

Clearing Up the Right-Of-Return Confusion

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A few weeks prior to the February election, some of the best minds on the Israeli left (Amos Oz, A.B. Yehoshua, David Grossman, etc.) issued, in the Israeli press, a letter to the Palestinian leadership. After noting that they have struggled for over 30 years for the two-state solution, the signers forcefully stated that they shall never be able to agree to the return of the refugees to within the borders of Israel. Instead they affirmed that “the refugees will have the right to return to their homeland, Palestine, and settle there.” 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 their homes in Israel. In doing this, they reinforced the conflation of two quite different matters: the Palestinian right to return and the actual return of the Palestinians. Rather than merging these two, it is important to sharpen an awareness of the distinction.

Unfortunately, by addressing their message to the Palestinian leadership, the signers of the statement have perpetuated a dangerous misunderstanding of the deadlock in the negotiations. The Palestinian leadership seeks some formal recognition of Palestinian rights. They are not seeking the return of millions of refugees to Israel. This, they understand, is quite impossible. They are seeking a choice-based approach that will provide the refugees with a variety of structured options, of incentives and disincentives, such that only a small percentage will actually choose to return to Israel.

The problem with the statement is that it represents the Palestinians as seeking to overwhelm Israel with refugees. As such they are portrayed as seeking Israel’s destruction. This portrayal can serve only as the basis for concluding that the Palestinians have no real interest in a negotiated solution and that diplomacy has exhausted its potential. But if diplomacy has exhausted its potential, then what need is there for a prime minister committed to the peace process? The stage is set for a military response, under the leadership of Ariel Sharon.

Rather than trying to get the Palestinians to embrace a “right to return to their homeland, Palestine,” the yet-to-be-completed task of negotiations needs to be identified: finding a way to accommodate a Palestinian right of return to Israel, while avoiding any actual return that threatens Israel’s Jewish character. This is a complex and subtle task, yet it is the future of the peace process, a major uncompleted task that requires further time and thought – a continuing peace process. Some think this an impossible effort to square the circle, but that view is quite mistaken.

DISTINGUISHING PALESTINIAN OBJECTIVES

Palestinians have sought all of the following objectives:

- That Israel would accept responsibility for the refugee problem
- That Israel would recognize “in principle” a right of return for Palestinian refugees
- That Israel would accept Resolution 194
- That returning to Israel would be one of the options available to refugees.

Each of these formulations is subject to multiple interpretations. All of them can be distinguished from actual outcomes (e.g. that 100,000 Palestinians will return; that 1 million Palestinians will return). What is truly striking about the gaps between the two sides in the negotiations is that they are about conceptualization rather than outcomes. The Israeli government is prepared, as an outcome, to allow certain numbers of refugees to return, but it wants them to be returning not by right, but as a matter of Israeli humanitarian policy.

In this, the negotiations over the refugees are quite different from those over Jerusalem or territorial withdrawal. In those areas Israel was pressured to make major compromises over outcomes: to agree that it would withdraw from 95 percent of the West Bank rather than 75 percent; to agree that Palestinians would gain sovereignty over neighborhoods within Jerusalem, not just over Abu Dis. And on these tangible matters, the Barak government made major concessions. Yet, when it comes to refugees, where the Palestinians are not pushing for the return of 500,000, 1 million or 2 million – on this issue there was a log jam.

One would have thought that Israel could afford to be gracious in its victory. Possibly it is not, because it takes that victory totally for granted. Yet it is worth remembering that under the Partition Resolution of 1947 (Res. 181) the Jewish state that was created in 1948 was itself almost 50-percent Palestinian. As a result of the 1948 war, Israel gained control over much of the intended Palestinian state, which was 100-percent Palestinian. Thus pre-1967 Israel consisted of a territory that up until 1948 had a clear Palestinian majority. In other words, had the refugee exodus never occurred, pre-1967 Israel could never have existed as a Jewish state. Even with the vast immigration of Jews to Israel over the last 50 years, if there had been no refugee exodus, Israel today would be 50-percent Palestinian. The fact that it is possible to end the conflict, hold onto lands captured during the 1948 war, retain Jewish Jerusalem and yet prevent 95 percent of the refugees from ever returning is a tremendous victory for Israel. It should be prepared to go to extraordinary lengths to give the Palestinians whatever conceptualization makes their defeat most bearable. Focusing on each of the Palestinian issues of conceptualization, there is much that Israel can indeed provide.

Moral Responsibility

Here a distinction needs to be made between overall responsibility for the creation of refugees and responsibility for specific acts that caused specific populations to become refugees. With respect to the latter, there is no doubt that during the 1948 war there were instances, perhaps numerous ones, in which Palestinian villages were forcibly evacuated without justification. This is well known to historians and to some extent is already part of Israel’s high school curriculum. There is no reason to deny this in the negotiations. Indeed, Israel’s ability to carry out the

difficult processes of peace building that will follow any successful negotiations will be enhanced by fuller awareness of the tragedy that befell the Palestinians. If the Palestinians want to see a Truth Commission emerge from the negotiations, so as to finally bring to light their individual experiences, Israel should agree.

The question of overall responsibility for the refugee problem is quite a different matter. Here Israelis can reasonably maintain that there would have been no refugee problem at all if the Arab world had accepted partition, if war had not been launched against the newly created Israel, or if there had not been broad Palestinian support for such efforts. Moreover, it is a reasonable assumption that, had Israel lost the 1948 war, the entire Jewish population would have become refugees, if they had survived at all.

As important as these issues of moral responsibility are, many have feared to deal honestly with them because it is thought that they are directly relevant to the right of return. This is a point of confusion. The issues are quite distinct. Whatever right of return Palestinian refugees have, it does not rest upon showing that they were forcibly evacuated. A refugee who leaves a war zone out of fear or mere prudence has a generally recognized right to return once hostilities have ceased. The issue of responsibility for his exodus has nothing to do with it.

A Right of Return for Palestinian Refugees

Here it is useful to distinguish between recognizing a right that pre-exists and shapes the negotiations as opposed to rights established as a result of the negotiations. With respect to the latter, this is a quite reasonable goal. Israel should emphasize that the negotiations will result in the refugees having specific mutually agreed-upon rights. The contested issue, of course, is what rights refugees should have as a result of the negotiations, but the idea that the negotiations might establish certain rights for the refugees, or classes of them, makes eminent sense, and would be a productive focus for future negotiations.

A pre-existing right of return is a distinct and different matter. What rights do refugees carry with them into the negotiations? The Palestinian position is that all of the refugees (and their descendants) possess a right to return to their homes within present-day Israel.

The first matter to dispose of is the issue of homes. In most cases, the homes no longer exist. They were bulldozed as part of a systematic effort to wipe evacuated Palestinian villages off the map. Palestinian researchers have identified over 400 such villages. In other instances, homes exist but have been occupied for 50 years by Israelis, often by those who have bought them from other Israelis who sold them under titles legitimized in Israeli eyes by Israeli law. While Palestinians have legitimate claims to compensation for their homes, it is hardly worth pursuing whether they have a right to return to them. Rather, the issue is whether they have a right to return to the areas from which they came or, perhaps more generally, a right to live anywhere in Israel and even a right to become Israeli citizens.

Part of the difficulty of sorting through such issues emerges from a confusion about “rights talk.”

An example might help. It makes perfect sense to say to a group of people: “Each of you has a right to do X” and at the same time insist that it is legitimate to regulate and limit the exercise or implementation of those same rights. For instance, consider a ferryboat with the capacity to carry two hundred people on its once-a-day route. The company sells 1000 annual passes giving holders the right to use the boat whenever they please. As a rule, no more than 50 passholders show up on any given day. One day all 1000 passholders show up. Each has a right to use the ferry, yet it is quite appropriate to enforce the rule that says no more than 200 are allowed at a time. To insist on the legitimacy of rules for the collective exercise of individual rights does not imply any denial of the existence of those rights for each individual. Indeed, it is hard to imagine any rights of individuals which under some circumstances would not be subject to appropriate restriction.

When considering governments with responsibility for protecting the common good, one can speak of the legitimacy of rules of implementation. When considering the bearer of the rights, one speaks of limitations of the right itself. Thus, one might say, “Yes, you have a right to take the ferry, but that doesn’t give you the right to board if it is already at full capacity. You have to wait even if it is a long wait, even if it means missing your only opportunity. Of course, if you don’t go, you get compensation.”

There are no perfect analogies, but conceptualizing the issue in this way, Israelis can reasonably say to Palestinian refugees, “Yes, we recognize a right of return, but it is not an absolute right. It is conditioned as well by 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 the legitimacy of a framework for regulating the exercise of right 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.”

Israelis may further say to the Palestinians, “You have repeatedly embraced U.N. resolutions as constituting the basis in international law for the rights of Palestinians, yet the Partition Resolution of 1947 (UNGA Res. 181) explicitly called for the creation of two states, ‘one Arab and one Jewish.’ This means that Israel has a right under international law to choose to remain a Jewish state.” Israel can offer mutuality: it will recognize a Palestinian right of return, provided that the Palestinians recognize Israeli rights that legitimize regulation of the implementation of return.

Could Palestinians accept this? Could they accept that international law provides a basis for regulating the implementation of the right of return? 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 Resolution 181 as an element of international law. Indeed, it is cited as a basis in international law for establishing, without Israeli permission, a Palestinian state. Most strikingly, within their Declaration of Independence, the Palestinians explicitly characterized Resolution 181 as having called for “two states, one Arab and one Jewish.” This was an implicit 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.

Regardless of whether or not the Palestinians go this far, this is the position that Israel should affirm: that because Israel has a right to choose to remain a Jewish state, until such time as it decides otherwise, the implementation of the right of return is appropriately subject to regulation. Retaining its right to remain a Jewish state should not, however, be used by Israel as a hammer to deny Palestinian rights, but rather to structure a principled position with respect to how to approach and understand Palestinian rights.

RESOLUTION 194

Israeli negotiators have refused to accede to Palestinian demands that they recognize the legitimacy of U.N. General Assembly Resolution 194, enacted in 1948. For the Palestinians, acceptance of 194 appears fundamental to settling the refugee problem. Here, too, Israeli negotiators should be flexible.

The key sentence in Resolution 194 reads: “The refugees wishing to live at peace with their neighbors should be allowed to return to their homes at the earliest practicable date.” Several points are worth noting:

- The resolution does not use “rights language,” saying only that the refugees should be allowed to return to their homes. It neither affirms nor denies that this is a matter of right.
- The resolution when enacted referred to the 1948 refugees. While international law recognizes the rights of descendants as well, the issue of practicability, cited in the resolution, is considerably transformed by the vast growth of the refugee population. The existing 1948 refugees constitute perhaps 10 percent of today’s refugee population.
- The resolution carries within itself a critical condition. It speaks of refugees “wishing to live at peace with their neighbors.” Thus Resolution 194 does not support a totally unconditional return. Implicit here is the notion that in order to return, the refugee must be willing to live at peace. Interpreting such a condition is not a simple matter. From an Israeli point of view, this does not mean a desire for peace in the abstract. It means a commitment to lawfulness under very uncertain conditions in the future, conditions that could even include war between Israel and one or more Arab states including the future state of Palestine.

Given the fissure that exists between Israel’s Jewish and Arab citizens and has deepened in recent months, no one can guarantee how large numbers of returning Palestinian refugees would act in a crisis. The “wishing to live at peace” condition in 194 suggests that a person by person determination needs to be made. Yet this is hardly possible. While some particularly militant refugees might be excluded for obvious security reasons, there is no way of knowing about the

future behavior of most refugees in unpredictable and trying circumstances. Indeed, it is possible to argue that the logic of the “wishing to live at peace” clause in Resolution 194 suggests that the extent of permitted return could be linked to the evolution of conditions of true peace. If peace proves to be genuine and resilient, then it becomes credible to say that 194 supports a large return; if lasting peace is uncertain, then a large return will itself undermine a willingness to live at peace.

The main point is that the scope and force of resolution 194 is open to wide interpretation. For the purposes of the negotiations, the key issue is that whatever is agreed upon by way of implementation of 194 must be affirmed to be adequate fulfillment of Resolution 194. If such an “adequate fulfillment” clause is part of the agreement, it would be highly desirable to affirm that the agreement was based on mutual acceptance of 194. Thus Israel should not treat mention of Resolution 194 as anathema.

THE OPTION OF RETURNING

The option to actually return is the central issue. For Palestinian leaders, the key is meaningful choice. They need to be able to turn to their people and say, “Yes, you have an opportunity to return to Israel, but you also have a variety of other options. Some of them are quite attractive. You decide.” Israel and the Palestinians might wisely put aside the question of the basis on which such options to return are grounded. Indeed, as suggested above, such options can themselves be viewed as a right to choose from a particular menu, a right that will be constituted by the negotiated agreement itself.

The key question is, what return options can Israel live with? Here the leftists who announced that they will never agree to the return of Palestinian refugees (except for limited numbers based on humanitarian grounds) are mistaken. They and other Israelis can in fact agree to much more without any risk of being overwhelmed by refugees. A variety of tools to do this are available:

Establishing a Rate of Return

Ideally the Palestinian leadership would like to avoid any regulation of the option to return to Israel. Their idea is to offer the refugees a menu of alternative options sufficiently attractive so as to avoid any need to restrict implementation. Ideally, then, it would just work out that 95 percent of the refugees would decide to accept compensation and resettlement elsewhere rather than returning to Israel.

Israel, of course, can't put itself in a situation in which there are no guarantees that it won't be overwhelmed by Palestinian refugees deciding that, all things considered, they would like to become Israelis. So from an Israeli point of view, something more is required. The temptation is to impose a cap, to say, for instance, that only 100,000 or 200,000 refugees can ever return. (200,000 is roughly the decline in the number of Palestinians who will be under Israeli sovereignty if Jerusalem is divided). 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 any total cap, it is possible to say that the rate of returning refugees must not alter the character of Israel as a Jewish state. There could be a fixed rate (e.g. 10,000 a year) or a negotiated formula. Many different kinds of formulas might be possible. For instance, the rate might be set at a certain percentage of the population (e.g. two-tenths of 1 percent of the population) or as a percentage of the previous year's population growth (e.g. 5 percent of the growth) or perhaps even a percentage of the Jewish annual immigration under the Law of Return for Jews (e.g. one-fifth of the previous year's Jewish immigration). Palestinians would, of course, argue for more permissive formulas.

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. Faced with waiting ten years to return to Israel or getting money, new homes and land elsewhere, most would choose the latter. In any event, the actual numbers entering would be proportional to existing demographics.

The 1948 Refugees

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. Yet surely as a matter of justice, priority should go to these elderly refugees. Moreover, the total number of living 1948 refugees is quite limited. Of the 300,000 or so 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. This return "by right" could be accompanied by a family reunification and visitation policy that would ease the hardship these elderly refugees would encounter in separation from adult children and grandchildren. But this secondary return could be controlled by Israel as a "humanitarian policy" under its discretion.

Location of return

The refugees will have lots of options to return to places other than Israel. For those seeking to become citizens of Israel, with the right to live where they please, only a very limited number could be accommodated each year.

But there are ways to give large numbers of Palestinian refugees a genuine option of returning to land that is today the state of Israel. The idea of land swaps was part of the negotiations. In exchange for territory that Israel seeks to annex to accommodate settlements in the West Bank, it will swap areas adjacent to the Gaza Strip. Since these areas will become part of the Palestinian

state, large numbers of refugees can be settled there. This is a powerful solution. It allows the leadership to say that refugees are able to return to what is today part of Israel.

Unfortunately it does not seem that this idea is having the powerful effect that some had expected. In part, this is because Palestinians still cling to the idea of returning to their homes. In part, it is because being in refugee resettlement areas adjacent to Gaza sounds awfully like being in new refugee camps, and, in part, because “returning to Israeli land that becomes Palestinian” may feel like a bit of a shell game.

It is possible however to modify the “land swap” idea in ways that will make it more meaningful for refugees. The key here is to maintain one principle: the refugees returning to these areas will be citizens of the state of Palestine, and any children born to them will also be Palestinian citizens. Within this framework, there is considerable room for creative ideas. One option is to not press ahead with an exchange of sovereignty. Rather, Israel could lease certain areas to the state of Palestine and, similarly, lease from the Palestinians settlement areas in the West Bank (thus giving the Palestinians sovereignty over a larger percentage of the West Bank). Secondly, such areas need not be limited to territories adjacent to Gaza. If it was thought that ultimately all the leased territories would become sovereign areas, they should be adjacent to either Gaza or the West Bank. Along the Green Line, such areas need not be extensive. In fact, there might be a number of quite small pocket-villages, designed specifically not to resemble vast refugee camps. It might even be possible for some leased areas to be in interior regions of Israel, parallel to isolated settlement areas leased within the West Bank, far from the Green Line. Just as the Jewish settlers would not be Palestinian citizens, so too, these Palestinians would not be Israeli citizens. Such options do not have to be of a large magnitude, they could be limited to a few thousand. The idea however is to offer to the refugees a wide variety of possibilities, an offer that is not easily categorized – or dismissed – while at the same time protecting Israel.

Binational Zones

An even more powerful idea would be the creation of binational zones, areas in which both Israeli and Palestinian citizens live. To appreciate this, it must be realized that the areas of the West Bank that Israel proposes to annex in order to accommodate Jewish settlers contain substantial numbers of Palestinians. On some proposals, upwards of 50,000 Palestinians now living in the West Bank would find themselves suddenly living in what has become Israeli sovereign territory. Oddly, the demographic implication of this inclusion within Israel of a significant Palestinian population goes largely unexamined by many Israelis who say “no” to any return of Palestinian refugees.

Rather than simply annexing these areas to Israel, these areas could be designated “binational zones” in which both Israelis and Palestinians would live, each group maintaining citizenship in its national state. To these binational zones taken from West Bank territory would be added territories within Israel that would similarly become binational zones. Within these zones, areas would be developed for the return of specified numbers of refugees.

The question of sovereignty over the binational zones offers a variety of possibilities. They could come under the undivided joint sovereignty of the two states (condominium). Alternatively, it is possible for those binational zones falling within the green line to remain under Israeli sovereignty and those beyond the green line to fall under Palestinian sovereignty. Or this could be reversed, with those beyond the green line going to Israeli sovereignty and those within the green line to Palestinian sovereignty. Another option would be for the entire issue of sovereignty over these zones to be deferred until they have been in existence for ten years.

Their basic characteristic is not their sovereignty, but rather their binational character. These would be areas in which both Israeli and Palestinian citizens could live, with each group having citizenship only in their national state, and thus without affecting the demographics of citizenship within either state.

CONCLUSION

These tools, regulating the rate of return, focusing on the 1948 refugees, using land swaps and establishing binational zones, would operate within the larger context of compensation and resettlement alternatives outside Israel, whether in the Palestinian state, Arab countries, Europe or the United States. Thus, a rich menu of choice can be devised, accompanied by some regulatory structure that safeguards Israel. From a political point of view, a choice-based approach of this sort has major advantages. For the Palestinian leadership, it allows them to avoid charges of having abandoned the right of return. Rather, it gives them the opportunity to deliver to the refugees a variety of attractive alternatives.

Such a choice-based approach is also best for Israel. Other approaches might wrest from the PLO a verbal statement affirming that the refugee claims have been satisfied. But this is unlikely to be accepted by the refugees themselves and their descendants. Other organizations (e.g. Hamas) would undoubtedly take up the cause, charging that the PLO had sold out the right of return. To truly end the conflict, it will be necessary for millions of Palestinians to actually feel that they themselves have made a decision about return, resettlement and compensation. Only then will the refugee issue be finally resolved, a necessary condition for truly ending the conflict.