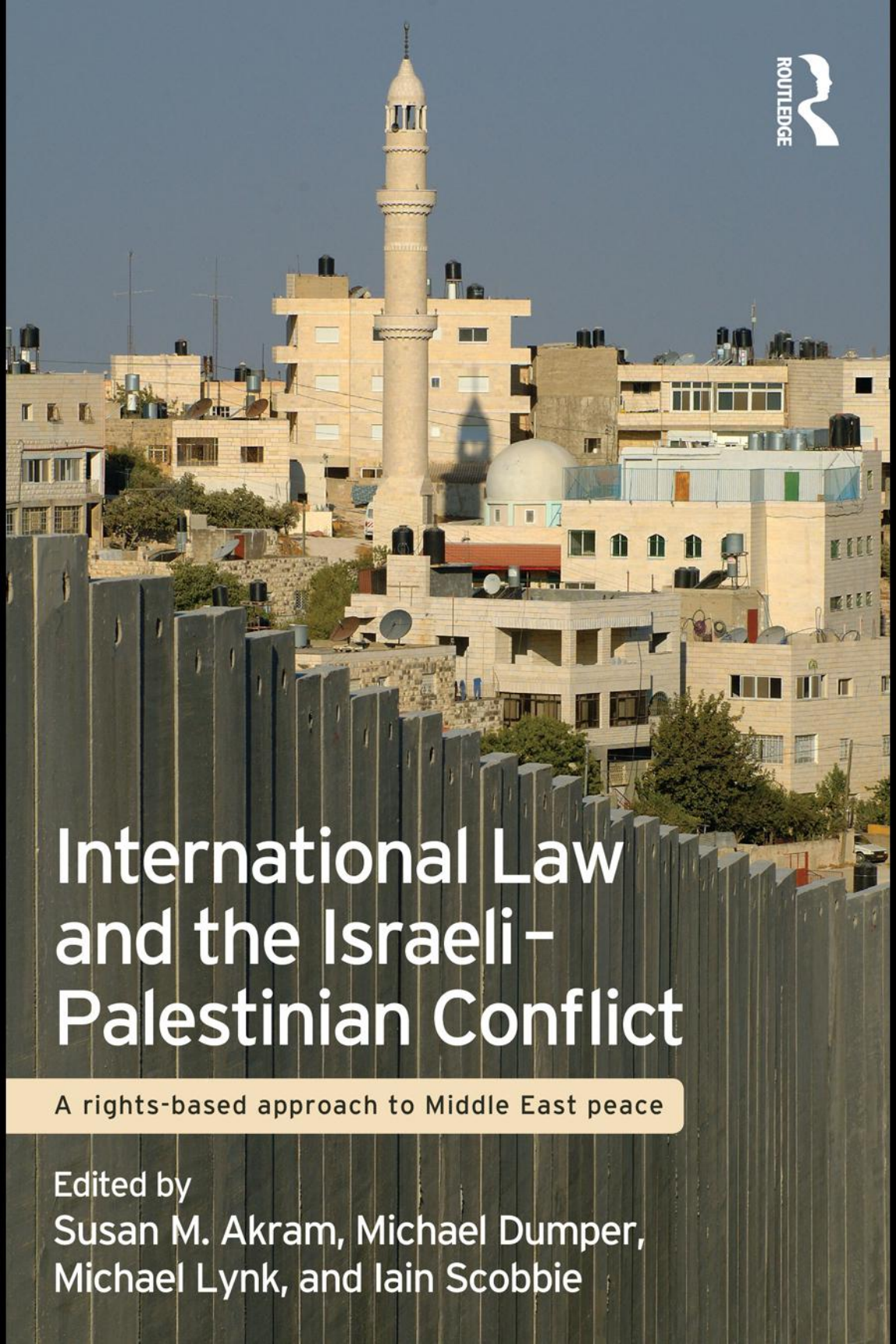




International Law and the Israeli- Palestinian Conflict

A rights-based approach to Middle East peace

Edited by
Susan M. Akram, Michael Dumper,
Michael Lynk, and Iain Scobbie

INTERNATIONAL LAW AND THE ISRAELI–PALESTINIAN CONFLICT

The Israeli–Palestinian conflict has long been intertwined with, and has had a profound influence on, the principles of modern international law. Placing a rights-based approach to the Israeli–Palestinian conflict at the centre of discussions over its peaceful resolution, this book provides detailed consideration of international law and its application to political issues.

Through the lens of international law and justice, the book debunks the myth that law is not useful to its resolution, illustrating through both theory and practice how international law points the way to a just and durable solution to the conflict in the Middle East. Contributions from leading scholars in their respective fields give an in-depth analysis of key issues that have been marginalized in most mainstream discussions of the Israeli–Palestinian conflict:

- Palestinian refugees;
- Jerusalem;
- security;
- legal and political frameworks;
- the future of Palestine.

Written in a style highly accessible to the non-specialist, this book is an important addition to the existing literature on the subject. The findings of this book will not only be of interest to students and scholars of Middle Eastern politics, international law, International Relations, and conflict resolution, but will be an invaluable resource for human rights researchers, NGO employees, and embassy personnel, policy staffers, and negotiators.

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INTRODUCTION

*Susan M. Akram, Michael Dumper,
Michael Lynk, and Iain Scobbie*

Introduction

Athenians: “You know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”

Melians: “You should not destroy what is in our common protection, the privilege of being allowed in danger to invoke what is fair and right . . . And you are as much interested in this as any, as your fall would be a signal for the heaviest vengeance and an example for the world to meditate upon.”

*Thucydides, History of the Peloponnesian War*¹

The precepts of modern international law and the decades-old Israel–Palestine conflict have had a long, tangled, and disquieting relationship. Born at the same time in the immediate aftermath of the Second World War, and shaped by some of the same social forces unleashed by the War, the two phenomena have matured in the shadow of each other. Yet, while one has developed into a respected and substantial body of universal legal principles, the other has metastasized into a destructive struggle that has contaminated the entire Middle East and beyond. The tragic irony is that the Israel–Palestine conflict has contributed decisively to the content of modern international law in a number of significant areas – giving enhanced meaning to such concepts as belligerent occupation, the rights of refugees, the prohibition on the acquisition of territory by conquest, the legal status of civilian settlements in occupied lands, the concept of terrorism, and the rules of war and resistance – while its numerous victims have received few of the benefits that the emerging rule of law on international conflicts has promised to endow.

Between 1947 and 1967, the UN’s role in the Israeli–Palestinian conflict was significant: in November 1947, it endorsed the partition of Palestine into a Jewish

and a Palestinian state; as the initial war was winding down, it sponsored the 1949 armistice negotiations that led to an uneasy truce; in 1950, it established the agency – commonly known by its acronym, UNRWA – which would offer a variety of vital services to the Palestinian refugees who were expelled or had fled from their homes in the 1947–9 war; and it sponsored the international peacekeeping initiative following the 1956 Suez war. In the aftermath of the Israeli victory in the June 1967 war and the multifold consequences of the ensuing occupation and the regular ruptures of regional instability, the United Nations (UN) substantially deepened its involvement in the conflict, albeit with few tangible results.

In March 2002, Kofi Annan, the Secretary-General of the United Nations, stated to the state leaders and diplomatic representatives gathered at a meeting of the Arab League in Beirut that: “There is no conflict in the world today whose solution is so clear, so widely agreed upon, and so necessary to world peace as the Israeli–Palestinian conflict.”² Annan was referring both to the general body of international law as well as the scores of specific resolutions adopted by the Security Council and General Assembly on the conflict since the late 1940s. His affirmation of the centrality of law to reaching a just and lasting peace in Israel/Palestine established a critical link between a rights-based approach and the solution to the Palestinian–Israeli conflict. Central to the approach of this book is the necessity of adherence not only to the aforementioned resolutions, but to the legal principles of the *United Nations Declaration of Human Rights* and other rights-based international agreements and covenants. In these principles and resolutions are the contours of a just and lasting resolution to this malignant conflict: self-determination for the Palestinians in a viable and true state of their own; security for Israel and acceptance by its neighbours; an end to the Israeli occupation and the return of all the territories conquered in the 1967 war; the removal of all the settlements constructed by Israel in the occupied territories; a creative solution to the status of Jerusalem that recognizes the legitimate claims of Jews and Palestinians; justice for the millions of Palestinian refugees in accordance with their substantive rights.

In recent decades, there has been an accelerating trend to seek resolutions to major conflicts by reference to international legal principles. Such major regional conflicts as those in *Indochina* (Comprehensive Plan of Action for Indochina) in the 1970s; *Central America* (the CIREFCA agreement in the 1980s); the *Balkans* (Dayton Agreement for Bosnia-Herzegovina); *South Africa* (the entrenchment of a power-sharing constitution and a reconciliation process); *West Africa*; and the *Great Lakes region of Africa* in the 1990s, have seen final peace agreements shaped by the emerging concepts in an international legal framework. In these conflicts, and others, such concepts as sovereignty, war crimes tribunals, reparations and compensation, new constitutions with human rights guarantees, the orderly settlement of property claims, the return of refugees and displaced civilians, minority rights, and the building or rebuilding of the rule of law have been influential features in the agreements. In reviewing the issues that had to be resolved in these conflict settlements, one of the key factors in their durability is the international legal

frameworks on which they are based. In fact, incorporation of a law-based framework may well be the single most important precondition for a lasting resolution to a conflict.

In a malignant struggle where both regional and international political will has failed to bring peace, a rights-based approach – as Annan recognized – has much to offer. A solution to the Israel–Palestine conflict that would lead to a just and lasting peace is not difficult to find. But such a solution would have to be based on the recognized rights of those who live there, rather than allowing the inequities of power politics to continue leading the Middle East to yet another morass. A rights-based approach requires the parties to a conflict to resolve their differences, and to build their new relationship, through the cornerstone principles of national, human, and individual rights which have emerged since the Second World War. This approach – which emphasizes equality, dignity, social and political rights, reconciliation, and human security – has become an integral part of the successful settlement of recent conflicts throughout the world. While the application of the rights-based approach requires flexibility to the circumstances of each particular conflict, it insists that rights are inherently possessed by individuals and peoples, and this provides them with the authority to demand their fulfillment.

In the Middle East, a rights-based approach based upon international law is an essential component for the success of any effort towards a comprehensive peace settlement for the following reasons:

- First, as stated by Kofi Annan the Israeli–Palestinian struggle is the most international of international conflicts. The world community, largely through the United Nations, endorsed the creation of the State of Israel, has cared for the millions of Palestinian refugees for five decades, closely observed the ongoing conflict, and has been intimately engaged in the region through diplomatic initiatives, massive arms sales and peacekeeping missions. Thus, the principles of international law and internationally-recognized rights are deeply engaged;
- Second, there is a strong international legal and political consensus that the Israeli occupation and annexation of Palestinian territories since 1967 is illegal, that the Palestinians are entitled to a viable state on these territories, that Israel is entitled to security within recognized borders, that the Palestinian refugees are entitled to a just solution, that settler-implantation is indefensible, and that violence directed towards civilians is wholly illegitimate;
- Third, there is a yawning gap between the extraordinary contribution that the Middle East conflict has made towards developing international law (primarily through UN resolutions, diplomatic statements, and scholarly comments), and the strange muteness by those who manage the conflict to meaningfully insist that any final settlement of the Middle East conflict must be shaped by the recognized rights of those who live there;
- Fourth, applying a rights-based approach would finally create something close to a level playing field at the Israeli–Palestinian bargaining table, and thus ensure

a real chance for peace. As long as unequal power politics guide Middle East peacemaking, the world will continue to see political agreements and peace proposals that are not only lopsided, but are unworkable precisely because they are so lopsided;

- Fifth, only international law can provide impartial definitions of acceptable behaviour that are universally endorsed. In a world torn by ethnic, religious, ideological, and nationalist struggles, only a rights-based approach is grounded upon principles and language that are universally accepted. As well, only a rights-based approach can provide viable examples of best practices from the successful settlement of comparable conflicts elsewhere; and can remain removed from the competing ethnic, religious, or nationalist historical narratives of victimization and of righteousness.
- Sixth, grounding a final settlement upon a rights-based approach would contribute significantly towards enhancing human security and good governance not only in Israel and Palestine, but more widely in the region as well. Only by implanting the rule of law – starting with final settlement issues, and continuing with the architecture of government and civil society, and finally with the relationships between unhappy neighbours – can peace have a realistic chance of being sustained and human security being ensured and enhanced.

As mentioned above, there has, in recent years been a rapidly-accelerating trend to seek solutions to major conflict situations by reference to international legal principles. States, private actors, and international bodies have adopted this approach for the simple reason that international law – particularly international human rights and humanitarian law – is widely accepted as providing the minimum guarantee of justice and fairness that a politically based process cannot provide by itself. For the same reason, a rights-based, or law-focused framework, is far more likely to be acceptable to a broad set of stakeholders to any conflict than a framework based on power politics. In practice, a rights-based framework is more likely to provide stability, acceptability, and durability to conflict resolution.

The Palestinian–Israeli conflict represents a marked departure from the trend towards incorporation of an international law framework into negotiations and the search for solutions. Indeed, it remains a zone of legal exceptionalism. Binding resolutions are scorned, Security Council investigations are rebuffed, advisory opinions from the International Court of Justice (ICJ) go unheeded, and the obligations of international conventions and treaties are dismissed. In contemporary terms this was seen by Israel’s initial outright refusal to co-operate with the UN fact-finding team in the aftermath of the recent Gaza conflict, Operation “Cast Lead.” Of the relevant laws that are heeded, most are interpreted wholly without reference to the Palestinians. This obstructionism fails not only the requirements of law, but also the demands of realism. No conflict can be transformed into an equitable and viable resolution where one party can successfully plead exemptions and special entitlements forbidden to others. The lack of political will to enforce compliance with international law and universally recognized rights – the result of Israeli

obstinacy, American obeisance, United Nations paralysis, Arab schisms, and Palestinian impotence – has allowed the matter to fester for more than five decades. Besides eroding the efficacy of international law, the irresolution of this conflict has destabilized the entire region, fueled the tensions between the West and the Arab and Muslim worlds, perpetuated the world's largest and longest-lasting refugee problem, adversely affected the global economy, and consumed an inordinate amount of diplomatic oxygen and goodwill.

Despite the hiatus in progress in the peace negotiations since the election of a HAMAS-dominated Palestinian Authority legislature in 2006, the final status issues – Jerusalem, refugees, borders and sovereignty, resources, and settlements, among others referred to in the Roadmap, sponsored by the Quartet (US, Russia, UN, and EU) – are still scheduled to become the focus of negotiations between Israel and the Palestinians. An equitable and compassionate resolution of each of these issues can be found in a rights-based approach, but there is little evidence that the Quartet sponsoring the Roadmap has sought to be guided by these principles. The Roadmap itself makes only a passing mention of international law (by referring to UNSC resolutions 242, 338, and 1397), while ignoring the multitude of other, more specific and more pertinent solutions and obligations. (Other recent peace proposals – such as the *Geneva Accord*, announced in October 2003 by non-governmental figures from both sides; the *Ayalon–Nusseibeh Statement*, issued in 2002 by a former head of Shin Bet and a senior Palestinian academic; and the unilateral *Sharon initiative* of April 2004 – also suffer from the same omission.) Even if the Roadmap falters, which despite the best efforts of the Obama administration in the U.S.A. appears possible, the final settlement issues that divide the parties will remain on the front burner for any subsequent peace effort.

The failure of parties to reach settlement through negotiations and the continued spiral of violence has revealed the extent to which power politics is unable to bring a just and lasting peace to the Middle East. Thus, the time is ripe for those committed to human security, to a compassionate peace in the Middle East, and to the international rule of law to advocate why a rights-based approach must be a central feature of any negotiations designed to reach a final, just, and lasting settlement between Israel and the Palestinians. Three factors in particular are present which can shape a final peace settlement based on rights. First, the Advisory Opinion issued in July 2004 by the International Court of Justice addressed a number of the outstanding legal and political issues in the Palestinian–Israeli conflict, and strengthened the framework for a rights-based approach. Second, the recent emphasis by the United Nations on rules-based and rights-based approaches towards settling international conflicts (for example, see Kofi Annan's speech on the centrality of the rule of law, delivered at the opening of the UN General Assembly in September 2004) bolsters the position of those who emphasize rights as the cornerstone negotiating principle in resolving the Middle East conflict. And third, there is recognition, at least on the rhetorical level, among a number of international observers of the recent Middle East conflict that the Oslo process faltered and expired primarily because of a missing centerpiece that would bind all parties; most

of these observers have identified the commitment to rights as the absent centerpiece.

This book is intended to be used as a tool in a broader campaign to place a rights-based approach at the core of all future peace plans, negotiations, and popular advocacy by non-governmental organizations (NGOs) in the region. This will not be an easy path. The principal powers in the Middle East conflict – Israel and the United States – have neither an interest nor a commitment to applying and enforcing a rights-based approach. Those committed to the application of international law will be advocating rights against power. But, then, every significant struggle for human dignity and equality in modern times has faced the same barriers, and used the same rights-based tools, to achieve their objectives.

The collection of essays in this book draws on the expertise of more than a dozen internationally recognized scholars, all experts in their fields, in order to provide a text for reference and to further the debate over the best way to reach a just and equitable solution. The topics covered in the individual chapters are wide ranging; from the core, or in the parlance of negotiations “final status” issues of the Israeli–Palestinian conflict, to security negotiations and the application of international law in the Palestinian Authority. The chapters have been integrated on the basis of a common adherence to the principles of the rights-based approach to conflict resolution that form the central thesis of the book. They are grouped into four parts: Core issues: Refugees and Jerusalem; Security; Legal and political frameworks for a durable peace; and finally, Debating the future.

In Chapter 1, Susan Akram begins with the central issue: the study of the Palestinian refugee population, offering an analysis of their current status and the prospects, or lack thereof for a durable solution to their plight. In contrast to the assessment in the following chapter by Scott Custer, Akram describes a sizeable “protection gap” for the refugees, a product of their ambiguous legal status which severely impinges on their physical protection and the protection of their rights. The legal and physical vulnerability of the refugee population, who remain bereft of legal status in many “host” states, is compounded by the extra-legal impediments to a satisfactory resolution of their situation, primarily propagated by Israel. In an exemplary expression of the rights-based approach in international law, Akram presents the Israeli obstruction of any potential refugee repatriation as having no basis in, and indeed contravening, international law.

In Chapter 2, Scott Custer, a former legal advisor to UNRWA, turns to a study of the assistance and protection offered by UNRWA to Palestinian refugees. Custer offers a critical comparison of the activities of both UNRWA and UNHCR that counters the accusations of ineffectiveness that have been frequently leveled at UNRWA. While recognizing the deficiencies inherent in the original “assistance-centric” UNRWA mandate, he contends that the agency has broadened its mandate out of necessity in order to include the protection of the legal and human rights of the refugees. The protection offered by UNRWA, Custer argues, is equal to what any other agency could provide under the same conditions. The conclusion of this argument is that the evolution of the UNRWA protection mandate for refugees,

protecting their legal and human rights, is a central part of the rights-based approach to the resolution of the Israeli–Palestinian conflict that is advocated in this text.

The resolution of the Palestinian refugee issue is a primary concern when addressing the Israeli–Palestinian conflict. The potential mechanisms for resolution are enshrined in international law, particularly human rights law. In Chapter 3, Terry Rempel and Paul Prettitore examine the core principles of restitution and compensation, which underpins UN attempts to address refugee crises, particularly for Palestinian refugees. Their discussion is centered on the ability of the rights-based approach to restitution and compensation to provide a viable normative solution to the Palestinian refugee issue. Despite the inherent practical difficulties in providing restitution and compensation, this approach is bolstered by an agreed framework of UN standards and principles which have been utilized, with varying degrees of success in post-conflict arenas, such as Bosnia, Kosovo, South Africa, and Mozambique. Despite the current hindrances, Rempel and Prettitore maintain that restitution and compensation can easily be applied as a normative solution for Palestinian refugees if legislative and judicial changes regarding land reform in post-conflict arenas can be effectively utilized.

The fourth chapter turns to the second core issue: Jerusalem. Mick Dumper continues the theme of the application of international law. Despite the large corpus of international law concerning Jerusalem, Dumper illustrates the lack of consistency and high level of ambiguity that surrounds international legal pronouncements on Jerusalem. Central to this chapter is the practical contrast that this legal ambiguity has produced. While it has allowed Israel to extend total functional control over the city, it has not conferred any legitimacy or recognition of the Israeli position by the international community. Dumper elucidates the twofold nature of the “constructive ambiguity” in international law, which, if exploited by negotiators, may provide scope for the interests and rights of both parties to be accommodated in the final resolution of the Jerusalem issue.

The following two chapters comprise Part II on security. In Chapter 5, Stephanie Koury returns to the subject of self-determination. She offers an analysis of ICJ advisory opinions in different post-colonial areas, including Namibia, Western Sahara, and Palestine, and the legal and political consequences of the rulings. In her chapter, Koury discusses the relatively high level of ICJ and UN support for self-determination in Namibia and Western Sahara, and contrasts the initially low amount of support garnered for an inalienable right of self-determination in Palestine. The role of the ICJ is central to the comparative analysis, documenting the relative lack of ICJ involvement in Palestinian affairs until the twenty-first century, in comparison to the prevailing legal and political strategy of early ICJ involvement in other post-colonial arenas and support for self-determination rights.

In Chapter 6, Omar Dajani presents a study on the implementation of international law in Israeli–Palestinian security negotiations. The background to his work shows the balance of international law regarding security to be weighted in favour of the Palestinians. However, Dajani considers that the complex security negotiations which have been ongoing since the Oslo Accords have ignored international law

and have given a strategic advantage to Israel. This results in primacy being accorded to Israeli security at the expense of Palestinian sovereignty, rights, security, and territorial congruity. The rights-based approach to security presented by Dajani incorporates not only adherence to international law, it incorporates rights, negotiations, and other law-based processes that would address the unbalanced security relationship.

Part III focuses on the nexus between the legal and political. In Chapter 7, John Quigley examines the legal implications of self-determination in international law. He places self-determination in a historical context, highlighting and analyzing the opposing views of self-determination as a right, and as a principle. Particularly germane to his analysis is the issue of unresolved sovereignty in post-colonial areas, using Palestine as the prime example. This approach offers contemporary relevance in Palestine, advocating an exploration of the competing claims to sovereignty of Fatah, Hamas, and Israel. The assessment of self-determination as a fundamental right under international law is of paramount importance to the conflict in Israel/Palestine, and a key component of the rights-based approach continued in following chapters.

Iain Scobbie discusses, in Chapter 8, the legal obligations of an occupying power with regard to natural resources. In his analysis of the right of access to water resources in Palestine, Scobbie re-evaluates the traditional focus on humanitarian law, adopting an approach more grounded in economic, social, and human rights. He argues that the social and economic rights to water for a population under occupation can be seen to have a weight equal to human rights in international law. Scobbie contends that Israel's utilization of Palestinian water supplies is a serious breach of international law regarding the duties incumbent upon an occupying state, as well as the human rights of the local population, and poses a significant challenge to peace negotiations.

While the preceding chapters have directly addressed contemporary issues through a rights-based approach, thereby invoking the application of international law, Chapter 9 by Feras Milhem and Jamil Salem deals with the limited current application of international law in Palestine by both parties. This chapter illustrates the difficulty of establishing a series of legal reforms in Palestine, based on international law principles. They maintain that the challenges facing the effective rule of law in Palestine are considerable. The relationship between the PA Basic Law and international law is unclear as no formal incorporation of international law into the domestic legal system has occurred. Milhem and Salem write that this raises concerns about the implementation of fundamental UN legal principles such as human rights in Palestine. Further complicating the establishment of the rule of law in Palestine are the restrictions of Israeli military law, Palestinian political infighting and widespread corruption, proving a considerable hindrance to the implementation of a rights-based approach to political, judicial, and legal stability.

The final part, Part IV, is a contribution to the debate over the relative merits of the one- or two-state models for the future of Palestine and Israel. Chapter 10, by Ian Lustick, offers a consideration of the most commonly invoked political

framework for durable peace in Israel/Palestine: the two-state solution. In addressing the two-state solution, he considers the viewpoint of its detractors who see it as impractical and even immoral. While acknowledging the deficiencies in such an imperfect model for resolution, Lustick highlights the almost universal popularization and acceptance of the two-state model as a significant factor in its favor. The critique of the one-state alternative provided in this chapter asserts that it has not been made subject to the same rigorous examinations of its practicality and plausibility as the two-state solution, and is rife with self-disconfirming arguments, driven by rhetoric rather than logic. The impracticality of both solutions as mutually exclusive utopias is central to the discussion in this chapter.

The alternative one-state solution is the subject of the final chapter by George Bisharat. Bisharat tackles the issue of the binational one-state solution as a normative rights-based solution. That is, a solution that is based on the implementation of international law. By advocating this approach to a political framework for peace, he seeks to address the fundamental rights of all communities through the implementation of international legal rulings, and also through negotiation, similar to the views expressed in Chapter 6 by Dajani. The rights-based approach to the one-state solution is necessary, but not sufficient, requiring a pragmatic attitude to negotiations in order to provide a viable normative alternative to the shortcomings inherent in the two-state solution.

This body of work is being published at an opportune moment. The prospect of renewal of the negotiations for a solution to the Palestine–Israel conflict has received new impetus with the advent of the Obama administration in the U.S.A. One reason for the lack of progress towards a solution in such negotiations has been that the security-orientated approach being pursued by policy makers hitherto has failed. Such an approach is based upon the existing imbalance of power between Israel and the Palestinians and therefore contains within it many unresolved grievances and is a recipe for further instability and oppression. A rights-based approach provides surer foundations for a lasting peace based as it is on justice and equity. The body of expertise presented in this book will contribute to our understanding of what such an approach comprises and what its implications are for policy makers, the donor community, and activists.

Notes

- 1 Translated by Richard Crawley (London: J. M. Dent, 1963), Chap xvii.
- 2 U.N. Doc. SG/SM/8177 (March 27, 2002).

PART I

Core issues:

Refugees and Jerusalem

1

MYTHS AND REALITIES OF THE PALESTINIAN REFUGEE PROBLEM

Reframing the right of return

*Susan M. Akram**

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Introduction

For close to six decades Palestinian refugees have been denied critical aspects of international protection, and remain today without a durable solution to their condition. Palestinians comprise one of the largest and longest-standing refugee, or “refugee-like” populations in the world – it is estimated that approximately two in five refugees in the world are Palestinian.¹ Palestinians as a nationally-identifiable population comprise the largest global population of *refugees*, *internally displaced*, and *stateless persons*. As this chapter will discuss, their situation as refugees is both similar in some aspects, and unique in other critical aspects, as compared to other global refugee populations.

Certain elements of the refugee problem are not unique to the Palestinian refugee case. Similar situations of conflict-induced mass exodus, widespread violations of human rights, institutionalized discrimination concerning nationality and property rights, are experienced by many refugees around the world and contribute to protracted refugee situations. Elements of the Palestinian refugee problem can be found in numerous mass refugee situations in Africa, Central America, Asia, and Europe.² What remains unique about the Palestinian refugee problem is the persistent and severe denial of international protection, the lack of access both to a durable solution and to the mechanisms for implementing a durable solution – minimum protection guarantees that are available over time to other refugee populations in the world. The lack of international protection towards Palestinians

A version of this chapter appears as the author’s contribution to the *Encyclopedia of the Israeli–Palestinian Conflict* (2010) Cheryl Rubenberg, ed., Lynne Rienner Publishers, and draws on prior published work co-authored with Terry Rempel. The author particularly thanks her research assistant at the American University in Cairo, Kate Burton, for her excellent research help and meticulous note editing on this chapter.

includes two key aspects: the day-to-day physical security and integrity of the person; and the longer-term durable solution to their unique condition as a refugee population. Contributing to the denial of protection to Palestinian refugees is a severe gap in understanding and implementing the key provisions of law applicable to the Palestinian case.

This chapter describes the main legal issues underlying the Palestinian refugee question, examining and deconstructing several of the key arguments surrounding the rights and principles involved in the refugee problem. Beginning with a brief summary of the contesting historical narratives of the causes of the refugee problem, the chapter discusses the relevant positions taken by both sides, and their validity as legal claims. Underlying the contentious nature of the Palestinian refugee problem is a lack of understanding about the difference between political positions and legal rights. These arguments are broadly described, separating political/philosophical positions from legal claims and discussing the actual rights involved in more detail, along with their implications for a just and durable solution to this core aspect of the Middle East conflict.

The historical roots of the refugee problem, and their relevance to legal rights

The origins of the Palestinian refugee problem can be traced to the interests of powerful western states in the Middle East region during the inter-war and post-World War II periods; the efforts to address the resettlement of large numbers of Jewish and other refugees and displaced persons after the War; and the Zionist program to create a “Jewish homeland” in Palestine. Much has been written about each of these contributing factors to the creation of the Palestinian refugee problem, but historians and social scientists disagree as to the exact causes of the refugee exodus, and why it has persisted to this day.³

The competing narratives about the origins of the Palestinian refugee problem relate directly to the Israeli position that recognizing Palestinians as refugees imputes a Palestinian “right” to return that would negate a Jewish right of return to Israel. This argument is described in varying ways: that the Palestinians were historically not a “people” with recognized rights to Palestine; that they were not forced out or expelled by the Israelis, but fled of their own volition (or in response to orders by Arab leadership to leave); that they fled as part of a war launched by the Arab states to prevent Israel from becoming a state as required by the Partition Resolution, and since Israel was the victor in that war, the Palestinians forfeited their land; that Jews were the native people of Palestine and historically its rightful owners, and in “returning” to it have redeemed it for the Jewish people, and any later claim by Palestinians cannot trump the prior Jewish claims.⁴ Intrinsically related to these arguments is the contention that the Partition Resolution was an affirmation by the international community of the establishment of a Jewish state, and that Israel has the right to maintain a state of exclusively Jewish character, or Jewish majority.⁵ Implicit in all of these arguments is a perception that recognizing

Palestinian refugees with a concomitant right of return threatens the existence of Israel as a Jewish state.

With the birth of the Zionist movement in 1897 came the program to create a “Jewish national home” in Palestine. The Zionists succeeded in obtaining passage of the Balfour Declaration by the British government, proclaiming that it “viewed with favour the establishment in Palestine of a national home for the Jewish people . . . it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”⁶

The Zionists interpreted this Declaration as a British commitment to the “Jewish people” for the creation of a Jewish state in Palestine.⁷ This interpretation is difficult to sustain for a number of reasons, not the least of which is that Britain had no authority to create a political entity in Palestine that disregarded the rights of the majority indigenous Palestinian population. The legal interpretation of the Balfour Declaration that is most consistent with the discussions between representatives of the British government and the Zionist delegations, the drafting history of the Declaration, and international law at that time, is that Britain intended to provide a sanctuary for Jews in Palestine without infringing on the rights of Palestinian Arabs or the rights of Jews residing in other countries in the world. In other words, the Balfour Declaration was meant to establish a home for Jews in Palestine, not a Jewish state.⁸

The inconsistent British commitments of, on the one hand, administering Palestine under the post-war League of Nations Mandate for the benefit of its native population and, on the other hand, carrying out the commitment of the Balfour Declaration to establish a “national home for the Jewish people” was disastrous.⁹ These policies laid the foundation for competing claims between the immigrating Jewish community and the native Palestinian population, and fighting broke out between the communities.¹⁰

When the conflict intensified between Jews and Arabs in Palestine, Britain declared unilaterally that it would quit its Mandate, and turned responsibility over the area to the United Nations. The UN General Assembly, in the face of strenuous opposition by the Arab states and Palestinian leadership, passed Resolution 181 on November 29, 1947, recommending the partition of historic Palestine into two states, one “Arab” and one “Jewish,” thus giving the Zionist plan further purported legitimacy. Although the Palestinians and the Arab states rejected the Resolution, it passed 30–17, with 9 abstentions.¹¹

Because of the impact Resolution 181 had on the events that followed, and particularly the role it had in creating the refugee problem, it is important to understand its legal character. The Resolution was a non-binding recommendation by the General Assembly for a political solution to the sudden termination of the British Mandate, the massive outbreak of violence, and the seemingly irreconcilable claims of the communities in Palestine.¹² The Resolution recommended the establishment of two states, Arab and Jewish, with economic union between them. The “Jewish” state was to be established in 56 percent of historic Palestine,

benefitting the less than one-third of the population which was Jewish that owned 6 percent of the land;¹³ the “Arab” state, benefitting the majority Palestinian Arab population, was to be established in the remaining land, and Jerusalem would be under “international trusteeship.”¹⁴

Aside from whether the General Assembly had legal authority to recommend partition of territory, let alone confer title to territory held by people who did not agree to relinquish their land, Resolution 181 did not authorize establishment of an *exclusive* Jewish state. The Jewish area was to have 498,000 Jews and 407,000 Arabs, and the Arab area was to have 10,000 Jews and 725,000 Arabs. Jerusalem was to be under “international trusteeship,” with 105,000 Arabs and 100,000 Jews.¹⁵ Thus, even in the Jewish area there would be a bare Jewish majority. Among the most important provisions of 181 are the non-discrimination provisions, which required each state to treat all of its citizens equally, that is, discrimination on the basis of race, religion, or national origin was prohibited.¹⁶ Neither did 181 authorize transfer of populations from one area to another, although provision was made to protect those who chose to move between the areas.¹⁷ Hence, the General Assembly through Resolution 181 gave no authority for an exclusive Jewish state; as such an action would constitute a fundamental violation of the UN Charter itself.

The organized Jewish community proclaimed Israel as a state on May 15, 1948.¹⁸ Following the passage of 181, and even before the declaration of the Israeli state, the Jewish militias had begun expelling the non-Jewish population from the self-declared territory of the new state, and then continued to expand into the territory that was to have been the Arab state. Months before the declaration of formal hostilities between Israel and the Arab states, armed and well-organized Jewish militias forced one-half of the Palestinian Arab population out of their towns, cities, and villages.¹⁹ During the war that followed, the disorganized and primarily unarmed Palestinian population was displaced and expelled in large numbers by the Zionist militias, using a combination of tactics: armed attacks on civilians, massacres, looting, destruction of property, and forced expulsion.²⁰

The largest number of refugees fled in April and early May of 1948 under “Plan Dalet,” the Zionist military plan to expel as many Palestinian Arabs as possible under the guise of necessity of war.²¹ One of the earliest documented massacres was that of the village of Deir Yassin of April 1948, in which 250 Palestinian men, women, and children were killed. Other massacres followed, including nine in October 1948 alone, in which hundreds of Palestinian villagers were killed and thrown in mass graves.²² The massacres had the effect of terrorizing the Palestinian population, and as more refugees fled or were forcibly expelled from their homes, Israeli forces systematically destroyed hundreds of their villages. Between 430 and 500 Palestinian villages were depopulated and destroyed, and in several key districts, no villages were left intact. By the time the Armistice Agreements were signed in 1949, an estimated two-thirds of Palestinian homes in what was the territory of the new state of Israel were destroyed, and the remaining houses were seized and occupied by Jews.²³ Israeli military forces carried out “shoot to kill” policies to prevent refugees from returning to their homes and lands. The Israeli government continued its expul-

sion policies, both within the ceasefire lines and outside, following the Armistice Agreements of 1949.²⁴

Immediately after the declaration of the state, Israel adopted measures to prevent return. The measures were incorporated in a plan called “Retroactive Transfer, A Scheme for the Solution of the Arab Question in the State of Israel.” Among the measures recommended and implemented were destruction of Palestinian Arab population centers, settlement of Jews in Arab towns and villages, and passage of legislation to prevent refugee return.²⁵ Israel also passed a series of laws defining Palestinians who had been forcibly removed from their lands or had fled as “absentees,” and their lands as “absentee properties” which were then confiscated.²⁶ Subsequent Israeli legislation converted vast amounts of confiscated Palestinian properties for the exclusive benefit of Jews, and prohibited restitution of such land to Palestinian Arabs in perpetuity. The absentee property laws also deprived Palestinians who had remained on their land and become Israeli citizens of possession of their properties, through the legal fiction that they were “present absentees” and also subject to the absentee property expropriation laws.²⁷

Prior to the creation of the Israeli state, Palestinians were the recognized nationals and citizens of the area known as Palestine under British Mandate, a status legally formalized by Mandate law that authorized the issuance of Palestinian passports. Israel’s Nationality Law of 1952 retroactively repealed Palestinian citizenship as recognized under the British Mandate, and provided that every Jewish immigrant was automatically entitled to Israeli nationality, but placed such stringent conditions on the eligibility of Palestinian Arabs for Israeli nationality that few could qualify.²⁸

Through its laws of nationality, citizenship, and land regulation, Israel denationalized the majority of Palestinian Arabs from the nationality of their homeland, permanently expropriated Arab lands, homes and collective properties, thus creating an entire population of stateless refugees. The intent and effect of these laws was institutionalized preferencing of one group of people on the basis of ethnicity (“Jewish nationality”) over another (Arab Palestinians), and legalizing discrimination against the latter in a wide range of fundamental human and civil rights.²⁹ This institutionalized discrimination has significantly affected both the creation and maintenance of the Palestinian refugee problem.

There are differing calculations of the numbers of Palestinians who became refugees or internally displaced during the 1948–9 conflict, but the best-documented calculations arrive at 750,000–800,000 Palestinian refugees, or about 85 percent of the Palestinian population from what became the state of Israel.³⁰ Today, there are three primary groups of Palestinian refugees. The largest group comprises Palestinians displaced from their places of origin due to armed conflict and the 1948 war. This includes refugees who are eligible for assistance from the United Nations Relief and Works Agency for Palestine Refugees (UNRWA), known as “registered refugees,” and those who were also displaced in 1948 but were either ineligible for UNRWA assistance or did not register with the agency. The second group of refugees – usually termed “displaced persons” – comprises those displaced for the first time from their homes in the territories Israel occupied after the 1967 conflict. The third group

includes those who were neither refugees from the 1948 nor the 1967 conflict, but who are outside of Palestine and are being denied the right to return due to Israel's discriminatory residency, expulsion, and deportation laws.³¹

The internally displaced still living in Israel or the occupied territories consist of two additional groups of Palestinians in "refugee-like" condition. The first group comprises those who remained in the "recognized borders" of Israel, who were expelled or forced to flee from their homes during the 1948 conflict or were otherwise displaced due to expropriation or demolition of their homes or transferred out of their home areas. The second group comprises persons who suffered similar Israeli actions within the 1967 occupied territories.³²

Although the historical record provides substantial evidence that the Palestinian refugees were forcibly expelled as part of a systematic plan to transfer as much of the Palestinian population as possible to make room for Jews, the contention that they left on their own has no relevance to their main legal rights as refugees: the right to return, the right to property restitution, and the right to compensation for real or personal property loss.³³ These rights will be discussed below, both in terms of their general application to refugees, and in their specific application to the Palestinian refugee case.

The definition and status of Palestinian refugees under international law

The most important questions that human rights and refugee law principles address are whether Palestinians are refugees or stateless persons under the international legal definition of those terms, and if so, what rights states must implement as a consequence of that status; whether they have a right to return to their places of origin, to restitution of property or compensation for losses; and what obligations states have to implement these or other rights in the search for a durable solution.

The problem of defining a Palestinian refugee

According to the most recent *Survey on Palestinian Refugees and Internally Displaced Persons*, compiled by Badil Resource Center for Palestinian Residency and Refugee Rights, the global population of 9.7 million Palestinians includes some 7 million persons who are refugees or internally displaced today.³⁴ The refugee figure includes 6.8 million of the original 1948 refugee population, of which 4.3 million are registered with the UN Relief and Works Agency for Palestine Refugees (UNRWA) for assistance; 834,000 refugees from the 1967 conflict; another 345,000 of the 1948 population internally displaced within Israel proper; and another 57,000 internally displaced within the 1967 occupied Palestinian territories.³⁵

Approximately 1.3 million Palestinian refugees are residents of 59 official refugee camps scattered throughout the West Bank, Gaza, Jordan, Lebanon, and Syria, established and run by UNRWA. The majority of the camp populations are 1948 refugees and their descendants, while the rest are 1967 refugees and their descendants.

UNRWA also operates another 17 “unofficial” camps to house Palestinian refugees who can no longer be accommodated in the existing official camp locations.³⁶ UNRWA’s figures give its registered refugee populations as of March, 2006 as 1,835,704 in Jordan; 405,425 in Lebanon; 434,896 in Syria; 705,207 in the West Bank; 993,818 in Gaza.³⁷ The majority of Palestinian refugees, as the numbers reflect, do not live in camps.³⁸

These categories and figures are challenged by Israeli/Zionist historical and legal narratives. Israeli narrative frequently denies the existence of Palestinian refugees in various formulations: that they abandoned their homes and thus were not nationals of the state of Israel; that they found refuge in nearby states which have the obligation to resettle them; that they have either *de facto* or *de jure* become nationals, citizens, or permanent residents of the new states in which they reside, thus no longer having a claim to being refugees even if they once did. The Israeli narrative also challenges the actual size of the Palestinian refugee population on various grounds.³⁹ These arguments relate both to diametrically opposed historical narratives as well as to differing readings of the application of international law, relevant aspects of which are addressed below.

The issue of the definition of the various categories of persons who became displaced from Palestine is a complex one. There is more than one definition of Palestinian refugee, depending on the function of the definition. The earliest record of a discussion within the UN of how to define the Palestinian refugees appears during the drafting of the General Assembly’s Resolution 194.⁴⁰ As hundreds of thousands of refugees fled or were forcibly expelled from Palestine in the wake of the Partition Plan, the UN took up the issue of its responsibilities towards them. The first action taken by the UN following the Partition Resolution, was the passage of Resolution 194 of December 11, 1948. Under Resolution 194, the General Assembly established the United Nations Conciliation Commission for Palestine (UNCCP) with a very broad mandate to resolve both the conflict and the massive refugee problem, described the refugees for whom the UNCCP would provide “international protection” and, in 194(III) paragraph 11, set out the required legal formula for resolving the refugee problem.⁴¹

Although no clear definition of “Palestinian refugee” is incorporated in the language of Resolution 194, the UNCCP’s authoritative *Analysis of paragraph 11 of the General Assembly’s Resolution of 11 December 1948*, states that: “[T]he term ‘refugees’ applies to all persons, Arabs, Jews and others who have been displaced from their homes in Palestine. This would include Arabs in Israel who have been shifted from their normal places of residence. It would also include Jews who had their homes in Arab Palestine, such as the inhabitants of the Jewish quarter of the Old City. It would not include Arabs who have lost their lands but not their houses, such as the inhabitants of Tulkarm.”⁴² This was the definition accepted by the drafters of Resolution 194 for purposes of defining the entire group of Palestinians who were entitled to the protection of the international community.⁴³

As will be discussed below, this definition is different from the universally-adopted definition of “refugee” that appears in the important international

instruments, but is consistent in the general legal understanding that a refugee is an individual meeting certain criteria who lacks the protection of his/her state of nationality or origin. It is the lack of protection from a refugee's own state that places the burden on the international community to provide "international protection."⁴⁴ This concept also underlies the extension of international protection towards persons who are stateless, that is, persons who are not recognized nationals of any state as a matter of either law or fact; and persons who are internally displaced in situations where the state of origin or nationality fails to provide protection.⁴⁵ By including the internally displaced Palestinians who had lost their homes and lands but remained in Israel in this definition, the UN drafters were recognizing the reality that such individuals, like the "refugees," were not receiving the protection of the Israeli state.

The definition of "Palestine refugees" for purposes of international protection and UNCCP's mandate is different from the definition given to "Palestine refugees" for purposes of the mandate of UNRWA, the agency providing assistance to those among the refugees who were in need. UNRWA coverage extends to registered Palestine refugees residing in UNRWA's areas of operation in the occupied Palestinian territories, Lebanon, Jordan, and the Syrian Arab Republic only.⁴⁶ For operational purposes, UNRWA has defined Palestine refugee as any person whose "normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict."⁴⁷ Palestine refugees eligible for UNRWA assistance are mainly persons who fulfill the above definition, and descendants of fathers fulfilling the definition.⁴⁸ It should be noted that this definition of refugee is necessarily restricted to those eligible to receive its aid, as the definition explicitly states that the refugee must have lost both home and means of livelihood to be eligible for registration with UNRWA. Thus, for the purposes of repatriation or compensation, as envisaged in UNGA Resolution 194 (III) of December 1948, the term "Palestine refugee" is used with a different, less restrictive meaning as compared to UNRWA's need-based definition.

The third definition relevant to Palestinians as refugees is that incorporated in two provisions of the 1951 Convention Relating to the Status of Refugees, Articles 1A(2) and 1D. The Article 1A(2) definition, which is referred to as the "universal" definition of refugee because of the almost-universal adoption by states, has been widely misunderstood in reference to Palestinians, and in relation to Article 1D's reference to Palestinians as a category of refugees; it is this ambiguity that is used to support the position that Palestinians are not "refugees" in the universal sense of that term.

Article 1A(2) of the 1951 Refugee Convention incorporates an individualized definition of refugee that prohibits a state party from returning or sending any individual to a state where she or he risks persecution for reasons of race, religion, political opinion, nationality, or social group.⁴⁹ Article 1D of the Refugee Convention has very different definitional criteria, and, although it does not mention any particular group, was meant to apply exclusively to Palestinian refugees. Article 1D states that the Refugee Convention "shall not apply to persons who are at

present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees [UNHCR] protection or assistance.” Its second sentence states: “when such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with [relevant UN resolutions] these persons shall *ipso facto* be entitled to the benefits of this Convention.”⁵⁰ Article 1D’s two clauses have been subjected to widely divergent interpretations by states, the UN, and experts in the field. The general result, however, is that Palestinians have been denied most of the minimum protection guarantees of the Refugee Convention. The most widely-held interpretation is that 1D is an *exclusion* clause, preventing Palestinians from being recognized as refugees since UNRWA is assumed to be providing them with international protection.⁵¹

Two other provisions apply to the status of Palestinians as subjects of international law, Article 1 of the Stateless Persons Convention, and Paragraph 7(c) of the Statute of the UNHCR.⁵² Both incorporate language similar to the first sentence of Article 1D, thereby precluding an extension of UNHCR’s mandate towards Palestinians as refugees, and an application of the benefits of the Stateless Persons Convention. The prevalent interpretation of these provisions has had severe consequences for Palestinians seeking benefits as refugees, stateless, and displaced persons worldwide. As a result, Palestinians have been precluded from many of the critical aspects of international protection, both in the day-to-day exercise of their human and civil rights, and in their longer-term desire for protection, intervention, and mechanisms for obtaining a durable solution to their condition as refugees and stateless persons.

The Palestinian “protection gap” and its consequences

The overall lack of a recognized legal status integrally relates to the deplorable physical and inhuman conditions in which the majority of Palestinian refugees find themselves. Although conditions on identifiable criteria do vary significantly country by country, Palestinians worldwide are in significant ways measurably worse off on the whole from their fellow non-Palestinian refugees or stateless persons in similar circumstances.⁵³ Conceptually and legally, conditions of Palestinian refugees can be viewed in two main ways: their day-to-day physical security and human needs; and their prospects for the realization and implementation of durable solutions for ending their refugee and stateless status. These two main aspects are further differentiated in two main global regions: in the Arab states, where the majority of Palestinian refugees are located, and in the non-Arab world.

Physical security, human dignity, and basic needs of Palestinian refugees within the Arab world vary quite dramatically from state to state. In the Arab regions where UNRWA operates – the West Bank and Gaza, Syria, Lebanon, and Jordan – refugees registered with the agency obtain benefits for basic survival needs. To provide assistance to the refugees, UNRWA administers refugee camp housing, allots food and clothing rations, establishes and runs primary schools, and operates medical facilities within its mandate.⁵⁴ Other rights and benefits outside UNRWA’s

mandate that are within the realm of “international protection” are left to the discretion of the host state, as neither UNHCR nor any other international agency has the authority to provide such protection to Palestinians within the Arab world. Thus, no state or agency has the authority to intervene to protect the refugees’ physical security, or to guarantee (or prevent violations of) their core human rights.

The ongoing reality for Palestinian refugees is one of extremely vulnerable conditions, particularly in the Arab world. Most states in the Arab League are not signatories to the international instruments guaranteeing the rights of refugees and stateless persons. Thus, the most important document in this regard is the 1965 Casablanca Protocol of the League of Arab States, which requires the Arab state signatories to guarantee to Palestinians in their territories the same treatment in employment, freedom of movement between Arab states, granting and renewing travel documents, freedom of residence, and rights to leave and return as they give their own nationals. In comparison to provisions of the international instruments, such as the Refugee Convention, the Casablanca Protocol provides more guarantees in a number of ways.⁵⁵

Nevertheless, the degree to which Arab states have complied with these obligations has depended primarily on the political environment affecting attitudes towards Palestinians in their territories, rather than on compliance with treaty standards. In general terms, most Palestinians in Arab states are treated like foreigners, in that they are unable to obtain permanent residence status or any kind of security of residence, even if they marry female citizens of the country or have children born in that Arab state. Movement between Arab states is extremely restricted because of lack of travel and residency documents; employment is restricted in many states, as is housing, access to education beyond primary school, and family reunification. Using this set of criteria, Palestinians in Lebanon have the worst conditions. They are restricted to living in overcrowded, substandard, unsanitary, and often dangerous refugee camps. They are denied the right to work in more than 60 professions as well as the rights to quality education and family reunification. Palestinians in Syria, on the other hand, enjoy quite favorable conditions in terms of day-to-day rights. Although they are not eligible for Syrian citizenship, they receive most of the same residency, social, education, employment, and civil rights as Syrian citizens.⁵⁶

Lack of residency rights or security of residence in most of the Arab areas where Palestinians reside has had devastating consequences for the refugee/stateless populations. Without security of residence, Palestinians have been subjected to repeated expulsion and dispossession for decades, a situation which continues today. Aside from the expulsions from historic Palestine/Israel and the occupied territories that began in 1948 and continues today, almost every decade has brought mass expulsion of Palestinians from one Arab state or another. For example, in the 1950s, Palestinian workers were expelled from the Gulf states; in the 1970s hundreds of Palestinians were expelled from Jordan in the wake of conflict arising from the Palestinian Liberation Organization (PLO) resistance movement and the “black September” massacre; more than 100,000 Palestinians were forced out of Lebanon during the civil war between 1976 and 1991; more than 400,000 Palestinians were

expelled from Kuwait during the 1990–1 Gulf War; thousands of Palestinians were forced out of Libya in 1995; and several thousand Palestinians have been displaced or expelled from Iraq since the second U.S. war on Iraq began in 2003. Palestinian refugee families have suffered multiple displacements within the Arab world due to lack of access to a nationality or citizenship.⁵⁷

In the non-Arab world, where over 500,000 Palestinian refugees reside, their physical and human condition is directly related to the host state's interpretation of the relevant provisions of the refugee and stateless persons instruments discussed above. UNHCR has recently formalized its position that in the non-Arab world it may exercise its protection mandate towards Palestinians, depending on the attitude of the host state.⁵⁸ Most states in the Western world are either signatories of the Refugee Convention, or one of the two Stateless Persons conventions, or some combination of these. Nevertheless, most states do not apply Article 1D at all, misinterpret it as an exclusion clause towards Palestinians, or apply the individualized refugee definition of Article 1A(2).⁵⁹ Generally, the result is that Palestinians are not recognized either as refugees or stateless persons in the majority of cases in the Western world, and reside in a precarious status where they are also vulnerable to multiple displacements due to their "nonreturnability." Since Palestinians are unable to regularize their status, they are subjected to prolonged detention in many cases because there is no state of nationality or habitual residence to which they can be returned. Nor do states provide them residence in fulfillment of the obligations to reduce statelessness. For example, states frequently identify Palestinians as of "unknown origin," or "unclear nationality," rather than identify them as stateless or Palestinian refugees in order to preclude the application of the provisions of the stateless and refugee conventions.⁶⁰

The legal "protection gap" for Palestinians is even more acute in terms of the ultimate resolution of the Palestinian refugee problem, a resolution which requires guarantees for and mechanisms to implement durable solutions. Since the provisions of the major instruments that guarantee rights to refugees and stateless persons are perceived as excluding Palestinians, they are left outside the norms and mechanisms by which other refugees can realize return, absorption in other states, restitution of properties, compensation, and other rights. UNHCR is the primary agency with the international mandate to work towards realization and implementation of these rights for other refugees and stateless persons. It does not, with few exceptions, exercise these rights for Palestinians. Most importantly, it does not play the key role of intervention with the state primarily responsible for causing Palestinians to be refugees and stateless persons – Israel – in seeking implementation of the solution preferred by the refugees, repatriation/return to place of origin. In the Palestinian case, UNHCR has been absent from the key role it plays in other mass refugee situations, that of developing the framework for a durable solution based on refugee choice as part of peace negotiations and post-conflict resolution. UNRWA, having no protection mandate, has been excluded from such a role with the effect that the key international mechanisms for implementing refugee return and related rights have been unavailable for Palestinians.⁶¹

The rights of Palestinian refugees and state obligations towards them under international law

What refugee rights Palestinians have under international law relates to whether Palestinian refugees are defined as refugees as a legal matter, which, as has been discussed above, is more complex than the international definition applied to other refugees. The international legal definition of refugee is, at its core, a determination about who are unable or unwilling to obtain national protection, and thus deserve the protection of the international community. Under the main international provisions that define refugees and others “deserving of international protection,” Palestinians clearly qualify, as discussed further below.

Significant recent research into the drafting history of the interrelated provisions in the Refugee and Stateless Persons Conventions and the Statute of the UNHCR reveals that interpreting these provisions to exclude Palestinians from protection guarantees is an incorrect application of the drafters’ intentions. The *travaux préparatoires* clarify the ambiguities in Article 1D and the related provisions. The UN delegates drafting these provisions reached an overwhelming consensus that Palestinian refugees deserved (and were in need of) both protection and assistance. The UN discussions reveal a consensus that Palestinians deserved special attention for several critical reasons: their large-scale persecution and expulsion as a people; the complicity of the UN itself in creating the refugee problem; and the consensus already embodied in UN Resolutions that the durable solution for Palestinians was repatriation and not resettlement.⁶²

The purpose behind these provisions was to set up a separate regime to specifically protect Palestinian refugees – through the creation of two UN agencies, the UNCCP and UNRWA – and not to dilute the particular responsibility of the UN towards them by incorporating them in the Refugee Convention/UNHCR framework that focused on resettlement. Moreover, since Palestinians as an entire people qualified as refugees in the eyes of the UN, they should not be required to meet the individualized refugee definition found in Article 1A(2) of the Refugee Convention. Article 1D was intended as a *contingent inclusion* clause that would operate to automatically bring Palestinian refugees as an entire category under the coverage of the Refugee Convention regime should either prong of the special regime – the protection and assistance provided by two agencies – fail for any reason.⁶³

Because the majority of Palestinians are considered not to meet the main refugee definition in the Convention, and are specifically excluded from the mandate of UNHCR by its Statute, they are presumed not to be “refugees” for purposes of eligibility for international protection. But the drafting history of the instruments and the mandates of the agencies relevant to the Palestinians reflect that international protection was of utmost concern to the UN for this population of refugees. The UNCCP, established by UNGA Resolution 194 in December 1948, was entrusted to provide international protection, in particular the implementation of the durable solution mandated within 194 itself. UNRWA, established a year

later, was entrusted with providing the day-to-day assistance of food, clothing, and shelter to the refugees pending the resolution of their situation. Of the two, UNCCP was clearly the agency that had the attention of the UN in its efforts to resolve both the refugee problem and the wider Palestinian Arab–Israeli conflict. The UNCCP had an indefinite mandate, while UNRWA was initially established for only three years.⁶⁴

The reasons are not entirely clear for the UNCCP losing its role as the instrument of international protection, but by 1952, the UNCCP had been reduced to no more than a small office to maintain records of Palestinian refugee property holdings. A partial explanation is that when the UNCCP was unable to implement any aspect of the durable solution required by 194 – immediate repatriation of the refugees, restitution of property, and compensation for losses – the UN determined that UNCCP was no longer able to fulfill its mandate and, in a series of budget reductions, decimated the agency. Thus, of the special, dual-agency regime set up to protect and assist Palestinian refugees, only UNRWA remained. Although UNRWA's valuable services have provided subsistence needs for Palestinian refugees for five decades, it is legally constrained from providing the main international protection guarantees to the refugees that could bring their plight closer to a permanent resolution.⁶⁵

Related to the position that Palestinians are not refugees is that they do not have any legal right to “return” to Israel that Israel is obligated to respect or implement. The political and ideological contours of this argument have been discussed above; the legal arguments that challenge a right to return will be addressed here. Opponents of a Palestinian right to return argue that Palestinians were displaced during a defensive war, that Israel has no obligation to allow them to return since they left voluntarily, that neither international human rights nor humanitarian law incorporates a right of return for war refugees, and that even if there were such a right, it applies only to the return of individuals and not to mass return. Opponents also argue that Israel as a successor state had the right to define its “nationals” to include or exclude any category of people it chose and since Palestinians became “non-nationals” under Israeli law, they had no right to return there. Opponents further claim that key UN resolutions supposedly grounding a right of return such as UNGA Resolution 194 are non-binding, that they do not, in fact, create a right of return, and that even if they did, they condition it on certain factors which have not been met. Each of the above positions negating a Palestinian right of return has been countered with significant legal authority, analysis, and state practice. Only key points of both sides of these arguments can be summarized here, with an emphasis on the refugee law dimensions of the arguments.

Palestinians voluntarily left in the war of 1948, and humanitarian law creates no obligation on Israel to permit war refugees to return.

Supporters of the Israeli position that humanitarian law does not ground a right of return claim there is no such right applying to Palestinians under treaties such as the

Fourth Geneva Convention, or under customary law. These arguments have various formulations: whether the Fourth Geneva Convention was binding on Israel in 1948;⁶⁶ whether the Israeli–Palestinian conflict is covered by the terms of the Fourth Geneva Convention at all;⁶⁷ and whether the humanitarian law principles apply if the population left voluntarily.⁶⁸

A few important points can be made about these positions. First, on the right of war refugees to return after displacement, humanitarian law makes no distinction between forcible or non-forcible displacement in guaranteeing such persons their right to return to their homes. The fact that the provisions do not specifically refer to “refugees” or “displaced persons” is irrelevant, as the key distinctions of the Fourth Geneva Convention are between protected persons (whether civilians or other categories of protected persons) or non-protected persons. The provisions regarding return cover all categories (with distinctions as to timing of return). Second, critical humanitarian law provisions that forbid the forcible transfers of individuals or groups of people from territories taken during war, require their repatriation “back to their homes” as soon as hostilities have ceased, and necessitate a return to normal community life existing before the conflict, are found both in the Fourth Geneva Convention and in the Hague Convention and Regulations which Israel has ratified and long declared applied in 1948.⁶⁹ Third, the underlying principle of prohibiting removal of civilians from their homes during conflict and requiring their repatriation immediately after the conflict has ceased, is (and was in 1948) widely considered a principle of binding customary humanitarian law, treaty obligations notwithstanding.⁷⁰

Palestinians were part of an “exchange of populations” between Israel and the Arab states as a result of the war of partition; Israel has absorbed the Arab Jewish refugees, and the Arab states are obliged to absorb the Palestinian refugees.

The arguments that there was a “transfer” or “exchange of populations” has been promoted by some prominent Israeli academics and commentators.⁷¹ This argument, however, misconstrues both the historical record and the international human rights and humanitarian principles on exile, return, and displacement. First, there is no historical support for the notion that there was an “exchange” of populations with mutual consent of the individuals or states involved. Second, although transfers of populations have taken place, they have been almost universally considered illegal under modern principles of international law. A concise statement of the state of the law on this issue is that of the UN Special Rapporteur on the Subcommission on Prevention of Discrimination and Protection of Minorities: “International law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because [these transfers are] subject to consent, this principle reinforces the prohibition against such transfer.”⁷²

Palestinians who left or fled in the war of 1948 never became nationals of the new Israeli state, and non-nationals of a state have no right to “return” under human rights treaties or UN Resolutions. Further, even if such a right of return exists in principle, it does not apply to mass refugee return, but only to individual cases which Israel has sole discretion to determine.

The arguments denying the right of return as a matter of human rights law center on the language in the International Convention on Civil and Political Rights (ICCPR), article 12(4) which states: “No one shall be arbitrarily deprived of the right to enter his own country.” A prominent Israeli academic states the argument as: “the right of return [under the ICCPR] is probably reserved for nationals of the State.”⁷³ This position does not challenge the existence of a right to return, but questions what the relationship is between the person and the place to which return is sought. Israeli academics have argued that the right of return under this provision supports a Jewish right to “return” to Israel, but not a Palestinian one, as the latter are not “nationals” of Israel under Israeli law.⁷⁴ As a matter of treaty interpretation, this reading of ICCPR 12(4) is incorrect, since the drafting history reveals that the term “own country” was chosen over the term “nationals” in order to make the connection between the individual and the territory as broad as possible.⁷⁵ The Human Rights Committee, the interpreting body of the ICCPR, states in General Comment No. 27 that:

The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them.⁷⁶

In addition to the ICCPR, human rights provisions underlying the right of refugees or displaced persons to return to their places of origin are found in the Universal Declaration of Human Rights (Art. 13), and in many other international and regional human rights instruments such as the European Convention on Human Rights (Prot. 4, Art. 3), the American Convention on Human Rights (Art. 22), and the African Charter on Human and Peoples’ Rights (Art. 12).⁷⁷ The weight of authority is that the rights in the universal instruments – UDHR and ICCPR – grant a habitual resident of territory the right to return to his/her precise place of origin regardless of current nationality or citizenship status.⁷⁸ Moreover, these instruments make no distinction between individual or mass return, and the drafting history of their provisions does not indicate that the drafters intended the provisions to apply only to individuals seeking to return.⁷⁹

Such a reading is consistent with the requirements of another area of law relevant to this question, the law of state succession. A core principle of this law is that “the population follows the change of sovereignty in matters of nationality”;⁸⁰ thus, the new state must grant nationality to all of the original inhabitants of the territory. This principle, codified in many treaties and legal decisions, appears in the UN’s authoritative International Law Commission Articles on Nationality and State Succession.⁸¹ Although a state has almost unfettered discretion in defining its citizens and nationals, it cannot violate certain recognized principles of international law, such as arbitrarily excluding the original inhabitants of the territory it acquires, or defining its citizens/nationals on a discriminatory basis. The principle of non-discrimination is a fundamental one, found throughout human rights law. Article 5(d) of the International Convention on the Elimination of Racial Discrimination (ICERD) specifically requires states “to prohibit . . . discrimination in all its forms and guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin . . . the enjoyment of rights [including] the right to leave any country, including one’s own and to return to one’s country.”⁸²

Israel is a party to all the universal rights instruments referenced here, the Fourth Geneva Convention, the ICCPR, and ICERD, and the Israeli Supreme Court has ruled that the 1907 Hague Regulations are binding on Israel; moreover, Israel has made no reservations limiting the application of these instruments on the issue of Palestinian right of return.⁸³ Thus, Israel’s massive denationalization of Palestinian Arabs on the basis of their national/ethnic origin was prohibited, and under these principles, Israel remains bound, despite the long passage of time, to remedy the denationalization and expulsion by implementing the right of return.⁸⁴

Palestinians cannot ground a right of return on non-binding UNGA Resolutions such as 194; even if they could, Resolution 194 implies only a conditional right to return, and those conditions have not been fulfilled.

The debate about whether UN Resolutions support a Palestinian right of return is misleading in that it positions UN Security Council Resolutions against General Assembly Resolutions. It is argued that the latter are non-binding and that the former do not incorporate any clear statement affirming such a right. This debate misconstrues the scope of UN resolutions, both on a refugee right of return in general, and on Palestinian refugee right of return in particular. UN General Assembly and UN Security Council Resolutions dating back more than 50 years affirm and reaffirm the *right of return for refugees* to their homes in every part of the world.⁸⁵ Quite aside from the depth and breadth of evidence available through general and particular UN Resolutions that there is a refugee right to return which all states must implement, state practice makes such a rule abundantly clear. In every part of the globe, the right of refugees to return to their homes and lands of origin, is incorporated in peace treaties, implemented individually or through mass repatriation, and recognized by all states. In fact, the right of refugees to return is one of the most, if not the most, widely-implemented and recognized right that

exists in refugee law. Taking only one decade as an example, in the 1990s an estimated 12 million refugees repatriated to every region in the world. In contrast, only approximately 1.3 million refugees were resettled during that decade.⁸⁶ UNHCR itself calculates that today less than 1 percent of the world's refugees are resettled, the overwhelming majority is repatriated or return post-conflict.⁸⁷ This is so despite 50 years of practice under the Refugee and Stateless Persons Conventions, with their emphasis on resettlement. From state and international practice alone, it is evident that under international law refugee return is the rule, and non-recognition of Palestinian refugees' right to return is the aberration.

Turning to General Assembly Resolution 194, it is the earliest resolution insisting on Palestinian refugee return, and its language must be understood in light of the state of international law existing at the time and the clarifications made by the UN drafters. The Resolution embodies a three-pronged solution in hierarchical order: return, restitution of properties, and compensation. Paragraph 11 of that Resolution states that:

the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and . . . compensation should be paid for the property of those choosing not to return and for loss or damage to property which, under the principles of international law or in equity, should be made good by the Governments or authorities responsible . . . [The UN] instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation.⁸⁸

That this language meant the Palestinian refugees *must* be permitted to return *if they so chose* is made clear both in the intentions of the UN mediator who drafted it, as well as in the discussions by the UN delegates when 194 was passed.⁸⁹ The principles of restitution and compensation of property were understood in the language "under principles of international law or equity," as the law of reparations at the time was already grounded in customary law, treaties, and a seminal decision of the Permanent Court of International Justice (PCIJ) dating to the inter-war period. In the *Chorzow Factory (Indemnity) Case* of 1928, the PCIJ established the principle that restitution was the required remedy for unlawful property taking, and only if restitution were impossible – strictly construed – should compensation be paid for property loss.⁹⁰ The *Chorzow Factory* decision made clear that reparations for property takings must, first and foremost, undo the effect of the violation, a formulation understood and incorporated in Bernadotte's language of Resolution 194. Paragraph 11 also makes return, restitution, and compensation equally enforceable, according to the refugee's own choice ("loss or damage . . . should be made good . . . under *principles of law and equity*") [emphasis added]. The "principles of law and equity" clarified in *Chorzow Factory* have been recently reiterated as the applicable law for Palestinians displaced from their property as a result of Israel's most recent expropriations to construct its massive separation Wall.⁹¹

This reading of 194 is consistent with refugee law principles in general, as recognized and implemented by states and international organs. UNHCR implements three forms of durable solution for refugees: return to place of origin, host country absorption, and third-state resettlement. As indicated above, return is the preferred solution for the overwhelming majority of refugees. However, UNHCR's implementation of any of the durable solutions is driven by the principle of *refugee choice*.⁹² The notion of international burden-sharing for refugees is meant to create meaningful and reasonable choice for refugees among safe and voluntary return, absorption, and resettlement – to the extent the latter two options are available in any particular refugee crisis.⁹³ At the same time, only return, of the three solutions, is an absolute obligation on states since no state is required to absorb or resettle a refugee – despite the provisions in the Refugee Convention encouraging them to do so – but as previously discussed, every state is obliged to permit its refugees to return home.⁹⁴ In most instances of mass refugee flows since the 1970s, all three options have been available to a greater or lesser degree, and resolutions of mass refugee flows have been most successful when all three choices have been meaningful ones for the refugees themselves.⁹⁵

For the issue of Palestinian refugee return, all of these principles have become even stronger since 1948 when Resolution 194 was passed, in that implementation and codification of return, restitution, and compensation have become more widespread. Until recently, the General Assembly also reaffirmed Resolution 194 itself on a yearly basis.⁹⁶ No other Resolution in the history of the United Nations reflects such repeated, overwhelming, decades-long international consensus as Resolution 194. State practice in general on return, and *opinio juris* as expressed through the majority of member states of the UN regarding Palestinians in particular, are conclusive that 194 has become binding as a matter of customary international law.⁹⁷

Concerning the phrasing of 194 itself, Israeli arguments interpret its language as requiring that certain conditions must be met before Palestinian refugees can seek to return. The phrase “should be permitted” has been construed as meaning that implementing return is discretionary and not a matter of rights which Israel must implement.⁹⁸ In addition, the phrases “willing to live at peace” and “earliest practicable date” are construed as conditioning return on an overall end of hostilities between Israel, the Palestinians, and the Arab states; and/or recognition by Palestinians and Arabs of Israel's “right to exist.”⁹⁹ However, the drafting history of 194 reflects that the delegates rejected language conditioning return of the refugees on the conclusion of a peace settlement between Arabs and Jews, and that their clear intention was to require return of the refugees immediately.¹⁰⁰ The evidence from the drafting discussions of 194, as well as from the subsequent resolutions which omit the phrase “wishing to live at peace” in reaffirming the right of return, is that the UN intended and understood that Palestinian refugees had an absolute, unconditional right of return to their places of origin.¹⁰¹ As noted above, from the 1960s onwards the UN resolutions on Palestinian return consistently refers to such return as a “right,” frequently calling it an “imprescriptable,” “inalienable,” or “natural” right.¹⁰²

Moreover, aside from Israel's lack of any reservation to the right of return provisions in the ICCPR or the ICERD, Israel cannot justify suspending those treaty rights by a "state of emergency," declared in 1948 and which continues in effect to this day. The ICCPR, in Article 12(4), prohibits a state from denying anyone the right to enter his country, and allows neither derogation nor limitation of this right on the basis of a declared emergency.¹⁰³ The Human Rights Committee, the ICCPR-monitoring body, has confirmed that no state may declare an emergency indefinitely as a way to derogate from its treaty obligations.¹⁰⁴ State practice on refugee return and repatriation, discussed above, moreover, shows that states cannot use general security considerations, conflict situations, or ethnic tensions, as a reason to prevent the right of refugees or returnees to repatriate should they so choose. Ethnic differences as a reason to prevent return are particularly proscribed under the human rights treaties. As the Committee on the Elimination of Racial Discrimination stated concerning Bosnian Serb efforts to prevent Muslims from returning to Bosnia-Herzegovina:

any attempt to change or to uphold a changed demographic composition of an area, against the will of the original inhabitants, by whichever means is a violation of international law and demand[s] that persons be given the opportunity to return safely to the places they inhabited before the beginning of the conflict.¹⁰⁵

The relevance of a legal framework for solutions to the refugee problem

Focusing on the precise legal principles underlying the various claims and positions concerning Palestinian right of return illustrates the importance of reinserting a rights-based framework to the discourse on this subject. Two general points can be made about the objections that have been raised to the right of Palestinian refugees to return to their places of origin. First, that the main objections that have been raised are not principled: either they are not grounded in international law, or they cannot be raised by Israel because Israel uses the same legal principles to claim those rights on behalf of Israel or Israeli Jews. Second, that the legal debate about the source or sources of a Palestinian right of return focuses more on how a Palestinian right of return could be realized without jeopardizing the "Jewish state" than on whether a right of return exists.

Aside from the specific legal issues discussed in more detail above, it is important to point out that Israel's denials of key Palestinian rights cannot be used to defeat them as a matter of law unless Israel has filed reservations against application of those rights in the treaties it has signed, or has persistently objected to the principle as a customary norm.¹⁰⁶ Israel may only claim persistent objection status when it has consistently, over time and in all situations, denied that those rules or principles are binding on it. It cannot be absolved of any obligation as a persistent objector if it uses those rules of principles for its own benefit, but denies that they apply for the

benefit of others in similar context. Juxtaposing Israeli and Palestinian rights and claims on the key principles discussed in this chapter illustrates that Israel cannot use persistent objector status to defeat the most important of Palestinian refugee rights.

Concerning the Israeli position that Palestinian refugees or displaced persons have no right of return to their homes and lands within Israeli territory, as a very general matter, it is extremely difficult to argue that Jews possess a right to “return” to Palestine after 2,000 years while Palestinians cannot exercise such a right after approximately 60 years. Israel and Zionists claim such a right, both as an individual one and as a collective one, belonging to the “Jewish people.”¹⁰⁷ The Jewish Law of Return is, in fact, grounded on the very assumption that such a right exists for Jews from everywhere in the world who claim ancient religious connection to the land but no recognized legal territorial claim.¹⁰⁸ As a legal matter, such a religious–historical claim cannot trump the uninterrupted actual territorial connection of indigenous Palestinians to their land, particularly for the hundreds of thousands of Palestinians holding deeded legal title to their properties. As for the Jewish/Israeli arguments under humanitarian and human rights law to deny Palestinian refugees return, restitution and other compensation/reparation for dispossession, property expropriation and other internationally cognizable wrongs, Israel and organized Jewry have also heavily relied on human rights and humanitarian law to claim these same rights for themselves. The prohibition against forced expulsion is one of the underlying principles that creates an obligation on states to permit victims of such expulsions to return home. Forced expulsion was already a war crime prior to 1948, had been incorporated as such in the Charter of the International Military Tribunal (IMT), and was one of the critical charges in the prosecution of Nazis on behalf of Jewish victims during the Nuremberg Tribunals.¹⁰⁹

Millions of displaced German and other European Jews also exercised their rights to return to their homes following the end of World War II, even though millions also sought asylum and resettlement elsewhere. No state claimed they did not have a right to return, whether individually or *en masse*, although property restitution and compensation were heavily contested and litigated (claims which continue to be disputed today).¹¹⁰

Concerning the related rights of property restitution and compensation, the strongest precedents for Palestinian legal claims to regain their actual properties expropriated by Israel and to be compensated for losses, are parallel Jewish property claims – not only against countries benefitting from seizure of Jewish property during World War II, but against Arab states that have expropriated property of Arab Jews following their exodus to Israel.¹¹¹ The Israeli government, as well as organizations such as World Organization of Jews from Arab Countries (WOJAC), has consistently demanded restitution of Jewish properties left behind, as well as compensation for property that can no longer be restituted, and massive claims for damages. Israel and Israeli representatives use such claims, in fact, as “counterclaims” to Palestinian refugee property claims, implicitly recognizing the legitimacy of the latter. During many of the Palestinian–Israeli negotiations, whether official or “track two,” the Israeli side has raised the demand for restitution and compensation of

Jewish properties lost or taken during the 1948 war or afterwards by Arab states, seeking to link them to Palestinian refugee demands.¹¹²

Concerning the argument that Palestinians were part of an “exchange of populations” between Israel and the Arab states as a result of the war of partition, some commentators have sought to make the claim that massive population exchanges were condoned as legal and widely practiced by states by 1948.¹¹³ Aside from the historical–factual question of whether there ever was a “population exchange,” any previous justification for “population exchanges” that involved coerced movement of peoples was put to rest by the entry into force of the IMT and the UN Charter in 1945. The related issue of Israel’s absorption of Arab Jewish refugees creating an obligation on Arab states to absorb Palestinian refugees is also not legally credible. Israel offers automatic citizenship to Jews from anywhere in the world; hence, Arab Jews leaving their homes entered Israel *as citizens*, not as refugees. As a sovereign state, Israel has great discretion in defining who will be entitled to citizenship (within the limits of the principles of non-discrimination and habitual residents found on the territory, described above), hence Arab Jews may be entitled to Israeli citizenship without any constraint under international refugee law. In contrast, no state is obligated to grant residence or citizenship to refugees, whether on a reciprocal basis or otherwise.

In similar fashion, Israeli arguments against Palestinian right of return under Resolution 194 can be applied to challenge Israel’s reliance on Resolution 181 to create and maintain a “Jewish state.” Israel has claimed consistently that Resolution 194, as a General Assembly resolution, has no binding authority, and hence does not have the force of law. No matter how many times 194’s language reaffirming Palestinian refugee rights to return, restitution, and compensation is reincorporated in new resolutions passed by the General Assembly, such resolutions alone can never become legally binding. Without a Security Council resolution to give it legal force, the right of return is nothing more than aspirational. These arguments also claim – as discussed above – that even if Resolution 194 were enforceable, all provisions of it must be enforced, such as those requiring the refugees to “live in peace with their neighbors.” Yet Israel relies on another General Assembly Resolution, 181, the Partition Resolution, to justify its very creation and existence as a “Jewish state.” This Resolution did not authorize a Jewish-dominated state that would supersede the rights of any other communities then residing in Palestine. It proposed a division of territory, with the rights of all groups to be fully preserved in both the “Jewish” and “Arab” territories. Jews and Arabs in either state would have full and equal rights as citizens in whichever state they were in, and the opportunity to move to the other territory with full and equal rights there if they so chose. It did not authorize population transfers. It described the territorial boundaries of each state, and prescribed Jerusalem’s special character as a *corpus separatum* under international jurisdiction. The Resolution required both states to incorporate the non-discrimination and equal rights provisions in a Constitution.¹¹⁴ Israel has used 181, a General Assembly Resolution, as the mandate from the international community for its creation; however, it has ignored all of the most critical provisions of 181,

expanded the territorial boundaries set out under 181 for the Jewish area, and maintained a belligerent occupation in the rest of historic Palestine, including all of Jerusalem, in direct contravention of the Resolution itself.

The second point to be made is that the common theme underlying Israeli objections to Palestinian refugee claims is that they jeopardize Israel's "right to exist." The latter position, if it is understood to mean that Israel has a right to maintain a state with a Jewish majority, and that it is entitled to institutionalize discrimination towards one religious group over any other, has no support in international law. As discussed above, Israel has never been authorized to create or maintain an exclusively "Jewish" state that discriminates against the rights of non-Jews. Resolution 181 gave no such authorization. Even though Security Council and General Assembly Resolutions have since given the *de facto* state of Israel legitimacy as part of the "vision of two States living side by side in peace and security[,]""¹¹⁵ the United Nations and treaty bodies have repeatedly decried Israel's institutionalized discrimination, belligerent occupation of Palestinian territories, expansion of settlements, lack of equal rights afforded to Jews and Arabs within the Israeli state and in the occupied territories, and denial of the rights of Palestinian refugees to return, restitution, and compensation.¹¹⁶

Clarity on the point that there is no international legal support for Israel as a "Jewish state" allows discussion of how Palestinian refugees can choose to exercise their rights to return to homes and lands, obtain restitution of their properties, and obtain compensation for losses while at the same time exercising those rights in ways that minimize legitimate fears and reconcile legitimate Israeli rights. But such discussion reorients the focus to ways and means of return and restitution, and the myriad precedents from other worldwide refugee repatriation movements that can be used to facilitate orderly and safe return and realization of property rights. It moves the discourse from the categorically impossible to what is eminently possible, with rich precedent to lead the way. Such issues as passage of time, security concerns, fundamental changes in place of origin, discriminatory legislation, inter-communal tensions, rights of secondary occupants, and conflicting property claims, are all issues that have been dealt with under either very strong or relatively clear legal principles and "lessons learned."¹¹⁷

It is critical at this juncture to reorient the discourse to a rights-based framework. As this chapter has sought to show, separating claims from legal rights illustrates which refugee rights must be incorporated in any peace negotiations and agreements for a solution for the massive refugee problem to be durable. Unfortunately, rights and principles have been set aside in all the official and non-official negotiations thus far in the Palestine-Israel case, while such rights and principles have been front and center in other negotiations involving mass refugee flows around the world. Although they are more or less well respected in other cases, the main point is that they set the framework for negotiations. In the Palestinian case, such rights and principles have been deliberately excluded from the politically-driven agenda of the negotiations. When a rights framework is reintroduced, a just and durable solution for the refugee problem may well be within reach.

Notes

- 1 Badil, *Survey of Palestinian Refugees and Internally Displaced Persons 2004–2005*, p. 46. For Badil's explanation of its refugee calculations, see <http://www.badil.org/en/documents/category/35-publications?download=135%3Asurvey04-05>. For updated Palestinian refugee figures, see Badil, *Survey of Palestinian Refugees and Internally Displaced Persons 2008–2009* (chapter 2), available at http://www.badil.org/index.php?page=shop.product_details&flypage=garden_flypage.tpl&product_id=119&category_id=2&vmcchk=1&option=com_virtuemart&Itemid=4. Although sources vary on this number, generally Palestinian refugees are said to make up either two-fifths or one-third of refugees worldwide; this discrepancy is due to a lack of a uniformly understood definition of "Palestinian refugee." See also Susan Akram and Terry Rempel, "Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees," *Boston University International Law Journal*, vol. 22, p.1, at p. 7 (2004).
- 2 See e.g., Fagan, *infra* note 93, for examples of mass refugee flows; see also Susan M. Akram and Terry Rempel, *Durable Solutions*, *infra* note 61, p. 54, "[t]he right of return is also affirmed in numerous peace agreements that have followed mass refugee crises in Africa, Asia, Central America, and in Europe."
- 3 Among the key works on the creation and causes of the Palestinian refugee problem are: Simha Flapan, *The Birth of Israel: Myths and Realities* (1988); Nur Masalha, *Expulsion of the Palestinians: The Concept of 'Transfer' in Zionist Political Thought, 1882–1948* (1992); Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* (2003); Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (1987); Michael Palumbo, *The Palestinian Catastrophe: The 1948 Expulsion of a People from their Homeland* (1987).
- 4 Such arguments are summarized and discussed in Tanya Kramer, "The Controversy of a Palestinian 'Right of Return' to Israel," *Arizona Journal of International and Comparative Law*, vol. 18, p. 979 (2001). The argument that Palestinians fled on their own, or as a result of Arab leaders' calls to leave their homes, has been maintained by traditional Jewish Israeli historians, and was the official Israeli version of events since the conflict began. Ilan Pappé, *The Making of the Arab–Israeli Conflict 1947–1951* (1994) p. 214, (citing Israeli archival reports that this was to be the official line). The official version of the war and reasons for refugee flight has now been significantly challenged by the work of the "new historians" who published their findings from recently declassified Israeli official archives. The main conclusions of the "new historians" criticizing prior historical narratives can be found in the collection, Ilan Pappé (ed.), *The Israel/Palestine Question (Rewriting Histories)* (1999), part IV "The New History of the 1948 War," pp. 169–211; Masalha, *The Politics of Denial*, *supra* note 3, chapter 2, "Israel's 'New Historians' and the Nakba: A critique on Zionist Discourse," pp. 49–63.
- 5 The claims that the "Jewish people" are an internationally recognized "nationality" entitled to self-determination is analyzed (and refuted on legal grounds) in W. T. Mallison, "The Zionist–Israel Juridical Claims to Constitute 'The Jewish People' Nationality Entity and to Confer Membership in It," *George Washington Law Review*, vol. 32, p. 983 (1964).
- 6 Balfour Declaration, written correspondence from Lord Balfour to Lord Rothschild, November 2, 1917, on behalf of the British Foreign Office. Available at Israeli Ministry of Foreign Affairs website, <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Balfour%20Declaration> (visited April 6, 2007). For a detailed analysis of the Balfour Declaration and its legality, see Mallison, "The Balfour Declaration: An Appraisal in International Law," in Ibrahim Abu-Lughod (ed.), *The Transformation of Palestine* (1971) p. 61. W. Thomas Mallison and Sally V. Mallison, "The Juridical Bases for Palestinian Self-Determination," *The Palestine Yearbook of International Law*, vol. 1, pp. 47–8 (1984).

- 7 See official interpretation of the Balfour Declaration by the Jewish Agency for Palestine, *Book of Documents Submitted to the General Assembly of the United Nations Relating to the Establishment of the National Home for the Jewish People* (1947) p. 5, cited in W. Thomas Mallison and Sally V. Mallison, "An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question," UN Doc. ST/SG/SER.F/4, p. 9 (1979).
- 8 John Quigley, *The Case for Palestine* (2nd edn., 2005), pp. 10, 17–18. Mallison and Mallison, *id.*, p. 13. H. Cattán, *Palestine and International Law: The Legal Aspects of the Arab–Israeli Conflict* (2nd edn., 1976) pp. 51–7; Cattán concludes that the Balfour Declaration was never approved by the British Parliament, see p. 54.
- 9 For the text of the Mandate of July 24, 1922, see report of the United Nations Special Committee on Palestine [UNSCOP], *General Assembly Official Records*, 2d Sess., Supplement No. 11, September 9, 1947, UN Doc. A/364/Add.1, pp. 18–22 (1947).
- 10 Quigley, *Case for Palestine*, *supra* note 8, pp. 23–31.
- 11 For the text and voting on the Resolution, see *ibid.*, p.37. For background on passage of UNGA Res. 181, see Mallison and Mallison, *International Law Analysis*, *supra* note 7, pp. 9–17.
- 12 Quigley, *Case for Palestine*, *supra* note 8, p. 37.
- 13 Quigley, *id.*, p. 36.
- 14 UN Special Committee on Palestine [UNSCOP], *The Question of Palestine*, September 3, 1947, UN Doc. A/364, Chapter 4 A, Part II (5). (1947).
- 15 *Ibid.*
- 16 G.A. Res. 181, Part I C chapter 2(2); "[n]o discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex." Although this provision did not include "national origin," it is clear that this was considered as intrinsically linked to "race" in the discrimination provisions of the Universal Declaration of Human Rights and following human rights treaties. For explanations on this, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999), pp.102–4.
- 17 G.A. Res. 181, Part 1B(9).
- 18 For the Declaration of the State of Israel of 14 May 1948, see *Israel's Written Constitution: Verbatim English Translations of the Declaration of Independence and of the Basic Laws* (3rd edn., 1999).
- 19 Historical research, and in particular, Israeli archival research, has shown conclusively that the Zionist militias carried out a policy of forced expulsion that resulted in half of Palestinian refugees becoming so prior to the entry of the Arab state forces into the conflict in May, 1948. Flapan, *supra* note 3, pp. 83–118; Masalha, *Expulsion*, *supra* note 3, pp. 176–80; Morris, *supra* note 3, pp. 287, 298.
- 20 Morris, *id.*, chapter 5 "Blocking a Return," pp. 155–96; for tactics, see Ilan Pappé, *The Ethnic Cleansing of Palestine* (2006) chapter 6, "The Phony War and the Real War over Palestine: 1948," pp. 127–45. Salman Abu Sitta, *The Palestinian Nakba 1948: The Register of Depopulated Localities in Palestine* (2001).
- 21 Morris first revealed the existence of "Plan Dalet" and the "Transfer Committee" comprising the key Jewish leaders who organized the expulsion. See Morris, *id.*, pp. 62, 135. Walid Khalidi, "Plan Dalet: Master Plan for the Conquest of Palestine," *Journal of Palestine Studies*, vol. 28, p. 1 (1988). Ilan Pappé's most recent work, however, provides a more complete picture of the extent and coordination of, and the ways and means by which the Israeli/Zionist leadership planned and carried out the mass expulsion of the Palestinian people. See Pappé, *id.*, chapters 4 and 5.
- 22 For a thorough list and description of Israeli massacres of Palestinian populations in towns and villages, based on a wide range of sources, including the Red Cross, see Abu Sitta, *supra* note 20. For the most complete assessment of the Deir Yassin massacre, see Daniel McGowan and Matthew C. Hogan, *The Saga of the Deir Yassin: Massacre, Revisionism and Reality* (1999).

- 23 Abu Sitta, *id.* Salim Tamari (ed.), *Jerusalem 1948: The Arab Neighborhoods and their Fate in the War* (1999). See also, Michael Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab–Israeli Conflict* (2003), at 4–5.
- 24 Benny Morris, *Israel's Border Wars 1949–1956: Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War* (1993).
- 25 This plan was submitted to then-Prime Minister of Israel, David Ben-Gurion, in a three-page memorandum drafted by one of the key proponents of mass “transfer” of the Palestinian population, Yosef Weitz, along with two others: Elias Sasson and Ezra Danin. The plan was adopted by Ben-Gurion as a means to solve the “Palestinian problem.” See Morris, *supra* note 3, p. 136; Fischbach, *supra* note 23, p. 12; Flapan, *supra* note 3, pp. 103–8; Morris, *supra* note 3, p. 136; Terry Rempel, “Housing and Property Restitution: The Palestinian Refugee Case”, in *Returning Home* (Scott Leckie, ed., 2003), p. 283.
- 26 Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Land Rights in Israel* (2003), p. 82; George Bisharat, “Land, Law and Legitimacy in Israel and the Occupied Territories,” *American University Law Review*, vol. 43, p. 467 (1994); Jeremy Forman and Alexandre Kedar, “From Arab Land to ‘Israel Lands’: The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948,” *Environment and Planning D: Society and Space*, vol. 22, pp. 809–33 (2004).
- 27 Forman and Kedar, *id.*, pp. 819–22.
- 28 Anis Kassim, “Legal Systems and Developments in Palestine,” *Palestine Yearbook of International Law*, vol. 1, p. 19 (1984). For the text of Israel’s nationality law, see Nationality Law, *Laws of the State of Israel*, vol. 6, p. 50 (1952), cited in Quigley, Case for Palestine, *supra* note 8, p. 126.
- 29 For authoritative UN reports that Israel has systematically discriminated against Palestinians inside and outside the 1967 Armistice borders through its nationality, return, land and other legislation amounting to gross violations of its international treaty obligations, see Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Israel, 31st to 33rd mtgs., November 17–18, 1998, UN Doc. E/C.12/1/Add.27 (1998); Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD), Israel, 52nd Sess., March 2–20, 1998, UN Doc. CERD/C/304/Add.45 (1998); Concluding Observations of the Human Rights Committee, Israel, 63rd Sess., July 15–16, 1998, UN Doc. CCPR/C/79/Add.93 (1998). See also *infra* note 116, on the most recent (2007) Concluding Observations of CERD.
- 30 See figures cited in *Final Report of the United Nations Survey Mission for the Middle East*, UN Doc. A/AC.25/6; Janet Abu-Lughod, *The Demographic Transformation of Palestine*, in I. Abu-Lughod (ed.), *supra* note 6, p. 159.
- 31 Badil, *supra* note 1, p. 47.
- 32 *Id.*
- 33 For a thorough legal discussion supporting the point that it is legally irrelevant whether Palestinians were forced to leave or fled on their own, see John Quigley, “Displaced Palestinians and a Right of Return,” *Harvard International Law Journal*, vol. 39, p. 171 (1998).
- 34 Badil, *supra* note 1, p. 48.
- 35 *Id.*, Table 2.1 p. 47.
- 36 *Id.*, p. 57.
- 37 *Id.*, p. 48. UNRWA statistics reflect only those Palestinians defined as “refugees” who voluntarily register with the agency in order to obtain relief assistance based on need. See further discussion below.
- 38 Updated UNRWA statistics available at <http://www.un.org/unrwa/publications/index.html> (visited April 10, 2007).
- 39 For these arguments, see Ruth Lapidot, “The Right of Return in International Law, with Special Reference to Palestinian Refugees,” *Israel Yearbook of Human Rights*, vol. 16, p. 103 (1986). Kurt René Radley, “The Palestinian Refugees: The Right to

- Return in International Law,” *American Journal of International Law*, vol. 72(3), p. 586 (1978). Joel Singer, “The Wrong Right: International Law and the Palestinian Right of Return,” *The Review* (2001). Donna Arzt, *Refugees into Citizens: Palestinians and the End of the Arab–Israeli Conflict* (1997) pp. 68–70. Donna Arzt and Karen Zughaib, “Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State,” *New York University Journal of International Law and Politics*, vol. 24(4), p. 1399 (1992). Justus Weiner, “The Palestinian Refugees’ ‘Right to Return’ and the Peace Process,” *Boston College International and Comparative Law Review*, vol. 20, p. 1 (1997).
- 40 G. A. Res. 194, *General Assembly Official Records*, 3rd Sess., Resolutions at 21, UN Doc. A/810 (1948). See *Progress Report of the United Nations Mediator on Palestine*, submitted to the Secretary General for Transmission to the Members of the United Nations, *General Assembly Official Records*, 3rd Sess., Supplement No. 11, September 16, 1948, UN Doc. A/648, Part One: The Mediation Effort, V. Refugees, para. 8 (1948).
- 41 See UNCCP, *Analysis of Paragraph 11 of the General Assembly’s Resolution of 11 December 1948*, May 15, 1950, UN Doc. W/45 (1950).
- 42 *Ibid.*
- 43 See *Addendum to Definition of a “Refugee”* under paragraph 11 of General Assembly Resolution of 11 December 1948 (prepared by the Legal Advisor), May 29, 1951, UN Doc. W/61/Add.1 (1951).
- 44 On the nature of international protection as a substitute for national protection for refugees, see Guy Goodwin-Gill, *The Refugee in International Law* (2nd edn., 1996) p. 206, chapter 6, “International Protection.” James C. Hathaway, *The Law of Refugee Status* (1991) p. 124.
- 45 Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (1978) pp. 46–9. See Convention Relating to the Status of Stateless Persons, April 26, 1954, 360 UNTS 117, art.1 (1954), where a stateless person is defined as one “who is not considered as a national by any State under the operation of its law.”
- 46 G. A. Res. 302 (IV), UN Doc. A/1251, p. 23 (1949).
- 47 UNRWA Consolidated Registration and Eligibility Instructions (CRI), January 1, 1993, para. 2.13. For discussion of changes in the UNRWA definition of Palestine refugee, see Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (1998) pp. 68–83.
- 48 *Ibid.*, CRI; see also *Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, July 1, 2003–June 30, 2004, *General Assembly Official Records*, 59th Sess., Supplement No. 13, UN Doc. A/59/13, para. 76, p. 28 (2005).
- 49 Geneva Convention Relating to the Status of Refugees, 189 UNTS 137 (July 28, 1951), art. 1A(2).
- 50 *Ibid.*, art. 1D.
- 51 For a thorough review of the interpretations given to this provision by UN agencies, domestic courts, and commentators, see Badil Resource Center for Palestinian Residency and Refugee Rights, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention (1D Handbook)*. See also, Susan M. Akram and Guy Goodwin-Gill, “Brief Amicus Curiae,” Board of Immigration Appeals, Falls Church Virginia, published in *Palestine Yearbook of International Law*, vol. XI, p. 32 (2002). But see, Hathaway, *supra* note 44, pp. 208–9 (“the . . . intention . . . was to deny Palestinians access to the Convention-based regime so long as the United Nations continues to assist them in their own region . . . More specifically, this exclusion clause applies to all Palestinians eligible to receive UNRWA assistance in their home region.”).
- 52 Convention Relating to the Status of Stateless Persons, April 26, 1954, 360 UNTS 117, art. 1 (1954). Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), G. A. Res. 428 (V), *General Assembly Official Records*, 5th Sess., UN Doc. A/1775, para. 7(c) (1950).

- 53 There are three ways in which Palestinians are measurably worse off than other groups in protracted refugee situations: first, the lack of any state or recognized entity legally required to provide international protection; second, the lack of state or entity with a mandate to specifically represent the refugees as an international matter, leaving Palestinians with no prospect for a just and durable solution to their plight; and third, lack of access to any enforcement mechanism that could implement their rights. For explanation of the ways in which Palestinians are measurably worse off than other refugees and stateless persons, see Susan M. Akram, "Palestinian Refugees and Their Legal Status: Rights, Politics and Implications for a Just Solution," *Journal of Palestine Studies*, vol. 31, pp. 36–51 (spring 2002).
- 54 See *Assistance to Palestine Refugees*, UN General Assembly, A/RES/60/100, 60th Sess., January 16, 2006. On UNRWA's assistance functions in policy and practice, see Badil, *supra* note 1, chapter 4. Benjamin Schiff, *Refugees Unto the Third Generation: UN Aid to Palestinians* (1995), chapter 2, pp. 13–47.
- 55 For a list and discussion of the Arab state parties to the relevant human rights conventions, and a comparison of guarantees under these conventions and the Casablanca Protocol, see Akram and Rempel, Temporary Protection, *supra* note 1, pp. 6–8, 28–30.
- 56 For a thorough review of the treatment of Palestinian refugees in Arab host states, see *ibid.*, pp. 25–6.
- 57 For an overview of Palestinian displacement from 1948 until today, including the expulsions listed here, see Badil, *supra* note 1, Chapter 1, "Historical Overview," and sources cited.
- 58 See *UNHCR Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, Office of the United Nations High Commissioner for Refugees (UNHCR), October 2009, available at <http://www.unhcr.org/refworld/pdfid/4add77d42.pdf>.
- 59 For a thorough empirical study and description of state and international interpretations, see Badil, *1D Handbook*, *supra* note 51, in particular chapters 3, 4, 5.
- 60 *Ibid.*, pp. 335–6. Akram and Rempel, *supra* note 1, p. 27.
- 61 For further comparison of UNHCR and UNRWA's roles in the Palestinian case, and a comparison of international agency protection provided in other mass refugee flows, see Susan M. Akram and Terry Rempel, "Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework," *Palestine Yearbook of International Law*, vol. XI, p. 1, at pp. 16, 25–6 (2000/01).
- 62 For a thorough discussion of the drafting history of Article 1D and the drafters' intentions in the special provisions regarding Palestinians as refugees and stateless persons, see Takkenberg, *supra* note 47, pp. 86–123. See also Akram and Rempel, Durable Solutions, *id.*, pp. 27–8. Earlier partial interpretations of the drafting history include Goodwin-Gill, *supra* note 44, p. 92. Atle Grahl-Madsen, *The Status of Refugees in International Law* (1966) p. 141. Hathaway, *supra* note 44, p. 208. Badil *1D Handbook*, *supra* note 51, p. 77.
- 63 Akram and Goodwin-Gill, *supra* note 51.
- 64 For texts of the Resolutions establishing UNCCP and UNRWA, see *supra* notes 41 and 47 respectively.
- 65 For a thorough history of the UNCCP and its mandate, see Fischbach, *supra* note 23. For a thorough history of UNRWA and its mandate, see Schiff, *supra* note 54.
- 66 See Weiner, *supra* note 39. Radley, *supra* note 39, pp. 595–9 (arguing that although Israel signed the 4th Geneva Convention, since it came into force in 1950 it did not apply retroactively to the 1948 conflict; that in any case the 4th Geneva Convention does not mention refugees or displaced persons in the provisions on repatriation after conflict; and that the provisions prohibiting forcible transfer of protected persons do not apply to non-international armed conflicts, including the 1948 war).
- 67 Yehuda Z. Blum, "The Missing Reversioner, Reflections on the Status of Judea and Samaria," *Israel Law Review*, vol. 3, p. 279 (1968).

- 68 See arguments summarized and cited in Kramer, *supra* note 4, pp. 1012–13.
- 69 Prohibition of forcible mass transfers in art. 49, Fourth Gen. Conv.; art. 43, Hague Regulations. On the applicability of the Hague Regulations in 1948, see Boling, *infra* note 70, asserting that the Regulations were “universally recognized, including by Israel, to have achieved customary status by 1939.” See Quigley, Displaced Palestinians, *supra* note 33 (arguing that the Fourth Geneva Convention applies to belligerent occupation, and since the Palestinian refugees would be returning to a territory under belligerent occupation, Israel is bound to the Convention’s repatriation provisions). See also Quigley, Family Reunion, *infra* note 79 (arguing that even if the 4th Geneva Convention did not come into force until after the conflict ended, the obligation to repatriate under art. 6(4) is ongoing, and binds Israel until the time it actually repatriates Palestinian refugees. He points out that there is no need to specify “refugees” in the Convention, since the term “protected persons” clearly includes refugees. Further, although the Israeli Supreme Court has consistently maintained that the 4th Geneva Convention does not apply, it has cited it extensively in its jurisprudence, and is bound by the customary law provisions in it, including the obligation to return refugees to their homes after conflict has ended).
- 70 On the right of victims of conflict to return to their homes as a matter of customary humanitarian law, see Mallison and Mallison, International Law Analysis, *supra* note 7, pp. 28–9 (pointing out that the right of return dates back before 1215, and was included in chapter 42 of the Magna Carta; reviewing the return provisions in each of the Four Geneva Conventions; and concluding that the right of return’s “broad ambit applies to protected civilian persons as well as to prisoners of war and disabled military personnel”). For the view of the International Court of Justice on the applicability of the 4th Geneva Convention and the Hague Regulations to Israel’s occupation policies, confiscation of land, and the right of Palestinians to return and repossess confiscated properties, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion of 9 July 2004*, <http://www.icj-cij.org/docket/files/131/1671.pdf>. For a thorough review of each of the humanitarian law provisions underlying the right of return, see Gail J. Boling, “The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis,” Badil Resource Center for Palestinian Residency and Refugee Rights, p. 28 (January 2001). For a thorough analysis of the human rights provisions, in particular, underlying the right of Palestinian refugees to return to their places of origin, see Kathleen Lawand, “The Right to Return of Palestinians in International Law,” *International Journal of Refugee Law*, vol. 8, p. 532 at pp. 544–6 (1996). See also Rex Zedalis, “Right to Return,” *Georgetown Immigration Law Journal*, vol. 6, pp. 507–8 (1992); Takkenberg, *supra* note 47, pp. 232–3.
- 71 Donna Arzt and Karen Zughaib, “Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State,” *New York University Journal of International Law and Politics*, 24/4 (summer 1992). Eyal Benvenisti and Eyal Zamir, “Private Claims to Property Rights in the Future Israeli–Palestinian Settlement,” *American Journal of International Law*, vol. 89, p. 295 (1995), see, especially, section 4(a), “Massive Relocations of Populations and their Effects on Private Property.”
- 72 The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers: Progress Report by Awn Shawkat Al-Khasawneh, Special Rapporteur, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 8, VII (B) para. 131, UN Doc. E/CN.4/Sub.2/1994/18 (1994). See *Yearbook of the International Law Commission*, A/CN.4/SER.A/1996/Add.1 (Part 2) (1996), Report of the Commission to the General Assembly on the Work of its forty-eighth session, Chapter II: “Draft Code of Crimes against the Peace and Security of Mankind” which describes how the code being developed for such crimes prohibits arbitrary mass transfer of population (see p. 49, para. 13). Also see “Existing and Emerging International Human Rights and Humanitarian Law Standards outlawing

- forcible population transfer and settler implantation,” Expert Seminar on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements 17–21, February 1997, HR/SEM.1/PT/1997/WP.5, February 14, 1997, Palais des Nations, Geneva. The report states that although the prohibition of mass expulsion is customary international law, as yet it is not codified in an international treaty (although it is in the regional European and African systems) and the sources of international law are yet to be developed on this issue.
- 73 Lapidoth, *supra* note 39. See also Radley, *supra* note 39, p. 609 (“the right of a person to ‘return to his country’ is the right of *nationals* to return to their country . . . the Palestinian refugees are, of course, not Israeli nationals, not by the state’s definition, and significantly, also, not according to the refugees’ own self-identity”).
- 74 Lapidoth, *id.* Radley, *id.*, pp. 613–14.
- 75 For a thorough review of the drafting history of ICCPR article 12(4), see Lawand, *supra* note 70, pp. 547–8.
- 76 General Comment No. 27: *Freedom of Movement (Art. 12)*, UN Human Rights Committee, November 2, 1999, UN Doc. CCPR/C/21/ Rev.1/Add.9, para. 20 (1999).
- 77 Universal Declaration of Human Rights, G. A. Res. 217A, UN *General Assembly Official Records*, 3rd Sess., UN Doc. No. A/810, art. 13, (1948). European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, Protocol 4, art. 3 (1950). American Convention on Human Rights: Pact of San Jose, Costa Rica, November 22, 1969, 1144 U.N.T.S. 123, art. 22 (1969). African Charter on Human and Peoples’ Rights, OAU doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58, art. 12 (1982).
- 78 Lawand, *supra* note 70. Quigley, *Displaced Palestinians*, *supra* note 33, p. 210. George Tomeh, “Legal Status of Arab Refugees,” *Law and Contemporary Problems*, vol. 33, no. 1, pp. 111–12 (winter 1968). Mallison and Mallison, *International Law Analysis*, *supra* note 7, p. 30, on how this ambiguous wording, if not interpreted broadly, could be used in a discriminatory manner to bar those who are not nationals or citizens.
- 79 Lawand, *id.*, pp. 541–3. Eric Rosand, “The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent,” *Michigan Journal of International Law*, vol. 19, pp. 1127–9 (1997–98). John Quigley, “Family Reunion and the Right to Return to Occupied Territory,” *Georgetown Immigration Law Journal*, vol. 6, p. 223, at pp. 236–7 (1992) and Quigley, *Displaced Palestinians*, *supra* note 33, pp. 211–14.
- 80 I. Brownlie, “The Relations of Nationality,” *British Yearbook of International Law*, vol. 39, p. 320 (1963), cited in “Human Rights and Population Transfer: Final Report of the Special Rapporteur, Mr. Al Khasawneh,” June 27, 1997, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-Ninth Session, 10th Agenda item, E/CN.4/Sub.2/1997/23, IV, para. 26 (1997). The report states that, although divergent international legal opinions exist on this issue, “Professor Brownlie’s position remains most relevant to the contemporary problems of nationality, displacement and new States.”
- 81 G. A. Res. A/RES/55/153 (December 12, 2000), “Articles on Nationality of Natural Persons in Relation to the Succession of States.” See also John Quigley (2003) “Repatriation of the Displaced Arabs of Palestine: The Legal Requirement as Seen from the United Nations” available as an SSRN paper at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896915. See Boling, *supra* note 70, pp. 17–18.
- 82 Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. A/6014 (1966). Charter of the United Nations, art. 1(3). Universal Declaration of Human Rights, G. A. Res. 217A, UN *General Assembly Official Records*, 3rd Sess., at 71, UN Doc. No. A/810, art. 13, (1948). art. 7. International Covenant on Economic, Social and Economic Rights, UN Doc. A/6316, art. 2(2) (1966). International Covenant on Civil and Political Rights, UN Doc. A/6316, art. 4(1) (1966).
- 83 Quigley, *Family Reunion*, *supra* note 79, pp. 230–1 (discussing Israel’s ratification of international humanitarian law conventions and the Israeli Supreme Court decisions

on the applicability of the 1907 Hague Regulations). For a decision by the Israeli Supreme Court on the applicability of the Geneva Conventions, see the *Beit Surik* decision: HCJ 2056/04 *Beit Surik Village Council v. State of Israel et. Tak-Din* 2004(2)3035. The facts and legal issues of the case, as well as the ICJ Advisory Opinion (see *supra* note 70), are discussed in Susan Akram and Michael Lynk, “The Wall and the Law: a Tale of Two Judgements,” *Netherlands Quarterly of Human Rights*, vol. 24 (March 2006) (“Israel’s stated position has been that international humanitarian law, primarily the Fourth Geneva Convention of 1949, does not apply to the occupied territories because Jordan was not a legally recognised ‘sovereign’ of the West Bank, as required by Article 2 of that Convention. The [ICJ] definitively rejected this ‘missing reversioner’ argument – an argument promoted by some Israeli jurists but overwhelmingly rejected by the weight of international legal authority,” at p. 10). Israel has made no reservations on any articles in human rights treaties relevant to the right of return. For the status of Israel’s reservations, see the OHCHR website. <http://www.ohchr.org/english/countries/ratification/index.htm> (updated December 6, 2006, visited April 6, 2007). On this point, also see Boling, *supra* note 70, p.37.

- 84 On the point that passage of time does not negate right of return, see Vic Ullom, “Voluntary Repatriation of Refugees and Customary International Law”, *Denver Journal of International Law and Policy*, vol. 29, p. 115, at p. 143.
- 85 Akram and Rempel, *Durable Solutions*, *supra* note 61, pp. 52–3; Terry Rempel in Scott Leckie, *supra* note 25, p. 308. Quigley, *Displaced Palestinians*, *supra* note 33, p. 215. Ullom, *id.*, p. 146, *Appendix 1: General Assembly and Security Council Resolutions on Repatriation*. See also *infra* note 96 for a partial list of relevant General Assembly Resolutions.
- 86 Akram and Rempel, *id.*, p. 44.
- 87 See, e.g., UNHCR, *2005 Global Refugee Trends* (2006). In 2005, 1.1 million refugees were repatriated compared to 30,500 resettled.
- 88 G. A. Res. 194, *General Assembly Official Records*, 3rd Sess., Resolutions at 21, UN Doc. A/810, para. 11 (1948).
- 89 See UNCCP, *Analysis of Paragraph 11 of the General Assembly’s Resolution of December 11, 1948*. May 15, 1950, UN Doc. W/45, part 2 (1950). See also Mallison and Mallison, *International Law Analysis*, *supra* note 7, p. 32.
- 90 *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 1928*.
- 91 ICJ Advisory Opinion, *supra* note 70.
- 92 See, e.g., statement by UNHCR High Commissioner in 1959, where he stresses that in the context of searching for durable solutions, a refugee must be assured a “free choice between the solutions offered to him: voluntary repatriation, emigration or integration.” Available at <http://www.unhcr.org/admin/ADMIN/3ae68fd414.html> (visited April 6, 2007).
- 93 See, e.g., “International burden-sharing in all its aspects: national, regional and international possibilities for refugees,” *General Assembly Official Records*, September 7, 1998, UN Doc. A/AC.96/904 (1998). The issues underlying the debate on whether there really is a “meaningful choice” is discussed in Richard Black, “Return of Refugees: Retrospect and Prospect,” in Michael Dumper (ed.), *Palestinian Refugee Repatriation* (2006) p. 26, and Patricia Weiss Fagan, “UNHCR and Repatriation,” in the same volume. Both state that repatriation is now by far the solution preferred by state and international consensus and that “[R]epatriation increasingly has become the only available option for refugees” (Fagan, p. 51).
- 94 Goodwin-Gill, *supra* note 44, pp. 275–7.
- 95 See Fagan, *supra* note 93. Fagan discusses situations of mass return (e.g. p. 52) and describes the benefits of UNHCR’s current programmes designed at boosting all three durable solutions, as well as a fourth one: reconstruction (p. 58).
- 96 The following is a partial list of General Assembly Resolutions reaffirming Resolution 194, between the dates of May 11, 1949 and December 8, 2005: G. A. Res. 273(III) (1949); 302 (IV) (1949); 303(IV) (1949); 393(V) (1950); 394(V) (1950); 513(VI) (1952);

- 614(VII) (1952); 720(VIII) (1953); 818(IX) (1954); 916(X) (1955); 1018(XI) (1957); 1191(XII) (1957); 1315(XIII) (1958); 1456(XIV) (1959); 1604(XV) (1961); 1725(XVI) (1961); 1856(XVII) (1962); 1912 (XVIII) (1963); 2052(XX) (1965); 2154(XXI) (1966); 2341(XXII) (1967); 2452(XXIII) (1968); 2535(XXIV) (1969); 2672(XXV) (1970); 2792(XXVI) (1971); 2963(XXVII) (1972); 3089(XXVIII) (1973); 3331(XXIX) (1974); 3419(XXX) (1975); 31/15 (1976); 32/90 (1977); 33/112(1978); 34/52 (1979); 35/13 (1980); 36/146 (1981); 37/120 (1982); 38/83 (1983); 39/99 (1984); 40/165 (1985); 41/69 (1986); 42/69 (1987); 43/57 (1988); 44/47 (1989); 45/73 (1990); 46/46 (1991); 47/69 (1992); 48/40 (1993); 49/35 (1994); 50/28 (1995); 51/129 (1996); 51/128 (1996); 51/124 (1996); 52/61 (1997); 52/62 (1997); 52/57 (1997); 53/51 (1998); 53/50 (1998); 53/46 (1998); 54/74 (1999); 54/73 (1999); 54/69 (1999); 55/128 (2000); 55/127 (2000); 55/123 (2000); 56/57 (2001); 56/56 (2001); 56/52 (2001); 57/122 (2002); 57/121 (2002) 57/117 (2002); 58/94 (2003); 58/93 (2003); 58/91 (2003); 59/120 (2004); 59/119 (2004); 59/117 (2004); 60/103 (2005); 60/102 (2005); 60/100 (2005).
- 97 This has been assumed because of the practice of states and *opinio juris*, as well as statements and resolutions by United Nations and other bodies. See Ullom, *supra* note 84, p. 125. Mallison and Mallison, *International Law Analysis*, *supra* note 7, p. 31. Lawand, *supra* note 70, pp. 544–6 on the right of return in customary international law.
- 98 Lapidoth, *supra* note 39; Radley, *supra* note 39, p. 601.
- 99 Lapidoth, *id.*, Radley, *id.*, p. 602.
- 100 Sources cited in Quigley, *Displaced Palestinians*, *supra* note 33, p. 188.
- 101 Resolutions cited in Quigley, *id.*, p. 187.
- 102 Resolutions cited in Quigley, *id.*, p. 189.
- 103 Quigley, *id.*, p. 201.
- 104 Quigley, *id.*, p. 204.
- 105 Quigley, *id.*, p. 214.
- 106 On reservations made by Israel to human rights treaties, see *supra* note 83.
- 107 See Quigley, *Case for Palestine*, *supra* note 8, chapter 8, “Kaftans and Yarmulkes: The Claim of Ancient Title to Palestine,” pp. 66–72.
- 108 Law of Return, 5710 (1950), article 1, “Every Jew has the right to come to this country . . .” http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950. Although this argument also implicates the competing claims for self-determination or “national rights” of the Jewish people and the Palestinian people, it will not be addressed as it is not intrinsically a refugee law issue and is beyond the scope of this paper. On the competing claims of self-determination, see Mallison, *Zionist–Israel Juridical Claims*, *supra* note 5.
- 109 Charter of the International Military Tribunal (IMT) (London Agreement), 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280 (August 8, 1945) (“War crimes . . . include . . . ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory . . .” “Crimes against humanity . . . include . . . deportation [of a] civilian population . . . on political, racial or religious grounds”). See Rosand, *supra* note 79. The prohibition against forcible mass transfer, has its basis in the Hague Regulations (art. 46(1)) and is also guaranteed in the Fourth Geneva Convention (articles 45, 49, 147). See Boling, *supra* note 70, section entitled “The ‘Forcible (Mass) Expulsion’ Right of Return in Humanitarian Law”, p. 32.
- 110 On the work of the International Refugee Organization, established in 1947 to facilitate the repatriation of WWII refugees to their homes, see Louise Holborn, *Refugees: A Problem of Our Time. The Work of the UNHCR, 1951–72* (2 volumes, 1975), cited in Boling, *id.*, p. 13. On compensation claims, see Norman Finkelstein, *The Holocaust Industry: Reflections on the Exploitation of Jewish Suffering* (2000).
- 111 On Jewish reparation claims, see Finkelstein, *id.* Although Finkelstein demonstrates the extent to which many “Holocaust profiteers” grossly exaggerated the claims of Jewish wealth and possessions taken by the Nazi regime, many of these compensation claims have been successful, such as in the case of *Republic of Austria et al v. Altmann*, Supreme

- Court, (2004). In this case, the United States Supreme Court ruled that the 1976 Foreign Sovereign Immunities Act could be applied retroactively to Altmann's case, thus allowing Altmann to sue the Austrian Government in US Courts. Jewish claims against Swiss insurance companies such as Allianz and banks such as Deutsche Bank and Dresdner Bank are discussed in the *Holocaust Insurance Issues Working Group Meeting*, December 8, 1997, Seattle, Washington, available at http://www.insurance.wa.gov/consumers/Holocaust_survivors/holo_seattle.shtml.
- 112 See Israeli demands and arguments during the various peace negotiations, described in Menahem Klein, "The Palestinian Refugees of 1948: Models of Allowed and Denied Return," in Dumper, *supra* note 93, p. 96.
 - 113 See, e.g., Stig Jagerskiöld, "Freedom of Movement," in Louis Henkin (ed.), *The International Bill of Rights* (1981) p. 180, claiming that the right of return [in the ICCPR] does not apply to "political transfers of territory or population, such as the relocation of ethnic Germans from eastern Europe during and after the Second World War, the flight of Palestinians from what became Israel, or the movement of Jews from the Arab countries," cited in Benvenisti and Zamir, *supra* note 71, chapter III: Return as a Right under International Human Rights Law?
 - 114 G.A. Res. 181, part 1.B(10)(d), the "constitutions of the States shall . . . include . . . provisions . . . guaranteeing to all persons equal and non-discriminatory in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms . . ."
 - 115 S.C. Res. 1515, November 19, 2003, (The Road Map), art. 2, UN Doc. S/RES/1515 (2003).
 - 116 For a partial list of United Nations General Assembly resolutions confirming Resolution 194 on a yearly basis, see *supra* note 96. On institutionalized discrimination and illegal nature of settlements, see the most recent concluding observations from CERD, the Committee overseeing compliance with the Convention, Seventieth session February 19, 2007–March 9, 2007, CERD/C/ISR/CO/13, paras. 16–17: "The Committee remains concerned . . . that no general provision for equality and prohibition of racial discrimination has been included in the Basic Law: Human Dignity and Liberty (1992), which serves as Israel's Bill of Rights." See also the ICJ Advisory Opinion, *supra* note 70, and the "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard," January 29, 2007, para. 49–50, p. 19, part VII, "Racial discrimination and Apartheid," Human Rights Council, Fourth Session, A/HRC/4/17 (2007).
 - 117 See, generally, Dumper, *supra* note 93. See chapter 14 conclusions on best practices from past restitution efforts. On passage of time, see p. 405; on rights of secondary occupants, see p. 401.

2

UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST (UNRWA): PROTECTION AND ASSISTANCE TO PALESTINE REFUGEES

*Scott Custer, Jr.**

Introduction

The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) received a mandate in 1949 to provide “relief and works” for nearly one million refugees from, and displaced persons within, what had been the British Mandate of Palestine who had been uprooted and displaced in the course of the Israeli–Palestinian Arab conflict that had then just ended.¹ The nature of UNRWA’s mandate, and particularly how it has evolved over time to include “protection,” will be the main theme of this chapter.

UNRWA’s mandate and the scope of the Agency’s operations often seem to be misunderstood. As a result, there are continuing calls, usually from people and groups who are strong supporters of Israel, for UNRWA’s mandate to be terminated and for its responsibilities for Palestine refugees to be turned over completely to the better-known United Nations refugee agency, the United Nations Office of the High Commissioner for Refugees, commonly known as UNHCR.² In recent years, a number of bills introduced in the United States Congress – supported by statements by influential Senators and Representatives – have joined in this view, seemingly based on the premise that UNRWA is perpetuating the Palestine refugee problem, rather than resolving it, does not provide the right kind of “assistance” to

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the refugees, and lacks UNHCR's "protection" mandate which would lead to solving the problem.³ One congressman has been quoted as saying, "The terrorism-breeding culture of poverty and dependency in the refugee camps must be brought to an end. Palestinian refugees should be encouraged to leave the camps and trained to assume normal, productive lives."⁴ UNHCR is generally recognized as having a "protection" mandate, which UNRWA is said to lack. The implication seems to be that, because of its explicit "protection" mandate, UNHCR would be able to resolve the Palestine refugee problem by integrating the refugees into their current countries of asylum or resettling them in third countries.⁵

These attacks on UNRWA are not new, but their reappearance on the legislative agenda and in the media call for an answer. To do so, this chapter will look at three preliminary questions:

- What is UNRWA's protection mandate, and how does it compare to UNHCR's?
- What does UNRWA actually do to "protect" and "assist" the Palestine refugees and other displaced Palestinians in its area of operations?
- If UNHCR took over UNRWA's mandate, could it provide more protection and assistance to Palestine refugees, and would it be more likely to find a just and durable solution to the refugee problem, than UNRWA does?

To answer these preliminary questions requires reviewing some basic history about the origins of the Palestine refugee problem and the United Nations response, including the establishment of UNRWA. Although much of this history is generally known, important details relevant to UNRWA's mandate, and its evolution of over time, are less known. After reviewing this historical record, the paper will compare UNRWA's "protection" mandate and activities with those of UNHCR. Finally, the chapter will outline UNRWA's current operations in providing assistance and protection to Palestine refugees in its five Fields of operation: Lebanon, Syria, Jordan, the West Bank (including East Jerusalem), and the Gaza Strip.⁶

Historical background

The initial response of the United Nations: Resolution 194 and UNCCP

One of the most intractable problems created by the Israeli–Palestinian conflict has remained that of the Palestinian refugees. At its core is the search for a just and durable solution for the hundreds of thousands of Palestinians – now with their lineal descendants numbering over four million – uprooted from their homes and livelihoods in Mandate Palestine as part of the creation of the State of Israel in 1948, and who fled or were expelled to the West Bank, the Gaza Strip, Jordan, Syria, Lebanon, and other neighbouring states. The United Nations took early action, even as the conflict continued, to provide both "protection" and "assistance." Protection

was originally included in the mandate given to the United Nations Mediator for Palestine, Count Folke Bernadotte, who was appointed in May 1948.⁷ The initial UN agency tasked with providing relief assistance, called United Nations Relief for Palestine Refugees (UNRPR), was created in November 1948.⁸

In his Progress Report dated September 16, 1948 and submitted to the United Nations one day before his assassination by Israeli terrorists, Count Bernadotte set forth the specific requirements for a “reasonable, equitable and workable basis for settlement” of the refugee problem.⁹ He recommended the establishment of “a Palestine conciliation commission . . . for a limited period” and stated:

The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission.¹⁰

The General Assembly incorporated Count Bernadotte’s recommendations almost verbatim in its Resolution 194(III) of December 11, 1948, saying “that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.”¹¹ Resolution 194(III) also established a “Conciliation Commission,” which was eventually named the United Nations Conciliation Commission for Palestine (UNCCP).¹² The UNCCP was instructed “to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them.”¹³ The UNCCP was also instructed “to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.”¹⁴

In December 1950, the General Assembly added the specific word “protection” to the mandate of the UNCCP by directing it to “continue consultations with the parties concerned regarding measures for the *protection* of the rights, property and interests of the refugees.”¹⁵ However, after several years of fruitless negotiations with the parties concerned, it became clear that the UNCCP was unable to carry out these instructions. Its activities are currently limited to reporting to the General Assembly on an annual basis that it has “nothing new to report.”¹⁶

Establishment of UNRWA

At roughly the same time that the General Assembly was tasking the UNCCP to *protect* the rights and interests of the refugees created by the Israeli–Palestinian

conflict, it moved in Resolution 302(IV) of 8 December 1949 to increase *assistance* to the refugees by replacing the UNRPR with a new agency, which it named the United Nations Relief and Works Agency for Palestine Refugees in the Near East. The operative paragraph of Resolution 302(IV) is surprisingly brief. In it, the General Assembly:

Establishes the United Nations Relief and Works Agency for Palestine Refugees in the Near East:

- (a) To carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission;
- (b) To consult with the interested Near Eastern Governments concerning measures to be taken by them preparatory to the time when international assistance for relief and works projects is no longer available.¹⁷

Neither in Resolution 302(IV) nor in Resolution 194(III) is there any definition of the terms “refugee,” “Palestine refugee,” or “Near East.” Yet all these terms were embedded in UNRWA’s name. Nor did Resolution 302(IV) give UNRWA a detailed mandate with respect to either “protection” or “assistance,” such as was later given to UNHCR by its Statute.¹⁸ UNRWA was simply authorized to carry out “relief” and “works” programmes, and – with implicit reference to at least some aspects of protection – to consult with interested governments about what they should do when international aid would no longer be forthcoming. UNRWA was also directed to consult with the UNCCP “in the best interests of their respective tasks, with particular reference to paragraph 11 of General Assembly resolution 194 (iii) of 11 December 1948.”¹⁹ The General Assembly obviously contemplated that international aid would not be available for long, that UNRWA’s existence would be temporary, and that interested governments would soon have to take up the refugee burden.

By December 1949, there were between 600,000 and 1,000,000 refugees and displaced persons within and from Mandate Palestine.²⁰ An overwhelming majority were Arab Palestinians, but there were also small, but significant, numbers of Jews, Greeks, Turks, and other nationalities inside the borders of former British Mandate Palestine on both sides of the 1949 armistice lines and in neighbouring Arab states. The bulk of the refugees had fled to the West Bank, the Gaza Strip, Lebanon, Syria, Trans-Jordan (as it then was), and Egypt. UNRWA’s mandate, as expressed in both its name and the context in which it was created, was to provide for “Palestine” refugees, meaning refugees from Mandate Palestine, whatever their nationalities, and not just for refugees who were Palestinians.²¹ When UNRWA commenced operations in May 1950, it had some 28,000 Arab and 17,000 Jewish “refugees” on its rolls within that part of Mandate Palestine that was incorporated into the State of Israel. By June 1952, however, the Government of Israel had taken over responsibility for the refugees inside its borders and, at its request, UNRWA had ceased operations inside Israel.²²

Defining “Palestine refugees”

When UNRWA opened for business, it took over the operations, assets, and liabilities of UNRPR. This relief operation had been financing assistance to over 900,000 refugees and other needy persons, primarily through contracts with the International Committee of the Red Cross (ICRC), the League of Red Cross Societies, and the American Friends Service Committee, all of which were then active in the area. UNRWA inherited the relief rolls of these three organizations and one of its first tasks was to decide who should continue to receive relief. The Agency was under great pressure from donors to reduce the number of food rations it was handing out and to clean up cases of duplication, fraud, and undeserving claimants.

As part of this effort to rationalize its relief rolls, the Agency decided to define as refugees eligible for UNRWA services those individuals and their families who had been residing in Mandate Palestine and had been uprooted and cut off from their previous homes and livelihoods as a consequence of the 1948 conflict. At the time, there were more than 300,000 people in the Agency’s area of operations who did not meet these criteria but were still widely viewed as in need of emergency relief. These people were called, at the time, “other claimants.”²³ They included some 182,000 Palestinians in “frontier villages” on the Jordanian side of the armistice line in the West Bank who were unable to reach their agricultural lands or former places of work in Israel; 100,000 “non-refugees” in the Gaza Strip; 14,000 Palestinians in East Jerusalem, mostly in the Old City; and a number of agricultural workers in south Lebanon, who had been employed in Palestine before the war.²⁴

In this context, UNRWA developed a series of working definitions of “Palestine Refugee” intended to limit the term to individuals who had resided in Mandate Palestine for a minimum two-year period prior to the 1948 conflict and who had lost *both* their homes and their livelihoods as a result of the conflict.²⁵ The definition was intentionally framed to exclude people who had been in Palestine for too short a period to be considered residents there, such as migrant workers. It was also intended to exclude people who may have lost a job or some property but still had either their original homes or farms or businesses to fall back on. Nevertheless, UNRWA did keep on its rolls a number of the “other claimants” it had inherited from its predecessor organizations. These, together with their eligible descendants, currently total some 111,000 registered persons entitled to receive UNRWA services.²⁶

UNRWA established its field operations in the countries and territories where the bulk of the Palestine Refugees were then living: Lebanon, Syria, Jordan, the West Bank, and the Gaza Strip. There were also some 10,000 Palestinian refugees in Egypt, and various numbers in other neighbouring Arab countries, but UNRWA generally limited its operations to what became known as its five Fields, listed above.²⁷

UNRWA'S mandate

"Relief" and "works"

The specific mandate given to UNRWA in Resolution 302(IV) included the words "relief" and "works," which were also embedded in UNRWA's name. Resolution 302(IV), as we have seen, provided that UNRWA was "to carry out . . . the direct relief and works programmes as recommended by the Economic Survey Mission" (the ESM). The ESM had been established the year before UNRWA by the UNCCP and had produced its final report by December 1949. The Report recommended continuing "relief" for the short term and organizing both small-scale and large-scale "works projects" for the longer term. Among the latter were envisaged ambitious regional water management and irrigation projects (on the order of the Tennessee Valley Authority which had helped pull the United States out of the Great Depression) designed to provide employment for the refugees and to further economic development of the region.²⁸

It soon became apparent that these large-scale "works projects," particularly in the water sector, were too ambitious and too politically contentious to be viable. In the first place, both the refugees and the host countries were sceptical of projects that might effectuate permanent resettlement of the refugees in the countries to which they had fled. Second, regional cooperation between the Arab states and Israel, especially over the strategic water issue, was problematic to say the least. Third, donor funding was wholly inadequate for such large schemes.²⁹ With a perennial problem of limited financial resources, UNRWA concentrated on basic relief – providing food, shelter, primary health care, and primary and preparatory education. Over time, as UNRWA focused more and more on human development as opposed to emergency humanitarian relief, Agency programmes expanded to include the development of human resources, adding vocational and teacher training and other initiatives to promote the intellectual capacities and economic independence of its beneficiaries.³⁰

Evolution of the mandate

UNRWA's mandate, as noted earlier, was originally envisaged as temporary. It has, however, been periodically renewed over more than 55 years, usually for a three-year term, most recently for the period ending June 30, 2008.³¹ The mandate has proven flexible enough to allow the Agency's programmes and operations to evolve as the situation on the ground has demanded. Of course, UNRWA's ability to change and even expand its mandate is not exercised in a vacuum. Its operations continue at all times to be subject to the continuing annual approval of the General Assembly, to the continued acceptance by the host countries and authorities within whose jurisdictions the Agency operates, and to the continued willingness of its donors to provide political and financial support. Each year, the Commissioner-General submits an Annual Report on the Agency's activities to the General Assembly, and each year the General Assembly expresses its appreciation for the

Agency's work and encourages the Commissioner-General to continue, affirming "that the functioning of the Agency remains essential in all the fields of operation."³²

As a former UNRWA General Counsel has commented, UNRWA's founding resolution, Resolution 302(IV), contained "little enough on which to launch an organisation on the extensive operations to which it became committed."³³ An internal Agency memorandum, drafted in 1988, summarized the subsequent evolution of UNRWA's mandate as follows:

The terms of the Agency's mandate, as embodied in the resolutions, have varied considerably. In the early years, mention was made of "direct relief and works" (1949), "relief and integration" (1950, 1952), "welfare" and "assistance for the health, welfare and education programme" (1952) and (from 1953 to 1957) "relief," "projects" and "rehabilitation." In 1958 . . . there is mention of "relief and rehabilitation programmes for the welfare of the refugees," "pursue its programme for refugees" and "projects capable of supporting substantial numbers of refugees and, in particular, programmes relating to education and vocational training." In 1959, we have "continue its programme of relief for the refugees and, insofar as financially possible, expand its programme of self-support and vocational training." For 1961, 1962 and 1963, the "mandate" was limited to mere thanks for efforts to provide "essential services for the Palestine refugees." In 1965, however, there was added to this the provision directing the Commissioner-General to "take such measures, including rectification of the relief rolls . . . to assure, in cooperation with the Governments concerned, the most equitable distribution of relief based on need."³⁴

More significantly for present purposes, after the June 1967 Six-Day War when Israel occupied the West Bank, including East Jerusalem and the Gaza Strip, the General Assembly expanded UNRWA's mandate to provide emergency humanitarian relief not just to "Palestine refugees" already registered with the Agency, but to other persons displaced by the conflict, endorsing the Commissioner-General's efforts "to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities."³⁵ The General Assembly has subsequently reaffirmed the Agency's mandate in this respect on an annual basis, expanding the beneficiaries to "persons displaced by the June 1967 and subsequent hostilities."³⁶

The Agency also has a mandate from the General Assembly "(i)n close cooperation with the relevant agencies, to continue to contribute to the development of the economic and social stability of the Palestine refugees in all fields of operation."³⁷ This part of the mandate dates back to 1993 when, following the signing of the *Declaration of Principles on Interim Self-Government Arrangements* by Israel and the Palestine Liberation Organization, the General Assembly called upon the Agency "within the framework of strengthened cooperation with the specialized agencies

and the World Bank, to make a decisive contribution towards giving a fresh impetus to the economic and social stability of the occupied territories.”³⁸

In 2003, the General Assembly both limited and expanded this aspect of the mandate. It limited the intended beneficiaries of the “economic and social stability” the Agency was supposed to develop to Palestine refugees, as opposed to all of the inhabitants of the occupied Palestinian territory. On the other hand, it expanded the geographical scope from the occupied territory to UNRWA’s entire area of operations.³⁹

UNRWA’S protection mandate

Comparison with UNHCR: Is there a “protection gap?”

UNRWA’s mandate provides considerable flexibility to allow the Agency to provide relief and assistance to its beneficiaries, mainly “Palestine refugees.” But what about *protection*? Some commentators have made much of the fact that the word “protection” was not used in Resolution 302(IV) establishing UNRWA, whereas it was very explicitly included in UNHCR’s founding Statute, where the High Commissioner for Refugees was authorized to:

assume the function of providing *international protection*, under the auspices of the United Nations, to refugees who fall under the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.⁴⁰

Palestine refugees then being assisted by UNRWA were provisionally excluded from the mandate of UNHCR, as they were from the protection of the subsequent 1951 *Refugee Convention*, for so long as they continue to receive “protection or assistance” from another UN agency. As a practical matter in the case of refugees from Palestine, this has meant UNRWA.⁴¹ Accordingly, some commentators have postulated that this has created a “protection gap” for Palestine refugees, particularly after the virtual demise of the UNCCP, because UNRWA provides only “assistance” and not “protection.”⁴²

This chapter hopes to demonstrate the opposite: that, in spite of the absence of the word “protection” in UNRWA’s founding resolution, UNRWA has received, and has exercised over the years, a clear mandate to provide “protection” for Palestine refugees. The chapter will also argue that if UNHCR were to assume UNRWA’s role, it would find its protection efforts stymied by the same factors as are the efforts of UNRWA and the other UN actors involved, particularly by the ongoing Israeli occupation of the West Bank and the Gaza Strip and the inability of the United Nations and its Member States to bring about an end to the Israeli–Palestinian conflict, including a just and durable solution to the plight of Palestinian refugees.

The general scope of UNHCR's protection activities is set forth, at least in the first instance, in Article 8 of the UNHCR Statute, which provides that the High Commissioner for Refugees shall protect refugees by:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
- (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
- (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
- (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
- (g) Keeping in close touch with the Government and inter-governmental organizations concerned;
- (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; and
- (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.⁴³

With the exception of item (a) above, relating to the promotion of international conventions, UNRWA has, since its beginning, engaged to some degree in all of the activities included in UNHCR's mandate. For example, the Agency has coordinated with governments and obtained information from them on the situation of Palestine refugees in its area of operations and it has coordinated action with other international organizations and with voluntary agencies regarding measures to assist the refugees.⁴⁴ A current example of this kind of protection is provided by the continuing dialogue between UNRWA and the Lebanese Government of Prime Minister Siniora, resulting over the last year – both before and after the Israeli military operations in the summer of 2006 – in considerable progress on improving the living and working conditions of Palestine refugees in Lebanon. In its early years, UNRWA provided limited subsidization assistance for small numbers of Palestine refugees willing to resettle in third countries.⁴⁵ This assistance helped Palestine refugees to emigrate to places as varied as Australia, Bolivia, Brazil, British Guiana, Canada, Chile, Colombia, the Federal Republic of Germany, France, Honduras, Iran, Ireland, Kenya, Kuwait, Liberia, Libya, Mexico, Morocco, Pakistan, Peru, Qatar, Saudi Arabia, the United States, and Venezuela.

UNHCR and the resolution of the Palestinian refugee problem

Some of UNRWA's critics contend, nevertheless, that UNHCR would be better equipped than UNRWA to find durable solutions for UNRWA's four million registered refugees, particularly by fostering local integration in their current countries of asylum or by resettlement in third countries. Such critics seem to forget that UNHCR's preferred solution, and the solution preferred under international law and practice particularly in situations of mass flight provoked by armed conflict, is voluntary repatriation to the home country.⁴⁶ That is still the solution which overwhelming numbers of Palestinian refugees themselves prefer, as they insist on the right of return "to their original homes" affirmed by Resolution 194(III). UNHCR's approach to integration and resettlement also requires the consent of the refugees concerned and of the host countries of asylum or countries of resettlement.

Without meaning to minimize in any way UNHCR's considerable achievements in dealing with major refugee situations around the world, it would seem that the successful resolution of such situations has required either (1) substantial political support from the international community, often backed up by Security Council action under Chapter VII of the UN Charter and the despatch of peacekeeping forces; or (2) the willingness of the parties directly involved in the conflict to reach agreement.⁴⁷ It is clear that at the current time, neither of these preconditions prevail in the conflict between Israel and the Palestinians, suggesting that UNHCR would be no more successful in bringing about a just and durable solution to the Palestinian refugee situation or providing "protection" to Palestinian refugees than UNRWA and the other UN actors involved have been over the last nearly 60 years.

The United Nations and protection of Palestinian refugees

It has long been argued – and has now been authoritatively confirmed by the ICJ's 2004 Advisory Opinion⁴⁸ – that the United Nations has a special responsibility, growing out of its original responsibility for the British Mandate and the 1947 partition resolution,⁴⁹ to see the Israeli–Palestinian conflict, including the refugee issue, settled justly and in accordance with international law.⁵⁰ Although the UNCCP is no longer active, the UN continues – through other actors, agencies, programmes, and "Special Procedures" – to work towards the protection of the population of the occupied Palestinian territory, an end to the Israeli–Palestinian conflict and a just and durable resolution of the Palestinian refugee situation. UNRWA cannot do everything required for such protection and should not be blamed for leaving appropriate responsibility to other actors.

The Quartet, made up of the UN, EU, United States, and Russia, which is represented by the Secretary-General at Principal's level and by the UN Special Coordinator for the Middle East Peace Process (UNSCO) at the Ambassadorial level, is directly involved in trying to promote a resolution of the Israeli–Palestinian conflict through the implementation of the Roadmap and the creation of a Palestinian state in the West Bank and Gaza. The Security Council and the General Assembly take up the Palestinian issue repeatedly. The United Nations Office

for the Coordination of Humanitarian Affairs (OCHA) monitors and reports extensively on what is happening in the occupied Palestinian territory. The Special Procedures put in place by the Office of the High Commissioner for Human Rights (OHCHR), most notably the periodic reporting by Professor John Dugard, Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, also provide a measure of protection, at least to refugees in the West Bank and the Gaza Strip.⁵¹ Finally the ICJ's 2004 *Wall Opinion* has provided authoritative guidance as to fundamental rights under international law of the Palestinian people living under Israeli belligerent occupation.

UNRWA has worked with all of these UN actors. For example, UNRWA has provided OCHA with extensive information on conditions on the ground in the occupied territory and has contributed heavily to a number of OCHA public reports, including the January 2006 report entitled "Humanitarian Impact of the West Bank Barrier."⁵² UNRWA also regularly meets with Professor Dugard and other Special Rapporteurs on their periodic visits to the region, providing information and arranging fact finding field tours in the West Bank and the Gaza Strip.

Sources of UNRWA's protection mandate

For a number of years after UNRWA's establishment, the word "protection" was not used by the General Assembly to refer to any of its activities. From the beginning, however, as we have seen in Resolution 302(IV), UNRWA was mandated to work closely with the host governments and it has done so. Partly in response to UNRWA's requests, each of the host governments, as well as the Palestinian Authority and the Government of Israel which have the primary responsibility for protection of the civilian population in their respective jurisdictions, have provided both assistance and protection in varying degrees to UNRWA's beneficiaries.

The word "protection" in connection with UNRWA's role as defined by the General Assembly, however, appears explicitly for the first time only in December 1982 in the title to General Assembly Resolution 37/120(J), "Protection of Palestine refugees," in which the General Assembly urged

the Secretary-General, in consultation with [UNRWA], and pending the withdrawal of Israeli forces from the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem, to undertake effective measures to guarantee the safety and security and the legal and human rights of the Palestinian refugees in the occupied territories.⁵³

Over time, this language, associating UNRWA with protection, evolved. In 1983, the Secretary-General was urged, again in consultation with UNRWA, "to undertake effective measures to guarantee the safety and security and the legal and human rights of the Palestine refugees in all the territories under Israeli occupation."⁵⁴ In 1988, instead of asking the Secretary-General to "undertake" such measures, the General Assembly urged him, in consultation with the Commissioner-General of

UNRWA, “to continue *their* efforts in support of the upholding of” those rights.⁵⁵ Then, in 1993, the General Assembly made their endorsement of UNRWA’s direct protection role even more explicit by urging

the Secretary-General and the Commissioner-General . . . to continue their efforts in support of the upholding of the safety and security and the legal and human rights of the Palestine refugees in all the territories under Israeli occupation since 1967.⁵⁶

The Goulding Report: Defining protection for UNRWA

Aside from the series of General Assembly Resolutions discussed above, central to UNRWA’s justification for and understanding of its protection role for the last two decades has been the analysis set forth by the Secretary-General in early 1988 in what is commonly referred to as the Goulding Report.⁵⁷ In the face of the worsening conflict between Palestinians and Israelis during the first *intifada*, which broke out in 1987, the Security Council had requested a report from the Secretary-General “containing his recommendations on ways and means for ensuring the safety and *protection* of the Palestinian civilians under Israeli occupation.”⁵⁸ The Secretary-General had then sent Marrack Goulding, Under-Secretary-General for Political Affairs, on a fact-finding mission to the occupied Palestinian territory. Based on Mr. Goulding’s findings, the Secretary-General issued a report that contains an analysis of the four types of protection that a UN agency might provide to a population under occupation:

- Physical protection, i.e., the provision of armed force to protect against threats to the safety of protected persons.
- Legal protection, i.e., intervention with the security and judicial authorities, as well as the political authorities, of the occupying power in order to ensure just treatment of individuals or groups.
- General assistance, which the Secretary-General called “a less well-defined form [of protection] in which an outside agency intervenes with the authorities of the occupying Power to help individuals or groups of individuals to resist violations of their rights (e.g. land confiscations) and to cope with the day-to-day difficulties of life under occupation, such as security restrictions, curfews, harassment, bureaucratic difficulties and so on.”⁵⁹
- Protection by publicity, *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 48/40 (A), UN GAOR, 48th Sess., UN Doc. A/RES/48/40 (A-J) (1993), described by the Secretary-General as instances in which outside observers, particularly the international media, provide a measure of protection by their mere presence and readiness to publish what they observe.

The Secretary-General then discussed how each type of possible protection might be enhanced in the situation then prevailing in the occupied Palestinian territory.

He concluded that the deployment of a UN peacekeeping force, needed for *physical protection*, was not then politically possible. He noted that the ICRC was able to provide a measure of *legal protection* and that, with respect to *protection by publicity*, both the Israeli and international media had been fully reporting the developments in the occupied territory and should be allowed a free hand to continue to do so.

On the topic of *general assistance*, the Secretary-General wrote that, as far as the registered refugees – i.e., the Palestine refugees constituting UNRWA's caseload – were concerned, "UNRWA has the leading role and provides a wide variety of assistance *and protection* (in addition, of course, to its main function of providing education, health and relief services); in the Gaza Strip, in particular, it provides indispensable support to the refugees in their day-to-day efforts to cope with living under occupation."⁶⁰ He thought, however, that more was needed and said that, for the registered refugees, "UNRWA is clearly best placed to provide additional general assistance." Accordingly, the Secretary-General "asked the Commissioner-General of UNRWA to examine the addition to UNRWA establishment in the occupied territories of extra international staff, within UNRWA existing administrative structures, to improve the general assistance provided to the refugee population."⁶¹

Following that request, UNRWA instituted its Refugee Affairs Officers programme in which eventually some 21 international staff members, 12 in the West Bank and 9 in the Gaza Strip, working in teams with Palestinian assistants, were deployed to provide by their presence, and sometimes by active intervention and discussion with Israeli Defense Forces (IDF) soldiers on the ground, a measure of protection to Palestine refugees in their daily lives, particularly in and around the refugee camps. Annually, since 1994, the General Assembly has described their work, which was largely discontinued by 1996 in the midst of the Oslo process, but then revived as the "Operations Support Officer Programme" immediately after the start of the second *intifada* in late 2000, as "valuable . . . in providing *protection* to the Palestinian people, in particular Palestine refugees."⁶²

Further in response to the Goulding Report, the Agency added international legal officers to both its Gaza and West Bank Field Offices and undertook some modest initiatives in the field of legal protection of refugees in the occupied territory. Throughout its history, UNRWA has also tried – by means of the Commissioner-General's Annual Report, the Agency's public information office, its press releases, publications, and website and public statements by officials – to provide appropriate "protection by publicity."⁶³

UNRWA's protection role

Three perspectives for viewing protection

To judge whether the resolutions just cited provide a firm basis for UNRWA to exercise a "protection" mandate, it may be useful to look at protection from the following three perspectives:

- Protection of refugees as civilians caught up in armed conflict and protected by international humanitarian law, including the law codified in the 1907 Hague Regulations and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). This perspective is clearly included in the resolutions we have just reviewed.
- Protection of refugees as bearers of fundamental human rights set out in the numerous conventions relating to international human rights. This perspective is also covered by the resolutions we have reviewed, at least as far as the occupied Palestinian territory is concerned. It has received new impetus from the ICJ's *Wall Opinion* confirming the parallel applicability of international human rights law and international humanitarian law to the occupied Palestinian territory.⁶⁴
- Protection of various rights specific to refugees, such as rights analogous to those spelled out in the 1951 *Convention Relating to the Status of Refugees*, and which include the right to asylum in a protected environment and the right to choose among voluntary repatriation, local integration, or resettlement. In the case of Palestine refugees, these choices, including the right of return and the right to compensation, are affirmed in Resolution 194(III). The Agency clearly has a mandate, within its area of operations, to promote the right to asylum in a safe and dignified environment for as long as the Palestine refugees remain in UNRWA's area of operations.

UNRWA has never been asked, however, to become directly involved in the negotiation of a just and durable solution to the refugee issue required by Security Council Resolution 242 and based on the rights affirmed in Resolution 194(III), and has therefore left it to the other UN actors referred to above. Nor has UNRWA been asked – not by the General Assembly nor by interested governments, nor by the refugees themselves – in the absence of such a solution, to assist in the repatriation of Palestine refugees to their original homes, to integrate them permanently into their current places of asylum or to resettle them *en masse* in third countries. If UNRWA were to be phased out, and its responsibilities for Palestine refugees handed over to UNHCR, the latter would hardly be in a different position with respect to the search for a just and durable solution, which would continue to be principally the responsibility, as far as the United Nations is concerned, of the Secretary-General acting through the Quartet, the Security Council and the General Assembly. Nor would UNHCR be in a position to force local integration or third-country resettlement on the Palestinian refugees against their wishes.

Emerging international protection norms

UNRWA's protection mandate is not solely grounded, however, either in the specific language of the General Assembly resolutions described above or in the types of protection outlined in the Goulding Report, which were formulated specifically with respect to the international protection of a civilian population under belligerent

occupation. Since the humanitarian disasters of Bosnia and Rwanda in the 1990s, there has been intense debate and a marked evolution in thinking as to the degree to which protection must be an integral part of any programme of humanitarian assistance.⁶⁵ The Inter-Agency Standing Committee (IASC), grouping both UN agencies and NGOs active in humanitarian assistance, which was established in June 1992 in response to General Assembly Resolution 46/182 calling for strengthened coordination of humanitarian assistance, has called humanitarian assistance and protection “two sides of the same coin.”⁶⁶ The IASC has agreed on a common definition of protection as: “all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law (i.e., human rights law, international humanitarian law, refugee law).”⁶⁷

Protection is recognized as being composed of three broad types of activities:

- Environment building – activities aimed at creating or consolidating an environment conducive to full respect for the rights of individuals;
- Responsive action – activities undertaken in the context of an emerging or established pattern of abuse and aimed at preventing or alleviating its immediate effects; and
- Remedial action – activities aimed at restoring dignified living conditions through rehabilitation, restitution and reparation.⁶⁸

In another passage, protection activities are divided broadly into (1) securing compliance by authorities with their obligations to protect beneficiaries by “denunciation” or “persuasion,” and (2) providing direct services to beneficiaries by “substitution,” as in the direct provision of goods and services, and “support to structures,” as in building local capacity.⁶⁹

In connection with these evolving concepts of protection, international agencies, including those of the UN system, have been exploring a rights-based approach to programming, one of whose pillars is protection of human rights during times of state repression, conflict, and occupation. The Secretary-General’s 1997 Programme for Reform “underscored that human rights are a concern that cuts across the entire UN system.”⁷⁰ In his 2002 report, entitled *Strengthening of the United Nations: An Agenda for Further Change*, he said, “The promotion and protection of human rights is a bedrock requirement for the realization of the Charter’s vision of a just and peaceful world.”⁷¹

Protection of children’s rights is a particular focus of the Secretary-General and has become of increasing concern throughout the international community, including within UNRWA. In 2002, the General Assembly adopted a document entitled *A World Fit for Children*. Among its 10 principles and objectives is the protection of children from harm, exploitation, violence, abuse and discrimination, as well as during war and while “under foreign occupation . . . in accordance with the provisions of international humanitarian law.”⁷² Protection of children during armed conflict has, in fact, been elevated to a global security issue by the Security Council since the publication of the Machel Report in 1996.⁷³ In July 2005, the

Security Council resolved to focus on such violations as the “killing or maiming of children,” “attacks against schools and hospitals” and the “denial of humanitarian access for children,” all of which have been and continue to be issues in the occupied Palestinian territory.⁷⁴ Such directives and resolutions represent a global movement for more active protection of civilians, and particularly children, by international humanitarian agencies, a movement which is of obvious importance for UNRWA.

The General Assembly has explicitly urged the Agency to give further consideration to “the needs and rights of children in its operations in accordance with the Convention on the Rights of the Child.”⁷⁵ This recommendation was re-enforced by many of UNRWA’s major donors at a conference held on 7 and 8 June 2004 in Geneva, hosted by the Swiss Agency for Development and Cooperation on behalf of the Government of Switzerland.⁷⁶

The future of “protection” within UNRWA

As a follow-up to the Geneva Conference, at the specific request and with the generous financial support of a particular donor, the Agency added to its staff a Senior Protection Policy Adviser for the express purpose of developing an operationally-oriented policy framework for the expansion of UNRWA’s protection activities. Through its core programmes of Education, Health and Relief and Social Services, applying an approach grounded in applicable international humanitarian and human rights law, including the 1989 *Convention on the Rights of the Child* (CRC),⁷⁷ the Agency is now drawing up plans (1) to assess protection needs and “gaps” and to identify urgent issues requiring fast-track responses; (2) to develop its programme-monitoring and evaluation capabilities in the context of the promotion of human development; (3) to initiate strategic partnerships and protection networks – which will include other UN agencies, international and local NGOs, host governments, and, of critical importance, the local communities directly involved – in order to improve programming and to close protection “gaps” affecting the Agency’s beneficiaries; and (4) to increase the Agency’s advocacy efforts and to participate in international processes focusing on protection, including treaty-monitoring committees and the “Special Procedures” of the High Commissioner for Human Rights. These plans should lead to a significant expansion of the Agency’s protection activities over the medium term.

UNRWA/UNHCR cooperation

One area of increased focus on protection in recent years has been the coordinated approach being taken by UNRWA and UNHCR to Palestinian refugees. The publication in October 2002 of UNHCR’s *Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees* was an important step in defining the respective mandates and operational roles of the two agencies and in making clear that UNHCR was available to provide protection and assistance to Palestinian refugees outside UNRWA’s area of operations. Following

publication of the Note, high-level workshops have been held annually between the two agencies to find practical ways of working together in areas of overlapping concern, as for instance on issues relating to Palestinian refugees in and fleeing from Iraq. One result of this increased collaboration was the publication in early 2007 of a jointly authored brochure, entitled *The United Nations and Palestinian Refugees*, which describes the mandates of the respective agencies with respect to Palestinian refugees both within and outside UNRWA's area of operations.⁷⁸ On the ground, in the Syrian Arab Republic, as well as in Jordan and Lebanon, there is frequent consultation and collaboration between the local offices of the two agencies, always with a common goal: to protect any Palestinian refugees from "falling through the cracks"⁷⁹ (to borrow the title of a recent study of Palestinian refugees in Lebanon).

Other protection networks: Cooperation with UNICEF and OHCHR

UNRWA's concern for the protection of children within its mandate, based on rights embodied in the CRC, has led to efforts to create protection networks with other UN agencies and interested NGOs, most notably with UNICEF. With a common interest in protecting children from violence, exploitation, abuse, and neglect,⁸⁰ the two agencies are exploring, not just cooperative programming, but a strategic protection approach, according to which UNRWA would "mirror" work that UNICEF has already begun with the Palestinian Authority and the host governments in Lebanon, Syria and Jordan. In cases where UNRWA has already developed a comprehensive policy and action plan, for example with respect to violence in UNRWA schools, UNICEF might then request that the plan be "mirrored" by the host government or authority in its schools.

In response to Security Council Resolution 1612, UNRWA is discussing with UNICEF and with other UN agencies and NGOs in the occupied Palestinian territory more systematic collection and channelling of child protection information to high-level enforcement mechanisms, such as the OHCHR Special Procedures. UNRWA regularly contributes, often jointly with other UN agencies, to reports being prepared by treaty-monitoring bodies, such as the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination.

UNRWA'S assistance to Palestine refugees

The discussion above on "protection" referred to the IASC's observation that humanitarian assistance and protection are "two sides of the same coin."⁸¹ It may be useful, therefore, to describe the "assistance" side of UNRWA's coin – that is, the current scope and magnitude of UNRWA's humanitarian assistance to Palestine refugees. A recent internal paper has adapted "human development" as the driver of the Agency's programming, stating:

Our mission is to promote the human development of refugees under our mandate. We pursue this mission through striving to deliver high quality

programmes in the areas of education, health, relief, social services, micro-finance and infrastructure.⁸²

By providing basic education, primary health care, and tools for economic self-sufficiency, UNRWA hopes that the Palestine refugees it serves will be an asset, not a liability, both to their current countries of asylum while they remain refugees and to any polity to which they may eventually be repatriated, permanently integrated, or resettled.

The sheer scale of UNRWA's interventions is not always understood or appreciated. UNRWA employs more than 28,000 staff in its five Fields, all but some 150 of whom are locally hired and at least 95 per cent of whom are themselves Palestine refugees. Given the average size of Palestinian families, these staff salaries provide a living income to a minimum of some 140,000 people. Nearly half of these are in the West Bank and the Gaza Strip. UNRWA's total budget for 2006, not including its emergency programme, was US\$639 million. The 2006 emergency programme, which runs only in the West Bank and Gaza Strip, asked for US\$170 million and actually raised some US\$145 million.

Returning to some of the criticism levelled at UNRWA referred to at the beginning of this chapter, UNRWA does not "keep" refugees in camps. Only some 30 percent of UNRWA-registered refugees in its five Fields still live in official refugee camps. In Jordan it is only some 10 percent and in Syria 27 percent. Neither does UNRWA promote or perpetuate a culture of poverty and dependency. Prior to the outbreak of the second *intifada* in the occupied Palestinian territory in 2000, only approximately 5 percent of registered refugee families (some 250,000 persons) were receiving food distributions and modest cash assistance under UNRWA's Special Hardship Case Programme. The programme concentrates on families with special needs and with no male breadwinner of working age.

More than half of UNRWA's staff and regular budget is devoted to UNRWA's Education Programme, the essence of which is to promote literacy and other basic intellectual and social skills required for refugee independence and self-sufficiency. In its five Fields, UNRWA currently operates over 660 schools, serving nearly 500,000 pupils. The Agency runs eight vocational training centres, handling about 5,500 trainees per year and four Educational Sciences Faculties for teacher training. The second largest programme, taking just under 20 percent of the regular budget and staff, is UNRWA's Health Programme, with 125 primary health care facilities, handling some nine million patient visits per year, one UNRWA-owned and operated hospital (in the West Bank) and health care programmes to provide basic coverage for refugees needing secondary and tertiary care from government and private hospitals.

The Agency's Relief and Social Services Programme, as noted earlier, provides direct relief assistance, in the form of food, cash, and shelter rehabilitation, to some 250,000 persons categorized as Special Hardship Cases. In addition, in the context of the current humanitarian emergency in the occupied Palestinian territory, the Agency is providing emergency food and other assistance to some 240,000 families

(nearly 1.2 million individuals). The Programme has also helped to found and support 65 Women's Programme Centres and 39 Community-based Rehabilitation Centres – both of which are engaged in promoting independence and self-sufficiency.

The Agency's Microfinance and Microenterprise programme, since its inception in 1991, has disbursed over 100,000 loans to the value of some US\$110 million and is considered one of the most successful lending operations of its kind in the region. Finally, UNRWA's expanded job creation programme under the revised 2006 Emergency Appeal provided over 53,000 short-term jobs (resulting in 3.2 million workdays) in the West Bank and the Gaza Strip last year.

With the goal of providing adequate housing and infrastructure to allow all refugees to live in dignity pending a just and durable solution to the refugee problem, UNRWA has also embarked on several notable camp redevelopment and improvement projects. The first of these is well under way at Neirab in the Syrian Arab Republic. The Agency has also engaged in the extensive reconstruction and repair of refugee housing destroyed by Israeli military operations during the current *intifada* in the West Bank and the Gaza Strip, most notably in the Jenin refugee camp in the northern part of the West Bank and in Rafah and Khan Younis in Gaza. In Lebanon, under the Siniora government, both prior to the Israeli military operations in the summer of 2006 and continuing since then, there has been an easing of prior restrictions and impediments and a positive encouragement from the government, as well as renewed interest and support from donors, for long overdue improvements to be made in the Palestine refugee camps there, including shelter rehabilitation and construction, the installation and upgrading of environmental health infrastructure (water and sewerage) and the construction of new education and health facilities.

It may be partly because UNRWA's assistance efforts have been so visible over the years that some observers have jumped to the conclusion that, in the absence of a more explicit UNRWA "protection" mandate, there was a serious "protection gap" in the international protection of Palestinian refugees. In fact, however, the range of UNRWA's assistance and human resource development programmes would seem to cover all of the IASC's "protection" categories cited earlier. As the Agency moves towards a more rights-based approach to programming and operations, moreover, it can take some comfort that its core relief and assistance programmes are well poised to address a large number of the essential human rights to which Palestine refugees are entitled.⁸³

Conclusion

The foregoing discussion has tried to answer the two interrelated questions of whether UNRWA has a protection mandate and whether UNHCR, because of its more explicit protection mandate, would be better placed than UNRWA to provide protection and assistance to Palestine refugees. It should now be clear that UNRWA does have a mandate to provide protection to Palestine refugees and has been exercising it for nearly six decades. The mandate has been flexible enough to evolve

over time to meet changing circumstances on the ground and is continually shaped and controlled by the General Assembly, by the Agency's host countries and other interested governments, as well as by UNRWA's donors, who provide some 95 percent of the Agency's regular budget from year to year and all of the funding for the project budget and emergency appeals.

That being said, there is no question that Palestinian refugees, including those registered with UNRWA, need and have clearly defined rights under international law to additional protection. UNRWA recognizes that it needs to do more in this regard and believes that, given the urging of the General Assembly, the requests and financial support it has received from major donors, and the emerging norms within the United Nations and the international humanitarian assistance community for rights-based approaches to programming and operations, it clearly has a political mandate to expand and enhance its protection activities. The Agency intends to continue to fulfill this mandate until such time as the General Assembly is able to determine that a just and durable settlement of the Palestine refugee issue has been achieved and that the protection and assistance for Palestine Refugees in the Near East provided by UNRWA are no longer needed.

Notes

- 1 UNRWA was created by *Assistance to Palestinian Refugees*, GA Res. 302(IV), UN GAOR, 4th Sess., UN Doc. A/Res/302(IV) (1949) para. 7.
- 2 UNHCR was created by *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res. 428(V), UN GAOR, 5th Sess., UN Doc. A/RES/428(V) (1950). For one such recent comment, see "Perpetuating Refugees" *Jerusalem Post* (February 12, 2007) 13.
- 3 See e.g., U.S., Bill H.R. 5278, *UNRWA Integrity Act*, 109th Cong., 2nd Sess., 2006 (referred to the House Committee on International Relations, May 3, 2006); I. Ros-Lehtinen, "Fold Palestinian Relief Agency into U.N.'s Refugee Body" *The Forward* (September 29, 2005), at <<http://www.forward.com>>.
- 4 Representative Tom Lantos, Ranking Minority Member, U.S. House of Representatives' International Relations Committee, quoted in M. Jordan, "Unmasking UNRWA, the Palestinians' relief agency: A JTA Special Report" 4, online: JTA <<http://www.jta.org/news/article/1999/11/30/13805/Itsrolemorevital>>.
- 5 For UNHCR's protection mandate, see fourth section in text. For the view that UNRWA lacks "the full panoply of international protection which covers the gamut of activities through which refugees' rights are secured, including the implementation of durable solutions commonly afforded to refugees," see Badil Resource Center for Palestinian Residency and Refugee Rights, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (Bethlehem: Badil Resource Center, 2005) at 53; compare sources cited at notes 2–4, *supra*.
- 6 References in this chapter to the West Bank include all of the West Bank occupied by Israel in 1967, including both the Eastern part of what was the City of Jerusalem at the time, often referred to as "East Jerusalem," comprising some 6.5 sq. km and the additional 70 sq. km from the West Bank Governates of Bethlehem and Ramallah that Israel has unilaterally annexed and included in the Greater Jerusalem Municipality and therefore considers part of the State of Israel. See Israeli *Basic Law on Jerusalem*, July 30, 1980, 9th Knesset, published in *Sefer Ha-Chukkim* No. 980, 5 August 1980 186.
- 7 See *Appointment and Terms of Reference of a United Nations Mediator in Palestine*, GA Res. 186(II), UN GAOR, 2nd. Sess., UN Doc. A/RES/186(S-2) (1948).

- 8 *Assistance to Palestine Refugees*, GA Res. 212(III), UN GAOR, 3rd Sess., UN Doc. A/RES 212(III) (1948).
- 9 *Progress Report of the UN Mediator for Palestine*, UN GAOR, 3rd Sess., Supp. No. 11, UN Doc. A/648 (1948) Pt. 1, VIII, para. 4. For the assassination and the characterization of the assassins as terrorists, see B. Morris, *Righteous Victims: A History of the Zionist–Arab Conflict, 1881–2001* (New York: Vintage Books, 2001) p. 243; cf. A. Shlaim, *The Iron Wall: Israel and the Arab World* (New York: W.W. Norton & Company, 2001) p. 37 and SC Res. 57, UN SCOR, 1948, UN Doc. S/RES/57 (1948).
- 10 *Progress Report*, *ibid.*
- 11 *Palestine Progress Report of the United Nations Mediator*, GA Res. 194(III), UN GAOR, 3rd Sess., UN Doc. A/RES/194 (III) para. 11.
- 12 *Ibid.* para. 2ff.
- 13 *Ibid.* para. 6.
- 14 *Ibid.* para. 11.
- 15 *Palestine: Progress Report of the United Nations Conciliation Commission for Palestine; Repatriation or resettlement of Palestine refugees and payment of compensation due to them*, GA Res. 394(V), UN GAOR, 5th Sess., UN Doc. A/RES/394 (V) (1950) para. 2 (emphasis added).
- 16 See, e.g., *Report of the United Nations Conciliation Commission for Palestine*, UN GAOR, 59th Sess., UN Doc. A/59/260 (2004). For a brief history of the UNCCP's earlier efforts, see L. Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford: Clarendon Press, 1998) pp. 24–8.
- 17 Resolution 302(IV), *supra* note 1 para. 7.
- 18 *Statue of the Office of the United Nations High Commissioner for Refugees*, GA Res. 428(V), UN GAOR, 5th Sess., UN Doc. A/RES/428 (V) (1950) [UNHCR Statute].
- 19 Resolution 302(IV), *supra* note 1 para. 20.
- 20 For a discussion of some of the conflicting estimates, see Takkenberg, *supra* note 16, pp. 18–19.
- 21 The current Arabic version used for the Agency's name refers to “*al-laji'in al filastini'in*” rather than “*laji'i filastin*” and thus fails to convey the difference that exists in English between “Palestine refugees” (i.e., refugees from Palestine) and “Palestinian refugees” (i.e., refugees of Palestinian nationality).
- 22 Takkenberg, *supra* note 16 p. 50; B. Schiff, *Refugees unto the Third Generation: UN Aid to Palestinians* (Syracuse: Syracuse University Press, 1995) 183.
- 23 See UNRWA, “The Problem of the Rectification of the UNRWA Relief Rolls, Information Paper No. 6” (Beirut: UN, 1962) cited in and discussed by Schiff, *supra* note 22 pp. 22–5.
- 24 *Ibid.*
- 25 UNRWA's current definition reads “any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict.” UNRWA, “Consolidated Eligibility and Registration Instructions,” June 2006 at 17.
- 26 UNRWA, Internal Statistics, December 2006.
- 27 UNRWA initially also established placement offices in Iraq and Libya which aimed to find employment for skilled refugees from the five Fields interested in emigrating to those countries. Later, in the aftermath of the first Gulf War, the Agency sent teams to Kuwait and the Libyan–Egyptian border to provide temporary assistance and protection to groups of Palestine refugees who had been expelled by the Gulf States and by Libya. It is currently working in coordination with UNHCR to provide assistance to Palestine refugees who have fled Iraq and are in camps in Jordan and Syria, or in the no-man's land on the Iraqi–Syrian border.
- 28 UNRWA's second Director, John B. Blandford, Jr. had formerly been the General Manager of the Tennessee Valley Authority.
- 29 See Schiff, *supra* note 22 p. 37.
- 30 See, generally, *Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 January–31 December 2005*, UN GAOR,

- 61st Sess., Supp. No. 13, UN Doc. A/61/13, 1, para. 2. The Commissioner-General (originally the Director) of UNRWA has submitted an annual report to the General Assembly each year since the founding of the Agency. These reports provide a good account of the evolution of UNRWA's operations.
- 31 *Assistance to Palestine Refugees*, GA Res. 59/117, UN GAOR, 59th Sess., UN Doc. A/RES/59/117 (2004) para. 5.
 - 32 *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 60/102, UN GAOR 60th Sess., UN Doc. A/RES/60/102 (2005).
 - 33 W. Dale, "UNRWA – A Subsidiary Organ of the UN" (1974) 23 *I.C.L.Q.* 576 at 580.
 - 34 Note on UNRWA's mandate by the Legal Adviser, S. Sinha, UNRWA Headquarters Archive, as discussed in Schiff, *supra* note 22 pp. 251–3.
 - 35 *Humanitarian Assistance*, GA Res. 2252 (ES-V), UN GAOR, Emergency Session, UN Doc. A/RES/2252 (ES-V) (1967).
 - 36 *Persons displaced as a result of the June 1967 and subsequent hostilities*, GA Res. 59/118, UN GAOR, 59th Sess., UN Doc. A/RES/59/118 (2004) (emphasis added).
 - 37 *Ibid.* para. 15.
 - 38 *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 48/40 (A), UN GAOR, 48th Sess., UN Doc. A/RES/48/40 (A-J) (1993) para. 5.
 - 39 *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 57/121, UN GAOR, 57th Sess., UN Doc. A/RES/57/121 (2003).
 - 40 UNHCR Statute, *supra* note 18 ch. I, para. 1 (emphasis added).
 - 41 *Ibid.* ch. II, para. 7(c), excluding from the competence of the High Commissioner any person "[w]ho continues to receive from other organs or agencies of the United Nations protection or assistance"; *Convention relating to the Status of Refugees*, 28 July 1951, Article 1.D, which provides in pertinent part: "This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the High Commissioner for Refugees protection or assistance".
 - 42 See sources cited notes 2–5, *supra*.
 - 43 This enumeration is by no means an exhaustive list of protection functions of UNHCR, but it should be sufficient for the basic comparison being made here.
 - 44 UNRWA Department of Legal Affairs, "UNRWA's Mandate: Its Competence Concerning the 'Protection of Refugees'," Memorandum No. 02/86 (June 1986) para. 4.
 - 45 See e.g., *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1954–30 June 1955*, UN GAOR, 11th Sess., Supp. No. 14, UN Doc. A/2978 (1955) at 22; *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1955–30 June 1956*, UN GAOR, 11th Sess., Supp. No. 14, UN Doc. A/3212 (1956) at 26; *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1956–30 June 1957*, UN GAOR, 12th Sess., Supp. No. 14, UN Doc. A/3686 (1957) at 26; *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1957–30 June 1958*, UN GAOR, 13th Sess., Supp. No. 14, UN Doc. A/3931 (1958) at 22; *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1958–30 June 1959*, UN GAOR, 14th Sess., Supp. No. 14, UN Doc. A/4213 (1959) at 19–20; and *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1959–30 June 1960*, UN GAOR, 15th Sess., Supp. No. 14, UN Doc. A/4478 (1960) at 10.
 - 46 UNHCR, *Refugee Protection: A Guide to International Refugee Law, Handbook for Parliamentarians* No. 2 (N.p., 2001) at 76; UNHCR, *Agenda for Protection*, 3rd. ed., (n.p., 2003) at 74; S. Akram and T. Rempel, "Temporary Protection for Palestinian Refugees: A Proposal" (Paper prepared for Badil Expert Forum, Ghent University, Belgium, 22–3 May 2003) at 18ff.
 - 47 See H. Parvathaneni and A. Imseis, UNRWA Policy Analysis Unit, "UNRWA's Role in Protecting Palestine Refugees," presented at the Badil Expert Seminar, "Closing the Gaps: From Protection to Durable Solutions for Palestinian Refugees," Cairo, March

- 5–8, 2004 at 17, referring to examples of mass refugee situations in Afghanistan, Bosnia-Herzegovina, Cambodia, Central America, East Timor, Iraq, Kosovo, and Namibia.
- 48 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion 9 July 2004*, Reports 2004, 136 para. 49, at ICJ website <<http://www.icj-cij.org>> [*Wall Opinion*], citing *Committee on the Exercise of the Inalienable Rights of the Palestinian People*, GA Res. 57/107, UN GAOR, 57th Sess., UN Doc. 57/107 (2003), in which the General Assembly acknowledges “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.”
- 49 *Future Government of Palestine*, GA Res. 181(II), UN GAOR, 2nd Sess., UN Doc. A/RES/181 (II) (A+B) (1947).
- 50 Compare *Concerning Principles for a Just and Lasting Peace in the Middle East*, SC Res. 242, UN SCOR, 1967, UN Doc. S/RES/242 (1967) para. 2(b), in which the Security Council affirmed the necessity for “achieving a just settlement of the refugee problem.”
- 51 See e.g., Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN ESCOR, 67th Sess., UN Doc. E/CN.4/2006/29 (2006).
- 52 OHCA and UNRWA, *Humanitarian Impact of the West Bank Barrier*, Update 6 (n.p.: UN 2006), at <<http://www.humanitarianinfo.org/opt/docs/UN/OCHA/OCHABarRprt-Updt6-En.pdf>>.
- 53 *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 37/120 J, UN GAOR, 37th Sess., UN Doc. A/RES/37/120 (A-K) (1982) para. 1.
- 54 *United Nations Relief and Works Agency for Palestine Refugees in the Near East: Protection of Palestine Refugees*, GA Res. 38/83(I), UN GAOR, 38th Sess., UN Doc. A/RES/38/83 (I) (1983).
- 55 *United Nations Relief and Works Agency for Palestine Refugees in the Near East: Protection of Palestine Refugees*, GA Res. 43/57, 43rd Sess., UN Doc. A/RES/43/57 (I) (1988) para. 4 (emphasis added). But see *United Nations Relief and Works Agency for Palestine Refugees in the Near East: Protection of Palestine Refugees*, GA Res. 45/73, 45th Sess., UN Doc. A/RES/45/73(I) (1990) para. 4, where “their efforts” reverts to “his [i.e., the Secretary-General’s] efforts.”
- 56 *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 48/40 (H), UN GAOR, 48th Sess., UN Doc. A/RES/48/40 (A-J) (1993) para. 4.
- 57 *Report Submitted to the Security Council by the Secretary-General in accordance with Resolution 605 (1987)*, UN SCOR, 1988, UN Doc. S/19443.
- 58 *Territories Occupied by Israel*, SC Res. 605, UN SCOR, 1987, UN Doc. S/RES/605(1987) (emphasis added).
- 59 *Report Submitted to the Security Council*, *supra* note 57 para. 28.
- 60 *Ibid.* para. 37 (emphasis added).
- 61 *Ibid.* para. 38, 39.
- 62 See e.g., *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 49/35(E), UN GAOR, 49th Sess., UN Doc. A/RES/49/35 (1994); and *Cooperation between the United Nations and the Inter-Parliamentary Union*, GA Res. 59/119, UN GAOR, 59th Sess., UN Doc. A/RES/59/119 (2004) (emphasis added).
- 63 See generally *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, at <<http://www.unrwa.org>>.
- 64 *Wall Opinion*, *supra* note 48 at paras. 102–13.
- 65 See e.g. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), at <<http://www.iciss.ca/menu-en.asp>>.
- 66 Inter-Agency Standing Committee, *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action* (New York: UNICEF, 2002) at 5. The IASC brings together a broad range of UN and non-UN humanitarian partners including UN humanitarian agencies (FAO, OCHA, UNICEF, UNDP, UNHCR, WFP, WHO), the Red Cross movement

represented by ICRC and IFRC, IOM, and three consortia of major international NGOs. The primary role of the IASC is to formulate humanitarian policy to ensure coordinated and effective humanitarian response to both complex emergencies and natural disasters.

- 67 *Growing the Sheltering Tree*, *ibid.* at 11. This definition was originally adopted at the third of a series of protection workshops organized by the ICRC between 1996 and 2000 and attended by a wide range of humanitarian and human rights experts.
- 68 *Ibid.* at 11–12. This paraphrase of the IASC paper is taken from *Protect or Neglect? Toward a More Effective United Nations Approach to the Protection of Internally Displaced Persons* (Washington, D.C.: OCHA-Brookings Institute, 2004).
- 69 *Ibid.* at 13–15.
- 70 Inter-Agency Standing Committee, *Human Rights Guidance Note for Humanitarian Coordinators*, IASC Working Group, 61st Mtg., (Geneva: June 22–23, 2005).
- 71 Secretary-General, *Strengthening of the United Nations: An Agenda for Further Change*, UN GAOR, 57th Sess., UN Doc. A/57/387 (2002).
- 72 *A World Fit for Children*, UN GAOR, 27th Special Sess., Annex, Agenda Item O, UN Doc. A/RES/S-27/2 (2003) at 3.
- 73 *Impact of Armed Conflict on Children: Report of the expert of the Secretary-General, Ms. Grac'a Machel, submitted pursuant to General Assembly resolution 48/157*, UN GAOR, 51st Sess., UN Doc. A/51/306 (1996).
- 74 United Nations, Press Release, SC/8460, HR/4864, "Security Council Establishes First Comprehensive Monitoring, Reporting System to Protect Children Affected by Armed Conflict: Offenders Ordered to Prepare Time-Bound Plans for Ending of Violations" (July 26, 2005); and *Children and Armed Conflict*, UN SCOR, 5235th Mtg., UN Doc. S/RES/1612 (2005).
- 75 *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 59/119, UN GAOR, 59th Sess., UN Doc. A/RES/59/119 (2004) para. 7.
- 76 Conference Report, Geneva Conference, 7–8 June 2004, "Meeting the Humanitarian Needs of the Palestine Refugees in the Near East," Chapter 2, part III, Workshop I, Priority Recommendations, at <<http://www.un.org/unrwa/genevconference>>.
- 77 1577 U.N.T.S. 3.
- 78 UNRWA & UNHCR, *The United Nations and Palestinian Refugees* (Gaza: UNRWA, 2007), at <<http://www.un.org/unrwa/publications/index.html>> .
- 79 Frontiers Association, *Falling through the Cracks: Legal and practical gaps in Palestinian refugee status* (Beirut: Frontiers Association, 2005).
- 80 CRC, *supra* note 77, art. 19.
- 81 *Supra* note 66.
- 82 UNRWA, *Outlines for a Programme Strategy: Discussion Paper for the Advisory Commission* (internal paper, February 2007) at 2.
- 83 For example, the right to education established by the CRC, *supra* note 77, art. 28 and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, art. 13, 6 I.L.M. 368 (entered into force January 3, 1976) [ICESCR]; the right to health at ICESCR, art. 12; the right to food at ICESCR, art. 11; the right to adequate housing at ICESCR, art. 11; and the right to work at ICESCR, art. 6.

3

RESTITUTION AND COMPENSATION FOR PALESTINIAN REFUGEES AND DISPLACED PERSONS

Principles, practical considerations,
and compliance

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In the early 1990s Anne-Marie Slaughter Burley, writing in the *American Journal of International Law*, described international law, procedure, and organizations as “arguably more effective than at any time since 1945.”¹ International law appeared to have been liberated, quoting Richard Falk, “from a sense of its own futility.”² While this post-Cold War assessment has surely been tempered by events of the new millennium – especially the conflict in Iraq – the apparent failure of military power and unilateralism to create order, let alone democratic peace, as well as the need to regularize expanding coordination and cooperation among and between states, intergovernmental organizations, and non-state actors, generally, lends further credence to the important role of international law in international relations.

Peace agreements, in particular, reflect growing recognition of the role of international law in providing political actors with common standards of behavior, procedures and mechanisms for ending major conflicts around the world.³ Nearly all agreements that address conflict-generated displacement since the end of the Cold War, for example, recognize the right to housing and property restitution and establish judicial and/or administrative procedures and restitution mechanisms.⁴ Affirming the importance of restitution in resolving displacement, the UN Sub-Commission on the Promotion and Protection of Human Rights recently adopted

a set of Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”).⁵

In contrast, Miranda Sissons, writing for Human Rights Watch, describes the role of international law in the Israeli–Palestinian conflict as “the missing guest at the diplomatic table.”⁶ Interim agreements briefly mention human rights,⁷ but as Christine Bell observes, “internationally accepted norms are to be subject to the agreement, rather than vice versa.”⁸ There is no mention of relevant humanitarian and refugee law standards – “rights have simply disappeared.”⁹ In one notable exception, however, the 1995 agreement obligates the Palestinian Authority to:

respect the legal rights of Israelis [“most of [which] were obtained after the Israeli occupation in accordance with military orders and changes in local law made by the Israeli military government”¹⁰] (including corporations owned by Israelis) related to government and absentee land located in areas under the territorial jurisdiction of the [Palestinian] council.¹¹

Housing, land, and property rights are a central element of the Israeli–Palestinian conflict, not only because of the hundreds of thousands of unresolved claims of Palestinians displaced during successive wars and conflict in the region,¹² but also because land is tied up with the still unresolved question of Palestinian and Jewish self-determination within the borders of pre-1948 Palestine,¹³ as exemplified in the 2004 Advisory Opinion of the International Court of Justice (ICJ) on the legal consequences of Israel’s construction of a Wall in the occupied Palestinian territory.¹⁴ For Palestinians, writes anthropologist Julie Peteet, “place, or village . . . is what ties a person to the space of Palestine.”¹⁵ Israeli geographer Oren Yiftachel describes space, place, and territory as the “kernels” of the Zionist project for Jewish political sovereignty in Palestine.¹⁶

A not insignificant number of commentators attribute the collapse of political negotiations to resolve the long-standing conflict, and subsequent upsurge in violence in the 1967 occupied Palestinian territories and in Israel, at least in part, to the exclusion of international law, procedures, and organizations – including those related to housing, property and land restitution and compensation – from the peacemaking process. “Indeed, this is a major lesson of all post-conflict situations throughout the world,” writes Scott Leckie, Executive Director of the Centre on Housing Rights and Evictions in reference to outstanding Palestinian refugee claims. “[A]ddress restitution issues head on, and more likely than not peace will hold. Ignore it, and the war that was so hard to stop in the first place will be much more likely eventually to re-ignite.”¹⁷

This chapter aims to define the broad parameters of a “rights-based approach”¹⁸ to Palestinian refugee housing, property, and land claims as part of a comprehensive solution to the Israeli–Palestinian conflict. Indeed, a rights-based approach provides common standards, procedures, and mechanisms for resolving region-wide problems of displacement and related property dispossession.¹⁹ The first section summarizes key restitution and compensation principles for refugees, highlighting similarities

with the specific standards elaborated to resolve Palestinian refugee claims and comparative practice elsewhere. The second section examines how international standards might be applied to resolve practical issues including restitution and compensation mechanisms, discriminatory legislation, documentation, and enforcement. The final section explores potential strategies for a rights-based approach to resolving the housing, property, and lands claims of Palestinian refugees.

Restitution and compensation norms

The question of Palestine was the first major case of international peace and security brought before the United Nations. The set of principles to resolve refugee housing, property, and land claims agreed upon by international actors in endless debates in the fall of 1948 during the waning months of the first Israeli–Arab war reflected the aspirations of those who drafted the UN Charter and the Universal Declaration of Human Rights for a world based on respect for fundamental human rights and the dignity and worth of the human person. Few could have then predicted, however, that the principles relating to refugees set forth in paragraph 11 of UN General Assembly Resolution 194(III) of December 1948²⁰ would reflect legal developments and practice many decades later; nor could they have envisioned, for that matter, that the refugee question would remain unresolved after 60 years.

Resolution 194(III) has been the subject of considerable debate and disagreement. Palestinians generally argue that Resolution 194(III) reaffirms that refugees wishing to do so have a right to return to their homes of origin.²¹ Many Jewish Israelis argue that the Resolution is not binding and, in any case, conditions of return depend on the willingness of refugees to live in peace.²² Working papers prepared by the Secretariat of the UN Conciliation Commission for Palestine (UNCCP) (the body established to implement the Resolution), and documents of the UN Mediator in Palestine (whose recommendations formed the basis for the Resolution), however, provide useful insight into the meaning of the Resolution. A discussion of other relevant UN resolutions – e.g., UN General Assembly Resolutions 3236, November 22, 1974 and 36/146, December 16, 1981 – is beyond the scope of this chapter.

While most interpretations of Resolution 194(III) focus on return and compensation – perhaps because the text does not use the term ‘restitution’ – the Resolution’s legislative history reveals that “[t]here is no doubt that in using this term [‘to their homes’] the General Assembly meant” the return of each refugee from Palestine (Arab, Jewish or other) to “his [her] house or lodging and not to his [her] homeland.”²³ The Assembly rejected two separate amendments that referred in more general terms to the return of refugees to “the areas from which they have come.”²⁴ In a working paper on historical precedents for property restitution and compensation the UNCCP Secretariat emphasized that “the underlying principle of paragraph 11, sub-paragraph 1, is that the Palestine refugees shall be permitted . . . to return to their homes *and be reinstated in the possession of the property which they previously held.*”²⁵ This mirrors language used by the UN Mediator who advised the

UN Security Council in June 1948 that the residents of Palestine should be permitted to regain possession of their property.²⁶

The historical record also indicates that the drafters envisioned two forms of compensation: (1) payment to refugees not choosing to return to their homes; and, (2) payment for the loss of or damage to property.²⁷ The General Assembly rejected draft resolutions and amendments that did not include provisions for payment for the loss of or damage to property.²⁸ The phrase “under principles of international law or in equity” in sub-paragraph 1 intended to provide special protection to returnees in the event that Israel’s domestic law would not provide equal protection for the right to compensation for Palestinian refugees choosing to return to their homes.²⁹ The drafters further intended that compensation should be paid to refugees for both movable and immovable property,³⁰ but excluded compensation claims for ordinary war damages from the scope of the Resolution, which they felt would be best dealt with as part of a comprehensive settlement of the conflict.³¹ Additionally, the UNCCP Secretariat noted that the drafting process indicated that the General Assembly did not wish to arbitrarily limit claims to compensation for material losses and damages as mentioned above.³²

As already mentioned, the principles elaborated in Resolution 194(III) are remarkably consistent with contemporary norms on housing, property, and land restitution for refugees and displaced persons.³³ The 2005 Pinheiro Principles reaffirm (Principle 2(1)) that all refugees and displaced persons have the right to repossess housing, land, and/or property of which they were arbitrarily or unlawfully deprived.³⁴ Principle 2(2) describes restitution as a “distinct right” applicable to all refugees regardless of whether they choose to return or not and it calls upon states to prioritize restitution as the preferred remedy for displacement and a key element of restorative justice.³⁵ Principle 2(1) also reaffirms that refugees and displaced persons have the right to compensation subject to three limitations described under Principle 21(1).³⁶ First, compensation should be restricted to cases in which the remedy of restitution is not factually possible – i.e., where property is either destroyed or no longer exists – as determined by an independent, impartial tribunal, although refugees should have the option to repair or rebuild whenever possible. Second, the injured party should knowingly and voluntarily accept compensation in lieu of restitution. And, finally, compensation is acceptable when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.

The Pinheiro Principles, while not binding in and of themselves, reflect widely accepted principles of international human rights, refugee and humanitarian law instruments, and related standards binding upon states signatories.³⁷ In international law, property rights have been addressed primarily through human rights treaties.³⁸ The *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR) protect against the arbitrary deprivation of property and the arbitrary or unlawful interference with the home.³⁹ Anti-discrimination protections in the UDHR, ICCPR, and in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁴⁰ and equal protection clauses

contained in the UDHR, ICCPR, and in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)⁴¹ can also be applied towards the exercise of property rights by refugees and displaced persons.

These principles, established by universal treaties, have also been incorporated to varying degrees in regional human rights treaties, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),⁴² the *American Convention on Human Rights* (ACHR),⁴³ the *African Charter on Human and People's Rights* (AfCHPR),⁴⁴ and the *Arab Charter on Human Rights*,⁴⁵ which has not yet taken force. These rights apply to individuals regardless of status as refugees or displaced persons, but can be useful as a basis for addressing post-conflict restitution. However, these rights have yet to enjoy full and uniform application. For example, property rights are most protected under the ECHR, both because these rights are clearly elaborated in the treaty and they can be enforced through the European Court of Human Rights, which has developed considerable case law on the protection of property rights. In contrast, property rights are weaker under the provisions of the AfCHPR and the *Arab Charter on Human Rights*, which also completely lacks an enforcement mechanism.

The UN Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council has urged governments to ensure the free exercise of the right to return by developing expeditious procedures and effective mechanisms to resolve property issues.⁴⁶ A working paper prepared by the Special Rapporteur on Housing and Property Restitution concludes that the right to restitution of property is a necessary element of the right to return, but is itself a free-standing, autonomous right, as the principle of housing and property restitution is “enshrined in international and national law, reaffirmed by the international community and recognized by independent United Nations expert bodies.”⁴⁷ It also states that the obligation to assist in the return of refugees implies the provision of restitution.

The right of restitution has also been contained in a number of UN resolutions related to conflicts. Following the adoption of Resolution 35/124 in 1980, which reaffirmed refugees and displaced persons have the right “to return to their homes in the homelands,” the General Assembly adopted resolutions referencing this right covering Algeria,⁴⁸ Cyprus,⁴⁹ Palestine/Israel,⁵⁰ and Rwanda.⁵¹ These resolutions contain varying levels of guarantees for the rights of those displaced, with perhaps stronger guarantees contained in the Palestine–Israel and Rwanda resolutions. Similar language, reaffirming the right of refugees and displaced persons to return to their homes, has been included in Security Council resolutions regarding the situations in Abkhazia and the Republic of Georgia,⁵² Azerbaijan,⁵³ Bosnia and Herzegovina,⁵⁴ Cambodia,⁵⁵ Croatia,⁵⁶ Cyprus,⁵⁷ Kosovo,⁵⁸ Kuwait,⁵⁹ Namibia,⁶⁰ and Tajikistan.⁶¹ However, actual further recognition of this right has been addressed to varying lesser degrees in a number of peace agreements, which directly affected the practical exercise of the right.⁶²

The subject of compensation is less clearly defined in international law, especially in regard to compensation as a substitute for restitution.⁶³ Several UN bodies have

elaborated on the right to compensation. A study issued by the Commission on Human Rights concluded that under international law victims of violations of human rights, particularly gross violations, have the right to reparations. Possible reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁶⁴ In subsequent resolutions, the Commission called upon the international community to give attention to the right to restitution, compensation, and rehabilitation for victims of grave violations of human rights.⁶⁵ The Committee on the Elimination of Racial Discrimination has stated that all refugees and displaced persons have the right to restitution of property or compensation where restitution is not possible, and are free of any commitments concerning such property made under duress.⁶⁶

The right of refugees to compensation has been contained in fewer UN resolutions. General Assembly resolutions cover Palestine/Israel⁶⁷ and South Africa.⁶⁸ South Africa⁶⁹ and Bosnia and Herzegovina⁷⁰ are mentioned in Security Council resolutions. Peace agreements in Bosnia and Herzegovina,⁷¹ Croatia,⁷² Georgia,⁷³ and Rwanda⁷⁴ also include specific provisions for refugee compensation. Yet there is little precedence of compensation as a right in cases where restitution is not factually possible in post-conflict settings. Compensation in lieu of restitution is particularly contentious in refugee return situations because there is often an incentive to promote situations where restitution is not factually possible as a means to prevent return, and therefore should be viewed in a more critical manner. According to the Pinheiro Principles, restitution should be deemed factually impossible only in exceptional circumstances, “namely when housing, land and/or property is destroyed or when it no longer exists,” which should be determined by an independent, impartial tribunal, or when there is a voluntary decision for compensation in lieu of restitution. Where compensation is applicable it can take the form of monetary or in-kind relief, both of which provide certain practical difficulties.

Compensation schemes in the form of money have been less successful as national governments often do not have the funds, and foreign donors prefer to allocate funds to other activities, such as reconstruction. Computing sums is extremely difficult, especially in cases of long-term displacement. The World Bank has advised against monetary compensation alone, except in limited instances, as cash-only approaches tend to lead to impoverishment.⁷⁵ In-kind compensation involving alternative land may prove problematic in places with land shortages or where sustainability issues are not addressed. Other forms of in-kind assistance can include: construction by the state of new housing; subsidies through state housing funds; allocation of state land; or housing credits. Such assistance is available for claimants in South Africa. But these types of assistance may prove difficult in post-conflict societies short on resources.

Another concern is that in certain circumstances it may not be in the public interest to allow physical restitution, even in cases where it is possible, because of overriding land reform initiatives. But since determination of the public interest would be made by the state, such a decision may be met with suspicion by returnees. In some specific cases, land currently used for business purposes is excluded from

physical restitution as a matter of policy in order to promote foreign and direct investment in the property. In both South Africa and Bosnia, physical restitution could be prevented in cases where the property was currently being used for certain commercial purposes, under the logic it was in the best public interest to promote investment and economic growth. Yet a counter-argument exists that, since international law is most protective of the right to home, land used for commercial or industrial purposes would be less protected, in which case physical restitution would be a higher priority if the land had been used for housing by the claimant.⁷⁶

In Bosnia, the Commission for Real Property Claims (CRPC) was mandated with providing compensation in lieu of restitution in cases where the property could not be returned, or where the claimant voluntarily chose compensation.⁷⁷ A special fund to provide monetary compensation was to be established in the Central Bank, with funds provided by the parties to the peace agreement and international donors. However, the fund was never established, and no money was ever made available for compensation, because neither the parties nor international donors provided funds. This is despite the fact that CRPC claimants could actually denote the desire for compensation on the actual claim forms. At the time, the parties were short on resources and the donors preferred to focus funds on promoting return.

While some legal scholars contest the relevance of contemporary norms on housing, land, and property restitution to the Palestinian refugee case,⁷⁸ it is clear from the drafting history and language of Resolution 194(III) that the General Assembly was not creating new standards.⁷⁹ Similar protections on the right to property, for example, are found in General Assembly Resolution 181(II), November 29, 1947 recommending the partitioning of Mandate Palestine into two states.⁸⁰ According to the Resolution, “[n]o expropriation of land owned by an Arab in the Jewish State (by a Jew in the Arab State) shall be allowed except for public purposes. In all cases of expropriation full compensation as fixed by the Supreme Court shall be paid previous to dispossession.”⁸¹ And, while not considered to be a binding legal instrument, the *Universal Declaration of Human Rights* (Article 17), adopted one day prior to Resolution 194(III), also affirms the right to property.⁸²

Indeed, the historical record indicates that those who drafted Resolution 194(III) and the UNCCP Secretariat and its legal advisers were of the general opinion that paragraph 11 reflected a wider body of customary and treaty law. Special reference was made to the *Hague Regulations* of 1907,⁸³ which the Commission noted, citing the 1939 Nuremberg Judgment, “were recognized by all civilized nations and were regarded as being declaratory of the law and customs of war.”⁸⁴ UNCCP lawyers identified Articles 3, 23, 28, 46, 47, and 56 of the *Hague Regulations* as relevant to the refugee question.⁸⁵ “[L]ooting, pillaging and plundering of private property and destruction of property and villages without military necessity,”⁸⁶ practices reported by the UN Mediator in Palestine, discussed during the drafting process and in subsequent UNCCP working papers (and reconfirmed in various documents released from Israel state archives over the past decades),⁸⁷ could not be, in the opinion of the UNCCP and its legal advisors, “considered as claims for ordinary war damages.”⁸⁸ They thus concluded that:

[w]henever it is established that, under international law, the property of a refugee has been wrongfully seized, sequestered, requisitioned, confiscated, or detained by the Israeli Government, the claimant is entitled to restitution of the property, if it is still in existence, plus indemnity for damages.⁸⁹

Refugees not wishing to return, meanwhile, were entitled to compensation consistent with “a legal principle [concerning the confiscation of private property] which is generally recognized both under the domestic law of most countries and under international law.”⁹⁰ Treaty law precedent examined by the Commission included the Treaty of Nimmegeun (1678), the Treaty of London (1839), and the Treaty of Sèvres (1920). The Secretariat further recommended that the Commission examine relevant precedent from WWII German reparations and India–Pakistan.⁹¹

More recently, some legal scholars have argued that while the initial mass displacement of Palestinians in 1948 preceded the development of human rights law, relevant instruments are nevertheless applicable to the Palestinian case. Gail Boling, for example, argues that Israel has “exposed itself to all the progressive developments of international law that have occurred since the initial breach of the international obligation in 1948” because “Israel’s wrongful taking of Palestinian refugees’ property . . . constitutes a ‘continuing violation’”⁹² of international law. UN Human Rights Treaty Bodies appear to confirm this conclusion. In 1998, the Committee on the Elimination of All Forms of Discrimination noted, for example, that “[t]he right of many Palestinians to return and possess their homes in Israel is currently denied. [Israel] should give high priority to remedying this situation. Those who cannot repossess their homes should be entitled to compensation.”⁹³ The Pinheiro Principles, moreover, clearly state (Principle 1) that the instrument applies equally to all refugees and displaced persons.⁹⁴

Others have addressed the issue of conflicting rights. Michael Kagan, for example, states that Israel’s obligation to apply the remedy of restitution has not diminished over the past 50–odd years, but also points out that “[i]ndividual property rights are the strongest conflicting rights claim that Israel can make” vis-à-vis Palestinian refugees.⁹⁵ “This means that Israelis can conceivably acknowledge the refugees’ right to return,” writes Kagan, “without necessarily conceding that any Israelis need to be displaced.”⁹⁶ The Pinheiro Principles provide some guidance on this issue, including how to address secondary occupation of refugee homes. And finally, the recent advisory opinion of the International Court of Justice on the legal consequences of Israel’s construction of a Wall in occupied Palestinian territory, while restricted to the occupied territories, reaffirms, in line with the Pinheiro Principles, that restitution and compensation are the appropriate remedies for the wrongful taking of property.⁹⁷

Some practical issues to consider

The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons provide a useful framework of agreed-upon international

standards, procedures, and mechanisms to consider practical issues that will need to be addressed in resolving Palestinian refugee housing, property, and land claims. The Principles are broad in scope; however, several examples of practical implications related to mechanisms, legislation, documentation, and enforcement are provided below as illustrative.

Principle 12 outlines standards related to national procedures, institutions, and mechanisms for restitution. States are called upon to “establish and support *equitable, timely, independent, transparent* and *non-discriminatory* procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims.”⁹⁸ Provisional regimes may be necessary in the absence of rule of law or where existing state mechanisms are unable to function in a just and timely manner. Such regimes may contain an international component if necessary, especially in cases where domestic actors may prove reluctant to act.

In a number of post-conflict countries, claims commissions have been established to address restitution, with varying levels of success. Claims bodies need to address a number of scenarios related to restitution of land, including: claims by the government against squatters; claims by refugees and displaced persons; claims by owners against refugees and displaced persons that occupy land; conflicting legitimate claims created by successive waves of displacements and occupations; and claims by different communities to the same land. At the outset, it must be determined whether a claims commission is necessary or whether the restitution process could be better implemented through the regular or specialized courts. Factors to be considered include whether a restitution process would overwhelm already weak courts, or whether the judiciary has been tainted during the conflict and thus no longer seen as legitimate.

Following conflicts in the Balkans, claims commissions were established in Bosnia and Kosovo. In Bosnia, the Commission for Real Property Claims was created in accordance with the Dayton Peace Agreement.⁹⁹ Despite its relative success in issuing a large number of decisions,¹⁰⁰ a number of weaknesses prevented CRPC from being an effective body.¹⁰¹ Most importantly, CRPC had no enforcement mechanisms. Implementation of its decisions was dependent on local housing bodies, and in cases involving forcible evictions, the local police as well. CRPC decisions could be appealed only under extremely limited circumstances, which some experts believed was a violation of the European *Convention on Human Rights*. Though more than 90 percent of claims were resolved by 2005, this is more a result of parallel restitution decisions on the same properties by domestic housing bodies than implementation of CRPC decisions. In addition, CRPC was never able to undertake its full mandate, thus compensation measures and the sale and mortgage of properties were never implemented.

Post-conflict, there were numerous disputes related to land in Kosovo. The UN Mission in Kosovo (UNMIK) established two bodies – the Housing and Property Directorate (HPD) and Housing Protectorate Claims Commission (HPCC) – to help regularize housing and property rights, as well as to resolve disputes over residential property, using local and international legal expertise.¹⁰² The HPD

attempted to reach amicable solutions where possible. Where not possible, the cases were sent to the Housing Protectorate Claims Commission (HPCC). The problems faced by HPCC included inaccurate cadastre records due to numerous informal and land transactions undertaken to circumvent discriminatory legislation, and low levels of registration of land in rural areas. In all, HPCC issued decisions on nearly all claims, but only about 40 percent of those had been implemented as of 2005.¹⁰³

Per a regulation of the Coalition Provisional Authority in Iraq, the Iraqi Property Claims Commission (IPCC) was established “for the purpose of collecting and resolving real property claims and to promulgate procedures for promptly resolving such claims in a fair and judicious manner.”¹⁰⁴ The IPCC was later replaced by the Commission for the Resolution of Real Property Disputes (CRRPD). The general principles under which the CRRPD operates were not based on existing legislation but, instead on *ad hoc* rules. There are questions as to whether the restitution process might have been better handled by the Iraqi courts through implementation of the *Civil Code*, though the large number of claims may have swamped the judiciary. The CRRPD holds exclusive jurisdiction over its mandate, thus individuals with property issues covered by its mandate had no other remedy available to them. There are no provisions covering situations where owners were forced to sell property unwillingly or for less than fair value, and there is no distinction made between good and bad-faith purchasers. As of May 31, 2007, the CRRPD had received roughly 132,000 claims, of which almost 35,000 had been decided at the level of first instance.¹⁰⁵

Apart from specialized claims commissions, other adjudicative and administrative mechanisms may be available, including domestic courts and specialized administrative bodies. If specialized claims commissions or administrative bodies are not established, domestic courts may be the natural option for resolving restitution claims. While the courts often have the advantage of providing additional procedural safeguards, including the right to appeal and the ability to consider verbal testimony, court procedures may also provide drawbacks. The number of claims for restitution may overwhelm under-resourced and underdeveloped judiciaries, in which case it may take years to resolve claims. And in certain cases the judiciary may have been involved in land confiscations during the conflict, thus potential claimants may not consider them a legitimate form of relief.

In South Africa, a special Land Claims Court was established to receive restitution claims, and the Minister of Land Affairs or the Department of Land Affairs was declared the respondent in all cases.¹⁰⁶ A requirement that all cases be finalized through a court procedure was eventually dropped so that the process could move forward more quickly through an administrative procedure, with courts limited to actual disputes. This was in recognition of the fact many parties were able to reach agreement without the delays inherent in a court process. The South African model highlights the need for having flexible remedies for the adjudication of restitution claims.

The Peace Accords signed in Guatemala in 1996 provide a basis for restitution, which includes special protections for the indigenous land rights. They contain a

number of land-related commitments and provide for the establishment of land-related institutions. These institutions were designed to resolve disputes through conciliation and legal aid, regularizing land titles, and promoting access to land through the provision of financial and technical assistance. There has been involvement from a number of institutions in regard to dispute resolution, especially ADR, though negotiated agreements are not necessarily legally binding. The land-related institutions have been plagued by a lack of clear policies or strategies, lack of resources and corruption.¹⁰⁷ Slow and inefficient regular courts do not offer much help, and no specialized courts have been established.

In Mozambique, the General Peace Accord provided refugees and displaced persons the right to restitution of property still in existence, as well as the right to pursue legal action against those currently in possession of the property. At present there is no formal restitution process, and means for compensation is limited. However, there has been an attempt to provide a legal environment for the “self-management” of complex restitution cases. The previous land law, which provided state ownership of all lands, and the legal system, whereby documentation is the singular form of evidence for a claim of restitution, put small landholders at a distinct disadvantage. The new *Land Law* aims to protect the land rights of local communities and promote investment in partnership between local communities and commercial investors, and restitution is part of these objectives. No specialized dispute resolution mechanism exists, and the Government of Mozambique would likely not have the resources to establish one. Instead, disputes are settled informally, for example through communal mechanisms, or remain unresolved.

Israel’s land regime effectively blocks all legal avenues through which Palestinian refugees might repossess their homes, lands, and properties.¹⁰⁸ This includes Area C of the West Bank (55 percent) over which Israel continues to exercise full civil and security control and where the exercise of property rights is particularly problematic for Palestinians.¹⁰⁹ A recent World Bank review also found that land administration in the areas administered by the Palestinian Authority – i.e., Areas A and B (comprising 45 percent of the West Bank) and the Gaza Strip – is weak and inefficient.¹¹⁰ While experts have raised questions about transparency and due process under the nascent land regime established by the Palestinian Authority (a draft *Land Law* is currently under consideration by the Palestinian Legislative Council),¹¹¹ the situation is especially problematic for Palestinians in Israel and in areas of the West Bank under Israel’s control.¹¹²

Effective remedies to these problems will likely require a temporary international regime (or an agreed-upon domestic regime with an international component) to administer and/or adjudicate Palestinian refugee and housing and property claims. The UNCCP experience in housing and property restitution provides some valuable lessons, particularly in the areas of membership and enforcement. Commission policies, for example, were often driven by member states rather than a clearly elaborated and transparent set of guidelines. And, the Commission was given neither the mandate nor the resources to deal with a protracted refugee situation.¹¹³ By the early 1950s it had basically become defunct, apart from a property documentation

project completed a decade later.¹¹⁴ Nevertheless, UNCCP documentation (summarized below) remains an invaluable source for property documentation in Israel-Palestine.

A strong legislative framework is also necessary for an effective restitution process. Restitution should be ensured through legislation, including the adoption, amendment, reform, or repeal of relevant laws. Legislation should be consistent with pre-existing relevant agreements, such as peace agreements, and states should take immediate steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the right to housing or restitution. As well, legislation should be based on international standards and should clearly establish the mechanism for exercising relevant rights. It should determine whether the restitution process is administrative or judicial. *De jure* or *de facto* discriminatory legislation is one of the main factors often leading to a breakdown in a restitution process. Apart from restitution laws, other existing legislation, which is *de jure* or *de facto* discriminatory, may actually cause or exacerbate certain types of land disputes. This may include inheritance laws, or discriminatory implementation of housing and land laws. It is necessary not only to cancel discriminatory legislation that was in effect prior to, or during, the conflict, but also to put into effect legislation that will address the damage caused by such legislation. Post-conflict legislation also needs to address contracts for sale or exchange of land made under duress. According to the Pinheiro Principles (Principle 19), states “should neither adopt nor apply laws that prejudice the restitution process, in particular through arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations”¹¹⁵ and are called upon to take immediate steps to repeal such laws.

One of the most egregious laws affecting Palestinian refugee claims is the 1950 *Absentees' Property Law*¹¹⁶ and its sister military order in the West Bank.¹¹⁷ The 1950 law applies to both refugees and internally displaced Palestinians (“present absentees”)¹¹⁸ but, as Forman and Kedar observe, it exempts Jews from being declared absentees “without incorporating explicitly discriminating provisions”.¹¹⁹ Debate over the legislation was recently revived in the context of the construction of the West Bank Wall when the government of Israel decided to retroactively implement the law in eastern Jerusalem.¹²⁰ One of the concerns expressed by one Israeli-Jewish official was that if Palestinian residents of the occupied West Bank were permitted to retain their land in Jerusalem, it may call into question the law in the whole of Israel with obvious consequences for the Palestinian refugee issue.¹²¹ A second law, the 1960 *Basic Law: Israel Lands*,¹²² ensures that all land held by the state, the Development Authority (the body established to facilitate the transfer of Arab property to the state) and the Jewish National Fund (JNF), estimated to be around 92 percent of the land in Israel, will be used “to further Jewish interests in the country.”¹²³ The 1960 law institutionalized what Halabi as well as Forman and Kedar refer to as Israel’s closed land “reservoir.” With few exceptions, the law prohibits any type of alienation of Israel lands to private persons.

The potential problems raised by the lack of attention to such legislation in a peace agreement are illustrated by the 1994 Jordan-Israel peace agreement. Article

11(b) of the agreement calls upon the signatories to abolish discriminatory legislation, but it does not list relevant laws that should be repealed. Michael Fischbach describes how Israel, through the *Law of Implementation of the Peace Treaty*, by which Israel ratified the agreement, ensured that Jordanian citizens (mostly of Palestinian origin) who had been declared absentees under Israel's 1950 *Absentees' Property Law* would remain classified as such and therefore denied access to restitution.¹²⁴ The matter remains unresolved.

In the occupied Palestinian territories, there are an additional number of problems related to land administration. The Palestinian Authority has done little in the way of adopting a formal land policy that addresses matters of government intervention, law, tenure, public management of land, the environment, gender, and socio-economic and market development. This can be explained only partly by ongoing Israeli military occupation. According to the World Bank "[t]he result of this lack of policy is a *de facto* land policy by the government, the components of which may be either at odds with each other and/or may not necessarily address the current and future needs of the Palestinians."¹²⁵ This puts a large number of land owners at risk. The management of public lands has also been conducted by the Palestinian Authority in a non-transparent and inefficient manner. More problematic is the Israeli administration of Area C. In 2005, the Israeli State Comptroller issued a report highlighting several areas of concern, including: irregularities in land requisition orders; lack of data on the total Palestinian assets under the authority of the Custodian for Abandoned Property; and the illegal allocation of private land for settlement purposes.¹²⁶ Yet the Government of Israel has not undertaken any serious steps to rectify this situation.

The Pinheiro Principles (Principle 17) also call upon states to ensure that secondary occupants are protected against arbitrary or unlawful forced eviction. "In cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution," evictions should be "carried out in a manner that is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress."¹²⁷ Another problem connected to secondary occupation is compensation for improvements made to property.

The Pinheiro Principles provide that current occupants should be protected against arbitrary or unlawful forced eviction. Where evictions are necessary in the process of restitution, they should be carried out pursuant to international human rights law. States should undertake to identify and provide alternative accommodation, though lack of such accommodation should not unnecessarily delay implementation of decisions regarding restitution. If housing, property or land had been sold by secondary occupants states may consider providing compensation to bona fide third parties. However, in certain cases the egregiousness of the underlying dispossession may arguably give rise to constructive notice of the illegality of purchasing abandoned property, thus pre-empting the formation of bona fide property interests.

The restitution process in Bosnia was geared heavily in favor of claimants, primarily because most of the rights provided to current occupants during the conflict were defined as temporary. Passage of time may also be a consideration. In Rwanda, the Arusha Accords provide that refugees that left Rwanda more than ten years prior to the signing of the accords should forego their right to reclaim property “in order to promote social harmony and national reconciliation.” This has been explained as necessary due to Rwanda’s housing and land crisis, and the fact is full-scale restitution would have required massive resettlement.¹²⁸

In South Africa, the Constitution (Section 25) guarantees current occupants “just and equitable” compensation if the land is returned to claimants through the restitution process. This compensation must reflect a balance between the interest of the affected party and that of the public, and improvements made by the current occupant should be taken into account. However, in practice it has been difficult to determine adequate amounts of compensation. There is also the issue of compensation to current occupants for improvements made to the land. Another consideration is whether the current occupant acquired rights to the land in good or bad faith. Theoretically, good-faith purchasers would be entitled to great protection. Knowledge of the underlying circumstances as to how the land became available should have put bad-faith purchasers on notice that their rights might not be protected. Such a differentiation is missing from the regulations on restitution in Iraq, which has become a source of criticism.

Secondary occupation of Palestinian refugee homes by Israeli-Jews is less of a problem in the sense that the majority of the refugees are from hundreds of rural villages,¹²⁹ most of which were completely destroyed, either during the 1948 Israeli–Arab war or under a process started in 1965 which was “described in official [Israeli] records as ‘cleaning’ the land or ‘leveling’ the area from the remnants of Arab villages.”¹³⁰ The same process was used, according to documents from the Association of Archeological Survey in Jerusalem, to destroy refugee villages west of Jerusalem, in the Jordan Valley and in the Golan Heights after the 1967 war. Still, the scope of the issue historically is illustrated by the fact that by April 1948, even before the first Israeli–Arab war had broken out, but after months of civil conflict, an estimated 110,000 new Jewish immigrants had already been housed in Palestinian quarters across the country.¹³¹ Some of these homes, particularly in the villages, were later destroyed. A related issue that will have to be addressed, although the areas, according to some researchers are small, is built-up refugee lands.¹³² Testimony from a 2000 commission of enquiry on refugee rights conducted in the Palestinian refugee camps spread across the Middle East illustrates some of the creative solutions that refugees have to these problems.¹³³

As far as the authors are aware, public information on the actual extent of secondary occupation today – i.e., how many pre-1948 Palestinian homes confiscated by Israel still exist – primarily in large cities such as Jerusalem, Haifa, Akka, Ramle, and Lydda is not available. The issue, nevertheless, is a serious one, to the extent that it raises existential fears, not to mention concerns about financial and material security. Fischbach relates one potential precedent in Israel relating to

secondary occupation. After the 1948 war, Israel allowed some 150 Baha'is to return to their homes in Haifa. Government funds enabled 15 Jewish families to find appropriate housing elsewhere.¹³⁴ While the experience may be of some technical value of how to apply relevant international law principles, its political efficacy is limited as the issues raised by the return of 150 Baha'is cannot be compared to issues raised by the return of much larger numbers of Palestinian refugees.

Principle 15 calls upon states "to establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution program."¹³⁵ "[J]udicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property should be accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure."¹³⁶

Any restitution process needs to fit within any plans for overall land reform in the post-conflict setting. In particular, providing security of tenure is viewed as a means to promote economic development and ensure future stability. However, post-conflict formal land tenure systems can be completely out of step with customary norms, particularly in terms of the types of rights and evidence to demonstrate such rights. There is no absolute standard to define security of tenure, as it is a subjective standard based on the relative security of tenure the owner/user currently enjoys. Revising legislation covering land rights is often an important step in land reform. Many tenure systems are based on a wide range of customary and historical influences, and any attempt to reform and develop tenure policies needs to take these influences into account. The unique obstacles faced by refugees and displaced persons in accessing land need also to be addressed.

While Israel and the PLO do not agree on the scope of 1948 refugee land claims, in large part due to Israel's rather broad definition of state lands,¹³⁷ a general estimate may be derived by subtracting pre-1948 Jewish-owned land (most of which was well documented and registered by cadastral survey), and land considered by the Mandate administration to be state land (some of which was registered with the remaining estimated) from the total land area of the state of Israel.¹³⁸ A similar methodology can be applied to the West Bank and Gaza Strip.¹³⁹ The Pinheiro Principles (Principle 16) provide some guidance on the types of claims that should be addressed by a restitution process, which, in addition to private property, should include the rights of tenants and other non-owners. This is particularly relevant to the situation in the Naqab/Negev where Bedouin tribes used large tracts of land with ownership determined by custom, but also in regard to lands held collectively by Palestinian villages. A related problem is the fact that many of the refugees did not own, or owned only very small, plots of land, and in the intervening 50-odd years the number of claimants to these lands has multiplied.¹⁴⁰ In addition to land restitution, a land reform and redistribution program, as was done in South Africa, may be necessary.¹⁴¹

Sources for housing, property and land ownership include Turkish¹⁴² and British Mandate¹⁴³ documents, the Israel land records,¹⁴⁴ the Jewish National Fund,¹⁴⁵

UNCCP,¹⁴⁶ documents attached to the family registration files with the UN Relief and Works Agency for Palestine Refugees,¹⁴⁷ title deeds, tax documents and other material still held by refugees themselves, and German and British aerial photographs of pre-1948 Palestine.¹⁴⁸ Land registration was a problem in pre-1948 Palestine generally,¹⁴⁹ and continues to be a problem in the Palestinian territories occupied in 1967. According to the World Bank less than 50 percent of the land in the Gaza Strip and 30 percent in the West Bank has been registered.¹⁵⁰ Due to multiple periods of administration (Ottoman, British and Jordanian (West Bank), and Egyptian (Gaza)), moreover, each land registry office has three sets of registries. Transactions are recorded in the registry in which the land was first registered.¹⁵¹

UNCCP records will be particularly valuable to any claims process. A global and individual identification of Palestinian property was conducted based on British mandate records to establish a comprehensive record of individual Palestinian Arab property to verify individual property claims. Forms (RP/1) were prepared for each parcel owned by Arabs, including partnerships, companies and cooperative societies. Separate forms (RP/3) were prepared for land owned by the state (including land let to Palestinian Arabs), other public authorities (including religious bodies), Jews and other non-Arab individuals. The UNCCP property database contains some 453,000 records documenting around 1.5 million individual holdings and is archived at the United Nations.¹⁵² While the Commission itself and several independent experts note that the records are problematic in several areas,¹⁵³ they provide the most comprehensive database of Palestinian refugee property to date. Digitization of the UNCCP database was completed in the late 1990s.¹⁵⁴

Finally, Principle 20 calls upon states “to designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgments.”¹⁵⁵ “States should ensure, through law and other appropriate means, that local and national authorities are legally obligated to respect, implement, and enforce decisions and judgments made by relevant bodies regarding housing, land, and property restitution.”¹⁵⁶ In many cases, enforcement proves the most difficult aspect of the restitution process. A number of mechanisms are available to support enforcement. These include courts (regular courts, specialized land courts, land commissions, mobile courts, national/international bodies), claims commissions, alternative dispute resolution (arbitration, negotiation and mediation) and customary procedures. Other bodies, which are only indirectly involved in the restitution process, must also play a part. For example, police may need to enforce eviction orders against current occupants who refuse to vacate property, and social welfare agencies may need to provide alternative accommodation to those entitled to it. Arbitration and mediation, as well as customary mechanisms, may be relevant in certain cases. The most effective means for providing enforcement is the establishment of multiple layers of mechanisms – for example administrative bodies, courts, and specialized tribunals. Political pressure by international actors and donor conditionality are also effective mechanisms.

In 1949, the UNCCP observed that Israel would “have to accept the specific claims of each refugee on his land.”¹⁵⁷ Israel ignored repeated requests from the

UN body to comply with the demands related to the protection of refugee property rights. The experience of the Commission – which called upon Israel to abrogate discriminatory legislation, including the 1950 *Absentees' Property Law* that was used to confiscate refugee property, suspend all measures of requisition and occupation of Palestinian homes and to unfreeze *waqf* (property endowed for religious purposes under Islamic law) property – raises important questions about enforcement, including domestic, and, possibly, international measures to ensure an efficient restitution process.

The willingness of the State of Israel, moreover, to enforce adverse land rulings gives further credence to the importance of enforcement procedures. In the 1952 ruling in *Mabada Daud et al. v. the Minister of Defense et al.*, for example, the Israeli High Court recognized the right of the Palestinian residents of two northern villages evacuated by the military during the 1948 war to return to their homes and lands. Following the ruling, however, the government declared the area a closed military zone and subsequently blew up one village and strafed the other with bombs. The case is still being fought in the courts 50 years later with successive Israeli governments refusing to allow internally displaced Palestinians to return to their homes.¹⁵⁸ Depending on the type of peace settlement, however, state authorities may be more willing to implement restitution claims.

From principle to practice

Few Palestinian refugees have been able to exercise the right to restitution and compensation as reaffirmed in Resolution 194(III).¹⁵⁹ Israel's position remains largely unchanged from that communicated to the UNCCP in 1949. "[The] proprietary rights of the refugees are recognized by the Government [of Israel] for the purposes of compensation," wrote Walter Eytan, head of the Israeli delegation in 1949, "but . . . this recognition does not bind the Government as far as concerns the use or restitution of the lands involved."¹⁶⁰ As already mentioned, Israel's legal regime forecloses almost all options for Palestinian restitution.¹⁶¹ Although much emphasis has been placed on the Palestinian case on compensation,¹⁶² in large part, because it is one aspect of the refugee question where there is some agreement between the state of Israel and the PLO,¹⁶³ few refugees have been compensated for losses and damages. It is not surprising, therefore, that during the last round of final status talks in Taba (Egypt) in January 2001 Israeli and Palestinian negotiators hammered out a general framework for compensation but were unable to agree on restitution.¹⁶⁴

Indeed, the Palestinian refugee case appears to confirm Andrew Hurrell's observation in a recent collection of essays on international law and international relations – not to mention the experience of the refugees themselves – that "the norms that [often] have the real political impact are not legal (or are only indirectly related to the legal order)."¹⁶⁵ Fischbach's historical analysis of UNCCP efforts to resolve refugee housing, land, and property claims demonstrates the wide gap between the principles set out in Resolution 194(III) and actual practice governed

more often than not by the balance of power between Israel and the Palestinians, US foreign policy interests in the Middle East, and, more generally, enforcement problems related to UN intervention, or the lack thereof.¹⁶⁶ It would be incorrect to suggest, however, that law is irrelevant to housing, property, and land claims in Israel and in the occupied Palestinian territories. As Sir Arthur Watts has observed generally: “It is striking that virtually without exception States seek always to offer a legal justification for their actions, even in extreme circumstances where the action is manifestly contrary to international law.”¹⁶⁷

This is perhaps best illustrated in the Palestinian case by the legal regime that Israel created to seize, expropriate, transfer, and then secure Palestinian refugee (and non-refugee) property in a “land reservoir” as the inalienable property of the Jewish people.¹⁶⁸ Aharon Tsizling, Israel’s first Minister of Agriculture, for example, emphasized in relation to the confiscation of refugee agricultural lands after the first Israeli–Arab war in 1948 that it was “important in the international arena and before the world community that what is happening *appears legal*.”¹⁶⁹ [emphasis added] After the 1967 Israel–Arab war, Israel adopted legal and administrative measures to facilitate the restitution of Jewish-owned properties in the eastern areas of Jerusalem that had been under Jordanian administration between 1948 and 1967 while preventing Palestinians from recovering property in western Jerusalem.¹⁷⁰ More recently, Israel has relied upon the rhetoric of international law to defend the confiscation of land and construction of the Wall in the occupied West Bank. “Only a separation fence built on a base of law,” writes outgoing Supreme Court President Aharon Barak in *Public Committee Against Torture in Israel v. Israel*, “will grant security to the state and its citizens.”¹⁷¹

In fact, as Boling points out, both Israel and the Jewish diaspora have progressively participated in the development of the law on property restitution.¹⁷² Israel and Jewish diaspora organizations have been both a ‘persistent advocate’ and a persistent beneficiary of the law of restitution. Testifying before the U.S. Congressional Subcommittee on International Organizations and Human Rights in February 1994, then Secretary General of the World Jewish Congress and co-chairman of the World Jewish Restitution Organization, Israel Singer, told committee members that “[Restitution] is a human right which *every* man deserves.”¹⁷³ As Michael Lynk notes, “The template for the modern international obligation to compensate for unilateral property compensations and wide-scale human rights abuses has been post-war German and European reparations for Jewish and other victims of Nazi persecution.”¹⁷⁴ Israel and Jewish diaspora organizations have also raised the unresolved question of the property rights of Jews who immigrated to Israel from Arab countries.¹⁷⁵ And in November 2001, the Israeli Justice Ministry set up a special unit to seek and locate the Jewish heirs of bank accounts and absentees’ property in Israel belonging to holocaust victims.¹⁷⁶

Israel’s seemingly contradictory approach to housing, land, and property restitution – i.e., rejecting Palestinian claims while supporting Jewish claims – raises interesting legal, moral, and political questions relevant to a solution of Palestinian refugee claims, not least of which is the issue of legal precedent. Yehouda Shenhav

notes, for example, how Israeli officials handling the case of Jewish immigrants from Arab countries in the early years after 1948 were careful not to create precedents that could then be applied to Palestinian refugees.¹⁷⁷ The concern about precedent has been offered as one explanation, by way of another example, for the absence of any process to address property claims of Egyptian Jews in the Camp David (Israel–Egypt) peace agreement.¹⁷⁸ The reference to the “legal rights” of Israelis (*vis-à-vis* absentee and government land in the occupied territories) in the 1995 interim agreement mentioned at the outset of this chapter may also have been included by Israel to forestall possible precedent relating to the larger Palestinian refugee question. More recently, the Knesset suspended procedures to restitute Jewish heirs of holocaust victims of property in Israel held by the state fearing, according to press reports, that the process could create a precedent for Palestinian refugees.¹⁷⁹

More generally, however, the Palestinian case raises what Harold Koh describes as one of “the most perplexing questions in international relations”¹⁸⁰ that is central to a rights-based approach for resolving the Israeli–Palestinian conflict – why do states obey international law, or, in the case of Palestinian refugees in particular, why do states disobey international law? The various streams of thinking about compliance summarized by Koh – rationalist, liberal, and constructivist – provide a framework for possible strategies to bridge the gap between international standards on restitution and compensation for refugees and Israel’s practice *vis-à-vis* Palestinian refugees.¹⁸¹ Before proceeding to the question of strategies, however, it is necessary to briefly explore the question of Israel’s non-compliance with international law standards on housing, land, and property restitution as consolidated in the 2005 Pinheiro Principles from the perspective of the various streams of compliance theory.

Most explanations of Israel’s policy on Palestinian refugees resort to rationalist arguments which link compliance with state interests. Israel’s primary interest *vis-à-vis* Palestinian refugees is to maintain the Jewish character of the state.¹⁸² Most frequently, and increasingly so, this focuses on the question of demography – i.e., the desire to maintain a permanent Jewish majority.¹⁸³ But land is just as central to the Jewish character of the state. Whether through purchase,¹⁸⁴ settlement¹⁸⁵ (creating so-called facts on the ground), or a legal regime which defines land as the inalienable property of the Jewish people,¹⁸⁶ control of land is still bound up with the struggle for territorial self-determination, which continues to be waged today, albeit primarily in the 1967 occupied Palestinian territories;¹⁸⁷ although Israel’s refusal to restitute Palestinian citizens who have been internally displaced since 1948¹⁸⁸ would suggest that the conflict over self-determination is, in reality, relevant to the entire area of Mandate Palestine. Barring a major shift in state interests – e.g., defining Israel as a state of all its citizens as demanded by Palestinian citizens of the state and some Jewish Israelis – or a reconceptualization of Jewish self-determination which is delinked from the question of territory, Israeli compliance with international norms on housing and property restitution *vis-à-vis* Palestinian refugees appears unlikely.¹⁸⁹

The problem with the rationalist explanation of non-compliance is that it assumes that Israel’s interests are fixed. Admittedly, Israel’s interests concerning Palestinian

refugees have proved largely immutable since 1948.¹⁹⁰ Changes in Israel's negotiating position at Camp David and in Taba in 2000 and 2001, respectively – no matter how significant for many Jewish Israelis, and how insignificant for most Palestinians – nevertheless, reflect Israel's ongoing interest in preserving the Jewish character of the state.¹⁹¹ South Africa, by way of example, however – setting aside contentious issues of comparison between Apartheid South Africa and Israel – demonstrates how the interests of states may in fact be shaped more significantly by a process of interaction, coercive or otherwise, with other state and non-state actors in the international system (see the constructivist model below). Rationalist explanations might hold greater explanatory power if Israel was a homogeneous state, but the simple fact that one-fifth of the population – i.e., Palestinian citizens – do not share Zionist values which most associate with their status as second-class citizens, with some increasingly turning to international fora to gain recognition of their rights, represents a continuous challenge to Israel's interests as a Jewish state.¹⁹²

Liberal explanations for compliance are premised on the assumption that liberal democracies – characterized by representative government, guarantees of civil and political rights, and a judicial system based on rule of law – are more likely to comply with international law, especially when norms are perceived as legitimate. According to Koh, legitimacy is characterized by clarity of rule, validation by rituals, and other formalities (e.g., UN resolutions and peace agreements), and enunciation and elaboration through “right process.”¹⁹³ Unfortunately for Palestinian refugees, Israel has traditionally viewed the United Nations, especially the UN General Assembly, which set out the primary framework for resolving the 1948 refugee question in Resolution 194(III), as holding a long-standing bias against the State of Israel.¹⁹⁴ While there are some contradictions in this explanation – e.g., Israel's general acceptance of General Assembly Resolution 181(II) as legitimate, while rejecting the legitimacy of Resolution 194(III) adopted by the same body¹⁹⁵ – it does offer a partial explanation for Israeli non-compliance including rejection of the 2004 ICJ Advisory Opinion on the Wall requested by the General Assembly.¹⁹⁶

Still, this model does not fully explain why Israel does not comply with norms on refugee housing and property restitution, which have gained increasing legitimacy as demonstrated by the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons; and the growing number of UN resolutions, peace agreements, and domestic laws that recognize refugees' rights to restitution and compensation. The discrepancy between Israeli practice vis-à-vis Jews and Palestinians can be explained, however, by the qualified nature of liberal democracy in Israel in which the ethnocratic nature of the state – i.e., a state that “facilitates the expansion of a dominant ethnic nation in a multi-ethnic territory”¹⁹⁷ – acts as a filter for the internalization of international norms. Indeed, in 1998 the UN Committee on Social, Economic and Cultural Rights noted with “concern that an excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens.”¹⁹⁸ The Committee raised particular concerns about Israel's national [Jewish] institutions “chartered to benefit Jews exclusively” which “control most of the land in Israel.”¹⁹⁹

Finally, the constructivist approach posits that compliance with international law occurs through an “iterative” and “solidaristic” process that reshapes the interests and the identity of states thus enabling the internalization of such norms. In short, peer pressure, including membership in treaty regimes, should induce Israeli compliance with international norms on housing and property restitution. While this approach may explain more recent efforts to address Jewish holocaust claims inside Israel²⁰⁰ – i.e., recent government efforts to locate heirs of holocaust victims who owned property inside Israel were motivated by internal pressures but also pressure from Jewish diaspora organizations – it does not offer a very robust explanation of Israel’s rejection of housing and property claims of Palestinian refugees, which have been reaffirmed, as mentioned earlier, by UN human rights treaty bodies monitoring compliance with conventions to which Israel is signatory.

Non-compliance can be explained by two factors. First, the constructivist model assumes that a state’s peers share a common understanding or perception that the relevant international rule – in this case the right of refugees to housing and property restitution – is both legitimate *and* applicable. While many of Israel’s primary ‘peers’ – e.g., the United States and the European Union – may accept the legitimacy of the right of refugees to housing and property restitution (the United States, for example, has been a key ally in pressing for Jewish restitution claims in Europe, while the EU has linked membership of former eastern bloc countries to restitution) they do not necessarily accept the applicability of these principles to the Palestinian case.²⁰¹ Not long after 1948, the U.S. delegation to the UN (using language that mirrored that adopted by the Clinton Administration some three decades later in relation to the status of the West Bank, eastern Jerusalem, and the Gaza Strip) argued that the “rights of Arab refugees in this matter (property) are the subject . . . of bitter dispute between the parties concerned and are most difficult to state precisely.”²⁰² Akram Hanieh who participated in final status talks on the refugee question at Camp David in 2000 describes how “American negotiators became strangely touchy at the mere mention of principles and rights.”²⁰³ Aaron Miller, a former State Department official, has acknowledged that “far too often, [the US] functioned in this process, for want of a better word, as Israel’s lawyer.”²⁰⁴ Israel is, therefore, unlikely to suffer a loss of reputation – i.e., it is unlikely to be susceptible to peer pressure – for non-compliance nor is it likely to face sanction by institutions of which its peers are key members – e.g., the now defunct UNCCP, the UN Security Council,²⁰⁵ or the Euro-Mediterranean Partnership/Barcelona process.²⁰⁶

Second, the international treaty regimes – human rights and humanitarian law regimes, in particular – that may address housing and property rights of Palestinian refugees, of which Israel is a member, lack sufficient enforcement mechanisms. Alfredsson observes that under international human rights instruments, for example, the only available procedure to submit complaints in the UN human rights system for violations of property rights is the 1503 procedure.²⁰⁷ Israel’s non-compliance with the 2004 ICJ Advisory Opinion on the Wall provides yet another example of the problem of enforcement. For Israel, the benefits of compliance, for example, with the concluding observations of the UN Committee on the Elimination of

Discrimination concerning refugee property mentioned above²⁰⁸ do not outweigh the cost – i.e., dismantling the land system that is central to the Zionist–Jewish identity of the state. “No foreign mediator should waste time trying to alter this standpoint [against the return of the refugees],” wrote the *Jerusalem Post*, Israel’s English-language daily in December 2000 as Israeli and Palestinian negotiators continued to negotiate over the refugee issue, “The vast majority of Israelis would rather forego a peace agreement than accept such terms.”²⁰⁹ Moreover, unlike Europe, for example, where a regional treaty regime has employed peer pressure to gain compliance of new or prospective member states with international norms on housing and property restitution, there is no such regional treaty regime in the Middle East to which Israel is a party. For example, in Bosnia, membership in the Council of Europe, and the future possibility of European Union membership, were conditioned on implementation of restitution laws.

All three models – rationalist, liberal, and constructivist – offer greater insight into Israel’s non-compliance with international norms on housing and property rights for Palestinian refugees. The rationalist and liberal models highlight the incompatibility of Palestinian refugee housing and property claims with Israel’s self-definition as a Jewish state. They also illustrate the obstacle to refugee claims posed by the linkage between control of land and Jewish self-determination. The constructivist model sheds light on the contribution, or lack thereof, of external actors, including the United States, European Union and Arab League, among others, as well as institutions like the United Nations towards a resolution of Palestinian refugee claims.

Together, the problems of non-compliance in each model, suggest some potential strategies for a rights-based solution for Palestinian refugee claims. The rationalist model raises the question of how to influence state interests. The case of South Africa, mentioned above, demonstrates the role played by more coercive, often parallel, measures to transform state interests. While some non-state actors in the Israeli–Palestinian conflict have adopted a boycott, divestment and sanctions (BDS)²¹⁰ strategy, state actors do not support such an approach. The rationalist and liberal models both point to the potential role of Israel’s non-Zionist (mostly Palestinian) population in challenging those aspects of Israel’s self-definition of itself as a Jewish state that prevent Palestinian refugees from exercising their rights to housing, property, and land restitution and compensation. The two models also raise the question of redefining self-determination in a way that accommodates the rights of Palestinian refugees.²¹¹ The constructivist model raises questions about how to influence foreign policy of relevant external actors, strengthening and enhancing regional (in the Middle East/Arab world) and international (at the United Nations) mechanisms.

Harold Koh’s model of a *transnational legal process* based on liberal and constructivist strands of compliance theory suggests a specific strategy through which states may internalize international norms. Some of the ideas addressed below are, in fact, already being employed in the Palestinian case. The model simply provides a conceptual framework. The transnational legal process model posits that there are three steps by which states internalize international norms:

1. one or more transnational actors provokes a legal *interaction* with another;
2. this interaction generates an *interpretation* or the enunciation of a global norm applicable to the situation; and,
3. future transactions further *internalize* the norms and help to reconstitute state interests and identity.²¹²

The UN General Assembly's request²¹³ for an advisory opinion from the International Court of Justice on the legal consequences of the construction of the Wall in the West Bank and the subsequent opinion²¹⁴ of the court may be considered as stage one and two of such a process.²¹⁵ The interactive process has continued largely through the General Assembly²¹⁶ resulting, to date, in a draft mechanism²¹⁷ to document damages resulting from the construction of the Wall and its associated regime. Arguably, however, the lack of follow-up – i.e., sustained legal interaction – has short-circuited the process.

Koh also suggests three steps towards effective internalization of international norms through such a transnational legal process:

- i) empower more actors to participate, including intergovernmental organizations, NGOs, private actors, etc.;
- ii) identify norms for enunciation and elaboration; and,
- iii) identify best strategies for internalization of international norms at the social, political, and legal levels.

In the Palestinian refugee case step one could include further empowering Palestinian refugees to participate in the search for their own solutions as recognized under international refugee law but seldom applied;²¹⁸ broader participation of Israeli-Jewish society;²¹⁹ and, building partnerships and joint transnational legal processes with other refugees facing unresolved housing and property claims.²²⁰ Recent comparative study of peace processes suggests that “where a peace process enables broad-based participation and public debate, intensely conflictual issues can be reclaimed as the normal subjects of political dialogue, problem-solving and constructive action.”²²¹ Indeed, one could argue that the strength of this type of process is one of the factors that led to the government of Israel's strong reaction against the 2000 World Conference Against Racism (WCAR) in South Africa, which provided a forum that empowered a broad range of global non-governmental actors to clearly enunciate legal norms applicable to a rights-based solution of the conflict, including refugees, and to identify strategies at all three levels – social, political, and legal – including law-based coercive measures.²²²

As already mentioned, the International Court of Justice has provided one forum for norm enunciation and elaboration but arguably requires sustained follow-up. In terms of other potential fora (step two) Susan Akram provides an overview of available fora for refugee claims, along with analysis of opportunities and constraints of each fora, including UN human rights mechanisms.²²³ The Chagos Islands case (*Bancoult v. Secretary of State*)²²⁴ and the Loizidou case in Cyprus (*Loizidou v. Turkey*)²²⁵ provide further examples of how legal fora at different levels could be

used to provoke an interaction, interpretation, and internalization of relevant norms on housing and property rights, although the latter has yet to happen in the Chagos case while steps towards internalization of the restitution norm with regard to Turkey, in particular, setting aside the situation in the Turkish-controlled area of Cyprus, remains tentative. While there are no region-wide fora in the Middle East currently available to Palestinian refugees – development of such fora is an area critical to the reform process advocated by regional and international actors – Palestinian refugees who have acquired citizenship in countries outside the Middle East may examine the potential of domestic fora to promote rights and advance outstanding claims. United Nations reform, particularly in relation to the organization's human rights mechanisms, will require a re-examination of potential avenues to strengthen principles and opportunities for redress.

Public education by groups such as the Zochrot Association inside Israel exemplifies efforts towards social internalization (one element of step three) of relevant legal norms. As several Israeli-Jewish writers have noted, there is an “abysmal lack of understanding” of the Palestinian refugee issue.²²⁶ Describing one project to post signs at the sites of destroyed Palestinian refugee villages, Eitan Bronstein writes:

Posting signs at destroyed Palestinian villages is part of a larger effort to bring civil and national equality to the country. Physically marking these villages and holding public discussions on the Palestinian *Nakba* may encourage a more ethical discourse and reveal both the victims and the initiators of the hardships. The act of making the destroyed villages visible is intended to set in motion a process of catharsis within the Jewish public, as well as serve as an expression of humanity.

Signs posted at demolished villages will invoke the question of a law of return for Palestinian refugees. The signs will place the question of the Palestinians' right to return on the public agenda by testifying to that which existed here, to that which cannot be ignored forever. Jewish recognition of the ongoing refugee problem and determined striving towards an agreement on the issue of return are keys to real reconciliation between the two peoples. Without a fair solution to the problem of return, the conflict can never be resolved.²²⁷

Indeed, follow-up discussions among Palestinians and Israeli-Jews about the legal norms enunciated and elaborated during this conference, and transmission of these norms to international policy makers are examples of social and political strategies that are part and parcel of such a transnational legal process that can build an effective epistemic community to address the unresolved problem of Palestinian refugee and housing claims.

Conclusion

This chapter has attempted to highlight not only the relevant principles that govern housing and property restitution for refugees, but also to explain Israel's

non-compliance and generate some initial ideas about strategies for a rights-based solution to outstanding refugee claims. And it has attempted to briefly explore how the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons could be used to construct a practical plan to address such claims while at the same time securing the housing and property rights of all persons on an equal and non-discriminatory basis as a key element of restorative justice.

Nearly sixty years ago, member states of the United Nations recommended that the international body obtain an advisory opinion from the International Court of Justice to help guide the General Assembly in its deliberations on the future of Palestine.²²⁸ The appeal was rejected. Explaining the vote, the Chair of the Assembly's *Ad Hoc* Committee said that raising matters of principle would not assist in the process of bringing the parties together to reach a solution to the Palestine question.²²⁹ Yet, as Mallison and Mallison observed more than three decades ago:

Because of the dismal failure of the techniques which have been utilized, international law is no longer only an ideal alternative. It is the only practical alternative to an indefinite continuation of the present situation . . . Another so-called 'practical' settlement based upon naked power bargaining and calculation will, at best, provide a short interlude between intense hostilities.²³⁰

For those seeking a just, comprehensive, and durable solution for this protracted conflict the authority and legitimacy rendered by a rights-based approach, which "crude power can never on its own secure,"²³¹ is both good news and considerable challenge. As Israeli historian Ilan Pappé observes, "[t]he very idea of considering the 1948 case in the realm of law and justice is anathema to most Jews in Israel . . . [R]ecognizing the Palestinians as victims of their own evil is deeply traumatic, for it not only questions the very foundational myths of the state of Israel and its motto of 'A state without people for a people without a state,' but it also raises a whole panoply of ethical questions with significant implications for the future of the state."²³²

Notes

- 1 A. M. Slaughter Burley, "International law and International Relations Theory: A Dual Agenda" (1993) 87:2 A.J.I.L. 205 at 205. Also see Koh, stating that "The end of the Cold War and the ensuing collapse of bipolarity initiated the era of global law in which we now live. In the heady days after the Berlin Wall fell, the future seemed unusually bright for the new 'New World Order'." H. H. Koh, "Why Do Nations Obey International Law?" (1997) 106:8 Yale L.J. 2599 at 2630.
- 2 Slaughter Burley, *ibid.* at 205.
- 3 Quigley attributes the role of law in resolving territorial settlements to three developments in the twentieth century: "creation of the United Nations, collective responsibility for belligerent occupation, and the emergence of human rights law." J. Quigley, "The Role of Law in a Palestinian-Israeli Accommodation" (1999) 31: 2-3 Case W. Res. J. Int'l L. 351 at 355.
- 4 For a review of international law provisions in recent peace agreements addressing refugees see e.g. Public Law and International Policy Group, *Peace Agreement Drafter's*

- Handbook – Refugee Return* (n.p.: PLIPG, 2005), online PLIPG <<http://www.publicinternationalallaw.org/areas/peacebuilding/peacehandbook/refugeereturn.pdf>>.
- 5 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Final Report of the Special Rapporteur, Paulo Sergio Pinheiro: Principles on Housing and Property Restitution and Displaced Persons*, annexed to *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons*, UN ESCOR, 56th Sess., UN Doc. E/CN.4/Sub.2/2005/17 (2005). Also see UNHCR, “Property-related Issues in the Context of Voluntary Repatriation,” *Global Consultations on International Protection*, Annex I, UN Doc. EC/GC/02/5 (2002).
 - 6 M. Sissons, “No peace without human rights” *The Guardian* (May 18, 2003), online: Guardian Unlimited < <http://www.guardian.co.uk> >. Also see M. Mar, “The Negotiation Process: The Lack of a Human Rights Component” (2003) 10:3 *Palestine–Israel Journal of Politics, Economics and Culture* 6.
 - 7 See Agreement on the Gaza Strip and Jericho Area, Cairo, May 4, 1994 (Article XIV stating that “Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this agreement with due regard to internationally accepted norms and principles of human rights and the rule of law”); and Wye River Memorandum (October 23, 1998), online: U.S. Department of State <http://www.state.gov/www/regions/nea/981023_interim_agmt.html> (Section II, Para. 4 stating that “Pursuant to Article XI (1) of Annex I of the Interim Agreement, without derogating from the above, the Palestinian Police will exercise powers and responsibilities to implement this Memorandum with due regard to internationally accepted norms of human rights and the rule of law, and will be guided by the need to protect the public, respect human dignity, and avoid harassment”).
 - 8 C. Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000) at 200. Similarly, the unofficial Geneva Accord completed in 2003 would override the UN *Charter* in situations of potential dispute between the *Charter* and the agreement itself (Article 2(6) stating that “Without prejudice to the commitments undertaken by them in this Agreement, relations between Israel and Palestine shall be based upon the provisions of the *Charter of the United Nations*”), online: Geneva Accord <<http://www.geneva-accord.org>>.
 - 9 Bell, *supra* note 8 at 203.
 - 10 R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (London: Kluwer Law International, 1997) at 43. The agreement does not define the “legal rights” of Israelis related to government and absentees’ land in the 1967 occupied Palestinian territories.
 - 11 The Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, September 28, 1995, Annex III, Appendix 1, Article 16, online: US Department of State < <http://www.state.gov/p/nea/rls/22678.htm> > [emphasis added].
 - 12 For more details see T. Rempel, “Housing and Property Restitution: The Palestinian Refugee Case” in S. Leckie, ed., *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Ardsey, NY: Transnational Publishers, Ltd., 2003) 275 at 297–305.
 - 13 The Israeli–Palestinian interim agreements “provide a change in status of territory” but do not recognize the right of the Palestinian people to self-determination. Bell, *supra* note 8 at 190. Also see R. Falk, “Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Process” (1994–5) 8 *Palestine Y.B. Int’l L.* 19.
 - 14 The Court opined that the Wall impedes “the exercise by the Palestinian people of its right to self-determination” and is “a breach of Israel’s obligation to respect that right.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136.
 - 15 J. M. Peteet, “Transforming Trust: Dispossession and Empowerment among Palestinian Refugees” in E. V. Daniel and J. C. Knudsen, eds., *Mistrusting Refugees* (Berkeley: University of California Press, 1995) 168 at 170. Moreover, it is important to note, as

Israeli geographer Oren Yiftachel observes, that Palestinians and Israelis do not necessarily share identical concepts of the relationship between land and identity. Palestinians historically viewed their “collective territorial identity as inclusive [while] Zionists only regarded Jewish newcomers as part of the nation.” O. Yiftachel, “Territory as the Kernel of the Nation: Space, Time, and Nationalism in Israel/Palestine” in S. K. Das, ed., *Peace Processes and Peace Accords* (New Delhi: Sage Publications, 2005) 56 at 69. This view continues to find expression through continued Palestinian support for a binational state in Mandate Palestine and in the view expressed by some Palestinians that Jewish settlers wishing to remain in the occupied Palestinian territories could become citizens of a future Palestinian state in the context of a two-state solution.

- 16 Yiftachel, *ibid.* at 68. This view, encapsulated by Ariel Sharon’s statement that while Palestinians may have rights *in* the land, it is the Jewish people that have a right *to* the land, finds substance in Israel’s land regime and its rejection of Palestinian refugee restitution. Prime Minister Ariel Sharon (Address to the High Level Plenary Meeting of the 60th Session of the General Assembly of the United Nations, September 15, 2005), online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il/MFA/Peace+Process/Key+Speeches/PM+Sharon+addresses+the+UN+General+Assembly+15-Sep-2005.htm>>. In an interview in the Israeli daily *Ha’aretz*, Sharon comments that he learned this doctrine from his parents. A. Benn and Y. Verter, “Even King Solomon ceded territories” *Ha’aretz* (April 22, 2005).
- 17 S. Leckie, “Peace in the Middle East: Getting Real on the Issue of Palestinian Refugee Property” (2003) 16 *Forced Migration Review* 41 at 43.
- 18 The term “rights-based approach” as used here refers to a negotiated political settlement governed by international legal standards, procedures, and mechanisms that protects the rights of all parties to the conflict. The specific rights of refugees and displaced persons to housing and property restitution are consolidated in the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5. For a useful overview of the development of rights-based approaches see, e.g., W. A. Schabas and P. G. Fitzmaurice, *Respect, Protect and Fulfil, A Human Rights-Based Approach to Peacebuilding and Reconciliation* (Monaghan, Ireland: Border Action, 2007).
- 19 This includes, for example, a settlement of unresolved housing, property, and land claims of Jewish immigrants from Arab countries. For a discussion of this issue in the context of Palestinian refugee claims, see, e.g. Y. Shenhav, “The Jews of Iraq, Zionist Ideology, and the Property of Palestinian Refugees of 1948: An Anomaly in National Accounting” (1999) 31: 4 *International Journal of Middle East Studies* 605; and M. Fischbach, “Palestinian and Mizrahi Jewish Property Claims in Discourse and Diplomacy” in A. M. Lesch and I. S. Lustick, eds., *Exile and Return, Predicaments of Palestinians and Jews* (Philadelphia: University of Pennsylvania Press, 2005) 207.
- 20 *Palestine – Progress Report of the United Nations Mediator*, GA Res. 194(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948) at 21. Paragraph 11: “Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.”
- 21 GA Res. 194 (III), *ibid.* For an overview of the Palestinian and Arab position, see e.g. G. J. Tomeh, “Legal Status of Arab Refugees” (1968) 33:1 *Law and Contemporary Problems* 110.
- 22 For an overview of the Israeli position, see e.g. R. Lapidot, “The Right of Return in International Law, with Special Reference to the Palestinian Refugees” (1986) 16 *Isr. Y.B.H.R.* 103.
- 23 United Nations Conciliation Commission for Palestine, *Analysis of Paragraph 11 of the General Assembly Resolution of 11 December 1948, Working Paper Prepared by the UN Secretariat*, UN Doc. A/AC.25/W/45 (1950). The drafting history does not provide a

- satisfactory answer as to why the term “right” used repeatedly by the UN Mediator was not retained in the final text of Resolution 194(III). Mallison and Mallison suggest that “The text of paragraph 11 appears to have been written on the assumption that the principle or right of return was not an issue and that the central task was achieving practical implementation of repatriation.” W. T. Mallison and S. V. Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Question of Palestine* (New York: United Nations, 1979) at para. 31, UN Doc. ST/SG/SER.F/4.
- 24 *Analysis of Paragraph 11 of the General Assembly Resolution of 11 December 1948*, *supra* note 23.
 - 25 *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, Working Paper of the UN Secretariat, March 1950, UN Doc. A/AC.25/W.81/Rev. 2 (Annex 1), 1950, para. 1 [emphasis added]. Also see comments of the legal adviser to the UN Economic Survey Mission to the Middle East. P. Contini, *Legal Aspects of the Problem of Compensation to Palestine Refugees*, Beirut, 22 November 1949, appended to *Letter and Memorandum dated 22 November 1949. Concerning Compensation*, received by the Chairman of the Conciliation Commission from Mr. Gordon R. Clapp, United Nations Economic-Survey Mission for the Middle East, UN Doc. W/32, (1950).
 - 26 *Text of Suggestions Presented by the United Nations Mediator on Palestine to the Two Parties*, UN SCOR, 1948, UN Security Council Doc. S/863, July 3, 1948.
 - 27 United Nations Conciliation Commission for Palestine, *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, Working Paper Prepared by the Secretariat, UN Doc. W/30 (Restricted) (1950), at para. 2. The original draft resolution submitted by the UK called for compensation for refugees not wishing to return, and compensation for property which has been lost “as a result of pillage, confiscation or of destruction.” UN Doc. A/C.1/394. In a second revision submitted by the UK, the latter was replaced by the phrase “[as a result] of loss of or damage to property which under principles of international law or in equity should be made good by the Governments or authorities responsible.” UN Doc. A/C.1/394, Rev.2. In his September 1948 report to the Secretary General, the UN Mediator in Palestine also called upon the United Nations to affirm the “payment of adequate compensation for the property of those choosing not to return.” *Progress Report of the United Nations Mediator on Palestine, submitted to the Secretary General for Transition for the Members of the United Nations*, UN GAOR, 3rd Sess., Supp. No. 11, UN Doc. A/648 (1948) at Part One, Section VII, para. 4(i).
 - 28 This included amendments by the United States (A/C.1/351/Rev.1 and 2), Guatemala (A/C.1/398/Rev. 1 and 2) and Colombia (A/C.1/399). According to the U.S. the latter “was a problem which could be dealt with better by the parties concerned, perhaps with the assistance of a claims commission.” The representative of Guatemala stated that “the question of war damage was separate from the refugee problem . . . The Commission should have nothing to do with war damages; that matter ought to be dealt with in the peace treaty.” *Compensation to Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, *supra* note 27, para. 9.
 - 29 *Letter and Memorandum dated 22 November 1949, Concerning Compensation*, *supra* 25. Nehemiah Robinson raised the same concern several years earlier in relation to displaced European Jews. See *Indemnification and Reparations, Jewish Aspects. Indemnification and Reparations, Jewish Aspects*. (New York: Institute of Jewish Affairs, 1944) cited in *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, *supra* note 25. While all refugees were to be compensated for the loss of or damage to property, the UNCCP Secretariat and its legal advisers noted that the body of law (international or municipal) applicable to claims of returning refugees would depend on the status of returnees under Israeli law.
 - 30 *Analysis of Paragraph 11 of the General Assembly Resolution of 11 December 1948*, *supra* note 23.
 - 31 The Secretariat observed that “Compensation claims for ordinary war damages originate in the direct consequences of the military operations and, as a general rule, are legally

- based on explicit provisions either in a peace treaty between the parties or in special Claims Conventions concluded subsequently to the general peace settlement. It is submitted that this category of claims falls outside the scope of the resolution of the General Assembly which, on the other hand, does not prejudice the position of the refugees in this respect. It would therefore seem that any action with respect to this category of claims would necessarily have to await the general peace settlement in Palestine.” *Compensation to Refugees for Loss of or damage to Property to be Made Good Under Principles of International Law or in Equity*, *supra* note 27 at paras. 4, 14.
- 32 By the substitution of the expression “loss of or damage to property, which under principles of international law or in equity should be made good,” whereby the wording became similar to that generally used in Mixed Claim Conventions, it may be assumed that the General Assembly on the other hand did not wish to limit the claims to cases as just mentioned. It would therefore seem necessary to give the provision in question a somewhat wider application and to consider each case on its merits.” *Ibid.* para. 13.
 - 33 See Principles on Housing and Property Restitution for Displaced Persons, *supra* note 5.
 - 34 Principle 2(1), *ibid.*
 - 35 Principle 2(2), *ibid.*
 - 36 Principle 2(1) and 21(1), *ibid.*
 - 37 For a more detailed analysis of relevant international law see “Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons,” Appendix to Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5. In relation to the Palestinian case, see e.g. G. J. Boling, “‘Absentees’ Property’ Laws and Israel’s Confiscation of Palestinian Property: A Violation of UN General Assembly Resolution 194 and International Law” (2000–2001) XI Palestine Y.B. Int’l L. 73. Counter-arguments by Benvenisti and Zamir do not appear to be consistent with the Principles on Housing and Property Restitution for Refugees and Displaced Persons. See E. Benvenisti and E. Zamir, “Private Claims to Property Rights in the Future Israeli–Palestinian Settlement” (1995) 89:2 A.J.I.L. 295.
 - 38 While not directly covering restitution of property, international humanitarian law does afford protections against the confiscation or destruction of property. Article 46 of the *Hague Regulations* provides that private property “must be respected” and “cannot be confiscated.” Article 55 states that an occupier is regarded only as an administrator and user of “public buildings, real estate, forests, and agricultural estates belonging to the hostile State and situated in the occupied country” and therefore “must safeguard the capital of these properties.” Article 53 of the Fourth Geneva Convention prohibits the destruction of real or personal property except where “absolutely necessary by military operations.” Additionally, Article 146 of the Fourth Geneva Convention includes “extensive destruction and appropriation of property, not justified by military necessity and undertaken unlawfully and wantonly” as a “grave breach” of the Convention, liable to penal sanctions.
 - 39 *Universal Declaration of Human Rights*, GA Res. 217A(III), UN GAOR, 3rd Sess., UN Doc. A/810 (1948) 71 at art. 17 [UDHR]. *International Covenant on Civil and Political Rights*, GA Res. 2200(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966) 52 at art. 17(1), adopted 19 December 1966 (entered into force March 23, 1976) [ICCPR].
 - 40 *International Covenant on Economic, Social and Cultural Rights*, GA Res. 220(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966) 49, adopted December 19, 1966 (entered into force January 3, 1976).
 - 41 *International Convention on the Elimination of All Forms of Racial Discrimination*, March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969).
 - 42 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force September 3, 1953).

- 43 OAS, General Assembly, *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser. L./V/I.4 Rev. (1965).
- 44 *African [Banjul] Charter on Human and Peoples' Rights*, June 27, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (entered into force October 21, 1986).
- 45 *Arab Charter on Human Rights*, Council of the League of Arab States, September 15, 1994, reprinted in (1997) 18 H.R.L.J. 151.
- 46 Committee on the Elimination of Racial Discrimination, UN CERDOR, 50th Sess., UN Doc. CERD/C/SR.1189 (1997).
- 47 Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Return of Refugees' or Displaced Persons' Property*, Working paper submitted by Mr. Paulo Sergio Pinheiro pursuant to Sub-Commission decision 2001/122, 44th Sess., UN Doc. E/CN.4/Sub.2/2002/17 (2002).
- 48 *Refugees From Algeria in Morocco and Tunisia*, GA Res. 1672 (XVI), UN GAOR, 16th Sess., UN Doc. A/RES/1672(XVI) (1961).
- 49 *Question of Cyprus*, GA Res. 3212 (XXIX), UN GAOR, 29th Sess., UN Doc. A/RES/3212(XXIX) (1974).
- 50 *Persons Displaced as a Result of the June 1967 and Subsequent Hostilities*, GA Res. 51/126, UN GAOR, 51st Sess., UN Doc. A/RES/51/126; and *Palestine – Progress Report of the United Nations Mediator*, GA Res. 194(III), UN GAOR, 3rd Sess., UN Doc. A/RES/194(III) (1948).
- 51 *Situation of human rights in Rwanda*, GA Res. 51/114, UN GAOR, 51st Sess., UN Doc. A/RES/51/114 (1996).
- 52 *On the Situation in Georgia*, SC Res. 1287, UN SCOR, 2000, UN Doc. S/RES/1287; *The Situation in Georgia*, SC Res. 1036, UN SCOR, 1996, UN Doc. S/RES/1036; *On Extension of the Mandate of the UN Observer Mission in Georgia*, SC Res. 971, UN SCOR, 1995, UN Doc. S/RES/971; and *Abkhazia, Georgia*, SC Res. 876, UN SCOR, 1993, UN Doc. S/RES/876.
- 53 *Armenia–Azerbaijan*, SC Res. 853, UN SCOR, 1993, UN Doc. S/RES/853.
- 54 *Bosnia and Herzegovina*, SC Res. 752, UN SCOR, 1992, UN Doc. S/RES/752.
- 55 *Cambodia*, SC Res. 745, UN SCOR, 1992, UN Doc. S/RES/745.
- 56 *On Compliance by Croatia with the Agreement Signed on 6 August 1995 between Croatia and the UN Peace Forces/UN Protection Force, including the Right of the Local Serb Population to Receive Humanitarian Assistance*, SC Res. 1009, UN SCOR, 1995, UN Doc. S/RES/1009.
- 57 *Cyprus*, SC Res. 361, UN SCOR, 1974, UN Doc. S/RES/361.
- 58 *On the Situation Relating Kosovo*, SC Res. 1244, UN SCOR, 1999, UN Doc. S/RES/1244; and *On the Situation in Kosovo (FRY)*, SC Res. 1199, UN SCOR, 1998, UN Doc. S/RES/1199.
- 59 *Iraq–Kuwait*, SC Res. 687, UN SCOR, 1991, UN Doc. S/RES/687.
- 60 *Namibia*, SC Res. 385, UN SCOR, 1976, UN Doc. S/RES/385.
- 61 *On Extension of the Mandate of the UN Mission of Observers in Tajikistan and Process of National Reconciliation*, SC Res. 999, UN SCOR, 1995, UN Doc. S/RES/999.
- 62 For further discussion, see P. Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study*, Working Paper No. 1 (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, April 2003) at 28. Also see S. M. Akram and T. Rempel, “Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework” (2000–2001) XI Palestine Y.B. Int'l L. 1 at 61–2.
- 63 For a more detailed analysis of relevant international law see, “Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons,” Appendix to Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5. Also see L. T. Lee, “The Right to Compensation:

- Refugees and Countries of Asylum” (1986) 80:3 A.J.I.L. 532. In relation to the Palestinian case see, e.g. M. Lynk, “Compensation for Palestinian Refugees: An International Perspective” (2000–2001) XI Palestine Y.B. Int’l L. 155.
- 64 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final report submitted by Theo van Boven, Special Rapporteur*, UN CHROR, 45th Sess., UN Doc. E/CN.4/Sub.2/1993/8, (1993).
- 65 See Commission on Human Rights Resolutions 1999/33 and 2000/41.
- 66 Committee on the Elimination of Racial Discrimination, *The Right to Self-Determination*, General Recommendation XXII, UN CERDOR, 48th Sess., UN Doc. A/51/18, Annex VII (1996) at 125.
- 67 *Supra* note 50.
- 68 *Policies of Apartheid of the Government of South Africa*, GA Res. 36/172, UN GAOR, 36th Sess., UN Doc. A/RES/36/172 (1981); *Policies of Apartheid of the Government of South Africa*, GA Res. 38/39, UN GAOR, 38th Sess., UN Doc. A/RES/38/39 (1983); and *Policies of Apartheid of the Government of South Africa*, GA Res. 39/72, UN GAOR, 39th Sess., UN Doc. A/RES/39/72 (1984).
- 69 *Lesotho–South Africa*, SC Res. 527, UN SCOR, 1982, UN Doc. S/RES/527; *Botswana–South Africa*, SC Res. 568, UN SCOR, 1985, UN Doc. S/RES/568; *Botswana–South Africa*, SC Res. 572, UN SCOR, 1985, UN Doc. S/RES/572; and *Lesotho–South Africa*, SC Res. 580, UN SCOR, 1985, UN Doc. S/RES/580.
- 70 *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, GA Res. 50/193, UN GAOR, 50th Sess., UN Doc. A/RES/50/193 (1995); and *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, GA Res. 51/116, UN GAOR, 51st Sess., UN Doc. A/RES/51/116 (1996).
- 71 *Agreement on Refugees and Displaced Persons, General Framework Agreement for Peace in Bosnia and Herzegovina*, Annex 7, 14 December 1995, at ch. 1, art. 1(1).
- 72 *The Erdut Agreement*, 12 November 1995, art. 7.
- 73 *Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons*, April 4, 1994, art. 3(g).
- 74 *Protocol of Agreement between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons*, June 9, 1993, ch. 1, s. 1, art. 4.
- 75 World Bank, *Operational Directive 4.30: Involuntary Resettlement*, June 1990.
- 76 M. Kagan, *Do Israeli Rights Conflict with the Palestinian Right of Return? Identifying Possible Legal Arguments*, Working Paper No. 10 (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, August 2005).
- 77 *Agreement on Refugees and Displaced Persons, General Framework Agreement for Peace in Bosnia and Herzegovina*, Annex 7, Article XI, *supra* note 71.
- 78 See e.g. Benvenisti and Zamir, *supra* note 37.
- 79 Mallison and Mallison, *supra* note 23 at 13; and R. J. Zedalis, “Right to Return: A Closer Look” (1992) 6 Geo. Immigr. L.J. 499 at 507–8.
- 80 *Future Government of Palestine*, GA Res. 181(II), UN GAOR, 128th Plen. Mtg. 1st Sess., UN Doc. A/64 (1947).
- 81 Part II, Chapter II, para. 8, *ibid.* Incidentally, the Resolution is also cited as justification for the establishment of a Jewish state in Israel’s Declaration of Independence. While Israel’s *Declaration of Independence* does not rely merely on Resolution 181(II) as the basis of international recognition for the establishment of a Jewish state, it does raise an interesting legal contradiction to the extent that Jewish Israeli lawyers argue that General Assembly Resolutions are not binding in reference to Resolution 194(III) relating to refugees.

- 82 *Universal Declaration of Human Rights*, *supra* note 39, art. 17.
- 83 *Convention Respecting the Laws and Customs of War on Land*, October 18, 1907, Annex to *Regulations Respecting the Laws and Customs of War on Land (Hague Regulations)*, 36 Stat. 2277, 2295.
- 84 *Compensation for Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, *supra* note 27 at para. 13.
- 85 “Art. 28 and 47 of the Hague regulation, annexed to the Convention, provide explicitly that pillage is prohibited. Art. 23 (g) prohibits destruction or seizure of the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war. Article 46 protects private property and Art. 56, paragraph 1, provides that the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property shall be treated as private property. In addition to these rules, Art. 3 of the Convention makes the explicit provision particularly important in this connection that a belligerent party which violates the provisions of the regulations shall, if the case demands, be liable to pay compensation.” *Letter and Memorandum dated 22 November 1949, Concerning Compensation*, *supra* note 25.
- 86 *Compensation for Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, *supra* note 27 at para. 13.
- 87 See e.g. references in B. Morris, *The Birth of the Palestinian Refugee Problem, 1947–49* (Cambridge: Cambridge University Press, 1987); and T. Segev, *1949: The First Israelis* (New York: The Free Press, 1986).
- 88 *Compensation for Refugees for Loss of or Damage to Property to be Made Good Under Principles of International Law or in Equity*, *supra* note 27 at para. 13.
- 89 *Letter and Memorandum dated 22 November 1949. Concerning Compensation*, *supra* note 25.
- 90 *Ibid.*
- 91 *Historical Precedents for Restitution of Property or Payment of Compensation to Refugees*, *supra* note 25.
- 92 G. J. Boling, “Restitution in International Law and Applicability to the Palestinian Case” (Summary of Presentation, Summary of Proceedings, Badil Expert Forum, Housing and Property Restitution in Durable Solutions for Palestinian Refugees, Session One, Graduate Institute of Development Studies, Geneva, October 3, 2003). Also see Kagan, *supra* note 76 at 18.
- 93 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, UN CERDOR, 52nd Sess., UN Doc. CERD/C/304/Add.45 (1998) at para. 18. Also see, Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN ESCOR, 22nd Sess., UN Doc. E/C.12/1/Add.27 (1998); and Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN ESCOR, 30th Sess., UN Doc. E/C.12/1/Add.90 (2003).
- 94 Indeed, the Pinheiro Principles draw upon UN resolutions relevant to Palestinian refugees – GA Resolution 194(III); GA Resolution 51/126 – as reflective of the rights consolidated in the instrument. The Principles apply equally to persons displaced across international borders but who may not meet the legal definition of a refugee under international refugee law (e.g., Palestinian refugees who fall within the scope of Article 1D of the 1951 Convention relating to the Status of Refugees) regardless of the nature or circumstances by which displacement originally occurred.
- 95 Kagan, *supra* note 76 at 26. Kagan finds that the greatest area of conflict is with property rights. By contrast, he does not find a legal conflict between the individual right of return and Jewish self-determination.
- 96 *Ibid.*
- 97 According to the opinion Israel is “under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event

- that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 14 at para. 153.
- 98 Principle 12(1), Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5.
 - 99 *Agreement on Refugees and Displaced Persons, General Framework Agreement for Peace in Bosnia and Herzegovina*, *supra* note 71. Annex 7, Article VII actually calls for the establishment of a Commission on Displaced Persons and Refugees with a mandate to "receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property." See Article XI. Claims could be made for return of the property or compensation. *Ibid.* The Commission called for under Article VII was established as the Commission for Real Property Claims.
 - 100 According to CRPC, as of July 2003, 302,109 decisions had been issued on 319,013 claims – amounting to a ratio of roughly 94 percent. See, Commission for Real Property Claims, online: CRPC < www.law.kuleuven.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm > .
 - 101 For an more in-depth analysis of the role of CRPC in the property restitution process see, Garlick, M. "Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina" (2000) 19:1 R.S.Q. 64.
 - 102 UNMIK Regulation 1999/23. The rules of procedure and evidence of HPD and HPCC were established subsequently by UNMIK Regulation 2000/60 in October of 2000. The HPD has exclusive jurisdiction over three categories of residential property claims exempted from the jurisdiction of local courts; claims by individuals who lost property rights as a result of discrimination after March 23, 1989, claims by individuals who entered into informal property transactions which could not be registered due to discriminatory laws, between March 24, 1989 and October 13, 1999 and claims by individuals who involuntarily lost possession of their properties after March 24, 1999. In addition, the HPD has the ability to administer abandoned residential properties throughout Kosovo for the purpose of providing for the housing needs of displaced persons.
 - 103 According to the Internal Displacement Monitoring Centre of the Norwegian Refugee Council. See, online: IMDC < www.internal-displacement.org > .
 - 104 For a list of legal documents related to establishment of the IPCC and CRRPD see, online: CRPPD < www.ipcciraq.org/en/legalDoc07.php > .
 - 105 See, International Organization for Migration, Iraq Property Claims Programme. Online: IOM < www.iom-iraq.net/ipcp.html > .
 - 106 For further information on the mandate and work of the Land Claims Court see, online: LCC < www.law.wits.ac.za/lcc/ > .
 - 107 See, Guatemala Country Page of the Internal Displacement Monitoring Centre. Online: IDMC, < www.internal-displacement.org > .
 - 108 See e.g. Abu Hussein stating that "As a result of my extensive research and based on my 29 years of practice before Israeli courts, it is my expert legal opinion that the State of Israel, including all three branches of the government, the legislative, executive, and the judicial, has systematically worked to deprive Palestinian citizens of Israel and Palestinian refugees of their land. It is also my expert legal opinion that it is largely futile for Palestinian citizens of Israel and refugees to challenge the confiscation of their property in Israeli courts." Affidavit of H. Abu Hussein, Overview of the Consequences for Palestinians of Israel's Legal Land Scheme, April 21, 2005, para. 4. [On file with the authors]. Also see G. Forman and A. S. Kedar, "From Arab Land to 'Israel Lands': the

- Legal Dispossession of the Palestinians Disposessed by Israel in the Wake of 1948” (2004) 22 *Environment and Planning D: Society and Space* 809; U. Halabi, *Israel’s Land Laws as a Legal-Political Tool, Confiscating and Appropriating Palestinian Arab Lands and Creating Physical and Legal Barriers in order to Prevent Future Property Restitution*, Working Paper No. 7 (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, December 2004).
- 109 Since 1979, Israel’s High Court has only accepted expropriation cases relating to private property. All other Palestinian claims must be brought before a special military objection committee. (Order Regarding Appeals Committees (Judea and Samaria) (No. 172), 5727–1967.) The objections committee is controlled and administered by Israeli military authorities. Israeli military authorities also issue the same property expropriation orders that are brought before the objections committee. R. Shehadeh, *Occupier’s Law, Israel and the West Bank* (Washington, D.C.: Institute for Palestine Studies, 1985) at 28. Also see, *supra* notes 10–11 and accompanying text.
 - 110 World Bank, *West Bank and Gaza Update* (Jerusalem: World Bank Group, 2006) at 9.
 - 111 For an overview, see the World Bank update, *ibid*.
 - 112 For a summary, see Rempel, *supra* note 12 at 299–300. For further details, see references on Israel’s land regime in Forman and Kedar, *supra* note 108; Halabi, *supra* note 108; Boling, *supra* note 37; S. R. Dajani, *Ruling Palestine, A History of the Legally Sanctioned Jewish–Israeli Seizure of Land and Housing in Palestine* (Geneva/Bethlehem: Centre on Housing Rights and Evictions and Badil Resource Center for Palestinian Residency and Refugee Rights, 2005); H. Abu Hussein and F. McKay, *Access Denied, Palestinian Access to Land in Israel* (London: Zed Books, 2003); and Y. Lein, *Land Grab, Israel’s Settlement Policy in the West Bank* (Jerusalem: B’Tselem – Israeli Information Center for Human Rights in the Occupied Territories, 2002).
 - 113 T. Rempel, *The United Nations Conciliation Commission for Palestine, Protection, and Durable Solutions for Palestinian Refugees*, Information and Discussion Brief No. 5, (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, 2000).
 - 114 For a detailed study of the UNCCP records, see M. Fischbach, *Records of Dispossession, Palestinian Refugee Property and the Arab–Israeli Conflict* (New York: Columbia University Press, 2003).
 - 115 Principle 19(1), Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5.
 - 116 *Laws of the State of Israel*, Vol. 4, (1949/1950) 68. For a brief discussion, see Halabi, *supra* note 108 at 4–5. For a discussion of the drafting history, see Forman and Kedar, *supra* note 108 at 813–15.
 - 117 For a full list of laws and military orders, see Dajani, *supra* note 112.
 - 118 For a discussion of the drafting history related to internally displaced Palestinians, see Fischbach, *supra* note 114 at 22.
 - 119 Forman and Kedar, *supra* note 108 at 815.
 - 120 See M. Rappaport, “Gov’t decision strips Palestinians of their East Jerusalem Property” *Ha’aretz* (20 January 2005). In July 2004, the government of Ariel Sharon decided to implement the Law in eastern Jerusalem. When Israel occupied the eastern part of the city in 1967 and applied Israeli law, a directive was issued that Palestinian residents of the city and West Bankers who owned property in the city would not be considered absentees. Prime Minister Rabin reissued the directive in 1993. For a discussion of this anomaly see Rempel, *infra* note 170.
 - 121 See M. Rappaport, “Land lords,” *Ha’aretz* (January 20, 2005).
 - 122 *Official Gazette Israel*, No. 413, July 19, 1960, 34.
 - 123 Forman and Kedar, *supra* note 108 at 823. For a detailed study on the role of the JNF in relation to the land conflict, see W. Lehn, *The Jewish National Fund* (London: Kegan Paul International, 1988).
 - 124 Fischbach, *supra* note 114 at 332.

- 125 World Bank, *supra* note 110 at 9.
- 126 Israeli Office of the State Comptroller, *Annual Report 56A*. (2005). Also see A. Eldar, "Documents Reveal Illegal West Bank Building Project" *Ha'aretz* (January 3, 2006); A. Eldar, "Ministry Documents Highlight West Bank Land Acquisition Network" *Ha'aretz* (March 8, 2006); and N. Shragai, "Peace Now: 43% of Settlements Built on Private Palestinian Land" *Ha'aretz* (October 20, 2006).
- 127 Principle 17(1), Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5.
- 128 L. Jones, "Giving and Taking Away: The Difference Between Theory and Practice Regarding Property in Rwanda" in S. Leckie, ed., *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Ardsey, N.Y.: Transnational Publishers, Inc., 2003) 199.
- 129 There are various sources for the number of Palestinian villages depopulated and destroyed in 1948. Estimates differ according to definition and geographic coverage. See Morris, *supra* note 87 (citing 369 villages); W. Khalidi, ed., *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, D.C.: Institute of Palestine Studies, 1992) (citing 418 villages); and S. Abu Sitta, *The Palestinian Nakba 1948, The Register of Depopulated Localities in Palestine* (London: Palestinian Return Centre, 2000) (citing 531 villages).
- 130 T. Segev, "Where Are All the Villages? Where are They?" *Ha'aretz* (September 6, 2002). Translated and reprinted in *Between the Lines*, October 2002. Segev writes that when Aharon Shai, a professor of history at Tel Aviv University, requested access to the archives of the Israel Lands Administration, the Jewish National Fund and the Israel Defense Forces to investigate the matter he was refused due to the sensitivity of the subject. Documents from the Association for Archeological Survey, however, revealed several possible explanations for the destruction, in addition to preventing the return of the refugees, including: nuisance and danger to visitors, they spoiled the beauty of the landscape, potential for "unnecessary questions" from tourists, it would spare Palestinian citizens from sorrow at the sight of their destroyed villages, and, possibly because they might weigh "heavy on the conscience of the state." *Ibid*.
- 131 E. Stock, *Chosen Instrument, The Jewish Agency in the First Decade of the State of Israel* (New York: Herzl Press, 1988) at 86, cited in Fischbach, *supra* note 114 at 10.
- 132 Abu Sitta, for example, notes that 12 village sites are built over. There are 110,000 refugees and their descendants from these villages. S. Abu Sitta, *From Refugees to Citizens at Home, The End of the Palestinian-Israeli Conflict* (London: Palestine Land Society and Palestinian Return Centre, 2001) at 18.
- 133 Joint Parliamentary Middle East Councils Commission of Enquiry – Palestinian Refugees, *Right of Return* (London: Labour Middle East Council, Conservative Middle East Council, Liberal Democrat Middle East Council, 2001).
- 134 Fischbach, *supra* note 114 at 24.
- 135 Principle 15(1), Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5.
- 136 Principle 15(2), *ibid*.
- 137 Forman and Kedar, *supra* note 108 at 812.
- 138 According to this formula, JNF official Yosef Weitz, stated that: "Of the entire area of the State of Israel only about 300–400,000 dunums . . . are state domain which the Israeli government took over from the Mandatory regime. The JNF and private Jewish owners possess under 2 million dunums. Almost all the rest belongs at law to Arab owners, many of whom have left the country." Quoted in Fischbach, *supra* note 114 at 59.
- 139 According to Fischbach, 16,684 dunums of Jewish-owned land lay in the West Bank after 1948. *Ibid.* at 157. Yiftachel notes that by the mid-1980s it was estimated that 52 percent of the West Bank's land was classified as Israeli 'state land'. Yiftachel, *supra* note 15 at 82.
- 140 UNCCP officials guessed that between 40–50 percent of the total value of refugee land would be divided among some 40,000 members of the "effendi class" who were not

- living in refugee camps or receiving UNRWA rations. Fischbach, *supra* note 114 at 137. Also see S. Tamari, "Palestinian Refugee Property Claims: Compensation and Restitution" in A. M. Lesch and I. S. Lustick, eds., *Exile and Return, Predicaments of Palestinians and Jews* (Philadelphia: University of Pennsylvania Press, 2005) 246.
- 141 For a summary, see J. de Plessis, *Land Restitution in South Africa*, Working Paper No. 6, (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, 2004). Also see M. Roodt, "Land Restitution in South Africa" (Paper prepared for Badil Expert Seminar Two, "The Right to Restitution: Law, Principles, Mechanisms – Comparative Experience and the Palestinian Refugee Case", University of Geneva/Graduate Institute for Development Studies, October 2–5, 2003), online: Badil at:<<http://www.badil.org/en/badil-news/829-story-1>>.
- 142 When the British occupied Palestine after the collapse of the Ottoman Empire the land records were found to be in chaos as regards names of owners, areas, and boundaries. Many records were removed by departing Turkish authorities. These records were reopened in the late 1990s in the context of final status negotiations. See "Turkey Opens Ottoman Archives" *Associated Press* (July 5, 1998); and "PA asks Turkey for Ottoman-era Jerusalem Land Papers" *Jerusalem Post* (July 5, 1998).
- 143 According to Fischbach, as of November 17, 1947, the mandatory government possessed 844 Ottoman land registers, 2,192 of its own registers of deeds along with 1,424 registers of title produced by the land settlement process. Fischbach, *supra* note 114 at 233. In 1948, many Palestinians were not in possession of land records, which had been submitted to local settlement offices for registration. Many others lost records and documents during periods of armed conflict.
- 144 For a recent study of the usefulness of these records, see R. Nathanson, "Survey of Palestinian Refugee Real Estate Holdings in Israel, Legal Mechanisms after 1948 which Enable Accurate Identification of Real Estate Owned by Palestinian Refugees and a Proposed Compensation Model Accordingly" (Paper prepared to the Stocktaking Conference on Palestinian Refugee Research, Ottawa, Canada, June 17–30, 2003).
- 145 See Lehn, *supra* note 123.
- 146 For a comprehensive account, see Fischbach, *supra* note 114. Also see Tamari, *supra* note 140.
- 147 For an account of the usefulness of these records, see Tamari, *supra* note 140. Tamari lists several problems with the UNRWA records relating to restitution and compensation claims. They are basically a record of poor refugees; they do not cover refugees who settled outside UNRWA areas of operation; they have no historical depth due to ongoing changes in the database; and they are based on self-reporting of property losses which Tamari argues does not lend itself to authentication and therefore to the external legitimizing of these claims. *Ibid.*, at 249–50.
- 148 For an example of the practical use of aerial photographs, see *Atlas of Palestine* (London: Palestine Land Society, 2005).
- 149 By 1948, registration of land had been completed in only 25 percent of the country. The majority of the registered land was located in areas where most of the Jewish population resided (i.e., the coastal plain and the urban areas of Jaffa–Tel Aviv, Haifa, and Jerusalem). By 1967, registration of land had been completed in just over 37 percent of the West Bank. Registration records, however, often included numerous irregularities as peasant farmers sought to evade taxation and military conscription and sales transactions and inheritance not recorded. Israel stopped all registration procedures when it occupied the West Bank and Gaza Strip in 1967.
- 150 World Bank, *supra* note 110 at 8.
- 151 *Ibid.*
- 152 For a discussion of the records, see Fischbach, *supra* note 114.
- 153 For a more detailed discussion of the records and problem, see Fischbach, *supra* note 114; Tamari, *supra* note 140; S. Hadawi, *Palestinian Rights and Losses in 1948* (London: Saqi Books, 1988); and A. Abdelrazek, "Modernizing the Refugee Land Records: Advantages and Pitfalls" in S. Tamari and E. Zureik, eds., *Reinterpreting the Historical*

- Record, The uses of Palestinian Refugee Archives for Social Science Research and Policy Analysis* (Jerusalem: Institute of Jerusalem Studies/Institute of Palestine Studies, 2001) 173.
- 154 Computerization revealed a number of flaws. See Fischbach, *supra* note 114 at 339–40.
- 155 Principle 20(1), Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5.
- 156 Principle 20(2), Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 5.
- 157 United Nations Conciliation Commission for Palestine, *The Refugee Problem in Concrete Terms, Working Paper Prepared by the Secretariat*, UN Doc. A/AC.25/W/3 (1949).
- 158 For an overview of the legal proceedings, see H. Abu Hussein, “Right of Return – The Ever Present Fear, The Iqrit Model and Land in Israel” (Paper prepared for the Badil Expert Forum, The Right to Restitution: Law, Principles, Mechanisms – Comparative Experience and the Palestinian Refugee Case, Hosted by the Graduate Institute of Development Studies/University of Geneva, October 2–5, 2003).
- 159 See Rempel, *supra* note 12 at 299–300, notes 126–33 and accompanying text.
- 160 Letter from Dr. Walter Eytan, Head of the Israeli Delegation, to the Chairman of the Conciliation Commission, (May 6, 1949) UN Doc. A/AC.25/IS.13. More recently, Israel rejected requests to release information on the status of Palestinian moveable properties on grounds that compiling the information would require an exorbitant amount of time and resources and because the information could damage Israel’s foreign relations. See Adalah, Press Release (January 28, 2002). Adalah, a registered non-governmental association inside Israel, has approached the Israeli Attorney General more than a dozen times with the same request.
- 161 *Supra* note 109. Even in cases where Palestinian refugees held dual citizenship at the time of their displacement, citizenship in a state not considered to be at war with Israel under the 1950 *Absentees’ Property Law*, the High Court still considers the person as an absentee according to a technical interpretation of the law. See e.g. *Yvonne Cokrin v. Committee* constitute under section 29 of the *Absentees’ Property Law 1950*, case 518/79, Judgment of September 13, 1979 cited in Rempel, *supra* note 12, at 299, note 127. For a discussion of the role of the courts, see A. Kedar, “The Jewish State and the Arab Possessor: 1948–1967” in R. Harris *et al.* eds., *The History of Law in a Multicultural Society, Israel 1917–1967* (Dartmouth: Ashgate, 2002) 311.
- 162 The UNCCP, for example, focused considerably more attention on compensation than restitution due in large part to Israel’s refusal to allow refugees to return to their homes of origin, but also as a means of meeting refugee needs after the loss of their homes, lands and properties and means of livelihood. For details the working papers prepared by the UNCCP Secretariat, see online: UNISPAL < <http://domino.un.org/UNISPAL.NSF?OpenDatabase> >. Also see Fischbach, *supra* note 114. During the 1990s numerous track-two conferences focused on the question of compensation. For a summary, see T. Rempel, “The Ottawa Process: Workshop on Compensation and Palestinian Refugees” (1999) 24:1 *Journal of Palestine Studies* 36. Also note the relative balance of research produced in the 1990s, for example, on compensation and restitution, online: Palestinian Refugee ResearchNet < http://www.arts.mcgill.ca/mepp/new_prpn >.
- 163 Nevertheless, significant differences remain, not least of which is the notion of compensation as a substitute for return and restitution, a position advocated by those who view the latter as politically and practically impossible.
- 164 See the summary of the talks by EU Special Representative Miguel Moratinos, reprinted in “The Taba Negotiations (January 2001)” (2002) 31:1 *Journal of Palestine Studies* 79.
- 165 A. Hurrell, “Conclusion: International Law and the Changing Constitution of International Society” in M. Byers, ed., *The Role of Law in International Politics, Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 327 at 333.

- 166 Fischbach, *supra* note 114. Also see M. Fischbach, *The Peace Process and Palestinian Refugee Claims Addressing Claims for Property Compensation and Restitution* (Washington, D.C.: United States Institute of Peace, 2006).
- 167 Sir A. Watts, "The Importance of International Law" in M. Byers, ed., *The Role of Law in International Politics, Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 5 at 7.
- 168 See Halabi, *supra* note 108; and Forman and Kedar, *supra* note 108.
- 169 Forman and Kedar, *ibid.* at 815. Indeed, former Jewish National Fund chairman Avraham Granott referred to the transfer of so-called absentees' property to the State of Israel as a "legal fiction." A. Granott, *Agrarian Reform and the Record of Israel* (London: Eyre and Spottiswoode, 1952) at 102.
- 170 Section 3 of the law limited the right of Palestinians to repossess absentee property to eastern Jerusalem. Section 5 of the 1970 *Legal and Administrative Matters [Regulation] Law* [Consolidated Version], dealing with the implementation of Israeli law in the eastern areas of Jerusalem occupied by Israel in 1967, enabled Jewish property owners to reclaim homes and property lost in 1948. For a discussion, see T. Rempel, "The Significance of Israel's Partial Annexation of East Jerusalem" (1997) 51:4 *Middle East Journal* 520.
- 171 Cited in G. R. Watson, "The 'Wall' Decisions in Legal and Political Context" (2005) 99:1 *A.J.I.L.* 6 at 22. Also see Israel Ambassador to the UN stating in 2003 that "International law and Security Council resolutions . . . have clearly recognized the right of States to use force in self-defence against terrorist attack, and therefore surely recognize the right to use non-forcible measures [i.e. the Wall] to that end." UN Doc. A-ES-10/PV.21 (2003) at 6, cited in S. D. Murphy, "Self-defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?" (2005) 99:1 *A.J.I.L.* 62 at 62.
- 172 Boling, *supra* note 92.
- 173 Quoted in L. Weinbaum, *Righting an Historic Wrong: Restitution of Jewish Property in Central and East Europe*, Policy Study No. 1 (Jerusalem: Institute of the World Jewish Congress, 1995) at 13 [emphasis added].
- 174 Lynk, *supra* note 63 at 175. Relevant precedents include the right of individuals or heirs to repossess homes and properties "abandoned" during periods of conflict, the right of individuals to repossess housing and property regardless of the passage of time, the right of organizations to receive communal and heirless assets, the role of non-governmental organizations as a party to negotiations concerning housing and property restitution, and the right of individuals to housing and property restitution in states where they are not domicile or do not hold citizenship.
- 175 In 1969, the Israeli government set up a special department at the Justice Ministry to document housing and property claims of Jews from Iraq, Syria, Egypt, and Yemen who had immigrated to Israel. In early March 2001, the Israeli cabinet decided to expand procedures set in place in 1969 to cover property claims of Jews who left all Arab states as well as Iran. Cabinet Communiqué, Jerusalem, 3 March 2002. The claims process includes printing and distribution of claims forms, advertisements in the media, computerization of data and development of internet sites in multiple languages. In October 2006, Israel's Minister of Justice announced renewed efforts to obtain reparations for Jews who lost property in Arab countries. "Minister to Oriental Jews: Claim Your Reparations" *Yediot Aharanot* (24 October 2006). For more details, see Shenhav, *supra* note 19; and Fischbach, *supra* note 19.
- 176 *Ha'aretz* (November 20, 2001). In 1998, the Jewish National Fund announced that it would publish a list of 1,836 unclaimed parcels of land in Israel purchased before WWII by presumed victims of the holocaust. *Agence France-Presse*, April 26, 1998. Also see I. Milner, "Claims in Israel's own backyard" *Ha'aretz* (November 12, 1999).
- 177 Y. Shenhav, "Arab Jews, Population Exchange, and the Palestinian Right of Return" in A. M. Lesch and I. S. Lustick, eds., *Exile and Return, Predicaments of Palestinians and Jews* (Philadelphia: University of Pennsylvania Press, 2005) 225. In 1951, for example, authorities requested that Iraqi Jews not file individual claims in order to avoid possible

- legal precedent for individual Palestinian refugee claims against Israel. *Ibid.* at 233. In the mid-1950s, authorities demanded that Jewish immigrants from Iraq not be asked about moveable properties, again, to avoid a possible precedent for Palestinian refugee claims. *Ibid.* at 235.
- 178 Benvenisti and Zamir, *supra* note 37 at 320.
- 179 See Z. Lavi, "Rivlin Calls Off Knesset Search for Holocaust Victims Lands in Israel" *The Globes* (June 7, 2005).
- 180 Koh, *supra* note 1 at 2599.
- 181 The analysis relies on the overview provided by H. H. Koh in a review article of works by A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995) and T. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) published by the *Yale Law Journal*. *Ibid.*
- 182 See e.g. Vice Prime Minister and Minister of Foreign Affairs Tzipi Livni (Address to the 61st United Nations General Assembly, New York, September 20, 2006) stating that "For the Jewish people, Israel was established to be our national homeland. It was the solution for Jewish refugees, the realization of Jewish rights. And this is the true calling of the future state of Palestine: a national homeland for the Palestinian people – the solution to Palestinian claims, the fulfillment of Palestinian dreams, the answer for Palestinian refugees – wherever they may be. If Palestinian leaders are unwilling to say this, the world should say it for them. Instead of giving false hope, it is time to end the exploitation of the refugee issue, and begin to resolve it on the basis of the vision of two states, two homelands. This is the real and only meaning of the two-state vision. It requires each people to accept that their rights are realized through the establishment of their own homeland, not in the homeland of others."
- 183 This is one of three interrelated components defining Israel as a Jewish state as set out in *Ben Shalom v. Central Elections Committee*, 43 P.D. IV 221 (1988), in (1991) *Israel Law Review* 25, cited in *Legal Violations of Arab Minority Rights in Israel* (Shafamr, Israel: Adalah – the Center for Arab Minority Rights in Israel, 1998) at 44–5. On demography, see e.g. A. Tal, "Its Ideology, Not Demography" *Ha'aretz* (October 19, 2006); N. Shragai, "Deal with the Demography" *Ha'aretz* (March 7, 2006); A. Benn, "Demographic Politics" *Ha'aretz* (February 2, 2005); U. Arad, "The Demographic Key" *Ha'aretz* (February 16, 2005); L. Greenberg, "Democracy versus Demography" *Ha'aretz* (February 9, 2005); M. Benvenisti, "Beware the Demographic Demon" *Ha'aretz* (January 27, 2005); and A. Tal, "The Demographic Scarecrow" *Ha'aretz* (January 24, 2005).
- 184 Before 1948, the Zionist movement acquired land in Palestine primarily through acquisition. The majority of land sales were by large absentee land owners. See Table 10.3, "Land Sales to Jews in Palestine by Non-Palestinian Absentee Landlords" in S. Hadawi, ed., *Palestinian Rights and Losses in 1948: A Comprehensive Study* (London: Saqi Books, 1988) at 66–7. Between 1922 and 1948 Jewish ownership of land in Palestine increased from approximately 1,020 sq. km (1925) to around 1,734 sq. km (May 1948). Table III, "Jewish land ownership in Palestine" Lehn, *supra* note 123 at 74.
- 185 By 1948, land acquisition and Jewish settlement had created the "strategic and demographic backbone" of the nascent Jewish state. After 1967, settlement of land in the occupied Palestinian territories served to incorporate these areas into the Israeli national system.
- 186 *Supra* note 109.
- 187 The 2005 Gaza disengagement in which Israel redeployed military forces outside the Gaza Strip and dismantled Jewish settlements provides an interesting example where state interests, demography in particular, led Israel to return land to Palestinians.
- 188 *Supra* note 160 and accompanying text. The cases of Iqrit and Bir'im are exemplary of a much wider problem facing more than a quarter of a million internally displaced Palestinians in Israel. For a more detailed discussion, see H. Cohen, *HaNifkadim HaNokhahim, HaPlitim HaFalestinim BeIsrael me'az 1948* [The Present Absentees:

- Palestinian Refugees in Israel since 1948] [Hebrew] (Jerusalem: Van Leer Institute, 2000); and Interview with W. Wakim, "The 'Internally Displaced': Seeking Return within One's Own Land" (2001) 31:1 *Journal of Palestine Studies* 32.
- 189 Israel's 2005 disengagement from the Gaza Strip demonstrates the possibility of restitution when the question of Jewish self-determination is delinked from the territorial issue. Nevertheless, the justification for disengagement was defined by state interests – in this case demography – rather than compliance with relevant provisions of international law whether related to military occupation or housing and property restitution. In other words, what constitutes right policy is considered to be lawful. See Koh's discussion of the New Haven School, *supra* note 1 at 2623.
- 190 After the 1948 war, a small number of Israeli Jews supported the return of a limited number of Palestinian refugees. The situation has not changed substantially since then with the notable development of a number of Jewish Israeli groups in the last 5–10 years advocating specifically for Palestinian refugee rights. See e.g. the work of the Zochrot Association, online: Zochrot < <http://www.nakbainhebrew.org> >.
- 191 Lesch and Lustick, among others, make the case that Israel's position has evolved, particularly during the Camp David II and Taba talks, throughout the period of the Oslo process. A. M. Lesch and I. S. Lustick, "The Failure of Oslo and the Abiding Question of the Refugees" in A. M. Lesch and I. S. Lustick, eds., *Exile and Return, Predicaments of Palestinians and Jews* (Philadelphia: University of Pennsylvania Press, 2005) 3 at 3. Moreover, while there has been some developments on the question of compensation, Israel's position on return and restitution, the latter, in particular, remains unchanged.
- 192 This is not to detract from the discussion amongst Jewish Israelis about the future of the state. See e.g. L. J. Silberstein, *The Postzionism Debates, Knowledge and Power in Israeli Culture* (New York: Routledge, 1999). For an historical treatment, see e.g. Y. M. Rabkin, *A Threat from Within, A Century of Jewish Opposition to Zionism* (London: Zed Books Ltd., 2006).
- 193 Koh, *supra* note 1 at 2629.
- 194 D. Ben Gurion, Israel's first Prime Minister coined a phrase for Israel's often testy relationship with the United Nations when he dismissed the organization with the remark, "Oom shmoom" (the UN is called "oom" for short in Hebrew). For a recent appraisal of the UN–Israel relationship, see e.g. American Jewish Committee, *A Diminished World Body: An Overview of the UN and Israel* (New York: AJC, 2006). Some commentators note, however, that both Israel's Foreign Ministry and the United Nations under the leadership of Secretary General Kofi Annan have made greater efforts to improve the relationship between Israel and the UN.
- 195 The legitimacy accorded to Resolution 181(II), which as noted above is referred to in Israel's *Declaration of Independence*, is based on a selective reading, not only with regard to property rights but also in relation to the definition of Israel as a Jewish state. The Jewish state referred to in Resolution 181(II) was demographically a binational state and was to have a constitution according individuals equal rights. For a discussion of the various sides to this issue, see e.g. Y. Tadmor, "The Palestinian Refugees of 1948: The Right to Compensation and Return" (1994) 8:2 *Temp. Int'l and Comp. L.J.* 401 at 414–16.
- 196 Israel chose not to submit a legal brief to the International Court of Justice. Israel and a number of other states, including the United States, argued that the Court was not the right forum to address concerns about the Wall.
- 197 A. Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda" (2002) 5 *Curr. Legal Iss.* 401 at 402. The concept of an ethnocratic state was developed by Israeli political geographer Oren Yiftachel. See e.g. O. Yiftachel, "The Political Geography of Ethnic Protest: Nationalism, Deprivation and Regionalism Among Arabs in Israel" (1997) 22:1 *Transactions of the Institute of British Geographers* 91.
- 198 *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, (1998), *supra* note 92 at paras. 10–11. For similar concerns, see *Identity Crisis: Israel and*

- its Arab Citizens*. Middle East Report No. 25. (Brussels: International Crisis Group, 2004).
- 199 *Ibid*.
- 200 *Supra* note 178.
- 201 Exceptions include early confidential papers prepared by the U.S. Department of State, reprinted in D. Neff *Fallen Pillars: US Policy Toward the Palestinians and Israel since 1945* (Washington, D.C.: Institute for Palestine Studies, 1995); and the 1973 European Economic Community Shuman Paper drafted by France, but blocked by Germany, the Netherlands and Italy (see European Parliament, Directorate General for Research, *The Middle East Peace Process*, [1999] 14). The paper states that the European Community affirms “the choice for Arab refugees of either returning to their homes or being indemnified.”
- 202 Quoted in UNCCP, *Historical Survey of Efforts of the United Nations Conciliation Commission for Palestine to Secure the Implementation of Paragraph 11 of General Assembly Resolution 194(III). The Question of Compensation, Working Paper Prepared by the Secretariat*, UN Doc. AC.25/W.81/Rev.2 (1961), para. 170 (emphasis added). Also see “Title to Arab Property in Israel” (February 24, 1961) cited in Fischbach, *supra* note 114 at 242, n. 52; and D. Forsythe, *United Nations Peacemaking, the Conciliation Commission for Palestine* (Baltimore: Johns Hopkins University Press, 1972) at 111. In his book on the UNCCP property records, Fischbach demonstrates how Commission policies increasingly reflected the views of its member states that restitution of Palestinian refugees was not practical in light of Israel’s policies and practices on the ground. In the early 1990s, the American delegation advocated removing all UN resolutions pertaining to Palestine from the UN record, including those related to Palestinian refugees and their properties. In 1993, the United States withdrew endorsement of Resolution 194(III), which affirms that all refugees displaced during the 1948 war should be permitted to return to their homes. The move was part of a broader effort to de-link Palestinian–Israeli negotiations from UN peacemaking efforts. See Letter from M. K. Albright, U.S. Ambassador to the UN, to Ambassadors to the United Nations (August 8, 1994), reprinted in (1995) 24:2 *Journal of Palestine Studies* 152 at 153.
- 203 A. Hanieh, “The Camp David Papers” (2001) 30:2 *Journal of Palestine Studies* 75 at 86. As Arthur Watts observes: “The constraints imposed by the law can be as unwelcome as they are sometimes unexpected. Indeed, to remind a politician active in international affairs of the relevance – and even of the very existence – of international law may sometimes be seen as an unfriendly act.” Watts, *supra* note 167 at 6. In 2004, President Bush issued a letter of assurance to Israel stating that the refugee issue would have to be resolved within the context of a Palestinian state which was viewed by some as foreclosing the idea of return and restitution.
- 204 Middle East Institute, *Lessons of Arab–Israeli Negotiating: Four Negotiators Look Back and Ahead*, Transcript (April 25, 2005).
- 205 Many writers have addressed the used of veto power by the United States on behalf of Israel in the Security Council. Since the beginning of the Oslo process, in particular, the United States has taken the view that the Security Council should “take a hands-off approach” to the conflict. Quigley, *supra* note 3 at 356 (quoting “U.S. Letter of Assurances to the Palestinians, Oct. 18, 1991” (1990–91) *Palestine Y.B. Int’l L.* 281–2).
- 206 The EU has been hesitant, for example, to adopt measures to enforce human rights provisions in the EU–Israel Trade Association Agreement and opposes sanctions against Israel for non-compliance. For more see Quigley, *supra* note 3 at 378–80.
- 207 Gudmundur Alfredsson, “Article 17” in A. Eide *et al.*, eds., *The Universal Declaration of Human Rights, A Commentary* (Oslo: Scandinavian University Press, 1992) 255 at 259–60.
- 208 *Supra* note 93.
- 209 “Refugee Realities” *Jerusalem Post* (December 24, 2000).
- 210 See e.g. the Palestinian civil society BDS campaign, online: Palestine BDS Campaign at <<http://www.bdsmovement.net/>>. “Th[e] website is overseen by the steering

- committee of the Palestinian BDS National Committee and has been adopted as a tool of the ICNP (International Coordinating Network on Palestine) to support efforts of networking and coordination.”
- 211 For an interesting approach in this regard, see e.g. B. Mello, “Recasting the Right to Self-Determination: Group Rights and Political Participation” (2004) 30: 2 *Social Theory and Practice* 193. Also see discussion on Jewish self-determination and Palestinian refugee rights in Kagan, *supra* note 76.
- 212 Koh, *supra* note 1 at 2646.
- 213 *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA Res. ES-10/14, UN GAOR, 10th Emergency Special Sess., UN Doc. A/RES/ES-10/14 (2003).
- 214 *Supra* note 14.
- 215 Koh, in fact, uses the 1997 Hebron Protocol negotiations between Israel and the PLO to explain how this process works and to account for the decision by the Likud government led by Benjamin Netanyahu to ultimately comply with the Oslo agreements and negotiate a further redeployment of Israeli military forces. Koh, *supra* note 1 at 2651–5.
- 216 See *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory, including in and around East Jerusalem*, GA Res. ES-10/15, UN GAOR, 10th Emergency Special Sess., UN Doc A/RES/ES-10/15 (2004) requesting the UN Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion of the International Court of Justice of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*.
- 217 *Report of the Secretary-General pursuant to General Assembly resolution ES-10/15, Illegal Israeli action in occupied East Jerusalem and the rest of the occupied Palestinian territory*, UN GAOR, 10th Emergency Special Sess., Agenda item 5, UN Doc. A/ES-10/361 (2006).
- 218 See e.g. the activities of internally displaced Palestinians from the village of Bir'im. This includes the development of plans by professional engineers and planners for return and village reconstruction and meetings with Israeli Jewish residents of the *kibbutz* established on part of the village lands of Bir'im. 'A'idoun ila Kafr Bir'im [Return to the Village of Bir'im] [Arabic] (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, 2005). On a broader scale, see the findings of the 2000 all-party British parliament commission of enquiry, *supra* note 124; and the recently published report of the Civitas project, Civitas Project, *Palestinians Register: Laying Foundations and Setting Directions* (Oxford: Nuffield College, University of Oxford, 2006).
- 219 See e.g. projects by the Zochrot Association, *supra* note 190. For another approach, see J. Nevo, “Transitional Justice Models and their Applicability to the Zionist–Palestinian Conflict and the Palestinian Refugee Issue” (Paper prepared for the Badil Expert Seminar Four, “Rights-based Durable Solutions for Palestinian Refugees: Ways Forward,” Emil Touma Institute for Palestinian and Israeli Studies and the Association for the Defense of the Rights of the Internally Displaced, Haifa, Israel, July 1–4, 2004), available online at Badil <<http://www.badil.org/en/badil-news/829-story-1>>.
- 220 This could include, for example, the Bhutanese refugees who have undertaken a documentation project as a tool for community mobilization and advocacy for their rights of return and restitution to be used in various international fora. For a summary, see R. Gazmere and D. Bishwo, “Bhutanese Refugees: Rights to Nationality, Return and Property” (2000) 7 *Forced Migration Review* 20. It could also include a wider range of refugee actors representing protracted cases of global displacement. For an overview of this issue, see Executive Committee of the High Commissioner's Programme, Standing Committee, *Protected Refugee Situations*, 30th Mtg., UN Doc. EC/54/SC/CRP.14 (2004).

- 221 C. Barnes, "Democratizing Peacemaking Processes: Strategies and Dilemmas for Public Participation" (2002) *Accord* 13.
- 222 The 2000 WCAR continues to be the subject of considerable controversy, not only in relation to the Israeli–Palestinian conflict, due to the wide gap in positions between governmental and non-governmental actors. Beyond the substantial post-conference political rhetoric of various actors, especially in relation to the Palestinian case, the authors are not aware of substantive evaluation of NGO collaboration before and during the conference which enabled many grassroots actors representing diverse issues and communities to ensure the inclusion of acceptable language in the final conference declaration. Excerpts of the final NGO declaration relating to Palestinian refugees are online: Badil <<http://www.badil.org/ar/component/content/article/54-press-releases-2001/255-press199-01>>.
- 223 S. M. Akram, *Fora Available for Palestinian Refugee Restitution, Compensation and Related Claims*, Information and Discussion Brief No. 2, (Bethlehem: Badil Resource Center for Palestinian Residency and Refugee Rights, 2000).
- 224 In May 2006, the High Court in London ruled that the resettlement of native islanders from their homeland in the Indian Ocean was unlawful. The Chagos Islands are an archipelago in the Indian Ocean which includes the island of Diego Garcia. During the 1960s, the United States administration decided that it required Diego Garcia as a strategic military base. The UK government decided that both Diego Garcia and the neighbouring islands needed to be cleared of their population. Following an adverse ruling in 2004, the UK invoked an unusual procedural rule known as an Order in Council, which sought to reverse the judgment applicable to overseas territories without parliamentary action. The High Court ruled this to be illegal. For more details, see R. Alford, "High Court Rules on Displacement of Chagos Islanders," online: *Opinio Juris* <<http://opiniojuris.org/2006/05/12/high-court-rules-on-displacement-of-chagos-islanders/>>.
- 225 In the 1980s Ms. Titina Loizidou, a tour guide and displaced person from the northern Cyprus port town of Kyrenia, decided to submit an application against Turkey to the European Commission on Human Rights based on the denial of her property. The case was referred to the European Court of Human Rights in 1993. In 1998, the Court ordered Turkey to pay Ms. Loizidou \$640,000 in compensation for denial of access to her property. At the end of 2004, Ms. Loizidou's peaceful enjoyment of her property (restitution) was still pending. For more details, see *Loizidou v. Turkey* (Article 50), (1998), 60 E.C.H.R. (Ser. A) 15318, online: ECHR <<http://www.worldlii.org/eu/cases/ECHR/1998/60.html>>.
- 226 U. Avineri, "Right of Return" (2003) 8 NEXUS: J. 35 at 3. Zakay, Klar and Sharvit offer a number of reasons to explain this lack of understanding: the interim period of the Oslo peace process did not provide a good environment for dealing with the "perennial problems" of the conflict; most Israeli Jews were not aware of the centrality of the refugee issue for Palestinians; the refugee issue may be the most threatening issue of the conflict for Israeli Jews; and, many Israeli Jews may have assumed that Palestinian acceptance of the Oslo framework meant that Palestinians had agreed to a solution on the refugee issue that would be acceptable to Israel. D. Zakay, Y. Klar and K. Sharvit, "Jewish Israelis on the 'Right of Return', Growing Awareness of the Issue's Importance" (2002) 9:2 *Palestine–Israel Journal of Politics, Economics and Culture* 58 at 58–9.
- 227 E. Bronstein, *Position Paper on Posting Signs at the Sites of Demolished Palestinian Villages*, online: Zochrot <<http://www.zochrot.org/index.php?id=343>>.
- 228 See, Resolution No. 1, Draft Resolution Referring Certain Legal Questions to the International Court of Justice in, *Yearbook of the United Nations 1947–48* (New York: United Nations, Department of Public Information, 1949), online: UNISPAL <<http://unyearbook.un.org/unyearbook.html?name=194748index.html>>. The resolution was voted on in two parts: questions 1 to 7 were rejected by a vote of 25 to 18,

with 11 abstentions; that last question was rejected by a vote of 21 to 20, with 13 abstentions.

- 229 Statement of the Chair of the *Ad Hoc* Committee, 19th mtg, October 21, 1947 in, *ibid.*
- 230 W. T. Mallison and S. V. Mallison, "The Role of International Law in Achieving Justice and Peace in Palestine-Israel" (1974) 3:3 *Journal of Palestine Studies* 77 at 79.
- 231 Hurrell, *supra* note 165 at 331.
- 232 I. Pappé, "The Trajectory of Peacemaking in Palestine: The Concept of a Solution" (Paper prepared for Workshop 11, The Uses of History in Conflict Resolution: The Impact of the Expulsion of the Palestinians in 1948 on the Current Negotiations on Refugees. Fourth Mediterranean Social and Political Research Meeting, Florence, March 19–23, 2003) 12.

4

CONSTRUCTIVE AMBIGUITIES?

Jerusalem, international law, and the peace process

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In the closing stages of the Camp David summit in July 2000, leaks to the media indicated that there was a flurry of proposals to bridge the differences between the Israel and Palestinian positions on Jerusalem.¹ Particularly dramatic were the various proposals of how to deal with the question of sovereignty over the Old City and the Haram ash-Sharif/Temple Mount. These included: dividing the Old City; recognizing Palestinian sovereignty over the Haram ash-Sharif/Temple Mount but allowing a Jewish place of prayer on a part of the enclosure; suspending sovereignty for an indefinite period; attributing sovereignty to God and allocating management functions to the two parties; entrusting sovereignty to an international religious council including Turkey under the auspices of the United Nations; dividing the Haram ash-Sharif/Temple Mount enclosure horizontally, with the Palestinian state having sovereignty over the surface to a certain depth, and the Israeli state having sovereignty over the lower reaches.² The increasingly bizarre contortions which the negotiators were driven to consider were an indication of the desperation of the American mediators to secure an agreement. More importantly, these proposals pointed to the absence of a clear set of principles with which to approach the complexity of the Jerusalem question and the lack of clarity in international law over its resolution in a manner that respected the rights of all parties concerned.

There have been numerous UN resolutions passed on the Jerusalem question.³ This is particularly the case since 1967, where the inadmissibility of Israeli policies in the eastern part of the city has received consistent reiteration.⁴ However, this chapter will argue that despite this body of law, the parties to the conflict have

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incorporated only a very narrow framework of international law in their negotiations to date. It is the author's intention that, because of this narrow frame of reference, there is insufficient legal support for a specific resolution of the problem. Indeed, what is striking in the literature is the absence of any mention of Jerusalem in many of the key documents upon which a peace agreement can be based. There are two notable exceptions to this observation: Jerusalem featured prominently in the Partition Plan of 1947 (UN General Assembly Resolution 181), in which a *corpus separatum* was recommended and laid out in great detail.⁵ It was also mentioned in the 1988 *Declaration of Independence* for the State of Palestine.⁶ However, Jerusalem was not mentioned in the Balfour Declaration in 1917,⁷ which was included in the Mandate *Charter* in 1922, nor was it mentioned elsewhere in the *Charter*.⁸ In retrospect, it is quite astonishing that it was not mentioned either in the *Declaration of the State of Israel*⁹ in 1948 nor in UN Security Council Resolution 242 itself.¹⁰

The absence of a specific template or set of prescriptions in the corpus of international law that has been applied to Jerusalem has led to a degree of ambiguity which is both confusing and leaves the future of the city open to a range of possibilities. This chapter will attempt, first, to identify the main areas of confusion and the policies which have flowed from it; and second, to evaluate the relative strengths and weaknesses of the possibilities left open as a result. It is important to note that the ambiguity in the international law framework that the parties have acknowledged, has allowed the stronger party, Israel, to exploit this situation in order to establish its control over the whole city, over both its eastern and western sections. Without a consistent and sustained position in international law, and without any restraining counterforce, the Israeli government has been successfully able to assert its presence in the city. Nevertheless it has been notably unsuccessful in translating its presence into a legitimate and recognized position by the international community.

It is in this way that the ambiguity inherent in international laws concerning the city can also be construed as "constructive." Apart from an implied Israeli withdrawal to the Armistice Lines of June 4, 1967 contained in UN Security Council Resolution 242,¹¹ the prescriptions for a just resolution to the question of Jerusalem are few. This lacuna can provide an opportunity for fresh thinking in light of the demographic and infrastructural changes that have taken place since 1948 and again in 1967. It allows for a degree of flexibility in contemplating a resolution for the Jerusalem problem. Thus, the chapter seeks to go beyond denunciations of the iniquities of Israeli actions in Jerusalem in order to explore how the ambiguities in international law over Jerusalem can be exploited to move the discussion forward so that a resolution respecting the interests of both parties can be delineated.

The possibilities opened up by recognizing the ambiguity in international law can be illustrated by the role of UN Security Council Resolution 242 in the negotiations and the former peace process. This chapter will argue that while Resolution 242 would be an essential tool in redressing the imbalance in power between the two parties and the imbalance over the control over land and property in the city, it does not deal with a number of additional important factors which

need to be addressed before a viable agreement can be signed. Resolution 242 is clearly a determining resolution which provides the basic framework for a solution. Translated into an agreement, it would give both Israel and the putative state of Palestine a stake in Jerusalem and lead to the formula of “two capitals in one city.” Nevertheless, it does not specify the relationship between those two halves, nor does it posit approaches to handle the new conditions in the city since the Israeli occupation of the eastern half in 1967.¹² It does not take into account, for example, Palestinian concerns over access to their former properties in the western part of the city (West Jerusalem), or Israeli concerns over their access to Jewish Holy Places, or Israeli confidence in the security arrangements on the eastern part (East Jerusalem), or issues related to Jewish-owned properties in the East. It is in this qualification or interpretation amendment of the intentions behind Resolution 242 which does allow for possible areas of agreement over Jerusalem. It may be sufficient for a framework for negotiations, but as it stands, Resolution 242 is insufficient for a durable peace agreement. It is, therefore, a prescription for the *status quo ante* and not for a viable socio-economic unit meeting the minimum political and religious aspirations of the protagonists.

Of course, hanging over this whole discussion is the brooding presence of the Separation Wall cutting through Palestinian neighbourhoods, dividing neighbours from each other and isolating the central suburbs from the West Bank and Palestinian state hinterland.¹³ (See Map 5.) Over 20 kilometres of concrete walls to the height of between 4 and 9 metres with another 57 kilometres of fencing, the Wall will leave 100,000 Jerusalemites on the West Bank side of the Wall, depriving them of access to families, schools, hospitals, religious sites, and commercial networks. Eight out of 12 access roads from the West Bank to Jerusalem have been closed to Palestinians.¹⁴ In the education sphere alone, the Wall will cut off some 18,000 pupils and 800 teachers from their schools.¹⁵ The physical damage to the functioning of East Jerusalem is incalculable, irrespective of the emotional suffering it has caused to separated families and the political damage it has introduced into the attempts to pursue a negotiated settlement. Nevertheless, the Wall is part of an imposed settlement, not a political agreement, and in this chapter we are dealing with options for agreement entered into voluntarily and framed by international law and not the results of a coercive and unilateralist policy. Indeed, in enclosing against their will over 100,000 Palestinians,¹⁶ the Wall poses as many, if not more, problems for Israel regarding the future of Jerusalem and the legitimacy of its presence there than it seeks to solve. For this reason alone, the unilateralist measures taken by the Israeli government with respect to Jerusalem are clearly temporary and provide no solution to the unstable situation it faces, and a discussion on the utility of international law and a rights-based approach is even more urgent.

This chapter is in four sections. The first section will identify the main approaches international law scholars have employed in examining the Jerusalem question. It will attempt to establish the basis of my argument that there is a “constructive ambiguity” in the body of law. The second section will examine the opportunities and challenges that this ambiguity opens up. In particular it will

outline the changing Jewish and Israeli discourse on Jerusalem which reveals a much greater flexibility than hitherto supposed. The third section will discuss different approaches to Jerusalem in some of the key milestones in the peace process. It will refrain from suggesting another formula for an agreement, but focus instead on the areas in which further progress can be made. The final section will attempt to draw together the points made and set out a vision of what a rights-based solution to the Jerusalem issue would look like within the proscribed political framework as it exists today. It will attempt to identify specific instruments that would facilitate the realization of such a vision. From this outline one should note that the author is not an international lawyer but a political scientist and therefore, the emphasis of the chapter is more on the political implications of the argument and does not address the large body of international law that exists outside of the political negotiation framework accepted by the parties to the conflict.

A word should be said about terminology. It is difficult to discuss *rights* to a city in the same way as one would the rights of minorities, of refugees, or of citizens. In this way trying to delineate a rights-based approach to Jerusalem will encounter conceptual and methodological problems which are beyond the scope of this chapter and the expertise of this author. This chapter, therefore, prefers to speak in terms of *claims* and *interests* to and in the city by the key players – Israelis, Palestinians, Jordanians, Jews, Christians, and Muslims. Nevertheless, the discussion of claims and interests is guided by an overriding framework of the rights discourse on justice, equality, and fairness. A further point on terminology is the use of phrases such as *new realities* and *realities on the ground*. Here the author is aware of the parallel discourse of *facts on the ground* used by some Israeli and U.S. politicians and negotiators to argue the impossibility of basing an agreement over Jerusalem upon Resolution 242 and that Palestinians will need to accept the presence of post-1967 Israeli settlements. As will be seen, this chapter does not accept this view. However, the argument of the paper is partly based upon recognition that there are certain urban dynamics which will allow the city to prosper and that, even if politically possible, it would not be in the interests of the residents of the city to undergo extensive disruption and economic and infrastructural separation that a simplistic return to the Green Line would imply. The chapter therefore refers to *new realities* in the sense that the city has developed in some beneficial ways since 1967, and that there are some integrative aspects of the occupation of East Jerusalem which should not be reversed without careful consideration.

Jerusalem and international law

The essence of the conflict over Jerusalem is that a number of parties – both within Israel/Palestine and internationally – have claims over the city or over parts of the city. All draw on various expressions of international law to reinforce their claims. Yet it is not always clear where the roots of that claim lie and from what source an assertion of sovereignty can be derived. As Rodman Bundy has summed up the issue:

The problem with Jerusalem . . . is that none of the traditional roots of title that lawyers often use fit the situation very well. Indeed, Jerusalem is in many respects judicially unique.¹⁷

This chapter will not run through the evolution of international law pertaining to Jerusalem. This has been adequately covered by scholars much more competent in legal history than this author.¹⁸ Box 1 highlights the key landmarks in this history and readers should refer to this to provide some context to the discussion that follows. Instead, the chapter will focus on four main approaches to the question of the legal status of Jerusalem: state succession, self-defense, *de facto* authority, and UN sovereignty. When discussing Jerusalem in international law, we should recall that there are at least two main phases – the pre-1967 phase and the post-1967 phase – and two geographical areas – an east and a west Jerusalem.

State succession and self-determination

The first approach combines the principles of state succession and self-determination.¹⁹ It is based on the premise that sovereignty is handed on as one state is replaced by another over a given territory.²⁰ In the case of Palestine, it is not clear which is the successor state following the termination of the Ottoman Empire. This, in turn, affects legitimacy accorded to the successor state or states after the termination of the British Mandate. For example, there is debate as to whether British control over Palestine rose to the level of exercising sovereignty or whether sovereignty resided with the League of Nations or, indeed, with either.²¹ If it is not clear which is the new state that succeeded the Ottoman Empire, neither is it clear to whom succession was passed. Was it Israel, Jordan, or the state-to-be Palestine to whom sovereignty was passed in 1948? In the case of Jerusalem, the lack of clarity is further complicated by the fact that the will of the international community was expressed in the Partition Plan of 1947, which clearly called for the creation of two states with Jerusalem as a separate entity as an internationalized city. There is an argument that this position has fallen in abeyance over the passage of time and has been superseded by Resolution 242 which, however, as we have indicated, was not specific on the subject of Jerusalem.

Nevertheless, there are those who argue that despite the lack of clarity, it is the Palestinian Arabs who have legal sovereignty over the whole of Palestine.²² This position is based upon the notion that sovereignty resides with the people. As self-determination is a right enshrined in the UN *Charter* (Article 1(2))²³ and because the Palestinians have this right, their historical presence in Jerusalem also gives them a basis to claim the city as Palestinian and, if they so wish, as their capital. However, this view has not received a general consensus. Thus, the lack of clarity concerning the question of state succession and the lack of consensus on the applicability of self-determination as a principle for Palestinian claims to East Jerusalem, makes these approaches inconclusive in guiding us towards an answer on Jerusalem.

Self-defense and the sovereignty vacuum

Closely related to the notion of state succession is the view that Israel acquired title to Jerusalem by a lawful act of self-defense. This view holds that a sovereignty vacuum arose as a result of hostilities against Israel and because of those hostilities, Israel was obliged to occupy West Jerusalem in 1948 and East Jerusalem in 1967.²⁴ This view also regards that such occupations have, over time, given additional strength to Israeli claims. The Israeli government argues that its claims to East Jerusalem are stronger than those of Jordan, since Jordan had occupied Jerusalem illegally in 1948 and thus, its claims to sovereignty are not valid.²⁵ Setting aside the claim that what happened in 1948 and 1967 were acts of aggression against Israel, resulting in Israel acting in self-defense, there is still the issue of whether filling a sovereignty vacuum is sufficient to base a claim for sovereignty or legal title.²⁶ In addition, in light of opposing claims to the city, the self-defense approach is also open to alternative interpretations. For example, one could argue that such a position constitutes a “guardianship” or a “temporary authority” pending a peace agreement to resolve the status of the city, rather than legal title.

De facto authority

A third approach recognizes that Israel has exercised *de facto* political authority over West Jerusalem since 1948 and the same over East Jerusalem since 1967, and that Jordan similarly exercised *de facto* political authority over East Jerusalem between 1948 and 1967.²⁷ On one hand, a claim to sovereignty put forward on this basis is dubious due to the fact it occurred as a result of the use of force. On the other hand, with regard to Israeli sovereignty over West Jerusalem, this approach has received a modicum of recognition and is tolerated by the international community by virtue of its acceptance of the borders of the Armistice Agreement with Jordan. In addition, implicit recognition is also contained in the international community’s support for Security Council Resolution 242, which calls for withdrawal of territories occupied in 1967 with no mention of West Jerusalem, acquired by Israel in 1948.²⁸

Nevertheless, this is weak recognition, since it is to some extent counter-balanced by the great reluctance of the international community to situate embassies in West Jerusalem and its practice of conducting as much diplomatic business as is convenient in Tel Aviv.²⁹ Some, such as Watson, argue this has less to do with a reluctance to recognize Israeli sovereignty over West Jerusalem and more to do with a reluctance to confer recognition to Israeli sovereignty over East Jerusalem. Yet, the Israeli insistence on the integrity of the city makes consideration of such motivational nuances rather tendentious.³⁰ With respect to East Jerusalem, a claim based upon this approach is no longer seriously advanced. The UN Security Council has repeatedly declared that Jerusalem is occupied territory and subject to the 1949 Fourth Geneva Convention.³¹ Indeed, UN resolutions and EU declarations rarely make any distinction between East Jerusalem and the other territories occupied in 1967. Clearly a Palestinian claim on this basis cannot be entertained, but this

impossibility does not necessarily strengthen the legitimacy of the Israeli claim to either part of the city.

UN corpus separatum

A fourth approach argues that the status of Jerusalem is determined by the Partition Plan of 1947, and thus, is the responsibility of the UN.³² UN General Assembly Resolution 181 recommended the creation of an international zone, or *corpus separatum*, in Jerusalem to be administered by the UN for a 10-year period after which there would be a referendum to determine its future.³³ (See Map 1.) This approach applies equally to West and East Jerusalem and is not affected by the occupation of East Jerusalem in 1967. To a large extent it is this approach that still guides the diplomatic behavior of states and thus has greater force in international law than many of the other approaches. At its core, this approach can be characterized by the refusal to accept the claims of either of the parties to sovereignty over the city to the exclusion of the other. The problem with this approach is, as we have already noted, the degree to which Resolution 181 is still active or has fallen in abeyance and has been superseded by Security Council Resolution 242.³⁴ Some have argued that it is still active even if subsumed by subsequent Security Council and General Assembly resolutions. There is also the issue of the status of General Assembly resolutions, which are only recommendations, as opposed to Security Council resolutions, which are legally binding. The different interpretations of the status of Resolution 181 make it difficult to turn to for a basis on which to determine title. Indeed the 10-year trusteeship over the city by the UN confirms the temporary nature of the status, and thus does not provide a long-term prescription for the city.

From this brief overview one can see the lack of consensus over the legal approaches, and hence the validity of claims, to title over Jerusalem. It should be noted that apart from the general Israeli view that they were the victims of hostilities in 1948 and 1967 and therefore acted in self-defense, the lack of consensus occurs also within lines of national affiliation of the scholars and one cannot correlate any of the above approaches to a clear Jordanian, Israeli, or Palestinian position. There was a grudging acceptance over time by the international community that between 1948 and 1967 Israel exercised political control in West Jerusalem and Jordan did the same in East Jerusalem, and that in the event of a peace agreement between these two parties on the basis of the borders of the Armistice agreements, recognition would be forthcoming.³⁵ However, since 1967 there has been an overwhelming consensus that the continuing and prolonged Israeli occupation of East Jerusalem in the post-1967 period does not lead to title and that an Israeli withdrawal (*pace* Resolution 242) remains the basis for negotiations over the city. The legal status of East Jerusalem, as an occupied territory, has not been in question in international law.³⁶

What is also very clear is that international law, in itself, does not prescribe a detailed formula for dealing with the Jerusalem issue as a whole. What is required

is a series of political decisions between the two parties – Israel and the PLO – in the context of an overall peace agreement.³⁷ For this decision to have the support of the respective constituencies, it needs to be based less on the balance of power now, but on fairness and the respect for religious and cultural rights within an overall package. While fraught with difficulties, such a situation also provides opportunities for the development of a viable and functionally integrated city for the future which goes beyond the constraints of international law.

The opportunities and challenges of constructive ambiguity

In this section I want to show how, in the absence of a clear prescription by international law on the future of Jerusalem, there is a degree of flexibility in the way a peace agreement can be addressed. As already mentioned, there is a downside to the lack of prescription in that the party with *de facto* political authority – Israel – is able to unilaterally strengthen its position on the ground in many ways. The most controversial and far-reaching has been the intensive colonization programme of building Israeli settlements in East Jerusalem which since 1967 has succeeded in creating a demographic revolution.³⁸ Over 180,000 Israeli Jews now live in settlements constructed in East Jerusalem with the result that there are now more Israeli Jews living in East Jerusalem than there are Palestinians.³⁹ (See Map 2.) The colonization programme has also had a dramatic impact on property ownership and land use, with 35 percent of East Jerusalem now expropriated or under effective Israeli control, and 80 percent placed beyond use of Palestinians through planning and zoning decisions.⁴⁰ Closely connected to these policies has been the stifling of political, social, and economic life through the stringent application of security considerations which have restricted residency and access of Palestinians to East Jerusalem.⁴¹ The erection of the Separation Wall between some of the inner and outer suburbs of East Jerusalem is the culmination of a “closure” policy which has been in existence since 1992. Taken together these acts have assisted in consolidating the Israeli physical control over both West and East Jerusalem.⁴² In addition, the position of the U.S. government that the final status of Jerusalem is to be determined by negotiations, and the willingness of the international community to fall in line with this, creates no pressure on Israel to reconsider its policies.

However, this chapter will also argue that the lack of prescription in international law also creates an opportunity for a resolution on Jerusalem that can encompass more inclusive political arrangements. Before doing so we need to lay out a number of building blocks for the argument. These can be consolidated into two main points: first, the often overlooked fact that Jewish, Zionist, and Israeli perspectives on Jerusalem have not been immutable, but have been subject to political and contextual changes. The second building block to my argument is that the Israeli state’s *de facto* authority over East Jerusalem has been a much more nuanced, scattered, and diluted authority than most policy makers and the public are aware. This creates a situation in which Israelis have actually less, and the Palestinians have had more, political control in East Jerusalem than the formal positions declare.

At this stage one should make clear that drawing attention to the possibility of a variety of icons and sacred foci and their changing nature, is not to enter into the debate over which religious community has greater rights to the city. Instead it serves to emphasize the fluidity of positions. A similar case can be made for changing perspectives in Muslim, Christian, Palestinian, and Arab discourses. For example, there is a debate pertaining to Muslim discourse on the holiness of Jerusalem based on the revival in the early twentieth century of the al-Buraq legend. In this legend the Prophet Muhammed's horse is tethered to the Western Wall during his Night Journey to Jerusalem.⁴³ Similarly, in the Christian tradition there are denominational variations over the location of Golgotha and the Garden Tomb, with some Protestant sects establishing rival sites outside the city walls. The focus in this chapter, however, is on the Jewish, Zionist, and Israeli discourse, since, by virtue of the political and military superiority of Israel, this is the discourse which matters in trying to identify room for negotiations.

Changing Jewish, Zionist, and Israeli perspectives

The first point to be established is that Jerusalem was not always so central in Jewish and Zionist political and religious discourse as it has been since 1967. While the religious link between Judaism and Jerusalem is very strong, there is also much evidence to suggest that it has undergone some changes.⁴⁴ For example, the current emphasis on the centrality of the Western (Wailing) Wall has to be set alongside the prevalence in the fifteenth century of Jewish rituals which encompassed Mount Zion and the Mount of Olives from where lamentations over the destruction of the Temple took place.⁴⁵ Similarly, the official Israeli history of the Western (Wailing) Wall refers to the absence of a mention of the Wall in the written sources of the medieval period.⁴⁶

It is also very much accepted among historians that Jerusalem played a secondary place in Zionist discourse and that, in fact, it was considered a burden in their pre-state strategies.⁴⁷ Associated with the past and with decadent orientalist imagery, it did not fit into the vision of the brave new world of the kibbutz and the metropolis of Tel Aviv. As a consequence, it did not receive much attention in the settlement planning of the first and second *aliyas*.⁴⁸ Indeed, some have even argued that the Zionist leadership was prepared to sacrifice Jerusalem in its pursuit of establishing a Jewish state.⁴⁹

More recent examination of the nature of the Israeli consolidation over Jerusalem has indicated a number of ambiguities. Studies by Lustick have drawn attention to the fact that Israel seems to have refrained from fully annexing the eastern part of the city by virtue of not imposing citizenship on the inhabitants in the same way as it did in areas outside the Resolution 181 borders in Galilee and the Little Triangle, ceded from Jordan in the Armistice Agreements. Furthermore, as he points out, the Basic Law of 1980, which declared Jerusalem to be the "complete and united" capital of Israel, omitted reference to any specific boundaries. Indeed his analysis is that the ambiguity over annexation is a deliberate act of policy designed to avoid

international censure and to maintain internal unity over the question of Jerusalem.⁵⁰ In 2000, an amendment was passed to the Basic Law whereby it could not be repealed without a two-thirds majority in the Knesset.⁵¹ While clearly an attempt to consolidate Israeli hegemony, it merely serves to underline its fragility and lack of consensus.

One important effect of this ambiguity is the failure to construct a hegemonic presence in East Jerusalem.⁵² Despite the huge investment in housing, infrastructure, political and diplomatic capital, and despite the marginalization of Palestinian representation, and the expense and deployment of military personnel, East Jerusalem is still regarded by the international community as occupied territory, and by its own citizens and by many, if not most Israelis, as not quite Israel. Poll findings routinely identify most areas of East Jerusalem as dispensable in the eyes of Israelis if it is in the interests of a broader peace agreement with the Palestinians.⁵³ A recent poll indicates that up to 55 percent of adult Israelis are willing to relinquish the Palestinian neighbourhoods in return for a peace agreement with Palestinians.⁵⁴ Indeed, on closer examination, the ambiguities of Israeli policy in East Jerusalem add up to what can be referred to as the “multiple borders of Jerusalem” in which Israeli political control and claims to sovereignty are undermined by a range of lacunae and anomalies.

The multiple borders of Jerusalem

A complicating feature in this discussion is the added factor that the borders of Jerusalem are dynamic and also can be disaggregated by their different functions. I refer to this phenomenon as the “multiple borders of Jerusalem.” (See Map 3.) At the Camp David summit in 2000, the Israeli offers were based on a perception of their political control and presence in East Jerusalem which did not accord with the reality on the ground. When Israel occupied East Jerusalem in 1967, one of the first laws it passed extended the West Jerusalem municipality to encompass the Jordanian Arab Jerusalem municipality and to the areas around it. (See Box 1.) On the same day, however, it passed the Law and Administration Ordinance Law (see Box 1) whose ostensible purpose was to integrate East Jerusalem into the Israeli legal system. A significant part of this law was actually the exemptions it contained to make the Israeli presence less intrusive in East Jerusalem and has led to the “multiple borders of Jerusalem.” For example, East Jerusalem was exempted from many health and safety regulations, from labour laws and from those concerned with the registration of businesses and money-changers.⁵⁵ As a result, the Palestinian Arab commercial system was allowed to continue to follow practices of the Jordanian era. Significantly, the draconian Israeli Absentee Property Law of 1950 was amended to exempt the residents of East Jerusalem from its provisions who, as Jordanians, and therefore technically “enemies,” were liable to have their property confiscated.⁵⁶ The same law also prevented residents from claiming their property in West Jerusalem.

In the same vein, concessions were made to the Muslim and Christian religious establishments which allowed a significant degree of autonomy in their internal

administrative arrangements over the Muslim and Christian Holy Places. One should recall that significant parts of East Jerusalem and, in particular, the Old City are owned and administered by the churches or an Islamic foundation, known as the Awqaf Administration. The Awqaf Administration during most of the period since 1967 was funded by the Jordanian government, which also appointed most of the senior personnel.⁵⁷ So a situation prevailed where there was a semi-autonomous administration employing several hundreds of people and carrying out significant building works and communal activities and being directed by both the Jordanian government and the PLO in the heart of the territory that Israel was claiming as its capital.

The Israeli presence in East Jerusalem is limited in other ways. For example, the education system and curricula in Palestinian schools in Jerusalem is almost identical to that in the West Bank under Palestinian jurisdiction; the water supplied to the northern Palestinian suburbs is piped by the Palestinian Ramallah Water Undertaking, while electrical power in all Palestinian areas is supplied by the Palestinian-owned East Jerusalem Electricity Company. These factors should also be seen in the context of the wholesale neglect of the Palestinian residential areas by both the Israeli Municipality of Jerusalem and the central government. According to a 1994 report, while Palestinians made up 28 percent of the city's population, they only received between 2 and 12 percent of the municipal budget across the various departments.⁵⁸ Another report detailed such discrepancies as: the existence of 680 kilometres of roads in West Jerusalem in contrast to only 86 kilometres in East Jerusalem; 1,079 public gardens in West Jerusalem and only 29 in East Jerusalem; and 650 kilometres of sewage lines in West Jerusalem as opposed to only 76 kilometres in East Jerusalem. Gaps in services between the two communities of over 500 percent have been identified.⁵⁹ Indeed, the disproportion of investment is possibly even greater than these figures suggest when one realizes that funds for Route One, one of the city's major road projects and for the Jerusalem football stadium in West Jerusalem were taken from funds targeted for the Palestinian Arab sector.⁶⁰

These policies have led to a seriously inadequate provision of basic municipal services, infrastructural development and welfare programmes in the Palestinian areas of East Jerusalem. In an attempt to fill the vacuum left by the Israeli state, Palestinian and foreign charitable associations, religious organizations, the PLO, and the Jordanian government have all stepped in. The result is that East Jerusalem consists of a series of Palestinian enclaves detached, to some extent, from the Israeli polity. It is significant that many of these enclaves have seen the revival of customary and tribal law among the Palestinian residents. After nearly 40 years of occupation, the only element of the Israeli state that is visible in these areas is the restrictive planning laws and the security forces. This could not have been the vision and the intention of those who passed the various laws of absorption in 1967 and, indeed, of the Basic Law in 1980.

One could also argue that the Israeli failure to impose citizenship, the persistent boycott of Israeli institutions and municipal elections by Palestinian residents, and the collapse of the neighbourhood council schemes during the first *intifada* led to a

network of alternative representative bodies and a drift towards referring internal issues to the Palestinian National Authority and its appointees, thus ignoring the Israeli institutions such as the Knesset and Municipal council.⁶¹ An attempt was made by the Netanyahu government after 1996 to shut down this avenue by the closure of the PLO-run Orient House and professional organizations such as the Jerusalem Chamber of Commerce. However, in their place we have seen the emergence of the Awqaf Administration and church leadership, al-Quds University, and a myriad of smaller research and social institutions trying to fill the gaps in representing the Palestinian community in the absence of Israeli institutions (albeit since the death of Faisal Husseini, coordination has been reduced). The failure of Israeli channels of representation to take root has only been exacerbated by the Palestinian electoral law agreed with Israel under the Oslo Accords, which allowed East Jerusalemites to participate in Palestinian presidential and legislative council elections. The election of Jerusalem parliamentarians, while ineffective in delivering benefits to their constituencies, has formalized the exclusion of Palestinians from the Israeli polity.⁶²

It is important not to overstate this argument. We should recognize, for example, that eligibility for coverage by the Israeli health and National Insurance system in East Jerusalem is a prime motivation for many East Jerusalemites who had sought residency in the outlying suburbs in the 1970s and 1980s to try to return to the central Israeli-controlled parts of the city in the 1990s. Nevertheless, taken as a whole, these exemptions, lacunae, anomalies, and forms of passive resistance add up to the city having numerous sub-political borders (see Map 3). For sure, we have a formal political or municipal border, but there are religious borders which ignore both the Armistice lines and the post-1967 borders; there is a commercial and banking border and an educational border which come right up to the Green Line; a water border that includes parts of East Jerusalem into the West Bank; an electricity border that does the same; a service provision border that creates neglected enclaves within the city; and also an electoral border which runs down to the Green Line. Finally and conclusively, since the first *intifada*, there has been a separate security border which has not been congruent with the municipal borders and which now forms the Separation Wall running through Jerusalem, referred to earlier. While changing significantly the points of access between the outer suburbs and the centre of Jerusalem, the overall point is that this new security border is also not congruent with the state borders or municipal provision borders established in 1967. Trying to identify which parts of East Jerusalem are fully under Israeli jurisdiction, or are as Israeli as the pre-1967 Israel parts are Israeli, is a complex, if not impossible, task.

Jerusalem and the peace process

The previous two sections have established that there is greater flexibility in both the corpus of international law on the future of the city and in the antecedents and discourse of the dominant Israel/Jewish party to the conflict. In this section, we turn to an examination of how the future of Jerusalem has been dealt with in discussions among policy makers and academics prior to and in the course of what has been

termed the “peace process” since the Oslo Accords in 1993. In essence, we consider what have been the attempts to operationalize the different perceptions of international law on this issue. From this point, we can then turn to consider what would be the main elements of a rights-based approach to the Jerusalem issue and how (and if) it differs from previous suggestions.

Peace proposals on Jerusalem are not thin on the ground. A publication in 1995 listed 63 of the main ones, and there have been scores more put forward since that date.⁶³ In general, the peace proposals can be placed on a continuum between two poles, with one pole emphasizing the unity and integrity of the city and the other emphasizing its binary nature and diversity.⁶⁴ An example that can serve as a template for the unity end of the continuum is that contained in Resolution 181 and the *Draft Statute for Jerusalem* prepared by the UN Trusteeship Council in 1948. In the Statute, the city would be internationalized and placed under a UN-appointed governor for a period of 10 years, after which a referendum would be conducted to determine its final status. A legislative council with equal numbers from each religious community would be appointed and a judicial system be made responsible to the Trusteeship council. Municipal functions would be delegated to autonomous units but policing arrangements would be the prerogative of the Governor.⁶⁵

At the opposite end lies the position enunciated by President Sadat in his letter attached to the Camp David Agreement in 1978. Here the President summed up the Arab and PLO position of the time which was that East Jerusalem would be under Arab (Palestinian) sovereignty and an integral part of the West Bank. All Israeli measures altering the *status quo* would be rescinded, but access to and internal administration of the Holy Places would be respected. A joint municipal council would oversee the essential functions of the city and, in this way, the city would remain undivided.⁶⁶

The most well known of the proposals which can be placed somewhere between these extremes are those of Professor Walid Khalidi who proposed a “joint inter-state Great Municipal Council,” and Drs. Sari Nusseibeh and Mark Heller, who suggested devolving some aspects to neighbourhood councils and others to a “metropolitan” government.⁶⁷ A subset of these proposals along this continuum are proposals which focus on the internationalization or the “extra-territorialization” of the Holy Places. In essence, religious sites are placed under a separate regime so that the international community can be assured that access to, and protection of, the sites are safeguarded. The latter has been, until the Camp David summit of 2000, the consistent Israeli position and most of its subsequent positions are derived from this starting point. A variant of this approach was put forward by the Jordanian Ambassador to the UN, Adnan Abu Odeh who argued for the extra-territorialization of the Old City.⁶⁸

The above illustrate the positions prior to the commencement of the peace process. As the process proceeded, variations were proposed which explored the notion of a dual capital in more detail. One of these is the “non-paper” agreement between the former Israeli Justice Minister Yossi Beilin and the then-PLO General Secretary Mahmud Abbas (Abu Mazen), known as the Abu Mazen–Beilin Plan. The

Plan was never officially published and it always remained a document for discussion. However, the detailed and wide-ranging nature of the plan, and its status as the basis for Israeli and American proposals during the Camp David summit in July 2000, has made it a reference and starting point for serious negotiation. The Plan proposed a Joint Higher Municipal Council and an Israeli and Palestinian sub-municipality responsible for the municipal concerns of their respective citizens and their property. The Plan also proposed a special regime for the Old City and the “preservation of the unique character of the Old City” was to be referred to a Joint Parity committee appointed by the two sub-municipalities.⁶⁹ In this plan, Palestinians would have extraterritorial sovereignty over the Haram ash-Sharif. The significance of this point is that the Palestinian sub-municipal areas did not come up to the 1967 borders, thus detaching the Old City and some of the Palestinian suburbs from the Palestinian sub-municipality and capital.

In 2000, the Camp David summit between Israel and the PLO, hosted by U.S. President Clinton, did not produce the hoped-for breakthrough. Although there was no formal record of the talks, from media leaks and post-mortems we can discern a number of proposals and counter-proposals.⁷⁰ We actually see the Israeli party offering less than in the Abu Mazen–Beilin plan. Palestinian counter-proposals, based upon Security Council Resolution 242, were rejected out of hand by the Israelis as politically unfeasible.⁷¹ The Israeli proposals comprised two main elements. First, they would relinquish control over the northern Palestinian-dominated suburbs of the city to the Palestinian Authority and devolve administration in the central areas of East Jerusalem to Palestinian bodies. (See Map 4.) Second, Israel would retain overall sovereignty and security control over East Jerusalem, including the Old City. As these came nowhere close to Palestinian aspirations and did not take into account Resolution 242 in any meaningful way, it was not surprising that they were rejected. Indeed, as we can see from the previous section, from a Palestinian perspective, the Israelis were not offering them much more than they already had. However, as the former Israeli Deputy Mayor of Jerusalem, Meron Benvenisti, declared:

A taboo has been broken and Israel has participated in talks on Jerusalem that were focused on a partition of the city, even if the word “partition” was not explicitly used. These two facts have created an irreversible situation.⁷²

In the attempt to rescue the peace process, U.S. President Clinton suggested a framework, which has become known as the “Clinton Parameters,” which would have led to the partition of the city, including the Old City, on demographic criteria. He further recommended Palestinian sovereignty over the Haram ash-Sharif and Israeli sovereignty over the Western Wall and special arrangements for excavations underneath the Haram.⁷³

Both sides have agreed that the subsequent talks at Taba in 2001 built on the Clinton Parameters and that there was further progress over the question of Jerusalem. As at Camp David, no formal agreement was reached, but a record

of the meetings at Taba, compiled by the EU Envoy Ambassador Miguel Moratinos, indicate a number of important developments. Both sides agreed that Jerusalem would be the capital of the two states. In addition, Palestinians were willing to discuss Israeli sovereignty over Israeli settlements in East Jerusalem and to accept Israeli sovereignty over parts of the Old City. For its part, Israel accepted Palestinian sovereignty over Palestinian suburbs up to the Green Line. There was no final agreement on the Holy Places, but there was an agreement to continue discussions on the concept of a Holy Basin to encompass religious sites and special arrangements regarding the Haram ash-Sharif/Temple Mount.⁷⁴ These were important steps towards actualizing Resolution 242 yet, on the other hand, recognizing that it could not be the basis of a long-term agreement which met the interests of both sides simultaneously.

The most recent public negotiations between the two sides which took place on Jerusalem were the Geneva Initiative (sometimes known as the Geneva Accords) whose interim plan was launched in December 2003. Although having no official status, they were led by many of the leading figures in, or advisors to the negotiating teams that met in Camp David and Taba. The Initiative illustrated that further progress on a number of key issues was achievable and it mapped out a possible trajectory for future official negotiations. A key element of the Geneva Accord is third-party intervention and monitoring. It proposes, significantly, a number of channels for external intervention and involvement. For example, an Implementation and Verification Group and an interfaith council would be established and a central reference for activities in the Old City would be UNESCO, with its protocols on conservation and heritage. This suggests a growing recognition on the Israeli side of the positive role the international community can play.

Like Taba, the Geneva Initiative proposes two capitals for two states with two municipalities responsible for their respective areas. There would be a coordination committee appointed by the municipalities to oversee the economic development of the city as a whole. As opposed to a Holy Basin idea, discussed in Taba, there would be a special regime for the Old City which would include Israeli sovereignty over the cemetery on the Mount of Olives and the Western (Wailing) Wall. Palestinian sovereignty over the Haram will be phased in according to an agreed-upon timetable. On the central issue of the areas of respective sovereignty, the Accord is not clear as it refers to a map which has not been published.⁷⁵ With respect to the settlements in and around Jerusalem, the Initiative proposes their evacuation according to an agreed timetable and to territory exchanges.⁷⁶

The Geneva Accords were greeted by some caution by the Palestinian leadership and by outraged scepticism by their Israeli counterparts, but most of the ire on both sides was directed at the clauses concerning the refugee issue and not the Jerusalem issue. Taken together with the Camp David summit and the Taba talks, what these trends in negotiations reveal is a gradual move away from the maximalist Israeli positions prior to the peace process and towards Resolution 242 in the form of an Israeli withdrawal and Palestinian sovereignty over large areas of East Jerusalem and a tacit parallel acquiescence on the part of Palestinians to the new realities in

Jerusalem. The fact that this movement is limited and incremental cannot disguise the fact that from being “non-negotiable” in the 1980s (pre-Oslo), Jerusalem became “negotiable-at-some-deferred-stage” in the 1990s (Oslo) to “negotiable-in-detail,” including territorial exchanges, in the twenty-first century (post-Camp David and Taba).

The current alteration to the landscape and physical use of the city by the construction of the Separation Wall and the unilateralist policies of the current Israeli government does not, for the time being, alter this trend. (See Map 5.) In this chapter we are discussing a peace agreement that has some chance of being durable rather than an imposed political settlement kept in place through coercion. If negotiations are to be resurrected, they are unlikely to advance on the basis of Israeli physical control over East Jerusalem that the Separation Wall delineates. Indeed, in line with Lustick’s argument over the failure by Israel to attain a hegemonic status over Jerusalem, referred to in the previous section, one should note that recent developments in Israeli political discourse indicate a reversal of the previous Israeli position. A new consensus is building on a much less maximalist position. While Israeli Prime Minister Ehud Olmert declared he

will never, never agree to a compromise on the complete control over the Temple Mount. And not only the Temple Mount but also the Old City, Mount of Olives and every place that is an inseparable part of Jewish history,

he went on to add

We don’t pray facing Beit Naballah or Issawiyya, or any of the other Palestinian neighbourhoods that have been added to Jerusalem by someone who drew a map one day.⁷⁷

Further illustration of this shift can be seen in the proposals by Knesset member Otneil Schneller, an adviser to Olmert but also, and more significantly, a former leading figure in the settler movement. He suggested that while Israel would retain the Old City and immediate environs, it would not seek to hold onto some of the Palestinian suburbs.⁷⁸ Thus while the construction of the separation barrier is clearly an impediment to the resumption of peace negotiations, it should not obscure the fact that there has been an unravelling of the Israeli consensus on Jerusalem since 1993, and that a return to the 1967 border (Resolution 242) subject to some critical territorial exchanges is not as distant a prospect as it was 10 years ago.

A rights-based approach to an agreement on Jerusalem

The context and facts presented above bring us to the conclusion that the solution to the Jerusalem issue is less encumbered by international legal prescriptions and political discourses than it might first appear. The Palestinian acceptance of Resolution 242 as a basis for negotiation about Jerusalem is already a major concession by the Palestinian leadership in that it implies an acceptance of the loss of

Palestinian land in West Jerusalem. Indeed, it is a concession that has not been fully reciprocated by the Israeli side, but as we have seen, the grounds for refusing such a reciprocation are much weaker than asserted. The Israeli claim to title over East Jerusalem has not been accepted by the international community and its *de facto* authority has, despite nearly 40 years of occupation, actually diminished. In this broad context, setting aside the immediate unstable conditions, the scope for a negotiated solution is still very much a possibility. In this section I first consider what the principles are which will help frame a solution to the question over the future status of the city. I then consider what Israeli and Palestinian interests will have an impact upon that framework and how they may be accommodated. I conclude by arguing that while the Separation Wall dramatically alters the current configurations on the ground, it also brings into sharp relief many unresolved questions over the status of East Jerusalem as part of Israel, and that ultimately it offers no solutions to Israel. Instead, a rights-based approach based on international law can have more opportunities than it initially appears.

A solution for Jerusalem will need to be based upon a framework encompassing four overarching principles: compatibility, reciprocity, and both a retrospective and a prospective perspective. By compatibility, I refer to the overall negotiating context. Whatever is agreed on Jerusalem should be both consistent and compatible with agreements in the other Final Status negotiations such as borders and security, refugees, and settlements. Border permeability, employment and residency rights, economic and fiscal arrangements, security and policing cooperation should all be compatible with other arrangements negotiated. For example, it would be unworkable to agree to “hard” or impermeable borders between most of the West Bank and Israel, but have “soft” or permeable borders for the areas between East Jerusalem and West Jerusalem. Militants opposed to the agreement on both sides could make use of this disjunction to enter each other’s territory *via* Jerusalem. Permeability of the borders would have to be consistent in one way or another. However, the principle of compatibility need not be absolute. For example, as a result of the unique status of the city as the site of Holy Places for three religions and of two national capitals, the requirement for compatibility should not exclude some special arrangements for Jerusalem. The agreement would need to address questions over access to holy places, taxation on religious property and the operations of embassies in a way which reflects this special status. Issues such as the settlements and refugee property restitution or compensation would need to have this same mix of compatibility with the broader agreement and some special arrangements for the Jerusalem case.

The second principle of reciprocity may appear implausible, particularly in the current balance of power between the two parties. In reality, reciprocity provides a considerable amount of flexibility. Here, issues such as the ceding of title to land, the recognition of restitution claims, of access and the transfer of legal jurisdiction from one side to the other side would all be in exchange for other “goods.” In this way, each metre shift in the border, each municipal service transferred and each legal jurisdiction obtained by the Israeli side, would be accompanied by a *quid pro quo* for

Palestinians, and *vice versa*. However, it is not often understood that there is a degree of flexibility in the principle of reciprocity. To put it simply, the “goods” exchanged need not be the same goods. Clearly territorial exchanges will play an important role if negotiators seek to avoid further excessive political and social disruption from the evacuation of settlements. But land can be exchanged for other goods, such as international monitoring of security procedures, guarantees of access, economic development, and environmental cooperation. In addition, goods can be disaggregated both physically and temporally so that particularly contentious exchanges of goods can be phased in over an extended period. Some settlements, for example, can be parcelled up and evacuated over an agreed-upon period. Clearly, this principle can only be implemented if premised on Resolution 242 and a Palestinian acceptance of Israeli sovereignty over West Jerusalem that is met by a reciprocal Israeli recognition of East Jerusalem as the Palestinian capital by Israel. Despite the weakness of their overall position, the Palestinians are stronger than Israel in one area that is vital for Israel: it is only through an agreement with the Palestinians on Jerusalem that Israel can obtain international legitimacy of their presence in the city and recognition of West Jerusalem as Israel’s capital. Similarly, the Israeli aspiration for an “end of conflict” clause in a peace agreement with Palestinians offers the Palestinians another form of “goods” which can be exchanged.⁷⁹

The third principle is that of retrospective-ness. By this I mean that most agreements comprise an element of making good what was wrong in the past. This can encompass a range of issues from the withdrawal of armed forces and the recognition of a grievance hitherto unaddressed, to reparations for the harm done during the course of the conflict. To a large extent Resolution 242, and subsequent Security Council resolutions on Jerusalem, provide the basis for some of this, but not all. Both sides have concerns that predate 1967 and Resolution 242. For the Israeli side, there are concerns about the Jewish Holy Places, including the cemetery on the Mount of Olives, and concerns for the property in the Jewish quarter of the Old City, in Silwan and the surrounding area. There are similar concerns on the Palestinian side. These issues need addressing in either the broader negotiations concerning property restitution and compensation, or as part of the Jerusalem ones.

The final principle is that of prospective-ness. Here we are looking forward to see what is required from the agreement to allow the city to prosper for both sides. What is required is an agreement which provides some economic viability to the city and that allows its urban fabric and infrastructure to develop to meet the needs of the residents on both sides, as well as to the thousands of visitors who will surely come to Jerusalem after a peace agreement is implemented.⁸⁰ It will need to sensitively accommodate cross-border cultural and religious attachments. In addition, the agreement will need to take into account the highly charged nature of a politically shared city with such huge religious symbolism contained within it, with some extra security cooperation and guarantees. Thus, it appears that an agreement which is intended to establish a stable basis for the city in the future will require a significant degree of joint activity, high-level consultation across a range of issues and a degree of third-party involvement, at least for the early stages. With these four

principles in mind, we can now discuss ways in which a right-based approach can accommodate both Israeli and Palestinian interests in the city.

Four major Israeli interests can be identified in their claims to Jerusalem. The first would be the international recognition of Jerusalem as its capital and the legitimacy of national institutions in the city from the President's Residence, the Knesset, the Supreme Court of Justice and the Israeli municipality, and the application of its laws in an agreed territory. Whatever agreement is reached, a *sine qua non* of Israeli acceptance would be the acknowledgment of its place in Jerusalem by the international community, including by countries of the Arab and Islamic world. If Palestinians were satisfied with other aspects of an agreement, this would be forthcoming.

A second important interest is that of access to, and control over, the Jewish Holy Places. Specifically, this would include Israeli sovereignty over the Western Wall and the cemetery on the Mount of Olives under an extraterritorial arrangement. Special arrangements could also be negotiated over an Israeli enclave in the Jewish quarter of the Old City stopping short of full sovereignty, but according Israeli residents there great latitude, depending upon the kind of administrative framework established for the Old City and the Holy Places. Connected to the question of the Holy Places is recognition that excavated sites will be accorded respect and be conducted with transparency in line with international standards.

The third major interest is the right to pursue good governance in terms of cooperation with Palestinians in service provision, regional and urban planning, and the security of Israeli residents. This would require a strategic administrative co-operative structure, such as a metropolitan council, close cooperation on legislation and extradition, and a partnership with Palestinian security forces involving some Israeli presence outside its sovereign territory, such as the monitoring of access points to Jerusalem in an interim phase.

Finally, in view of the length of time elapsed since the construction of settlements, the position of Israeli residents in East Jerusalem should be considered. Their status as citizens can be addressed either through territorial exchanges, which will allow some of the settlements to remain under Israeli sovereignty, or by a phasing in of Palestinian sovereignty to provide them with time to evacuate in an orderly way. An offer of Palestinian citizenship and compensation for relocation should also be offered under the terms of the agreement.

On the Palestinian side the rights are identical to those of the Israelis with respect to the first three: international recognition of the city as the Palestinian capital, access and control over the Holy Places, and good governance and security. The Palestinian side, in addition, can legitimately claim some additional rights with regard to refugee property in West Jerusalem. The way to address these concerns would be to decouple the issue of sovereignty from that of ownership to allow for either restitution or compensation. This was the approach followed by the signatories of the Dayton Peace Agreement which included far-reaching provisions to deal with the refugee issue.⁸¹ Although it was not adopted, this approach also informed the Annan Plan for Cyprus and has set a benchmark for international norms on reparations.⁸² Both these approaches allowed for a significant degree of redress, but in a manner which

is framed by the overall political structures. It is also important to recognize that for the Palestinian side, any territorial exchanges and cooperation over security and economic activities envisaged in both East and West Jerusalem would need to be supplemented by two further rights: the right to reverse the planning decisions and land expropriations of the past 40 years and the right to establish contiguity between East Jerusalem and the West Bank.

In a situation where political instability and short-term security consideration override longer-term perspectives on the future of the city, the distance to travel from where we are now to that envisaged above is considerable. The gradual fragmentation of the PLO and Palestinian Authority and the unilateralism of the Israeli government suggest that no serious negotiations will take place in the coming few years. In this event, the “hard” border in the form of the Separation Wall being constructed by the Israeli government will impinge harshly on Jerusalem. In essence, the harder the border between Israel and Palestine, the further east of Jerusalem it will likely to be.

In this sense the Wall runs absolutely counter to the settlement policy of the past. That policy was designed to pre-empt an Israeli withdrawal by making the separation between the two communities impossible, and in order to isolate East Jerusalem from the West Bank hinterland. That objective has now been abandoned by the unilateralist policies of Israel. The Wall now has to encircle Palestinian suburbs but not Israeli settlements so that it twists and turns around the hills of East Jerusalem and has to go further east to incorporate the settlements.

If this is to be the new permanent border between Israel and the putative Palestinian states, then it will pose several dilemmas to the new Israeli government. It will have to deal with the multiple borders issue and the changing Zionist discourse on Jerusalem, which recognizes that not all of Jerusalem is Jewish Jerusalem, as discussed above. For example, if it decides to impose citizenship on the Palestinian East Jerusalemites on the Israeli side of the border, this would alter the demography of Israel and have electoral consequences that would enhance the influence of Palestinian Arab parties. In addition, it will raise the dormant issue of their rights to property in West Jerusalem. If it decides to leave them in the current state of legal limbo, this would undermine its authority and its claim to sovereignty in the eyes of the international community and delay once again its objective of international recognition. Furthermore, the Separation Wall will reignite the struggle over the education curriculum in the Palestinian sector which took place in the 1980s with its accompanying strikes and rioting students. It may oblige the Israeli government to try again to co-opt the religious leadership in an international political climate where there are increased sensitivities to religious interference and where there is a much greater degree of pan-Islamic and pan-Christian organization that will be able to resist these attempts. Finally, as a result of the Separation Wall, the municipality will be obliged to re-establish its role as the primary service provider in East Jerusalem with the huge costs that entails. In sum, the Separation Wall and the current policy of unilateralism will create even more problems for Israel with regard to Jerusalem.

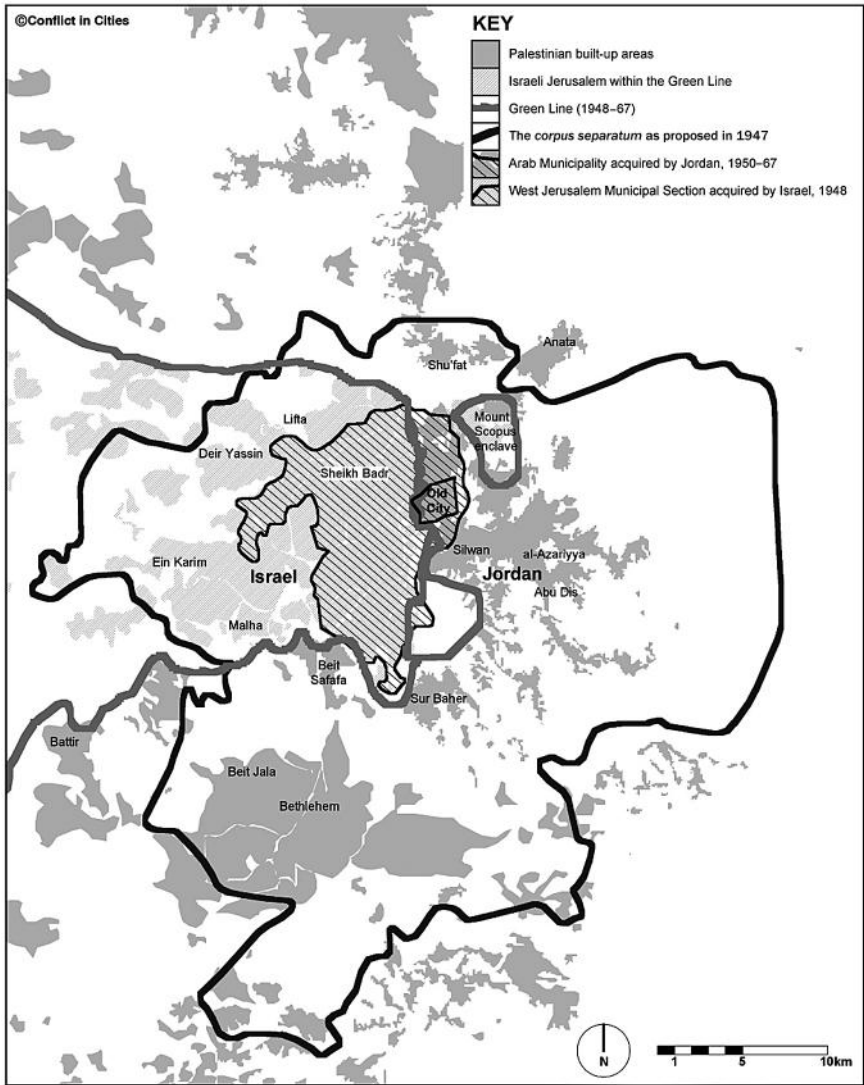
These dilemmas confronting Israeli policy makers make the discussion of a rights-based approach relevant and urgent. They also strongly confirm that a solution can only be based along the lines outlined in this chapter: that of recognition of the centrality of international law and its appropriate flexibility to take into account changes on the ground and the wider negotiation context. This chapter has illustrated that international law lacks both a clear prescription over the future of Jerusalem and a degree of ambiguity that allows for greater room for negotiation than is often recognized. It has also sought to demonstrate that the political discourse on Jerusalem, despite the polarity that exists in policy and practice, is much less entrenched than in the pre-Oslo period. By combining these two observations, and by introducing the discourse of a rights-based approach, this chapter has also shown how a resolution can be arrived at. By recognizing the rights, claims, and interests of both sides of the conflict in the context of legal flexibility and changing elite aspirations, it is possible to delineate the basic prerequisites of an agreement.

BOX 1 LEGAL LANDMARKS IN THE MODERN HISTORY OF JERUSALEM

1922	British Mandate for Palestine: Provisions concerning the Holy Places.
1947	UNGAR 181 (II) (C: Part III) The City of Jerusalem. Recommending an international zone to be administered by the UN for 10 years.
1948	Resolution of the 2nd Palestine Arab Conference, Jericho. Proclaiming unity of Palestine, including East Jerusalem, and the Hashemite Kingdom of Jordan.
1949	Jordan–Israel: General Armistice Agreement. Unofficial map of armistice lines dividing Jerusalem.
1967	Application of Israeli law to East Jerusalem: Law and Administration Ordinance (Amendment 11) Law; Municipal Ordinance (Amendment No. 6) Law; Protection of Holy Places Law.
1967	UNGAR 2253 calling upon Israel to rescind all measures which alter the <i>status quo</i> .
1967	UNSCR 242. Concerning the withdrawal of Israeli armed forces and the termination of belligerency.
1968	UNSCR 252. Considers all Israeli legislative measures altering the status of Jerusalem as invalid.
1968	UNESCO General Conference Resolution 15C/3.343 concerning the preservation of cultural property in Jerusalem.
1978	Camp David. Letters of President Sadat, Prime Minister Begin and President Carter stating their positions on Jerusalem attached to the final statement.

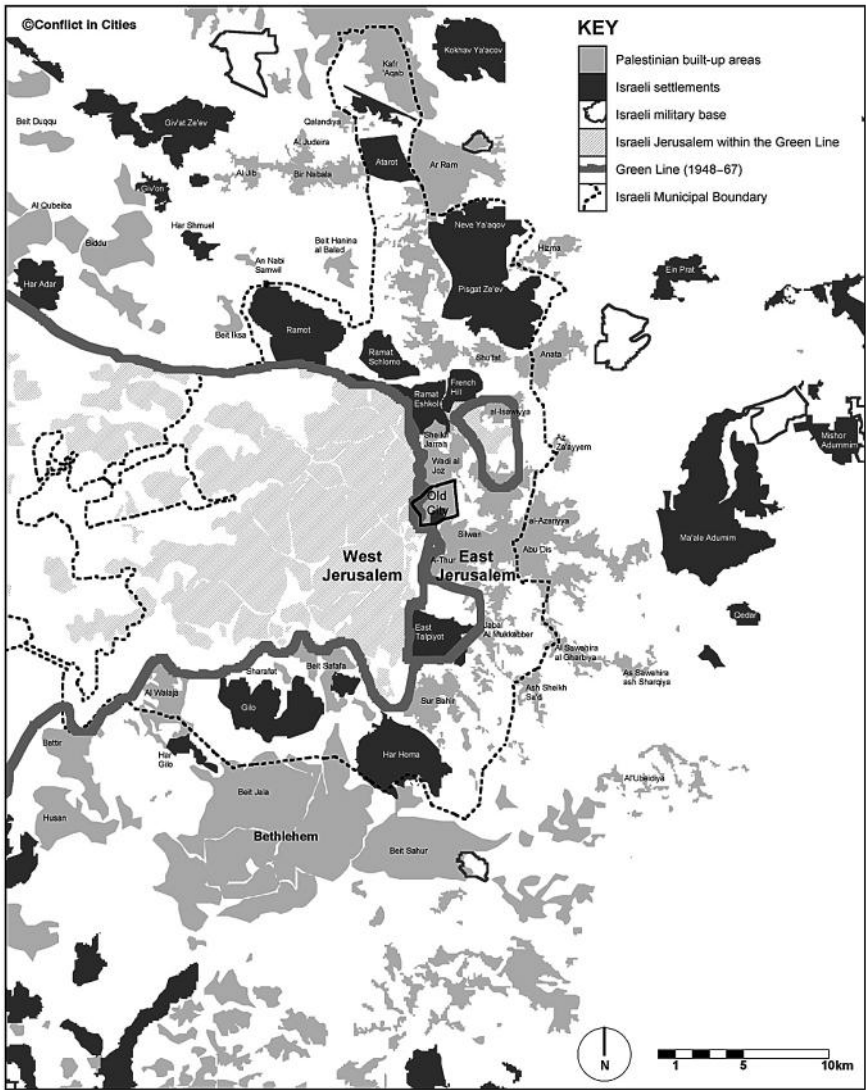
1980	European Council Venice Declaration. (1.1.6. Middle East. 8). Not accepting changes to the status of Jerusalem.
1980	Israel's Basic Law: Jerusalem as capital of Israel.
1982	Arab League Summit, Fez. Calling for creation of Palestinian state with Jerusalem as its capital.
1993	Declaration of Principles on Interim Self-Government Arrangements between Israel and the PLO. Permanent Status Negotiations and Jerusalem (Art. V) Right to participate in elections (Annex 1)
1993	Peres–Holst letters. Confirming the essential role of East Jerusalem institutions.
1995	Palestinian Election Law. Eligibility of East Jerusalemites to vote in Palestinian elections.

Maps

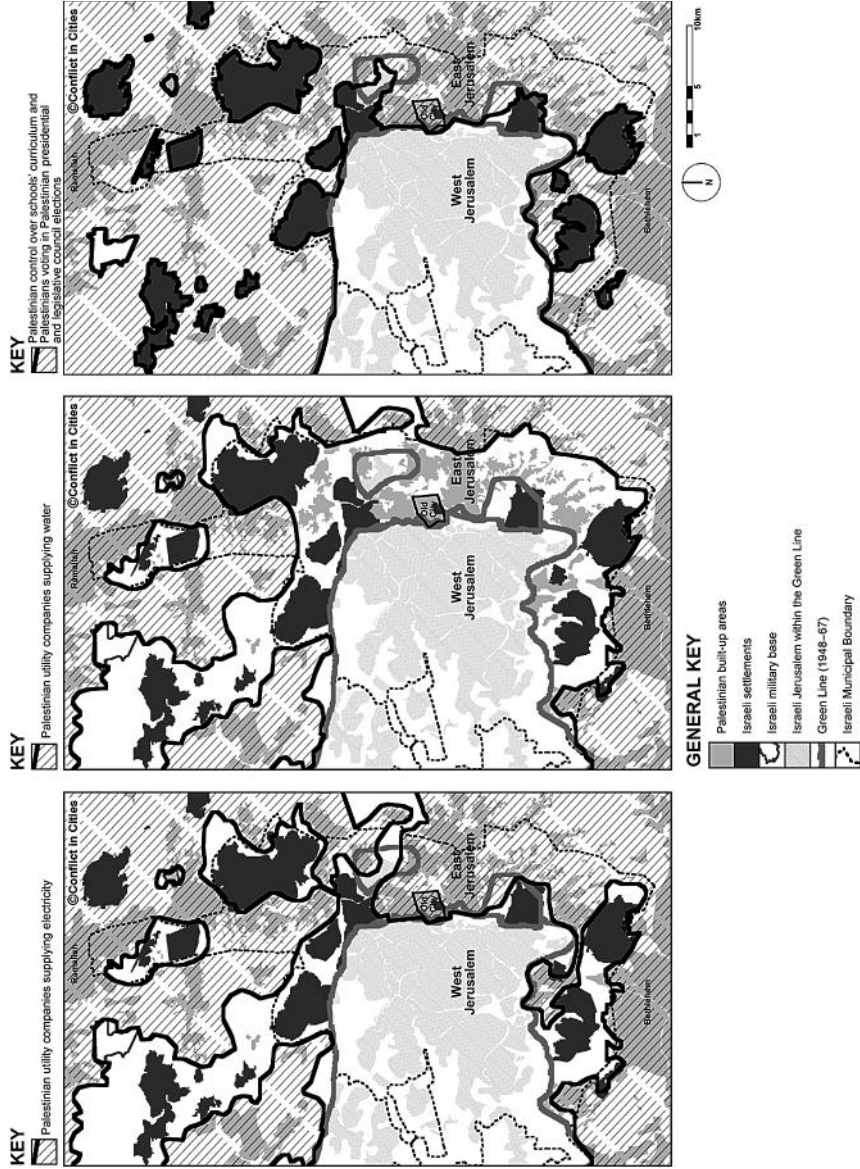


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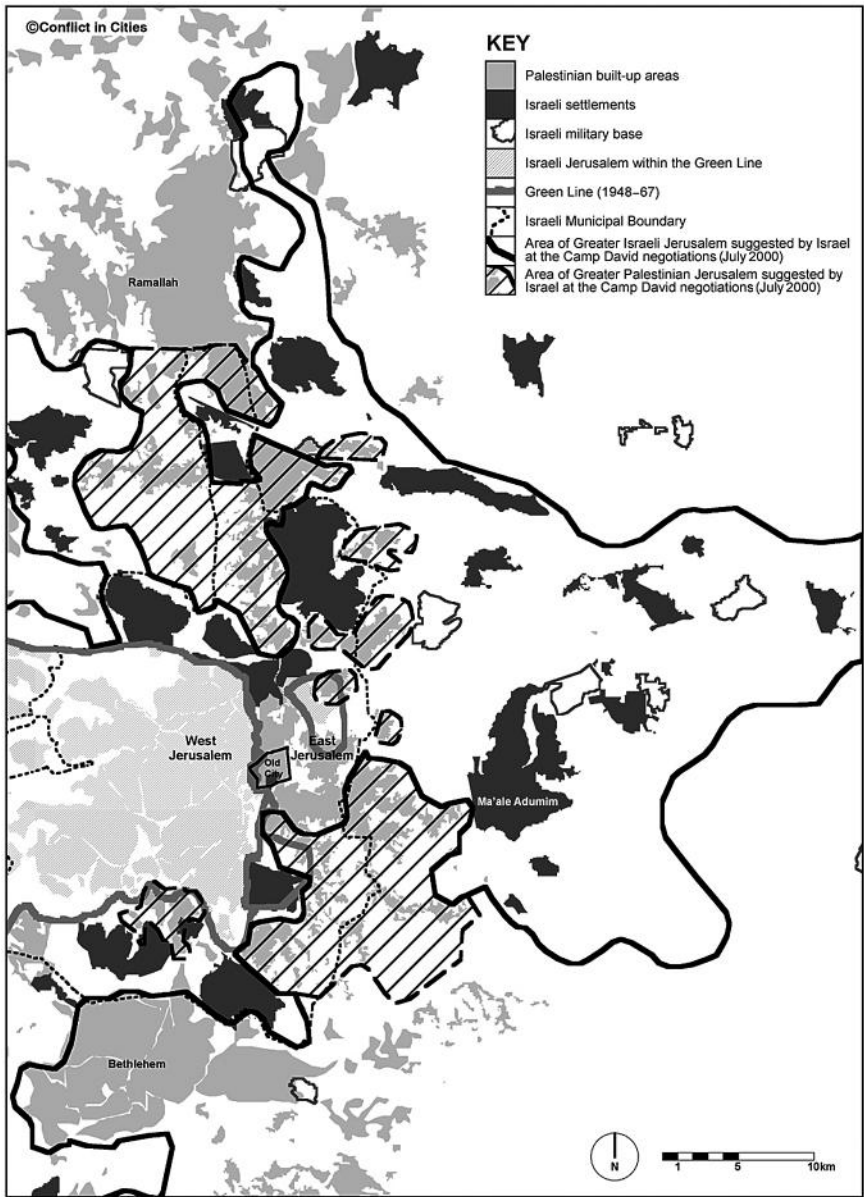
Map 1 International Zone of Jerusalem as laid down in the Partition Plan 1947 and Jerusalem borders laid down by the Armistice Agreements 1949



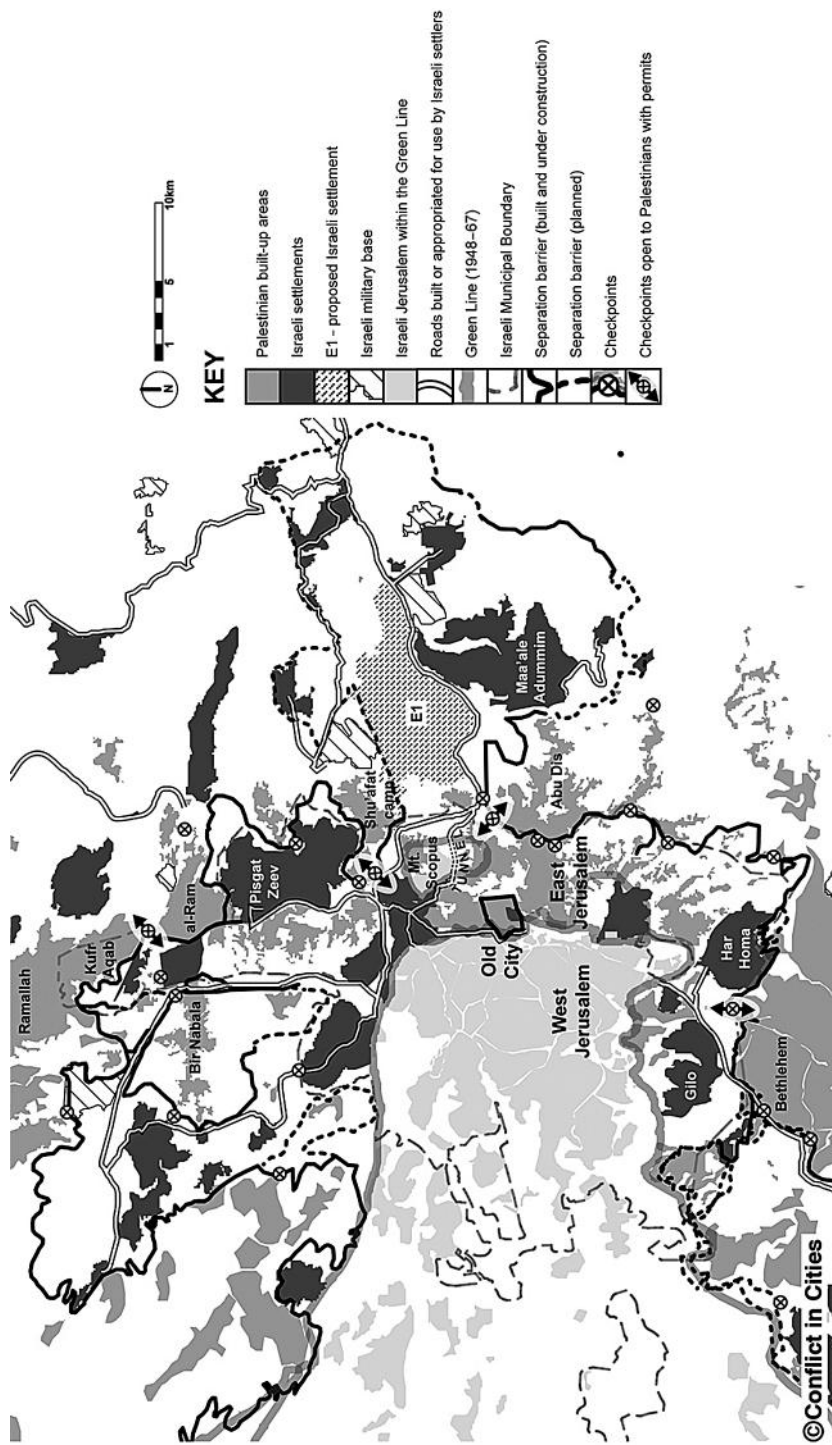
Map 2 Jerusalem: new Israeli municipal border and settlements after 1967



Map 3 The multiple borders of Jerusalem



Map 4 Jerusalem: Camp David proposals



Map 5 Greater Jerusalem showing the Separation Wall

Notes

- 1 The various positions put forward are discussed in Hussein Agha and Robert Malley, "Camp David: The Tragedy of Errors" (2001) 48: 13 *New York Review of Books*. See also replies to Ehud Barak in H. Agha and R. Malley, "Camp David and After: An Exchange (A Reply to Ehud Barak)" (2002) 49: 10 *New York Review of Books* and Benny Morris and Ehud Barak, "Camp David and After – Continued" (2002) 49: 11 *New York Review of Books*; Deborah Sontag, "And Yet So Far: A Special Report: Quest for Mideast Peace: How and Why it Failed" *New York Times* (26 July 2001) A1, online: *New York Times* <<http://www.NYTimes.com>>; Menachem Klein, *The Jerusalem Problem: The Struggle for Permanent Status* (Gainesville: University of Florida Press, 2003) at 63ff; S. Shamir and B. Maddy-Weitzman, *The Camp David Summit – What Went Wrong?* (Brighton: Sussex Academic Press and Tel Aviv University, 2005).
- 2 M. Hirsch, B. Housen-Couriel, and R. Lapidot, *Whither Jerusalem: Proposals and Positions Concerning the future of Jerusalem* (The Hague: Martinus Nijhoff, 1995); "Patriarchs Demand Old City Stay United" *Ha'aretz* (July 20, 2000).
- 3 See Palestinian Academic Society for the Study of International Affairs, *Documents on Jerusalem*, (Jerusalem: PASSIA, 1996) at 225–91. In a collection of UN documents from between 1947 and 1997, there are no less than 66 Security Council, General Assembly Council and UNESCO resolutions on Jerusalem.
- 4 See *ibid.* at 247. Excluding UNESCO resolutions, these include *inter alia* *Measures Taken by Israel to change the status of the city of Jerusalem*, GA Res. 2253 (ES-V), UN GAOR, 5th Emergency Special Session, Supp. No. 1, UN Doc. A/6798 (1967); *Measures Taken by Israel to change the status of the city of Jerusalem*, GA Res. 2254 (ES-V), UN GAOR, 5th Emergency Special Session, Supp. No. 1, UN Doc. A/6798 (1967); *The Situation in the Middle East*, GA Res. 35/207, UN GAOR, 35th Sess., UN Doc. A/RES/35/207 (1980); *Recent developments in connection with excavations in Eastern Jerusalem*, GA Res. 36/15, 36th Sess., UN Doc. A/RES/36/15 (1981); *Question of Palestine*, GA Res 36/120, UN GAOR, 36th Sess., UN Doc A/RES/36/120 (1981); *The Situation in the Middle East*, GA Res. 37/123, UN GAOR, 37th Sess., UN Doc. A/RES/37/123 (1982); *Question of Palestine*, GA Res. 38/58, UN GAOR, 38th Sess., UN Doc. A/RES/38/58 (1983); *The Situation in the Middle East*, SC Res. 252, UN SCOR, 1968; *The Situation in the Middle East*, SC Res. 258, UN SCOR, 1968; *The Situation in the Middle East*, SC Res. 279, UN SCOR, 1970; *The Situation in the Middle East*, SC Res. 298, UN SCOR, 1971; *Territories Occupied by Israel*, SC Res. 452, UN SCOR, 1979; *Territories Occupied by Israel*, SC Res. 465, 1980, *Territories Occupied by Israel*, SC Res. 476, UN SCOR, 1980; *Territories Occupied by Israel*, SC Res. 478, UN SCOR, 1980; *Territories Occupied by Israel*, SC Res. 672, UN SCOR, 1990.
- 5 *Palestine Partition Plan*, GA Res. 181(II), UN GAOR, 2nd Sess., UN Doc. A/519 (1947) at 131, reprinted in R. Lapidot and M. Hirsch, eds., *The Arab–Israeli Conflict and its Resolution: Selected Documents* (Dordrecht, Boston: Martinus Nijhoff, 1992) 33.
- 6 "Declaration of Palestinian Independence, 15th November, 1988" in PASSIA, *supra* note 3 at 50.
- 7 The Balfour Declaration was contained in a letter dated 2 November, 1917, from the British Foreign Secretary, Lord Balfour to Lord Rothschild, a leading representative of the British Jewish community. Reprinted in R. Lapidot, *ibid.* at 20.
- 8 "British Mandate for Palestine" (1922) League of Nations O.J., Annex 391, 1007 at 1009, reprinted in R. Lapidot, *ibid.* at 25.
- 9 "Declaration of the Establishment of the State of Israel, 14 May 1948" *Laws of the State of Israel*, authorized trans., Vol. I, 5708–1948 at 3. Reprinted in R. Lapidot, *ibid.* at 61.
- 10 *The Situation in the Middle East*, SC Res. 242, UN SCOR, 1967, UN Doc. S/RES/242.
- 11 *Ibid.*
- 12 G. R. Watson, *The Oslo Accords: International Law and the Israeli–Palestinian Peace Agreements* (Oxford: Oxford University Press, 2000) at 268.
- 13 There has been much written on the Separation Wall. For the position of the international community see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

- Territory*, Advisory Opinion, [2004] ICJ 136, online: ICJ <<http://www.icj-cij.org>>. See also Negotiations Affairs Department (PLO), *Israel's Wall*. (Ramallah: PLO, 2004); Y. Lein, and A. Cohen-Lifshitz, *Under the Guise of Security* (BIMKOM and B'TSELEM, 2005); I. Habib, *A Wall in its Midst: The Separation Barrier and its Impact on the Right to Health and on Palestinian Hospitals in East Jerusalem* (Tel-Aviv: Physicians for Human Rights, 2005); M. Al-Barghuti, *Health and Segregation: The Impact of the Israeli Separation Wall on Access to Health Care Services* (Ramallah: Health Development, Information and Policy Institute, 2004).
- 14 *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Note By the Secretary-General*, UN GAOR, 61st Sess., UN Doc. A/61/500 (2006).
 - 15 "Schools in Jerusalem" (2006) 73 Tanmiya (Quarterly Newsletter of Welfare Association) 5.
 - 16 *Report of the Special Committee*, *supra* note 14.
 - 17 R. Bundy, "Legal Approaches to the Question of Jerusalem" in G. Karmi, ed., *Jerusalem Today: What Future for the Peace Process?* (Reading: Ithaca Press, 1996) 46.
 - 18 H. Cattán, *Jerusalem* (London: Croom Helm, 1981); J. Quigley, "Jerusalem in International Law" in *Jerusalem Today: What Future for the Peace Process?* G. Karmi, (Reading: Ithaca Press, 1996) 25; R. Lapidot, R. and M. Hirsch, *The Jerusalem Question and Its Resolution: Selected Documents* (Dordrecht, Netherlands: Kluwer Academic Publishers, 1994); Yehuda Zvi Blum, *The Juridical Status of Jerusalem* (Jerusalem: Hebrew University, 1974).
 - 19 Elena Molaroni, Report of the Third Committee, *Right of peoples to self-determination: Draft resolution III, The right of the Palestinian people to self-determination*, UN GAOR 61st Sess., UN Doc. A/61/442 (2006) at 12–13. The Resolution declares that: "The General Assembly, *Aware* that the development of friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, is among the purposes and principles of the United Nations, as defined in the Charter, *Recalling further* the advisory opinion rendered on 9 July 2004 by the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and noting in particular the reply of the Court, including on the right of peoples to self-determination, which is a right *erga omnes*, *Recalling* the conclusion of the Court, in its advisory opinion of 9 July 2004, that the construction of the wall by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, along with measures previously taken, severely impedes the right of the Palestinian people to self-determination."
 - 20 I. Brownlie, ed., *Principles of Public International Law*, 4th edn. (Oxford: Oxford University Press, 1990) at 663–4.
 - 21 A. Cassese, "Legal Considerations on the International Status of Jerusalem" in H. Koehler, ed., *The Legal Aspects of the Palestine Problem with Special regard to the Question of Jerusalem* (Vienna: International Progress Organisation, 1981) at 149–51.
 - 22 Cattán, *supra* note 18; Quigley, *supra* note 18.
 - 23 L. Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford: Clarendon Press and Oxford University Press, 1998) at 252.
 - 24 E. Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israel Association, 1968); J. Stone, *Israel and Palestine: Assault on the Law of Nations* (Baltimore: Johns Hopkins University Press, 1981).
 - 25 Blum, *supra* note 18; Yehuda Zvi Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (1968) 3 *Isr. L.R.* 279.
 - 26 Bundy, *supra* note 17.
 - 27 M. Shamgar, "The Observance of International Law in the Administered Territories" (1971) 1 *Isr. Y.B. H.R.* 262.
 - 28 Watson, *supra* note 12 at 268.
 - 29 M. Dumper, *The Politics of Jerusalem since 1967* (New York: Columbia University Press, 1997) at 231–49. See also S. Slonim, "The United States and the Status of Jerusalem, 1947–84" (1984) 19 *Isr. L.R.* 179.

- 30 Watson, *supra* note 12 at 268–9.
- 31 *The Situation in the Middle East, Including the Palestinian Question*, SC Res. 1322, UN SCOR, 2000, UN Doc. S/RES/1322.
- 32 W. T. Mallison, and S. V. Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question: Study Prepared and Published at the Request of the Committee on the Exercise of the Inalienable Rights of the Palestinian People* (New York: United Nations, 1979).
- 33 *Future Government of Palestine*, GA Res. 181(II), UN GAOR, 2nd Sess., UN Doc. A/RES/181(II) (1947). Most recently recalled in *Jerusalem*, GA Res. 60/41, UN GAOR, 60th Sess., UN Doc. A/RES/60/41 (2005).
- 34 Watson, *supra* note 12 at 273.
- 35 Dumper, *supra* note 29 at 33–8.
- 36 See *supra* note 4.
- 37 One should also note that the Israel–Jordan peace treaty of 1994 contained clauses in which Israel recognized Jordan’s “historic role” in the Holy Places in the city. This was not acceptable to the PLO. See M. Dumper, *The Politics of Sacred Space: The Old City of Jerusalem in the Middle East Conflict* (Boulder: Lynne Rienner, 2001) at 33. See also M. Klein, “The Islamic Holy Places as a Political Bargaining Card (1993–95)” (1996) 45:3 *Cath. U. L. Rev.* 747.
- 38 Further details can be found in Dumper, *supra* note 29 at 53–88.
- 39 See “Population and Population Growth in Jerusalem, by Population Group, 1967–2004” *Statistical Yearbook for Jerusalem* (Jerusalem: Jerusalem Institute for Israel Studies, 2005) Table III/4.
- 40 Y. Hurwitz, *East Jerusalem: The Current Planning Situation: A Survey of Municipal Plans and Planning Policy*, (Jerusalem: Ir Shalem, n.d.)
- 41 Dumper, *supra* note 37 at 163.
- 42 UNCTAD, *The Palestinian War-Torn Economy: Aid, Development and State Formation* (New York and Geneva: UN, 2006), UN Doc. UNCTAD/GDS/APP/2006/1 at 13–15.
- 43 A. L. Tibawi, *The Islamic Pious Foundations in Jerusalem: Origin, History, and Usurpation by Israel* (London: Iraqi Cultural Foundation, 1979); H. S. Karmi, “How Holy is Palestine to the Muslims?” (1970) 12: 2 *Islamic Quarterly*; S. D. Goitein, “The Sanctity of Jerusalem and Palestine in Early Islam” in Goitein, ed., *Studies in Islamic History and Institutions* (Leiden: Brill, 1968); H. Lazarus-Yafeh, “The Sanctity of Jerusalem in Islam” in Lazarus-Yafeh, ed., *Some Religious Aspects of Islam* (Leiden: Brill, 1981).
- 44 Dumper, *supra* note 29 at 197–206.
- 45 S. Ricca, “The Jewish Quarter of Jerusalem: Analysis of the destruction and reconstruction since 1967” (PhD thesis, University of Exeter, 2003), 71.
- 46 Ricca, *ibid*.
- 47 See discussion in M. Friedman, “Haredim and Palestinians in Jerusalem” in M. Breger, and O. Ahimeir, eds., *Jerusalem: A city and its future* (Syracuse: Syracuse University Press and Jerusalem Institute for Israel Studies, 2002) 235.
- 48 A. Kellerman, “Settlement Myth and Settlement Activity: Interrelationships in the Zionist Land of Israel” (1996) 21: 2 *Transactions of the Institute of British Geographers*, New Series 363.
- 49 Golani, 1999, cited in Ricca, *supra* note 45 at 53. See also S. Abu Zayd, “Continuity and change in Israeli policy over Jerusalem” (PhD. thesis, University of Exeter, 2005) at 41ff.
- 50 I. Lustick, “Has Israel Annexed Jerusalem” (1997) 5:1 *Middle East Policy*.
- 51 *Laws of the State of Israel* (Jerusalem: Government Printer, 2000).
- 52 Dumper, *supra* note 29 at 264.
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PART II

Security

5

LEGAL STRATEGIES AT THE UNITED NATIONS

A comparative look at Namibia,
Western Sahara, and Palestine

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Introduction

This chapter examines the similarities and differences between the UN legal strategies for decolonization and self-determination in Namibia and Western Sahara, and the legal struggle for self-determination and ending the occupation in Palestine, as well as what lessons from the former cases can apply to the latter. Its focus is on the development of the applicable legal frameworks within the United Nations (UN) in general, including efforts to obtain and implement favorable decisions from the International Court of Justice (ICJ) in each of these lengthy struggles. It sets out the background of the Namibia, Western Sahara, and Palestine situations and the development of their respective legal frameworks through the UN. The chapter also describes legal and political strategies for influencing UN decisions and resolution of the conflicts, particularly in the case of Namibia, including the role of ICJ Advisory Opinions. It then briefly recounts the findings of the ICJ Advisory Opinion of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and subsequent efforts to implement those findings.¹ Finally, the paper examines legal and political differences among the three cases, and in light of the *Wall Opinion*, concludes with recommendations on legal strategies aimed at securing the exercise of the right of Palestinian self-determination.

Background on Namibia and Western Sahara

The struggle for decolonization in Namibia at the UN

Under the League of Nations (League), South Africa was the Mandatory for Namibia.² With the League's demise, the General Assembly refused South Africa's request to incorporate Namibian territory and South Africa refused the General

Assembly's request to place Namibia under a trusteeship agreement in accordance with Chapter XII of the UN *Charter*, starting South Africa's lengthy battle with the UN.³ In response to South Africa's decision in 1948–9 to cease submitting Mandate reports on its administration of Namibia and its initiation of steps towards annexation, the General Assembly requested an Advisory Opinion from the ICJ on the *International Status of South West Africa*.⁴ In its Opinion, the Court found that South Africa retained its obligations as Mandatory; that the General Assembly was legally qualified to exercise the supervisory functions previously performed by the League; that South Africa was obliged to submit to the General Assembly's supervision and render annual reports, but was not obliged to place Namibia under a UN Trusteeship; and that South Africa did not have the competence to unilaterally modify the status of Namibia because UN consent was required.⁵ South Africa rejected the Opinion.⁶ The General Assembly accepted it, requested that South Africa place Namibia under Trusteeship, and created an *Ad Hoc* committee to confer with South Africa to implement the *Status of South-West Africa* Opinion, but to little avail.⁷

Subsequently, the General Assembly also sought two Advisory Opinions relating to its supervisory capacity and powers: *Voting Procedures on Questions relating to Reports and Petitions concerning the Territory of South West Africa (1955)*⁸ and *The Admissibility of Hearings of Petitioners by the Committee on South West Africa (1956)*.⁹ Throughout the 1950s, South Africa persisted in its refusal to place Namibia under Trusteeship or to fulfill its Mandatory obligations of reporting and forwarding petitions; it also refused to recognize the General Assembly's authority and subsequently asserted that the Mandate had elapsed.¹⁰ For its part, the General Assembly continued to affirm the 1950 Opinion, increasingly deplored South Africa's policies as contrary to its international obligations, including its policy of apartheid, and recognized Namibian right to independence and its exercise of national sovereignty.¹¹ In response to South Africa's denial of entry into Namibia of the Committee on South West Africa, the General Assembly established the UN Special Committee on South West Africa to prepare the territory for elections and independence.¹² Subsequently, the General Assembly transferred these tasks to the more aggressive Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Committee of Twenty-Four). The Special Committee's first report prompted the General Assembly to request that the Secretary-General take steps to establish an administration in Namibia, and to call for Member States to refrain from action which would hinder the implementation of General Assembly resolutions, including supplying weapons to South Africa.¹³

On the basis of a study undertaken by the Committee on South West Africa on legal options, Liberia and Ethiopia filed proceedings in the ICJ against South Africa in the hope of securing an enforceable judgment; however, in July 1966 the ICJ dismissed the proceedings.¹⁴ In October that year, the General Assembly terminated the Mandate, placed Namibia under the UN's direct responsibility, and established an *Ad Hoc* Committee for South West Africa to recommend "practical means for administering South West Africa to enable the people of the Territory to exercise

self-determination and achieve independence.”¹⁵ It subsequently established a UN Council for Namibia (hereinafter Namibian Council) to administer the territory until independence.¹⁶

Role of the Security Council

In response to the South African terrorism trials in 1968 against 37 Namibians, the Security Council was seized of the issue for the first time and implicitly recognized the General Assembly’s termination of the Mandate.¹⁷ A resolution two months later reaffirmed “the international status of the territory now under direct UN responsibility” and in 1969, the Security Council declared actions designed to destroy the territorial unit and national integrity of Namibia contrary to the UN *Charter*. Furthermore, the Security Council expressly recognized the General Assembly’s termination of the Mandate, the illegality of South African presence, and called for its withdrawal, all of which South Africa rejected.¹⁸ The Security Council then decided that South Africa’s occupation constituted an “aggressive encroachment” on UN authority, a violation of territorial integrity and a denial of Namibian political sovereignty. It called on Member States to refrain from dealing with South Africa when it was acting on behalf of Namibia and it demanded withdrawal by a specific date.¹⁹ South Africa refused and the Security Council established an *Ad Hoc* Sub-Committee to recommend ways UN resolutions could be implemented, encompassing economic, military, political, and legal measures, including an ICJ Advisory Opinion.²⁰ The Security Council next determined that the obligation of non-recognition also encompassed diplomatic, consular, and trade related matters and requested an Advisory Opinion seeking an answer to “*What are the legal consequences for States to the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)*” (hereinafter *Namibia Opinion*).²¹

In its Opinion, the Court affirmed the legal framework articulated by the General Assembly and the Security Council. First, the Court recalled the object of the Mandate as a sacred trust of civilizations to be exercised for the benefit of the peoples, the ultimate objective of which was self-determination and independence. It noted that “subsequent developments in international law enshrined in the UN Charter made . . . self-determination applicable to all non-self-governing territories.”²² The Court then found that the Mandate was validly terminated, and consequently South Africa’s presence – and acts on behalf of Namibia – were illegal, and that it was obliged to withdraw.²³

Pronouncing on the legal consequences for Member States, the Court found that they are obliged to recognize the illegality of South Africa’s presence in Namibia, the invalidity of its acts there, and not to imply recognition or lend support to its presence.²⁴ In cases where South Africa purported to act on behalf of or concerning Namibia, Member States were obliged not to enter into treaties with South Africa, to abstain from applying provisions of existing treaties which involve active intergovernmental cooperation, and to refrain from economic and other dealings. They were also to exclude Namibia from the jurisdiction of diplomatic or special

missions to South Africa, to make clear that diplomatic relations did not imply recognition of its authority regarding Namibia, to abstain from sending consular agents to Namibia and to remove existing ones.²⁵ Moreover, the Court warned non-Member States not to expect the UN or its members to recognize the validity or effects of relations with South Africa concerning Namibia.²⁶

Post-Advisory Opinion: legal and political strategies

The Security Council subsequently accepted the Opinion and “expressly agree[d]” with the legal consequences for South Africa and third states. It declared that South Africa’s continued occupation constituted an internationally wrongful act and a breach of international obligations, and threatened Chapter VII action by declaring that any “further refusal to withdraw *could* create conditions detrimental to the maintenance of peace and security.”²⁷ The Security Council reaffirmed the UN direct responsibility for Namibia, called on its *Ad Hoc* Sub-Committee to study measures for fulfilling this responsibility, requested a review of treaties to determine whether states had recognized South Africa’s authority in Namibia, and requested that the Secretary-General report periodically on the Resolution’s implementation.²⁸ Subsequent resolutions addressed specific human rights abuses, called upon states to ensure that their nationals conformed to the *Universal Declaration on Human Rights*, and declared that Namibia’s unity and territorial integrity must be assured in response to South Africa’s annexation of Walvis Bay.²⁹

The *Namibia Opinion* also provided impetus to the General Assembly and the Namibian Council to take more aggressive action. The General Assembly recognized SWAPO as the “sole and authentic representative of the Namibian people” and endorsed a right to armed struggle in order to secure independence. Furthermore, it requested that states cease military dealings with South Africa in response to Security Council permanent members’ vetoes of a mandatory arms embargo, rejected the credentials of South Africa’s delegation to the UN on the basis that the government represented only the white minority, and later requested that the Namibian Council and SWAPO intensify the international campaign for mandatory sanctions.³⁰ The Namibian Council enacted Decree No. 1 for the Protection of Natural Resources of Namibia, and initiated litigation.³¹

Policy initiatives

In 1972, the Security Council invited the Secretary-General to initiate contacts with all parties in order to “establish the necessary conditions to enable the people of Namibia to exercise their right to self-determination and independence, in accordance with the UN Charter.”³² The Secretary-General’s missions from 1972 to 1973 made little headway and the initiative ended in response to the demands of various parties.³³ Subsequent resolutions affirmed the legal framework adopted by the General Assembly and the Security Council, and called on South Africa to comply with earlier resolutions and the *Namibia Opinion*; to recognize the territorial

integrity and unity of Namibia and withdraw; and to comply with human rights standards.³⁴ In 1976, the Security Council enunciated in Resolution 385 a basic legal framework for the transfer of power, which included a demand on South Africa to declare its acceptance of free elections, to comply with UN resolutions and the *Namibia Opinion*, and to recognize the territorial integrity of Namibia.³⁵ In the face of subsequent attempts by Western states to modify Resolution 385, SWAPO affirmed the UN framework for resolution of the conflict.³⁶ In 1978, at the request of the Security Council, the Secretary-General's Special Representative prepared a settlement proposal which was subsequently adopted in Resolution 435. The proposal *inter alia* affirmed the settlement framework on the basis of 385 and declared null and void South African unilateral election measures.³⁷ In the early 1980s, attempts by Western states to revise the UN plan were rejected by SWAPO, the Organization of African Unity (OAU) and the General Assembly, and albeit under pressure, by the Security Council.³⁸ SWAPO reaffirmed its commitment to a UN framework, and subsequent resolutions affirmed the UN plan until independence.³⁹ Ultimately, South African withdrawal from Namibia was linked to regional troop withdrawal, as provided under the 1988 Tripartite Agreement between Cuba, Angola, and South Africa; however, this Tripartite Agreement recognized the right to self-determination, independence, and equality for the southwestern region of Africa.

The Security Council never imposed an oil or arms embargo⁴⁰ in response solely to South Africa's actions in Namibia because of UK, USA and France vetoes. However, sufficient consensus existed on the outcome, which largely compelled the Security Council to reject settlement proposals that deviated from the legal framework and to urge states to consider voluntary measures against South Africa.⁴¹

Self-determination for Western Sahara through the UN

Unlike Namibia, Western Sahara was never under special UN supervision or formally placed under Trusteeship. Spain declared Western Sahara a 'protectorate' in 1884 and later, a Spanish province in 1958.⁴² In 1963 the Western Sahara was included as a non-self-governing territory under Chapter XI of the UN *Charter*, after which Spain came under increasing pressure from the UN General Assembly (UNGA) and the OAU to decolonize the Western Sahara and to allow the free exercise of the right to self-determination.⁴³ This section discusses UN efforts to secure self-determination of the Sahrawi population, including the *Western Sahara Advisory Opinion* (hereinafter *Western Sahara Opinion*).⁴⁴

Spurred into action by the Committee of Twenty Four, in the mid-1960s the General Assembly first articulated the elements of the Western Sahara legal framework. It affirmed Resolution 1514, and called on Spain to take measures for Western Saharan liberation from colonial domination. In furtherance of that objective, it invited Spain to permit the return of Sahrawi refugees, to determine with Morocco and Mauritania procedures for a referendum under UN auspices for the free exercise of the right to self-determination, and to ensure the participation in the referendum

of only indigenous Sahrawis.⁴⁵ In response to continued Spanish intransigence, the General Assembly reaffirmed the principle of self-determination, pressed for a referendum, deplored Spain's failure to provide a timetable for decolonization, explicitly recognized the Sahrawis' right to independence, and called on states to refrain from economic and immigration policies contributing to colonization. The UN also pressed Spain to allow entry to UN missions.⁴⁶

Spain, opposing independence, appointed a local government (Djemma) as a step towards autonomy. Although Morocco and Mauritania supported the Sahrawi right to self-determination by endorsing relevant General Assembly resolutions, they favoured a future union with their respective countries.⁴⁷ Only after Spain reached détente and secured its economic interests with the Organization for the Liberation of Saguia El Hamra y Rio de Oro (POLISARIO), the internationally recognized liberation movement of the Sahrawi people, did it announce a referendum under UN auspices for 1975.⁴⁸ Subsequently, at the urging of Morocco and Mauritania, the General Assembly requested an Advisory Opinion without prejudice to the application of General Assembly Resolution 1514. It urged Spain to postpone the referendum pending the Opinion, reaffirmed the Sahrawis' right to self-determination, and requested that the Committee of Twenty-Four dispatch a UN mission to "ascertain the wishes and aspirations of the people."⁴⁹ The UN mission found overwhelming consensus for independence and recommended that the General Assembly take steps to enable the population groups to decide their future in freedom and security.⁵⁰ Three days later, the ICJ issued its *Western Sahara Opinion* which affirmed the legal framework of the right to self-determination. The Court stated "the right of that population to self-determination constitutes a basic assumption of the questions put to the Court." The Court recalled General Assembly Resolution 1514, which stated that "all peoples have the right to self-determination which entails freely determining political status" and that:

Immediate steps shall be taken . . . in non-self-governing territories . . . to transfer all powers to the peoples of those territories, without conditions or reservations, in accordance with their freely expressed will and desire . . . Any attempt aimed at partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purpose and principles of the UN Charter.⁵¹

In concluding, the Court found no legal (Moroccan or Mauritanian) ties "that might affect the application of Resolution 1514 (XV) and the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory . . ."⁵² In addressing third states, the Court affirmed an earlier declaration by the General Assembly that:

Every State has a duty to promote through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the Charter and to render assistance to the UN in carrying out the

responsibilities entrusted to it by the Charter regarding the implementation of the principle in that order . . . in order to bring a speedy end to colonialism having due regard to the freely expressed will of the peoples concerned.⁵³

Post-ICJ action

Morocco rejected the ICJ's finding by announcing in October 1975 the "Green March" of approximately 350,000 citizens into the Western Sahara "to gain recognition of Morocco's right to national unity and territorial integrity."⁵⁴ The Security Council reacted passively and in November a weakened Spanish government, anxious to avoid military confrontation with Morocco, secretly ceded Western Sahara to Morocco and Mauritania in exchange for mining and fishing concessions, while publicly announcing an interim Western Saharan administration composed of Morocco, Mauritania, and the Djemma.⁵⁵ The General Assembly did not declare null and void this administration, but called on it to ensure Sahrawis their inalienable right to exercise self-determination.⁵⁶ Fighting ensued between the POLISARIO and the growing presence of Moroccan and Mauritanian forces. Approximately 50,000 Sahrawis fled to Algeria. In February 1976, Spain terminated its administration and the POLISARIO declared the independent Saharan Arab Democratic Republic state. Subsequently, Morocco, and Mauritania partitioned the territory.⁵⁷ In 1979, Mauritania, under political and military pressure, renounced its claim and Morocco annexed the rest. However, in 1981, increasingly isolated within the OAU and under pressure from allies, Morocco committed to holding a referendum. In 1983, the OAU adopted an eight-point resolution, based on direct POLISARIO–Morocco negotiations for a ceasefire, to secure conditions for a peaceful and fair referendum for self-determination of the people of Western Sahara under UN and OAU auspices.⁵⁸ Fighting continued until 1988, when the UN Secretary-General secured a ceasefire and agreement on a settlement to hold a referendum with the aim of enabling the Western Saharan people to exercise their right of self-determination and independence in accordance with General Assembly Resolution 1514.⁵⁹ Almost immediately the Settlement Plan stalled – and remains stalled today – primarily over disagreements on eligibility for participation in the referendum and the absence of a mechanism to sanction violations of the Plan.⁶⁰

Role of the General Assembly post-ICJ

The General Assembly took note of the *Western Sahara Opinion* that affirmed the Sahrawis' inalienable right to self-determination within a framework that guaranteed the free and genuine expression of their will, and reaffirmed the responsibility of the UN and of Spain towards the decolonization of Western Sahara. The General Assembly initially called upon the Secretary-General to make arrangements for the exercise of self-determination, and supporting OAU efforts, expressed hope of a just and lasting solution in accordance with UN *Charter* principles.⁶¹

In 1979, when Morocco annexed the remaining territory after the 1979 POLISARIO–Mauritania agreement, the General Assembly deplored its occupation, and called for its termination. The General Assembly affirmed the right to self-determination and the legitimacy of the Sahrawi's struggle, and recognized the POLISARIO as the representative of the Sahrawi people, recommending its full participation in the search for a just solution.⁶²

Subsequently, the General Assembly supported the OAU–UN Secretary-General's mediation efforts, reaffirmed the 1983 OAU principles and the inalienable right of the Sahrawis to self-determination and decolonization. Furthermore, the General Assembly called on the Committee of Twenty-Four to report on the situation, took note of Security Council resolutions when it re-engaged in 1988 and supported the Settlement Plan.⁶³ However, in contrast to the case of Namibia, the UN did not respond robustly to Moroccan actions. It did not affirm the principle of non-acquisition of territory by force, or condemn Morocco's settlement policy or its economic exploitation of natural resources. Nor did it condemn Moroccan violation of human rights or call for arms embargoes, and economic or diplomatic sanctions. Moreover, in stark contrast to Namibia, it did not create *ad hoc* or special committees of the General Assembly to engage in direct action towards realizing the Sahrawis' exercise of their right to self-determination.

Role of the Security Council

In response to the 1975 Green March, the Security Council became seized of the matter for the first time, adopting two resolutions which reaffirmed General Assembly Resolution 1514 and called on the Secretary General to consult relevant parties to enable the Security Council to adopt measures.⁶⁴ A third resolution deplored the March, called for Moroccan withdrawal and for the parties' cooperation with the Secretary-General without prejudice to General Assembly Resolution 3292 (1974). However, it did not affirm the principle of non-acquisition of territory by force; since it was not adopted under Chapter VII, it was disregarded.⁶⁵ French–U.S. opposition had prevented stronger resolutions; those adopted effectively substituted a UN negotiating role for one that would prepare a referendum.⁶⁶ From 1976 to 1987, the Security Council adopted no resolutions, while the OAU and the Secretary-General pursued mediation. In the face of the stalled Settlement Plan, the Security Council has reiterated its commitment to a free and impartial referendum for self-determination and supported the UN Special-Representative's mediating efforts, but it lacks the will to compel or to impose a solution on the basis of the Plan or to propose deviations from it.⁶⁷

Self-determination for Palestine through the United Nations

The Namibia and Western Sahara case studies provide two examples of extreme opposites regarding the degree of consensus and political will within the UN organs over their respective legal frameworks and UN efforts to secure independence. Palestine, like Namibia, was a League Mandate and has a relatively well-developed

legal framework, but like Western Sahara, it has yet to realize self-determination. This subsection discusses key historical points on the question of Palestine, the legal frameworks articulated by the General Assembly and the Security Council and the tensions between these two organs. It also discusses the Advisory Opinion's affirmation of the legal framework and post-Opinion efforts to secure its implementation.

The 1922 League of Nations Mandate to Britain to administer Palestine exceeded the obligation to "promote the well-being and development of such people" to include "securing the establishment of a Jewish National home" – a policy which engendered Palestinian fear of dispossession and placement under Jewish political dominion.⁶⁸ Ongoing Jewish immigration, land purchases, and consequent dispossession led to increasing unrest and fighting. In response, the UK requested that the General Assembly propose a solution, which subsequently resulted in the adoption of Resolution 181 recommending partition of Palestine into two states. The Jewish Agency accepted this recommendation and the Arab High Committee rejected it.⁶⁹ As British departure neared, fighting increased and approximately 800,000 Palestinians were expelled or fled.⁷⁰ On May 14, the Jewish Agency issued its *Declaration of the Establishment of the State of Israel* and gained control of 77 percent of historic Palestine through fighting. Israel secured admission to the UN in 1949. In 1967, Israel occupied the West Bank and Gaza Strip further displacing Palestinians, launched its settlement policy, and annexed East Jerusalem in order to expand existing borders of the Jewish state.⁷¹ In December 1973, the Geneva Peace Conference was held under UN auspices and U.S.–USSR co-chairmanship. Subsequently however, the USA sidelined UN efforts and pursued unilateral initiatives culminating in the 1978 Israeli–Egyptian Camp David Accords. These Accords articulated a transitional five-year period of autonomy with a self-elected Palestinian authority, and declared permanent negotiations to commence in year three on the basis of Resolution 242.⁷² In 1981 the Arab League articulated an eight-point plan, calling for Israeli withdrawal from all territory it occupied in 1967, a dismantling of the settlements, an affirmation of Palestinian inalienable rights including self-determination and, implicitly, the right of return. The plan also called for a Palestinian state with East Jerusalem as its capital, a UN transitional administration and the UN Security Council as the guarantor of peace. In 1988, the Palestine National Council declared independence, a Palestinian state, settlement of the refugee question in accordance with pertinent resolutions, and called for an international peace conference under UN auspices on the basis of Security Council Resolutions 242 and 338.⁷³ Bypassing the UN, the USA and USSR sponsored the 1991 Madrid Conference negotiations on the basis of 242 and 338 for Palestinian interim self-government arrangements to be followed by a permanent agreement.⁷⁴ In September 1993, the Declaration of Principles (DOP), the Oslo Accords Framework document signed between the PLO and Israel, usurped the Madrid process, but adopted its two-phased approach: an interim period lasting five years with permanent status negotiations on Jerusalem, settlements, refugees, security arrangements, and borders, to start in year three, leading to a permanent settlement

based on 242 and 338.⁷⁵ The Accords stated that the aim of the Israeli–Palestinian negotiations was to “lead to a permanent settlement based on Security Council Resolution 242 and 338” and noted that negotiations on permanent status will lead to the implementation of these two Resolutions. There was no explicit reference to the Geneva Convention Relative to the Protection of Civilians in Time of War of 12 August 1949 (hereinafter Fourth Geneva Convention) or language to bridge Israeli–Palestinian differences over interpretation of 242, nor was there explicit reference to Palestinian self-determination or inalienable rights, although the DOP’s Preamble and subsequent Interim Agreement referred to “mutual recognition of legitimate and political rights.”⁷⁶ No final agreement was reached, and in 2000 the second *intifada* (uprising) erupted. The Arab League adopted the 2002 Beirut Declaration calling for a full Israeli withdrawal from the Arab territories it occupied in 1967, a Palestinian state therein with East Jerusalem as its capital, and a just and agreed-upon solution on refugees in accordance with 194 in exchange for peace and normalization with the Arab states. The Quartet (Russia, U.S., EU, and UN represented by the Secretariat) presented its Roadmap: a three-phased plan aimed at achieving a two-state solution, a final, comprehensive settlement based on, *inter alia*, Security Council Resolutions 242 and 338, and an “agreed, just, fair and realistic resolution to the refugee issue.”⁷⁷

Role of the Security Council

After the adoption of Resolution 181, the Security Council initially called on its members to study the implementation of partition, but then subsequently requested that the General Assembly consider further the question of the future government of Palestine, including possible trusteeship.⁷⁸ With the increasing fighting, it appointed a mediator and a Truce Commission. After the 1948 war and Israel’s declaration of statehood, the Security Council focused on ensuring compliance with armistice agreements, at times invoking Chapter VII.⁷⁹ After the 1967 war, it called on Israel to facilitate the return of inhabitants who have fled, urged respect for the Geneva Conventions, and articulated in Resolution 242 two “principles for a just and lasting peace”: (1) Israeli withdrawal from territories it occupied; and (2) an end of belligerency, respect for states’ sovereignty, territorial integrity and political independence, and the right to live in peace in secure and recognized boundaries free from threats or acts of force. It also further affirmed the necessity for achieving a just settlement of the refugee problem, emphasized the inadmissibility of acquisition of territory by war; and requested the Secretary-General appoint a mediator, who made little progress.⁸⁰ After the 1973 war, it called upon the parties to implement Security Council Resolution 242 and decided that negotiations under appropriate auspices shall start “for all parties concerned and aimed at establishing a just and durable peace.”⁸¹ Thereafter, however, the Security Council failed to affirm inalienable Palestinian rights, namely self-determination and statehood, the right of return for Palestinian refugees, and Israeli withdrawal from all territory occupied in 1967 (although it affirmed the non-acquisition of territory by force). It also blocked,

after the initial 1973 Geneva Conference, UN-sponsored conferences by vetoes or by refusing to consider General Assembly recommendations.⁸² With the defunct Oslo process, the Security Council reaffirmed Resolutions 242 and 338 as the basis of a negotiated solution, and endorsed the Quartet's Roadmap.⁸³

With respect to human rights and humanitarian law, throughout the 1970s and 1980s, the Security Council often condemned Israeli violations of human rights and international law, affirmed the *de jure* applicability of the Fourth Geneva Convention, established commissions to study Israeli settlements, appointed fact-finding missions and requested the Secretary-General to report back on Israeli compliance. On the other hand, it did not take enforcement action in response to Israeli violations of its resolutions, and several draft resolutions condemning human rights violations were vetoed.⁸⁴ With Oslo, the Security Council's involvement decreased dramatically, although significant human rights violations persisted. For example, the last resolution that condemned Israeli settlements was in 1990, despite accelerated expansion from 1993 to 2000.⁸⁵ With the increased violence in the second *intifada* the Security Council condemned terror, violence and destruction, but vetoed draft resolutions condemning human rights violations.⁸⁶

The General Assembly's role

The General Assembly's *Ad Hoc* Committee – formed to study proposals on the future government of Palestine – rejected a proposal to seek an ICJ Advisory Opinion and instead recommended partition, as adopted in Resolution 181.⁸⁷ From 1948 through the late 1960s, the General Assembly primarily addressed the plight of the approximately 800,000 Palestinian refugees, affirming annually their right to return, compensation for those choosing not to do so, and for loss or damage of property. It also established the Conciliation Commission (UNCCP), a body to facilitate realization of these rights, and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) for the provision of relief.⁸⁸

In 1969, the General Assembly first recognized Palestinian inalienable rights, including equality and self-determination, under the UN *Charter* and the *Universal Declaration of Human Rights*, and thereafter affirmed them.⁸⁹ In 1974 The General Assembly also recognized the PLO as a principal party for establishing a just and lasting peace, and granted it observer status.⁹⁰ In 1975, it established the Committee on the Exercise of Inalienable Rights of the Palestinian People (Palestine Committee) to study and recommend a program of implementation of the right to self-determination, and subsequently a special unit on Palestinian Rights to assist the Palestine Committee in promoting Palestinian inalienable rights.⁹¹ The following year, the General Assembly endorsed the Palestine Committee's Guidelines and Recommendations as the basis for resolution of the conflict, stating that any solution must take into account the legitimate aspirations and inalienable rights of the Palestinian people. These rights include the right to return to their homes and property and the right to self-determination, national independence, and sovereignty.⁹²

Throughout the late 1970s and 1980s, the General Assembly maintained that agreements purporting to solve the Palestine issue must be within the UN framework and requested the Security Council to urge Israel to implement relevant UN Resolutions. Furthermore, the General Assembly urged the Security Council to consider and decide on its Recommendations. When the Security Council vetoed a draft resolution on these Recommendations, the General Assembly convened in Emergency Special Session (ESS), pursuant to Uniting for Peace – Resolution 377 (V) – and reaffirmed its Recommendations. The General Assembly also requested the Secretary-General to take necessary measures towards their implementation and for the Security Council to consider Chapter VII measures if Israel failed to comply with the Security Council's resolutions.^{93,94} It also convened an international conference in 1983 on the question of Palestine which produced the Geneva Declaration, and invited parties to participate in an International Peace Conference on the Middle East. It requested the Secretary-General to undertake preparations for such a conference and repeatedly called for its convening despite sustained U.S.–Israeli opposition.⁹⁵

When the political process deviated from ensuring the realization of Palestinian inalienable rights, the General Assembly asserted them. It expressed concern that Resolution 242 did not provide for the inalienable rights of the Palestinian people and rejected provisions of the 1978 Camp David Accords which infringed the inalienable rights provided for under international law and the UN *Charter*.⁹⁶ Since Oslo, the General Assembly has fairly consistently reaffirmed principles of equality and self-determination, inadmissibility of territory by war, and Israeli withdrawal from territory occupied in 1967. It has also consistently reaffirmed Security Council Resolutions 242 and 338, the realization of Palestinian right to self-determination, and resolution of the refugee question in accordance with General Assembly Resolution 194.⁹⁷ Finally, it has also stressed the need for greater UN involvement in the peace process, and declared null and void illegal Israeli measures in Jerusalem.⁹⁸

The General Assembly began to address human rights after the 1967 war. In 1968 it established the Special Committee to Investigate Israeli practices affecting the Human Rights of the Population of the Occupied Territories to report on Israeli human rights violations. This Committee's reports provide the basis for annual General Assembly resolutions which, *inter alia*, call on Israel to recognize the Fourth Geneva Convention's *de jure* applicability, declare illegal Israeli measures null and void, and call upon states, specialized agencies and international organizations not to recognize these illegal measures or assist Israel in carrying them out.⁹⁹

ICJ Advisory Opinion on the Wall

Despite the extensive pronouncements and sustained involvement for more than 60 years by the UN on the question of Palestine, legal questions were not put to the ICJ prior to the request for the *Wall Opinion* in December 2003. This lacuna is partially attributed to the desire by some states to minimize a UN role and ambivalence or antipathy towards the application of law in resolving the conflict.

This ambivalence was also reflected in the lead-up to the General Assembly's adoption of the resolution requesting the Advisory Opinion. The resolution was adopted in the 10th Emergency Special Session by a vote of 90:8 with 74 abstentions, under Uniting for Peace, after the U.S. vetoed a draft resolution declaring the construction of the Wall illegal, and a finding by the Secretary-General that Israel failed to stop and reverse its construction in response to an earlier General Assembly demand.¹⁰⁰ The General Assembly sought guidance on the following question:

What are the Legal Consequences arising from the Construction of the Wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?¹⁰¹

In its *Wall Opinion*, the Court largely affirmed the legal framework that had been articulated by successive General Assembly and Security Council resolutions. First, the Court affirmed that the West Bank, including East Jerusalem, remains occupied territory, and that Israel's was as an occupying power there, despite Israel's unilateral annexation of East Jerusalem and the subsequent adoption of the Oslo Accords.¹⁰² Second, the Court recalled the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly Resolution 2625) and its 1971 *Namibia Opinion* on self-determination, and affirmed the applicability of this right to the Palestinian people. The Court also found Israel had recognized this right and concluded that the Wall's construction, along with Israel's settlements and annexation of Jerusalem, "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore in breach of its [Israel's] obligation to respect that right."¹⁰³ Third, recalling General Assembly Resolution 2625 and Security Council Resolution 242, the Court affirmed the illegality of territorial acquisitions resulting from the threat or use of force; acknowledged the fear that the Wall will prejudice the future frontier between Israel and Palestine and that Israel may integrate the settlements and their means of access; and concluded that its construction creates a "*fait accompli* on the ground that could well become permanent, in which case . . . it would be tantamount to *de facto* annexation."¹⁰⁴

Fourth, contrary to Israel's long-held position, the Court affirmed both the applicability of relevant human rights instruments to the Occupied Palestinian Territory (OPT) and the *de jure* applicability of the Fourth Geneva Convention.¹⁰⁵ In determining the *de jure* applicability of the Fourth Geneva Convention, the Court relied, *inter alia*, on *opinio juris* recalling relevant Security Council and General Assembly resolutions and the affirmations by States party to the Fourth Geneva Convention at their Conferences in 1999 and 2001.¹⁰⁶ The Court also held that Section III of the Hague Regulations regarding military administration over territory was applicable and not Section II on hostilities.¹⁰⁷ The Court affirmed the illegality

of settlements under 49(6) of the Fourth Geneva Convention, noting that this violation encompasses not just forced transfers but measures by an Occupying Power to organize or encourage its civilian population to move to occupied territory.¹⁰⁸ It also found violations of Article 49(6) due to alterations to the demographic composition of the OPT arising from Israel's settlements *and* the Wall-induced-departure of Palestinians.¹⁰⁹ The Court also found several human rights violations, involving, among others, liberty of movement, right to work, to health, to education, and to an adequate standard of living.¹¹⁰

Fifth, the Court recognized that Israel does face indiscriminate, deadly attacks against its civilians, but affirmed that measures taken must be in conformity with applicable international law.¹¹¹ The Court was not convinced the specific Wall route Israel had chosen was necessary to attain its security objectives, nor could the violations of Palestinian rights be justified by military exigencies, national security, or public order under the applicable international humanitarian law (IHL) and human rights instruments.¹¹² The Court further held that Israel could not rely on the doctrine of self-defense under Article 51 of the UN *Charter* or the customary defense of necessity to justify the wrongfulness of its actions.¹¹³

Sixth, in addressing the legal consequences to Israel, the Court affirmed the customary legal principles of restitution and compensation, principles articulated in General Assembly resolutions, notably Resolution 194.¹¹⁴ The Court concluded that Israel is obliged to stop construction, remove existing sections built within the OPT, repeal related legislative and regulatory acts, undertake restitution by returning confiscated property, and pay compensation where restitution is infeasible and for material damage suffered.¹¹⁵

In articulating the obligations of third states, the Court concluded that Israeli violations implicated *erga omnes* obligations, namely the right to self-determination and provisions of humanitarian law, and it affirmed its earlier language:

Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .¹¹⁶

The Court affirmed a positive duty on states to ensure that – while respecting international law and the UN *Charter* – impediments to the exercise of self-determination resulting from the Wall's construction were removed.

In addressing humanitarian law, it recalled Article 1 of the Fourth Geneva Convention, and affirmed that states are obliged to ensure Israel's compliance with humanitarian law as embodied in the Fourth Geneva Convention, whether or not they are party to the conflict.¹¹⁷ States, too, are obliged not to recognize the illegal situation resulting from the construction of the Wall and its regime, nor to render aid or assistance in maintaining the situation created by its construction. The Court

also affirmed principles previously articulated by the General Assembly in response to Israeli human rights violations.¹¹⁸

The Court rejected the position that the Wall is a bilateral matter between Israel and Palestine and affirmed UN responsibility towards the question of Palestine. It also reiterated the General Assembly's description of "a permanent responsibility . . . until the question is resolved in all its aspects in a satisfactorily manner in accordance with international legitimacy".¹¹⁹ It determined that the "United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime taking due account of the Court's Opinion."¹²⁰

Post-ICJ case: UN and Member States' efforts to implement

Israel rejected the Court's Opinion, stating it was a one-sided question and a politically motivated maneuver, and that it failed to address terrorism.¹²¹ Israel also stated it would follow its own High Court's rulings.¹²²

The General Assembly adopted the *Wall Opinion* in Resolution ES/10-15, which acknowledged the Opinion, restated the key findings, and demanded that Israel comply with its obligations. The General Assembly called upon Member States to comply with their obligations, requested the Secretary-General to establish a registrar of damages in connection with Israel's obligation to undertake restitution and compensation, and called upon States party to the Fourth Geneva Convention to ensure Israel's respect of its provisions. The General Assembly invited Switzerland, in its capacity as the Convention's depositary, to conduct consultations and report back.¹²³

However, as with the proceedings, the *Wall Opinion* has met with considerable opposition among third states. Efforts to include stronger language in the General Assembly Resolution were rejected, and subsequent Swiss consultations to reconvene a conference of High Contracting Parties to the Fourth Geneva Convention produced a "virtual consensus on the inadvisability" of holding a new conference at that time.¹²⁴

Regarding donor aid and development, some states have refused to fund an Israeli road project in the OPT that would assist in the maintenance of the Wall. States have also developed guidelines to assist in deciding whether a potential assistance or development project is in accordance with their obligations articulated in the *Wall Opinion*.¹²⁵

The Non-Aligned Movement, at its 2004 Ministerial Conference, called upon Member States – acting individually, collectively and through legislative means – to impose sanctions on entities involved in the Wall's construction and other illegal activities in the OPT. It also called upon states to deny entry to Israeli settlers and to prevent settlement products from entering their markets. The Conference also called on the Security Council to undertake measures to ensure Israel's compliance with the Opinion, and for the Secretary-General to ensure that the positions and

documents of the Secretariat are fully consistent with the *Wall Opinion*.¹²⁶ In 2006, it reaffirmed this position, expressed disappointment at the Secretariat's lack of progress in establishing the register of damages and called upon the Secretary-General to expedite the matter.¹²⁷

In August 2004, the UN Secretariat sought legal guidance from the UN Office of Legal Affairs (OLA) on possible "actions and positions which the Secretariat, including UNSCO, could take pursuant to the Court's Advisory Opinion." The Opinion listed Member States' obligations articulated in the *Wall Opinion* and concluded that:

As a matter of law and practice, the UN Secretariat has considered obligations incumbent upon all states to apply, where appropriate and *mutatis mutandis*, to the Secretariat, few of the foregoing obligations lend themselves to practical implementation by the Secretariat: the obligations not to recognize the illegal situation; to see to it that the exercise of Palestinians' right to self-determination is not impeded (a legal consequence not included in the legal operative of the Opinion), and to ensure compliance by Israel with international humanitarian law, *can only be implemented by states*.¹²⁸

The memo also cites Judge Kooijmans' Separate Opinion, in which he expressed his view that "the duty not to recognize amounts, therefore in my view, to an obligation without real substance."¹²⁹ The OLA concludes that the "obligation to consider further action required to bring an end to the illegal situation resulting from the construction of the Wall and its associated regime . . . is addressed to the UN political organs and Member States" and not, by implication, to the Secretariat. In reference to the General Assembly's request to the Secretary-General to establish a registry, the OLA underscored that the obligation of the Secretary-General to establish a registry does not flow from the Advisory Opinion as a legal consequence but rather from its more general obligation to comply with General Assembly and Security Council resolutions addressed to the Secretariat.¹³⁰ The Opinion concludes that the Security Council is not legally required to reiterate the Court's determination or to call upon Israel to dismantle the Wall, as it is a political judgment.¹³¹

On the question of Palestine, the Secretary-General is nevertheless extensively engaged.¹³² For example, the Secretary-General reports monthly to the Security Council on the question of Palestine. He has called on Israel to abide by its legal obligations or referred to the *Wall Opinion* in 14 of his 28 reports to date.¹³³ Thirty months since the General Assembly's request to the Secretary-General to establish a register, he has yet to do this. The Secretary-General's initial proposal lacked verification and on-the-ground presence, and the General Assembly attempted to amend these deficiencies.¹³⁴ The Quartet's references to the *Wall Opinion* are practically non-existent. Of the Quartet's 15 statements issued since the *Wall Opinion*, only one "takes note of the ICJ opinion on the subject." Nor does the Quartet refer to the parties' legal obligations, such as respect for IHL, human rights or the non-acquisition of territory by force.¹³⁵

UN strategy for Palestinian liberation

Differences in Namibia, Palestine, and the Western Sahara

The preceding sections have attempted to highlight some of the legal and political strategies undertaken in the cases of Namibia, Western Sahara, and Palestine. In the case of Namibia, legal and political strategies were ultimately successful, while in the case of Western Sahara, they have been less effective to date. There are many reasons for the success in Namibia or the failure in the Western Sahara, however, in order to appropriate effective strategies from these cases and apply them to the question of Palestine, key legal and political differences and similarities among the three should be highlighted. This section will briefly examine differences and similarities among the three, addressing institutional aspects, legal frameworks, and their impact on political consensus. The section then concludes with recommendations.

First, self-determination in a defined territorial unit is a key principle for all three peoples.¹³⁶ Although all three cases involve an occupying power's measures that seek to prevent or impede self-determination, only in Namibia was there a political and judicial determination of illegal presence, and negotiations focused on securing full South African withdrawal. In Palestine and the Western Sahara, a determination of illegal presence has yet to occur.

Second, in the case of Palestine, the right of self-determination and its attendant obligations on third states is underutilised, as compared to laws of occupation, while the reverse is true in Namibia and the Western Sahara. Although the General Assembly has since 1969 continued to affirm Palestinian inalienable rights, including self-determination, in contrast the Security Council initially articulated Palestinian "inalienable rights," but soon ceased to do so. Moreover, the Security Council is not committed to the implementation of 242 on the basis of Palestinian self-determination or to ensuring the territorial integrity of the self-determination unit, unlike in Namibia.

Perhaps the most critical factor distinguishing Namibia from Western Sahara and Palestine is the General Assembly's supervisory authority over Namibia. This authority, previously exercised by the League of Nations, placed South Africa under legal obligation to submit to the General Assembly's supervision, as articulated in the 1951 South West Africa Cases. The subsequent advisory opinions in 1955 and 1956 affirmed this authority and sanctioned the General Assembly's exercise of these supervisory powers. The succession of the General Assembly to this authority was recognized internationally, and enabled the General Assembly to largely define the legal framework for resolution of the conflict, including taking the historic decision to terminate South Africa's mandate, determine South Africa's presence to be illegal, and assume *de jure* administration over Namibia until independence. This recognition of authority also enabled litigation to enforce Namibian rights, particularly over its natural resources. Although Security Council involvement was ultimately critical to the success of Namibian independence, by the time the Security Council and the Contact Group became seized of the matter, the legal framework

had largely been defined over the preceding 20-year period. Subsequent attempts by some states to depart from this framework were largely rejected.

Consensus over the legal framework that emerged within the UN over the resolution of Namibia manifested itself in the Security Council's request – not the General Assembly's – for the fourth and final advisory opinion on Namibia. As Judge Higgins noted, “there existed at the time of the request for an opinion in 1971 . . . a series of Court opinions on South West Africa which made clear what were South Africa's legal obligations” and which ultimately provided the grounds and authority for the General Assembly to determine the illegality of South Africa's actions and terminate the Mandate.¹³⁷ The opinions played an important role in forging consensus among the UN organs and in the international community, as did the abhorrence of South Africa's apartheid policies. South Africa's supporters would often, though not always, abstain rather than cast a veto because of concern about domestic and international perceptions. UN action against apartheid, including the 1977 arms embargo, strengthened Namibian efforts for independence and blocked the efforts of some states to marginalize a UN framework. It also provided cover for sanction strategies by civil society and state actors.

In the case of Palestine and the Western Sahara, the General Assembly currently does not possess this type of supervisory authority or the right of *de jure* administration. This absence of authority in these two cases has facilitated, in part, U.S. and Israeli efforts in the case of Palestine, and French–U.S.–Moroccan efforts in the case of Western Sahara, attempts to resolve the conflicts outside a UN framework.¹³⁸ Moreover, particularly in the case of Palestine, both the General Assembly and the Security Council act to shape the legal framework, with the latter acting not infrequently to the detriment of Palestinian rights under international law. Consensus among the two organs and interested states on the legal framework and resolution does not yet exist. This absence of consensus is most notable regarding the right of return as embodied in General Assembly Resolution 194 and a full withdrawal from the territory occupied in 1967. Often the Security Council, usually by veto of a permanent member, has blocked General Assembly efforts to utilize a UN law-based framework for resolution of the conflict in the case of Palestine, and increasingly in the case of the Western Sahara. Also, the lack of robust Security Council involvement in resolution of the Palestine question is a function of the degree of consensus.

Moreover, consensus does not exist for pursuing a law-based approach to the resolution of the Palestine question. The General Assembly requested the *Wall Opinion* in an Emergency Session in response to a U.S. veto and a majority of EU countries did not support the request.¹³⁹ The *Wall Opinion* is the first judicial affirmation of the majority of the relevant legal principles. The UN's failure to request an Advisory Opinion for over five decades is perhaps indicative, too, of this absence of consensus on a law-based approach and a UN framework for resolution of the conflict.¹⁴⁰ The USA not infrequently exercises its veto in relation to human rights violations, insisting on “balanced” resolutions, rather than assigning and apportioning responsibility on the basis of the applicable legal framework and the

specific violations. EU states, too, profess support for international law, but favor a non-law-based approach to negotiations and a political process outside a UN framework. Greater consensus on the legal framework and outcome is necessary for future strategies to have the desired impact.

In the case of *Western Sahara*, the 1975 *Opinion* affirmed the relevant legal framework, but insufficient political will existed – and even less exists today – among the UN organs to ensure its implementation, despite the fact that the settlement plan was forged under UN auspices and adopted by the Security Council. Moreover, Western Sahara's legal framework needs further development and articulation by UN bodies in light of events subsequent to the 1975 Advisory Opinion, namely Morocco's occupation and annexation of Western Sahara, its exploitation of Western Saharan resources, and the obligations of third states in light of these violations of peremptory norms.

Third, in the case of Namibia, cessation of human rights violations appeared to be closely linked with the settlement plan and the articulation of the applicable legal framework. In the case of Palestine, when Israeli human rights violations are condemned by the Security Council, they tend to be treated as distinct from the political framework for resolution of the conflict. This tendency may be due to the lack of consensus within the Security Council or its current limited role in the political process. However, a robust link between the human rights violations and its impact on the political process must be established, particularly in regard to Israeli settlements and the Wall, which unlawfully increase Israel's bargaining power in the negotiations over borders and pre-empt negotiations over Israeli withdrawal. In the case of Western Sahara, the Security Council has yet to address human rights violations.

Finally, unlike in Namibia and the Western Sahara, the PLO's decision to enter the Oslo Agreements even without such legal references as the Fourth Geneva Convention or the right of return undermined consensus over a law-based approach to resolution of the conflict and the applicable legal framework. It also contributed to the policy adopted by the USA and European Union of treating Israel and the PLO as equals, rather than within the applicable framework of occupied and occupying power. Although the *Wall Opinion* does provide a vehicle to forge consensus on the legal framework, to reverse the effects of Oslo, the political realities must be taken into account in fashioning effective strategies.

Proposals for UN strategies

To realize the self-determination of the Palestinian people, legal and political strategies must engage the UN on the basis of its "permanent responsibility towards the Question of Palestine."¹⁴¹ The strategies must be based on the applicable legal framework affirmed in the *Wall Opinion* as well as customary international law reflected in General Assembly resolutions. The strategies must compel the General Assembly and Security Council to consider what further action is required to bring to an end the illegal situation resulting from the construction of the Wall and the

associated regime, as required by the *Wall Opinion*.¹⁴² Any strategy must also factor in the lack of consensus between the General Assembly and the Security Council, the Secretariat's reluctance to date on the issue, and the trend to divorce respect for human rights from the political process. Finally, legal and political strategies should utilize the various powers and authorities of the political organs and the Secretariat, including the General Assembly requesting tasks of the Secretary-General or convening under Uniting for Peace, or requesting additional advisory opinions and developing further the legal framework.¹⁴³

Recommendations

The General Assembly should commission the preparation of legal studies aimed at ensuring Israel's compliance with its obligations articulated in the *Wall Opinion* and the applicable legal framework. For example, in light of the Court's affirmation that the Palestinian territories are occupied, and the applicability of the Hague Regulations of 1907 and the Fourth Geneva Convention, states should act to ensure Israel's respect for the Convention in accordance with Article 1. A study should be authorised by the General Assembly to set out states' obligations to ensure that their own nationals or legal entities do not engage in or aid and assist in violations of IHL. The Conference of High Contracting Parties could be reconvened and legal technical working groups formed to study and report back on this matter. Similarly, strategies should be formulated on the basis of the laws of occupation, the affirmation of the illegality of Israeli settlements, and the right to self-determination – strategies aimed at keeping the Palestinian population on its land and preserving its natural resources. In response to Israeli land sales in the occupied West Bank, states should be urged to put their citizens on notice against land purchases in occupied territory. For example, the UK has put its citizens on notice in regard to land sales in northern Cyprus. Similarly, the appropriate body, either the PLO or PA or both, should be advised to issue a declaration or enact legislation that land sales under occupation are null and void or subject to review by Palestinian courts in the future state of Palestine. Similar declarations were issued or acts legislated by several sovereigns in exile during World War II whose territory was occupied.

Potential litigation should also constitute a core element of the legal and political strategies. A legal study should be undertaken to assess the feasibility of lawsuits in different jurisdictions to be brought on the basis of the substantive findings of the *Wall Opinion* and potential breaches by third states. By example, the Council on Namibia commissioned such a study, and eventually filed suit in the Netherlands. As was done in Namibia, a study should undertake the political and legal feasibility of third states bringing suit on behalf of the Palestinian people on the basis of state responsibility and *erga omnes* obligations. Litigation-related questions should also assess whether the PLO, as the internationally recognized representative of the Palestinian people, has standing in jurisdictions abroad to bring suit, and what jurisdictions would be amenable to such litigation strategies. A study on jurisdictions for potential civil and criminal litigation brought by individuals would be useful and

could complement ongoing efforts in some jurisdictions. Finally, with an eye towards enforcing legal rights, bilateral, regional, and international organizations' agreements with Israel should be studied to determine if they offer possibilities for litigation or political advocacy in light of Israel's violations within the occupied Palestinian Territory. These studies could be initiated within the UN through the existing committees on Palestine, if appropriate, based on their authority and capacity, or via a different means, if necessary.

Also, in light of the legal consequences for states as articulated in the *Wall Opinion*, a study is needed on ways and means states can and must fulfill their obligations of non-recognition or aiding and assisting. Unlike the *Namibia Opinion*, in which the ICJ and the Security Council outlined ways in which states must fulfill these duties, neither the *Wall Opinion* nor subsequent UN resolutions have mandated or provided guidance on this issue. Drawing from the *Namibian Opinion*, the study should emphasize a review of bilateral agreements between Member States, international and regional organizations and Israel to determine if the agreements violate the obligation of non-recognition or the duty to refrain from aiding and assisting. Existing information on EU and Canadian bilateral agreements with Israel indicate possible violations. Moreover, there is a need to study and potentially recommend other measures such as declarations or "on the ground" steps states must take in fulfillment of their duty of non-recognition such as notifying Israel that areas west of the Wall or in closed zones do not constitute Israeli territory or not engaging with the permit system within the Closed Zone. Any study and subsequent strategy should also aim to support and bolster existing initiatives such as the measures stipulated in the Non-Aligned Movement's declarations and those of civil society.

Building on the *Wall Advisory Opinion*'s affirmation of the Palestinian right to self-determination, a study should assess the degree to which the political framework for resolution of the conflict deviates from this inalienable right, and devise strategies that can be utilized for reinserting this right into the political process. On a related note, in the *Wall Opinion*, Judge Higgins in her separate opinion referred to outstanding obligations on the part of Palestine; the point merits further study in order to identify those obligations and whether they must be complied with or otherwise addressed prior to realizing the right of self-determination.

In light of the *erga omnes* character of self-determination, states can and must fulfill their duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination in accordance with the *Charter* and with their obligations under human rights instruments to promote and respect that right.¹⁴⁴ As noted above, an assessment of bilateral agreements between Member States, international organizations and Israel is needed in order to determine if these agreements run counter to their obligation to promote the realization of self-determination. In accord with the right of self-determination, states should be required to carefully examine the effect of the Wall, and particularly settlements, on the exercise to self-determination and territorial integrity to bolster the Court's finding that these Israeli measures are impediments to the right of self-determination. Finally, regarding the ICJ's affirmation of the non-acquisition of territory by force

and the illegality of settlements and the Wall, it is time to undertake a study to determine fully what measures constitute *de facto* and *de jure* annexation, and assess relevant Israeli orders and legislation with extraterritorial application.

Moreover, in relation to some states and civil society's calls for boycotts and sanctions, a legal and political study on these issues in the face of continued Israeli failure to comply with its legal obligations would be useful to clarify the legality of particular acts and provides historic examples. This study could help to strengthen civil society and governmental efforts in this direction. Moreover, requesting a UN report on companies engaging in business within the OPT that aid and assist in the Wall and settlements, and the responsibilities of the home states, could help mobilize efforts on divestments, boycotts, and sanctions towards these non-state actors, as was prepared for Namibia and South Africa with the Secretary-General's assistance.¹⁴⁵

Successive Advisory Opinions formed an integral part of Namibia's strategy for building consensus around and expanding the existing legal framework and eventually securing South Africa's withdrawal. A study should be conducted, with an eye towards seeking additional advisory opinions, on the legality of Israel's regime in the OPT in light of its systematic, persistent, and numerous violations of its human rights, humanitarian law, and *erga omnes* obligations, as suggested by John Dugard, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.¹⁴⁶ A study could also be undertaken which examines the legal and political implications on whether an advisory opinion should be sought on other issues such as the right of transit between the West Bank and Gaza, the right of return, or grave breaches of the Fourth Geneva Convention.

With regard to the right of return, Akram and Lynk have observed that the Court's affirmation of the applicability of the human rights instruments to the OPT, and the principles articulated therein, "imposes substantial obligations on Israel towards Palestinian refugees, including refugees' right of return and property restitution."¹⁴⁷ If not already under way, a strategy should be devised to affirm and strengthen elements of the legal framework not directly addressed in the *Wall Opinion*, but which constitutes customary law, such as the right of return and restitution.

The Court affirmed the UN's permanent responsibility towards the question of Palestine, albeit without defining what this responsibility entails. However, the UN organs have many tools at their disposal to act within their respective capacities to influence the legal framework and resolution of the conflict. The General Assembly's resort to the Uniting for Peace Resolution is an example of one of these tools. A consultation with an expert on the UNGA or a study might be needed to identify fully the General Assembly's powers and assess how to more fully utilize its powers of budgetary authority, appointments and formations of bodies, and requests to the Secretariat. These powers can be incorporated into the above legal and political strategies as well as serve as the basis for additional strategies.

Strategies should be devised to compel the Secretary-General to exert good-faith efforts to ensure that the findings of the ICJ serve as core components of his multilateral work on the question of Palestine, particularly in the Quartet. One such

strategy could be to pose questions to the Secretary-General, perhaps in his monthly reporting to the Security Council, on how the legal framework as articulated in the *Wall Opinion* or other customary law principles are being incorporated into the Quartet's decision making and formulations for the implementation of Roadmap. Such questions should aim to assess, *inter alia*, how the Quartet is dealing with non-reciprocal obligations under human rights and international humanitarian law as enunciated by the Court. Similar questions can also be posed to the other Quartet members. In light of the failure of the Quartet to incorporate the parties' legal obligations, a study should assess the basis on which the Quartet derives its authority, and ensure that its actions conform to UN and member states obligations. A similar study was undertaken on the Contact Group in the Namibian conflict.

Legal and political strategies should also utilize the General Assembly's power to make requests of the Secretary-General. The OLA legal opinion correctly recognized that resolutions addressed to the Secretariat to perform tasks are binding. Thus, the strategy could include the adoption of additional General Assembly resolutions which request the Secretary-General, in conjunction with the General Assembly, to undertake some of the aforementioned studies, including how the *Wall Opinion* can be implemented by states, the UN organs, and the Secretariat and to report back on their compliance. Similar requests were made by the General Assembly to the Secretary-General in the aftermath of the 1950 *Voting Procedures Case* and by the Security Council to the *ad hoc* Committee in the aftermath of the 1971 *Namibia Opinion*.¹⁴⁸ Finally, OLA's legal memo to the Secretariat should be critiqued to respond to its deficiencies and shortcomings regarding the Secretary-General's legal obligations. The critique should be utilized in dialogue with the Secretariat and OLA to advocate for a more robust position by the Secretariat.

Conclusion

The case of Namibia provides an effective example of how a legal framework was forged, and legal and political strategies employed, to create consensus and shape the political process to realize the exercise of the right of self-determination. Critical to this success was the General Assembly's initial requests for advisory opinions that affirmed its exercise of power and the applicable legal framework, and its use of law-based, technical strategies that forged consensus around this framework. Such consensus ultimately constrained the Security Council from deviating from the legal framework which guided resolution of the conflict. The cases of Palestine and the Western Sahara, although different in some aspects, reveal how the absence of consensus between UN organs over the legal framework and over the role of that legal framework in shaping a resolution of the conflict can cripple efforts to secure the right of self-determination.

Although the case of Namibia had some unique attributes, such as the General Assembly's supervisory authority, many of the legal and political strategies employed by the General Assembly, and subsequently the Security Council, can be utilized in the case of Palestine and the Western Sahara. In light of the role that advisory

opinions played in Namibia, additional advisory opinions should be considered on the question of Palestine as a means to forge greater consensus and ultimately shape resolution of the conflict to accord more closely with international law. The *Wall Advisory Opinion* provides the legal affirmation on which to devise a range of legal and political strategies for forging greater consensus and political will to secure the exercise of the right of Palestinian self-determination.

Notes

- 1 [2004] ICJ Rep. 136, 43 I.L.M. 1009 [*Wall Opinion*].
- 2 Prior to 1968, Namibia was known as South West Africa.
- 3 See *Future Status of South West Africa*, GA Res. 65(I), UN GAOR, 1st Sess., UN Doc. A/RES/65(I) (1946); *Question of South West Africa*, GA Res. 449 (V)(B), UN GAOR, 5th Sess., UN Doc. A/RES/449(V) (1950); John Dugard, ed., *The South-West Africa/Namibia Dispute* (Berkeley: University of California Press, 1973) at 141, 162: South Africa sought instead an agreement with the USA, UK and France over its administration of Namibia.
- 4 Dugard, *ibid.* at 120; *Question of South West Africa: reiteration of previous resolutions and submissions of reports*, GA Res. 337(IV), UN GAOR, 4th Sess., UN Doc. A/RES/337(IV) (1949). On the Advisory Opinion, see *Question of South West Africa: Request for an advisory opinion of the International Court of Justice*, GA Res. 338(IV), 4th Sess., UN Doc. A/RES/338(IV) (1949), which posed the following questions: What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular, a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa, and if so, what are those obligations? b) Are the provisions of Chapter XII of the *Charter* applicable and if so, in what manner, to the Territory of South-West Africa? c) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?
- 5 *International Status of South West Africa*, Advisory Opinion, [1950] ICJ Rep. 128 at 143–4.
- 6 Dugard, *supra* note 3 at 164–6.
- 7 GA Res. 449A–B, *supra* note 3; Dugard, *supra* note 3 at 166–8 citing UN GAOR, 6th Sess., Annex Agenda Item 38 at 2–8; General Assembly committees dealing with South Africa included Permanent Committee on South West Africa (1953) and the Good Offices Committee (1957), whose proposal for partition/annexation as a basis for agreement was rejected by the General Assembly. See *Report of the Good Offices Committee on South West Africa*, GA Res. 1243 (XIII), UN GAOR, 13th Sess., UN Doc. A/RES/1243 (XIII) (1958).
- 8 *Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion, [1955] ICJ Rep. 67 [*Voting Procedures Opinion*]. In response to South Africa's contention that the General Assembly's voting requirement of a two-thirds majority constituted a greater degree of supervision than that of the League (which required a unanimous vote including that of the Mandatory) the General Assembly requested answers to the following: "a) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950: 'Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations'?" and "b) if

this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa?" The Court found that the General Assembly in following the rules of its organization charter was in conformity with its 1950 Opinion regarding the degree of General Assembly supervision. See *supra* note 5 at 78.

- 9 *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, [1956] ICJ 23. The General Assembly sought answers to the following: "Is it consistent with the Advisory Opinion of the International Court of Justice of 11 July 1950 for the Committee on South-West Africa, established by GA Resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters related to the Territory of South-West Africa." The need for oral petitions arose because South Africa refused to provide information to the Committee. The Court held that "it was not inconsistent with its 1950 Opinion for the GA to authorize a procedure for the grant of oral hearings . . . provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory." See *supra* note 5 at 32.
- 10 *Economic Conditions in Non-Self-Governing Territories*, GA Res. 1142 (XII), UN GAOR, 12th Sess., UN Doc. A/RES/1142(XII) (1957).
- 11 *Question of South West Africa*, GA Res. 1568 (XV), UN GAOR, 15th Sess., UN Doc. A/RES/1568(XV) (1960).
- 12 The Committee's plan included evacuation of South African forces, release of political prisoners, repeal of regulations on movement restrictions and apartheid as well as preparations for elections. See *Question of South West Africa*, GA Res. 1702(XVI), UN GAOR, 16th Sess., UN Doc. A/RES/1702(XVI) (1961).
- 13 See *Question of South West Africa*, GA Res. 1805 (XVII), UN GAOR, 17th Sess., UN Doc. A/RES/1805(XVII) (1962) and *Special Committee for South West Africa*, GA Res. 1806 (XVII), UN GAOR, 17th Sess., UN Doc. A/RES/1806(XVII) (1962). The Committee of Twenty-Four, established by *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1654(XVI), UN GAOR, 16th Sess., UN Doc. A/RES/1654(XVI) (1961), examined, recommended and reported on implementation of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), UN GAOR, 15th Sess., UN Doc. A/RES/1514(XV)(1960). On the General Assembly's response, see *Question of South West Africa*, GA Res. 1899 (XVIII), UN GAOR, 18th Sess., UN Doc. A/RES/1899(XVII) (1963) and *Question of South West Africa*, GA Res. 1979 (XVIII), UN GAOR, 18th Sess., UN Doc. A/RES/1979 (XVIII) (1963).
- 14 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, [1962] ICJ Rep. 319. The countries alleged, *inter alia*, that South Africa failed to submit Mandate reports, unilaterally modified the Mandate's terms; violated Article 2 of the Mandate and 22 of the League's Covenant by its apartheid policies and failure to promote the "material and moral well-being and social progress of the inhabitants." See 322–3. *The South West Africa Cases, Second Phase*, [1966] ICJ Rep. 6, para. 99. The Court found Ethiopia and Liberia did not possess a legal interest in the matter.
- 15 *Question of South West Africa*, GA Res. 2145 (XXI), UN GAOR, 21st Sess., UN Doc. A/RES/2145(XXI) (1966).
- 16 *Question of South West Africa*, GA Res. 2248 (S-V), UN GAOR, 5th Special Sess., Supp. No. 1, UN Doc. A/6657 (1967); and GA Res. 2372 (XXII), UN GAOR, 22nd Sess., A/RES/2372(XXII) (1968). The Namibian Council attempted to assert direct UN administration over Namibia, secure South Africa's withdrawal and SC involvement and influence UN policy in consultation with SWAPO; *inter alia*, it participated in Non-Aligned Movement, OAU and international organization meetings, commissioned studies on Namibia and held hearings; disseminated information and sought data from governments regarding their nationals activities in Namibia, served as associate or

- full member in some UN specialized agencies on behalf of Namibia, and it issued – and secured recognition of – travel documents for Namibian refugees in neighboring countries. See *Question of Namibia*, GA Res. 2403 (XXIII), UN GAOR, 23rd Sess., UN Doc. A/RES/2403(XXIII) (1968) and GA Res. 2373(XXII), UN GAOR, 22nd Sess., UN Doc. A/RES/2373 (XXII) (1968). UN Council for Namibia, *Report of the United Nations Council for Namibia*, UN GAOR, 25th Sess., Supp. No. 24, UN Doc. A/8024 (1970). UN Institute for Namibia, *Namibia: A Direct United Nations Responsibility* (Lusaka: UNIN, 1987) at 151–63. Isaak I. Dore, “Self-Determination of Namibia and the United Nations: Paradigm of a Paradox,” 27 Harv. Int’l. L. J. 159 (1986).
- 17 *The Question of South West Africa*, SC Res. 245, UN SCOR, 1968, UN Doc. S/RES/245 (1968), which “took note of the General Assembly’s termination and of South Africa’s arbitrary laws . . . which have been illegally extended to the Territory” Dugard, *supra* note 3 at 422–3.
 - 18 *The Question of South West Africa*, SC Res. 246, UN SCOR, 1968, UN Doc. S/RES/246 (1968); and *The Situation in Namibia*, SC Res. 264 (1969), UN SCOR, 1969, UN Doc. S/RES/264 (1969) (13–0 with France, UK abstaining); the Security Council reacted to South Africa’s acceleration of “separate development” policies including *bantustans*.
 - 19 *The Situation in Namibia*, SC Res. 269, UN SCOR, 1969, UN Doc. S/RES/269 (1969) (12–0 with UK, France, Finland abstaining); Dugard, *supra* note 3 at 440.
 - 20 *The Situation in Namibia*, SC Res. 276, UN SCOR, 1970, UN Doc. S/RES/276 (1970) (13–0 with UK, France abstaining); Dugard, *supra* note 3 at 442–3. The committee worked with the Secretary-General, Member States and specialized agencies.
 - 21 *The Situation in Namibia*, SC Res. 283, UN SCOR, 1970, UN Doc. S/RES/283 (1970). This Resolution requested states to undertake the following: refrain from diplomatic, consular and other relations with South Africa implying recognition of its authority over Namibia; issue a declaration that they do not recognize South African authority over Namibia and that its presence is illegal; terminate diplomatic and consular representation extending to Namibia and to withdraw their officials; end all dealings with respect to Namibia by state-owned companies and cease further investments and concessions; withhold government loans, credit guarantees, and other means used to facilitate trade or commerce with Namibia; withhold protection of investments or concessions in Namibia against claims by a future lawful government; discourage tourism and emigration; review all bilateral treaties with South Africa in so far as they applied to Namibia; and report back on measures taken. The Resolution also re-established the *ad hoc* sub-committee on Namibia to study and recommend ways relevant resolutions can be implemented and it requested the Secretary-General to review multilateral treaties to which South Africa was party and which might apply to Namibia and the General Assembly to establish a UN Fund for Namibians who suffered persecution and for an educational and training programme. Regarding the Advisory Opinion, see *The Situation in Namibia*, SC Res. 284, UN SCOR, 1970, UN Doc. S/RES/284 (1970) (12–0 with UK, Poland, and USSR abstaining).
 - 22 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16 at 31, para. 53.
 - 23 *Ibid.* at 54, para. 118, 57–8, paras. 132–3.
 - 24 *Ibid.* at 55–6, paras. 122–6, 58, para. 133(2). The Court qualified the duty of non-recognition, stating non-recognition should not deprive the Namibian people of advantages derived from international cooperation. While the South African government’s official acts are illegal and invalid, this cannot be extended to those acts such as registration of births, deaths, and marriages, the effects of which can be ignored only to the inhabitants’ detriment.
 - 25 *Ibid.* at 55, paras. 122–3.
 - 26 *Ibid.* at 56, paras. 126, 58, para. 133(3).

- 27 *The Situation in Namibia*, SC Res. 301, UN SCOR, 1971, UN Doc. S/RES/301(1971) (13-0 with France, UK abstaining).
- 28 *Ibid.*
- 29 See *The Situation in Namibia*, SC Res. 310, UN SCOR, 1972, UN Doc. S/RES/310 (1972); and *Namibia*, SC Res. 366, UN SCOR, 1974, UN Doc. S/RES/366 (1974); on Walvis Bay, see *Namibia*, SC Res. 432, UN SCOR, 1978, UN Doc. S/RES/432 (1978).
- 30 *UN Responsibility*, *supra* note 15 at 188; see 151-85 for more details on the General Assembly's and Namibian Council's actions. See also *The Situation in Namibia Resulting from the Illegal Occupation by South Africa*, GA Res. 31/146, UN GAOR, 31st Sess., UN Doc. A/RES/31/146; *UN Responsibility*, *ibid.* at 207-9. Three Western SC members' veto prevented South Africa's expulsion. See *Question of Namibia*, GA Res. 42/14/C, UN GAOR, 42nd Sess., UN Doc. A/RES/42/14/C (1987) and *Question of Namibia*, GA Res. 43/26, UN GAOR, 43rd Sess., UN Doc. 43/26 (1988).
- 31 *Question of Namibia*, GA Res. 3295 (XXIX), UN GAOR, 29th Sess., UN Doc. A/RES/3295 (XXIX) (1974). Decree No. 1 prohibits exploitation of Namibian natural resources (animal and mineral) without the Namibia Council's permission; invalidates licenses and concessions purporting to allow exploitation; provides for the seizure of resources and transport vessels; and creates liability to the future government for legal entities acting to the contrary. The Council sent copies of Decree No. 1 to known foreign investors, shipping, and insurance companies and it was raised at shareholders meetings. In the 18 months after the Decree, U.S. oil and gas companies relinquished their concessions. In 1985, the Council initiated legal proceedings in the Netherlands against URENCO, a company involved in processing Namibian uranium. See *UN Council for Namibia v. URENCO, UCN and the State of the Netherlands*, in (1988) 1 Leiden J. Int'l L. 25, alleging that URENCO, a uranium processing, partially state-owned company, was contributing to/infringing on the right to self-determination and rights of ownership of natural resources and thereby violating the Decree, the 1920 Mandate, the UN Charter, General Assembly and Security Council Resolutions, and the Namibian Advisory Opinion. The Council sought a prohibition on enrichment of Namibian uranium and a requested a certificate indicating non-originating Namibian uranium. In 1990, the Council withdrew the case. The decision to initiate litigation in the Netherlands was based on a legal study on the likely outcome of legal action in several countries. See Nico J. Shriver, "The *UN Council for Namibia v. URENCO, UCN and the State of the Netherlands*" (1988) 1 Leiden J. Int'l Law 25; Caleb M. Pilgrim, "Some Legal Aspects of Trade in the Natural Resources of Namibia" (1990) LXI Brit. Y.B. Int'l L. 250. See also *UN Responsibility*, *ibid.* at 158-62.
- 32 *The Situation in Namibia*, SC Res. 309, UN SCOR, 1972, UN Doc. S/RES/309 (1972); and SC Res. 310, *supra* note 27.
- 33 *UN Responsibility*, *supra* note 15 at 204. See also *The Situation in Namibia*, SC Res. 342, UN SCOR, 1973, UN Doc. S/RES/342 (1973) (SWAPO, among others, called for an end to these negotiations).
- 34 S.C. Res. 366 of December 17, 1974; S.C. Res. 385 of January 30, 1976. The SC demanded, *inter alia*, that South Africa abolish racially discriminatory and repressive laws, release political prisoners, and allow the return of political exiles without risk of arrest.
- 35 *Namibia*, SC Res. 385, UN SCOR, 1976, UN Doc. S/RES/385 (1976).
- 36 *UN Responsibility*, *supra* note 15 at 287.
- 37 *Namibia*, SC Res. 431, UN SCOR, 1978, UN Doc. S/RES/431 (1978) and *Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 431 (1978) concerning the situation in Namibia*, UN Doc. S/12827 (1978). This plan was based on an earlier proposal negotiated by the Contact Group (UK, U.S., France, West Germany, Canada) outside UN auspices but in accordance with Resolution 385. The settlement plan affirms the legal framework of 385, includes withdrawal of forces, preconditions for elections including return of exiled Namibians, the release of political

- prisoners, the repeal of racially discriminatory laws, the conduct of elections, and the formulation and adoption of a constitution.
- 38 Following General Assembly action, the Security Council rejected plans to link Namibia's decolonization with Cuban troop presence in Angola and South African attempts to create an interim government. See *Namibia*, SC Res. 539, UN SCOR, 1983, UN Doc. S/RES/539 (1983) (14-0 with U.S. abstention) and *Namibia*, SC Res. 566, UN SCOR, 1985, UN Doc. S/RES/566 (1985) (13-0 with U.S., U.K. abstention). See also *Question of Namibia*, GA Res. 37/233, UN GAOR, 37th Sess., UN Doc. A/RES/37/233 (1982).
 - 39 *UN Responsibility*, *supra* note 15 at 283–9. See also *Namibia*, SC Res. 632, UN SCOR, 1989, UN Doc. S/RES/632 (1989) and *Namibia*, SC Res. 640, UN SCOR, 1989, UN Doc. S/RES/640 (1989).
 - 40 The Security Council did impose an arms embargo on South Africa in 1977 in response to its policy of apartheid, its aggression against front-line states and its large-scale killing of South Africans demonstrating against apartheid in 1976. Presumably this binding resolution would have influenced South Africa's actions and policy in Namibia. See *South Africa*, SC Res. 418, UN SCOR, 1977, UN Doc. S/RES/418 (1977).
 - 41 On vetoes, see *Guyana, Iraq, Mauritania, the United Republic of Cameroon and the United Republic of Tanzania: Draft Resolution*, SCOR, 1975, UN Doc. S/11713 (1975); *Benin, Guyana, Libyan Arab Republic, Pakistan, Panama, Romania, and United Republic of Tanzania: Draft Resolution*, UN SCOR, 1976, UN Doc. S/12211 (1976); *Mexico, Niger, Panama, Tunisia and Uganda: Draft Resolution*, UN SCOR, 1981, UN Doc. S/14459 (1981); and *Niger, Tunisia and Uganda: Draft Resolution*, UN SCOR, 1981, UN Doc. S/14662 (1981). On voluntary measures, see *Namibia*, SC Res. 566, UN SCOR, 1985, UN Res. S/RES/566 (1985).
 - 42 Tony Hodges, *Western Sahara: The Roots of Desert War* (Westport: Laurence Hill and Co., 1983) at 42, 153. Spain informed the UN that it had no self-governing territories because they were classified as provinces under Spanish law.
 - 43 On inclusion as a non-self-governing territory, see the letter dated 29 January 2002 from the Under-Secretary General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc. S/2002/161 of 12 February 2002, para. 5. On the OAU's role, see Hodges, *ibid.*, at pp. 307–20.
 - 44 *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12.
 - 45 UN GAOR, 19th Sess., Annex No. 8 (part I), UN Doc. A/5800/Rev.1 (1964). See e.g., *Question of IFNI and Spanish Sahara*, GA Res. 2072 (XX), UN GAOR, 20th Sess., UN Doc. A/RES/2072(XX) (1965) and *Question of IFNI and Spanish Sahara*, GA Res. 2229 (XX), UN GAOR, 20th Sess., UN Doc. A/RES/2229 (XX) (1966). For the OAU's role, see Hodges, *supra* note 42 at 307–20.
 - 46 See e.g., *Question of Spanish Sahara*, GA Res. 2711 (XXV), UN GAOR, 25th Sess., UN Doc. A/RES/2711(XXV) (1970); and *Question of Spanish Sahara*, GA Res. 3162 (XXVIII), UN GAOR, 28th Sess., UN Doc. A/RES/3162 (XXVIII) (1973). See also Thomas Franck, "The Stealing of the Sahara" (1976) 70 A.J.I.L. 694 at 703–5; Hodges, *supra* note 42 at 105–7.
 - 47 Franck, *ibid.*, at 703; Hodges, *supra* note 42 at 106.
 - 48 The POLISARIO was established in 1973 and recognized as the representative of the Sahrawi population in 1979. See *Question of Western Sahara*, GA Res. 34/37, UN GAOR, 34th Sess., UN Doc. A/RES/34/37 (1979); Hodges, *supra* note 42 at 83, and 160–4. On Spain's initial opposition to Western Saharan integration with Morocco because of economic interests, see Hodges, *supra* note 42 at 168–70.
 - 49 *Question of Spanish Sahara*, GA Res. 3292 (XXIX), UN GAOR, 29th Sess., UN Doc. A/RES/3292 (XXIX) (1974). The General Assembly sought answers to two questions: "Was Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*)" and if the answer is no, "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?" Franck maintains

- that Morocco and Mauritania urged the request to delay the referendum, *supra* note 46 at 705–6.
- 50 Franck, *supra* note 46 at 708, citing *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc. A/10023/Add.5 at 11 (1975).
 - 51 *Western Sahara Opinion*, *supra* note 44 at 40–1, paras. 84–5 and 31–3, paras. 54–9.
 - 52 *Ibid.* at 68, para. 162.
 - 53 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the UN Charter*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/RES/2625 (XXV) (1970).
 - 54 Hodges, *supra* note 42 at 10, 211, 213, 216, 219–24. The March was named after the holy color of Islam.
 - 55 See Madrid Accords, Hodges, *supra* note 42 at 217–24. See also Franck, *supra* note 46 at 715–7.
 - 56 *Question of Spanish Sahara*, GA Res. 3458B (XXX), UN GAOR, 30th Sess., UN Doc. A/RES/3458 (XXX) (1975) (56–42 with 34 abstentions).
 - 57 On refugees, statehood, and partition see Hodges, *supra* note 42 at 233, 238, 241 respectively. Algeria supported POLISARIO. The General Assembly named Spain the administrator. For further information on the history of Western Sahara, see Western Sahara Online, online: < <http://www.wsahara.net/history.html> >.
 - 58 Hodges, *supra* note 42 at 310–11. See also OAU, Assembly of the Heads of State and Government, 18th Sess., *Question of Western Sahara*, AHG/103 (XVIII) (1981); and OAU, Assembly of the Heads of State and Government, 19th Sess., *Western Sahara* AHG/Res.104 (XIX) (1983).
 - 59 *Western Sahara*, SC Res. 621, UN SCOR, 1988, UN Doc. S/RES/621 (1988). Further developed, the plan was adopted in *Western Sahara*, SC Res. 658, UN SCOR, 1990, UN Doc. S/RES/658 (1990) at paras. 1, 4, 6, 23 which discuss the plan's aims. It does not affirm the principle of non-acquisition of territory by force or laws of occupation, but it does provides for the return of refugees who are deemed eligible to vote.
 - 60 *Report of the Secretary-General on the situation concerning Western Sahara*, UN SCOR, 2002, UN Doc. S/2002/178 at para. 48. In 2002, Morocco expressed unwillingness to continue with the settlement plan.
 - 61 *Question of Spanish Sahara*, GA Res. 3458A (XXX), UN GAOR, 30th Sess., UN Doc. A/RES/3458 (XXX) (1975) (88–0, with 41 abstentions); *Question of Western Sahara*, GA Res. 31/45, UN GAOR, 31st Sess., UN Doc. A/RES/31/45 (1976); and *Question of Western Sahara*, GA Res. 33/31, UN GAOR, 33rd Sess., UN Doc. A/RES/33/31 (1978).
 - 62 *Question of Western Sahara*, GA Res. 34/37, UN GAOR, 34th Sess., UN Doc. A/RES/34/37 (1979); and *Question of Western Sahara*, GA Res. 35/19, UN GAOR, 35th Sess., UN Doc. A/RES/35/19 (1980) which coincided with strongly-worded Non-Aligned Movement and OAU Resolutions. See Hodges, *supra* note 42 at 309–19.
 - 63 See e.g. *Question of Western Sahara*, GA Res. 38/40, UN GAOR, 38th Sess., UN Doc. A/RES/38/40 (1983); *Question of Western Sahara*, GA Res. 40/50, UN GAOR, 40th Sess., UN Doc. A/RES/40/50 (1985); *Question of Western Sahara*, GA Res. 33/31, UN GAOR, 33rd Sess., UN Doc. A/RES/33/31 (1978); *Question of Western Sahara*, GA Res. 41/16, UN GAOR, 41st Sess., UN Doc. A/RES/41/16 (1986); *Question of Western Sahara*, GA Res. 42/78, UN GAOR, 42nd Sess., UN Doc. A/RES/42/78 (1987); *Question of Western Sahara*, GA Res. 49/44, UN GAOR, 49th Sess., UN Doc. A/RES/49/44 (1995); *Question of Western Sahara*, GA Res. 50/36, UN GAOR, 50th Sess., UN Doc. A/RES/50/36 (1995); *Question of Western Sahara*, GA Res. 55/141, UN GAOR, 55th Sess., UN Doc. A/RES/55/141 (2000); and *Question of Western Sahara*, GA Res. 57/135, UN GAOR, 57th Sess., UN Doc. A/RES/57/135 (2002).
 - 64 *Western Sahara*, SC Res. 377, UN SCOR, 1975, UN Doc. S/RES/377 (1975); and *Western Sahara*, SC Res. 379, UN SCOR, 1975, UN Doc. S/RES/379 (1975).

- 65 *Western Sahara*, SC Res. 380, UN SCOR, 1975, UN Doc. S/RES/380 (1975).
- 66 Security Council members considered Morocco's threats to defend Saharan territory a threat to international peace and security, including an attempt to acquire territory by force. Franck, *supra* note 46 at 712–13.
- 67 *Report of the Secretary-General on the situation concerning Western Sahara*, UN SCOR, 2003, UN Doc. S/2003/565 at paras. 43–9, 56, 60. See also *The Situation Concerning Western Sahara*, SC Res. 1429, UN SCOR, 2002, UN Doc. S/RES/1429 (2002). The 1988 Settlement Plan assigned the Security Council a limited role of appointing the Secretary-General's representative with exclusive authority over the referendum and arrangements for an Observer group. SC Res. 690, UN SCOR, 1991, UN Doc. S/RES/690 (1991) established the UN Mission for the Referendum in Western Sahara to provide technical assistance.
- 68 League of Nations, *Mandate for Palestine*, [1922] 8 O.J. 1007. The 1917 Balfour Declaration was incorporated into the Mandate. See also John Quigley, *The Case for Palestine: An International Law Perspective* (Durham: Duke University Press, 2005) at 8–19.
- 69 Quigley, *ibid.*, at 31. On partition, see *Future Government of Palestine*, GA Res. 181 (II), UN GAOR, 2nd Sess., UN Doc. A/RES/181(II) (1947). The Arab High Committee hoped the General Assembly would reconsider and recommend an alternative solution, which the Security Council subsequently requested. Quigley, *ibid.*, at 33–8, 43. The Arab League supported a political solution. King Abdullah of Jordan opposed a Palestinian state as he sought to annex territory with British encouragement.
- 70 Quigley, *ibid.*, at 82–6, 97–8. Expulsions continued throughout 1953.
- 71 On Israel's admission, see *Admission of new Members to the UN: Israel*, SC Res. 69, UN SCOR, 1949, UN Doc. S/RES/69 (1949); and *Admission of Israel to Membership in the United Nations*, GA Res. 273 (III), UN GAOR, 3rd Sess., UN Doc. A/RES/273(III) (1949). On settlements see, Geoffrey Aronson, *Israel, Palestinians and the Intifada: Creating Facts on the West Bank*, 2nd edn. (London: Kegan Paul International, 1990) at 14–16.
- 72 “The Camp David Accords, September 17, 1978, Framework A,” in William B. Quandt, *Camp David Peacemaking and Politics* (Washington, D.C.: Brookings Institution, 1986) at 377–9. Israel was not forced to accept the need for eventual Israeli withdrawal from the OPT and its position on Jerusalem was not diluted. Quandt, *ibid.* at 256.
- 73 *Letter dated 18 November 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General*, UN GAOR/UN SCOR, 1988, UN Doc. A/43/827-S/20278 (1988) at 13.
- 74 PLO representation was not permitted. The U.S. indicated it would not support a parallel UN process. See U.S. Department of State, Letter of Assurances to the Palestinian Team of 18 October 1991, *Palestine Yearbook of International Law*, vol. 6 (1990–1) at 262.
- 75 *Report of the Secretary-General on the Work of the Organization: Declaration of Principles on Interim Self-Government Arrangements*, UN GAOR/UN SCOR, 1993, 1993, Annex 11, UN Doc. A/48/486-S/26560 (1993).
- 76 Article V (1–2), Declaration of Principles on Interim Self-Government Arrangements, *ibid.* The five-year transitional period would begin at the time of withdrawal of Israel from Gaza and Jericho.
- 77 For an overview of the history and structure of the Quartet and the Roadmap, see online: UN < <http://www.un.org/News/dh/mideast/roadmap122002.pdf> >.
- 78 *The Palestine Question*, SC Res. 42, UN SCOR, 1948, UN Doc. S/RES/42 (1948); and *The Palestine Question*, SC Res. 44, UN SCOR, 1948, UN Doc. S/RES/44 (1948), respectively. The Security Council called on the parties to refrain from acts that might prejudice rights or claims pending further General Assembly consideration, see *The Palestine Question*, SC Res. 46, UN SCOR, 1948, UN Doc. S/RES/46 (1948); Quigley, *supra* note 68 at 35–8, 44.
- 79 *The Palestine Question*, SC Res. 48, UN SCOR, 1948, UN Doc. S/RES/48 (1948);

- SC Res. 46, *ibid.*; *The Palestine Question*, SC Res. 49, UN SCOR, 1948, UN Doc. S/RES/49 (1948); *The Palestine Question*, SC Res. 61, UN SCOR, 1948, UN Doc. S/RES/61 (1948); *The Palestine Question*, SC Res. 54, UN SCOR, 1948, UN Doc. S/RES/48 (1948); *The Palestine Question*, SC Res. 113, UN SCOR, 1956, UN Doc. S/RES/113 (1956); *The Palestine Question*, SC Res. 127, UN SCOR, 1958, UN Doc. S/RES/127 (1958); *The Palestine Question*, SC Res. 162, UN SCOR, 1961, UN Doc. S/RES/162 (1961); and *The Palestine Question*, SC Res. 228, UN SCOR, 1966, UN Doc. S/RES/228 (1966).
- 80 *The Situation in the Middle East*, SC Res. 237, UN SCOR, 1967, UN Doc. S/RES/237 (1967); and *The Situation in the Middle East*, SC Res. 242, UN SCOR, 1967, UN Doc. S/RES/242 (1967). On little progress, see *Report of the Secretary-General under Security Council Resolution 221 (1973) of 20 April 1973*, UN SCOR, 1973, UN Doc. S/10929 (1973) at paras. 108–9.
- 81 See e.g. *The Situation in the Middle East*, SC Res. 248, UN SCOR, 1968, UN Doc. S/RES/248 (1968); and *Cease-fire in the Middle East*, SC Res. 338, UN SCOR, 1973, UN Doc. S/RES/338 (1973).
- 82 Initially, the 1973 conference was to proceed without the co-chair arrangements. The PLO was not a participant. See *Peace Conference in the Middle East*, SC Res. 344, UN SCOR, 1973, UN Doc. S/RES/344 (1973); *Report of the Secretary-General: The Situation in the Middle East*, UN GAOR/UN SCOR, 1978, UN Doc. A/33/311-S-12896 (1978). For U.S. vetoes, see *Draft resolution: Benin, Guyana, Pakistan, Panama, Romania and United Republic of Tanzania*, UN SCOR, 1976, UN Doc. S/11940 (1976); *Draft Resolution: Guyana, Pakistan, Panama and United Republic of Tanzania*, UN SCOR, 1976, UN Doc. S/12119 (1976); *Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized and on the Stage Reached in their Consideration*, UN SCOR, 1980, Addendum, UN Doc. S/13737/Add.17 (1980).
- 83 *The situation in the Middle East, including the Palestinian question*, SC Res. 1435, UN SCOR, 2002, UN Doc. S/RES/1435 (2002); *The situation in the Middle East, including the Palestinian question*, SC Res. 1405, UN SCOR, 2002, UN Doc. S/RES/1405 (2002); and *The situation in the Middle East, including the Palestinian question*, SC Res. 1515, UN SCOR, 2003, UN Doc. S/RES/1515 (2003).
- 84 See e.g. *The Situation in the Middle East*, SC Res. 298, UN SCOR, 1971, UN Doc. S/RES/298 (1971) [Jerusalem]; *Territories occupied by Israel*, SC Res. 446, UN SCOR, 1979, UN Doc. S/RES/446 (1979) [Commission to study settlements/Fourth Geneva Convention]; *Territories occupied by Israel*, SC Res. 468, UN SCOR, 1980, UN Doc. S/RES/468 (1980); *Territories occupied by Israel*, SC Res. 469, UN SCOR, 1980, UN Doc. S/RES/469 (1980); *Territories occupied by Israel*, SC Res. 484, UN SCOR, 1980, UN Doc. S/RES/484 (1980) [expulsion of mayors]; *Territories occupied by Israel*, SC Res. 476, SCOR, 1980, UN Doc. S/RES/476 (1980) [Jerusalem/Fourth Geneva Convention]; *Territories occupied by Israel*, SC Res. 592, UN SCOR, 1986, UN Doc. S/RES/592 (1986) [firing on students]; *Territories occupied by Israel*, SC Res. 605, UN SCOR, 1987, UN Doc. S/RES/605 (1987) [killing of civilians/Fourth Geneva Convention]; *Territories occupied by Israel*, SC Res. 607, UN SCOR, 1988, UN Doc. S/RES/607 (1988); *Territories occupied by Israel*, SC Res. 608, UN SCOR, 1988, UN Doc. S/RES/608 (1988); *Territories occupied by Israel*, SC Res. 636, UN SCOR, 1989, UN Doc. S/RES/636 (1989); *Territories occupied by Israel*, SC Res. 641, UN SCOR, 1989, UN Doc. S/RES/641 (1989); *Territories occupied by Israel*, SC Res. 694, UN SCOR, 1991, UN Doc. S/RES/694 (1991); *Territories occupied by Israel*, SC Res. 726, UN SCOR, 1992, UN Doc. S/RES/726 (1992); *Territories occupied by Israel*, SC Res. 799, UN SCOR, 1992, UN Doc. S/RES/799 (1992) [deportations]; *Territories occupied by Israel*, SC Res. 672, UN SCOR, 1990, UN Doc. S/RES/672 (1990) and *Territories occupied by Israel*, SC Res. 673, UN SCOR, 1990, UN Doc. S/RES/673 (1990) [violence at Haram Al-Sharif/mission]; *Territories occupied by Israel*, SC Res. 681, UN SCOR, 1990, UN Doc. S/RES/681 (1990) [Conference of High Contracting Parties/Article 1 duty]. On vetoes, see *Benin, Guyana, Pakistan, and United Republic of*

Tanzania: Draft Resolution, UN SCOR, 1976, UN Doc. S/12022 (1976) [Jerusalem/settlements]; *Jordan: Draft Resolution*, UN SCOR, 1982, UN Doc. S/14943 (1982) [dismissal of Palestinian mayors]; *Iran, Jordan, Morocco and Uganda: Draft Resolution*, UN SCOR, 1982, UN Doc. S/14985 (1982) [attacks on worshipers in Al-Haram al-Sharif]; *Algeria, Bahrain, Democratic Yemen, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen: Draft Resolution*, UN SCOR, 1983, UN Doc. S/15895 (1983) [settlements]; *Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates: Draft Resolution*, UN SCOR, 1986, UN Doc. S/17769 (1986) [sanctity of Haram Al-Sharif]; *Algeria, Argentina, Nepal, Senegal, Yugoslavia and Zambia: Draft Resolution*, UN SCOR, 1988, UN Doc. S/19466 (1988) [cessation of human rights violations]; *Algeria, Argentina, Nepal, Senegal, Yugoslavia and Zambia: Draft Resolution*, UN SCOR, 1988, UN Doc. S/19780 (1988) [deportations]; *Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal and Yugoslavia: Draft Resolution*, UN SCOR, 1989, UN Doc. S/20463 (1989) [opening fire on civilians]; *Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal and Yugoslavia: Draft Resolution*, UN SCOR, 1989, UN Doc. S/20677 (1989) [school closures, deportations, vigilante attacks]; *Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal and Yugoslavia: Revised Draft Resolution*, UN SCOR, 1989, UN Doc. S/20945/Rev.1 (1989) [siege of towns, confiscation of property, valuables]; *Colombia, Cuba, Malaysia and Yemen: Draft Resolution*, UN SCOR, 1990, UN Doc. S/21326 (1990) [Commission to investigate]; *Botswana, Honduras, Indonesia, Nigeria, Oman and Rwanda: Draft Resolution*, UN SCOR, 1995, UN Doc. S/1995/394 [expropriation of land in East Jerusalem]; *France, Portugal, Sweden and United Kingdom of Great Britain and Northern Ireland: Draft Resolution*, UN SCOR, 1997, UN Doc. S/1997/199 and *Egypt and Qatar: Draft Resolution*, UN SCOR, 1997, UN Doc. S/1997/241 [Jabal–Abu Ghneim settlement]. See also *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, UN GAOR, 38th Sess., Supp. No. 35, UN Doc. A/37/35 (1985) at paras. 67–70.

- 85 The Security Council condemned Israeli deportations in *Territories occupied by Israel*, SC Res. 726, UN SCOR, 1992, UN Doc. S/RES/726 (1992), but the USA vetoed draft resolutions on Israeli land expropriation in 1995 and settlement construction in 1997. See Security Council Resolutions 1073 of September 28, 1996 (Hebron massacre) and 904 of March 18, 1994 (tunnel in Old City) which do not condemn Israeli actions or assign responsibility. Violations included home demolitions, land confiscation, revocation of Jerusalem IDs, and torture.
- 86 See *On the situation in the Middle East, including the Palestinian question*, SC Res. 1322, UN SCOR, 2000, UN Doc. S/RES/1322 (2000); *The situation in the Middle East, including the Palestinian question*, SC Res. 1397, UN SCOR, 2002, UN Doc. S/RES/1397 (2002); *The situation in the Middle East, including the Palestinian question*, SC Res. 1402, UN SCOR, 2002, UN Doc. S/RES/1402 (2002); *The Situation in the Middle East, including the Palestinian Question*, SC Res. 1405, UN SCOR, 2002, UN Doc. S/RES/1405 (2002); and *The situation in the Middle East, including the Palestinian question*, SC Res. 1544, UN SCOR, 2004, UN Doc. S/RES/1544 (2004). For vetoes see *Pakistan, South Africa, Sudan and Syrian Arab Republic: Draft Resolution*, UN SCOR, 2003, UN Doc. S/2003/891 [threats to deport Palestinian Authority president]; *Algeria and Libyan Arab Jamahiriya: Draft Resolution*, UN SCOR, 2004, UN Doc. S/2004/240 [assassination]; *Algeria, Pakistan and Tunisia: Draft Resolution*, UN SCOR, 2004, UN Doc. S/2004/783 and *Qatar: Draft Resolution*, UN SCOR, 2006, UN Doc. S/2006/508 [Gaza/Israeli soldier; detained ministers]; *Qatar: Draft Resolution*, UN SCOR, 2006, UN Doc. S/2006/878 [Beit Hanoun shelling/rocket fire].
- 87 See *Report of the Ad Hoc Committee on the Palestinian Questions*, UN GAOR, 2nd Sess., UN Doc. A/516 (1947) at paras. 16, 24. See also Sub-Committee 2, *Report of Sub-Committee 2 to the Ad Hoc Committee on the Palestinian Question*, UN GAOR, 2nd Sess., UN Doc. A/AC.14/32 and Add. 1 (1947) at 299–301. Potential questions concerned

- the General Assembly's competence to recommend a solution and a state's authority to implement a proposed solution without the consent of the people of Palestine.
- 88 *Palestine – Progress Report of the United Nations Mediator*, GA Res. 194 (III), UN GAOR, 3rd Sess., UN Doc. A/RES/194 (III) (1948); *Assistance to Palestine Refugees*, GA Res. 302 (IV), UN GAOR, 4th Sess., UN Doc. A/RES/302 (IV) (1949); *Palestine: Progress Report of the United Nations Conciliation Commission for Palestine Refugees and Payment of Compensation due to them*, GA Res. 394 (V), UN GAOR, 5th Sess., UN Doc. A/RES/394 (V) (1950). The UNCCP was also tasked to address Jerusalem. See Lena El-Malak, "Palestinian Refugees in International Law: Status, Challenges, and Solutions" (2006) 20:3 *Immigration, Asylum and Nationality Law* 179 at 180–2.
 - 89 *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 2535 B (XXIV), UN GAOR, 24th Sess., UN Doc. A/RES/2535 (XXIV) (1969); for subsequent affirmation of inalienable rights, see i.e. *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res. 2672 C (XXV), UN GAOR, 25th Sess., UN Doc. A/RES/2672 (XXV) (1970); *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res. 3070 (XXVIII), UN GAOR, 28th Sess., UN Doc. A/RES/3070 (XXVIII) (1973); and *Question of Palestine*, GA Res. 3236 (XXIX), UN GAOR, 29th Sess., UN Doc. A/RES/3236 (XXIX) (1974).
 - 90 *Observer Status for the Palestine Liberation Organization*, GA Res. 3237 (XXIX), UN GAOR, 29th Sess., UN Doc. A/RES/3237 (XXIX) (1974).
 - 91 *Question of Palestine*, GA Res. 3376 (XXX), UN GAOR, 30th Sess., UN Doc. A/RES/3376 (XXX) (1975); On the special unit, see *Question of Palestine*, GA Res. 32/40 B, UN GAOR, 32nd Sess., UN Doc. A/RES/32/40 B (1977).
 - 92 *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, UN GAOR, 31st Sess., Supp. No. 35, UN Doc. A/31/35 (1976); *Question of Palestine*, GA Res. 31/20, UN GAOR 31st sess., UN Doc. A/RES/31/20 (1976); See *Question of Palestine*, GA Res. 35/169, UN GAOR, 35th Sess., UN Doc. A/RES/35/169 (1980) for the recommendations, which include a two-phase plan for implementing the right of return, measures for realizing self-determination and sovereignty (timetable for Israeli withdrawal, settlement evacuation, Israeli compliance with Fourth Geneva Convention), the inadmissibility of acquisition of territory by force, internationally recognized and secure borders, a speedy, complete end to Israeli occupation which is a condition *sine qua non* for the exercise of its inalienable rights, an expanded UN role (peacekeepers, Security Council utilizing its powers to implement a just solution), PLO participation as the legitimate representative, and emphasis on the duty and responsibility of all concerned to enable Palestinians to exercise their inalienable rights.
 - 93 On the vetoed draft security council resolution see *Tunisia: Draft Resolution*, UN SCOR, 1980, UN Doc. S/13911 (1980); On convening the emergency special session, see *Convening of the Session, (Question of Palestine), Note by the Secretary-General*, A/ES-7/1 (Letter from Senegal) of July 21, 1980, 7th Emergency Sess., UN Doc. A/ES/7/1 (1980); on the powers of the General Assembly to convene in the face of lack of unanimity by the permanent members of the Security Council, see *Uniting for Peace*, G.A. Res. 377 (V), UN GAOR, 5th Sess., UN Doc. A/RES/377 (V) (1950), which "resolves that if the Security Council, because of lack of unanimity of its permanent members, fails to exercise its responsibility for the maintenance of international peace and security where there appears to be a threat to the peace, breach to peace, or acts of aggression, the GA shall consider the matter immediately, with a view to making appropriate recommendations to its members for collective measures."
 - 94 See *Question of Palestine*, GA Res. 32/40, UN GAOR, 32nd Sess., UN Doc. A/RES/32/40 (1977); *Report of the Security-General*, *supra* note 78; *The Situation in the Middle East*, GA Res. 33/29, UN GAOR, 33rd Sess., UN Doc. A/RES/33/29 (1978); *Question of Palestine*, GA Res. 34/65A, UN GAOR, 34th Sess., UN Doc.

- A/RES/34/65 (1979); *Question of Palestine*, GA Res. ES-7/1, UN GAOR, 7th Emergency Sess., UN Doc. A/RES/ES-7/2 (1980); and *Question of Palestine*, GA Res. ES-7/6, UN GAOR, 7th Emergency Sess., UN Doc. A/RES/ES-7/6 (1982).
- 95 On convening a conference and the Geneva Declaration, see *International Conference on the Question of Palestine*, GA Res. ES-7/7, UN GAOR, 7th Emergency Sess., UN Doc. A/RES/ES-7/7 (1982); *Question of Palestine*, GA Res. 38/58 C, UN GAOR, 38th Sess., UN Doc. A/RES/38/58 (1983); *Report of the Secretary-General (in pursuance of the General Assembly Resolution 38/58 C)*, UN GAOR/UN SCOR, 39th Sess., UN Doc. A/39/130-S/16409 (1984); *The Situation in the Middle East*, GA Res. 44/40 A-B, UN GAOR, 44th Sess., UN Doc. A/RES/44/40 (1989); and *International Peace Conference on the Middle East*, GA Res. 45/68, UN GAOR, 45th Sess., UN Doc. A/RES/45/68 (1990).
 - 96 See e.g. *Question of Palestine*, GA Res. 34/65B, UN GAOR, 34th Sess., UN Doc. A/RES/34/65 (1979); and *Question of Palestine*, GA Res. 35/169A-B, UN GAOR, 35th Sess., UN Doc. A/RES/35/169 (1980).
 - 97 *Question of Palestine*, GA Res. 48/158[D], UN GAOR, 48th Sess., UN Doc. A/RES/48/158[D] (1993); *Peaceful Settlement of the Question of Palestine*, GA Res. 52/52, UN GAOR, 52nd Sess., UN Doc. A/RES/52/52 (1997); *Peaceful Settlement of the Question of Palestine*, GA Res. 53/42, UN GAOR, 53rd Sess., UN Doc. A/RES/53/42 (1998); *Peaceful Settlement of the Question of Palestine*, GA Res. 54/42, UN GAOR, 54th Sess., UN Doc. A/RES/54/42 (1999); *Peaceful Settlement of the Question of Palestine*, GA Res. 57/110, UN GAOR, 57th Sess., UN Doc. A/RES/57/110 (2002); and *Peaceful Settlement of the Question of Palestine*, GA Res. 60/39, UN GAOR, 60th Sess., UN Doc. A/RES/60/39 (2006).
 - 98 *Question of Palestine*, GA Res. 50/84, UN GAOR, 50th Sess., UN Doc. A/RES/50/84 (1996); *Peaceful Settlement of the Question of Palestine*, GA Res. 56/36, UN GAOR, 56th Sess., UN Doc. A/RES/56/36 (2001); and *Jerusalem*, GA Res. 56/31, UN GAOR, 56th Sess., UN Doc. A/RES/56/31 (2001).
 - 99 See e.g. *Respect for and Implementation of Human Rights in Occupied Territories*, GA Res. 2443 (XXIII), UN GAOR, 23rd Sess., UN Doc. A/RES/2443 (XXIII) (1968); *Report on the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, GA Res. 3092 (B) (XXVIII), UN GAOR, 28th Sess., UN Doc. A/RES/3092 (XXVIII) (1973); *Permanent Sovereignty over Natural Resources in the Occupied Arab Territories*, GA Res. 3175 (XXVIII), UN GAOR, 28th Sess., UN Doc. A/RES/3175 (XXVIII) (1973); *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Occupied Territories*, GA Res. 31/106 (A-D), UN GAOR, 31st Sess., UN Doc. A/RES/31/106/A/B/C/D (1976); *The uprising (intifada) of the Palestinian people*, GA Res. 45/69, UN GAOR, 45th Sess., UN Doc. A/RES/45/69 (1990); *Jerusalem*, GA Res. 52/53, UN GAOR, 52nd Sess., UN Doc. A/RES/52/53 (1997); *Question of Palestine*, GA Res. 50/84, UN GAOR, 50th Sess., UN Doc. A/RES/50/84 (1995); *Peaceful Settlement of the Question of Palestine*, GA Res. 51/26, UN GAOR, 51st Sess., UN Doc. A/RES/51/26 (1996); *Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, GA Res. 60/104, UN GAOR, 60th Sess., UN Doc. A/RES/60/104 (2005); and *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, GA Res. 60/106, UN GAOR, 60th Sess., UN Doc. A/RES/60/106 (2005). Measures condemned include destruction of homes/villages, pillaging of archaeological/cultural property, expropriation of property, deportation, denial of right of return to refugees and displaced persons; ill-treatment and torture of prisoners, settlements, measures in Jerusalem, and annexation of occupied territory and Wall construction. Resolutions also affirm the applicability of Fourth Geneva Convention. The UN Commission on Human Rights also consistently condemns Israel's human rights violations and in 1993 appointed a Special Rapporteur to "investigate Israel's violations of the principles and bases of international law, international humanitarian law, and the Geneva Convention

- relative to the protection of civilian persons in time of war, of 12 August 1949 in the Palestinian territories occupied by Israel since 1967.” See Commission on Human Rights, *Question of the violation of human rights in the occupied Arab territories, including Palestine*, CHR Res. 1993/2, UN CHR, 49th Sess., UN Doc. E/CN.4/RES/1993/2 (A+B) (1993).
- 100 *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA Res. ES-10/13, UN GAOR, 10th Emergency Sess., UN Doc. A/RES/ES/10-13 (2003). For the text of the vetoed draft Security Council Resolution, see *Guinea, Malaysia, Pakistan and Syrian Arab Republic: draft resolution, UN SCOR (2003)*, UN Doc. S/2003/980 (2003).
 - 101 *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA Res. ES-10/14, UN GAOR, 10th Emergency Sess., UN Doc. A/Res/ES/10-14 (2003).
 - 102 *Wall Opinion*, *supra* note 1 at paras. 75–8.
 - 103 *Ibid.* para 122.
 - 104 *Ibid.* para. 121.
 - 105 *Ibid.* paras. 124, 90–101, 110–13, respectively. For Israel’s position on the Fourth Geneva Convention’s applicability, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York: SUNY Press, 2002) at 32–5. The human rights instruments are the *International Covenant on Civil and Political Rights*, the *International Covenant on Social and Economic Rights*, and the *Convention on the Rights of the Child*.
 - 106 The Conference of High Contracting Parties was convened by the General Assembly 10th Emergency Special Session in 1999 and reconvened in 2001. See *Illegal Israeli Actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, ES-10/6 (1999), UN GAOR 10th Emergency Sess., UN Doc. A/RES/ES-10/6 (1999).
 - 107 *Wall Opinion*, *supra* note 1 at para. 124.
 - 108 *Ibid.* para. 120.
 - 109 *Ibid.* paras. 120, 133.
 - 110 *Wall Opinion*, *supra* note 1 at para. 134.
 - 111 *Ibid.* para. 141.
 - 112 *Ibid.* para. 137.
 - 113 *Ibid.* paras. 137–42. The Court found Article 51 inapplicable since the attacks are not imputable to a foreign state, nor do they emanate from territory outside of Israel’s control. Israel can not rely on the defense of necessity because it did not show that the chosen route was “the only way for the state to safeguard an essential interest against a grave and imminent peril.”
 - 114 *Supra* note 102 at 82–4.
 - 115 *Wall Opinion*, *supra* note 1 at para. 153.
 - 116 *Ibid.* paras. 155–6. The Court cited its language from the *Barcelona Traction Case* on *erga omnes* obligations: “in view of the importance of the rights involved, all states can be held to have a legal interest in their protection.” *Barcelona Traction, Light and Power Company Limited, Second Phase*, [1970] ICJ Rep. 32 at para. 33. In the *Wall Opinion*, the Court did not specify which of the humanitarian provisions are of *erga omnes* character.
 - 117 *Wall Opinion*, *supra* note 1 at paras. 158–9. Article 1 states “The High Contracting Parties undertake to respect and ensure respect for the Convention in all circumstances.”
 - 118 *Ibid.* para. 159.
 - 119 *Ibid.* para. 49. The ICJ noted the origins of responsibility from the mandate period, General Assembly Resolution 181, and pointed to the creation of subsidiary UN organs and the adoption of resolutions on Palestine as manifestations of that responsibility.
 - 120 *Ibid.* paras. 50, 160.
 - 121 See “ICJ Advisory Opinion on Israel’s Security Fence – Israeli Statement,” Israel Ministry of Foreign Affairs, July 9, 2004, <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+ICJ+Advisory+Opinion+9-July-2004.htm>.

- 122 See "World Court tells Israel to Tear Down Illegal Wall," Chris McGreal, *The Guardian*, July 10, 2004, <http://www.guardian.co.uk/world/2004/jul/10/israel3>.
- 123 *Advisory Opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, GA Res. ES-10/15, UN GAOR, 10th Emergency Sess., UN Doc. A/RES/ES/10-15 (2004) (voting record: 105-6-10).
- 124 In written submissions to the Court, states argued, *inter alia*, that an advisory opinion would impede negotiations; undermine the Roadmap; and lacks a useful purpose; Language such as "accepts" or "welcomes" the opinion were resisted; Report prepared by Switzerland in its capacity as depositary of the Geneva Conventions prepared pursuant to paragraph 7 of resolution ES-10/15 (Letter dated June 30, 2005 from the permanent representative of Switzerland), A/ES-10/304 of July 5, 2005, para. 17.
- 125 "Donor Countries Won't fund Israeli-Planned Separate Roads for Palestinians," by Amira Haas, *Ha'aretz*, November 30, 2004 at: <http://agonist.org/node/9653/print>; see also LAAC Secretariat, *Wall Mitigation: Implications for Donors and Implementing Agencies Operating in Areas affected by the Separation Barrier*, Report to the Local Aid Coordinating Committee, January 30, 2005, 9-10.
- 126 *Declaration on Palestine*, XIV Ministerial Conference of the Non-Aligned Movement (Durban, South Africa, August 17-19, 2004), text online: NAM < <http://www.nam.gov.za/media/040820a.htm> > at para. 5.
- 127 Fourteenth Summit Conference of Heads of State or Government of the Non-Aligned Movement, Havana, September 11-16, 2006; *Letter dated 19 September 2006 from the Permanent Representative of Cuba to the United Nations addressed to the Secretary-General*, UN GAOR, UN Doc. A/61/472-S/2006 (2006) at para. 141. NAM also seeks to convene a public forum within the UN to mobilize public opinion.
- 128 "Note to Mr. Prendergast: Advisory Opinion of the ICJ on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory" Office of Legal Affairs, United Nations (August 10, 2004) at para. 4 [emphasis added].
- 129 Separate Opinion of Judge Kooijmans, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep. 219, 43 I.L.M. 1065 at para. 44.
- 130 *Supra* note 120, paras. 5, B8-9.
- 131 *Ibid.*
- 132 *Inter alia*, the Secretary-General reports monthly to the Security Council, represents the UN in the Quartet, and fulfills tasks requested by both the General Assembly and the Security Council.
- 133 The period covers from August 2004 to February 2007. For a link to the monthly reports, see UNISPAL, online: < <http://unispal.un.org/unispal.nsf/vSecgen?OpenView> >.
- 134 For the initial proposal by the Secretary-General, see *Letter dated 11 January from 2005 Secretary-General to General Assembly, Tenth emergency special session, Agenda item 5, Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, A/ES-10/294 of January 13, 2005; For changes to the proposal, see the General Assembly resolution establishing the registry, *Establishment of the United Nations Register of Damage caused by the Construction of the Wall in the Occupied Palestinian Territory: Revised Draft Resolution*, UN GAOR, 10th Emergency Sess., UN Doc. A/ES-10/L.20/Rev.1 (2006).
- 135 The period covers August-February 2007. The statement of March 1, 2005 reaffirms the principles and positions outlined in its September 22, 2004 statement (SG/2091), when the Quartet mentions the barrier, it "takes note with concern of the route and its impact on undermining Palestinian trust in the Roadmap." For all Quartet statements, see online: UN < <http://www.un.org/apps/news/docs.asp?Topic=Middle%20East&Type=Quartet%20statement> >.
- 136 In Namibia and Palestine, initially South Africa and Israel, respectively, sought to retain overriding sovereignty with devolved local autonomy and later partition. In Western Sahara, Morocco seeks full annexation of the territory and sovereignty over the Sahrawi population and has rejected proposed partition.

- 137 Separate Opinion of Judge Higgins, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] I.C.J. Rep. 207, 43 I.L.M. 1058 at para. 2.
- 138 Another important factor is the political decisions made by the internationally recognized representatives of the respective liberation movements.
- 139 Only Sweden, Ireland, and France appeared to support the request with arguments on the legal merits. For written statements see online: ICJ < <http://www.icj-cij.org> >.
- 140 Judge Elaraby remarked, “The question of Palestine has dominated the work of the UN since its inception, yet no organ has requested the ICJ to clarify the complex legal aspects of the matters under its purview” until this *Wall Opinion*. See Separate Opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in *Wall Opinion*, [2004] I.C.J. Rep. 246, 43 I.L.M. 1081 at 1082.
- 141 *Wall Opinion*, *supra* note 1 at para. 49.
- 142 *Ibid.*, at para. 160.
- 143 Article 98 of the UN Charter provides that the Secretary-General shall perform such functions as entrusted to him by these organs (the General Assembly and the Security Council); Article 97(3) states that the Secretary-General shall be the Chief Administrative officer of the Organization. See Bruno Simma *et al.*, eds., *The Charter of the United Nations: A Commentary*, 2nd edn. (Oxford: Oxford University Press, 2002) at 1207.
- 144 Advocacy efforts should emphasize more the right to self-determination as it appears efforts to date have focused primarily on the laws of occupation and not sufficient attention to the right to self-determination. This is not to exclude other areas of relevant law.
- 145 *Activities of Transnational Corporations in South Africa and Namibia and the Responsibilities of Home Countries with Respect to their Operations in this Area*, UN Centre for Transnational Corporations (New York: UN, 1984), ST/CTC/84.
- 146 John Dugard, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”* UN HRCOR, 4th Sess., UN Doc. A/HRC/4/17 (2007) at para. 62.
- 147 Susan Akram and Michael Lynk, “‘The Wall and the Law’: A Tale of Two Judgments” (2006) 24: 1 *Netherlands Quarterly of Human Rights* 61 at 83–4.
- 148 *Study of Legal Action to Ensure the Fulfilment of the Obligations Assumed by the Mandatory Power Under the Mandate for South West Africa*, GA Res. 1060 (XI), UN GAOR, 11th Sess., UN Doc. A/RES/1060(XI) (1957).

6

“NO SECURITY WITHOUT LAW”

Prospects for implementing a rights-based approach in Palestinian–Israeli security negotiations

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The Palestinian–Israeli conflict is, famously, a dispute about land, but it is no less fundamentally a dispute about law – about whether international legal norms are relevant and responsive to the issues in contention, about what the norms mean, what they require, and what they allow. These questions have proven particularly difficult to resolve with respect to issues of security, due in part to the challenge of defining “security” either as a topic for negotiation or as a bundle of legal rights and obligations.

Indeed, the long-standing debate about the interpretation and implications of United Nations Security Council Resolution 242, which has served as a primary point of reference for Middle East peace efforts for the last four decades,¹ captures poignantly the challenge of situating security in relation to legal rights. In 242, the Security Council not only emphasized “the inadmissibility of the acquisition of territory by war” and the consequent necessity of “withdrawal of Israeli armed forces from territories occupied [during the 1967 war],” but also affirmed the need “to work for a just and lasting peace in which every State in the area can live in security” and the “right [of those States] to live in peace within secure and recognized boundaries free from acts or threats of force.”² The Council’s formulation raises vexing questions: Is “security” a right in itself, to be balanced against other legal norms such as the prohibition of acquiring territory by force, or is it better understood as one consequence of the faithful application of legal norms? If security is a right, who possesses it? Is it confined to states? And can it be achieved only through statehood?

In this chapter, I examine how Palestinians and Israelis undertook to address these questions during the Oslo peace process, analyzing the systems they established to contain and respond to security threats during the interim period and the competing concepts they articulated during permanent status negotiations for structuring their security relations in the future. In both contexts, I focus in particular on the

challenges faced by the parties in using international law as a framework for resolving the issues in dispute. Based on this analysis, I then turn to assessing the opportunities and challenges of implementing a rights-based approach as a framework for future efforts by Palestinians and Israelis to reconcile peace, justice, and security.

Looking back: Palestinian–Israeli security discourse during the Oslo process

Since the abrupt conclusion of the Oslo peace process in 2001, the security situation in the Middle East has changed in dramatic ways as a result of both the Iraq and Lebanon wars and the breakdown in Palestinian–Israeli security relations during the second *intifada*. Even so, the parties' security arrangements and discourse during the Oslo years offer useful insights regarding their respective security interests, concerns, and concepts – and the roles that international legal rights and obligations play in them. This section examines the parties' approaches to security issues during the interim period and permanent status negotiations.

Security framework for the interim period

The Declaration of Principles (DOP) and subsequent Palestinian–Israeli agreements (collectively, the “Oslo Accords”) created an elaborate framework of transitional security arrangements for the “interim period” pending conclusion of a “permanent status” agreement.³ Subject to the complex jurisdictional scheme defined by the agreements,⁴ the Palestinian Authority would establish a police force charged both with “guarantee[ing] public order and internal security for the Palestinians of the West Bank and the Gaza Strip”⁵ and with taking “all measures necessary in order to prevent acts of terrorism, crime and hostilities”⁶ directed against Israel and Israelis. At the same time, Israel would “continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.”⁷ Israel also would have the reciprocal obligation of taking all measures necessary “to prevent acts of terrorism, crime and hostilities”⁸ directed against the Palestinian Authority and Palestinians.

The Oslo Accords did little to reveal how these commitments related to the international legal status of the occupied Palestinian territory or to the parties' other rights and obligations under international law.⁹ Although the Accords did provide that the parties' negotiations “will lead to the implementation of Security Council Resolutions 242 and 338”¹⁰ (or, alternatively, “to a permanent settlement *based on* Security Council Resolutions 242 and 338”¹¹ – a distinction reflecting the parties' inability to resolve the long-standing debate about whether the obligations in Resolutions 242 and 338 are self-executing or require further negotiation), they offered only limited guidance about the bearing of international norms on the security arrangements they had established for the interim period. The Accords did oblige “the security and public order personnel of both sides [to] exercise

their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms of human rights and the rule of law and [to] be guided by the need to protect the public, respect human dignity and avoid harassment.”¹² In addition, they required the parties to implement their defined security obligations “while respecting and preserving without obstacles, normal and smooth movement of people, vehicles, and goods within the West Bank, and between the West Bank and the Gaza Strip,”¹³ and without prejudice to “the Palestinian development programs and projects for reconstruction and development of the West Bank and the Gaza Strip, as well as the moral and physical dignity of the Palestinian people in the West Bank and the Gaza Strip.”¹⁴

The effectiveness of these guarantees was constrained, however, by several factors. First, notwithstanding the expansive terms in which they are expressed,¹⁵ their scope was narrowed in operation by other clauses of the agreements. The Accords assign Israel “*overriding* responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism.”¹⁶ In addition, the clause guaranteeing free movement and the non-obstruction of development programs ends with the caveat that “Nothing in this Article shall derogate from Israel’s security powers and responsibilities in accordance with this Agreement.”¹⁷ Israeli officials cited both of these provisions in support of the proposition that Israel’s right to respond to security threats (as perceived by Israel) overrode guarantees offered in other parts of the agreement. As Uri Savir recounts in his memoir of the peace process, “Above all . . . Israel wanted it understood that the free movement of Palestinian goods and citizens be subject to security considerations. In short, the Palestinians would be wholly dependent on Israel’s economy and security – or, to be more precise, on Israel’s *sense* of security.”¹⁸

Although Palestinian officials and civil society organizations objected to the Israelis’ interpretation of the agreements, a second feature of the Accords sharply diminished the effectiveness of their challenges. The DOP provides that “[d]isputes arising out of the application or interpretation of [the DOP] or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations,”¹⁹ permitting recourse to conciliation or arbitration only “upon the agreement of both parties.”²⁰ This dispute resolution framework is replicated in the system of committees created to facilitate cooperation in each of the functional areas addressed by the Accords, including the *Protocol Concerning Redeployment and Security Arrangements* annexed to the Interim Agreement. It provides that the Joint Security Coordination and Cooperation Committee (the “JSC”), which is charged, *inter alia*, with “deal[ing] with alleged violations, as well as differences relating to the application or implementation of the security arrangements set out in this Agreement,”²¹ is to reach decisions “by agreement between the two sides.”²² Accordingly, Palestinian claims that Israeli conduct violated the terms of the Accords, or the international norms they incorporated by reference, could be resolved only with Israel’s agreement.

This veto power was technically mutual, as the Palestinian side also possessed the right to withhold its consent to Israeli interpretations of the Accords. On a few

occasions, Palestinian officials did demur in the face of Israeli security demands (such as the collection of weapons and the arrest of suspected militants),²³ and they downgraded levels of security cooperation during political stalemates.²⁴

The Palestinians' capacity to advance effective challenges to Israeli violations of individual or collective rights through the bilateral dispute resolution structures defined in the Accords was limited, however, by their narrow latitude for self-help or retaliatory action.²⁵ The balance of power on the ground, after all, tilted sharply in Israel's favour: Israeli forces continued to exercise security control over the vast majority of West Bank territory as well as much of the Gaza Strip, including the transportation arteries between Palestinian population centres and all movement between the West Bank and Gaza Strip, into Israel, and across international crossing points. In addition, the incremental negotiation and implementation of transfers to the Palestinians of territorial and functional jurisdiction tended to place Palestinian officials in the position of supplicants to their Israeli counterparts, giving Israel the power to punish perceived Palestinian violations of the agreements by withholding transfers of funds or by declining to proceed with the next stage of redeployment called for in the agreements.²⁶ Within the framework defined by the agreements, Palestinians possessed no similar levers of influence over Israeli conduct: if they were unable to persuade their Israeli counterparts of their position on a given issue, their only non-violent means of recourse was either to withhold an agreement or to seek third-party assistance in pressuring Israel. The former tactic was employed with some frequency, but little success, by Yasser Arafat at critical junctures in the Oslo process.²⁷

The latter tactic also proved ineffective, particularly in view of the insistence of the United States, the primary broker of the Accords, that disputes between the parties be resolved bilaterally through negotiation, rather than through recourse to international institutions or processes. On that rationale, the United States blocked a number of attempts to address claimed violations of Palestinian rights in international forums, employing its veto to prevent Security Council action to censure Israel for violations of international law²⁸ and using its political influence to counteract efforts to convene the High Contracting Parties to the Fourth Geneva Convention to discuss enforcement of the Convention in the occupied Palestinian territory.²⁹

The cumulative effect of these factors was to limit the availability of avenues for redressing alleged violations of Palestinian rights under international law and to shift the focus of the parties' discourse regarding security away from them. Even though the Oslo Accords imposed reciprocal obligations on the parties to prevent "acts of terrorism, crime, and hostilities" against each other and their respective constituents and to facilitate free movement of persons and goods, the parties' security agenda came increasingly to focus on threats of violence against Israel and Israelis, Palestinian security concerns often treated as political questions best addressed through resolution of the parties' underlying dispute.³⁰ To be sure, that shift in focus is attributable to a certain extent to strategic choices made by the Palestinian leadership, who appear to have regarded national liberation – ending Israel's military occupation

and establishing a Palestinian state in the West Bank and Gaza Strip – as the surest means of securing Palestinian individual and collective rights. It is also, however, a consequence of the structure of the cooperation and coordination mechanisms defined in the Oslo Accords, whose reliance on negotiation as the exclusive means of resolving disputes both marginalized discussion of legal rights and remedies and permitted the more powerful party – Israel – to define the agenda.

Indeed, the arrangements that Palestinians and Israelis established to govern their relations during the interim period demonstrate the risks involved in defining security arrangements within an exclusively bilateral framework, without reference to international legal rights and obligations. For Palestinians, the Oslo framework not only offered few avenues for redressing violations of their individual and collective rights, but also seriously eroded confidence in the effectiveness and legitimacy of both the broader peace process and their own national leadership. Although the arrangements secured one of Israel's core objectives – maximizing its discretion in the security arena – that broad discretion arguably served to erode the durability of the arrangements because Palestinians regarded their exercise as arbitrary and unresponsive to their own security needs. In addition, severing the Oslo agreements from the broader framework of international law hindered the resolution of disputes regarding interpretation of the agreements – provisions of which were deliberately vague as a result of the parties' inability to resolve differences during their negotiations.³¹ Like parties to a contract obliged to implement their obligations without the benefit of a commercial code, the parties lacked recourse to a framework for resolving interpretive disputes or for filling in gaps in the agreements, offering no means of addressing the allegations of bad faith by each side and further diminishing mutual confidence. Indeed, by the time the parties commenced permanent status negotiations in 1999, the reservoir of trust between them was near depletion, exacerbating the difficulties they faced in devising a mutually acceptable permanent status agreement. It is to those negotiations that I turn next.

Security issues in permanent status negotiations

Security figured prominently in permanent status negotiations. The DOP explicitly listed "security arrangements" among the core issues on the permanent status agenda;³² and, over the course of 15 months during which negotiations were conducted, a broad range of issues came to be addressed under that heading. These issues included long-term strategic arrangements, such as whether Israel would be permitted to establish or maintain early warning stations in the West Bank, to deploy its military forces in Palestinian territory during national emergencies, to use Palestinian airspace for military training and operational manoeuvres, and to deploy a small tripwire or anti-infiltration force in the Jordan Valley and to pre-position military equipment there. The parties also discussed long-term limitations on Palestinian military capacity, including the weapons Palestine could procure, the structure and composition of its military and security forces, and its capacity to enter

into bilateral or multilateral military or security alliances involving states other than Israel. In addition, the parties undertook to establish ongoing cooperative mechanisms for preventing and responding to low-level violence and for addressing the security dimensions of managing aviation, the electromagnetic sphere, border crossings, and Jerusalem. As a means of guaranteeing these arrangements and facilitating transitional arrangements, the parties also discussed potential roles for international forces in the sub-region. Outside of negotiations regarding security arrangements, moreover, security issues were raised by one or both of the parties as a key component of virtually all of the other issues on the table – with respect to the location of borders, the disposition of Israeli settlements, the division of sovereignty and control over Jerusalem, the fate of Palestinian refugees, the allocation of water resources, and the framework for economic relations between Israel and Palestine.

Both of the parties acknowledged the centrality of security to the new relationship they were negotiating: Israel's opening presentation during the first round of permanent status talks in November 1999 focused on security concerns, describing security arrangements as "one of the most fundamental issues to be negotiated;"³³ similarly, in the Palestinians' opening presentation, they "agree[d] that security is an essential component of peace."³⁴ Despite this shared recognition of the importance of security, and its pervasiveness on the permanent status negotiating agenda, the parties entered the talks with fundamentally different conceptions of how to promote security – and of its relationship to their respective rights and obligations under international law. In this section, I sketch the parties' competing security concepts, examining how their differences shaped their positions in negotiations over security arrangements.

Israeli security concept

In a recent essay on Israeli negotiating culture, Aharon Klieman suggests that a dichotomy exists between Israel's "diplomatic subculture" and its "security subculture," observing that the latter "is by far the more influential cultural subset shaping Israel's negotiating stance."³⁵ He attributes this influence to a number of factors, "the most important of which is the unrelieved sense of existential threat to the state."³⁶ That sense of threat, Klieman submits, informs the "first principles" of Israel's security subculture, which include: "an assumed anarchic Hobbesian international system; an abiding suspicion concerning the willingness of the international community and of the Arab-Islamic world to grant the Jewish state and the Jewish people full acceptance; [and] a belief in the absolute necessity for preserving a self-help and self-defense capacity against all threats based on deterrent military power, and the will to use that power when and where necessary."

Israeli officials made frequent reference to these principles during permanent status negotiations. They expressed scepticism about the capacity of a peace agreement with the Palestinians to eliminate the security risks and threats faced by Israel, stating in their opening presentation in November 1999:

We of course hope that the day will soon come when a comprehensive regional peace is reached. But even then, security concerns will not vanish. Risks will remain prevalent in a region that has been characterized by instability and upheaval. By way of example, prior to the Iranian Revolution in 1979, our relationship with Iran was on a firm and friendly footing, grounded in strong diplomatic and commercial ties. With the overthrow of the Shah, the nature of this relationship was reversed overnight. The geopolitical equation was abruptly altered . . . We cannot ignore the existence of risks and the possibility that these risks may materialize into real threats.³⁷

In sum, while “recognizing the contribution of peace to security,” Israeli negotiators emphasized that “peace in itself cannot be a substitute for security.”³⁸

They also expressed scepticism about the capacity of international institutions and processes to obviate these threats, balking at Palestinian proposals to substitute international forces in the contexts where Israel sought the right to deploy Israeli forces (such as in the Jordan Valley, at Palestine’s external border crossings, and in specified areas during emergency situations). As Gen. Shlomo Yanai told Mohammad Dahlan at the Camp David summit, “When it comes to our national security, we can’t trust anyone but ourselves.”³⁹

Israeli scepticism about the security benefits of peace and the prospect of reliable international protection animated what Yanai later described as the “heart core” of Israel’s national security concept: the need to maintain Israel’s independent self-defense capacity.⁴⁰ In their opening presentation on security, Israeli negotiators explained that they “view security as being comprised of two principal components. The first being independent security abilities and the second stemming from security cooperation. These components do not substitute [for] one another but rather complement each other to provide an appropriate security response.”⁴¹ Observing that “[f]rom a purely military and security point of view, the existing strategic situation provides [Israel] with an adequate defensive response in the face of these threats,” they emphasized that “any future agreement, including the Permanent Status Agreement, whilst changing this situation, *must not undermine our ability to respond to the eventuality of these threats.*”⁴² Thus, while a peace agreement could serve to fortify Israel’s security, it could not acceptably narrow Israel’s latitude for independent action to respond to perceived threats. Israelis reiterated this principle again and again during negotiation of discrete security arrangements: Israel would not rely on international forces to protect it in emergency situations – it had to be able, itself, to deploy in the West Bank; Israel would not rely on Palestinian air traffic controllers to identify potential threats presented by aircraft approaching Palestinian/Israeli skies – Israel had to maintain the authority to contact and, if necessary, to apprehend them; Israel would not rely on others to monitor the movement of persons and goods across the Palestinian border to ensure compliance with the agreement (e.g., limitations on the importation of weapons) – either Israel would monitor the border, or it would restrict movement across its own borders with Palestine.

Israel's focus on preserving an independent self-defense capacity informed two additional elements of its approach to security issues. First, Israeli negotiators tended to urge a linkage between Israel's self-defense capacity and its control over territory. From the outset, they emphasized the inadequacy of Israel's "strategic depth," which they defined as "the geographical and temporal limitations that restrict [Israel's] ability to absorb an attack and consolidate [its] position without dramatically compromising [its] national security."⁴³ Accordingly, their opening position provided for the establishment of Israeli sovereignty – or the maintenance of control – over substantial amounts of Palestinian territory: "an Eastern security area in the Jordan Valley under Israeli sovereignty"; "a security area on both sides of the border between Israel and the West Bank"; "security perimeters between Gaza and Israel," like those then in existence; a "security perimeter along the border between the Palestinian area and Egypt, under Israeli sovereignty"; "military locations under Israeli sovereignty"; "specific routes to the Eastern security area under Israeli control"; "free access to settlements"; and "special security arrangements regulating access by sea to and from the Gaza Port under Israeli sovereignty."⁴⁴ These demands, they argued, were supported by UN Security Council Resolution 242, which provides for the establishment for each state in the area of "secure and defensible borders" – a requirement, they added, that did not extend to a state of Palestine, which "was not mentioned in 242."⁴⁵

Although Israeli negotiators moderated some of these demands over the course of negotiations, the logic underlying them continued to animate Israeli claims throughout the talks. For example, at the parties' final negotiating round at Taba in January 2001, Israeli negotiators refused to rely on the Palestinians to ensure the security of roads between settlements they sought to annex and Israel's current border, instead seeking to annex large parcels of land around the roads to ensure what they characterized as "a reasonable amount of security and contiguity that is not an engineered contiguity, but a territorial contiguity."⁴⁶ (The irony of these remarks was not lost on the Israelis' Palestinian counterparts, who responded, "Let's remember these points when we talk about the Palestinian state!")⁴⁷ They also declined to view Israel's peace agreements with Egypt and Jordan, in which durable security arrangements were established without Israeli military presence in Arab lands, as a relevant precedent, arguing that those contexts involved merely a "border dispute," while Palestinian and Israelis "have a dispute . . . which covers all the aspects of life," adding, "We are so deeply integrated, each one in the life of the other – the depth and width of the conflict is completely different."⁴⁸

Second, Israeli negotiators tended to treat Palestinian defensive capacity as a security liability, rather than as a security asset. During the first round of negotiations, they expressed alarm when Palestinians stated that they hoped to secure "the ability to assure by our own means . . . our self-defense."⁴⁹ When discussions regarding limitations on Palestinian military capacity commenced in earnest in the fall and winter of 2000, moreover, Israeli negotiators sought to prohibit a "spectrum of activities . . . wherever it touches the security of Israel,"⁵⁰ demanding that the Palestinians refrain from acquiring not only offensive weapons (such as tanks,

military aircraft, and missiles), but also an array of defensive weapons (including air defense weapons systems, anti-tank weapons systems, and land and naval mines) that could be used against Israel in the event of a subsequent Israeli deployment of troops in Palestinian territory.⁵¹

In sum, the security concept articulated by Israelis during permanent status negotiations rested on maximizing and preserving Israel's latitude for action in the face of perceived security risks and threats. Commitments that would restrict Israel's discretion in the security context – the presence of international forces, constraints on Israel's capacity to deploy troops in the West Bank, time limits for transitional arrangements, and Palestinian acquisition of defensive weapons – were met with suspicion, and often rejected outright.

In view of the dominant theme of the Israelis' security concept – maintaining unfettered discretion to define and respond to military and security threats – it is perhaps unsurprising that Israeli negotiators tended to resist embedding the negotiations within a framework of international law. Although the Israeli negotiating team acquiesced, during an early negotiation session in December 1999, to Palestinian demands to discuss the international legal framework governing resolution of borders issues (and their security dimensions), they declined to recognize the applicability or relevance of most of the norms cited by the Palestinians. They challenged the applicability of the Fourth Geneva Convention to the occupied Palestinian territory, for example, submitting that "occupation presupposes the prior existence of a state and that 'nobody knows' the status of the West Bank prior to 1967"; and, while acknowledging that Israel's views on that issue placed it in the extreme minority of international opinion, they asserted, "No one can force Israel to adopt another interpretation."⁵² Similarly, they argued that the prohibition on acquiring territory by force was applicable only to a limited extent to the West Bank and Gaza Strip.⁵³ As the talks progressed, Israelis expressed willingness to accept the establishment of a sovereign state in the West Bank and Gaza Strip, but they argued that security arrangements based entirely on sovereign rights would be unresponsive to some of Israel's security needs. Instead, they sought Palestinian acceptance of significant derogations from Palestinian sovereignty in a number of spheres: limitations on Palestine's military capacity; the establishment of early warning stations and Israeli forces in specified locations in Palestinian territory; a right of access to Palestinian airspace for military operations and training; and the right to deploy armed forces in the West Bank in emergency situations. Thus, according to Israeli negotiators, international law provided an unsuitable framework for addressing security issues: the international norms cited by the Palestinians were either inapplicable, indeterminate, or unresponsive to Israeli needs.

Palestinian security concept

The Palestinians' approach to security issues in permanent status negotiations differed sharply from the Israelis'. The overriding component of the Palestinians' national security concept was Palestinian sovereign control over Palestinian territory – a

concept defined primarily in relation to the elimination of Israel's military presence in the West Bank and Gaza Strip. As they explained during their opening presentation on security in November 1999:

For us, existential security is inextricably bound up with the exercise of our sovereignty over territory that is sufficient in terms of overall area, integrity, and contiguity, utility and accessibility, and historical significance. To be frank, a situation in which we do not have full sovereign control over our borders with our neighbors and our access to the outside world, or in which our country is a patchwork of enclaves connected by underpasses and overpasses and gates, would be intolerable. To take only one aspect, we have suffered economic strangulation too often, and for too long, to allow our national survival to be held hostage again . . . Our people have an overriding need to be able to travel the length and breadth of our land without seeing armed Israelis or submitting to armed checkpoints. And they cannot abide by a settlement that leaves them vulnerable to harassment and violence by extremist elements within your society.⁵⁴

Accordingly, Palestinian negotiators rejected almost all Israeli demands involving the deployment of Israeli forces in Palestinian territory and airspace, acquiescing only to the maintenance or establishment of two or three Israeli early warning stations in the West Bank.

Overall, Palestinians were more sanguine about the likely effects of peace on the regional security environment than their Israeli counterparts. In their opening presentation, they expressed "every confidence that there will soon be a complete 'ring of peace' around Israel,"⁵⁵ observing, "[a]lready the ring of war is a thing of the past; whatever risks or over-the-horizon threats persist further afield. The tried and tested reality of peace between Israel and Jordan and Egypt, and of the related security provisions, demonstrates that Israeli gains in strategic depth are major ones and alter qualitatively the defensive calculations of the past."⁵⁶ Security, they argued, would arise from the justness of the terms of the peace agreement, not from arrangements that compromised the Palestinian state's independence or viability. As Mohammad Dahlan asserted at a negotiating round in Jerusalem in September 2000:

You [Israelis] are . . . seeking to continue your mandate over the Palestinians. I didn't detect that you want to move from the interim mentality to the permanent status mentality. Under your approach, you're offering a few dark corridors, which, if entered, will pull us deeper and deeper into darkness. I looked through your agreement with Egypt, which did not involve all this. The threat to Israel from Egypt at the time was from all Arab countries. The PLO and Israel are now working together. Our strategic thinking is that we move from the hostility stage to friendship. And we've really witnessed a change in 90% of the Palestinian people. I see it in the streets, in the business community, the people in the PA . . . We have confronted a certain segment

of the Palestinian society, and we were victorious. Hamas and a number of groups against the agreement have become paralyzed. Their position outside and inside is weakening day to day. We don't want to witness a rebirth – a new life – for them. Your suggestions are based on the past and weaken what we aspire to reach with you . . . Plus the peace agreement will produce a peaceful situation in the area if we reach a comprehensive, peaceful agreement with you. There will not be incentives for states like Iran to attack you. And if they attack you, they'll be attacking us.⁵⁷

Thus, according to the Palestinians, peace would obviate not only strategic threats from materializing, but also threats of low-level violence; on the other hand, they argued, Israeli proposals that impaired the territorial integrity of the Palestinian state or its sovereign powers would undermine efforts to achieve genuine peace. As the Palestinians declared in their opening presentation on security, “although we believe that every State in the region is indeed entitled to live in peace within secure and recognized borders, we also believe that an unjust border can never be secure.”⁵⁸

To the extent that Palestinians acknowledged that security threats might persist in peacetime, they advocated responding to them cooperatively, on the basis of sovereign equality. For example, in two sessions on security issues in September 2000, the parties debated whether Israel or Palestine would control the Palestinian electromagnetic sphere. In his opening presentation, Israeli negotiator Gilead Sher stated, “We’re not interested in any commercial use of the sphere. And whatever needs you may have in it, we shall do our best to accommodate – before signing the agreement.”⁵⁹ When Palestinian negotiator Mohammad Dahlan responded to Sher the next day, he expressed willingness to construct a cooperative framework for managing the electromagnetic sphere, but argued that Israeli control ran afoul of Palestinian rights: “Regarding the [electromagnetic sphere], you use a phrase which I don’t like – that you’ll take care of my commercial needs. I’m talking about my rights. Give me your security concerns, and let’s discuss it. The [electromagnetic] sphere . . . will be under our sovereignty and control . . . Let the technical experts of both sides deal with these issues in coordination.”⁶⁰ Palestinians took the same approach to addressing control over airspace: while recognizing that there would be a need for close coordination between Palestinian and Israeli air traffic controllers, they rejected the Israeli demand for overriding control over Palestinian airspace, arguing that it “is Palestinian by right, and we will accommodate Israeli needs, not the other way around.”⁶¹ Mohammad Dahlan explained the reasons for this position during one session at the Taba talks:

I understand that there are emergencies. I’m open to have coordination with you . . . If the overriding is yours, then I have nothing. I’m not going to leave anything to good faith. I’ll get you a list of the number of times planes coordinated with you were rejected for various reasons by your land control. For the permanent status, we have our airspace, our own traffic control, and

on that basis we're prepared to discuss how to deal with emergencies and other special situations with you. But we say no to overriding Israeli control.⁶²

As Dahlan's remarks indicate, the Palestinian team's adamant insistence on sovereign rights as the framework for future Palestinian–Israeli security relations was born of their unhappy experience with Israel's retention of broad security discretion during the Interim Period.

As part of their effort to persuade their Israeli counterparts to end Israel's military presence in Palestinian territory, however, Palestinian negotiators did express willingness to accept three related limitations on Palestinian sovereignty. First, they agreed to accept restrictions on the kinds of weapons a Palestinian state could possess, on the premise that Palestinian military and security forces' "main objective" would be "to defend the Palestinian state internally."⁶³ Second, they proposed that Palestine become a neutral nation, foreclosing not only Israeli deployment on Palestinian territory, but also deployment by Arab and other states. Third, they proposed assigning to international forces many of the roles that Israel sought to play itself, such as monitoring and verification, serving as a tripwire in the Jordan Valley, and protecting both states in the event of an emergency situation.

In addition to these constraints on their sovereignty, Palestinians urged the establishment of regional mechanisms to address strategic and low-level threats; as Saeb Ereikat suggested at a session in September 2000:

Egypt has annual manoeuvres with the Americans, as do the Jordanians. Those are the countries that border us. Let's see if we can create a system involving these two countries and us for the benefit of regional security. It can involve smuggling or imminent attacks. With this, we can alleviate ourselves of the strategic question – that we can't be allies against Arabs or be allies against you. That's as far as we can go. We are willing to say that our territory will be void of any international troops – aside from what's in the agreement – and our skies will be void of any international presence, aside from what's agreed.⁶⁴

Thus, although Palestinian negotiators accepted the premise that Palestine would be, as Saeb Ereikat put it, "a nation of limitations,"⁶⁵ their acceptance of these limitations arose from their effort to secure a single, overriding objective – the elimination of Israeli military presence in Palestinian territory.

In sum, the thing Palestinian negotiators sought most emphatically to avoid – Palestinian–Israeli security arrangements in which Israel retained unconstrained latitude of action – was precisely the thing Israeli negotiators sought to preserve. The parties' differences in security negotiations were not, for the most part, about the content of international law: the Israelis did not, for example, challenge the idea that Palestine as a sovereign state would have certain rights by default (such as the rights to control movement across its borders, to manage its electromagnetic sphere, and to defend itself). Instead, they argued that sovereign rights were of only limited use as a framework for defining the parties' future security relationship and that the

Palestinians should consent to limitations on the exercise of those rights in the interest of achieving a negotiated agreement. The Palestinians were asked, in other words, to give up attributes of sovereignty in exchange for statehood.

Looking forward: Opportunities and challenges of implementing a rights-based approach to Palestinian–Israeli security relations

What lessons can be learned from Palestinian–Israeli security discourse during the Oslo peace process? To what extent may international legal rights profitably be injected into the discussion? Looking forward, a rights-based approach to security must begin by disaggregating the concept of security – by identifying the array of rights and interests it implicates and giving careful consideration, in the context of international agreements, to how security is defined and to who defines it. In addition, a rights-based strategy must be built on an awareness of the limitations of international negotiations as a forum for discourse about legal rights and on a sober assessment of which rights are best achieved through a negotiated resolution of the Palestinian–Israeli conflict and which are more likely to be realized through more law-based processes. Each of these questions is explored further below.

Disaggregating security

Perhaps the primary challenge to addressing security within the framework of a rights-based approach is its conceptual elasticity. As a prominent scholar of international relations has observed, “The term ‘security’ is as ambiguous in content as in format . . . There is no one concept of security; ‘national security,’ international security,’ and ‘global security’ refer to different sets of issues and have their origins in different historical and philosophical contexts.”⁶⁶ The concept of security spans not only multiple disciplines, but also a range of ideas.⁶⁷ It is physical and psychological, embodying both a narrow conception of physical safety and a more subjective, intangible (but no less politically and economically consequential) freedom from fear – a *sense* of security. It is both individual and collective, finding expression not only in individual rights, such as the right to life and prohibitions of arbitrary and degrading treatment,⁶⁸ but also in collective rights, including national rights to territorial integrity and political independence⁶⁹ and other group rights such as the right to self-determination⁷⁰ and the prohibition of genocide.⁷¹ Further complicating matters, security interests may legitimately serve both to animate rights (such as the right of states to self-defense)⁷² and to impose limits on rights (offering governments a justification for the abridgment of individuals’ liberty interests⁷³ and of other states’ sovereign rights).⁷⁴ In sum, the concept of security is highly contingent, derived from the exercise of rights in some contexts and constraining their exercise in others.

Accordingly, any attempt to define security, as a topic for negotiation or as a bundle of legal rights and obligations, risks being either over-inclusive or under-inclusive. A definition that is too broad may cloud dispute resolution efforts by making it difficult to distinguish security interests from other kinds of interests and

to devise coherent responses to each. Conversely, a definition that is too narrow may fail to capture critical elements informing a nation's – or individual's – real and perceived security. Indeed, Palestinian–Israeli security discourse has tended to manifest *both* of these problems. Palestinians sometimes viewed Israeli security arguments with suspicion, as pretexts for pursuing other goals such as territorial aggrandizement;⁷⁵ and, conversely, they resented Israelis' unwillingness to recognize the ways in which Israeli measures such as settlement expansion⁷⁶ and movement restrictions⁷⁷ damaged the security environment. Israelis, on the other hand, complained that Palestinians underestimated the security threats facing Israel⁷⁸ and that they overstated the security threat presented by a continuing Israeli presence in Palestinian territory.

The point of highlighting these definitional disputes is not to suggest that a particular conception of security should prevail in all circumstances. The concept of security is necessarily, perhaps even inherently, variable and subjective. The point is to recognize that, because security is difficult to define objectively, it is particularly vulnerable to abuse as a rationale for limitations on other rights and interests. Effort, consequently, should be made to ensure that security discourse addresses the interests of all affected parties and that reasonable constraints are placed on the exercise of security discretion by one party where it affects the rights and interests of the other.

In a recent monograph, Hussein Agha and Ahmad Khalidi reflect thoughtfully on the first of these points, making the case that “Palestinian security fears, concerns, and aspirations must be treated on a par with those of all other sides of the conflict,” and that Palestinian–Israeli security arrangements should be attentive to the Palestinians' right to (and need for) self-defense.⁷⁹ Neither of these aims was realized during the parties' permanent status negotiations, during which Israeli security concerns predominated. Negotiators treated even Palestinian self-defense capacity as an Israeli issue: for example, when discussion turned to the kinds of arms and military forces that a Palestinian state was likely to need, it focused not on what Palestine would need to protect its citizens against foreign or domestic threats but, instead, on what it would need to ensure that Palestinian territory was not used to launch attacks against Israeli targets. Although it is understandable, in negotiations, that Israelis would seek – and Palestinians would offer – assurances that Palestinian military force would not be (or could not be) directed against Israel, it is crucial that the parties' future security discussions give the same attention to Palestinian security needs as to Israeli needs, as well as to the relationship between the two. The fact that Palestinian and Israeli security needs differ from each other in some respects – or, at least, may be addressed in different ways – does not obviate the necessity of giving both equal priority at the negotiating table.

What is even more critical than the question of how security is defined is the question of who gets to define it. As discussed in the first part of this essay, the “overriding” security control assigned by the Oslo Accords to Israel gave it broad latitude to define and respond to security threats as Israeli officials saw fit, leaving the Palestinians few avenues for challenging either the definition or the response.

In light of this experience, Palestinian negotiators were understandably reluctant during permanent status talks to give Israel overriding authority over cooperative security mechanisms. When that was unavoidable – for example in contexts where Israeli sovereign rights were directly affected – the Palestinians sought to narrow Israeli discretion through careful definition of terms.⁸⁰ Both of these strategies – limiting the occasions in which one side exercises security discretion over the other and defining precise parameters for its exercise when such discretion is unavoidable – should be employed when Palestinians and Israelis again undertake to devise security arrangements. To be sure, these kinds of discussions are difficult to have, as they imply a lack of confidence in the other side's good faith. But the Oslo peace process makes clear that relying on good faith implementation of agreements is a foolhardy strategy where security arrangements are involved, as operational decisions during implementation are apt to be taken through opaque processes (security organizations, after all, are not famous for transparency) and to be based on politicized, zero-sum analysis.

Palestinian strategic dilemmas

The definitional challenges described above present the Palestinians with several strategic dilemmas.

National rights vs. human rights. The concessions made by the Palestinian leadership in the Oslo Accords reflect their conclusion that Palestinian rights were best served by achieving Palestinian statehood through negotiation with Israel. That calculation was not without basis: despite the increasing lip-service given to the concept of human security, the international system continues to serve primarily the interests of states,⁸¹ and few avenues exist for remedying human rights violations independent of the structures of the nation state. Even so, as the plight of Palestinians in the occupied Palestinian territory continues to worsen, it may be necessary to revisit whether the pursuit of national rights remains the best vehicle for safeguarding Palestinian human rights.⁸² That analysis will turn both on the likelihood that Palestinian statehood is eventually achieved and on the shape the state ultimately takes, and I will not attempt here to prognosticate regarding either factor. The Oslo experience makes clear, however, that statehood will be perceived to have little value if it is built on arrangements that leave Palestinians' personal security in Israel's hands (such as continuing Israeli control over international crossings, East Jerusalem, or other West Bank areas; the lack of a secure territorial link between the West Bank and Gaza Strip; etc.). Moreover, the establishment of even a genuinely viable and independent Palestinian state is not sure to safeguard – and may even endanger – the security of Palestinian communities in Israel and in the diaspora.⁸³ The government of a future Palestinian state consequently should make it a diplomatic priority to ensure that these communities, which too often have been ignored in the past, receive the full protection of the states where they reside. Indeed, it is unnecessary to wait for statehood before beginning to address these issues: the PLO, for example, may begin now to build the capacity of its diplomatic missions to

represent the interests of Palestinians residing abroad, particularly in countries where they lack citizenship rights.

Negotiation vs. law-based processes. Strategies for advancing Palestinian rights – national and human – must also be informed by an understanding of how law functions in international negotiations and of its limitations in that context. As I have described elsewhere, legal rules may contribute to the fairness and efficiency of a bargaining process in a number of different ways: by defining what can lawfully be negotiated – i.e., standards of procedural and substantive fairness that the parties may not lawfully contravene even if they would freely choose to do so; by helping parties to anticipate the remedy that is likely to be imposed by law if negotiations fail, informing their negotiating positions and walk-away points; by offering the parties objective standards for choosing among competing positions; and by providing a predictable framework for later filling in gaps in the agreement that the parties intentionally or unintentionally leave open during negotiations.⁸⁴ When bargaining occurs at the international level, however, the capacity of legal norms to exercise some of these functions is impaired by the relative lack of development of international law and the limited availability of avenues for its enforcement.⁸⁵ If legal rules have unclear implications or if their enforcement is a remote prospect, they will not effectively constrain the parties' positions and bargaining behavior or provide a predictable basis for filling in gaps in an agreement during implementation, and their usefulness as objective standards may simply become another point of dispute.

That said, I am by no means arguing that international law has no relevance to international negotiations. To the contrary, I believe that inattention to international law contributed much to the demise of the Oslo process. Rather, I am arguing that efforts to devise a rights-based approach to resolving the Palestinian–Israeli conflict must include a strategy for bolstering the effectiveness and influence of international law in future negotiations. That strategy, I submit, should have two components. The first is, perhaps, obvious. International legal norms are likely to have more influence over negotiations if they are determinate and if there are cognizable costs attached to non-compliance with them. Accordingly, efforts to clarify their content and implications (through opinions of national and international tribunals, multilateral conventions, resolutions of the UN Security Council and General Assembly, etc.) and to penalize non-compliance with them (through censure, sanctions, etc.) should not be suspended if and when negotiations resume. Indeed, contrary to the United States' position during the Oslo process, these kinds of efforts arguably facilitate, rather than undermine, bilateral negotiations by increasing the costs to one or both of the parties of failing to reach a deal.

A rights-based approach, however, must be built not only on pressure, but also on persuasion. Although it may be counter-intuitive to call something a right if one must persuade another to honour it, the absence of robust enforcement mechanisms at the international level and the primacy of consent in negotiations processes make persuasion critical to the success of efforts to ensure that negotiated outcomes comport with international norms. Accordingly, negotiating parties should move beyond simply reciting norms – “X is my sovereign right” – to undertaking to

explain their legitimacy and justness, as well as the efficacy of compliance with them.⁸⁶ Indeed, persuasion assumes even greater importance when the topic of negotiation is security, as states are unlikely to subordinate what they perceive to be their security needs to the asserted rights of others.

That kind of persuasive effort may take many forms, not just legal argumentation, and it need not await the resumption of Palestinian–Israeli negotiations. Changes in the regional security context could have a significant effect on Israel’s strategic calculations, which, in turn, could strengthen Palestinian arguments against limitations on their new state’s sovereign powers. In this regard, Agha and Khalidi suggest, “As many of Israel’s security demands of the Palestinian side are regionally oriented, moves toward resolving the regional security issues preoccupying it can be viewed as benefiting the Palestinians.”⁸⁷ The Princeton Project on National Security, a recent bipartisan American initiative “to develop a sustainable and effective national security strategy for the United States,” reaches a similar conclusion, recommending in its final report the establishment of a “Conference for Security and Cooperation in the Middle East . . . modeled after the Organization for Security and Cooperation in Europe (OSCE)” or of a “Gulf Security Council” that would “provide Gulf States with a forum to hold Iran to its comments on proliferation . . . and give Iran and other states an opportunity to provide positive, rather than coercive, leadership in the region.”⁸⁸ The Princeton Project suggests that these initiatives, along with increased NATO engagement with both Israel and the Palestinians, could help not only to “generate additional security across the region,” but also to create incentives for both parties to embrace a peace settlement.⁸⁹

Indeed, Palestinians may have more success securing respect for their sovereign rights if they pursue them within the framework of regional collective security mechanisms than they would through an exclusively bilateral process. Reflecting on the experience of Europe after World War II, British diplomat Robert Cooper has suggested, “A lasting solution to the Israel/Palestine problem will require a transformation of Israel and also of the Palestinian identity. To insist on preserving sovereignty, to refuse to adapt our identity in some degree to accommodate others, is to insist on preserving the problem.”⁹⁰ Cooper’s prescription is not to abandon sovereignty in favour of Israeli or American hegemony but, instead, to enlarge the context – to develop a web of complex political, economic, and security relationships, bilaterally and regionally, by virtue of which security comes to depend on neither sovereignty nor hegemony.⁹¹ As he observes, “The reason why Britain, France, and Germany, in spite of a thousand years of antagonism, no longer consider fighting each other comes from a redefinition of Us . . . Before we can begin to construct a foreign policy, we have to ask ourselves not only what sort of world we want to live in, but also who are We? The broader our answer, the more likely We will be able to live in peace.”⁹² Although that kind of redefinition seems remote from the current reality in the Middle East – a reality scarred by exclusivist rhetoric, sectarian violence, and “separation” barriers – Palestinians would do well to promote it. For so long as they remain stateless and dispersed, they are the party most likely to bear the burden of continuing regional insecurity.

Conclusion

In some respects, the debate about rights and security in the Middle East has changed little since the UN Security Council adopted Resolution 242 four decades ago. To be sure, some of the participants are different – Egypt and Jordan have reached uneasy but enduring accommodations with Israel, while the right of Palestinians to represent themselves at the negotiating table is now universally recognized (though their right to decide *who* will represent them is not). But the issues presented to the Council in 1967 – the relationship between security, sovereignty, and territory and the roles of international law and the international community in reconciling them – have remained a sore point of contention in the years since. During the Oslo process, as described in the first part of this essay, Israelis continued to define security in relation to their control over territory and their latitude to respond independently to perceived threats when and how they saw fit. The Palestinians, in turn, sought above all to establish their place among the States in the region – to achieve security through sovereignty. What made these two visions so difficult to reconcile was not only the parties' mutual mistrust, which grew more pronounced as the Oslo process wore on, but also the elasticity of the concept of security. Having endured the consequences of Israel's "overriding security responsibility" during the Interim Period, the Palestinians were unwilling to see their exercise of sovereign rights constrained by the vagaries of Israeli security perceptions, rejecting proposals that would give Israel continued discretion in regulating the lives and territory of Palestinians. The Israelis, conversely, found little security in Palestinian assurances that a just peace would prevent further conflict – and that, if it did not, the international community would.

The parties' failure to overcome these differences during their last attempt at genuine peace talks does not suggest that they are irreconcilable. What it suggests, instead, is that they are resistant to resolution through bilateral negotiations, without reference either to the regional security context or to international law. Although the United States' recent military adventurism has exacerbated regional insecurity, the increasingly worrisome consequences of its intervention may provide some impetus for the development of more robust and coherent security institutions in the Middle East. Situating Palestinian–Israeli security relations within a sound framework for regional security may well help the parties to overcome the zero-sum-game mentality that has made reaching an accommodation so difficult in the past. It also may help Palestinians to demonstrate the efficacy of a relationship with Israel built upon sovereign rights, equality, and cooperation, rather than upon Israeli territorial acquisition and military hegemony. As Israel's High Court of Justice declared in an "epilogue" to its landmark decision regarding the route of the West Bank wall, "Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. *There is no security without law.*"⁹³ The Palestinians could not have said it better themselves.

Notes

- 1 See generally D. Ross, "UNSC 242 and Arab-Israeli Peacemaking" in *UN Security Council Resolution 242: The Building Block of Peacemaking* (Washington, D.C.: Washington Institute for Near East Policy, 1993) 61.
- 2 *The situation in the Middle East*, SC Res. 242, UN SCOR, 1967, UN Doc. S/RES/242 (1967) at preamble, para. 1.
- 3 In 1993, Palestinians and Israelis agreed to establish interim self-government arrangements for the Palestinian population in the West Bank and Gaza Strip and to commence "negotiations on the permanent status" of the Palestinian territories following a transitional period of five years. *Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestine Liberation Organization*, art. 1 (September 13, 1993) [hereinafter DOP] in M. C. Bassiouni, ed., *Documents on the Arab-Israeli Conflict: The Palestinians and the Israeli-Palestinian Peace Process*, vol. 2 (Ardsey, N.Y.: Transnational Publishers, 2005) 890 [hereinafter *Documents on the Arab-Israeli Conflict*].
- 4 See O. Dajani, "Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period" (1997) 26 *Denv. J. Int'l L. & Pol'y* 27 at 61–9.
- 5 DOP, art. 8, *supra* note 3 at 891.
- 6 *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, *Isr.-PLO*, art. 15 (September 28, 1995) [hereinafter Interim Agreement], in *Documents on the Arab-Israeli Conflict*, *supra* note 3, 975 at 983.
- 7 DOP, art. 8, *supra* note 3 at 891.
- 8 Interim Agreement, art. 15, *supra* note 6 at 983.
- 9 See C. Bell, *Human Rights and Peace Agreements* (Oxford: Oxford University Press, 2000) at 312; Dajani, *supra* note 4 at 28.
- 10 DOP, art. 1, *supra* note 3.
- 11 *Ibid.*
- 12 Interim Agreement, annex 1, art. 11, para. 1, *supra* note 6.
- 13 *Ibid.* annex 1, art. 1, para. 2.
- 14 *Ibid.* annex 1, art. 1 para. 3.
- 15 Human Rights Watch complains that the terms were too expansive to be enforceable, suggesting that as a result of "the lack of explicit, detailed human rights guarantees in the Oslo agreements," Israel and the PA "downplayed IHL and human rights commitments in their conduct on the ground." Human Rights Watch, *The 'Roadmap': Repeating Oslo's Human Rights Mistakes* (Washington, D.C.: Human Rights Watch, n.d.), online: HRW < <http://www.hrw.org/backgrounder/mena/israelpa050603.htm> >.
- 16 Interim Agreement, annex 1, art. 13, para. 2(a), *supra* note 6; see Dennis Ross, *The Missing Peace: The Inside Story of the Fight for Middle East Peace* (New York: Farrar, Straus and Giroux, 2004) (describing negotiations over this phrase).
- 17 Interim Agreement, annex 1, art. 1, para. 7, *supra* note 6.
- 18 U. Savir, *The Process: 1,100 Days that Changed the Middle East* (New York: Vintage International, 1998) at 100.
- 19 DOP, art. 15, para.1, *supra* note 3.
- 20 *Ibid.* art. 15, para. 2.
- 21 Interim Agreement, art. 3, para. 1(b)(5), *supra* note 6.
- 22 *Ibid.* art. 3, para. 1(c).
- 23 Ross, *supra* note 16 at 422.
- 24 S. Santoro, "We are the peace process: Oslo implementation and the Israeli-Palestinian Joint Committees" (2005) [unpublished dissertation, on file with author] at 190.
- 25 An additional factor that limited the Palestinians' ability to challenge Israeli interpretations of the agreements was the non-functioning of the Joint Liaison Committee (JLC) in the years following Benjamin Netanyahu's election as Prime Minister. The JLC had been conceived as a high-level forum for resolving disputes over non-technical issues, particularly those with political implications. After Netanyahu's election, however, the JLC was convened only rarely and ceremonially. See Santoro, *ibid.* at 163.

- 26 See Lamis Andoni, "Redefining Oslo: Negotiating the Hebron Accord" (1997) 26 J. Palestine Stud. 17 at 26.
- 27 See Savir, *supra* note 18 at 104.
- 28 For example, the Clinton Administration declined to allow censure of settlement activity in the Security Council, vetoing two resolutions that called on Israel to halt construction of the settlement of Har Homa near Jerusalem. See *Security Council Again Fails to Adopt Resolution on Israeli Settlement*, UN SCOR Press Release, UN Doc. SC/6345 (1997). The U.S. ambassador to the United Nations, Bill Richardson, explained the U.S. position during discussion of a similar resolution in the General Assembly, stating, "We must take great care to respond to developments in a constructive way that will bolster the negotiating process, not limit prospects for the successful conclusion of permanent status talks. We have never believed, despite the useful role the United Nations can play and has played in working for Middle East peace, that it is an appropriate forum for addressing the issues now under negotiation between the parties." UN GAOR, 51st Sess., 93rd mtg., UN Doc. A/51/PV.93 (1997).
- 29 Associated Press, "Meeting on West Bank Settlements Begins" *Atlanta Journal-Constitution* (July 15, 1999) A3. According to Allegra Pacheco, the PA, under American pressure, consented to the deferral of the High Contracting Parties' meeting "as a goodwill gesture to Israel's new government." A. Pacheco, "Flouting Convention: The Oslo Agreements" in R. Carey, ed., *The New Intifada: Resisting Israel's Apartheid* (New York: Verso, 2001) 181 at 201.
- 30 Three Palestinian security issues that tended to be treated as political questions were: (1) the scope of Palestinians' right to free movement of persons and goods within (and between) the West Bank and Gaza Strip and across international borders; (2) the scope of Israel's obligation to release Palestinian political prisoners held by Israel; and (3) the consequences of continuing Israeli settlement activity and home demolitions, which, according to Palestinian officials, had an adverse effect on the security environment. See Savir, *supra* note 18 at 172. The prevailing attitude was captured in a speech by President Clinton in the Gaza Strip on December 14, 1998. He declared, "The Palestinians must recognize Israel's right to existence, the right of its people to live in safety today, tomorrow, and forever. Israel must recognize the right of the Palestinians to aspire to live in freedom today, tomorrow, and forever." C. Enderlin, *Shattered Dreams: The Failure of the Peace Process in the Middle East, 1995–2002*, trans. by S. Fairfield (New York: Other Press, 2003) at 99–100 (emphasis added).
- 31 See generally A. Klieman, *Constructive Ambiguity in Middle East Peace-Making* (Tel Aviv: Tami Steinmetz Center for Peace Research, 1999) at 61–5.
- 32 DOP, art. 5, *supra* note 3.
- 33 Israeli Delegation to Permanent Status Negotiations, "Israeli Security Concerns" (Presentation at Palestinian–Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem, 22 November 1999) (on file with PLO Negotiations Affairs Dept.).
- 34 General Abdel Razzaq el-Yahya, Chairman of Palestinian Borders and Security Committee, "The Palestinian Vision for Peace and Security" (Presentation at the Palestinian–Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem, November 29, 1999) (on file with PLO Negotiations Affairs Dept.).
- 35 A. Klieman, "Israeli Negotiating Culture" in Tamara Cofman Wittes, ed. *How Israelis and Palestinians Negotiate: A Cross-Cultural Analysis of the Oslo Peace Process* (Washington, D.C.: United States Institute of Peace, 2005) 81 at 87.
- 36 *Ibid.* at 88.
- 37 Israeli Delegation to Permanent Status Negotiations, "Israeli Security Concerns," *supra* note 33.
- 38 *Ibid.*
- 39 Enderlin, *supra* note 30 at 246.
- 40 Minutes, transcribed by PLO Negotiations Support Unit, "Palestinian–Israeli Permanent Status Negotiations" (Hilton Taba Hotel, Taba, Egypt, January 23, 2001) (on file with PLO Negotiations Affairs Dept.).

- 41 Israeli Delegation to Permanent Status Negotiations, "Israeli Security Concerns" (Presentation at Palestinian-Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem, November 22, 1999) (on file with PLO Negotiations Affairs Dept.).
- 42 *Ibid.* (emphasis added).
- 43 *Ibid.*
- 44 PLO Negotiations Affairs Dept. Legal Unit, *Report on Permanent Status Negotiations: Special Session on Borders Issues*, December 21, 1999 (Ramallah, 1999) (on file with PLO Negotiations Affairs Dept.) (emphasis added).
- 45 *Ibid.*
- 46 Minutes, transcribed by PLO Negotiations Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (Hilton Taba Hotel, Taba, Egypt, January 23, 2001) (on file with PLO Negotiations Affairs Dept.).
- 47 *Ibid.*
- 48 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (King David Hotel, Jerusalem, September 18, 2000) (on file with PLO Negotiation Affairs Dept.).
- 49 General Abdel Razzaq el-Yahya, Chairman of Palestinian Borders and Security Committee, "The Palestinian Vision for Peace and Security" (Presentation at the Palestinian-Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem, November 29, 1999) (on file with PLO Negotiations Affairs Dept.).
- 50 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (King David Hotel, Jerusalem, September 18, 2000) (on file with PLO Negotiation Affairs Dept.).
- 51 Minutes, transcribed by PLO Negotiations Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (Hilton Taba Hotel, Taba, Egypt, January 26, 2001) (on file with PLO Negotiations Affairs Dept.).
- 52 *Report on Permanent Status Negotiations*, *supra* note 44.
- 53 *Ibid.*
- 54 General Abdel Razzaq el-Yahya, Chairman of Palestinian Borders and Security Committee, "The Palestinian Vision for Peace and Security" (Presentation at the Palestinian-Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem, November 29, 1999) (on file with PLO Negotiations Affairs Dept.).
- 55 *Ibid.*
- 56 *Ibid.*
- 57 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (King David Hotel, Jerusalem, September 18, 2000) (on file with PLO Negotiation Affairs Dept.).
- 58 General Abdel Razzaq el-Yahya, Chairman of Palestinian Borders and Security Committee, "The Palestinian Vision for Peace and Security" (Presentation at the Palestinian-Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem, 29 November 1999) (on file with PLO Negotiations Affairs Dept.).
- 59 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (King David Hotel, Jerusalem, September 17, 2000) (on file with PLO Negotiation Affairs Dept.).
- 60 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (King David Hotel, Jerusalem, September 18, 2000) (on file with PLO Negotiation Affairs Dept.).
- 61 Minutes, transcribed by PLO Negotiation Support Unit, "Consultations with United States Officials" (Washington, D.C., September 27, 2000) (on file with PLO Negotiations Affairs Dept.).
- 62 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (Taba Hilton Hotel, Taba, Egypt, January 23, 2001) (on file with PLO Negotiation Affairs Dept.).
- 63 Minutes, transcribed by PLO Negotiation Support Unit, "Palestinian-Israeli Permanent Status Negotiations" (King David Hotel, Jerusalem, September 18, 2000) (on file with PLO Negotiation Affairs Dept.).

- 64 *Ibid.*
- 65 *Ibid.*
- 66 H. Haftendorn, "The Security Puzzle: Theory Building and Discipline-Building in International Security" (1991) 35 *Int'l Stud. Q.* 3 at 3.
- 67 See Y. Sayigh, "Redefining the Basics: Sovereignty and Security of the Palestinian State" (1995) 24 *J. Palestine Stud.* 5 at 6 (observing that security may refer to both "military defense against direct, physical threats" and "the ability to protect 'national values'").
- 68 The *Universal Declaration of Human Rights* provides, in Article 3, that "Everyone has the right to life, liberty and security of person," and, in Article 5, "That no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." As Anne-Marie Slaughter points out, the report of the United Nations Secretary-General's High Level Panel on Threats, Challenges and Change embraces a concept of collective security that requires responding to threats to the security not only of states, but also of persons within states. Anne-Marie Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform" (2005) 99 *A.J.I.L.* 619 at 623.
- 69 These rights, reaffirmed in Article 2(4) of the *Charter of the United Nations*, are the foundation on which the post-World War II system of international security was built.
- 70 See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *U.N.T.S.* 171, art. 1 (entered into force March 23, 1976) [ICCPR].
- 71 Although the *Convention on the Prevention and Punishment of the Crime of Genocide* defines crimes, rather than rights, it is arguably rooted in the concept of a group's right to life and security. See generally C. Kukathas, "Genocide and Group Rights" (Paper presented at a conference on Ethics in Africa, Cape Town, May 31, 2006, unpublished).
- 72 See *UN Charter*, art. 51.
- 73 See, e.g. *ICCPR*, *supra* note 70 at art. 4 (permitting derogation from certain rights during times of "public emergency").
- 74 Article 2(7) of the *UN Charter* makes clear that the principle of non-intervention in the domestic affairs of a state does not prejudice the application of enforcement measures in the event of a threat to or breach of international peace and security.
- 75 Describing the negotiations over the Interim Agreement, Marwan Barghout told one researcher, "Regarding all issues, they said 'security'. If you discuss the air, they want security. If you discuss the colours, they say security. They are living under the complex of security. We have to liberate them from this." H. Schultz, *One Year into Self-Government: Perceptions of the Palestinian Political Elite* (Jerusalem: PASSIA, 1995) at 20.
- 76 Ross, *supra* note 16 at 344.
- 77 Savir, *supra* note 18 at 296.
- 78 *Ibid.* at 116.
- 79 H. Agha and A. Khalidi, *A Framework for a Palestinian National Security Doctrine* (London: Chatham House, 2006 at 8–9. Agha and Khalidi proceed to describe and prioritize Palestinian fears, concerns, and interests and identify options for addressing them within the evolving Middle East security environment.
- 80 For example, in negotiations over Palestinian–Israeli economic relations, the Palestinians pressed for free access of Palestinian workers to Israeli labour markets; when the Israeli side demurred, the Palestinians suggested that the permissible reasons for denying such access be defined in the agreement and that the basis for a denial in a specific case be communicated to the applicant. These proposals were not enthusiastically received by the Israeli side, although they were not without precedent during the Oslo negotiations. See Savir, *supra* note 18 at 118.
- 81 See M. Odello, "Commentary on the United Nations' High-Level Panel on Threats, Challenges, and Change" (2005) 10 *J. Conflict and Security L.* 231 at 233 (noting that report of UN High-Level Panel reaffirms proposition that international security "is based on the survival of states").
- 82 These two categories are not, of course, mutually exclusive. Self-determination, for example, is both a national right and a human right.
- 83 Agha and Khalidi, *supra* note 79 at 56.

- 84 O. Dajani, "Shadow or Shade: The Roles of International Law in Palestinian-Israeli Peace Talks" (2007) 32 Yale J. Int'l L. 61, at 65–70.
- 85 *Ibid.* at 70–83.
- 86 *Ibid.* at 120–1.
- 87 Agha and Khalidi, *supra* note 79 at 72.
- 88 G. J. Ikenberry and A. Slaughter, "Forging a World of Liberty Under Law: U.S. National Security in the 21st Century" *Final Report of the Princeton Project on National Security* (Princeton: Princeton Project on National Security, 2006) 36–7.
- 89 *Ibid.* at 35.
- 90 R. Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-first Century* (London: Atlantic Books, 2003) at 144.
- 91 *Ibid.* at 147–51.
- 92 *Ibid.* at 151.
- 93 HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807, available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf (emphasis added).

PART III

Legal and political frameworks for a durable peace

7

SELF-DETERMINATION IN THE PALESTINE CONTEXT

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The long-standing debate over self-determination as applied to the territory of historic Palestine took a turn in 2006 when Palestinian voters in the Gaza Strip and West Bank of the Jordan River elected a parliamentary assembly in which a majority was held by the Hamas organization. Unlike the Fatah organization that had previously controlled the Assembly, and which had been the main force in the Palestine Liberation Organization (PLO), Hamas proclaimed a right of the Palestinians to self-determination in the entirety of the territory of historic Palestine. The political turn gave new importance to the question of self-determination in regard to that territory.

At the same time, another issue was developing in a way that put a new spotlight on the question of Palestine self-determination. The refusal by Israel to consider any sizable repatriation of the Arabs displaced from their home areas in 1948 was being justified in part on the Israeli side by the fact that the Arabs were to get a state in the Gaza Strip and the West Bank of the Jordan River. If the Palestinians were to get their own state, so the reasoning ran, why did the displaced Palestinians need to return to home areas in Israel? This new rationale for refusing repatriation led to a reconsideration on the Palestinian side of the wisdom of aiming for a Gaza–West Bank state. Perhaps it would make more sense to merge with the Israelis in a single state, rather than to set up a separate, small state.

The division of authority that came about in 2007 between the Gaza Strip and the West Bank as a result of a split between Hamas and Fatah complicated the matter further and made a Gaza–West Bank state seem even more problematic. The division also brought the possibility that each faction might pursue its own approach to the achievement of self-determination, regardless of what the other might do.

This chapter analyzes self-determination as it applies to the peoples who inhabit historic Palestine, in light of these three developments. First, it inquires whether there is a basis for Hamas' claim, or whether the Fatah aim is more consistent with

international law. Second, it inquires whether, if the Palestinians seek to effectuate self-determination in the Gaza Strip and West Bank, the right of repatriation would in some fashion be waived or compromised.

The accession of Hamas

Fatah has been the predominant element in the Palestinian political movement, the Palestine Liberation Organization (PLO), since its founding. The PLO, from the time of its founding, took the position that the predominantly Arab population of Palestine was entitled to exercise self-determination there. Later, however, the PLO modified its position and declared instead an aim of effectuating the right of self-determination in a portion only of the territory of historic Palestine, namely in the Gaza Strip and the West Bank of the Jordan River.

That turn in policy reduced the significance of the self-determination issue. Israel, as reflected in the approach of Prime Minister Itzhak Rabin, was willing to accept eventual Palestinian sovereignty in the Gaza Strip and West Bank, or at least in a portion of those sectors. In 1993, when the PLO and Israel began to negotiate, they exchanged documents in which they recognized each other, thereby effectively expressing a mutual view that Israel could exercise sovereignty in at least most of the territory it had controlled since 1948, and that the PLO could establish a Palestine state in more or less the territory of the Gaza Strip and West Bank.¹

From the PLO's standpoint, the turn away from claiming a right to effectuate self-determination in the entirety of the territory of historic Palestine represented an "historic compromise" with Zionism. The Palestinians would forego their claim to the territory of historic Palestine, would accept Israel's sovereignty in the bulk of that territory, and would establish a small state consisting of the Gaza Strip linked to the West Bank.

The accession to control of the Palestinian Authority by Hamas in 2006 put the "historic compromise" into question. Hamas viewed the concessions of Fatah as having been ill-advised. The concessions had not gained for the Palestinians even the sovereignty in a small piece of territory that Fatah had sought. Instead, Israel had expanded its settlements in the West Bank, thereby reducing the prospect for a Palestine state in any significant territory. During the period when the two sides supposedly were moving towards negotiations, Israel had consolidated its position in the West Bank, and in particular in East Jerusalem, by facilitating the settlement there of new thousands of Israelis. Israel had moved in the direction of devising a border unilaterally, a border that would include major portions of the West Bank as territory of Israel.

Hamas declined to state its acceptance of an Israeli state within the territory of historic Palestine. Hamas held to Fatah's original position: that the Palestinian right of self-determination extended to the entirety of the territory of historic Palestine. In a letter to the UN Secretary-General, the foreign minister of the Hamas-led Palestinian Authority referred to the aim as being the right of the Palestinian people "to establish their fully sovereign independent State, with Jerusalem as its capital,

and the right of the Palestine refugees, including their right to return and compensation.”² That formulation did not specify the territorial extent of an anticipated Palestine state, but Prime Minister Ismail Haniya clarified that Hamas did not advocate the two-state approach.³

The Hamas accession to authority sent shock waves through the international community. The major powers insisted they would not deal with a Hamas-led Palestinian Authority until and unless Hamas accepted Fatah’s “historic compromise.” Hamas’ assertion of a claim for Palestinian self-determination in the entirety of the territory of historic Palestine was cause for its being relegated to the status of politically unacceptable. Israel stopped forwarding the tax and customs receipts it collects on behalf of the Palestinian Authority. The United States and the European Union cut off aid they had been giving to the Palestinian Authority.⁴

The refugee issue

The issue of the Palestine Arabs displaced in 1948 also brought the self-determination question to the forefront. The Fatah effort at gaining a state in the Gaza Strip and West Bank gave rise to a new argument from the Israeli side. Although there had never been a willingness on the Israeli side to consider the possibility of a repatriation of any substantial number of the displaced, once the Palestinians declared for a small state, Israel agreed in 1993 to negotiate over the issue of the refugees. Quickly, however, Israeli political leaders began to suggest that Palestinians desiring to return should move to the Palestine state, even if it did not include the home area from which their family had been displaced. A possible connection thus came to be seen between a right of self-determination and a right of repatriation. If the Palestinians sought to exercise self-determination in only a segment of Palestine, then that perhaps should affect the meaning of the right of repatriation. From the Israeli standpoint, a benefit of recognizing a small Palestine state might be that Israel could find a new reason for refusing to repatriate the displaced Arabs, a reason that might be more acceptable to the international community than the reasons it had been asserting since 1948.

One response from the Palestinian side to the Israeli argument was to question the feasibility of attempting to establish a state in the Gaza Strip and West Bank only. If the Israelis would take such a state as a repudiation of the right of repatriation to home areas, then perhaps the Palestinians should rethink whether the “historic compromise” was a wise move. Instead, it might make more sense to think in terms of a single state in historic Palestine to be inhabited by its current Jewish population and as well by the Arabs who either are there presently or were displaced. A division in Palestinian thinking emerged between those promoting two states, and those promoting one state. Those promoting a one-state approach were motivated to some degree, of course, by the same set of circumstances that had prompted Hamas to question Fatah’s “historic compromise.” And it may have been the one-state thinking that led many who did not otherwise support Hamas to vote for its candidates in 2006.

The question of self-determination

These developments render more critical than was the case even a few years ago the importance of analyzing self-determination in the context of Arab and Jewish claims to the territory of historic Palestine. If the Hamas position on self-determination is correct, then the major powers are assuming a stance at odds with the body of international law to which they have tried to hold the Palestinians. If Palestinian self-determination can be exercised in the entirety of historic Palestine, moreover, repatriation might be facilitated.

There is controversy, at the outset, on the status of self-determination as a legal norm. Many on the Israeli side regard it as a principle, and by calling it a principle they view it as something less than a norm of customary international law. Even if self-determination is conceded to hold the status of a legal norm, there is a question about how it is to be applied. Self-determination has meaning only in relation to a particular piece of territory, and when one begins to talk about a particular piece of territory opinions can differ as to who has self-determination rights there.

Self-determination is sometimes dated from the adoption of the *Charter of the United Nations*.⁵ The *Charter* proclaimed self-determination of peoples in express terms. Article 1, paragraph 2, stated, as a purpose of the United Nations: “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” In the first instance, that phrase gives rise to an issue of construction. Some commentators argue that since the *Charter* terms self-determination a “principle” it is not a right. Eugene Rostow, for example, argues that self-determination is “one of the aspirations” of the United Nations but “can hardly be regarded as an absolute, either in international law or in international practice.”⁶ If the *Charter*’s drafters had intended to depict self-determination as legally required, why, say analysts of Rostow’s persuasion, did they not refer to a “right” of self-determination, rather than referring to self-determination as a “principle”?

Analysis of this terminological issue is complicated by the fact that the term “principle” is not used in all five of the authentic texts of the *Charter*. Article 1, paragraph 2, of the *Charter* referred to self-determination as a “principle” in the Chinese, Spanish, English, and Russian texts. In the French text of Article 1, paragraph 2, however, the term “principle” is, oddly, nowhere to be found. Instead, the French text speaks of the *droit d'auto-détermination* [right of self-determination]. Where the other four texts use “principle,” the French text uses “right.”

All five texts are, according to the *Charter* itself, authentic.⁷ No single one of them takes precedence over another. One might think that a four to one predominance means that the French text should be written off as an instance of Gallic exceptionalism. If the French used a term that differed from the other four texts, the French must simply have gotten it wrong. That, however, is not the accepted way in which plurilingual treaty texts are read in case of variance. The assumption with plurilingual treaty texts is that they are all correct. If at all possible, they are to be construed in a fashion that does not render any one of them irrelevant. The texts must be reconciled if possible, to achieve a meaning that makes sense in each authentic text.⁸

Thus, if at all possible, “principle” and “right” must be read to hold the same meaning. “Right” connotes legal entitlement, whereas “principle” can connote legal entitlement, or something less. One can speak of a principle of law in the sense of a norm of law. “Principle” can be equated with “norm” or “right” without departing from the accepted meaning of “principle.” Since “principle” can be read to mean “right,” it is appropriately read in that fashion to maintain consistency with the other four authentic texts.

The term “principle,” moreover, is often used in a normative sense in treaties.⁹ Its use elsewhere in the *Charter* indicates that the *Charter* drafters used “principle” in a normative sense. Article 2, for example, indicates that states “shall act in accordance with the following Principles . . . (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Here the term “principle” is used to describe what is perhaps the most important prohibition in the *Charter*, namely, the prohibition on the use of force. The use there of the term “principle” is clearly in the sense of a norm of law.

The International Court of Justice (ICJ) has read Article 2, paragraph 4, as a norm of law. It has said, “The prohibition against the use of force is a cornerstone of the United Nations *Charter*.” Article 2, paragraph 4, of the *Charter* requires that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁰ The Court made no reference to the fact that the quoted language is preceded by a phrase that characterizes it as a “principle.” It evidently did not consider that characterization to negate its normative character.

Self-determination and colonialism

Even if the text can be read as importing self-determination as a norm of law, some argue that it cannot be read this way, because the *Charter* did not require colonial powers to liberate their colonies. If colonialism remained lawful, self-determination could hardly be a norm of law. Britain and France did not understand that by joining the United Nations they would be required immediately to abandon their empires. The colonial powers had objected to stronger language on self-determination as the *Charter* was being drafted, out of fear that the *Charter* would expressly challenge colonialism.¹¹

Reference is made in particular to the *Charter*’s provisions on non-self-governing territories. The *Charter* requires member states to regard their control over colonies as a “sacred trust” and to transmit periodic reports regarding their administration of them to the United Nations.¹² By imposing these obligations, Nathan Feinberg argued, the *Charter* impliedly “acknowledge[d] the right of colonial States to continue administering the non-self-governing territories,” hence that “even its inclusion [self-determination] in the *Charter* did not convert it into a norm of

international law.”¹³ Analysts who argue in this direction take the view that, if the *Charter* permitted colonial tenure, then self-determination could not have normative force.¹⁴

However, even in that era, when colonial empires were being maintained, the UN General Assembly in its resolutions referred to self-determination as a right. This, of course, was a General Assembly that included few Third World states. In 1950 the General Assembly adopted Resolution 421(D), in which it “call[ed] upon the Economic and Social Council to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination.”¹⁵ A short time later, the General Assembly adopted Resolution 545, in which it referred back to Resolution 421(D) and, in a preamble clause, characterized it as having viewed self-determination as a right: “Whereas the General Assembly at its fifth session recognized the right of peoples and nations to self-determination as a fundamental human right (Resolution 421D (V) of 4 December 1950).”¹⁶

Moreover, the General Assembly was anxious to put self-determination into the anticipated treaty on human rights that the UN Commission on Human Rights was elaborating. A human rights treaty, would, of course, carry normative force. Thus, in Resolution 545, the General Assembly “decid[ed] to include in the International Covenant or covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations.”¹⁷ In the event, two covenants were drafted, one on civil and political rights, and the other on economic, social, and cultural rights. In each of them self-determination was included as the first article of the covenant, and the formulation was that it was a right of all peoples: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸

Acting on self-determination in the context of colonialism, in 1960 the General Assembly adopted its *Declaration on the Granting of Independence to Colonial Countries and Peoples*, affirming that self-determination precluded colonialism.¹⁹ In 1970 the General Assembly adopted its *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, which again restated that self-determination is a right.²⁰

The International Court of Justice analyzed the *Charter* provision on self-determination in 1971 and said that self-determination is a right. The case involved Namibia (then called South-West Africa), which had been under a League of Nations mandate. The Court explained that the *League Covenant* had given a self-determination right to peoples under mandates and that the *United Nations Charter* expanded this right to peoples of all non-self-governing territories. The Court stated that:

the subsequent [to the League of Nations Covenant] development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and

expanded to all “territories whose peoples have not yet attained a full measure of self-government” (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier.²¹

The ICJ reaffirmed this view in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Court said: “that the principle of self-determination of peoples has been enshrined in the United Nations *Charter*,” thus indicating its view of the normative character of self-determination.²² The court cited in further support the General Assembly’s *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, and specifically its statement that “Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination.”²³ Additionally, the Court cited the two international covenants, viewing them as affirmation of the normative character of self-determination: “Article 1 common to the International Covenant on Economic, Social and Cultural rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations *Charter*.”²⁴

Self-determination under the League of Nations

As indicated in the Namibia case,²⁵ the ICJ found self-determination to have been a matter of right even prior to the UN *Charter*, in regard to the peoples of mandate territories. Self-determination as a norm can, indeed, be traced to the inter-war period. At the end of World War I, Woodrow Wilson declared that self-determination of peoples was an aim for which the Allies were fighting.²⁶ In Russia, the new Soviet government declared that no “nation” should be “held within the borders of a state by force.”²⁷

Publicists regarded the statements of that period as aspirational only.²⁸ But self-determination received specific content through the *League of Nations Covenant*. Hence, League members evidently viewed self-determination as legally required. Article 22 of the *League Covenant* prohibited France and Britain, which had occupied Ottoman territory in World War I from taking them as colonies. Britain, of course, had occupied Palestine. The League devised a procedure whereby these states would hold a “mandate” to administer territory. Article 22 required states taking over territories whose peoples were “not yet able to stand by themselves under the strenuous conditions of the modern world” to promote the “well-being and development of such peoples.” The mandates régime gave legal personality to collectivities of peoples. It broke with the concept that “international law only operated between European states or states of European culture. It started a process of international supervision of colonial administration.”²⁹

Under Article 22, a mandatory power was to help make the communities under mandate “capable of self-determination.”³⁰ “[I]t was envisaged that the mandates would find their natural and only conclusion in the attainment of independence by the mandated territory.”³¹ One of the mandates the League issued was to Britain to administer Palestine.³²

The phrase “not yet able to stand by themselves” indicated that the territories were entitled to self-determination, which would mean independence if the populations so chose.³³ The International Court of Justice said the communities under mandate “were admitted” to “possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples ‘not yet’ able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be ‘able to stand by themselves.’”³⁴ The Court said that the “ultimate objective” of the mandate system was the “self-determination and independence of the peoples concerned.”³⁵ The Legal Secretary to the Government of Palestine (later Attorney General of Palestine) wrote of the mandate system that “among the leading doctrines of international law in its extended sphere is the right of nationalities, great and small, in the East as in the West, to live their national life, and the duty of the greater States to train them to that end.”³⁶

The League of Nations’ Permanent Mandates Commission, which supervised the mandates, entertained complaints about violation of the responsibilities of mandatories and in its deliberations it viewed sovereignty as resting with the peoples of the territories, rather than with the mandatory power.³⁷ The Commission “consistently upheld the theory of ultimate independent sovereignty” and “assumed that sovereign independence, and not merely ‘self-government’ and ‘autonomy,’ was intended by the Covenant.”³⁸

The mandatory power acquired no sovereignty.³⁹ The mandate system involved “a rejection of the notion of annexation.”⁴⁰ The principle of “no annexation” was what “most distinguishes the mandates system from similar cases as practiced before the war. The administering power in any mandated territory is not there by any right of possession, but as a Mandatory with specifically delegated powers.”⁴¹ The League’s Permanent Mandates Commission construed Article 22 as negating any claim of sovereignty by the mandatory power. The Commission “consistently challenged on every possible occasion any policy or legal text that seemed to imply directly or indirectly that the mandatory state possessed or could possess sovereignty.”⁴²

Mandatory powers were viewed as holding a “sacred trust of civilization” towards the community under mandate.⁴³ The duty to promote the interests of the indigenous population forbade exploitation. The Attorney General for Palestine read the Palestine mandate in that way: “All that capitalistic exploitation which marked the development of Africa and the Far East under the protection of European States in the nineteenth century is directly negated in the terms of the Mandate for Palestine.”⁴⁴

Although Article 22 applied only to territories taken in World War I, it reflected an acceptance of self-determination.⁴⁵ What was viewed as normative was the

prohibition against new colonial acquisition and the obligation to move the territories towards independence. In its 1947 report on Palestine, the UN Special Committee on Palestine stated regarding self-determination under the *League Covenant* that “international recognition was extended to this principle at the end of the First World War.”⁴⁶

The Aaland Islands case

As to applying self-determination beyond the mandate territories, one case that was heard by the League of Nations in 1920 holds relevance. The Aaland Islands lie between Finland and Sweden. The inhabitants were predominantly Swedish and the islands were held by Sweden. In 1809, Sweden ceded Finland to Russia, and along with Finland the Aaland Islands. Finland gained independence from Russia in 1917, whereupon the islanders asked Finland to return the Islands to Sweden. The matter was referred for a legal opinion to the League of Nations. The League Council appointed a committee of jurists, who concluded that the islanders had no right to secede from Finland: “Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.”⁴⁷

This language has been taken by some publicists as showing that the jurists found no concept of self-determination in positive international law.⁴⁸ However, these publicists typically omit the language immediately following that quoted. There the jurists explained that their negative conclusion about self-determination related only to a people, like the one in the case at hand, that inhabited a portion of a state: “Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.”⁴⁹ The jurists said that in a situation of unresolved sovereignty, however:

All that has been said concerning the attributes of the sovereignty of a State, generally speaking, only applies to a nation which is definitely constituted as a sovereign State and an independent member of the international community, . . . if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, . . . This transition . . . interests the community of States very deeply both from political and legal standpoints. Under such circumstances, the principle of self-determination may be called into play.⁵⁰

The jurists explained that a people in such a situation of unresolved sovereignty had several options: "The principle of recognizing the rights of peoples to determine their political fate may be applied in various ways; the most important of these are, on the one hand the formation of an independent State, and on the other hand the right of choice between two existing States."⁵¹

Nathan Feinberg, one of the publicists who reads the jurists' report to negate self-determination as a legal right, also quotes from the jurists' report language that suggests, in Feinberg's rendition, that self-determination may be subordinated to other desiderata:

The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise may appear necessary . . . according to international legal conception and may even be dictated by the interests of peace.⁵²

The phrase in the ellipsis, a phrase that Feinberg omitted, reads: "based on an extensive grant of liberty to minorities." This phrase shows that the jurists made this statement in a discussion of the situation of a minority nationality within a definitely constituted state. Such a minority would be one that might be accorded autonomy as some recognition of its status. The jurists considered that self-determination was a matter of positive law for peoples who did not inhabit the territory of a state enjoying clear sovereignty.

The League was not fully satisfied with the jurists' negative conclusion on the right of secession of the Aaland islanders. The League Council appointed a commission of inquiry to give a second opinion. The Commission said that if Finland did not provide certain basic guarantees, the islanders would have a right to a plebiscite that could lead to separation from Finland.⁵³

The right of the Palestinians to Palestine

The mandate system and the League's handling of the Aaland Islands situation seemed to point to statehood for the Arabs of Palestine. The Arabs had a solid claim to the territory they inhabited. They had occupied it since the fourth millennium B.C.E. The oldest known inhabitants were Canaanites, a Semitic people.⁵⁴ Hebrews were numerous in Palestine by the twelfth century B.C.E. and set up a state around 1000 B.C.E. in what today is the West Bank of the Jordan River.⁵⁵ But it was the Palestine Arabs, as they were called in mid-twentieth century, who had inhabited Palestine since ancient times. They became Arabs only from the seventh century on, but they had been the principal inhabitants of the territory more than a millennium prior to the Arab conquest.

In the late tenth century B.C.E., the Hebrew state split into Judea in the south and Samaria in the north.⁵⁶ Hebrews constituted a majority in Judea, but the record is not clear whether they constituted a majority in Samaria.⁵⁷ The Hebrews were driven out as rulers of Samaria by the Assyrians around 720 B.C.E., and as rulers of Judea by the Babylonians around 590 B.C.E.⁵⁸ Some of the upper-class Hebrews were deported to Babylonia, but the Hebrew peasantry remained.⁵⁹ Many of the deportees returned towards the end of the sixth century B.C.E.⁶⁰ The Hebrews regained statehood in Judea around 150 B.C.E.⁶¹ and maintained it until 63 B.C.E. During that period, they extended their control over much of twentieth-century Palestine.⁶²

Hebrews continued to constitute the majority population of Judea until the second century C.E.⁶³ Many were expelled by the Romans in 133 C.E. Thereafter, the population was “a mixture of Philistines, Canaanites, Greeks, Romans” and others.⁶⁴ Palestine was conquered in the seventh century by Arabs from the Arabian Peninsula, and the population absorbed the Arabs’ language; many also took on their religion, Islam.⁶⁵ In the sixteenth century, the Ottoman (Turkish) Empire conquered Palestine and held it until World War I.

The ICJ in the *Wall Opinion* recognized the Palestinian people as a people entitled to self-determination. It said, “As regards the principle of the right of peoples to self-determination, . . . the existence of a ‘Palestinian people’ is no longer in issue.” In support, the Court stated, “Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister.”⁶⁶

This history shows a strong connection between the Arabs of Palestine and the territory of Palestine. In any claim to territory, the key legal issues are occupation (i.e., active presence on the territory by a people) and dominion.⁶⁷ In a dispute between the Netherlands and the United States over sovereignty in certain Pacific Ocean islands, an arbiter relied on Dutch East India Company agreements with local princes relating to the islands as more significant than a United States claim that its predecessor in interest, Spain, had discovered them.⁶⁸ Effectiveness of occupation was used by the ICJ to resolve competing claims to Western Sahara. The situation of Western Sahara was analogous to that of Palestine in 1948, since the colonizing power (Spain) had just withdrawn. Like Palestine, Western Sahara was emerging from a status of dependency. The Court assessed the competing claims by analyzing acts of occupation and dominion by the contending parties.⁶⁹

Julius Stone argued that “no identifiable people now survives which can demonstrate any special relation to Palestine prior to the centuries of Jewish statehood there.”⁷⁰ To the contrary, the Arabs of Palestine are a population that has occupied since the fourth millennium B.C.E. Toynbee wrote that “by 1948, the Palestinian Arabs had been the inhabitants of Palestine for more than 1,300 years. This length of time,” he said, gave them “a prescriptive right to continue to live in Palestine and to retain their property there.”⁷¹

Determinations in violation of self-determination

In 1917, Zionist leader Chaim Weizmann convinced Lord Balfour, a member of the British cabinet, to propose to the cabinet a statement of support for Zionist settlement in Palestine.⁷² In November of that year, a letter was drafted, which came to be known as the Balfour Declaration.⁷³ The British government declared that it “viewed with favor the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”⁷⁴ The League of Nations incorporated the terms of the Balfour Declaration into the mandate instrument.

Britain had scant legal basis for issuing a declaration about territory outside its borders, and in particular a declaration that jeopardized the rights of the inhabitants.⁷⁵ Arthur Balfour characterized as “flagrant” what he called “the contradiction between the letter of the Covenant” and the Declaration. “[I]n Palestine,” he said, “we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country.”⁷⁶ The King-Crane Commission, dispatched to Palestine in 1919 by US President Woodrow Wilson quoted Wilson’s own statements of support for self-determination: “If that principle is to rule, and so the wishes of Palestine’s population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine – nearly nine-tenths of the whole – are emphatically against the entire Zionist program.” The Commissioners said that Jewish immigration to Palestine would constitute a “gross violation” of self-determination.⁷⁷

The call on Britain to promote a Jewish national homeland was inconsistent with the League’s recognition of self-determination. Quincy Wright visited Palestine and expressed the view that “the Balfour Declaration and the Palestine Mandate, in recognizing the Jewish people as entitled to a national home in Palestine . . . , were political decisions difficult to reconcile with the claim of the Arab population to self-determination.”⁷⁸ The UN General Assembly’s Special Committee on Palestine recited the history in 1947 and said that self-determination “was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there.” According to the Committee, “the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle.”⁷⁹

The United Nations’ partition recommendation

In 1947, the United Nations General Assembly recommended formation in Palestine of two states – one Arab, one Jewish – with close economic union between them.⁸⁰ Like the Balfour Declaration, the proposal for two states was a political decision, not one based on legal right. The proposal was an attempted solution to a significant Jewish refugee problem in Europe. The major powers, unwilling to accept Jewish refugees themselves, viewed a Jewish state in Palestine as a convenient alternative. “It was not the Palestinians Arabs who committed genocide against the

European Jews,” wrote Toynbee. “It was the Germans. The Germans murdered the Jews; the Palestinians Arabs have been made to pay for what the Germans did.”⁸¹

The resolution drew borders that would have given the Jewish state 57 percent of Palestine, though they constituted only 30 percent of its population. The proposed Jewish state would have had an approximately equal number of Arabs and Jews, while the proposed Arab state would have had an almost entirely Arab population.⁸² The resolution received its strongest support in the General Assembly from the countries of Europe and North America. Most countries of Asia, Africa, and the Middle East opposed it, though some of them voted for it after being threatened by the United States with withdrawal of U.S. economic aid.⁸³

The General Assembly framed its resolution as a request to the Jews and Arabs of Palestine to establish the two states with economic union. The resolution did not purport to determine rights. The Assembly refused a request by Arab states to seek an advisory opinion from the International Court of Justice as to the competing claims to Palestine. The Palestine Arabs, with much justification, regarded partition as a violation of their self-determination right. The Arab Higher Committee, which represented the Arabs of Palestine at the United Nations, declared by resolution on November 30, 1947, that it would not accept the recommendation embodied in the partition resolution.⁸⁴

The Zionists, too, relied on self-determination as a basis for their claim to Palestine, thereby indicating their view of self-determination as a norm of law.⁸⁵ The Zionist claim to territory in Palestine, however, is not on firm ground. Ancient occupation is not recognized over and against long-term, unchallenged occupation.⁸⁶ “As for the Jews’ claim to have a right to reoccupy Palestine,” Toynbee rightly stated, “the statute of limitations applies to this.”⁸⁷ Moreover, even if one considers occupation of Palestine in ancient times, the Arabs would still be numerically predominant in the population entitled to the territory, based on their ancient occupation.

Jews who number among the long-time inhabitants of Palestine would form part of the population entitled to self-determination. This would not, however, be self-determination for a Jewish state, but rather for a state representing the entire population.

Repatriation and self-determination

During the hostilities of 1948 in Palestine, upwards of 85 percent of the Arabs were expelled from the territory that the Jewish Agency and Israel took under their control.⁸⁸ The interplay between the right of repatriation for a displaced population and the right of that same population to self-determination has complicated the analysis of the situation of the Palestine Arabs displaced in 1948 beyond the borders of what became the state of Israel. The repatriation right was recognized by the General Assembly of the United Nations shortly after the displacement occurred.⁸⁹ The General Assembly viewed the displaced Palestine Arabs individually, saying that Israel must repatriate them.

By the 1970s, the General Assembly was regarding the Palestine Arabs, whether displaced in 1948 or not, as entitled to self-determination. This recognition complicated the repatriation issue in two ways. First, it led to confusion as to whether the right was individual, to be exercised by a particular displaced person, or collective, to be exercised by the Palestinian people in some concerted fashion.

Second, the recognition of a right of self-determination led to confusion over the identity of the territory in which the right was to be exercised. The General Assembly's 1948 call on Israel to repatriate clearly related to the precise homes and lands from which Palestine Arabs had been displaced. Once self-determination was recognized, the question arose as to the identity of the territory in question, since self-determination has meaning only if it relates to territory. By the late 1980s, the Palestine Liberation Organization, which was recognized as representing the Palestinian people, focused on the Gaza Strip and the West Bank of the Jordan River as the relevant territory.

If those two sectors were the territory in which self-determination was to be exercised, then the question arose whether that too would be the territory in which repatriation would be exercised. To put it otherwise, the question was whether the right to self-determination and its focus on the two sectors in effect altered the posture as conceived by the General Assembly in 1948.

This was the way in which many analysts in Israel viewed the matter. If the Palestinians were to get the two sectors, then that should be where they reside, rather than in territory of Israel. This conclusion is logical in a sense. Typically, if a people claim self-determination in a territory, then that is the territory where they have the right to reside. When colonial peoples in Africa, for example, began to assert a right of self-determination over and against Britain or France, they asserted a right to the territory of the colony.

The issue has been the focus of discussion in debates among Palestinians who are rethinking whether they should be seeking a state in the two sectors, or whether they should seek to exercise self-determination in some other fashion. The alternative to two states – Palestine and Israel – is seen as a single state encompassing historic Palestine. Proponents of this approach say that it would blunt the argument of Israelis that they, as Palestinians, would have a separate state in which they should reside. The question of the two rights, and how they relate to each other, thus occupies a central place in the current debate over self-determination and how it should be exercised.

The connection between repatriation and self-determination

A person who has been displaced beyond an international border is entitled to return. This right has a double grounding in law. In the first instance, the state from which the person was displaced is obliged to repatriate, since the state of refuge has no obligation to keep the person permanently. Unless the displaced person seeks and is granted the nationality of the state of refuge, that state may legitimately demand repatriation from the state of displacement. It has no obligation to nation-

alize the displaced person. It has no obligation to allow the person to remain, unless the person is in fear of returning because of political persecution.

In the second instance, repatriation is required as a right personal to the individual. A person displaced has a right to return as a human right. This right is not dependent on holding the nationality of the state of displacement.

These propositions hold wholly apart from any claim to self-determination on the part of the people to which the displaced person belongs. They hold, additionally, apart from whether the state of displacement prefers not to repatriate for reasons particular to its own political situation. In particular, the state of displacement may not decline to repatriate because it seeks to maintain ethnic homogeneity or a certain ethnic balance in its population. The repatriation right overrides such considerations.

Even if a right of self-determination attaches for the Jewish people in some portion of historic Palestine, such a right would give no license to exclude those lawfully entitled to reside there and to enjoy rights of citizenship. Palestine Arabs who were either nationals of Palestine, or who enjoyed permanent residence, were entitled to reside there. Once displaced, they were entitled to return. That is so regardless of whether they left to go on holiday, whether they left voluntarily anticipating hostilities, whether they were forced out, and whether they left out of fear or for any other reason. The reason for the departure is irrelevant.⁹⁰

Israel was obligated both to repatriate them and to offer them its nationality. It has, except for small numbers, declined to repatriate. By its Nationality Law of 1952,⁹¹ it refused its nationality to them. That refusal violated customary international law obligations. The Harvard Law Research draft Convention on Nationality was written in 1930 to reflect customary law: "A state may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another state, if such person is a national of the first state or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other state."⁹²

A state has a right to control admission to its territory, but an individual who is denied admission by all states is unable to function and thus to exercise the many other rights that are internationally protected. States are obliged, once they recognize an individual as a national, to admit that person into its territory. This right is sometimes referred to as a right of return, although it equally applies where a national has never before entered the state of nationality.⁹³

The *Universal Declaration of Human Rights* provides, "Everyone has the right to leave any country, including his own, and to return to his country."⁹⁴ The *International Covenant on Civil and Political Rights*, to which Israel is a party,⁹⁵ states that "no one shall be arbitrarily deprived of the right to enter his own country."⁹⁶ The *International Convention on the Elimination of All Forms of Racial Discrimination*, to which Israel is also a party,⁹⁷ guarantees a right "to return to one's country" as an aspect of a state's obligation to avoid racial discrimination.⁹⁸

Properly understood, the rights of repatriation and self-determination are separate from another. The right of self-determination relates to a people and its right to

exercise sovereignty in particular territory. Repatriation relates to individuals and their right, as individuals, to return to a locality and a piece of property from which they were displaced. The establishment of a Palestine state in the West Bank and Gaza Strip in no way deprives displaced Palestine Arabs of their right to be repatriated by Israel and to be accorded the nationality of Israel. The right of repatriation is a right held by individuals and not subject to being ceded by an entity that represents the Palestinian people as a whole.

Self-determination as a series of options

A right of self-determination is included in the corpus of customary international law. As recognized during the interwar period, the people of Palestine are entitled to exercise self-determination there. The “people” so entitled includes those who were displaced from Palestine in 1948. Those people as well are entitled to be repatriated by Israel. The accession of Hamas to control of the Palestinian Authority in the West Bank and Gaza Strip has put new focus on the self-determination issue. It is, of course, within the rights of the Palestinian people as a collectivity to forego a claim to part of the territory to which they are entitled. By negotiation with Israel, this might be done. Repatriation, as a right adhering to the individual, is not subject to being ceded by the collectivity.

As of the 1990s, it appeared that a consensus had been reached among the Palestinians to opt for exercising self-determination by seeking a state in the Gaza Strip and West Bank. That choice was, to be sure, not based on a sense that option represented that to which the Palestinian people were entitled. It was a choice based on a political reality that did not appear to afford all the options that should have been open in exercise of the right of self-determination.

As a result of failure at achieving a Gaza–West Bank state, opinion shifted such that a significant segment of the Palestinian population questioned whether the aim for such a state was the manner in which Palestinians should be seeking to exercise self-determination. The refusal of Israel to consider repatriation contributed to this shift in opinion. If Israelis were going to view a Palestine state as the appropriate area of residence for the Arabs displaced in 1948, then perhaps it made better sense to seek a state in the entirety of the territory of historic Palestine, even if it were a state that would include the large number of Jewish and other migrants who had settled after 1948.

The modalities for the exercise of self-determination present some difficulty of implementation. Referenda have, at times, been used to assess the desire of a population, but this is not a perfect method. For the Palestinians, any assessment of desire is complicated by the fact that those inhabiting Gaza and the West Bank are part of a structure with a representative institution. Those living in the diaspora are not part of this mechanism. The representative institutions of the Palestine Liberation Organization have been in atrophy since the creation of the Palestinian Authority, a fact that makes it difficult for diaspora Palestinians to make their views known. Arabs inhabiting Israel form yet another segment of the Palestinian people,

and their views as well would need to be ascertained. Despite these difficulties, the general outline of the right of self-determination is clear. What remains to be devised is a political process that would allow the right to be effectuated.

Notes

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- 3 S. R. Weisman and C.S. Smith, "U.S. and Europe Halt Aid to Palestinian Government" *New York Times* (April 8, 2006) A6.
- 4 *Ibid.*
- 5 Signed at San Francisco, June 26, 1945. 59 U.S. Congress Statutes at Large 1031.
- 6 E. V. Rostow, "Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate" (1978) *Yale Studies in World Public Order* 147 at 153–4.
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- 8 *Vienna Convention of the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 33, para. 3 (entered into force January 27, 1980).
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- 11 W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen, 1977 at 99–103).
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- 16 *Inclusion in the International covenants on Human Rights of an article relating to the right of peoples to self-determination*, GA Res. 545(VI), UN GAOR, 6th Sess., Supp. No. 20, UN Doc. A/2119 (1952) at 36–7 (Vote on quoted paragraph: 40–4–10).
- 17 *Ibid.* Voting on this paragraph was done in three parts. The language through to the word "article" was adopted 41–7–2. The language from there through to the word "self-determination" was adopted 43–4–6. The language from there through to the end was adopted 46–4–3.
- 18 *International Covenant on Civil and Political Rights*, (December 19, 1966) 999 U.N.T.S. 171, art. 1 (entered into force 23 March 1976).
- 19 GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1961) at 66.
- 20 GA Res. 2675(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971) 121, art. 1; reprinted in (1970) 9 I.L.M. 1292. See also A. Cassese, "Political

- Self-Determination – Old Concepts and New Developments” in A. Cassese, ed., *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979) 137 at 138; G. Abi-Saab, “Wars of National Liberation in the Geneva Conventions and Protocols” (1979) 165:4 *Recueil des cours* 353 at 369–70.
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 - 22 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 88.
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 - 25 *Supra* note 21.
 - 26 Ofuatey-Kodjoe, *supra* note 11 at 87.
 - 27 Decree on Peace, *Sobranie uzakonenii raboche-krest'ianskogo pravitel'stva Rossiiskoi federativnoi sotsialisticheskoi respubliki* [Collection of laws of the worker-peasant government of the Russian Soviet Federated Socialist Republic], November 8, 1917, No. 1, item 2.
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8

NATURAL RESOURCES AND BELLIGERENT OCCUPATION

Perspectives from international humanitarian and human rights law

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A State does not have an unfettered discretion to treat the inhabitants and natural resources of territory it occupies at will, but rather its powers are tightly regulated. An occupant is not the sovereign of the territory it occupies, but merely a temporary administrator and thus it lacks the right to deplete the territory of its resources and other property. On the contrary, the occupant may only use these to meet the requirements of the local population and the occupying forces. In particular, the occupant may not exploit the wealth of the territory to benefit its own economy or, for that matter, the furtherance of its war aims. The broad aim of the rules governing an occupant's use of property and natural resources located in occupied territory is to remove an economic incentive to war and the prolongation of occupation once hostilities have ceased.

Under the law of armed conflict, an occupant's relations with the inhabitants of the territory are constrained principally by the relevant provisions of the Regulations annexed to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and by the more detailed régime set out in 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Further, in recent years it has become increasingly recognized that an occupying power is also under the duty to afford human rights guarantees to the population of territories under its control. Human rights law applies without discrimination to all people in the territory. In contrast, by virtue of Article 4, the provisions of Geneva Convention IV apply only to those individuals who qualify as "protected persons," namely civilians "who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals," with the exception of nationals of neutral or co-belligerent States which maintain diplomatic relations with the occupant State. In contrast to the elaborate stipulation of the treatment owed to

the inhabitants of occupied territory,¹ the constraints placed on the occupant's conduct in relation to the natural resources of the territory are rudimentary. The governing provisions lie principally within the law of armed conflict and are contained in the 1907 Hague Regulations. The law of armed conflict is not, however, a self-contained and comprehensive legal régime. Its application must take account of relevant norms in other areas of international law.

In considering the legal régime applicable to the treatment of natural resources in occupied territory, analysis has traditionally focused on the implications of the relevant provisions of the Hague Regulations. Nevertheless, given the convergence of international humanitarian and human rights law – although the precise contours of the relationship between these two branches of international law are contested and at times unclear – there is cause to argue that the traditional analysis should be re-evaluated. At least in relation to some natural resources, and the focus in this paper is on water, it seems justifiable that a dual approach should be adopted. While the traditional approach under the terms of international humanitarian law undoubtedly remains relevant, the right to water, derived from economic, social, and cultural rights, adds further elements to this analysis. Moreover, while international humanitarian law makes control and use of the physical resource the centre of attention, human rights law focuses on people and their needs. This is more consonant with the aims of Geneva Convention IV, which aims to protect civilians in time of war.

The contours of the question

“Natural resources” is a disparate category encompassing naturally occurring items which have an economic value in their unprocessed form: it thus includes things such as land, minerals, hydrocarbons, water, flora, fauna, fish, and forests. Waves and wind, as precursors to the generation of electricity, may also be classed as natural resources. Some resources, such as fish, are capable of renewing their stock whereas others, such as coal, are finite, although renewable resources may become exhausted if exploited beyond the bounds of their capacity for regeneration. Because natural resources are so divergent, different legal considerations are relevant in the regulation of specific resources although, under the law of armed conflict, the broad principle governing an occupant's use of natural resources is quite clear:

if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the [Hague] Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority—*permissions which all refer to the army of occupation*. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner.²

This principle reflects the fundamental premise of belligerent occupation that sovereignty over occupied territory does not transfer to an occupant, but as occupation prevents the legitimate sovereign from exercising its authority, the occupant acquires a temporary right of administration. This is alluded to, but not expressly stated, in the opening clause of Article 43 of the Hague Regulations which provides “[t]he authority of the legitimate power having *in fact* passed into the hands of the occupant.”³

The law of armed conflict, however, cannot provide a comprehensive régime to govern an occupant’s treatment of natural resources in occupied territory. Of necessity it must reach out to other areas of international law as these provide the wider context for the exercise of the occupant’s powers. For instance, in exploiting sea fisheries, the occupant’s powers must be located within the framework provided by the law of the sea which, for instance, determines the maritime areas over which the occupant may exercise jurisdiction. Similarly, should a transboundary river traverse the occupied territory, then the occupant must observe applicable rules concerning the equitable use of these waters and the prevention of pollution.

It may seem odd to claim that human rights law is relevant to the treatment of natural resources in occupied territory. This might, for instance, appear as an appeal to contested notions of a right to property, or as an attempt to give some normative content to a specific aspect of the right to development in the absence of State practice. An appeal to human rights law, it must be admitted, provides neither a comprehensive nor fully inclusive régime for the treatment of natural resources in occupied territory. On the other hand, by building on the emerging alliance between the law of armed conflict and human rights law, one may import the principle of non-discrimination into the occupant’s duties. This duty already exists to a limited extent in Geneva Convention IV. The application of Part II of the Convention, entitled *General protection of populations against certain consequences of war*, is subject to Article 13, which provides:

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

On the whole, Part II of Geneva Convention IV sets out mechanisms aimed at protecting civilians and medical facilities from the effects of hostilities rather than provide for the conduct of an occupation. This paper will argue that non-discrimination is also a relevant consideration in the allocation of water resources in occupied territory. This has a particular resonance for the Occupied Palestinian Territories given claims that the exploitation of its groundwater resources is biased against Palestinians and in favor of settlers and Israel’s domestic use. For instance, a recent report by the UN Secretary-General noted that:

Israeli settlements in the Jordan Valley alone, for example, consume an equivalent of 75 per cent of the water that the entire West Bank Palestinian

population of approximately two million consumes for domestic and urban uses.⁴

This chapter will first employ the law of armed conflict to present a “traditional” exegesis of an occupant’s powers over natural resources in occupied territory. It will then consider the confluence of the law of armed conflict and human rights law in order to assess the normative significance the “right to water” may exert on an occupier’s exploitation of water resources in occupied territory.

Occupation, natural resources, and the law of armed conflict

The 1907 Hague Regulations contain the basic rules which delineate an occupant’s powers regarding the treatment of property in occupied territory. The application of these provisions is dependent on various categories – such as whether the property in question is privately or publicly owned, whether it is moveable or immoveable, and whether it can be classified as *munitions de guerre*.⁵ In relation to private property found in occupied territory, Article 46 of the Hague Regulations expressly and without qualification prohibits its confiscation: this is buttressed by an absolute prohibition of pillage in Article 47.⁶ The immunity from seizure thus accorded to private property is nevertheless subject to an exception should it fall within the category of *munitions de guerre*. The second paragraph of Article 53 provides:

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, *even if they belong to private individuals*, but must be restored and compensation fixed when peace is made.⁷

Further, under Article 52, moveable private property may be requisitioned by the occupying forces, but this is subject to limitation as Article 52 provides in part:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country . . .

Insofar as concerns privately owned natural resources in occupied territory, the interplay of Articles 52 and the second paragraph of Article 53, could be determinative in relation to the seizure or exploitation of raw materials and resources. As Lauterpacht observes, however, to hold that these may be seized as *munitions de guerre* in quantities surplus to the requirements of the occupying forces under the second paragraph of Article 53 would obviate the need for the occupant to make lawful requisitions under Article 52.⁸ It should not readily be assumed that one provision makes another in the same treaty redundant.⁹ Further, as the governing principle in

the Regulations is to grant immunity from seizure to private property, a restricted scope to an occupant's powers under the second paragraph of Article 53 is justified.

In general terms, however, it seems better to locate an occupant's powers over the natural resources of occupied territory within the régime created by the Hague Regulations in respect of publicly owned property. This is consistent with the overarching principle of permanent sovereignty over natural resources which vests title in the indigenous population as the economic corollary of self-determination.¹⁰ Although the Hague Regulations grant an occupant wider powers over the disposal and use of publicly owned property than over privately owned property, a major omission is that no definition of publicly owned property is provided.¹¹ Moreover, the Regulations do not provide standards for the legitimate treatment of property in which the State has an interest, but not absolute ownership. The United Kingdom and United States have assumed, if ownership is doubtful, that property is owned by the State unless private ownership can be established.¹² The relevant provisions of the Hague Regulations are the first paragraph of Article 53 and Article 55, which provide:

- 53. An army of occupation can only take possession of cash, funds and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all moveable property belonging to the State which may be used for military operations.
- 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.¹³

Article 55 reflects the principle that the occupant does not displace the legitimate sovereign of the territory as it cannot deal with publicly owned immoveable property at will. This cannot be appropriated or sold and the occupant cannot acquire title to it.¹⁴ The principle that the occupant must act in accordance with the rules of usufruct limits its legitimate powers. This Roman law doctrine was defined in Justinian's Institutes as *Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia*.¹⁵ This is the right to enjoy and take the fruits of another's property, but not to destroy it or fundamentally alter its character.¹⁶

Some implications of this doctrine for the purposes of Article 55 are clear: the occupant must respect the substance or capital of publicly owned immoveable property, but it has the right to the proceeds or produce it provides. Accordingly, the occupant may lease or use State buildings, sell or consume the crops grown on public land, fell and sell the timber of State forests.¹⁷ However, usufruct prohibits exploitation which amounts to the destruction of this property: the classic example provided by textbooks to illustrate this is the German despoilation of French forests during the Franco-Prussian war.¹⁸ A similar verdict was reached by the Criminal

Chamber of the French Cour de Cassation in 1927: it ruled that the felling of trees contrary to the provisions of the pre-occupation Forest Code breached the rules of usufruct.¹⁹ Further, both the 1940 and 1956 U.S. Army Field Manuals provided:

As administrator or usufructuary [the occupant] should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value.²⁰

Quite simply, practice and legal opinion has consistently adhered to the position that the occupant can only act as usufructuary in relation to publicly owned immoveable property. Whether this position has changed as a result of practice during the occupation of Iraq remains a matter of conjecture given claims that that occupation should not be classified as a traditional belligerent occupation but rather takes the novel form of a reconstructive occupation which is at least akin to the international administration of territory by the United Nations.²¹ If this claim can be legally justified, or becomes consolidated, it may be that the traditional rules regarding the treatment of property in the Hague Regulations no longer apply with their full force.

On the basis of the assumption that natural resources fall within the category of publicly owned property, the question immediately arises as to whether they should be classified as moveable or as immoveable property. Under the first paragraph of Article 53, the occupant has the right to “all moveable property belonging to the State which may be used for military operations” whereas under Article 55 it must act as usufruct over immoveable property. The standard of permissible treatment of natural resources by an occupant may, therefore, revolve around the fact whether the resource in question has already been extracted or remains *in situ*.²² Further, although the doctrine of usufruct is easily applicable to immoveable property which produces a repeating yield – such as forests – as the occupant may enjoy and dispose of the fruits of the property in question while safeguarding its capital, the implications of the doctrine are not clear where the resource is not renewable but finite – such as minerals or hydrocarbons. No guidance may be gained from the Roman law roots of the doctrine, because the Romans thought that minerals renewed themselves, and the *travaux* of the Hague Regulations are simply silent on this matter.²³

The extent of an occupant’s authority over non-renewable natural resources was explored in diplomatic notes exchanged between the United States and Israel²⁴ as a consequence of Israel’s desire to explore for and exploit hydrocarbon resources in the Sinai and the Gulf of Suez following the 1967 war. Egypt had granted oil concessions in the Gulf of Suez to a US company, the Standard Oil Company of Indiana (Amoco).²⁵ In protection of its interests, the United States argued that:

An occupant’s [usufructuary] rights under international law do not include the right to develop a new oil field, to use the oil resources of occupied territory for the general benefit of the home economy or to grant oil concessions.²⁶

Further, while the doctrine of usufruct allowed the continued exploitation of existing oil wells at the normal pre-occupation rate, a usufructuary could not open

new wells or fields.²⁷ This view is also reflected in UK military doctrine. In discussing an occupant's powers over public immoveable property which is essentially civilian in character, such as public buildings, forests, farms, and coal mines, the UK Manual states:

The occupying power is the administrator, user, and, in a sense, guardian of the property. It must not waste, neglect, or abusively exploit these assets so as to decrease their value. The occupying power has no right of disposal or sale but may let or use public land and buildings, sell crops, cut and sell timber, and work mines. It must not enter into commitments extending beyond the conclusion of the occupation and the cutting or mining must not exceed what is necessary or usual.²⁸

In contrast, while Israel noted that it and the United States were agreed that an occupant could exploit existing oil fields,²⁹ it rejected the remainder of the United States' argument. In particular, it contended that under Article 55, its usufructuary rights included "the obligation and right to continue reasonable considered and orderly new drillings" as the Hague Regulations should not be interpreted in such as way as "to cause economic paralysis of occupied territory."³⁰

Furthermore, Israel argued that Article 55 did not place any restrictions on the purposes to which legitimately extracted resources could be put.³¹ This was in response to the United States' contention that an occupant could only lawfully exploit natural resources in occupied territory to meet the needs of the army of occupation, and not for the general benefit of its home economy.³² The position expounded by Israel, however, ignores settled jurisprudence. In the *Krupp* case, it was held that, during belligerent occupation, the "economy . . . is to be kept intact" as otherwise:

If an economic asset which, under the rules of warfare, is not subject to requisition is nevertheless exploited during the period of hostilities for the benefit of the enemy, the very things result which the law wants to prevent, namely, (a) the owners and the economy as a whole as well as the population are deprived of the respective assets; (b) the war effort of the enemy is unfairly and illegally strengthened; (c) the products derived from the spoilation of the respective assets are being used, directly or indirectly, to inflict losses and damage on the peoples and property of the remaining (non-occupied) territory of the respective belligerent, or on the peoples and property of its allies.³³

Accordingly, in relation to the exploitation of non-renewable natural resources in occupied territory, the Hague Regulations indicate that while the occupant may continue their exploitation only at pre-occupation levels, this should only be for the benefit of the army of occupation. Nevertheless, the traditional rules regarding the treatment of property, and consequently natural resources, contained in the Hague

Regulations are perhaps unwieldy and ill-adapted to the exigencies of a modern economy. A product of their times, the Regulations were drafted to deal with a world of States and societies whose economic and social presuppositions differ radically from contemporary conditions.

The confluence of international humanitarian and human rights law

As early as the late 1960s, United Nations bodies had affirmed that some substantive human rights remained relevant during an international armed conflict.³⁴ Thus, for instance, in resolution 237 (June 14, 1967) on the situation in the Middle East, the Security Council noted that “essential and inalienable human rights should be respected even during the vicissitudes of war,” and in operative paragraph 1 of resolution 2675 (XXV) of December 9, 1970, *Basic principles for the protection of civilian populations in armed conflicts*, the General Assembly affirmed:

Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

By the mid-1990s, although it was generally accepted that both human rights instruments and international humanitarian law were relevant in the regulation of non-international armed conflict, the notion that both could also be applicable during an international armed conflict was only emerging towards doctrinal consolidation.³⁵

The first authoritative ruling on the nature of the relationship between international humanitarian and human rights law in an international armed conflict was enunciated by the International Court of Justice in the *Legality of the threat or use of nuclear weapons* advisory opinion in 1996. It had to consider whether or not the International Covenant on Civil and Political Rights was applicable during an international armed conflict. The Court ruled:

the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.³⁶

This ruling is, however, fairly crude and does not provide a completely candid or transparent account of the relationship between international humanitarian and

human rights law in an international armed conflict. It nevertheless did legally entrench the idea that there is a normative relationship between the two branches of law.

This ruling could also be seen as counter-intuitive inasmuch as international humanitarian law, the law regulating armed conflict, is a much older branch of international law than the protection of human rights. Robertson, however, observed that this apparent anomaly disappears when the issue is considered analytically. Human rights are the basic rights of everyone in all places at all times, whereas humanitarian law ascribes rights to specific categories of persons, in essence those who fall within the categories of protected persons enumerated in the 1949 Geneva Conventions, in the specific circumstance of an armed conflict. Accordingly, human rights provisions constitute the norms of general application and only in exceptional circumstances do the norms of international humanitarian law apply.³⁷ Further, the International Court's ruling in the *Nuclear weapons* advisory opinion contradicts the traditional idea that these two branches of law are mutually exclusive because of their conditions for application and also the sphere of protection they afford. There are still some States which claim to adhere to this view, such as the United States and Israel.³⁸ Very simplistically, the traditional argument was that while human rights law applies during time of peace, international humanitarian law alone applies once an armed conflict exists. Human rights law was also seen as applying territorially, within the national territory of a given State, whereas international humanitarian law was seen as applying extra-territorially as it regulated what States could do outside their own territory in wartime. A bifurcation was also drawn between the destination of obligation arising under the two branches: human rights law was seen as comprising a body of obligations which citizens could claim from their own government, whereas international humanitarian law was seen as principally imposing obligations on governments in their treatment of non-nationals.

Since World War Two this has never been an accurate position to adopt because human rights are, for instance, owed to non-nationals within a State's territory and subject to its jurisdiction, while international humanitarian law also regulates the conduct of hostilities in a non-international armed conflict as common Article 3 to the four Geneva Conventions of 1949 and 1977 Additional Protocol II attest. Moreover, as the International Committee of the Red Cross' study of customary international humanitarian law demonstrates, the regulation of different types of conflict has converged as many of the customary rules applicable in international armed conflicts are equally applicable in non-international conflicts.³⁹

Since the *Threat or use of nuclear weapons* advisory opinion, the International Court has had little opportunity to elaborate on its view of the relationship between these two branches of the law, although in the advisory opinion on the *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, it indicated that there are three possible configurations of their relationship – “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”⁴⁰ This really does not advance the argument very far, but at least

gives a structure for doctrinal exegesis such as that being undertaken by the UN Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights.⁴¹

The incorporation of human rights law into international humanitarian law

Although the contours of the relationship between international humanitarian and human rights law are still to be plotted fully, humanitarian law has an inherent malleability as a result of the Marten's Clause which makes it receptive to the influence of human rights law. Although now a customary principle of humanitarian law, the clause was first included by unanimous vote in the preamble of the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land. Its effect is to underline that humanitarian law treaties, concluded by States specifically to regulate the conduct and consequences of the use of military force, are not comprehensive and that, as a discipline, humanitarian law cannot be insulated from developments occurring in other fields of international law. The Martens Clause provides:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.⁴²

In the *Krupp case*, the U.S. Military Tribunal at Nuremberg expressly affirmed and emphasized the rationale of the clause:

the preamble just cited, also known as "Mertens Clause" [sic], was inserted at the request of the Belgian delegate, Mertens [sic], who was, as were others, not satisfied with the protection specifically guaranteed to belligerently occupied territory . . . it refers specifically to belligerently occupied country. The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.⁴³

The relatively narrow interpretation of the clause, which emphasizes that international humanitarian law conventions do not provide a complete code for the conduct of war but must be read within the context of general international law, finds solid support in State practice and judicial decisions.⁴⁴ Meron argues that the

pleadings in the *Threat or use of nuclear weapons* advisory opinion proceedings demonstrated that there was general agreement on this construction of the Martens Clause while “broader layers of interpretation inspired strong disagreement.”⁴⁵ Although the International Court acknowledged the continued relevance of the clause, and indeed declared its customary status,⁴⁶ it “did not resolve the principal controversies concerning its interpretation.”⁴⁷ Nevertheless, the Australian contention, made during its oral argument, that “[i]nternational standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience”⁴⁸ finds some support in the *KW case*, which was decided by the Conseil de guerre de Bruxelles in 1950. In this, the Conseil de guerre employed the Martens Clause to import established human rights standards as interpretative guidelines for the Hague Regulations.⁴⁹

The balance of rights

In scholarly discussion of the interrelationship between international humanitarian and human rights law, the emphasis is generally on civil and political rights, such as the right to life and deprivation of liberty, as these are conceived in the International Covenant on Civil and Political Rights: economic, social and cultural rights tend to be ignored in this debate.⁵⁰ This is despite the doctrinal unity of human rights which is expressed, for instance, in the preambles of both International Covenants:

in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.⁵¹

Thus economic, social, and cultural rights have an equal importance to civil and political rights despite claims that civil and political rights impose immediate obligations on States⁵² whereas the implementation of economic, social, and cultural rights is to be realized progressively.⁵³ Nevertheless, this dichotomy should not be perceived as absolute but more one of degree as the realization of rights of each category requires both positive action by States as well as acts of forbearance. Indeed, McCaffrey argues that the obligation placed *on* States by both Covenants is one of due diligence to bring about the realization of the enumerated rights rather than one of immediate or progressive implementation.⁵⁴

Aspects of economic, social, and cultural rights already form part of the law of occupation – for instance, albeit only “to the fullest extent of the means available to it,” under Articles 55 and 56 of Geneva Convention IV an occupant has a duty to ensure food and medical supplies and to maintain public health and hygiene facilities and services for the population of occupied territory.⁵⁵ Further, an adequate provision of fundamental economic, social, and cultural rights, such as the right to “an adequate standard of living . . . including adequate food, clothing and housing” which comprehends “the fundamental right of everyone to be free from hunger,”⁵⁶

could be seen as consonant with the occupier's duty under Article 43 of the Hague Regulations to "restore, and ensure, as far as possible, public order and safety" in occupied territory.

Economic, social, and cultural rights and natural resources

Although it may seem strange to consider the question of the exploitation of natural resources in occupied territory within the framework of economic, social, and cultural rights, the implications of human rights norms may elaborate an occupant's legal obligations under humanitarian law.⁵⁷ The (emergent) human right to water is relevant to an occupant's duties regarding the treatment of water as a natural resource which augments the rules arising under international humanitarian law.

Scholarly consensus is that an autonomous right to water does not exist in customary international law.⁵⁸ Nor is express reference made to water as a human right in general human rights treaties,⁵⁹ but it is claimed to be an implicit right in the International Covenants because it is essential to secure expressly enumerated rights.⁶⁰ On this basis, the Committee on Economic, Social and Cultural Rights adopted General Comment No.15 (2002) on the right to water,⁶¹ paragraph 3 of which provides:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11, paragraph 1, (see General Comment No. 6 (1995)). The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.⁶²

The function of General Comments is "to assist and promote [the] further implementation of the Covenant,"⁶³ but they are not binding as such because the Committee does not have the authority to create new obligations for States parties. Nevertheless General Comments carry "significant legal weight"⁶⁴ because they elaborate and clarify the extent of existing obligations.⁶⁵ Salman and McInerney-Lankford conclude that because General Comment 15 only "gives definition to certain of the [Covenant's] explicit provisions, and extrapolates the obligations these entail," it does not create new obligations for States parties but simply elaborates the rights they "have already undertaken to realize."⁶⁶

The nucleus of the right to water expounded in General Comment 15 is that it:

entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁶⁷

The Comment observes that although the Covenant provides for the progressive realization of rights as this is dependent on available resources, it also imposes various obligations which have an immediate effect. In the case of the right to water, one core obligation immediately incumbent upon States is that this right must be exercised without discrimination of any kind.⁶⁸ While the broad duty on States parties to realize the right to water is essentially one of due diligence, the Comment states that its core obligations are non-derogable and no justification may be made for non-compliance.⁶⁹

In delineating the contours of the right, General Comment 15 identifies three types of obligation incumbent upon States parties, namely, the obligations to respect, protect and fulfil.⁷⁰ In the context of belligerent occupation, obligations to respect and protect are possibly the most important. Thus:

The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.⁷¹

A State's obligation to protect requires it to prevent third parties from interfering "in any way" with the enjoyment of the right to water, and includes the duty to adopt legislative and other measures to restrain third parties "from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural resources, wells and other water distribution systems."⁷² Further, States parties "should refrain at all times" from imposing embargoes or other measures that prevent the supply of water or of goods and services essential to secure the right to water – "Water should never be used as an instrument of political and economic pressure."⁷³

These elements of the right to water restrain the lawful activities of occupants in relation to the water resources of occupied territories and complement the rules derived from international humanitarian law. For example, while international humanitarian law prohibits an occupant's use of water resources for reasons other than the needs of the army of occupation, an unlawful extraction made to benefit

the occupant's home population could also be seen as an inequitable extraction which the occupant has a duty to prevent, or as an arbitrary interference with established arrangements of water allocation, and consequently a breach of its duty to ensure the right to water.

Human rights in the Wall advisory opinion

In the *Legal consequences of the construction of a wall in Occupied Palestinian Territory* advisory opinion, the International Court of Justice reaffirmed its earlier ruling in the *Threat or use of nuclear weapons* advisory opinion that human rights conventions continued to apply in time of armed conflict, subject to any derogations made by States parties using mechanisms such as Article 4 of the International Covenant on Civil and Political Rights.⁷⁴ The Court then proceeded to consider the extra-territorial application within the Occupied Palestinian Territory of the principal human rights instruments to which Israel is a party, namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Convention on the Rights of the Child.⁷⁵

In finding that the International Covenant on Civil and Political Rights applied extra-territorially, the International Court followed the settled view of the Human Rights Committee,⁷⁶ ruling that this was confirmed by the *travaux préparatoires* of Article 2.1 of the Covenant.⁷⁷ In doing so, the Court noted, but rejected, Israel's consistent claim made before the Human Rights Committee that it is under no legal obligation to apply the International Covenant on Civil and Political Rights in the Occupied Palestinian Territories.⁷⁸ Article 2.1 provides:

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷⁹

In contrast, the Court observed that the International Covenant on Economic, Social and Cultural Rights contains no provision regulating the scope of its application. While noting that this Covenant dealt with rights which are “essentially territorial,” the Court continued that “it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.” Accordingly, it rejected Israel's claim, made before the Committee on Economic, Social and Cultural Rights, that it was under no legal obligation to apply the International Covenant on Economic, Social and Cultural Rights in the Occupied Palestinian Territory. It further ruled that Israel “is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”⁸⁰

Accordingly, the International Court negated the position on the extra-territorial application of human rights treaties during armed conflict that Israel had expounded

before, for instance, the Human Rights Committee. For instance, in 1998, its representative had stated:

Humanitarian law in armed conflicts had to be distinguished from human rights law. Under human rights régimes, the purpose was to protect the individual from loss of life and liberty and from cruel treatment or oppression by the State, inflicted on him either as a citizen or as a person temporally subject to the jurisdiction of the State in question. Humanitarian law in armed conflicts, on the other hand, was designed to balance the needs of humanity against the nature of warfare. His Government believed that the latter situation was much more pertinent to the case of the occupied territories.⁸¹

Hampson and Salama have considered whether Israel is entitled to rely on the principle of persistent objection to claim that the applicability of international humanitarian law precludes that of human rights law in armed conflict. They cast doubt on whether it can do so, as its objection does not appear to be sufficiently consistent, noting that it has neither made reservations to this effect nor objected to general comments by the Committee which have dealt with the applicability of human rights law in time of armed conflict.⁸² One may also wonder whether a claim based on persistent objection can be structural as opposed to substantive. The Court's ruling on the extra-territorial applicability of the Covenants was that Israel's view was contrary to the preponderant interpretation. The question in issue did not bear on the existence of Israel's obligations under the Covenants, but rather the extent of those obligations.

The right to water and the Occupied Territories

The Palestinian population of the West Bank is approximately 2.5 million: in 2006, Israel's Central Bureau of Statistics stated that 268 400 settlers lived there.⁸³ From the available water resources from the Mountain Aquifer, which is shared between Israel and the West Bank,⁸⁴ Palestinians use 17 percent, settlers 10 percent, and Israel 73 percent.⁸⁵ *Per capita* consumption of water by settlers is at least four times that of the West Bank Palestinian population, and in Israel, four times.⁸⁶ Although this gap in consumption is partially due to a difference in standards of living, Palestinian demand for water exceeds supply, thus "if Israel did not dictate the existing unfair division of water, the gap in consumption between the two populations would be significantly smaller."⁸⁷ Further, in 1967, Israel changed the water sector law in the Occupied Territories.⁸⁸ B'Tselem argues that, in principle, this could have led to a more efficient supply of water to Palestinians but "Israel utilized these changes to promote only Israeli interests, almost completely ignoring the needs of the Palestinian people, which was left to face a growing water shortage."⁸⁹ The creation of the Joint Water Committee by virtue of Annex III, Appendix I, Article 40 of the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (Washington D.C., September 28, 1995) did not change this situation but "merely

formalised a discriminatory management régime that was, for the most part, already in existence.”⁹⁰ Palestinian water resources remain controlled by the Israeli authorities through the combination of Military Orders and its effective veto in the Joint Water Committee.⁹¹ The provisions of the Interim Agreement do not reflect customary principles of international water law as “the patterns of water utilization in the region remain deeply inequitable, and certainly unsustainable.”⁹²

A core element of the right to water is the duty of non-discrimination: this is not derogable and no justification may be made for non-compliance. The substantive obligations that the right to water places on States parties to the International Covenant on Economic, Social and Cultural Rights include the duty to refrain from any practice or activity that denies or limits equal access to adequate water or that arbitrarily interferes with traditional arrangements for water allocation. States parties must also prevent third parties from interfering with the enjoyment of the right to water. Although the striking difference in *per capita* water consumption could be taken as *prima facie* evidence of discriminatory water allocation, other Israeli practices are clearly discriminatory. Israel has denied the Palestinian Authority access to water resources in the Jordan River basin and has declared land along the lower Jordan River a closed military zone. This has deprived Palestinian farmers of its water resources which they had used for irrigation before the occupation.⁹³ There is also evidence that the quantity and pricing of water supply is discriminatory between Palestinians and Israeli settlers.⁹⁴ Discrimination in water supply in favour of settlers constitutes a double illegality, as it is also a diversion of the resources of occupied territory for a use unrelated to the needs of the army of occupation. Accordingly, this breaches Israel’s duties arising under both international humanitarian law and the human right to water.

The denial of Palestinian use of water resources in the Jordan River valley which had been used for irrigation before the occupation is not, however, the most extensive interference with traditional arrangements for water allocation in the West Bank. The construction of the wall, declared illegal by the International Court of Justice in the *Consequences of the construction of a wall* advisory opinion, systematically deprives West Bank Palestinians access to water:

The construction of the barrier has closed off the access of Palestinians to 95 per cent of their own water resources (630 million m³ of 670 million m³ annually) by destroying 403 wells and 1,327 cisterns. It has cut off access of owners to 136 wells providing 44.1 million m³ of water annually. The barrier has closed 46 springs (23 million m³/year) and 906 dunums of underground water (99 per cent of underground West Bank water) . . . The latest barrier route will isolate another 62 springs and 134 wells in the “seam zone.”⁹⁵

The route of the wall closely follows the “red line,” delineated in 1977 by the Israeli water commissioner at the request of Prime Minister Begin, to define those areas of the West Bank from which Israel could withdraw without severely affecting Israel’s water supply.⁹⁶ This is another case of compounded illegality: the use of an illegal

mechanism to commit a breach of both international humanitarian law through the unlawful appropriation of the resources of occupied territory in a discriminatory manner which violates the human right to water.

Human rights law is not a panacea to the inadequacies of international humanitarian law and can only have a circumscribed impact in determining the substantive content of an occupant's duties and powers in the exploitation of the natural resources of occupied territory. It supplements international humanitarian law only to a limited extent. Nevertheless, where human rights law is relevant, it deals with the pre-eminent natural resource necessary for human survival. The human right to water both complements and supplements the essentially economic provisions of the Hague Regulations and, perhaps paradoxically, through its insistence on non-discrimination, may be seen as more humanitarian in its exigencies than the provisions of international humanitarian law.

Notes

- 1 The legal régime of occupation is not, however, comprehensive; for a partial enumeration of *lacunae* see G. von Glahn, *The protection of human rights in time of armed conflicts*, 1 Israel Yearbook on Human Rights 208 (1971), 212–13.
- 2 *In re Krupp* (U.S. Military Tribunal, Nuremberg: 1948) 15 Ann Dig 620 at 622–3: emphasis added.
- 3 Emphasis added: on the interpretation of Article 43, see e.g. Y. Dinstein, *Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding*, <www.hpcr.org/pdfs/OccasionalPaper1.pdf>; G. von Glahn, *The occupation of enemy territory: a commentary on the law and practice of belligerent occupation* (University of Minnesota Press: Minneapolis: 1957) 94–105; C. Greenwood, *The administration of occupied territory in international law*, in E. Playfair, *International law and the administration of occupied territory* (Clarendon Press: Oxford: 1992) 241; M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *European Journal of International Law*, p. 661 (2005); G. Schwarzenberger, *International law as applied by international courts and tribunals. Vol. II: The law of armed conflict* (Stevens: London: 1968) 191–210; and E. Schwenk, *Legislative power of the military occupant under Article 43, Hague Regulations*, 54 *Yale Law Journal* 393 (1944–5).
- 4 Note by the Secretary-General, Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan, A/61/67, E/2006/13 (May 3, 2006), 12–13, para. 47. This statistic is drawn from a B'Tselem report which notes that these settlements had an approximate population of 5000, compared to a Palestinian population of two million – see B'Tselem, *Land grab: Israel's settlement policy in the West Bank* (B'Tselem: Jerusalem: 2002) 95. See also Note by the Secretary-General, Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan, A/62/75, E/2007/13 (May 3, 2007) 12, para. 40–1; Note by the Secretary-General, Report of the Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the Occupied Territories, A/61/500/Add.1 (June 8, 2007), 10, paras. 29–30; Office for the Coordination of Humanitarian Affairs, *The humanitarian impact on Palestinians of Israeli settlements and other infrastructure in the West Bank* (July 2007) 114, <http://www.ochaopt.org/documents/TheHumanitarianImpactOfIsraeliInfrastructureTheWestBank_full.pdf>; the World Bank, *Two years after London: restarting Palestinian economic recovery* (September 24, 2007) 22–3, para. 64,

- <<http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/AHLCMainReportfinalSept18&cover.pdf>>; B'Tselem Thirsty for a solution: the water crisis in the Occupied Territories and its resolution in the final-status agreement, (B'Tselem: Jerusalem: 2000), especially Chapters 3–5; and I. Scobbie, Natural resources and belligerent occupation: mutation through permanent sovereignty, in S. Bowen (ed.), *Human rights, self-determination and political change in the Occupied Palestinian Territories* (Nijhoff: Kluwer: 1997), 221 at 260–73.
- 5 These provisions are dealt with *in extenso* in Scobbie, above n. 4, 226–46.
 - 6 Paragraph 2 of Article 46 simply provides, “Private property cannot be confiscated” while Article 47 states, “Pillage is formally forbidden”: Schwarzenberger, above n. 3, 244 argues that this “formal” prohibition entails an absolute prohibition. These provisions are stated to have customary status in the ICRC customary international humanitarian law study – see J-M. Henckaerts and L. Doswald-Beck, *Customary international humanitarian law* (Cambridge UP: Cambridge: 2005), 178–85, commentary to Rules 51 and 52.
 - 7 Emphasis added: on *munitions de guerre*, see E. Lauterpacht, *The Hague Regulations and the seizure of munitions de guerre*, 32 British YIL 218 (1955–6), but compare E. J. Wallach, *The use of crude oil by an occupying belligerent State as a munition de guerre*, 41 ICLQ 287 (1992).
 - 8 *Ibid.*, 237: this question is discussed in Scobbie, above n. 4, 234–8.
 - 9 See R. Y. Jennings and A. D. Watts, *Oppenheim’s international law. Vol. I: Peace* (Longmans: London: 1992, 9th edn.) 1280–1.
 - 10 On the development of the doctrine of permanent sovereignty over natural resources, see N. Schrijver, *Sovereignty over natural resources: balancing rights and duties* (Cambridge UP: Cambridge: 1997) Chapters 2 and 3; and on its relevance in the context of occupation, see Scobbie, above n. 4, 247–53 and the works cited therein.
 - 11 Possible tests for public ownership are provided by E. H. Feilchenfeld, *The international economic law of belligerent occupation* (Carnegie Endowment for International Peace: Washington D.C.: 1942) 57–61; and C. C. Hyde, *International law chiefly as interpreted and applied by the United States* (Little Brown: Boston: 1951, 2nd edn.) 1895–6. M. M. Whiteman, *Digest of international law* (Dept of State: Washington: 1968) Vol. 10, 574–5 reproduces the advice contained in the *US Dept of the Army field manual on the law of land warfare* (1956), section 394(a) of which sets out the basis principle that:

Under modern conditions, the distinction between public and private property is not always easy to draw. For the purpose of treatment of property under belligerent occupation, it is often necessary to look beyond strict legal title and to ascertain the character of the property on the basis of the beneficial ownership thereof.

- 12 G. H. Hackworth, *Digest of international law* (Dept of State: Washington: 1943) Vol. VI, 411; 10 Whiteman 575; *US Dept of the Army field manual on the law of land warfare* (1956), section 394(c); UK Ministry of Defence, *The manual of the law of armed conflict* (Oxford UP: Oxford: 2004) 304–5, para.11. 90; and von Glahn, *Occupation*, above n. 3, 179. This test was also adopted by the Israeli High Court in *Al Nawar v Minister of Defence* 16 Israel YHR 321 (1986) at 324–5, 326. This approach has been criticized by Cassese A., *Powers and duties of an occupant in relation to land and natural resources*, in Playfair, above n. 3, 419 at 437–8; and by Schwarzenberger, above n. 3, 309–10.
- 13 Rule 51(b) of the ICRC customary international humanitarian law study identifies the occupant’s duty to administer immovable public property in occupied territory in accordance with the rules of usufruct as customary, see Henckaerts and Doswald-Beck, above n. 6, 178–9.
- 14 See, for instance, *In re Flick* (U.S. Military Tribunal, Nuremberg: 1947) 14 Ann Dig 266 at 271; and *El Nazer et al. v. Commander of the Judea and Samaria Area et al.* (Israeli High Court) 13 Israel YHR 368 (1983) at 370.
- 15 *Institutes* II.2.4 – “Usufruct is the right to the use and fruits of another person’s property, with the duty to preserve its substance”: translation by P. Birks and G. McLeod, *Justinian’s Institutes* (Duckworth: London: 1987) 61.

- 16 For accounts of the doctrine in Roman law see, for instance, W. W. Buckland, *A textbook of Roman law from Augustus to Justinian* (Cambridge UP: Cambridge: 1963, 3rd edn. by Stein P.) 269 *et seq*; and B. Nicholas, *An introduction to Roman law* (Clarendon Press: Oxford: 1962) 144 *et seq*.
- 17 Feilchenfeld, above n. 11, 55; von Glahn, *Occupation*, above n. 3, 176–7; and L. Oppenheim, *International law: a treatise. Vol. II: Disputes, war and neutrality* (Longmans: London: 1952, 7th edn. by H. Lauterpacht) 397–8.
- 18 Feilchenfeld, above n. 11, 56; von Glahn, *Occupation*, above n. 3, 177 n. 4; Oppenheim-Lauterpacht, above n. 17, 619 n. 1; and Schwarzenberger, above n. 3, 313. Destruction which is not justified by military necessity amounts to an act of spoliation – see, for instance, *French State v. Lemarchand* (Court of Appeal of Rouen: 1948) 15 Ann Dig 597.
- 19 See *In re Falck* (Court of Nancy: 1926) 3 Ann Dig 480 (1925–6) at 481, reversed by the Cour de Cassation in *Administration of Waters and Forests v. Falk* 4 Ann Dig 563 (1927–8).
- 20 1940 Manual – VI Hackworth 412; 1956 Manual – 10 Whiteman 576. The UK Manual, above n. 12, 303, para. 11. 86 contains similar guidance.
- 21 For an assertion of the traditional rules of belligerent occupation in relation to Iraq, see G. H. Fox, *The occupation of Iraq*, 36 Georgetown JIL 195 (2005). For an analysis of the allegedly novel nature of the occupation of Iraq, see A. Roberts, *Transformative military occupation: applying the laws of war and human rights*, 100 American JIL 580 (2006); see also H. Tigroudja, *Le régime d'occupation en Iraq*, 50 Annuaire Français de Droit International 77 (2004).
- 22 Compare the *Singapore oil stocks case*, *NV de Bataafsche Petroleum Maatschappij and others v. the War Damage Commission* (1956), 23 ILR 810: discussed Scobbie, above n. 4, 236–7.
- 23 On both points, see B. M. Clagett and O. T. Johnson, *May Israel as a belligerent occupant lawfully exploit previously unexploited oil resources of the Gulf of Suez?* 72 American JIL 558 (1978) at 568 and 574 respectively: see 565–76 generally for a discussion of the evolution of the substance of Article 55.
- 24 U.S. Dept of State, *Memorandum of law on Israel's right to develop new oil fields in Sinai and the Gulf of Suez of 1 October 1976*, 16 International Legal Materials 733 (1977) and Israel Ministry of Foreign Affairs, *Memorandum of law on the right to develop new oil fields in Sinai and the Gulf of Suez*, 17 International Legal Materials 432 (1978).
For commentary, see Clagett and Johnson, above n. 23; A. Crivellaro, *Oil operations by a belligerent occupant: the Israel–Egypt dispute*, 3 Italian Yearbook of International Law 171 (1977); E. R. Cummings, *Oil resources in occupied Arab territories under the law of belligerent occupation*, 9 Journal of International Law and Economics 533 (1974); E. R. Cummings *et al.*, *Territories occupied by Israel: settlements and exploration of oil resources*, 72 ASIL Proc 118 (1978);
A. Gerson., *Off-shore oil exploration by a belligerent occupant: the Gulf of Suez dispute*, 71 American JIL 725 (1977); A. N. Roushdy., *Egypt's rights over oil resources under the rules of belligerent occupation*, 36 Revue Égyptienne de Droit International 101 (1980); M. Rosenne, *Development of oil resources in Sinai*, in M. Shamgar (ed.), *Military government in the territories administered by Israel 1967–1980. Vol. I: the legal aspects* (Hebrew University: Jerusalem: 1982) p. 335; and Scobbie, above n. 4, 238–44.
- 25 See Clagett and Johnson, above n. 23, 559; and U.S. Memorandum, above n. 24, 734: some of the oil fields in Sinai were owned by a joint venture in which the Italian state oil corporation had an interest, which Israel allegedly exploited in excess of pre-occupation levels – see Cummings, above n. 24, 533–5.
- 26 U.S. Memorandum, above n. 24, 734.
- 27 U.S. Memorandum, above n. 24, 736–9, and 740–1: see also von Glahn, *Occupation*, above n. 3, 177.
- 28 U.K. Manual, above n. 12, 303, para. 11. 86: note omitted.
- 29 Israeli Memorandum, above n. 24, 437.
- 30 Israeli Memorandum, above n. 24, 435.
- 31 Israeli Memorandum, above n. 24, 436–7.

- 32 See U.S. Memorandum, above n. 24, 734 and 742–6; and also David H. Small, U.S. Dept of State, letter dated February 17, 1977, 1977 Digest of United States Practice in International Law 921.
- 33 *In re Krupp* (U.S. Military Tribunal, Nuremberg: 1948) 15 Ann Dig 620 at 622–3 and 624–5.
- 34 For contemporary commentary see, for instance, G. I. A. D. Draper, *The relationship between the human rights regime and the law of armed conflicts*, 1 Israel Yearbook on Human Rights 191 (1971), and von Glahn, *Human rights*, above n. 1.
- 35 See, for instance, H. S. Burgos, *The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special reference to war crimes and political crimes*, in F. Kalshoven and Y. Sandoz (eds.), *Implementation of international humanitarian law* (Nijhoff: Dordrecht: 1989) 1; C. M. Cerna, *Human rights in armed conflict: implementation of international humanitarian norms by regional intergovernmental human rights bodies*, in Kalshoven and Sandoz, *op. cit.*, 31; Y. Dinstein, *Human rights in armed conflict: international humanitarian law*, in T. Meron (ed.), *Human rights in international law: legal and policy issues* (Clarendon Press: Oxford: 1984) Vol. II, 345; L. Doswald-Beck and S. Vite, *International humanitarian law and human rights law*, 293 International Review of the Red Cross 94 (1993); A. Eide, *The laws of war and human rights – divergences and convergences*, in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (ICRC: The Hague: 1984) 675; F. Hampson, *Human rights and humanitarian law in internal conflicts*, in A. Meyer (ed.), *Armed conflict and the new law* (BIICL: London: 1989) 55; P. H. Kooijmans, *In the shadowland between civil war and civil strife: some reflections on the standard-setting process*, in A. Delissen and G. Tanja (eds.), *Humanitarian law of armed conflict: challenges ahead. Essays in honour of Frits Kalshoven* (Nijhoff: Dordrecht: 1991) 225; Meron T., *Human rights in internal strife: their international protection* (Grotius: Cambridge: 1987); Robertson AH, *Humanitarian law and human rights*, in Swinarski, *op. cit.*, 793; and D. Schindler, *Human rights and humanitarian law: interrelationship of the laws*, 31 American University Law Review 935 (1982).
- 36 *Legality of the threat or use of nuclear weapons* advisory opinion, ICJ Rep, 1996(1), 226 at 240, para. 25. The earlier ruling by the European Court of Human Rights which addressed aspects of the applicability of human rights norms in an international armed conflict, delivered in *Loizidou v Turkey, preliminary objections judgment* (March 23, 1995), Series A, No. 310 at 23–4, paras. 62–4, is more restricted than that of the International Court in the *Nuclear weapons* advisory opinion. In *Loisidou*, the European Court addressed only the extra-territorial applicability of the European Convention on Human Rights where a State party exercises effective control over foreign territory. It ruled (24, para. 62):

Bearing in mind the object and purpose of the Convention, the responsibilities of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set forth in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

- 37 Robertson, above n. 35, 797–8: compare M. J. Dennis, *Application of human rights treaties extraterritorially in times of armed conflict and military occupation*, 99 American JIL 119 (2005).
- 38 See F. Hampson and I. Salama, *Working paper on the relationship between human rights law and international humanitarian law*, E/CN.4/Sub.2/2005/14 (21 June 2005), 17, paras. 69–70. For the United States' position, see also Human Rights Committee, *Consideration of reports submitted under Article 40 of the Covenant. Concluding observations: United States of America*, CCPR/C/USA/CO/3/Rev.1 (December 18, 2006), 2–3, para. 10, and U.S. Department of Defense, *Working Group Report on detainee interrogations in the global war on terrorism: assessment of legal, historical, policy and operational considerations* (6 March 2003), < <http://www.cdi.org/news/law/pentagon-torture-memo.pdf> >, 6.

- 39 See Henckaerts and Doswald-Beck, above n. 6; and N. Lubell, *Challenges in applying human rights law to armed conflict*, 860 International Review of the Red Cross 737 (2005) 747.
- 40 *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ Rep, 2004, 136, at 178, para.106: re-affirmed in the *Armed activities on the territory of the Congo* case (Democratic Republic of the Congo v. Uganda, 19 December 2005), 45 International Legal Materials 271 (2006), 317, para. 216, and see 317–19, paras. 215–21 generally.
- 41 See Hampson and Salama, above n. 38; see also the Human Rights Committee, *General Comment No. 29 (Derogations during a state of emergency)*, CCPR/C/21/Rev.1/Add.11 (August 31, 2001), and *General Comment No.31 (Nature of the general legal obligation imposed on States parties to the Covenant)*, CCPR/C/21/Rev.1/Add.13 (May 26, 2004). See also H. Krieger, *A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study*, 11 Journal of Conflict and Security Law 265 (2006).
- 42 This is the version of the clause contained in the preamble to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. The original 1899 version of the clause provided:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

On the Martens Clause, see: *Military and paramilitary activities in and against Nicaragua case: merits judgment* (Nicaragua v. United States), ICJ Rep, 1986, 14 at 113–14, para. 78; the *Legality of the threat or use of nuclear weapons advisory opinion*, ICJ Rep, 1996(I), 226 at 257, para. 78 and 259, para. 84; and *Prosecutor v. Kupreskic and others* (IT-96-16-T, ICTY, Chamber of First Instance: 14 Jan. 2000) < <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> >, para. 525.

- For commentary on the clause, see A. Cassese *The Martens clause: half a loaf or simply pie in the sky?* 11 European JIL 187 (2000); C. Greenwood, *Historical development and legal basis*, in D. Fleck (ed.), *The handbook of international humanitarian law* (Oxford UP: Oxford: 2008, 2nd edn.), 1 at 28–9, ¶129; T. Meron, *The Martens clause, principles of humanity, and dictates of public conscience*, 94 American JIL 78 (2000), and his *The humanization of international law* (Nijhoff: Leiden: 2006) 16–29; Miyazaki S., *The Martens Clause and international humanitarian law*, in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (ICRC/Nijhoff: Geneva/The Hague: 1984) at p. 433; Pustogarov VV, *The Martens clause in international law*, 1 Journal of the History of International Law 125 (1999); H. Strebel, *Marten's Clause*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland Publishing Co: Amsterdam: 1982) Vol. 3, p. 252; and R. Ticehurst, *The Martens clause and the laws of armed conflict*, 317 International Review of the Red Cross 125 (1997).
- 43 *In re Krupp* (U.S. Military Tribunal, Nuremberg: 1948) 15 Ann Dig 620 at p. 622. Cassese, above n. 42, 204 argues that this ruling was *obiter* as the tribunal proceeded to apply specific provisions of the Hague Regulations, rather than the Martens Clause, to decide the case.
 - 44 The most extensive analysis is Cassese, above n. 42.
 - 45 Meron (*Martens Clause*), above n. 42, 85: see also his *Humanization*, above n. 42, 25–7.
 - 46 *Threat or use of nuclear weapons advisory opinion*, ICJ Rep, 1996(I), 226 at 257, paras. 78 and 259, para. 84: see also *Nicaragua case: merits judgment*, ICJ Rep, 1986, 14 at 113–14, para. 218.
 - 47 Meron, above n. 42, 87: see also Cassese, above n. 42, 210–11.
 - 48 Oral argument of Evans (Australian counsel), CR.95/22 (October 30, 1995), 45, para. 27, available at < www.icj-cij.org/docket/files/95/5925.pdf >: see also Hampson and Salama, above n. 38, 6–7, paras. 15–18.

- 49 See Cassese, above n. 42, 207.
- 50 For an exception, see Lubell, above n. 39, 751–3; compare Dennis, above n. 37, 139–41.
- 51 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, third preambular paragraph: see also, for instance, General Assembly resolution 42/102 (7 December 1987) on *Indivisibility and interdependence of economic, social, cultural, civil and political rights*; Lubell, above n. 39, 751; and S. M. A. Salman and S. McInerney-Lankford, *The human right to water: legal and policy dimensions* (World Bank: Washington: 2004) 25–8.
- 52 Article 2.1 of the International Covenant on Civil and Political Rights provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- 53 Article 2.1 of the International Covenant on Economic, Social and Cultural Rights provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
- 54 See S. C. McCaffrey, *A human right to water: domestic and international implications*, 5 Georgia International Environmental Law Review 1 (1992) 12–15; A. Hardberger, *Life, liberty, and the pursuit of water: evaluating water as a human right and the duties and obligations it creates*, 4 Northwestern Journal of International Human Rights 331 (2005) 336; P. Hunt, *Economic and social rights: issues of implementation*, in Bowen, above n. 4, 201; and Salman and McInerney-Lankford, above n. 51, 24–5 and 65–6.
- 55 For a consideration of some of the general issues that could arise from a human rights perspective being placed on the occupant's duty regarding health care, see Lubell, above n. 39, 751–3.
- 56 International Covenant on Economic, Social and Cultural Rights, Article 11.
- 57 Compare Lubell, above n. 39, 751.
- 58 See, e.g., Hardberger, above n. 54, 332–3, 337–8, 340, and 345; and J. Scanlon, A. Cassar and N. Nemes, *Water as a human right?* (IUCN Environmental Policy and Law Paper No. 51: Cambridge: 2004) 12.
- 59 In contrast, Article 14.2(h) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women requires States parties to take all appropriate measures to eliminate discrimination against women in rural areas and to ensure them the right to adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications. Article 24 of the 1989 Convention on the Rights of the Child includes, in its enumeration of the elements of the child's right to health, the duty of States parties "to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution" (Article 24.2(c)).
- 60 See Economic and Social Council, Commission on Human Rights, *Economic, social and cultural rights: relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation. Final report of the Special Rapporteur, El Hadji Guissé*, E/CN.4/Sub.2/2004/20 (14 July 2004), 8–10, paras. 23–4 and 29; Hardberger, above n. 54, 337–8 and 345; McCaffrey, above n. 54, 1 and 10–12; Salman and McInerney-Lankford, above n. 51, 56–60; and Scanlon, Cassar and Nemes, above n. 58, 4–5 and 18–20.

- 61 General Comment No.15, *The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11 (January 20, 2003). For an account of the Committee's role and competence to issue General Comments, see Salman and McInerney-Lankford, above n. 51, 33–53.
- 62 E/C.12/2002/11, 2, para. 3: notes omitted.
- 63 Salman and McInerney-Lankford, above n. 51, 46.
- 64 Salman and McInerney-Lankford, above n. 51, 49.
- 65 Salman and McInerney-Lankford, above n. 51, 53 and 86: see also Hardberger, above n. 54, 347–8.
- 66 Salman and McInerney-Lankford, above n. 51, 78: see also 64 and 85–7.
- 67 E/C.12/2002/11, 2, para. 2.
- 68 See E/C.12/2002/11, 8, paras. 17, and in greater detail 12–13, para. 37.
- 69 E/C.12/2002/11, 13, para. 40.
- 70 See E/C.12/2002/11, 9–11, paras. 20–9.
- 71 E/C.12/2002/11, 9, para. 21: emphasis in original.
- 72 E/C.12/2002/11, 9, para. 23.
- 73 E/C.12/2002/11, 11–12, para. 32.
- 74 *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 177–8, paras. 105–6.
- 75 See *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 177–81, paras. 102–13. Israel ratified both International Covenants and the Children's Convention on October 3, 1991—see ICJ Rep, 2004, 177, para. 103.
- 76 See, e.g., Human Rights Committee, *Consideration of Reports submitted by States parties under Article 40 of the Covenant. Concluding observations: Israel*, CCPR/C/79/Add.93 (18 August 1998), para. 10.
- 77 For a contrary interpretation of the *travaux préparatoires*, see Dennis, above n. 37, 123–4: see 122–7 generally.
- 78 *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 179–80, paras. 109–11.
- 79 Emphasis added.
- 80 *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 180–1, para. 112: compare Dennis, above n. 37, 127–8.
- 81 Human Rights Committee, *Summary record of the 1675th meeting*, CCPR/C/SR.1675 (21 July 1998), statement of Mr Schoffmann (Israel), para. 23.
- 82 Hampson and Salama, above n. 38, 17, para. 70: on persistent objection in the context of international humanitarian law, see also the chapters by Hampson and Scobbie in E. Wilmshurst and S. Breau (eds.), *Perspectives on customary international humanitarian law* (Cambridge UP: Cambridge: 2007).
- 83 The Central Bureau of Statistics 2006 figure for the settler population of the West Bank is reproduced at < http://www.fmep.org/settlement_info/settlement-info-and-tables/stats-data/israeli-settler-population-1972-2006: this source states that in 2005, 184, 057 settlers lived in occupied East Jerusalem.
- 84 For details of this aquifer, see B'Tselem, *Thirsty for a solution*, above n. 4, Chapter 2.A. For an account of the regional water situation, see D. J. M. Phillips, M. Doaudy, J. Öjendal, A. Turton and S. McCaffrey, *Trans-boundary water cooperation as a tool for conflict prevention and for broader benefit-sharing* (Ministry for Foreign Affairs: Stockholm: 2006), Chapter 4 and 144–52; and for an historical overview, A. Jägerskog, *Why States cooperate over shared water: the water negotiations in the Jordan River Basin* (Linköping Studies in Arts and Science No. 281: Linköping University, Sweden, 2003), 76–87, available at < <http://waterwiki.net/images/a/a2/Jagerskog2003.pdf> >.
- 85 Note by the Secretary-General, *Economic and social repercussions of the Israeli occupation*, A/61/67, E/2006/13 (3 May 2006), above n. 4, 12–13, para. 47; Note by the Secretary-General, *Report of the Special Committee to investigate Israeli practices*, A/61/500/Add.1 (8 June 2007), above n. 4, 10, para. 29; and World Bank, *Two years after London*, above n. 4, 22.

- 86 B'Tselem, *Thirsty for a solution*, above n. 4, text following n. 128, and text to n. 131–2; Jägerskog, above n. 84, 74; OCHA, *Humanitarian impact*, above n. 4, 114; Phillips *et al.*, *Trans-boundary water cooperation*, above n. 84, 50; and D. J. H. Phillips, S. Attili, S. McCaffrey and J. S. Murray, *Factors relating to the equitable distribution of water in Israel and Palestine*, paper presented at Israel/Palestine Center for Research and Information, *Second Israeli–Palestine International Conference on Water for Life in the Middle East* (Antalya, Turkey, October 10–14, 2004), < www.ipcri.org/watconf/papers/davidp.pdf >, 3.
- 87 B'Tselem, *Thirsty for a solution*, above n. 4, text to n. 135–6.
- 88 For details, see Scobbie, above n. 4, 260–8.
- 89 B'Tselem, *Thirsty for a solution*, above n. 4, text following n. 79.
- 90 J. Selby, *Joint mismanagement: reappraising the Oslo water regime*, paper presented at Israel/Palestine Center for Research and Information, *Second Israeli–Palestine International Conference on Water for Life in the Middle East* (Antalya, Turkey, October 10–14, 2004), < www.ipcri.org/watconf/papers/jan.pdf >, 4, and see *passim*; and also B'Tselem, *Thirsty for a solution*, above n. 4, Chapter 3B.
- 91 Phillips *et al.*, *Equitable distribution*, above n. 86, 6; Phillips *et al.*, *Trans-boundary water cooperation*, above n. 84, 56–7; and Selby, above n. 90, 9.
- 92 Phillips *et al.*, *Trans-boundary water cooperation*, above n. 84, 58.
- 93 B'Tselem, *Thirsty for a solution*, above n. 4, text to n. 49 and 80; Note by the Secretary-General, *Report of the Special Committee to investigate Israeli practices*, A/61/500/Add.1 (8 June 2007), above n. 4, 10, para. 29.
- 94 For instance, see B'Tselem, *Thirsty for a solution*, above n. 4, Chapter 5B; OCHA, *Humanitarian impact*, above n. 4, 114; and Selby, above n. 90, 7–8.
- 95 Note by the Secretary-General, *Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan*, A/62/75, E/2007/13 (3 May 2007) 12, para. 40, notes omitted: see also D. Arsenault and J. Green, *The effects of the separation barrier on the viability of a future Palestinian State*, paper presented at Israel/Palestine Center for Research and Information, *Second Israeli–Palestine International Conference on Water for Life in the Middle East* (Antalya, Turkey, October 10–14, 2004), < www.ipcri.org/watconf/papers/daniel.pdf >.
- 96 See Arsenault and Green, above n. 95, 10; and A. Wolf, *Trends in transboundary water resources: lessons for cooperative projects in the Middle East*, in D. B. Brooks and O. Mehmet (eds.), *Water balances in the Eastern Mediterranean* (International Development Research Center: Ottawa: 2000), available at < www.idrc.ca/fr/ev-33233-201-1-DO_TOPIC.html >.

9

BUILDING THE RULE OF LAW IN PALESTINE

Rule of law without freedom

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Introduction

The most accurate characterization of the situation of the Palestinians of the Occupied Palestinian Territories (OPTs) is that they are “anticipating a rule of law system” before sovereignty has been achieved. The current political system in the Palestinian Territories is defined as “interim” under various agreements and is administered by the Palestinian Authority (PA), which formally serves as a branch of the Palestine Liberation Organization (PLO).¹ The laws in force in the OPTs include legislation enacted in the Ottoman Empire, during the British Mandate over Palestine, the Jordanian rule in the West Bank, the Egyptian rule in Gaza, Israeli military orders in Gaza and in the West Bank, and Palestinian Legislation enacted by the PA.

The PA was established in 1994 as a consequence of the 1993 *Declaration of Principles on Interim Self-Government Arrangements* (the Oslo Accords) signed by Israel and the PLO. These Accords had many subsequent agreements including the 1994 Gaza–Jericho Agreement, the 1995 Interim Agreement, the 1998 Wye River Memorandum, and the 1999 Sharm el-Sheikh Agreement.²

The Palestinian self-governing entity in the West Bank and the Gaza Strip does not constitute a state. It only meets part of the criteria of statehood under international law.³ Of the positive criteria, it meets only the criterion of a permanent population.⁴ Due to the powers and responsibilities retained by the Israeli military government and due to the fragmentation of the areas under Palestinian territorial

jurisdiction, the PA does not exercise overall, exclusive, and independent governmental authority over the territory and its population.⁵ The territory is divided into a collection of separate enclaves, most of which are not contiguous. The ability of the PA to enter into relations with other states is also extremely limited and remains predominately under the control of the occupying state.⁶

The independence and ability for self-governance of Palestine as an emerging state is severely constrained under the Oslo Accords, which define it as being in an “interim period”, as well as by the *de facto* realities of the occupation.

Annex I of the “Protocol Concerning Redeployment and Security Arrangements” to the Interim Agreement divides the West Bank into three areas: A, B, and C. The logic behind these divisions is based upon the gradual transfer of land to the PA (Israel’s gradual redeployments). The process of Israeli transfer of land to the PA should have been completed 18 months after the latter’s inauguration in 1994, which was in July 1997. However, with the deadlock in the peace process and the start of the second *Intifada* in 2000, the Israeli forces withdrew from only 42.9 percent of the West Bank. Within the restored territories, the A Areas represented 18.2 percent,⁷ (i.e., the big cities and most populated areas, where the PA has full authority), while 24.7 percent of the territories were B Areas (i.e., villages and towns where the PA has civil authority, while Israel retained power over security).⁸ In the meantime, 57.1 percent of the territories, which was called Area C, remained under the full powers of the Israeli Military Government. In April 2002, Israel reoccupied areas “A” and “B” and the above three categories have lost their significance; while civil matters inside these areas are still managed by the PA, the Israeli army is acting without constraint in all areas of the West Bank.

In September 2005, Israel took unilateral steps to disengage from the Gaza Strip, removed military installations and dismantled the illegal settlements in the Strip. Israel has claimed that its “disengagement” has put an end to the occupation of the Gaza Strip. However, Israel has maintained full control over the economy, all movement between Gaza and the West Bank, borders, crossing points, airspace, and water space in this area. Under international humanitarian law, a territory is no longer occupied when the occupying power ceases to exert any form of effective control that undermines the right of self-determination of the occupied population.⁹ Since the Palestinian population in the Gaza Strip is *de facto* enclosed in a giant open-air prison completely controlled by Israel, the claim that Israel is no longer occupying Gaza is legally incongruous.¹⁰

Constitutional framework of the nascent Palestinian state

The Oslo Accords and subsequent agreements currently comprise the constitutional framework for the West Bank and the Gaza Strip under public international law.¹¹ However, the scope of powers granted to the PA under the Oslo Accords was both functionally and territorially limited.¹²

The Palestinian Legislative Council (PLC) approved a temporary Basic Law for the PA in October 1997 for the transitional period, that was promulgated on May

29, 2002. It provides the constitutional framework for the PA during the interim period and is expected to serve as a provisional legal framework for a future Palestinian state. The law states that the government of Palestine is a parliamentary democracy based on the principles of pluralism (Article 5 of the Basic Law), the rule of law (Article 6, *legis citatae*), and separation of powers, with consideration for minority rights (Article 2, *legis citatae*).¹³

The Basic Law has been amended twice. On March 18, 2003, the President of the PA signed the Basic Law Amendment, which was approved by the PLC to allow the appointment of a Prime Minister who will have important authority over the administration of the government.¹⁴ The second amendment, approved on August 18, 2005, regulated the term of the presidency and the PLC, which should not exceed four years.¹⁵ The amendments change the political system from a presidential to a parliamentary one and allow partial proportional representation in political elections.¹⁶

The PA has committed to the respect of human rights within its jurisdiction as a result of the incorporation of Article XIX of the Interim Agreement, which obliges both sides to respect the rule of law and human rights laid down in international conventions. The Basic Law, in chapter two, contains a catalogue of rights, freedoms, and guarantees.¹⁷ Article 9 stipulates that all Palestinians are equal before the law and the judiciary, without discrimination on the basis of race, sex, color, religion, political views, or disability. Article 18 adds that religious freedom, including performance of rituals, is guaranteed.

The Basic Law guarantees complete independence of the judiciary. It establishes a High Constitutional Court to review the constitutionality of laws and regulations, interpret legislation, and settle jurisdictional disputes. Article 95 of the Basic Law requires the High Court to act as a Constitutional Court until a law creating such a court is passed and judges are appointed to serve on it.¹⁸

Despite the legal framework that incorporates respect for human rights, independent groups and respected non-governmental organizations (NGOs) have maintained that the Palestinian public authorities have violated many aspects of Palestinian citizens' rights and freedoms. The claimed violations include the right to life, to personal safety, to protection from torture, to freedom of opinion and expression, as well as other rights and freedoms guaranteed in national and international rights covenants.¹⁹

The relationship of the basic law to international law norms

In any debate either related to the Israeli–Palestinian conflict or to local issues (e.g., general rights and freedoms for citizens), the reference to international law norms is the pillar of such discussion. Palestinian interests in always referring to international law are to make sure that PA legislation adopts the best practices and international standards related to democracy, human rights, social and economic policies. The Palestinian Basic Law was drawn up from various documents, and especially benefited from the laws of countries that witnessed political and legal transitions, such as those of Central and Eastern Europe and South Africa.²⁰

The constitutions of some Central and Eastern European countries have recently given international norms and treaties a direct effect over their local laws. Some of them have even gone as far as to claim that if a provision of law is contrary to international law, the latter shall apply instead. In that respect, Article 15(4) of the Russian *Constitution* of 1993 states that:

The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.²¹

The Constitutions of Moldova, Azerbaijan, Kazakhstan, and Georgia provide rules that are similar to the above Article.²² In other countries, the direct effect of international norms is stated, but is restricted only to ratified treaties, such as in the Czech Republic *Constitution*. Article 10 of that country's constitution states that:

Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.²³

Similar to the Czech Republic *Constitution*, but with less clarity, the Palestinian Basic Law in Article 10 reads:

Basic human rights and freedoms shall be binding and respected. The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights.

This provision is the only reference to international law in the Basic Law, and it does not explicitly state that international norms have a direct effect on domestic law. The provision begs the question whether the legislature intended to make these treaties controlling over domestic law and turn them into formal and binding sources of rights and obligations. The reference in the first part of Article 10 to “basic human rights . . .” being “binding” indicates that the legislature intended to make at least the core human rights of the principle human rights treaties binding on domestic law. However, there is no reference to specific treaties, or a distinction made between treaties and international custom, so it is unclear what “basic human rights” are being incorporated. The second part of Article 10, moreover, refers not to the immediate effect of international law, but rather requires the PA to take steps without delay to join international treaties and conventions. This means that the PA must first ratify these treaties before they come into force.

Similar to the Czech Republic *Constitution*,²⁴ the Palestinian Basic Law does not have a general clause regulating the relationship between international and domestic law. Article 10 does not allow the direct effect of international law over domestic law until international treaties are ratified.

Notwithstanding the ambiguity in the Basic Law itself, the Palestinian legislature has incorporated international norms into the legal system of the PA. Newly-enacted Palestinian laws have been modeled on, and sometimes expressly reference, international treaties and conventions, such as labor law,²⁵ environmental law,²⁶ and social security law,²⁷ to list a few.

The independence of the Palestinian judiciary

The Palestinian judicial system is the legacy of layers of colonial systems inherited from the different political rulers governing the country. The burden of this colonial heritage from the Ottoman, British, Jordanian, Egyptian, and Israeli eras cannot be ignored in assessing the current situation. Decades of negligence – the consequences of which have resulted in poor case management, poor recording and bookkeeping; a shortage of judges and qualified support staff; a lack of equipment, appropriate buildings, and offices; a paucity of legal resources for research; and the lack of independent enforcement and police units – have seriously undermined the effective functioning of the judiciary.²⁸

Over time, the PA has taken measures to deal with these problems. The most important steps taken in recent years were the ratification of the Law of the Formation of Civil Courts of 2001;²⁹ the Judicial Authority Law of 2002 (JAL);³⁰ the statements on the independence of the judiciary in the Basic Law; and finally, the decision to establish a Judicial Studies Institute.³¹

Articles 97–109 of the Basic Law include many of the UN *Basic Principles on the Independence of the Judiciary*. These provisions call for the independence and impartiality of the judiciary and mandate the creation of an independent Higher Judicial Council (HJC). Article 97 states: “The judicial system shall be independent, and shall be assumed by the different types and levels of courts.” Article 98 adds that judges shall be independent, and shall not be subject to any authority other than the authority of the law. Article 99 emphasizes that the appointment, transfer, delegation, promotion, and questioning of judges are to be regulated by a special law (the JAL).³² The JAL regulated the Palestinian judicial system, including magistrate, first instance, appeal, and high courts, as well as the office of the attorney general. It guarantees an independent budget for the judiciary and entrusts the HJC with the power to nominate judges for appointment to the judiciary.

Adding to the problems facing an independent judiciary is the ongoing power struggle between the President and the Hamas-dominated PLC. This conflict is seriously hampering the development and adoption of a legal framework that could provide clarity on the relations and division of power between key actors in the judicial system, such as the HJC, the Ministry of Justice (MoJ), the PLC Legal Committee, and the President.³³

Both the Constitutional Court and the amended JAL were issued by Presidential decree just before the presidential elections in February 2005.³⁴ The amended JAL consolidates the judicial authority and central position of the HJC, including authority over court administration, and the power to appoint, select, inspect, promote,

and train judges. However, despite the clarifications made in the amended JAL, controversy over the scope of judicial authority seems to hinder effective organization and management of important sections of the judicial system. The November 2005 amendments to the JAL had given administrative authority over the judiciary to the MoJ, but these amendments were eventually annulled by the High Court in its capacity as Constitutional Court. Under the latest amendment passed by Presidential decree, administrative authority lies with the HJC. However, the HJC lacks sufficient capacity and institutional design to efficiently administer the courts. As it stands, the HJC is simply not equipped to perform this additional task. The same goes for the other duties of the HJC that lie with its secretariat – the training and education department and the technical and inspection offices. There are no by-laws for the different departments of the HJC, so they lack clear institutional guidance or clarity concerning their respective responsibilities. In the absence of such additional legislation on organizational design, division of responsibilities and procedures within the HJC, informal and personal relations determine policy, rather than regulation.

The attempted establishment of a truly independent Palestinian Judiciary within the PA is rather recent and there is still hope that the vision of a judiciary based on the principles of independence and impartiality will be realized in time. The PA has taken several steps in this direction, including legislation, various reforms, and salary raises for the judges, but there is much more to do. The process will take time, and must begin with reforming the education system, implementing the judicial training process, and establishing an effective evaluation process. All of this has become the focus of attention for many actors who are interested in realizing the rule of law in Palestine.

An evaluation of the rule of law and independence of judiciary in Palestine

The promulgation of the Basic Law and the Judicial Authority Law in 2002 were critical steps towards guaranteeing the rule of law in Palestine. However, human rights organisations have criticized the continued interference by the executive branch in the work of the judiciary, and in preventing the execution of some judicial verdicts, particularly those of the High Court of Justice.³⁵ On July 27, 2003, the PA took a positive step in this direction by abolishing the State Security Court and transferring its authority to the regular courts and to the Attorney-General.³⁶ Despite this decision, human rights organizations have reported that new cases that have been brought in the Security Court.³⁷ Since the promulgation of the judicial laws, the PA has also formed the Court of Cassation and the High Court of Justice. New judges have been appointed in these courts that are expected to protect human rights and promote the rule of law.³⁸

In addition to judicial reforms, the PA began implementing crucial institutional reforms, especially in the financial sector. On May 16, 2002, the PLC issued a document entitled: “Statement Towards Development and Reform of the PNA

Institutions” in which it articulated the fundamental principles required for reform, especially in the areas of expenditures, planning, aid coordination and policy, as well as institutional and structural measures.³⁹ This statement was the basis for adopting the June 23, 2002 “100 Day Plan,” in which the PA committed itself to promoting the rule of law, restructuring ministries and official agencies, and creating efficient and effective institutions.⁴⁰ This Plan was followed by another, the “Emergency and Public Investment Plan 2003–4” which aimed at continuing institutional reform and providing better public services to Palestinians.

In practice, the Palestinian judicial system functions in a relatively satisfactory manner, despite facing two significant problems. First, the judicial system suffers from the ongoing political constraints of the occupation. Israel imposes severe restrictions on Palestinians’ movement from one major city to another, and between the cities and neighbouring towns and villages of the West Bank and the Gaza Strip, making the work of the judiciary very difficult. Judges, lawyers and litigants who live outside the major cities cannot arrive at the courts. Moreover, the Israeli occupation has destroyed the Palestinian police and prison facilities, making it difficult – if not impossible – to enforce court judgments. The Minister of Justice himself addressed this problem in a conference held in Ramallah in 2003, concluding that the rule of law could not become reality as long as the Israeli occupation continues.⁴¹

Second, despite the legal reforms, the judicial system requires an appropriate case management system, equipment, and adequate court premises, as well as better coordination between the Ministry of Justice and the High Judicial Council. Due to the difficulties discussed above, the work of the judiciary proceeds slowly. Many cases take a long time to conclude; the case overload and unnecessary delays are frustrating for both the judges and the litigants. Recent court statistics issued by the Palestinian High Judicial Council show that despite improvements in the work of the Palestinian courts in the first half of 2004, the number of pending cases is still high.⁴² The statistics reveal⁴³ that there were 39,987 cases pending before the Magistrate Courts of the West Bank at the end of 2003. Another 6,271 cases were filed in the first half of 2004. During that same time period, 14,329 cases were decided, leaving 31,929 pending cases.⁴⁴ The number of decided cases in the Magistrate Courts are encouraging, despite all the difficulties the system faces.

However, other courts have a less positive record. For example, the Court of First Instance of the West Bank had 6,927 pending cases by the end of 2003. During the first half of 2004, 1,779 cases were filed. By the end of that period only 1,257 were decided, leaving 7,449 pending cases.⁴⁵ Statistics for the enforcements of court judgments reflect a dismal picture. By the end of 2003, 19,046 judgments remained unexecuted. In the first half of 2004, another 2,463 unenforced judgments were added to that figure. If the Palestinian courts continue to have this kind of backlog, undoubtedly litigants will search for alternative means to solve their legal disputes outside the formal judicial system of the PA.

Recent developments in the Palestinian judicial system reflect the immense pressure from the High Judicial Council to remain totally independent from the Ministry of Justice. The High Judicial Council claimed many of the powers

traditionally undertaken by the Ministry of Justice such as the establishment and construction of new court houses, negotiating with international donors and signing agreements. In 2006, the High Judicial Council was pushed to issue a Presidential Decree amending the Judicial Authority Law of 2002. This Decree moves all powers and responsibilities of the Minister of Justice to the High Judicial Council. The decree was repealed by Hamas' majority at the PLC.⁴⁶

The latest challenge to the work of the court system in particular, and the rule of law in general, is the escalating chaos in the OPTs. Part of the blame for this chaos can be placed on weaknesses in the PA institutions directly caused by the oppressive measures of Israeli occupation, particularly Israeli interference in the Palestinian security organization. The other part of the blame lies on measures taken as a consequence of Hamas' landslide win in the Parliamentary elections of 2006. Hamas' victory led to an international financial boycott and a siege of the Palestinian population, with very negative consequences to the Palestinian people in general, and further institutional and governmental reform has either been postponed or completely halted.

Criminal law

The Jordanian Criminal Law of 1960 and the British Mandate Penal Law of 1963 are still in force in the West Bank and the Gaza Strip. However, the *Diwan Al Fatwah Wal Tashri*⁴⁷ has drafted a new Criminal Law which is under deliberation by the PLC. In case of its promulgation, the Criminal Law will eventually be unified between the West Bank and the Gaza Strip and will replace old and scattered rules.

The sources of the draft Criminal Law are the laws of Arab neighbouring countries, mainly Egypt. They have also been influenced by the Jordanian Criminal Law of 1960 and the British Mandate Penal Law of 1936.⁴⁸ In that sense, the new draft law is a codification of various sources, but reflects no clear policy towards modernization. For example, Article 248 of the draft imposes light penalties on husbands – up to three years of imprisonment – for killing or harming their wives, daughters or sisters suspected of committing adultery. Article 248 of the draft is a copy of Article 237 of the Egyptian Criminal Law, but differs from the Jordanian Law in Article 340.⁴⁹ The latter, which is currently applicable in the West Bank, states the following:

1. He who surprises his wife or one of his [first female relatives] *mahrams* committing adultery with somebody, and kills, wounds, or injures one or both of them, shall be exempt from liability [*udhr muhill*: literally, “shall benefit from the exculpating excuse”].
2. He who surprises his wife, or one of his female antecedents or descendants or sisters with another in an unlawful bed, and he kills or wounds or injures one or both of them, shall be liable to a lesser penalty in view of extenuating circumstances [*udhr mukhaffaf*: literally, “shall be benefiting from the mitigating excuse”].⁵⁰

The Palestinian draft Criminal Law did not go as far as the above mentioned Article did in distinguishing between the two cases of surprise pertaining to the act of adultery and to an 'unlawful bed'. Neither did it allow the perpetrator of a crime against a relative female caught in an unlawful bed from a mitigating excuse. However, the revision in Palestinian law does not take into account present social life, where women are being killed or harmed by their husbands and relatives for so-called crimes of honour having to do with these female victims' breaking of social and cultural taboos – namely with behaviour regarded as immoral because it tarnished the honour of the families in question. In addition, the reform does not take into account the legal and social debate in Jordan and Lebanon that has favoured change in the legal treatment of "unacceptable" social behaviour. Like all neighbouring Arab criminal laws, Article 248 of the draft Criminal Law suggests that only males could be exempted from penalty or benefit from a reduced sentence; a wife who kills her spouse after surprising him in the act of "adultery" could not benefit from a mitigating excuse. In fact, the Palestinian legal reform failed to take into account two points: First, the historical circumstances of regulating this Article, which was transplanted to Arab criminal codes from the French Criminal Law of 1810 (Article 324). On November 6, 1975, the French legislature repealed Article 324 and so did Turkey, Spain, Portugal, and Italy.⁵¹ Second, the Palestinian legal reform breaches a superior legislation: the Basic Law calls for full equality between males and females. Indeed, if this provision is enacted, it will infringe an established constitutional right.

On the other hand, several provisions of the draft Criminal Law prescribe capital punishment for more than 23 crimes, while many countries restricted or prohibited the regulation of capital punishment in local legal systems and constitutions. This type of punishment will trigger discussions within the PLC, since the majority among legal academics and members of civil society organizations oppose its incorporation, or at least call for limiting the number of crimes demanding its application.⁵² Those individuals and institutions will lobby in order to compel the lawmakers to drop capital punishment completely from the draft.

The *Shari'a* criminal law had no influence on the draft, a matter that prompted some advocates of Islamic law to protest. Several workshops were held by Hamas and other Islamic organizations, in which speakers criticized the Palestinian legal reforms as encouraging adultery and the consumption of alcohol. Yet, real and active pressure came from human rights organizations and NGOs, which managed to halt the legislative process of the draft. In a letter sent to the Speaker of the PLC, human rights organizations highlighted many loopholes in the draft, such as its treatment of women and capital punishment, its inconsistency, and its being transplanted from an old Egyptian criminal law without any consideration of modern developments in this important area.⁵³

Customary law and the informal Palestinian justice system

In spite of the existence of a normative order outside the formal law, historically the political regimes that ruled Palestine did not officially recognize customary law solutions. However, they turned a blind eye to non-state law.⁵⁴ After over 500 years of foreign rule and occupation, the Palestinian people view formal legal systems as a tool of domination, control and suppression. In the aftermath of the Israeli occupation of the West Bank and the Gaza Strip, the resort to non-state normative solutions increased.⁵⁵ Customary law was used as a tool to preserve the national identity and maintain social order in the absence of a legitimate regime. In addition, customary law was preserved because the underpinning of the Palestinian society is family ties. In case one of its members caused any harm or was the victim of any act, the onus of responsibility and obligation would rest on the entire clan, such as in any patriarchal and patrimonial society. The movement from such a society towards modernization and westernization started a century ago when the Ottomans, and later the British Mandate and the Jordanian rulers, started introducing legal reforms. However, customary law has demonstrated a unique ability to adapt itself to the new circumstances of a modern society. For instance, despite the extension of the modern Israeli legal system into occupied East Jerusalem in 1967, the resort to non-state normative solutions in that region has continued and even became stronger.⁵⁶ Again, the political aspect has been the reason for preserving customary law and fostering family ties, and not the rejection of modernity. Any attempt to change the Palestinian legal system necessitates particular attention to the future status of customary law.

Upon its establishment in 1994, the PA started the reform of the legal system. Despite the fact that non-state law is evident and part of the socio-legal culture of Palestinian society, the policy towards customary law can be described as a grey one, which provokes much contradiction. On the one hand, the PA intended the centralization of the emerging legal system, but on the other hand it continued to enhance the role of customary law as well as to strengthen the power of the heads of clans. In 1994, the President issued the "Resolution Regarding the Establishment of the Tribal Affairs Administration (No. 161), 1994."⁵⁷ Being aware of family ties in the Palestinian society, Arafat aimed to consolidate his power in the face of the growing Islamic opposition to the national movement.

The relationship among the judiciary, prosecutors and the police is currently underdeveloped. Lack of coordination and compliance between these main actors in the judicial process is causing delay in processing court cases, and seriously hampering the enforcement of court decisions. All of these consequences further erode public trust in the judicial system.

Lack of cooperation between officials working in the justice sector is only one example of the factors causing severe erosion of public trust. Additional factors, such as the lack of enforcement of judgments, inaccessibility to courts because of restrictions on movement, lack of Palestinian court jurisdiction (in East Jerusalem), corrupt practices, and the economic crisis, have all contributed to the search for

alternative means of justice besides the formal judicial system. Many Palestinians are increasingly resorting to *traditional informal justice*⁵⁸ and avoiding the formal justice system.

The informal (mainly tribal) justice system has developed particular procedures and methods, as well as unique evidentiary processes in resolving conflicts. The informal system also issues and enforces judgments and penalties. In general, the informal system of justice is characterized by several key concepts and basic rules.

The informal justice system's rules of determining guilt and innocence, evidence, and punishment have derived primarily from traditions or conventional practices. As such, these conventional rules basically contradict the principles of rule of law. Basic due process in the Palestinian formal legal system requires that no crime or penalty can be enforced without a duly promulgated legal provision issued by an authorized power established under the Basic Law.⁵⁹ Thus, the conventional rules do not meet basic due process requirements; they may be appropriate to reduce criminal penalties ordered by a formal court, but they are inadequate to issue such penalties in the first place.

In addition, the type and nature of criminal penalty which the informal judicial system addresses differ from those provided for by the formal penal legislation. For example, penalties involving the deprivation of freedom (i.e., imprisonment) do not exist in the informal judicial system.

Another contrast between the formal and informal systems is that the former requires all penalties be personal and fit the crime, while in the informal system, judgments are enforced on both the criminal and his/her family. A common procedure in the informal judicial system is the so-called "*al jalwah*" (expulsion),⁶⁰ by which a criminal's family can be expelled from its place of residence as punishment for an individual family member's crime. In most cases, fines determined by the informal justice system exceed the criminal's financial capacity; hence his tribe or family must bear the financial burden of payment. Such collective penalties violate the principle of individual responsibility.⁶¹

The informal justice system, like the formal one, attempts to reach a settlement between conflicting parties.⁶² However, the informal process is frequently influenced by such factors as the financial situation of the parties to the conflict, their political and partisan affiliations, the size of their families or tribes, whether they are refugees or indigenous, the power and status of the particular tribal judge, and the degree of respect he engenders. Finally, the outcome of the settlement may depend entirely on the means of pressure available to the judge. These factors contribute to developing the contours of the final settlement of the conflict, though not necessarily towards providing justice.

A relationship of sorts has developed between the informal judicial system and executive power in Palestine. There has been a kind of accommodation between the actions of the informal justice system and the agencies of the PA executive, particularly governorates, security agencies and the Presidency itself. An example of this accommodation is in the decrees and instructions issued by the Executive that have regulated and supported the actions of the informal system.⁶³

The generally accepted theory behind the rule of law is that governance is determined by the will of the people, and it is the people who delegate this power to the legislative, executive, and judicial branches of government. Under that theory, the judiciary exercises a monitoring role over both the executive and the legislative powers. In addition, the judiciary plays a primary role in preserving the rule of law and individuals' rights, a role which it carries out through the guarantees of access to the courts. Another key aspect of the rule of law is the monopoly of judicial power which courts must have to successfully adjudicate through all stages of case proceedings. Thus, institutions or entities that undermine this function should not be established. Hence, when the informal judicial system intervenes in criminal conflicts and issues judgments and decisions, it trespasses against the core jurisdiction of the judicial power. In the same vein, when the Executive utilizes or reinforces the tribal judiciary, it also violates the legitimate jurisdiction of the judiciary. These kinds of inroads on the legitimacy of the formal judicial system violate individual rights to fair access to an impartial court system, and violate the basic rule that no penalty should be imposed on any individual except by a duly-executed judicial judgment.

Public administration and corruption

Palestinian public institutions are viewed as the bearers of the national project of independence. They are entrusted with the weighty responsibility to develop and strengthen the national institutions.⁶⁴ An argument for strong Palestinian State institutions is often made, as that is seen as necessary to push forward socio-economic transformations towards development through economic growth.⁶⁵ However, the genesis and organic constraints of the PA have doomed its apparatus to be authoritarian and security oriented.

The Oslo Accords facilitated the patrimonial nature of the new Palestinian political regime, hence undermining the proper functioning of national institutions, and limiting the role of public administration in implementing regulations issued by these institutions.

Another cause of instability in Palestinian governance is corruption and favoritism. According to statistics gathered by the Coalition for Accountability and Integrity, as part of preparations for a Conference on Favoritism and Nepotism in Palestinian Society that was held in March 2005, these phenomena were widely believed to be the most common form of corruption in Palestinian society.⁶⁶ It would seem that corruption at all levels, from large-scale to petty, is deeply entrenched and systematic in the PA apparatus. According to development scholarship, corruption is mainly regarded as a factor that seriously reduces legitimacy of the Palestinian State and its developmental capacity.⁶⁷

The Basic Law articulates the functions and authorities of public administration. Article 86 of the Law specifies that "all public appointment at all government ranks must conform to the legal requirements." Article 87 states that "the law organizes all aspects of civil services." In 1998, the Civil Service Law was signed by the

President of the PA. Salaries and allowances of personnel are regulated in Chapter III of this law.⁶⁸

The High Court has original jurisdiction over matters which are handled by administrative courts in many countries; it will continue to handle these cases until administrative courts are established by future legislation. This administrative jurisdiction of the High Court currently includes decisions issued by public agencies, public employment, and petitions for repeal of regulations and rules. The High Court also considers any matters referred to it by statute, and matters which do not fall within the jurisdiction of any other court. In this role, the High Court oversees the protection of individual fundamental rights.

A number of regulatory measures against corruption have been taken by the PA. These include the establishment of a Public Auditing Board by the Presidential Decree No. 22 of 1994.⁶⁹ Article 2 of this decree stipulates that the Board is an independent authority which shall have its own personality, in order to control public expenditure and secure its best use.⁷⁰ In addition, the PA has enacted a Law against Illegal Gains;⁷¹ another law governing the functioning of the Administrative and Financial Monitoring Office is under preparation.⁷² However, no officials were subject to legal processes on accusations of mismanagement or corruption.⁷³

Local law versus Military Orders

In the aftermath of the occupation of the West Bank and the Gaza Strip, the General Commander of the Israeli Army issued two separate Military Orders for both the West Bank (Military Order No. 1) and the Gaza Strip (Military Order No. 2).⁷⁴ Article 3 of these Orders assumes in the Regional Commander the administrative, legislative and appointment powers for the OPT.

Despite the Agreements, Israel continues to issue military orders. According to Article I.5 of the Interim Agreement, it is clear that during the transitional period, the Israeli Military Government will be withdrawn, but not dissolved.⁷⁵

In 39 years of occupation, the estimated number of Israeli “legislation” exceeds 2,500 in the West Bank and 2,400 in the Gaza Strip. These enactments cover a wide range of different fields such as commercial, land, judicial and criminal law.⁷⁶

Article XVII.4.b. states:

To this end, the Israeli military government shall retain the *necessary* legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel’s applicable legislation over Israelis *in personam*.⁷⁷

The reference to “necessary” opens up the possibility that they might be misused to exercise authorities in matters which are transferred to the PA, not least because the description of the powers and responsibilities in most spheres is general and not comprehensive.⁷⁸

Israel has maintained the legislative changes it introduced to the pre-existing local laws that were in effect prior to 1967. The Military Government was most active in “legislating” in the areas of land, economy, and security. The most aggressive Military Orders were those issued to facilitate the confiscation of land for building illegal settlements. Though of lesser importance to the Military Government than to the local population, other spheres witnessed important changes by means of Military Orders at the same time, such as education, labour, direct taxes, and agriculture.

Israeli negotiators have managed to maintain the legal changes introduced by means of Israel’s military orders, and to incorporate them in the agreements which were signed with the PLO. Examples of Military Orders incorporated in the Agreements were:

1. The Order concerning the Law of Customs and Excises on Local Products (No. 658) of 1976,⁷⁹ which created Value Added Taxes, was incorporated in Article III.7 of Annex IV to the Gaza–Jericho Agreement, called “Protocol on Economic Relations between the Government of the state of Israel and the PLO Paris, April 29, 1994.”⁸⁰ Moreover, the Protocol in Article II.5.a listed the goods which did not fall under the Palestinian local laws. It stipulated that “the Israeli rates of customs, purchase tax, levies, excises and other charges, prevailing at the date of signing the Agreement, as changed from time to time, shall serve as the minimum basis for the Palestinian Authority.”⁸¹ The implication of this Article is that changes to the laws of the state of Israel including possible future changes will apply to the PA. Israel collects the taxes and transfers them to the PA after deducting administrative fees.
2. Moreover, the PLO, without realizing it, signed up for the continued applicability of Israeli law to the settlers of the occupied territories.⁸² For example, Article XVII.4.b of the Interim Agreement explicitly provided Israeli legislation over Israelis *in personam*.⁸³
3. The Israeli–Palestinian Agreements achieved for the Military Government what it did not succeed in achieving before the start of the peace process. For example, on the one hand, the local Palestinian courts had resisted Israeli Military Orders that prevented them from hearing cases against Israeli settlers, but on the other hand, the Israeli–Palestinian agreements incorporated Military Orders that only gave Israel jurisdiction over cases involving Jewish settlers.⁸⁴

The Israeli Military Government strategy that remained intact after establishment of the Civil Administration in 1981 was that articulated in the PLO–Israel agreements. It reflected a policy of minimal authority for the Palestinians – limited mainly to the running of daily life – whereas the real source of power remains today in the Military Government. It is a policy of institutionalizing the occupation rather than ending it, as required by international law and recognition of Palestinian legitimacy.⁸⁵

The Israeli Military Orders after 1994

Although detailed agreements were signed between Israel and the PLO, the Military Government issued several proclamations on the implementation of the Agreements. Proclamation No. 7 was issued after signing of the Interim Agreement and was entitled: “Proclamation Regarding the Implementation of the Interim Agreement” (Judea and Samaria).⁸⁶ It has 10 Articles, most of which are inconsistent with the Interim Agreement. This Proclamation is intended to confirm that the source of authority that the PA was to enjoy according to the Agreements is that of the Israeli Military Commander. Military Order No. 7 did not dissolve the Civil Administration, which was created by the Military Government. Contrary to the provisions of the Interim Agreement in Article I.5, Article 6.a of the Order stipulates that the Israeli Military Commander in the area (OPT) was to continue exercising powers, responsibilities, and duties – which included legislative, judicial, and executive powers – related to settlements and military locations. It is clear that the Military Order considers the Israeli military Commander as the ultimate source of power. As a result, approximately 200 security enactments were issued during the interim period (1994–9). Out of this number, many Military Orders were issued in spheres and responsibilities under the PA’s functional jurisdiction. The Israeli Military pamphlet has many illustrations of such Orders, including the following:

1. An amendment Order to Towns, Villages and Building Planning Law (No. 1446) was issued in 1996,⁸⁷ even though Article 25 of Annex III to the Interim Agreement transferred the local government sphere to the PA. Israel argues that this Order was intended to be applicable in Area C, but there are no indications of this intention. Another clear violation in the sphere of local government is Military Order (No. 1) of 1997.⁸⁸ After forbidding Palestinians in Hebron City to add constructions to their homes, Article 4 of the Order (No. 1) states that to resume building, permission should be obtained from the Commander of the Hebron region, who could give a conditional permission or refuse the demand.
2. Another enactment, the Regulation Concerning Amending Income Tax Law (without number) of 1999 amended the Jordanian Income Tax Law (No. 25) of 1964.⁸⁹ It was introduced by Israel although this sphere was transferred to the PA in accordance with Annex III of the Interim Agreement. Article 8 on Direct Taxes gave the PA the authority to collect income taxes from Palestinians in all Areas A, B, and C.

In the following section, we describe how the PA has dealt with the Israeli Military Orders.

The PA and the Israeli Military Orders

Upon its inauguration in 1994, the PA issued a Presidential Decree regarding the legislation and the judicial system in the West Bank and the Gaza Strip. In Article 1, it declared the following:

The laws, regulations and orders of the West Bank and the Gaza Strip, which were in force prior to June 5th, 1967, shall remain in force until unified.⁹⁰

As a result of one interpretation of this Article, the Israeli Military Orders could be considered to be no longer in force in the West Bank and the Gaza Strip. Being aware of political and legal consequences of such a conclusion, the PA issued another Presidential Decree (No. 5) in 1995, in which it declared:

All powers and responsibilities in accordance to legislation, laws, decrees, proclamations and orders which are in force in the West Bank and Gaza Strip prior to May 19th, 1994, shall be vested in the Palestinian Authority.

Retreating from the position held in the Presidential Decree of 1994, this Article, (which is in conformity with the Article IX of the DOP), confirmed the continuity and the applicability of the Military Orders as long as they are not replaced by the PA. However, the Palestinian courts in the West Bank and Gaza Strip distinguished two types of Military Orders. They continue to apply the Military Orders which fill the lacunae in local laws, such as those on the compensation of traffic victims, and others which have no political implication until their replacement by Palestinian legislation.⁹¹ Nonetheless, the presence of the Military Government and Administration with full powers to issue security legislation continues to form the main threat for the development of an independent and influential Palestinian legal system.

Conclusion

Palestinian legal reformers are faced with a complex maze of diverse laws and regulations and it could be concluded that the Palestinian legal system is indeed in transition. Policy makers do not always have the freedom to form perfect legislative policy. A country like Palestine, which is under occupation, has to build its own legal system within a difficult political situation. Palestinian policy makers have already managed to invent practical legal solutions to complex political difficulties imposed by the occupier; for example, the impossibility to travel between the West Bank and the Gaza Strip, the military siege imposed on Palestinian communities and the restrictions on the freedom of movements.

The Oslo Agreements paved the way for a kind of legal reform that aimed to reflect cultural aspects as well as the legislative priorities and political needs of the Palestinian people. These changes were also perceived as necessary to provide the people with basic human rights that were denied to them for over a century. As expected, the Palestinian society anxiously participated in the first and second legislative elections, and effectively influenced several draft laws, especially the draft Basic Law, which was adopted in 2002. Its articles not only provide the basis for the future developments of the Palestinian law, but also elaborate on human rights as formal sources on which the courts are constitutionally obliged to draw. The Basic Law incorporates the values of freedom and democracy as principles that have to shape the Palestinian society.

While the legislative policy of the PA is to build a modern legal system, the established local customs and non-state normative solutions have so far been ignored. Palestinian legal reform can, and still has the chance to, incorporate some customs and customary law procedures into the formal state system and act against inappropriate customs and social behaviours. In essence, any legal arrangement towards customary law is a policy-making decision and, as such, must be considered in advance of law reform.

Notwithstanding the lack of clear legislative policy and other constraints, legal reform has been proceeding within a complex political situation due to the continuing Israeli occupation, curfews, siege, and restrictions on movement between Palestinian cities, villages, and refugee camps. The physical separation of the West Bank and the Gaza Strip has prompted members of the PLC to proceed to law-making and reform, using available technology, such as videoconferences, electronic mail, faxes, etc. The current political situation will probably have an impact on the future development of Palestinian law if it reaches a dead end, as a result of the decision of the Quartet to freeze support to the PA after the victory of Hamas in the legislative elections, and Israel's completing the construction of the Segregation Wall, which is already deep into Palestinian occupied territories. The Palestinian legal reformer will have to think about the impact of the new Segregation Wall on the proper functioning and prospective evolution of the Palestinian legal system.

In addition to the bulk of Military Orders introduced by the Israeli occupation, which has added more complexity to local laws, the Israeli settlements in the OPT will also affect the future independent evolution of the Palestinian legal system, since these settlements apply Israeli laws. The outcome of Israeli policy, in using sophisticated "legal tools" to extend its law into the OPT, is a complete legal segregation between two peoples living in the OPT. These days, the legal segregation becomes more obvious for the simple reason that the number of settlers and settlements has been increasing.

To conclude, it would be fair to say that an informal 'rule of law' exists to an extent that is greater than the extent of the sovereignty of the PA. There are many limitations, handicaps, and restrictions existing today that prevent the establishment of a formal rule of law in OPTs. However, a more robust legal system cannot come about without the existence of the most basic prerequisite to the formal rule of law: sovereignty.

The past few years have witnessed the second Palestinian *Intifada*: an era where every aspect of the life of Palestinians deteriorated. The GNP went down dramatically, unemployment grew to an unprecedented size, and poverty reached very high levels. The brutality of the occupation was at a peak during the past period.

The fact that the Palestinians were working on the improvement of the general situation of the rule of law, and in particular on the legal and judicial system is worth praising, and the fact that the success was limited does not come as a surprise.

The main challenge to the rule of law in Palestine is occupation, and the prevalence of an externally imposed agenda that does not have the wellbeing of the nation as its priority. This agenda is imposed in two different ways that pose different

challenges: the first is external, and ranges from colonial imposition by Israel, to reform agendas of international actors led by the USA that do not fit the needs of the Palestinians; the second is the lack of a national vision. The lack of a unified leadership that shares a national vision is in tension with the situation on the ground in which national liberation remains the ultimate goal uniting Palestinians, and prevailing despite serious internal debate on the form future life will take in the nascent state.

Many international organizations are involved in facilitating the promotion of rule of law in Palestine. It is important to couple these efforts in Palestine with efforts on the international level aimed at enforcing a just political solution to the conflict, thus ending the belated colonial reality that Palestinians face.

The failure of the peace process poses serious dilemmas which can only be addressed with an integrative approach to reform in Palestine. The political process should be dealt with on the political level as well as on the popular level; economic development should be more sustainable and its results should reach the wider population; the reform process should respond to a local agenda; and at each level, the process must address a focus on decolonization, that brings Palestinians closer to freedom. Decolonization and unification remain the number one priority of the Palestinians.

Notes

- 1 The Declaration of Principles (DOP) on Interim Self-Government Arrangements signed on September 13, 1993 between the PLO and Israel served as a basic text for subsequent agreements between the two sides. According to Article 1 of the DOP, an Interim Self-Government would be established for the Palestinian people in the West Bank and Gaza Strip. The DOP and especially the Interim Agreement of 1995 have laid down the structure, the powers, and the jurisdictions of the PA. See Israel–Palestine Liberation Organization: Interim Agreement on the West Bank and Gaza Strip, done at Washington, D.C., September 28, 1995, 1997 36 *International Legal Materials*, 551.
- 2 For more details and the text of these agreements, see “Israel 1991 to Present Peace Process,” online: Palestine Facts <http://www.palestinefacts.org/pf_1991to_now_peace_process_outline.php> .
- 3 International law requires that an entity exercises effective and independent governmental control, a defined territory, the capacity to engage in foreign relations, and a control over a permanent population. P. Fischer and H. F. Köck, ed., *Allgemeines Völkerrecht* (Wien: Linde, 1994) at 69–71, 93–8 (in German).
- 4 The status of the Palestinian residents of East Jerusalem is ambiguous. While they are permitted to participate in General Political Elections, they are not allowed to hold Palestinian IDs or travel documents. See Mohammad Shtayyeh, *Scenario on the Future of Jerusalem, the Palestinian for Regional Studies* (Al-Bireh: Palestinian Center for Regional Studies, 1998) at 193–203.
- 5 The issue of jurisdictional limits of the PA was given particular attention in all agreements concluded between the PLO and Israel. It was first formulated in Article IV of the DOP and especially Article XVII.1, *supra* note 1. The territorial jurisdiction of the PA in the West Bank and Gaza Strip was dealt with in the Interim Agreement. The main principle was similar to the already mentioned provisions. In this respect, territorial jurisdiction of the PA is defined in Article XVII.2 of the Interim Agreement, as including subsoil and territorial waters, except for the areas mentioned in the Article. See *supra* note 1.

Therefore, the PA would not assume full jurisdiction during the interim period for the exempted issues that would be discussed in the final negotiation, like water, refugees, Jerusalem.

- 6 Article IX.5.a. of the Interim Agreement clearly stipulates: "In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions, . . .", *supra* note 1.
- 7 Camille Mansour used the plural instead of the singular to cite Areas A and B. He rightly explained the reason behind using the plural as follows: "While area C, under exclusive Israeli jurisdiction, can be crossed from end to end by settlers and Israeli soldiers without discontinuity, areas A and B constitute numerous small discontinuous enclaves, which is why the plural must be used when speaking of these two areas." See Camille Mansour, "The Impact of 11 September on the Israeli-Palestinian Conflict" (2002) 31: 2 *Journal of Palestine Studies* 6.
- 8 This information relating to the Israeli redeployment was taken from an interview with the Palestinian Head Negotiator Saeb Erekat, see article in *Al Quds* (January 1, 2000) (in Arabic).
- 9 The Disengagement Plan (revised), proposed by Ariel Sharon, May 28, 2004, Section III.A.3 states: "the State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip." In addition, by virtue of the terms of the Plan, Israel unilaterally controls whether or not Gaza opens a seaport or an airport. Israel controls all border crossings, including Gaza's border with Egypt. See Section III.A.1 of the Disengagement Plan. Text of the Disengagement Plan is available online: Knesset <http://www.knesset.gov.il/process/docs/DisengagementSharon_eng_revised.htm>.
- 10 See Mustafa Mari, "The Israeli Disengagement from the Gaza Strip: An End of the Occupation?", *Yearbook of International Humanitarian Law* (2005) 8 *Yearbook of International Humanitarian Law*, 356–68.
- 11 In 1993, the signature of the DOP prompted the PLO to start drafting a Basic Law. This Agreement on the Legislative Powers, in Article XVIII.1, states that the PA has the right to promulgate the Basic Law: "For the purpose of this Article, legislation shall mean any primary and secondary legislation, including basic laws, laws, regulations and other legislative acts." *Supra* note 1.
- 12 *Supra* note 5.
- 13 For the text of the Basic Law in English, see online: Palestinian Basic Law <<http://www.palestinianbasiclaw.org/2002-basic-law>>.
- 14 Palestine Gazette (Palestine National Authority), "special publication" (March 19, 2003) 5. The texts of the amendments may be found at: <<http://www.palestinianbasiclaw.org/>>.
- 15 Palestine Gazette (Palestine National Authority), 57 (August 18, 2005) 5.
- 16 The Law No. 9 concerning the Elections states in Article 3: "The Palestinian electoral law shall be based on the mixed electoral system evenly (50%–50%) between the relative majority and proportional representation . . ." See Palestine Gazette (Palestine National Authority) 57 (August 18, 2005) 8.
- 17 An expert describes ch. 2 as follows: "Most Arab documents contain equally lists of such rights and freedoms . . . Thus the real test for the Palestinian Basic Law is not how many freedoms it can name but how it is constructed to defend them. The document is quite mixed in this regard, though it is stronger than all of its counterparts". See Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: University of Cambridge Middle East Studies, 1997) at 39.
- 18 Article 95 states: "The High Court shall temporarily assume all duties assigned to administrative courts and to the High Constitutional Court, unless they fall within the jurisdiction of other judicial entities, in accordance with applicable laws."
- 19 For more details, see e.g. Amnesty International, *Palestinian Authority Report 2005*. See also online: Amnesty International <<http://www.amnesty.org/en/library/info/POL10/001/2005>>; and Human Rights Watch, *Israel, the Occupied West Bank and Gaza Strip and Palestinian Authority Territories* (2003), online: HRW <<http://www.hrw.org/wr2k3/>>

- mid east5.html>. For an overview of the yearly decisions of the High Court, see the Annual Reports of the Palestinian Independent Commission for Human Rights from 1996 until 2004.
- 20 See e.g. Adrien Katherine Wing, "Cultural and Postcolonial Critiques in Latcrit Theory: Healing Spirit Injuries: Human Rights in the Palestinian Basic Law" (2002) 54 Rutgers L. Rev. 1087.
 - 21 For the text of the Russian Constitution, see online: Bucknell University <<http://www.departments.bucknell.edu/russian/const/ch1.html>>.
 - 22 For more details, see Gennady M. Danilenko, "Implementation of International Law in CIS States: Theory and Practice 10" (1999) E.J.I.L. 51.
 - 23 For the text of the Czech Republic Constitution, see online: <http://www.servat.unibe.ch/icl/ez00000_.html>.
 - 24 For more details on the Czech Republic Constitution and the treatment of international norms in its domestic legal system, see Dalibor Jilek, "Human Rights, Treaties and the New Constitution" (1993) 8 Conn. J. Int'l L. 407.
 - 25 Palestine Gazette (Palestinian National Authority) 7 (November 25, 2001) 7.
 - 26 Palestine Gazette (Palestinian National Authority) 32 (February 29, 2000) 38.
 - 27 Palestine Gazette (Palestinian National Authority) 48 (January 19, 2004) 7.
 - 28 For more details, see Nasser Al-Rayes, *Judiciary in Palestine: Obstacles for its Development*, (n.p.: Al-Haq, 2000) 182ff (in Arabic).
 - 29 Palestine Gazette (Palestine National Authority) 38 (September 5, 2001) 89.
 - 30 Palestine Gazette (Palestine National Authority) 40 (May 18, 2002) 35.
 - 31 The mentioned details are based on an unpublished document that the authors received from the Steering Committee of the Judiciary and Justice entitled "Towards a Master Plan for the Judicial Authority in Palestine."
 - 32 Law of the Judicial Authority No. 1, Palestine Gazette (Palestine National Authority) 40 (May 18, 2002) 9.
 - 33 The Palestinian Independent Commission for Citizens' Rights, *The Eleventh Annual Report: the Status of Citizens' Rights in Palestine during the Year 2005* at 181.
 - 34 The legislative activity of the PA is based on three kinds of legislation: Presidential decrees, decisions and laws. The basis of this classification is not built upon any clear criteria or any clear legislative strategy, such as the formulation of priorities and legislative planning, but rather upon the immediate needs of the newly emerged authority.
 - 35 The vast majority of these decisions are related to political prisoners who are held under Israeli and American pressure. For details, see Amnesty International, *Palestinian Authority, Report 2003*. See also online: Amnesty International <<http://www.amnesty.org/en/library/info/POL10/003/2003>>. For an overview of the yearly decisions of the High Court, see the Annual reports of the Palestinian Independent Commission for Human Rights from 1996 until 2005. There is no publication of court judgments in the PA. The Institute of Law at Birzeit University is working on a project to include such judgments in the online databank (*Al-Muqtafi*). For more information, see Al-Muqtafi <<http://muqtafi2.birzeit.edu/en/index.aspx>>.
 - 36 The decision has not yet been published in the Palestinian Gazette. According to the law relating to the procedure for preparing legislation (No. 4) of 1995, see Palestine Gazette (Palestine National Authority) issue 4 (May 1995) 15 (in Arabic), the President of the PA has to sign, issue and publish the law that was approved by the Palestinian Legislative Council in the Palestinian Official Gazette. Interview with Hussein Abu Hanoud, Legal Department, Palestinian Independent Commission for Citizens' Rights in Ramallah, on (May 23, 2003) interviewed by Feras Milhem.
 - 37 See the Press Release of the Palestinian Centre for Human Rights (3 September 2003), online: PCHR <<http://www.pchrgaza.org/files/PressR/English/2003/93-2003.htm>>. PCHR denounces the continuation of the state security courts, despite the Minister of Justice's recent decision to abolish them.
 - 38 See the Decision on the Appointment of Judges No. 31 of 2002, which was published in Palestine Gazette (Palestinian National Authority) 43 (September 5, 2002) 9.

- 39 For more detailed information, see the text of the "Statement towards Development and Reform of the PNA Institutions", online MIFTA <<http://www.miftah.org/Display.cfm?DocId=757&CategoryId=2>>.
- 40 For more detailed information on the 100 Day Plan and the institutional reform, see Hiba I. Husseini, "Challenges and Reforms in the Palestinian Authority" (2003) 26 *Fordham Int'l L.J.* 534.
- 41 See the proceedings of Conference entitled: Law and Judging under Tension held in July 2002, Birzeit University.
- 42 Report of the High Judicial Council, the Status of Courts in 2004; (The Palestinian Territories, 2004) (in Arabic).
- 43 *Ibid.* Appendix No. 2.
- 44 For the Magistrate Courts of the Gaza Strip, the figures are respectively 5745, 5913, 7176 and 4482. See *ibid.* Appendix No. 2.
- 45 For the Courts of First Instance of the Gaza Strip, the figures are respectively 4087, 2084, 1863 and 4308. See *ibid.* Appendix No. 2.
- 46 According to the Basic Law, as amended in 2005, the President has the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law. In the above case, the PLC used its power not to approve the Presidential Decree.
- 47 *Diwan Al Fatwah Wal Tashri* (the Bureau of Legislation and Opinion) is the main "legislative body" that has been coordinating, drafting and publishing the legislation of the PA in an official gazette. The *Diwan* was formed in 1994 and was formally constituted by the Presidential Decree (No. 286) of 1995. See Palestine Gazette (Palestine National Authority) 4 (May 6, 1995) 15.
- 48 See Issa Abu Sharar, *The Palestinian Draft Criminal Law: Legal Commentaries*, The Palestinian Independent Commission for Citizens' Rights (PICCR).
- 49 The British Mandate Penal Law of 1936 does not have a similar provision to the Jordanian Criminal Law because the origin of the latter was the French Criminal Law.
- 50 The translation is done by Lyn Welchman. Quoted in Nadera Shalhoub-Kevorkian, "Femicide and the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?" (2002) *Law and Society Journal Review* 580.
- 51 *Ibid.* at 582.
- 52 Capital punishment has been the subject of many studies undertaken by human rights organizations. For example, see Amar Dweik, *Capital Punishment in Palestine and International Standards* (2003), The Palestinian Independent Commission for Citizens' Rights (PICCR). See also a study by the Parliamentary Research Unit of the PLC on the draft Criminal Law, which highlighted the new trends in the World to cancel or limit the application of this punishment. See Issam Abdeen, *Study on the Draft Criminal Law*, (unpublished study of the PLC No. 85/2001) 45–74.
- 53 Feras Milhem, interview with Issam Abdeen, a legal researcher in the Parliamentary Research Unit of the PLC.
- 54 For more information, see Robert Terris and Vera Inoue-Terris, "Case Study: Conflict Resolution and Customary Law in a Neopatrimonial Society" (2002) 20 *Berkeley J. Int'l L.* 469.
- 55 *Ibid.* at 470–1.
- 56 See in general Ifrah Zilberman, "The Future of Jerusalem: Palestinian Customary Law in the Jerusalem Area" (1996) 45 *Cath. L. Rev.* 795.
- 57 Palestine Gazette (Palestinian National Authority) 3 (February 20, 1995) 1.
- 58 This conclusion is based on a study entitled "Informal justice: Rule of Law and Dispute Resolution in Palestine – National Report on Field Research results" (Institute of Law, Birzeit University, 2006), online: Birzeit University <http://lawcenter.birzeit.edu/iol/ar/research/lawSoc/output/inforamal_justice_ar.pdf> (in Arabic).

- 59 Article 11 states, "it is unlawful to arrest, search, imprison, restrict the freedom or prevent the movement of any person, except by judicial order in accordance with a law to be enacted."
- 60 *Ibid.* at 51–2, 73–4.
- 61 Article 15 of the Basic Law states: "Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law."
- 62 See *Tribal Justice in Palestine*, Institute of Law, Birzeit University [unpublished] at 51–2, 72.
- 63 See e.g. the Presidential Decree No. 161, 1994. Palestine Gazette (Palestinian National Authority) 3 (February 20, 1995) 24. Through this decree an Administration of Tribal Affairs was established at the Presidential Office.
- 64 For a discussion and a critique of the "good governance approach" and an exploration of the "social transformation approach" to the nascent State in Palestine, see Mushtaq Khan, "Evaluating the Emerging Palestinian State 'Good Governance' versus 'transformation potential'" in Mushtaq Khan, George Giacaman and Inge Amundsen, eds., *State Formation in Palestine. Viability and Governance during a Social Transformation* (New York, London: RoutledgeCurzon, 2004) 13, especially at 59.
- 65 See on this argument Inge Amundsen and Basem Ezbedi, *Clientelist Politics. State Formation and Corruption in Palestine 1994–2000, Development Studies and Human Rights* (Bergen: Chr. Michelsen Institute, 2002) 4.
- 66 For more details, see Coalition for Accountability and Integrity, *Opinion Poll on Corruption in the Palestinian Society WASTA (Favoritism and Nepotism)* (December 30–1, 2004), online: Aman-Palestine <<http://www.aman-palestine.org/English/documents/OpinionSurvey2005-eng.doc>>.
- 67 Amundsen and Ezbedi, *supra* 64 at 2, 4.
- 68 Palestine Gazette (Palestinian National Authority) 24 (July 1, 1998) 20.
- 69 Palestine Gazette (Palestinian National Authority) 1 (November 20, 1994) 39.
- 70 On May 25, 1997, the Board issued a 600-page report concluding that \$323 million was wasted or misused by ministries in the year 1996. This report resulted in the formation of a new Cabinet. For more detailed information on the Report, see Ilan Halevi, "Self-Government, Democracy, and Mismanagement under the Palestinian Authority" (1998) XXVII: 3 *Journal of Palestine Studies* 35.
- 71 Palestinian Law on Illegal Gains, No. 1 January 8, 2005, Palestine Gazette, (Palestine National Authority) 5 (February 2, 2005) no. 52, 154.
- 72 For an overview see e.g. Azmi Shuaibi, "Case Study: The Occupied Palestine" in *Corruption and Good Governance in Arab Countries* (Beirut: Center for the Studies of Arab Unity, 2004), 711 (in Arabic).
- 73 For more details see online: The Coalition for Accountability and Integrity <<http://www.aman-palestine.org/eng/index.htm>>.
- 74 These two Proclamations were called "Proclamation concerning the Administration of Rule and Justice (No. 2) of 1967." For the text of the order of the West Bank, see Proclamations, Orders and Appointments (Israeli Occupation–West Bank) 1 (August 11, 1967) 3. For the text of the order of the Gaza Strip, see Proclamations, Orders and Appointments (Israeli Occupation–Gaza Strip) 1 (September 14, 1967) 5. During the Jordanian rule in the West Bank (1948–67) and the Egyptian administration in Gaza Strip (1948–67) two different legal systems developed. When Israel occupied the two regions, it maintained this division. In many cases, Israel used to adopt the same Military Order for both the West Bank and Gaza Strip, but it published them separately in each region.
- 75 Article 1.5 of the Interim Agreement states that "... The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council." See Annex IV to the Interim Agreement (on Protocol concerning Legal Affairs), (1997) 36 *International Legal Materials*, 559. It was not clear what the DOP in Article 1 meant by the Palestinian "Council" to be established during the

Interim Period. Was it executive or the legislative power? This terminology became clearer in subsequent agreements, which talked about the election of the Council and the formation of the executive members from the Council. Therefore, the "Council" meant the Palestinian Authority (PA), which included both the executive and the legislative powers. For example Article III (2) of the Interim Agreement on the structure of the PA also states that: "The Council shall possess both legislative power and executive power, in accordance with Articles VII and IX of the DOP." For the full text of the agreement of Israel–Palestine Liberation Organization: Declaration of Principles on Interim Self-Government arrangements (done at Washington, September 13, 1993) (1993) 32 *International Legal Materials* 1525.

- 76 These numbers are based on the latest statistics of the Legislative Database at the Institute of Law.
- 77 Interim Agreement, *supra* note 1 at 564.
- 78 Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (n.p.: Springer, 1997) at 41.
- 79 See Proclamations, Orders and Appointments (Israeli Occupation–West Bank) 38 (February 1, 1967) 183.
- 80 See Annex IV to Israeli–Palestine Liberation Organization: Agreement on the Gaza Strip and the Jericho Area, made in Cairo, May 4, 1994. This is an Annex of the Protocol on Economic Relations between the Government of Israel and the PLO, made in Paris, April 29, 1994, (1994) 33 *International Legal Materials*, 622 at 696.
- 81 *Ibid.* at 699.
- 82 Raja Shehadeh wrote: "It is clear, then, that the Gaza–Jericho agreement has entirely removed the Israeli settlements – as well as the Palestinians of East Jerusalem – from the legal jurisdiction of Palestinian courts . . . This was done in an agreement to which the Palestinians themselves were a party. At the same time, by confirming the 'laws' that were in force prior to the signing of the agreement without defining, which laws are meant, the agreement has left open the possibility that the Israeli side will claim that this constitutes a recognition by the Palestinian side of the applicability of Israeli law to the settlements." See Raja Shehadeh, "Question of the Jurisdiction: A Legal Analysis of the Gaza–Jericho Agreement" (1994) 23 *Journal of Palestine Studies* 20.
- 83 Interim Agreement, *supra* note 55 at 564.
- 84 See the Order concerning Legal Assistance (West Bank) (No. 348) of 1969 and compare it with Article IV (Legal Assistance in Civil Matters) of the Israeli–Palestinian Interim Agreement on the West Bank and Gaza Strip in Annex IV (Protocol concerning Legal Affairs).
- 85 John Quigley emphasized, in a symposium entitled "The Legal Foundation of Peace and Prosperity in the Middle East", the importance of solving the Palestinian–Israeli conflict within the framework of the rules of international law and legitimacy, especially with respect to the issue of final negotiations such as Jerusalem, refugees, settlements, etc. Perry Dane who rejected Quigley's views on the role of international law responded that negotiations shall be the basis of any future settlement of the conflict. See John Quigley, "The Role of Law(s) in a Palestinian–Israeli Accommodation" (2000) 32 *Case W. Res. L. Rev.* 273.
- 86 Proclamations, Orders and Appointments (Israeli Occupation–West Bank) 194 (November 23, 1995) 1947.
- 87 See Proclamations, Orders and Appointments (Israeli Occupation–West Bank) 169 (November 16, 1996) 2129.
- 88 See Proclamations, Orders and Appointments (Israeli Occupation–West Bank) 172 (February 11, 1997) 2243.
- 89 See Proclamations, Orders and Appointments (Israeli Occupation–West Bank) 187 (April 16, 1999) 2243.
- 90 *Palestine Gazette* (Palestinian National Authority) 1 (November 20, 1994) 10.
- 91 Interview with Ala Bakri: a professional lawyer in Ramallah, interviewed by Feras Milhem (November 15, 2003).

PART IV

Debating the future

10

ONE STATE NOT TWO?

A cruel examination of the
two-states-are-impossible argument
for a single-state Palestine/the land
of Israel

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The secret power and public accomplishment of the two-state solution

There is only one framework for dramatic improvement in relations between Jews and Palestinian Arabs within Palestine/the Land of Israel that has ever attracted majorities on both sides. That framework, however imperfect, is partition – division of the land into two closely related but politically separate sovereign states. Despite the cumulative effects of four decades of occupation, settlement, *de facto* annexation; and despite the increased interest in some circles in eliminationist or integrationist solutions, it is safe to say that significant pluralities and even majorities of Jews and of Palestinians are still willing to accept it in return for a secure peace.

To be sure, levels of expressed support for the two-state solution can vary and will continue to vary as terrible events, stupid policies, and/or missed opportunities, make any arrangement between the two sides (whether partitionist or not) seem virtually impossible to many of the protagonists. But out of the mists of despair associated with massacres, prolonged suffering, and horrific acts of terrorism, the rugged image of two states in one land will re-present itself as the least of all evils. This has been true in the past, it is true now, and it will be true as long as Israeli occupation, in whatever guise, continues.

The fundamental reason for the resilience of the two states for two peoples framework is that it alone holds out the prospect for both sides to think they may get all of what they absolutely need and much of what they strongly desire. What each side absolutely needs is access to a state apparatus that can regularize daily life with reasonable access to public resources for its members, international recognition of its rightful place in the family of nations, and the ability to foster immigration

into its borders for nationals living abroad. What each side strongly desires is to greatly reduce its need to encounter “others” in “its” land. Binational or other single-state solutions seek to secure what is needed by abandoning what is strongly desired – Jews and Arabs are to share the land, resources, recognition, and immigration opportunities afforded by a single state ruling the whole land, but at the cost of having to forever encounter each other in micro and macro struggles to achieve a distribution of those resources which each side feels is as much as it can get of what it deserves. The secret power of the separate state solution is that it uses what each side strongly wants (the desire to be rid of the other) to achieve the territory, resources, recognition, and immigration opportunities each side needs.

Before considering how the difficulties facing the two-state solution are treated and characterized by advocates of various one-state solutions, it is worth noting how far toward its implementation the two-state solution has come. Measuring this progress is especially important if we are to appreciate just what obstacles face advocates of the one-state solution and the scale of the challenge, in terms of effort, time, suffering, and despair, associated with making comparable progress toward achievement of a satisfyingly organized single state in all of Palestine/Eretz Yisrael.

Many of its advocates recognize that the widespread notion that the one-state solution is unattainable, impossible, or otherwise utterly unacceptable (for example, by contradicting virtually every political consensus that exists among Jewish/Zionist Israelis) is the greatest barrier to progress toward its realization. Certainly that was an enormous barrier to the two-state solution (among both Palestinians and Israelis) from the late 1960s until the late 1970s among Palestinians and the late 1980s among Israelis. Although it may or may not be the most important obstacle to the single-state solution, its advocates are faced with overthrowing settled ideas about national independence and state sovereignty that have sunk deeply into both Palestinian and Jewish/Israeli culture. Statism may not be the only way nationalism can be satisfyingly expressed, but there are few relevant examples of alternatives, especially when the contending peoples have defined themselves and their national attachments so vividly and so directly in terms of their struggle with one another. Nor do advocates of the one-state solution have the advantage, as they seek to break old ways of thinking and substitute new images of loyalty and community, that they can appeal to the powerful if unpleasant sentiments of hatred and distrust that both Palestinians and Jewish Israelis have used to rationalize their acceptance of partition of the land. “We don’t get everything we deserve,” two-staters have been able to argue, “but at least we are free of (most of) ‘them.’”

But in order to match, *politically*, the progress made by two-staters, one-staters must not only establish their vision for majorities as conceivable, then implementable, then preferable, they must also achieve a transformation in organized political life so that not only fringe groups, but dominant parties, contending for control of state or parastatal institutions, embrace, publicly, at least the principle of a one-state solution. For this is what the two-staters, on each side, have accomplished. More than that, of course, the one-staters must match the spectacular success

of the two-staters on the international scene, where, apart from Iran and a few other outliers, almost every sovereign state and almost every relevant intergovernmental organization endorses the two-state solution.

Fudging impossibility

Let us distinguish between at least two kinds of arguments on behalf of the one-state solution: *moral* arguments, maintaining that however impossible or possible the one- or two-state solutions might be, only the one-state solution is morally acceptable; and *practicality* arguments, maintaining that, in principle, both solutions are morally acceptable, but the two-state solution, having been rendered impossible by events or the accumulation of various “realities,” must now be abandoned in favour of striving for the one-state solution. In this chapter I will avoid considering the first kind of argument (though I consider it of great importance and possibly wholly persuasive) in favor of focusing on the second, which has attracted substantial interest of late, but which has been advanced in a largely undisciplined and ineffective manner. I present my analysis of this position – that the two-state solution can no longer be attained and *therefore* peace and justice advocates must strive for one state – not because I oppose the argument being made, or believe it is necessarily false, but precisely because I think it is crucial to make the argument, and make it as strongly as possible, even though I do think it is false.

In the late 1970s, following the Likud’s rise to power and Ariel Sharon’s launch of a massive settlement effort in the West Bank, Meron Benvenisti, Yehuda Litani, Dani Rubinstein, and other Israeli journalists and observers associated with the dovish left began warning that unless drastic and immediate actions were taken by opponents of the government’s policies, the permanent incorporation of the territories into Israel would be made a fait accompli.¹

In the phrase made famous by Benvenisti, the clock registered the time as “five minutes to midnight.” Benvenisti pointed in particular to government and World Zionist Organization plans predicting that 100,000 settlers would be decisive, a critical mass capable of preventing any moves toward withdrawal or a two-state solution. By 1983, Benvenisti had declared that the “point of no return” had indeed been past.² It was past midnight. Israeli withdrawal from occupied territories had become impossible. The conflict had become “endemic” and those Israelis incapable of understanding that there would be one and only one state west of the Jordan River were suffering from illusions that had deep psycho-pathological roots. To be sure, Benvenisti later reversed his public position, arguing in the early 1990s that a two-state solution was possible, explaining he had earlier been misunderstood. He had only meant to say that Israeli withdrawal was not inevitable.³ Since the second *intifada*, Benvenisti has re-articulated his position. “[T]oday we are living in a binational reality, and it is a permanent given . . .” Accordingly, he now fully supports the one-state solution, contending, again, that Israeli withdrawal from the West Bank, at least a withdrawal sufficient to establish the basis for a two-state solution, is impossible.

You won't be able to overcome the fact that this country will not tolerate a border in its midst. In the past year, then, I reached the conclusion that there is no choice but to think in new terms. There is no choice but to think about western Palestine [Eretz Yisrael, or the land of Israel] as one geopolitical unit.⁴

The saga of Benvenisti's position on the irrevocability of Israeli *de facto* annexation of part or all of the territories extends over, and is only apparent by comparing three decades of his books, monographs, newspaper columns, and speeches. However, the ambivalence and ambiguity of this jagged pattern of public assessment for the prospects of the two-state option reflects are readily apparent in the work of advocates of the one-state solution as they try to delineate exactly how, why, and when the two-state solution is or will be "impossible."

Let us consider some representative arguments in favor of the one-state solution with respect to the clarity of the judgment offered in support of that future that the two-state solution is no longer possible. As'ad Ghanem has argued strongly for abandoning efforts to achieve a separate Palestinian state in the West Bank and Gaza in favour of a "bi-national" solution. Written during the second *intifada*, in the wake of Israel's "reoccupation" of Palestinian cities in the West Bank, As'ad describes the Labor Party (currently the chief coalition partner of the centrist Kadima Party) as "irrelevant." Separation (of Israel from the territories) is "not relevant" because Israel has "crossed the threshold of its willingness to withdrawal . . . Even were the Israeli left to return to power in the foreseeable future it would not risk civil war."⁵ At some points Ghanem is categorical. "The option of separation," he writes, "is not possible." In the area of East Jerusalem, Israeli policies of encirclement "are clearly and indisputably irrevocable" so that even if the two sides were ready for a "redistribution" of land in the area "it is not now possible to carry it out."⁶ Ghanem portrays the two-state solution as so infeasible that his bi-national alternative, including difficult but implicitly less unfeasible steps such as the dissolution of the Israel Defense Forces in favour of a security force comprised equally of Jews and Palestinians, should be embraced. But in crucial passages of his analysis Ghanem retreats, or waffles, as we shall see most one-staters do, on the question of whether the two-state solution is categorically impossible. At one point Ghanem describes a list of obstacles to Israeli separation from enough of the West Bank and Gaza Strip to provide the basis for a two-state solution, indicating that these factors are "delaying such a separation, and *perhaps* even making it impossible."⁷ Later in his analysis, he describes his claim not as "separation is impossible," but that "separation is not practicable," and even that claim, he characterizes, not as a fact judged to be true, but as the "basic premise" of his argument and therefore not a proposition he expects he has or can establish empirically.⁸

Tony Judt's widely cited *New York Review of Books* essay favoring the one-state solution, begins with the seemingly categorical assertion that "The Middle East peace process is finished. It did not die: it was killed." This claim is the basis for urging advocates of two states to abandon their objective and instead pursue the one-state option. Yet toward the end of his piece, Judt offers a rather less compelling

characterization of the premise that peace based on two states is impossible. Two states were, he writes, “once a just and possible solution,” but instead of then reaffirming his assessment of its impossibility, he says only that “I *suspect* we are already too late for that.”⁹ His *suspicion*, in the end, is all that he offers as the basis for a radical change in political program, including abandonment of what he still acknowledges is an international “consensus” for resolving the Israeli–Palestinian conflict.

A common pattern is for one-state advocates to adopt a rhetorical posture that signals the “irreversibility” of Israel’s incorporation of the West Bank, even while employing analytic formulations that acknowledge a two-state solution is not, in fact, impossible, even in their view. For example, Jeff Halper urges readers to “prepare for the anti-apartheid struggle” that will lead to the one-state solution, as it did in South Africa. His call is issued because, he writes, “The Israeli settlement blocs are so extensive, their incorporation into Israel proper by a massive system of highways and ‘by-pass roads’ so complete and the Separation Wall physically confining the Palestinians to tiny cantons so advanced as to render any genuine two-state solution impossible and ridiculous.”¹⁰ In contrast with this categorical assertion of the two-state solution’s impossibility, Halper’s overall argument in this paper is that the two-state solution is *not* impossible, only that it will likely become impossible, making necessary a one-state solution, if the international community does not quickly and strongly mobilize to implement the “roadmap.” Echoing the “five minutes to midnight” arguments in favour of all-out mobilization “before it is too late” that Meron Benvenisti, Abba Eban, Yossi Sarid, and others have made since the late 1970s, Halper characterized as “the crunch” the threat to the particular diplomatic minuet of 2003.

As anyone who has spent even a few hours in the Occupied Territories readily understands, Israel has entered in the last phase of fully and finally incorporating the West Bank into Israeli proper, of transforming a temporary occupation into a permanent state of apartheid.¹¹

Helena Cobban, a journalist and scholar long associated with advocacy of the two-state solution, changed her mind (or seemed to) in 2003. As did Halper, Cobban identified the demise of the roadmap as marking the end of the possibility of the two state solution. Her article begins dramatically. “We can ask, ‘Who killed the road map for peace between Israelis and Palestinians?’ Or we can start thinking through the implications of the *fact that it is dead*.”¹² Whatever possibilities the two-state solution had were tied to the roadmap. However, declares Cobban, “[a]ll that is now history. The road map, which never had much real momentum, is dead.” It is here that Cobban starts to waffle. The roadmap’s death is not exactly the same as the death of the possibility of two states. Rather, “[i]t *could* also mark the end of the long-pursued concept of a two-state solution.”¹³ Cobban goes on to describe the extensive settlement of the territories as an obstacle to the two-state solution, bringing about, not the impossibility of that outcome, but a “situation in which the establishment of

a viable Palestinian state *looks* impossible.”¹⁴ So Cobban stops well short of declaring the two-state solution impossible, and endorsing a switch to the one-state solution, but rather advocates thinking about the South African experience as a guide toward a one-state future “*if, indeed, there is no hope for a two-state solution.*”¹⁵

In his highly provocative and original treatment, Jan de Jong argues that the cumulative effects of Israeli settlement patterns along with the construction of the separation barrier have produced what is described in the title of his essay as the “End of the Two-State Solution.”¹⁶ A closer reading, however, reveals that de Jong stops well short of declaring the two-state solution impossible, although he does describe one state as the “solution (that) now looks inevitable.”¹⁷ De Jong’s actual argument is two-pronged. First, the two-state solution is impossible, but only if its contours are left completely up to unilateral Israeli decisions.¹⁸ In other words, if negotiations, bargaining, and especially international pressure (what he calls “international legitimacy”) are involved, then the two-state solution is definitely not impossible. Second, determining the shape of a two-state solution based on two viable states requires starting from Palestinian needs, not Israeli needs, and that will lead to a configuration for two states looking a bit more like the 1947 partition lines (with a divided rather than united but internationalized the Jerusalem area) than like the Geneva Plan centred more or less on the Green Line.

In her book-length treatment of the one-state solution, Virginia Tilley follows more or less this same pattern. On the one hand, she seems to portray the two-state solution as categorically impossible, leaving, by a process of elimination, only the one-state solution. All of current diplomacy is irrelevant because its “premise – the two-state solution – has . . . become impossible . . . eliminated as a practical solution.”¹⁹ Any Palestinian state, she reasons, that could be established on the “twisted scrap of land remaining” would be neither viable nor politically efficacious. While she admits that removal of settlements could fix this problem, she judges that “no power – internal or external – has the political capacity to effect any meaningful withdrawal of these urban communities and their infrastructure, and no such capacity *is likely to appear*”²⁰ Thus even in this admirably explicit analysis, Tilley begins to waffle. If removing urban settlements could permit establishment of a satisfactory two-state solution, and all she says is that such a capacity is not “likely” to appear, then she is implying that it may appear, and therefore that the two-state solution is still possible. Toward the end of her book, after advocating a somewhat peculiar “Jewish-National-Home” but democratic version of the one-state solution, Tilley returns to this ambiguous formulation. She begins unambiguously. The “two-state option evaporated years and perhaps decades ago . . . Whatever the past possibilities for partition, they are now lost.”²¹ Just one page later, however, while asserting that “[i]nternal Israeli politics is not capable of resolving the ideological tensions that would escalate at any serious attempt by the Israeli government to withdraw from the West Bank Settlement grid,” she allows that “overwhelming external pressure” could do the trick, observing only that “no *present* external actor or coalition of actors possesses both the political will and the raw power to exert that pressure.”²²

It is thus fair to say that advocacy of the one-state solution is only rarely, if ever, based on the claim that the two-state solution is *definitely* not possible. That means that arguments in favor of the one-state solution resolve into three main types. The first advances the one-state solution as a tactic to enliven interest in the two-state solution. The second claims that even if the two-state solution may be theoretically possible, it is no longer as available or as achievable, as the one-state solution. The third asserts that even if the one-state solution is as difficult to achieve as the two-state solution, it is uniquely capable of satisfying certain moral or political objectives. Elsewhere I have attended at some length to the substance of the first of these types of arguments, and will therefore omit additional consideration of it here.²³ I shall also avoid treating at length the third version, based on categorical imperatives ruling out anything but a one-state solution on grounds of justice, since, as in art or taste, there is ultimately no disputing absolute moral convictions, and because even if that imperative is accepted, it will still be necessary to separate effective and convincing arguments on its behalf from flawed and unpersuasive arguments. Instead my focus here is on the second type of argument, that efforts to bring about a one-state solution are in order because the two-state solution is no longer possible.

Self-disconfirming arguments for the one-state solution

We may therefore proceed to consider the adequacy of the case made by those who promote the one-state solution because the obstacles to that future are deemed less daunting than the obstacles to the two-state solution. The standard formulation of this argument, as I have illustrated, is that the two-state solution should be abandoned because, although it may not be in principle impossible, it is impossible for those I have cited, to imagine or at least predict the kinds of changes necessary to bring about the two-state solution. In some formulations, the thick network of settlements, barriers, roads and other infrastructural and demographic facts seem to promise too great an obstacle to a viable Palestinian state for any conceivable Israeli government to overcome. Often it is argued that making the necessary withdrawals would provoke, and would be understood to be liable to provoke, a civil war in Israel, and that no Israeli government (it is predicted) would tolerate such a threat or survive a civil war should one break out. Other versions of the same argument emphasize the depth of hatreds and distrust on both sides that are deemed to render the two-state solution impossible; or judgments that the international community just does not care enough or is not willing to exert itself on behalf of the Palestinians with enough vigour to pressure Israel sufficiently to orchestrate a viable two-state solution.

To be a convincing alternative to the two-state solution, the one-state solution must be advanced based on judgments that the requirements for its achievement are not only available (i.e. that a satisfactory onestate future is possible), but that the path or paths to a one-state solution, after being examined with the same sceptical rigor as is applied to suggested routes to the two-state solution, are *more* available and easier to follow than are paths to the two-state solution. However, even those

one-state advocates who clearly argue their chosen future is possible (and many only offer the hope that it is), seldom measure the relative possibility of the one-state solution against the possibility of the two-state solution.

Let us consider more closely specific arguments made by one-staters in favour of jettisoning the two-state solution. One-staters regularly make a crucial logical error in their arguments. One version of this error is to reject the two-state solution after having advanced a particular requirement as being unattainable; even as that requirement is reasonably or even inevitably seen as not only necessary for a one-state solution, but even *more* difficult to attain than it would be in the context of a two-state solution. Another version of this mistake by one-staters is to assume or forecast developments required for the one-state solution that, if realized, would make the two-state solution more readily attainable than achievement of a democratic single state. Both versions involve contradictions that entail the elimination of the premise of the argument that the two-state future must be abandoned in favour of one state because the former is no longer achievable.

The first version of this error is well illustrated by the introduction Yehudith Harel provided for an oft-cited collection of three essays challenging or rejecting the continued relevance of the two-state solution in favor of one state. The three authors (Haim Hanegbi, Meron Benvenisti, and Ari Shavit), she observed, came to doubt the possibility of the two-state solution:

because the 100 years old and still ongoing Zionist and Israeli expansionism and forceful colonization of the Palestinian lands, the wide support for these acts and the lack of any real resolution and public support to honestly put an end to this process, give no reason to believe that a two state solution is ever going to materialize. . . .²⁴

What I wish to note is that if the evidence of continual Zionist and Israeli expansionism, colonization, and solid Israeli-Jewish support for dominating Palestinians and Palestinian territory is deemed to be persuasive as to the unattainability of a solution based on two states for two peoples, it should be considered at least as persuasive with respect to the unattainability of a one-state solution in the context of which Israeli Jews would not only not dominate Palestinians, but actually share power more or less equally with them.

Virginia Tilley offers a rather spectacular example of this error. A standard, and impressive, element in most one-state arguments is what she describes as the Israeli “settlement grid” in the West Bank. She portrays the settlements as a massive, stubborn, and immovable reality blocking a two-state solution. A further obstacle is the “extent of Israeli governmental complicity in building the settlements.” But for Tilley, “even deeper ties concretize the state’s commitment to the grid.” These obstacles to the two-state solution she identifies as “ties [that] transcend investments, security, and the role of any passing government or prime minister . . . the policy to settle all of Eretz Israel not only runs deeply throughout the fabric of Israeli politics but is embedded in the state’s very design.”²⁵ In the context of Tilley’s entire

argument, this statement is not only odd, but deeply illogical, since it implies that, if a principle of design running through the fabric of Israeli society contradicts a policy prescription, the objective of that policy prescription must be considered impossible and irrelevant. Yet Tilley's recommendation is for an end to the "Jewish state" and its replacement by a single democratic Jewish–Palestinian Arab state in which Jews would neither be sure of being a majority nor be in control of a state apparatus. To accept this proposal as anything but impossible and irrelevant would fly directly in the face of her own analysis. That is because however important settlement of the "whole Land of Israel" is and has been for many Zionists, as a principle of Zionist design running through the "fabric of Israeli society," it cannot match or even begin to rival the centrality of the commitment to a Jewish majority and to Jewish statehood.²⁶

Another example of this version of the error appears in Tony Judt's analysis of the failure and, now, impossibility, of the two-state solution. Tony Judt emphasized the long history of failed American policies, putatively based, since the Reagan Plan of 1981, on achieving a two-state solution. Judt describes U.S. diplomacy as having systematically crippled international efforts to push toward a two-state solution. "Rather than think straight about the Middle East, American politicians and pundits slander our European allies when they dissent, speak glibly and irresponsibly of resurgent anti-Semitism when Israel is criticized, and censoriously rebuke any public figure at home who tries to break from the consensus."²⁷ Judt's diagnosis of the critical importance of America's opposition to effective international action in support of the two-state solution is a crucial element in his advocacy for the one-state solution. Strikingly, Judt acknowledges the existence of an international consensus behind the two-state solution, and *even so* argues that American reluctance to effectively promote the idea is a sufficient condition to prevent it. The problem here is that when Judt lists the requirements for achievement of a single bi-national state, admitting the *absence* of international consensus in favor of it, the first requirement he mentions is "a brave and relentlessly engaged American leadership."²⁸ This is odd, even bizarre. Having just blamed the unavailability of a two-state solution on the absence of this kind of American policy, he then argues that just this kind of policy is one of a number of *necessary requirements* of the solution he advocates in place of the two-state solution.

The second version of the self-disconfirming argument – prediction or postulation of a condition necessary for the one-state solution that would, if it existed, create an even greater likelihood or availability of a two-state solution – is associated with Haim Hanegbi's analysis of why Israel will be incapable of dismantling West Bank settlements:

any recognition that the settlements in the West Bank exist on plundered Palestinian land will also cast a threatening shadow over the Jezreel Valley, and over the moral status of Beit Alfa and Ein Harod. I understood that a very deep pattern was at work here. That there is one historical continuum that runs from Kibbutz Beit Hashita to the illegal settler outposts; from Moshav Nahalal to the Gush Katif settlements in the Gaza Strip.²⁹

Leaving aside the fact that Israel did dismantle the Gush Katif settlements in Gaza, the argument is remarkable because it uses Israeli refusal to allow questions, even indirectly, about their “plundering” of Palestinian lands within the 1949 lines as the basis for predicting the impossibility of Israeli decisions to relinquish settlements and lands across the Green Line. On its own, such an argument might make sense. What does not make sense is to then argue, as Hanegbi does, that a one-state solution should be pursued. That does not make sense because to do so would *directly* raise the question of plundered Palestinian lands inside the Green Line when Hanegbi has just argued that even the *indirect* raising of that question is a deal-breaker.

Jeff Halper makes the same kind of mistake. Two conditions are offered as necessary before Jewish Israelis will accept the one-state solution he advocates in lieu of the apparent unavailability of the two-state solution. First, Halper stipulates existence of an “inclusive world order based on the enforcement of human rights and international law.” Second, he requires “an article in the new state’s constitution specifying that both Jews and Palestinians possess the right of return to the country, and that members of both peoples in need of refuge will be automatically accepted.” The problem, of course, is that developments leading to or making possible the emergence of these two radically transformative conditions, one about the world and one about Israeli–Jewish preferences, would have already produced, or have had to be associated with conditions sufficient to produce, the two-state solution.

Rhetoric vs. argument

The failure of one-state advocates to settle on just how difficult a two-state solution would be, or whether it is truly “impossible,” is no accident. For they confront a fundamental difficulty. Logically there are only two ways to make a conclusive argument of impossibility, and neither is available. Either there is an appeal to a well-established theory of how states divide, relinquish territory, or contract themselves in the way that two-staters say is possible in the Israeli–Palestinian case but one-staters say is impossible, or there is a compellingly analogous case or set of cases showing an invariable pattern, under very similar circumstances, of either the emergence of two states or its non-emergence. However, insofar as efforts have been made to establish a theory of state expansion and contraction, the results would tend to support the continuing possibility of two states.³⁰ As far as analogies go, the two-staters have France/Algeria and Britain/Ireland to “show” that integrated, “inconceivably divisible” parliamentary democracies, can indeed contract to produce a separate national state out of heavily settled and legally and politically integrated territories. The favorite, indeed almost the only, analogy used by one-staters is South Africa. However, while the two European cases show how the barrier of “inconceivability” could be breached in the direction of producing two states (France and Algeria out of “France” and Ireland, the United Kingdom of Great Britain and Northern Ireland out of the “United Kingdom of Great Britain and Ireland”), the South African case *never* involved a two-state solution (partition) that any important group entertained as conceivable, rendering South Africa an

interesting heuristic comparison, but a relatively useless analogy for analysts seeking to evaluate the continuing availability of a partitionist future for Israel/Palestine.

Absent either theory or analogy in their favor, one-staters tend, therefore, to rely on the vividness of their rhetoric and the urgency of their complaints about the immorality of alternatives. Indicative of this reliance on the moral pressure invoked as argument for adopting the one-state solution is heavy use of the word “must.” The word has a dual meaning. On the one hand “must” can describe a state of affairs that necessarily, by the workings of the laws of the universe, will come about. But the same word can also be used to describe a state of the world that, if not achieved, will contradict certain stated or unstated but nevertheless categorical moral imperatives. It is often difficult to tell in the argumentation offered in favor of the one-state solution which version of the word is meant to be understood. Employed in analytic contexts it can only mean the former – a prediction of an inevitable state of affairs.

An important rhetorical move by one-state advocates is based on a subtle but insistent exploitation of the dual meaning of the word “must,” so that readers who share the advocate’s outrage at the thought of a moral imperative not being met will experience the power of those sentiments as evidence for the inevitability, not just the moral rectitude, of the one-state solution. For example, the claim that the refugees “must” be given the right of return to vindicate basic human principles of justice, is transmuted into evidence that the refugees will inevitably achieve the right of return. In other words, it “must” be (it is inevitable) that they will be given the right of return because they “must” have (justice absolutely requires that they have) the right of return. This is not a logically correct statement, but it is a semantically and rhetorically efficacious technique for substituting strongly held preferences for logic.

For example, in his 6,000-word article entitled “A One Democratic State Might Be THE Solution,” Rifat Odeh Kassis uses the term featured in the title of the article, “might,” three times.³¹ But the word “must” appears twenty times. Most of these usages are hortatory – presented as moral or political imperatives to readers, but the usages are mixed, and thereby tend to flow into one another. The empirical requirement meaning of “must” appears in the sentence: “We *must* admit that the facts, which Israel created on the ground over the 35 years of occupation, have destroyed the climate for a two-state solution.” Subsequently, Kassis urges readers to understand the various tasks they “must” undertake and the new ways of thinking they “must” adopt. Conflation of these two meanings of the term is then achieved in sentences such as “Solutions to the Arab–Israeli conflict cannot be found on a piece-meal basis, one-at-a-time. The solutions *must* be comprehensive.” The reader can, and probably does, understand this sentence as an exhortation to pursue a “comprehensive” solution (by which Kassis means one that does not entail compromise, but rather reconciliation) *and* as an empirical claim that no solution to the Arab–Israeli conflict is possible unless it is comprehensive. In his essay of comparable length, “The Solution of the Israeli–Palestinian Conflict: One or Two States?” Sami Aldeeb uses the word “must” 22 times.³² Approximately half the time the word is

used as an exhortation describing features of a settlement of the conflict that are required from the point of view of justice or morality. For example:

With regard to the main violation of human rights in Palestine/Israel, i.e. the expulsion of the Palestinians from their lands and the destruction of their localities and possessions, the proposed state *must* allow the return and the concession of nationality to all Palestinian refugees who wish it. An equitable solution *must* be found for those living on the lands and in the homes of the Palestinian refugees and for those living in the settlements created after 1967. All political prisoners and prisoners of war *must* be liberated. Reconciliation commissions *must* be created to heal and compensate the victims of both sides. A national fund *must* be created for this purpose. Citizens of the new State are entitled to live anywhere within its borders and to settle on their own property. A law respecting the principle of non-discrimination *must* regulate citizenship and immigration.

In much of the article, however, Aldeeb uses the term “must” to describe what Israeli Jews will have to do to accommodate themselves to the realities of the need for a one-state solution. These are empirical claims about what “shall” happen, and what then “must” happen because of what will happen.

The State *must* have a unified, democratically elected parliament and government. Political parties *must* respect the principle of non-discrimination in their programmes and membership. The State *must* have a unified army and a unified police force. The citizens *shall* decide upon a unified, democratic constitution respecting the principle of non-discrimination, on the name of the country, on its national anthem and on its flag.

The State *must* respect the right to life and physical integrity. This implies the abolition of death penalty as well as male and female circumcision. The State *must* also respect the right to freedom of religion, including the right to change one’s religion.

The State *must* provide an education system integrating all of its citizens. This implies the creation of unified State schools and high schools, and programmes respecting the principle of non-discrimination, with the possibility of establishing private schools, provided that they respect the principle of non-discrimination. Arabic and Hebrew *are to be* the official national languages. Principles for the peaceful solution of conflicts *must* be applied.³³

A second rhetorical device is to camouflage extremely weak claims about the likelihood, possibility, popularity, or influence of the one-state idea with language so robust and categorical that the assertion, while technically accurate, falls considerably short of the impression left on the reader. In the conclusion to his assessment of the steady “erosion” in Israeli support for the two-state solution, Gary Sussman argues that the pendulum is swinging toward the one-state idea. However,

despite rhetorical thrusts toward the depiction of the one-state solution as displacing interest among Israelis in the two-state solution, the specific language Sussman uses is so constrained that, if read carefully, it leaves almost nothing claimed. "There is," he writes, "an increasing recognition in some Israeli circles that a bi-national outcome is on the cards." The phrase "on the cards" (or, as the American idiom goes, "in the cards") telegraphs an expectation of inevitability. But the evidence for this expectation is fairly weak; only that in "some" Israeli circles (Sussman does not say how big these circles are or whether they are associated with any politically or demographically important group) there is, not a belief or a powerful argument being made, but only "an increasing recognition." In context this only means that if the degree of "recognition [of the inevitability of a single state] was small," that now, within certain unspecified groups of Israelis, there is an understanding of this idea that is not as small.

This same technique of rhetoric camouflaging the absence of substance is used by Virginia Tilley in her aforementioned book. To overcome impressions of the marginal quality of the one-state solution Tilley portrays what she calls a "tectonic shift" among Palestinians toward the idea.³⁴ The claim is dramatic, but her evidence is scanty. Consider Tilley's overall characterization of growing support for the idea "within both Jewish and Palestinian politics," where she says:

a major shift is brewing. With increasing clarity and insistence, people are beginning to speak of a different future for Israel and the Palestinian territories: one democratic state . . .³⁵

Consider how many conditionals there are in this sentence. First, Tilley does not claim that "a major shift" has occurred, but that it is "brewing," meaning, presumably, that slow and mostly unobservable processes are at work which will at some future point become noticeable. But what are these processes that are not observable, but that are "brewing?" Tilley explains. It is not that people are building a single democratic state, or even that they are speaking of it, but they "are beginning" to speak of it. Indeed, less than that. Insofar as any specific substantive claim is being made here, it is the rather pallid assertion that those people who are beginning to speak of the idea, are doing their "beginning" with more "clarity and insistence" than those who had been beginning to speak of the idea in the past.

The same kind of rhetorical complexities camouflage the bareness of Tilley's claims about the forces that might help bring a single-state solution into being. In her response to Yoav Peled's critical review of her book, Tilley faults him for concentrating on her treatment of U.S. policy as paralyzed when, she says, she had identified a crucial non-European, non-American vector of support for the one-state solution.

The transnational human-rights community may now comprise the only agent capable of creating the political space in which the diplomatic community might be brought to consider a one-state solution . . .³⁶

On its face this is an assertion of the feasibility of the one-state solution and the strategic importance of the “transnational human-rights community” in achieving it. But note how many constraints and limitations Tilley places on this assertion. It is not that this community can, does, or will act as she would like, but that it “may.” And what “may” it do? It may “comprise” something. And what may it comprise? It may comprise an agent. And what would this agent do that it may comprise? The agent may “create” something – not the single-state solution, but “political space.” And what might be the importance of this political space that may be created by the agent comprised by the human-rights community? In that space, the “diplomatic community” might, not produce a one-state solution, nor even “consider” a one state-solution, but be “brought to consider” it. So after removing all the grammatical hedges, Tilley’s claim is that Peled ignores the role human-rights organizations might play in prodding the usual suspects of the diplomatic community (presumably the community dominated by American and European states she has already described as paralyzed on this issue) to begin to consider an option they have utterly rejected.

In his review of the Tilley volume, Yoav Peled criticizes her for “using a best-case scenario to describe the outcome she favo[u]rs – the one-state solution – and a worst-case scenario for the one she dislikes: the two-state solution.”³⁷ This specific criticism is an instance of a prevalent and natural tendency among scholars. As Philip Tetlock and Aaron Belkin put it, “People often succumb to the temptation of applying strong tests to dissonant arguments and weak tests to consonant ones.”³⁸ Indeed, the un-noted use of two very different standards for measuring the two options is the most important, and prevalent, rhetorical manoeuvre performed by one-state advocates. It is as if they were comparing the height of two individuals, not by using a single tape measure with feet marked out 12 inches apart, but two different tape measures, one with feet marked out 12 inches apart, and one with feet marked out 6 inches apart. Discovering, thereby, that one individual was much “taller” than the other would hardly be surprising (or convincing).

A fair and precise assessment of the two- and one-state options with regard to their plausibility, possibility, or impossibility would require comparing something like the following two (analytically equivalent propositions):

1. Because of the identifiable obstacles standing in the way of a two-state solution its realization should be treated as impossible by serious political actors.
2. Because of the identifiable obstacles standing in the way of a one state-solution its realization should be treated as impossible by serious political actors.

Each of these is a hard question. They hold each option to a tough standard – demonstrable, or at least persuasive plausibility. Any convincing comparison of the one- and two-state solutions, if it is to be based on the extent to which they are “realistic” or “possible” and *therefore* relevant, cannot ask one question of the two-state solution (a very hard question) and then ask a different (very easy question) about the one-state solution.

Yet that is precisely what most advocates of the one-state solution do. While asking cruel, important, and detailed questions about the obstacles attending various paths to a two-state solution, they tend to rely on a studious refusal to ask the same kind of scouring questions about the plausibility, conceivability, or even possibility of the one-state solution. Often the reasoning that is offered entails the unconvincing logic that because alternatives, or the present situation, are morally or psychologically intolerable, therefore the just solution (figured as one democratic state) is not (usually “must not”) be a fantasy but an attainable objective. Missing entirely from these arguments, often explicitly, is any plan for how to move from the present situation to the single state solution. Meron Benvenisti is admirably clear about this. “I don’t yet have a coherent proposal. I don’t have a work plan. But the direction of thought is clear. The new paradigm is mandated by reality.”³⁹ Rejecting South Africa-style one-person-one-vote democracy as impossible in light of intense Jewish–Israeli particularism and fear, Benvenisti gingerly suggests some sort of “consociational” or “power-sharing” arrangement. Admitting that it has not worked in very many other places, and offering no systematic or theoretical reason why the Israeli–Palestinian case should be considered an auspicious one for the this type of federal/cantonal/power-sharing/consociational system, he does suggest the Good Friday agreement in Northern Ireland and the Dayton Accords in Bosnia as “food for thought for the experts who contemptuously wave off the binational option.”⁴⁰

Consider how different this treatment of the one-state option is from the analytically close and cruel analyses offered by Benvenisti, Tilley, Sussman, Hanegbi, Aldeeb, Kassis, Saïd, or most other one-staters who call into question or even reject the possibility of two states. The question they ask about the two-state solution is not whether it can be imagined or whether a “direction of thought” toward a two-state solution is available, but whether there is a plan and schedule of moves, consequences, and events that, in their judgment, would inevitably and surely bring about a twostate solution. If no such direct and compellingly convincing route to establishing the two-state solution is discovered, it is rejected as unavailable or as deserving of being treated as if it were impossible. On the other hand, even though no advocate of the one-state solution has produced or even claimed to produce a detailed scenario for its attainment, that option is considered “available” and therefore “possible” just because it can be imagined, or because some people, in some circles are talking about it, or even just beginning to talk about it more than they were.

With respect to the two-state solution, Tilley describes her book’s accomplishment as demonstrating that “no power – internal or external – has the political capacity to effect any meaningful withdrawal of these urban communities [West Bank settlements] and their infrastructure, and no such capacity is likely to appear.” This is a straight-out empirical claim, and a proof of a negative to boot, indicating that the focus of her attention has been on practical paths toward the two-state solution that she finds wanting. But with regard to the one-state solution, she does not attend to “practical paths,” whether wanting or not. The burden she, and other one-staters, assume with respect to their preferred option is simply to persuade their

audience that the option is not a fantasy, that it is something that cannot, in principle, be ruled out. As Tilley puts it, the “model” of the one-state solution is “not as bizarre or alien to the conflict as some people believe.”⁴¹ Notice how completely different this standard is, indeed how easy it would be to argue that the two-state solution is “not as bizarre or alien to the conflict as some people believe.” On the other hand, it is not even possible to subject various plans for moving from where we are now to a one-state solution to critical scrutiny, since even those who spin wistful tales of the one-state solution that in principle could be, or evoke the South African example as a model of possible and wonderful transformations, do not offer practical routes that may be followed to achieve that end or carefully reasoned explanations of which similarities in the Israeli–Palestinian/South African cases outweigh the huge differences.

Conclusion

In this brief chapter I have not offered a comprehensive account of the arguments for a one-state solution. I have specifically limited myself to evaluating arguments for the one-state solution based on judgments that the two-state solution is impossible of attainment. I have found these arguments wanting, though not because I believe they are mistaken about the daunting obstacles confronting a viable two-state solution. It is rather that making a convincing argument for the one-state solution on the basis of the impracticality of two states requires not only showing the two-state solution is difficult to achieve, and not only showing that the one-state solution is conceivable or thought about or favored by some people, but that the one-state solution, as an alternative, is more capable of attainment than the two-state solution. And this task, I argue, has not been accomplished.

It should be emphasized that there are many other kinds of arguments on behalf of the one-state solution. Even if a two-state solution were judged to be attainable, and even if one were to be committed to political paths to a solution, or to solutions only achievable via negotiations, one still might prefer the one-state option to two states. Indeed what may drive preferences for most advocates of the one-state solution are not fears that the two-state solution is no longer available but the one-state solution’s moral superiority in terms of Palestinian refugee return, non-discrimination principles, democratic and secular norms, freedom of movement, legal requirements, and norms of historical justice. For others who still cherish the two-state solution and believe it worth pursuing, nudging the discourse toward the one-state solution is strategically important as a way to generate support from reluctant compromisers who would rather rule half the country themselves than share it with the others, but still think they might be able to rule the whole country themselves.

My own view is that no political movement, including the effort to secure circumstances of peace, justice, and security for Jews and Arabs in Palestine/the Land of Israel, can afford to be trapped with only one utopia in its repertoire. Any movement too strongly wedded to only one image of success gives its adversaries a ready-made formula to demoralize and defeat it by creating “facts” that may seem

to render that objective impossible. Both because the political world is so complex and so fundamentally unpredictable at the level of practical detail, and because of the strategic requirements of success for either of these two options, we must insist on disciplined, logical, and self-critical arguments, anchored in evidence and fully conscious of the rare opportunities for the accurate use of terms like impossible or inevitable in politics.

Notes

- 1 See Ian S. Lustick, *Unsettled States, Disputed Lands: Britain and Ireland, France and Algeria, Israel and the West Bank/Gaza* (Ithaca: Cornell University Press, 1993) at 11–18. For recent explicit exemplars of this type of argument, see Terje Roed-Larsen, “Before It’s Too Late” *Ha’aretz* (October 13, 2002), online: *Ha’aretz* <<http://www.haaretz.com>>; and arguments offered by Avraham Bendor, David Kimche, and Salam Fayyad, as quoted by Gary Sussman, “The Challenge to the Two State Solution” (2004) 231 *Middle East Report* at 8–15, online: Middle East Research and Information Project <<http://www.merip.org>>.
- 2 Lustick, *ibid.* at 21.
- 3 *Ibid.*
- 4 Meron Benvenisti, “Cry, The Beloved Two-State Solution” *Ha’aretz* (August 10, 2003), online: *Ha’aretz* <<http://www.haaretz.com>>.
- 5 As’ad Ghanem, “The Bi-National Solution: Conceptual Background and Contemporary Debate” in Mahdi Abdul Hadi, ed., *Palestinian–Israeli Impasse* (Jerusalem: PASSIA, 2005) at 26–7. Here As’ad implies that this writer’s two-threshold theory of state contraction and expansion (involving a “regime threshold” and a “hegemonic threshold,” can be applied to predict the impossibility of Israeli withdrawal. This is a fundamentally incorrect application of that theory, which, first, requires that both the regime and hegemonic thresholds be crossed before such a judgment can be made; and second, even if both thresholds are crossed, allows the possibility of a war of apposition that would reverse even the deeply institutionalized incorporation of territories at the hegemonic level. See Lustick, *supra* note 1. For explicit consideration of prospects for Israeli withdrawals even after the passage of the regime threshold (expectations of threats of civil war), see 385–438.
- 6 Ghanem, *ibid.* at 32.
- 7 Ghanem, *ibid.* at 28 [emphasis added].
- 8 Ghanem, *ibid.* at 35.
- 9 Tony Judt, “Israel: The Alternative” (October 23, 2003) 50: 16 *New York Review of Books*, online: NY Review of Books <<http://www.nybooks.com/articles/16671>>.
- 10 Jeff Halper, “One State: Preparing for a Post Road-Map Struggle Against Apartheid” (Paper presented at the United Nations International Conference on Civil Society in Support of the Palestinian People, New York, September 5, 2003), online: ZNet <<http://www.zmag.org/content/showarticle.cfm?SectionED=22&ItemID=4203>>.
- 11 *Ibid.*
- 12 Helena Cobban, “A binational Israel-Palestine” *Christian Science Monitor* (October 9, 2003), online: Christian Science Monitor <<http://www.csmonitor.com>>.
- 13 *Ibid.* [emphasis added].
- 14 *Ibid.* [emphasis added].
- 15 *Ibid.* [emphasis added].
- 16 Jan de Jong, “The End of the Two-State Solution: A Geo-Political Analysis” in Mahdi Abdul Hadi, ed., *Palestinian–Israeli Impasse* (Jerusalem: PASSIA, 2005) 315.
- 17 *Ibid.* at 315.
- 18 “As long as it is left to the State of Israel to determine unilaterally how much of the Palestinian Territories it intends to keep occupied of annex, there will be no viable two-state solution.” *Ibid.* at 337.

- 19 Virginia Tilley, *The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock* (Ann Arbor: University of Michigan Press, 2005) at 1.
- 20 *Ibid.* at 3 [emphasis added].
- 21 *Ibid.* at 183.
- 22 *Ibid.* at 184 [emphasis added].
- 23 Lustick, *supra* note 1 at 9–18.
- 24 Yehudith Harel, “Is the ‘Two State Solution’ still a viable and desirable solution to the Israeli-Palestinian Conflict?” *Ha’aretz* (August 8, 2003), online: One Democratic State <<http://odspi.org/articles/shavit-hanegbi-benvenisti.html>>
- >. Harel’s remarks are an introduction to “Cry, The Beloved Two-State Solution” *supra* note 4 and *infra* note 29.
- 25 Tilley, *supra* note 19 at 46.
- 26 For another example of this error, see Daniel Gavron, *The Other Side of Despair: Jews and Arabs in the Promised Land* (Lanham: Rowman and Littlefield, 2004). Tilley cites this book as evidence of what she characterizes as burgeoning support within Israel for the one-state solution.
- 27 Judt, *supra* note 9.
- 28 *Ibid.*
- 29 Haim Hanegbi, “Cry, The Beloved Two-State Solution” *Ha’aretz* (August 6, 2003), online: Ha’aretz <<http://www.haaretz.com>> .
- 30 Lustick, *supra* note 1 at 417–38.
- 31 Rifat Odeh Kassiss, “A One Democratic State Might Be THE Solution” (Paper delivered at the International Seminar on the Palestinian Struggle and Globalization, Bethlehem, August 29–31, 2003), online: Association for One Democratic State in Palestine/Israel <<http://odspi.org/articles/kassiss.html>> .
- 32 Sami Aldeeb, “The Solution of the Israeli-Palestinian Conflict: One or Two States?” (November 8, 2003), online: Association for One Democratic State in Israel/Palestine <<http://odspi.org/articles/aldeeb002.html>> [emphasis added].
- 33 *Ibid.* [emphasis added].
- 34 Tilley *supra* note 19 at 190.
- 35 *Ibid.* at 184.
- 36 Virginia Tilley, “The Secular Solution: Debating Israel-Palestine” (March/April 2006) 38 *New Left Review* 39.
- 37 Yoav Peled, “Debating Israel–Palestine” (March/April 2006) 38 *New Left Review* 33.
- 38 Philip E. Tetlock and Aaron Belkin, “Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives” in Philip E. Tetlock and Aaron Belkin, eds., *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives* (Princeton: Princeton University Press, 1996) 34.
- 39 Benvenisti, *supra* note 4.
- 40 Meron Benvenisti, “Which kind of binational state?” *Ha’aretz* (November 20, 2003), online: Ha’aretz <<http://www.haaretz.com>> .
- 41 Tilley, *supra* note 19 at 9. Her argument is that Zionist discourse did not entirely exclude an image of a Jewish national home without a Jewish state, and cites politically marginal but intellectually significant Zionist thinkers to this effect. She does not compare the prevalence of partitionist thinking and associated “statist” interpretations of Zionism that dominated the discourse and drove the Buberian ideas she recovers to the fringes of the movement.

11

MAXIMIZING RIGHTS

The one-state solution to the Palestinian–Israeli conflict

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Introduction

The principal aim of this chapter is to explore a “rights-based approach” to one possible overarching political framework for the resolution of the Palestinian–Israeli conflict: the “single-state solution.”¹ A “rights-based approach” is generally distinguished by reliance on international human rights, as elaborated in international treaties and declarations, to provide a normative framework for addressing or resolving problems.² That is, indeed, the sense in which it is used here, although with the addition that, in the particular context of Middle East peacemaking, principles of both international humanitarian law and of more general public international law also have key roles to play.³ In turn, a “single-state solution” involves a resolution of the Palestinian–Israeli conflict in which outstanding rights, claims, and interests of Jewish Israelis and Palestinian Arabs will be addressed within a single polity. Thus, the main question I seek to answer is: What promise does a single-state solution hold as a vehicle for fulfilling fundamental rights of both Palestinians and Israelis, particularly in comparison to the more widely accepted alternative of partitioning Palestine into two states, one for each people?

I will advocate four broad points here. First, a rigorous rights-based approach is a necessary, though not sufficient, ingredient to successful Middle East peace-making.⁴ While not all aspects of the Palestinian–Israeli dispute are amenable to resolution along legal lines, some are, and the application of international law in its various strains would have a number of salutary effects on efforts to bring peace to the region. International law is not a substitute for negotiations between the two parties to the dispute, but rather establishes parameters that can help structure and guide negotiations toward resolutions that are mutually respectful of the rights of all.

Second, a one-state solution is supported by a variety of arguments, some of which will be reviewed here. But the most important argument and the primary concern

of this chapter is that a single state, as compared to the two-state solution that has been broadly supported by the international community since 1947, offers superior opportunities to maximize the legitimate rights, interests, and aspirations of the greatest number of Israelis and Palestinians. In particular, it is the framework most amenable to the genuine realization of the rights of Palestinian refugees to return to their homes and homeland, and to the vindication of rights to full equality for the Palestinian citizens of Israel. Thus the one-state solution is most just, not only as between Israeli Jews and Palestinian Arabs, but also as among differently situated groups of Palestinians. Moreover, a solution that emphasizes justice and truly remedies past violations of rights will prove more durable over time, and will pave the way for the acceptance into the region that Israel has longed for, but never achieved.

Third, notwithstanding the attractions of a one-state solution, substantial legal and practical obstacles lie in the path to its achievement. Most significantly, each people – Israeli Jews and Palestinian Arabs – enjoys internationally recognized rights of self-determination and sovereignty. There is no legal means by which a one-state solution could be directly imposed on the parties to the dispute without violating the respective rights of each group. Although there may be a number of legal levers that could be used to pressure the two parties to such an agreement, as a matter of law, a one-state solution could only come about through the agreement of Palestinians and Israelis and as an exercise of their respective rights to self-determination.

Fourth and finally, the inability to implement a one-state solution without consent of the parties obligates us to consider the means by which such an agreement might be encouraged. While states and international organizations wield powerful tools to urge the parties toward a one-state solution, the political will to do so is currently lacking. That is a condition not likely to change radically in the near future. It is, therefore, necessary to consider whether international civil society is capable of playing a facilitating role, analogous to the role it played in fostering the demise of apartheid in South Africa.

In view of current realities in the region and foreseeable trends, it is conceivable that Israel might suffer sustained international isolation, similar to that experienced by South Africa during the apartheid era. This might eventually bring a cadre of Israeli leaders to view the one-state solution as the only viable long-term option. Even in this scenario, widespread support for a one-state solution would have to be won among Jewish Israelis at some point. It is difficult to imagine this kind of support emerging among Israelis in an atmosphere of distrust stoked by continuing violence between the two parties, including Palestinian violence that fails to discriminate between Israeli civilians and military targets. This strongly suggests that a movement with non-violence as its central component, or at least one that scrupulously curbed lethal violence against civilians, would enjoy the greatest chance of success in implementing a one-state solution to the Palestinian–Israeli conflict.

No reasonable person can deny that a single-state solution faces enormous political obstacles: a lack of broad public support at the present time among either Israelis or Palestinians and an international consensus that has reigned for 60 years in support of partition of Palestine between the two peoples, are only two such

obstacles. My conclusion that a rights-based approach to Middle East peacemaking favors a one-state solution thus poses several difficult questions: Can those who support rights-based approaches as a matter of principle justify abandoning such an approach in this case, in the face of the political challenges to its implementation? Does the image of a single-state solution merely entice Palestinians and Israelis into a quixotic venture that would cruelly prolong the sufferings of the two peoples, likely for decades to come? These are challenging and real questions and supporters of a single-state solution – particularly those who do not experience the direct sufferings of the two peoples – must ponder them respectfully and carefully and begin to offer answers that dispel justifiable scepticism about the approach and the end that they seek.

A rights-based approach to Middle East peacemaking

We have already seen that a rights-based approach to resolving conflict in the Middle East is one that is normatively based on international law, including international human rights standards, international humanitarian law, and general principles of public international law. This section will explore the implications of a rights-based approach somewhat more specifically and operationally, and outline some of its advantages. In particular, a rights-based approach is posed here as an alternative, if not an antidote, to the approach that prevailed during the years of the Oslo peace process, in which international law was treated largely as an impediment to peace negotiations. Although Palestinian representatives repeatedly sought to base negotiations on international legal principles, Israeli and American negotiators favored “pragmatism,” flexibility, and political accommodation.⁵ As we are all painfully aware, this anti-legal approach ended in failure.

A rights-based approach starts with a belief that to designate something a “right” in international law is not a trivial act. Rather, bestowal of this very special status means that it embodies the most cherished principles of morality and justice held by the world community.⁶ Rights exist as a matter of law and are distinct from desires, aspirations, or interests, in the sense that they bestow entitlements for which the rights holder need not bargain and for which a demand for enforcement may be made of legitimate authority.⁷ When rights conflict with interests or aspirations, rights should prevail.

A rights-based approach involves a commitment to maximize rights – that is, to make concerted effort to achieve the widest array of rights for parties to a dispute and to firmly resist the sacrifice of rights to power or political expediency.⁸ Proposals to rank, prioritize, or establish hierarchies of rights should be approached with great care, as rights are often intangible and extremely difficult to compare. Instead, every effort should be made to reconcile rights to the maximum extent possible.⁹ Notions of superior and inferior rights can be a prelude to “balancing conflicting rights,” and ultimately, to the negation of the rights of some in favor of the putative rights of others.¹⁰ Where properly defined rights are genuinely and inevitably in conflict, a rights-based approach would presumptively favor equitable compromise – splitting

the difference. Zero-sum dispositions, in contrast, are subversive of the very notion of rights, as “rights” that cannot be enforced are not, ultimately, worthy of the designation.

A rights-based approach should, wherever possible, prioritize direct remedies of rights over indirect remedies. The danger, otherwise, is that the conversion of rights into monetary or other values is an invitation for the rich and powerful to overbear and exploit the poor and weak.¹¹ Extreme vigilance is due to the conditions under which rights are bargained or negotiated – that is, to who purports to speak for rights holders, with what representative authority, mediated by whom, and whether in an environment supportive or subversive of the protection of rights. At the same time, when a suitably protective bargaining environment is created, the choices of rights-holders to either insist on enforcement or to trade rights for other benefits must be respected. No one should be “held hostage” to his or her right.

Finally, a rights-based approach should pay attention not just to substantive definitions of rights, but also to process. This is not so much a moral imperative as a practical one: if proponents of this approach are incapable of tracing a legal path to the realization of rights, then they risk being dismissed as well-intentioned but misguided dreamers.

What advantages does a rights-based approach bring to Middle East peace-making? Let me suggest three. First, international legal rights establish a baseline of protections for both Palestinians and Israelis and would partially offset the huge imbalance of military, economic, and diplomatic power between the two parties.¹² It would thus promote a resolution based on justice, not simply power. Second, an agreement based on well-established international norms would enjoy the greatest legitimacy among both domestic constituencies and within the international community more generally.¹³ Third, a rights-based resolution to the conflict would demonstrate to the peoples of the Middle East, and elsewhere, that international law is not simply the tool by which greater powers justify military interventions, but also a means by which justice and durable peace can be achieved. In a region afflicted by great, and understandable, cynicism about the rule of law, with the resulting temptation to redress grievances through extralegal means, this would be a powerful and positive statement.¹⁴

Calls to enhance the role of international law in Middle East peacemaking could easily go unheeded.¹⁵ While one can speculate as to the reasons for U.S. official hostility to international law in this context, it is hard not to see Israeli reticence as stemming from trepidation over the support that international law provides Palestinian positions on a number of key issues.¹⁶ The simple fact is that the application of a rights-based approach to Middle East peacemaking is likely to effectuate a substantial redistribution of rights and benefits in favor of Palestinians. How might Israel, which still possesses an enormous power differential over the Palestinians, and the United States, Israel’s ally, ever be coaxed into responding differently to this approach than in the past?

The answer, of course, is that they may not – at least, not in the immediate future. Nonetheless, each power has the failure of the Camp David negotiations to learn

from. In the aftermath of Israel's unsuccessful war against Lebanon in 2006, and with the scale of the United States' Iraq debacle becoming increasingly clear, it is possible that both powers will develop greater incentives to negotiate on terms more respectful of international law.

Nonetheless, calls for implementing international law in Middle East peace-making are likely to be treated as partisan, and those making them must be scrupulous in upholding legality in a consistent and principled manner, and in emphasizing the law's benefits to both parties to the dispute. A healthy awareness of the limitations of international law is also necessary. International law does not offer clear prescriptions for all of the outstanding issues between Palestinians and Israelis.¹⁷ Nor were the failures of past negotiations between Palestinians and Israelis solely due to insufficient reliance on international law; rectifying only one part of the equation will not guarantee more successful results in future negotiations.¹⁸

General arguments for a one-state solution

This section will briefly review the history of the idea of a one-state solution, and outline some of the major arguments that have been made in its support. While it would be possible to articulate a rights-based justification for a one-state solution in the abstract, situating it in a broader historical and political context is helpful. The notion of a single state seems far less alien when its origins and rationale are excavated. In some respects, the rights-based approach echoes and recasts themes that are evident in the arguments considered in this section.

For the last 60 years, following the United Nations General Assembly passage of the partition plan for Palestine,¹⁹ the prevailing assumption in the international community has been that the competing claims of Jewish Israelis and Palestinian Arabs to the land of former Mandate Palestine must be resolved by some kind of territorial division. Palestinian national aspirations were occluded for the two decades or so following the collapse of the British mandate in Palestine and the creation of Israel. UN Security Council Resolution 242, adopted after the June 1967 Arab–Israeli war, did not call for a Palestinian state, but it did mandate Israeli withdrawal from the Arab territories it seized, including the West Bank. Palestinian rights to self-determination and nationhood gained steady international recognition through the 1970s. In 2003, the Security Council adopted the Roadmap for Peace as official UN policy, thereby adopting an explicit plan to create a separate Palestinian state alongside Israel.²⁰ Israel, which for many years denied the national rights of Palestinians and opposed the creation of a Palestinian state, finally bowed to international opinion, and at least verbally assented in the need to create a Palestinian state.

Yet the notion that Jews, Muslim, and Christian Palestinians should live within a single polity has relatively deep roots in both communities. In the period before Israel's foundation, prominent Jewish intellectuals Judah Magnes, Martin Buber, and Hannah Arendt supported a program to establish a common Jewish–Arab state in Palestine in which all citizens, regardless of ethnic or religious affiliation, would live

as equals.²¹ This current of Jewish thought was largely superseded, during and after World War II and the Nazi holocaust, by the Zionist drive to establish a Jewish state in Palestine. But it never entirely disappeared, and recently has begun to re-emerge in the writings of a small number of Jewish Israelis and others outside of Israel – some of which will be reviewed below.

Palestinian Arabs strongly opposed the partition of Palestine, as an unwarranted violation of their rights to self-determination and sovereignty in the land they had inhabited continuously for generations.²² Calls for the creation of a single state by Palestinians resurfaced during the late 1960s, when official policy of the Palestine Liberation Organization (PLO) stipulated the creation of a “democratic secular state” in Palestine, in which Jews and Palestinians would reside as equal citizens. By the mid-1970s, however, the PLO had begun to support a “national authority” in any areas from which Israel might withdraw – which was largely understood as a coded acceptance of Israel’s permanency and a call for a two-state solution.²³ In 1988, the PLO took the momentous step of recognizing Israel within its boundaries prior to the June 1967 war and declared the independence of the State of Palestine. The latter, of course, was a purely symbolic gesture, but the PLO’s commitment to respecting Israel’s integrity as a state was cemented in the Declaration of Principles signed by Israel and the PLO in 1993 that ushered in the “Oslo peace process.” Support for a two-state solution has been the PLO’s official stance ever since.²⁴

Palestinian critics of the two-state solution, likewise, have never disappeared and as the Oslo process floundered, a number of Palestinians began to articulate support for a one-state solution. As early as 1997, prominent Palestinian-American literary critic and theorist Edward Saïd began to criticize the logic of partition underlying the Oslo process, and to call for Palestinians and Israelis to “plan a common life together.”²⁵ As despair over the viability of the two-state solution has set in, support for a single state appears to be growing, particularly among Palestinian intellectuals, joined by a smaller number of Israeli thinkers.²⁶

In fact, the phrase “one-state solution” is better conceived as a category of possible solutions, rather than a single defined model or plan. Indeed, elements of the Israeli right support a version of a one-state solution whereby Israel would annex the entire West Bank and either expel large numbers of Palestinians or formalize their permanent disenfranchisement.²⁷ The Palestinian group Hamas also supports a single-state solution, although one in which Muslims would rule over Christians and Jews.²⁸ But the one-state solution contemplated here involves either a state in which all citizens enjoy equal rights – what might be called the secular democratic model – or one in which Palestinian Arab and Jewish Israeli collective identities are formally recognized and made the basis of power-sharing arrangements – what might be called the binational model.²⁹

The arguments in support of a one-state solution reviewed here are somewhat overlapping, but emphasize different things. They include what might be called, for shorthand, an “organic” argument; a “moral-ideological” argument; and a “negative” or “default” argument.

The organic argument

The organic argument is one that views Palestine/Israel as a functioning, natural, organic unit. Its Jewish and Palestinian inhabitants are so inextricably entwined – geographically, economically, administratively, and otherwise – that no equitable and mutually acceptable partition of the territory is possible.³⁰ Indeed, partition, far from being the solution to intercommunal tensions, is the source of many problems. All attempts to draw partition lines that fairly apportion territory to the two peoples have failed, and attempts to separate them have necessarily entailed violence.³¹ The first major attempt to impose separation was during the 1948 war, when close to 800,000 Palestinians were expelled or fled from their homes in fear in the areas that fell under Israel's control.³²

This separation, however, was reversed when Israel occupied those territories in 1967, in effect, reintegrating Israel/Palestine into a single functioning geopolitical and economic unit. Israel has determinedly battled Palestinian efforts to establish meaningful sovereignty there and implanted nearly half a million Israeli settlers in over 200 West Bank settlements, linked by an extensive system of roads and infrastructural services.

Attempts to reimpose separation – through the closing of Israel's borders to Palestinian migrant labourers, through the creation of a separate legal system for the settlers and settlements, and through the erection of Israel's "security barrier" – have only imposed further hardship on Palestinians and increased strife. With shared water resources, limited airspace, integrated economies, and the like, disentangling Israel and the Palestinian territories would be, if not impossible, at least highly inefficient and would inevitably produce further injustices.

In short, partition, in a variety of formulations, has been the international community's guiding principle with respect to Palestine/Israel for 60 years – and it has repeatedly proved itself a failure. After six decades of experimentation with dividing the land of Palestine/Israel between the two peoples, resulting only in conflict and strife, it is time to admit defeat and to explore a new approach.

The moral-ideological argument

The moral-ideological argument essentially states that Zionist ethnic nationalism is a regressive, chauvinistic ideology that, if not by its very nature, at least in the form and manner actualized in Palestine, has entailed aggression, oppression, and injustice against the Palestinians. In contrast, a single state founded on principles of inclusion, tolerance, and recognition of the mutual dignity of all citizens – Jews, Palestinian Muslims, and Christians – would be more in consonance with the morals, aspirations, and ideals of the contemporary world, and is therefore more desirable.

Zionism was born not simply as a reaction to European anti-Semitism, but was also inspired by nineteenth-century ethnic nationalism. A central Zionist tenet was that a Jewish state could not be maintained except through establishing and maintaining a Jewish majority. Unfortunately, this tenet had disastrous implications

when played out in a country in which the majority population, as late as 1948, was overwhelmingly Palestinian Arab. The expulsion of the Palestinians in 1948 was a logical corollary of Zionism's commitment to Jewish majority domination. While the fate of the Palestinians was not greatly different than that of other native peoples subjected to settler colonialism, Israel was founded in the era of decolonization, when international law no longer tolerated the excesses of the colonial past.³³

Israel claims membership in the fellowship of democratic nations, but is the only ethnic democracy to do so. Other settler colonial societies, such as the U.S.A., Australia, and South Africa, have all learned the painful lesson that ethnic nationalism, with its tendencies toward ethnic cleansing, discourses of ethnic supremacy, and incompatibility with the precept of equality before the law, is in fundamental ways anti-democratic and an anachronism. Israel, propelled out of World War II by the Nazi holocaust, won itself temporary reprieve from the judgments that other ethnic regimes faced. But the tension between Israel's commitment to being a Jewish state and its espousal of democratic ideals is deepening, not diminishing, and its policies are currently leading to intolerable regional and global tensions.³⁴

Needless to say, this is by no means a new critique of Zionism.³⁵ It is evident, however, that the demise of the Oslo "peace process" and the outbreak of the al-Aksa *Intifada* brought about a revival of older concerns and spurred soul-searching among some former Zionists.³⁶

Far from rendering the final answer to the "Jewish question," Israel may well have contributed, by its policies, to the rise of anti-Semitism in the Muslim world, and possibly in the West as well. Although conceived as a safe haven for Jews, in fact Israel has now become one of the most dangerous places for Jews in the world, a fact reflected in flagging immigration numbers.³⁷ Thus Zionism is a failed ideology, even in its own terms.

The negative argument

The negative argument, or argument by default, rests on the belief that a two-state solution is no longer possible given political conditions on the ground in Palestine/Israel, and therefore the only principled solution that remains is the one-state solution.³⁸ The basic thrust of the argument is that Israel's colonizing process in the West Bank has gone so far that it is now irreversible and that the remaining land base for a Palestinian state is insufficient.

The challenge of reversing decades of Israeli colonization of the West Bank to make adequate space for credible and sustainable Palestinian sovereignty is, indeed, daunting. The West Bank, including East Jerusalem, is now home to some 460,000 Israeli settlers.³⁹ Many hold a powerful ideological attachment to what they believe to be the ancient Jewish heartland. While it is commonly believed that many Israelis support withdrawal from the West Bank and the creation of a Palestinian state, they have repeatedly elected leaders who tolerate, if not actively promote, further settlement activity. Some polling data suggests that a minority of Israelis actually support full withdrawal to the pre-June war borders, while a majority oppose it.⁴⁰

The movement to absorb West Bank land is continuing,⁴¹ so the challenge is to forecast when – if ever – the political forces against expansion will overtake those in its support. This involves a reading of domestic Israeli politics, in which the forces in favor of continuing colonization the West Bank are, at least for the foreseeable future, insurmountable. Key external actors, such as the U.S.A., European Union, the Arab states, and the Palestinians themselves are either unable or unwilling to effectively oppose consolidation of Israeli control over major parts of the West Bank.

Were a Palestinian state to be created of the remaining enclaves of territory, the result would still be continuing instability.⁴²

The problem with the “negative” argument is that the conditions rendering a two-state solution no longer possible would appear similarly to block the creation of a single state. On close inspection, then, this argument seems to conjoin an empirical proposition – that two states have been precluded by facts on the ground – with a normative one – that we should, for moral reasons, support the only principled solution that remains. Yet read most realistically, the facts on the ground seem to foreshadow a future in which no principled or just solution is likely to be reached at all.

The single state as a framework for maximizing rights

Let me now turn to the rights-based argument in support of a one-state solution: a single state offers the most promising framework for realizing the widest array of rights for both Israelis and Palestinians, particularly as compared to the conventionally accepted two-state solution. To reiterate: rights achieve their very special status because they embody particularly cherished values and exemplify norms of justice held throughout the world. A resolution of the conflict that vindicates rights of both peoples, and remedies violations of individual rights, is one that best approximates a just outcome and best guarantees a durable peace. Thus we must ask: what are the internationally recognized rights of each of these two peoples, that each would seek to preserve in a final resolution of their conflict, and how would they fare under a one-state solution as opposed to its common alternative, the two-state solution?⁴³ Palestinians and Israelis harbor other interests and aspirations that are not rights. While interests and aspirations do not have the same claim to vindication that rights do, it is still important to also ask: how may these other interests and aspirations be interwoven with the peoples’ respective rights, so as to create the best deal for both peoples?

As a matter of principle, of course, both Palestinians and Israelis possess symmetrical collective rights of self-determination and sovereignty – a point to which I will return below. Israelis and Palestinians enjoy the same array of individual human, civil, and political rights as all other human beings. Their respective experiences, however, lead to some similar and some different priorities.⁴⁴ The object here cannot be to provide an exhaustive catalogue of all the legal rights at stake in the conflict. Rather, I have tried to identify some key demands of the two peoples, and to determine what rights might underlie and support them.

Key Palestinian rights and interests

The rights that seem most important to Palestinians include: a return for Palestinian refugees; equality of Palestinian citizens of Israel; national self-determination and sovereignty; control over East Jerusalem; and freedom from Israeli occupation of the West Bank and Gaza Strip.⁴⁵

The right of return for Palestinian refugees and compensation for losses they suffered. The forced exile of hundreds of thousands of Palestinians in 1948, and again in 1967, for many Palestinians was, and remains, the very essence of their conflict with Israel. The condition of statelessness, attendant estrangement and vulnerability are defining features of the Palestinian experience and the commitment to return is a key dimension of Palestinian identity. Palestinian refugees and their offspring today probably constitute a majority of the Palestinian people, whether living outside the borders of Palestine, or in the West Bank and Gaza Strip.⁴⁶

While there is lingering controversy over the legal status of Palestinian refugee claims, the more compelling argument is that the right of Palestinian refugees to return to their homes of origin, and the associated right to receive either restitution of their properties or compensation, is firmly grounded in international law.⁴⁷ Importantly, the right to return is an individual right and is fulfilled only when a refugee is offered a free choice between repatriation with compensation for damages or compensation and support for resettlement.⁴⁸ Associated property rights are also individual rights, violations of which are remedied by restitution, compensation, or a combination of the two.

It should be evident that genuine fulfillment of the Palestinians' right of return can only be effectuated under a one-state solution. It is, of course, unknowable how many refugees would return were they offered the choice, but it is hard to square the return of any significant number of Palestinian refugees with maintaining the predominance of Jews in Israel, which is the very rationale of a two-state solution.⁴⁹ Actual return of large numbers of Palestinian refugees would raise real, but surmountable challenges – for example, restitution may be physically impossible in many cases, and due measures would have to be taken to protect the rights of secondary occupants.⁵⁰

The most generous treatment of Palestinian refugees yet envisioned in association with the two-state solution occurred in the unofficial Geneva Accord of 2003.⁵¹ The Accord was never formally adopted by either Israel or the Palestinians, and then-Israeli Prime Minister Sharon firmly rejected it. Nonetheless, it gives us a rough “best case” scenario for refugee rights under a two-state solution.

According to the Geneva Accord, Palestinians would be entitled to seek compensation for “refugeehood” and losses of property. In addition, Palestinian refugees would be offered a choice between return to Israel and resettlement, either in current host countries or in third countries. However, the actual numbers permitted to return would be subject to Israel's sovereign discretion.⁵² The few who actually returned to their homes in Israel would receive the fullest remedy of their rights, although at the expense of second-class citizenship, in effect trading one

violation of their rights for another.⁵³ Palestinian refugees in the West Bank and Gaza Strip, even if compensated for damages and losses of their property in Israel, would receive no real remedy for their right to return, as their right would be deemed already “realized.”

Palestinians abroad would be faced with the prospect of crowding into the West Bank, as the Gaza Strip is greatly overpopulated and already in urgent need for demographic relief itself. Those who, however unwisely – or desperately – did so would at least have been spared the condition of statelessness, which is a net positive, of course. But provision of a state, no matter how welcome, does not remedy the core right that has been violated – which is an individual right to choose freely to remain in the home of one’s long attachment. In fact, statehood is a remedy for the denial of different rights – the rights of the Palestinian people to self-determination and sovereignty. The only true remedy for a violation of the right to return is actual return and restitution of refugee property. The probable outcome of the two-state treatment of refugee rights, therefore, is that the majority of Palestinian claimants would be forced to accept partial and imperfect remedies.

Rights to equality for the Palestinian citizens of Israel. The nearly 1.4 million Palestinian citizens of Israel constitute approximately 20 percent of the population of that state.⁵⁴ Rights of Palestinian citizens of Israel to basic equality under the law, as the citizens of any other state, are protected by the United Nations *Charter*,⁵⁵ the *Universal Declaration of Human Rights*,⁵⁶ and other sources of international law.⁵⁷

In reality, Palestinian citizens of Israel suffer a variety of forms of discrimination in their daily lives, whether in the form of 20 laws that either privilege Jews or discriminate against Palestinians⁵⁸ or in the form of discrimination in the allocation of government services and resources.⁵⁹ Israel’s *Basic Law of Human Dignity and Liberty*, intended as the country’s “bill of rights”, not only fails to include an explicit guarantee of equal rights, but it characterizes Israel as a “Jewish and democratic” state.⁶⁰ Palestinian citizens thus face *de jure* and *de facto* discrimination in many aspects of life without benefit of a constitutional principle protecting equal rights under the law.

Again, only in a one-state solution would the rights of Palestinian citizens of Israel truly be realized. The key fact is that their current plight is, fundamentally, an outgrowth of their status as non-Jews in a state that is in letter and in spirit a Jewish state. Surely there is a degree to which their plight is exacerbated by the conflict; in a post-conflict Israel, this plight might be somewhat ameliorated even in the event of a two-state solution. Yet is hard to imagine how Palestinians could ever achieve full equality in a state that explicitly represents itself as the state of another people.⁶¹ It is far more likely that this symbolic official commitment to Jews will continue to be actualized in discriminatory policies on the ground, and that any improvement for Palestinian citizens will be at the margins.⁶² Furthermore, if the birth rate of Palestinian citizens of Israel continues to outstrip that of Jewish Israelis, the latter have only deferred, not solved, the “demographic problem” to which the two-state solution was in large part directed.⁶³ If so, Palestinian citizens of Israel are likely to continue to be the object of policies designed to curb their political influence.⁶⁴

Palestinian rights to national self-determination and sovereignty in their own land. Many Palestinians directly trace their vulnerability to their condition of statelessness. Therefore, creating a viable Palestinian state is essential to the protection of their other rights, and is a good in itself, as a form of national self-expression. The right of the Palestinian people to national self-determination, including the right to establish a state, has been recognized by the international community.⁶⁵

A two-state solution, at least one involving real and not truncated sovereignty, would satisfy this right, however unevenly. All Palestinians would enjoy the symbolic affiliation with a state that embodies the collective identity of the Palestinian people. But only those living within the territorial jurisdiction of the Palestinian state would enjoy the full tangible benefits of statehood; those remaining outside its boundaries – Palestinian citizens of Israel, and Palestinian refugees for whom immigration to the new Palestine is impracticable – would not.

A one-state solution, on the other hand would apportion this right more evenly and justly among Palestinians. However, as the one-state solution necessarily would involve shared sovereignty with Jewish Israelis, Palestinians of the Occupied Territories would be sacrificing the exclusive sovereignty a two-state solution would afford so that all Palestinians have some share in this right. Of course, when sovereignty is shared between two peoples, each enjoys less of that right than would be the case were one or the other to have exclusive sovereignty. Shared sovereignty, while a compromise, is a far cry from no sovereignty at all, and the specific identities and interests of each people can be enshrined and protected in a variety of ways.

Control over East Jerusalem. East Jerusalem has been the economic, political, and cultural hub of the West Bank and is the center of religious life for Palestinian Muslims and Christians. A Palestinian state lacking a capital in East Jerusalem is inconceivable to many Palestinians and this strong desire will not be satisfied by locating the capital in a re-named suburb. Although the international legal status of Jerusalem is contested – the UN Partition Plan provided for an internationally administered *corpus separatum* for the city and Israel's annexation of the city has never been recognized as legal by the international community – Palestinians have rights of sovereignty there that are equal or superior to those of Israel.⁶⁶

A two-state solution would be adequate to address Palestinian rights to Jerusalem provided that the two sides can agree to an equitable division of the city, coupled with agreements guaranteeing the rights of non-citizens who remain in the quarters falling under the control of the other state. Given the intermingling of the populations and the intense attachments of each side to areas that are, literally, part and parcel of each other (such as the Western Wall and the Haram ash-Sharif) such a division seems nearly impossible.⁶⁷ A one-state solution would vault over all these difficulties, and provide Palestinians and Israelis equal access to the city to which both peoples are deeply devoted.

Freedom from Israeli occupation of the West Bank and Gaza Strip. Properly speaking, there is no international legal right to be free of foreign military occupation as such. On the other hand, Israeli occupation has entailed many violations of Palestinian rights and an end to Israeli occupation would free Palestinians from these violations. Nations

are barred from territorial acquisition by war and Israel has been under call by the United Nations Security Council to end its occupation of Palestinian territories since 1967.⁶⁸ Israeli occupation is the principal obstacle to the realization of Palestinian right to self-determination. Occupation has provided the umbrella under which Israel has colonized Palestinian land in the West Bank, violating both individual property rights of Palestinian landowners,⁶⁹ and Israel's obligations as an occupying authority.⁷⁰ Specific policies of Israel's occupation forces including restrictions on freedom of movement,⁷¹ detention without charge,⁷² torture,⁷³ assassination,⁷⁴ home demolition,⁷⁵ curfew,⁷⁶ and others have entailed violations of Palestinian rights to life, freedom of travel, housing, medical care, work, due process, and dignity.

An end to Israeli occupation would be effected by either a one-state or a two-state solution. In regard to the rights of Palestinians now living under Israeli occupation, both solutions are equally effective.

Key Israeli rights and interests

Key Israeli rights and interests include: rights to individual and collective security; preserving Israel as a Jewish state; achieving sovereignty in Jerusalem; continued settlement in the West Bank; and regional acceptance and friendly relations with neighbouring Arab countries.

Rights to individual and collective security. All nations have rights to be free of aggressive attack⁷⁷ and individuals have rights to life that are violated by acts of violence, and no less so Israel as a nation and Israeli Jews as individual human beings.⁷⁸ Notwithstanding the power of Israel's military, it is indisputable that Israelis live with a chronic sense of insecurity, and that they fervently desire, and deserve, to live a normal life of peace.

Perhaps the most important lesson of Israel's build-up of immense military power yet continued sense of embattlement and threat is that security, ultimately, does not stem from military superiority. While a two-state solution might defuse hostilities in the short term, the rights of Palestinian refugees and Palestinian citizens of Israel would remain smouldering issues. Israelis know that some Palestinians support a two-state solution as part of the *al-barnamij al-marhali*, or "program of stages" adopted by the PLO in 1978, whereby acceptance of a Palestinian state on the West Bank and Gaza Strip would be a first step toward total liberation of Palestine.⁷⁹ The election of a Hamas majority in the January 2006 elections to the Palestinian Legislative Council is likely to further convince many Israelis of the ultimate determination of Palestinians to destroy Israel. An atmosphere of tension and distrust is therefore likely to accompany the two-state solution. Israel is likely to remain highly vigilant regarding its security and to take direct actions to guarantee it. Palestinians may initially accept a demilitarized state, but if they continue to suffer Israeli incursions and the same chronic sense of insecurity they faced under Israeli occupation, they may begin to question the legitimacy of a state that cannot fulfill basic state functions, including defense of the nation's territory and individuals. It would then be only a few short steps to a resumption of larger-scale conflict.⁸⁰

A one-state solution, on the other hand, would resolve all the major outstanding Palestinian grievances with Israel, and thus largely eliminate the sources of conflict. No doubt, some Palestinians would remain ideologically committed to establishing an Islamic state in all of Palestine, but there are strong indications that this group is a small minority within the Palestinian population.⁸¹

Preserving Israel as a Jewish democratic state. The lesson that many Jews drew from the Nazi holocaust was that the defense of the Jewish people should never be entrusted to others. A majority of Jewish Israelis clearly support the idea of a Jewish state as the ultimate guarantor of the safety of the Jewish people and as the national expression of Jewish identity. Maintaining a safe haven for Jews worldwide, and facilitating their in-migration, is a key component of Israel's role. Israel's political leadership has always operated as if these goals could only be achieved by establishing and maintaining a dominant Jewish majority in the country. While Israel has never publicly avowed a precise formulation of a desirable demographic mix, there is evidence that its leaders have set a Palestinian minority of 15–20 percent as a target.⁸²

There is substantial legal support for the proposition that the international community has recognized the Jews as a people with rights to self-determination in Palestine.⁸³ The Council of the League of Nations incorporated the terms of the Balfour Declaration into the British Mandate for Palestine, approving the “establishment in Palestine of a national home for the Jewish people.”⁸⁴ A Jewish state was recommended by the United Nations General Assembly Partition Plan of 1947.⁸⁵ Israel was admitted to the United Nations in 1949.⁸⁶ Its independence and right to sovereignty were affirmed in 1967, in the aftermath of the June War.⁸⁷ Israel, today, is recognized by all but a handful of states.

But is Israel's desire to remain a state with a predominant Jewish majority justifiable in international law? The answer is almost certainly no. None of the sources that Israel cites as grounds for Jewish self-determination and sovereignty entitle Israel to any specific demographic configuration. Indeed, the UN Partition Plan would have established a “Jewish state” in which Jews were perhaps a slight minority, undercutting the notion that a “Jewish state” necessarily entailed a strong Jewish majority.⁸⁸ All of these same sources also contain at least general protections for the rights of non-Jews that would bar Israel from taking discriminatory actions with respect to them. Nor is it clear that any legal authority could entitle Israel to violate fundamental Palestinian rights – to equality, to property, *et cetera* – that are secured in basic instruments of international human rights law.

It follows, then, that Israel's desire to maintain a strong Jewish majority, while deeply held, is not a “right” protected in international law. Thus, it cannot operate as a legal justification for the denial of Palestinian rights – for example, the right of Palestinian refugees to return.⁸⁹ Putting that to one side for a moment, let us consider how Israel's desire for Jewish demographic predominance would fare under the two- and one-state solutions.

On the face of it, it seems a simple and obvious fact that a two-state solution is compatible with the goal of preserving Israel as a state for the Jews – that, indeed, is its very rationale – and a one-state solution is not. But the reality is that Israel

today is already a flawed democracy and as long as it has a significant Palestinian minority, it will continue to be. As we have already noted, given the higher birth rate among Palestinians than among Jewish Israelis, a two-state solution will delay confrontation with, but not ultimately resolve, the contradiction between Israel's commitments to its Jewishness and to democracy. To date, that contradiction has been resolved in favor of Israel's Jewish character at the expense of its democratic character, but more measures will be necessary to contain Palestinian growth or the contradiction will become more acute and visible over time.

There is no escaping the difficult fact that a one-state solution would require an abandonment of the goal of preserving Israel as a predominantly Jewish state, or one in which Jews enjoy privileged status over non-Jews. The fact that Israel has no right to maintain Jewish predominance in international law is likely to provide small comfort to many Israeli Jews.

The question they will have to face is whether that goal is an end in itself or a means to achieve other ends, and, if a means, whether it is superior to other political frameworks in achieving them. As we have seen, Jews have not always insisted on separate statehood and Israelis, with the rest of us, now have 60 years of agonized experience with partition on which to reflect. Whereas a predominantly Jewish state may have seemed sensible in 1948, efforts to establish and maintain it have only brought strife, and ultimately insecurity, to Israeli Jews. It is not inconceivable that some, and eventually many, Israelis will be convinced to try a different course.

It is clear that a single state ensuring equality for all citizens would be more truly democratic and would eliminate the underlying fault that runs through the Israeli polity today. While Israel would surrender its character as a "Jewish state," it would more fully realize its commitment to democracy – a commitment that, no doubt, many Jewish Israelis hold deeply. Finally, just as for Palestinians, shared sovereignty for Jews does not imply the complete negation of sovereign rights, and arrangements to preserve Jewish interests and identity can be incorporated into a one-state framework.

Sovereignty in Jerusalem. Jerusalem is the center of Jewish religious life and a symbol of the connection of Jews to the land. Continuing control over most or all of Jerusalem is a *sine qua non* for a large majority of Israeli Jews. As we have noted previously, the international legal status of Jerusalem is contested and Israel's designation of it as its capital has not been recognized by the international community. However, its claims of sovereign rights to the city are stronger with respect to West Jerusalem than with respect to East Jerusalem.⁹⁰

As we have also previously seen, a two-state solution will require a division of sovereignty within Jerusalem, while a one-state solution would avoid the difficulties entailed in territorial division. Full sovereignty over some parts of the city would be traded for shared sovereignty over all.

Continued access to residence in parts of the country of particular historical importance to Jews. While not of such universal significance to all Israelis, and a value that many would readily sacrifice in exchange for peace, many others hold passionate and sincere attachments to the parts of the West Bank that are viewed as the heartland

of the ancient Jewish kingdoms. Jewish Israelis, however, have no legal rights to settle in the West Bank, and Israel, on the contrary, has an international legal obligation not to settle its civilians in occupied Palestinian territories.⁹¹ Still, this desire is strongly held by some Israelis.

A two-state solution would likely, but not necessarily, entail evacuation of Jewish settlements in the West Bank and curtailment of opportunities for Jews to settle there in the future. In a single state, however, there would be no need to restrict residence by either Jews or Palestinians in any part of the country. In theory, Jewish settlements and settlers could remain where they are in the West Bank, although the rights of Palestinian property owners whose lands were taken for settlements would still require redress.

Regional acceptance and friendly relations with the surrounding Arab countries. It may well be the case that Israelis have despaired of ever gaining genuine acceptance in the Arab world. Israel has had a peace agreement with Egypt for nearly 30 years and with Jordan for more than a decade, but those agreements have, manifestly, not led to acceptance by the populations of those countries, nor those of other countries in the Middle East. Of course, Israel has no legal rights against its neighbours beyond respect for its borders and security and cannot compel their friendship or admiration.

Attitudes toward Israel in the Arab and Muslim worlds are likely to continue to be significantly influenced by perceptions of its treatment of the Palestinians. A two-state solution that does not genuinely address the plight of Palestinian refugees and Palestinian citizens of Israel and leaves injustices festering is unlikely to change the current reality of “cold peace” in the region. It is conceivable that a single, democratic secular state in Israel/Palestine may be ideologically challenging to some forces in the region in other ways, but it is far less likely to generate the kind or level of hostility that Israel currently attracts. On the contrary, it may constitute a positive beacon of tolerance, egalitarianism, and other progressive ideals that will inspire democratic forces in the region.⁹²

One of the key points that should emerge from this exercise is that different resolutions of the conflict have differential impacts not only as between Palestinians and Israelis, but also as between differently situated segments of the Palestinian people.⁹³ The one-state solution is the most just, not only in the way that it maximizes and reconciles rights between Palestinians and Israelis, but also in the way that it distributes justice among Palestinians themselves. In particular, the one-state solution is the only framework that would enable the realization of rights to equality for Palestinian citizens of Israel and rights of return for Palestinian refugees. If we are to truly take rights seriously, as a principled rights-based approach mandates, no solution to the conflict can afford to simply ignore the rights of these two groups of Palestinians. As importantly, no solution that leaves basic grievances unresolved will ever withstand the test of time.

Sharing sovereignty clearly involves serious compromise to each people's rights to nationhood. It is, however, a reciprocal compromise, and the only means of avoiding a zero-sum disposition in which some enjoy full rights and others enjoy none. It would require Jewish Israelis to abandon a deeply cherished value – that of

maintaining Israel's character as a state for the Jews. It would also require Palestinians to surrender hopes of an independent Palestinian state, and to rethink, and perhaps attenuate, their connections to the broader Arab world.

Assuming, however, that the one-state solution is the most desirable resolution of the Palestinian–Israeli conflict, how might that end be achieved? More specifically, if a rights-based approach encompasses respect for procedural regularity, is there a legal path to achieve that goal? These are questions that must be engaged if proponents of the one-state solution expect to gain genuine political traction.

Getting to one state

Those committed to charting a legal path to a one-state solution must confront one overriding consideration: as a matter of law, Israelis and Palestinians cannot be compelled to accept such a solution against their wills. Israel is a recognized sovereign state, and although the Palestinians have not yet achieved sovereignty, their right to establish a state has also received international recognition. It would seem completely incompatible with the concept of sovereignty, even in its modern, somewhat permeable form, for any external entity or group of states to force Israel to extend jurisdiction to the entirety of former Palestine and to share sovereignty with Palestinians within that territory. It would seem equally inconsistent with these rights were the international community to force the Palestinian people into an unwanted union with Israeli Jews.

The question thus becomes: under what conditions might Israelis and Palestinians choose to bind their people's futures together in one polity? We will look first at prospects for internal developments in support of one state within each group and then turn to the potential roles that external actors may play in encouraging the one-state solution.

Support for one state among Palestinians

As it stands today, among Palestinians in the West Bank and Gaza Strip, support for a one-state solution appears to range between one-quarter and one-third, but no organized political party or prominent political leader espouses a single state.⁹⁴ Logically, Diaspora Palestinians may be expected to support a single state in higher proportions than those living under Israeli military occupation, and perhaps so would many Palestinian citizens of Israel. These are the two Palestinian constituencies whose interests would be least adequately addressed under a two-state solution. But there is little hard data to substantiate this expectation.

In one benign scenario, a one-state solution may follow a period of diminished tension and a gradual realization among both Israelis and Palestinians that economic, administrative, and other interests would be best served by union. This assumes, however, an interim phase in which tensions indeed diminish considerably. As I have already suggested, a two-state solution is unlikely to accomplish long-term stability. The far more likely future – in a truncated, discontinuous Palestinian entity

lacking full sovereign powers – is virtually guaranteed to bring continued, if sporadic, violence and conflict. So the necessary condition for this benign scenario almost certainly will not be met. We need to look, instead, at how the two parties to the conflict are likely to respond to circumstances of continued, and possibly even intensified, tension.

Such predictions are always somewhat risky, but it is not difficult to imagine the rapid conversion of a majority of Palestinians to support for a one-state solution. All that may need to happen is for many to finally acknowledge that a viable Palestinian state is no longer possible – a moment that may not be so distant from the present.⁹⁵ There are some indications that this transformation has already begun. Perhaps the most notable shift occurred in the summer of 2005, when 170 Palestinian civil society organizations issued a public call for boycotts, divestment, and sanctions against Israel on the anniversary of the International Court of Justice's advisory opinion on Israel's Separation Wall. While the statement did not explicitly call for a one-state solution, its demands included realization of the Palestinians' right of return, and end to Israeli occupation, and, especially tellingly, equality for Palestinian citizens of Israel.⁹⁶ As we have seen, these are not rights that are easily accommodated within a two-state framework. Moreover, the civil society organizations represented all major segments of the Palestinian people – those in Israel, in the Occupied Territories, and in exile – and across many occupational and other sectors.⁹⁷

One significant restraint on a strategic shift in support of a single state is the resistance of the secular nationalist Palestinian leadership. Most PLO and Palestinian Authority figures appear wholly invested in a strategy of negotiations toward a two-state solution.⁹⁸ Palestinian officials, including PLO Chairman Yasser Arafat before his death, and Palestinian Authority Prime Minister Ahmad Qurei, have occasionally raised the possibility of shifting strategy to seek a single state.⁹⁹ Their pronouncements, however, were widely dismissed as posturing.¹⁰⁰ An admission by the leadership that its two-state strategy had failed, and an announcement of a shift of strategy in favor of equal rights in a unified Israel/Palestine, could have a galvanizing effect on many Palestinians. The shift could legitimately be represented not as a deviation, but rather as a return to the PLO's earlier principled stand in support of a secular democratic state.

At the moment, of course, there is no forum within the Palestinian national movement to debate strategic options. The Palestinian Authority only operates in the Occupied Territories and its elected members represent the perspective of only one segment of the Palestinian people. Meanwhile, the PLO – the internationally recognized representative body of the Palestinian people, is nearly defunct.¹⁰¹ The supreme policy-making body of the PLO – the Palestine National Council¹⁰² – has not met since 1996. Even under the best of circumstances, the PNC was never a fully representative body and membership was always brokered among established political parties and groupings.¹⁰³ If there is, indeed, an emerging gap between Palestinian "officialdom" fixated on the two-state strategy, and Palestinian civil society, moving in the direction of a one-state strategy, an urgent preliminary need

may be to recreate a forum for the frank debate of options for strategic directions. If this is done via a revivification of the PLO, reforms must truly open up PNC membership and free it from the monopoly of established political groupings to effectively foster genuine debate and enable a strategic shift.¹⁰⁴

Support for one state among Israelis

The obstacles on the Israeli side are infinitely greater. A single state is bitterly opposed across almost the entire Israeli political spectrum and is supported by only a few isolated intellectuals.¹⁰⁵ Needless to say, the likely future of continued or intensified tension will fuel distrust and hostility toward the Palestinians among Israelis. That is certainly indicated by the trajectory of Israeli politics since the outbreak of the al-Aksa *Intifada* in September 2000. This period has seen the ascendance of right-wing forces, such as the patently racist Israel Beitenu party – now a member of Israel’s ruling coalition – and the redefinition of the Israeli political landscape, such that the Kadima party with roots in revisionist Zionism, now occupies the political center. A measure of commitment to separation from the Palestinians is exemplified in the growing popularity among Jewish Israelis of the idea of “transfer” of Palestinians under Israeli rule – either through mass expulsions or through the redrawing of political boundaries to exclude them.¹⁰⁶

Yet there is another noticeable trend that has emerged in recent years in Israel – a small but influential number of Israeli voices calling for fundamental reassessment of the Zionist project and supporting the creation of a binational state. These include former deputy mayor of Jerusalem Meron Benvenisti,¹⁰⁷ political activist Haim Hanegbi,¹⁰⁸ journalist Daniel Gavron,¹⁰⁹ and others. They come from different backgrounds and ideological positions, but they are all deeply pessimistic about the long-term prospects for Israel, if it continues on its current path.¹¹⁰

The Israeli supporters of a one-state solution need not persuade a vast swath of the Jewish Israeli public – at least not initially. Rather, the change could be catalyzed by Israeli political elites. The process would be more complex and contentious than it might be on the Palestinian side. But if a leader were to be convinced that Israel’s future cannot ultimately be guaranteed by forcible imposition of its will over the Palestinians, and were he or she willing to speak forthrightly to the Israeli people about its future in the region, change might come quicker than expected.

Such a scenario is not likely to be realized if Israel feels strong, prosperous, and secure. Rather, it will only be brought to such a radical change out of desperation and a sense of beleaguerment. Since the Palestinians are currently powerless to bring such a condition about alone, the question becomes: could it be accomplished in concert with external actors?

The role of the international organizations and other states

Although the international community lacks the legal capacity to force a one-state solution directly on undesiring Palestinians and Israelis, it nonetheless possesses

powerful means to herd the parties toward political union indirectly. Perhaps the international community's biggest "stick" would be a threat to enforce, or actual enforcement of, the Palestinian right of return. There is nothing in principle that would bar the United Nations Security Council from declaring the continuing plight of the Palestinian refugees a threat to peace and to impose sanctions, or even resort to force, to compel Israeli compliance.¹¹¹ This action, alone, would bring about a result nearly tantamount to imposition of a one-state solution. Theoretically, the same actions could be taken to compel Israel's withdrawal from the West Bank, or to halt its construction of the Separation Wall, or to stop construction of illegal Israeli settlements. While none of these actions would directly bring about a single-state solution, forcing Israel to face staunch international resistance, and denying it alternatives, might pressure it ultimately in that direction.

There is, of course, little indication that the international community is inclined to take this course and it is difficult to envision how this situation might change in the near future.¹¹² After all, these options have always been available, but have never been exercised. It is almost inconceivable that states would adopt this radical course until the official representative body of the Palestinians, the PLO, assumes the lead by shifting to a one-state strategy. Few, if any, states will be "more Palestinian than the Palestinians." It is worth noting, however, that these theoretical possibilities exist, even if current political circumstances make them unattainable.

The role of international civil society

If international organizations and states are, for now and the reasonably foreseeable future, disinclined to employ legal leverage to effectuate, might the initiative come from elsewhere? For example, could Israel face the kind of international isolation and condemnation that South Africa faced during the apartheid era, led by groups in international civil society?

This is a terribly complex question with many factors to weigh. The world is a vastly different place than it was in the 1980s, the heyday of the anti-apartheid movement. Among the most important changes since that era are the emergence of the United States as the world's only superpower; the tightening of the U.S. alliance with Israel; and the unfolding of the so-called "War on Terror." All of these developments (and more) create a far less friendly environment for the emergence of any equivalent to the anti-apartheid movement. There are also critical differences between Israel and South Africa that make the prospects of international isolation more challenging.¹¹³

There is, of course, a nascent international civil society movement advocating boycotts, divestment, and sanctions (BDS) against Israel that parallels the aforementioned Palestinian movement for BDS. It consists at this point of a disparate mix of loosely coordinated organizations, churches, and other groups with roots in Palestine, Europe, South Africa, and the U.S.A. Its campaigns range from shareholders actions within corporations (such as Caterpillar),¹¹⁴ to civil lawsuits or criminal actions against Israeli officials for human rights violations,¹¹⁵ to the boycott

of Israeli academics urged by the National Association of Teachers in Further and Higher Education in mid-2006.¹¹⁶ The primary demands of this movement to this point have been to stop construction of Israel's Separation Wall and to end Israeli occupation of the West Bank and the Gaza Strip.

This movement, too, shows signs of a strategic shift in support of a one-state solution. It is significant, for example, that the resolution passed in May 2006 by NATFHE spoke of Israeli "apartheid policies."¹¹⁷ A more recent boycott resolution passed by the Ontario branch of the Canadian Union of Public Employees cites the "apartheid nature of the Israeli state," and specifically cited General Assembly Resolution 194.¹¹⁸ Whatever the merits of the apartheid analogy, the point here is that the concerns being articulated no longer run solely to Israeli occupation, and the demands strain to be met through the conventional version of the two-state solution.¹¹⁹

This movement has faced fierce opposition from Israel and its supporters in the U.S.A. and Europe. The British Association of University Teachers reversed its own boycott resolution last year after one month of withering attack.¹²⁰ The Presbyterian Church, which passed a divestment resolution in 2004¹²¹ and faced condemnation from Israel's defenders in the U.S.A., modified, but did not rescind their position in 2006.¹²² Despite this opposition, the movement seems to be slowly, fitfully, gaining momentum.

It is, perhaps, remarkable that the BDS movement has achieved the progress it has without clear direction and leadership from the formal representatives of the Palestinian people – namely, the PLO. Again, were the PLO leadership to make the strategic judgment to abandon negotiations toward a two-state solution and plunge ahead toward a one-state solution, framing their demand as a struggle for equality and fundamental human rights, this could be immensely powerful. Indeed, there are indications that Israeli leaders are quite aware of this possibility – and are terrified by it.¹²³

Conclusions

After six decades during which the international community has attempted, at least intermittently, to implement a partition of Palestine into two states, it is time to admit a painful truth: these efforts have brought only conflict and strife. There is no realistic scenario by which this pattern will change. The time has come for a new paradigm.

A rights-based approach to resolving the Palestinian–Israeli conflict strongly militates in support of a one-state solution to the Palestinian–Israeli conflict, as the one solution that promises to provide the widest array of rights to the greatest number of Palestinians and Israelis. Moreover, where rights are genuinely in conflict – such as in the right of Israelis and Palestinians to nationhood in Palestine/Israel – a one-state solution would effectuate the most equitable compromise of rights for all. Quite simply: the one-state solution is the most just solution. It is the solution most likely to bring lasting peace to the region because it will truly resolve the major

grievances that currently contribute to conflict.¹²⁴ Pragmatists should embrace it for this reason as well.

The one-state solution is sometimes derided as “unrealistic” or utopian. No one should imagine that a single state lies just over the horizon. In fact, however, it is the two-state solution that has proven – through decades of empirical experience – to have been impracticable and utopian. Thus, with the realistic hopes fading for the creation of a viable Palestinian state on the West Bank and the Gaza Strip, supporters of peace and justice are faced with no acceptable choices.

Still, proponents of the one-state solution must take seriously the challenge inherent in the charge that their goal is fanciful. One-state supporters must think carefully, strategically, and responsibly, and begin to define concrete steps toward their desired future. If a single state can only be brought about through the agreement of Israelis and Palestinians, it would seem imperative that one-state supporters begin to seriously address the need to engage the Israeli public, or at least leading elements within it, and to win their support. As difficult as this may be, there is no other route. This strongly implies a rigorous commitment to non-violence, as violence, particularly against Israeli civilians, has driven a majority of Israelis away from conciliatory positions and toward ever more hostile and harsh ones.¹²⁵

The greatest resources on which proponents of one-state may draw are the deep commitments of both Israelis and Palestinians for real and lasting peace and true democracy. In the end, perhaps one of the weaknesses of the two-state solution has been its inability to excite anyone, on either side of the conflict, as it clearly involves deep compromises to justice. The one-state vision, by contrast, can be far more morally compelling, and has the capacity to unite both Israelis and Palestinians in a joint struggle against chauvinist nationalisms, and in support of principles of universalism and humanism worthy of our contemporary world. The power of a moral idea should never be underestimated. Israel – or perhaps Israel/Palestine – may yet be a “light unto nations” although in a form never expected.

Notes

- 1 Accordingly, a comprehensive argument in support of a one-state solution is beyond the scope of this writing. For two recent book-length treatments of the topic, see V. Tilley, *The One-State Solution* (Ann Arbor: University of Michigan, 2005); and A. Abunimah, *One Country: A Bold Proposal to End the Israeli–Palestinian Impasse* (New York: Metropolitan Books, 2006). The topic is also addressed in J. Kovel, *Overcoming Zionism* (London, Ann Arbor: Pluto Press, 2007), and G. Karmi, *Married to Another Man* (London, Ann Arbor: Pluto Press, 2007). I will, however, briefly review some of the major arguments in support of a one-state solution by these and other authors below.
- 2 A “rights-based approach” has been urged in a wide variety of contexts, including development – see online: Office of the United Nations High Commissioner for Human Rights (OCHR) <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>>; reproductive health (see “A Rights-Based Approach to Reproductive Health” (2003) 20: 4 Outlook, online: PATH <http://www.path.org/files/EOL_20_4_dec03.pdf>); budget analysis (see M. Diokno for the International Human Rights Internship Program, “A Rights-Based Approach to Budget Analysis” (1999), online: United Nations <<http://www.un.org/kg/en/publications/document-database/article/>

- document-database/un-system-in-kyrgyzstan/human-rights-and-human-rights-based-approach/129-budget-finance/1893-a-rights-based-approach-towards-budget-analysis-1999-eng->; refugee assistance (see M. Posner and D. Clancy, "A Human Rights-Based Approach to Refugee Assistance", online: Human Rights First <http://www.humanrightsfirst.org/intl_refugees/regions/approach_refugess.pdf>); and gender equality (see S. Gooneskere, "A Rights-Based Approach to Realizing Gender Equity", UN Inter-Agency Network on Women and Gender Equality).
- 3 International humanitarian law regulates the conduct of states and individuals in times of war. Public international law governs the structure and conduct of states, international organizations, and to a lesser extent, supranational corporations and individuals. While Israel has protested the application of human rights law to its occupations of the West Bank and Gaza Strip, the international community "is increasingly coming to view the two sets of standards [IHRL and IHL] as conceptually different but complementary, and both applicable in situations of internal and international conflict." C. Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000) at 89.
 - 4 Increased emphasis on international law in Middle East peacemaking has been urged by a variety of writers, including most participants in a 2004 symposium sponsored by the Toda Institute for Global Peace and Policy Research entitled "Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict." The proceedings of the symposium were published in the *Hastings International and Comparative Law Review*. See G. Bisharat, "Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict" (2005) 28 *Hastings Int'l & Comp. L. Rev.* 319 for the introduction to the symposium. See also several commentators in a discussion entitled "Is there a Role for International Law in the Middle East Peace Process?"; G. Abi Saab, "Is there a Role for International Law in the Middle East Peace Process" (2005) 99 *American Society of International Law Proceedings* 307; J. Quigley, "The Role of Law in Palestinian-Israeli Accommodation" (1999) 31 *Case W. Res. J. Int'l L.* 351; R. Falk, *International Law and the Peace Process* (2005) 28 *Hastings Int'l & Comp. L. Rev.* 331; and E. Kaufman and I. Bisharat, "Introducing Human Rights into Conflict Resolution: The Relevance for the Israel-Palestine Peace Process" (2002) 1 *Journal of Human Rights* 79. The Bethlehem-based NGO Badil, the Center for Refugee Rights, has been particularly active in advocating a rights-based approach to the Palestinian refugee issue. O. Dajani, "Shadow or Shade? The Roles of International Law in Palestine-Israeli Peace Talks" (2007) 32:1 *Yale J. Int'l L.* 61.
 - 5 Dajani, *ibid.* documenting numerous attempts by Palestinian negotiators at Camp David to introduce international legality but facing resistance by both Israeli and U.S. negotiators. Perhaps at no point was the difference in approaches between Palestinians, on the one hand, and Israelis and Americans, on the other hand, more dramatically underscored than in President Clinton's tirade against PLO negotiator Ahmad Qurei. Qurei had requested that Israel negotiate on the basis of the June 4, 1967 border. As recounted by C. Swisher, *The Truth about Camp David* (New York: Nation Books, 2004) at 275: Clinton shouted: "This isn't the Security Council. This isn't the General Assembly. If you want to give me a lecture, go over there and don't make me waste my time. I'm the President of the United States. I'm ready to pack my bags and leave. I also risk losing a lot here. You're obstructing the negotiation. You're not acting in good faith." A similar version of the incident is given in D. Ross, *The Missing Peace* (New York: Farrar, Strauss and Giroux, 2004) at 668-9. Palestinians' appeal to international legality is also described in W. Quandt, "Israeli-Palestinian Peace Talks: From Oslo to Camp David II" in C. Wittes, ed., *How Israelis and Palestinians Negotiate* (Washington, D.C.: United States Institute for Peace, 2005). (Palestinians have "clung to their strong suit - international legitimacy, UN resolutions, and broad principles of international law"); and O. Dajani, "Surviving Opportunities: Palestinian Negotiating Patterns in Peace Talks with Israel" in C. Wittes, *ibid.* at 65, quoting a PLO legal advisor

that Palestinians “were raised, in a sense, identifying the Palestinian cause with law.” For some representative Israeli views on the role of law in the peace process, see S. Shetreet “Negotiations and Agreements Are Better Than Legal Resolutions: A Response to Professor John Quigley” (2000) 32 *Case W. Res. J. Int’l L.* 258 (international legal norms are indeterminate and do not mandate acceptance of Palestinian legal claims); E. Barkan, “The Mirage of Rights – Response” (2005) 28 *Hastings Int’l and Comp. L. Rev.* 411 (rights are a “mirage” that fail to offer practical solutions and immediate relief to Palestinian refugees), and World Council of Churches “Panelists at Odds over Role of International Law in Palestinian–Israeli Peace Efforts” (2003), online: <<http://www.eappi.org/en/news/eappi-news/news-wcc/sw/browse/11/article/4566/panelists-at-odds-over-ro.html>> (reporting statements of Avraham Burg that peace negotiators should focus on “practical concerns of ordinary citizens, not ‘theoretical’ international norms”). See also A. Klieman, “Israeli Negotiating Culture” in C. Wittes, *ibid.* (2005) (Israeli negotiating style dominated by security subculture).

- 6 This is not to suggest that international law, including international human rights standards, does not reflect the values and preferences of the world’s most powerful, and predominantly Western, states. See, for example, M. Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) (arguing that the human rights corpus, though well meaning, is a Eurocentric formula for the reconstruction of non-Western societies and peoples through a set of culturally-biased norms and practices that inhere in liberal thought and philosophy). Changes in the international legal order since the September 11, 2001 attacks on the World Trade Tower have caused some to speculate that the “age of rights” is over. A. Neier, “Did the Era of Rights end on September 11?” *Crimes of War Project* (September 2002), online: Crimes of War <<http://www.crimesofwar.org/sept-mag/sept-neier.html>> . Flawed and frayed though they may be, international legal principles nonetheless represent a kind of consensus within the world community, and provide some objective standards of the reasonableness of the claims of parties to a conflict. See Falk, *supra* note 4 at 334.
- 7 V. Lowe, “Is there a Role for International Law in the Middle East Peace Process?” (2005) 99 *American Society of International Law Proceedings* 221 at 222.
- 8 A “rights-based approach” to development, for example has been described as “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.” online: UNHCHR <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>> at p. 15.
- 9 For a good example of this, see M. Kagan, “Do Israeli Rights Conflict with Palestinians’ Rights of Return? Identifying the Legal Arguments” Badil Working Paper (2005), online: Badil <http://www.badil.org/Publications/Legal_Papers/WorkingPapers/WP-E-10.pdf> . He considers whether the right of Palestinian refugees to return to their homes in Israel conflicts with Israeli rights to self-determination, finding that the rights, properly defined, do not conflict. International law does not support Israel’s claim of a right to exclude Palestinian refugees simply because they would transform Israel’s demography and jeopardize Jewish predominance, and Palestinian exercise of the right of return is thus compatible with Israel’s right of self-determination.
- 10 For example, the U.S. Supreme Court’s explicit introduction of a “balancing approach” in Fourth Amendment jurisprudence – that dealing with search and seizure rights – has, in almost every case, led to the diminution of individual rights to privacy in favor of community rights or interests in expeditious and accurate prosecutions of crimes. S. Sundby, “A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*” (1987–8) 72 *Minn. L. Rev.* 383 (critiquing the two major cases that introduced a “balancing approach” to search and seizure issues).
- 11 Perhaps reflecting this concern, the recently drafted Pinheiro Principles dealing with housing rights of refugees favours restitution over compensation. UN Commission on

- Human Rights, *Housing and property restitution in the context of the return of refugees and internally displaced persons: Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro*, UN ESCOR, 56th Sess., UN Doc. E/CN.4/Sub.2/2005/17 (2005), online: Badil <<http://www.badil.org/e-library/Pinheiro-Principles.pdf>>.
- 12 E. Kaufman and I. Bisharat, "Are Human Rights Good for the Top Dog as Well? Rescuing the Missing Dimensions of the Israeli-Palestinian Peace Process" (2003) 10: 3 *Palestine-Israel Journal of Politics, Economics, and Culture* 89 (arguing that employing human rights standards in conflict resolution benefits the more powerful as well as the less powerful of the parties). See also Quandt, *supra* note 5, citing the power imbalance between Israel and the Palestinians as one reason for failure of the Oslo peace process.
 - 13 Dajani, *supra* note 4, demonstrating that the conformity with international law can provide negotiated agreements legitimacy with domestic constituencies and international actors.
 - 14 I have made these points previously. See Bisharat, *supra* note 4. See also Falk, *supra* note 4: International law represents a general embodiment of reasonableness, and therefore gives disputants an approximate gauge of the fairness of prospective resolutions of conflict. Omar Dajani, *supra* note 4, has performed perhaps the most systematic examination of the role of international law in Palestinian-Israeli peace negotiations from the perspective of a participant. His tally of benefits of the role of international law in peace negotiations include some similar to mine, but he adds further that international law can serve to fill gaps in agreements.
 - 15 See Falk, *supra* note 4, admitting the improbability of implementing international law "because of considerations of political feasibility."
 - 16 Quigley, *supra* note 4, international law supports Palestinian positions on requirement of full Israeli withdrawal from territories occupied in 1967, illegality of Israeli settlements in the West Bank and Gaza Strip, repatriation of Palestinian refugees, and challenging Israeli claims to sovereignty over Jerusalem.
 - 17 Rights to water (H. Elver, "Palestinian/Israeli Water Conflict and Implementation of International Water Law Principles" (2005) 28 *Hastings Int'l and Comp. L. Rev.* 421) and the disposition of Jerusalem (Dumper, Chapter 4, in this book) may be two issues in which international law fails to offer clear prescriptions.
 - 18 See Quandt, *supra* note 5, for a discussion on the failure of diplomacy to settle Israeli-Palestinian conflict due to history, culture, intrinsic difficulty of solving core issues, inequality between parties, domestic opponents to conciliation, and dependency on third-party mediation; Kaufman and Bisharat, *supra* note 4 at 71: for causes of breakdown of the Oslo process include "leadership failure, intercultural misunderstandings, contending negotiating styles, and previous traumatic experiences.
 - 19 *Resolution Adopted on the Report of the ad hoc Committee on the Palestinian Question*, GA Res. 181(II), UN GAOR, 2d. Sess., A/RES/181(II) (1947), reproduced at: The Avalon Project, Yale Law School <<http://www.yale.edu/lawweb/Avalon/un/res/181.htm>>. As A. Hodgkins, "Beyond Two-States: Alternative Visions of Self-Determination for the People of Palestine" (2004) 28:2 *Fletcher Forum of World Affairs* 109 shows, partition was not the international community's preferred solution to the conflict until virtually the eve of the vote on partition.
 - 20 See *The Situation in the Middle East, including the Palestinian Question (The Road Map)*, SC Res. 1515, UN SCOR, 4862d Mtg., UN Doc. S/RES/1515 (2003).
 - 21 Tilley, *supra* note 1 at 214–18, describing the positions of Magnes, Buber, and Arendt. See also L. Silberstein, *The Postzionism Debates: Knowledge and Power in Israeli Culture* (New York: Routledge, 1999), showing that Zionism was, from its inception, contested and controversial, and reviewing the thoughts of both early and contemporary Jewish critics of Zionism.
 - 22 See R. Khalidi, *The Iron Cage* (Boston: Beacon Press, 2006), describing Palestinian Arab opposition to partition.

- 23 Two of the better sources on these shifts in Palestinian diplomatic posture are A. Gresh, *The PLO – The Struggle Within* (London: Zed Books, 1988); and H. Cobban, *The Palestine Liberation Organization: People, Power, and Politics* (Cambridge: Cambridge University Press, 1984). See also Y. Sayigh, *Armed Struggle and the Search for State* (Oxford: Oxford University Press, 1997).
- 24 On several occasions, Palestinian leaders, including PLO Chairman Yasser Arafat and Palestinian Authority Prime Minister Ahmad Qurei have remarked on the narrowing window for the two-state solution, and raised the possibility of again calling for a single state.
- 25 E. Saïd, *The End of the Peace Process: Oslo and After* (New York: Vintage Press, 2001), reprinting the 1997 article, along with others.
- 26 Palestinians writing recently in support of a single state include M. Tarazi, “Two peoples, one state” *New York Times* (October 4, 2004); G. Bisharat, “Two-state solution again sells the Palestinians short” *Los Angeles Times* (January 25, 2004); L. Abu Odeh, “The Case for Binationalism” *Boston Review* (December 2001/January 2002); M. Qumsiyeh, *Sharing the Land of Canaan* (London: Pluto Press, 2004); Abunimah, *supra* note 1; and A. Khalidi, “A one-state solution. A unitary Arab–Jewish homeland could bring lasting peace to the Middle East” *The Guardian* (September 29, 2003), online: Guardian Unlimited <<http://www.guardian.co.uk>>. American political scientist Virginia Tilley has also contributed one of the most important works in support of a single state, *supra* note 1. In July 2007, a group of academics, journalists, and activists from the United States, Israel, Europe, and South Africa met outside Madrid, Spain, to discuss the vision of a one-state solution and strategies for its implementation. The group issued a statement calling for a one-state solution, and for further debate and study of the means of its implementation. The statement and meeting participants may be viewed at <http://electronicintifada.net/v2/article7102.shtml>. Support for a one-state solution is by no means uniform among Palestinian intellectuals; for two critical views see S. Tamari, “The Dubious Lure of Binationalism” (2000) 30 *Journal of Palestine Studies* 83; and M. Baraka, “Between the one-state and the two-state solution: Independence is a necessity, not a luxury” (2005) 28 *al-Majdal* 20.
- 27 See G. Sussman, “The Challenge to the Two-State Solution” in J. Beinín and R. Stein, eds., *The Struggle for Sovereignty: Palestine and Israel, 1993–2005* (Stanford: Stanford University Press, 2006), describing Israeli right wing plans for permanent Jewish rule over a Palestinian majority.
- 28 K. Hroub, *Hamas: Political Thought and Practice* (Washington, D.C.: Institute for Palestine Studies, 2000), describing the ideology and objectives of Hamas. Hamas leaders, however, have hinted more than once that they might countenance a long-term, and possibly permanent, reconciliation with Israel. See K. Meshal, “The chief of Hamas’ political bureau outlines its mission – and its message for the U.S., Europe, the Arab states and Israel” *The Guardian* (January 24, 2006); M. Abu Marzouk, “What Hamas is Seeking” *Washington Post* (January 31, 2006), A17; and A. Yousef, “A Pause for Peace” *New York Times* (November 1, 2006).
- 29 The binational model can be further broken down: Sussman, *supra* note 27 at 304: “The binational model encompasses federal, confederal, and consociational variants.” Unfortunately, there is no terminological consistency in discussions of the single-state solution. Sussman points out that in Israel “binationalism” sometimes refers to what I characterize here as the “secular democratic model.”
- 30 Abunimah, *supra* note 1, offers one of the most straightforward articulations of the “organic” argument. Another version, given by Meron Benvenisti (quoted in A. Shavit, “Cry, the Beloved Two State Solution,” *Haaretz* (August 8, 2003)) poses unity of the land almost as if it were the “natural order of things”:

The model of a division into two nation-states is inapplicable. It doesn’t reflect the depth of the conflict and doesn’t sit with the scale of the entanglement that exists in large parts of the country. You can erect all the walls in the world here but you won’t

be able to overcome the fact that there is only one aquifer here and the same air and that all the streams run into the same sea. You won't be able to overcome the fact that this country will not tolerate a border in its midst.

- 31 Abunimah, *ibid.* at 19–54, discusses the failure of various attempts at partition.
- 32 I. Pappé, *The Ethnic Cleansing of Palestine* (Oxford: Oneworld Press, 2006) at xiii.
- 33 The moral–ideological argument is well stated by Tilley, *supra* note 1: Zionism is a form of ethnic nationalism that contradicts equality under the law, a basic precept of true democracy.
- 34 Tilley, *supra* note 1 at 179–82.
- 35 See Silberstein, *supra* note 21, which reviews Jewish and some Palestinian critics of Zionism.
- 36 Perhaps the most prominent example in recent years is T. Judt, “Israel: The Alternative” (2003) 50:16 *New York Review of Books*: “The problem with Israel, in short, is not – as is sometimes suggested – that it is a European enclave in the Arab world; but rather that it arrived too late. It has imported a characteristically late-nineteenth-century separatist project into a world that has moved on, a world of individual rights, open frontiers, and international law. The very idea of a “Jewish state” – a state in which Jews and the Jewish religion have exclusive privileges from which non-Jewish citizens are forever excluded – is rooted in another time and place. Israel, in short, is an anachronism.” See also D. Gavron, *The Other Side of Despair: Jews and Arabs in the Promised Land* (Oxford: Rowman and Littlefield Publishers, 2004); and Shavit, *supra* note 30, interviewing Meron Benvenisti and Haim Hanegbi.
- 37 D. Lazare, “The One State Solution” *The Nation* (November 3, 2003): “Herzl envisioned a state that would draw Jews like a magnet, yet more than half a century after Israel’s birth, most Jews continue to vote with their feet to remain in the Diaspora, and an increasing number of Israelis prefer to live abroad. Israel was supposed to serve as a safe haven, yet it is in fact one of the more dangerous places on earth in which to be Jewish.”
- 38 Almost all proponents of a one-state solution make this argument in one form or another. Perhaps the most complete statement is Tilley, *supra* note 1. See also Abunimah, *supra* note 1; Gavron, *supra* note 36; H. Cobban, “A Binational Israel–Palestine” *Christian Science Monitor* (October 9, 2003); and Abu Odeh, *supra* note 26.
- 39 S. Erlanger, “Israeli Map says West Bank posts sit on Arab land” *New York Times* (November 2, 2006): 80,000 Israeli settlers beyond the “security barrier”, 180,000 on the Israeli side of the barrier, and 200,000 in East Jerusalem.
- 40 Abunimah, *supra* note 1 at 52.
- 41 In June 2006, for example, Israel announced plans to establish Maskiot, a new settlement in the Jordan Valley, to be inhabited by settlers evacuated from the Gaza Strip. L. Copans, “Israel builds West Bank settlement” *Associated Press* (June 3, 2006). Other existent settlements have continued to expand, even beyond lands authorized to them by the Israeli government. S. Erlanger, “Israeli Settlements Found to Grow Past Boundaries,” *New York Times*, July 7, 2007, at <http://www.nytimes.com/2007/07/07/world/middleeast/07mideast.html?ex=1341460800&en=cdaabeb646d90ab0&ei=5088&partner=rssnyt&emc=rss>.
- 42 Tilley, *supra* note 1 at 3–5 states: “The resulting Palestinian statelet would be blocked off physically from the Israeli economy, its major cities would be cut off from each other, and its government would be unable to control the territory’s water resources, develop its agriculture, or manage its trade with neighbor[ing] states. It would comprise little more than a sealed vessel of growing poverty and demoralization.”
- 43 The Alternative Palestinian Agenda presents a similar inventory and analysis of what are called the “concerns and aspirations” of Israelis and Palestinians. See Nasser Aburfalha “Proposal for an Alternative Configuration in Palestine–Israel”, online: Alternative Palestinian Agenda <<http://www.ap-agenda.org/initiative.htm>> and also his “Bi-Nationalism in Palestine–Israel: A Palestinian Historical Choice, Not a Last Resort” at <http://www.ap-agenda.org/not_a_last_resort.htm>.

- 44 It is impossible in the limited scope of this chapter to provide full legal argument in support of each of the “rights” below – as desirable as that may be. I fully recognize that some “rights” are contested (such as the “right of return” for Palestinian refugees); all I can do here is to state my position and provide supporting references.
- 45 Although Israel withdrew its civilian settlers from the Gaza Strip in 2005, it continues to control the region’s borders, airspace, and coast, and provides it with gas, electricity, and water. “Effective control” is the legal measure of occupation, and Israel, therefore, may be said to still occupy the Gaza Strip. See I. Scobbie, “Is Gaza Still Occupied Territory?” (2006) 26 *Forced Migration Review – Palestinian Displacement: A Case Apart?* 18.
- 46 See Badil statistics which state the registered and unregistered Palestinian refugees from 1948 together were 5.51 million in 2003, online at: <<http://www.badil.org/en/documents/category/23-population>>; and PASSIA, online: <http://www.passia.org/index_pfacts.htm>, which puts the total Palestinian population at about 10 million.
- 47 W. Mallison and S. Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestinian Question* (New York: United Nations, 1979) at 28, “Historically, the right of [refugee] return was so universally accepted and practiced that it was not deemed necessary to prescribe or codify it in a formal manner”; J. Quigley, “Displaced Palestinians and a Right of Return” (1998) 39 *Harv. Int’l L.J.* 171, which responds to major criticisms of the right of return, and concludes that Palestinians are entitled to return as matter of right irrespective of the causes of flight; S. Akram and T. Rempel, “Recommendations for Durable Solutions for Palestinian Refugees: A challenge to the Oslo Framework” (2000/2001) XI *Palestinian Y.B. Int’l L.* 1, which discusses the Palestinian right of return rooted in principles of state succession, human rights, and humanitarian law; and L. Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford: Clarendon Press, 1998), which states that UN Resolution 194 of 1948 affirmed, rather than established, Palestinian right of return. For contrary views, see R. Lapidoth, “The Right to Return in International Law, with special reference to Palestinian refugees” (1986) 16 *Isr. Y.B.H.R.* 103, which states that Palestinian refugees were never nationals of Israel, having fled before Israel was created, and Israel is not obligated to accept return; E. Benvenisti and E. Zamir, “Private Claims to Property Rights in the Future Israeli–Palestinian Settlement” (1995) 89 *Am. J. Int’l L.* 295, stating the right of return in the *Universal Declaration of Human Rights* is individual, with no application to situations of mass exodus; and J. Weiner, “The Palestinian Refugees Right to Return and the Peace Process” (1997) 20 *B.C. Int’l and Comp. L. Rev.* 1, stating that Palestinian refugees left voluntarily hoping Arab armies would conquer area and aid return, and have no right of return.
- 48 G. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: an International Law Analysis* (Bethlehem: Badil Resource Center, 2001), standing for the claim that the right of return is an individual right.
- 49 R. Korobkin and J. Zasloff, “Roadblocks to the Roadmap: A Negotiation Theory Perspective on the Israeli–Palestinian Conflict After Yasser Arafat” (2005) 30 *Yale J. Int’l L.* 1 at 12–13: Israel is unalterably opposed to resolution involving return of large numbers of Palestinian refugees.
- 50 Kagan, *supra* note 9: a “balance of hardships” favors Israeli secondary occupants, who should be allowed to remain, while returning refugees should receive alternative property and compensation. See however S. Abu Sitta, “The Right of Return: Sacred, Legal, Possible” in Naseer Aruri, ed., *The Palestinian Refugees: The Right of Return, 2001* (London: Pluto Press, 2001): showing that 78 percent of Israelis inhabit 14 percent of land, and most refugees fled from 86 percent inhabited by only 22 percent of Israelis.
- 51 Geneva Initiative, *Geneva Accord*, online: <<http://www.geneva-accord.org/mainmenu/English>>.
- 52 Geneva Accord, *ibid.* art. 7. Host and third countries would also be able to specify the numbers of refugees they would resettle.
- 53 The status of Palestinian citizens of Israel will be taken up below.

- 54 See Israel Central Bureau of Statistics, showing Arab population of Israel in 2003 at 1,302,000, or 19 percent of the total population of Israel, and with a growth rate of 3 percent, online: <http://www.cbs.gov.il/reader/cw_usr_view_Folder?ID=141>.
- 55 *Charter of the United Nations*, June 26, 1945, Can. T.S. 1945 No. 7 at Preamble, online: UN <<http://www.un.org/aboutun/charter/>>.
- 56 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 17 at art. 1, online: UN <<http://www.un.org/Overview/rights.html>>.
- 57 See for example, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 26, (entered into force March 23, 1976), online: OHCHR <<http://www2.ohchr.org/english/law/ccpr.htm>>.
- 58 According to Adalah, the Legal Center for Arab Minority Rights in Israel, online: <<http://adalah.org/eng/backgroundlegalsystem.php>>.
- 59 See for example, Human Rights Watch, "Second Class: Discrimination Against Palestinian Children in Israel's Schools" (New York: Human Rights Watch, 2001), online: Human Rights Watch <<http://hrw.org/reports/2001/israel2/ISRAEL0901-01.htm#TopOfPage>>. See also S. Nathan, *The Other Side of Israel* (New York: Doubleday, 2005), relating experiences of a Jewish immigrant woman moving to an unrecognized Palestinian village, and documenting Israeli discrimination against Palestinian citizens.
- 60 Israel, *Basic Law of Human Dignity and Liberty*, passed by the Knesset on 12 Adar 5752 and amended on 21 Adar 5754, art. 1, online: Knesset <http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm>.
- 61 T. Segev, "Breakdown" *Haaretz* (November 22, 2006) reports on an Israel Democracy Institute initiative that brought twelve Israeli Jews and eight Palestinian citizens of Israel to meet monthly for two years to draft a Charter on Jewish-Arab relations within Israel. The group reportedly ended its meetings without agreement, as Jews demanded Arab recognition of Israel as a Jewish state, and Arabs refused, on the grounds that unless Israel became a state of all of its citizens, it would not be democratic and would continue to discriminate against Arabs. According to one of its Jewish members, law professor and former head of the liberal Association for Civil Rights in Israel, Ruth Gavison "One of the fraudulent things about the Israeli-Jewish left is the statement that yes, there will be equality. There will not be equality. There will be dispute. It will be better than [elsewhere] in the region; it will be better than in many other places; there will be a process; but there will not be equality. . . ."
- 62 See N. Gordon, "Bitter Wine for Israeli Bedouins" *The Nation* (June 5, 2006), describing Israel's plan to develop a "Wine Route" in the Negev Desert, and continuing to violate land rights and intensify alienation of the Bedouin population of Israel.
- 63 A. Soffer, "Demographics in the Israeli-Palestinian Dispute" *Peacewatch* #370 (March 22, 2002), projecting that non-Jews will be one-third of the population within Israel's pre-1967 borders by 2020. For online summary of article see <<http://www.upjf.org/preview.do?noArticle=193>>; E. Schechter, "Doomsday Demographer Gets a Hearing at the Prime Minister's office" *Jerusalem Report* (November 5, 2001), citing demographer Sergio della Pergola that Israeli Jews' majority would be "severely eroded" in 50 years.
- 64 I. Lustick, *Arabs in a Jewish State* (Austin: University of Texas, 1980) is still the best analysis of the policies employed by the Israeli government to subjugate its Palestinian citizens.
- 65 See *Question of Palestine*, GA Res. 3236(XXIX), UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974) 4, affirming Palestinian rights to self-determination and to national independence and sovereignty. See also Bell, *supra* note 3 at 78: international legal position supports three propositions: there is a Palestinian people; Palestinians have rights of self-determination; these rights may be realized in the West Bank and Gaza Strip, not all of former mandatory Palestine.
- 66 J. Quigley, "Sovereignty in Jerusalem" (1996) 45 *Cath. U. L. Rev.* 765: Citizens of Palestine had rights to sovereignty over all of Palestine, including Jerusalem, by virtue

of a self-determination principle that outweighs Israeli claims based on occupation. Cf. Dumper (Chapter 4, in this book): International law provides no clear template for resolution of disputed claims over the city.

- 67 See Dumper Chapter 4, describing the complexity of dividing Jerusalem.
- 68 Security Council Resolution 242, UN SCOR, 1967, UN Doc. S/Res/242, online: United Nations <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement>>.
- 69 Erlanger, *supra* note 39.
- 70 Specifically, Israeli settlements violate Article 49 of the Fourth Geneva Convention.
- 71 See B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories, “Restriction of Movement”, online: B'tselem <<http://www.btselem.org/English/Freedom%5FoF%5FMovement>>.
- 72 See B'tselem, “Administrative Detention”, online: <<http://www.btselem.org/English/Administrative%5FDetention>>.
- 73 See B'tselem, “Torture”, online: <<http://www.btselem.org/english/Torture/Index.asp>>.
- 74 B'tselem, “Take No Prisoners – The Fatal Shooting of Palestinians by Israeli Forces During Arrest Operations” (May 2005), online: <http://www.btselem.org/english/publications/summaries/200505_take_no_prisoners.asp>.
- 75 B'tselem, “Through No Fault of Their Own: Israel’s Punitive House Demolitions in the al-Aqsa Intifada (November 2004), online: <http://www.btselem.org/english/publications/summaries/200411_punitive_house_demolitions.asp>.
- 76 B'tselem, “New Report: Lethal Curfew – The Use of Live Ammunition to Enforce Curfew” (October 16, 2002), online: <http://www.btselem.org/english/press_releases/20021016.asp>.
- 77 The *Charter of the United Nations* bars recourse to armed force in international relations except in a valid exercise of self-defense under Article 51, or in collective action to enforce peace under Chapter VII. It further specifies “suppression of aggression” as one of its principle goals. Principle VIa of The Principles of the Nuremberg Tribunal (available at <http://deoxy.org/wc/wc-nurem.htm>), defines aggressive war as a crime against peace.
- 78 UN Security Council Resolution 242 (*supra* note 68) recognizes the right of all states in the region – including, of course, Israel – “to live in peace within secure and recognized boundaries free from threats or acts of force.” The individual right to life is sanctified in Article 3 of the *Universal Declaration of Human Rights*, *supra* note 56.
- 79 Alternative Palestinian Agenda, *supra* note 43, citing Israeli distrust of Palestinian intentions due to awareness of “*al-barnamij al-marhali*.”
- 80 As Tilley, *supra* note 1 at 3–4, argues, “The resulting Palestinian statelet would be blocked off physically from the Israeli economy, its major cities would be cut off from each other, and its government would be unable to control the territory’s water resources, develop its agriculture, or manage its trade with its neighbor[s]. It would comprise little more than a sealed vessel of growing poverty and demoralization.”
- 81 For example, according to a poll conducted by the Jerusalem Media and Communications Center in June 2006 (“Poll Results on 100 days on the formation of the 10th Palestinian government”), only 2.9 percent of Palestinians polled in the Occupied Territories supported the aim of establishing an Islamic state in Palestine, while another 7.4 percent supported creating one Palestinian state. Results of the poll are available online: Jerusalem Media and Communication Centre (JMCC) <<http://www.jmcc.org/documentsandmaps.aspx?id=442>>.
- 82 N. Masalha, *Expulsion of the Palestinians* (Washington, D.C.: Institute for Palestinian Studies, 1992) at 199: Israeli Transfer Committee in 1948 recommended maximum Arab population of 15 percent in mixed cities and towns, and reportedly advised a maximum Arab population in the country of 20 percent.
- 83 Yet see J. Quigley, *The Case for Palestine* (Durham: Duke University Press, 2005) for a critique on legal grounds for Israel’s establishment.

- 84 Text of the Palestine Mandate is available online through the Avalon Project at Yale Law School <http://avalon.law.yale.edu/20th_century/palmanda.asp>.
- 85 United Nations General Assembly Resolution 181 of 1947, available at <http://www.yale.edu/lawweb/avalon/un/res181.htm>.
- 86 United Nations General Assembly Resolution 273 of 1949, *supra* note 19.
- 87 UN Security Council Resolution 242, see *supra* note 68.
- 88 There is some disagreement among sources as to the population figures for the two prospective states. Quigley, *supra* note 83 at 36, cites UN Statistics showing that the Jewish state would have 499,020 Jews and 509,780 Palestinian Arabs. H. Cattani, *Palestine and International Law* (London: Longman Group, 1973), p. 101, cites these same figures, as does D. Hirst, *The Gun and the Olive Branch* (3rd edn., New York: Thunder's Mouth Press and Nation Books, 2003) p. 257. Yet A. Sa'di, "Afterword," in *Nakba: Palestine, 1948, and the Claims of Memory* (A. Sa'di and L. Abu-Lughod, eds.), p. 290 maintains that the Jewish state would have been inhabited by 499,000 Jews and 438,000 Arabs. Certainly the borders of the Jewish state were drawn with the expectation of large-scale Jewish immigration, but the General Assembly could not have known in advance the scale of it.
- 89 Kagan, *supra* note 9.
- 90 M. Eisner, "Jerusalem: An analysis of legal claims and political realities" (1993–94) 12 *Wis. Int'l L.J.* 221 which finds Israeli claims weak with respect to East Jerusalem, including the Walled City, and superior to Palestinian claims regarding West Jerusalem.
- 91 *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, 75 U.N.T.S. 287, art. 49, (entry into force 21 October 1950). The International Court of Justice, as part of its 2004 advisory opinion on Israel's Separation Wall, unanimously agreed that this provision applied to the West Bank and barred Israel's extensive settlement program there. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.
- 92 J. Halper, "Beyond Road Maps and Walls" (2005) 37:1 *The Link* 1. Halper proposes a "two stage" solution, in which Palestinian–Israeli reconciliation is followed by a Middle East Union, catalyzing economic growth and democratic reforms regionally.
- 93 O. Dajani, "Preparing for the inevitable negotiation" (2006) 139: 3 *Journal of Palestinian Studies* 39.
- 94 See Abunimah, *supra* note 1 at 162 for reporting on polls conducted by the Jerusalem Media and Communications Center. But see Tilley, *supra* note 1 at 241–2 which identifies methodological problems with JMCC polls.
- 95 Abunimah, *supra* note 1 at 170–1: A Palestinian majority would, if offered a single state option, willingly accept; Tilley, *supra* note 1 at 188, quoting Palestinian political scientist Ali Jirbawi: "Most Palestinians prefer the idea of separation, because they want their own state. But Sharon's idea of a two-state solution is to squeeze us into cantons . . . Given a choice between cantonization and one-state, Palestinians will choose the latter."
- 96 ICJ Advisory Opinion, *supra* note 91. The text of the statement is available online: Global BDS Movement <<http://www.bdsmovement.net/?q=node/52>>.
- 97 The list of endorsing organizations is also available at Palestine BDS Campaign <<http://www.bds-palestine.net>> .
- 98 There is evidence, however, that some Palestinian leaders privately question this position and are at least intrigued by the one-state solution. Abunimah, *supra* note 1 at 162, quoting PLO legal advisor Michael Tarazi that Palestinian Authority officials had privately admitted support for one-state but could not state so publicly.
- 99 Reuters, "Qureia: Israel's unilateral moves are pushing us toward a one state solution" *Ha'aretz*, online: Haaretz.com <<http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=381153&contrassID=2&subContrassID=1&listSrc=Y>>; S. Milne, "Two state plan at risk, warns Arafat" *The Guardian* (January 24, 2004), online: Guardian Unlimited <<http://www.guardian.co.uk>>.

- 100 D. Rubenstein, "Making threats, cultivating an image" *Ha'aretz* (January 9, 2004), describing Qureia's statement as "threat."
- 101 The PLO was granted observer status at the United Nations in 1974, and was invited to participate in all deliberations on Palestine. See *Observer Status for the Palestine Liberation Organization*, GA Res. 3237, UN GAOR, 29th Sess., UN Doc. A/RES/3237/29 (1974).
- 102 See Cobban, *supra* note 23 at 11 for a description of the structure of the PLO.
- 103 Cobban, *ibid.* at 11: The PNC requirement of elections never followed in practice; membership was negotiated among leaders of major political factions.
- 104 There have been recent calls, of course, to reform the PLO, although the focus of these efforts has been the integration of Hamas into the formerly purely secular organization. The "Cairo Declaration" of March 2005, for example, called for the creation of a committee to select PNC members, but provided that these committee members would be appointed from among established Palestinian parties and factions. This would broaden the base of the selection process to include more such groups, but does not fundamentally democratize it. See G. Usher, "The Calm Before the Storm?" *Al-Ahram Weekly* (March 14–30, 2005), online: Al-Ahram Weekly <<http://weekly.ahram.org.eg/2005/735/re1.htm>> for comments on, and providing text of, the Cairo Declaration.
- 105 Abunimah, *supra* note 1 at 171: Israeli Jews view one state as "invitation to commit suicide."
- 106 R. Blecher, "Living on the Edge: the Threat of 'Transfer' in Israel and Palestine: in J. Beinun and R. Stein, *The Struggle for Sovereignty: Palestine and Israel, 1993–2005* (Stanford: Stanford University Press, 2006). "Transfer" has more legitimacy in Israel today than at any point since 1948.
- 107 Shavit, *supra* note 30, interviewing Meron Benvenisti.
- 108 Shavit, *ibid.* interviewing Haim Hanegbi.
- 109 Gavron, *supra* note 36; and P. Hirschberg, "One state awakening" *Ha'aretz* (December 10, 2003), interviewing Daniel Gavron.
- 110 A similarly pessimistic view is expressed by former Knesset speaker Avraham Burg, who, while not endorsing the one-state solution, argues that democracy cannot be maintained without granting equal rights to Arabs and Jews, and that Israelis must choose between land and democracy. A. Burg, "The End of Zionism?" *International Herald Tribune* (September 6, 2003).
- 111 Under Article 39 of the UN *Charter*, the Security Council has broad discretion to identify a threat to the peace, a breach of the piece, or an act of aggression, and to decide what measures to remedy the situation.
- 112 The great obstacle to these prospective actions would appear to be the U.S. government, with its tremendous diplomatic and political power, and its willingness to employ these assets to insulate Israel from the enforcement of international law. The U.S.A. has exercised its veto power in the Security Council no fewer than 41 times since 1948 on Israel's behalf – half of the total number of uses of its veto power for all purposes since the birth of the UN. Great political changes would have to occur within the United States to begin to check this trend and there is no reason to believe that such changes are in the making. See Tilley, *supra* note 1 at 89–129, documenting incapacity of external actors to deflect current Israeli policies.
- 113 For example, the struggle of black South Africans for equality resonated with the U.S. experience of the struggle for civil rights. Israel, on the contrary, reads as a form of "affirmative action" for the Jews. On the comparison of Israel to South Africa, see C. McGreal, "Worlds Apart" *The Guardian* (February 1, 2006), online: Guardian Unlimited <<http://www.guardian.co.uk>>.
- 114 The American-based organization A Jewish Voice for Peace has been active in the Caterpillar shareholder action; see its statements online: Stop Caterpillar <<http://www.catdestroyshomes.org/index.php>>.
- 115 V. Dodd and C. Urquart, "Israeli evades arrest at Heathrow over army war crime allegations" *The Guardian* (September 12, 2005), online: Guardian Unlimited

- <<http://www.guardian.co.uk>>, reporting on a senior Israeli military officer's evasion of arrest warrant at Heathrow Airport.
- 116 B. Joffe-Walt, "Lecturers back boycott of Israeli academics" *The Guardian* (May 30, 2006), online: Guardian Unlimited <<http://www.guardian.co.uk>>, reporting on the NATFHE vote in support of an Israel boycott. In May 2007, the University and Colleges Union, a successor union to the NATFHE, voted to conduct debate over the possibility of a boycott of Israeli academic institutions, with an eye toward returning to the issue and deciding whether to implement such a boycott after one year. Debbie Andalo, "Lecturers back boycott of Israel," *The Guardian*, May 30, 2007. Boycotts of Israeli goods were also supported by trade unions in South Africa (Cnaan Liphshiz, "South Africa's largest trade union seeks to boycott Israel," *Haaretz*, May 31, 2007), the United Kingdom (Haim Bior, "Major British workers' union joins moves to boycott Israel," *Haaretz*, July 8, 2007), and Northern Ireland ("Boycott and divestment gains ground in Northern Ireland," Press Release, *Trade Union Friends of Palestine*, June 27, 2007, viewed at <http://electronicintifada.net/v2/article7064.shtml>).
 - 117 M. Cowell, "A British teachers' union weighs boycott of Israeli teachers" *New York Times* (May 14, 2006) A11, online: *New York Times* <<http://www.nytimes.com>>, reporting that NATFHE resolution noted "continuing Israel apartheid policies."
 - 118 For the text of the CUPE resolution, see Coalition Against Israeli Apartheid, Press Release, "CUPE Ontario Votes in Support of Boycott, Divestment, Sanctions Against Israeli Apartheid" (May 29, 2006), online: Coalition Against Israeli Apartheid <<http://electronicintifada.net/v2/article4745.shtml>>.
 - 119 On the other hand, it is entirely possible to invoke the analogy of apartheid without supporting a single state, as is demonstrated in former President Jimmy Carter's book *Israel: Peace not Apartheid* (New York: Simon and Schuster, 2006). President Carter explicitly limits the term "apartheid" to Israel's treatment of Palestinians under occupation, yet continues to strongly support a two-state solution.
 - 120 M. Taylor, "Vote ends Israeli boycott" *The Guardian* (May 27, 2005), online: Guardian Unlimited <<http://www.guardian.co.uk>>, quoting AUT member regarding "a well funded campaign and massive pressure on members" to reverse earlier boycott vote.
 - 121 For the text of this resolution, see *General Assembly Action Resolution on Israel and Palestine: Initiating Divestment and Ending Occupation*, online: Presbyterian Church (U.S.A.) <<http://www.pcusa.org/ministries/global/resolution-israel-and-palestine-2004/#1>>.
 - 122 T. Hill, "GA overwhelmingly approves Israel/Palestine recommendation" (June 21, 2006), online at PC (U.S.A.) <<http://www.pcusa.org/ga217/newsandphotos/ga06124.htm>>, reporting on Presbyterian Church 2006 vote.
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 - 124 As Bell, *supra* note 3 notes, peace and justice can be opposed, especially in post-conflict situations, where fears of investigations and prosecutions for past wrongs can inhibit political settlement.
 - 125 Blecher, *supra* note 106, describing rise in anti-Arab sentiment in Israel.

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