestinian Refugee Problem*, *supra* note 17 at 297–98, who suggests 370; W. Khalidi, ed., *All That Remains*, *supra* note 17, who estimates the number to be 418; and I. Pappé, *The Making of the Arab-Israeli Conflict*, *supra* note 17, who offers a figure of 400.
29. D. Peretz, *Palestinian Refugee Compensation* (Washington, D.C.: Center for Policy Analysis on Palestine, 1995) at 12–13.
30. D. Peretz, *Palestinians Refugees and the Middle East Peace Process* (Washington, D.C.: U.S. Institute for Peace, 1993) at 87.
31. D. Peretz, *Palestinian Refugee Compensation*, *supra* note 29 at 13. Also see F. Lewis, "Agricultural Property and the 1948 Palestinian Refugees: Assessing the Loss" (1996) 33 *Explorations in Economic History* 169.
32. D. Artz, *Refugees into Citizens: Palestinians and the End of the Arab-Israeli Conflict* (New York: Council of Foreign Relations, 1997), at p. 16.
33. I. Kershner, "The Refugee Price Tag" *The Jerusalem Report* (17 July 2000) 22–23.
34. *Ibid*. at 23. Also see Rempel, *supra* note 14.
35. E. Benvenisti & E. Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement" (1995) 89 *American Journal of International Law* 295. Also see T. Rempel, "Dispossession and Restitution" in S. Tamari, ed., *Jerusalem 1948* (Jerusalem: Institute of Jerusalem Studies, 1999) 189.
36. Peretz, *Palestinian Refugee Compensation*, *supra* note 29 at 7; Artz, *supra* note 32 at 16; also see D. Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder: Westview Press, 1990), ch. 4.
37. B. Morris, *The Birth of the Palestinian Refugee Problem*, *supra* note 17 at 155, states that these developments included:

    > …the gradual destruction of the abandoned Arab villages, the cultivation and/or destruction of Arab fields and the share-out of the Arab lands to Jewish settlements, the establishment of new settlements on abandoned lands and sites and the settlements of Jewish immigrants in empty Arab housing in the countryside and in urban neighbourhoods. Taken together, they assured that the refugees would have nowhere, and nothing, to return to.

38. The principal Israeli pre-conditions, as summarized in the mediation conferences organized between 1949 and 1952 by the UNCCP, were: (i) compensation must be part of a general peace settlement; (ii) there would be no restitution of property; (iii) compensation would not be paid for individual claimants, but only to a collective fund, which would be utilized for the resettlement of the refugees elsewhere; (iv) Israel would maintain the right to raise its own claims for property damages and losses; (v) its contributions to a compensation fund would be limited by its ability to pay; (vi) it accepted no moral or political responsibility for the creation of the refugee problem; and (vii) the resolution of abandoned Jewish property claims in Iraq, and, subsequently, to Jewish property left behind in other Arab countries. See UNCCP, *supra* note 27 at paras. 62–65, 72–75, 99–101; Peretz, *Palestinian Refugee Compensation*, *supra* note 29 at 10–11; R. Zweig, "Restitution of Property and Refugee Rehabilitation: Two Case Studies" (1993) 6 *Journal of Refugee Studies* 56.
39. In March 1951, Moshe Sharett, the Israeli Foreign Minister, told the Knesset that:

    > We…have an account with the Arab world – namely, the account of the compensation that accrues to the Arabs who left the territory of Israel and abandoned their property…The act now committed by the Kingdom of Iraq… forces us to link the two accounts…We will take into account the value of the Jewish property that has been frozen in Iraq with respect to the compensation we have undertaken to pay the Arabs who abandoned property in Israel.

    Quoted in Yehouda Shenhav, "The Jews of Iraq, Zionist Ideology, and the Property of the Palestinian Refugees of 1948: An Anomaly of National Accounting" (1999) 31 *International Journal of Middle East Studies* 605 at 619.
40. At the UNCCP conferences, the position of the Arab states focused on the following: (i) the Palestinian refugees had to be given a free choice about returning to their homes, and only then could compensation be determined as between those returning and those resettling elsewhere; (ii) compensation was to be paid to individual claimants; (iii) compensation should reflect the true value of the property; (iv) Israel bore the principal responsibility for paying the compensation, and if it is unable to pay the full amount, the United Nations also bore responsibility because of its role in the 1948 partition; and (v) the refugees must be represented at the different stages of negotiations. UNCCP, *supra* note 27 at paras. 102–5.
41. E. Buehrig, *The UN and the Palestinian Refugees* (Bloomington: Indiana University Press, 1971) 21–25.
42. The United States Assistant Secretary of State, George McGhee, presciently foresaw the consequences of leaving the Palestinian issue unresolved, during testimony given to the House Committee of Foreign Affairs in February 1950:

    > The presence of three-quarters of a million idle, destitute people – a number greater than the combined strength of all the standing armies of the Near East – whose discontent increases with the passage of time, is the greatest threat to the security of the area which now exists.

    U.S. Congress, House, Committee on Foreign Affairs, *Hearings on Palestine Refugees*, 81st Cong., 2nd Sess. S. J. Res. 153, 16–17 February 1950 (Washington, D.C.: USGPO, 1950) 9.
43. The accepted starting point for the sources of international law is Article 38(1) of the *Statute of the International Court of Justice*. It directs the Court to apply: (i) international conventions, whether general or particular; (ii) international customary law; (iii) general principles of law, which include principles commonly accepted by various domestic legal systems, and principles of equity; (iv) judicial decisions; and (v)

scholarly views. Other accepted sources of international law include the frequent restatement of principles by international organizations, particularly by the United Nations. See generally I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) 1–30.

44. A. de Zayas, "Population, Expulsion and Transfer" in R. Bernhardt, ed., 8 *Encyclopaedia of Public International Law* (Amsterdam: North Holland Publishing Co., 1992) 438 at 443. ("As a fundamental denial of the right to self-determination and in the light of the Nuremberg principles, the Genocide Convention and the developing body of human rights law, population expulsion must be seen as incompatible with modern international law.")
45. International Law Association, *Declaration of Principles of International Law on Compensation to Refugees*, Cairo, April 1992. Reprinted in (1993) 6 *Journal of Refugee Studies* 69. Also see H. Garry, "The Right to Compensation and Refugee Flows: A 'Preventative Mechanism' in International Law?" (1998) 10 *International Journal of Refugee Law* 97; L. Lee, "The Right to Compensation: Refugees and Countries of Asylum" (1986) 80 *American Journal of International Law* 532.
46. International Law Association, *ibid*. Principle 1 states:

    > The responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee and/or remain abroad as refugees. The discharge of such responsibility by countries of asylum, international organizations (e.g., UNHCR, UNRWA, IOM) and donors (both governmental and non-governmental), pending the return of refugees, their settlement in place, or their resettlement in third countries, shall not relieve the countries of origin of their basic responsibility, including that of paying adequate compensation to refugees.

47. Such a principle has been a policy centrepiece for organizations dedicated to the material restitution of human rights victims. For example, a founding principle of the Jewish Restitution Successor Organization, which played a significant role in the recovery of heirless property owned by Jewish victims of the Holocaust, stated: "that a nation may not retain property that it gained by the mass spoliation of minorities whom it persecuted on racial or religious grounds." See S. Kagan & E. Weismann, *Report on the Operations of the Jewish Restitution Successor Organization, 1947–1972* (New York: J.R.S.O., 1972) at 6.
48. While serious violations of human rights such as mass population displacements are, at one level, irreparable, since no remedy can perfectly restore the victim to her or his position prior to the violation, the United Nations Special Rapporteur for Human Rights has nonetheless argued that "reparation for human rights violations has the purpose of relieving the suffering of, and affording justice to, victims by removing to the extent possible the consequences of the wrongful acts." T. van Boven, Special Rapporteur, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/Sub.2/1993/8 (2 July 1993) at para. 137.
49. L. Lee, "The Right to Compensation," *supra* note 45.
50. E. Marx, "Refugee Compensation" in J. Ginat & E. Perkins, eds., *Palestinian Refugees: Old Problems – New Solutions* (Norman: University of Oklahoma Press, 2001).
51. 19 November 1794, 8 Stat. 116.
52. *Ibid*., Article 9: "It is agreed, that British Subjects who now hold lands in the Territories of the United States…shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives…"
53. K. Schwerin, "German Compensation for Victims of Nazi Persecution" (1972) 67 *Northwestern University Law Review* 479.
54. United Nations, "Historical Precedents for Restitution of Property or Payment of Compensation to Refugees," UN Doc. A/AC.25/W.81/Rev.2, March 1950.
55. *Ibid*.
56. For other historical examples besides the treaties mentioned, see K. Schwerin, *supra* note 53.
57. *Fourth Geneva Convention of 1949*, 75 U.N.T.S. 287, Article 49 ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.")
58. *Convention Respecting Reciprocal Emigration*, 27 November 1919, 1 LNTS 68.
59. *Convention Respecting the Exchange of Populations*, 30 July 1923, 2 *The Treaties of Peace, 1919–1923* 653 (New York: Carnegie Endowment for International Peace, 1924).
60. (Merits) 1928 P.C.I.J. (Ser. A.), No. 17.
61. *Ibid*. at 29.
62. *Ibid*. at 47.
63. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, 184.
64. *Valesquez Rodriguez Case (Compensatory Damages)*, (1989), 7 Inter-Am. Ct. H.R. (ser. C).
65. T. van Boven, *Preliminary Report, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/Sub.2/1990/10 (26 July 1990).
66. E. Rosand, "The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law" (2000) 33 *Cornell International Law Journal* 113; H. Garry, "The Right to Compensation and Refugee Flows," *supra* note 45; L. Lee, "The Preventative Approach to the Refugee Problem" (1992) 28 *Willamette Law Review* 811; L. Lee, ""The Right to Compensation," *supra* note 45.
67. Lee, "The Preventative Approach," *ibid*. at 829.
68. Lee, "The Right to Compensation," *supra* note 45 at 544.
69. For a comprehensive collection of the relevant UN resolutions on the Middle East conflict, see the five-volume series: *United Nations Resolutions on Palestine and the Arab-Israeli Conflict*

(Washington, D.C.: Institute for Palestine Studies, 1975, 1988, 1988, 1993, 1999).

70. *Ibid*., vol. 5, 211–12.
71. B. Sloan, "General Assembly Resolutions Revisited (Forty Years After)" (1987) 58 *British Yearbook of International Law* 39; J. Castaneda, *Legal Effects of United Nations Resolutions* (New York: Columbia University Press, 1969); S. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions" (1969) 63 *American Journal of International Law* 444; R. Falk, "On the Quasi-Legislative Competence of the General Assembly" (1966) 60 *American Journal of International Law* 782; R. Higgins, "The Development of International Law through the Political Organs of the United Nations" in *Proceedings of the 59th Annual Meeting of the American Society of International Law* 116.
72. See in particular the oft-cited dissenting opinion of Judge Tanaka in the *South West Africa Cases* (Second Phase), 1966 ("What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly."), reproduced in I. Brownlie, ed., *Basic Documents on Human Rights*, 3rd ed. (Oxford: Clarendon Press, 1992) at 575. Also see *Military and Paramilitary Activities In and Against Nicaragua* [1986] I.C.J. Rep. 99–100; *Namibia Advisory Opinion*, [1971] I.C.J. Rep. 50.
73. *Statute of the International Court*, Art 38(1)(c).
74. The Roman lawyer and legislator Pomponius stated in the second century A.D. that: "For this by nature is equitable, that no one be made richer through another's loss."; quoted in J.P. Dowson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little, Brown and Co., 1951), at 3.
75. [1943] A.C. 32, at 61. In the Third World, a similar view was stated by Mr. Justice Guha Roy of India in 1961: "That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable." "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 *American Journal of International Law* 863.
76. American Law Institute, *Restatement of the Law of Restitution, Quasi-Contract and Constructive Trusts* (St. Paul: American Law Institute Publishers, 1937) at 12.
77. T. van Boven, *Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996. Also see: (Third) Restatement of the Law, 901 (Redress for Breach of International Law).
78. *Supra* note 5.
79. Art. 2(3)(a), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52.
80. Art. 6, G.A. Res. 2106 (XX), B, 20 U.N. GAOR.
81. Art. 10, O.A.S., Treaty Series No. 36, 1144 U.N.T.S. 123.
82. Art. 21(2), *ibid*.
83. Art. 21(2), O.A.U. Doc. CAB/LEG/67/3 rev.5.
84. *Supra* note 79 at Article 9(5).
85. Article 5(5), E.T.S. No. 5, Rome, 4.XI. 1950.
86. Article 75, [1998] 37 I.L.M. 999.
87. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, Annex, 39 UN GAOR Supp. No. 51 at 97, art. 14(1) ("an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible"); *Declaration on the Protection of All Persons from Enforced Disappearance*, G.A. Res. 47/133, 47 UN GAOR, Supp. No. 49 at 207, art. 19 ("the victims of acts of enforced disappearance and their families shall obtain redress and have the right to adequate compensation, including the means for as complete a rehabilitation as possible"); *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (I.L.O. No. 169), 72 I.L.O. Official Bull. 59, Article 16(5) ("full compensation for any loss or injury").
88. *Supra* note 48.
89. *Ibid*. at para. 45.
90. *Ibid*. at para. 131.
91. *Ibid*. at para. 137.
92. *Ibid*. at para. 137.
93. *Ibid*. at para. 135.
94. *Velasquez-Rodriguez* v. *Honduras (Compensatory Damages)* (1989), 7 Inter-Am C.H.R. (ser. C), at para. 25. Also see D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999), ch. 8. The UNCHR Special Rapporteur (van Boven) study, *ibid*. notes, at para. 81, that the European Court had, by 1993, awarded "just satisfaction" of a pecuniary nature in far over one hundred cases.
95. *(Merits)* (1988), 4 Inter-Am Ct.H.R. (ser. C); *(Compensatory Damages)*, (1989), *ibid*; *(Interpretation of the Judgement on Compensatory Damages)* (1990), 9 Inter-Am Ct.H.R. (ser. C).
96. *Supra* note 81.
97. *(Merits)*, *supra* note 95 at para. 26: "Reparation for harm brought about by the violation of an international obligation consists in full restitution *(restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violence, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."
98. *(Interpretation of the Judgement on Compensatory Damages)*, *supra* note 95 at para. 27.
99. See D. Shelton, "Reparations in the Inter-American System" in D. Harris & S. Livingstone, *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998), ch. 6.
100. *Supra* note 85, Article 8 states that: "Everyone has the right to respect for…his home."
101. (1997), 23 E.H.R.R. 513 (E.C.H.R.).
102 (1998), 26 E.H.R.R. C.D.5 (E.C.H.R.).
103. *Cyprus* v. *Turkey* (Application 25781/94) (8 September 1999).
104. *Ibid*. at para. 321.
105. J. Mickletz, "An Analysis of the $1.25 Billion Settlement Between the Swiss Banks and Holocaust Survivors and Ho-

locaust Victims' Heirs" (1999) 18 *Dickinson Journal of International Law* 199; S. Denburg, "Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property" (1998) 18 *Boston College Third World Law Journal* 233; R. Zweig, *German Reparations and the Jewish World: A History of the Claims Conference* (Boulder: Westview Press, 1987); K. Schwerin, *supra* note 52; N. Balabkins, *West Germany Reparations to Israel* (New Brunswick, N.J.: Rutgers University Press, 1971).

106. [1953] BGB1. II 35. See generally Schwerin, *supra* note 53.

107. According to Balabkins, *supra* note 105 at 153, the primary German legislation, the *Federal Indemnification Law* of 1953, provided for "compensation for loss of life, damages to body and health, including medical costs, reduction of income, loss of freedom, incarceration, arrest, property losses, capital losses, discriminatory taxes, impairment of economic and professional advancement, etc."

108. Conference on Jewish Material Claims against Germany, *Restitution Guide*, online: <http://www.claimscon.org/CC_content.html> (date accessed: 26 November 2000). Also see the testimony of U.S. Deputy Treasury Secretary Stuart Eizenstat to the U.S. Senate Foreign Relations Committee, 5 April 2000, online: <http://www.usis.it/wireless/wfa00405/A0040508.htm> (date accessed: 26 November 2000).

109. *Restitution Guide*, *ibid.*

110. I. Pogany, *Righting Wrongs in Eastern Europe* (Manchester: Manchester University Press, 1997); M. Henry, *The Restitution of Jewish Property in Central and Eastern Europe* (New York: American Jewish Committee, 1997).

111. *Restitution Guide*, *supra* note 108.

112. *The General Framework Agreement for Peace in Bosnia and Herzegovina* (1996), 35 I.L.M. 1171.

113. *Ibid.*, Annex 7, Article I: "All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them." Further, Article XII(5) permits all refugees and displaced persons the choice between return and compensation, and ensures that the owner has the right to compensation in lieu of return.

114. *Ibid.*, Annex 7, Article XI.

115. E. Rosand, *supra* note 66; M. Cox, "The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina" (1998) 47 *International and Comparative Law Quarterly* 599.

116. "*Kevesevic v. Federation of Bosnia and Herzegovina*" (1998) 20 *Human Rights Law Journal* 318; (1999) 20 *Human Rights Law Journal* 326.

117. R. Lillich, ed., *The United Nations Compensation Commission* (Irvington: Transitional Publishers Inc., 1995); D. Beterman, "The United Nations Compensation Commission and the Tradition of International Claims Settlement" (1994) 17 *New York University Journal of International Law and Politics* 1.

118. N. Wuehler, "The Iran-United States Claims Tribunal: Ten Years of Arbitration at Work" (1991) 8 *Journal of International Arbitration* 5; W. Mapp, *Iran-US Claims Tribunal* (Manchester: Manchester University Press, 1990).

119. A. Painter, "Property Rights of Returning Displaced Persons: The Guatemalan Experience" (1996) 9 *Harvard Human Rights Journal* 145.

120. *The Civil Liberties Act of 1988*, 50 U.S.C. app. 1989 (b)-4; which authorized payments of $20,000 (US) to each person who suffered as a consequence. Also see E. Yamamoto, "Racial Reparations: Japanese American Redress and African American Claims" (1998) 40 *Boston College Law Review* 477.

121. M. Omatsu, *Bittersweet Passage: Redress and the Japanese Canadian Experience* (Toronto: Between The Lines, 1992).

122. N. Newton, "Compensation, Reparations, and Restitution: Indian Property Claims in the United States" (1994) 28 *Georgia Law Review* 453; M. Ferch, "Indian Land Rights: An International Approach to Just Compensation" (1992) 2 *Transitional Law and Contemporary Problems*" 301.

123. W. Henderson & D. Ground, "Survey of Aboriginal Land Claims" (1994) 26 *Ottawa Law Review* 187; K. Coates, ed., *Aboriginal Land Claims in Canada* (Toronto: Copp Clark Pitman Ltd., 1992).

124. R. Bartlett, "The Landmark Case on Aboriginal Title in Australia: *Mabo v. State of Queensland*" in S. Corrigan & J. Sawchuk, eds., *The Recognition of Aboriginal Rights* (Brandon: Bearpaw, 1996) 132.

125. B. Gilling, "The Maori Land Court in New Zealand: An Historical Overview" in S. Corrigan & J. Sawchuk, eds., *The Recognition of Aboriginal Rights*, *ibid.*, 121.

126. See generally N. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: U.S. Institute of Peace Press, 1995).

127. This part of the essay draws from the papers presented at a workshop held in Ottawa, Canada, in July 1999 on the role of compensation as part of a comprehensive solution to the Palestinian refugee issue. For a further review of the shape of these workshop discussions, see "Final Report, Workshop on Compensation," online: <http://www.arts.mcgill.ca/MEPP/PrrN/prcomp3.html> (date accessed: 18 December 2002); and T. Rempel, "The Ottawa Process," *supra* note 14.

128. *Supra* note 5. It is probable that the right to return had already achieved customary status in international law by the time the *Universal Declaration* was declared. See G. Boling, "Palestinian Refugees and the Right to Return: An International Law Analysis," BADIL Brief No. 8 (Bethlehem: January 2001).

129. United Nations Human Rights Committee, *General Comment #27: Freedom of Movement: Article 12*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 21. In para. 19, the Committee states: "The right to return is of utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."

130. For an articulation of the right in the context of the Middle East, see Human Rights Watch, "Letter to Israeli Prime Minister Ehud Barak," 22 December 2000, online <http://www. hrw.org/press/2000/12/isrpab1222.htm> (date accessed: 18 January 2001): "As in the cases of all displaced people, those unable to return to a former home because it is occupied or has been destroyed, or those have lost property, are entitled to compensation. However, compensation is not a substitute for the right to return to the vicinity of a former home, should that be one's choice."
131. BADIL Resource Centre for Palestinian Residency and Refugee Rights, "The Impact of Return on Compensation", paper presented to the July 1999 Ottawa Workshop on Compensation.
132. *Ha'aretz*, 21 September 2000.
133. The Moratinos Document, *supra* note 7, stated that: "The Palestinian side raised the issue of restitution of refugee property. The Israeli side rejected this."
134. For a thoughtful discussion of the issue of compensation and Palestinian women, see N. Abdo, "Engendering Compensation: Making Refugee Women Count!" (March 2000), online: <http://www.arts.mcgill.ca/MEPP/PRRN/abdo.html> (date accessed: 18 December 2002).
135. See the Moratinos Document, *supra* note 7.

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Research Report

Diaspora of Islamic Cultures: Continuity and Change

Haideh Moghissi

Abstract

This paper, drawing upon an ongoing research project funded by Canada's Social Sciences and Humanities Research Council (SSHRC) and the Ford Foundation, introduces the main ideas and themes that inform the study of changing gender and family relations among four displaced communities of Islamic cultures (Iranian, Afghan, Palestinian, and Pakistani). For members of each group, three sets of "circumstances" are analyzed – an individual's experience in the home and host country, together with an examination of socio-economic conditions and policies in the host. In addition to these social and economic factors, in particular, it will focus on the ways in which social class, gender, and religious commitments affect an individual's experience when they move. It is argued that gender significantly impacts new migrants' experience and how they feel about their "home" country. One of our main hypotheses is that under pressures of a rapid, often difficult, social and cultural transformation, changing gender dynamics in the new country can lead to a new understanding among partners – or, alternatively, to heightened tension, with severely damaging effects, particularly for women and children. Culturally, when family understandings collapse, this process may be accompanied by an effort to find religious justification for gender inequality. Then, a connection can be seen between difficulties in the new country, the efforts of conservative men to reclaim the dominance they once enjoyed in their countries of origin, and give it a religious justification. Hence, the revival, in the diaspora, of conservative Islamic practice and belief.

Résumé

Inspiré d'un projet de recherche toujours en cours – projet financé conjointement par le Conseil de recherches en sciences humaines du Canada, CRSH, et la Fondation Ford – cet article présente les thèmes majeurs et les idées principales sous-jacents à cette étude sur les changements qui s'opèrent dans les relations entre membres des deux sexes ainsi qu'au sein de la structure familiale pour quatre groupes de déplacés de culture islamique – les communautés iranienne, afghane, palestinienne et pakistanaise. Trois ensembles de « circonstances » sont analysés pour les membres de chaque communauté : l'expérience personnelle d'un individu dans son pays d'origine et dans le pays hôte, ainsi qu'une analyse des conditions socio-économiques et des politiques en cours dans le pays hôte. En plus de ces facteurs sociaux et économiques, seront aussi examinés de plus près les façons dont l'appartenance à une classe sociale, le fait d'être un homme ou une femme et le degré d'attachement à la religion influent sur l'expérience d'un individu lorsqu'il émigre. L'auteure soutient que l'appartenance à un genre ou à un autre – la sexospécificité - influe de façon notable sur l'expérience vécue par les nouveaux migrants et sur leur sentiment envers leur 'patrie'. L'une des principales hypothèses est que, sous la pression des transformations sociales et culturelles qui s'opèrent rapidement – et souvent difficilement – les changements dans la dynamique des relations entre les deux sexes dans le nouveau pays peuvent amener une nouvelle compréhension entre les partenaires – ou, au contraire, contribuer à des relations interpersonnelles plus tendues, avec des effets dommageables tout particulièrement pour les femmes et les enfants. Dans un con-

texte culturel, lorsque l'harmonie familiale se désintègre, ce processus peut s'accompagner d'efforts pour essayer de trouver des justifications religieuses à l'inégalité entre les genres. On peut donc établir un lien entre les difficultés vécues dans le nouveau pays et les efforts déployés par les hommes conservateurs pour essayer de retrouver leur position dominante qu'ils occupaient dans leur pays d'origine, tout en lui donnant une justification religieuse. Ceci explique la renaissance à l'intérieur de la diaspora, de pratiques et de croyances islamiques conservatrices.

Displacement and migration are prevalent features of the present century. In October 2002, UNESCO's International and Multicultural Policies section declared that the number of migrants has more than doubled since 1975. According to UNESCO, currently 175 million people, that is, about 3 per cent of the world population, live in countries in which they were not born. The experience of diasporic communities in their adopted countries raises urgent questions of socio-cultural integration, human rights, and security for both migrant communities and the host societies.

This paper, drawing upon an ongoing research project funded by Canada's Social Sciences and Humanities Research Council (SSHRC) and the Ford Foundation, introduces the main ideas and themes that inform the study of the effects of displacement on gender relations among four migrant and refugee communities from Islamic cultures. The time frame for the research would be five years (2000–05). Of the four diasporic communities that are the focus of this project, Iranians, Afghans, Pakistanis, and Palestinians, two are studied in developed societies (Iranians and Pakistanis in Canada and Britain).The other two communities, are being studied in Canada and, in addition, in developing Islamic states (Afghans in Iran, and Palestinians in Jordan and in the West Bank and Gaza under social and economic conditions arising from occupation). For members of each group, three sets of "circumstances" are analyzed – an individual's experience in the home and host country, together with an examination of socio-economic conditions and policies in the host. In addition to these social and economic factors, we seek to demonstrate how gender significantly impacts new migrants' experience and how they feel about their "home" country. That is, the challenge to traditional ideas may present itself as a positive experience for many (particularly younger) women, who find an opportunity to break from the extended family, and a relatively negative one for men, who may encounter difficulty in finding satisfying work in the new society, and whose authority, dignity, and sense of self-worth may therefore be threatened.

In this study, we use the term "diaspora" in a rather self-explanatory fashion to refer to communities of immigrant, exiled, and self-exiled individuals who, despite cultural, economic, and political distinctions, share the experience of separation from home about which they have a collective memory. An awareness of or consciousness about this experience for the expatriate communities – what William Safran has called "intellectualization of an existential condition" – is central to this definitional choice. This definition includes characteristics such as a dispersal from an "original center" to "peripheral" places, maintaining a memory about the homeland and perhaps considering it a place of eventual return, and particularly having an underclass position in the "hostland" and a belief "that they are not – and perhaps cannot be – fully accepted by their host country."[1] These are characteristics that are shared by many diasporic communities.

Our study of changing gender relations and family dynamics within communities of Islamic cultures seeks to show that "diasporic consciousness" with its associated effects for communities of Islamic cultures results more from a gradually developed emotional, psychological, and inevitably cultural detachment from the "host-land" rather than a continued attachment to the "home-land;" and that this might be the inevitable result of declared and/or undeclared hostility and exclusionary practices that target diasporic communities of Islamic cultures in Western metropolisis. Indeed, a central effect of diasporic experience is a lasting sense of not belonging felt by many individuals living away from their homeland. Not-belonging or feeling out of place can sometimes be intellectual and political. Many nonconformist intellectuals who do not share the cultural values, perceptions, and/or dominant ideologies in their home countries may feel this sense of not belonging, regardless of their nationality or place of residence. They feel culturally homeless within their home, so to speak. But generally, the sense of not belonging, or living on the margin of social and economic life, is more profound and has more immediate practical consequences for the groups of migrant, refugee, and displaced communities, particularly those coming from so-called Third World societies. This is partly related to the host country/country of residence (racism, xenophobia, and non-acceptance of difference) and partly the result of the diasporic individuals' and communities' sense of banishment or deprivation from a homeland. They feel they have lost their historical location and heritage and are separated from the comforting embrace of the familiar culture.

To be sure, displacement and migration involve enormous changes in the lives of displaced individuals. How these changes are processed and absorbed depend on many factors including one's social class, personal financial resources in exile, racial location, gender, rural and urban origin, and political views. Many studies in this area point to the fact that the sense of emptiness and of cultural loss and the need to construct a new framework for belonging increase over time, at least for certain migrants. The development of an "identity conflict" is particularly true of the second-generation migrants for whom, over time, "awareness of differences between themselves and dominant Anglo society may increase."[2] However, while the second generation migrants are often able to adopt a strategy to shift back and forth between their culture and the dominant culture of the host country, this role shift between public and private behaviour may not be as easy for the first generation. Hence, over time the desire to be or *to appear the same* may turn into a desire to *emphasize difference*. The sense of exclusion and cultural difference, that is, a feeling of not being accepted or at least tolerated by the host country, adds to the sense of isolation. Many refugees and immigrants feel that they are expected to work harder, to be on their most impeccable behaviour, to complain less, and always to be grateful in their adopted home. The feeling that they are being watched and have to prove themselves never quite leaves them.[3] One respondent in a study of Arab women in the United States stated, "For the first six years I tried very hard to assimilate and look and act and sound like everyone else." She continues that gradually she felt she had lost herself and instead of a sense of self she had become ashamed of herself.[4] It is not uncommon for some to try to make themselves "invisible" through changing their hair colour or name. In my own study of the Iranian community in Canada, I found that female respondents, in particular, very clearly differentiate between their perceptions of the host country, whose legal system and social services have provided them with support and assistance to "stay on their two feet," as one of them told me, and their feelings about the society (the very same society) which accepted them with cold politeness but "never opens itself" to them; thus she explains that she hesitates to be warm and does not expect warmth from anyone.[5]

Diaspora of Islamic Cultures

One important question that needs to be discussed at the outset is the ambiguity of the identity marker that is often used to refer to individuals we define as diasporas of Islamic cultures. Does Islam define their identity or the diasporic experience define their Islamic cultural identity?

As is more or less known, in the West today, racism need not be linked to "race." Racialism no longer needs to be linked to biology or to be theorized through "scientific racism." Today, racism against Muslims takes the form of a focus on "the way of life," on "cultural difference" between the insiders (the white Europeans) and the outsiders (in this case, Muslims). What we are facing now, as Al-Azmeh would argue, is three displacements in the notion of race. "Race becomes ethnicity, then culture; the normative hierarchy and inequality gave way to representation in terms of difference."[6] Muslims are perhaps the best example of groups who are continuously targets of racism, without having an identifiable marker such as colour that works against blacks. Their religion, Islam, becomes a source of discrimination and exclusion.

Now in this context, the point is not whether we can identify a particular diasporic group or community as "Islamic" with distinct and easily identifiable characteristics. The point rather is that the Islamic diaspora in the West is often a product of anti-Muslim propaganda and racism. This is not to deny the resurgence of traditional practices, increased religiosity and even revitalization of tribal customs among certain groups of migrants of Islamic cultures. The point is that these are to a large extent the results of what has been identified as a "siege mentality." That is, often immigrants of Islamic cultural backgrounds are entirely conceptualized and their history, culture, and way of life are understood with reference to Islam and Islam alone. It seems Islam is the organizing force, shaping all aspects of the societies the immigrants come from as well as their existence in the West. Hence, the profound heterogeneity of peoples from Muslim societies within or without the Middle East is completely obscured. As I have said elsewhere, the notion of "difference" is used as a term to draw attention only to dissimilarities between the "Muslim" and "Western" ways and views. It is never found to be a useful term to note the contrast among the ways and views of people from "Muslim" societies.[7]

That is to say, ethnic, regional, and class divisions between and among diasporic communities from Islamic societies define the world views, the ways of life, the attachments to the cultural practices of the homeland, and most definitely the politics of individual migrants of Islamic cultures. For example, there are enormous differences between the ethnic makeup and class background of Muslim diasporic communities in Europe and their counterparts in Canada and the United States. Muslim communities in Britain, France, and Germany, for example, come predominantly from working-class and rural backgrounds and consist primarily of poor, unskilled or skilled migrants. The Muslim diasporic communities in the United States and

Canada, at least until very recently, tended to have urban, middle-class, and professional backgrounds. Baha Abu Laban's study of Muslims in Canada in the early 1980s, for example, showed that 43 per cent of Canadian Muslims are of Indo-Pakistani origin, over 7 per cent are of European, mostly of British background, and over 6 per cent of North and South American backgrounds. His study showed that the average income among Muslim males in Canada was substantially lower than the comparable income for non-Muslim males, and this was despite the fact that the level of their educational attainment exceeded the Canadian average. Nonetheless, Muslims in Canada, Abu-Leban noted, were "linguistically competent, relatively well placed in the occupational structure of Canada' and showed a high degree of integration and cultural preservation." Accordingly, gender equity between boys and girls in Muslim communities varies directly with socio-economic status (income, education, and occupation).[8] By contrast, as Al-Azmeh has argued, Muslims in Bradford, England, are of rural origin with hardly any social awareness of city life even in Pakistan itself.[9] Understandably, their rural origin explains their social conservatism on matters such as girls' education. Another study of Arab Canadians in the early 1990s points that 33 per cent of this population has a university degree compared to 11 per cent of the general population. Also, 25 per cent of women of the population of Arab-Canadians have attained university degrees and 32 per cent were reported as working outside the home.[10] Also according to Statistics Canada, 48 per cent of Iranians in Canada have a university degree and 17.5 per cent have attained a non-university diploma. Women constitute 38 per cent of this population. Only 18 per cent of Iranians were reported as unemployed in 1996, 15.9 per cent of men and 23.7 per cent of women.[11]

These differences point to one important fact: that Islam is not a meta-culture bounding all immigrants from Islamic societies together. That is why, for example, Arabs, Iranians, and Muslims did not act uniformly during the affair concerning Salman Rushdi's affair arising from Ayatollah Khomeini's *fatwa*. While a large group of Iranian intellectuals in exile signed a petition condemning the *fatwa,* others, including many Middle Eastern and Western scholars, coyly supported the *fatwa,* using "different cultural standards" as an excuse. Worse, there were several pro-*fatwa* rallies by the Muslim community of Indo-Pakistani origin in Bradford, England. However, the Western media that made extensive use of these rallies to reinforced hostile, racist perceptions about Muslims as the ultimate Other made no mention of the anti-*fatwa* protest.

The point is that the notions of "cultural difference, formulate and frame 'the discursive boundary' of SELF and OTHER, civilized and uncivilized....[a] French woman with a scarf is chic, but a Muslim woman with a scarf is a threat to civilization. The very 'noise and smell' of Muslims, as Jacques Chirac once declared, drives decent and civilized French people understandably crazy."[12] With respect to diasporic Muslim communities in the West, we suggest that, in many cases, the identifiable cultural characteristics often take shape in response to the recurrent Islamophobia of media and governments in the West and the construction of shameless racist imagery about Islam, about Muslim women, and about the Muslim way of life which target specifically diasporic communities.

What we seek to examine in our study is, how does the "siege mentality" affect the relationship between the diasporic communities and the host society and, consequently, the gender relations and family dynamics among the communities of Islamic culture? These research questions are based on a premise that, in diasporic communities that are the targets of racism, gradually a consciousness develops which is expressed in several ways: a resentment against the dominant culture and its thought of as aggressively, but indirectly, pushing its values on all those considered as *Other;* a return to cultural practices with a claim of authenticity; often associated with diasporic experience is a sense of self-righteousness which turns into "moral bookkeeping," to use David Stannard's term, and leads to "guilt-tripping" others. Also, depending on race, class, and gender, it often leads to a retreat into a particular lifestyle and a closure and inability to move beyond self/community-centred concerns and commitments. That is, politics becomes auto-referential, primarily or even solely focusing on personal and experiential existence. Related to this personalized politics is hostility and non-acceptance of views, attitudes, and practices which fall beyond the frontiers of the indigenous culture, which are considered as belonging to the "outside" world. In the case of Muslim communities, for example, one may observe the gradual development of unwarranted loyalties and uncritical acceptance of male-defined cultural norms and values, and even the emergence of a loyalty to the same home government whose policies drove this population out of the homeland. One of the unfortunate consequences of this psychological detachment from the host society is that the individual migrants, instead of joining social struggles in the host country to establish a more humane society, turn on themselves and wrestle, obsessively, with challenges to their culture and collective identity. In this way, cultural resistance may suppress individuality, the right to choice, and critical thinking for individual community members. They insist "that they are Muslim, their children are Muslim, without making an attempt to define what that means in the Western environ-

ment where they are in minority and they refuse to accept, or relate to, issues facing their communities... such as child sexual abuse and spousal abuse."[13]

In this context, racism and social and cultural pressures from the host country can create among ethno-racial minorities of Islamic cultures grounds for a solidarity and bonding that would not necessarily exist in the home country. The construction of a specific ineluctible cultural identity can limit understanding and the ability to act in a self-empowering way and can make it difficult for a people to recognize, pursue, or appreciate alternative moral and social goals. That is to say, there is a close link between the formation of identity and the sorts of moral and social responsibility that individuals take within their family and their communities.

The point of departure in the study of changing gender relations and family dynamics among diasporic communities of Islamic cultures is that relations within the family are affected by a complex web of class, ethnic, gender, religious, and regional factors and not simply by pre-existing cultural values imported from originating countries. Hence, the vision of the homeland, which affects individuals' readiness to adapt to a new country and defines the attachment to cultural and religious values (including values that are hostile to gender justice and equality within the family), is compatible with and differentiated by variables which are external to the diasporic communities themselves. The feeling that they are being watched and have to prove themselves never quite leaves them.

The commonality of the experience which allow us the use of the term "diaspora of Islamic cultures," and which has inspired this project, may lie in the fact that pressures of displacement and the increasing, and often openly hostile, stereotypes about migrants of Islamic cultures pushes a substantial number of individuals in each community to barricade themselves behind an ancestral cultural heritage which reinforces gender inequalities. Indeed, racism and the sharp decline in class position that many migrants experience may have a direct impact on gender relations. That is, they may reinforce sexist values and patriarchal power relations within a diasporic community. The pain and the anger caused by anti-Muslim and anti-Islam racism encourage members of the diaspora family to take refuge in their own culture, indeed to value the culture in its totality and to suppress critical positions and "disharmony" in its different forms, including challenges to cultural traditions coming from youth and women. In this context, sustaining the native culture and identity manifests itself in maintaining beliefs and practices pertaining to men-women relationships within the family and to culturally acceptable masculine-feminine values and roles.

Our goal in this study is not to make apologies and to excuse the manipulation of culture, tradition, and religion by conservative men who are determined to maintain the structures and relations of male dominance. Rather, we hope to identify the forces from which conservatives in the diaspora draw strength. We suggest that a chilling reception by the host country encourages the diasporic communities to cling to a folkloric and reified "Islamic" identity, walling themselves off from the dominant culture. Instead of seeking a positive reckoning of where they are and what they might do, they may refrain from interacting with the host community and from making a positive contribution to its betterment. That is to say, structural racism of the host society and indigenous patriarchy merge to create a need for cultural belonging, an ethnic identity which is masculine and which struggles to regenerate the traditional status quo. Sexism and moralistic attitudes are given cultural force and are camouflaged, suppressing expressions of individuality and individual choice.[14] This leads to an idealization of "Muslim family" in a desperate attempt to keep age and gender hierarchies intact.

To conduct this research, we have chosen a multiple method combining two major methodological perspectives, the comparative and the systemic. A comparative method is needed to examine the similarities and differences in gender and family relations among several immigrant and refugee communities in different host countries. At the same time, the study adopts a systemic method which provides a comprehensive framework within which different parameters affecting the behaviour of individuals and communities can be studied in a uniform and balanced manner. The migrant communities examined in this research are each considered as a *system*. These systems constitute a relatively integrated whole with some degree of cohesion. They consist of a set of interrelated *sub-systems* (individuals, families and institutions) and operate within a larger environment, the *supra-system*. The *sub-systems* for each community include families and individuals, as well as institutions such as religious organizations, workplaces, community media, and schools. Within these sub-systems and in the community as a whole, individuals are differentiated on the basis of factors such as gender, age, class, education, and occupation or profession. These factors are considered both in the country of origin before exit and in host societies. Finally, at a higher level, the *supra-system* consists of factors including the culture and social norms of the host society, the economic situation, and government policies. Open in structure, each system interacts with its sub-systems and supra-systems, is affected by them, and influences them. Thus, taken together, the study considers factors influencing the behaviour of individuals and com-

munities at three levels (system, sub-system, and supra-system) and relates these factors in a dynamic manner. We believe that only by using this methodology can we compare diverse communities in different countries. Hence, each diaspora community (the sub-total of the sampled individuals forming the statistical "population" of that community in a particular host country) will be correlated with different "circumstances" that may affect different (or similar) behaviour.

We have categorized these circumstances under three groups. The "situation of individual at origin" involves variables such as social background/family status, urban/rural origin, level of education, type of occupation, and income in the home country. These are in turn correlated with two variables of gender and age. The "situation of individual in host" involves variables such as type of occupation, education, and income in the host country, again correlated with gender and age. The "conditions/policies at host" consists of mostly independent variables such as social, cultural, political, and economic conditions of the host, and government policies, particularly in relation to immigration and refugees. The research instruments we are using this study include oral interviews with immigrants and refugees as well as with social workers and experts and informants in the community: questionnaires, administered in the communities; content analysis of community publications; and census data analysis.

By identifying forces which prevent or hinder change in gender roles, this research can suggest interventions that may reduce the incidence of conflict and tensions within families. In particular, it tries to show how the cultural inheritance of displaced populations intersects with larger political and economic forces, as discrimination, racist attitudes, and social and cultural pressures create grounds for solidarity and bonding among ethno-racial groups that might not otherwise exist. These findings should be of value in considering the role and mission of government and non-governmental agencies which work in sustained contact with immigrants and refugees.

Notes

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Case Comment

Ahani v. *Canada*: A Persuasive Dialogue within the Courts

Adrian di Giovanni

Abstract

This paper is a comment on Ahani v. Canada (OCA). Canadian courts are presently involved in a dialogue over the role of international law domestically. The courts' own grappling with various norms of international law, however, has helped to clarify and reinforce the status of these norms. In Baker v. Canada, the Supreme Court gave a new prominence to the "persuasive approach" of applying international law. Ahani demonstrates that while the persuasive approach has begun to be internalized into Canadian law, the courts are still at odds with how persuasive international law should be. To complicate this account, the Supreme Court's discussion in Suresh of peremptory norms of international law demonstrates that an over-emphasis on the "persuasive" approach can in fact weaken the role of international law domestically. At the same time, the dialogue within the courts is linked to a much more general dialogue. The importance of cases such as Ahani ultimately stretches beyond the domestic context.

Résumé

Cet article est un commentaire sur le cas Ahani c. Canada. Les tribunaux canadiens sont actuellement engagés dans une discussion sur le rôle du droit international au plan domestique. Cependant, les efforts-mêmes de ces instances pour essayer de comprendre et maîtriser diverses normes du droit international ont servi à éclaircir et à renforcer ces normes. Dans Baker c. Canada, la Cour Suprême a donné une nouvelle importance à « l'approche persuasive » dans l'application du droit international. Le cas Ahani démontre qu'alors que l'approche persuasive a commencé à être adoptée par le droit canadien, les tribunaux ne sont toujours pas d'accord sur la question de savoir jusqu'où doit aller la persuasion en droit international. Pour compliquer les choses, la discussion de la Cour Suprême dans le cas Suresh sur les normes péremptoires en droit international montre que trop d'emphase sur l'approche « persuasive » peut en fait affaiblir le rôle du droit international à l'intérieur du pays. Il faut noter par la même occasion que cette discussion à l'intérieur des tribunaux est liée à une discussion bien plus générale. En fin de compte, l'importance de cas tel que celui d'Ahani s'étend bien au-delà du contexte domestique.

On the night of June 18, 2002, Mansour Ahani, an Iranian Convention refugee and suspected terrorist, was deported from Canada to Tehran. This marked the end of his nine-year battle to prevent his deportation, which saw his case reach the Supreme Court of Canada on two occasions. In his first case, Mr. Ahani challenged a deportation order made by the Canadian government, on the ground that he would face a serious risk of torture were he to be returned to his native Iran.[1] He claimed that the prohibition on torture in international law is non-derogable and therefore superseded any provisions in the *Convention Relating to the Status of Refugees* that would allow for the *refoulement* of refugees.[2] Mr. Ahani's appeal to the Supreme Court was ultimately dismissed. The Court ruled that whereas Mr. Ahani had been given the proper procedural protections to prove his case, he had failed to establish that he faced a substantial risk of torture if deported. As he had exhausted all of his rights of review, it was now open to the Canadian government to deport Mr. Ahani.

In a last effort to prevent his removal from Canada, Mr. Ahani filed a "communication" with the United Nations Human Rights Committee (the Committee) for relief under the Optional Protocol of the International Covenant of Civil Political Rights (the Optional Protocol).[3] His claim was based on Articles 1 and 2 of the Protocol. These articles, respectively, call on signatory states to recognize the competence of the Committee, and to allow for individuals to bring claims once they have exhausted all available domestic remedies.[4] The Committee made an "interim measures" request that Canada stay the deportation order until it had considered Mr. Ahani's communication.[5]

The Optional Protocol of the ICCPR has been ratified by Canada but not implemented into Canadian law. By ratifying the Optional Protocol, state parties agree to recognize the Committee. However, since the language of the Protocol and the Committee's rules of procedures are permissive, the Committee is only empowered (under the Optional Protocol and the Rules of Procedure) to express its views and make requests to state parties. In this sense, parties are not legally bound to yield to the committee's requests or findings. Given the permissive language of the Protocol, the Canadian government took the view that the interim measures request was not binding and, as a result, chose not to accede it, wishing again to deport Mr. Ahani immediately. Mr. Ahani applied to the Superior Court of Ontario for an injunction to restrain his deportation pending the Committee's consideration of his communication. The effect of such an injunction would have been to force the Canadian government to follow the Committee's request. The central question in *Ahani II* then was whether Canada was bound – either on the principles of the *Charter of Rights and Freedoms* or of international law – by the procedures of a ratified but non-implemented international instrument, notwithstanding the fact that the relevant procedures are permissive only.

This question was ultimately answered in the negative. Both the Superior Court and the Court of Appeal of Ontario denied the request of Mr. Ahani for an injunction. His application for leave to appeal was further dismissed 2-1 by the Supreme Court of Canada on May 16, 2002.[6] This cleared the way for his deportation. Mr. Ahani's fate since his return to Iran is uncertain. What is more certain, however, is that his attempts to stay his deportation will help to shape how Canadian courts conceive of and apply international law in future cases. Of particular significance are the majority and dissenting judgments of the Court of Appeal. What we see emerge from those respective judgments is the continuation of an ongoing debate within the courts that is in fact part of a reconceptualization of the role of international law. The purpose of this paper is to examine that debate in more detail and how *Ahani II* fits into it. The significance of this debate is underscored by looking to other recent Canadian cases that address issues of international law. What we shall see, ultimately, is that the impact of *Ahani II* resonates beyond the domestic context.

The starting point of my analysis is the case of *Baker* v. *Canada*.[7] In that case, we are presented with competing visions of the relationship between international law and domestic courts. At issue in *Baker* was the deportation order of Ms. Baker, the mother of four dependant Canadian-born children, who had remained in Canada without legal status for over a decade. The issue, with respect to international law, was whether Canadian immigration officials had to give primary consideration to the interests of Ms. Baker's children when exercising their discretion on whether to issue a deportation order. The language of "the primary interest of the child" is found in the *Convention on the Rights of the Child*, a convention that Canada has ratified but never implemented into domestic law.[8] As Knop points out, there are essentially three different views of international law at play in *Baker*. First, there is Iacobucci J.'s minority judgment that takes a strict or traditional view of how the domestic courts can apply international law. On this view, "an international convention ratified by Canada is of no force or effect until its provisions have been incorporated into domestic law by way of implementing legislation."[9]

By contrast, the lawyers for Ms. Baker and two of the interveners took the view that international law should be applied by "default." On this view, "the legislature is presumed to comply with international law" and, as a result, statutes and the *Charter of Rights and Freedoms* should be interpreted to comply, as much as possible, with international conventions, "regardless of whether the conventions have been incorporated by domestic legislation."[10] In other words, on this view, upon ratification, a treaty or convention is not only binding on Canada as a matter of international law, but domestic law should then be interpreted so as to conform to that instrument. Finally, the majority judgment introduces a view that fits not entirely within either of these two positions. On the one hand, L'Heureux-Dubé J. follows on previous rulings that "international treaties are not part of Canadian law unless they have been implemented by statute."[11] On the other hand, she also takes the view that non-implemented conventions that Canada has ratified do play a role in domestic law. On her view, international human rights law can be used as a tool to "help inform the contextual approach to statutory interpretation and judicial review."[12]

The view that international law can inform a court's interpretation of domestic law, particularly the *Charter*, had been recognized prior to *Baker*.[13] *Baker* is a good star-

ting point for examining the debate over international law, however, to the extent that the stricter traditional view does not prevail.[14] One could say that L'Heureux-Dubé J.'s majority decision marks a new-found prominence for the "persuasive" approach. It is an affirmation on the part of the Court that ratified international law should not be relegated solely to those cases where a treaty or convention has been implemented. As we shall see, *Ahani II* is significant because it demonstrates that the issue of how persuasive these non-implemented instruments should be is far from resolved. The role of the Canadian courts in international law can thus be seen as one of debate or dialogue – a dialogue that has a two-fold effect. First, in addressing the applicability of international law, the courts are better enunciating the evolving relationships between international and domestic law (whereas before the role of unimplemented ratified treaties may have been considered inconsequential). Second, to the extent that the courts are grappling with these issues, they are playing a role in internalizing the values or principles of international law. In other words, the mere exercise of examining these issues may also have the effect of reinforcing the principles that the courts are trying to elucidate.[15]

The traditional reading of international law in Iacobucci J.'s judgment in *Baker* is fairly easily grasped. In short, on that judgment, international law is only binding on Canadian courts when incorporated into domestic law by way of an implementing legislation. In other words, non-incorporated ratified international conventions have no force or effect in Canadian law. One could then ask whether this view simply reduces international law to domestic law, *i.e.* whether international law only exists as a function of domestic law.[16] However, without delving too far into that issue, we can see how Iacobucci J.'s judgment relegates the role of Canadian courts solely to arbiters of domestic law and, in the process, establishes a clear division between what is binding as a matter of domestic law and what may be binding as a matter of international law. In this case, Iacobucci J. gave no legal authority to the *Convention on the Rights of the Child* because there was no mechanism, through the domestic courts or otherwise, for binding Canada as a matter of domestic law to the non-implemented convention. Any discussion of international law ended there. The final implication of this judgment, then, is that in choosing not to implement the *Convention on the Rights of the Child* into domestic law, Canada is free domestically to do what it wants with this and other non-implemented international "obligations."[17] In other words, despite their prior ratification, Canada need only follow – as a matter of domestic law – various non-implemented conventions when it is in Canada's interest to do so.

The more traditional reading of international law by Iacobucci J. in *Baker* is also reflected in the majority judgment of *Ahani II*. The issue of bindingness is one-step removed in this case, however. Similar to the *Convention on the Rights of the Child*, the Protocol has also been ratified but not implemented into Canadian law. The difference arises because the relevant provisions of the Protocol are non-binding. As we have seen, the powers of the Human Rights Committee are framed in permissive terms. This difference proved ultimately to be a decisive consideration. Writing for the majority, Laskin J.A. did not to give any weight to the Committee's request to stay the deportation.[18] In the first place, citing the majority judgment in *Baker*, Laskin J.A. reiterates the view that international treaties such as the Protocol are "not part of Canadian law unless they have been incorporated into Canadian law."[19] More important, given the absence of any provisions for making the Optional Protocol formally binding, whether as a matter of international or domestic law, Canada was free to disregard the Committee's request. The matter was entirely within Canada's discretion and Canada could deport the appellant as it wished. The further question then was whether Canadian law – in particular, the principles of fundamental justice under s. 7 of the *Charter* – went beyond the obligations of the Protocol, so as to bind Canada to the Committee's request. Once again, Laskin J.A. followed the Supreme Court's lead in *Ahani I* and took the view that the appellant had been given the proper procedural protections to present his case.[20] Mr. Ahani's deportation was thus consonant with the principles of fundamental justice.

By not giving any weight to a ratified but non-implemented instrument, albeit a non-binding one, Laskin J.A.'s judgment might be seen as a step away from L'Heureux-Dubé J.'s understanding of international law in *Baker*. On my view, however, we can still situate the majority decision of *Ahani II* within the ongoing dialogue about the role of international law in Canada. In the first place, Laskin J.A. does not ignore the persuasive role of international law. He merely takes the appellant's position to be extending the reach of international law too far. On Laskin J.A.'s view, to adopt the appellant's position would be to interpret s. 7 of the *Charter* in such a way as to make a *non-binding*, as opposed to simply *unimplemented*, commitment binding.[21] Now, whether or not this is an accurate reading of how the appellant sought to invoke the Optional Protocol is debatable. Indeed, the dissenting judgment is precisely at odds with this view. Before we turn to that judgment, however, it is important to note a further way that Laskin J.A. may have been participating in the "dialogue." The conclusion of the majority judgment is that the federal government is not bound by the Optional Protocol, as a matter of inter-

national or Canadian law, and thus cannot be compelled to implement it as a matter of domestic law. This decision was backed by a well established line of precedents.[22] Nevertheless, Laskin J.A. stayed the deportation to give the appellant a chance to appeal to the Supreme Court. In so doing, the majority may have been tacitly accepting that the final word had yet to be pronounced on this matter. More generally, by acknowledging that the Supreme Court may want to weigh in on these issues, the majority may have been displaying a certain awareness that the role of international law is unsettled and constantly evolving.

Another element of the *Ahani II* case that points to an ongoing dialogue about international law is the fact that there was a dissenting judgment. Rosenberg J.A., in dissent, took the view that the appellant had a right, under s. 7 of the *Charter*, to have his deportation stayed pending review by the Human Rights Committee:

> However, I think there is a generally held consensus in Canada that in the human rights context an individual whose security is at stake should within reason be given the opportunity to access remedies at the international level, and that necessarily the executive should not unreasonably frustrate the individual's attempt to do so.[23]

Framed in these terms, Rosenberg J.A.'s understanding of the issues in *Ahani II* appears to be extending the persuasive role that L'Heureux-Dubé J. ascribes to ratified non-implemented international conventions in *Baker*. According to Rosenberg J.A., an order enjoining the appellant's deportation would not bind the government to any decisions made under the Protocol. Canada would still be free not to comply with any decision of the Committee. Canada would not be free, however, to disregard the jurisdiction that the federal government has conferred upon the Committee by ratifying the Protocol.[24] In other words, even though the views and requests of the Committee are not binding, Canada's ratification of the Optional Protocol helps to inform a more robust understanding of the guarantees accorded under s. 7 of the *Charter*:

> [The appellant] claims only the limited procedural right to reasonable access to the Committee, upon which the federal government has conferred jurisdiction. He submits that the government, having held out this right of review, however limited and non-binding, should not be entitled to render it illusory by returning him to Iran before he has a reasonable opportunity to access it. I agree with that submission and that it is a principal of fundamental justice that individuals have fair access to the process in the Protocol.[25]

With these words, in effect, Rosenberg J.A. was either trying to internalize the principles underlying the Optional Protocol's obligations into the Canadian *Charter*, or was recognising that these principles have already been internalized. One could query then whether Rosenberg J.A.'s decision brings us closer to the third view in *Baker*, that international law should be applied by default.[26]

Clearly, however, we are not at the stage where international law will be applied by default, especially given that Rosenberg J.A. was writing in dissent. Moreover, the Supreme Court ultimately dismissed the appellant's application for leave to appeal.[27] This decision, however, was not without its own dissent. L'Heureux-Dubé J. disagreed with the ruling of Bastarache and Binnie JJ. that the Court not weigh in on these issues.[28] Since reasons are rarely given for judgments in leave applications, one can only speculate as to what guided the decisions of the respective judges. Did the panel's views parallel those of the Court of Appeal? That is, was L'Heureux-Dubé J. swayed by the dissent of Rosenberg J.A.? Did she take the view that this was precisely a case where the persuasiveness of international law should guarantee greater procedural protections, a principle she so strongly enunciated in *Baker*? Did Bastarache and Binnie JJ., by contrast, simply follow the lead of Laskin J.A.'s more restrained understanding of how international law should be applied in this case? Again, this is just to speculate.[29]

The cases of *Baker* and *Ahani II*, however, do offer questions for more immediate discussion. Might Rosenberg J.A.'s view, which can be seen to extend L'Heureux-Dubé J.'s persuasive reading of international law in *Baker*, become more prominent? Will this bring us closer to a default view of international law in the domestic context? The answers to these questions are uncertain. They are important because the more views like those of Rosenberg J.A. become prominent, the more the courts will look to make Canada comply with the international instruments that it has ratified, whether they are implemented into Canadian law or not, by reading the *Charter* and statutes in-line with those instruments. What is more certain, though, is that the courts are increasingly faced with these issues. As a result, the courts have become engaged in a dialogue, by helping to enunciate better what their role should be in applying international law. In turn, they are helping this role to evolve.[30] They are helping to redefine Canada's interaction with international law and the relationship between the courts and international law.

If one gives credence to the idea that there is a dialogue within the Canadian courts over the role of international law, then the next step would be to situate this debate within a more general context. The case of *Suresh* is particularly instructive in this respect.[31] For the purposes of this discus-

sion, the issue of note in that case is the Supreme Court's discussion of peremptory norms of customary international law (*jus cogens*). The Court's examination of that issue, on the one hand, serves as what is perhaps a cautionary tale of invoking the persuasive understanding of international law. In *Suresh*, the Court may have weakened the status of peremptory norms in Canadian law. The Court's general discussion of peremptory norms, on the other hand, suggests that the debate over international law in the courts may have a more profound impact than I have suggested until now. In short, this debate may actually transcend the domestic context. In helping courts to internalize principles of international law domestically, cases such as *Ahani*, *Baker*, and *Suresh* may also be reinforcing principles of international law generally or *internationally*.

Suresh was the most recent discussion by the Supreme Court of the issue of peremptory norms. Indeed, this issue is one that hovered over the second *Ahani* case, and that was central to the first. As a definition for peremptory norms, the Court endorses in *Suresh* the definition contained in Article 53 of the *Vienna Convention on the Law of Treaties*:

> [A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[32]

Suresh and *Ahani I* were heard at the same time and the Court used the analytical framework in *Suresh* to render judgment on the issues in *Ahani I*.[33] The particular norm in question in both cases was the prohibition on deportation to torture. The Court discusses the status of this norm in *Suresh* when addressing the content of the principles of fundamental justice under s. 7 of the *Charter*. The Court did not pronounce definitively in *Suresh* on whether the prohibition on deportation to torture has attained the status of a peremptory norm, but suggested there was strong evidence to that effect.[34] At the same time, the Court's discussion of this prohibition provides some initial answers to more general questions about the status of peremptory norms in Canadian law. In particular, prior to *Suresh*, the Supreme Court had yet to clarify whether judges could apply these norms directly, as a matter of Canadian law or of international law binding on Canada, or whether these norms had somehow to be filtered through Canadian law.[35]

A central feature of peremptory norms of customary international law, if we follow the definition endorsed by the Court in *Suresh*, is that there can be no derogation or modification of these norms (except by way of a subsequent norm). At first blush then, the Court's definition of peremptory norms as being non-derogable appears to bear some similarity to the "default view" of applying international law that we saw in *Baker*.[36] The Court's discussion of peremptory norms in *Suresh*, however, is ultimately much more evocative of the persuasive understanding of international law. Moreover, by giving peremptory norms merely an informative or persuasive role, the Court may actually ascribe a weaker role to peremptory norms, as a matter of domestic law, than would be suggested by the Court's own definition. As a basic proposition, the Court begins by saying that international law can inform its decision.[37] In this case, the Court was concerned with which principle of international law should guide its *Charter* interpretation, in the face of an apparent conflict between various principles. As we saw in *Ahani I*, the Court was looking at the interplay between the prohibition on deportation to torture and the right of states to *refoule* refugees in cases where security interests are at stake. After an examination of the relevant sources of international law, the Court concluded by endorsing the prohibition against torture. In other words, "the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*."[38]

Without passing judgment on the soundness of the Court's C*harter* analysis, we can quickly point to potential shortcomings with how the Court treats peremptory norms. We have seen that, on the Court's own definition, peremptory norms can only be derogated from or modified by way of another such norm. By implication, this would mean that peremptory norms would take priority over any international treaty or domestic law. The force of peremptory norms arises precisely because of the international consensus required for them to take root. Once a norm has been identified as a peremptory norm of international law (which the Court seems to suggest is almost the case for the prohibition on deportation to torture in *Suresh*), it would be increasingly harder for an individual state to deviate from that norm; *i.e.* to justify a law or practice different from that of the international consensus. In this sense, the individual state would be bound by the peremptory norm. Domestic law and practices, *inter alia*, would thus be required to conform to the peremptory norm.[39] The Court in *Suresh* does not give as robust a status to peremptory norms, however. As we have seen, on the facts of *Suresh*, the discussion of peremptory norms by the Court is restricted to its *Charter* analysis. This would perhaps not be so problematic had the Court stated, for example, that it is *obliged* to interpret the *Charter* so as to conform with the prohibition against the deportation to torture – because of the

peremptory norm's status as a peremptory norm. Again, this is not what the Court did. The Court only went so far as to say that the prohibition *informs* Canadian courts in their application of domestic law. Moreover, the prohibition does not ultimately take priority over Canadian law. The Court allows for derogation from the prohibition in certain rare cases, where national security is at risk. In so doing, the Court was ostensibly saying that these norms do not *bind* the courts.[40]

The Court's discussion of the prohibition on torture thus leaves us with somewhat conflicting conclusions. On the one hand, the Court gives a strong recognition to the prohibition on deportation to torture, as a matter of Canadian law. After all, the Court states that the prohibition is virtually non-derogable, making this perhaps the most decisive factor in the Court's *Charter* analysis. On the other hand, peremptory norms are only treated as a tool or factor for interpreting the *Charter*. What this would mean, at the extreme, is that these norms could only play a role domestically by virtue of previously established domestic law (through which to inform and gain expression).[41] One could query then whether the persuasive view has become too persuasive in Canadian courts. As we have seen, the international consensus required for a norm to become peremptory would suggest that these norms somehow supersede Canadian law, instead of merely informing it. This raises the further question, in turn, of whether international law will ever be accorded any independent priority over Canadian domestic law. Indeed, by ascribing a persuasive role to peremptory norms, the Court is able to skirt the question, for example, of whether peremptory norms should be considered part of Canadian law (*e.g.* as part of the common law, or under its own heading), or part of a higher order of law, to which Canadian law is subservient.[42] For the time being, the final result of the Court's decision in *Suresh* may be that international law (peremptory norms included) is only strictly binding on Canada, as matter of Canadian law, by way of an implementing legislation. Any other norm of international law, even those which carry the consensus of the international community, will only be given expression in Canadian law – however strong – by virtue of its informative or persuasive value.[43] This is perhaps a tacit disregard of the significance of an international consensus. At the very least, the Court's view of peremptory norms of customary international law in *Suresh* may be inconsistent with the definition that the Court first introduces of those norms.

The Court's discussion of peremptory norms is relevant in another way to the dialogue in the courts of the role of international law. As we have seen, the Court endorses, if only equivocally, the prohibition of deportation to torture as a peremptory norm of customary international law. It is precisely this endorsement that allows us to see that the debate in the courts over international law is inextricably linked to a more general or international dialogue about the role of international law. The Court outlines three indicia in *Suresh* to help determine whether the prohibition on torture has achieved the status of peremptory norm: multilateral instruments, domestic practices, and international authorities.[44] Now, it would be fairly safe to assume that these indicia would apply to most investigations to determine the existence of a peremptory norm. Further, we can assume for the purposes of this discussion that the decisions of a domestic court can be placed in the category of "domestic practices."[45] If this is the case, then by corollary, the judgments of a high court will play a role in the development of a peremptory norm. In other words, a court's endorsement of a principle domestically will lend weight to the view that there is an international consensus concerning that principle. As we have seen, the Court specifically states in *Suresh* that it was not being asked "to pronounce on the status of the prohibition on torture in international law."[46] This statement, however, is perhaps a shrewd display of self-awareness, on the part of the Court, of what it was actually doing. Even though the Court did not affirm unequivocally whether the prohibition on torture is a peremptory norm, the Court's discussion of the status of the prohibition, and subsequent strong endorsement of that norm will only reinforce any emerging consensus about that norm in the future.[47]

This endorsement, then, has a two-fold effect. First, it internalizes an international norm, the prohibition against torture, into domestic law (although perhaps not in as binding a way that a peremptory norm should be). In this sense, the judgment in *Suresh* can be placed alongside the decisions of L'Heureux-Dubé J. in *Baker* and of Rosenberg J.A. in *Ahani II*. Second, the endorsement will also serve to reinforce or "externalize" a norm at the level of international law. If one accepts this reading, then we see that the development of international law, and of peremptory norms, is a reflective process.[48] As certain principles have gained prominence internationally, they have been internalized domestically, which has further reinforced those principles internationally, which will then reaffirm the principles domestically, and so on. The domestic and international fora are inextricably linked.

If we turn back to *Ahani II*, the ultimate effect of the majority judgments of the Court of Appeal, and of the Supreme Court at the leave stage, may be that the status of the Optional Protocol of the ICCPR will be less firm or, at the very least, no stronger than before. The provisions of the unimplemented instrument will continue to have no

formal binding effect domestically. Further, at the international level, this will not assist in raising the principles enshrined in the Optional Protocol to the level of a peremptory norm, as was eventually the case with the *Universal Declaration of Human Rights*, for example. Canada will be able to maintain its status as a state party of the Optional Protocol, yet continue to disregard any of the communications and requests of the UN Human Rights Committee with near impunity.[49] There may yet be hope, however, for those who would wish to see the Canadian government more formally bound to the pronouncements of the Committee.

As we have seen, the introduction and development of the persuasive understanding of international law in the Canadian courts has been a gradual process. The cases of *Baker* and the dissent in *Ahani II* demonstrate that there is a clear shift away from a purely traditional understanding of international law, in the courts' application of international law. The courts are still struggling to delineate how persuasive international law should be. In the case of *Suresh*, we see possible drawbacks of placing too much emphasis on the persuasive reading of international law. At the same time, *Suresh* also shows how the courts' decisions may have more far-reaching implications. It provides a tacit recognition by the Supreme Court that the role of the courts cannot be seen as confined merely to the domestic process, that their judgments themselves may be persuasive in reinforcing various norms internationally (a recognition that may make the Court's reluctance to apply peremptory norms directly or more forcefully all the more troubling). That is not to say that the development of international law is a self-fulfilling prophecy. But by viewing the role of the courts in these cases in terms of an ongoing dialogue, one with definite international implications, we can see that international law may only become better defined and, for better or for worse, more persuasive in future cases.

Notes

1. *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2 [hereinafter *Ahani I*].
2. *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force April 22, 1954 [hereinafter *Refugee Convention*] and *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967 [hereinafter *Protocol*]. See in particular Art. 1(F) of the Refugee Convention.
3. *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 58 O.R. (3d) 11, [2002] O.J. No. 431 (OCA) at 111 [hereinafter *Ahani II*].
4. *Ibid.* at 114.
5. Note: The Committee issued the interim measure request, according to Rule of 86 of its rules of procedure.
6. This decision can be found online at: <http://www.lexum.umontreal.ca/csc-scc/en/com/2002/html/02-05-16 .3a.html> (date accessed: August 2002).
7. [1999] 2 S.C.R. 817 [hereinafter *Baker*].
8. See, *e.g.*, *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.
9. K. Knop, "Here and There: International Law in Domestic Courts," (2000) 32 N.Y.U.J. Int'l L. & Pol. 501 at 510 [hereinafter Knop].
10. *Ibid.*
11. *Baker*, *supra* note 7 at para. 69.
12. *Ibid.* at para 70. Knop, *supra* note 9 at 511–12 also cites this quotation and goes on to characterize the role that L'Heureux-Dubé J. accords to international law as a "persuasive" one.
13. For a good discussion of the evolution of international law in the Canadian courts, see S.J. Toope, "*Inside and Out: The Stories of International and Domestic Law*," (2001) 50 UNBLJ 11 [hereinafter Toope]. For cases of note, in particular *Slaight Communications Inc.* v. *Davidson*, [1989] 107 R.C.S. 1038 at 1056–57. See also *United States* v. *Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 paras. 79–81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 512; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 348, *per* Dickson, C.J. (dissenting); *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at p. 750. Note that these cases were cited on this point with approval by the Supreme Court in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] SCC 1 [hereinafter *Suresh]* at para. 46.
14. Knop, *supra* note 9, cites an earlier case where the persuasive view of international law was forwarded in dissent.
15. This is particularly the case in a common law precedent system. In *Baker*, *supra* note 7, L'Heureux-Dubé J. may only have been trying to determine how international law applied to the case at hand. The judgment's precedential value, however, may have been to reinforce, for future cases, a previously uncertain view on the application of international law to Canadian domestic law.
16. Admittedly this characterization of Iacobucci J.'s view may be a bit rigid, but I cast it in such terms due to the limited scope of this paper. Knop's analysis of transjudicialism is also of note here on the point of domestic courts interpreting international law. Domestic courts need not be seen as merely applying international law, as "police," but also as shaping it. Knop makes this point in her explanation and critique of what she terms the "traditional model"; see Knop, *supra* note 9 at 515–19.
17. Even further yet, Canada is free to decide whether or not it wants to ever make these "obligations" true obligations, *viz.* binding in domestic law, by introducing implementing legislation. If so, Canada would again be largely free, in the implementing legislation, to designate which coercive structure should ensure compliance, be it a Canadian court or international adjudicative body.
18. *Ibid.* at 118–19.
19. *Ahani II*, *supra* note 3 at 118.

20. *Ibid*. at 120.
21. See, *e.g.*, *Ahani II*, *supra* note 3 at 117:

    > Absent implementing legislation, neither has any legal effect in Canada. Of course, Canada's international human rights commitments may still inform the content of the principles of fundamental justice under s. 7 of the Charter. But Ahani is not merely asking this court to interpret s. 7 in a way that is consistent with international human rights norms. Instead, he seeks to use s. 7 to enforce Canada's international commitments in a domestic court. This he cannot do.

22. See, *e.g.*, *ibid* at 118.
23. *Ibid*. at 135. See also *ibid*. at 133.
24. *Ibid*. at 134.
25. *Ibid*. at 134.
26. That is, we presume that our statutes and *Charter* should be read in conformity with ratified international obligations.
27. If anything, especially in light of the Court's treatment of *jus cogens* in *Suresh*, one could say that we are moving towards a stage where the default concerning international law, in the Canadian courts, is that it be applied only in a persuasive way, unless implemented.
28. Briefly, the provision governing leave applications is s. 37 of *Supreme Court Act*, R.S. 1985, c. S-26. Under that section, the Court will grant leave to appeal, *inter alia*, "where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision." Further, the *Act* goes on to outline in more detail what the test will be for being granted leave to appeal. The basic test is that question ought to be one of "public importance." The Court also retains a residual discretion, however, to hear cases that it deems it ought to hear. See, *e.g.*, s. 43(1)(a): the Court will "grant the application if it is clear . . . that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it."
29. Note: It would have been interesting to have seen the reasons for the judgment in this case, because we would have been able to see how strongly the majority was endorsing Laskin J.A.'s interpretation of international law. Although we may never know what guided the judges' decision, the judgment by the panel remains significant because the mere fact that there was a dissent (again paralleling the Court of Appeal decision) demonstrates that there is a debate in the courts over the role of international law, and that this debate has yet to be resolved conclusively. This point is only further reinforced when one considers that it is uncommon for there to be a dissent among the judges of a leave application panel.
30. Are courts dealing with these issues more and more simply because – for various social reasons – there are more cases that touch on international law? Or is it because, by recognizing a greater role for international law, the courts have helped foster a greater attention to international law, thus engendering more cases in this area of law? I suspect it is a combination of both.
31. The facts in *Suresh*, *supra* note 13, are somewhat analogous to those of *Ahani I*. The Canadian government ordered the deportation of Mr. Suresh, a Convention Refugee, on the grounds that he constituted a threat to national security. The government's claim that Mr. Suresh was a threat was based on the allegations that he was a member of and fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), and that these constituted terrorist activities. Mr. Suresh was ultimately successful in staying deportation on the grounds that he faced a serious risk of torture if returned to his native Sri Lanka. Unlike in *Ahani I*, the Supreme Court took the view in *Suresh* that the appellant had not been given the proper chance to establish that he would face a risk of torture if he were deported.
32. *Suresh*, *supra* note 13 at para. 61.
33. *Ahani I*, *supra* note 1 at para. 2.
34. See *Suresh*, *supra* note 13 at para. 65, for instance:

    > Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.

    This paragraph goes a long way to suggesting that the prohibition against torture has attained a status that is close to that of a peremptory norm, but is not unequivocal enough to conclude that the Court sees the norm as a peremptory one.
35. On this point, see Toope, *supra* note 13 at 20–21. As Toope points out, writing prior to the *Suresh* decision, the Supreme Court had yet to clarify when customary law might be "compelling or even binding," as a matter of Canadian law. *Suresh* was thus viewed as an opportunity for the Court to clarify whether judges are to apply these norms in a direct or monistic manner, or in a more dualistic manner, *i.e.*, through the vehicle of another domestic law.
36. That is, a peremptory norm would override domestic law even where it has not been formally implemented into the domestic law. (As an aside, Toope points out, at 16–18, that the courts of late have adopted a very limited notion of what constitutes implementation, *viz.* by way of an implementing instrument. Toope gives an account of various other ways of characterizing international law as being implemented.) The default view is the broader view of how international law should apply, however, because this view would have all ratified international instruments override domestic law, and not just those norms which have achieved the most widespread consensus.
37. *Suresh*, *supra* note 13 at para. 60.
38. *Ibid*. at para. 75.
39. It is here that the question of the status of peremptory norms in Canadian law is perhaps best illustrated. Are peremptory norms to take priority over domestic law to the extent that

these norms form part of the corpus of domestic law (*e.g.*, as part of the common law, or under its own heading as Canadian law)? Or do these norms take priority over Canadian law as a matter of "pure international law" that takes priority over domestic law? Again, please see Toope, *supra* note 13 at 20–22, for a more complete examination of this question.

40. As Toope, *supra* note 13, says at 17, the Supreme Court has ignored the distinction between what is persuasive and what is obligatory, and this is a loss to both *Charter* and international law cases. Moreover, this distinction is not merely one of semantics, and has definite practical implications. The Court's ultimate conclusion was that a refugee could be deported, notwithstanding the risk of torture, in rare circumstances where national security would be at risk (*Suresh*, *supra* note 18 at para. 76–79). However small, this is a derogation from the prohibition – it is not absolute. The Court arrived at such a position as a result of the balancing process that courts engage in as part of the s. 7 analysis. This suggests that, because of the *Charter*'s specific interpretive tests, it may not always be appropriate to use the *Charter* as a vehicle for giving expression to international law (especially in those cases where we are dealing with the most firmly entrenched of norms.) These tests may skew the proper application of international norms. What this has meant, in practical terms, is that Canadian government officials – citing reasons of national security – have continued to insist on trying to deport various persons who face a risk of torture, often at the expense of those persons' procedural rights. This is the case, for example, for Mahmoud Jaballah, an Egyptian refugee claimant. The Canadian government has sought the deportation of Mr. Jaballah, notwithstanding a threat of torture on his return, based on the Canadian Security Intelligence Service's allegations that he is a threat to national security. Government officials have refused to reveal the case against Mr. Jaballah, however, again citing the need to protect confidential information. (See, *e.g.*, online: <http://cbc.ca/stories/2002/08/23/jaballah020823>, date accessed August 2002). Admittedly I am exposing my own bias here on these cases, but query whether these cases might have been treated differently by government officials had the Court accorded an independent status, or more binding reading, to the prohibition on deportation to torture.

41. As it stands, in a judgment subsequent to *Suresh*, the Superior Court of Ontario took a more attenuated view on the role of peremptory norms. In *Bouzari* v. *Islamic Republic of Iran*, for example, Swinton J. states that "[c]ustomary rules of international law are directly incorporated into Canadian domestic law unless ousted by contrary legislation." *Bouzari* v. *Islamic Republic of Iran*, 00-CV-201372 (May 1, 2002) Ont. Sup. Ct at para. 39 [hereinafter *Bouzari*]. In that case, Swinton J. was drawing on the Federal Court of Appeal judgment in *Suresh* (*Suresh* v. *Minister of Citizenship and Immigration* (2000), 183 D.L.R. (4th) 629 (F.C.A.) at 659). As Swinton J. later goes on to say at para. 59, "A rule of *jus cogens* is a higher form of customary international law." Presumably then, Swinton J.'s judgment can be read to mean that peremptory norms of international law are directly incorporated into Canadian domestic law, unless ousted by contrary legislation (since *jus cogens* is merely a higher form of custom). However, since Swinton J. makes reference to the Federal Court of Appeal judgment in *Suresh*, it is not clear that the Supreme Court's view on peremptory norms is consistent with Swinton J.'s. Swinton J. does point out at para. 39 that the appeal in *Suresh* was allowed on another basis. However, since the Supreme Court only treated the prohibition against deportation to torture as an interpretive tool, it is not clear that the Court would endorse Swinton J.'s view of customary law being directly incorporated in Canadian law. For the time being this appears to be an open issue for future courts to weigh in on.

42. Some have suggested for similar reasons that the persuasive reading of international law is actually a step backwards in the role of international law. In earlier case law, for example, courts adopted the presumption that a court should interpret legislation so as to be consistent with international law. See Toope, *supra* note 13 at 16–17 for an account of the various presumptions adopted by the courts in applying international law. I would like to thank Jutta Brunnée for helpful comments on some of the potential downsides of the persuasive approach of international law. Prof. Brunnée's concerns about the persuasive reading of international law extend beyond the issue of peremptory norms. Briefly, on her view, the persuasive approach is problematic because, on that approach, the influence of international law is at the judge's discretion. The persuasive approach may lead courts to consider international law in more cases, but its influence in each of these cases may be diminished. This concern is particularly pressing in the human rights context. In the alternative, courts should follow a presumption of conformity, whereby the courts would have an obligation to interpret domestic law consistently with Canada's international obligations, so far as possible – *i.e.*, not against any clear contrary legislative intent.

43. However, if one follows Swinton J.'s reading of *Suresh* in *Bouzari*, then this statement needs to be qualified. As we have seen in note 41, *supra*, Swinton J. allows peremptory and other customary norms to be directly incorporated into Canadian law, absent contrary legislation. This view, while perhaps allowing for a more robust expression of customary international law, still does not accord a peremptory force, as a matter of domestic law, to peremptory norms. What this would mean, conceivably, is that the legislature could override a peremptory norm with subsequent legislation. Again, it is not clear that Swinton J.'s view is consistent with the Supreme Court's analysis of peremptory norms.

44. *Suresh*, *supra* note 13 at para. 62.

45. One could argue that the judgments in *Suresh* or *Ahani I* and *II* can be placed under the rubric of international authorities, but that would depend largely on whether one sees these cases as having primarily domestic or international implications. In either event, the distinction is merely one of semantics in this context, and has no effect ultimately on the points I make. I place the judgments of courts within the domestic practices

category because the judgments of courts, interpreting and applying the law, can be a very clear indication of a country's practice or stance on an issue. Note also that Art. 38(1)(d) of the *Statute of the International Court of Justice* lists judicial decisions as "subsidiary means" for the determination of international law.

46. *Suresh*, *supra* note 13 at para. 65.
47. See, *e.g.*, *Bouzari*, *supra* note 41 at para. 61 where Swinton J. rules that given the judgment in *Suresh*, and the cases cited therein, the prohibition on torture has reached the status of a peremptory norm of international law. (This ruling was notwithstanding the Supreme Court's reluctance in *Suresh* to decide finally whether that prohibition was a peremptory norm.)
48. Here again, we see a validation of the view that international law is in part a transjudicial process. See Knop, *supra* note 9 at 515–19 and 533. Knop's discussion of the merging of international and comparative law, at 525, is also instructive in this context.
49. Rosenberg J.A. appears to show some exasperation on this point in *Ahani II*, *supra* note 3 at 138, when he says that if Canada is concerned that the Optional Protocol will be used to shield terrorists, then Canada should denounce the Protocol, instead of continuing as a state party but not fully living up to its associated obligations.

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Book Review

Palestinian Refugee Property and the Arab-Israeli Conflict

Michael R. Fischbach
New York and Washington: Columbia University Press
and Institute for Palestinian Studies, forthcoming, 2003).

Loss is an inherent feature of the refugee experience. Oftentimes, the problem of refugees is discussed in terms of a loss (or denial) of legal protection by the home country of the individual asylum seeker. But invariably a refugee also has lost his or her place, and frequently the accoutrements of a place, namely, land, housing, and/or personal property. Frequently, such losses by exiles remain unremedied even as they begin new lives elsewhere.

Human displacement, moreover, has been a chronic feature of our world, and it is likely to remain prevalent for the foreseeable future. History shows that among the variety of causes of displacement is conflict associated with state creation. A paradigmatic example is the communal violence that resulted in partition and the creation of two separate states, India and Pakistan, in 1947, which displaced an estimated 14 million people as Muslims in India fled to Pakistan, and Hindus in Pakistan fled to India. More recently, over the past decade, forced migration accompanied the violent breakup of the Socialist Federal Republic of Yugoslavia and conflicts that followed the dramatic implosion of the Soviet Union, as well as the emergence of new states in these regions.

Michael Fischbach in his forthcoming book, *Palestinian Refugee Property and the Arab-Israeli Conflict,* examines a complicated place-based refugee problem in a particular situation of political volatility, the Arab-Israeli conflict. Fischbach begins with a detailed examination of the evolution of legal and administrative measures relating to property issues occasioned by the partition of Palestine in 1947, and the more or less coerced migration of 726,000 Palestinians, about one-half of the entire population. Over the ensuing years, this population of exiles has grown to approximately six million, nearly four million of whom are registered as refugees under the mandate of the United Nations Relief and Works Administration (UNRWA). As this exile community has grown over the course of this protracted conflict, the debates and policy framwork concerning the refugee property issue have evolved as well. Positions and policies have mutated as has the underlying conflict.

The starting point for analysis on the refugee property question is United Nations General Assembly Resolution 194 (III), issued on December 11, 1948. This resolution, which established the United Nations Conciliation Commission for Palestine (UNCCP), provides at paragraph 11:

> Resolves that the refugees wishing to return to their home and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible; Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation….

The ensuing political history of the Arab-Israeli conflict has served to deconstruct this language and exposed a variety of ambiguities. This includes such fundamental questions as: who are the refugees, what is their property, and how should it be valued? There are also a variety of important subsidiary issues, such as: Should payment be made, or accepted, in the nature of "compensation" for property? Should there instead be an international fund to defray the costs of integrating refugees in the states where they are now found, or resettling them elsewhere? Who would pay into this fund? Apart from those who do not return, should payment be made as well to those who do return, including for property loss or damage? Does this include fixtures and movable property in addition to land? Should payment be made to individual claimants or collectively to governments? Should compensation for Jewish land in Arab countries be deducted from compensation for Palestinian refugees, and, if so, what is the value of those "counterclaims"?

All these issues, and others, have been raised at times by one or another of the parties in negotiations over the question, including the United Nations. Fischbach examines these complicated bundles of questions, and places them usefully in the context of the development of Israeli and Arab policies, as well as the policies of other governments and UN activities relating to refugee property. He does this in a highly readable way, giving a sense of person to many of the key policy figures as well as a realistic sense of context to the policy process.

One of the most instructive contributions of the book is an examination of the UNCCP technical program, which began its work in 1952 and reported initially in 1964. The technical program produced the most authoritative statistics to date on the scope and value of Arab property, including as amended by the computerization of the underlying data in 2000. Under this project, the scope of Arab land is calculated at 4,851,613.98 dunums (one dunum equals 1,000 square meters), with a value of 224,815,931 Palestinian pounds (one Palestinian pound in 1948 was the equivalent of U.S. $4.03). Nevertheless, the fact that the exact scope and value of Palestinian refugee land continues to be debated by both scholars and governments prompted Fischbach to include abstracts of sixteen different studies of the questions in a very useful appendix.

The discussion of the efforts of the UNCCP program is a particularly insightful examination of the limits of taking a technical approach to resolving a broader conflict. Indeed, this is a central conclusion Fischbach draws from his study – that piecemeal approaches will not work in solving this conflict. But advocates for peace should always be mindful of how technical initiatives can sometimes bridge what seems to be an unmanageable chasm of mistrust and hostility. What may not work at one particular time in the history of a conflict, moreover, may work at another point in its life cycle.

The refugee property question was profiled recently in efforts by U.S. President Bill Clinton, who convened an early 2000 summit meeting in Camp David, Maryland, in an audacious bid to resolve the underlying Arab-Israeli conflict. The refugee issue emerged centrally in the course of this latest settlement gambit, and follow-on exchanges in 2001 at Taba in Egypt, and became a deal-breaking question, with Israeli negotiators insisting firmly on alternatives to an unfettered right of return. Palestinian negotiators have long insisted on a categorical right of return, arguing that refugees should be given the maximum feasible choice in terms of where to live in the future.

In an attempt to finesse the issue in these 2000 discussions, a proposal was tabled for the relocation of Palestinians to Israeli territory, which would then be transferred to Palestinian jurisdiction. In addition, the U.S. proposed a financial package in an attempt to break the impasse and help buttress a peace agreement. About $10 billion of the overall package was to be compensation for Palestinian refugees, an amount considered by many analysts both unrealistic and, at the same time, too low. The U.S. was also prepared to solicit donations from other countries for refugee compensation in lieu of return to their homes in what is now Israel. Whether these parameters will remain in place or waver over time in the course of subsequent negotiations, as Fischbach recounts has happened in the past, cannot be foretold.

Clearly, the Palestinian refugee issue will be a key aspect of any settlement of the Arab-Israeli conflict. Understanding the technical aspects of refugee arrangements, moreover, will be crucial to the successful implementation of any peace accord. Needless to say, addressing technical implementation issues in detail could provide useful comfort to negotiators during ongoing political discussions.

Michael Fischbach's *Palestinian Refugee Property and the Arab-Israeli Conflict* will be an invaluable resource for those in charge of conducting the predictable tutorial after any settlement of the underlying conflict. Examining implementation options drawn from a variety of other comparative experiences will surely be useful as well. For example, the simplified and quicker procedures for payment of smaller compensation amounts used by the United Nations Compensation Commission to address claims against Iraq for the invasion of Kuwait, and techniques developed to identify property ownership by the Commission for Real Property Claims in Bosnia and Herzegovina, are among recent innovations in international operations which could inform an implementation scheme relating to Palestinian refugee property. Fischbach notes, in fact, that Palestinian representatives visited the Bosnian property commission recently to gain just such comparative insights.

Nor is it too early to begin the inquiry. In a world in which we increasingly have to be prepared to be surprised, we should prepare not only for the worst case scenario, we should be prepared to seize upon unexpected opportunities as well. Yet, as a senior UNWRA official recently told this reviewer in relation to modeling a settlement of the refugee issue, including compensation criteria and mechanisms, "No one is working on this." Fischbach's book will be a helpful resource in the implementation of any settlement of the conflict.

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