Rights in Principle - Rights in Practice

Revisiting the Role of International Law in Crafting Durable Solutions for Palestinian Refugees

Terry Rempel, Editor

BADIL Resource Center
for Palestinian Residency & Refugee Rights, Bethlehem
RIGHTS IN PRINCIPLE - RIGHTS IN PRACTICE
REVISITING THE ROLE OF INTERNATIONAL LAW IN CRAFTING DURABLE SOLUTIONS FOR PALESTINIAN REFUGEES

Editor: Terry Rempel

xiv 482 pages. 24 cm

1- Palestinian Refugees 2– Palestinian Internally Displaced Persons 3- International Law 4– Land and Property Restitution 5- International Protection 6- Rights Based Approach 7- Peace Making 8- Public Participation

HV640.5.P36R53 2009

Cover Photo: Snapshots from «Go and See Visits», South Africa, Bosnia and Herzegovina, Cyprus and Palestine (© BADIL)

Copy edit: Venetia Rainey
Design: BADIL
Printing: Safad Advertising

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December 2009

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Abbreviations

ACHR  American Convention on Human Rights
AfCHPR  African Convention on Human and People’s Rights
CAT  Convention Against Torture
CEDAW  Convention on the Elimination of All Forms of Discrimination Against Women
CERD  Convention on the Elimination of Racial Discrimination
CRC  Convention on the Rights of the Child
CRPC  Commission on Real Property Claims (Bosnia and Herzegovina)
DLA  Department of Land Affairs (South Africa)
DoRA  Department of Refugee Affairs of the PLO
DPA  Dayton Peace Agreement (Bosnia and Herzegovina)
ECHR  European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR  European Court of Human Rights
EU  European Union
GA  General Assembly of the United Nations
IASC  Inter-Agency Standing Committee
ICC  International Criminal Court
ICCPR  International Covenant on Civil and Political Rights
ICESCR  International Covenant on Social, Economic and Cultural Rights
ICJ  International Court of Justice
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for the former Yugoslavia
ILA  Israel Lands Administration (Lands Authority since 2009)
JA  Jewish Agency
JNF  Jewish National Fund
LASC  League of Arab States Council
LCC  Land Claims Court (South Africa)
NGO  Nongovernmental Organization
OPT  Occupied Palestinian Territories
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>PLO</td>
<td>Palestine Liberation Organization</td>
</tr>
<tr>
<td>PNC</td>
<td>Palestine National Council</td>
</tr>
<tr>
<td>RAO</td>
<td>Refugee Affairs Officer (UNRWA)</td>
</tr>
<tr>
<td>Refugee Convention</td>
<td>1951 Convention Relating to the Status of Refugees</td>
</tr>
<tr>
<td>Road Map</td>
<td>Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict</td>
</tr>
<tr>
<td>SC</td>
<td>Security Council (of the United Nations)</td>
</tr>
<tr>
<td>TP</td>
<td>Temporary Protection</td>
</tr>
<tr>
<td>TRC</td>
<td>Truth and Reconciliations Commission (South Africa)</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCCP</td>
<td>United Nations Conciliation Commission for Palestine</td>
</tr>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNRWA</td>
<td>United Nations Relief and Works Agency for Palestine Refugees in the Near East</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>WZO</td>
<td>World Zionist Organization</td>
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</tbody>
</table>
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This collection demonstrates the importance of a law-based approach to resolving the situation of the Arabs displaced from Palestine in 1948. The collection is the more important in light of the paucity of serious analysis of this issue from the standpoint of relevant international law principles. In any peace process, the legitimate expectations of the parties and other stakeholders should be at the forefront of consideration. If such expectations are ignored, a resulting peace may turn out to be ephemeral, because it may not be accepted by those whose rights have not been respected.

For the displaced Arabs and their descendants, an expectation of being given an option to return to their homes is legitimate. Under international law, persons displaced from home areas who find themselves across an international border are entitled to return, if they so desire. Thus, in the Israel-Palestine peace process, a repatriation option is essential if legitimate expectations are to be respected.

The rights of states of refuge also come into play when there has been a displacement of population. The states in which the displaced Palestine Arabs found refuge may be affected by what is resolved in an Israel–Palestine peace agreement. The states of refuge have a legitimate expectation that the displaced will be allowed to return. Just as any state is entitled to control immigration, these states of refuge are under no obligation to grant permanent residency to the displaced Palestine Arabs. A peace agreement that did not respect this legitimate expectation of the states of refuge would be of dubious validity.

A basic precept of the international order is that a state must grant entry to its nationals, or to those entitled to its nationality. Israel sought to avoid that obligation through its nationality and citizenship laws which denied nationality to the Arabs displaced in 1948 and did not allow them to return. These Israeli laws violated the fundamental norm in international law that requires a state newly sovereign to respect the nationality and residence rights of the population. A state is not free to take territory without giving the existing population the option of remaining and of assuming the state’s nationality.

On the Israeli side, return has been denied because the Jewish Agency that established Israel sought state territory but did not want its non-Jewish population. In recent times, that aim has been argued under the rubric of ‘demographic security’, namely, that a return of the displaced Arabs would jeopardize the Jewish majority
in Israel’s population. Thus for Israel the aim is one of maintaining control over territory whilst excluding what was the existing population in order to preserve a particular ethnic balance. That expectation is not legitimate under international law, and Israel’s exclusionary immigration policies – allowing any Jew to enter and gain nationality, but denying entry and nationality to Arabs who are entitled thereto—has appropriately been condemned as a violation of the Convention on the Elimination of All Forms of Racial Discrimination by the international committee that monitors compliance with that Convention.

Within the international community, the right of the displaced Arabs to return has been recognized since the time of their displacement. The international community has exerted efforts, to date ineffectual, to convince Israel to comply with its repatriation obligation. The UN General Assembly established a commission in 1948 that urged Israel to repatriate. When the UN Security Council adopted a resolution in 1967 on the elements it viewed as essential for an overall peace between Israel and her neighbors (Resolution 242), it included a call on Israel to repatriate the displaced Arabs.

Lacking has been political will in the international community to enforce repatriation. The Security Council bears responsibility for international peace. The Council must, according to the UN Charter, act in the face of a threat to peace. The Charter empowers the Council to impose sanctions to deal with a threat to peace. Israel’s failure to repatriate could easily be qualified by the Council as a threat to peace. But the Council to date has imposed no sanctions on Israel. In other instances of population displacement in recent years, the Security Council has insisted on repatriation, and repatriation has been implemented. In the face of the Council’s inaction, the UN General Assembly might recommend sanctions, under its Uniting for Peace procedure.

In the 1980s, the UN General Assembly sought an international forum for resolution of the Arab-Israeli conflict, a forum in which legitimate expectations under international law would have been at the center of discussion. But in the 1990s, at the instigation of the United States, a bilateral process was initiated instead, a process in which international legality, as reflected in Resolution 242 was to play a role, but at the same time a process that pitted an Israel that enjoyed the backing of the United States against a Palestine Liberation Organization that had little leverage at the bargaining table.

To some, the repatriation issue comes down to the question of resolving the difference of view over the reason the Arabs of Palestine left their homes in 1948 and went
beyond the territory that Israel came to control. If the Arabs left of their own accord, then they have no right to return. If Israel, or the militias that fought to establish a state in Palestine under the banner of the Jewish Agency, forced the Arabs out, then perhaps a right of return might come into play.

The Arabs were, without doubt, forced out, under a scheme conceived by the Jewish Agency and executed by its militias. But a right of return does not turn on that question. A population that flees for whatever reason has a right to return.

What is needed at present, and the essays in this collection demonstrate this need, is a process in which international legality lies at the center of consideration. This theme has been the focus of BADIL in its important activity on repatriation, activity reflected in the conferences represented in this collection, as well as in extensive public activities. Legal principles do not exist in a vacuum. Nor are they automatically implemented, as reflected, unfortunately, in the inability of the international community to date to secure Israel’s compliance with the repatriation obligation. Civil society has assumed a key role on the repatriation issue, reminding the relevant authorities of the principles that must guide their work. The essays collected here spell out those principles and make practical suggestions for their implementation.

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Acknowledgments

The 2003-2004 BADIL Expert Forum was sponsored/hosted by the Al-Ahram Center for Strategic and Political Studies, the Association of World Council of Churches Related Development in Europe (APRODEV) NGO Network, the Association for the Defense of the Rights of the Internally Displaced (ADRID), the Emil Touma Institute for Palestinian and Israeli Studies, the Flemish Palestine Solidarity Committee, the Department of Third World Studies/University Ghent, the Interchurch Organization for Development Cooperation/Netherlands (ICCO), the Institute of Graduate Development Studies/University of Geneva, Oxfam Solidarite/Belgium, Stichting Vluchteling/Netherlands, the Swiss Federal Department for Foreign Affairs (PD IV), and, the Swiss Human Rights Forum Israel/Palestine.

BADIL Resource Center would also like to thank Leila Hilal, Elna Sondergaard and Shahira Samy for their feedbacks and comments on the original manuscript, and the Spanish Development Cooperation (AECID) for support of print publication.
Introduction

by Terry Rempel

In the summer of 2000 representatives of Israel and the Palestine Liberation Organization met to hammer out a comprehensive solution to the long-standing conflict in the Middle East. Among the issues on the agenda was the future of Palestinian refugees. Millions of Palestinians had fled or had been expelled from their homes, villages and towns since the beginning of the conflict. Most were displaced during two major wars between Israel and its Arab neighbours in 1948 and 1967. Three-quarters of a million Palestinians became refugees during the armed conflict that began with the UN recommendation (General Assembly Resolution 181) to divide Palestine into two states in 1947 and ended more than a year later with the signing of armistice agreements between Egypt, Jordan, Lebanon, Syria and the newly-established state of Israel. Two decades later, armed conflict between Israel and its Arab neighbours led to the displacement of another 400,000 Palestinians, half of whom were refugees from the previous war. A smaller but no less significant number of Palestinians were displaced during the two-decades of military government inside Israel after 1948, and as a result of Israel’s military occupation of the West Bank, eastern Jerusalem, and the Gaza Strip that began in 1967. In sum, by the summer of 2000 more than two-thirds of the entire Palestinian people had experienced some form of forced displacement and related dispossession, more than half being displaced outside the borders of their historic homeland.

Camp David was a fitting venue for so-called final status talks between the two sides. Two decades earlier, US-mediated talks between Egypt and Israel at the presidential retreat outside Washington, DC had resulted in an agreed upon framework for a ‘just, comprehensive, and durable settlement of the Middle East conflict’ based on UN Security Council Resolutions 242 (1967) and 338 (1973). The 1978 Framework for Peace in the Middle East set out a multi-stage process that would begin with the election of a self-governing Palestinian authority in the Israeli-occupied West Bank and Gaza Strip, to be followed not more than 3 years later by negotiations over the ‘legitimate rights of the Palestinian people and their

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1 Resolution 242 calls for the withdrawal of Israeli forces from the territories occupied during the 1967 conflict, freedom of navigation through international waterways in the area, a just settlement of the refugee problem and the territorial inviolability and political independence of every state in the area. SC Res. 242, UN SCOR, 1382nd mtg., UN Doc. S/RES/242 (1967). Resolution 338 reaffirms 242 and calls for negotiations aimed at establishing a just and durable solution in the Middle East. SC Res. 338, UN SCOR, 1747th mtg., UN Doc. S/RES/338 (1973).
just requirements’. On refugees, the framework provided for the creation of a 4-party committee, comprising Egypt, Jordan, Israel and the Palestinians, to decide on modalities for the admission of 1967 refugees to the West Bank and Gaza Strip, while the future of the much larger group of 1948 refugees who originate from villages, towns and cities inside Israel would be deferred to final status talks among the parties. It was this framework that became the model for the 1993 Declaration of Principles on Interim Self-Government Arrangements and the ‘agreed political process’ that eventually led to final status talks between Israel and the PLO. The fundamental feature of the process was that the nature and scope of rights to be afforded to the Palestinian people, including the refugees, would be decided solely through negotiations between the two parties.

Israel and the PLO arrived at Camp David with very different ideas about how to resolve the Palestinian refugee issue. Palestinian negotiators wanted to start with an agreement on legal principles and then proceed with a discussion about the details of their implementation. They wanted Israel to recognize its legal and moral responsibility for the refugee crisis, the right of Palestinian refugees to return to their places of origin, to repossess their homes, lands and properties and to receive compensation for losses and damages along with the principle of choice for refugees as set out in UN General Assembly Resolution 194 (III) of 11 December 1948. Once Israel accepted these principles they were willing to be flexible in their implementation. They suggested a pilot program that would begin with the refugees in Lebanon. Israeli negotiators aimed to ensure that any solution would be consistent with Israel’s overriding interest to maintain a Jewish state with a permanent Jewish majority. They viewed resettlement in a future Palestinian state, in Arab host states and elsewhere combined with compensation for privately-owned land as the most appropriate solution for Palestinian refugees. Israel would not be held morally or legally responsible for the refugee crisis, nor would it recognize Resolution 194 and the principles of return and restitution. It would agree to allow a small number of refugees to enter the country on humanitarian grounds such as family reunification and it would contribute to an international fund

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2 A Framework for Peace in the Middle East Agreed at Camp David, *International Legal Materials* 17/6 (1978), 1466-70.


4 GA Res. 194 (III), UN GAOR, 3rd Sess., UN Doc. A/RES/194 (1948), para. 11. The resolution resolves that 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. It also provides for international assistance in the resettlement of those refugees not wishing to return. See also, UNCCP, ‘Analysis of paragraph 11 of the General Assembly’s Resolution of 11 December 1948’, Working paper prepared by the Secretariat, UN Doc. A/AC.25/W.45 (1950).
that would compensate the refugees for their properties. Israeli negotiators wanted the same fund to compensate Jews who lost properties in Arab countries.\(^5\)

The mobilization of Palestinian refugees to demand their rights and the lack of public deliberation among Jewish Israelis about the root causes of and solutions for the refugee question presented negotiators with additional challenges in building broad support for a future agreement. In the mid-1990s, Palestinian refugees in the OPT and internally displaced Palestinians inside Israel held a series of conferences with the aim of launching a popular refugee movement to defend and lobby for their rights. The movement quickly spread to other areas of Palestinian exile. The popular refugee movement focused on raising awareness about the rights of return, restitution and compensation, refugee choice, the implications of a two-state solution for refugee rights and the practicalities of how to implement a rights-based solution. Refugees warned that ‘support for parties—elected or not, official or not—and for any negotiating team, [would] depend on their respect for democracy, national and human rights’, including their rights of return, restitution and compensation.\(^6\)

At the same time, Jewish Israelis appeared to be more concerned about other final status issues, like the future of Jerusalem, assuming that a Palestinian state would provide a solution for the refugees. Public deliberation about how to resolve the refugee question only began to pick up in the months preceding final status talks between Israel and the PLO at Camp David. In the press and in public opinion surveys Jewish Israelis frequently equated the return of Palestinian refugees to their places of origin inside Israel with ‘the “destruction of the state”, “a national disaster”, “massacre of the Jews” and even “holocaust”’.\(^7\)

The breakdown of separate negotiations on the future of 1967 refugees and on the broader humanitarian aspects of the refugee question in the years leading up to the

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\(^5\) The international law principles applicable to Palestinian refugees also apply to Arab Jews displaced and dispossessed of their properties. Further discussion of the rights and claims of Arab Jews, however, is beyond the scope of this volume. For more details see, e.g., Yehuda Shenhav, *The Arab Jews: A Post-Colonial Reading of Nationalism, Religion, and Ethnicity* (Stanford: Stanford University Press, 2006); and, Michael Fischbach, *Jewish Property Claims Against Arab Countries* (New York: Columbia University Press, 2008).


second Camp David summit in 2000 underscored the challenge in finding solutions for 1948 refugees. Four-party talks involving the PLO, Israel, Egypt and Jordan on modalities for the admission of 1967 refugees to the Israeli-occupied West Bank and Gaza Strip had ground to a halt over disagreements about who was a refugee, their numbers and the degree to which Palestinians would control their entry into the OPT. Multilateral talks on family reunification, human resource development, job creation and vocational training, economic and social infrastructure, and public health and child welfare involving Israel, the PLO, Egypt, Jordan, the United States, the former Soviet Union, the European Union, Japan and a number of other states were suspended after the Arab League called for a boycott of the talks to protest Israeli settlement activity in the OPT. Both sides, moreover, had serious misgivings about the multilateral talks. Palestinians felt that the focus on refugee needs had undermined refugee rights, while Israelis expressed concern that family reunification had provided a ‘back door’ for the right of return. Meanwhile, ongoing land confiscation and settlement construction in the OPT threatened to undermine the territorial compromise that was in principle at the heart of the two-state solution.\(^8\)

Israel and the PLO ultimately failed to resolve their fundamental differences at Camp David. On refugees, the two sides reiterated their positions on the right of return, restitution, compensation, resettlement, responsibility and Resolution 194 (III), but there was little substantive discussion or agreement on the details of a solution. Low level talks continued through the fall. With a second intifada in the OPT and elections looming in both Israel and the US, however, prospects for a comprehensive solution to the conflict appeared increasingly remote. The US tried unsuccessfully to facilitate an agreement in late 2000 when it presented Israel and the PLO with a series of ideas to bridge their differences over the borders of a Palestinian state, the future of Jewish settlements, security arrangements, the status of Jerusalem and Palestinian refugees. While neither side rejected the ideas in total, they both expressed reservations. These included the terms of reference for resolving the Palestinian refugee question.\(^9\)


\(^9\) ‘Proposals for a Final Status Settlement’, Washington, DC, Dec. 23, 2000, *reprinted in*, *Journal of Palestine Studies* 30/3 (2001), 171-4. The provisions on refugees were based on a model agreement known as the ‘Beilin-Abu Mazen agreement’, drafted in the mid-1990s by a small group of Israeli and Palestinian academics with ties to officials on both sides of the conflict. The document subsequently became a template for a number of proposals to resolve the conflict. For an account of the talks see, Hussein Agha et al., *Track-II Diplomacy, Lessons from the Middle East* (Cambridge, MA: MIT Press, 2003), 71-90.
ideas nevertheless provided a framework for subsequent talks. Israel and the PLO made a final attempt to resolve their differences in bilateral talks at the Egyptian resort of Taba in early 2001. The two sides claimed that substantial progress had been made on a number of issues, including an agreement on the establishment of an International Commission and Fund to oversee refugee compensation, but they still fell short of a comprehensive solution to the conflict. On refugees, major differences remained over the handling of the rights of return and restitution and the question of responsibility for the massive displacement and dispossession of Palestinians since 1948.\textsuperscript{10}

The failure of the Middle East peace process to resolve the long-standing conflict has been attributed to a wide range of factors. These include: the asymmetric balance of power between Israel and the PLO; the absence of trust between the two sides; indecisive and ineffectual leadership; the exclusion of refugees, host states and other stake-holders from the peacemaking process; the lack of accountability; the influence of domestic politics on the negotiation process; biased and ineffective US mediation; the lack of time to reach a comprehensive agreement; and, the absence of a clearly defined outcome of the peace process. The collapse of final status talks at Camp David and Taba also re-ignited an equally long-standing debate about the role of international law in resolving the conflict. The fundamental premise of the Middle East peace process that was conceived at the first Camp David summit was that the ‘legitimate rights’ of the Palestinian people and their ‘just requirements’ would be decided through negotiations among the parties concerned. In practice this meant that international law had to be set aside when Israel and the PLO failed to agree on the content and application of the law. For some, the dispute over the rights of Palestinian refugees and the respective obligations of the two parties at Camp David and Taba reaffirmed their view that international law had little to offer in terms of conflict resolution. For others, however, it was the repeated failure to resolve the conflict without reference to the rights and obligations of all respective stakeholders that underscored the need to put international law at the center of the peacemaking process.

Palestinian Refugees and Internally Displaced Palestinians (IDPs) (end 2000)

<table>
<thead>
<tr>
<th>Category</th>
<th>Population (2000)</th>
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<tr>
<td>UNRWA registered 1948 refugees</td>
<td>3,737,494</td>
</tr>
<tr>
<td>Estimated non-registered 1948 refugees</td>
<td>827,022</td>
</tr>
<tr>
<td>Estimated 1967 refugees</td>
<td>743,257</td>
</tr>
<tr>
<td>Estimated 1948 internally displaced persons</td>
<td>264,613</td>
</tr>
<tr>
<td>Estimated 1967 internally displaced persons</td>
<td>72,758</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>5,645,144</strong></td>
</tr>
</tbody>
</table>


IDPs in the OPT include an unknown number who also hold refugee status. The figures do not include an undefined number of Palestinians who are neither 1948 nor 1967 refugees but have also been displaced outside Israel and OPT. The estimates are based on best available sources and population growth projections. Figures are therefore indicative rather than conclusive.

PURPOSE OF THE BOOK

This collection of papers from the 2003-2004 BADIL Expert Forum revisits the role of international law in crafting durable solutions for Palestinian refugees. The premise of the forum was that the exclusion of international law from both the terms of reference for negotiations and the substance of agreements was a major factor which contributed to the failure of the Middle East peace process. There are a number of other important reasons, however, to reconsider the role of international law in resolving the long-standing Palestinian refugee question. First, Israel’s use of domestic law to deny Palestinian refugees rights to return and to repossess homes, lands and properties, and the legal justifications offered, invite scrutiny as to whether its laws, policies and practices are consistent with its obligations under international law. Second, revisiting the role of international law provides an opportunity to move beyond legal rhetoric and clarify what a rights-based solution would look like for all stakeholders, including refugees, other Palestinians and Jewish Israelis. Third, it provides an opportunity to take stock of developments in international law since the beginning of the Palestinian refugee crisis and to assess the implications of key developments for crafting durable solutions for this group of refugees. Finally, it provides a framework to compare and contrast the role of international law in resolving other cases of displacement and dispossession and to draw lessons from this which can be applied to resolving the Palestinian refugee question.
The BADIL Expert Forum brought together academics, practitioners, policymakers and civil society actors for a series of four expert seminars to explore a rights-based approach to crafting durable solutions for Palestinian refugees. A rights-based approach provides a normative framework to address all aspects of the refugee experience from displacement through durable solutions. The UN High Commissioner for Human Rights has enumerated five key questions that help frame a rights-based approach:

- What is the content of the right?
- Who are the rights claim-holders?
- Who are the corresponding duty-bearers?
- Are claims-holders and duty-bearers able to claim their rights and fulfil their responsibilities?
- If not, what can be done to help them to do so?11

The 1951 Convention Relating to the Status of Refugees, complimentary regional conventions, and international and regional human rights instruments establish the foundation for a rights-based approach. Relevant norms include the rights of return, restitution and compensation, the obligation of non-refoulement, as well the panoply of economic, social, cultural, civil and political rights to be accorded to refugees and displaced persons by host countries until a durable solution is realized, whether that be voluntary repatriation, or host country integration and third country resettlement. The right to participate and the fundamental principle of equality are also central to a rights-based approach.12

This collection of papers from the BADIL Expert Forum is structured around the four expert seminars held in the cities of Ghent (‘Role of International Law in Peacemaking and Crafting Durable Solutions for Palestinian Refugees’), Geneva (‘The Right to Housing and Property Restitution’), Cairo (‘Closing the Gaps, From Protection to Durable Solutions for Palestinian Refugees’) and in Haifa (‘Rights-based Durable Solutions for Palestinian Refugees—Ways Forward’). Each of the four sections of the book includes a selection of papers prepared for the Expert Forum.

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The book also contains a selection of photos from a series of study tours to Bosnia and Herzegovina, South Africa and Cyprus undertaken parallel to the Expert Forum. The tours provided opportunities for Palestinian refugee activists from camps and communities of exile to explore rights-based approaches to other refugee situations. A complete list of working papers and forum participants can be found in the annexes. The conclusion summarizes findings from the working papers, discussions and debates and individual contributions in this collection. It reviews relevant principles, examines how they are put into practice, identifies major gaps in putting principles into practice in the Palestinian case and then offers some recommendations on ways forward.

The role of international law

The first seminar (‘The Role of International Law’) aimed to clarify and create awareness about the role of international law in peacemaking and crafting durable solutions for refugees. Lynn Welchman (Chapter 1) introduces principles and practices relevant to a rights-based approach. These include the rights of return, restitution and compensation. Welchman explores their implementation in Bosnia and Herzegovina, South Africa and Cyprus focusing on efforts to resolve housing, land and property claims. The chapter also examines principles and practices to redress systematic or widespread past violations of international law. These include the establishment of international criminal tribunals and truth commissions to enable victims to realize their rights to justice and the truth. The chapter compares and contrasts the role of truth commissions in South Africa and East Timor. Welchman’s consideration of civil society efforts to pursue housing, land and property rights in Cyprus at the European Court of Human Rights and the efforts of Palestinians to pursue justice through universal jurisdiction exemplifies another important principle which is central to a rights-based approach, namely, the right to participate. The comparisons drawn by Welchman illustrate the complete disconnect between justice and peace in Palestine/Israel. While peacemaking may ultimately be an act of compromise, the cases in this and subsequent chapters illustrate how the pragmatic choices over rights that are made to secure an end to violent conflict in the short-term may be insufficient to ensure long-term peace and reconciliation. Welchman thus observes that for peace to last, there must also be sufficient justice. She suggests that civil society efforts at developing a ‘legal narrative’, with a specific focus on Palestinian refugees, and the quest for inclusion and participation of refugees themselves, are initiatives that may contribute to a rights-based solution to the refugee question.

Alejandra Vicente (Chapter 2) continues the discussion about principles and practices to redress systematic or widespread past violations of international law. The
chapter examines amnesties, truth commissions, international courts and tribunals and their use in Chile, Guatemala, Northern Ireland, South Africa, Rwanda, Sierra Leone and Bosnia and Herzegovina. Vicente explores the relationship between amnesty, prosecution and truth commissions, noting that while the international preference for addressing systematic or widespread violations of international law now favors prosecution over amnesty, truth commissions often comprise elements of both, and may be especially useful in situations where there is an acute tension between the imperative of ending violent conflict and the necessity of achieving peace and reconciliation. Vicente’s in-depth discussion of the International Criminal Tribunal for the Former Yugoslavia illustrates the various roles of justice in peacemaking and reconciliation. These include determining individual responsibility for systematic or widespread violations of international law, establishing a historical record, providing a dignified space for victims to tell their stories, effectuating deterrence against the repetition of international crimes in the future and contributing to reparation, reconciliation and the maintenance of peace. The chapter also underscores the role of civil society in seeking justice through universal jurisdiction and unofficial truth projects, especially in cases where states are unwilling to provide effective remedies, satisfaction and guarantees of non-repetition. Vicente concludes that while there is no ideal model to follow, the key to achieving lasting peace and reconciliation may be found in broadening and incorporating various approaches to add restitution, acknowledgment, apology, forgiveness and equality to the retributive character of justice.

Karma Nabulsi (Chapter 3) explores the role of refugee participation in peacemaking and crafting durable solutions. Building on the discussion of civil society participation in previous chapters, Nabulsi examines relevant principles, including popular sovereignty, self-determination, individual and collective rights, and then explores their role in the peacemaking process. The chapter describes the multiple ways in which Palestinian refugees, who comprise more than half of the Palestinian people, were excluded from the Middle East peace process. These include the separation of refugees from their political leadership as a result of the breakdown in the PLO’s organically developed democratic structures, the exclusion of refugees and other Palestinians outside the 1967 OPT from presidential and legislative elections for the Palestinian Authority, and, the marginalization of civil society, especially refugees outside the 1967 OPT, from the peacemaking process. While debate on the future of Palestinian refugees most often focuses on their rights of return and compensation, Nabulsi argues that policymakers need to be aware of and integrate the entire range of refugee rights into efforts to craft durable solutions. This includes intrinsic values like popular sovereignty, deliberative democracy and representation which provide the most useful framework upon which to model practical and legitimate solutions to conflict. Nabulsi says that the integration of these principles would provide a more fair system of decision making, restore the
democratic link between Palestinian leaders and the refugee community and help to advance a more consensual solution to the refugee question. She emphasizes the importance of creating and/or recreating civic structures for refugees that will better enable them to participate in the determination of their own future. She also recommends measures to broaden the understanding of the policy community on the entire range of refugee rights and their instrumental value in approaching durable solutions for Palestinian refugees.

Housing, land and property restitution

The second seminar (‘Housing, Land and Property Restitution’) aimed to clarify and promote awareness of international law on restitution, review the administrative and legal measures through which Palestinian refugees have been denied access to their property and examine lessons learned from comparative practice. Hussein Abu Hussein and Usama Halabi (Chapter 4) review relevant Israeli legislation and explore the role of Zionist organizations—Jewish National Fund, Jewish Agency and World Zionist Organization—and the Israeli courts in regulating the use of Palestinian/refugee land, validating its expropriation and transfer to the state of Israel, and in creating barriers that make restitution for Palestinians virtually impossible. While the chapter focuses on the situation of Palestinian refugees and Palestinian citizens of Israel, they remind readers that Israel’s denial of property rights affects all Palestinians, including refugees, Palestinian residents of the 1967 OPT and Palestinian citizens of Israel. The issue of restitution is thus central to a resolution of the conflict. Their discussion of the case of Iqrit, a destroyed Palestinian village in northern Israel, illustrates how Israel’s laws, institutions and its judicial system work together to prevent Palestinians from reclaiming their homes, lands and properties. Abu Hussein and Halabi also describe how the preferential treatment and allocation of rights on the basis of Jewish nationality is central to Israel’s land regime. They explain that the situation is not one of individual discrimination, although this does occur, but rather discrimination against an entire group of people on the basis of their national identity. The authors argue that if Israel is to evolve into a state that accepts basic international and human rights norms, it will have to undertake major land reforms that provide equal rights to land, dismantle Zionist institutions that discriminate on the basis of nationality and redress the violation of land rights since 1948. Abu Hussein and Halabi suggest that international intervention will be necessary as such changes are unlikely to happen as a result of Israeli goodwill alone.

Paul Prettitore (Chapter 5) examines the right to restitution under international human rights and humanitarian law and reviews legislative and administrative measures that have enabled refugees to repossess homes, lands and properties in
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Bosnia and Herzegovina. Prettitore notes that while the right to property is not absolute, any interference or difference in treatment must satisfy the twin criteria of objectivity and reasonableness. The prohibition of discrimination is also relevant to the protection of property rights. The extensive review of case law highlights a number of related principles, including the doctrine of continuing violations which is relevant to situations where the initial violation of the right to property predates the ratification of contemporary legal instruments. The overview of the right to restitution in UN resolutions and peace agreements further exemplifies the growing importance of restitution in crafting durable solutions for refugees. In Bosnia and Herzegovina, the Dayton Peace Agreement enshrines the right to restitution as a constitutional principle and mandates the establishment of administrative procedures to facilitate restitution. Prettitore examines a number of obstacles to restitution in Bosnia and Herzegovina and highlights a number of lessons learned from their experience. One, peace agreements should include detailed provisions for restitution setting out the rights of refugees and the corresponding obligations of state signatories as well as the procedures, institutions and mechanisms to facilitate restitution. Two, restitution may provide a more efficient and fair mechanism for compensating refugees who chose not to return to their homes and places of origin. Three, there should be a clear delineation of tasks to avoid duplication and inefficient use of resources. Four, restitution is most effective when it is grounded in the rule of law. And five, a comprehensive legislative framework, judicial mechanisms of enforcement, and the use of conditionality and incentives are critical to ensure implementation of the right to restitution.

Monty Roodt (Chapter 6) examines the right to restitution in South Africa and the administrative and judicial mechanisms established to deal with the country’s long history of dispossession. Restitution is one of three pillars of the land reform program in post-apartheid South Africa, the other two being land tenure and land redistribution. Similar to the situation in Bosnia and Herzegovina, the right to restitution is enshrined as a constitutional principle. It is also considered central to reconciliation, reconstruction and development. Roodt identifies several legislative provisions that are unique to South Africa. These include provisions which provide redress for dispossession due to racially discriminatory practices (and not just racially discriminatory laws) and which render the state (and not the current land owner) responsible for effectuating all restitution claims. As the author explains, these provisions aimed to redress two importance features of the apartheid land regime: individuals were often dispossessed of land on a discriminatory basis through facially neutral legislation and the central role of the state in the dispossession of land. South Africa’s constitution also requires the government to establish a Land Claims Court and a Commission to investigate the merits of restitution claims, to mediate and settle disputes and to draw up reports and gather evidence for the adjudication of claims.
by the Court. Roodt identifies a number of obstacles in the restitution process and explains the eventual shift from a judicial rights-driven approach to a rights-based approach that is developmentally sustainable. The author also highlights several important lessons from the South African experience. These include the importance of securing a good match between the institutional, legal and policy framework and the scope and nature of claims, the value of administrative procedures in dealing with large volumes of claims, the merits of active participation of claimants, NGOs, community organizations and service providers in the restitution process, and the importance of adequate resources to sustain the entire process.

International protection

The third seminar (‘International Protection’) aimed to identify gaps in the international protection regime for Palestinian refugees and to review proposals and initiatives to enhance protection and support rights-based durable solutions for Palestinian refugees. Muhammad al-Az’ar (Chapter 7) examines instruments and mechanisms to regulate the status of Palestinian refugees in the Arab world, reviews the treatment of refugees in relation to freedom of movement, citizenship, education and property ownership in major Arab host states, and identifies gaps between principle and practice. While the Casablanca Protocol Concerning the Treatment of Palestinians in Arab Countries represents a major effort to regularize the status of Palestinian refugees in the region, Az’ar notes that, with the exception of Syria, no Arab state is committed to the systematic implementation of the Protocol. The author explains that the protection gaps in the Arab world stem from the lack of effective legislation at the national level, relatively weak legal instruments and mechanisms at the regional level, the lack of effective coordination and cooperation among Arab states and the fact that the primary responsibility for the refugee question rests with Israel and the international community. Az’ar also points out that the ossification and corruption of the PLO’s representative structures, described by Nabulsi in Chapter 3, and frequent periods of political instability and armed conflict have further undermined the Arab League’s attempt to harmonize the treatment of Palestinian refugees. Az’ar emphasizes the importance of civil society-driven efforts to strengthen legal frameworks and mechanisms in the Arab world for the protection of the human rights of citizens and refugees. Additional measures recommended by Az’ar include improvements in refugee living conditions, tackling host country suspicions about de facto resettlement, securing revenue from the use of refugee properties by Israel and enhancing the role of Palestinian institutions in refugee protection.

Harish Parvathaneni (Chapter 8) examines the special regime established to provide international protection for Palestinian refugees and explores the role of
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the UN Conciliation Commission for Palestine, the UN Relief and Works Agency for Palestine Refugees, and the UN High Commissioner for Refugees in protecting them. The chapter provides an overview of the reasons behind the establishment of a special protection regime for Palestinian refugees and why most Palestinian refugees today lack the formal protection accorded to other refugees. Parvathaneni highlights the range of protection options available to UNRWA and illustrates how the Agency has attempted to fill the protection gap in its areas of operation despite having a limited mandate to do so. This includes the protection of basic economic and social rights by providing a core program of essential services (education, health and welfare); monitoring the treatment of refugees, first in Lebanon during the 1982 Israeli invasion and then in the 1967 OPT during the first (1987) and second (2000) intifadas; intervening with host governments on behalf of refugees; and publicizing violations of their rights. Parvathenani also points out, however, that this type of ad hoc approach has applied a weaker standard of protection to Palestinian refugees. The author also describes how effective protection elsewhere has been linked to the existence of international political will as manifest in UN Security Council action and/or in the political will of the parties directly involved in the conflict through an express agreement or military intervention. The comparisons drawn in this chapter effectively illustrate the complete absence of political will in the Palestinian case. Parvathaneni concludes that the best way to protect Palestinian refugees is to address the root of their problem, namely, the unresolved territorial conflict and the denial of the right of the Palestinian people to self-determination.

Susan Akram and Terry Rempel (Chapter 9) examine the international refugee regime, the international framework for durable solutions and the applicability of each to the situation of Palestinian refugees. Based on a review of temporary protection and comprehensive plans of action in Europe, the Americas, Africa and Asia, the authors present arguments for an internationally-harmonized temporary protection regime for Palestinian refugees linked to a comprehensive plan of action for durable solutions guided by the principles of non-refoulement, voluntary choice and the right of return. Palestinians fleeing renewed conflict in the 1967 OPT, those in Arab host states, as well as those Palestinian refugees already in exile who lack third-state citizenship would fall under the scope of the proposed regime. Akram and Rempel argue that such a regime would provide Palestinians the protection rights they currently lack, with many of the concomitant rights of an individual granted asylum, but without the permanent status accompanying integration or resettlement that might compromise their right to return. The authors explain how existing instruments and mechanisms described by Az’ar and Parvathaneni could be strengthened to enhance the protection afforded to Palestinian refugees in the short-term and contribute to the realization of a rights-based solution to the refugee question in the long-term. The chapter recommends that a harmonized regime of temporary protection for
Palestinian refugees should include the following rights: status, identity and travel documents (freedom of movement), family reunification, employment, housing and education and health and welfare benefits. Akram and Rempel conclude that civil society, including refugees, would have to comprise the driving force behind the plan, given the lack of international political will to facilitate a rights-based solution to the conflict.

**Putting rights into practice**

The final seminar (‘Putting Rights into Practice’) examined the role of local initiatives in facilitating a rights-based solution to the Palestinian refugee situation. Celia McKeon (Chapter 10) examines the role of public participation in peacemaking. Building on the discussion of participation in the first section of this collection, McKeon notes that public participation in peacemaking has both intrinsic and instrumental value. On the one hand, individuals have a right to participate in the political affairs of their own country. This includes public deliberation on issues frequently addressed by peace agreements such as the structure of the state, systems of governance, access to resources, security and opportunities for development. On the other hand, participation contributes to political reconciliation between protagonists, problem-solving, constructive action and the consolidation of democratic politics. The author also points out that while the dominant ‘elite pact-making’ approach to peace has led to the successful resolution of conflicts, the exclusion of civil society also has opportunity costs, including the lack of broad ownership and legitimacy. The chapter draws on comparative research of diverse peace processes including South Africa, Northern Ireland, Guatemala, Philippines, Colombia and Mali to illustrate the various ways in which civil society can participate and contribute to the peacemaking process. This includes examples of representative participation through political parties, consultative mechanisms where civil society has an opportunity to voice views and formulate recommendations and direct forms of participation where all interested individuals engage in a process of developing and implementing agreements. McKeon also examines some of the problems that participatory processes need to address such as security, integrity of mediation, diverse voices, managing inclusion and superficial participation. The author recommends that international involvement in peacemaking should be rooted in a respect for the primacy of local ownership and popular sovereignty.

Jessica Nevo (Chapter 11) provides an overview of the emerging field of transitional justice and its applicability to the Israeli-Palestinian conflict. The chapter continues the discussion initiated by Lynn Welchman and Alejandra Vicente focusing, in particular, on restorative justice and the use of truth commissions and unofficial
truth projects to address situations where violence is endemic. Nevo reviews some of the early examples of transitional justice in Argentina and then identifies and responds to arguments that the transitional justice paradigm is not applicable to Palestine/Israel. This includes the ongoing nature of the conflict and the continuity of the regime responsible for rights violations, the lack of acknowledgment in Jewish Israeli society that ‘something is wrong’, and the fact that truth commissions are most commonly associated with intra-state conflict. Nevo explains that while transitional justice mechanisms are commonly employed in post-conflict situations, such mechanisms can also be used as catalysts for transition in situations of ongoing conflict. The author also identifies a number of civil society processes within Israel that indicate various degrees of acknowledgment among small sectors of Jewish Israeli society that something is wrong. This includes the work of Zochrot discussed in the following chapter. Nevo underscores the importance of support for these types of initiatives. Finally, the author argues that Israel’s effective control over the occupied West Bank, eastern Jerusalem, and Gaza Strip, the settlement of Jewish Israelis there and the connection of these settlements to Israel suggests that Palestine/Israel has important features of an intra-state conflict, albeit more akin to apartheid South Africa. Nevo argues that providing victims with a public and dignified space to tell their stories and allowing perpetrators to give their testimonies could enable a process of acknowledgment, recognition of responsibility and expression of apology in Israel. She recommends that civil society actors should initiate a truth seeking process focused on the Palestinian Nakba given the fact that Israel is unlikely to establish an official commission on its own initiative.

Eitan Bronstein (Chapter 12) explores the lack of public debate about the origins of the Palestinian refugee question in Jewish Israeli society and then describes a range of different grassroots projects that aim to educate Jewish Israelis about the Palestinian Nakba. The chapter describes how Nakba denial is evident in the geography and the history taught in schools, in maps and in the signs marking places across the country. Bronstein explains that from a Zionist perspective the Nakba is both an event that could not have taken place, because Palestine was ‘a land without a people for a people without a land’, and an event that had to take place in order to establish a Jewish state in a land that in reality had a non-Jewish majority. This paradox helps to explain the lack of public debate on the refugee question. As Bronstein notes, the very discussion of the question is considered an existential threat for many Jewish Israelis. This fear forecloses public debate around both the origins of the refugee question and its solution. The chapter also describes how one Israeli association, Zochrot, has attempted to educate and raise awareness about the Nakba among Jewish Israelis. This includes public visits to Palestinian villages that were depopulated in 1948 and subsequently destroyed to prevent the refugees from returning; posting signs at these sites with information about the villages, the circumstances of their
destruction, and the location of their inhabitants today; protecting Palestinian sites of memory through intervention in urban and rural planning procedures and Israeli courts; and, by developing community-based models for Palestinian refugee return and restitution. The author’s discussion of a joint effort by a group of Jewish Israelis and internally displaced Palestinians to resolve claims to the same land illustrates how public participation can facilitate solutions that are beyond reach of elite negotiations. Bronstein concludes that confronting the Nakba may provide the key to a more consensual, just and lasting solution to the Palestinian refugee question.

Finally, Michael Kagan (Chapter 13) explores the value of rights-based discourse in facilitating a solution to the Palestinian refugee question. While there is a significant amount of research on the rights of Palestinian refugees, there is relatively little research which explores how a rights-based approach would play out in practice for Jewish Israelis. Using the concept of ‘conflicting rights’, the author examines whether the Palestinian right of return conflicts with a collective Jewish right to form and maintain a Jewish state with a permanent Jewish majority, individual Jewish property and housing rights and public interest in economic and social stability. Kagan argues that assessing Jewish Israeli rights is important for establishing a level playing field, facilitating a more productive dialogue between the two sides and developing models of Palestinian refugee return which take into consideration the rights of Jewish Israelis that have been found legitimate upon legal scrutiny. While most of the debate on the right of return focuses on the perceived conflict between the return of Palestinian refugees and Israel’s self-definition as a Jewish state, Kagan finds that international law does not support the claim that Israel has a right to exclude Palestinian refugees simply because they are not Jewish. As the author explains, for the purposes of self-determination, the people of Israel could include both current Israeli citizens, as well refugees who choose to return. Kagan acknowledges that while this will be of little comfort to Jewish Israelis who insist on a Jewish state with the Jewish majority, a focus on conflicting rights can address more practical issues like housing and property rights, where there is a greater potential for conflicting rights, and concerns about political, social and economic stability. Kagan concludes that a focus on conflicting rights illustrates how mutually legitimate rights can be acknowledged and addressed, reducing fears that Palestinians assert a right to return that would result in the forcible displacement of all Jews from Israel.
Part One

The Role of
International Law
Introducing this expert seminar on ‘The Role of International Law and Human Rights in Peacemaking and Crafting Durable Solutions for Refugees’, BADIL Resource Center set out the following assumption:

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

This is a sober assessment that in my opinion correctly points up the risks that the Oslo process took in failing to set commitment to existing obligations in international law as the framework for the transition. This argument has been

*I am grateful to Fouzia Khan for research assistance on this paper; to Colm Campbell, Catherine Jenkins, Mona Rishmawi and Wilder Tayler for suggestions on comparative material; and to Lena al-Malak for comments.*
made in particular in regard to international humanitarian law.¹ Nor does the latest initiative, on the face of it, appear to break this mold. The Quartet’s Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict formally published by the United States at the end of April 2003² contains no reference to international law or indeed to any framework external to terms agreed bilaterally or proposed by particular third parties—hence, there is a passing reference to past agreements and Israel is to freeze settlement activity in accordance with the Mitchell Report (not in accordance with its obligations under international law). The only reference to the refugees comes in the plan for the third and final phase, when the parties are to

...reach final and comprehensive permanent status agreement that ends the Israeli-Palestinian conflict in 2005, through a settlement negotiated between the parties based on UNSCR 242, 338 and 1397, that ends the occupation that began in 1967, and includes an agreed, just, fair and realistic solution to the refugee issue….³

These three Security Council resolutions do not explicitly deal with the individual rights of the refugees.⁴ One could understand the adjectives ‘just and

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³ Road Map, id.

The Role of International Law and Human Rights

fair’ used in the Road Map to describe the solution envisaged for ‘the refugee issue’ as indicating the solution generically described by human rights law as currently articulated (the right to return and to housing and property restitution). On the other hand, the word ‘realistic’ hints at the attitude described in the above-cited assumption of the seminar (to the effect that solutions envisaging the implementation of these same international legal provisions could be regarded as ‘unrealistic’ or ‘impractical’). Nor can it be assumed that with the use of ‘agreed’, the drafters of the Road Map intend to directly secure the agreement of the refugees themselves, beyond the agreement of their hard-pushed political representatives.5

The three UN Security Council resolutions cited in the Road Map broadly present and reaffirm the ‘land-for-peace’ formula now the basis of the two-state solution to the Israeli-Palestinian conflict, explicitly recognized in UN Security Council Resolution 1397 of 12 March 20026, within a framework of political negotiations between the parties and with an affirmation of the customary international law prohibition on the acquisition of territory by war. If the collective Palestinian right of self-determination is recognized through the vision of a Palestinian state articulated in Resolution 1397, the issue of individual rights of the refugees is not. Back in 1948, the newly established state of Israel responded at the UN to calls for it to repatriate hundreds of thousands of Palestinians of refugees to the effect that this

...was not a question of the rights of certain individuals but of the collective interests of groups of people. It was not enough to allow these individuals to return when and where they desired, for the question arose as to who was to assume responsibility for their integration in their new environment.7

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A more recent quote presents the individual right of Palestinian refugees to return as threatening the Jewish people’s collective right to self-determination as secured by the state of Israel. According to Ariel Sharon, Israel’s former Prime Minister, Palestinians should renounce the right of return to areas inside Israel’s 1948 borders as a pre-condition for implementation of the Road Map, because it is ‘a recipe for the destruction of Israel’.  

If there is ever to be an end to the conflict the Palestinians must recognize the Jewish people’s right to a homeland, and the existence of an independent Jewish state in the homeland of the Jewish people. I feel that this is a condition for what is called an end to the conflict. … The end of the conflict will come only with the arrival of the recognition of the Jewish people’s right to its homeland.  

Leaving aside the issue of the individual right to return in situations of mass displacement, these positions illustrate what Christine Bell has called the ‘meta-conflict’, or ‘conflict about what the conflict is about’ ultimately forming the locus of what she terms ‘the deal’ in a generic or ideal type peace agreement. Bell’s Peace Agreements and Human Rights (2000) identifies in peace agreements three types of human rights-related provisions: ‘rights to self-determination or minority rights (“the deal”), building for the future (institutional protection for civil, political, social, economic and cultural rights) and past human rights violations.’ As demonstrated in the cases she considers (South Africa, Northern Ireland, Bosnia and Herzegovina and Israel/Palestine), while all three are inherently inter-connected, it is particularly the ‘meta-bargaining’ over the deal on the collective rights (to self-determination) that implicates the handling of individual rights arising from past human rights violations and hence, the nature and extent of reparation due—as she puts it, ‘the trade-offs between different

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9 Ari Shavit, ‘PM: Iraq war created an opportunity with the Palestinians we can’t miss’, Ha’aretz, Apr. 30, 2003.  
11 Bell, supra n. 1, 15.  
12 Id., 35.
human rights provisions including in particular the relationship between group and individual rights'.

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

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

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

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

Asmal does not himself accept the dichotomy, and indeed his effort in the lecture (in 1999 at the London School of Economics) is to set out in what ways he understands the South African approach to have ‘moved beyond the twin traps of naiveté and realpolitik’, offering Nelson Mandela as an example of a ‘third

13 Id., 2.
14 Id., 5.
15 Id., ix.
17 Id.
18 Id.
19 Id., 8.
Rights in Principle, Rights in Practice

...international law is particularly susceptible to the siren call of social science, as it struggles perpetually with suspicions of its own irrelevance.21

For others, on the other hand, interest in international relations scholarship is held to reaffirm international law ‘as an intellectual and practical enterprise’ and to perceive ‘the integration of IR [international relations] and IL [international law] scholarship’ as ‘the natural corollary of the indivisibility of law and politics’.22 According to Slaughter et al., ‘insiders in both disciplines reject such facile distinctions’ as ‘positive versus normative, politics versus law’.23

The burgeoning scholarly literature on transitional justice deals directly with the particular question of the justice/peace formula worked out in the process of peace settlements. Colm Campbell et al. explain transitional justice as ‘a set of discourses’ which focus on ‘the problem of reconciling the demands of peace with the imperatives of justice’.24 The issue of the right to return for Palestinian refugees directly provokes the justice/peace debate, as shown by the various quotes in this chapter, and as a ‘conflict-related legal legacy’, falls clearly within the concerns of


22 Id., 372.

23 Id., 393. In a consideration of ‘problem-driven’ interdisciplinary work, Slaughter et al. cite ‘Israeli-Palestinian relations’ as one area where international law scholars have applied international relations theory ‘as a diagnostic and policy-prescriptive tool ….’ Id., 367, nn. 48-9.

transitional justice as thus defined:

‘Transitional justice’ … functions as a collective title for the numerous forms of political and legal accommodation that arise in the shift from conflict to negotiation. Its concerns are with conflict-related legal legacies as well as with the myriad of internal legal quandaries that are a part of the post-conflict world.\textsuperscript{25}

The peace processes in South Africa, Israel/Palestine and former Yugoslavia are among those that the authors identify as being more recently dealt with in the transitional justice literature.\textsuperscript{26} While various criticisms are made of different aspects of the South African approach\textsuperscript{27}, it is the case that Bell puts first among her case studies in a summary ranking of the human rights measures included in the various peace deals ‘according to detail and capacity to deliver change’. The Israel/Palestine deal comes last.\textsuperscript{28} In fact, Bell holds that ‘in both their text and their implementation the Israeli/Palestinian peace agreements demonstrate an almost complete divorce between the concept of peace and the concept of justice’.\textsuperscript{29} In her categorization of three sets of human rights provisions typically contained in peace agreements, this is referring to the second set, the building for the future provisions for human rights institutions. Her evaluation of the way in which the other two sets of human rights provisions fare in the Israel/Palestine peace agreements (rights to self-determination and past human rights violations) is equally negative.

Bell’s comparison is based on a broad distinction between pre-negotiation, framework-substantive agreements and implementation agreements, although acknowledging inevitable overlaps in function and content, and consequent challenges to the classification.\textsuperscript{30} Her detailed comparison is between four sets of ‘framework’ peace agreements (the type of agreement ‘often marked by a handshake moment’\textsuperscript{31}) in the four conflicts she considers: the South African Interim Constitution (Act No. 200 of 1993), the Israeli-Palestinian Declaration of

\textsuperscript{25} Id., 336.

\textsuperscript{26} Id., 334. Of particular interest for the Israel/Palestine process, the authors note that ‘one of the most striking features of the recent legal scholarship in the field of transitional justice has been a reassertion of the critical importance of international humanitarian law’. Id., 335.

\textsuperscript{27} See, e.g., Anthea Jeffrey, \textit{The Truth About the Truth Commission} (Johannesburg: Institute of Race Relations, 1999), cited (and challenged) by Asmal, supra n. 16, 2.

\textsuperscript{28} Bell’s ranking on this point is South Africa, Northern Ireland, Bosnia and Herzegovina, Israel/ Palestine. Bell, supra n. 1, 231.

\textsuperscript{29} Id., 203.

\textsuperscript{30} Id., 20, 29-32.

\textsuperscript{31} Id., 25. This is a leitmotif that, for observers of the Israel/Palestine conflict/peace process, immediately evokes the White House lawn.
Principles of 1993 and the 1995 Interim Agreement\textsuperscript{32}, the Dayton Peace Agreement of 1995\textsuperscript{33} and the Belfast (or Good Friday) Agreement of 1998\textsuperscript{34}. Bell recognizes that a key difference between the Israel/Palestine agreements and those of the other three conflicts under examination is that the function of the former is to ‘build separate Israeli and Palestinian institutions and government, rather than designing ways to share both’.\textsuperscript{35} This critical distinction (based on the two-state solution) complicates the comparison considerably, but does not invalidate it.

The provisions of peace agreements regarding the return of refugees and displaced persons and property rights issues are in Bell’s category of past human rights violations, or ‘past-focused issues’, along with issues of accountability for and/or ‘truth about’ abuses during the conflict.\textsuperscript{36} The way the past is dealt with is ‘inextricably linked with how the agreement has dealt with self-determination’ and raises ‘most graphically the justice-peace debate’.\textsuperscript{37} Thus, in the quote from Ariel Sharon above, peace (manifested as ‘the end of the conflict’) requires \textit{ab initio} the waiving of justice (as manifested by Palestinian refugees exercising their individual right to return including inside the 1948 borders). Sharon’s articulation of the relationship, on the other hand, is in terms of a fit between peace and justice, with his presentation of the Jewish people’s right to self-determination inside the 1948 border. When combined with Sharon’s apparent acceptance of a Palestinian ‘state’\textsuperscript{38}, the deal here is presented as mutual recognition of collective rights to be exercised separately and to exclude the exercise of the individual right to return.

The different types of past-focused issues considered by Christine Bell tend to be dealt with, as she points out, at different points in peace processes, and the discussions on measures taken and mechanisms established for the purpose of


\textsuperscript{35} Bell, \textit{supra} n. 1, 155.

\textsuperscript{36} \textit{Id.}, 233.

\textsuperscript{37} \textit{Id.}, 9.

\textsuperscript{38} What Ariel Sharon means by ‘statehood’ for Palestinians remains unclear.
dealing with the past are increasingly informed by developments in mechanisms of both retributive and restorative justice. As for the first, the developing concept in international law of a duty to prosecute\(^39\) is not an explicit feature in the texts of peace agreements. The International Criminal Tribunal for the former Yugoslavia was set up as the conflict was ongoing, rather than being established as part of the agreement between the parties, although subsequently its mandate was referred to in both the process leading to and the text of the Dayton Peace Agreement which provided for exclusion of persons indicted by the Tribunal from the negotiations and the exclusion from prisoner releases and amnesties of those charged with crimes within its jurisdiction.\(^40\) The role played in peacemaking by the prosecution of perpetrators is assessed by Alejandra Vicente in chapter 2, but it is worth noting here that the application of retributive justice through criminal prosecution, as one approach to dealing with the past, is not entirely in the hands of those negotiating the peace, or reliant on the international community for the establishment of tribunals. In the case of Israel as an Occupying Power, there is of course the explicit obligation to search for and prosecute those accused of grave breaches of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.\(^41\) Israel’s co-parties to the Convention have studiously ignored this obligation, although many have complied with the obligation to promulgate national legislation enabling such prosecutions to be launched against suspects of any nationality. This may give a certain scope for those outside the political processes to take the law, so to speak, into their own hands, in their pursuit of justice; a recent case in point being the


\(^{40}\) The opposition of the United States to the mandate of the International Criminal Court (as compared with conflict-specific tribunals) is well documented. A recent press release by Amnesty International calls on the government of Bosnia and Herzegovina to refuse to sign an impunity agreement on which the US is insisting, under threat of withdrawal of military assistance. The agreement would commit the government ‘not to surrender US nationals accused of genocide, crimes against humanity and war crimes to the new International Criminal Court’. Amnesty International, ‘Bosnia and Herzegovina: The government should reject US impunity agreement’, May 16, 2002, AI Index EUR 63/011/2003.

\(^{41}\) Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287 (*entered into force* Oct. 21, 1950). Article 147 of the Convention defines grave breaches as ‘those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.
effort by lawyers in London to prompt a prosecution under the Geneva Conventions Act of Lieutenant General Shaul Mofaz on charges relating to events in the Jenin refugee camp in April 2002. In a report commissioned against the background of the high-profile legal action against Ariel Sharon in the Belgian courts relating to the 1982 massacre of Palestinian refugees in Sabra and Shatila, Israel’s Ministry of Justice was reported to have singled out Britain, Spain and Belgium as ‘the most likely to prosecute Israelis who breach international law’. This must be referring to the potential for initiatives originating in civil society, rather than state action; it is doubtful that the political leaders (or their civil servants) of any of the three countries named would see this form of justice as a helpful contribution to their own foreign policy priorities. Indeed, following increasing numbers of legal actions against a range of foreign leaders, the Belgian authorities moved in April 2003 to amend the 1993 ‘anti-atrocity’ legislation. The extent of the amendments dismayed human rights organizations, which according to Human Rights Watch

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44 Loi relative à la répression des infractions graves aux Conventions de Genève du 12 aout 1949 et aux Protocoles I et II du 8 juin 1977, June 16, 1993, as amended in February 1999 by Loi relative à la répression des violations graves du droit international humanitaire, which included genocide and crimes against humanity, under which sections many of the actions were filed. Implementing the principle of universal jurisdiction over these grave breaches and international crimes, the law enabled Belgian courts to hear criminal complaints by victims of any nationality against officials of any nationality on accusations of genocide, crimes of humanity and war crimes. In April 2003 the Belgian Parliament voted through amendments that, inter alia, give wider scope to the judiciary to reject claims involving non-Belgians, and allow the government to intervene to have cases transferred to the home state of the accused where the state is considered to uphold the right to a fair trial and where the victim is not Belgian. See, briefing by Human Rights Watch, ‘Belgium: Anti-Atrocity Law Limited’, Apr. 5, 2003 <http://hrw.org/press/2003/04/belgium040503.htm> (accessed May 16, 2003). According to Human Rights Watch, this last provision ‘will subject the government to diplomatic pressure when a complaint is filed’. Such pressure was most recently evident when a Brussels lawyer confirmed that 19 Iraqi plaintiffs were seeking to bring charges against US General Tommy Franks and other US soldiers in relation to alleged crimes including failure to prevent the looting of hospitals and ‘a shooting incident on a Red Crescent ambulance’. Ian Black, ‘Franks may face war crimes charge’, The Guardian, Apr. 30, 2003. The case was filed on 14 May 2003. George Monbiot, ‘Let’s hear it for Belgium’, The Guardian, May 20, 2003. Human Rights Watch notes that cases have also been filed under the law against, inter alia, Saddam Hussein, Fidel Castro, Paul Kagame and Yasser Arafat along with a list of others, although noting that ‘many of these cases have not been actively pursued’. Human Rights Watch, id. The Belgian Supreme Court had already ruled in February 2003 that as a ‘top sitting state official’, Prime Minister Ariel Sharon had immunity in the Belgian courts.
had ‘long proposed establishing “filters” to prevent frivolous cases and render the law more politically viable’. It remains to be seen whether the new version is in practice a workable balance of law and politics. What may be less easy to track is whether, if serious concerns persist and are publicized in Israel (and specifically among the armed forces) about the implementation of national legislation providing for universal jurisdiction over allegations of grave breaches of the Fourth Geneva Convention, the deterrent effect of potential criminal justice proceedings against implicated Israeli nationals abroad will in fact help reduce the level of serious violations of international humanitarian law—which in turn could substantively promote the prospects for peace building.

The arguments around prosecution as a mechanism for establishing accountability for past abuses are provoked, inter alia, by agreements on amnesty, which may be presented as key elements of transition to peace. In this regard, Bell reports

45 Human Rights Watch, id.
46 See, Lynn Welchman, supra n. 1; compare Bell, supra n. 1, 116-7.
47 Summarized by Bell, supra n. 1, 271-2.
48 See, Catherine Jenkins, ‘Amnesty for Gross Violations of Human Rights in South Africa: A Better Way of Dealing with the Past?’, in Ian Edge (ed.), Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department (Ardsley, NY: Transnational Publishers, 2000), 345-86, 353-66 on amnesties and international law. Bell points out that limited effect amnesties are likely to take place at different stages of peace processes: prisoner releases, for example, or the return of certain categories of refugees, as confidence building measures, or to enable key negotiators to participate in the process (her example here is South Africa), may occur at a very early stage (the pre-negotiation stage according to Bell, ‘by the framework-substantive agreement at the latest’). Bell, supra n. 1, 273. She contrasts these with ‘more holistic’ or ‘comprehensive “past-oriented” mechanisms’ such as the Truth and Reconciliation Commission in South Africa, which was based in a ‘post-amble’ to the Interim Constitution negotiated between the African National Congress and the then South African Government, but enacted as a mechanism only subsequent to the change in government. Bell finds only ‘piecemeal measures for dealing with discrete issues’ in the Belfast Agreement and the Israeli-Palestinian agreements. Confusion around the standing of such limited measures in the Israel/Palestine context was highlighted recently with the arrest of Muhammad Abbas (Abu Abbas) in Iraq by US special forces. The press reported Italy’s announcement that it would seek his extradition to face trial; Saeb Erekat insisted that Palestine Liberation Organization members must not be arrested or prosecuted for acts before the Declaration of Principles, in accordance with the Interim Agreement signed, inter alia, by US President Bill Clinton; the Israeli Supreme Court was reported as having declared Abbas immune from prosecution in Israel in 1998, citing the Interim Agreement, while a radio interview with an Israeli spokesman appeared to suggest that subsequent acts on his part might change his status; and as for the US, while the Justice Department was reported as saying it had no grounds on which to seek his extradition since Washington had dropped a warrant for his arrest, a State Department official was quoted by Reuters as saying ‘that agreement only concerned arrangements between Israel and the Palestinian Authority’ and ‘does not apply to the legal status of persons detained in a third country’. The Guardian, Apr. 16, 2003; and Richard Norton-Taylor and Conal Urquhart, ‘Abbas: US trophy or reformed terrorist?’ The Guardian, Apr. 17, 2003.
'evidence that the demands of international law for accountability have increasingly shaped domestic initiatives such as the establishment of truth commissions'. In a comparison of fifteen truth commissions written in 1994, Priscilla Hayner observes that 'prosecutions are rare after a truth commission report', although her reference is explicitly to prosecutions in the national legal system. In South Africa, Catherine Jenkins notes the case made for the application of a model of restorative justice, which included a provision for amnesty in the post-amble of the Interim Constitution and the Promotion of National Unity and Reconciliation Act (No. 87 of 1995) establishing the Truth and Reconciliation Commission. According to Jenkins, the restorative justice concept was identified 'as a potential means of reconciling the political imperatives of new nationhood with the demands of human rights norms and the more traditional concept of retributive justice'. Also writing on South Africa, David Crocker describes restorative justice as 'rehabilitating perpetrators and victims and (re)establishing relationships based on equal concern and respect'. Alex Boraine describes the TRC as a 'third way' between the choices of a blanket amnesty and criminal prosecutions of perpetrators of gross human rights violations. Among the elements that Jenkins (writing in 2000) regards as strengths in the system as set up by the Act were the potential for the disclosure and dissemination of information about violations (the need for ‘the truth’), including the public and dignified space to be given to victims to tell their truths, the expectation that amnesty would involve an acknowledgment of wrong-doing on the part of the wrongdoers, the potential for achieving moral and social (if not legal) accountability, the requirement that the TRC ‘make recommendations for reparation measures for victims’ and the combined potential of many of these elements for individual and society reconciliation and the building of a culture of human rights. Many of these elements are included in the ‘core content’ of the concept of reparations as outlined below, a concept with critical

49 Bell, supra n. 1, 272.


51 Jenkins, supra n. 48, 374.


53 Boraine, supra n. 20, 143.

54 Jenkins, supra n. 48, 373-6. Compare the evaluations of the ‘unique features’ of the South African model in, inter alia, Boraine, supra n. 20; Crocker, supra n. 52 (looking at it as a process of transitional justice); and Martha Minow, ‘The Hope for Healing: What Can Truth Commissions Do?’, in Rotberg and Thompson (eds.), supra n. 52, 235-60.
significance for Palestinian refugees in its inclusion of restitution. It might be noted here that in specific regard to the *Nakba*, Karma Nabulsi and Ilan Pappé have called for mechanisms to ‘encourage the Israeli people to learn about their own past’ and observed that ‘we can all look to South Africa for a practical model’:

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

An early evaluation of the practice (not the principle) of the TRC56 is consolidated in a later article where Jenkins reviews the experience of the South African TRC in light of the approval by the National Council of East Timor of a draft regulation by the United Nations Transitional Administration for East Timor to establish a Commission for Reception, Truth and Reconciliation in East Timor57, with a mandate, *inter alia*, of

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

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

56 Jenkins, *supra* n. 48, 376-86.
58 *Id.*, 234.
While we believe in and promote reconciliation, the people of East Timor are crying out for justice against the perpetrators of the horrendous crimes committed during the Indonesian occupation. Without justice, the brokenness continues.\(^59\)

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

Away from the experience of the TRC, a ‘titanic struggle’ over land restitution and property rights in South Africa preceded agreement, in the Interim Constitution, on ‘a limited right to restitution under the rubric of the fundamental right to equality’.\(^62\) The subsequent Restitution of Land Rights Act (No. 22 of 1994), discussed by Monty Roodt in chapter 6, allowed for restitution claims dating back to 1913, with a wide definition of a ‘right in land’ and a provision ‘that direct descendants of the dispossessed (and not merely the dispossessed themselves) would be entitled to enforce restitution of a right in land’.\(^63\) Issues of current private ownership, the history of the dispossession, ‘the uses to which the land is being put’, ‘the desirability of avoiding major social disruption’, whether restoration would be ‘just and equitable’, the designation of a piece of alternative land from state ownership, or the payment of compensation in lieu thereof were among matters for consideration by the Land Claims Court\(^64\); claims for restitution were to be lodged by the last day of 1998.

Jenkins’ overview of the process reveals problems related to the length of time it was taking to settle the thousands of claims, the reduction in value of compensation awards and a move away from land restoration in urban areas.


\(^{60}\) Id.

\(^{61}\) Id., 246.


\(^{63}\) Id., 453.

\(^{64}\) Id., 453-4.
Land restitution, once perceived as an essential part of redressing the injustices of the *apartheid* past and the suffering caused by forced removals, has come to be seen as an expensive millstone around the neck of the government.\(^{65}\)

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

Jenkins also suggests that the international community consider ways in which ‘reparation for victims can be partly funded by the international community’\(^{67}\), in the context of the effort at the UN to develop the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*\(^{68}\). The *Basic Principles* explicitly adopt a ‘victim-oriented point of departure’ and include

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\(^{65}\) *Id.*, 456.

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

\(^{67}\) *Id.*, 483

\(^{68}\) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by GA Res. 60/147, UN Doc. A/RES/60/147 (2005). In a process that began in 1989, the first set of draft guidelines was drawn up by Theo van Boven in 1993 (UN Doc. E/CN.4/Sub.2/1993/8) and according to Mona Rishmawi ‘acquired a life of their own’. Mona Rishmawi, ‘The History of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims and Violations of International Human Rights and Humanitarian Law’, presentation to the NGO Parallel Meeting of the 59th session of the UN Commission on Human Rights, Apr. 8, 2003. Jenkins describes the draft Basic Principles as ‘an attempt to codify the existing obligations of states in respect of remedies and reparation, as well as to indicate emerging norms and existing (non-binding) standards’. Jenkins, *supra* n. 62, 439. After circulation among states, intergovernmental and non-governmental organizations, the Commission on Human Rights appointed Cherif Bassiouni to prepare a revised version, which was submitted in 2000 (UN Doc. E/CN.4/2000/62) and in its turn circulated for comment. A consultative meeting held in Geneva in the summer of 2002 by the Office of the High Commissioner for Human Rights and reported to the Commission on Human Rights in April 2003 (UN Doc. E/CN.4/2003/63).
both retributive and restorative approaches to justice. Specifically on reparation, they hold that states ‘should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’. They continue:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

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

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69 \text{‘In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.’ Basic Principles, id., para. 4.}
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70 \text{In a background briefing on the Draft Basic Principles, a coalition of international human rights organizations locate the principle of reparation in ‘restorative justice theory, an ancient way of thinking about justice that goes beyond retribution’. They continue: ‘Reparation goes to the very heart of human protection—it has been recognized as a vital process in the acknowledgment of the wrong to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law’. Redress, OMCT, Amnesty International et al., ‘The Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law’, <http://www.alrc.net/doc/mainfile.php/documents/115/> (accessed May 16, 2003).}
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71 \text{Basic Principles, supra n. 68, para. 18. Jenkins notes that ‘the Principles use the word “shall” for existing international obligations and the word “should” for emerging norms and existing standards’. (emphasis in original) Jenkins, supra n. 62, 439, n. 118.}
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72 \text{Basic Principles, supra n. 68, para. 19.}
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73 \text{For a complete list see id., paras. 22-3.}
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74 \text{Nabulsi and Pappé, supra n. 55.}
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heard from Palestinian refugees in the camps of Jordan and Lebanon:

The British Government might consider it particularly appropriate, at this time, to make some verbal gesture of acknowledgment of the historical responsibility that Britain bears for the creation of the refugee crisis that continues today. Although symbolic, this could help the Palestinian people towards a future, as well as showing the way that others might also acknowledge their roles in the creation of this catastrophe.\footnote{Joint Parliamentary Middle East Councils Commission of Enquiry—Palestinian Refugees, \textit{Right of Return} (London: Labour Middle East Council, 2001), 27.}

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

\begin{quote}
\textit{Restitutio in integrum} … aims, as far as possible, at eliminating the consequences of the illegality associated with particular acts such as population transfer and the implantation of settlers. A crucial aspect of this involves the right to return to the homeland or the place of original occupation in order to restore the status quo and to reverse the consequences of illegality. This right is recognized, for example, in relation to Palestinians, in the Dayton Agreement and Agreement on ‘Deported Peoples’ of the Commonwealth of Independent States; it establishes a duty of the part of the State of origin to facilitate the return of expelled populations.\footnote{A. S. al-Khasawneh and R. Hatano, \textit{The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers}, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45\textsuperscript{th} Sess., Aug. 2-27, 1993, Item 8 of the provisional agenda, UN Doc. E/CN.4/Sub.2/1993/17 (1993), para. 60.}
\end{quote}

He notes that this remedy ‘would also involve the payment of compensation to the victims and survivors of population transfers’.\footnote{\textit{Id.}, para. 61.} The following year, the Sub-Commission on Prevention of Discrimination and Protection of Minorities reaffirmed the ‘right of all refugees … and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin’.\footnote{Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1998/26, UN Doc. E/CN.4/SUB.2/RES/1998/26 (1998).} In the preamble to the resolution the Sub-Commission recognized:

That the right of refugees and internally displaced persons to return freely to their homes and places of habitual residence in safety and security forms an
indispensable element of national reconciliation and reconstruction and that the recognition of such rights should be included within peace agreements ending armed conflicts.\textsuperscript{79}

The Dayton Agreement contains extensive provisions for the rights of refugees and displaced persons in its Annex 7, including the concept of safe return (the conditions to which they are returning), and property rights. Paul Prettitore’s chapter on housing and property restitution in Bosnia and Herzegovina, goes into considerable detail on the implementation of the provisions on property restitution as well as providing an overview of property repossession under different international law regimes.\textsuperscript{80} A number of points of comparative interest arise from his evaluation, including his assessment that the process engaged by the Property Law Implementation Plan\textsuperscript{81} aiming at full implementation of the property laws ‘became truly effective when it moved from a political process driven by political forces to a rule of law process based on individual rights’.\textsuperscript{82} He also points up the advantages of an administrative rather than a judicial process for claims, including speedier resolution.\textsuperscript{83} As regards compensation, although refugees and displaced persons were recognized in the Dayton Peace Agreement as having the right to compensation in cases where their property could not be restored, the designated mechanism (the Refugees and Displaced Persons Fund) has not been established (‘no resources were made available’) and ‘in practice compensation did not materialize as envisioned’.\textsuperscript{84} Once again, the issue of resources imposes itself on the implementation of recognized rights.

Compared to Dayton, the provisions regarding refugees in the Israeli-Palestinian agreements so far concluded are minimal; indeed it is part of the deal so far that the refugee issue is postponed till the final status agreement. Bell points out that there are in fact references in the Declaration of Principles to agreements to be made on admitting ‘persons displaced from the West Bank and Gaza Strip in 1967’ (not 1948 refugees) and the establishment of the multilateral Refugee Working Group.\textsuperscript{85} However, where Bell’s comparison informs in this regard is the similarity

\textsuperscript{79} Id.


\textsuperscript{82} See, in this collection, Chapter 5, ‘The Right to Housing and Property Restitution in Bosnia and Herzegovina’, pp. 115-154.

\textsuperscript{83} Id., p. 142.

\textsuperscript{84} Id., p. 150.

\textsuperscript{85} Bell, supra n. 1, 248-50.
she finds in that in both the Dayton Agreement and the existing Israeli-Palestinian agreements, the ‘meta-bargain failed to resolve the central conflict’ which has been relocated, in part, to issues of return and access to land. In Bosnia and Herzegovina, she underlines ‘the significance of return for the self-determination deal through the assumption that large-scale returns would change the power balances and territorial realities of the separate Entities and unitary state structure agreed to in the Dayton Peace Agreement’ and attributes to this what she considers (on figures from 1999) as a failure of implementation of Dayton’s terms.86

Prettitore provides updated figures of nearly a million returnees to pre-war homes and an up-beat assessment of ‘strong progress’ on property repossession. However, it is clear that much of the progress has been achieved not through the will and choice of the Entities and their agents but through the continuing involvement and pressure of the international community, including direct intervention in matters of domestic legislation and implementation by the Office of the High Representative, and thus that Bell’s assessment of the failure of the meta-bargain between the parties likely remains valid. The extent to which the international community was involved and remains involved in Dayton, and the role of third parties in securing Oslo is a closely related point of comparison that Bell makes between the peace deals in Bosnia and Herzegovina and Israel/Palestine, to be returned to shortly in this paper.

Summarizing ‘pragmatic peace’ arguments in response to the ‘refugee-specific “just peace” thesis’ advanced by the UNHCR, she states:

In short, return of refugees and land justice can begin to rewrite the territorial compromise at the heart of the deal, and this crucially affects bargaining over them. Even if return is provided for in a peace agreement, implementation will not necessarily follow. If return of refugees is a signifier of peace, then where the deal has failed to resolve the conflict (rather than just the violence), the conflict will continue to be waged not least through whether, how, and to where refugees and displaced persons are returned.87

The legal basis of the established right to return of Palestinian refugees is not the subject of this paper.88 However, it is worth noting that currently, the negotiating dynamics of the peace process, and the failure by the sponsoring third parties to affirm the right to return in their vision of a ‘realistic peace’, certainly

86 Id., 252.
87 Id., 256.
appear to approach Bell’s scenario, where ‘the “right of return” increasingly becomes subject to barter, effectively overwriting a plethora of General Assembly resolutions’\(^89\), as well as, it might be added, strong positions in international human rights law\(^90\).

In other conflicts, the Security Council as well as the General Assembly continues to reaffirm the right to return, and indeed the ‘right to return to one’s home’. In his 2002 report on *The Return of Refugees’ or Displaced Persons’ Properties*\(^91\), Paulo Sérgio Pinheiro cites the Security Council in recent years as having reaffirmed this principle ‘in resolutions addressing displacement in numerous countries and regions, including Abkhazia and the Republic of Georgia, Azerbaijan, Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia and Tajikistan’\(^92\). The General Assembly he cites as having ‘reaffirmed or recognized the right to return to one’s home in resolutions concerning Algeria, Cyprus, Palestine/Israel and Rwanda’.\(^93\) In a later paragraph he considers peace agreements:

> The right to housing and property restitution has also been recognized and utilized in several agreements designed to end conflict, including those dealing with the return of displaced persons in post-conflict situations in Bosnia and Herzegovina, Cambodia, Guatemala, Kosovo, Mozambique and Rwanda.\(^94\)

As for the remedy of compensation:

> ...the overwhelming consensus regarding the remedies of restitution and compensation is that compensation should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution.\(^95\)

Having found the rights established and recognized, Pinheiro’s conclusion is that what needs careful study is the ‘disjunction between existing standards and the reality

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89 Bell, *supra* n. 1, 258.
91 *The Return of Refugees’ or Displaced Persons’ Property*, *supra* n. 80.
92 *Id.*, para. 24 (references to resolutions not reproduced here).
93 *Id.*, para. 25.
94 *Id.*, para. 40.
95 *Id.*, para. 57.
on the ground’. Khasawneh’s earlier report similarly raised the contrast between the recognition of *restitutio in integrum* as the remedy for population transfer, and the fact that this remedy may not be achievable in practice, as an illustration of the dissonance (or antagonism, as he puts it) between principle and pragmatism in negotiating peace:

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

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

For a final comparison, illustrating also the involvement of ‘unofficial’ or civil society actors and their relationship with the guarantees offered by international law, we can take the Cyprus conflict. In recent developments, although no agreement has been reached at the time of writing, the parameters of the particular matters to which failure to reach agreement were attributed—publicly at least—would fit well with Bell’s arguments on the meta-bargain. The UN-sponsored Set of Ideas on an

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96 *Id.*, para. 29. In 2003 the Commission on Human Rights endorsed the decision of the Sub-Commission of the Promotion and Protection of Human Rights (Res. 2002/7, UN Doc. E/CN.4/SUB.2/RES/2002/7) to appoint Pinheiro as Special Rapporteur with the task of preparing a comprehensive study on the subject. Decision 2003/109, UN Doc. E/CN.4/2003/2.11/Add.6 (2003). In the current report (paras. 42-55) he examines a range of impediments and challenges to implementing the right, including issues of secondary occupation (including by other displaced persons), laws on abandoned property, and the destruction of property registration and records.

97 *The Return of Refugees’ or Displaced Persons’ Property*, supra n. 80, para. 63.
Overall Framework Agreement on Cyprus (1992)\textsuperscript{98} promotes reunification of the island along the broad lines of two federated states, ‘bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects’, with detailed ideas for the federal constitution and references to agreements and arrangements yet to be made between the parties in respect of issues such as territorial adjustments and displaced persons.\textsuperscript{99} Under the original text it appears that the ‘option to return’ may be ‘selected’ only by ‘current permanent residents of Cyprus who at the time of displacement owned their permanent residence in the federated state administered by the other community and who wish to resume their permanent residence at that location’. Those who were renting would be ‘given priority under the freedom of settlement arrangements’. Other claims (including of heirs) would appear to fall to claims for compensation, which would be funded from the sale of properties transferred ‘on a global communal basis’ between agencies acting for the two communities; other governments and organizations would be invited to contribute to this fund.\textsuperscript{100}

The initiatives of civil society actors brought the property-related grievances of Greek Cypriots to the European Court of Human Rights. In 1989, Mrs Titina Loizidou joined a march organized by the Women Walk Home Movement, seeking to assert the right of Greek Cypriot refugees to return to homes they had left in 1974 when Turkish troops occupied the north of the island. Prevented from crossing by Turkish troops and then arrested by Turkish Cypriot police, she took her claim to the Court, which issued two rulings on the case.\textsuperscript{101} In the first (1996) the ECtHR found for the claimant, declining to recognize an ‘irreversible expropriation’ of property in the north and holding that the denial of Mrs Loizidou’s access to her property ‘and consequent loss of control thereof’ was ‘imputable to Turkey’. Arguing against the claim, the Turkish government argued, \textit{inter alia}, that ruling on such matters

\begin{footnotes}
\item[99] The Security Council has endorsed this idea of ‘a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities … in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession’. \textit{See, e.g.}, SC Res. 649, UN SCOR, 2909\textsuperscript{th} mtg., UN Doc. S/RES/649 (1990); SC Res. 716, UN SCOR, 3013\textsuperscript{th} mtg., UN Doc. S/RES/716 (1991); SC Res. 750, UN SCOR, 3067\textsuperscript{th} mtg., UN Doc. S/RES/750 (1992); and SC Res. 774, UN SCOR, 3109\textsuperscript{th} mtg., UN Doc. S/RES/774 (1992).
\item[100] Set of Ideas on an Overall Framework Agreement on Cyprus, \textit{supra} n. 98, paras. 77-80.
\item[101] \textit{See, Loizidou v Turkey} (merits)—Rep. 1996-VI, fasc. 26 (18.12.96) and \textit{Loizidou v Turkey} (Article 50)—Rep. 1998-VI, fasc. 81 (28.7.98).
\end{footnotes}
‘would undermine the inter communal talks, which were the only appropriate way of resolving this problem’. The ECtHR found that this could not provide a justification under the European Convention. In the second decision, in 1998, the ECtHR awarded Mrs Loizidou compensation for pecuniary and non-pecuniary damage against the Turkish Government. The latter again made the case that ‘the question of property rights and reciprocal compensation is the very crux of the conflict in Cyprus’ and ‘can only be settled through negotiations and on the already agreed principles of bizonality and bi-communality’.103

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

Turkey has claimed that the decision could only be implemented within the framework of a Turkish Cypriot proposal for a “Joint Property Claims Commission” which envisages compulsory acquisition of Greek Cypriot and Turkish Cypriot properties against compensation to be provided, eventually, from various sources including contributions from third States and international organizations.104

The experts considered factual situations of ‘forcible mass transfer or enforced displacement’ under different provisions of international law and advised the Republic of Cyprus that it ‘could not, consistently with its international obligations,
accept or implement the proposal for a Joint Property Claims Commission. The legal and political battles over the land issue, mostly projected by the different sides of the argument as involving either individual or collective rights, were raised again at the beginning of 2003 when the UN Secretary-General involved himself in particularly intensive efforts to encourage the parties to reach agreement on a settlement before Cyprus became a member of the European Union in April. The effort failed at the last minute; the Guardian reported that ‘the talks stumbled over Turkish insistence that their breakaway Cypriot state win full recognition, and demands by the Greeks for the right of refugees to return to homes in northern Cyprus that they left 29 years ago’.

The intense and direct involvement of the UN Secretary-General in these efforts, and the UN role in the Set of Ideas, may suggest that Cyprus has features of the ‘models’ of Bosnia and Herzegovina and Israel/Palestine, in Bell’s scheme, although the mass support reported as being shown for the reunification plan by Turkish Cypriots introduces a different dynamic. In her comparison of the peace agreements in South Africa, Northern Ireland, Bosnia and Herzegovina and Israel/Palestine, Bell observes that a superficial glance at the human rights provisions ‘would suggest (rather superficially) that the more internal a deal, the greater its human rights sophistication; and the more international, the less human-rights-friendly it is’. She puts this ‘apparent inverse relationship between international involvement and effective human rights provision’ down to the pressures and motivations that are driving the need for a deal, and thus the extent to which shared interests perceived by the parties to the deal can be assisted through the language and content of human rights. She also notes, however, that there is an explanation in

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106 Id., 14.
107 Failing agreement and the entry of Cyprus as a federated state, European Union laws will apply only to the territory of the Republic of Cyprus, to be extended to the Turkish-controlled north of the island after reunification. The Guardian, Mar. 11, 2003.
108 Id. Shortly after Cyprus’ entry into the European Union however, in what was seen as something of a surprise move, Turkish Cypriot leader Rauf Denktash announced the easing of travel restrictions and hundreds of Cypriots flowed north and south over the UN-patrolled ‘Green Line’. Angelique Chrisafis reports Greek Cypriots ‘clutching branches of trees on their return from visiting houses they had not seen for thirty years …’ The Guardian, May 3, 2003. Chrisafis reported the ‘wave of fraternization’ as not free of misunderstandings: ‘One Turkish Cypriot woman reportedly died of a heart attack when Greek Cypriots visited her house saying it was theirs. They were only there to gather plant cuttings, but she feared she would be made homeless. Two Greek Cypriots are due in court after assaulting a Turkish Cypriot family for knocking on their door for the same reason.’
109 The Economist reported that some 70,000 people (‘nearly half the North’s population’) demonstrated in favor of EU entry. The Economist, Mar. 8, 2003.
110 Bell, supra n. 1, 231.
...the more mundane but related question of who was at the negotiations. Internally mediated processes tend to have mechanisms for including civil society, while internationally mediated processes working out of traditional international relations and violence-focused paradigms do not. Internally driven processes by their nature must preserve the link between politicians and their constituents. Internationally facilitated processes often focus on bringing together those who have directly waged the war, often in secret and isolated locations, while the skills of those who have waged peace ... are left at home.

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

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

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The clarity of international law and morality, as pertaining to Palestinian refugees, is beyond any serious question. It needs to be appreciated that the obstacles to implementation are exclusively political—the resistance of Israel, and the unwillingness of the international community, especially the Western liberal democracies, to exert significant pressure in support of these Palestinian refugee rights. It is important to grasp the depth of Israeli resistance, which is formulated in apocalyptic language by those in the mainstream, and even by those who situate themselves within the dwindling Israeli peace camp. On a recent visit to Jerusalem, I heard Israelis say over and again that it would be “suicide” for Israel to admit a Palestinian right of return, that no country could be expected to do that. A perceptive Israeli intellectual told me that the reason Israel was uncomfortable with any mention of human rights was that it inevitably led to the refugee issue, with a legal and moral logic that generated an unacceptable political outcome. How to overcome this abyss is a challenge that should haunt the political imagination of all those genuinely committed to finding a just and sustainable reconciliation between Israel and Palestine.\[112\]

Although the future of the Road Map is unclear, it remains the case that at least for the moment there is a ‘rush of events to redefine relations’ also in the Middle East. Looking back on another rush of events after the end of the 1991 Gulf war, producing first Madrid and then Oslo, Palestinian lawyer, human rights activist and writer Raja Shehadeh speaks of the development of a Palestinian ‘legal narrative’ through the efforts of civil society actors, where legal narrative is ‘the way a people tell the story of their right to a land using the symbolic language of law’.\[113\] It has to have consistency and its own internal logic, and the preservation and development of such a narrative, he tells us, ‘is no minor matter’. Despite the clear challenges and dangers of the present time, activities and initiatives in seminars such as these are part of and contribute to that process, preserving and developing the Palestinian legal narrative with a specific focus on the refugees. And again, despite such challenges and dangers, there is arguably more space and resonance afforded internationally (or rather, perhaps, in the civil societies of powerful third party states), to the story told through a legal narrative, now that wider constituencies have been taking moral and political positions on the basis of closely argued statements of international law. Everybody who was in a European or North American state in the lead up to and during the war on Iraq will have their own examples of what appears to have

\[112\] Richard Falk, ‘Preface’ in Right of Return, supra n. 75, 6-8, 6.

been unprecedented public attention to arguments on international law. In Britain, by way of example, the government was obliged under parliamentary and public pressure to disclose the legal advice of its Attorney General, in a ‘startling breach of convention’ aimed at ending speculation that he was being ignored and arguably in at least partial response to a letter from international law academics, and subsequent media coverage and debates. The conclusions of the longest serving Member of Parliament, Tam Dalyell, on British backing for the war on Iraq without proper UN authorization were published in an article entitled ‘Blair, the war criminal’; and more quietly, the deputy legal adviser at the Foreign Office resigned. While this attention to the law did not produce an immediate change in policy, exponents of realpolitik would acknowledge its potential impact in the medium term. And beyond the decision-makers, international law has an immediacy and an audience that makes space for the legal narrative. The legal narrative speaks to justice, and its (re)establishment as a discourse of immediacy and relevance, invested with practical meaning, is one approach to the ‘almost complete divorce between the concept of peace and the concept of justice’ that Bell observes in the text and implementation of the Israeli-Palestinian peace agreements so far concluded.

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


118 Bell, supra n. 1, 203. Supra n. 29 and accompanying text.

119 Nabulsi and Pappé, supra n. 55.
In today’s world, issues of peace and international justice are receiving increasing attention. This chapter examines the relationship between these two concepts—peace and justice—and the impact of prosecution on peacemaking in the short term, and reconciliation in the long term.

The importance of prosecuting crimes after a repressive regime or violent conflict, and the impact it has on peacemaking and reconciliation, cannot be discussed without reference to other approaches to reconciliation. In the last century, the international community has moved from accepting amnesty laws as the standard way to secure peace, to considering punishment before national or international courts as a preferred solution for achieving justice and reconciliation. Meanwhile, a third alternative is emerging with characteristics of both—the truth commission, or truth and reconciliation commission.

With the internationalization of human rights and humanitarian law, the international community has demonstrated its repudiation of human rights abuses, and its preference for prosecuting the perpetrators of crimes over granting them...
amnesty.¹ This preference for prosecution is reflected in legal instruments, such as the Genocide Convention of 1948², the Geneva Conventions of 1949³, as well as in international institutions, such as the Inter-American Court and its Commission on Human Rights, and the United Nations Human Rights Committee, among others.

Among scholars, however, there is vigorous debate about the most effective way to achieve peace and reconciliation, suggesting a dichotomy between judicial and non-judicial approaches, or what some authors distinguish as retributive and reconciliatory justice.⁴

This chapter adopts an approach to this debate in the context of contemporary international law. The first part presents an overview of the different judicial and non-judicial approaches to address past conflict, as well as an analysis of their contribution to peace and reconciliation in several different cases. The second part examines and assesses the role of the International Criminal Tribunal for the former Yugoslavia in achieving peace and reconciliation in the Balkans.

¹ See, Mary Margaret Penrose, ‘It’s Good to Be the King!: Prosecuting Heads of State and Former Heads of State under International Law’, Columbia Journal of Transnational Law 39/1 (2000), 193-220. Penrose advocates the enactment of prosecutorial rules and urges the international community and states in particular to take the necessary steps to try the perpetrators of crimes. See also, David Scheffer (US Ambassador for War Crimes Issues), Address at Dartmouth College, Oct. 23, 1998 <http://amicc.org/docs/Scheffer10_23_98.pdf> (accessed Dec. 21, 2006). Scheffer states that ‘As the most powerful nation committed to the rule of law, we [the US] have a responsibility to confront these assaults on humankind. One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice’.


APPROACHES TO RECONCILIATION AND THEIR PRACTICAL APPLICATION

In the decades immediately following World War II, human rights advocates contributed to three important innovations: the establishment of International Military Tribunal trials in Nuremberg and Tokyo, the creation of the United Nations and the expansion of intergovernmental and nongovernmental organizations. More recent mechanisms for the promotion and protection of human rights include ad hoc international tribunals (such as those for the former Yugoslavia and Rwanda), truth commissions and the permanent International Criminal Court.

As shown throughout this chapter, each of these mechanisms has been applied in very different situations and in conflicts with different characteristics, but all of them aim to deal with the past and to prevent the recurrence of conflict and serious crimes. Among these approaches, it is possible to distinguish between non-judicial and judicial mechanisms.

Non-judicial approaches: amnesty laws and truth commissions

The traditional approach to the intersection of peace and justice was the amnesty law, by which outgoing authorities granted themselves, or negotiated the granting of amnesty. Not surprisingly, this mechanism was frequently abused by repressive military regimes or other regimes seeking impunity for their crimes before relinquishing power to successor governments. However, it can be argued that at certain points in history, amnesty was the only means of ensuring a smooth transition from repressive regime to democratic rule, and thus may have represented the best option available to victims as well as perpetrators.\(^5\)

The recent trend in international law, however, has been to reject amnesty laws. For example, the UN Commission on Human Rights and its Sub-Commission for the Prevention of Discrimination and Protection of Minorities have concluded that amnesty is a major reason for continuing human rights violations throughout the world.\(^6\) The Inter-American Court and its Commission on Human Rights have also held that amnesties granted by several Latin American countries are incompatible with the American Convention on Human Rights.\(^7\) However, a compromise between the international demand for prosecution of international crimes and the national

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\(^5\) Note, for instance, post-Franco Spain or post-Pinochet Chile.


appeal for a political compromise involving amnesty can be achieved, in some cases, by recognizing a distinction between permissible and non-permissible amnesties, and by granting international acceptance only to the former.\(^8\)

In recent decades, and after facing atrocities such as those committed in Chile, South Africa, Uganda and Cambodia, human rights enforcement has required the development of creative alternatives. Among the most remarkable is the development of truth commissions to investigate and document torture, murder and other human rights violations that oppressive regimes would otherwise deny and cover up. This approach constitutes a new form of dealing with the past, located between amnesty laws and international or national tribunals, and is sometimes employed together with either of these two mechanisms. As the case studies in the next section illustrate, truth commissions have proven to be an effective way to address the past and achieve reconciliation. The best-known case, and perhaps most successful, is South Africa.

**Chile**

Chile is an example of non-permissible amnesty, although the case is more complex than such a simple characterization suggests.\(^9\) The way that Chileans have dealt with the atrocities committed during the regime of Augusto Pinochet (1973-1990) can be divided into two phases—a ‘political phase’ and a ‘judicial phase’.

The executive branch played a dominant role during the political phase, beginning with the first successor civilian government under President Patricio Aylwin Azócar. It determined how the new democracy would deal with the past, and what limits the government sought (or was forced) to impose in prosecuting the perpetrators of crimes committed by the Pinochet regime.

Government efforts to uncover the truth about past human rights violations led to the establishment of a Truth and Reconciliation Commission in 1990. After nine months of work the Commission published its report (named the Retting Report after the Commission’s President). The Commission’s findings were broadcast nationwide.\(^10\) In 1992 the government established a National Reparation and

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\(^8\) See, the comparison between the experiences of Chile and South Africa noted in Dugard, *supra* n. 4, 1001-15.


Reconciliation Corporation to provide compensation for the victims of human rights violations. It also recognized the ‘inalienable right’ of relatives to find missing family members.

Other measures taken by the government during this phase focused on justice and reform of the constitution, the legal system and the military. However, these measures failed, primarily due to the power that the military still retained in Chilean institutions. As Barahona de Brito points out,

...of all the transitions in Latin America, Chile’s was arguably the most restricted, because it was there that the military retained the highest degree of power and legitimacy. The Constitution of 1980 protected the military. The Pinochet dictatorship had succeeded uniquely in institutionalizing and legitimating itself through the Constitution, radically transforming the juridical and ideological foundations of the political system, and finally ensuring a step-by-step passage to a “protected democracy”.

The strength of right-wing political forces in the legislature further constrained government efforts to address the past, blocking important constitutional reforms necessary for the improvement of human rights policies. In addition, terrorist acts by the Manuel Rodriguez Patriotic Front (FPMR) at this stage helped to legitimize the anti-subversive activities of the military.

The election of President Eduardo Frei in 1993 marked the beginning of the second (judicial) phase. During this period atrocities committed during the Pinochet regime acquired tremendous international attention thanks to the work of human rights organizations, political party activists and victims’ organizations. In 1997, the Supreme Court applied the Geneva Conventions for the first time since 1973, giving primacy to international law over the amnesty law and breaking the sanctity of the amnesty mechanisms granting impunity.

In January 2000 Pinochet’s arrest in London renewed civil-military tensions in Chile and highlighted one of the most important considerations in the Chilean case—the tension between peace and justice. The British House of Lords issued two judgments considered to be progressive since they refused to accord immunity to a former head of state in respect of international crimes. In the end, however, the judges were influenced by the argument, strongly advanced by the government of Chile, that the extradition of Pinochet to Spain would endanger the fragile peace between the army and the civilian government in the country. Yet, Chileans viewed the challenge to General Pinochet’s immunity as a decidedly positive development

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11 Barahona de Brito, supra n. 9, 154.
12 Dugard, supra n. 4, 1008.
for democracy and justice, and one which helped to deconstruct the fear that had immobilized the political system.

Although recent developments are encouraging, the original amnesty approach used in Chile has created many lasting problems. As Barahona de Brito concludes:

...the struggle for justice in Chile does not have a clear path ahead; but it is far from over. Chileans have fought to give expression to their passion for dealing with the past since 1973. In pursuit of that aim since 1990, they have had to wrestle with a tendency to premature “reconciliation”, a euphemism for the acceptance of a limited democracy with authoritarian enclaves. They have also had to confront real obstacles in the form of a powerful military and right wing, as well as legal limitations of a kind not found in any other democratized country of the region. The law has been both an obstacle and a source of new opportunities.

Guatemala

In contrast to the Chilean case, the shift from authoritarian regime to elected civilian government in Guatemala was not a true indicator of democratic transition. The 1985 military-controlled elections were followed by a period of gross human rights violations, consolidation of military power and elimination of opposition movements. Ten years passed before Guatemala took concrete steps toward peace and the possibility of reconciliation.

It is important to note that in the Guatemalan case, the circumstances under which the peace negotiations were conducted did not favor the establishment of a commission with a strong mandate to investigate the past. Although the balance of power between the military and civilian sectors of Guatemalan society had shifted in the period leading up to the peace agreements, the military remained the most organized and powerful of the two sides. As a consequence, provisions in the December 1996 agreement for demilitarization and institutional reform were very weak.

Due to the efforts of the Catholic Church and human rights groups, however, an agreement for a UN-sponsored Historical Clarification Commission was signed in June 1994. Despite its weak mandate, the Commission’s recommendations

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13 On 14 September 2005 the Chilean Supreme Court denied Pinochet’s request for immunity for his presumed responsibility in the disappearance of 119 people during Operation Colombo in 1975.

14 Barahona de Brito, supra n. 9, 175.

included programs for compensation of victims (including psychological and economic assistance, etc.), investigation and exhumation of clandestine graves and a commission to search for missing children among others. The Human Rights Office of the Catholic Church also published an extensive report in 1998 on human rights violations during the armed conflict. The report included names of those individuals responsible for violations. That transparency was likely the reason why one of its co-authors was killed a few days after the publication of the report.

The process of dealing with past atrocities in Guatemala has been led primarily by civil society organizations independent from the revolutionary left and supported by numerous international NGOs as well as the UN mission in the country. These groups have frequently challenged military power and impunity in the process of uncovering the truth and securing justice for the victims of human rights violations. In order to achieve genuine democracy, however, these activities must be accompanied by a willingness of the elite to submit to the rule of law and to abandon their historic privileges. Although the truth commission and compensation mechanisms in Guatemala contributed to the reconciliation process, the lack of judicial sanctions has ensured impunity for the military and civilian elites that still remain in the country, thus obstructing any real democratic transition.

NGOs and civil society organizations have also been at the forefront of more recent judicial initiatives. In December 1999, Nobel Peace Prize recipient, Rigoberta Menchú, initiated proceedings before the Spanish National Criminal Court, denouncing crimes committed in Guatemala between 1978 and 1986, including genocide, torture, terrorism, murder and unlawful detentions. Even though the Spanish National Criminal Court initially ruled that Spain did not have jurisdiction to try the crimes, the Spanish Constitutional Court reversed previous rulings in October 2005, deciding that Spain would investigate without restriction all crimes related to genocide, terrorism and torture committed in Guatemala between 1978 and 1986.¹⁶

Northern Ireland

In Northern Ireland, distrust among the parties is steeped in almost eight hundred years of conflict. Discrimination and segregation of Catholics, particularly since

¹⁶ This ruling constitutes a radical change in Spanish’s position in relation to ‘universal jurisdiction’. The Constitutional Court, while recognizing that Guatemala has primacy to prosecute the crimes, decided that Spain shall investigate atrocious crimes, such as genocide, without having to show that Guatemala has failed to do so. The Constitutional Court outlined that the purpose of the Genocide Convention is to avoid impunity for those responsible of such crimes.
Ireland’s independence in 1921, led to an escalation of violence, including the terrorist campaign of the Irish Republican Army.

The 1994 cease-fires and the involvement of the political parties associated with the paramilitaries led to the Belfast (Good Friday) Agreement of April 1998\(^{17}\), which contemplated the establishment of a devolved assembly and executive in Northern Ireland. Demilitarization and decommissioning of explosives and weapons was a prerequisite for the implementation of the agreement. The peacemaking phase envisaged the creation of political mechanisms that would contribute to the reconciliation process. The agreement itself, however, did not address prosecution or amnesty. In fact, the involvement of ex-paramilitaries who were still loyal to their ideals, but who had abandoned violence, was very important in promoting dialogue between local communities.

Commentators note that the incorporation of different approaches to justice, co-existence and reconciliation contributed to the signing of the agreement. According to Mari Fitzduff, equality was achieved primarily through a series of legislative reforms to address existing inequalities, resulting in several commissions and other institutions dealing with unfair employment policies, and social and economic inequalities. Moreover, a new Human Rights Commission and an Equality Commission for Northern Ireland were created as part of the 1998 agreement.\(^{18}\)

The Northern Ireland case is included here because, as McCaughey notes,

...what was achieved by the Good Friday Agreement of 10 April 1998 was not forgiveness, much less reconciliation. What was achieved was an agreement to disagree, a \textit{modus vivendi}. In a situation such as existed in Northern Ireland, that is an enormous step forward, however modest it may sound to outsiders.\(^{19}\)

Indeed, coexistence is a prelude to enlarging peace, and peacemaking is a precondition and a necessary requirement for any form of reconciliation. In old and complicated conflicts, such as this one or the Israeli-Palestinian conflict, this may already be a considerable achievement.


South Africa

One of the most relevant examples of permissible amnesties is South Africa’s Truth and Reconciliation Commission, created in 1995 by the first democratically elected parliament as a consequence of the peaceful transition from *apartheid*. It is important to point out that the TRC was a compromise (launching a process that would grant amnesty to participants in the conflict) included during the peace negotiations. In South Africa, unlike the cases considered above, there was clear political will from all sides of the conflict to include a mechanism for national reconciliation in the peacemaking stage. As Villa-Vicencio notes, ‘ironically, it was the forced compromise between the forces of liberation and the forces of *apartheid* that provided an alternative way to dealing with the atrocities of the past’.

The TRC was a transitional mechanism designed, in the words of South Africa’s Interim Constitution (Act. No. 200 of 1993),

...[to] provide a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.\(^\text{21}\)

The TRC was comprised of amnesty, victim testimony and reparation and rehabilitation committees. The granting of amnesty for politically motivated crimes was conditioned on full disclosure of the facts in a public hearing under cross-examination; remorse was not a requirement. Those who failed to obtain amnesty from the committee, or who failed to apply for it, faced prosecution. In other words, while the truth and reconciliation process in South Africa did not favor impunity, amnesty was conditioned on certain requirements.

Although the TRC did not seek retributive justice, it had a positive effect on the victims and succeeded, in large part, to generate consensus among South Africans in support of a pluralistic society. Montville points out that the opportunity provided to victims to tell their stories usually had a cathartic effect. These stories became part of the official public record of the state. He argues that storytelling also


penetrated the defenses of the other side that had resisted broadside accusations of wrongdoing.\textsuperscript{22}

The Commission nevertheless had its shortcomings. It failed in a number of ways to meet the needs of victims, and the government failed to respond to the Commission’s recommendations concerning reparations. Moreover, the TRC did not adjudicate legal culpability for those who either supported or enabled the apartheid regime. Nevertheless, the TRC is still seen as a successful transitional mechanism to deal with the past, and it has been referred to in many debates dealing with reconciliation, including those at the ICTY.\textsuperscript{23}

**Judicial approaches for dealing with the past**

Judicial approaches for dealing with the past are employed in different legal environments and comprise different features, but most are characterized by being retributive, and in most cases, although not necessarily, adversarial. Among them it is possible to distinguish between the following:

1. military tribunals, such as Nuremberg and Tokyo;
2. ad hoc tribunals such as the ones created for the former Yugoslavia and Rwanda;
3. national courts (applying the principle of universal jurisdiction) such as Belgium with its case against Ariel Sharon, Canada with its case against Désiré Munyaneza for war crimes committed in Rwanda\textsuperscript{24}, or Spain with its cases prosecuting crimes committed in Chile, Argentina and Guatemala;
4. national courts (prosecuting the perpetrators in their own jurisdictions and under their own judicial system) such as in Chile or Rwanda;
5. special courts created by agreement, such as in Sierra Leone, representing a mixture of national and international law; and
6. the International Court of Justice and the International Criminal Court in The Hague.


\textsuperscript{23} For instance, note below that Alex Boraine, former co-president of the TRC, appeared as a witness before the ICTY, during the proceedings to consider the guilty plea of the defendant Biljana Plavšić.

\textsuperscript{24} Munyaneza was the first person to be charged and convicted under the Canadian Crimes Against Humanity and War Crimes Act of 2000. ‘Quebec court convicts Munyaneza of war crimes in Rwanda’, *CBC News*, May 22, 2009 <http://www.cbc.ca/canada/montreal/story/2009/05/22/quebec-rwanda-war-crimes-guilty.html> (accessed June 2, 2009).
The Holocaust and other atrocities committed during World War II led to the establishment of military tribunals. Although they are highly relevant from a historical point of view, this approach is widely seen today as ‘victor’s justice’ and, therefore, not conducive to reconciliation. Following massive violations of human rights in the former Yugoslavia and in Rwanda, including genocide, the UN Security Council, acting under Chapter VII (threats to international peace and security) of the organization’s Charter, created ad hoc tribunals to assist in the restoration and maintenance of peace in each of the two countries.

The effect on Chilean society of the case against General Pinochet in Spanish courts was considered in the previous section. More recently, the Spanish National Criminal Court sentenced Argentinean General Adolfo Scilingo to a single sentence of 640 years of imprisonment for crimes against humanity in relation to crimes committed during the dictatorship in Argentina (1976-1983). In the Rwandan case, discussed below, national prosecution is complemented by the International Criminal Tribunal for Rwanda. Although different in nature and in procedures, both the ICJ and ICC constitute international fora in which countries can bring their grievances regarding human rights violations. In particular, the recently created International Criminal Court represents the future of prosecution for human rights violations. Two of these many examples—those of Rwanda and Sierra Leone—are discussed below.

Rwanda

The atrocities committed during the Rwandan conflict represent some of the worst ever committed, both for their intensity and for their efficiency and calculated organization. The conflict was the result of fighting between the two main ethnic groups, Hutus and Tutsis, over political power and access to resources and wealth. As Vandeginstein notes: ‘dealing with the past in such a context cannot solely be a judicial issue; it is a political challenge and a challenge for society as a whole.’ He also recognizes that Rwanda has not yet reached a political transition process based

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25 The sentence, rendered on 19 April 2005, constitutes the first of its kind against a high-ranking perpetrator of crimes during the Argentinean dictatorship, taking place in a foreign country and with the presence of the accused. Even though the sentence of General Scilingo was supported by many Argentineans, including NGOs and civilian organizations, it is early to assess the overall effect of the Spanish judicial process in Argentina. The sentence can be consulted at <http://www.derechos.org/nizkor/espana/juicioral> (accessed Dec. 21, 2006).

on representation, inclusiveness and good governance. Although the Arusha Accords included power sharing and numerical distribution of seats in the transitional National Assembly, this agreement has not been implemented.

In this context, two different approaches for dealing with the Rwandan conflict have arisen: an ad hoc tribunal created by the international community, and a reformed national judicial system. The UN Security Council established the International Criminal Tribunal for Rwanda in November 1994 in reaction to the atrocities committed in Rwanda between April and June of that year. Security Council Resolution 955 recognizes that the role of the Tribunal is to ‘contribute to the process of national reconciliation and to the restoration and maintenance of peace’. Despite the high expectations of the Rwandan population, however, the ICTR has been the subject of various criticisms. These include procedural delays, its temporal limit (the Tribunal’s mandate only covers crimes committed in 1994), lack of investigation of the crimes committed by the victor (Tutsis), and lack of involvement of victims in the process.

The response of the national judicial system was a consequence of the new government’s willingness to prosecute the perpetrators of mass human rights violations as a precondition for reconciliation in the country. To that aim, two objectives were essential and consecutive: the re-establishment of the justice system, and the prosecution of genocide crimes within that system. In spite of its achievements, the national justice system has also been subject to criticism, including delays and the quality of the proceedings (which do not always follow recognized international standards), the fact that the justice system is seen by the Hutus as the victor’s justice system, and the lack of victim’s participation in the process. Defenders of the system sometimes justify the obstacles confronting individual criminal trials by pointing to the magnitude of the conflict, the limited capacity of the judicial system and the economic situation of the country.

In Rwanda, prosecution thus seems to have been insufficient to bring about reconciliation. As Vandeginste notes,

...for justice to be accepted as an instrument of reconciliation, it must meet certain conditions that go even beyond criteria of the independence and impartiality of the judiciary. These conditions include its embeddedness in an overall process toward transparency, political participation, and inclusiveness.

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28 In this sense, it is important to mention Prosecutor v Serushago (Sentence)—ICTR-98-39 (5.2.99), para. 19; Prosecutor v Kambanda (Judgment and Sentence)—ICTR-97-23 (4.9.98), paras. 26-8 (see also para. 59); and Prosecutor v Rutaganda (Judgment and Sentence)—ICTR-96-3 (6.12.99), paras. 455-6.
29 Vandeginste, supra n. 26, 246.
Sierra Leone

In response to atrocities committed during the civil war in Sierra Leone in the 1990s, the UN Security Council adopted Resolution 1315 of 14 August 2000 requesting the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law within the territory of Sierra Leone. It is important to note that, unlike the International Criminal Tribunal for the former Yugoslavia, which was created under Chapter VII of the UN Charter, the Special Court was the result of an agreement signed between the United Nations and the Sierra Leonean government. As a consequence, the Special Court has concurrent jurisdiction with primacy only over Sierra Leonean courts.

The subject matter jurisdiction of the Court includes crimes under international law (crimes against humanity, war crimes and other serious violations of international humanitarian law not including the crime of genocide), and crimes under Sierra Leonean law.

Although the civil war started in 1991, the temporal jurisdiction of the Court only covers events after 30 September 1996 when the first peace agreement between the parties collapsed and the hostilities resumed with great violence. Its negotiators argued that temporal jurisdiction since the beginning of hostilities in 1991 would have been too ambitious a project, considering the economic and temporal constraints, and may have endangered the viability and success of the Court.

The Statute of the Court specifically provides that an amnesty granted to any person falling within the jurisdiction of the Special Court, in respect of the crimes referred to in the Statute, shall not be barred from prosecution. The Special Court thus recognizes the prevailing rejection of amnesty under international law and denies any form of impunity for the perpetrators.

Relative to the ICTR and the ICTY, the Special Court of Sierra Leone is innovative in several respects. In addition to the incorporation of national law, several judges...
and staff members are from Sierra Leone or appointed by its government, and the seat of the Tribunal is in the country’s capital, Freetown.

The Court’s judges were sworn in at the end of 2002, and, at the time of writing, the Court had indicted thirteen individuals. One of the main issues the Court confronted was whether Nigerian authorities would turn over former Liberian President, Charles Taylor, to face charges of war crimes and crimes against humanity committed during the conflict in Sierra Leone. Taylor was finally arrested in 2006. At the time of writing, it was still early, however, to evaluate the role that this judicial mechanism will have in achieving lasting peace and reconciliation in Sierra Leone.

**The ICTY: A path to reconciliation?**

The International Criminal Tribunal for the former Yugoslavia, headquartered in The Hague, is the most visible of the currently functioning judicial mechanisms addressing past conflict. This section examines the various functions of justice in achieving reconciliation, and analyzes whether the ICTY accomplishes those functions and contributes to a lasting peace in the former Yugoslavia.

Commentators observe that justice is related to truth, fairness, rectitude and retribution. In order to achieve justice, it is important to know the truth, to record and find the causes of the conflict, and to determine who is responsible for what. That exercise is better undertaken by a third party that is able to exercise fairness and impartiality. Impartiality in this context means that, once the facts are known by the third party, they are not misrepresented in order to maintain artificial impartiality, but rather are incorporated into the decision-making process. One example of this in the Yugoslav case is the War Crimes Commission created by the United Nations in 1993 to assess the nature of the conflict and the extent of each party’s responsibility with respect to the crimes committed during the conflict. Although the findings point to atrocities committed by each party, the Commission concluded that the Serbian forces had acted as aggressors and were responsible for the vast majority of crimes.\(^{33}\)

Fairness also means that negotiators do not seek agreements at the expense of the victims, forcing them to accept concessions against their will or judgement. Although such concessions may contribute to finalizing a peace agreement and, thereby, avoid human suffering in the short term, they may not contribute to lasting

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For example, some commentators argue that during the 1995 Dayton talks the American negotiators applied too much pressure on the Bosnian delegation to accept certain concessions that Bosnians saw as unacceptable for lasting peace in the area.\footnote{Williams and Scharf, supra n. 33, 22.}

In addition, as part of the peacemaking stage, retribution may be essential in terms of compensating the victims, punishing the perpetrators and imposing the rule of law. In this specific case, the method chosen was the ICTY, intended to try those individuals responsible for war crimes.

In comparison with other ways of dealing with conflict described in the previous sections, and as an argument in favor of prosecution, Williams and Scharf argue that

...the particular circumstance of the crimes committed in the former Yugoslavia required the formation of an \textit{ad hoc} criminal tribunal for both moral and practical reasons. First, the genocide, rape, and torture that occurred was of a nature and scale so horrific that nothing short of full accountability for those responsible would provide justice. Second, the domestic legal systems in some of the republics of the former Yugoslavia had been so thoroughly corrupted that they were not competent to conduct a fair trial of the war’s perpetrators, many of whom are still in power.\footnote{Williams and Scharf, supra n. 33, 22.}

The same authors add, however, that during the peace building process the norm of justice must be applied together with other relevant approaches, such as accommodating the interests of the parties in the conflict, economic inducements and the use of force. As the first Prosecutor of the Tribunal, Richard Goldstone, remarked, ‘one must not expect too much from justice, for justice is merely one aspect of a many faceted approach needed to secure enduring peace in a transitional society’\footnote{See, Richard J. Goldstone, ‘Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals’, \textit{New York University Journal of International Law and Policy} 28 (1996), 485-504, 485-6.}.
Functions of justice and their achievement by the ICTY

Determination of individual responsibility

One of the functions of prosecution is to determine individual responsibility and thereby avoid assigning such responsibility to an entire group—the Serbs in this case. ‘Far from being a vehicle for revenge, notes former President of the ICTY, Antonio Cassese, ‘the Yugoslav Tribunal is an instrument for reconciliation’.\textsuperscript{38}

The arrest of indictees, however, has been a very complicated problem since the early days of the ICTY. During the Dayton talks, ICTY Prosecutor Richard Goldstone formally asked the United States to make the surrender of indicted suspects a condition for any peace accord. The American peace negotiators declined, fearing that it might endanger the entire peace process.\textsuperscript{39}

The lack of provisions in the Dayton agreement for prosecuting the perpetrators of atrocities committed during the war is important in understanding the subsequent difficulties faced by the Tribunal in arresting important indicted war criminals, such as Radovan Karadžić and Ratko Mladić, who still remain at large today. Moreover, negotiators considered President Slobodan Milošević essential to reaching any peace agreement.

The ambiguous mandate of the NATO-led Implementation Force (later Stabilization Force) to arrest indictees and transfer them to the Tribunal, whether intentional or not, also contributed to the above mentioned situation.\textsuperscript{40} The non-prosecution of some high-level perpetrators and their treatment as legitimate negotiators, as seen by the victims and other observers, has undermined the reconciliatory function of the Tribunal.

Although dealing with the perpetrators was not on the agenda of the Dayton talks, Security Council Resolution 1022 of 22 November 1995\textsuperscript{41} encouraged the authorities of the former Yugoslavia to cooperate with the Tribunal and noted that compliance


\textsuperscript{39} Williams and Scharf, \textit{supra} n. 33.

\textsuperscript{40} As an indication that the negotiators considered it more important to achieve an agreement than to address issues of justice dealt with by the Tribunal, \textit{see}, e.g., US Ambassador Holbrooke stating that ‘the Administration remained divided over the most important question it faced: if we got an agreement in Dayton, what would the NATO-led Implementation Force, IFOR, do? Of course, if Dayton failed to produce a peace agreement, our deliberations would be meaningless’. Richard Holbrooke, \textit{To End a War} (New York: Random House, 1998), 215.

\textsuperscript{41} SC 1022, UN SCOR, 3595\textsuperscript{th} mtg., UN Doc. S/RES/1022 (1995).
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with orders from The Hague ‘constitutes an essential aspect of implementing the Peace Agreement’\(^\text{42}\). Moreover, the Tribunal was established as an enforcement measure of the Security Council under Chapter VII of the UN Charter and is therefore a subsidiary organ with delegated enforcement powers. The Tribunal’s Statute, approved by Security Council Resolution 827 in 1993\(^\text{43}\), also grants the Tribunal, through article 29, the power to issue international arrest warrants, which shall be complied ‘without undue delay’\(^\text{44}\). In addition, Rule 61 of the Rules of Procedure and Evidence contemplates a procedure in case of failure to execute an arrest warrant, with the possibility for the President of the Tribunal to notify the Security Council of the failure of that state. With these mechanisms, it should not be difficult, in theory, for the Tribunal to arrest the perpetrators. In reality, however, the international community has found it necessary to condition economic assistance on full cooperation from the former Yugoslavia to arrest war criminals. Nevertheless, out of 161 persons indicted by the Tribunal for serious violations of international humanitarian law, only seven are currently at large.

**Historical record**

Another function of justice is to create a detailed historical record of the events and atrocities committed during the war in order to know what happened, who was responsible, why it should be condemned, and to prevent it from happening in the future.\(^\text{45}\) This was an important function of the Tokyo and Nuremberg Tribunals. The most important legacy of the Nuremberg trials, noted Chief Prosecutor Robert Jackson, was the documentation of Nazi atrocities ‘with such authenticity and in

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\(^\text{42}\) *Id.*

\(^\text{43}\) SC 827, UN SCOR, 3217\(^{\text{th}}\) mtg., UN Doc. S/RES/827 (1993).

\(^\text{44}\) The Trial Chamber has noted in this respect that the Tribunal is empowered to issue binding orders to States pursuant to article 29 of the Statute, which derives its binding force from Chapter VII and article 25 of the United Nations Charter and Security Council resolutions adopted pursuant thereto. By affording judicial assistance to the Tribunal, States do not thereby subject themselves to the primary jurisdiction of the Tribunal, which is limited to natural persons. Rather, when issuing binding orders to States, the Tribunal exercises its ‘ancillary (or incidental) mandatory powers vis-à-vis States’, as embodied in article 29 of the Statute. *See, Prosecutor v Kordić and Čerkez* (Decision on Request of the Republic of Croatia for Review of a Binding Order)—IT-95-14/2 (9.9.99), para. 16.

\(^\text{45}\) Note Santayana’s famous phrase: ‘Progress, far from consisting in change, depends on retentiveness …. Those who cannot remember the past are condemned to repeat it’. George Santayana, *Life of Reason or the Phases of Human Progress*, 5 vols. (New York: Charles Scribner’s Sons, 1936).
such detail that there can be no responsible denial of these crimes in the future’. Publicizing the truth about what happened thus helps to discredit the policies applied and the regime responsible for their application.

The ICTY is contributing to that end in a considerable way by collecting evidence, including witness testimonies, preparing analytical studies, conducting investigations and gathering other information regarding the conflict. Due to the confidentiality of most of these documents, however, it is still not clear whether they will be released to the public once the Tribunal’s mandate ends. Moreover, the Tribunal’s jurisdiction and prosecutorial practices leave uncovered many smaller (but nevertheless important from the victims’ point of view) incidents that took place during the conflict. Procedural or legal technicalities may also lead to information being withheld from the public, in order to protect witnesses or for other reasons.

The role of the victims

Acknowledging the victims and their stories and grievances is also one of the main functions of justice and is essential for peaceful co-existence. Not only is it important to acknowledge the dignity of the victims, it is also important to provide them with material and psychological support to repair the damage as far as possible.

Unlike the recently created International Criminal Court, which contemplates a Victims’ Compensation Fund, the Statute of the ICTY does not provide for such a mechanism. Moreover, the complexity of the procedure inherent in any judicial mechanism implies that many perpetrators may continue to live at large in the communities where the crimes took place. In 2000, the International Crisis Group reported that some seventy-five individuals indictable for major war crimes held important positions of power and influence in municipalities and political party institutions across the Republika Srpska and in the Republika Srpska central


47 For instance, if the defendant dies before the issuance of the judgment, the case is dismissed with the result that the court’s findings of fact and law are never publicly pronounced. This was the case of Slavko Dokmanović, who died while in detention awaiting judgment. See, the ICTY Press Release, ‘Completion of the Internal Inquiry into the Death of Slavko Dokmanović’, UN Doc. CC/PIU/334-3 (1998).
government. This makes the relief of the victims very difficult, if not impossible, and encourages individuals to take the law into their own hands.

Deterrence

Justice is also intended to produce deterrence. This function is directly connected with the above-mentioned individualization of responsibility, and it requires the Tribunal to exert maximum efforts to impute crimes and arrest the perpetrators. While the ICTY was set up in 1993, it was only after 1999 that the Office of the Prosecutor indicted Slobodan Milošević and other high-level officials accused from Serbia. Had the Tribunal acted earlier, it may have prevented the subsequent atrocities committed by some of the same perpetrators accused of war crimes in Kosovo in 1999.

It is too early, however, to examine the role of the Tribunal in contributing to the long-term stability of the Balkans and other international conflicts (and, in particular, its effectiveness as a deterrent). Since 2001, indictees from each party to the conflict, not only Serbs, have been arrested or have surrendered to the Tribunal. Nevertheless, there exists abundant jurisprudence in the Tribunal’s case law to illustrate that one of its aims is to prevent future violations of human rights and that deterrence is being considered by the judges when imposing sentences. In Prosecutor v Tadić, for example, the Trial Chamber stated that

...the unique mandate of the International Tribunal of putting an end to widespread violations of international humanitarian law and contributing to the restoration and maintenance of peace in the former Yugoslavia warrants particular consideration

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49 The fact that the victims have had few opportunities to tell their stories and obtain relief from their suffering through a judicial process may be an argument in favor of a parallel truth commission. In this sense see also, Williams and Scharf, supra n. 33, 125-6.

50 Milošević’s initial indictment was issued on May 24, 1999, together with Šainović, Ojdanić, Stojilković and former Serbian Prime Minister Milan Milutinović. The indictment against Momcilo Krajišnik, another high level Serbian official, was confirmed on Mar. 21, 2000.

51 Three members of the KLA (Kosovo Liberation Army) were brought to the Tribunal in February 2003 and they are currently awaiting sentence (see, Prosecutor v Limaj et al.—IT-03-66). The Tribunal has also indicted and arrested Bosnian Muslim individuals (see, Prosecutor v Hadžihanović and Kubura—IT-01-47, Prosecutor v Halilović—IT-01-48, Prosecutor v Orić—IT-03-68 and Prosecutor v Delić—IT-04-81).
in respect of the purpose of sentencing … The Trial Chamber shares the opinion expressed in the above mentioned cases in respect of retribution and deterrence serving as the primary purposes of sentence. Accordingly, the Trial Chamber has, in its determination of the appropriate sentence, taken these purposes into account as one of the relevant factors. 52

Reconciliation and maintenance of peace

Extensive case law also suggests that the Tribunal has been fully aware that reconciliation and maintenance of peace is yet another function of justice and that the Tribunal itself has seen reconciliation as one of the main objectives in the former Yugoslavia. 53

In Prosecutor v Delalić et al.54, the Trial Chamber noted that the theory of retribution, which is an inheritance of the primitive theory of revenge, urges the Trial Chamber to retaliate to appease the victim. The UN Security Council, however, has emphasized the importance of reconciliation. This is the basis of the Dayton Peace Agreement55 by which all the parties to the conflict in Bosnia and Herzegovina have agreed to live together. Consideration of retribution as the only factor in sentencing is likely to be counterproductive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice.

The Office of the Prosecutor also appears to consider reconciliation important to the purpose and success of the Tribunal. In one of its closing arguments, for instance, the Prosecution noted that in 1993 the Security Council passed Resolution 82756 expressing its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law, systematic detention, mass killings, rape of women and the continued practice of ethnic cleansing. According to the Prosecution, it was recognized that peace required the deterrence of such conduct, and the Council was

52 See, Prosecutor v Tadić (Sentencing Judgment)—IT-94-1 (11.11.99), paras. 7-9 (referring to the sentencing decisions in Ćelebići, Furundžija, Kayishema and Ruzindana, Serushago, Akayesu and Kambanda).


54 See, Prosecutor v Delalić et al. (Judgment)—IT-96-21 (16.11.98), 1998, para. 1231.


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said to have been determined to put an end to such crimes and to bring to justice the persons most responsible. The Prosecution declared that the Tribunal was created with the aim of contributing to the restoration and maintenance of peace.\textsuperscript{57}

Among the case law of the Tribunal, guilty pleas by some defendants have been perhaps the most valuable element aiming at reconciliation. To date, more than ten accused have entered guilty pleas.\textsuperscript{58} One of the most significant pleas is that of Biljana Plavšić, former President of the Republika Srpska, in which the defense and prosecution joined efforts to show the judges that Plavšić’s confession and remorse could be a significant and essential contribution to the reconciliation process in Bosnia and Herzegovina and the former Yugoslavia. Several internationally-renowned witnesses, such as Alex Boraine (former Vice-Chairperson of the South African Truth Commission), Madeleine Albright (former US Secretary of State) and Elie Wiesel (winner of the Nobel prize for peace) testified before the court to present Plavšić’s act as a contribution to reconciliation.

In a statement, Mrs Plavšić herself noted that to achieve any reconciliation or lasting peace in Bosnia and Herzegovina, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility, regardless of their ethnic affiliation and that acknowledgment is an essential first step.\textsuperscript{59}

Furthermore, the Trial Chamber accepted that

...acknowledgment and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concluded that the guilty plea of Mrs Plavšić and her acknowledgment of responsibility, particularly in the light of her former position as President of the Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole.\textsuperscript{60}

Interestingly, the effect achieved through such a guilty plea contains most of the characteristics examined in this chapter for achieving reconciliation. Although occurring in a very different procedural context, guilty pleas achieve in many ways similar results to some of the non-judicial methods of dealing with human rights atrocities analyzed above.

\textsuperscript{57} See, Prosecutor v Stakić (Prosecutor’s Closing Arguments)—IT-97-24 (11.4.03). In this sense see also, Prosecutor v Plavšić (Closing Arguments), infra n. 59.

\textsuperscript{58} See, the cases of Erdemović—IT-96-22; Jelisić—IT-95-10; Sikirica et al.—IT-95-8; Todorović—IT-95-9/1; Deronjić—IT-02-61; or Jokić—IT-02-42/1 among others.

\textsuperscript{59} See, Prosecutor v Plavšić (Sentencing Judgment)—IT-00-39 & 40/1-S (27.2.03), para. 74.

\textsuperscript{60} Id., para. 80.
Lessons from the ICTY experience

There are several lessons from the ICTY experience, where the prosecution of perpetrators was imposed by the Security Council under Chapter VII, rather than agreed upon by the parties to the conflict.

First, and most important, the decision to negotiate with war criminals at Dayton undermined the role of justice during the peacemaking stage. Indeed, the role of justice in the peacemaking stage was not as relevant as may have been desirable. The Office of the Prosecutor did not release an indictment against Milošević until a later stage in the conflict and he was seen a legitimate negotiator in the Dayton and Ramboïulet/Paris talks. This fact is essential to understanding the atrocities that followed several years later in Kosovo. As Williams and Scharf point out,

...had there been greater reliance on the norm of justice during the Dayton negotiations, and had the mechanisms proposed by the Bosnian government been incorporated into the agreement, many of these indictable war criminals would not have continued to exercise power and influence over the implementation of the accords. In all likelihood Bosnia now would be on a path toward ethnic reintegration as opposed to the path of de facto ethnic partition.61

Second, it is important to fulfill the aims for which the ICTY was created and to complete the prosecution of all the perpetrators within the Tribunal’s jurisdiction. While this task may be difficult to achieve due to temporal and economic constraints, the removal from positions of influence and power of war criminals still occupying high positions in local and national institutions, is indispensable for the relief of the victims and for co-existence.

Although the International Tribunal serves as a forum for some of the victims to tell their stories and place their grievances before the court and the international community, it has failed to contemplate any kind of compensation system or to serve as a comprehensive mechanism in which a larger number of victims could expose the atrocities they suffered to the rest of the world. Their testimonies would serve not only their own relief but also provide the international community with the full knowledge of what happened in the former Yugoslavia and to prevent this from happening in the future.

Thus, despite the tremendous contributions of the ICTY, there is substantial room for improvement in these and others areas.62

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61 See, Williams and Scharf, supra n. 33, 169.

CONCLUSION

States (individually, and together in the United Nations and other international organizations) have adopted different approaches to address human rights violations in or outside their boundaries, largely determined by the circumstances of each case. Although some experiences have been more successful than others, reconciliation has not been achieved in any of the aforementioned conflicts. One reason, as most of the commentary notes, is that reconciliation among the parties is a process that starts at the peacemaking stage, by reaching an agreement on how to deal with the past, but it takes time for such an agreement to be implemented and incorporated by the new society. The experiences summarized above, however, provide some initial conclusions that may be useful for the resolution of present and future conflicts, including the Palestinian-Israeli conflict.

First, justice and reconciliation are key elements that demand the attention and consideration of peacemakers and peace builders before agreements are signed or negotiated political compromises reached.

Second, the approaches to achieve reconciliation must be agreed upon by the parties, even if monitored by an impartial third party, in a way that they include every group or ethnicity in the negotiations and that they do not force one party to accept concessions that will not contribute to lasting peace. It is important that any approach to deal with past crimes be included in the peacemaking stage, so that there is an explicit compromise by the parties to create and enhance the foundations of an inclusive social infrastructure. Effectively changing political systems after an intense conflict requires recognition of and tolerance for diversity, as well as access to participation in the processes that determine the conditions of security and identity.

Third, states and other parties involved in the negotiating process influence the peace building strategy according to their own interests. Therefore, negotiators should acknowledge the political circumstances of the conflict, take into consideration the nature of the problems and how to deal with them and identify the approach chosen with democratic states.

Fourth, cases like Chile and the former Yugoslavia illustrate the tension between making peace and doing justice, where the negotiators sacrificed the full application of the rule of law in favor of a peace agreement to end the conflict or reach stability in the country. In order to end an international or internal conflict, negotiations are very often conducted with the leaders who are themselves responsible for gross human rights abuses. In these situations, insisting on criminal prosecution may prolong the conflict and intensify human suffering63, thus having a harmful effect on peacemaking. It is

important to keep in mind, however, that although the achievement of an agreement may avoid more human suffering in the short term, reconciliation is necessary to prevent recurring cycles of revenge among the parties. Indeed, like the South African case shows, sometimes judicial and non-judicial approaches for dealing with the past complement each other.

Fifth, justice is a necessary condition for reconciliation, although it is not a sufficient condition. There is a dilemma raised by looking at the past to correct grievances while creating a viable present and future for every group after a conflict. Reconciliation thus requires complementary approaches to achieving justice—more than the typical retributive, adversarial process. A major challenge for negotiators is to find a process capable of achieving the functions of justice without creating resentment amongst any one group.

Sixth, reconciliation only succeeds if it is linked to structural and institutional change. Any approach that does not address reform of corrupt institutions, as well as promoting reconstruction, dealing with returnees, redistribution of resources and other economic needs among others will have many chances to fail and not contribute to lasting peace.64

Seventh, reconciliation must include elements of forgiveness, which does not mean forgetting and burying the past. For the parties to reach reconciliation, they have to acknowledge the past and remember their historical injuries. As Abu-Nimer notes when dealing with the Palestinian-Israeli conflict, ‘the ability to remember the story and share with the other, with its full intensity, is an element that relieves tension and anger in conflict relationship’.65

And finally, unfortunately, there is no ideal model to follow in the world to achieve reconciliation. Neither ad hoc tribunals nor truth commissions by themselves are capable of handling the complexity of a post-conflict situation. For instance, judicial approaches may be politically biased, provide selective prosecution, unduly limit the admissibility of evidence, or be seen as victor’s justice. Truth commissions, on the other hand, may be insufficiently punitive or ineffectual. Perhaps for this reason, some authors indicate that the key to achieving lasting peace is broadening and incorporating various approaches, in order to add restitution, acknowledgment, apology, forgiveness and equality to the retributive character of justice.


65 Id., 245.
Popular Sovereignty, Collective Rights, Participation and Crafting Durable Solutions for Palestinian Refugees

Karma Nabulsi

Approaches to a solution to the refugee issue over the last decade have rested upon a dichotomy between rights and realpolitik—rights are nice, but need to be put aside for the hard realities. It will be argued here that this is both a false and dangerous postulation: in the refugee case in particular, it is intrinsic principles that have the most practical and pragmatic application to a realistic settlement of the refugee issue. The choice here is not between the intrinsic values of rights-based solutions, versus instrumental mechanisms which facilitate a settlement that reflects the current status quo. Rather, intrinsic values provide the most useful framework upon which to model pragmatic solutions. Moreover, avoiding principled approaches have, without question, created the current disastrous dilemma we find ourselves in vis-à-vis the Middle East Peace Process overall. The issue of the refugees is the core of the entire conflict, and the way it has been managed hitherto has seriously undermined the possibilities of peace for years to come. This chapter will also suggest practical measures to address these lacunae in civil and political rights.

The Oslo framework for resolving the refugee problem was presented as the pragmatic realistic solution, and those who sought to disagree—or even worse to rectify, change or address its flaws—were seen as utopian, dangerous and foolhardy. It has now been almost universally acknowledged that the Oslo structure provided, in reality, the very opposite of its initial claim, representing a serious setback to the possibilities of a negotiated settlement on the refugee issue (as well as many other crucial aspects, such as a piece of territory upon which to build the Palestinian state). A peace process that was marketed as pragmatic, highly
technical and bound by the constraints of a scientific framework was actually riddled with dangerous illusions, wild utopianism and false universalism. It also relied heavily upon faulty social science models that, although emerging from academia, lacked both methodological rigour and empirical testing.

A central part of the Oslo arrangements were to simply shelve the hard issues (including the core of the original conflict, the refugees) to a later date, relying upon a methodology drawn from conflict resolution literature which promoted confidence building measures, to be introduced in incremental steps. Yet, as we have all now seen, incrementalism has not meant incremental improvement on the contours or the substance of the refugee problem, but rather incremental disrepair, damage, neglect, a growing intransigence and a growing ignorance of this issue above all within the wider epistemic community of the Middle East Peace Process. It has also led to a radical deterioration on the ground, with a view to settlements or land expropriation or refugees’ conditions, whether in the West Bank and Gaza or in the exile.

The Oslo process also sought, more quietly, to undermine the international legal standards that have underpinned the Palestinian refugee case, and to lower expectations of the refugees in their quest for them. Instead, it has done the opposite, as refugees have mobilised to protect those rights. Meanwhile, it has raised the expectations of the Israelis to an impossible threshold, so that even mainstream and left-wing Israeli commentators were sincerely shocked when the refugee issue returned to the table as a matter that needed to be substantively addressed—they had been led to believe, falsely, that it was a closed file, and that the refugees would disappear off the map when they disappeared off the negotiating table. Former Israeli Prime Minister Ehud Barak’s reaction at Camp David in July 2000 can best be understood in light of this common understanding fostered by the Oslo process.

But it was the years of collective endeavour by the international community, through the work of a few academics, policy experts and think-tank projects that were largely responsible for the situation we now find ourselves in. This vast wave of research was guided by an unspoken agreement of a final settlement that would comprehensively ignore refugee rights. It focussed upon the development of mechanisms that would impose this settlement through a system combining compensation, absorption of existing refugee camps in the West Bank and Gaza into local neighborhoods, of the refugees into host and third party countries and the resettlement of some into the West Bank.

This was to be done by mutual arrangement between Arab host nations and those of the international community involved in the peace process. They were to present it to an unequipped refugee population inside and outside of the West
Bank and Gaza as a legitimate agreement, negotiated by the Palestinian National Authority, acting in the name of the Palestine Liberation Organisation, whose presence and signature would guarantee its legitimacy. The PNA became the primary client, and the exclusive focus of attention and pressure under this policy. The refugees themselves were assessed, surveyed, quantified, classified, tested and their living standards, housing conditions, economic and social interests became the objects of study. The refugees themselves were nowhere to be found.

The scenario defined above has absolutely no chance of succeeding for many reasons. Let us begin, and focus, upon the most central of them. The most important reason that this scenario will not work—even for one minute—is, quite simply, that not a single Palestinian constituency accepts it in any form. It is entirely unrepresentative of the Palestinian body politic, both refugees and non-refugees, and this knowledge was easy enough to establish from the very start. And accordingly, the people will continue to respond to these attempts in the only means available: they will protest, resist, revolt, struggle, rise and articulate their reality, their identity, their essential quality as human beings and the demand to be treated with respect.

It was, therefore, wildly utopian to think one could ignore an entire people because it was awkward, unfortunate, inconvenient and did not fit into the agreed political arrangements by the major players. This attempt to avoid this straightforward set of commonplace actualities on the ground has created many more problems than it sought to address, and the continuing cost of ignoring the reality and basic rights of the victims of this conflict will create an even greater disaster in the coming years. And there is no avoiding the responsibility of the devastating impact this approach has had on the chances for peace in the near future.

Democracy, human rights—both civic and political—are intrinsic values and have intrinsic properties. This chapter will explain how these rights, as well as other rights, are relevant to the Palestinian refugee case. The first part presents a general classification of rights, with differing typologies and sources, drawn from modern legal and political theory. This is followed by a survey of the Palestinian context in relation to two groups of these rights and principles, setting out the development of these principles in practice. This section argues that the rights derived from popular sovereignty, participatory democracy and representation need to be integrated into legal and political solutions for Palestinian refugees, as well as by the broader field of refugee experts in general. It concludes with a final section that makes two recommendations which connect the particular role of these principles to the crafting of a durable solution for Palestinian refugees.
A TYPOLOGY OF RIGHTS

There are four typologies grouped below. The first two—popular sovereignty and self-determination of peoples—rest on rights that accrue anterior to the founding of a state, and concern the just basis for its establishment. The latter two—individual and collective rights—are more commonly implemented once the state has been established, although, of course, the sources are drawn from models which were developed well before the modern state came into being.¹

Popular sovereignty

The origin of popular sovereignty in the modern legal tradition is derived directly from what is defined as the social contract school of the late seventeenth to mid-eighteenth centuries. Popular sovereignty is the notion that no law or rule is legitimate unless it rests directly or indirectly on the consent of the individuals concerned—that is, of the people.² Thomas Hobbes (1588-1679)³, John Locke (1632-1704)⁴ and Jean-Jacques Rousseau (1712-1778)⁵ are some of the founders of this theory, which argues that the nature of society, whatever its origins, lies in a contractual arrangement between its members. Rousseau’s The Social Contract (1762) is largely regarded as the most influential

⁴ Locke in his Second Treatise of Government, published 1690, claimed (as Hobbes had before him) that the social contract was permanent and irrevocable, but the legislature was only empowered to legislate for the public good. If this trust was violated, the people retained the power to replace the legislature with a new legislature. It is unclear if Locke deposited sovereignty in the people or in the legislature. Locke’s conception is quite closely reflected in the traditional British view of parliamentary sovereignty. John Locke, Two Treatises of Government, in Peter Laslett (ed.), (Cambridge: Cambridge University Press, 1988), II, sec. 135.
canon of modern democratic theory and the articulation of popular sovereignty.\textsuperscript{6} Rousseau set out the claim that all power and legitimacy rested and was derived from the people, and furthermore proposed a variety of mechanisms in order to enable one to discover what the ‘general will’ of a community actually was. He saw legislative powers as vested in the people itself.

This theory of popular sovereignty had two distinct branches. The first relied upon the will of the people and shaped the ideology of communism and socialist republics, and the second, from which the theory of modern democracy is drawn, saw the enactment of the will of the people through the creation of democratic republics.\textsuperscript{7} Democracies established during the late eighteenth century, France, America, Poland and the rest of Europe in the nineteenth century, relied heavily upon the principles Rousseau set out in the \textit{Social Contract} and elsewhere in his writings.

In recent times legal philosophers such as Ronald Dworkin have reconfirmed the basic legal principles of modern democratic life by recalling the basis in the notion of popular sovereignty, setting out a series of principles that currently underpin the institutional design of today’s democracies.\textsuperscript{8}

\textbf{Self-determination of peoples}

The second source that will concern us here are the rights of a people to self-determination as enshrined in international law, starting with Wilson’s Fourteen Points of 1917 and articulated in both the League of Nations and later the United Nations; it was the basis for the restructuring of Europe after World War I, and for the demands of self-determination by peoples under colonial rule.\textsuperscript{9}

The right of self-determination of peoples is widely understood to be concerned with the national liberation of a people from foreign or colonial rule, and to leave aside the question of the type of regime or government peoples would choose to live under.


\textsuperscript{7} For a development of this model see, Chapter 4 in David Held, \textit{Models of Democracy} (Cambridge: Polity, 1990), 105-36.


\textsuperscript{9} National liberation is drawn from an older tradition in the laws of nations, which does not place democracy as a precondition nor a necessary component of a people’s freedom. For a legal narrative of the development of self-determination from a political ideal to a legal standard see, Antonio Cassese, \textit{Self-Determination of Peoples: A Legal Reappraisal} (Cambridge: Cambridge University Press, 1998).
This constraint was shaped by the politics of the Cold War, of the Soviet Union’s support for national liberation movements and models, and the West’s reliance upon authoritarian regimes and dictators. Yet the very notion of self-determination of peoples has, by its nature, an implicit recognition that all peoples have a right to democratically determine their fate, as a nation, or a state, or both.\textsuperscript{10}

**Individual rights**

The third set of rights—individual rights—are those more usually implemented once a state is formed; indeed, the function and purpose of the modern democratic state itself is to both guarantee and preserve the basic individual rights of her citizens. However, these rights have an older legal basis than the establishment of the modern state, and current legal and political principles in the West are drawn from established traditions of mainly Roman, Renaissance and Enlightenment thought.\textsuperscript{11}

Individual rights can be classified in generations, in tiers, or through ontological traditions.\textsuperscript{12} Social, political, civil and economic rights of an individual are all types of rights whose protection is to be provided for by the state.\textsuperscript{13} The most important of these, in the Western canon, is the preservation and guarantee of individual liberties.\textsuperscript{14} The Universal Declaration of Human Rights\textsuperscript{15}, which absorbed competing claims from the socialist and the democratic traditions, ranks these types of rights into a hierarchy that reflected this priority of civil and political rights over social and economic ones.

\textsuperscript{10} Id., 48.


\textsuperscript{15} Universal Declaration of Human Rights, GA Res. 217A, UN GAOR, 3\textsuperscript{rd} Sess., UN Doc. No. A/810, at 71 (1948). International conventions protecting individual rights are seen as standards for domestic courts to adopt. The European Convention on Human Rights is treaty law, and as such has mechanisms of enforcement.
Collective rights

The fourth set of rights that are used when looking at refugees are group rights and collective rights, and much of the relevant legislating principles and practices have emerged as a result of the development of rights for minority groups within a state system. The rights of refugees as a distinct body of people within states, who hold special claims on protections of various kinds under both domestic and international law have been extensively rehearsed, developed and disseminated by international jurists and scholars.

Collective rights claims, on the other hand, often address issues such as multiculturalism in a liberal state, and the rights of religious or ethnic groups within such a state to autonomous practices and protections of various kinds. Yet these political theories (many of whose principles can be illustrated in recent Canadian legislation for example) derive their notion of collective rights from their notion of individual rights, and the underlying principles of individual autonomy.

The Palestinian context: rights of participation and representation

The second part of this chapter will briefly discuss the political and legal context for the first two categories of rights outlined above, focusing upon popular sovereignty and the rights of participation in a democracy in a short account of the structural difficulties of Palestinian representation, and constraints on its ability to achieve self-determination in the last forty years.

Popular sovereignty: the principles in practice

This section will outline the ways in which institutions and mechanisms in modern society reflect and represent popular sovereignty in the manner democracies operate today. The creation, by institutional design, of mechanisms, procedures and institutions that could give a voice to the ‘general will’ of a people, as defined in democratic theory, has been the focus of much of the political thought and activities over last two centuries in the west, and in recent decades in eastern Europe, as well as through vast democratization programs worldwide.¹⁸

There are a wide variety of institutions and functional levels and mechanisms through which ‘voice’ is expressed in a democratic state. They consist of the application of a framework of laws which can include constitutions; with elected houses of representatives, executive organs and with independent judiciaries and courts, among other structures.¹⁹ The processes themselves in which citizens participate are various.

Most commonly understood is elections, where citizens vote for their representatives, both local and national. But voting and elections are only a small part of democratic procedure.²⁰ Citizens give voice and choose political options through different types of democratic deliberation within the public sphere. They also shape legislation as well as public policy through participation in public and civic bodies.²¹ The relationship between elected representatives and their constituents operate through a variety of ways outside of the election process, and all of these are essential and everyday practices in democratic societies.²²

The activities take place in a series of spheres and levels, which both interconnect and interact: local groups with larger ones, government representatives with popular societies, newspapers, unions and so forth. The bedrock of that continual

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¹⁹ Ian Shapiro, Democratic Justice (New Haven, CT: Yale University Press, 1999), 11.


association—the social contract—occurs in the public sphere of civil society.\(^{23}\) Within civil society there are a variety of institutions, associations, groups, unions, parties, popular committees, NGOs and community groups, that is ‘the whole body of individuals, groups, and organisations that work for the welfare of their nation or community outside the established official services of the government’.\(^{24}\)

**Popular sovereignty and self-determination, the Palestinian case**

The Palestine Liberation Organisation can be defined as a loose coalitional institution that has broadly represented the prevailing popular will of the Palestinian people. It has been representative in its ability to capture the aspirations and goals of the Palestinian people in their search for self-determination, embodying as it did the many political and guerilla movements for national liberation (to varying degrees) in its near forty-year history.

The PLO consisted of a set of institutions: the Palestine National Council, a parliament based in exile made up of Palestinians inside and outside the West Bank and Gaza, its executive and legislative bodies, and the differing departments that operated as ministries, with representation at the UN and all other international bodies and embassies and offices worldwide.

The national liberation movement has been drawn largely from Palestinian refugees in the Arab world who had been expelled from their homes in Palestine to make way for the establishment of the state of Israel in 1948, and these parties operated inside the West Bank and Gaza as well. Resistance to Israel was launched from those refugee camps of Lebanon, Syria, Jordan and from Egypt after seventeen years waiting for Israel to implement United Nations General Assembly Resolution 194 (III)\(^ {25}\) which would allow them to return to their homes, towns and villages.

**Representation**

As the umbrella institution within which the broad-based popular movement

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\(^{25}\) GA Res. 194 (III), UN GAOR, 3rd Sess., UN Doc. A/RES/194 (1948).
operated, the PLO suffered a series of profound seismic shocks in Lebanon in 1982 and 1985 and in the Gulf during the first war of 1990. While separating it from its relationship with its constituencies living outside the West Bank and Gaza, these ruptures have also undercut its organically developed democratic mechanisms.

The first was when it moved the shattered remnants of its institutional base from Lebanon to Tunis at the end of the 1982 Israeli invasion of Lebanon, after tens of thousands of civilians (Lebanese and Palestinians), cadres and fighters of the movement were killed. Much of its institutional infrastructure and popular base (which was deeply associational, grass-roots and democratic in nature), drawn from the 300,000 Palestinian refugees living in the camps there, was destroyed in much the same manner as the recent institutional and social destruction in the West Bank and Gaza, though much more violently and comprehensively.²⁶

The second division occurred when the core part of the PLO political infrastructure resettled in Gaza under the terms of the Oslo accords after 1993, becoming in the process the Palestinian National Authority, and responsible only for Palestinians inside the West Bank and Gaza. This had serious repercussions for the Palestinian people as a whole, as the PLO had previously operated in a far closer relationship with the grass roots associations in the refugee camps outside of the West Bank and Gaza. Indeed, Palestinians have always resisted attempts to separate the ‘outside’ from the ‘inside’ since the Israeli occupation of the West Bank and Gaza in 1967, when Israel attempted to establish an alternative leadership to the exile PLO through the ‘Village Leagues’ or other collaborationist measures.

Instead, almost all politically active Palestinians living under military occupation within the 1967 borders (the 22 per cent of historic Palestine) were, since 1965, members of the underground movements that made up the PLO, such as Fatah, the Popular Front and the Democratic Front and others. Yet one consequence of the move of much of the official apparatus of the PLO to inside the occupied Palestinian territories in 1994 was that it did not only lessen representation with Palestinians outside the occupied Palestinian territories, but it created new cleavages with those of the underground parties in the territories where they were now functioning.

**Democratic participation**

The most serious assault to the collective sovereignty of the Palestinian body politic and accompanying loss of democracy was a direct result of the elections themselves in the West Bank and Gaza by which the Legislative Council was established in 1996. Instead of enhancing true democracy and representation, this process further fragmented the Palestinian people as a whole, excluding as it did all Palestinians outside of the West Bank and Gaza from the democratic process to which they too were entitled, and creating division and tensions between segments of Palestinian society.

At Washington between 1991 and 1993, the Palestinian delegation to the peace talks argued that elections must involve all Palestinians, including the refugees of 1948 and 1967 that were in camps across the borders in Lebanon, Syria, Jordan, etc. and not just the refugees who happened to have ended up in refugee camps inside the occupied West Bank and Gaza, who could (and did) participate. Excluding almost half of an entire people from the most fundamental mechanism that allows them a minimal participation in shaping their present and their future cannot under any terms be classified as a democratic process, whether adhering to either a conservative or more liberal understanding of the concept.²⁷

**Participation in civil society**

The enhancing of civil society structures and funding of civic and human rights NGOs inside the West Bank and Gaza further intensified this divide between Palestinians inside and outside: those inside received considerable international funding, while the political and civil participation of those outside the Palestinian territories in building a common future were ignored, neglected and even rejected.

One of the effects of this stripping of political identity has been to polarise the views of the refugees outside, who have been excluded from any peace process. Furthermore, many of those refugees outside who are part of the political parties contributed to their own marginalisation, through a loyal silence in the years immediately following Oslo. Doubting the purposes behind the Oslo deal yet wanting to ‘give peace a chance’, they accepted the PLO’s promise not to forget them and represent them honorably at the final status negotiations—although clearly their patience has now come to an end.

The exclusion of refugees has also denied them an elementary democratic right to help shape the constitution and the political institutions of the future state that is as much theirs as the rest of the Palestinian people's. Rather than lowering expectations or building confidence in a fair settlement, denying basic civic rights has proved merely to exacerbate the original distress of their predicament, limiting creative possibilities for a solution. Furthermore, the exclusion of the refugees has also effectively de-historicised the conflict, which no longer has an origin, and thus obscured the means and mechanisms necessary to resolve it.28

Solutions and Recommendations based upon Rights inherent in Models of Democracy and Civic Participation in the Peace Process

This final section will look at a range of solutions to the refugee issue which corrects the current lacunae in legal and political issues of representation and participation. First, there is the development of a variety of mechanisms which could helpfully restore the functioning of representation of refugees. A second practical recommendation is for a policy awareness program that focuses not only on individual rights of Palestinian refugees and collective rights of refugees under their legal status as refugees, but an awareness of their rights as a people in order to help shape their future through democratic representation and public participation. This equally important sets of rights, derived from popular sovereignty and the basic principles of democratic practice, have hitherto been absent from approaches to a solution.

Civic structures for refugees

One claim for the creation (and in some cases the recreation) of civic structures for the refugees outside of the West Bank and Gaza is drawn directly from the main recommendations of a report that was published in March 2001 by the Joint Parliamentary Middle East Councils Commission of Enquiry—Palestinian Refugees.29 Its conclusions and recommendations identify the issue of political and civic representation for the refugees—including their voices—as the main shortcoming in

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the past ten years in the search for a solution to the refugee issue that would be both acceptable and durable.

The gaps left by new structures [of the PNA], all of which have emerged since Oslo, and the shift of focus exclusively to the West Bank and Gaza, point to several aspects which the Commission believes need attention. The last seven years (and in particular during the run-up to the first Legislative Council elections of 1996) saw a tremendous surge of interest, expertise and donor money flooding into the Occupied Territories from the various EU member states, and above all by the European Union, in order to give badly needed assistance with the important task of constructing the institutional and social components of a democratic society. British organisations, such as the Westminster Foundation for Democracy, helped in the transparency procedures for these elections and in the training of several women candidates in campaigning. However, it is clear that non-governmental organisations, parliamentary organisations and European governments could all help with the establishment of political infrastructures for the refugees now outside the West Bank and Gaza, so that they may continue to have much needed links maintained with their chosen representatives.\(^{30}\)

Most of the intervention logic and examples lie within the ‘Themes, Remarks, and Recommendations’ of this British Parliamentary Report, the bulk of which is testimony from refugees from all over the region. The evidence clearly demonstrates that, although the PLO is without question the representative of choice of all refugees everywhere, they are not being represented at this point in time by it.\(^{31}\) Further, it demonstrates that the refugees state that their wish is to be better represented on a wide range of issues by the PLO, and not only on final status issues concerning their legal and political rights.

The ‘Findings’ of the Report examines this question of political and civic representation. In a section entitled ‘Representativeness’ it sets out the paradigm and parameters for the case for structures outside the West Bank and Gaza, however temporary, that would help construct a role for the refugees in the peace process and participate in shaping their future:

There were several discrete aspects concerning the complex subject of representation. This issue is the most complicated of all, but it is also perhaps the most understudied and misunderstood part of Palestinian refugee life. We learnt that over different sets of rights and concerns there were different responses to

\(^{30}\) ‘Recommendations’, \textit{id.}, 50.

\(^{31}\) The physical constraints upon the PLO being able to provide the full representation it would like to refugees are covered in Bassma Kodmani-Darwish, \textit{The Palestine Question: A Fragmented Solution for a Dispersed People} (Paris: Institute D’Etudes Politiques, 1996).
the question of representativeness. The Commission learnt that representation involves different understandings depending on the issue at hand: individual property rights, civil rights and collective rights as a people to self-determination. For the collective will, and as to the rights of the Palestinian people as a people, the Commission was told without exception that their representative was the PLO. Khaled Mansur (Um al-Zaynat) put it quite simply, as did all Palestinians when this issue was raised:

‘As a Palestinian, I consider the PLO to be the only legitimate representative of the Palestinians and the leadership of our struggle to achieve the right of return. The strategy of the PLO is to push the international community and the United Nations to work for an implementation of the right of return through diplomatic and political channels.’

Refugees repeatedly told us, however, that representation was needed at several levels, not just one: political, legal, individual, and civil. However, all were explicit about the limits of national representation over individual rights. In Gaza, we were told that it was the refugees’ right to make decisions about their individual claims to their property. Abdullah Arabid (Hirbiya, Gaza) said:

‘My personal private rights state that nobody, whoever he is, is entitled to take a decision on my behalf. I am from the occupied village of Hirbiya. Nobody is entitled to sell, to let, to rent or to relinquish Hirbiya to anybody, on my behalf.’

They all believed popular sovereignty and democracy was crucial to a representation over their rights, and that ‘no group has the right to challenge’ the right of return. ‘Furthermore’, Arabid said, ‘we consider any bargain or concession concerning these national essentials, which were ratified by international law, to be treason. The main authority to decide on such issues is people themselves, not some individuals’. The Commission notes that there was wide disparity between those who were fortunate in having active representation at a grassroots level in the camps, and places where there was no such adequate representation. Finally, the Commission noted that the groups able to make direct representations to their elected leadership were only those refugees in close physical proximity to them; those living in the Occupied Territories. Indeed the only group that the Commission met who mentioned petitioning the leadership were in Gaza.

There was a deep concern amongst refugees in the Arab countries that they were not in a physical position or situation which would allow their voices to be heard by their chosen representatives, the Palestine Liberation Organisation, and they were seeking for means to correct this.32

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32 Right of Return, supra n. 29.
The views from the refugees who participated in the British report, as well as the democratic rights that have been established in this chapter, both support the claim for a robust notion of democracy that could provide a more fair system of decision making, and prevent the antagonisms and distrust that now exist between the Palestinian leadership and the refugee community as a whole. Deliberative democracy possesses other benefits, and in this instance as a technique of conflict resolution in the development of a more consensual position vis-à-vis a final settlement. Thus, deliberative democracy can provide instrumental benefits and procedural usefulness\(^\text{33}\) that far outweigh the methodology used by the Oslo framework, which relied upon confidence building measures and mutual trust that never appeared\(^\text{34}\).

### Education about the refugee issue

Another way to advance the peace process would be to broaden the understanding of the policy community on the issue of the entire range of refugee rights. It is important to set out the contours of group, individual and collective rights of refugees, the rights of participation and democratic deliberation and their constructive benefits in approaching a durable solution.

Although the Oslo accords themselves were implemented with the advice and assistance of a host of academics in consultancy positions from various universities and think-tanks around the world, the intellectual underpinnings and practical policy frameworks that guided the peace process up until its collapse at Camp David in 2000 and the start of the *al-Aqsa intifada* were constructed on a theory which proved fatally flawed in some of its parts, nowhere more apparent than on the issue of the refugees.

It has been widely recognized now that an actual reverse of a peace process has taken place on the refugee issue (while no progress had been achieved on the smaller confidence building measures either). It is commonly agreed by diplomats, policy experts and academics that the question of the Palestinian refugees itself, as well as a practical means to resolve this issue, has become even more intractable

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\(^{34}\) Another claim made by the framers of the Oslo agreement was that by deferring the refugee issue to final status, one could lower the threshold of expectations of the refugees. For an overview of the Oslo Accords and their effect on the local refugee community in the West Bank and Gaza see the first section of Ingrid Jaradat Gassner, *The Evolution of an Independent, Community-Based Campaign for Palestinian Refugee Rights*. Information & Discussion Brief No. 3 (Bethlehem: BADIL Resource Center for Palestinian Residency & Refugee Rights, 2000).
during the ten years that it was put onto a multilateral track which was subsequently frozen.

This reversal of peace is widely understood to be the result of three factors: neglect, a growing ignorance of the issue of the refugees and their place in the conflict, and a hardening of positions on both sides, once the Oslo accords failed to provide any progress towards a fair settlement. One way to address this situation would be to introduce theoretical and practical frameworks based upon established measures and mechanisms, both from the community of legal experts and from those experts in conflict resolution across the world who have successfully used techniques of public participation and education in peace processes, applying them to the refugee issue.35

A multi-tiered education program aimed directly at the epistemic communities now crucially involved in the peace process in the Middle East on the refugee issue could successfully address this problem. A program of collective research and policy initiatives, aimed at introducing the relevant and basic facts, useful methodologies based on legal standards, and substantive approaches, will be crucial to advance a successful peace process in long-term, but it can also provide positive redress in the short and medium-term through dissemination and education.36

CONCLUSION

Models of democracy and civil and political rights have been slowly eroded and abandoned in the case of a large segment of the Palestinian people—those refugees that reside outside of the West Bank and Gaza. This exclusion has exacerbated isolation, intransigence and a highly fractured body politic; all of these factors have prevented a solution to the refugee issue rather than assisted it. The involvement of the refugees in civic structures and in national political activities, where they can contribute to the peace process, means crafting a durable peace.37

The right to take an active role in the many aspects of the process—deliberations on the future possible constitution, discussions on a wide range of issues with their

35 The BADIL/University of Ghent’s Expert Forum addresses this particular gap by providing a forum for an exchange of ideas and expertise for a wide variety of participants from the international legal community and the broader policy community on refugees and the peace process.


representatives (not only on their basic right of return, but on social, economic and legal issues); all these mechanisms will create new bridges to the future. Refugee choice and the preservation of individual rights of Palestinian refugees is absolute, and much of the conceptual and legal work on this issue has been forged, in recent years, by rights-based organisations such as BADIL. But refugees’ rights as a collective—not as a group of refugees dealing with issues of return, but as a people who have the right to shape their future and be represented as such—is the absent part of this quest for a durable structure of peace.38

Part Two

Housing, Land and Property Restitution
Land lies at the heart of the ‘Palestine Question’. This is true not only because of its centrality in the negotiations that relate to the territories occupied by Israel since 1967. Land is also central to the situation of Palestinian refugees from 1948, whose right of return to their land in Israel has to be considered as part of any solution that is in accordance with international law.¹ But what is too often forgotten is that the question of land also lies at the heart of the nature of the state of Israel itself, the third major component of the Zionist-Palestinian conflict.

This chapter deals with the land and settlement policy adopted and implemented


within the 1948 borders of Israel. The main task of this chapter is to review legal methods used by Israeli governments to achieve state/Jewish control over the land of historic Palestine, through the creation of physical (e.g., Jewish settlements) and legal barriers (e.g., laws and regulations additional to existing Mandatory laws to ensure that ‘redeemed’ lands remain in Jewish hands). These methods aim to prevent the possibility of future property restitution to Palestinian refugees, ‘absentees’, or even displaced Arab citizens living within Israel.

A second objective of this chapter is to demonstrate that the land laws that have been used by Israeli authorities to achieve the aforementioned goals, reflect a Zionist approach towards Palestine and the Palestinians expressed in such slogans as: ‘a land without a people for a people without a land’ and ‘redeeming the nation’s (i.e., Jewish) land and water’ etc.

**STATE STRATEGY REGARDING PALESTINIAN LAND**

There are three main tools or means by which Israel has restricted access to land for Palestinians in Israel. The first of these is dispossession. Prior to 1948, Palestinian Arabs owned or used the vast majority of the land in Palestine; this was no ‘land without a people’. The undermining of Palestinian land rights really began when the area was placed under the British Mandate, which had already committed itself in 1917 to allowing the establishment of a Jewish homeland in Palestine.

During the 1948 war, the land of the 750,000 Palestinian refugees was seized and four-fifths of the Palestinian communities in that area that became Israel disappeared. Israeli governments subsequently stated that they regarded the solution to the Palestinian refugee problem as being solely with the Arab states; the refugees might have a right to compensation, but not a right to return to their land. Israel took an equally uncompromising stance as regards Palestinians displaced internally, who were also prohibited from returning to their villages and homes even though they had become Israeli citizens. From 1948 onward, the new state continued to...
seize Palestinian land using a variety of legal means. The surviving Palestinian communities within the state lost as much as 70 per cent of their land.

A particularly harsh policy has been pursued against the Palestinian Bedouin of the Naqab/Negev. Israel forcibly evicted most of the Bedouin from their lands in the 1950s and has since been trying to relocate them in small and inappropriate urban townships, a solution rejected by the Bedouin. Meanwhile, Bedouin land claims have still not been recognized or resolved. The state has played a waiting game, putting pressure on the population to comply with its resettlement policy and demanding that the Bedouin surrender their land claims in exchange for moving into the townships. Forced off their land, prohibited from developing their communities yet not offered an acceptable alternative, many Bedouin prefer to suffer harsh conditions in ‘permanently temporary’ communities known as ‘unrecognized villages’.

A second major tool for restricting Palestinian access to land has been the regime for the ownership and administration of non-private land. The land regime formalized in 1960 involved not so much ‘nationalization’ as ‘Judaization’ of land. All of the land that was owned by the state and the Jewish National Fund was renamed ‘Israel Lands’, and now comprises more than 90 per cent of all land in the state. This land may be leased for particular purposes, but not sold. The legal regime is covered below in more detail in the second part of this chapter.

Control and administration of Israel Lands was placed in the hands of a new and powerful public body, the Israel Lands Administration. Since it controls so much land immediately surrounding and even within Palestinian communities, every Palestinian community is dependent on the ILA for land. Any land regime that keeps a very high proportion of land in non-private ownership and administered directly by the state is under a heavy burden to ensure equality of access to that land. But although as a public body it has a duty to treat all citizens equally, the ILA, dominated by representatives of the JNF who make up half of its governing board, systematically discriminates against Palestinian communities, and makes it extremely difficult for them to obtain access to land for agriculture, building and other development.

The third major tool for denying Palestinian access to land in Israel has been the system regulating land development and land use planning. For Jews in Israel, planning is a dynamic and proactive if uncoordinated push to ‘create facts’, encouraging and initiating development even if this means breaking the law or creating special procedures.\(^5\) Palestinians, on the other hand, experience planning that is passive, regulatory and reactive. Planning fails to take account of their needs and in some aspects actually works to prevent development. Palestinians face obstacles whether they try to develop existing communities, establish new localities or move into

predominantly Jewish areas. Planning authorities have not allowed the establishment of any new communities for Palestinians since 1948 other than those aimed at concentrating Bedouin. They have contained existing towns and villages, starving them of land and development to such an extent that they all face severe crises in housing and infrastructure. A particularly harsh policy has been pursued against the unrecognized villages, tens of Palestinian communities that Israeli governments and planning bodies have refused to include in planning processes and have labeled as illegal. Prohibited from developing as a punitive measure, these communities have little or no access to national water, electricity and other networks.

One issue that consistently arises is the exclusion of Palestinians from bodies that take key decisions regarding access to land. Nor are Palestinians allowed anything more than a minimal degree of self-government even at the local level. There is a need for an Arab body that looks at the questions of planning and building across the whole Arab sector and acts as a single voice for the aspirations of Palestinian communities. Israel has discouraged the development of independent Palestinian institutions.

The combined force of these three policy tools of the Israeli land regime form an extremely powerful bar on Palestinian access to land in the state. The question of access to land in Israel goes to the core of the nature of Zionism and of the state of Israel, and of the relationship between Israel and the Palestinians within its borders. The Zionist movement that was created at the end of the nineteenth century set out to acquire land in Palestine and to settle it exclusively with Jews. Land, once acquired, was considered to be ‘redeemed’ for the Jewish people, and could be possessed and worked only by Jews. By the time the state of Israel was established in 1948, two separate land systems had already developed within the boundaries of Palestine. The 6 or 7 per cent of land in Jewish ownership was effectively closed to Palestinians, held by Zionist national institutions for the benefit of Jews only. The rest was still largely in the possession of the indigenous Palestinians.

More than fifty years after the establishment of Israel, the same situation still prevails—only now, the proportions are reversed. Today some 94 per cent of all land in the state is regarded as redeemed land that is considered to be at the disposal of the Jewish people. This is what is known as Israel Lands. Only the remaining 6 per cent can still be bought and sold, around half of which is in Palestinian ownership. Some 13 per cent of Israel Lands is owned by the JNF, which excludes Palestinians from using its land. Although the remainder is not subject to the same restrictions, it is managed in many respects as if it were also still in the ownership of the Zionist movement. As we have sought to demonstrate, all of the bodies that control the land regime—the JNF, the ILA, planning bodies, government ministries and officials—have consistently been driven by Zionist goals.

A particularly problematic factor is the extensive role given to the Jewish
National Fund and the Jewish Agency. Established as institutions of the early Zionist movement, these organizations were not disbanded after 1948 but were incorporated, as explained below, into the framework of the new state and given special statutory responsibilities relating to the development and ownership of land. But despite having been assigned what are in reality key public functions, these bodies have still been permitted to act as if they are private bodies and to exclude Palestinians entirely from their projects. The JNF, for instance, still regards itself as fulfilling the Zionist enterprise, as was clearly shown in an interview with the head of the JNF. Neither the state nor the courts, responsible for protecting the rights of all citizens, have stepped in to impose on them an obligation to respect the principle of equality. But this surrendering of state functions to unaccountable bodies that act in the private interests of one category of citizens is unacceptable. These institutions, if they are to be allowed to retain their public functions in the state, must be required to change their policy as regards non-Jews. They should be required to either carry out their functions for the benefit of all citizens or to hand over their functions to the state. Legislation defining their role and functions should be amended so as to ensure that they are not permitted to perform their functions in a discriminatory manner. They should also be made subject to public law, insofar as they do retain public functions.

The way Israel presents itself is as a state governed by the rule of law, fundamental principles of equality and human rights; a state both Jewish and democratic. When Israel defines itself (such as in Basic Laws) as the Jewish state, it presents a publicly acceptable image of a state in which Jews can find a home. However, what is more difficult in today’s world, in which apartheid and discrimination are abhorred, is to justify a situation in which Israel retains its Zionist character and marginalizes the almost 20 per cent of citizens of the state who are not Jews, purely on the basis of their race and nationality. In other words, it is not easy to justify an ethnic state that is not ready to tolerate the presence of other ethnic groups within its borders.

Israel as a Jewish state deals with the Palestinians by ignoring their presence as an ethnic and national group. Aside from the indirect reference in Israel’s Declaration of Independence to ‘all inhabitants’, and reference by exclusion in several pieces of legislation that refer to Jews only (such as the Law of Return), there is little recognition or acknowledgment of the indigenous Palestinians, whether individually

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6 See, the interview with Shlomo Gravitz, head of the JNF Council. ‘One Hundred Years of the JNF’, Globes [Hebrew], Oct. 5, 2001, 29.

7 The Declaration of the Establishment of the State of Israel declares that Israel is ‘the Jewish state’ but also that the state will ‘foster the development of the country for the benefit of all its inhabitants’ and will ‘ensure complete equality of social and political rights to all its inhabitants’. Official Gazette 1 (1948), 1.
or as a group, as having a status in the state. In official dealings, they tend to be referred to by their religious or other affiliation: as Druze, Bedouin, Muslims, Christians, etc. At most, where the state is forced to refer to them collectively, the term ‘non-Jews’ tends to be used (such as in the annual Statistical Abstracts) or the generic word ‘Arabs’. The implications as regards land are clear. Israel aims to deny the particular link that the Palestinians have with land in what is now Israel, and suggests that they are a disparate collection of people with no particular identity that could settle anywhere in the Arab world.

The treatment of Palestinians in Israel that we have described is not a question of discrimination by private persons, or even of low-level officials, though these certainly occur. They are overwhelmingly instances where public and quasi-public bodies exercising public functions are consistently and systematically pursuing policies that restrict Palestinian access to land. One of the most remarkable aspects of the Israeli land policy is the extent to which government departments, planning bodies, the Israel Lands Administration, the Jewish national institutions and others charged with developing and implementing policies relating to land work with extraordinary singleness of purpose to pursue this objective.\footnote{For example, the settlement of title process that took place in the 1950s and 1960s comprised a concerted effort by the legislature, the courts and the Israel Lands Administration. See, Chapter 2 in Hussein and McKay, supra n. 1; and Alexandre Kedar, ‘Time of Majority, Time of Minority: Land, Nationality and Prescription Laws in Israel’, in Hanoch Dagan (ed.), Land Law in Israel: Between Private and National [Hebrew] (Tel Aviv: Ramot Publishers and Tel Aviv University, 1999), 443ff.} Israel does not necessarily ignore the principle of legality: it makes sure to pass the laws it requires in order to achieve its objectives. And it constructs a framework of state and Zionist bodies to control and develop land that have built-in mechanisms aimed at carefully protecting them from having to treat non-Jews in the same way that they treat Jews.

This manipulation also occurs in an international context. Israel is bound by a wide range of international principles that oblige the state to provide equal rights to its Palestinian citizens, including the principles of equality and non-discrimination. International law also obliges Israel to recognize the historical rights of the indigenous Palestinians to land and property within the state, including the refugees. Because Israel aspires to acceptance by the international community and wishes to be viewed as a democratic state abiding by the rule of law, it seeks to justify its actions to the external world. Israel, for example, submits official reports to UN human rights bodies explaining how its policies and practices are in line with international standards.

Given that Israel claims to be a state committed to rule of law (including international law), democracy, equality and non-discrimination, there are a number
of institutions and mechanisms that ought to operate to safeguard these principles. Far from protecting the land rights of the Palestinians, the legislature, ministries and other branches of the executive and the courts have operated with remarkable consistency to limit Palestinian access to land. The wide discretions granted under legislation and insufficient safeguards against discrimination have had a major impact on Palestinians.

The recognition of certain rights, such as the right to property and to freedom of occupation, as constitutional principles since 1992 has had only limited positive impact. Since the Basic Law does not affect the validity of legislation already in force, it leaves intact the main legislative framework used for expropriating Palestinian land, including the Absentees’ Property Law. Basic Laws are, however, to be taken into account for the purposes of interpreting existing legislation, and have proved significant in some cases before the High Court.

The role of the Israeli High Court in protecting Palestinian land rights has been particularly disappointing. For more than fifty years the Israeli Supreme Court, sitting as the High Court of Justice, has been assigned the role of guardian of the rule of law in Israel. Since 1948 the High Court has been called upon to adjudicate on many of the crucial cases for Palestinian land rights. Many of these have been linked to the process of expropriation and dispossession of Palestinian land. In these decisions, the Court has dealt many blows to Palestinian interests in land, and its role in securing the transfer of ownership and control of land to the state has been considerable. When confronted with these issues, the Court has tended to largely defer to the executive, though in certain areas it has played a more proactive role in facilitating the state goal of seizing Palestinian land. In cases relating to control of land use, the Court’s record has been little better. Far from championing the rights to equality and non-discrimination for Palestinian citizens of the state in relation to land use planning and access to state land, the Court has proved reluctant to intervene in decisions of the executive.

Significant gaps remain between the jurisprudence of the High Court and

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9 The Basic Law: Human Dignity and Liberty, enacted by the Israeli Knesset in 1992, purports to bring about constitutional entrenchment of property rights in Israel. Article 3 provides: ‘There shall be no violation of the property of a person’. Exceptions are provided for in article 8 which states that rights guaranteed under the Basic Law shall not be violated: ‘except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law’. The amended law is published in, Book of Laws 1454 [Hebrew] (1994), 90.

10 Absentees’ Property Law, infra, n. 34.

11 The Israeli Supreme Court, sitting as the High Court of Justice, hears petitions in constitutional and administrative law issues against any government body or agent.
internationally accepted standards on questions such as the scope of discrimination.\(^{12}\) The practices we have described reveal many violations of international law and human rights, and Israel has in recent years come under heavy criticism from United Nations bodies responsible for monitoring states’ compliance with human rights obligations they have committed themselves to. Yet the Israeli courts have rarely referred to these international standards even when they are set out before them.

The record of the High Court is not all negative, and particularly in recent years significant general principles have been established or reaffirmed by the High Court including the right of participation in the planning process, the ongoing link of the original owners of the land following expropriation and the fact that the state may not discriminate in allocation of land.\(^{13}\) Application of each of these principles, however, was limited to specific circumstances, or qualified or on a tentative basis, and these cases have yet to have a wider impact beyond the specific cases examined. Such decisions hardly scratch the surface of the exclusionary land regime in Israel. Palestinians have not been able to look to that institution to deliver bold judgments touching on the Jewish nature of the state. Rather, the Court has worked in tandem with other organs of the state, the legislative and the executive, to preserve the dominance of Zionist interests and goals. Nowhere has this been more apparent than in cases relating to land. The role of the High Court in Israel has not been pivotal in such changes as have occurred in the status of Palestinians in Israel. Unlike the United States, where the Supreme Court played a key role in the 1950s and 1960s in confronting institutional racism, the Israeli High Court has not been willing to criticize or depart from the prevailing regime and, in particular, the nature of ethnic relations in the state.\(^{14}\) The High Court has preferred to avoid

\(^{12}\) Compare, for example, Nazareth Committee for the Protection of Expropriated Land v Minister of Finance—HCJ 30/55 with more recent cases relating to discrimination in funding of religious cemeteries. See, discussion in Chapter 1 of Hussein and McKay, supra n. 1.

\(^{13}\) The question of consultation was addressed in Hashim Sawa’id and Others v Local Planning and Building Commission of Misgav and Others—(Judgment) HCJ 7960/99 (5.9.01) and Ismai’il Sawa’id and Another v Local Planning and Building Commission of Misgav and Others—(Judgment) HCJ 6032/99 (5.9.01). The Court ordered that the inhabitants of the unrecognized village of Kamaneh should be consulted by the planning authorities during the process of preparation of a plan for their community. The link of original owners with their land was affirmed in the Kirsik case, involving a Jewish landowner whose land had been expropriated for public purposes, the High Court said that the effect of Basic Law: Human Dignity and Liberty in a case where the original reason or the expropriation no longer existed as that the land should be return to the owner. Kirsik and Others v State of Israel, ILA and Others—HCJ 2390/96. The third case regarding discrimination in allocation of land in the Qa’dan case, ‘Adil Qa’dan v ILA and Others—(Judgment) HCJ 6698/95 (8.3.00).

taking bold decisions that threaten the established order and will go out of its way to turn the matter over to the legislature. When forced to confront the question of the Jewish character of the state when it comes up against other principles it is bound to uphold, such as the principle of equality, the Court comes down clearly on the side of the former. For instance, in giving judgment in the *Qa’dan* case, in which it held that the state cannot allocate land to a third party (the Jewish Agency) that uses it on a discriminatory basis, the Court affirmed that the Jewish state incorporates the right to equality. But the Court also said the JA has a historical mission in Israel and its work is not yet complete. The High Court has also, like the state itself, consistently refused to address issues relating to the Palestinian community as collective issues. Palestinians have based many petitions on a claim of historical discrimination as a national group, but the Court has insisted on dealing with them as individual cases.

Where does this lack of protection of their rights leave the Palestinian citizens of Israel? This population is now ghettoized in almost the same number of communities that they had more than fifty years ago, or in pockets within a few ‘mixed’ cities, which where Palestinian cities before 1948. Some 7.5 per cent still live in appalling conditions in communities that have not been formally recognized by the government, because the government wants them to move elsewhere.

The last two decades have seen an increase in broader Israeli-Palestinian tension, including two intifadas. This has coincided with a strengthening of the Palestinian identity of the Palestinian citizens. The violence of October 2000, when 13 Palestinian citizens of Israel were killed in confrontations, echoed the start of the *al-Aqsa* intifada in the OPT, and represents, at least in part, a spill-over of frustration with Israeli policies, including those concerning land. Since 1948, land expropriation has consistently been the leading source of popular protest against the government among the Palestinian citizens of Israel. At the same time, Israel has been even more concerned than before to place emphasis on ethnicity and on the Jewish nature of the state. In the run up to general elections in January 2003, requests were filed—including by the Attorney General—to disqualify three Arab political parties and three individual Palestinian candidates from standing on the basis that their goals and activities deny ‘the existence of the state of Israel as a Jewish and democratic

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15 See, e.g., the *Kirsik* case in which the Court, having found that practices relating to the 1943 Land (Acquisition Public Purpose) Ordinance, would contravene the Basic Law: Human Dignity and Liberty, asked the legislative branch to address the issue. *Kirsik and Others v State of Israel, ILA and Others*, supra n. 13.

16 See, e.g., the petitions brought by the legal advocacy group Adalah—The Legal Center for Arab Minority Rights in Israel and many of those brought to the Court in recent years, such as the *Nazareth* and *Makhul* cases under the 1943 Lands (Acquisition for Public Purpose) Ordinance.
state’. Calls from Israeli right-wingers for the expulsion of Palestinian citizens of the state, or for a population exchange, have become more vocal.

**FROM LAND OWNERS TO REFUGEES, ABSENTEES AND DISPLACED PERSONS**

As mentioned above, various legal methods have been used since 1948 by the Israeli authorities to confiscate and appropriate Palestinian lands and properties, and to transfer them to Jewish possession and common ownership (known as Israel Lands) to ensure building up the ‘national Jewish home’ and future control of the lands within Israel for the benefit of the Jewish people/the Jewish citizens. A brief review of those methods follows (see Figure 4.1 for an illustration of the land regime).

**‘Jewish National Institutions’ as a cover for discrimination**

As discussed above, following the establishment of Israel in 1948, the new government permitted and actively encouraged pre-state Jewish ‘national’ institutions to play a key role in the development of the new Jewish state. Powerful Zionist institutions such as the Jewish Agency, the World Zionist Organization and the Jewish National Fund were given quasi-governmental status. The latter, which

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17 Adalah—The Legal Center for Arab Minority Rights in Israel, ‘Attorney General, Supported by GSS, Seeks Disqualification of NDA Party from Israeli Elections; Right-Wing MKs Ask to Ban Three Arab MKs and Three Political Parties; Adalah to Represent All Arab MKs and Political Parties’, Election News Update, Dec. 21, 2002. The requests were submitted pursuant to section 7(a) (Amendment No. 9) of the 1950 Basic Law: The Knesset. According to section 7(a): ‘A candidates’ list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as the state of the Jewish people; (2) negation of the democratic character of the State; (3) incitement to racism.’ Basic Law: The Knesset (Amendment No. 9), Book of Laws 1155 [Hebrew] (1985), 196.

has ‘specialized’ in buying and taking over private Palestinian land, acted before 1948 as a private foreign company based in Britain. However, the JNF has become a private Israeli company since 1953 according to a special law enacted by the Knesset (parliament) known as the Jewish National Fund Law.\textsuperscript{19} According to its Memorandum of Association the JNF acts within any area under the jurisdiction of the government of Israel and for the benefit of Jews only\textsuperscript{20}, and in the case of the dissolution of the JNF all its property will be transferred to the Israeli government\textsuperscript{21}. It is estimated that the JNF owns around 13 per cent of the lands in Israel.\textsuperscript{22} In addition to the JNF Law, in 1953 the Israeli Knesset enacted the World Zionist Organization and the Jewish Agency (Status) Law.\textsuperscript{23} According to article 4 of this law, these two ‘national organizations’ have been recognized by the state of Israel as allowed

\begin{quote}
...to continue to operate in the State of Israel for the development and settlement of the country, the absorption of immigrants from the Diaspora and the coordination of the activities in Israel of Jewish institutions and organisations active in those fields.\textsuperscript{24}
\end{quote}

\section*{Destruction of Palestinian villages and declaring them ‘closed military areas’}

After forcibly expelling Palestinians inhabitants in 1948, the Israeli authorities destroyed almost 80 per cent of Palestinian towns and villages in a process that lasted until the 1960s. Most of the destroyed/evacuated villages were declared ‘closed military areas’. Such a declaration was made according to article 125 of the 1945 Defense (Emergency) Regulations\textsuperscript{25}, promulgated by the British Mandate and reactivated by Israel. The aim of declaring a village a closed military area has been to

\begin{itemize}
\item \textsuperscript{19} 1953 Jewish National Fund Law, \textit{Book of Laws} 130 [Hebrew] (1953), 34.
\item \textsuperscript{21} \textit{Id.}, art. 6, \textit{id.}
\item \textsuperscript{22} David Kretzmer, \textit{The Legal Status of The Arabs in Israel} (Boulder, CO: Westview Press, 1990).
\item \textsuperscript{23} 1950 World Zionist Organization and the Jewish Agency (Status) Law, \textit{Book of Laws} 112 [Hebrew] (1952), 2.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} 1945 Defense (Emergency) Regulations, \textit{Palestine Gazette}, No. 1442 (1945), Supplement 2, 1055.
\end{itemize}
prevent its inhabitants from returning, and thus lose actual possession of their lands. Moreover, not actually living or farming the land satisfied one of the conditions needed by other laws\textsuperscript{26} to validate the take over of lands and their transfer, in the main, to the Development Authority\textsuperscript{27} and also, in smaller part, to the possession of the Minister of Agriculture according to the Emergency Regulations (Exploitation of [Uncultivated] Land) of 1948\textsuperscript{28}. Furthermore, the Israeli authorities issued the Emergency Regulations (Security Zones) in 1949\textsuperscript{29} which empowered the Minister of Defense to declare most areas close to the northern border with Lebanon and the eastern border with Jordan (in the Triangle area\textsuperscript{30}) as a ‘security zone’ and thus deny entry or exit to any person and even expel him/her from the declared zone. The Minister of Defense has used his power according to these Regulations to deny entry and even expel inhabitants of Palestinian villages located within the security zone, such as in the case of Iqrit (examined in more detail below)\textsuperscript{31} and Ghabsiyyeh in the Galilee.

It is worth noting here, that by 5 November 1948, 700,000 refugees were expelled from 443 towns and villages, and ‘[by] 20 of July 1949 over 800,000 Palestinians were expelled from 531 towns and villages, in addition to 130,000 from 662 secondary small villages and hamlets, making total of 935,000 refugees’\textsuperscript{32}.

The wide definition of ‘absentee’

Using the 1948 Emergency Regulations Concerning Absentee Property\textsuperscript{33} and later the 1950 Absentees’ Property Law\textsuperscript{34}, Israeli authorities have declared the largest

\textsuperscript{26} Mainly the 1953 Land Acquisition (Validation of Acts and Compensation) Law. See, infra n. 38 and accompanying text for an explanation of the 1953 law.

\textsuperscript{27} The Development Authority was created by the 1950 Development Authority (Transfer of Property) Law, infra n. 37. The village of Iqrit, for example, lost 15,600 dunums (3,900 acres/1,560 hectares) according to this law. See, supra nn. 56-68 and accompanying text, for a detailed discussion of the Iqrit case.

\textsuperscript{28} 1948 Emergency Regulations (Exploitation of [Uncultivated] Land), Laws of the State of Israel 2 (1948/49), 71-7.

\textsuperscript{29} 1949 Emergency Regulations (Security Zones), Laws of the State of Israel 3 (1949), 56

\textsuperscript{30} The Wadi Ara area in the Galilee comprising the Palestinian cities of Umm al-Fahm, Baqa al-Gharbiyya and at-Tira.

\textsuperscript{31} See, Daoud v Committee for Security Zones—HC 239/51.

\textsuperscript{32} Abu Sitta, supra n. 1, 7-8.

\textsuperscript{33} 1948 Emergency Regulations Concerning Absentee Property, Laws of the State of Israel 1 (1948), 8.

\textsuperscript{34} 1950 Absentees’ Property Law, Book of Laws 37 [Hebrew] (1950), 86.
number of Palestinians possible as absentees, confiscating their private lands as ‘absentee’s property’. The extensive use of these regulations and law, and the all-inclusive definition of absentee, created the problem of the ‘present absentees’: the ‘displaced Palestinians’ who have been banned from returning to their villages, despite the fact that they are Israeli citizens.

The Absentees’ Property Law provides that absentee property shall be administered by the Custodian for Absentees’ Property. Article 19(a) states that when the absentee property is land the Custodian is not allowed to sell it or otherwise transfer the ownership to a third party. However, the same article continues: ‘if a Development Authority is established under a Law of the Knesset, it shall be lawful for the Custodian to sell the property to that Development Authority at a price not less than the official value of the property.’

Six months after the enactment of the Absentees’ Property Law, such an authority was established by the Development Authority (Transfer of Property) Law of 1950. It is estimated that as of 1959, the Custodian administered 3,250,000 dunums (812,500 acres/325,000 hectares), most of which he transferred to the Development Authority.

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35 Article 1(b) of the Absentees’ Property Law defines absentee as follows:
‘(b) ‘absentee’ means —
(1) A person who, at any time during the period between the 16th Kislev, 5708 (29 November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, (5708—1948), that the state of emergency declared by the Provisional Council of State on the 10th of Iyar, 5708 (19th May, 1948) has ceased to exist, was the legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period —
(i) Was a national or citizen of the Lebanon, Egypt, Syria, Saudi—Arabia, Trans—Jordan, Iraq or the Yemen, or
(ii) Was in one of these countries or in any part of Palestine outside the area of Israel or
(iii) Was a Palestinian citizen and left his ordinary place of residence in Palestine
(a) for a place outside Palestine before the 27th Av 5708 (1st September, 1948); or
(b) for a place in Palestine held at the time by forces which sought to prevent the establishing of the State of Israel or which fought against it after its establishment;
(2) A body of persons which, at any time during the period specified in paragraph (1), was a legal owner of any property situated in the area of Israel or enjoyed or held such property whether by itself or through another, and all the members, partners, shareholders directors or managers of which are absentees within the meaning of paragraph (1), or the management of the business of which is otherwise decisively controlled by such absentees, or all the capital of which is in the hands of such absentees;’

36 Id., art. 19(a).

Validating illegal acts of land acquisition

To validate any prior illegal expropriations/taking over of lands between 1948 and 1953, the Israeli Knesset enacted the 1953 Land Acquisition (Validation of Acts and Compensation) Law. The declared objective of this law was to ‘validate’ retroactively the taking over of Arab-owned lands for military purposes or for use by existing or newly established Jewish settlements. According to article 2 of this law the prior acquisition of land becomes legal if the Minister of Finance issues a written statement confirming that three cumulative conditions exist. The first condition was that the property concerned was not in the possession of the owner on April 2, 1952. The second condition is that the property was used or allocated for ‘purposes of essential development, settlement or security’. The third condition is that the property concerned is still needed for one of the aforementioned purposes. After signing such a statement, it will create solid proof that the acquisition of the land is legal, and the ownership of the concerned property will automatically be vested in the Development Authority.

Land expropriation for ‘public purposes’

Further, the Israeli authorities have confiscated Arab lands for ‘public purposes’ (in most cases for the ‘benefit of the Jewish public’) according to the 1943 Lands (Acquisition for Public Purposes) Ordinance. This is a Mandatory Law which was reactivated by Israel. The law itself is neutral, however, its use has been discriminatory, as in many cases Arab lands were expropriated for public purposes, but later used for the benefit of the Jewish public only. For example, 1,200 dunums (300 acres/120 hectares) expropriated in 1953 from Arab Nazareth, were claimed to be designated to build government offices. Later, it became clear that only 80 dunums (20 acres/8 hectares) were used to build the said offices, and the rest to build a few thousand residential units which became the nucleus of Jewish Upper Nazareth. In addition, another 3,000 dunums (750 acres/300 hectares) of el-Battof plain (Galilee) were

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39 Id., art. 2(a)(2).
40 1943 Lands (Acquisition for Public Purposes) Ordinance, Palestine Gazette, No. 1305 (1943), Supplement 1, 44.
41 See, Ahmad Kasem v the Minister of Finance—HC 18/57.
expropriated in 1965,\(^{42}\) and almost 5,100 *dunums* (1,275 acres/510 hectares) of the lands of B’aneh and Deir al-Asad were expropriated in 1966, land on which the city of Carmi’el was later built.\(^{43}\)

All lands taken according to the 1943 Ordinance have become part of the ‘state property’ according to the 1951 State Property Law\(^{44}\), which includes lands which were registered prior to 1948 in the name of the High Commissioner, ‘on behalf’ of certain Arab villages\(^{45}\).

## Transfer of Arab land to Jewish hands and creating legal barriers to restitution

Israeli authorities have used a two-fold strategy to complete control of Palestinian land. Firstly, to conquer land, not only by military means but also through ‘legal tools’—i.e., laws and regulations—some created by the British Mandate and reactivated by the Israeli government, but most ‘Israeli made’.\(^{46}\) The second stage has been to quickly ‘transfer’ the confiscated Palestinian villages and private lands (either declared absentee property or abandoned property) into Jewish hands, and prevent the return of the redeemed lands to the hostile group, that is, Palestinian Arabs.

The first stage has been achieved through various legal tools. The main legal tool in this regard has been the Absentees’ Property Law\(^{47}\) discussed above, according to which the Custodian of Absentees’ Property has been authorised to transfer absentee properties to the Development Authority established by the 1950 Development Authority (Transfer of Property) Law.\(^{48}\) The latter then transferred the possession of those properties to Amidar (a government company responsible for Jewish settlement) and the World Zionist Organization, and to new Jewish immigrants creating new Jewish settlements over former Palestinian villages and lands.\(^{49}\) Other important legal

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\(^{45}\) *Id.*, art. 1(4).


\(^{47}\) See, n. 34 and accompanying text.

\(^{48}\) See, n. 37 and accompanying text.

\(^{49}\) Halabi, *supra* n. 42, 24.
tools used to achieve the ‘legal conquest’ of the Palestinian land are the 1953 Land Acquisition (Validation of Acts and Compensation) Law\(^{50}\) according to which the Minister of Finance has assigned ownership of expropriated lands to the Development Authority, and the 1943 Lands (Acquisition for Public Purposes) Ordinance\(^{51}\).

In order to secure the land in the long term, the Israeli legislator ensured that all lands taken from the Palestinians become part of Israel Lands (Hb: Mikarki’eh Yesrael), which includes: (a) lands owned and registered in the name of the state of Israel; (b) lands owned and registered in the name of the Jewish National Fund; and, (c) lands registered in the name of Development Authority. According to article 1 of the 1960 Basic Law: Israel Lands\(^{52}\) the ownership of Israel Lands is not transferable through sale or any other way. This legislated land tenure system has ensured exclusive use by Jews of most of Israel Lands which are estimated to be more than 90 per cent of the total lands in Israel.\(^{53}\)

**Confiscation of Arab land after ‘Land Day’ in 1976**

The Israeli policy of confiscating Arab lands and building new Jewish settlements continued even after the massive Arab protests on Land Day (1976), when six Palestinian protestors were killed in the Galilee. Under the slogan ‘resettling the Galilee’ (Hb: yishuv Hagalil), often referred to as ‘Judaization of the Galilee’, tens of new ‘lookout settlements’ (Hb: metzpim) were built on hilltops in the Galilee. In addition, thousands of dunums were seized from the Negev Bedouins according to the 1980 Negev Land Acquisition (Peace Treaty with Egypt) Law.\(^{54}\) The main purpose of the policy has been to strengthen already existing Jewish cities and towns, and to achieve contiguity between Jewish built-up areas and fragmentation of Arab residential areas. This policy continues today. In September 2003 a new settlement plan was launched with the goal of building new neighborhoods and strengthening 23 existing Jewish settlements in the upper Galilee.\(^{55}\)

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\(^{50}\) See, n. 38 and accompanying text.

\(^{51}\) See, n. 40 and accompanying text.


Figure 4.1: ‘Redeeming the National (Jewish) Land’

Land owned by Palestinian Arabs before the 1948 war

**Absentees’ Property Law (1950)**
Movable and immovable property of refugees transferred to the Israeli Development Authority. Created assumption that the Israeli Custodian of Absentees’ Property acts in good faith when transferring ‘absentee property’ to a third party. As of 1959 the Custodian administered 3,250,000 dunums of refugee property.

**Development Authority Law (1950)**
(Transfer of Land)
Settling of new (Jewish) immigrants. According to the Israel Lands Administration, the Development Authority owns 2,564,000 dunums, or around 13 per cent of ‘Israel Lands’.

**Land Acquisition Law (1953)**
(Validation of Acts & Compensation)
Retroactively validated acquisition of 1,225,184 dunums including lands and built-up areas of Palestinian villages, in addition to 70,000 dunums of Waqf property.

**Israel Lands Reservoir**
Basic Law: Israel Lands (1960)
Defines ‘Israel Lands’ as including ‘state property’, land held by the Jewish National Fund and the Development Authority. This provides for Jewish ownership of around 93 per cent of the land in Israel. Article 1 of the Basic Law prevents the transfer of Israel Lands except in very limited cases. Israeli Lands may only be leased for 49 years with the option of an extension for another 49 year period, subject to the provision of other laws.

**Land Ordinance (1943)**
(Acquisition for Public Purpose)
Used to develop Jewish cities, towns and neighborhoods such as Upper Nazareth in 1955 (1,298 dunums), and Carmel in 1966 (5,000 dunums).

**State Property Law (1950)**
All property registered in the name of the High Commission for Palestine on behalf of certain Arab villages before 1948 and land confiscated for ‘public purpose’ becomes ‘state property’.

**Jewish National Fund Law (1953)**
The Jewish National Fund becomes an Israeli (rather than British) private company, acting for the benefit of Jews only. The Jewish National Fund owns 13 per cent of the lands in Israel.

**Negev Land Acquisition Law (1980)**
(Peace Treaty with Egypt)
Thousands of dunums of land taken over from Arab Bedouins residing in the Naqab/Negev.

**Israel Lands Administration Law (1960)**
Amended in the 2009 Israel Lands Authority law, establishes what is now the Israel Lands Authority (ILA) and places it in charge of “Israel Lands” (93% of land within the green line, including JNF and Development Authority lands). JNF appoints 6 of the 13 members of the council that directs the ILA.

**Agricultural Settlement Law (1967)**
(Restrictions on the Use of Agricultural Land and Water)
Prevents the sub-leasing of agricultural land that is considered to be ‘Israel Lands’ within the meaning of the 1960 Basic Law: Israel Lands, to Palestinians.

This land regime has resulted in a situation where Palestinians who comprise 18 per cent of the population of Israel own 3 per cent of the land; tens of ‘unrecognized (Arab) villages’, and at least 220,000 internally displaced Palestinians. Since 1948 the government has not established a single new Palestinian town on land held in the ‘Israel Lands Reservoir’. Source: Usama Halabi (LL.M).
RIGHT OF RETURN, THE EVER-PRESENT FEAR: THE IQRIT MODEL

Between 1948 and 2003, Palestinian inhabitants of the depopulated village of Iqrit who are citizens of Israel requested to return to their village in four petitions submitted to the Supreme Court, sitting as the High Court of Justice. The central tenet of all the decisions was far removed from the legal arguments—it was the fear of a precedent for the right of return.

The President of the Supreme Court Justice Aharon Barak said in a speech to the Israel Bar Association Conference in Eilat in May 2003 that:

The courts are the defenders of democracy. The courts are working with all their capability with the tools they have to establish Israeli democracy, because they know that if they do not defend democracy, it will not defend us. ... Democracy is a power of values, principles and human rights that the majority cannot take from the minority.

This section will examine the extent to which these values have guided the conduct of the Supreme Court in the case of the Palestinian village of Iqrit.

Iqrit was occupied on 8 November 1948. The Israeli army ordered its inhabitants, together with those of the neighboring Palestinian village of Bir’im, to leave their villages due to security concerns along the nearby Lebanese border. They left on the basis of assurances that they would be permitted to return within fifteen days. When this did not happen the residents turned to the courts. The High Court (the first petition) ruled in July 1951 that the residents of Iqrit were entitled to return to their village because the reason for the temporary evacuation no longer existed and no legal grounds existed to deprive them of their right to return. However, the military defied the order, issued the inhabitants with expulsion orders and destroyed both villages. A second petition by residents from Iqrit was denied.

The use of emergency legislation, in this case the 1949 Emergency Regulations (Security Zones), to seize for the state large areas of Palestinian land, must be viewed as an unjustified interference with the fundamental right of the Palestinian community to peaceful enjoyment of their property. International law does not allow states unlimited power to violate rights in times of emergency and has developed standards governing such situations. Restriction of rights by the use of emergency powers must be exceptional, temporary, proportional and only to the extent strictly necessary; and some rights, such as the prohibition on discrimination, can never be derogated from even in time of emergency.

56 Daoud v Defense Minister—HCJ 64/51.
57 Daoud v Committees for Security Zones, supra n. 31.
58 See, n. 29 and accompanying text.
On 28 August 1953, several months after the Knesset had approved the Land Acquisition (Validation of Acts and Compensation) Law\textsuperscript{59}, the Ministry of Finance expropriated 24,591 dunums (6,148 acres/2,459 hectares) of Iqrit’s lands. The lands were given to the Development Authority and were registered in the name of the state. The 1953 Land Acquisition Law stated in section 2 that a property which on 1 January 1952 was not in the possession of its owners, declared as confiscated by a Minister, used for necessary development, settlement or security and is still needed for those purposes, will be transferred to the ownership of the Development Authority. The lands in question in Iqrit were used for Jewish housing, industry and agriculture.

In November 1963 the Military Commander issued a closure order according to article 125 of the 1945 Defense (Emergency) Regulations\textsuperscript{60} that forbade entry to the village. The residents of Iqrit re-applied for their return to the village, but the government headed by Golda Meir decided in July 1972 that the residents of Iqrit and Bir’im would not be allowed to return to their villages, and would be compensated and resettled in their existing residences. The case continued to be present in public discourse, and in 1977 the newly-elected government of Menachem Begin nominated a Committee headed by then Minister of Agriculture Ariel Sharon to examine the issue of the return of the residents. The Committee decided not to allow their return.

In 1981 the residents issued their third petition to the Supreme Court, in which they requested the cancellation of both the closure order and the confiscation of their land. The petition was denied on the grounds of the long time delay. The Court assumed that the expropriation was legal and that there was no change in the security situation that should justify the cancellation of the orders.\textsuperscript{61} In the early 1990s several drafts of laws allowing the villagers to return were advanced by different Knesset members, but none were passed.

Nevertheless, the former residents continued their campaign to return to the village. In 1993 a Ministerial Committee was appointed by then Minister of Justice David Libai to advise the government of former Prime Minister Yitzhak Rabin how to resolve the problem of Iqrit and Bir’im. This Committee took the view that in this particular case there was no reason of state security to continue to prevent those evacuated from returning to their villages. They determined that it would be possible to return a limited area of land without harming the rights of those who had subsequently settled in the area.

\textsuperscript{59} See, n. 38 and accompanying text.

\textsuperscript{60} See, n. 25 and accompanying text.

\textsuperscript{61} Committee of Iqrit v the Government of Israel—HCJ 141/81.
The Committee recommended that a total of 600 dunums (150 acres/60 hectares) be given to each village (Iqrit and Bir‘im), and that the Israel Lands Administration be responsible for defining which particular land this would comprise. This was less than 10 per cent of the land originally owned by inhabitants of the two villages. Each head of a family that had resided in the village in 1948 would be entitled to 500 meters on which to build a house, which he could assign to a family member of his choice. If the head of family was dead, a Committee would decide which family member would receive this privilege. At the same time, the person acquiring the rights would be required to sign a document giving up any further rights to land in the area.

Stalemate followed the Committee’s recommendations. On the one hand, branches of government refused to implement them, while on the other, the people of Iqrit and Bir‘im rejected them as inadequate, arguing that their effect would be to limit the numbers who could return and live on the land and to leave no scope for the future agricultural and economic development that would be vital to establish employment opportunities. However, the government did not make a decision on the recommendation, and in the elections of October 1996 the government changed.

In February 1997 the petitioners issued a new petition (the fourth petition) in which they claimed that the security situation had changed and that no doubt existed on this point, or on the point of their right to return to the village. On 10 October 2001, the Israeli cabinet finally issued its decision (on the recommendations of the Libai Committee). There was no reason, the government said, to change the decision of Golda Meir in 1972, which was to refuse to allow a return to the two villages on the grounds of security concerns and because it would set a precedent for other displaced Palestinians.

Four years after the fourth petition was submitted, an affidavit was issued to the Court by then Prime Minister Ariel Sharon in which he claimed that promises were given to the residents by the authorities, that these promises were not confirmed by the government and that the government could act freely when political will existed. He added that the issue was strongly raised at Camp David negotiations and the subsequent wave of hostility strengthened the possible implications of such a decision. A precedent regarding the return of evacuated residents will be used politically and for propaganda purposes by the Palestinian Authority.

The petitioners claimed that there is no link between their right to return and the issue of the refugees, because they are Israeli citizens of whom it was demanded that they change residence temporarily. The petitioners based their demand to return to their village on three grounds: (1) the lack of a security reason for the issue of the closure order; (2) the promise of the state; and (3) the new precedent given by the Supreme Court in the 1990s regarding the ability of the government to cancel a confiscation.
In its decision on this fourth petition issued in June 2003 the Supreme Court agreed that there was no longer a justification for the closure order.\textsuperscript{62} The Court stated that without allocation of land by the state to the residents of the villages there was no practical way to settle the issue. With regard to the promise of the state, the Court stated that the Israeli government did not consolidate a formal decision to cancel the decision of the government headed by Golda Meir to prevent the return of the displaced inhabitants to their villages. However, a state promise was given, or it may be assumed that such a promise was consolidated by the behavior of the authorities during tens of years. This ranged from the Israel Defense Force officer who ordered the evacuation and promised the villagers could return to the village, to the Committee set up by Minister of Justice David Libai which stated that the villagers are permitted to return.

The Court also stated that an administrative authority could be released from a state promise if there was a legal justification such as a change of circumstances that justifies the rescinding of the promise. It continued:

\ldots in our case, the Libai Committee based its recommendations, \textit{inter alia}, on political changes that have occurred in the area, including the peace treaty with the Palestinian Authority (the Oslo Agreement). However, the political reality since that time has changed and the Palestinians have repeated their demand of the right of return. The precedent of the return of the displaced inhabitants might harm the interests of the state. In these circumstances there is no place to enforce the state promise to settle the displaced in the Iqrit area. Nevertheless, the petitioners have the right to an alternative enforcement by the allocation of land or compensation.\textsuperscript{63}

The petitioners had referred to the statement in the Libai Committee’s report that indicates defined areas near Iqrit and Bir’im on which community settlements could be built without causing harm to the neighbors. The petitioners claimed that these areas are still not used and are no longer needed for the public interest for which they were confiscated. Therefore, in these circumstances, the Minister of Finance should cancel the transfer of the ownership of the land to the Development Authority. The Court denied this claim by stating its reliance on the state’s affidavit in which the state itself declared that the lands are occupied.

The Court stated that the precedent given in the \textit{Kirsik} case\textsuperscript{64} in 2001 regarding the jurisdiction of the court to cancel a land confiscation is not applicable in these

\textsuperscript{62} \textit{Sbait et al. v State of Israel}—HCJ 840/97.
\textsuperscript{63} \textit{Id}.
\textsuperscript{64} \textit{Kirsik and Others v State of Israel, ILA and Others}, supra n. 13.
circumstances. Ownership of the land of Iqrit was transferred to the Development Authority according to the 1953 Land Acquisition Validation of Acts and Compensation Law65, i.e., a different law than the one that served as the basis for the decision in the Kirsik case—the 1943 Acquisition of Land for Public Purposes66.

The role played by the Israeli High Court in the cases of Iqrit and Bir’im is interesting in that, unusually, it was willing to rule in favor of the Palestinian owners, at least in the initial stage. Subsequently, however, the Court was not willing to confront the executive and has continually deferred to the government in seeking a solution. The Supreme Court adopted the state’s standpoint: the state and Zionist movement’s fear of the precedent of the right of return of the Palestinians. The decision given by the Supreme Court contradicts basic principles of democracy and the rule of law as set out by Justice Barak in the quote at the beginning of this section. The Court did not defend the minority from the power of the majority—on the contrary it gave it a legal justification.

This ruling by the Supreme Court regarding the right of people who were displaced from their village during the 1948 war and who became Israeli citizens represents the official position of the state regarding the right of return of displaced Palestinians who are Israeli citizens. As quoted in the judgment on this fourth petition, the officer who gave the affidavit to the court is no less than former Prime Minister Sharon—who stated that the implementation of the right of return could endanger the security values of the state of Israel and be used as a precedent by the Palestinian Authority in their negotiations with Israel.

Therefore, there is a common viewpoint between the executive and the judiciary regarding the right of return. Here it is useful to quote a recent statement of Ephraim HaLevi, the former head of both the Mossad and the Israel Defense Council:

We should demand from the Palestinians that they acknowledge the legitimacy of Zionism. They should acknowledge that the Zionist project is legitimate as they demand that we should acknowledge a Palestinian state. This acknowledgment should not be tacit or implicit—it must be very clear … This acknowledgment of the right of existence is different from the acknowledgment of existence itself. The Palestinian right of return cancels our right of existence. The right of return is more dangerous than the return itself … the acknowledgment of the right of return means to acknowledge the right of four million people to come back here, even if they do not actually do so, as the Palestinian leadership claims. Giving the right of return will transfer to the Palestinians that basic right of property in the homeland and will de-legitimate Israel. The right of return means no right of Israel to exist. We must demand that the Palestinians cancel the right of return.

65 See, n. 38 and accompanying text.
66 See, n. 40 and accompanying text.
HaLevi’s statement represents the Israeli national consensus—the official as well as public view regarding the right of return.

**CONCLUSION**

Looking ahead, it is difficult to see the will on the part of Israel to resolve the many aspects of the Palestinian land question. A crucial question for Palestinians is what will be done to redress fifty years of violations. Even if new legislation and policies were to effectively guarantee Palestinian access to land today, what of all the land lost and all of the violations committed during all the years since 1948? Even the Israeli High Court has acknowledged that expropriation does not sever the link between a land and its owner. The Israeli attempts to do so by passing land from the Custodian of Absentees’ Property to the Development Authority to the JNF, and now possibly to private Jewish owners, cannot magically make the historic rights of the Palestinian owners disappear. As Justice Dalia Dorner remarked in the *Nusseibeh* case, compensation is not sufficient to deal with the harm done to property rights.

At the same time, the legal and practical machinery used to dispossess Palestinians of their land and to limit Palestinian access to land in the state of Israel remains fully intact in all fundamental aspects, and Palestinian citizens of the state remain all too aware that these same laws could be used again. They also see little will to change the policies and practices that have consistently denied Palestinians access to land. Planning is now taking place that will determine how Israel will look in 2020. These plans involve exactly the same objectives that characterized earlier plans—to contain Palestinian development and promote Jewish development. This cannot be done without further harming the rights of Palestinians.

On a day-to-day level, a million Palestinians live as citizens of Israel, but find it increasingly difficult to gain access to the land they need to survive. Palestinians in Israel, like any other population, depend on access to land for housing and the natural growth of their communities, industry and agriculture, leisure and other activities. Yet their growing communities are increasingly finding themselves hemmed in to ever decreasing amounts of land. If Israel is to evolve into a state that accepts basic international and human rights norms, it will have to prove itself willing to redress the wrongs of the past fifty years, modify its fundamental systems regarding land and allow equality of access to land to its Palestinian citizens.

In light of the above, it seems that any serious plan to enable/facilitate the return of Palestinian refugees and displaced persons to their homeland/original villages and/or to create a real possibility for property restitution has to include proposed changes/amendments to Israeli land laws so that parts of Israel Lands can again be
transferable. Such legal changes are unlikely to happen as a result of Israeli good will. There must be real Palestinian and (mainly) international diplomatic efforts to push for a political-legal solution (within a peace agreement) to the Palestinian refugee problem, similar to the one Paul Prettitore describes in chapter 5 on Bosnia and Herzegovina. In the latter case, the governments of the Federation of Bosnia and Herzegovina and of the Republika Srpska were obliged by the Dayton Peace Agreement (Annex 7 to the Agreement)\textsuperscript{67}, to change and repeal certain domestic legislation to enable the return of refugees to their place of origin, to claim back their properties or to be compensated for any property of which they were deprived in the course of hostilities that cannot be restored to them.\textsuperscript{68} Yet, it is important to note here that ‘only after extensive negotiations with the International Community did the Federation of Bosnia and Herzegovina in April 1998 adopt property legislation geared toward returning property lost during the conflict’.\textsuperscript{69} Moreover, it seems that without the Peace Implementation Council, consisting of 55 countries and international organizations, created after the signing of the DPA, the efforts to bring about the desired changes in domestic legislation in the Federation of Bosnia and Herzegovina and in the Republika Srpska would have failed. Since the legislation enacted by the two entities were not adequate, in 1999 the Office of the High Representative (established by Annex 10 of the DPA, and who takes the lead role of monitoring and fostering all aspects of civilian implementation) was forced to impose the appropriate legislation in each of the two entities, ‘pursuant to his powers granted by the Peace Implementation Council in Bonn’.\textsuperscript{70}

Thus, although it is important to raise the right of the Palestinian refugees and displaced persons to return to their places of origin, and it is important to emphasize that it is a legal and moral right, it is no less important to find the way to implement it. In this regard, the case of Bosnia and Herzegovina is an important relevant example to bear in mind and try to follow.


\textsuperscript{69} \textit{Id.}, p. 141

\textsuperscript{70} \textit{Id.}
The Right to Housing and Property

Restitution in Bosnia and Herzegovina

Paul Prettitore

While the right of refugees and displaced persons to return to their homes is well-established in international law, the right to repossess property lost during displacement is only now starting to be recognized on a regular basis. There are many circumstances by which individuals are deprived of property. There are instances where property is lost through abandonment and subsequent reallocation during conflict situations, as well as nationalization and expropriation by governmental authorities. Sometimes similar actions are carried out under both circumstances. This chapter focuses on post-conflict situations because of the unique circumstances surrounding the return of properties in such situations.

As the right of return has become more established, the right to repossession of property lost during periods of displacement has emerged as a topic for discussion. It is becoming apparent that the right to repossession/compensation is becoming an integral part of international human rights law. However, this right has yet to enjoy full and uniform protection, as evidenced in several instances throughout the world. Even in instances where the right has been recognized, political and practical obstructions prevent individuals from reclaiming their property.

The right to repossession of property has most often been addressed under human rights law either through provisions guaranteeing some level of protection of property rights or provisions protecting against discrimination. Both universal and regional human rights treaties and conventions provide some kind of protection of property, home or possessions. Such protections apply to individuals regardless of status as refugees or displaced persons. In many instances, this right has been elaborated in peace treaties ending hostilities, usually under the aim of allowing, in particular, refugees and displaced persons to return to their homes. The reference to return ‘home’ has often been clearly defined as return and repossession of the actual property lost during the conflict.
While repossession of property is not the only issue facing refugees and displaced persons, in many ways it is one of the most basic issues. Without the ability to return to their property, efforts aimed towards reintegration and sustainability, such as employment, education and health care, are meaningless. In addition, in a post-conflict situation property may be one of the few tangible belongings refugees and displaced may have, and even if they are not interested in return, they can sell or lease property and thus generate income which could be used to provide for their own durable solution, thus removing them from the group of refugees and displaced person for which governments must provide benefits. Post-conflict situations may require special remedies to more efficiently address the gross violations of international human rights that took place during the conflict, especially in view of the issues of capacity and neutrality of domestic mechanisms. Specifics need to be worked into the peace agreement/settlement, especially the terms of restitution and compensation, as well as establishment of a legal framework and mechanisms for the enforcement of rights.

The restitution of housing and property is important in the context of providing real means to the success of voluntary repatriation of refugees and displaced persons. In most cases, one of the prime concerns of refugees and displaced persons is repossession of lost property. Where returnees are unable to repossess property in a reasonable amount of time voluntary repatriation becomes less of an effective option. Restitution also allows those who wish to resettle elsewhere means for a durable solution, if they are able to access property and sell it, or be compensated, thus easing the strain on host countries and countries of resettlement. It is also important in the context of reversing ethnic cleansing and promoting respect for the rule of law and human rights.

This chapter elaborates on the right to restitution under current human rights treaties, both universal and regional. It will also look at the protection of the right in practice, with special emphasis on enforcement of the right to restitution in post-conflict Bosnia and Herzegovina.

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1 Voluntary repatriation, along with integration into countries of asylum and resettlement in third countries, have been identified by the United Nations High Commissioner for Refugees as a key durable solution to refugee situations. See, UNHCR, Executive Committee, Conclusion on Durable Solutions and Refugee Protection, No. 56 (XL) (1989). The concept of voluntary repatriation developed from the UN General Assembly resolution of 14 December 1950, in which the statute of UNHCR was adopted and member states were called on to cooperate fully with the activities of UNHCR. Additionally, the UNHCR Handbook on Voluntary Repatriation states that the issue of restitution of property for returnees should be included in any agreements or declarations concerning the rights of returnees. See, UNHCR, Handbook on Voluntary Repatriation (Geneva, 1996).
The repossession of property under international law

Human rights law

Property rights have never been categorized as falling exclusively within the realm of civil, economic or social rights. Most often property rights are grouped with economic and social rights because they are tied closely to economic and social policies of states. In post-conflict settings, political considerations may create additional reluctance in states to honor property rights. Many of the major human rights treaties contain provisions that protect the right to property or home. However, these rights are often not absolute, as the provisions allow for interference under certain criteria. Provisions in such treaties include both rights to property as well as guarantees against interference with already established property rights. In general, because of the language used in most provisions, property rights are open to interpretation by supervisory organs, which must define property and determine when interference is justifiable.

The Universal Declaration of Human Rights\(^2\) covers both the right to property as well as protection of property rights. Article 17 guarantees the right to own property and protection against arbitrary deprivation of property.\(^3\) But these rights are not absolute, as the language would allow for interference if conducted in a non-arbitrary manner. While not specifically guaranteeing the right to property, the International Covenant on Civil and Political Rights\(^4\) provides protection from arbitrary or unlawful interference with a home under article 17(1).\(^5\) The International Covenant on Economic, Social and Cultural Rights\(^6\) recognizes the right to housing under article 11(1).\(^7\)

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\(^3\) ‘(1) Everyone has the right to own property alone as well as in the association with others; (2) No one shall be arbitrarily deprived of his property.’ \textit{Id.}, art. 17.


\(^5\) ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’ \textit{Id.}, art. 17(1).


\(^7\) ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.’ \textit{Id.}, art. 11(1).
Apart from provisions specifically covering property rights, provisions on non-discrimination can also be utilized to ensure protection of property. The UDHR anti-discrimination clause provides protection of the rights guaranteed under the UDHR to all individuals ‘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’.\(^8\) The same language is included in provisions of the ICCPR and ICESCR. But the ICCPR goes a step further in obliging parties to adopt legislative or other measures to ensure protection of the rights elaborated in the ICCPR, in particular providing for, and implementation of, effective remedies.\(^9\)

In addition, individuals are protected against discrimination by guarantees of equal protection before the law under article 7 the UDHR.\(^10\) Article 26 of the ICCPR provides for equality before the law and to equal protection by the law.\(^11\) Such measures allow for protection from discrimination in the enjoyment of all rights, even such rights that are not contained in the convention. The Convention on the Elimination of All Forms of Racial Discrimination,\(^12\) protecting property as a civil right, guarantees the right to own property without distinction as to ‘race, colour, or national or ethnic origin’\(^13\).

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\(^8\) UDHR, \textit{supra} n. 2, art. 2.

\(^9\) ‘Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’ ICCPR, \textit{supra} n. 4, art. 17(2). \textit{See also}, art. 17(3). ‘Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.’ \textit{Id}.

\(^10\) ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’ UDHR, \textit{supra} n. 2, art. 7.

\(^11\) ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ ICCPR, \textit{supra} n. 4, art. 26.


\(^13\) ‘In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... Economic, social and cultural rights, in particular: ... The right to housing.’ \textit{Id}., art. 5(e)(iii).
Property rights are also included in the Convention on the Elimination of All Forms of Discrimination against Women, the Convention Related to the Status of Refugees and the Convention Related to the Status of Stateless Persons. The latter two conventions include guarantees under which protected individuals are afforded treatment at least equal to aliens as regards property rights and protection from discrimination in enjoyment of their rights, while CEDAW includes a prohibition against discrimination before the law under article 15(1).

More recently, human rights treaty bodies have further interpreted the rights of refugees and displaced persons to restitution under CERD and ICESCR. In 1993 the Commission on Human Rights issued a study on the rights of victims of gross violations of human rights to reparations. The study concluded that under international law victims of violations of human rights, particularly gross violations, have the right

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14 Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 UNTS 13 (entered into force Sept. 3, 1981), art. 15(2). ‘States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. See also, art. 16(1)(h): ‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.’

15 Convention Related to the Status of Refugees, July 28, 1951, 189 UNTS 137 (entered into force Apr. 22, 1954), art. 13. ‘The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to relating to movable and immovable property.’

16 Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 UNTS 117 (entered into force June 6, 1960), art. 3. ‘The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.’

17 ‘States Parties shall accord to women equality with men before the law.’ CEDAW, supra n. 14, art. 15(1).


19 Id. The list of possible gross violations includes deportation or forcible transfer of population, and systematic discrimination, in particular based on race or gender. Either of these may be applicable in situations involving displaced persons and refugees seeking return of property. The Commission on Human Rights has affirmed the practice of forced evictions constitutes a gross violation of human rights, and recommended ‘that all Governments provide immediate restitution, compensation and/or appropriate sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups’. CHR Res. 1993/77, 49th Sess., UN Doc. E/CN.4/RES/1993/77 (1993).
to reparations. It also concluded that reparation should be adequate to the needs and wishes of the victims. Possible reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Victims include not only the direct victim, but in certain circumstances immediate family, dependents or others in a special relationship. 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.20

The Committee on the Elimination of Racial Discrimination addressed the rights of refugees and displaced persons under article 5 of CERD at its Forty-Ninth Session in 1996.21 Here the Committee 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. The Committee went on to observe at its Fiftieth Session in 199722 that the magnitude of this issue required further study pursuant to international law and human rights instruments and reiterated its position from the Forty-Ninth Session23.

At the recommendation of the Committee on the Elimination of Racial Discrimination, the Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council issued a working paper in June of 2002 that further elaborated on the right of refugees and displaced persons to repossess property.24 Prior to this, in Resolution 1994/2425, the Sub-Commission had affirmed

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23 Id. ‘The flight of hundreds of thousands of refugees or displaced persons who leave their homes and properties empty, as a result of an armed conflict, frequently results in such property being occupied by non-authorized people. Such is at present the case in the Great Lakes region, Bosnia and Herzegovina, Cyprus and elsewhere. After their return to their homes of origin all such refugees and displaced persons have the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated for any such property that cannot be restored. Furthermore, any commitments or statements relating to such property made under duress should be null and void.’ Note the similarity of this language to that of article 1 of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina, infra n. 89.


the right of refugees and displaced persons to return to their place of origin or choice of destination. In Resolution 1998/26\textsuperscript{26}, the Sub-Commission reaffirmed this right, and urged governments to ensure the free exercise of this right by developing expeditious procedures and effective mechanisms to resolve property issues. The working paper 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’.\textsuperscript{27} It also states that the obligation to assist in the return of refugees implies the provision of restitution. Compensation should only be accepted where restitution is factually not possible or the owner voluntarily requests it.

**Regional Conventions**

Many regional human rights treaties also include provisions on property rights. But like universal treaties these provisions are open to interpretation by supervisory organs.\textsuperscript{28} Since the rights to property are not absolute, the scope of property must be defined and decisions must be made as to when interference is justifiable. Some form of property rights are included in the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{29}, the American Convention on Human Rights\textsuperscript{30}, the African Charter on Human and People’s Rights\textsuperscript{31} and the Arab Charter on Human Rights\textsuperscript{32}. In most regional conventions, property rights are individual


\textsuperscript{27} Pinheiro, supra n. 24, 9.

\textsuperscript{28} For example, the European Court of Human Rights in Strasbourg makes final determinations regarding violations of the European Convention on Human Rights. The Inter-American Commission on Human Rights hears cases of alleged violations of the American Convention on Human Rights, while the African Commission on Human and Peoples’ Rights receives claims regarding the African Convention on Human Rights. There is not yet an established body to rule on alleged violations of the Arab Charter on Human Rights.


Rights in Principle, Rights in Practice

Rights. Often, property rights are more enforceable under regional human rights agreements. Within the regional context, property rights are more secure under certain regional bodies than others. The ECHR provides the most extensive protection of property rights of any convention or treaty, while the jurisprudence under the ACHR and AfCHPR is much less developed than under the ECHR. The Arab Charter on Human Rights has not yet been ratified. For these reasons the following section will focus primarily on the role of the European Court of Human Rights in protecting property rights.

European Convention on Human Rights

The ECHR was signed in 1950 and entered into force in 1953. Under the ECHR, the first international complaints procedure and the first international court for human rights were established. The ECHR provides the European Court of Human Rights jurisdiction over both individual complaints and inter-state complaints, and has developed the most comprehensive jurisprudence of any regional system, particularly as regards property rights. Most importantly, state parties comply with and implement the decisions of the European Court. In particular, individual claims brought by nationals against their states have proven highly effective.33

Although there is no explicit reference to property rights in the ECHR, article 1 of Protocol 1, adopted in 1965, covers peaceful enjoyment of possessions. The European Court of Human Rights has held that the right to peaceful enjoyment of possessions is basically equivalent to the right to property.34 Article 1 of Protocol 1 does not guarantee the absolute right to one’s property, nor does it completely prohibit the deprivation of property by the state. It does provide protection to both


34 See, Marckx v Belgium—31 (13.6.79). Para. 63 states, in relevant part: ‘By recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by the words “possessions” and “use of property” . . .; the “travaux preparatoires”, for their part, confirm this unequivocally: the drafters continually spoke of the “right of property” or “right to property” to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1 (P1-1). Indeed, the right to dispose of one’s property constitutes a traditional and fundamental aspect of the right to property (cf. Handyside v the United Kingdom—24 (7.12.76), para. 62).’ For a complete analysis of article 1 of Protocol 1 see, Monica Carss-Frisk, The Right to Property: A Guide to the Implementation of Article 1 of Protocol 1 to the European Convention on Human Rights, Human Rights Handbooks No. 4 (Strasbourg: Directorate General of Human Rights, Council of Europe, 2001).
natural and legal persons, but does not protect instances where property is occupied without a legal right. The definition of ‘possessions’ under article 1 to Protocol 1 has been interpreted widely to include many types of property/possessions.\textsuperscript{35}

Originally property rights were not included in the Convention, only the right to home under article 8.\textsuperscript{36} The inclusion of article 1 of Protocol 1 was somewhat controversial as several governments were concerned this right might limit their abilities to initiate nationalization programs of certain industries or because other social or economic rights, such as the right to work or the right to an adequate standard of living, were not included.\textsuperscript{37} According to article 1:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principals of international law.

The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.\textsuperscript{38}

Thus article 1 of Protocol 1 contains three rules.\textsuperscript{39} The first rule contains the principle of the protected right to the peaceful enjoyment of property. The second rule

\textsuperscript{35} See, Carss-Frisk, \textit{id.}, 6. For example, the European Court has found the following types of property to constitute a possession under article 1 of Protocol 1: movable or immovable property, tangible or intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord’s entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a legitimate expectation that a certain state of affairs will apply, a legal claim and the clientele of a cinema. However, for the purposes of this article the focus will be on residential real property. A wide interpretation of property can be beneficial in post-conflict situations as property, other than real property, such as pensions and business materials, may also be protected.

\textsuperscript{36} ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ ECHR, \textit{supra} n. 29, art. 8(1).

\textsuperscript{37} \textit{Id.}, 5.

\textsuperscript{38} \textit{Id.}, Protocol 1, art. 1.

\textsuperscript{39} \textit{Sporrung and Lönroth v Sweden}—52 (23.9.82). \textit{See}, para. 61, which states in relevant part: ‘That Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.’
establishes the requirement that any deprivation of property be in the public interest and pursuant to requirements set in both domestic and international law. Under the third rule it is established that states may control the use of property subject to the general interest and domestic law. Both the second and third rules are connected to the first in that they set limits on the scope of its application, thus setting the criteria for justifiable interference.

In determining a breach of article 1 of Protocol 1, three considerations must be made. The first consideration to be made is whether the subject of the claim can be considered a possession under the first sentence of article 1 of Protocol 1. The next consideration is whether there has been an interference with the possession. The type of interference—whether a deprivation or control on use of property—will determine which of the three rules should be applied. The third and final consideration is whether the interference with the possession is justifiable. Once interference has been found, the respondent party will have to justify the interference. The burden of proof is on the respondent party, and if the interference can be justified there will be no violation of article 1 of Protocol 1. In order for the interference to be justified, it must serve a legitimate aim in the public, or general, interest. But not only must the interference serve a legitimate aim, it must also be proportionate, thus striking a fair balance between the demands of the general interests of the community and the protection of the individual’s fundamental rights.

Inherent in determining whether the interference or deprivation is ‘in the public interest’ is a determination as to whether there is a fair balance between the demands of the general interest and the protection of individuals rights—thus a requirement for proportionality between the means employed and the aims sought. Violations of article 1 of Protocol 1 will be found where the applicant is made to bear ‘an excessive burden’. The European Court of Human Rights has allowed states wide

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40 James and Others v the United Kingdom—98 (21.2.86), para. 46.
41 Sporrung and Lönnroth v Sweden, supra n. 39, para. 69.
42 Pressos Compania Naviera SA and Others v Belgium—332 (20.11.95), para. 38; Sporrung and Lönnroth v Sweden, id., para. 73; and Hentrich v France—296-A (22.9.94), para. 49.
43 Sporrung and Lönnroth v Sweden, supra n. 39, paras. 70-73.
deference in ascertaining public interest\textsuperscript{44} since it is the role of national authorities to make initial assessments of political, economic and social considerations warranting deprivation of property and to develop the necessary action to be taken. In particular, states have been granted wide latitude concerning housing issues.\textsuperscript{45} Thus, the Court has intervened only in cases where state actions are manifestly without reasonable foundation. However, the Court has found itself bound to review any contested measures under article 1 of Protocol 1, including making inquiries into the facts with regard to which the national authorities acted\textsuperscript{46}, and in many cases has concluded states have overstepped their discretion to serve the public interest\textsuperscript{47}. In light of case law, there appears to be no real difference between public interest and general interest.

The requirement that deprivation and control of property be done pursuant to requirements set in law, as included in the second and third tests\textsuperscript{48}, refers not only to a determination of whether the action was legal under the relevant legislation at the

\textsuperscript{44} James and Others v the United Kingdom, supra n. 40, para. 46, Mellacher and Others v Austria—169 (19.12.89), para. 45. Of interest in cases regarding refugees and displaced persons is the case of Loizidou v Turkey (merits)—Rep. 1996-VI, fasc. 26 (18.12.96), which involves the deprivation of property of a Greek Cypriot by authorities of the Turkish Republic of Northern Cyprus. In this case the Court found that it had not been explained how the aim of the TRNC to re-house displaced Turkish Cypriot refugees following the Turkish intervention in the island in 1974 could justify the complete negation of the property rights of the applicant in this case ‘in the form of a total and continuous denial of access and purported expropriation without compensation’, nor could it be justified under the ECHR on the grounds property rights were the subject of inter-communal talks between Turkish and Greek communities in Cyprus. The Human Rights Chamber of Bosnia and Herzegovina, which is mandated with the enforcement of the ECHR within Bosnia and Herzegovina, has concluded in several cases that the aim of housing war veterans who may have lost their homes is a legitimate one, but that the Federation of Bosnia and Herzegovina government had never provided any evidence that expropriated property had been used for such purposes. See, Miholic and Others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, CH/97/60 (7.12.01) and Kurtisaj and M. K. against v the Federation of Bosnia and Herzegovina, CH/98/1311 (6.9.02).

\textsuperscript{45} In the case of Scollo v Italy—315-C (28.9.95), the Court noted that housing shortages are an almost universal problem of modern society, and that regulations controlling the use of property are therefore common in the field of housing. In this case, the Italian Government passed legislation preventing evictions of tenants as Italy was at the time facing a severe housing shortage. While the Court found such regulations did serve a legitimate aim in the public interest, it went on to issue a ruling against the Italian Government on the grounds that it did not adequately apply provisions that would have allowed the claimant in this case to repossess his apartment pursuant to the regulations in effect because of the special circumstances of the claimant.

\textsuperscript{46} James and Others v the United Kingdom, supra n. 40, para. 46.

\textsuperscript{47} See, Carss-Frisk, supra n. 34, 6.

\textsuperscript{48} In order for a deprivation or control on use of property to be justified, the taking of the property must have been done pursuant to domestic legislation.
time, but also that the quality of the law be assessed, in particular for conformity with the ECHR. Any such law must be compatible with the rule of law, and should involve a fair and proper procedure. In particular, any measure should be executed by a competent authority and should not be done in an arbitrary manner.\textsuperscript{49} In the second rule there is an additional requirement that such measures must also be compliant with international law. However, this provision has not been elaborated in-depth. Yet, the European Court for Human Rights has concluded that the general principles of international law are not necessarily applicable to a taking by a state of a national’s property, but would apply in connection to takings of non-nationals since they do not necessarily enjoy the same domestic protections as nationals of a state.\textsuperscript{50}

A deprivation of property usually includes a formal transfer of ownership, but in some cases a \textit{de facto} deprivation has been found to invoke article 1 of Protocol 1. The European Court has found a violation of article 1 of Protocol 1 where the applicant was unable to use property, nor could he ‘sell, bequeath, mortgage or make a gift of it’ because the Greek Navy had taken control and possession of the property.\textsuperscript{51} Such a finding can be of benefit in post-conflict situations where property may not have been legally expropriated but is nonetheless occupied by other individuals, who in some cases may be refugees or displaced persons themselves, or governmental bodies. The Court has also recognized in some cases that an interference represents a continuing violation, which is most relevant in countries where the initial interference occurred prior to accession to the ECHR.\textsuperscript{52}

While there is no express right to compensation included in article 1 of Protocol 1, whether or not compensation has been paid, as well as the level of compensation, provides a significant factor in assessing whether an interference strikes a fair

\textsuperscript{49} Winterwerp v Netherlands—33 (24.1079), para. 45.

\textsuperscript{50} See, Lithgow v the United Kingdom—102 (8.7.96), paras. 111-9.

\textsuperscript{51} Papamichalopoulos and Others v Greece—260-B (24.6.93), para. 45. ‘The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.’

\textsuperscript{52} See, Papamichalopoulos and Others v Greece, id.; and Loizidou v Turkey, supra n. 44.
balance. Determination of compensation is often controversial. Compensation does not need to be for the full value of the property, but must be reasonably related to the value. Unless the payment of compensation is reasonably related to the value of the property the interference would likely be found disproportionate. As a general rule, the greater the public interest served the greater the burden the owner can be expected to endure. Thus, in general, an owner should be compensated for any deprivation of property. In exceptional cases the state will be excused from paying any compensation. Since control of use of the property is less of an interference there may be less of an obligation to provide compensation. In certain cases, compensation standards may vary as regards nationals versus non-nationals. Practice varies as to compensation amounts, and when compensation must be paid.

The European Court of Human Rights has also ruled in some cases on the issue of discrimination in enjoyment of property rights under article 1 of Protocol 1. In terms of claims related to interferences under article 1 of Protocol 1 and article 53 See, James and Others v the United Kingdom, supra n. 40, para. 54. The case states in relevant part: ‘The first question that arises is whether the availability and amount of compensation are material considerations under the second sentence of the first paragraph of Article 1 (P1-1), the text of the provision being silent on the point. The Commission, with whom both the Government and the applicants agreed, read Article 1 (P1-1) as in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State. Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on applicants (Sporrong and Lönnroth v Sweden, supra n. 39, paras. 69 and 73). The Court further accepts the Commission’s conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court’s power of review is limited to ascertaining whether the choice of compensation terms falls outside the State’s wide margin of appreciation in this domain.’

54 In the cases of James and Others v the United Kingdom and Lithgow v the United Kingdom, the Court found there may be grounds for differentiating between nationals and non-nationals as regards compensation for takings concerning social reform, for the reasons that non-nationals are more vulnerable to domestic legislation since they likely had no input in its adoption and in certain cases it may be legitimate to require nationals to bear a greater burden in that they are more likely to enjoy the benefits of the social reform.
of the Convention, the Court has ruled that differences of treatment of certain categories of owners do not constitute discrimination if they have an ‘objective and reasonable justification’. Any differential treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means and realization of the aim.

In several cases, the European Court of Human Rights has dealt with the issue of destruction of housing in conflict situations. In one case brought by Kurdish citizens against the Turkish Government, the European Court of Human Rights concluded the deliberate burning of the applicant’s homes and contents constituted a serious interference with the right to family life and home under article 8 as well as the peaceful enjoyment of possessions under article 1 of Protocol 1.\textsuperscript{57} The Court also found a violation of article 25(1)\textsuperscript{58} because the Turkish authorities had questioned the applicants regarding their claims to the Court.

In a similar case brought against the Turkish Government, the Court made similar findings regarding article 8 and article 1 of Protocol.\textsuperscript{59} It also found the burning of houses constituted inhuman treatment and thus a violation of article 3.\textsuperscript{60} The Court also concluded the applicants were relieved from the obligation of exhausting domestic remedies because of the special circumstances surrounding the case. These circumstances included: the emergency situation existing in southeastern Turkey at the time; the fact that despite a number of villages having been burned no compensation had been offered; the general reluctance of Turkish authorities to admit such practice carried out by security forces; no prosecutions brought against security forces; and the fact the applicants were in a state of upheaval and insecurity following the destruction of their homes. The Court also found a violation of article 14 of the Convention which states:

\textit{The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.} ECHR, \textit{supra} n. 29, art. 14.

\textsuperscript{55}\textit{James and Others v the United Kingdom, supra} n. 40, para. 63.

\textsuperscript{56}\textit{Akdivar and Others v Turkey}—Rep. 1996-IV, fasc. 15 (16.9.96).

\textsuperscript{57}\textit{Selçuk and Asker v Turkey}—Rep. 1998-II, fasc. 71 (24.4.98).

\textsuperscript{58}\textit{No one shall be subjected to torture or to inhuman or degrading treatment or punishment.} ECHR, \textit{supra} n. 29, art. 3.
because the state did not carry out a thorough and effective investigation of the house burnings. The Court also awarded pecuniary and non-pecuniary damages to compensate for destruction to property, loss of income and reimbursement for alternative accommodation. The Court also ruled that where a breach is found a state is obligated to end the breach and make reparations in such a way as to restore the situation existing before the breach (restitution in integrum).

In a case brought by the Government of Cyprus against the Turkish Government (*Cyprus v Turkey*), the Court held that the respondent party violated article 8 and article 1 of Protocol 1 by refusing to allow the return of Greek Cypriot displaced persons to their homes in northern Cyprus, which effectively denied them use and enjoyment of their property for which no compensation was paid. There was also found a violation of article 13 in that the respondent failed to provide any remedies to contest interferences with their rights under article 8 and article 1 of Protocol 1 to Greek Cypriots residing outside of northern Cyprus.

### American Convention on Human Rights

The ACHR was adopted in 1969 and entered into force in 1978. It includes primarily civil and political rights. The right to property is established in article 21, which provides the following:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 21 closely resembles the right under the ECHR, with the primary exception that it protects only natural persons. All natural persons have the right to use and enjoyment of their property. While it establishes the right to use and enjoy property, much like the ECHR, such rights can be subordinated to the interest of society and

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61 ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’ *Id.*, art. 13.

62 *Cyprus v Turkey* [GC], no. 25781/94, ECHR 2001-IV—(10.5.01), paras. 175 and 184.

63 ACHR, *supra* n. 30, art., 21.
pursuant to established law. Deprivation of property is allowed ‘for reasons of public utility or social interest’ pursuant to established law, and only upon payment of compensation. It differs from article 1 of Protocol 1 of the ECHR in that it provides expressly for the payment of compensation.

The Inter-American Commission on Human Rights, created in 1959, has spent most of its time documenting gross violations of human rights by states party to the Convention, rather than investigating single violations. The recommendations and conclusions of the Commission are not legally binding. And while the Inter-American Court of Human Rights does have jurisdiction to receive individual complaints and can issue legally binding decisions, the Court’s case law, including issues concerning property rights, is much less developed than that of the European Court. However, it has at times referred to decisions of the European Court. As regards particular issues, the Inter-American Court has held that property includes both tangible and intangible property\textsuperscript{64} and that deprivations must be clearly arbitrary to constitute a violation\textsuperscript{65}.

\textit{African Charter on Human and People’s Rights}

The Charter, which was adopted in 1981 and entered into force in 1986, is a broad mix of civil, political, economic, social and cultural rights. The right to property is included in article 14, which states:

\begin{quote}
The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.\textsuperscript{66}
\end{quote}

Article 14 is much less comprehensive than either the ECHR or ACHR, but does guarantee a right to property that can be interfered with only in the interest of public need or in the general interest of the community, in accordance with the relevant laws. It does not distinguish between different forms of interference. While there is no express guarantee of compensation in article 14, article 21(2)\textsuperscript{67} allows for recovery of property and adequate compensation in cases where individuals are deprived of their

\textsuperscript{64} \textit{Baruch Ivcher Bronstein v Peru}—Rep. 20/98, Case 11.762 (3.16.98).

\textsuperscript{65} See, \textit{Carlos Garcia Saccone v Argentina}—Rep. 8/98, Case 11.671 (3.2.98); and \textit{Edo Margoli and Josefina Ghiringhelli de Margradi v Argentina}—Rep. 104/99, Case 11.400 (9.27.99).

\textsuperscript{66} AfCHPR, supra n. 32, art. 14.

\textsuperscript{67} ‘In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.’ \textit{Id.}, art. 21(2).
property. In terms of enforcement of property rights, neither the African Commission on Human and Peoples’ Rights nor the African Court on Human and Peoples’ Rights have undertaken much action. The Commission itself has few real powers. The fact that the ability to file individual complaints to the Court is dependent on a special declaration by the state and the discretion of the court makes the Court much less accessible to individual victims than either the European or American Courts.

**Arab Charter on Human Rights**

The Arab Charter on Human Rights was adopted in 1994 but has not yet entered into force. It includes a right to property under article 25, which states:

> Every citizen has a guaranteed right to own property. No citizen shall under any circumstances be divested of all or any part of his property in an arbitrary or unlawful manner.69

In terms of the other regional conventions, the Arab Charter would appear to create the weakest protection of property rights. Although it does guarantee the right to own property, it allows for deprivation of property so long as it is not arbitrary and is done according to law. There is no requirement that a deprivation be pursuant to any public or general interest, thus leaving state parties a freer reign in enacting measures to expropriate property in that there appears no need to justify such measures. At this time there is no mechanism for enforcement.

**International humanitarian law**

International humanitarian law does not explicitly include the right to repossession of property. It does, however, include certain protections of property. Article 46 of the Hague Regulations provides that private property ‘must be respected’ and ‘cannot be confiscated’.70 Article 55 states that an occupier is regarded only as an administrator and user of ‘public buildings, real estate, forests

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69 ArCHR, *supra* n. 32, art. 25.

70 Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 2295, art. 46.
and agricultural estates belonging to the hostile State and situated in the occupied
country’ and therefore ‘must safeguard the capital of these properties’.\textsuperscript{71} Article
53 of the Fourth Geneva Convention prohibits the destruction of real or personal
property except where ‘absolutely necessary by military operations’.\textsuperscript{72} 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.\textsuperscript{73} The fact these provisions protect against unnecessary destruction and
provide the Occupying Power control of the property only as administer infers the
property should be returned to owners after the end of hostilities.

\textbf{United Nations resolutions}

A number of UN resolutions have dealt with the issue of return of property
in post-conflict situations. The General Assembly adopted Resolution 35/124 in
1980, which reaffirmed refugees and displaced persons have the right ‘to return to
their homes in the homelands’.\textsuperscript{74} The General Assembly has adopted resolutions
furthering this right regarding Algeria\textsuperscript{75}, Cyprus\textsuperscript{76}, Palestine/Israel\textsuperscript{77} and Rwanda\textsuperscript{78}.
The resolutions regarding Algeria and Cyprus recognize the right to return,
however, the other resolutions offer more concrete language on the rights of
those displaced. Resolution 51/126 (Palestine/Israel) reaffirms the rights of those
displaced by hostilities commencing in June 1967 and afterwards to return to their
homes or former places of residence. Resolution 194 (III) (Palestine) provides
that refugees wishing to return to their homes should be permitted to do so at the
earliest possible date, and compensation should be paid for those choosing not to
return and for damage to property. This resolution goes further to create a body,
the Conciliation Commission, to facilitate return and compensation. Resolution

\begin{itemize}
\item \textsuperscript{71} Id., art. 55.
\item \textsuperscript{72} Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of
War, Aug. 12, 1949, 75 UNTS 287 \textit{(entered into force} Oct. 21, 1950), art. 53.
\item \textsuperscript{73} Id., art. 146.
\item \textsuperscript{74} GA Res. 35/124, UN GAOR, 35\textsuperscript{th} Sess., UN Doc. A/RES/35/124 (1980).
\item \textsuperscript{75} GA Res. 1672 (XVI), UN GAOR, 16\textsuperscript{th} Sess., UN Doc. A/RES/1672 (1961).
\item \textsuperscript{76} GA Res. 3212 (XXIX), UN GAOR, 29\textsuperscript{th} Sess., UN Doc. A/RES/3212 (1974).
\item \textsuperscript{77} GA Res. 51/126, UN GAOR, 51\textsuperscript{st} Sess., UN Doc. A/RES/51/126 (1996); and GA Res. 194 (III),
UN GAOR, 3\textsuperscript{rd} Sess., UN Doc. A/RES/194 (1948).
\item \textsuperscript{78} GA Res. 51/114, UN GAOR, 51\textsuperscript{st} Sess., UN Doc. A/RES/51/114 (1996).
\end{itemize}
51/114 (Rwanda) invited all involved parties to support the government of Rwanda in reintegrating refugees and addressing competing claims to housing and property.

Similar language has been included in a number of Security Council resolutions regarding the situations in Abkhazia and the Republic of Georgia, Azerbaijan, Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia and Tajikistan. Each of these resolutions reaffirms the rights of refugees and displaced persons to return to their homes. Resolution 820 (Bosnia and Herzegovina) provides that all commitments as regards land and property made under duress are null and void. A similar provision was included in the Constitution of Bosnia and Herzegovina, as during the conflict many refugees and displaced persons were forced to sign documents transferring their property to local officials or other individuals. Resolution 687 (Kuwait) requested the UN Secretary-General to report to the Security Council the steps taken to ensure the return of Kuwaiti property seized by Iraq, including lists of non-returned or damaged property.

**Peace agreements**

In recent years, a number of peace agreements have been signed that contain provisions regarding the rights of refugees and displaced persons to return to their homes. The most comprehensive is perhaps the General Framework Agreement for

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Peace in Bosnia and Herzegovina, otherwise known as the Dayton Peace Agreement, which was signed in December of 1995. It contains specific provisions providing rights to repossess property lost during the conflict and compensation. It also forms the basis for the establishment of a comprehensive mechanism for exercising these rights.

Apart from the Dayton Peace Agreement, a number of other agreements have established similar rights. The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, signed in October 1991, provides that efforts should be made to create the necessary conditions for voluntary return and integration, and offers protection for the right to property. It also sets out that the rights included in the Universal Declaration of Human Rights and other relevant international human rights instruments are guaranteed to all persons in Cambodia, including refugees and displaced persons.

The series of agreements that ended the conflict in Guatemala in 1994 contain provisions regarding both return and resettlement. Displaced persons are provided the right to return or resettle in the place of their choice. In addition, the government is obliged to revise legal provisions to ensure prior abandonment of property is not considered voluntary, and ensure the inalienable nature of land ownership rights. In this respect it is obliged to promote the return of land to original owners and/or seek adequate compensation.

The Arusha Peace Agreement that ended the conflict in Rwanda, contains a provision that prevents the repossession of property by refugees who fled the country more than ten years prior to the agreement if the property is currently occupied. Instead, the government is obliged to compensate them with other land and resettlement assistance. Agreements regarding peace settlements in Mozambique and Somalia provide stronger rights to property. In Mozambique, refugees and displaced persons are entitled to initiate legal proceedings against the current possessor.


refugees and displaced persons are entitled to return of all properties that were illegally confiscated, robbed, stolen, seized, embezzled or taken by other fraudulent means.\textsuperscript{95}

\textbf{BOSNIA AND HERZEGOVINA AND ANNEX 7 OF THE DAYTON PEACE AGREEMENT}

In 1992 war erupted in Bosnia and Herzegovina following the break-up of the Federal Republic of Yugoslavia. For the next three-and-a-half years violence, much of it aimed at displacement of different ethnic/religious groups, created over 2.3 million refugees and displaced persons. Some individuals fled active fighting, while others were forcibly evicted and displaced because of their ethnicity. The 1995 Dayton Peace Agreement ended the conflict by establishing the state of Bosnia and Herzegovina consisting of two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. The DPA contains annexes governing both civilian and military matters, with the Office of the High Representative taking the lead role of monitoring and fostering all aspects of civilian implementation.\textsuperscript{96} Included in the DPA is the right of refugees and displaced persons to return and repossess their prewar property.

Immediately after the signing of the DPA, a Peace Implementation Conference was held in London to mobilize support for the agreement. This conference resulted in the establishment of the Peace Implementation Council, which consists of 55 countries and international organizations that sponsor and direct the peace implementation process.\textsuperscript{97} The Peace Implementation Conference provides political guidance to the Office of the High Representative and has met periodically to elaborate on its mandate. It also funds the Office with contributions assessed


\textsuperscript{96} The Parties to the Dayton Peace Agreement are the Republic of Bosnia and Herzegovina and its two entities—the Federation of Bosnia and Herzegovina and the Republika Srpska. It consists of a general framework agreement and ten annexes, of which the Constitution of Bosnia and Herzegovina (Annex 4), the Agreement on Human Rights (Annex 6), the Agreement on Refugees and Displaced Persons (Annex 7) and the Agreement on Civilian Implementation (Annex 10) are most relevant to the rights of refugees and displaced persons to return and repossess their property.

\textsuperscript{97} Peace Implementation Council members include, among others: Germany, France, United Kingdom, United Sates, Russia, Italy, Belgium, Netherlands, Japan, Turkey, the European Commission, the Council of Europe, the International Committee of the Red Cross, the International Monetary Fund, NATO, the Organization for Security and Cooperation in Europe, the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees and the World Bank.
at: 53 per cent by the European Union, 22 per cent by the United States, 10 per cent by Japan, 4 per cent by Russia, 3 per cent by Canada, 2.5 per cent by the Organization of Islamic Conference and 5 per cent by others. Meetings of the Peace Implementation Conference Steering Board are held on a regular basis and issue communiqués that elaborate on the priorities for civilian implementation of the DPA. A number of these communiqués have addressed the issues of return of refugees and displaced persons and property repossession.

According to the United Nations High Commissioner for Refugees, at the time of writing over 426,000 refugees and 511,000 displaced persons have returned to their pre-war homes. In general, it has proven difficult to determine accurate numbers of returnees, as many returnees spent time in both their pre-war homes as well as their areas of displacement. Many others have found durable solutions within Bosnia, the other republics of the former Yugoslavia and as refugees in countries outside of the region. At the end of the conflict, roughly 412,000 housing units had been damaged or destroyed, accounting for roughly 32 per cent of the housing stock, according to the Office of the High Representative. Numerous other properties became occupied by individuals other than their owners. Not only were properties occupied by other displaced persons and refugees, but in many cases, especially in the larger cities, properties were occupied by domicile ‘upgraders’—individuals who moved to larger and better-situated properties, normally through political connections.

During the conflict each of the ethnic groups—Bosniaks, Serbs and Croats—established their own administrations that among other things, administered ‘abandoned’ property. Legislation was enacted in all areas of Bosnia and Herzegovina that deprived individuals of their property and allocated such property to other individuals on either a temporary or permanent basis. Property was supposed to be allocated to individuals with humanitarian needs, but often was not done so. In the Republic of Bosnia and Herzegovina, both the Law on Temporary Abandoned Real Property Owned by Citizens and the Law on Abandoned Apartments provided authorities with the ability to allocate property declared abandoned. In the Republic of Herceg-Bosna the Decree on the

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98 For full information on refugee returns see, the UNHCR mission to Bosnia and Herzegovina website <http://www.unhcr.ba> (accessed Dec. 21, 2006).

99 During the conflict, the Bosniaks established the Republic of Bosnia and Herzegovina, the Serbs the Republika Srpska and the Croats the Republic of Herceg-Bosna.


Use of Abandoned Apartments was enacted. The authorities of the Republika Srpska adopted the Law on the Use of Abandoned Property of the Republika Srpska only in 1996; prior to this property had been allocated by municipal authorities.

In addition to use of laws governing abandoned property, local authorities used discriminatory enforcement of other laws, in particular the Law on Housing Relations, to confiscate property. Such measures legalized the allocation of property along ethnic lines, which consolidated ethnic cleansing and provided a major obstacle to the repossession of property following the conflict. The result was that at the end of the conflict, Bosnia was composed of three mostly mono-ethnic areas in the two entities that comprise Bosnia: the Federation of Bosnia and Herzegovina and the Republika Srpska. While the wartime legislation set specific criteria for the allocation of abandoned property, in practice the competent authorities allocated property at will. Additionally, there was no recourse to seek return of properties, particularly in the Republika Srpska where the courts were ordered to refuse claims for repossession of property.

Establishment of the right

During the course of the conflict a number of UN Security Council resolutions were adopted concerning Bosnia and Herzegovina. Of importance to repossession of property are Resolutions 752 of 1992 and 820 of 1993. In Resolution 752, the Security Council expressed full support for all efforts to assist in the return of displaced persons to their homes. It also called upon all parties concerned to ensure the cessation of forcible expulsions. Resolution 820 expressed Security Council

104 Under the Law on Housing Relations, individuals would lose occupancy rights (rights to usage of socially-owned property) to the property if they were absent for more than six months. Local officials used this provision primarily against refugees and displaced persons, refusing to acknowledge war activities as a justification for prolonged absence from the property.
106 Id., 228.
107 SC Res. 752, supra n. 81.
108 SC Res. 820, supra n. 89.
insistence that displaced persons be allowed to return to their former homes, and reaffirmed that any commitments made under duress regarding land and property were null and void.

In March of 1994, the Confederation Agreement between the Bosnian government and Bosnian Croats\textsuperscript{109} was signed in Washington, DC. This agreement effectively stopped the conflict between two of the warring parties and provided for the establishment of one of the Bosnia and Herzegovina entities. This agreement contained a number of provisions regarding the form and function of the Federation and included specific language on the rights of refugees and displaced persons. In particular, it provided that all refugees and displaced persons had the right to return to their homes of origin and to repossess, or be compensated for, property lost during the conflict. It also provided that all commitments made under duress regarding property were made null and void. This language set the precedent for the rights included in the final peace agreement.

The rights of refugees and displaced persons are established under Annex 7 to the Dayton Peace Agreement. The rights established are individual rights, in that each refugee and displaced person is free to exercise any of the rights guaranteed in Annex 7. These rights are provided in the first paragraph of the Annex, which states:

\begin{quote}
All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.\textsuperscript{110}
\end{quote}

Not only does Annex 7 establish rights, it also includes obligations on the Parties to ensure the return of refugees and displaced persons.\textsuperscript{111} Article I(1) states that ‘the early return of refugees and displaced persons is an important objective of the settlement of the conflict’\textsuperscript{112} and obliges the Parties to accept the return of such persons. In subsequent paragraphs the Parties undertake to ensure that refugees and


\textsuperscript{110} General Framework Agreement for Peace in Bosnia and Herzegovina, supra n. 90, Annex 7, Chapter One, art. I(1).

\textsuperscript{111} The Parties to Annex 7 are the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska.

\textsuperscript{112} General Framework Agreement for Peace in Bosnia and Herzegovina, supra n. 90, Annex 7, Chapter One, art. I(1).
Housing and Property Restitution in Bosnia and Herzegovina

displaced persons can return without risk of discrimination\textsuperscript{113} and provide not to interfere with choice of destination\textsuperscript{114}. Article I(3) obliges the Parties to, among other things, take the necessary steps to prevent any activities which would impede safe return of refugees and displaced persons. Most importantly for the right to repossess lost property, this article specifically obliges the Parties to undertake ‘the repeal of domestic legislation and administrative practices with discriminatory intent or effect’.\textsuperscript{115} This provision was used as a basis to adopt post-conflict legislation that annulled legislation used to deprive refugees and displaced persons of their property during the conflict.

The right to repossession of property is also guaranteed in the Constitution of Bosnia and Herzegovina, which is included in the DPA as Annex 4. Article II of the Constitution contains provisions relating to human rights and fundamental freedoms. This article elevates the rights to return and repossess property to constitutional rights by providing:

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 of the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.\textsuperscript{116}

Additionally, the Constitution, along with Annex 6 of the DPA (Agreement on Human Rights)\textsuperscript{117}, obliges the state of Bosnia and Herzegovina and both entities to ‘ensure the highest level of internationally recognized human rights and fundamental freedoms’ and creates a Human Rights Commission to ensure compliance\textsuperscript{118}. It also established the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols as the highest law of Bosnia and Herzegovina\textsuperscript{119} and includes an annex of human rights treaties that are directly

\textsuperscript{113} Id., Annex 7, Chapter One, art. I(2).
\textsuperscript{114} Id., art. I(4).
\textsuperscript{115} Id., art. I(3)(a).
\textsuperscript{116} Id., Annex 4, art. II(5).
\textsuperscript{117} Id., Annex 6, art. I.
\textsuperscript{118} Id., art. II(1).
\textsuperscript{119} Id., art. II(2).
applicable in Bosnia and Herzegovina. The ECHR includes the right to home and family life, as well as a guarantee of peaceful enjoyment of possessions. In addition, both the Constitution and Annex 6 include non-discrimination clauses.

Under Annex 7 of the DPA, the parties to the agreement were obligated to revoke domestic legislation that denied displaced persons the right to repossess their property. However, despite continued promises of cooperation, local authorities were unwilling to adopt adequate legislation despite having been provided draft legislation by the International Community in May of 1997. Early legislation adopted by officials of Bosnia and Herzegovina contained inadequate deadlines for filing claims and failed to establish effective implementation mechanisms. Following this the Peace Implementation Council requested the appropriate legislation be adopted


121 See, art. II (4) of the Constitution and art. I(14) of Annex 6. Both include non-discrimination clauses that protect against discrimination on the grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

122 Hastings, supra n. 105, 228.
and recommended that international assistance for reconstruction of housing be conditioned on the necessary changes being made.\textsuperscript{123}

Only after extensive negotiations with the International Community did the Federation in April 1998 adopt property legislation geared towards returning property lost during the conflict. Three laws were enacted: the Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens\textsuperscript{124}, the Law on Cessation of Application of the Law on Abandoned Apartments\textsuperscript{125} and the Law on Taking Over the Law on Housing Relation\textsuperscript{126}. The Republika Srpska followed by enacting the Law on Cessation of Application of the Law on Use of Abandoned Property in December of 1998.\textsuperscript{127} The Republika Srpska legislation was particularly problematic in that it included provisions that would slow the entire process of repossession. In particular, there was no mechanism provided for forcible evictions, appeals of decisions granting repossession could delay implementation of the decisions and pre-war owners could repossess property only if the current occupant residing in the property was able to repossess their property at the same time.\textsuperscript{128}

Given the reluctance of Bosnia and Herzegovina officials to adopt adequate legislation, the High Representative was forced in 1999 to impose the appropriate legislation in each of the two entities\textsuperscript{129}, pursuant to his powers granted by the Peace Implementation Council in Bonn. This imposition established the legal framework for ensuring the right to repossess property. The property legislation in both the Republika Srpska and Federation of Bosnia and Herzegovina establishes

\begin{itemize}
\item \textsuperscript{123} Ministerial Meeting of the Steering Board of the Peace Implementation Council, Sintra, May 30, 1997.
\item \textsuperscript{126} Law on Taking Over the Law on Housing Relations, \textit{Official Gazette of the Federation of Bosnia and Herzegovina} 11/98 (1998), para. 78.
\item \textsuperscript{128} Hastings, \textit{supra} n. 105, 230.
\item \textsuperscript{129} In October 1999, the High Representative imposed the Law on the Cessation of Application of the Law on Use of Abandoned Property in the Republika Srpska, and imposed amendments to the Law on the Cessation of the Application of the Law on Abandoned Apartments and the Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens in the Federation of Bosnia and Herzegovina.
\end{itemize}
the procedure for individuals to file a claim for the repossession of property, as well as the procedures for the local authorities in accepting, issuing decisions on and implementing claims. Additionally, the laws govern the rights of individuals currently using the property. To receive the claims, Bosnian authorities established housing offices in every municipality in Bosnia and Herzegovina. The claims process follows an administrative, rather than a judicial process. An administrative process provided several advantages over judicial proceedings. A large number of claims for repossession of property would have overwhelmed Bosnia and Herzegovina’s judicial system, and claimants would be forced to wait for years for resolution of their cases. In addition, the Bosnia and Herzegovina court system at the end of the conflict was viewed as ethnically biased, in particular as some refugees and displaced persons had been deprived of their property through court proceedings. In all, the local housing offices have received roughly 260,000 claims for the repossession of property.

The right to claim property

Under both the Bosnia and Herzegovina Constitution and Annex 7 of the DPA, all refugees and displaced persons were given the right to repossess property they were deprived of during the conflict. However, a number of problems arose with defining refugee and displaced persons status, creating the need for further clarification in the property laws. A new provision was enacted that provided that any individual who left their property during the conflict would be considered a refugee or displaced person under Annex 7. Such a provision was necessary because housing offices routinely rejected claims on the grounds the claimants had left the property on a voluntary basis and thus were not refugees or displaced persons, and there was little way to prove otherwise. This policy could have been used by local officials to create a major obstacle to the repossession of property.

Pursuant to the legislation in effect in each entity any owner, or person in

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130 Prior to the war there were two types of property in Bosnia and Herzegovina: private property and socially-owned property. Socially-owned property consisted primarily of apartments owned by companies or governmental bodies that allocated such apartments to their workers through the issuance of ‘occupancy rights’. While such property did share some aspects of private property, there were certain restrictions on its use, including prohibitions on renting or prolonged absences from the property, and the limited ability to transfer the apartments.

131 This definition of refugees and displaced persons became *lex specialis* in regards to repossession of property. The dates in the respective entity laws differ slightly. In the Federation legislation, the effective date is 30 April 1991 through 4 April 1998. The date in the Republika Srpska legislation is 30 April 1991 through 19 December 1998. The different dates correspond to the periods of time in each entity when housing was being declared abandoned and re-allocated.
unconditional possession of the property at the time it was declared abandoned, can file a claim for repossession of the property. The status of owner is further defined as a person who, according to legislation in effect at the time, was the owner at the time the property was declared abandoned. The owner can authorize a proxy to submit a claim. In addition, legal heirs may submit a claim as well in cases where the previous owner is now deceased. There is no deadline for submitting claims for private property.

The claims procedure

As mentioned above, the claims procedure in Bosnia and Herzegovina is an administrative, rather than judicial, procedure. An owner, or lawful possessor, of the property declared abandoned has the right to submit a claim to the competent municipal or cantonal administrative authority for property affairs. Claims are supposed to be submitted in writing with all relevant documents on ownership attached. Upon receipt of the claim, the administrative body is under an obligation

132 See, Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, supra n. 124, art. 4. Only this law deals exclusively with private property, and for this reason only this law will be cited in this article. The Republika Srpska Law on the Cessation of the Application of the Law on Use of Abandoned Property includes provisions dealing with private property and socially-owned property. Supra n. 127. The sections covering the return of private property are basically similar to those of the Federation of Bosnia and Herzegovina Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens. The Federation of Bosnia and Herzegovina Law on Cessation of the Application of the Law on Abandoned Apartments deals exclusively with socially-owned property, supra n. 124.

133 Id., art. 5.

134 There was, however, a deadline for filing claims for socially-owned property that expired roughly eighteen months after passage of the full set of property laws.

135 Prior to the adoption of the relevant property laws, property owners could file claims for repossession of property with municipal courts. However, once the property laws went into effect claims had to be filed with the administrative body responsible for housing issues in the respective municipality or canton. Owners who had filed claims with the courts prior to the passage of the property laws could proceed with the judicial proceedings. However, court decisions on repossession of property covered only the right of the owners to be reinstated. Court decisions did not address the rights of the current users, which created problems when evictions were ordered based on judicial decisions and the current users were in need of, but not provided with, alternative accommodation. See, Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, supra n. 124. art. 17.

136 Owners of property never legally declared abandoned, who lost control of such property during the conflict, also have the right to file claims for repossession so long as they left the property prior to the cessation of the conflict. Id., art. 17(a).
to issue a decision within thirty days. However, in practice decisions were rarely issued within thirty days, due to a combination of political obstruction and lack of resources allocated to the housing offices. Claims are supposed to be resolved in chronological order based on the date the claim was filed.

Each decision addresses the rights of the pre-war owner and the rights of the current occupant. The decision includes the following information: a decision on the ownership rights of the claimant; a decision terminating the right of the current user; a time limit for the current user to vacate the property; a decision whether the current user is entitled to other accommodation; a decision on termination of the municipal administration of the property as of the date of reinstatement; and an explicit warning against looting of the property. The current user is entitled to remain in the property under the applicable legal conditions until a decision has been issued in favor of the claimant. Decisions can be appealed to the competent second instance body within fifteen days by either the claimant or current user. However, appeals do not suspend the implementation of the decision. Either party can also appeal from the second instance body to the competent local court, and then through the rest of the judicial system. The deadline for the current user to vacate the property depends on his/her housing needs. The deadline is 15 days in cases where the housing needs of the current user are otherwise met. If the housing needs of the current user are not otherwise met, a decision is given with a 90 day period to vacate the property.

If a current user does not vacate the property within the specified deadline, the claimant must request enforcement of the decision. At this time, the local housing office must schedule a forcible eviction and secure participation by the local police office. In the case of fifteen-day decisions, housing officials are responsible for scheduling an eviction at the expiry of the time period and do not have to wait for a request from the claimant to enforce the decision.

Since there were concerns as to the ability of local officials to fully implement the right to repossession of property, an international body was created to assist.

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137 Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, supra n. 124, art. 12.
138 Id. Looting of the property by the current user became a serious problem, such that the damage caused by the looting made the property uninhabitable in many cases.
139 Id., art. 13. Such a provision was necessary as second instance administrative bodies would delay decisions on appeals in order to stall repossession. Article 13 provides that if an appeal against a positive decision is not resolved within the time period specified in the relevant laws governing administrative procedures the decision of the first instance body, and thus the right of the claimant to the property, is deemed confirmed.
140 Id., art. 12(a).
141 Id., art. 16.
Chapter II, article VII, Annex 7 established the Commission for Displaced Persons and Refugees. This Commission was created in form of the Commission for Real Property Claims. The mandate of CRPC is to receive and decide claims for real property, whether the claim is for return of the property or for compensation.\textsuperscript{142} CRPC is composed of three international and six national commissioners and its decisions are final and binding. Only CRPC can alter its decisions upon a request for reconsideration of the decision by either the claimant or the current occupant.

CRPC issues decisions solely on the right of the claimant. It makes no determination as to the subsequent rights of the current user. Its decisions confirm whether the claimant was the owner or occupancy right holder as of April 1992—the start of the conflict. CRPC investigates claims primarily through access to official land records. There are no public hearings. After investigating individual claims, decisions are adopted \textit{en masse} by the Commissioners at regular plenary sessions. However, CRPC has no internal enforcement mechanism. A claimant in possession of a CRPC decision must file a request for enforcement with local housing officials. Once this request is made, local housing officials will only assess the rights of the current user. A CRPC decision can only be reviewed by CRPC under a request for reconsideration. However, a CRPC decision can be appealed to the local judiciary on the grounds the property was legally transferred after April 1992.

The primary shortfall of CRPC is that its decisions are not immediately enforceable. In an attempt to remedy this situation, the High Representative imposed legislation on implementation of CRPC decisions.\textsuperscript{143} An individual who receives a CRPC decision in their favor must submit the decision to the housing office in the municipality where the property is located and file a request for enforcement with Bosnia and Herzegovina authorities. However, the housing office must first issue a decision on the rights of the current user of the property. Since most problems in the process stemmed from the rights of the current occupant, CRPC certificates were not viewed as adding considerable benefit to the process. In practice, officials in housing offices rarely implemented the CRPC decisions, and instead issued their own decisions that were later implemented. In this respect CRPC served as a parallel mechanism to the system of housing offices, especially since many individuals filed claims with both.

\textsuperscript{142} General Framework Agreement for Peace in Bosnia and Herzegovina, \textit{supra} n. 90, Annex 7, art. XI.

Enforcement mechanisms

A number of enforcement mechanisms are contained in the DPA. In order to facilitate and coordinate the activities under the DPA, the parties agreed under Annex 10 to the designation of a High Representative to be appointed by the Peace Implementation Council and endorsed by the United Nations Security Council. The primary responsibilities of the High Representative are to coordinate the activities of civilian organizations and agencies in Bosnia and Herzegovina and to facilitate as necessary the resolution of any difficulties arising from implementation of the civilian aspects of the DPA. As such, the High Representative is designated as the final authority in Bosnia and Herzegovina regarding interpretation of the civilian aspects of the DPA. In order to provide adequate staff to these issues, the Office of the High Representative was established. Since implementation of this mandate proved more difficult than envisioned, the High Representative was accorded increased authority, including the right to impose legislation and dismiss elected and appointed officials.144 This power has been key to the enactment of adequate legislation concerning the right to repossess property, as once the DPA had been signed, none of the Parties were willing nor capable to enact legislation ensuring the right of return and repossession of property. In addition, the High Representative has dismissed a number of officials due to the failure to adequately implement property legislation.

Under Annex 6 the Commission on Human Rights, consisting of the Human Rights Chamber and the Office of the Ombudsmen, was established to assist the Parties in guaranteeing these rights.145 Both bodies have issued a number of decisions reinforcing property rights. The Office of the Ombudsman is empowered to investigate, on its own initiative or upon request by any Party or person, claims of alleged violations of human rights.146 The Human Rights Chamber can receive claims referred by the Ombudsman, or on behalf of any Party or person claiming to be the victim of a human rights violation by a Party or acting on behalf of alleged

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144 Peace Implementation Council, Bosnia and Herzegovina 1998: Self-Sustaining Structures (Bonn, 1997), art. XI. The Council welcomed the High Representative’s intention to use his final authority regarding implementation of the civilian aspects of the DPA. In particular, the High Representative received support for adopting interim measures when the Parties to the DPA were unable to do so, and to take actions against officials deemed by the High Representative to be in violation of the DPA or the terms of its implementation. Officials who are dismissed by the High Representative are prohibited from holding appointed or elected positions in the future.

145 General Framework Agreement for Peace in Bosnia and Herzegovina, supra n. 90, Annex 6, art. II(1).

146 Id., art. V(2).
victims who are missing or deceased.\textsuperscript{147} While decisions issued by the offices of the Ombudsman institution are advisory in nature, decisions of the Human Rights Chamber are final and binding. Both of these bodies have acted as monitors of the domestic legislature, judiciary and administration.

Any individual can submit applications to either body in regards to alleged violations of the rights covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms and subsequent protocols, as well as alleged discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status regarding the rights provided for in the other human rights agreements annexed to the DPA. The Ombudsman issues reports and recommendations to government bodies and can forward such reports to the Human Rights Chamber for further action. The Human Rights Chamber issues decisions on whether the parties have breached their obligations under the DPA and what steps must be taken by the party to remedy such a breach, including orders to cease and desist, monetary relief and provisional measures.

In addition, a number of international organizations have been strongly involved in property issues. These include the Organization for Security and Cooperation in Europe, the United Nations High Commissioner for Refugees and the United Nations Mission in Bosnia and Herzegovina. Together with Office of the High Representative, these organizations adopted the \textit{Property Law Implementation Plan}.\textsuperscript{148} This plan adopts a rule of law strategy for full implementation of the property laws, as opposed to progress via political agreements.\textsuperscript{149} This approach best fit with the individual rights enshrined in the DPA. Pursuant to this plan, one staff member from one of the organizations was assigned as a focal point in each municipality in Bosnia and Herzegovina. Their job is to monitor implementation of the property laws and produce comprehensive statistics for all of Bosnia and Herzegovina on a monthly basis for each municipality. One lesson from the \textit{Property Law Implementation Plan} project is that the process became truly effective when it moved from a political process driven

\textsuperscript{147} \textit{Id.}, art. VII(1).


\textsuperscript{149} In the years following the signing of the DPA a number of political agreements were made regarding refugee return, including the Sarajevo Declaration, the New York Agreement and the Tri-Presidency Initiative, each of which achieved few results. For example, on 3 February 1998 Sarajevo Canton adopted the Sarajevo Declaration. Its adoption was an attempt by Canton officials to demonstrate their commitment to a multi-ethnic Sarajevo by returning at least 20,000 minorities to the Canton by the end of the year. Further international assistance was conditioned on success towards implementation of the Declaration. On several occasions funding was withheld by donors when Canton officials failed to execute their responsibilities, which did have a large effect on forcing them back into compliance. See, Hastings, \textit{supra} n. 105, 229.
by political forces to a rule of law process based on individual rights. Additionally, entity criminal laws include provisions creating offenses where return is obstructed. Several such cases against Bosnia and Herzegovina officials have been launched.

Rights of current occupants

At the start of the process considerable thought was given to the rights of current occupants, many of whom were displaced persons themselves. In fact, some early legislative provisions allowed for the weighing of interests between the pre-war and current occupant in cases involving socially-owned property. However, later legislation ensured the rights of the pre-war owners or occupants remained paramount. Housing offices must first make a determination as to whether the current occupant has a valid legal basis for occupying the property. The property must have been declared abandoned and allocated to the current user pursuant to wartime legislation in effect at the time. However, if the current user is a registered refugee or displaced person, they may be entitled to a form of emergency accommodation under the relevant legislation on refugees and displaced persons as described above. The deadline for the current user to vacate the property depends on the housing needs of the current user. The deadline is fifteen days in cases where the housing needs of the current user are otherwise met. Criteria in evaluating whether housing needs are met include whether the current user: has access to their pre-war housing, which is sufficiently intact; has sold or otherwise transferred their pre-war housing; has refused the provision of alternative accommodation; has sufficient disposable income to provide for adequate accommodation; or is a refugee or displaced person and has not filed a claim for repossession of his/her property. Current users without any legal right to occupy the property are considered illegal occupants and must vacate the property within fifteen days with no rights to alternative accommodation.

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150 See, the Criminal Code of the Federation of Bosnia and Herzegovina (arts. 324, 358 and 366) and the Criminal Code of the Republika Srpska (arts. 187, 226 and 234 (1)). Both codes contain provision covering abuse of office and failure to report offenses—both of which can be used to prosecute individuals for obstructing return.

151 For cases involving socially-owned property, the Council of Europe issued an opinion that due to the special circumstances around the displacement in Bosnia and Herzegovina a presumption in favor of the prewar occupant was required under article 8, article 1 of Protocol 1 and article 14 of the ECHR in order to prevent discrimination against a particularly vulnerable group. See, Hastings, supra n. 105, 237.

152 For a complete listing of criteria see, Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, supra n. 124, arts. 12(a), 16 and 16(a).

153 Id., art. 7.
If the housing needs of the current user are not otherwise met, a decision is given with a 90 day period to vacate the property.\textsuperscript{154} In such cases the current user is entitled to alternative accommodation to be provided by housing authorities, but the burden of proof of demonstrating eligibility is on the current user. Alternative accommodation is meant as a temporary housing solution—it is not a durable solution. In that sense the right to alternative accommodation is reviewed on a regular basis. It was created only for vulnerable categories of current users. It is not supposed to be housing of comparable size and quality as the property being vacated. Alternative accommodation is only meant to provide shelter from adverse weather conditions and afford five square meters per person.\textsuperscript{155} Possible sources of alternative accommodation include unclaimed housing, state-owned hotels, schools and army barracks. However, failure of housing authorities to secure alternative accommodation for the current user does not prevent the eviction from taking place at the end of the 90 day period. Such a provision was necessary as housing authorities did little to provide alternative accommodation in hopes that doing so would slow or halt the process of repossession.

In addition, officials in both entities undertook resettlement programs to benefit refugees and displaced persons choosing not to return. In many ways such programs were initiated in attempts to keep an ethnic majority in a certain area. Settlements were often built on agricultural property of refugees and displaced persons to undermine sustainable return, or in locations that would intimidate returnees. Such programs usually included the provision of land and building materials. However, there was no legal entitlement of such assistance for current users and the lack of resettlement assistance did not prevent or postpone their evictions. Eventually the shortage of land and financial resources limited these programs.

\textbf{Compensation}

Under the Bosnia and Herzegovina Constitution, refugees and displaced persons have the right to be compensated for any property of which they were deprived in the course of hostilities that cannot be restored to them.\textsuperscript{156} Compensation was also addressed in Annex 7, again providing for compensation in cases where property

\textsuperscript{154} Id., art. 12(a).
\textsuperscript{155} Id., art. 8.
\textsuperscript{156} Constitution of Bosnia and Herzegovina, art. II(5).
cannot be restored\textsuperscript{157}, and providing for the establishment of the Refugees and Displaced Persons Fund to settle claims for compensation\textsuperscript{158}. This Fund was to be established in the Central Bank of Bosnia and administered by CRPC. Resources for the Fund were to be provided through the purchase, sale, lease and mortgage of real property that had been claimed before CRPC.\textsuperscript{159} Funds could also be provided through direct payments by the Parties or from contributions from international donors.

While both the right to, and a mechanism for, compensation were established under the DPA, in practice compensation did not materialize as envisioned. The Fund was never established because no resources were made available. CRPC never undertook any activities regarding purchase, sale, lease and mortgage of property. Instead, it focused its activities on issuing decisions on claims for repossession of properties—even in cases where applicants had stated a preference for compensation. In addition, no part of the Bosnia and Herzegovina government made any resources available. International donors were more interested in funding reconstruction of housing and infrastructure than compensation. Another complication is determining the rate of compensation, especially as regards destroyed or damaged properties.

In practice, it could be argued that the right to compensation has been partially fulfilled by allowing refugees and displaced persons to repossess and subsequently sell their property. In such cases the property owners probably received a fairer price, and more quickly, than they would through a compensation scheme. However, individuals whose property was destroyed would be disadvantaged as no consideration would be made for the destruction to their property.

### Progress

Return in Bosnia began mostly with refugees and displaced persons returning to destroyed housing that had been reconstructed by the international community. However, return to property occupied by others was initially slow, primarily because the status of the temporary occupants of the property had not yet been established. In most cases local authorities were reluctant to evict temporary occupants, most of whom comprised the same ethnicity, to return properties to minorities. At the start of the process for return of property many obstructions were thrown in the

\textsuperscript{157} General Framework Agreement for Peace in Bosnia and Herzegovina, \textit{supra} n. 90, Annex 7, art. I(1).

\textsuperscript{158} \textit{Id.}, art. XIV(1).

\textsuperscript{159} \textit{Id.}
way of claimants. The primary obstructions were political. These included rejecting submission of claims and charging illegal fees for filing claims. In many municipalities officials refused to allocate adequate resources to the housing offices, with some not even having electricity, computers or telephones.160

Throughout the process implementation of decisions proved the most difficult task, primarily because in many instances, especially at the start of the process, implementation was dependent on initiation of a forcible eviction of the current occupant. No member of the international community was interested in carrying out evictions, so the responsibility remained with local officials, particularly the local police. At first local police resisted, and local interest groups, primarily composed of displaced persons or war veterans associations, often staged protests. Local officials attempted to enact legislation preventing evictions during winter, holidays or the school year. But as the process matured forcible evictions became routine. The international community forced non-compliance reports to be written for police officers that failed to implement eviction orders. Once the local communities realized eviction orders would be enforced, many current occupants began to voluntarily vacate property before eviction orders were issued.

In addition, there were some unclear provisions in earlier versions of the laws. In particular, the laws lacked clear mechanisms for forcible evictions. The definition of refugee was often deliberately misinterpreted with claims being rejected because the claimants allegedly left their property for reasons unrelated to the war, for example, to start a new job or visit relatives. In most instances local officials were hoping considerable delays in the process would force individuals to give up on claims and instead resettle in ethnically homogeneous areas. Also of concern was the fact that implementation of the property legislation varied widely throughout the country, with hard-line areas preventing almost all repossessions when the laws first came into effect. This problem of non-uniform implementation has lasted throughout the entire process. During the early stages of the process, local officials would allow the return of property in rural areas while preventing repossession of property in city centers in an attempt to keep minority populations marginalized. At this time the rate of implementation of the property laws was so slow that it was estimated that full resolution of all claims would have taken at least thirty years, a time period unacceptable to the international community.

Establishing mechanisms to ensure realization of the right to repossession of property takes considerable time—it is not a short-term possibility if it is to be done

160 To counteract such practice in the Republika Srpska, the US Government donated over $1.5 million to assist the Republika Srpska Ministry for Refugees and Displaced Persons to hire additional staff and provide adequate resources to the municipal housing offices.
In Bosnia and Herzegovina the mixture of international and domestic bodies and a comprehensive set of safeguards has allowed for strong progress in a relatively short period of time. The success of the right to repossess property depends on two factors: the provision of adequate legal regulations governing the right and process for repossession and political support to ensure the regulations are enforced. The DPA clearly established that refugees and displaced persons had the right to return and repossess property. However, local officials were unwilling to enact adequate legislation to ensure the right to repossess property, despite having agreed to do so under the DPA. Therefore it was necessary for the High Representative to have the power to impose adequate legislation.

But the provision of adequate legislation was only the first step. Implementation of the relevant laws has been problematic, although it has improved with time. From the start, there was little effort on the part of local officials to implement property laws. Obstruction ranged from outright harassment, such as refusing to accept claims and issue decisions, to more passive obstruction, such as failing to provide funds for the adequate staffing of housing offices. In addition, implementation throughout Bosnia and Herzegovina has remained imbalanced, with strong progress in some areas contrasted by completely inadequate progress in others.

To correct this imbalance, the international community has attempted to use certain pressures, both financial and political. The Office of the High Representative has worked with donors to ensure, to the extent possible, that development/reconstruction assistance is conditioned on cooperation by the local authorities on implementation of property laws. In addition to direct financial incentives, there are also political leverages. Implementation of property laws has been made a precondition for Bosnia and Herzegovina’s entry into the Council of Europe and the European Community.

Since the full property laws have come into effect, nearly eighty-two per cent of all of the claims for repossession of property have been implemented. Since the start of the process the rate of repossession has steadily grown faster, even in the more obstructive areas. While this is an accomplishment, the rate of repossession remains slow. Given the current pace of repossession, full implementation of the property laws should be achieved within the next couple of years.

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161 For a thorough discussion of the early years of the implementation of property legislation in Bosnia see, Hastings, supra n. 105.

Conclusion

In establishing a mechanism for refugees and displaced persons to return and repossess their property, a number of considerations need to be addressed. Agreements should be as detailed as possible. The DPA set out in general the rights of refugees and displaced persons and the obligations of the signatories. In this respect it establishes the rights to return and repossess property as individual rights—each refugee and displaced person has the choice regarding return and property. Although Annex 7 did provide for the repeal of discriminatory legislation, the DPA had no enforcement mechanism, and the Parties were left to their goodwill in implementing provisions of the agreement. Only the elaborated powers of the High Representative were able to ensure the provision of adequate legislation. The DPA also did not contain a specific mechanism for return. However, the DPA did provide for adequate monitoring and participation by the international community, which did allow for enforcement. In similar situations, if there is not a strong presence of the international community, it becomes more important for the peace agreement to be as detailed as possible.

A comprehensive framework of legislation is necessary to ensure refugees and displaced persons can exercise their full rights. It is best if such legislation is grounded in international human rights law, in particular providing for some type of regional complaints mechanism. In Bosnia and Herzegovina, legislation established administrative rather than judicial procedures to more effectively implement the right to repossess property. It is also necessary to provide adequate review mechanisms to ensure the laws are complied with by local officials. In Bosnia and Herzegovina, the Ombudsman and Human Rights Chamber were mandated with this responsibility, and Bosnia and Herzegovina is now subject to the European Court of Human Rights.

Repossession of property can provide a more efficient and fairer mechanism for compensation. Under both Annex 7 and the Bosnia and Herzegovina Constitution, refugees and displaced persons were given the right to compensation in cases where they chose not to, or could not, repossess property. In particular, a Refugees and Displaced Persons Fund was to be established in the Central Bank of Bosnia and Herzegovina and funded by direct payments by the Parties and through the purchase, sale and lease of properties by CRPC. However, such a fund was never established. The Parties did not have the resources, and CRPC never undertook to purchase, sell or lease properties. In addition, no international donors were willing to fund compensation. Instead, individuals who did not wish to return could simply repossess their property and sell it. In many instances they likely received a fairer price and were able to do so in a quicker manner than through a pure compensation mechanism. However, this may not be so for individuals with destroyed property or property in undesirable locations.
Political backing needs to be mobilized. In Bosnia and Herzegovina, the Peace Implementation Council has provided strong political support to the process of return and repossession of property. Without strong and united backing by such players, particularly the United States and the European Union, the process most likely would not have worked.

Return and repossession of property should be grounded in the rule of law. In the early phases of return, numerous political agreements were made setting out specific arrangements for numbers of returns to certain areas. However, such agreements resulted in little progress. It was only when the international community encouraged a system for return and repossession grounded in the rule of law, and not subject to political agreements that serious progress did ensue.

Financial assistance and membership in regional organizations should be conditioned on cooperation with laws regarding the repossession of property. Bosnia and Herzegovina is heavily dependent on international assistance, which provided strong leverage to the international community. Bosnia and Herzegovina’s future is also heavily dependent on membership in the Council of Europe and the European Union, providing even further leverage.

There should be a clear delineation of tasks to avoid the inefficient use of resources. The international community has spent considerable resources on implementation of the right to return and repossess property in Bosnia and Herzegovina. In particular, a large number of personnel have been active in monitoring implementation. The presence of international organizations has both forced progress by local officials and created a more neutral environment of trust and security within the local population. However, attention should be paid to avoiding unnecessary duplication of efforts by different bodies involved in the process, including that of international organizations.
South Africa has experienced a long history of colonial conquest and dispossession. This process included the conquest of the San (Bushmen) by the Bantu speaking people who colonized the southern reaches of Africa prior to the advent of European colonization. The latter started in earnest in 1652 with the arrival of the Dutch at the Cape. By the early 1900s the process of European land conquest was all but complete, with the majority of the original inhabitants, constituting approximately 80 per cent of the population, confined to reserves that made up 7 per cent of the land surface of the country. In 1936 these reserves were extended to 13 per cent of the total land.

In the 1950s the *apartheid* state began to implement its legislated relocation policies. This included both mass removals and the implementation of influx control. Despite resistance, it is estimated that close to 5 million people were forcibly removed and dumped in resettlement camps in the *Bantustans*, as the reserves became known. The resistance to removals culminated in the establishment of residents associations in the early 1980s, which in conjunction with civic organizations around the country conducted a national campaign to put an end to relocation, especially mass removals. This campaign achieved its aims in 1984, when the then National Party state was forced to abandon its policy of racially-based spatial segregation.

From the 1970s into the 1980s, the struggle against the *apartheid* state was fiercely conducted at the local level. All over South Africa’s townships, the inhabitants felt
the impact of *apartheid* most directly in the course of their daily lives and with their interaction with the local state. From lack of housing, education, medical facilities, transport and infrastructure, to the brutality of the police and other *apartheid* functionaries, it was at the local level that *apartheid* had its greatest impact on people’s lives. And no institution was more hated than the collaborationist black local authorities, which came in a baffling variety of guises as the *apartheid* state strove to achieve some measure of legitimacy for its segregationist policies.

Duncan Village in East London is a good example of a community that was subjected to the full force of the *apartheid* state’s policies. With the demolition of the shanty houses and the relocation of the occupants, Duncan Village became the classic *apartheid* dormitory township. Spatially and socially transformed and tightly controlled by the Eastern Cape urban administration board, movement of Africans in and out of the area was carefully monitored and influx control strictly enforced.¹ When relocation ended in 1984, only 30,000 people remained in Duncan Village. The township was placed under the authority of a Black Local Authority in 1979, which became known as the Gompo Town Council. As with other Black Local Authorities in South African townships in the 1980s, it did not enjoy any legitimacy and at the height of the national uprisings in 1986 the councilors were forced to resign. Control of the township then passed on to the militant Duncan Village Resident’s Association.

The result was a massive densification of the township as the Duncan Village Resident’s Association allocated tiny plots where incoming migrants from the rural areas surrounding East London, the Ciskei and the Transkei constructed dwellings with any material that came to hand. From 30,000 people in 1984, it is estimated that there were over 100,000 people (estimates vary from 80,000 to 150,000) crammed into 360 hectares. In the most dense parts, this meant a total of 2,125 people per hectare, making Duncan Village one of the most overcrowded townships in South Africa.²

West Bank in East London is another example. The community known as Nongqongqo was a small urban location which housed approximately 7,000 African and ‘Colored’ residents. It was the original village and first location of East London and served primarily as a source of labor for workshops, transport and packing concerns in the East London harbor. The village, which was also known as the West Bank (of the Buffalo river), was a stable and peaceful community that accommodated an ethnically mixed population of Xhosa, Fingoes (Mfengu), Pondos, Zulus, Sothos and ‘Colored’ people.

At the time of removals in 1965 residents lived in a variety of structures, ranging from well-constructed wood and iron houses, rectangular municipal houses, concrete

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rondawels (round huts) and wood and iron adjoining shacks, the latter rented out to permanent tenants. Despite a lack of facilities, a strong sense of community existed with sports teams (rugby, cricket, tennis), choirs and concerts forming a focal point of recreational activities. A large number of informal businesses operated often from people’s homes and because of the settlement’s proximity to the city and harbor, people did not have to travel long distances to work.

The process of removing people to their new locations took six months. In total 1,152 African and 222 ‘Colored’ families were forcibly removed with no consultation beforehand. ‘Colored’ families were moved to the East Bank locations and African families to the new Ciskei township of Mdantsane, many kilometers from the city and their places of work. Oral evidence from claimants reveal the hardship suffered at the time, emotional stress due to insecurity and uncertainty, as well as a strong sense of a loss of community. Mdantsane especially, a huge sprawling apartheid style township today wracked by crime and violence, represented an alien environment, with removees being scattered far and wide amongst existing residents.

The release of Nelson Mandela and other political prisoners in 1990 heralded the end of apartheid and the beginning of preparations for the Constitutional negotiations which took place in the early 1990s. One of the issues addressed was that of reversing the impact of one of the most hated pillars of the colonial and apartheid system, the loss of land to the white settler minority through conquest, forced removals and other discriminatory legislation that prevented black people from owning land in 87 per cent of the country. A land reform program was implemented consisting of three pillars—land redistribution, land restitution and tenure upgrade. This chapter will focus on the restitution process in post-1994 South Africa.

Restitution within National Legislation

Restitution in South Africa, as defined by the white paper on land policy, is to:

Restore land and to provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and practice, in such a way as to provide support to the vital process of reconciliation, reconstruction and development.³

Judge Meer, in her 1996 Land Claims Court (the Court) judgment of Dulabhb v Dulabhd⁴, argues that the term ‘restitution’ has a variety of different meanings in different

⁴ Dulabhb v Dulabhd—LCC14/1996 (16.4.96).
legal contexts. Because restitution of a right in land at the time of her judgment (one of the first restitution judgments) was a novel one in South African jurisprudence, she states that it is hardly surprising that South African legal dictionaries offered no definition of restitution in this context, but only in relation to the law of contract. She does, however, find the following definition in *Black’s Law Dictionary*:

> Restitution—an equitable remedy under which a person is restored to his or her original position prior to the loss or injury or placed in the position he or she would have been in had the breach not occurred. The act of making good or giving equivalent for any loss, damage or injury. The act of restoring something to its rightful owner. Compensation for the wrongful taking of property. Restoration of the status quo, the amount which would put the plaintiff in as good a position as he would have been in had no contract been made and restores to the plaintiff the value of what he parted with in terms of the contract.  

As can be seen from the above definitions, restitution usually involves a number of components: (1) the restoration of a right; (2) the restoration of physical property lost, and/or; (3) the compensation of victims; (4) the reconciliation of victims and the perpetrators/beneficiaries of the original dispossession; and (5) the expectation that the restitution process will contribute in some way to economic upliftment and development.

The restitution process has to occur within the limitations of state resources and within the broader policy framework of the compensating state. With regard to physical assets lost, the primary aim of restitution is restoration. This may involve land, residential property, commercial premises, factories, works of art, vehicles, ships and family heirlooms. If restoration is not possible, restitution may take the form of financial compensation or in the case of land, alternative land. In addition, as occurs in South Africa, claimants may be provided with priority access to existing state development programs. In most countries, financial compensation has been less than the amount originally lost, due to budget constraints, other development priorities such as economic growth and job creation as well as the perceived lack of culpability of the compensating state.

In trying to give legislative content and meaning to the restitution process in South Africa, it is necessary to start by examining the relevant sections of the 1993 Interim Constitution (Act No. 200 of 1993).

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The Interim Constitution

The Interim Constitution is still of relevance today with regard to the restitution process. The Interim Constitution sets out the legislative framework and importantly provides the constitutional guarantee for restitution in more detail than the final 1996 Constitution. The Interim Constitution devoted a special subchapter to land reform. According to Professor John Murphy the subchapter had four objectives: first, it obliged parliament to enact legislation for realizing the restitution of land rights, which was accomplished by the Restitution of Land Rights Act (No. 22 of 1994); secondly, it conferred a constitutional right to restitution of specified categories of dispossessed persons (section 121(2)); thirdly, it compelled parliament to establish a Commission on the restitution of land rights with the power to investigate the merits of claims, to mediate and settle disputes and to draw up reports and gather evidence for the adjudication of claims (section 122); and fourthly, it set the parameters of the powers of the Land Claims Court to make orders of restoration and compensation (section 123).

Gilfillan argues that the Interim Constitution went further than protecting fundamental human rights. The Interim Constitution contains:

...a measure which is designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms as envisaged in section 8(3)(a) of the Interim Constitution. Section 8(3)(b) expressly grants every person or community dispossessed of rights in land before the commencement of the new constitution under any discriminatory laws the rights to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

In terms of the Interim Constitution the state has a responsibility to give effect to the restitution of land rights. Section 121 instructs the legislature to provide redress through an Act of Parliament for the victims of dispossession with respect to forced removals due to racially discriminatory laws. Section 121(2) specifies that a claim for restitution of land rights is a claim against the state. This means that even if there is a private owner on the land being claimed, it is the state’s responsibility to buy the land, if feasible, and return it to the claimant. The rationale is that apartheid dispossession were effected by the state and, therefore, the state is responsible for the settling of restitution claims, not the current owners.

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The Interim Constitution and the Restitution Act establish a right for people who were victims of dispossession to claim restitution. Both set out qualification criteria, in section 121(4) of the Interim Constitution and in section 2 of the Restitution Act. A restitution claim will be accepted for investigation where the claimant was:

1. dispossessed;
2. of a right in land;
3. after 19 June 1913;
4. under, or for the object of furthering, racially discriminatory laws; and
5. not paid just and equitable compensation, if expropriated under the Expropriation Act.

Restitution is not mentioned in Schedule 6 to the Interim Constitution, which deals with provincial and local government competencies, and is thus a matter provided for in national legislation. There are two main reasons for this. Firstly, the African National Congress and its allies were strongly in favor of a national land reform program and were aware of the necessity to transform the conservative Department of Agriculture and Land Affairs. This department had dealt mainly with large-scale white commercial farmers and the aim was to transform it into an institution that could drive the land reform process and reorient itself towards the needs of small-scale and emerging commercial black farmers. Secondly, it was recognized that the provincial departments of agriculture and land affairs did not have the capacity to implement land reform, a situation that in the Eastern Cape, for example, pertains to this day.⁹

The establishment of the Commission is dealt with in section 122(1) of the Interim Constitution that instructs the legislature to this effect. The section as a whole sets out the powers and functions of the Commission to:

(a) investigate the merits of any claims for the restitution of rights in land;
(b) mediate and settle disputes arising from such claims;
(c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and,
(d) exercise and perform any such other powers and functions as may be provided for in the said Act.¹⁰

Section (d) should be read in conjunction with section 122(2) that states: ‘The

⁹ Interview by author with Coleman, 2000.
¹⁰ Constitution of the Republic of South Africa (Act No. 200 of 1993), supra n. 6, sec. 122(1).
procedures to be followed for dealing with claims under this section shall be
prescribed by or under the said Act.’

These two sections expressly empower the legislature to enact an Act of Parliament
enabling the Commission to exercise and perform other powers and functions and to
prescribe in it the procedures to be followed for dealing with restitution claims.

Section 123 deals with the nature of court orders, the restoration of state land
and with the issue of ‘just and equitable compensation’ for both the present land
owner and the claimant, the latter relating to compensation paid by the state at
the time of dispossession. This section sets out clearly the legalistic and complex
process necessitated by the inclusion of the property clause in the Bill of Rights
and the market-driven approach, as well as the decision to take into account any
compensation paid at the time of the original dispossession. This latter requirement
had a twofold purpose: to cut down the cost of the restitution process to the state and
to prevent white claimants who received adequate compensation (often more than
adequate) from succeeding with their claims. It led, however, to a situation where
the Department of Land Affairs, representing the state as respondent, applied this
requirement literally and mechanically to all claimants. This was irrespective of the
fact that compensation was often impossible to calculate as claimants were either
underpaid or not paid at all, in spite of apartheid era documentation to the contrary.
Also of relevance is the question of whether it was possible to pay disenfranchised
victims of forced removals, with limited access to judicial arbitration and no choice
as to where they were resettled, ‘just and equitable’ compensation.

The Constitution

In the 1996 Constitution (Act No. 108), the issue of land reform, in general,
and restitution, in particular, was reduced from the four sections it occupied in the
Interim Constitution (sections 8(3)(b), 121, 122 and 123) to one section in the Bill of
Rights. It is contained in section 25 entitled ‘Property’. The equivalent of sub-section
8(3)(b) under the sub-chapter titled ‘Equality’ in the Interim Constitution, which
entitled people who were dispossessed of land rights under racial laws, was watered
down to a more general clause which reads:

Equality includes the full and equal enjoyment of all rights and freedoms. To

11 Id., sec. 122(2).
12 Gilfillan, supra n. 8, 4.
promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.\textsuperscript{14}

However, section 25(4), (5) and (8) were added to reinforce the notion of a second generation right as being a real right, which is able to overcome the entrenchment of property rights and place an onus on the state to actively promote land reform. The tension between these opposing rights, that is, the protection of property rights and the imperative for land reform remained. The three sections read as follows:

\begin{enumerate}
\item[(4)] For the purpose of this section—
\begin{enumerate}
\item[a.] the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources, and
\item[b.] property is not limited to land.
\end{enumerate}
\item[(5)] The State must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.
\item[(8)] No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).\textsuperscript{15}
\end{enumerate}

Section 36(1) deals with the limitation of rights. It states that

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including:

\begin{enumerate}
\item[a.] the nature of the right;
\item[b.] the importance of the purpose of the limitation;
\item[c.] the nature and extent of the limitation;
\item[d.] the relation between the limitation and its purpose; and,
\item[e.] less restrictive means to achieve the purpose.\textsuperscript{16}
\end{enumerate}

\textsuperscript{14} Id., sec. 9(2).
\textsuperscript{15} Id., sec. 25(4), (5) and (8).
\textsuperscript{16} Id., sec. 36(1).
Another difference between the Interim and final Constitutions is the change from ‘rights in property’ to the more simple ‘property’. With regard to compensation in the case of expropriation, section 25(3) requires that the compensation and the time and manner of payment must reflect ‘an equitable balance between the public interest and the interests of those affected’. 17 Two new clauses are added with regard to circumstances which have to be taken into consideration when deciding on compensation, namely, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and the purpose of the expropriation (sections 25(4) and (5)).

Another change is the widening of the parameters that qualify persons or communities for tenure upgrade and restitution in sub-sections (6) and (7). Whereas in the Interim Constitution discrimination had to be in terms of a racial law, in the Constitution a person or community who was unable to obtain secure tenure or who lost property through a racial practice also qualifies for redress.

The reason for including racial practices is that under segregation and apartheid people often lost land due to a racial action without a specific law being applied. In the Komga district of the Eastern Cape, for example, the Eastern Cape Land Claims Commission is investigating a number of cases involving black farmers who claim to have been coerced into selling to adjacent white farmers, with the connivance of the local magistrate. These sales were often encouraged by local state officials on the basis that the district was a ‘white area’. 18 In other cases communities were forcibly removed under legislation that was not overtly racial, such as forestry, conservation and legislation used to initiate irrigation schemes and dams. Durkje Gilfillan, the first Regional Land Claims Commissioner for Northern Province and Mpumulanga quotes the following example:

Black landowners around the present Loskop dam for example were expropriated in terms of race neutral laws, but the resultant irrigation scheme was reserved for whites only. 19

In addition, because the communities concerned were disenfranchised, they were less able to challenge the removals and generally not able to choose where they wanted to be resettled. The state often used these types of acts to disguise the racial intent of the removals of communities to the Bantustans.

Another tactic used by the apartheid state was to downgrade communities

17 Id., sec. 25(3).
18 Author’s experience as Research Manager for the Eastern Cape and Free State Regional Land Claims Commission.
19 Gilfillan, supra n. 8, 3.
rights in land to that of squatters. For example, crown tenancy and the rights that went with it was abolished by the Native Trust and Land Act (No. 18 of 1936) and affected communities declared squatters. When the land was subsequently needed for conservation purposes or forestry, often years later, the communities living on the land were removed as squatters in terms of seemingly race neutral common law or legislation dealing with trespass.

According to Gilfillan, certain legislation, though race neutral, was used exclusively to effect evictions in a racial manner:

> Slum clearance was undertaken by local governments ostensibly for health reasons or to initiate low cost housing projects. The advantages and upgrading of such actions by local government benefited whites with blacks being removed to areas set aside for black occupation with little or no improvements in living standards.\(^\text{20}\)

### The Restitution of Land Rights Act

The Restitution of Land Rights Act (No. 22 of 1994) is based primarily on the Interim Constitution and was amended in 1997 to bring it into line with the 1996 Constitution. Further amendments were effected after the Ministerial Review in 1998 and again in the early 2000s (see below). The first part deals with the general functions of the Commission. Two issues are of particular relevance. Section 6(2)(b) allows the Commissioner to refer a claim that does not qualify for restitution to the Minister for alternative relief under the redistribution or tenure upgrade programs. Sections 8 and 9 deal with the appointment of staff and consultants, the latter section being responsible for widespread unhappiness amongst Commission investigative division staff because of the insecurity of the yearly renewable contracts.

Sections 10 and 11 set out the steps to be followed during the lodgment and initial investigation of the claims. Section 11 provides for the gazetting and publication of claims, an important step that means the claim has been accepted for further investigation and also allows affected parties to make representations. Sections 12, 13 and 14 deal with further investigation and settling of claims, allowing for the grouping of claims of a similar nature within a geographical area, mediation or referral to Court.

Sections 22 to 35 set out the powers of the Land Claims Court. Section 33 lists the factors the court needs to take into account when considering its decision in restitution cases and section 35 sets out the awards the court is authorized to make. A 1997 amendment allows for direct access to Court by claimants.

\(^{20}\) Id., 3.
**Restitution as a Rights-based Legally Driven Process**

There were a number of motivations for the establishment of a Land Claims Court in South Africa. A group of individuals from academic, legal and land organizations under the auspices of the Centre for Applied Legal Studies at the University of the Witwatersrand did much of the original research into the viability of a land court to drive the land reform process. In the end the participants in the process decided that a court was more suited to restitution and certain aspects of tenure security, while redistribution and tenure upgrade were more suited to an administrative process. The Court was perceived as an integral part of what was known as the ‘Land Claims Court Model’, which set out the specific steps through which a land claim would have to go.

The Centre for Applied Legal Studies group recognized that *apartheid* policies had rendered moot the claims of black people to land outside of the legal system. Legislation such as the Black Administration Act (No. 38 of 1927); the Development Trust and Land Act (No. 18 of 1936); the Group Areas Act (No. 41 of 1950 revised in 1957 and 1966); the Community Development Act (No. 30 of 1966) and the Black Resettlement Act (No. 19 of 1954) had systematically stripped black people of formal land rights and were used to remove, evict and expropriate ‘black spot’ communities, unregistered and deregistered labor tenants and disqualify urban dwellers. In spite of the lack of formal title, the Centre for Applied Legal Studies researchers found that claims to land by black people repeatedly referred to certain basic principles and values:

These principles, including length of occupation, birthright and secure tenure preserved through due process and contractual obligations, were often closely related to established legal concepts.

It was argued that a court could give recognition to the terms of claims by black people by applying non-racial criteria to determine the strength of the various claims to land and as such award restitution of land to people who had been forcibly dispossessed by the application of *apartheid* policies and legislation.

The Centre for Applied Legal Studies group was in favor of a ‘highly particularized land claims court that would respond to the needs of only a small segment of the

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22 *South African Land Policy White Paper, supra* n. 3, 54.

23 Swanson, *supra* n. 21, 332.
total population claiming land’. They argued that courts work best when they are handling disputes between specific parties. Based on this argument, redistribution and tenure upgrade were deemed to be outside the ambit of the court and more suited to an administrative process. The ‘disputes’ referred to overlapping land claims where the strength of rights had to be ascertained and adjudicated and to situations where privately or state-owned land would be claimed. The latter was no doubt in anticipation of the Constitutional entrenchment of property rights, although there was some debate as to the effect the inclusion of the right to property in a bill of rights would have on the efficacy of the court.

When the new 1994 parliament debated the Act to set up the Land Claims Court and the Commission there was some concern from land activists over the proposed narrow focus of the two institutions. It had been hoped the Court would give much needed impetus to the land reform process as a whole. This stemmed from a lack of confidence in the ability of the as yet untransformed (in 1994) Department of Land Affairs to deliver the needed land administratively and the failure of the National Party government’s Advisory Commission on Land Allocation to deliver anything substantial. It was feared that its brief to deal only with restitution, that is, it would only deal with communities and individuals claiming back the land they were originally removed from, coupled with the 1913 cut-off date, would exclude the majority of people involved in land struggles. For example, in the Border/Kei area of the Eastern Cape, the Border Rural Committee, an affiliate of the National Land Committee, pointed out that restitution represents the smallest category of land struggles, and would exclude the needs of settled communities who need additional land, in many cases adjacent to where they have settled. The latter included: Black spots who fought against removal to the Ciskei; those who fought against incorporation into the Bantustans; those who fled or were evicted from Ciskei; and communities such as Thornhill and Zwelidinga (who had been moved to temporary land by the state because they did not want to be incorporated into the Transkei bantustan).

It also excluded certain categories of labor tenants as well as the claims of those dispossessed under ‘betterment’ policies, which ‘involved the forced removal and loss of land rights for millions of inhabitants of the former Bantustans’. The South African Land Policy White Paper argued that betterment claims should be dealt with by the tenure security program, land administration reform and the land redistribution support program. This was the position adopted by the first Eastern Cape Land Claims Commissioner Dr Peter Mayende. However, after the Border Rural Committee took

24 Id., 340-1.
26 South African Land Policy White Paper, supra n. 3.
the Chata claim (a community which had undergone betterment planning) to the court, the DLA decided that betterment does fall under the restitution program. The Chata claim was settled in 2000, opening up access for millions of other rural inhabitants to claim restitution for the losses suffered under *apartheid* betterment planning.

To a certain extent the early fears of land activists have been born out. Under the second Minister of Land Affairs, Thoko Didiza, the tenure security and redistribution programs have come to a virtual standstill, while the restitution program did achieve a degree of organizational capacity to deliver.\(^27\)

In addition to the restricted brief, the Centre for Applied Legal Studies group put forward five broad criteria for the Land Claims Court to consider in making its decision on a claim. The criteria were drawn from the ‘basic principles underlying Western and African notions of property and attempted to select criteria that embodied values common in both systems’.\(^28\) The intention was that by drawing on shared values the Court would be in a position to make decisions that were understood and accepted by both black and white people in terms of their understanding of land rights. The five criteria were:

1. **time**—the length of time of physical occupation;
2. **birthright**—people who were born on the land and used it for permanent residence would be favoured;
3. **investment**—would include monetary investments and physical labour;
4. **loss**—financial and emotional loss suffered during dispossession; and
5. **social benefit**—the interests of the public as a whole.\(^29\)

Swanson points out that the omission of *title* from the list does not advantage or disadvantage title holders. Using the above criteria, title may prevail, but in some cases title is not the strongest claim to the land:

Where title was obtained through theft, where title holders have neglected their property, where certain people were prohibited from obtaining title because of their race, there may be a claim to the land that is far more valid than legal title.\(^30\)

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\(^27\) Interview by author with Ashley Westaway, Managing Director, Border Rural Committee, East London, Nov. 23, 2000.

\(^28\) *Swanson, supra* n. 21, 335.

\(^29\) *Id.*, 335-6.

\(^30\) *Id.*, 336.
The purposive method of interpretation

Another important development within South African jurisprudence in general was the move away from treating the Constitution in the same manner as other acts of parliament. Support for this approach came from the British member of the Privy Council Lord Wilberforce. He argued that the way to interpret a Constitution was not to treat it as if it were an act of Parliament, but as requiring principles of interpretation of its own suitable to its character. Courts interpreting constitutions are required, he argued ‘to avoid the austerity of tabulated legalism’.

Judge Meer of the LCC puts forward a similar point of view in the Dulabh case. She argues that to fully determine the ambit of restitution, one should reach beyond the immediate linguistic context of the word restitution, its ordinary and grammatical meaning, as contained in the Interim Constitution (sections 123(3), 121(2) and 8) and the Act (section 2(1)), to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation, but also to the sense, spirit, ethos, morality and fundamental principles of the Interim Constitution and the Act.31

This approach involves moving away from what Judge Meer terms as ‘a legacy of a literal positivistic theory of statutory interpretation in South Africa’32, and moving towards what Judge Dobson in his 1998 Slamdien judgment terms as a ‘purposive approach’33. In general this approach requires that one must ‘ascertain the meaning of the provision to be interpreted by an analysis of its purpose’.34 In addition it requires that the judge must:

- have regard to the context of the provision in the sense of its historical origins;
- have regard to the immediate context of the provision in the sense of its historical origins;
- have regard to its context in the sense of the statute as a whole, the subject matter, and broad objects of the statute and the values which underlie it;
- have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- have regard to the precise wording of the provision; and,
- where a constitutional right is concerned, as is the case here, adopt a generous

31 Dulabh v Dulabh, supra n. 4.
32 Id.
33 The Minister of Land Affairs of The Republic Of South Africa and another v Omar Slamdien and others—LCC107/98 (10.2.99).
34 Id.
rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.

In addition the Constitution provides a general exhortation in section 39(2):

> When interpreting *any legislation*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.35 (author’s emphasis)

Judge Froneman of the High Court Eastern Cape Division, in his judgment handed down after an application for a class action by Ngxusza and others against the Department of Welfare, quoting with approval the experience of an Indian judge, states that:

> ...flexibility and a generous approach to standing in a poor country is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective.36

Budlender, in a 1998 commentary on new land laws asked whether the courts would apply a purposive interpretation that he defined as:

> ...giving the words a meaning which seems to be consistent with the general purpose and import of the provision in its broader constitutional context, and relying on international jurisprudence as a guide.37

The answer to his question seems to be that while many have delivered judgments (see Meer and Dobson above) with lengthy expositions on the purposive method of interpretation, the findings of the judgments have often failed to carry through the professed ethic inherent in this approach. Early restitution judgments bear testament to this, and two examples are outlined below. Mark Euijen, an advocate working for the Legal Resources Centre in Grahamstown in the early 2000s, cites a number of examples of magistrates, as well as judges of the LCC resorting to narrow interpretations which in his opinion have disadvantaged the intended beneficiaries in cases brought under the Extension of Security of Tenure Act (No. 62 of 1997). Apart from adopting an adversarial approach (placing the onus on the farm worker to prove that they are an occupier, for example) when the Constitution clearly places the onus on the Court to investigate all relevant circumstances before an eviction order may

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36 *Ngxusza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E), 17.

be granted (section 26(3) of the Constitution), he suggests:

...the legislation is nevertheless clear enough for the Land Claims Court to have been more broad minded about its interpretation of the Act’s applicability and use rights attendant upon a farm worker’s right of residence had it chosen to do so.\(^{38}\)

This often erratic functioning of the LCC, in terms of the tension between its sometime reversal to an adversarial and narrow (non-purposive) mode of operation and legal interpretation, despite its stated intentions to the contrary, often gave rise to what were seen by Commission staff battling to make sense of a highly complex process, as leading to contradictory judgments. This did little to bridge the growing gulf between Commission staff, claimants and land NGOs on the one hand, and the LCC judges on the other, over the continuing legalistic and bureaucratic approach to the settlement of claims. Two examples will suffice.

The **Macleantown** judgment\(^{39}\) was the first to be handed down by the Land Claims Court. The judgment overturned a carefully negotiated settlement that had overcome much conflict and taken years to broker. The settlement involved white residents, the black dispossessed landowners, their erstwhile tenants, their descendants, the Department of Land Affairs and the Amatola District Council. The most important aspect of this settlement was that it allowed the stakeholders on the ground (the so-called ‘community’) to decide what was acceptable in terms of who should be included and who received what, rather than some outside agency such as the Land Claims Court or the Commission.

The **Macleantown** judgment gave rise to a ponderous process of claimant verification that required the drawing up of family trees to map out descendants as well as the collection of identification documents for each and every family member. It required the identification of a specific piece of land with each original owner and the valuation of the land in order to buy it from the present owner. The exact calculation of the monetary value of each claimants original property was also required. As a result, the judgment set back the process by more than three years and effectively excluded any descendants from acquiring land at Macleantown through the restitution process, in spite of the fact that the local authority, the DLA, the white residents and the dispossessed community had agreed that they should be allocated land.

The other controversial judgment is one known as the **Cremin** judgment\(^{40}\). Here

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\(^{39}\) McDonnell, *Macleantown Residents Association—LCC12/1996 (4.7.96).*

\(^{40}\) Mayibuye I-Cremin Committee—LCC28/96 (21.11.97).
the Land Claims Court judges ruled that where the original person dispossessed is deceased, the term *direct descendant* in the Restitution Act should be narrowly interpreted to exclude any person who is not the spouse or a direct blood relation of the dispossessed person, in terms of eligibility to claim. The fact that this interpretation goes against the customary inheritance practices of the indigenous African population, and that they make up approximately 90 per cent of the claimant body, was not deemed important in spite of a thoroughly researched and well-argued presentation by Council acting for the claimants in the *Cremin* case. The judges decided that the common interpretation used in the High Court should apply in the Land Claims Court as well.

Things came to a head in September 1999 when the Chief Land Claims Commissioner, after a particularly technicist judgment by the court in the *Bautaung ba ga Selale v Zephanjeskraal* case\(^41\) called a special meeting of the commission’s legal officers to discuss ‘the unfair rulings of the court and other critical issues’ in order to strategize ‘how to deal with the Court’.\(^42\)

**The move towards a developmental approach**

By the beginning of 1998 there was a realization among a number of role-players involved in restitution that the program had run into serious problems that needed to be addressed as a matter of urgency. Of the eventual 63,455 claims lodged with the Commission by the cut-off date, only

...eighteen restitution cases were resolved by the end of 1997, allowing some 27,000 people to recover approximately 150,000 hectares of land. In addition, decisions were made in respect of a further 172 cases which on the basis of research and investigation, were rejected by the Land Claims Commission as invalid .... A further 20 cases had been referred to the Land Claims Court.\(^43\)

Many of the problems outlined above contributed to the slow pace of delivery. These include the legalistic, centralized and bureaucratic nature of the restitution process, the tensions between the DLA and the Commission and the lack of active participation of claimants in processing their claims. But some restitution role-players began to realize that the slow pace at which claims were being settled was only one aspect of the problem facing the program. In the midst of calls for ‘fast-

\(^{41}\) *Bautaung ba ga Selale v Zephanjeskraal*—LCC85/98 (2.9.99).

\(^{42}\) Note from the Regional Land Claims Commission to Legal Officers, Sept. 3, 1999.

tracking’ of claims, for ‘a rolling action of delivery’ and a ‘focus on urban individual and community claims where claimants prefer financial compensation’\textsuperscript{44}, some protagonists began to draw attention to the vital issue of restitution’s contribution to land reform and development. The \textit{Green Paper on South African Land Policy} quotes the Reconstruction and Development Program which sets out the relationship between restitution, land reform and development very clearly:

> A national land reform programme is the central and driving force of a programme of rural development. Such a programme aims to redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding.\textsuperscript{45}

and,

> Economic viability and environmental sustainability—planning of land reform projects developed at local level must ensure that these are economically viable and environmentally sustainable.\textsuperscript{46}

The \textit{South African Land Policy White Paper} is even more explicit:

> The principles of fairness and justice also require a restitution policy that considers the broader development interests of the country and ensures that limited State resources are used in a responsible manner. To be successful, restitution needs to support, and be supported by, the reconstruction and development process.\textsuperscript{47}

Different aspects of this ‘developmental’ approach were emphasized by people in different regional Commissions, more organized claimant groups such as the Port Elizabeth Land and Community Restitution Association, NGOs supporting claimants, such as the Urban Services Group in Port Elizabeth and the National Land Committee, and the Ministerial Review task team, the Director General of the DLA Geoff Budlender and the Development Facilitation Act Implementation Task Team.

\textsuperscript{44} Circular to Commission on Restitution of Land staff from the Office of the Chief Land Claims Commissioner (Pretoria, 1999), 5.


\textsuperscript{46} \textit{Id.}, 5.

\textsuperscript{47} \textit{South African Land Policy White Paper}, supra n. 3, 52.
It is difficult to unravel exactly who took what position because not only did people's positions change over time, especially as the policy debate began to be influenced by the engagement of restitution practitioners with the variety of claims and claimants in the field, archives, deeds offices, courts and the local state in the different provinces, but also because the difference between the two positions was often one of emphasis rather than diametrical opposition. A number of initiatives began to emerge during the period under discussion, some prior to and during 1998 through 1999, which lent impetus to the more developmental approach.

The first of these was the Port Elizabeth Land and Community Restoration Association claim. Supported by the Delta Foundation, the Legal Resources Centre, the Urban Services Group and Metroplan, this claim charted a new path for restitution claims in a number of ways. Fundamental to this process was the need for each claimant to subscribe to a development-directed approach as a mechanism to resolve the claims. The challenge was therefore to reconcile the diversity of claims and develop an approach that deals in a fair and just manner with each claim. The chosen form of restitution was a combination of restoration and allocation of alternative land in the form of serviced *erven*. The outcome has been the development of a proposal that is acceptable to the Port Elizabeth Land and Community Restoration Association and all other stakeholders that was reached through a process of lengthy negotiation. The state has been requested to develop the land to full municipal standards.48

*Macleantown* is a claim for the restitution of land rights lodged by a group of claimants, through a representative body known as the Macleantown Resident's Association, for a number of *erven* in Macleantown in the Magisterial District of East London, of which the claimants were dispossessed in 1970. The *Macleantown* claimants were dispossessed of their residential, arable and commonage rights in land and forcefully removed in terms of section 13(2) of the Native Trust and Land Act (No. 18 of 1936). The land was acquired by the state. At the time of the dispossession the claimants had been residing in Macleantown since the turn of the century. The claimants were forcibly removed and resettled on less productive land in the then Ciskei at Mpongo Location at Chalumna. Each family received only a standard quarter acre plot, the number of *erven* previously owned not being taken into consideration.

The claimants were divided into two groups, landowners and tenants. The landowner claimants claimed their original *erven*, except for nine of them, who claimed alternative land, as it was not feasible to restore their original land due to erosion and a main road cutting through the properties. The Amatola District Council agreed to survey and allocate alternative plots of equivalent size from the

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48 Submission to the Minister of Land Affairs (42(d)), Port Elizabeth Land and Community Restoration Association, Regional Land Claims Commission, Eastern Cape, 1999.
commonage, and the Department of Land Affairs agreed to purchase additional land adjacent to the commonage to increase the size of the commonage.

The Amatola District Council also surveyed, and the appointed Project Manager allocated, residential plots to tenant claimants. After initial resistance, the present (white) landowners agreed to the purchase by the state of those erven claimed and not affected by erosion and the main road, and negotiations were conducted, based on valuations suggested in a report commissioned by the DLA, and vetted by the Land Affairs Board of the National Department of Public Works.

The claim was based on the injustice of the forced removal and the fact that the land to which the claimants were relocated was of considerably inferior quality and could in no way be considered to have been ‘just and equitable’ compensation, even if the monetary payments to land owners with title (the only claimants to receive any) is taken into consideration. These factors led to the claimants living conditions deteriorating markedly and it was argued that the restoration of the original and alternative land would go a long way towards reconstructing their fragmented communal life, and improve their socio-economic position. All parties to the claim were in agreement based on these considerations.

The Macleantown claim provided a model for future claims in that the Border Rural Committee, an NGO affiliated to the National Land Committee took the initiative to set up a steering committee which includes all stakeholders, including the Amatola District Council, which body is responsible, in conjunction with DLA and the Department of Local Government and Housing, for the provision of infrastructure and housing to the resettled claimants. The latter department, through its Provincial Housing Board, agreed to give the claimants priority in terms of the granting of housing subsidies. A settlement agreement was signed by all parties. In addition, a negotiations mandate was signed by all relevant head office functionaries, as well the Minister, making the section 42(d) referral a formality.\footnote{Section 42(d) of the Restitution of Land Rights Act empowers the Minister of Land Affairs to settle claims administratively as a result of negotiations between the relevant parties.}

The Macleantown project also included a redistribution component, to accommodate ex-farm workers that were initially part of the restitution claim, but did not qualify under the Act. A Project Manager was appointed by the provincial office of the Department of Land Affairs to assist with the implementation of the project, especially the reintegration of the community. As per agreement with the previous Minister, the claimants were allowed to return to Macleantown before the formalities of the process were completed.\footnote{Government of South Africa, \textit{Commission of Restitution of Land Rights Annual Report 1999-2000} (Pretoria: Department of Land Affairs, 2000), and Macleantown Resident’s Association Settlement Agreement, Regional Land Claims Commission, Eastern Cape, 1999.}
The Development Facilitation Act Task Team

The Development Facilitation Act (No. 67 of 1995), was, in the words of the DLA Director-General, Geoff Budlender, ‘promulgated with the objective of fast-tracking land development and providing a legal framework for integrated and sustainable land development’.\(^{51}\) The Development Facilitation Act established a number of bodies, including the Provincial Development Tribunals that have ‘extraordinary powers in order to expedite the process of land development’.\(^{52}\) As such its main purpose is to overcome the inequalities created by apartheid planning, and to this end section 3 of the Act puts forward a number of principles for land development. Briefly, these are that all policy, administrative practices and laws should:

- facilitate new, and recognize informal settlements;
- promote efficient and integrated land development through integrating social, economic, institutional and physical aspects, for example overcoming the rural/urban divide, the distance between residential and work areas, promoting the densification of towns and cities, and correcting historically distorted spatial patterns of settlement while making the optimum use of existing infrastructure;
- encourage environmentally sustainable land development practices;
- promote participation by affected communities thereby developing their skills and capacities;
- provide security of tenure while providing for a wide range of alternatives; and,
- ensure that a competent authority co-ordinates the process at national, provincial and local level.\(^{53}\)

The land development objectives and the restitution process

The Development Facilitation Act requires local authorities to formulate land development objectives. Incorporation of restitution into the process of formulating land development objectives is important for two reasons.

\(^{51}\) Minutes of meeting with claimants, Regional Land Claims Commission, Eastern Cape, April 1998.

\(^{52}\) Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another, supra n. 36.

Firstly, Geoff Budlender points out that because municipal budgets are based on approved land development objectives: ‘If the restitution process is not incorporated during the process of formulating land development objectives, it will have major implications for the servicing and after care of the restitution projects’. Given the incapacity, at that time, of Transitional Rural Councils and Transitional Local Councils in small towns in most rural areas, and the fact that the District Councils acted as ‘mother local authorities’ to these bodies it was necessary for District Councils to be included into this process.

Secondly, in terms of the Development Facilitation Act, municipalities have to apply to the DLA for funds in order to complete the rather complicated process of drawing up their land development objectives. Due to the lack of skills at the local level, expertise often had to be brought in to assist local councilors. In order to qualify for the DLA’s grant for the establishment of land development objectives, one of the requirements of the Development Facilitation Act is that municipalities had to incorporate land reform into their land development objectives. And as restitution forms one of the three pillars of land reform, it has to by definition be incorporated into any land development objective. The Development Facilitation Act and the land development objective process has now been replaced by the incorporation of the requirements described above into the Integrated Development Process. Nonetheless, the same principles apply.

The Ministerial Review

By June 1998 the Minister could no longer ignore the fact that the restitution process was in serious trouble. Pressure for review came from all sides. Claimants around the country were dissatisfied with the lack of progress in the processing of their claims, the manner in which they were being handled, and especially the complicated and legalistic requirements of the judicial process. The National Land Committee, a consistent opponent of the property clause in the Constitution, had been agitating for a more pro-active supply-led restitution program, and were extremely vocal in calling for a review into the whole process:

The land reform context presented some interesting advocacy opportunities during the year. These opportunities arose because of the ongoing non-delivery of land reform, in South Africa in general, and in the Eastern Cape in particular. The Ministerial Review of Restitution, that was commissioned as a result of

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54 Id.
55 Minutes of meeting with claimants, supra n. 51.
NLC [National Land Committee] pressure, provided space for critique and recommendations pertaining to this fundamentally important programme.\textsuperscript{56}

A series of workshops within the Commission and the DLA to resolve tensions between the two institutions, and to discuss the legalistic nature of the LCC and the slow pace of delivery, pointed to the need for a review of the restitution process:

It would be a very positive move for the Commission to launch a proactive and searching restitution review. It would send a signal to the outside world that the Commission was taking the initiative and playing a central and responsible role in evaluating the success of restitution. This was particularly important in view of the fact that, a review was due anyway—and an “informal” review process was taking place anyway, often in the form of “corridor gossip”.\textsuperscript{57}

Tensions between the Minister of Land Affairs, Derek Hannekom and the Chief Land Claims Commissioner, Joe Seremane, became apparent by the middle of 1998. The latter’s style of management and leadership abilities also led to dissatisfaction within the Commission. Zohra Dawood, an National Land Committee employee at that time, conducted interviews with Commission staff in two regional offices:

Most interviewees leveled criticism at the office of the Chief Land Claims Commissioner. These ranged from tension caused as a result of the delegation of powers to the regional offices of the Commission, to lack of policy guidelines from the top with the result that regional commissioners used their own discretion to determine policy .... There was even a sense that the Chief Land Claims Commissioner had pronounced wrongly on the law in some cases thus causing confusion and potential conflict.

In July 1998 the Minister established a Review Team convened by Dr Andries Du Toit of the Programme for Land and Agrarian Studies at the University of the Western Cape. Its brief, according to the Minister’s media release, was:

...to investigate the entire process of restitution, including the legislative framework, structures, processes and the three institutions implementing restitution.\textsuperscript{58}

\textsuperscript{56} Annual Report to the Board (East London: Border Rural Committee, 1998).


His main concern was the slow pace of delivery and the concern that if restitution carried on in the same way that it had been, the ‘government would not meet its implementation targets as set out in the White Paper on Land Policy’.\textsuperscript{59} The White paper sets the government the following time limits: a three-year period for the lodgment of claims; a five-year period for the Commission and Court to finalize all claims; and a ten-year period for the implementation of all court orders.\textsuperscript{60}

It was quite clear that the Commission and Court were not going to finalize all claims within the five-year period, as the three-year period for the lodgment of claims had already been extended by a year and only 10 claims had been finalized by the Court by the middle of 1998\textsuperscript{61}, and a further 8 had been referred to the Minister under section 6(2)(b)\textsuperscript{62}. These bland statistics did not do justice to the large number of claims under various stages of investigation by the Commission. The Minister recognized this by saying that ‘press reports have not accurately and fairly portrayed the amount of work actually done by the Commission and DLA’, but added:

Nevertheless, the slow pace was a concern to me. I also became aware of problems in relationships between various actors in Restitution and I believed that we needed to have a clear understanding of the source of these problems as it was my impression that they arose primarily out of the frustration with slow delivery, the root of which lay in legislative and institutional shortcomings.\textsuperscript{63}

The ‘problems between various actors in Restitution’ did not take long to impinge on the Restitution Review process. The original proposed terms of reference for the review, drawn up by the DLA, was technicist and limited in that its main focus was on generic business process mapping (i.e., outlining in detail the path of the claim from lodgment to post-settlement in each restitution office), and designed so that:

...the Review takes place against the backdrop of a broad change management process in the Department of Land Affairs, which includes a Land Reform Re-engineering Project, the purpose of which is the same as the restitution review, but for land reform as a whole.\textsuperscript{64}

\textsuperscript{59} \textit{Id}.  

\textsuperscript{60} \textit{South African Land Policy White Paper, supra n. 3, 53.}  

\textsuperscript{61} ‘Findings of the Restitution Review Process’, \textit{supra n. 58}.  

\textsuperscript{62} Section 6(2)(b) provides for alternative relief for claimants who do not qualify for restitution.  

\textsuperscript{63} \textit{Id}.  

\textsuperscript{64} Minister’s Review of Restitution Process, Proposed terms of Reference (Department of Land Affairs, 1998), 5.
The ‘key deliverables’, to use DLA review-speak, which were to be attained in relation to ‘the Objective’ were: a comprehensive process map of the present restitution business process, including regional variations; a clear analysis of the process map in order to identify the main impediments to delivery; and a detailed description of an implementable, redesigned restitution business process and information system, and concomitant changes to the policy and legislation.

**The findings of the Restitution Review**

Many of the problems identified by the Restitution Review have been discussed and I will not go into detail here. The main points of relevance are the recommendations of the Review Team with regard to the move from a judicial rights-driven approach to a rights-based approach which is developmentally sustainable; its recommendations on claimant participation and its comments on the move away from a wholly judicial approach to a decentralized administrative approach.

The findings of the Review Team revolved around five key symptoms of crisis in the restitution process:

- **Slowness of delivery**: At the rate that claims were being finalized it was clear that the government would not complete the process in the time frames projected.
- **A crisis of unplannability** arising out of the absence of a reliable database. The basic information necessary for planning, institutional design and resourcing in the restitution process was wanting.
- **A strong perception that there is an opposition between restitution and development.** Restitution was poorly integrated into the government’s broader Land Reform and development processes, and was in danger of becoming a “programme apart”.
- The restitution process was often characterized by **low levels of trust between implementers**.
- **High levels of frustration** within the organizations tasked with implementing restitution and among claimants themselves.65

The Review Team argued that the very rights-based approach that was thought to be the central advantage for restitution claimants is responsible for making the process singularly hard to implement. Contrary to the debates preceding and accompanying the establishment of the Restitution Program as to whether the process

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65 Id.
should be rights-based or not or as to the advantages or disadvantages of a rights-based approach, they argued that:

Attention should be focused, not on whether or not restitution should be rights based, but on exactly how rights are allocated by the Restitution Act, on the procedures whereby these rights are given force, and the discourses and practices that arise in implementation structures.66

In essence the Review Team argued that a powerful human rights ethic permeated the Commission and DLA’s approach to restitution; an ethic that concentrated efforts into sorting out the minutiae of claimants’ rights: the right to claim, the rights of each and every descendant to a share, the monetary value of the right, the right to restoration, to monetary compensation; and led to a reluctance to engage in a meaningful way with claimants on issues of post-settlement planning, sustainability and development. This led to a situation where the right to restitution has been confused with the right, by the claimant, to insist on particular restitution options:

The wide allocation of the right to claim means that even a single dispossession, which creates but a modest entitlement, also gives the right to contest that entitlement to scores of often conflicting descendants, all of whom have to be traced and brought to the party. This has made the processing of claims an impossibly onerous task. This framework is ill suited to the developmental needs and specific dynamics of the restitution process. Particularly where officials are reluctant to engage with claimants about their desired outcomes, the right to restitution becomes translated into the supposed right of each affected party to insist on specific entitlements even if these cause huge complications for other interested parties.67

One of the reasons for the concentration of restitution implementers on the rights of claimants and their paralysis when it came to the issues of sustainability, development and land reform, was what the Review Team described as ‘the mismatch between the institutional, legal and policy framework and the scope and nature of demand’.68 The Centre for Applied Legal Studies group at the University of the Witwatersrand that was responsible for much of the research into the judicial rights-based restitution model designed it primarily as part of the land reform process for rural areas:

67 Id.
68 Id.
It is important to note that most members of the group working on the land claims court are more familiar with rural African land claims than with disputes and claims arising out of Group Areas Act removals ... the group did not have sufficient familiarity with the terms of the claims of people removed under the Group Areas Act to put forward any solutions with confidence .... Despite the wide ambit of claims initially considered, the group finally narrowed its focus to people who had been removed from land in rural areas as a result of apartheid policies.69

The majority of claims made to the Commission have, however, turned out to be urban claims. These comprise 80 per cent of claims lodged involving approximately 300,000 beneficiaries.70 This, according to the Review Team, has led to restitution implementers being swamped by the sheer volume of claims and sheer pressure to get cases settled so as to show some delivery, and has led to poor prioritization and vast amounts of capacity and energy being spent on individual urban restitution claims:

Ultimately, however, the most serious problem is the fact that the legal framework of the Act as it stands, which was designed with the facilitation of large rural claims in mind, was poorly suited to the facilitation of large numbers of individual urban claims.71

They pointed out that the Restitution Act as originally conceived prescribes that the agreements have to be finalized by a Court. The Team raised the question of whether approval by a Court was the best way of finalizing agreements in that it required high degrees of legal precision in the information before it in order to come to a decision. This they argued, turned the Commission into an investigating arm of the Court, and required it to go to considerable additional lengths to satisfy the Court. This judicial framework had the effect of seriously disempowering administrators and officials involved in the restitution process:

...this framework evacuated and undermined officials’ policymaking and decision making skills. The normal prerogative officials have to make sometimes risky and difficult decisions was undermined, because all officials knew that ultimately questions of legal interpretation would fall on the Court.72

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69 Swanson, supra n. 21, 340-1.
70 Circular to Commission on Restitution of Land staff from the Office of the Chief Land Claims Commissioner (Pretoria, 1999), 5.
71 Du Toit et al., supra n. 66, 4.
72 Id.
In addition, the framing of the Restitution Act created a very limited conceptualization of the options claimants were entitled to: restoration of rights in land or alternative land, usually conflated with settlement on the land, or monetary compensation, with priority access to state development programs tacked on, in the minds of restitution practitioners, almost as an afterthought. The Act, the Team believes, does not facilitate exploration of the many ways in which rights in land can vest in claimants without a physical resettlement being necessary:

S33 of the Restitution Act only considers “feasibility” when restoration of a right in land is claimed. What should be considered is not the feasibility of restoration, but of the processes of settlement and the development plans that arise out of it. Mere restoration is almost always feasible. It is what claimants want to do with the land that might or might not be feasible. By this token, feasibility should also be considered in respect of restoration of rights in alternative land, or when priority access to development programmes is awarded.73

The Review Team recognized that the participation of claimants in the demand-led rights-driven judicial restitution program was limited to filling in claim forms and choosing one of the restitution options outlined above. Very little was being done to involve NGOs, community organizations or service providers in empowering claimants to make informed choices about the wide range of possible restitution options. These include the problems attendant on restoration and resettlement, including community relations and possible conflict, and the process of ensuring service provision and housing by provincial and local government, as well as securing livelihood. Much has been written about the problems experienced by newly re-settled groups of claimants, especially that of reconstituting the community after years of separation. Forced removals often meant the dispersal of communities to different geographical locations according to ethnic classifications.74

The Team argued that there should be far more attention to empowerment and capacity-building in the claimant group, which had to occur in close collaboration with civil society:

The detailed work of empowering a community to make a strong, representative and informed bid for a particular option is well beyond the capacity of the State. It will only be possible if community and group claims are well prioritized, and if the

73 Id.
work of community development and facilitation is outsourced to organizations and individuals in civil society. This will require strong alliances with reputable NGOs and other service providers working in the area.

and,

Rather than simply naming a preferred option, claimants should be encouraged to apply their minds as to how their option could be made realistic and workable ... There will also be a similar need for a greater emphasis on synergistic and collaborative work with local and metropolitan authorities, particularly for urban restitution.\(^75\)

An area of weakness within the Ministerial Review Team’s report is its lack of detail on the integration of restitution into the land reform program and rural development. In a response to the Teams report, Cheryl Walker, the Kwa-Zulu Natal Regional Land Claims Commissioner, commented:

...it is further proposed that an authoritative national level Restitution and Land Reform Steering Committee be established. Its terms of reference are not spelled out but the potential seems high for ambiguity and continued uncertainty as to where responsibility for the development of intermediate/implementation policy lies between different organizations.\(^76\)

It did, however, draw attention to the need for restitution to be integrated into local and provincial government planning. The Team, under the heading of ‘re-conceptualizing institutional responsibilities in urban restitution’ recommended that the making of policy on urban restitution needed to involve not only the DLA and its immediate partners, but also local and provincial government, as well as key role players in the private sector:

Particularly important is the task of clarifying the role of the State as respondent in urban restitution cases. There is a real need for detailed consultation between the Minister, the DLA, Commissioners, other relevant government departments, as well as with provincial and metropolitan governments themselves, and for the building of a shared understanding of the role of local government in the restitution process.\(^77\)

\(^75\) Du Toit et al., *supra* n. 66, 18-9.

\(^76\) *Id.*, 4.

\(^77\) *Id.*, 13-4.
The Gauteng Development integrated approach

In the wake of the Ministerial Review on Restitution there was much debate on policy issues and the way forward. One of the more vocal contributions came from the Gauteng and North West Regional Commission, specifically the Implementation Unit, driven by Mashila Mokono and Ken Margo. Mokono was also part of the team that visited Germany and Estonia to investigate their restitution programs in June of 1999. The central concern of the Gauteng Implementation Unit was that it was pointless to return to claimants exactly what was lost through the complicated historical valuations/compensation received/monetary value of the claim process because this system was costly and in most cases inaccurate:

The present path of trying to determine the monetary value of the claim, which implies that the exact value of what was lost should be found by somehow doing a historical valuation, and thereby determining and deducting the compensation received at the time, is doomed to failure.\(^78\)

They argued that its failure was due to a number of reasons. Historical records are often inconsistent and incomplete. It may be added that they are often inaccurate as well, especially when tailored so specifically to serve the ideological needs of a political system such as the *apartheid* one. It is a technicist method which fails ‘by its very nature’ to recognize the human rights abuses meted out by the previous policies of removals and dispossession. It involves long, complicated, and ‘inevitably expensive investigations (valuations and research) which unfortunately end up enriching consultants involved’.\(^79\) It creates an environment of hostility and the possibility of endless litigation between claimants and the state, which only benefits lawyers and so-called ‘expert witnesses’, as in the *Highlands* land claim.\(^80\)


\(^79\) *Id.*

\(^80\) *Id.*
CONCLUSION

It is clear that the restitution program in South Africa has been successful in providing a constitutionally backed, rights-based and legally driven process and succeeded in registering a vast number of claims, both urban and rural. Delivery in terms of the processing of claims has been slower, especially in the early years of the Commission on Restitution of Land Claims and the Land Claims Courts existence. The main reason for the slowness of the restitution program is the complicated, legalistic and bureaucratically centralized process. Another major problem has been the lack of integration of the restitution process with local government land planning and development processes.

A number of initiatives, the Port Elizabeth Land and Community Restoration Association, Macleantown claims, the Development and Facilitation Task Team, the Ministerial Review, and the Gauteng restitution office initiative have made valuable contributions in correcting these problems. Efforts are being made to decentralize the process, to bypass the Land Claims Court by referring completed and uncontroversial claims to the Minister for signing off, and to involve local and district government in the processing of claims in order to integrate them into a more developmental framework.

The results have been mixed. Most of the claims are urban claims that have been settled through financial compensation. Of the 36,488 claims settled by March 2003, a study by the University of the Western Cap could identify only 185 rural claims settled with land.\(^{81}\) By 2003 the bulk of the rural claims were still outstanding (approximately 11,500), yet these held most potential to transform landholding, redress the past and address poverty.\(^{82}\) Some progress has been made since 2003 with regard to rural claims. Political pressure has been applied to settle all claims by 2008. There is no indication that this is possible, given the number of large rural claims still outstanding at the beginning of 2007 (4,248 scheduled for settlement by the end of 2008 with a further projected 1,162 residual claims).\(^{83}\)

The cost of land for settled rural claims has amounted to an average of 1.7 million Rand each. According to Hall, ‘one in six of these were settled with state land’ with no capital cost.\(^{84}\) It is not clear whether the remaining rural claims

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81 Ruth Hall, ‘Rural Restitution’. Powerpoint presentation (University of the Western Cape, 2003).
82 Id.
83 Id.
84 Id.
will cost on average the same. There is no doubt that completing the restitution process will cost a huge amount. Hall suggests that conservatively the bill could come to 10 billion Rand for the rural claims and 1 billion Rand for urban claims.\textsuperscript{85} This figure does not include attendant development and settlement grants and another 25 per cent for an operating budget. Recent and projected increases are necessary but unlikely to be able to address the scale of restitution. The limited budget for restitution and land reform in general will have to be addressed as a matter of urgency, given what has happened in Zimbabwe.

\textsuperscript{85} Id.
Photo Essay

“Go and See Visits”: Palestine/Israel, Bosnia and Herzegovina, South Africa and Cyprus
Palestinian Refugees Explore Return to their Villages and Homes
May 2000

As Palestinian negotiators were preparing for the final round of peace negotiations with Israel at the US presidential retreat at Camp David, many Palestinian refugees set out on their own in order to explore their options for return.

All it took was a half-hour bus ride and one Israel military checkpoint ...

...for these families from the Aida, Azza and Dheisha refugee camps in the district of Bethlehem to reach their home villages of Bayt Nattif, Zakariyya and Bayt Jibrin.

Our land is empty, there is room for us here.
Bayt Nattif

Until 1948, Bayt Nattif was home to some 2,500 Palestinian villagers who owned 44.4 km² of land. Today there are several small Israeli agricultural settlements (moshavim), Israeli memorial sites and nature parks, including parks run by the Jewish National Fund (JNF).

We searched for the remains of what was home...

and we gathered za’atar (thyme) so our gray camps will smell like home ...

Just don’t get caught by the Israeli security guards!
Zakariyya

Home to some 1,150 Palestinian villagers by 1945 who owned 15.3 km² of land. Zakariyya was completely ethnically cleansed in 1950, and the land confiscated by the Israeli state and the Jewish National Fund (JNF).

Today, the exclusively Jewish village is called Zacharia, but the old mosque and some houses have remained.
Many Jewish inhabitants of Zakariyya/Zacharia are Kurdish immigrants from Iraq and speak Arabic.

You can have your house here back, if I can get back my home in Baghdad.

Others, however, preferred to call the police.
Bayt Jibrin

Bayt Jibrin was home to over 2,500 Palestinian villagers who owned some 55 km² of land until 1948. Today, most of the land is managed by the small Kibbutz Beit Guvrin, and there is an archeological park.

The sight of the ruins on the empty land gave rise to discussion about practical questions related to the return of the refugees of Bayt Jibreen:

- How would we rebuild here?
- Would we want to build a small town? Or would we want to rebuild our village as it was and return to be farmers?
- And what would we do about the kibbutz?
Our return visits ended with a small celebration in front of the abandoned villa of the mukhtar (village leader).

All of us agreed:

Bayt Jibrin is still beautiful!
Palestinian Refugees Study Return and Housing and Property Restitution
Bosnia-Herzegovina, June 2002

At the height of Israel’s military reconquest of the occupied West Bank in June 2002, a group of ten Palestinian refugees and IDPs traveled from Palestine, Lebanon, Syria, Jordan, Denmark and the UK, in order to learn about the practical experience of return from Bosnian returnees, local authorities and international NGOs and agencies charged with implementation of the Dayton Peace Agreement and the Property Law Implementation Plan.

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons...

In the villages around Banja Luka, Republica Srpska, we were told by the returnees:

My house was vandalized and needs repair. We need proper schools, health services and public transport, so that the young people can return. Services and salaries here don’t compare with what our children can find in Sarajevo.
During the 1993-1995 war in Bosnia-Herzegovina, approximately 1.2 million civilians or around one-quarter of the population was displaced; 65 percent of the housing stock was destroyed.

Many obstacles to return were mentioned by international organizations and agencies, primarily in areas where returnees form part of the ethnic minority. Obstacles included non-implementation of restitution decisions, intimidation of returnees, vandalism by secondary occupants, and allocation of land in a way that preserves the demographic composition of localities created by the war.
In August of 2000, the Office of the High Representative annulled laws of the Republica Srpska which discriminated against refugees and subsequently removed 15 public officials, including a deputy minister and a mayor, along with 13 housing officials for violations of the property laws. In some cases, we were told, such removals resulted in the election of even more obstructionist officials.
By 2001, more than half of the displaced persons had found durable solutions, and property claims were expected to be resolved in 4-5 years.

The sustainability of return, however, remained a major concern among the international community and local officials.

An elderly refugee woman who had recently repossessed her home in Banja Luka said:

You must be persistent. If I hadn’t been persistent, I would never have returned to my home. I still have lots of problems. My house needs repair and my possessions were stolen from it. But I am home. I have my freedom.
Palestinian Refugees Study Land Restitution and Post-conflict Reconciliation
South Africa, November 2003

In the first week of April 1960, pamphlets, signed by senior police and Government Bantu Administration Officials, were dropped from Air Force planes, appealing to Cato Manor residents to observe law and order. The pamphlets read as follows:

"Zulus! You have always been a law-abiding people and have recognized constituted authority...
It has been brought to our notice that false rumours are being circulated among you by agitators and other irresponsible elements and that people are being encouraged to take part in demonstrations and to absent themselves from work. This creates confusion in the minds of the people and you should ignore agitation and the rumours they spread. Unauthorised gatherings or assemblies and strikes are unlawful and you should not associate yourselves with them in any way."

Signed by
A J Turton
Chief Bantu Commissioner for Natal

C C Elston,
Bantu Affairs Commissioner for Durban

Col. R D Jenkins
Deputy Commissioner of Police

Col. C A Fraser
O/C Natal Command

Municipal Records 323, Volume 2

Visitor’s Center, Canto Manor, Durban – symbol of resistance to forced removal in the 1950s – 1960s. (Photos: Canto Manor)

The resemblance between what happened in South Africa and what is happening in Palestine is striking. In both cases, access to justice remains a burning issue albeit in different ways.
BADIL's nine-member delegation, Palestinian refugees from Lebanon, Europe and Palestine, learned that 80 percent of South Africa's population was living on only 13 percent of the land due to apartheid policies and laws.

In post-apartheid South Africa, the right to land is a constitutional right and land reform is a declared priority. The government has enacted legislation and established institutions to implement land restitution and reform, and has taken overall responsibility for national reconciliation and stability.
In the provinces of Mpumalange and KwaZulu Natal, the Palestinian visitors heard that land-restitution in South Africa has been painstakingly slow:

"The land we have gotten is dry and poor, and we lack the means to develop it."

Meeting with the Association for Rural Advancement (AFRA) in Pietermaritzburg.

"The ‘willing-buyer, willing-seller’ policy and the requirement of fair compensation to current land owners has placed constraints on the extent of land transfers. Claims for commercial agricultural land are costly and most of the rural population cannot pay. Up until 2000, only 0.81 percent of the farmland was redistributed."
We found widespread lack of trust in the government’s commitment to the land reform process.

Under the slogan “No Land, No Vote” the Landless People’s Movement threatened to boycott the 2004 national elections.

“Economic apartheid has replaced political apartheid,” said representatives of the Landless People’s Movement (LPM).
We concluded:

Peace agreements must not only include details about people's rights, but a strong grass-roots movement is needed in order to keep the process on the track.

The international environment was unfriendly, and this created a necessity for compromise in 1994 with those in economic power in South Africa.

But I also say to the LPM, 'go and educate the people first. Go and make the land productive.' It is embarrassing to say that sometimes some people will not work the land given to them.
In April 2004, some 76 percent of Greek Cypriots voted “no” in a referendum on the UN (Annan) peace plan, while 65 percent of Turkish Cypriots voted in favor.

BADIL’s 11-member delegation, including Palestinian refugees from the Middle East, Europe and Canada, traveled to Cyprus five months after the referendum in order to learn about the solutions proposed by the UN for displaced Cypriots and their properties and about why Greek Cypriots rejected the deal.

Greek Cypriots felt that the benefits they would derive from the proposed agreement were not in balance with the costs.

Visiting Nicosia with Index, a Cypriot NGO that had worked to explain the Annan Plan to the public. (© BADIL)
The Annan Plan proposed a federal state of Cyprus composed of two separate states. It recognized the rights of displaced persons to return and property restitution, but imposed limits on both in order to ensure that a Turkish Cypriot political entity would remain in place.

Three-quarters of the approximately 200,000 displaced persons with return and restitution claims are Greek Cypriots.
Turkish Cypriots want two separate communities and political entities, and limited return and property restitution for Greek Cypriots in Turkish Cypriot areas.
Greek Cypriots want demilitarization, one sovereign state and reparation for human rights violations.

Many Greek Cypriots seek justice in courts rather than through political agreements.

The Court affirmed Ms. Loizidou right to her property in the northern Cyprus port town of Kyrenia and ordered Turkey to pay compensation for denial of access to her property.

Ms. Tatiana Loizidou explaining her case to the European Court of Human Rights. (© BADIL)
The people of Cyrus should have been consulted more and at an earlier stage.

The UN impression about the type of compromise acceptable to Greek Cypriots was largely based on information drawn from the political elite. Little attention was given to the concerns of average man and woman.

Maybe the UN needed only one “yes” vote to pave the way for Turkey to the EU. Therefore, what was the point in making more generous offers to the Greek Cypriots to get their support?
Part Three

International Protection
Introduction

Land Restitution in South Africa

Arab Protection for Palestinian Refugees, Analysis and Prospects for Development

Mohammed Khaled al-Az‘ar*

The destruction of Palestinian society in 1948, including the expropriation of land and demolition of thousands of homes, led to a massive transfer of people from their homeland.¹ Some assumed that neighboring Arab countries would replace Palestine as the refugees’ country of origin. Arab states rejected this solution, but feared that refugees would be resettled outside historic Palestine once the issue was forgotten. This fear continues to influence Arab policies toward Palestinian refugees today. At the same time, Israel refused to allow the refugees to return to their homes and lands. This has resulted in protracted exile and the concomitant need for protection, which Arab states have been unable or unwilling to provide.

The sudden mass influx of refugees was a new experience for Arab states. They neither had the knowledge nor sufficient resources to deal with the crisis. In July 1948, for example, the mayor of Ramallah sent a letter to King Abdullah of Jordan requesting him to order the municipal council to evict the refugees. ‘The city cannot bear this situation’, the mayor wrote. ‘The city suffers from a severe lack of consumer goods and water, and the presence of the refugees will endanger public health.’ In Jordan, up to 80,000 refugees sought refuge in urban areas. Due to the lack of housing, they found shelter in schools and public gardens. Some remained under the open sky and without food.

The British Consul General in Jerusalem described the local response as ‘generally

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¹ Original translation from Arabic by Rana Mousa.

uncoordinated’. The American Consulate in Jerusalem described the situation in mid-August 1948 as ‘horrifying’.

[Refugees] are assembled under trees and on the sides of the streets. They have no food and no homes. During September, the weather is extremely cold at night and soon rain will start falling and the water reserve might deplete before the end of August. There are not enough hygienic facilities and not enough hospital beds in East Jordan. In general, there is massive chaos on the organizational level and local authorities are unable to bear this burden. Moreover, there is not enough trained staff to organize the camps and distribute food or hygienic equipment, or to carry out vaccination campaigns.²

In Cairo, Jefferson Peterson, the American Embassy’s charge d’affaires, reported that there were 14,000 Palestinian refugees living in special homes or in temporary camps, all of them suffering immensely. With regard to the few refugees in Iraq, the British Representative in Baghdad noted that ‘Iraqis have not made any efforts to contain the refugees and do not collect money for them’.

Reports by American and British diplomats during the early stages of the Palestinian Nakba concluded that most Arab countries did not make much of an effort to alleviate the refugees’ suffering. According to the British government: ‘His Majesty’s government realizes that the Arab countries’ major concern is geared towards the possibility of sending the refugees back to their homes. But, even if this were possible, it would require a long time to implement such return, and until then the situation of the refugees will remain catastrophic’.³ According to the UN Mediator in Palestine, Count Folke Bernadotte, the living conditions of the refugees were the worst he had ever witnessed.

The lack of effective protection of Palestinian refugees in the Arab host states, however, did not stem simply from a lack of preparedness, an overestimation of Arab military strength in the conflict with Israel or economic and social underdevelopment in the Arab states. Ineffective protection was directly related to a minimalist approach towards both human rights and refugee rights. This factor, in particular, explains the continued suffering of Palestinian refugees, irrespective of the capacity of Arab countries to look after them. The concept of individual rights, not to mention the rights of refugees, is completely absent from the Charter of the Arab League. In light of the situation in Palestine, the League paid little attention to human rights violations among its own member states. Efforts concentrated on exposing Israel’s

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³ Id., 288.
violation of the rights of the Palestinian people without paying due attention to Arab conduct towards Palestinian refugees.\(^4\)

Lack of concern about the special legal status of refugees in general, limited domestic legislation on refugee affairs and non-conformity of domestic law with international norms and Arab and Islamic traditions pertaining to asylum and protection all highlight the deficiency of the Arab legal system. Developments in the mid-1990s (e.g., Arab Charter for Human Rights), however, may constitute some improvement and can be explained by several factors: the work of Arab NGOs concerned with refugees, some of which had obtained international recognition; the catastrophic results of wars in the Gulf and in the Balkans; increased public interest in human rights; and growing pressure from international organizations, including initiatives of the UN High Commissioner for Refugees and its regional staff in several Arab countries who drew attention to the importance of refugee law.\(^5\) These developments, however, came late, remained largely unnoticed and failed to have a tangible impact on the protection of Palestinian refugees.

The current situation is better understood in the context of the broader issue of democratization, which is the subject of ongoing debate in the Arab world. Palestinians were displaced at a time when newly-independent Arab states were more concerned with solidifying borders inherited from the colonial powers. These states were characterized by authoritarian regimes, an excessive concern about national sovereignty and political systems inconsistent with the basic principles of democracy. The fact that these states violated the rights and dignity of their own citizens is an important factor in understanding the treatment of Palestinian refugees.

In most Arab states, governments and security agencies have used nationality and citizenship (and the issuance of passports) to ensure control over the people. Individuals have been deprived of their nationality and citizenship rights as a result of political activities or due to disputes among states. This includes the Shiites of Iranian origin in Iraq and other Gulf states and many Jordanians of Palestinian descent. Thousands of Yemeni, Jordanian and Palestinian laborers were expelled from Gulf countries during the 1990-91 Gulf War. The closure of borders to individuals from Arab states provides yet another example of the frequent violation of freedom of movement and travel, especially during political crises.

\(^4\) Unlike African states, the Arab League failed to develop special mechanisms for human rights protection. The first African Charter on Human and People’s Rights was adopted in 1981, whereas the draft of the Arab Charter for Human Rights was completed in 1994, that is, fifty years after the establishment of the Arab League. This step came relatively late, at a time when the human rights system was well established, as a result of international and regional interest and persistent lobbying of unofficial bodies that had adopted the matter.

It is difficult, in this context, to consider the rights of vulnerable sectors of these societies, including visible minorities, women and refugees, separate from the wider problem of human rights violations in the Arab world. Moreover, it is important to note that refugee protection in Arab countries has also been influenced by the view that the ‘international community’, represented by the United Nations, was and remains, primarily responsible for Palestinian refugees. Likewise, Arab states hold Israel accountable for the displacement and ongoing suffering of Palestinian refugees, especially since Israel refuses to implement UN General Assembly Resolution 194 (III).

In February 1951, for example, the Arab League’s Political Committee asked member states to send a joint memorandum to the major powers denouncing Israel’s refusal to allow the Palestinian refugees to return to their homes and demanding that refugees be given access to their movable and immovable properties. According to the memorandum:

> Arab countries are unable to take on full responsibility for the quest for international peace as long as the refugee problem exists, and they have done their best in order to solve this problem. In addition, it is beyond their capacity to provide a fundamental solution for this tragedy. Therefore, the international community must assume this burden, in accordance with the Charter of the United Nations.

Individually and collectively, Arab states have stated repeatedly that the protection of Palestinian refugees is an international responsibility to be carried out specifically via the United Nations Relief and Works Agency for Palestine Refugees

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7 The United Nations recognized its responsibility towards Palestinian refugees when the General Assembly established a separate agency in November 1948 to provide emergency relief for the refugees. The UN Relief for Palestine Refugees was given the mandate to provide food, health services and housing to the refugees. Due to this agency’s shortcomings, the United Nations established the UN Relief and Works Agency for Palestine Refugees in the Near East. This recognition and resulting activity, however, remained limited and insufficient for providing for all the needs of the refugees living in Arab (and non-Arab) countries.

8 GA Res. 194 (III), UN GAOR, 3rd Sess., UN Doc. A/RES/194 (1948).

Despite their appreciation of UNRWA’s efforts, however, Arab states have been reluctant to take on greater financial responsibility to rectify the Agency’s chronic budget shortfalls, charging that UNRWA’s funding cannot be ‘Arabized’. Some states have suggested, in fact, that UNRWA's financial crises are fabricated\(^\text{11}\) and part of a plan to shut down the Agency and transfer responsibility for the refugees to the Arab host states.

The Arab League has nevertheless cooperated with UNRWA on a country-by-country basis since the Agency was set up in 1949. Council Resolution 325 of 12 June 1950\(^\text{12}\) called upon all Arab states to cooperate with UNRWA, without prejudice to the final resolution of the Palestinian issue. The League called on Arab host countries to develop a unified approach towards UNRWA to avoid differential treatment of refugees in the various host countries.\(^\text{13}\) Host country-UNRWA relations were also strengthened by numerous bilateral agreements.\(^\text{14}\) The Arab League also laid out a set of broad guidelines to direct Arab states in their relations with UNRWA. Among the most important are:

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\(^{10}\) See, e.g., the recommendation of the First Conference of Supervisors on Palestinian Affairs in Arab Host Countries endorsed by LASC Res. 2019, 42\(^{\text{nd}}\) Sess., Sept. 30, 1964. See also, the recommendations of the Conference’s 66\(^{\text{th}}\) session in July 2001, endorsed by the League Council in September 2001, stating: ‘We reaffirm Israel’s responsibility for causing the refugee problem and its continuation without a just solution. In addition, we reaffirm the responsibility of the international community to support UNRWA, to use its important services, and to refrain from termination or transfer of these services to any other party until the refugee issue is resolved on the basis of UN Resolution 194 (paragraph 11). … We also call upon UNRWA to remedy its financial crisis without affecting the basic services provided for the Palestinian refugees.’ Arab League, Arab League Resolutions [Arabic] (Tunis: General Secretariat of the Arab League, 1988), 382. See also, the League of Arab States <http://www.arableagueonline.org> (accessed, Dec. 21, 2006)

\(^{11}\) See, e.g., discussion at the 27\(^{\text{th}}\) session of the Conference of Supervisors of Palestinian Affairs in Arab Host Countries (Beirut, Aug. 10-17, 1981). Host states described UNRWA's financial crisis as ‘a crisis fabricated with the intention to pressure the Arab governments and the refugees. It is important to pressure the international community to increase its contribution to UNRWA so that its budget becomes part of the United Nation’s budget. All efforts to Arabize its funding must be rejected, in order to maintain international responsibility’. The conference report is reprinted in, Arab Affairs [Arabic] 118 (1981), 134-5.

\(^{12}\) LASC Res. 325, 12\(^{\text{th}}\) Sess., June 12, 1950.

\(^{13}\) LASC Res. 2252, 46\(^{\text{th}}\) Sess., June 12, 1966.

\(^{14}\) UNRWA entered into an agreement with Lebanon on 26 November 1954; Jordan on 14 March 1951; Egypt on 12 September 1950; and Syria granted facilities to UNRWA without any special agreement. On 28 August 1948, Syria committed itself, via the UN Mediator, to grant United Nations representatives concerned with serving refugees all necessary privileges to perform their duties, including UNRWA activities. Abdel-Muni‘m al-Mashat, ‘United Nations Relief and Works Agency in the Near East’ [Arabic], MA diss., (Cairo University, 1975), 321-2.
projects implemented by UNRWA must not, in any way, violate refugee rights or pre-empt the political future of Palestine;

- the United Nations and UNRWA must remain involved until the refugees return to their homes and receive compensation;

- services or land provided by Arab states to UNRWA to facilitate its operations do not signify a transfer of obligations to these states;

- Arab countries are not obliged to fund UNRWA operations;

- UNRWA operations must not become a burden on the national economies;

- UNRWA operations must take into consideration the importance for refugees of securing a good standard of living in economic and social terms; and,

- UNRWA operations must take into consideration the need for family reunification, in addition to specific refugee needs deriving from varying circumstances.\textsuperscript{15}

While UNRWA-host country relations differ widely, the facilitation of UNRWA operations through the provision of storage space, coverage of expenses for freight, transportation, customs and tax exemptions, as well as protection of UNRWA employees and officials and recruitment of a local labor force for the Agency has contributed to the protection of Palestinian refugees. Host-country monitoring contributed to the rectification of UNRWA beneficiary lists and prevented cuts in their numbers. Cooperation also extends to the field of education as UNRWA schools follow the curriculum of the respective host countries. All major Arab host countries are members of UNRWA’s Advisory Commission.\textsuperscript{16}

The importance of host country protection for Palestinian refugees arises not only as a result of UNRWA’s limited mandate\textsuperscript{17}, but also because most Palestinian refugees are excluded from the protection provided by the Office of the UN High Commissioner for Refugees\textsuperscript{18} depriving them of the special protection granted by

\begin{itemize}
\item LASC Res. 389, 15\textsuperscript{th} Sess., Oct. 10, 1951.
\item The Advisory Commission includes Australia, Belgium, Canada, Denmark, the European Community, Egypt, France, Germany, Italy, Japan, Jordan, Lebanon, Netherlands, Norway, Saudi Arabia, Spain, Sweden, Switzerland, Syria, Turkey, the United Kingdom and the United States. The European Community, League of Arab States and the PLO attend as observers.
\item UNRWA provides basic health, education and social welfare. Refugees, however, also have the right to residency, freedom of movement, employment, housing, as well as additional rights enshrined in international conventions and treaties.
\item Palestinians benefiting from UNRWA assistance were made a separate group from other refugees and from the benefits of the 1951 Refugee Convention Relating to the Status of Refugees. This was based on a provision in the Convention which excludes refugees who receive support from agencies or organizations other than the UNHCR.
\end{itemize}
Introduction

Land Restitution in South Africa

Arab Protection for Palestinian Refugees

the 1951 Refugee Convention and its 1967 Protocol. Palestinian refugees thus find themselves with a lower level of protection than that accorded to other refugees and in a situation where the level of protection depends largely on that accorded by respective Arab host states.

Arab Protection—Institutional Mechanisms and Government Decisions

In the context of the challenges summarized above, Arab regimes have attempted to provide a minimum level of protection for Palestinian refugees through a number of mechanisms, procedures and a series of decisions to regularize the status of refugees in the Arab host countries. Palestinian attempts to restore their own political, social and economic networks, later known as ‘revitalizing the Palestinian entity’, have been met with varying degrees of acceptance and rejection by Arab states.

Institutional mechanisms

In September 1948 the Arab League recognized the creation of an All Palestine Government. The government was set up in Gaza and took responsibility, in part, to assist in

...organizing refugee lives, catering to their basic needs, returning them to their homes, guaranteeing the personal and civil freedoms of Palestinian citizens irrespective of religious and ethnic affiliation, upholding freedom of worship for all denominations, compensation of individuals for movable and immovable properties and businesses damaged or lost, and the creation of work for the unemployed.

Catering to all of these needs exceeded the capacity of host authorities, a task made all the more difficult by the narrow margin of freedom granted by Arab states to the refugees.

While some Arab states recognized the All Palestine Government, others, such as Jordan (the center of Palestinian exile after 1948), refused to do so and prevented Palestinians from taking independent measures to enhance protection. Egypt was

19 For more information see, Shiblak, supra n. 6, 82-7.

20 For more information about the All Palestine Government see, Mohammed Khaled al-Az’ar, All Palestine Government at its 50th Anniversary [Arabic] (Cairo: Dar al-Shurouq, 1998).
more tolerant, issuing passports to some 90,000 refugees in the Gaza Strip; citizenship and birth certificates; letters of recommendation for employment in Arab states; work permits for refugees in certain areas in Egypt; financial and health relief for hardship cases; and assistance with entry into educational institutions in the Arab world. These efforts, albeit limited, were extremely important for the refugee community.

The All Palestine Government survived for just over a decade and was followed by the establishment of the Palestine Liberation Organization in 1964. Compared with refugees’ prior status, the PLO provided a significant and much greater degree of protection, expanding the focus of concern to include refugee employment, education, health care and travel and residency. Refugees thus developed a sense of trust in the organization. The PLO’s effectiveness, however, was always dependent on Arab recognition and the maintenance of good relations with Arab host states.21

Arab recognition of the PLO as the sole legitimate representative of the Palestinian people in 1974 encouraged Palestinian leaders to press Arab governments to expand efforts to protect the refugees and improve their living conditions. In addition to general legal standards, such initiatives drew upon the solidarity of Arab nationalism.22 In September 1965 the PLO Chairman presented a number of proposals to the third Arab League Summit meeting in Casablanca. These proposals became the basis for the Protocol Concerning Treatment of Palestinians in Arab Countries (discussed below), the most comprehensive Arab framework regulating the status of Palestinians in Arab world.

Likewise, the PLO presence in Lebanon (1969-1982) resulted in a substantial improvement in the level of protection for Palestinians there. Prior to the 1969 Cairo Agreement23 between the PLO and Lebanon, refugee camps were subject to severe security restrictions. Palestinians were forbidden from moving from one camp to

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22 The proposal included the following principles: (1) Refugees are granted temporary residency in each country until they are allowed return to Palestine. Their freedom of travel and movement is guaranteed at a level equal to the level available to citizens as adopted in agreements between governments; (2) Palestinians are granted travel documents from their country of residence based upon their request and with the same facilities granted to citizens; the travel document holder is eligible to return to the country of residence without prior visa requirements; (3) Palestinians are expected to be treated equally to citizens of the country with respect to rights and obligations, excluding political rights; (4) Permanent expulsion of Palestinians to foreign countries is prohibited; and (5) Arab governments are expected to cooperate, in order to care for refugees’ affairs and maintain refugee rights, in addition to unifying apparatuses concerned with Palestinian affairs under one apparatus. The proposal is reprinted in, *Palestinian Documents for the Year 1965* [Arabic] (Beirut: Institute of Palestine Studies, n.d.), 504-5.

23 See also, Abdel Rahman, *supra* n. 21, 190-6.
another without prior authorization. Expansion of camps beyond the initial zoning plan was prohibited despite natural population growth. More importantly, refugees were prohibited from adding new floors to their shelters or improving zinc rooftops with concrete and stone. Similar restrictions affected all aspects of life, including health care, education, employment and personal dignity.

After the signing of the Cairo Agreement living conditions in the camps improved. The PLO established numerous institutions to provide social and health services and many young people became members of the various PLO organizations providing a source of income for Palestinians in Lebanon. Restrictions on freedom of movement were eased, implementation of legislation that infringed on their rights was relaxed and refugees set up private armed forces for their protection.24 When the PLO and its institutions left Lebanon as a result of the Israeli invasion in the summer of 1982, the status of the refugees deteriorated and reverted to the pre-1969 situation.25

Crises between Arab states also impacted the refugees. Palestinian refugees have often found themselves between ‘the hammer and the anvil’, held ‘hostage’ to the political interests of Arab host states. This has contributed to a situation of permanent crisis, leaving refugees morally and financially drained, with their lives and limited stability constantly at risk.26 The inability of the Arab League to force member states to comply with its decisions is no doubt an additional factor encouraging state authorities to act against the refugees without restraint or fear of sanction.

The Arab League’s lack of preparedness for the refugee crisis resulted in the creation of multiple mechanisms, especially during the early stages of the crisis. On

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25 Concerning the right to health, for example, the PLO and its factions used to cover gaps in UNRWA services through the Palestinian Red Crescent Association. This association used to supervise ten hospitals and forty-six medical centers spread throughout the camps. These activities ceased to exist in 1982 precisely at the same time when the camps were struggling with overcrowding, poor living conditions and massive destruction of infrastructure. It is estimated that Palestinian organizations in Lebanon employed around 65 per cent of total refugee labor force. ‘Report on Palestinian Organizations’ Economic Activities in Lebanon’, Samed 50/51 [Arabic] (1984), 348-63.

26 Examples include the situation of Palestinians in Kuwait during the 1990-1991 Gulf War. Palestinians became the scapegoats for the PLO’s position toward Iraq and were expelled from the country, including many who had served Kuwait for decades. Many other Gulf countries implemented similar procedures whether directly or indirectly, described by some as a transfer operation for Palestinians, but an Arab transfer. Likewise, the Libyan government, seeking to demonstrate its opposition to the Oslo accords and PLO policy expelled Palestinians to the Egyptian Libyan border. Anis F. al-Kasim, ‘Marginal to the Hebron Crisis, the Palestinians between the Hammer and the Anvil’, Journal of Palestine Studies 4 [Arabic] (1990), 3-8. Also refer to the statement issued by the PLO’s Representative in Lebanon regarding the expulsion of Palestinians from Libya cited in, Journal of Palestine Studies 24 [Arabic] (1995), 213-14.
16 February 1948, the League formed the Palestine Committee to address the political and military aspects of the issue. When the refugee problem emerged in the spring of 1948 the League formed a Financial Experts Committee to supervise the allocation of government, individual and group contributions towards all aspects of the Palestinian problem, in particular that of the refugees. The League also established a High Council for Relief to help disburse financial aid to Palestinian students, refugees and families of martyrs and injured who had lost all sources of income.

The establishment of multiple mechanisms necessitated the creation of a coordination body known as the Palestine Administration within the General Secretariat of the Arab League. The head of the Administration also served as Deputy Under Secretary of the Arab League. The Palestine Administration was divided into two sections: a political section and a refugee section. The refugee section was mandated to ‘care for the material and immaterial needs and investigate the management of projects for refugees in the various areas, and identify the tasks accruing to Arab states from the presence of the refugees in their territory’.

Arab League Council Resolution 514 of 29 April 1953 and Resolutions 705 and 721 of 27 January 1954 established an advisory body comprised of Arab government specialists in Palestinian affairs. This advisory body met prior to the bi-annual meetings (held in March and September) of the Arab League Council. The advisory body was later renamed the Forum of Heads of Departments of Palestine Affairs in Arab States.

The Financial Experts Committee and the Refugee Relief Council were subsequently dissolved and the Palestine Administration, in cooperation with the Forum of Heads of Departments and the Conference of Supervisors of Palestinian Affairs in Arab Host Countries, became the major bodies concerned with refugee related issues. Over the period of four decades, these two fora were among the most important Arab League institutions concerned with Palestinian refugee affairs. A brief summary of the background of these fora is necessary before discussing their performance on refugee protection.

**Forum of Heads of Departments of Palestine Affairs in Arab States**

On 7 September 1959 the Arab League Council adopted Resolution 1594 establishing in each member state a mechanism to address all aspects of the Palestinian
problem.\textsuperscript{30} The broad mandate given to the Forum of Heads of Departments of Palestine Affairs in Arab states thus included both refugee affairs and the general situation in Palestine. The Forum went through a lengthy process of establishment with the first annual meeting held in February 1961.\textsuperscript{31}

The Forum’s by-laws provided for two annual closed sessions unless agreed otherwise by the delegates. Each member state had a single vote. States that raised reservations were not bound by the Forum’s recommendations or related resolutions issued by the Arab League Council. The Forum was also empowered to establish sub-committees to address specific issues.

Arab states tended to discount the Forum as a body that could seriously tackle the urgent situation in Palestine. Weak participation of states prevented the Forum from taking strong positions.\textsuperscript{32} Arab League Council Resolution 1905 of 19 September 1963\textsuperscript{33}, for example, called on Arab states to expedite the establishment of domestic mechanisms on Palestine in accordance with Resolution 1594 and requested the heads of these departments to participate in the meetings of the Arab League Forum.

\textit{Conference of Supervisors of Palestinian Affairs in Arab Host Countries}

The Arab League was slow to recognize the Forum’s shortcomings. Eventually, though, it realized that the refugee situation demanded additional attention and more frequent, specialized meetings focused on issues such as the civil, economic and social rights of the refugees. Moreover, the common problems faced by refugees (travel, residency, employment and housing in particular), regardless of their place of refuge, necessitated coordinated action.

Following a meeting of representatives of all major refugee host countries in the region, Jordan, Lebanon, Syria and Egypt agreed to establish a permanent Conference of Supervisors of Palestinian Affairs in Arab Host Countries. The Conference was mandated to monitor refugee status and UN assistance to the refugees. Unlike the Forum, the Conference of Supervisors does not include all Arab states. Participation is reserved for the supervisors of Palestinian refugee affairs. The Conference held its first meeting in Damascus in June 1964 and continues to meet on a regular basis.\textsuperscript{34}

\textsuperscript{30} LASC Res. 1594, 32\textsuperscript{nd} Sess., Sept. 1, 1959.
\textsuperscript{31} LASC Res. 1747, 35\textsuperscript{th} Sess., Apr. 1, 1961.
\textsuperscript{33} LASC Res. 1905, 40\textsuperscript{th} Sess., Sept. 19, 1963.
\textsuperscript{34} Jaber, \textit{supra} n. 32, 208-10.
The establishment of a mechanism explicitly dedicated to refugee affairs demonstrated the growing concern and interest among Arab regimes in ‘organizing the Palestinian entity’. At the same time the Arab League, meeting at Summit level, approved the establishment of the Palestine Liberation Organization. Shortly thereafter, the League broadened the mandate of the Conference of Supervisors to include tasks previously undertaken by the Forum. The Conference of Supervisors eventually became the sole authority on refugee affairs and the primary source of recommendations to the Arab League Council.

A review of Conference minutes reveals a number of ongoing concerns. These include UNRWA assistance (the Conference regularly debates and comments on the Agency’s annual reports), the status of Palestinian refugees in Arab host states, especially relating to travel, residency, education and employment, and all matters related to general developments on the question of Palestine. Delegations from Jordan, Syria, Lebanon, Egypt, the PLO and the General Secretariat of the Arab League usually attend the Conference meetings.

**Decisions and performance**

The Arab League has issued numerous resolutions and decisions concerning the civil, economic and social rights of the refugees. Although controversial and only partially adopted, these measures provide a minimum set of non-binding standards for the treatment of Palestinians in Arab states. Resolutions deal with matters related to freedom of movement, citizenship, employment, education and property ownership. Implementation of these standards by Arab host countries reflects a mix of domestic interests, policies and pressures exerted by non-Arab third parties.

**Freedom of movement and travel**

In 1952 the Arab League addressed the matter of unified travel documents for Palestinian refugees. Travel documents were to be issued to the refugees by each

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35 In 1965 the Arab League Council in its 62nd session adopted a resolution stating that the Conference of Supervisors is responsible for the handling of all matters discussed in the meetings of the Heads of Departments on Palestine Affairs, in addition to all issues related to Palestine; and, the Conference of Supervisors is to hold two, instead of one, annual sessions.

host country.\textsuperscript{37} Arab League resolutions affirm that holders of these travel documents must be treated as nationals with regard to visa and residency permits and be exempt from paying visa and permit renewal fees.\textsuperscript{38} Individuals holding the nationality of the host country are not entitled to a travel document.

States are not obliged to grant residency status to refugees entering on a travel document while refugees should be permitted to re-enter the country that issued their travel document. Regulations governing requests for travel documents, their period of validity, expiration and renewal fall within the remit of each state. Much emphasis was given to the fact that travel document holders in all Arab League states must be treated as nationals with respect to visa and residency rights.\textsuperscript{39}

In September 1965, the PLO Chairman presented, as mentioned earlier, a comprehensive proposal on ways and means to improve the treatment of Palestinians in Arab countries. Elements of this proposal were approved by the League Council at its 1965 summit in Casablanca. The ‘Casablanca Protocol’ included the following provisions pertaining to travel and residency:

- Palestinians residing at the moment in [Arab League member state] in accordance with the dictates of their interests, have the right to leave and return to this state.
- Palestinians residing in other Arab states have the right to enter and leave the territory of [Arab League member state] in accordance with their needs. This right does not entitle to residency, but rather for the right to stay for the purpose and period stated in the permit, unless the responsible authority specifies otherwise.
- Palestinians currently residing in [Arab League member state], as well as those were residing there but left abroad, are issued travel documents upon request. The responsible authorities are requested to issue and renew these documents without delay.
- Holders of such travel documents are to be treated \textit{en part} with nationals of Arab League member states in visa and residency matters.\textsuperscript{40}

\textsuperscript{37} LASC Res. 1033, 24\textsuperscript{th} Sess., Oct. 14, 1955.

\textsuperscript{38} LASC Res. 424, 16\textsuperscript{th} Sess., Sept. 14, 1952; LASC Res. 524, 18\textsuperscript{th} Sess., Apr. 9, 1953; LASC Res. 714, 20\textsuperscript{th} Sess., Jan. 27, 1954; LASC Res. 715, 20\textsuperscript{th} Sess., Jan. 27, 1954; LASC Res. 1705, 34\textsuperscript{th} Sess., Sept. 7, 1960; and LASC Res. 1946, 41\textsuperscript{st} Sess., Mar. 31, 1964.

\textsuperscript{39} LASC Res. 714, 16\textsuperscript{th} Sess., Jan. 27, 1964.

\textsuperscript{40} Protocol on the Treatment of Palestinians, \textit{reprinted in}, Jaber, supra n. 32, 249.
Citizenship

Arab Leagues policies on granting citizenship to Palestinian refugees appear somewhat ambiguous. Whereas the Arab League did not prohibit the granting of citizenship by member states to Palestinian refugees, it emphasized the importance of preserving the Palestinian national identity and the political rights of the refugees. At the same time, the League was aware of the difficulties and complications stemming from this position. Resolution 1547 of 9 March 1959, which encourages Arab states—as a general rule—to preserve the Palestinian nationality of the refugees, for example, also includes a request that host countries make compassionate efforts to provide employment for the refugees.

The June 1967 war, and subsequent measures adopted by Israel in the West Bank and Gaza Strip, led to another wave of Palestinian displacement. Israel encouraged Palestinian emigration to Arab and foreign countries, including facilitating travel to Latin America and other destinations. In response, the Arab League issued Resolution 2455 of September 1968 explaining its fear that this emigration would eventually lead to the liquidation of the Palestinian issue. The League requested member states to instruct their embassies and consulates abroad to refrain from issuing Arab passports to Palestinians, ‘because this contradicts the Arab League resolution calling for the preservation of Palestinian nationality’.

The question of citizenship is related to the treatment of refugees on all levels. Many Palestinian refugees attempt to obtain the citizenship of second country simply as a way to overcome the problems they face as Palestinians and as refugees. The Casablanca Protocol attempted to minimize this burden. According to paragraph 1, ‘While maintaining their Palestinian nationality, Palestinians currently residing in the territory of [Arab League member state] have the right of employment on par with nationals’. The League, however, failed to meet its objectives, as will be explained below.

Education

The Arab League allocated funds through its Palestinian Student Relief and Aid Committee to Palestinian students and persons who had lost all sources of income since their displacement in 1948. In 1955 the League sent a delegation to investigate

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43 Protocol on the Treatment of Palestinians, supra n. 32.
the status of refugee education and personal affairs in Arab countries.\textsuperscript{44} The delegation reported back that ‘if the situation of the Palestinian people is not rectified, they will soon be in total ruin’.\textsuperscript{45}

The Arab League continued issuing decisions regarding refugee education, including a decision to establish a follow-up committee.\textsuperscript{46} It also recommended that public school curricula in Arab states include lessons on the Palestinian issue and even considered the design of a unified curriculum and textbooks for this purpose. The League also considered establishing a fund to help refugees educate their children and care for their cultural and social needs but the fund was never established.

As time passed host countries, in cooperation with UNRWA, took on responsibility for refugee education and the issue subsequently disappeared from the agenda of the Arab League Council and its specialized committees. The result was that refugees received education of various quality depending on their place of exile. The Arab League was unable to establish a school, college or university for the refugees while the recommendation for a unified curriculum on the Palestinian issue was never implemented.\textsuperscript{47}

\textit{Property ownership}

Arab League interest in refugee property ownership has focused on refugee properties in Palestine, especially in that part of Palestine occupied in 1948, far more than on the right of refugees to own property in the countries of exile. For example, the League decided to study administrative and legal measures used by Israel to expropriate refugee properties and considered raising the matter at the United Nations or with the International Court of Justice.\textsuperscript{48} League members agreed that refugee properties should be preserved until a comprehensive solution to their problem was found.

\textsuperscript{44} LASC Res. 361, 14\textsuperscript{th} Sess., May 19, 1951.

\textsuperscript{45} al-Mashat, \textit{supra} n. 14, 290.


\textsuperscript{48} LASC Res. 525, 18\textsuperscript{th} Sess., Apr. 9, 1953.
Doubting the competence of Israel’s Custodian of Absentees’ Property to manage refugee properties and the revenues derived therefrom, the League ultimately decided to bring the matter before the UN General Assembly.\textsuperscript{49} The Arab League has emphasized the importance of putting in place a UN-appointed trustee or a trustee-body to administer these properties.\textsuperscript{50}

\textbf{THE GAP BETWEEN THEORY AND PRACTICE}

Even though the Arab League has been deeply involved in the Palestinian issue for strategic and national security reasons, and despite the many resolutions calling for the protection of Palestinian refugees, Arab states have been unable to provide the refugees with meaningful protection. In reality, League standards governing the status of the refugees have remained just like other issues that require coordinated Arab treatment, i.e., far removed from the arena of implementation. From the outset, many states adopted their own standards for the treatment of the refugees.

Despite its deficiencies, the Protocol Concerning Treatment of Palestinians in Arab Countries represents a major effort to provide minimum guarantees and protections. Jordan, Syria, Algeria, Egypt, Iraq and Yemen adopted the Protocol without reservation; Kuwait, Lebanon and Libya approved it with certain reservations; Saudi Arabia and Morocco did not declare a position; a number of states, including Tunisia, did not even attend the meeting and did not clarify their stand. Bahrain, Qatar, Oman, the United Arab Emirates, Mauritania, Somalia, Djibouti and the Comoros Islands joined the Arab League after the adoption of the Protocol and their position has remained unknown.

Five years after the adoption of the Protocol, the Conference of Supervisors of Palestinian Affairs noted that ‘travel, residency and employment procedures related to Palestinians in Arab countries still violate the spirit of national ties and affiliation’.\textsuperscript{51} The Conference issued similar conclusions from 1981 to 1987.\textsuperscript{52} Implementation of the Protocol continues to be a major item on the Conference agenda, even as Arab solidarity, the source of compassion for the refugees, has come under increasing strain.

\textsuperscript{49} LASC Res. 576, 18\textsuperscript{th} Sess., May 10, 1953.

\textsuperscript{50} See, League Council recommendation of 14 October 1955. The recommendation was reaffirmed during the 27\textsuperscript{th} Supervisors Conference in Beirut in 1981.


\textsuperscript{52} See, the report from the 27\textsuperscript{th} session of the Conference of Supervisors on Palestinian Affairs in Arab Host Countries, \textit{reprinted in}, \textit{Palestinian Affairs} [Arabic] 168/169 (1987), 112-4.
The lack of commitment to the minimum standards set out in the Protocol has given rise to varying levels of protection. With the exception of Syria, no Arab state is committed to a systematic policy for the protection of the basic, non-political rights of Palestinian refugees, while existing minimum standards have eroded over time. Protection standards are intricately linked to political developments in Arab host states and in the wider region. In the absence of fixed legal standards, Palestinian refugees find themselves subject to the storms of Arab politics. The following summary sheds light on the level of actual protection available for the majority of the refugees.

**Jordan**

Jordan has hosted the largest number of Palestinian refugees since 1948. There are approximately 2.5 million Palestinian refugees residing in Jordan, comprising about half of the total Jordanian population. It should be noted, however, that it is difficult to know the exact size of the Palestinian refugee population due to the absence of a comprehensive registration system and the differences in registration systems among host countries and other refugee areas. According to UNRWA figures for 2003 there were 1,740,170 registered refugees in Jordan of whom 307,785 lived in 10 camps supervised by UNRWA.53

In 1950 Jordan annexed the West Bank and set about integrating the refugees into the Jordanian nation-building project. A Nationality Law54 promulgated in 1954 granted citizenship to Palestinian refugees displaced to Jordan during the 1948 war and provided them with all rights and obligations of Jordanian nationals. Acquisition of Jordanian citizenship was the only way for Palestinian refugees to obtain basic rights to travel, freedom of movement, employment, residency, education and even registration of births and deaths.55

The integration of Palestinian refugees in Jordan, however, was largely theoretical to the extent that positions of power remained in the hands of non-Palestinian Jordanian nationals. Moreover, the fact that the refugees had become citizens of

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53 See, UNRWA, *UNRWA in Figures* (Gaza, Dec. 2003). Differences in numbers can also be explained by the politicization of refugee registration. Arab countries and Palestinian were in favor of magnifying the number, while Israel intentionally underestimated the refugee population. Estimates of the original number of refugees thus range from 520,000 (Israel) to 940,000 (Arab League). Some researchers conclude that approximately 805,000 Palestinians were displaced in 1948. See, Abu Sitta, *supra* n. 1, 13. Mustafa al-Tahan, ‘Social and Living Conditions of the Palestinian People in Jordan’, *Islamic Union* 14/15 [Arabic] (2003), 1-3.


Jordan failed to dispel suspicions about their intentions. This led to the establishment of an extensive surveillance regime to monitor the refugees.

In addition, despite having been annexed to Jordan, West Bank Palestinians only had limited rights to employment, education and purchase of subsidized goods. Unlike refugees who became citizens under Jordan’s Nationality Law, West Bankers were issued temporary, renewable two-year passports and were not allowed to work in government offices or banks. When Jordan decided to disengage and withdraw from the West Bank in 1988, Jordanian passports held by West Bank residents, half of whom are refugees, became temporary passports. This further decreased the level of protection afforded to them by Jordanian passports.

Refugees were particularly vulnerable during periods of conflict between Jordan and the PLO, especially during the bloody events of 1970-1971. An eye-witness account of the lives of camp refugees in Jordan in the mid-1970s describes the poor level of protection:

The camp in Jordan is no more than an accumulation of people and does not represent a social body; in fact, it does not represent a society according to generally accepted human standards. There is a lack of normal relationships or ties among members in this gathering that was forced on refugees. The camp is not worth any human effort, and does not provide opportunities for work, agriculture and industrial efforts, except in a very limited way; it therefore cannot become a natural source of productivity. It is not a place naturally linked to the center of life; it is a place that conveys the feeling that it is intended to be ignored, no one talks about it and no one is attracted to it. It is a place where each person remembers every hour what he or she has lost. The camp does not give refugees a chance for development or the achievement of goals.56

Refugees in Jordan, especially in the camps, still do not have access to opportunities equal to other Jordanian citizens in education, health services, employment, housing and other basic services.57

**Lebanon**

From the early days of exile, Palestinian refugees in Lebanon have not enjoyed guarantees or protections other than those accorded to foreigners in Lebanon.

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Official and non-official sources give varying numbers of refugees and immigrants in Lebanon. According to UNRWA’s 2003 statistics, there were 394,532 registered refugees in Lebanon of whom 223,596 resided in camps.58

The status of Palestinian refugees in Lebanon is considered one of the worst when compared to Arab and other host countries. From the beginning, Lebanon has been opposed to the presence of Palestinian refugees because they tilted the sectarian balance in favor of Sunni Muslims. When the Arab League adopted the Casablanca Protocol, Lebanon submitted reservations to most of its articles, and conveyed—albeit indirectly—that Lebanon would not comply with the standards set out in the Protocol.

Refugees must hold special employment permits. Those who are lucky enough to work are employed mainly in the service sector and in the black market. In March-April 1983, for example, the Ministry of Social Affairs and Labor issued only 47 work permits for a population of 125,000 registered refugees in Beirut, conditioned on a commitment to work in jobs allowed for foreigners, ‘in particular, construction (except sanitation and electricity), glass manufacturing, agriculture, tanning, excavation, carpentry, mineral production and washing automobiles’.59 Moreover, refugees do not receive ‘equal payment for equal jobs’ compared to Lebanese citizens.60 Palestinian laborers do not have a right to form unions, and although at one point social security fees were deducted from their salaries, workers received no benefits.61

Some refugees receive ‘travel documents’ that allow them free entry and exit without prior Lebanese visa requirements. These comprise refugees who were registered with UNRWA by 1950 and with the General Security Department responsible for monitoring and supervising Palestinian refugees. Another refugee group is entitled to ‘transit documents’ for exit from and re-entry to Lebanon. They are not registered with UNRWA but benefit from its services in one way or another. A third group, displaced in 1967 and not registered with UNRWA, is the most

58 UNRWA in Figures, supra n. 53. In March 1992, there were 317,376 refugees registered with UNRWA. This number is less than the number previously mentioned by the Lebanese Minister of Refugee Affairs, which was between 400-500,000. The Lebanese Refugee Affairs Department estimated their number to be 350,000, whereas another source estimated their number, during the same year (1992) to be 310,000. See, Rosemary Sayigh, ‘Palestinians in Lebanon’, Journal of Palestine Studies 13 [Arabic] (1993), 12-28, 16.


60 Id., 21.

vulnerable; they have no documentation and their presence in Lebanon is considered illegal.\textsuperscript{62} Their conditions deteriorated further during the Oslo process.

UNRWA provides 10 years of schooling throughout Lebanon and has opened three secondary schools due to the particular difficulties refugees face in accessing secondary education there. Most refugees who want to pursue post-secondary education cannot afford to due so owing to their restricted access to the labor market, high unemployment rates and preference given to Lebanese citizens. Unsurprisingly, unemployment rates among refugees and graduates rose steadily, from 33 per cent in 1989 to more than 35 per cent in 1996.\textsuperscript{63} The fact that refugees face an unknown future in the labor market reduces the value of education.

Refugees in Lebanon also suffer from miserable health and housing conditions for many reasons, including cutbacks in UNRWA health services and the high cost of private health care; denial of the right to own property and severe building restrictions inside and outside the camps; deterioration of the basic infrastructure in camps; and the absence of assistance from the PLO after it was forced to leave Lebanon in 1982.\textsuperscript{64}

Refugees who were displaced from their camps during the Lebanese civil war continue to experience severe hardship stemming from contradictory policies of the Lebanese government. Lebanon holds that the solution to this problem lies with UNRWA, but at the same time has prevented the Agency from rebuilding the camps which would provide refugees with basic protection. These internally displaced refugees number around 30,000 persons and reside in 87 locations. Three quarters of them have been displaced more than once. The government justifies its policy by arguing that camp reconstruction would suggest permanent resettlement of the refugees in Lebanon.\textsuperscript{65}

**Egypt**

The number of refugees who sought temporary shelter in Egypt in 1948 was small compared to other countries in the region. Between 1948 and 1967 Egypt was

\textsuperscript{62} The Lebanese government adopted the Protocol on the Treatment of Palestinians on 3 August 1966, with reservations on refugee entry and exit, which was preconditioned by 'obtaining prior approval from relevant Lebanese authorities to re-enter Lebanon'.

\textsuperscript{63} Around 75 per cent of refugee families in Lebanon live below poverty level, 60 per cent of these families include (6 members or more) who suffer from abject poverty. Yousef al-Madi, ‘Income and Poverty Levels among Palestinians in Lebanese Camps’, \textit{Samed} 109 [Arabic] (1996), 187.


\textsuperscript{65} \textit{Id.}, 166-7.
also responsible for Palestinians in the Gaza Strip. There are no accurate statistics for the number of Palestinian refugees in Egypt. Some sources estimate the total number of refugees and displaced persons to have reached 100,000 by 1992. Since 1994, however, some Palestinian refugees have moved to the occupied Palestinian territories.66

Egypt has endorsed all Arab resolutions on Palestinian refugees, including the Casablanca Protocol. Nevertheless, there have been significant changes in the treatment of Palestinian refugees in Egypt. During the 1950s Egypt granted residency to the refugees for short periods (1-6 months) and refugees were able to travel on passports issued by the All Palestine Government in Gaza. However, for many years during this time, Egypt prohibited employment with or without pay, while offering refugees financial, educational and other in-kind assistance in order to prevent hunger and illiteracy.

From the early 1960s to the mid-1970s, under the leadership of President Gamal Adbul Nasser, Egypt adopted a compassionate policy towards Palestinian refugees demonstrating that refugees could be protected without harming their political and national rights. Palestinian refugees received equal treatment under the law with Egyptian nationals in all aspects, such as travel, employment in the private and public sectors, facilitation of residence, education, health and property ownership with the exception of citizenship and political rights.

Since the mid-1990s, privileges granted to Palestinian refugees in comparison with other foreigners (i.e., travel, movement, residence, education and health services) have been canceled in all fields.67 While children of Egyptian women married to non-Egyptians were entitled to hold Egyptian citizenship, Egyptian women married to Palestinians were excluded in order to preserve Palestinian nationality. Many regarded this justification as unfounded because Egypt permits dual citizenship and has rescinded support for several Arab League resolutions regarding the treatment of Palestinians, including some adopted in the framework of the 1965 Casablanca Protocol.68

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66 Approximately 11,000 refugees arrived during 1948 with only 7,000 remaining in 1950. They comprise the core of the 1948 refugee population estimated to be around 20,000 in addition to some 45,000 1967 displaced Palestinians. See, Abdallah al-Kashef, ‘Palestinian National Identity in Egypt’ [Arabic], MA diss. (Cairo University, 1948), 236-7. See also, Mohammed Khalid al-Az’ar, ‘Palestinians in Egypt: Between the Present and the Future’, in *Palestinians in Egypt* [Arabic] (Cairo: Dar al-Mustaqbal al-Arabi, 1986), 119.

67 For relevant laws see id., 112.

Iraq

Iraq has been host to a small number of Palestinian refugees since 1948. Estimates for the number of Palestinian refugees in Iraq in 2000 put the number at around 40,000. The majority (96 per cent) live in Baghdad.

Iraq was among those Arab states that implemented the Casablanca Protocol. Palestinian refugees were defined as Palestinians who entered Iraq before 25 September 1958 and whose country was occupied. Palestinian refugees lived in old shelters and homes in poor condition rented and paid for by the Iraqi government. The Iraqi Ministry of Defense took initial responsibility for the refugees, but this was later transferred to the Palestinian Refugee Affairs Department.

Palestinian refugees displaced in 1948 were granted residency status. Iraqi-issued travel documents permitted exit and re-entry. The 1967 displaced were not granted residency rights. In the 1960s the Iraqi government passed a number of laws to help refugees enter the job market providing refugees with the same rights to employment, wages and retirement benefits as Iraqi nationals. They were also granted free education at the primary and secondary level. Refugees were not permitted to own property, including land, in order to prevent—as it was argued—their resettlement outside Palestine. This situation changed in 1997 when the government promulgated new legislation.

With the fall of the Iraqi regime and the occupation of the country in April 2003, Palestinian refugees became victims of rumors, insults, accusations of collaboration with the former regime and attacks, including expulsion from homes they had lived in for decades. These events represented a new threat and many were forced to leave, facing the uncertainty and dangers, such as hunger and homelessness, posed by the extreme conditions along the Iraqi-Jordanian border. Their displacement triggered alarm among many human rights organizations, as well as the UNHCR. The Jordanian government called on states that had issued travel documents to the refugees to re-admit them. If these states had abided by Arab League resolutions regarding the treatment of refugees there would not have been a need for such calls and the refugees would not have become victims of a new cycle of suffering.

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Syria

Syria also took in Palestinian refugees from the 1948 war. By 2001 there were some 400,000 Palestinian refugees living in Syria. Most of the refugees (around 68 per cent) live in Damascus and its suburbs. The majority are 1948 refugees, with a small number having come to Syria during Palestinian-Israeli crises in 1956, 1967 and 1970.\(^7\)

Compared with other countries, Palestinian refugees in Syria enjoy an adequate level of protection. Syria has implemented Arab League resolutions concerning the treatment of Palestinian refugees, including the Casablanca Protocol. Syrian compliance may be explained by the ruling political ideology which considers Palestine and its residents as citizens of southern Syria. Refugees in Syria are supervised by a government body which was set up in 1949 by presidential decree ‘to organize, relieve, and secure different needs for refugees, in addition to allocating suitable jobs for them’.

In the 1950s, the Syrian government issued legislation providing for equal treatment between Palestinian refugees and Syrian citizens in civil, social, economic and cultural rights. This equality includes compulsory military service in the Palestine Liberation Army, possession and employment rights, and national development.

**REFUGEE PROTECTION AND A POLITICAL SETTLEMENT OF THE CONFLICT**

Political negotiations in early 1990s between Arab states, the Palestinian leadership and Israel came at a time when refugee protection was in decline across the region. Negotiations to resolve the refugee issue, moreover, had failed to produce conclusive results. In fact, the Palestinian refugee issue and its solution represented a major source of disagreement in the negotiations with refugees widely perceived as a bargaining chip. Frequent delays generated fears among both refugees and host countries and, along with the transfer of the central Palestinian leadership from the exile to Palestine, led to further erosion in refugee protection abroad.

The PLO, for its part, neglected the refugees—financially, economically, socially and politically—especially in Lebanon, Syria and Jordan. The PLO’s relationship with these three states had long been tense. The PLO did not send a delegation, neither before nor after the Oslo accords, to consult and build closer relations with

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Lebanon. Palestinian-Syrian relations were also put in doubt. It is important to note, however, that this occurred in a situation in which the PLO found it difficult to consult and be heard by any Arab government on issues concerning Palestinian refugees residing in their territory.

The signing of the Declaration of Principles on Interim Self-Government Arrangements between the PLO and Israel in 1993 gave the impression that the PLO had given up on refugee protection. Moreover, there was a strong feeling that with the creation of the Palestinian Authority, the Palestinian leadership would more readily tolerate the idea of settling refugees in their countries of exile and that the idea of a single Palestinian people with an indivisible cause had disappeared from its agenda.

Although negotiators agreed on the importance of improving the living conditions of refugees and displaced persons (especially in the camps), host countries and refugees alike remained skeptical. This can be explained by the long-held position that linked refugee protection and the concomitant improvement in their standard of living with the loss of their legal and political rights—as if maximizing their suffering was the best way to preserve their rights, and despite the fact that violation of their basic rights would perhaps diminish their capacity to resist and remain steadfast in the long run. Some refugees in Lebanon were aware of this conundrum. They considered that ‘the lack of commitment to their social and economic rights, the limited services provided and the bad treatment received, aimed at forcing Palestinian refugees to surrender and accept whatever political offer is available, because they will no longer be able to decline what is offered’.

In any case, the confusion about the future of the refugees led to further erosion in the level of protection provided to them. In Lebanon, rumors circulated that Palestinians were preparing to settle down and were buying plots of land to build housing projects. This triggered a public and private backlash against their presence. Palestinian officials were forced to repeatedly deny such rumors by stressing the fact that all lands bought were registered with the Lebanese Awqaf (religious endowments), that Lebanese law did not permit purchase of land and property by Palestinians and that the Palestinian leadership remained committed to the right of return. Public campaigns, however, continued unabated and sometimes resulted in extreme actions against the refugees.

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72 Editor’s Note: Since 2005 several PLO delegations have visited Lebanon and the PLO has re-established an office in Beirut.


74 al-Az’ar, *supra* n. 55, 30-1.

In Jordan, debate about a settlement of the refugee question also included Jordan’s treatment of refugees. Jordanian authorities were accused of not abiding by the Arab policy of preserving Palestinian identity. Critics charged that equality under the law in Jordan had failed to guarantee protection of Palestinian refugees. The Jordanian tribal system (one of the main foundations of the political system) did not favor Palestinians. Moreover, Palestinians say that people of eastern Jordanian descent receive preferential treatment in the public, military, trade and service sectors. They also say that state surveillance and arrests increased following the launch of political negotiations because refugees were expected to reject the proposals made in this process.76

Since the beginning of the so-called peace process, UNRWA drew increasing attention to its ongoing financial crisis that has apparently prevented it from providing a full range of services to the refugees. As mentioned above, UNRWA has experienced financial problems since it was established, but these problems grew in the 1990s. Some donors debated whether to allocate money to UNRWA or the Palestinian Authority. Many observers argued that UNRWA was decreasing its services in line with developments in the Palestinian-Israeli negotiations. This enraged Palestinian factions and refugees themselves. The result was a call for clear separation between UNRWA operations and the outcome of the negotiation process, in order to prevent states from using UNRWA as yet another political tool to pressure and interfere with the choices of the refugees and the Palestinian negotiators.77 Arab countries rejected cut-backs in UNRWA services stating that UNRWA was responsible for the refugees until their problem is resolved permanently.

Towards improving Arab protection for Palestinian refugees

No major developments on the protection of Palestinian refugees in the Arab world can be expected apart from improvements in the broader issues of human rights and democratization. Weak protection mechanisms and the erosion of minimum standards are an expression of the general lack of respect for human rights. Research and analysis have shown clearly that the national ideology that links the Palestinian refugees and the broader Arab nation, along with the joint struggle against Zionist-Israeli aggression, has failed to raise the level of Arab protection for refugees, except for the limited protection provided at certain times under specific conditions. The

76 al-Tahan, supra n. 53, 6-8.

Syrian approach towards the refugees has perhaps been unique in its consistency since 1948; protection has not had negative effects on the political dimensions of the refugee problem. It thus negates a concern that has been used by many Arab states to justify violations of the human dignity of the refugees.

If one were to condition improvements in refugee protection in the Arab world on the development of the rule of law and democracy, recognition of past wrongs, generosity and ties of national brotherhood or the implementation of international and regional conventions, one might be waiting a long time. But it is important not to despair. Parallel work at all levels should be undertaken in order to advance improvements and formulate objectives that will result in a just environment for the refugees. It is important to tackle all these issues from within the current political context of the Arab world.

Refugees and displaced persons are determined to return to their homes and lands. There are many explanations and justifications for this position—historical, moral, political and legal, not to mention UN resolutions affirming their right of return. International law and practice emphasize voluntary return as the primary solution for refugees and the most effective way to address the human rights violations that accompany life in exile. Therefore, the most important task is a sustained and concerted effort to implement the right of return thus bringing about an end to human rights violations committed against refugees in their host countries.

Political initiatives to craft solutions for complex and protracted conflicts with major social and historical implications, such as the Arab-Israeli conflict and the Palestinian issue, however, are often painstakingly slow. It is important, therefore, to search for complementary models of refugee protection, models which provide a response to the miserable reality of refugees today and do not conflict with the right of return to their homeland in the future. Refugees cannot and should not wait and suffer any longer. This is exactly why the drafters of international refugee instruments did not condition efforts for ending refugee suffering with the achievement of a comprehensive solution to conflicts, but rather developed guidelines for the fair treatment of refugees in exile, regardless of the direction of political and non-political efforts at conflict resolution.

Activation of legal frameworks and the human rights movement

International and regional standards for the protection of refugees have undergone significant development since 1948. If Arab host countries had implemented these standards the suffering of Palestinian refugees would have been alleviated considerably. Non-implementation of relevant international instruments, generally, and the failure to implement Arab conventions and resolutions, in particular, were
nurtured by slogans of state sovereignty and based on fears that better treatment of Palestinian refugees might lead to either resettlement or domestic instability.

Taking into consideration these political sensitivities, and without infringing on national sovereignty in dealing with this vulnerable refugee population, it is possible for human rights advocates to draw greater attention to the rights of refugees and asylum seekers in the Arab world. In this way, the human rights movement, on the Palestinian, Arab and international levels can include the issue of Palestinian refugees in its agenda. The human rights movement should monitor the status of Palestinian refugees in accordance with international and regional instruments, as well as Arab resolutions, and point out or expose the gap between official support for Palestinian rights and practice in Arab states.

Support of non-governmental, civil society initiatives

It is also important to promote and support non-governmental organizations active among refugees, especially in camps which lack basic living conditions.

In the refugee camps of Lebanon, for example, there are some 40 active private and non-governmental organizations. These organizations receive financial support from several major non-governmental organizations outside Lebanon, including: Norwegian People’s Aid, the Welfare Association (Geneva), and the Medical Relief Association (United Kingdom), in addition to the Palestinian program of UNICEF. These associations operate 120 centers inside the camps with an average annual budget of US $70-80 million. Centers provide pre-school education, vocational training, health care, special needs care and micro-enterprise loan programs.78

Such associations have existed since 1983 to compensate for the loss of services previously provided by PLO institutions and a chronic deficiency in state services. Their activities have always been subject to financial and political constraints that prevented development, sustainability and consistency in the delivery of services over the long-term. In line with global developments and the role of civil society organizations, support of these non-governmental organizations may provide a way to motivate government institutions to perform better. For political reasons, initiatives by civil society organizations may also be more acceptable for refugees. This does not, however, negate the need for high-quality services from host states to sustain refugee confidence until a solution is found.

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Improving the refugee environment, eliminating host country suspicion

Additional efforts are required to overcome the culture of fear and suspicion in many host countries, as well as among refugees, that ‘improving refugee living conditions’ will lead to de facto resettlement. Studies show that Palestinian refugees who enjoy a broader set of rights (e.g., in Syria and Jordan) are not less connected to their Palestinian identity and the wish to return than Palestinian refugees in Lebanon who live under fragile legal conditions.\(^79\) Perpetuation of refugee suffering is no guarantee of preserving Palestinian identity. In fact, the contrary may be true. Advocates of better living conditions should endeavor to convince host countries that improving the situation of refugees is not the same as resettlement. Furthermore, it may be possible to argue that such improvements are one way of improving the general environment in certain host countries.

In Lebanon, for example, it may be argued that neglect of and daily pressure on refugees has resulted in numerous social, behavioral and security problems affecting Lebanese society as a whole. Preventing refugees from leaving and re-entering the country without prior permission creates anxiety beyond the fear of traveling itself. Many refugees thus prefer to stay in Lebanon. Deprived of remittances, further social and economic deterioration is the result.\(^80\) Increased resources would enhance security, both for refugees and Lebanese nationals whose economy would be strengthened. A decree issued by the Lebanese Prime Minister on 11 January 1999, calling for additional freedom of movement for Palestinian refugees holding Lebanese travel documents and for their exemption from exit and re-entry permit requirements must be seen in this context.\(^81\) Employment and housing issues must be tackled accordingly. Much damage and disadvantage is caused to refugees, Lebanese society and Lebanon by the siege imposed on the miserable camps and settlements of internally displaced persons.

Solving this problem requires cooperation between the Lebanese government and UNRWA. Completely destroyed camps must be rebuilt and partially destroyed ones must be repaired. If this is not possible, some have suggested allocating alternative lands. It is worth mentioning here that the matter has been discussed between camp representatives and Lebanese government officials and resulted in an agreement to


\(^80\) This is the general understanding of many working forces within refugees. Specifically, refer to the Palestinian Forces Alliance’s memorandum in Lebanon with regards to new permits procedures for Palestinians residing in Lebanon and wish to leave and come back, *Journal of Palestine Studies* 25 [Arabic] (1996), 217-19.

\(^81\) The Decree is reprinted in, *Journal of Palestine Studies* 38 [Arabic] (1999), 194-5.
construct new houses for refugees. However, many Lebanese rejected this agreement fearing resettlement, so the agreement was frozen.\textsuperscript{82}

\textit{Revenue from refugees properties}

Efforts should also be made to procure revenue from Palestinian refugee properties in occupied Palestine to improve their living conditions in the countries of exile. This necessitates a phased-approach to resolving the refugee issue based on the fact that there is no contradiction between the right to return and the enjoyment of property revenues. Property records need to be consolidated, properties re-evaluated and a mechanism set up to transfer revenues to claimants in a way that benefits the entire refugee community. Earlier attempts in this direction were made by the Arab League when the UN Conciliation Commission on Palestine was still active.

The Conference of Supervisors has also issued numerous recommendations regarding this matter and obtained a UN General Assembly resolution calling for the appointment of an international custodian of refugees’ properties in Palestine, in order to use property revenue to fund UNRWA.\textsuperscript{83} UN General Assembly Resolution 36/146 (16 December 1981) requested the UN Secretary-General “to take all necessary steps in cooperation with the Conciliation Commission, in order to protect and administer properties, bank accounts and Arab property rights in Israel and to present a report of actions taken to the General Assembly”.\textsuperscript{84} Included in this resolution was a request for the PLO to be given the records of Arab properties and accompanying documentation, including lists of Arab real estate along with the cadastral survey and complete descriptions of property.\textsuperscript{85}

Following-up on such an initiative will provide additional help with refugee protection, i.e., maintaining the level of international protection provided through UNRWA which is experiencing an ongoing financial crisis. If UNRWA were to discontinue its services in education, health and social welfare without a substitute in place, under the current conditions of deficient Arab protection, this would have a catastrophic impact on entire refugees communities.

\textsuperscript{82} Interview with a Palestinian official regarding the housing project for Palestinian refugees in Lebanon, and another interview with Mr. Walid Junblat, Minister of Refugees Affairs in, \textit{Journal of Palestine Studies} 20 [Arabic] (1994), 215-23.

\textsuperscript{83} Recommendations from the 27\textsuperscript{th} session of the Supervisor’s Conference, \textit{supra} n. 11.

\textsuperscript{84} GA Res. 36/146 C, 36\textsuperscript{th} Sess., UN Doc. A/RES/36/146 (1981).

Despite the importance of UNRWA, there are some who believe that this international agency cannot provide a real international protection umbrella because of its character as a relief agency that does not offer a substitute for the protection provided by the 1951 Refugee Convention and its 1967 Protocol. This argument provides an opportunity to raise and clarify this matter and draw Arab attention to the need for widening the margin of refugee protection.\textsuperscript{86}

In 1984, the PLO asked the United Nations to amend the Statute of the UN High Commissioner for Refugees in a way that would enable Palestinians to benefit from international protection just like other refugees. This PLO effort failed for a number of reasons, among them fears among certain donor countries that such an amendment would lead to the politicization of the Office. However, it is possible nonetheless to ask for UNHCR intervention in assistance and protection for Palestinian refugees in Arab countries where UNRWA services are not available, such as Iraq, Gulf States and Egypt, or refugees inside Occupied Palestine who are not registered with UNRWA.

\textit{Enhancing the role of Palestinian institutions}

As shown earlier, levels of refugee protection improved in periods when Palestinian political and representative institutions were established and functioning, and in times of positive relations on the wider, Arab level. This is explained not only by the ability of these institutions to set up procedures and mechanisms that helped reduce the suffering of refugees (such as job opportunities, employment, financial support; social, economic, health and education services, etc.), but also by the fact that they acted as negotiators on behalf of the refugees and as a representative of their plight in the host countries. PLO institutions undertook frequent studies of refugee living conditions, raised their problems and acted as a messenger that conveyed their views to relevant Arab organizations.

The opposite is also true. Whenever Palestinian institutions were absent or were faced with resistance or constraints, the alarm bells rang also for refugees depending on Arab protection. This reciprocal relationship, positive and negative, between strength and weakness of Palestinian institutions and the level of Arab refugee protection, was illustrated earlier by the example of Lebanon. This study also showed that efforts by Palestinian institutions which are comprehensive in terms of specialization and Arab recognition (e.g., the PLO) can have a positive influence on the level of Arab protection available for Palestinian refugees.

\textsuperscript{86} Shiblak, \textit{supra} n. 6, 83-4.
Refugees are no different from other persons in their entitlement to protection against violations of their basic human rights. Where there is no state authority to provide this critical function, the intervention of the international community becomes essential. In the wake of the massive refugee problem following World War I, the international community, through the League of Nations, entrusted the task of protecting refugees to the International Committee of the Red Cross.\(^1\) The massive political upheaval occasioned during and after World War II, including an unprecedented refugee crisis, necessitated the creation of new global institutions, foremost of which was the United Nations. While the new UN system began deliberating immediately about creating a global refugee protection regime, it was not until 1949 that such a regime took root though the establishment of the Office of the United Nations High Commissioner for Refugees.\(^2\)

During this period, the United Nations was deeply engaged with the Arab-Israeli conflict in Mandate Palestine and the consequent creation of the Palestinian refugee problem. In the absence of the soon-to-be-formed UNHCR, and in recognition of its own role in the Palestine problem, the UN General Assembly established a series of \textit{ad hoc} bodies charged with, \textit{inter alia}, the task of providing relief and assistance as well as the facilitation of durable solutions to the problem. Among these were the United Nations Mediator for Palestine\(^3\), the United Nations Relief for Palestine

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\(^2\) GA Res. 319 (IV), UN GAOR 4\textsuperscript{th} Sess., UN Doc. A/RES/319 (1949).

\(^3\) GA Res. 186 (D-2), UN GAOR 3\textsuperscript{rd} Sess., UN Doc. A/RES/186 (1948).
Refugees\textsuperscript{4}, the United Nations Conciliation Commission for Palestine\textsuperscript{5}, including its Economic Survey Mission, and finally, the United Nations Relief and Works Agency for Palestine Refugees in the Near East\textsuperscript{6}. 

Due to a number of political considerations, the assistance and durable solutions mandate for Palestine refugees remained with these \textit{ad hoc} institutions, and the Palestine refugees were specifically excluded from the global protection regime administered by UNHCR, particularly under the 1951 Convention Relating to the Status of Refugees.\textsuperscript{7} Of all of the \textit{ad hoc} bodies mentioned above, only UNRWA continues to operate today, providing essential relief and humanitarian assistance, with a very limited level of protection\textsuperscript{8}, to the Palestine refugees. The lack of an explicit protection mandate for the Palestine refugees supported by UNRWA has received only periodic attention from the international community, e.g., in the aftermath of notable crises, and often for only limited periods of time or scope.\textsuperscript{9} At no point since 1948, has the international community attempted to incorporate the Palestine refugees into the global refugee protection regime. Rather, the \textit{ad hoc} approach continued to apply a weaker standard of protection, at best, to the Palestine refugees as compared to other refugees.

This ‘protection gap’ has been the subject of considerable debate among influential academics and refugee advocacy groups. At the center of the debate has been the apparent double standard regarding the protection regime available for refugees world-wide and that afforded the Palestine refugees. Over 70 per cent of all Palestinian refugees reside in UNRWA’s area of operations, protection for a majority of whom has been the responsibility of occupying powers at various historical periods. More often than not, particularly in the context of Israel’s prolonged 36-year occupation of the West Bank and Gaza Strip, the principal protection vulnerabilities of the refugees relate to the need to be protected from the excesses of the Occupying Power.

\begin{thebibliography}{9}
\bibitem{4} GA Res. 212 (III), UN GAOR 3\textsuperscript{rd} Sess., UN Doc. A/RES/212 (1948).
\bibitem{5} GA Res. 194 (III), UN GAOR 3\textsuperscript{rd} Sess., UN Doc. A/RES/194 (1948).
\bibitem{6} GA Res. 302 (IV), UN GAOR 4\textsuperscript{th} Sess., UN Doc. A/RES/302 (1949).
\bibitem{8} See, text accompanying \textit{infra} nn. 76-89.
\bibitem{9} Id.
\end{thebibliography}
BACKGROUND

The creation of the Palestinian refugee problem

This chapter does not deal with the historical origins of the Arab-Israeli dispute. Insofar as the exodus of refugees from Mandate Palestine is concerned, the United Nations Mediator for Palestine, Count Folke Bernadotte, commented on the issue in a Progress Report dated 16 September 1948 in which he informed the Secretary-General for transmission to members of the United Nations of the following:

As a result of the hostilities in Palestine, an alarming number of persons have been displaced from their homes. Arabs form the vast majority of refugees in Palestine and the neighbouring countries … It is, however, undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which, under the Assembly resolution of 29 November [UNGAR 181 (II)], was to be included in the Jewish State. The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion. It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries … There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity.10

Elsewhere in the Progress Report, refuting charges that the flight of the Palestinian Arab refugees had been incited by Arab leaders, Bernadotte noted that ‘as a result of the conflict in Palestine, almost the whole of the Arab population fled or was expelled from the area under Jewish occupation’.11 The refugee problem was compounded by two acts taken unilaterally by the Provisional Government of the State of Israel: (1)


a war-time decision to refuse repatriation of Arab refugees; and (2) the destruction of the vast majority of the villages from which the refugees had been expelled and/or fled, and the settlement of Jewish immigrants in Arab properties left standing.

The creation of a special international regime for Palestine refugees

In reaching specific conclusions to provide a ‘reasonable, equitable and workable basis for settlement’ of the refugee problem, Count Bernadotte recommended in the Progress Report the establishment of ‘a Palestine conciliation commission … for a limited period … responsible to the United Nations, and acting] under its authority’. Thus spawned the creation of what would evolve into a special ad hoc regime applicable to the Palestine refugees. Regarding the Arab refugees, Bernadotte’s specific conclusions were as follows:

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 …

The UN General Assembly, vide Resolution 194(III) of 11 December 1948, established the UNCCP to assume as necessary the functions of the UN Mediator on Palestine and the United Nations Truce Commission. The General Assembly instructed the UNCCP to ‘take steps to assist the governments and authorities concerned to achieve a final settlement of all questions outstanding between them’. While the Assembly commented on outstanding questions such as the status of the holy places and Jerusalem, access to transportation and communication facilities, etc., on the issue of refugees it resolved that those,

...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

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13 Id., 17.
14 Progress Report of the UN Mediator for Palestine, supra n. 10, Pt. 1, VIII, para. 4.
15 Id.
16 GA Res. 194 (III), supra n. 5.
17 Id., para. 6.
be paid for the property of those choosing not to return and for loss of or damage to property which under principals of international law or in equity should be made good by the governments or authorities responsible.\(^{18}\)

The General Assembly had thus asked the UNCCP to address the Palestine refugee problem in the overall context of a final settlement of outstanding questions because the government of the state of Israel was opposed to a blanket return of the refugees, and insisted that even a return ‘on purely humanitarian grounds in disregard [of the] military, political [and] economic aspects might even aggravate [the] problem’.\(^{19}\) The General Assembly also instructed the UNCCP to ‘facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation’, and authorized it to ‘appoint such subsidiary bodies’ in order to discharge this function.\(^{20}\)

Though Resolution 194 (III) does not specifically refer to the ‘protection’ of the Palestine refugees, such a mandate was explicitly stated by the General Assembly in Resolution 394 (V) of 14 December 1950 while considering the progress report of the UNCCP. It directed the UNCCP to ‘establish an office which, under the direction of the commission, shall … continue consultations with the parties concerned regarding measures for the protection of the rights, property and interests of the refugees’\(^{21}\) [emphasis added]. It also called upon ‘the governments concerned to undertake measures to ensure that refugees, whether repatriated or resettled, will be treated without any discrimination either in law or in fact’.\(^{22}\)

In August 1948, Israel submitted its proposals to the UNCCP on the refugee problem, stating that ‘the solution of the refugee problem was to be sought primarily in resettlement in Arab territories’, and that it was prepared to accept the return of very limited numbers of refugees subject to Israel maintaining a right to resettle them in locations of its choosing.\(^{23}\) The Arab delegations conveyed to the UNCCP that ‘the solution of the refugee problem should be sought in the repatriation of the refugees in Israeli controlled territory and in the resettlement of those not repatriated in Arab

\(^{18}\) Id., para. 11.

\(^{19}\) Cablegram dated 1 August 1948 from the United Nations Mediator to the Secretary-General Concerning Arab Refugees, UN Department of Public Information, Press Release PAL/236, Aug. 5, 1948.

\(^{20}\) Id., paras. 11-12.

\(^{21}\) GA Res. 394 (V), UN GAOR 5th Sess., UN Doc. A/RES/394 (1950), para. 2.

\(^{22}\) Id., para. 3.

\(^{23}\) UNCCP, Fourth Progress Report (For the period 9 June to 15 September 1949 inclusive), UN Doc. A/992 (1949), para. 17.
countries or in the zone of Palestine not under Israeli control’.\footnote{Id., para. 12.} Shortly thereafter, the UNCCP established the Economic Survey Mission to ‘examine the economic situation of the countries’ affected by the conflict, and recommend to the commission an integrated program to, \textit{inter alia}:

\begin{quote}
...facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation pursuant to the provisions of paragraph 11 of the General Assembly’s resolution of 11 December 1948, in order to reintegrate the refugees into the economic life of the area on a self-sustaining basis within a minimum period of time.\footnote{Id., Annex I. Among other things, the UNCCP recommended that the Economic Survey Mission, in collaboration with the governments concerned: ‘... (b) ... examine proposals submitted by the governments concerned for economic development and settlement projects requiring outside assistance which would make possible absorption of the refugees into the economy of the area on a self-sustained basis in a minimum time with a minimum expenditure; (c) examine other economic projects which can, with outside assistance, provide temporary employment for the refugees ... ; ... (e) estimate the number of refugees who cannot be supported directly or indirectly through the employment envisaged ...; (f) study the problem of compensation to refugees ... with special reference to the relationship of such compensation to the proposed settlement projects; (g) study the problem of rehabilitation of refugees, including matters concerning their civil status, health, education and social services; (h) propose an organizational structure to achieve the objectives ... within a United Nations framework, to coordinate, supervise and facilitate measures for relief, resettlement, economic development and related requirements such as community service facilities, bearing in mind the interests of all governments concerned.’}
\end{quote}

Based on the first interim report of the Economic Survey Mission, the General Assembly, in Resolution 302 (IV) of 8 December 1949, recognized that ‘without prejudice to the provisions of paragraph 11 of General Assembly Resolution 194 (III) of 11 December 1948, continued assistance for the relief of the Palestine refugees is necessary to prevent conditions of starvation and distress among them and to further conditions of peace and stability’. It established UNRWA ‘to carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission’.\footnote{GA Res. 302 (IV), \textit{supra} n. 6.} However, in Resolution 393 (V) of 2 December 1950 the General Assembly considered that ‘without prejudice to the provisions of General Assembly Resolution 194 (III) of 11 December 1948, the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement, is essential in preparation for the time when international assistance is no longer available, and for the realization of conditions of peace and
stability in the area’.\(^{27}\) Thus, by the early 1950s, the special regimes put in place by the United Nations to deal with the Palestine refugee problem, crystallized into two institutions: (1) the UNCCP, charged with facilitating the search for durable solutions and the provision of protection to the Palestine refugees; and (2) UNRWA, mandated to provide essential humanitarian and relief assistance.

**UNHCR and the 1951 Convention**

In contrast to the *ad hoc* protection regime established by the United Nations to deal with the Palestine refugees, the General Assembly created UNHCR through Resolution 319 (IV) of 3 December 1949.\(^{28}\) UNHCR’s mandate is set out in the Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the General Assembly in Resolution 428 (V) of 14 December 1950.\(^{29}\) Article 1 of the UNHCR Statute provides that the UNHCR ‘shall assume the function of providing international protection … to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and … private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities’.\(^{30}\) Furthermore, article 8 of the UNHCR Statute provides that the High Commissioner ‘shall provide for the protection of refugees falling under the competence of his Office by:

(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing

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\(^{27}\) GA Res. 393 (V), UN GAOR 5th Sess., UN Doc. A/RES/393 (1950). Importantly, although UNRWA was mandated to facilitate the ‘reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement’, in practice its efforts solely focused on resettlement in host countries and, to a very limited extent in its early years, provided limited assistance to refugees seeking to resettle in third countries. By the mid-to-late 1950s the General Assembly had annually noted that ‘no substantial progress’ had ‘been made in the programme for reintegration of refugees’, and directed the Agency to ‘plan and carry out projects and programmes relating to self-support, education and vocational training’. See, GA Res. 916 (X), UN GAOR 10th Sess., UN Doc. A/RES/916 (1955); GA Res. 1315 (XIII), UN GAOR 13th Sess., UN Doc. A/RES/1315 (1958); GA Res. 1456 (XIV), UN GAOR 14th Sess., UN Doc. A/RES/1456 (1959); GA Res. 1856 (XVII), UN GAOR 17th Sess., UN Doc. A/RES/1856 (1962); and GA Res. 1912 (XVIII), UN GAOR 18th Sess., UN Doc. A/RES/1912 (1963).

\(^{28}\) GA Res. 319 (IV), *supra* n. 2. This resolution decided to ‘establish, as of 1 January 1951, a High Commissioner’s Office for Refugees’.


\(^{30}\) *Id.*, art. 1.
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.\(^{31}\)

Thus, from its very inception, the ‘cornerstone’ of the UNHCR has been the ‘international protection’ of refugees and displaced persons.\(^{32}\) Among other things, it has discharged this duty through the promotion of international refugee law—particularly as codified in the 1951 Refugee Convention and the 1967 Protocol thereto\(^{33}\)—foremost of which is the principle of non-refoulement, or the prohibition against the expulsion or return of ‘a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’\(^{34}\). For these purposes, article 1A(2) of the 1951 Convention defines as a ‘refugee’ any person who:

\(^{31}\) Id., art. 8.

\(^{32}\) UNHCR, Helping Refugees: An Introduction to UNHCR (Geneva, 2001), 6.


\(^{34}\) 1951 Refugee Convention, supra n. 7, art. 33(1). The prohibition against refoulement is not absolute however. Article 33(2) provides that the principle of non-refoulement may not be invoked ‘by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.
...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\footnote{Id., art. 1(A)2. Through UNHCR promotion, the legal principles outlined in the 1951 Refugee Convention and the 1967 Protocol—particularly the definition of a ‘Convention refugee’ and the principle of non-refoulement—have been gradually incorporated into the domestic legislation of many of the states party to those conventions.}

In addition to protection, the UNHCR has sought ‘long-term’ or ‘durable solutions’ to refugee problems ‘by helping refugees repatriate to their homeland if conditions warrant, by helping them to integrate in their countries of asylum or to resettle in third countries’.\footnote{Helping Refugees: An Introduction to UNHCR, supra n. 32, 7.}

Over the years, UNHCR has developed a range of operational experience that includes: asylum and resettlement assistance; the provision of health, education and social services; the implementation of special programs for women, children and the elderly; large scale relief operations; community development for purposes of durable reintegration of refugees; and repatriation operations.\footnote{Id., 10.} Although the UNHCR was originally created as a temporary organization, its mandate has been extended every five years since its founding.\footnote{This is with the exception of its first mandate, which spanned three-years. See id., 4-5.} Today, it is ‘one of the world’s principal humanitarian agencies’, employing more than 5,000 personnel and helping over 21.8 million people in over 120 countries.\footnote{Id., 5.} This mandate, however, does not extend to the vast majority of Palestine refugees by virtue of the existence of the special international \textit{ad hoc} regime governing their treatment.

This flows from the following two related provisions of the UNHCR Statue and the 1951 Refugee Convention, respectively. The first is article 7(c) of the UNHCR Statue which provides that ‘the competence of the High Commissioner … shall not extend to a person … [w]ho continues to receive from other organs or agencies of the United Nations protection or assistance’.\footnote{UNHCR Statute, supra n. 29, art. 7(c).} As the Palestine refugees had then been considered to be receiving protection and assistance through the UNCCP and UNRWA, respectively, they were effectively excluded from UNHCR’s mandate. Despite the clarity of the language employed by the drafters of article 7(c), there was
considerable confusion among UNHCR officials in the early 1950s as to the extent of the geographical and personal jurisdiction exercised over the Palestine refugees by UNRWA, primarily due to the Agency’s inability to establish a firm definition of ‘Palestine refugee’ or to set out the exact geographical parameters of its area of operations in its early years. The matter was eventually settled in 1954 when both organizations issued the following joint press release:

As far as the United Nations is concerned, and without prejudice to the responsibility of individual governments, the material welfare of Palestine refugees in the Near East is the exclusive responsibility of UNRWA, whereas the protection interests of those refugees as regards compensation and repatriation is the concern of the Palestine Conciliation Commission. The mandate of the High Commissioner [for Refugees] does not extend to them.\(^{41}\)

The second of the provisions excluding most Palestine refugees from UNHCR coverage is article 1D of the 1951 Convention. Building on article 7(c) of the UNHCR Statute, article 1D attempts to address the issue of Palestine refugees not actually receiving protection or assistance from UNRWA through the addition of what some have termed an ‘inclusion clause’. Article 1D provides that the 1951 Convention,

\[
\text{...shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.}
\]

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall \textit{ipso facto} be entitled to the benefits of this Convention.\(^{42}\)

Over the years, the second paragraph of article 1D has been interpreted by UNHCR to mean that any registered Palestine refugee situated \textit{outside} of UNRWA’s area of operations—not able to receive protection or assistance from UNRWA because the Agency requires physical presence to claim beneficiary status—is automatically subject to UNHCR’s jurisdiction and may claim the benefits of the 1951 Convention.\(^{43}\) Although it is impossible to know with any precision the number of Palestine refugees actually resident outside of the Agency’s area of operations, it

\(^{41}\) Takkenberg, \textit{supra} n. 12, 305.

\(^{42}\) Refugee Convention, \textit{supra} n. 7, art. 1D.

\(^{43}\) Takkenberg, \textit{supra} n. 12, 306. See, UNHCR, \textit{Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees} (Geneva, 2002).
would be reasonable to assert that they comprise a significant minority of the total registered refugee population. Moreover, the protection needs of this minority of Palestine refugees tend to focus on claims for asylum and resettlement in third states which, although important, cannot be said to represent the main protection concerns of the vast majority of Palestine refugees who continue to reside in UNRWA’s area of operations. In particular, those Palestine refugees resident in the OPT, as well as those who have at various periods in history been subject to other occupations, harbor far more pressing and substantial protection concerns based principally, though not exclusively, on the need to safeguard their right to life and security of the person and property. As will be seen in the following section, the failure of the special ad hoc regime for the Palestine refugees to provide protection in accordance with international law and practice has led to the emergence of a protection gap in comparison to other refugee groups.

**The Protection Gap**

*What is ‘protection’?*

Although ‘refugees have existed as long as history, ... an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations’. Since that time, mechanisms of international refugee protection have evolved in a manner that have constantly challenged the state-centered foundation upon which the international system was founded. At its very core, international refugee protection concerns individual/group rights as opposed to state rights. The constant need to balance between competing individual/group and state rights, coupled with the ever-increasing complexity of global refugee crises, has produced a wide array of mechanisms available for international refugee protection, the suitability of which depends on the situation in which the refugee finds her/himself. As noted by one expert, although there are ‘certain fundamental principles in the protection of refugees, each problem has to be considered on its own facts’.

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44 According to UNRWA, as of 30 June 2003 there were 4,082 million registered Palestine refugees. UNRWA, *UNRWA in Figures* (Gaza, Aug. 2003).


Although article 8 of the UNHCR Statute provides a good general statement of the mechanisms available for protection of refugees, it does not set out the totality of protection options that has evolved since its promulgation in 1950. The options available in international refugee protection include:

(a) registration and documentation of refugee individuals or groups;
(b) provision of special travel documents to refugee individuals or groups;
(c) protection by publicity, particularly in relation to human rights violations; and
(d) promotion of international refugee law, both at the international and domestic levels.
(e) provision of humanitarian emergency assistance, including food, shelter and primary health care;
(f) provision of ‘temporary protection’ in third states;
(f) provision of legal aid to refugees, or legal intervention with relevant state authorities;
(h) unilateral or multilateral interventions short of the use of force, such as economic sanctions against relevant state authorities; and
(i) facilitating durable solutions, including repatriation, resettlement in host states and asylum in third states.
(j) implementing durable solutions, including repatriation, resettlement in host states and asylum in third states; and
(k) ensuring physical protection through unilateral or multilateral interventions, not excluding under Chapter VII of the UN Charter, particularly in situations of armed conflict or belligerent occupation.

It is important to recognize that each of the protection options listed above is capable of being applied in a variety of ‘protection contexts’. These contexts include: human rights protection, diplomatic protection, consular protection, protection of the vulnerable including women, children and the elderly, protection of peoples, including through political representation, protection of groups and protection of civilian persons in armed conflict. Oftentimes, as is the case in the OPT, these contexts overlap and operate simultaneously, demanding a concerted and multi-pronged approach from the international community. In addition, although there is a general distinction between ‘international protection’ on the one hand (i.e., of basic rights enjoyed by refugees qua refugees) and ‘durable solutions’ on the other (i.e., measures taken to end refugee status), the case of the Palestine refugees is unique in the sense that the international community vested one particular body (the UNCCP; see below)

\[47\] See, text accompanying supra n. 31.
with the mandate over both of these functions, to be exercised coterminously. As will be seen, the international community’s approach to protecting Palestine refugees has not sufficiently evolved in accordance with universal protection practices.

**UNHCR and the protection gap**

As previously mentioned, UNHCR provides protection to Palestine refugees residing outside UNRWA’s area of operations. For the most part, this protection is focused primarily on assisting Palestine refugees in seeking asylum in third states. Although UNHCR is well equipped to provide such assistance to Palestine refugees who may be outside UNRWA’s area of operations, its efforts in this respect have for years been frustrated by the manner in which national courts or administrative tribunals of states, particularly in Western Europe and North America, have interpreted provisions of the 1951 Convention that have been incorporated, in whole or in part, into their domestic legislation. In particular, years of ‘restrictive’ interpretation of article 1D by judicial authorities in third countries has made it very difficult for Palestine refugees to obtain asylum in such countries.\(^{48}\)

The restrictive interpretation of article 1D by judicial authorities in some third states has been the result of a failure to give effect to the ‘inclusion’ clause contained in the second sentence of the article. Thus while some of these bodies recognize that the so-called ‘exclusion’ clause of article 1D may not apply to a Palestine refugee asylum claimant on account of the fact that he/she is outside UNRWA’s area of operations, they do not determine that as a result such persons are *ipso facto* entitled to the benefits of the 1951 Convention (i.e., entitled to Convention refugee status on the basis alone of being outside UNRWA’s area of operations). Instead, once it is determined that the Palestine refugee asylum claimant is outside UNRWA’s area of operations, these authorities deem article 1D inapplicable and proceed to assess the claim under a generic ‘well-founded fear of persecution’ test based on the Convention refugee definition contained in article 1A(2) of the 1951 Convention.\(^{49}\) Countries that employ this approach include the Federal Republic of Germany and the Netherlands.\(^{50}\) Other countries—such as Austria, Canada, Switzerland and the United States—do not incorporate article 1D into domestic legislation at all, and the Convention refugee status of Palestine refugee asylum

\(^{48}\) Takkenberg, *supra* n. 12, 90.

\(^{49}\) See, text accompanying *supra* n. 35.

claimants is determined solely with reference to article 1A(2) or similar municipal legal provisions.

Over the years, these approaches have been encouraged by the UNHCR through its *Handbook on Procedures and Criteria for Determining Refugee Status*\(^{51}\), which is considered the most authoritative commentary on the 1951 Convention. With respect to article 1D, the UNHCR *Handbook* provides that ‘a refugee from Palestine who finds himself outside’ UNRWA’s area of operations ‘does not enjoy the assistance mentioned’ in the first sentence of article 1D, ‘and may be considered for determination of his refugee status under the criteria of the 1951 Convention’\(^{52}\)—thereby requiring the refugee claimant to satisfy the requirements of article 1A(2), notwithstanding the inclusion clause contained in article 1D.

In recognition of the difficulties its *Handbook* commentary on article 1D may have produced for Palestine refugees seeking asylum in third states, in October 2002 UNHCR published a *Note on the Applicability of 1D to Palestine refugees*.\(^{53}\) The Note offers the most extensive commentary on article 1D to date, including the following important provisions:

6. If the person concerned is inside UNRWA’s area of operations and is registered, or is eligible to be registered, with UNRWA, he or she should be considered as receiving protection or assistance within the sense of paragraph 1 of article 1D, and hence is excluded from the benefits of the 1951 Convention and from the protection and assistance of UNHCR.

7. If, however, the person is outside UNRWA’s area of operations, he or she no longer enjoys the protection or assistance of UNRWA and therefore falls within paragraph 2 of article 1D, providing of course that articles 1C, 1E and 1F do not apply. Such a person is *automatically entitled to the benefits of the 1951 Convention* and falls within the competence of UNHCR. This would also be the case even if the person has never resided inside UNRWA’s area of operations. [emphasis added]\(^{54}\)

Thus, whereas the UNHCR interpretation of article 1D once required Palestine refugees outside of UNRWA’s area of operations to satisfy the terms of article 1A(2) of the 1951 Convention before Convention refugee status could be granted, UNHCR now definitively regards any such refugee as *ipso facto* entitled to the benefits of the

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\(^{52}\) *Id.*, paras. 142-3, quoted in Takkenberg, supra n. 12, 95.

\(^{53}\) See, *Note on the Applicability of Article 1D*, supra n. 43.

\(^{54}\) *Id.*, 2.
1951 Convention, subject to various other generic exclusions contained in articles 1C, 1E and 1F. This interpretation is concurred with by a number of experts, including Guy Goodwin-Gill, Susan Akram and Lex Takkenberg.

The extent to which states have adopted the UNHCR’s new interpretation of article 1D into domestic law is unclear. What is certain, is that the vast majority of states will likely regard it as merely a recommended approach to be used by domestic judicial authorities in the interpretation of article 1D. The non-binding character of this interpretation practically means that to the extent that the judicial authorities of third states remain committed to the older interpretation of article 1D, the de facto protection gap for Palestine refugee asylum claimants will continue to exist. In countries whose legal systems are based on principles of stare decisis—or judicial precedence—this problem may prove very difficult, though not impossible, to redress.

UNCCP and the protection gap

It will be recalled that the UN General Assembly, through Resolution 194 (III) of 11 December 1948, established the UNCCP with the express purpose of taking steps

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55 Article 1C provides that the 1951 Convention ‘shall cease to apply to any person falling under the terms of section A if: (1) he has voluntarily re-availed himself of the protection of the country of his nationality; or (2) having lost his nationality, he has voluntarily re-acquired it; or (3) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) he can no longer, because of circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; and (6) being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence’. Article 1E provides that the 1951 Convention ‘shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country’. Article 1F provides that the 1951 Convention ‘shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations’.
to assist the governments and authorities concerned to achieve a final settlement of all questions outstanding between them’, including the refugee issue. Resolution 194 (III) also expressly instructed the UNCCP ‘to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation’, thereby establishing the UNCCP’s durable solutions mandate. The General Assembly appointed France, Turkey and the United States to the Commission. The UNCCP’s mandate regarding international protection of the Palestine refugees was expressly set out by the General Assembly in UNGAR 394 (V) of 14 December 1950, which provided that the UNCCP should establish and oversee a ‘Refugee Office’ whose task would be to, inter alia, ‘continue consultations with the parties concerned regarding measures for the protection of the rights, property and interests of the refugees’. Taken together, these General Assembly resolutions vested the UNCCP with a dual responsibility over protection of and durable solutions for the Palestine refugees, as previously discussed. Prior to that, the UNCCP had outlined the following preliminary measures for the protection of the ‘rights, property and interests of the refugees’:

The return to their lands and homes of Arab owners of orange groves, together with the necessary workmen and technicians; the immediate unfreezing of Arab accounts in Israeli banks; the abrogation of the [Israeli] Absentee [Property] Act; the suspension of all measures of requisition and occupation of Arab houses and the reuniting in their homes of refugees belonging to the same family; the assurance of freedom of worship and of respect of churches and mosques; the repatriation of religious personnel; the freeing of Wakf property; the assurance to refugees returning to their homes of the guarantees necessary to their security and their liberty.

Efforts to mediate a final settlement of all outstanding questions between the parties to the conflict in a manner that would secure the protection of the rights of the Palestine refugees, particularly to repatriation in accordance with Resolution 194 (III), were undertaken by the UNCCP. A number of proposals for repatriation of the refugees were put to the parties, despite the fact that as early as ‘the end of 1948, US and UN officials recognized that Israel was unwilling to repatriate large numbers

56 GA Res. 194 (III), supra n. 5, para. 6. As the successor body to the UN Mediator on Palestine, it can be said that the UNCCP functioned, in today’s terminology, as somewhat of a facilitator of ‘final-status’ issues.

57 Id., para. 11.


59 GA Res. 394 (V), supra n. 21, para. 2.

60 Fourth Progress Report, supra n. 23.
of refugees'. The issue was extensively discussed at peace talks held at Lausanne, Switzerland, in the spring of 1949. In July 1949, Israel indicated its willingness, under severe US pressure, to repatriate 100,000 Palestine refugees as part of a larger peace settlement with the Arab States. The offer was rejected by the Arab states as insufficient. Similar efforts undertaken by the UNCCP at a Paris conference in 1951 yielded no fruit, and the issue remained unresolved.

Faced with the lack of movement on repatriation, the UNCCP’s protection efforts turned towards resettling the Palestine refugees in the Arab host states. However, recognizing that host states and refugees were just as opposed to resettlement as Israel was to repatriation, the UNCCP established the Economic Survey Mission and, for the first time, focused on the objective of reintegrating ‘the refugees into the economic life of the area on a self-sustaining basis’. In an interim report issued in November 1949, the Economic Survey Mission noted that repatriation of the refugees ‘requires political decisions outside’ its ‘competence’, and noted that ‘the only immediate constructive step in sight’ would be ‘to give the refugees an opportunity to work where they now are’. Accordingly, the Economic Survey Mission recommended the establishment of an agency designed to continue relief activities and initiate job-creation projects. Acting on this recommendation, the General Assembly created UNRWA in Resolution 302 (IV) of 8 December 1949.

Another protection activity undertaken with increased vigor by the UNCCP as a result of the lack of progress on repatriation, was the effort to obtain compensation for the refugees. Resolution 394 (V) expressly directed the UNCCP Refugee Office to ‘make such arrangements as it may consider necessary for the assessment and payment of compensation in pursuance of paragraph 11 of General Assembly Resolution 194 (III)’. After conducting a study on the matter, the Refugee Office determined that the estimated value of the movable and immovable property abandoned by the

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61 Benjamin Schiff, *Refugees unto the Third Generation: UN Aid to Palestinians* (Syracuse: Syracuse University Press, 1995), 16.
62 *Fourth Progress Report, supra* n. 23, para. 9
63 *Id.*, para. 10.
66 *Takkenberg, supra* n. 12, 26.
67 *GA Res. 394 (V), supra* n. 21, para. 2.
Palestinian refugees was 120 million Palestine pounds, and held that this was a sum that ‘constituted a debt by the Government of Israel to the refugees’\(^\text{69}\). In the absence of agreement between the parties, no further action was taken on the issue. The UNCCP had limited success in 1952, when it concluded an agreement with the government of Israel for ‘the complete release of Arab refugee accounts and safe deposit items blocked in banks in Israel’\(^\text{70}\).

Unable to qualitatively protect the interests of the Palestine refugees through efforts to mediate the conclusion of an agreement between the parties on repatriation and compensation, the UNCCP’s protection efforts focused on the establishment of an Office for Identification and Valuation of Arab Refugee Property, charged with the task of cataloging the property records of the Palestine refugees with the ultimate aim of laying a foundation for the implementation of paragraph 11 of Resolution 194 (III).\(^\text{71}\) By 1964, the cataloging was complete.\(^\text{72}\) Since that year, the UNCCP has not made any contribution towards protecting the Palestine refugees. In fact, as early as 1951 the UNCCP concluded that ‘during its three years of existence’ it had,

\[\ldots\text{been unable to make substantial progress in the task given to it by the General Assembly of assisting the parties to the Palestine dispute towards a final settlement of all questions outstanding between them,}\]

and that,

\[\ldots\text{the present unwillingness of the parties fully to implement the General Assembly resolutions under which the Commission is operating, as well as the changes which have occurred in Palestine during the past three years, have made it impossible for the Commission to carry out its mandate.}\]

Having never been formally wound-up, the UNCCP continues to report annually to the General Assembly asserting that its efforts to advance matters toward the


\(^{69}\) *Id.*, para. 59.

\(^{70}\) *Id.*, para. 74.

\(^{71}\) *Id.*, paras. 75-6.


\(^{73}\) **Progress Report, supra** n. 64, paras. 79 and 87.
The implementation of Resolution 194 (III) presuppose ‘substantial changes’ in the positions of the parties. The regularity with which these reports appear year after year constitutes a sober reminder of the extent of the protection gap that persists for Palestine refugees. This is particularly significant, given the fact that within the special ad hoc regime put in place by the United Nations to deal with the Palestine refugee problem, the UNCCP was expressly charged with facilitating the search for durable solutions and the provision of protection to the Palestine refugees, while UNRWA was specifically mandated to provide essential humanitarian and relief assistance.

**UNRWA and the protection gap**

In accordance with General Assembly Resolution 393 (V), UNRWA spent its first six years focused on reintegrating the Palestine refugees ‘into the economic life of the Near East either by repatriation or resettlement’, noting that it is ‘essential in preparation for the time when international assistance is no longer available, and for the realization of conditions of peace and stability in the area’. This form of ‘protection’ was largely undertaken through four types of programs: (1) ‘Work Relief’, i.e., small scales training and employment creation; (2) ‘Works Projects’, i.e., medium-sized public sector government-controlled projects such as road-building and tree-planting aimed at employment creation; (3) assistance to and subsidization for small numbers of Palestine refugees willing to resettle; and (4) large-scale regional development projects with regional governments. During this period, however, it became clear to the Agency that these programs held little promise for significantly improving the economic well being of the Palestine refugees, in part because the first three were limited in scope and the fourth encountered resistance from the refugees and host governments.

This resulted in the gradual shift in the Agency’s programs from reintegration to relief and human resource development. By the late 1950s, the Agency had established its primary blueprint for its operations focused on vocational training, self-support, primary education, primary health care and continued relief for needy refugees. These humanitarian interventions eventually developed into the Agency’s three regular programs of education, health and relief and social services, along with its microenterprise and microfinance special program.

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Notwithstanding UNRWA’s humanitarian focus, its mandate has at various points included a ‘passive’ protection function, especially at times when the security and human rights of the Palestine refugees were under particular threat. The Agency’s passive protection activities began in 1982, following Israel’s invasion of Lebanon and the Sabra and Shatila massacre. In Resolution 37/120 J of 16 December 1982, the General Assembly urged,

...the Secretary-General, in consultation with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 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.\(^75\)

As a result, UNRWA undertook to monitor the security of Palestine refugees in occupied Lebanon, issued public statements on the situation from time to time, and ‘took up the need for appropriate action … to protect the refugees’ with the government of Israel and various members of the Security Council.\(^76\)

In addition, the General Assembly requested in Resolution 37/120 I of 16 December 1982 that the Secretary-General, in cooperation with UNRWA,

...issue identification cards to all Palestine refugees and their descendants, irrespective of whether they are recipients or not of rations and services from the Agency, as well as to all displaced persons and to those who have been prevented from returning to their homes as a result of the 1967 hostilities, and their descendants.\(^77\)

Prior to that point, the Agency had decided to issue registered refugees with individual registration cards to replace the family cards, though it could not actually be implemented. The issuance of identification cards to those refugees and displaced persons not registered with the Agency required the concerted cooperation of the numerous countries in which they had taken-up residence over the years. In the absence of such cooperation, the Secretary-General and UNRWA were unable to carry out this measure.\(^78\)

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76 Takkenberg, *supra* n. 12, 282.
78 Takkenberg, *supra* n. 12, 283.
The *intifada* of 1987-1993 was the next occasion when UNRWA was called upon to implement passive protection activities in relation to the Palestine refugees. This came by way of Security Council Resolution 605 of 22 December 1987, which after taking note of and strongly deploring Israeli violations of the human rights of the Palestinian people in the OPT, called upon the Secretary-General to assess the situation and to report to the Security Council ‘recommendations on ways and means for ensuring the safety and protection of the Palestinian civilians under Israeli occupation’. In accordance with this resolution, the Secretary-General provided a report to the Security Council in which he outlined four principal means by which the protection of the Palestinian people in the OPT, including the refugees, could be secured: (1) physical protection; (2) legal protection; (3) protection by way of general assistance; and (4) protection by publicity. Of these four protection mechanisms, UNRWA was specifically requested by the Secretary-General to enhance its ‘general assistance’ capacity through the addition ‘of extra international staff’ in the OPT to, *inter alia*, intervene with the authorities of the Occupying Power in an effort to provide a modicum of passive protection to the Palestinians. Thus was initiated the Agency’s Refugee Affairs Officer Program, an integral component of its ‘programme of general assistance and protection’.

The RAO program, which began in January 1988, constitutes the most expansive protection mechanism ever instituted by the Agency. According to the *RAO Guidelines* of 15 March 1989, the goals of the program were two-fold: (1) to facilitate ‘UNRWA operations in the difficult prevailing circumstances’ of the *intifada*; and (2) to provide ‘a degree of passive protection for the refugee [and, eventually, non-refugee] population’. At any given period, there were 21 RAOs operating in the OPT. In addition, each of the Gaza and West Bank fields appointed a legal officer to support the program. The specific duties of the RAOs included the following:

(a) circulating throughout the OPT on a frequent, though unannounced, schedule for the purpose of observing and reporting to the respective Field Office any unusual or abnormal circumstances;
(b) visiting Agency installations in the OPT and reporting any disruptions in Agency operations;
(c) visiting camps and other areas under curfew, and reporting to the respective Field Office on any problems affecting the welfare of the population;
(d) ascertaining and reporting as accurately as possible the names, ages,

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refugee status, circumstances and other appropriate information relating to Palestinians killed or wounded as a result of hostilities in the OPT;
(e) liaising with local military governors and civilian administrators of the Occupying Power on matters affecting the Agency’s operations or the welfare of the refugees; and
(f) visiting UNRWA staff members detained by the Occupying Power.  

The general assistance and protection program became a central supportive feature of UNRWA’s programs in the OPT by the early 1990s. By 1991 it had come to include a ‘legal aid scheme’ run by the Agency with the purpose of helping the refugees deal with a range of problems of life under occupation’, including:

...sustained follow-up in cases of deaths, injuries and harassment; bureaucratic difficulties in obtaining various permits; discrimination in access to courts of law, welfare benefits, etc.; travel restrictions; and, various forms of collective punishment.

The conclusion of the Declaration of Principles on Interim Self-Government Arrangements in 1993 and the establishment of the Palestinian Authority ushered in a period in which it was thought the RAO program would soon no longer be required. Accordingly, the program was officially suspended in the Gaza field in May 1994 and in the West Bank field in April 1996. To this day, each of the Fields maintains a legal officer as part of its operations, although the functions of these officers have evolved and cover general legal matters.

Notwithstanding the many successes of the initiative, the RAO program was from the start hindered by the fact that it possessed only a limited mandate of providing passive protection to the refugee and non-refugee populations of the OPT. This much was acknowledged in the RAO Guidelines which stated that the passive protection afforded through the program was only ‘to be achieved by maintaining an international presence in the field, observing, reporting and, in appropriate circumstances, making contact with the Israeli security forces’. As noted in the RAO Guidelines, ‘UNRWA has no power to enforce the rights of the refugees, and RAOS must not make physical contact or engage in heated arguments with the Israeli security forces’. Similarly,
in a report to the Security Council dated 31 October 1990 the Secretary-General noted that although the RAO program had ‘helped to defuse tense situations, avert maltreatment of vulnerable groups, reduce interference with the movement of ambulances, and facilitate the provision of food and medical aid during curfews’, the program’s Palestinian beneficiaries were of the opinion that it did not have ‘the necessary impact on the behaviour of the Israeli authorities’. Thus, at its peak the RAO program was unable to bridge the protection gap in relation to Palestine refugees in the OPT, who continued to face serious violations of person and property at the hands of the Occupying Power. According to John Dugard, the Special Rapporteur of the United Nations Commission on Human Rights, these violations, which have persisted until the present, include:

...loss of life, inhuman and degrading treatment, arbitrary arrest and detention without trial, restrictions on freedom of movement, the arbitrary destruction of property, the denial of the most basic economic, social and educational rights, interference with access to health care, the excessive use of force against civilians and collective punishment.

In order to facilitate the Agency’s activities under its emergency program, the Operational Support Officers Program was introduced in 2000 to assist in facilitating the delivery of humanitarian goods, securing the safe passage of Agency staff through checkpoints and more generally enhancing the proper implementation of Agency programs in accordance with United Nations norms. While the Operational Support Officers Program is not mandated or equipped to provide the Palestine refugees with protection (in the UNHCR sense), to the extent that it has assisted in the delivery of essential humanitarian aid to the refugees, it can be said to have indirectly, and in a relatively limited way, contributed to providing the refugees with a form of passive protection.

**Political Challenges**

In contexts of conflict outside of the Palestine refugee case, success in providing ‘international protection’, or effecting a durable solution, has been directly dependent on the existence of either (1) the support and will of the international

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87 UN Doc. S/21929, as quoted in Takkenberg, supra n. 12, 297.

community as manifest in the Security Council; and/or (2) the political will of the parties directly involved in the conflict. Thus, refugee problems in Afghanistan, Bosnia and Herzegovina, Cambodia, Central America, East Timor, Iraq, Kosovo and Namibia have benefited from various levels of support/action from the Security Council, sometimes acting under Chapter VII of the UN Charter, and the political support of the parties directly involved in the conflict as manifest in either an express agreement or effective military intervention. In some of these cases, action was taken on the basis that the problem at hand constituted a threat to international peace and security.

The questions that must be posed in the context of the Palestine refugees are: Has the international community through the Security Council demonstrated sufficient will and support in bringing about conciliation or in militarily intervening to protect Palestine refugees, deeming the issue a threat to international peace and security? Have the parties to the conflict demonstrated sufficient political will to address the issues of refugee protection and durable solutions? In short, the answer to each of the above must be ‘no’.

This conclusion stems from the fact that in the Palestine refugee context, the concrete and practical support of the Security Council for a durable solution has never existed beyond its affirmation, in Resolution 242 of 22 November 1967, of the necessity of achieving ‘a just settlement of the refugee problem’\(^89\), as well as its endorsement of the Quartet Road Map in Resolution 1515 of 19 November 2003 which provides that there should be ‘an agreed, just, fair, and realistic solution to the refugee issue’\(^90\). While the Quartet currently represents the international community, it has not taken any other practical steps in the direction of protecting the Palestine refugees or searching for a durable solution to their plight.

In so far as protection of Palestine refugees is concerned, an analysis of Security Council resolutions reveals a trend of weak Security Council intervention limited to instances of gross human rights violations of Palestinian civilians and refugees, a trend that is significantly at variance with Council behavior in other refugee and conflict situations. For example, following the Sabra and Shatila massacre of September 1982 in which hundreds of Palestine refugees were brutally murdered in Beirut, the Security Council passed Resolution 521 in which it condemned ‘the criminal massacre’ but only went so far as to authorize the Secretary-General ‘to increase the number of United Nations observers in and around Beirut’ and to ‘initiate appropriate

\(^89\) SC Res. 242, UN SCOR, 1382\(^{nd}\) mtg., UN Doc. S/RES/242 (1967).

\(^90\) SC Res. 1515, UN SCOR, 4862\(^{nd}\) mtg., UN Doc. S/RES/1515 (2003). For text of Road Map see, A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, annex to letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2003529/, May 7, 2003.
consultations’ with the Lebanese government regarding ‘the possible deployment of United Nations forces’.\footnote{SC Res. 521, UN SCOR 2396th mtg., UN Doc. S/RES/521 (1982).} Likewise, at the height of the 1987-1993 intifada, and two months following the 8 October 1990 killing of 17 unarmed Palestinian civilians and the injuring of another 150 by Israeli border guards in al-Haram al-Sharif compound in Jerusalem, the Security Council adopted Resolution 681 in which it merely called upon the High Contracting Parties of the Fourth Geneva Convention to ensure that Israel respect its provisions, and for the Secretary-General ‘to monitor and observe the situation regarding Palestinian civilians under Israeli occupation, making new efforts in this regard’.\footnote{SC Res. 681, UN SCOR 2970th mtg., UN Doc. S/RES/681 (1990).} Finally, in the aftermath of the murder of 29 Palestinian worshipers at al-Haram al-Ibrahimi by a machine gun wielding Jewish settler in 1994 in Hebron, the Security Council passed Resolution 904 in which it condemned the ‘massacre’ but only went so far as to ‘call for measures to be taken to guarantee the safety and protection of the Palestinian civilians throughout the occupied territory’.\footnote{SC Res. 904, UN SCOR 3351st mtg., UN Doc. S/RES/904 (1994).} This included the call for the establishment of ‘a temporary international or foreign presence’ as per the Israel-PLO 1993 Declaration of Principles on Interim Self-Government Arrangements, not a Council mandated UN presence as has happened in other cases.\footnote{Id. This resolution gave birth to the Temporary International Presence in Hebron observer team. \textit{See}, Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements, \textit{supra} n. 85, Annex II, art. 3(d).}

In contrast, following the killing of a number of refugees and three UNHCR staff members in East Timor, the Security Council passed Resolution 1319 in which it recalled ‘that grave violations of international humanitarian and human rights law have been committed and that those responsible for these violations should be brought to justice’.\footnote{SC Res. 1319, UN SCOR 4195th mtg., UN Doc. S/RES/1319 (2000).} The UN figured prominently in bringing about East Timor’s independence and is now in the process of examining the possibility of helping it establish an \textit{ad hoc} criminal tribunal for the purpose of trying persons responsible for serious crimes committed during the period of Indonesia’s rule. Likewise, the Security Council displayed considerable political will in establishing the UN Assistance Mission in Afghanistan for the purpose of leading the relief, recovery and reconstruction efforts in the country, as well as with requiring the UN Protection Force in Bosnia and Herzegovina to act as a cease-fire monitor and to assist the UNHCR in the delivery of essential humanitarian assistance. Security Council action in the case of Bosnia and Herzegovina was also important for establishing the principle of UN-protected ‘safe areas’ as a means of protecting vulnerable civilian and refugee populations.
Although the use of such safe area designations in Bosnia and Herzegovina failed to stop atrocities during the war, particularly at Srebrenica\textsuperscript{96}, the principle itself is sound and represented an innovative step taken by the Security Council to protect civilians and refugees during armed conflict.

Similarly, in the Palestine refugee context there has never existed a common political will among the parties to the conflict sufficient to considerably enhance the protection of the refugees’ interests or to implement a just and durable solution to their problem. As is well known, the refugees and their political leadership have consistently been of the view that a ‘just’ resolution of their plight necessitates the recognition of their right to return to their homes in accordance with General Assembly Resolution 194 (III). On the other hand, the state of Israel has been equally adamant that no right to return exists for the Palestine refugees, that any such return would necessarily bring about the demise of Israel as a Jewish state, and that, therefore, the answer to the refugees’ plight must be found in resettlement in a future Palestinian state, the host states or third countries.

In over half a century of conflict, these positions have essentially remained the same, and the plight of the Palestine refugees has gradually become worse. As a humanitarian organization, UNRWA was never mandated to conciliate and influence the political positions of the parties to the conflict on the refugee question. As noted above, this task was left to the UNCCP, whose durable solution efforts essentially came to a halt because of the inability of the parties to reconcile those positions. Since the beginning of the Madrid and Oslo processes, the Secretary-General has exercised durable solutions efforts through the Office of the United Nations Special Coordinator in the Occupied Territories, his Personal Representative to the Palestine Liberation Organization and the Palestinian Authority and the framework of the Quartet. UNRWA, on the other hand, has continued to provide essential humanitarian relief and development-oriented interventions to the refugees for over five decades.

\textsuperscript{96} See, generally, UNSG, \textit{The Fall of Srebrenica, Report of the Secretary-General Pursuant to General Assembly Resolution 53/55}, UN Doc. A/54/549 (1999).
CONCLUSION

Any approach to protecting Palestine refugees and implementing a just and durable solution must begin by acknowledging and dealing with the root of their problem: the unresolved territorial conflict and the denial of the right of the Palestinian people to self-determination, including statehood, and prolonged occupation, settlement construction and consequent dispossession and exile. In many ways, an international protection ‘regime’ already exists in the form of relevant international legal principles as they relate to the rights of protected persons subject to occupation and the rights of peoples. In the short term, the focus must be on redoubling the effort to ensure that Israel respects and ensures respect for the law of belligerent occupation, particularly as embodied in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. As stated above, the principal protection vulnerabilities of the majority of Palestine refugees today are in relation to the OPT. As such, any meaningful protection of Palestine refugees must begin here. Furthermore, increased energies must be devoted toward ensuring Israeli and host state compliance with the International Bill of Rights, in addition to numerous other human rights instruments including the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination against Women, and the Convention on the Rights of the Child. In the long-term, the focus must be on the establishment of an independent and viable Palestinian state, living side by side with Israel within secure and recognized borders, thereby rendering protection a non-issue. Only a just and durable solution of the refugee problem that addresses the statelessness that is the lot of the majority of Palestine refugees and the issue of occupation in the OPT can comprehensively solve their protection gap dilemma.

97 This is composed of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (along with its two optional protocols).
Temporary protection is widely regarded as an international legal norm that is now obligatory on states in certain circumstances with regard to their treatment of a mass influx of refugees, or persons fleeing situations of armed conflict or civil strife.\(^1\) As a recognized status, it is the most recent of the three major possibilities for protection of refugees which a state can offer—the other two being the now-universal obligation of \textit{non-refoulement} (non-return)\(^2\), and the non-obligatory protection of political asylum\(^3\).

Despite the controversy temporary protection has generated, it has special significance to the Palestinian refugee situation. For historical, legal and political reasons, Palestinian refugees and stateless individuals have been effectively denied many of the minimal legal protections available to other refugees under the 1951 Refugee Convention regime. This has had grave consequences, both for Palestinians

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\(^{3}\) See, Grahl-Madsen, \textit{id.}, 108.
within the Israeli-occupied territories and in exile, the latter including those within the Arab states.\(^4\)

The implications of the legal lacunae in which Palestinians find themselves are more stark in the post-Oslo era when a politically-negotiated resolution of the conflict appears more remote than ever. The escalating Israeli violence, directed at a Palestinian population held captive in towns and villages by lengthy curfews and checkpoints, as well as ongoing ethnic cleansing and low-intensity population transfer, is generating new forms of Palestinian displacement.

It is in this post-Oslo, second intifada framework that a regularized program of temporary protection appears to be a particularly attractive option for Palestinians fleeing renewed conflict in the occupied territories, as well as those Palestinian refugees already in exile who lack third-state citizenship, and those remaining in Arab states. In this chapter, the authors argue for an internationally-harmonized approach to temporary protection for Palestinian refugees and stateless persons. Temporary protection would offer Palestinians in exile in any of the main regions to which they have fled the protection rights they currently lack, with many of the concomitant rights of an individual granted asylum, but without the permanent status accompanying integration or resettlement that might compromise their right to return to their places of origin.

Currently, a comprehensive negotiated solution to the protracted conflict is more remote than ever, particularly in the absence of political will amongst the relevant states to enforce its realization. Harmonized temporary protection would create an incentive for participating states to engage in the implementation of durable solutions for Palestinian refugees. While TP tied to refugee choice and right of return would provide tremendous incentive to the Arab states and to the refugees themselves to commit to the process, a set of special incentives and disincentives is designed to encourage Israeli participation.

Moreover, the international community’s experience over the last forty years of implementing refugee solutions, shows clearly that the only solutions which have been durable are those based on equitable responsibility-sharing driven by refugee choice. Finally, the status of temporary protection with the expectation of repatriation to place of origin is fully consistent with principles of international law on the right of return, as well as principles governing the design and implementation of durable solutions for refugees in general, and Palestinian refugees in particular.

THE LEGAL FRAMEWORK OF TEMPORARY PROTECTION

The Refugee Convention and Protocol

The current international legal regime for refugees is a relatively recent one, established in the framework of the 1951 Convention Relating to the Status of Refugees, its companion 1967 Protocol and the Statute of the United Nations High Commissioner for Refugees. With this regime in place, the international community initiated a consensus model of refugee problem-solving, sharing the responsibility of implementing a multi-leveled durable solution process driven by the pivotal principle of refugee choice.

The Refugee Convention and Protocol incorporate two essential state obligations: the application of the now universally-accepted definition of ‘refugee’ which appears in article 1A(2) of the Convention, and the obligatory norm of non-refoulement, which is incorporated in article 33(1). Non-refoulement as a peremptory norm, is widely respected even by states not signatories to the Refugee Convention or Protocol. Meeting the refugee definition automatically triggers the protection of non-refoulement; it does not entitle the individual to asylum status. Nevertheless, the Convention requires states to extend protection as long as the conditions justifying

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8 According to Erika Feller, the Director of UNHCR’s International Protection Division, in order to address the main challenges in protection of refugees, ‘[t]he overarching theme that has to run through the entire process is responsibility sharing, based on international cooperation and solidarity’. Erika Feller, ‘The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime’, Washington University Journal of Law and Policy 5 (2001), 129-40, 132.
9 ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ Refugee Convention, supra n. 5, art. 33(1).
10 ‘…States have been prepared to accept that the principle of non-refoulement should be scrupulously observed. In numerous resolutions of international bodies in which this principle has appeared in recent years, this principle has been stated without any qualification.’ G. J. L. Coles, Temporary Refuge and the Large-Scale Influx of Refugees, paper submitted to the UNHCR Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, UN Doc. EC/SCP/16/Add.1 (1981).
non-refoulement continue, thus requiring more permanent status if return becomes impossible over the longer term—an obligation of non-refoulement through time.\textsuperscript{11}

UNHCR describes the three main durable solutions for refugees as repatriation, host country absorption, and third-state resettlement.\textsuperscript{12} Voluntary repatriation in safety and dignity, based on the fundamental right to return to one’s home and country, is recognized both in principle and in state practice as the most appropriate solution to refugee flows.\textsuperscript{13} In the 1990s alone, approximately 12 million refugees returned or were repatriated around the world, while some 1.3 million refugees and persons of concern to UNHCR were resettled.\textsuperscript{14} In a single year—1999—over 1.6 million refugees returned to their homes, while 45,000 refugees resettled to third states.\textsuperscript{15}

The Convention restrictively defines the situations in which a state may terminate an individual’s status as refugee. The detailed and specific nature of the cessation clauses indicate they are to be restrictively interpreted.\textsuperscript{16} The combination of the requirement that states must examine all claims to refugee status made in their territory, the non-refoulement obligation and the restrictive cessation clauses, squarely place the obligation on states not to return individuals when their lives or safety are at risk, and to maintain that obligation until and unless a cessation condition is met.

**Elements of temporary protection: between asylum and non-refoulement**

Although the Refugee Convention was drafted to address the mass displacements caused by World War II in Europe and has provisions for group or category determinations, it has been viewed by states as primarily an instrument for


\textsuperscript{12} See, UNHCR, Executive Committee, General Conclusion on International Protection, No. 90 (LII), (2001), para (j)-(k). See also, UNHCR, Executive Committee, Conclusion on Resettlement as an Instrument of Protection, No. 67 (XLII) (1991), para (g).

\textsuperscript{13} See, UNHCR, Executive Committee, Conclusion on Voluntary Repatriation, No. 40 (XXIX) (1985); UNHCR, Executive Committee, Conclusion on Voluntary Repatriation, No. 18 (XXXI) (1980).

\textsuperscript{14} UNHCR, *Refugees and Others of Concern to the UNHCR, 1999, Statistical Overview* (Geneva, 1999), Table V.20—‘Refugee Resettlement in Selected Countries, 1990-1999’.


\textsuperscript{16} ‘The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.’ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), para. 116.
individualized refugee assessments.\textsuperscript{17} Thus, some states view the Refugee Convention as inapplicable to situations of mass refugee flows.\textsuperscript{18} New instruments and policies have been devised to bridge the gap between states’ obligations of \textit{non-refoulement} and the need for a durable solution in situations where individualized asylum claims overwhelm the capacity of state systems, or the cause of flight is for non-Convention reasons. It is in this context that temporary protection has emerged as a regularized status in recent years.

Temporary protection in its more recent, formalized sense\textsuperscript{19}, is characterized by a set of common elements. First, it is a grant of protection of a temporary nature from the receiving state to specific groups or individuals.\textsuperscript{20} Second, it is granted with the expectation that it is an interim solution, and that at the end of the time period of the grant, the individual or group will either return home or, if return is not desirable, that either the receiving or a third state will offer more permanent status.\textsuperscript{21} Third, temporary protection may afford fewer rights to the individual receiving the status than she would receive as a Convention refugee.\textsuperscript{22}

From the perspective of the state, temporary protection has the following advantages:

1. it is a humanitarian response to situations of mass influx, whether of persons who might qualify as refugees under the Refugee Convention definition, or who would not qualify, but are fleeing emergency situations in their home


\textsuperscript{19} For a thorough study on the range of practice of temporary protection see, Secretariat of the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, \textit{Inter-Governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia: Report on Temporary Protection in States in Europe, North America and Australia} (Geneva, 1995).


\textsuperscript{21} Describing the more formalized temporary protection, the Inter-Governmental Consultations on Asylum study found four common elements: admission, or extension of stay; non-refoulement; basic rights/humanitarian standards; and eventual return. \textit{Inter-governmental Consultations on Asylum, supra} n. 19, 11. This has particular implications for Palestinians, which will be addressed below.

\textsuperscript{22} Rutinwa, \textit{supra} n. 20, para. 1.7.
countries and deserve humanitarian treatment in their place of refuge; it is an alternative to the receiving states’ obligation to provide full asylum procedures otherwise required for persons seeking refugee status, conserving resources in often overstretched adjudication systems; it absolves receiving states from having to grant asylum to large numbers of putative refugees, addressing domestic political debates; it has frequently been implemented as part of responsibility-sharing, thus relieving any individual state of having to absorb the entire refugee flow involved; and, it demonstrates both to the arriving alien and the world at large that the state is providing protection on a temporary basis, with the understanding that this status will be revoked once repatriation is feasible.

From the perspective of the putative refugee, temporary protection has both advantages and disadvantages, depending on a number of variables determined by domestic legislation. Generally, however, the advantages include:

1. the individual is not required to go through a protracted and often taxing asylum application procedure;
2. the individual may be granted many of the protection rights afforded to an asylee: the right to work, the right to freedom of movement, the right to obtain certain basic benefits for subsistence; and
3. the status is granted for a definite period of time, allowing the individual to make specific plans for repatriation, or for resettlement in a third state within a certain time frame.

Temporary protection measured under guarantees of the Refugee Convention

Aside from their core obligation of non-refoulement through time, under the Refugee Convention states must provide a number of economic and social rights to recognized refugees, and to expand those rights over time. The rights guaranteed by the Convention are employment, housing, public education, property ownership,

\[23 \text{ Id.}
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\[24 \text{ Feller, supra n. 8, 133.}
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\[25 \text{ See, Sopf, supra n. 11, 143.}
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\[26 \text{ See, Rutinwa, supra n. 20, para. 1.7. See also, Sopf citing Conclusion on People Displaced by the Conflict in the Former Yugoslavia 4 (1992) <http://www.unhcr.ch/legal/bibliographic/papers.4htm> (accessed Aug. 1, 2001), supra n. 11.}
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freedom of movement, identity papers, travel documents, and social security.\textsuperscript{27} The Convention requires that most of these rights be guaranteed at the same level as nationals of the state, and all are guaranteed at least at the same level as for other aliens.\textsuperscript{28} The Refugee Convention is not the only constraint on states that deny human rights, as they may be bound to such instruments as the International Covenant on Civil and Political Rights\textsuperscript{29}; the International Covenant on Economic, Social and Cultural Rights\textsuperscript{30}; the Convention on the Rights of the Child\textsuperscript{31}; the Convention on the Elimination of Racial Discrimination\textsuperscript{32}; the Convention on the Elimination of all Forms of Discrimination Against Women\textsuperscript{33}; and the Convention Against Torture\textsuperscript{34}. European states’ actions towards refugees and other non-refugee aliens or migrants are further regulated by the European Convention on Human Rights\textsuperscript{35}, the Convention on the Status of Stateless Persons\textsuperscript{36}, and the Convention on the Reduction of Statelessness\textsuperscript{37}. However, since there is no internationally-binding standard that guarantees certain human rights for persons granted temporary protection, a state may deny even basic Convention rights in its discretion.\textsuperscript{38}

\textsuperscript{27} See, Refugee Convention, \textit{supra} n. 5, arts. 13, 14, 17, 21, 22, 26, 27 and 28 (on rights to property, housing, education, movement, identity and travel documents).

\textsuperscript{28} There are three main categories of status recognized in the Refugee Convention, each with different levels of rights-protections: simple presence, lawful presence and lawful residence. \textit{See id.}, arts. 2, 3, 4, 27 and 33; \textit{cf.} arts. 18, 26 and 32 and arts. 15, 17(1), 19, 21, 23, 24 and 28. \textit{See}, Goodwin-Gill, \textit{supra} n. 2, 307-9.


\textsuperscript{34} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85 (\textit{entered into force} June 26, 1987).


Revisiting ‘temporary protection’ in the Arab world

Although part of a larger region of the Arab world, the states in which the vast majority of Palestinian refugees reside are Egypt, Jordan, Lebanon, occupied Palestine, Syria, Iraq and, in lesser numbers, the Gulf states. All are members of the Arab League, and thus make up the relevant region for discussing temporary protection for Palestinians.39

The instruments that bind certain states in the region are the Refugee Convention or Protocol, ratified by nine states.40 The African Arab countries are also signatories to the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on Human and Peoples’ Rights and the major international instruments on human rights.41 International human rights instruments also bind Arab states.42 Only a handful of states have ratified either of the two statelessness conventions.43

The single most important regional body in the Arab world is the Arab League. It was established by the Arab League Pact in March 1945, with the ‘purpose of … [drawing] closer the relations between member States and coordinat[ing] their activities with the aim of realizing a close collaboration between them …’.44 Through the Arab League, there have been a number of efforts to create a regional system of human rights.45 The Declaration on the Protection of Refugees and Displaced Persons in the Arab World delineates a broad range of protection rights for refugees and displaced persons, but has no binding force.46

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42 For ratification information see, id.


The Arab world’s efforts to create regional standards for the protection offered to displaced Palestinians predate the formalized TP programs in the Western world. As the first Palestinian exodus began in large numbers during the 1947-1949 conflict in Palestine, the neighboring Arab states provided shelter to the hundreds of thousands of refugees seeking refuge in their territories. Less than two decades later armed conflict in the region led to another Palestinian exodus. Once again, refugees found safe refuge in neighboring Arab states. The Arab states’ five decades of de facto temporary protection offered to the Palestinians is unprecedented, as it has often been at great social, economic and political cost. Although critics frequently challenge the Arab states’ treatment of Palestinians in terms of violations of rights and for not offering Palestinians permanent status, they ignore the fact that the Arab states are under no legal obligation to grant permanent status to Palestinian refugees, and that the Arab states have in fact supported what the refugees themselves have demanded all along: the right to return to their original lands and homes.

The Arab League Council and the Council of Arab Ministers of the Interior have adopted a series of resolutions concerning the status and treatment of Palestinian refugees in their territories. The Protocol Relating to the Treatment of Palestinians adopted by the Council of Ministers in 1965 in Casablanca (Casablanca Protocol) is the most important instrument relevant to temporary protection of Palestinian refugees in Arab host states. The Casablanca Protocol was a major effort to regularize the status of Palestinians in the states where they had primarily fled in 1948, and which continued to host them. In its five articles, the Casablanca Protocol requires that Palestinians receive the same treatment as nationals of Arab host states with regard to employment; the right to leave and return to the territory of the state in which they reside; freedom of movement between Arab states; and issuance and renewal of travel documents.

Together, the standards set forth in League Council resolutions and the Casablanca Protocol have afforded Palestinian refugees, in theory if not always in practice, a type of temporary protection in Arab League member states with the expectation that refugees will return to their homes of origin. Provisions relating to employment

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49 The Casablanca Protocol refers to the treatment of Palestinians generally in Arab states, recognizing ‘… that the legal position of non-refugee Palestinians is much the same as that of those who had become refugees in 1948-49’. Takkenberg, id., n. 57, 141.

50 Protocol on the Treatment of Palestinians, arts. 1-5; Shiblak, supra n. 47.
allowed refugees to enter the labor market in host states. Many of those Arab states hosting the majority of Palestinian refugees incorporated League standards on employment into domestic law. Suspension of visa requirements during the 1950s, and issuance of travel documents facilitated freedom of movement and enabled refugees to fill vacancies in the labor market, particularly in the Gulf states. Generally, Palestinian refugees in Jordan and Syria have accrued the widest range of benefits in law and in practice. In Jordan, refugees have the added protection afforded through the acquisition of Jordanian nationality, while retaining their status as refugees and their right to return to their homes of origin.

Despite attempts by the Arab League to create normative standards of treatment and status grants for Palestinians in the Arab world, however, actual practice is inconsistent. De facto temporary protection under League resolutions and the Casablanca Protocol has not had the effect of improving the civil and human rights of the refugees pending the implementation of durable solutions to their plight. Due to their unique historical and legal situation and the ‘protection gap’ discussed below, Palestinians receive vastly differing treatment in the different areas of the world where they find themselves. Palestinian refugees in Arab host states, Casablanca Protocol notwithstanding, are accorded fewer rights than provided for under the Refugee Convention.

**Palestinian Refugees, International Protection and Durable Solutions**

More than half a century of persecution of Palestinians inside their historic homeland has produced a chronic pattern of forced displacement that can only be

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52 During the 1950s a series of reciprocal agreements was concluded between Kuwait and other Arab states that canceled the need for visas. Brand, *id.*, 111.


characterized as a form of forced population transfer or ethnic cleansing.\textsuperscript{55} It is estimated that three-quarters of the Palestinian people are refugees and displaced persons.\textsuperscript{56} Approximately one in three refugees worldwide is Palestinian.\textsuperscript{57} Root causes of Palestinian displacement include: denial of the right to self-determination, armed conflict, colonization, foreign occupation, racial discrimination, and practices of ethnic/religious separation akin to internationally recognized forms of apartheid.\textsuperscript{58} The absence of temporal and geographical constraints on displacement of the indigenous Arab population of Palestine, its ethno/religious character, systematic nature, and lack of effective remedies gives special significance to international protection for this refugee and stateless population. Less than one percent of the total number of displaced Palestinians has been able to return to their homes and villages of origin either inside Israel or in the 1967 occupied Palestinian territories.\textsuperscript{59}

**Palestinian refugees and international refugee protection**

The other defining feature of the Palestinian refugee condition is the lack of


\textsuperscript{56} See, Akram and Rempel, id., 25-7 and sources cited.


\textsuperscript{58} For a detailed discussion of these factors and sources see, Akram and Rempel, id, 27-53 and sources cited.

both national and international protection. Most host states where the majority of Palestinian refugees reside do not recognize or do not apply the full panoply of basic rights afforded to refugees under relevant international and regional instruments. As discussed below, the legal status of Palestinian refugees in these states is more often shaped by domestic political and security considerations. The lack of national protection is compounded by the lack of international protection (often referred to as the ‘protection gap’).

No international agency is currently recognized by the international community as having an explicit mandate to systematically work for the realization of the basic human rights of all Palestinian refugees, and to search for and implement durable solutions consistent with international law as affirmed in UN General Assembly Resolution 194 (III). Practically, this anomaly means that most of the nearly seven million Palestinian refugees, or nearly one-third of the world’s total refugee population, do not have meaningful access to international protection, in the sense that such protection is legally required or available to other refugee populations.

To fully understand the reasons and consequences of the protection gap it is necessary to compare certain aspects of the special Palestinian refugee regime with the international regime established for all other refugees.

Article 1A(2) of the Refugee Convention sets out the universally-accepted definition of ‘refugee’ as:

Any person who … as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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62 Refugee Convention, supra n. 5, art. 1A(2).
This individualized definition of a refugee, however, was not intended to apply to Palestinian refugees. Their situation was specifically designated for different treatment than for other refugees falling within the Refugee Convention regime. Palestinians as a group or category of refugees are covered by the Refugee Convention in article 1D—a provision which the drafting history makes absolutely clear is applicable solely to Palestinians and no other group of refugees.

Article 1D provides:

This 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 protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

When this provision was drafted, Palestinians were afforded a special protection regime consisting of the United Nations Conciliation Commission on Palestine, which had a protection mandate, and the United Nations Relief and Works Agency.

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63 For a detailed discussion of the instruments and agencies comprising the special regime established for Palestinian refugees, the various interpretations of the provisions that apply, and the consequences of the interpretations 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 11 (2001-2002), 1-71. For a somewhat differing interpretation see, Takkenberg supra n. 48; see also, Goodwin-Gill, supra n. 2, 91-3 and 241-6. For a collection of critical writing on the history, politics and legal situation of Palestinian refugees see, Naseer Aruri (ed.), Palestinian Refugees: The Right of Return (London: Pluto Press, 2001), supra n. 4.

64 For a detailed treaty analysis of article 1D and its related provisions in light of the travaux preparatoires, a comparison of various interpretations, as well as a discussion on the problems of defining ‘Palestinian refugee’ see, Takkenberg, supra n. 48; see also, Susan M. Akram and Guy Goodwin-Gill, ‘Brief Amicus Curiae, Board of Immigration Appeals, Falls Church, Va.’, reprinted in, Palestine Yearbook of International Law 11 (2001-2002), 185-260.

65 Refugee Convention, supra n. 5, art. 1D.

66 On 11 December 1948, the General Assembly passed Resolution 194 (III), establishing the UN Conciliation Commission on Palestine and setting out its multi-level protection mandate and terms of reference. GA Res. 194 (III), supra n. 61.
for Palestine Refugees in the Near East, which had an assistance mandate. The
delegates to the committee drafting the Refugee Convention considered that it was
both unnecessary and inadvisable to include Palestinians in the Refugee Convention
regime as long as two other UN agencies were providing them with the twin functions
of protection and assistance. Moreover, for reasons that made the Palestinian case
unique, the drafters believed that Palestinians would get less protection than they
desired if they were subsumed with other refugees in the general protection system
of the Refugee Convention.

However, for a number of historical and political reasons, Palestinian refugees
have been considered excluded from the coverage of the Refugee Convention
for most purposes, and at the same time, the special refugee regime long-since
failed to provide the international protection they were to receive as long as their

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67 UNRWA was established by UN General Assembly Resolution 302 (IV) on 8 December 1949,
as an interim agency to provide subsistence for the refugees until their required durable solution could
be implemented. UNRWA was given only a three-year mandate. GA Res. 302 (IV), UN GAOR, 4th
Sess., UN Doc. A/RES/302 (1949). UNRWA's mandate was limited by the definition of persons who
were eligible for UNRWA relief. By 1993, UNRWA defined eligible persons as: ‘[Those] (1) whose
normal residence was Palestine during the period June 1, 1946 to May 15, 1948; (2) who lost both their
homes and means of livelihood as a result of the 1948 conflict; (3) who took direct refuge in one of
the countries or areas where UNRWA provides relief; and (4) who are the direct descendants through
the male line of persons fulfilling 1-3 above.’ See, UNRWA Consolidated Registration and Eligibility
Instructions, Jan. 1, 1993.

68 See, remarks of the delegates to the Third Committee of the General Assembly, Palestine refugees
were ‘the direct result of a decision taken by the United Nations’, and thus, ‘a direct responsibility on
the part of the United Nations’. UN GAOR, 5th Sess., 328th mtg, paras. 52 and 55 (1950) (Mr Azkoul,
Lebanon).

69 The proponents of the special regime further believed that ‘if the Palestine refugees (were
included) in a general definition of refugees, they would become submerged and would be relegated
to a position of minor importance’… thus, they should ‘continue to be granted a separate and special
status’. Id. (Mr Baroody, Saudi Arabia) The Arab state representatives were also concerned that if
the other relevant UN agencies ceased functioning, the Palestine refugees should be protected by the
UNHCR. UN GAOR, 5th Sess., 344th mtg., para. 13 (1950) (Mr Raafat, Egypt).

70 The protection gap applying to Palestinian refugees and stateless persons is due to a series
of instruments and provisions that are interpreted as excluding Palestinians from their coverage.
These Palestinian exclusion clauses are in the UNHCR Statute, supra n. 7, para. 7(c); the Convention
Relating to the Status of Refugees, supra n. 5, art. 1D; and the Convention Relating the Status of
Stateless Persons, supra n. 36, art. 1(2)(i). UNHCR originally took the position that because of para.
7(c) of its Statute, it was precluded from any international protection mandate over Palestinians.
Recently, however, UNHCR has proposed a redefinition of article 1D of the Refugee Convention
that would provide some Palestinians outside UNRWA-areas with protection under the Convention,
and permit UNHCR’s protection mandate to extend to them. See, UNHCR, Note on the Applicability
of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees
(Geneva, 2002).
refugee situation remained unresolved. The implications of this protection gap for Palestinians is evident in both aspects of refugee protection: in day-to-day security and human rights protection, and in the search for durable solutions. Most countries in which Palestinians seek protection outside their place of origin interpret the relevant provisions in a manner that fails to grant them adequate protection—although the precise interpretations differ from state to state. Palestinians for the most part have difficulty when they find themselves in third (non-Arab) states and apply for political asylum, residence based on family reunification, or other related protections that are available to other refugees in the world. Many remain in Western states without recognized legal status, without work permits and without the basic essentials to live in freedom and dignity.

In the Arab states, due to the long-standing consensus that the solution to the Palestinian problem is repatriation to their homes and lands, a series of agreements and resolutions, as mentioned above, bound the host countries to give Palestinian refugees the right to remain in their territories in temporary status. At the same time, most Arab states are not signatories to the 1951 Refugee Convention, and are thus not

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71 The distinction in the mandates of the two separate agencies that comprise the special regime for Palestinian refugees—i.e., UNCCP, which had the mandate of providing international protection to the refugees; and, UNRWA, which had a much narrower mandate of providing assistance—although they can overlap in actual practice, is quite marked as a legal matter. The concept of international protection has two main aspects: day-to-day protection of the legal and human rights, interests and physical integrity of the refugee under all applicable international and domestic laws; and the most critical aspect for refugees, which is the obligation to promote and implement durable refugee solutions under international legal principles. See, UNHCR, Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Opening Statement by the High Commissioner, 32nd Sess., UN Doc. EC/SCP/16/Add.1 (1981), 1. Assistance, on the other hand, means the provision of basic welfare: food, clothing and shelter for the subsistence needs of refugees. Soon after the establishment of the UNCCP, it became clear that that body would be unable to implement the required durable solution based on the refugees’ demands to return to their homes because of Israeli intransigence. Thereafter, in a series of measures, the UN reduced the UNCCP’s mandate, and de-funded its major protection role toward the refugees. See, David P. Forsythe, United Nations Peacemaking: The Conciliation Commission for Palestine (Baltimore: John Hopkins University Press, 1972).

72 There are two main categories of interpretation of article 1D of the Refugee Convention: one category is of those states that do not recognize or incorporate article 1D in their asylum law at all; and the second is those states that do incorporate 1D. The first category of states, which includes the United States, Canada, Austria and Switzerland, ignore 1D and determine Palestinian claims under the normal criteria of article 1A(2). The second group of states does apply 1D, but interprets it in a variety of inconsistent ways, even within domestic courts. There are at least five distinct interpretations of 1D among and within these states. For a review of the cases see, Akram and Rempel, supra n. 55, 59-61 and sources cited. For a detailed discussion of the jurisprudence of 11 states on Palestinian refugee/asylum claims see, Akram and Goodwin-Gill, supra n. 64, 23-4 and 47-52.

73 Examples from United States cases reflect the consequences of confusion over the legal status of Palestinians as refugees and stateless persons. For a description of such issues see, id.
Rights in Principle, Rights in Practice

bound by either article 1A(2) or article 1D of that Convention. They are, however, bound by the customary international law principle of non-refoulement, obliging them not to expel Palestinian refugees from their territories to a place where their ‘lives or freedom would be threatened’. Due to the Arab states’ failure to recognize Palestinians as refugees under the Refugee Convention—recognition which would guarantee them the minimal rights of that Convention—and the failure of these states to guarantee Palestinian refugees legal protection, they do not routinely grant Palestinian refugees many basic human rights, despite the requirements of the Casablanca Protocol. Thus, Palestinians are routinely denied the right to work, to travel freely either inside or outside their territories, to unite with family members, to own private property, or to benefit from a wide spectrum of international human rights guarantees as discussed below.

Aside from the implications of the protection gap for the day-to-day protection of Palestinian refugees and stateless persons, the consequences of this gap may be even more profound for the search for durable solutions. Palestinians as refugees have been denied an international body to represent them in furthering their search for a durable solution, significantly affecting them in at least three major contexts: international representation to assert their rights as refugees to return, obtain restitution and compensation; access to international mechanisms to claim and promote these rights; and an internationally-mandated entity to preserve and promote their individual as well as collective claims in the context of a negotiated peace plan. Due to the ‘exclusion clause’ of article 7(c) in its Statute, UNHCR has never interceded to protect Palestinian refugees in any of these three aspects of the search for a durable solution, despite its clear mandate and rich practice in these aspects concerning all other refugee populations.

For a more detailed discussion of the implications of the protection gap in the search for a durable solution see, Akram, supra n. 4, 165.

The UNHCR’s protection functions, as spelled out in its Statute, include ‘Promoting the conclusion and ratification of international conventions for the protection of refugees … assisting governmental and private efforts to promote voluntary repatriation or assimilation … obtaining permission for refugees to transfer their assets and especially those necessary for their resettlement …’, UNHCR Statute, supra n. 7, para. 8.

In the last 30 years, the principles on refugee return, restitution and compensation have been greatly strengthened by provisions in numerous negotiated settlements. See, e.g., Agreement Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, reprinted in, International Legal Materials 31/1 (1992), 180-204; the General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, reprinted in, International Legal Materials 35/2 (1996), 89-169; and the peace agreements on Guatemala and El Salvador under the CIREFCA accords see, Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons, UN Doc. CIREFCA/891989) 14/).
Palestinians as refugees or stateless persons

Although the UN bodies concerned with the Palestine refugee problem referred to ‘Palestinian’ or ‘Palestine’ refugees as meaning the relief definition incorporated in the UNRWA regulations, no formal definition of ‘Palestinian refugee’ was adopted for purposes of international protection. The basic components of the de facto definition of Palestinian refugee meant by the UN drafters were based on UNRWA’s assistance definition, which were: a Palestinian national or individual having his/her permanent residence in Palestine who lost home, lands, or livelihood as a result of the 1948 conflict. Because this definition referred to approximately two-thirds of the Palestinian population, it would be illogical to apply an individualized definition such as the one under consideration for the Refugee Convention.

Stateless persons who are refugees are covered by the Refugee Convention. The rights of stateless persons who are not refugees, or stateless persons who are excluded from the coverage of the Refugee Convention, are governed by the Convention Relating to the Status of Stateless Persons, and the Convention on the Reduction of Statelessness. Although these Conventions are significant in terms of the legal rights they afford stateless persons and the obligations required of state signatories, they have limited reach, as they have been ratified by very few states.

In order to obtain the benefits of these Conventions, a person must be determined to be ‘stateless’—defined as ‘a person who is not considered a national by any state under the operation of its law’. The Convention on the Reduction of Statelessness

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77 The legal adviser to the UNCCP secretariat prepared a draft definition of a Palestine refugee for protection purposes, however, by the time the draft was completed, the international community had already begun to dismantle its authority. UNCCP, Addendum to Definition of a ‘Refugee’ Under paragraph 11 of the General Assembly Resolution of 11 December 1948 (Prepared by the Legal Advisor), UN Doc. W/61/Add.1(1951).

78 Palestinians are considered to have been given a status similar to that of statutory refugees, as described in article 1A(1) of the Refugee Convention. See, Grahl-Madsen, supra n. 2, 140-2; see also, Goodwin-Gill, supra n. 2, 93. See also, Akram and Goodwin-Gill, supra n. 64, 70-2.

79 Convention Relating to the Status of Refugees, supra n. 5, art. 1A. See also, Convention Relating to the Status of Stateless Persons: ‘Those stateless persons who are also refugees are covered by the Convention Relating to the Status of Refugees of 28 July 1951.’ Id., supra n. 36, preamble.


81 Convention Relating to the Status of Stateless Persons, supra n. 36, art. 1.
adopts the same definition of stateless persons, but also recommends that ‘persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality’.\(^{82}\) This basic definition of ‘stateless person’ is now considered customary international law, and therefore binding even on states that are not party to one or other of these Conventions.

The focus of the Convention on the Status of Stateless Persons is to improve the status of such persons, and to grant them the widest possible guarantees of fundamental human rights.\(^{83}\) For Palestinians, the most important aspect of the Convention on the Reduction of Statelessness is the recommendation for an expanded ‘stateless’ definition, and article 11, which provides for the establishment of an agency with a mandate to protect and assist stateless persons claiming the benefit of that Convention. In 1974, the UN General Assembly entrusted the UNHCR with the mandate to protect and assist stateless persons as required by article 11.\(^{84}\) The UNHCR has never exercised this mandate under the Convention.\(^{85}\)

As for the interpretation of the status of Palestinians as stateless persons, these have varied among and even within those states that are signatories to one or other of the two statelessness Conventions.\(^{86}\) However, the vast majority of Palestinians coming from many of the Arab states are de facto stateless. By not recognizing them as such, Germany, Switzerland and other European states deny them rights guaranteed under the Convention on the Reduction of Statelessness such as obtaining travel documents, employment authorization and granting nationality to their children born in those countries.\(^{87}\) Aside from being denied such benefits as travel documents, access to appropriate asylum or residence processing, obtaining authorization to work and other fundamental rights guarantees, Palestinians have also not received the benefit of UNHCR’s protection mandate under article 11 of the Convention.

Appropriately interpreted, the regime of UNCCP, UNRWA and article 1D of the Refugee Convention were designed to guarantee that Palestinian refugees would at all times receive both protection and assistance, whether by two other UN agencies, or by UNHCR (preferably in combination with UNRWA). Article 1D was meant to

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\(^{82}\) Convention on the Reduction of Statelessness, supra n. 37.

\(^{83}\) See, e.g., arts. 24, 26, 27 and 28 of the Convention on the Status of Stateless Persons, supra n. 36.

\(^{84}\) GA Res. 3274 (XXIX), UN GAOR, 29th Sess., UN Doc. A/RES/3274 (1974). This mandate was extended indefinitely by GA Res. 31/36, UN GAOR, 31st Sess., UN Doc. A/RES/31/36 (1976).


\(^{86}\) See, Takkenberg, supra n. 48, 92-123; see also, Akram and Goodwin-Gill, supra n. 64.

\(^{87}\) See, Goodwin-Gill, supra n. 2, 243-6; Takkenberg, supra n. 48, 190.
ensure that if the twin-agency regime of UNCCP/UNRWA should fail in either of its functions, the Refugee Convention would automatically cover Palestinian refugees as an entire group or category, without the necessity of applying the individualized definition of refugee in article 1A(2). Since the Refugee Convention only obliges states to respect the principle of *non-refoulement*, states are free to grant any additional status to refugees they choose, whether asylum or temporary protection or some other form of more permanent status.

However, article 1D mandates that in the Palestinian case, states must grant ‘the benefits of [the] Convention’ to these refugees pending ‘the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations’. This language has several implications. First, once article 1D is triggered, states are required to grant Palestinian refugees protection (‘the benefits of this Convention’). Second, states are required to grant protection to Palestinian refugees only until their position is settled according to the relevant UN resolutions. The relevant resolutions clearly center on General Assembly Resolution 194 (III), which embodies the consensus of refugee repatriation and compensation. This is so primarily because the drafting history of article 1D makes clear that the drafters intended to create—and did create—the special protection regime with an agreed-upon durable solution and mandated both a primary and alternative body to bring about that solution, the UNCCP and the UNHCR. Third, such protection should be consistent with the international legal rights of refugees both to return to their places of origin and to choose the appropriate solution for their plight.

**Palestinian refugees and durable solutions based on the right of return**

The right of return is a critical component of the special protection regime, and of the recommendation that Palestinian refugees be granted temporary protection. The legal underpinnings of the right of refugee return are found in three main

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bodies of law: the law of nationality and state succession\textsuperscript{89}; human rights law\textsuperscript{90}; and humanitarian law\textsuperscript{91}. In each of these bodies of law, the right of return is found both as a rule of customary law and codified in international treaties. The state responsible for recognizing and implementing the right of return in the Palestinian refugee case is, of course, Israel, which is the state responsible for creating the refugees, and has bound itself to the principle through numerous treaty ratifications.

The right to return is also consistently referred to in resolutions of the UN dealing

\textsuperscript{89} The obligation of a successor state to grant nationality to all residents of that territory is a well-established customary international law rule, which requires that ‘the population follows the change of sovereignty in matters of nationality’. \textit{See}, Ian Brownlie, ‘The Relations of Nationality in Public International Law’, \textit{British Yearbook of International Law} 39 (1963), 284-364, 320. It is important to note that during the British Mandate period, Palestinian nationals had distinct ‘Palestinian Citizenship’, with recognized British-issued passports. The 1952 Israeli Citizenship Law retroactively repealed the Palestine Citizenship Orders, and provided that every Jewish immigrant was automatically entitled to Israeli citizenship under the 1950 Law of Return, and that former Palestinians of Arab origin were eligible for Israeli citizenship under a series of restrictive conditions which effectively disqualified the vast majority of Palestinian Arabs, and stripped them of their Palestinian nationality. 1952 Citizenship Law, 5712/1952, \textit{Official Gazette} 93/22 (1952), Sec. 3. \textit{See}, Anis F. Kasim, ‘Legal Systems and Developments in Palestine’, \textit{Palestine Yearbook of International Law} 1 (1984), 19-35. Denationalization based on race or ethnic origin is a violation of the general principles of non-discrimination in customary international law, as well as of the ICCPR and the CERD, both of which are binding on Israel. \textit{See}, ICCPR, \textit{supra} n. 29, art. 2(1), 26; and CERD, \textit{supra} n. 32, art. 5(d)(ii).


\textsuperscript{91} Under humanitarian law principles, codified in the Hague Regulations, The Charter of the International Military Tribunal and the Fourth Geneva Convention, there are very clear provisions prohibiting forcible expulsion, and affirming that persons forced from their homes due to hostilities have the right to repatriate. \textit{See}, e.g., Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287 (\textit{entered into force} Oct. 21, 1950), arts. 45, 134 and 147 expressly prohibiting expulsion, and requiring return of any persons leaving areas of conflict, whether forcibly or otherwise.
with rights of refugees. Concerning Palestinians specifically, General Assembly Resolution 194(III), 11 December 1948, embodies customary law relative to the right of return. Resolution 194, paragraph 11, delineates the specific rights and the primary durable solution for Palestinian refugees. The primary durable solution for Palestinian refugees is return, restitution and compensation for loss of or damage to property. The resolution specifically affirms the right of refugees to return to their homes. Refugees who choose not to exercise the rights set forth in paragraph 11(a) may opt for resettlement in host states or in third countries, as well as real property restitution and compensation. General Assembly Resolution 194 (III) also affirms

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95 For analysis of the right to restitution and compensation see, UNCCP, Operations of the Custodian of Absentee Property and estimation of the compensation due to Arab refugees not returning to their homes, working paper prepared by the Secretariat of the Commission at Jerusalem, UN Doc. A/AC.25/W.52 (1950); UNCCP, Note on the problem of compensation, working paper prepared for the Secretariat of the Commission at Jerusalem, UN Doc. A/AC.25/W.53 (1950).

96 The General Assembly clearly meant the return of each refugee to ‘his[her] house or lodging and not to his[her] homeland’. 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’. Analysis of paragraph 11 of the General Assembly’s Resolution of 11 December 1948, supra n. 94.

97 Paragraph 11(b) thus ‘instructs’ the UNCCP to facilitate the resettlement of those refugees choosing not to return and the payment of compensation. GA Res. 194 (III), supra n. 61, para. 11(b).
the principle of individual refugee choice.\textsuperscript{98}

Finally, widespread state practice implements the rights of resident nationals to enter their state of origin. Such mass displacements as took place in Indochina, Central America and the Balkans were resolved with a primary focus on repatriation.\textsuperscript{99} Numerous peace agreements also affirm the right of return.\textsuperscript{100} The international community has employed a variety of means, including conditionality\textsuperscript{101}, extraordinary administrative powers\textsuperscript{102}, mass information campaigns\textsuperscript{103} and threat and use of force\textsuperscript{104} to ensure return of refugees and displaced persons.

States, then, are obligated to extend protection to Palestinians until a comprehensive durable solution is found under the framework of Resolution 194 (III) and the body of

\textsuperscript{98} By 1948, the principle of refugee choice had already become an established principle of refugee law and practice. The principle of individual refugee choice is emphasized in documents of the UN Mediator in Palestine, whose recommendations formed the basis for Resolution 194. \textit{Analysis of paragraph 11 of the General Assembly’s Resolution of 11 December 1948, supra n. 94.}


\textsuperscript{101} This includes, for example, the ‘Open-Cities Initiative’ in Bosnia-Herzegovina in which cities facilitating minority return became eligible for more comprehensive and substantive donor assistance. Other conditions include the threat of sanctions and the cessation of international assistance. Lynn Hastings, ‘Implementation of the Property Legislation in Bosnia-Herzegovina’, \textit{Stanford Journal of International Law} 37/2 (2001), 221-54, 232.

\textsuperscript{102} In Bosnia, for example, the Office of the High Representative is empowered to remove elected officials obstructing implementation of the agreement, revoke discriminatory legislation, and write new legislation. Hastings, \textit{id.}, 225.


\textsuperscript{104} See, e.g., Security Council Resolution 1244 (1999) authorizing the Secretary General to establish an international security presence in Kosovo ‘to provide for the safe and free return of all refugees and displaced persons to their homes’. UN SCOR, 4011th mtg., UN Doc. S/RES/1244 (1999). \textit{See also}, Security Council Resolution 1264, establishing a multinational force in Kosovo under Chapter VII of the UN Charter, and stressing it is the responsibility of Indonesian authorities ‘to ensure the safe and dignified return of refugees to East Timor’. UN SCOR, 4045th mtg., UN Doc. S/RES/1264 (1999).
law it codifies. Such protection need only be temporary, consistent with the Refugee Convention regime that places no greater burden on a state than *non-refoulement* through time. The obligation to provide protection may be affected by the article 1C cessation clauses and the exclusion clause of article 1E, as there is no evidence that they are inapplicable to Palestinians brought under Convention coverage by article 1D.\(^{105}\)

However, although these provisions may be applicable to Palestinians who have sought asylum, subject to appropriate interpretation under the second sentence of article 1D\(^{106}\), they are not necessarily applicable to considerations of a grant of temporary protection—as reflected by state practice through existing TP models\(^{107}\). In other words, the language of 1D provides a separate ‘cessation clause’ for Palestinians covered by 1D, that alters the time when Refugee Convention protection terminates. Moreover, we propose a harmonized TP program that is directly connected to a comprehensive durable solution based on the legal principles of return, restitution and compensation through shared state responsibility. With such a program, cessation will be clearly-defined by the existence of a comprehensive peace plan based on these principles\(^{108}\), and TP in the meantime will be granted on a *prima facie* basis without necessity for individual asylum status determinations.

Even if Palestinian refugees are denied Refugee Convention or stateless convention coverage, they should be eligible for UNHCR protection concerning durable solutions.\(^{109}\) Furthermore, Palestinian claims to restitution, compensation

\(^{105}\) See, Takkenberg, *supra* n. 48, 128. Similarly, Palestinians seeking refugee status would be subject to the exclusion clauses found in article 1F. Discussion of this issue is beyond the scope of this paper, and not directly relevant to the argument for temporary protection.

\(^{106}\) The cessation clauses are restrictive, and accurate interpretation is essential given the complexities of the Palestinian situation. See, *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* n. 16, para. 116. For an overview of the issues arising from articles 1C and 1E relating to the Palestinians see, Takkenberg, *supra* n. 48, 127-30. See also, Akram and Rempel, *supra* n. 55.

\(^{107}\) State practice has also shown that most states rarely terminate grants of asylum or refugee status based on these provisions, so the cessation clauses are marginally relevant to a discussion of a grant of TP consistent with the Refugee Convention. See, Sopf, *supra* n. 11, 127 and 151.

\(^{108}\) The optimal framework for a just and durable solution as part of a comprehensive Israeli-Palestinian-Arab peace plan, consistent with the principles articulated in this paper, are beyond the scope of this discussion, although the authors make reference here to the basic outlines of a necessary framework on the refugee issue.

\(^{109}\) Currently, para. 7(c) of the UNHCR Statute precludes extending UNHCR’s mandate towards Palestinian refugees. *See, supra* n. 70. However, UNHCR has extended *de facto* protection towards Palestinians outside UNRWA territories, and the General Assembly has authority to extend UNHCR protection towards persons ‘of concern’, as it has done in numerous other refugee and refugee-like situations. *See, supra* n. 48, 307; see, generally, Akram and Rempel, *supra* n. 63, 13-24. Moreover, UNHCR’s recently-issued *Note on the Applicability of Article 1D* to amend its Handbook, explicitly recognizes the necessity of extending UNHCR protection to this refugee population. *See, supra* n. 70.
for damage and loss of property\textsuperscript{110}, and reparations for war crimes and crimes against humanity remain independently-grounded in general international law and humanitarian and human rights law principles, regardless of any specific refugee law provisions or state practice\textsuperscript{111}.

\textbf{The Existing Regional Approach to Temporary Protection and a Rights-Based TP Framework}

Temporary protection, although relatively recent in terms of a recognized, or formalized, status granted by states towards persons who may or may not fall within the Refugee Convention definition but are deserving of international protection, is not a new concept. It has precedents in temporary refuge, or safe haven, extended in response to large-scale humanitarian emergencies such as in Southeast Asia,

\footnotesize
\textsuperscript{110} Provisions in human rights instruments to which Israel is a party expressly protect the right to property, and to restitution of wrongfully confiscated property. \textit{See}, \textit{CERD, supra} n. 32, art. 5(d) (v) (protecting the right to property); \textit{ICESCR, supra} n. 30, art. 2(2) (prohibiting discrimination in property rights and the right to means of subsistence); \textit{id.}, art. 11(1) (protecting the right to adequate housing and prohibiting illegal government interference in rights to one’s housing). \textit{See also}, \textit{Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law}, adopted and proclaimed by GA Res. 60/147, UN Doc. A/RES/60/147 (2005). Under customary international law, property rights are also of a fundamental character. \textit{See}, Universal Declaration of Human Rights, GA Res. 217A, UN GAOR, 3\textsuperscript{rd} Sess., at 71, UN Doc. No. A/810 (1948), art. 17; \textit{CERD, id.}, art. 5(d) (v); \textit{American Convention on Human Rights: Pact of San-Jose; Costa Rica, Nov. 22, 1969, 1144 UNTS 123 (entered into force July 18, 1978), art. 21; African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (1981) (entered into force Oct. 21, 1986), arts. 14 and 21(2); and \textit{ECCHR, supra} n. 35, art. 1, Protocol 1. Humanitarian law also protects the right to property and restitution. \textit{See}, Hague Regulations Convention IV, arts. 23, 25 and 28; the Fourth Geneva Convention, \textit{supra} n. 91, arts. 33, 53 and 147 (defining as ‘grave breaches’ the ‘destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly’). For a detailed review of the human rights, humanitarian and general international law bases of property restitution and compensation \textit{see}, Akram and Rempel, \textit{supra} n. 63, 48-52.

\textsuperscript{111} Provisions requiring restitution of refugee property appear in most major peace agreements incorporating durable solutions in the last 20 years. \textit{See}, \textit{e.g.}, \textit{General Framework Agreement for Peace in Bosnia and Herzegovina, supra} n. 76, Annex 7: Agreement on Refugees and Displaced Persons (Article 1(1) provides that refugees ‘shall have the right to have restored to them property of which they were deprived in the course of hostilities … and to be compensated for any property that cannot be restored to them’); \textit{General Peace Agreement for Mozambique, Protocol III, supra} n. 100 (Article (e) provides that ‘Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it’). For additional examples \textit{see}, Akram and Rempel, \textit{supra} n. 63, 53-5.
where surrounding states accepted, on a de facto basis, the presence of thousands of Vietnamese and Cambodians fleeing conflict\textsuperscript{112}; in Pakistan and Iran, which accepted approximately 6 million Afghan refugees while war raged in their home country\textsuperscript{113}; and in Mexico and Honduras, which temporarily admitted hundreds of thousands of refugees from civil war in El Salvador and Guatemala\textsuperscript{114}.

Temporary Protection emerged in the 1980s and 1990s as a regionally-specific approach to the problems of mass influx and non-Convention refugees. Different regional TP situations from the models applied in Africa, Europe, and the Americas are used as illustrations of failures to be avoided and principles to be applied to the Palestinian refugee case. A discussion of the temporary protection-type statuses granted Palestinians in the Arab world follows.

\textbf{Lessons from current regional TP models}

The main elements of each of the regimes, whether in regional or domestic instruments, intergovernmental discussions or state implementation, address the questions:

1. which individuals are to be covered by TP?
2. what will be the duration of TP status and what measures are to be taken at the cessation of status?; and
3. what standards of treatment are to be afforded TP applicants?

Very general comparisons can be drawn in the approach to these questions among various regions.

TP has operated both in the optimal context of shared responsibility among states receiving the putative refugees, and in the context of burden-shifting, with stronger states in a region forcing weaker states to absorb the bulk of refugee flows.\textsuperscript{115} The more

\textsuperscript{112} See, Mark Cutts et al., The State of the World’s Refugees, Fifty Years of Humanitarian Action (Oxford: Oxford University Press, 2000), 80-103

\textsuperscript{113} Id., 115-21.

\textsuperscript{114} Id., 121-31.

positive illustrations of how TP can work to complement Convention protection for refugees include the Comprehensive Plan of Action, initiated to address the massive Indochinese refugee flows of the 1970s.\textsuperscript{116} The Comprehensive Plan of Action was designed to prevent front-line states from turning back the desperate refugees by implementing an agreement for short-term temporary protection in those states, with a longer-term obligation of states outside the region to resettle the refugees and to provide material assistance.\textsuperscript{117} In a massive responsibility-sharing effort, the front-line states permitted the refugees to remain and allowed resettlement processing by third states to take place on their territories.\textsuperscript{118}

The Comprehensive Plan of Action involved 70 governments, and was one of the first examples of a commitment to multilateral durable solution mechanisms that included the country of origin as well as stakeholders in the region and third (resettlement) states.\textsuperscript{119} Despite acknowledged problems with implementation,\textsuperscript{120} the Comprehensive Plan of Action is one of the more successful examples of mechanisms including temporary protection that can ensure solutions that are durable for large refugee flows when there is real commitment to shared responsibility amongst relevant states.

A different model of responsibility-sharing which involved organized initiatives of the refugee populations themselves was the repatriation and return that took place in the context of the peace negotiations in the Central American states of El Salvador, Guatemala, and Nicaragua in the late 1980s. During almost ten years of civil conflict and proxy wars in Central America over two million people became refugees.\textsuperscript{121} Scattered across the region, hundreds of thousands sought asylum in neighboring states, in the United States and in other countries. Less than 150,000 were granted refugee status in the region; the majority remained in tenuous temporary statuses in refugee and internally displaced camps in Mexico, Honduras, Guatemala and Nicaragua.\textsuperscript{122}

Even before the 1987 regional peace agreement of Esquipulas II was signed,

\textsuperscript{116} See, Cutts et al., supra n. 112, 82-8.
\textsuperscript{117} Id., 84-91.
\textsuperscript{118} Id.
\textsuperscript{119} Id., 84.
\textsuperscript{120} Some of the problems plaguing the Indochinese refugee situation, both before and during the Comprehensive Plan of Action, were forced returns; piracy; serious human rights violations; reneged commitments; premature closing of camps; and anti-immigrant sentiment in resettlement states. Id., 82-103.
\textsuperscript{121} Id., 136.
\textsuperscript{122} Id., 136-7.
groups of Salvadoran refugees in Honduras began self-repatriation programs on their own.\textsuperscript{123} By the time multilateral peace efforts brought together the states of the region as well as the United States and UNHCR at the 1989 \textit{Conferencia Internacional sobre Refugiados Centroamericanos} to draft a plan for durable refugee solutions, large numbers of Guatemalan refugees followed their Salvadoran counterparts and returned home from Mexico. By the mid-1990s all the registered Salvadoran refugees in neighboring states had returned home, and between 1984 and June 1999, approximately 42,000 Guatemalan refugees repatriated on their own or with UNHCR assistance.\textsuperscript{124}

High refugee participation and voluntary choice were two significant elements contributing to the durability of the CIREFCA process, which lasted from 1989 until 1994.\textsuperscript{125} Additional critical principles in the success of CIREFCA were the involvement of all states of the region; the commitment to peace building in tandem with development; an international human rights framework for the major aspects of the peace process officially monitored by the United Nations; and the critical role of local and international NGOs. The process involved coordination of national, regional and international action to achieve lasting solutions to displacement and refugee flows in the entire region.\textsuperscript{126}

Non-formalized temporary protection played a critical role in the ultimate durable solutions for Mozambican refugees who fled to Malawi, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe between 1976 and 1992. Approximately 1.3 million Mozambican refugees remained in Malawi for over a decade before the General Peace Agreement for Mozambique was signed in October 1992.\textsuperscript{127} Malawi, one of Africa’s poorest states and the sixth poorest country in the world, gave temporary protection to a refugee population equivalent to 10 per cent of its own population.\textsuperscript{128} Until 1987, Malawi permitted the refugees to settle freely; when numbers and resource constraints became overwhelming, Malawi requested UNHCR to construct camps where it required the refugees to live.\textsuperscript{129} As in Central America, the Mozambican refugees began to return on their own before the peace agreement came into effect.

\textsuperscript{123} \textit{Id.}, 137.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.}, 136-43.
\textsuperscript{126} \textit{Id.}, 141.
\textsuperscript{127} More than 1.7 million Mozambicans, out of a population of 16 million, became refugees in the three decades of conflict in the country; four million were internally displaced; about a million lost their lives. \textit{Id.}, 148.
\textsuperscript{128} \textit{Id.}, 112.
\textsuperscript{129} \textit{Id.}, 113.
The repatriation process under UNHCR auspices began in December 1992, and was part of a larger UN peacekeeping and peace building effort.\textsuperscript{130}

UNHCR’s repatriation and reintegration assistance in Mozambique exceeded that in either Central America or Cambodia.\textsuperscript{131} Among the critical factors contributing to the durable nature of the Mozambican refugee situation were the commitment of the host states to providing temporary protection over a lengthy period, despite enormous drains on their resources; the involvement of major international organizations and donor states to post-conflict rehabilitation and development; and the focus on community development involving former adversaries to the conflict.\textsuperscript{132}

Another novel example of responsibility-sharing arising out of an extreme emergency situation was the 1999 airlift of Kosovar refugees into European states where they were granted temporary protection tied to a resettlement plan for the longer term.\textsuperscript{133} As a condition of admitting the Kosovars temporarily, the Macedonian government insisted on rapid airlift of the refugees from its territory. The program resulted in the evacuation of approximately 96,000 refugees to 28 states, primarily in Europe.\textsuperscript{134} Despite the creative solution it presented, the humanitarian evacuation program raised concerns about states applying \textit{ad hoc} standards of rights and legal status. Nevertheless, the unprecedented relief effort in the Kosovo case, and engagement of large numbers of states both inside and outside the region, provide another illustration of successful use of TP in the context of shared state responsibility.

In 1980 and 1981, the UNHCR Executive Committee issued two Conclusions concerning temporary protection in situations of large-scale refugee influx.\textsuperscript{135} These Conclusions recommended that states should grant temporary refuge, or temporary protection, pending durable solutions for refugees found in their territories, and the

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\item\textsuperscript{130} The UN Operation in Mozambique included significant troops, police, civilian monitors, and an Office for Humanitarian Assistance Coordination to oversee reintegration and refugee/IDP assistance. \textit{Id.}, 148.
\item\textsuperscript{131} \textit{Id.}, 151.
\item\textsuperscript{132} UNHCR, UNDP and the World Bank, with significant funding from donor states, committed to development and rehabilitation projects including roads, schools, clinics and ‘quick impact projects’. \textit{Id.}, 152.
\item\textsuperscript{133} Fitzpatrick, \textit{supra} n. 17, 279.
\item\textsuperscript{134} As with the Bosnians, Germany accepted the largest number of Kosovars for TP, 14,700 people; the US accepted 9,700; Turkey, 8,300; France, Norway, Italy, Canada and Austria each accepted more than 5,000 refugees for temporary protection. \textit{See}, Cutts et al., \textit{supra} n. 112, 239.
\item\textsuperscript{135} UNHCR, Executive Committee, Conclusion on Temporary Refuge, No. 19 (XXXI) (1980); and UNHCR, Executive Committee, Conclusion on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, No. 22 (XXXII) (1981).
\end{enumerate}
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proposals evolved into various temporary protection statuses under state domestic legislation. Various kinds of temporary statuses were instituted to provide temporary protection to both Bosnians and Kosovars in Europe between 1991 and 1995. EU principles and practices on TP became closely tied to the UNHCR Conclusions and guidelines, and were ultimately incorporated in a European Council Directive on minimum standards for TP in the event of mass influx. In the US, temporary protected status has been fairly recently codified in domestic legislation. First passed as a specific remedy for hundreds of thousands of civil war refugees from El Salvador, Temporary Protected Status evolved into a time-limited status granted to persons of designated nationalities fleeing civil strife.

To be consistent with the international refugee and human rights norms incorporated, at least in principle, in the now-formalized TP regimes, any TP framework must be based on rights principles that include the following:

1. respect for the core Convention principles of non-refoulement through time; access to refugee status determinations and to durable solutions driven by refugee choice;
2. responsibility-sharing among states, involving implementation of multiple durable solutions options tied to refugee choice; and
3. durable solutions that adhere to international human rights standards, including respect and implementation of the right to return in safety and dignity, and of incrementally-based rights tied to length of stay.

136 See, Conclusion on Temporary Refuge, id. para. (b)(i-ii).
139 James Hathaway argues that the Refugee Convention’s obligation to grant non-refoulement through time requires no greater status than temporary protection. See, Hathaway and Neve, supra n. 18.
AN ARGUMENT FOR INTERNATIONALLY-HARMONIZED TP FOR PALESTINIANS: APPLYING RIGHTS-BASED PRINCIPLES TO THE SEARCH FOR DURABLE SOLUTIONS

The Current Status of Palestinians in the Arab States and in Occupied Palestine

Despite efforts by the League of Arab States to create region wide standards for the treatment of Palestinian refugees in the Arab world chronic protection gaps persist. Approximately 4 million refugees are affected in varying degrees.\textsuperscript{140} Day-to-day security and human rights protection is particularly problematic in Lebanon, Kuwait and other Gulf states\textsuperscript{141}; protection has been inconsistent in Egypt and Libya\textsuperscript{142}; and armed conflict in the region renews concern about basic security for Palestinian refugees in Iraq\textsuperscript{143}.

Region-wide implementation of standards set forth in Arab League Council resolutions and the Casablanca Protocol is inconsistent. Protection gaps vary from state to state. Despite obligations to provide national treatment in the areas of employment, the right to leave and enter, travel documents, and visas and residence, treatment accorded to Palestinian refugees in Egypt, Libya, Kuwait and other Gulf

\textsuperscript{140} The number of registered refugees in Jordan, Lebanon and Syria as of December 2002 is 2,493,105. UNRWA, UNRWA in Figures (Gaza, Dec. 2002).

\textsuperscript{141} In Lebanon Palestinian refugees face some of the most severe protection gaps primarily as a result of political considerations concerning sectarian power sharing in the country along confessional lines. Takkenberg supra n. 48, 162. Kuwait and other Gulf states strictly control the presence of non-nationals, including Palestinian refugees. The situation of Palestinian refugees in Kuwait and other Gulf countries began to deteriorate during the 1980s. Zureik supra n. 53, 35. During and after the 1991 Gulf war several hundred thousand Palestinians in Kuwait came under heavy pressure aimed at forcing them out. Takkenberg, id., 159-62.

\textsuperscript{142} Shiblak, supra n. 47, 39. Zureik describes three phases of treatment towards Palestinians in Egypt: (1) (1948-mid 1950s) refugees were settled in urban centers and accorded limited employment opportunities; (2) (mid 1950s-mid 1970s) refugees accorded national treatment; and (3) (mid 1970s to present) refugees treated as foreigners. Zureik, id., 35. See also, Takkenberg, supra n. 48, 150-4; and Brand supra n. 51, 43-63. Refugees in Libya generally enjoy national treatment as set forth in the Casablanca Protocol, however, implementation has been inconsistent. In 1995, for example, Libya ordered all Palestinians to leave the country in protest against the Oslo political process. Hundreds of Palestinian refugees were stranded on the border between Libya and Egypt between August 1995 and April 1997 when Libya permitted refugees to remain in the country. Takkenberg, id., 166-7.

\textsuperscript{143} There are an estimated 90,000 Palestinian refugees in Iraq. Annex A.7 ‘Refugee population by origin and country or territory of asylum, 1992-2001’, UNHCR Statistical Yearbook 2001, supra n. 57, 93. See also, Takkenberg, id., 154-5.
states is often similar to protection standards accorded to all other categories of foreigners. Standards in Lebanon, in particular, are below that accorded to foreigners and do not meet minimum requirements set forth in the Refugee Convention.\textsuperscript{144}

The scope of protection provided to Palestinian refugees under League resolutions and the Casablanca Protocol is significantly narrower than that provided to refugees under respective instruments in other regions of the world.\textsuperscript{145} The Casablanca Protocol does not provide adequate protection in the context of a protracted refugee problem.\textsuperscript{146} Neither the Casablanca Protocol nor League resolutions include provisions for the protection of adequate housing, access to public education, property ownership and social security.\textsuperscript{147} As noted above, most Arab host states are not signatories to the Refugee Convention and its Protocol or either of the two statelessness conventions. Compliance with standards set forth in regional draft human rights instruments and in international human rights instruments varies from state to state.\textsuperscript{148} Regional mechanisms for monitoring, enforcement and standard-setting, including the Arab League, do not include the refugee generating state—Israel.

In contrast to protection gaps in Arab states, the status of refugees in 1967 occupied Palestine is characterized by a long-standing ‘protection crisis’.\textsuperscript{149} More than 1.5 million refugees, who comprise nearly 50 per cent of the population of the West Bank, eastern Jerusalem and the Gaza Strip, are affected.\textsuperscript{150} Day-to-day security and human rights protection is virtually absent with dire consequences for a population living under protracted military occupation.\textsuperscript{151}

\textsuperscript{144} For more details and sources see, Akram and Rempel, supra n. 55, 115-9, nn. 538-56.

\textsuperscript{145} For an overview of regional instruments see, supra nn. 40-3 and accompanying text.

\textsuperscript{146} The scope of protected rights afforded to Palestinian refugees in Arab host states has not expanded over time. This is due, in large part, to Arab government concerns that expansion of basic rights beyond those set forth in the Casablanca Protocol may lead to de facto resettlement (Ar: tawtiin) of the refugee population.

\textsuperscript{147} For a list of protected rights under the 1951 Refugee Convention and the 1965 Casablanca Protocol see, respectively supra n. 28 and 50 and accompanying text.

\textsuperscript{148} UN human rights treaty body committees commonly recognize the efforts exerted by Arab states to host Palestinian refugees, but significant concerns remain regarding implementation of relevant human rights instruments. For details on Arab state signatories see, Akram and Rempel, supra n. 63.

\textsuperscript{149} The United Nations has long recognized the protection gap in 1967 occupied Palestine. For cites to UN Conclusions and General Assembly Resolutions see, Akram and Rempel, supra n. 63, 121, n. 567.

\textsuperscript{150} As of December 2002 there were 639,448 registered refugees in the West Bank and 893,141 registered refugees in the Gaza Strip. UNRWA in Figures, supra n. 140. There are few non-registered refugees in 1967 occupied Palestine. See, Akram and Rempel, supra n. 55, 25-7 and sources cited.

\textsuperscript{151} For more details on the protection gaps in the OPTs see, Rempel and Akram, id., 125-6, nn. 581-9 and accompanying text.
Implementation of regional standards in 1967 occupied Palestine is virtually non-existent. Palestine is a founding member of the League of Arab States, but without the derivative powers of a state, is unable to accord national protection to Palestinian refugees resident in the West Bank, eastern Jerusalem and the Gaza Strip. Limited civilian powers transferred to the Palestinian Authority under the Oslo agreements are circumscribed and remain subject to Israel’s overall authority. Israel’s military campaign directed at the Palestinian Authority since the beginning of the second Palestinian intifada, moreover, brings into question the political, administrative, jurisdictonal, and financial viability of the Authority.

The Palestine Liberation Organization, which oversees Palestinian refugee affairs through its Department of Refugee Affairs, is not a government in any legal sense, and thus has neither the legal status nor the resources to provide effective comprehensive protection for Palestinian refugees, neither in 1967 occupied Palestine or elsewhere. The PLO has bilateral relations with host states and has raised protection issues with the Conference of Supervisors of Palestinian Affairs, the Council of Ministers and the Council of Arab Ministers of the Interior. It has also signed agreements with states, including the Cairo Agreement, with Lebanon, in order to ensure respect for basic economic and social rights. Despite these efforts, however, the status of refugees has not improved significantly.

152 See, Takkenberg stating ‘… the entity “Palestine” currently does not fully satisfy the international legal criteria of statehood: a permanent population, a defined territory, government, and the capacity to enter into relations with out states’. Takkenberg supra n. 48, 181; see also, id, 17883-.

153 UNHCR’s Executive Committee conclusions and General Assembly resolutions concerning refugee protection ceased following the commencement of the Oslo political process in 1993 despite the continued legal and institutional protection gap in 1967 occupied Palestine. For cites see, Akram and Rempel, supra n. 55, 121, n. 567. See also, Report of the Human Rights Inquiry Commission, supra n. 60.

154 The authors of the Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution 3-5/1, of 19 October 2000 conclude that neither the DOP nor subsequent agreements establish a Palestinian state, and they transfer only limited powers to the Palestinian Authority. Id., para. 182.

155 While the PLO is a recognized public body that represents the Palestinian people and maintains offices which are similar or equivalent to diplomatic missions it does not satisfy other criteria for statehood. Anis F. Kasim, ‘The Palestine Liberation Organization’s Claim to Status: A Juridical Analysis under International Law’, Denver Journal of International Law and Policy 9/1 (1980), 1-34, 9 cited in Sally V. Mallison and W. Thomas Mallison Jr., ‘The Juridical Bases for Palestinian Self-Determination,’ Palestine Yearbook of International Law 1 (1984), 36-67, 45.

156 Takkenberg supra n. 48, 145.


158 Id. In 1977 the PLO requested the League to issue a Palestinian passport, however, the request did not receive wide support among LAS members. Shiblak, id., 12.
Israel is not a member of the Arab League and is not bound by League standards. As an Occupying Power, however, the Fourth Geneva Convention relative to occupied territory binds Israel to protect the civilian population, including refugees, in the West Bank, eastern Jerusalem and the Gaza Strip.\textsuperscript{159} The military reoccupation and siege imposed on Palestinian cities, towns and refugee camps in the context of the second intifada attests to Israel’s absolute control over the whole of 1967 occupied Palestine and concomitant responsibility for human rights protection of the civilian population, including refugees.\textsuperscript{160} Finally, Israel is a signatory to both the Refugee Convention and Protocol; however, it did not ratify them until 1999. Israel is the only signatory to the Refugee Convention that does not have legislation to define and protect refugees.\textsuperscript{161}

The status of Palestinians in Europe and the United States

Protection gaps in Europe for Palestinian refugees largely relate to the interpretation of the status of Palestinian refugees under article 1D of the Refugee Convention. The exact number of Palestinian refugees in Europe is unknown. Most states do not include Palestinians as a separate ethnic or national group in population censi. Statistical information often categorizes Palestinians as ‘other Middle East’. It is estimated that over 200,000 Palestinian refugees are currently residing in Europe. This includes some 30,000 - 80,000 Palestinian refugees in Germany; 20,000

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refugees in Denmark; 15,000 refugees in Britain; 3,000 Palestinians in France, and some 9,000 Palestinian refugees in Sweden.\footnote{The Palestinian Central Bureau of Statistics estimates the total size of the Palestinian population outside the Arab world and the United States at 295,075 at the end of 2002. Palestinian Authority, \textit{Palestinians at the End of the Year 2002} (Ramallah: Palestinian Central Bureau of Statistics, 2002), 35. \textit{See also} Abbas Shiblak, \textit{Palestinian Refugee Communities in Europe, an overview}, Workshop on Palestinian Refugee Communities in Europe, St. Anthony’s College, 5-6 May 2000, University of Oxford. [On file with the authors].}

As detailed above, most European states either do not incorporate article 1D into domestic law or interpret the article incorrectly. Palestinians for the most part have difficulty when they apply for political asylum\footnote{According to the Swedish Migration Board, there are 934 stateless Palestinians registered in Sweden. Of these, 895 do not have residency status. The Immigration Department has called for a policy change on Palestinian asylum-seekers that would permit them to claim a ‘need for protection’ due to armed conflict, entitling them to automatic residence. \textit{See}, ‘Palestinians to be Allowed to Stay in Sweden’, \textit{BBC Worldwide Monitoring}, Apr. 11, 2002.}, residence based on family reunification, or other related protections that are available to other refugees in the world. Many remain in European states without recognized legal status, without work permits, and without the basic essentials to live in freedom and dignity. The protection gap vis-à-vis Palestinians in Europe is most evident when compared to rights granted other refugees under the Refugee Convention and rights granted other stateless individuals under the two conventions on statelessness. In the context of the second \textit{intifada} some states have placed tighter restrictions on asylum claims for Palestinians originating from 1967 occupied Palestine.\footnote{ECRE notes that ‘in light of the current situation in the ME and an increase in asylum applications made by Palestinian nationals, the Home Office is currently not considering asylum applications’. European Council on Refugees and Exiles, \textit{2001 Country Report: United Kingdom} (London, 2002). The UK’s asylum statistics, however, do not separately designate Palestinians as a nationality, presumably categorizing them under ‘other ME’.}

Like Europe, protection gaps in the United States largely relate to the interpretation of article 1D and the status provided to Palestinian refugees who are not accorded refugee status. It is estimated that more than 200,000 Palestinian refugees reside in the United States.\footnote{The Palestinian Central Bureau of Statistics estimates the total size of the Palestinian population in the United States at 231,723 at the end of 2002. \textit{Palestinians at the End of the Year 2002}, supra n. 162, 35. The 1990 US Census estimated the number of Palestinians in the US at around 50,000. Government of the United States, \textit{1990 Census Special Tabulations} (Washington, DC: Department of Commerce, Bureau of the Census, Ethnic and Hispanic Branch, 1990). This number, however, is likely low due to the underestimation of minority populations in the United States and it may not include Palestinian refugees who have acquired citizenship in Jordan.} Similar to the situation of Palestinian refugees in Europe, precise figures for the number of Palestinian refugees in the United States are not available. Palestinian nationality is rarely recognized; Palestinians therefore mysteriously
‘disappear’, most likely categorized as ‘other Middle Eastern’.\textsuperscript{166} As in Europe, Palestinians have difficulties due to the confused and inconsistent application of the provisions of the Refugee Convention and Protocol, and consequently suffer the same protection gaps in rights guarantees.

**Principles and parameters of an internationally-harmonized temporary protection regime for Palestinians**

As shown, the status and treatment given Palestinians in the UNRWA areas fall below applicable standards in the different states and regions, such as the Convention Governing the Specific Aspects of Refugee Problems in Africa, the Refugee Convention and the human rights instruments ratified by various Arab states. Moreover, the status and treatment given Palestinians everywhere is inconsistent with the special regime established to ensure their protection pending a durable solution consistent with refugee law principles of safe return, absorption or resettlement based on the refugee’s voluntary choice, as required by article 1D’s implicit reference to General Assembly Resolution 194 (III) in its language: ‘the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nation’.\textsuperscript{167}

As described above, if article 1D were properly interpreted, Palestinians would be recognized as *prima facie* refugees in any state, and would qualify for the benefits of the Refugee Convention. This would not require states to grant Palestinians asylum, but might authorize a grant of temporary protection until a durable solution is found. Guided by the lessons of temporary protection as implemented by states in both formalized and non-formalized policies, we propose a TP regime for Palestinians involving the following elements.

*First*, TP that is closely connected to durable solutions guided by *non-refoulement*, voluntary choice and the right of return. The most remarkable feature of the Palestinian people as refugees worldwide is their 55-year steadfast commitment to return to their homes and lands.\textsuperscript{168} Palestinians have been given no *choice* in any

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\textsuperscript{167} Refugee Convention, *supra* n. 5, art. 1D.

\textsuperscript{168} For a more detailed discussion *see*, Akram and Rempel, *supra* n. 55, 130-6, nn. 600-26 and accompanying text.
meaningful sense concerning their desires for a durable solution.\textsuperscript{169} In the absence of any international body and mechanism to design and implement durable solutions, the pattern of their status and migration has been one of expulsions and lack of status in many states that have no legal obligation to receive them as described above. We propose a 5-year renewable, formalized temporary protection status for Palestinians, applying the same principles and standards in every state that participates in the regime.\textsuperscript{170} TP would be offered to all Palestinians fleeing the West Bank and Gaza

\textsuperscript{169} When choice is accepted as a basic principle governing durable solutions, it is often framed within the context of arbitrary restrictions whose objective is to limit to the greatest extent the number of refugees choosing to exercise their right to return to their homes of origin inside Israel. See, \textit{e.g.}, Council of Europe, European Parliamentary Assembly Res. 1156, 14\textsuperscript{th} Sess. (1998); ‘American “Non-Paper” on Israeli-Palestinian Stockholm Negotiations, June 2000’, \textit{reprinted in, Journal of Palestine Studies} 30/1 (Autumn 2000), 154; ‘Israeli private response to the Palestinian refugee proposal of January 22, 2001, Non-Paper - Draft 2, 23 January, 2001, Taba’, \textit{reprinted as, Annex to Bulletin No. 10: Principles and Mechanisms for a Durable Solution for Palestinian Refugees <http://www.badil.org/Publications/Bulletins/B-10a.htm> (accessed Dec. 21, 2006); and International Crisis Group, \textit{Middle East Endgame II: How a Comprehensive Middle East Peace Settlement Would Look} (Brussels, 2002).

\textsuperscript{170} There are several factors suggesting that 5 years is an appropriate initial time period for such a TP program, some of which may be relevant to the Palestinian situation. First, in the European context, open-ended TP is seen as undesirable, and both the UNHCR’s Informal Consultations and the European Commission’s draft report recommend a limit of five years. See, UNHCR, Executive Committee, \textit{Progress Report on Informal Consultations on the Provision of International Protection to All who Need It}, UN Doc. EC/47/SC/CRP.27 (1997), para. 4(r); and Amended Proposal for a Joint Action concerning Temporary Protection of Displaced Persons, COM (9), 372 final, art. 13. See, Fitzpatrick, \textit{supra n. 17}, 302. In the Palestinian context, a relatively short, clearly fixed period tied to creating the conditions of safe return is essential for the program’s success. Given the length of time the Palestinian refugee situation has remained unresolved and the longstanding resistance of major players to implementing a principled solution, anything less than 5 years is unrealistic. In the current critical cycle of violence forcing a renewed exodus, anything greater than 5 years would permit continued ethnic cleansing. Second, two studies support the conclusion that for mass refugee crises, 5 years is a critical period determining the feasibility of return: a UN survey of the period 1970-1980 showed that large-scale repatriation took place in 50 per cent of the cases within five years of the creation of the refugee problem; and a study of integration of Vietnamese refugees in Finland concluded that assimilation and acculturation of refugees did not occur until five years after their arrival in a host state. See, Sadruddin Aga Khan, \textit{United Nations Study on Human Rights and Massive Exodus}, UN ESCOR, UN Doc. E/CN.4/1503 (1981); and Karmela Liebkind, ‘Self-Reported Ethnic Identity, Depression and Anxiety Among Young Vietnamese Refugees and their Parents’, \textit{Journal of Refugee Studies} 6/1 (1993), 25-39, 34-5, cited and discussed in Hathaway and Neve, \textit{supra} n. 18, 182-3. For Palestinians, obviously, the statistics on 5 year repatriations has little meaning, but it is reasonable to expect that if a TP program creates the appropriate incentives, at least for the latest flows, repatriation could well take place within 5 years; moreover, for the most recent refugees, 5 years would be the critical time when they would either develop longer ties to the host states or be more psychologically prepared to return. For the refugees who have been exiled for a generation or more, 5 years would be an essential psychological component to generate activity and investment in making their return possible. After over 5 decades of waiting, an open-ended process would be as meaningless to the Palestinian refugees as their current unending limbo status.
as a result of military occupation and the resultant humanitarian crisis, as well as to Palestinians residing in any of the participating states who do not already have citizenship or permanent residence as well as security of residence and protection. Consistent with the formal TP status offered in Europe after the Balkan crisis, and on the recommendation of UNRWA or UNHCR, states would prioritize their TP slots for urgent humanitarian cases (emergency medical and physical safety cases should be considered for airlift, such as in Kosovo); family reunification; threat to life or safety; victims of severe human rights abuses, and ethnic cleansing.

Second, TP that is internationally-harmonized, as part of a process that includes shared responsibility on many levels, which recognizes and accommodates both legal and political interests of the states involved. The TP program would be instituted through an international conference geared towards designing and implementing mechanisms to address the root causes of the conflict, and to creating conditions that would allow Palestinian refugee repatriation—to create meaningful choice. The TP regime proposed would engage all states that have significant Palestinian populations, and all stakeholders in the outcome of Israeli-Palestinian peace. It must, at a minimum, involve the PLO, all the Arab states and Israel, as well as the Quartet comprised of the US, the EU states, Russia and the United Nations. As part of the international conference on Palestinian refugees, states would commit to the same kind of multilateral repatriation, restitution, compensation, development and monitoring process as in CIREFCA, Mozambique, and the Dayton process. This proposal envisions a combination of incentives and disincentives that would create both vested interests in a principled solution for all the states involved, and create pressure on non-complying states to participate. The incentives would include targeted assistance to develop integrated multi-ethnic communities within Israel, coupled with requirements to dismantle discriminatory laws, and to phase in restitution with compensation formulae. The proposal could also cover displaced Arab Jews within the broader durable solutions plan.\textsuperscript{171} The disincentives would tie more economic cuts to Israel, isolation and pressure, from the involved states and the UN bodies that would be a formal part of the process. Normal relations, at least at the governmental and regional levels, would be premised on Israeli participation in the TP regime, and the phased-in process of family reunification over the first 5 years.

Third, the TP Plan proposed here would include phases and a timetable that link

\textsuperscript{171} Although Arab Jewish claims to restitution and compensation of property are not ‘counterclaims’ to Palestinian property rights in any legal sense as is often asserted, their claims are nonetheless valid as against their states of origin. For a discussion of the issues of Arab Jewish claims as separate from Palestinian claims against Israel see, Jan Abu Shakrah, ‘Deconstructing the Link: Palestinian Refugees and Jewish Immigrants from Arab Countries’, in Naseer Aruri (ed.) \textit{Palestinian Refugees: The Right of Return} (London: Pluto Press, 2001), 208-16, 208.
temporary protection to the implementation of durable solutions based on refugee choice and the right of return. The first 5 years of TP and related conditions would initiate a period of confidence-building measures, hinging on the incentive/disincentive process implemented by all the participating states. As part of this process, Israel will immediately be asked to open up 100,000 slots for family reunification (both to Israel and to the West Bank and Gaza Strip), to be completed within the first two years; then 10,000 each year until all family reunification applications are completed. The first 100,000 slots in Israel should prioritize those pending cases from the Arab states. Within these five years, as Israel meets the family reunification targets, the TP participants would make funding available to develop communities within Israel and in the West Bank and Gaza Strip that would benefit both the reintegrating and the stayee communities. Such development would engage civil society across the ethnic/religious communities so that communities affected by reintegration become vested in the success of the process.

A phased process for return, beginning with family reunification has multiple benefits. This process will be least disruptive to the stayee communities (Israeli and Palestinian) because family reunification automatically implies an existing support system to assist the returning family members. The phased process would provide both returnee and stayee communities with an opportunity to assess the individual and collective impact of refugee return prior to a broader return operation—similar to ‘go and see visits’ sponsored by UNHCR and other international agencies in other refugee cases. Palestinian refugees in 1967 occupied Palestine undertook similar visits in 2000. Evaluation of the return program in Guatemala observed that ‘… in the case of Guatemala, repatriation not only did not wait for peace, it helped force it’. For Israeli Jews, controlled family reunification would address fears of mass influx and security, and likewise, provide a testing ground for the broader return operation. Israel, moreover, already accepts the principle of family reunification.

One of the lessons of the Bosnian return program was that employment, health, education and social security, need to be addressed at the same time as housing


173 Arafat Jamal, Refugee Repatriation and Reintegration in Guatemala, Lessons Learned from the UNHCR’s Experience (Geneva: UNHCR, 2000), 2.

174 On early family reunification policy to Israel see, e.g., Don Peretz, Israel and the Palestine Arabs (Washington, DC: Middle East Institute, 1958), 50-5.
reconstruction programs. In Mozambique the positive donor response to finance the repatriation of millions of refugees was related to thorough consultation during the drafting process of the repatriation plan and the detailed nature of the final operations plans. Successful integration of reunifying families, including infrastructure development, schools and curricula, health care services, equitable use of land and water, would be the measure for the next phase.

Within the first five-year period, a formula for return of additional refugees to their original homes and lands would be worked out by the states involved in the process. During this period TP participants would also address protection gaps in domestic law, and seek wider regional ratification of international instruments. Efforts would also focus on the expansion/and or establishment of new regional economic, political and security bodies or mechanisms tied to the dual incentive/disincentive approach discussed above. An important part of this process would involve reform and or repeal of discriminatory citizenship and property law across the region according to relevant international standards to facilitate solutions for regional displacement and outstanding housing and property claims. Consideration of dual citizenship and respect for housing and property rights will be key to this process. Another important feature will be the development of regional instruments relative to the protection of refugees and human rights, including enforcement mechanism/s for human rights similar to the ECtHR.

After the first 5 years, the status of reunification and returns based on refugee choice would be evaluated. UNHCR/UNRWA would monitor refugee choice, and once returns have been secured, states will open other slots, based on TP priorities, to accept refugees not wishing to return for resettlement. The incentive-disincentive process should continue in phases, with donor funding focused on development of communities involving both returnee and stayee populations within Israel and the West Bank and Gaza Strip (regardless of what state constructs are in place).

Fourth, TP that is consistent with recognized international refugee and human rights standards concerning beneficiaries, duration and conditions for cessation of status, and


177 Supra nn. 40-3 and accompanying text.

178 Id.

179 The Arab League Legal Department, for example, has examined the idea of the establishment of an Arab Court to address regional disputes. Robert W. MacDonald, The League of Arab States, A Study in the Dynamics of Regional Organization (Princeton, NJ: Princeton University Press, 1965), 138-9.
standards of treatment. Drawing on the principles established by the African\textsuperscript{180}, European\textsuperscript{181} and US\textsuperscript{182} area instruments, policies and regional practices; guidelines can be readily established for defining and prioritizing the appropriate beneficiaries of Palestinian temporary protection. TP should be offered to all UNRWA-registered refugees no matter where they are located, with UNRWA continuing to provide the assistance benefits to those located within the areas of its mandate. TP should also be offered to all Palestinians who are short-term visa holders, Palestinians in any kind of ‘indeterminate’ status, and those with no recognized status, on a \textit{prima facie}, or group basis, consistent with article 1D. As TP has worked in a number of mass influx situations, states should prioritize available TP slots for various kinds of cases: the Northern and Western state participants might be asked to take the most Palestinian influx from the West Bank and Gaza, to relieve the immediate pressure from the front line Arab states. They might, in addition, prioritize refugees in need of urgent medical treatment or family reunification, unaccompanied minors and persons in similar emergency situations, according to recommendations from UNHCR based on guidelines developed in other refugee crises.\textsuperscript{183}

A uniform minimum standard of treatment is essential for TP to be successful in this context, to reduce the incentive for massive secondary refugee movement from the Arab states, including the 1967 occupied territories, to Western or Northern states. The Arab states would be required to standardize their treatment of Palestinian refugees, and to regularize the rights offered to a standard acceptable to all the TP participant states, and consistent with recognized legal standards.

Although each of the relevant regions for a Palestinian TP program has differing minimal and optimal rights standards, harmonizing the benefits and rights that are offered under TP will be one of the most critical factors for the program to be

\textsuperscript{180} Under the 1969 Organization of African Unity Refugee Convention, the reasons for the Palestinian exodus—both over time and currently—would qualify the majority of them under the definition of ‘refugee’ of article I(2), as one who: ‘... owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality …’

\textsuperscript{181} European TP for Bosnians and Kosovars provides ample state practice and legal grounding for granting Palestinians TP, particularly if tied directly to mechanisms for return to their places of origin.

\textsuperscript{182} Under American Temporary Protected Status legislation, the reasons for the current exodus would clearly qualify the majority of Palestinians for protection, as they are experiencing ‘ongoing armed conflict which poses a serious threat to life or safety’ and ‘extraordinary temporary conditions … preventing them from returning home in safety ….’ INA ch. 477, Sec. 244(b)(1).

successful in the Palestinian case. Besides concerns about secondary movement, a standard of rights provides a semblance of justice and principle—much lacking in the Palestinian situation. Moreover, for the program to be standardized on a basis that is acceptable to states and participants, there must be a framework of applicable human rights standards including civil, economic and social rights. In the Palestinian situation, the following rights should be considered fundamental.

**Status, identity and travel documents (freedom of movement)**

The Refugee Convention and both conventions on statelessness require states to issue identification and travel documents to refugees/stateless persons lawfully in their territories. These provisions are widely standardized and respected. European TP and US Temporary Protected Status standards require status documents to be issued to those receiving benefits under those programs, and UNHCR and EU guidelines require the same. Travel documents and freedom of movement are less well-respected, both in applicable guidelines and in practice. Nevertheless, at a minimum, freedom of movement within the TP state should be mandated, as noted in the UNHCR *Progress Report* on TP.¹⁸⁴ Palestinians have long suffered severe restrictions on freedom of movement without adequate justification, arbitrary visa restrictions and re-entry requirements, compounded by forced separation from family members.

**Family reunification**

Family unity, at least as to the nuclear family, is recognized as a core requirement for TP under the EU 2001 Council Directive, which incorporates detailed provisions obligating states to grant residence to family members of TP beneficiaries and respect rights to family unity. Family rights in the EU context are considered fundamental under the ECHR.¹⁸⁵ The US does not protect family unity under Temporary Protected Status; however, UNHCR has repeatedly stressed the importance of family

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¹⁸⁴ *Progress Report on Informal Consultations on the Provision of International Protection to All who Need It*, supra n. 170. The report states that ‘the right to education, employment, freedom of movement, assistance and personal identification should be granted without discrimination, while it is understood that any restrictions imposed must be justified on grounds of legitimate national interest and must be proportional to the interest of the state.’

reunification in temporary protection schemes and in considering durable solutions for refugees. For Palestinians, family separation has been an intergenerational problem, exacerbated by lack of status, identity and travel documents, arbitrary criteria that screen out large numbers of applicants and severe restrictions on movement. Using family reunification as a principle for granting TP and for granting residence to derivative family members of TP recipients will enhance the durability of the solution of choice for refugee families.

**Employment, housing and education**

The Refugee Convention gives the highest priority to employment, housing and elementary education, requiring states to grant refugees lawfully in their territories rights in each of these areas on par with nationals. Although EU state policies concerning granting employment authorization vary significantly, the standard-setting guidelines and the Council Directive reflect common agreement that employment should be authorized for TP recipients. In the US, Temporary Protected Status recipients are authorized to work. For Palestinian refugees, the inability to work in many of the areas where they are located has been a major source of poverty, frustration, and instability. A Palestinian TP program would appear far more palatable if its recipients were able to work rather than require welfare benefits. Housing and education, at least at the elementary level, are also considered core rights under human rights and refugee standards, as is widely reflected in the main international human rights instruments. For UNRWA, reduction in services based on less need, rather than fiscal shortfalls, would provide the agency with the opportunity and resources to retool programs towards durable solutions. Skill development will also enhance the ability of such individuals to integrate as economic contributors to new communities when they either return to their place of origin, resettle or integrate in host states.

**Health and welfare benefits**

The majority of Palestinian refugees in the Arab states receive minimum health and welfare benefits through UNRWA. It would be illogical to structure a TP
program that did not provide equivalent guarantees to UNRWA standards, and EU and international human rights standards would mandate additional guarantees in these areas. Consistent with the Refugee Convention, states would be expected to incrementally improve the rights and benefits offered TP recipients over time. In the second 5-year period, refugee rights will increase, consistent with other state TP policies and practice, and UN guidelines. Greater consideration would need to be given to the areas of, particularly: gender equality; higher education and vocational training benefits; the granting of equal employment opportunities with nationals of the host state; additional economic, social and cultural rights; and expanded notions of family unity. Ultimately, as part of a comprehensive peace, all those in TP who choose not to return will be offered permanent residence, either in the host state or in resettlement states through a responsibility-sharing formula, such as in the Indochinese orderly departure program.

In the Palestinian case, the duration of status should be tied to safe return in the context of a comprehensive and durable peace settlement of the Israeli-Palestinian conflict, as most consistent with general refugee law principles, accepted principles for temporary protection and the special Palestinian regime of article 1D and its companion provisions and instruments.

In order for TP to be meaningfully connected to return and a comprehensive durable solution for Palestinian refugees, it must include solution-oriented components. These components can be usefully categorized as maintaining refugees’ social structures; developing refugees’ skills and resources; creating linkages between refugees and communities in the home state; and confidence-building measures in both returning and stayee communities prior to return.

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187 Fitzpatrick notes that rights standards for TP beneficiaries should be guaranteed at a level between two concerns: rights cannot be afforded at a level higher than that afforded citizens of the host states, but restrictions must be directly related to a legitimate state objective. She also notes that standards set by the Refugee Convention for economic, social and cultural rights are appropriate standards for TP beneficiaries as well, in particular because many TP beneficiaries would meet the refugee definition and should not be deprived of the guaranteed level of rights simply because they are receiving a less permanent status. See, Fitzpatrick, supra n. 17, 304.

188 Due to the unique situation of Palestinian refugees and their displacement in many parts of the world, family unity considerations must remain pivotal for TP benefits. For cultural, identity and economic reasons, Palestinians consider their close families as extending beyond the nuclear family. See, UNHCR’s approach recommending that undue restrictions not be placed on family relationships, and that special consideration be given for ‘vulnerable beneficiaries’, such as children, the elderly, and victims of trauma. Progress Report on Informal Consultations on the Provision of International Protection to All who Need It, supra n. 170, para 4(m).

189 Hathaway and Neve detail a useful framework for solution-oriented TP, from which we draw critical components for a successful Palestinian TP regime. See, Hathaway and Neve, supra n. 17, 173-81.
CONCLUSION

An internationally harmonized TP regime is flexible enough to provide solutions to the various protection problems. In the context of ongoing low-intensity conflict—unilateral separation or partial Israeli withdrawal—such a regime would enhance protection of the civilian population living under protracted military occupation, and ease the burden on front line Arab states. Such a regime would also provide EU member states with a mechanism to address a likely increase in Palestinian asylum claims. The package of incentives and disincentives would also provide leverage to steer the parties towards a resolution of the conflict based on objective criteria. For a Palestinian state, temporary protection would also be an appropriate status to grant to Palestinian refugees residing or wishing to reside in its territory, but for whom residency in a West Bank/Gaza Strip state is not an appropriate durable solution in legal terms. It would not be consistent with the internationally-recognized right of return to ‘repatriate’ the refugees to yet another area, such as a Palestinian state, which was not their place of origin. Temporary protection would also support the legal argument that Palestinian refugees would not need to give up their right to return to their homes and lands in order to improve their living conditions pending return. Granting temporary protection to Palestinian refugees would be consistent with article 1D as a mechanism towards implementing the appropriate UN General Assembly-mandated durable solution. The right of return called for in Resolution 194 (III) would be to the refugees’ place of origin. Temporary protection would provide Palestinian refugees in Arab states, as well as other states of the Palestinian exile, a recognized legal status. Consistent with the parameters of temporary protection in Europe, or Temporary Protected Status in the United States, temporary protection for Palestinian refugees should afford them the basic protection rights of other persons who are granted such status when fleeing emergency situations, whether Convention-defined refugees or not. Temporary protection specifically addresses the real needs of Palestinian refugees: the need to work, to travel freely, to live where s/he chooses within the temporary protection state, to reunite with family members, and to travel outside and return without special permission. Temporary protection also specifically addresses the fears of both the Arab and other states that they would either have to grant asylum or some more permanent type of status to the refugees, or expel them. Finally, it addresses the ongoing concern of Palestinian refugees and the PLO that the post-Oslo process might subvert the international consensus that the durable solution for Palestinian refugees is return to their place of origin, restitution, and compensation, as embodied in UN General Assembly Resolution 194 (III) and grounded in international law.
Part Four

Putting Rights into Practice
In March 2004 a commemoration was held near the ‘Cinema City’ in Herzliya for the Palestinian village of Ijlil, which existed at the site until 1948. Its inhabitants fled upon hearing of massacres committed against Palestinians by Zionist forces in the area. A detailed report about the village, its uprooting and the fate of its refugees, was published in the local paper *Sharon Times* on the occasion of the memorial. One week later the same paper published a letter to the editor written by a reader who was outraged at the paper for ‘providing a stage … to some Arabs who claim to have once lived on the site of the recently constructed, magnificent Cinema City.’ In another case, an educator working in Netanya was surprised to hear from high school students that, ‘before the Jews there were the British in the country’.

These are two rather incidental examples for the denial of the Palestinian *Nakba* by Jews in Israel. While it would certainly be possible to find even stronger examples, there appears to be no need for proof of the argument that the Jewish public in Israel denies the occurrence of the *Nakba*. The *Nakba* denial is found in the geography and the history taught in schools, on the maps of the country and in the signs marking places on its surface. All of them ignore, almost completely, the event which made possible the establishment of the Jewish state as a state with a Jewish majority and a Palestinian minority, after the majority of the indigenous people of the country were evicted, their properties destroyed and/or confiscated for the benefit of the new state.

How can we understand this denial of the *Nakba*? Can it be explained in psychological terms as the denial of an event that cannot be comfortably accepted?

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* This chapter is based on an article that first appeared in, *Haq al-Awda* 4-5 [Arabic] (2004). Translation from Hebrew original by Ingrid Jaradat Gassner.
Could we also say that recognition of the suffering inflicted on the Palestinians would ‘remove’ Jews in Israel from the status of the ultimate victim which justifies almost each evil action? Or maybe the denial is a result of plain ignorance? There may be various correct explanations for this phenomenon. This chapter will try to shed light on one aspect of the discourse about the **Nakba** in Israel (before and after its establishment).

It will show that from the Zionist viewpoint the **Nakba** represents an event that cannot possibly have occurred and—at the same time—had to occur. From early on, Zionism ignored the existence of the Arab inhabitants of Palestine. It is, therefore, not possible that some 800,000 persons were ethnically cleansed from the country and that more than 500 Palestinian villages were destroyed. On the other hand, the expulsion of the Palestinian majority from their country was inevitable for Zionism that aimed to establish a Jewish state, i.e., a national home for the Jewish people in the world on a territory ruled by a Jewish majority on the basis of law.

**THE **N**AKBA**—AN EVENT THAT DID NOT OCCUR

Zionist identity was built from the beginning on a two-fold negation: it negates time and space of the Jews outside Zion, a ‘negation of exile’ which extends beyond the realm of religion, and it negates time and space of those indigenous to the territory of Zion. The latter is best defined by the well-known statement of Zionist leader Israel Zangwill about ‘a people without land returning to a land without people’. 1 Attitudes of the leaders and architects of Zionism towards the indigenous inhabitants of ‘Zion’ were situated between their perception as (temporary) guardians or holders of the land on one end, and their absolute non-existence as a relevant factor on the other extreme. In this aspect, Zionism resembles other colonialist projects.

Edward Said writes in his book *Orientalism*, that for the Orientalist there is ‘no trace of Arab individuals with personal histories that can be told … The Arab does not create existential depth, not even in semantics … The oriental person is

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1 The phrase is attributed to Zangwill, but was coined by Lord Shaftesbury (1801-1885), a British politician, philanthropist and proponent of the creation of a Jewish state in Palestine. According to Zangwill, ‘If Lord Shaftesbury was literally inexact in describing Palestine as a country without a people, he was essentially correct, for there is no Arab people living in intimate fusion with the country, utilizing its resources and stamping it with a characteristic impress; there is at best an Arab encampment’. Israel Zangwill, *The Voice of Jerusalem* (London: William Heinemann, 1920), 104.
oriental first, and human second’. According to the approach of Zionism, a typical Orientalist movement, indigenous Arabs of the country exist and live in it, but they are of no importance in the sense of deserving a treatment similar to that shown to ‘European humans’. They certainly do not constitute a people or a collective able or interested in realizing itself as such, or in a way similar to the Jewish national collective.

If Palestinians do not ‘really’ exist, as opposed to the ‘reality’ of Zionist existence, then also their expulsion cannot occur. It is not possible to expel somebody who is not present. According to Zionism, the violent events around 1948 did in fact occur, but only in the form of an unavoidable response to the disturbance caused by the ‘locals’, who did not accept the establishment of the new entity, the Jewish state. Therefore, what is important to understand, teach and tell about this period is the story of ‘liberation’ and ‘independence’ of the Jewish people in its homeland. According to this approach there was certainly no Nakba or tragedy for any other, because the other had never really existed in the land. Hundreds of villages in the coastal areas, in the south and in the center were not expelled; rather ‘territorial continuity’ was created according to the Haganah’s Plan Dalet.

The space is thus ‘naturally’ Jewish. It must only be realized and transferred to Zionist control. Jewish territorial continuity and Jewish demographic homogeneity in Palestine represent the core of the Zionist project. Therefore, the Zionist subject cannot understand or see the catastrophe inherent in this project, especially since what is involved is the historical realization of an idea that derives its relevance from the Bible and a modern nationalism turned into a religion in many aspects. The Zionist subject cannot see the Nakba or seriously debate its circumstances. It must strip off its inner essence, in order to start to see it as an event that has shaped the space in which Zionism realized itself.

Ever since 1948 the Nakba is dismissed, and must be dismissed, from the consciousness of the Zionist subject, because its existence challenges the basis on which it was built—the notion of a people without land for a land without people. Therefore, recognition of the Palestinian Nakba, or even the attempt to look at this tragedy as something that happened to somebody else here, is outrageous and almost incomprehensible. It is possible to recognize that some massacres happened here and there, as a result of local battles and fighting; it is possible to recognize that all Arab armies tried to destroy ‘us’, the nation that wished to form itself. It is impossible, however, to look at the Nakba as a catastrophe committed by this collective in order to form itself, or as a necessary condition for the Zionist identity.

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THE NAKBA—AN EVENT THAT HAD TO OCCUR

On the other hand, and paradoxically, the Nakba—the violent expulsion of the inhabitants of the country and the transformation of those remaining into refugees in their homeland, or into second-class citizens—is a necessary event, because it brought about the realization of the ethnically pure, closed and autonomous Zionist subject which builds itself in the framework of a state aimed exclusively for him/her. Without the Nakba, the Zionist subject might have become contaminated intellectually by foreign ideas and practices, such as bi-nationalism, or even physically from living in a space over which s/he does not exert exclusive and absolute control. Benny Morris, for example, describes eloquently how the idea of transfer was found strongly in the heads and writings of Zionist leaders back in the early decades of the twentieth century, based on the profound understanding that the establishment and existence of the Jewish state will require the eviction of the native inhabitants of Eretz Isra’el.3

Morris then proceeds to show that also in the process of the Nakba Zionist leaders decided immediately, and in his opinion rightly so, not to permit the return of the refugees so as not to infringe upon the possibility of the establishment of a Jewish state. The decision then, by the Israeli government, to prevent the return of the Palestinian refugees, clearly indicates that its members were aware of their capability to bring about ethnic cleansing. Some Arab villages had maintained good neighborly relations with the Jews until 1948 and some Jews intervened on behalf of Arabs to stay in the country, however, even this did not help them to remain in their homes. Zionism was not concerned with this village or that, depending on its attitude or behavior towards the new state. Arabs stayed in the country as a result of mercy, and according to Morris, this was a mistake.4 The Zionist project had to evict the inhabitants of the country in order to realize itself.

Yosef Weitz, one of the heads of the Jewish National Fund at the time, provides evidence which is surprising in its honesty. He tells of the destruction of the village of Zarnuqa after its inhabitants had been expelled, despite numerous calls by Jews to abstain from their expulsion. He describes how he stood in the village watching the bulldozers destroy the buildings, which until recently had housed their inhabitants, feeling nothing. The destruction of Palestinian lives does not cause any doubts or emotional disturbance. He is even surprised about the fact that he feels nothing. As if this destruction was expected and premeditated.

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The Nakba continues as a non-event and causes anxiety when it appears

If the basic argument outlined above is correct, it can help explain two processes related to the Nakba, one situated in the reality of the violent conflict, the other in the consciousness of Israeli Jews who become exposed to the Nakba.

The Nakba as an event that did not occur in the past continues to not occur also today. Extra-judicial assassination of Palestinian leaders, confiscation of land, barring of Palestinian farmers from working their land by means of the wall under construction and the denial of their basic human rights are understood by the Zionist subject as means of the war against terrorism and as defensive acts necessary in order to fight the intolerable and illegitimate terror of the Palestinian people, who, according to a recent statement by an Israeli leader, are seen as a genetically abnormal species.\(^5\)

If the Nakba never happened, it is impossible that millions of Palestinians today are refugees who demand restitution of their rights. It is also impossible that the Palestinians demand control of at least one-fifth of Palestine (i.e., the West Bank and Gaza Strip), because they also had nothing before. In the eyes of the Zionist subject, everything that is happening today is completely disconnected from the historical context of the Nakba. Reference to the past of 1948 is made only in line with the Zionist narrative which holds that, ‘just like they did not accept us here in the past (e.g., according to the UN Partition Plan), they continue to try to throw us into the sea also today’.

The above also helps explain the position, in Israel, towards the question of Palestinian return. On no other issue related to the conflict is there a similar and broad consensus like the consensus against Palestinian return. As a matter of fact, there is not even a need to oppose return, because the very discussion of this topic is perceived as an existential threat. It is, therefore, excluded from the agenda of public debate without meaningful reference.

All Zionist Jewish political parties share this approach, which meets the logic of the argument that the Nakba never happened and results in a situation where the rights of millions of people remain denied until this day. If the Nakba was perceived by the Zionist subject as an event that really took place, there could be some Israelis, at least among the Zionist left, who would realize that some responsibility must be taken by the Israeli side for what happened in 1948. However, if there was no Nakba, there is also nothing to take responsibility for.

Another interesting process related to the denial of the Nakba is what happens to

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Jewish Israelis who are exposed to it for the first time. The Jewish Israeli individual experiences the encounter with the Palestinian Nakba as a kind of surprising slap in the face. Suddenly, and without prior warning or preparation (a result of years of denial), s/he is confronted with a tragedy that happened to the Palestinian neighbor, while s/he feels part of the side that had caused it. This creates intolerable feelings of guilt and helplessness.

Guilt may be relatively easy to cope with, because it can be recognized and forgiveness can be requested if we are ready to really listen to the voice of the Nakba. The major problem, however, is the challenge of all we have grown up with. The Zionist subject stands on somewhat shaky ground. It established itself by means of a violent process that is denied as an event that did not happen. When the ghostly spirit of this process is awakened (by Zochrot, for example), it triggers astonishment and anger. If, however, we rise above these emotions towards a more objective perspective of this threatening past, we may be able to find the key to conciliation almost sixty years after the Nakba.

**Zochrot and Nakba Awareness**

In the course of recent years we have witnessed a revival of Palestinian Nakba awareness. We started to hear, read and see much more from Palestinians about the Nakba of 1948 and their collective memory. Zochrot can be seen as an expression of a new wave of Jewish awareness following the wave of change among Palestinians in Israel. In addition, there were the events of October 2000 [the killing of 13 Palestinian citizens by Israeli police], which exposed the failure of most of the Israeli ‘peace camp’.

However, some understood—due to this crisis in Jewish-Arab relations—that we have to tackle the hard questions and to go to the roots of the conflict. Zochrot, together with other initiatives that radicalized themselves in this period, is part of a sector of the Israeli left that understood after October 2000 that we Jews must take responsibility, take a stand and act, and not waste time with strategy discussions or wait until we obtain the approval of the Arab side for this joint project or that. So yes, Zochrot activists are not veteran activists of the Israeli anti-Zionist movement, but rather people working in the field of education that have become aware of the necessity to act politically.

The idea of Zochrot was born in the year 2000. Around this time, I was searching the internet and came across a place called Qaqun in the Tulkarem District. It was a place I had played in during my childhood, and it was very dear to me. We knew

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then that the ruins were the remains of a crusader fortress. And then I found the
name on the internet and I thought, what does this place have to do with it? It’s my
childhood place. I clicked on it and I saw that it was a Palestinian village and that it
was destroyed early on during the 1948 war, following a heavy battle with Zionist
forces. This click on the computer is what Zochrot is about. Of course, it is more
difficult in the real world than in the virtual one, but this is the essence of what we
are about.

Public visits and sign-posting

Zochrot has been posting signs in 1948 depopulated Palestinian communities,
including public spaces such as Canada Park (built on the ruins of the Palestinian
villages of Imwas, Yalu, and Beit Nuba, which were destroyed in the 1967 war), in
cities (such as on Ibn Givrol Street in Tel Aviv, which borders Sumeil), and by major
roads, mainly in locations where remnants of the destruction still exist today. In this
context Zochrot has invited Jewish people to join guided visits in order to learn about
the Nakba.

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 an expression of universal humanity.

Though mainly symbolic, posting signs is an act fundamentally connected to the
past, as it constitutes recognition of the moral debt that is owed for the injustices
committed in the creation of the Jewish state. The catastrophe that occurred to the
Palestinians with the destruction of more than 400 of their villages demands some
kind of consideration on the part of the historical victors. Simply erecting a sign
that tells the story of a demolished village with dignity is recognition of the wrongs
committed and the tragedy.

A sign’s existence has both aesthetic and material character. It cannot be ignored
on the landscape. It is a physical monument, giving its viewer a new, more critical
perspective on the reality in which he or she lives. As long as razed Palestinian
villages remain uncommemorated on the Israeli landscape, their existence in the
past and their destruction is repressed. Each new sign will change the experience of
driving down Israel’s roads and walking on its paths. Signs erected over the ruins
of Palestinian villages will represent a challenge to written history inscribed on the
landscape.

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 a purposeful striving towards an agreement on the issue of return, are the keys to real reconciliation between the two peoples. Without a fair solution to the problem of return, the conflict can never be resolved.

Posting signs at villages integrates the past, present and future and the ethical, aesthetic and political. This is taking action upon the landscape in the hope of rediscovering and remodeling it, creating a renewed landscape that will reveal the traces of what has refused to be wiped out, in spite of so many efforts. In a more just society, the politics of landscape oblige society to morally account for its past wrongdoings, an obligation whose visual expression must be exposed to the light of day.

In March 2006, following a two-year legal battle, Israeli authorities conceded Zochrot’s request to post signs at Canada Park designating the Palestinian villages of Yalu and Imwas, on which remains the park was built.\(^7\) Zochrot argued that the ‘selective exclusion of segments of local history’ was an ‘unreasonable decision’ and that the ‘absence of an expressed justification for the decision’ led to suspicions that the purpose was to prevent park visitors ‘from becoming familiar with the Arab past of the area’.\(^8\) The petition to the High Court of Justice further argued that a decision not to grant permission to post signs at the park would violate freedom of expression and the right to equality.

Zochrot subsequently sent a letter to the JNF congratulating the Fund on the posting of the signs as an important step toward public recognition of the Palestinian life in the country and in advancing the shared existence of all residents of the land. We also proposed that similar action be taken to mark Palestinian communities and sites at every place for which the JNF is responsible. The signs were posted in May 2006, but one month later one of the signs disappeared. In July the remaining sign was vandalized rendering the text referring to the Palestinian villages illegible. Portions of the sign describing the Hasmonean, Byzantine, Roman, and Crusader periods in the park remained unscathed.

\(^7\) See, the High Court of Justice Petition No. 5580/05 on the Zochrot website for case background and legal arguments. Id. See also, Amiram Barakat, ‘The JNF will post signs commemorating the Palestinian villages that were destroyed’, Ha’aretz, July 26, 2005.

\(^8\) High Court of Justice Petition No. 5580/05, id.
Protecting sites of Palestinian memory

Zochrot also tries to prevent the destruction of the remaining signs of Palestinian life from before 1948. For example, in 2004 we engaged in a joint effort to stop the expansion of Moshav Ya’ad (Misgav Council in the Galilee), which would have affected the center of the destroyed Palestinian village of Mi’ar including its cemetery. A group of residents of the moshav, Zochrot and former Palestinian residents of Mi’ar (the Society for the Protection of Nature also presented an objection) presented legal objections to the proposed construction arguing that the memory of the Palestinian Nakba should be protected.

Ms Hannah Livne, a landscape artist and resident of Ya’ad, spoke on behalf of fifteen members of the moshav who publicly opposed those parts of the plan (and a number of others who opposed the plan but did not want to affix their signature to a petition against it) that would have affected the remains of central Mi’ar and its cemetery. Livne outlined the three reasons why they opposed parts of the plan, including its impact on visual landscape, archaeological reasons, and because of its impact on the village of Mi’ar:

...The third is the matter of the village of Mi’ar. The village existed on the hill until 1948 and was abandoned. Some of the people of Mi’ar who left the village are our neighbors and I know them. The life that existed there was extinguished. This involved great pain. We must acknowledge this if we are to have co-existence.

History is built layer by layer. Usually every layer, by virtue of its existence, erases the layer that preceded it. This is the essence of history. In our case, people who experienced the pain, come to the hill and see and remember the pain that they had. The hill is a space of memory and they are entitled to it.

She thus suggested that ‘the area that has not been built up’ be preserved ‘as a park that will give expression to the historical layers’:

...It would contain a reminder of the mishnaic Jewish village Sha’av, and a reminder of the village of Mi’ar which disappeared. The park will preserve the hill as a site, an area that would include expressions of the historical layers for the needs of the people of Mi’ar and for the memory of what they experience and this open wound. We have to understand what is happening to the other side and to reconcile with it. This park is an opportunity and a turning point. It is something that has not existed yet and there is hope for the future. We came to a compromise that says that you can build the green plots which is also not easy. It’s hard to say where the line should be drawn. The founders of Ya’ad who came to Mi’ar Hill saw that it was a lovely place and they knew about the painful history there, so
they went a bit further on. I heard that at the time, there was a boy who said when the people of Ya’ad came to settle in the area it was easier for them because of the greater distance from the village that was destroyed.

Mr Ahmad Tahta is a member of the group that organized the meetings between the people of Mi’ar and the secretariat of moshav Ya’ad:

...From the beginning we had the intention of reaching a compromise that would not hamper the expansion of the community and would not cause further injury to the memory and the pain of the people of Mi’ar. We asked that a surveyor examine which points might cause further injury to the memory and the pain of the residents, and which points would not. We were shown only two points, on the border of the plots. Yet, in the plan, plot 173 falls on the wall of a house, and there would be a fence and a security path precisely over the mosque of the village. Nonetheless, the members of the secretariat who saw the points marked by the surveyor asked to keep plots 168-176.

This plan has a few versions. In one version a plot was added on the western side. There was opposition by some of the residents that this would obscure the landscape on the west, and members of the secretariat asked to cancel these plots so as not to impair the landscape. To me, it seems that people treat scenic value as being more important than the memory of people.

And finally, Mr Hayibi Zakhi, who was born in Mi’ar in 1942 told the hearing that while he appreciated all the people who spoke, it nonetheless hurt him ‘that people are building on my home. I don’t know what kind of democracy ruins a house and builds another house on top of it. If they would build on this place and recreate the houses both for Arabs and Jews to live in, I would not be opposed to the plan’. The regional planning council eventually agreed to leave open space (by removing 12 planned houses), followed by a decision by Moshav Ya’ad to remove 14 more houses from the original plan.

Developing community-based models for refugee return and restitution

Zochrot also have an interesting new project, which involves a process of dialogue between internally displaced Palestinians and Jews who are living on their land, It aims to design a plan of action for improving the lives of both sides, based on the recognition of the wrong done in the past. This is something that has never been done before.

There has never been systematic dialogue between displaced Palestinians from
one particular village and Jewish Israelis living on their land today. Meetings are organized not in order to get to know each other, or to learn about the conflict, but with the aim of dealing with what happened in 1948, and to examine how this space can be reshaped and how change can be brought about to allow a better life for all.

One example is an initiative between several members of Kibbutz Bar’am and internally displaced Palestinians from the destroyed village of Bir’im. A group of 7 Jewish members of Kibbutz Bar’am and 5 people of Bir’im was formed between January and May 2004. As of July 2004 three meetings had been held. The first meeting served to talk about what happened in the past, whilst in the second meeting options for the future were discussed. The third meeting was dedicated to the question: what can we do? This meeting was held in the church of Bir’im, one of the few remaining buildings in the destroyed village. The group divided into two sub-groups (Jewish Israelis and internally displaced Palestinians), and the Jewish group produced a statement, which was subsequently discussed and approved by Palestinian group members as the basic platform for future action:

With great sorrow for the injustice done in 1948, throughout the military regime and until today, we wish to tell the story of what happened and act for the return of the displaced people of Bir’im and their descendants to their village.

The statement included a list of basic principles for the proposed solution:

- Bir’im will be re-established upon the lands and forest not currently cultivated by Kibbutz Bar’am, Kibbutz Sasa and Moshav Dovev;
- Land built-up and cultivated by the kibbutzim will not be returned to the original owners, unless the members of the kibbutzim agree otherwise;
- Palestinian owners of the above land will be compensated;
- Those displaced from Bir’im who choose not to return will be compensated;
- Those displaced from Bir’im who reside abroad are considered right-holders just like those present in the country;
- All members of the group, those displaced from Bir’im and members of Kibbutz Bar’am, will work together in order to prevent further confiscation of land.

Based on these principles, Bir’im displaced would be restituted of some 10,000 dunums of land, while 2,000 dunums would remain with Kibbutz Bar’am, Kibbutz

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9 The report about this initiative was presented jointly by Einat Luzati and Shlomit Kafri, members of kibbutz Bar’am, and Nahida Zahra, a second-generation internally displaced Palestinian resident of Bir’im.
Sasa, and Moshav Dovev (as compared to 600 dunums offered to the Bir’im displaced by an Israeli government proposal based on the Liba’i Commission).

Future activities planned by the group included preparation of exhibitions informing about the circumstances of depopulation and destruction of Bir’im and Israeli polices preventing the return of its residents; a summer camp for the children of both communities; work for the enlargement of the group; arrange a meeting for Bir’im displaced with the Secretary of kibbutz Bar’am; posting of signs in the village, cleaning of village paths; organize a meeting between members of kibbutz Dovev and displaced people from the village of Sa’sa; organize public memorial events to commemorate the history of Bir’im; raise public awareness about the plan to rebuild the village based on the six principles listed above; and produce a film about the second and third generation of both communities.

CONCLUSION

Posting signs at demolished Palestinian villages, protecting sites of Palestinian memory and developing community-based plans for return and restitution are only several elements of an expansive effort to commemorate the Nakba in Hebrew. Calling attention to the Nakba in Hebrew—at schools, universities and in other public arenas—should be an objective of all who desire mutual recognition and peace between Arabs and Jews in the Middle East. At a time when the word machsom (roadblock) is so ubiquitous that young Palestinians are unaware that it is a term belonging to the occupation, let alone a word in Hebrew, it is appropriate that Israelis think and speak of the Nakba as a way to begin to understand Palestinian suffering.

In addition to posting signs, Zochrot also suggests creating children’s games on the subject of the Nakba, organizing study tours of villages that were destroyed (including training tour guides for this purpose), manufacturing maps that include these villages, creating a database and documentation of the demolished villages and organizing exhibitions, among many other possibilities. This will all be carried out in clear and simple Hebrew.

Zochrot seeks to address these challenges: to commemorate and talk about the Nakba in Hebrew so that our language will be more peaceful and just; to witness what was wiped off the face of the earth in order to understand our neighbors’ pain and loss; to acknowledge the Palestinian catastrophes of 1948 and 1967 and, thereby, attempt to mold a peace-seeking Jewish-Israeli consciousness.

11

Transitional Justice and its Applicability to the Zionist/Palestinian Conflict and the Palestinian Refugee Issue

Jessica Nevo

This chapter begins with a brief comment on my personal experience in coming to deal with the Palestinian refugee issue and exploring mechanisms for justice in the context of the transitional justice paradigm. As a Jew living in Israel, the process of uncovering the layers of denial about Palestinian history, their reality and the ‘refugee problem’ was, and still is, complex and painful. As for many Israeli Jews, including partners and colleagues who are politically active, this is a never ending ‘journey of awakening’ that reveals hidden facts and confronts one with a choice to reject the ‘official story’ of Zionism, to reject being deaf to the stories of Palestinians. This decision requires one to cross the lines of consensus and, as a result, live on the margins of society, labeled as a ‘traitor’.

At the same time, the fact that I was born and grew up in Argentina before coming to Israel has perhaps given me the immigrant’s ‘advantage of the margins’, that is to say, it has enabled me to critically observe Israeli society and the official (and dominant) Zionist version of its past and present history. But my Argentinian background also means that I was exposed to the particular circumstances of a society controlled by a totalitarian regime, characterized by total control of the media, the education system and a pattern of gross human rights violations including assassination of opposition figures. Having lived almost all of my life under state terrorism and military curfews informed my own critical perspective on the Zionist-Palestinian conflict.

I remember the first time that I understood that there were Palestinian citizens of Israel; the first time I heard that more than 500 Palestinian villages were depopulated in 1948; the first time I heard the Arabic word Nakba; and my first look at the oppressive elements in planning and environmental policies in Israel. My refusal...
to be drafted into the army was not, at that time, a conscious political stand; rather, it was connected to a more intuitive feeling that ‘something was wrong’. Together with my experiences living under a totalitarian regime in Argentina, these insights into the more subtle aspects of totalitarianism and militarism under the illusion of freedom that we live as Israeli Jews led me to the perspective presented here.

This chapter examines issues related to the Zionist-Palestinian conflict, and the Palestinian refugee issue in particular, from the perspective of transitional justice. Is the transitional justice paradigm relevant? If so, what existing civil society responses in Israel express transitional justice mechanisms and how could they lead a pro-active process towards more official mechanisms that advance transitional processes? The first part of the chapter provides a brief review of the debate on the applicability of transitional justice to Israel/Palestine, followed by an examination of processes within Israeli Jewish society that indicate that an actual pre-transitional process is already underway led by civil society. The chapter concludes with a proposal for proactive strategies in anticipation of further change, and a discussion of the role that Israeli Jews might play regarding the events of 1948.

**Transitional Justice Mechanisms**

The International Center for Transitional Justice has identified five primary mechanisms to deal with mass abuses and human rights violations in societies undergoing transitions from war to peace, dictatorship to democracy, etc. These are: prosecution, truth seeking (dealing with the past), reparations, institutional reform, and removing abusers from positions of power. These responses integrate elements from both retributive and restorative paradigms, use legal and non-legal tools and may include official and unofficial initiatives, the latter referring to civil society initiatives or ‘civil strategies’. This chapter focuses on strategies connected to looking at the past, also known as ‘civil strategies of memory’.

Besides being a place to learn about the impact of gross human rights abuses on society, as mentioned above, Argentina is also a pertinent place to examine mechanisms developed in response to such situations. The mechanisms set up in Argentina were developed long before transitional justice was conceptualized as a discipline and ‘truth commissions’ became famous with the 1990 Truth and Reconciliation Commission in South Africa. The National Commission on the Disappeared or CONADEP, the first formal ‘truth-seeking mechanism’ of its kind, was set up in Argentina in 1984 during the transition from the dictatorship to democracy. Survivors and representatives of those who had disappeared at the hands of the Argentinian military demanded that the newly-elected democratic
government disclose the facts about the events that took place during the military dictatorship.\(^1\)

The National Commission on the Disappeared was actually a political compromise as civil society groups had petitioned for the establishment of an official government commission. While CONADEP was only semi-official in nature, civil society demands would eventually lead to the establishment of an official commission of inquiry.\(^2\) CONADEP was mandated to establish the truth about the fate of the disappeared and the nature of repression under military rule. In other words, the National Commission on the Disappeared was a fact-finding body, as if the main question of a commission of inquiry in Zionist-Palestinian conflict would ask: ‘What happened in Palestine in 1948 that led to the refugee problem?’

The truth-seeking process in Argentina, however, was not limited to CONADEP. The weekly demonstration of the ‘Mothers of the Plazo de Mayo’ that began in 1976 has and continues to serve as an active ‘tool of memory’, publicly raising demands for truth and accountability about the disappeared.\(^3\) In March 2004, a Museum of Memory was established at the Escuela de Mecanica de la Armada. The school previously served as the main torture camp during the military regime in Argentina. The Argentinian president, Néstor Kirchner, chose the site due its significance, and to express an apology for the crimes committed by the military junta 28 years ago.

Before discussing possible strategies for official transitional justice mechanisms in Israel— commissions of inquiry and/or ‘civil strategies of memory’—the following section provides a brief review of the main arguments concerning the applicability of the transitional paradigm to the Zionist-Palestinian conflict, followed by a counter argument that a ‘transition’ has, in fact, already started.

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\(^1\) Nunca Más. Annexos del Informe de la Comisión Nacional sobre la Desaparición de Personas (Buenos Aires: Editorial Universitaria de Buenos Aires, 1984).


\(^3\) At the beginning of the first intifada I joined ‘Women in Black—Israeli Women Against the Occupation’ in Haifa, a group which has used this same pattern of weekly demonstrations for nearly two decades and continues to do so today.
Arguments against the applicability of transitional justice to the Zion-Palestinian conflict

The conflict has a unique history and features

One of the more common arguments is that transitional justice mechanisms are not applicable to Israel/Palestine because this conflict and its features are unique. Lessons learned from other transitional processes, such as the well-known case of South Africa in particular, therefore, do not apply.

Taking the South African comparison as an example, however, it is possible to identify similarities between the former apartheid regime and Israeli control of the occupied Palestinian territories. A more critical approach might argue that the hidden and real agenda of all peace agreements between Israel and the Palestinians, from the Oslo agreements of the 1990s to the 2003 Road Map is to set up an apartheid system in the West Bank, based on the creation of territorial bantustans, the relocation of the Palestinian population, land confiscation and a segregated economy.

Based on these similarities with the former South African regime, it would be possible to look at the South African experience as a transition model for the Zionist-Palestinian conflict.

Restorative/transition mechanisms address internal conflicts

Others suggest that restorative/transition mechanisms are applicable primarily to internal conflicts, like Argentina or South Africa, where the parties to the conflict share the same territory, while the Israel/Palestine case is characterized by cross-

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6 A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, annex to letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2003/529, May 7, 2003.

border conflict. To back this up they also point to the increasing trend towards separation of Israeli Jews and Palestinians.\(^8\)

At the same time, the geographic proximity of Israel and the occupied Palestinian territories, 40 years of blurring the ‘green line’ (the border between Israel and the West Bank before 1967) through settlement construction in the OPTs, and the interconnection of the two populations, challenge if not contradict the definition of this conflict as a cross-border one. The dependency of the Palestinian economy on Israel is another crucial aspect of this interconnection, as is the presence of thousands of Israeli Jewish soldiers and almost half a million Israeli Jews living in settlements among the Palestinian population in the occupied territories.

These realities, along with the fact that Israel does not truly intend ‘separation’ or a total withdrawal and dismantling of settlements, suggests that the Zionist-Palestinian conflict is, in fact, an internal conflict—similar to the one in South Africa—and should therefore be considered as such when dealing with transitional justice.

**There is no discontinuity in the ruling political regime**

Another argument against the applicability of transitional justice in the Zionist-Palestinian case is that the efficacy of the process is grounded in a clear discontinuity of the ruling political regime. This creates the space for any new political regime to openly reject the former regime during the transitional process.\(^9\) Moreover, it is argued that transitional justice mechanisms are more appropriate for societies emerging from dictatorship or totalitarianism.\(^10\)

On the contrary I would argue that a sharp or drastic discontinuity in regime is not absolutely vital for a transitional process. In Israel, a transformative and genuine process will demand structural and institutional reforms that will require the rejection of the former dominant ideology, these reforms acting as a kind of ‘discontinuity of regime’.

A more radical analysis would contend that Israeli society as a whole is militarized. It is led by values of war and violence, and it educates its citizens to consent to

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\(^10\) Goldstein, *supra* n. 8.
the draft system from the moment they are born. Moreover, Israeli governments historically have been led by former military officials.

An acknowledgment that ‘something is wrong’

Finally, some argue that the Israeli-Palestinian conflict cannot (yet) be defined as in a transition phase, because it is far from being a post-conflict situation. Alex Boraine, Vice-Chairman of the TRC in South Africa under Archbishop Desmond Tutu, proposes one way of looking at patterns of transition and how they condition different modes of justice. Each pattern has to deal with particular political and institutional constraints which delineate the form of justice—from the most retributive model (prosecutions and trials) to more restorative models (truth commissions). Boraine’s four patterns of transition, listed below, do not apply directly to the Zionist-Palestinian conflict.

(1) Full defeat in an armed conflict as in Germany at the end of WWII;
(2) A transition after a dictator loses an election, as in Chile;
(3) A transition through compromise and negotiations like South Africa; and
(4) Transition from longstanding communist regimes as seen in Eastern Europe.

It is argued that transitional justice is not applicable to Israel/Palestine because the success of such a process lies in the willingness of the ruling regime to undertake an official initiative. In the present circumstances, the Israeli government will neither initiate nor back (unlike what happened with former apartheid government in South Africa) such a process. Moreover, transitional processes are effective only when the perpetrators—in this case Israeli Jews—realize that ‘something is wrong’. This recognition cannot happen as long as Israeli Jews perceive themselves only as victims and not as perpetrators of the abuses suffered by Palestinians.

When the impetus for an official process is lacking, the construction of collective memory, and the investigation and documentation of past repression is often taken up by civil society. Unofficial, civil strategies of memory have been developed

13 Tamir, supra n. 9.
14 Teital, supra n. 2, 81.
in countries, such as Uruguay, Brazil and Ireland among others, where official government policy towards the past is characterized by amnesia or collusion. In Guatemala, for example, which is dealt with in more detail by Sandra Vicente in chapter 2, the church initiated unofficial investigations of past abuses. Strategies that began as civil society/grassroots efforts often catalyze official processes, as in Guatemala where unofficial findings were later incorporated into an official report, comprising institutional reforms, investigations, prosecutions and reparation programs. Exposing hidden facts and narratives, and the denunciation of abusive regimes by non-governmental voices, eventually mobilizes an official response.

A truth-seeking process that looks back at the history of Israel (either the last 100 years or since 1948 or 1967), and the Israeli policy towards the Palestinians living on this piece of land, would lead to the exposure of human rights violations and oppressive policies against Palestinians. It could end up putting the whole Zionist project on trial. The official exposure of mass abuses committed in 1948 would mean recognition of the damage inflicted. Such an acknowledgment would require an admission of responsibility for the events of 1948 (if not earlier), not least of which would suggest a need to establish official reparation programs for Palestinian refugees and their descendants (including internal refugees—i.e., Palestinians living in Israel who were displaced in 1948).

Aware that the Israeli establishment will not lead a ‘peace with justice and reconciliation’ process and recognizing the fact that politicians and generals will not provide, in the immediate future, official backing for a transition process, some Israeli civil society groups are already re-telling the story of the occupation, the establishment of Israel, the Nakba and the Zionist movement. The story of 1948, for example, is being re-told by the ‘new historians’ who challenge the hegemonic, Zionist narrative of the conflict; by civil society groups such as Zochrot (see chapter 11) who bring the Nakba to the Jewish Israeli public; by the 1948 women’s testimonies project of the Israeli NGO Bat Shalom15; and also by a coalition of activists and organizations that came together in 2006 in order to raise awareness leading up to the 60th anniversary of the Nakba in 2008.

The amnesia or collusion in our case is not only towards the past but also towards the present, that is to say, the occupation. The refusenik movement—18-year-old women and men resisting compulsory draft to the army, often at risk to their own security and personal freedom—and the trials the army held against them, mainly in 2002-2003, have also challenged the desire of officials to ‘sweep’ undesirable histories of the military occupation in the West Bank and Gaza under the carpet.

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15 For more details see, the Bat Shalom website <http://www.batshalom.org> (accessed Mar. 10, 2007).
I see the testimonies given by *refuseniks* in military court about massive abuses of Palestinians in the occupied territories as anticipating a unique truth-seeking mechanism in Israel. The strategy of the refusers led to slight changes in the draft process, thereby anticipating some kind of ‘institutional reforms’, another indicator that predicts the possibility of a transitional justice process.

All the voices mentioned above clearly declare that ‘something is wrong’. In this way they are re-telling the ‘official story’ of Zionism, the 1967 occupation and the violations inflicted on Palestinians. They also challenge the ‘victim psychology’ discourse that is dominant among Israeli Jews and in Israeli institutions. If there is an admission that ‘something is wrong’, this could lead to a type of transition.

**TRANSITIONAL JUSTICE MECHANISMS RELEVANT TO 1948**

I arrived at the transitional justice paradigm while looking for alternative responses to ‘personal’ traumas/experiences of violence, abuse, violation and crimes and became interested in alternative processes—i.e., outside the criminal justice process—undertaken by communities and societies coming to terms with collective traumas and crimes, and searching for justice, closure and healing. The transitional justice paradigm goes beyond criminal justice and broadens the concept of bringing about justice. While trials focus on the perpetrators, transitional justice, combined with a restorative component, focuses more clearly on ‘survivor’s justice’.

As mentioned earlier, transitional justice utilizes a range of retributive and restorative forms of justice. Looking at the intersection of transitional justice with the restorative justice paradigm is interesting for several reasons, including the raising of questions about the efficacy of the adversarial paradigm based on the experiences and contributions of international criminal tribunals, like the ones in Bosnia and Herzegovina and Rwanda, to peacemaking and reconciliation, and because of the limitations of the adversarial paradigm in addressing situations where violence is endemic.

One model of restorative justice, developed at the University of Fresno, California, deals with healing and restoration of material and non-material harms through processes that aim to solve conflicts in such a way as to give maximum response to the *needs that the harm produced*. For the model to be successful all three of the following components must be fulfilled, and each one is reliant upon the fulfillment of the former:

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(1) recognizing/acknowledging the harm perpetrated;
(2) restoring the imbalance and repairing the wrongs; and
(3) clarifying the future and giving assurance that the wrongs will not be perpetrated again.

Based on this model, the first stage requires dealing with the past. How can we talk about reparation/compensation when the perpetrators have yet to acknowledge their wrongs? Palestinian demands for reparations will go unmet without recognition by the Israeli establishment that the Nakba happened and that it caused harm. In order to reach this first stage two parallel strategies are proposed: a commission of inquiry and alternative civil society strategies of memory.

Societies in transition use ‘truth-seeking’ mechanisms to deal with massive human rights violations. They emerged as the leading transitional and restorative mechanism to expose and eradicate massive and systemic abuses meted out by repressive states. A diverse array of public truth-seeking mechanisms are commonly used to address the question of recognition. They are seen by some commentators as ‘the essential, crucial minimum response’ to advance reconciliation for societies in transition.17 According to Alex Boraine, one of the most important functions of such mechanisms is

to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example, that the military didn’t throw half dead victims in the sea from helicopters. In Chile it is no longer permissible to assert in public that the Pinochet regime didn’t dispatch thousands of innocent people.18

Participation in any social order presupposes a shared memory. To the extent that memories of a past diverge, members of the same social order can share neither experiences nor assumptions.19 In our case, the Zionist and the Palestinian narratives exist in different spheres, different languages and they compete for visibility. Since Israelis live as if the Palestinian narrative of 1948 does not exist, exposure to stories retold in the public space, with as much official legitimacy as possible, can create an


opportunity for the Israeli Jewish public to hear the testimonies of the other. That is the beginning of recognition, if not acceptance.

As I do not envisage an entirely official truth-seeking mechanism in the near future, I see two possible tracks within the existing constraints of dealing with the events of 1948 and the Palestinians refugee issue as a precondition for any conflict resolution in the present.

**A commission of inquiry**

Under the Commissions of Inquiry Law of 1968 Israel has conducted several official investigations of past events. These include the 1982 Kahan Commission set up to investigate the massacre of Palestinian refugees in the Sabra and Shatila camps in Lebanon, the Landau Commission investigating interrogation practices of the General Security Services, the Shamgar Commission investigating the 1994 Hebron massacre, the second Shamgar Commission into the murder of Yitzhak Rabin and the Orr Commission investigating the October 2000 events. Regardless of whether or not these official commissions of inquiry produced concrete outcomes, they at least recognized that ‘something happened’.

Such commissions do not function as a court of law, but they are entitled to request witnesses to testify as part of the commission proceedings. This is relevant to Israel/Palestine since attempts to prosecute mass human rights abuses (i.e., through criminal proceedings) focus on ‘personal responsibility’ and do not fit well in situations where the violence/abuses are systemic, that it to say, where most of the society, including perpetrators, collaborators and beneficiaries of the regime can be blamed for the oppressive policies and/or violence, either directly or indirectly. Criminal justice mechanisms are suitable when breaking the law is the exception and not the norm.

The 1968 law provides for the establishment of commissions to review issues of vital public interest that demand clarification and that are at the center of the public agenda, including past events that may generate public unrest. But in the case of Israel/Palestine it is the present relevance of the issues that justify a commission of inquiry. All attempts to advance a ‘peace process’ have failed. One of the lessons learned, as we saw before, is that it is not viable to skip stages in a healing or recovery process. The failure to recognize the past and the harm done is central to understanding the failure of the Israeli-Palestinian peacemaking process.

The basic contribution of the CONADEP report (*Nunca Mas* or Never Again)

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in Argentina was that it named the disappeared, recorded the testimonies of the disappeared that were released and documented the systemic nature of the *junta* repression. A minimum contribution of such a commission in our case would be to give acknowledgment of the *Nakba* by naming all people who were damaged by the 1948 events including those who fled, those who were expelled, and those injured and killed. Since the process of testifying and naming is thought to be cathartic in itself, such a commission would provide the beginnings for a restorative, healing public space.

**Civil, alternative models of justice**

The Israeli establishment may not be ready to take that step, but civil society is ready, as discussed above. To achieve an official recognition of past harms in the Zionist-Palestinian conflict will require unofficial, civil society strategies that hold the possibility of eventually leading to an official mechanism of acknowledgment of the *Nakba* and the Palestinian refugee issue.

Civil strategies of memory challenge official historiography and often lead to the development of new movements that demand accountability. They also force truth and justice into the social discourse. Initiatives led by Jewish Israeli groups, such as a memorial for *Nakba* victims, civil society public forums with open hearings, transmitted through alternative media, could provide the space to hear the testimonies of victims, perpetrators and collaborators, acknowledge the past and open the possibility for a transitional apology.

Holding such hearings among Palestinian communities outside Israel could be a start if such hearings are still not possible to hold inside Israel itself.
One of the fundamental principles of democratic government is that it requires the consent of the governed. The citizens of a country have the right to participate in political decision-making¹ and the ‘will of the people’ is the source of legitimacy of the political leadership.

Peace processes and the agreements reached through them offer opportunities not only for ending violence, but also for negotiating new political structures and relationships. Agreements often lead to significant changes to the structure of the state, systems of governance, access to resources, security and opportunities for development. The processes themselves offer opportunities for political reconciliation between protagonists, and for the consolidation of democratic politics as the dominant arena of political decision-making. Therefore, the way these processes are managed matters, and the question of participation is of particular importance.

Yet the dominant paradigm of peacemaking is what may be called ‘elite pact-making’; the leaders of the combatant groups are brought together behind closed doors, often in a foreign country and frequently with the assistance of an international mediator, to reach an agreement which satisfies the minimum demands of the negotiators. The agreement is then announced to a largely ignorant and often polarized public, who are then exhorted to accept it and expected to cooperate in its implementation.

This model of peacemaking has successfully contributed to the ending of civil wars in a number of countries: Sierra Leone, Tajikistan and El Salvador. This success should certainly not be under-estimated, and neither should the enormous challenges of simply getting the armed parties to the table.

However, it is clear that this approach has some significant ‘opportunity costs’. It rarely provides opportunities for those who are not involved in the violence—including other political groupings, organized civil society or the wider public—to have a voice in shaping or endorsing the agreements. And although the end of hostilities is likely to be met with widespread feelings of relief, some may feel alienated from an agreement that is not ‘theirs’.

**Public Participation: an alternative to the elite pact-making paradigm?**

In 2002, the *Accord* program of the London-based NGO Conciliation Resources undertook a project to explore whether there are alternatives to this elite pact-making paradigm of peacemaking. It discovered a number of highly significant peacemaking experiences, in a range of different countries, where people have succeeded in ‘opening’ the political process to facilitate the participation of a broader range of social groupings.

Each of the mechanisms documented in our *Accord* project engaged people from different sectors and identity-groups to deliberate the substantive and procedural issues addressed in the negotiations. The mechanisms existed in the ‘public sphere’: wider audiences were aware of them and had opportunities to contribute. They were reported in the media, the issues could be meaningfully debated in public and representatives had opportunities to consult with constituencies.

The cases reveal several basic modes of participation in peacemaking:

- *representative participation* through political parties;
- *consultative mechanisms* where civil society has an opportunity to voice views and formulate recommendations; and
- *direct participation* where all interested individuals engage in a process of developing and implementing agreements to address the conflict.

Conciliation Resource’s *Accord* project contains a number of examples of each of these modes of peacemaking. All are referred to in this chapter, and for each mode, there is a more detailed description of one of the particular examples.³

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³ Readers requiring more detailed explanations of context, methodology and outcomes of individual mechanisms are encouraged to refer to the relevant articles in *id.*
It is hoped that the following brief glimpses into the nature of mechanisms for public participation elsewhere in the world may assist in reflecting on the opportunities for more inclusive, participatory approaches to peacemaking in Palestine/Israel. The examples are not offered as models to be replicated from one peace process to another; rather they provide ideas of how different societies have drawn on the strengths of their own traditions to create innovative mechanisms for participation. Their successes and shortcomings hopefully provide both inspiration and warning to inform conflict resolution efforts elsewhere.

Representative participation

In South Africa and Northern Ireland, key actors realized that an agreement was unlikely to be sustainable without the involvement and consent of all the other parties. The political negotiations were therefore designed to engage all the political groupings with a requisite degree of public support that were willing to participate in the talks. In both cases, these multi-party negotiations became decision-making bodies addressing the constitutional framework for a new post-conflict social contract.

In Northern Ireland, preparations began in 1996 for the ‘all party talks’. Elections were held to ensure that there were delegations for all the main communities. Seats were allocated through a two-track system, whereby 18 territorial constituencies elected five representatives, complemented by a ‘top-up’ system which added two representatives from each of the 10 most successful political parties. This resulted in a total of 110 delegates to the talks.

The Northern Ireland Women’s Coalition was formed in response to the exclusion of women from the candidate lists of political parties. When their lobbying failed, a group of women formed their own coalition, including women from both the main communities of Irish nationalists and unionists. In preparation for the elections, they held meetings twice per week to debate positions and prepare their manifesto. The meetings were facilitated by rotating chairs, and participants were encouraged to bring their ‘identity baggage’ into the room. The Women’s Coalition needed to win 10,000 votes to be eligible for the ‘top-up’ layer seats. Despite a lack of resources, they ultimately succeeded in gaining one per cent of the vote and finished as the ninth most popular political party.

During the talks, the larger parties were allowed three seats at the table, plus three back-up delegates. Smaller parties were allowed two seats plus three back-up delegates. Initially the only women at the talks, the Women’s Coalition delegates ensured that they always had a nationalist and a unionist woman at the table at all times. Their back-up team of ten advisers was also similarly balanced, with delegates
selected from an open meeting. Initially, they focused on procedural issues, helping to smooth the process of the talks. As the negotiations advanced, they were also able to broaden the agenda to include victims’ rights and reconciliation. To ensure they remained representative of their constituency, they consulted with their membership on a monthly basis, exploring their views on upcoming agenda items and holding discussions with other NGO leaders.

The Belfast Agreement was signed in April 1998\(^4\) and subsequently endorsed by a public referendum. The representative political process was a key factor in determining its acceptability to the wider public in Northern Ireland. It is widely acknowledged that the Women’s Coalition played a crucial role in ensuring the inclusion of sensitive issues, demystifying the political process and showing civil society’s capacity to engage in political decision-making.

In both Northern Ireland and South Africa, there was a well-developed system of multi-party politics rooted in the vibrant political cultures of the different communities. Many parties had processes for consulting members and affiliate bodies. These factors increased the potential for parties to serve as a channel of constituency interests and values; they could both represent prevalent opinions and help to ‘bring along’ their supporters in the process. Over a period of time, the processes became the main political forum for addressing the issues under discussion and there were incentives for cooperative behavior in order for each group to achieve their primary objectives. Because all political groupings could participate, it became difficult to sabotage the process; instead, the parties remaining outside the process typically became increasingly marginalized.

**Consultative mechanisms**

The Guatemalan Civil Society Assembly and the Philippines National Unification Commission were both formed to consult a broad array of constituencies and elicit their recommendations for peacemaking. The aim was to generate social consensus to inform and shore up decisions taken by the government and armed groups (in Guatemala) and by the government (in the Philippines). The Guatemalan Civil Society Assembly was organized on a sectoral basis, enabling political parties, religious groups, trade unions, women’s organizations, Mayan organizations, development NGOs and others to debate possible solutions to a range of substantive conflict issues. The Philippines National Unification Commission convened provincial, regional and national level consultations, each comprising a range of social sectors,

to make proposals on ending the armed conflicts and identify issues relevant to the peace process.

The peace process in Guatemala ended more than three decades of war. As with many places, the processes suffered many setbacks and a whole series of negotiation processes preceded the UN-mediated negotiations between the Guatemalan government and the Guatemalan National Revolutionary Unity, which resulted in the Peace Accords of 1996. It was in the context of the UN-mediated negotiations that the Civil Society Assembly took place, but it had some important precedents in the Grand National Dialogue of 1989. The Grand National Dialogue convened 84 delegates representing 47 organizations, including the government, political parties, media organizations, churches, etc. The Guatemalan National Revolutionary Unity was not allowed to participate, and the process was also boycotted by right-wing formations such as the large agro-business sector. Neither women’s nor Mayan organizations were represented. Although security deteriorated and the Grand National Dialogue had to be disbanded, it identified several themes of key importance in the conflict. This analysis subsequently helped to define the official negotiating agenda between the Guatemalan National Revolutionary Unity and the government in 1994. Significantly, this new negotiation framework distinguished between substantive and operative themes and the Civil Society Assembly was created to discuss the former.

The Civil Society Assembly was chaired by a Catholic Bishop, assisted by an Organizing Committee. It comprised representatives of 10 social sectors, including, for the first time, representatives of sectors representing indigenous peoples and women. The Assembly was mandated to draft consensus papers on seven substantive negotiating themes, each of which was addressed sequentially. Each sector presented its position on a specific theme and the issues were debated until they were able to prepare a consensus paper. Many of the Assembly’s proposals were adopted in the drafting of the relevant peace accord on the topic. The role played by Mayan organizations was of crucial importance and enabled them to legitimize their voice and issues in the mainstream of Guatemalan politics. However, the process also had several shortcomings. The Civil Society Assembly failed to sustain the participation of the agro-business elite, which led to the undermining of several Civil Society Assembly suggestions on socio-economic and agrarian reform and land distribution. There were also poor mechanisms for communication with wider

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public, who remained relatively unaware of the details of the process, and who were insufficiently engaged to support the accords in the subsequent referendum.

Each mechanism created unprecedented space for non-combatants to discuss the structural causes of conflict and participants identified key issues that were later incorporated into the official negotiating agenda. Yet the difficulties in sustaining the outcomes of these processes suggests that while consultation mechanisms may provide valuable opportunities to identify issues and build consensus, they are weaker forms of participation than the representative model because their recommendations are not binding.

**Direct participation**

The Malian inter-community meetings, Colombia’s Municipal Constituent Assemblies and the local and regional peace committees of South Africa’s National Peace Accord all reveal another mode of participation based on the direct involvement of members of the public. In each, local civic leaders initiated and managed processes engaging all interested community members in developing and implementing agreements to address the aspects of a conflict within their control. In this way they were able to create a ‘pragmatic peace’ with others in their community.

A significant factor was the scale on which they operated: by working at a community level, local leaders could facilitate processes that engaged hundreds and even thousands of people in face-to-face, direct political dialogue. Those who participated in these processes tended to feel ownership of the agreements reached, creating significant social pressure for their implementation.

The West African state of Mali experienced a separatist conflict in the north of the country between June 1990 and March 1996. The conflict had its origins in the political marginalization of the northern region and particularly of the nomadic Tuaregs, who inhabit the area along with Arab nomads and the Songhay sedentarists of the Niger River basin. Efforts to reach a peaceful settlement of the conflict began in late 1990 and culminated in the signing of a ‘National Pact’ in April 1992 between the government and the armed movements. However, it soon became clear that the National Pact process was incapable on its own of transforming the dynamics of the conflict and bringing about sustainable peace. Local combatant groups continued to fight the war and made implementation of the agreement virtually impossible.

It was only towards the end of 1994 that real breakthroughs began to occur. Recognizing that they would need to take greater responsibility for their own affairs

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to find a settlement of the conflict, local traditional leaders initiated peace talks in their communities. This was soon followed by a series of local meetings, leading to the negotiation of localized ceasefires that ended organized violence by April that year. It was then that a small group of civil society leaders formed a ‘facilitation group’ to provide guidance for local initiatives. They called on a trusted international NGO, Norwegian Church Aid to assist their efforts. Thirty-seven inter-community meetings were then conducted throughout the north.

The meetings were structured to meet the needs of communities characterized by levels of interdependence with regard to territory, natural resources and trading venues. Given the lack of leadership structures at this level, the facilitation group selected meeting organizers on the basis of their individual integrity, position and capacity to convene the events. They listed a series of problems arising from the war and requested that the communities develop commonly acceptable solutions to each one. The facilitation group also suggested that a diverse group of people should be involved in decision-making at the meetings, including traditional leaders, religious leaders and civil society leaders including representatives of women and youth. Local politicians, soldiers and government officials were given ‘observer’ status, to ensure that sufficient space was given to the communities to engage in and renew their traditional forms of dialogue.

Each meeting was attended by between 300 and 1,800 people and typically lasted one or two days. It began with an introductory plenary, including the selection of members for topical commissions. The commissions typically focused on issues of security and development and each commission would debate possible solutions to their issue, looking for compromises between the known positions of influential figures. Their proposals would be brought back to the plenary where people could make last comments or suggestions. Then the meeting would choose members for follow-up commissions to carry out the decisions.

Although there were variations between the meetings, there were also some important trends in their outcomes. The practical results included the re-opening of markets, reduction in armed robbery and greater willingness among ex-combatants to join demobilization camps and turn in their weapons. There was also overwhelming agreement on the need to restore the authority of the state through the development of its institutions.

**The Role of International Actors**

Although the most important ingredient in each process was the activation of those involved, each mechanism needed a variety of financial, technical and practical resources to implement it. International actors played crucial roles,
whether by sponsoring or hosting preparatory or consultative meetings or by using their leverage to encourage governments and armed groups to create socially and politically inclusive processes. International observers, monitors and peace keepers were also able to assist in addressing the ‘security first’ dilemma, by helping to create a necessary level of security to create a safe environment for participation.

Such approaches need to be rooted in a respect for the primacy of local ownership and popular sovereignty—and as such would require a paradigm shift away from current interventionist policies. The ‘international community’ needs to be encouraged to design its interventions in a way that strengthens or complements indigenous capacities for conflict resolution; respecting traditional leadership structures as well as encouraging the participation of marginalized groups. It needs to be lobbied to support fragile, local-level peace initiatives, which often offer important starting points and precedents for national initiatives. There is a crucial need to support vulnerable peace and human rights advocates, whose voices will play an important role in preparing the public for political change.

**Legitimate Process, Legitimate Outcomes?**

In each of the experiences documented in our Accord project, the involvement of those outside the combatant groups imbued the negotiation of new political arrangements with greater legitimacy. It is arguable that if a process is seen as legitimate, then the outcomes are likely to be treated as such. Moreover, because each of these processes enabled wider participation in general, there were more opportunities for traditionally marginalized groups to have a voice. It was notable that, women and indigenous communities in particular were able to raise their political voice during the negotiations—creating a benchmark that carried forward into the new post-settlement political system.

Each process also managed to take the political debate out of the capital and into spaces accessible to ordinary people. In addition to the instrumental dimension of influencing decisions, this had an important symbolic value: people felt that they were being included in politics, often for the first time, and were able to take part in shaping their country’s future.

All the case studies indicate that participatory mechanisms succeeded in widening the range of issues addressed in the agenda, thereby offering a greater opportunity to address substantive grievances and explore a wider range of possible solutions. This also helped to reflect the scope of public concerns and generally contributed a greater depth to the debate. Thus the agreements tended to be better at addressing the causes of conflict and they had a broad legitimacy that made them more sustainable.

Even in places where there have been implementation difficulties, it has been
impossible to ignore the agreement altogether. At the very least, the agreements have remained alive in public political discourse as aspirational guidelines and have provided an important base line for the political agendas of pro-agreement activists.

Finally, each process can be seen to have emerged from the unique combination of cultural resources, political traditions and imaginative leadership of its particular context. The challenge for all of them has been to sustain the culture of inclusion they stimulated, to institutionalize broad participation in the country’s political systems and structures and to further embed the democratic values they promoted.

It seems 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. They help to underscore that differences can be addressed through political processes instead of outside the system through illegal/violent means. The peace process therefore has the potential to be a defining moment in the transition from one political order to the next and can create movement toward a more participatory and democratic political system and society.

PRINCIPLES TO GUIDE POLICY AND PRACTICE

Why public participation?

Peace processes as processes of political decision-making—Peace agreements typically go beyond arrangements to end the hostilities to address questions relating to the state structure, political systems and the allocation of resources; as such they can mark a significant turning point in the country’s history.

Participation is a fundamental human right—Effective political participation is essential for determining the will of the people, which is the basis of the authority of government. These rights should be promoted during peace negotiations, as in other forms of political decision-making.

Supporting democratic values—A more participatory process can enhance democratic values and structures, laying the groundwork for further democratization of political systems and mechanisms for dispute resolution.

Enhanced legitimacy—The involvement of those beyond the combatant groups gives greater public legitimacy to the negotiation of new political arrangements; if the process is seen as legitimate, the outcomes are more likely to be treated as such.
Ownership of agreements—Broad ownership of agreements contributes greatly to the sustainability of settlements and is enhanced if a wide range of actors feel included in the process.

Widening the agenda—Experiences suggest that a more open process tends to widen the scope of political issues to be negotiated, offering greater opportunity to address substantive grievances and explore a wider range of possible solutions.

Coordination of initiatives—The strategic co-ordination of peace initiatives and advocates through a process of participation can enable more effective communication between actors and less duplication of initiatives, binding people to a common process.

Reconciliation—Through the process of deliberating the issues and struggling to reach shared agreements, peace talks can help to forge more cooperative relationships between a country’s diverse communities and help to lay the foundations for social and political reconciliation.

Dilemmas of public participation

Security first—Does public participation slow down the process of reaching agreements on ending the violence? How can tensions between short-term security and long-term solutions be managed?

‘Integrity of the mediation’—Does public participation put at risk the confidentiality and coordination that many mediators believe to be crucial to building trust and effective negotiations between protagonists? Can sequencing inclusion in the talks at different phases of the process help address this dilemma?

Divergent voices—How can process mechanisms deal with the heterogeneous nature of ‘the public’ so as to address diverse and contradictory aspirations?

Managing inclusion—How can the process be designed to enable the effective participation of traditionally marginalized social groups and not just the ‘civil society elite’? Can and should exceptional support be given to pro-peace, pro-human rights and pro-democracy groups within civil society?

Superficial participation—Given inevitable imbalances of power, how can one ensure that public participation is meaningful rather than a superficial public relations exercise?
Principles to guide policy and practice

General principles

Linking peacemaking to democratization and development programs—International actors should work towards the collaborative development of process mechanisms that underpin democratic values and decision-making. Peace processes can address the challenges of comprehensive human security by considering issues of good governance and equitable development within a participatory framework.

Primacy of local ownership and popular sovereignty—International interventions should be designed to strengthen or complement indigenous capacities for conflict resolution. This includes respect for traditional leadership structures as well as encouraging marginalized groups. International actors can use their leverage to encourage or sponsor processes that are socially and politically inclusive, and that promote transparency and encourage the accountability of those who negotiate it.

Support for local-level peace initiatives—Participatory processes at a local level can offer important precedents for national initiatives. International actors should be sensitive to and supportive of local initiatives, especially as they offer opportunities for reaching a ‘pragmatic peace’ within the community.

Conflict prevention—International development assistance that is designed to strengthen governance systems should address issues of political inclusion and actively promote appropriate forms of participation at local, regional and national levels.

Public participation as a comprehensive framework for policy development. Debates, campaigns and discussions about the roles of different sectors of national and international civil society in peacemaking (i.e., women, war-affected children, the business sector, international NGOs) can fit within the comprehensive framework of public participation and policy development can be usefully approached from this perspective.

Preparation for negotiations

Support for civil society peace advocates—It is vital to provide political, financial and technical support as appropriate to vulnerable peace advocates operating in a
hostile environment. Their voices will play an important role in preparing the public—and encouraging the protagonists to engage in negotiations.

**Capacity-building**—Invest in training opportunities and resources for participants who might be involved in future negotiations. Provide support for strategizing among non-combatant groups so that they can better articulate their aspirations, shape the negotiating agenda and possibly develop consensus positions.

**Violence mitigation mechanisms**—In a context where wide scale violence could threaten a negotiation process, explore with local civil society and the parties to the conflict possible violence-reduction mechanisms which could be implemented at a local as well as national level.

**Safety**—Push for principles of engagement in the negotiations that encourage safe space for non-combatants.

**Participation in formal political negotiations**

*Opening the process*—International actors, and particularly countries that are ‘friends of the process’, can use their leverage to open the process to the participation of non-combatant groups and ensure their aspirations are considered in the negotiating agenda.

*Process mechanisms*—Develop mechanisms which enable the effective participation of all groupings, and which mitigate against domination of the process by one or two groups. Explore the possibility and appropriateness of multi-party representative negotiations, multi-sectoral consultation processes, or mass participation direct negotiations—as consistent with the cultural and political systems of the society.

*Substantive agenda issues*—With negotiations frequently tackling reforms to the constitution, the security sector, socio-economic policy and human rights, relevant sectors of society should be invited to contribute to the substantive content of the agenda and provisions to address these issues.

*Communication strategies*—Develop public information campaigns that speak to the variety of different constituencies being represented at the negotiations. Ensure sufficient time and appropriate mechanisms for consultation between delegates and their constituencies.
Participation in implementation of agreements

*Implementation*—Prioritize financial, technical and political support for implementation of peace agreements, including mechanisms to monitor and verify compliance.

*Public education campaigns*—Encourage and resource public information campaigns and events and civic education initiatives that provide details and opportunities for discussion on the agreements reached.

*Referenda*—If the public will be balloted on the agreement, work with the parties to ensure that the public is informed of the issues and to ensure that referenda questions are clear.

*Institutionalizing participation*—Contribute resources that enable continuity of meaningful political participation in governing institutions.
Debates over the right to return often compress two separate questions. First, are debates about whether Palestinian refugees in fact have a right to return. Second, are Israeli anxieties about what such return would mean. Relatively little attention has been paid to examining how the right of return would play out in practice, and, in particular, how Palestinian return could be implemented without trampling on Israelis’ rights. Leaving these questions unanswered may encourage unnecessary anxiety about refugee return for Israelis, and prevent Palestinians from refining their arguments to accommodate legitimate Israeli interests.

This chapter takes as a given that Palestinian refugees have a right to return, as well as restitution of confiscated property. The purpose of this chapter is to examine whether Israelis or Jews\(^1\) have rights that might conflict with these Palestinian rights. If such conflicting rights exist, then they would have to be balanced against Palestinian return. Depending on the relative weights of the conflicting rights, Palestinian return rights might be negated entirely, limited in order to reduce harm to Israelis and Jews, or unaffected (if the Israeli/Jewish rights are relatively minimal).

This chapter is an attempt to identify potentially conflicting Jewish/Israeli legal rights, articulate the ‘best case’ arguments that can be made for them, and offer a commentary on the strengths and weaknesses of these arguments. It is hence, first

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\(^1\) Throughout this paper, I use the terms ‘Israeli’ and ‘Jewish’ distinctly and deliberately. Israel is a diverse country with citizens of many faiths and ethnic backgrounds, although the majority of Israelis are Jewish. In discussing individual Israeli rights that might conflict with the right of return, it makes little difference whether the Israeli in question is Jewish, Arab, Christian, Muslim, etc. On these questions I will refer to ‘Israeli’ rights. However, some of the most important questions relating to the right of return relate to the collective rights of either Jewish Israelis or of the Jewish people. In these areas, a person’s religious background matters a great deal. On these questions, I will refer to ‘Jewish’ or ‘Jewish Israeli’ rights.
and foremost, an effort to encourage a new line of constructive discussion on the most sensitive and high stakes issue in the Israeli-Palestinian conflict. To this end, each section of the chapter provides an overview of the legal context, then sets out possible ‘pro-Israeli’ arguments, and, finally, provides a commentary on the legal strength of the proposed Israeli argument. This study is intended only to map out particular lines of legal analysis; each topic could be developed in greater detail.

Although this chapter presents arguments for Israeli rights that would conflict with the Palestinian refugees’ right to return, this chapter should not be taken as an argument against the refugees’ rights. The legal opinion of the author is that Palestinian refugees individually have the right to choose whether to return to areas that are now part of Israel.

**What is a Conflicting Right?**

To state the obvious, Jews and Israelis have a long list of rights. The only rights addressed here are those that could conflict with the Palestinian refugee right to return. Israeli citizens have a right to life, a right to be free and equal, a right to security, a right to be free from arbitrary arrest, detention or exile, a right to free movement within Israel and a right to residence inside Israel. None of these rights directly conflicts with the Palestinian right of return. Palestinian refugees could return to the country, and Israeli citizens could continue to enjoy these and other rights freely and equally.

**What, then, would a conflicting Israeli or Jewish right look like?**

Even if Israel were to concede in the abstract that Palestinian refugees have a right to return to their homes inside Israel, there could be entirely separate rights held by Israelis that simply cannot coexist with refugee return. In this situation, Palestinian refugees might be blocked from actual return, or the practicalities of their return would have to be adjusted. In this situation, refugees’ rights would have to be vindicated in some other way, for instance through extra compensation or some other remedy, but their actual return to a particular place might be prevented. But in order for this to happen, it is not enough for a conflicting right to exist. The conflicting Israeli right must be substantial enough to outweigh Palestinian return.

Broadly speaking, we can identify three types of possible Jewish/Israeli rights that could conflict with Palestinian return. The first are collective Jewish rights to form and maintain a specifically Jewish state, in which Jews must hold a dominant
demographic majority. The second are individual Israeli property-related rights that would conflict with property restitution for refugees. The third possible right addresses Israel’s prerogative as a state to use the risk of social and political disruption as a justification to avoid full refugee return and property restitution.

Why talk about conflicting rights?

Palestinians have been insisting on their right to return to homes inside Israel ever since 1948, while Israel has consistently refused to allow return. General Assembly Resolution 194 (III) of 1948\(^2\), which called for refugee return, has become a central part of the Palestinian national movement. These debates have often centered on conflicting historical narratives, in which Palestinians claimed to have been expelled while Zionists insisted they left voluntarily or at the instigation of Arab leaders. More recently, historical research based largely on Israeli government archives has generally backed up the Palestinian version. While a few scholars still dispute whether Israel engaged in a pre-meditated plan of ethnic cleansing, fewer and fewer serious historians debate that fear of violence, massacres by Jewish militias and forced expulsions of particular towns and villages at the hands of Israeli forces were the main causes of the Palestinian exodus. Adding to the historical debate, since the late 1990s several legal studies have been published arguing that Palestinian refugees have a right to return that is guaranteed by international law.\(^3\) This legal scholarship has demonstrated that the right of return has a much broader basis in law than General Assembly Resolution 194 (III), and that Palestinians can legally insist on return even if one were to accept for the sake of argument the older Zionist version of what happened in 1948. In addition, there has been new legal and historical research into the legislative mechanisms used by Israel to transfer control over land from Palestinian refugees to Jews.\(^4\) This line of research has bolstered Palestinian arguments that the Israeli land regime is substantially racist, and supports Palestinian claims for property restitution.

In recent years, a number of Israeli and Zionist intellectuals have sought to

\(^2\) GA Res. 194 (III), UN GAOR, 3rd Sess., UN Doc. A/RES/194 (1948).


seriously engage with these arguments from the Palestinian side in a series of conference papers and articles (many of which remain unpublished). A few Israeli jurists, notably Yaffa Zilbershats and Eyal Benvenisti, have argued that there was no right of return in international law in 1948 and that the Palestinian exile should be legitimized as a population transfer between Arab states and Israel. Other Israeli jurists, notably Ruth Lapidoth, have responded to Palestinian legal arguments by insisting that law should not be relevant to resolution of the Palestinian refugee problem. It is not the purpose of this paper to debate the basis of the right of return. Suffice it to say, these legal responses to Palestinian arguments appear divorced from the historical evidence about what Israeli forces did to Palestinians in 1948, or are attempts to exempt Israel from the mandates of international law.

Perhaps the most interesting intellectual responses from the Israeli side have been produced by political theorists, culminating in a collection of essays published in July 2004 by the Israeli journal *Theoretical Inquiries in Law*. Several of these writers, notably Chaim Gans, Jeremy Waldron, and Yoav Peled and Nadim Rouhana (writing jointly) adopt a partially sympathetic approach toward the Palestinian refugees, acknowledging to varying degrees that they were dealt with unjustly during the establishment of the state of Israel, while similarly opposing to varying degrees their right of return. These writers generally assume that Palestinian claims are legitimate in the abstract, but that they cannot be reconciled with the needs of Israel, especially 57 years after the beginning of the problem. They therefore argue that the right of return either cannot be implemented or must be substantially compromised. In their analysis they assume that whenever Palestinian and Jewish/Israeli claims clash, the Palestinians must be the ones to compromise. This imbalance renders their conclusions less convincing. Nevertheless, these essays might be an intellectual opening. That is because, rather than dispute the Palestinian right of return, they articulate Jewish and Israeli fears about what Palestinian return would mean. This opens the door for Palestinians to show either that Jewish/Israeli interests would not be threatened by refugee return or are not as substantial as refugee rights.

There are, therefore, three reasons to add a conflicting rights approach to the ongoing dialogue over the right of return.

First, assessing Jewish/Israeli rights is important for establishing a level playing field in which claimed Jewish/Israeli rights are subject to the same legal scrutiny as Palestinian claims. Since 1948, while the microscope has been turned on Palestinian claims, much less attention has been paid to the legal aspects of corresponding Jewish/Israeli claims. In some cases, scholars and advocates appear to take for granted that refugee return would unacceptably infringe on Israeli rights. Such arguments may or may not have merit, but they depend on the assumption—often left unanalyzed—that there are, in fact, legitimate Jewish/Israeli rights that conflict with the right of return.

Second, separating discussion of Israeli/Jewish rights from Palestinian rights may
facilitate more productive dialogue between the two sides. Without this separation, any assertion of Palestinian rights may be misunderstood as a denial of Israeli rights, and vice versa. Because Palestinians base their right to return in international law, many Israelis may assume that international law leaves no room for their concerns. By looking at separate, conflicting rights, the interests of both sides can at least be acknowledged in the discussion, and both assessed through the neutral lens of international law. This offers a channel of dialogue for Israelis and Palestinians who want a just solution rooted in international law. Discussing conflicting rights would be useful for Israelis who are sympathetic with the plight of Palestinian refugees, but who worry about the effect on Israel of mass refugee return. This line of analysis would be similarly useful for Palestinian refugees who want to advocate the right of return without infringing on the legitimate interests of Israelis and Israel.

Third, if after legal scrutiny there are valid Jewish/Israeli rights that outweigh the right of return in some or all cases, then Palestinians would be encouraged to respond by adjusting their own claims.

What this chapter is not

This chapter presents a legal analysis; it does not assess political and religious arguments associated with various streams of Zionism which can motivate resistance to the right of return. A number of arguments have been made about why Jews are entitled to either control land in Israel/Palestine, or create a Jewish-controlled state. These arguments reference, among other things, ancient ties to the land, the value of national redemption after the Holocaust, the need for a refuge from anti-Semitism, the trauma of Jewish Diaspora, the fact that there are many Arab states but only one Jewish state and perceived religious entitlements or connections. Each of these arguments can generate a rich debate on a political, ethical, historical or theological plane. But such arguments have, at most, only an indirect relevance to law. They are important for this chapter only to the degree they relate to Jewish rights to self-determination, which is discussed below.

This chapter seeks only to identify potential arguments that Israelis or Jews may make for conflicting rights against the right of return. While it offers a commentary on the strengths and weaknesses of these arguments, it does not attempt to present a full Palestinian rebuttal. The objective here is to add an important dimension to the debate over the right of return. But since this chapter does not explore the legitimacy of the right of return, it does not offer a fully developed historical or legal argument for the Palestinian cause. As already mentioned, the chapter begins from the premise that Palestinian refugees have a right individually to choose to return to their homes. It is taken as a given that Palestinians have been violently forced from their homes and
dispossessed of their property in order to make way for the construction of a Jewish state. Yet, even if it is assumed that Israel was built through colonialism and ethnic cleansing, there still might conceivably be Israeli/Jewish rights that conflict with refugee return. The purpose of this chapter is to identify and assess such claims.

**Jewish Self-Determination**

Among the most frequently asserted claims against the right of return is the Zionist position that Israel has the right to exist as a Jewish state. This claim is asserted in different ways. It is often spoken of in terms of Israel’s demographic anxieties about maintaining a dominant Jewish majority. It is sometimes asserted as Israel’s ‘right to exist’, linked to the allegation that Palestinians assert their right to return out of a desire to undo Israel’s existence as a Jewish state, rather than to pursue justice for themselves.

The Palestinian right to return on its own does not challenge Israel’s sovereignty as a state. Just as other countries’ demographic composition has changed through history, so could Israel’s. Nor does refugee return inherently challenge the ability of Jews to live in Israel even as Palestinian refugees exercise their own right to return. But Palestinian return would challenge Israel’s efforts to build and maintain a dominant Jewish majority in the country. Israel’s Jewish demographic character is at issue here, not the state of Israel itself, nor the right of Jews to live in Israel.

In the abstract, the key legal question is: Are Jews (or Jewish Israelis) a ‘people’ who have the right in international law to political sovereignty within an independent country? If one ignores the rights of Palestinians, it is not difficult to answer the question ‘yes’. But in order to pose a conflicting right against the Palestinian right to return, Jewish self-determination on its own is not enough. The following argument must be made from the Israeli side:

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(1) The Jewish community in Israel, and/or the Jewish people in general, have a collective right to self-determination in Israel/Palestine;
(2) A large non-Jewish population would threaten Jewish self-determination; and
(3) The Jewish national right to self-determination outweighs the competing rights of non-Jewish people to return to their homes, or to otherwise return to the territory that became Israel.

The first premise is plausible; there is legal authority supporting the idea that Jews are a people, although they have never been the only people whose homes are in Israel/Palestine. However, even if one concedes, arguendo, the first of these premises, the other points are much more problematic. Although Jews taken in isolation are entitled to self-determination, they could achieve this jointly with non-Jews in a state where all citizens are equal. Since self-determination is mainly a right against foreign domination, ending Jewish dominance over Arabs in Israel would not infringe on Jews’ rights to self-determination. And even if Jewish self-determination would be threatened by refugee return, there is no sound basis on which this alone would trump Palestinian rights. Self-determination in international law is meant to facilitate the enjoyment of other rights, not to negate them.

For these reasons, the establishment and maintenance of a Jewish state is the weakest possible conflicting right vis-à-vis the right of return dealt with in this study. This legal weakness is notable in contrast to the political emphasis placed on Israel’s determination to maintain itself as a Jewish state. This section begins with an overview of the law of self-determination, followed by an attempt to present a best case argument for Jewish self-determination as a conflicting right and a concluding commentary on these arguments.

Who is entitled to self-determination?

The right of peoples to self-determination developed during the same first four decades of the 20th century when the international community wavered over the emerging conflict in Palestine. The law of self-determination is still ambiguous today, and it was especially vague in its early years. There is, therefore, no open and shut argument on either side about whether the Yishuv (Jewish community in Palestine) had a legal right to establish an independent sovereign state in 1948.

Peoples’ rights to self-determination developed from a political principle in international relations after World War I into a full fledged right today.\(^7\) Before World

War II, states had not yet recognized the right of all peoples to self-determination. It was included in treaty law for the first time in the United Nations Charter of 1945. On its face, the Charter’s reference to self-determination was only an articulation of guiding principles and objectives, although it may also have been a recognition of an emerging customary norm. Self-determination only became indisputably established as a clear right in international law in the 1960s with the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1966 International Bill of Rights. Self-determination was included as the first article of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: ‘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.’

Since the law was still in development in 1948, any argument for self-determination in 1948 can be subjected to some immediate doubts by legal formalists. Nevertheless, it is clear that in 1948 self-determination was well on its way to being fully recognized as a legal right; it even had carried substantial political weight already in the way the international community dealt with the problem of Palestine after World War I.

Though the right of peoples to self-determination is today clearly established, it is much less clear what this right actually means, and who can legally benefit from it. The most vexing question is whether this is a right held by each ethno-national community, or whether it is merely a right of the people in a given territory to be free from foreign domination. In Israel/Palestine, this boils down in part to the question of partition. Can the right of self-determination be used to justify creating two states, one Jewish and one Arab, out of what was once the unified territory of Palestine? Or did the right of self-determination merely allow all of the people of Palestine (both Jews and Arabs) to free themselves from foreign domination (i.e., the British Mandate)?

International law has generally sought to protect territorial integrity. In the context of decolonization after World War II, commentators tended to define a people to simply

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12 See, Shaw, supra n. 7, 181.
mean the population of an established territory, rather than each ethnic group within a particular territory.\textsuperscript{13} States and international law commentators have consistently objected to any notion of self-determination that would license all minorities to territorially secede to form separate states. The International Commission of Jurists that ruled in the 1920 \textit{Aaland Islands} opinion stated that ‘positive international law does not recognize the right of national groups, as such, to separate themselves from the state of which they form a part by simple expression of a wish’.\textsuperscript{14} Hence, rather than requiring the division of states into smaller homogeneous ethno-national states, the right to self-determination can be satisfied simply through democratic self-government within a pre-existing territory.\textsuperscript{15}

But there may be exceptions. One of the opinions issued in the \textit{Aaland Islands} case suggested that normal territorial sovereignty might be compromised in favor of national self-determination during periods of political transformation, and called for the international community to play a role in resolving such cases.\textsuperscript{16} In 1975, the International Court of Justice noted that the UN General Assembly has on occasion ‘dispensed with the requirement of consulting the inhabitants of a given territory’\textsuperscript{17}, in other words allowing pre-defined territories to be partitioned. According to the court, such exceptions are made ‘either on the consideration that a certain population did not constitute a “people” entitled to self-determination, or on the conviction that a consultation was totally unnecessary, in view of the special circumstances’.\textsuperscript{18} The court did not elaborate on what it meant by ‘special circumstances’, though this oblique phrase may have been a reference to Israel/Palestine.

Rigidly defining a people in line with arbitrary borders can in practice make forming a representative government difficult because the populations in a multi-national state may pledge their political loyalties to their own subjective ethno-national groups rather than to the state’s institutions.\textsuperscript{19} Some liberal political philosophers have


\textsuperscript{15} ‘Freedom from colonial rule did not include a right for ethnic groups within the boundaries of those colonies to secede or redraw the boundaries once independence had been secured.’ Allison Beth Hodgkins, ‘Beyond Two States: Alternative Visions of Self-Determination for the People of Palestine’ \textit{Fletcher Forum of World Affairs} 28/2 (2004), 109-26, 112-3.


\textsuperscript{17} ICJ, ‘Advisory Opinion on the Western Sahara’, in \textit{Reports} (1975), 33, para. 59.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} See, Musgrave, \textit{supra} n. 13, 152-4.
argued that free and democratic institutions are not usually possible in multi-national states. They considered these arguments for specific minority groups to form separate, independent, and sovereign states. But it should nevertheless be understood that, at most, self-determination supports partitioning established territories only in exceptional cases.

Were self-determination to be defined purely in terms of ethnicity or religion rather than territory, the people in question would need a territory in which they are dominant enough to form a state without endangering basic democratic principles. If it was legitimate to define Jews as a people, and hence establish a Jewish state, then it would logically be reasonable to worry about how to ensure a dominant Jewish majority. Achieving Jewish independence without endangering the rights of Arab Palestinians was always a daunting task given that Jews were a minority in Palestine up to 1948. Transfer also figured prominently in Zionist thinking.

Yet, even if international law, in rare circumstances, permits drawing new territorial borders, self-determination is never a license for artificially changing the demographics of a given territory or privileging the rights of one community over another. International law has conceived self-determination as a means of facilitating human rights, not as a claim that can defeat other rights. The UN Charter recognizes self-determination along with principles of equality and human rights in general. There is no provision for self-determination to trump other rights. The Charter’s article 1 provides that the purposes of the United Nations are, inter alia:

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

(3) To achieve international co-operation in solving international problems … and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Three key pre-1948 documents are essential for understanding the way the international community tried to apply emerging principles of self-determination

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20 Id., quoting J.S. Mill: ‘Free institutions are next to impossible in a country made up of different nationalities.’

21 Philosophers of human rights have stressed the need to balance collective and individual rights, but individual rights ultimately must take precedence. See, Ignatieff stating that ‘It is the individualism of human rights that makes it a valuable bulwark against even the well-intentioned tyranny of linguistic or national groups’. Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton, NJ: Princeton University Press, 2001), 76.
to Palestine. The first is the 1917 Balfour Declaration. The second is the 24 July 1922 decision by the Council of the League of Nations to endorse the Balfour Declaration’s objective of establishing a ‘Jewish national home’ in Palestine. The third is the UN General Assembly’s 1947 partition resolution (Resolution 181). Of these three documents, only the second had binding legal force. The Balfour Declaration was a purely political statement of British foreign policy, which gained legal importance only when it was included in the League Council’s resolution. Resolution 181 was officially only a recommendation. General Assembly resolutions are generally not binding, although they are evidence of the international community’s general sense of how international law applies in a specific case.

The international community was consistently unwilling to endorse any forced population transfer in order to achieve territorial partition in Palestine. In 1937, the Peel Commission noted that it had first conceived that partition would involve population transfer, but the British Government flatly rejected this suggestion. Some commentators have noted that the League of Nations had designated Palestine as a whole as a provisionally independent nation in 1919, not as a territory that could be partitioned along ethnic lines, and had hence recognized the sovereignty of the Palestinian people. Britain’s role as a mandatory power was to ‘render administrative advice’ and provide ‘tutelage’. Rather than act as a sovereign government, Britain was in a fiduciary role, carrying out a ‘trust’. While there was a need to determine how to replace Britain’s administrative role in 1948, Palestinian self-determination had already been achieved (at least in theory) via the League’s provisional recognition of the country’s existence as an independent country.

By 1948, forced expulsion had already been clearly established as a war

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23 Declaration of the Council of the League of Nations (July 24, 1922). The 1922 Mandate for Palestine is reprinted id., 4-11.


25 See, Boling arguing that the people of Mandate Palestine as a whole had a vested collective right to sovereignty, so that political and military efforts to partition the territory were illegal, supra n. 3, 17 and 22. See also, Hodgkins, supra n. 15, 115.

26 Palestine was a ‘Class A’ mandate under the Covenant of the League of Nations. The Covenant’s article 22 provides, in part: ‘Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by the Mandatory until such time as they are able to stand alone.’ See, generally, Boling, supra n. 3, 22.
crime or crime against humanity. 27 Israel was therefore bound to accept all of
the population—both Jews and non-Jews—from the territory it acquired during
the course of the 1948 war. Self-determination did not and cannot justify ethnic
cleansing or forced population transfer. This indicates the steep legal challenge
that advocates of Jewish self-determination face in opposing the Palestinian right
of return.

Best case arguments for exclusivist Jewish self-determination

Territorial integrity could not be maintained in 1948 Palestine

From the end of the Ottoman Empire, Palestine was a troubled territory because
it was torn between two competing national claims. Over the ensuing decades, the
Jewish and Arab populations grew into separate political communities, with tension
and violence growing between them. As Britain ended its mandate, the population
of the Palestine territory was so divided that Palestine could not be considered
a ‘definitely constituted’ sovereign state (in the words of the International
Commission of Jurists in the Aaland Islands case). Nor could the population
of Palestine be considered a single people that could effectively exercise self-
determination and establish institutions of democratic self-government.

Hence, the situation in Palestine in 1948 warranted two exceptions to normal
rules of international law of state sovereignty and territorial integrity. First, as
recommended in the Aaland Islands case, the international community had a role
in helping Palestine resolve its unstable de facto status. Second, the Palestine
territory could be partitioned in order to allow the two competing peoples inside to
enjoy separate self-determination. The UN General Assembly embraced both steps
through Resolution 181 (II), recommending the partition of Palestine.

It matters little here that the partition resolution was not binding, nor that the Arab
side rejected it. What is important here is that the General Assembly recognized
that there was nothing sacred about the territorial boundaries of Palestine. In the
case of Palestine, the international community recognized that self-determination
could be pursued at the expense of territorial integrity.

27 See, Charter of the International Military Tribunal, 58 Stat. 1544, EAS No. 472, 82 UNTS 280
(Aug. 8, 1945). The Charter defines ‘war crimes’ to include ‘ill-treatment or deportation to slave labor
or for any other purpose of civilian population of or in occupied territory’ and defining ‘crimes against
humanity’ to include ‘deportation’ of a civilian population on political, racial or religious grounds.
The League of Nations and the UN recognized the Jews as a people entitled to self-determination

The Jewish right to self-determination in Palestine has been recognized internationally since 1922. The terms of Israel’s Proclamation of Independence grew directly and naturally from decades of international recognition.

In assigning the Palestine Mandate to Great Britain, the Council of the League of Nations adopted the terms of the 1917 Balfour Declaration, ‘in favour of the establishment in Palestine of a national home for the Jewish people’.28 The Council explicitly provided that Britain ‘should be responsible for putting into effect the declaration’.29 The Council added to the terms of the Balfour Declarations by stating: ‘Recognition has thereby been given to the historical connexion of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.’30 The United Nations General Assembly, anticipating the end of the British Mandate, acted in 1947 to implement this Jewish right to self-determination by recommending the partition of Palestine, including ‘independent Arab and Jewish States’.31

This well-known history shows a clear and logical trajectory: first, recognition of Jews as a people; second, recognition of the connection between Jews and the territory then called Palestine; and finally, endorsement of a separate Jewish national claim to self-determination in Palestine. By endorsing partition, the General Assembly rejected the alternative proposition that a Jewish national home could be achieved without full Jewish statehood.32 Relying as it did on both the Balfour Declaration and the UN Partition Plan, Israel’s 14 May 1948 Proclamation of Independence broke no new ground by declaring: ‘It is the natural right of the Jewish people to lead, as do all other nations, an independent existence in its sovereign State.’33

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28 Balfour Declaration, supra n. 22.
29 Mandate for Palestine, supra n. 23, preamble.
30 Id.
31 GA Res. 181 (II), supra n. 24, Part I(A)(3).
33 Declaration of the Establishment of the State of Israel, Official Gazette 1, May 14, 1948, 1.
The international community made Jewish self-determination a higher priority than Arab rights

Self-determination has a stronger and clearer basis in international law than does the right of return. The Palestinian right to return relies heavily on customary international law, expressed through UN General Assembly Resolution 194 (III). Self-determination has a firmer basis, having been established in multiple international treaties as a foundation for other rights and for world peace. Self-determination was a founding principle of the UN Charter in the 1940s. The right to return did not find expression in a treaty until the 1960s. It is hence entirely natural that Jewish self-determination is a higher priority right than Palestinian refugee return.

Beginning with the Balfour Declaration and the League of Nations Mandate, the international community recognized that Jewish self-determination would be in tension with, in the words of Arthur Balfour, ‘the civil and religious rights of existing non-Jewish communities in Palestine’. It is lamentable that the balance of rights in Palestine sought by the Balfour Declaration has yet to be achieved. The fact that the international community recognized the obvious—that Jewish and Arab rights were in conflict in Palestine—does not mean that the two peoples’ rights were necessarily conditional on each other. A better way to look at the situation was that the international community had no illusions. The international community endorsed the independence and sovereignty for the eventual Jewish state with the full understanding that Arab inclusion in the eventual Jewish state would be problematic.

The 1947 UN Partition Plan, while providing for equal rights for all, also attempted to find a mechanism short of forced population transfer that could prevent a large Arab population from relying on a Jewish state for its civil rights. Under the plan, Arabs living in the Jewish state could opt for the citizenship of the Arab state instead. Jews living in the Jewish state could make a reciprocal choice. The plan also temporarily prohibited Arabs from moving into the Jewish state, and vice versa. The General Assembly hence wanted to establish incentives for Jews and Arabs to align themselves with their respective national states. The General Assembly of course did not endorse forced population transfers, nor anything approaching ethnic cleansing. But it nevertheless showed a clear preference for as much ethnic homogeneity in each state as possible, and signaled, in particular, that the independent Jewish state ideally should not have a large Arab population.

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34 ICCPR, supra n. 11. Israel ratified the Covenant in 1991.
35 Balfour Declaration, supra n. 22.
36 GA Res 181 (II), supra n. 24, Part I(C), chapter 3(1).
37 Id., Part I(B)(9).
The international community was not unaware that Arab rights within a Jewish independent state would be problematic. Nonetheless, the international community endorsed partition. From this, it would be fair to say that the international community was willing, if necessary, to risk Arab rights in order to achieve an independent Jewish national home. The international community’s unwillingness to sacrifice the Jewish people’s right to ‘an independent existence in its sovereign State’ has great significance for the implementation of Palestinian refugees’ right of return. Their right to return can be fully acknowledged in the same sense that the international community has long acknowledged non-Jewish civil and religious rights in Palestine. But to the extent that the return of a mass of non-Jewish Palestinians would endanger the Jewish character of the state, the Jewish right to independence is the higher priority and more clearly established. Hence, implementing a full right of return is impossible, though Israel may be able to implement a limited quota of returnees, in a number small enough to maintain Jewish demographic dominance at present and for the foreseeable future. No doubt, this is far from an ideal solution, but it is the only way that long recognized Jewish rights to self-determination may be maintained.

**Jewish self-determination is stronger today than in 1948**

Today, Israel’s sovereignty and independence as a state are well established, and not open to serious dispute. Nearly all of the world recognizes Israel’s statehood. Israel was admitted to the UN in 1949, has been recognized by all but a few Arab and Muslim states, and is recognized by all five permanent members of the Security Council. In 1967, a legally binding UN Security Council resolution resolved any lingering doubts about Israel’s legitimacy as a sovereign state within the borders established by the 1949 armistice agreements. Resolution 242 of 13 November 1967\(^{38}\), passed to deal with the repercussions of the June 1967 Arab-Israeli War, called on Israel to withdraw only ‘from territories occupied in the recent conflict’, and called for respect for the ‘sovereignty, territorial integrity and political independence of every state in the area’. The Security Council hence accepted de facto the pre-June 1967 boundaries.

The Israeli people now are a mainly Jewish group who define their political identity in reference to their life within a Jewish state. Palestinian refugees outside Israel may have maintained their insistence on their right to return, but the Israeli people—their national identity, way of life, culture, political cohesion, etc.—have developed on a separate track. Even if Palestinian refugees should have been included in Israel from

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\(^{38}\) SC Res. 242, UN SCOR, 1382\(^{nd}\) mtg., UN Doc. S/RES/242 (1967).
the beginning, history has left them outside the country, so that the Israeli people developed without them. Palestinian refugees today are not part of the Israeli people. They do not interact with Israel socially or politically, and many if not most of the refugees do not accept the legitimacy of a Jewish state. They are not part of the same political grouping. Hence, for Israelis today to exercise their right as a people to ‘freely determine their political status and freely pursue their economic, social and cultural development’ they must remain separate. Israeli self-determination today thus conflicts with the return of non-Jewish Palestinian refugees.

The only logical conclusion that can be drawn from binding international resolutions on the Israeli-Palestinian conflict is that Israel must remain a Jewish state. The League of Nations endorsed the objective of building a Jewish national home in 1922. In 2003, the UN Security Council endorsed a two-state solution. Such a solution to the conflict is logical only if one assumes that Israel will remain Jewish. Hence, Israel’s right to security, independence and sovereignty includes implicitly a right to remain Jewish, which necessitates refusing the return of most non-Jewish refugees.

One of the expressions of self-determination for a sovereign state is the prerogative to decide who can become a citizen. Determination of nationality—the granting of citizenship and admission to a political community—is one of the few areas where states may legitimately discriminate on the basis of race, religion, national origin and ethnicity. Nearly all democracies do this in their immigration laws. Some states refuse nationality to people who have lived on their territory for more than one generation. In others, like the United States, immigration and citizenship is the notable arena in which courts have not struck down nineteenth century allowances for racial discrimination.

The clearest articulation of this provision for discrimination in international law is in the Convention on the Elimination of All Forms of Racial Discrimination. Despite generally prohibiting any ‘distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin’, the Convention contains a significant exception: ‘Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.’

Israel is entirely within its rights to take religion and ethnicity into account in determining who should become an Israeli citizen. Israel discriminates in its law of

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41 Id., art. 1(3).
nationality in favor of Jews, an entirely permissible practice under international law. And it is well within its rights to not allow a large group of non-Jewish refugees to become its citizens.

**COMMENTARY**: **UNTANGLING SELF-DETERMINATION IN PALESTINE**

The strongest aspect of the Jewish self-determination argument put forward here is the premise that Jews are a people with a connection to the land of historic Palestine and a right to a national homeland there. The principle that Jews should establish a ‘homeland’ was recognized in the League of Nations Mandate for Palestine. But this does not mean that Jewish collective rights outweigh Palestinian rights, nor that Jewish self-determination is effective legally as a conflicting right against the refugee right of return. The authorization to build a Jewish national homeland was not a right to form a Jewish-dominated state at the expense of other communities.

The only semi-legal sanction for Israel’s secession from Palestine was the UN Partition resolution (Resolution 181) in 1947. Had population transfer been a legitimate course of action in 1947, the General Assembly could have included population exchange in its partition recommendation, as occurred in the partition of India and Pakistan. But the General Assembly instead recommended full equality and civil and political rights for Arabs in the prospective Jewish state. Resolution 181 (II) was quite specific about minority rights. Although the UN partition plan would have allowed for Palestinian Arabs inside Israel to voluntarily change their allegiance to the Arab state, its default rule was that Arabs in the Jewish state would remain there as equal citizens. Every non-Jew who was a resident of the Jewish state (i.e., the Palestinians) would have been entitled to citizenship within the Jewish state. Jews in the Arab state would have had a reciprocal right. The resolution provided that all Palestinian citizens ‘shall become citizens of the State in which they are residents and enjoy full civil and political rights’.

When one looks at binding resolutions on the Palestine conflict, the Jewish self-determination argument appears even weaker. Less than a month before Israel proclaimed its independence, Security Council Resolution 46 called on the Jewish Agency and the Arab Higher Committee to ‘refrain, pending further consideration of the future government of Palestine by the General Assembly, from any political activity which might prejudice the rights, claims, or positions of either community’.

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42 GA Res 181 (II), *supra* n. 24, Part I(C), chapter 3(1).

43 *Id*.

This is an especially important resolution because it was passed in April 1948, during one of the most intense periods of combat and refugee flight in the war. The Security Council omitted any reference to Jewish rights to self-determination, and it clearly anticipated that the General Assembly would arrive at a new recommendation after the rejection of its earlier partition plan. More to the point, preventing war refugees from returning to their original homes and villages certainly violated this provision against prejudicing ‘the rights, claims, or positions of either community’.

It is true that the right of return was not explicitly enshrined in an international treaty until the 1960s, largely due to the fact that there were no international human rights conventions until then. But human rights certainly existed before the 1960s. The Universal Declaration of Human Rights, approved in December 1948, prohibited discrimination and stated in article 13: ‘Everyone has the right to leave any country, including his own, and to return to his country.’\(^\text{45}\) The general prohibition on forced expulsion had already been established by the London Charter of the Nuremberg Trials.\(^\text{46}\)

The doctrine of continuing violations developed in European human rights law holds that states may be liable for rights violations that began even before the ratification of key human rights treaties, so long as the situation continues to exist at the present time.\(^\text{47}\) For instance, in the context of refugee property claims in Cyprus, the European Court of Human Rights has held that Turkey could be liable for property confiscations that occurred 16 years before Turkey accepted the court’s jurisdiction.\(^\text{48}\) The same would be equally true in the Palestinian case; the Palestinian exile experience continues today. Not only has Israel’s \textit{de facto} policies not changed Palestinian claims, Israel’s subsequent ratification of key human rights treaties have strengthened Palestinian arguments for the right of return.\(^\text{49}\)


\(^{46}\) Charter of the International Military Tribunal, \textit{supra} n. 27.

\(^{47}\) \textit{Papamichalopoulos and Others v Greece}—260-B (24.6.93), para. 40.

\(^{48}\) \textit{Loizidou v Turkey} (merits)—Rep. 1996-VI, fasc. 26 (18.12.96), para. 42.

\(^{49}\) The doctrine of continuous violations holds that states may be liable for rights violations that began even before the ratification of key human rights instruments, so long as the situation still exists at the present time. \textit{See, Papamichalopoulos and Others v Greece, supra} n. 47, para. 40.
‘Jewish National Home’ versus Jewish State

The drafting history of the Balfour Declaration indicates that British authorities at the time did not necessarily believe they were sanctioning a separate Jewish state. As one account of the process explained,

The Zionist movement actually failed to secure British endorsement of a Jewish Commonwealth of State in Palestine despite the document’s endorsement of a Jewish homeland. As a result of the efforts of Lord Curzon, and several non-Zionist Jews in the cabinet, the actual declaration stopped short of endorsing a state.50

Throughout the 1930s and 1940s, the Mandate authorities (and the various commissions they created) wavered about whether the Balfour language endorsing a ‘Jewish national home’ meant an independent Jewish state, or merely the development of a Jewish national community within the state of Palestine. Just one year before the UN partition plan, the 1946 Anglo-American Committee of Inquiry had argued against partition:

The Jewish National Home … is today a reality established under international guarantee. It has a right to continued existence, protection and development. Yet Palestine is not, and never can be a purely Jewish land. … It is, therefore, neither just nor practicable that Palestine should become either an Arab state, in which an Arab majority would control the destiny of a Jewish minority, or a Jewish state, in which a Jewish majority would control that of an Arab minority. … Palestine, then, must be established as a country in which the legitimate national aspirations of both Jews and Arabs can be reconciled without either side fearing the ascendancy of the other.51

Nevertheless, international law adapts to changed circumstances. New states may acquire international legitimacy by the mere fact of their existence as sovereign political units controlling a permanent population and having a territorial base.52 A state may achieve this through the principle of self-determination, as Israel argues it did in 1948. But international law allows the recognition of new

51 Anglo-American Committee of Inquiry, supra n. 32, chapter I.
states *de facto*, not only *de jure*. Hence, although much of the international community (including the United Nations) did not explicitly endorse the way Israel came into existence, Israel has acquired legitimacy over time.

The concept of partitioning Palestine into two states has gained legal legitimacy as well. In 2003, the Security Council explicitly endorsed partition of historic Palestine as a final resolution to the conflict. Resolution 1515 of 19 November 2003 called on all parties to implement the Performance Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict. Resolution 1515 specifically endorsed the ‘vision of two states living side by side in peace and security’.

Like the Balfour Declaration at the end of World War I, the current Road Map shows the intersection between international law and politics. The Road Map grew from US President George W. Bush’s speech of 24 June 2002. When the Road Map was first proposed by the Quartet (the United States, the European Union, Russia and the UN) in December 2002, it had political force given the power of the states and institutions that drafted it. But until it was endorsed by the Security Council in 2003, the Road Map was not legally binding.

Being a sovereign state and being a specifically Jewish state are two separate questions. Israel has acquired legitimacy only as a state, not as a specifically Jewish state. The Road Map plan makes no mention of the ethnic or religious identity of either state; it does not say that Israel must be ‘Jewish’, nor that the proposed Palestinian state must be ‘Arab’. One could certainly argue that this is implied in a two-state solution, but one can also still say that Israel’s existence as a specifically Jewish state has never been explicitly endorsed in a legally binding instrument. The two-state formula allows for substantial flexibility regarding the demographic composition of each state, just as the UN’s 1947 partition resolution recommended a Jewish state with only a marginal Jewish majority.

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54 SC Res. 1515, *supra* n. 39.

55 A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, annex to letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2003/529, May 7, 2003.

56 On 14 April 2004, President Bush George W. Bush gave Israeli Prime Minister Ariel Sharon a letter stating that Israel should remain a Jewish state, and opposing Palestinian refugee return to Israel. At present, this is merely a political statement reflecting American policy, similar to the status of the Balfour Declaration in 1917. Its importance stems from the political power of the United States, but it is not international law.
Assuming the legitimacy of partitioning Palestine in 1948, or of the two-state solution today, there is still the question of whether Jewish self-determination requires complete ethnic homogeneity—in other words, a dominant Jewish majority. It is one thing to take demographics into account when defining a people for the sake of self-determination. It is another to look only at demographics. The UN’s partition recommendation was essentially territorial in definition, but used ethnicity as a guide as it carved out the territory. When the UN General Assembly recommended partition in 1947, the proposed Jewish state would have had only a narrow Jewish majority. The UN endorsed the Jewish nature of this state only by recommending boundaries in which there would be a slim Jewish majority and by providing ‘facilities for a substantial immigration’. Under the resolution, the Jewish character of the state could not be established, strengthened or maintained through any compromise of Arab rights.

The suggestion that Palestinian refugees are not connected with the Israeli people and therefore cannot be included in Israeli self-determination is essentially a circular argument, and an effectively Jewish-centric perspective. They have been excluded from Israel only because of the Israeli denial of the right to return. Palestinian refugees are, at most, socially distinct from only Jewish Israelis, not from all Israelis. Palestinian citizens of Israel share culture, religious and family ties with Palestinian refugees, not to mention coming from the same places of origin within historic Palestine. In addition, the economic ties between the occupied Palestinian territories (including refugee camps) and Israel, not to mention the geographic proximity of the refugee camps to Israel should not be easily dismissed. Palestinian refugees’ ties to their homeland is not at issue so much as the question of whether Jews have a collective right to maintain dominant political and economic control of the country.

Though non-binding, the UN partition plan illustrates that building a Jewish national home need not necessitate Jewish demographic dominance. This concept is very different from the Jewish state idea that Israel insists on today. It would not have had a dominant Jewish majority. Instead, it would have had a significant Jewish population within a diverse country. One could still rationalize partition on the logic that carving out a separate state provided the Jewish community sufficient demographic weight to feel secure in a context of ethnic tension. In the proposed state, Jews would not have been overwhelmingly dominant in number, but they also would not have had to live as a small minority. This version of Jewish self-determination does not conflict with the Palestinian right of return.

\footnote{57 GA Res 181 (II), supra n. 24, Part I(A)(2).}
Immigration versus return

The Israeli-Palestinian conflict has produced a confusing vocabulary about migration, much of which is connected to conflicting notions of self-determination. Palestinians insist on their right to return, while Israel has a Law of Return\(^{58}\) permitting Jews from other countries to immigrate. While Jewish immigration for Zionism has been a means for reconstituting a homeland, for Palestinians it has been a form of colonization and fuel for displacement. Whereas for Palestinians return would be a just restitution of the status quo, for Israelis it would be a disruptive imposition of a foreign people in a sovereign state. Essentially, by viewing the other’s form of migration (immigration for Jews, return for Palestinians) as illegitimate, each side can perceive self-determination in terms in which the other is excluded, or not present in large numbers. International law is not amenable to such approaches on either side.

Since the vast majority of Jewish Israelis came to the country after the Balfour Declaration, Palestinians can, with good reason, perceive the size of the Jewish population in their homeland to be the artificial product of colonial policies. The League of Nations endorsed Jewish immigration in its Mandate for Palestine, and linked immigration to land settlement.\(^{59}\) This deprived Palestinians from setting an immigration policy for their own country, which western states had been doing since the nineteenth century, and which Israel seized the opportunity to do after 1948. At some points during the mandate period, when Britain sought to limit Jewish immigration, Zionist organizations organized illegal immigration. Almost immediately after the exodus of Palestinian refugees in 1948, Israel and Zionist organizations facilitated the immigration of hundreds of thousands of Jews, some of whom were settled on lands and in homes confiscated from expelled refugees.

For all these reasons, much of Jewish immigration to Palestine and later to Israel should be seen as bound up in colonialism and racism. Yet, no matter how they arrived, Jewish immigrants to Israel and their descendants are today Israeli citizens and have rights to remain in Israel as equal citizens, along with returning Palestinian refugees. There are three reasons for this. First, Israel is a sovereign state that is entitled to determine its own immigration and nationality laws. Second,


\(^{59}\) According to article 6 of the Palestine Mandate: ‘The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish agency … close settlement by Jews on the land, including State lands and waste lands not required for public purposes.’ Mandate for Palestine, \textit{supra} n. 23.
for better or worse Jewish immigration was endorsed by the League of Nations mandate, and had the legitimacy conferred by the League. Third, many (though by no means all) of the Jewish immigrants were refugees either from Nazism in Europe or post-1948 anti-Jewish discrimination in Arab countries. Such people had a right to seek asylum.

The state of Israel has the right, if not the duty, to preserve Jewish and Hebrew culture. The International Covenant on Economic, Social, and Cultural Rights, article 15, guarantees everyone’s rights to ‘take part in cultural life’. The state has similar responsibilities to its substantial non-Jewish (mainly Arab) communities; preservation of one culture is not a negation of another. Israelis today have the same rights that Palestinians had in 1948: to remain in their country, and to be equal citizens in it. But the International Covenant on Economic, Social and Cultural Rights, article 5, makes clear that its protection of culture does not permit ‘any State, group or person … to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms [of others]’.61

Some defenders of Zionism have increasingly sought to justify Jewish dominance in Israel by analogy to international migration law. There are a number of states in the world that define themselves by reference to a specific nationality, religion or ethnicity. This is one reason why international law allows discrimination in the context of immigration law, for instance favoring immigrants with certain ethnic, religious and racial traits. This area of international law is morally unsettling because it permits forms of discrimination that would be abhorrent to human rights in any other field. Yet, this is a facet of international law today.62

International law permits Israel to discriminate in favoring Jews as immigrants via the Law of Return. The Inter-American Court of Human Rights issued an advisory opinion in 1984 that Costa Rica is entitled to favor ‘nationals of other Central American countries, Spaniards, and Ibero-Americans’ in its nationality laws because it is legitimate in naturalization procedures to favor,

...those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily

60 ICESCR, supra n. 11, art. 15.
61 Id., art. 5.
with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.\footnote{Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (OC-4/84), paras. 57, 60. See also, Belgian linguistic—5 and 6 (9.2.67 and 23.7.68). The European Court of Human Rights reasons that differential treatment is impermissible only when it lacks an objective and reasonable justification.}

But the problem with this analogy is that when we talk of Palestinian refugees we are not talking about immigration of new citizens. The right of return is about the repatriation of people who were forced from their homes and de-nationalized for discriminatory reasons. Sovereign states may legally restrict immigration in order to maintain a particular ethnic or religious demography. But they may not expel or prohibit people from returning to their homes in order to create a new demographic reality. Since 1948, Israel has used military and political force to dramatically remake the ethnic balance of the country. That is not permissible in law, and is not justified by claims to self-determination.

The Palestinian situation is covered by the Racial Discrimination Convention’s article 5:

\begin{quote}
States Parties undertake to prohibit and to eliminate racial discrimination in all its forms … notably in the enjoyment of the following rights … [including] The right to leave any country, including one’s own, and to return to one’s country; The right to nationality; [and] The right to own property alone as well as in association with others.\footnote{CERD, supra n. 40, art. 5.}
\end{quote}

The UN Human Rights Committee, interpreting analogous provisions of the International Covenant on Civil and Political Rights, has commented: ‘The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.’\footnote{Human Rights Committee, General Comment No. 27, Freedom of Movement (Art. 12), 67th sess., UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 19, reprinted in, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 174 (2003).} Were we to accept the Israeli argument made above, then a treaty designed to eliminate discrimination would somehow be read to allow ethnic cleansing. Such a reading would clearly undermine international human rights law, and is not warranted here.
PROPERTY DISPUTES: REFUGEE RESTITUTION VERSUS SECONDARY OCCUPANTS

Claims to restitution

Refugee return is highly linked to property restitution. Property restitution has been a hallmark of refugee return and reconstruction in other ethnic conflicts, such as Bosnia and Herzegovina, Kosovo, Guatemala and elsewhere. If Palestinian refugees were to return to Israel without being restituted their original properties, they would essentially become internally displaced within Israel. Many Palestinian citizens of Israel are already in this situation. Yet relatively more attention has been paid to the demographic consequences of return than to the more technical issues involved in property claims.

Whereas compensation remedies an injustice through the payment of money, restitution remedies dispossession by allowing a property owner to reclaim the specific property that he or she lost, vindicating property rights in the most direct possible way. For refugees, restitution has a clear basis in international law. A number of legal authorities make clear that restitution, not compensation, is the primary remedy for violations of property rights, especially for refugees.

Restitution can give victims a unique sense of justice that monetary compensation may never achieve. Although property, of course, has an economic importance, land and homes also have unique sentimental importance to people and are, in this sense, priceless. Where land is highly bound up with questions of personal and national identity, as is clearly the case in Israel and Palestine, money alone is unlikely to bring a complete sense of justice. Moreover, only restitution can actually reverse ethnic cleansing. Compensation may concede past injustice or possibly deter future violations, but it leaves ethnic cleansing in place.

Much as this chapter assumes for the sake of argument that refugees have a right to return, we can assume for present purposes that they have a right to seek restitution.

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as well. The important issue here is to ask whether Israelis have conflicting rights that may act as defenses to restitution.

Even if the state of Israel was a wrongdoer in terms of property seizures, individual Israelis who have used the property (known as ‘secondary occupants’) can have their own separate rights that may conflict with the rights of returning refugees. Generally, two areas of law intersect to offer potential arguments for Israelis. First, human rights law protects people’s right to housing, and can hence potentially affect any effort to evict Israelis from residences on refugee property. Second, property law in many cases protects investments even in property that should not have been taken in the first place.

Although they preferred restitution as a remedy, both the Permanent Court of International Justice in 1928 and the European Court of Human Rights have also accepted compensation or provision of alternative property as a remedy for property violations where restitution would not be possible. The *Chorzów Factory* decision stated:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

The problem is how to define when restitution is ‘impossible’. This has no clear answer in international law today.

The entire question of property restitution is worthy of a far more in depth legal study; the following discussion will only briefly touch on the relevant issues.

**Recent post-conflict restitution precedents**

Since the end of the Cold War, there have been several cases of mass restitution in the context of conflict resolution. One of the most vexing problems in these cases has been how to satisfy displaced persons’ claims for property restitution when their property has been occupied by other people. Much as it provides a unique sense of justice to victims, restitution imposes immediate and direct hardships on other individuals. Current occupants of a property must usually be

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69 Case Concerning the Factory of Chorzów, *id.*
evicted. Three different UN studies have concluded that there is currently a lack of clarity about how to resolve conflicting rights between returning refugees and secondary occupants, and that this is an area in which more legal development is needed.70

Property restitution has often been impeded by the rights of secondary occupants of property.71 These hardships may be especially acute in the case of Israel/Palestine because an entire new country has been built over more than half a century around the assumption that the displacements and land confiscations of the late 1940s and early 1950s would not be reversed. Because of these hardships, current occupants can assert various defenses to restitution.

In Bosnia and Herzegovina and in Kosovo, secondary occupants were allowed few defenses against restitution. The Dayton Accords’ Annex 7 covered the rights of refugees and displaced persons. Its first paragraph provided:

All refugees and displaced persons have the right to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.72

If the claimant has a valid property right, eviction may be prevented only if the current occupant has no alternative housing, and in that case it may usually only be delayed until temporary housing becomes available.73 UN regulations in Kosovo are similar. UN Security Council Resolution 1244 of 199974 provided for a right of return, but did not provide specific rules governing property rights. Like Bosnia, restitution arrangements in Kosovo grant secondary occupants relatively little recourse under

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71 Housing and Property Restitution in the Context of the Return of Refugees and Displaced Persons, id., para. 17; The Return of Refugees’ or Displaced Persons’ Property, id., paras. 46-48; and The Problem of Access to Land and Ownership in Repatriation Operations, id., paras. 47-48.


73 See, in this collection, Chapter 5, ‘The Right to Housing and Property Restitution in Bosnia and Herzegovina’.

UN regulations. In general, their need for replacement housing can lead to a delay of restitution of only six months.\textsuperscript{75}

On the other hand, in South Africa, secondary occupants were eligible for substantial defenses against restitution. The South African Land Claims Court considered whether it is ‘practical’ to order restitution.\textsuperscript{76} The South African system considered restitution as a conflict of rights between the current owner and the dispossessed person.\textsuperscript{77} Where land has been urbanized or developed industrially, direct restitution is usually avoided in favor of financial compensation.\textsuperscript{78} In addition, the person who loses his property through restitution (i.e., usually a white owner) is entitled to compensation from the state.\textsuperscript{79}

\textbf{Is passage of time relevant?}

A common question regarding Palestinian refugee rights is whether the weight of their claims is in any way diminished by the decades that have passed since their original exile. In a recent article on the Palestinian right of return, Jeremy Waldron argued that the passage of time can render legitimate originally unjust seizures of indigenous peoples’ lands. He calls this the ‘supersession’ thesis: ‘Certain things that were unjust when they occurred may be overtaken by events in a way that means their injustice has been superseded.’\textsuperscript{80} Waldron’s argument is rooted in his view of moral philosophy, and relies on colonial era violations that pre-dated modern humanitarian and human rights law. However, we can attempt to assess it by reference to comparative examples of restitution in other conflict resolution situations.

Perhaps the most favorable precedent for an Israeli argument based on lapse of time comes from Rwanda. The Rwandan government in 1994 proclaimed its intention to apply the 1993 Arusha Accords, which guaranteed the right to return for all refugees. A related protocol on refugee repatriation held that return is ‘an

\textsuperscript{75} UNMIK/REG/2000/60, Oct. 31, 2000, art. 13.2.
\textsuperscript{78} Id., 33.
\textsuperscript{79} Id.
inalienable right’ and essential to ‘peace, unity, and national reconciliation’. This protocol allowed returning refugees to settle ‘in any place of their choice’ so long as they do not encroach on others’ rights. It also held that ‘all refugees shall … have the right to repossess their property on return’. However, the same protocol stated:

The two parties recommend, however, that in order to promote social harmony and national reconciliation, refugees who left the country more than 10 years ago should not reclaim their properties, which might have been occupied by other people.

Those excluded from restitution by this rule were to receive compensation. The ‘ten-year’ rule has been explained as a reflection of Rwanda’s housing and land crisis, in which many Rwandan’s took over refugees’ property in good faith, or perhaps out of desperation. Restitution would have required mass resettlement of these new residents. A UN report explained the Rwandan system as a unique application of local customary law, rather than a general precedent.

At the other extreme, South Africa’s reconciliation process allowed for restitution claims dating back to the Native Land Act (No. 27 of 1913). The South African Constitution’s Bill of Rights section 25(7) provides: ‘A person or community dispossessed of property after 9 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.’

A possible Israeli argument on conflicting property rights

The right of returning Palestinian refugees to claim restitution must be balanced against the rights of Israelis who presently occupy their property. Israeli secondary occupants’ rights will be especially strong in the case of residences, since the right to

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83 Id.
84 Id.
85 The Problem of Access to Land and Ownership in Repatriation Operations, supra n. 70, para. 48.
a home is specifically protected in international law. Business can also be protected when good faith investments were made to improve the property; at the very least current owners would be entitled to compensation for their loss should they be evicted.

The fact that Israel has been a sovereign state for 59 years weighs heavily in favor of secondary occupants, especially relative to those in the Balkans where new property acquisitions had little legitimacy and were reversed quickly. The precedent in Rwanda indicates that conflict resolution does not require a complete reversal of long standing property transfers.

In balancing refugee rights against those of secondary occupants, one must consider the hardships that would result from evicting the present occupants. The current status quo is that most Palestinian villages in Israel were destroyed, and remaining property in urban areas occupied by Israelis. Significant number of Israelis would need to be displaced and compensated if refugees are to return. Such hardships would be difficult to justify given that no matter where they return Palestinian refugees will need to invest and re-build their communities. As a result, the balance of hardships favors allowing Israelis to remain and instead give returning refugees alternative property and compensation.\(^{87}\)

**Observations on the restitution problem**

Individual property rights are the strongest conflicting rights claim that Israel can make against the right of return under international law. Secondary occupants’ rights have been a major issue in other restitution programs. This means that Israelis can conceivably acknowledge the refugees’ right to return without necessarily conceding that any Israelis need to be displaced. In order to comply with international law, restitution should be the primary or default remedy for refugee property claims which can be compromised only when it would impose substantial hardship. Whenever a Palestinian refugee is denied restitution, he or she would be owed substantial compensation by Israel, which is ultimately responsible for having confiscated refugee property. Nevertheless, a rights-based resolution of the refugee issue might not actually return all Palestinians to their original properties.

\(^{87}\) It should be noted for clarity that this argument can extend only to property inside Israel where Israeli domestic property law applied. Israelis could not make these arguments about land inside settlements (colonies) in the occupied Palestinian territories (including East Jerusalem) since their residence is not on occupied territory (not inside Israel) and is in violation of the Fourth Geneva Convention and UN Security Council Resolution 242.
Nevertheless, the rights of secondary occupants are also subject to substantial limits.

First of all, secondary occupants’ rights would not block all refugee return, and it would have little effect in areas of the country that are sparsely populated.\textsuperscript{88} Recent research by scholar Salman Abu Sitta has noted that the majority of Israeli Jews live in the central region of the country where much of the land was Jewish-owned before 1948.\textsuperscript{89} While much urban refugee property was transferred to Jews, the majority of confiscated land remains vacant or sparsely populated. Hence, even if a final settlement took a very lenient approach toward Israeli property rights, the majority of Palestinian refugees would likely be able to return to their homes.

Second, not all Israeli property rights are equal. International law is most protective of residences and the right of people not to be displaced from their homes; commercial, industrial and agricultural property will be subject to much less protection. In such cases, there is far less harm in displacing the secondary occupants, who at most should be able to claim compensation for their investments in the land. This compensation could come from the state, which is responsible for having misallocated the land, not from the returning refugees.

Third, the means by which various Israeli individuals and institutions acquired and used land may be an important consideration limiting defenses to restitution. The purpose of protecting secondary occupants is to avoid disrupting the lives of innocent persons. But where the secondary occupants were responsible for the original confiscation or for racially discriminatory allocation of land, it may not be equitable to protect their rights over those of return refugees. The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons state:

\begin{quote}
The egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property, preempting the formation of bona fide property interests in such cases.\textsuperscript{90}
\end{quote}

\textsuperscript{88} Chaim Gans reaches a similar conclusion in an essay based on moral philosophy rather than law. Chaim Gans, ‘The Palestinian Right of Return and the Justice of Zionism’, \textit{Theoretical Inquiries in Law} 5/2 (2004), 269-304. He argues that Palestinian refugees should be enjoy the right to return only in unpopulated areas of Israel.


\textsuperscript{90} \textit{Housing and Property Restitution in the Context of the Return of Refugees and Displaced Persons}, supra n. 70, para. 17.4.
The Jewish National Fund, in particular, acquired a great deal of confiscated refugee property in the late 1940s and 1950s through land sales that were illegal even under Israeli law, and insists to the present day that its property can only be used for the benefit of Jews. A number of powerful Israeli constituencies lobbied the Israeli government to distribute particularly valuable homes to them, and to give lower standard accommodations to new Jewish immigrants. In such cases, Israeli secondary occupants may not be able to legitimately block property restitution to returning refugees.

Fourth, even where secondary occupants acquired property in good faith, some authorities state that it is the secondary occupant, not the returning refugee, who should accept compensation, at least where the original buildings are still in existence.

Finally, it remains open to Palestinians to argue that they were victims of a state-sponsored discriminatory land regime that was inseparable from a larger campaign of ethnic cleansing. Palestinians can argue that they were victims of Israel, and have a right to restitution from Israel. If this requires the state to evict other individuals, then arguably the secondary occupants should seek compensation or alternative property, rather than place the burden of compromise on people who spent decades as refugees in exile.

Since international law remains ambiguous about how refugees and secondary occupants’ rights should be balanced, this is an area where Israeli and Palestinian negotiators may have substantial flexibility to design a solution. In other conflict resolution settings, the negotiated settlement prescribed general rules governing restitution along with an individual claims mechanism to resolve specific cases over the ensuing years. However, the precise rules varied considerably, especially on the question of how to weight the rights of secondary occupants.

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91 Kedar and Forman, *supra* n. 4, 809, 815.


93 *Housing and Property Restoration in the Context of the Return of Refugees and Displaced Persons*, *supra* n. 70, para. 17.4. Compare the above provision with paragraph 21.2 recommending that returning refugees be given compensation in lieu of restitution ‘when housing, land and/or property is destroyed or when it no longer exists’.
CONCERN FOR STABILITY AMID MASS RETURN

A number of writers who defend the Israeli position against the right of return have indicated, directly or indirectly, that the return of Palestinian refugees to Israel would be a security threat to Israel. This fear is to some extent acknowledged in the text of General Assembly Resolution 194 (III) of 1948, which recognizes the right of return. As Justus Weiner has noted:

> General Assembly Resolution 194 limits permission to individuals that wish to return and are willing to “live at peace with their neighbors.” In other words, even if one ignores the non-binding nature of General Assembly resolutions, Resolution 194 limits the return of Palestinian refugees to those who wish to live peaceably with Israel, i.e., by refraining from terrorism and irredentist activities.

While there is a basis in law for raising security concern in individual cases where there is a reason to consider a particular person dangerous, it is more doubtful whether this can be raised for an entire population based solely on their nationality. Such an approach would run afoot of strong rules in international law against racial discrimination. However, could there be other grounds for raising general concerns of general public interest inherent in refugee return?

A major practical concern associated with any refugee repatriation is the issue of stability. Most refugee repatriations are associated with countries in need of development, so that repatriation and post-conflict reconstruction go hand in hand. In the case of Israel/Palestine, Israel is already a highly developed country, and the concern would be that mass returns would destabilize the country, undo its economic status quo and cause mass new displacements.

It is unclear in international human rights law exactly how far a state may go to compromise rights for the sake of stability, especially in a case like the Palestinian one. Must Israel’s concerns be limited solely to disruption to the economy and housing supply, or can it also take into account potential disorder stemming from ethnic tensions amid refugee repatriation? Can Israel raise concerns about maintaining order when it bears responsibility for having excluded the refugees in the first place?

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95 Weiner, supra n. 94, 41-2.
The role of the public interest

In the 1995 case of *Scollo v Italy*\(^{96}\), the European Court of Human Rights noted that concern for the general public interest gave a state a legitimate reason to avoid mass housing evictions. The Court explained: ‘To have enforced all evictions simultaneously would undoubtedly have led to considerable social tension and jeopardized public order.’\(^{97}\) The Court has recently revisited this issue in the context of a more than 50-year-old mass property confiscation problem. Its ruling suggests that Israel could have legal grounds to resist mass restitution, not on the basis of individual property claims, but out of concern for general public order.

On 22 June 2004, the European Court of Human Rights issued a judgment in the case of *Broniowski v Poland*\(^{98}\) concerning a dispute over restitution of pre-World War II property in Poland. Parts of what are now Belarus, Lithuania and Ukraine were part of Poland before World War II, and were known as the ‘Bug River’ territories. The Yalta and Potsdam conferences drew a new border between Poland and the Soviet Union, stripping Poland of the territory, and prescribing a population transfer. In September 1944 bilateral ‘Republican Agreements’ with the USSR, Poland agreed to compensate Poles from the Bug River territories who were forced to move to Poland, and who lost their property. The agreements called this ‘repatriation’, though it would seem more accurately described as a forced expulsion. From 1944 to 1953, around 1,240,000 persons were displaced from the Bug River Territories.

During this displacement, Broniowski’s grandmother lost a large property in what is now Ukraine, and from 1947 until 2004 she and her heirs went through a long series of procedures to try to obtain compensation. In 1982, she was given a lesser property inside Poland, worth only 2 per cent of the value of her original property. After the fall of the Communist regime, the Polish government went through a substantial reorganization, which included a reorganization of state lands. In the process, the Polish government informed Broniowski that there were no longer any lands available to provide him the rest of the compensation. Until 2002, there were numerous revisions of the Polish legislation concerning Bug River claims. In December 2003, Poland enacted a new law under which Broniowski could not obtain any further compensation because his grandmother had accepted a piece of state land in 1982, though of much less value.

Broniowski argued that his right to ‘peaceful enjoyment of his possessions’ had been violated. Although Broniowski never litigated a claim against Ukraine for

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\(^{96}\) *Scollo v Italy*—315-C (28.9.95).

\(^{97}\) *Id*.

\(^{98}\) *Broniowski v Poland* [GC], no. 31443/96, ECHR 2004-V—(22.6.04).
restitution of the actual lost property (because he wanted Poland to provide a substitute property) the case had many practical similarities with a claim for restitution. The European Court was not asked to address the validity of the Republican Agreements. The Court assumed that Broniowski had a right to compensation and assumed that Poland was responsible for providing it.

For present purposes, the relevant part of the Court’s judgment focused on its interpretation of the concept of ‘public interest’ as a defense against implementing either restitution or compensation. The Court explained that property rights must be balanced against ‘a general interest of the community’. It concluded that local (in this case, Polish) authorities were best positioned to assess what is in the public interest, and are owed ‘a certain margin of appreciation’. The court then stated:

The notion of “public interest” is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly-funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. … This logic applies to such fundamental changes of a country’s system as the transition from a totalitarian regime to a democratic form of government and the reform of the State’s political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation.\(^9\)

In terms of political, economic and social issues, the Polish government argued that the post-Communist political reorganization had made it difficult to satisfy Bug River claims. Poland argued that it had tried its best to compensate the claimants, but were simultaneously required to provide restitution to Poles wronged by the previous totalitarian regime. The Court generally agreed: ‘The Court does not doubt that during the political, economic and social transition undergone by Poland in recent years, it was necessary for the authorities to resolve such issues.’\(^1\) The Court also agreed that the large number of claims involved (in this case, 80,000) was a legitimate concern for Poland.

The Court sided with Broniowski over instances in which executive agencies had failed to implement legislation and entitlements, which the Court considered threats to the rule of law. But, in *obiter dicta* (non-binding commentary), it stressed:

The Court accepts that in situations such as the one in the present case, involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole, the national authorities must have considerable

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\(^9\) *Id.*

\(^1\) *Id.*
discretion in selecting not only the measures to secure respect for property rights or to regulate ownership relations within the country, but also the appropriate time for their implementation. … Balancing the rights at stake, as well as the gains and losses of the different persons affected by the process of transforming the State’s economy and legal system, is an exceptionally difficult exercise. In such circumstances, in the nature of things, a wide margin of appreciation should be accorded to the respondent State.101

The factual situation would have been more analogous for the Palestinian refugee case had Broniowski been claiming restitution from Ukraine; the fact that Poland was essentially an innocent government trying to compensate people for dispossession inflicted by another state was referenced throughout the Court’s decision. Legally, this difference was not clearly decisive. According to the Republican Agreements, Poland was in a sense a stand-in for Ukraine. Still, Poland’s relative innocence may have made the Court more willing to extend Poland ‘a wide margin of appreciation’.

The case is highly analogous to Palestine/Israel in terms of its specific lines of argument. No one, not even Poland, contested Broniowski’s general right to compensation or restitution. The decisive issue was essentially one of conflicting rights. Did Poland have legitimate conflicting concerns that permitted it to not make good on Broniowski’s valid property claim? Although in the end Poland lost (because its administrative agencies had stalled in implementing legislation), in terms of general principles Poland won.

The Broniowski decision shows that a conflicting rights approach can allow Israelis to assert legitimate concerns about refugee return through international law, although it is not certain what specific results such arguments would produce in the Israel/Palestine context. The Court stated that in cases of property restitution, governments have wide discretion to consider political, social and economic issues. Although this was *obiter dicta* in the decision, the court emphasized it repeatedly and at length. These arguments could be applied by Israel.

Possible Israeli argument about stability

The prerogative of a state to protect the public interest may open the door to the following Israeli argument.

Whether or not the displacement and dispossession of Palestinian refugees was just, the reality is that Israel’s economic and social life has been built on it over the past 59 years. Granting the right to return and restitution would entail not just evicting

101 *Id.*
current residents, but social and economic upheaval on an almost unfathomable scale. Israel’s economy would be disrupted if not decimated. Even if economists could devise a remedy to the economic challenges, this kind of disruption would threaten large political constituencies within Israel. Jewish Israelis would likely resist the implementation of restitution, both through legal and illegal means. Major civil unrest and vigilantism are conceivable, if not likely.

One also has to consider the dispositions of the returning refugees. Many of the refugee camps are dominated by militant political factions that have never accepted peace negotiations with Israel, and which have advocated violence against Jewish Israelis.

Essentially, refugee return would send the country back to the inter-communal violence of the 1930s and 1940s. Rather than begin reconciliation between Israelis and Palestinians, such return and restitution would generate new conflict for decades to come.

**Observations on the public interest**

It is true that the language used by the European Court of Human Rights in *Broniowski* seems to favor Israel’s concerns. But the actual legal holding does not. The court was deferential to Poland because Poland was a relatively innocent state. Israel is not. Israel, unlike Poland in the *Broniowski* case, has unclean hands to argue that it must block refugee return to maintain public order. A defense of necessity may not be invoked when ‘the state has contributed to the situation of necessity’.102 The upheaval that Israel may fear is an upheaval that in substantial part is Israel’s own creation. It is hence not entitled to use this argument to maintain the *status quo*. In addition, concerns for the public interest should be interpreted narrowly in order to limit any interference with human rights.103

The concern of the European Court for maintaining public order is important in planning refugee return, but not for blocking return. It requires first that refugee repatriation be gradual and orderly, as in any mass population movement. It also points to the need for refugee return to be part of far more extensive efforts at reconciliation between Jews and Palestinians.

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103 *Housing and Property Restitution in the Context of the Return of Refugees and Displaced Persons*, supra n. 70, para. 17.2.
Maintaining security and stability are important concerns in deciding how, but not if, to implement refugee repatriation. As noted above, recent research indicates that refugee return and restitution may not affect the regions of Israel where most of the Jewish population lives. Return and restitution in these places would not directly generate the kind of disruption feared. The Israeli argument proposed here is really only an argument against restitution in areas that are heavily populated or economically developed by Israelis. Such situations are dealt with to a large extent by the potential defenses to restitution suggested in the previous section.

Most concern for political unrest stems more from existing ethnic tensions than from the direct impact of refugee return disruptions. Human rights law values equality above nearly any other principle. Governments are not permitted to allow discrimination simply because their populations have racist opinions. Nor can Israel legitimately profess concern for civil unrest simply because Jews would resist the return of non-Jews to their midst.

Refugee return will require Jewish Israelis to live in close proximity to Palestinians, and given decades of conflict people have a right to be concerned about what this will mean. Israel cannot in good faith use the conflict as an excuse to avoid refugee return. But nor can anyone ignore the conflict and insist merely on return without any arrangements to keep order and security. Refugee repatriation and restitution for displaced people in other countries, including Bosnia and Herzegovina, South Africa and Guatemala were part of much larger efforts aimed at reconciliation. Palestinian refugee return cannot be pursued in isolation. If Israel plays a good faith effort in repairing the injustices of the last six decades and in promoting reconciliation based on human equality, it will have every right to raise concerns to insist that the modalities of refugee repatriation minimize social and economic disruption.

Concluding Observations

This chapter has touched on vast areas of public and private law, and each section could warrant an in-depth study of its own. Nevertheless, there are some important observations to be made about a conflicting rights approach to the right of return.

Jewish self-determination cannot trump other human rights. The first part of this chapter explored arguments that the Jewish collective right to form and maintain a Jewish state could negate Palestinian refugee return. This argument does not seem sustainable in law, principally because self-determination cannot be achieved for one group by disenfranchising another. Israel can discriminate in its immigration laws, but not in laws dealing with returning refugees. If Palestinian refugees have
a right to return, they cannot be legally prevented from doing so simply because it would change Israel’s demographic composition. The law of self-determination is flexible enough to accommodate this reality. For the purposes of self-determination, the ‘people’ of Israel can include both current Israeli citizens, as well refugees who choose to return.

Self-determination is inclusive, not exclusive. Self-determination is a foundation for other rights, not a conflicting right. International law has long accepted that Jews are a people entitled to a homeland in what is now Israel. Refugee return need not threaten Jewish national life in Israel, but it would necessitate a re-definition of Israel as a ‘Jewish State’. Israeli sovereignty and Jewish sovereignty are not necessarily the same thing. The dominant Jewish demographic position in Israel is the artificial result of the fact that the Palestinian refugees have not been allowed to return home. Even without refugee return, Israel’s non-Jewish (largely Arab) population is already substantial. Today, Israel is an established sovereign state, but it is also a diverse state.

Refugee return and restitution must accommodate Israeli property and residential rights. Israelis have open to them a range of possible arguments to defend significant portions of their current property. Although refugee return and property restitution are linked, there are a number of potentially valid conflicting interests that individual Israelis may assert. Even if the state of Israel was wrong to take refugee property, individual Israelis who acquired it may have interests that the law will protect.

This chapter has not explored all of the complexities of property restitution, but it can at least be said that Israeli and Palestinian rights may be in genuine conflict in the area of private property. Israelis who acknowledge the justice of Palestinian refugees’ desire to return but who worry about the practical implementation would benefit from an expanded exploration of competing property claims. This would affect only specific pieces of property; refugees who come from undeveloped or sparsely populated areas of Israel would be able to return without obstacle.

Return arrangements should account for political, social and economic stability. Israel would have valid concerns that mass refugee return would generate tremendous upheaval. However, there is no basis in international law for this concern to negate the right of return entirely. Stability is a legitimate and necessary state concern, which could justify delaying or staging returns and restitution over time. Expertise gained from other large scale refugee repatriations would have obvious application in designing the modalities and logistics of refugee return.

As in other post-conflict situations, refugee repatriation should be part of a wider effort at reconciliation. Since Israel has played a part in promoting ethnic tension between Jews and Palestinians, it cannot reflexively claim the existence of conflict as a reason to block non-Jewish refugee return. But if Israel plays a constructive and good faith role in reconciliation, the state will have every right to raise concerns
about maintaining stability in the course of refugee return.

The right to return need not leave Israelis and Jews unprotected. It would be to the benefit of both Israelis and Palestinians to have greater focus on Israeli rights, especially private property rights, for two main reasons.

First, full acceptance of the Palestinian right to return need not generate widespread fear of Jewish displacement. Israelis have a range of rights to assert that would either slow or in some cases prevent full return to refugees’ original homes. This will be of little comfort to those who ideologically insist on a Jewish state with a dominant Jewish majority. But the conflicting rights approach can address more practical Israeli interests.

Second, addressing Israeli rights in the context of refugee return may have an important benefit in terms of reconciliation. The Israeli-Palestinian conflict is often described in terms of irreconcilable claims to self-determination. Zionists claim Israel as a Jewish state, Islamists claim historic Palestine as an Islamic state, Arab nationalists claim it as an Arab state, and so on. As noted above, the legal right of peoples to self-determination need not and legally cannot be expressed in such exclusivist terms. It is possible to acknowledge both the Palestinian right to return, as well as Israelis’ rights to property and homes. By acknowledging mutually legitimate rights, this approach should reduce fears that Palestinians assert a right to return in order to drive all Jews from Israel, as well as fears that Israelis resist the right to return in order to continue illegitimate colonization.
Introduction

Conclusion

Terry Rempel

One week after the conclusion of the BADIL Expert Forum in July 2004 the International Court of Justice handed down its much anticipated advisory opinion on the legal consequences of Israel’s construction of a Wall in occupied Palestinian territory. The Court’s opinion provided an important opportunity to reassert a role for international law in crafting a solution to the Israeli-Palestinian conflict. In assessing the legal consequences of the construction of the Wall, the Court reviewed the content of the applicable rights, identified the claims-holders and duty-bearers and their corresponding rights and obligations, assessed whether or not they were able to claim their rights and fulfill their obligations and then listed a number of steps through which they might be able to do so. In brief, the Court found that Israel’s construction of the Wall violates a wide range of rights including the right of the Palestinian people to self-determination. It thus concluded that Israel has a legal obligation to cease construction of the Wall, dismantle it, repeal legislation and make reparation for damage caused to all natural or legal persons concerned. The Court also found that all states, in view of the character and importance of the rights and obligations involved, have a legal obligation not to recognize the illegal situation resulting from the Wall’s construction, not to render aid or assistance in maintaining the situation created by its construction and to ensure Israel’s compliance with relevant international law. The Court further recommended that the United Nations as a whole consider what further action is required to bring an end to the conflict and establish a just and lasting peace in the region.

The ICJ opinion has important implications for resolving the Palestinian refugee question. First, the Court emphasized the imperative of achieving as soon as possible a negotiated solution to the conflict on the basis of international law. This includes the unresolved situation of millions of Palestinians who have been displaced and dispossessed of their homes, lands and properties over the past sixty years. Second, the Court set out the rights and obligations relevant to a negotiated solution to the refugee question. While the advisory opinion did not address the specific situation of
Palestinian refugees, the Court found that the smaller group of Palestinians displaced and dispossessed by Israel’s construction of the West Bank Wall have a right to a remedy and reparation and that Israel has a corresponding obligation to provide effective remedy and reparation for harm done. The primary forms of reparation comprise restitution (e.g., return to one’s place of origin, return of property), compensation, rehabilitation, satisfaction and guarantees of non-repetition. Finally, the Court identified a number of mechanisms to put these principles into practice. These included the withdrawal of aid or assistance used to maintain the illegal situation and the establishment of a reparations regime for persons unlawfully displaced and dispossessed by the Wall’s construction. The same principles and mechanisms apply to the much larger group of Palestinians displaced and dispossessed of their homes, lands and properties since 1948.

The BADIL Expert Forum provided an opportunity for academics, practitioners, policy makers and civil society actors to revisit the role of international law in resolving the Palestinian refugee question. Participants examined legal principles relevant to a rights-based approach and identified and addressed a number of problems arising from their application in the Palestinian case. Participants also examined efforts to put these principles into practice in a variety contexts and cases worldwide. They identified similarities and differences across cases and drew a number of lessons learned, in terms of both practices to be avoided and those to be applied. Finally, participants identified major gaps between principle and practice in the Palestinian case along with a number of measures to facilitate a practical and rights-based solution to the Palestinian refugee question. The following conclusion is based on the contributions in this collection as well as the presentations, working papers, discussions and debates from each of the four expert seminars; it does not necessarily reflect the views of each participant. A selection of rule of law tools with further information about principles and practice relevant to a rights-based approach to the Palestinian refugee question, as well as a complete list of working papers and participants, are included in the annexes to this collection.

**Rights in Principle**

Participants to the BADIL Expert Forum examined a range of principles relevant to a rights-based approach to the Palestinian refugee question. These include both substantive and procedural rights.

Participants affirmed that the rights of return, restitution and compensation constitute the primary principles for durable solutions afforded to refugees under international humanitarian, human rights and refugee law. Refugees who do not
yet have access to durable solutions also have rights to employment, housing, public education, property ownership, freedom of movement, identity papers, travel documents and social security under international refugee law, as well as the broader set of rights inherent to all human beings under international human rights law. Participants also identified and addressed three major issues arising from the application of these principles to the Palestinian case. These include claims of conflicting rights, the question of ‘timing’ and inaccurate interpretations of the status of Palestinian refugees under international refugee law. Finally, participants concluded that certain procedural rights discussed in this collection are also highly relevant for a rights-based approach, especially in situations where states or other duty-bearers fail to uphold their respective obligations under international law. These include the right to participate, the right to justice and the right to know the truth about systematic and/or widespread past violations of international human rights and humanitarian law.

Conflicting rights

The assertion that the right of Palestinian refugees to return to their homes, lands and properties inside Israel necessitates the denial of the rights of Jewish Israelis is one of the primary misconceptions that has prevented the application of a rights-based approach to the refugee question. In this collection, Michael Kagan argues compellingly that international law analysis of potentially conflicting rights is important for the proper and consistent application of a rights-based approach. On the one hand, such analysis creates a more level playing field in which the claims of both sides are subject to the same legal scrutiny. It thus corrects an historic imbalance in which the rights of Jewish Israelis under international law have been subject to much less scrutiny than those of the Palestinians. On the other hand, such analysis may facilitate a more productive dialogue by demonstrating the benefits of a rights-based approach for both Palestinian refugees and Jewish Israelis. It thus helps to move the discussion about how to resolve the Palestinian refugee question beyond the realm of rhetoric towards a more practical discussion of how the right of return would play out in practice for both Palestinian refugees and Jewish Israelis.

The right of return and the Jewish state

Israel’s primary argument against the return of Palestinian refugees is that their individual right of return conflicts with the collective Jewish right to self-
determination in a ‘Jewish state’. The claim that there is a conflict of rights, however, conlates two different issues, namely, the existence of Israel as a state and its self-definition as a Jewish state. As Kagan explains, the Palestinian right of return on its own does not challenge Israel’s existence as a state nor does it challenge the ability of Jews to continue to live in Israel. Palestinian refugees could return to their places of origin inside Israel and live side-by-side with Jewish Israelis without affecting the existence of the state or the continuity of Jewish life. The Palestinian right of return does, however, challenge two essential features of Israel’s self-definition as a Jewish state, namely, a permanent Jewish majority and the preferential treatment of Jews, especially in relation to nationality/citizenship and property rights.

Kagan’s review of relevant law finds that the establishment and maintenance of an exclusive Jewish state is not a right under international law and comprises Israel’s weakest defense against the Palestinian right of return. While states have wide discretion in immigration laws and policies, they may not expel or prohibit people from returning to their homes in order to create a new demographic reality. UN human rights treaty committees which have reviewed Israel’s compliance with international human rights instruments have thus found that Israeli laws which facilitate Jewish immigration and simultaneously deny Palestinian refugees their right to return violate fundamental human rights. Self-determination, moreover, is meant to facilitate the enjoyment of rights, not to negate them. The requirement in the 1947 UN partition plan that each state enshrine human rights as constitutional principles, for example, aimed to ensure that the realization of self-determination through the creation of two states would not infringe upon the rights of individuals in either state. The cases of South Africa and Bosnia and Herzegovina in this collection further illustrate Kagan’s conclusion.

The right of return and property rights

The greatest potential for a conflict between the right of return of Palestinian refugees and the rights of Jewish Israelis may arise from individual property claims. As the two case studies on restitution in this collection illustrate, the re-allocation of property along ethnic or racial lines is often one of the most difficult problems to resolve in crafting durable solutions for refugees. From a purely practical perspective, however, this issue may be less problematic in the Palestinian case than it first appears. This is because the vast majority of Palestinian refugee property, as Hussein Abu Hussein and Usama Halabi explain, is held by the state of Israel thus reducing the potential for destabilizing conflicts between original property owners and secondary occupants. Secondary occupation is also less problematic because
Israel has since destroyed the vast majority of refugee homes to prevent their return. The potential for conflicting rights to property thus arises primarily in urban centers like Haifa, Jaffa and western Jerusalem, where a smaller number of refugee homes remain intact, and in places where Jewish Israelis have built new homes, commercial and industrial establishments and other types of institutions on village lands.

In sorting out claims to these properties it is necessary to distinguish between the right to property and secondary occupation. As Kagan points out, Jewish Israelis have a right to property, but this is different from a claim to someone else's home, business or land. In order to comply with international law, restitution should be the primary or default remedy for refugee property claims. Parallel measures, however, should ensure that secondary occupants who are required to vacate refugee homes are able to enjoy their right to adequate housing. In situations where restitution is factually impossible, as determined by an impartial body, refugees would be entitled to full compensation for their losses. While the passage of time may increase the potential for conflicting property rights, often necessitating creative arrangements like those discussed by Monty Roodt in his case study on South Africa, it does not cancel the right of original owners to their property. In the case of Loizidou v Turkey, which is discussed by several contributors to this collection, for example, the European Court rejected the argument that the re-housing of Turkish Cypriot refugees justified the complete negation of Greek Cypriot property rights.

Kagan also discusses a number of additional constraints on Jewish Israeli property claims. In situations where Jewish Israelis are responsible for the unlawful confiscation or for racially discriminatory allocation of refugee homes, lands and properties, it would not be equitable to protect their rights over those of refugees. This would apply, for example, to situations where individual Jewish Israelis or groups (e.g. kibbutzim) unlawfully occupied refugee homes, lands and properties during and after the 1948 war. It would also apply to refugee lands unlawfully acquired by the Jewish National Fund and used for the exclusive benefit of Jews. In many cases, like the situation in Canada Park described by Eitan Bronstein, the JNF established national forests or parks on the sites of destroyed Palestinian villages. Palestinian refugees may also argue that they were victims of ethnic cleansing as in the former Yugoslavia and/or a state-sponsored discriminatory land regime like the one in apartheid South Africa as discussed in more detail below.

The right of return and security/public order

Finally, an analysis of conflicting rights shows that there is no innate conflict between the right of return of Palestinian refugees and the right of Jewish Israelis to
security and public order. This issue is not unique to the Israeli-Palestinian conflict. In Bosnia and Herzegovina, for example, returnees and the communities in which they settled both expressed concerns about security and public order in the context of repatriation operations. It is also a major concern in the context of the unresolved question of displacement and dispossession in Cyprus. Kagan points out that legitimate concerns about security and public order in the Palestinian case would be mitigated somewhat by the fact that a relatively small number of Jewish Israelis live in the areas of Israel to which refugees would potentially return. Moreover, there are few cases where the villages of Palestinian refugees are actually built over. The return and restitution of Palestinian refugees would therefore not directly generate the kind of social and economic disruption that many Jewish Israelis may fear.

In assessing whether there is a conflict between the right of return and the right of Jewish Israelis to security and public order it is necessary to distinguish between the right to security and public order and the means to achieve it. As Kagan explains, Israel cannot justify the denial of return and restitution for an entire population based solely on their national identity, nor can it legitimately profess concern about civil unrest simply because Jews would resist the return of non-Jews to their midst. As with the arguments about immigration and secondary occupation of property discussed above, such an approach would violate the fundamental principle of equality and the prohibition of racial discrimination. This is not to say that security and public order are unimportant. On the contrary, the success of durable solutions is dependent upon securing the rights of both returnees and the communities receiving them. Security and public order, rather, are important concerns in deciding how, but not if, to implement the right of return of refugees.

The question of timing

The inter-temporal doctrine

A second issue that arises in the application of the rights of return, restitution and compensation to the situation of Palestinian refugees relates to the state of international law at the time Palestinians were displaced and dispossessed of their homes, lands and properties. As the contributors to this collection explain, a general principle of international law (the inter-temporal doctrine) is that the legality of acts should be assessed in light of the state of the law at the time of their commission. The question of timing primarily concerns the situation of Palestinians displaced and dispossessed during the 1948 war. This is due to the fact that there have been significant developments in international law, including the expansion of international
human rights law, since they became refugees and because they originate from areas inside Israel which opposes their return. They also comprise the largest group of Palestinian refugees. Two separate questions need to be addressed in order to assess the implications of the inter-temporal doctrine for Palestinians displaced and dispossessed during the 1948 war. First, what were the specific acts which led to their displacement and dispossession; and, second, what legal principles or instruments were applicable at the time of the 1948 war.

The first question is a matter of ongoing debate among most Palestinians and Israelis. Indeed, it was one of the major issues that the two sides were unable to resolve during final status talks at Camp David and Taba in 2000-2001. This debate, however, tends to focus on which side started the 1948 war rather than the specific acts that contributed to the displacement and dispossession of the Palestinian population. Both have legal implications for resolving the Palestinian refugee question, but the latter has often been overlooked in discussions about individual and state responsibility for Palestinian displacement and dispossession. While some Palestinians fled as a result of the violence and chaos of war, victim testimonies and official documents from Israeli archives also reveal a pattern of indiscriminate attacks on civilians, willful killing including massacres and other atrocities, forcible transfer or expulsion of the civilian population, widespread looting of homes and businesses and expropriation and destruction of private property. These acts, coupled with the aim of clearing areas of the Palestinian population in order to establish a state with a Jewish demographic majority, comprise what is today described as ethnic cleansing.

The three major legal instruments relevant to the 1948 war include the 1907 Convention (IV) Respecting the Laws and Customs of War on Land and its annex (Hague Regulations Concerning the Laws and Customs of War on Land), the 1945 London Charter of the International Military Tribunal at Nuremberg, which prosecuted leaders of Nazi Germany after their defeat in WWII, and the restitution laws adopted by Allied Powers in occupied Germany following the war. The Hague Convention, which comprised customary law at the time of the 1948 war and was thus binding on all parties, prohibited the deportation or expulsion of civilian population, pillage and expropriation and destruction of private property without military necessity. The Nuremberg Charter classified these acts as both war crimes and crimes against humanity. The restitution laws adopted in post-war Germany, moreover, reaffirmed the principle that restitution is the appropriate remedy for wrongful governmentally-sanctioned taking of property. It is thus clear that even at the time of the 1948 war, acts which led to the massive displacement and dispossession of Palestinians were illegal under international law. The question that remains is whether more recent legal instruments, including international human rights law, are applicable to the situation of 1948 Palestinian refugees.
The continuing violations doctrine

Participants to BADIL’s second expert seminar discussed the implications of another legal doctrine (the continuing violations doctrine) for resolving the Palestinian refugee question. As Paul Prettitore and Michael Kagan explain, the doctrine stipulates that the legality of an act may be assessed in light of new treaty law if the act (i.e., violation) does not cease before the coming into effect of a new treaty. In the context of unresolved refugee property claims in Cyprus, for example, the European Court of Human Rights (Loizidou v Turkey) held that Turkey could be liable for the violation of Greek Cypriot property rights in Turkish-controlled northern Cyprus under the European Convention on Human Rights even though Turkey had not ratified the Convention at the time of the original violation. In the Palestinian case, the continuing violations doctrine implies that if Israel’s actions which led to the massive displacement and dispossession of Palestinians in 1948 constituted a violation of international law at the time, and if Israel continues to commit the same violation today, then one may apply current international law to Israel’s actions in 1948.

Participants noted that each of these requirements is met in the Palestinian case. First, as discussed above, military attacks on civilian population, massacres, the destruction of property without military necessity, pillage and expulsion each comprised serious violations of international law at the time Palestinians were first displaced and dispossessed of their homes, lands and properties in 1948. Second, Israel has continued to violate the above-mentioned norms thus creating an ongoing pattern of displacement and dispossession since the 1948 war. This includes displacement and dispossession within and from Israel after the 1948 war; from the West Bank, including eastern Jerusalem, and the Gaza Strip since Israel occupied these territories in 1967; and the ongoing internal displacement and dispossession inside Israel and in the OPT, among other as a result of Israel’s construction of the Wall in the occupied West Bank. Since international law on the rights of return and restitution has become stronger since 1948, Israel’s legal obligations to Palestinian refugees have only gained greater strength.

Interpretation of international law

Article 1D of the 1951 Refugee Convention

The third problem arising from the application of a rights-based approach to Palestinian refugees relates to the different interpretations of the status of Palestinian refugees under international refugee law. Participants to BADIL’s third expert seminar examined the interpretation of the status of Palestinian refugees under the 1951 Refugee
Convention in Europe, the Americas, Australia and New Zealand where a growing number of Palestinian refugees have sought asylum in recent decades. Preliminary research presented to the third expert seminar identified four different approaches to and at least eight different interpretations of the status of Palestinian refugees under the Refugee Convention. In most cases, Palestinian refugees are required to meet the criteria for the individualized refugee definition (article 1A(2)) rather than the group or category (prima facie) definition (article 1D) of the Convention. The common problem facing Palestinian refugees whose status in third countries is assessed under article 1A(2) is that due to the unique circumstances of their situation they are frequently unable to prove (a reasonable fear of) persecution. In most cases, Palestinian refugees whose asylum claims are rejected are required to leave. Since most Palestinian refugees are also stateless persons, they often have no where to go.

In this collection, Susan Akram, Terry Rempel and Harish Parvathaneni point out that, appropriately interpreted, article 1D of the Refugee Convention was designed to guarantee that Palestinian refugees would at all times receive both protection and assistance, whether by the UNCCP and UNRWA, by UNHCR in combination with either agency, or by UNHCR itself in the event that both other agencies ceased to exist. Article 1D was thus meant to ensure that if the twin-agency regime of UNCCP/UNRWA should fail in either of its functions, that is to say protection or assistance, the Refugee Convention would automatically cover Palestinian refugees as an entire group or category, without the necessity of applying the individualized refugee definition in article 1A(2). Once article 1D is triggered, states are thus required to grant Palestinian refugees protection under the 1951 Refugee Convention until their position is settled according to the relevant UN resolutions, namely, General Assembly Resolution 194 (III) relating the situation of 1948 refugees or Security Council Resolution 237 relating to the situation of 1967 refugees. Such protection should be consistent with the international legal rights of refugees both to return to their places of origin and to choose the appropriate solution for their plight. These findings conform with UNHCR’s 2002 Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian refugees. A similar interpretation applies to the corresponding provisions in the statelessness conventions.

Additional problems of interpretation

Participants to the third expert seminar also discussed several additional problems arising from the interpretation of the status of Palestinian refugees under the 1951 Refugee Convention and the two conventions on statelessness. The status of Palestinian refugees under the Convention’s cessation and exclusion clauses requires
additional clarification, in part, because the acquisition of citizenship (a condition for cessation of refugee status under the Convention) in some Arab states may not provide Palestinian refugees with effective protection of their basic rights. In this collection, for example, Mohammad al-Az’ar notes that despite having acquired Jordanian citizenship and the rights derived therefrom, Palestinian refugees may be discriminated against on the basis of their Palestinian nationality or experience other deprivation of rights stemming from political and security considerations. Many countries of asylum in the Arab world, moreover, do not grant Palestinian refugees a right to re-enter upon travel abroad. A more accurate assessment of the level of protection afforded to Palestinian refugees by these countries is also needed to determine the ‘returnability’ of Palestinian asylum-seekers whose claims are rejected by states party to the 1951 Refugee Convention.

The relationship between refugee status and the right of return also deserves further clarification given the frequent misconception and propaganda disseminated by those who oppose the return of Palestinian refugees to their places of origin inside Israel that the cessation of refugee status under the 1951 Refugee Convention is equivalent to the loss of the right of return. A frequent claim, for example, is that Palestinian refugees who have acquired Jordanian citizenship no longer have a right to return to their homes of origin inside Israel. Participants to BADIL’s third expert seminar clarified that even if Palestinian refugees are found to be no longer refugees under the terms of the Refugee Convention, they remain refugees or displaced persons under the relevant UN resolutions until their situation is resolved definitively in accordance with these resolutions. The right of return, moreover, is a fundamental human right under international human rights law. It is a right held by all persons and not limited to persons defined as refugees under international refugee law.

Finally, participants noted that it is important to distinguish between international recognition of the right of the Palestinian people to self-determination in an independent state and the legal definition of a stateless person under international law on statelessness, i.e., someone who is not considered a national by any state under the operation of its law. As above, the misconception derives from conflating the status of Palestinians under two distinct bodies of international law when in fact the rights accorded under each are distinct and separate. The perception that Palestinians who have not acquired the citizenship of any state are not stateless militates against legal strategies which seek to strengthen the protection of their rights in accordance with the two statelessness conventions. This includes both a set of basic rights to be accorded to stateless persons and the international protection afforded by UNHCR which has a mandate to oversee compliance with the conventions on statelessness.
Procedural rights

Participants to BADIL’s Expert Forum also identified the disregard of important procedural rights as yet another factor that has militated against a rights-based approach to resolving the Palestinian refugee question. In recent decades, the right to justice and the right to know the truth about systematic or widespread past violations of international law (e.g., war crimes, crimes against humanity, torture, genocide) have played an increasingly important role in states emerging from political violence, armed conflict or dictatorial rule. As the contributors to this collection explain, the primary aim of these rights is to promote peace and reconciliation and to prevent the recurrence of such violations by holding perpetrators accountable and providing victims with a remedy and reparation for harm done. The failure to investigate, prosecute and punish perpetrators and to facilitate knowledge about such crimes comprises a major reason for ongoing violations of international law worldwide. In the case of Israel and the Palestinian people, the exclusion of the procedural rights to justice and knowledge of the truth from the peacemaking process is central to understanding the protracted nature of the conflict and Israel’s ongoing violations of international law.

The right to justice and the right to the truth

The right to justice has its basis in international humanitarian, human rights and criminal law. The 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, for example, requires that High Contracting Parties to the Convention investigate, prosecute and punish perpetrators of grave breaches of the Convention within and outside of their territory of jurisdiction. A number of international human rights instruments, such as the 1984 International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, include explicit provisions which require signatories to investigate, prosecute and punish individuals responsible for human rights violations. Similar provisions are found in the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide and in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The right to justice is also reflected in the 1998 Rome Statute of the International Criminal Court and in the principle of universal jurisdiction under which domestic courts may investigate, prosecute and punish violations committed abroad.

The right to the truth has its legal underpinnings in international humanitarian and human rights law. The 1977 Protocol (I) Additional to the 1949 Geneva Conventions
relating to the Protection of Victims of International Armed Conflicts, for example, codifies the right of persons to know the fate of relatives during an international armed conflict. The issue of missing persons was a major focus of some of the early truth commissions that were established to address major violations of international law in Latin American countries emerging from military rule in the 1970s and 1980s, including the ones in Argentina and Chile discussed in this collection. In the context of international human rights law, the inalienable right of victims to know the truth can be inferred from the right to freedom of expression, including the freedom to seek, receive and impart information under the 1966 International Covenant on Civil and Political Rights. The right to the truth is especially relevant to situations where violations of international law are systematic and widespread over a period of time and in situations where perpetrators are no longer alive.

The right to participate

Participants to the BADIL Expert Forum also examined the right to participate. The right to participate has been described as a fundamental or keystone right because it is central to the realization of the panoply of rights accorded to individuals and peoples under domestic and international law. In situations where states fail to uphold their obligations under international law, it is often only through express participation of civil society, as the case studies in this collection illustrate, that claims-holders are able to realize their rights. Christine Bell’s study of the role of human rights in peace agreements, reviewed by Lynn Welchman in this collection, for example, finds that internally-mediated peace agreements, that is to say, those negotiated by the parties to a conflict themselves, often include more extensive provisions on human rights, in part, because they tend to have mechanisms for the inclusion of civil society. The case of South Africa exemplifies this point. The exclusion of Palestinian refugees and, indeed, the Palestinian people as a whole, from the Israeli-Palestinian peace process is central to understanding the marginalization if not the complete disappearance of their rights from interim peace agreements between the two sides.

The right to participate has its basis in the principle of popular sovereignty, the notion that no law or rule is legitimate unless it rests upon the consent of the individuals concerned. It is also found in the law of self-determination and under international human rights and refugee law. The collective or external right to self-determination, as Karma Nabulsi explains, accrues anterior to the founding of a state and is generally concerned with the national liberation of a people from foreign or colonial rule. The individual or internal right to self-
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determination is more commonly implemented once a state has been established and is concerned with the question of the type of regime or government peoples choose to live under. The individual right to participate in the political affairs of one’s country is found in the 1966 International Covenant on Civil and Political Rights and in the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women. The right to participate under international human rights law also involves a set of related core rights including freedom of expression, association, assembly and the overarching principles of equality and non-discrimination.

The right to participate can also be found in refugee ‘soft law’ instruments, that is to say, quasi-legal instruments like UNHCR policy documents and operational handbooks. These instruments address a variety of forms of refugee participation, including participation in the design and provision of emergency assistance and relief, in the identification of and response to protection needs and in the negotiation, planning and implementation of durable solutions. A refugee’s choice of his/her own durable solution is a fundamental expression of the right to participate. These instruments also affirm the right of refugees to participate in post-conflict elections in their country of origin.

Rights in Practice

States have the primary duty to ensure that refugees are able to enjoy the full set of rights accorded to them under international law. This includes both a positive obligation to respect, protect and promote refugee rights and a negative obligation to refrain from the violation of their rights. States also have a corresponding duty to provide effective remedy and reparation for the violation of refugee rights. The codification of both substantive and procedural rights mentioned above in national legislation and the establishment of national procedures, institutions and mechanisms help ensure that refugees are able to enjoy the full set of rights accorded to them. Participants to the BADIL Expert Forum reviewed efforts by states and civil society to put a rights-based approach into practice in a variety of contexts and cases worldwide. The contributors to this collection examine housing, land and property restitution, protection of Palestinian refugees in host countries, prosecution and truth commissions and public participation in peacemaking processes. Participants also identified similarities and differences across cases, drew a number of lessons learned, in terms of both, practices to be avoided and those to be applied, and discussed a number of issues of particular relevance for the Palestinian case.
Restitution

Restitution is central to all three durable solutions, namely, voluntary repatriation, host country integration and third country resettlement. As Paul Prettitore explains, restitution facilitates the early return of refugees, contributes to their reintegration and, in cases where refugees choose not to return, they can sell their properties and use the capital to re-establish themselves elsewhere. The cases in this collection also demonstrate the importance of restitution as reparation for ethnic cleansing and apartheid. Participants to BADIL’s second expert seminar examined various models for resolving housing, land and property restitution claims. These include domestic models like the ones in Rwanda and South Africa, hybrid models that include national and international components as in Bosnia and Herzegovina and the UN plan for Cyprus, and international models like the one in Kosovo.

In this collection, Paul Prettitore and Mondty Roodt examine restitution programs in Bosnia and Herzegovina and South Africa. The two cases share a number of features. Peace agreements and/or national legislation, for example, recognized the right of all refugees and displaced persons to housing, land and property restitution; delineated the rights of secondary occupants; established claims procedures, institutions and mechanisms including the Commission on Real Property Claims in Bosnia and the Land Claims Court in South Africa; and defined the corresponding obligations of national authorities, including the obligation to repeal discriminatory legislation. New constitutions in both countries, moreover, enshrined both the right to equality and the prohibition of racial discrimination as well as the right of all refugees and displaced persons to restitution as constitutional principles. In both cases, restitution provides reparation for years, and in the case of South Africa decades, of racial discrimination in the allocation and use of housing, land and property.

There are also a number of important differences between the two cases. In Bosnia and Herzegovina, for example, restitution claims were made against secondary occupants while in South Africa they were made against the state, given its central role in the dispossession of land during the apartheid era. The restitution program in Bosnia focused on the repossession of private and socially-owned property, whereas the new land regime in South Africa included additional measures for land tenure reform and land distribution to address problems arising from different types of property ownership/usage and the length of time since original dispossession. Finally, the implementation and enforcement of restitution decisions in Bosnia relied to a great extent on international intervention, including the promulgation of new laws, the removal of obstructionist officials from public office and the use of economic and political conditionality and sanctions. The implementation and enforcement of restitution decisions in South Africa was aided by the participation of civil society
in the design of the country’s new land regime and through the mobilization, self-organization and participation of claimants.

Lessons learned from comparative practice

A comparative assessment of restitution programs in Bosnia and Herzegovina and South Africa yields a number of important lessons. In both cases a rule of law approach was central to the success of the restitution process. Paul Prettitore observes that the restitution process in Bosnia, for example, only became truly effective when it moved from a political process driven by political forces to a rule of law process based on individual rights. Prettitore recommends that peace agreements and national legislation should therefore include detailed legal provisions on restitution setting out the rights of refugees and the corresponding obligations of state signatories as well as a comprehensive legislative framework, procedures, institutions and mechanisms in order to facilitate a rule of law approach to restitution.

The restitution programs in Bosnia and Herzegovina and South Africa also illustrate the importance of ensuring a good match between the nature and scope of restitution claims and the legal and institutional framework for restitution. In South Africa, for example, the initial mismatch between the judicially-driven restitution process, which was designed to address large rural property claims when in practice the majority of claims filed comprised individual urban properties, contributed to the slow pace of restitution and growing frustration among claimants. The subsequent reforms described by Monty Roodt resulted in a more decentralized administrative approach and more efficient processing of restitution claims. In Bosnia, the exclusion of communal land from the restitution process complicated domestic and international efforts to reverse the effects of ethnic cleansing because restitution served as an incentive for repatriation only among those refugees who held private and socially-owned property. The restitution programs in both cases nevertheless demonstrate the utility of administrative procedures when addressing a large volume of housing, land and property claims.

The two cases also demonstrate the importance of adequate means of enforcement to ensure that refugees are able to realize their right to restitution. This was particularly important in Bosnia and Herzegovina, where the peace agreement failed to resolve the underlying or meta-conflict over self-determination. As Lynn Welchman explains, the twin issues of refugee return and restitution thus became important means for each side to realize its vision of self-determination. The creation of a human rights ombudsman and a human rights chamber and the establishment of the European Convention on Human Rights as the highest law of the country provided
additional options for redress when the parties to the peace agreement failed to comply with their obligations. UNHCR and other international agencies, moreover, played an important role in monitoring the implementation of restitution decisions. The European Union and the Council of Europe also made Bosnian membership conditional on the implementation of refugee rights.

The restitution programs in Bosnia and Herzegovina and South Africa also underscore the importance of ensuring adequate resources to underwrite the restitution process. In South Africa, for example, the post-apartheid government under-estimated the enormous financial implications of its market-driven approach to restitution, including the cost of full and fair compensation of property owners, especially in light of other pressing social priorities. In Bosnia, a compensation mechanism was planned but never funded, in part because the national government lacked the financial resources to underwrite the fund and because the international community was more interested in funding reconstruction and development projects rather than individual compensation. Paul Prettitore observes, however, that in situations where refugees choose not to return to their homes, lands and properties, restitution may serve as an efficient and fair mechanism of compensation if refugees are able to repossess and sell or exchange their property.

Finally, a comparative assessment of the two restitution programs also demonstrates the instrumental value of civil society participation in realizing the right to restitution. In South Africa, the international campaign of boycotts, divestment and sanctions contributed to the collapse of apartheid and its discriminatory land regime. The broad participation of civil society in the development of the country’s new land policy and the inclusion of claimants in the restitution program imbued the process with greater legitimacy and facilitated creative solutions that were both workable and realistic. In Bosnia, the mobilization and self-organization of refugees following the initial failure of the parties to implement their respective obligations under the Dayton peace agreement helped to ensure that refugees were able to realize their right to repossess their homes, lands and properties.

Context and prospects of Palestinian restitution claims

The case studies in this collection provide a useful comparison to the Palestinian situation given the central role of racial discrimination in the dispossession and re-allocation of land, the massive destruction of housing and property and the complications for post-conflict restitution that arise from different types of land ownership, e.g., private, communal and customary. Hussein Abu Hussein and Usama Halabi effectively illustrate how Israel has used law to ensure that Palestinians are
unable to repossess their homes, lands and properties. Israeli law, for example, enshrines the right to property as a constitutional principle, but leaves intact the main legislation for expropriating Palestinian property. The law also allows for the violation of constitutional principles in situations that ‘befit the values of the state as a Jewish and democratic state’. Property laws which discriminate against Palestinians thus override the constitutional right to property because they are consistent with Israel’s self-definition as a Jewish state under which the vast majority of land is held as the inalienable property of the Jewish people. Israeli law, moreover, does not incorporate the fundamental right to equality and the prohibition of racial discrimination as constitutional principles because they would negate the preferential treatment accorded to Jews, especially in relation to nationality/citizenship and property.

Abu Hussein and Halabi’s discussion of the case of Iqrit, a destroyed Palestinian village in the northern Galilee, exemplifies how Israel’s executive, legislative and judicial branches of government all cooperate to prevent restitution of Palestinian property. The special role accorded to the World Zionist Organization, the Jewish Agency and the Jewish National Fund add a unique element to Israel’s land regime. These organizations, which operate as private charities worldwide, have been assigned key public functions, including the administration and development of land, yet cater exclusively to the needs of the Israel’s Jewish population. UN human rights treaty committees which have reviewed Israel’s compliance with international human rights law have thus found that the massive and systematic confiscation of Palestinian housing, land and property and its transfer to the above organizations comprises an institutionalized form of discrimination that violate’s Israel’s obligations under international human rights law. Participants to BADIL’s second expert seminar also noted the stark contrast between Israel’s persistent denial of restitution to Palestinians and the fact that Israel has been both a persistent advocate and beneficiary of the right to restitution in relation to Jewish losses since the end of the second World War.

Participants also discussed the PLO’s efforts to pursue restitution claims in the context of final status talks with Israel. In preparation for negotiations, for example, the PLO created a GIS computer database linking UNCCP property records and maps of land holdings in pre-1948 Palestine in order to identify and verify claims. These records constitute the largest and most comprehensive record of property ownership and claims arising in the context of the Israeli-Palestinian conflict. The PLO proposal at the 2001 Taba peace negotiations included a Compensation Commission to evaluate material and non-material losses and to administer and adjudicate restitution and compensation claims. It also included provisions for legislative reform to enable refugees to realize their rights. Since then the PLO has carried out feasibility studies on restitution, comparative analysis of restitution schemes, an
assessment of whether refugee claims should be directed against individuals (as in Bosnia) or against the state of Israel (as in South Africa), a review of the advantages and disadvantages of administrative and judicial restitution mechanisms and the design of an implementation mechanism.

The PLO nevertheless failed to develop a coherent legal strategy supported by practical measures to protect and promote the rights of return, restitution and compensation in the decades leading up to final status talks with Israel. The 1995 Interim Agreement, for example, includes provisions which obligate the Palestinian Authority to respect the legal rights of Israelis to government and absentee property in the occupied West Bank and Gaza Strip (Annex III, Appendix I, art. 16), that is to say, public and private property expropriated from Palestinians since 1967. The Palestinian Authority, by way of a second example, has yet to establish a land regime in areas of the OPT under its jurisdiction, including legislative and institutional provisions for housing, land and property restitution to redress situations of illegal deprivation. Recognition of the right of Palestinians to their property in these areas and the establishment of a restitution mechanism could have been used to strengthen and promote a rule of law approach in negotiations with Israel about the larger refugee question. These two examples illustrate Lynn Welchman’s point about the importance of using the language of law, that is to say, developing a legal narrative, to tell the story of one’s right to land.

Participants to BADIL’s Expert Forum also examined the role of civil society in promoting housing, land and property restitution for Palestinians refugees. Eitan Bronstein’s discussion of a community-driven restitution model developed by internally displaced Palestinians from the village of Bir’im in cooperation with a group of Jewish Israelis from kibbutz Bar’am, which was established on part of the village lands, illustrates how claimant participation, as in South Africa, can lead to rights-based, but nevertheless practical, solutions to conflicting claims to property. In a separate initiative, internally displaced Palestinians from Bir’im also presented to an inter-ministerial committee of the Israeli government a series of professional plans and maps which effectively illustrate how return, restitution and reconstruction can be put into practice for their community. On the eve of final status talks between Israel and the PLO and in midst of a global campaign for Jewish restitution, refugee activists and community leaders issued a petition affirming the right of all victims, including Jews, to restitution and called upon governments and civil society, in particular Jewish organizations, to uphold this right for Palestinians. ‘Go and see’ visits to villages of origin undertaken by Palestinian refugees comprise another example of civil society led efforts to pursue restitution claims.

Participants identified several major problems facing civil society efforts. Palestinian refugees, for example, lack sufficient information about the applicable
rights and the current situation in their places of origin inside Israel, especially those in Arab host countries who cannot undertake go and see visits like those mentioned above. Hussein Abu Hussein and Usama Halabi effectively illustrate the absence of domestic remedy through Israel’s judicial system. At the same time, international mechanisms for direct restitution claims are not readily available for Palestinians. Participants noted that Palestinian refugees in Europe may be able to file claims against Israel in courts of countries where they have acquired citizenship and, subsequently, in the European Court of Human Rights which has an extensive record on property rights. The likelihood of restitution, however, depends on the willingness of domestic courts, states and the European Court of Human Rights to pursue claims against the state of Israel. Participants also discussed possibilities to obtain declaratory rulings through indirect claims mechanisms, such as the Alien Tort Claims Act and the Tortured Victim Protection Act in the United States. UN human rights treaty committees also provide an important mechanism for Palestinians to lay the legal foundations for future Palestinian claims.

Additional comparative findings on the Palestinian case

There are three additional issues that make the Palestinian situation different from the cases discussed in this collection. First, there is no international body with an explicit mandate to search for and implement durable solutions for Palestinian refugees, including the right to housing, land and property restitution. The UNCCP, the international body initially mandated to protect and facilitate durable solutions for Palestinian refugees, is no longer active and neither UNRWA nor UNHCR currently exercise a durable solutions mandate for them. The idea of the Middle East peace process of the 1990s was to create a new set of international institutions that would give the peacemaking process a veneer of international legitimacy, but one that was unencumbered by the obligation of UN agencies like UNHCR and UNRWA to respect, protect and promote refugee rights. This approach deprived Palestinian refugees of important protections accorded to other refugees including international representation to assert their rights, access to international mechanisms to claim and promote their rights and an internationally-mandated entity to protect and promote their individual as well as collective claims in the context of peace negotiations. The approach also failed to capitalize on the strengths, competencies and experiences of existing agencies in facilitating durable solutions for Palestinian refugees. UNRWA, for example, has worked with Palestinian refugees for almost 60 years and has a successful record in housing reconstruction and micro-financing and is well-placed to register refugee choices. UNHCR has a broad range of experience in facilitating durable solutions for refugees worldwide.
The second major difference is the absence of strong regional instruments and mechanisms that set out the rights of refugees and provide effective remedy and reparation for displacement and dispossession. The 2004 Arab Charter on Human Rights, for example, provides relatively weak protection for the right to property in comparison to other regional human rights instruments. The absence of any requirement that a deprivation of property be pursuant to public or general interest, as Paul Prettitore explains, leaves state parties freer reign to expropriate property in that there appears to be no need to justify such measures. While the Charter provides for an expert committee to review compliance of state signatories, such a committee has yet to be established. The Arab Commission on Human Rights, meanwhile, does not even have a mechanism to receive or examine state reports or to receive individual complaints. The Arab League has long discussed the establishment of an Arab human rights court but has yet to do so. The 1994 draft Arab Convention Regulating Status of Refugees in the Arab Countries, however, comprises a significant step towards the adoption of a complementary regional convention on refugees tailored to the specific nature of displacement in the Arab world. Like the OAU Convention on Refugees in Africa, the draft Arab Convention includes both an expanded refugee definition, the prohibition of discrimination and recognition of the right to return, a provision which is absent from the 1951 Refugee Convention. Finally, the boycott of Israeli companies and goods launched by the League in the aftermath of the 1948 war has been relatively ineffective in restoring the rule of law over the long haul. The League does not enforce the boycott and regulations are not binding on League members. Although Israel is not a member of the Arab League, a strong regional system could be of value for promoting rights-based solutions to the Palestinian refugee question.

The final difference between the Palestinian case and those discussed in this collection is the absence of international political will to ensure that refugees are able to realize their right to restitution. The international community, in general, has failed to ensure that aid or assistance to Israel is not used to maintain the illegal situation created by the massive violation of international humanitarian and human rights law over the past 60 years despite repeated calls by the UN General Assembly to refrain from providing economic, political and military assistance to Israel in light of its disregard of its obligations under international law, the UN Charter and relevant resolutions. The international community has also failed to uphold peremptory norms, such as the right to self-determination and the prohibition of racial discrimination, from which no derogation is permitted. The United States, in particular, supports a two-state solution to the conflict that explicitly endorses Israel’s self-definition as a Jewish state and thus abets discrimination against Palestinians. Finally, the international community has failed to take collective action, including
sanctions, in response to Israeli policies and practices which UN bodies, including the ICJ, have found to comprise a threat to international peace and security. The United States alone has consistently used its veto power in the UN Security Council to prevent the passage of binding resolutions that would oblige state members to fulfil their obligations under the UN Charter. The lack of international political will to ensure that Palestinian refugees can exercise their rights to return and restitution undermines not only the rule of law, but also the very credibility of international actors as neutral mediators in the conflict, especially in the context of rights-based approaches to refugee situations elsewhere.

Protection

National protection efforts

Participants to the third BADIL expert seminar examined national, regional and international efforts to protect the rights of Palestinian refugees on a day-to-day basis until they are able to realize durable solutions. Israel has the primary responsibility to protect the rights of the civilian population, including those who are refugees, in the occupied West Bank, including eastern Jerusalem, and the Gaza Strip. Susan Akram, Terry Rempel and Harish Parvathaneni identify two distinct problems. First, Israel’s policies and practices are inconsistent with its obligations under international law. Israel is a signatory to the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War and all major international human rights instruments, for example, but does not accept responsibility to apply them to its treatment of Palestinians in the OPT. It has not acceded to individual complaints procedures under international human rights instruments which provide victims with options for redress when states fail to uphold their legal obligations. Second, Israel rules the OPT by means of a dual system of law whereby Jewish settlers enjoy the status of privileged Israeli citizens, while the occupied Palestinian population is subject to military rule and denied the protections afforded by both Israeli civil law and international law.

Israel’s dual regime in the OPT has led an increasing number of observers to describe the situation as comprising an apartheid regime. Hussein Abu Hussein and Usama Halabi’s discussion of the Israel’s discriminatory land regime suggests, however, that one cannot begin to understand the situation in the OPT, without taking a careful look at Israel’s treatment of the 1948 Palestinian refugees and its own Palestinian citizens. The similarities (and differences) have been described in detail in parallel reports submitted by civil society organizations to UN human rights treaty
committees. While Israel strongly refutes allegations of maintaining an *apartheid* regime, the systemic discrimination on the basis of nationality, race or ethnicity in allocation of fundamental rights and resources such as land, the preferential treatment accorded to Jews in Israel through the Zionist ‘Jewish national institutions’, the informal and formal segregation of Jews and Palestinians in Israel and the OPT, and the massive displacement and dispossession of Palestinians since 1948 all comprise elements of *apartheid* under international humanitarian, human rights and criminal law, including the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1998 Rome Statute of the International Criminal Court.

Participants also examined the protection afforded to Palestinian refugees in Arab host states. Mohammad al-Az’ar observes that with the exception of Syria, no Arab state is committed to the systematic protection of Palestinian refugees under domestic, regional or international instruments. Participants to BADIL’s third expert seminar emphasized the vulnerability of refugees in Egypt who face difficulties renewing residency permits required for access to employment, education and health care; those in Lebanon, especially those who are not registered with UNRWA or who do not have any documentation (they are neither registered with UNRWA nor the Lebanese authorities); and refugees in Jordan who fled the Gaza Strip during the 1967 war (‘ex-Gazans’) and are required to renew temporary residency permits in order to access employment, education and health care. The situation of Palestinian refugees in Iraq, where hundreds were stranded in inhospitable border areas as a result of the 2003 US-led war and occupation, moreover, exemplifies the vulnerability of Palestinian refugees in periods of armed conflict and regime change across the region. Most of the major Arab host states are signatories to regional instruments like the 1965 Casablanca Protocol on the Treatment of Palestinians in Arab States, but have either lodged major reservations or fail to apply the Protocol in full. Few have ratified the 1994 Arab Convention Regulating Status of Refugees in the Arab Countries or the 2004 Arab Charter on Human Rights. In contrast to other regions, moreover, few states in the Middle East are signatories to the 1951 Convention Relating to the Status of Refugees or the two conventions on statelessness. While most Arab states have ratified major international human rights instruments, only a handful have ratified individual complaints procedures available under these instruments.

In countries outside the Arab region, Palestinian refugees lack access to effective protection due to problems with interpretation of their status under the 1951 Convention Relating to the Status of Refugees. The primary problem, as the earlier discussion illustrates, is that most states either do not incorporate article 1D in their national legislation or they apply it incorrectly to Palestinian asylum seekers. Both the European Union (Council Directive 2004/83/EC) and the Council
of Europe (Parliamentary Recommendation 1612) have directed member states to incorporate UNHCR’s revised interpretation of article 1D in national legislation. As long as UNHCR’s Note remains non-binding, and to the extent that judicial authorities remain committed to the older interpretation of Article 1D, however, Palestinian refugees will continue to find it next to impossible to avail themselves of the protections afforded under the 1951 Refugee Convention. Finally, few states are signatories to the two statelessness conventions and those that do not apply it correctly to Palestinian cases. In contrast to the situation in Israel and the Arab world, many states have ratified individual complaints procedures available under relevant international human rights instruments. To the extent that Palestinian asylum seekers are able to show cause for asylum, these procedures may provide recourse for individual refugees in need of protection but denied refugee status under the 1951 Refugee Convention. The major weakness of the procedure, however, is that it lacks an independent means of enforcement.

The role of the PLO, Palestinian Authority and civil society

Participants to the third expert seminar also examined PLO, Palestinian Authority and civil society efforts to protect the rights of Palestinian refugees on a day-to-day basis until they are able to realize durable solutions. The PLO, for example, has enhanced the protection afforded to Palestinian refugees in host states through diplomatic interventions and by offering refugees access to health care, education and employment in its broad network of economic and service institutions. The PLO has also sponsored major protection initiatives including the 1965 Casablanca Protocol and an unsuccessful initiative in the 1980s to amend the UNHCR statute to enable Palestinian refugees to benefit from the international protection the agency affords to other refugees. The PLO’s effectiveness, however, has always been dependent on Arab recognition and the maintenance of good relations with Arab host states. The gradual breakdown of the PLO’s political, economic and service institutions, as described by Karma Nabulsi, further undermined its ability to enhance the protection of refugee rights. Finally, Mohammad al-Az’ar argues that the PLO’s focus on state-building in the OPT in the 1990s, including the transfer of cadre and resources to establish the Palestinian Authority there, gave the impression that the organization had given up on refugee protection. Participants also observed that while the Palestinian Authority has a responsibility to protect the rights of all persons in areas under its jurisdiction in the OPT, its obligation and ability to do so are constrained by the interim agreements with Israel which limit PA jurisdiction largely to municipal affairs and leave Israel in effective control of the entire OPT.
The limited improvements in protection of Palestinian refugees in the Middle East since the 1980s are due, in part, to effective collaboration among civil society actors and UN agencies. Civil society actors have played an important role, for example, in protecting the basic economic and social rights of Palestinian refugees by supplementing basic services provided by national authorities and international agencies like UNRWA. This has been particularly important in the OPT and in Lebanon which have faced decades of military occupation and armed conflict. At the regional level, Arab human rights NGOs have called upon host states to implement in full the 1965 Casablanca Protocol and other Arab League resolutions in order to guarantee all Palestinian refugees civil, economic, and social rights until they are able to realize durable solutions. They have also called upon the international community to provide physical protection to Palestinians in the OPT and for states signatories to the 1951 Refugee Convention to apply the interpretation of article 1D advanced by UNHCR. Participants also identified a number of obstacles. This includes insufficient knowledge of international refugee law and the protections afforded which makes it difficult for Palestinian refugees to know what rights apply and which body is responsible to ensure that they are able to enjoy their rights. It was also noted that there is little awareness of refugee rights among Arab societies and that refugee law courses are generally absent from university law programs in the region.

Regional efforts to protect refugee rights including temporary protection

Participants to BADIL’s third expert seminar also discussed regional efforts to harmonize the treatment afforded to Palestinian refugees in the Arab world. Mohammad al-Az’ar, Susan Akram and Terry Rempel describe Arab League efforts since 1948 as unprecedented, but also point out that the protection accorded to Palestinian refugees in the Arab world has not had the effect of ensuring the realization of their full panoply of rights under international law pending the implementation of durable solutions. Major problems include the lack of effective cooperation and coordination among Arab states, the absence of a strong regional instruments including a complementary refugee convention tailored to the specific nature of displacement in the Arab world, and the absence of effective regional institutions to monitor and ensure the states respect, protect and promote refugee rights. The Casablanca Protocol, the primary instrument regulating the status of Palestinians in the Arab world, for example, does not fully incorporate the range of rights accorded to refugees under international refugee law. The Conference of Supervisors of Palestinian Affairs, the primary body mandated to oversee the implementation of the Casablanca Protocol, lacks effective
authority to ensure that states comply with their obligations under the Protocol. Participants shared Mohammad al-Az’ar’s conclusion that no major developments on the protection of Palestinian refugees in the Arab world can be expected apart from improvements in the broader issues of human rights and democratization.

The efforts by the Arab League to regulate the status of Palestinians in the Arab world nevertheless provide a potential foundation to strengthen the protection afforded to Palestinian refugees through the development of an internationally-harmonized regime of temporary protection. As Susan Akram and Terry Rempel explain, temporary protection is a humanitarian response to situations of mass refugee influx from conflict and other emergency situations, when individuals fleeing might/not meet the 1951 Refugee Convention definition. One of the benefits of temporary protection from the perspective of a receiving state is that it absolves authorities from the pressure of taking the full asylum burden a mass influx would represent. States are required to provide international protection only on a temporary basis and to facilitate repatriation when safe and feasible. Participants examined the arguments presented for a temporary protection regime for Palestinian refugees fleeing renewed conflict in the OPT, those in Arab host states, as well as those in third countries and lacking citizenship in light of lessons derived from temporary protection programs for refugees from Indochina, Central America, Mozambique and the former Yugoslavia. They also discussed a possible role for civil society in promoting a proposal for an internationally-harmonized temporary protection regime for Palestinian refugees linked to a comprehensive plan of action for durable solutions guided by the principles of non-refoulement, voluntary choice and the right of return.

Additional challenges to protection of Palestinian refugees

The contributors to this collection identify two additional problems relating to the protection of Palestinian refugees. Both have serious implications also as regards durable solutions which are discussed in detail above. The first problem is the absence of an international body with an explicit mandate to protect the rights of all Palestinian refugees. The UNCCP, as noted earlier, is no longer active, UNRWA does not have an explicit protection mandate (a situation often overlooked in judicial and administrative review of Palestinian asylum claims in third states), while UNCHR’s mandate is limited to the smaller number of Palestinian refugees outside UNRWA’s areas of operation and in need of protection. UNRWA has tried to fill the protection gap in its fields of operation, as Harish Parvathaneni explains, through monitoring, reporting, legal assistance (‘passive protection’) and through
the delivery of a core programme of essential services, i.e., education, health and social services. In some cases, the two agencies have collaborated to address gaps affecting specific groups of Palestinians. The joint effort to assist and protect Palestinian refugees stranded in camps on the borders of Iraq, Syria and Jordan as a result of the 2003 US-led war and occupation of Iraq exemplifies the enhanced cooperation and co-ordination between the two agencies in recent years. This *ad hoc* approach to protection in the Palestinian case, as Parvathanieni observes, however, has provided a weaker standard of international protection in comparison to that afforded to other refugees.

The second problem, also discussed above, is the absence of international will to protect the rights of Palestinian refugees. This is especially so in the OPT and in Lebanon. As Lynn Welchman points out with respect to the OPT, states signatories (High Contracting Parties) to the 1949 Geneva (IV) Convention have studiously avoided their duty to investigate grave breaches of the Convention and prosecute and punish perpetrators. Harish Parvathaneni’s comparison of UN Security Council action in the Israeli-Palestinian conflict and other refugee and conflict situations underscores the differential treatment afforded to Palestinian refugees. Following the killing of a number of refugees and three UNHCR staff in East Timor, for example, the Security Council passed Resolution 1319 calling upon states to bring to justice persons responsible for grave violations of international humanitarian and human rights law. The UN subsequently assisted East Timor in the establishment of a hybrid tribunal to investigate, prosecute and punish individuals responsible for serious crimes committed during the period of Indonesia’s rule. Following the massacre of several thousand Palestinian refugees in the camps of Sabra and Shatila in Beirut, the Security Council passed Resolution 521 in which it condemned the massacre but only went so far as to authorize the Secretary-General to increase the number of UN observers in and around Beirut and initiate consultations with the Lebanese government regarding the possible deployment of UN forces. Finally, the United States has blocked several attempts to deploy international monitoring or protection forces under Chapter VII of the UN Charter (threat to international peace and security) to the OPT, most recently in the context of the second Palestinian *intifada*.

**Prosecution and truth telling**

The BADIL Expert Forum also examined how the rights to justice and to know the truth have been applied in practice through prosecution and truth telling and discussed lessons learned and implications for the Palestinian case. As Alejandra
Vicente explains, these mechanisms share a number of common functions: they contribute to the establishment of a historical record of events and related violations of international law, they provide a space for victims to tell their stories and a means to hold perpetrators accountable for their actions, they contribute to the establishment of deterrence against future violations and they facilitate the restoration and maintenance of peace. As noted earlier, states have the primary responsibility to investigate, prosecute and punish perpetrators of international crimes committed under their jurisdiction and to facilitate knowledge of such crimes. The international community, however, may exercise concurrent jurisdiction when states are unable or unwilling to uphold their respective obligations under international law.

In this collection, Alejandra Vicente and Lynn Welchman explore different models for investigation, prosecution and punishment of international crimes, including war crimes, crimes against humanity and genocide. These include domestic courts as in Chile and Rwanda, ad hoc international criminal tribunals like those established in the former Yugoslavia and Rwanda, hybrid courts that combine both international and domestic regimes as in Sierra Leone and East Timor, and international models like the International Criminal Court. The contributors to this collection also highlight the role of civil society in situations where states are unwilling or unable to investigate, prosecute and punish perpetrators of international crimes. Alejandra Vicente, for example, describes how civil society actors in Chile, Argentina and Guatemala have relied on universal jurisdiction laws in the UK and Spain to hold political and military officials accountable for international crimes in the absence of a domestic remedy. These efforts often encourage states to more proactively investigate, prosecute and punish their own nationals.

Truth commissions provide a ‘third way’ between blanket amnesty and prosecution. They share several common features: they are temporary, officially-sanctioned, non-judicial fact-finding bodies; they focus on systematic or widespread past violations usually committed over a period of time; and they commonly issue a final report which includes recommendations concerning various forms of reparation, i.e., compensation, legal and institution reform and prosecution. Alejandra Vicente, Lynn Welchman and Jessica Nevo examine various truth commission models including those established by legislative or executive decree as in Argentina, Chile and South Africa, those established by peace agreement like Guatemala and truth commissions established by UN transition administrations as in East Timor. The contributors to this collection also describe the role of civil society in the construction of public memory through unofficial truth projects as in Uruguay, Brazil and Northern Ireland and memorialization projects like the Mothers of the Plazo de Mayo and the Museum of Memory in Argentina. As Jessica Nevo explains, these types of unofficial or civil society-led initiatives often play a catalytic role leading to the eventual establishment of official truth commissions.
Lessons learned from comparative practice

The contributors to this collection also highlight a number of lessons learned. While peacemaking may ultimately be an act of compromise, the failure to address systematic or widespread violations of international law in order to facilitate an end to conflict in the short-term may actually undermine peace and reconciliation in the long-term. Alejandra Vicente observes, for example, that the failure to carry out effective investigation, prosecution and punishment of war criminals in the former Yugoslavia, and their participation in peace negotiations is viewed as having undermined efforts towards ethnic reintegration in Bosnia and Herzegovina and explains, to some extent, the atrocities that followed several years later in Kosovo.

The cases in this collection also demonstrate that the key to achieving long-term peace in states emerging from political violence, armed conflict or dictatorial rule may lie in a holistic approach which incorporates both prosecution and truth-telling with reparations and legal and institutional reform. Neither prosecution nor truth commissions by themselves are capable of handling the complexity of most post-conflict situations. As Vicente explains, judicial approaches may be politically biased, provide selective prosecution, unduly limit the admissibility of evidence, or be seen as victor’s justice. They also provide fewer opportunities for victim participation. Truth commissions, on the other hand, may be insufficiently punitive or ineffectual in providing satisfaction to the victims.

Political, military and judicial reform are also important to address the underlying structural causes that have contributed to violations of international law and to ensure that they do not reoccur in the future. Vicente points out, for example, that the retention of power by the military and civilian elite in both Chile and Guatemala undermined justice and hampered the peacemaking and reconciliation process in both countries. The failure to address the underlying economic aspects of apartheid in South Africa has also raised serious questions about justice, peace and reconciliation in both the short and long-term. The impact of South Africa’s decision to avoid adjudicating legal culpability for those who either supported or enabled the apartheid regime remains to be seen.

The cases in this collection also underscore the need for adequate financial resources to underwrite prosecution and truth telling initiatives. This includes resources to establish and run tribunals and commissions as well as resources for the reparation of victims. In South Africa, as Lynn Welchman explains, the government under-estimated the potential cost of reparations and eventually rejected the Truth and Reconciliation Commission’s recommendations on victim compensation. The cost of truth commissions discussed in this collection, not including reparations, ranged from USD 5-10 million. The two ad hoc international tribunals for Rwanda and the former Yugoslavia each cost about USD 120 million per year.
Finally, a comparative assessment of prosecution and truth telling initiatives emphasizes the importance of civil society and victim participation in their design and implementation. The participation of victims is not only a right, but also has instrumental benefits. Participation ensures that prosecution and truth telling initiatives reflect the needs of victims, imbues them with a greater degree of legitimacy and ownership and thus contributes to more sustainable outcomes. The cases in this collection also illustrate the catalytic role victims and broader civil society can play in providing redress for systematic or widespread past violations of international law when states are unable or unwilling to uphold their obligations to prosecute international crimes and facilitate knowledge of such crimes.

Comparative findings on the Palestinian case

Prosecution and truth telling initiatives discussed in this collection provide a useful comparison to the Palestinian refugee situation given the types of crimes involved. These include forcible transfer or expulsion of civilian population, wilful killing including massacre of civilians, plunder and the destruction of private property without military necessity. Paul Prettitore’s discussion of case law in this collection provides a number of interesting precedents for the Palestinian case. In *Selçuk and Asker v Turkey*, for example, the European Court of Human Rights has found that a duty to conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible arises by virtue of the deliberate destruction of houses and household property. The International Criminal Tribunal for the Former Yugoslavia, discussed by Alejandra Vicente, has found (*Prosecutor v Kupreškić*) that the destruction of property may also constitute a crime of humanity of persecution when committed with requisite intent. No independent, impartial, transparent and effective tribunal or truth commission, however, have ever been established to investigate the serious allegations of Israeli crimes that have led to the massive displacement, dispossession, injury and loss of life suffered by Palestinians over the past 60 years.

Participants identified two major obstacles that militate against the investigation, prosecution and punishment of such crimes against Palestinians. First, both Israel and the international community have consistently ignored their respective obligations to investigate, prosecute and punish perpetrators. In contrast, Israel has been both a persistent advocate and beneficiary of the right to justice, including the prosecution of Nazi war criminals such as Adolf Eichmann (*Attorney General of the Gov’t of Israel v Eichmann*) on a range of charges like expulsion and deportation of civilian population during WWII. Second, mechanisms to prosecute international crimes discussed in
this collection are generally unavailable in the Palestinian case. Participants noted that a Security Council-mandated tribunal as in the former Yugoslavia and Rwanda is unlikely as long as the US exercises its veto power in the Council. A hybrid model like those in Sierra Leone and East Timor that requires Israel’s consent is equally unlikely. Prosecution in the International Criminal Court is also unlikely given the fact that Israel is not a state party to the Court’s statute and because it is yet unclear whether the Palestinian Authority which has requested to be a party qualifies as a state for the purpose of the ICC. Moreover, as Lynn Welchman observes, a number of states that have incorporated universal jurisdiction in domestic legislation have recently begun to amend their laws to prevent prosecution of Israeli officials in their courts.

Participants also identified a number of obstacles that militate against a truth commission. The primary problem lies in Israel’s fear about the political and legal consequences of delving into the past. As Eitan Bronstein explains, for Israel the Nakba represents an event that could not have occurred because Palestine was ‘a country without a people for a people without a country’ and yet it had to occur in order to create a Jewish state in a country with a non-Jewish indigenous majority. This paradox leads to what Bronstein and others have described as Nakba denial, a phenomenon evident not only in Israel’s adamant rejection of any moral, legal or political responsibility for the displacement and dispossession of Palestinians, but also in the geography and history taught in Israeli schools, in the maps of the country and on signs that mark the landscape. The other major problem is that truth commissions are sometimes seen as ill-fit to the specific features of the Israeli-Palestinian conflict. This includes the ongoing nature of the conflict and the continuity of the regime responsible for rights violations, the lack of acknowledgment in Jewish Israeli society that there is ‘something wrong’, and the fact that truth commissions are most commonly associated with intra-state conflict. Jessica Nevo counters, however, that forms of truth telling can also be used as catalysts for transition in situations of ongoing conflict, identifies a number of civil society initiatives that indicate various degrees of acknowledgment among small sectors of Israeli Jewish society that something is wrong, and argues that Israel’s effective control over the OPT, the colonization of these areas by Jewish settlers and the integration of these settlements into Israel suggest that Palestine/Israel has important features of an intra-state conflict akin to apartheid South Africa.

Civil society efforts for transitional justice

Participants to BADIL Expert Forum also examined the role of civil society actors in pursuing prosecution and truth-telling initiatives in the Palestinian case. In this collection, for example, Lynn Welchman describes civil society efforts to
prosecute Israeli political and military leaders responsible for war crimes, including grave breaches of the 1949 Geneva Convention (IV), in second countries that have incorporated universal jurisdiction in domestic legislation. Jessica Nevo and Eitan Bronstein draw attention to how civil society actors already use various forms of truth telling, including the annual commemorations of the Nakba inside Israel, the OPT and elsewhere and the visits and sign-posting at the sites of destroyed Palestinian refugee villages to illuminate the circumstances that have led to the massive displacement and dispossession of Palestinians since 1948. Bronstein’s description of legal efforts to oblige the Jewish National Fund to post signs about the history of destroyed Palestinian villages in Canada Park effectively illustrates how judicial and memorialization efforts can be used in tandem. In recent years, Palestinians and Jewish Israelis have also published histories of refugee villages, created maps and websites that identify refugee villages, lands, and holy sites. Jessica Nevo describes the work of Israel’s so-called new historians, including Benny Morris, Tom Segev and Ilan Pappé, as a form of truth-telling. The studies of the 1948 war produced by these historians are significant, not so much because they reveal a significant degree of new information about the circumstances and reasons surrounding the massive displacement and dispossession of Palestinians in 1948, but rather because they provide official evidence from Israel’s state archives of major violations of international law that confirms the oral testimonies of Palestinian refugees themselves.

Participation

Finally, participants to the BADIL Expert Forum examined the role of public participation in peacemaking and crafting durable solutions for refugees. As the contributors to this collection explain, participation is not only a right under international law, but it also has a range of instrumental benefits. Participation provides a means through which refugees are able to realize the panoply of rights that are violated when individuals are displaced; it offers an opportunity to consolidate democratic politics and the inclusion of otherwise marginalized groups in post-settlement political systems; and it comprises a technique of conflict resolution contributing to the development of a more consensual position vis-à-vis a final settlement.

In this collection, Celia McKeon identifies and describes three different approaches to public participation in peacemaking. In South Africa and Northern Ireland, for example, a long tradition of representative politics and strong political parties facilitated broad participation in the peacemaking process thus ensuring that
agreements reached were representative of the broader public. In Guatemala and the Philippines, civil society assemblies and commissions enabled different sectors of society to debate and propose solutions to the various aspects of the respective conflicts. Many of the proposals put forward by civil society were eventually integrated into post conflict settlements. In Mali, Colombia and South Africa, civil society participated directly in peacemaking. In each case, local leaders initiated and managed processes engaging all interested community members in developing and implementing agreements to address different aspects of the respective conflicts. Karma Nabulsi identifies two additional types of participation: plebiscites and referenda which are commonly used to determine the will of people living under colonial or foreign rule and military occupation, and elections, which comprise one of the most commonly understood forms of democratic participation. Most peace agreements today include provision for refugee participation in post-agreement elections. Finally, a refugees’ choice of his/her durable solution is one of the most fundamental aspects of refugee participation.

Comparative lessons learned

A number of lessons were derived from comparative study of public participation in peacemaking.

A lesson common to many of the cases in the collection is that mobilization, organization and the development of solidarity networks are critical to opening up the peacemaking processes to the public. The parties directly engaged in a conflict, including governments, opposition and rebel forces, among others, are often reluctant to open up negotiations to other sectors of society. In Northern Ireland, for example, women from both communities formed their own coalition in response to their exclusion from the peace process and were thus able to win a seat at the negotiating table. In Guatemala, refugees were able to secure the terms of their own return in direct negotiations with the Guatemalan government through self-mobilization, organization and the support received from civil society actors outside Guatemala and from international organizations like UNHCR.

Celia Mckeon’s comparative assessment of public participation in peacemaking also suggest that while each method of participation has advantages and disadvantages, overall success in relation the peacemaking process may lie in a holistic approach to participation, that includes representative, consultative and direct forms of participation. Such an approach maximizes opportunities for participation and expands possibilities to address substantive grievances and explore a wider range of possible solutions. The cases of South Africa and Guatemala, which
included representative, consultative and direct forms of participation, demonstrate how different forms of participation can be used simultaneously with great effect. Civil society, intergovernmental agencies, state and other actors, however, should nevertheless be cognizant of both the advantages and disadvantages of each form of participation when designing opportunities for public participation in peacemaking processes.

Another important lesson derived from a comparative assessment of public participation in peacemaking is that international interventions should be designed to strengthen or complement indigenous capacities for conflict resolution. The international community has an important role to play in facilitating peacemaking in terms of financial, technical and political support, but international actors should also respect local ownership and the principle of popular sovereignty. Mckeon’s discussion of the role of Norwegian Church Aid in facilitating inter-community discussions in Mali and the British Commission of Inquiry on Palestinian Refugees described by Karma Nabulsi exemplify the different ways international actors can strengthen indigenous efforts to resolve conflict.

Finally, while public participation in peace processes comes with certain challenges, e.g., security, integrity of mediation, divergent voices, inclusion and superficial participation, the exclusion of the broader public from the peacemaking process can also have significant cost, including agreements that lack public legitimacy and ownership. The failure of UN efforts to facilitate a resolution to the division of Cyprus and the extensive enforcement role of the international community in Bosnia described in this collection, for example, illustrate the risks incurred by processes that fail to include all stakeholders. In contrast, participation often imbues negotiations, agreements reached and the new political arrangements stemming from them with greater legitimacy thus making them more sustainable in the long-term. The case of South Africa exemplifies the value of participation.

**Comparative findings on the Palestinian case**

The cases of public participation in peacemaking discussed in this collection provide a stark contrast with the Palestinian case. The primary problem, as Karma Nabulsi explains, is that Palestinians as a people have been denied their basic right to determine their own future through mechanisms like plebiscites and referenda which are commonly used to ascertain the will of a people in territories under foreign, colonial or military rule. As noted in the introduction to this collection, the premise of the Middle East peace process that was conceived at Camp David more than three decades ago was that a solution to the conflict could only be found through direct
negotiations between the parties. Absent a binding framework of international law, the question of Palestinian self-determination and participation in the peacemaking process was determined by the balance of power between the two sides. Israel thus recognized the PLO as representative of the Palestinian people, but refrained from explicit recognition of their right to self-determination. It was also reluctant to allow refugees a voice in the negotiations, fearing that too many would insist on their rights of return, restitution and compensation. The Palestinian people, especially those living outside of OPT, who comprise more than half of the Palestinian people, most of whom are refugees, were thus marginalized and excluded from the peacemaking process.

Karma Nabulsi identifies three related factors that have undermined public participation in the case of Palestinians and further contributed to the ‘de-democratization’ of the peacemaking process. First, the PLO’s transfer to Tunis in 1982, which separated the people from their leadership, and the transfer of cadre and resources to the OPT to establish the Palestinian Authority at the expense of camps and communities of exile, significantly weakened the PLO’s ability to represent the Palestinian people. The British Commission of Inquiry referred to by Nabulsi, for example, found that while refugees continued to view the PLO as their sole, legitimate representative, they also felt that they were not adequately represented. Second, Palestinians outside the OPT, most of whom are refugees, were prohibited from participating in elections for the legislative council and presidency of the Palestinian Authority that was set up in the occupied West Bank and Gaza Strip under the Oslo agreements. This situation was exacerbated by the inability of the PLO to hold elections in all areas of exile for the Palestine National Council which represents Palestinians as a whole. Third, international donors contributed to the ‘de-democratization’ of the peacemaking process to the extent that their support of civil society initiatives excluded mass-based organizations like unions, syndicates, associations and political parties, as well as projects in camps and other communities of exile outside the OPT.

The Israeli-Palestinian peace process also comprised what Celia McKeon describes in this collection as an ‘elite pact-making’ approach to peace. Negotiations were often conducted in secret outside Israel and the OPT and restricted to a small group of political elite and their advisors who preferred to delay and defer substantial discussion of highly contested issues, such as the Palestinian refugee question. Civil society participation, in general, was restricted to post-agreement peacebuilding initiatives which effectively negated opportunities for civil society actors to put their issues on the agenda and influence the substance of agreements. This superficial type of participation undermined both the legitimacy of and public ownership in the peacemaking process. Finally, proposals for a solution to the refugee issue in the context of final status negotiations offered refugees a number of options but no
real choice. The inclusion of incentives for resettlement in host countries and third states and quotas and other limitations on return to places of origin inside Israel, for example, effectively undermined the principle of refugee choice because they aimed to exert undue influence over the decision-making process and would have denied most refugees the right to return once limited quotas for return to places of origin inside Israel were filled.

Civil society efforts to participate in the peacemaking process

Participants to BADIL’s Expert Forum also discussed how refugees have attempted to play a role in the peacemaking process. In the occupied West Bank and Gaza Strip, for example, refugees organized popular conferences and called for ‘a peace built on mutual respect for internationally legitimized rights’ and declared that their ‘support for parties—elected or not, official or not—and for any negotiating team, [would] depend on their respect for democracy, national and human rights’. (Declaration Issued by the First Popular Refugee Conference in Deheishe Refugee Camp, 1996) Meetings and conferences were convened also by those in exile and internally displaced Palestinians in Israel. New regional and global networks, such as the Palestine Right to Return Coalition (2001), were formed to reconnect those inside and outside the OPT, coordinate public statements and petitions and broaden popular initiatives, in particular, the annual Nakba commemorations.

Palestinian refugees have also made use of the few internationally-sponsored mechanisms that have sought to encourage their participation, such as the British Commission of Inquiry discussed by Karma Nabulsi in this collection. The Commission, which held hearings in refugee camps across the Arab world, found that many refugees felt ‘completely excluded from the peace process’ and that ‘a peaceful solution could only emerge with the inclusion of the refugee issue, as well as the refugees’ participation in some manner’. Among its main recommendations, the Commission urged the European Union to ensure that the refugees were included in any political process which sought to contribute to a lasting and comprehensive peace in the Middle East, and to help reconnect them to their legitimate representation in ways which were consistent with the principle of self-determination. The fourth expert seminar also discussed the Civitas project which aims to provide Palestinians outside the OPT with opportunities to assess the tools and mechanisms needed for communication with their leadership and identify issues they would like to raise. The findings will be presented to both the PLO and the international community.

The exceptional efforts of the internally displaced community of Kafr Bir’im to remain connected with their 1948 depopulated village through ‘returns’ in the
form of weddings, summer camps and funerals, law suits, interventions in the Israeli parliament and maps and plans illustrating possible scenarios for return and reconstruction of the ‘new’ Kafr Bir’im provides a useful example of how direct participation of displaced Palestinians in the search for durable solutions may advance rights-based solutions in ways that are ‘out of reach’ of official negotiators. Similar creative solutions are found in refugee responses to the British Commission of Inquiry referred to above and in the Kafr Bir’im/Kibbutz Bar’am initiative described by Eitan Bronstein where internally displaced Palestinians and Jewish members of a local kibbutz addressed their conflict over rights and claims to the same land.

**Rights in Principle, Rights in Practice: Bridging the Gaps**

Finally, the BADIL Expert Forum examined various measures to ensure that Palestinian refugees are able to claim their rights and that states and other duty-holders are able to fulfil their obligations to them. These measures can be grouped into three main complementary areas of activity: education and awareness-raising, legal and institutional reform and the promotion of accountability. Education and awareness-raising is central to a rights-based approach. Palestinian refugees need to know their rights and the mechanisms available to achieve them while states and other duty-bearers need to know their corresponding obligations to refugees under international law. Laws and mechanisms which incorporate and give expression to both substantive and procedural rights discussed above provide the foundation for a rights-based approach to the Palestinian refugee question. Finally, additional measures are required to ensure that states and duty-bearers fulfill their obligations to Palestinian refugees and are held accountable when they fail to do so.

Participants discussed a role for states and intergovernmental organizations, including the United Nations, in all three areas of activity. Given the lack of political will for a rights-based approach to the Palestinian refugee question, however, the role of civil society actors, including refugees, was considered central for bridging the gaps between principle and practice in this case. The actions of refugees in Cyprus to redress property claims through the European Court of Human Rights, the collective work of the Arab human rights movement to strengthen and develop legislation and mechanisms in the Arab world, the collaboration among activists, NGOs and faith-based movements to prosecute international crimes committed during the war in Guatemala, the self-mobilization of women in Northern Ireland which won them a seat the negotiating table and contributed to a solution to the conflict and the dedicated efforts of millions of ordinary citizens around the world.
in a global campaign of boycotts, divestment and sanctions against apartheid South Africa each demonstrate the power of local, regional and global networks to bring about change in seemingly intractable conflicts.

**Education and awareness-raising**

**Among refugees**

Civil society actors should promote greater awareness among Palestinian refugees of their rights and the mechanisms available to claim them. This will better enable refugees to hold states and other duty-bearers accountable to their obligations under international law. Participants to the BADIL Expert Forum further recommended that UNRWA include durable solution and protection norms in its human rights curriculum to enable refugees to be more effective participants in the assessment, design, implementation and evaluation of programs to meet their needs and protect their rights including the search for and implementation of durable solutions. UNRWA and UNHCR should also promote the development of refugee law programs in universities and other academic institutions in the OPT and Arab host states. Education and awareness-raising initiatives, however, should go beyond a mere summary of the law. Civil society actors, humanitarian organizations and UN agencies should engage refugees in a process in which they translate their basic needs into rights and obligations to which states and other duty-holders can be held accountable. This type of approach not only respects the basic right of refugees to participate in decisions that affect their lives, but also contributed to individual and collective empowerment and development of movements for change. The international community, moreover, should design interventions in ways that strengthen or complement indigenous capacities to resolve the Palestinian refugee question, support fragile, local-level initiatives, like the community-based return and restitution models described in this collection, which may offer important starting points for broader initiatives, and facilitate the participation of marginalized groups.

**Jewish Israeli civil society**

Jewish Israeli civil society should be engaged in a principled debate about a rights-based approach to the Palestinian refugee question. As noted in the above discussion on conflicting rights, debate about how to resolve the Palestinian refugee question has too often rested on a lack of scrutiny of Jewish Israeli claims
under international law and the false assumption that the assertion of Palestinian refugee rights necessitates the denial of the rights of Jewish Israelis. Jewish Israeli society should also be encouraged to confront the Palestinian Nakba and the institutionalized discrimination that is central to Israel’s self-definition as a Jewish state and which comprises the primary obstacle to a rights-based solution to the Palestinian refugee question and the conflict itself. Initiatives should also explore the practical implications of a rights-based approach to the refugee question. The Bir’im/Bar’am community-based return and restitution model discussed above provides a useful example of how engagement among Palestinian refugees and Jewish Israelis may provide innovative solutions to the long-standing Palestinian refugee question. Participants to the BADIL Expert Forum acknowledged that this type of engagement will not lead to a quick solution, but considered it nevertheless critical to building the foundations for a comprehensive, rights-based and lasting solution to the conflict.

Regional and global education and awareness-raising

Civil society actors should also undertake education and awareness-raising initiatives at a regional and global level including the Arab world, the United States, Europe and elsewhere to build support for the basic principles and practices relevant to a rights-based approach. This is especially critical in North America and in Europe where public pressure is the only way to change current positions which militate against a rights-based approach. Participants to BADIL’s Expert Forum also noted that there is significant potential to build broad public support elsewhere, including Latin America, where there is a large and well-integrated Arab and Palestinian population capable of lobbying on behalf of a refugee rights, in newly-industrialized countries like Brazil and India which are playing an increasingly greater role in a slowly developing multi-polar world and in places of historic solidarity like South Africa. Civil society campaigns should include a wider range of actors, such as Arab civil society initiatives and political leaders from other anti-colonial struggles, refugees, NGOs and anti-colonial movements based on the principle of reciprocal solidarity. Initiatives should remind states and other duty-bearers of their respective obligations under international law. NGO reports to human rights treaty committees, submissions to UN special complaints procedures and participation in UNHCR’s annual NGO consultations were among the mechanisms identified for this purpose. Participants further recommended that UNRWA consider establishing a similar NGO consultation process parallel to its annual Advisory Commission meetings.
Priorities for education and awareness-raising

Finally, participants highlighted two priorities for broader public education and awareness-raising about Palestinian refugees. First, it is important to revisit the root causes of Palestinian displacement and dispossession. A number of campaign themes were identified to raise public awareness about the root causes of the Palestinian refugee question. These include campaigns that draw attention to the role of foreign companies located on refugee lands in Israel; the establishment of forests and parks on refugee lands, especially those in the name of third countries (e.g. Canada Park, South African Forest); the role of Jewish national institutions like the Jewish National Fund in the dispossession of Palestinian refugees; and, the desecration, denial of access and destruction of religious sites, including cemeteries, churches and mosques. Second, there is need for a new vision of a solution that is both morally sound and can inspire people. Participants in the fourth expert seminar explained that the two-state model has not only failed to resolve the conflict but also framed the debate about the solution around issues of ethnic or national identity that obstruct refugee return and fail to inspire broad public support. It was suggested that public education and awareness-raising should promote an alternative vision that is rooted in and guided by the universal principles of equality and non-discrimination, especially since the current bi-national reality in Israel and the OPT has all the hallmarks of an apartheid regime under international law. A vision based on equality and non-discrimination can inspire global support and encourage public debate about models of one-state solutions that permit return and restitution of Palestinian refugees and protect basic rights and fundamental freedoms of both Palestinians and Jewish Israelis.

Strengthening and developing effective legislation and mechanisms

National reforms

Participants to the Expert Forum identified a number of ways whereby states, intergovernmental organizations and the PLO can build the foundations for a rights-based approach through legal and institutional reform. Israel, as the primary duty-holder, should repeal discriminatory legislation and adopt new laws consistent with its legal obligation to provide effective remedy and reparation, including the return of Palestinian refugees and displaced persons to their homes, lands and properties. Israel should incorporate the fundamental principle of equality and the prohibition of non-discrimination as constitutional principles, abolish the status and role as state
agents of institutions (i.e., WZO, JA and JNF) that privilege Jews, and establish new institutions that provide public services and allocate land in a manner consistent with the principles of equality and non-discrimination. Israel should also repeal the laws and dismantle the institutions that comprise its regime of military occupation and colonization in the OPT. Finally, Israel should comply in full with its obligations under international humanitarian, human rights and refugee law and accede to individual complaints procedures which provide additional recourse to individuals in need of protection.

Arab and other host states should also ensure that laws, policies and practices affecting Palestinian refugees are consistent with international human rights, humanitarian and refugee law. Arab states should comply in full with their obligations under the 1965 Casablanca Protocol on the Treatment of Palestinians in Arab Countries. States that have not done so should accede to the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries and the 2004 Arab Charter on Human Rights. Legal and institutional reforms should be implemented to ensure that humanitarian assistance meets relevant international standards and that Palestinian refugees can participate in the assessment of their needs and in the planning and evaluation of programs and services to protect their rights and meet their needs. States that have not done so should accede to and incorporate the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol in domestic asylum and refugee law. All states should incorporate article 1D in their national legislation and comply with UNHCR’s revised interpretation of article 1D, under which Palestinian asylum-seekers are entitled to the benefits of the convention on a prima facie basis with the aim of ensuring both protection and assistance until their situation is resolved in accordance with relevant UN resolutions, namely General Assembly Resolution 194 (III) and Security Council Resolution 237. States should also accede to individual complaints procedures provided for under international human rights law. All states should facilitate the participation of Palestinian refugees in elections for the PLO’s National Council in accordance with relevant international standards.

The PLO should ensure that policies and practices relating to the protection of Palestinian refugees, including proposals for durable solutions, are consistent with international law. The PLO should reactivate and strengthen its institutions, including the Department of Refugee Affairs, to enhance the protection afforded to Palestinian refugees in all places of exile. The PLO should also proceed with efforts to reform and rebuild representative structures so that elected officials can more effectively represent their constituency. The Civitas report referred to above provides a good starting point to identify refugee needs, issues of concern and the types of mechanisms they need to better communicate with the PLO. It should also implement plans to hold elections for the Palestine National Council and press for
the inclusion of 1967 refugees in future PA elections. The Palestinian Authority, its legislative council, ministries, municipalities and local councils should strengthen efforts to protect refugees within their limited jurisdiction. The PLO should also expand efforts to engage refugees in the search for durable solutions, explore mechanisms through which refugees might participate in future negotiations and advocate for their inclusion. The case studies in this collection provide various models for representative, consultative and direct forms of participation. It should also continue legal and technical work on the design of a return and restitution plan that demonstrates the efficacy of rights-based approach.

Regional reforms

The Arab League should strengthen and develop regional legislation and mechanisms to ensure comprehensive protection of their rights on a day-to-day basis and to promote and eventually facilitate the implementation of rights-based durable solutions for Palestinian refugees. The League should expand the rights accorded to Palestinian refugees under the 1965 Casablanca Protocol on the Treatment of Palestinians in Arab Countries over time in line with international refugee law. It should also remedy deficiencies in the Arab Charter on Human Rights as discussed above. The Arab League should strengthen regional institutions, like the Conference of Supervisors of Palestinian Affairs in Arab Host Countries, and strengthen cooperation with UNHCR, to monitor the treatment of Palestinian refugees in the Arab world and ensure that member states comply with their relevant legal obligations. It should explore and establish mechanisms for refugee participation in these bodies, similar to mechanisms that enable cooperation and collaboration between civil society actors and UNHCR. The League should also establish the human rights committee provided for under the 2004 Arab Charter on Human Rights, including a procedure for parallel NGO reporting as provided for under international human rights instruments, adopt an optional protocol to the Charter that would enable individual complaints and establish a regional human rights court.

International reforms

UNRWA and UNHCR should adopt a collaborative and systematic approach to international protection of Palestinian refugees, including the promotion of rights-based durable solutions. They should also identify ways in which each agency could bring its own strengths, competencies and experiences to bear on the implementation
of durable solutions for Palestinian refugees. UNRWA, UNHCR and other relevant UN agencies should adopt a collaborative and systematic approach to housing, land and property restitution including the establishment of unified procedures for documentation, registration and valuation of claims. All UN agencies, including the UNCCCP which maintains the largest and most comprehensive database for future Palestinian property claims, should provide refugees access to property records to verify claims in line with relevant international norms. UNRWA should work towards the development of a protection policy and progressive harmonization of standards in its areas of operation in accordance with international law. UNHCR should continue efforts to harmonize state practice outside UNRWA areas of operation regarding article 1D of the 1951 Refugee Convention. UNHCR should also clarify the applicability of Convention cessation and exclusion clauses (articles 1C and 1E) as passports and travel documents issued by Arab host states often provide limited protections. The two refugee agencies should develop a comprehensive registration system for Palestinian refugees to enable the efficient exchange of information and improved monitoring of their treatment. The international community should increase funding to enable UNRWA and UNHCR to carry out their respective mandates for Palestinian refugees and promote and support NGOs and community-based organizations active among refugees.

Civil society initiatives

Participants to BADIL’s Expert Forum noted that civil society actors can play a role to encourage states and other duty-bearers to strengthen and develop effective legislation and mechanisms to ensure that refugees are able to realize their rights. Civil society actors should undertake a comprehensive assessment of relevant legislation and institutions in Israel, the OPT, Arab and other host states and prepare new draft legislation and plans for new mechanisms to protect refugees and facilitate rights-based durable solutions. They should also adopt a systematic and coordinated approach to the documentation and valuation of ongoing losses in collaboration with the PLO and relevant UN agencies. Civil society actors should also develop a return and restitution model to facilitate education and awareness-raising about the concrete implications of a rights-based approach to the refugee question. Participant’s to BADIL’s third expert seminar recommended that civil actors explore complimentary approaches to protect the rights of Palestinian refugees. This includes the promotion of an internationally-harmonized regime of temporary protection linked to durable solutions. Such a regime would offer Palestinians in exile in any of the main regions to which they have fled the protection rights they currently lack, with many of the
concomitant rights of an individual granted asylum, but without the permanent status accompanying integration or resettlement that might compromise their right to return to their places of origin inside Israel and the OPT. Participants recommended that further research identify state interests and incentives required to ensure their participation.

**Promoting accountability**

**Prosecution**

Participants to BADIL’s Expert Forum also recommended that civil society actors lobby and campaign for a series of measures that to end impunity and ensure that states and other duty-bearers are accountable to their obligations under international law. Israel and other states should be pressured to fulfill their respective obligations to investigate, prosecute and punish perpetrators of serious violations of international law that have contributed to the forcible displacement and dispossession of Palestinians over the past 60 years. States should also be reminded of their obligation to adopt appropriate national legislation for investigation, prosecution and punishment of perpetrators under universal jurisdiction. The importance of prosecution in the context of ongoing conflict lies, among others, in its potential to affect deterrence against ongoing violations of international law. The question that has to be asked is whether the ongoing displacement and dispossession of Palestinians over the past six decades would have taken place if persons responsible for the commission of war crimes and crimes against humanity in 1948 would have been held accountable for their actions. The other important feature of prosecution, as the cases in this collection demonstrate, is its ability to promote peace and restore relations by focusing on individual perpetrators rather than assigning blame to society as a whole. Prosecution is also an important form of reparation. Civil society actors should also campaign for the establishment of a General Assembly-mandated international criminal tribunal to exercise concurrent jurisdiction in situations where states fail to fulfill their respective obligations to investigate, prosecute and punish individual perpetrators under their national jurisdiction. Civil society actors should continue to document and seek prosecution of international crimes in national courts exercising universal jurisdiction. Participation of Palestinian victims/survivors should be ensured to the greatest possible extent in both domestic and international mechanisms for investigation, prosecution and punishment of international crimes.
State responsibility

Civil society actors should lobby the PLO, Arab and other states to request a second advisory opinion from the International Court of Justice given Israel’s refusal to comply with its legal obligations. There is a long history of attempts to obtain ICJ counsel on the conflict. In 1947, for example, Arab and other states repeatedly advised the General Assembly to obtain legal counsel from the Court in order to ensure that recommendations on the future of Palestine would be consonant with international law. The dominant view of the international community has long held that recourse to the Court is either inappropriate or would further complicate efforts to facilitate an agreed upon solution to the conflict. The ICJ rejected this view in its 2004 advisory opinion on the legal consequences of Israel’s construction of the Wall in the occupied West Bank. A request for a follow-up opinion from the ICJ should include questions related to the legal consequences of Israel’s protracted military occupation, colonization of Palestinian land and its institutionalized regime of racial discrimination and oppression which have been described as forms of apartheid under international law. Civil society actors should also explore options for direct restitution claims in domestic courts of countries where refugees have obtained citizenship. This is especially relevant in Europe, where there is significant jurisprudence on property rights. They should also explore possibilities for obtaining declaratory rulings and some form of civil redress through the Alien Tort Claim Act and the Tortured Victim Protection Act in the United States, which permit suit against foreign parties in US federal courts for human rights abuses.

Truth telling

Civil society actors should further promote the establishment of an international truth commission to examine and confront Israel’s ongoing denial of systematic and widespread violations of international law that have contributed to the massive displacement and dispossession of Palestinians over the past 60 years. As the cases in this collection illustrate, such commissions serve to transform knowledge of past violations into official acknowledgment thus opening the way for reparations and restoration of relations. Israel and the Arab states participating in the 1948 and 1967 wars should also release information from archives that has yet to be made public clarifying the circumstances and reasons leading to the Palestinian refugee situation. Israel should also release information covering actions that have led to the displacement and dispossession of Palestinians in the West Bank, including eastern Jerusalem, and the Gaza Strip since it occupied these areas in 1967. Civil society
actors should also request UN human rights bodies to establish a collaborative mechanism to investigate Israel’s institutionalized regime of discrimination, colonization and occupation, including examination of the applicability of the crimes of apartheid and genocide, and its consequences with the aim to recommend to the entire UN system practical measures for their eradication. The establishment of such commissions should be undertaken in consultation with victims/survivors to the greatest possible extent. Possibilities for unofficial truth projects should be explored in parallel. As the cases in this collection illustrate, these types of civil society-led initiatives often lead to the eventual establishment of an official truth commission. Civil society actors should also continue efforts to create awareness about the past through commemoration of the Palestinian Nakba, visits to and sign-posting of sites of depopulated and destroyed Palestinian communities, documentation of refugee places of origin and properties through the use of new technologies, collection and publication of oral histories relating to the Palestinian refugee question and other forms of memorialization.

Boycotts, divestment and sanctions

Finally, participants to the fourth expert seminar recommended that civil society actors build pressure on states, the United Nations and the private sector to refrain from aid or assistance that is used by Israel to displace and dispossess Palestinians of their homes, lands and property or to maintain the illegal situation created by Israel’s violations of international law. Civil society actors should also lobby for a General Assembly resolution establishing a comprehensive regime of economic, military and diplomatic sanctions until Israel complies in full with its obligations under international law. Israel should bring an immediate end to its more than four-decade-old military occupation, halt colonization of Palestinian land, dismantle its institutionalized regime of racial discrimination which comprises a form of apartheid under international law and provide reparations for Palestinian victims, including return, restitution and compensation for Palestinian refugees. The General Assembly should also instruct the UN Committee on the Exercise of the Inalienable Rights of the Palestinian People to activate its mandate and resources and provide support similar to the support provided in the past to the people of South Africa by the UN Special Committee Against Apartheid. Civil society actors should also promote consumer boycotts and boycotts of and divestment from organizations, institutions and companies that help maintain Israel’s illegal policies and practices. Participants to BADIL’s Expert Forum acknowledged that such a campaign would likely result in a break with mainstream Jewish Israeli society, but they also warned...
that there is little prospect of restoring the rule of law and facilitating a rights-based solution to the refugee question and the conflict itself without recourse to more coercive measures of this kind.
In the five years since the conclusion of the BADIL Expert Forum, the situation of Palestinians inside Israel, in the 1967 OPT and elsewhere in the region, has continued to decline in the face of repeated violations of their basic rights under international law. In Israel, for example, new legislation to privatize housing, land and property held by the state further threatens the right of dispossessed Palestinians to repossess homes, lands and properties taken from them since 1948. Meanwhile, efforts to further strengthen Israel’s self-definition as a Jewish state continues to chip away at the basic rights of its Palestinian citizens. In the 1967 OPT, construction of the West Bank Wall and colonization continues apace, leading to new cycles of displacement and dispossession, and further exacerbating the ongoing process of de-development that began in 1967. The continued blockade imposed on the Gaza Strip, coupled with the massive loss of life and destruction of property stemming from Israel’s 2008-2009 war on Gaza, has led to a humanitarian catastrophe in which the majority of the population is now dependent on international aid to meet their basic needs. Individuals responsible for the commission of serious violations of international law during the war have yet to be held accountable for their actions. Meanwhile, the U.S.-led occupation of and armed conflict in Iraq and Israel’s 2006 war on Lebanon have had grave consequences for Palestinian refugees in these areas. The international community has not only failed to ensure that Israel refrains from violating international humanitarian and human rights law but has also failed to ensure that it provides effective remedy and reparation for the victims of such violations.

In July 2005 more than 170 Palestinian civil society organizations, inspired by the struggle of South Africans against apartheid, issued a collective call to international civil society organizations and people of conscience around the world to impose a comprehensive regime of boycotts, divestments and sanctions against Israel until it complies with its obligations under international law. The statement, which came one year after the International Court of Justice released its landmark advisory opinion on the legal consequences of Israel’s construction of the Wall in the occupied West Bank, was issued in response to Israel’s persistent violations of the rights of the Palestinian people, the majority of whom today refugees and IDPs, and the corresponding failure of the international community, in general, to ensure that Israel complies in full with its obligations under international law as detailed in this collection. The statement calls upon international civil society organizations and people of conscience to maintain these non-violent measures until Israel complies with the ICJ advisory opinion and cease construction of the West Bank Wall, tear it
down, repeal legislation and make reparation for damage caused; end its protracted military occupation and colonization of the West Bank, eastern Jerusalem, and the Gaza Strip; dismantle its institutionalized regime of discrimination and provide equal treatment to Palestinian citizens of Israel; and respect, protect and promote the right of Palestinian refugees and displaced persons to return to their homes, lands and properties inside Israel and the West Bank, including eastern Jerusalem, and the Gaza Strip.

In June 2007, on another anniversary - 40 years since Israel occupied the West Bank, including eastern Jerusalem and the Gaza Strip - the UN High Commissioner for Human Rights reminded the international community that it has a moral and legal obligation to ensure that international law is fully implemented by all in efforts towards a lasting solution and that the human rights of Palestinians and Israelis cannot be subject to negotiation or compromise. This obligation has been systematically ignored for more than sixty years. In 1947 as members of the newly-created United Nations engaged in vigorous debate about the future of Palestine, Arab diplomats who played an instrumental role in the development of Universal Declaration of Human Rights and the Convention relating to the Status of Refugees reminded their colleagues that the problem of Palestine was not a matter of ‘what to do with Palestine’, but rather, ‘a lack of regard for certain principles of international relations and human life, including the principle of self-determination, the principle of the right to live peacefully in one’s own home, and the principle of self-government in a democratic way’. Given the divergence of opinion about the best way forward in what would be the international organization’s first attempt to resolve a major issue of international peace and security, they suggested that the UN General Assembly obtain legal counsel from the International Court of Justice. A majority of members nevertheless rejected this approach. Today, the ongoing perils of ignoring the rights and obligations codified in international law in resolving the long-standing conflict in the Middle East are plain for all to see.

Indeed, the unresolved conflict in Palestine/Israel has become, in the words of the South African international law expert and former UN Special Rapporteur for Human Rights in the OPT, a test for the rule of law, generally, and for the international system developed over decades to ensure respect, protection and promotion of the basic rights and fundamental freedoms codified in international law:

For years the occupation of Palestine and apartheid in South Africa vied for attention from the international community. In 1994, apartheid came to an end and Palestine became the only developing country in the world under the subjugation of a Western-affiliated regime. Herein lies its significance to the future of human rights. There are other regimes, particularly in the developing world, that suppress human rights, but there is no other case of a Western-affiliated regime that denies
self-determination and human rights to a developing people and that has done so for so long. ... If the West, which has hitherto led the promotion of human rights throughout the world, cannot demonstrate a real commitment to the human rights of the Palestinian people, the international human rights movement, which can claim to be the greatest achievement of the international community of the past 60 years, will be endangered and placed in jeopardy.¹

Appendix One
Selected Rule of Law Tools


Appendix Two
List of Papers & Presentations


el-Abed, Oroub. ‘Case Study: Unprotected Palestinian Refugees in Egypt’.

Abu Hussein, Hussein. ‘Right of Return—The Eve-Present Fear: The Iqrit Model and Land in Israel’.

Abu Sitta, Salman. ‘Components of Property Restitution in Palestine’.

Akram, Susan and Terry Rempel. ‘A Plan for Temporary Protection and Durable Solutions’.


al-Az’ar, Muhammad Khalid. ‘Arab Protection of Palestinian Refugees: Investigation and Basis for Development’.

Berger, Christian. ‘The European Union and Palestinian Refugees’.

Boling, Gail. ‘The Right of Property Restitution of 1948 Palestinian Refugees under International Law’.

____________. ‘State Responsibility of Israel and Individual Responsibility of Perpetrators under International Law to Remedy Violations against 1948 Palestinian Refugees and Internally Displaced Persons’.


Fischbach, Michael. ‘The Usefulness of the UNCCP Archives for Palestinian Refugee Compensation/Restitution Claims’.

Garlick, Madeline. ‘Case Study Cyprus: Principles, Mechanisms and Lessons Learned from the Cypriot Case’.

Halabi, Usama. ‘Israel’s “Land Laws” as a Legal-Political Tool: Confiscating and Taking over Palestinian Arab Lands and Creating Physical and Legal Barriers to Prevent Future Property Restitution’

Jones, Lisa. ‘Giving and Taking Away: The Difference between Theory and Practice Regarding Property in Rwanda’.

Kagan, Michael. ‘Do Israel Rights Conflict with the Right of Return’.

Luzati, Einat, Shlomit Kafri and Nahida Zahra. ‘Bir’im-Bar’am, a Community-based Model for Palestinian Refugee Rights and Reconciliation?’


McKeon, Celia. ‘Public Participation in Peace Processes: Comparative Experience and Relevant Principles’.

Nabulsi, Karma. ‘Foundations for Participation: Civic Structures for the Palestinian Refugee Camps and Exile Communities’.

_____________. ‘Popular Sovereignty, Collective Rights, Participation and Crafting Durable Solutions for Palestinian Refugees’.

Nevo, Jessica. ‘Transitional Justice Models and their Applicability to the Zionist-Palestinian Conflict’.

Pappe, Ilan. ‘The Role of Israel Sanctions and Boycott in Promoting Rights-based Solutions for Palestinian Refugees and Just and Durable Peace’.

Parvathaneni, Harish. ‘UNRWA’s Role in Palestinian Refugee Protection’.

de Plessis, Jean. ‘Notes on Restitution in South Africa’.

Prettitore, Paul. ‘The Right to Housing and Property Restitution in Bosnia and Herzegovina’.

Rangwala, Glen. ‘Negotiating the Non-Negotiable: The Right of Return and the Evolving Role of Legal Standards’.
Rempel, Terry. ‘Palestinian Refugees, Property and Housing Losses—An Overview’.

__________. ‘Rethinking Regional Protection Mechanisms as Part of a Political Strategy for Durable Solutions’.

__________. ‘UN General Assembly Resolution 194 (III) and the Framework for Durable Solutions for 1948 Palestinian Refugees’.

Roodt, Monty. ‘Land Restitution in South Africa’.

al-Salem, Reem. ‘Case Study Afghanistan: Land Problems in the Context of Sustainable Repatriation in the Eastern Region’.

__________. ‘Case Study Afghanistan, Land Problems in the Context of Sustainable Repatriation in the Northern District’.

Schechla, Joseph. ‘The Habitat International Coalition’s Dual Strategy for Defending Palestine’s Refugees, Displaced and Dispossessed’.

Sondergaard, Elna. ‘An Overview of the Legal Status and Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention’.

Suleiman, Jaber. ‘Palestinian Civil Society Perspectives towards Improving Protection for Palestinian Refugees’.


Vicente, Alejandra. ‘Justice Against Perpetrators, The Role of Prosecution in Peacemaking and Reconciliation’.

Welchman, Lynn. ‘The Role of International Law and Human Rights in Peacemaking and Crafting Durable Solutions for Refugees: Comparative Comment’.

Wengert, Gabriela. ‘Current protection situation of Palestinian refugees in Iraq and in the Ruweished Camp in Jordan/the No Man’s Land on the border between Iraq and Jordan’.

2002 UNHCR Note on the Status of Palestinian Refugees under the 1951 Refugee Convention + BADIL commentary
# Appendix Three

## List of Participants

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