

Chapter 5

Justice and Fairness as Barriers to the Resolution of the Israeli-Palestinian Conflict⁴¹

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“Justice will destroy all of us,
so let’s think of less than justice.”⁴²

The reasons for the failure of the Oslo process and the eruption of Israeli-Palestinian violence in September 2000 have been explored in depth in the memoirs of peace process participants and in many academic studies. Several of these have characterized the Israeli-Palestinian conflict as intractable, uncontrollable, and insoluble. Others have attributed the failure of the talks to the parties’ lack of readiness to make the concessions necessary for resolving the conflict, and some have focused on psychological, cultural, and internal political barriers or the ineffectiveness of the American intermediary (Ben-Ami; Sher; Miller; Ross; Bar-Siman-Tov, 2005).

Some researchers, Palestinians in particular, have argued that the Oslo process failed because the parties to the conflict avoided discussing and addressing the widespread problems of injustice that Israel has perpetuated against the Palestinians since the beginning of the conflict and especially in 1947-1949. These researchers claimed that the conflict cannot be resolved unless Israel accepts the following Palestinian demands: recognition of its responsibility for the expulsion of Palestinians from the land of Palestine in the 1947-1949 war and acceptance of the Palestinian demand for a just solution to the refugee problem

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⁴² Baram, H. (2008). “Roundtable: 1948: Independence and the *Nakba*.” *Palestine-Israel Journal*, 15(1 & 2), 114.

through the implementation of their right to return to their homes in Palestine (within the territory of the State of Israel). A just solution to the conflict – or, in their view, a just peace – therefore depends on Israeli acquiescence to these demands (Said, 1994, 1995a, 1995b, 2006; Karmi, 1996; Peled & Rouhana, 2004; Rouhana, 2006).

Israel, for its part, refused to accept these Palestinian demands as preconditions for resolution of the conflict and, to date, has continued to refuse to do so. Its argument is that the Palestinians and Arab countries bear the responsibility for the outcomes of the 1947-1949 war and the Palestinian refugee problem. Israel argues that the Arabs' refusal to recognize the November 1947 Partition Plan and their initiation of a war intended to prevent, by force, the establishment of the State of Israel are what led to the historic injustice perpetuated against the Palestinians. Moreover, the Palestinians are aware that their demand for implementation of the right of return means the end of Israel as a Jewish state, and their insistence on this right is therefore a barrier to the resolution of the conflict.

The conflicting historical narratives of the two sides regarding the question of responsibility for the injustice and for its remedy turn the Israeli-Palestinian conflict into a classic case linking the issue of justice with peace. Given that the two sides often define the conflict in terms of injustice and unfairness, these issues have particular relevance for the peace process, and it is precisely this that makes dealing with them as barriers to resolution of the conflict so problematic.

This chapter holds that the Palestinian demand for a just peace, or for the inclusion of the issue of justice as a precondition for resolution of the conflict, has the potential to harm the prospects of resolving the conflict and is therefore a severe barrier to its resolution. The link between justice and peace is an important issue requiring both sides' attention, but – given the wide and currently unbridgeable gap separating the two sides on this issue – it should be postponed to the phase of reconciliation rather than being included in the process of conflict resolution.

The argument offered here will be examined in the following way: first, a theoretical discussion will be presented on the concept of “justice,” the link between justice and peace as a necessary condition or as a possible barrier to achievement of peace, and the link between historical narratives, on the one hand, and peace and justice, on the other hand. Then an empirical discussion will be presented, focusing on examination of the narratives of the two parties to

the conflict and on the Palestinian demand for a just peace in all its aspects, as expressed by Palestinian intellectuals and in the peace process since its beginnings in Oslo (1993) and until Taba (2001), as well as in the second track of talks: the Ayalon-Nusseibeh Initiative and the Geneva Initiative.

The Concept of Justice

Justice is the quality of being just; the quality of being correct or right; righteousness, equitableness, or moral rightness; upholding the justice of a cause; the moral principle determining just conduct; fair representation of facts; vindictive retribution (Webster's Encyclopedic Unabridged Dictionary of the English Language, 1994: 776, 993); conformity, rectifying the wrong, restitution, and fairness (Lederach, 1997: 28).

Truth and justice are among the more positive attributes of human activity and the natural characteristics of human interaction (Rawls, 1971). Justice is not necessarily a universal, objective, or consensual concept but is, rather, subjective and perceptual, a relative matter and a matter of judgment, and a controversial concept not subject to a singular, agreed-upon definition.

Despite the differences in the perceptions of justice among various societies and cultures – including even conflicting views – there is a common perception of justice as a source of harmony and cooperation among individuals, groups, societies, and states. In the absence of agreement or common understanding regarding a definition of justice or its implementation, however, parties will have difficulty cooperating and might even find themselves in conflict over this issue (Rawls, 1999: 5-6). John Rawls argues that in the absence of the possibility of basing principles of justice on real agreement, the parties must try to achieve what he terms “overlapping consensus” in order to formulate a strictly political perspective that would express “an idea that every reasonable comprehensive doctrine can accommodate in its own terms, based on the understanding that this is essential for purposes of coexistence” (Attas & Heyd: 9).

Justice is also linked to the distribution of goods, the manner of their distribution, and the procedure involved. The link between the manner of distribution and the procedure is what connects justice and fairness. Principles of justice are linked to the outcome of a procedure based on equitable agreement

between the parties. Notions of justice are influenced by the attitudes of the parties to a certain situation and context, as well as by their expectations (Rawls, 1971, Deutsch, 2000).

The discussion of justice includes attention to basic needs and fundamental rights of individuals and groups in society. The concept of “basic rights” is a matter of controversy, especially when it is defined in terms of unique interests and translated into rights that pose demands of others (Solomon: 188-191). Justice is often expressed through negative emotions such as rage, oppression, and revenge – emotions characteristic of individuals, groups, and societies that feel their basic rights and needs have been denied. They tend to think of justice in terms of placing responsibility on others who are responsible for their situation, and they do not tend to take this responsibility upon themselves. They tend to see themselves as real victims of injustice and they demand its immediate remedy. The demand for justice includes recognition and acknowledgement by the other side of its responsibility for the unjust act that denied their fundamental rights and basic needs, as well as a demand for a thorough remedy of the situation. From the moment that these demands are framed as fundamental rights and basic needs, they tend to persist, harden, and become a non-discussable issue. When both sides present conflicting and irreconcilable demands for justice and remedy, they are likely to find themselves in a state of permanent conflict, unless they are wise enough to negotiate an agreeable compromise (Solomon: 181-183; Deutsch, 2000: 41-46, 52-55).

The Relationship Between Justice and Peace

Justice and peace have been intertwined since early days. In the Book of Psalms, it is written that, “Mercy and truth are met together; justice and peace have kissed. Truth will spring out of the Earth, and justice will look down from Heaven.”⁴³ Justice is thus reciprocally linked with peace, as well as with truth and mercy. Their combination is a necessary condition not only for achieving peace but also for its existence and preservation.⁴⁴ Justice and peace are also intertwined in Article 2 of Chapter 1 of the United Nations Charter, where they are, however, also tied to the issue of security: “All Members [of the United Nations] shall settle

⁴³ Psalms 85, 11.

⁴⁴ Lederach holds that these concepts are a precondition for reconciliation.

their international dispute by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

The relationship between justice and peace is seemingly natural and obvious. It is a normative and moral relationship. Peace must be just. Justice is at the basis of peace. Peace without justice is not peace. Without justice, peace cannot exist and is likely to collapse after being achieved. A peace that is perceived as just by only one side will not last, and therefore, the relationship between justice and peace must be acceptable to both sides. Similarly, injustice is also perceived as a source of conflict and of its continuation.

Issues of justice and fairness are intertwined with peace processes and, in recent years, have been the focus of theoretical and practical work on peaceful conflict resolution. We can identify two approaches to this issue: the first approach requires a close tie between justice and peace because peace that does not strive for justice is not a true peace, and as such, cannot be achieved or actualized; the second approach, although not denying this link in principle, denies complete interdependence between justice and peace and sees such interdependence as a barrier to the resolution of conflicts.

The first approach, requiring a link between justice and peace, has two principal sub-approaches. The first not only requires a link between justice and peace, but also sees their combination as a necessary condition for dealing with the injustice or historic wrong that one of the parties to the conflict has perpetuated against the other, or even an injustice that both sides have inflicted upon each other. This sub-approach holds that it is not possible to advance a peace process, to achieve a peace agreement, to stabilize peaceful relations, or to ensure reconciliation without addressing the wrongs and injustice inflicted on one or both of the parties to the conflict. The demand for justice usually includes three different elements and types of justice. The first of these is admission, recognition, and acceptance of responsibility by the side that perpetuated the injustice, as well as punishment of this party. The second is an apology and a request for forgiveness (transitional, restorative, and retributive justice). The third element is actual compensation for the victim (compensatory justice). These conditions for ensuring justice are usually indicated by reconciliation, which is perceived as an advanced stage of the process of building or establishing peace, and not necessarily a stage of conflict resolution (Deutsch, 2000: 42, 49; Bar-Siman-Tov, 2004). There are, however,

conflicts in which these conditions or demands are already raised at the conflict-resolution stage. The Palestinians, for example, raise this demand as a condition for resolving the conflict (see below).

The second sub-approach requires a relationship between justice and fairness on the one hand, and peace on the other, but it does not necessarily regard justice as a means of dealing with wrongs or with injustice in the relations between the parties; rather, it holds that the peace process and peace agreement must be based on principles of justice, fairness, and equality, which in turn are based on the free and genuine will of the parties to draft a peace without coercion or constraint and with a guarantee of procedural and distributive justice (Albin; Deutsch, 2000: 41-44). These requirements are especially necessary when there are clear power asymmetries between the parties to the conflict because the latter, by definition, do not allow for justice and fairness in peace processes. Power discrepancies tend to ensure clear advantages to the stronger side at the expense of the weaker side. The stronger party usually tends to take advantage of its power in order to maximize its gains during negotiations at the expense of the weaker side, while the weaker side is compelled to make greater concessions. In the absence of clear criteria for justice and fairness, the key principle that translates these values into a pragmatic rule is *full equality* between the parties (even in cases of power-relation asymmetries) in the conduct of negotiations (*procedural justice*) such as, for example, through agenda-setting and determination of issues for discussion, rank of participants, equality of concessions and outcomes, and benefit and cost of the agreement (*distributive justice*). Like the first sub-approach, this sub-approach also holds that not abiding by principles of justice and fairness could, in fact, sabotage the process and the peace agreement or undermine its formulation and continuation, although the weaker side does have a *right of veto*, which can prevent the initiation or conclusion of a peace process if it perceives these as unjust (Albin).

In accordance with these two sub-approaches, which require a link between justice and peace, the link itself is not necessarily limited only to the principles of transitional, restorative, retributive, compensatory, procedural, or distributive justice. The link is, in essence, a matter of principle and values, entailing basic needs as well as rights. This relationship is perceived as a sacred and protected value that is not subject to negotiation or bargaining. It also serves as the only

criterion for judging the quality of the peace process and peace agreement and for their justification. The importance of this relationship increases when it becomes an organic part of the collective, historical memory of the parties to the conflict.

Why Justice Should Not Be Linked to Peace

The second approach is also composed of two sub-approaches. One of them, the realistic-rational approach, denies a link between justice and peace, while the second, which may be termed the liberal approach, recognizes the importance of the relationship between justice and peace, but objects to peace being defined in terms of justice and to use of the concept of a “just peace.”

The realistic-rational sub-approach is based on the assumption that the negotiating parties have embarked on the process out of goodwill and in order to reach an agreement that is necessarily better than the pre-existing situation. The parties to negotiations and peace processes operate on the basis of the interests and power relations between them, and thus there is no conflict between justice and peace or between justice and power asymmetries. Each side is naturally aware of, and familiar with, the difference in power relations, and logic dictates that each side will also work to maximize its benefits through the negotiations, although it should be aware that one-sided benefit maximization in a peace process can lead to failure of the process and inability to reach an agreement (Mnookin and Ross, 1995). This sub-approach holds that a just agreement is an agreement that is reached freely and consensually and is perceived as beneficial to both sides, which are “equals” in their capacities to accept or reject it. The respect of the agreement and the complete fulfillment of its obligations in letter and spirit are what constitute justice. Past injustice can be remedied and compensated through the negotiating process as long as it is agreeable to both sides and does not have the potential to undermine the benefits they gain from the agreement. It follows that acceptance of the principles of justice during the peace process constitutes a necessary compromise between the interests of two sides who want to achieve an agreement (Albin; Barry, 1995; Gauthier, 1986; Snyder and Diesing, 1977; Zartman, 2000, 2005a, 2005b).

The liberal sub-approach holds that a conditional link between justice and peace suggests that a just peace is a prescriptive and ideal peace – the only kind of

peace to be pursued – that there is no other, and that any peace not defined in this way will not be recognized as a just peace. Moreover, this distinction between a just peace and an unjust peace is likely to generate opposition to peace – based on the claim that it is unjust – when a dispute regarding the links between justice and peace erupts. Given that issues of justice and fairness in international relations are complex, varied, and grounded in inter-personal and inter-social relations, they cannot be generally and consensually defined or formulated in a precise and detailed way. There are differences of opinion and varying criteria regarding the links among justice, fairness, and peace. What is perceived as a just and fair solution in one case might not be just or fair in another case. The relationship between justice and peace is thus a controversial one. It is perceived differently in different religions, cultures, and societies and is even presented differently in different historical narratives. In the absence of an agreement regarding the definition and elements of justice, conditioning it on a peace process is problematic (Albin; Beilin, 2006).

Moreover, justice and peace can even clash, and the preference for justice over peace could prevent the achievement of a peace agreement and even serve as a barrier. There are circumstances in which one or even both sides might refuse to reach a peace agreement because they see it as unjust, but it later turns out that the injustice, in fact, lies in not achieving a peace agreement because this situation generated war between the parties and led to unnecessary suffering and greater injustice (Roberts, 2006; Beilin, 2006). Excessive focus on justice and fairness could lead the sides to make irrational choices and not realize or maximize benefits. In addition, it could lead to lack of receptivity to new information, diminished cognitive capacity, insistence on demands, unwillingness to compromise, greater willingness to take risks, and even resort to violence (Welch; Bazerman & Neale, 1995).

In addition, differences of opinion regarding the relationship between justice and peace are likely not only to prevent peace, but also to lead to war. The demand for justice could be a barrier to conflict resolution, especially in cases where there are conflicting perspectives on the issue of justice and where the only criteria for judging are each side's own historical narrative regarding the conflict and its development. The danger here is that the national narratives of the parties have already become their sources for the definition of justice. Moreover, experience

has shown that it is not possible to bridge between conflicting historical narratives and that any effort to do so will inevitably fail (Bland & Ross, Welch).

The pursuit of justice is often more tactical than strategic and is intended to reinforce the moral position of one side in relation to the other. The adoption of such a stance has negative implications for the chances of achieving peace because it reinforces the bargaining position and makes flexibility regarding the negotiating positions more difficult to achieve in light of the glorification of the just position. The conflict then tends to become one of justice and morality, an ideological conflict rather than a conflict of interests and, therefore, a zero-sum conflict (Deutsch, 2000: 54-55).

Adherence to a one-sided interpretation of justice could create a barrier to peace and even an “ideological” excuse for unwillingness to resolve the conflict. In this situation, the conflict will tend to persist and its continuation will be explained as a quest for justice (Allan & Keller). The liberal sub-approach also holds that a demand for compensatory justice during a peace process – a demand based on past wrongs perpetuated against one of the parties to the conflict – could clash with the party’s current and future needs, independent of the past harms inflicted upon it. The preference for remedy of past injustice could prevent realization of current needs and make the sense of injustice permanent (Albin; Byron & Bland).

How to Bridge Between Justice and Peace

Although it is possible to combine the two sub-approaches that require a link between justice and peace, it would appear that the first sub-approach, which combines justice and peace in cases on injustice and the need to remedy them, is the more complex and problematic. This approach views justice as a precondition not only for reconciliation, but also for a peace agreement. The issue of justice according to this sub-approach goes beyond distributive justice in the sense of equal benefits in a peace agreement or equal distributive peace. The demand here focuses on transitional, restorative, and compensatory justice. While transitional and restorative justice mainly involves clarifying and examining the injustice perpetuated – including taking responsibility and apologizing – compensatory justice refers to the compensation requested.

The demand for transitional, restorative, and compensatory justice during a peace process tends to be based on principles and values and is linked to the historical narrative of the injustice as well as to national identity. Without actual attention to the demands for transitional, restorative, and compensatory justice, it is not possible to reach an agreement. It is not possible to achieve transitional and restorative justice without compensatory justice. While transitional and restorative justice is seemingly declaratory in nature and is essentially a matter of admission of wrong, acknowledgement, responsibility, and apology, compensatory justice is a real and tangible justice in that it demands actual compensation for the wrong that was committed.

These demands, corresponding to the two types of justice, become part of the narrative and the *ethos of the conflict*. They undergo indoctrination processes and tend to develop into “*protected values*” (Tetlock et al.), that is, sacred and mystical values intertwined with national identity and therefore not subject to negotiation, bargaining, or compromise of any sort.

Insistence on these demands by one of the parties to the conflict can create a barrier to peace or an excuse for aborting the peace process if the other party is not willing to accept them because it does not acknowledge the injustice or does not feel responsible for it, or because of a clash between two opposing concepts of justice – as expressed in the national narratives – that do not correspond with the first party’s definition of injustice or its demands for justice. The central problem in the case of two conflicting views of justice is that both sides are partly right in one or another aspect of their claims, and thus it cannot be expected that a peace agreement will fully and satisfactorily address all of the problems related to justice. It follows that parties that are interested in bridging between peace and justice should adopt the following strategies:

- (1) The two sides should agree that justice needs to be among the issues subject to discussion as part of negotiations and the peace process, like other issues. The two sides should develop a joint perspective regarding matters of justice that are linked to the peace process and ways of dealing with them (Albin: 15-19).
- (2) Given that every peace process includes concessions, compromises, and costs, these apply to questions of justice as well. The real issue that the

parties need to confront is not whether the peace agreement is just, but whether the concessions made – including the issue of justice – are mutual, balanced, and bearable, and whether the benefits of peace outweigh its costs, including those linked to the issue of justice. Moreover, the parties need to consider whether the benefits of peace outweigh the sense of incomplete justice. This problem is especially salient in cases of asymmetrical power relations between the parties, when the weaker side feels that any agreement that does not correspond with its perception of justice is negative and serves to perpetuate its sense of injustice, and it therefore rejects the peace agreement (Bland and Ross).

- (3) Presentation of moderate demands for justice, addressing only some of the problems of injustice but not completely resolving them, is another strategy. A party interested in resolving the conflict but unable to accept all the demands for justice of the other side will sometimes tend to recognize that party's suffering, and even agree to reduce it, more readily than it would agree to solve the problem in its entirety (Bland & Ross).
- (4) Another strategy is to opt for dealing with the current injustice, rather than the injustice linked to the past. Bland and Ross propose prioritizing the remedying of the current injustice because its negative influence is ongoing and requires immediate redress.
- (5) A trade-off involving justice-related values between the parties is also a possible strategy. When both sides demand the remedying of an injustice caused by the conflict, it is possible to reach an agreement if each side relinquishes some of its demands for justice in exchange for the other side relinquishing some of its demands. This trade-off is intended to balance conflicting demands for justice rather than resolve them.
- (6) Issues of justice can be framed in terms of interests rather than values. Such framing is likely to make the possibility of compromise easier by transforming the concessions necessary for resolution of the conflict into a matter of interests, which – unlike values that are not subject to compromise – can be subjected to bargaining and compromise.
- (7) The parties could decide to employ a mediator who would search for an equitable formula to bridge between their conflicting demands.

- (8) It is possible that the parties will have already failed in their efforts to formulate a joint framework linking justice with peace and that the demands for justice have only generated a barrier to peace, yet the parties are still interested in reaching a peace agreement. In such a case, they should consider postponing efforts to address the issue of justice to the reconciliation phase. This would entail the parties' agreeing – within the peace accord that they sign – that they consider the question of justice to be very important and that the peace between them cannot be stabilized until this question is addressed. Delaying the discussion to the reconciliation phase, however, could make it easier for the parties to overcome the justice barrier in the peace process and enable them to examine the issue of justice after having built trust and reaching a stage of readiness to engage in this difficult and value-laden issue.

The Link Between Justice and Peace in the Israeli-Palestinian Conflict

The Israeli-Palestinian conflict is, as noted, one of the classic cases wherein justice and peace are intertwined. Indeed, both sides see themselves as victims of the injustice caused exclusively by the other side. The Palestinian demand for a just peace as a *condition* for resolution of the conflict is particularly salient. In the absence of objective or agreed-upon criteria for evaluating and defining the historic injustice, the historical narratives of the parties to the conflict – or the collective memory of each side – become the only sources for defining justice. The collective historical narrative, which develops over time and describes the history of the conflict to its own group, includes a set of social beliefs about justice that addresses the justice of the goals, the collective self-image, the sense of victimization, the unity of members of the group, and the de-legitimization of the rival.

1. Narratives as definers of justice

The historical narrative has two salient characteristics. First, it is not necessarily intended to describe the past in objective terms but to describe it in such an intermediary way as is needed for the continued survival of the society in light of

its conflict with the other side. The historical narrative, although based on real events to a certain extent, is biased, selective, and distorted for the purposes of addressing the society's needs in the present. The narrative tends to emphasize certain facts and ignore others, and it interprets events that took place in a tendentious way. A second characteristic of the historical narrative is its being shared by the members of society, who see it as historical truth, as also represented and underscored by government and social institutions (Bar-Tal, 2007: 33).

The narrative is a social and national structuring of the conflict, and it combines four basic perspectives in the context of peace and justice:

- (1) Justifying the objectives of the conflict – including its causes, its conduct, and its lack of resolution – as well as emphasizing the absolute importance of these objectives, the essentiality of their realization, and the danger of not realizing them, while denying the objectives of the other side and presenting them as unjust and immoral;
- (2) Presenting a self-image as a victim of the rival's objectives and conduct while emphasizing the injustice, suffering, and loss caused by the conflict;
- (3) Shedding all responsibility for creation of the injustice and attributing it to the other side;
- (4) Conditioning resolution of the conflict on the remedying of the injustice, suffering, and loss, including a demand for admission of guilt, assumption of responsibility, apology, and appropriate compensation for the consequences of the injustice (Bar-Tal, 2007: 33-34).

The historical narrative contributes to the development and cultivation of the ethos of injustice, which has present-day implications for the characterization of the society's current problems. This narrative generates a moral commitment to remedying the injustice, informs the positions of leaders in remedying the historic injustice, provides these positions with moral justification, and conditions resolution of the conflict on the unequivocal remedy of the injustice. The ethos of injustice becomes part of the collective identity, binding society and its leaders and preventing them from reaching compromise or making concessions in the peace process. The ethos of injustice exalts the important role of *justice* in changing the situation. Any attempt at a political solution to the problem must be

defined in terms of justice as defined and agreed upon by society. Any deviation from the accepted and agreed-upon perception of justice is seen as a betrayal of sacred values (Bar-Tal, 2007: 38-41).

2. The clash of narratives and the ethos of injustice in the Israeli-Palestinian conflict

The issue of injustice is deeply embedded in the Israeli-Palestinian conflict. Each side is certain that the other side perpetuated injustice against it during the conflict, and each has developed and cultivated a collective historical narrative and opposing ethos of injustice that reflect its perception of the conflict and image of the other. Each side sees the justice in its claims and denies the justice of the other's claims. The gap and contradiction between the narratives, like each side's claims of justice, are vast and not bridgeable at this stage. The gap and contradiction between the positions of the two sides have already erupted into outbursts in the course of the conflict and blocked the possibility of its resolution. They surfaced during the Oslo process, throughout Track II agreements and understandings attempted by the parties, and in the course of meetings between intellectuals and academics from each side. The historical narratives of the two sides, like the ethos of injustice, are the "organizing principles" of their beliefs and positions in the conflict (West; Scham, Salem, and Pogrund; Lesch and Lustick; Rotberg).

The Jewish-Zionist Narratives

In Israel's historical narratives, as in its ethos of injustice, it is possible to distinguish between basic, fundamental narratives that justify the establishment and existence of Israel as a Jewish state in terms of distributive, restorative, and compensatory justice, on the one hand, and narratives linked to the 1947-1949 war and its outcome, on the other. The basic, fundamental historical narratives focus on the right of the Jewish people to political independence and to the establishment of a state on the basis of the right of self-determination. According to this narrative, the Jewish people were uprooted from their country and homeland and persecuted throughout history, and they have the right to return to their original place of residence even if that place has been settled by another people.

The right of the Jewish people to return to the Land of Israel, where their national and religious identity was forged, and to rebuild their state is also justifiable through the principles of restorative and compensatory justice. The oppression and persecution of the Jewish people in Europe, which reached its peak during the Holocaust, gave rise to an obligation to remedy the injustice and compensate the Jewish people through their return to their homeland and the establishment of an independent Jewish state (Israel's Declaration of Independence; Ganz, 2004). These principles of justice were recognized by the British and the international community in the Balfour Declaration (1917), the League of Nations' Mandate Plan (1922), the 1937 Peel Plan, and in particular, the United Nations Partition Plan (1947).

The historical narrative of the 1947-1949 war also justifies Israel's objectives with respect to the war and its conduct during the war and places full responsibility for the outbreak and outcome of the war on the Palestinians and the Arab countries. If the Palestinians and Arab countries had accepted the Partition Plan proposed to them in November 1947 and refrained from initiating a war intended to prevent implementation of the plan and to destroy the State of Israel and its Jewish community, then it would have been possible to resolve the conflict peacefully. For Israel this was a defensive war intended to prevent its destruction as a political entity and the slaughter of its citizens. Moreover, the war led to the death of 6,000 Israelis (1% of the population), several thousands wounded, and an enormous economic cost. According to the Zionist narrative, Arab leadership is solely responsible for the outcome of the war, for the fact that an Arab state was not established according to the Partition Plan, and for the creation of the Palestinian refugee problem. The war ended with unstable ceasefire agreements rather than a peace agreement because the Arabs refused to accept its outcome and recognize the existence of Israel as a Jewish state. Most Israelis do not believe that the Arabs would have accepted Israel as a regional state even if it had adopted a more conciliatory stance.

The Palestinian demands for justice, which include a demand that Israel acknowledge responsibility for the injustice perpetuated against them (transitional justice) and agree to the return of the refugees (restorative and compensatory justice), are utterly rejected by Israel and perceived by it as a threat to its existence as a Jewish state (Bar-On; Bar-Tal & Salomon; Bar-Tal, 2007). In the

context of its efforts to justify its goals over the years, Israel rejected the rights of the Palestinians in the Land of Israel. The land was often described in the Israeli narrative as an unsettled land. According to the Zionist perspective, the Palestinians are not the original residents of the Land of Israel, and they only migrated there in recent centuries. This perspective holds that there is in fact no Palestinian nation and that the Palestinian entity is only a recent concept. Until the Jews returned to their land towards the end of the 19th century, the Land of Israel had been barren, neglected, and backward (Bar-Tal & Salomon; Bar-Tal, 2007).

The Israeli ethos of injustice is based on the opposition of the Palestinians and Arab countries to the resolution of the conflict through peaceful means and on their violent and unrelenting plotting against its very existence and security. Rejection of the United Nations' Partition Plan, the initiation of a war against Israel with the aim of preventing its establishment or destroying it after establishment – like the wars that followed, including other means of violence such as guerilla warfare, terrorism, and economic and political boycott – caused Israel great human, political, and economic suffering. In addition, the unwillingness to recognize Israel as the state of the Jewish people and the demand to repatriate refugees are a serious threat to the existence of Israel, and they further illustrate the lack of Palestinian willingness to come to terms with Israel's existence and to make peace with it.

The Palestinian Narratives

The Palestinian narratives and the Palestinians' ethos of injustice were developed and cultivated both separately from the Jewish-Israeli narratives and in reaction to them. As with the Jewish-Israeli narratives, it is possible to distinguish between basic and fundamental Palestinian narratives regarding their right to political independence and the narrative of the 1947-1949 war, on the one hand, and its outcome, that is, the *Nakba*, on the other. The Palestinian narratives and the Palestinian people's ethos of injustice are perceived by the Palestinian side as a legitimate and necessary means of expression of the injustice, their opposition to its continuation, and their demand for its remedy (Rouhana, 2006).

The basic and fundamental Palestinian narratives are grounded in principles of distributive, restorative, and compensatory justice, which grants them the right of self-determination according to the following arguments:

- (1) The Palestinians are an ancient people with historical roots in Palestine that date back to before the emergence of the Zionist movement. Palestine is the exclusive homeland of the Palestinian Arab nation within the borders of the British Mandate.
- (2) Had it not been for the Zionist enterprise, Palestine could have developed into a Palestinian state under rule of the British Mandate, as did other Arab countries.
- (3) If the Jews have a right to an independent state on the basis of their long-time suffering, including the Holocaust, then this right should be realized outside of Palestine because the latter is the land of the Palestinian people (The Palestinian National Covenant, 1968; Rouhana, 2006; Jawad).

The Palestinian narratives of the 1947-1949 war include the following:

- (1) The major powers, especially Britain, are responsible for the perpetuation of injustice because of their efforts to establish a Jewish state in the heart of the Arab world. There is no moral justification for the establishment of a Jewish state in Palestine at the expense of its Palestinian residents. All of Palestine belongs to the Palestinians and they do not need to share it with the Jews.
- (2) Palestinian rejection of the Partition Plan was just and legitimate, as was the violence employed in order to forcibly prevent the establishment of the Jewish state. Palestinian armed resistance in order to prevent their lands from being stolen and to demand the return of stolen lands is a human, natural, and legitimate reaction to injustice. The use of violence is justified given that violence and use of force are also embedded in the Zionist idea and in the conduct of Israel. The State of Israel would not have come into being without use of force and violence.
- (3) Resistance includes rejection of unjust diplomatic conflict-resolution proposals that perpetuate the injustice and reflect the power asymmetry between Israel and the Palestinians.

- (4) Israel alone is responsible for the expulsion of hundreds of thousands of Palestinians from their homes and is the source of the refugee problem. Israel's objective in the war was ethnic cleansing because it cannot exist unless it has a Jewish majority.
- (5) Only Israel is responsible for the suffering of the Palestinians since 1947. Its refusal to absorb the refugees after the war is another basic injustice.
- (6) The 1967 occupation and further expulsion of Palestinians, particularly from the West Bank, only aggravated the suffering of the new refugees as well as of Palestinian residents of the West Bank and Gaza. The establishment of settlements and roadblocks, collective punishment (including curfew and siege), and the building of the security fence or separation wall are further expressions of the injustice perpetuated against the Palestinians (Rouhana, 2006; Jawad; Said, 2006).

In the context of the arguments justifying their rights, Palestinians tended to deny the right of Jews to a state, all the more so in Palestine, for the following reasons:

- (1) The historical Jewish presence in Palestine, even during the times of the First and Second Temple, was marginal and negligible, and it came to an end 2000 years ago.
- (2) Judaism is a religion rather than a nationality, and therefore, the Jews are not a nation that deserves a state.
- (3) Israel will never be recognized as a Jewish state, even after resolution of the conflict and establishment of a Palestinian state, because there is no legitimacy to a Jewish state in the Palestinian homeland.
- (4) The Palestinians cannot accept Israel's demand for the conclusion of the conflict because the moment they do, they will no longer be able to raise the issue of justice.

The Palestinian ethos of injustice includes a long list of atrocities that Israel committed throughout the course of the conflict: the establishment of a Jewish state in territory that belongs exclusively to the Palestinians, expulsion of Arabs from Palestine and creation of the refugee problem, the *Nakba* and the Palestinian

suffering, which has continued since that time and includes unwillingness to repatriate refugees, the Israeli occupation since 1967, and the establishment of settlements in the West Bank and Gaza.

A summary glance at the narratives and ethos of injustice of both sides to the conflict indicates a great deal of similarity between them. Each side sees itself as a victim of the other's unjust acts. Their historical narratives center on a yearning for rights, justice, and truth. Both sides recognize that without a solution to the issue of justice (the injustice and the wrong committed), it is doubtful that the conflict can be resolved or that peaceful relations between them can be established. Indeed, it would appear that the two sides are not yet ready to frame their basic historical narratives and ethos of injustice in a way that would allow them to put an end to the conflict. Both sides frame their historical narratives and ethos of injustice as protected values that are not subject to negotiation, bargaining, or compromise.

3. The Palestinian demand for just peace, transitional justice, and compensatory justice

The Palestinian demand for a just peace is based on a perception of the ethos of injustice and the need to remedy it. According to this demand, a just peace will be achieved only if Israel responds affirmatively to two Palestinian demands for remedy:

- (1) Israel acknowledges its responsibility for the expulsion of Palestinians from their homes in Palestine and apologizes for it.
- (2) Israel accepts the Palestinians' right of return, that is, allows them to return to their homes in Israel. While there is a Palestinian consensus regarding the right of return as a matter of rights and justice (remedying the injustice of the expulsion), there are varying interpretations regarding the implementation of this right. There is a spectrum of possibilities for implementation of this issue, beginning with a return of the refugees and their descendants to their original residencies in Palestine (within the territory of Israel) and concluding with a return of some of them and monetary compensation for others who are not interested in returning (Peled & Rouhana; Abu Sway; Jubeh; Sha'ath; Salem).

Two Israeli researchers – Palestinian and Jewish (Nadim Rouhana and Yoav Peled) – have presented the Palestinian demands in terms of transitional justice and compensatory justice. The terminology of the two types of justice is particularly prominent in research dealing with reconciliation in South Africa, research in which special efforts were made to present claims for justice in a scientific and persuasive way. While an admission of responsibility for the expulsion of Palestinians from their land and recognition of their right of return are basic principles of transitional justice, they are also preconditions for implementation of the right of return, which is a matter of restorative and compensatory justice. Peled and Rouhana recognize that demands for historical-transitional justice are essential for the achievement of reconciliation in societies experiencing internal conflict rather than international conflict, but they are certain that the idea of transitional justice can be implemented in the Israeli-Palestinian conflict as well because its characteristics resemble those of internal conflicts (including Jewish-Arab relations within Israel).

Peled and Rouhana adopt the historical narratives and ethos of injustice of the Palestinians in full. In their view, Israel is solely responsible for the injustice of the Palestinian *Nakba*, which they unequivocally define as a “historic injustice.” Therefore, Israel must recognize the right of return into its territory. This right is not subject to denial or bargaining, even if more than 60 years have passed. The two researchers hold that it is possible to differentiate between the right of return – which, being a right, is not subject to negotiation or bargaining from the Palestinian point of view – and ways of implementing it, which are subject to negotiation between the parties regarding the number of refugees to be returned. The reason they make this distinction is that they recognize that implementation of the right of return is perceived in Israel as a threat to its Jewish character. Nevertheless, they unequivocally hold that implementation of this right must occur within the borders of Israel itself, independent of the question of where the permanent borders are to lie. Israeli recognition of the right of return places a moral and ideological obligation on it, and thus there is no moral value to implementation of the right outside of the borders of Israel because this recognition has no meaning if it is implemented in another country, including a future Palestinian state or even territories that Israel might transfer to the Palestinians in the context of territorial exchange.

Peled and Rouhana hold that Israeli recognition of the right of return would express its willingness to acknowledge responsibility for the uprooting of most Palestinians in 1947-1949. Such recognition could satisfy the basic Palestinian demand, which has become a fundamental feature of the national Palestinian identity, and it would assist both sides in negotiating implementation of the right of return. The two researchers are convinced that Israeli recognition of the right of return would be an important reply to the Palestinians' demand and would enable them to recognize the right of Israelis (rather than Jews) to maintain their national existence in their part of the disputed land. Surveys by Palestinians indicate that the number of refugees interested in actualizing their right of return is not as great as originally projected; therefore, implementation of this right would not seriously threaten the character of Israel.

Peled and Rouhana offer an original way to solve the problem of injustice, by distinguishing between recognition of the right of return and its implementation. Yet they ignore three factors:

- (1) The demands for recognition of the right of return and of its implementation are perhaps necessary for reconciliation (in light of the demands for transitional and compensatory justice), but they are barriers to resolution of the conflict.
- (2) The demand for the right of return to lands within the borders of Israel remains unchanged, although it is possible to negotiate the number of refugees who would actualize this right.
- (3) The demands for recognition and implementation of the right of return are admittedly based on full acceptance of the Palestinian ethos of injustice, which in turn is based on their narrative of the 1947-1949 war and on absolute rejection of the Israeli ethos of injustice. Attributing the entire perpetuation of injustice to Israel, while ignoring the Palestinian and Arab countries' responsibility in rejecting the Partition Plan and initiating a war, makes their demands completely unacceptable – lacking in justice and fairness – to Israel.

The rationale of the concept of “transitional justice” is based on in-depth and fair assessment of the parties' responsibility for the events that led to the war and its outcome, including creation of the refugee problem. Placing all of the

blame on Israel, without a thorough, fact-based, and objective evaluation of what really happened, actually excludes the possibility of implementing the principles of transitional justice in the Israeli-Palestinian case. Peled and Rouhana reached their conclusions without such an evaluation. Like many others on both sides of the Israeli-Palestinian conflict, they too are certain that the issues for discussion or solution are not necessarily historical and factual. From their point of view, the collective historical narratives are what matter. They see the historical narratives and ethos of injustice (which cannot be bridged) – not necessarily the historical facts – as the root of the problem, and they do not take into account that historical narratives are themselves barriers to conflict resolution when they shape positions, beliefs, values, and policies in practice.

4. Procedural, transitional, and compensatory justice in the peace process: from Oslo to Taba

A. The Oslo talks

The historical narratives – and in particular the ethos of injustice and the Palestinian demands for justice, fairness, and equality – played a central role throughout the Oslo process. Although they did not prevent the initiation and pursuit of the process, these narratives did contribute significantly to its failure through the enormous divides that they generated between the parties. The Palestinian negotiators presented their demands for procedural justice and for transitional and compensatory justice during unofficial talks that took place at the start of the Oslo process and during the official talks that followed. The Palestinians stressed their concerns that, in light of the power imbalance between the sides and the relationship of occupier-occupied, they doubted that fair and just negotiations can be conducted or that a fair and just agreement can be achieved. They demanded the establishment of a new balance between the two sides, based on full equality and respectful of their status as the other party to the process. They warned that they could not accept any agreement that exploits Israel's greater relative power, which would prevent their realizing their own demands and just and fair rights and would impinge on their honor. This position was expressed by Abu Alaa, head of the Palestinian delegation to the negotiations, who stressed the point to Uri Savir, head of the Israeli delegation, in saying, "You may try to force your

approach on Arafat. And if you use your strength to push him into a corner, he may have no choice but to accept your approach. But remember: if you do that: you will isolate him. A one sided agreement will not stand” (Savir: 180).

Even in the signing ceremony where the Oslo accords were initialized, Abu Alaa emphasized the Palestinian demands for equality as a condition for the success of the peace process: “Our two nations are equal, despite the differences in their material means. As long as cooperation is based on equality and respect, then we shall be able to overcome the obstacles of doubt and fear that have accumulated over the decades. Relations between us must reflect this equality” (Hirschfeld: 144).

The Palestinian demands for procedural justice were not acceptable to Israel. Although its negotiators certainly knew that without Palestinian agreement it would not be possible to advance the negotiations and reach resolution and that it was necessary to embark on a new political relationship that would recognize the Palestinians as a partner and would be based on mutual dependence, they found it difficult in practice to relate to the Palestinians as equals. They tended to demonstrate their unwillingness to alter the basic conditions of inequality, as the Palestinians demanded, or to refrain from taking advantage of their relative power in the negotiating process and in the agreements signed (Oslo 1, the Cairo Agreement, and Oslo 2). The obvious gaps in the positions of the parties and the power balance between them, as well as the nature of the prolonged conflict, the occupier-occupied relations, and the basic lack of trust, did not make possible negotiating conditions that comply with the classic requirements of procedural justice.

These were not negotiations between equals. While the Palestinians felt that Israel did not treat them as equals and, instead, took advantage of their weakness, the Israelis felt that they were conceding and granting the Palestinians real compensation (territories) while the latter were not making any such concessions and were all the while driven by demands of honor, justice, and fairness, which can derail the process.

Some of the Israeli negotiators do, however, admit that they had adopted too patronizing an attitude and that the process could have been conducted on the basis of a more direct and egalitarian dialogue, one that respected the Palestinians’

honor and did not resemble that of an occupier dictating to the occupied (Savir, Sher).

In sum, it can be argued that, in practice, it was Israel that primarily determined the agenda of the Oslo process and its conduct, a process that was essentially an interim arrangement for five years while the discussion of core issues was postponed to the later stage of permanent arrangement. The Palestinians' failure to secure the status of an equal partner was characterized as an unjust, unfair, and disrespectful peace, as described by Palestinian and Arab intellectuals. According to Fouad Ajami: "There was no honor in this unequal peace, the true believers said. The language, the preserve of the intellectual class, came to the aid of the opponents of the peace. In a play on words, normalization, *tatbi*, was dismissed as *tatwi* (domestication) and peace, *salam*, as nothing other than surrender, *istislam*" (pp. 274-5).

The Palestinian negotiators' demands for transitional and compensatory justice were categorically rejected by their Israeli colleagues, who even conditioned the Oslo process itself on not engaging in this issue, claiming that they were there to deal with the future rather than the past, as focusing on the past only creates a barrier to peace. The Palestinian demands for recognition of Israeli responsibility for the injustice perpetuated against the Palestinians (primarily the 1947-1949 war) and their demand for a right of return were rejected by the Israelis as entirely unacceptable. The latter claimed that peace negotiations necessitate a pragmatic approach that sets aside the historical divisions and charges of injustice. They argued that the negotiations must focus on the results of the 1967 war, not the 1947-1949 war. Indeed, Savir noted in his memoirs that he had already made this abundantly clear to the Palestinians at the first stage of the Oslo process: "I am sure that we can debate the past for years and never agree. Let's see if we can agree about the future... Never again would we argue about the past... Discussing the future would mean reconciling two rights, nor readdressing ancient wrongs" (Savir: 15).⁴⁵

⁴⁵ At the start of the Oslo process, Yitzhak Rabin was certain that there was no chance of reaching an agreement with the Palestinians because of the problems of Jerusalem and the refugees, as described by Yair Hirschfeld: "Rabin was sure ... that it would not be possible to reach agreements regarding Jerusalem or the Palestinian refugees" (Hirschfeld: 153). Nevertheless, Rabin did hope, as did other Israeli leaders, that eventually it would be possible to reach an agreement.

Although the Palestinian negotiators felt from the outset of the negotiations that the Israelis' refusal to discuss past wrongs and the right of return was unjust and unfair, they felt compelled to acquiesce. They correctly assumed that the Israelis would absolutely refuse to negotiate the outcome of the 1947-1949 war and that it would not be possible to coerce them to do so because of the power imbalance, on the one hand, and the vital and burning Palestinian interest in reaching an agreement that would enable the establishment of a Palestinian state, on the other hand. The Palestinians assumed that their insistence on recognition of the injustice and on its remedy would immediately derail the negotiations and prevent any possibility of establishing a Palestinian state. The injustice in not establishing a state was seen by the Palestinians during the first phase of negotiations as a greater injustice than the failure to deal with past wrongs.

Indeed, Abu Alaa explained the Palestinian concession on the issue of injustice during the first phase of the Oslo process by pointing to the Palestinian weakness: "The balance of power drastically favored Israel and worked against the Palestinians. This was reflected in the behavior of the Israeli negotiators on all issues and at every stage. For this reason, the Palestinian negotiators were obliged to use the few cards in their hand with patience, endurance and skill. We also needed to deploy logical argument. *We derived our power from the justice of our case, as opposed to the Israelis, who sought to define what was just on the basis of their power*" (Ahmed Qurei: 296-297, emphasis added).

Nonetheless, the Palestinians sensed that the Oslo process would not lead to a just agreement from their point of view, and that Israel was taking advantage of their weakness, rendering it impossible, under these circumstances, to reach a just agreement (Albin).⁴⁶

B. The Stockholm talks, or the "Swedish track"

The Palestinians did not give up on the issue of injustice and its remedy, and they raised it when later stages of the negotiations addressed the question of a permanent arrangement during the era of Ehud Barak. During the Stockholm talks, or what

⁴⁶ In interviews that Cecelia Albin conducted on behalf of her research on "justice and fairness in international negotiations" with negotiators from both sides, both of the sides agreed that justice and fairness were not among the issues in which they had engaged.

was also termed “the Swedish track” (May 2000), which was an official but secret track preceding the Camp David Summit, the Palestinians presented the issue of right of return as the most important from their point of view and requested that any discussion of this issue be conducted in accordance with U.N. General Assembly Resolution 194.⁴⁷ They demanded that Israel recognize the right of return and agree to return a substantial number of refugees to lands within Israel, although they refrained from presenting numbers (Ben-Ami: 20, 33, 40, 47).

Israel’s positions on the issues of transitional and compensatory justice did not change during the Barak era. Israel rejected Palestinian claims regarding responsibility for creating the refugee problem and the matter of return, arguing that “there is no turning the wheels [of time] back” (Sher: 41). Nevertheless, the Israeli negotiating team did explore a number of new proposals for addressing the questions of responsibility and refugees. In order to diminish its responsibility for this issue, Israel proposed establishing an international commission and an international fund to develop a mechanism for compensation and resettlement of the refugees in a Palestinian state, in their host countries, or in other states. “We wanted a mechanism that would internationalize the issue instead of allowing it to serve as an eternal barrier between us and them, as the exclusive responsibility and burden of Israel” (Ben-Ami: 47). Even so, Israel expressed willingness to absorb a limited number of refugees (a few thousand), over the course of decades, in accordance with its sovereign judgment, and only on the basis of family unification. Regarding compensation for refugees, Israel agreed to allocate a sum of money to be determined and disbursed over a number of years as part of an international effort to establish an international fund totaling 20 billion dollars. Israel sought to set a final upper limit in advance, on the assumption that a third party would ensure the funds were raised. Although the Palestinians agreed to establish an international commission and international fund, they continued to demand implementation of the right of return according to Resolution 194, which means actualizing the right to return to the territory of Israel and using the properties that were abandoned there for the purposes of substantive compensation. The link that they sought to establish between “properties that were abandoned” and

⁴⁷ Paragraph 11 of Resolution 194 of September 1948 states, “...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...”

compensation was, in their view, principled and ideological. They wanted Israel to acknowledge officially that the country was built on the basis of abandoned property of refugees.

Although the issues of responsibility and the right of return were not resolved in the Stockholm talks (or the “Swedish track”), the sense of Israelis was that the Palestinians had relaxed their stance and that real progress had been made because a joint perspective had been developed regarding the practical aspects of resolving the refugee problem, the essence of which was compensation (Ben-Ami: 47, 54; Sher: 86, 104, 107-108, 142; Pressman). It would appear that this was a false impression, however, because soon afterwards, during talks in June 2000 in Tel Aviv, it became clear to the Israeli team that the Palestinians had retreated from what the Israelis saw as joint understandings reached during the Stockholm talks, namely, that the principle of “family unification” was not acceptable to them and that Israel needed to acknowledge its responsibility for creating the refugee problem and agree to the principle of “right of return” to be implemented through a quota of 5,000-10,000 refugees per year, “until the issue naturally dissipates” (Ben-Ami: 77, 82).⁴⁸ On the eve of the Camp David Summit, the Palestinians made clear to the United States that they would not accept any agreement that did not include a just solution to the refugee problem (Hanieh).

C. Camp David Summit

The Palestinian demands for justice were not discussed substantively during the Camp David Summit. Akram Hanieh is certain that the reason for this was “the lack of will on Israel’s part.” According to Hanieh, the refugee committee at Camp David, which was supposed to deal with this issue, became “the greatest failure of the Summit” because of Israel’s position (Hanieh: 82). Hanieh, who described the Palestinian version of the Camp David talks, held that the discussions of the refugee issues focused mainly on the past, on the roots of the conflict, and on

⁴⁸ Ben-Ami holds that on the matter of refugees there was a certain degree of retreat during the period between the Stockholm talks (which preceded the Camp David Summit) and the Camp David Summit because of divisions within the Palestinian camp. He claims that Abu Mazen persuaded Abu Alaa not to engage in any discussion of numbers but to adhere to the right of return (Shavit, A. (2001). Interview with Ben-Ami. *Haaretz*, 14 September). In a meeting with Ben-Ami on 25 June 2000, Arafat noted that he cannot understand why Israel is not willing to recognize the right of return but is willing to annex 300,000 Palestinians to Jerusalem (Ben-Ami: 115).

the Palestinian *Nakba*, although both sides also presented their perspectives on a solution to the problem. The differences in the narratives of the two sides regarding the past and a solution to the problem were vast. Regarding a solution to the problem, which was discussed within the committee between the two sides exclusively, as well as in the presence of President Clinton, the Palestinians demanded both Israel's acknowledgement of its legal and moral responsibility for creating the problem and its acceptance of the right of return, according to Hanieh. Their demand was that the right of return must be actualized for each refugee, as per U.N. Resolution 194. The Palestinians also called for the establishment of a mechanism for implementation of this right as well as repatriation of the Palestinian refugees from Lebanon first, in light of their particularly difficult circumstances and family connections with Palestinians living in the Galilee. The mechanism for realization of the right of return had to include a timetable and a count of the number of Palestinians desiring to implement their right of return. The Palestinians also argued that after recognition of this right and establishment of a mechanism for its implementation, it would be necessary to set up a fund for compensation. They believed that the issue of compensation for Jews who left Arab countries is not part of the Palestinian issue and therefore not a subject for discussion (Hanieh: 94).

According to Hanieh, Israel categorically denied any legal or moral responsibility for the refugee problem, but was willing to express regret for the Palestinian suffering that resulted from the 1948 war. The Israeli delegation also absolutely denied a right of return. Hanieh argues that every discussion of the right of return is a taboo subject for Israel because it means a declaration of a war of annihilation against it. There can therefore be no discussion of a timetable for its implementation. At the same time, Israel expressed willingness to compensate the Palestinians, albeit indirectly through the international community. Israel also demanded that some of the monies from the international fund for compensation be granted to Jews from Arab countries that had come to Israel. Israel did, nevertheless, agree to allow a few thousand refugees to return to Israeli territory over the course of 10 years in the context of family reunification and humanitarian considerations (Hanieh: 82, 94).⁴⁹

⁴⁹ Hanieh argues that the Israeli delegation tried to persuade the Palestinian delegation that Israel did not undertake a scare campaign or slaughter in 1948 and that there had not been any expulsions or destruction of villages. According to their version, the Arab countries are responsible for the

In his version of the Camp David talks, Hanieh also presents the negative impressions of the Palestinians regarding the non-implementation of their demands for procedural justice. He claims that Israel tried, with full U.S. support, to maximize fully (by 100%) its achievements during the negotiations, while completely ignoring the positions, rights, and demands of the Palestinians as partners to the peace process. With U.S. support, Israel tried to force its desired agreement on the Palestinians, but the latter, of course, forcefully rejected this effort. The failure of the Camp David Summit is therefore, according to Hanieh, directly attributable to Israel and the United States (Hanieh: 81).

The Israeli version of the discussion of refugees during the Camp David talks differs from that of Hanieh. According to the former, the Palestinians demanded that Israel acknowledge its responsibility for creating the refugee problem, recognize their right of return, and accept between 10-20% of the refugees, amounting to **400,000-800,000** persons. They primarily demanded the return of refugees from Lebanon to their homes in the Galilee, and they rejected Israel's demand for compensation for Jewish refugees who had fled Arab countries. Israel, for its part, made clear to the Palestinians and Americans that the right of return is a Palestinian narrative that Israel cannot accept, just as the Palestinians cannot accept Zionist narratives, and that recognition of the right of return would be a moral defeat for Israel. Nonetheless, Israel is open to practical solutions to the refugee problem in the framework of compensation through an international committee and fund. Israel also agreed to recognize a right of return to a *Palestinian* state and even to receive within its territory a "modest number" of refugees on humanitarian grounds over the course of an extended period of time (Ben-Ami: 142, 205, 208).

The Israeli negotiators to the Camp David talks were surprised by the intensity of Palestinian demands on the issue of justice, and primarily by the issue of a right to return. They had assumed, or deluded themselves, that the Palestinians accepted that they were not there to discuss the past and the right of return, having presumably internalized Israel's absolute opposition to this issue,

Nakba because they called on the Palestinians to abandon their homes and await the Arab liberation of Palestine. Although these Israeli claims have long been denied by serious historians, including Israelis, the Israeli delegation refused to retreat from its stance. Nor did the Israeli delegation revise its view when the Palestinians presented memoirs and testimonies of Israeli generals who affirmed Israel's responsibility for the *Nakba* (Hanieh: 82).

and that the refugee problem could be resolved through compensation. The Israeli policy-makers first realized at Camp David that the Palestinians had not actually limited themselves to demands for transitional and compensatory justice, which are linked to the outcome of the 1947-1949 war, but had expanded their demands to the issue of the very existence of Israel, at their expense.

Shlomo Ben-Ami described his impressions in this context as follows: “The Israelis arrived ready to seek a compromise solution to the problems of 1967 and found themselves crashing into the wall of 1948 problems... with the Israelis speaking of a dream come true through a process of reasonable compromise during which they relinquish some of their dearly-held myths about Jerusalem and the Land of Israel, while the Palestinians are refusing to abandon their perception of Israel as a state born in sin that needs to admit as much and pay the price. The apparently weaker side, the Palestinians, strove for Israel’s moral defeat, to the point of dealing a fatal blow to its legitimacy as a Jewish state” (Ben-Ami: 464).

Ben-Ami claimed that the Palestinian demands for justice were an obstacle to peace: “We can say in all honesty that we tried everything and that we found, to our regret and sorrow, that the Palestinian leadership rejected the boldest possible proposals – including, in fact, a complete return of the territories – while trapped in myths of return, exile, and Islam, and that it is not capable of a compromise that would recognize a Jewish state’s moral right to exist in this part of the world” (Ben-Ami: 455).

According to Ben-Ami, the Palestinian leadership was not searching for a solution but for justice. He states that on more than one occasion, he warned the Palestinian negotiators that striving for justice would undermine the chances of peace, but they saw the peace process as “a political journey to justice and to the sanctity of Islam, which – if it fails – becomes a violent journey intended to compel the Israelis to recognize and acknowledge the justness of the Palestinian cause and the Islamic claims of ownership in Jerusalem” (Ben-Ami: 487).

Ben-Ami concluded that the Palestinian ethos is determinative of the future of peace and relations between the parties. The question in his mind is whether the Palestinians will succeed in “letting go – which will not be easy for them – of the ethos of revenge and remedy for injustice directed against Israel, the state that – in collective Palestinian memory – murdered, expelled, and inherited” (Ben-Ami: 506).

Ehud Barak, who shared Ben-Ami's perspective, held that Arafat could not, in his heart of hearts, morally and legally accept Israel's right to exist as a Jewish state and that Arafat's obsession was not for the establishment of a sovereign Palestinian state in part of the Land of Israel, but for a remedy to the injustice of 1948 or, in other words, the destruction of the State of Israel (Interview of Barak by Ari Shavit, *Haaretz*, 6 September 2002).

Although the Israeli policy-makers rejected Palestinian demands for justice, and especially the right of return, they understood that Israel needed to find a way to deal with these demands for justice. During discussions within the Israeli team at the Camp David Summit, differences of opinion on the matter surfaced. Barak held that "we must distinguish between our justice and the patently clear observation that without some sort of satisfactory response to the other side, there will be no agreement" (Sher: 164). Ben-Ami was also convinced that, given that the Palestinians are the main victims of the conflict, "we must not shrink away from one fundamental, moral aspect of the conflict: we, a nation of victims, also insist on living within the culture of victimhood without a real ability to acknowledge that another nation was – even if mainly through the fault of its leaders – our constant victim. . . . We are obliged to give them back their dignity and compromise on their rights" (Ben-Ami: 507). He held that even if the agreement on refugees is "very narrow and measured," it "must include some element of moral compensation" (Sher: 164). In contrast, Elyakim Rubinstein denied the possibility of relating to the Palestinian narrative: "History cannot be rewritten. The State of Israel has an ethos and does not need to abandon it" (Sher: 164).

The attitude of the Israeli negotiators towards "moral compensation" or "some sort of satisfactory response" to the other side was limited to an Israeli willingness to recognize the suffering and hardship of the Palestinian refugees and the reality that they were the primary victims of the bloody Israeli-Arab conflict and a willingness to receive a few thousand refugees over the course of many years solely on a humanitarian basis and not, heaven forbid, on the grounds of a right of return, which would amount to an admission of injustice and recognition of this right (Barak, 2005; Beilin, 2002 ; Ben-Ami: 277).

After the Camp David Summit, the parties continued negotiating these issues with each side retaining its accepted position. The Palestinians continued to demand that Israel recognize its moral responsibility in creating the refugee

problem and agree to a right of return, though implemented in a way that maintains the internal demographic balance within Israel. They made it clear that if Israel wants to conclude the conflict and put an end to demands, it must recognize the right of return. Israel, for its part, categorically denied the Palestinian demands and put forward yet another reason for its absolute resistance to the right of return to Israel: the right of return should only be actualized within the territory of the Palestinian state because it is not conceivable that Palestinian refugees would return to live within Israel if a Palestinian state were established, as there is a clear contradiction between the Palestinian aspiration for a state and the return of refugees to Israel. Israel's acceptance of the unrestricted return of Palestinian refugees to a Palestinian state amounted to a new Israeli concession. Israel also raised the idea, which President Clinton later adopted as one of his parameters, that refugees would be able to return to those territories that the Palestinian state receives from Israel in the context of territorial exchange, and that the Palestinians could define this as implementation of the right of return. In addition, Israel held that the foundation for a discussion of the refugee question was not Resolution 194, but Resolution 242. At the same time, Israel expressed willingness to adhere to the Stockholm draft and receive 15,000 refugees over the course of 20 years (Ben-Ami: 277, 285, 372-373; Pressman).

D. Clinton's parameters – transitional and compensatory justice

Through United States President Bill Clinton's parameters, which were presented to the parties on 23 December 2000, just before the conclusion of Clinton's presidency, the American intermediary for the first time proposed ways of resolving the conflict that addressed the questions of justice and resolution of the refugee problem, among others. Under the heading "refugees," the president noted that he *believes* that Israel is prepared to acknowledge the moral and material suffering caused to the Palestinian people as a result of the 1948 war and the need to assist the international community in addressing the problem. This approach was not rejected by Israel, as it was essentially limited to "willingness to acknowledge the moral and material suffering" but did not include a willingness to recognize Israel's responsibility for the suffering or its remedy. Indeed, President Clinton stressed that the fundamental gap in the positions of the parties relates to the right of return. The president noted that, being familiar with the history of the issue, he

knows how difficult it is for the Palestinian leadership to appear to be neglecting the principle of the right of return, but on the other hand, Israel simply cannot acquiesce on this issue because a Palestinian right of return endangers its Jewish character.

The solution, according to Clinton, has to address the needs of both sides and accord with the perspective of “two states for two peoples” – the Palestinian state as the homeland of the Palestinian people and the State of Israel as *the homeland of the Jewish people* – a perspective on which both sides agreed as a way of concluding the Israeli-Palestinian conflict. In the two-state solution, the Palestinian state would be the “focal point” for Palestinian return to the region, without ruling out the possibility that Israel will accept some of these refugees. Regarding the right of return, the president stressed that he *believes* that the parties need to adopt a formula that makes clear that there is no specific right of return to Israel itself, but that does not negate the aspiration of the Palestinian people to return to the area. In this context, the president proposed two alternatives to the parties: (1) Both sides recognize the right of Palestinian refugees to return to historic Palestine; or (2) Both sides recognize the right of Palestinian refugees to return to their homeland.⁵⁰

In the president’s opinion, the agreement between the parties should define actualization of this right in a way that would accord with the two-state solution. Within this context, Clinton proposed five alternatives for permanent residence for refugees: (1) The Palestinian state; (2) Areas that Israel transfers to the state of Palestine in the context of territorial exchange; (3) Host countries; (4) Third countries; (5) The State of Israel.

In noting these alternatives, the agreement would make clear that return to the West Bank and Gaza, or to the territories that Israel transfers to the Palestinians in the context of territorial exchange, is the right of Palestinian refugees, while their rehabilitation in host countries, and resettlement in third countries, or absorption into Israel will depend on the policies of these countries. Israel could indicate in the agreement if it intends to establish a policy that some of the refugees would be absorbed into Israel, consistent with its sovereign decision. The president noted that he believes that priority should be given to the refugees living in Lebanon.

⁵⁰ It appears that both alternatives are problematic for Israel because both “historical Palestine” and “homeland” could include the State of Israel itself.

The parties would agree that implementing these steps puts the stipulations of U.N. Resolution 194 regarding Palestinian refugees into practice.

President Clinton's parameters on the matter of responsibility and the right of return addressed Israel's aspirations. Israeli recognition of the moral and material suffering of the Palestinian people as a result of the 1948 war and limited reception of refugees over a long period of time – not on the basis of a right of return but solely on the humanitarian ground of family reunification – were solutions that Israel had no difficulty accepting. In contrast, Clinton's parameters generated a formula that did not address the Palestinian demands for justice. Indeed, rather than determining that Israel was responsible for the refugee problem, the president's formula only included Israeli recognition of the moral and material suffering of the refugees, and the right of return was limited only to the Palestinian state and territories that Israel would transfer to the Palestinians in a territorial exchange. Israel's willingness to receive an undetermined number of refugees over a long period of time was not sufficient to address the demand for a right of return.

On December 28 Israel did indeed accept Clinton's parameters as a basis for continuation of the negotiations towards a permanent arrangement, on the condition that the Palestinians accept them as they are and in the same manner. At the same time, however, Israel had various reservations. Regarding the refugee issue, Israel emphasized that its position opposing the right of return to its territory is necessarily firmer than what appears in the president's proposal (Sher: 373).⁵¹ The Americans stated that they had the impression that Arafat was in principle willing to consider the president's ideas in a positive light, although they were not certain.⁵² Later the Americans received the impression that Arafat had retreated from and changed his position when he understood that without a right of return, he cannot face the refugees because return is not only a matter of right but also of justice and honor.

⁵¹ Writers and "peace camp" personalities David Grossman, Meir Shalev, Nissim Calderon, Amos Oz, Zeev Sternhell, and A.B. Yehoshua published a notice in the newspaper *Haaretz* in which they expressed unequivocal opposition to acceptance of the right of return: "acceptance of this right amounts to elimination of the State of Israel" (Sher: 376).

⁵² Sher: 375, 377.

E. The Taba Summit

Although the Palestinians requested that Clinton's parameters not serve as a basis for talks with the Israelis in January 2001 in Taba, it would appear that they did indeed serve as such. The negotiations in Taba regarding the refugee issue were headed by Yossi Beilin and Nabil Sha'ath and were, in fact, the most substantive negotiations on this issue since the beginning of the Oslo process. In Taba the parties dealt with three issues: the narrative, Israeli willingness to receive a certain number of Palestinian refugees, and international institutional arrangements for personal compensation to Palestinians through an international fund.

The first issue raised in Taba was the narrative. Beilin notes that the insight reached in the Taba talks was that it is possible to discuss the creation of the refugee problem without expressing willingness to receive the refugees in Israel. The very fact that they could discuss the refugees and respect both narratives was enough to satisfy each party that its narrative had not been neglected. Beilin recalls a formula that had been developed to address the Palestinians' demand for transitional justice and compensatory justice, which included three elements: refraining from demands for recognition of responsibility for creating the refugee problem; refraining from demands for a declaration cancelling the right of return; and refraining from demands for recognition of a right of return. Instead, the parties agreed on a concise description of the evolution of the conflict as each side sees it, humanitarian recognition of the refugees' suffering and hardship, and separate interpretations of Resolution 194, while agreeing that this right would be implemented according to the principles of the Clinton plan (Beilin, 2001: 208). Regarding the reception of a number of refugees – a topic discussed for the first time in Taba – Beilin (without consulting with Barak) expressed Israeli willingness (unrelated to the Palestinian demand regarding the right of return) to receive 25,000 refugees during the first three years in the context of a 15-year arrangement (Beilin, 2002: 12-17).⁵³ Regarding the third issue, the establishment of an international fund and personal compensation for refugees, it was agreed to adopt the principles that Clinton had proposed as to where the refugees would be received: (1) The Palestinian state; (2) The areas that Israel transfers

⁵³ According to a different version, Beilin agreed to 40,000 refugees (Interview of Ben-Ami with Shavit, *Haaretz*, 14 September 2001). In his book, *Manual for a Wounded Dove*, Beilin notes, "the question of the number of refugees that Israel would be willing to accept symbolically was left to the decision of the leaders as part of the signing of a framework agreement" (p. 216).

to a Palestinian state in the context of territorial exchange after Palestinian sovereignty is established; (3) Third countries; (4) The State of Israel; (5) Current host countries.

The solutions, including compensation, would represent the implementation of Resolution 194, and with this the Palestinian demands would end.

Nabil Sha'ath presents the agreement about refugees reached at Taba in a different manner. Sha'ath claims that it was agreed that the right of return is a principle that Israel must accept if it wants to solve the refugee problem because without its acceptance in principle, a solution to the problem would never be achieved. Sha'ath holds that a conceptual understanding was indeed reached regarding Israel's responsibility for the suffering and problems of the Palestinian refugees, but that actualizing the right of return would have to be agreed upon by both parties to the negotiations.

In a document he submitted to the United States, Sha'ath indeed agreed to include the term "agreed" as part of a just solution to the problem (Sha'ath, 2002).⁵⁴ Even so, the Palestinians were not willing to compromise on the number of refugees received by Israel or on the timetable, as Beilin had proposed at the Taba meeting. Israeli sources noted that the Palestinians had cited a total number of a million and a half refugees to be received over the course of ten years – 150,000 refugees per year (Interview of Ben-Ami with Shavit, *Haaretz*, 14 September 2001; Barak, 2005: 145).⁵⁵ Other sources cite different numbers raised by the Palestinians at Taba and other opportunities – between 100,000 and 300,000 refugees.⁵⁶

⁵⁴ In a press conference at the end of the Taba Summit, Abu Alaa declared that on the matter of the refugees, it should be noted that the Palestinians demanded the right of return and Israel refused. Although Beilin and Sha'ath claimed that this was not the case and asked him to relay the tremendous progress that had been made on the issue, including identifying a way to present the problem so that neither side is offended, Abu Alaa refused and said, "This is good for you [Israel] as well!" Beilin interpreted this as follows: "It's as if he said – why should you complicate things before elections through an agreement with us on the refugee issue? Better that each side sticks with its position." The impression created as a result was that in light of the conflicting demands of the parties on the issue of return, a permanent agreement is not possible (Beilin, 2001: 217).

⁵⁵ Barak noted that he never heard these numbers from Arafat (Barak, 2005: 145).

⁵⁶ In this context see Pressman, J. (2003). "Visions in Collision: What Happened at Camp David and Taba?" *International Security*, 28(2), 32.

Although both Beilin and Sha'ath claimed that an agreement was reached at Taba regarding the refugee problem, the Palestinians refused to define it as a "just solution" because their demands regarding the question of Israeli responsibility for creation of the refugee problem and Israel's recognition of the right of return were not in fact met (Ju'beh, 2002:11). Israel did indeed refuse to acknowledge responsibility for creation of the refugee problem and to recognize the right of return. Its willingness to receive 25,000 or 40,000 refugees was not reflective of recognition of the right of return and its implementation but was, rather, made in the context of humanitarian gestures such as family reunification.

Although Ben-Ami was not a partner to the Taba negotiations on the refugee issue, he notes that the principal demand that the Palestinians raised at Taba – that Israel recognize the right of return and then discuss the details of its implementation – "infuriated me no less than when they mentioned numbers in this or that occasion" (Interview of Ben-Ami with Shavit, *Haaretz*, 14 September 2001). Barak was even more adamant: "When we understood that Arafat is not willing to relinquish the Palestinian demand to allow refugees to return to the sovereign territory of Israel – something we realized at Camp David and Yossi Sarid realized at Taba – we informed Clinton and Arafat that even if we are willing, like previous Israeli governments, to receive thousands of Palestinian refugees in the context of humanitarian reunification of families, we cannot agree to Arafat's version of the right of return. Neither I nor any other Israeli prime minister would be willing to receive a single refugee on the basis of the principle of right of return" (Barak, 2005: 145).

5. Procedural, transitional, and compensatory justice in Track II talks

With the failure of the Oslo process and the ending of official negotiations after the Taba talks in January 2001, the discussion focused on issues of justice and injustice through unofficial channels: Ayalon-Nusseibeh Agreement (the People's Voice) and the Geneva Initiatives.

In the Ayalon-Nusseibeh Agreement of 27 July 2002, the matter of justice and its remedy is not mentioned, although the "right of return" is mentioned. The document limits the Palestinian return to the Palestinian state only and

denies return to the State of Israel. Article 4 of the agreement – entitled “Right of Return” – states, “Recognizing the suffering and the plight of the Palestinian refugees, the international community, Israel, and the Palestinian state will initiate and contribute to an international fund to compensate them. Palestinian refugees will return only to the state of Palestine; Jews will return only to the state of Israel. The international community will offer to compensate toward bettering the lot of those refugees willing to remain in their present country of residence, or who wish to immigrate to third-party countries.” Interestingly, the first article in this agreement, entitled “Two States for Two Peoples,” states “Both parties will declare that Palestine is the only state of the Palestinian people and Israel is the only state of the Jewish people.”⁵⁷

The Geneva Initiative of 19 October 2003 does not mention the injustice and its remedy, nor does it mention the term “right of return,” or even the word “return.” Yet Article 7, which deals with refugees, in Clause 1, under the heading “Significance of the Refugee Problem,” states: “The Parties recognize that, in the context of two independent states, Palestine and Israel, living side by side in peace, an agreed resolution of the refugee problem is necessary for achieving a just, comprehensive, and lasting peace between them.” Later, in Clause 2, it states: “The Parties recognize that UNGAR 194, UNSC Resolution 242, and the Arab Peace Initiative (Article 2.ii) concerning the rights of the Palestinian refugees represent the basis for resolving the refugee issue, and agree that these rights are fulfilled according to Article 7 of this Agreement.”

During negotiations of the Geneva Initiative, the Israelis rejected not only the return of refugees to Israel but also the very word “return.” They also rejected the Palestinian idea of territorial compensation based on territories beyond those of 1967 (what was termed the “101% option”) in exchange for Palestinian relinquishment of implementation of the right of return to within Israel. Moreover, the Israelis also rejected the Palestinian demand that the agreement state that the parties recognize the right of Palestinian refugees to return to their homeland of Palestine, and they demanded that the word “state” be inserted before “Palestine”

⁵⁷ In a speech at the Hebrew University on 15 October 2001, Sari Nusseibeh said that the Palestinians need to stop calling for a right of return. He states that the Palestinians must understand that if they want to reach a two-state agreement, there must be one state for Israelis and one state for Palestinians, not one state for Palestinians and also another state for Palestinians. (Greenberg, J. (2001). “Palestinian Offers Idea: Get Israelis on Our Side.” *New York Times*, October 17.)

so that it would be clear that the return is limited to the state of Palestine, in contrast to the alternatives proposed in Clinton's parameters. The Geneva Initiative enables the individual refugee to retain the right of return in his consciousness, but if he chooses to reside permanently in Israel and if Israel agrees, then he will have to undergo an immigration process conditional on Israel's agreement. This distinction differs completely from the classic Palestinian conception of the right of return, which demands of Israel that the right be granted to each and every refugee. Moreover, according to the Geneva Initiative, a refugee who wants to actualize the right of return that exists in his consciousness cannot rely on international resolutions and decisions of U.N. agencies because these would be voided and the Palestinian refugee status no longer recognized (Klein: 57-8).

Article 7 of the Geneva Initiative further states: "The solution to the PPR [permanent place of residence] aspect of the refugee problem shall entail an act of informed choice on the part of the refugee to be exercised in accordance with the options and modalities set forth in this agreement. PPR options from which the refugees may choose shall be as follows: (i) The state of Palestine... (ii) Areas in Israel being transferred to Palestine in the land swap, following assumption of Palestinian sovereignty... (iii) Third Countries... (iv) The state of Israel... (v) Present Host countries."

Regarding the fourth option – the state of Israel – the Initiative states: "Option iv shall be at the sovereign discretion of Israel and will be in accordance with a number that Israel will submit to the International Commission. This number shall represent the total number of Palestinian refugees that Israel shall accept. As a basis, Israel will consider the average of the total numbers submitted by the different third countries to the International Commission."

Regarding Palestinian recognition of Israel as a Jewish state, the Geneva Accord explicitly states that "this agreement marks the recognition of the right of the Jewish people to statehood and the recognition of the right of the Palestinian people to statehood, without prejudice to the equal rights of the Parties' respective citizens."⁵⁸

⁵⁸ Within Israel there was criticism of the Initiative's handling of the refugee question. Two principal claims were voiced against the accord's formulation: first, the Palestinians had not actually conceded the right of return to Israeli territory; second, the text cites Resolution 194 of the U.N. General Assembly as one of the bases for resolution of the problem, something the Palestinians interpret as a right of return to Israel (Klein: 189-191).

Menachem Klein states in his book *A Possible Peace Between Israel and Palestine: An Insider's Account of the Geneva Initiative* that during the negotiations of the Geneva Accord, the Palestinians also raised the issue of the 1948 narrative, that is, the question of who is to blame for creation of the refugee problem and what would be the nature and rubric of the agreement. Klein claims that both sides had learned the lesson of the official negotiations' failure to agree on a joint narrative of the 1948 war (for example, at Taba). The Geneva Initiative proposed giving this assignment to civil society, with the support of both governments, a proposal that was not really disputed. Indeed, in February 2005, after the death of Arafat and election of Abu-Mazen, a series of announcements signed by writers and other personalities was published at the initiative of author David Grossman (not on behalf of the Geneva Initiative), calling for the government of Israel to commence negotiations "by addressing the Palestinian people and acknowledging their suffering, and recognizing that Israel bears partial responsibility for that suffering. We feel that, as Israelis, we today have the ability to make the first necessary step: to look directly at the neighboring Palestinian people and recognize their suffering, out of human sympathy and empathy... We expect that the new Palestinian leadership will also express its empathy for the suffering that Israelis have known over the years of conflict and recognize its partial responsibility for that suffering" (Klein, 60; *Haaretz*, 9 February 2005). This initiative did not receive a response from the other side.

In sum, the two above Track II agreements do not mention the issue of injustice, do not address the question of Israeli admission of responsibility for the injustice, and do not mention the right of return. The Geneva Initiative, however, does include an Israeli commitment to receive a certain number of refugees as it sees fit. For both agreements, the issues of justice and its Palestinian interpretation do not pose a barrier because the Palestinian representatives relinquished these demands following Israeli refusal to accept them. It is difficult to say whether the Palestinians conceded because of the power imbalance between the two sides or because they understood that it would not be possible to establish a Palestinian state without concession on these demands. Although these agreements are the result of informal initiatives, their significance lies in their relatively large success in creating joint understandings of how to overcome the barriers of the past and bridge the gaps between the parties. Nonetheless, it is doubtful whether policy-

makers and the public on both sides are ready at this stage of the conflict to accept either the Ayalon-Nusseibeh Agreement or the Geneva Initiative.

Conclusions

The relationship between peace and justice is at the heart of the Israeli-Palestinian conflict, particularly in light of the Palestinian demand for a just peace. The Palestinian demand for justice has two layers: a demand for procedural justice and a demand for transitional and compensatory justice. The demand for procedural justice relates primarily to Israeli recognition of the Palestinians as an equal partner in the peace process given the asymmetry in power relations between the two sides and the occupier-occupied relations between them. The demand for transitional and compensatory justice focuses mainly on Israeli acknowledgment of its responsibility for perpetuating injustice against the Palestinian people and for its remedy. The Palestinian demand for procedural justice was acceptable to some of the Israeli representatives, but they had trouble carrying it out in practice, and thus the relations between the parties were not grounded in real equality.

After the outbreak of the second *Intifada*, Israel found it difficult to recognize Arafat or Abu Mazen as a negotiating partner, the former because of loss of trust in him and the latter because of his weakness. At the same time, however, the Palestinians have veto power and there is thus no way of resolving the conflict without their agreement.

The Palestinian demands for transitional and compensatory justice are principally linked to the outcome of the 1947-1949 war, but also to the establishment of Israel as a state on Palestinian land, according to their view. The Palestinians demand that Israel acknowledge responsibility for expulsion of the Palestinians and creation of the refugee problem and that it agree to implementation of the right of return within its borders. The Palestinians, for their part, do not acknowledge their responsibility for the outbreak of the Israeli-Palestinian conflict or, specifically, for the 1947-1949 war and its outcome. Similarly, they do not accept the Israeli view of justice, which is focused on the right of Jews to establish a Jewish state in the Land of Israel and/or to recognize Israel as the state of the Jewish people. In the Palestinian view, such acknowledgment would add to the injustice that the Zionist movement inflicted upon them through the

establishment of Israel on their land, and it has the potential to deny their right of return and undermine the rights of Palestinians living in Israel.

The Palestinians presented their demands for procedural, transitional, and compensatory justice at the start of the Oslo process, but Israel completely rejected them. Israel conditioned the peace process on its focusing on the outcomes of the 1967 war, not those of the 1947-1949 war. Israel also objected to dealing with injustice and its remedy as defined by the Palestinians and, in fact, imposed the negotiating framework that it wanted, based on a gradual and multi-phased process including an interim arrangement to be achieved before the parties reach a permanent agreement, with the core issues postponed to the permanent agreement phase. The Palestinians were forced to accept the Israeli position at Oslo, recognizing that, in light of the power imbalance between them and Israel, their insistence on having their demands for justice met could be a barrier to peace and the establishment of a Palestinian state. Nonetheless, they did not reconcile themselves to removal of the justice issue from the agenda, and they saw the peace process as unjust and unfair, a result of Israel exploiting its power during the negotiations. Their demands for justice were renewed more adamantly at the Camp David Summit because of the massive criticism leveled against Arafat and the Palestinian negotiating team by other Palestinians, especially intellectuals, for abandoning their demands for justice and, in particular, the right of return. Although the Palestinian demand for justice was not the only cause of the failure of this summit, it did contribute significantly to this failure.

The Israeli negotiating team at Camp David was surprised by the renewal of the Palestinian demand for justice and by its intensity, and they saw it as a barrier to peace. They received the impression that the Palestinian demand for justice not only includes the right of return, which has the potential to endanger Israel as a Jewish state, but that it actually denies the very existence of Israel as the state of the Jewish people because its establishment was the primary source of injustice according to the Palestinian view.

Nevertheless, changes in the Palestinian demands did take place between the start of the Oslo process and the Taba Summit in January 2001. Although the Palestinians were insisting on transitional justice – that is, Israeli recognition of its responsibility for creating the refugee problem and Israel’s willingness to accept the right of return in principle – they were willing to have implementation

of the right of return (compensatory justice) – that is, determination of the number of refugees that Israel would receive – achieved through negotiations between the parties, while recognizing that any massive return of refugees would endanger the Jewish character of Israel. Israel refused to acknowledge the change in Palestinian demands for justice as a substantive one because the latter were still focused on Israel’s recognition of its responsibility for the injustice and on the right of return to its territory. Israel expressed willingness to receive a limited number of refugees on a humanitarian basis and in the framework of family reunification, but under no circumstances on the basis of a right of return. Similarly, Israel refused to accept any responsibility for creation of the refugee problem.

The Track II initiatives – the People’s Voice and the Geneva Initiatives – dealt differently with the Palestinian demands for justice. In both of these initiatives, the parties decided not to engage in the Palestinian demand that Israel acknowledge responsibility for the injustice perpetuated against the Palestinians, and they associated the right of return solely with the territory of the Palestinian state. Even so, the Geneva Initiative included an agreement to receive Palestinian refugees into Israel, though not on the basis of a right of return. The two initiatives dealt with a solution to the refugee problem outside of the framework of the right of return, thus removing the right of return as a barrier to resolution of the Israeli-Palestinian conflict. It seems that while Israel can accept this solution, it is doubtful whether the Palestinian policy-makers and public are ready, at this stage, to abandon their demand for transitional and compensatory justice. This is because the demand for transitional and compensatory justice is a protected value that the Palestinians are not willing to relinquish, and any effort at such a concession on the part of Palestinian leadership will create a confrontation with the Palestinian public and in particular with the refugees who base their exile on the ethos of return.⁵⁹

It would appear that the theoretical arguments that we have presented regarding the possibility of finding a compromise formula between peace and justice can only be of limited help in dealing with the problem of justice in the

⁵⁹ In this context it is appropriate to note the decisions of the Fatah Summit in Bethlehem in August 2009 and the declarations of Palestinian Authority leaders: Abu Alaa (*Haaretz*, 26 May 2009); Abu Mazen (*Washington Post*, 29 May 2009); Saeb Erekat (*Al Dustur*, 25 June 2009), as well as Agha, H. & Malley, R. (2009). “Israel & Palestine: Can They Start Again?” *The New York Times Review of Books*, 56(19).

Israeli-Palestinian conflict. This is because even if both sides agree that justice is one of the topics for negotiation and the peace process, it is doubtful whether they are currently ready to develop a joint perspective regarding the issues related to justice and how to handle them.

The accepted proposal in the theoretical literature – a trade-off between protected values as a compromise that combines justice with peace – was rejected by the Palestinians. They rejected an Israeli proposal for exchange of protected values that had been raised during negotiations after the Camp David Summit and included Israel relinquishing sovereignty over the Temple Mount in exchange for Palestinian concession on the right of return. The Palestinians were unable to concede the right of return, given its status as a protected value, and it is surprising that the Israeli negotiating team raised this possibility, considering that it would be unlikely to receive religious, political, and public legitimacy (Ben-Ami: 367, 377). This proposal could present an apparently fair compromise, but it is doubtful whether it will be repeated given that it ignores the difficulty for both sides in exchanging protected values.

Another reasonable compromise would involve distinguishing between the Palestinian demands for transitional justice and their demands for compensatory justice. A moderate Palestinian demand for transitional justice, such as Israel's willingness to acknowledge the suffering of the Palestinian people (though not to take responsibility) – as proposed in Clinton's parameters – can serve as a compromise solution to the demand for transitional justice. Alternatively, both sides could adopt a formula acknowledging their joint responsibility for the injustice that each side inflicted on the other during the course of the conflict, apologize to each other, and forgive each other. This option is of course only possible if the Palestinians accept it, and it is doubtful whether they are ready to do so.

With respect to the demand for compensatory justice, the two-state solution and the establishment of a Palestinian state alongside Israel should be seen as an Israeli compromise and an actualization of the demand for compensatory justice. The Israeli and American proposals – that the refugees be relocated to territories that Israel would exchange with the Palestinians and would thus be regarded as having actualized their right of return – can also be seen as a compromise. The establishment of a Palestinian state would not only put an end to the current

Israeli occupation and Palestinian suffering, but would also allow realization of the right of return to within the Palestinian state. The Palestinians have rejected solutions that did not, in their view, address their demands for a right of return. The Palestinian demand for a right of return to the territory of Israel conflicts with the idea of establishing a Palestinian state because the establishment of a Palestinian state in itself is a rational, moral, and reasonable solution to the refugee problem. Palestinian insistence on the right of return to Israel will not only prevent the achievement of a peace agreement and the formation of a Palestinian state, but will also cause more suffering to refugees and residents of the West Bank and Gaza Strip and increase the sense of grievance and injustice. The Palestinian demands for transitional and compensatory justice are, therefore, a barrier to peace.

In a situation where the parties are unable to reach agreement regarding justice but are indeed interested in reaching a peace agreement based on a two-state solution, they should consider postponing engagement with the issue of justice to the phase of reconciliation. In so doing, they would agree, within the framework of a peace agreement, that the issue of justice is very important to them and that peace cannot be established and maintained until they have fully dealt with the question of justice in their relations. Delaying the matter to the reconciliatory phase could make it easier for the parties to overcome the justice barrier in the peace process and enable them to examine this issue after they have resolved the conflict and established trust. The parties would then be better prepared to engage in this issue, which is very value-laden and difficult to resolve through compromise.

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