

Still Waiting for Tomorrow

Still Waiting for Tomorrow:
The Law and Politics of Unresolved
Refugee Crises

Edited by

Susan M. Akram and Tom Syring

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P U B L I S H I N G

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FOREWORD

GUY S. GOODWIN-GILL*

The scholarly and thoughtful contributions to this volume cover a broad range of problems, and together should ensure that one question of principle in particular remains firmly on the international agenda. The issue can be simply stated: it is that of *responsibility*, the legal, political, and moral responsibility of States and other actors and stakeholders to find solutions to the displacements of people that are consistent with international law and concordant with justice.

Since the League of Nations first engaged with refugee issues in the 1920s, much has been achieved in developing a protective shield of rights for individuals in flight from risk of harm, and in bringing States together in pursuit of solutions; unfortunately, manifest deficiencies remain. At the time of writing, the Syrian refugee crisis had reached catastrophic proportions, presenting a scenario in which multiple armed militias, factionalism, and sectarianism all hinted strongly at a bleak, unresolved future. How long will the principal refugee receiving countries—Turkey, Lebanon, Jordan, Iraq—be left to cope with an exodus that could well top three million? What price must they pay, not in terms simply of dollars for assistance, but also in regard to their own development, security and community relations? This collection invites the reader to consider comparable problems for which resolution is still wanting, and to think ahead, about other potential causes of displacement, about how risks can be managed and preparedness enhanced.

History is there, but whether we can learn from historical examples is another matter. Clearly, history does not repeat itself in any simplistic sense, in the refugee context or otherwise, for causes, people, places, are not the same, and opportunities are infinitely variable. On the one hand, history does offer certain lessons, obvious though many of them are. It tells us of the human cost whenever solutions are left pending, of the transmissibility of despair through generations, and of its not infrequent translation into active militancy. It tells us of the political costs, borne especially by ‘front-line’ receiving States, but also in international

relations more generally, as the displaced repeatedly raise their call for peace and justice.

On the other hand, solutions cannot be cut and pasted onto different scenarios. If history fails to offer prescriptive answers, in confirming the practical necessity and value of solutions for both individuals and communities, it nonetheless reveals the sorts of principles which must underwrite solutions if they are ultimately to be durable. Above all, it reminds us that political convenience cannot be substituted for protection and security, considered across the broadest spectrum of human endeavour; that the freedom to choose is critical, whether in the grand sense of self-determination and nationhood, or in the matter of individual life choices; that compensation, restitution or reparation can make the difference between success and failure; and that a special effort will always be required for those, such as the handicapped or the isolated, who might otherwise be left behind.

Fifty-five years ago or so, the plight of 'non-settled refugees,' primarily those who had been displaced by the Second World War or events immediately thereafter, was also a matter of concern. In 1957, the General Assembly requested the High Commissioner to intensify efforts to achieve permanent solutions for the maximum number of refugees remaining in camps, but without losing sight of the needs of others.¹ In the Third Committee the following year, the High Commissioner spoke of the 'Camp Clearance Programme' and of its aim 'to abolish camps as places of permanent residence for refugees.' His critique was that camps led to a feeling of isolation from the world, commonly left refugees unable to contribute economically and socially to life around them, resulted in a sense of hopelessness at the prospect of a camp life in perpetuity, and did great psychological damage.² The High Commissioner also brought up the idea for a 'World Refugee Year,' which was quickly endorsed by the General Assembly. The two aims for the Year were:

'(a) To focus interest in the refugee problem and to encourage additional financial contributions from Governments, voluntary agencies and the general public for its solution,

'(b) To encourage additional opportunities for permanent refugee solutions, through voluntary repatriation, resettlement or integration, on a purely humanitarian basis and in accordance with the freely expressed wishes of the refugees themselves.'³

Given its emphasis on 'a purely humanitarian effort'⁴ and fund raising, World Refugee Year certainly had a positive impact. Over \$70 million was contributed, and the High Commissioner could announce the completion

of the camp clearance programme in Europe.⁵ The General Assembly, in turn, noted that the Year had been a 'remarkable success' in many parts of the world, 'not only financially but also in promoting solutions of problems relating to large numbers of refugees, particularly those who are handicapped. . .'.⁶

Looking back, however, it is important to locate this initiative not only in the prevailing political context, but also with due recognition for the nature of the issues then facing the international community of States (or at least those States whose interests led them to engage with the refugee question). First, the strong emphasis on the year as a 'purely humanitarian effort' meant that there was little or no engagement with the deep politics of unresolved refugee situations.⁷ Second, as the numbers were already down, the emphasis in the Camp Clearance programme was very much on *individually* targeted measures for resettlement, integration or voluntary repatriation,⁸ rather than on political solutions for refugee communities at large. Nevertheless, as the High Commissioner hoped, that programme will at least have demonstrated that, 'it is no solution to keep refugees in camps. . .'

As the contributions to this volume show, attaining durable solutions for refugee problems can be negatively affected by events and measures at both the national and the international level. A State's criteria for admission or resettlement may be so tightly drawn as to deny a solution to hundreds, even thousands, of refugees whose experience of suffering and flight may have exposed them to contact with armed groups, irrespective of any personal culpability as understood in the exclusion provisions of the 1951 Convention. 'National security,' though it has international implications, is a category which demands the closest scrutiny by domestic courts if it is to retain legitimacy in a democratic society.

Uncertainty is another problem. Prediction is not an exercise much favoured by High Commissioners for Refugees, but the climate change debate has certainly encouraged thinking about how to manage future risks and about preparedness for uncertainty. Not everything can be anticipated—the Palestinian dispersal was thought to be just a temporary phenomenon when States sat down to finalize the 1951 Convention—but the history of international refugee law and organization is also a lesson in the potentialities of co-operation, and in how working together is central to solutions.

As this collection shows, however, unresolved refugee situations reveal the gaps between principle and practice, the limits of laws and rules, and the temptation for various actors to exploit those gaps. They are clearly indicative of very real deficiencies in what is otherwise quite a sturdy

international refugee regime, oriented in principle towards protection and the search for durable solutions, and possessed of institutional mechanisms which ideally should be the catalyst for effective action.

In 2009, after failing to reach consensus at its regular October meeting, the UNHCR Executive Committee did finally adopt a 'Conclusion' on protracted refugee situations.⁹ It recognised that the *status quo*, the unresolved refugee situation, was not an acceptable solution, and then set out to identify the goals for the international community, declaring with all due emphasis that voluntary repatriation is to be preferred. It coupled this with recognition of the necessity to ensure, in appropriate circumstances, that restitution of property is guaranteed where refugees return to their countries of origin or, in the absence of restitution, that sufficient provision be made for compensation. It emphasised international solidarity and burden-sharing and that, notwithstanding the priority of return, there was also room for encouraging self-reliance amongst refugees and for promoting resettlement. Significantly, and in contrast to many 'historical' approaches to refugee issues, the Executive Committee identified countries of origin as important players in the search for solutions.

This combination of calls and proposals offers matters for co-operation with matters in which States might individually take initiatives, for example, by adjusting their own resettlement criteria towards the needs of those in protracted refugee situations, and therefore perhaps away from the self-interest which is otherwise almost always a major driver. However, while the Executive Committee stressed that solutions must be pursued with full respect for the rights of those affected, the 2009 Conclusion has its shortcomings, being less than forthright on those human rights which must play a central role in the politics of solution, and saying little about practicalities, such as how to make international co-operation work in specific situations. Thus, the Executive Committee emphasised, as it had done in its 2005 Conclusion,¹⁰ that local integration is a matter of sovereign decision.¹¹ 'Sovereignty' is obviously a factor in the international refugee regime, but this traditional framing of the issue ignores those human rights considerations which may well push in the opposite direction, and fails also to give sufficient attention to special protection concerns and to the rights which international law requires to be protected, for example, in the case of unaccompanied children, of women at risk, and of those with disabilities.

The lessons of history are not there to be repeated, but they can provide moral and political guidance; they should also be the spurs to action, urging us ahead while equally keeping our focus on what is possible and viable. The seemingly intractable has been solved in the past, where the

basic challenge—that of galvanising political will in matters apparently devoid of national self-interest—was no different from today.

It might be nice to think that World Refugee Year's simple agenda could be replicated today, but across the whole spectrum: to focus interest on the refugee problem, and to encourage additional opportunities for permanent refugee solutions, on a purely humanitarian basis and in accordance with the freely expressed wishes of the refugees themselves. The numbers needing solutions in 1959/1960, however, were considerably smaller than now, and the international environment quite different. The unresolved refugee situations described or touched on in this collection show that 'equitable burden-sharing' is clearly *not* the norm; on the contrary, the capacity of the international community to fulfil its political and legal responsibilities is fragmented, not so much by fundamental disagreement on relevant international legal principles, but on a lack of will and imagination in making solutions a reality in the face of pressing need.

The 2009 UNHCR Executive Committee conclusion, recognizing the importance of political will in reaching solutions, calls for 'comprehensive, multilateral and multi-sectoral collaboration and action', which would deal with root causes, avoidance of the necessity for flight, and full respect for the rights of those affected.¹² At one level, particularly given the dimension of international peace and security, solutions fall well within the remit of the Security Council and the General Assembly, and are the proper concern of UN organisations in addition to UNHCR, of regional organisations, and of individual States. But innovation is also needed, to promote co-ordination of effort among UN institutions and in ever pushing for action, both regionally and internationally. Just as the UN Secretary-General appointed a Special Representative for World Refugee Year, so today a Special Representative of the Secretary-General for Refugee Solutions at large might be considered. Political complexity, stalemate and overlapping organisational interests demand a mandate wider than the 'purely humanitarian' premise that governs UNHCR's efforts. An institutionally cross-cutting role could effectively exploit new opportunities for partnership, ensure that solutions are consistent with international law and relevant General Assembly resolutions, and take due account of such broader political processes as may be under way.¹³

Prolonged refugee situations are commonly the product of neglect—not benign neglect, but the surely conscious decision of many States to disregard and ignore those refugees whose intrinsic needs are integrally linked to hard political issues like self-determination, peace-making, peace-building, transitional justice, and development; or on whose behalf

hard decisions must be taken, such as non-recognition, boycotts, or sanctions. In many respects, the issues *were* easier in the past. The camp clearance programme authorised by the General Assembly in the 1950s was premised on a given politics which framed the task in terms of the individual, rather than the community, and which, as High Commissioner Lindt remarked on many occasions, allowed due regard to individual choice. Many of today's unresolved situations, by contrast, engage the community in context, even if too little is done to ensure representative expression and due accounting of the community voice.

Now is the time for bold measures and for innovative steps to strengthen the international refugee regime and to bridge the responsibility gap between protection and durable solutions.

Notes

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¹ G.A. Res. 1166 (XII), U.N. Doc. A/RES/1166 (XII), (Nov. 26, 1957).

² Statement of the UN High Commissioner, Auguste Lindt, to the U.N.G.A. Third Committee, Nov. 3, 1958. The High Commissioner also mentioned the 'Far East Programme', which was directed to refugees of European origin in the Far East, who had no possibility of integrating locally, and for whom emigration was seen as the main solution.

³ G.A. Res. 1285 (XIII), U.N. Doc. A/RES/1285 (XIII), Dec. 5, 1958. The General Assembly urged States to co-operate in promoting the Year, 'as a practical means of securing increased assistance', and requested the Secretary-General to take such steps to this end as he considered necessary.' Dag Hammarskjöld appointed Claude de Kémoularia as his Special Representative and the Year ran from June 1959 to July 1969.

⁴ Statement of the UN High Commissioner, Auguste Lindt, to the Economic and Social Council, July 20, 1959.

⁵ See G.A. Res. 1388 (XIV), U.N. Doc. A/RES/1388 (XIV), (Nov. 20, 1959); G.A. Res. 1390 (XIV), U.N. Doc. A/RES/1390 (XIV), (Nov. 20, 1959).

⁶ G.A. Res. 1502 (XV), U.N. Doc. A/RES/1502 (XV), (Dec. 5, 1960); Yearbook of the United Nations, Part 1, Sec. 2, Ch. VIII, 356-61 (1960), *available at* <http://unyearbook.un.org/unyearbook.html?name=1960index.html>.

⁷ For example, while WRY generated additional funds for the UN Relief and Works Agency for Palestine Refugees in the Near East, it does not appear to have led to any relevant political initiatives; *see generally*, United Nations Yearbook, 1960, *supra* note 7, at 357.

⁸ Statement of the UN High Commissioner, Auguste Lindt, to the Economic and Social Council, July 25, 1960.

⁹ See UNHCR Executive Committee, *Report of the 60th Session*, §13, U.N. Doc. A/AC.96/1078, (Oct. 9, 2009); UNHCR Executive Committee, *Report of the*

Extraordinary Meeting of 8 December 2009 of the 61st Session, §5, U.N. Doc. A/AC.96/1080, (Dec. 29, 2009); UNHRC, Executive Committee, *Report of the 61st Session*, Annex II, U.N. Doc. A/AC.96/1095, (Oct. 12, 2010).

¹⁰ UNHCR, Executive Committee, *Report of the 56th Session*, ¶22, U.N. Doc. A/AC.96/1021, (Oct. 7, 2005).

¹¹ UNHCR, *Report of the Extraordinary Meeting of 8 December 2009 of the 61st Session*, *supra* note 9, at §5(h).

¹² UNHCR, *Report of the Extraordinary Meeting of 8 December 2009 of the 61st Session*, *supra* note 9, at §5(a), (b).

¹³ UNHCR, *Report of the Extraordinary Meeting of 8 December 2009 of the 61st Session*, *supra* note 9, at §5 (c), (n).

CHAPTER ONE

AN ESSAY ON THE CAUSES AND FACTORS OF THE UNRESOLVED PALESTINIAN REFUGEE PROBLEM: A VIEW FROM AN UNRWA COMMISSIONER GENERAL

KAREN KONING ABUZAYD*

I. Introduction

Long before the 1948 Arab-Israeli war when 750,000 people fled or were forced out of Mandate Palestine, the stage was set for Palestinians to become—and to remain—refugees. From the late 19th century the Zionist movement had conceived a plan for a Jewish return to the Holy Land. The movement foresaw the creation of a Jewish state, which by definition could not accommodate –or tolerate–Arab Palestinians living on the territory designated for the Jewish ‘home’ at that time. The ability of the Zionists to influence the ‘big’ powers in the first half of the 20th century was consolidated by the horrors of the Holocaust and the consequent attempt of those powers to make up for the events of World War II. Since the 1940s there have been few voices raised on behalf of Palestinians, particularly with regard to their right to an independent state or the right of those who remain refugees since 1948 to return home—the preferred solution for all refugees around the world.

This essay will review events from the early part of the 20th century until today, focusing on the origins of the Palestine refugee condition and the meager attempts by the ‘international community’ to protect Palestinian refugee rights.

II. Root Causes

On July 24, 1922, the League of Nations granted Britain a mandate to administer the territory covering what today is known as the occupied Palestinian territory (West Bank and the Gaza Strip), Jordan and Israel. The Mandate divided British authority between Transjordan, under Hashemite and indirect British rule and Palestine, under direct British rule. The latter was known as the British Mandate for Palestine, which made provision for ‘a home for the Jewish people.’ Over the following two decades, fluctuating cooperation and conflict among the British, Arabs and Zionists over immigration to Mandate Palestine culminated after World War II in Zionist and American pressure to create a Jewish State in Palestine.

In 1947, the British declared their intention to leave Palestine, returning their mandate to the United Nations and requesting the United Nations General Assembly (“UNGA”) to make recommendations concerning the future of Palestine. The UNGA set up a UN Special Committee on Palestine (“UNSCOP”) to “. . .investigate the cause of the conflict. . .and. . .prepare a report to the General Assembly and. . .submit such proposals as it may consider appropriate for the solution of the problem of Palestine.”¹ The 11 nation members of UNSCOP, having considered a number of proposals, including that of a bi-national state, were apparently convinced that the enmity between Arab Palestinians and Jews would prevent their living together in one state. They, therefore, recommended partition into two states.

On November 29th 1947, the UN voted for partition in UNGA Resolution 181, awarding 61% of Mandate Palestine to a Jewish State. The British Mandate expired on May 14th 1948, the establishment of the State of Israel was declared and the Arab-Israeli war broke out on May 15th 1948. These events comprise the onset of what continues to be seen by Palestinians as ‘al-Nakba’ or ‘the Catastrophe.’ At the end of the war in March 1949, the new State of Israel kept the majority of the territory granted to it by Resolution 181 and took control over another 60% of what had been allocated to Arab Palestine, an irrefutable ‘catastrophe’ for Palestinians.²

The consequence of partition and the inevitable war which followed was the forced exile of 726,000 Palestinians from their homes in Mandate Palestine.³ The majority of those fleeing made their way to neighboring territories or countries. They found refuge in what came to be known as the Palestinian Territory (West Bank and Gaza), the Hashemite Kingdom of Transjordan (since 1949, the Hashemite Kingdom of Jordan), the Syrian

Arab Republic, the Republic of Lebanon, the Arab Republic of Egypt and the Kingdom of Iraq (since 1958, the Republic of Iraq).⁴

III. Agencies established by the UN for Palestine refugees: UNCCP, UNRWA and UNHCR

A. The United Nations Conciliation Commission for Palestine (UNCCP)

On 11 December 1948, the UN General Assembly passed Resolution 194, creating the UN Conciliation Commission for Palestine (“UNCCP”). The UNCCP was expected to ‘conclude’ the 1948 war and work toward a ‘final settlement’ of all outstanding issues between the parties to the war. The issues of particular relevance to the Palestine refugees were dealt with in Section III, Article 11 of the Resolution as follows:⁵

(i) *‘Right of return.’*

Resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.

(ii) *‘Repatriation, resettlement and economic and social rehabilitation.’*

Instructs the CC to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.

The Commission continues to present annual reports to the United Nations, passively keeping alive these issues most relevant to Palestine refugees: the ‘right of return’ and ‘restitution,’ issues which are repeatedly ignored rather than addressed in the off and on negotiations that have passed for a peace process since 1949.⁶

B. The United Nations Relief and Works Agency for Palestine Refugees (UNRWA)

In response to the recognized urgency of the needs of hundreds of thousands of refugees who fled from Palestine, the United Nations established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) by UNGA Resolution 302 (IV) on 8th December 1949 as a subsidiary organ of the UNGA, to provide relief and works services to the refugees.⁷

Today, some five million Palestine refugees (including the descendants of the 1948 refugees, according to the family unity principle applying to all refugees around the world) are registered with UNRWA in the West Bank and Gaza, Jordan, Syria and Lebanon.⁸

The UN operational definition of a Palestine refugee is ‘any person whose normal place of residence was Palestine during the period between 1 June 1946 and 15 May 1948, and who lost both home and livelihood as a result of the 1948 Arab/Israeli conflict.’⁹

Palestine refugees are the sole group of refugees for whom there is an agency devoted exclusively to them. When the Office of the United Nations High Commission for Refugees was created in 1950 to protect and assist other refugees, the Palestine refugees were specifically excluded on the basis that they were already served by another UN agency.¹⁰

Today, UNRWA provides basic public services (primary education, primary healthcare, relief and social services, vocational training and microfinance programs). It is designed to promote self-reliance among Palestine refugees in a defined geographical environment.¹¹ UNRWA’s 2013 General Fund budget (which covers the core services provided to the refugees) is \$675 million, serving a population of 5.3 million refugees in the five separate, mainly urban, ‘fields.’¹² This is a conservative expenditure when matched against comparable locations, services and numbers of beneficiaries. Its functions are carried out largely by 30,000 Palestine refugee staff, the majority of them professionals—teachers, medical workers, engineers and administrators.¹³ UNRWA’s success since 1949 can be measured by the fact that only one third of the refugees live in camps (which are usually peripheral parts of existing towns) and only 6% of the refugees are in need of social services.¹⁴

C. The United Nations High Commissioner for Refugees (UNHCR)

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) received its mandate in General Assembly Resolution 428 (V) in December, 1950 to ‘provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them.’¹⁵ It functions on the basis of the 1951 Convention Relating to the Status of Refugees. ‘Persons of concern’ have, over the years, been added to its mandate, including some groups who are internally displaced and individuals who are stateless. Palestine refugees, in countries outside where UNRWA functions, are entitled to request UNHCR services and protection.¹⁶

III. International Legal Principles: Refugee Rights and State/UN Obligations

The ‘right of return’ and ‘compensation’ as promised in Resolution 194, and renewed annually at the UNGA, continue to resonate in the minds and hearts of Palestinians, who insist that the Resolution reinforces their legal and political rights to their original homes and the land they will be able to reclaim in their own independent state. These rights are a cornerstone for Palestinian resistance and essential to their persistence in identifying themselves as Palestine refugees who are still struggling for their right to statehood and Palestinian citizenship no matter where they are or what other status they have acquired.¹⁷

The ‘right to return’ and ‘compensation’ are core issues for Israeli-Palestinian ‘final status’ negotiations.¹⁸ The UN view is that a just and durable solution to the issue of Palestine refugees must be found in accordance with international law and existing UN resolutions, including Resolution 194.¹⁹ The parties are obliged to negotiate an outcome consistent with the principles of international law as affirmed by UN resolutions.²⁰

IV. The Protracted Conflict over Claims

In considering how to address Palestine refugee ‘claims,’ it is necessary to underscore that Palestinian rights as refugees are not outside the framework of legal rights afforded other refugees. It is important to refer to the ‘durable solutions’ defined in the 1951 Convention Relating to the Status of Refugees, which governs UNHCR’s activities and provides

the framework for solutions for all refugees.²¹ The Convention ensures a refugee's right to seek and enjoy asylum in another state, and eventually a 'durable solution' option, that is, voluntary repatriation, local integration or resettlement in a third country. Repatriation, or return to one's original home, is the solution usually preferred by the refugees and by both the country of origin and the country of asylum. It is the only 'right' that is absolute of the available durable solutions, as the right to return home is guaranteed under treaty and customary law and is a core obligation of all states of origin to accept the return of the inhabitants of their territory.²² Each of the three durable solutions must be offered and agreed to by the refugees, by the countries of origin, and the asylum or resettlement states. Unlike the obligation on the state of origin to accept back the inhabitants of their territory, a country of asylum or resettlement is not legally obliged to accept an asylee or refugee permanently on its territory.

However, multi-state agreements to resolve major refugee crises involving return, host country absorption and third-country resettlement are often brokered by external parties—a UN agency, non-government parties engaged in conflict resolution or governments friendly to, or with an interest in, the refugees or the country of origin and/or asylum. In best case scenarios the 'brokers' have negotiation expertise, and use their skills impartially on behalf of all the parties involved. Moreover, these agreements usually begin with the premise that the right to return is a necessary prerequisite to a shared obligation amongst other states to accept a proportion of the refugee population unable or unwilling to return to the country of origin (conditions largely absent in discussions about Palestine refugees).²³

The particular difficulty with realizing the preferred solution—repatriation—for Palestine refugees is obvious, given the 'threat' the State of Israel perceives would be posed to its defining characteristic, that of being a Jewish homeland. The fear that granting the 'right of return' would result in an influx of any number of Palestine refugees, sufficient to change the demographic majority of Jewish citizens, has been turned into a claim that the right of return requires the 'destruction' of the Israeli state. More discouraging for those who might attempt to realize a durable solution for refugees in a Palestinian state, these developments are rooted in religion and an unassailable belief by Israelis that they have a right to the 'biblical' land, while the Palestinians make their claim on the basis of being Palestinian, belonging to the land of Palestine (as in Resolution 194) and whose ancestors had lived on and tilled this same land for centuries before the declaration of the Israeli state.

Complicating the possibility of reaching agreement over what is regarded as negotiable on both sides is the pronounced inequality of the two parties to the conflict. Israel is home to what is described as the sixth most powerful army in the world and, more important, it has the unassailable political support of the United States of America,²⁴ from which it reportedly receives officially upwards of three billion dollars in aid a year.²⁵ Israelis, as well, are in the legally and morally reprehensible position of being the Occupying Power in the Palestinian territory of West Bank and Gaza since 1967. Palestine, on the other hand, for the past two decades has had a governing Authority (the Palestinian National Authority or Palestinian Authority in UN terminology) possessing little leverage to defend its past or even current geographical boundaries. Moreover, it has no substantive ability to function independently, either politically or economically, given the control exercised over essential aspects of state functions (land, sea and air border movements, airways control, customs collection, to name a few) by Israel, the Occupying Power.²⁶

Given the origins and definition of Palestine refugees and the positions taken by powerful external actors on, inter alia, relevant UN resolutions, it is not surprising that decades-long negotiations to end Palestine refugee status, which began as part of Palestinian/Israeli peace talks and are inextricably linked with the creation of the Palestinian state, continue until today. Milestones along the way include the 1991 Madrid Conference, which was the catalyst for the 1993 (non-public) talks in Norway between Israel and the Palestinian Arabs that launched what became known as the Oslo peace process.²⁷ This led to the 1993 Declaration of Principles on Interim Self-Government Arrangements—known as the Oslo Accords²⁸—and later to the 2000 Camp David meeting.²⁹ While no agreement was reached at Camp David, a trilateral (Israel, Palestine and America) statement was made conveying that efforts would continue and would be based on UN Resolutions 242³⁰ and 338,³¹ promulgated at the end of the 1967 and 1973 wars, respectively, proclaiming that both sides were committed to eschewing violence.

To understand, in part, what has taken place on the ground over the past 20 years requires examining the Oslo Accords more closely, and more specifically, the Oslo II Agreement of 1995, which further complicated the possibility of reaching a Palestinian/Israeli peace agreement that would permit an independent, viable State of Palestine to exist and bring an end to Palestine refugee status. The Oslo Accords are based on a vision of a ‘two state solution,’ or a state of Israel and a state of Palestine living side by side in peace and security. Negotiators agreed to an odd (while not unique) step-by-step arrangement, decidedly disadvantageous to the

Palestinians. The Palestinian Authority would gradually demonstrate its ability to function as a reliable ‘partner’ (i.e., proving the ability to guarantee Israel’s security), and would then be rewarded with gradually more independence and control over some of the lands left from the already reduced original Mandate Palestine.³² However, precisely the opposite has occurred, as Palestinian West Bank and Jerusalem land continues to be taken over by Israeli settlers.³³

A succinct summary of the most egregious content of the Oslo II Agreement (illustrated by a map) appears in the following paragraph from the Israeli Coalition Against House Demolitions (“ICAHD”).

Under the Oslo II Agreement of 1995, the West Bank was divided into three Areas: A, under full Palestinian Authority control; B, under Palestinian civil control but joint Israeli-Palestinian security control; and C, under full Israeli control. Although Area A was intended to expand until it included all of the West Bank except Israel’s settlements, its military facilities and East Jerusalem—whose status would then be negotiated—in fact the division become a permanent feature. Area A comprises 18% of the West Bank, B another 22%, leaving Area C, a full 60%, including most of Palestinian farmland and water, under exclusive Israeli control. These areas, comprising 64 islands, shape the contours of the ‘cantons’ [former Israel Prime Minister Ariel] Sharon proposed as the basis of the future Palestinian state...In this scheme Israel will expand from its present 78% to 85-90%, with the Palestinian state confined to just 10-15% of the country.³⁴

The Palestinians, under pressure from Western governments, agreed to function on, at most, 22% of British Mandate Palestine, all of which had once been their homeland.³⁵ Besides ignoring the right of return and the pre-1967 borders, this step-by-step arrangement has allowed the Israelis to control all of the West Bank and three of the Gaza borders. Furthermore, at first slowly and by now seemingly in a rush, the Israeli government has been creating ‘facts on the West Bank and Jerusalem ground’ by building settlements, roads, security areas, checkpoints, fences and walls. Peace negotiations have done nothing to slow down the massive and constant settlement construction. Consider the latest round of ‘peace talks’ brokered by U.S. Secretary of State Kerry, convened in August 2013 under a mediator with strong connections to Israel,³⁶ and which began with a token release of 100 long serving prisoners from Israeli jails at the same time an announcement was made approving the building of 2,000 new housing units in the occupied West Bank.³⁷

Today more than 400,000 settlers populate the West Bank and 200,000 more have moved into what was deemed to be Palestinian East Jerusalem.³⁸

There is no longer sufficiently contiguous territory in the West Bank that can be considered, or even function as, a viable state (quite aside from the separated and separately governed Gaza Strip, which is yet another obstacle to overcome).

Israeli laws and rules are cumulatively devised to make life increasingly complicated and oppressive for those who live in Jerusalem and the West Bank. Israeli policies make life miserable for any Palestinian who lives in the West Bank and has work, medical, education, international travel, family or other reasons to travel to Jerusalem and vice-versa.³⁹ Some argue these laws are intended to encourage (in some cases, clearly forcing) Palestinians to emigrate, a thinly disguised attempt at 'ethnic cleansing.'⁴⁰ There has also been a significant increase in settler violence perpetrated on Palestinian individuals and their property, as well as a continuing stream of displacements and removal of Palestinian structures.⁴¹ Bedouin communities are particularly at risk of forcible displacement in the West Bank as Israel's proposed 'Praver Plan' gains support in the Knesset and condemnation from, among other parties, the European Parliament.⁴²

V. The Need for a Paradigm Shift

Is there a solution that will allow Palestinians and Israelis to live side by side, with dignity and security for both peoples? Israel, despite its military strength and international political influence, will continue to feel threatened by neighbors who have been and are being mistreated, discriminated against and denied their rights. The Palestinian territory today is a conglomerate of pockets, with its borders (and revenues) controlled by an occupying power. These factors do not advance the future citizenship of Palestinians in a state of their own, even one with the tentative and truncated Oslo boundaries. So what avenues might be explored which suit Palestinians, especially those steeped in resistance until their 'right' of return is granted—as promised by UNGA Resolution 194? What may be seen as positive elements to give the refugees hope that they and their children will not remain endlessly in a stateless, refugee limbo?

The elements are few, and, unfortunately, weak, particularly when set alongside the major obstacles already described, plus the length of exile and a deteriorating 'status quo,' which in itself obviates the possibility of reaching an agreement or (it is worth repeating) a viable state and an acceptable 'home' for refugees.

For their part, Palestinian officials, as they had begun to insist at the 1995 Taba negotiations, are adamant that their goal is to follow a path

consistent with the principles of the UN Charter and international law in seeking resolution of all outstanding issues with Israel (borders, security, Jerusalem, refugees, settlements, water, land swaps).⁴³ Subsequent, although inconclusive—or ignored—proposals have been undertaken by the ‘international community’ (the 2002/3 Quartet’s Road Map, for example) and neighboring states (the 2002 Arab Initiative).⁴⁴

Today, following their newly acquired non-State observer status at the UN, Palestinian officials speak openly about what actions they will take if the current efforts fail.⁴⁵ They have prepared legal papers and documents to accede to UN Treaties and Agencies, including the International Criminal Court, and they propose to advance these applications and submit cases for judgment to the latter, including on alleged war crimes.⁴⁶ Among options under consideration are cases challenging violations of International Humanitarian Law by Israel, including under Article 49 of the Fourth Geneva Convention. Cases would build upon the International Court of Justice’s Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which found that Israeli settlements in the occupied Palestinian territories, including East Jerusalem, have been established in breach of international law. Specifically, Article 49, Paragraph 6 of the Convention provides that ‘the Occupying Power shall not deport or transfer parts of its civilian population into the territory it occupies.’⁴⁷

It follows that if current political efforts to achieve progress in the peace process flounder, then Palestinians may choose the path of international law to seek justice and redress their grievances. Such action could have consequences in terms of threats to funding for the Palestinian Authority from Western donors and all that would entail for a people and a government highly dependent on external aid to survive and function. Still, it could lead to international legal mechanisms once again, or for the first time, becoming the center of the dispute, a development which would benefit Palestinians, since international law and decades of UN resolutions favor the creation of an independent State of Palestine.

Meanwhile, proposals for a one state solution are gaining ground in the political and humanitarian literature,⁴⁸ and are discussed seriously at academic and other international events.⁴⁹ Briefly, in the ‘one- state scenario,’ Palestinians and Israelis will live equally and peacefully under one democratic government. Will the governments and the majority among the populations on either side agree?

For Israelis, this would constitute a demographic threat to the future of the Jewish state, a state they believe they have fought for and earned in the aftermath of World War II and the Holocaust, and a position for which

there is firm support or at least sympathy among many Western governments. Palestinians would have to agree, at best, to accept a second-class citizenship, as already prevails in many ways for Palestinians who live in Israel and have Israeli citizenship.⁵⁰ For two peoples who have been unable to live peacefully in adjacent territories in 65 years, agreeing on how to live together amicably in one state seems to many somewhat of a fantasy.⁵¹

Beyond the historical, political, geographic and religious ‘big picture,’ there are human rights and refugee issues to be considered in the quest to afford Palestinians the rights which are guaranteed to them, as to all human beings, under the Universal Declaration of Human Rights (not one of the 30 UDHR rights is currently enjoyed by Palestine refugees).

One factor, often cited as an ‘advantage’ for Palestine refugees, is the uniqueness of having had an agency, UNRWA, created specifically for them. Yet Section II, Article 11 of Resolution 194 has been used to proscribe the role of UNRWA, interpreting it to confine the Agency’s role to ‘assistance.’ UNRWA’s achievements are often criticized both by those opposed to its work as well as by its supporters who contend that its mandate does not extend to international protection—at least not for seeking durable solutions. Its formal mandate, adopted in 1949, unlike UNHCR’s mandate, does not specifically assign to it the ‘protection’ function, so when it addresses Palestinian rights issues, it is challenged by those who claim that UNRWA’s intervention is ‘political’ or ‘inappropriate.’⁵²

Still, there is strong political support for UNRWA’s work on protection as illustrated by the annual Resolutions adopted by the UN General Assembly on UNRWA operations. Resolution 66/74 of 12 January 2012, for example, states in operational Paragraph 3 that the UNGA “expresses special commendation to the Agency for the essential role it has played for over sixty years since its establishment in providing vital services for the well-being, human development and protection of the Palestine refugees and the amelioration of their plight.”⁵³ These resolutions receive overwhelming support annually at the General Assembly.⁵⁴

Additionally, because it offers wide-ranging services that would normally be provided by a state or local government, it faces accusations of ‘perpetuating’ the refugee problem and of creating refugee dependency. These allegations come not only from those who wish to deny Palestine refugees the right to decent living conditions, but also from those who seek to pre-empt a solution to the refugee issue in the context of the Middle East Peace negotiations. The false argument is advanced that handing the refugees over to UNHCR would be more appropriate, implying that this would also solve the right of return issue. This argument ignores the fact

that refugees' right of return to their original homes is the preferred durable solution for other refugees served by UNHCR.

A similar interpretation is given to the presence of the Palestinian Authority (since November 2012 the occupied State of Palestine). Because the Palestinians have had a government and associated institutions to serve and represent them, including in international fora (if only as an observer), at least the refugees in West Bank and Gaza are expected to be satisfied as 'citizens' with their own 'state' institutions. This view does not take into account the fact of occupation, whereby the territory, the economy and the people—that is, the movement of both people and goods in and out of West Bank and Gaza—are under the heavy-handed administration and control of the Israeli Defense Forces (IDF) 'Civil' Administration.⁵⁵

Since Oslo, the question of the future of the refugees has been dealt with by negotiators from, or associated with the Authority, which at every encounter left this most difficult issue to last as they tackled what they deemed to be more pressing issues or ones more amenable to discussion, such as security. Refugees (and Palestinians generally) have hesitated to criticize their own authorities, believing that their officials already face too many insurmountable difficulties with their Israeli counterparts, and wishing, in any case, to save their expressions of disagreement for the root cause of their problems, the occupation and the occupying power. However, it is a rare refugee (outside those among the Palestinian official establishment) who believes that she is well represented, particularly in peace negotiations regarding refugee rights, by those who have so far not seriously raised the right most important to them, that is, the right of return.

Although external parties often regard the possibility of refugees being able to return to their original homes or lands in any significant numbers as unrealistic, every refugee believes she has the right to return. The 'right' itself is not something a refugee (anywhere) will give up. This 'right' itself must be acknowledged in any negotiation, and compensation must be offered for material and psychological losses, as UNGA Resolution 194 asserts.⁵⁶

Palestinians, like many refugees, are well known for their steadfastness and their resilience. They have been able to adapt over the years to the unrelenting discrimination and hardships they experience under occupation, and in some instances from governments and people in asylum countries.⁵⁷ While these attributes have been crucial to their survival as a strong and determined people over six and a half decades, they have also contributed to a superficial acceptance of their condition, reflected by the intermittent uprisings aside from the first and second *intifadas* in the West Bank and

Gaza. Otherwise, there has been a dearth of meaningful or consistent resistance to their oppression under occupation. Instead, there has been a dependence upon mainly externally generated and influenced international negotiations that have, for the most part, postponed discussion of the refugee issue and ignored provisions of international human rights and refugee law that would lead to justice for Palestinians, and, more specifically, for Palestine refugees.⁵⁸

This adaptability, along with having to manage the hardships of their daily lives (particularly in the occupied Palestinian territories and Lebanon) has also contributed to the refugees' leaving decisions and actions to the Authority over the past 20 years. The Authority's elders appear to have been satisfied with a tentative (and misleading) international recognition, which has brought little meaningful improvement in the lives of their constituents. These leaders have grown increasingly out of touch with the Palestinian polity.

The widespread belief in the right of Palestinians to aspire to a state of their own, and the number of individuals and organizations that take an active interest in, and pursue actions on behalf of the Palestinian cause should give pause to elected (and other) governments around the world who do not show the same enthusiasm as their populations to defend and promote justice for Palestinians.

One must ask why such a popular—and just—cause, which receives consistent media coverage, does not garner more political support from world leaders or their legislatures.

VI. Conclusions

Where is international law in discussions regarding this struggle? Occupation is illegal.⁵⁹ Settlements,⁶⁰ settler violence and acquisition or seizure of territory,⁶¹ destruction of property⁶² and the wall, are all illegal.⁶³ UN Resolutions abound in defense and affirmation of an independent State of Palestine and the rights of Palestinian refugees.⁶⁴

How might the widespread support and positive factors be parlayed into action? Are there too many negatives, too many contradictions and too much Israeli power and influence to find a way to ensure justice to the Palestinians? Do Israelis and the Israeli Government understand that there will be no peace in the region without justice for Palestinians?

The coming period will be decisive as it becomes clearer whether the Palestinian leadership or the Palestinian people will choose to follow a path to seek redress for their longstanding and just grievances. One factor is certain. Support for the Palestinian cause is increasing among the

international community, as witnessed by recent votes at the United Nations and the growing international support for the Boycott, Divestment and Sanctions movement.⁶⁵

A recent potentially far-reaching development, should it serve as an example to be followed, has been the EU Commission Notice of 15 July 2012 regarding 'the eligibility of Israeli entries and their activities in the territories occupied by Israel since 3 June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards.'⁶⁶ The Notice states that the EU does not recognize the sovereignty over any of the 'territories,' which are defined as those comprising the Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem. The related guidelines do not cover EU support to Palestinian entities in these same territories. Significantly, the 'aim' is stated as 'to ensure the respect of EU positions and commitments in conformity with international law . . .'⁶⁷

At the United Nations, Palestinian statehood is no longer disputed. The outstanding issue is full membership, which requires the (unlikely to be secured) approval of the Security Council.

There are signs the political tide is turning, although translating this into an agreed (two state/one state?) solution is not yet within reach. If no progress is made on the political track, Palestinians may begin to exercise their right to pursue solutions for enforcement of their rights, anchored in international law, a path that might finally accord them justice, and both the Israelis and the Palestinians peace.

Notes

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¹ U.N. Special Comm. on Palestine [UNSCOP], Report to the General Assembly, GAOR, 2d Sess., Supp. No. 11, U.N. Doc. A/364, (Sept. 3, 1947).

² Permanent Observer Mission of the State of Palestine to the United Nations, *1949 Armistice Agreement*, PERMANENT MISSIONS TO THE UNITED NATIONS, <http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/11600> (last visited Sept. 6, 2013).

³ U.N. Conciliation Commission for Palestine, *Final Report of the United Nations Economic Survey Mission for the Middle East*, U.N. Doc. A/AC.25/6 (Dec. 28, 1949). In a June 2008 document, the Palestinian National Authority's Palestine Central Bureau of Statistics broke this figure down as follows: 280,000 in Gaza, 190,000 in the West Bank and 256,000 in Arab Countries. Press Release, The

Demographic Characteristics of the Palestinian Refugees, Palestinian National Authority, Palestinian Central Bureau of Statistics (June 2008).

⁴ In the early years, the governments in Egypt and Iraq developed their own programs to support Palestine refugees. When leadership changes took place in these two countries and the Palestine refugees became less welcome, as in Egypt after Nasser and Iraq after Saddam Hussein, support for them was transferred to the Office of the United Nations High Commissioner for Refugees (see Section II, C).

⁵ G.A. Res. 194 (III), ¶ 11, U.N. Doc. A/194 (Dec. 11, 1948).

⁶ See, e.g., United Nations Conciliation Commission for Palestine, *Nineteenth Progress Report*, U.N. Doc. A/4921 (Oct. 13, 1961) (“The right of 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...”); United Nations Conciliation Commission for Palestine, *Twenty-Fourth Progress Report*, U.N. Doc. A/6451 (Sept. 30, 1966) (recalling the statement from the seventeenth progress report, “the work of identification and valuation is technical in nature and constitutes a prerequisite for any settlement with regard to the rights of individuals to their immovable property.”)

⁷ UNRWA’s mandate has been renewed every three years by the UNGA. Its responsibilities were extended to cover persons displaced by the 1967 hostilities in the region. The current mandate runs until 30 June 2014. United Nations Relief and Works Agency for Palestine Refugees in the Near East, *Who We Are*, UNRWA.ORG, available at <http://www.unrwa.org/who-we-are?> (last visited Sept. 23, 2013).

⁸ Another estimated five million Palestinians meeting the above definition reside in the wider Diaspora. United Nations Relief and Works Agency for Palestine Refugees in the Near East, *Statistics*, UNRWA.ORG, available at <http://www.unrwa.org/etemplate.php?id=253> (last visited Sept. 6, 2013).

⁹ Since some of those who fled were of nationalities other than Palestinian, the United Nations used the designation of ‘Palestine refugees’ rather than ‘Palestinian refugees’. United Nations Relief and Works Agency for Palestine Refugees in the Near East, *Palestine Refugees*, UNRWA.ORG, available at <http://www.unrwa.org/etemplate.php?id=86> (last visited Sept. 6, 2013).

¹⁰ Article 1D in the July 1951 Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, which governs the application of the Convention towards Palestinian refugees states that “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 the Convention.” See LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* (1998).

¹¹ Additional emergency programs (in 2012 amounting to around \$500 million) are implemented by UNRWA during times of conflict, as in the first and second intifadas in the late 1980s and early 1990s and in the early 2000s, respectively. These interventions are not treated in this essay as they deserve separate analysis, along with the 2008-9 and 2012 attacks on Gaza and the Fatah/Hamas confrontation, which led to separate governance in the two parts of the territory. The Syria crisis has also necessitated a significant emergency program for Palestine refugees in Syria and for those who fled from Syria to neighboring countries (\$290 million is the budget for these groups in the 2013 appeal). United Nations Relief and Works Agency for Palestine Refugees in the Near East, Syria Regional Crisis Response, July-Dec., 2013, UNRWA.ORG, <http://www.unrwa.org/sites/default/files/201306071557.pdf>.

¹² United Nations Relief and Works Agency for Palestine Refugees in the Near East, *UNRWA General Fund Programme Budget 2012-2013*, UNRWA.ORG, http://www.unrwa.org/userfiles/file/financial_updates/2011/Blue%20Book%202012-2013.pdf; United Nations Meeting in Support of Israeli-Palestinian Peace, Beijing, June 18-19, 2013, Presented by Richard Wright, Director of United Nations Relief and Works Agency for Palestine Refugees in the Near East, available at <http://domino.un.org/pdfs/P1%20Richard%20Wright%20E.pdf>.

¹³ United Nations Relief and Works Agency for Palestine Refugees in the Near East, *Overview of UNRWA*, UNRWA.ORG, <http://www.unrwa.org/etemplate.php?id=85>, (last visited Sept. 6, 2013). See Lance Bartholomeusz, *The Mandate of UNRWA at Sixty*, 28:2-3 REF. SURVEY Q'LY 452 (2009) (explaining that UNRWA's Programme Budget relates to activities of all agency programmes such as education, health, relief and social services, microfinance, microenterprise, infrastructure and camp improvement).

¹⁴ This percentage does not include the 827,000 refugees who receive food assistance as a consequence of the Gaza blockade. United Nations Relief and Works Agency for Palestine Refugees in the Near East, *Palestine Refugees*, UNRWA.ORG, <http://www.unrwa.org/etemplate.php?id=86> (last visited Sept. 6, 2013).

¹⁵ UN HIGH COMM'N FOR REFUGEES, SELF-STUDY MODULE 1: AN INTRODUCTION TO INTERNATIONAL PROTECTION. PROTECTING PERSONS OF CONCERN TO UNHCR 7 (Aug. 1, 2005), available at <http://www.refworld.org/docid/4214cb4f2.html>.

¹⁶ *Supra* note 10. The UNHCR has issued several interpretations of the meaning and scope of Article 1D. For the most recent update on UNHCR's interpretation of its obligations towards Palestinian refugees, see U.N. High Commissioner for Refugees, *UNHCR Observations in the case C-364/11 El Kott and Others regarding the interpretation of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive*, REFworld.ORG (Oct. 27, 2011), <http://www.refworld.org/docid/4eaa95d92.html> (last visited Sept.19, 2013)

¹⁷ See PLO Statement on the Intifada, available at <http://www.jewishvirtuallibrary.org/jsource/History/PLOstatement88.html> ("foremost among these rights are their right to repatriation, to self-determination, and to establish a free and independent state with Jerusalem as its capital"); *The*