

WHOSE HOME IS IT? REFLECTIONS ON THE PALESTINIANS' INTERESTS' IN RETURN

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A 'right of return' to a homeland is claimed in different ways by both Palestinians and Israelis. Talk of rights, of course, has always been vague and in need of attention. Jeremy Bentham, the great Utilitarian, spoke of some talk of rights as nonsense and other talk as nonsense on stilts. Prof. Harel conceives of rights in terms of the interests of people. What he has to say, which is well above the level of debate by politicians and the like, is summarized by him in the abstract below. He teaches in and writes from the Law Faculty of the Hebrew University in Jerusalem. Having studied the philosophy of law in Oxford, he subsequently was a lieutenant in the Israeli army, and has written widely in the Philosophy of Law and related areas.

Abstract: *This paper investigates whether Palestinians have an interest in return rather than a mere interest in settling in a state that provides them with civil rights and economic opportunities. The paper establishes the following three claims. First, Palestinians have some interests in return to Palestine. Second, many of these interests can be satisfied (at least to some extent) by establishing an independent Palestinian state in part of historical Palestine. Third, some of these interests are similar to the interests that may justify an analogous right of return of Jews.*

“When I went to the UN in 1974, the Zionists organized a demonstration with banners reading, ‘Arafat go home.’ I said, ‘This is exactly what I want; this is what I came here for.’”**

The Palestinians are amazing. All people of the world live in their respective places except for the Palestinians...the place lives in them.”

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** Yasser Arafat, A discussion with Yasser Arafat, **Journal of Palestinian Studies** vol. 11, 3 at 8 (Winter, 1982).

1. Introduction

Many Palestinians believe that respecting their “right of return” is tantamount to respecting one’s basic human right to return to one’s home. At the same time, Israelis are convinced that respecting that same right is tantamount to being expelled from home. Regrettably, it is only after Palestinians or Israelis instinctively associate the "right of return" with either the right to return home or with the fear of being expelled from it that they pay some attention to the question of what the right of return is and what it entails for the lives of Israeli Jews and for Palestinians. The thrill of discussing the issue in an academic setting is precisely that such a setting facilitates liberating oneself from the irresistible political and personal passions, in particular, fervent hopes and colossal fears characterizing the political discourse (or at least so I hope).

The politics surrounding the right of return is not only passionate; it is also enigmatic. The traditional rightwing support of historical rights and the traditional skepticism concerning these rights on the left breaks down in this context.¹ Some leftist activists who traditionally oppose historical rights become enthusiastic advocates of the Palestinian right of return while rightwing activists who are typically sympathetic to historical rights oppose it. In this respect the debate concerning the Palestinian right of return differs dramatically from the similar (although less familiar) debate concerning the rights of Germans expelled from Eastern Europe.

¹ The most notable advocate of historical rights is of course Robert Nozick. See, Robert Nozick, *Anarchy, State and Utopia* (1974). Many people noticed the relevance of Nozick’s defense of property rights to the issue of land rights. Nozick’s critics from the left who explored the ramifications of this theory to conflicts over land typically try to demonstrate that historical rights are more flexible than assumed by Nozick. See, e.g., David Lyons, *The New Indian Claims and Original Rights to Land* 4 **Social Theory and Practice** 249 (1977); John Simmons, *Historical Rights and Fair Shares* 14 **Law and Philosophy** 149 (1995); Jeremy Waldron, *Superseding Historic Injustice* 103 **Ethics** 4 (1992). As opposed to the mechanical and inflexible rigidity of Nozick, leftist critiques of historical rights insist that these rights “must bend to the needs and interests of human beings.” See Lyons at 271; or that “historical rights can change, shrink, or expand, and so be sensitive to passing time and changing circumstances.” See Simmons at 170. In contrast the Palestinian leading organization advocating return Al-Awda – the Palestinian Right to Return Coalition -- justifies the right of return partly by emphasizing “the sanctity of private ownership” See Statement by the Right of Return Defense Committees February 9, 2002 (http://www.al-awda.org/old/ror_defense_committees.htm).

Traditionally both the advocates and the foes of the right of return believe that one of the primary questions determining the justifiability of return is the question of responsibility or culpability for the plight of Palestinians.² This paper takes a different route. The most neglected aspect of the right of return is the question of whether Palestinians have an interest in return. This question is crucial given the prevailing conviction that rights are related to interests in various ways and that interests are often relevant to the just resolution of conflicts.³ This article aims at filling this gap by investigating whether return is conducive to Palestinian interests. More specifically, the paper distinguishes between seven different interests that may be served by facilitating return: the interest in annulling a wrong, the monetary interest, the interest in restoring one's physical environment, the interest in restoring one's social environment, the interest in restoring one's civic-political status, the interest in returning to formative territories and the interest in settling in the most appropriate site.

Before starting the investigation let me state an important proviso. Some people believe that the Palestinian right of return is grounded in principles of international law.⁴ The international community as a whole has an interest in states fulfilling their international obligations and this interest may give rise to rights. This paper does not

² For the Palestinian position, see, e.g., Khalidi, *Observations on the Right of Return* *Journal of Palestine Studies* vol. XXI no. 2 (Winter 1992) 29 at 30. In an interview devoted to the Palestinian right of return, Edward Said also emphasized the asymmetry in the responsibility of Israelis and Palestinians. See Edward W. Said, *The Palestinian Right of Return: An Interview with Ari Shavit* 34, 39 (2001). The political activist Salman Abu Sitta described it in more dramatic terms: "There is nothing like it in modern history. A foreign minority attacking the national majority in its own homeland, expelling virtually all of its population, obliterating its physical and cultural landmarks, planning and supporting this unholy enterprise from abroad, and claiming that this hideous crime is a divine intervention and victory for civilization. This is the largest ethnic-cleansing operation in modern history." See Abu Sitta (<http://www.arts.mcgill.ca/mepp/prn/papers/abu-sitta/>) On the other hand, Efraim Karsh devotes much of his arguments against recognizing the right of return to demonstrating that Palestinians rather than Israelis are responsible for the 1948 tragedy. See Efraim Karsh, *The Palestinians and the 'Right of Return'* *Commentary Magazine* (May, 2001) <http://www.wzo.org.il/en/resources/view.asp?id=252>

³ On the relation between rights and interests, see Alon Harel, *Theories of Rights* (forthcoming in *Blackwell's Guide to the Philosophy of Law and Legal Theory*)

⁴ For an overview of the international law treatment of the right of return, see Eyal Benvenisti, *The Right of Return in International Law: An Israeli Perspective* (a paper presented at the Stocktaking Conference on Palestinian Refugee Research in Ottawa Canada, June 17-20, 2003); Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 *Mich.J. Int'l.* 1091, 1120 (1998); Vic Ullom, Leonard V. B. Sutton Award Paper: *Voluntary Repatriation of Refugees and Customary International Law* 29 *Denv. J. Int'l. & Pol'y* 115 (2001); Ruth Lapidot, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, *Israel Yearbook on Human Rights*, Vol. 16, 1986.

investigate this question; it is devoted exclusively to a philosophical investigation of the right of return and the interests underlying it.

1. The Right of Return

The term 'the right of return' is used in different ways and means different things. The extensive (and often passionate) use and abuse of this term in political discourse by its advocates as well as by its foes inevitably leads to ambiguities concerning its precise content. It has often been noted that while the idea of 'return' has been central to the Palestinian national narrative, there is no authoritative Palestinian definition of what the content of this right is. Instead, the right of return has been taken to mean many things ranging from the right of all Palestinians and their descendants to return to their former homes and places of origin in Palestine, to a return of some Palestinians to some limited part of Palestine.⁵

The term 'return' implies departure and consequently the right of return is premised on departure. The departure/expulsion need not be departure/expulsion of the person who claims she has a right; it may be grounded in departure/expulsion of his/her biological ancestors or even cultural "ancestors." Having a right of return differs therefore from having a right to immigrate to Israel and settle in it. It is only the right of Palestinians that is grounded in the fact that they (or somebody who is related to them, e.g., their ancestors) departed or were expelled from Palestine that can plausibly claim that they have a right of return as opposed to the mere right to settle in the territory which

⁵ See Rashid Khalide, *supra* note 2 at 29; Menachem Klein, From a Doctrine-Oriented to a Solution-Oriented Policy: The PLO's Right of Return 1964-2000 in Joseph Ginat and Edward J. Perkins **The Palestinian Refugees: Old Problems-New Solutions** 46 (2001).

One of the most important limits accepted now by many Palestinians is that the right of return can be exercised exclusively or primarily to the territory of the Palestinian state rather than to Israel itself. See, Khalidi, *supra* note 2 at 36. Of course this is controversial and some believe that no concessions with respect to the destination of the "returners" can be made. Amnesty International and Human Rights Watch adopted this latter position. In a policy statement published by Amnesty International, it stated that: "Amnesty International supports the return of the exiles **to their own homes or the vicinity of their own homes**, where this is feasible." See section 8 of Amnesty International (http://www.badil.org/Law/Human_Rights/AI_Policy.htm). Human Rights Watch endorsed a similar view but omitted the words: "where this is feasible." See (http://www.badil.org/Law/Human_Rights/AI_Policy.htm)

is now part of the state of Israel. Hence, denying that Palestinians have a right of return does not imply that many or even all Palestinians do not have a right to settle in Israel. A right to settle in Israel may be grounded in the right that Palestinians have that their poverty be alleviated – a right that has nothing to do with departure -- or in their right to family reunification. Yet, none of these rights ought to be classified as a right of return because none of these rights is grounded in departure, or expulsion.

Arguably the distinction is an overly academic one. What Palestinians wish is to be given the right to return in order to be given the opportunity to live decent lives in a society that provides them with economic opportunities and civil rights.⁶ Hence instead of drawing academic distinctions between the right of return and the right to settle in the territory of the State of Israel, one ought simply to facilitate the return of Palestinians to their homes.

While I have sympathy for the pragmatic mind raising this objection, there is ample evidence that Palestinians care deeply about this distinction. What Palestinians want is not simply to be granted a right to return to their homes but to be granted the right **for the right reasons**.⁷ Ultimately it is the political discourse of Palestinians that presupposes the distinction and respect for Palestinians demands is what requires one to investigate the distinction. This observation implies that in drawing the distinction one ought to investigate the political discourse of both advocates and opponents of the right of return. The criteria for determining what the right of return is, ought to be founded in the writings of political activists, the speeches of political leaders and in the convictions of Palestinians and Israelis. Observing these, one may conclude the following.

First, the right of return is characterized by the type of justification provided for the right to settle in Israel. The justification for the Palestinian right of return is based on the departure or expulsion of the Palestinians. Other reasons to recognize a right **to settle** in the relevant territory – reasons that are not directly related to prior departure/expulsion, e.g., the immense poverty of some Palestinians, cannot provide a basis for a right of

⁶ I discuss this objection later in section 2c7.

⁷ This is not unique to the right of return. Rights are reason-dependent demands and the proper identification and recognition of the reasons underlying them is important for the sake of realizing this right. See Alon Harel, Rights-Based Judicial Review: A Democratic Justification 22 **Law and Philosophy** 247, 262 (2003).

return although they may be used to alert people to the urgency of the demand to return.⁸ Second, the right of return to Palestine is a distinctively Palestinian right. It is founded on certain facts about their history and it is often regarded as a constitutive component of Palestinian identity.⁹ These observations help to explain the importance of the territory of Palestine in this context and why other territories cannot provide an adequate substitute for Palestine.

2. Do Palestinians Have an Interest in Return?

a. Introduction

This section investigates the interests Palestinians have return. The reader may find the very posing of the question demeaning. Palestinians struggle courageously to be granted such a right. They may be wrong and misguided in this struggle; but how can one question their interest in having it? How can one judge what the real Palestinian interests are without being paternalistic and dismissive? The answer to these disturbing questions is provided in section b. Interests differ from desires and having a desire to X does not imply having a corresponding interest. More generally, section b explores the link between rights and interests and demonstrates why an investigation of interests is crucial for normative purposes. It concludes by conceding that it is possible that Palestinians have a right of return that is not conducive to their interests but that the investigation of the interests at stake is nevertheless important. Section c lists seven different interests that may ground a right of return and examines the potential ramifications of these interests

⁸ The characterization of the right of return as a right that is premised on departure is not free of difficulties. The justification for the right of return need not be logically or conceptually related to departure. One of the justifications often provided for the Palestinian right of return is grounded in the cultural importance of Palestine to the Palestinian people and its centrality in the Palestinian tradition. For a discussion of the importance of cultural affiliation with a territory and the rights it generates, see Chaim Gans, *The Limits of Nationalism* chap. 4 (2003). Yet as the Greek obsession with Atlantis demonstrates, people develop cultural affiliation to a land without it being the case that they or their ancestors have ever departed from it. The centrality of cultural affiliation in the Palestinian political discourse governing the right of return justifies classifying it as a justification giving rise to the right of return even though cultural affiliation is not necessarily related to departure.

⁹ See Khalidi, *supra* note 2 at 31-32.

on the scope and the content of the right. Section d summarizes the discussion and draws some tentative conclusions.

b. Why Substitute Interests for Rights?¹⁰

Political discourse uses the term the ‘right of return’ rather than that a term involving interests. It is natural for the reader to inquire why one ought to substitute the language of rights with that of interests. I shall argue that resolving the question of whether there is an interest in return and if there is what it is can help in resolving the dispute concerning the right of return.

Rights and interests are intimately related to each other. Joseph Raz described the relation as follows: “‘X has a right’ if and only if . . . an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”¹¹

Interests, as the term is used here, are not normative-free concepts. Affirming that A has an interest in X is an objective statement founded on the conviction that the granting of X is conducive to one’s well-being. The judgment that X is conducive to one’s well-being is ultimately founded on certain premises of what the good life consists of. People may desire things that are not in their interests and having a desire does not necessarily indicate that the person has an interest in satisfying the desire. Moreover, people often desire things under the wrong description, description that does not correspond to their interests. Palestinians may desire to return to a certain territory from which they or their parents departed, i.e., Israel; but their real interest may be to settle in a country that provides them with economic opportunities and civil rights. Fulfilling their desire of return may be conducive to their interests, but it is conducive not because return is conducive to their interests but because return would facilitate the provision of economic opportunities and civil rights.

While rights are grounded in the interests of the rightholders, respecting a right does not always promote the interests of the rightholder. In order for X to be a right of an individual A, it ought to be the case that **typically** respecting the right is conducive to the

¹⁰ I am grateful to David Enoch for his very important comments on an earlier version of this section.

¹¹ Joseph Raz, *The Morality of Freedom* 166 (1986)

interests of A. When one states that people have a right to property, it is based on the conviction that owning property is conducive to people's interests. Nevertheless, it can be the case that some owners would use their property in ways that are detrimental to their interests and that therefore owning these items is against their interests.¹² Their right under these circumstances is not conducive to their interests; instead its force is derived from a more fundamental right – the right to property – that as a whole is conducive to rightholders' interests.

A can therefore have a right to Φ in one of two cases. Either A has a (core) right to Φ if A has an interest to Φ and that interest is sufficiently weighty to justify the imposition of duties on others. Alternatively, A may have a **derivative** right to Φ – a right that is not founded on an interest in Φ -ing, but on a more general right. The more general right has to be grounded in interests of the rightholders; but not each and every right derived from it is conducive to the interests of the rightholder. Thus, for instance, while a person does not have an interest in producing bad art or in publishing petty gossip, both activities are protected by a right. The first right is derivative of the more fundamental right of artistic expression while the second is derivative of the right to freedom of speech.

This analysis implies that examining whether Palestinians have an interest in return is perhaps important to settling the question of whether they have a right to return. The existence of interests is highly relevant to establishing whether Palestinians have a non-derivate right of return. Attempting to establish that Palestinians have a derivative right of return requires identifying and establishing a core right from which the right of return is derived and this I believe is not an easy task. Last, the presence or absence of interests is crucial not merely for establishing the existence of a right of return but also for

¹² For a discussion of the relations between rights and interests, see Raz, *supra* note 11 at 180 (1986); Alon Harel, *supra* note 3.

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examining the reasonable scope for a compromise that promotes and respects the interests of both sides. At the same time, this analysis implies that even if Palestinians have no interests whatsoever in return, it may still be the case that they have such a right.¹³ This section established therefore the importance and relevance of investigating the Palestinian interests in return although it also demonstrated that Palestinians may have a right of return without having an interest in return.

c. The Interest in Return

1. The Interest in Annuling a Wrong

The right of return is typically understood to be a remedial right. It is founded on the conviction that a primary right of Palestinians – the right to live peacefully on one's land or the right to return to one's home immediately after the 1948 departure was either (unjustifiably) violated or at least (justifiably) infringed. Much of the heated debate among Israeli and Palestinians is over the attribution of guilt and responsibility. Jewish Israelis often attribute responsibility for the plight of Palestinian refugees to the Palestinian leadership (for encouraging the departure of Palestinians during the 1948 war) or to Arab states (for refusing to integrate the refugees in their society) while many Palestinians believe that Israelis perpetrated ethnic cleansing during the 1948 war and that the primary or even the exclusive responsibility for the plight of Palestinians is to be attributed to Israelis.¹⁴

The importance attributed to the issue of responsibility or culpability raises the possibility that the interest promoted by protecting the right of return is the interest in public acknowledgement and institutional recognition that a terrible wrong was committed. Rashid Khalidi describes this conviction as follows:

¹³ It is possible however that while exercising the right under these circumstances is permissible it is morally wrong.

¹⁴ The dispute concerning the responsibility for the plight of Palestinian refugees is both a factual dispute and a normative one. For an attempt to present both the Israeli and the Palestinian points of view and to provide a sketch of an acceptable solution, see Concept Paper: The Palestinian Refugee Problem and the Rights of Return **Middle East Policy** vol. 6 p. 167 (1999).

"Acknowledgement of the right of return is seen as an acceptance in principle of the fact that the Palestinians are a people with national rights... and that a wrong was done to them as a people in preventing them from doing so. On the other hand, rejection of the right of return is seen as a denial of the Palestinian's peoplehood and rooted-ness in their homeland, and thus of the injustice they have suffered."¹⁵

There are at least two serious difficulties in this view. First, it seems that the remedies provided for the violation of a right typically promote the interests of a victim independently of its expressive value. The expressive value of a remedy may be of great importance to the victim; but the expressive value depends upon the prior judgment that the remedy is beneficial independently of its expressive value. Second, there is nothing that suggests that the right of return is the only or the most appropriate way of expressing regret or of conveying the recognition that a wrong was indeed committed.

If one committed a wrong, one ought to publicly express regret and sometimes even be willing to be punished or impose voluntary costs upon oneself in order to convey publicly the seriousness of one's remorse and the sincerity of one's conviction that a wrong was committed. Both the expression of regret and one's willingness to impose costs upon oneself may be of great value to the victim. Yet recognizing the right of return is not tantamount to an apology or a public confession or even punishment of the perpetrators of the wrong. It is perceived to be a **remedy** for violating the primary right, the right of Palestinians to leave peacefully on one's land or their right to be permitted to return to it after departure.

Remedy for committing a wrong promotes the interests of the victim in two ways. First, remedy typically grants the victim financial or other tangible benefits. Second by describing the benefit as a remedy or compensation one promotes the interest of the victim in public recognition that a wrong was committed, i.e., one links the benefit to the commission of a prior wrong. The value of a remedy is not therefore exclusively expressive. The expressive value is the byproduct of conferring a benefit that has independent value for the victim.

Take the following example. If I negligently harm a person, I am required to pay compensation to the victim of the wrong. Compensation consists of money which promotes the financial interests of the victim independently of the wrong committed. By

¹⁵ Khalidi supra note 2 at 31-32.

labeling this money ‘compensation’, one typically acknowledges publicly that the money is linked to the commission of a prior wrong. This acknowledgment promotes a second interest of the victim, namely the interest in public recognition that her right was violated and that a wrong was committed. But the fact that compensation promotes this second interest depends on demonstrating that the provision of the remedy promotes the first interest, namely an interest that is independent of the public recognition of the wrong. The provision of money to charity or to another person who is equally needy but is not the victim of the wrong cannot, in the typical case, constitute a remedy. It seems therefore that the right of return can indeed promote the victim’s interest in public recognition that a wrong was indeed committed only if the victims of the wrong – Palestinians -- have an independent interest in having a right of return.

Some advocates of the right of return believe it is only by affirming the Palestinian right of return (or even by affirming that Palestinians ought to be permitted to return on the basis of this right, namely that this right is not overridden by conflicting interests) that a person recognizes that a wrong was committed.¹⁶ This claim is based on a serious confusion since: "As all lawyers know, not all wrongs can be remedied by reinstating the status quo ante. Third party expectations and other considerations merit respect."¹⁷ Israelis who advocate the provision of compensation typically ground their conviction in their belief that wrongs were indeed committed, but that the appropriate remedy for these wrongs is the provision of compensation. They may be wrong in believing that compensation rather than restitution of land is the most appropriate remedy, but this is not because their opposition to the right of return implies that they do not recognize the existence or the seriousness of the wrong. By denying that a person whose hand I intentionally broke is entitled that my hand be chopped off and transplanted, one does not imply that I committed no wrong in breaking the hand.

2. The Monetary Interest

¹⁶ See Khalidi note 2 at 31-32.

¹⁷ See, Benvenisti, *supra* note 4 at 8.

Many Palestinians have lost much or all of their property during the departure/expulsion. Moreover, departure/expulsion was sometimes accompanied by additional costs and losses for instance the losses of potential income.

Calculating the monetary value of the loss is a complicated enterprise for both normative as well as econometric reasons.¹⁸ Yet, for the purposes of this paper, one need not investigate the issue since the interest Palestinians have in the monetary value of their property and other damages related to departure/expulsion can be satisfied without facilitating return.

3. The Interest in Restoring One's Physical Environment

Home, as some advocates of the right of return are quick to point out, is not merely of monetary value.¹⁹ One of the primary losses of Palestinians in 1948 war was the loss of their proximate physical environment: homes, fields, trees, wells and the landscape. In the moving descriptions written by Palestinians one often finds expressions of the intense feeling of loss attributable to the forcible departure from their physical environment. In his poem "Diaries of a Palestinian Wound", Mahmoud Darwish writes:

We shall remain wakeful, we remember!
Al-Carmel lives in us, like a wonder:
On our eyelids lives Galilee grass,
And the waters of our river do pass
Through the texture of our native soil;
We write no poetry, but we do toil:
Twenty years before the June disaster,
We lived in fetters, dear beloved sister!
Those sad shadows that are darkling
Upon your eyes, to eliminate sparkling
Happiness, are but our long, dark night

¹⁸ Some Palestinian researchers made attempts to calculate these losses. For a useful discussion and references, see Terry Rempel: Workshop on Compensation and Palestinian Refugees 113 **Journal of Palestinian Studies** (1999).

¹⁹ In the Oath of Return, published on 6 March, 2001, thousands of Palestinians have vowed that they will never accept compensation as a substitute to the right of return. See Al Mjad issue 9, March 2001 p. 8 (<http://216.239.59.104/search?q=cache:bFIK34J7K0J:www.badil.org/Publications/Majdal/2001/majdal9.pdf>)

. Samah Jabr gives voice to this sentiment by pointing out that in the Palestinian society money for stolen land is considered "bakshish," a dishonorable bribe. See <http://www.palestinereport.org/sect/refs/samah.html>

Against which we continued to fight.
When you sang, dear skylark,

The sense of lost physical environment is equally intense in the stories describing Palestinians visiting their lost homes. In his story "The Return to Haifa", Rasan Kanafani describes a meeting between the Palestinian refugees (Said and Safia) who visit their home after twenty years of absence and meet an old Jewish woman who lives in their home. The old woman looks at them "and then said slowly: 'you are the owners of this home, and I know it.' How do you know? Said and Safia ask together. The old woman continues to smile and said: From everything. From the pictures, from the way you stood in front of the gate. The truth is that ...many people have come and started looking at their homes and enter, and every day I said that you probably will come." Kanafani describes how the Palestinian couple watch carefully the living room and detect objects they remember from their past: At one point Kanafani describes the emotional upheaval of the man who after twenty years of absence suddenly gazes at "five peacock's feathers that are rooted in a wooden vase in the middle of the room, and he sees them moving in their unbelievably rare wonderful colors in the wind blowing from the open window. Suddenly, he asks rudely pointing at the vase 'there were seven feathers. What happened to the two missing ones?'"²⁰ Nobody can remain indifferent to these descriptions that by now have been translated to Hebrew and owe part of the popularity in Israel to the experiences of European Jews who visit their shattered homes in Europe.

The intense interest people have in being in contact with physical objects is recognized by legal systems and provides the basis for legal doctrine. A less dramatic case than the one discussed here is the case of contractual obligations to sell rare or unique objects. The standard remedy for a breach of contract is of course money damages. Specific performance in contract law is considered an exceptional remedy. In the terminology favored by the law and economics movement one phrases this difference by asserting that the Anglo-American law of contracts protects most contractual rights with a "liability rule", i.e., by compensating the victim of breach rather than by a "property rule", i.e., by enforcing the contractual obligation. Yet there is an important

²⁰ See Rasan Kanafani, *The Return to Haifa in The Other Rooms: Three Palestinians Novellas* ed. Ami Elad-Bouskila 93, 107 (2001).

exceptional category of cases in which the remedy for breach of contract is specific performance. Kronmann describes this exception as follows:

"If the 'subject matter of a contract is unique in character and cannot be duplicated' or if obtaining 'a substantial equivalent involves difficulty, delay, and inconvenience,' a court will be more apt to compel specific performance.' The fact that such a duplicate or equivalent cannot be so obtained does not necessarily show that money damages are not an adequate remedy, but is a fact that tends strongly in that direction.' Conversely, if the subject matter of a contract is such that 'its substantial equivalent for all practical purposes is readily obtainable from others than the defendant in exchange for a money payment, this fact will usually in the absence of other factors be sufficient to show that money damages are an adequate remedy for breach.'"²¹

The intuition underlying this exception is straightforward. Contract law is designed to compensate the victim of a breach of contract for her loss. In cases in which the subject matter of a contract is unique this cannot simply be done by monetary compensation. It is the object that one contracted for that one cares about, not its monetary value. The loss of one's home is typically a much greater loss than the loss of unique objects for which one contracted, but it is not the size of loss that counts. It is rather the fact that it belongs to the category of losses of unique or uncharacteristic objects – one for which monetary compensation is simply inappropriate. It is inappropriate not because of the difficulty in evaluating the size of the loss but because of the incommensurability of the loss and the inappropriateness of substituting return with monetary remedies.

The claim is subject to two difficulties. First memories of one's immediate physical environment (and arguably the interest one has in restoring it) fade with the passing of time. Second, the physical environment itself is being transformed with the passing of time. Memories of one's physical environment on the one hand and the physical environment on the other hand come apart. Hence it is not clear that the interest underlying the right can be satisfied by return.²² Let me investigate each one of these considerations.

Memories of one's physical environment become less and less concrete as time goes by. This is particularly true for the ancestors of the refugees whose “memories” of

²¹ Anthony Kronman, *Specific Performance* 45 *University of Chicago L. Rev.* 351 (1978).

²² For a discussion of the question whether the interests in restitution of land can be sustained after long departure, see Tamar Meisels, *Can Corrective Justice Ground Claims to Territory* 11 *Journal of Political Philosophy* 65, 80-81 (2003).

“their homes” are based on stories and legends told by their parents or other relatives. Note that the willingness to "return" to one's imagined physical environment can be as intense as the willingness to return to one's actual environment. The longing to restore imaginary realities based on stories and myths can be as intense as the longing to restore actual realities grounded in one's life experiences. The question is ultimately a normative question whether "memories" based on myths and stories are normatively compelling. Does the tangible concreteness of the memories and longings of one's actual physical environment from which she recently departed provide her with reasons to return similar in nature (even if weaker in strength) to the reasons provided by the intense longing to return to a place one has never been in, or has only a dim memory of.

Jeremy Waldron supports the view that memories of one's recent past provide better justification for return than the faded memories of one's childhood:

"If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible. For I must have developed some structure of subsistence. And that will be where my efforts have gone and where my planning and my practical thinking have been focused. I may of course yearn for the lost resource and spend a lot of time around the campaign for its restoration. But that is not the same thing as the basis of the original claim. The original entitlement is based on the idea that I have organized my life around the use of this object, not that I have organized my life around the specific project of hanging on to it or getting it back."²³

Andrei Marmor is not persuaded:

"So I think that Waldron is right to maintain that merely yearning for a lost property, by itself, does not necessarily warrant the endurance of the entitlement to possess it. The conclusion is quite different, however, if the yearning is not just a sentimental matter, but something which is closely related to the person's individual or communal sense of identity. Now consider the Palestinian refugees, living in miserable refugee camps, being reduced to this degraded status by the very loss of their homes in Palestine. Could we think of any clearer case where the yearning for the lost property is important for the sense of identity of the dispossessed?"²⁴

²³ Waldron, *supra* note 1 at 18-19. Waldron repeats and elaborates this argument also in his *Settlement, Return and the Supersession Thesis* (unpublished manuscript) pp. 33-36

²⁴ Andrei Marmor *Entitlement to Land and the Right of Return: An Embarrassing Challenge for Liberal Zionism* 19 (unpublished manuscript).

Marmor's argument contains a fallacy that strengthens rather than weakens the case for the right of return. It is misguided to differentiate as Marmor does between the privileged yearnings of an eminent Palestinian intellectual such as Edward Said to return to the palm tree of his childhood in the lucrative neighborhood of Talbieh²⁵ and the yearnings of a impoverished refugee to return to his village. While addressing the economic needs of the refugee is more urgent, her shattered sense of identity is not necessarily different than that of Edward Said.²⁶

The real question is whether Marmor-type concerns, namely the interest in return generated by the yearnings (of both privileged as well as impoverished Palestinians) to property which they have not possessed for a very long time (and in most cases property possessed by their parents)²⁷ provides reasons similar in nature to those of Waldron-type concerns, namely the interest of a person who currently possess the property or possessed it recently in being able "to alter it use it and make it in effect part of their life."²⁸

²⁵ See Edward Said, *supra* note 2 at 34.

²⁶ The rest of the analysis of Marmor suffers from a similar weakness. Although Marmor relies on an autonomy-based argument he conflates it with economic and humanitarian considerations. Thus, for instance, in the context of developing his autonomy-based argument, Marmor says: "If I am expelled from my home, and reduced to a status of refugee, with very limited opportunities to escape such a predicament, the case for the endurance of my entitlement becomes much stronger." See Marmor, *supra* note 24 at 19. This claim is misleading in an important way. If one is reduced to a status of refugee the case for facilitating his integration into the civil society is strong but this ought not be equated with the case for granting him back his lost property. While the autonomy-based argument purports at least to justify return, the humanitarian considerations raised by Marmor suggest only that Palestinian refugees need to be provided with economic and civic opportunities, but do not indicate where or how these opportunities ought to be realized. Tamar Meisels provides perhaps an explanation for the differential treatment of impoverished refugees and those who are not impoverished. She argues that: "In many cases, while a group loses control over a territory, its members continue to reside within it or near it. They are unable to rebuild their lives around a different territorial asset, since they have nowhere else to go, and thus the lost asset, with which they are still in physical contact, continues to play a pivotal role in their lives. This is the group members who live in refugee camps" See Meisels *supra* note 22 at 84. The poverty, under this view, can at most serve as a proxy for the importance of the lost territory for one's identity.

The typical solution practiced in Europe in cases of ethnic cleansing is resettling the refugees in new states rather than facilitating return. See Benvenisti, *supra* note 4 at 6-7; Yoav Gelber, *The Historical Background and the Right of Return in Joseph Ginat and Edward J Perkins, The Palestinian Refugees: Old Problems – New Solutions* 17, 30-32 (2001).

²⁷ Marmor limits his analysis explicitly to first and second-generation refugees. See Marmor, *supra* note 24 at 14. This is a concession that most advocates of the right of return would reject. I ignore it here because my argument addresses both the case of first generation refugees and similar arguments that may apply to their descendants.

²⁸ See Waldron, *supra* note 1 at 18. In a conversation, Marmor defends the position that the two types of interests ought to be protected in a similar manner. In his view, the fact that squatters have forced me out of my apartment and as a result of being left out for a long time I have forgotten the colors of the walls of my apartment or the texture of my carpets does not imply that my right over my apartment has been weakened

Waldron's analysis seems to equivocate between two possible options. Under the first option it is the proximity in time to the time in which the object formed part of one's life that ultimately determines whether the object is necessary for maintaining one's sense of identity. Under the second option it is the actual success in leading an alternative life or in having an alternative "structure of subsistence" – one that does not depend upon the lost object -- that indicates whether the lost object is indeed essential for one's sense of identity. Marmor seems to accept the fundamental observation made by Waldron that one ought to distinguish between the mere yearning for a lost object and a yearning that is "is closely related to the person individual or communal sense of identity", but he regards the poverty and the lack of an alternative life as a better indication for the importance played by the lost object to one's sense of identity.

Without providing a definite answer to these questions, I wish to make three unrelated observations with respect to these two interests. First, the very choice of whether to classify the yearning of a person to acquire their lost property as a whim or as "a sentimental matter" or to label it as a valuable commitment constitutive of their identity depends partly on one's sense of whether granting possession, under the circumstances, is just or not. Some people believe that in prior life, they lived in a different country or belonged to a different nation. Often these people yearn to return to their home or join the nation to which they believe they belong. Assume that I yearn to live in India because I believe that in prior life I was Indian and I believe firmly that my having being Indian in past life defines my identity. My yearning to immigrate to India is more likely to be classified by Marmor as merely "a sentimental matter" or perhaps may be classified as a psychiatric aberration while Edward Said's yearning to return to his home in the neighborhood of Talbieh is more likely to be described as yearning that is "closely related to...[Said's] individual or communal sense of identity." My yearning to

or that the squatters have a right to possess it. My senility is not a reason to deprive me of my property rights precisely as my neighbor's sharp memory is not a reason to grant his rights extra-protection.

This objection only demonstrates that rights operate on the basis of broad generalizations. A person does not acquire or lose a right on the basis of her weaker or sharper memory but in designing rights, concerns founded on the temporal proximity of the memories may be relevant. A person who believes that the more remote the yearning is from real-life experiences the less it forms part of one's life and consequently the less it deserves consideration ought not rely on the particularities of the individual. She could instead justify the differential treatment of Waldron-type interests and Marmor-type interests on the differential reasonableness of the emotional attachment in these two cases.

live in New Delhi may deserve sympathy, but it does not justify imposing a duty upon the Indian government to grant me a legal right to immigrate to India. Similarly the sincere and the deeply held conviction of the “Hebrew Blacks” that they are the true Israelites and therefore ought to be settle in Israel would probably be rejected on the grounds that their conviction is merely “a sentimental matter.” But this latter conviction classifying their yearning as merely a sentimental matter seems to rest upon the moral judgment that they do not have a right to settle in Israel. More generally, it seems to me that our tests for determining what constitutes one’s sense of identity are too dependent upon our moral judgments concerning the justifiability of one’s demands. If one accepts this conclusion, it implies that Marmor’s argument is circular. First one has to establish that her yearning deserves some normative force and only later partly on the basis of this judgment one can infer that the yearning is constitutive of one’ sense of identity.

Second, in contrast to Waldron-type interests, Marmor-type interests are, at least in the context of the Israeli-Palestinian conflict, a double-edged sword. Palestinians may find it particularly difficult to concede the force of these interests because they are ones that have been used to justify also the return of Jews to the very same piece of land. The more the yearning to the lost property is detached from actual experiences of life in Palestine, the more it resembles the Jewish yearning to return to Zion and the easier it is to justify the Jewish right of return to Israel. There may be differences in the circumstances that may perhaps justify the claim that the Jewish interests are less weighty or significant, but many Palestinians want to differentiate sharply between the Palestinian interests in return to Palestine and the Jewish claim to have such an interest. Marmor-type arguments blur this distinction in a way that constitutes a major concession on the part of Palestinians – one that most Palestinians would be reluctant to make.²⁹

Third and most importantly, while Marmor-type interests are important there is a fundamental difference that distinguishes them from Waldron-type interests. Waldron-

²⁹ Marmor could address this claim in three ways. First, he could bite the bullet (or perhaps deny it is a bullet) and concede that both Jews and Palestinians have an interest in return and turn to investigate whether these interests can be reconciled or whether one of them overrides the other. Second he could classify the Jewish yearning as a “whim” or as an “obsession” while classifying the Palestinian yearning as one that is “closely related to the Palestinian sense of identity.” Third he could argue that it is only the conjunction of the injustice done to Palestinians with the interest they have in gaining their sense of identity that give rise to a right of return. Each one of these arguments deserves a careful treatment and is bound to depend upon a thorough investigation of the particularities of the Jewish and Palestinian history.

type interests in property are rigid interests. My interest in possessing an item that has formed part of my life is an interest that typically can be satisfied only by possessing that particular item or an item that is almost identical with it. On the other hand, my interest in realizing my yearning to return to property that I have never possessed (but, for instance, was possessed by my grandparents) is typically an interest that can be satisfied by possessing property that is similar but not identical to the one possessed by them.³⁰

The reason for this difference seems to rest on human nature. When a physical object forms part of one's daily life, one typically develops greater sensitivities to the object; it is therefore that object and that object only that can serve the needs of that person. In contrast, when an object is removed from one's actual experiences and it is only the remote memory of the object, or merely stories concerning the object, that provide the basis for the interest in acquiring it, it is typically easier to satisfy the interest by providing a substitute. The proximity of Waldron-type interests to actual experiences dictates a greater degree of rigidity in the remedies. At the same time, the detachment from the tangible concreteness of physical objects one yearns to in the context of Marmor-type interests typically facilitates a degree of flexibility with respect to the remedies. Recent Zionist history demonstrates this claim. Much of the Zionist settlement in Israel took place in areas that have never been controlled by Jews. Yet, for most Jewish Israelis, "return" to Ashkelon – a city that in ancient time has not been controlled by Jews is a sufficient substitute because of its relative proximity to the ancient kingdom of Judea.

Arguably Marmor could raise the following objection. While in general Marmor-type interests are flexible this is not always the case. Some evidence suggests that the Palestinian desire to return is rigid. Edward Said expressed his yearning to return to **his** home in **Talbieh** and not to some equally lucrative neighborhood in Ramallah³¹ and the refugees born in the camps often express a desire to return to a specific village – the village from which their parents departed or were expelled.

³⁰ For a similar claim in a different context, see Lyons, *supra* note 1 pp. 262-266. Lyons speaks not of remedies for violation of right but of property rights in general and he demonstrates their instability and their dependence upon the changing circumstances. Even Simmons who is sympathetic to historical rights demonstrates that historical rights are often not to the particular object lost. Historical rights can be to "particularized shares". See Simmons *supra* note 1 at 165-66.

³¹ See Said, *supra* note 2 at 34.

This evidence however is inconclusive for two reasons. First, it seems that even if the yearnings to return are to return to the same house or village, these yearnings are simply impossible to realize without committing grave injustices. Hence even in the more demanding versions of the right of return the right is subject to the concern not to deprive third parties of their rights.³² If the interest in return is rigid and cannot be reasonably satisfied other than by return to the same village or piece of land, this may imply that the interest perhaps cannot be satisfied in any way whatsoever (other than by committing grave injustices) and one has therefore to resort to a second best, namely to compensation. Second, as indicated earlier, not any desire of a person establishes an interest that this desire be satisfied. It is plausible that Palestinians have a desire to return to the same site from which they or their ancestors departed or expelled from but that their interests can be satisfied by facilitating return to places other than the ones from which their parents or grandparents departed or were expelled from. The remoteness of these memories provides in my view support for the claim that the interests are flexible and can be satisfied in various ways.

So far this section examined the gap between the 1948 environment and the actual life experiences of Palestinians residing outside of the 1948 boundaries and the difficulties this gap generates for the claim that return is conducive to their interest in restoring physical environment. The case for justifying return on the grounds that it is conducive to the restoration of the physical environment is even weaker if one takes into account the fact that the environment to which Palestinians would return, if given the opportunity to do so, is radically different from the environment they left in 1948. The five feathers that Said left behind in 1948 and which he found twenty years later in the novel by Kanafani are a rare exception rather than the rule. Returning to one's physical environment is not tantamount to returning to a specific geographical coordinate; it is a

³² This principle was accepted by some Palestinian leaders as well as by Palestinian intellectuals. See, e.g., Yasir Arafat, *The Palestinian Vision of Peace* in *New York Times*, 3 February, 2001; Said, *supra* note 2 at 47-48. Human rights organizations which support the right of return also emphasize this principle. Section 8 of the Amnesty International policy statement, *supra* note asserts that "The rights of innocent third parties who may be living in the homes on the lands of the exiles, should also be taken into account." Section 18 reiterates more clearly this principle and states that: "Where possible, Palestinians should be able to return to their original home or lands. If this is not possible-because they no longer exist, have been converted to other uses or because of a valid competing claim – they should be allowed to return to the vicinity of their original home." For a good discussion of the constraints imposed by the interests of third parties, see Chaim Gans, *The Palestinian Right of Return and the Justification of Zionism* at 7.

return to the sights, smells and colors of one's home. Ironically, the failure to acknowledge the enormity of the transformation of the physical environment can be understood as a failure to comprehend the enormity of the wrong that Israel has committed by erasing the history in a way that precludes the possibility of restoring it or even documenting it.³³

Let me finally qualify my skepticism and specify the rare circumstances under which return can indeed be conducive to the interest Palestinians have in restoring their physical environment. First it is not inconceivable that there are some cases of elderly Palestinians who have real memories of physical environments that are still in existence. Second, although the interest in restoring one's physical environment typically does not give rise to a Palestinian right of return; it may give rise to other rights. Palestinians' memories and longings may give rise to a right that their past be documented, that the names of their villages be reused, and that their history be respected.³⁴ Hopefully a person who reads this article in ten years would be surprised to learn that at the time of writing this paper in 2003, no single museum devoted exclusively to the documenting Palestinian history exists in Israel.

4. The Interest in Restoring One's Social Environment

The Palestinian exile has not only forced Palestinians out of their physical environment; it also uprooted them from the community and shattered their fundamental social structures. Perhaps, it could be argued, the interest in return is an interest in restoring one's social environment – the network of friends and relatives who provided one with a sense of social identity.

³³ Some people may argue that by recognizing that the duration of time weakens one's rights, one provides incentives for invaders either to commit ethnic cleansing or to prevent the return of victims of ethnic cleansing to their lands. This paper is devoted exclusively to the examination of the interests at stake. It is possible that in the design of legal institutions these incentives should be taken into account. Yet predicting the effects of incentives is very difficult and speculative enterprise. Arguably, if the duration of time does not affect rights, it provides greater incentives for invaders to commit genocide rather than ethnic cleansing because it is only genocide that can guarantee the rights of their descendants. More importantly however since the judgment concerning the interest in return has important normative ramifications concerning the rights of others, the mere fear of the potential harmful consequences cannot justify the violation of these rights. For a discussion of the irrelevance of deterrence-based arguments, see also Jeremy Waldron, *Settlement, Return, and the Supersession Thesis* (an unpublished manuscript) 16-24.

³⁴ For the importance of the memory of injustice, see Waldron *supra* note 1 at 5-7.

I believe that the arguments provided in the last sub-section with respect to one's physical environment are also relevant here. The memory of the social structures has been distorted and it often represents an idealization of the past. Even when the memories are real ones, it is difficult to see how return can restore the lost social structures. Of all categories of interests that may give rise to a right of return this seems to be the least plausible for at least two reasons. First, restoring one's social environment does not depend on return. It is more likely to be realized successfully in an independent Palestinian state. Second, and equally importantly, the lost social structures seem to be lost forever. No return can restore them.

5. The Interest in Restoring One's Civic and Political Identity

The Palestinians expelled from their homeland lost not merely their property, their immediate physical environment, their social environment but also their status as civic-political political agents.

The claim that Palestinians had civic/political presence in mandatory Palestine is controversial.³⁵ The controversy is not factual but interpretative. This section rests on the following understanding of the civic and political status of Palestinians. In mandatory Palestine, Palestinians were major political agents: their culture and religion were present in the public sphere and they had some representation in the decision-making process. Moreover, the presence of Palestinians in Mandatory Palestine was such a meaningful presence that they reasonably expected to have an opportunity to establish an even more significant civic/political presence in the future. At the same time, in mandatory Palestine, Palestinians did not have full-fledged independence and British officials were ultimately in charge of making political decisions. By claiming that Palestinians had a significant civic/political presence, I suggest that despite the British control of Palestine, Palestinians had major impact on politics in mandatory Palestine; that they had significant civic/political presence in the lives of the society and moreover that they had reasonable expectations to strengthen their civic/political presence.

³⁵ I am grateful for the forceful criticisms of Tamar Meisels suggesting that Palestinians have never had significant civic/political presence in mandatory Palestine.

The departure/expulsion from Palestine changed radically their status. Khalidi aptly describes the fate of Palestinians in 1948 as “politicide.”³⁶ With the exception of Palestinians residing in Jordan, Palestinians have never regained power as political agents. Palestinians who reside in Lebanon Syria or Egypt are not citizens at all. The political impact of Palestinians who reside in western countries is small and insignificant. Ironically in Israel Palestinians enjoy some political rights and have significant representation in the political sphere. Yet their status as full-fledged citizens is compromised by the self-declared characterization of Israel as a Jewish state and by persistent official and unofficial discrimination. Some political theorists have described the peculiar status of Israeli Palestinians by arguing that there are two forms of citizenship in Israel: republican for Jews and liberal for Arabs. Arabs enjoy civil and political rights but are barred from "attending to the common good."³⁷

The interest in restoring Palestinian civic and political identity ought to be distinguished from two other interests. First it ought to be distinguished from the interest Palestinians have in becoming equal full-fledged citizens in the countries in which they reside. Palestinians acquired citizenship in Western Europe, Australia or North America are presumably full-fledged citizens in these countries. Palestinians residing in Lebanon, Syria or Egypt ought to be able to become citizens if they so wish and Israeli Palestinians ought to become full-fledged citizens. Yet the interest I am speaking of is a more demanding interest. It is not merely the interest a person has in being a citizen in a well-ordered society with equal rights and duties but an interest in shaping the public and political sphere in ways that are expressive of Palestinian culture and tradition. This interest is not satisfied in countries in which Palestinians form only a marginal minority (such as western countries) or in states which are officially "nation states" when the relevant nation is not Palestinian (such as Israel).

The interest in restoring civic-political status is therefore more demanding than the interest in being a citizen with equal rights and duties. It is however less demanding than the interest Palestinians may have in national self-determination. The interest of Palestinians in self-determination may give rise to a right to establish their own nation-

³⁶ See Khalidi, *supra* note 2 at 30.

³⁷ See Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, **American Political Science Rev.** vol. 86 at 432 (1992).

state. But restoring the civic-political status does not require the establishment of a nation-state. It can be satisfied within the frame of a bi-national state.

The interest in restoring civic-political identity can be described as an interest which is an amalgam of the interest in being equal citizens in a non-Palestinian state and the interest Palestinians may have in national self determination. It is the interest that Palestinians have not merely to participate in politics as equal citizens but to be able to shape the political sphere in a way that is expressive of their culture. This interest can be satisfied either by establishing a Palestinian state or by establishing a bi-national state – a state in which Jews and Palestinians are equal partners. Return of Palestinians is therefore conducive to such an interest. If Palestinians return they can become a meaningful minority or perhaps a majority in a new bi-national state and thereby restore the lost civic-political status they had. Their citizenship in such a state would be meaningful and valuable in a different way than their citizenship in Europe. Yet while return to Israel is conducive to such an interest, it is not the only or even the most effective way in which this interest can be satisfied. Establishing a Palestinian state (in which Palestinians will be the overwhelming majority) is equally if not more conducive to the realization of this interest.

6. Palestine as a "Formative Territory"

In his discussion of historical rights Gans describes the importance of formative Territories as follows:

"For peoples and national conscious individuals, the interest in not being severed from their formative territories touches on emotions that are inextricably intertwined with their conception of their identities... These are interests tied to some of the deepest layers of identity, both in their origin (the perception of selfhood) and in the consequences which result from the deprivation of these needs (feelings of alienation and longing)."³⁸

Gans suggests a useful analogy between the relation to formative territories and the relations among members of a family:

"The interest in formative territories which the parental ties analogy represents is the desire to be in close physical proximity to one's loved ones, that is, not to be separated

³⁸ See Gans, *supra* note 8 at 116. Gans' analysis is one recent example of a more general argument made by theorists of nationalism. For a short discussion and references, see Meisels, *supra* note at 83.

from them or to spend one's life in a state of pinning." The existence of such interests is therefore "clear and self-evident requiring no proof."³⁹

Gans does not regard formative territories as sufficient to establish a right to political sovereignty over a particular territory. Instead he believes that identifying a territory as a formative territory for a group which has a right to political sovereignty plays an important role in determining the location of territorial sovereignty. First people have to establish that they have a right to territorial sovereignty. Once this right was established, the particular location of sovereignty ought sometimes to be determined by the cultural ties to a particular territory.⁴⁰ Moreover, Gans believes that the interest of a group in a "formative territory" justifies not merely perpetuating an existing state of affairs, namely facilitating the future presence of those who currently reside in their formative territory but also in restoring the *status quo ante*, namely facilitating under certain conditions return of people who reside outside the boundaries of their formative territory.⁴¹ Using Gans' framework to justify the Palestinian right of return requires first to establish that they have a right to territorial sovereignty and then to investigate whether Palestine is a "formative territory" for Palestinians and last (if the answer is affirmative) to examine the normative implications of this judgment. I shall assume that Palestinians have a right to political sovereignty and focus therefore on the latter questions.

In support of the claim that Palestine is a formative territory for Palestinians one can provide ample evidence: literary, historical and cultural. Admittedly the boundaries between the interests Palestinians have in residing in a "formative territory" cannot always be sharply distinguished from the interests they have in restoring the physical environment or their social environment. The longing to restore one's physical and social environment can often be expressed in terms that are similar to the longing to return to one's formative territory. Thus, the literary, historical and cultural expressions of longings are often ambiguous. Despite the risk in mischaracterizing the nature of the Palestinian longing to return, there is sufficient evidence substantiating the claim that Palestine is indeed a formative territory for Palestinians. In his poem "we shall return" Issa Lubani writes:

³⁹ See Gans, *supra* note 8 at 110.

⁴⁰ See Gans *supra* note 8 at 103.

⁴¹ See Gans *supra* note 8 at 118.

My beloved, I am hungry for thine eyes:
My tongue is tied; stifled are the cries
On my lips. Yet deep is my yearning,
And, through bitter experience, I am learning
That he who departs must one day return.
Longing eats into my ribs, and doth burn:
It transcends boundaries. In its grip
We are caught, you and I, in a long trip.
The leaves, the fruits, the trees and letters
Shall prosper and glow, despite the fetters.
Our pain, our wounds, our misery, our agony
Teach us to defy humiliation, ignominy.
Despite the odds of fate, we ever stand
Steadfast, and shall regain our homeland.⁴²

It seems to me evident that the role that the longings to Palestine play in Palestinian culture is central and the very existence of a distinctive Palestinian identity as opposed to other Arabic identities is founded on the distinctive role of Palestine as a formative territory. It is ultimately the territory of Palestine and the longings towards it that differentiates Palestinians from Egyptians, Syrians, Lebanese and other Arabic nations.

Once one establishes that Palestine is a formative territory for Palestinians, one ought to investigate what the ramifications of this recognition are. First, it would be difficult to deny that the territory of Israel/Palestine is not merely a formative territory for Palestinians but also for Jews. By founding their right of return to Palestine on the interest in "formative territories", the Palestinians put themselves on a par with Jews. This recognition does not necessarily commit Palestinians to the view that Jews also have a right of return. It is possible that the circumstances giving rise to this right are not satisfied in the Jewish case or that the Palestinian right of return override the Jewish right.

⁴² I rarely dare engage in literary interpretation but this seems to me an opportunity calling for it. The poem by Lubani is different in an important way from the poem by Darwish "The Diaries of a Palestinian Wound". Unlike Darwish's poem, the longings expressed in Lubani's poem are not longings to concrete or specific sites of one's childhood; instead it longings for sites one aspires to return to for the first time rather than longings for sites one aspires to return to after one departed. The images are abstract and are focused more on the longings and the pain caused by them than on describing the specific sites to which one desires to return. There are poems expressing longings for specific sites colors and smells that do not represent actual memories but are derivative of stories and myths. At the same time, the prevalence of longings of the latter type indicates that Palestine serves as a formative territory for Palestinians.

Moreover, as Gans indicated, even if one concedes the Jewish right of return, one is not committed to justifying the establishment of a Jewish state or Jewish sovereignty.⁴³ But this recognition forces Palestinians who oppose Zionism to concede that Palestinians and Jews have similar type of interests in return and if the Palestinian case is stronger than the Jewish one, it must be because of nuanced and contested differences between these two cases. Israel/Palestine is alas a formative territory for both Jews and Palestinians.

More importantly however unlike the interest in restoring one's physical environment, the interest in returning to one's homeland does not necessarily or even typically entitles one to return to any particular site in one's homeland. Gans points out that the "site of self-determination, even under its statist conception...does not necessarily imply that sovereignty applies to all of the historical territories."⁴⁴ The reason is that the interest in residing in formative territories is a typically a flexible interest that can be satisfied by living in various places that are sufficiently associated with formative territories. Naturally the formative interest of Jews in residing in the formative territory of Eretz Israel could not have been realized in Uganda. But, it seems that the interest could have been realized to a sufficient degree in Israel in the pre 1967 borders when the holy part of Jerusalem and other sites of great formative importance were under Jordanian rule. In fact, much of the area which forms the pre- 1967 Israel is not the territory which ancient Jews have occupied and yet it is sufficiently close and related geographically and spiritually to constitute "formative territory".

It is not denied of course that the interest in residing in formative territories can be realized to a greater or lesser degree and it is possible that an opportunity to reside in any site in Palestine is more conducive to this interest. Thus, it is possible that the interest in residing in formative territories could be better satisfied in a bi-national state or in a "secular and democratic state" replacing Israel rather than in a Palestinian state located in the West Bank and Gaza Strip. But acknowledging that that this interest can be satisfied in the frame of a two state solution weakens the case for justifying an unqualified right of return to any part of Palestine on the basis of the interest in return to one's formative territories.

⁴³ See Gans, *supra* note 8 at 119-120.

⁴⁴ See Gans, *supra* note 8 at 115-16.

7. The interest in Immigrating to the Most Appropriate Site

The discussion so far has been founded on the distinction between the interest in return and the interest in mere settling Palestine. Palestinians, it was argued earlier, do not merely wish to return; they wish to return for certain reasons and they want these reasons to be understood and acknowledged by Israel as well as by the international community. But perhaps I have been wrong. Perhaps Palestinian refugees wish to end their endless misery in refugee camps and Israel is simply the most appropriate place for it or the most appropriate agent to bear the costs of it. The interest underlying their demand is an interest in living in a state that provides them with economic opportunities and civil liberties. Satisfying these interests is costly and it is Israel is the most appropriate place to satisfy this interest because of at least two reasons. First, under this view, Israel is responsible and most likely culpable for their plight since Israel is the one that either expelled them or (at best) prevented unjustifiably their return in 1948. Second, Israel is the territory where they departed from. Admittedly, under this view, the interest would be equally satisfied by settling in Greece or even in a Palestinian state with stable economy and a liberal constitution. But why not Israel? Is not Israel simply the most appropriate site for Palestinian settlement?⁴⁵

The claim that Palestine is the most appropriate site seems compelling and yet it is subject to three major difficulties. First, as argued earlier, it does not represent correctly the Palestinian position. Palestinians care deeply about the place where they settle. They wish that their right of return be recognized rather than simply their right to settle in Israel because it happens to be a country with a relatively prosperous economy in the vicinity. The historical resistance of Palestinians to any attempt to facilitate permanent settlement in Arab states is a good evidence for the desire of Palestinians to realize a right of return rather than merely to settle in a country that would provide them economic opportunities and guarantee their liberties.⁴⁶

⁴⁵ Surprisingly this interest is rarely mentioned in the literature. For an exception, see Meisels, *supra* note 22 at 84.

⁴⁶ In his article, Khalidi describes the opposition of Palestinian leadership to any attempt to resettle the refugees. See Khalidi, *supra* note 2 at 30-31. Even the most sympathetic advocates of the right of return

Second, this claim is founded on the conviction that there are no compelling legitimate interests to prevent return of Palestinians to Israel. Jewish Israelis often point out that return would undermine the Jewish character of the state as well as undermine its economic and social fabric. But Palestinians who dispute the legitimacy of the Jewish state have argued that precisely as South Africa could not use the white character of the state as a justification for Apartheid, so Israel cannot use an argument based on its Jewish character to justify depriving Palestinians of their right of return.⁴⁷ Even those who concede that Zionist aspirations may be legitimate argue that given the urgency of Palestinian humanitarian concerns, the aspirations for a Jewish state should be set aside.⁴⁸ It has also been argued by Palestinians that Israel can sustain mass Palestinian immigration and that such immigration would not undermine the economic and social infrastructure.⁴⁹ This claim gains some support from the fact that Israel has absorbed huge number of immigrants from different cultures and while the success of this enterprise is controversial, the process has not led to economic or social disaster.⁵⁰

ought to have reservations concerning the resistance of the Palestinian leadership to consider this possibility at least with regard to the impoverished refugees in Arab states. So intense was this resistance that Palestinians resisted at first even UN resolution no. 194 partly because it provides the refugees an option to return or to receive compensation – compensation that was regarded as selling out. See Khalidi at 36. This is analogous to the accusation made against Zionist leaders who, in the view of some historians were oblivious to the humanitarian disasters characterizing the lives of Jews in Europe. The debate between Herzl and the Eastern European delegates concerning the possibility of immigration of Jewish refugees to Uganda after the brutal pogroms in Russia in 1903 is one example of the inattentiveness of Zionist leaders to the endless humanitarian disasters in Eastern Europe.

⁴⁷ See, e.g., W. Thomas Mallison; Sally V. Mallison *The Right of Return* *Journal of Palestinian Studies* vol. 9 125, 134 (Spring, 1980). The same point is made in the Statement by the Right of Return Defense Committees which asserts that: "We also confirm that the Right of Return is not conditional upon the demography of Israel nor subordinate to Israel's racist policies including Apartheid, as this would mean the legitimization of the ethnic cleansing against the Palestinians..."

(http://www.al-awda.org/old/ror_defense_committees.htm)

⁴⁸ Marmor, *supra* note 25 at 26.

⁴⁹ Among those who believe that return is feasible is the influential activist researcher Dr. Salman Abu Sitta. See Salman Abu Sitta, *The End of the Israeli-Palestinian Conflict: From Refugees to Citizens at Home* (2001). Abu-Sitta envisages a seven-stage process in which most Palestinians would return to Palestine. For a brief accessible description of his proposal, see his debate with Michael Lerner <http://www.vancouver.indymedia.org/news/2003/04/43021.php>(

Regrettably, however, Abu-Sitta is reputed to be unreliable. A revealing amusing example demonstrating his lack of familiarity with the facts is his recent assertion that the majority of Israeli Jews hold foreign passports. <http://www.caabu.org/press/articles/tarbush-abu-sitta.html>

⁵⁰ See Uri Avnery, *The Right of Return II*

(<http://www.tikkun.org/magazine/index.cfm/action/tikkun/issue/tik0103/article/010313c.html>)

The justifiability of Zionist aspirations for a Jewish state as well as the economic and social feasibility of return are concerns that will not be discussed in the frame of this paper.⁵¹ Yet, the trivialization of the interests of Israelis is unjustified even if one rejects the legitimacy of a Jewish state and establishes the economic and social feasibility of return. Massive immigration of Palestinians to Israel would change radically the social conventions, the political culture and the traditions sustaining Israeli society. The new society emerging after such a transformation could perhaps be a better society as Edward Said believes.⁵² But in the absence of very compelling reasons one could maintain that the ultimate decision to conduct such a demographic experiment which would no doubt have immense social and cultural effects cannot be said not to affect dramatically legitimate interests of those who currently reside in Israel.

Assume that both of my claims are false. Palestinians do not wish to return but merely to settle in a land that provides them with economic opportunities and civil liberties and there are no compelling reasons against facilitating return to Israel. Israel is responsible for the plight of Palestinians and therefore ought to bear the costs of their settlement.

These observations are insufficient to establish a right of return. If Palestinians have no interest in having a right of return but merely an interest in having a right to settle to a country that provides them with economic opportunities and civil liberties and Israel is responsible for their plight, it seems just to impose the costs of their integration on Israel. But these costs can be borne in many ways including for instance by compensating Palestinians for their losses or by persuading other states to facilitate

⁵¹ The former concern is a matter of fierce ideological dispute. Many believe that the idea of a Jewish state is racist and unacceptable. Yet some Palestinian leaders accepted its legitimacy. See Arafat supra note 34. The issue is of course part of a broader issue of nation-states with ethnic minorities or nation states that have special affiliation with minorities living outside their borders. For a thorough discussion of these issues see Amnon Rubinstein, Alex Yakobson, *Israel and the Family of Nations: Jewish Nation-State and Human Rights* (2003). One ought to remember however that the legitimacy of having a Jewish state and the legitimacy of the “demographic concerns” have only an indirect influence on the question of the Palestinian right of return. If these concerns are illegitimate, this only implies that Israel cannot use the demographic concern or more generally its identity as a Jewish state as a justification for rejecting **an otherwise justified demand** to have a right of return. Establishing that having a Jewish state is illegitimate is not sufficient therefore to justify a right of return.

⁵² In an interview Said said: “Why do you think I’ m so interested in the bi-national state? Because I want a rich fabric of some sort, which no one can fully comprehend, and no one can fully own. I never understood the idea of this is my place, and you are out. I do not appreciate going back to the origin, to the pure... I do not believe in all that. I would not want it for myself.” See Said, supra note 2 at 52. This sentiment, Said argued, makes him “the last Jewish intellectual.”

Palestinian immigration. Under these assumptions, it seems unintelligible to insist that they be allowed to return since, under this hypothesis, return does not promote their interests. Thus, unless it can be shown that the Palestinian interest in being provided with economic opportunities and civil liberties cannot be satisfied in any way but by granting them a right of return, these considerations cannot establish a right to return. The question whether it is only return that can facilitate the provision of economic opportunities and civil liberties is an issue that I leave for economists sociologists and political scientists.

d. The Interest in Return: A Summary

The force of the interest of Palestinians in return can be best be evaluated by a thought experiment. Assume that Palestinians established a prosperous society and regained their independence elsewhere. Would return still promote their interests? The discussion established that, under this scenario, Palestinians might have two legitimate interests in return. First, some Palestinians -- first generation refugees -- would have an interest to reside in the physical environment of their childhood. Second, Palestinians would have an interest in residing in a territory that is formative of their identity. This latter interest could to some extent be satisfied if a Palestinian state were to be established in the West Bank and Gaza strip. But it could be satisfied to a larger degree in a bi-national state because in such a state Palestinians could reside in any place they wish. Ironically, however, this latter interest is one that is shared by both Jews and Palestinians and it may even ground an equivalent Jewish right of return.⁵³

⁵³ There is some (admittedly inconclusive) evidence suggesting that the advocates of the right of return are also skeptical with respect to the interests served by the right. What is puzzling with respect to the Palestinian right of return is that its advocates often argue that the rightholders (Palestinians) are unlikely to exercise it. The claim that Palestinians are unlikely to exercise their right of return once they have it is supported by the recent controversial report of Dr. Khalil Shikaki, Results of PSR Refugees' in the West Bank/Gaza Strip, Jordan and Lebanon on Refugees' Preferences and Behavior in a Palestinian-Israeli Permanent Refugee Agreement (January-June 2003). The report suggests that while Palestinians wish to have a right of return, only a minority would exercise it if given the opportunity to do so. At the same time, one has to acknowledge that there are immense difficulties in predicting the future decisions of Palestinians on the basis of surveys of this type. For an interesting discussion see: Sari Hanafi, Return: Sacred Cow or Dialogue? Palestine Report vol 8 no. 24 November 21, 2001. Hanafi describes his visit to his family and the refusal of his father to see photos from Haifa because "in his words, it was not 'his Haifa.' Haifa was now an Israeli city, he declared, and was adamant that he could not return as long as it remained under Israeli sovereignty. The very next day, however, a Swiss journalist...asked him if he would return to Haifa

I started this paper by stating that liberating oneself from the passions of politics by engaging in academic discourse is thrilling. But it has own costs. One is not guaranteed that the responses that one wished for would come true. And indeed the conclusions of this investigation would be disappointing for both sides. There are indeed interests that may give rise to a Palestinian right of return, but at least some of those interests are ones that may give rise to a Jewish right of return. Hence a person who supports the Palestinian right of return strengthens the case for the Jewish right of return. Moreover, it was demonstrated that most of the interests served by return can also be served at least partially by establishing a Palestinian state. The question of whether there are compelling conflicting considerations has also been discussed but no definite answers have been provided. Those who believe that Palestinians do not have a right of return or at least those who believe that an acceptable solution requires major concessions with respect to it will be interested in reading the next and last section.

4. Coda: Should Palestinians End Their Dream of Return or Should they Pretend They Returned?

In a recent conversation with Dr. Sari Nusseibeh – the President of Al-Quds University, he was asked about his new joint initiative with Ami Ayalon. Under this initiative Palestinians would give up the right of return to Israel in exchange for a Palestinian state.⁵⁴ Nusseibeh was asked whether instead of abandoning the aspiration of realizing the right of return could not the initiative insist on some symbolic gestures (such as limited family reunification) that would enable Palestinians to pretend that they in fact returned. Why end so cruelly and abruptly the dream to return? Why not mitigate the agony by reinterpreting the right?

Dr. Nusseibeh claimed that he believes in the virtues of a shock therapy in politics. Awakening from the long sweet dream of return is painful but abrupt pain is better in his view than political fraud. This paper investigated whether awakening from the dream

if it becomes possible. His discourse became quite suddenly ideological and elegant as he announced that, ‘as a Palestinian, like any other, I long to return no matter the conditions.’ ”

⁵⁴ For the text of the joint “statement of principles”, see <http://www.mifkad.org.il/eng/PrinciplesAgreement.asp>

is not merely a pragmatic concession to the military might of Israel but may also be grounded in Palestinian interests.

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