

# Disentangling Displacements: Historical Justice for Mizrahim and Palestinians in Israel

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*Israel's discursive strategy for legitimizing the displacement of Palestinians in 1948 involved describing it as part of a regional "population exchange." This argument contributed to three critical characteristics of Israeli citizenship. First, it solidified an understanding of citizenship as a negation of persecution and a haven for would-be Jewish refugees. Second, it tied Mizrahi claims against states across the Middle East to Palestinian claims against Israel. Israel thus exploited Mizrahi refugee rights for its geostrategic interests—a fight against the claims of Palestinian refugees. This had detrimental material consequences for both groups. Third, this strategy contributed to the construction of Palestinians as an "exchangeable remainder" and a demographic threat that could potentially pose a risk to the Jewish majority. Ultimately, Israel irrevocably entangled the displacement histories of three groups: Ashkenazi Jews, Mizrahi Jews, and Arab Palestinians. This Gordian knot remains with us today, and is reflected in a stratified Israeli society. But the vision that this symposium suggests we consider, that of "historical justice," demands that it be undone. This Article therefore offers a way in which the refugee histories could perhaps one day be disentangled: a program of reparations for the Mizrahi and Palestinian citizens of Israel.*

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## INTRODUCTION

On 11 December, 1948, the U.N. General Assembly passed Resolution 194 (III), stating that Israel should allow Palestinian refugees who had fled during its war of independence back to their homes.<sup>1</sup> This, however, was not something that the new country's leadership intended to do. When they did not appeal to religious justifications, Israeli politicians stressed that the country had been founded as a haven for persecuted Jews.<sup>2</sup> Some politicians and lawyers, however, apparently were concerned that such an argument would not provide sufficient rebuttal for Palestinian refugees' claims. How, then, could the demand of return be countered? It is precisely for this purpose that Israeli officials embarked on a long-term project to frame what happened in 1948 as a case of population exchange.<sup>3</sup> As they sought to demonstrate, the story was not only about a wave of Jewish refugees from Europe—*Ashkenazim*—displacing another wave of Palestinian refugees.<sup>4</sup> It was also about a tectonic regional shift, in which populations from both sides of the border were moved to reunite with their fellow nationals. Israel's establishment was supposedly part of a process in which state borders and national identities would be aligned. In the context of the international law and policies of the time, such an alignment

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a set of critical remarks, and the participants, whose comments and interventions I learned from. I also presented a draft at the Minerva Center for the Rule of Law in Extreme Conditions (The University of Haifa, April 2020), and benefited from illuminating comments by Bana Shoughry and the team of researchers there. I would like to thank Alexandre (Sandy) Kedar, Kenneth Mann, Tom Mehager, Ilan Saban, Lihi Yona, and Raef Zreik for helpful informal and friendly conversations; Muhammad Abbabsi, Wessam Sharaf, and Netta Tauber for their fantastic research assistance; and the Theoretical Inquiries in Law anonymous reviewer and team of student editors, led by Alon Jasper, for their diligent and insightful assistance. Any mistakes are mine alone. Cite as: Itamar Mann, *Disentangling Displacements: Historical Justice for Mizrahim and Palestinians in Israel*, 21 THEORETICAL INQUIRIES L. 427 (2020).

- 1 G.A. Res. 194 (III), at art. 11 (Dec. 11, 1948).
- 2 This remains the major normative argument advanced by liberal Zionists. *See, e.g.*, CHAIM GANS, A JUST ZIONISM 5 (2011), (emphasizing the annihilation of European Jews).
- 3 *See, e.g.*, Catriona Drew, *Remembering 1948: Who's Afraid of International Law in the Israeli-Palestinian Conflict?*, in WHO'S AFRAID OF INTERNATIONAL LAW? (Raimond Gaita & Gerry Simpson eds., 2017); UMUT ÖZSU, FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS 12, 25 (2015).
- 4 *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 290 (1976).

was often thought of as desirable. It was part of a specifically ethno-national understanding of self-determination, characteristic of the period.<sup>5</sup>

But who were to be the “exchanged” populations in this argument? The Israeli government appealed to the histories of Middle Eastern Jews to provide evidence of this *reciprocal* displacement.<sup>6</sup> During Israel’s first decades, *Mizrahim* immigrated to the country from many parts of the Middle East and North Africa. Some had suffered discrimination, expropriation, or persecution in their former homes.<sup>7</sup> Tying their plight to the plight of Palestinians would render the population exchange argument tenable. According to this interpretation of the events, 1948 was not about Jews displacing Palestinians. It was about an intertwining of displacements; part of a longer process, the result of which would be that Jews would live in a Jewish state, and “Arabs” would live in Arab states.<sup>8</sup> Alongside Israel’s role as a haven for Jews, a certain understanding of the principle of self-determination thus granted displacement a veneer of legitimacy.<sup>9</sup>

Three entailments of this argument became crucial in Israeli history ever since. First, it solidified the emergence of an understanding of citizenship as a negation of persecution and a haven for would-be Jewish refugees.<sup>10</sup> Second, it led to the exploitation of Mizrahi refugee histories in a fight against the claims of Palestinian refugees, to the detriment of both groups.<sup>11</sup> Third, it contributed to the construction of Palestinians as a “demographic threat” that could upend the numerical majority Jews had secured due to the displacement of Palestinians.<sup>12</sup> Together, these generated divisions of class and constructed

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5 See ÖZSU, *surpa* note 3, at 52.

6 Michael R. Fischbach, *Palestinian Refugee Compensation and Israeli Counterclaims for Jewish Property in Arab Countries* 38(1) J. PAL. STUD. 6 (2008).

7 See, e.g., LYN JULIUS, *UPROOTED: HOW 3000 YEARS OF JEWISH CIVILIZATION IN THE ARAB WORLD VANISHED OVERNIGHT* (2018); SHMUEL TRIGANO, *LA FIN DU JUDAÏSME EN TERRES D’ISLAM (THE END OF JUDAISM IN ISLAMIC COUNTRIES)* (2009).

8 I’m putting “Arabs” in parentheses because some Jews define themselves as Arab. See YEHUDA SHENHAV, *THE ARAB JEWS: A POSTCOLONIAL READING OF NATIONALISM, RELIGION, AND ETHNICITY* (2006).

9 See Drew, *surpa* note 3, at 114-16, 126-27.

10 Cf. Itamar Mann, *Medinat Haplitim (State of Refugees) in* LEVINSKI PINAT ASMARA 456 (Tally Kritzman-Amir, ed., 2015).

11 Cf. Eetta Prince-Gibson, ‘Weaponizing the Mizrahim’: *Why Reparation Claims by Jews who Fled Arab Counties Could Derail U.S. Peace Plan*, HAARETZ (Apr. 4, 2019), <https://www.haaretz.com/israel-news/.premium-weaponizing-the-mizrahim-these-jews-claims-could-derail-the-u-s-peace-plan-1.7139413>.

12 Yossi Yonah has argued that the discourse of the “demographic threat” has racist underpinnings not only in how it regards Palestinians, but also toward Mizrahi

divisions of ethnicity; in short, they shaped fundamental stratifications in Israeli citizenship. Ultimately, the explanatory strategy irrevocably entangled the displacement histories of three groups: Ashkenazi Jews, Mizrahi Jews, and Arab Palestinians—a Gordian knot that remains with us to this day, aching to be unfastened.

This Article seeks to trace the entanglement of these histories of displacement, to describe the high costs it incurred for Mizrahim and Palestinians, and to offer a preliminary reflection on their disentanglement: by that, I mean to advance the outlines of a political program that would seek to offer Israeli citizens accountability based on each of the refugee histories separately. One way of doing so is through a mechanism of reparations, premised on compensation for citizens according to historical losses.<sup>13</sup>

I start in Part I with a historical account of the work of one Ashkenazi lawyer, Leo Kohn. In the service of the Israeli government, Kohn articulated the ways in which the Zionist movement sought to link Mizrahi and Palestinian displacement. Kohn's efforts, initially intended for an international audience, are one indicative example of how Israel tied different refugee histories together in a narrative of population exchange. As will become apparent, Kohn spent energy recording expenses for the integration of new immigrants in Israel, which would one day help to offset debts towards Palestinians.<sup>14</sup> While this argument was more or less ignored in the international sphere, it contributed to social stratification within Israeli citizenship. Part II explains how Israel exploited the plight of Mizrahim against Palestinians, and how the exchange narrative influenced Mizrahim, as a group, in Israel. Part III describes how Palestinian citizens of Israel have respectively been constructed as inferior. Part IV advances the argument that this entanglement of refugee histories should be undone by introducing sweeping policy changes. One way to do so is through mechanisms of reparation. We are used to thinking of reparations for historical wrongs as premised upon corrective justice; I explain that they may also be important in establishing equal citizenship and achieving distributive justice. The Conclusion briefly addresses a number of potential objections.

For some readers, the recommendations I conclude with will sound misguided or unrealistic. I can only admit that for the purposes of a symposium on "historical justice," I embrace a perspective far beyond what current political

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Jews. See Yossi Yonah, *Israel's Immigration Policies: The Twofold Face of the 'Demographic Threat,'* 10 J. STUD. RACE, NATION, CULTURE 195 (2004).

13 Cf. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>. See also *supra* note 11.

14 See *infra* note 31.

realities would likely allow. As I finalize these words, the Israeli government is considering a unilateral annexation of the territories Israel occupied in 1967. Such a step may further exacerbate hierarchical relationships between different groups of citizens and noncitizens under Israeli control. Within this context, the Article is offered as a proposal for a radically different direction.

### I. “EAST MEETS WEST”: ENTANGLING REFUGEE HISTORIES

Leo Kohn was born in Frankfurt in 1894 and studied law and political science at the universities of Strasburg, Berlin, Marburg, and Heidelberg.<sup>15</sup> He obtained his doctoral degree in the latter, where his interests in self-determination led him to write a dissertation on the “Constitution of the Irish Free State” (1928). A scholar and a refugee who could not return to his home country when the Nazis took power, he came to be an avid Zionist.

In Palestine too, Kohn became deeply involved in Jewish and Zionist issues. On the eve of Israel’s independence, he worked as part of the nascent Ministry of Foreign Affairs.<sup>16</sup> As the United Nations General Assembly adopted the Partition Plan of 29 November, 1947,<sup>17</sup> Kohn observed the developing tension between Jews and non-Jewish Palestinians, including reciprocal acts of violence.<sup>18</sup> In an article he penned in January 1948, *The 29th of November and After*, he drew upon his expertise in Irish constitutional history to illuminate the way towards Jewish independence. Quoting James Fintan Lalor, “the spiritual leader of the Young Irelanders,” he emphasized that sovereignty was not only a formal status, but also an economic reality, particularly reflected in real estate holdings: “those who own your lands will make your laws and command your liberties and your lives.”<sup>19</sup> This emphasis on land holdings would later reappear in his work on Mizrahi and Palestinian refugees.

Kohn also observed the Arab responses against Jewish communities living elsewhere in the Middle East. Not long before the Genocide Convention was signed in 1948,<sup>20</sup> Kohn received a letter from Raphael Lemkin, its chief

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15 Israel State Archive (hereinafter ISA), ISA-Privatecollections-LeoYehudaCohen-0010hjn (hereinafter Leo Kohn Collection) (short biographical note, undated).

16 ISA, ISA-mfa-UNInterOrg3-000qjwz (letter exchanges from January 1948 to December 1949, covering a range of foundational question about the ministry’s work).

17 G.A. Res. 181 (II), (Nov. 29, 1947).

18 Leo Kohn Collection *Supra*, note 15, at 38 (undated and untitled letter).

19 *Id.* at 59 (draft article titled “The 29<sup>th</sup> November and After” (sic)).

20 Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 34 U.N.T.S., 277, <https://www.ohchr.org/EN/ProfessionalInterest/>

architect. Lemkin explained that attacks against the cultural property of Syrian Jews, following the partition plan, amounted to a cultural genocide.<sup>21</sup>

A faculty member at the Hebrew University, where he studied and taught international law, Kohn held a Chair in the international relations department starting in 1953. He also served as a consultant to the Israeli Ministry of Foreign Affairs.<sup>22</sup> In 1960, he received an appointment as head of Israel's National Committee for the UN World Refugee Year. His work in this context is a powerful illustration of how the Zionist movement tied together the refugee histories of Ashkenazim, Mizrahim, and Palestinians.

The Committee put together a small pamphlet titled *The Refugee Problem in Israel* (1960),<sup>23</sup> explaining to foreign governments the role Israel played in refugee resettlement and integration. It was only a drop in a sea of official materials whereby the new state sought to explain itself abroad.<sup>24</sup> Yet it successfully captures the outlines of a peculiar kind of political membership. The pamphlet reflects a political imagination in which seeking asylum is an act of liberation, nation-building, and collective self-determination.<sup>25</sup>

“Do you intend to go about all your lives with the word ‘refugee’ inscribed on your foreheads? The word ‘refugee’ connotes dependence and helplessness.

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Pages/CrimeOfGenocide.aspx.

- 21 ISA, ISA-Privatecollections-LeoYehudaCohen-00101al, at 88 (undated letter from Raphael Lemkin, probably shortly after November 29, 1947).
- 22 See *supra*, note 16. A search for Leo Kohn in the Israeli National Archive reveals multiple files from Kohn's service at the Ministry of Foreign Affairs.
- 23 See United Nations World Refugee Secretariat, *The Refugee Problem in Israel*, WRY/INF/44 (Apr. 1960), at 8 (on file with the ISA, file no. נא-5953/2, alongside letters and annotations written by Kohn in preparation).
- 24 In 1953, for example, the Israeli government published a booklet in which it explained, in English, its position with regard to the Palestinian refugees. See THE GOVERNMENT OF ISRAEL, THE ARAB REFUGEES (1953); Israel's role as a haven for refugees is apparent in THE DECLARATION OF ESTABLISHMENT OF THE STATE OF ISRAEL (1948), <https://www.refworld.org/cgi-bin/txis/vtx/rwmain?page=search&docid=3ae6b51910&skip=0&query=holocaust&coi=ISR&searchin=fulltext&sort=date> (emphasizing that “Survivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to Eretz-Israel, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland”).
- 25 Cf. ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW (2016) (particularly chapter 1, providing a reading of the history of the 1947 Exodus ship that brought Jewish displaced people from Europe to Palestine).

The sooner you get rid of it the better!”<sup>26</sup> The pamphlet’s opening words were not those of an Israeli or Zionist leader. They were, rather, the words of Indian founding Prime Minister Jawaharlal Nehru. Both countries gained independence in the same year, 1948. Just as refugees in India, following the partition with Pakistan, were encouraged to stand on their feet, so Israeli citizenship became a solution for refugees. The state is thus imagined at one and the same time as both an extension of refugees’ struggle, and an end to it: “The success of refugee settlement in Israel — involving the absorption in little more than eleven years of approximately one million people by a population of some 650,000 — is due in pre-eminent measure to the fact that the newcomers were never treated as ‘refugees’.”

Quoting another source, the text Kohn put together for the pamphlet adds:<sup>27</sup>

Refugee settlement in Israel has not been the work of a select group of philanthropists and social workers. It has been a national effort . . . Its crowning success has been that it has eradicated from these people the sense of inferiority, the feeling of being outcasts, which gnaws at the soul of every refugee.

The pamphlet seems to suggest that there’s no gap between the political interests of refugees, and those of citizens at large. Israeli citizenship is imagined as the citizenship of refugees, in the sense that there is an underlying equality and a shared identity among the different groups of Jewish refugees. Israel is a kind of refugee state, premised upon their integration: “They were accepted from the moment of their arrival as free and equal members of society. They have responded accordingly. We recently had general elections. There were many parties, but there was no Refugee Party.”

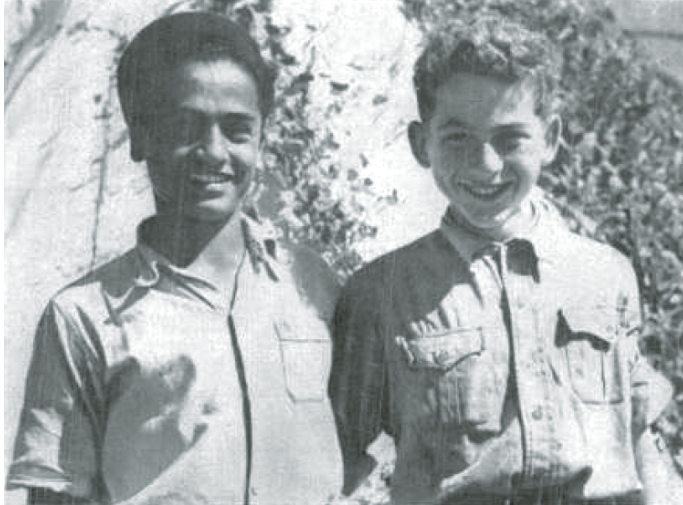
Kohn’s pamphlet describes the destitution of Jewish refugees, both from Europe and from the Middle East. Collective self-determination allows people to rise from different kinds of ashes, seemingly to obtain full and equal membership. Within the bounds of Israeli citizenship, Jews from different cultural and ethnic backgrounds come to unite in a new land. The picture below is one of several illustrations in the pamphlet. It represents this transformation of refugees into members of a cosmopolitan nation of Jews. The subtitle—“East meets West”—conveys that this is not merely an encounter between two boys. With the boys standing shoulder to shoulder, it is a moment of political foundation. The trauma of displacement is overcome when superficial cultural and historical differences are eliminated, giving way to life in one political

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26 *Supra* note 23, at 2.

27 *Supra* note 23, at 7 (quoting the Chairman of the Israel national committee, speaking at a Geneva conference in January 1960).

community. Kohn's *The Refugee Problem in Israel* reflects the birth of a political imagination in which Israeli citizenship is constituted by the figure of a refugee, who is then transformed and rendered upright.



There is, however, a kind of irony in that a state, which trumpets itself as a haven for refugees, should at the same time deny the return of refugees from its war of independence. Indeed, the pamphlet reveals the ways in which such a constitutional ethos can serve to oppress and exclude parts of society. On 27 November, 1960, Israel's second President, Yitzhak Ben Zvi, explained how that duality of displacing refugees while welcoming others could work. In an interview he gave to the *Washington Post*, he said: "the majority of people outside Israel do not know, or do not want to know, that what happened here is not only the re-birth of a Nation but an exchange of population of Jews and Arabs on vast scale."<sup>28</sup> Ben Zvi, a historian by training, continued:

If the actual facts would be admitted [...], the question of the Arab refugees would be settled neither by sending Arab refugees to Israel nor Iraqi Jews back to Iraq. The only way to settle the question is this: the Arabs must accept the fact that Arab refugees must be resettled in

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28 ISA, file no. נצ-5953/2 (hereinafter State Advisor Leo Kohn Documents) (digital copy on file with the author), at 141 (memorandum from 8 December, 1960, reprinting the President's words). The importance of this interview, from an Israeli perspective, is also reflected in YOHANAN COHEN, *HAMAFTTEAH BE'IDEY HA'ARAVIM: LE'PITRON BE'AYAT HAPLITIM HA'ARAVIM* (THE ARABS HOLD THE KEY: HOW TO SOLVE THE REFUGEE PROBLEM) 56-57 (1962).



their countries in the same way as Jewish refugees from Arab countries were resettled in Israel, *Mutatis Mutandis*.<sup>29</sup>

This was by no means the first time in which the fate of Mizrahi Jews was linked to that of Palestinian refugees.<sup>30</sup> Indeed, the reference to Nehru is an oblique allusion to the “exchange of populations” between India and Pakistan in 1947. At least for Kohn, Ben Zvi’s appeal to this idea of exchange was an inspiring professional challenge. Kohn became particularly interested in tallying the price of Jewish emigration from the Middle East. This included not only real property and movables that Arab governments had confiscated from Middle Eastern Jews abroad, starting in the late 1940s. He also became preoccupied with the expenses that the Israeli government accrued in resettling Middle Eastern Jews in Israel. How many dollars did the Israeli government spend on the integration of Mizrahi newcomers into Israeli society? On their education, housing, and professional training?<sup>31</sup> This accounting work, he was convinced, would help offset any liabilities that might be imputed to Israel one day due to the expulsion of Palestinians and expropriation of their property during its war of independence (which Palestinians often call the *Nakba*).

When President Ben Zvi received the pamphlet, he wrote back to Kohn:<sup>32</sup>

the pamphlet will bring to the English reader the political truth about the process of population exchange, as well as our efforts to integrate our brothers, who have left or who have fled from Arab countries, and to rehabilitate them in Israel. The pamphlet highlights our efforts as opposed to the negligence of Arab countries with their own refugees, despite the copious international aid they receive.

On 26 February, 1961, a senior official at the Israeli Ministry of Foreign Affairs sent out a memorandum addressed to all the directors of Israeli representative

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29 *Id.*

30 *See infra* note 37.

31 *See* I State Advisor Leo Kohn Documents, *supra* note 28, at 74 (letter dated 5 February, 1961) (following Leo Kohn’s solicitation, the author of the letter comments that it cost \$10,000 to integrate every new Jewish emigrant from an Arab country to Israel in agriculture; he further explains that the cost of urban integration was \$5,000. Kohn tallied these prices to offset the debt accrued to Palestinians). *See also Id.*, at 77 (letter dated February 1, 1961) (citing a cost of \$15,000 per family for integration of Mizrahi Jews in agriculture, and \$10,000 per family in urban integration); *Id.*, at 106 (handwritten note dated January 1961 in which Kohn recorded a cost of \$118,075,000 for the organized emigration of youth from Middle Eastern countries. Cost is specified for each country separately).

32 *Id.*, at 2 (letter dated 26 Feb, 1961).

offices abroad, with a clear imperative: “Insist in all conversations that one cannot discuss Arab and Jewish refugees separately. What happened from November 1947 to the end of 1952 was an unplanned and uninitiated Israeli Jewish population exchange.”<sup>33</sup>

During the 1950s and 1960s, “population exchange” became a central aspect of Israel’s justification of the displacement of Palestinians.<sup>34</sup> Though various Israeli and Zionist actors sought to promote a settled agreement on population exchange, it never happened.<sup>35</sup> The underlying premises of the encounter Kohn conceptualizes in his pamphlet would reemerge in domestic Israeli politics and shape realities in Israel-Palestine to this day.<sup>36</sup> Both the celebration of the Jewish melting pot and the instrumentalization of its components not only contributed to uniting *Ashkenazim* and *Mizrahim*, who had different social and economic interests and cultural backgrounds, but also worked to counter Palestinian claims of return and restitution. The instrumental way in which refugee identities were deployed against each other also contributed to the conditions for the rise of hierarchies between different groups of Israeli citizens. In important ways, Israeli citizenship did not ensure full equality either for Mizrahi Jews or for Arab-Palestinian citizens. Both their histories of displacement were disregarded in the service of specific political interests. In both cases, this fact has noteworthy connections to the argument of population exchange. The two following Parts of this Article demonstrate how inequality emerged from population exchange.

## II. MIZRAHI CITIZENSHIP: “DE-PALESTINIZATION OF THE CONFLICT”

Ashkenazim and Mizrahim were both parts of the positive vision of a melting pot, as articulated in Kohn’s pamphlet. This is a vision of *Kibutz Galuyot* (“Ingathering of the Exiles”), a basic tenet of Zionist ideology according to which the Jewish diaspora would be collected in the State of Israel. At the same time, the rights and interests of Mizrahim became objects of exchange. While the pamphlet clearly *couples* both these aspects of Israeli citizenship, both had been visible at least since the state’s founding.

In the shadow of World War II, the status of Jews in various parts of the Arab world had already grown increasingly precarious. The most famous example is the 1941 *Farhoud* massacre in Baghdad, in which 250-300 people,

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33 *Id.*, at 46 (letter dated 26 February, 1961).

34 *See, e.g.*, Government of Israel, *supra* note 16.

35 *See infra* Part III.

36 *See infra* Parts II, III.

mostly Jews, were killed.<sup>37</sup> The violence immediately followed the defeat of the Iraqi pro-Nazi government of Rashid Ali. As Jews were often closer to the British authorities, they drew hostility from supporters of the overthrown government. This became even clearer during the *Al-Wathbah* uprising of January 1948.<sup>38</sup> As the Iraqi monarchy planned to renew the 1930 Anglo-Iraqi Treaty, which turned Iraq into a British protectorate, Iraqis took to the streets in demonstrations and riots.

To mention just one individual's account, Miriam Soli, a member of the Jewish community in Baghdad, recounted her feelings in a personal letter dated 29 January, 1948:

After the demonstrations the mobs would follow armed with daggers, clubs, sticks and other weapons [...] Among them were secret police to intimidate them to attack Jewish possessions so that the demonstrations would lose their nationalistic and popular character and the government could claim to all the world that these things were for thefts and against the Jews because of Palestine.<sup>39</sup>

The letter was addressed to Jerusalem, and received by a personal friend, Leo Kohn. Soli acknowledged that he too must be in distress because of the Arab violence following the 1947 UN Partition Plan. Yet unlike her, she observed, Kohn had the privilege of leaving the country to a more stable Western nation. But the Zionist international lawyer wasn't going anywhere. Such an account must have influenced his interest in documenting the confiscated holdings of Middle Eastern Jews, years later.

Following the displacement of Palestinians with the establishment of Israel in 1948, Iraq began to officially seize Jewish private property. Expropriations and nationalizations were typical during post-1945 processes of decolonization.<sup>40</sup> Rightly or not, Jewish holdings were framed as part of a legacy of British colonial accumulation.<sup>41</sup> This is when Zionists in Israel began to think of Jewish Iraqi claims as objects of exchange. Sociologist Yehouda Shenhav

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37 See Yehouda Shenhav, *The Jews of Iraq, Zionist Ideology, and the Property of the Palestinian Refugees of 1948: An Anomaly of National Accounting*, 31 INT. J. MID. E. STUD. 607 (1999).

38 MOSHE GAT, THE JEWISH EXODUS FROM IRAQ, 1948 – 1951, 35-38 (1997).

39 See Leo Kohn Collection, *supra* note 15, at 114.

40 Nicholas J. White, *The Settlement of Decolonization and Post-Colonial Economic Development*, in 173(2/3) BIJDRAGEN TO DE TAAL-, LAND-EN VOLKENKUNDE 208 (2017).

41 For an analysis of the Marxist notion of “primitive accumulation” in the context of international law, see Umut Özsu, *Grabbing Land Legally: a Marxist Analysis*, 32 LEIDEN J. INT'L L. 215 (2019).

has meticulously documented how the property of Iraqi Jews, confiscated by the Iraqi government, would be counted as the accruing debt of those governments to Israel.<sup>42</sup>

As part of the effort to convince Iraqi Jews to emigrate to Israel, the Israeli government created an expectation that it would compensate Iraqi Jews for their property confiscated in Iraq.<sup>43</sup> The idea was to pay Iraqi Jews an appropriate part of the private Palestinian property Israel had confiscated from those who became refugees in 1948. Israel's Absentee Properties Law of 1951 had nationalized the property.<sup>44</sup> As Moshe Sharett (Shartok), Israel's Foreign Minister, explained,

The act that has now been perpetrated by the Kingdom of Iraq ... forces us to link the two accounts ... We will take into account the value of the Jewish property that has been frozen in Iraq when calculating the compensation that we have undertaken to the Arabs who abandoned property in Israel.<sup>45</sup>

Such compensation was not thought of as an individual right of its potential recipients. It was conceived of as part of a larger interstate scheme for peace in the Middle East.<sup>46</sup> The underlying logic was that if Israel would compensate its Iraqi Jewish citizens for wrongs that Iraq was responsible for, the Iraqi government would be required to resettle Palestinian refugees—and compensate them for their lost properties in Palestine.

While several thousand Palestinian refugees reached Iraq, this idea of population exchange was not formalized in an agreement. Israel in effect also nationalized the private property claims of Iraqi Jews, keeping them for negotiations on an ultimate peace agreement with Arab countries. As Shenhav explains, “the Israeli government turned this bind into a system akin to double-entry accounting with regard to the two sets of property — of the 1948 Palestinian refugees and of the Iraqi Jews — and thereby neutralized the claims of both.”<sup>47</sup> The fact no such agreement was concluded led the government to withhold any compensation from Iraqi Jews. The expectations of Iraqi Jews were dashed. Israel took the property of Palestinians and Iraq

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42 Shenhav, *supra* note 37, at 606.

43 *Id.* at 606, 620.

44 Absentee Property Law, 5710-1950, SH No. 37 p. 86 (Isr.).

45 Quoted in Shenhav, *supra* note 37, at 605.

46 *Id.* at 618 (quoting Sharett, explaining a possibility according to which “a declaration on our part that all this will be taken into account in the payment of compensation in a final settlement, etc.”)

47 *Id.* at 606.

took the property of Iraqi Jews. Neither Iraqi Jews nor Palestinians were granted redress.

In broad strokes, however, the story that Shenhav unfolds is not specific to Iraqis. It is, rather, a microcosm of what happened with Jews from the Arab world more generally. In many countries, they suffered persecution, including attacks and political arrests, and their properties were confiscated.<sup>48</sup> During the 1956 Suez crisis, the Egyptian government persecuted Jews, and international organizations subsequently recognized Egyptian Jews as refugees.<sup>49</sup> When they finally arrived in Israel, Mizrahim were often settled far from the urban centers of Israel, in rural or peripheral areas that offered few opportunities, and they were not allowed to establish ownership.<sup>50</sup> The more valuable portion of the Palestinian property had often been allocated to Ashkenazim. The entanglement of Palestinian and Mizrahi histories is thus intimately tied to the differential allocation of housing rights in early Israel.<sup>51</sup>

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48 For a summary, see Ada Aharoni, *The Forced Migration of Jews from Arab Countries*, 15(1) PEACE REV. 53 (2003).

49 Charles H. Jordan, Aide Memoire on the Plight of Jews in Egypt and the Asylum Granted to a Part of them in France, (Jan. 9, 1957) (on file with the ISA, file no. 73-21-9), at 1.

50 See, e.g., Yossi Yonah & Ishak Saporta, *The Politics of Land and Housing in Israel: A Wayward Republican Discourse*, 8(2) SOC. IDENTITIES 91, 93 (2002) (arguing that Israel allocated land and housing rights unequally, discriminating against Arab and Mizrahi groups, and thus constructed their membership in the polity as inferior); Joseph Massad, *Zionism's Internal Others: Israel and the Oriental Jews*, 25(4) J. PAL. STUD. 53, 62-63 (1996) (describing the Mizrahi social movements that emerged in the 1950s protesting discrimination against them and in favor of Ashkenazim in the distribution of the "abandoned" Palestinian properties); Oren Yiftachel, *Social Control, Urban Planning and Ethno-Class Relations: Mizrahi Jews in Israel's 'Development Towns'*, 24(2) INT'L J. URB. REGION. RES. 418, 424 (2000) (on the preferential treatment that Ashkenazi and especially Polish immigrants received in Israel's first years, while Mizrahim languished in temporary camps); Erez Tzfadia, *Public Housing as Control: Spatial Policy of Settling Immigrants in Israeli Development Towns*, 21(4) HOUS. STUD. 523, 526 (2006) (on the emergence of social stratification between Ashkenazim and Mizrahim from the housing policies of early Israel). On barriers upon ownership, see Neta Ziv, *Housing Law and Social Exclusion: The Case of Public Housing in Israel*, 9 L. GOV. ISR. 411, 423 (2006).

51 As Yossi Yonah and Ishak Saporta explained:

The differential nature of this allocation, in turn, contributes immensely to the emergence of socioeconomic stratification along national and ethnic lines in Israeli society, and thus it underscores the impossibility of distinguishing

According to a narrative constructed by the Zionist movement, East met West: it was a heroic encounter between two groups of Jewish refugees. But for a very long time, an operative compensation scheme existed only for those refugees coming from Europe. In 1952 Israel concluded the Luxembourg Treaty with Germany, which provided compensation for the victims of the Holocaust as part of a normalization of relations between Germany and Israel.<sup>52</sup> Under this agreement, Germany paid Israel 3 billion German marks between 1953 and 1965.<sup>53</sup> Individual victims of the Holocaust could receive personal payments, but Jews who had lived in North Africa under occupying regimes that allied with Germany during WWII were not entitled to reparations and acknowledgment under the Luxembourg treaty. Libyan Jews, for example, actively attempted to receive such recognition, and were initially ignored by the Zionist leadership.<sup>54</sup> More generally, claims of Mizrahi refugees were preserved as bargaining chips against the Palestinian refugees' claims. They were part of a vision of regional peace that turned into a lingering mirage.<sup>55</sup>

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Israel's definition of citizenship from its settlement project and from the emergence of socioeconomic stratification along these lines.

Yonah & Saporta, *supra* note 50, at 93.

52 Agreement between the State of Israel and the Federal Republic of Germany, Isr.-Ger., Sept. 10, 1952.

53 *Id.* at art. 1(a).

54 The fight for recognition of Libyan Jews as "Holocaust Survivors." Yaakov Hajaj-Liluf, *Tziunei Derech Ba'mavak (Landmarks in the fight)*, INSTITUTE RESEARCH JEWISH LIBYAN STUD., <https://livluv.org.il/%D7%94%D7%9E%D7%90%D7%91%D7%A7-%D7%9C%D7%94%D7%9B%D7%A8%D7%94-%D7%91%D7%99%D7%94%D7%95%D7%93%D7%99-%D7%9C%D7%95%D7%91-%D7%A0%D7%99%D7%A6%D7%95%D7%9C%D7%99-%D7%A9%D7%95%D7%90%D7%94-2/> (last visited June 24, 2020).

55 One early peace initiative, published in 1958 by a group of mainly Jewish American academics, and premised on return for Palestinian refugees where possible, alongside resettlement in Arab countries, reflects the linking of the accounts at this stage. *See THE PALESTINE REFUGEE PROBLEM: A NEW APPROACH AND A PLAN FOR SOLUTION 27 (1958)*:

In addition to the costs of settlement there would be costs of compensation. These would naturally fall on the government of Israel in the case of the refugees from Israeli Palestine and on the governments of Iraq and Egypt for Jews who left those countries since 1948 and were unable to take their property with them. In all these cases international loans might be available to these governments if needed to make the compensation possible.

Among the coauthors of the initiative were Nasrollah Fatemi, "Former Iranian Delegate to the United Nations," and Hannah Arendt, "Political Scientist, Author of 'The Origins of Totalitarianism.'"

Arguably the best opportunity Israel had to demand compensation for property Mizrahim had lost in Arab countries emerged in the context of Israeli-Egyptian peace negotiations and pertained to Egyptian Jews. As Seth Anziska recently documented, President Carter had initially aimed to foster a larger Middle Eastern peace agreement, which would involve Palestinian representatives as well. Carter agreed, however, that Palestinians would not be invited to preliminary talks planned in Geneva. In a meeting on 17 July, 1977 Carter suggested that “the question of refugees be put on the agenda.” To this Israeli Prime Minister Menachem Begin responded, “Both the Arab and the Jewish refugees.”<sup>56</sup> Prime Minister Menachem Begin deployed the claims of Mizrahi Jews strategically—as a counterbalance to Palestinian refugee claims.

On 7 September, 1977, in preparation for the direct Israeli-Egyptian bilateral talks, a group of Israeli lawyers and diplomats met at the Israeli Ministry of Justice. At that point, the P.L.O. was advocating for one democratic state in historic Palestine. The Legal Adviser to the Foreign Ministry, Dr. Meir Rosen, opened the meeting by exclaiming: “the suffering of Jews in Arab countries ... illustrates what Jews in Israel can expect if the P.L.O.’s dream of a ‘secular and democratic’ state will be realized.”<sup>57</sup> Among other issues, they discussed how to counter continued claims concerning Palestinian refugees. Population exchange was a main item on the agenda. Ami’el Najjar, an Egyptian-born Israeli diplomat who had previously served as an ambassador to Brussels and Rome, commented: “the Jews of Arab descent can contribute greatly to the de-Palestinization of the conflict, as their claims are directed against all Arab states.”<sup>58</sup> The idea was to cast any specific Palestinian grievance as a matter of regional interstate relations. A stenographer typed the handwritten minutes, adding a title: “The Rights of Jews in Arab Countries as an Instrument to Counter the Reputation of the P.L.O.”<sup>59</sup>

On 26 March, 1979, Israel and Egypt signed the peace agreement.<sup>60</sup> The treaty recognized that there were outstanding financial claims between the sides, and so Article 8 provided the basis for a claims commission.<sup>61</sup> Yet the outcome of this strategy of “de-Palestinization” was that neither Egyptian Jews

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56 Quoted in SETH ANZISKA, *PREVENTING PALESTINE: A POLITICAL HISTORY FROM CAMP DAVID TO OSLO* 60 (2018).

57 Meeting minutes of a meeting between a group of Israeli lawyers and diplomats held at the Israeli Ministry of Justice (Sept. 7, 1977) (on file with the Israeli National Archive, file n. 8-7363-10).

58 *Id.*

59 *Id.*

60 Israel-Egypt Peace Treaty, Isr.-Egypt, Mar. 26, 1979.

61 *Id.* at art. 8.

nor Palestinian refugees had their rights recognized. While some European Jews, particularly German Jews, continued to enjoy increased financial stability thanks to the Luxembourg Treaty, the opportunity for a similar treaty for Mizrahim was strategically missed. As one Israeli observer explained, securing restitution for Mizrahim was never the highest priority. "Israel had a strategic interest in peace with Arab States . . . and if an Arab state was ready, Israel was prepared to cut a deal without compensation."<sup>62</sup> Neither the Israeli nor the Egyptian side has since requested that a claims commission be established under Article 8.

Advocates of the Mizrahi cause noticed the construction of a symmetry between the two refugee identities, Mizrahi and Ashkenazi, with the corresponding lack of symmetry in their possibilities for compensation. In a book analyzing Israeli society from the perspective of intra-Jewish ethnic struggle, Yehezkel Haddad offered the contrast between Mizrahi expropriation and Ashkenazi compensation as an explanation for the relative poverty of Mizrahim. As Haddad noted, Ashkenazim obtained much of their wealth under the agreement with Germany, while Mizrahim had no comparable remedy. Over time, this contributed to a class distinction. At present, writes Haddad in 1983, the idea that the Ashkenazim and Mizrahim can merge into one people is a fine aspiration, but an unrealistic one.<sup>63</sup> Better for the two communities to live side by side, while abandoning the illusion they can become one nation. According to this view, the instrumentalization of Mizrahi refugee claims exposes the image of "East meets West" as a cynical ploy.

For several decades, the population exchange argument fell relatively dormant.<sup>64</sup> The 1990s saw the Oslo Peace Process, and with it, hopes for a negotiated end of Israel's occupation of the West Bank and Gaza (since 1967). Palestinian leaders often raised the issue of refugees in this context, citing U.N.

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62 Samuel G. Freedman, *Are Jews Who Fled Arab Lands to Israel Refugees, Too?*, N.Y. TIMES (Oct. 11, 2003), <https://www.nytimes.com/2003/10/11/arts/are-jews-who-fled-arab-lands-to-israel-refugees-too.html> (quoting Martin Kramer).

63 Yehezkel Haddad, *YEHUDEY ARZOT ARAB VE ISLAM (JEWS OF ARAB AND MUSLIM COUNTRIES)* 167 (1983).

64 *But see*, MALKA HILLEL SHULEWITZ, *THE FORGOTTEN MILLIONS: THE MODERN JEWISH EXODUS FROM ARAB LANDS* 207 (1999) (documenting and providing the judgement from the "tribunal relating to the claims of Jews from Arab lands," written by former U.S. Supreme Court Justice Arthur Goldberg in 1987). *See also* Carole Basri, *The Jewish Refugees from Arab Countries: An Examination of Legal Rights — A Case Study of the Human Rights Violations of Iraqi Jews*, 26(3) *FORDHAM INT'L L. J.* 656, 713 (2002).



General Assembly Resolution 194.<sup>65</sup> Israeli and American policymakers, on the other hand, emphasized the prospects of a territorial compromise, while minimizing refugee claims. In July 2000, President Bill Clinton announced that an agreement had been reached at the Camp David summit to recognize the Jews from Arab countries as “refugees” and that an international fund would provide compensation for the property they left behind.<sup>66</sup> Israel has never publicly pursued this option. While public figures constantly referred to it, it now seems like mere lip service.<sup>67</sup> Mizrahi property claims played no major role in these negotiations.

Things would change somewhat in response to the Palestinian uprising of 2000-2005 (“the Second Intifada”), and with the U.S. invasion of Iraq (2003). Writing in this context, Mizrahi author Ada Aharoni explained that recognition of the Mizrahi persecution and expulsion from Arab countries could help foster political support among Mizrahim for a peace arrangement. After all, ever since rightwing politician Menachem Begin led the opposition to the Luxembourg Treaty, Mizrahim have been largely on the right of Israeli politics. As she contends, Mizrahim will not support a compromise with Palestinians, if the Israeli government and its Arab negotiating partners do not address their own grievances.<sup>68</sup> The U.S.-led regime change in Iraq in

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65 See, e.g., INTERNATIONAL CRISIS GROUP, BRINGING BACK THE PALESTINIAN REFUGEE QUESTION 7 (2014) (discussing Palestinian positions on the refugee issue during the Oslo years); compare Edward Said, *The One State Solution*, N.Y. TIMES (Jan. 10, 1999), <https://www.nytimes.com/1999/01/10/magazine/the-one-state-solution.html> (commenting that “Oslo required us to forget and renounce our history of loss, dispossessed by the very people who taught everyone the importance of not forgetting the past. Thus we are the victims of the victims, the refugees of the refugees”).

66 See, e.g., ISRAELI MINISTRY OF FOREIGN AFFAIRS, SPECIAL REPORT ON THE ISSUE OF JEWISH REFUGEES FROM ARAB COUNTRIES (2012), [https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Jewish\\_refugees\\_from\\_Arab\\_and\\_Muslim\\_countries-Apr\\_2012.aspx](https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Jewish_refugees_from_Arab_and_Muslim_countries-Apr_2012.aspx).

67 See, e.g. Avi Beker, *The Forgotten Narrative: Jewish Refugees from Arab Countries*, 17(3) JEWISH POL. STUD. REV. (2005), <https://www.jcpa.org/jpsr/jpsr-beker-f05.htm>; MINISTRY OF FOREIGN AFFAIRS, *DFM Ayalon opens international conference “Justice for Jewish Refugees from Arab countries”*, (Sept. 10, 2012) <https://mfa.gov.il/MFA/PressRoom/2012/Pages/Ayalon-opens-conference-10-Sep-2012.aspx>.

68 See Aharoni, *supra* note 48, at 59-60.

2003 provided an opportunity for a public restaging of these claims.<sup>69</sup> This opportunity too was missed.

As the Oslo Process gave way to the violence of the Second Intifada, it became clear that a territorial compromise based on the 1967 lines was unpopular on both sides. Israelis and pro-Israeli Jews, in Israel-Palestine and around the world, gradually realized that the sources of the Israeli-Palestinian conflict ran deeper than the occupation. It was rooted in 1948 (or even earlier), and the uprooting of Palestinian societies at that time was a major part of the story.<sup>70</sup> As some social movements quickly realized, this reemergence of 1948 Palestinian refugee histories was an opportunity to redraw attention to Mizrahi displacement and expropriation. If Israeli actions in 1948 were ethnic cleansing, as some commentators suggested,<sup>71</sup> then perhaps the persecution of Mizrahi Jews in the Arab world could be framed in much the same way. Appropriating the Palestinian phrase, some Mizrahi advocates even started to talk about the “Jewish Nakba.”<sup>72</sup>

In 2009, the Israeli government renewed the old project—quantifying and documenting Mizrahi property claims in an official register.<sup>73</sup> A year later, the Statute for the Protection of the Rights of Jewish Refugees from Arab Countries and Iran passed in the Knesset.<sup>74</sup> The central provision reads: “In negotiations for peace in the Middle East, the government will include the issue

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69 See Freedman, *supra* note 62 (just as the Jews and Israel at its founding enjoyed relative favor with British Mandate authorities, so contemporary Israel was a close ally of George W. Bush’s. Perhaps, a new pro-U.S. Iraqi regime could agree to finally compensate Iraqi Jews).

70 See generally HILLEL COHEN, *YEAR ZERO OF THE ARAB-ISRAELI CONFLICT 1929* (2015).

71 ILAN PAPPE, *THE ETHNIC CLEANSING OF PALESTINE* (2007); Cf. Drew, *supra* note 3, at 107-113 (discussing Pappé’s “Yugoslav ethnic cleansing paradigm” as applied to Palestine).

72 Edi Cohen, *Ani Palit, Nizol Hanekba Hayehudit (I’m a Refugee, Survivor of the Jewish Nekbah)* MIDA (Nov. 29, 2015), <https://mida.org.il/2015/11/29/%D7%A0%D7%99-%D7%A4%D7%9C%D7%99%D7%98-%D7%A0%D7%99%D7%A6%D7%95%D7%9C-%D7%94%D7%A0%D7%9B%D7%91%D7%94-%D7%94%D7%99%D7%94%D7%95%D7%93%D7%99%D7%AA/>.

73 See Ministry of Social Equality, *The Property of Jews from Arab States and from Iran* [https://www.gov.il/he/Departments/Guides/rechush\\_arav\\_iran](https://www.gov.il/he/Departments/Guides/rechush_arav_iran) (noting that in 2009 documenting the loss of Jewish property was entrusted to the Ministry of Social Equality).

74 Law for the Preservation of the Compensation Rights of Jewish Refugees from Arab Countries and Iran, 5780-2010 SH No. 2232 p. 406 (Isr.).

of compensation for the loss of property for refugees from Arab states and Iran, including property that belonged to Jewish communities in said countries.<sup>75</sup> While it is likely merely symbolic, the provision nevertheless signals how the link between Mizrahi and Palestinian claims had been cemented. During Obama's years in the White House, Prime Minister Netanyahu reasserted a claimed commitment to the two-state solution.<sup>76</sup> Yet such legislation illustrates the persistent employment of Mizrahi claims in their ever-useful role as diplomatic shields against the claims of Palestinian refugees.

Interestingly, a group of Iraqi citizens who were victimized during the *Farhoud* attacks against Jews in Baghdad (1941), have recently sought increased compensation under the Luxembourg Treaty. Recall that Israel had concluded this treaty, back in 1952, to secure German compensation for victims of the Nazi regime. In their case against the Israeli government, the petitioners argued that through its anti-Semitic propaganda and its links to anti-British Iraqi leaders, the German government had aided the attack on Jews in Iraq.<sup>77</sup> The German government, they claimed, should therefore be held responsible, under the Treaty, for the *Farhoud* events. The Court provides an analysis of state responsibility under customary international law and reaches the conclusion that Germany cannot be held responsible.<sup>78</sup> The Luxembourg Treaty is of no avail.<sup>79</sup> Yet thanks to their political campaign in parallel to the case, Mizrahim were able to secure Israeli governmental subsidies granted to Holocaust survivors.<sup>80</sup> While this is important, framing persecution during the

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75 *Id.*

76 Isabel Kershner, *Netanyahu Backs Palestinian State, With Caveats*, N.Y. TIMES (June 14, 2009), <https://www.nytimes.com/2009/06/15/world/middleeast/15mideast.html>.

77 See DC (Hi) 1797-08-17 *The Authority for the Rights of Holocaust Survivors at the Ministry of Treasury v. Zvi Gamish et al.*, ¶¶ 60-102 (2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter: *The Authority v. Gamish*). For a similar case submitted by a group of Moroccan Jews, see file No. 63910-12-13 Magistrate court (Hi), *Moshe Sasportas v. The Authority for the Rights of Holocaust Survivors at the Ministry of Treasury* (2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

78 In its analysis the court relies, *inter alia*, on the Draft Articles on State Responsibility. See U.N. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts* (2001), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

79 *The Authority v. Gamish*, *supra* note 77, at ¶ 127.

80 Ofer Aderet, *Israel to Compensate Iraqi, Moroccan, Algerian Jews for Holocaust-era Persecution*, HAARETZ (Dec. 4, 2015), <https://www.haaretz.com/israel-news/.premium-redress-for-wwii-woes-of-mizrahim-1.5431013>.

*Farhoud* events as a matter of German state responsibility reflects how the Ashkenazi refugee identity became a desirable status of universal victimhood. The memory of the Holocaust had the unfortunate effect of blurring the particularities of other very real historic tragedies.<sup>81</sup>

This more recent history may seem to be in tension with the argument that Mizrahim were disadvantaged by the geostrategic instrumentalization of their plight. After all, one cannot deny that increased subsidies are a measure of redress too. Is this history truly about hierarchical membership? Recent developments grant an important modicum of recognition to people whose stories and hardships were often not even discussed. In that regard, the acknowledgement of Mizrahi history is part of an important revival of Mizrahi culture during Prime Minister Netanyahu's years. From a different perspective, however, there is nothing new about many aspects of the interest in Mizrahi refugees. As it was over decades, Mizrahi persecution in the Arab world is still weaponized against Palestinians. Furthermore, such localized corrective subsidies cannot furnish a more robust agenda for reparations. They do not serve to "set the historical record straight" in terms of the Zionist movement's historical wrongs towards Mizrahi Jews. And they likely end up grossly underpaying the victims of these wrongs. As I emphasize towards the conclusion of this Article, appropriate payments could also help dismantle the stratification that the entanglement of refugee histories has bred.

A 2014 report by Israel's State Comptroller, former Judge Yosef Shapira, shows how slim such domestic recognition of Mizrahi persecution really is. As Shapira finds, the government did not follow up sufficiently upon its decision to renew the documentation of private claims by Mizrahi citizens of Israel. Hani Zubeida, an academic who emigrated to Israel from Iraq in 1971, explains the injustice: "The Palestinians deserve full compensation, and regardless of them, my family and I deserve compensation too. We had to flee and were uprooted from our country. Iraq is my homeland."<sup>82</sup>

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81 Cf. Adi Ophir, *On Sanctifying the Holocaust: An Anti-Theological Treatise* 21(6) *TIKKUN* (2006); on the Holocaust and universal victimhood, see Samuel Moyn, *Two Regimes of Memory* 103(4) *AM. HIST. REV.* 1182 (1998).

82 See THE STATE COMPTROLLER AND OMBUDSMAN OF ISRAEL, HAVAT DA'AT: MA'AGAR MEIDA AL PLITIM MEARTZOT ARAV VE'MEIRAN (OPINION ON THE DATABASE ON JEWISH REFUGEES FROM ARAB COUNTRIES AND IRAN) (2014), [https://www.mevaker.gov.il/he/Reports/Report\\_233/aece638e-f673-43ba-978f-b9545ee4fb43/2014-PlitimYehudim.pdf](https://www.mevaker.gov.il/he/Reports/Report_233/aece638e-f673-43ba-978f-b9545ee4fb43/2014-PlitimYehudim.pdf) (Hebrew); See also Etti Blumental, *Pitzuim Leyehudey Arav: "Hegia HaZman Ledaber Al Ze" (Compensation for Jews from Arab Countries: "Time to Talk about It")*, *YNET* (Feb. 2, 2014), <https://www.ynet.co.il/articles/0,7340,L-4483256,00.html> (Hebrew).

### III. PALESTINIAN CITIZENSHIP: AN EXCHANGEABLE REMAINDER

Some 700,000 Palestinian refugees fled the territory that became Israel during Israel's War of Independence, in 1947-1948. Others were domestically displaced and became "internal refugees."<sup>83</sup> The Palestinians that remained in the newly established state were granted Israeli citizenship, but many were stripped of their property. At best, they were granted meager and partial compensation.<sup>84</sup> How did the entanglement of their history with that of Jewish displacement affect them? The civic status of Palestinians was often shaped by the argument that Zionists appealed to when they tied Mizrahi refugee history to that of the Palestinians: the argument of population exchange. While the population exchange framing was initially introduced primarily for foreign audiences, it ended up having considerable influence on the domestic level: Palestinian citizens were part of a population exchange that was yet to be concluded, and thus denied full membership in the Israeli polity. That a Palestinian citizen of Israel does not stand shoulder to shoulder with the two Jewish boys in the photograph of the encounter between East and West is of course no accident. The picture eliminates the presence of the Palestinian. He or she is hidden behind the pleasant smile of the Mizrahi boy on the left—a smile that itself conceals the way in which the latter is excluded. As one commentator noted, in a different context, "Israeli identity has to be understood in strictly relational terms, not as pre-existing and determining conflict, but as a complex process in which Jews gradually become divided within themselves, and exclude (or deny) what may have connected them with Palestinians."<sup>85</sup> The argument of population exchange ended up shaping Palestinians in Israel as an exchangeable remainder.

The population exchange argument allowed Israel to instrumentalize Mizrahi claims against neighboring Arab states. In the case of Palestinian citizens, the point is even stronger: the doctrine contributed to and shaped

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83 See generally Hillel Cohen, *The State of Israel versus the Palestinian Internal Refugees*, in *CATASTROPHE REMEMBERED: PALESTINE, ISRAEL, AND THE INTERNAL REFUGEES* 56 (Nur Masalha ed., 2005).

84 See Acquisition of land law (authorization of actions and reparations) 5713-1953, 122 LSI 58 (Isr.); former Chief Justice Beinisch has explained that the expropriation and compensation under this law would not pass judicial review under Israel's constitutional protections granted by Basic Law: Human Dignity and Liberty, 5753-1992, 1392 LSI 150 (Isr.). See IE 6534/10 Sason v Reshut Hapituach, ¶ 6 (2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

85 Gil Eyal, *The Discursive Origins of Israeli Separatism: The Case of the Arab Village* 25 THEO. & SOC. 391 (1996).

their subordination.<sup>86</sup> Their very status as members of the polity remained precarious, arguably due to an ongoing perception that they are an unhealthy “remainder” of an incomplete exchange.<sup>87</sup> Mizrahi claims were constructed as a consideration in any future regional peace deal. Palestinian citizens were the unwanted good the new state had tried but failed to “sell” to its neighbors, as part of a larger plan to establish a haven for Jews. They have retained such a subordinated status ever since, with significant material consequences.

With families split, the 1947-1948 war tore apart the social fabric of Palestinian society. Alongside the dispersal of families, the confiscation of property lies at the basis of the class society created in Israel and the subordination of the Palestinian citizens of Israel.<sup>88</sup> The largescale expropriation dramatically de-developed Palestinian regions within the new State of Israel.<sup>89</sup> As Yossi Yonah and Yitzhak Saporta have argued, housing became a major issue shaping hierarchies between Ashkenazi and Mizrahi citizenships.<sup>90</sup> As Leo Kohn observed early on, the nature of Israeli sovereignty was shaped not only by formal status, but also by the structure and distribution of real estate holdings.<sup>91</sup> When one considers the confiscations from Palestinians, the inequality between Ashkenazim and Mizrahim looks like a mere quarrel over the division of booty.<sup>92</sup>

The nationalization of Palestinian property was initially accomplished by way of emergency regulations, The Emergency Regulations on Absentee

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86 See generally Nimer Sultany, *The Making of an Underclass: The Palestinian Citizens of Israel* 27(2) *ISR. STUD. REV.* 190 (2012).

87 On this idea of an “incomplete exchange,” see, e.g., Chaim D. Kaufmann, *When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century*, 23 *INT’L SECURITY* 120, 121 (1998); on the notion of a “remaining” population, see Yael Berda, *Managing ‘Dangerous Populations’: How Colonial Emergency Laws Shape Citizenship*, *SEC. DIALOGUE* 1, 4 (2020).

88 The genealogy of population exchange in Israel-Palestine had a role in what Marxists call “primitive accumulation”: the unequal distribution of property that relies on the infliction of brute force in a pre-capitalist stage. Cf. Özsü, *supra* note 41 (conceptualizing the role of international law in the violent acquisition of land that precedes capitalist market relations, which Karl Marx calls “primitive accumulation”).

89 I adopt the term from Sara Roy. See SARA ROY, *THE GAZA STRIP: THE POLITICAL ECONOMY OF DE-DEVELOPMENT* (1995). See also Sultany, *supra* note 86, at 191-92.

90 See Yonah, *supra* note 12.

91 See *supra* note 19.

92 See generally Massad, *supra* note 50, at 62 (describing how the Palestinian village of Musrara was razed, only to play a role in Mizrahi property grievances).

Property of 1948.<sup>93</sup> Under these regulations, Palestinian property was transferred to a state custodian.<sup>94</sup> Initially temporary in nature, the regulations were extended a year later through legislation that would apply “until the end of the state of emergency.”<sup>95</sup> The process of nationalization thus began as stemming from a security risk, in the same context in which some members of the Jewish *Yishuv* felt attacked in a war of annihilation. This, however, was not enough for the Israeli authorities. The government needed properties to house new immigrants and indeed Jewish refugees who had come to Israel from Europe, the Middle East, and North Africa. The Absentee Property Act of 1951 rendered the confiscation permanent. As its drafting history shows, the need to absorb the mass immigration of Jews was the primary argument justifying it. As Sandy Kedar has shown, it relied on a precedent from another population exchange—that between India and Pakistan (1947).<sup>96</sup>

Apart from the Palestinian citizens’ material disenfranchisement, the population exchange model also aligned with early initiatives to remove them from Israel’s territory. These reflect a mixture of unilateral displacement plans, which play a role alongside bilateral ideas for a legalized exchange. For

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93 Emergency Regulations on Absentee Property 5709-1948 (on file with the Israeli National Archive, file no. 2-54323/23).

94 See Jeremy Forman & Alexandre (Sandy) Kedar, *From Arab land to ‘Israel Lands’: the legal dispossession of Palestinians displaced by Israel in the wake of 1948*, 22 ENV’T & PLAN. D: SOC’Y & SPACE 815 (2004). As Forman and Kedar explain,

An absentee was anyone who, on or after 29 November 1947 (the date of the United Nations General Assembly resolution to partition Palestine), had been (a) a citizen or subject of one of the Arab countries at war with Israel; (b) in any of these countries, or in any part of Palestine outside the jurisdiction of the regulations; or (c) a citizen of Palestine who abandoned his or her normal place of residence. Technically, this included virtually all Arabs who vacated their homes during the war, regardless of whether they returned.

95 Law for the extension of the emergency regulations on absentee property 5710-1949, SH No. 36 p. 83 (Isr.).

96 The emergency ordinance is a colonial form of legislation adapted from the British Mandate. See Forman & Kedar, *supra* note 94, at 814-15 (2004) (describing the run-up to the emergency regulations, as well as their importance: “Whereas the permanent version of the legislation ... would include notable changes, the 1948 regulations introduced a framework and terminology that would remain a central, permanent component of Israel’s legal treatment of appropriated land.” As they explain, “The Absentee Property Regulations were inspired by the British Trading with the Enemy Act (1939), which created an extremely powerful property custodian and formally extinguished all rights of former owners”).

the Zionist leaders, the policy challenge was how to preserve the numerical advantage that the 1947-1948 war gave Jews. Israel planned, for example, to unilaterally transfer Arab Palestinians from various parts of the country. On 4 December, 1949, the first director general of Israel's Foreign Ministry informed the Minister, Moshe Sharett, of a plan to expel around 10,000 residents of the Galilee. "Expulsion, that is, coerced transfer to other places, is required for security reasons." While the author told the minister that he was opposed to this measure, he also transmitted a message according to which it was possible to conclude the transfer "without unnecessary brutality."<sup>97</sup>

In 1950 Sharett considered a proposed removal of Arab Palestinians from within Israel to the territory of Libya.<sup>98</sup> Israel entered bilateral negotiations on the prospect of formalizing population exchange agreements based on the permanent resettlement of Palestinian refugees or Palestinian citizens of Israel in that country. Such efforts reached an advanced stage with King Idris As-Senussi.<sup>99</sup> The plan was to initiate a reciprocal immigration of Libyan Jews to Israel, and of Palestinians from Israel. Each group would receive housing in the homes the other would have left behind.<sup>100</sup>

Another initiative for orderly resettlement, though not an exchange program, arose in March 1952. The Foreign Ministry and secret service agents from the Mossad devised a plan to evict Arab Palestinian citizens from Israel to Brazil and Argentina.<sup>101</sup> The two countries needed immigrants for agricultural work, and Israel sought to take advantage of the immigration need to reduce

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97 See original document in Adam Raz, *The Secret Letter Detailing Israel's Plan to Expel Arabs, "Without Unnecessary Brutality,"* HAARETZ (Dec. 21, 2018), <https://www.haaretz.com/israel-news/.premium-the-secret-letter-detailing-israel-s-plan-to-expel-arabs-1.6766389>.

98 NUR MASALHA, *A LAND WITHOUT PEOPLE: ISRAEL, TRANSFER AND THE PALESTINIANS, 1949-1996* 16-21 (1997) (documenting "the Libyan operation").

99 Letters and memoranda related to this set of negotiations are available in the ISA, file no. אצ-2564/19.

100 Israel's practice of housing immigrants in the homes Palestinians left behind in 1948 is well-documented. See Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT'L L. & POL. 923, 945 (2000) ("... as was the case with India and Pakistan and the war between Turkey and Greece, most of the new immigrants arriving in Israel during this period were settled on refugee land (in this case, Arab land).").

101 The plan was named "Operation Yohanan." See, e.g., "Hahlafat Toshavim Verehush" (Exchange of Residents and Property), ISA, ISA-mfa-mfa-000lsgp (Letter of A. Sasson, Israeli Representative in Ankara, (Feb. 2, 1952)). See generally ARIK ARIEL LEBOVIC, *KDUSHAT HASTATUS QUO: YISRAEL VESUGIAT HAPLITIM*



an unwanted population of non-Jews. Palestinians were experienced in such work, so Israel sent an agent to examine “those regions of Argentina that would presumably be suitable for the kind of farmers accustomed to the soil of the upper Galilee.”<sup>102</sup> Though approved by Prime Minister Ben-Gurion, the plan did not materialize.<sup>103</sup>

Just like the Mizrahi story above, after a rise of interest in population exchange during the 1950s and 1960s, the idea fell dormant in legal and political discourse. Granted, on the right wing of Israeli politics there was a constant interest in the idea of “transfer.”<sup>104</sup> The word was euphemistically adopted into the Hebrew language, where it designates a coerced expulsion of Palestinians, whether from the occupied West Bank, or from within Israel. Yet a more contemporary version of the population exchange doctrine reemerged with the demise of the Oslo Process, and with the second Intifada. This later version is not obviously linked to Jewish refugee histories, apart from the mere fact of continuing the tradition of thinking about drawing borders according to ethno-national lines.

In October 2000, Palestinian citizens of Israel joined a wave of unrest in the West Bank with large demonstrations and riots. During protests in the region of Wadi Ara, the Israeli police responded by opening fire, killing 13.<sup>105</sup> The clashes led to an investigation of possible police misconduct, but also to a novel discourse on the “demographic threat.” Several politicians, including Avigdor Lieberman (on the right), but also Ehud Barak (on the left), expressed different versions of the same idea: predominantly Arab areas and

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HAFALASTINIM 1948-1967 (THE SANCTITY OF THE STATUS QUO: ISRAEL AND THE ISSUE OF THE PALESTINIAN REFUGEES) (2015).

102 ISA, ISA-mfa-mfa-000lsgp (letter of the Israeli representative in Buenos Aires [Jan. 8, 1952]).

103 Raz, *supra* note 97.

104 Rehav'am Ze'evi was perhaps the best-known for advancing the idea he called “transfer with consent” (“transfer behaskama”), starting from the 1980s. See e.g. ASHER ARIAN, SECURITY THREATENED: SURVEYING ISRAELI OPINION ON PEACE AND WAR 108 (1995); NUR MASALHA, IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION 188-89 (2000); For a survey of this idea from a rightwing perspective, see also MOSHE YEGER, RA'AYON HILUFEI HA'UCHLUSIN VEGILGULAV BITKUFAT HAMANDAT HABRITI: SKIRA HISTORIT (THE IDEA OF POPULATION EXCHANGE AND ITS VERSIONS DURING THE TIME OF THE BRITISH MANDATE: A HISTORICAL REVIEW) (2009).

105 Amjad Iraqi, *Thirteen Killed, no one Punished: Remembering October 2000*, +972 (Oct. 4, 2015), <https://972mag.com/thirteen-killed-no-one-punished-remembering-october-2000/112266/>.

their populations should pass to Palestinian control.<sup>106</sup> The idea tied into a hope for Palestinian agreement to Israeli sovereignty over Jewish settlements in the West Bank (with or without Israeli recognition of a Palestinian state). It assumed that the transferred population would lose its Israeli citizenship, receiving some kind of membership in the Palestinian Authority instead.<sup>107</sup>

Unlike earlier iterations of the population exchange model, this would not entail removing people from their homes—coercively or voluntarily. Redrawing the map, even if through a unilateral excision of territory from a state, is not as violent as an evacuation plan. One might therefore choose to understand this as a wholly different measure—with different political and ethical underpinnings. Yet the Lieberman plan did echo the population exchange framework in one fundamental way: the border would be drawn to achieve an ethno-national vision of self-determination.<sup>108</sup> The flipside of the Jewish cosmopolitanism described above, in which Jews of many colors were supposed to unite, was an enduring Israeli preference for a homogenously Jewish population.

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106 In an article from 2008, Rabin and Peled emphasized that the proposal in fact originated in academic circles and expressed a belief that it can be considered on its legal and policy merits, outside of partisan politics. From the present perspective, such a nonpolitical attitude could be fostered precisely because the proposal lacked a deep-seated legal consciousness. See Yoram Rabin & Roy Peled, *Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective*, 17 MINN. J. INT'L. L. 59, 62 (2008).

107 See generally Ilan Saban, *Citizenship and its Erosion: Transfer of Populated Territory and Oath of Allegiance in the Prism of Israeli Constitutional Law*, 2(1) LAW & ETHICS HUM. RIGHTS 1 (2010); Yuval Shany, *Redrawing Maps, Manipulating Demographics: on Exchange of Populated Territories and Self-Determination*, LAW & ETHICS HUM. RIGHTS 1 (2010). The term “membership” is used rather than citizenship, because it was not always absolutely clear that those calling for this solution agreed to recognize a Palestinian state. See Hilufei Shtahim – State of Israel Ministry of Foreign Affairs, *Ha'avarat Ribonut al Shtahim Meuchlasim Bemisgeret Hesder Keva Im Hafalstinim – Heibetim Mishpatiyim (Transfer of Sovereignty on Populated Territories under a Permanent Agreement with the Palestinians – Legal aspects)*, (Feb. 17, 2014) (on file with author).

108 Note, however, that Resolution 181 did contemplate the possibility of minorities in both the Jewish and the Arab states, and thus did not seek *absolute* homogeneity.

#### IV. DISENTANGLING REFUGEE HISTORIES

For many Israelis today, the justification for the state rests primarily on theological grounds, and in a divine promise. For liberal Zionists, however, religion cannot offer such justifications. The preferred argument is, rather, that Israel's justification stems from its status as a haven for Jews, and realization of our right to self-determination.<sup>109</sup> That argument of self-determination was backed by another historical and legal argument—one that framed what happened in 1948 as a case of population exchange. The latter framing had a price. Its proponents sought to make it possible by silencing and deferring the claims of Mizrahim against Arab states, and of Palestinian citizens against their own state.

The theoretical scope of the right of self-determination is wide and rather indeterminate.<sup>110</sup> Appealing early on to the idea of population exchange as an avenue for its realization, Jewish Israelis ended up largely preferring a specific notion of self-determination: one premised upon demographic homogeneity. “Linking the accounts,” to use the felicitous phrase Shenhav retrieves from his archive, gave rise to an historical injustice that both Mizrahim and Palestinians continue to suffer.<sup>111</sup> Rather than focus on the *ab initio* justification of the Zionist project, today the question of “historical justice” concerns how to disentangle refugee histories. To be sure, I do not advance such disentanglement for its own sake. It is part of a political program that seeks to provide a measure of recognition, as well as compensations or reparations for the harmed groups. By doing so, it seeks to build a more equal society. Not to “disentangle” for the sake of fragmenting society and breaking its common ground; but rather to disentangle the stories in order to reconnect them, while doing away with their hierarchical relationships.

The underlying insight is simple. Palestinians who were displaced and whose land had been expropriated at and around the founding of Israel cannot be blamed for wrongs against Mizrahi Jews. Jews in Middle Eastern countries were in no way responsible for Israel's decision to take private property from its would-be-citizens and prevent the return home of their relatives after the war. Both groups should not be held liable—which is the *de facto* result of the nationalization of their claims. Granted, the argument that the Israeli government offered over the decades for tying together the Mizrahi and Palestinian refugee histories was not about their *fault*. Rather, it purported

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109 See GANS, *supra* note 2.

110 See generally KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2009).

111 Shenhav, *supra* note 37 at 606.

to be one about a desirable policy outcome: the need for a regional peace deal. Whatever merit that argument might have had at any point in the past (I do not think it had any), today Israel can no longer advance it in good faith.

First, as I have shown above, this *de facto* nationalization of private claims in fact had another entirely undesirable outcome: it contributed to stratification within Israeli society, and thus runs up against strong distributional justice arguments. With Ashkenazi historical wrongs compensated for under the Luxembourg Treaty, both on a national and on a private basis, one group gained a structural material advantage over two others. While it is beyond my ability to measure the extent of this advantage, it clearly shaped Israeli society in significant and objectionable ways.<sup>112</sup>

Second, chances for a peace deal between Israel and the Palestinian Authority in the foreseeable future have vanished. In such circumstances, the continued discriminatory nationalization of claims based on historical wrongs seems even harder to justify. Also important are the geostrategic transformations in the region, which have likely put reparations for Mizrahi claimants within much *closer* reach of the Israeli government. Israel enjoys peace and cooperation on many fronts, including security and economic, with Egypt, which had historically confiscated the property of Egyptian Jews. It is also a close ally of the United States, which since the 2003 American invasion in Iraq has backed the Iraqi government. At least on these two fronts, the demand for redress should not have to wait any longer.

To be sure, systematic disregard of the legitimate claims of displaced groups was not achieved *only* through their nationalization; nor was their mutual entanglement, through the accounting efforts that Kohn pioneered, the only relevant method. From the outset, nationalization and entanglement were achieved through a strategy of *internationalization*. To use Carl Schmitt's terms, the claims of the three different groups came to be constructed as differing assemblages of *imperium* and *dominium*—the former term designating rights under public law, and the latter designating rights under private law (with the relationship between both domains shaping global law). The internationalization of the different refugee claims enabled their interlinking.<sup>113</sup>

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112 See generally SHLOMO SVIRSKY, LO NECHSHALIM ELA MENUCHSHALIM (NOT FALTERING, BUT FALTERED) (1981); Yifat Bitton, *Finally, Our Brown! (?)*, 45(2) ISR. L. REV. 267 (2012); BRYAN K. ROBY, THE MIZRAHI ERA OF REBELLION: ISRAEL'S FORGOTTEN CIVIL RIGHTS STRUGGLE, 1948-1966 (2015), and additional sources *supra* note 50.

113 See CARL SCHMITT, THE NOMOS OF THE EARTH 46-47 (2006):

We must remember that, both externally and internally, this fundamental process of land-appropriation preceded the distinction between public and private law, public authority and public authority, *imperium* and *dominium*.

The claims of Palestinian refugees were not primarily articulated as private claims of foreign nationals against Israel. They were also most often not articulated as claims of Palestinian citizens of Israel against their own government. They were, rather, represented by the Palestinian national movement as claims of the Palestinian nation against the Israeli presence in Palestine (often without recognition of Israel as a state).<sup>114</sup> This is not only the result of Israeli choices. The Palestinian national movement largely participated in the dynamic of internationalization of refugee claims. For the Palestinian national movement, the refugees were an international issue, and their plight would have to be addressed internationally. While this may be true for a large part of the Palestinian refugees—those who have not obtained Israeli citizenship—it is not true for all of them. As I have emphasized, a part of the Palestinian people remained within Israel. While they are not normally thought of as refugees, many were displaced within the territory that became Israel.<sup>115</sup> Collectively, they suffered enormously from the broader Palestinian displacement, which has solidified their position as a lower class of Israeli society.<sup>116</sup> The historical harms to Palestinians who became Israeli citizens should stand on their own, as claims of citizens against their own government. Instead of being internationalized, they can be framed as claims that are also about civic equality and distributive justice.

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Land-appropriation thus is the archetype of a constitutive legal process externally (*vis-à-vis* other peoples) and internally (for the ordering of land and property within a country). It creates the most radical title, in the full and comprehensive sense of the term *radical title*.

Compare with Kohn's quotation from James Fintan Lalor, *supra* note 19. For an excellent and influential analysis of how the end of colonization led to a global renegotiation of these two domains, property and sovereignty, see also QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018).

114 See DIANA ALLAN, *REFUGEES OF THE REVOLUTION: EXPERIENCES OF PALESTINIAN EXILE 3* (2014) (explaining that “In the discourses of both nationalism and international diplomacy, refugees have been reduced to symbols of a historical and political grievance awaiting redress, and their political and legal claims are almost always discussed with reference exclusively to Israel”).

115 See Berda, *supra* note 87.

116 See the essays collected in NUR MASALHA, *IS ISRAEL THE STATE OF ALL ITS CITIZENS AND “ABSENTEES”?* (1993); Israel's Proclamation of Independence (1948) grants Arab citizens of Israel “full and equal citizenship.” However, it is questionable whether this formal equality remains after the 2018 enactment of the Basic Law: Israel – The Nation State of the Jewish People, 5779-2018, SH No. 2743 p. 898, which provides (Article 1(c)) that “The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People.”

Likewise, the claims of Mizrahi citizens who had lost properties in Arab countries were not cast as private claims of individual Israeli citizens against foreign states.<sup>117</sup> They were also mostly not cast as claims of individual Israeli citizens against their own government. In order to be internationalized, they were first nationalized: Israel took the role of representing its own Mizrahi citizens against other countries. But that representation was often not in the best interest of its beneficiaries. Representing the best interest of Mizrahi citizens would mean seeking compensation for Mizrahi claims without prejudice to Palestinian claims. If Israel had really sought to represent Mizrahi claims, it should have, for example, sought to resolve the issue through diplomatic relations with the Egyptian government—by appeal to Article 8 of the peace agreement, or otherwise. But Israel never initiated proceedings under the claims commission initially intended for that purpose. An even more appropriate way in which Israel could “disentangle” Mizrahi and Palestinian displacements would be to directly compensate Mizrahim for the wrongs they have suffered in other Middle Eastern countries. Like an insurer, Israel would then appropriately have ownership over Mizrahi claims, and it could seek to obtain indemnification without having its Mizrahi citizens bear the financial risk.

In other words, one should assume (a legal fiction) that when their properties were nationalized Mizrahi citizens of Israel held an insurance policy granted by the Israeli government. (In reality, they were typically not yet holders of Israeli citizenship.) One should further imagine that confiscations were precisely what the insurance was for. The group should now be able to activate their policies and recover. This does not mean that the insurer (the Israeli government) will have to simply internalize the losses. After covering the damage its insurance holders suffered, it can turn to the liable parties and demand they cover the expenses. To be sure, this analogy does not work for Palestinian citizens. In their case, there is no other government that can be held liable. The Israeli government should pay them compensation and internalize the costs, or in other words, transfer them to the Israeli taxpayer.

From the present perspective, the *internationalization* of claims can no longer be justified. “Delinking the accounts” thus amounts to a program of reparations for historical wrongs on the domestic rather than the international sphere.<sup>118</sup> These would come in the form of compensation for Palestinian

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117 This of course does not mean that, in various instances, Mizrahim did not cast their own claims as private ones. See, e.g., Raphael Bigio et al. v The Coca Cola Company (2<sup>nd</sup> Cir. 2012).

118 On the politics of the distinction between the terms “compensation” and “reparation,” see Rex Brynen, *Compensation for Palestinian Refugees: Law, Politics, and Praxis* 51(1) ISR. L. REV. 29, 32 (2018). He explains that

and Mizrahi citizens of Israel who had been harmed by the decision to pit their claims against one another. Such a program would also help advance Israel towards a less stratified social reality. Palestinian citizens who have been wronged by the *Nakba* should enjoy reparations, as part of fulfilling the fiduciary duty that the state has toward its own citizens. Mizrahi citizens who have valid claims against Middle Eastern states should be able to receive indemnification, in return for transferring their claims to the government.

## CONCLUSION

Surely, objections to such a program abound. I cannot develop its details here, but the devil would surely be there. I would nevertheless like to conclude by addressing the most fundamental points of contention.

First, majority support cannot be mustered for the kind of policy changes, including legislation, that would have to be put in place. Ever since Israel's founding, many citizens have clearly rejected the notion that the Palestinians were wronged at Israel's founding. Indeed, this Article does not seek to follow the constraints of existing political realities, but rather to offer an alternative, more desirable path. On the more optimistic side, I have emphasized that in recent years, public awareness of the dispossession that Mizrahim had suffered in Middle Eastern countries has constantly grown. While "disentangling displacement" is *per se* unlikely, it is imaginable that the movement to compensate Mizrahim will grow, and that its urgency and material demands will render eternal deferral no longer tenable.

Second, the outlined program may appear to entail a huge transfer of public funds from their present allocation to two groups in particular—Mizrahim and Palestinians. This may naturally draw opposition from members of other groups, including Ashkenazim. Moreover, while I have argued that this Article advances corrective justice *and* distributive justice, their mutual consistency is far from obvious. A program along the lines I have suggested may benefit the most well-off Palestinians and Mizrahim—those who belong to families who historically owned real estate and other resources. And it may remove public funds from poverty-stricken groups who have not historically suffered

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Palestinian and many international legal experts increasingly prefer the term 'reparations', a category which might include either the full or partial restitution of former refugee properties in addition to monetary or other payments to refugees who were dispossessed. UN General Assembly Resolution 194(III), however, speaks of compensation. Many Israelis prefer this term in that it carries less implication of past wrongdoing and moral responsibility. 'Reparations', by contrast, is associated by some with German payments to Israel and individual Jews after the Second World War.

from the wrongs I have described (think, for example, of Jewish Ethiopian immigrants to Israel). These are indeed potentially significant challenges. However, they are not premised on a denial of the need to grant compensation or reparation for historical wrongs. Once the latter principle is acknowledged, striking a balance between corrective and distributional outcomes will have to be carefully considered.

A related objection may come from a Palestinian perspective. Viewing historical wrongs against Palestinians through the prism of their Israeli citizenship may provoke opposition from Palestinians. After all, a large part of the Palestinian people, including many descendants of refugees, remain under Israeli occupation and siege in the West Bank and Gaza; not to mention the *shatat* (Palestinian diaspora), a large part of which still lives in refugee camps or suffers from statelessness. An effort to isolate the relatively minor dispossession of Palestinian citizens of Israel and address the inequality they suffer from may even be perceived as an Israeli strategy of “divide and govern.” This, however, is a misguided argument. Equality for the Palestinian citizens of Israel does not in and of itself change the status of any claims other Palestinians have. In practical terms, it will have the result of increasing the economic and political power of a part of the Palestinian people. The newfound power could then be used to oppose the oppression of other parts of the Palestinian people.

The understanding of citizenship as a negation of persecution and a haven for Jewish refugees did not have to come with the hierarchical structure of citizenship this Article has traced. If we can find a path to disentangle the three displacements, perhaps our citizenship will one day reflect a recognition of each on its own terms.