

A Choice-based Approach to the Right of Return

February 1, 2001

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In recent weeks, some of the best minds on the Israeli left (including Amos Oz, A.B. Yehoshua and David Grossman) issued an open letter to the Palestinian leadership in which they forcefully stated that they would never agree to the return of the refugees to within the borders of Israel. Instead, they affirmed that "the refugees will have the right to return to their homeland, Palestine, and settle there." For the best minds, this was not their best thinking. By introducing "the right to return to their homeland, Palestine," the signers appear to be rejecting the key Palestinian demand for recognition of their right to return to Israel. In doing this, they reinforce the conflation of two quite different matters: the Palestinians' right to return and their actual return. Rather than merging these two, it is important to sharpen an awareness of the distinction.

Unfortunately, the open letter perpetuated a dangerous misunderstanding of the deadlock in the negotiations. The Palestinian leadership is not seeking the return of millions of refugees to Israel. This, they understand, is quite impossible. They are seeking a "choice-based" approach which will provide the refugees with a variety of structured options, of incentives and disincentives, such that only a few will actually choose to return to Israel. In a choice-based approach, the Palestinian leadership will be able to turn to the refugees and say "Yes, you have a right to return to Israel, but you also have many other options which may be more attractive. You decide."

For the Palestinian leadership, this would protect them from the charge of having sold out the refugees, of having abandoned Palestinian rights. From an Israeli point of view, if it were possible to give the Palestinian refugees a menu of choices and have almost all of the refugees opt not to return to Israel, this too is the best option.

Consider the alternative: suppose it is possible to get the PLO to sign a statement saying that the right of return has been abandoned or translated into a right to return to the State of Palestine. What meaning does this have to the million refugees already living in the future State of Palestine? Inevitably, the focus of all refugees will be on what was denied. The PLO leadership will be significantly discredited; Hamas and others will still affirm the right of return; international lawyers will point out that such rights are individual rights that no state can abandon in the name of individuals; and future generations will still struggle for their right of return.

In short, the most convincing way to end the conflict is some variant of a choice-based approach in which Palestinians have the right to return but instead choose compensation and resettlement elsewhere.

But is it possible? How could the choices be such that almost all Palestinians would choose to not return? And how could Israel be protected against an "illogical" decision by millions of Palestinians that they want to return, even if other alternatives look better? These are the central questions now facing the negotiations.

Israelis can reasonably say to Palestinian refugees, "Yes, we recognize a right of return, but it is not an absolute right. It is qualified by our rights as well, our right to self-determination. Because Israel has a right to exist as a Jewish state, and because your population has grown so massively, we insist on a framework for regulating the exercise of rights of refugees to return."

Saying this to the Palestinians does not constitute a great concession. Such rights are universally recognized for all refugees. Yet this allows Israel to accept a right of return "in principle." Could Palestinians accept this? It is a possibility that needs further exploration.

Here is an interesting fact. In 1988, meeting in Algiers, the PLO issued the Palestinian Declaration of Independence, one of the foundational documents of Palestinian nationalism. Within this declaration, they for the first time recognized the 1948 UN Partition Resolution (181) as an element of international law. Most strikingly, within this declaration, the Palestinians explicitly characterized Resolution 181 as having called for "two states, one Arab and one Jewish." Implicitly this was an acceptance of the fact that Israel's Jewishness is enshrined in international law.

Thus, it is quite possible that the Palestinians could enter into a mutual exchange of rights-recognition. Israel would recognize a right of return, and Palestinians would recognize that Israel has a right to choose to remain a Jewish state, and thus a right to regulate the implementation of the right of return. Even if the Palestinians do not formally recognize Israel's right to choose to remain a Jewish state, it is possible to agree on mechanisms of implementation.

The temptation is to impose a total cap; to say, for instance, that only 100,000 or 200,000 refugees can ever return. The problem here, however, is that a fixed cap seems to fly in the face of giving all refugees some option of returning. As an alternative to a total cap, it is possible to say that the rate of returning refugees must be such as to not alter the character of Israel as a Jewish state. The rate could be a negotiated formula.

The existence of a regulated rate of return means that if more Palestinians seek to return than this number allows, they have to wait in a queue. The more who seek to return, the longer the queue and thus the longer the wait. This in turn means that choosing the option of returning to Israel becomes less and less attractive compared to resettlement elsewhere, accompanied by immediate access to a major financial package for assistance and compensation.

This approach can be strengthened by giving priority to the 1948 refugees as opposed to their adult children. From an Israeli point of view, the return of some refugees is more threatening than the return of others. The least threatening are the actual 1948 refugees, as opposed to their adult children and grandchildren. A child of 15 in 1948 is today 68 years old. This elderly and dwindling population is well past childbearing age. Their return, accompanied by minor children in the rare cases where they exist, poses no long-term impact on Israeli demographics. Similarly they pose no security threat.

Surely as a matter of justice, priority should go to these elderly refugees. The total number of living 1948 refugees is quite limited. Of the 300,000 or so refugees living in Lebanon, not more than 30,000 fall into this category. Subject to some regulation of the rate of return, Israel can extend an option to all of the actual 1948 refugees to return. It will find that relatively few decide

to do so because of their age and dislocation from adult children and grandchildren.

Other approaches exist as well. The key point is to recognize that a choice-based approach which protects the Jewish character of Israel is a far stronger basis for lasting peace than any other alternative. It is worth trying to negotiate.