8 November 2002

Dear ICG,

We are writing in response to the ICG framework proposal (Middle East Endgame II: How a Comprehensive Israeli-Palestinian Peace Settlement Would Look, July 2002) for a comprehensive solution to the Palestinian-Israeli conflict. In particular, we would like to draw your attention to a number of concerns and criticisms related to suggestions in the proposal for a solution to the Palestinian refugee issue. This letter follows a previous letter regarding an earlier ICG report (A Time to Lead: The International Community and the Israeli-Palestinian Conflict, April 2002) on the Middle East conflict.

For your information, BADIL Resource Center for Palestinian Residency and Refugee Rights (BADIL) is a non-governmental community-based Palestinian organization registered with the Palestinian Authority and located in Bethlehem. BADIL was established in 1998 to assist the refugee community in advocating for a just and durable solution to their plight based on international law and relevant UN resolutions. For more information about BADIL, please refer to our website – www.badil.org.

Rather than addressing every single issue in chronological order, we would like to draw your attention to a number of legal, practical, and political concerns raised by suggestions for solutions for Palestinian refugees contained in the July 2002 ICG proposal. Where possible we have included relevant references.

**Legal Concerns**

The most distressing omission in the report is a clear international legal framework for crafting durable solutions for Palestinian refugees. As other commentators and experts have noted, the Palestinian refugee issue “is no more political and no less legal than the issue of repatriation of Hutu refugees to Rwanda or that of Bosnian refugees to Bosnia, to name a few. It no less deserves the application of international law, and the level of political controversy surrounding the origins and rights of the Palestinian diaspora is irrelevant to that point.” (K. Lawand, The Right to Return of Palestinians in International Law,” 8 IJRL 4, 1996; also see, S. Akram, Retinterpreting Palestinian Refugee Rights under International Law, Palestinian Refugees, 2001).
The omission is particularly disturbing given the fact that the absence of explicit reference to international law as affirmed in relevant UN resolutions (e.g., UNGA 194, 11 December 1948) in the 1993 Declaration of Principles was one of the key factors which led to the rise of independent Palestinian refugee initiatives, including the internally displaced inside Israel, in the mid-1990s. The aim of these initiatives was and is to lobby the Palestinian leadership, the international community, and Israel for durable solutions consistent with international law and practice. The omission is also glaring in light of ICG reports concerning other refugee cases. These ICG reports, unlike the recent reports on the Middle East, look to international law as the basis for crafting durable solutions for refugees.

The absence of any reference to international law is further troubling in light of conclusions drawn by numerous UN human rights bodies and international human rights NGOs, including Amnesty International and Human Rights Watch, suggesting that the collapse of the Oslo process and the failure of all parties, including the international community, to reconstitute an effective political process leading to a comprehensive resolution of the conflict is directly related to the absence of a clear international law/human rights framework. (For an insightful analysis of the Oslo agreements in comparative perspective, see e.g., C. Bell, Peace Agreements and Human Rights, Oxford, 2000).

Even to a casual observer, the most glaring omission is the absence of any legal reference to the right of displaced persons and refugees to return to their homes of origin and repossess their properties. The right of displaced persons and refugees to return to their homes of origin is found in several bodies of international law, including international humanitarian law, international human rights law, and international refugee law. (There are numerous articles and books published on this topic. For a legal analysis of the Palestinian case, see e.g., G. Boling, The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis, 2001) Numerous UN resolutions and peace agreements also reaffirm the right of displaced persons and refugees to return to their homes of origin. (See, e.g., PLO Negotiations Affairs Department, Double Standards; and, S. Akram and T. Rempel, Recommendations for Durable Solutions for Palestinian Refugees, PYIL, 2000-2001). Additionally, international law provides for the right to housing and property restitution. (This issue is addressed in depth in the Refugee Survey Quarterly, Vol. 19, Number 3, 2000; also see, "Property-related Issues in the Context of Voluntary Repatriation," Global Consultations on International Protection, UN Doc. EC/GC/02/5, 25 April 2002, 'Voluntary Repatriation,' Annex I.)

In contrast, the ICG proposal “makes clear that there would be no return to Israel on the basis of a general right of return.” (ICG, at 3) The proposal does not even address the issue of housing and property restitution, except through inference to compensation. In fact, the proposal would appear to exclude the right to housing and property restitution. The proposal recommends, for example, that “Jewish neighbourhoods” (i.e., settlements) established in eastern Jerusalem, including the territory annexed from the West Bank, comprise, together with western Jerusalem, the capital of Israel. (ICG, at 5) Refugees have considerable housing and property claims in these areas. (For more details on
western Jerusalem, see, e.g., Jerusalem 1948, The Arab Neighbourhoods and their Fate in the War, 2nd Revised Edition, 2002; and, B’telem, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem, 1997). The proposal also recommends resettlement of refugees in border areas inside Israel, which would subsequently be transferred to the Palestinian state. (ICG, at 8) According to this scenario most refugees would be resettled on land claimed by others. (For more on the legal implications of population transfer, see, e.g., The Human Rights Dimensions of Population Transfer, including the Implantation of Settlers, Preliminary Report prepared by Mr. A.S. Al-Khawaswneh and Mr. R. Hatano. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session 2-27 August 1993, Item 8 of the provisional agenda, E/CN.4/Sub.2/1993/17, 6 July 1993).

The proposal does not provide adequate explanation of these recommendations in light of international law, not to mention numerous policy papers and positions on the rights of Palestinian refugees prepared by leading international human rights organizations such as Amnesty International and Human Rights Watch (See, e.g., 'The Right to Return: The Case of the Palestinians,' AI-index: MDE 15/013/2001, 30/03/2001; 'Human Rights Watch Policy on the Right of Return, www.hrw.org/campaigns/israel/return/), international refugee NGOs such as the Norwegian Refugee Council (See, statement published in Forced Migration Review 14), and UN human rights bodies (See, 1998 Concluding Observations, Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; and, Committee on Civil and Political Rights).

Concerning relevant UN resolutions, the ICG recommendation relating to the implementation of UN General Assembly Resolution 194(III) is inconsistent with both the intent and drafting history of the resolution. The proposal states that both sides would agree simply that

the terms of UN General Assembly Resolution 194 are satisfied by a variety of resettlement options and compensation provisions then spelled out. As to the refugees’ permanent location, they would be offered the options of living in Palestine, in third countries or in their current host countries (subject, of course, to the sovereign decisions of those states) – and in addition would be offered the option of going to land now in Israel, adjacent to the West Bank and/or Gaza and turned over to Palestinian sovereignty as part of the land swap (which could perhaps be specifically designated for refugee return and substantially developed for their integration). Furthermore, Israel would agree to continue its programs of family reunification and humanitarian absorption and to establish such other programs as may be specified in the bilateral agreement. (ICG, at 8)

In fact the drafting history of the resolution and various interpretative working papers prepared by the Secretariat of the UN Conciliation Commission for Palestine (UNCCP) provide a very concise interpretation of the intent and purpose of Resolution 194.
In brief, Resolution 194 affirms three separate rights – i.e., right of return, right to real property restitution, and the right to compensation – and two distinct solutions (i.e., return, restitution and compensation or resettlement, restitution and compensation) governed by the principle of individual refugee choice. By 1948, the right of refugees and displaced persons to return to their places of origin had already assumed customary status in international law. Arbitrary denationalization and mass expulsion were prohibited under international law. The resolution also affirms the right of refugees to return to their homes of origin. The General Assembly rejected two separate amendments that referred in more general terms to the return of refugees to “the areas from which they have come.” The Secretariat further stated that the “underlying principle of paragraph 11, sub-paragraph 1, ... is that the Palestine refugees shall be permitted ... to return to their homes and be reinstated in the possession of the property which they previously held.” (Sources and more detailed analysis are available from BADIL).

While the ICG proposal recognizes the principle of refugee choice (i.e., refugees are provided with a slate of choices), the proposal introduces a series of arbitrary restrictions, which render those choices less than free and less than voluntary. Generally, states of origin do not have unlimited sovereign powers over the return of refugees to their homes of origin, particularly in the case of denationalization and expulsion applicable to the Palestinian refugees. The proposal also aims to “provide a clear incentive to refugees opting for rehabilitation and compensation programs in Palestine and in present host countries” (ICG, at 14) – i.e., to choose not to return to their homes of origin. This also constitutes arbitrary interference with the principle of refugee choice. “Voluntariness means not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning.” (UNHCR, Handbook on Voluntary Repatriation: International Protection).

Finally, the ICG proposal recommends that a comprehensive peace agreement include “an acknowledgement by the Palestinians that implementation of the agreement satisfies all claims stemming from this historic conflict.” (ICG, at 8) The right of return and right to housing and property restitution are collective and individual rights. Generally, international legal experts concur that states cannot extinguish the individual rights of those they represent. This principle has been upheld in numerous other cases. (See, e.g., recent claims by Sudetan Germans and Greek Cypriots) In reference to the Palestinian refugee case, for example, Human Rights Watch comments: “Like all rights, the right to return binds governments. No government can violate this right. Only individuals may elect not to exercise it. The parties currently involved in negotiating a Middle East peace agreement should focus on implementing the right to return and facilitating the options of local integration and third-country resettlement. They should not waive individuals' right to return.” The ICG proposal does not explain how the PLO, negotiating on behalf of the Palestinian people, of whom approximately three-quarters are refugees, is able to extinguish the right of refugees to return to their homes of origin and recover their properties.

Practical Issues

In addition to the legal issues addressed above, the ICG proposal raises a number of practical issues that require further consideration. First, in addition to legal implications already addressed above, the proposal fails to consider the practical implications of resettling Palestinian refugees in border areas inside Israel that would subsequently be
transferred to a future Palestinian state. (ICG, at 8) Many of the border areas where Palestinians already reside are already crowded with some villages and towns having the appearance of refugee camps due to the expropriation of land by Israel. It is estimated that by the early 1960s Israel had expropriated some 700 km² of land from Palestinians who remained within the territory that became the state of Israel. Today that figure has nearly doubled. (See, e.g., Sabri Jiryis, The Arabs in Israel, 1976; Jack Cano, The Question of Land in the National Conflict between Arabs and Jews, 1992) Many of the places of origin where refugees originate from are much less crowded and undeveloped. According to recent research in this area, 77 percent of Jews in Israel live in 15 percent of the country. The remaining area is roughly equal in area and size to that of Palestinian refugee lands. About 1 million Jews live in this area with 80 percent residing in cities that were originally Palestinian and are now mixed, or in a number of small new development towns. It is only in 10 percent of the total number of villages of origin, where Palestinian refugees would have some difficulty in returning due to the post-1948 development of these areas. (S. Abu Sitta, From Refugees to Citizens at Home, 2001)

Second, the ICG proposal places considerable emphasis on compensation as both an incentive and palliative to the exclusion of a general right of return to Israel, but fails to address practical issues of implementing a compensation scheme for Palestinian refugees. According to housing and property restitution experts, compensation should only be considered if restitution is materially impossible. (For more details, see, e.g., Centre on Housing Rights and Evictions, www.cohre.org) The possibility of housing and property restitution in the Palestinian case, with the exception of destroyed homes, is largely a political rather than a material issue. Compensation should be based on the full market value of the property and funds should be paid in a prompt, fair and equitable manner. The estimated full market value of Palestinian housing and property claims is estimated at more than US$ 150 billion. (See, e.g., Atif Kibursi, Valuing Palestinian Losses in Today’s Dollars, Palestinian Refugees, 2001) Given general trends in donor funding and clear donor preferences for development assistance as opposed to cash compensation it is highly questionable as to whether the international donor community would be able to marshal financial resources for a compensation fund based on the full market value of refugee claims not to mention human capital losses and psychological damage. Compensation should only be considered if the funds to be paid already exist within a trust fund or other guaranteed source, administered by independent parties, which ensure that the compensation award will actually be paid. Non-implementation of compensation provisions in Annex 7 of the Dayton Peace Agreement is one example of how compensation schemes can go wrong in the absence of due attention to these principles. Finally, compensation, in lieu of restitution, should only be considered if this is the preferred remedy expressed by the claimant. The ICG proposal largely ignores Palestinian refugee preferences.

Third, the ICG proposal fails to adequately consider the practical implications of phasing out UNRWA operations. The recommendation appears to be based on political – i.e., perceptions that UNRWA has inhibited resolution of the Palestinian refugee issue – rather than operational consideration of potential ‘value-added’ benefits of UNRWA as an implementing agency, in full or in part, for durable solutions for Palestinian refugees.
Indicators of agency effectiveness in implementing durable solutions for refugees, including knowledge of the people’s concerned, a strong field presence, and an established working relationship with local NGOs through its field presence, all rank high in the case of UNRWA. UNRWA’s future role should be examined in this context. The ICG recommendation, moreover, runs counter to recent recommendations to the European Union, which suggest that UNRWA should be strengthened, and, in the context of durable solutions, further suggests that UNRWA should be reconstituted as a lead agency for implementing durable solutions for Palestinian refugees.

**Political Issues**

Finally, the ICG proposal raises a considerable number of political issues, which, in addition to the legal and practical issues already addressed, seriously, if not fatally, impair implementation of the recommendations for a solution to the Palestinian refugee issue. First, the authors of the ICG proposal suggest that the proposal represents “what both sides can accept as fair.”

As to the elements of the bilateral settlement, ICG has been engaged in intensive discussions with Israelis, Palestinians and others in the international community for a number of months. The terms of the settlement outlined here reflect our best assessment of what both sides can accept as fair, comprehensive and lasting and what, ultimately, their agreement more or less will have to look like. (ICG, at 1)

Because this proposal is designed to resonate with the Israeli and Palestinian peoples, it inevitably draws on the many prior discussions that have been held between the two parties. (ICG, at 2)

At the same time, it is ICG’s belief that numerous Palestinian leaders now hold the view that a solution to the refugee question that does not include any explicit recognition of a right of return to Israel can be found in the context of a wider, acceptable political settlement. (ICG, at 7)

While the report does not provide sources (due to the ‘sensitive nature’ of the discussions) it can be safely concluded that those who drafted the proposal either failed to speak with refugees themselves or decided to exclude their positions from the proposal. The absence of refugee voices in the report is difficult to understand given the public character of debate around the refugee issue, particularly in refugee camps across the region. As Palestinian negotiators headed off to Camp David in July 2000, for example, refugee organizations in the West Bank issued a statement to the Palestinian leadership, which read, in part,

Do no bother asking whether we will accept compensation, whether we will go to Canada, Europe or China. Let Clinton, Barak and Arafat know - let the armies of negotiators and the legions of journalists know: We are going home - home to Palestine. Our olive trees and oranges await us. We will not accept anything less no matter who signs the next of the infinite agreements. The
right of the refugees is a personal and collective right that cannot be cancelled - whatever the balance of power, whoever the signatories.

We, the refugees tell the Camp David clique, do not bother returning if you are bringing us anything less than the Right of Return. For we are a force that cannot be broken, that cannot be defeated, as though we would one day accept others to negotiate our fate. We will fight to defend our rights - those of our grandparents, and those of infinite generations of our children who will one day raise their own children in Haifa, Akka and Jaffa, in Zakariya, Beit Jibrin and Safed.

Beware of the wrath of the camps. Beware of the wrath of the unborn children of Palestine. We hold the past, the present and the future and we will know what to do to realize what is ours. (Copy on file with BADIL).

Similar statements were issued by other refugee initiatives in various places of exile and by internally displaced Palestinians inside Israel. More recently, Palestinian refugees, political parties, and the PLO Refugee Affairs Department, publicly rejected a joint proposal by Sari Nusseibeh and Ami Ayalon that called upon refugees to forego the right of return in order to reach a political settlement between the PLO and Israel. The official position of the PLO on the refugee issue affirms the right of Palestinian refugees to return to their homes of origin and receive compensation for losses and damages as set forth in UN General Assembly Resolution 194 and international law. In short, there is no evidence to indicate that refugees have altered their position on the right of return. It is difficult to understand how the ICG proposal would “resonate” with the Palestinian people, of whom over two-thirds are refugees. (For an interesting survey of refugee views, see, e.g., Joint Parliamentary Middle East Councils Commission of Enquiry – Palestinian Refugees, London, 2001)

Secondly, from the perspective of those most affected by the ICG recommendations – i.e., the refugees themselves – the proposal fails to provide convincing arguments as to why the right of return and the right to housing and property restitution, applicable to all other refugees, are not applicable to Palestinian refugees. Moreover, the proposal fails to provide arguments as to why rights claimed by Israelis and Jews (including return under Israel’s 1950 Law of Return and the right to property restitution) do not apply to Palestinians. Relevant precedents in this regard include administrative procedures for real property restitution of Jewish residents and citizens of Israel (See, e.g., Israel’s 1970 Legal and Administrative Matters [Regulation] Law [Consolidated Version], Section 5; 1969 government decision establishing a special department at the Justice Ministry to document housing and property claims of Jews from Iraq, Syria, Egypt and Yemen, as amended in March 2001; and, the November 2001 decision to establish a special unit in the Justice Ministry to locate Jewish heirs of bank accounts and absentees’ property belonging to holocaust victims), the more expansive range of Jewish restitution claims in Europe (relevant precedents include: the right of individuals or heirs to repossess homes and properties ‘abandoned’ during periods of conflict, the right of individuals to repossess housing and property regardless of the passage of time, the right of organizations to receive communal and heirless assets, the role of non-governmental
organizations as a party to negotiations concerning housing and property restitution, and, the right of individuals to housing and property restitution in states where they are no domicile or do not hold citizenship), a large body of declaratory law that has developed through UN institutions affirming and calling upon states to facilitate the return of refugees and displaced persons as well as housing and property restitution, and principles and procedures set forth in numerous peace agreements (For an overview of UN resolutions and peace agreements, see, e.g., S. Akram and T. Rempel, Recommendations for Durable Solutions for Palestinian Refugees, PYIL, 2000-2001).

Thirdly, the ICG proposal does not adequately consider the full range of political implications of the March 2002 Declaration issued at the Arab League summit in Beirut. The authors of the proposal suggest that the Declaration represents a ‘compromise’ position on the refugee issue because the Declaration does not use the term ‘right of return.’ (ICG, at 8) The proposal fails to consider that the terms ‘right of return’ and ‘Resolution 194’ are often used interchangeably by Arab states. In addition to the language of the text, the Declaration should also be read in light of Arab League (LAS) resolutions on the Palestinian refugee issue, positions adopted by civil society organizations in Arab states, and, the dynamics of the political process as it has developed over the last decade. LAS resolutions, for example, clearly affirm the right of Palestinian refugees to return to their homes and villages of origin. Since the mid-1990s, the League has repeatedly called upon the United Nations to investigate the state of Palestinian refugee properties, the violation of land ownership rights, the current use of refugees properties, and the revenues accruing from such use. Arab civil society organizations have adopted numerous position papers and other documents reaffirming the right of Palestinian refugees to return to their homes of origin.

In addition, it is worth remembering that over the past decade, when international pressure focused on moving the political process forward, all parties exerted efforts to avoid direct and frank discussion of the most sensitive issues, including the refugee issue. Palestinian negotiators, for example, were often compelled to reassure their Israeli counterparts that few refugees would really want to return to exercise their right of return or that return would be fulfilled in the context of a Palestinian state. When the time finally came to sit down and hash out the most sensitive issues it became apparent that the right of return was more significant than suggested by previous references to the issue. The ICG proposal provides a clear example of this type of ‘blinkered’ thinking on the refugee issue. In addition to the March 2001 Beirut Declaration, the authors of the proposal suggest that “numerous Palestinian leaders now hold the view that a solution to the refugee question that does not include any explicit recognition of a right of return to Israel can be found in the context of a wider, acceptable political settlement.” (ICG, at 7) The proposal cites a February 2002 Op-ed in the New York Times, in which Yasser Arafat writes that the PLO is “ready to … negotiate … creative solutions of the plight of the refugees while respecting Israel’s demographic concerns.” Interestingly, the ICG proposal chose to ignore a significant part of the Op-Ed in which Arafat further writes that “Israelis too must be realistic in understanding that there can be no solution to the Israeli-Palestinian conflict if the legitimate rights of these innocent civilians continue to be ignored…. How is a Palestinian refugee to understand that his or her right of return will not be honored but those of Kosovar Albanians, Afghans and East Timorese have?”
Finally, the ICG proposal fails to seriously take into account the significance of the right of return and right to housing and property restitution for Palestinian refugees. While the authors acknowledge that the self-identity of the Palestinian people is first and foremost as refugees who have been unjustly dispossessed of their land and property (ICG, at 7), the recommended solutions, which totally ignore the innate sense of belonging to the village and the land, have been crafted as if Palestinian refugees were no more than simple economic migrants. As one commentator has noted:

There is a fashionable way of seeing the modern Palestinian predicament as a sort of mirror image of the Jewish diaspora on the European continent. The exiles will easily find their way after the final settlement in a globalised world, it is thought, connecting to their community through the internet, perhaps adding a Palestinian passport to that of Canada or of Jordan. But this is largely a false image, merely that of an elite who managed to get passports or savings out, or went to the Gulf or America in the 50s and 60s.

Palestinians do possess an enormous flourishing of talent and skill: as doctors, engineers, scientists, artists, architects and teachers from the coastal towns and cities, as well as from the countryside. But the overwhelming character of the Palestinian people remains that of farmers and peasants, people intimately connected to the land, although for three generations now born in camps, often only a few kilometres from their destroyed villages and empty fields. (K. Nabulsi, The Guardian, 18 September 2002)

That identity and sense of belonging is evident, even after more than five decades in exile, in the centrality of village to refugees. Refugee camps and catchment areas are organized around and often named after the village of origin. The village continues to play a central role in social and clan relations. Village societies oversee common concerns. Refugee children continue to identify themselves by their grandparents' or great-grandparents' village and are often able to relate the history and social fabric of the village. Those refugees who are able to acquire passports and enter Israel as tourists continue to visit their village sites often taking with them a jar of water from the village spring, a box of soil or clippings of wild herbs as a way of strengthening the bond to and memory of the village even in distant places of exile. The sense of identity with and belonging to the land has been preserved for more than 50 years in exile. One of the defining characteristics of the Palestinian refugee condition has been separation – separation from family and community, and separation from the land. The ICG proposal fails to explain why refugees would suddenly agree to permanently sever those bonds by treaty, or how Palestinian leaders, even if they wanted to, would be able to convince refugees to alter their identity and sever their ties with their homes of origin.

In summary, we believe that the ICG proposal fails to provide a credible framework for just and durable solutions for Palestinian refugees that will resonate with the refugee
community. We believe that a solution that is not based on international law and relevant resolutions will have negative consequences for both refugees and Israel. While the authors of the ICG proposal suggest, “the issue of a right of return for refugees has led the Israeli people to question the sincerity of the Palestinian commitment to a two-state solution,” (ICG, at 7) it is equally true that Israel’s rejection of international law, including the right of all refugees and displaced persons to choose to return to their homes of origin, as the framework for a solution has led Palestinians to question Israel’s commitment to a just, comprehensive and durable solution to the historic conflict.

We also believe that a political process that does not include refugees themselves will fail to provide a just, durable and comprehensive solution. From the outset of the Oslo process, Palestinian refugees have been largely excluded from the political process. It is only through self-organization, mobilization, and networking, in addition to support provided by international non-governmental organizations, that Palestinian refugees have been able to ‘insert’ their voices and demands into the political process. Applying democratic principles to the political process provides the best insurance for public support of negotiated agreements. Ignoring refugee voices, rights and demands is a sure recipe for political failure.

Finally, we believe that a political process that avoids addressing the root cause of the historic conflict – i.e., the mass displacement and dispossession of the Palestinian people – within a clear legal framework cannot and will not lead to a just, comprehensive and durable solution. One of the most profound failings of the Oslo process was the failure to define the very nature of the conflict. Mechanisms must be found to allow Israelis to learn about 1948 and the role of Jewish/Zionist forces in the mass displacement and expulsion of Palestinians from their historic homeland. The prospect of a peaceful and prosperous future is dependent on confronting the past. It is the only way to build the kind of common language that is necessary to talk about the issue of Palestinian refugees and work towards acceptable solutions. In this context, Palestinian refugees and the right of return is not an obstacle to peace, but a bridge.

Sincerely,

BADIL Resource Center
Bethlehem
November 2002