

## **Transitional Justice and The Right of Return of the Palestinian Refugees**

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## Introduction

By most accounts, the issue of the Palestinian refugees and their right to return to the part of Mandatory Palestine that now constitutes the State of Israel has been the most obstinate stumbling block preventing the resolution of the conflict between Israel and the Palestinians. This is so because the right of return, more than any other issue, touches, for each side, on the essence of its history since the conflict began, and on its prospects for the future. The national narrative of each side is centered on its own version of how things turned out in the 1948 war, during which the Palestinian refugee problem was created. And both sides believe that their national identity and future national existence hinge on how the issue of the right of return is resolved.

The 1993 Oslo Accords designated the question of the Palestinian refugees a “final status” issue, meaning that it was one of the issues that Israel and the Palestinians would have to resolve for a permanent peace to be established between them. This issue was central to the failure of the Camp David summit in the summer of 2000 to result in a final status agreement. It figured even more prominently in the talks held in Taba, Egypt, in early 2001, where some progress on this issue was reportedly achieved.<sup>1</sup> The progress achieved at Taba was supposedly reflected in the Geneva Accord, a mock peace agreement authored by a number of liberal Israeli politicians and unofficial representatives of the Palestinian National Authority in December 2003. This accord,

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Nazmi Ju'beh, *The Palestinian Refugee Problem and Final Status Negotiations: A Review of Positions*, 9<sup>1</sup> Palestine-Israel Journal, 5 (2002); *The Refugee Problem at Taba: Akiva Eldar Interviews Yossi Beilin and Nabil Sha'ath*, 9 Palestine-Israel Journal, 12 (2002); Yossi Beilin, *A Guide for a Wounded Dove* (Rami Tal ed., Yediot Aharonot, Sifrei Hemed, 2000X); Ofer Shinar, *Making Silent Voices Heard: Non-Official Truth and Reconciliation Commissions in the Israeli - Palestinian Conflict* (New York University, 2001) .((unpublished

however, failed to address the issue of the right of return in a straightforward manner, and has been soundly criticized for that.<sup>2</sup>

The failure of these peace efforts to seriously address the issue of the right of return is a reflection of the fact that the broader question of historical justice in general has been avoided in the various attempts to solve the Israeli-Palestinian conflict. A key argument in support of this avoidance has been that justice is a subjective construct, and allowing it to become a subject of negotiation would only perpetuate the conflict. As articulated by the Israeli scholar of international relations, Yaakov Bar-Siman-Tov:

Since fairness and justice are not self-defining and objective terms, it may be difficult for the parties to agree what is fair and just. The assessments of what is fair and just are often biased by self-interest. The resulting conflict in perceptions of what constitutes fair and just agreement may create barriers to peace implementation and relations.<sup>3</sup>

However, the negotiating framework established in Oslo in 1993, that studiously avoided considerations of justice, has brought the parties to an historic dead-end, resulting in unprecedented dynamics of violence that have posed existential threats to both parties.

### **Transitional justice**

Our argument in this paper is that considerations of historical justice are essential for achieving reconciliation in the Israeli-Palestinian (like any other) conflict, and that a

<sup>2</sup> See, for example, Mark Levine, *The Trouble With Geneva*, Tikkun, Oct. 25, 2003, at <http://www.tikkun.org/index.cfm/action/current/article/195.html> The Accord itself is at <http://www.heskem.org.il> References in the present paper are to the hard-copy Hebrew edition: The Geneva Initiative: A Model for an Israeli-Palestinian Permanent Agreement, November 2003.

<sup>3</sup> Yaakov Bar-Siman-Tov, *Dialectics Between Stable Peace and Reconciliation*. Paper presented at the Leonard Davis Institute, Hebrew University, Jerusalem, February 2001, 8.

morally and politically sound basis could and should be established for a workable solution to the question of the right of return. We believe this could be achieved on the basis of a conception of justice that is not merely *corrective* or *compensatory*, but rather *transformative*. This conception, usually referred to as “transitional justice,” does not seek to achieve a balance between violated rights and compensatory measures. It aims, rather, to establish the principles that should govern the transition from a morally deficient (“barbaric”) society or situation to a morally superior (“minimally decent”) one.<sup>4</sup> The successful transition itself is what endows the measures necessary for its achievement with their moral value. In other words, in transitional justice the practical outcome that is being sought should itself be the basis in which the moral arguments are grounded.

While transitional justice necessarily addresses past injustices, it is future-, rather than past- or present-oriented in terms of where its moral emphasis lies. It seeks to “affirm and restore the dignity of those whose human rights have been violated; hold perpetrators accountable, emphasizing the harm they have done to individual human beings; [and] *create* social conditions in which human rights will be respected.”<sup>5</sup> Here, therefore, the “practical” is not a limiting condition of the “moral,” but rather its foundation.

While the principles of transitional justice seek to transcend mere power relations, in order to achieve its ultimate goal – establishing the conditions for greater respect of human rights -- transitional justice must take the power balance between the parties into account. Its virtue, therefore, lies not in its being absolute, but rather in its being *attainable*. It is for this reason that transitional justice privileges reconciliation

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Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, in *Truth v. Justice: The Morality of Truth and Reconciliation Commissions* (Robert I. Rotberg and Dennis Thompson, eds., Princeton University Press, 2000) 45

E. Kiss, *Moral Ambition Within and Beyond Political Constraints*, in *Truth v. Justice*, *supra* note 12, 68<sup>5</sup> (emphasis added)

over retribution – which would satisfy solely the victims of past injustices -- and forgetfulness –, which would benefit only their perpetrators. Still, transitional justice must walk a thin and very treacherous line between ignoring the existing power relations and subjecting justice to them.

### *Recognition*

To achieve reconciliation, transitional justice relies on what may be termed its two other R's: recognition and restitution. Recognition of the narrative told by the victims of injustice is a necessary precondition for reconciliation. This narrative forms an essential component of the victims' identity; and is usually denied and delegitimated by their victimizers.<sup>6</sup> In many cases, recognition of that narrative, that is, of the injustice that was committed, and validation of their experiences, memories and identity, is the primary objective sought by victims of historic injustice. For

When political victims suffer violence, they are not merely harmed physically ... The act of violence transmits an unambiguous, unequivocal message, that their views on the common good – on matters of public significance – do not count, that their side of the argument has no worth and will not be heard, that they will not be recognized as participants in any debate, and, finally, that to negotiate, or even reach a compromise with them, is worthless. In effect, it signals their disappearance from the public domain.<sup>7</sup>

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<sup>6</sup> For the place of the *nakba* – the catastrophe of 1948 -- in Palestinian identity see, among many other sources, Rashid Khalidi, *Observations on the Right of Return*, 21 *Journal of Palestine Studies*, 29 (1992); Ahmad Sa'di, *Catastrophe, Memory and Identity: Al-Nakbah as a Component of Palestinian Identity*, 7 *Israel Studies*, 175 (2002); Dan Rabinowitz, *Morality, Identity, Demography, Return: Thoughts on the Future of Palestinian Refugees*, presented at The Hagop Kevorkian Center for Near Eastern Studies, New York University (2003).

<sup>7</sup> Bhargava, *supra* note 12 at 47. An example of this attitude can be seen in an interview with Ehud Barak, Israel's Prime Minister during the failed Camp David summit. Barak said in that interview "..."

It is this situation that is most often in need of rectification.

Recognizing the victims of historic injustice requires, first and foremost, that the historical truth about the injustice that was committed against them be revealed.<sup>8</sup> However, if the victims' truth entails the complete denial of the perpetrators', then, unless the power relations between the two sides had been reversed, the perpetrators, who are still the more powerful party, will refuse to accept it. Therefore, the primary function of truth and reconciliation commissions has been to enable the victims, as well as the perpetrators, to air their historical narratives.

The work of truth and reconciliation commissions is designed to acknowledge the distinctive identity of the victims, strive to repair the damage done to them through violence, stigmatization, and disrespect, and include their histories in the collective memory of the relevant political community.<sup>9</sup> Revealing the truth about past injustices can be very traumatic, of course, to both victims and perpetrators, as well as to their descendants and sympathizers. This trauma has been exemplified in the acrimony generated by the "historians' debate" about the 1948 war in Israel, and, most recently, by the controversy surrounding the claim that a massacre had been perpetrated by Israeli forces in the Palestinian coastal village of Tantura. What the appearance of the "new history" in Israel also points to, however, is the greater readiness of new generations, farther removed from the original injustice, to face the historical truth.<sup>10</sup>

<sup>8</sup> Nadim Rouhana, Identity and Power in the Reconciliation of National Conflict. In Eagly, A. H., Baron, R. M., & Hamilton, V. L. (Eds.). (2004). *The Social psychology of group identity and social conflict: Theory, application, and practice*. Washington, D.C.: American Psychological Association.

<sup>9</sup> Kiss, *supra* note 13, at 73.

<sup>10</sup> Teddy Katz, *The Exodus of Arabs from Villages at the Foot of Southern Mount Carmel in 1948*, Master's thesis, University of Haifa, Haifa, Israel (1998) (Hebrew). In his thesis Katz argued, mainly on the basis of

### *Restitution*

One way of according recognition to victims of historic injustice, as well as compensating them for their real material losses, is through restitution. The question of restitution raises the issue of responsibility: Who is the agent responsible for the injustice? Can the present generation, or immigrants who arrived after the injustice had been committed, be held accountable for the actions of their predecessors? Is the political community the responsible agent, regardless of its changing human composition? Similarly, how far can the right to receive restitution be transmitted across generations? Does that right inhere in individual members of the victimized community, or in the community as a whole? Are the rights of the victims ever superseded, and under what conditions? Different schools of thought in moral philosophy and political theory give different answers to these questions.<sup>11</sup>

A major issue to be considered in discussing restitution is not only the form it should take – restoration of citizenship status and expropriated property, repatriation, monetary compensation, etc. – but also its magnitude. The passage of time makes the monetary evaluation of the damage done to the victims of injustice extremely difficult, but not impossible. However, the factors that should be included in this evaluation are in contention among scholars, as are the principles that should govern their determination.

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oral history, that the Jewish forces committed a massacre in the process of occupying the Palestinian village of Tantura. The public and academic outrage that this thesis stirred continues until today. The author was taken to court by veterans of the brigade that had occupied the village and Haifa University established a special committee to investigate the thesis and eventually disqualified it. See also Jose Brunner, *Pride and Memory*, 9 *History and Memory*, 256 (1997); Jose Brunner, *Contentious Origins: A Psychoanalytic Comment on the Public Debate over Israel's Creation*, in *Psychoanalysis, Identity, and Ideology: Critical Essays on the Jewish/Israeli Case* (J. Bunzl and B. Beit-Hallahmi eds.), (Kluwer 2002); Ilan Pappé, *The Tantura Case in Israel: The Katz Research and Trial*, 30 *Journal of Palestine Studies*, 19 ((2001); Samera Esmeir, 1948: Law, History, Memory, 21 *Social Text*, 2 (2002

Jeremy Waldron, *Superseding Historic Injustice*, 103 *Ethics*, 4 (1992); W. James Booth, *Communities of Memory: On Identity, Memory, and Debt*, 93 *American Political Science Review*, 249 (1999); Susan (Dodds, (1998). *Justice and Indigenous Land Rights*, 41 *Inquiry*, 187 (1998

Should restitution aim to restore a hypothetical *status quo ante*? Should it aim to compensate the victims or their descendants for all they could have achieved had the original injustice not been committed? For all that the perpetrators had gained from their injustice? Is it even possible to calculate those things? Or should restitution serve as merely the material signifier of recognition, and involve only symbolic compensation?<sup>12</sup>

### *Reconciliation*

If recognition means acknowledging the identity of the victims as rights-bearing human beings, reconciliation entails recognition *by* the victims of the humanness of their oppressors, rather than the attribution to them of absolute evil. The historicity of the injustice committed should be taken into consideration, without being used as a justification for the injustice. In other words, as much as reconciliation demands remembering, it also demands letting go of the psychologically comforting tendency of the victims to picture themselves as “the ‘good people:’ the ones who, from now on, will have the absolute right to command because they were absolutely right in the way they suffered.”<sup>13</sup> Going through a psychological transformation of this kind is no less traumatic for the victims than revealing the historical truth is for the perpetrators, and victims tend to show a great deal of resistance to this demand.

### **Transitional Justice and the Right of Return**

Transitional justice has usually been applied to transitions *within* particular societies, rather than to inter-societal relations. It could be argued, therefore, that

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Waldron, *supra* note 10; Barkan, *supra* note 20; Tyler Cowen, *Discounting and Restitution*, 26 <sup>12</sup> *Philosophy and Public Affairs*, 26, 168 (1997); Atif Kubursi, *Valuing Palestinian Losses in Today's Dollars*, in *Palestinian Refugees: The Right of Return* (Naseer Aruri, ed., Pluto Press 2001) 217; Ruth .[??] Klinov [IN THIS ISSUE

B. Van Roemund, B. (2001). *Rubbing Off and Rubbing On: The Grammar of Reconciliation*, in Lethe's <sup>13</sup> *Law: Justice, Law and Ethics in Reconciliation* (E. Christodoulidis and S. Veitch, eds., Hart, 2001), at .183, 186

transitional justice is not applicable to the case of the Israeli-Palestinian conflict, which is a conflict between two distinct societies. We, however, believe that the principles of transitional justice can provide useful guidelines for analyzing the Israeli-Palestinian conflict in general, and the issue of the right of return in particular. The Israeli-Palestinian conflict has features of both an intra-societal and inter-societal dispute, and its very nature in this respect has been a subject of controversy and has changed over the years.

Since the Zionist movement claimed Palestine as the homeland of the Jewish people, that land came to be the site of conflict between the Palestinians and the Zionists. Thus at the core of the Israeli-Palestinian conflict, at its current stage, is a disputed but shared territory – that of Mandatory Palestine -- with which the history and identity of both sides are inextricably intertwined. This despite the fact that on each side there are people who do not currently reside in that territory, have never resided in it in the past and may never reside there in the future. The obvious asymmetry, that members of one national group – the Palestinian refugees – are prohibited from returning to that land, because their right of return is not recognized, while members of the other group are welcomed under a Law of Return, is the outcome of power relations -- the defeat of the Palestinian national movement in 1948. Due to the Arab defeat of 1967 the disputed territory in its entirety is currently under the control of one side, which has established an internationally recognized state on part of it, while the other side has failed to achieve this goal. The question of what kind of state the Palestinians seek to establish, and may eventually succeed in establishing – a separate state in the occupied territories or one bi-national or non-national state in all of Mandatory Palestine -- is still unresolved. Its resolution would

determine, retroactively as it were, whether the conflict is (was) an intra-societal or inter-societal one.

More concretely, the issue of the right of return bears not only on the relations between Israel and the Palestinians outside the borders of its formal sovereignty. It bears also, at least in part, on Jewish-Palestinian relations within the sovereign state of Israel as well. Israel's Palestinian citizens are implicated in the issue of the right of return in several ways:

- (1) as members of the Palestinian nation whose society was decimated in 1948, resulting in a very large portion of its members becoming refugees;
- (2) as citizens of a state that encourages the immigration of Jews, but blocks almost completely the immigration of Palestinians (since 2003, even of those married to Israeli citizens) among other reasons, for fear of recognizing the right of return “through the back door;”
- (3) because at least 15% of Israel's Palestinian citizens, or about 150,000 people, are “internal refugees” (known officially as “present absentees”), displaced from their original places of residence since 1948 and not allowed to return to those places, mostly for fear, again, of implicitly recognizing the right of return.<sup>14</sup>

This complicates even further the question of whether the conflict is an intra-societal or inter-societal one, adding weight to our determination that the principles espoused by the conception of transitional justice are relevant to its resolution.

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The best known of these cases is that of the Christian communities of Ikrith and Bereim, a case that has<sup>14</sup> been in adjudication in the Israeli courts for the past 50 years. On June 26, 2003, Israel's Supreme Court rejected yet another appeal by the former residents of Ikrith to be allowed to return to their village, on the grounds that such a return could enhance the Palestinians' claim of a general right of return (*Haaretz*, June 27, 2003). For a general discussion of the “present absentees” see Hillel Cohen, *The Present Absentees: (The Palestinian Refugees in Israel Since 1948)* (The Institute for Israeli Arab Studies, 2000) (Hebrew

For Palestinians, the *nakba* was an historic injustice inflicted on them by the Zionist project, an injustice that, in their view, can be rectified only through recognition of the right of return.<sup>15</sup> If the *nakba* was indeed an historic injustice, which we take as our starting point,<sup>16</sup> then it is hard to see how the right to return to the homes and homeland from which they had been unjustly removed could have been denied to the refugees at the time. However, some might argue that in the half-century that has passed since the original injustice had been committed the right of the refugees to return has been superseded.

Jeremy Waldron has most eloquently articulated the argument that historic injustice may be superseded with time.<sup>17</sup> Waldron's argument is sophisticated and multi-layered, but the crux of it, we believe, is the contention that an act that may have constituted an injustice at a certain point in time may not constitute an injustice at a later point, due to changed circumstances. When that happens, the right of the victims of the original act to restitution has been superseded.

If one were to apply Waldron's argument to our particular case, s/he would have to argue along the following lines: The expulsion of about 750,000 Palestinians from Israel, and the expropriation of their land, in 1947-48, by 600,000 Jews, who then comprised one third of the population of Palestine, was indeed unjust. However, in the intervening years millions of additional Jews arrived in the country, both because their national identity is intimately connected with it and because they had nowhere else to go. Today, Jews, broadly defined, outnumber Palestinians at a ratio of about 3:2 within Mandatory Palestine, so their control of about 75% of the territory is at least not as blatantly unjust as it was in 1948.

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<sup>15</sup> Khalidi, *supra* note 14, at 31-32.

<sup>16</sup> We take this as a starting point, rather than arguing why the expulsions of 1947-48 were indeed an injustice. The burden of argument that expulsion of the Palestinians from their homeland and preventing them from return is just should be on those who maintain this view. The view that their expulsion is unjust is shared by all Palestinians and is, therefore, the view that needs to be addressed if reconciliation is to be achieved.

<sup>17</sup> Waldron, *supra* note 10.

Moreover, Jewish settlement has resulted in economic development that would have been unimaginable without it, so that property values have soared and even small amounts of property can now guarantee their holders a decent standard of living. If only the Palestinians had agreed to accept the Jews and live in peace with them, all of Mandatory Palestine, whether divided politically into two states or not, could have been a peaceful and prosperous land.

This argument, we believe, would have been difficult even for Waldron to accept. Even if by some theory of justice it could be convincingly argued that the Palestinians now have a moral duty to share their land with Jews, or even that they had that duty in 1947 (because Jews were persecuted and had nowhere else to go), this would in no way diminish the injustice committed by the forceful expulsion of the Palestinians from their homes and homeland, the destruction of their society, and the disruption of so many individual and family lives. Moreover, many of the refugees of 1948, and their descendents, still live in refugee camps in miserable conditions (for example in Lebanon) and have not been able to reconstruct their lives. Thus the injustice committed against them is still ongoing, and the question of supersession has not become relevant. (Refugees who are most likely to actually return to Israel, if an agreement is ever reached on the right of return will come from this group) Even according to Waldron, his supersession thesis “applies only if an honest attempt is being made to arrange things justly for the future. If no such attempt is being made, there is nothing to overwhelm or supercede the enterprise of reparation.”<sup>18</sup>

But there is a morally valid argument that can be derived from the changed circumstances, viz., that the Jews living in Israel now have acquired, with time, the right not to be displaced and to maintain an Israeli Jewish national community in that land. For these Jews, the prospect of a massive Palestinian return, and the

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<sup>18</sup> Waldron, *supra* note 10, at 27.

demographic transformation it would entail, raises a profound and acute fear, that has to be addressed, that their lives, as individuals and as a national community, be disrupted.<sup>19</sup> Therefore, just like the Palestinians, they maintain the fundamental belief that their future national existence hinges on whether, and how, the issue of the right of return is resolved.

Taking these realities into account, the principles of transitional justice would suggest, we argue, the separation of the *right of return*, that is non-negotiable for the Palestinians, from the means of *realization* of that right in practice, which could be negotiated between the two sides. The only *right of return* that can be meaningfully recognized by Israel is the right of the refugees to return to the State of Israel within the borders of its formal sovereignty, whatever these borders may be following a future Israeli-Palestinian peace agreement. Since recognition of a right necessarily creates an obligation, and since there is no moral value in creating an obligation for somebody else, Israel cannot meaningfully recognize the right of the refugees to return to a third country, not even to the future state of Palestine. In this respect, the Geneva Accord, that gives the Palestinian refugees the *right* to return only to territories that will be under the sovereignty of the future Palestinian state, and denies them the *right* to return to their original places in Israel, fails to meet the moral challenge that, in our view, must be met for reconciliation between the two peoples.<sup>20</sup>

By the same token, if Israel were to recognize the *right* of return this would satisfy an essential demand of the Palestinians and would enable them to recognize Israel's acquired right to continue its national existence in its part of the disputed

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<sup>19</sup>

Rabinowitz, *supra* note 14.

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Geneva Initiative, *supra* note 2, at 33, Article 7(4)(d)(iii); see also at 8, Article 5; *cf.* Levine, *supra* note 2

territory. This would mean that the actual means of realization of the right of return could be negotiated in a way that would take the concerns and interests of Israeli Jews into account. So much has been made clear already by many Palestinians, including people in positions of authority from Yasser Arafat on down.<sup>21</sup> So far, however, neither present nor former Israeli officials, not even those actively engaged in seeking an understanding with the Palestinians, have agreed to recognize the right of return. They have maintained, erroneously we believe, that the Palestinian demand for recognition of the right of return signifies, in and of itself, a denial of the right for a national Jewish existence or the right of the State of Israel to exist.

Recognition by Israel of the *right* of return would meet many of the goals stipulated by transitional justice as necessary for achieving reconciliation.<sup>22</sup>

**Truth.** The Palestinian narrative of 1948 will become legitimate in Israel, leading to recognition of the *nakba* and of the Palestinians' identity as its victims. This is a necessary first step towards the construction of a joint historical narrative, an important goal of transitional justice. Preparatory work could begin even before Israel recognizes the right of return, by non- or semi-official truth and reconciliation commissions that would clarify and acknowledge the historical truth. The biggest task of these truth commissions will be to document the specific histories of the refugees, in order to establish a pattern, which will expose the "hidden history" of the region. As Hanan Ashrawi has stated, "allowing the truth to come out will go a long way to starting a process of reconciliation."<sup>23</sup>

<sup>21</sup> Khalidi, *supra* note 14; Yasser Arafat, The Palestinian Vision of Peace, The New York Times, XXXX; *The refugee Problem at Taba*, *supra* note 1, at 17-23.

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David A. Crocker, *Transitional Justice and International Civil Society: Toward a Normative Framework*, 5 Constellations, 492 (1998)

<sup>23</sup> Shinar, *supra* note 1 at 52-53; see, in relation to that, the cover story in *Haaretz Weekend Magazine*, 31 October 2003 (Hebrew).

**Recognition** of the moral worth of the Palestinians as human beings that has been denied since 1948. (This denial of their moral worth has been more pronounced in the case of non-Israeli citizen Palestinians under Israel's rule and of the refugees in some of the Arab countries than for those who are citizens of Israel). Recognizing their historical narrative will go a long way towards affirming their humanity and moral worth.

**Responsibility**, both collective and individual, of Israel and of Israelis, for the *nakba* in general and for individual atrocities (e.g. Tantura) will be established. Israel/Israelis will probably maintain that they had no choice,<sup>24</sup> that the Palestinians, as well as the Arab states, shared in the responsibility, etc. Given the passage of time, recognition of responsibility is not likely to lead to demands for the prosecution of individual perpetrators of crimes (on either side).

**Public Discussion.** This has been stifled in Israel due to the fear of recognizing the right of return. That fear will, obviously, be removed, once the right of return is recognized, and this will open up the possibility of airing the history of 1948, including the opening up of still classified material in various official Israeli archives.<sup>25</sup>

Of course, recognition of the right of return only will not be sufficient in itself to achieve reconciliation. But it will meet many of the preconditions for it. Reconciliation could be achieved only after some measures of restitution are affected as well. Of these, compensations and reparations could begin to be assessed (although recognition of the right

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Zeev Sternhel, *Settler Post Zionism*, Haaretz, June 20, 2003 (Hebrew).

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Benny Morris, *Revisiting the Palestinian Exodus of 1948*, in *The War for Palestine: Rewriting the History of 1948* (Eugene L. Rogan and Avi Shlaim eds., Cambridge University Press, 2001, 37, at 49-50

of return is not necessary for that), while the most difficult aspect of restitution, return of refugees, begins to be negotiated.

### Conclusion

Most people who are interested in achieving reconciliation between Israelis (or actually Israeli Jews) and Palestinians realize, that the Gordian knot tying the Palestinians' demand for recognition of the refugees' right of return to the Jews' absolute determination to maintain a substantial Jewish majority in Israel must be cut. Most liberal Israeli politicians and scholars, as well as some Palestinians, such as those involved with the Geneva Accord, believe the knot can be cut by distinguishing between a collective right of "return" and self-determination in a future Palestinian state and an individual right of return that could be redeemed (without being openly recognized, according to most versions) through monetary compensation. Others have suggested that the right of return itself should be curtailed in various ways,<sup>26</sup> or that a distinction should be made between Israeli *citizenship*, including social benefits, that will be granted to Palestinian refugees who would opt for it, and *residence* in Israel that will be denied to most of them.<sup>27</sup>

It is significant, we believe, that none of these authors have been able to provide a morally persuasive argument for dividing the right of return in any particular way (e.g., between generations of refugees, between the residents of different host countries, between those whose former places of residence are still vacant and those who are not, by socio-economic status, etc.). In our view, the right of return is indeed indivisible (as is clearly evident in the way Israel conceptualized and implemented its own Law of Return), and therefore the only way to cut the Gordian knot that is both morally sound and politically

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<sup>26</sup> According to Gans recognition of the injustice done to the refugees could be separated from recognition of their right of return.

<sup>27</sup>

Rabinowitz, *supra* note 14.

practicable would be to conceptually decouple the *right of return* from the negotiations over the means of actual return of refugees.

In the spirit of transitional justice, recognition by Israel of the right of the 1948 Palestinian refugees to return to their previous places of residence within the State of Israel would be a formidable step towards achieving reconciliation between Israelis and Palestinians. The moral significance of this act would be lost, however, if its meaning is circumvented by designating the future Palestinian state as the target area of the “return” or by trying to balance off the rights of the Palestinian refugees against the rights of the Jews who had left the Arab countries in the wake of the 1948 and subsequent Arab-Israeli wars. Still, as is the case with all individual and collective rights, on the way from recognizing the right of return to the actual return of refugees to Israel the right of return will have to be balanced against other relevant rights that must also be recognized.

Regardless of the original justice or injustice of Zionism, present-day Israelis have acquired the right not to be displaced from their homes inside Israel’s pre-1967 borders. (In this sense there is a great deal of difference between Jewish residents of pre-1967 Israel and of the territories occupied in that year. The latter have been settled in territories that are under belligerent occupation, in clear contravention of international law.) Liberal political theory also recognizes Israeli Jews’ right of national self-determination, especially if the solution to the Israeli-Palestinian conflict is envisioned as a two-state solution. (The moral force of Israeli Jews’ claim of the right of national self-determination will be greatly weakened, however, if the national minority rights of Israel’s own Palestinian citizens are not recognized.) In addition, the social, economic and environmental rights of Israelis and of the refugees themselves must be recognized.

One area where the relations between the right of return and its implementation are unproblematic is that of the internal Palestinian refugees within Israel. The internal refugees’ return to their original places of residence (or to locations nearby if the original

places are inhabited by others), with an adequate compensation program, would not enhance the Palestinian demographic presence, that Israel considers to be a threat, and could be affected immediately and unilaterally by Israel. This very act would signal recognition of the injustices committed by Israel since 1948 and at least some assumption of responsibility for these injustices. The Israeli Supreme Court's recent decision alluded to above<sup>28</sup> is clearly a significant step in the wrong direction, in that respect.

Another possible, and partial, way for the conflicting rights/aspirations/fears of Jews and Palestinians to be reconciled could be negotiation over the abolition/modification of the Law of Return would be undertaken by Israel in return for limiting the implementation of the refugees' right of return. Despite the different moral foundations of these "returns," the Law of Return could be used by Israel in negotiating the practical implementation of the Palestinians' right of return.<sup>29</sup> As it is, from a Zionist point of view the Law of Return is already defeating its own declared purpose, in that the majority of immigrants entering Israel under its provisions right now are religiously non-Jewish.<sup>30</sup> Thus it should not be too difficult for Israel to agree to abolish that law and replace it with an equitable civil immigration law, in return for Palestinian concessions on the number of Palestinian returnees. From a Palestinian point of view, data based on survey research show that the number of refugees who would actually want to implement a right of return if recognized is not as high as was originally expected. Thus it should be possible for Palestinians to make concessions on number of returnees given that most refugees will opt not to return.

Finally, since the question of how many refugees would be allowed to return is paramount in most Israelis' minds, we would like to point out that if and when Israel gives up its occupation of East Jerusalem, the number of Palestinians within the State of Israel

<sup>28</sup>

*Supra* note 23.

<sup>29</sup>

*Cf. The Refugee Problem at Taba, supra* note 1, at 18-19.

<sup>30</sup>

Ian Lustick, *Israel as a Non-Arab State: The Political Implications of Mass Immigration of Non-Jews*, 53 *Middle East Journal*, 417 (1999).

will decline by 250,000 – 300,000 people. Recent studies have indicated that the number of Palestinian refugees who are likely to be actually interested in returning to Israel is not much higher than this figure.<sup>31</sup> We point this out not in order to legitimize Israel's "demographic fear," which we consider to have racist overtones, but as a way of showing that the conceptual decoupling of the recognition of the right of return – a *sine qua non* for reconciliation -- from the negotiation in good faith over the means of its implementation hides a potential yet unexplored for resolving the conflict. Furthermore, our suggestion is based on sound moral foundations that guide the approach of transitional justice.

If the implications of Israel's recognition of the right of return could be shown to have no negative effect on the question of the continued Israeli Jewish national existence, while the benefits of recognizing that right, in terms of enhancing the prospects for reconciliation, could be immense, some of the fears blocking Israelis' ability to even consider this issue may be alleviated. To the extent that this would facilitate reconciliation between Israelis and Palestinians, a political outcome of great moral value would be achieved.

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<sup>31</sup> Khalil Shikaki, The Right to Choose, Al-Ahram Weekly, 28 August – 3 September, 2003; Khalil Shikaki. The Right of Return, 30 July, 2003.

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