

Beyond Exclusion: Assessing Palestinian refugees' struggle for protection and recognition and their potential contribution to a peace settlement

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Palestinian refugees' long-fought struggle for legal protection, return and restitution relates to a broader political struggle for individual and collective recognition as key civic stakeholders in the Palestinian people's struggle for self-determination. This paper briefly sketches the turbulent history that has resulted in a political impasse and the largest group of forcibly displaced persons in the world. It also assesses the resulting 'protection gap' for these refugees and makes reference to recent developments in international refugee law and forced migration discourses that provide new legal protection possibilities. The paper concludes that invoking international law obligations in political and popular discourse and involving Palestinian refugees as key civil society stakeholders, play both a key role in the legal protection of refugees and in offering greater prospects for a peaceful resolution of the impasse.

1. Introduction

Whether as individuals or as part of a group making collective claims, Palestinian refugees have long struggled against social exclusion and for recognition of their legal rights. This struggle for individual legal protection, return and restitution relates to a broader, collective struggle for political recognition and participation as key civic stakeholders in the Palestinian people's struggle for self-determination.

Mostly excluded from the international legal regime to protect refugees, and the mandate of the United Nations High Commissioner for Refugees (UNHCR), by way of a definitional limitation,² Palestinian refugees were

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² See G. Boling *The 1948 Palestinian Refugees and the Individual Right of Return: An international law analysis*, (Bethlehem: Badil, 2007) and S. Akram and T. Rempel, 'Temporary

initially accorded legal protection through a separate United Nations (UN) agency, the UN Conciliation Commission for Palestine (UNCCP). This agency failed after two years, leaving another UN agency, the Relief and Works Agency (UNRWA) providing humanitarian assistance, but with no legal protection mandate, resulting in a legal 'protection gap'.³

Efforts to secure legal protection for Palestinian refugees in the Occupied Palestinian Territories and in neighbouring countries have been principally thwarted by Israel's denial of nationality to non-Jews, its ongoing policies of dispossession and its decades-long, belligerent military occupation, despite repeated condemnation of Israel's behaviour by the UN and others. At a political level, Palestinian refugees as a distinct group have never been included in successive, failed efforts at achieving a negotiated settlement between Israel and the Palestinians. Indeed, such efforts at 'peace-making' have deliberately excluded their involvement.

But there has been a shift, both in the possibilities for better legal protection and in the opportunities for greater political representation. After sketching the turbulent history that resulted in Palestinian refugees becoming the single largest group of forcibly displaced persons in the world, this paper assesses the resulting protection gap and then makes reference to recent developments in international refugee law and forced migration discourses that provide new legal protection possibilities for Palestinian refugees to address this gap. This paper concludes with four propositions, which are rooted in an assumption that international law obligations – in particular human rights – and the involvement of Palestinian refugees as key civil society stakeholders, fulfil important roles both in legal protection and in offering greater prospects for a peaceful negotiations process.

2. Context to the Palestinian Refugee Crisis

How issues are framed is crucial to how they are perceived in terms of state responsibility. As Valerie Hunt has written, 'context matters because context frames how an issue is understood.' Hunt goes on to argue, that 'when news is contextualized in a "thematic" framing, where issues are portrayed in more general terms, then the public tends to assign systemic or governmental accountability'.⁴

Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees', 22(1) Boston University International Law Journal (2004).

³ See L. Takkenberg, *The Status of Palestinian Refugees in International Law*, (Oxford: Clarendon Press, 1998).

⁴ V. Hunt, 'The Questionable Place of Rights in U.S. Immigration Policy After September 11: Past Policy and Present Public Attitudes', presented at the 2005 Law and Society Association Annual Meeting, Las Vegas, USA.

Most people's understanding of the Palestinian refugee issue has been bounded in terms of competing moral claims rather than the historical context in which hundreds of thousands of Palestinians were uprooted from their homes, prevented from returning and later de-nationalised by a series of laws. As discussed in this section, the historical context of the Palestinian refugee issue has generally been blind to the systematic efforts of the Zionist founders of Israel in 1948 to 'ethnically cleanse', in the words of Ilan Pappé, the Palestinian territory in order to create and maintain a Jewish majority.⁵

Since the initial expulsion of Palestinians in 1948, the Israeli legal system has only recognised Jewish nationality, excluding non-Jews from a variety of services, rights and privileges.⁶ The concept of Israeli nationality does not exist in Israeli law.⁷ Israel is possibly the only country in the world where citizenship and nationality are two entirely separate concepts. Palestinians who became citizens of Israel in 1948 therefore do not enjoy any legally protected nationality. Drawing on this exclusive legal distinction, many policies of the Israeli government, particularly concerning the Israeli occupied territories of the West Bank and Gaza, have been characterised by a growing number of authors, including former president of the United States of America Jimmy Carter as apartheid, or 'apartheid-like' practices.⁸

According to the UNRWA and Badil Resource Center for Palestinian Residency and Refugee Rights (Badil), Palestinian refugees form the largest single group of forcibly displaced people in the world, estimated at between five and seven million. Approximately one third of uprooted and dispossessed Palestinians live in refugee camps in Gaza, the West Bank, Jordan, Syria and Lebanon, assisted by UNRWA. The remaining refugees live in exile as part of host societies in other countries, though not all have citizenship.

⁵ I. Pappé, *The Ethnic Cleansing of Palestine* (London: One World, 2006).

⁶ M. Zeidan, 'Citizenship without Nationality: The Case of the Palestinian Arab Minority in Israel', Conference paper presented on his behalf by Masri, M. at the Law and Society Association Meeting 2008, Montreal, Canada, 29 May – 1 June 2008.

⁷ J. Schehla, 'The Invisible People Come to Light: Israel's "Internally Displaced" and the "Unrecognized Villages"', 31(1) *Journal of Palestine Studies*, 20-31 (2001) and J. Schehla, 'The Material Consequences of Institutionalized Discrimination: Citizens and "Nationals" in Israeli Law', Conference paper presented at the Law and Society Association Meeting 2008, Montreal, Canada, 29 May – 1 June 2008.

⁸ J. Carter, *Palestine, Peace not Apartheid* (Simon and Schuster, 2006); UN, 'Report of the UN Special Rapporteur John Dugard on the situation of human rights in the Palestinian territories occupied since 1967', (2007); U. Davis, *Apartheid Israel: Possibilities for the Struggle Within* (London: Zed Books, 2003); P. Bennis, *Understanding the Palestinian-Israeli Conflict*, 46-49 (Northampton: Olive Branch Press, 2007).

Large numbers of Palestinians reside in Egypt and – until recently – in Iraq, while smaller numbers reside in various countries in Europe, the United States and elsewhere in the world.

Table 1: Statistics of Palestinian Refugees and Internally-Displaced Persons (IDPs)

Year	UNRWA Registered 1948 Refugees	Non-registered 1948 Refugees	1967 Refugees	IDPs in Israel since 1948	IDPs in the OPT since 1967**
2007	4,510,510	975,190	914,112	325,441	111,803
2008	4,671,811*	1,014,741	955,247	335,204	128,708

* Figure excludes 48,800 persons receiving relief in Israel who were the responsibility of UNRWA until June 1952.

** Including 37,000 persons (2008) who are internally displaced refugees – i.e. refugees displaced at least twice.

The figures above reflect estimates according to the best available sources and population growth projections. Figures are therefore indicative rather than conclusive.

SOURCE: *Badil Resource Center on Palestinian Residency and Refugee Rights*

As table 1 reveals, both an estimated 335,204 Palestinians with Israeli citizenship who have been unable to return to their homes and lands since 1948 after being forcibly displaced, and a further 128,708 Palestinians forcibly displaced by events in 1967 are considered to be internally-displaced persons in terms of international law.⁹ Similar to most other refugee situations in the world, conditions for Palestinian refugees in each country are very different, though they all are entitled to various universal rights. However, unlike most other refugee situations in the world, Palestinian refugees' right to return (ROR) is not acknowledged by the state of Israel.

So how did Palestinians come to be forcibly displaced? Despite numerous books and articles about the systematic dispossession, transfer and other forms of forced removal of Palestinians, there remains a high level of ignorance about the origins of the Palestinian refugee crisis.¹⁰ With

⁹ K. MacAllister and I. Jaradat-Gassner (editors), *Survey of Palestinian Refugees and Internally-Displaced Persons (2006-2007)*, 44 (Bethlehem: Badil, 2007) and *Survey of Palestinian Refugees and Internally Displaced Persons 2008-2009*, Bethlehem: Badil, p.58.

¹⁰ c.f. M. Palumbo, *The Palestinian catastrophe: the 1948 expulsion of a people from their homeland* (London: Quartet, 1989); I. Pappé, *One Land, Two Peoples* (Cambridge: Cambridge University Press, 2006) and I. Pappé, *supra* note 5; E. Rogan and A. Shlaim, *The War for Palestine: Rewriting the History of 1948* (Cambridge: Cambridge University Press, 2001) and to some extent B. Morris, *The Birth of the Palestinian Refugee Problem* (Oxford: Oxford University Press, 1998), although Morris later revised the book (*Revisited*, 2004) and

some notable exceptions, there have been few efforts, particularly from within Israel, to correct this ignorance. The Palestinian-Arab narrative of dispossession, which is rooted in international law, directly conflicts with a Zionist narrative of maintaining a Jewish 'homeland'. Nur Masalha has termed the Zionist narrative a 'politics of denial',¹¹ while the alternative Jewish-Israeli organisation Zochrot has referred to the Zionist narrative as intertwined with Israelis' collective 'amnesia'.¹²

The most significant event contributing to Palestinian dispossession and exile were the events directly leading to and following Israel's unilateral declaration of independence, which Palestinians refer to as the *nakba*. The process of creating the state of Israel involved the systematic dispossession of Palestinian land and property, extending well into to the time of the British Mandate over the territory, and before.

The following sections explain what I regard as the four main phases of this process of ethnic cleansing, which has resulted in an acute protection gap for Palestinian refugees, with both legal and political aspects. Since the dominant understanding in both popular and political discourses of what occurred in what was once known as the Palestinian territory have been framed by a Zionist-Israeli narrative, the following is deliberately informed by, though hardly pretending to fully represent, a lesser-known Palestinian narrative. Such a perspective, which others have written on far more comprehensively than the space in this paper allows, helps explain the origin of claims made by Palestinian refugees and why efforts to secure a peace settlement that ignores this narrative have failed so dismally.

2.1 Phase 1: British Mandate over Palestine

Up until the beginning of the twentieth century, the area known as the British Mandate of Palestine formed part of the Ottoman Empire for several hundred years. With the end of the First World War, the newly-established League of Nations introduced a paternalistic system of mandate territories, providing for a drawn-out process of decolonisation. Countries that emerged victorious from the First World War, including Great Britain, became 'trustees' of territories previously under their own control and under the control of others. Under this system, administration of the territory of Palestine fell to Britain.

shifted responsibility for Palestinian dispossession away from Israel on to neighbouring Arab States. For a comprehensive bibliography and other (e.g. audio-visual) resources on this subject, see www.iss.nl/isrpal Last checked on 29.3.10.

¹¹ N. Masalha, *The Politics Of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto Press, 2003)

¹² A. P. Weaver, 'Remembering the Nakba in Hebrew: Return Visits as the Performance of a Binational Future', *6 Holy Land Studies*, 125-144: 127.

Almost immediately following its acquisition of the Palestinian mandate, the British colonial administration faced increasing pressure by Zionist organisations who desired that a Jewish state be formed in that territory. The administration initially permitted unrestrained acquisition of property by Zionist organisations, including the then London-based Jewish National Fund. The law observed was not British property law, but the archaic Ottoman law that did not adequately respect the rights of Palestinian tenants. Where Ottoman law did protect public lands, such as Islamic *waqf*, such protections were widely disregarded.¹³

Jewish immigration to Palestine increased, first gradually and then exponentially following mass atrocities and ethnic cleansing operations in Europe aimed especially at Jews, but also homosexuals, gypsies and people with disabilities. Immigration to Palestine was further stimulated by a refusal of the United States, South Africa and other immigrant-receiving countries to permit additional Jewish immigration.¹⁴ Growing tensions between European-Zionist ideology and Arab communities in the middle-east and North Africa also caused great disruptions for minority Jewish communities in these countries and some chose to emigrate, including to Palestine.

Despite various explanations raised for this mass Jewish immigration, the demographic impact of this large-scale immigration to the small mandate territory of Palestine caused a massive disruption for Palestinians – Christians, Muslims and Jews – who had lived there for thousands of years. To further secure what can contemporarily understood as forcible acquisitions of land and almost unrestrained immigration as part of the vision of a long-term colonial project by Zionist organisations, Palestinian towns and villages as well as the British colonial mandate administration became the target of armed Zionist militias.

As a consequence of these events, and many others now well-documented by historians,¹⁵ thousands of Palestinians lost their homes and lands while the Jewish population in the territory increased from 60,000 in the 1920's

¹³ S. Dajani, *Ruling Palestine, A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine* (Geneva and Bethlehem: COHRE and BADIL, 2005).

¹⁴ S. Peberdy, 'Not white like us: preserving the "original stocks" and the exclusion of Jewish immigrants', in *Selecting Immigrants: Nationalism and National Identity in South Africa's Immigration Policies, 1910-2008* (Johannesburg: Wits), 57-84.

¹⁵ I. Pappé and B. Morris, *supra* note 10 as well as W. Khalidi, *Before Their Diaspora: A Photographic History of the Palestinians, 1876-1948*, (Washington D.C.: IPS, 1984); W. Khalidi, *All that remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington D.C.: IPS, 1992); N. Masalha, *Expulsion of the Palestinians: The Concept of Transfer in Zionist Political Thought: 1882-1948*, (Washington D.C.: IPS, 1992); N. Masalha, *A Land Without a People* (London: Faber and Faber, 1997); N. Masalha, *supra* note 11 and A. Abunimah, *One Country: A bold proposal to end the Israeli Palestinian Impasse*, (New York: Metropolitan Books, 2006); V. Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (London: Pluto, 2009).

to over 300,000 in 1948. Both of these developments were directly related to Zionist efforts to establish a Jewish state.

2.2 Phase 2: 1948

The second, and most dramatic phase of Palestinian dispossession was not unrelated to the first, being the culmination of the openly-stated intentions of Zionist organisations to form a Jewish state, at the cost of the indigenous Palestinian inhabitants. By 1947, the British mandate of the territory was coming to an end and members of the League of Nations (League) were busy concluding an agreement to form the UN, which would replace the League. One of the first efforts of the nascent UN was to introduce a compromise plan to resolve growing tensions between mostly immigrant Jews and indigenous Palestinians; this became known as the UN Partition Plan, contained in UN General Assembly Resolution 181 of 1947.

The Partition Plan was understandably accepted by the Zionist leaders (as they had everything to gain by it) and understandably rejected by Arab states and the Palestinian leaders (who would have faced massive dispossession by the Plan). However, the detailed terms of the Plan, which included various legal protections for all civilians, became largely irrelevant as the British withdrew and the by now dominant and well-armed Jewish-Zionist immigrant community declared the establishment of the state of Israel, precipitating a war between Israel and surrounding Arab states. Following the war, Israel, supported by powerful states including the United Kingdom, The Netherlands and later the USA,¹⁶ retrospectively interpreted the Partition Plan as justifying the expulsion of several hundred thousand Palestinians, who had been either physically expelled or fled the violence and in any event were prevented from returning to their homes and lands.

Over 530 Palestinian towns and villages were destroyed and/or entirely removed of their Palestinian Arab inhabitants as a consequence of the war. Israel, meanwhile, received widespread recognition by powerful states in Europe and the USA. Further, from the moment it declared statehood in 1948, the Israeli government declared a state of emergency, legally permitting Israel to limit fundamental rights to the inhabitants of the territory it controlled.¹⁷

The chaotic situation led the UN into a – largely self-created – *cul-de-sac*, trying on one level to preserve the rights of indigenous Palestinians while

¹⁶ W. Bass, *Support Any Friend: Kennedy's Middle-East and the Making of the U.S.-Israel Alliance* (Oxford: Oxford University Press, 2003).

¹⁷ The declaration of a state of emergency has continued, unbroken, to the present day.

simultaneously accommodating the forceful demands of Jewish-Zionist immigrants.¹⁸ As briefly mentioned earlier, the first development arising out of these UN-led efforts was the establishment of the UNCCP, which amongst other matters was mandated to protect Palestinian property rights. The second development was the establishment of the UNRWA, which was established to provide emergency humanitarian assistance to several hundred thousand Palestinian refugees who had been exiled to Jordan, Syria and Lebanon. Finally, the UN General Assembly passed Resolution 194 of 1948, which amongst other provisions affirmed well-established rights, that ‘refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date’.

2.3 Phase 3: 1967-1973

Despite these efforts of the UN, the Palestinian *nakba* seemed to have no end and in 1967 Israel once again became embroiled in a large-scale war with its neighbours. In a short period of time, an exceptionally well-armed Israeli military managed to occupy large territories: Sinai, including the Gaza Strip, the territory of Egypt; Golan, the territory of Syria and the West Bank, the territory of Jordan. The territories occupied by Israel were populated mostly by Palestinians. For those who had fled the war in 1948 and had already spent twenty years in exile, the events of 1967 that caused further, forced displacement represented a second *nakba*.

Responding with overwhelming military force to fledgling efforts by Palestinians to defend their homes and lands, the Israeli government and military officers – in 1967 and on many occasions since, including a further devastating war in 1973 – have become implicated in numerous atrocities, including acts of collective punishment against Palestinian civilians.¹⁹

2.4 Phase 4: 1973 – Present

In terms of a settlement negotiated by then US President Carter, Israel withdrew from the Sinai territory in 1973. However, Israel continued to occupy Golan, the West Bank and the Gaza Strip, in defiance of UN Security Resolution 242 of 1967.

¹⁸ This contradictory and unprincipled position of the UN was, sadly, a sign of things to come.

¹⁹ These violations are well-documented by Israeli, Palestinian and international NGOs as well as United Nations agencies, including the Office of the UN High Commissioner for Human Rights, UN OCHA, UNRWA, The Palestinian section of the International Committee of Jurists, Al-Haq, Palestinian Center for Human Rights (PCHR), B'tselem, Hamoked, Amnesty International, Human Rights Watch and many others.

Israel's occupation from the 1970s has led to annexation of Palestinian land. Israel has systematically violated article 49 of the Fourth Geneva Convention by establishing or permitting military outposts and eventually Jewish-Israeli settlements on land in the occupied territories, marked in the West Bank and East Jerusalem by the UN-brokered 'green-line' of armistice. Increasing encroachment of the settlements and military installations set up to protect the settlements has led to further forced displacement. This is but one of many flagrant violations by Israel as occupying power, and resulting in a third *nakba* for millions of Palestinians.²⁰

Defying numerous calls by the United States, European countries, the UN Security Council and General Assembly and International Court of Justice for Israel to immediately cease settlement construction and dismantle existing settlements, Israel has continued expanding the settlements, withering the prospects of realising a 'two-state solution'.



Figure 1

²⁰ As countless reports of the United Nations have confirmed, despite being a signatory to the Geneva Conventions of 1948, Israel has continually refused to respect the laws of humanitarian conflict or their human rights obligations, in particular concerning their treatment of civilians in occupied territories. Particularly horrific, recent examples of these atrocities took place towards the end of 2008 and beginning of 2009, during Israel's illegal aggression in the Gaza strip. The activities of the UN concerning Palestine are archived at: www.unispal.un.org Last checked on 29.3.10.

As figure 1 illustrates, the consequences of more than 60 years of dispossession, reinforced by a more than 40-year long occupation of the West Bank, East Jerusalem, Gaza Strip and the Golan and Israel's massive-scale construction of settlements, have resulted in an ever diminishing patch of land that – since the League of Nations mandate – states and international organisations have elusively sought to develop as an 'autonomous', Palestinian state.

Using the stated justification of protecting Israel (and its illegal settlements) against militant attacks, but in practice seeking to reinforce unsupported claims that view the West Bank, Gaza Strip and much of East Jerusalem as sovereign territories of Israel, Israel began constructing a Wall in 2002.²¹ The Wall has snaked its way around the illegal settlements,²² protecting these and Jewish settler-only roads and has encircled much of the Gaza strip. In the West Bank and East Jerusalem, the wall encroaches deep within the green line, and has caused a further wave of forced displacement.²³ The Wall cuts off Palestinians from their lands, jobs, schools, universities and businesses and reinforces a situation referred to earlier as resembling apartheid.

Responses to these crimes by armed Palestinian combatants, exercising their right to resist (though bound within the limits permitted by international humanitarian law), have also violated humanitarian law. In particular, Palestinian combatants have unlawfully launched inaccurate rockets that are unable to distinguish between military and civilian targets in Israel and have killed a small, but still unacceptable number of civilians and more especially been the source of much fear amongst Israelis.²⁴ The Israeli government's responses to these rockets have been to collectively punish and kill Palestinian civilians. In 2006 and especially in 2008-09, Israel's military forces undertook pre-emptive and grossly disproportionate – therefore illegal – attacks, in multiple attacks that furthermore involved the illegal use of certain weapons, including white phosphorous, and deliberately targeted Palestinian civilians and

²¹ Notwithstanding the fact that the Wall is a fence in some places and a thirty-foot high, reinforced concrete edifice with watchtowers in other parts of the occupied Palestinian territory, the term deliberately used here is consistent with that used by the International Court of Justice, which also termed it a 'Wall'. This point also emerged during the course of the conference in Brussels.

²² The illegally-constructed settlements are not small, isolated 'neighbourhoods' as characterised by Israel, but massive communities of several hundred thousand settlers, including college campuses, farms and other businesses, a network of roads and other transport hubs for settlers' exclusive use.

²³ Badil Resource Center and Norwegian Refugee Council's Internal Displacement Monitoring Centre, *Displaced by the Wall* (Bethlehem: Badil, 2006).

²⁴ Human Rights Watch, 'Indiscriminate Fire: Palestinian Rocket Attacks on Israel and Israeli Artillery Shelling in the Gaza Strip' (New York: Human Rights Watch, 2007).

civilian areas, as documented by United Nations²⁵ as well as Israeli and Palestinian human rights organisations.²⁶

For the 1.1 million Palestinian refugees, out of a total of 1.5 million Palestinians in the Gaza Strip, the blatant disregard by Israel for the international rules of armed conflict and the resulting atrocities has been matched by a silence on the part of most powerful countries, which has enraged many, including international legal scholars.²⁷ The experience of the past sixty years has also exposed serious weaknesses within the United Nations system. As the next section discusses, from their initial dispossession in 1948 until the present day, Palestinians have faced an acute protection gap.

3. A protection gap

As discussed in the previous section, the actual protection needs of Palestinian refugees have become obvious from a thorough consideration of the historical context that led to their dispossession. The protection gap faced by Palestinian refugees relates to legal and political failures on the part of both national and international authorities. These failures have left Palestinian refugees in particular, both displaced inside and outside Israel, without effective national or international protection.

3.1 Lack of national protection by Israel

From its very inception, Israel has consistently refused to accord Palestinians, including Palestinian refugees and internally displaced Palestinians in Israel, equal rights in Israeli civil and/or military law. As explained earlier, even for Palestinians with Israeli citizenship, the failure to accord equal rights to non-Jews and deny them a nationality is legally operationalised on the basis of several laws, most passed within

²⁵ United Nations, 'Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict', Ref: A/HRC/12/48, 15 September 2009 (The "Goldstone Report"). Other reports have been produced by the United Nations Office for the Co-ordination of Humanitarian Affairs, UN Relief and Works Agency and UN Special Rapporteur for the Occupied Palestinian Territories, most of which are available at: <http://unispal.un.org/unispal.nsf> Last checked on 29.3.10.

²⁶ A report by Al-Haq, the Palestinian section of the International Commission of Jurists, revealed evidence of the Israeli military's deliberate policies that target civilians and civilian areas. Al-Haq Brief: Legal Aspects of Israel's Attacks on the Gaza Strip during "Operation Cast Lead" (Ramallah: Al-Haq, 2009). Similar reports of deliberate atrocities against civilians and civilian areas have been produced by B'tselem, including witness reports that Israeli soldiers shot woman waving white flag, (Tel Aviv: B'tselem, 2009).

²⁷ In response to the alarming violence of 2008-09 and the lack of an even-handed response by powerful countries, a group of internationally respected international legal scholars signed a statement rejecting Israel's argument that it was acting in self-defence and accusing Israeli government officials and military commanders of war crimes. 'Israel's bombardment of Gaza is not self-defence – it's a war crime', *The Sunday Times*, London, January 11, 2009.

the first few years of Israel's existence. For Palestinians in occupied territories, the failure to recognise equal rights is based on military laws that discriminate between the rights of Palestinians and those of Israelis, and in particular Jewish-Israeli settlers.

3.1.1 Israel as occupying power

As an occupying power, Israel's government and military have violated countless international humanitarian laws and human rights laws designed to protect Palestinian civilians in general and refugees in particular. Israel has – incomprehensibly from a legal point of view – sought to justify many of their violations as undertaken in order to protect Israelis living in illegal settlements. Numerous violations have been documented by UN experts as well as Israeli and Palestinian NGOs.²⁸ These include violations of the Fourth Geneva Convention on the protection of civilians in armed conflict as well as violations of human rights law, irrespective of the state of emergency that has existed since 1948.

Israel's official terminology has dangerously blurred the debate. Refugees have been referred to by Israeli military and government leaders, the Israeli military courts and in certain Israeli laws in various, derogatory ways. Palestinian resistance fighters are referred to in a blanket way as 'terrorists', even if they observe rules of international humanitarian law by wearing uniforms and targeting the Israeli military. Owners of property that cannot be claimed are referred to as 'absentees', even though the reason for their failure to claim property is because of their inability to obtain a residence permit from Israel. Those who attempt to return to their homes, property and jobs inside Israel are referred to as 'infiltrators'. The Israeli and international media have uncritically repeated these terms and have also been partly responsible for them.

Israeli military laws that apply to occupied territories socially exclude Palestinians on the basis of separate application of law, and on the basis of defining who is permitted to live in certain areas, as designated by the failed Oslo Accords.

3.1.2 Israeli courts

Israeli courts have excluded the vast majority of internally-displaced Palestinians in Israel, which manifests itself in three main respects.²⁹ (1)

²⁸ These include reports of the UN Special Rapporteur on the Occupied Palestinian Territories, the Israeli organisations B'tselem and Hamoked and Palestinian organisations Al-Haq in the West Bank and Palestinian Centre for Human Rights in Gaza.

²⁹ This section partly draws from a presentation by S. Akram and J. Handmaker, 'Legislative and political advocacy: the obligations of Governments under international law' at the

Israeli courts have affirmed the so-called Israeli law of return, which only recognises Jewish nationality and effectively denationalises non-Jews.³⁰ (2) Israeli courts have reinforced the institutionalization of religious-exclusivity in defining nationality, as mentioned earlier, which also restricts family reunification if marriage is to a non-Jew.³¹ (3) Israeli courts have failed to recognise numerous property claims by Palestinians; only a handful of properties have been recovered through the Israeli courts. In all these respects the Israeli Supreme Court has rendered a highly circuitous interpretation of international law, closely resembling the 'exceptionalism' argument upheld by courts in the United States.³²

In these respects, and many others,³³ Palestinian rights are excluded by way of the Israeli courts (re)defining which rights are to be enjoyed by whom, on the basis of arbitrary (religious and/or ethnic-based) distinctions.

3.2 Lack of international protection

In addition to a failure of the state of Israel to protect their rights, Palestinian refugees lack protection by international organisations and third states as well as the international refugee law regime. Palestinian refugees also lack protection through a failure to meaningfully include their interests in political negotiations.

3.2.1 Early Efforts of the UN

The UN Partition Plan, while never implemented, has become the basis for various – abortive – efforts at peace between Israel and the Palestinians. Stemming from the Partition Plan, efforts to find a peaceful solution on the basis of two-states have been a central feature. This is despite widespread sentiments, reflected in scientific studies, that the overwhelming majority of Palestinians would choose a one-state solution based on international and comparative principles of a secular democratic state.³⁴ The idea of a so-called 'two-state solution' has thus principally

United Nations International Conference on the Question of Palestine, New York, Sept 2004.

³⁰ J. Schechla, *supra* note 7, p. 26.

³¹ P. Shifman, *Civil Marriage in Israel* (Jerusalem: Association for Civil Rights in Israel, 2001).

³² S. Akram and M. Lynk 'The wall and the law: a tale of two judgements', 24(1) *Netherlands Quarterly of Human Rights*, 61-106 (2006); S. Akram, 'Do constitutions make a difference as regards the protection of fundamental human rights? Comparing the United States and Israel' in *The Dynamics of Constitutionalism in an Age of Globalisation*, Frishman, M. and Muller, S. (eds.) (The Hague: Hague Academic Press / Springer, 2010), 89-109.

³³ See HRA, *On the Margins 2006: Annual Review of Human Rights Violations of the Arab Palestinian Minority in Israel* (Nazareth: Arab Human Rights Association, 2006). Last checked on 29.3.10 at: www.arabhra.org

³⁴ Near East Consulting, *Survey: 70 percent of Palestinians support one-state solution*, 24 February 2007. See also Y. Stern, 'Israeli Arabs / 'Haifa Declaration' urges Israel to own

responded to the (leftist-Zionist) views of Israel, while right-wing Zionist interests have maintained that Israel also holds a sovereign claim to the occupied territories.

The stated intentions of the UN in seeking to protect Palestinian rights have been threefold. (1) The UN aimed to partition Palestine into two autonomous, sovereign states in which Jewish-Israeli and Palestinian rights were to be equally respected in both states. This model of a 'two-state solution' has failed to progress beyond the realm of political rhetoric. Furthermore, policies and practices of the state of Israel, in particular Israel's construction of settlements and the Wall – principally promoted by right-wing political interests – have deliberately and irreversibly undermined this 'solution'.

The other two intentions of the UN in seeking to protect Palestinian rights have been (2) to provide humanitarian assistance through the UNRWA and (3) to document the property and lands of Palestinians by way of a register that was partially completed by the UNCCP. This last effort in particular has also yielded highly unsatisfactory results. More recent efforts have been to document violations of Palestinian rights in terms of international humanitarian law, in particular through the appointment of a Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 and an independent UN Commission led by Mr. Justice Goldstone in 2009 to ascertain whether war crimes had been committed in the Gaza territory during the conflict in 2008-09.

The UN General Assembly Resolution 194 of 1948 aimed to recognise Palestinian refugees' rights to return, restitution and compensation, based on long-standing, universal principles of international law. The more politically compromised, but legally binding Security Council Resolution 242 sought a 'just settlement of the refugee problem', without elaboration, also drawing on long-standing principles of international law. However, there has been no serious effort on the part of the UN membership to ensure implementation of either of these UN Resolutions and protect the Palestinian right of return. To the contrary, the UN has revised its language consistent with the position of other members of the so-called Quartet, in particular the United States, which bear very little, if any relation to international law.³⁵

up to Nakba responsibility', *Haaretz*, 15 May 2007. The declaration is available at: <http://www.mada-research.org/archive/haifaenglish.pdf> Last checked on 29.3.10.

³⁵ Created at the initiative of US president George W. Bush, together with the office of the United Nations Secretary-General, European Union and government of Russia.

3.2.2 Other states' failure to protect

A second element illustrating the lack of international protection for Palestinian refugees includes the failure of other states to hold Israel to account for its violations of international law. As a 2004 International Court of Justice (ICJ) Advisory Opinion confirmed, states are obliged to do so as members of both the UN Charter and in terms of the Geneva Conventions.³⁶ Consequently, one of the recommendations of the UN General Assembly confirming the 2004 Advisory Opinion was that there be a reconvening of member states party to the Geneva Conventions in order to implement this principle.³⁷ This reconvening of state parties has not transpired.

States have prioritised state security at the cost of human security that prioritises the protection of civilians in areas of conflict. The catastrophic situation that has resulted is reinforced by third states maintaining the legally ambiguous and morally questionable position that Israel has a 'right to exist' as a Jewish state, while the rights of Palestinian refugees receive only cursory mention, and only in the context of gaining access to humanitarian assistance.

3.2.3 International refugee law

A third, major failure to provide international protection to Palestinian refugees has been the purported exclusion from the international refugee law regime and in particular article 1D of the 1951 Convention Relating to the Status of Refugees.³⁸ While at first sight this appears to be the clearest normative example of political exclusion through legal (re)definition, it is in fact the highly restrictive interpretation of article 1D by states that has led to a break from the original intentions of the drafters of the 1951 Convention. The first part of this article reads as follows:

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.

Many states stop at this particular paragraph and fail to consider second part of article 1D, which reads:

³⁶ United Nations, International Court of Justice, 'Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', Issued on 9 July 2004.

³⁷ United Nations General Assembly, Resolution, Ref: A/RES/ES-10/15, 2 August 2004.

³⁸ United Nations, Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951).

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.

Read in its entirety, it is clear that Article 1D was never designed to leave Palestinian refugees without international protection. Indeed, as a 2002 Note on International Protection from UNHCR later confirmed,³⁹ the drafters of the 1951 Convention could never have envisaged that the UNCCP would be effectively shut down, or that Palestinian refugees would remain in exile for sixty years. And yet, state practice in the application of 1D has given undue attention to the first part of this article, resulting in the unlawful exclusion of an indeterminate number of Palestinians who have sought refugee protection outside UNRWA areas.⁴⁰

3.2.4 Exclusion from political negotiations

A fourth area, in which Palestinian refugees – and their rights to return, restitution and compensation – have lacked international protection, is the exclusion of their interests from political negotiations. This is in stark contrast to the peaceful negotiations of other conflicts, which have often placed the situation of forcibly displaced persons at the centre of the negotiations process.⁴¹

The PLO, recognised by many states and the UN as representing the interests of the Palestinian people, has raised the issue of Palestinian refugee rights as part of the collective right of return, which is itself a principal feature of the right to self-determination. The PLO cannot, however, exclusively represent the interests of refugees, who also possess a separate, individual right to return on the basis of choice, as confirmed by other, existing sources of international law.⁴²

But, even in terms of their collective rights, Palestinian refugees have been treated as a ‘final status issue’ in terms of a collective right, represented by the PLO. With the collapse of the UNCCP, which was designed to protect

³⁹ UNHCR, ‘Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugees’, (Geneva, 2002).

⁴⁰ J. Handmaker and A. Nieuwhof, ‘No man’s land: Government mistreatment of Palestinian asylum seekers’, in Musalo, K., Moore, J. and Boswell, R. (editors) *Refugee Law and Policy: A Comparative and International Approach*, Third Edition (North Carolina: Carolina Academic Press, 2006)

⁴¹ Examples include South Africa, where the return of political exiles was a central feature of negotiations between liberation groups and the nationalist government at the time as well as the former Yugoslavia, where the return of refugees to Kosovo, Bosnia, Croatia and Serbia-Montenegro formed a key pillar of the Dayton Accords.

⁴² G. Boling, *supra*, note 1.

the individual rights of Palestinian refugees, no international organisation has stepped in to defend the individual rights of Palestinian refugees. Despite its central role in the ongoing impasse and conflict between Israel and the Palestinians, the other members of the so-called 'Quartet' – the United States, the European Union and Russia – have expressed only a limited desire to address the interests of refugees. Indeed, in most cases, the rights of refugees have been excluded from the framework of negotiations altogether.

3.3 Further consequences of the lack of protection

This brief assessment of Palestinian refugees' lack of access to national and international protection has shown that there is both a lack of normative (legal) protection and a failure on the part of Israel and international organisations to exercise much in the way of actual protection either.

With some exceptions, for example the 2002 Note on International Protection by UNHCR, the failure of legal protection has been accompanied by the lack of an international body specifically mandated to represent Palestinian refugees on their individual rights. There is also no specific, binding instrument clearly guaranteeing the rights of Palestinian refugees.

Further, the lack of ongoing (actual) protection, through Israel's failure to respect human rights and humanitarian law, has been accompanied by Israel's non-recognition of basic citizenship and nationality rights to its non-Jewish residents, many of whom were also forcibly displaced in 1948. This includes the denial of property restitution, the absence of an Israeli nationality and corresponding exclusion from Israeli citizenship and other levels of institutional and social exclusion.

In addition, there is a lack of protection through control of movement in occupied territories by way of what Jeff Halper of the Israeli Committee Against Housing Demolitions, and others, have referred to as 'Bantustans',⁴³ created by way of civil and military policies. This Bantustan policy reinforces Israel's illegal settlements and settlement infrastructure, and the associated regime that primarily exists to protect the settler-colonists who reside there illegally.

Finally, refugee camps have been targeted by the Israeli military through well-documented cases of collective punishment that punish families

⁴³ J. Halper, *Obstacles to Peace: A Critical Re-framing of the Israel-Palestine Conflict*, third edition, (Jerusalem: Israeli Committee Against House Demolitions, 2005). See also: www.icahd.org Last checked on 29.3.10.

and even entire refugee communities for the acts of Palestinian armed resistance groups.

4. Closing the gap

How can these immense protection gaps be filled? While international law is so often violated, the fact that so much effort is made by states to try and establish that they are, in fact, in compliance with international law gives it an enduring value. Ultimately, however, international legal process, through legal instruments and legal mechanisms, is wholly dependent on a state's willingness and power to enforce it. As this section argues, international law should be seen as aspiring to a political objective. From a civic perspective, it is crucial both to engage with international law and mobilise advocacy in a strategic way.

4.1 (Re)engaging with international law

In the context of protection to Palestinian refugees, there are three areas of engagement that have shown some promise. These are the 2004 Advisory Opinion of the ICJ on the legal consequences of Israel's construction of a wall in occupied Palestinian territory, (re)interpretations of international refugee law and the principle of temporary protection.

4.1.1 ICJ Advisory Opinion of 2004

Recognising the (il)legal implications of the Wall's construction, the UN General Assembly referred a question to the International Court of Justice (ICJ). In requesting an Advisory Opinion, it appeared that the General Assembly of the UN sought to re-engage states and the UN institutions with international law in protecting the long-neglected interests of Palestinians and to finally hold Israel accountable in an even-handed manner. Very explicit in the ICJ's reasoning is that the underlying conflict between Israel and the Palestinians, what Ali Abunimah and others characterise as an 'impasse',⁴⁴ cannot be resolved without adherence to international law.

The key conclusions of the ICJ's 2004 ruling confirmed the existence of various binding obligations in international law. (1) The ICJ confirmed that there is a Palestinian people with a right to self-determination, a matter of substantial relevance to Palestinian refugees who claim a collective right to return to their homeland. (2) Several of Israel's policies and actions were declared by the ICJ to violate international law. In particular, Israel violates international humanitarian law and human rights and has illegally annexed Palestinian lands and constructed illegal settlements

⁴⁴ A. Abunimah, A., *supra* note 14.

and infrastructure that only benefits Jewish-Israeli settlers. Furthermore, Israel maintains what the ICJ referred to as an 'associated regime', encompassing a vast military presence of several hundred checkpoints, as well as temporary and (semi)permanent structures, including earth mounds that have greatly restricted movement by Palestinians and particularly refugees, residing in densely-populated camps. (3) The ICJ confirmed that it is not only Israel, but 'all states' that have obligations to ensure respect for international law; in other words, there is a principle of collective responsibility, both not to recognise or support the situation arising out of Israel's violations of international law and to hold Israel accountable.⁴⁵

Responses to the Advisory Opinion have been mixed. On one hand there has been extensive reference to the Advisory Opinion by human rights organisations, the UN Special Rapporteur on the Occupied Palestinian Territories and others concerned with a just solution to the impasse and its associated, ongoing conflicts. On the other hand, states and the UN's main institutions, notably the Security Council have been very reluctant to take action. Apart from a handful of cases in the Supreme Court of Israel that have forced the government to re-route the path of the Wall, at substantial additional cost,⁴⁶ the ICJ's ruling has had virtually no impact on Israel's behaviour.⁴⁷

In 2006, after having withdrawn settlements and checkpoints in the Gaza Strip, but continuing to maintain its occupation of the territory through control of its borders, Israel began a series of devastating military actions in the Gaza Strip. Known as 'Operation Summer Rains', the Israeli military stated that its aims were to recover an Israeli soldier (who had been captured in a legally legitimate military raid by the militant group Hamas) and to stop rocket attacks emanating from Gaza.⁴⁸ In several weeks of relentless bombardment of civilian targets and infrastructure that caused a massive humanitarian crisis, the operation failed to achieve either of these objectives.⁴⁹

⁴⁵ See also S. Akram and J. Quigley, *A Reading of the International Court of Justice Advisory Opinion on the Legality of Israel's Wall in the Occupied Palestinian Territories*, (Washington D. C.: The Palestine Center, 2004), Last checked on 29.3.10 at: http://www.palestinecenter.org/cpap/pubs/update_on_wall_072004.pdf

⁴⁶ There have been rumours circulating on right-wing websites such as www.onejerusalem.org (Last checked on 29.3.10) that the Israeli military has run out of funds to finish construction of the Wall.

⁴⁷ Akram and Lynk, *supra* note 31.

⁴⁸ According to the Tel Aviv based Jaffee Centre for Strategic Studies in 2006, attacks in Israel by Qassam rockets, which were handmade and with a limited range, had caused 'comparatively light' civilian casualties since their introduction in 2001. BBC News, 'Gaza's rocket threat to Israel', 15 November 2006 http://news.bbc.co.uk/2/hi/middle_east/3702088.stm Last checked on 29.3.10.

⁴⁹ At the time of writing, Gaza continued to be under strict Israeli military restrictions, leading to what multiple UN and non-governmental agencies have termed a humanitarian

Israel, together with members of the Quartet, has sought to isolate the democratically-elected Hamas government since the party came to power in 2005 / 2006. It has sought to accomplish this by collectively punishing all Palestinian residents in Gaza, through imposing a blockade of food, medical supplies and other essential items. States have failed to condemn Israel's collective punishment. States have also failed to condemn Israel's illegal capture of elected members of the Palestinian legislature, who at the time of writing this article continued to be held in detention.

During Israel's disproportionate, unlawful aggression in the Gaza Strip in 2008-09, known as 'Operation Cast Lead', Israel ignored a call for ceasefire by the UN Security Council and was later accused of having committed war crimes. These included allegations that the Israeli military targeted civilians and civilian targets in its actions in the Gaza Strip, such as hospitals and schools, and that the military illegally made use of certain weapons, such as white phosphorous.⁵⁰ These allegations led the United Nations Secretary General to call for an investigation into possible war crimes, which was eventually undertaken by an independent commission led by Mr. Justice Goldstone.⁵¹ However, so far, Israel has escaped condemnation, let alone punishment, by third states, a situation that emphasises and indeed facilitates Israel's continued impunity.

It is clear from leaked comments made by Alvaro De Soto following his stepping-down as Under-Secretary General of the UN and representative to the Quartet as well as successive reports by Professor John Dugard, former Special Rapporteur for the Occupied Palestinian Territories, that all members of the Quartet essentially take their lead from the United States government in Washington.⁵²

The persistent failure by other states, the UN General Assembly and the UN Security Council to hold Israel to account for its continued belligerence and blatant violations of international law have resulted in a monumental failure of their 'Responsibility to Protect' civilians.⁵³ As Dugard already put it in 2004, 'Israel's defiance of international law poses

catastrophe.

⁵⁰ Amnesty International, 'Israel used white phosphorus in Gaza civilian areas', London, 19 January 2009.

⁵¹ B. Ki-moon, 'Opening remarks at press conference', (Gaza: United Nations, 20 January 2009).

⁵² *End of Mission Report*, Alvaro de Soto, Under-Secretary-General of the United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, May 2007. Available at: <http://image.guardian.co.uk/sys-files/Guardian/documents/2007/06/12/DeSotoReport.pdf>

⁵³ J. Handmaker, 'Responsibility to protect: when international authorities fail' in G. Kerber and S. Asfaw (editors), *The Responsibility to Protect: Ethical and Theological Reflections*, World Council of Churches: Geneva, 70 – 82 (2005).

a threat not only to the international legal order but to the international order itself' and that this was 'no time for appeasement'.⁵⁴

In light of Israel's continued defiance and silence, if not complicity, on the part of the UN and third states, Dugard later revised his message as follows:

*The Security Council has largely relinquished its powers in respect of the Occupied Palestinian Territory in favour of ... the Quartet. ... without a founding resolution or mandate from either the Security Council or the General Assembly. ... The Quartet does not see it as its function to promote respect for human rights, international humanitarian law, the advisory opinion of the International Court of Justice, international law or countless United Nations resolutions on the subject of the Occupied Palestinian Territory.*⁵⁵

The implications of Israel's disregard for international law and the failure of other states to hold Israel accountable have been disastrous for Palestinian refugees. The construction of the separation wall has led to new categories of refugees, further displacing Palestinians, including some who had already experienced forced displacement in 1948, 1967 or in other conflicts.⁵⁶ The solution, therefore, as Dugard and others have argued is to re-engage with international law, as confirmed by the ICJ. This legal reasoning has become a central pillar of a global, civic campaign of boycotts, divestments and sanctions against Israel.⁵⁷

4.1.2 Refugee Law

As explained earlier, the international refugee protection regime has largely excluded Palestinians from its remit and, apart from a brief mentioning in its annual report, the UNHCR has paid little attention to their plight. From 2002, however, when the UNHCR clarified its position concerning article 1D, and in 2006 when the UNHCR and UNRWA

⁵⁴ United Nations Economic and Social Council, 'Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Special Rapporteur of the commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967', 7 December 2004, E/CN.4/2005/29.

⁵⁵ United Nations Economic and Social Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, United Nations General Assembly, 17 August 2007, Ref: A/62/275.

⁵⁶ K. McAllister and I. Jaradat-Gassner, Displaced by the wall: Forced displacement as a result of the West Bank wall and its associated regime, (Bethlehem and Geneva: Badil and Norwegian Refugee Council Internal Displacement Monitoring Centre, 2006). Last checked on 29.3.10 at: www.internal-displacement.org

⁵⁷ The global, non-violent BDS movement represents a broad collection of interests. Gaining inspiration from the justifications and tactics seen during the South African anti-apartheid movement, the movement has marked some significant successes. See: <http://bdsmovement.net/>

issued a joint statement concerning their organisation's respective responsibilities, the protection concerns of Palestinian refugees have received more attention. Every year from 2005 until 2007, at the annual meeting of the Executive Committee of UNHCR, NGO statements have included mention of Palestinian refugees. For example, in 2007, NGOs including the following in their collection statement on international protection:

*Palestinian refugees and internally displaced persons (IDPs) constitute the largest and longest-standing unresolved caseload of refugees and displaced persons in the world today. NGOs urge the international community to increase efforts to find voluntary durable solutions to their plight.*⁵⁸

UNHCR and UNRWA now routinely report on the protection situation of Palestinian refugees. These collective efforts on the part of UNHCR, UNRWA, other UN Agencies such as OCHA and NGOs have undeniably raised the profile of Palestinian refugees as a global protection issue.

4.1.3 Temporary Protection

A further development raised by international lawyers in various meetings and fora, including the 2006 Pre-EXCOM NGO sessions in Geneva, concerns a comprehensive proposal of temporary protection for Palestinian refugees. Developed by Professor Susan Akram, together with Terry Rempel, the proposal draws on extensive comparative state practice and a comprehensive reading of state obligations towards Palestinian refugees contained in numerous binding instruments.⁵⁹

The proposal for temporary protection argues that it is possible to extend what is known as a 'complementary' form of protected status to Palestinian refugees, who would otherwise benefit in full from the protections provided by the 1951 Convention Relating to the Status of Refugees were it not for a single, restrictive paragraph contained in Article 1D. As discussed later, this article has since been reaffirmed by UNHCR as not intending to leave Palestinian refugees without any protection. In this spirit, recognition through the status of temporary protection would create individual and collective state obligations and incentives to protect

⁵⁸ UNHCR, NGO Statement, Agenda Item 5a (International Protection), 58th Executive Committee of the High Commissioner's Programme, 1-5 October 2007

⁵⁹ S. Akram and T. Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees', 22(1) Boston University International Law Journal, (2004) and T. Rempel (editor) *Revisiting the Role of International Law in Crafting Durable Solutions for Palestinian* (Bethlehem: BADIL, 2009).

the basic rights of Palestinian refugees and to provide a durable solution to their plight.⁶⁰

4.2 Through strategic civic advocacy

Civic advocacy often draws on international law. Whether or not legal options are exhausted, there is much scope for civic advocacy in seeking to enhance state accountability. As explained by veteran human rights advocate Adri Nieuwhof, authoritarian regimes, such as the state of Israel, can be held accountable through a combination of four inter-linking strategies. These comprise: (1) a well-argued communication of the legal and moral justifications for advocating a state's accountability, (2) political pressure and (3) economic isolation through boycotts, divestments and sanctions. Finally (4), Nieuwhof argues that it is crucial to provide support to civic structures that are mobilised in the country where violations are taking place.⁶¹

As Badil, Al-Awda, the Right of Return Coalition and others have demonstrated, constructing a refugee rights discourse that articulates the legal and moral justifications requires a strategic approach, bearing in mind the potential and challenges of legal avenues for claiming those rights as well as the interests of various stakeholders, which are often overlapping. Such an approach that engages refugee communities, political leadership, Israeli society and finally individual states and the United Nations, together with NGOs and other civic actors around the world.

A global coalition of activists, including Badil as well as NGOs such as Al-Haq in Ramallah and the Palestinian Center for Human Rights (PCHR) in Gaza, have demonstrated that recognition of Palestinian rights through a rights-based approach can be very productive. Badil has also engaged sections of Israeli society through strategic links with organisations such as Zochrot, a Tel Aviv-based network of human rights advocates calling for a rejection of Israelis' 'collective amnesia'. Al-Haq has earned an international reputation for its well-argued reports that document Israel's systematic violations of international law. The PCHR have also documented violations of international law by Israel and have

⁶⁰ Such durable solutions may include any of the following: return, restitution, compensation, resettlement or integration in host countries.

⁶¹ J. Handmaker, 'Civil society and international law: protecting and promoting human rights in the light of the July 2004 advisory opinion of the International Court of Justice', in United Nations International Meeting on the Question of Palestine. Implementing the advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory - the role of Governments, intergovernmental organizations and civil society, United Nations Office at Geneva, 8 and 9 March 2005, 75-82 (New York: United Nations, 2005).

launched numerous claims at the United Nations and in various countries around the world.

Through advocating for the application of international law as an alternative to violence, all three of these organisations have developed respectable profiles as authorities on Palestinian (refugee) rights, which have been validated through their being accorded consultative status by the United Nations.

5. Some conclusions and propositions

Notwithstanding its numerous drawbacks, but given the highly unstable situation in Israel, the Occupied Palestinian Territories and the Middle East in general, it would be prudent to return to the one institution, long-neglected by the Quartet, which was established to prevent the reoccurrence of war and to resolve conflicts on the basis of international law, namely the United Nations.

Numerous efforts to resolve the impasse between Israel and the Palestinians and find peace on the basis of 'discovering the common ground' have failed miserably, and with bloody consequences. They have failed, not only because of their failure to recognise massive legal, social and economic inequalities, but because of a highly-unprincipled approach on the part of those seeking to 'bring peace' to the region. The approach outlined by the Quartet – and led especially by the United States – regards three, major issues perceived as presenting 'obstacles' to any peace settlement, namely the status of Jerusalem, the fate of the settlements and the plight of Palestinian refugees. The Quartet has then relegated these key issues to the back burner, treating them as so-called 'final status' issues in the hope that at some stage, an interim peace settlement can be found. This approach simply has not worked.

An alternative approach, which so far the UN has not applied to any significant degree, though strongly advocated by Professor Dugard, would be one based on international law and human rights. Rather than being hampered by massive inequalities, the UN would be directly engaged in redressing those inequalities and ensure that civilians, including Palestinian refugees, were directly engaged in finding a solution to the impasse between Israel and the Palestinians.

An approach rooted in international law offers a highly desirable alternative to stagnated diplomacy and a seemingly endless cycle of violence. It declares that human rights are inextricably linked to peace; in other words, respect for international law (and human rights) is a *pre-requisite* to a peaceful outcome. Such an approach furthermore expands

the possibilities of alternative solutions to the now defunct prospects of a two-state solution.

In light of this analysis, I offer the following propositions.

The first proposition is that *international law (and by extension human rights) serves as the most credible basis for restoring equitable legal protection*. This proposition recognises that the legal status of Israelis as well as Palestinians should be based on the principle of normative equality. It urges that mechanisms be put in place, both to claim that status, in order to achieve actual equality, and to resolve conflicting rights that will inevitably arise.⁶² It assumes that an increased respect for human rights will increase the prospects for peace.

The second proposition is that *recognising the right of return is an essential pre-requisite to any peace settlement*. This will, of course, require considerable compromises by Israel, which are the highly unfortunate consequences of Israel's reconstructing of 'facts on the ground', notably the decades-long illegal construction of settlements on occupied Palestinian territory. However, as the Israeli organisation Zochrot has declared, recognising the right would 'enable a space where the *Nakba* can be spoken of or written about' both in Arabic as well as Hebrew, in other words, re-framing the debate.⁶³

The third proposition is that *refugees must be provided a role to participate in political negotiations*. The reasoning here is that refugees are seen not as part of the problem, but as part of the solution. As Valerie Hunt has argued, the 'moral perspective of deservedness plays a large role in how we understand the assignment of rights to different groups within society'.⁶⁴ It furthermore allows one 'to make positive connections' between one and the other's national identities.⁶⁵

The fourth and final proposition is that *alternative models for resolving the decades-long impasse, including the option one, secular democratic state is deserving of serious consideration*.⁶⁶ A change of facts on the ground have created permanent structures in the settlements, and rendered a two-state solution socially and economically impossible. As Abunimah and others

⁶² M. Kagan, 'Do Israeli Rights Conflict With the Palestinian Right of Return? Identifying the Possible Legal Arguments', Working Paper 10, Badil, August 2005.

⁶³ N. Musih, 'Learning the Nakba as a condition for peace and reconciliation', *Position Paper* (Zochrot: Tel Aviv, no date). Last checked on 21.1.09 at: <http://www.zochrot.org/index.php?id=642>

⁶⁴ V. Hunt, *supra* note 3 at 27.

⁶⁵ *Ibid*, 16.

⁶⁶ For more on this topic, see <http://www.yorku.ca/ipconf> (Last checked on 18 February 2011).

have argued, Israel has in fact already created one-state separated into various cantons, all of which are under the effective control of the Israeli government and military. All borders are controlled by the Israeli military and border police. In Israel, there is growing recognition of the treatment of Palestinian citizens of Israel as second-class citizens, including the especially appalling treatment of Bedouins inside Israel and throughout the occupied Palestinian territories.

Despite the political rhetoric and apparent momentum in favour of a two-state solution, it is abundantly clear that such a solution would not resolve the refugee issue, without doubt the most enduring obstacle to a just peace in the 60-year long impasse between Israel and the Palestinians.

Following the devastation of Gaza at the beginning of 2009, caused by Israel's illegal aggression, and the continued closure of the West Bank and relentless growth of illegal settlements, the prospects of resolving impasse between Israel and the Palestinians seems further than ever. No resolution of this impasse will be possible in the absence of an even-handed approach, which international law provides for, but which the UN and third states have – until now – refused to apply with any degree of consistency, or consequence for Israel.

Until this situation changes, a global, civic-led campaign of boycotts, divestment and sanctions offers a non-violent alternative to the horrifying cycle of violence in Israel-Palestine.⁶⁷ Rooted in international law principles, this campaign also offers good prospects for promoting justice and peace to all who are victims of the ongoing impasse between Israeli Zionist ideology and Palestinian national aspirations, and especially offers a glimmer of hope for Palestinian refugees, the largest group of forcibly displaced persons in the world.

⁶⁷ For more information on the movement, see <http://www.bdsmovement.net> (Last checked on 18.2.11).