

**"Negotiating the non-negotiable: the right of return and the evolving
role of legal standards"**

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I. Introduction: maximalist political demands and legal standards

There is a certain degree of the difficulty in presenting the right of return in the political arena. By its very nature, it is conceived by its adherents as a non-political, individual human right, and thus outside the realm of legitimate politics. The role of the negotiator -- the primary agent in the Palestinian political domain between 1991 and at least 2000, but with a substantial role in other historical periods as well -- is thus automatically rendered suspect. On the one hand the right is non-negotiable, and the Palestinian negotiator does not have the legal standing to dissolve it; all that can be discussed is implementation. On the other hand the party being negotiated with accepts neither the conception of the right of return nor any measures to implement it de facto. In such circumstances, what use is negotiation relating to the right of return?

This paper will trace the attempts to grapple with this dilemma, from the perspective of an analyst of the politics of international law, not from that of a practitioner or participant. An institutional structure recognised internationally as the sole legitimate representative of the Palestinian people has since at least 1988 defined its modus operandi as negotiations, compromise, and the reaching of agreements. It has staked its political credibility both internationally on its commitment to these means, and nationally on the potential for these means to be successful. Understanding the combination of local and international factors that have contributed to the shaping of this stance is significant for disclosing not only how it was that the Oslo process dealt -- or failed to deal with -- the right of return, but also the potential for any future arrangement, be it bilateral, multilateral or imposed, to engage with the issue in a different and more advantageous way.

The right of return has been understood, portrayed and deployed in two competing senses. Firstly, it has the role of a maximalist political demand. Few would disagree that the capacity for refugees to return to their homes is something that the Palestinian national movement as a whole wishes to achieve.¹ Palestinian political movements are united in that, ideally, every refugee would be given the option to return. One conception has been that to achieve the practical realisation of return in as many cases as possible, the only way is discussion and negotiation with Israel. The Palestinian negotiating hand will be strengthened by marshalling

¹ Two definitional clarifications: firstly, references to "return" mean return to one's homes if they still exist, and to the immediate vicinity if overriding circumstances do not permit the rehabilitation of those homes. The notion of return as discussed here is unrelated to the capacity of a Palestinian refugee to return to some part of the territory of historical Palestine (such as the West Bank and Gaza Strip) if she originated from a different part of the territory: this would be repatriation, not return. Although I do not discuss compensation or restitution here, the standards are interlinked. Secondly, the reference to refugees encompasses all those who originate from territories that were part of historic Palestine, but are unable to return to those territories, in line with the definition of article 1 of the 1951 Refugee

international support, and one way to garner this support may be to emphasise the basis of the right of return in international law. Despite this basis, however, Israel will only accept the return of some refugees if the possibility of the return of others is foreclosed. This is the messy business of politics, the making of compromises, international *Realpolitik*. However, it is also a situation in which the appeal to a legal conception of the right of return can serve a political objective: a high standard is set, and any compromise upon this may still result in the return of a considerable number of refugees.

Secondly, the right of return has been conceived as a human right, within the sphere of the international law of human rights. In this sense, it is absolute and inalienable, and -- crucially in this contrast -- it is non-negotiable at the political level. The right rests with the individual, and only the individual can choose not to exercise it at any point in time. From this standpoint, a governing authority or international representative can no more negotiate away an individual's right of return than they can dispense with that individual's right not to be tortured. The right of return in international human right law is well-established, rooted in the customary law articulated in article 13(2) of the 1948 Universal Declaration of Human Rights, and in the treaty law of article 12(4) of the 1966 International Covenant on Civil and Political Rights. Furthermore, the right had become an established facet of international human rights and humanitarian law by the time of the 1947-49 conflict, and so difficult questions of retroactivity do not apply.²

This portrayal of the right of return has been the preponderant conception in Palestinian civil society, particularly in the diaspora. Its most well-known articulation, in paragraph 11 of General Assembly Resolution 194 (11 December 1948), is frequently cited, quoted and endorsed. The discussion of the right of return is conducted at the popular level in quasi-legal language, through the discourse of rights and state obligations. By contrast, the Israeli position, at both the official level and in the academic and popular writings of the pro-Israeli mainstream, the rejection of the right of return for Palestinian refugees is articulated in non-legal language. There have been some attempts either to deny in law a general right of refugees to return to homes, and there are specific arguments that have been deployed that try to show why Palestinian refugees in particular are not entitled to a right of return. However,

Convention. That is, it is not limited to those who were displaced in the 1947-49 war.

² See, e.g., UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, "The right of return of the Palestinian people", UN Doc. ST/SG/SER.F/2 (1 November 1978), chapter II, accessed at <http://domino.un.org/unispal.nsf>; W. Thomas Mallison and Sally V. Mallison, "The right of return", *Journal of Palestine Studies* 9 (1980), p.125-36; Kathleen Lawand, "The Right to Return of Palestinians in International Law," *International Journal of Refugee Law* 8 (1996), p.532-68; John Quigley, "Mass Displacement and the Individual Right of Return", *British Yearbook of International Law*, 68 (1997), pp.65-125.

the predominant strategy has been not to engage with the Palestinian appeal to international law, and instead counter through references to demography, security and tendentious readings of history. The disjunction in appeals to legal standards is explicable from the primary political role of international law, in protecting those who cannot be protected by the threat or use of physical measures. Powerful states do sometimes need to appeal to international legal standards, for example in protecting private corporations and citizens abroad. However, the role of international law is significantly more important for states and their populations (and proto-states and those represented by them) without the physical means to implement their core interests and rights. As a result, the weaker party appeals to the law, whilst its stronger adversary dismisses its significance. Few situations illustrate this point better than the Israeli-Palestinian conflict.

It cannot seriously be questioned that, in recent years, the Palestinian position on the notion of return as it has been presented and understood internationally has given every indication of being a maximalist political stance, rather than being an indivisible value. Some have attempted to make distinctions between possessing the right of return and having the permission to implement it. Others have relied upon the difference between the official statements of the Palestinian National Council (PNC) on the one hand and those of the chairman of the PLO's executive committee, the head of the PLO Department of Information and Culture, and its Negotiations Affairs Department on the other. These distinctions lack credibility, as bearing a human right is equivalent to bearing a right of its implementation in international law; and it is the individuals in effective control of the Palestinian negotiating team who will determine the acceptability of the proposals that are put to them.

This is not to say that a stance based upon an appeal to the right of return has not been promoted, but simply that the features of the non-negotiable right that rests with the individual that accrue to the right of return in international law have been absent from official language. The maximalist stance has indeed sometimes been found to constitute a useful starting point in a negotiating strategy, as the Taba discussions in January 2001 displayed. Yet this is itself problematic: to articulate the maximalist position, an absolute standard has to be drawn upon, found in international human rights law. The result is a persistent sense of an impending mismatch between the expectations upheld among the wider Palestinian political constituency and the anticipated outcome. The escape route for the Palestinian leadership has been to de-emphasise the right of return in official discourse, as I will explore in the subsequent section of this paper. I will then go onto show how the rhetorical strategy of leaving the issue of return unaddressed reached the point of unsustainability in the later stages of the Oslo process, and how the maximalist position could neither be delivered nor plausibly

transformed. I will end with some observations on the potential role of international human rights law in future arrangements. It is not the intention here to adjudicate on the respective value of the different conceptions of the right of return, to provide a full evaluation of the feasibility of pitching principles against practicalities, or indeed to ascertain if the contending perspectives can themselves be phrased in those terms. Instead, it is to trace how the transformation has occurred, and its impact upon the Oslo process.

II. From rationale to the margins: the role of return in the Palestinian national position

The transformation of the mainstream of the Palestinian Resistance Movement (PRM) from a revolutionary movement to a state-building project, or in moving from a liberationist strategy to a territorialist one, has been discussed and analysed well by scholars such as Muhammad Muslih, Salim Tamari, and Yezid Sayigh.³ I will focus here on how a significant part of the transformation has related to the status and conception of the future of the Palestinian refugee population.

The exclusive emphasis on the return of the refugee is clear from the earliest statements of Fatah. Characteristic assertions come from the opening sentences of Fatah's first and seventh military communiqués, from 1965, and a fighting song made famous by Fatah:

"[...] armed revolution is our only path to return and freedom."⁴

"Armed struggle and continuous revolutionary activity point our way back to Palestine."⁵

"Palestine, our fatherland, back to you I must return. Fatah revolution will be victorious."⁶

The centrality of return to the conception of the goals of the movement provided in these statements is matched by the understanding of Palestine solely in terms of the 1948 Territories, internationally recognised as Israel. Most of Fatah's personnel could lawfully

³ Major works in this vein include: Muhammad Muslih: *Towards Coexistence: An Analysis of the Resolutions of the Palestine National Council* (Washington DC: Institute for Palestine Studies, 1990); Salim Tamari, "The Palestinian movement in transition: historical reversals and the uprising", *Journal of Palestine Studies* 20 (1991), pp.57-70; and Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement 1949-1993* (Oxford: Clarendon Press, 1997).

⁴ Communiqué No.1 from al-'Asifa, 6 January 1965, in *al-Watha'iq al-'Arabiyya* [hereafter: WA] 1965, p.4.

⁵ Communiqué No.5 [sic; usually considered 7] from al-'Asifa, 20 February 1965, in WA 1965, p.74.

⁶ The *anashid* (fighting song) is "Biladi, Biladi". The Arabic text of the time (before its more recent modification) is contained, inter alia, in Edward McGuire, ed., *Songs of the Fedayeen* (London: Bellman Bookshop, 1970).

enter the West Bank and Gaza Strip, parts of the Palestine. Fatah's language, however, makes sense only if this is discounted; it is clear that when they refer to Palestine, the writers of these words really meant the territories occupied by Israel in 1948. Thus return only had meaning in terms of the reclamation of the homes lost in conflict.

Similarly, the Palestinian was conceived in terms of his or her exilic condition by the nascent PRM. All but one of the 13 members of Fatah's central committee before 1974 were 1948 refugees, and they structured their entire appeal so that it was focused solely upon the dispossessed segments of the camp population.⁷ The editorial to the February 1960 edition of their magazine, *Filastinuna*, probably written by Khalil al-Wazir (or possibly Yasir 'Arafat), expressed their view of the Palestinian plight well when they berate Palestinians for taking an interest in party politics in other Arab States when they are themselves so impoverished: "you have been deprived of your entity and your people are humiliated in the tents and camps [...] *you are all wretched, fugitive and devoid of dignity and entity*". Similarly, the communiqué issued by Fatah (using the pseudonym, al-'Asifa) after their first attack on an Israeli installation, an act that was later to be acclaimed as the start of the Palestinian revolution, began by addressing itself to "our steadfast people, waiting at the borders".⁸ The Palestinian predicament was thus phrased entirely in terms of the situation of refugees striving to return to the original homes.

The conception of the Palestinian struggle solely in terms of the striving for return was not confined to the *fida'i* groups, but was central to the PLO from its inception even before being taken over by the *fida'i* groups in February 1969. The speech by Ahmad Shuqayri in 1964 at the start of the first session of the PNC, which declared him to be the chairman of the PLO's Executive Committee, is typical in this regard:⁹

[I]n conspiring against this brave people, the forces of Zionism and imperialism have established Israel on our land, acted to expel our people from our homeland, and have dispersed us far and wide [...] the people of Palestine were uprooted from their homeland and banished from their homes.

Despite a brief mention towards the end of his long speech, that the new Organization will

⁷ The exception was Walid Nimr, from Qalqilya in the West Bank, and a leading member of Fatah (as a military instructor) from 1965 until his murder in July 1971. Although he was born in Jinsafut (in Qalqilya district), Faruq al-Qaddumi grew up in Haifa and was displaced from there in 1948, and thus is to be considered a refugee.

⁸ *Filastinuna*, No.5 (Feb 1960), quoted in 'Isa al-Shu'aybi, *al-Kayaniyya al-Filastiniyya: al-Wa'i al-Dhati wa al-Tatawwur al-Mu'assasati, 1947-1977* (Beirut: Palestinian Liberation Organization Research Centre, 1979), p.54, emphasis added; *al-'Asifa* communiqué no.1 of 6 January 1965, reprinted in WA 1965, p.4.

⁹ Speech of 28 May 1964; reprinted in WA 1964, pp.280-1.

represent all Palestinians, "both refugee and resident", the dominant story being recited throughout the speech is of the rendering of every Palestinian into exile, and the aspiration of every Palestinian to return to the land that they have become alienated from.

In tandem, political songs – that crucial tool of popular mobilization – used by the nascent Palestinian institution conveyed a message of a determination to return to the lost lands. When the PLO's radio broadcasts began as "Voice of Palestine" under Egyptian auspices in March 1965, the first item transmitted was the fighting song, "We Shall Return".¹⁰ In excluding the Palestinians indigenous to and still resident on the historical territories from participation in this "we", Voice of Palestine was setting itself as a voice for the refugee population alone.

The PLO and the *fida'i* organizations entered the post-1967 period with a strong popular base solely in the Palestinian diaspora, speaking as refugees to a community which had shared the experience of dispersal in the 1947-1949 war and the subsequent process of social marginalization in the Arab world. At least until 1973, the emphasis on return was retained as the key substantive value to be achieved through the PRM's actions. One aspect of this was the homogenization of Palestinian experiences in terms of being refugees, and the standardisation of goals in terms of return. Often, even after 1967, Fatah leaders stated that the whole Palestinian nation was expelled in 1948.¹¹ Even when recognizing the situation of the residents of the West Bank and Gaza Strip, the PRM took the essence of their plight to be similar to that of the refugees: their current problems were portrayed as having figured prominently in the personal histories of the Palestinian refugees. A late, but highly expressive, example of this comes from the 1975 Political Program of the DFLP, which stated that the Palestinian problem is that of national fragmentation and dispersion.¹² A different form of expression is that of a prominent emblem of the PFLP, imprinted on many of their publications as well as hoisted on demonstrations from (at least) 1971: it shows an arrow emerging out of the first letter of their name (ﺡ), imposed on a map, and stretching from the East Bank of the Jordan and running into the territory of Palestine. In this way, the PFLP was representing the core Palestinian aspiration as that of return to the land of Palestine, a desire that was obviously not applicable to those indigenous to and still resident in the 1967

¹⁰ Donald R. Browne, "The Voices of Palestine: a broadcasting house divided", *The Middle East Journal* 29, no. 2 (1975), p.136.

¹¹ e.g., "Towards a democratic state in Palestine" (Fatah's address to the Second World Conference on Palestine, Amman, 2-6 September 1970): "A whole nation, more than one million inhabitants of a country, were deliberately terrorized and uprooted from their homes ... One can hardly believe that the forced exile of a whole nation is possible in the Twentieth Century..." (from transcript, unpaginated).

¹² Part II.A of the Political Program of the DFLP, October 1975, in *al-Watha'iq al-Filastiniyya al-'Arabiyya* [hereafter, WFA] 1976, pp.45-51.

Territories.

Through the particularity of its expressed goals, the PLO was able to avoid the paradoxical role of a political institution expressing non-political values, in the form of the right of return. Most obviously, the PLO and the PRM more generally was not seeking a negotiated solution to the conflict with Israel in which compromises might need to be made, but was instead seeking the liberation of all of the territory of historical Palestine. As such, the implementation of the refugees' right of return would come about by default. In association with this, the language of international law, articulating the right of return to a State of Israel that would otherwise remain intact, was antithetical to the goals of the PRM.

Equally, though, the problem did not arise because the PLO was not claiming to be the sole representative of the Palestinian people. Instead, it arrogated to itself the role of a vanguard (*tali'a*), demonstrating to the Palestinian population how they should act. There was a claim that the underlying Palestinian personality was most validly expressive (*mu'abbir*) of itself in armed struggle, whether or not the majority of Palestinian individuals recognised this. However, the PLO could not endanger the standing of the right of return as it did not purport to speak on behalf of the Palestinian population.

The changes that brought the PLO into a situation of potential conflict with the bearers of the right of return took place in the period from 1971 to 1977. Firstly, the PLO made the claim to speak internationally on behalf of the Palestinian population. The eighth session of the PNC of March 1971 made the assertion that the PLO was the "sole representative" of the Palestinian people.¹³ This was a claim that was to assume centrality (in slightly modified form, as the "sole legitimate representative") in the discourse of the PLO over the coming years, in opposition to non-PLO Palestinians who sought to speak for the Palestinian people, but primarily utilized against Arab governments — Jordan, and then Egypt and, to a lesser extent, Syria — who promoted alternate models of the Palestinian future. The claim moreover was successful: it was accepted by the Algiers Arab summit of November 1973 (with Jordanian reservations), and unanimously at the Rabat Arab summit of October 1974.

Secondly, the PLO began to signal internationally its acceptance of some form of two-state solution, particularly in the immediate aftermath of the October 1973 war. The first major articulation of a change in approach was the "phased" political programme adopted at the 12th

¹³ Political programme for the Conduct of the Palestinian Revolution adopted by the 8th PNC, 4-5 March 1971, at WFA 1971, p.189: "The PLO is the sole representative of the masses of the Palestinian Arab people".

session of the PNC in June 1974. This programme supported the establishment of "the people's national, independent, combatant authority (*sulta*) over every part of Palestinian land that is liberated".¹⁴ This programme was expressed in terms of a demand for statehood by late 1976,¹⁵ an approach formally accepted in March 1977 at the 13th session of the PNC. Although even in 1977, leading members of the PLO discussed the potential for a future State of Palestine to recognise Israel, this was not formally decided upon by the PNC until 1988.

The two-state route, as proposed from 1976, was not just one goal of equivalent status to others, but was increasingly the dominant focus of the PLO's stance. This process was encouraged by the emergent support of the major powers for some degree of Palestinian self-governance in the 1967 Territories, coupled with a lack of substantive support for the implementation of the right of return. US President Nixon had made specific commitments to Israel in 1971 to exclude the possibility of providing each refugee with the opportunity of returning to his or her home, and this position was not altered under subsequent administrations. Thus when President Carter declared his support in March 1977 for a Palestinian "homeland", this was posited as the solution for the Palestinian refugee problem:

"There has to be a homeland provided for the Palestinian refugees who have suffered for many, many years."

Similarly, the EEC statement of 29 June 1977, the "peace settlement" outlined is phrased entirely in terms of territorial boundaries:

"a solution to the conflict in the Middle East will be possible only if the legitimate right of the Palestinian people to give effective expression to its national identity is translated into fact, which would take into account the need for a homeland for the Palestinian people."

Although the right of return was given nominal support by the powers in certain forums, their statements were either non-binding in themselves, and thus only recommendatory (such as in the UN General Assembly), or they were intentionally ambiguous, in order to enable supportive Arab governments to claim that they were not sacrificing the legitimate rights of the Palestinian refugees.

Despite setbacks over the following years -- Sadat's visit to Jerusalem in 1977 and Camp David, the 1982 Lebanon invasion, the splintering of the PLO and the War of the Camps --

¹⁴ The political programme is reprinted in WFA 1974, pp.210-11.

¹⁵ esp. Faruq al-Qaddumi in statement of 29 November 1976, at BBC Summary of World Broadcasts [hereafter: SWB] ME/5378/i, calling for "an independent Palestinian State in the West Bank and the Gaza Strip"; and PLO Central Committee statement of 14 December 1976, at WFA 1976, pp.203-04 on the right to establish an independent State.

the dominant players on the international stage continued to indicate the possibility of a future Palestinian state in the 1967 Territories. However, even the Soviet Union -- the international power that gave its most extensive support to the Palestinian cause -- did not in its major statements provide support for the Palestinian refugees to choose to implement their right of return. Thus Soviet Foreign Minister Gromyko in 1979 spoke of the "the legitimate rights of the Arab people of Palestine including the right to create their own state", without specific reference to the right of return. The 1982 Brezhnev Peace Plan and the July 1984 Soviet proposals both adopt similarly ambiguous language in phrasing the return of the refugees to their homes and compensation as alternatives, without specifying who would make the choice between them.

In this way, the achievement of a Palestinian State appeared to be a substantive prospect that could be won by the PLO through the effective management of the mechanisms of international diplomacy, whilst the opportunity for the implementation of the right of return remained as distant as ever. The language of the PLO leadership translates the possibilities into priorities. Thus in immediate response to President Carter's statement about a Palestinian homeland, 'Arafat stated that Carter had "put his hand *on the heart* of the Middle East problem".¹⁶ Similarly, Faruq al-Qaddumi stated that "a Palestinian State, big or small, has been the dream of our people for a very long time".¹⁷ Palestinian Statehood in the 1967 Territories was presented not as a solution that was unsatisfactory but the maximum attainable from an unjust but stronger opponent, but instead as a legitimate solution: a "just, lasting and comprehensive" peace, PLO leaders argued, would be achieved if such a State could be formed.¹⁸ In this way, the PLO was not denying the existence of the right of return, but was situating the priorities of the Palestinian national movement elsewhere.

A third change, in part the result of the former two developments, was the PLO's adoption of the language of international law, as it took on the role of the representative of the Palestinian people in international forums. International legal terminology provided the format in which the right of return was discussed in the major statements of the PNC and PLO, insofar as it was mentioned at all. The first major statement in which the right of return was specifically mentioned was the 12th session of the PNC in June 1974, in the same statement that first

¹⁶ Statement of 17 March 1977, in *Arab Report and Record* 1977, p.229; emphasis added.

¹⁷ Interview with *al-Mustaqbal* (Paris), and reprinted in Wafa press release, 2 July 1977. Similarly, Salah Khalaf on 13 January 1977 in SWB ME/5414/A/5.

¹⁸ e.g., statements by Qaddumi on 10 March 1975 in SWB ME/4852/A/3-4, on 26 February 1977 in IDP 1977, p.337, and 2 October 1977, at IDP 1977, p.399; 'Arafat in *World Marxist Review* 18/2 (February 1975), p.44; Voice of Palestine (Cairo) commentary of 2 October 1977, at ME/5631/A/4-5; and PLO-EC statement (para.2) of 21 October 1977, at IDP 1977, pp.399-400. Other statements listed in Sameer Abraham, "The PLO at the crossroads: moderation, encirclement, future prospects", *Merip Reports* 80

opened the way towards the acceptance of the two-state route. As Rashid Khalidi has remarked, the two concepts fit logically together: the appeal for the implementation of right of return only has a role if the territory was not conceived of as being under the jurisdiction of the Palestinian or Arab side in a future scenario.¹⁹ Moreover, the vision of the return of the refugees to their homes that had been elaborated by Fatah from its first military communiqué in 1965 was replaced with the more ambiguous truncation, *haqq al-'awda*, the right of return, which did not specify whether Fatah was still seeking the return of the refugees to their former areas of residence, or solely to a State in the 1967 Territories. A similar formulation is used in the 13th session of the PNC in March 1977, and would be repeated in future major statements of the PLO and PNC, including the Declaration of Independence of 15 November 1988.

This ambiguity also enabled specific second-rank individuals within the PLO to articulate the distinction between the principle of the right of return, which they continued to stress that Israel must accept, and its implementation, which is open for negotiation.²⁰ This distinction, which is without a conceptual basis or precedent in international human rights law, was openly discussed within the PLO from the end of the 1970s, as a way of reconciling a claim to be upholding international law without detracting from the possibility of using the implementation of the right of return as a bargaining chip in negotiations with Israel.

III. The right of return in the Madrid and Oslo processes

As I have traced, by 1991, the concept of the right of return was endorsed by the PLO but with three provisos. Firstly, it was a secondary goal of the organisation, with the priority instead placed upon the achievement of Statehood. Secondly, there was ambiguity in the presentation of the right of return: the right for refugees to choose between the alternatives of return to their homes and compensation was rarely mentioned, particularly in major statements to international audiences. Thirdly, an institution had taken on the role of speaking for the refugees in claiming their rights. In itself, this was not problematic; but it left the way open for that institution to be able to make the claim internationally that it could dispense with those rights as part of a quid pro quo for the achievement of a higher goal, Statehood.

(1979).

¹⁹ Rashid Khalidi, "Observations on the right of return", *Journal of Palestine Studies* 21, no. 2 (1992), pp.33-36.

²⁰ Early formulations of this distinction include Sabri Jiryis (PLO Research Centre), "al-Majlis al-Watani al-Filastini: nahwa dawla filistiniyya mustaqilla", *Shu'un Filistiniyya* 62 (1977), pp.18-29; and Walid Khalidi (senior advisor), "Thinking the unthinkable: a sovereign Palestinian state", *Foreign Affairs* 56 (1978), pp.695-713. Variants on restrictions on the right of return had earlier been discussed by Sa'id Hamami from 1975 and Isam Sartawi from late 1976.

The Madrid multilateral talks, and to an even greater extent, the Oslo bilateral process accelerated and entrenched these tendencies. Both tracks were based upon Security Council Resolutions 242 (1967) and 338 (1973), which only provide a thematic link with the refugee issue, rather than a restatement of the law appertaining to the right of return. Although the PLO were formally excluded from participation in the early stages of the multilateral talks, the Palestinian members of the Jordanian delegation -- led by Haydar 'Abd al-Shafi -- closely coordinated their stance with the PLO, and were accepted by the PLO leadership as suitable intermediaries.

The Madrid process incorporated a Refugee Working Group (RWG) launched through the Moscow steering group in January 1992. The RWG did not base its discussion on international legal principles, for example by sponsoring independent studies to determine the legal status and rights of refugees. By contrast, it was focused on technical and humanitarian issues, such as job creation and vocational training, public health, and child welfare for Palestinian refugees in their host countries, as well as the collection of economic and social information as pertains to their current condition. By focusing on such themes, the Palestinian participants in the delegation were able to avoid having to react to compromise proposals, and could thus continue outside the RWG to endorse the conception of the right of return as understood through international human rights law.

Insofar as it attempted to move beyond these issues, the Israeli side was able to restrict effectively the activities of the RWG. The Canadian gavel-holder of the RWG, Marc Peron, produced in March 1995 a "Vision Paper of the New Middle East", which discussed return, compensation and resettlement as possible alternatives for the refugees' future.²¹ This paper was caught in the bifurcation of forums that occurred: the Israeli Foreign Ministry argued that this paper transgressed the mandate of RWG, and was instead an appropriate focus only for the Oslo track negotiations. As a result, the vision paper was not taken forward in the RWG. Instead, the RWG under its new gavel-holder, Andrew Robinson, focused on "adaptation" -- the social and economic integration of refugee communities into their host surroundings, particularly among refugees who returned to the West Bank and Gaza Strip.²²

The Oslo process contained a similar deferral in addressing the future of Palestinian refugees. Article XII of Oslo Accords established the Quadripartite Committee on Displaced Persons

²¹ Quoted extensively in Salim Tamari, *Return, Resettlement, Repatriation: The Future of Palestinian Refugees in the Peace Negotiations* (Institute for Palestine Studies, 1996).

²² See, for example, his lecture "Adaptation and Change in the West Bank and Gaza" (31 March 1996),

(the QPCDP, comprising of Jordan, Egypt, Israel and the PLO), which worked on the basis of the distinction already accepted by the Palestinian side of persons displaced in 1967 from 1948 refugees. The latter group was specifically excluded from discussion in this venue. Instead, the issue of 1948 refugees was deferred until the Permanent Status negotiations. As Salim Tamari notes, one effect was to marginalise even further the discussion on the 1948 refugees.²³ It also enabled Israel to claim that the QPCDP *was* the discussion on refugees, thereby portraying the return of refugees from the 1967 war as closing the refugee file. Although the Palestinian delegation and the QPCDP clearly never accepted this formulation, the issue of the 1948 refugees was sidelined to the extent that it no longer featured in wider discourse on the progress and problems of the Oslo process. Ambiguity over the nature of the Palestinian official portrayal of the right of return was thus preserved, and the refugee issue was kept secondary to the developments in the creation of an autonomous Palestinian self-governing body in the Bank and the Strip.

The displacement of the refugee issue as an item of significance in the conceptions of the Palestinian leadership in this period is noticeable. Palestinian aspirations were summarily stated as the creation of a Palestinian State in the entire 1967 Territories, with al-Quds as the capital of this State. For example, 'Arafat's told the PLO Executive Committee member with responsibility for the Refugees Affairs Department: "My only responsibility is to establish an independent Palestinian state with its capital in Jerusalem".²⁴ The return of refugees, although not denied in such statements, was thus not accorded the position of being a significant Palestinian goal.

Only in more extended descriptions of Palestinian goals were the refugees mentioned. Even then, in a number of forums, the nature of refugee rights is either left without explanation (using the formulation of "resolving the issue of the Palestinian refugees according to the international resolutions", without specifying the resolutions at issue), or is phrased in terms of a return to a Palestinian State, not to the original homes of the refugees. An example is the resolutions of the 21st PNC, held in Gaza in April 1996. Although the relevant resolution refers to General Assembly Resolution 194, it explains it in terminology not taken from that text:

at: <http://www.dfait-maeci.gc.ca/Peaceprocess/SHAML-en.asp>

²³ For example, the US (the sponsor of the talks) & Canada (the gavel-holder) both replaced the heads of their delegations to the RWG with more junior officials (Tamari, *Return, Resettlement, Repatriation*, p.23).

²⁴ Reported in the briefing by the International Crisis Group, "The meanings of Palestinian reform" (12 November 2002), accessed via: <http://www.intl-crisis-group.org/projects/reports.cfm?keyid=40>

"The PNC stresses its full commitment to the full implementation of Resolution 194 regarding the Palestinian refugees. The multilateral negotiating committee on refugees has considered this resolution as the basis for discussing the refugees issue; since it preserves their right of return to their *homeland*." (emphasis added)

Nevertheless, the tactic of relying upon ambiguity, elisions and implications was not longer viable as Permanent Status Negotiations began in September 1999. As a final status issue, as projected by Article V.3 of the 1993 Declaration of Principles, the refugee issue was scheduled as a topic for discussion in these negotiations. Interestingly, from the commencement of the Permanent Status Negotiations, and particularly from 2000, there seems to have been an increased emphasis on General Assembly Resolution 194 (III) in the statements of the Palestinian side, together with a coherent and largely accurate description of the rights of the Palestinian refugee population.²⁵

Was this a change in the direction of the Palestinian leadership, faced with the prospect of substantive negotiations on the future of the refugee population? It does not appear so. The initial position of the Palestinian side on the right of return remained whilst Israel refused to engage with this issue, most noticeably at the Camp David talks of July 2000. However, as substantive discussion on the right of return began, at Taba in January 2001, two features of the official conception of the right of return became apparent. Firstly, the Palestinian negotiating side had arrogated to itself the right to pronounce on the full implementation of the right of return. Paragraph 60 of the 22 January 2001 draft article on Palestinian refugees stipulates that:²⁶

"The full implementation of this Article shall constitute a complete resolution of the refugee problem and shall end all claims emanating from that problem."

Secondly, the actual implementation of the article was not based upon the legal conception of the right of return, as understood in international human rights law. Although refugees present in Lebanon would be accorded a full right to return (paragraph 15), all others would be denied this right and instead be part of a limited return programme. Paragraph 16 of the draft article states:

"Without prejudice to the right of every refugee to return to Israel, and in addition to refugees returning pursuant to Paragraph 15 above [ie, those resident in Lebanon], a minimum of XX refugees will be allowed to return to Israel annually."

²⁵ This was particularly apparent in the material produced by the Negotiations Affairs Department of the PLO, much of which was placed onto their website, at: <http://www.nad-plo.org/>

²⁶ The text is at: <http://www.monde-diplomatique.fr/cahier/proche-orient/refugeespal-en>

That is, a figure to be negotiated would limit the number of those entitled to return. On the assumption that a greater number of refugees would wish to return than the figure determined through negotiation, Palestinian refugees would be prevented from exercising their right of return.

Over the subsequent eighteen months, the statement of the Palestinian position became even more distant from the legal understanding of the right of return. In November 2001, the PA Minister of Information (and the head of the PLO Department of Information and Culture) stated that: "We asked for the principle of the right of return, but the implementation of it, it should be discussed in a very practical and even pragmatic way, without affecting or without - yes, without affecting - the Jewish nature of the state of Israel. We said it. This was our position". Developing this point, in an article for the New York Times on 3 February 2002 entitled "The Palestinian Vision of Peace", Yasir 'Arafat wrote:

"We understand Israel's demographic concerns and understand that the right of return of Palestinian refugees, a right guaranteed under international law and United Nations Resolution 194, must be implemented in a way that takes into account such concerns."

It is difficult to understand how the right of return can be implemented without significantly changing Israel's demographic balance, the subject of the concerns referred to, unless the right of return is conceived to entail only a highly limited and staged return of refugees.

In June 2002, Yasir 'Arafat announced his full acceptance of the "Clinton plan", in an interview with Israel's Ha'aretz newspaper. The Clinton plan, as presented on 23 December 2000, requires an agreement that "will make clear that there is no specific right of return to Israel itself but that does not negate the aspiration of the Palestinian people to return to the area."²⁷

That is, the default option specified by President Clinton was that Palestinian refugees would "return" to the Palestinian State established in the majority of the West Bank and Gaza Strip. Israel would be permitted to allow refugees to return to their original homes, but this "will depend upon the policies" of Israel, and be "consistent with Israel sovereign decision". Furthermore, both "parties would agree that this implements Resolution 194". Such an interpretation of General Assembly Resolution 194 clearly does not conform to either the

²⁷ The text of the Clinton plan is at: <http://www.ariga.com/treaties/clintonframework.shtml>

drafting intentions or the literal meaning of the words of the text, nor does it conform to the conception of refugee rights in international law, as outlined above.

The acceptance by Yasir 'Arafat of the Clinton plan, and the limitations on the right of return as accepted by a number of other members of the current PA cabinet, originates in the sense that it would not be possible to secure Israel's (or the major powers') acceptance for its implementation in full. Therefore, according to this standpoint, the right of return can be accepted only as a maximalist conception. That is, the right of return and the interpretation of General Assembly Resolution 194 were conceived of as bargaining chips by the Palestinian negotiating side, and starting points for a negotiating strategy from which convergence with the opposing viewpoint can be reached, to display the extent of the Palestinian concessions to the stronger power, Israel.

IV. The future role of the right of return in negotiations

One problem outlined above is that the maximalist conception of the right of return relies upon a paradox: for the Palestinian negotiating side to articulate their starting point in negotiations, an absolute conception has to be endorsed that is not within the responsibility of the negotiating side itself. The right of return rests with the Palestinian refugee him or herself, and the negotiating side in presenting its opening gambit implicitly acknowledges -- by invoking international human rights law -- that it does not have the legal capacity to dispense with this right. As a result, the popular conception of the right of return as held by Palestinians remains largely unchallenged by their own political leadership. Even in the West Bank and Gaza Strip, over 80% of the Palestinian population endorse a conception of the refugees' future in which all are entitled to choose to return to their original homes.²⁸ In Syria and Lebanon, that figure rises to 98%.²⁹

In these circumstances, it is likely that there will be pressure to bridge the disjunction between the demand that remains extensive in the Palestinian refugee community for a continued will to implement the right of return and the strategy of the Palestinian leadership to press for a territorially-based settlement that leaves the issue of return unresolved. I outline here four ways in which a strategy could be reformulated. These strategies are not mutually exclusive.

Firstly, negotiations could take international human rights as its accepted starting point. It

²⁸ Elia Zureik, *Public Opinion and Palestinian Refugees* (1999).

²⁹ Poll conducted by Dr. Nabil Mahmoud between March and April 1998, taking into consideration the demographic, sex and age distribution; quoted in *al-Majdal* 4 (December 1999), p.19. Other studies

could begin with a determination of what the exact human rights of the relevant parties are, using a combination of the existing international human rights infrastructure and ad hoc bodies. The negotiations of the parties would then be structured in such a way that they were oriented around making the practical arrangements for the implementation and safeguarding of these human rights. Needless to say, this approach has always been rejected both in principle and in practice by the State of Israel. Such a solution will not be accepted by Israel in a bilateral process, unless there is a dramatic alteration in the balance of power in the region.

Secondly, as the conflict in the region has become significantly more violent and dangerous to international peace and security since 2000, there have been increased calls for an imposed solution, either through the United Nations, the United States or the Quartet. That is, an international power would lay down not only the general principles for a settlement, but also the exact formulation of those principles, and would be responsible for implementing their enactment. If such an international power accepted or came to accept the implementation of the right of return, the disjunction between human rights and political possibilities would be significantly narrowed. However, this has not been the approach taken so far by the major powers. The Roadmap released on 30 April 2003 situates the solution for refugees in an "international conference" (Phase III of the Roadmap's plan, scheduled for 2005), and does not ground the principles for negotiation in international human rights law.³⁰ Unless there is a significant alteration in the position of the United States, driven either by a concerted campaign by the Arab States or by altered domestic public opinion, an imposed solution that involves the implementation of human rights law seems highly unlikely.

Thirdly, a division could be accepted by both parties and internationally between the territorial solution and the wider conflict. That is, a long-term interim agreement could be reached in which the West Bank and Gaza Strip are placed under Palestinian sovereignty, whilst the refugee file is kept open for decisions on future implementation. This was an approach that was widely discussed after July 2000, but has not so far won the favour of either side. The Israeli and US positions have been for a full peace agreement that would allow Israel's full economic integration into the Arab Middle East, and this goal was emphasised by President Bush in his speech of 9 May 2003, calling for a "free trade area within a decade".³¹ As a result, the Palestinian negotiating side may be presented with the invidious alternatives of either a full agreement -- without the implementation of the right of

reported in: Elia Zureik, *Refugees and the Peace Process* (Institute for Palestine Studies, 1996).

³⁰ Text at: <http://www.state.gov/r/pa/prs/ps/2003/20062.htm>

³¹ Text at: <http://www.whitehouse.gov/news/releases/2003/05/20030509-11.html>

return -- or no agreement at all.

Fourthly, it could be recollected to whom the right of return belongs. With the widespread Palestinian popular desire for the international acceptance of their representation by the PLO from the 1970s, it has often been forgotten that no institution -- no matter how well-led -- can ever make a claim to have the authority to dispense with the human rights of its constituent members: this is why human rights are conceived of as inalienable. With the right of return as one such human right, the Palestinian negotiating side and the refugees themselves could make it apparent that no-one has the capacity to override the right of the individual refugee to choose to return to his or her home, thus preserving the international standing of the right of return.