



PALESTINIAN REFUGEES AND THEIR LEGAL STATUS: RIGHTS, POLITICS, AND IMPLICATIONS FOR A JUST SOLUTION

SUSAN M. AKRAM

The Palestinian refugee problem is one of the longest-lasting refugee crises in the world—now exceeding fifty-three years—without a real solution in sight. Although at its core a political problem, the Palestinian refugee crisis is also a problem of legal distortion: Palestinian refugees fall into a legal lacuna that sets them outside minimal international protections available for all other refugee groups in the world. This paper provides background to the legal anomaly that sets Palestinian refugees apart; discusses the legal, practical, and political implications of that status; and proposes a framework and mechanisms aimed at promoting a rights-based solution for the Palestinian refugee problem.

THE INTERNATIONAL REGIME for refugee protection and the internationally adopted definition of “refugee” are embodied in the 1951 Refugee Convention,¹ its companion instrument the 1967 Refugee Protocol,² and the Statute of the United Nations High Commissioner for Refugees (UNHCR).³ These instruments are the basis of an interrelated set of conventions and UN agencies that have a bearing on Palestinian refugees.

The Refugee Convention brought about a number of significant changes in the substantive definition of “refugee” and in the manner in which the international community dealt with refugee flows. One of the most significant of these was the adoption of an *individualized* definition of “refugee,” as opposed to the *group* or *category* approach that had been used until then. A second major change involved a shift in emphasis from returning refugees to their places of origin to the principle of *non-refoulement* (non-return) against a refugee’s wishes, as well as a new emphasis on resettlement in third states.⁴ Finally, instead of addressing refugee problems in an ad hoc fashion involving only the states directly affected, the new approach viewed these problems as being the responsibility of the entire world community.⁵ The underlying premise of this third change was the need not only to pro-

SUSAN M. AKRAM is associate professor at Boston University School of Law. This article is based on a forthcoming book, co-authored with Terry Rempel, and from their forthcoming article, “Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework,” in the *Palestine Yearbook of International Law* (Kluwer Law Institute with the al-Shaybani Society of International Law, forthcoming 2001).

mote assistance but also to address the perceived cause of refugee and stateless persons' plight: the lack of international protection.

The Refugee Convention (Article 1A.2) and Protocol incorporate the now universally accepted definition of "refugee":

[A]ny person who . . . as a result of events occurring before 1 January 1951 and 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.⁶

The convention and protocol also incorporate the obligatory norm of *non-refoulement* (Art. 33.1), which requires that states not return refugees to a place where their lives or freedom would be threatened. In addition to the obligation of *non-refoulement*, the simple recognition that an individual meets the criteria of a refugee, as defined in the convention, requires states to grant the person a number of rights, including freedom of religion (Art. 4); rights in movable and immovable property (Art. 13); access to courts (Art. 16); freedom from undue restrictions on employment (Art. 17); primary education (Art. 22); and identity papers (Art. 27). It also makes persons recognized as refugees eligible for more permanent forms of relief, such as political asylum, residence, and citizenship, subject to the discretion of the granting state. These instruments are intended to improve the status of refugees and to grant them the widest possible guarantees of fundamental human rights.

In addition to the guarantees provided under the Refugee Convention and Protocol, the international refugee regime brought about by these instruments provides a mechanism to ensure compliance with them, to implement durable solutions for refugees, and to provide for their protection. This mechanism is the UNHCR, which predates the convention, having been established in December 1950.⁷ The UNHCR statute itself specifies the most critical aspects of the agency's protection function, including promoting international agreements for refugee protection, supervising and monitoring compliance with those agreements, assisting governments and nongovernmental organizations in the voluntary repatriation of refugees or in their resettlement in host or third states, and assisting refugees in protecting their properties, such as restitution or transfer of assets left in their states of origin.⁸ At its most basic level, international refugee protection provided by UNHCR is twofold: direct protection of refugees' human rights on a daily basis; and the search for and implementation of durable solutions for refu-

gees from the available choices of voluntary repatriation, resettlement, or host-country absorption. UNHCR's work in implementing durable solutions in any refugee situation is guided by the pivotal principle of individual refugee choice.

Over the years, UNHCR's role has evolved in significant ways. First, UNHCR has gradually expanded its mandate to include persons who do not fit the convention's strict statutory definition, including displaced persons, returnees, persons falling within broader refugee definitions adopted by individual states, and persons deemed "of concern to the international community."⁹ Under its "of concern" mandate, UNHCR's role as a representative of refugees has been critical in many mass displacement crises.¹⁰

Expanded protection has also meant that refugees benefit from broader concepts of human rights embodied in more recent (or more widely implemented) international conventions and enforcement mechanisms. Regional human rights organizations, specific treaty bodies, and UN organs have been set up to monitor and enforce compliance with the human rights instruments under their supervision.¹¹

Finally, international human rights instruments and human rights bodies increasingly are being utilized on behalf of refugees, and UNHCR is representing their interests with growing frequency at international human rights treaty bodies and UN organs concerned with human rights. The treaty bodies in the last few years have interpreted their provisions explicitly to reach refugees and persons in refugee-like situations. UNHCR plays an increasingly critical role in protecting the human rights of refugees as part of the mechanisms devised for implementing durable solutions and has established guidelines to implement human rights "standards, information, and mechanisms" in its overall protection activities.

PROVISIONS FOR PALESTINIAN REFUGEES

In contrast to the regime set up under the 1951 Refugee Convention and the UNHCR mandate, a separate regime governs the status of Palestinian refugees. This regime comprises two special UN agencies—the United Nations Conciliation Commission on Palestine (UNCCP) and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA)—and certain provisions of the 1951 Refugee Convention and the UNHCR statute. The regime is also grounded in special principles enunciated in a series of UN resolutions concerning the Palestinians.

The first development in the creation of a special regime for Palestinian refugees was the establishment of the UNCCP on 11 December 1948.¹² The UNCCP was given the critical function of protecting the refugees and furthering the consensus concerning the appropriate solution for their problems. A year later, on 18 December 1949, the UN General Assembly (UNGA) created UNRWA with the dual mission of providing direct relief and establishing a "works program."¹³ These services have been provided to those meeting

UNRWA's definition of "Palestine refugees": persons whose normal residence was in Palestine between 1 June 1946 and 15 May 1948 and who lost their homes and means of livelihood as a result of the 1948 war. It is important to emphasize that this definition is limited to needy persons and is thus markedly distinct from the protection-related definitions of refugee found in the 1951 Refugee Convention and the UNHCR statute. As a result, and as the explicit terms of UNRWA's mandate suggest, the agency's beneficiaries receive basic subsistence—food, clothing, and shelter—but none of the protections for a wide range of human rights and fundamental freedoms that were to be guaranteed by the 1951 Refugee Convention and UNHCR.

Indeed, Article 1D of the 1951 Refugee Convention singles the Palestinians out for special treatment:

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.¹⁴

In contrast to the individualized definition of refugees in Article 1A.2, Palestinian refugees are not included in the Article 1A.2 definition, but their status is defined specifically by the language and content of Article 1D. The UNHCR statute's Paragraph 7.c likewise sets the Palestinians apart, providing 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."¹⁵ The "other" UN agencies to which these provisions refer are, of course, the UNCCP and UNRWA.

The above provisions have been interpreted as meaning that UNHCR has no protection mandate over Palestinian refugees in the areas where UNRWA operates and a minimal protection mandate over them outside the UNRWA areas. They also have been widely understood to mean that Palestinians are excluded from the coverage of the 1951 Refugee Convention and the 1967 Refugee Protocol. However, the drafting history of these provisions and the context of the regime set up for the Palestinians demonstrate that these provisions have been widely misinterpreted. That exclusion was not the intent of the UN delegates should be obvious from the second sentence of Article 1D above, which extends coverage of the convention if "such protection or assistance has ceased for any reason."¹⁶ Indeed, a careful treaty analysis leads to a number of conclusions concerning Article 1D. First, far from being an exclusionary clause, it was intended as a *contingent inclusion* clause.

Second, Article 1D was intended to ensure continued protection and assistance to Palestinian refugees at all times, either through a distinct regime combining UNCCP and UNRWA or a fallback regime comprising UNHCR and the 1951 Refugee Convention. Third, Palestinians were covered by this provision as an entire group, or category, not as individuals. Fourth, Article 1D was meant to extend protection and assistance for Palestinian refugees until such time as a durable solution was found in accordance with the international consensus of return, restitution, and compensation established by UNGA resolutions, particularly Resolution 194.

WHY A SPECIAL REGIME FOR PALESTINIAN REFUGEES?

Palestinian refugees were discussed extensively throughout the drafting process of the UNHCR statute, the Refugee Convention, and the 1954 Statelessness Convention. The record of these discussions clearly reflects that Palestinians were presumed to deserve coverage under the refugee definition, to lack international protection, and to qualify for special protection from the UN. It is equally clear from these discussions that Palestinian refugees and stateless persons were excluded from the various instruments because their case was deemed unique and of such particular concern that the UN established a separate and special protection regime for them.

The international community decided that this particular refugee crisis warranted special measures for a number of reasons. Beyond the recognition of the large-scale persecution and expulsion of Palestinians as a people, effectively depriving them of both nationality and access to their homes and lands, the international community recognized that, unlike other refugee situations up to that time, the UN body itself bore heavy responsibility for their plight. A consensus arose among the UN delegates to the Refugee and Statelessness committees that, because of their wholesale persecution, there “was no doubt at all that such refugees [the Palestinians] came under the terms of Article 1 [of the Refugee Convention].”¹⁷ In other words, there was general recognition that Palestinians, as a group, met the persecution requirement of the refugee definition. However, their plight was unique because “the obstacle to their repatriation was not dissatisfaction with their homeland [as required by Article 1], but the fact that a Member of the United Nations was preventing their return.”¹⁸

The Arab states that drafted the provisions concerning Palestinian refugees (UNHCR statute and Article 10 of the Refugee Convention and Protocol) were determined that the issue remain vital to the UN community and not be “submerged . . . and relegated to a position of minor importance.”¹⁹ They also did not want Palestinians to be bound by the prevailing consensus for refugees—third-country resettlement. Instead, they demanded repatriation and compensation in accordance with the refugees’ wishes and existing international law, notably Paragraph 11 of UNGA Resolution 194 (III). This resolution established a framework by which the refugees’ individual choices—

repatriation, restitution, and compensation for losses or resettlement, rehabilitation, and compensation—would have to be respected by the states concerned. Its language was intended to codify customary law with respect to the right of return and the prohibition against arbitrary denationalization and mass expulsion. Resolution 194 (III) acknowledges that no new rights were created in proclaiming the Palestinian refugees' right of return to their homes and lands.²⁰ Although the status of Palestinian nationals/citizens after the creation of the State of Israel has been much debated, established principles of state succession,²¹ human rights,²² and humanitarian law²³ confirm that the denationalization of Palestinians was illegal and that they retain the right to return to their places of origin.

Since 1948, the principles of the internationally binding right of return have been strengthened by their inclusion in numerous treaties, many of which bind Israel as a signatory.²⁴ The right of return, most commonly articulated in the language of the Universal Declaration of Human Rights,²⁵ also is included in many draft declarations, constitutions, laws, and jurisprudence of states. Aside from the significant support existing in international conventions for the right of return, the right not to be expelled, the right to a nationality, and the right not to be denationalized on an arbitrary or discriminatory basis, a large body of declaratory law has developed through UN Resolutions affirming the right of return specifically in the Palestinian context, Resolution 194 (III) being the most important one.²⁶

The early UN resolutions on Palestine also reflected a focus on individual rights. Although the UN recognized the status of Palestinians as a people with national rights in the 1947 Partition Resolution, subsequent resolutions emphasized the Palestinians as individual refugees and war victims.²⁷ Until 1969, UN efforts in principle sought to implement the right of return and the achievement of basic Palestinian human rights. Subsequently, the UNGA, partly in response to new Arab and PLO priorities (see below), shifted its perspective to acknowledge the Palestinians as a people having rights under the UN Charter.²⁸ This recognition of the Palestinians' juridical status has been affirmed by all subsequent UN resolutions on the subject.²⁹ Despite the UN's shift in focus from the individual to collective rights of the Palestinian people, the protection of the "rights of the people" does not, as a legal matter, eviscerate or undermine their rights as individuals.³⁰ In recognition of this premise, the major international human rights instruments, although dealing primarily with individual rights, incorporate recognition of the rights of "peoples" to self-determination.³¹

THE UNTIMELY DEMISE OF THE UNCCP

Under its broad mandate, the UNCCP focused on political intervention with Israel: first, to bring it to accept the validity of the internationally binding right of the refugees to return, and later, to bring about more limited repatriation.³² These efforts culminated in Israel's offer of a limited repatria-

tion of 100,000 refugees, an offer it officially retracted in 1951.³³ In response to the impasse, the UNGA passed a series of measures beginning in 1951 that effectively terminated the UNCCP's role of implementing the durable solution of return and curtailed its role as intervenor with Israel (or other states) to protect refugees' rights and interests.³⁴ By 1952, the only aspect of the broad range of the UNCCP's protection activities that remained was gathering information on refugee property in Israel and investigating the possibilities of compensation.³⁵ The UNCCP continues today to collect and maintain records of Palestinian refugee property in its New York office, housing the most complete records of Palestinian land ownership in Mandate Palestine.

After the UNCCP was stripped of its protection function, the major vehicle entrusted with protecting the substantive rights of the Palestinian refugees dissolved, leaving them with whatever UNRWA could provide. However, under the restricted terms of its mandate, UNRWA was neither designed nor equipped to take over the UNCCP's protection function. Thus, the special protection regime designed for Palestinian refugees was bereft of its core function of providing the refugees with the most critical aspects of international protection.

PALESTINIAN AND ARAB STRATEGY

The Arab states were unanimous in their position that Israel was responsible for the expulsion of the refugees and was legally required to permit their return. They also agreed that the UN bore secondary responsibility for the refugee problem by virtue of Resolution 181 that in effect legitimized Zionist claims to Palestinian land. Hence, the Arab states felt that resolution of the

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Palestine problem rested squarely with the UN and with the states that had voted for partition, and for many years they refused to contribute to UNRWA. They also reached a consensus that absorption or resettlement of the Palestinians within Arab territories (or elsewhere) would undermine the demand for the refugees' return. These positions contributed to creating the "protection gap," which left the Palestinians

in a unique situation. Although they were to be beneficiaries of a special regime to ensure their protection, when the main prongs of that regime failed, they were left without even the minimal protections afforded all other refugees under the international burden-sharing system.

With the formation of the PLO in the late 1960s, the Palestinian and Arab strategy at the UN changed dramatically. Taking lessons from the postcolonization movements in Africa in particular, the PLO and the Arab League reformulated their message to focus on the Palestinian right to self-determination and independence. The PLO waged an intense struggle for recognition as the sole representative of the Palestinian people, the refugees being its largest constituency, and in so doing framed the Palestine problem

as a collective one. Hence, it argued vociferously and in many venues against treating Palestinian refugees as individual cases and even made explicit requests that Palestinians not apply for refugee status in the West. It also insisted that UNHCR not be involved in resettling Palestinian refugees in countries outside the Arab states. Recently, the PLO has come to question its long-held assumption that recognition of individual rights of Palestinians as refugees or stateless persons was inconsistent with its demands for recognition of the inalienable rights of the Palestinian people, including self-determination, independence, and sovereignty.³⁶ In the meantime, however, the institutionalized failure to recognize the importance of the preservation of both these sets of rights has led the PLO on a collision course between them.

THE “PROTECTION GAP” AND BASIC RIGHTS OF PALESTINIANS

The implications of the “protection gap” for Palestinians are evident in every area of the world where Palestinians find themselves and in all aspects of protection—from the provision of basic human and refugee rights to the search for durable solutions. UNRWA took on the role of being the international “face” of the plight of Palestinian refugees, but its protection function is virtually nonexistent. UNHCR, for its part, has interpreted its mandate to provide protection to Palestinian refugees under its own statute as limited. Since Paragraph 7.c of the UNHCR statute incorporates only the first sentence of Article 1D, a literal reading of that provision might support such an interpretation. As for its mandate with regard to Palestinian refugees under the Refugee Convention, the UNHCR has offered several different interpretations depending primarily on whether the state in which they reside has incorporated Article 1D. Most states follow the UNHCR’s authoritative refugee handbook, which interprets the provisions of the Refugee Convention³⁷ to suggest that Palestinians no longer receiving “assistance” from UNRWA can present a claim for determination of refugee status under Article 1A.2 of the Refugee Convention. However, UNHCR has also put forward a completely different position in a number of cases that claim that Article 1D requires that Palestinians be granted recognition as refugees without any assessment of the claim under Article 1A of the refugee definition.³⁸

As for the Palestinians in the countries of the diaspora, political marginalization, general lack of knowledge in the specifics of the Palestinian refugee case, and lack of PLO involvement in protecting individual rights of Palestinians has left the interpretation of their status to ad hoc approaches on a case-by-case basis. In Western countries, there have been a number of different, and inconsistent, interpretations of the legal principles applying to Palestinians as refugees. Most countries in the West are signatories to the 1951 Refugee Convention or 1967 Refugee Protocol, or both. Although there are a number of factors that affect Western states’ interpretations of the status of Palestinians as refugees or asylum-seekers,³⁹ the most common interpretation appears to be that refugees outside UNRWA’s areas of operation can

present claims for determination of refugee status under Article 1A.2 of the Refugee Convention and Protocol. As a result, the unique situation of Palestinians is ignored, and their claims for refugee status are treated the same as other refugees, but with severely negative results (see below).

The most serious implications of the “protection gap” are in the Middle Eastern regions under UNRWA mandate. Arab states, with the possible exception Jordan,⁴⁰ grant Palestinians very few benefits as a matter of *right*; whatever benefits they might grant are best understood as *privileges* for Palestinians—and thus revocable at any time and for any reason. Since none of the UNRWA Arab states is a signatory to the Refugee Convention or Protocol, they can deny Palestinians the guarantees of those instruments: the right to work; the right to freedom of movement both internally and externally; the right to family reunification; the right to engage in professions; the right to transfer of assets, etc.⁴¹ In the Middle Eastern states that are not UNRWA areas, the situation is not much different, as most are not 1951 Refugee Convention signatories either, nor are they signatories of the international instruments protecting stateless people. This gives the Palestinians a precarious existence in these states with regard to their human and civil rights. The actual rights and status of the refugees remain subject to political and security considerations of the Arab governments.⁴² There is no formalized legal status for Palestinians in most Arab states, their legal position depending primarily on administrative policies that change constantly.⁴³

Arab states have tended to respond to any political action by the PLO or by Palestinian factional groups by restricting the rights of all Palestinians or expelling them altogether. For example, most Palestinians were collectively expelled from Kuwait and other Gulf states in retaliation for the PLO's support for Saddam Hussein during the 1991 Gulf War. In the summer of 1995, Libya expelled several hundred Palestinians in retaliation for the establishment of the Palestinian Authority under the Oslo accords. Various Gulf states, whether or not signatories of the protocol, have expanded or contracted the rights accorded to Palestinians in keeping primarily with their need for Palestinians as skilled workers and professionals.⁴⁴

In Western countries signatory to the Refugee Convention or Protocol, applying Article 1A.2 rather than 1D means that in order to qualify as “refugees,” Palestinians, not having a nationality, must show that they are fleeing their place of “last habitual residence”—usually an UNRWA area—due to a well-founded fear of persecution on the basis of one or more of the five required grounds. But Palestinians cannot claim the original persecution by Israel because they are not Israeli nationals and Israel is not their place of “last habitual residence.” Some states do not recognize persecution by non-state actors, and thus Palestinians who fled Lebanon out of fear of persecution by militia groups are unable to qualify as refugees on these grounds. Even states that recognize persecution of Palestinians in an UNRWA area may refuse to grant asylum because the individual Palestinian may have resided in another Arab state as well and thus is able to return safely to another

state of habitual residence. Still other states find that Palestinians have “indeterminate” status, not qualifying either as refugees or stateless persons, and therefore are not entitled to the protections of either the refugee or statelessness conventions. The final result is that most Palestinian claims for refugee status are either denied or involve extremely protracted and difficult proceedings (Canada and Greece are notable exceptions) during which the individual may be denied the right to work or travel and may be held in lengthy immigration detention.

THE “PROTECTION GAP” AND ENFORCING PALESTINIAN RIGHTS

Palestinians also have suffered from the lack of any mechanism extending the evolving human rights and refugee principles that UNHCR and other organs are implementing on behalf of other refugees. UNHCR’s “rights enforcement” approach toward day-to-day refugee protection and longer-term solution efforts benefit other refugee groups in significant ways. The most important, of course, is the day-to-day presence of UNHCR protection officers in the field, where they intervene with the states involved on a regular basis. No international body has taken on this critical role for the Palestinians, and UNRWA’s intermittent attempts to fill this gap have been stymied by the acknowledged limitation of its mandate and strong Israeli opposition to any expansion of its role.⁴⁵

Since the UNCCP’s protection function was truncated, and with the limitation in UNHCR’s statute under Paragraph 7.c, no UN organ has recognized protection jurisdiction over Palestinian refugees in any UNRWA area. Certain states even have specifically requested UNHCR to enter into memoranda of understanding stipulating that it will under no circumstances exercise any mandate toward Palestinians residing in their territories.⁴⁶ Thus, whereas for other refugee groups UNHCR officially can intervene with a transgressing country to protect the day-to-day human rights of individual refugees, intervene on their behalf in domestic venues concerning their status and rights as refugees, or raise concerns about lack of protection through United Nations organs and mechanisms, it can do none of these protective functions on behalf of Palestinian refugees. The lack of any specific UN organ with a Palestinian refugee protection mandate has deprived Palestinians of obligatory international intervention, as is demonstrated whenever their refugee camps are bombed or they are massacred.

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Just as critical, Palestinians have been left out of the mechanisms that UNHCR has been implementing to expand human rights principles on behalf of refugees. These mechanisms, which are part of UNHCR’s greater protection role, include a far more active role in the human rights treaty implementation machinery, addressing root causes of refugee flows, and in-

tervening with domestic laws and policies to protect refugees' human rights and prevent expulsions. There have been some developments in the treaty bodies concerning certain human rights principles and their applicability to the Palestinian situation, but these have developed through the efforts of NGOs, not the UNHCR or any other UN organ.⁴⁷ Moreover, although these developments have been positive in terms of strengthening the applicable law for Palestinian refugees, there has been no implementing mechanism, whether through direct intervention with the state involved—primarily Israel—or through implementation at the international level.

THE “PROTECTION GAP” AND THE SEARCH FOR DURABLE SOLUTIONS

Refugee law principles include the guarantee that the options for permanent solutions available to refugees will be guided by each refugee's voluntary choice. Of the three durable solutions—voluntary repatriation, host country absorption, and third-country resettlement—UNHCR considers voluntary repatriation to be the most appropriate. Resettlement is considered a solution of last resort, when neither voluntary repatriation nor local integration is possible. In the 1990s, an estimated 12 million refugees were repatriated to such countries as Angola, Bosnia-Herzegovina, Cambodia, Ethiopia, Guatemala, Iraq, Mozambique, Rwanda, Somalia, and South Africa.⁴⁸ The right of return has been affirmed in numerous peace agreements following refugee crises in Africa, Asia, Central America, and Europe. But because there has been no recognition of the applicability of the principle of voluntary choice and the repatriation option in the Palestinian refugee case, no provisions for return have been included in Palestinian-Israeli negotiations. In the absence of any international organ with a specific mandate for promoting and enforcing durable solutions principles for Palestinian refugees, no entity specifically representing the rights of the refugees has been involved in negotiations on their behalf.

Refugee law principles and precedents also include the right to claim restitution of property and/or compensation for losses caused by the refugee-producing state. In the last twenty years, the principles on refugee return, restitution, and compensation have been greatly strengthened by provisions in numerous negotiated settlements. Where restitution is not possible, many of these agreements provide for adequate compensation as an alternative. However, no provisions for restitution have been included in the framework of the Oslo agreements for Palestinians. Restitution principles also require redress against discriminatory legislation. In this respect as well, in the absence of any international representation to enforce these rights or to further them in bilateral negotiations, Palestinians have not benefited from these refugee property restitution principles.

The special regime for Palestinian refugees requires the application of an additional body of principles in addition to standard refugee law, namely,

the many UN resolutions that are to be implemented in any final resolution of the refugee problem. The legal effect of these resolutions is relevant to the body of rights and principles applicable to the Palestinians as refugees, and several resolutions are considered critical for a just solution. UNGA Resolution 194 (III) remains the key resolution, having been endorsed annually since December 1948. UN Security Council (UNSC) Resolution 237 concerning the 1967 Palestinians displaced from the West Bank and Gaza Strip, which also has been endorsed annually since its initial passage in 1967, calls on Israel “to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities.”⁴⁹ Finally, UNSC Resolution 242 emphasizes “the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,” and calls for “achieving a just settlement of the refugee problem.”⁵⁰

The only resolutions specifically referenced in the Oslo agreements, and indeed in any of the Arab-Israeli treaties, are 242 and 338,⁵¹ the basis of the “land-for-peace” formula. However, neither resolution has specific language referring to the framework of a just solution for the refugees, and it is clear that the omission of UNGA Resolution 194 and UNSC Resolution 237 is deliberate on Israel’s part. The effect of these provisions on the rights of the refugees, as outlined in Resolution 194, is profound. Throughout the negotiations, Israel insisted on a clause that would extinguish any individual refugee claims to return, restitution, or compensation beyond whatever agreement involving “collective” claims was reached with the PLO. By making explicit reference to only the resolutions embodying the “land-for-peace” formula—in other words, satisfying the Palestinian collective demand for self-determination—but excluding reference to any resolutions delineating individual rights of the refugees, the Oslo framework legitimizes a tradeoff of the latter rights for the former.

PROPOSALS FOR IMPLEMENTING A JUST PALESTINIAN REFUGEE REGIME

The ramifications of the above analyses are clear. First, if UNCCP has failed to fulfill its protection mandate, that function must be fulfilled by another appropriately mandated UN organ. There are a number of available choices: reconstituting the UNCCP’s protection mandate, amending UNRWA’s mandate to include explicitly the full range of international protection functions, or including the Palestinians under UNHCR’s mandate. UNHCR actually has been expanding its protection mandate over Palestinian refugees in some situations, in de facto if not explicit recognition of this requirement.⁵² In light of the long years of experience of both UNHCR and UNRWA, it would seem most appropriate to bring Palestinian refugees under the protection mandate of UNHCR but continue UNRWA as the assistance agency.⁵³ This is consistent with the special regime in providing one agency for protection of Palestinian rights and another for providing material assistance.

Thus, all of the protective duties of UNHCR spelled out in its statute should be applicable to Palestinian refugees. Moreover, under the alternative regime of Article 1D, the Refugee Convention and all its guarantees toward refugees also should be fully applicable to the Palestinian refugees.

Second, under this reinterpretation, all international human rights protections available to other refugees are equally available to Palestinian refugees, including the expanded panoply of rights promoted and implemented by UNHCR in many different fora. Although in theory all human rights protections are available to Palestinian refugees, without the appropriate representation of those rights, and a forum where such rights can be raised, they simply cannot be enforced. For example, if an entity were authorized to represent Palestinian refugee claims, whether a state or nonstate representative, Palestinian refugee claims might be raised in any of the regional human rights organs. Palestinian refugees also might raise claims more successfully or seek reports and advisory opinions from the different UN human rights fora. Finally, UNHCR or an appropriately mandated UN organ could promote the appropriate mechanism to handle Palestinian refugee claims for return, restitution, and compensation and confront Israeli laws that are inconsistent with international law and that deny Palestinian refugees the right to return to their homes and to reclaim their properties.

The issue of representation of the Palestinian refugees is critical and urgent vis-à-vis a framework for continued negotiations. The PLO, which is conducting the negotiations on behalf of Palestinians, represents the interests of all the stakeholders on the Palestinian side. But individual refugee interests may be diametrically opposed to the collective rights of the Palestinians and to other stakeholders in the process. Under refugee law principles, the interests of refugees should be represented separately by a competent protection agency, along with the PLO, in the negotiations involving their long-term solutions.

Immediate interagency discussions and consultations, including UNCCP, UNHCR, and UNRWA, are required to effect implementation of international protection as provided for under the special regime established for Palestinian refugees. In all other refugee cases, the UNHCR has played a critical role in promoting and facilitating implementation of the specific rights of refugees in the context of peace agreements. There is no legal, political, or moral reason why Palestinian refugees should be deprived of international protection. Without such guarantees of international protection and mechanisms for enforcement, and without a rights-based framework for future negotiations, there will be no durable solution to the Palestinian refugee problem.

NOTES

1. UN Convention Relating to the Status of Refugees, 189 United Nations Treaty Series (UNTS) 137, 28 July 1951 (hereinafter 1951 Refugee Convention).

2. Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (hereinafter 1967 Refugee Protocol).

3. Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly (UNGA) Resolution 428 (V), UN General Assembly Official Reports (GAOR), 5th Sess., UN Doc. A/1775, 1950 (hereinafter UNHCR Statute).

4. The focus on resettlement was in response to the desire of most post-World War II European refugees not to return home but did not weaken the international legal principles underlying the right of any person to return to his or her country.

5. The burden-sharing obligation is embodied in the preamble of the 1951 Refugee Convention. Numerous UNHCR Executive Committee Conclusions on International Protection reflect this obligation, and it is incorporated in many multiparty agreements implementing durable solutions for refugees.

6. 1951 Refugee Convention, Article 1A.2, n. 1 at 152.

7. UNHCR Statute, chapter 8, was established under UNGA Res. 428 (V) of 14 December 1950; see UN GAOR, 5th Sess., Plenary, Summary Records.

8. UNHCR Statute, at UNGA Res. 428 (V), UN GAOR, 5th Sess., UN Doc. A/1775, 1950.

9. See, for example, UNGA Res. 1167 (XII), 12 UN GAOR, 12th Sess., UN Doc. A/3805 (1957). See also Economic and Social Council (ECOSOC), Res. 1655 (LII), 1 June 1972; ECOSOC, 52d Sess., Plenary Meeting, E/Res/1654 (LII)–E/Res/1697 (LII) and E/Res/1741 (LIV), 4 May 1973; ECOSOC, 54th Sess., Plenary Meeting, E/Res/1733 (LIV)–E/Res/1770 (LIV) and E/Res/1799 (LV), 30 July 1973; ECOSOC, 55th Sess., Plenary Meeting, 1797 (LV)–1827 (LVM) and E/Res/1877 (LVII), 16 July 1974; ECOSOC, 57th and Resumed 57th Sess., Plenary Meeting, E/Res/1874 (LVII)–E/Res/1914 (LVII).

10. See further UNHCR, *State of the World's Refugees: The Challenge of Protection* (New York: Penguin Books, 1993); and UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (New York: Oxford University Press, 1997–98).

11. The primary regional human rights organs are the Organization of African Unity and the African Commission; the Organization of American States with its Inter-American Court and Commission;

and the European Union and the European Court of Human Rights. The main human rights treaty bodies are the Human Rights Committee (under the International Covenant of Civil and Political Rights [ICCPR], 1996); the Committee on Economic, Social and Cultural Rights (under the International Covenant for Economic, Social and Cultural Rights [ICESCR], 1966); the Committee Against Torture (CAT); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of all Discrimination Against Women (CEDAW); and the Committee on the Rights of the Child (CRD). UN organs include the International Court of Justice at The Hague (ICJ); the UN High Commission on Human Rights and the Office of the High Commissioner on Human Rights; the UN General Assembly; the UN Security Council; and the Economic and Social Council.

12. UNGA Res. 194 (III), UN Doc. A/Res/194 (III), 1948.

13. UNGA Res. 302 (IV), GAOR, 4th Sess., UN Doc. A/1251 at 23, 1949.

14. 1951 Refugee Convention, n. 1 at 156.

15. For discussion of the text that became UNHCR statute, Paragraph 7.c, see Summary Record of the 29th Meeting at 6, 19 July 1951, UN Doc. A/CONF.2/SR.29; Lex Takkenberg and Christopher L. Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol. 3 (Amsterdam: Dutch Refugee Council under the auspices of the European Legal Network on Asylum, 1990), p. 489.

16. For a detailed treaty analysis of Article 1D and related provisions, see Susan Akram and Guy Goodwin-Gill, *Brief Amicus Curiae*, Board of Immigration Appeals, Falls Church, VA, published in *Palestine Yearbook of International Law* (Kluwer Law Institute with the al-Shaybani Society of International Law, forthcoming 2001).

17. "Remarks of the Egyptian Delegate," Summary Record of the 2d Meeting, UN Doc. A/CONF.2/SR.2, at 22; Takkenberg and Tahbaz, *Collected Travaux*, p. 209.

18. "Remarks of the Lebanese Representative," UN GAOR, 3d Comm., 5th

Sess., 328th mtg., para. 47, UN Doc. A/C.3/SR.328.

19. "Remarks of the Saudi Arabian Representative," UN GAOR, 3d Comm., 5th Sess., 328th mtg., paras. 52 and 55, UN Doc. A/C.3/SR.328.

20. See further "Progress Report of the United Nations Mediator on Palestine," UN GAOR, 3d Sess., Supp. no. 11 at 45-51, UN Doc. A/648, 1948.

21. See further Ian Brownlie, *Principles of Public International Law*, 4th ed. (New York: Clarendon Press, 1990), p. 661.

22. When denationalization is based on race or ethnic origin, it is a violation of the general principles of nondiscrimination in customary international law, as well as of Articles 1 and 16 of the ICCPR, 999 UNTS 173, 19 December 1966, and Article 5.d.ii of the CERD, 660 UNTS 221, 7 March 1966.

23. Humanitarian law principles also prohibit transferring civilian populations under the control of an occupier and require return of those expelled. The four Geneva Conventions of 1949, particularly the Fourth Geneva Convention, have explicit provisions affirming the right of return to persons forced from their homes by hostilities. See further "Geneva Convention for the Protection of Civilian Persons in Time of War (Geneva IV) of 1949," 75 UNTS 31, 12 August 1949.

24. The right of return is expressly recognized in most international human rights instruments, including, Article 13.2 of the Universal Declaration of Human Rights (1948); Article 12.4 of the ICCPR; Article 5.d.ii of the CERD, 7 March 1966; Article VIII of the American Declaration of the Rights of Man, Organization of American States (OAS), Res. XXX, OAS Official Records, OEA ser. L/V/14 (1965), reprinted in Burns H. Weston et al., eds., *Basic Documents in International Law and World Order* (St. Paul: West Publishing Co., 1990), pp. 293-94; Article 22.5 of the American Convention on Human Rights, 1144 UNTS 123, 22 November 1969; Article 12.2 of the African Charter on Human and Peoples' Rights, 1981, 21 ILM 59, 1982; and Article 3.2 of Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, 1950.

25. Universal Declaration of Human Rights, Article 13.2.

26. Other resolutions calling for the return of Palestinian refugees to their homes and lands include UNGA Res. 273 (III), UNGA Plenary Meetings, 3d Sess., UN Doc. A/855 (1949) of 11 May 1949, admitting Israel as a member of the UN conditioned on implementation of Resolution 194; UNSC Res. 93, UN Security Council Official Reports (SCOR), 6th Sess. at 7, UN Doc. S/inf/6/Rev. 1 of May 1951, calling on Israel to facilitate the return of those Palestinians expelled from the demilitarized zone after the 1948 war; and UNGA Res. 3236, UN GAOR, 29th Sess., Supp. No. 3 at 4, UN Doc. A/9631, 1974, reaffirming the right of the Palestinian people to self-determination and the right of refugees and displaced persons to return to their homes.

27. W. Thomas Mallison, Jr. and Sally Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question* (New York: United Nations, 1979), p. 39.

28. See, for example, the first paragraph of UNGA Res. 2535B (XXIV) of 10 December 1969, UN GAOR, 24th Sess., Supp. No. 30 at 25, UN Doc. A/8730 (1970).

29. See, for example, UNGA Res. 2672C (XXV), UN GAOR, 25th Sess., Supp. No. 28 at 36, UN Doc. A/8028; UNGA Res. 3210 (XXIX), UN GAOR, 24th Sess., Supp. No. 30 at 25, UN Doc. A/8730, 1970; UNGA Res. 3236, UN GAOR, 29th Sess., Supp. No. 31 at 4, UN Doc. A/9631.

30. See Lex Takkenberg, *The Status of Palestinians in International Law* (New York: Oxford University Press, 1998), p. 255 and sources cited therein.

31. See ICCPR, CCPR, UN Doc. CCPR/C/81/Add.4 at 5, and ICESCR, 999 UNTS 171, 19 December 1966, common Article 1.

32. David P. Forsythe, *United Nations Peacemaking: The Conciliation Commission for Palestine* (Baltimore: Johns Hopkins University Press, 1972), p. 70.

33. *Ibid.*, 83.

34. UN Res. 394 (V) of 1951, UN Doc. A/Res/394 (V), directed the UNCCP to establish a Refugee Office, which would make assessments for payment of compensation and take "measures for the protection of the rights, property and interests of the refugees."

35. The UNCCP's functions further were constrained in 1952, when its budget was limited solely to maintaining a record-keeping office in New York; see UNGA, Plenary Meetings, 6th Sess., Agenda Item 24.a at 1, UN Doc. A/2072, 1952.

36. Takkenberg, *Status of Palestinians*, p. 134.

37. Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, para. 143.

38. *Mohamed Sharif Ahmad v. The Ministry of Public Order*, 790/1993 at 3 *Mohamed Ahmed Radwan v. Ministry of Public Order*, 520/1993, at 3; see Akram and Goodwin-Gill, *Brief Amicus Curiae*.

39. For a review of jurisprudential interpretations on the applicability of Article 1D and Article 1A.2 to Palestinian refugees in eleven countries that are parties to the Refugee Convention, see Akram and Goodwin-Gill, *Brief Amicus Curiae*.

40. All Palestinians in the West Bank, as well as Palestinian refugees in the East Bank, became Jordanian citizens in 1950 upon the creation of the Hashimite Kingdom of Jordan and comprised more than half of the new state's population. It must be noted that although Jordan is the only Arab state to have granted collective citizenship to Palestinian refugees, their legal status is not secure in the same way as the status of citizens in Western states, primarily because the decision to withdraw citizenship status clearly resides with the Jordanian monarch, without judicial or legislative limitation. Jordanian monarchy fiat can best be illustrated by the decision to denationalize West Bank Palestinians from Jordanian citizenship in 1988, which the Jordanian High Court determined was an act of state and not reviewable by the court. *Al Kour v. Minister of Interior*, Jordanian High Court of Justice, HC 164/90, 24 January 1991, originally published in the *Journal of the Bar Association* 39, no. 6–8 (June–August 1991), at 1040; unofficial English translation in *Palestine Yearbook of International Law*, vol. 6 (Nicosia: al-Shaybani Society of International Law, 1991), p. 68.

41. Beginning in 1952, the Council of Ministers of the Arab League adopted a series of resolutions concerning the status and treatment of Palestinian refugees in

their territories. For a compilation of these agreements, in English translation, see Abbas Shibliak, *The League of Arab States and Palestinian Refugees' Residency Rights*, vol. 9 (Ramallah: Palestinian Diaspora and Refugee Centre [SHAML], 1998).

42. See further *ibid.*; and Takkenberg, *Status of Palestinians*, pp. 149–69.

43. Takkenberg, *Status of Palestinians*, p. 133.

44. Abbas Shibliak, *The League of Arab States and Palestinian Refugees Residency Rights*, p. 6.

45. Takkenberg, *Status of Palestinians*, pp. 280–95.

46. Author's discussion with senior UNHCR officer in charge of policy for Central Asia, South West Asia, North Africa, and the Middle East; a sample memorandum of agreement between UNHCR and an Arab state is on file with the author.

47. See, for example, "Observations of the Human Rights Committee," 63d Sess., UN Doc. CCPR/C/79/Add.93, 1998; "Report of the Committee on Economic, Social and Cultural Rights," Summary Record of 31st Meeting, 19th Sess., UN Doc. E/C.12/1998/SR.31, 1998; "Concluding Observations of Committee on the Elimination of All Forms of Racial Discrimination: Israel," 52d Sess., UN Doc. CERD C/304/Add.45, 1998.

48. "Refugee Resettlement in Selected Countries, 1990–99," table V.20, in *Refugees and Others of Concern to the UNHCR 1999, Statistical Overview* (Geneva: UNHCR, 1999).

49. UNSC Res. 237, 14 June 1967, UN SCOR, 22d year at 7, UN Doc. S/inf/22/Rev.2, 1967.

50. UNSC Res. 242, 22 November 1967, UN SCOR, 22d year at 11, UN Doc. S/Res/242, 1967.

51. UNGA Res. 338, UN SCOR, 28th year, UN Doc. S/inf/29, 1973.

52. For UNHCR ad hoc interventions on behalf of Palestinians, see Takkenberg, *Status of Palestinians*, pp. 304–9.

53. Under chapter 2, para. 10, of the UNHCR statute, the agency may delegate and coordinate refugee assistance with other "private and public" agencies. UNGA Res. 428 (V), UN GAOR, 5th Sess., UN Doc. A/1775, 1950.