

## COMPENSATION FOR PALESTINIAN REFUGEES: LAW, POLITICS AND PRAXIS

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*The question of Palestinian refugees has long been recognised as one of the core issues that would need to be addressed in any eventual Israeli-Palestinian peace agreement. This article examines compensation for property seizure and forced displacement, an aspect that has figured in every round of major peace talks on permanent status issues for the past quarter of a century. Drawing upon research, informal ‘track two’ discussions and official negotiations, it highlights the challenge of crafting arrangements that would be both politically and practically feasible.*

**Keywords:** Israel, Palestine, refugees, compensation, reparations

### 1. INTRODUCTION

Since 1948 the Palestinian refugee issue has constituted one of the most difficult elements of the Israeli-Palestinian and broader Arab-Israeli conflicts. The need to resolve it was proclaimed by the international community in United Nations (UN) General Assembly Resolution 194(III) (1948)<sup>1</sup> and in UN Security Council Resolution 242 (1967);<sup>2</sup> by Egypt and Israel in the 1978 Camp David Accords;<sup>3</sup> by Israel and the Palestinians in the 1993 Oslo Accords (as one of the main permanent status issues);<sup>4</sup> by Israel and Jordan in their 1994 Peace Treaty;<sup>5</sup> and by the entire Arab world in the Arab Peace Initiative of 2002.<sup>6</sup> Over the past quarter of a century,

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<sup>1</sup> UNGA Res 194(III), Palestine – Progress Report of the United Nations Mediator (11 December 1948), UN Doc A/RES/194(III), para 11.

<sup>2</sup> ‘[Affirms further the necessity ...] For achieving a just settlement of the refugee problem’: UNSC Res 242 (22 November 1967), UN Doc S/RES/242, para 2b.

<sup>3</sup> ‘During the transitional period, representatives of Egypt, Israel, Jordan, and the self-governing authority will constitute a continuing committee to decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern may also be dealt with by this committee. Egypt and Israel will work with each other and with other interested parties to establish agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem’: Framework for Peace in the Middle East agreed at Camp David (entered into force 14 June 1979) 1138 UNTS 39, 42.

<sup>4</sup> ‘It is understood that these [permanent status] negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest’: Declaration of Principles on Interim Self-Government Arrangements (signed 13 September 1993), art V.

<sup>5</sup> Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan (signed 26 October 1994), art 8.

<sup>6</sup> The Arab Peace Initiative, Council of the League of Arab States at the Summit Level, 14th Ordinary Session, 27 March 2002.

every serious set of Israeli-Palestinian negotiations, both formal and informal, has addressed the refugee issue, albeit never to the satisfaction of all parties.<sup>7</sup>

The issue itself can be subdivided into three main elements:

- the future status and residency of refugees, including their possible ‘right of return’ to Israel, repatriation to a future Palestinian state, and resettlement in host or third countries;
- the question of redress for Palestinian property and other losses suffered as a result of forced displacement during and after the establishment of the State of Israel;
- the normative and intangible dimensions of forced displacement, including expressions of regret or responsibility.

These elements are linked in several fundamental ways. The provision of substantial compensation, for example, could have major effects on the economic ease of refugee repatriation or resettlement. Similarly, moral acknowledgement and demands for financial compensation are intrinsically connected, such that failure to address the former may adversely affect the acceptability of the latter.<sup>8</sup> Nevertheless, this article will focus its attention on the second of these three elements: compensation for Palestinian refugees. In doing so, it hopes to further advance understanding of how this aspect might be dealt with in any future negotiations.

As the title suggests, the analysis offered in this article indicates that a narrow legal focus is likely to be of limited value in crafting viable and durable solutions. This is not to say that legal considerations are irrelevant. The Palestinian side, in particular, frames many of its claims in legal terms, anchoring it in an evolving body of international human rights and refugee law, and undoubtedly will continue to do so. Agreement on certain legal principles would certainly facilitate crafting a mutually acceptable agreement, and would also help in selling it to a potentially critical mass public.

However, legal considerations are only one set among many. Any future peace process will need to address both the complex politics of the refugee issue, as well as the immense practical challenges of designing an effective compensation regime. In past negotiations, many of these practical challenges appear to have been underestimated.<sup>9</sup> This problem is particularly acute on the Israeli side.<sup>10</sup> Unlike Jerusalem, borders, security and settlements, the Palestinian refugee

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<sup>7</sup> For an overview, see Rex Brynen, *The Past as Prelude? Negotiating the Palestinian Refugee Issue* (Chatham House 2008).

<sup>8</sup> For discussion of these linkages, see Rex Brynen, ‘Palestinian Refugee Compensation: Connections and Complexities’ in Rex Brynen and Roula El-Rifai (eds), *Compensation to Palestinian Refugees and the Search for Palestinian-Israeli Peace* (Pluto Press 2013) 263.

<sup>9</sup> The practical complications of designing a refugee agreement were brought home by simulated refugee negotiations organised in 2008 by Chatham House. These found that, despite years of talks, there remained serious gaps of policy analysis and ‘[m]ore work is needed on implementation issues’: Rex Brynen, *The Regional Dimension of the Palestinian Refugee Issue: Simulation Exercise Report* (Chatham House 2008) 11. Similarly, a workshop held in December 2013 to inform the ongoing Israeli-Palestinian negotiations at the time underscored the immense practical difficulties of designing a compensation regime: Rex Brynen, ‘Compensation Complications’, *PRRN – The Blog of Palestinian Refugee ResearchNet*, 23 December 2013, <https://prrnblog.wordpress.com/2013/12/23/compensation-complications>.

<sup>10</sup> Orit Gal, *Israeli Perspectives on the Palestinian Refugee Issue* (Chatham House 2008) 1. This point has frequently been made to the author by current and former US and Israeli officials too.

issue is one that many Israeli politicians and officials would prefer not to think about. There is no specific office, agency or Ministry responsible for policy development and coordination in this area. By contrast, for Palestinians the issue is core to their national identity, with over half of all Palestinians living in involuntary exile from their homeland. Not only must Palestinian policy-makers deal with the politics of the refugee issue on a daily basis, but many Palestinian negotiators are themselves refugees.

Finally, this article should not be taken to suggest that progress towards either an agreement on refugees or a broader and more comprehensive resolution of the Israeli-Palestinian conflict is likely in the near or medium term. The author is, sadly, quite pessimistic on that subject for reasons that lie beyond the scope of this piece. However, if there is ever to be a future comprehensive permanent status agreement between Israel and the Palestinians it will, of necessity, address the refugee issue. For that reason, reflecting on some of the difficult issues concerned is a potentially helpful exercise.

## 2. A NOTE ON TERMINOLOGY

The history of the refugee issue is one that is sometimes hotly debated, with the differing narratives of Israeli Jews and Palestinians both intimately bound up with issues of national identity and political claims. International law relating to the various aspects of the refugee issue is complex, and divergent views are common.<sup>11</sup> Even agreement on basic terminology can be a challenge.

The very category of ‘refugees’ as applied to the Palestinian case is an example of this. Israeli officials have sometimes argued that most Palestinian refugees should not be considered as such, either because they have acquired citizenship elsewhere or because refugee status should not be handed down to second and subsequent generations.<sup>12</sup> Article 1.D of the 1951 Convention relating to the Status of Refugees,<sup>13</sup> however, precludes its application to refugees ‘who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees [(UNHCR)] protection or assistance’ – that is, those receiving support from the UN Relief and Works Agency (UNRWA) in its area of operations. UNRWA itself defines refugees as ‘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 a result of the 1948 conflict’, together with the descendants of male refugees, but this is a definition intended solely for the purposes of determining eligibility for services rather than a determination of legal status.<sup>14</sup> Officials of both UNHCR and UNRWA agree that stateless descendants of 1948

<sup>11</sup> The best overview of this is provided by Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998). A revised and updated version of this study will be published soon.

<sup>12</sup> Israel Ministry of Foreign Affairs, ‘Israel, the Conflict, and Peace: Answers to Frequently Asked Questions,’ 30 December 2009, [http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ\\_Peace\\_process\\_with\\_Palestinians\\_Dec\\_2009.aspx#Refugees1](http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Refugees1).

<sup>13</sup> Convention relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 150, as amended by its Protocol (entered into force 4 October 1967) 606 UNTS 267 (Refugee Convention).

<sup>14</sup> UNRWA, ‘Palestine Refugees’, <https://www.unrwa.org/palestine-refugees>.

Palestinian refugees would certainly enjoy derivative refugee status under UNHCR rules, as in other cases of protracted refugee situations.<sup>15</sup>

In practice, this public terminological debate has proved to be largely irrelevant to actual negotiations. At no point in either multilateral or bilateral talks since 1991 has any side ever argued that there is not a Palestinian refugee issue to be addressed. Rather, debate and discussion has focused on who is responsible, how it should be addressed, and what other issues might also be included (for example, Jewish claims against Arab states). There are also important issues of eligibility to be addressed. As discussed later, however, these typically do not hinge on the wording of the Refugee Convention.

With regard to redress for Palestinian property losses, there is also something of a terminological divide. Palestinians and many international legal experts increasingly prefer the term ‘reparations’, a category which might include either the full or partial restitution of former refugee properties in addition to monetary or other payments to refugees who were dispossessed.<sup>16</sup> UN General Assembly Resolution 194(III), however, speaks of compensation. Many Israelis prefer this term in that it carries less implication of past wrongdoing and moral responsibility. ‘Reparations’, by contrast, is associated by some with German payments to Israel and individual Jews after the Second World War.<sup>17</sup>

For reasons of habitual use and convenience, this article uses the term ‘compensation’. This is the term used by both sides during the Camp David and Taba negotiations in 2000–01 and during the Annapolis process in 2007–08.

### 3. BACKGROUND AND PAST NEGOTIATIONS

Like so many other aspects of the history of the Arab-Israeli conflict, the number of Palestinians who fled the former Mandate of Palestine in 1947–49 has been the subject of debate, as have the specific reasons for their departure. There is today broad consensus among most historians, however, that the number totalled around 700,000, and that military operations were the major reason for flight – whether those operations were intended to push non-Jews out of the nascent Jewish state, or forced displacement was an accidental, collateral effect of fighting as families sought

<sup>15</sup> ‘Exploding the Myths: UNRWA, UNHCR, and the Palestinian Refugees,’ 27 June 2011, <https://www.unrwa.org/newsroom/features/exploding-myths-unrwa-unhcr-and-palestine-refugees>. Indeed, UNHCR has registered stateless, subsequent-generation Palestinians as refugees in Iraq and elsewhere.

<sup>16</sup> See, eg, the letter from Ahmed Qurei (then head of the Palestinian negotiation team) to US Secretary of State Condoleezza Rice and Israeli Foreign Minister Tzipi Livni, 15 June 2008, in Ziyad Clot, *Il n’y aura pas d’état Palestinien: Journal d’un négociateur en Palestine* (Max Milo 2010) 270, <http://transparency.aljazeera.net/en/projects/the-palestine-papers/201218232924546615.html>.

<sup>17</sup> Specifically, the Reparations Agreement between Israel and the Federal Republic of Germany (1952): Agreement between the State of Israel and the Federal Republic of Germany (entered into force 27 March 1953) 162 UNTS 206. This point has been raised with the author in a number of workshops on the refugee issue.

safety from the violence, or whether a variety of factors were at work in different places (as was almost certainly the case).<sup>18</sup>

In a position that would influence the issue for decades to come, UN mediator Count Folke Bernadotte urged, before his assassination in September 1948, that refugees be permitted to return to their homes, and that compensation should be paid to those who chose not to do so. This view was subsequently incorporated into UN General Assembly Resolution 194(III) (1948):<sup>19</sup>

11. Resolves that the refugees 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.*

Following the 1949 Lausanne peace conference, a technical committee of the United Nations Conciliation Commission for Palestine (UNCCP) began what would ultimately be quite extensive work on the documentation and valuation of Palestinian property losses. The Israeli government proposed the return of up to 100,000 refugees at the Lausanne conference – an offer that was contingent, however, on comprehensive peace and the resettlement of most of the refugees elsewhere. It also agreed to pay some compensation to refugees, minus war damages and the value of Jewish properties seized by Arab states.<sup>20</sup> This was rejected, and indeed may have been proposed only because there was little chance of it being accepted.

Other measures were more telling. The Prevention of Infiltration (Offences and Jurisdiction) Law of 1954 criminalised the return of Palestinian refugees, authorising their imprisonment and re-expulsion. Of greatest relevance to the issue of refugee property was the Absentees' Property Law of 1950. Under its terms, all residents of Mandatory Palestine who had left their place of residence during the war to seek safety in areas held by Arab forces, or in another country, had control of their property transferred to the Custodian of Absentee Property.<sup>21</sup> The legislation provided for the theoretical possibility of returning property to the original owner.<sup>22</sup> In practice, the Israeli government had no intention of permitting any substantial return of refugees to Israel, and instead Palestinian housing and lands were used for the resettlement of Jewish immigrants and refugees.

Politically and diplomatically, the refugee issue largely remained in hiatus for the next four decades. Palestinian rhetoric emphasised the refugees' right to return,<sup>23</sup> while in Israel the

<sup>18</sup> The best source on this remains Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge University Press 2004). Some have been critical of his work for underestimating the degree of deliberate expulsion: eg, Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oneworld 2006).

<sup>19</sup> UNGA Res 194(III) (1948) (n 1) para 11 (emphasis added).

<sup>20</sup> Michael R Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict* (Columbia University Press 2003) 91–102.

<sup>21</sup> Absentees' Property Law, 1950 (Israel), art 1(b).

<sup>22</sup> *ibid* art 28.

<sup>23</sup> The Negotiations Affairs Department of the Palestinian Liberation Organization (PLO), for example, stresses that '[k]ey to the resolution of the refugee issue is Israel's recognition of the applicable principles and rights of

Palestinian refugee question received little attention other than from a few scholars, and certainly little or none from policy makers.

That changed with the onset of Arab-Israeli peace negotiations in Madrid in 1991, the formation of the multilateral Refugee Working Group the following year, and especially with the beginning of the Oslo process in 1993. Refugees had once more become a core element of permanent status negotiations. Initially, many Palestinians were wary about too much focus on compensation for fear that it would be put forward as an alternative to return.<sup>24</sup> On the Israeli side there was concern that compensation might be construed as a tacit admission of moral guilt, or that its costs might be excessive. Israeli policy makers were also anxious that were Israel to pay compensation, this should also constitute an end of claims, and not simply a down-payment on never-ending Palestinian demands.

In the meantime, international practice had increasingly moved in the direction of acknowledging and addressing the property claims of refugees and displaced persons. This was notably evident in the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (or the Dayton Agreement), which declared that refugees and displaced persons ‘shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them’. A Commission on Real Property Claims was established to oversee this process.<sup>25</sup> Redress was also evident in the settlement of a number of property claims dating back to the Second World War, as well as in the (ultimately unsuccessful) Annan Plan for resolving the Cyprus dispute.<sup>26</sup> In 2006 the UN endorsed the Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), which recognised a clear right to restitution of – or, where this was not possible, compensation for – properties that had been arbitrarily or unlawfully seized. These principles were rapidly adopted as policy guidelines and a summary of best practice by UN specialised agencies, as well as by many states and non-governmental actors.<sup>27</sup>

Thus, by the time that serious permanent status negotiations began in 2000, both sides had come to accept that the issue of refugee compensation was largely separate from that of future residence, and stood on its own legal, political, and normative merits. Among Israeli negotiators it was broadly accepted that Israel had seized, and still retained, refugee properties. Since property restitution was not something that either the Israeli public or leaders were willing to consider, compensation was the logical alternative. Compensation could be conceptualised as a largely

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the refugees, including our refugees’ right to return to their homes and lands’ – although it goes on to add that ‘Israel’s recognition of the right of return will pave the way to negotiating how that right will be implemented’: PLO, Negotiations Affairs Department, ‘Our Position: Refugees – Position’, <https://www.nad.ps/en/our-position/refugees>.

<sup>24</sup> Salim Tamari, *Palestinian Refugee Negotiations: From Madrid to Oslo II* (Institute for Palestine Studies 1996) 38–40; Elia Zureik, *Palestinian Refugees and the Peace Process* (Institute for Palestine Studies 1996) 65–66.

<sup>25</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (signed 14 December 1995), Annex 7, art.1.

<sup>26</sup> Norbert Wühler and Heike Niebergall, *Property Restitution and Compensation: Practices and Experiences of Claims Programmes* (International Organization for Migration 2008) 39.

<sup>27</sup> *Housing and Property Restitution for Refugees and Displaced Persons: Implementing the ‘Pinheiro Principles’* (United Nations 2007).

financial transaction, one that did not imply moral liability, and which would be a part of bringing the refugee issue to a definitive close. Public opinion surveys suggest that a majority of the Israeli public supports compensating Palestinian refugees.<sup>28</sup> On the Palestinian side property restitution remained the preferred option. In its absence, compensation was considered not only an inherent and independent right of refugees, but also a tacit Israeli acknowledgement of moral responsibility for Palestinian dispossession.

Despite differences between these two views in both assumptions and preferences, the overlap between them was sufficient for both sides to include compensation as a component of their negotiation positions during 2000–01.<sup>29</sup> The so-called Clinton Parameters, put forward by the United States (US) in December 2000, called for an international commission to be established to implement an agreed compensation regime.<sup>30</sup> Compensation was discussed at length during the negotiations at Taba in 2001. There were major differences: the Palestinians included substantial property restitution, an open-ended process for property valuation, and compensation for non-material losses, while the Israeli government proposed compensation alone, with an Israeli fixed-sum contribution. However, the two sides made substantial progress on a technical paper outlining possible mechanisms for addressing this and other aspects of the issue.<sup>31</sup> During the Annapolis talks in 2007–08, Israeli negotiators were willing to state flatly that ‘we agree that there will be compensation ... and that Israel will contribute’.<sup>32</sup>

With the question of refugee compensation now being addressed in some detail, a host of practical and political challenges soon emerged. Some were addressed by Israeli, Palestinian and international experts in a variety of settings over the next decade or so, with the tacit support of the US and other key members of the international community.<sup>33</sup> Often this followed a cyclical pattern, with renewed interest arising every time the parties re-engaged in serious talks, notably

<sup>28</sup> Palestinian Center for Policy and Survey Research and Tel Aviv University, Tami Steinmetz Center for Peace Research, ‘The Palestinian-Israeli Pulse: A Joint Poll’, December 2016, Question PV11.4, [http://www.pcpsr.org/sites/default/files/Table%20of%20Findings\\_English%20Joint%20Poll%20Dec%202016\\_12Feb2017.pdf](http://www.pcpsr.org/sites/default/files/Table%20of%20Findings_English%20Joint%20Poll%20Dec%202016_12Feb2017.pdf) (The Palestinian-Israeli Pulse). This question was asked only of those who would otherwise oppose a Taba-type deal, so the actual number is likely to be higher.

<sup>29</sup> The Israeli Draft Framework Agreement on Permanent Status (n 49 below), for example, called for the establishment of an international commission and fund to pay property compensation to Palestinian refugees: Gilead Sher, *Israeli-Palestinian Peace Negotiations 1999–2001: Within Reach* (Routledge 2006) 247–49.

<sup>30</sup> Clinton Proposal on Israeli-Palestinian Peace, 23 December 2000, [https://www.usip.org/sites/default/files/Peace%20Puzzle/10\\_Clinton%20Parameters.pdf](https://www.usip.org/sites/default/files/Peace%20Puzzle/10_Clinton%20Parameters.pdf). Neither side objected, although the Palestinian response to the Clinton Parameters insisted on stronger assurances that the refugees’ rights to restitution and compensation will be fulfilled: ‘Remarks and Questions from the Palestinian Negotiating Team regarding the United States Proposal’, *The New York Times*, 2 January 2001, <http://www.nytimes.com/2001/01/02/world/remarks-and-questions-from-the-palestinian-negotiating-team-regarding.html>.

<sup>31</sup> Brynen (n 7) Appendix 4 (Palestinian Position on Refugees, Taba, 22 January 2001), Appendix 5 (Israel’s Private Response to Palestinian Refugee Paper of 22 January, Taba, 23 January 2001), and Appendix 6 (Joint Refugee Mechanism Paper, Draft 2, Taba, 25 January 2001).

<sup>32</sup> Minutes from Berlin Meetings Post Annapolis, 24 June 2008, <http://www.ajtransparency.com/files/2797.pdf> (Berlin Minutes).

<sup>33</sup> These included, among others, Harvard University, the ‘Ottawa Process’ sponsored by the Canadian government in the 1990s, the Economic Cooperation Foundation, the Minster Lovell series of workshops organised by Chatham House in the UK, the Aix Group, and the Geneva Initiative.

during the Annapolis period (2007–09) and the Kerry initiative (2013–14).<sup>34</sup> In contrast to the Palestinians, who commissioned numerous studies on the topic in support of their negotiating team, Israel often undertook rather less research of its own, and often seemed to lose expertise every time there was a change of government. One meeting of Israeli experts and former officials held in March 2013 – almost 22 years after the start of the Madrid peace process – concluded that ‘Israeli official knowledge on the Palestinian refugee issue lags behind the state of research and policy work, particularly on the technical dimensions of implementing the refugee component of an Israeli-Palestinian agreement’.<sup>35</sup>

In general, both research and negotiations revolved around six main aspects: (i) who would be eligible for compensation; (ii) how compensation might be valued and financed; (iii) how an international implementation mechanism might be organised; (iv) end of claims; (v) moral acknowledgement; and (vi) linkage to the question of Jewish claims against Arab countries. Each of these is addressed in turn below.

## 4. THE ISSUES

### 4.1. ELIGIBILITY

The question of eligibility for compensation is intrinsically linked to what it is that is being compensated for. The narrowest category of recipients would be those who lost real property in 1948 and for whom Israel is unwilling to offer restitution of that property. A larger group of claims and claimants is created if compensation is considered for moveable property. Still larger would be compensation intended to address lost income or damages incurred by refugees because of their forced displacement and involuntary exile. Property-based claim systems have the firmest foundations in international law, relevant UN resolutions on the Palestinian issue, and evolving international practice. However, they also present substantial political complications as well as major practical challenges.

Based on British Mandatory records, the UNCCP assessed in 1951 that 159,860 refugee families had lands seized by the Israeli government.<sup>36</sup> Leaving aside the question of valuation for now, it would be possible to determine with some degree of accuracy who owned what in

<sup>34</sup> For a summary of some of this, see Michael Dumper (ed), *Palestinian Refugee Repatriation: Global Perspectives* (Routledge 2006); Michael Dumper, *The Future for Palestinian Refugees: Toward Equity and Peace* (Lynne Rienner 2007); Arie Arnon and Saeb Bamyā (eds), *Economic Dimensions of a Two State Agreement between Israel and Palestine* (Aix Group 2007); Rex Brynen and Roula El-Rifai (eds), *Palestinian Refugees: Challenges of Repatriation and Development* (IB Tauris 2007); Arie Arnon and Saeb Bamyā (eds), *Economic Dimensions of a Two State Agreement between Israel and Palestine, Vol II: Supplementary Papers* (Aix Group 2010); Brynen and El-Rifai (eds) (n 8); Rex Brynen and Roula El-Rifai (eds), *The Palestinian Refugee Problem: The Search for a Resolution* (Pluto Press 2014).

<sup>35</sup> Chatham House, ‘Israeli Perspectives on the Palestinian Refugee Issue’, March 2014, <https://www.chathamhouse.org/event/israeli-perspectives-palestinian-refugee-issue>. This point has also been made to the author by both senior Israeli and US officials.

<sup>36</sup> Fischbach (n 20) 129.



1948. However, given the passage of time, the process would necessarily be slow and cumbersome. Land and tax records do not always exist, and may not always be accurate. In many or indeed most cases, the original properties have been transformed. Although modified by both Ottoman land reform and subsequent British administration, a large portion of agricultural land in Mandatory Palestine was *miri* land, technically owned by the state but to which legally enforceable usufruct existed. Since these rights were inheritable and commonly divided among heirs, Palestinian village agriculture was often common property shared among many individuals (*musha'* lands). In short, determining individual Palestinian refugee land ownership rights in Israel more than half a century after the fact is far from a simple matter.

To further complicate matters is the exponential growth in the number of descendants, and hence potential heirs. From the 700,000 or so refugees who fled in 1948, UNRWA counted some 5.3 million registered refugees in 2016.<sup>37</sup> In many cases, descendants live in several different legal jurisdictions, with widely differing laws regarding inheritance, especially regarding the inheritance rights of women.<sup>38</sup>

One study of 349 members of a single Palestinian extended family, for example, found that they lived in a dozen different countries (and hence legal jurisdictions) across the diaspora, in addition to the West Bank and Gaza.<sup>39</sup> Quite apart from the issue of documenting actual property losses, any compensation regime would need to address who qualifies as an heir, and how any compensation payments should be distributed among multiple claimants.

Some models of refugee compensation – including that put forward by Israeli negotiators in Taba in 2001,<sup>40</sup> as well as the model suggested by the unofficial Geneva Initiative<sup>41</sup> – call for compensation to be paid to all refugees for past suffering, regardless of actual property losses. An argument for adopting this system arises from the highly unequal distribution of land ownership in Mandatory Palestine. A claims-based system of compensation based solely on 1948 property losses would aggravate social inequality. Poor refugees – those most likely still to be living in refugee camps, and those most adversely affected by forced displacement – would receive the smaller share of resources, despite the greatest need. Leaving aside the social desirability of this, it could also be a source of future refugee grievance. A second argument for per capita payments is the inevitably complex, time-consuming, and hence expensive nature of a claims-based compensation system some three generations after the fact. A compensation system that takes years to administer could well prove to be a lightning rod for refugee discontent,

<sup>37</sup> UNRWA, 'In Figures', 1 January 2016, [https://www.unrwa.org/sites/default/files/content/resources/unrwa\\_in\\_figures\\_2016.pdf](https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2016.pdf). The UNRWA registers refugees for the purposes of service eligibility, and not to establish any kind of legal status. It also only registers refugees in its areas of operation (West Bank, Gaza, Jordan, Syria and Lebanon), so the global number is likely to be higher.

<sup>38</sup> Heike Niebergall and Norbert Wühler, 'Implementation of an Agreed Solution for Palestinian Refugee Claims: Learning from the Experience of Other Claims Mechanisms' in Brynen and El-Rifai (n 8) 177, 193–97.

<sup>39</sup> Shafiq Ghabra, 'Palestinians in Kuwait: The Family and the Politics of Survival' (1988) 17(2) *Journal of Palestine Studies* 62, 66.

<sup>40</sup> 'Israel, Private Response to Palestinian Refugee Paper of 22 January, Taba, 23 January 2001 (Draft 2)', art 10, in Brynen (n 7) 18.

<sup>41</sup> Geneva Initiative, Annex 7: Solution to the Problem of the 1948 Palestinian Refugees (2009).

undermining a broader peace deal. Conversely, fast-tracking payments in some way (for example, through per capita payments to all refugees) would rapidly generate tangible benefits associated with peace, and would further provide financial resources to support repatriation, resettlement and the general welfare of the refugee population.

One drawback of per capita payments is the decoupling of the relationship between actual property losses and specific payments of compensation. For many Palestinians, an important benefit of a claims-based system is that it represents an acknowledgement of every individual act of dispossession carried out by Israel. Nevertheless, one opinion survey suggests around half of all Palestinian refugees would prefer a per capita system.<sup>42</sup>

Compensation for 'refugeehood' would require agreement on who is a refugee, and the determination process to be adopted. Using the criteria of the Refugee Convention would be problematic from a Palestinian perspective, since it would exclude those who obtained Jordanian or other citizenship after 1948. Using UNRWA records would exclude those who never registered with the agency or who live outside its area of operations. At Taba, a joint Israeli-Palestinian working paper suggested that UNRWA registration should be considered *prima facie* evidence of refugee status, but that a Status Determination Committee be established as part of a refugee agreement to make final decisions.<sup>43</sup>

An alternative to compensation payments to individual refugees would be a collective, lump sum payment to a future Palestinian state. This would be by far the easiest mechanism, requiring only agreement on the size and timing of the payment. Politically, however, it is problematic. Many refugees, deeply suspicious of the Palestinian authorities, would be doubtful that any such resources would be appropriately spent for their benefit. The backlash this could provoke could be damaging to the broader peace agreement. Widespread refusal to accept collective compensation as closure to the refugee issue would also have the effect of keeping individual Palestinian refugee demands alive, undercutting Israel's wish that any agreement should represent an end of claims.

Another potential form of collective compensation would be payments to host countries for the burden of having hosted refugees in the past. Lebanese and especially Jordanian officials have long pressed for this, and at times such compensation has been included in Palestinian proposals. Most donors are unenthusiastic about the precedent of offering compensation to refugee-hosting countries as part of a peace agreement, and prefer instead to consider any aid as part of a broader development assistance programme.<sup>44</sup>

## 4.2. VALUATION AND FINANCING

If the parties were ever to agree on a compensation regime for Palestinian refugees, the question of valuation would immediately arise. In the case of a claims-based system focused on 1948

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<sup>42</sup> Khalil Shikaki, 'Managing Refugee Expectations' in Brynen and El-Rifai (2014) (n 34) Table 10.12.

<sup>43</sup> 'Joint Refugee Mechanism Paper (Draft 2), Taba, 25 January 2001', arts 19–20, in Brynen (n 7) 19.

<sup>44</sup> According to Palestinian minutes of a trilateral meeting with Israeli and Palestinian negotiators in Berlin on 24 June 2008, US Secretary of State Condoleezza Rice raised concern about the precedent that would be set if countries were to be compensated retroactively for hosting refugees: Berlin Minutes (n 32).

property losses, how would the value of these be ascertained, and how would this be converted into contemporary values? In the case of per capita payments for suffering incurred as refugees, how could one ever place a price tag on this?

With regard to the first issue, the challenge is fourfold. As suggested in the section above, the parties would first need to agree on the losses that are eligible for compensation. Only private land? Communal and state lands too? Moveable as well as immovable property? Loss of future income? Not surprisingly, Israeli negotiators have always sought a narrow extent (privately owned land), while Palestinian negotiators have included moveable property, communal lands and loss of income. Second, a claims-based system requires an evidentiary foundation to establish what precise losses were suffered by whom – such as land titles, tax records, and so forth. Third, there would need to be an agreed methodology to determine the value of those properties in 1948. Finally, those values would need to be converted into current amounts, including adjustments for currency and inflation, and possibly some adjustment for the rate of return refugees might have enjoyed on those resources over the past seven decades or so – and hence the opportunity costs imposed by property seizure.

There have been several efforts to assess the general value of refugee property losses.<sup>45</sup> In 1962 the UNCCP used official records and individual reports from refugees to estimate that refugee-owned land within Israel had been worth £P 204.7 million (Palestinian pounds) in 1947, then equal to USD 825 million.<sup>46</sup> This would be worth around USD 8.6 billion in 2016, or almost USD 80 billion if UNCCP upper estimates of moveable property are included and a 3 per cent annual real rate of return is applied (after inflation).<sup>47</sup> A study prepared by Thierry Senechal for the Palestine Liberation Organization (PLO) Negotiations Support Unit (NSU) illustrated the higher end of claims calculations. This included privately owned rural and urban land, holy places, loss of employment and livelihoods, personal property and moveable assets, business losses and the Arab share of state-owned land, and placed total Palestinian losses at USD 3.3 billion in 1948. The report suggested a then current (2008) value of this at up to USD 310 billion when an appropriate rate of compound interest was applied.<sup>48</sup>

The point here is not to endorse any one set of estimates but, on the contrary, to note that the cost of refugee compensation can quite reasonably, depending on what is being included and how it is being valued, be calculated as being anywhere from a few billion dollars (narrow scope, 1948 values without adjustment) to hundreds of billions of dollars (broader scope, with compound interest). The magnitude of these numbers is hardly surprising, given that the refugees represented over 40 per cent of the pre-independence population of the areas that would become the State of Israel.

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<sup>45</sup> For a comprehensive overview, see Fischbach (n 20).

<sup>46</sup> *ibid* 276–77.

<sup>47</sup> Here I have used historical data on US inflation rates to make the adjustment.

<sup>48</sup> Thierry J Senechal, 'Valuation of Palestinian Refugee Losses', PLO Negotiations Support Unit (NSU), 18 June 2008, 17–40, <http://www.ajtransparency.com/files/2767.pdf>. See also Thierry J Senechal and Leila Hilal, 'The Value of 1948 Palestinian Refugee Material Damages: An Estimate Based on International Standards' in Brynen and El-Rifai (n 8) 132.

Not surprisingly, past Israeli negotiators have been loath to consider any compensation mechanism that leaves open the extent of Israeli liability – especially when the ultimate numbers could prove so high. In the Framework Agreement on Permanent Status proposed by Israel in 2000, the positions put forward in Taba in 2001 and during the Annapolis initiative of 2007–09, Israel proposed contributing a fixed and pre-negotiated amount to a larger international fund to which others would also contribute. This would then be used to finance compensation claims, as well as support the ‘rehabilitation’ of refugees.<sup>49</sup> Conversely, the Palestinian position has remained that the two sides should agree to a process of valuation and that ‘Israel shall provide the funds needed for such compensation’ without limit.<sup>50</sup>

The US has generally endorsed the idea of an international fund, with the implication that Israel’s contribution would be limited rather than open-ended, and that others would make up the difference. Other potential donors are less certain: on several occasions, European officials have privately warned that their taxpayers should not be expected to foot the bill for Israeli property seizures, and that while Europe would be generous in supporting a peace agreement, they were less than enthusiastic about financing compensation.<sup>51</sup>

Given the potentially very wide gap between Palestinian claims and Israeli (and international) willingness to pay, one looming threat to any refugee agreement would be one of inadequate financing and unmet expectations. Israeli officials informally considered contributions of around USD 3–5 billion at the time of the Taba negotiations, while during the Camp David negotiations in 2000 American officials floated the idea of an international fund of USD 20 billion. The latter works out at about 5 to 10 per cent of Palestinian claims, and only around USD 3,700 per UNRWA-registered refugee. If an international fund were used also to finance refugee repatriation and development, host countries, and possibly Jewish claims against Arab countries, the amount available per refugee could fall to a mere fraction of this. Many Palestinian refugees would see this as inadequate – especially in comparison with the over USD 1 billion in compensation paid by Israel to fewer than 9,000 settlers evacuated from Gaza in 2005.<sup>52</sup> Indeed, informal second-track discussions held in 2013, at the time of the Kerry initiative, strongly underscored that inadequate resourcing for compensation could be an Achilles heel of a refugee deal: far from addressing grievances and providing closure, inadequate payments are seen by refugees as adding insult to injury.<sup>53</sup>

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<sup>49</sup> Israeli Draft Framework Agreement on Permanent Status (2000), arts 77–90, in Brynen (n 7) 13; ‘Israel’s Private Response to Palestinian Refugee Paper of 22 January’ (n 40) art 10e. See also ‘Current P/I Positions Reflecting Discussion up to May 23, 2008’, leaked from the archive of the PLO NSU to *al-Jazeera*, <http://www.ajtransparency.com/files/2627.pdf>.

<sup>50</sup> ‘Palestinian Position on Refugees, Taba, 22 January 2001’, art 35, in Brynen (n 7) 16. The Palestinian first preference, of course, was that of restitution.

<sup>51</sup> Based on multiple conversations with US and European officials over the period 2000–14.

<sup>52</sup> Palestinians, of course, would further note that settlement activity is considered illegal under international law, while Palestinian refugees are themselves the victims of forced displacement, making the difference in compensation levels even more difficult to swallow.

<sup>53</sup> Chatham House, ‘The Palestinian Refugee Issue: Compensation and Implementation Mechanisms’, 18–19 December 2013, 9, [https://www.chathamhouse.org/sites/files/chathamhouse/field\\_document/20131218/PalestinianRefugeesCompensationImplementation.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field_document/20131218/PalestinianRefugeesCompensationImplementation.pdf) (The Palestinian Refugee Issue). For an assessment of this

One model that has been suggested as relevant to the Palestinian case is that of the United Nations Compensation Commission (UNCC), established under the authority of UN Security Council Resolution 692 (1991) to address Iraq's liability for 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.<sup>54</sup> In order to streamline the process, the UNCC established several categories of claim: those who had been forced to leave Iraq and Kuwait (category A); those who had suffered injury or family death (B); personal losses of up to USD 100,000 (C); larger personal claims (D); claims by corporations (E); and claims by governments and international organizations (F). Categories A, B and C were given priority. By 2005, the UNCC had received some 2.7 million claims, of which 1.5 million were awarded a total of USD 52.4 billion in compensation.<sup>55</sup>

The UNCC undertook individualised assessment of all claims. While this process took over a decade, category A and B claims were all processed (with a few late exceptions) by 1996, and category C claims by 1999. Sorting claims into baskets like this – and then perhaps standardising compensation amounts rather than evaluating each in detail – could simplify a Palestinian refugee compensation system. Indeed, at one unofficial meeting of Israeli, Palestinian and international experts in 2013 this emerged as the preferred option of some of the working groups.<sup>56</sup>

Iraqi liability was unlimited in this case, with the Security Council requiring Baghdad to pay out of its oil revenues whatever amounts the UNCC considered were required to fully compensate claimants. It is difficult or impossible to imagine any possible circumstances in which the UN or international community would pressure or require Israel to accept such a commitment. As noted above, Israeli negotiators have always insisted on a lump sum contribution to an international fund rather than accepting a compensation regime with an unknown price tag.

### 4.3. MECHANISM

Of the various aspects of the compensation issue, the one on which there has been perhaps the most progress in the past is that of a mechanism to implement the various aspects of a refugee agreement. At Taba in 2001 the Israeli team drafted a joint mechanisms paper that developed one such approach in considerable detail. During the Annapolis round of talks, several meetings in 2008 addressed aspects of an international mechanism to oversee implementation of a refugee agreement. While progress in this area was welcome, it also underscored the difficulty of reaching agreement on other aspects of the refugee issue. In many ways, discussions on an international mechanism were seen by all sides as 'low hanging fruit', which might generate momentum towards resolving more contentious issues.

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same meeting, see 'Compensation Complications', *PRRN – The Blog of Palestinian Refugee ResearchNet*, 23 December 2013, <https://prnblog.wordpress.com/2013/12/23/compensation-complications>.

<sup>54</sup> UNSC Res 692(1991), 20 May 1991, UN Doc S/RES/692(1991), Preamble.

<sup>55</sup> United Nations Compensation Commission (UNCC), 'The Claims', <http://www.uncc.ch/claims>.

<sup>56</sup> Chatham House (n 53).

Typically, negotiations focused on the idea of establishing both an international commission (comprising the key regional actors and major international donors) to oversee the process, and an international fund to finance it. However, there are a variety of ways in which this might be carried out and no clear consensus of what might best suit the individual and collective interest of Israel, Palestine, the host countries, donors and refugees themselves.<sup>57</sup>

First is the question of how much detail should be included in any future peace agreement, and how much should be left for the international commission to work out later. Postponing agreement on detail makes it easier to reach an initial deal, and provides more opportunity to canvass the views of key stakeholders. It does, however, hold the risk that differences over institutional arrangements and procedures could result in extended delays in implementing a peace deal, thereby generating a growing backlash among the refugees. The more than 36 years (and counting) that it has taken the Iran-United States Claims Tribunal to resolve claims arising from the 1979 Iranian revolution highlights how long such processes can be. A similar lengthy duration in the case of refugee compensation could well prove politically fatal to any peace agreement.

Second, what mandate would an international commission have? This depends, of course, on questions of eligibility, the modalities of payment and so forth, as well as other aspects of a refugee agreement (such as return, repatriation and resettlement). In an unpublished research and policy advice in the early 2000s, the World Bank warned about imposing too many bureaucratic strictures out of concern that these could create perverse incentives that would distort decision-making by refugee households, especially regarding their permanent place of residence.<sup>58</sup> Similarly, experts at the International Organization for Migration, who conducted a comparative study of compensation and claims mechanisms, urged that any Palestinian refugee mechanism be designed in a way that reduces costs, delays and unnecessary complication.<sup>59</sup>

Third, which parties would be part of a refugee mechanism, and how would an international commission reach decisions? On the Israeli side, various officials and experts have held different views: some have preferred Israeli representation and a consensual decision-making process that would provide Israel with a veto. Others have preferred minimal Israeli involvement in order to avoid blame for the inevitable shortcomings and delays. The Palestinians have generally favoured broad participation by host countries and donors in the hope that these participants would generally share their views.<sup>60</sup>

A related question concerns the future role of UNRWA. Typically, Israeli officials have been anxious to see the UN agency quickly terminated as part of a peace deal, viewing it as an institutional perpetuation of the refugee issue. Conversely, Palestinian and host countries have been

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<sup>57</sup> For a much more detailed discussion of this issue see Niebergall and Wühler (n 38).

<sup>58</sup> For a summary of some of this research, see Rachele Alterman, 'Land and Housing Strategies for Immigrant Absorption: Lessons from the Israeli Experience' in Brynen and El-Rifai (2007) (n 34) 163; Nick Krafft and Ann Elwan, 'Infrastructure Scenarios for Refugees and Displaced Persons' in Brynen and El-Rifai (2007) (n 34) 132; Rex Brynen, 'Refugees, Repatriation, and Development: Some Lessons from Recent Work' in Brynen and El-Rifai (2007) (n 34) 102.

<sup>59</sup> Niebergall and Wühler (n 38) 177.

<sup>60</sup> See, eg, 'Palestinian Position on Refugees, Taba, 22 January 2001', art 9, in Brynen (n 7) 15.

eager to extend its mandate and role until all aspects of the refugee issue have been fully resolved. Donors have no desire to fund the agency indefinitely or expand its mandate, but equally recognise that its considerable expertise would be invaluable in implementing an agreement.

#### 4.4. END OF CLAIMS

For Israel a key requirement of any refugee agreement has been that it should bring about a final resolution and an end of the Palestinian claims. Indeed, this aspect was mentioned, one way or another, seven separate times in Israel's proposed Draft Framework Agreement on Permanent Status (2000). Similarly, the working paper submitted by Israel at Taba in 2001 stressed that a refugee deal would 'constitute a full, final and irrevocable settlement of the Palestinian refugee issue in all its dimension', with no additional demands arising thereafter and 'no individuals qualified for the status of Palestinian refugees'.<sup>61</sup>

Palestinian negotiators have sought to leverage Israel's desire to see the issue closed in order to secure better terms, arguing that:<sup>62</sup>

It is their common interest to reach a satisfactory closure of the matter: since individual rights are at stake (rather than the national rights of the future Palestinian State), the risk of future potential (thousands, perhaps millions) law suits filed by unsatisfied refugees against Israel and/or Palestine cannot be overlooked.

At the same time – and in keeping with the broader evolution of international human rights law – Palestinian officials also argue that rights are carried by individual refugees, and that neither the PLO nor a future state of Palestine can abrogate them by agreement. Ironically, while such assertions raise Israeli suspicions that the Palestinians will make never-ending demands for more and more, on the Palestinian side this language is sometimes intended to facilitate concessions and avoid charges that the Palestinian leadership is ready to sell out refugee rights.

While an agreement between Israel and Palestine would not and could not prevent refugees from trying to advance compensation claims outside the agreed process, in practice there would be few or no venues for them to do so. Israeli courts would be unlikely to entertain such claims. National courts elsewhere would lack jurisdiction in most cases, and would otherwise undoubtedly consider the fact of a peace agreement – all the more so since it would be strongly endorsed by the UN Security Council. Presumably Israel would simply refuse to accept adverse rulings in foreign (or international) courts in any event.

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<sup>61</sup> 'Israel's Private Response to Palestinian Refugee Paper of 22 January, Taba, 23 January 2001', art 16, in Brynen (n 7) 18.

<sup>62</sup> 'Talking Points for Meeting with Tal Becker regarding the Recognition of Refugees' Rights', memo from the PLO NSU to Saeb Erekat, 26 March 2008, 1, <http://www.ajtransparency.com/files/2370.pdf>.

#### 4.5. MORAL ACKNOWLEDGEMENT

Compensation for refugees has sometimes been seen by the international community as a positive component of a future peace agreement that would help to sell the deal to Palestinians. Quite apart from the issue of whether the resources available for this would be adequate, this rather narrow view also ignores the extremely important moral and psychological dimensions of the refugee issue.<sup>63</sup> For many refugees, recognition of their plight (and even more so, of Israeli responsibility for their forced displacement and exile) is at least as important, and in some cases more important than material compensation. Indeed, experimental research on the Israeli-Palestinian conflict and others clearly demonstrates that efforts to win public support for compromise through financial promises alone, without addressing deeply held issues of symbolism and identity, tend to aggravate rather than diminish political differences.<sup>64</sup> The issue, however, is not an easy one. As noted before, Israelis and Palestinians have different narratives of what happened in 1948. Many Israelis reject the notion that Palestinians were forcibly displaced and dispossessed. If forced displacement did occur, it is often suggested, it was justified in any event by war and Arab aggression against the nascent Jewish state. More fundamentally, any statement of Israeli responsibility seems to be viewed as tantamount to admitting original sin in the Zionist enterprise – a particularly sensitive issue in the context of efforts to delegitimise the very existence of Israel itself. For their part, Palestinians often fail to appreciate Israeli concerns or sense of insecurity. The pressures and persecutions that generated the Zionist endeavour are given little weight. The forced displacement of the Palestinian people is seen as tantamount to ethnic cleansing and part of a larger, and fundamentally racist, colonial agenda.

Further complicating the issue is the Israeli demand – almost entirely absent from final status negotiations in 2000–01, but of growing importance in the years since then – that the Palestinians recognise Israel as a Jewish state. In the absence of Israeli recognition of moral responsibility for the refugee issue, many Palestinians see this as legitimising discrimination and ethnic cleansing.<sup>65</sup> Conversely, in the absence of any Palestinian recognition of Israel's status as a Jewish homeland, many Israeli Jews see Palestinian demands for refugee return and repatriation as a form of demographic warfare.

Narrowing this gap will not be easy. Opinion polls consistently show that most Israeli Jews are strongly opposed to accepting even partial responsibility for the refugee issue.<sup>66</sup> While good will, political leadership and the adroit formulation of mutually acceptable language might shift attitudes on both sides, none of that is likely to happen any time soon.

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<sup>63</sup> Michael Molloy and others, 'Intangible Needs, Moral Acknowledgement and the Palestinian Refugee Issue' in Brynen and El-Rifai (2014) (n 34) 189.

<sup>64</sup> Jeremy Ginges and others, 'Sacred Bounds on Rational Resolution of Violent Political Conflict' (2007) 104 *Proceedings of the National Academy of Sciences* 7357; Scott Atran and Robert Axelrod, 'Reframing Sacred Values' (2008) 24 *Negotiation Journal* 221.

<sup>65</sup> 'The Precondition of Recognizing Israel as a "Jewish State"', Memo to Palestinian Drafting Team from the NSU, 13 November 2017, <http://www.ajtransparency.com/files/2234.pdf>.

<sup>66</sup> The Peace Index, 'The Peace Index: January 2014', 8 April 2014, <http://www.peaceindex.org/indexMonthEng.aspx?mark1=&mark2=&num=273>.



#### 4.6. JEWS FROM ARAB COUNTRIES

There is no doubt that Jewish communities across the Arab world have faced campaigns of harassment and violence, resulting in almost all of them fleeing to seek refuge within the State of Israel or elsewhere. Equally there is no doubt that there are many legitimate claims for property restitution or compensation to be made against Arab countries. Whether that issue should be connected in any way with the issue of compensation for Palestinian refugees is another question.

On the Palestinian side there is discomfort at any comparison between the forced displacement of their own *nakba* (disaster) in 1948 and the experience of Jews elsewhere in the Middle East. More importantly, they argue that the question of compensation for Jews from Arab countries is one that Israel ought to raise with the Arab countries that were responsible for this, rather than with the Palestinians, who were not. In informal settings, Palestinian officials have suggested that they would be willing to consider Jewish claims for any property that was seized within East Jerusalem or the West Bank during the 1948 war or under Jordanian rule.

In the early 1950s, Israel first sought to link the issue of Jewish claims to that of Palestinian refugee claims, partly to seek compensation for the former but even more so in a rather cynical effort to offset or cancel out any liability for the latter. Indeed, as the era of armistice negotiations and the UNCCP faded, there was little serious effort by successive Israeli governments to seek any compensation from Arab countries in the years that followed. Article 8 of the 1979 peace treaty with Egypt did create ‘a claims commission for the mutual settlement of all financial claims’, but Israeli governments made little attempt to use this to pursue the issue of Egyptian seizures of Jewish property. Instead, it was preferred to keep this issue open as a way of countering any future Palestinian claims.<sup>67</sup> Similarly, little effort was made to pursue the issue with Jordan after the 1994 peace treaty between the two countries.

With the onset of permanent status negotiations in 2000, the Israeli position – generally accepted by the US, but not the Palestinians – was that an international refugee mechanism and fund should also address Jewish claims. At times, however, Israeli negotiators appeared to agree with their Palestinian counterparts that there is no logical reason why abuses by entirely different Arab countries should be something for Israeli-Palestinian talks to address. At Taba, for example, the Israel negotiating team suggested that ‘[a]lthough the issue of compensation to former Jewish refugees from Arab countries is not part of the bilateral Israeli-Palestinian agreement, in recognition of their suffering and losses, the Parties pledge to cooperate in pursuing an equitable and just resolution to the issue’.<sup>68</sup>

During the later Annapolis initiative, the question was again raised. However, it became an even more pressing issue after the election of the Netanyahu government in 2009, and amid increased activism by the World Organization of Jews from Arab Countries, Jews for Justice

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<sup>67</sup> Michael R Fischbach, *Jewish Property Claims Against Arab Countries* (Columbia University Press 2008) 177.

<sup>68</sup> ‘Israel’s Private Response to Palestinian Refugee Paper of 22 January, Taba, 23 January 2001’, art 15, in Brynen (n 7) 18.

from Arab Countries, and other groups.<sup>69</sup> In 2010 the Knesset passed legislation which required that any future peace negotiations must provide for compensation for Jews from Arab countries and Iran.<sup>70</sup>

The consequences of this linkage can be assessed in different ways. To the extent that both Palestinian and Jewish refugees are compensated from a common international fund, linkage reduces the amount available to meet both sets of claims. This could render it difficult or impossible to reach any agreement, especially given concerns that the resources likely to be available were already inadequate. This problem is particularly acute given that some of the countries with the worst record regarding their historic Jewish communities are least likely to pay compensation. On the other hand, advancing Jewish refugee claims provides some further buttressing for Palestinian claims, since it is difficult to advance the former without implicitly endorsing the legitimacy of the latter. Moreover, there is considerable evidence that securing compensation for Jewish property claims would have a positive political effect on Israeli public support for an agreement. One opinion survey indicates that a full 40 per cent of all Israeli Jews opposed to a comprehensive peace agreement (along the lines of that proposed by the Geneva Initiative) would alter their view if the deal included this element.<sup>71</sup>

## 5. CONCLUSION

As noted at the outset, nothing in this article is meant to suggest that substantive Israeli-Palestinian negotiations, let alone a resolution of the refugee issue, is likely to happen soon. Rather, its purpose has been to highlight the complexities of just one aspect of that issue – namely, compensation for Palestinian refugees. It has highlighted the need to balance complex and contested political needs and demands on both sides with the immense practical challenges of providing redress for forced displacement and dispossession. Undoubtedly, some will object to certain characterisations or terminology, or to some of the approaches that have been proposed in earlier peace negotiations or in non-official second-track discussions. Such sensitivities only underscore the point made above.

There is value in airing those differences, in thinking through alternative approaches, and in wrestling with the many complexities and difficulties involved. If a comprehensive peace agreement is ever reached in this conflict, it is almost certain to address the refugee issue. Doing so can be facilitated only by thinking about it and discussing it, well in advance of that day.

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<sup>69</sup> Shayna Zamkane, 'Justice for Jews from Arab Countries and the Rebranding of the Jewish Refugee' (2016) 48 *International Journal of Middle East Studies* 511.

<sup>70</sup> The Law for Preservation of the Rights to Compensation of Jewish Refugees from Arab Countries and Iran, 2010 (Israel), art 3.

<sup>71</sup> 'The Palestinian-Israeli Pulse' (n 28) Question IV11.8.