
**Entitlement to Land and The Right of Return:
An Embarrassing Challenge for Liberal Zionism**

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When it comes to controversies and conflicts over nations' holdings of territories and their entitlement to their territorial possessions, it is very difficult to rebut the general perception that "might is right". Sometimes it seems that in the international domain we are not too far from the Hobbesian state of nature. On the other hand, nations and ethnic groups almost invariably make moral arguments to support their claims to territory, or to national self determination. Perhaps there isn't much sincerity in those claims. Or perhaps it is only made by the weak and vulnerable. Nevertheless, I believe that we should assume that even in the international domain, it just cannot be the case that might is right. The actions of nations, like the actions of individuals, should be subject to moral scrutiny, and nations' entitlement to the lands they control should be justified by justice and morality, not only by their actual possession. This is my main assumption in this essay, which purports to evaluate the moral legitimacy of Israel's holding of its territories and the Palestinians' right of return.

The Liberal version of Zionism, ostensibly, shares this assumption. Liberal Zionists believe that Israel has a moral right to exist as a Jewish state, implementing the Jews' right to national self-determination and acting as an agent of, or at least as a refuge state for, the world Jewry. At the same time, however, Liberal Zionism also insists on the Liberal Democratic character of the Jewish state, aspiring for Israel's implementation of

general principles of humanism and justice.¹ The purpose of this essay, however, is to serve as a reminder that Liberalism and Zionism constitute a difficult, if not impossible, match. There is not much novelty in this claim. Liberal Zionists are quite aware of this challenge, and in recent years many of them have struggled to come up with political theories attempting to reconcile the obvious conflicts between the Romantic ideology of Zionism and contemporary Liberal political morality.² I doubt it that such a reconciliation is possible, but I will not attempt to explain my doubts here at a general level. My concern in this paper is limited to one issue, namely, the legitimacy of territorial holdings, arguing that at least in this limited sphere, Liberal Zionism faces irresolvable conflicts.

It is surprisingly easy to list a set of moral-political convictions held by Liberal Zionism with respect to entitlement to land in this disputed territory. The following is a representative set of views:

1. Israel's holding of the territory within the 1967 borders, namely, those territories acquired in the war of independence, is basically legitimate.
2. The Palestinians are entitled to a state of their own, roughly within the West Bank and the Gaza strip. As part of such a compromise, many of the Israeli settlements in these territories ought to be dismantled.
3. Finally and crucially, the Palestinians' demand for a right of return for the Palestinian refugees cannot be acknowledged.

¹ This dualism is now enshrined in Israeli constitutional law, endorsed by the Supreme Court, following the enactment of two Basic Laws which define Israel as a 'Jewish democratic' state.

² See, for example, *Multiculturalism in a Democratic and Jewish State*, Mautner, Sagi, & Shamir eds., (Ramat 1998), particularly the essays by Gavison and Gans. Liberal Zionists reject the original, Romantic, foundations of Zionism, arguing that the relevant tenets of Zionism can be defended on liberal foundations. Many complicated issues, that I cannot address in this essay, are involved here. See, for example, Gans's contribution to this volume.

This essay argues that from a Liberal perspective, such a view is incoherent. I will begin with the distinction between Israel's alleged entitlement to the territories it occupied during the war of independence and those it occupied in 1967, and then I will discuss the Palestinian's right of return. I believe that these two issues are very closely related.

I. Occupation and entitlement to land.

Israelis are deeply divided over the legitimacy of the settlements in the West Bank and the Gaza strip. Roughly, about half of the Israelis believe that those settlements are basically illegitimate while the other half vehemently supports them. But the Israelis are astonishingly united in their belief that the territories Israel has occupied during the war of independence is Israel's to hold on to, and that it has a rightful entitlement to the entire territory of Israeli land within the borders which were established in 1948. Is this a coherent distinction? What is the morally relevant difference between the entitlement to Arab land that Israel has occupied and resettled in 1948, that is, dozens of Arab towns and hundreds of Arab villages³, and those lands it has occupied, and resettled⁴, in 1967?

³ In a rare moment of frankness, Moshe Dayan, the legendary defense minister at the time, made this statement in 1969: 'We came to this country which was populated with Arabs, and we are establishing a Hebrew, that is a Jewish state here. In considerable areas of the country we bought the lands from the Arabs. Jewish villages were built in the place of Arab villages and I do not even know the names of those villages and I do not blame you, because these geography books no longer exist; not only do the books not exist, the Arab villages are not there either. Nahallal arose in place of Mahalul, Gevat in place of Jibta, Sarid in place of Haneifs, and Kefar Yehoshua in place of Tel Shaman. There is not one place built in this country that did not have a former Arab population.' Haaretz newspaper, 4 April, 1969. It is far from clear that all these facts in Dayan's statement are true, but the sheer tone of it is telling.

⁴ The number of Israeli settlements and settlers in the West Bank and the Gaza strip is itself a highly contentious issue, mainly because it much depends on how one counts. The numbers, however, are in the hundreds of thousands.

One standard answer to this question is based on the distinction between the nature of the two wars which have gained Israel these territories. In 1948, we are told, it was a legitimate war of independence where Israel exercised its right to national self determination. On the other hand, in 1967 the occupation of the West Bank and the Gaza strip was only a strategic move, at best forced on Israel by the necessities of war, or worse, illegitimate to begin with. But it is difficult to see how this answers our question. Even if we assume that the war of independence was, indeed, a legitimate necessity of implementing Israel's right to national self determination, the legitimacy of the war cannot, by itself, entail any particular conclusions about the scope of the territory Israel is entitled to hold. By maintaining that the war of 1948 was a legitimate war of independence, we are only forced to the conclusion that Israel's holding of some territory, enough to establish a viable state, is legitimate. Nothing follows about the legitimate borders of such a state, or the entitlement to Arab land occupied, and resettled, during the war.

Consider the following analogy: suppose that I lawfully purchase a piece of land from its rightful owner, but before I actually take full possession of it, neighboring squatters invade and threaten my lawful possession. Presumably, I am justified in using force to obtain my rightful possession of this land. But now suppose that as a result of this conflict, I also manage to overtake substantial parts of neighboring land which had previously belonged, lawfully, to the squatters. Have I acquired legitimate possession of the squatters' land? I cannot see any moral argument to support such a conclusion. The fact that I had to use force to take possession of my lawfully purchased land can justify, at most, a claim for compensation from the squatters for the expenses I had to endure; it

cannot, by itself, justify the acquisition of new land to which I had no legitimate claim to begin with.

There might be a possible rejoinder to this argument that would run as follows: If there is a territorial conflict between two nations and one of them resorts to force in order to impose its solution, it thereby accepts a new *procedure* for the resolution of the conflict, namely, the war itself. From a moral perspective, such an argument can either rely on some notion of implicit consent or, perhaps more plausibly, on an analogy to the legal concept of estoppel. The claim would be that once a nation embarks on a bellicose course of action, it should be regarded as if it had consented to the results of the war, whatever they turn out to be or, at the very least, that it is in no moral position to claim otherwise. But of course, this cannot be quite right. If I lose my temper with your obnoxious behavior and strike you with a blow, maybe you have a right to strike back at me, and perhaps even harder than I did, but you are certainly not entitled to torture me and injure me in a hugely disproportionate manner. A resort to force, whether justified or not, cannot be regarded as an open ended invitation to abide by the bellicose procedure and accept its consequences, whatever they turn out to be. Suppose, for example, that my neighbor objects to the fence I have erected in my back yard and he knocks it down. Can I respond by destroying his entire house?

It may be replied, however, that there is a crucial element in the story of 1948 that I have missed here. After all, so the Zionist story goes, the 1948 war was a war of *self defense*. On the 29th of November 1947 the UN adopted the famous Palestine partition resolution, which Israel has accepted, but the Arabs have not. Instead, they waged a war on the Yeshuv (as the pre-statehood Jewish settlement in Palestine is called) in order to

prevent the establishment of Israel, and everything the Yeshuv had done to resist that aggression was an act of self defense. But for the Arab rejection of the partition resolution and the deliberate aggression that followed, the Yeshuv would not have had to fight and concur those parts of Palestine that it did. Therefore, the argument concludes, the territories Israel has occupied during this war of self defense, are rightly Israel's to keep.

Even if we raise no doubts about the truth of this standard Zionist narrative, however, the conclusion simply does not follow. Generally speaking, a right to self defense is a right to ward off aggression, and not a right to punish the aggressor.⁵ If I lawfully purchase a piece of land, and neighboring squatters try to take possession of it by force, the right to self defense justifies using force on my part to ward off their aggression, retaking possession of my land; the right to self defense clearly does not justify an extension of my possession to the lands of the squatters even if such a possession occurred during the conflict and as an integral part of it. Once again, I may have a right to compensation from the squatters, but not more than that; self defense does not justify punishing the squatters for their initial aggression by taking possession of part of their own lands.

It might be argued, however, that in the international context the right to self defense ought to be somewhat more extensive than its counterpart in the context of individual conflicts within a domestic setting. After all, in the international domain there is no third party, like the state in the context of conflicts between individuals, that can

⁵ See, for example, Judith Jarvis Thomson, 'Self Defense', *20 Philosophy and Public Affairs*, (1991), pp. 283-310.

ensure proper punishment for wrongful conduct.⁶ Therefore, so this argument would run, the right to self defense between nations cannot be so sharply distinguished from a right to punish, or at least, to inflict some costs on the initial aggressor. Maybe so; perhaps it is true that nations have a right to inflict certain costs on other nations which unjustly attack them, over and beyond their right to ward off the aggression. But even this extended version of the right to self defense cannot grant Israel a moral entitlement to the Arab towns and villages it occupied and resettled in Palestine during the war. The most we can say, on the basis of the extended version of the right to self defense, is that Israel may have had a right to some territorial expansion as a result of the war; such a right cannot be extended to legitimize the overtaking of vast amounts of private property, lands, houses, and estates, owned by the indigenous Arab population in Palestine. To put it simply, though somewhat bluntly, there is a considerable moral difference between territorial expansion, which a state may sometimes have a right to carry out in a war of self defense, and ethnic cleansing. Israel's current possession of a vast proportion of Israeli land is a direct result of ethnic cleansing; tens of thousands of Arabs living in towns and villages in Palestine were forcefully expelled from their homes during and in the wake of the war, their lands confiscated by the state, and resettled with Jews.⁷ This is not the kind of cost which may justly be inflicted on an aggressor nation as part of another nation's right to self defense. It is just a clear and blunt violation of basic human rights.

⁶ Although there are noble efforts to change this and introduce some forms of international punishment, these relatively recent changes are still in a very rudimentary and precarious stage.

⁷ The total number of Palestinian refugees during the war is estimated at 700,000; how many of those were actually expelled by Israeli forces, as opposed to those who just fled from the misfortunes of war, is the topic of heated debates amongst historians. For comparison's sake, however, it is worth keeping in mind that the total Arab population in Palestine was around 1.3 millions, and the Jewish population in Palestine at the time was around 600,000.

Thus, the widespread assumption among the Liberal Zionists that Israel's possession of the land within the borders of Israel proper is legitimate, whereas the settlements in the West Bank and Gaza are illegitimate and ought to be dismantled, seems to be quite groundless from a moral point of view. Both are tainted with illegitimacy and both result from violations of basic human rights and principles of justice. Furthermore, in a moral comparison between these two episodes of conquest, the occupation of Arab land in 1948 would fare much worse. As morally wrong and politically stupid as the settlements are, at least they were not established in a process of ethnic cleansing. To the best of my knowledge, relatively few Palestinian residents were evicted from their homes in the course of resettlement⁸, no atrocities accompanied the confiscation of Palestinian (mostly agricultural) land on which those settlements have been erected, and there were no population transfers involved. Unfortunately, none of this can be said of the 1948 conquest.

⁸ This is not to say that Palestinians were not expelled during, and in the wake of, the 1967 war. In fact, at least 200,000 of them, many of whom were already refugees from 1948 in the West Bank, moved away, mostly to Jordan. Some of these refugees moved east across the border on their own initiative, mainly around the Jericho area, but tens of thousands were "strongly encouraged" by the Israeli army to move. In addition, most of the Syrian villages on the Golan heights were evicted, partly, at least, by the IDF during the war. The point in text is, however, that such population transfers, voluntary or not, were not involved in the process of establishing the settlements. The settlement movement of the West Bank and Gaza strip began only about a decade after the 67 war. For a general survey of these events, see, Benny Morris, *Righteous Victims, A History of the Zionist-Arab Conflict 1881-2001*, (1999, 2001), Random House, NY.

It is often claimed that the differences in the era and the historical context are morally significant. In the first half of the 20th century the world witnessed ethnic cleansing and population transfers on much larger scale all over the world, and the prevalent norms of international conduct were much more conducive to this kind of behavior. That may be so. But the moral significance of this historical context is very limited. At best, it would pertain to the judgment of the moral responsibility of the agents involved: we could say that those agents who performed acts of ethnic cleansing in an era in which it was more acceptable than it is today, deserve less moral blame for it. Perhaps they can be partly excused for their wrongful conduct as they may have had less of an opportunity to realize its iniquity. But for our purposes, this is beside the point. A moral wrong does not become less wrong just because the agents who are responsible for it can be excused. Perhaps those who are responsible for the ethnic cleansing during, and in the wake of, the war of independence are less blameworthy than those agents who conducted the settlements in the West Bank and Gaza strip. But none of this has any bearing on the question of what kind of wrong is actually involved in these two episodes of conquest and resettlement.

Nevertheless, there is a pragmatic, forward looking argument that can be made here. It is not an argument that pertains to the legitimacy of historic entitlements; it is an argument about the desirable distribution of land given the present situation. The assumption would be that both nations, the Jews and the Palestinians, have a right to national self determination, and that both nations have justified claims, based on history and culture, to exercise this right in the land of Palestine. Therefore, this argument continues, it is incumbent upon the Jews and the Palestinians to divide the land between

them. Now the question arises, what would be a fair and just division of the disputed territory? According to the argument under consideration, this is basically a question of distributive justice and pragmatic considerations. Israel has already achieved statehood within viable borders; therefore, it is Israel's duty to share the land with the Palestinians, and allow them to establish a viable independent state within borders that they can identify with, and on land that they can regard as their own. According to this view, then, the settlements in the occupied territories are wrong and should be dismantled because they hinder such a compromise and seriously impede the possibility of establishing a viable Palestinian state. The settlements undermine Israel's ability to implement a political solution which would be both viable and fair.

From a pragmatic political perspective there is a lot to be said in favor of such a stance and the policy it entails. Nevertheless, it should be clear that such a forward looking argument that appeals to principles of just distribution leaves much more up for grabs than the Liberal Zionists would want to admit. By itself, such an argument cannot explain why would the Palestinians have a better claim to the outskirts of Ramalla or Nablus in the West Bank, than the town of Ramla in the heart of Israel or Talbia in West Jerusalem (both former Arab settlements occupied in 1948 and resettled by Jews). Once the argument is based on considerations of distributive justice, the line between "theirs" and "ours" can no longer be drawn by the 1967 line; the line should be drawn, or rather, entirely redrawn according to whatever is required by justice in the distribution of resources. In principle, everything should be up for grabs.

Well, this is not quite so simple. There is an argument to be made about changing circumstances: more than 50 years of development and mass emigration to Israel, have

created new circumstances which may make a difference as to the question of entitlement to land. This is a complicated issue, and I will discuss it in some detail with respect to the right of return. For our present purposes, however, it could be argued that the justification for focusing on the 1967 border, more or less, is basically pragmatic. The 1967 line has become some kind of a major focal point that the parties to the dispute, and the international community, are willing to consider as an historic compromise.⁹ And then there may well be other pragmatic considerations to a similar effect. For the time being, however, let me summarize the conclusion so far: I have argued that from the perspective of justice in territorial acquisition, there is no moral difference between the Israel's acquisition of Arab land in 1948 and the Israeli settlements in the occupied territories. Both are tainted with the same kind of illegitimate acquisition and both constitute a violation of principles of justice. The only difference that Liberal Zionists can point at concerns forward looking arguments, based on principles of distributive justice, pragmatic considerations and, of course, on the moral imperative to end the conflict. A valid argument can be made that the settlements hinder the possibility of a fair compromise with the Palestinians. But it should be kept in mind that this forward looking argument, sound as it is, cannot establish a *principled* distinction between the legitimacy of entitlement to land in the occupied territories, and the confiscated Arab land within Israel proper.

⁹ It is arguable that the 1967 line gained international legal recognition by the famous UN Security Council Resolution 242 which demanded, among other things, a compromise based on the formula of 'territories in return of peace'. Although the resolution does not mention the 1967 border, it is widely acknowledged that withdrawing to the 1967 line is the most that Israel is required to accomplish by this resolution. Israelis argue that the deliberate omission of "the" from the "territories" in this formula indicates that Israel is entitled to territorial holdings beyond the 1967 line. Be this legal formalism as it may, I think that it would

II. The Right of Return

Probably the widest consensus in the Israeli society these days is the outright rejection of the right of return of the Palestinian refugees to Israel. Most Israelis think that the Palestinian refugee problem is simply not one for Israel to solve in any way whatsoever. Some, perhaps a tiny minority, are willing to recognize Israel's partial responsibility for the problem, and they would be willing to accept a compromise which involves some monetary compensation for the refugees. But the idea that Palestinian refugees should be allowed to return to their homes in Israel strikes almost all Israelis as a nightmarish idea, to be rejected at all costs. Let me strike a few dissonant accords in this Israeli chorus, suggesting that at least some categories of refugees should have the right to return.

Despite the enormous political implications of the refugee problem, the exact numbers of refugees, in their various categories, are not readily available. Estimates vary considerably.¹⁰ Nevertheless, we do know some basic facts. To begin with, it is now undeniable that some of the refugees have escaped from Palestine during the war, while many others have been forcefully and deliberately expelled by the Israeli fighting forces.¹¹ Most of the property of both categories of refugees has been confiscated by the Israeli authorities, and resettled with Jews. Many of the villages were demolished, and typically, rebuilt by Israel as part of Israeli cities and agricultural settlements. Some of

be fair to say that Israeli entitlement to its land within the 1967 border has gained considerable international recognition.

¹⁰ From various internet sources the following figures emerge: the total number of Palestinian refugees is probably close to 4 million people, about a quarter of which still live in refugee camps. UNRWA recognizes and runs 59 camps, about half of which are in Jordan, Syria, and Lebanon, and the rest in the West Bank and Gaza. The total number of Palestinians residing in refugee camps is estimated between 900,000 up to 1.5, million people.

them are in the middle of Israeli cities and others are in more remote places. We also know that a substantial part of the Palestinian refugees and their offspring still reside in refugee camps in the West Bank, Gaza, Lebanon, Syria, and Jordan. Others have managed to resettle, either in the middle east or in other areas of the world. These differences in status may well have some moral significance. Thus, for the sake of the present argument, I will focus on one main category of refugees: those who have been actually expelled by the Israeli army during the 1948 war, whose property had been confiscated by Israel, and who still live in refugee camps.¹² Should they, at least, have a right to return to their homes and have their property recovered?

As I have indicated above, the vast majority of Israelis are united in their negative answer to this question. A closer look at the reasons which are given for this outright rejection of the right to return would reveal two main categories of arguments. The first type of argument which strives to refute the right of return regards the issue as one of an individual's right to possess property, and how such a right may be lost or superseded due to changing circumstances. The other argument is a nationalistic-demographic one: it claims that even if, as individuals, the Palestinians may have a right to return, Israel cannot recognize such a right since it will result in mass emigration of Palestinians to Israel, and to such an extent that it will undermine the Jewish identity of the state. Let me consider these two categories of arguments in turn.

¹¹ See Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, (Cambridge, 1987), and more recently, his 'Revisiting the Palestinian exodus of 191948', in Rogan & Shlaim (eds.), *The War For Palestine* (Cambridge, 2001).

¹² I must admit that there is no principled reason for restricting the argument to those who still reside in refugee camps. My assumption is, however, that needs of these refugees is much more urgent and compelling than the needs of those Palestinians who have managed to resettle.

I. The Individualistic Arguments

The individualistic argument raises serious issues, some which are discussed in the literature in similar contexts.¹³ Basically, the question is this: can we say that during the five decades which have passed since their expulsion and the considerable changes in the circumstances in Israel, the Palestinian refugees have lost their right to return? Note that the assumption would be that they had had such a right shortly after their eviction, and it is the passage of time and the changes of circumstances which warrant the conclusion that the right of return has been superseded. Before I begin to consider such a claim, let me admit that there is an important complication of this issue that I will mostly ignore here, and this is the intergenerational problem: Presumably, many of those who have been expelled are no longer alive, and most of the refugees are their children and grand children who were born in refugee camps and other places. It is not evident that the rights of the original refugees automatically transfer, as it were, to subsequent generations. Nevertheless, given the relatively short time span, only 54 years, I will not deal with this intergenerational issue, and just assume that the rights of the original refugees transfer, at least, to their immediate offspring.¹⁴

a. adverse possession.

I think that there are three main considerations which have been suggested to justify the claim that the Palestinian refugees have lost their right to return. The first, and

¹³ See, for example, J. Waldron, 'Superseding Historic Justice', *Ethics* 1992, 4-28. See also his contribution to this volume: 'Redressing Historic Injustice', particularly sections 4-6. The context is usually the question of Aboriginal claims to repossess lands they have lost during various forms of Western colonization. In contrast to the Palestinian issue, however, in the former cases the problems raised by the intergenerational gap, which goes back hundreds of years, is a very complicated issue which forms one of the pivotal points of the debate.

weakest, argument against the right of return relies on the idea of adverse possession, or more precisely, on the moral analogy of the legal concept of adverse possession. Most legal systems acknowledge a startling exception to the general principle that people should not be allowed to profit from their own wrongs, in the case of an unauthorized use of land which takes place continuously for a long time. Under certain conditions, the details of which vary in different legal systems, the unauthorized user gains property rights in her use against the original owner, even without the latter's consent. The justification of the doctrine of adverse possession is far from self evident, since it involves serious problems of moral hazard and encourages wrongful behavior. Nevertheless, the details need not concern us here, since the doctrine of adverse possession contains a crucial caveat that clearly obtains in the current political context: one doesn't gain property rights by adverse possession if the original owner continuously expresses her objection to the unauthorized use and strives to protect her rights. In other words, one cannot gain rights by adverse possession against the continuously expressed protest of the original owner.¹⁵ The reason for this is quite simple: if the original owner expresses her protest and strives to defend her property rights, the disputed possession becomes a straightforward legal contest; surely, neither the law nor morality could possibly regard actual possession as a way of resolving such conflicts. Now, this crucial and justified caveat should make it absolutely clear that Israel cannot claim to have gained any rights against the Palestinian refugees by adverse possession; the Palestinians have made their protest loud and clear, often all too violently, for the entire period of their exile.

¹⁴ For an interesting debate of the intergenerational issues involved in such cases, See, for example, John Simmons, 'Historical Rights and Fair Shares', 14 *Law and Philosophy*, 1995, 149. .

b. superseding property rights.

The second argument deserves much closer attention. In a very similar context, Jeremy Waldron¹⁶ has argued that entitlements to land and property of an original owner may fade as time goes by and circumstances change. His main argument is worth quoting in full:

‘If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible. For I must have developed some structure of subsistence. And that will be where my efforts have gone. . . . I may of course yearn for the lost resource. . . [and] even organize my life around the campaign for its restoration. But that is not the same thing as the basis of my original claim.’¹⁷

Now the argument is based, as Waldron makes quite clear, on a certain conception of the right to private property, and particularly, on the moral grounds for a right of original acquisition. Having rejected Locke’s famous ‘mixing of labor’ conception, Waldron suggests an autonomy based argument, claiming that the right of original acquisition is based on the role of property possession in the life of the individual, who ‘alters it, and uses it, makes it in effect a part of her life, a pivotal point in her thinking, planning, and action’.¹⁸ Before we proceed, however, let me stress two points. First, (and this is not an argument against Waldron) it should not be assumed that the right of return is simply a property right. The right to repossess wrongfully lost property is surely an important part of the right of return, but the right of return is more extensive than that. Basically, it is the right of people who have been expelled, or otherwise forced to flee

¹⁵ Similar considerations apply to the statutes of limitation and for the same reasons.

¹⁶ ‘Superseding Historic Justice’, *Ethics* 1992, 4-28. To be sure, Waldron does not mention the Palestinian example. See also Waldron’s contribution to this volume ‘Redressing Historic Injustice’.

¹⁷ ‘Superseding Historic Justice’ p. 18-19.

¹⁸ *Ibid.*, p. 18.

their homes, to return to their homes, regain possession of their lost property and, in relevant circumstances, regain their citizenship and residence rights.

Secondly, I have some doubts about the connection, suggested here by Waldron, between a theory of *original acquisition* of property, ala Locke (or Nozick), and the moral grounds for the endurance of property rights. The endurance of property rights, and the conditions under which such rights fade or supersede, depend on the moral grounds for acknowledging property rights, and their desirable scope, in the world as we know it, where the question of original acquisition is quite irrelevant. The scope of property rights has very little to do with the original Lockian question of how people can acquire property rights in a State of Nature.¹⁹ In other words, whether I am entitled to regain my stolen watch from the thief after a few decades, hardly depends on the question of my initial acquisition of that watch, as long as it is not disputed that I had a rightful possession of it at the time of its theft. However, for our immediate purposes, we need not decide about this controversy. The reason for this is that the autonomy based argument Waldron relies on is not confined to a theory of original acquisition. As I understand it, the argument quoted above is, that entitlement to property over time depends on the actual role that the property plays in the life of its owner. The more central it is to the owner's autonomy, the more of a claim to possession the person has, and *vice versa*; once the property loses its actual functions in the life of its owner, even if such a loss is incurred by the violation of her right, the less of a right to repossession the person can rightfully claim.

¹⁹ In other words, Locke's theory of original acquisition pertains to the question of whether the right to private property can be regarded as a *natural right*. Even Locke, however, was quite explicit in admitting that current holdings of property do not coincide with such a natural right and must be justified, he thought, on some consensual basis. See John Locke, *The Second Treatise on Government*, chapter 5.

I do not wish to deny that the argument is basically plausible, but there is a crucial question about its limits. The problem is actually easy to illustrate by the Palestinian case. Decades have passed since they have lost their property in Israel, and we may assume, with Waldron, that the lost property can no longer play an actual, physical or economic, role in the lives of the refugees; since they haven't possessed the property for several decades, it cannot play any practical role in their current subsistence and economic activities. Needless to say, they yearn for the homes and property they have been forced to leave behind, and a campaign for its restoration plays a central role in their individual and collective consciousness. But, Waldron claims, the yearning is not enough to ground the endurance of the entitlement. Only the actual role which the property plays in their lives constitutes the relevant considerations. Yet this is somewhat difficult to understand, particularly when Waldron himself admits that if the holding of the lost property is important for the sense of identity of the dispossessed, his conclusion would be different: 'It may not apply so clearly to cases where the dispossessed subject is a tribe or a community, rather than an individual, and where the holding of which it has been dispossessed is particularly important for its sense of identity as a community'.²⁰ True, Waldron confines this comment to communities, as opposed to individuals, but it is difficult to see the reason for this restriction. If the argument for the endurance of private property is based on the importance of property to *personal* autonomy, and similar individualistic considerations, why should it matter that the 'dispossessed subject is a tribe or community'? What seems to matter is that the property plays an important role in the constitution of one's self and sense of identity, and the question of whether the

²⁰ 'Superseding Historic Justice' p. 19.

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

Furthermore, when we think of the endurance of property rights, the question of alternatives and opportunities must also arise. In this respect, Waldron's favorite example of the stolen car is quite misleading.²¹ Sure, if my car has been stolen decades ago, I would have had ample opportunities to replace it since, or perhaps to readjust my life to one without a car. The car has long lost its practical role in my life, and therefore, Waldron concludes, I can no longer insist on its return if the car is found decades later. But the conclusion should be quite different if the stolen property is much more vital to my subsistence, and if I have had very limited opportunities to replace it or to find adequate substitute. If I am expelled from my home and reduced to a status of refugee, with very limited opportunities to escape such a predicament, the case for the endurance of my entitlement becomes much stronger.

²¹ *Ibid.* p. 15.

c. changing circumstances.

Finally, we should consider the case against the right of return due to changing circumstances. The property lost by the Palestinian refugees has been dramatically transformed by Israeli development in the last five decades. Places where a small Arab village stood in 1948, are now in the midst of high-rises in modern cities. On agricultural land which was barely cultivated in 1948 now stand modern factories, universities, or new towns and neighborhoods. Surely, the argument runs, this transformation must make a difference. But what kind of difference does it really make? Let me suggest three possible interpretations.

The argument from development can have an economic aspect. The property claimed by the Palestinian refugees is simply much more valuable than it had been five decades ago, and its added value is mostly due to Jewish development. By itself, however, the added value of the property entails nothing about the entitlement to possess it. Under normal circumstances, if a piece of land was worth, say, \$50 in 1948, and it is now worth \$100, the original owner may still regain it granted that she compensates the successive developers for the added value. But what if the current value is not \$100 but \$5,000? Indeed, it is arguable that if the added value substantially surpasses the original value, then it is the original owner which should be compensated, leaving the possession of the property in the hands of the subsequent developer. I think that this is quite right, and it entails that many Palestinians simply cannot exercise their right of return to the

actual property from which they had been expelled.²² In such cases, the appropriate remedy would have to be adjusted to the change in the circumstances.

Another interpretation of the argument from development would stress a moral point. There is a general principle in law that the courts would not grant specific performance if it is particularly harsh on the defendant. The moral intuition behind this principle is similar to the economic consideration mentioned above. Suppose, for example, that I have owned a small piece of land in the wilderness, which had been stolen from me, so to speak, decades ago. That piece of land now forms a small part of the land on which a house has been built. Now suppose that I go to a court of law and ask to repossess my land, even if it means that the present residents would either have to share their home with me, or demolish it and move somewhere else. Presumably, any reasonable court would refuse to grant me such a request, and will rule for some kind of compensation instead. This is quite understandable, and it simply derives from the moral intuition that there ought to be a limit to the hardship one can impose on a party who needs to rectify a wrong, even if that party is himself to blame for the wrong that ensued. Once again, the practical conclusion must be that the right of return cannot always be implemented in a straightforward way, simply by restituting to the Palestinian refugees the property they had owned in 1948.

Note, however, that the conclusion of both of these versions of the argument from development is more limited than might meet the eye, and in two respects. First, even in the face of the huge development of land in Israel in the last few decades, there are still many places where Palestinians could regain their property without undue hardship to the

²² The situation here is actually more complicated: some of the land development in Israel was deliberately designed to prevent Palestinian return, thus making Israel's reliance on the argument from development

current owners. Not every Palestinian house has been replaced by a high-rise. Second, and more importantly, the conclusion of this argument still leaves it open whether the appropriate compensation for the loss of property that cannot be returned is a monetary one or, perhaps, relocation at some other place within Israel. Clearly, the relocation option would be much fairer to many Palestinian refugees. It would redeem them from the status of refugees, and it would at least enable them to live in proximity to their previous homes, relatives, and cultural community, and in their own homeland. Once again, it should be kept in mind that the right of return is more extensive than a standard right to private property. People can have property rights in places they do not reside, including foreign countries. In contrast, the right of return is basically the right to return home and regain one's life as a normal resident in the country of one's origin.

Well, many Liberal Zionists argue that the Palestinians' right of return should be exercised within the borders of the Palestinian State that will be established in the West Bank and Gaza strip. After all, they claim, Israel has its Law of Return for Jews, and Palestine, once established, should have a similar law, entitling the Palestinian Diaspora to return to the Palestinian state. Isn't that a fair compromise? Far from it. In the relationship between Israel as a Jewish state, the world Jews, and those who have persecuted them during the centuries, Palestinians are a by-stander who has never had anything to do with the creation of the Jewish refugee problem or the Jews' predicament in other parts of the world. Jews came to establish their state in Palestine because they were persecuted by Europeans, not by Palestinians. The Palestinian refugee problem, on the other hand, is Israel's doing; Israel is not a by-stander in this relationship, and it

much more difficult to accept.

cannot claim that the problem is for the Palestinians to solve on their own. Thus, if there is any argument against relocation within Israel, it would have to derive from the “demographic nightmare” argument that I will consider separately, in a moment.

The third interpretation of the argument from development can be derived from Waldron’s interesting claim that entitlement to property, particularly in land, should always be subject to re-distributive reevaluation due to changes in circumstances.²³ Suppose, for example, that I have owned an oasis in the desert which was, at the time, one of many. Waldron claims, and I think that rightly so, that even if the oasis has been wrongfully taken away from me at the time, I may no longer have an entitlement to it if, by now, it has become the only oasis in the desert. The pressing needs of others may outweigh the historic entitlement to the property of the original owner. Surely, that is right. We must concede that re-distributive concerns may outweigh historic entitlements. Redistribution, however, makes little sense if it comes at the expense of the poorer party in the equation. The purpose of re-distribution, at least from the vantage point of a humanistic liberal tradition, is to transfer resources from the rich and fortunate to the poor and less fortunate, not *visé versa*.²⁴ Given this essential rationale of re-distributive principles, one could hardly claim that re-distributive concerns justify superseding the Palestinians’ entitlement to the land they have lost in Palestine. If re-distributive

²³ ‘Superseding Historic Justice’ p. 22-26 and Waldron’s contribution to this volume, section 4.

²⁴ For a similar argument see Tamar Meisels, ‘Can Corrective Justice Ground Claims to Territory?’, forthcoming in *The Journal of Political Philosophy*. Waldron’s re-distributive argument is nevertheless quite important in a certain context. I think that it does point to an important consideration when we think of the Aboriginal or Indian right to repossess territory that belonged to them centuries ago: I agree with Waldron that at least when it comes to *the scope* of the territories these communities claim to repossess, the re-distributive considerations have a major role to play: The world has become much more densely populated, land much more scarce, and therefore it doesn’t make sense to re-grant Aboriginals or Indians vast amount of land, even if they were the original owners of it centuries ago. In such cases, distributive considerations should outweigh historic entitlements, at least to some extent.

considerations have any bearing on the issue of the right to return, they would point to the opposite conclusion.

II. The Demographic Argument

Now, at long last, we come to the nationalistic-demographic argument. The vast majority of Israelis are united in their rejection of the right of return because they see it as an end to Zionism. If hundreds of thousands of refugees are allowed to return to Israel and resettle on Israeli land, the Jewish identity of the state will be imperiled. Zionism cannot allow that to happen.²⁵ So here is the problem. Let us assume that the liberal-individualistic arguments against the right to return all fail, as I have argued at some length above: Can you still be a Liberal Zionist? Can one reconcile the liberal principles of justice with the Zionist rejection of the right of return?

Perhaps an easy answer might come to Liberal Zionism's rescue: suppose that Israel recognizes its responsibility for the Palestinian refugee problem, but instead of implementing the right of return, it offers monetary compensation to the refugees. Would that be an acceptable solution? I cannot speculate on how feasible, practically speaking, such a solution might be. Nor is it clear how can monetary compensation solve the problem of the Palestinian refugees who live in refugee camps in Lebanon, Syria, and Jordan, since there doesn't seem to be any country which is willing to resettle them.²⁶ But I will not push these practical issues any further. As a matter of principle, however,

²⁵ I must say that there is a lot of demagogy in such statements on Zionism's part, even on its own ideological grounds. The current Israeli population consists of about 6.5 million people, 82% of which are Jews. Therefore, it would take an influx of *millions* of Palestinians to put the Jewish majority in Israel at any serious risk, not hundreds of thousands.

compensation would hardly suffice. *If* there is, indeed, a principled conflict between Zionist aspirations for maintaining Israel as a Jewish state, and the rights of Palestinians to return to their homes and regain their residence and property, the ideological conflict remains, notwithstanding monetary compensation. There is something particularly objectionable in the idea that States may buy off, with monetary compensation, their violations of human rights. The atrocities of Serbian Nationalists, for example, cannot be laundered morally, so to speak, by compensating those who suffered from their ethnic cleansing in recent years. Needless to say, individual victims are entitled to compensation when no other rectification of the violation of their rights is feasible. But again, it should not be assumed that compensation can rectify any wrong that has been inflicted on another.

There is a deeper issue, here, however. Liberal Zionists tend to argue that the conflict between Liberal principles of justice and Israel's aspiration for maintaining its Jewish identity can be resolved within Liberal political theory. They rely on the recently mounting literature in Liberal political theory which stresses the Liberal values of communal identity, the values of a prospering culture to individuals' flourishing, and even the Liberal values of straightforward Nationalism.²⁷ I doubt it, however, that this communal turn in Liberal political theory can solve Zionism's problem. As I have argued above, the refugee problem is a result of gross violations of human rights. More importantly, Israel's refusal to deal with the problem, thus perpetuating the predicament

²⁶ It is a difficult question, which I cannot address here, whether there is any Arab country which is under a moral *duty* to resettle the refugees in its borders. It should be noted, however, that Jordan has granted citizenship to all the Palestinian refugees within its borders shortly after the 1967 war. No other Arab country followed suit.

of hundreds of thousands of refugees who live in utter poverty in a degrading refugee status, is a *continuous* violation of human rights, day after day. Now, suppose that we generously grant to the Liberal Zionists that Zionism is, in principle, reconcilable with liberal principles pertaining to the values of a unified ethno-cultural community or even nationalism. In other words, suppose that the Jewish character of Israel can be defended on the grounds of a liberal political theory. Still, at best the conclusion could be that the importance of maintaining the Jewish identity of Israel outweighs other liberal values to the extent that it justifies violation of human rights. But then, if we assume, *arguendo*, that maintaining the Jewish character of Israel justifies the violation of some fundamental individual rights, such as one's right to property and security of residence, why would it not justify the violation of *other* human rights, if need arises, such as the right to vote in elections, or freedom of speech? Why should Liberal Zionism draw the line at demographic concerns? For example, Israel could maintain its Jewish identity even as a Jewish-minority state, as long as it denies equal rights of citizenship. Is that necessarily worse than denying the right of return? In other words, even if there is a lot to be said in favor of Zionism from a liberal perspective, no liberal political theory can justify the implementation of some sub-set of its values at the expense of gross violations of human rights. We do not think that communal values, and the right to national self-determination, important as they may be, justify ethnic cleansing or population transfers. From a liberal perspective, the implementation of communal values must find its ways within paths which respect fundamental human rights. And what if I am wrong and it is

²⁷ Will Kymlicka's *Liberalism, Community and Culture* (Oxford, 1989) engendered a vast amount of literature in the liberal tradition stressing the importance of various communal structures from a liberal perspective. For the influence of this literature on the Israeli political situation see the collection of essays in *note 2*, above.

really the case that Israel simply cannot maintain its Zionist aspirations if it implements the Palestinian's right of return? I can only say what my personal reaction would be: so much the worse for Zionism.

Conclusion

Practical conclusions rarely follow straightforwardly from moral-philosophical analysis. In the tragic and volatile conflict between Israel and the Palestinians practical recommendations would seem to be even more futile. Even from a moral perspective, however, there are numerous complexities that I have not dealt with. In particular, although I have argued that Israel must recognize its responsibility for the Palestinian refugee problem, and allow at least a limited right of return, I did not intend to claim that Israel should bear the sole responsibility for solving this problem. Some of the Arab states should bear part of the responsibility as well. They have encouraged and actively supported the Palestinian revolt in 1948, and then they have failed to take any actions to alleviate the dire situation of the Palestinian refugees within their borders, perpetuating their refugee status for purposes of political manipulation. This, I think, entitles Israel to claim that a substantial part of the cost for solving the refugee problem must be born by the Arab states involved. And then there are other complications. As I have mentioned earlier, not all the Palestinians now living in exile can truthfully claim that they have been expelled by the Israeli forces in 1948; quite a number of them, particularly the elite, had simply escaped even before the actual war begun. Many others were, allegedly, encouraged to leave by the neighboring Arab states. The status of these refugees or Palestinians living in exile, and their right of return, is more problematic, and I couldn't

deal with these complexities here. Then there is the problem of the Jewish refugees from Arab states who were forced to leave without their property and whose property had been confiscated, without any compensation, by those states. All these, and many other complexities, make any complete solution to the refugee problem almost intractable. But we should always remember that even a partial solution is often much better than no solution at all. More importantly, as long as Liberal Zionism continues to ignore the refugees problem and insists on an outright refusal to acknowledge the right of return, its moral stance will remain questionable. Moral inconsistencies do not dissipate in the smoke of battle.

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