

Do Israeli Rights Conflict With the Palestinian Right of Return?

Identifying the Possible Legal Arguments

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This working paper represents only the personal opinion of its author, and does not necessarily reflect the views of any other institution.

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1. Executive Summary	4
2. Introduction	6
a) What is a conflicting right?.....	6
b) Why talk about conflicting rights?.....	7
c) What this paper is not.....	8
3. Jewish self-determination	10
a) Who is entitled to self-determination?.....	11
b) Best case arguments for exclusivist Jewish self-determination	14
c) Commentary: Untangling self-determination in Palestine.....	17
d) “Jewish National Home” v. Jewish state.....	18
e) Immigration v. return.....	20
4. Property Disputes: Refugee Restitution v. Secondary Occupants	23
a) Claims to restitution.....	23
b) Recent post-conflict restitution precedents.....	24
c) Is passage of time relevant?.....	25
d) A possible Israeli argument on conflicting property rights.....	26
e) Observations on the restitution problem.....	26
5. Concern for Stability Amid Mass Return	29
a) The role of the public interest.....	29
b) Possible Israeli argument about stability.....	31
c) Observations on the public interest.....	32
6. Concluding Observations	33

1. Executive summary

Recent historical and legal research have strengthened longstanding arguments that Palestinian refugees are morally and legally entitled to choose whether to return to homes inside Israel and to claim restitution and compensation for lost property. Historical research has generally backed up Palestinian claims that they were expelled from their homes by violence and fear, and likely by a systematic campaign of ethnic cleansing. Legal research has illustrated that the right of return has broad roots in international law.

While the right of return remains highly contentious among Jewish Israelis, some Israeli intellectuals have sought to acknowledge the justice of Palestinian claims while finding alternative reasons for opposing the full implementation of the right of return. Such arguments have centered on the effect Palestinian return would have on Jews and on the State of Israel. Much of this new literature presupposes that the Palestinian and Israeli rights are in conflict.

This paper attempts to develop the idea of conflicting rights as a means of addressing Israeli objections to Palestinian refugee return. Rather than explore Palestinian arguments for the right of return, this paper starts from the assumption that the right of return exists and must be accepted by Israel in order to reach a just peace that complies with international law. Instead, this paper aims to identify and assess separate claims by Jews or Israelis that cannot coexist with refugee return. Without this separation, any assertion of Palestinian rights may be misunderstood as a denial of Israeli interests, and vice versa. Because Palestinians base their right to return in international law, many Israelis may assume that international law leaves no room for their concerns. By looking at separate, conflicting rights, the interests of both sides can at least be acknowledged in the discussion, and both assessed through the lens of international law. This offers a channel of dialogue for Israelis and Palestinians who want a just solution to the conflict.

Broadly speaking, we can identify three types of possible Jewish/Israeli rights that could conflict with Palestinian return. The first is the basic Zionist claim that Jews have a collective right to self-determination to form and maintain a specifically Jewish state, in which Jews must hold a dominant demographic majority. The second are individual Israeli property-related rights, such as the right to a home, that would conflict with property restitution for refugees. The third possible conflicting right addresses Israel's prerogative as a state to use security and fear of socio-political disruption as a justification to avoid full or partial implementation of the right of return.

Each of these claims has, at least in the abstract, a plausible legal basis. However, it is not enough for Jews or Israelis to simply assert a right in a vacuum. In order to function as a conflicting right, they must show that their rights are actually irreconcilable with refugee return, and carry more weight than the right of return. Only some of the possible conflicting rights can plausibly pass this test.

The most frequently asserted Israeli conflicting right is the claim that Israel has a right to exist as a Jewish-dominated state and to resist Palestinian refugee return in order to maintain a Jewish majority. In the abstract, this claim draws support from the fact the League of Nations recognized Jews as a "people" in 1922, and modern human rights law entitles all "peoples" to self-determination. The problem is that self-determination is normally meant as a right of all of the people of a given territory to self-government. It is not a license to artificially change the demographic character of a country by either ethnic cleansing or prohibition of refugee return. The UN's non-binding partition recommendation for Palestine in 1947 specifically prohibited such measures. In international law, self-determination is inclusive, not exclusive; so long as Jewish Israelis retain their equal citizenship in Israel, their right to self-determination cannot be threatened by non-Jews returning to homes in the same country. Self-determination in law is a foundation upon which to base other human rights; it cannot be used to negate other human rights.

A much stronger conflicting rights claim can be made by Israelis concerning property restitution for returning refugees. Since the end of the Cold War, there have been a number of cases of conflict resolution that involved property restitution for displaced and dispossessed people. In Guatemala, South Africa, and in the Balkans, one of the major challenges was to balance the rights of returning refugees against secondary occupants of their property, especially their rights to maintain legally acquired homes. International law mandates that restitution be the primary remedy for refugees who unjustly had their property confiscated by Israel. Yet, one of the chief challenges in negotiating a settlement to the Israeli-Palestinian conflict will be to safeguard the rights of Israeli secondary occupants. This conflicting right cannot negate the entire right of return for Palestinians; recent research indicates that most of the confiscated Palestinian refugee property in Israel remains sparsely populated today. However, the right of return does not necessarily mean the automatic displacement of all Israelis who today live on former refugee property.

Concerns about stability and security in the context of mass refugee return have a sound basis in law. Every state has a right to safeguard security and stability, and rights are sometimes legitimately compromised in the public interest. Yet, such concerns arise in nearly all refugee repatriations in post-conflict situations; they are not unique to Israel/Palestine. Stability and security concerns require carefully planning about how refugee repatriation is implemented, but they do not justify avoiding refugee return. Much of the disruption that could result would be the result of Israeli policies that illegally confiscated refugee property, and of communal tensions that have long fed the Israeli-Palestinian conflict. Such problems are very real, but it would be illogical to use them as justifications to continue the displacement of refugees and hence continue the conflict. Rather, as in other conflict resolution situations, these problems call for refugee return to be carefully planned and staged, and to go hand-in-hand with a broader program of reconciliation.

The general conclusion of the paper is that Israelis and Jews have a range of important interests that should be assessed and considered in deciding how to implement the right of return. International law does not support Zionist claims that Israel has a right to exclude Palestinian refugees simply because they are not Jewish. But international law does protect other important rights, especially the right of Israelis to remain in their homes. A dialogue about conflicting rights is therefore important for framing a rights-based case for Palestinian refugee return, and should be attractive for Israelis who want to remedy the injustice inflicting upon Palestinians without infringing on their own legitimate interests.

2. Introduction

Debates over the right to return often compress two separate questions. First are debates about whether Palestinian refugees in fact have a right to return. Second are Israeli anxieties about what such return would mean. Relatively little attention has been paid to examining how the right of return would play out in practice, and in particular how Palestinian return could be implemented without trampling on Israelis' rights. Leaving these questions unanswered may encourage unnecessary anxiety about refugee return for Israelis, and prevent Palestinians from refining their arguments to accommodate legitimate Israeli interests.

This paper takes as a given that Palestinian refugees have a right to return, as well as restitution of confiscated property. The purpose of this paper is to examine whether Israelis or Jews¹ have rights that might conflict with these Palestinian rights. If such conflicting rights exist, then they would have to be balanced against Palestinian return. Depending on the relative weights of the conflicting rights, Palestinian return rights might be negated entirely, limited in order to reduce harm to Israelis and Jews, or unaffected (if the Israeli/Jewish rights are relatively minimal).

This paper is an attempt to identify potentially conflicting Jewish/Israeli legal rights, articulate the "best case" arguments that can be made for them, and offer a commentary on the strengths and weaknesses of these arguments. It is hence first and foremost an effort to encourage a new line of constructive discussion on the most sensitive and high stakes issue in the Israeli-Palestinian conflict. To this end, each section of the paper provides an overview of the legal context, then sets out possible "pro-Israeli" arguments, and finally provides a commentary on the legal strength of the proposed Israeli argument. This study is intended only to map out particular lines of legal analysis; each topic could be developed in greater detail.

Although this paper presents arguments for Israeli rights that would conflict with the Palestinian refugees' right to return, this paper should not be taken as an argument against the refugees' rights. The legal opinion of the author is that Palestinian refugees individually have the right to choose whether to return to areas that are now part of Israel. *Potential Israeli arguments are made in italics, and do not necessarily reflect the views of the author.* The author's commentary and introductory remarks are in regular type.

a) What is a conflicting right?

To state the obvious, Jews and Israelis have a long list of rights. The only rights addressed here are those that could conflict with the Palestinian refugee right to return. Israeli citizens have a right to life, a right to be free and equal, a right to security, a right to be free from arbitrary arrest, detention or exile, a right to free movement within Israel, and a right to residence inside Israel. None of these rights directly conflicts with Palestinian right of return. Palestinian refugees could return to the country, and Israeli citizens could continue to enjoy these and other rights freely and equally.

What, then, would a conflicting Israeli or Jewish right look like?

Even if Israel were to concede in the abstract that Palestinian refugees have a right to return to their homes inside Israel, there could be entirely separate rights held by Israelis that simply cannot

¹ Throughout this paper, I use the terms "Israeli" and "Jewish" distinctly and deliberately. Israel is a diverse country with citizens of many faiths and ethnic backgrounds, although the majority of Israelis are Jewish. In discussing individual Israeli rights that might conflict with the right of return, it makes little difference whether the Israeli in question is Jewish, Arab, Christian, Muslim, etc. On these questions I will refer to "Israeli" rights. However, some of the most important questions relating to the right of return relate to the collective rights of either Jewish Israelis or of the Jewish people. In these areas, a person's religious background matters a great deal. On these questions, I will refer to "Jewish" or "Jewish Israeli" rights.

coexist with refugee return. In this situation, Palestinian refugees might be blocked from actual return, or the practicalities of their return would have to be adjusted. In this situation, refugees' rights would have to be vindicated in some other way, for instance through extra compensation or some other remedy, but their actual return to a particular place might be prevented. But in order for this to happen, it is not enough for a conflicting right to exist. The conflicting Israeli right must be substantial enough to outweigh Palestinian return.

Broadly speaking, we can identify three types of possible Jewish/Israeli rights that could conflict with Palestinian return. The first are collective Jewish rights to form and maintain a specifically Jewish state, in which Jews must hold a dominant demographic majority. The second are individual Israeli property-related rights that would conflict with property restitution for refugees. The third possible right addresses Israel's prerogative as a state to use the risk of social and political disruption as a justification to avoid full refugee return and property restitution.

b) Why talk about conflicting rights?

Palestinians have been insisting on their right to return to homes inside Israel ever since 1948, while Israel has consistently refused to allow return. General Assembly Resolution 194 of 1948, which called for refugee return, has become a central part of the Palestinian national movement. These debates have often centered on conflicting historical narratives, in which Palestinians claimed to have been expelled while Zionists insisted they left voluntarily or at the instigation of Arab leaders. More recently, historical research based largely on Israeli government archives has generally backed up the Palestinian version. While a few scholars still dispute whether Israel engaged in a pre-meditated plan of ethnic cleansing, fewer and fewer serious historians debate that fear of violence, massacres by Jewish militias and forced expulsions of particular towns and villages at the hands of Israeli forces were the main causes of the Palestinian exodus. Adding to the historical debate, since the late 1990s several legal studies have been published arguing that Palestinian refugees have a right to return that is guaranteed by international law.² This legal scholarship has demonstrated that the right of return has a much broader basis in law than General Assembly Resolution 194, and that Palestinians can legally insist on return even if one were to accept for the sake of argument the older Zionist version of what happened in 1948. In addition, there has been new legal and historical research into the legislative mechanisms used by Israel to transfer control over land from Palestinian refugees to Jews.³ This line of research has bolstered Palestinian arguments that the Israeli land regime is substantially racist, and supports Palestinian claims for property restitution.

In recent years, a number of Israeli and Zionist intellectuals have sought to seriously engage with these arguments from the Palestinian side in a series of conference papers and articles (many of which remain unpublished). A few Israeli jurists, notably Yaffa Zilbershats and Eyal Benvenisti, have argued that there was no right of return in international law in 1948 and that the Palestinian exile should be legitimized as a population transfer between Arab states and Israel. Other Israeli jurists, notably Ruth Lapidot, have responded to Palestinian legal arguments by insisting that law should not be relevant to resolution of the Palestinian refugee problem. It is not the purpose of this paper to debate the basis of the right of return. Suffice it to say, these legal responses to Palestinian arguments appear divorced from the historical evidence about what Israeli forces did to Palestinians in 1948, or are attempts to exempt Israel from the mandates of international law.

² See John Quigley, "Displaced Palestinians and a Right of Return," 39 *Harvard International Law Journal*, 171 (1998); Gail Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*. Bethlehem: BADIL Resource Center for Palestinian Residency and Refugee Rights (January 2001).

³ See Michael R. Fischbach, *Records of Dispossession, Palestinian Refugee Property and the Arab-Israeli Conflict* New York: Columbia University Press, 2003; Alexandre (Sandy) Kedar and Jeremy Forman, "From Arab land to 'Israel Lands': The legal dispossession of the Palestinians displaced by Israel in the wake of 1948," 22 *Environment and Planning Development: Society and Space* 809 (2004).

Perhaps the most interesting intellectual responses from the Israeli side have been produced by political theorists, culminating in a collection of essays published in July 2004 by the Israeli journal *THEORETICAL INQUIRIES IN LAW*.⁴ Several of these writers, notably Chaim Gans, Jeremy Waldron and Yoav Peled and Nadim N. Rouhana (writing jointly) adopt a partially sympathetic approach toward the Palestinian refugees, acknowledging to varying degrees that they were dealt with unjustly during the establishment of the state of Israel, while similarly opposing to varying degrees their right of return. These writers generally assume that Palestinian claims are legitimate in the abstract, but that they cannot be reconciled with the needs of Israel, especially 57 years after the beginning of the problem. They therefore argue that the right of return either cannot be implemented or must be substantially compromised. In their analysis they assume that whenever Palestinian and Jewish/Israeli claims clash, the Palestinians must be the ones to compromise. This imbalance renders their conclusions less convincing. Nevertheless, these essays might be an intellectual opening. That is because, rather than dispute the Palestinian right of return, they articulate Jewish and Israeli fears about what Palestinian return would mean. This opens the door for Palestinians to show either that Jewish/Israeli interests would not be threatened by refugee return or are not as substantial as refugee rights.

There are therefore three reasons to add a conflicting rights approach to the ongoing dialogue over the right of return.

First, assessing Jewish/Israeli rights is important for establishing a level playing field in which claimed Jewish/Israeli rights are subject to the same legal scrutiny as Palestinian claims. Since 1948, while the microscope has been turned on Palestinian claims, much less attention has been paid to the legal aspects of corresponding Jewish/Israeli claims. In some cases, scholars and advocates appear to take for granted that refugee return would unacceptably infringe on Israeli rights. Such arguments may or may not have merit, but they depend on the assumption — often left unanalyzed — that there are in fact legitimate Jewish/Israeli rights that conflict with the right of return.

Second, separating discussion of Israeli/Jewish rights from Palestinian rights may facilitate more productive dialogue between the two sides. Without this separation, any assertion of Palestinian rights may be misunderstood as a denial of Israeli rights, and vice versa. Because Palestinians base their right to return in international law, many Israelis may assume that international law leaves no room for their concerns. By looking at separate, conflicting rights, the interests of both sides can at least be acknowledged in the discussion, and both assessed through the neutral lens of international law. This offers a channel of dialogue for Israelis and Palestinians who want a just solution rooted in international law. Discussing conflicting rights would be useful for Israelis who are sympathetic with the plight of Palestinian refugees, but who worry about the effect on Israel of mass refugee return. This line of analysis would be similarly useful for Palestinian refugees who want to advocate the right of return without infringing on the legitimate interests of Israelis and Israel.

Third, if after legal scrutiny there are valid Jewish/Israeli rights that outweigh the right of return in some or all cases, then Palestinians would be encouraged to respond by adjusting their own claims.

c) What this paper is not

This paper presents a legal analysis; it does not assess political and religious arguments associated with various streams of Zionism which can motivate resistance to the right of return. A number of arguments have been made about why Jews are entitled to either control land in Israel/Palestine, or create a Jewish-controlled state. These arguments reference, among other things, ancient ties to the

⁴ 5 *Theoretical Inquiries in Law* 2 (2004).

land, the value of national redemption after the Holocaust, the need for a refuge from anti-Semitism, the trauma of Jewish Diaspora, the fact that there are many Arab states but only one Jewish state, and perceived religious entitlements or connections. Each of these arguments can generate a rich debate on a political, ethical, historical or theological plane. But such arguments have at most only an indirect relevance to law. They are important for this paper only to the degree they relate to Jewish rights to self-determination, which is discussed in Section 3 on Jewish self-determination.

This paper seeks only to identify potential arguments that Israelis or Jews may make for conflicting rights against the right of return. While it offers a commentary on the strengths and weaknesses of these arguments, it does not attempt to present a full Palestinian rebuttal. The objective here is to add an important dimension to the debate over the right of return. But since this paper does not explore the legitimacy of the right of return, it does not offer a fully developed historical or legal argument for the Palestinian cause. As already mentioned, the paper begins from the premise that Palestinian refugees have a right individually to choose to return to their homes. It is taken as a given that Palestinians have been violently forced from their homes and dispossessed of their property in order to make way for the construction of a Jewish state. Yet, even if it is assumed that Israel was built through colonialism and ethnic cleansing, there still might conceivably be Israeli/Jewish rights that conflict with refugee return. The purpose of this paper is to identify and assess such claims.

3. Jewish self-determination

Among the most frequently asserted claims against the right of return is the Zionist position that Israel has the right to exist as a Jewish state. This claim is asserted in different ways. It is often spoken of in terms of Israel's demographic anxieties about maintaining a dominant Jewish majority.⁵ It is sometimes asserted as Israel's "right to exist," linked to the allegation that Palestinians assert their right to return out of a desire to undo Israel's existence as a Jewish state, rather than to pursue justice for themselves.⁶

The Palestinian right to return on its own does not challenge Israel's sovereignty as a state. Just as other countries' demographic composition has changed through history, so could Israel's. Nor does refugee return inherently challenge Jews' ability to live in Israel even as Palestinian refugees exercise their own right to return. But Palestinian return would challenge Israel's efforts to build and maintain a dominant Jewish majority in the country. Israel's Jewish demographic character is at issue here, not the state of Israel itself, nor the right of Jews to live in Israel.

In the abstract, the key legal question is: Are Jews (or Jewish Israelis) a "people" who have the right in international law to political sovereignty within an independent country? If one ignores the rights of Palestinians, it is not difficult to answer the question "yes." But in order to pose a conflicting right against the Palestinian right to return, Jewish self-determination on its own is not enough. The following argument must be made from the Israeli side:

1. The Jewish community in Israel and/or the Jewish people in general have a collective right to self-determination in Israel/Palestine.
2. A large non-Jewish population would threaten Jewish self-determination.
3. The Jewish national right to self-determination outweighs the competing rights of non-Jewish people to return to their homes, or to otherwise return to the territory that became Israel.

The first premise is plausible; there is legal authority supporting the idea that Jews are a people, although they have never been the only people whose homes are in Israel/Palestine. However, even if one concedes, *arguendo*, the first of these premises, the other points are much more problematic. Although Jews taken in isolation are entitled to self-determination, they could achieve this jointly with non-Jews in a state where all citizens are equal. Since self-determination is mainly a right against foreign domination, ending Jewish dominance over Arabs in Israel would not infringe on Jews' rights to self-determination. And even if Jewish self-determination would be threatened by refugee return, there is no sound basis on which this alone would trump Palestinian rights. Self-determination in international law is meant to facilitate the enjoyment of other rights, not to negate them.

For these reasons, the establishment and maintenance of a Jewish state is the weakest possible conflicting right vis-à-vis the right of return dealt with in this study. This legal weakness is notable in contrast to the political emphasis placed on Israel's determination to maintain itself as a Jewish state. This chapter begins with an overview of the law of self-determination, followed by an attempt to present a best case argument for Jewish self-determination as a conflicting right and a concluding commentary on these arguments. However, it should be understood that the arguments

⁵ See, e.g., Tanya Kramer, "The Controversy of a Palestinian 'Right of Return' to Israel," 18 *Arizona Journal of International Law and Comparative Law* (2001), pp. 1013-1015; Albert W. Wan, "Israel's Conflicted Existence as a Jewish Democratic State: Striking the Proper Balance Under The Citizenship and Entry into Israel Law," 29 *Brooklyn Journal of International Law* (2004), pp. 1345, 1356.

⁶ See, e.g., Marc Zell and Sonia Shnyder, "Palestinian Right of Return or Strategic Weapon?: A Historical, Legal and Moral Political Analysis," 8 *Nexus Journal of Opinion*. 77 (2003); Yaacov Lozowick, *Right to Exist: A Moral Defense of Israel's Wars*. New York: Doubleday, 2003, pp. 220, 221, 235.

presented on the Israeli side in this chapter are on the whole considerably weaker in international law than the arguments proposed in other sections of this study.

a) Who is entitled to self-determination?

The right of peoples to self-determination developed during the same decades when the international community wavered over the emerging conflict in Palestine. The law of self-determination is still ambiguous today, and it was especially vague in its early years. There is therefore no open and shut argument on either side about whether the *Yishuv* (Jewish community in Palestine) had a legal right to establish an independent sovereign state in 1948.

Peoples' rights to self-determination developed from a political principle in international relations after the First World War into a full fledged right today.⁷ Before World War II, states had not yet recognized the right of all peoples to self-determination. It was included in treaty law for the first time in the United Nations Charter.⁸ On its face, the Charter's reference to self-determination was only an articulation of guiding principles and objectives,⁹ although it may also have been a recognition of an emerging customary norm. Self-determination only became indisputably established as a clear right in international law in the 1960s with the UN Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)¹⁰ and the International Bill of Rights (1966).¹¹ Self-determination was included as the first article of both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Since the law was still in development in 1948, any argument for self-determination in 1948 can be subjected to some immediate doubts by legal formalists. Nevertheless, it is clear that in 1948 self-determination was well on its way to being fully recognized as a legal right, and it had already carried substantial political weight in the way the international community dealt with the problem of Palestine after World War I.

Though the right of peoples to self-determination is today clearly established, it is much less clear what the right actually means, and who can legally benefit from it. The most vexing question is whether this is a right held by each ethno-national community, or whether it is merely a right of the people in a given territory to be free from foreign domination. In Israel/Palestine, this boils down in part to the question of partition. Can the right of self-determination be used to justify creating two states, one Jewish and one Arab, out of what was once the unified territory of Palestine? Or did the right of self-determination merely allow all of the people of Palestine (both Jews and Arabs) to free themselves from foreign domination (i.e. the British Mandate)?

International law has generally sought to protect territorial integrity.¹² In the context of decolonization after World War II, commentators tended to define a "people" to simply mean the population of an established territory, rather than each ethnic group within a particular territory.¹³ States and international law commentators have consistently objected to any notion of self-determination that would license all minorities to territorially secede to form separate states. The

⁷ See M.N. Shaw, *International Law*. 4th Ed. Cambridge: Cambridge University Press, 1997, pp. 177-181.

⁸ Charter of the United Nations art. 1(2), 51 Stat. 1031 (June 26, 1945).

⁹ See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge: Cambridge University Press, 1995, p. 43.

¹⁰ G.A. Res. 1514 (XV).

¹¹ Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights include an identical first article that states: "All peoples have the right to self-determination."

¹² See Shaw, *supra* note 7, at 181.

¹³ See T.D. Musgrave, *Self-Determination and National Minorities*. Oxford: Clarendon Press, 1997, pp. 148-149.

International Commission of Jurists that ruled in the 1920 Aaland Islands opinion stated that “positive international law does not recognize the right of national groups, as such, to separate themselves from the state of which they form part by simple expression of a wish.”¹⁴ Hence, rather than requiring the division of states into smaller homogeneous ethno-national states, the right to self-determination can be satisfied simply through democratic self-government within a pre-existing territory.¹⁵

But there may be exceptions. One of the opinions issued in the Aaland Islands Case suggested that normal territorial sovereignty might be compromised in favor of national self-determination during periods of political transformation, and called for the international community to play a role in resolving such cases.¹⁶ In 1975, the International Court of Justice noted that the UN General Assembly has on occasion “dispensed with the requirement of consulting the inhabitants of a given territory,”¹⁷ in other words allowing pre-defined territories to be partitioned. According to the court, such exceptions are made “either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination, or on the conviction that a consultation was totally unnecessary, in view of the special circumstances.”¹⁸ The court did not elaborate on what it meant by “special circumstances,” though this oblique phrase may have been a reference to Israel/Palestine.

Rigidly defining a “people” in line with arbitrary borders can in practice make forming a representative government difficult because the populations in a multi-national state may pledge their political loyalties to their own subjective ethno-national groups rather than to the state's institutions.¹⁹ Some liberal political philosophy has argued that free and democratic institutions are not usually possible in multi-national states.²⁰ These considerations bolster arguments for specific minority groups to form separate, independent and sovereign states. But it should nevertheless be understood that, at most, self-determination supports partitioning established territories only in exceptional cases.

Were self-determination to be defined purely in terms of ethnicity or religion rather than territory, the people in question would need a territory in which they are dominant enough to form a state without endangering basic democratic principles. If it was legitimate to define Jews as a people, and hence establish a Jewish state, then it would logically be reasonable to worry about how to ensure a dominant Jewish majority. Achieving Jewish independence without endangering the rights of Arab Palestinians was always a daunting task given that Jews were a minority in Palestine up to 1948. Transfer also figured prominently in Zionist thinking.

Yet, even if international law in rare circumstances permits drawing new territorial borders, self-determination is never a license for artificially changing the demographics of a given territory or privileging the rights of one community over another. International law has conceived self-determination as a means of facilitating human rights, not as a claim that can defeat other rights.²¹

¹⁴ “Report of International Commission of Jurists on Legal Aspects of the Aaland Islands Question,” *League of Nations Official Journal*, Spec. Supp. No. 3 (1920).

¹⁵ Allison Beth Hodgkins, “Beyond Two States: Alternative Visions of Self-Determination for the People of Palestine,” 28 *Fletcher Forum of World Affairs* (2004), pp. 109, 112-113. (“[F]reedom from colonial rule did not include a right for ethnic groups within the boundaries of those colonies to secede or redraw the boundaries once independence had been secured.”)

¹⁶ “Report of International Commission of Jurists on Legal Aspects of the Aaland Islands Question,” *League of Nations Official Journal*, Spec. Supp. No. 3 (1920).

¹⁷ Advisory Opinion on Western Sahara, ICJ, Reports 1975, 33, para. 59.

¹⁸ *Ibid.*

¹⁹ See Musgrave, *supra* note 13, pp. 152-154.

²⁰ *Ibid.* (quoting J.S. Mill: “Free institutions are next to impossible in a country made up of different nationalities.”)

²¹ Philosophers of human rights have stressed the need to balance collective and individual rights, but individual rights ultimately must take precedence. See Michael Ignatieff, *Human Rights as Politics and Idolatry*. Princeton, NJ:

The UN Charter recognizes self-determination along with principles of equality and human rights in general. There is no provision for self-determination to trump other rights. The Charter's Article 1 provides that the purposes of the United Nations are, *inter alia*:

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

(3) To achieve international co-operation in solving international problems ... and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Three key pre-1948 documents are essential for understanding the way the international community tried to apply emerging principles of self-determination to Palestine. The first is the 1917 Balfour Declaration. The second is the July 24, 1922 decision by the Council of the League of Nations to endorse the Balfour Declaration's objective of establishing a "Jewish national home" in Palestine. The third is the UN General Assembly's 1947 partition resolution (Resolution 181). Of these three documents, only the second had binding legal force. The Balfour Declaration was a purely political statement of British foreign policy, which gained legal importance only when it was included in the League Council's resolution. Resolution 181 was officially only a recommendation. General Assembly resolutions are generally not binding, although they are evidence of the international community's general sense of how international law applies in a specific case.

The international community was consistently unwilling to endorse any forced population transfer in order to achieve territorial partition in Palestine. In 1937, the Peel Commission noted that it had first conceived that partition would involve population transfer, but the British Government flatly rejected this suggestion. Some commentators have noted that the League of Nations had designated Palestine as a whole as a provisionally independent nation in 1919, not as a territory that could be partitioned along ethnic lines, and had hence recognized the sovereignty of the Palestinian people.²² Britain's role as a mandatory power was to "render administrative advice" and provide "tutelage." Rather than act as a sovereign government, Britain was in a fiduciary role, carrying out a "trust."²³ While there was a need to determine how to replace Britain's administrative role in 1948, Palestinian self-determination had already been achieved (at least in theory) via the League's provisional recognition of the country's existence as an independent country.

By 1948, forced expulsion had already been clearly established as a war crime or crime against humanity.²⁴ Israel was therefore bound to accept all of the population – both Jews and non-Jews – from the territory it acquired during the course of the 1948 war. Self-determination did not and cannot justify ethnic cleansing or forced population transfer. This indicates the steep legal challenge that advocates of Jewish self-determination face in opposing the Palestinian right of return.

Princeton University Press, 2001, p. 76. ("It is the individualism of human rights that makes it a valuable bulwark against even the well-intentioned tyranny of linguistic or national groups.").

²² See Boling, *supra* note 2, at 17, 22 (arguing that the people of Mandate Palestine as a whole had a vested collective right to sovereignty, so that political and military efforts to partition the territory were illegal); Hodgkins, *supra* note 15, at 115.

²³ Palestine was a "Class A" mandate under the Covenant of the League of Nations. The Covenant's article 22 provides, in part: "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 the Mandatory until such time as they are able to stand alone." See generally, Boling, *supra* note 2, at 22.

²⁴ See Charter of the International Military Tribunal (IMT) (London Agreement), 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280 (August 8, 1945) (defining "war crimes" to include "ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory" and defining "crimes against humanity" to include "deportation" of a civilian population on political, racial or religious grounds.).

b) Best case arguments for exclusivist Jewish self-determination

i) Territorial integrity could not be maintained in 1948 Palestine

From the end of the Ottoman Empire, Palestine was a troubled territory because it was torn between two competing national claims. Over the ensuing decades, the Jewish and Arab populations grew into separate political communities, with tension and violence growing between them. As Britain ended its mandate, the population of the Palestine territory was so divided that Palestine could not be considered a "definitively constituted" sovereign state (in the words of the International Commission of Jurists in the Aaland Islands Case). Nor could the population of Palestine be considered a single people that could effectively exercise self-determination and establish institutions of democratic self-government.

Hence, the situation in Palestine in 1948 warranted two exceptions to normal rules of international law of state sovereignty and territorial integrity. First, as recommended in the Aaland Islands case, the international community had a role in helping Palestine resolve its unstable de facto status. Second, the Palestine territory could be partitioned in order to allow the two competing peoples inside to enjoy separate self-determination. The UN General Assembly embraced both steps through Resolution 181, recommending the partition of Palestine.

It matters little here that the partition resolution was not binding, nor that the Arab side rejected it. What is important here is that the General Assembly recognized that there was nothing sacred about the territorial boundaries of Palestine. In the case of Palestine, the international community recognized that self-determination could be pursued at the expense of territorial integrity.

ii) The League of Nations and the UN recognized the Jews as a people entitled to self-determination

The Jewish right to self-determination in Palestine has been recognized internationally since 1922. The terms of Israel's Proclamation of Independence grew directly and naturally from decades of international recognition.

In assigning the Palestine Mandate to Great Britain,²⁵ the Council of the League of Nations adopted the terms of the 1917 Balfour Declaration,²⁶ "in favour of the establishment in Palestine of a national home for the Jewish people." The Council explicitly provided that Britain "should be responsible for putting into effect the declaration."²⁷ The Council added to the terms of the Balfour Declarations by stating, "Recognition has thereby been given to the historical connexion of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country."²⁸ The United Nations General Assembly, anticipating the end of the British Mandate, acted in 1947 to implement this Jewish right to self-determination by recommending the partition of Palestine, including "independent Arab and Jewish States."²⁹

This well-known history shows a clear and logical trajectory: first, recognition of Jews as a people; second, recognition of the connection between Jews and the territory then called Palestine; and finally, endorsement of a separate Jewish national claim to self-determination in Palestine. By endorsing partition, the General Assembly rejected the alternative proposition that a Jewish national home could be achieved without full Jewish

²⁵ Declaration of the Council of the League of Nations (24 July 1922) (hereafter "the Mandate").

²⁶ Letter from Foreign Office (Arthur James Balfour) to Lord Rothschild (2 November 1917).

²⁷ The Mandate, *supra* note 25, preamble.

²⁸ *Ibid.*

²⁹ G.A. Res 181 Part I(A)(3) (29 November 1947).

statehood.³⁰ Relying as it did on both the Balfour Declaration and the UN Partition Plan, Israel's 14 May 1948 Proclamation of Independence broke no new ground by declaring: "It is the natural right of the Jewish people to lead, as do all other nations, an independent existence in its sovereign State."³¹

iii) The international community made Jewish self-determination a higher priority than Arab rights

Self-determination has a stronger and clearer basis in international law than does the right of return. The Palestinian right to return relies heavily on customary international law, expressed through UN General Assembly Resolution 194. Self-determination has a firmer basis, having been established in multiple international treaties as a foundation for other rights and for world peace. Self-determination was a founding principle of the UN Charter, in the 1940s. The right to return did not find expression in a treaty until the 1960s.³² It is hence entirely natural that Jewish self-determination is a higher priority right than Palestinian refugee return.

Beginning with the Balfour Declaration and the League of Nations Mandate, the international community recognized that Jewish self-determination would be in tension with, in the words of Arthur Balfour, "the civil and religious rights of existing non-Jewish communities in Palestine." It is lamentable that the balance of rights in Palestine sought by the Balfour Declaration has yet to be achieved. The fact that the international community recognized the obvious — that Jewish and Arab rights were in conflict in Palestine — does not mean that the two peoples' rights were necessarily conditional on each other. A better way to look at the situation was that the international community had no illusions. The international community endorsed the independence and sovereignty for the eventual Jewish State with the full understanding that Arab inclusion in the eventual Jewish state would be problematic.

The 1947 UN Partition Plan, while providing for equal rights for all, also attempted to find a mechanism short of forced population transfer that could prevent a large Arab population from relying on a Jewish state for its civil rights. Under the plan, Arabs living in the Jewish state could opt for the citizenship of the Arab state instead. Jews living in the Arab state could make a reciprocal choice.³³ The plan also temporarily prohibited Arabs from moving into the Jewish state, and vice versa.³⁴ The General Assembly hence wanted to establish incentives for Jews and Arabs to align themselves with their respective national states. The General Assembly of course did not endorse forced population transfers, nor anything approaching ethnic cleansing. But it nevertheless showed a clear preference for as much ethnic homogeneity in each state as possible, and signaled in particular that the independent Jewish state ideally should not have a large Arab population.

The international community was not unaware that Arab rights within a Jewish independent state would be problematic. Nonetheless, the international community endorsed partition. From this, it would be fair to say that the international community was willing if necessary to risk Arab rights in order to achieve an independent Jewish national home. The international community's unwillingness to sacrifice the Jewish people's right to "an independent existence in its sovereign State" has great significance for the implementation of Palestinian refugees' right of return. Their right to return can be fully acknowledged in the same sense that the international community has long acknowledged non-Jewish civil and religious rights in Palestine. But to the extent that the return of a mass

³⁰ Cf. Anglo-American Committee of Inquiry (1946).

³¹ State of Israel Proclamation of Independence (14 May 1948).

³² G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (ratified by Israel 1991).

³³ G.A. Res 181 Part I(C), chapter 3(1).

³⁴ *Ibid.*, Part I(B)(9).

of non-Jewish Palestinians would endanger the Jewish character of the state, the Jewish right to independence is the higher priority and more clearly established. Hence, implementing a full right of return is impossible, though Israel may be able to implement a limited quota of returnees, in a number small enough to maintain Jewish demographic dominance at present and for the foreseeable future. No doubt, this is far from an ideal solution, but it is the only way that long recognized Jewish rights to self-determination may be maintained.

iv) Jewish self-determination is stronger today than in 1948

Today, Israel's sovereignty and independence as a state are well established, and not open to serious dispute. Nearly all of the world recognizes Israel's statehood. Israel was admitted to the UN in 1949, has been recognized by all but a few Arab and Muslim states, and is recognized by all five permanent members of the Security Council. In 1967, a legally binding UN Security Council Resolution resolved any lingering doubts about Israel's legitimacy as a sovereign state within the borders established by the 1949 armistice agreements. Resolution 242 of 13 November 1967, passed to deal with the repercussions of the June 1967 Middle East War, called on Israel to withdrawal only "from territories occupied in the recent conflict," and called for respect for the "sovereignty, territorial integrity and political independence of every state in the area." The Security Council hence accepted de facto the pre-June 1967 boundaries.

The Israeli people now are a mainly Jewish group who define their political identity in reference to their life within a Jewish state. Palestinian refugees outside Israel may have maintained their insistence on their right to return, but the Israeli people — their national identity, way of life, culture, political cohesion, etc. — have developed on a separate track. Even if Palestinian refugees should have been included in Israel from the beginning, history has left them outside the country, so that the Israeli people developed without them. Palestinian refugees today are not part of the Israeli people. They do not interact with Israel socially or politically, and many if not most of the refugees do not accept the legitimacy of a Jewish state. They are not part of the same political grouping. Hence, for Israelis today to exercise their right as a people to "freely determine their political status and freely pursue their economic, social and cultural development" they must remain separate. Israeli self-determination today thus conflicts with the return of non-Jewish Palestinian refugees.

The only logical conclusion that can be drawn from binding international resolutions on the Israeli-Palestinian conflict is that Israel must remain a Jewish state. The League of Nations endorsed the objective of building a Jewish national home in 1922. In 2003, the UN Security Council endorsed a two-state solution. Such a solution to the conflict is logical only if one assumes that Israel will remain Jewish. Hence, Israel's right to security, independence and sovereignty includes implicitly a right to remain Jewish, which necessitates refusing the return of most non-Jewish refugees.

One of the expressions of self-determination for a sovereign state is the prerogative to decide who can become a citizen. Determination of nationality — the granting of citizenship and admission to a political community — is one of the few areas where states may legitimately discriminate on the basis of race, religion, national origin and ethnicity. Nearly all democracies do this in their immigration laws. Some states refuse nationality to people who have lived on their territory for more than one generation. In others, like the United States, immigration and citizenship is the notable arena in which courts have not struck down 19th Century allowances for racial discrimination.

The clearest articulation of this provision for discrimination in international law is in the International Convention on the Elimination of All Forms of Racial Discrimination. Despite generally prohibiting any "distinction, exclusion, restriction or preference based on

race, colour, descent, or national or ethnic origin,"³⁵ the Convention contains a significant exception: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."³⁶

Israel is entirely within its rights to take religion and ethnicity into account in determining who should become an Israeli citizen. Israel discriminates in its law of nationality in favor of Jews, an entirely permissible practice under international law. And it is well within its rights to not allow a large group of non-Jewish refugees to become its citizens.

C) Commentary: Untangling self-determination in Palestine

The strongest aspect of the Jewish self-determination argument put forward here is the premise that Jews are a people with a connection to the land of historic Palestine and a right to a national homeland there. The principle that Jews should establish a “homeland” was recognized in the League of Nations Mandate for Palestine. But this does not mean that Jewish collective rights outweigh Palestinian rights, nor that Jewish self-determination is effective legally as a conflicting right against the refugee right of return. The authorization to build a Jewish national homeland was not a right to form a Jewish-dominated state at the expense of other communities.

The only semi-legal sanction for Israel’s secession from Palestine was the UN Partition Resolution (Resolution 181) in 1947. Had population transfer been a legitimate course of action in 1947, the General Assembly could have included population exchange in its partition recommendation, as occurred in the partition of India and Pakistan. But the General Assembly instead recommended full equality and civil and political rights for Arabs in the prospective Jewish state. Resolution 181 was quite specific about minority rights. Although the UN partition plan would have allowed for Palestinian Arabs inside Israel to voluntarily change their allegiance to the Arab state, its default rule was that Arabs in the Jewish state would remain there as equal citizens. Every non-Jew who was a resident of the Jewish state (i.e., the Palestinians) would have been entitled to citizenship within the Jewish state. Jews in the Arab state would have had a reciprocal right.³⁷ The resolution provided that all Palestinian citizens "shall become citizens of the State in which they are residents and enjoy full civil and political rights."³⁸

When one looks at binding resolutions on the Palestine conflict, the Jewish self-determination argument appears even weaker. Less than a month before Israel proclaimed its independence, Security Council Resolution 46 called on the Jewish Agency and the Arab Higher Committee to "refrain, pending further consideration of the future government of Palestine by the General Assembly, from any political activity which might prejudice the rights, claims, or positions of either community."³⁹ This is an especially important resolution because it was passed in April 1948, during one of the most intense periods of combat and refugee flight in the war. The Security Council omitted any reference to Jewish rights to self-determination, and it clearly anticipated that the General Assembly would arrive at a new recommendation after the rejection of its earlier partition plan. More to the point, preventing war refugees from returning to their original homes and villages certainly violated this provision against prejudicing “the rights, claims, or positions of either community.”

³⁵ International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

³⁶ *Ibid.* art. 1(3).

³⁷ G.A. Res 181 Part I(C), chapter 3(1).

³⁸ *Ibid.*

³⁹ S.C. Res 46(1)d) (17 April 1948).

It is true that the right of return was not explicitly enshrined in an international treaty until the 1960s, but there were no international human rights conventions until then. But human rights certainly existed before the 1960s. The Universal Declaration of Human Rights, approved in December 1948, prohibited discrimination and stated in article 13: “Everyone has the right to leave any country, including his own, and to return to his country.” The general prohibition on forced expulsion had already been established by the London Charter of the Nuremberg Trials.

The doctrine of continuing violations developed in European human rights law holds that states may be liable for rights violations that began even before the ratification of key human rights treaties, so long as the situation continues to exist at the present time.⁴⁰ For instance, in the context of refugee property claims in Cyprus, the European Court of Human Rights has held that Turkey could be liable for property confiscations that occurred 16 years before Turkey accepted the court’s jurisdiction.⁴¹ The same would be equally true in the Palestinian case; the Palestinian exile experience continues today. Not only has Israel’s *de facto* policies not changed Palestinian claims, Israel’s subsequent ratification of key human rights treaties have strengthened Palestinian arguments for the right of return.⁴²

d) “Jewish National Home” v. Jewish state

The drafting history of the Balfour Declaration indicates that British authorities at the time did not necessarily believe they were sanctioning a separate Jewish state. As one account of the process explained,

[T]he Zionist movement actually failed to secure British endorsement of a Jewish Commonwealth of State in Palestine despite the document’s endorsement of a Jewish homeland. As a result of the efforts of Lord Curzon, and several non-Zionist Jews in the cabinet, the actual declaration stopped short of endorsing a state.⁴³

Throughout the 1930s and 1940s, the Mandate authorities (and the various commissions they created) wavered about whether the Balfour language endorsing a “Jewish national home” meant an independent Jewish state, or merely the development of a Jewish national community within the state of Palestine. Just one year before the UN partition plan, the 1946 Anglo-American Committee of Inquiry had argued against partition:

The Jewish National Home...is today a reality established under international guarantee. It has a right to continued existence, protection and development. Yet Palestine is not, and never can be a purely Jewish land. ...It is, therefore, neither just nor practicable that Palestine should become either an Arab state, in which an Arab majority would control the destiny of a Jewish minority, or a Jewish state, in which a Jewish majority would control that of an Arab minority. ...Palestine, then, must be established as a country in which the legitimate national aspirations of both Jews and Arabs can be reconciled without either side fearing the ascendancy of the other.

⁴⁰ Papamichalopoulos and Others v. Greece, 18/1992/363/437, at para. 40 (1993).

⁴¹ Loizidou v. Turkey, 40/1993/435/514 (1996) at para. 42.

⁴² The doctrine of continuous violations holds that states may be liable for rights violations that began even before the ratification of key human rights instruments, so long as the situation still exists at the present time. See Papamichalopoulos and Others v. Greece, Eur. Ct. H.R. judgment of 24 June 1993, Ser. A no. 260-B, p. 69, para. 40.

⁴³ Hodgkins, *supra* note 15, at 115, citing Leonard Stein, *The Balfour Declaration*. New York: Simon and Schuster, 1961, p. 500.

Nevertheless, international law adapts to changed circumstances. New states may acquire international legitimacy by the mere fact of their existence as sovereign political units controlling a permanent population and having a territorial base.⁴⁴ A state may achieve this through the principle of self-determination, as Israel argues it did in 1948. But international law allows the recognition of new states *de facto*, not only *de jure*.⁴⁵ Hence, although much of the international community (including the United Nations) did not explicitly endorse the way Israel came into existence, Israel has acquired legitimacy over time.

The concept of partitioning Palestine into two states has gained legal legitimacy as well. In 2003, the Security Council explicitly endorsed the concept of partition of historic Palestine as a final resolution to the conflict. Resolution 1515 of 19 November 2003 called on all parties to implement the “Performance Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict.” Resolution 1515 specifically endorsed the “vision of two states living side by side in peace and security.”

Like the Balfour Declaration at the end of World War I, the current Road Map shows the intersection between international law and politics. The Road Map grew from U.S. President George W. Bush’s speech of 24 June 2002. When the Road Map was first proposed by the Quartet (the United States, the European Union, Russia and the UN) in December 2002, it had political force given the power of the states and institutions that drafted it. But until it was endorsed by the Security Council, the Road Map was not legally binding.⁴⁶

Being a sovereign state and being a specifically Jewish state are two separate questions. Israel has acquired legitimacy only as a state, not as a specifically Jewish state. The Road Map plan makes no mention of the ethnic or religious identity of either state; it does not say that Israel must be “Jewish,” nor that the proposed Palestinian state must be “Arab.” One could certainly argue that this is implied in a two-state solution, but one can also still say that Israel’s existence as a specifically Jewish state has never been explicitly endorsed in a legally binding instrument. The two-state formula allows for substantial flexibility regarding the demographic composition of each state, just as the UN’s 1947 partition resolution recommended a “Jewish” state with only a marginal Jewish majority.

Assuming the legitimacy of partitioning Palestine in 1948, or of the two-state solution today, there is still the question of whether Jewish self-determination requires complete ethnic homogeneity -- in other words, a dominant Jewish majority. It is one thing to take demographics into account when defining a “people” for the sake of self-determination. It is another to look only at demographics. The UN’s partition recommendation was essentially territorial in definition, but used ethnicity as a guide as it carved out the territory. When the UN General Assembly recommended partition in 1947, the proposed “Jewish” state would have had only a narrow Jewish majority. The UN endorsed the Jewish nature of this state only by recommending boundaries in which there would be a slim Jewish majority and by providing “facilities for a substantial immigration.”⁴⁷ Under the resolution, the Jewish character of the state could not be established, strengthened or maintained through any compromise of Arab rights.

The suggestion that Palestinian refugees are not connected with the Israeli “people” and therefore cannot be included in Israeli self-determination is essentially a circular argument, and an effectively

⁴⁴ See Ian Brownlie, *Principles of Public International Law*, 6th Ed. Oxford: Oxford University Press, 2003, p. 77.

⁴⁵ See Oppenheim’s *International Law*, 9th Ed., sect. 46 (1992).

⁴⁶ On 14 April 2004, President Bush George W. Bush gave Israeli Prime Minister Ariel Sharon a letter stating that Israel should remain a Jewish state, and opposing Palestinian refugee return to Israel. At present, this is merely a political statement reflecting American policy, similar to the status of the Balfour Declaration in 1917. Its importance stems from the political power of the United States, but it is not international law.

⁴⁷ G.A. Res 181 Part I(A)(2).

Jewish-centric perspective. They have been excluded from Israel only because of the Israeli denial of the right to return. Palestinian refugees are, at most, socially distinct from only Jewish Israelis, not from all Israelis. Palestinian citizens of Israel share culture, religious, and family ties with Palestinian refugees, not to mention coming from the same places of origin within historic Palestine. In addition, the economic ties between the occupied Palestinian territories (including refugee camps) and Israel, not to mention the geographic proximity of the refugee camps to Israel should not be easily dismissed. Palestinian refugees' ties to their homeland is not at issue so much as the question of whether Jews have a collective right to maintain dominant political and economic control of the country.

Though non-binding, the UN partition plan illustrates that building a Jewish national home need not necessitate Jewish demographic dominance. This concept is very different from the Jewish state idea that Israel insists on today. It would not have had a dominant Jewish majority. Instead, it would have had a significant Jewish population within a diverse country. One could still rationalize partition on the logic that carving out a separate state provided the Jewish community sufficient demographic weight to feel secure in a context of ethnic tension. In the proposed state, Jews would not have been overwhelmingly dominant in number, but they also would not have had to live as a small minority. This version of Jewish self-determination does not conflict with the Palestinian right of return.

e) Immigration v. return

The Israeli-Palestinian conflict has produced a confusing vocabulary about migration, much of which is connected to conflicting notions of self-determination. Palestinians insist on their right to return, while Israel has a Law of Return permitting Jews from other countries to immigrate. While Jewish immigration for Zionism has been a means reconstituting a homeland, for Palestinians it has been a form of colonization and fuel for displacement. Whereas for Palestinians return would be a just restitution of the *status quo*, for Israelis it would be a disruptive imposition of a foreign people in a sovereign state. Essentially, by viewing the other's form of migration (immigration for Jews, return for Palestinians) as illegitimate, the two sides can perceive self-determination in artificial terms in which the other is not present in large numbers. International law is not amenable to such approaches on either side.

Since the vast majority of Jewish Israelis came to the country after the Balfour Declaration, Palestinians can with good reason perceive the size of the Jewish population in their homeland to be the artificial product of colonial policies. The League of Nations endorsed Jewish immigration in its Palestine Mandate, and linked immigration to land settlement.⁴⁸ This deprived Palestinians from setting an immigration policy for their own country, which western states had been doing since the 19th century, and which Israel seized the opportunity to do after 1948. At some points during the mandate period, when Britain sought to limit Jewish immigration, Zionist organizations organized illegal immigration. Almost immediately after the exodus of Palestinian refugees in 1948, Israel and Zionist organizations facilitated the immigration of hundreds of thousands of Jews, some of whom were settled on lands and in homes confiscated from expelled refugees.

For all these reasons, much of Jewish immigration to Palestine and later to Israel should be seen as bound up in colonialism and racism. Yet, no matter how they arrived, Jewish immigrants to Israel and their descendants are today Israeli citizens and have rights to remain in Israel as equal citizens, along with returning Palestinian refugees. There are three reasons for this. First, Israel is a

⁴⁸ The Mandate, *supra* note 25, at article 6 ("The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish agency ... close settlement by Jews on the land, including State lands and waste lands not required for public purposes.")

sovereign state that is entitled to determine its own immigration and nationality laws. Second, for better or worse Jewish immigration was endorsed by the League of Nations mandate, and had the legitimacy conferred by the League. Third, many (though by no means all) of the Jewish immigrants were refugees either from Nazism in Europe or post-1948 anti-Jewish discrimination in Arab countries. Such people had a right to seek asylum.

The State of Israel has the right, if not the duty, to preserve Jewish and Hebrew culture. The International Covenant on Economic, Social, and Cultural Rights, article 15, guarantees everyone's rights to "take part in cultural life." The state has similar responsibilities to its substantial non-Jewish (mainly Arab) communities; preservation of one culture is not a negation of another. Israelis today have the same rights that Palestinians had in 1948: To remain in their country, and to be equal citizens in it. But the International Covenant on Economic, Social and Cultural Rights, article 5, makes clear that its protection of culture does not permit "any State, group or person ... to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms [of others]."

Some defenders of Zionism have increasingly sought to justify Jewish dominance in Israel by analogy to international migration law. There are a number of states in the world that define themselves by reference to a specific nationality, religion or ethnicity. This is one reason why international law allows discrimination in the context of immigration law, for instance favoring immigrants with certain ethnic, religious and racial traits. This area of international law is morally unsettling because it permits forms of discrimination that would be abhorrent to human rights in any other field. Yet, this is a facet of international law today.⁴⁹

International law permits Israel to discriminate in favoring Jews as immigrants via the Law of Return. The Inter-American Court of Human Rights issued an advisory opinion in 1984 that Costa Rica is entitled to favor "nationals of other Central American countries, Spaniards and Ibero-Americans" in its nationality laws because it is legitimate in naturalization procedures to favor,

those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.⁵⁰

But the problem with this analogy is that when we talk of Palestinian refugees we are not talking about immigration of new citizens. The right of return is about the repatriation of people who were forced from their homes and de-nationalized for discriminatory reasons. Sovereign states may legally restrict immigration in order to *maintain* a particular ethnic or religious demography. But they may not expel or prohibit people from returning to their homes in order to create a new demographic reality. Since 1948 Israel has used military and political force to dramatically remake the ethnic balance of the country. That is not permissible in law, and is not justified by claims to self-determination.

⁴⁹ See, e.g., Roger I. Zakheim, "Israel in the human rights era: Finding a moral justification of the Jewish State," 36 *New York University Journal of International Law and Politics*. (2004), p. 1005 (arguing that Israel can find legal justification for maintaining the Law of Return for Jews, but not for ethnic cleansing).

⁵⁰ Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (OC-4/84), paras. 57, 60; see also *Belgian Linguistic Case*, 6 European Court of Human Rights. (ser. A) (1968) (reasoning that differential treatment is impermissible only when it lacks an objective and reasonable justification).

The Palestinian situation is covered by the Racial Discrimination Convention's article 5:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms ... notably in the enjoyment of the following rights...[including] The right to leave any country, including one's own, and to return to one's country; The right to nationality; [and] The right to own property alone as well as in association with others.

The U.N. Human Rights Committee, interpreting analogous provisions of the International Covenant on Civil and Political Rights, has commented: "The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."⁵¹ Were we to accept the Israeli argument made above, then a treaty designed to eliminate discrimination would somehow be read to allow ethnic cleansing. Such a reading would clearly undermine international human rights law, and is not warranted here.

⁵¹ U.N. Human Rights Committee, General Comment No. 27 para 19 (1999).

4. Property disputes: Refugee restitution v. secondary occupants

a) Claims to restitution

Refugee return is highly linked to property restitution.⁵² Property restitution has been a hallmark of refugee return and reconstruction in other ethnic conflicts, such as Bosnia and Herzegovina, Kosovo, Guatemala and elsewhere. If Palestinian refugees were to return to Israel without being restituted their original properties, they would essentially become internally displaced within Israel. Many Palestinian citizens of Israel are already in this situation. Yet relatively more attention has been paid to the demographic consequences of return than to the more technical issues involved in property claims.

Whereas compensation remedies an injustice through the payment of money, restitution remedies dispossession by allowing a property owner to reclaim the specific property that he or she lost, vindicating property rights in the most direct possible way. For refugees, restitution has a clear basis in international law. A number of legal authorities make clear that restitution, not compensation, is the primary remedy for violations of property rights, especially for refugees.⁵³

Restitution can give victims a unique sense of justice that monetary compensation may never achieve. Although property of course has an economic importance, land and homes also have unique sentimental importance to people and are, in this sense, priceless. Where land is highly bound up with questions of personal and national identity, as is clearly the case in Israel and Palestine, money alone is unlikely to bring a complete sense of justice. Moreover, only restitution can actually reverse ethnic cleansing. Compensation may concede past injustice or possibly deter future violations, but it leaves ethnic displacement in place.

Much as this paper assumes for the sake of argument that refugees have a right to return, we can assume for present purposes that they have a right to seek restitution as well. The important issue here is to ask whether Israelis have conflicting rights that may act as defenses to restitution.

Even if the *State* of Israel was a wrongdoer in terms of property seizures, individual Israelis who have used the property (known as “secondary occupants”) can have their own separate rights that may conflict with the rights of returning refugees. Generally two areas of law intersect to offer potential arguments for Israelis. First, human rights law protects people’s right to housing, and can hence potentially affect any effort to evict Israelis from residences on refugee property. Second, property law in many cases protects investments even in property that should not have been taken in the first place.

Even though they preferred restitution as a remedy, both the Permanent Court of International Justice in 1928 and the European Court of Human Rights have accepted compensation or restitution of alternative property as well as a remedy for property violations where restitution would not be possible.⁵⁴ The *Chorzow Factory* decision stated:

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

⁵² See UN High Commissioner for Refugees (UNHCR), *Handbook for Repatriation and Reintegration Activities*. Geneva: UNHCR (May 2004), p. 16.

⁵³ UNHCR Executive Committee (EXCOM), Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, Conclusion No. 101 (LV) (2004). Committee on the Elimination of Racial Discrimination, General Recommendation XXII on article 5 of the Convention on refugees and displaced persons para. 2(c) (1996); U.N. Human Rights Commission Resolution 2003/34.

⁵⁴ Case Concerning the Factory of Chorzów, Permanent Court of International Justice, Ser. A, no. 17, p. 47; *Papamichalopoulos and Others v. Greece* (Article 50), 18/1992/363/437 (1995), para. 39.

damages for loss 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.

The problem is how to define when restitution is “impossible.” This has no clear answer in international law today.

The entire question of property restitution is worthy of a far more in depth legal study; the following discussion will only briefly touch on the relevant issues.

b) Recent post-conflict restitution precedents

Since the end of the Cold War, there have been several cases of mass restitution in the context of conflict resolution. One of the most vexing problems in these cases has been how to satisfy displaced persons’ claims for property restitution when their property has been occupied by other people. Much as it provides a unique sense of justice to victims, restitution imposes immediate and direct hardships on other individuals. Current occupants of a property must usually be evicted. Three different UN studies have concluded that there is currently a lack of clarity about how to resolve conflicting rights between returning refugees and secondary occupants, and that this is an area in which more legal development is needed.⁵⁵

Property restitution has often been impeded by the rights of secondary occupants of property.⁵⁶ These hardships may be especially acute in the case of Israel/Palestine because an entire new country has been built over more than half a century around the assumption that the displacements and land confiscations of the late 1940s and early 1950s would not be reversed. Because of these hardships, current occupants can assert various defenses to restitution.

In Bosnia and Herzegovina and in Kosovo, secondary occupants were allowed few defenses against restitution. The Dayton Accords’ Annex 7 of the accords covered the rights of refugees and displaced persons. Its first paragraph provided:

All refugees and displaced persons have the right 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.

If the claimant has a valid property right, eviction may be prevented only if the occupant has no alternative housing, and in that case it may usually only be delayed until temporary housing becomes available.⁵⁷ UN regulations in Kosovo are similar. UN Security Council Resolution 1244 (1999) provided for a right of return, but did not provide specific rules governing property rights. Like Bosnia, restitution arrangements in Kosovo grant secondary occupants relatively little recourse under UN regulations. In general, their need for replacement housing can lead to a delay of restitution of only six months.⁵⁸

⁵⁵ UN High Commissioner for Refugees (UNHCR) Inspection and Evaluation Service, *The Problem of Access to Land and Ownership in Repatriation Operations*. EVAL/03/98 (May 1998), p. 48; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The return of refugees’ or displaced persons’ property*, Working paper submitted by Mr. Paulo Sergio Pinheiro, E/CN.4/Sub.2/2002/17 (12 June 2002), at para. 48; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Final report of the Special Rapporteur*. E/CN.4/Sub.2/2005/17 (28 June 2005), paras. 8-9.

⁵⁶ *Final Report of the Special Rapporteur*, *supra* note. 55, at para. 17; *Working paper by Paulo Sergio Pinheiro*, *supra* note 55, at paras. 46-48; UNHCR, *supra* note 55, at paras. 47-48.

⁵⁷ Paul Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study*. Working Paper No. 1. Bethlehem: BADIL Resource Center for Palestinian Residency & Refugee Rights (April 2003), pp. 13-14.

⁵⁸ UNMIK/REG/2000/60 (31 Oct 2000) art. 13.2.

On the other hand, in South Africa, secondary occupants were eligible for substantial defenses against restitution. The South African Land Claims Court considered whether it is “practical” to order restitution.⁵⁹ The South African system considered restitution as a conflict of rights between the current owner and the dispossessed person.⁶⁰ Where land has been urbanized or developed industrially, direct restitution is usually avoided in favor of financial compensation.⁶¹ In addition, the person who loses his property through restitution (i.e., usually a white owner) is entitled to compensation from the state.⁶²

c) Is passage of time relevant?

A common question regarding Palestinian refugee rights is whether the weight of their claims is in any way diminished by the decades that have passed since their original exile. In a recent article on the Palestinian right of return, Jeremy Waldron argued that the passage of time can render legitimate originally unjust seizures of indigenous peoples’ lands. He calls this the “supersession” thesis: “Certain things that were unjust when they occurred may be overtaken by events in a way that means their injustice has been superseded.”⁶³ Waldron’s argument is rooted in his view of moral philosophy, and relies on colonial era violations that pre-dated modern humanitarian and human rights law. However, we can attempt to assess it by reference to comparative examples of restitution in other conflict resolution situations.

Perhaps the most favorable precedent for an Israeli argument based on lapse of time comes from Rwanda. The Rwandan government in 1994 proclaimed its intention to apply the 1993 Arusha Accords, which guaranteed the right to return for all refugees. A related protocol on refugee repatriation held that return is “an inalienable right” and essential to “peace, unity, and national reconciliation.” This protocol allowed returning refugees to settle “in any place of their choice” so long as they do not encroach on others’ rights. It also held that “all refugees shall ... have the right to repossess their property on return.”⁶⁴ However, the same protocol stated:

The two parties recommend, however, that in order to promote social harmony and national reconciliation, refugees who left the country more than 10 years ago should not reclaim their properties, which might have been occupied by other people.⁶⁵

Those excluded from restitution by this rule were to receive compensation. The “ten-year” rule has been explained as a reflection of Rwanda’s housing and land crisis, in which many Rwandan’s took over refugees’ property in good faith, or perhaps out of desperation. Restitution would have required mass resettlement of these new residents.⁶⁶ A UN report explained the Rwandan system as a unique application of local customary law, rather than a general precedent.⁶⁷

⁵⁹ Emily Bordeaux Smith, “South Africa’s Land Reform Policy and International Human Rights Law,” 19 *Wisconsin International Law Journal* (2001), pp. 267, 286.

⁶⁰ Kristina Mannerback and Hanna Fransson, *Restitution of Land Rights as Part of Land Reform in South Africa: A Critical Analysis of the Process*. Gothenburg Department of Law (2003), p. 92, available at www.handles.gu.se/epc/archive/00003601.

⁶¹ *Ibid.* at 33.

⁶² *Ibid.*

⁶³ Jeremy Waldron, “Settlement, Return and the Supersession Thesis,” 5 *Theoretical Inquiries in Law* (2004), pp. 237, 240.

⁶⁴ Lisa Jones, “Giving and Taking Away: The Difference Between Theory and Practice Regarding Property in Rwanda,” unpublished manuscript of chapter to be published in *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons*. Scott Leckie (ed.) New York: Transnational Publishers, 2003.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *UNHCR Inspection and Evaluation Service*, *supra* note 55, at para. 48.

At the other extreme, South Africa's reconciliation process allowed for restitution claims dating back to the 1913 Native Land Act. The South African Constitution's Bill of Rights section 25(7) provides: "[A] person or community dispossessed of property after 9 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress."

d) A possible Israeli argument on conflicting property rights

The right of returning Palestinian refugees to claim restitution must be balanced against the rights of Israelis who presently occupy their property. Israeli secondary occupants' rights will be especially strong in the case of residences, since the right to a home is specifically protected in international law. Business can also be protected when they have made good faith investments to improve their property; at the very least they would be entitled to compensation for their loss should they be evicted.

The fact that Israel has been a sovereign state for 58 years weighs heavily in favor of secondary occupants, especially relative to those in the Balkans where new property acquisitions had little legitimacy and were reversed quickly. The precedent in Rwanda indicates that conflict resolution does not require a complete reversal of long standing property transfers.

In balancing refugee rights against those of secondary occupants, one must consider the hardships that would result from evicting the present occupants. The current status quo is that most Palestinian villages in Israel were destroyed, and remaining property in urban areas occupied by Israelis. Significant number of Israelis would need to be displaced and compensated if refugees are to return. Such hardships would be difficult to justify given that no matter where they return Palestinian refugees will need to invest and re-build their communities. As a result, the balance of hardships favors allowing Israelis to remain and instead give returning refugees alternative property and compensation.⁶⁸

e) Observations on the restitution problem

Individual property rights are the strongest conflicting rights claim that Israel can make against the right of return under international law. Secondary occupants' rights have been a major issue in other restitution programs. This means that Israelis can conceivably acknowledge the refugees' right to return without necessarily conceding that any Israelis need to be displaced. In order to comply with international law, restitution should be the primary or default remedy for refugee property claims which can be compromised only when it would impose substantial hardship. Whenever a Palestinian refugee is denied restitution, he or she would be owed substantial compensation by Israel, which is ultimately responsible for having confiscated refugee property. Nevertheless, a rights-based resolution of the refugee issue might not actually return all Palestinians to their original properties.

Nevertheless, the rights of secondary occupants are also subject to substantial limits.

First of all, secondary occupants' rights would not block all refugee return, and it would have little effect in areas of the country that are sparsely populated.⁶⁹ Recent research by scholar Salman Abu

⁶⁸ It should be noted for clarity that this argument can extend only to property inside Israel where Israeli domestic property law applied. Israelis could not make these arguments about land inside settlements (colonies) in the occupied Palestinian territories (including East Jerusalem) since their residence is not on occupied territory (not inside Israel) and is in violation of the Fourth Geneva Convention and UN Security Council Resolution 242.

⁶⁹ Chaim Gans reaches a similar conclusion in an essay based on moral philosophy rather than law. Chaim Gans, "The Palestinian Right of Return and the Justice of Zionism," 5 *Theoretical Inquiries in Law* 2 (2004). He argues that Palestinian refugees should be enjoy the right to return only in unpopulated areas of Israel.

Sitta⁷⁰ has noted that the majority of Israeli Jews live in the central region of the country where much of the land was Jewish-owned before 1948. While much urban refugee property was transferred to Jews, the majority of confiscated land remains vacant or sparsely populated. Hence, even if a final settlement took a very lenient approach toward Israeli property rights, the majority of Palestinian refugees would likely be able to return to their homes.

Second, not all Israeli property rights are equal. International law is most protective of residences and the right of people not to be displaced from their homes; commercial, industrial and agricultural property will be subject to much less protection. In such cases, there is far less harm in displacing the secondary occupants, who at most should be able to claim compensation for their investments in the land. This compensation could come from the state, which is responsible for having misallocated the land, not from the returning refugees.

Third, the means by which various Israeli individuals and institutions acquired and used land may be an important consideration limiting defenses to restitution. The purpose of protecting secondary occupants is to avoid disrupting the lives of innocent persons. But where the secondary occupants were responsible for the original confiscation or for racially discriminatory allocation of land, it may not be equitable to protect their rights over those of return refugees. Proposed UN Principles on Housing and Property Restitution for Refugees and Displaced Persons state:

The egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property, preempting the formation of bona fide property interests in such cases.⁷¹

The Jewish National Fund (JNF) in particular acquired a great deal of confiscated refugee property in the late 1940s and 1950s through land sales that were illegal even under Israeli law, and insists to the present day that its property can only be used for the benefit of Jews.⁷² A number of powerful Israeli constituencies lobbied the Israeli government to distribute particularly valuable homes to them, and to give lower standard accommodations to new Jewish immigrants.⁷³ In such cases, Israeli secondary occupants may not be able to legitimately block property restitution to returning refugees.

Fourth, even where secondary occupants acquired property in good faith, some authorities state that it is the secondary occupant, not the returning refugee, who should accept compensation, at least where the original buildings are still in existence.⁷⁴

Finally, it remains open to Palestinians to argue that they were victims of a state-sponsored discriminatory land regime that was inseparable from a larger campaign of ethnic cleansing. Palestinians can argue that they were victims of Israel, and have a right to restitution from Israel. If this requires the state to evict other individuals, then arguably the secondary occupants should seek

⁷⁰ See Salman Abu Sitta, "The Feasibility of the Right of Return," Palestinian Refugee Research Net (June 1997) <http://www.arts.mcgill.ca/mepp/prrn/papers/abusitta.html>; Salman Abu-Sitta, "The Right of Return: Sacred, Legal and Possible," in *Palestinian Refugees: The Right of Return*. Naseer Aruri (ed.). London: Pluto Press, 2001, p. 95.

⁷¹ Final report of the Special Rapporteur, *supra* note 55, at para 17.4.

⁷² Alexandre (Sandy) Kedar and Jeremy Forman, "From Arab land to 'Israel Lands': the legal dispossession of the Palestinians displaced by Israel in the wake of 1948," 22 *Environment and Planning Development: Society and Space* (2001), pp. 809, 815.

⁷³ See Nathan Krystall, "The Fall of the New City 1947-1950," in *Jerusalem 1948, The Arab Neighbourhoods of the City and their Fate in the War*. Salim Tamari (ed.). Jerusalem: BADIL Resource Center for Palestinian Residency & Refugee Rights and the Institute for Jerusalem Studies, 1999, p. 123.

⁷⁴ Final report of the Special Rapporteur, *supra* note 55, at para 17.4. *Compare ibid.* at para. 21.2, (recommending that returning refugees be given compensation in lieu of restitution "when housing, land and/or property is destroyed or when it no longer exists.").

compensation or alternative property, rather than place the burden of compromise on people who spent decades as refugees in exile.

Since international law remains ambiguous about how refugees and secondary occupants' rights should be balanced, this is an area where Israeli and Palestinian negotiators may have substantial flexibility to design a solution. In other conflict resolution settings, the negotiated settlement prescribed general rules governing restitution along with an individual claims mechanism to resolve specific cases over the ensuing years. However, the precise rules varied considerably, especially on the question of how to weight the rights of secondary occupants.

5. Concern for stability amid mass return

A number of writers who defend the Israeli position against the right of return have indicated, directly or indirectly, that the return of Palestinian refugees to Israel would be a security threat to Israel.⁷⁵ This fear is to some extent acknowledged in the text of General Assembly Resolution 194 of 1947, which recognizes the right of return. As Justus Weiner has noted:

General Assembly Resolution 194 limits permission to individuals that wish to return and are willing to 'live at peace with their neighbors.' In other words, even if one ignores the non-binding nature of General Assembly resolutions, Resolution 194 limits the return of Palestinian refugees to those who wish to live peaceably with Israel, i.e., by refraining from terrorism and irredentist activities.⁷⁶

While there is a basis in law for raising security concern in individual cases where there is a reason to consider a particular person dangerous, it is more doubtful whether this can be raised for an entire population based solely on their nationality. Such an approach would run afoul of strong rules in international law against racial discrimination. However, could there be other grounds for raising general concerns of general public interest inherent in refugee return?

A major practical concern associated with any refugee repatriation is the issue of stability. Most refugee repatriations are associated with countries in need of development, so that repatriation and post-conflict reconstruction go hand in hand. In the case of Israel-Palestine, Israel is already a highly developed country, and the concern would be that mass returns would destabilize the country, undo its economic *status quo* and cause mass new displacements.

It is unclear in international human rights law exactly how far a state may go to compromise rights for the sake of stability, especially in a case like the Palestinian one. Must Israel's concerns be limited solely to disruption to the economy and housing supply, or can it also take into account potential disorder stemming from ethnic tensions amid refugee repatriation? Can Israel raise concerns about maintaining order when it bears responsibility for having excluded the refugees in the first place?

a) The role of the public interest

In the 1995 case of *Scollo v. Italy*, the European Court of Human Rights noted that concern for the general public interest gave a state a legitimate reason to avoid mass housing evictions. The Court explained: "To have enforced all evictions simultaneously would undoubtedly have led to considerable social tension and jeopardized public order." The Court has recently revisited this issue in the context of a more than 50-year-old mass property confiscation problem. Its ruling suggests that Israel could have legal grounds to resist mass restitution, not on the basis of individual property claims, but out of concern for general public order.

On 22 June 2004, the European Court of Human Rights issued a judgment in the case of *Broniowski v. Poland*⁷⁷ concerning a dispute over restitution of pre-World War II property in Poland. Parts of what are now Belarus, Lithuania and Ukraine were part of Poland before World War II, and were known as the "Bug River" territories. The Yalta and Potsdam conferences drew a

⁷⁵ See Kramer, *supra* note 5, at 984-985, 998; Justus R. Weiner, "The Palestinian Refugees' "Right to Return" and the Peace Process," 20 *B.C. International and Comparative Law Review* 1 (1997), pp. 29, 38-39; Wan, *supra* note 4, at 1356; Kurt Rene Radley, "The Palestinian Refugees: The Right to Return in International Law," 72 *American Journal of International Law* (1978), pp. 586, 613.

⁷⁶ Weiner, *supra* note 73, at 41-42.

⁷⁷ Application No. 31443/96 (2004).

new border between Poland and the Soviet Union, stripping Poland of the territory, and prescribing a population transfer. In September 1944 bilateral "Republican Agreements" with the USSR, Poland agreed to compensate Poles from the Bug River territories who were forced to move to Poland, and who lost their property. The agreements called this "repatriation," though it would seem more accurately described as a forced expulsion. From 1944 to 1953, around 1,240,000 persons were displaced from the Bug River Territories.

During this displacement, Broniowski's grandmother lost a large property in what is now Ukraine, and from 1947 until 2004 she and her heirs went through a long series of procedures to try to obtain compensation. In 1982, she was given a lesser property inside Poland, worth only 2 percent of the value of her original property. After the fall of the Communist regime, the Polish Government went through a substantial reorganization, which included a reorganization of state lands. In the process, the Polish Government informed Broniowski that there were no longer any lands available to provide him the rest of the compensation. Until 2002, there were numerous revisions of the Polish legislation concerning Bug River claims. In December 2003, Poland enacted a new law under which Broniowski could not obtain any further compensation because his grandmother had accepted a piece of state land in 1982, though of much less value.

Broniowski argued that his right to "peaceful enjoyment of his possessions" had been violated. Although Broniowski never litigated a claim against Ukraine for restitution of the actual lost property (because he wanted Poland to provide a substitute property) the case had many practical similarities with a claim for restitution. The European Court was not asked to address the validity of the Republican Agreements. The Court assumed that Broniowski had a right to compensation and assumed that Poland was responsible for providing it.

For present purposes, the relevant part of the Court's judgment focused on its interpretation of the concept of "public interest" as a defense against implementing either restitution or compensation. The Court explained that property rights must be balanced against "a general interest of the community." It concluded that local (in this case, Polish) authorities were best positioned to assess what is in the public interest, and are owed "a certain margin of appreciation." The court then stated:

[T]he notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly-funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. ... This logic applies to such fundamental changes of a country's system as the transition from a totalitarian regime to a democratic form of government and the reform of the State's political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation.

In terms of political, economic and social issues, the Polish Government argued that the post-Communist political reorganization had made it difficult to satisfy Bug River claims. Poland argued that it had tried its best to compensate the claimants, but were simultaneously required to provide restitution to Poles wronged by the previous totalitarian regime. The Court generally agreed: "The Court does not doubt that during the political, economic and social transition undergone by Poland in recent years, it was necessary for the authorities to resolve such issues." The Court also agreed that the large number of claims involved (in this case, 80,000) was a legitimate concern for Poland.

The Court sided with Broniowski over instances in which executive agencies had failed to implement legislation and entitlements, which the Court considered threats to the rule of law. But,

in *obiter dicta* (non-binding commentary), it stressed:

The Court accepts that in situations such as the one in the present case, involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole, the national authorities must have considerable discretion in selecting not only the measures to secure respect for property rights or to regulate ownership relations within the country, but also the appropriate time for their implementation. ...Balancing the rights at stake, as well as the gains and losses of the different persons affected by the process of transforming the State's economy and legal system, is an exceptionally difficult exercise. In such circumstances, in the nature of things, a wide margin of appreciation should be accorded to the respondent State.

The factual situation would have been more analogous for the Palestinian refugee case had Broniowski been claiming restitution from Ukraine; the fact that Poland was essentially an innocent government trying to compensate people for dispossession inflicted by another state was referenced throughout the Court's decision. Legally, this difference was not clearly decisive. According to the Republican Agreements, Poland was in a sense a stand-in for Ukraine. Still, Poland's relative innocence may have made the Court more willing to extend Poland "a wide margin of appreciation."

The case is highly analogous to Palestine/Israel in terms of its specific lines of argument. No one, not even Poland, contested Broniowski's general right to compensation or restitution. The decisive issue was essentially one of conflicting rights. Did Poland have legitimate conflicting concerns that permitted it to not make good on Broniowski's valid property claim? Although in the end Poland lost (because its administrative agencies had stalled in implementing legislation), in terms of general principles Poland won.

The *Broniowski* decision shows that a conflicting rights approach can allow Israelis to assert legitimate concerns about refugee return through international law, although it is not certain what specific results such arguments would produce in the Israel-Palestine context. The Court stated that in cases of property restitution, governments have wide discretion to consider broad political, social and economic issues. Although this was *obiter dicta* in the decision, the court emphasized it repeatedly and at length. These arguments could be applied by Israel.

b) Possible Israeli argument about stability

The prerogative of a state to protect the public interest may open the door to the following Israeli argument:

Whether or not the displacement and dispossession of Palestinian refugees was just, the reality is that Israel's economic and social life has been built on it over the past 58 years. Granting the right to return and restitution would entail not just evicting current residents, but social and economic upheaval on an almost unfathomable scale. Israel's economy would be disrupted if not decimated.

Even if economists could devise a remedy to the economic challenges, this kind of disruption would threaten large political constituencies within Israel. Jewish Israelis would likely resist the implementation of restitution, both through legal and illegal means. Major civil unrest and vigilantism are conceivable, if not likely.

One also has to consider the dispositions of the returning refugees. Many of the refugee camps are dominated by militant political factions that have never accepted peace negotiations with Israel, and which have advocated violence against Jewish Israelis.

Essentially, refugee return would send the country back to the inter-communal

violence of the 1930s and 1940s. Rather than begin reconciliation between Israelis and Palestinians, such return and restitution would generate new conflict for decades to come.

c) Observations on the public interest

It is true that the language used by the European Court of Human Rights in *Broniowski* seems to favor Israel's concerns. But the actual legal holding does not. The court was deferential to Poland because Poland was a relatively innocent state. Israel is not. Israel, unlike Poland in the *Broniowski* case, has unclean hands to argue that it must block refugee return to maintain public order. A defense of necessity may not be invoked when "the state has contributed to the situation of necessity."⁷⁸ The upheaval that Israel may fear is an upheaval that in substantial part is Israel's own creation. It is hence not entitled to use this argument to maintain the *status quo*. In addition, concerns for the public interest should be interpreted narrowly in order to limit any interference with human rights.⁷⁹

The concern of the European Court for maintaining public order is important in planning refugee return, but not for blocking return. It requires first that refugee repatriation be gradual and orderly, as in any mass population movement. It also points to the need for refugee return to be part of far more extensive efforts at reconciliation between Jews and Palestinians.

Maintaining security and stability are important concerns in deciding how, but not if, to implement refugee repatriation. As noted in the previous section, recent research indicates that refugee return and restitution may not affect the regions of Israel where most of the Jewish population lives. Return and restitution in these places would not directly generate the kind of disruption feared. The Israeli argument proposed here is really only an argument against restitution in areas that are heavily populated or economically developed by Israelis. Such situations are dealt with to a large extent by the potential defenses to restitution suggested in the previous section.

Most concern for political unrest stems more from ethnic tensions than from the direct impact of refugee return disruptions. Human rights law values equality above nearly any other principle. Governments are not permitted to allow discrimination simply because their populations have racist opinions. Nor can Israel legitimately profess concern for civil unrest simply because Jews would resist the return of non-Jews to their midst.

Refugee return will require Jewish Israelis to live in close proximity to Palestinians, and given decades of conflict people have a right to be concerned about what this will mean. Israel cannot in good faith use the conflict as an excuse to avoid refugee return. But nor can anyone ignore the conflict and insist merely on return without any arrangements to keep order and security. Refugee repatriation and restitution for displaced people in other countries, including Bosnia and Herzegovina, South Africa and Guatemala were part of much larger efforts aim at reconciliation. Palestinian refugee return cannot be pursued in isolation. If Israel plays a good faith effort in repairing the injustices of the last six decades and in promoting reconciliation based on human equality, it will have every right to raise concerns to insist that the modalities of refugee repatriation minimize social and economic disruption.

⁷⁸ International Law Commission, Draft article on Responsibility of States for internationally wrongful acts art. 25(2)(b), G.A.OR A/56/10 (2001); see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002, p. 184.

⁷⁹ *Final report of the Special Rapporteur, supra* note 55, at para 7.2.

6. Concluding observations

This paper has touched on vast areas of public and private law, and each section could warrant an in depth study of its own. Nevertheless, there are some important observations to be made about a conflicting rights approach to the right of return.

Jewish self-determination cannot trump other human rights. The first section of this paper explored arguments that the Jewish collective right to form and maintain a Jewish state could negate the Palestinian refugee return. This argument does not seem sustainable in law, principally because self-determination cannot be achieved for one group by disenfranchising another. Israel can discriminate in its immigration laws, but not in laws dealing with returning refugees. If Palestinian refugees have a right to return, they cannot be legally prevented from doing so simply because it would change Israel's demographic composition. The law of self-determination is flexible enough to accommodate this reality. For the purposes of self-determination, the "people" of Israel can include both current Israeli citizens, as well refugees who choose to return.

Self-determination is inclusive, not exclusive. Self-determination is a foundation for other rights, not a conflicting right. International law has long accepted that Jews are a people entitled to a homeland in what is now Israel. Refugee return need not threaten Jewish national life in Israel, but it would necessitate a re-definition of Israel as a "Jewish State." Israeli sovereignty and Jewish sovereignty are not necessarily the same thing. The dominant Jewish demographic position in Israel is the artificial result of the fact that the Palestinian refugees have not returned home. Even without refugee return, Israel's non-Jewish (largely Arab) population is already substantial. Today, Israel is an established sovereign state, but it is also a diverse state.

Refugee return and restitution must accommodate Israeli property and residential rights. Israelis have open to them a range of possible arguments to defend significant portions of their current property. Although refugee return and property restitution are linked, there are a number of potentially valid conflicting interests that individual Israelis may assert. Even if the State of Israel was wrong to take refugee property, individual Israelis who acquired it may have interests that the law will protect.

This paper has not explored all of the complexities of property restitution, but it can at least be said that Israeli and Palestinian rights may be in genuine conflict in the area of private property. Israelis who acknowledge the justice of Palestinian refugees' desire to return but who worry about the practical implementation would benefit from an expanded exploration of competing property claims. This would affect only specific pieces of property; refugees who come from undeveloped or sparsely populated areas of Israel would be able to return without obstacle.

Return arrangements should account for political, social and economic stability. Israel would have valid concerns that mass refugee return would generate tremendous upheaval. However, there is no basis in international law for this concern to negate the right of return entirely. Stability is a legitimate and necessary state concern, which could justify delaying or staging returns and restitution over time. Expertise gained from other large scale refugee repatriations would have obvious application in designing the modalities and logistics of refugee return.

As in other post-conflict situations, refugee repatriation should be part of a wider effort at reconciliation. Since Israel has played a part in promoting ethnic tension between Jews and Palestinians, it cannot reflexively claim the existence of conflict as a reason to block non-Jewish refugee return. But if Israel plays a constructive and good faith role in reconciliation, the state will have every right to raise concerns about maintaining stability in the course of refugee return.

The right to return need not leave Israelis and Jews unprotected. It would be to the benefit of both Israelis and Palestinians to have greater focus on Israeli rights, especially private property rights, for two main reasons.

First, full acceptance of the Palestinian right to return need not generate widespread fear of Jewish displacement. Israelis have a range of rights to assert that would either slow or in some cases prevent full return to refugees' original homes. This will be of little comfort to those who ideologically insist on a Jewish state with a dominant Jewish majority. But the conflicting rights approach can address more practical Israeli interests.

Second, addressing Israeli rights in the context of refugee return may have an important benefit in terms of reconciliation. The Israeli-Palestinian conflict is often described in terms of irreconcilable claims to self-determination. Zionists claim Israel as a Jewish state, Islamists claim historic Palestine as an Islamic state, Arab nationalists claim it as an Arab state, and so on. As noted above, the legal right of peoples to self-determination need not and legally cannot be expressed in such exclusivist terms. It is possible to acknowledge both the Palestinian right to return, as well as Israelis' rights to property and homes. By acknowledging mutually legitimate rights, this approach should reduce fears that Palestinians assert a right to return in order to drive all Jews from Israel, as well as fears that Israelis resist the right to return in order to continue illegitimate colonization.

