

# Palestinians' Right of Return and Israel's Right to Exist as a Jewish State

Jerome M. Segal

Do Palestinians who were displaced when the state of Israel was created in 1948 have a right to return to their former homes? A widely held Palestinian position is that the Israelis must recognize a right of return as a matter of principle, and that Palestinians will then work out with them a realistic compromise on implementation. As far back as February 2002, Yasir Arafat, in his one and only *New York Times* op-ed piece, made it clear that Palestinian negotiators were not seeking the actual return to Israel of millions of Palestinian refugees. He wrote, "We understand Israel's demographic concerns and understand that the right of return of Palestinian refugees, a right guaranteed under international law and United Nations Resolution 194, must be implemented in a way that takes into account such concerns."

Israeli negotiators, however, have long resisted any recognition of a right to return. To the extent that they are prepared to allow some refugees to return to Israel, they insist that this be done on humanitarian grounds, such as "family unification," rather than in deference to claimed refugee rights. The Israelis fear that were they to accept, even in principle, a right of return, they would be opening themselves to never-ending pressure to admit greater and greater numbers of refugees. They also fear that acceptance of any right of return

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would bolster acceptance of Palestinian accounts of the events of 1948, accounts that most Israelis reject outright or regard as one-sided.

The refugee issue is a major challenge for any effort to end the conflict. In order to achieve a lasting peace, Israeli-Palestinian negotiations must produce a treaty that will be regarded as legitimate by the refugees themselves. Part of the difficulty may be that little progress has been made in defining the rights of the

refugees with any precision. Instead, the phrase "right of return" has been bandied about without adequate analysis or clarification. In this regard, the situation is similar to that involving the other rights concept which has plagued efforts to negotiate a comprehensive peace: recognition of Israel's "right to exist." As we think about the right of return, then, it is useful to reflect on past experience with the "right to exist" concept.

## Unanswered Questions

In 1975, as a result of talks between Henry Kissinger and Israel's Deputy Prime Minister, Yigal Allon, the United States declared that it would not negotiate with the Palestine Liberation Organization (PLO) until the PLO recognized Israel's right to exist. Today, "recognition of Israel" is one of the conditions imposed by the Middle East Quartet (the United Nations, the European Union, Russia, and the United States) on Hamas, which regularly announces that it will never "recognize Israel," "Israel's legitimacy," or "Israel's right to exist"—three concepts which are not the same, but whose meaning remains to be clarified.

With respect to "Israel's right to exist," the most fundamental questions have never been answered. Are we talking about a moral right or a legal right? And are we talking about a right to have come into existence or a right to remain in existence? These distinctions generate a spectrum of four possible interpretations of the "right to exist." To the Palestinians, the least acceptable of these would be that Israel had a moral right to come into existence. The least problematic would be that the existing state of Israel, under international law, has a legal right to live in peace and security. The first interpretation represents a highly controversial ideological assertion about the moral validity of Zionism, while the second represents a far less controversial assertion about the rights of all existing states under current international law. The point is that in the 33 years since the Kissinger-Allon agreement, no one has ever clarified the meaning of this fundamental concept.

## Joseph's Bones

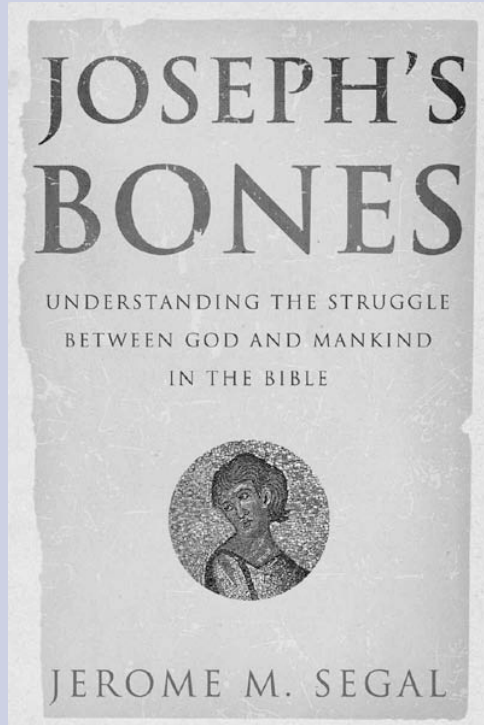
### Understanding the Struggle Between God and Mankind in the Bible

Jerome M. Segal

Imagine if someone who had never heard of Judaism or Christianity read the Old Testament. How could the relationship between God and humanity possibly be understood? In *Joseph's Bones*, Jerome M. Segal approaches the Bible from this fresh perspective—one framed by the story of the Israelites' fidelity to Joseph—and finds something unexpected: an account of the human condition that reads like an existential novel about the struggle of mankind against the unpredictable and often unwarranted wrath of God.

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I would suggest that, in many ways, the right of return of Palestinian refugees is equally in need of clarification. Here are some basic questions that have yet to be resolved:

1. Moral rights exist whether or not they are recognized by governments. Often enough, a government's failure to recognize moral rights calls its legitimacy into question. Legal rights, by contrast, exist only insofar as they have been agreed to by governments. The scope and power of a right under international law may be quite different from its scope and power as a moral right. When Israel is asked to recognize that Palestinian refugees have a right of return, is it being asked to affirm that existing international law provides for such a right, or is it being asked to affirm that, independent of what international law says or doesn't say, the refugees have such a right? Or, if both, which is more important to Palestinians?

2. How strong a right is the right of return? Rights are not absolute. For instance, in democratic societies, it is widely accepted that there is a right to free speech, that no one can be imprisoned for simply speaking. Yet it is also widely accepted that the right of free speech is not absolute. It does not permit someone to yell "Fire"

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*Moral rights exist whether or not they are recognized by governments.*

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in a crowded movie theater in which there is no fire. To do so would cause a riot in which many would be injured. One can explain this limitation in terms of a conflict between rights. In the crowded theater, the right of free speech does not extend to acts that would violate the rights of other people—specifically, their right not to be endangered unnecessarily.

This kind of limitation on the strength of a particular right is not a compromise between justice and power. It is not that justice provides the right to say whatever one wants, whenever one wants to, but that out of prudence or weakness, one sometimes needs to compromise. Rather, the issue is justice itself. It would be unjust to the others in the theater to endanger them by issuing a false alarm.

When it comes to the right of return, such considerations have entered into key formulations under international law. For instance, in Resolution 194, approved by the United Nations General Assembly in 1948, the text reads, "the refugees wishing to return to their homes and live at peace with their neighbors should be allowed to do so at the earliest practicable date." The phrase "wishing to . . . live at peace with their neighbors" serves as a qualifier on any general right of return. By including this qualifier, the General

Assembly took the position that the Israelis have a right which must be balanced against the right of return. That right is to be able to live at peace within the Jewish state that was created pursuant to UN General Assembly Resolution 181, the Partition Resolution of 1947.

I emphasize this idea of living at peace within a Jewish state because this was the key issue in the period in which Resolution 194 was enacted. The 1948 war emerged out of the rejection of the Partition Resolution by the Palestinians and the Arab states. That resolution was the trigger for the fighting that began in late 1947 and for the war between Israel and the Arab states that began in May 1948. Thus, the General Assembly, when it adopted Resolution 194 in December 1948, was not referring to some general willingness of refugees to live at peace with Jewish neighbors, for instance, within a largely Islamic society. Rather, it was referring to a willingness to live at peace within the Jewish state that had just been created.

A word must be said about the term “Jewish state.” In the context that is relevant to understanding UN Resolutions 181 and 194, “Jewish state” has a limited meaning. It most certainly does not mean a state in which Judaism will be the state religion, or in which Jewish religious law will be enforced by the state, or in which Jewish religious authorities will have power over the governance of the state. A Jewish state is not a theocracy. Rather, a Jewish state as envisioned in 1947 is a democratic state, with equal rights for all its citizens. It is, however, intended as a homeland for the Jewish people, and as a place where the Jewish people exercise their right of self-determination. Because it is also a democracy, in which the majority rules, the Jewish state is implicitly intended to be a state in which a majority of the citizens are Jews.

If one reaches the conclusion that, taken together, UN Resolutions 181 and 194 support a right of Israeli Jews to live in a Jewish state in peace and security, then this intersects in two ways with the Palestinian right of return. One dimension, acknowledged in the 2002 statement by Yasir Arafat, has to do with simple demography: Were very large numbers of refugees to return to Israel, this would be inconsistent with Israel’s remaining a state with a Jewish majority. The second dimension has to do with how we are to understand the qualifying condition that returning refugees must be willing to “live at peace with their neighbors.” Let me consider this latter issue.

Today, with some sources placing the number of Palestinian refugees at 7 million, interpretation of the phrase “wishing to live at peace” is quite complex. It cannot be a matter of asking individual refugees



*Palestinian children in the Jabaliya camp in the Gaza Strip carry symbolic keys to their grandfathers' homes in Israel abandoned during the 1948 Mideast war.  
(AP Photo/Adel Hana)*

whether they are willing to live at peace with Jewish neighbors, within a Jewish Israel. On a one-by-one basis, it is quite possible that millions of refugees would say, “Yes, if I can return, I am willing to live in peace within the Jewish state.” And there is little reason to doubt that these Palestinians would abide by this promise, were limited numbers to return.

But one must also ask whether that situation would change if large numbers returned. Palestinians, today, constitute approximately 20% of Israeli citizens, and while the overwhelming majority did not participate in either the first or the second Intifada, they fully identify with the Palestinian side of the Israeli-Palestinian conflict. How might the internal security situation change, then, if the population were 40% Palestinian and 60% Jewish, or divided evenly between Palestinians and Jews? Would a much more substantial Palestinian population remain at peace within Israel if there were

another war between Israel and the Arab states? What if that war were between Israel and a future Palestinian state? In asking these questions, I do not mean to suggest a specific answer, but rather to say that these are legitimate questions that bear directly on how one is to understand the “peaceful intent” qualifier of Resolution 194.

The larger point here is that the right of return is not an absolute right. In trying to determine what justice requires, we must balance that right against other rights. What exactly are those other rights, and how strong are they? These are basic and open questions. But Israelis would certainly maintain that one of the

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key balancing rights is the right of Israeli Jews to live in peace and security within a Jewish state.

Some Palestinians would vehemently reject this position. But others, likely a minority, would agree that this is indeed the whole point of the two-state solution, and that Palestinian refugees who wish to violently resist that solution have no right of return, no right to go live in Israel and plan to overthrow it from within.

### Recognizing Rights

With this in mind, we can return to the original question: What exactly is Israel being asked to affirm when it is asked to recognize the rights of Palestinian refugees? Clearly, it makes no sense to ask the Israelis to affirm without qualification, even in principle, that justice requires that all Palestinian refugees have a right of return.

On the other hand, if the right of return is viewed as one right among many, as a right that needs to be balanced against either moral or legal rights that Israelis claim, then one can perhaps see a glimmer of a solution. For instance, might it not be possible to bring together an Israeli recognition of the right of return—whether understood as a legal right, a moral right, or both—with a Palestinian recognition of Israel’s right, under international law, to live in peace and security as a Jewish state?

I am suggesting here that Palestinians be asked to recognize Israel’s “right to exist” only as a legal right under international law. It makes little sense to ask Palestinians to affirm that Israel had a moral right to come into existence, or that it has a moral right to remain a Jewish state. The entire Palestinian understanding of the conflict is that the creation of Israel

was a vast injustice to the Palestinians. Further, concern for the rights of the Palestinian citizens of Israel raises questions for Palestinians, and for some Israelis as well, about the morality of Israel’s continuing to be a Jewish state. However, regardless of Palestinian views about the morality of a Jewish state, it remains possible for them to acknowledge its legality. This does not mean that the Palestinian citizens of Israel would have to be in favor of Israel’s remaining a Jewish state. They could take the position that Israel has a right under international law to remain a Jewish state, but that it should not exercise that right. And thus, within the framework of democratic decision making, they would be free to seek to have Israel abandon that self-identity.

This dual Palestinian position—that, in moral terms, the creation of Israel was unjust, but that it was lawful, and that Israel had a legal right to come into existence as a Jewish state—has an important precedent. This position is consistent with the Palestinian Declaration of Independence of 1988, enacted by the PLO under Arafat’s leadership. The third paragraph of the Declaration addresses UN Resolution 181, noting that the resolution “partitioned Palestine into two

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states, one Arab, one Jewish.” Maintaining the distinction between morality and legality, the Declaration refers to “this historical injustice inflicted on the Palestinian people,” yet affirms that the Partition Resolution “still provides those conditions of international legitimacy that ensures the right of the Palestinian people to sovereignty and national independence.”

The Declaration points toward a formulation that would provide both sides with some of the symbolic and practical recognition of the rights they seek. The right of return would be affirmed, but recognized as qualified by Israel’s legal right to have come into existence as a Jewish state, and by extension, its legal right to choose to remain a Jewish state so long as the choice is democratically made. This does not require Palestinians to say what they do not believe with respect to matters of justice. Palestinians can agree with the Palestinian citizens of Israel that Israel should not be a Jewish state, but they would recognize that in terms of international law, this is up to Israel.

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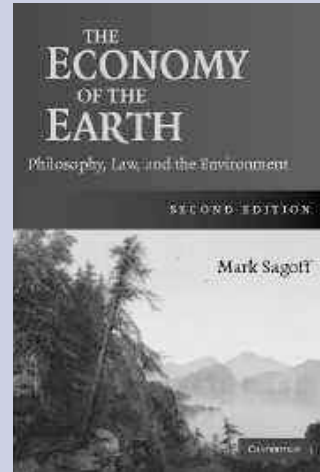
*icy analysis rest on strong and sometimes naïve ethical assumptions.*

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### Which Refugees?

If Israel's legal right to be a Jewish state is brought into connection with discourse over the Palestinian right of return, the key question is, How are these two rights to be balanced? And this brings us to a third basic question about the right of return that is rarely asked and has never been adequately answered: Whose right is it? To whom does the term "refugees" refer? If it refers to all 7 million refugees, does it refer to them all equally? Or is the right of return a stronger claim with respect to some refugees than it is with respect to others?

A recent fact sheet published by the PLO Negotiations Affairs Department says that there are more than 7 million refugees, including 6 million who lost their homes in 1948, 1 million who were displaced in 1967, and 350,000 internally displaced refugees living inside Israel.

It further says that in the occupied territories, there are 1.8 million refugees, and that outside the territories, the largest refugee populations are in Jordan (2.4 million), Syria (465,000), and Lebanon (438,000).

Of those 7 million identified as refugees, however, only a small proportion are among the 700,000 who either fled or were forced out of what became Israel in 1948. An infant from 1948 would be sixty years old today, and few who were adults in 1948 remain alive. It would be fairly safe to assume that the actual 1948 refugees remaining alive number between 200,000 and 300,000. From this, it follows that of the 6 million refugees identified as 1948 refugees, roughly 5.8 million are descendants of those who once lived in what is now Israel.

Once one starts distinguishing among categories of refugees, it makes sense to similarly distinguish

among different refugee rights. These include, but are not limited to:

- The right to return to one's actual former home.
- The right to return to a home in which one never lived, but which was the home of one's parents, grandparents, or great-grandparents.
- The right to have that former home returned to you, whether or not you can live there now.
- The right to be compensated financially for property that belonged to one's parents or grandparents.
- The right to become a citizen of Israel.
- The right to live in Israel, but as a Palestinian citizen.

Which categories of refugees have the strongest claims to which rights? This is a vital question, and it is the key to understanding how the rights of the refugees might be appropriately balanced against the rights of Israeli Jews to live in security within a Jewish state. I would suggest that any attempt to address this question must begin by attending to a few key points:

a) The right of refugees who actually once lived inside what is now Israel to return to their homes and land, and to become Israeli citizens, is stronger than the right of their numerous grandchildren and great-grandchildren.

b) Because the youngest members of the group of 1948 refugees are at least sixty years old, this group poses no threat to Israeli security or to the demographics that sustain the Jewish majority within Israel.

c) Therefore, a final settlement can, at the very least, both affirm the right of return of the actual 1948 refugees and provide for the implementation of this right, should those refugees choose to return.

d) To give some reality to this right of the actual 1948 refugees, some respect must be paid to the somewhat different rights of some of their descendants—for instance, the right of descendants of the 1948 refugees to live in Israel as Palestinian citizens. By taking Palestinian and not Israeli citizenship, these descendants would not alter the demographics of Israeli elections.

e) Even if they did not become Israeli citizens, if a large number of Palestinian refugees returned to Israel, this would raise legitimate security concerns. Thus, some balancing of rights would be necessary. Negotiators would have to agree on the actual number that could exercise this right at any given time. Furthermore, the right to live in Israel would be conditional upon the refugees' behavior. If a Palestinian citizen residing in Israel engaged in violence, Israel would have the right to revoke his or her residency rights.

On the above basis, it should be possible for Israeli and Palestinian negotiators to reach a framework which says:

"As a matter of international law, and drawing on two UN resolutions from 1947–1948 (Resolutions 181 and 194), we recognize two rights, neither of which was formally stated in those resolutions, but both of which were implied: the right of Israeli Jews to live in peace and security within a Jewish state, and the right of those Palestinian refugees who fled or were forced from their homes during the 1948 war, and who are prepared to live at peace with their Jewish neighbors, to return to those homes. Neither of these rights is absolute. Each must be exercised with respect for the rights of others. With regard to implementation of refugee rights, it is feasible to offer all surviving 1948 refugees an opportunity to relocate to Israel and to become Israeli citizens. These refugees will be offered sufficient compensation to be able to live in the areas where they originated. If their former properties are available, they can use the funds provided to regain possession.

"In addition, it is feasible to offer the opportunity to reside within Israel, as citizens of the State of Palestine, to some 200,000 descendants of the original refugees who will accompany their relatives. Because the balancing of rights requires limitations on the numbers of descendants of 1948 refugees who will actually come to live in Israel, the implementation of the rights of most of the descendants of the 1948 refugees shall be limited to their right to have their properties (or the market value of their properties) returned to them, as distinct from their returning to those properties."

On a basis of this sort, I believe, Palestinians and Israelis can move towards resolution of their conflict.

Jerome M. Segal  
Research Scholar, Institute for Philosophy and  
Public Policy  
jsegal@umd.edu

Sources: Yasir Arafat, "The Palestinian Vision of Peace," *New York Times*, Feb. 3, 2002, <http://www.nytimes.com/ref/membercenter/nytarchive.html>; United Nations General Assembly Resolutions 181 and 194, <http://www.un.org/documents/resga.htm>.