

The Role of International Law and Human Rights in  
Peacemaking and Crafting Durable Solutions for Refugees  
**Comparative Comment**

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# The Role of International Law and Human Rights in Peacemaking and Crafting Durable Solutions for Refugees: Comparative Comment

Introducing this Expert Seminar on The Role of International Law and Human Rights in Peacemaking and Crafting Durable Solutions for Refugees,<sup>1</sup> al-Badil Resource Centre set out the following assumption:

*The Oslo process has been dominated by a primarily political approach, which considers relevant international law and human rights provisions as 'impractical' and obstacles for a negotiated solution of the Palestinian refugee issue and the Israeli-Palestinian conflict. The exclusion of international law, human rights standards and relevant UN resolutions from the terms of reference for negotiations and the substance of agreements has been identified as a major cause of the failure of the Oslo process in general, and of efforts at tackling the Palestinian refugee issue in particular.*

This is a sober assessment that in my opinion correctly points up the risks that the Oslo process took in failing to set commitment to existing obligations in international law as the framework for the transition.<sup>2</sup> This argument has been made in particular in regard to international humanitarian law.<sup>3</sup> Nor does the latest initiative, on the face of it, appear to break this mould. The Quartet's 'Performance-based Road Map' formally published by the US at the end of April 2003<sup>4</sup> contains no reference to international law or indeed to any framework external to terms agreed bilaterally or proposed by particular third parties - hence, there is a passing reference to 'past agreements' and Israel is to freeze settlement activity in accordance with the Mitchell report (not in accordance with its obligations under international law). The only reference to the refugees comes in the plan for the third and final phase, when the parties are to 'reach final and comprehensive permanent status agreement that ends the Israel-Palestinian conflict in 2005, through a settlement negotiated between the parties based on UNSCR 242, 338, and 1397, that ends the occupation that began in 1967, and includes an agreed, just, fair and realistic solution to the refugee issue...' These three Security Council resolutions do not explicitly deal with individual rights of the refugees.<sup>5</sup> One could understand the adjectives 'just and fair' used in the road map to describe the solution envisaged for 'the refugee issue' as indicating the solution generically described by human rights law as currently articulated (the right to return and to housing and property restitution). On the other hand, the word 'realistic' hints at the attitude described in the above-cited assumption of the seminar (to the effect that solutions envisaging the implementation of these same international legal provisions could be regarded as 'unrealistic' or 'impractical'). Nor can it be assumed that with the use of

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<sup>2</sup> I am grateful to Fouzia Khan for research assistance on this paper; to Colm Campbell, Catherine Jenkins, Mona Rishmawi and Wilder Tayler for suggestions on comparative material; and to Lena al-Malak for comments.

<sup>3</sup> See Welchman, 'The Middle East Peace Process and the Rule of Law: Irreconcilable Objectives?' in Eugene Cotran and Mai Yamani (eds) *The Rule of Law in the Middle East and Islamic World*, London: I.B.Tauris 2000, 51-65; Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, The Hague: Kluwer Law International 1997, 168, 131; Christine Bell, *Peace Agreements and Human Rights*, Oxford: Oxford University Press 2000, see discussion at 183-184 and 203; and Colm Campbell, 'A Problematic Peace: International Humanitarian Law and the Israeli-Palestinian Peace Process,' in Kirsten E. Schulze, Martin Stokes and Colm Campbell (eds), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East*, London: I.B.Tauris 1996, 39-54. For a political science critique of Oslo, see Ian S. Lustick, 'The Oslo Agreement as an Obstacle to Peace,' *Journal of Palestine Studies* XXVIII/1 1997 61-66; Lustick's focus is what he describes as a 'sophisticated strategy of opposition' to Oslo among right-wing Israeli opponents and their supporters in the US, which involves "ignoring its political content and insisting that it be treated as a legal document [...]."

<sup>4</sup> A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict; formally released by the US on 30 April 2003; see Conal Urquhart, 'US releases 'road map' amid underlying tension,' *The Guardian* 1 May 2003.

<sup>5</sup> In UNSCR 242 (1967) the Security Council 'affirms the necessity [...] for achieving a just settlement of the refugee problem;' this resolution is recalled and affirmed in 338 (1973) and 1397 (2002).

'agreed', the drafters of the road map intend to directly secure the agreement of the refugees themselves, beyond the agreement of their hard-pushed political representatives.<sup>6</sup>

The three UN Security Council Resolutions cited in the road map broadly present and reaffirm the 'land-for-peace' formula now the basis of the two-state solution to the Israeli-Palestinian conflict explicitly recognized in UNSCR 1397 (2002),<sup>7</sup> within a framework of political negotiations between the parties and with an affirmation of the customary international law prohibition on the acquisition of territory by war. If the collective Palestinian right of self-determination is recognized through the vision of a Palestinian state articulated in resolution 1397, the issue of individual rights of the refugees is not. Back in 1948, the newly established state of Israel responded at the UN to calls for it to repatriate hundreds of thousands of Palestinians of refugees to the effect that this:

*was not a question of the rights of certain individuals but of the collective interests of groups of people. It was not enough to allow these individuals to return when and where they desired, for the question arose as to who was to assume responsibility for their integration in their new environment.*<sup>8</sup>

A more recent quote presents the individual right of Palestinian refugees to return as threatening the Jewish people's collective right to self-determination as secured by the state of Israel. In recent weeks, Israel's Prime Minister is reported to be demanding that the Palestinians should renounce the right of return to areas inside Israel's 1948 borders as a pre-condition for implementation of the road map, because it is 'a recipe for the destruction of Israel'.<sup>9</sup> According to Ariel Sharon:

*If there is ever to be an end to the conflict the Palestinians must recognize the Jewish people's right to a homeland, and the existence of an independent Jewish state in the homeland of the Jewish people. I feel that this is a condition for what is called an end to the conflict.[...] The end of the conflict will come only with the arrival of the recognition of the Jewish people's right to its homeland.*<sup>10</sup>

Leaving aside the issue of the individual right to return in situations of mass displacement,<sup>11</sup> these positions illustrate what Christine Bell has called the 'meta-conflict', or 'conflict about what the conflict is about'<sup>12</sup> ultimately forming the locus of what she terms 'the deal' in a generic or ideal type peace agreement. Bell's consideration of *Peace Agreements and Human Rights* (2000) identifies in peace agreements three types of human rights-related provisions: "rights to self-determination or

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<sup>6</sup> At the beginning of the Oslo process, Richard Falk identified among the difficulties Oslo faced as including the fact that "the Palestinians living as refugees outside the West Bank and Gaza Strip were essentially unrepresented by the PLO during the negotiations." Richard Falk, 'Some International Law Implications of the PLO/Israeli Peace Process,' VIII *Palestine Yearbook of International Law* 1996 19-34, reproduced as 'Implications of the Oslo/Cairo Framework of the Peace Process,' in Jean Allain (ed) *Unlocking the Middle East: The Writings of Richard Falk*, Moreton-in-Marsh: Arris Books 2003, 66-94, at 66.

<sup>7</sup> UNSCR 1397 (2002) explicitly affirms 'a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders.' Falk (ibid 78-79) notes the failure to explicitly recognize the Palestinian right to collective self-determination in the two earlier resolutions, 242 (1967) and 338 (1973). On UNSCR 242, see Musa Mazzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israel Conflict*, Reading: Ithaca Press, 1997, 199-238.

<sup>8</sup> UN Doc. A/C.1/SR.220 (1948) cited in John Quigley, 'Mass Displacement and the Individual Right of Return' 68 *British Yearbook of International Law* 1997 65-125 at 76.

<sup>9</sup> Chris McGreal, 'Powell arrives to face uphill struggle on road map' *The Guardian* 10 May 2003; and Jonathan Freedland, 'Don't hold your breath' *The Guardian* 16 April 2003.

<sup>10</sup> Ari Shavit, 'PM: Iraq war created an opportunity with the Palestinians we can't miss,' *Haaretz* 30 April 2003.

<sup>11</sup> See Quigley, *supra* note 8, and sources cited therein; see also Eric Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' 19 *Michigan Journal of International Law* 1998, 1091-1139. Specifically on Palestinian refugees, see John Quigley, 'Displaced Palestinians and a Right to Return,' 39 *Harvard International Law Journal* (1998) 171-229; and papers to the Badil seminar by Susan Akram and Terry Rempel ('Temporary Protection as an Instrument for Implementing the Rights of Return for Palestinian Refugees') and Karma Nabulsi ('Popular Sovereignty, Collective Rights, Participation and Crafting Durable Solutions for Refugees').

<sup>12</sup> Bell, *supra* note 3, at 15.

minority rights ('the deal'), building for the future (institutional protection for civil, political, social, economic and cultural rights), and past human rights violations."<sup>13</sup> As demonstrated in the cases she considers (South Africa, Northern Ireland, Bosnia Herzegovina, and Israel/Palestine), while all three are inherently inter-connected, it is particularly the 'meta-bargaining' over 'the deal' on the collective rights (to self-determination) that implicates the handling of individual rights arising from past human rights violations and hence, the nature and extent of reparation due - as she puts it, "the trade-offs between different human rights provisions including in particular the relationship between group and individual rights".<sup>14</sup>

Through a detailed examination of particular agreements from those four conflicts, Bell explores the justice and peace connection, the nature of which she finds in practice to be "problematic and controversial":

*The view that human rights law provides unnegotiable minimum universal standards is often presented as in tension with the need for a pragmatic peace involving compromise, including compromise on human rights.*<sup>15</sup>

This is familiar from the assumption cited at the beginning of this paper. The tension - or dynamic - of "principle and pragmatism, or law and politics"<sup>16</sup> is addressed by Kader Asmal as the risk of a deadlock between "what might be called human rights fundamentalism, on the one hand, and cynical *realpolitik* on the other."<sup>17</sup> Speaking some years into the new South Africa, Asmal (South African Minister of Education at the time) locates himself as an international lawyer speaking "from a position well within the human rights discourse." With this discourse, he notes, with a tone of gentle self-mockery,

We come up against the technocrats of the social sciences and of international relations. These are the hard men of *realpolitik*, the mandarins of statecraft, who view moralists as naïve children, lacking knowledge of the real world's harsh realities.

Asmal does not himself accept the dichotomy, and indeed his effort in the lecture (in 1999 at the LSE) is to set out in what ways he understands the South African approach to have "moved beyond the twin traps of naiveté and *realpolitik*,"<sup>18</sup> offering Nelson Mandela as an example of a 'third way'.<sup>19</sup> In the literature (and in the practice) of peace processes, the positing of tensions or dichotomies may pick out law/politics or principle/pragmatism, as cited above, or law/power, peace/justice, truth/justice, truth/reconciliation, depending on the dynamic and the particular situation that is being addressed. On the academic side, certain of these dynamics are closely implicated in increasing interest among international lawyers in the disciplinary theories of international

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<sup>13</sup> *Id.*, at 35.

<sup>14</sup> *Id.*, at 2.

<sup>15</sup> *Id.*, at 5.

<sup>16</sup> *Id.*, at ix.

<sup>17</sup> Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective,' The 1999 Chorley Lecture, London School of Economics, 4 November 1999, 5; text available at [www.education.gov.za/Media/Articles/Chorley](http://www.education.gov.za/Media/Articles/Chorley) (last visited 20 May 2003).

<sup>18</sup> *Id.*, at 8.

<sup>19</sup> Asmal notes the coincidental use of this phrase to describe the South African approach by Archbishop Desmond Tutu; *id.*, at 5 note 28. See also Alex Boraine, 'Truth and Reconciliation in South Africa: The Third Way,' in Robert I. Rotberg and Dennis Thompson (eds.), *Truth v. Justice: The Morality of Truth Commissions*. Princeton: Princeton University Press, 2000, at 141-157.

relations. Slaughter et al note that for some this proceeds from a perceived "reality deficit" of the law:

*international law is particularly susceptible to the siren call of social science, as it struggles perpetually with suspicions of its own irrelevance.*<sup>20</sup>

For others, on the other hand, interest in international relations scholarship is held to reaffirm international law "as an intellectual and practical enterprise" and to perceive "the integration of IR and IL scholarship" as "the natural corollary of the indivisibility of law and politics."<sup>21</sup> According to Slaughter et al, "insiders in both disciplines reject such facile distinctions" as "positive versus normative, politics versus law."<sup>22</sup>

The burgeoning scholarly literature on transitional justice deals directly with the particular question of the 'justice-peace' formula worked out in the process of peace settlements. Colm Cambell et al explain 'transitional justice' as "a set of discourses" which focus on "the problem of reconciling the demands of peace with the imperatives of justice."<sup>23</sup> The issue of the right to return for Palestinian refugees directly provokes the justice-peace debate, as shown by the various quotes in this paper, and, as a "conflict-related legal legacy," falls clearly within the concerns of 'transitional justice' as thus defined:

*'Transitional justice' [...] functions as a collective title for the numerous forms of political and legal accommodation that arise in the shift from conflict to negotiation. Its concerns are with conflict-related legal legacies as well as with the myriad of internal legal quandaries that are a part of the post-conflict world.*<sup>24</sup>

The peace processes in South Africa, Israel-Palestine and former Yugoslavia are among those that the authors identify as being more recently dealt with in the transitional justice literature.<sup>25</sup> While various criticisms are made of different aspects of the South African approach,<sup>26</sup> it is the case that Bell puts it first among her case studies in a summary ranking of the human rights measures included in the various peace deals "according to detail and capacity to deliver change." The Israel/Palestine "deal" comes last.<sup>27</sup> In fact, Bell holds that "in both their text and their implementation the Israeli/Palestinian peace agreements demonstrate an almost complete divorce between the concept of peace and the concept of justice."<sup>28</sup> In her categorization of three sets of human rights provisions typically contained in peace agreements, this is referring to the second set, the 'building for the future' provisions for human rights institutions. Her evaluation of the way in which the other two sets of human rights provisions fare in the Israel/Palestine peace agreements ('rights to self-determination' and past human rights violations) is equally negative.

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<sup>20</sup> Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Scholarship,' 92/3 *American Journal of International Law* (1998), 367-397, at 372. The authors attribute their usage of "reality deficit" to Brian Tamanaha, 'An Analytical Map of Social Scientific Approaches to the Concept of Law,' 15 *Oxford Journal of Legal Studies* (1999), 501, at 512.

<sup>21</sup> Slaughter et al, *supra* note 20, at 372.

<sup>22</sup> *Id.*, at 393. In a consideration of "problem-driven" interdisciplinary work, they cite 'Israeli-Palestinian relations' as one area where international law scholars have applied international relations theory "as a diagnostic and policy-prescriptive tool [...]." *Id.*, at 367, notes 48 and 49.

<sup>23</sup> Colm Campbell, Fionnuala Ni Aolain and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland,' 66:3 *The Modern Law Review* (2003), 317-345, at 317.

<sup>24</sup> *Id.*, at 336.

<sup>25</sup> *Id.*, at 334. Of particular interest for the Israel-Palestine process, the authors note (at 335) that "one of the most striking features of the recent legal scholarship in the field of transitional justice has been a reassertion of the critical importance of international humanitarian law."

<sup>26</sup> For example by Anthea Jeffrey, *The Truth About the Truth Commission*. Johannesburg: Institute of Race Relations, 1999, cited (and challenged) by Asmal (*supra* note 17, at 2).

<sup>27</sup> Her ranking on this point is South Africa, Northern Ireland, Bosnia Herzegovina, Israel/Palestine. Bell, *supra* note 3, at 231.

<sup>28</sup> *Id.*, at 203.

Bell's comparison is based on a broad distinction between pre-negotiation, framework-substantive agreements and implementation agreements, although acknowledging inevitable overlaps in function and content and consequent challenges to the classification.<sup>29</sup> Her detailed comparison is between four sets of 'framework' peace agreements (the type of agreement "often marked by a handshake moment")<sup>30</sup> in the four conflicts she considers: the South African Interim Constitution of 1993, the Israeli-Palestinian Declaration of Principles of 1993 and the 1995 Interim Agreement,<sup>31</sup> the Dayton Peace Agreement of 1995,<sup>32</sup> and the Belfast (or Good Friday) Agreement of 1998.<sup>33</sup> Bell recognizes that a key difference between the Israel-Palestine agreements and those of the other three conflicts under examination is that the function of the former is to "build separate Israeli and Palestinian institutions and government, rather than designing ways to share both."<sup>34</sup> This critical distinction (based on the two-state solution) complicates the comparison considerably, but does not invalidate it.

The provisions of peace agreements regarding the return of refugees and displaced persons and property rights issues are in Bell's category of past human rights violations, or "past-focussed issues," along with issues of accountability for and (/or) 'truth about' abuses during the conflict.<sup>35</sup> The way the past is dealt with is "inextricably linked with how the agreement has dealt with self-determination" and raises "most graphically the justice-peace debate."<sup>36</sup> Thus, in the quote from Ariel Sharon above, peace (manifested as 'the end of the conflict') requires *ab initio* the waiving of justice (as manifested by Palestinian refugees exercising their individual right to return including inside the 1948 borders). Sharon's articulation of the relationship, on the other hand, is in terms of a fit between peace and justice, with his presentation of the Jewish people's rights to self-determination being exercised inside the 1948 border. When combined with Sharon's apparent acceptance of a Palestinian 'state,'<sup>37</sup> the 'deal' here is presented as mutual recognition of collective rights to be exercised separately and to exclude the exercise of the individual right to return.

The different types of "past-focussed issues" considered by Christine Bell tend to be dealt with, as she points out, at different points in peace processes, and the discussions on measures taken and mechanisms established for the purpose of dealing with the past are increasingly informed by developments in mechanisms of both 'retributive' and 'restorative' justice. As for the first, the developing concept in international law of a 'duty to prosecute'<sup>38</sup> is not an explicit feature in the texts of peace agreements. The International Criminal Tribunal for former Yugoslavia was set up as the conflict was ongoing, rather than being established as part of the agreement between the parties, although subsequently its mandate was deferred to by both the process leading to and the text of the Dayton Peace Agreement in regard to the exclusion of persons indicted by the Tribunal from the negotiations and the exclusion from prisoner releases and amnesties of those charged with crimes within its jurisdiction.<sup>39</sup> The role played in peacemaking by the prosecution of perpetrators

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<sup>29</sup> *Id.*, at 20, 29-32.

<sup>30</sup> *Id.*, at 25. A leitmotif that for observers of the Israel-Palestine conflict/peace process, immediately evokes the White House lawn.

<sup>31</sup> She also considers elements of the Gaza-Jericho Agreement of 1994. Bell notes the particular difficulty in drawing distinctions between the types of agreements in this conflict, see discussion at 83.

<sup>32</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, 4 December 1995.

<sup>33</sup> Agreement reached in Multi-Party Negotiations, 10 April 1998: Bell, *supra* note 3, at 65.

<sup>34</sup> Bell *supra* note 3, at 155.

<sup>35</sup> *Id.*, at 233.

<sup>36</sup> *Id.*, at 9.

<sup>37</sup> What he means by 'statehood' for Palestinians remains unclear.

<sup>38</sup> See Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' 100 *Yale Law Journal* (1990-1991), at 2537-2615; and Bell, *supra* note 3, at 258 ff and sources at note 1.

<sup>39</sup> The opposition of the USA to the mandate of the International Criminal Court (as compared with conflict-specific tribunals) is well documented. A recent press release by Amnesty International calls on the government of Bosnia and Herzegovina to refuse to sign an impunity agreement on which the US is insisting, under threat of withdrawal of military assistance. The agreement would commit the government "not to surrender US nationals accused of genocide, crimes against humanity and war crimes to the new International Criminal Court." Amnesty International, 'Bosnia and Herzegovina: The government should reject US impunity agreement,' 16 May 2002, AI Index EUR 63/011/2003.

is assessed in a separate paper,<sup>40</sup> but it is worth noting here that the application of 'retributive justice' through criminal prosecution, as one approach to dealing with the past, is not entirely in the hands of those negotiating the peace, or reliant on the international community for the establishment of tribunals. In the case of Israel as an Occupying Power, there is of course the explicit obligation to search for and prosecute those accused of grave breaches of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>41</sup> Israel's co-parties to the Convention have studiously ignored this obligation, although many have complied with the obligation to promulgate national legislation enabling such prosecutions to be launched against those 'of any nationality.' This may give a certain scope for those outside the political processes to take the law, so to speak, into their own hands, in their pursuit of justice; a recent case in point being the effort by lawyers in London to prompt a prosecution under the Geneva Conventions Act of Lieutenant General Shaul Mofaz on charges relating to events in the Jenin refugee camp in April 2002.<sup>42</sup> In a report commissioned against the background of the high-profile legal action against Ariel Sharon in the Belgian courts relating to the 1982 massacre of Palestinian refugees in Sabra and Chatila, Israel's Ministry of Justice was reported to have singled out Britain, Spain and Belgium as "the most likely to prosecute Israelis who breach international law."<sup>43</sup> This must be referring to the potential for initiatives originating in civil society, rather than state action; it is doubtful that the political leaders (or their civil servants) of any of the three countries named would see this form of justice as helpful contributions to their own foreign policy priorities. Indeed, following increasing numbers of legal actions against a range of foreign leaders, the Belgian authorities moved in April 2003 to amend the 1993 'anti-atrocity' legislation.<sup>44</sup> The extent of the amendments dismayed human rights organizations, which according to Human Rights Watch had "long proposed establishing

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<sup>40</sup> Alejandra Vincente, 'Justice Against Perpetrators: The Role of Prosecution in Peacemaking and Reconciliation,' paper to the Badil seminar.

<sup>41</sup> Article 147 of the Convention defines grave breaches as "those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

<sup>42</sup> Scotland Yard was reported to be investigating. Chris McGreal, 'Amnesty calls for arrest of Israelis for war crimes,' *The Guardian*, 4 November 2002. See Amnesty International, *Shielded from Scrutiny: IDF violations inn Jenin and Nablus*, AI Index MDE 15/143/2002, 4 November 2002.

<sup>43</sup> Chris McGreal, 'Israelis fear war crimes arrests,' *The Guardian*, 12 November 2002. For background on the action against Ariel Sharon, see Amnesty International, 'International Justice for Sabra and Chatila Victims', 25 September 2002, AI Index MDE 15/144/2002.

<sup>44</sup> Loi relative à la répression des infractions graves aux Conventions de Genève du 12 aout 1949 et aux Protocoles I et II du 8 juin 1977, Law of 16 June 1993, as amended in February 1999 by Loi relative à la répression des violations graves du droit international humanitaire, which included genocide and crimes against humanity, under which sections many of the actions were filed. Implementing the principle of universal jurisdiction over these grave breaches and international crimes, the law enabled Belgian courts to hear criminal complaints by victims of any nationality against officials of any nationality on accusations of genocide, crimes of humanity and war crimes. In April 2003 the Belgian Parliament voted through amendments that *inter alia* give wider scope to the judiciary to reject claims involving non-Belgians, and allow the government to intervene to have cases transferred to the home state of the accused where the state is considered to uphold the right to a fair trial and where the victim is not Belgian. See briefing by Human Rights Watch, 'Belgium: Anti-Atrocity Law Limited', 5 April 2003 (at <http://hrw.org/press/2003/04/belgium040503.htm>, last visited 14 May 2003). According to Human Rights Watch, this last provision "will subject the government to diplomatic pressure when a complaint is filed." Such pressure was most recently evident when a Brussels lawyer confirmed that 19 Iraqi plaintiffs were seeking to bring charges against US General Tommy Franks and other US soldiers in relation to alleged crimes including failure to prevent the looting of hospitals and "a shooting incident on a Red Crescent ambulance." Ian Black, 'Franks may face war crimes charge,' *The Guardian*, 30 April 2003. The case was filed on 14 May (George Monbiot, 'Let's hear it for Belgium,' *The Guardian*, 20 May 2003). Human Rights Watch (*loc cit*) notes that cases have also been filed under the law against, *inter alia*, Saddam Hussein, Fidel Castro, Paul Kagame and Yasser Arafat along with a list of others, although noting that "many of these cases have not been actively pursued." The Belgian Supreme Court had already ruled in February 2003 that as a 'top sitting state official,' Prime Minister Ariel Sharon had immunity in the Belgian courts.



'filters' to prevent frivolous cases and render the law more politically viable."<sup>45</sup> It remains to be seen whether the new version is in practice a workable balance of law and politics. What may be less easy to track is whether, if serious concerns persist and are publicized in Israel (and specifically among the armed forces) about the implementation of national legislation providing for universal jurisdiction over allegations of grave breaches of the Fourth Geneva Convention, the deterrent effect of potential criminal justice proceedings against implicated Israeli nationals abroad will in fact help reduce the level of serious violations of international humanitarian law - which in turn could substantively promote the prospects for peace building.<sup>46</sup>

The arguments around prosecution as a mechanism for establishing accountability for past abuses<sup>47</sup> are provoked *inter alia* by agreements on amnesty, which may be presented as key elements of transition to peace.<sup>48</sup> In this regard, Bell reports "evidence that the demands of international law for accountability have increasingly shaped domestic initiatives such as the establishment of truth commissions."<sup>49</sup> In a comparison of fifteen truth commissions written in 1994, Priscilla Hayner observes that "prosecutions are rare after a truth commission report," although her reference is explicitly to prosecutions in the national legal system.<sup>50</sup> In South Africa, Catherine Jenkins notes the case made for the application of a model of restorative justice, which included a provision for amnesty in the post-amble of the Interim Constitution and the Promotion of National Unity and Reconciliation Act of 1995 establishing the Truth and Reconciliation Commission. According to Jenkins, the restorative justice concept was identified "as a potential means of reconciling the political imperatives of new nationhood with the demands of human rights norms and the more traditional concept of retributive justice."<sup>51</sup> Also writing on South Africa, David Crocker describes restorative justice as "rehabilitating perpetrators and victims and (re)establishing relationships based on equal concern and respect."<sup>52</sup> Alex Boraine describes the TRC as a 'third way' between the

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<sup>45</sup> Human Rights Watch, 'Belgium: Anti-Atrocity Law Limited,' *supra* note 44.

<sup>46</sup> See Lynn Welchman, *supra* note 3; compare Bell, *supra* note 3, at 116-117.

<sup>47</sup> Summarized by Bell, *supra* note 3, at 271-272.

<sup>48</sup> See Catherine Jenkins, 'Amnesty for Gross Violations of Human Rights in South Africa: A Better Way of Dealing with the Past?' in Ian Edge (ed.), *Comparative Law in Global Perspective*. Transnational Publishers, 2000, 345-386, at 353-366 on amnesties and international law. Bell (273) points out that limited effect amnesties are likely to take place at different stages of peace processes: prisoner releases, for example, or the return of certain categories of refugees, as confidence building measures, or to enable key negotiators to participate in the process (her example here is South Africa), may occur at a very early stage (the pre-negotiation stage according to Bell, "by the framework-substantive agreement at the latest"). She contrasts these with "more holistic" or "comprehensive 'past-oriented' mechanisms" such as the Truth and Reconciliation Commission (TRC) in South Africa, which was based in a 'post-amble' to the Interim Constitution negotiated between the African National Congress and the then South African Government, but enacted as a mechanism only subsequent to the change in government. Bell finds only "piecemeal measures for dealing with discrete issues" in the Belfast Agreement and the Israeli-Palestinian agreements. Confusion around the standing of such limited measures in the Israel-Palestine context was highlighted recently with the arrest of Muhammad Abbas (Abu Abbas) in Iraq by US special forces. The press reported Italy's announcement that it would seek his extradition to face trial; Saeb Erekat insisted that PLO members must not be arrested or prosecuted for acts before the DoP, in accordance with the Interim Agreement signed *inter alia* by US President Bill Clinton; the Israeli Supreme Court was reported as having declared Abbas immune from prosecution in Israel in 1998, citing the Interim Agreement, while a radio interview with an Israeli spokesman appeared to suggest that subsequent acts on his part might change his status; and as for the US, while the Justice Department was reported as saying it had no grounds on which to seek his extradition since Washington had dropped a warrant for his arrest, a State Department official was quoted by Reuters as saying "that agreement only concerned arrangements between Israel and the Palestinian Authority" and "does not apply to the legal status of persons detained in a third country." *The Guardian*, 16 April 2003; and Richard Norton-Taylor and Conal Urquhart, 'Abbas: US Trophy or Reformed Terrorist?' *The Guardian*, 17 April 2003.

<sup>49</sup> Bell, *supra* note 3, at 272.

<sup>50</sup> Priscilla Hayner, 'Fifteen Truth Commissions - 1974 to 1994: A Comparative Study,' 16 *Human Rights Quarterly* (1994) 597-655, at 604. Her article was completed just as the South Africans announced plans to establish a truth commission.

<sup>51</sup> Jenkins, 'Amnesty,' *supra* note 48, at 374.

<sup>52</sup> David Crocker, 'Truth Commissions, Transitional Justice and Civil Society,' in Rotberg and Thompson (eds.), *Truth v. Justice* (*supra* note 19), 99-112, at 105.

choices of a blanket amnesty and criminal prosecutions of perpetrators of gross human rights violations.<sup>53</sup> Among the elements that Jenkins (writing in 2000) regards as strengths in the system as set up by the Act were the potential for the disclosure and dissemination of information about violations (the need for 'the truth'), including the public and dignified space to be given to victims to tell their truths, the expectation that amnesty would involve an acknowledgement of wrongdoing on the part of the wrongdoers, the potential for achieving moral and social (if not legal) accountability, the requirement that the TRC "make recommendations for reparation measures for victims," and the combined potential of many of these elements for individual and society reconciliation and the building of a culture of human rights.<sup>54</sup> Many of these elements are included in the 'core content' of the concept of reparations as outlined below, a concept with critical significance for Palestinian refugees in its inclusion of restitution. It might be noted here that in specific regard to the Nakbah, Karma Nabulsi and Ilan Pappé have observed that "we can all look to South Africa for a practical model" in their call for mechanisms to "encourage the Israeli people to learn about their own past:"

*not as a means of retribution or blame but as a measure of restitution and reconciliation, as the beginning of a concrete process of peace and mutual recognition...Facing the past as a way out of the present impasse has proved successful with deep-rooted conflicts. The image of two communities of suffering is central to this process, for the role of the Holocaust in the memory and actions of the people of the state of Israel is essential for understanding their attitude towards the refugees.*<sup>55</sup>

An early evaluation of the practice (not the principle) of the TRC<sup>56</sup> is consolidated in a later article where Jenkins reviews the experience of the South African TRC in light of the approval by the National Council of East Timor of a draft regulation by the United Nations Transitional Administration for East Timor to establish a Commission for Reception, Truth and Reconciliation in East Timor,<sup>57</sup> with a mandate *inter alia* of

*establishing the truth regarding past human rights violations in East Timor, assisting in restoring the human dignity of victims, promoting reconciliation and supporting the reception and reintegration of individuals who have caused harm to their communities.*<sup>58</sup>

An earlier International Commission of Inquiry established by the UN had been mandated to collate information only on violations of 1999 when the Occupying Power, Indonesia, had finally left the territory after an occupation that had lasted since 1974. The Commission on Inquiry had recommended that the UN proceed with measures to ensure reparations for victims, consider "the issues of truth and reconciliation" and establish "an international human rights tribunal" to ensure the prosecution of those accused of "serious violations of fundamental human rights and humanitarian law" in the period within its mandate. Jenkins notes that no such tribunal had yet been established, and with particular regard to violations committed before 1999, cites Bishop Carlos Belo:

*While we believe in and promote reconciliation, the people of East Timor are crying out for justice against the perpetrators of the horrendous crimes committed during the Indonesian occupation. Without justice, the broken-ness continues.*<sup>59</sup>

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<sup>53</sup> Boraine, 'Truth and Reconciliation in South Africa,' *supra* note 19, at 143.

<sup>54</sup> *Id.*, at 373-376. Compare the evaluations of the "unique features" of the South African model in, *inter alia*, Boraine (*supra* note 19), Crocker (looking at it as a process of transitional justice, *supra* note 52); and Martha Minow, 'The Hope for Healing: What Can Truth Commissions Do?' in Rotberg and Thompson (eds.), *Truth v. Justice* (*supra* note 19), at 235-260.

<sup>55</sup> Karma Nabulsi and Ilan Pappé, 'Facing up to Ethnic Cleansing' *The Guardian*, 19 September 2002.

<sup>56</sup> Jenkins, 'Amnesty,' *supra* note 48, at 376-386.

<sup>57</sup> Catherine Jenkins, 'A Truth Commission for East Timor: Lessons from South Africa?', *7/2 Journal of Conflict and Security Law* (2002), at 233-251.

<sup>58</sup> *Id.*, at 234.

<sup>59</sup> *Id.*, 236 citing 'Nobel Laureate Appeals for East Timor Tribunal', *Associated Press*, 23 April 2001.

For her part, Jenkins considers that "the main consideration militating against an international tribunal may well be what the International Commission of Inquiry termed 'the rush of events to redefine relations in the region,'"<sup>60</sup> and warns against "unrealistic expectations" of the East Timorese Commission. In her assessment of the South African experience of restorative justice and in particular with regard to reparation, Jenkins notes that the TRC's proposals regarding material reparations for victims were eventually rejected by the ANC-led government as "too expensive"; the importance of reparations, she observes, "was undoubtedly under-estimated in South Africa and was perhaps the 'Achilles' heel' of the entire process."<sup>61</sup>

Away from the experience of the TRC, a "titanic struggle" over land restitution and property rights in South Africa preceded agreement, in the Interim Constitution, on "a limited right to restitution under the rubric of the fundamental right to equality."<sup>62</sup> The subsequent Restitution of Land Rights Act of 1994 allowed for restitution claims dating back to 1913, with a wide definition of a 'right in land' and a provision "that direct descendants of the dispossessed (and not merely the dispossessed themselves) would be entitled to enforce restitution of a right in land."<sup>63</sup> Issues of current private ownership, the history of the dispossession, 'the uses to which the land is being put,' 'the desirability of avoiding major social disruption' whether restoration would be 'just and equitable,' the designation of a piece of alternative land from state ownership, or the payment of compensation in lieu thereof were among matters for consideration by the Land Claims Court;<sup>64</sup> claims for restitution were to be lodged by the last day of 1998. Jenkins' overview of the process reveals problems related to the length of time it was taking to settle the thousands of claims, the reduction in value of compensation awards and a move away from land restoration in urban areas:

*Land restitution, once perceived as an essential part of redressing the injustices of the apartheid past and the suffering caused by forced removals, has come to be seen as an expensive millstone around the neck of the government.*<sup>65</sup>

Officials of the South African government have referred to the enormous financial implications of full and fair compensation in light of other social priorities pressing on the country's budget.<sup>66</sup> The lessons to be learned, for Jenkins, implicate both process - the need to design a mechanism capable of settling claims promptly, possibly implying an administrative rather than a judicial process in cases of compensation - and resources, with a warning that political and economic constraints "need to be taken realistically into account" at the design stage.

Jenkins also suggests that the international community consider ways in which "reparation for victims can be partly funded by the international community,"<sup>67</sup> in the context of the ongoing effort at the UN to develop the Draft Basic Principles and Guidelines on the Right to a Remedy

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<sup>60</sup> Jenkins loc cit.

<sup>61</sup> Jenkins, *supra* note 57, at 246.

<sup>62</sup> Catherine Jenkins, 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa,' *South African Journal of Human Rights* (2000), 417-485, at 450. Specific targets of land restitution would necessarily include the impact of race-based legislation on land ownership dating from 1913 and the Group Areas Acts of 1950 and 1966 specifying particular areas of land to be used exclusively by a particular racial group; Jenkins at 451-452.

<sup>63</sup> *Id.*, at 453.

<sup>64</sup> *Id.*, at 453-454.

<sup>65</sup> *Id.*, at 456.

<sup>66</sup> Jenkins cites the Chief Land Claims Commissioner as follows: "We are trying to redress the dispossession, but excessive amounts cannot be met by the fiscus. Land restitution competes with portfolios like health, education, transport and safety and security - all pressing needs in South Africa. We face volumes of claims - this is a gesture to try to heal the wounds of the past." *Id.*, at 456 citing *Business Day*, 2 May 2000.

<sup>67</sup> Jenkins, *supra* note 62, at 483

and Reparation for Victims of International Human Rights and Humanitarian Law.<sup>68</sup> The Draft Basic Principles explicitly adopt a "victim-oriented point of departure" and include both retributive<sup>69</sup> and restorative<sup>70</sup> approaches to justice. Specifically on reparation, they hold that states "should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition."<sup>71</sup> They continue:

*Restitution should, wherever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and the return of property.*<sup>72</sup>

Measures of satisfaction and guarantees of non-repetition are to include, where applicable, "apology, including public acknowledgement of the facts and acceptance of responsibility."<sup>73</sup> In the case of the Palestinian refugees, Nabulsi and Pappé call on all those involved in resolving the conflict to have "the public courage to confront the Israeli denial of the expulsion and ethnic cleansing at the heart of the Palestinian refugee question," identifying this as "the single largest stumbling block towards a lasting peace between both peoples."<sup>74</sup> The matter of apology and acknowledgement of responsibility has been raised also in relation to Britain. Writing in the spring of 2001, the Joint Parliamentary Middle East Councils Commission of Enquiry - Palestinian Refugees included the following recommendation, in view of what they had themselves heard from Palestinian refugees in the camps of Jordan and Lebanon:

*The British Government might consider it particularly appropriate, at this time, to make some verbal gesture of acknowledgement of the historical responsibility that Britain bears for the creation of the refugee crisis that continues today. Although symbolic, this could help the Palestinian people towards a future, as well as showing the way that others might also acknowledge their roles in the creation of this catastrophe.*<sup>75</sup>

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<sup>68</sup> Jenkins describes the draft Basic Principles as "an attempt to codify the existing obligations of states in respect of remedies and reparation, as well as to indicate emerging norms and existing (non-binding) standards" (*id.*, at 439). In a process that has lasted since 1989, the first set of draft guidelines was drawn up by Theo van Boven in 1993 (UN.Doc E/CN.4/Sub.2/1993/8) and according to Mona Rishmawi "acquired a life of their own" (Mona Rishmawi, 'The History of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims and Violations of International Human Rights and Humanitarian Law,' presentation to the NGO Parallel Meeting of the 59th session of the UN Commission on Human Rights, 8 April 2003). After circulation among states, intergovernmental and non-governmental organizations, the Commission on Human Rights appointed Cherif Bassiouni to prepare a revised version, which was submitted in 2000 (UN Doc. E/CN.4/2000/62) and in its turn circulated for comment. A consultative meeting held in Geneva in the summer of 2002 by the Office of the High Commissioner for Human Rights and reported to the Commission on Human Rights in April 2003 (UN Doc. E/CN.4/2003/63).

<sup>69</sup> "Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations..." UN Doc.E/CN.4/2000/62 para. 4.

<sup>70</sup> In a background briefing on the Draft Basic Principles, a coalition of international human rights organizations locate the principle of reparation in "restorative justice theory, an ancient way of thinking about justice that goes beyond retribution." They continue:

Reparation goes to the very heart of human protection - it has been recognized as a vital process in the acknowledgement of the wrong to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law.

Redress, OMCT, Amnesty International et al, 'The Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,' at <http://www.alrc.net/doc/reparationvv.doc> (last visited 16 May 2003).

<sup>71</sup> UN Doc. E/CN.4/2000/62 para 21. Jenkins ('After the Dry White Season,' *supra* note 62, at 439, note 118) notes that "the Principles use the word 'shall' for existing international obligations and the word 'should' for emerging norms and existing standards" (emphasis in original).

<sup>72</sup> UN Doc E/CN.4/2000/62 para. 22.

<sup>73</sup> *Id.*, para. 25.

<sup>74</sup> Nabulsi and Pappé, *supra* note 55.

<sup>75</sup> *Joint Parliamentary Middle East Councils Commission of Enquiry - Palestinian Refugees, Right of Return.* London, 2001, at 27.

The issue of restitution, as defined in the Draft Principles above, immediately implicates the 'past-focussed issues' of refugees, the right to return and the restoration of property. In 1997, UN Special Rapporteur Awn al-Khasawneh explained the principle of *restitutio in integrum* as the remedy for population transfer:

*Restitutio in integrum [...] aims, as far as possible, at eliminating the consequences of the illegality associated with particular acts such as population transfer and the implantation of settlers. A crucial aspect of this involves the right to return to the homeland or the place of original occupation in order to restore the status quo and to reverse the consequences of illegality. This right is recognized, for example, in relation to Palestinians, in the Dayton Agreement, and Agreement on 'Deported Peoples' of the Commonwealth of Independent States; it establishes a duty of the part of the State of origin to facilitate the return of expelled populations.*<sup>76</sup>

He notes that this remedy "would also involve the payment of compensation to the victims and survivors of population transfers."<sup>77</sup> The following year, the Sub-Commission on Prevention of Discrimination and Protection of Minorities reaffirmed the "right of all refugees [...] and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin."<sup>78</sup> In the preamble to the resolution the Sub-Commission recognized:

*That the right of refugees and internally displaced persons to return freely to their homes and places of habitual residence in safety and security forms an indispensable element of national reconciliation and reconstruction and that the recognition of such rights should be included within peace agreements ending armed conflicts.*

The Dayton Agreement contains extensive provisions for the rights of refugees and displaced persons in its Annex 7, including the concept of safe return (the conditions to which they are returning) and property rights. Paul Prettitore's case study for the Badil seminar, on housing and property restitution in Bosnia and Herzegovina, goes into considerable detail on the implementation of the provisions on property restitution as well as providing an overview of property repossession under different international law regimes.<sup>79</sup> A number of points of comparative interest arise from his evaluation, including his assessment that the process engaged by the Property Law Implementation Plan aiming at full implementation of the property laws "became truly effective when it moved from a political process driven by political forces to a rule of law process based on individual rights."<sup>80</sup> He also points up the advantages of an administrative rather than a judicial process for claims, including speedier resolution.<sup>81</sup> As regards compensation, although refugees and displaced persons were recognized in the Dayton Peace Agreement as having the right to compensation in cases where their property could not be restored, the designated mechanism (the Refugees and Displaced Persons Fund) has not been established ("no resources were made available") and "in practice compensation did not materialize as envisioned."<sup>82</sup> Once again, the issue of resources imposes itself on the implementation of recognized rights.

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<sup>76</sup> UN Doc. E/CN.4/Sub.2/1997/23 para. 60.

<sup>77</sup> *Id.*, para. 61.

<sup>78</sup> Sub-Commission resolution 1998/26 'Housing and property restitution in the context of the return of refugees and internally displaced persons.'

<sup>79</sup> Paul Prettitore, 'The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study' April 2003 at the Badil seminar, at 21-34. See also UN Doc E/CN.4/Sub.2/2002/17, 'The return of refugees' or displaced persons' property,' working paper submitted to the Sub-Commission on the Promotion and Protection of Human Rights pursuant to Sub-Commission decision 2001/122, by Mr Paula Sérgio Pinheiro, paras. 22-41.

<sup>80</sup> Prettitore, *supra* note 79, at 15.

<sup>81</sup> *Id.*, at 10.

<sup>82</sup> *Id.*, at 16-17.

Compared to Dayton, the provisions regarding refugees in the Israeli-Palestinian agreements so far concluded are minimal; indeed it is part of the 'deal' so far that the refugee issue is postponed till the final status agreement. Bell points out that there are in fact references in the Declaration of Principles to agreements to be made on admitting "persons displaced from the West Bank and Gaza Strip in 1967" (not 1948 refugees) and the establishment of the multilateral Refugee Working Group.<sup>83</sup> However, where Bell's comparison informs in this regard is the similarity she finds in that in both the Dayton Agreement and the existing Israeli-Palestinian agreements, the "meta-bargain failed to resolve the central conflict" which has been relocated, in part, to issues of return and access to land. In Bosnia and Herzegovina, she underlines "the significance of return for the self-determination deal through the assumption that large-scale returns would change the power balances and territorial realities of the separate Entities and unitary state structure agreed to in the DPA" and attributes to this what she considers (on figures from 1999) as a failure of implementation of Dayton's terms.<sup>84</sup> Prettitore provides updated figures of nearly a million returnees to pre-war homes and an up-beat assessment of 'strong progress' on property repossession. However, it is clear that much of the progress has been achieved not through the will and choice of the Entities and their agents but through the continuing involvement and pressure of the international community, including direct intervention in matters of domestic legislation and implementation by of the Office of the High Representative, and thus that Bell's assessment of the failure of the meta-bargain between the parties likely remains valid. The extent to which the international community was involved and remains involved in Dayton, and the role of third parties in securing Oslo is a closely related point of comparison that Bell makes between the peace deals in Bosnia and Herzegovina and Israel-Palestine, to be returned to shortly in this paper. Summarising 'pragmatic peace' arguments in response to the "refugee-specific 'just peace' thesis" advanced by the UNHCR, she states:

*In short, return of refugees and land justice can begin to rewrite the territorial compromise at the heart of the deal, and this crucially affects bargaining over them. Even if return is provided for in a peace agreement, implementation will not necessarily follow. If return of refugees is a signifier of peace, then where the deal has failed to resolve the conflict (rather than just the violence), the conflict will continue to be waged not least through whether, how, and to where refugees and displaced persons are returned.<sup>85</sup>*

The legal basis of the established right to return of Palestinian refugees is not the subject of this paper.<sup>86</sup> However, it is worth noting that currently, the negotiating dynamics of the peace process, and the failure by the sponsoring third parties to affirm the right to return in their vision of a 'realistic peace,' certainly appear to contemplate Bell's scenario, where "the 'right of return' increasingly becomes subject to barter, effectively overwriting a plethora of General Assembly resolutions,"<sup>87</sup> as well as, it might be added, strong positions in international human rights law.<sup>88</sup>

In other conflicts, the Security Council as well as the General Assembly continues to reaffirm the right to return, and indeed the "right to return to one's home." In his 2002 report on "The return of refugees' or displaced persons' properties," Paula Sérgio Pinheiro cites the Security Council in recent years as having reaffirmed this principle "in resolutions addressing displacement in numerous countries and regions, including Abkhazia and the Republic of Georgia, Azerbaijan, Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia and Tajikistan."<sup>89</sup> The General

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<sup>83</sup> Bell, *supra* note 3, at 248-250.

<sup>84</sup> *Id.*, at 252.

<sup>85</sup> *Id.*, at 256.

<sup>86</sup> See Terry Rempel's paper to the Badil seminar, 'UN General Assembly Resolution 194 (III) and the Framework for Durable Solutions for 1948 Palestinian Refugees,' and other sources at note 11 above.

<sup>87</sup> Bell, *supra* note 3, at 258.

<sup>88</sup> See [www.hrw.org/campaigns/israel/return](http://www.hrw.org/campaigns/israel/return) (last visited 16 May 2003).

<sup>89</sup> UN Doc. E/CN.4/Sub.2/2002/17, *supra* note 79, para. 24 (references to resolutions not reproduced here).

Assembly he cites as having "reaffirmed or recognized the right to return to one's home in resolutions concerning Algeria, Cyprus, Palestine/Israel and Rwanda."<sup>90</sup> In a later paragraph he considers peace agreements:

*The right to housing and property restitution has also been recognized and utilized in several agreements designed to end conflict, including those dealing with the return of displaced persons in post-conflict situations in Bosnia and Herzegovina, Cambodia, Guatemala, Kosovo, Mozambique and Rwanda.*<sup>91</sup>

*As for the remedy of compensation:*

*the overwhelming consensus regarding the remedies of restitution and compensation is that compensation should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution.*<sup>92</sup>

Having found the rights established and recognized, Pinheiro's conclusion is that what needs careful study is the "disjunction between existing standards and the reality on the ground."<sup>93</sup> Khasawneh's earlier report similarly raised the contrast between the recognition of *restitutio in integrum* as the remedy for population transfer, and the fact that this remedy may not be achievable in practice, as an illustration of the dissonance (or antagonism, as he puts it) between principle and pragmatism in negotiating peace:

*What is important to emphasize here is that the suggestion that restitutio in integrum should not always be insisted on touches on the fundamental question of the innate antagonism between peace and justice. Obviously restitutio in integrum is the most just remedy because it seeks to wipe out the consequences of the original wrong. On the other hand, peace is ultimately an act of compromise. To put it differently, peace is by definition a non-principled solution reflecting the relative power of the conflicting parties, or simply the realization that no conflict, no matter how just it is perceived to be, can go on for ever. In reality, therefore, while the primacy of restitutio in integrum has to be continuously reaffirmed, most conflicts end with situations where some form of pecuniary compensation - sometimes in the form of development aid - is substituted for the right of return. Only time can tell whether such solutions will withstand the test of durability without which peace becomes a formal truce.*<sup>94</sup>

We come, again, to the immediate implication of the right to return and to restitution (extrapolated into the politics of demographics and of land) in the justice-peace dynamic. Khasawneh's final observation goes clearly to the argument that at least sufficient justice is necessary if a peace is to last; and, of course, to the meanings of 'peace.' Pragmatism, as well as principle, requires addressing any perceived 'reality deficit' of the law in order for a workable 'justice/peace' formula to be agreed and sustained.

For a final comparison, illustrating also the involvement of 'unofficial' or civil society actors and their relationship with the guarantees offered by international law, we can take the Cyprus conflict.

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<sup>90</sup> *Id.*, para. 25.

<sup>91</sup> *Id.*, para. 40.

<sup>92</sup> *Id.*, para. 57.

<sup>93</sup> *Id.*, para. 29. In 2003 the Commission on Human Rights endorsed the decision of the Sub-Commission of the Promotion and Protection of Human Rights (Res. 2002/7 of 14 August 2002) to appoint Pinheiro as Special Rapporteur with the task of preparing a comprehensive study on the subject. Decision 2003/109, UN Doc.E/CN.4/2003/2.11/Add.6, 25 April 2003. In the current report (paras. 42-55), he examines a range of impediments and challenges to implementing the right, including issues of secondary occupation (including by other displaced persons), laws on abandoned property, and the destruction of property registration and records.

<sup>94</sup> *Supra* note 76, para. 63.

In recent developments, although no agreement has been reached at the time of writing, the parameters of the particular matters to which failure to reach agreement were attributed - publicly at least - would fit well with Bell's arguments on the meta-bargain. The UN-sponsored Set of Ideas on an Overall Framework Agreement on Cyprus (1992) promotes reunification of the island along the broad lines of two federated states, "bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects," with detailed ideas for the federal constitution and references to agreements and arrangements yet to be made between the parties in respect of issues such as territorial adjustments and displaced persons.<sup>95</sup> Under the original text it appears that the "option to return" may be "selected" only by "current permanent residents of Cyprus who at the time of displacement owned their permanent residence in the federated state administered by the other community and who wish to resume their permanent residence at that location." Those who were renting would be "given priority under the freedom of settlement arrangements." Other claims (including of heirs) would appear to fall to claims for compensation, which would be funded from the sale of properties transferred "on a global communal basis" between agencies acting for the two communities; other governments and organizations would be invited to contribute to this fund.<sup>96</sup>

The initiatives of civil society actors brought the property-related grievances of Greek Cypriots to the European Court of Human Rights. In 1989, Mrs Titina Loizidou joined a march organized by the 'Women Walk Home Movement,' seeking to assert the right of Greek Cypriot refugees to return to homes they had left in 1974 when Turkish troops occupied the north of the island. Prevented from crossing by Turkish troops and then arrested by Turkish Cypriot police, she took her claim to the Court, which issued two rulings on the case.<sup>97</sup> In the first (1996) the ECHR found for the claimant, declining to recognize an "irreversible expropriation" of property in the north and holding that the denial of Mrs Loizidou's access to her property "and consequent loss of control thereof" was "imputable to Turkey." Arguing against the claim, the Turkish government argued, inter alia, that ruling on such matters "would undermine the intercommunal talks, which were the only appropriate way of resolving this problem." The ECHR found that this could not provide a justification under the European Convention. In the second decision, in 1998, the ECHR awarded Mrs Loizidou compensation for pecuniary and non-pecuniary damage<sup>98</sup> against the Turkish Government. The latter again made the case that "the question of property rights and reciprocal compensation is the very crux of the conflict in Cyprus" and "can only be settled through negotiations and on the already agreed principles of bi-zonality and bi-communality."<sup>99</sup>

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<sup>95</sup> The Security Council has endorsed this idea of "a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities [...] in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession." See, for example, SCRs 649 (1990), 716 (1991), 750 (1992), 774 (1992).

<sup>96</sup> Set of Ideas on an Overall Framework Agreement on Cyprus (1992) paras. 77-80; available at [www.pio.gov.cy/docs/un/ideas](http://www.pio.gov.cy/docs/un/ideas) (last visited 11 May 2003).

<sup>97</sup> Case of *Loizidou v. Turkey*, decisions of 18 December 1996 and 28 July 1998.

<sup>98</sup> For loss of use of the land, nor for 'expropriation' as she had been found to still be the legal owner; she had withdrawn a claim for the restoration of her rights.

<sup>99</sup> Although the ECHR ruled nevertheless on Mrs Loizidou's rights, a number of its judges gave dissenting opinions on various grounds including that "it is impossible to separate the situation of the individual victim from the complex historical developments and a no less complex current situation" (dissenting opinion of Judge Bernhardt, 1996) and "Given that efforts are under way to arrive at a peaceful settlement of the Cyprus problem within UN, CE and other international bodies, a judgment of the European Court may appear as prejudicial" (dissenting opinion of Judge Jambrek 1996).



With Turkey refusing to implement the *Loizidou* decision, the Attorney General of the Republic of Cyprus invited a group of international legal experts to provide an opinion on Turkey's position, including that:

*Turkey has claimed that the decision could only be implemented within the framework of a Turkish Cypriot proposal for a "Joint Property Claims Commission" which envisages compulsory acquisition of Greek Cypriot and Turkish Cypriot properties against compensation to be provided, eventually, from various sources including contributions from third States and international organizations.*<sup>100</sup>

The experts consider factual situations of "forcible mass transfer or enforced displacement" under different provisions of international law<sup>101</sup> and advise the Republic of Cyprus that it "could not, consistently with its international obligations, accept or implement the proposal for a "Joint Property Claims Commission."<sup>102</sup> The legal and political battles over the land issue, mostly projected by the different sides of the argument as involving either individual or collective rights, were raised again at the beginning of this year when the UN Secretary General involved himself in particularly intensive efforts to encourage the parties to reach agreement on a settlement before Cyprus became a member of the EU in April.<sup>103</sup> The effort failed at the last minute; the Guardian reported that "the talks stumbled over Turkish insistence that their breakaway Cypriot state win full recognition, and demands by the Greeks for the right of refugees to return to homes in northern Cyprus that they left 29 years ago."<sup>104</sup>

The intense and direct involvement of the UN Secretary-General in these efforts, and the UN role in the Set of Ideas, may suggest that Cyprus has features of the 'models' of Bosnia and Herzegovina and Israel-Palestine, in Bell's scheme, although the mass support reported as being shown for the reunification plan by Turkish Cypriots introduces a different dynamic.<sup>105</sup> In her comparison of the peace agreements in South Africa, Northern Ireland, Bosnia and Herzegovina, and Israel/Palestine, Bell observes that a superficial glance at the human rights provisions "would suggest (rather superficially) that the more internal a deal, the greater its human rights sophistication; and the more international, the less human-rights-friendly it is."<sup>106</sup> She puts this "apparent inverse relationship between international involvement and effective human rights provision" down to the

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<sup>100</sup> 'Opinion: Legal Issues Arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974,' Georges Abi-Saab and nine others, 30 June 1999. Available at [www.pio.gov.cy/docs/other/opinion](http://www.pio.gov.cy/docs/other/opinion) (last visited 11 May 2003).

<sup>101</sup> *Id.*: "Mass transfers can occur in a variety of ways, including the following:

- a) forcible transfer or enforced flight, where the government of the sending State or of some territorial unit within it expels the populations concerned, or deliberately causes them to leave by targeting particular groups or communities;
- b) large scale movements as a side-effect of armed conflict;
- c) enforced displacement resulting from a refusal to permit the return of persons in categories a) and b).

It should be stressed that the creation of barriers to return has the clear effect of endorsing, and perpetuating, the initial policy of forcible mass transfer."

<sup>102</sup> *Id.*, at 14.

<sup>103</sup> Failing agreement and the entry of Cyprus as a federated state, EU laws will apply only to the territory of the Republic of Cyprus, to be extended to the Turkish-controlled north of the island after reunification. *The Guardian*, 11 March 2003.

<sup>104</sup> *Id.* Shortly after Cyprus' entry into the EU however, in what was seen as something of a surprise move, Turkish Cypriot leader Rauf Denktaş announced the easing of travel restrictions and hundreds of Cypriots flowed north and south over the UN-patrolled 'Green Line.' Angelique Chrisafis reports Greek Cypriots "clutching branches of trees on their return from visiting houses they had not seen for thirty years..." *The Guardian*, 3 May 2003. Chrisafis reported the "wave of fraternization" as not free of misunderstandings: "One Turkish Cypriot woman reportedly died of a heart attack when Greek Cypriots visited her house saying it was theirs. They were only there to gather plant cuttings, but she feared she would be made homeless. Two Greek Cypriots are due in court after assaulting a Turkish Cypriot family for knocking on their door for the same reason."

<sup>105</sup> *The Economist*, 8 March 2003 reported that some 70,000 people ("nearly half the North's population") demonstrated in favour of EU entry.

<sup>106</sup> Bell, *supra* note 3, at 231.

pressures and motivations that are driving the need for a deal, and thus the extent to which shared interests perceived by the parties to the deal can be assisted through the language and content of human rights. She also notes, however, that there is an explanation in:

*the more mundane but related question of who was at the negotiations. Internally mediated processes tend to have mechanisms for including civil society, while internationally mediated processes working out of traditional international relations and violence-focused paradigms do not. Internally driven processes by their nature must preserve the link between politicians and their constituents. Internationally facilitated processes often focus on bringing together those who have directly waged the war, often in secret and isolated locations, while the skills of those who have waged peace [...] are left at home.<sup>107</sup>*

This observation underlines the importance of inclusion. At the current time, recognition of the right to return (as a *right*) for Palestinian refugees appears to be posited, in the 'realistic' (or 'realist?') language of the road map, as impractical, to return to the assumptions of the al-Badil seminar. In the positions articulated by Ariel Sharon cited at the beginning of this paper, and apparently across a broader constituency in Israel, it is treated as a political non-starter. Unsurprisingly, the perspectives of the Palestinian refugees appear not to coincide with this approach; and the law is on their side. The US international lawyer Professor Richard Falk addresses this in his Preface to the *Right of Return* Report published by the Joint Parliamentary Middle East Councils Commission of Enquiry - Palestinian Refugees, a British report based on and largely constituted of the testimonies of Palestinian refugees in camps in different countries of the Middle East. His contextual remarks are worth citing in full:

*As the testimonies in this moving report make vividly clear, the refugee consciousness is unified behind the idea that "a right of return," as guaranteed by the United Nations and by international law, is indispensable to any prospect of reconciliation between the two peoples who have been for so long at war with one another. Once this right is acknowledged by Israel in a manner that includes an apology for a cruel dynamic of dispossession in 1948, Palestinian refugees seem consistently prepared to adapt to the intervening realities, including the existence of Israel as a sovereign, legitimate state. But to pretend that peace and reconciliation can proceed behind the backs of the refugees is to perpetuate a cruel hoax, inevitably leading to a vicious cycle of false expectations and shattered hopes. The collapse of the Oslo process is an occasion for grave concern about the future, but also a moment that encourages reflection about what went wrong and why.*

*The clarity of international law and morality, as pertaining to Palestinian refugees, is beyond any serious question. It needs to be appreciated that the obstacles to implementation are exclusively political - the resistance of Israel, and the unwillingness of the international community, especially the Western liberal democracies, to exert significant pressure in support of these Palestinian refugee rights. It is important to grasp the depth of Israeli resistance, which is formulated in apocalyptic language by those in the mainstream, and even by those who situate themselves within the dwindling Israeli peace camp. On a recent visit to Jerusalem, I heard Israelis say over and over again that it would be 'suicide' for Israel to admit a Palestinian right of return, that no country could be expected to do that. A perceptive Israeli intellectual told me that the reason Israel was uncomfortable with any mention of human rights was that it inevitably led to the refugee issue, with a legal and moral logic that generated an unacceptable political outcome. How to overcome this abyss is a challenge that should haunt the political imagination of all those genuinely committed to finding a just and sustainable reconciliation between Israel and Palestine.<sup>108</sup>*

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<sup>107</sup> Loc cit. For a feminist critique of various areas of the theory and practice of international law relevant to the Israel-Palestine peace process, see Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*. Manchester: Manchester University Press, 2000, especially Chapters 5 (The idea of the state), 8 (The use of force in international law) and 9 (Peaceful settlement of disputes).

<sup>108</sup> Richard Falk, 'Preface' in Joint Parliamentary Middle East Councils, *supra* note 75, 6-8, at 6.

Although the future of the road map is unclear, it remains the case that at least for the moment there is a 'rush of events to redefine relations' also in the Middle East. Looking back on another rush of events after the end of the 1991 Gulf war, producing first Madrid and then Oslo, Palestinian lawyer, human rights activist and writer Raja Shehadeh speaks of the development of a Palestinian 'legal narrative' through the efforts of civil society actors, where legal narrative is "the way a people tell the story of their right to a land using the symbolic language of law."<sup>109</sup> It has to have consistency and its own internal logic, and "the preservation and development of such a narrative," he tells us, "is no minor matter." Despite the clear challenges and dangers of the present time, activities and initiatives in seminars such as these are part of and contribute to that process, preserving and developing the Palestinian legal narrative with a specific focus on the refugees. And again despite the clear challenges and dangers, at the present time there is arguably more space for and more resonance, internationally (or rather, perhaps, in the civil societies of powerful third party states), with the story told by a legal narrative, now that wider constituencies have been taking moral and political positions on the basis of closely argued statements of international law. Everybody who was in a European or North American state in the lead up to and during the war on Iraq will have their own examples of what appears to be unprecedented public attention to arguments on international law over recent months. In Britain, by way of example, the government was obliged under parliamentary and public pressure to disclose the legal advice of its Attorney General, in a "startling breach of convention" aimed at ending speculation that he was being ignored,<sup>110</sup> and arguably in at least partial response to a letter from international law academics, and subsequent media coverage and debates.<sup>111</sup> The conclusions of the longest serving MP, Tam Dalyell, on British backing for the war on Iraq without proper UN authorisation were published in an article entitled 'Blair, the war criminal';<sup>112</sup> and more quietly, the deputy legal adviser at the Foreign Office resigned.<sup>113</sup> While this attention to the law did not produce an immediate change in policy, exponents of '*realpolitik*' would acknowledge its potential impact in the medium term. And beyond the decision-makers, international law has an immediacy and an audience that makes space for the legal narrative. The legal narrative speaks to justice, and its (re)establishment as a discourse of immediacy and relevance, invested with practical meaning, is one approach to the "almost complete divorce between the concept of peace and the concept of justice" that Bell observes in the text and implementation of the Israeli-Palestinian peace agreements so far concluded.<sup>114</sup>

As for participation and inclusion, Nabulsi and Pappé observe that "it is a profound failing of political imagination to believe that democracy is a dangerous tool when confronting the issue of five million Palestinian refugees."<sup>115</sup> If the rights of Palestinian refugees continue to provoke constructed juxtapositions such as law/politics, peace/justice, 'idealism/realism,' among the options for developing a 'third way,' if one is to be sought, is surely the principled and pragmatic option of effective involvement of the refugees in the debate and in the design of the peace.

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<sup>109</sup> Raja Shehadeh, *supra* note 3, at 160. See his consideration of the Palestinian and Israeli "legal narratives" in "The Weight of Legal History: Constraints and Hopes in the Search for a Sovereign Legal Language," in Eugene Cotran and Chibli Mallat (eds.), *The Arab-Israeli Accords: Legal Perspectives*. The Hague: Kluwer Law International, 1996, at 3-44.

<sup>110</sup> Michael White, 'Publish advice on legality of war, opposition urges No. 10,' *The Guardian*, 13 March 2003; and Gaby Hinsliff, 'Attorney General backs Blair,' *The Guardian*, 16 March 2003.

<sup>111</sup> Letter from Profs. Bernitz, Lowe, Chinkin, Sands et al, *The Guardian*, 7 March 2003; and front page article the same day, 'Academic lawyers round on PM.' There were of course other opinions among academic lawyers; in a later letter to the *Guardian* newspaper, a Labour MP referred to "what is now described in legal terms as the Greenwood defence," in reference to Professor Christopher Greenwood's legal arguments in favour of the government position, and, according to the newspaper, assistance to the Attorney General in the drafting of his opinion. Letter from Brian Sedgemoor MP published in *The Guardian*, 14 April 2003, and Richard Norton-Taylor, 'Law unto themselves' in the same edition; and 'Making the Case: Opinions show a clear divide' *The Guardian*, 18 March 2003.

<sup>112</sup> Tam Dalyell, 'Blair, the war criminal,' *The Guardian*, 27 March 2003.

<sup>113</sup> Ewen MacAskill, 'Adviser quits Foreign Office over legality of war,' *The Guardian*, 22 March 2003.

<sup>114</sup> Bell, *supra* note 3, at 203; see above note 28 and accompanying text.

<sup>115</sup> Nabulsi and Pappé, *supra* note 55.