Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians

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I. Introduction

A profound paradox characterizes the Israeli-Palestinian conflict: While the outline of a two-state solution that would better serve the interests of most Israelis and most Palestinians is reasonably clear, leaders of both parties are unable to reach agreement across the negotiation table this seemingly intractable, often violent, conflict persists. Indeed, during the five years since the collapse of the Oslo peace process, more than 1000 Israelis and 3000 Palestinians have died in renewed violence. We believe the essential explanation for this paradox relates to profound internal conflicts among Israeli Jews on the one hand, and among Palestinians on the other. These "behind the table" conflicts within each community stand as barriers to progress at the negotiation table.[1]

The general terms of a two-state deal are well known. President Clinton outlined them to the parties in December of 2000.[2] This outline included arrangements to ensure a secure Israel, which would remain a democratic Jewish state. A Palestinian state would be established, that would comprise Gaza and essentially all of the West Bank. All Jewish settlements would be evacuated, with possible exceptions for those very near the "Green Line"[3] or adjacent

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[1] Interactions between "across the table negotiations" and conflicts among each negotiator's constituents characterize bargaining in labor relations and international relations, and there is an academic literature dealing with each. For relevant citations see Mnookin & Eiran, *supra* note *, at 13 n.8. *See also* Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L L. 1 (2005).

[2] *See* DENNIS ROSS, THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE 752-53 (2004).

[3] The "Green Line" was the cease-fire line, established in 1949, that became a provisional border between Israel and the territory controlled by Jordan before the 1967 War. *See* Rob-

to Jerusalem. Those settlements might be annexed to Israel in exchange for land that is presently part of Israel, and other considerations. Jerusalem would become a condominium of sorts, encompassing the internationally recognized capitals of two states, Israel and Palestine. Arab east Jerusalem would become the capital of the new Palestinian state, while the Jewish portions of Jerusalem would be Israeli. The Palestinian claim that their refugees have a "right of return" would be definitively resolved in a way that guaranteed Jews remained a substantial majority in Israel proper.

We argue in this paper that this conspicuous and as of yet unachievable deal, while serving the interests of most Israelis and most Palestinians, creates profound conflicts within each community. These conflicts help explain why the Oslo Principles were so vague, why there has been a pattern within both communities of deferring decisions on these issues, and why, although there is substantial evidence that moderates on both sides might be able to make this deal, it has never been accomplished.[4]

Among Israeli Jews, the internal conflict concerns the future of the settle-ments. A contiguous Palestinian state in the West Bank portion[5] would encom-pass many existing Jewish settlements, and as a practical matter displace tens of thousands of Jewish settlers. It would also mark the end of the "settlement project." For some religiously observant Israelis, this project was meant to guarantee the fulfillment of a messianic desire to include within the Jewish state the cradle of "Eretz Yisrael,"[6] or biblically significant parts of the ancient Jewish land. The political and social turmoil that Israel experienced prior and

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ert J. Araujo, *Implementation of the ICJ Advisory Opinion—Legal Consequences of the Con-struction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 B.U. Int'l L.J. 349, 365-66 (2004).

[4] Many blame the breakdown at Camp David on Yasser Arafat, *see* Ross *supra* note 2, at 710, although Prime Minister Ehud Barak and President Clinton are sometimes said to be responsible as well. *Compare* Hussein Agha & Robert Malley, *Camp David: The Tragedy of Errors*, N.Y. Rev. of Books, Aug. 9, 2001, *available at* http://www.nybooks.com/arti-cles/14380, *with* Dennis Ross, Gidi Grinstein, Hussein Agha & Robert Malley, *Camp David: An Exchange*, N.Y. Rev. of Books, Sept. 20, 2001, *available at* http://www.nybooks.com/articles/14529. *See also* Jeremy Pressman, *Visions in Collision: What Happened at Camp David and Taba?*, 28 Int'l Security 5, (2003), *available at* http://muse.jhu.edu/journals/international_security/v028/28.2pressman.pdf. In the years since, some commentators have suggested that the Bush II administration bears blame for the lack of progress towards reso-lution because it failed to design a strategy to enable the parties to accept the terms of a deal that would appear to serve the interests of both sides. *See* Gareth Evans & Robert Malley, *Roadblocks on the Path to Peace*, N.Y. Times, Oct. 24, 2002, at A35 (claiming President Bush lacked a sufficient plan for comprehensive political settlement between Israel and Palestinians); Thomas L. Friedman, *A Rude Awakening*, N.Y. Times, Feb. 5, 2004, at A31 (blaming the Bush foreign policy team for failing to tailor the peace process to build a moderate center Palestinian bloc). Other explanations suggest the possible absence of a bar-gaining zone between the two parties, or mutual hard bargaining. *See* Korobkin & Zasloff, *supra* note 1.

[5] It is widely assumed that the Palestinian state will have two non-contiguous parts: the Gaza Strip and the West Bank.

[6] "Eretz Yisrael," literally "land of Israel." Politically, the term means "greater Israel," those areas that were promised to the Jews in the Bible including areas that are not under the sovereignty of the modern state of Israel. The territory that was held by the under British as a mandate from the League of Nations 1920 control (1917-1948) was called "Palestine-Eretz Yisrael."

during the relocation of some 8500 settlers from Gaza (which has little religious significance to Jews) and the northern West Bank in the summer of 2005 underlines the salience and importance of the internal conflict concerning the future of the West Bank settlements spread over the biblical heartland, where over 250,000 Jewish settlers now live.

Among Palestinians, one of the more pressing internal conflicts concerns the "right of return" of Palestinian refugees and their descendants to what is now Israel in order to claim and reoccupy the land and property that had been theirs before Israel was established. During what Israelis call their War of Independence and what Palestinians call the "disaster," about 750,000 Palestinians became refugees. Today, they and their descendents number in the millions, many of whom remain in refugee camps not only in Gaza and the West Bank but also in Lebanon, Syria, and Jordan. Unlike the internal conflict among Israeli Jews over the settlement project, which is conspicuously revealed in very public disputes at the center of Israeli politics and Israeli civil society, the internal Palestinian conflict over the scope and meaning of this right is not so conspicuous and has not been a matter of substantial similar public debate. As we will show, in part because the Palestinian national liberation movement has defined itself as a refugee movement, at the level of political rhetoric, there would appear to be a nearly unanimous commitment among Palestinian leaders to a right that is both a collective right of the Palestinian people and a "fundamental" and "inalienable" individual right of every refugee to choose whether to return to what is now Israel. But beneath the surface, there lurks a profound internal conflict among Palestinians about the scope and meaning of this right of return.

Privately, many Palestinians acknowledge that it is unrealistic to expect that Israel will accept large numbers of Palestinian refugees. Moreover, some polls suggest that many refugees would rather get compensation and citizenship rights in a new Palestinian state or in some other country[7] of their choosing than live in Israel. But the same polls indicate a substantial minority of the refugees and their descendants would prefer to return to their original lands in what is now Israel. The disappointment and anger of these Palestinians over any negotiated deal extinguishing their right of return is widely seen as capable of erupting into violent opposition.

These internal "behind the table" conflicts interact with, and create problems for, any significant across the table negotiations between the Israeli government and the Palestinian Authority. Indeed, these interactions best explain why it is difficult for Israeli and Palestinian leaders to make and implement a comprehensive deal. On the one hand, if an Israeli leader goes to the negotiating table insisting on the broad territorial claims of the national religious settlers, or if a Palestinian negotiator presses for the expansive demands of refugees who insist on return to Israel "proper", negotiations across the table are doomed. On the other hand, a two-state accord that might satisfy the interests of most Israelis and most Palestinians risks turmoil and even violence "behind the table" *within* each community.

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[7] Korobkin & Zasloff, *supra* note 1, at 55-56.

Part II of this paper begins by describing conflicting Palestinian and Israeli perspectives concerning the origins of the refugee problem, its scope, and who should bear moral, legal, political or economic responsibility for its resolution. We next review the history of Israeli settlements and show how, in the aftermath of the 1967 Six Day War, a settlement movement led by determined national religious settlers promoted and vastly expanded Jewish settlements on the West Bank and Gaza. Finally, we demonstrate the centrality and intractability of the refugee and settlement issues by examining the recent across–the-table negotiating history between the Israeli government and the Palestinians.

Part III marshals the evidence to demonstrate the existence of profound internal conflicts on these issues. With respect to the internal Israeli conflict concerning the settlements, the evidence is conspicuous and overwhelming. The difficulties faced by Prime Minister Sharon in removing less than four percent of the settlers serve as a vivid reminder. The internal conflict among Palestinians about the scope and meaning of the right of return is more subtle but no less difficult. We trace the changing currents of Palestinian thought on these issues to show how, since the collapse of the Oslo process, the internal conflicts have become explicit and public. After describing these two internal conflicts, we compare them. In each case, the most fervent proponents claim their legitimacy within each community founded on a reading of history. Both employ a narrative based on suffering and past victimization, and the claims of each implicate their core identity. As we will show, each is able to sound themes that have broad resonance even among their compatriots who think their more extreme claims are unrealistic and counterproductive.

The conclusion suggests that managing internal conflicts like these demands a combination of empathy and assertiveness on the part of Israeli and Palestinian leaders. Empathy is required because a stable two-state solution will require that Israeli settlers be displaced from their homes and Palestinian refugees give up all hope of returning to what had once been their homes. Ending the settlement project and forgoing the right of return would involve profound sacrifices on the part of members of each of those groups, giving up hopes and dreams that have given meaning to their lives. Within each community, some would be required to suffer and pay a price for the sake of the greater good of their people. We suggest that ideological as well as financial compensation will be necessary. Assertiveness by the leadership is necessary because compliance will not be voluntarily secured from some, no matter what the compensation. After a legitimating process, authorities in both Israel and the new Palestinian state will need to impose the outcome on a dissenting minority.

II. UNDERSTANDING THE REFUGEE AND SETTLEMENTS ISSUES:
ESSENTIAL BACKGROUND

In this section we provide some essential background on the two core issues, first on the Palestinian refugee problem and then on the Israeli settlements. We explain why these two issues are central to any resolution of the Israeli-Palestinian conflict and demonstrate how intractable they have remained over the years, despite intermittent attempts to resolve them.

A. The Palestinian Refugees

Palestinians and Israelis have radically different perspectives on the refugees and contest the causes of their original displacement, the reasons behind their continued demand for return, the legality and justice of their claims, and even the basic facts about their present and past numbers.

1. The Conflicting Palestinian and Israeli Narratives

The traumatic events of 1947-1949, which the Palestinians refer to as al-Nakba ("the Disaster"), constitute the central narrative in the formation of the Palestinian national identity.[8] According to one Palestinian perspective, the "refugee problem" arose during this period as a direct consequence of the violence and terror that Zionist militias deliberately visited upon the Palestinians, with a view to cleansing them from the land allotted to Israel through the U.N. Partition Plan.[9] These Palestinians claim that waves of refugees were either expelled directly by those militias or forced to flee as word of impending destruction spread from village to village. A key component of this narrative is the massacre at Deir Yassin and the terror among ordinary Palestinians caused by its news.[10] While many Palestinians stayed and fought to retain their lands, eventually vast numbers fled when forced to choose between the defense of their lands and the fear of death.[11] Another version of this history mutes the claim of ethnic cleansing on the part of Israelis and acknowledges that refugees are often a natural consequence of war but insist that international human rights law mandates that all refugees be allowed to return to their homes, if they should choose to do so, at the cessation of hostilities.[12]

The Israeli narrative, for its part, holds that the state of Israel had no direct role in the creation of the refugee crisis, which was a *consequence* and not a *cause* of the 1948 war that had been declared unjustly upon the nascent state of Israel by the Arab states.[13] In the Israeli narrative, the culpability of the Arab states for the creation of the refugee problem is two-fold: (1) They caused the refugee crisis by their violent rejection of the UN Partition Resolution of 1947 that envisaged the creation of a Jewish and an Arab state in Palestine (a plan the Jews accepted peacefully); and (2) the Arab states actively encouraged Palestinians to leave their homes during the war, and falsely gave them reason to believe that they would be let back in after the war had been won.[14]

The essential component of this narrative is that the 1948 war was unjustly declared upon the state of Israel by the Arab states and that the Jewish militias

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[8] Rashid I. Khalidi, *Observations on the Right of Return,* 21 J. OF PALESTINE STUD. 29, 30 (1992).

[9] Joseph Alpher & Khalil Shikaki, *The Palestinian Refugee Problem and the Right of Return* 3-4 (Weatherhead Center for International Affairs, Working Paper No. 98-07, 1998), *available at* http://www.wcfia.harvard.edu/papers/98-07.pdf.

[10] Adel Yahya, *The Future of the Palestinian Refugee Issue in Final Status Negotiations; Palestinian Refugees: Their Past, Present and Future* 28-30, IPCRI Final Status Publications Series (1998).

[11] *Id.* at 83.

[12] Alpher & Shikaki, *supra* note 9, at 3-4.

[13] SHIMON PERES, THE NEW MIDDLE EAST 186-87 (1993).

[14] Alpher & Shikaki, *supra* note 9, at 5-7.

that entered into the war fought only in their own defense.[15] The refugee prob-
lem arose not because of any deliberate, premeditated actions of the Jewish
armed forces that predated the war, but rather as a natural consequence of the
war, as refugees are a natural consequence of any war.[16] Although within
Israel there is some scholarship by "revisionist" or "new" Israeli historians such
as Benny Morris suggesting that at least some Arabs became refugees because
of deliberate actions of Jewish militias and the Israel Defense Forces during the
War of Independence, a majority of Israelis reject the notion that they are
broadly responsible for the creation or maintenance of the refugee problem.[17]

    Palestinians reject the Israeli claim that the Arab states were the aggres-
sors in the war. They maintain that the first act of aggression was committed
against them by the British who allowed immigration of Zionist foreigners into
their land; allowed mass transfer of ownership of that land to the Zionists
through dubious means; and eventually, the violent partition of that land, all
without the consent of the people who lived on it. The second act was by the
UN when it mandated the partition of the land, again, without the consent of the
people who lived on it. And the third act was by the Zionist gangs that used
violence (or the threat of it) to force Palestinians' flight from their homes and
lands.[18] The Zionist acquisitions of Palestinian land during the British Man-
date period, and the accompanying injustices, were, in the Palestinian view, the
primary cause of the 1948 war.[19]

2. *The Question of Responsibility*

    The Palestinians consider the refugee issue to be a matter of political
rights (and wrongs) and legal remedy, while the Israelis consider it to be a
matter of humanitarian assistance and, thus, economic aid. Moreover, many
Israelis believe that the Palestinian leadership, with the cynical complicity of
the leaders of the Arab host states, contrives to keep the refugees mired in their
current misery to keep alive artificially, and indeed fan the flames of, the
demand for return.[20] They claim that the refugee problem is essentially a
humanitarian one that can be solved by humanitarian means (e.g., improving
the living conditions of the refugees today, helping them to find jobs and better
educate themselves, and aiding their resettlement into the countries in which
they currently reside).[21]

    The Palestinians, for their part (and, interestingly, this includes not just the
Palestinian leadership but very many refugees themselves), insist that the refu-

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[15] *See, e.g.*, ARI SHAVIT, HALUKAT HA'ARETZ 148 (2005) (in Hebrew).

[16] PERES, *supra* note 13, at 181-94.

[17] BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949, 1-3
(1989).

[18] Yahya, *supra* note 10, at 52-62.

[19] It is important to note here that the primary sources of Palestinian history are not scholars
but the refugees themselves; it is an oral history, a survivors' history, that endures in the
camps and cities and countries in which the refugees have coalesced; it is passed down from
generation to generation with the keys of the houses lost and the deeds of the properties
vanished; it is codified and confirmed by word of mouth; and has about it an anecdotal
authenticity with which dryly factual historical accounts cannot quite contend.

[20] PERES, *supra* note 13, at 187.

[21] Alpher & Shikaki, *supra* note 9, at 5-6.

gee problem is essentially a *political* one that can be solved only by *political* means (i.e., by allowing the refugees to choose their method of return). The humanitarian aspects of the problem are, according to them, important but secondary, as they do not address the root causes of the problem.[22] They also vigorously deny the charge that the Arab and Palestinian leaders have been keeping the issue alive artificially, asserting instead that the refugees themselves have consistently rebuffed any attempts on the part of leaders to "bribe" them into accepting a solution that does not allow them the freedom to choose.[23]

This deep disconnect in perceptions is further underscored by the insistence with which the Palestinians look to the rubric of international law for the legitimacy of their claim: The Palestinian perspective maintains that the right of refugees to return to their homes, should they choose to do so, is enshrined in an array of international laws and conventions such as the International Covenant on Civil and Political Rights (1966),[24] the Universal Declaration of Human Rights (1948),[25] and the Fourth Geneva Convention (1950).[26] Additionally, Palestinians refer to international bodies and instruments that seek specifically to protect the rights of refugees. Examples of these are the United Nations High Commission for Refugees ("UNHCR"), which has recently begun to favor voluntary repatriation as an optimal solution for refugees, and the 1951 Refugee Convention, which defines refugees as protected persons under international law and articulates certain basic minimal provisions for their protection.

Palestinians also point to what they consider to be the successful return and/or restitution of refugees at the cessation of other hostilities around the world. For example, the right of return of Bosnian refugees was enshrined in the Dayton Agreement of 1995 and seen as an important factor in resolving that conflict. The same holds for the Arusha Peace and Reconciliation Agreement of 2000, the Interim Agreement in Kosovo in 1999, the Quadripartite Agreement in Georgia in 1994, and many other peace agreements signed in the last quarter century, which all provide for the voluntary repatriation and restitution of property of war-time refugees.[27]

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[22] *Id.*

[23] Yahya, *supra* note 10, at 118-20.

[24] G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp No. 16, at 52, U.N. Doc. A/6316 (1966) ("No one shall be arbitrarily deprived of the right to enter his own country.").

[25] G.A. Res. 217A, U.N. GAOR, 3d Sess., at 74, U.N. Doc. A/810 (1948) ("Everyone has the right to leave any country, including his own, and to return to his country.").

[26] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49(1), 6 U.S.T. 3517, 3544, 75 U.N.T.S. 287, 314 ("Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of another country, occupied or not, are prohibited, regardless of their motive. . . . Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."). *See generally* Yifat Susskind, Background Resource: The Crisis of Palestinian Refugees and the Right of Return (July 2000), http://www.madre.org/articles/me/rightofreturn.html.

[27] Badil Resource Center for Palestinian Residency and Refugee Rights, Peace Agreements and Refugees—Lessons Learned (December 2003), http://www.badil.org/Publications/Bulletins/Bulletin-14.htm. Some Palestinians also point to the positive example set by the Land Claims Court in South Africa that sought to compensate or return land to those dispossessed

Palestinians find their most concrete legal backing in their reading of the famous U.N. General Assembly Resolution 194 and it is this resolution which they quote principally when referring to their "right to return."[28] In their reading, of course, they honor what they consider to be the spirit and intention of the Resolution, rather than its exact wording, which is, as we shall see below, to what Israelis refer. The essential paragraph from that resolution resolves that:

> [R]efugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible . . . .[29]

The Israelis, for their part, also look to international law for guidance and support on this matter, for a key component of the Israeli narrative is that Israel is a legitimate, sovereign state that was re-established as a homeland for the Jewish nation after years of striving, suffering and homelessness on the part of the Jewish people. The legitimacy of this re-established state derives not merely from the international approval manifested in the UN Partition Resolution, but also from history, including that Israel is the historic birthplace of the Jewish people, the cradle in which their "spiritual, religious and national identity was formed," and that the Holocaust proved beyond doubt the necessity of the re-establishment of a homeland that would provide for the Jewish people an "equality of status among the family of nations" which had been denied them for centuries.[30]

According to this perspective, Israel, like all sovereign states, has the right to self-determination enshrined in international law, meaning, among other things, the right to determine the character of the state and to decide the rules of its citizenship. Israel's founders intended it to be a Jewish democracy, and Israel's right to declare itself as such, and to pass legislation to that effect, is a basic exercise of its right to sovereignty and self-determination, and not, exceptional.[31] A sovereign state's right of self-defense forms a secondary basis for Israel's position on the refugee issue—no sovereign state may be required to allow people into its territory who will cause harm (directly or indirectly) to the safety and security of the state and its citizens. An uncontrolled influx of refugees into sovereign Israeli territory will encroach not only upon Israel's right to define the state as a homeland for the Jewish people but also on its right to

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by racially discriminatory laws during the apartheid regime, and, invariably, to agreements between Germany and Israel and Jewish organizations, that allowed for the restitution of Jewish property and compensation, and that have played a crucial role in the healing process between Jews and Germans since the Holocaust. Susskind, *supra* note 26.

[28] *See, e.g.*, Susan Akram, Reinterpreting Palestinian Refugee Rights Under International Law, and a Framework for Durable Solutions, Badil Resource Center for Palestinian Residency and Refugee Rights (February 2000), http://www.badil.org/Publications/Briefs/Brief-No-01.htm.

[29] UN General Assembly, Resolution 194 (1948), *reprinted in* THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT 85 (Walter Laqueur & Barry Rubin eds., 6th rev. ed., Penguin Books 2001) (1969) [hereinafter THE ISRAEL-ARAB READER].

[30] State of Israel: Proclamation of Independence (1948), *reprinted in* THE ISRAEL-ARAB READER, *supra* note 29, at 81-83.

[31] Alpher & Shikaki, *supra* note 9, at 5-6, 11-12.

defend those people from the economic, political and social dangers of such an influx.[32] To the extent that there is an option to return, then, Israel understands that it is controlled by the state of origin and not by the refugees themselves.[33]

In addition, in Israel's view, international law grants to refugees the option of returning to their country of origin only if they actually have a country of origin to which they may return. Since Israel was not their country of origin, the Palestinian refugees cannot possibly claim a right to return to it. Lastly, Israel is careful to point out that nowhere in international law is a refugee granted a "right to return." Israel's reading of U.N. Resolution 194 is, in this sense, carefully literal.[34]

3. Numbers Past and Present

In addition to their deep disagreements about the origins of the refugee problem, and the justice/legality of the claim of return, Palestinians and Israelis also disagree about the numbers involved, both in the past and at present. Estimates of the number of Palestinians displaced during those turbulent war years vary greatly, and no definitive statistics exist that satisfy both sides. According to the reputable think tank *International Crisis Group*, the estimate considered reliable by most researchers today is 750,000, produced by the U.N. Economic Survey Mission of 1949.[35] This estimate is approximately the number arrived at independently by Israeli historian Benny Morris[36] and tends to be the number most widely used. Statistics published in 1951 by the United Nations Relief and Works Agency (UNRWA), however, suggest that the original number might have been much higher (around 860,000), as there existed at least 100,000 undocumented or paperless refugees who were not accounted for in the 1949 U.N. Survey.[37] On the other hand, official and private Israeli accounts claim the number was closer to 500,000.[38]

Of the original 750,000-odd refugees, the 1949 U.N. Economic Survey Mission estimated that approximately 280,000 went to the area now known as the West Bank; 200,000 to the Gaza Strip; 100,000 to Lebanon; 75,000 to Syria; 70,000 to Jordan; and smaller numbers to Iraq, Egypt, and other countries. By the time the U.N. had established the UNRWA in 1950 as a special

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[32] Shlomo Gazit, The Palestinian Refugee Problem, Final Status Issue Study No. 2 8-14 (Jaffee Center for Strategic Studies) (1995).

[33] *See* Ruth Lapidoth, Do Palestinian Refugees Have the Right to Return to Israel?, Jan 15, 2001, http:// www . israel . org / mfa / peace % 20process / guide % 20to % 20the % 20peace % 20 process/do % 20palestinian % 20refugees % 20have % 20a % 20right % 20to % 20return % 20to. In addition to claiming that it bears no responsibility for the refugee problem, Israel has long claimed that this resolution is "non-binding" because it was issued by the General Assembly, not the Security Counsel.

[34] *Id.*

[35] International Crisis Group, Palestinian Refugees and the Politics of Peacemaking (Feb. 5, 2004), http://www.crisisgroup.org/home/index.cfm?id=2511&1=1.

[36] Morris, *supra* note 17.

[37] *See, e.g.*, United Nations Relief and Works Agency, Frequently Asked Questions, http:// www.un.org/unrwa/overview/qa.html (last visited Jan. 28, 2006).

[38] *See, e.g.*, Melissa Radler, *Justice for All*, JERUSALEM POST, February 16, 2001, at 14 (indicating that Israel estimates "half a million Palestinians became refugees" in 1948).

body to administer to the needs of these scattered and impoverished refugees, the official numbers looked (and have continued to look) as follows:

TABLE 1
Number of Registered Persons[a]
(As of 30 June 2004)

Field	1950	1970	1990	2000	2004
Jordan	506,200	506,038	929,097	1,570,192	1,758,274
Lebanon	127,600	175,958	302,049	376,472	396,890
Syria	82,194	158,717	280,731	383,199	417,346
West Bank[b]	—	272,692	414,298	583,009	675,670
Gaza	198,227	311,814	496,339	824,622	938,531
Total	**914,221**	**1,425,219**	**2,422,514**	**3,737,494**	**4,186,711**

a. Figures are based on UNRWA registration records, which are updated continually. However, the numbers of registered refugees present in the Agency's area of operations is almost certainly less than the population recorded.
b. Until 1967, the West Bank was administered as an integral part in the Jordan field.

The most recent UNRWA estimate indicates that there are four million Palestinian refugees today. However, this number is also in dispute, for some Israelis claim that descendants of those who lost their homes in 1948 and have since acquired citizenship rights in third countries ought not be considered as refugees themselves.[39] UNRWA, however, defines as a refugee "all persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as the result of the 1948 conflict." More to the point, it considers as refugees all descendants of those who meet that definition and who choose to call themselves refugees.[40] However, despite the apparently generous sweep of this definition, several thousand refugees are evidently excluded, as UNRWA counts only eligible beneficiaries and excludes all Palestinians who have no residency rights in its areas of operation, all those who were never counted in the first place, and all those who have been removed over the years from its rolls for various reasons. Therefore, the actual number might be much higher than the four million estimated here. Palestinian sources suggest that it is approximately 5.8 million,[41] while predictably, Israeli sources provide a much lower number, some as low as 2 million, and imply that UNRWA's figures are grossly overstated.[42]

Notwithstanding these disputes about numbers, it is clear that the majority of people who define themselves as Palestinians in the world today are refugees. Interestingly, the majority of the 2 million Palestinians who live in the West Bank are not refugees but are instead descendants of the original

[39] International Crisis Group, *supra* note 35.
[40] *See* United Nations Relief and Works Agency, *supra* note 37.
[41] International Crisis Group, *supra* note 35.
[42] ANTI DEFAMATION LEAGUE, ADVOCATING FOR ISRAEL: AN ACTIVIST'S GUIDE (2002). None of these estimates include those who were made refugees—either by being deported from, or by being prevented from returning to their homes—in what became the Occupied Territories during and after the 1967 war.

residents of these areas.[43] This fact is significant, because the majority of Palestinians now living in the West Bank, since they are not refugees, have different interests with respect to the implementation of the right of return from the refugees themselves.

To summarize, not all Palestinians are refugees. About a million remain in Israel as Israeli citizens and over two million living in the West Bank and Gaza are indigenous to those areas. Of those who were originally refugees, many who fled to Jordan and Syria are now citizens of those countries, as are some of those who went to Egypt, the United States, and various European countries and received asylum and sometimes citizenship on a case by case basis. In addition to these differences in political status, there are great differences in economic, social, and political circumstances stemming from the varying reception accorded them in different host countries. Clearly, the worst off are those who live in refugee camps. Today, roughly one-third of Palestinian refugees live in fifty-nine camps recognized by UNRWA (see Table 2 below), most in conditions of wretched poverty, congestion, rightlessness, unemployment, and conflict. Of these, it is generally considered that the twelve camps in Lebanon, "home" to approximately 200,000 refugees, are the harshest and most untenable, and that of all the host countries, the state of Lebanon most greatly circumscribes the essential rights and freedoms of the refugees.[44] These distinctions and proportions matter because they create differences which in turn substantially affect the underlying interests of the various groups when it comes to the right of return.

TABLE 2
Distribution of Registered Population
(As of 30 June 2004)

Country	Registered Population	Number of Camps	Total Camp Population	Registered Pop Not in Camps	% Pop Not in Camps
Jordan	1,758,274	10	304,035	1,454,239	83%
Lebanon	396,890	12	209,216	187,674	47%
Syria	417,346	10	122,055	295,291	71%
West Bank	675,670	19	181,891	493,779	73%
Gaza	938,531	8	490,410	448,121	48%
Total	**4,186,711**	**59**	**1,307,607**	**2,879,104**	**69%**

Source: UNRWA Public Information Office, UNRWA Headquarters (Gaza), August 2004.

Against this background, it is plain that the resolution of issues related to the Palestinian refugees is central to any resolution of the Israeli-Palestinian conflict. A large proportion of all Palestinians see themselves as refugees, and

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[43] While not refugees, these "native" Palestinians, like most Palestinian refugees, are presently stateless, and share with the refugees a desire for the creation of a Palestinian state.
[44] *See* Wadie E. Said, *Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict*, 28 HASTINGS INT'L & COMP. L. REV. 349, 352-54 (2005) (describing restrictions including, *inter alia*, a government office that decides whether or not to issue travel documents to Palestinian refugees, and the limited availability of work permits).

the ethos of dispossession lies at the heart of the modern Palestinian narrative. For Israeli Jews, on the other hand, the possible return of large numbers of Palestinian refugees, because of the demographic implications, is seen as an existential threat to the continued viability of Israel as a Jewish democratic state.

B. The Jewish Settlements

1. The Settlers and Settlements Today

About 250,000[45] Israeli settlers out of a total population of some five million Israeli Jews live in about 120 settlements in the West Bank.[46] The settlers comprise three reasonably distinct groups. The first group, the religious nationalists, is deeply committed to a religiously based expansionist vision. Although they comprise only about a quarter of the settlers, they make up the vast majority of the movement's institutional leadership.

The second group consists of many more settlers, perhaps half of the total, who moved to the settlements to improve their quality of life. They were initially motivated primarily by generous government subsidies and the opportunity to acquire better housing in a less densely populated area with more open space from which they could still commute to Tel Aviv or Jerusalem.

A third group, about a quarter, are ultra-orthodox Jews (called the "Haredim") who had similar, primarily economic, motivations. The Haredim have traditionally lived in segregated communities in territorial Israel and abstained from participating in Israeli public life. Indeed, some have never recognized the existence of the State of Israel. For these Haredim, the settlements provide a way to create new, low-cost, segregated communities. Living in the West Bank, at least initially, carried no special significance for them.[47] Over time, however, some of those whose original motivation was primarily economic have become more ideologically committed to the settlement project, at least in nationalistic terms. While the political affiliations of these three groups vary, a higher proportion of settlers vote for right-wing parties than is true for Israel as whole.[48]

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[45] This number does not include the 176,000 Jewish inhabitants of those portions of Jerusalem previously in the West Bank that were annexed to Israel in 1968. *See* Yehezkel Lein, *Land Grab: Israel's Settlement Policy in the West Bank*, BE'TZELEM, May 2002, http://www.btselem.org/Download/200205_Land_Grab_Eng.pdf; *see also* Dror Etkes, *Testimony Before the Near Eastern and South Asian Affairs Subcommittee of the Senate Foreign Relations Committee*, Oct. 15, 2003 http://foreign.senate.gov/testimony/2003/EtkesTestimony 031015.pdf. For 2005 figures see Uri Yablonka, *13,000 New Settlers in the West Bank*, MAARIV, Aug. 26, 2005, at 1, http://www.yesh-din.org/sys/spotlight/elist.php?id=67.

[46] The precise number of "settlements" is not so easily determined. In addition to recognized settlements, there are others, sometimes called "outposts," that are not officially recognized by the Israeli government.

[47] Ultra-Orthodox settlers have been the fastest-growing group of settlers in the last few years. In 2002, fifty percent of new settlers were from this group. *See* Nadav Shragai, *Settler numbers are approaching the 220,000 mark*, HAARETZ, April 10, 2004, http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=190545&contrassID=2&subContrassID =1&sbSubContrassID=0&listSrc=Y.

[48] If one were creating a typology of settlements, rather than types of settlers, one might use three categories: (1) "Political Settlements" created for ideological reasons where national religious settlers live; (2) "Residential Settlements," inhabited by either "quality of life"

2. *The Growth of the Settlements: A Short History*

Before Israel's surprising victory in the Six Day War in 1967, there was very limited domestic political pressure to expand the boundaries of the state. In the years following the establishment of Israel in 1948, the right wing party Herut voiced the rhetorical aspiration that the Jewish state should someday extend to the "two banks" of the Jordan River, but this notion was viewed by an overwhelming majority of Israelis as implausible and foolish. Some left-leaning Labor parties such as Ahdut Ha'Avoda also displayed expansionist approaches, insisting that all the areas under the former British Mandate should be controlled by Israel. Yet by 1948, as a practical matter these streams abandoned this position. Some of them, such as Yitzhak Tabenkin, would join, after 1967, those forces that called for Israeli territorial expansion.[49] In another expansionist episode, immediately after the 1956 war, Prime Minister David Ben-Gurion initially staked out a claim for the Sinai and Gaza, but under international pressure, the Israeli government relinquished its occupation and control within a matter of weeks. Despite these episodes, the expansionist visions remained a minority voice in the pre-1967 Israel.

The impetus to claim and settle the West Bank and Gaza arose only after Israel's surprising victory in the Six Day War, whose outcome elated Israelis and laid the foundation for a fundamental change in territorial attitudes. Israel suddenly found itself occupying a vast, unexpectedly enlarged territory that carried emotional significance for some Israelis. The years that followed saw the emergence of various political and religious movements that called for expansion into these occupied territories.

The first expansionist step involved Jerusalem. Immediately after the war, Israel annexed East Jerusalem, and thereafter the Israeli government took steps to encourage Jews to move into these newly annexed neighborhoods. There was a broad consensus among Israeli Jews that an *undivided* Jerusalem should be the capital of Israel. By 1977, less than a decade later, 50,000 Jews had moved into the newly annexed parts of the city; today there are over 175,000 Jews in those areas. Among Israeli Jews, this annexation and settlement has never been controversial. Today there is a widely shared belief that these new Jewish neighborhoods would remain part of Israel in any "two-state" deal.[50]

Settlement activities can best be understood in four distinct time periods. The first period was between 1967 and 1977 when the Labor Party[51] was in

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settlers or the Haredim; and (3) "Security Settlements" created for purposes of Israeli security. These would include the settlements in the Jordan Valley that were part of the Alon plan (discussed later) and those on the Golan Heights. For the most part the settlers living in these settlements are not religious nationalists.

[49] ARYE NAOR, GREATER ISRAEL 104-23 (2001) (in Hebrew).

[50] While the manner in which Jerusalem would be divided was a contentious issue during the 2000-2001 Taba negotiations, it appears that the Palestinians were prepared to accept the reality of Israeli control of Jewish neighborhoods in East Jerusalem. *See* Miguel Moratinos, *EU description of the outcome of permanent status talks at Taba*, http://www.ariga.com/treaties/taba.shtml (last visited Jan. 28, 2006).

[51] Labor is Israel's center-left political party. The party was in power from 1933 (as a pre-state political institution) until 1977 and then again from 1992 to 1996 and 1999 to 2001. Since the 1970s, it has supported trading land for peace with regard to the West Bank and Gaza.

power and there was limited settlement activity. During this period, the government generally resisted settlement, and much of the activity was unauthorized. The second period began in 1977 with the ascendancy of the Likud Party[52] and extended until 1992 when Labor regained power. After a cautious start, the governments during this period became actively involved in promoting the expansion of settlements. The third period runs from 1992 until 2004. During this period, which includes the Oslo peace process, under both Labor and Likud there was a substantial expansion in the number of settlers with limited creation of new settlements. The fourth period, beginning in 2005 reflects both contraction and consolidation. Prime Minister Sharon relocated over 8000 Israeli settlers from Gaza and the northern West Bank while at the same time expanding the settlements in other parts of the West Bank.

a.   1967 – 1977 Settlement Activities

During this initial period, the Israeli government essentially viewed the territories as a bargaining chip that would some day be traded for recognition and peace.[53] Nonetheless, some limited settlement activities were authorized based primarily on national security considerations. Labor also authorized the "reestablishment" of three settlements on sites populated by Jews earlier in the twentieth century, prior to Israel's establishment.[54] Some within the government opposed on principle even this limited activity.

In the aftermath of the Six Day War, a Ministerial Committee on the Settlements was formed, chaired by Yigal Alon. He developed what became known as the "Alon Plan" which involved the creation of a string of small settlements along the valley of the Jordan River to provide an eastern line of defense.[55]

Other settlements were begun contrary to government policy, often under false pretenses, by right-wing national-religious activists who claimed to be living in temporary "work camps" or on archaeological excavations.[56] The most influential movement promoting early settlement in the West Bank was Gush Emunim ("Bloc of the Faithful"), a right-wing national-religious movement formed in 1974.[57]

This movement reflected a fusion of religious and Zionist[58] ideologies, and was based on the theology of two charismatic rabbis, Avram Isaac Kook

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[52] Likud is Israel's center-right political party. It was created in 1973 as a union between a number of opposition parties, the most important one being Herut, a nationalistic right-wing party. Likud rose to power in 1977 when it was able to effectively channel the resentment of many sectors of Israeli society towards the long-ruling Labor Party. Since then it has been continually in power with the exception of 1992-1996 and 1999-2001.

[53] Lein, *supra* note 45.

[54] *See generally id.*

[55] *Id.* at 12.

[56] *Id.* at 13 (discussing tactics used by Gush Emunim).

[57] *Id.*

[58] Zionism is a political movement established in the late nineteenth century which was aimed at promoting the Jewish people as a nation and establishing a Jewish state. The ideological content and meaning of Zionism has been contested for over 100 years. *See* SCHLOMO AVINERI, VARIETIES OF ZIONIST THOUGHT (1991) (in Hebrew).

and his son Tzvi Yehuda Kook.[59] *Gush Emunim was comprised largely of* politically and religiously energetic youths who belonged to the National Religious Party but were disappointed by their party's limited role in shaping the Israeli public sphere.[60] This movement aspired to incorporate all of the territories into "Eretz Yisrael" as an expression of its dual mission: devotion to a religious mandate ("the Promised Land") that is a necessary condition to the coming of the messiah, as well as a suggestion that the "new frontier" is a way to revive Zionism, a movement that was in the process of decline in their eyes. The settlement project sought to guarantee that all parts of "Eretz Yisrael" be incorporated as an integral part of the state of Israel. The first set of principles published by Gush Emunim in 1975 states that "we have to make it unequivocally clear to [Israelis] and the nations of the world that the people of Israel are fully committed to opposing any attempt to force upon them a withdrawal, through political or military means, from parts of Eretz-Yisrael."[61]

The movement's original goals were wider than simply creating "facts on the ground" to bring about Israeli territorial expansion. Its original list of principles included expansion of national and religious education, unity of the Jewish people, support for Jewish immigration to Israel, political and economic independence from foreign powers, and an activist foreign policy. Yet, by the late 1970's the movement essentially focused on a single mission: settling the West Bank and the Gaza Strip. Gush Emunim set up a "settlement department" called Amana (Covenant). By the early 1980s Gush Emunim disintegrated as a political movement, while its settlement arm, Amana, remained active and has since played a crucial role in the expansion of settlements.

From 1974-1976, successive Labor governments worked to restrain the settlement activities of Gush Emunim. For example, at the same site near Nablus Gush Emunim, activists made seven attempts to establish a settlement, and the government removed them each time.[62] But on the eighth try they succeeded when, due to an internal rift between Yitzhak Rabin and Shimon Peres, a compromise was struck. The settlers were allowed to reside at a neighboring military base which they subsequently transformed into a civilian settlement.[63]

By 1977, when the Labor government left power, 4500 Israelis lived in thirty-six settlements (thirty-one in the West Bank and five in the Gaza Strip,) that had been established either on the government's initiative or with its acquiescence.[64]

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[59] Lein, *supra* note 45, at 13. The father (1864-1935) was a dominant religious authority who saw Zionism, even when led by non-religious Jews, as a movement that serves religious values. He argued that a secular state is the beginning of Jewish redemption. His son (1890-1981), also a rabbi, carried on his work.

[60] Gideon Aran, From Religious Zionism to a Zionist Religion: The Roots of Gush Emunim and its Culture (1987) (Ph.D. dissertation, Hebrew University).

[61] GERSHON SHAFAT, GUSH EMUNIM 360 (1995).

[62] *See* Lein, *supra* note 45, at 13.

[63] *Id.*

[64] *Id.* at 12.

b. The 1977 Watershed: The Rise of Likud

In 1977, the Likud Party broke the Labor Party's long-term political monopoly and formed its first government. Likud was committed to an expansionist ideology that suggested Israel should include not only the West Bank but also most of Jordan. However, this position was a minority one until 1977.[65] The 1977 elections brought to power people who were sympathetic to Gush Emunim's dream that the Jewish state should include *all* of the Land of Israel. While many in Likud shared an expansionist vision, Prime Minister Menachem Begin's government was initially cautious. Comparatively few Israelis were persuaded by Gush Emunim's religious justification, and many secular Zionists, including some members of Likud, were concerned that the conspicuous expansion of settlements would damage Israel's international standing.

Ariel Sharon championed the expansion of the settlements. In the first Likud government, from 1977-1981, Sharon became Minister of Agriculture and used that post to design his own long-range plan for expansion.[66] Sharon was motivated by a non-religious, expansionist vision. His initial goal was to erase the Green Line with settlements.[67] While Gush Emunim and similar organizations were able to attract nationally and religiously motivated settlers, Sharon went to great lengths to attract the general public to the settlement project.[68] By 1981 the number of West Bank settlers nearly quadrupled to over 16,000.[69]

Likud won again in 1981 and during its second administration (1981-1984) the settlement project greatly expanded and was further institutionalized. Begin's successor as prime minister, Itzhak Shamir, was committed to a vision of greater Israel and was willing, perhaps even more than Begin, to expose Israel to international condemnation to expand the settlements. Government agencies were deeply involved in planning and implementing the creation and expansion of settlements. During this period, mainstream non-governmental Zionist organizations such as the Jewish Agency and the World Zionist Organization actively participated.[70] This participation meant that the expansion of settlements was transformed from an essentially entrepreneurial activity led by a fringe group into a mainstream endeavor that provided substantial subsidies to encourage Israelis to move to settlements. Even more striking is the fact that between 1984 and 1990, although Labor participated with Likud in two successive national unity governments, the expansionist policies persisted. During those years, the number of West Bank settlers increased from 35,000 to more than 78,000.[71]

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[65] YONATHAN SHAPIRA, CHOSEN TO COMMAND: THE ROAD TO POWER OF THE HERUT PARTY (1989).

[66] *See* Lein, *supra* note 45, at 14.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 18 (Table 2, citing Central Bureau of Statistics).

[70] The Jewish Agency and the World Zionist Organization were Zionist organizations created before 1948 that served as the institutional foundation for the state of Israel. Since the state of Israel was established, as quasi-governmental organizations they have remained deeply involved in facilitating Jewish immigration and settlement activities.

[71] Lein, *supra* note 45, at 18 (Table 2, citing Central Bureau of Statistics).

During this period the Israeli governments actively sought to erase the distinction between Israel proper and the occupied territories. For example, the Ministry of the Interior began referring to the territories as "Judea and Samaria" in official announcements and changed the Hebrew word for "settlement" in government publications and documents from a neutral word to one evocative of Biblical claims of redemption.[72] Once again the Labor Party was complicit.[73] But Labor and Likud, Israel's two major parties during this period, had different long-term goals regarding the settlements. Labor publicly expressed willingness to trade land for peace, thus implicitly anticipating an offer to remove settlements as a bargaining chip in some future peace negotiations with an Arab partner. Likud, on the other hand, while never prepared to annex the territories, became implicitly committed to a vision of a greater Israel. Likud sought to create "facts on the ground" in the territories through an ambitious government sponsored settlement project so that politically, no future Israeli government would be able to withdraw from the West Bank as part of an overall settlement agreement.

c.   *1992 – 2004: Settlement Expansion during Oslo and Beyond*

In 1992 Labor came to power again, led by Yitzhak Rabin who promised to reduce significantly the amount of governmental resources going to settlements.[74] In September 1993, after a few months of secret negotiations, Israel and the Palestinian Liberation Organization ("PLO") signed a declaration of principles that outlined a process over a period of years that would lead to a two-state resolution of the Israeli-Palestinian conflict. Oslo was premised on the notion of land for peace.[75]

Implicit in this agreement was the notion that Jewish settlements would be dismantled. Moreover, as part of the Oslo process, in 1995 Israel officially committed not to "initiate or take any step that [would] change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations."[76] The Labor government also promised to the United States that it would not establish new settlements or expand existing ones, except, if necessary, to accommodate the "natural growth" of the local population.[77] Ironically, during the 1990s, a decade dominated by the Oslo process, the number of

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[72] The original word, "Yeshuvim," was used in the early phases of Zionist settlement in Palestine, and did not have religious overtones. The new word, "Hitnahluyot," was used in the Bible to describe the settlement process by which the Israelites reclaimed their land after being slaves in Egypt.

[73] Indeed, as early as 1969 no official Israeli maps had the Green Line on them, and the terms "West Bank" and "occupied territory" were not used on state radio.

[74] Lein, *supra* note 45, at 15.

[75] This principle—that first appeared in the 1967 UN Security Council Resolution 242— governed the 1979 Israeli-Egyptian peace agreement, underlined the Israeli-Syrian peace negotiations from 1992 onwards, and was to serve as the basis of the final status agreement between Israelis and Palestinians in the Oslo process.

[76] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Chap. 5, Art. 31(7) (1995), *available at* http://www.jewishvirtuallibrary.org/jsource/Peace/interim.html.

[77] Lein, *supra* note 45, at 11.

West Bank settlers grew from 78,000 to nearly 200,000.[78] Much of this expansion occurred under three Labor governments.

During the Rabin period, the government's internal guidelines suggested there would be no new settlements, only "natural growth."[79] But the guidelines made an exception for new settlement construction in "the Greater Jerusalem[80] area and in the Jordan Valley."[81] The Labor government also created semantic loopholes by expansively interpreting all of these terms. "Greater Jerusalem" was construed quite liberally.[82] "Natural growth" was vague enough to allow Israel to build thousands of new housing units without provoking a public rebuke from the United States.[83] A number of settlements were constructed as "new neighborhoods" of already-existing ones.[84] Between 1993 and 2001, the number of housing units in the Gaza Strip and the West Bank (excluding East Jerusalem) rose fifty-four percent, from 20,400 to 31,400. The most significant increase took place under Ehud Barak in 2000.[85]

d. 2004 to the Present: Evacuation of Settlements from Gaza and the Northern West Bank

The last fourteen months have marked a new phase in the settlement project, in which the Israeli government evacuated some settlements while expanding others.[86] On December 18, 2003 Israeli Prime Minister Ariel Sharon suggested, without being specific, that Israel should "unilaterally disengage" from some occupied areas that were presently under Israeli control but were heavily populated by Palestinians (the "Herzliya Speech"[87]). Sharon made clear that this would require the relocation of some Israeli settlements that in his view would never "be included in the territory of the state of Israel in the framework of any possible future permanent agreement."[88] Within weeks Sharon more precisely defined the scope of his initiative to include the evacuation of all settlements[89] in Gaza as well as four small settlements in the West

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[78] *Id.* at 13-14 (Table 2, citing Central Bureau of Statistics).

[79] *Id.* at 11. A policy of natural growth would mean that the only new construction would accommodate young settlers choosing to remain in their settlement but who want to leave their parents' homes.

[80] Greater Jerusalem is an area of 440 square kilometers that comprises the inner metropolitan core around Jerusalem beyond the Green Line.

[81] Lein, *supra* note 45, at 11 (citing to the Alon Plan).

[82] *See id.*

[83] *Id.* at 12.

[84] *Id.*

[85] *Id.*

[86] A similar approach was undertaken by the second Begin government (1981-1983). While it relocated 7,000 Israelis from settlements in the Sinai, it buttressed the settlement project in Gaza and the West Bank

[87] Ariel Sharon, Speech at the Herzliya Conference, http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=373673&contrassID=1 (last updated Dec. 20, 2003).

[88] *Id.* Sharon also re-affirmed his intention to construct a fence in the West Bank that he claimed would diminish the risk of Palestinian terrorism. *Id.* Some large settlements would be on the "Israeli side" of the fence, but many smaller settlements would not. *Id.* Sharon indicated that the placement of the fence would *not* determine the border in any final status agreement that might someday be negotiated. *Id.*

[89] There are either seventeen or nineteen settlements in Gaza, depending on whether two small adjacent neighborhoods are counted as a separate settlement.

Bank. The Prime Minister asked the Israeli National Security Council to initiate a governmental process to plan for relocation. The Ministry of Justice was assigned the task of drafting legislation to authorize the evacuation and provide for compensation of those settlers required to move.

In the fall of 2004, after an initial symbolic vote rejecting Sharon's statement convening the legislative session, the Knesset approved the plan in principle. Legislation followed in February 2005 authorizing the relocation and stipulating a compensation mechanism. To secure a majority in the Knesset, Sharon reconfigured his coalition by inviting the Labor Party to a national unity government. The political avenues open to Sharon's opponents were finally exhausted when the Knesset approved the budget in the spring of 2005, thus securing the survival of Sharon's government.

The plan was executed in August 2005 with a massive show of force. The Israeli military and police deployed some 50,000 soldiers and law enforcement officers to the carry out the mission in Gaza where over 8000 Jewish settlers were forcibly relocated, most of them to temporary housing in territorial Israel.

These actions of the Sharon government hardly signaled an abandonment of the settlement project, however. Indeed, during 2005 the total number of Jewish settlers increased, notwithstanding this evacuation, because of the population growth of the remaining West Bank settlements. During the first eight months of 2005, the number of settlers in the West Bank grew by five percent, to 250,000.[90] Moreover, the Israeli government also took steps to signal its increased commitment to large settlement blocks in the West Bank. Sharon secured a commitment from United States President George Bush guaranteeing, in effect, U.S. recognition that some settlements will remain in place even in the event of a future peace agreement with the Palestinians. On April 14, 2004 Bush wrote to Prime Minister Sharon a letter stating:

> In light of new realities on the ground,[91] including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the *armistice lines of 1949*, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.[92]

C.   *The Intractability of Both Issues*

As noted above, the conflict over the Palestinian refugees dates back to the creation of Israel in 1948, while the conflict over the Jewish settlements arose in the aftermath of the 1967 Six Day War. For years, each side asserted its positions, and there were no negotiations, as neither side recognized the legitimacy of the other. When direct negotiations between the Israelis and the Palestinians finally began in 1991, both sides agreed to defer any meaningful discussion of the substantive issues to a later phase of the Oslo process. The

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[90] Yablonka, *supra* note 45.

[91] Widely understood to mean the settlement blocks.

[92] Bush Letter to Sharon Supports Israeli Withdrawal Plan, Dep't of State Press Releases, 2004 WLNR 2465693 (April 14, 2004) (emphasis added).

first serious attempt to even discuss these issues took place only in the spring of 2000, during what came to be known as the "Swedish channel."[93]

During the short negotiation history, which begins at the first direct talks in 1991 and culminates at the last official attempt at bilateral negotiation in the winter of 2001 at Taba, the two issues proved intractable as no agreement could be reached on either. While the informal record suggests that in the Swedish channel and at Taba, negotiators at the table made some progress in reducing their differences on these two issues, the internal conflicts within each side remained unaddressed and unresolved. Neither issue could be resolved satisfactorily despite the efforts of negotiators, and by the end of talks at Taba in February 2001, the Oslo process had definitively collapsed, and was followed in the next three years by intensifying frustration on both sides, and escalating violence.

1.   Israeli-Palestinian Negotiations from 1991 – 1999

The first direct attempts at negotiation between Israelis and Palestinians began at Madrid in October 1991 during multilateral talks initiated by the U.S. and co-sponsored by the Soviet Union. These talks were held in the wake of the American victory in the Gulf War, the turbulence caused by the Palestinian *intifada*, the proliferation and growing popularity of militant Islamic groups such as Hamas and Islamic Jihad, and the growing awareness that Palestinians needed to be involved in negotiations for a lasting peace to ensue. In contrast to previous peace talks, a Palestinian delegation was allowed to participate at Madrid, albeit as part of the Jordanian delegation. The Madrid talks also involved representatives from Syria, Lebanon and Jordan. While the PLO was not allowed to officially attend, the Palestinian delegation, led by Haydar 'Abd al Shafi, was accepted by the PLO as a suitable intermediary.[94]

Alongside the bi-lateral negotiations that Israel held with its neighbouring countries, the Madrid process also included a number of multilateral "working groups" to deal with regional issues. One of these was a multilateral Refugee Working Group ("RWG"), chaired by Canada and comprising delegates from thirty-nine countries, which was meant to directly discuss the refugee issue.[95] The proceedings of this group amply demonstrated the wide gaps between Palestinian and Israeli positions on the refugee issue. During these multilateral talks, the Palestinians attempted to focus the discussion on international legal principles concerning the rights of refugees to return and compensation and wished to discuss long-term political solutions to the problem. They claimed that Israel bore full responsibility for the creation of the refugee problem and argued that Article 11 of U.N. Resolution 194 required Israel to allow all refugees who chose to return to do so, provided they were willing to live in peace with their neighbours. The Palestinians also demanded compensation from

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[93] SHLOMO BEN-AMI, A FRONT WITHOUT A REARGUARD: A VOYAGE TO THE BOUNDARIES OF THE PEACE PROCESS 45 (2004) (in Hebrew).

[94] Glen Rangwala, Negotiating the Non-negotiable: The Right of Return and the Evolving Role of Legal Standards 12 (May 22-23, 2003), http://www.badil.org/Campaign/Expert_Forum/Ghent/paper04.pdf.

[95] A User's Guide to the Multilateral Bodies of the Middle East Peace Process, http://www.usembassy-amman.org.jo/Enviro/MEPP2.html (last visited Jan. 28, 2006).

Israel for all refugees who chose not to return; and, above all, they asserted that every refugee, and every descendant of every refugee, had a legal and moral right to return to his or her original home.

On the other hand, the Israeli delegates rejected outright, as Israel had done since 1949, any possibility of a significant return of Palestinian refugees to Israel. They denied any responsibility for the refugee problem, arguing instead that it was entirely the fault of the Arab states that had declared war on Israel in 1948. They claimed that the only compensation Israel would pay would be part of an international package.[96] More importantly, however, they raised a procedural objection to the workings of the RWG, insisting that the refugee issue could never be solved in a multilateral framework. They demanded instead that the RWG talks be restricted to technical and humanitarian concerns (e.g., job creation, vocational training, public health, and child welfare for the Palestinian refugees in their host countries) as well as on policies of adaptation (i.e., better social and economic integration of the refugee communities into their host surroundings).[97]

While the RWG meetings continued to flounder in irrelevance, Israel and the PLO reached a breakthrough agreement on mutual recognition which culminated in the joint "Declaration of Principles" at Oslo in 1993. Inspired by the nascent hope that permeated the region at the time, Yossi Beilin, then the Israeli Deputy Foreign Minister, announced his government's willingness to double the number of annual licenses granted to Palestinian refugees through the family reunification program from 1000 to 2000.[98]

Meanwhile, the historic mutual recognition between the PLO and the state of Israel had led to the commencement of bilateral talks, which meant, for the first time, a direct negotiating channel between the two parties. However, these talks were carefully circumscribed to discuss only "interim" issues, with talks about long-term political solutions to the refugee issue relegated, with other major issues such as borders and settlements, to the planned "final status" talks that were to be concluded by the end of a five-year interim period in May 1999.

As such, the three agreements that were arrived at between the Israelis and the Palestinians over the course of the next few years (The Declaration of Principles on September 13, 1993, the Gaza-Jericho Agreement on May 4, 1994, and the interim agreement on September 28, 1995) contained nothing of relevance to the refugee issue. Instead, buried in Article XII of the "Declaration of Principles," now known as the "Oslo Accord" under a subheading titled "Liaison and Cooperation with Jordan and Egypt," was a sentence that established a multi-lateral committee that would decide "the modalities of admission of persons displaced from the West Bank and Gaza Strip."[99] This provision, agreed

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[96] Jacob Tovy, *Negotiating the Palestinian Refugees*, THE MIDDLE EAST Q. (Spring 2003), *available at* http://www.meforum.org/article/543.

[97] *Id.*

[98] *Id.*

[99] Jewish Virtual Library, Declaration of Principles On Interim Self-Government Arrangements Article XII (Sept. 13, 1993), http://www.jewishvirtuallibrary.org/jsource/Peace/dop.html.

to by the PLO leadership, related to persons "displaced" from their West Bank homes as a result of the 1967 war, not refugees of 1948.

The Oslo Accord and the other interim agreements signed during this period must be considered nothing short of pivotal in the context of the larger history of the Arab-Israeli conflict. But the accords placed a higher priority on taking steps towards Palestinian autonomy (and its promise of eventual statehood) in Gaza and the West Bank over a resolution of the refugee issue. Those Israelis who supported the Oslo process assumed that the creation of a Palestinian state, to which refugees could return, would be the solution to the refugee problem.

Likewise, no concrete discussions ensued at Madrid about the settlements. What discussion there was about territorial issues was limited strictly to the scope of autonomy in the territories.[100] Similarly, there was no discussion in the Declaration of Principles of settlements or borders, which were relegated to "final status talks" that were meant to be held at the end of an interim period of five years. One clause of "Oslo 2" (Sept 28, 1995, Ch. 2, Art. 10, section 2) vaguely implied a withdrawal of Israeli troops from the West Bank over a period of time, but the scope of this troop withdrawal was ambiguous, and no mention was made of settlements or settlers.

2. Final Status Negotiations—The Swedish Channel (Spring 2000)

Although final status talks were meant to begin in 1996, the peace process entered a crisis in 1995, and the ensuing stalemate was not broken until Ehud Barak led the Labor Party back to power in 1999 on the strength of a campaign promise to end the conflict and usher in peace. Implied in this promise was his willingness to attempt to solve permanently the refugee issue, and, to that end, he demonstrated a willingness on Israel's part to allow the refugees of the 1967 war (though not the 1948 refugees) to re-enter the territories now administered by the Palestinian Authority (previously, Israel had demanded repatriation of all "displaced persons" to Egypt or Jordan). While Barak remained adamant that there would be no return of refugees to Israel, and while he insisted that Israel would accept no responsibility for the creation of the refugee problem, many considered these to be "opening positions" at the negotiation table when final status talks formally began in September 1999. Serious final-status negotiations finally got underway in the spring of 2000, in secret talks that came to be known as the "Swedish Channel" or "Stockholm Talks."

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[100] The bilateral component of the discussions at Madrid comprised four separate sets of talks between Israel and her Arab neighbors (Jordan, Syria, Lebanon, and a Palestinian delegation represented through Jordan). According to the Israeli government, "While the talks with the three Arab states were aimed at achieving peace treaties, the negotiations between Israel and the Palestinians were based on a two-stage formula: 5-year interim self-government arrangements, to be followed by negotiations on the permanent status issues." The multilateral talks at Madrid were construed more as "confidence building" measures, and comprised five separate forums attended by delegations from countries in the region as well as representatives of the international community. The multilateral talks focused on "key issues that concerned the entire Middle East—water, environment, arms control, refugees and economic development." (note: no mention of territories, borders or settlements). *See* Jewish Virtual Library, The Madrid Framework, http://www.jewishvirtuallibrary.org/jsource/Peace/madrid1.html (last visited Jan. 28, 2006).

By this time public opinion polls indicated that Israeli Jews and Palestinians held diametrically opposite views about the appropriate resolution to the conflict. The vast majority of Palestinians in the West Bank and Gaza (no polls were conducted at the time of refugees in Lebanon, Jordan and Syria) wanted a full right to return to Israel, while the vast majority of Israelis rejected any solution that would allow large numbers of Palestinians to be admitted to Israel and insisted that it was Israel's sole right to decide who should be allowed to return, if at all.[101]

In the secret negotiations that occurred in the Swedish Channel, it appeared that the representatives at the table made some progress with respect to the refugee issue. There was little change in the Israeli position. The Israelis proposed accepting up to 10,000 refugees within a humanitarian family reunification scheme.[102] The Palestinians proposed that an international commission ask all refugees where they wished to reside, with the questions framed in such a way that the probable result would be that only a limited number would settle in Israel. The parties agreed to try to create what would be a vaguely worded historical recapitulation on the right of return that would somehow be consistent with both people's historical narrative.[103] And they also discussed the creation of a twenty billion dollar fund by the international community to settle refugee claims and financially aid those countries that shouldered the burden of accepting and rehabilitating them.[104]

According to some Israeli sources, the talks on refugees were sufficiently promising so that the impression on the Israeli side was that the question of the right of return could be "satisfactorily resolved."[105] According to the same sources, however, the Palestinian delegates, while unofficially admitting that the Swedish Channel had resulted in agreement in principle that the right of return would never be fully implemented, were unhappy with the vague wording of the statement that was meant to resolve the contradictory narratives. They believed Israel should assume moral and legal responsibility for the situation of the refugees and issue an apology, demands that had been rejected by the Israeli delegates. Most fundamentally, it was not clear whether President Arafat was aware of concrete proposals that were discussed, much less whether he had agreed to them.[106]

3. *Final Status Negotiations—Camp David (2000)*

While the underlying reasons are not clear, during the Camp David summit in July 2000, the refugee issue did not receive as much attention as did

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[101] Tovy, *supra* note 96.

[102] Uriya Shavit & Jalal Bana, *Everything You Wanted To Know About The Right Of Return But Were Too Afraid To Ask*, Ha'aretz, July 6, 2001, *available at* http://www.mideastweb.org/refugees3.htm.

[103] Tovy, *supra* note 96.

[104] Shavit & Bana, *supra* note 102.

[105] *Id. See also* Ari Shavit, *End of a Journey*, Ha'aretz, *available at* http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=74353&contrassID=3&subContrassID=0&sbSubContrassID=0 (last visited Jan. 28, 2006).

[106] Giliad Sher, Be'Merhak Negia 141 (2001) (in Hebrew).

other divisive issues, such as Jerusalem, security, and borders.[107] Indeed, some participants suggested there was something of a regression between the Swedish Channel and Camp David on the refugee issue.[108] Whatever the reason, it is clear that nothing more was achieved than had already been achieved at Stockholm. Barak continued to refuse the notion that Israel should accept any responsibility, legal or moral, for the refugee problem, and he continued to oppose any recognition of the principle of the right of return. However, he also agreed to express Israel's regret for the suffering of the refugees, to absorb "tens of thousands" under the family reunification plan, and to make financial contributions to an international organization that would be established for the rehabilitation of the refugees outside Israel.[109]

Yasser Arafat and his delegates, for their part, continued to insist on the moral and legal bases of the right of return but also agreed on practical grounds that there could be no full return of refugees to Israel. And, for the first time in the negotiating history of the issue, Arafat's team referred to a non-literal interpretation of U.N. Resolution 194, which marked a departure from the very literal interpretation on which they had traditionally grounded their claim.[110] The Palestinian position demanded that Israel accept the principle of a right of return that would give individual Palestinians a choice, but it would be understood that the right would be somehow implemented so that only a limited number of Palestinian refugees would actually return to Israel. As the PLO Negotiations Affairs Unit put it:

> [A]n Israeli recognition of the Palestinian right of return does not mean that all refugees will exercise that right. What is needed in addition to such recognition is the concept of choice. Many refugees may opt for (i) resettlement in third countries, (ii) resettlement in a newly independent Palestine (though they originate from that part of Palestine which became Israel) or (iii) normalization of their legal status in the host country where they currently reside. In addition, the right of return may be implemented in phases so as to address Israel's demographic concerns.[111]

For Israel, no deal was possible unless it was entirely clear that the numbers would be limited and that Palestinians would give up all future claims with respect to return.

While both the Israelis and the Palestinians had traveled some ways from the days when they clung to a fierce denial of all return to Israel or a fierce demand for full return to Israel, the parties were clearly unable to resolve the refugee issue at Camp David. The Palestinian delegation had accepted a non-literal interpretation of the right of return, although the issue of Israel's acceptance of moral responsibility remained central and non-negotiable for them; the Israelis had increased the numbers of refugees they would allow in under family-reunification schemes, although any acceptance of responsibility on their

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[107] *See* DENNIS ROSS, THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE 674 (2004) ("there was little discussion of refugees").

[108] *See* Shavit, *supra* note 105.

[109] Tovy, *supra* note 96.

[110] Rangwala, *supra* note 94, at 13-14.

[111] PLO Negotiations Affairs Department, Why Did the Palestinians Reject the Camp David Peace Proposal?, http://www.nad-plo.org/inner.php?view=nego_nego_camp_cmp_ncamp david1p (last visited Jan. 28, 2006).

part, and any uncontrolled return of large numbers of refugees, remained for them equally non-negotiable.

By all accounts, the territorial/border/settlement discussion consumed much time and attention at Camp David, but again, no agreement emerged and the discussions ended in acrimony. The Israelis and Americans claimed that the final proposal offered by Barak and Clinton to the Palestinians would have involved Israeli annexation of nine to ten percent of the West Bank, encompassing many current settlement blocs, but leaving the Palestinian territory in one contiguous piece. In addition, a narrow strip comprising fifteen percent of the length of the border along the Jordan River valley would be kept by Israel for security purposes on "long-term lease" for an interim period.[112] In return, the Israelis would cede one to three percent of their territory in the Negev to Palestine.[113]

The Palestinians claimed that this proposal aimed to divide the would-be state of Palestine into four separate and non-contiguous cantons surrounded by Israel—the Northern West Bank, the Central West Bank, the Southern West Bank, and Gaza.[114] This division, they charged, would prohibit freedom of movement of goods and persons within the Palestinian state, and subject Palestinian nationals and the Palestinian economy to Israeli control, thereby depriving the state of any semblance of sovereignty and independence. Lastly, they objected to the fact that the final proposal sought to leave Israel in control of all Palestinian borders. However, they also stated that they were not opposed to discussing further the solutions that had been proposed by the Israelis during the talks, but they proposed that such swaps should "be based on a one-to-one ratio, with land of equal value and in areas adjacent to the border with Palestine and in the same vicinity as the lands to be annexed by Israel."[115] They claimed that the Camp David proposal envisioned a nine-to-one land swap in Israel's favour, which was not only unfair but also detrimental to the principle of fair territorial compromise for peace.

4. The Clinton Proposal (December 2000)

The Clinton proposal was an attempt, on the part of President Clinton, to bridge the gaps that still existed between the sides at the end of Camp David.

With respect to the refugee issue, President Clinton stated, "I sense that the differences are more relating to formulations and less to what will happen on a practical level,"[116] and this sense led Clinton to believe that the gap on the refugee issue concerned not the actual return (he believed that the Palestinians were ready to "give it up") but the handling of the history of the issue, and the question of the apology. This led in turn to a proposal that was not materially different on the refugee issue from what had been discussed at Camp David,

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[112] Map available at http://www.mideastweb.org/lastmaps.htm (last visited Jan. 28, 2006).

[113] *Id.*

[114] PLO Negotiations Affairs Unit, Camp David Peace Proposal of July, 2000: Frequently Asked Questions, http://www.ipcri.org/files/palresponsescampdavid.html (last visited Jan. 28, 2006).

[115] *Id.*

[116] Bill Clinton, *The Clinton Plan* (Dec. 23, 2000), *reprinted in* THE ISRAEL-ARAB READER, *supra* note 29, at 563.

but one that employed different language. Clinton said, for instance, that "we need to adopt a formulation on the right of return that will make clear there is no specific right of return to Israel itself but that does not negate the aspiration of the Palestinian people to return to the area."[117] The Clinton proposal suggested individual Palestinians would not have a right to choose to come to Israel, but they would have a right to "return" to a new Palestinian homeland which would become a state. The Clinton plan also specified that "the agreement will make clear that the return to the West Bank, Gaza Strip and area acquired in the land swap would be *right* to all Palestinian refugees, while rehabilitation in host countries, resettlement in third countries, and absorption into Israel will depend upon the policies of those countries."[118] Lastly, the plan mentioned the need to prioritize the refugee population in Lebanon.

While the Israelis accepted the Clinton Plan within forty-eight hours of its publication with some reservations (which had to do with security clauses and the sovereignty to be assigned to the Temple Mount), the Palestinians responded on January 1, 2001, with a stern document titled "The Palestinian Position Regarding Clinton's Proposal" which declared the plan objectionable primarily on account of its ambiguity, and which stated:

> The United States proposals were couched in general terms that in some instances lack clarity and detail. A permanent status agreement, in our view, is not merely a document that declares general political principles. It is, rather, a comprehensive instrument that spells out the details, modalities, and timetables of ending the Palestinian-Israeli conflict. For such an agreement to be effective, it must be backed by clear, effective international implementation guarantees. We believe that a general, vague agreement at this advanced stage of the peace process will be counter-productive. . . . The permanent status agreement must be a truly final agreement rather than an agreement to negotiate.[119]

With respect to refugees, the official Palestinian position on the Clinton proposal was not much different from the negotiating position of the Palestinians at Camp David. They claimed the substitution of the word "home" with the word "homeland" was unacceptable and not in keeping with international law, and they claimed Palestinian refugees must be given the option to choose where to settle. However they also claimed they were "prepared to think flexibly and creatively about the mechanisms for implementing the right of return,"[120] and that they were willing to accommodate Israel's demographic and security concerns. In the Palestinian view, the Clinton proposal did less than what had already been agreed to at the Swedish Channel almost a year ago, and in this view they perhaps did not differ too much from their Israeli counterparts.[121]

The Palestinians had a series of objections to the territorial issue:

a) The proposal was unaccompanied by a map, which made it difficult to see how Palestinian contiguity would or would not be affected and which settlement blocks would be annexed to Israel;

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[117] *Id.* at 564.
[118] *Id.* (emphasis added).
[119] The Palestinian Negotiating Team, The Palestinian Position Regarding Clinton's Proposals (Jan. 1, 2001), http://www.monde-diplomatique.fr/cahier/proche-orient/reacpal-en.
[120] *Id.*
[121] *See, e.g., id.*

b) The proposal had not made clear what was the total of annexed land for purposes of the calculation (i.e., it was unclear whether East Jerusalem and the Dead Sea area were considered to be part of the West Bank when calculating the three to four percent that would be annexed to Israel, or whether those were in addition to the other portions that would be swapped, which would bring the "percentage annexed" number closer to the ten percent range);

c) The proposal did not contain any provisions to ensure direct Palestinian access to its international borders or even Palestinian control over movement of goods and people within the new state of Palestine;

d) The proposal envisioned that an additional ten percent of Palestinian territory would be placed under Israeli control under what they called "ill-defined security arrangements;"

e) The proposal had not made clear *which* areas would be swapped in return for the settlements (the Palestinians desired that annexed land be swapped with land of equal size and value, and not, for example, with arid desert regions in the Negev).[122]

Despite these substantial objections, the Palestinians agreed to reconvene talks with the Israelis at the end of the month and to take as their starting point the Clinton proposal.

5.   Taba (January 2001)

Israeli and Palestinian negotiators met for a final time officially in what was described as a "last-ditch effort" to secure an overall permanent-status agreement before the prime-ministerial elections in Israel which were scheduled for February 2001 and were widely believed to hold slim chances of success for Ehud Barak's by-then-very beleaguered government.

The talks at Taba ended inconclusively, with no agreement between the parties on any of the issues discussed. These talks were probably doomed from the outset because Prime Minister Barak's government had fallen, elections had already been scheduled for February 2001, and the second intifada was raging. Unlike Camp David, neither Barak nor Arafat was present, and it is unclear whether either leader in fact authorized the unrecorded proposals that were discussed by the negotiators at the table.[123] Moreover, even if the Palestinians had accepted the Israeli proposals, which they did not, it appeared at the time that Barak would have faced significant difficulties ratifying and implementing an agreement.

There is no official record of the negotiations at Taba, but an EU Special Representative later created a report, never officially made public but in fact later released ("EU non-paper"), suggesting that concessions appeared to have been offered by both sides.[124]

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[122] The Palestinian Negotiating Team, *supra* note 119.

[123] *See* SHLOMO BEN-AMI, HAZIT LELO OREF 432-55 (2004) (in Hebrew).

[124] While the discussions at Taba have never been officially made public, this report prepared by Ambassador Moratinos, the EU Special Representative to the Middle East Process at the time, has been acknowledged by Israelis and Palestinians who were present at the talks as being a "relatively fair description of the outcome of the negotiations on the permanent status issues at Taba."

a. Refugees

With respect to refugees, four key issues were identified and discussed: (1) the actual implementation of return; (2) what should be said acknowledging a right of return and the question of historical responsibility for the suffering of the refugees; (3) mechanisms of compensation; and (4) the need for closure.

i. Implementation

There was an acknowledgement on Israel's part that the refugee issue would not only have to be resolved *in accordance with* U.N. Resolution 194, but that such resolution was essential to "creating a lasting and morally scrupulous peace."[125] This translated into an agreement on Israel's part that *some* refugees would have to be given the right to return to Israel, although the total number allowed in would continue to be strictly capped and controlled by Israel (no number was agreed upon during the talks, but sources suggest that the numbers discussed were higher than before), and a three-track fifteen-year absorption process would regulate this return.[126] Also, Israel agreed that a somewhat larger (though, again, unspecified) number of refugees would be allowed into territory currently belonging to Israel, but that would eventually be "swapped" over to the newly-established Palestinian state in exchange for settlements in the West Bank.[127] These "swapped territories" would essentially comprise the predominantly "Arab areas" of Israel, which would presumably include such towns as Umm al Fahm.

For their part, the Palestinian negotiators suggested, as they had at the Swedish Channel, that Israel would have the right to cap the number of refugees allowed to return to Israel, to regulate the manner of that return, and, moreover, any return into Israel "proper" would only be symbolic. Moreover, the Palestinian negotiators were also willing to concede that a return to "swapped territory" and to "an eventual Palestinian state" would also constitute return, and that rehabilitation in existing host countries, or relocation to willing third countries, so long as they occurred voluntarily on the part of refugees, would also be acceptable components of a just and lasting solution in accordance with Resolution 194. Significant gaps remained between the sides as to the actual number of refugees returning to "Israel proper," the priority given, or not given, to the refugees in Lebanon, and to the importance and feasibility of unrestricted choice.

ii. Acknowledgment

Much heated discussion apparently ensued during the talks in Taba about the extent to which Israel would accept any responsibility for its role in the creation of the refugee problem, and while the European Union non-paper indicates that "much progress" was made on the issue of a joint narrative, it is not

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[125] EU Description of the Outcome of Permanent Status Talks at Taba, Ha'aretz at http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=130196&contrassID=2&subContrassID=5&sbSubContrassID=0&listSrc=Y (last visited Jan. 28, 2006).
[126] *Id.*
[127] *Id.*

clear what was exactly agreed to in the end.[128]   Some sources indicate that Israel was willing to express "its sorrow for the tragedy of the Palestinian refugees, their suffering and their losses" without acknowledging any direct responsibility for that tragedy; other sources dispute even that admission.[129]

iii.   Compensation

There seemed to have been a consensus across the table at Taba on the need for the establishment of an "International Commission" and an "International Fund" to deal with the difficult issue of compensation. Both sides also apparently agreed that all claims of compensation for property losses below a certain amount would be subject to "fast-track" procedures. The question of how much, if at all, Israel would contribute to this International Fund was hotly debated, but it appears that the Israelis agreed to be responsible at least for a certain lump sum amount. There was disagreement on how appropriated assets would be compensated, with the Israelis preferring a "macro-economic survey to evaluate the assets in order to reach a fair value"[130] and the Palestinians preferring a sum calculated based on the "records of the UNCCP, the Custodian for Absentee Property and other relevant data with a multiplier to reach a fair value,"[131] but it would be churlish, given the magnanimity of the discussion, to consider these disagreements as gaps.

iv.   Closure

In what must be considered a significant concession on the part of the Palestinians, both parties agreed that the implementation of an agreement would constitute a "complete and final implementation of U.N. Resolution 194 and therefore end all claims"[132] to the right to return. Moreover, both parties agreed that UNRWA would be disbanded at the end of the process, and that all refugee documents and claims would be terminated. In the end, there would effectively be no more Palestinian refugees in the region.

Despite these four areas of progress, there remained two open issues: 1) the Israelis' refusal to provide any restitution of property rights for property appropriated from Palestinians by the state of Israel; and 2) the Palestinians' refusal to include any discussion, under the bilateral framework, of compensation to former Jewish refugees from Arab countries. Although the Israelis did recognize that this was not a Palestinian responsibility, it seems the disagreement was more on whether the issue should be brought up in the context of refugee rights.

b.   Boundaries and Settlements

The talks at Taba were marked by serious efforts by both sides to narrow the wide gaps that remained at the end of the Camp David talks concerning

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[128] *Id.*

[129] Eldar Akiva, *How to Solve the Palestinian Refugee Problem*, HA'ARETZ, May 29, 2001.

[130] Moratinos, *supra* note 50.

[131] *Id.*

[132] *The Taba Proposals and the Refugee Problem*, MIDEAST WEB, Jan. 27, 2001, http://www.mideastweb.org/taba.htm.

boundaries. The discussions about territory were accompanied, for the first time, by an open exchange of proposed maps of the West Bank, which served to make the discussions about borders and land swaps far more concrete than they had been in the past, and thus more productive. While the talks began loosely with the Clinton parameters, the major discussions and disagreements centered on five points.[133]

i.   Annexation of settlement blocs

The Palestinian side argued that the settlement blocs proposed by the Clinton plan would cause significant harm to Palestinian interests and rights, particularly to the Palestinians residing in those areas that Israel would annex, while the Israeli side maintained that Israel was entitled to the blocs outlined in the Clinton plan. Also in keeping with the Clinton proposal, the Israeli maps aimed to place in settlement blocs approximately eighty percent of the settlers, which would amount to a six percent annexation of the West Bank, which was the outer limit of the Clinton proposal. The Palestinians presented maps allowing for three percent annexation and insisted that Palestinian villages and towns could not be annexed to Israel. They also claimed the "no man's land" (Latrun area) as part of the West Bank, which the Israelis disputed.

ii.   Contiguity

The Israeli side maintained that Israel was entitled to contiguity between and among settlements, while the Palestinians claimed that contiguity of the West Bank was more important, essential to the free movement of goods and services within Palestine and more importantly, to preserving the sovereignty and independence of the new Palestinian state.

iii.   Further growth of settlements

The Israeli maps included plans for future development of Israeli settlements in the West Bank, to which the Palestinians greatly objected. They insisted instead that all settlement growth must occur inside Israel.

iv.   Land swaps

Both sides remained committed to the idea of land swaps, but they clashed on what exactly those swapped lands would look like. The Palestinians wished to be given full sovereign control over all lands swapped to the Palestinian state, while the Israelis wished to control the "safe passage/corridor" that was to be included as part of the swap (the Palestinians said, in response, that if Israel were to exert control over this land, it could not be counted as "swapped"). The Palestinians also stressed that Palestinian villages and towns could not be annexed to Israel and insisted that any swapped land should be equitable in size and value, in areas adjacent to the border with Palestine, and in the same vicinity as the lands annexed by Israel.

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[133] *See EU Description of the Outcome of Permanent Status Talks at Taba, supra* note 125 (providing the following account).

    v.   Leased land

The Israelis requested an additional two percent of West Bank land under a lease arrangement, while the Palestinians claimed that such an arrangement could only be discussed after the establishment of a Palestinian state and the transfer of land to Palestinian sovereignty.

On January 27, 2001, the parties ended the Taba talks without agreement. The negotiators issued an extremely upbeat joint statement indicating that in discussing President Clinton's proposals there had been "substantial progress in the understanding of the other side's positions and in some of them the two sides grew closer."[134] The statement further suggested that "in light of the significant progress in narrowing differences between the sides," talks should be resumed following the Israeli elections because "it will be possible to bridge the differences remaining . . . ."[135] The events of the next four years suggested that this statement was overly optimistic. While we are of the view that moderates on both sides could "bridge the differences" and reach agreement, a careful analysis of the two internal conflicts demonstrates the profound challenge to sell the deal within each community.

III.   UNDERSTANDING THE INTERNAL CONFLICTS

A.   The Internal Palestinian Conflict Over the Scope and Meaning of the Right of Return

As we have shown, the idea of return has been central to the Palestinian national narrative for over fifty years. The demand to return to their homes was the first response of the Palestinians to their "nakba" or disaster of 1948, and therefore preceded every other political notion including that of independent Palestinian statehood. Although Palestinian political thought underwent a profound change with the PLO's acceptance of the two-state framework and the public acknowledgment of the right of Israel to exist alongside an independent Palestinian state, the concept of the right of return has remained until this day a salient Palestinian political demand. There is clearly a tension between goals of an independent Palestinian state and the return of Palestinian refugees to Israel, one that sometimes goes unacknowledged and can be resolved in differing ways.

Some Palestinian "moderates" have publicly acknowledged that they would sacrifice the a right to return to what is now Israel in order to secure an independent Palestinian state with the context of a two state solution. The internal conflict over the right of return pits these latter "moderates" against four major groups of Palestinians: (1) the intellectuals and politicians who are proponents of the "bi-national one state" solution, and who believe that Jews and Arabs should be free to live wherever they want in the land between the Mediterranean Sea and the Jordan River; (2) the majority of the Palestinian Fatah leadership who continue to demand both statehood and return as a negotiating stance and who believe that any talk of limiting return should only occur once other major concessions have been offered by the Israeli negotiators; (3)

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[134] *The Taba Proposals and the Refugee Problem, supra* note 132.
[135] *Id.*

some Palestinian refugees and their leaders in the Diaspora who appear to be unwilling to give up the idea of a broad and individually based right of return even if it means postponing the establishment of a Palestinian state in the West Bank and Gaza; and (4) those Palestinians, including the leadership of Hamas and Islamic Jihad, who remain opposed to the very idea of a Jewish state of Israel and who believe "return" will take place after the destruction of the state of Israel.

In this section, we first explore the evolution of Palestinian ideas about the right of return from the early days in 1948 to the present. Then we examine the dimensions of the internal conflict among Palestinians on this issue by describing the arguments of certain Palestinian intellectuals, such as Dr Sari Nusseibeh and Dr Khalil Shikaki, and by taking note of the violent disagreement such arguments have engendered. Last, we offer some speculative evidence about the deep, if hidden, differences in opinion and preference that have existed for some time among Palestinian refugees themselves about the meaning and scope of the right of return.

1. The Evolution of Palestinian Thought about the Right of Return

Palestinian refugees claimed a right to return to their homes and property from the very outset. Self-appointed committees comprising refugees such as the "Congress of Refugees of Ramallah" and "The Jaffa and District Inhabitants Committee," appeared before the U.N. Mandated Palestine Conciliation Committee at Lausanne in 1949, which the U.N. had launched in the hopes of arriving at a "lasting and just peace" in accordance with U.N. General Assembly Resolution 194.[136] The Palestinians pleaded for the implementation of this resolution; however, they were not officially present during the talks, and the representatives of the defeated Arab states (Jordan, Syria, Egypt, and Lebanon) were considered the sole official arbiters of the "Palestine problem."

For almost two decades after the conference at Lausanne, little progress was made on the refugee issue. The Palestinian leadership had virtually disappeared from the scene, and the Palestinian people, suffering from the severe traumas of dispossession and dispersion, were politically inactive and practically invisible during this time.[137] The Arab states, in what can best be termed a policy of avoidance and deferral, continued during these years to demand full repatriation of the refugees to Israel while doing little to make such demand a reality. Meanwhile, the camps where the refugees were housed became festering centers of resentment, violence, and lawlessness. The worsening conditions in the camps exerted, especially on the governments of Jordan, Lebanon, and Egypt, significant political, social, and economic pressures, which in turn led to an even greater intransigence on the part of these states and an implacable and self-interested insistence that all refugees be returned to their original homes and properties.

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[136] United Nations Conciliation Commission for Palestine, *Fourth Progress Report* (Sept. 22, 1949), http://domino.un.org/UNISPAL.NSF/0/60fd15ff5b22ca0d85256101007a9d2e?
OpenDocument.
[137] Sari Hanafi, *Opening the Debate on the Right of Return*, MIDDLE EAST REP. 222 (2002), *available at* http://www.merip.org/mer/mer222/222_hanafi.html.

The humiliation of the Arab defeat in the Six Day War had a profound and complex impact on Palestinian political and national identity, and, in turn, on Palestinian thinking on the refugee issue. The defeat hastened the final break between the elite leaders of the Arab countries and the young, impoverished, and frustrated Palestinian refugees who had grown up in refugee camps and who felt deeply abandoned and disillusioned by the leaders of these states.

a. The Rise of the PLO

The PLO was formed in Jordan in 1964 by the League of Arab States upon the urging of an influential group of Palestinian refugees.[138] Soon after the defeat of the Arab armies in the Six Day War and the resultant disillusionment of young Palestinians with the Arab leaders who had thus far sought to speak for their interests, the PLO emerged as the most important organization for Palestinian nationalism and political activism. By 1968, the PLO was dominated by the Fatah party, which had been founded in Kuwait in 1957 by a young refugee[139] named Yasser Arafat.[140] Within a few years of its creation, the PLO became the most significant representative body of the Palestinian people and was the first such organization that was exclusively Palestinian in focus. From its earliest days, the PLO was dominated by Palestinian refugees from various parts of the Diaspora and functioned as a typical organization-in-exile.

The PLO enjoyed a sudden surge in popularity among camp residents after the war, and young guerrillas such as Arafat, who emerged as most prominent among the first generation of purely Palestinian leaders, began to urge their people away from dependence on the rest of the Arab world. A new demand for *Palestinian* statehood gradually began to take root in the Palestinian mind and political discourse in place of what had thus far been solely a pan-*Arabist* focus on a general objective of destroying the state of Israel and restore it to Arab hands.

While the discourse of return was embedded throughout the 1960s and early 1970s in the larger desire to "liberate all of Palestine" through armed struggle, by 1974, during the 12th Session of the Palestinian National Council ("PNC") in Cairo, a first mention was made of a "right of return" (*haqq al awda*) that was to be "at the forefront of Palestinian rights." But that right was expressed *separately* from the goal of the liberation of Palestine.[141] As scholar Rashid Khalidi has since pointed out, the language used during this session is noteworthy because it contained the beginnings of the idea of the possibility of a Palestinian entity *in only part of Palestine* with the first mention of "any part of Palestine which is liberated."[142] It was also the first time the PLO publicly accepted U.N. Resolutions 181 and 194, both of which had been opposed

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[138] Rashid Hamid, *What is the PLO?*, 4 J. OF PALESTINE STUDIES 90 (1975).

[139] Although some accounts suggest that Arafat's family left Palestine prior to the 1948 war.

[140] Palestinian National Authority, FATEH (Palestine), http://www.pna.gov.ps/Government/gov/fateh.asp (last visited Jan. 28, 2006).

[141] Khalidi, *supra* note 8, at 34.

[142] *Id.* Khalidi cites the "Provisional Political Program" adopted by the PNC in 1974 during its 12th Session, which included a sentence that suggested that the PLO was, for the first time in its history, advocating a Palestinian state in only part of Palestine.

before because they required peaceful recognition of Israel. While it would take several more years for the PLO to say this explicitly, the beginnings of a concept of nationhood on part of historical Palestine, and the first realization that return would not take place through the "liberation" of all of Palestine, but rather by making demands on the international community, can be traced to this session.

The tumultuous events between 1971 and 1982 led the Palestinian leadership to believe, by the end of that decade, that the cause of independent Palestinian statehood was more feasible, and internationally considered more legitimate, than that of the return of all Palestinian refugees to Israel.[143] Events that hastened the growing precedence of statehood over return in the minds of these leaders included: (1) President Nixon's assurance to Israel in 1971 that the United States would never insist on any implementation of the claimed Palestinian right of return; (2) the 1973 war and the subsequent weakening of support for this idea on the part of the Soviet Union, which was at the time the Palestinians' strongest ally; (3) the "land-for-peace' formula that established peace between Egypt and Israel in 1978 through the Camp David accords and made no mention of the right of return but instead mentioned the legitimate rights of self-determination of the Palestinian people;[144] and (4) the Israeli invasion of Lebanon and the subsequent splintering of the PLO in 1982.

By 1988, at the 19th Session of the PNC in Algiers, the PLO had sufficiently resolved the tension between the desire to liberate "all of Palestine" and the desire to achieve immediate statehood on "any part of Palestine" to openly accept, for the first time in its history, a two-state solution and, with that, a recognition of the state of Israel. As far as the right of return was concerned, both documents released by the PNC at the time—the Declaration of Independence and the Political Resolution—grounded that right crucially *"within the context of"* UN resolutions and rendered it *less* of a priority than the aim of independent statehood. Significantly, PLO chairman Arafat used language almost identical to U.N. Resolution 194 when he appeared before the U.N. General Assembly in Geneva in December 1988 and called for the "repatriation of the Palestinian refugees *or the payment of compensation for the property of those choosing not to return . . . in accordance with* the pertinent U.N. resolutions."[145] This desire on the part of the Palestinian leadership to ground the right of return in what Arafat called "international legitimacy" is significant for two reasons:

   i.   The embrace of the language of U.N. Resolution 194 meant that the Palestinian leadership accepted the implicit limits on return to only those who were willing "to live at peace with their neighbours;" and

   ii.   The Palestinians no longer made any mention of the specific destination of those returning, thereby leaving open the possibility of return not to original homes and properties now in Israel, but, potentially, to a new state of Palestine.

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[143] Rangwala, *supra* note 94.
[144] Camp David Summit Meeting: Frameworks for Peace (Sept. 17, 1978), *reprinted in* THE ISRAEL-ARAB READER, *supra* note 29, at 222.
[145] Khalidi, *supra* note 8, at 35 (emphasis added).

Thus, a crucial shift had occurred in Palestinian political thought. While the right of return was never relinquished as a key demand of the Palestinian people, the desire to destroy the state of Israel to liberate all of Palestine had now become secondary to the desire to establish an independent Palestinian state on any part of historic Palestine. Consequently, the desire to allow refugees to return to historic Palestine was also subordinated to this desire for immediate Palestinian statehood. Self-determination had become, during this era, the *cri-de-couer* for the Palestinians, and it remains till this day the preeminent political demand of the Palestinians.

b.   The Composition of the PLO

While the PLO may speak with one political voice, it is composed of many individual groups. The Fatah party has always dominated, but many other parties and groups with widely differing political philosophies are also members. These groups include the Popular Front for the Liberation of Palestine ("PFLP") (two factions); the Democratic Front for the Liberation of Palestine ("DFLP") (two factions); the Palestine Liberation Front ("PLF"); Al Saiqa Organization; the Arab Liberation Front ("ALF"); the Palestinian Democratic Union (Fida); and the Palestinian People's Party ("PPP").

Despite the differing political philosophies of these groups (which concern primarily attitudes towards Israel, Oslo, the role of religion in the state, and the role of armed struggle in the national liberation effort), most of their members are refugees whose main demand for decades, despite differences of opinion as to means and methods, was to return to their homes and lands in erstwhile Palestine. As we have discussed in the previous section, it was only recently, since 1988, that the demand for separate statehood was added to the PLO's manifesto, and even more recently that the latter demand for statehood has taken precedence over the former demand for return.

While there has recently emerged a tension between those pragmatic politicians who believe the right of return must be settled through a process of give-and-take with the Israelis during negotiations and those who continue to assert that return is a non-negotiable moral right of all Palestinians, there is no clear *official* difference among the various PLO political parties on this issue. The PLO's charter, which every PLO member body has ratified, states in Article 3 that "[t]he Palestinian Arab people possess the legal right to their homeland and have the right to determine their destiny after achieving the liberation of their country in accordance with their wishes and entirely of their own accord and will."

Although the PLO was not recognized as the sole legitimate representative of the Palestinian people by the Arab states until 1974, it served since its inception as the main umbrella under which many Palestinian organizations (political and militant groups, trade unions, professional associations, as well as prominent national figures) met to discuss and implement national Palestinian goals.[146] The PLO continues to play the same umbrella role today, although it has lost some of its salience to the Palestinian National Authority ("PNA", sometimes abbreviated as "PA"), which was created by the Oslo Process and

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[146] Hamid, *supra* note 138.

now has sole authority to administer the Palestinian Territories. However, the PLO remains the official representative of all Palestinians in the Diaspora, whereas the PNA's role is carefully circumscribed in its charter to the Palestinians residing in the Palestinian Territories.

c.   *The PLO and the PNA*

It is not hard to imagine that there is a natural tension between the aims of the officials-in-exile of the PLO, who continue to live outside the Palestinian Territories and whose prime concern is return to their original 1948 homes, and the officials of the PNA, who live in the West Bank and Gaza and whose prime concerns center around the establishment of a viable Palestinian state. This divergence in aims is recent, and can possibly only be traced back to July 1994, the date of the first re-entry of Palestinian leaders, led by a triumphant Arafat, into the Palestinian Territories, through the Gaza-Jericho agreement signed earlier that year by Israel and the PLO in Cairo. The agreement restricted the administrative reach of the Palestinian Authority to the areas of Gaza and Jericho.[147]

However, it is worth noting that most PNA officials are given to reminding their Palestinian audiences of their own refugee status, that many of them visit refugee camps in and outside the Territories, and that many of them are either original 1948 refugees themselves, or were born and brought up in refugee camps as descendants of refugees. The current President, Mahmoud Abbas, is himself a refugee from Safed, located in the northern Gaililee region in what is now Israel, and while he has enunciated in public a nuanced interpretation of the right of return, he is always quick to point to his own refugee status in all discussions of the issue.[148]

d.   *Political Parties and Groups Outside the PLO*

Outside the umbrella of the PLO and PNA, the most significant Palestinian groups are the militant Islamist groups, Hamas and Islamic Jihad. These two groups are violently anti-Fatah and do not recognize the authority of either the PNA or the Oslo process, and their charters officially call for the destruction of the state of Israel through *jihad* (holy war). Consequently, the official charters of these groups contain no mention of the phrase "right of return." Unlike the groups housed within the PLO, they continue to be focused on the destruction of the state of Israel, and reject (at least officially) any prospect of a negotiated settlement.[149]

2.   *Evidence of Conflict*

Needless so say, Hamas and Islamic Jihad support a right of return with a very broad scope. Indeed, they articulate a desire not simply for the refugees to

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[147] Permanent Observer Mission of Palestine to the United Nations, Palestinian National Authority, http://www.palestine-un.org/pna/intro.html (last visited Jan. 28, 2006).
[148] Akiva Eldar, *Abu Mazen and Nabil Sha'at to Palestinian Refugees: You Aren't Going Back to Israel*, HA'ARETZ, Sept. 5, 2002, *available at* http://www.chicagopeacenow.org/ppw-03.html.
[149] *See, e.g.*, Hamas Charter, http://www.palestinecenter.org/cpap/documents/charter.html (last visited Jan. 28, 2006).

return to what is now Israel, but they also wish to have the refugees return to an Islamic Palestinian state that would include not simply the West Bank and Gaza but all of Israel. Indeed, the presence and importance of these groups underlines the severity of the internal conflict. While this internal conflict is obvious, we wish to examine below a more subtle dimension of the conflict. Since the PLO stated in 1988 its willingness to accept a two-state solution, there has also arisen a conflict between those Palestinians who have realized the impossibility of demanding statehood *and* Palestinian return at the same time, and those who have continued to believe that both demands could exist simultaneously. This section examines this dimension of the conflict by noting, in particular, the effects of the writings of Palestinian intellectual and academic, Dr. Sari Nusseibeh, and the polling data collected by another Palestinian academic, Dr. Khalil Shikaki.

Shortly after the details of the unofficial talks at Taba in early 2001 were revealed, Dr. Nusseibeh, who was then serving as the Palestinian Authority's diplomatic representative in Jerusalem, wrote a series of articles about the impossibility of reconciling the idea of a full Palestinian right of return with that of a peaceful, mutually acceptable, two-state solution. The articles essentially made explicit what had already been implicitly, privately agreed-upon by the negotiators at Taba.[150] These articles culminated in the publication, in July 2002, of a joint initiative between Dr. Nusseibeh and Ami Ayalon, the former head of Shin Bet (Israel's internal security service) called the Nusseibeh-Ayalon Plan, which they called the "People's Voice Campaign," and through which they circulated a petition that declared, that "Palestinian refugees will return only to the State of Palestine . . . [or] remain in their present country of residence or immigrate to third party countries."[151]

While the Ayalon-Nusseibeh petition did receive some signatures of support from Israelis and Palestinians (according to the initiative's website, approximately 160,000 Palestinians and 250,000 Israelis signed the petition), due to its dismissal of the right of return, it was met with a deafening and emotionally-charged chorus of disapproval, especially on the Palestinian side. Dr. Nusseibeh was vigorously criticized by his fellow intellectuals and politicians, and above all by Palestinian refugees and their advocates, who swiftly organized an impassioned and remarkably personal campaign to dismiss not only his ideas but also his character and credibility. A typical response was expressed in the evocatively titled piece, "Please, don't Speak on Our Behalf," written by Fawaz Turki, a son of 1948 refugees, who said:

> Nusseibeh, after all, is a child of privilege. Not only did he not experience the hunger, the cold and the destitution that were the lot of Palestinians expelled from home and homeland in 1948, but he did not know that behind the blackened walls of that encapsulated world we call a "refugee camp," a whole generation of Palestinians grew up to whom the notion of Palestine had immediacy and concreteness . . . . No outsiders, and *certainly Nusseibeh in this context is an absolute outsider*, should insinuate themselves into this smoldering debate with unsolicited, not to mention provocative and inflammatory, observations. Sure, we libertarians who value free

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[150] Hanafi, *supra* note 137.
[151] Ami Ayalon & Sari Nusseibeh, Statement of Principles, July 27, 2002, http://www.mifkad.org.il/en/principles.asp.

speech will not hold it against Nusseibeh for saying what's on his mind—as a private citizen. As an official, however, he should be more thoughtful and circumspect. He should know better.[152]

Early responses were viciously personal in their criticism of Dr. Nusseibeh. Some like Turki accused Dr, Nusseibeh of being an "outsider" who knew nothing, some claimed that he was an Israeli and American stooge, others claimed that he was entitled to his views as a private citizen but could not air them so long as he remained a public official, and the rest charged, as did the self-described "70 year old Palestinian who [has] spent his life as a . . . [r]efugee struggling for survival since 1948," that "I am sure that you are reflecting an *implicit official position.*"[153] The PLO's Department of Refugee Affairs issued, for its part, in prompt response to such suspicions, a statement in October 2002 that reiterated the PLO's official stance on the right of return, while also making sure to point out that the "Palestinian National Authority is the party authorized to design the solution to the Palestinian-Israeli conflict . . . ."[154] Meanwhile, various refugee groups and organizations coalesced to issue solemn statements that asked, in one typical instance, "[c]an the words of one man revoke the legal and moral rights of millions of Palestinian refugees?,"[155] while fellow politicians, such as Husam Khader, a Palestinian legislator from the Balata Refugee camp, declared that Dr. Nusseibeh was no longer "in our camp," and academics, such as Dr. Salman Abu Sitta, who deemed Dr. Nusseibeh irresponsible for misrepresenting the refugees' demands, scrambled to refute and deny any validity to Nusseibeh's logic.[156]

However, Dr. Nusseibeh was also, somewhat unexpectedly, defended by a few groups and political factions, such as the Fatah youth organization, which published a communiqué sent to all other Fatah factions in his support;[157] scholars such as Muhi 'Abd al-Hadi and Jan de Jong of PASSIA (the Palestinian Academic Society for the Study of International Affairs), who proposed, in a special bulletin, an extension of the Palestinian territories to include the Galilee and some areas of the Begev to absorb portions of refugee populations without altering the demographic balance of Israel; and by certain high and low ranking insiders within the political establishment of Fatah.[158] For example, Abd al-Karim Shamasna, a grass-roots Fatah leader in the West Bank, responded to Nusseibeh's ideas by saying that the Palestinians in Haifa, Jaffa and Acre (inside Israel's 1948 borders) are part of the Palestinian family but

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[152] Fawaz Turki, *Please, Don't Speak on Our Behalf*, AL-AWDA NEWS, http://www.shaml. org/ground/Nusseibeh/reactions/Please.htm (last visited Jan. 25, 2006) (emphasis added).
[153] Nizar Sakhnini, An Open Letter to Prof. Sari Nusseibeh: Surrender of Palestinian Rights is NOT the Proper Way for a Peaceful Co-existence (Dec. 30, 2001), http://www.shaml.org/ ground/Nusseibeh/reactions/an_open_letter.htm (emphasis added).
[154] Palestine Liberation Organization, Statement issued by the Department of Refugee Affairs, (Oct. 9, 2002), http://www.badil.org/Publications/Press/2002/press275-02.htm.
[155] Al-Awda Coalition, Palestinian Refugees Have Every Right to Return, http://www. shaml.org/ground/Nusseibeh/reactions/Palestinian%20Refugees.htm (last visited Jan. 25, 2006).
[156] *See, e.g.*, Hanafi, *supra* note 137 (describing Sitta's "spirited responses" to Nusseibeh and quoting Khader as saying "Sari Nusseibeh has taken himself away from the national camp").
[157] *Id.*
[158] *Id.*

that "the price" of gaining an independent state has to be "giving up the dream" of ever returning there.[159] Similarly, Yasser Abdu Rabbo, the Palestinian Minister of Information, said, in an interview with the Israeli newspaper Yediot Ahronot in November 2002, that "Palestinians will not insist on the implementation of the right of return for the refugees."[160]

Although what support there existed on the Palestinian "street" for Dr. Nusseibeh generally appeared in oblique and muted terms and was thus far less vociferous than the outcry against him, Dr. Nusseibeh did succeed, as noted above, in garnering at least 160,000 Palestinian signatures in favor of his "initiative." The more notable achievement, however, of his articles and speeches, was the provoking, for the first time in Palestinian political thought, of a debate (albeit still very one-sided) about the *practicality* of the right of return, which in turn prompted some Palestinian intellectuals to think more concretely than they had before about the contradiction, as Dr. Nusseibeh called it, between the *practical* imperative for a two-state solution and the *moral* imperative for a right of return.

While there was to be neither a dramatic revolution in Palestinian political thought on this matter (as there had been, for example, in 1988 when the PLO accepted for the first time in public the concept of a two-state solution), nor a definitive break between Palestinians (as there had been in the Israeli side on the issue of the settlements), Dr. Nusseibeh's writings prompted a new division of Palestinians into "pragmatic" and "absolutist" camps and a fresh political subtlety that led even an activist as committed to the cause of Palestinian rights as Azmi Bishara to write, in an article that practically mirrored the logic and language of Nusseibeh's piece, that:

> It is impossible to apply the right of return to the two-state framework! There is a structural contradiction between the two-state solution and the right of return for Palestinian refugees, which would change the demographic nature of the Jewish state, with the permission of the Jewish state itself. The Palestinian national liberation movement should decide whether the establishment of the Palestinian state without the right of return constitutes an acceptable historical compromise (as long as the state has sovereignty over the Haram al Sharif and as long as the agreement allows refugees to return to inside the state's borders). If such a historical compromise is impossible from both the Palestinian and Israeli points o view, we have before us a long struggle . . . .[161]

Until 2003 this debate remained very much confined to the rarified realm of intellectual discourse and was conducted, as such discourses are, through the pages of newspapers and journals. To the extent that average refugees themselves participated, it was to express disapproval and disagreement with the ideas of Dr. Nusseibeh and his supporters with one voice, through refugee

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[159] Isabel Kershner, Palestinian Affairs: Palestinian Peace Now, HASHD People's Campaign for Peace And Democracy (August 9, 2004), http://www.hashd.org/english/eliazabith/Jerusalem%20Report.htm.

[160] SHAML Palestinian Diaspora and Refugee Centre, The Palestinian Return Centre Condemns Statement by Yasir Abdu Rabbo and Calls for his Removal from Office, http://www.shaml.org/ground/Nusseibeh/reactions/yasir_abed.htm (last visited Jan. 25, 2006) (quoting statement of Yasir Abdu Rabbo).

[161] Azmi Bishara, *Liberating the Homeland, Liberating Human Beings*, WIJHAT NAZAR, Dec. 23, 2001 (in Arabic).

advocacy groups such as BADIL and al-Awda Coalition. It was not until 2003, when Dr. Khalil Shikaki published, to loud and public notice, the results of a poll of some 4500 refugees (in the West Bank, Gaza, Jordan, and Lebanon) conducted between January and June 2003, that these "average refugees" were themselves revealed to not be entirely in agreement with each other. The results of this poll (summarized in Table 3 below) implied *inter alia* that notwithstanding their constant unanimity on the subject of return, only ten percent of the refugees polled wished to physically return to Israel if given the option, more than fifty percent wished to return to a Palestinian state and receive compensation in lieu of return to Israel proper, and there existed great disparities among the refugees in West Bank and Gaza, Jordan, and Lebanon, on each of the questions asked.

TABLE 3
**Results of PSR Refugees' Polls on Refugees' Preferences and
Behavior in a Palestinian-Israeli Permanent
Refugee Agreement**

		WBGS %	Jordan %	Lebanon %	Total (% of tot. popn in the areas)*
1	Return to Israel and become (or not become) an Israeli Citizen.	12	5	23	10
2	Stay in the Palestinian State that will be established in the West Bank and Gaza and receive fair compensation for the property taken over by Israel and for other losses and suffering.	38	27	19	31
3	Receive Palestinian citizenship and return to designated areas inside Israel that would be swapped later on with Palestinian Areas as part of a territorial exchange and receive any deserved compensation.	37	10	21	23
4	Receive fair compensation for the property, losses and suffering and stay in host country receiving its citizenship or Palestinian citizenship.	0	33	11	17
5	Receive fair compensation for the property, losses and suffering and immigrate to a European country or the US, Australia or Canada and obtain citizenship of that country or Palestinian citizenship	1	2	9	2
5	Refuse all options	9	16	17	13
6	No opinion	2	8	0	5

Source: Palestinian Center for Policy and Survey Research, June 2003.
*Based on 4506 refugees.

While this poll was criticized by some statisticians for its methodology, selection biases, sampling errors, leading questions that allegedly led to biased answers, and a host of other faults, it was nonetheless hailed by many others (not least Shikaki himself) as proof that:

> [R]efugees—without help from their own leaders—have internalized the dramatic shift and have acted on it, favoring their national identity over land and legacy. . . . Needless to say, what facilitated the decision for the majority of the Palestinian refugees in seeking to live in a Palestinian state is the fact that their national identity can still be embodied in a part of the historic homeland; they can have the best of the two worlds: to be on the land, and with the people, of Palestine.[162]

While the merit of such a large claim on Shikaki's part is necessarily dubious,[163] the reaction to the poll was itself noteworthy. A flurry of articles appeared in international and regional newspapers and journals alternately criticizing and supporting the results and interpreting them at length. The expatriate Palestinian community, meanwhile, joined forces with West Bank and Gaza based refugee organizations to organize a spirited public campaign to point out the pitfalls inherent in such polls,[164] while almost all PA-sanctioned media outlets in the Palestinian territories remained significantly silent on the matter.[165]

However, things came to a head a few weeks after the poll was published, when Shikaki's office in Ramallah was ransacked by what he described as an "organized mob" which didn't appear to him to be a spontaneous gathering. According to one journalist's account, this mob:

> [A]rrived in orderly manner by bus and offered the gathered journalists their own press release. Calling [itself] the Committee for the Defense of Palestinian Refugees' Rights, and using the stationary of the PLO refugee affairs department . . . , [the mob] accused Shikaki of "selling himself to the U.S. dollar" and "deviating from the consensus of the Palestinian people." The statement warned "anyone who considers harming the national rights that their fate will be similar to that of Shikaki."[166]

Newspaper reports go on to describe how, as Palestinian police officers stood by, the mob ransacked Shikaki's office and then made its way down the street to the Muqata compound where, allegedly, Arafat welcomed them, although the *New York Times* story noted that it was unclear whether Arafat knew what the mob had just done.[167] Despite the possible, and alleged, "official" sanction of this act of violence against Shikaki, the fury of this mob indicated that Shikaki's poll had brought into the fray ordinary Palestinians, and in

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[162] Khalil Shikaki, *The Right of Return*, WALL ST. J., July 30, 2003, at A12.

[163] Notwithstanding the many statistical objections to the poll mentioned above, at least thirteen percent of all refugees polled "refused all options," which Shikaki and others who trumpeted the significance of the poll have tended to ignore.

[164] BADIL, for example, released a bulletin which stated that:

> Opinion polls do not determine refugee rights, [instead, they] reflect public sensitivity resulting from the Israeli-international effort at undermining refugee rights, are strongly influenced by the specific polling context, (and) are bad indicators of actual future refugee choices, because refugees do not have the factual information required for educated choices, and they do not have a guarantee that their choices will be recognized.

http://www.badil.org/Publications/Press/1999/press73-99.htm.

[165] Eric Umansky, *Why a Mob Attacked the Most Rational Man in the Middle East*, 42 COLUM. JOURNALISM REV. 30, 31 (2004).

[166] *Id.*

[167] James Bennet, *Palestinian Mob Attacks Pollster*, N.Y. TIMES, July 14, 2003, at A1.

so doing, had opened up to the Palestinian "masses" what had previously been a debate among intellectuals. The arguments that had once been confined to the pages of newspapers and journals had now been taken to the street.

3. Differences Among Refugees in Circumstances and Interests

While Palestinian political leaders and refugee activists have largely ignored or even attempted to silence public expression of differences concerning the right of return, both anecdotal interviews and common sense support the notion that there is an internal conflict among Palestinian refugees themselves because of profound differences in their interests and circumstances. The following section of this paper examines some of the more conspicuous dimensions of these differences.

a.   The Generational Differences

It stands to reason that there is a conflict between those refugees who place a greater weight on their personal and economic interests and those for whom the memory of past injustice outweighs all concern for present or future living conditions. The former are often middle-aged or young refugees, who wish for a better life for themselves and their children, are bitter about camp conditions and the political stalemate that keeps them there, and resent the discrimination they face in their host countries because of their refugee status. The latter are often older refugees, who have either lived through the expulsion from the homeland themselves or know someone who has, and for whom the status of refugee is itself a badge of honor that attests to the suffering of their people. As one young refugee put it, "the condition of being a refugee has become a psychological trap for the older generations, for whom the individual loss" (the loss of a home, of a way of life, of a parent or a sibling or a loved one) "has been confused with the collective loss" (the loss of a homeland for the Palestinian people), and together these losses have constituted a psychology of loss from which there is no escape.[168] These older generations long most visibly for return; the middle-aged and younger refugees talk of their right to return but do not seem to *long* for it in quite the same way.

b.   Geographical Differences

There is much evidence to support the conjecture that there is a negative correlation between the treatment of, and discrimination against, refugees in their host countries, and the intensity of their desire to return. This evidence became apparent to us during discussions with refugees on the situation in Syria, during which our interviewees explained to us that while the Palestinian refugees in Syria are certainly not treated well by the government, they are treated as badly as any other Syrian, and feel no special discrimination on account of their status as refugees and Palestinians. Their desire to return to Palestine is consequently muted when compared to that of their counterparts in Lebanon, who are discriminated against by the state of Lebanon and deprived of all manner of essential rights including the freedom to move out of the

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[168] Interview by Sreemati Mitter with Anees Anani, San Rock Hotel, Amman, Jordan (Jan. 17, 2005).

camps, the freedom to work in most professions, the freedom to marry Lebanese citizens and so on.

This point is of special significance when it comes to understanding the intensity of the demand for the right of return in the camps in Gaza and the West Bank. Unlike their counterparts in Syria, Jordan and Lebanon, these refugees are already living in "Palestine." They hold on to the right of return much more adamantly, as the fact of being a refugee is "an existential issue for them."[169] It impinges on every aspect of their lives, and they live in the camps as refugees, often within short distance of their original homes and lands, without any political or social rights to speak of, "whereas, [in Jordan], we are treated more or less as citizens, we don't live in camps, and [for us] it is more a political issue."[170]

This negative relationship is greatly complicated by the fact that many refugees who continue to live in camps, at least in the West Bank, do so by choice, to hold onto their refugee status, which they consider sacred. It is also complicated by the fact that many refugees who live in relative affluence and freedom in Western Europe and the United States, and who enjoy full rights as citizens in those countries, are often the most strident when it comes to demanding the right of return. But these complications do not disprove the general validity of the principle that the better one is treated politically and socially by the host country, the more one is disposed to think of the right of return as a political issue as opposed to an existential issue, and the less desperately one wishes for an actual physical return.

c.   Class Differences

Perhaps unsurprisingly, a gap also exists between those refugees who are affluent, especially second and third generation refugees, and feel less urgently the need to return, and those who are poor and continue to live in the camps, in circumstances of dreary impoverishment.

d.   Tribal/Clan Affiliations

Many Palestinian refugees have maintained over the years the historic tribal or geographical/village affiliations of their families from the pre-1948 days in Mandate Palestine. Most refugees in Jordan and Lebanon have resettled in camps that are arranged along clan and tribal lines, and it is not unusual to find an entire village from erstwhile Mandatory Palestine recreated, almost in its entirety, in Lebanon. There seems to be, moreover, a general negative correlation between the condition of living among one's own tribe and/or clan in the host country and the desire to return to what is now Israel. In other words, the greater the degree of replication in the host country of the societal structures that were once in place at home and the more comfortable and familiar the current surroundings, the less likely the refugee is to demand a return to what he knows will be an entirely alien social situation in a country he knows nothing about. This correlation is important because it is especially true of older

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[169] Interview with Jalal al-Husseini, Institut Francais du Proche-Orient, in Amman, Jordan (Jan. 18, 2005).

[170] *Id.*

generation "original 1948 refugees" who actually have memories of living in Mandate Palestine. While this group is most likely to hold onto its demand for return, when pressed, most "original" refugees tend to say that they will not actually return because all their friends and family members live around them, and they had no one to return to. The advanced age and physical debilitation of most of these "original 1948 refugees" also greatly reduces, to our mind, the credibility of their desire to return.

In sum, there are profound differences among Palestinians: between the refugees who continue to live in the camps and those who have been assimilated for years into the cities; between those who have been incarcerated in the woeful camps of Lebanon and those who live in relative prosperity and freedom in Syria and Jordan; between those who have been granted asylum in affluent Western countries and those who went to live in the Gulf states and were persecuted and expelled after the Gulf War, in punishment for the support of Saddam Hussein by the PLO; and finally between the actual survivors of 1948 who continue to live with their memories and long to return to Palestine as they knew it, and their grandchildren who live with their ambitions for education, employment and wealth, have never set foot in Palestine, and have more complex, hyphenated notions of personal identity.

B. *The Internal Israeli Conflict over Jewish Settlements*[171]

1. *The Nature of the Conflict*

The core internal conflict over the future of the Jewish settlements has two dimensions. First, the settlements pose a concrete political question: What should Israel do with the occupied territories? The conflict over this question profoundly affects Israel's internal politics. The second dimension goes to the nature of Israel and the meaning of a Jewish state. It implicates the core identity of some but not all the protagonists. This dimension raises the following sorts of questions: What role should religion play in public life? In a democracy, can the "sacred" override state sovereignty? By what process should decisions over these issues be made?

In a brilliant essay written two decades ago, Amos Oz suggested that the internal conflict among Israelis over the settlement project implicated these sorts of issues. He wrote, in words that ring true to us today:

> Hundreds of thousands of Israelis are convinced, intellectually and emotionally, that if Israel keeps hold of the occupied territories it will cease to exist—nothing less than that. Hundreds of thousands of other Israelis are convinced that if Israel pulls out, it will cease to exist—nothing less than that . . . . Both sides are armed with precedents and expert opinions, indications that appear to them infallible. Both sides sense an imminent catastrophe. Both sides share a sense of emergency.[172]

a. *The West Bank, Gaza and Israel's Future Borders*

The settlement project goes to the question at the heart of the most significant internal Israeli political conflict of the last three decades: what should be

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[171] *See* Mnookin & Eiran, *supra* note * (providing a detailed discussion of this conflict).
[172] AMOS OZ, ISRAEL, PALESTINE, AND PEACE: ESSAYS: WHOSE HOLY LAND? DIVIDED ISRAEL IN PALESTINE 78-82 (1995).

the permanent status of the occupied territories of West Bank? Although Israel has controlled the West Bank since 1967, its final status has not been decided and the region has never legally been made a part of Israel proper. Deciding how to answer this question has created an internal fault-line between the Israeli right and left since the 1970s. The right has traditionally supported retaining the territories for a combination of national security, cultural and religious reasons. In their view Israel needs to expand eastwards to create a more defensible border as well as protect the country's water supplies. The West Bank is also viewed as the historical cradle of Jewish civilization and an essential part of the Promised Land. Despite these views, however, the right never annexed the territories when it was in power.

Left-wing Israelis believe that Israel should aim to relinquish control over these areas for strategic, demographic, and moral reasons. Strategically, the left has argued that the occupied territories should ultimately be traded in return for peace with the Palestinians and Israel's Arab neighbors.[173] The left has also emphasized the adverse long-term demographic consequences of annexing the occupied territories: Israel could not remain a democracy with a Jewish majority. The left has further argued that Israel's continuing domination over Palestinian areas is both immoral and would, in the long run, corrupt and coarsen Israel itself.

Since the late 1970s, on the Israeli left, Peace Now has led the efforts to halt the expansion of settlements.[174] Dror Etkes, a Peace Now staffer, indicated in 2003:

> Peace Now has always thought that settlements in the occupied territories threaten our existence as a Jewish, democratic state, weaken the security of Israel, drain our economic resources, undermine our society's moral fiber, and serve to perpetuate Israeli rule over another people in a way that prevents Israel from reaching peace with the Palestinians. The settlements today pose an existential threat to the future of Israel. Let me be very clear: it is in Israel's own best interests to separate itself from settlements and the occupied territories that the settlers would have us bind to the state.[175]

The settlement project was designed to affect the outcome of this territorial conflict through the creation of "facts on the ground." The vision of the national religious settlers was to create a thick network of Jewish settlements in the West Bank and Gaza to prevent the possibility of an Israeli withdrawal from these areas. Once there were a sufficiently large number of settlers, it was assumed that it would become impossible for any Israeli government to require massive numbers of ordinary Israelis to relocate.[176]

A partial and limited answer to the question of Israel's future borders was made clear in 2005 when the Sharon government "unilaterally" uprooted over

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[173] Initially, most Israelis thought the West Bank would be returned to Jordan.

[174] *See* Peace Now, About Us, http://www.peacenow.org.il/site/en/peace.asp?pi=43 (last visited Nov. 19, 2005) (Claiming to be Israel's largest non-governmental movement, founded in 1978 and currently running a "Settlement Watch" project to both monitor and protest the building of settlements in the West Bank and East Jerusalem).

[175] Dror Etkes, *Testimony Before the Near Eastern and South Asian Affairs Subcommittee* of the Senate Foreign Relations Committee (Oct. 15, 2003) *available at* http://foreign.senate.gov/testimony/2003/EtkesTestimony031015.pdf.

[176] Meir Harnoi, *The Settlers*, TEL-AVIV: MAARIV 225 (1994) (in Hebrew).

fierce internal opposition all the Jewish settlements in Gaza and withdrew
Israeli troops from that area. Yet, the internal conflict about the future of the
West Bank settlements, home of the vast majority of settlers, is far from
resolved. If an Israeli government attempts to define its borders in the West
Bank, whether through further unilateral actions[177], or by a negotiated agree-
ment with the Palestinians, large numbers of Jewish settlers will be required to
relocate, and many can be expected to resist. It remains to be seen how the
events of summer 2005 in, Gaza will affect the "next political round" in this
internal conflict. Indeed, the violent clash between Jewish settlers and the
Israeli police at the West Bank outpost of Amona in early February 2006 sug-
gest the possibility that future relocation of West Bank settlements may prove
to be a far greater challenge than relocating settlers from Gaza.[178]

b.   The Settlements and the Nature of the Jewish State

The conflict over the settlements implicates more than the concrete inter-
nal debate about territorial expansion. It raises profound issues about the
nature of the Jewish state and the personal identities of some of the protago-
nists. One such issue relates to Israel's national identity as a democratic Jewish
state. Since Israel's birth in 1948 there has been an inherent but manageable
tension between the nation's universalistic, democratic norms and its particular-
istic affiliation with Judaism and Zionism. In its fifty-year history, Israel has
accommodated this tension by encouraging the development of both a demo-
cratic culture and one where Jewish holidays and symbols had a preferred sta-
tus. In addition, there were special immigration rules such as the "Law of
Return" that gave every Jew the right to immigrate to Israel and become an
Israeli citizen.[179] Because Jews represent about eighty percent of Israel's total
population, they are a dominant majority in the state.[180] Although twenty per-
cent of Israel citizens are Palestinians, the "Jewishness" of the public sphere
and national culture has been maintained while according its Arab citizens full
right to participate in Israeli political life.

If the settlement project leads to the annexation of the occupied territories,
Israel will be faced with hard choices. What will be the status of the millions
of Palestinians residing in the West Bank and Gaza? Resolving this issue
implicates the tension between maintaining Israel as a Jewish state and as a
democratic state. To maintain a Jewish electoral majority, even in the short
run, Palestinians in the occupied territories cannot be given full voting rights.
This would obviously undermine Israel's democratic character. But if Pales-
tinians in the West Bank and Gaza become equal members in the Israeli body

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[177] See Greg Myre, *Olmert Wants to Define Borders, Ally Says*, N.Y. TIMES, March 6, 2006,
at A5.
[178] Efrat Porsher and Tal Yemin Wolwowitz, *Amona Relocation Ends: 160 injured*,
MAARIV, Feb.1, 2006 (Hebrew), *available at* http://www.nrg.co.il/online/1/ART1/042/164.
html (Viewed last on March 6, 2006)
[179] In its present form, the Law of Return has a very expansive definition of who counted as
a Jew.
[180] *See* CIA WORLD FACTBOOK 273 (2005), *available at* http://www.cia.gov/cia/publica-
tions/factbook/geos/is.html.

politic, Israel would soon lose its Jewish majority[181] and as a result its Jewish national identity would be jeopardized.

The conflict over the settlements also implicates contentious issues about the role of religion in the public life. The national religious settlers base their determination to annex the occupied territories on a religious claim that the land is sacred, and that their project involves a religious calling to populate the "Promised Land" and redeem God's promise to the Jewish people. Many national religious settlers broadly call for the infusion and imposition of traditional religious norms, as opposed to Jewish cultural norms, throughout Israeli public life. One settler suggested recently that Israel should develop a "third temple culture" that fuses religion with all aspect of the modern state.[182] For Israeli Jews with a secular, non-religious orientation, such notions are profoundly repugnant.

For some protagonists, the internal conflict over the settlements poses profound issues of personal identity. For the first generation of national religious settlers, the project gave their life meaning by defining their role in the chain of Jewish history and representing their unique generational contribution to Judaism and Zionism. For such settlers, dismantling their settlements would be a direct challenge to their personal identities. Some scholars have suggested that a collapse of the settlement project might push some settlers to relinquish their religious fervor or even turn suicidal.[183]

As evident from the Amos Oz quote above,[184] this conflict also poses issues of identity for liberal Israelis, whether secular or religious, who are committed to Israel's democratic nature. One observant Israeli academic summed up his concerns quite vividly:

> If the map of the settlements will establish the border of the sovereignty of the State of Israel, this will bring about a situation for the next generation in which a Jewish minority will oppress and will go on oppressing an Arab majority with everything that entails in daily life. For me this would mean that Israel is a state that wasn't worth establishing; a state that is a disgrace for the Jewish people and for the Bible.[185]

Finally, the conflict over the settlements poses process issues relating to political legitimacy. By what process should decisions about the future of the settlements be made? Religious nationalists base the legitimacy of their claims in part on the sacred. Some suggest this gives them the right to disregard, in effect, the secular political process. Some have suggested that even if the vast majority of Israeli Jews agree to abandon the territories, it will be an illegiti-

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[181] Arnon Soffer, Demographics in the Israeli-Palestinian Dispute, Address at the Washington Institute Special Policy Forum (Mar. 22, 2002) (summary *at* http://www.washington institute.org/templateC05.php?CID=2061).

[182] MOTI KARPEL, THE EMUNIC REVOLUTION: THE DECLINE OF ZIONISM AND THE RISE OF THE EMUNIC ALTERNATIVE 73 (2003).

[183] Gideon Aran, Anthropological-Historical Notes on the Hard Core Israeli Settlers in the Territories Towards Possible Evacuation, Presentation at Harvard Law School Conference: Past, Present, and Future of the Israeli Settlements in the West Bank and Gaza Settlements: The Internal Israeli Conflict (Oct. 14-15, 2004).

[184] *See infra* Part II.A.

[185] Interview with Moshe Halbertal, Professor, Hebrew University of Jerusalem, (Apr. 14, 2004).

mate act because of the sacred nature of the land of Israel and the obligations of Jews to occupy it.[186] The left, on the other hand, believes that the state has complete sovereignty to make these kinds of decisions through ordinary political processes. Their commitment reflects a belief in both democratic and rational decision-making.

Most see Zionism as a national, *secular* movement. They reject using religious rituals or beliefs as the basis for government policy. They believe that modern secular, not ancient religious, norms should determine the fate of the Jewish people. A leading Israeli philosopher summed this up when he suggested that the current debate about Prime Minister Sharon's proposal is "not typically cast by the settler movement in terms of whether it is right or wrong as a matter of policy or wise politics, but instead is cast in terms of jurisdiction: whether Israel as a state has the sovereign power to decide it? Is there a legitimate process that can adjudicate the conflict?" In his view, the settlers suggest that "elected government officials lack the jurisdiction to decide these issues and that relocation of settlers poses issues of religious law beyond the capacity of the state to decide."[187]

2. *Settlers' Efficacy and the Internal Debate*

Less than five percent of the Jewish population of Israel resides in settlements, and the ideologically committed national religious settlers are only about a quarter of those settlers. Nevertheless, the history of the last thirty-seven years has demonstrated that this small group has wielded disproportionate influence on domestic politics and Israel's international relations. The number of settlers has expanded almost continuously under both Labor and Likud governments.

The settlers played a crucial role in brining down Israeli governments that tending towards settlement relocation. Within Israel it has been politically risky for a political figure even to *talk* about evacuation of settlements. Taking concrete steps towards this end contributed to the downfall of the Rabin, Netanyahu, and Barak governments and now threatens Sharon's. What is the origin and nature of this influence? Why have settlers in general, and the national religious contingent in particular, succeeded in making the future of the settlements into the third rail of Israeli politics? And more broadly, what factors, unrelated to actions of the settlers, contributed to the successful expansion of the settlements.

The national religious settlers draw on three sources for their disproportionate influence: (1) their ability to sound themes that have religious and ideological resonance with broad appeal within Israel; (2) the institutional structure of the governmental entities representing the settlers and the peculiar influence minority parties can play within Israeli politics; and (3) the fear created within Israel by the settlers' willingness to use hard-bargaining tactics, including civil

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[186] *See* Elyakim Haetzni, Mishal Am, NFC, (Sept. 24, 2004), http://www.nfc.co.il/archive/003-D-7425-00.html?tag=8-10-01 (in Hebrew).
[187] Moshe Halbertal, National Religious Ideology's Challenge to Israel's Sovereignty, Presentation at Harvard Law School Conference: Past, Present, and Future of the Israeli Settlements in the West Bank and Gaza Settlements: The Internal Israeli Conflict (Oct. 14-15, 2004).

disobedience and the threat of violent protest. There are also four other factors unrelated to actions of the settlers that contributed to the expansion. These are: (1) considerations relating to national security; (2) the lack of clarity about whether there was an Arab entity with whom to negotiate that was prepared to accept responsibility for the West Bank; (3) a desire to create incentives for possible future negotiations with Arab or Palestinian representatives; and (4) the economic benefits to Israel's economy of retaining the occupied territories.

a.   The Settlers Can Sound Themes Having Broad Resonance within Israel

Ideologically committed settlers have had surprising influence because of their ability to sound themes and create images that have deep resonance among a much broader group of Israeli Jews who may be less religious or nationalist than the settlers. Some of these themes are biblical, and connect the West Bank to the ancient homeland of the Jewish people; others are more explicitly religious, and suggest redemption through the settlement of the ancient homeland. Many of these themes echo sentiments voiced by secular Jews who laid the foundation for the modern state. These themes include the rebirth of the Jewish people through a pioneering spirit, the importance of strong solidarity within communities consisting of mutually supportive members, the primacy of non-materialistic values, the need to value a "serving elite" willing to devote their lives to the creation and survival of Israel, and the importance of "creating facts on the ground" through new communities that would eventually shape the territorial borders of the Jewish state. The broader resonance of these themes creates sympathy and support among many non-settlers. Perhaps more importantly, they create ambivalence and even reluctance to voice their opposition among those who intellectually object to the settlement project. Danny Rubinstein, an Israeli author, observed, "the slogans of Gush Emunim . . . penetrated the hearts of those who were distant from Judaism and the National Religious Party."[188]

The combination of the pioneer appeal, the notions of a serving elite, and the model of communitarian life all resonate for many Israelis as an extrapolation of traditional Zionism. Zionism is a settler ideology. From the 1920s until at least the 1950s, many thought that the essence of Zionism required the creation of settlements that would reclaim the land and create a new identity for Jews connected to the land. Even today, some Israelis believe that settlements are a crucial manifestation of Zionism.

The national religious settlers see themselves as reviving Zionism and rescuing it from the hands of an aging and debased group of Labor Zionists[189] who were in decline. Traditional Zionism was a secular movement with socialist overtones, led by many who wished to rebel against traditional Judaism. It was primarily political and was focused on establishing a Jewish state. Observant Jews had never been at the core of the movement and felt marginalized.

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[188] DANNY RUBINSTEIN, ON THE LORD'S SIDE: GUSH EMUNIM 162 (1982) (in Hebrew).
[189] Labor Zionists traditionally believed that a Jewish state can be created and maintained through the efforts of the Jewish working class on kibbutzim and in the cities. *See* AVINERI, *supra* note 58.

After 1967, religious nationalists saw the settlement project as a means to create a central role in Zionism for themselves through the fusion of religion with old notions of territorial expansion through settlement and national security. From the caboose of the Zionist train, national religious Israelis moved to the front car and in the eyes of some seized control of the locomotive.[190] One leader of the settlement movement, Hanan Porat, declared that Labor Zionism "had concluded its mission" and now its leaders should move aside and "stop disrupting" the task of reviving Zionism through new settlements.[191]

b.   *Institutional Sources of Settler Influence*

i)   *The Israeli Political System—Coalitional Politics*

The settlers enjoy significant influence in the Israeli political system as a result of some institutional features of the system. These features are compounded by the internal structure of the settlement movement, which gives the most ideologically committed settlers disproportionate influence among the settlers as a whole.

The Israeli political system allows small, determined, and cohesive minority groups to exert disproportionate power. This power has allowed small parties that were sympathetic to the settlement movement (mostly the National Religious Party) to affect political outcomes well beyond their small numbers.

Moreover, settlers are substantially overrepresented in the Knesset. By 2003, nine percent of the members of the Knesset (11 of 120) were settlers,[192] even though settlers comprised only three percent of the electorate.

ii)   *Regional, Local, and the Yesha Councils*

Other structural features of the Israeli government and settlement movement itself contribute to the disproportionate influence of ideologically committed settlers. Those settlers who become elected officials, mostly at the local government level, are often willing to commit municipal and regional resources under their control to the settlement movement.

In both Israel and the occupied territories, many significant governmental functions, including planning and zoning, the provision of roads, sewers and water, and many social and educational services are administered by local government entities, not the central government. Regional and local councils have command over significant material and human resources that can be translated into political power. One source of patronage is their control of the local payroll. Indeed, for Jews, government is the largest employer in the territories. Local and regional councils have used their budgetary control to finance campaigns against settler relocation during the Oslo process and to fight the Sharon initiative. Resources are also used directly for political mobilization. For example, during the 2004 mass demonstrations in Israel against Prime Minister Sharon's relocation plan, settler regional and local councils used their control over the educational and busing systems to transport thousands of schoolchil-

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[190] A metaphor widely attributed to Amos Oz.

[191] RUBINSTEIN, *supra* note 188, at 162.

[192] *The Price of the Settlements*, HA'ARETZ (Special Rosh Hashanah Journal), Sept. 26, 2003, at 43.

dren and local government employees to protest against the government's policies.

Along with this municipal government structure, the geographic distribution of settler groups accounts for the disproportionate influence of the most ideologically committed settlers. Most national religious settlers reside in, and make up a majority of, smaller settlements with a local or regional council government. Most non-ideological settlers reside in larger communities with a "city" form of local government. This residence structure has two consequences. First, national religious settlers are able to control most local and regional councils. Second, such settlers are able to control the Yesha Council, an institution composed of settler leaders. Although the Yesha Council has no official governmental status, it has long claimed to speak for those who live in the settlements.[193]

The settlers further benefit from continuity in their leadership. Some of their leaders, such as Pinchs Vallerstein, the head of the Regional Council of Mate Binyamin, and Ze'ev Hever (Zambish), the head of the settlement arm of Gush Emunim, have been leading the settlers for almost three decades. Most of the bureaucrats they deal with, do not keep their positions for that long. This gives the settlers a significant advantage when they interact with those who oppose them, who are countered easily by the experienced settlers. It also allows them to use the state's resources more effectively when they interact with bureaucrats that support their project by virtue of their experience.

c. *The Settlers' Effective Use of Hard Bargaining Tactics*

The settlers have successfully played on the fear among Israelis at large that any attempt to evacuate settlers would result in a violent confrontation, could create a painful and costly internal rift among Israeli Jews, and may create a crisis that would damage the principle of democratic, majority rule. The leaders of the settlement movement, while typically reluctant to explicitly endorse the use of violent tactics, nevertheless have always been willing to exploit fears of settler violence in the face of evacuation.[194] For example, while leaders suggest that most national religious settlers are law-abiding and would never resort to violence, they simultaneously suggest that some extreme elements within their ranks are difficult to constrain.[195] The existence of extreme elements prepared to use violence is doubted by few Israelis, given the plot of the Jewish underground to blow up the Temple Mount and the Rabin assassination.[196]

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[193] Mnookin & Eiran, *supra* note *, at 21-22.

[194] Interview with Moshe Halbertal, *supra* note 185.

[195] This suggestion interestingly reflects a similar argument made by leaders of the Palestinian authority who suggest they lack the capacity to control Hamas, Islamic Jihad, and extreme elements with the PLO.

[196] NOEMI GAL-OR, THE JEWISH UNDERGROUND: OUR TERRORISM 39-48 (1990). Some contemporary analysts have suggested that the youth who have established new hilltop outposts cannot be controlled by the settler leadership. Shlomo Kaniel, The Hilltop Settlers: Biblical Sabras, Presentation at Harvard Law School Conference: Past, Present, and Future of the Israeli Settlements in the West Bank and Gaza Settlements: The Internal Israeli Conflict (Oct. 14, 2004).

Israelis are especially sensitive to the risk of internal conflict because of the "lessons" of history. Even secular Jews are taught the Talmudic story in school, indicating that Jewish independence was lost to the Romans during the Second Temple era (circa 70 AD) because of violent rifts and "internal hatred" among the Jews.[197]

Religion aside, Jewish culture has traditionally stressed a tribal notion that Jews throughout the world share a responsibility for each other's well-being and survival. This cultural theme makes repugnant the prospect of a violent confrontation among Jews. This notion may help to explain the extreme trauma created by Rabin's assassination.

For Israelis, the "nightmare scenario" of an internal rift would involve widespread insubordination within the military. Today settlers and other relig-ious nationalists are understood to be vastly overrepresented in junior officer corps and combat units.[198] Press reports have suggested that many of these soldiers might disobey orders to evacuate settlements. As a result, the Israeli military was careful to choose units that had absolute loyalty to the state, in carrying out the settlement relocations in the summer of 2005. Conscription units that were suspected as being hesitant regarding the relocation mission were not mobilized to directly support it.[199] Nearly all Israeli Jews believe the strength and cohesion of the military is essential for Israel's survival. No insti-tution within Israel enjoys higher prestige than the armed forces.[200] This pres-tige is hardly surprising given Israel's fundamental reliance on its military over a fifty-six year period that has seen six wars and intermittent terrorist attacks. The role of settlers and religious nationalists in the military adds to the credibil-ity of the implicit threat of disunity in the ranks. Indeed, in the past some rabbis have issued edicts saying that soldiers should ignore certain military orders relating to the cession of army bases in the West Bank to the Palestinians.[201]

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[197] Romans destroyed the Second Temple in 70 AD. In 132 AD the Jews unsuccessfully rebelled again against the Romans. The Romans then expelled most of the Jews from the Holy Land and the second Diaspora began. *See* YEHOSHFAT HARKABI, THE BAR KOKHBA SYNDROME: RISK AND REALISM IN INTERNATIONAL POLITICS, (1983); Talmud, Yoma, 9B (The Second Temple was destroyed because during that time "sinat Hinam" [baseless hatred] characterized the relationship among Jewish groups. The Talmud concludes that "this teaches us that baseless hatred [among Jews] is deemed as grave as the sins of idolatry, immorality and bloodshed combined.").

[198] In 1998, former Director of Military Intelligence, General (Res.) Shlomo Gazit, warned that the large numbers of religious and settler soldiers is "dangerously politicizing the mili-tary." Tzahi Fanton, The Motherland of Antisemitism, NFC (Apr. 19, 2004), http://www.nfc.co.il/archive/003-D-5650-00.html?tag=4-57-59 (in Hebrew).

[199] Yishai Holander & Kave Shafran, *Golani will not Relocate Settlers,* MSN NEWS (Hebrew Edition), 16 June 2005, http://business.msn.co.il/news/statepoliticalmilitary/mili-tary/200506/20050616072745.htm?inter=1.

[200] *See* YARON EZRAHI, RUBBER BULLETS: POWER AND CONSCIENCE IN MODERN ISRAEL 38 (1998) (service in the military is "the most defining component of Israeli identity").

[201] Joel Greenberg, *Hand Over Israeli Bases? No Way, Rabbis Tell Troops,* N.Y. TIMES, July 13, 1995, at A3.

> d.   *Other Factors Contributing to Settler Power and Settlement Expansion*

Other factors, unrelated to the actions of the settlers themselves, contributed to the remarkable expansion of the settlements.

> i.   *National Security Arguments*

Borders: Over the years many believed that settlements in the West Bank enhanced Israel's security. As noted above, among Israelis, the old "Green Line" border between Israel and the West Bank was deemed impossible to defend from an eastern military attack. Israeli Foreign Minister Abba Eban, who had a reputation as a "dove," labeled it "the Auschwitz Border" because it risked extermination of Israel, as the neck of Israel was less than ten miles wide. Many believed that by "creating facts on the ground," settlements might enhance Israel's long-term security by ultimately guaranteeing that any future eastern border would be east of the Green Line.[202]

Whatever the final borders, many Israelis believe that maintaining *control* over portions of the West Bank is essential until there is a stable Palestinian government insuring there would be no cross-border terrorist attacks and the West Bank aquifer would not be contaminated.[203] Even among some former leaders of the Labor Party, such as Yigal Alon, settlements were a vital method of insuring interim control.[204] Settlements could house military units and could create a continuing presence in a strategic location. However, the effectiveness of civilian settlements in asserting military control is disputed. Many analysts argue that civilian presence in the territory compromises military control because civilian settlers need extra military protection and divert scarce military resources.

The Settlements as a Bargaining Chip: After Israel took control of the territories, it was widely assumed that Israel would someday trade land for peace in a future negotiated deal with its neighboring Arab states or the Palestinians. However, with the exception of Egypt, between 1967 and 1991, there were no formal negotiations between Israel and its Arab neighbors. Shortly after the Six Day War, the Israeli cabinet suggested that it was prepared to trade land for peace with its Arab neighbors. At an Arab League summit at Khartoum in September of 1967, the response was "three no's": no peace with Israel, no recognition of Israel, and no negotiation with Israel.[205]

Within Israel, many who had no interest in permanently remaining in the territories either supported or acquiesced in the creation of settlements for two reasons. On the one hand, the threat of ongoing settlement expansion might

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[202] Another area where settlements are thought to contribute to Israeli security was the Gush Etzion area, south of Jerusalem. In hostile hands, control of this area would facilitate attacks on Jerusalem.

[203] Some security analysts suggest that Israel should control at least part of the West Bank because the West Bank aquifer, if contaminated, would compromise Israel's main water supply.

[204] Yigal Allon, *Israel: The Case for Defensible Borders*, FOREIGN AFFAIRS, Oct. 1976, at 38-53.

[205] Jewish Virtual Library, The Khartoum Resolutions (Sept. 1, 1967), http://www.jewish virtuallibrary.org/jsource/History/three_noes.html.

create a "fading opportunity" that might induce the Arabs to come to the bar-
gaining table. On the other hand, some believed that at the bargaining table
itself the settlements could serve as a "bargaining chip" that could be traded for
an Arab concession. There is an obvious tension between these arguments.
The opportunity is "fading" only to the extent that settlement expansion was
seen as irreversible. Moreover, the use of the settlements as a bargaining chip
in negotiation requires the Israeli government to have the capacity to require
evacuation of the settlers. The experience of the last twenty years suggests
neither argument has panned out. On the one hand, the constant expansion of
settlements appears to have undermined and inhibited negotiations with the
Palestinians. On the other, the existence of the settlements has in fact made it
very difficult for any Israeli leader to create and sustain sufficient domestic
support to abandon them. The settlers have not been passive pieces on a strate-
gic chessboard. They have played an active role as spoilers, resisting all inter-
nal political efforts to reach an Israeli-Palestinian deal.

ii. The Ambiguous Status of the Territories

The settlers benefited from the unclear status of the West Bank and Gaza,
as well as the ongoing inability to determine their future status. Israel occupied
both areas in 1967, but never annexed them, and legally ruled them under a
temporary military legal system. But even prior to Israeli occupation, sover-
eignty over these regions was not internationally agreed upon.

The issue goes back to the early days of the state of Israel. Since 1948,
with the end of the British Mandate, no state acquired internationally recog-
nized sovereignty over these areas. Though under the 1947 U.N. Partition Plan
Gaza and the West Bank were supposed to be part of a future Palestinian state,
by the end of the 1948-1949 war, they were occupied by Egypt and Jordan
respectively. Egypt held Gaza under military rule between the years 1949-1967
but never annexed it. Jordan annexed the West Bank in 1950, but the interna-
tional community did not recognize the annexation.[206] Though it was widely
assumed in Israel that the territories would be handed to an Arab party at some
point, for at least twenty-five years, it was not clear whom this party would be.
Until 1987 Jordan claimed that the West Bank was part of the Hashemite King-
dom. Following the 1993 Oslo accord it was assumed that a Palestinian state
would have sovereignty of the region, but the collapse of the Oslo process in
2000 once again created uncertainty.

The Palestinians, the local residents of these areas, did not articulate a
clear and effective demand for self-determination until the 1970s, and even
then the demand was deemed unrealistic by many, as it included an undist-
inguishable claim for both the territories and the state of Israel. These circum-
stances created a political vacuum in the West Bank and Gaza that made it
easier for settlers to both pursue their project and create "facts on the ground"
without substantial internal opposition.

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[206] Two countries, the United Kingdom and Pakistan, were alone in recognizing this
annexation.

iii.   Absence of a Deal

The settlers greatly benefited from the absence of a final status deal between Israelis and Palestinians. At no time was the Israeli public faced directly with a choice between the settlements in the West Bank and Gaza and a peace agreement with the Palestinians, and they did not have to evaluate the trade-offs between the two. For the first twenty-five years of the settlement project, neither Israelis nor Palestinians accepted the legitimacy of the other's right of self-determination, let alone a negotiated deal. Though both sides negotiated and signed a set of agreements in the 1993-2000 Oslo peace process period, it was only in 2000 in the Camp David and Taba negotiations that Israel and the PLO got closer to discussing a comprehensive final deal which would have crystallized the choice between land and peace. Even then, as we discuss above, a deal was not reached and the public was not asked to make a choice between peace and the settlement project.

Although the Israeli public was not asked to choose between the settlements and peace during the Oslo peace process, Israel's short history provides one vivid example of majority support for halting or uprooting a settlement project when a concrete peace plan was on the table. In 1982, the Israeli Knesset authorized the relocation of 6000 Israeli settlers in Sinai as part of an Israeli-Egyptian peace agreement. Yet the public has never had to make a direct choice between settlements and peace in the West Bank and Gaza, and they did not have a strong incentive to halt the settlement project.[207]

Many Israelis, as well as Palestinians, warned that the continuation of the settlement project would create enormous difficulties for a future peace agreement. But lacking a final status agreement, their warnings were ignored.

3.   The Parties to the Conflict: An Assessment

The history of the internal conflict over the settlements can be seen as a political contest for the hearts and minds of a reluctant and ambivalent majority where the protagonists are two warring minorities. One minority, led by the national religious settlers, has shaped events to a much greater degree than the second minority, the peace movement led by Peace Now. The settlers have effectively mobilized government resources in their service, especially when Likud was in power. Peace Now was much less effective in mobilizing Labor governments to block settlement expansion. Indeed, the settlement movement has succeeded in creating "facts on the ground" that profoundly complicate the implementation of a two state solution. One hundred and twenty settlement communities, home to over 250,000 Jews, now pepper the West Bank and Gaza.[208] We have suggested that national religious settlers, a small, deter-

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[207] Moreover, public opinion data provide inconclusive evidence of the Israeli public's appetite for other land-for-peace deals. Polling data show that withdrawing from the Golan Heights in exchange for peace with Syria has not mustered the support of a majority of Israelis. *See* Ephraim Yaar & Tamar Hermann, Steinmetz Center for Peace Research Report, Dec. 1999, http://spirit.tau.ac.il/socant/peace/peaceindex/1999/files/dec99e.pdf ("[T]he Jewish public at this time lacks a majority in favor of full withdrawal from the Golan in return for a full peace agreement with Syria.").

[208] This paper was written prior to the implementation of Prime Minister Sharon's plan to relocate all Jewish settlements in Gaza.

mined and well-organized minority have successfully invoked themes, both cultural and religious, having broad resonance within Israel. We have also pointed to institutional features of the Israeli political system that have amplified their power.

The number of Jewish settlers in the occupied territories has increased steadily since the 1967 war, irrespective of whether Labor or Likud led the Israeli government. As noted, even in 2005. notwithstanding the evacuation of of the Gaza settlements, the total number of settlers grew.

From 1967 until 2004, Israel's two major political parties responded differently to the conflicts between national religious settlers and the peace movement. As a general proposition, Labor-led governments employed a strategy of avoiding direct confrontation with the settlement movement. These governments demonstrated little understanding or sympathy for the perspective of the national religious settlers, but they were unwilling to firmly halt expansion. Conflict avoidance characterized their response. When Likud-led governments were in power, their posture was one of accommodation of the settlers. Likud demonstrated an empathetic understanding for the settlers' goals and actively supported settlement expansion. While territorial expansion was consistent with Likud's traditional ideology, Likud governments were never assertive enough to implement the settlers' grand vision and annex the territories to Israel proper.

The internal conflict has also been one that keeps changing. In the thirty-seven years of internal debate, many players, such as political leaders, parties, and public intellectuals, shifted their positions. Most of them have turned against the settlement project. Shimon Peres, as Rabin's Minister of Defense in the 1970s, was the champion of the early Gush Emunim settlements in Samaria, but by the 1990s had become one of their greatest opponents. Prime Minister Sharon, the champion of the settlers from the mid 1970s to the early 2000s, now directly confronts the movement with a specific proposal to evacuate all the settlements in Gaza as well as four small ones in the West Bank. Similarly, the Likud party, once the leading supporter of a vision of a Greater Israel that implied keeping all the settlements and even expanding them, is now torn internally over the future of the settlement project.

4.   *The Internal Debate and Debate around Sharon's Disengagement Plan*

Because of the settlers' political efficacy, Sharon faced fierce political resistance to his initiative to relocate settlers from Gaza and the West Bank. The leadership of the settlement movement mobilized their entire settlement constituency, not just those 8000 that might be required to move. To all the settlers, the leadership indicated that Sharon's initiative was a dangerous precedent and that it would be a precursor for much more substantial steps. The leadership effectively recruited tens of thousands of settlers for demonstrations and door-to-door grass-roots campaigning. They further created dissent among the Likud Members of Knesset and encouraged the withdrawal of two parties from Sharon's original coalition government.

By the spring of 2005, once the settlers lost the formal political battle, their resistance had moved to the streets. The settlers believed that their backs

were "to the wall" and they needed to demonstrate their willingness to use hard bargaining tactics. During the spring and the summer of 2005, settler leaders called for massive civil disobedience to make the government "fill the jails" with protesters.[209] On numerous occasions major highways in territorial Israel were blocked by Israelis opposing the relocation of the settlers,[210] and in July 2005 the settlers organized a mass march from territorial Israel to the Gaza Strip. The police were able to block the march, but the settlers committed to continue this type of resistance.[211]

As noted above, these efforts were not enough to block the implementation of the Sharon plan. Yet, although this battle over the Gaza relocation ended with complete relocation of settlers, the conflict at large is far from over. In our view, this limited Israeli withdrawal will not be the last and will not lay to rest the debate over the settlements. Israelis will debate the future, perhaps even the near future, the nature of their state and its boundaries. When they do, the conflict over the settlements is bound to appear yet again at the core of this inevitable rift.

C.   Third Track Initiatives

The recent "third track" initiatives and the strong reactions they provoked in both Israeli and Palestinian communities provide further concrete evidence of the internal conflicts we analyze. The Ayalon–Nusseibeh "People's Plan" of 2002 and the "Geneva Accord"[212] strongly suggest that moderates on each side might be able to navigate successfully through the stormy waters created by clashing narratives, existential fears and collective memories and reach agreement on the terms of a two-state solution that would well serve the interests of most Israelis and Palestinians. On the other hand, the angry reactions to each initiative within the two respective communities underline the internal conflicts.

The two initiatives adopted essentially identical principles to resolve the territorial/border issue, and both contemplated that after establishment of agreed borders, no Jewish settlers would remain in the new Palestinian state. Both took as the starting point the June 4, 1967 "green line," and both contemplated possible modifications based on agreed-upon territorial exchanges on a

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[209] Letter from Pinchas Vallerstein, to the Settlers of Mate Binyamin Regional Council, (Dec. 20, 2004), http://www.ynet.co.il/articles/0,7340,L-3021080,00.html (in Hebrew).

[210] Aril Bender, *Blocking Roads is a Form of Rebellion*, Maariv-NRG (July 5, 2005), http://www.nrg.co.il/online/1/ART/954/475.html (in Hebrew).

[211] Yoad Kedari, Eliran Hayat, & Uri Glickman, *Thousands in Demonstration Against Relocation*, Maariv-NRG (July 18, 2005), http://www.nrg.co.il/online/1/ART/959/786.html (in Hebrew).

[212] The Geneva Accord was the result of extended secret negotiations between a group of Israelis and Palestinians over a three year period, hosted and sponsored by the Swiss government. The Palestinian delegation was headed by former Palestinian Information Minister Yasser Abed Rabbo and the Israeli delegation by former Israeli Justice Minister Yossi Beilin. The discussions culminated eventually in the publication of a Draft Permanent Status Agreement which was made public in October 2003. Foundation for Middle East Peace, The Geneva Accord (Oct. 2003), http://www.fmep.org/documents/Geneva_Accord.html.

one-to-one basis.[213] Both also provided for a "safe corridor" linking the West Bank and Gaza. Far more detailed and lengthy than the similarly motivated People's Plan, the Geneva Accord resembled in appearance and tone an international treaty and went further than the Plan by identifying, through a map, a possible land swap.

The two initiatives differ in their treatment of the refugee issue, although both would require relinquishment of any notion that individual Palestinians would have an unfettered right to return to Israel. The People's Initiative unambiguously extinguishes any claim that Palestinian refugees have a right to return to Israel. It states "Palestinian refugees will return only to the State of Palestine," and "[t]he international community will offer to compensate toward bettering the lot of those refugees willing to remain in their present country of residence, or who wish to immigrate to third-party countries."[214] The Geneva Accord also provides for refugee compensation through an international fund, but it is one to which Israel would contribute amounts of its own choosing.[215] Unlike the People's Plan, the Geneva Accord would permit a limited number of refugees to choose Israel as their permanent place of residence.[216] Although the Geneva Accord suggests this number "shall be at the sovereign discretion of Israel," it also appears to constrain that discretion by providing that Israel will submit to an International Commission the total number of Palestinian refugees that Israel will accept, and that as a basis for that number Israel *"will consider the average of the total numbers submitted by the different third countries to the International Commission."*[217]

The official and unofficial reactions among Israelis and Palestinians to these two initiatives confirm our basic thesis that internal conflicts within each community are potential barriers to a negotiated resolution. While the Ayalon-Nuseeibeh plan was endorsed by some 250,000 Israelis and some 160,000 Palestinians, it was also met by a deafening chorus of disapproval on both sides.[218] The Geneva Accord was widely condemned within Israel. The Likud government rejected it outright while the Labor Party remained silent.[219] Meanwhile, prominent Israeli moderates such as Gilad Sher publicly criticized the Accord for not being sufficiently clear on the right of Israel to limit refugees' choice of Israel as their permanent place of residence and for not clearly stating that the accord would entail the end of all claims of Palestinians to

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[213] For the text of the Geneva Accord, see *id.* For the text of the People's Plan, see http://www.mifkad.org.il/en/about.asp.

[214] The Ayalon-Nusseibeh Plan: The "People's Choice" (July 27, 2002), http://www.jewish virtuallibrary.org/jsource/Peace/peoplesvoiceplan.html; Ayalon & Nusseibeh, *supra* note 151.

[215] Geneva Accord, *supra* note 212.

[216] The Geneva Accord avoids any use of the term "right of return," instead referring to a "choice of permanent place of residence." *Id.*

[217] *Id.* (emphasis added).

[218] *See supra* Part III.A.2. *See, e.g.*, Khaled A. Toameh, *PLO Slams Nusseibeh for 'Stabbing Arafat in the Heart'*, JERUSALEM POST, Oct. 15, 2002, at 2 (Nusseibeh was "strongly criticized" by Palestinians).

[219] *See, e.g.*, Matt Rees, *A Different Road Map*, TIME, Dec. 15, 2003, at 38 (calling Prime Minister Sharon "apoplectic in his condemnation of the plan").

return to Israel.[220] On the Palestinian side, acceptance was only slightly less lukewarm.[221] Arafat sent representatives and a message of support to the signing ceremony, but avoided actually endorsing it, while Hamas and Islamic Jihad were quick to condemn it.[222]

D. *Comparison of the Two Internal Conflicts*

The internal conflicts share two basic features: (1) the possession or repossession of land lies at the heart of the claims of the settlers and the refugees; and (2) the implementation of these claims, on either side, would imply the end of the two-state solution. The two internal conflicts share some other features as well, which we analyze below.

1. *Narrative, Ideology, Identity, History*

National religious settlers and Palestinian refugees have sincerely and fervently held beliefs involving historical claims to land voiced by a people who have a narrative of suffering, victimization and loss. Palestinians believe that dispossession and their refugee status form the core of the Palestinian national identity. National religious settlers believe that by reclaiming "Eretz Israel" their settlement activities represent the essence of Zionism, their sacred duty, and their personal contribution to the historic struggle of the Jewish people. In their eyes, the settlement project is the response to two thousand years of Jewish victimization, culminating in the Holocaust. Each claim is inextricably linked with each group's reading of its national history, ideology, and individual and collective identity, and both groups subscribe to a particular version of the national narrative that grounds the very essence of national and individual identity on that claim.

True believers within each group are contemptuous of compromise, not out of narrow self-interest, but because they see their duty as vindication of their people's rights. As we have shown, the themes sounded by the true believers have some real resonance among many who are sympathetic to the broad claims but would prefer compromise and peace within the framework of a two state solution. Others within each community oppose the broad claims as endangering what they believe should be the essence of the national project. There are Israeli Jews who see the settlement project as jeopardizing the continued existence of a democratic Jewish state. Some Palestinians see a broad

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[220] The Geneva Accord provides that "the parties recognize" that UN Resolutions 194 and 242, and the Arab Peace Initiative concerning the rights of the Palestinian refugees "represent the basis for resolving the refugee issue" and further provided that implementation of the agreement would mean the "permanent and complete resolution of the Palestinian refugee problem" and that the only claims that could be raised in the future were those related to the implementation of this agreement. Geneva Accord, *supra* note 212; Interview with Gilead Sher, Apr. 19, 2004. *See also* Gilead Sher, *Geneva is Not So Good for Israel*, HA'ARETZ, November 30, 2003, at B2.

[221] Peter Goodspeed, *Geneva Accord Leaves Both Houses Divided*, NAT'L POST, Dec. 4, 2003, *available at* http://www.globalpolicy.org/security/issues/israel-palestine/2003/1204 bothhouses.htm; Palestine Centre for Policy and Survey Result, Poll No 10, Geneva Accord (Dec. 2003).

[222] Tony Karon, *Geneva Accord: Political Theatre, but Worth Watching*, TIME, Dec. 4, 2003, http://www.time.com/time/columnist/karon/article/0,9565,555902,00.html.

assertion of a right of return as undermining the establishment of an independent Palestinian state. These differences result in profound conflicts *within* each community.

2. Leadership Challenges

Each internal conflict poses great challenges to any leader who wishes to negotiate a two state solution. A Palestinian leader must largely sacrifice the rights of refugees to return to what is now Israel. An Israeli leader will need to dispossess tens of thousands of Jews now living in the West Bank. Both leaders will, of course, claim that the sacrifice is necessary for the greater good of their people. But for many within each community the prospective loss will outweigh the claimed benefits.

Prime Minister Sharon's uphill struggle to implement the evacuation of the 9,000 settlers of Gaza amply demonstrates how difficult the task of evacuating settlements is and renders almost unimaginable, in terms of political difficulty, the task of evacuating settlements from the West Bank, which, as we have noted above, are far more populous and numerous, and often of greater religious, political and economic significance, than are the settlements in Gaza. On the Palestinian side, we have described how difficult it is for any public figure to contemplate openly the unfeasibility of any return of refugees to Israel, and how, for every voice that points out the incompatibility of the right of return with any two-state solution, there are several more voices, louder and shriller, that warn against the bartering away of the "sacred" rights of the refugees.

3. Avoidance and Deferral

Within both the Israeli and Palestinian societies, there has been a historic tendency to avoid and defer any concrete solutions, especially at the political level, to the "settlement problem" and the "problem of the claim of return." While the reasons for this tendency to avoid and defer are clear enough (and discussed in sections III and IV), it has resulted in a hardening of positions on both sides and a "status quo" mentality that has been immeasurably dangerous to the prospects for peace. Deferral further compounded the problem on each side. The number of refugees has grown from 750,000 in 1948 to more than four million in 2004 as the children of refugees are also awarded the status of refugees.[223] The number of settlers has in turn grown from a few dozen in 1968 to 231,000 in 2004. In turn, the growth in numbers created secondary effects that also added to the complexities of the situation. A growth in numbers has awarded these groups further power within their respective communities. Both groups enjoy a high birth rate and are now greater not only in numbers but also in proportion. Larger numbers also mean that many more resources will be needed to resolve the problem.

Deferral and avoidance occurred also in other realms. On the Palestinian side, refugees have been offered no incentives by politicians to discuss openly their understanding of the meaning and scope of the return. Rather, their individual preferences have been silenced, and they have often been encouraged to

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[223] *See* United Nations Relief and Works Agency, *supra* note 37.

keep demanding the right to return and to keep believing in the possibility of a future implementation of this right. On the Israeli side, although there was much public discussion over the future of the territories and the settlements, no clear decision was taken. Even under the Oslo process, which was intended to lead to a two-state solution, not a single settlement was relocated.

Bargaining chips: Both Palestinian and Israeli leaders have tended to think of these two issues as bargaining chips during negotiations that could eventually be given up in return for other concessions. Israeli (Labor) leaders allowed the settlements to expand because they felt that this would increase their leverage at the negotiating table. Similarly, some Palestinian leaders continue to cling publicly to the demand for return, even while privately acknowledging the impracticality of this demand, to strengthen their hand during negotiations and to hold on to what they view as an eventual valuable concession. In so doing, leaders on both sides have created dangerous aspirations (on the Palestinian side) and facts on the ground (on the Israeli side), which have now made, as we have seen, a two-state solution more difficult than before to implement.

4. The Need for Compensation and Relocation

The resolution of each internal conflict is going to require complex compensation and relocation mechanisms that will, no matter how well-planned, likely give rise to uncomfortable questions about equity and fairness, and will just as likely cause further disagreements that may erupt in violent internal conflict and civil strife. Obviously they will also require a substantial investment of resources. Relocating 8000 Israeli settlers from Gaza will cost Israel over one billion dollars and demand about 40,000 soldiers and policepersons.[224] Compensating the Palestinian refugees and their offspring might cost tens of billions of dollars.[225]

But financial resources alone will not suffice. Compensation mechanisms that err too heavily on the financial side while ignoring ideological aspects will carry with them the taint of "bribery," while compensation mechanisms that err too lightly on the financial aspects and concentrate more on the ideological ones will likely be dismissed as ungenerous and humiliating. Compensation in both cases will have to be allocated both on individual as well as collective bases, and given the huge numbers involved and the sheer diversity (especially on the Palestinian side) of economic and social conditions, such mechanisms are bound to be controversial and unacceptable to large numbers of people affected.

5. Simplifications, Misconceptions of 'Outsiders'

Both groups tend to be regarded by outsiders and "non-members" as monolithic blocs comprised of individuals who all want the same thing, and rarely

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[224] *See, e.g.*, Zvi Zrahiya & Meirav Arlozorov, *Government to Increase Settler Payouts by NIS 1.5 Billion*, HA'ARETZ, Sept. 19, 2005, *available at* http://www.haaretz.com/hasen/spages/626605.html.
[225] *See, e.g.*, Michael R. Fischbach, *The United Nations and Palestinian Refugee Property Compensation*, 31 J. OF PALESTINE STUD. 34 (2002).

are the differences within each group acknowledged and respected by even their own compatriots. Moreover, both settlers and refugees tend to be mocked and vilified by some of those who disagree with their claims.

6. Diaspora Support

Both Jewish settlers and Palestinian refugees receive financial and political support from organizations in the United States and elsewhere, and this support has helped each group strengthen and refine its position and better organize its defenses. For example, California-based Al-Awda Coalition is a well organized and well funded U.S. based right of return group. Other U.S. based groups, such as American Friends of Elon Moreh, are organized primarily to support the settlement project. Such organizations have played a crucial role in strengthening the hands of the settlement and right of return movements.

7. Differences and Contrasts

Despite these similarities between the two internal conflicts, there are also some significant differences, which stem not only from the nature of each conflict but also from the particular history and context from which it is derived. The most conspicuous differences are identified below:

a. Numbers Involved

There are about 250,000 settlers remaining in the West Bank, excluding the Jewish inhabitants of those portions of Jerusalem previously in the West Bank that were annexed to Israel in 1968. This total comprises a small percentage of Israel's total population of about five million Jews. The settlers are thus a small but vocal and well-represented minority within the state of Israel and are treated as such by the rest of Israel's Jewish population. The Palestinian refugees, on the other hand, number today at more than four million and comprise (and have always done so) a majority of all Palestinians.

b. Broader Perceptions about Centrality to National Identity

The right of return is central to the core Palestinian identity, more so than the "Eretz Israel" settlement project is to Israeli identity. Because of the vast numbers involved, and because the refugee problem predates the beginning of the Palestinian national movement, the refugees and their longing for return constitute the defining and oldest identity/narrative of the Palestinian people. This is evident not only from the official and unofficial political discourse that emanates from Palestinians, which invariably treats the issue of return as central to the Palestinian cause, but also from Palestinian literature, poetry, music, and theatre, which frequently depict the longing for return.

Moreover, the catastrophe or "Nakba" of 1948 was the crucial event that crystallized the sense of Palestinian uniqueness—(as distinct from other Arabs) and it therefore remains a core defining event in the Palestinians' sense of nationhood. Because their sense of shared nationhood is so inextricably tied to the dispossession and refugeehood suffered by most Palestinians during the Nakba, almost all Palestinians have great sympathy for the plight of the refugees, and most believe that the Palestinian people were wronged by the creation

of Israel. Most are either refugees themselves or closely related or otherwise linked to refugees and are well-versed in the culture of longing and loss that defines the Palestinian refugee experience.

In Israel, although national religious settlers claim to form the Zionist vanguard and to embody the very essence of that founding philosophy of the state of Israel, a majority of Israelis, including those who are sympathetic, do not see them as representing the defining element of Israeli national identity. Their project to extend the boundaries of the state of Israel in the West Bank and Gaza through settlements began only after 1967 and is not supported by the majority of Israelis. Many Jews are not sympathetic with, and sometimes even reject, the messianic nationalist vision of the national religious settlers, and many have no personal connection to settlers. Many also do not understand, and have little interest in understanding, the motivations and ideologies of these settlers.

c. Role of Religion

Religious beliefs lie at the heart of the national religious settlers' claims, whereas the right of return is a secular claim that arises from what Palestinian refugees consider to be a past wrong that must be righted.

d. Perceived Immediacy within Each Community

Concrete discussions about possible and feasible solutions to the refugee question within the two-state framework have long been avoided and deferred in Palestinian society, especially at the political level. Similarly, material discussion about the evacuation of Israeli settlements in keeping the two-state framework has also tended to be postponed and avoided by Israeli political leaders even, as we noted above, when these leaders were conducting the Oslo process between 1993 and 2000. But this changed in December 2003 when Ariel Sharon announced his unilateral plan to disengage from Gaza. That announcement had the effect of galvanizing people's sentiments about the settlements. Those who were for them became more vocal and strident than before, as did those who were against them, and those who sat on the fence were forced to choose sides. On the right of return issue, however, there has been no such concrete announcement or plan by Palestinian politicians, and thus discussions about the implementation of the return, when they do occur, lack the urgency and concreteness of the current and ongoing discussions about the settlements and tend to be more philosophical and abstract.

e. Institutions and Fora for Debate

Israel is a mature multi-party democracy with well-developed institutions that allow for political and intellectual debates about the settlements (and other matters), not just in the Knesset, but also in the newspapers, universities, cafes, and in all the other institutions that facilitate a healthy public exchange of ideas. In comparison, the Palestinian Territories lack the apparatus of independent statehood, and the institutions of the Palestinian Authority are immature and less in comparison. The Palestinian Authority has held two elections since its

creation,[226] and in neither election was there been widespread discussion and debate about the meaning and the scope of the right of return. And as we have noted before, among Palestinian intellectuals and academics, the discussion of this subject is more muted and less freely conducted.

f. Representation

Another difference between the internal conflicts relates to the complexities concerning representation. With respect to the Israeli settlements, while there is certainly internal debate over whether there should or needs to be some sort of referendum among Israelis before land is traded for peace and settlers are evacuated, it is plain that the Israeli government will claim the authority to make the decision on behalf of the state of Israel. For Palestinian refugees, on the other hand, it is less clear that the Palestinian Authority can legitimately make a deal on behalf of those refugees living outside the West Bank and Gaza whose claims would be affected. More that two million refugees currently live outside the geographic boundaries of what will become the Palestinian state, and it is not at all clear who speaks for them; how, if at all, they should participate in a ratification process; and what is to happen if a majority of Palestinians presently living within the West Bank and Gaza approve a deal along the Clinton lines.

IV. CONCLUSION

Our introduction suggested the paradoxical nature of the Israeli-Palestinian conflict from the perspective of a negotiation analyst: while a majority within each community tells pollsters that it accepts the basic notion of a two-state solution, Israeli and Palestinian leaders seem unable to reach agreement notwithstanding the fact that the essential terms of a two-state deal are reasonably clear. The explanation, we suggest, relates to internal "behind-the-table" conflicts among Israeli Jews about the settlements project and among Palestinians about the scope and meaning of the right of return.

Since the lecture on which this paper is based was delivered in March of 2005, a great deal has transpired: Prime Minister Sharon successfully implemented the "unilateral" evacuation of Gaza; Sharon and his former nemesis Shimon Peres launched Kadima, a new centrist political party; Sharon became incapacitated by a stroke, and Ehud Olmert became acting Prime Minister; and Hamas won a surprising political victory in the Palestinian legislative elections. By the time this article appears there will be a new governments both in Israel and for the Palestinian Authority.

The quick condemnations of the third track initiatives by some Israelis and Palestinians and the recent electoral success of Hamas serve as a useful reminders that there are some within each community who explicitly and vehemently reject the idea that there should be two states in the land between the Mediterranean Sea and the Jordan River. The charter of Hamas explicitly calls for the destruction of Israel and the restoration of all of "Palestine" to the Palestinian

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[226] Palestinian National Authority, http://www.pna.gov.ps/Government/gov/Elections_in_ Palestine.asp (last visited Jan. 28, 2006).

people. Some Israelis would have Israel annex all of the West Bank and dream of sending its Palestinian population to Jordan or elsewhere in the Arab world.[227]

In addition to those who explicitly reject a two-state solution, there are many more within each community who pay lip service to the idea but take positions that, as a practical matter, are profoundly inconsistent with what would be required to make such a solution viable. On the Palestinian side, this group includes those leaders and individuals who publicly declare their support for the two-state solution but who at the same time insist on an individual and collective right of return that might permit large numbers of Palestinian refugees to return to Israel and thus threaten the continued existence of Israel as a democratic Jewish state. Given the PLO's competition with Hamas, that the PLO leadership persists in rhetorically claiming a broad right of return becomes more understandable. It allows the PLO to support the idea of a two-state solution while undercutting one of the most powerful objections to it by those refugees who still dream of going "home."[228]

What is problematic about this stance, however, is that it reinforces unrealistic expectations among some refugees. Moreover, no Israeli leader would conceivably accept a deal granting a broad "right of return" because of the demographic and security risks entailed and because of the ideological consequences. Today a substantial minority of Israeli citizens (about twenty percent) are Palestinian Arabs. Israeli Jews fear that broad recognition of a Palestinian right of return would soon create an Arab majority within what is now Israel. In the eyes of most Israelis, this demographic change would mean Israel would no longer remain the Jewish homeland and a Jewish state.[229] Instead, what is now a Jewish democratic state would either become a second state controlled by Palestinians or an undemocratic state that limited Palestinian political participation.

On the Israeli side, there are also those who pay lip service to the two-state solution, but persist in taking positions that would make its durable implementation impractical. This group includes those within Likud's leadership who declare their support for the two-state solution but who continue at the same time to insist that Israel must retain and even expand settlements that would make impossible the creation of a Palestinian state with a contiguous region in the West Bank.

No Palestinian leader could conceivably accept a deal unless it provides for a contiguous state encompassing nearly all of the West Bank (along with, of

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[227] There is, of course, a small third group: Some Palestinians and Israelis believe that there should be a one secular, "bi-national" democratic state.

[228] The conflict between the PLO and Hamas—at least in terms of their articulated differences—do not center on the scope and meaning of the right of return but instead on the role of religion in public life and whether the legitimacy of Israel's right to exist should be acknowledged at all. Hamas is a grass roots fundamentalist Islamic religious organization while the PLO has always had a secular, non-denominational ideology.

[229] *See, e.g.*, Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 245 n.46 (2003).

course, East Jerusalem and Gaza).[230] As a practical matter, this deal would require that all the settlements be evacuated. While some have suggested that Jewish settlers should be allowed to remain but be subject to the protection and control of a new Palestinian state, this seems unlikely to create a stable solution. There is widespread Palestinian hostility towards the Jewish settlers who are seen as having illegally dispossessed Palestinians of their land. If a Jewish settlement came 'under attack and was not adequately protected by the new Palestinian state, Israel would face irresistible pressure to intervene and come to its aid. Within Israel, there is a widely shared notion that the state has a duty to the extent possible to defend Jews anywhere in the world. Israeli intervention in a neighboring state on behalf on former Israeli citizens, many of whom would have relatives or co-workers in Israel, would seem inevitable. Knowing this, a Palestinian negotiator is likely to insist on the evacuation of the Jewish settlers.

The recent evacuation of the Jewish settlements in Gaza offers some hope but also serves as a sobering reminder of the difficulties inherent in these internal conflicts.[231] There are grounds for both optimism and pessimism. The good news relates to the basic fact that Israel was able to evacuate without bloodshed over 8500 Jewish settlers, notwithstanding fierce internal political opposition. Israel did prove to itself that it had the capacity, through its political institutions, to relocate settlers. After fierce internal debate in Israel regarding disengagement, the conflict was resolved through the formal political process. The plan was approved by the cabinet and the Parliament, and stood the test of judicial review by the Israeli Supreme Court.

The sobering news relates to how difficult this relatively small evacuation proved to be, and to the demands it imposed on Israel's material resources, political institutions, and leadership. Today there are more Jewish settlers remaining in the Occupied Territories than there were when Sharon first announced his initiative in December 2003. While the Sharon government was relocating settlers from Gaza and the northern West Bank, it was simultaneously expanding settlements in other parts of the West Bank. A day after the last Israeli soldier left Gaza, both Prime Minister Sharon, and Defense Minister, Shaul Mofaz, vowed to "strengthen the settlement blocks."[232] In this sense, far from resolving the internal conflict, the Gaza evacuation can be seen a contin-

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[230] While some have suggested that the West Bank settlers might remain but be subject to the protection and control of a new Palestinian state, Palestinian hostility towards them makes this outcome unlikely, particularly given the widely shared notion within Israel that the state has a duty to come to the aid of Jews outside of Israel if they came under attack. *See, e.g.*, Yossi Melman, *Ha'Mossad Hya Rotze Limno'a Pigu'im Be'Rahvey Ha'Olam*, HA'ARETZ, Nov. 11, 2003, *available at* http://www.haaretz.co.il/hasite/pages/ShArt.jhtml? itemNo=361556 (in Hebrew).

[231] It bears emphasis, of course, that this unilateral Israeli initiative was not the product of Israeli-Palestinian negotiations and in no way addressed the final status issues relating to permanent borders or refugees that must be resolved for a comprehensive resolution. Its implementation and aftermath nonetheless provide a number of important insights relevant to the internal conflicts that are the focus of this paper.

[232] United Nations Information System on the Question of Palestine, Chronological Review of Events Relating to the Question of Palestine (Sep. 16, 2005), http://domino.un.org/UNIS-PAL.NSF (then follow "search" hyperlink; then search by title and date) (last visited Sept. 20, 2005). In part, this strategy is intended to mollify the right in the internal Israeli debate,

ued form of deferral which may make the internal questions more difficult to resolve in the long run.

The events leading up to the Gaza withdrawal as well as its aftermath suggest the monumental leadership challenges on both sides. The Israeli withdrawal was not a consequence of any across the table negotiations between Israel and the Palestinians, but rather a unilateral act initiated and implemented by Israel alone. No Palestinian leader was required to take any actions that required diminishing the scope of a right of return.

On the Israeli side, it took Sharon, the former champion of the settlement movement and a leader known to have a will of iron, to pull off this important but modest evacuation of settlements. That Prime Minister Sharon would survive the challenge, either politically or physically, was by no means clear. The Israeli security services took very seriously the threat that a Jewish assassin might try and kill Sharon to prevent the implementation of the plan. Nor was his political survival assured. If following the March 2006 elections, Ehud Olmert becomes Prime Minister, it remains open to question whether he will have the political capital to bring about further settlement evacuations in the West Bank.He plainly lacks Prime Minister's Sharon's national security credentials.

The Gaza evacuation serves as a useful reminder that the evacuation of Jewish settlements in the West Bank and the resolution of the Palestinian refugee issue will require extraordinary amounts of resources and government institutional capacity to implement decisions involving the relocation of large numbers of people. The costs of resettling those Palestinians who now reside in refugee camps outside of the West Bank and Gaza, let alone the costs of fairly compensating those Palestinians for their loss of property when they fled Israel will amount to untold billions of dollars. Unwinding the settlement project in Gaza were far greater than the costs of creating it in the first place: avoidance and deferral are expensive. The Gaza evacuation required an enormous investment of resources to relocate less than four percent of the settlers. Israel deployed five Army divisions to carry out the operation and evacuate less than 10,000 settlers and Israel earmarked over a billion dollars to relocate these settlers and to fund various other activities related to the relocation.

The impressive fashion in which the Israeli police and military combined empathy and assertiveness in evacuating the Gaza settlers has important implications for the broader internal conflicts. In Gaza, the soldiers and police charged with physically removing the settlers were unarmed but deployed in overwhelming numbers. They were patient, sympathetic and sometimes even tearful but also firm and purposeful. In resolving the broader internal conflicts, national leadership will also need to combine both empathy and assertiveness.

Israeli leaders must show empathy for those West Bank settlers who will need to leave their houses and dismantle their communities. Palestinian leaders will need to show empathy for those refugees who will need to give up the dream of ever returning to their ancestral homes. Leaders on both sides also need to be assertive. The Israelis should, as they did in the summer of 2005,

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as Sharon could argue that while the settlement project was rolled back in one place, it was in fact buttressed in another.

signal to the settlers that if a democratic government should decide to relocate them, the decision will be carried out. The Palestinian leaders must also be assertive. Most of all, they need to say in public what they admit in private: most refugees, after sixty years of dispossession, will never be able to regain their lands in what is now Israel. For too long, Palestinian and Israeli leaders have fed false hopes: that the refugees will be able to choose to return and that Jews would be able to settle Eretz Israel. It is time to end this pattern.