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PALESTINIAN REFUGEES -
Questioning the Legitimacy and
Implementation of Durable
Solutions and the Corresponding
Role of the United Nations

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Preface

Ever since my parents moved to the Middle East to work in the West Bank, I have been very interested in the long running conflict between Israel and Palestine. After numerous visits in the area, great shock arose when I witnessed the refugees' situation and living conditions. I became enthusiastically interested in the reasons how the refugees had been placed in this unfortunate position and curious about the regulations in international law. Furthermore I questioned myself to what extent the United Nations were involved and possibly responsible.

I hereby wish to thank my parents, Ingrid and Gustaf Ödquist, for giving me the opportunity to visit the area and inspiring me to write this paper. They have engaged in great activity and assisted me with material and ideas. I also wish to thank my boyfriend, Mikael Drackner, who has supported me throughout the writing process with general encouragement, as well as issues regarding the English language and means and methods of writing.

Abbreviations

CAT	Convention Against Torture
CERD	Convention for the Elimination of Racial Discrimination
ICC	International Criminal Court
ICCPR	International Covenant for Civil and Political Rights
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILC	International Law Commission
RAO	Refugee Affairs Officer Programme
UDHR	Universal Declaration for Human Rights
UNCCP	United Nations Conciliation Commission for Palestine
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNRWA	United Nations Relief and Work Agency for Palestine Refugees in The Near East
WHO	World Health Organisation

1 Introduction

The Palestinian refugee problem is one of the most discussed and analysed refugee dilemma in the world. Due to the unique status of Palestinian refugees the problem has been debated for decades. The Palestinian refugees have a significant legal status in international law and they cannot be related to any other refugee plight. They do not fall under the general regulations of Refugee Convention or under the protection of UNHCR. The purpose is however not to perceive their situation in a negative manner with reduced attention since they are on the contrary entitled to exceptional treatment and a higher protection regime. In practice however the level of protection is, as will be shown, different.

The Palestinian refugee problem is considered one of the great mistakes of United Nations' history. They can be seen as responsible for generating the Palestinian refugees, due to the establishment of the Partition Plan that legally divided Palestine and consequently initiated the war in 1948. The obligations of UN to maintain the rule of law and ensure the implementation of refugee rights are therefore even greater in the Palestinian refugee case. In order to redress the problem UN has thus provided with appropriate legal framework in coordination with the international law instruments.¹ Paragraph 11 of UN Resolution 194 (III) is considered the cornerstone for presenting the durable solutions for the Palestinian refugees and the fundamental point of departure.

1.1 Aims and Questions

The aim of the essay is to analyse and evaluate Resolution 194 (III) and its correspondence and legitimacy with international law and customs. Throughout the work various questions have been asked. What are the international legal principles that constitute Resolution 194(III) and to what extent are they applicable to the Palestinian refugees? Why are not the basic solutions possible to implement? What are the main problems? Do the claims stated by Israel have support in international law? Who is the spokesman for the Palestinian refugees in the discussion? What is the role of the United Nations?

A very important question to be considered in this case is the question of responsibility. Who is primarily to be held responsible for the refugee problem, as well as the essential question of who is to be responsible and act as spokesman for the Palestinian refugees until the question is settled? At present the refugees are stateless and can not be provided with protection from their nation or government. UNHCR is the UN organ that generally takes responsibility for refugees. According to Article 1D of the UNHCR

¹ UN General Assembly Resolution 194 and Security Council Resolutions 242 and 338.

Refugee Convention the Palestinian refugees have however been entitled to protection from a separate UN agency, UNRWA. This protection has however not been successful in all situations leading to the establishment of a so-called grey zone between the mandates of UNHCR and UNRWA. The protection gap and its legal consequences will be discussed as well as its significance reaching sustainable solutions for the refugee problem.

The debate regarding the Palestinian refugee situation has been in progress ever since the question actualised in 1948 and it is still one of the most complicated problems in the peace process between the Israelis and Palestinians. Due to the prolonging debate of more than 50 years it is of great significance to finally investigate the set of problems that arises, the role of UN and their protection of Palestinian refugees from 1948 until today.

1.2 Methodology

Given the nature of the essay the most suitable method in this context is studying literature and international treaties. With help from relevant scholars and in collaboration with studying UN resolutions and international treaties, I have tried through critical reading to seek the answers to my questions. Main emphasis has been put on the legal instruments and their drafting history as well as discussions between various related scholars. The essay will hence mainly concern an analysis from an international law perspective in the light of the international legal instruments. Further on, an analysis of why these methods do not function and have not been successful will be elaborated. Great emphasis will be put on both the Israeli and Palestinian point of view presenting their main arguments as well as the role and approach of the United Nations towards reaching the most effective and feasible solutions.

1.3 Limitations

Limitations have been made in order to avoid far too complicated issues. This essay will therefore focus strictly on the legal point of view putting less emphasis on the political and religious aspects. It cannot however be ignored that this conflict is extremely politically loaded with large influence from the international community, most significantly the relationship between the United States and Israel. It is guaranteed that the Palestinian refugee set of problems would be far more easier to solve if only the legal aspects were considered.

1.4 Previous Research

Immense research has been carried out within the area concerning Palestinian refugees. Both legal and political scholars have engaged in great efforts towards solving the serious set of problems through detailed analysis and discussions. Lex Takkenberg, Luke Lee, Donna Artz and Don Peretz are perhaps the most leading scholars within the legal area. The BADIL Resource Center has also been of considerable importance when searching for facts and discussions.

Given the political influence of the refugee problem it has been inevitable to find unbiased literature. The possible bias of the scholars has been considered, to the extent of reflection, when evaluating the Palestinian refugee set of problems.

1.5 Further Content of the Essay

The point of departure will be paragraph 11 of Resolution 194 (III) which is the main instrument that governs the Palestinian refugee situation, as well as promoting appropriate solutions and refugee rights. It is divided into two parts with the first part stating the rights of refugees, being the right of return and compensation. The second part involves the implementation of rights and how it should function in practice, laying the responsibility on the United Nations and the specific organs of the organisation. Despite its fairly precise wording, the meaning of the resolution will be elaborated with references to international law as well as general statements and treaties in order to search for ways to interpret the suggested solutions in a correct manner and to seek for durable solutions. The second part of the essay will focus on the role of the United Nations and their responsibility for the Palestinian refugees. Finally, an analysis of the durable solutions will be presented questioning the legitimacy and problems of implementation.

2 Historical Background

The historical explanation of the Palestinian refugees can be traced far back in time. In this context the history will be limited to the 20th century constituting the period when the conflict emerged and the main root causes were initiated.

Until the end of the first World War the Ottoman Empire governed Palestine. Due to their failure to rule the country, the League of Nations delegated the responsibility to Great Britain with mandate to govern the area until it had reach a sufficient level of independence. After the second World War the Jewish population were promised land in the area as a consequence of the peace settlement. Fundamental Zionist movements pressured Great Britain and managed to convince them to permit the establishment of a Jewish state within the area. This new establishment was however not satisfactory for all parts and the situation in the region grew unstable and rebellious. After two decades of rule, Great Britain perceived the situation as unworkable and wished to withdraw from its mandate and leave the area. Fearing the severe consequences the United Nations refused abandon the area completely. Instead they issued a resolution dividing the area into one Arab state and one Jewish state and leaving Jerusalem under international rule.² This so called UN Partition Plan made Palestine fall under Israeli rule allocating more than 50% of Palestine to Israel. The resolution was accepted by the Jews in Palestine but rejected by the Arabs in Palestine and the Arab states. The proposal gave rise to heavy opposition arguing that it was unfair and unfeasible. The conflict became inevitable and resulted in a war between the states. The war finally lead to Israeli occupation and confiscation of land and the creation of the state of Israel. The Palestinian fled in desperation from their homelands to other regions in the Middle East mainly Gaza, West Bank, Syria, Jordan and Lebanon. More than 700 000 Palestinians were spread throughout the Middle East with only a small part remaining in the area under Israeli control. This minority became Israeli citizens within the Jewish state.³

In 1967 a new war broke out in the region. Israel occupied significant land areas, such as East Jerusalem, the West Bank and Gaza, and it has remained under Israeli rule ever since. The occupation has brought about severe effects of additional refugees and displaced persons in region, as well as constituting a transformation of the overall question to an even more political and complex matter. The creation of a Palestine state in the Israeli occupied West Bank and Gaza has been discussed in relation to the various peace processes. The results have however been varied. Through the Madrid/Oslo peace process in the 1990s the occupied territories from 1967

² United Nations General Assembly Resolution 181 of 29 November 1947.

³ Peretz (1993), p. 5-6, PASSIA (2001)

were said to be self governing by Palestinian authorities but still under occupation of Israel.⁴

As a consequence of both wars in the region the Palestinian have urged their right to return to their country claiming their explicit legal right to do so. These demands have however been ignored and denied by Israel. The rights of the Palestinian refugees have been argued ever since the emergence of the conflict in 1948 and the controversial question has remained unsettled. The Israelis have generally been claiming that the Palestinians did not flee but rather followed orders from their neighbouring countries. The Palestinians claim that they were driven by force out of their country and are accordingly not allowed to return even though they have a legal right to do so. The main responsibility is left to the United Nations and its specialised agency UNRWA that functions in the region. The situation today looks rather dark and unsolvable with an ongoing vicious circle of ruthless violence from both parties.⁵

⁴ www.badil.org/Refugees/History/Historical_Overview.htm, 2003-06-02

⁵ Ibid.

3 Who is a Palestinian refugee?

Before approaching the Palestinian refugee problem it is of great value to be acquainted with the term Palestinian refugee and its signification. There is no generally accepted definition of a Palestinian refugee in the legal context since there are no international legal instruments dealing specifically with Palestinian refugees. The most universally accepted general definition of a refugee is stated in the 1951 Convention relating to the Status of Refugees (Refugee Convention). The criteria is presented in article 1A and is based on four decisive criteria. A refugee must be outside his/her country of nationality and unwilling or unable to avail himself/herself from the protection of that country. The unwillingness or inability must be based on a well founded fear of persecution being determined on individualistic basis based on reasons of race, religion, nationality, membership of a particular social group or political opinion. If an individual falls within these four criteria he/she is determined to be convention refugee and consequently receive protection from UNHCR.⁶

The unique status of the specific Palestinian refugees has however resulted in an exclusion of the general definition of the 1951 Refugee Convention. Due to their situation of not being outside the country of origin and not unwilling to return as well as grounds of persecution, they are not able to fulfil all relevant general criteria and cannot be included under the general conditions. Instead they have been given a specific clause in article 1D, where they are excluded from the general refugee definition and protection from UNHCR, yet referring to another UN agency of protection, UNRWA. Even though the provision is not specifically stated to apply to Palestinian refugees this is to be the intent of the drafters.⁷

3.1 UNRWA refugee definition

Since the Palestinian refugees are excluded from the general definition of a refugee and directed to the protection from UNRWA there is a need for a specific definition of the term Palestinian refugee in order to determine its scope of application. The refugee definition stated by UNRWA has gain legitimacy on its own and is generally recognised by the international community as the working definition. The definition provided by UNRWA considers a Palestinian refugee:

“a person whose normal residence was Palestine for a minimum of two years preceding the conflict in 1948, and who, as a result of this conflict, lost both his home and his means of livelihood and took refuge in one of the countries where UNRWA provides relief.”⁸

⁶ Goodwin-Gill (1996), p. 18-20

⁷ Ibid, p. 91-93

⁸ www.un.org/unrwa/refugees/whois.html, 2003-04-20

Refugees falling within this definition and their direct descendants are entitled to aid from UNRWA conditioned on the facts that they are registered with the agency, living in the area where the agency operates and are in direct need of assistance. The countries of UNRWA operation are Syria, Lebanon, Jordan, West Bank and Gaza Strip.⁹

The UNRWA definition does not include the refugees that moved into other areas where UNRWA is not present, constituting for example Egypt, countries in the Gulf, Europe and US, or the refugees that remained in the Israeli controlled areas after the war. According to article 1D of the 1951 Refugee convention these individuals shall be entitled to protection by the general agency UNHCR.¹⁰

Palestinian refugees can subsequently be identified from three different incidents. Primarily the refugees from the 1947-49 period displaced in areas that became state of Israel, as well as persons who have remained in the areas that became state of Israel. Secondly, the persons who were displaced from their homes in the West Bank and Gaza as a result of the 1967 war, and thirdly expired permit holders constituting residents of the West Bank and Gaza who overstayed their permits while staying abroad and were later denied to re-enter.¹¹

3.1.1 Facts and Figures

The Palestinian refugees have remained under the responsibility of UNRWA since the 1948 war with a steady increase of refugees over the years. The war in 1967 produced about 350 000 refugees counting 500 000 including families. They were initially regarded as internally displaced persons and have not been registered with UNRWA, but the agency however provides them with necessary aid. Many of the individuals who were displaced during the 1967 war were also part of the 1948 war and were thus displaced for a second time already included under the agency's mandate for aid. There are also displaced persons who were in other countries when the 1967 war broke out as well as people refusing to enter the occupied areas after the war.¹²

Today the majority of refugees are descendants of original refugees. Originally there were about one million Palestinian refugees. Including descendants there are over three million refugees, making half the Palestinian population refugees. The number of registered Palestine

⁹ PASSIA (2001), p. 3

¹⁰ See further article 1D of the 1951 Refugee Convention

¹¹ PASSIA (2001), p. 2

www.badil.org/Refugees/Answers/questions_and_answers.htm, 2003-04-20

¹² PASSIA (2001), p. 2

<http://www.un.org/unrwa/>, 2003-04-20

refugees has grown from 914,000 in 1950 to more than four million in 2002. The amount is steadily increasing due to natural population growth.¹³

It should be recalled that the number of refugees are based on estimates rather than accurate figures due to the ambiguity of the definition. An estimation is made today that there are approximately 5.5 million Palestinian refugees where about 3.8 million are registered with UNRWA. About 1/3 of the 3.8 million live in refugee camps established between 1948-1953 operating under UNRWA. These figures subsequently states that 2/3 of the Palestinian population are refugees. If displaced persons from the 1967 war are included approximately ¾ of population constitute refugees. The majority of the Palestinian refugees today are living in the neighbouring countries. Of the 3.8 million refugees registered with UNRWA most are living in Jordan (42%). Almost the same amount of refugees are living in the West Bank and Gaza (38%). 19% live in Syria and the remaining 10% are situated in Lebanon.¹⁴

3.1.2 Problems of definition

Refugee status shall not under any circumstances be given to persons who have committed crimes against peace or humanity, serious non-political crimes outside the country of refuge or acts contrary to the purposes and principles of the United Nations.¹⁵ Given the unique definition of a Palestinian refugee it has never been properly determined if the exclusion clauses should be applicable in UNRWA definition of a refugee. According to Artz it would be reasonable to exclude those Palestinians who are involved in unlawful acts, being war crimes or terrorism based on an individual rather than collective determination. If the concept of a refugee shall be uniform and universal the fundamental standards should also be consistent.¹⁶

Persons who have been granted convention refugee status under article 1 are accordingly entitled to fundamental human rights stated in the 1951 Refugee Convention and the standard of treatment should be equivalent with nationals. In the Palestinian refugee context the application of these standards is rather ambiguous. Many of the host countries have not signed or ratified the 1951 Refugee Convention and are thus not forced to comply with its standards. Another problem of definition is the status of article 1 D of the 1951 Refugee Convention and the difference in the mandate of UNHCR and UNRWA. Do the Palestinian refugees under the operation of UNRWA receive the same legal treatment as convention refugees? This question will be discussed and elaborated further on in this context.¹⁷ The

¹³ www.un.org/unrwa/refugees/whois.html, 2003-04-20

¹⁴ PASSIA (2001), p. 2,3

www.badil.org/Refugees/Answers/questions_and_answers.htm, 2003-04-20

¹⁵ Article 1F of the 1951 Refugee Convention

¹⁶ Artz (1997), p. 70

¹⁷ See Section 8.3, p. 53

UNRWA definition has also caused problems and criticized for not being complete and covering all Palestinian refugees or needy persons. The definition was however intended to function for working purposes in fulfilment of its mandate, and not aimed to serve as an overall long lasting universal definition.

4 UN General Assembly Resolution 194 (III), Paragraph 11

Resolution 194 (III) came to exist as a consequence of the 1948 war in an attempt to end the war and solve the severe situation that had arisen. It is based on the report and recommendations from the UN appointed Mediator for Palestine Count Folke Bernadotte who actively worked in the area. Before his assassination he managed to establish a thorough report on the serious situation in the region and possible solutions to achieve peace and stability. The report became the framework for durable solutions for Palestinian refugees and significant for expressing the facts of international law regarding repatriation and compensation. The progress report did neither contain nor establish new rights for refugees, but rather affirmed the existing recognised rights in international law in this context.¹⁸

Paragraph 11 of Resolution 194 (III) is the significant provision concerning refugee rights and durable solutions, both affirming the right of return to Palestinian refugees to their original homes as well as establishing the mechanisms for its implementation. Four main components are set out as durable solutions; repatriation, compensation, resettlement and social and economic rehabilitation. No right to return per se is stated, yet the resolution affirms that refugees should be permitted to return at the earliest practicable date and that compensation should be offered for those not wishing to return including compensation for loss of property.

Resolution 194 (III) is not only significant for its confirmation of refugee rights, but is also noteworthy for its length of existence and its unique application to the Palestinian people. It explicitly referring to the right of the Palestinian people to return home as well as presenting welfare opportunities until they return through the creation of responsible UN agencies. It is not binding in itself given the recommendatory nature of General Assembly resolutions.¹⁹ The resolution has however been reaffirmed over 50 times and is generally recognised as customary law binding for all states being consistent and implemented in both human rights law²⁰ and international refugee law²¹. In this context it is also worth noticing that the General Assembly made Israel's entrance to the UN conditional upon its implementation of the resolution.

¹⁸ Progress Report of the United Nations Mediator on Palestine, A/648 of 16 September 1948

¹⁹ The wording "should" and not "shall" in the text further strengthens this statement. For a more detailed discussion see Artz (1997), 65-66

²⁰ UDHR, article 13.2 and ICCPR, article 12.4

²¹ UNHCR Statute, article 1

Reviewing the drafting history of the resolution the refugees mentioned shall include all persons who have been displaced from their homes in Palestine including Arabs, Jews and others. The wording is based on a non-discriminatory intent thereby including all individuals who have been exposed to plight.²²

4.1 Paragraph 11.1

*11. Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to the property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;*²³

Sub-paragraph 1 of paragraph 11 clearly states the refugee's right to return and receive compensation. The refugee himself shall have the right to choose whether he/she wishes to return or to be compensated, hereby stating a distinct individual rather than collective right of return. Moreover a distinct reference to place of return is stated explicitly referring to "homes" rather than "country". A time limit with reference to "the earliest practicable date" is further stated in the provision. The significance of the terms are mentioned in the drafting history and will be discussed below.

The provision primarily states that refugees should be permitted to return to their "homes" literally referring to their house rather than homeland. Even though the statement was expressed in this manner in order to avoid misinterpretation, there is constant disagreement between the parties what the term "home" more precisely should include. The Israelis suggest that it applies to homeland and since the Palestinians do not have a proper homeland resettlement should be the most appropriate solution. On the other hand it is argued that homeland implies to house or lodging since it would otherwise be untenable to state that only those not choosing to return would be compensated for their property.²⁴

The resolution further declares that the durable solutions should unconditionally be based on the free choice of the individual. The refugee is entitled to an individual choice of either repatriation and compensation for damages, or no return but additional compensation for property. Since refugee rights in general are more commonly structured as collective rights this resolution contributes to the unique situation of the individual rights in focus.

²² UN document W/45, p.1

²³ United Nations General Assembly Resolution 194 (III) of 11 December 1948

²⁴ UN document W/45, p.3

The time limit of the repatriation is said to be “at the earliest practicable date” meaning immediately. Measures such as a peace agreement is not said to be necessary since the intent is not to make repatriation conditional upon the establishment of such an agreement. Stable conditions in the country should instead be regarded as an adequate measure. The drafters considered signing the Four Armistice Agreements as sufficient in this context.²⁵

Noteworthy is also the last phrase “live at peace with their neighbours”. It can be seen to imply limiting conditions to the refugees requiring an assurance that their intention is to live in peace once they have returned. There should however also be a reassurance to the state of Israel that they will not be faced with internal security problems due to the return of refugees.²⁶

Regarding the matter of compensation two different kinds are mentioned, compensation for damages and losses as well as compensation for those refugees not wishing to return. If a refugee decides not to return he/she should receive fair compensation and in situations of property that have been lost since the war. The resolution clearly states that the state bears responsibility for their actions violating principles of international law. Refugees do hereby have the right to compensation due to the state actions. The resolution further states that refugees should be compensated under principles of international law or in equity. According to international law refugees are under all circumstances entitled to receive compensation. Under general international law the responsibility lies on the state to compensate refugees.²⁷ The principle of equity more explicitly implies that countries should not benefit from violating human rights of minorities or nationals of other countries. By referring to international law and equity the resolution restates pre-existing law on principles of compensation thereby moving beyond the recommendatory status requiring legal binding nature. The resolution is not binding per se but the international law directly referred to is binding to all states.²⁸

4.2 Paragraph 11.2

“Instructs the Conciliation Commission 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 Palestinian Refugees and, through him, with appropriate organs and agencies of the United Nations;”²⁹

The role of the United Nations and the appropriate mechanisms for implementing durable solutions for the Palestinian refugees is stated in the

²⁵ Ibid, p.6

²⁶ Ibid, p.4

²⁷ International Law Commission Draft Articles on State Responsibility, article 1

²⁸ Lee (1993), section 5

²⁹ United Nations General Assembly Resolution 194 (III) of 11 December 1948

second sentence of paragraph 11, where it explicitly instructs the United Nations to facilitate the implementation of the durable solutions for Palestinian refugees. All solutions are to be based on the individual choice of the refugee. Repatriation is seen as the most durable solution, but compensation as well as resettlement shall be offered as alternatives. According to the resolution the United Nations is to take prior responsibility for the refugees providing social and economic rehabilitation during the process.

The second sentence of paragraph 11 more precisely establishes the presence of a UN agency that shall assist in the implementation process of the durable solutions stated in the first sentence of paragraph 11. The agency established was named the Conciliation Commission for Palestine (UNCCP) and composed of three member states; Turkey, France and the United States. The central task of the commission involved the implementation of reparations based on the assumption of Israel's cooperation in finding the most sustainable solution for the Palestinian refugees.³⁰

In the drafting process the General Assembly wished to stress the choice of the term "facilitation" which stated the precise function of the established Commission. The Commission was only to facilitate the implementation of the durable solutions, meaning to make it easy or promoting to process, and not implied with duties to permit or prevent actual repatriation. The role of the Commission in the negotiations between the parties it should thereby be restricted to assisting them in their already activated work and not to commence any negotiations. They were to work towards protecting the principles stated in Resolution 194 (III) and obliged to report possible violations of these principles to the United Nations. The Commission should however not be entailed with any executive power nor powers of arbitration. As regards the more precise process of repatriation the Commission however takes a more leading role facilitating the admittance of permissions to return. If the refugees do not receive permission to return from the Commission the process will be hindered.³¹

Through the wording of paragraph 11.2 the resolution puts the main responsibility on the United Nations in relation to the implementation process. It also most importantly expresses the compulsion of Israel to re-admit refugees and to establish conditions to assist their return in accordance with international law. The government of Israel was assumed to cooperate with the United Nations in a traditional diplomatic manner by the terms of "good faith" and assuring to "take all possible steps to assist the implementation of the resolution". As will be shown the practice is however different.

³⁰ Mallison (1979), p. 31-32

³¹ UN document W/45, part II

One of the main drawbacks when drafting the resolution was the absence of a specific provision determining the respective competence of the United Nations Relief Agency and the General Office of the High Commissioner for Refugees, as well as the personal or geographical competence of the agency. The exclusion has resulted in great difficulties determining responsibility for the refugees consequently weakening the protection level for the Palestinian refugees. Protection for Palestinian refugees should according to the resolution be divided between UNRWA and UNCCP not mentioning situations of possible changes in the agencies' work or existence.

Despite its ambiguities the resolution is by all means considered a key element in the implementation of durable solutions for Palestinian refugees. As previously mentioned the Resolution 194 (III) did not intend to establish new rights for refugees but rather affirming the existing rights of generally recognised international law. An analysis of its correspondence with international law is therefore of vital interest in order to legitimise the principles of repatriation and compensation stated in the resolution as well as the responsibility of the United Nations and their ability to bring about a solution for Palestinian refugees.

5 Repatriation and International Law

Repatriation means the right of return and the implementation of the right of return. The principle is considered international customary law binding upon all states. The right to repatriate can be traced back to the Magna Carta Declaration from 1215 A.D.³² and in the Constitution of 1791 from the French Revolution.³³ It can accordingly be considered as one of the most fundamental human rights and is generally understood as a natural right not requiring a high level of attention. In practice the situation is nevertheless different not giving all people the true freedom of movement. The Palestinians are in the unfortunate situation of not being entitled to the fundamental right of return. They have instead been denied access to their homes ever since the war in 1948. The right of return has a central role in the Palestinian refugee set of problems and serves as an important symbol in the struggle for justice.

In general international law the Palestinian refugees' right to return to their homes is rather ambiguously stated. General international law relates to the return of people to states of their original nationality. Since the majority of the Palestinian refugees are not Israeli citizens the law can be interpreted in the negative manner, resulting in the recognition of the right to leave and return to one's country rather than home. Due to the unfortunate situation of the Palestinian refugees they argue that the term "home" should be considered rather than "country". The ambiguity of the principle makes the question of right to return one of the most debated and controversial issues in relation to the Palestinian refugees. From a strict legal point of view the question is rather straight forward and uncontroversial which will be shown below in the analysis of the main international human rights treaties.

5.1 The Right of Return in Human Rights Law

International human rights law involves individual rights and corresponding duties upon states. The right of return appears in almost every human rights instrument as a general fundamental human right. Commencing with the most generally recognised Universal Declaration of Human Rights (UDHR) every person has the right to return to his country. Article 13.2 of the Declaration specifically states:

³² The Magna Carta guaranteed the freedom "...to go out of our Kingdom and to return, safely and securely, by land or by water..."

³³ The Constitution stated "...the freedom of everyone to go, to stay or to leave, without being halted or arrested unless in accordance with procedures established by the Constitution".

*“Everyone has the right to leave any country, including his own, and to return to his country.”*³⁴

The only legitimate limitation to this principle is if the state is opposed to actions threatening the national security or public order in the state.³⁵ Repatriation in this Declaration refers to his “country” rather than “home”. If interpreted restrictively it shall strictly apply only to nationals and citizens, causing complications for the Palestinian refugee where a majority of the people are stateless. According to the drafters of the Declaration the intent was however to cover all nationals and those stateless persons and aliens who had a close relationship to the state or a permanent home.³⁶ The Palestinians are hereby through the extensive interpretation included and accordingly allowed to exercise the right of return.

UDHR is an universally recognised legal instrument. The established general principles of international law are however only of recommendatory status. The International Covenant of Civil and Political Rights (ICCPR) directly derives from UDHR and is of greater significance due to its status of an international treaty binding upon all states who has signed and ratified the convention. The ICCPR is the most fundamental and universal human rights instrument concerning civil and political rights. Article 12.4 of the Covenant states:

*“No one shall be arbitrarily deprived of the right to enter his own country.”*³⁷

The Covenant differs from the UDHR not only through its binding nature, but it also modifies the principle of return by declaring a broader right than the initial principle stated in UDHR. Using the term “no one” makes the principle applicable to both nationals and aliens. The term “enter” rather than “return” further opens the right to return to an extensive group of people possibly including further generations of the Palestinian people. According to the General Comment to Article 12.4³⁸ the term “his own country” should involve a generous interpretation including for instance, people who refer to the area as the country of their nationality but have been transferred into another national entity, and in relation been denied the new nationality. It should further include stateless people and persons having close connections to the country in other ways than geographical and political, such as religious and cultural ties. Modifying the term “return to one’s country”, (stated in art 13.2 of UDHR), to “enter his own country”, (stated in art 12.4 of ICCPR), opens for the possibility to include nationals or citizens outside the country who had never lived there. An even wider

³⁴ Universal Declaration of Human Rights, General Assembly resolution 217 (III) adopted on 10 December 1948.

³⁵ UDHR, article 29

³⁶ Nowak (1993), p. 218-221

³⁷ The International Covenant on Civil and Political Rights, adopted by UNGA res. 2200 A (XXI) on 16 December 1966, entering into force 23 of March 1976.

³⁸ UN Human Rights Committee (1999)

interpretation of the term is suggested in the famous “Nottebohm” case³⁹ which mainly declared that the link to the country could be based on tradition, establishments, family ties and activities, instead of strictly referring to the formal state of citizenship.

Applying these modified interpretations to the Palestinian population further strengthens their right of return. The term “his own country” in reference to the Palestinians has in particular been discussed by many scholars. According to the drafters of the declaration and the general concept of nationality in international law, the term “*his own country*” does not only necessarily refer to the legal nationality but also to the country where the individual has a genuine link. A set of criteria proposed by Lawand suggests that the term should be equally applicable to all claimants and determined on a case by case basis. Lawand supports the “Nottebohm” case and elaborates the meaning of the term “*his own country*” by stating that in the determination process, the most important criteria is the habitual residence of the individual including property, family ties, attachment to the country and expressed intentions for the future. In addition evidence showing that the close link to the country has existed in the past of significant importance. If the proposed criteria are fulfilled there is an established genuine connection to the country of origin and this should accordingly be equivalent to the concept of nationality.⁴⁰

The term “*arbitrarily*” is also an ambiguous term that could cause misinterpretation. According to the drafters it should only refer to exile as a penal sanction and is the only permitted exception to the principle of return. The limitation clause mentioned in article 12.3 did not intend to apply to the right of return but rather to the right to leave a country. The denial of the right of return is constrained to be based on law and on non-discriminatory grounds. Furthermore Article 2.1 of the Covenant prohibits the governments to establish laws that are in interference to the general principles of the Covenant based on discrimination on grounds of race, religion or nationality. Article 4.1 finally makes the discrimination clause absolute.⁴¹

The right of return has in addition been incorporated in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁴². Article 5.d (ii) stresses the civil right to leave and return to one’s country. It is stated as a specific right that shall be treated in accordance with the non-discriminations rules set forth in the opening paragraph of the article.⁴³

³⁹ Nottebohm Case, (Liechtenstein v. Guatemala) Second Phase, Judgment, I.C.J. reports 1955, Rep 4.

UN Human Rights Committee (1999), p. 20

⁴⁰ Lawand (1996), p. 557-558

⁴¹ Hannum (1987), p. 45

⁴² The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by UNGA res. 2106 A (XX) on 21 December 1965, entering into force 4 January 1969.

⁴³ CERD, article 5

It is worth mentioning that Israel has signed and ratified both the ICCPR and CERD without any reservations.

5.2 The Right of Return in Humanitarian Law

Humanitarian law refers to the law regulating the means of waging war. The rules and principles were created with the purpose to limit the use of violence in times of armed conflict and to avoid unnecessary suffering by all possible means. It also includes the protection of those persons who are not directly participating in the war being the wounded, shipwrecked, prisoners of war and civilians. Through the establishment of international humanitarian law, human rights are safeguarded also during wartime. The right of return has a dominant position in humanitarian law where repatriation is the most desired solution as a consequence of war.

There have been considerable declarations and conventions throughout the years regulating means and methods of war. The main rules have been considered customary international law and further incorporated in the 1907 Hague Convention Respecting the Laws and Customs of War on Land and its annexed Hague Regulations⁴⁴ (Hague Law), and in the 1949 Geneva Convention⁴⁵ with its additional protocols⁴⁶ (Geneva Law). The Hague Conventions regulate the means and methods of waging war while the Geneva Conventions with its additional protocols regulate the protection of the victims of war. These two legal frameworks are said to constitute the foundation of international humanitarian law with almost universal ratification. Israel is bound by the rules of both Hague law and Geneva law due to its treaty status and status of customary law. Israel has however not signed the additional protocols to the Geneva Conventions.

Humanitarian law can be seen as an important tool and of significant relevance when determining legitimate solutions for the Palestine refugees, mainly since they have exposed to armed conflict and war conditions ever since the birth of the conflict. After the 1967 war most of the remaining areas belonging to Palestine were occupied by the Israeli military with a

⁴⁴ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annex: Regulations Respecting the Laws and Customs on Land. Signed 18 October 1907 and entered into force 26 January 1910.

⁴⁵ The Geneva Conventions (I-IV) of 12 August 1949:

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.(I)

Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces at Sea.(II)

Geneva Convention Relative to the Treatment of Prisoners of War.(III)

Geneva Convention relative to the Protection of Civilian Persons in Time of War.(IV)

⁴⁶ Protocol I: *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977*

Protocol II: *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict of 8 June 1977.*

remaining occupation in the area ever since. Palestinians are therefore not only refugees in a legal manner but also entitled to protection under international humanitarian law as status of civilians under occupation.

5.2.1 Hague Law

Humanitarian law expresses a general right of return to all persons who have been displaced during hostilities. The principle is affirmed in article 43 of the Hague Regulations, stating that the occupant is during the occupation required to restore and ensure public safety and respecting the laws in force in the country. The occupants shall further preserve the social status to the maximum extent possible until a solution is reached between the powers. The normal living conditions of the people would logically imply a permission to remain or return to their homes if being displaced.

Article 20 of the Hague Regulations further recognises the right of return by clearly stating that after a peace agreement the prisoners of war shall as quickly as possible be repatriated. Even though it only refers to prisoners of war there is strong evidence suggesting that the civilian population should be included, since the level of protection should according to general practice always be greater to civilians than combatants. The famous “Marten Clause” included in the preamble provides additional protection, stating that if there exists any gap in a regulation it should be interpreted in accordance with the general principles of international law. The preamble also explains that the main purpose of the regulation being is to diminish the suffering of war to a highest possible level and to spare the local inhabitants from unnecessary suffering to a maximum extent. Consequently all inhabitants should be included in article 20 and be given the right to repatriation. The general principle of humanitarian law hereby grants the right of return to all displaced people as a consequence of war and cessation of hostilities.

There is also a right of return in humanitarian law to all people who have been displaced through forcible expulsion which is of special interest in the Palestinian refugee context. The right to repatriation is strengthened if the expulsion is done on mass scale and strengthened even more if the deportation is carried out on discriminatory basis. The most appropriate remedy to forcible expulsion is to offer repatriation to the former home. Article 46 of the Hague Regulations states that persons and their private property must be respected under occupation and property can not be confiscated. Deportation would thus seriously violate this article as well as customary international law in general.

5.2.2 Geneva Law

The 1949 Geneva Civilians Convention additionally declares the right of return of displaced persons to their homes as a consequence of war. The principle of repatriation has been incorporated in all the four Geneva

conventions and its two additional protocols. The intention of the drafters was to apply voluntary repatriation to the homes of origin following an armed conflict. The most important common provisions of the Geneva Conventions relates to repatriation. It is considered a natural remedy as a consequence of conflicts and is guaranteed to all person protected by one of the four Geneva Conventions.⁴⁷ Denunciation clauses have similarly been included in all conventions affirming that denunciation is not legal until a peace agreement has been reached, following that repatriation of protected persons has to be terminated as such. The process may thus not occur until after repatriation has been carried out.⁴⁸

Geneva Convention IV elaborates the right of repatriation with an even greater protection provisions due to its reference to the protection of civilians. The convention is applicable to protected person in armed conflict, meaning all habitual residents of a territory that have been displaced from their place of origin during conflict. It applies to both aliens in the territory of a party to the conflict as well as persons in an occupied territory.⁴⁹ Refugees as such are not specifically included in the definition of protected persons, but being civilian persons effected by a conflict is recognised as an equivalent matter. Protected persons are said to be persons who are not given protection by their national government or being in the hands of an occupying power where they are not nationals. Art 44 specially refers to refugees and protects the abuse of refugees who are in the weak position of not being protected by any government. Art 70.2 furthermore gives special protection to those refugees who are nationals of an occupying state. Finally, Additional Protocol I art 73 explicitly states that refugees are to be considered as protected persons. There should hence not be any questioning about refugees and stateless persons and their relation to the convention.

Geneva Convention IV furthermore contains a repatriation provision affirming that the convention shall remain in effect even after the end of hostilities for those in need of repatriation.⁵⁰ It also protects persons from deportation by unconditionally prohibiting forcible transfers. Persons evacuated shall immediately be permitted to return when hostilities have ceased. The intent is to prevent the removal of protected civilians so that they would not need to claim their right to return⁵¹. Article 53 further prohibits destruction of personal or real property and Article 45 limits permitted situations of transferring people temporarily and as well as conditioning transfer upon repatriation. Both article 45 and 49 explicitly refers repatriation to be initiated to their homes. The convention finally

⁴⁷ Geneva Convention I, article 5; Geneva Convention II, article 6; Geneva Convention III, articles 5, 109-119; Geneva Convention IV, articles 6, 36 and 134.

⁴⁸ Geneva Convention I, article 63.3; Geneva Convention II, article 62.3; Geneva Convention III, article 142.3; Geneva Convention IV, article 158.3.

⁴⁹ Geneva Convention IV, article 4

⁵⁰ Geneva Convention IV, article 6.4

⁵¹ Geneva Convention IV, article 49

declares that internees should after a war be assisted in their repatriation and returned to their homes.⁵²

Noteworthy in this context is also Article 17 of the second protocol to the Geneva Conventions which prohibits deportation, forcible expulsion even in non international armed conflicts.⁵³

5.2.3 Breaches of Humanitarian Law

As earlier mentioned humanitarian law strictly forbids deportation and forcible transfer of people. These methods are said to constitute grave breaches of international law according to both Hague law and Geneva law⁵⁴ and accordingly considered as war crimes and crimes against humanity. Besides the Hague Regulations and Geneva Conventions the decisions from the International Military Tribunal at Nuremberg has established principles in relation to repatriation that have been incorporated as international customary law. Forcible mass expulsion especially on discriminatory basis are illegal by all means, with repatriation as the only effective remedy. The charter of the International Military Tribunal included deportation as a war crime and crime against humanity.⁵⁵ The International Criminal Court has furthermore stated through its statute that the deportation or forcible transfer of population constitutes a crime against humanity and that grave breaches of the Geneva Conventions constitute war crimes.⁵⁶

5.3 The Right of Return in International Refugee Law

General international refugee law mainly focuses upon the right not to be returned or forcibly repatriated as long as the conditions causing flight remain.⁵⁷ The right to return for refugees is however recognised as one of the general fundamental principles of international law. The unlawful means of forcible expulsion and the right of return is of significant importance in refugee law. Generally there are three recognised durable solutions considered for refugees being repatriation, reintegration and resettlement. Voluntary repatriation is considered the most desirable solution for refugees. Repatriation is the only right that is guaranteed in law with a corresponding binding obligation to the country of origin. The Office of the United Nations High Commissioner for Refugees (UNHCR), which is responsible for refugees, generally advocates that the right of return is the

⁵² Geneva Convention IV, article 134

⁵³ Additional Protocol II to the Geneva Conventions

⁵⁴ Geneva Convention IV, article 147; Hague Regulations, article 46

⁵⁵ Charter of the Nüremberg International Military Tribunal, article 6 (b) and (c)

⁵⁶ Rome Statute of the International Criminal Court, articles 7,8

⁵⁷ The principle of Non-Refoulement, 1951 Refugee Convention, article 33

most appropriate of the three durable solutions.⁵⁸ According to its statute they should inter alia "...facilitate the repatriation of refugees.."⁵⁹

The most universally recognised legal instrument in refugee law is the 1951 Convention Relating to the Status of Refugees⁶⁰ and its related 1967 Protocol⁶¹. It defines the term refugee and states that the implementation of the right of return should be carried out under the auspices of UNHCR.⁶² The definition of the term refugee in article 1 of the convention is the most generally accepted definition. Refugee law as such constitutes of sets of human rights law and principles of humanitarian law that all refugees included in the convention are entitled to, naturally including the right of return. The implementation of refugee rights is under the responsibility of UNHCR.

5.3.1 International Refugee Law and Palestinian Refugees

In relation to Palestinian refugees the 1951 Convention is not as clear and precise. The application of the Convention is ambiguous including both exclusion and inclusion standards. Due to political reasons the Palestinian refugees were excluded from UNHCR and the 1951 Refugee Convention. They are hence in the unique position to be excluded from the convention through article 1 D, which excludes refugees who receive protection or assistance from other agencies than UNHCR. Even though Palestinian refugees are not mentioned explicitly in article 1D it can be seen in from the view of the drafters that they are to be the main target. Palestinian refugees are thus distinguished from other refugees and given special treatment by a special agency UNRWA (United Nations Relief and Work Agency).⁶³

There are two types of Palestinian refugees that fall under the definition in article 1D (1). The first being the original refugees from the war in 1948 and the later displaced persons following the conflict in 1967 and their descendants. The remaining Palestinian refugees that do not fall into any category are entitled to protection through the UNHCR. This is stated in the second sentence of article 1D of the Convention making it possible for Palestinian refugees to benefit from the convention. The criteria is based on the condition that protection by other agencies has ceased in any way.⁶⁴ Their refugee status is then to be determined upon the general criteria stated in article 1 A of the convention.

⁵⁸ UNHCR (1996)

⁵⁹ UNHCR Statute, article 1

⁶⁰ 1951 Convention Relating to the Status of Refugees, General Assembly Resolution 429(V) of 14 December 1950, entering into force 22 of April 1954.

⁶¹ 1967 Protocol relating to the Status of Refugees of 28 July 1951, entering into force 4 of October 1967

⁶² 1951 Refugee Convention, article 1

⁶³ This is stated in both 1951 Refugee Convention, article 1D and 1950 Statute of the Office of the United Nations High Commissioner for Refugees, paragraph 7(c)

⁶⁴ 1951 Refugee Convention, article 1D (2)

According to UNHCR the country of origin is obliged to repatriate its inhabitants. In relation to the Palestinian refugees this statement is rather doubtful and raises even more difficult question and problematic questions. What is the intent and possible solution if one's country does not exist? Is it possible to return to the country of origin a few generations later when there has been a change in nationality? The problem of statelessness and state succession is a very relevant and controversial question that will be discussed in detail later. Another problem is the application of the 1951 Convention per se since most of the countries on the Middle East have not ratified the 1951 Convention and are thus not bound by it.

Further elaboration of the meaning and contents of UNRWA protection and its relation to UNHCR will be discussed later in reference to the United Nations and their role in the Palestinian refugee set of problems. What can be concluded so far is the inclusion of both human rights and humanitarian in the refugee law context and those Palestinian refugees who fall under the protection of the United Nations are entitled to exercise these rights including the right to return.

6 Compensation and International Law

The general meaning of the term compensation is to “make good” or, to “as far as possible wipe out all the consequences of the illegal act, and re-establish the situation which would have existed if that act has not been committed”.⁶⁵ The right to be compensated should be seen as an individual right unaffected by government decisions. It has evolved into a general right in international law by satisfying the criteria commonly accepted and recognised by the international community. This is indicated in international conventions and agreements, regional treaties, domestic and international practice, ruling of international judicial bodies as well as in opinions of relevant scholars.

According to international law there are two different concepts of compensation. Compensation can be offered to refugees as an alternative solution if they choose not to return, and offered for loss of property or material damage of property. Property in this context should include both private and public goods referring to both movable and immovable property. Compensation should in addition include lost income deriving from the use of property and for non material damages.⁶⁶

Compensation can hereby be seen either as a complement to repatriation or as a substitute, with the former being the most desirable. The unconditional right to receive compensation in international law can be seen as based on three basic principles. States are under international law held responsible for injuries caused by acts within their control and with remedies required for any deprivation of human rights. Thirdly, the main purpose of compensation should by all means be respected. This signifies restoring a person to the position before deprivation occurred, with a following obligation to pay compensation to refugees who otherwise would have been restored through voluntary compensation. The following statements are generally recognised principles under international law and shall accordingly under all circumstances be followed.⁶⁷

The unconditional right to receive compensation has furthermore been affirmed and analysed by a Special Rapporteur for the United Nations Commission on Human Rights.⁶⁸ He reviewed a number of international treaties and conventions and concluded that victims of human rights violations do under international law have the right to effective remedies and just reparations including compensation. Gross violations of human rights such as deportation or forcible transfer of population should be given

⁶⁵ Chorzow Factory case (1928)

⁶⁶ Lynk (2001)

⁶⁷ Artz (1997), p.71-73

⁶⁸ Theo van Boven (1993)

special attention. International law does not limit any remedies for claims concerning human rights. It, on the contrary, declares that the essential principle must be respected by all means.

Regarding compensation and refugees most relevant scholars agree that it does not exist as an independent right under human rights law but must be seen in relation to the right of return. The right to compensation is based on customary law and stated in various declarations and conventions, but not independently as a general right to refugees.⁶⁹ In this chapter the concept of compensation shall be elaborated in an attempt to show that the right to compensation is present in international law and various areas in the human rights field. Through its existence it thereby strengthens the legitimacy of refugees right to receive compensation as a legitimate durable solution.

6.1 Compensation and Human Rights Law

A state that violates the legal obligation to ensure human rights is required to make reparation including compensation for loss and injury. An individual that has been exposed to a human rights violation should thereby have the corresponding right to an effective remedy. Due to the absence of a specific right to compensation in general human rights law, the right to an effective remedy appears to be of high relevance acting as an important complement. The fundamental principle can be found in all the general human rights instruments. According to the Universal Declaration of Human Rights (UDHR) every individual is entitled to an effective remedy⁷⁰. This is additionally restated in binding legal treaties of International Covenant on Civil and Political Rights (ICCPR)⁷¹ and the Declaration on the Elimination of all forms of Racial Discrimination (CERD)⁷².

Apart from the general right to an effective remedy ICCPR affirms the enforceable right to compensation if a person has been victimised of unlawful arrest or detention.⁷³ Seen from a refugee perspective the provision could further strengthen their right to be compensated. CERD additionally elaborates the right to an effective remedy through the use of tribunals and declares the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of discrimination.⁷⁴ Compensation is also mentioned in reference to torture in the Convention against Torture (CAT) giving a victim of torture an enforceable right to fair and adequate compensation.⁷⁵

⁶⁹ Takkenberg (1998), p.239-240

⁷⁰ UDHR, article 8

⁷¹ ICCPR, article 2.3(a)

⁷² CERD, article 6

⁷³ ICCPR, article 9.5

⁷⁴ CERD, article 6.2

⁷⁵ CAT, article 14

Regional instruments refer to a more precise right to be compensated in accordance with the law as well as an enforceable right to compensation. This will however not be elaborated in this context.⁷⁶

6.2 Compensation and Humanitarian law

Humanitarian law focuses on the protection of individuals in situations of war and conflicts. It prohibits persecution creating displacement of persons and general mass expulsions of civilian populations. Compensation is accordingly to be received from domestic actions causing generation of refugees as a repairing mechanism of human rights violations. The right to compensation is specifically stated in the Hague Regulations and the Hague Convention. If the belligerent party violates any provision in the convention they are held responsible and obliged to pay compensation for all acts committed by persons under their rule.⁷⁷ The convention further states that pillage is prohibited and a total protection of private property is given under humanitarian law.⁷⁸

The Geneva Conventions commonly confirm that grave breaches of international law require compensation.⁷⁹ Certain specific rights are given to civilians and prisoners of war in their respective conventions, entitling to the right to claim compensation as a consequence to breaches of law.⁸⁰ Finally Additional Protocol I to the Geneva Conventions, protecting victims of international armed conflicts, further emphasizes that the responsible party is liable to pay compensation if a violation of any regulation in the convention occurs.⁸¹

6.3 Case law- The Chorzow Factory Case

The modern basis for compensation rights in international law is based on a ruling of the Permanent Court of International Justice⁸² in a case called “The Chorzow Factory Case”.⁸³ The case primarily concerned Polish expropriation of a German owned industrial property in Poland, where the German government tried to obtain compensation reparation on behalf of the owners. The case was decided as a commercial property act in private international law, but its principles have however gained high acceptance in various public international law decisions including situations of human

⁷⁶ ECHR, article 5.5; American Charter of Human Rights, article 10

⁷⁷ Hague Regulations, article 4; Hague Convention, article 3

⁷⁸ Hague Regulations, articles 28,47 and 46.

⁷⁹ Geneva Convention I, articles 50,51; Geneva Convention II articles 51,52; Geneva Convention III articles 130,131; Geneva Convention IV articles 147,148.

⁸⁰ Geneva Convention III, article 68

⁸¹ Additional Protocol I, article 91

⁸² the predecessor to the International Court of Justice

⁸³ *Chorzow Factory Case* (Germany v. Poland), 1928 PCIJ (Ser. A) No.17 (Judgement of 13 September 1928)

rights violations. In its decision the court stated that “*reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.*”

This would be accomplished through restitution or compensation and include payments of a sum corresponding to the value of the loss and lost profits. The court further affirmed the principle of state responsibility in the case of an act in violation of international legal obligations. Any breach of an engagement or failure to apply any provision invokes an obligation to make reparation. If full compensation can not be achieved there should be remedies of first restitution.⁸⁴

Concerning the relevance of compensation to refugees in relation to the outcome of the case, these general standards have been considered and later proposed that fair and adequate compensation was seen as more appropriate in situations of mass relocation and abandonment of property.⁸⁵ The Chorzow factory case is however an important indication of state practice and the establishment of the principle of right to compensation in general terms.

6.4 ILA Cairo Declarations of Principles of International Law on Compensation to Refugees

The International Law Association (ILA) have developed principles codifying customary international law concerning compensation to refugees by issuing the Cairo Declarations of Principles of International Law on Compensation to Refugees. Besides codifying customary law it involves promoting justice to refugees, preventing new flows of refugees, promoting compensation as a durable solution to refugees and considering it as an alternative solution to repatriation. Due to the lack of independent compensation rights in human rights law the Declaration provides significant guidelines. In its preamble the International Law Association recalls both Resolution 194 (III) as well as General Assembly Resolution 41/70 of 3 December 1986 calling upon states to respect their obligations to return as well as provide compensation to refugees. Since neither resolution elaborates the principle of compensation to refugees the development and codification of international law for compensation done by ILA is essential.

The principles of the Declaration considers the refugee problem from a different point of view, focusing on the country of origin and their responsibility rather than the actual care and maintenance of refugees. The original perspective lays the responsibility mainly on international organisations and their determination of refugee problems through the

⁸⁴ Artz (1999), p. 4

⁸⁵ Benvenisti (1999)

principle of first-country asylum, donor countries and resettlement plans. The Declaration states that the purpose shall not be to relieve the countries that generated refugees but rather to stress the concept of state responsibility and their corresponding obligation to pay compensation to refugees. By laying the responsibility on the country of origin the root causes of refugees are highlighted. A more preventive approach is thereby suggested compared to the original approach where refugees are assisted when they are in need.⁸⁶

The most significant consequence of codifying the Declaration is the legal obligation of the countries of origin to pay compensation to refugees. Compensation shall include both property loss and personal injuries. The principle of compensation significantly prevents countries from creating their own citizens into refugees. It also as confirms that the generator of refugees shall not be encouraged or profitable but rather held responsible and pay.⁸⁷ A country that refuses to pay compensation in any manner shall be imposed with sanctions.⁸⁸ Compensation should furthermore not make any distinction between individuals but to be provided to nationals, aliens, refugees as well as internally displaced persons.⁸⁹ The declaration finally states that turning a citizen into a refugee is an internationally wrongful act conditioned with an obligation to make right. In some situations generating refugees is considered equivalent to genocide.⁹⁰

6.5 State Responsibility

State responsibility refers to the principle of obligation of a state to make good when violating the rules of international law producing injury to another state. State responsibility applies in cases of an act or omission violating an international legal obligation. Any breach of international law is conditioned with an obligation to pay reparation. Article 1 of International Law Commission's Draft Articles on State Responsibility confirms this principle by stating that

*“Every internationally wrongful act of a State entails the international responsibility of that State.”*⁹¹

This is considered applicable in both international and domestic law. International wrongful acts are characterized and governed by international law irrespective of internal legislation.⁹² Even though the articles are of drafting character and have not yet been codified, most principles have been confirmed by international courts and through United Nations resolutions and can therefore be considered part of customary law.

⁸⁶ Lee (1993), p. 65-67

⁸⁷ Cairo Declaration, principle 1

⁸⁸ Cairo Declaration, principle 2

⁸⁹ Cairo Declaration, principle 4

⁹⁰ Cairo Declaration, principles 2,3

⁹¹ International Law Commission draft articles on State Responsibility, article 1

⁹² Ibid, article 3

The principle of state responsibility could be seen as the most successful way to legally claim that refugees have the right to compensation. States are to be held responsible for all its internationally wrongful acts involving breaches of rules of international law causing injuries to other states. State responsibility generally refers to other states and not per se individuals. States are however responsible to ensure as well as to respect human rights towards their nationals. If a state is unable to fulfil their obligation they commit an internationally wrongful act and are accordingly obligated to restore the situation, apply remedies provided under its internal law as well as compensation if restoration is not possible.⁹³ Finally the state should provide guarantees that the act will not reoccur.⁹⁴ State responsibility is determined on an objective basis making means of action and its connection conditions for determining breaches of international law. States bear full responsibility for all their acts and there is no need of admitting fault by states to make them held responsible. There are circumstances where defences are acceptable but wrongfulness is never accepted if there is a breach of fundamental norm of general international law.⁹⁵

In relation to refugees and international human rights law the Declaration puts great emphasis on states and their corresponding responsibility to compensate refugees due to illegal state actions. The most common remedy for a breach of an international obligation is to comply with adequate compensation. States that are considered responsible for creating refugees and performing acts that transforms citizens into refugees violates all the articles of the Universal Declaration of Human Rights. This does by all means constitute breaches international law and accordingly considered international crimes. The mere existence of refugees shows that governments have violated the fundamental human rights. States are imposed with legal duties to prevent violations of human rights and to carry out investigations of violations committed under its jurisdiction. They are also obliged to identify responsibility matters, impose appropriate punishment and ensure compensation to victims.⁹⁶ Refugees should be given the opportunity to repatriate or receive compensation from the responsible state who have placed them in this unfortunate situation.⁹⁷

In relation to state responsibility and individuals another relevant question arises. To whom are states responsible when they breach human rights under international law? The rules determining state responsibility are generally applicable only between states. The subject who has suffered the injury in this case is however not the state but the nationals, and victims themselves have no right to bring international claims. State responsibility arises under multilateral human rights treaties, customary law of human

⁹³ Ibid, articles 31, 36, 37

⁹⁴ Ibid, article 30 (b)

⁹⁵ Ibid, articles 20-27

⁹⁶ UN charter, articles 55,56

⁹⁷ Luke (1986), p. 541-542

rights and most importantly to the community of nations. Due to the fundamental character of the principle it can be considered to have an “erga omnes” character signifying that breaches of international human rights have legal implications to all states concerned and involved. To violate an obligation to respect human rights is a fundamental breach of international law.⁹⁸

State responsibility is not easy to apply in the refugee context. Not only are rules and regulations restricted between states but there are also obstacles in seeking compensation from their respective government and lack of an existing forum to bring forward claims against their government. Luke has interpreted this problem by putting the responsibility on the United Nations. They should be the guardian of the refugees’ interests with a corresponding duty to represent the refugees in international claims.⁹⁹ An advisory opinion from the International Court of Justice also discussed the role of the UN suggesting to empower them with the capacity to bring an international claim against a state, not only against its agent but also to the interests of which they are the guardian.¹⁰⁰ By entitling UN with the possibility to bring forward claims by refugees refugee compensation can be made possible even though they lack the procedural capacity to process proceedings against their own governments are present. The creation of the Conciliation Commission in the Palestine case shows a leading example in this context.

6.6 Compensation and the Palestinian Refugees

As shown in the text above, international law establishes the right for displaced persons who have become refugees to receive compensation as an effective remedy. Breaches and gross violations of human rights as well as lost property through breach of international accepted legal standards, gives rise to the right to receive compensation. Palestinian refugees can thus be said to be entitled to the right to receive compensation for their losses due to Israel’s violation of international legal obligations. The acts causing the flight of half the Palestinian population, confiscation of approximately 80% of land originally belonging to mandate Palestine, destruction of Palestinian property as well as refusing the Palestinian population the right to return is indisputably a breach of international law.

There are generally two major aspects of compensation that are of relevance for the Palestinian refugees. The first signifying compensation due to loss of property and the second involving compensation as an alternative to repatriation. Loss of property shall imply both for lost homes and monetary

⁹⁸ van Boven (1993), p. 17-18

⁹⁹ Luke (1986), p. 549-552.

¹⁰⁰ ICJ Advisory Opinion on Injuries Suffered in the Service of the United Nations; Luke (1986), p.551-552.

compensation for damages. Compensation should furthermore include restitution of their land and property, income deriving from it, the social and moral suffering they have experienced as well as associated lost earnings and opportunities.¹⁰¹

Since the majority of rights concerning compensation in general concern nationals against their state, they can not easily be applicable to the Palestinian refugees due to their situation of statelessness. As it has not been clearly established that the Palestinians were citizens of the country that forced them to flee, no country can be held technically responsible for compensation. This results in a lack of international protection and claims for compensation for the unfortunate Palestinians. The law regulating claims by stateless persons or others who were not nationals at the time of seizure is unfortunately less developed in international law. In situations of statelessness and lack of protection the United Nations can therefore play a significant role in order to facilitate compensation claims. In the Palestinian case a specific UN body UNCCP was established entailed with the task to solve the compensation issues and develop a durable program that would satisfy both parties.¹⁰²

Due to the unique character of the Palestinian refugees their right to compensation is not only stated in international legal standards, but also stated and elaborated through various UN Resolutions. Resolution 36/148 specifically focuses on refugee compensation referring to property loss rather than the former resolution covering a larger area referring to adequate compensation. In addition Resolution 51/129 entitles Palestinians to their property and the income deriving from it.

¹⁰¹ Lynk (2001), p 8-10

¹⁰² The work of the UNCCP will be discussed below, see section 7.1, p. 34

7 United Nations and the Palestinian refugees

The role of the United Nations is unique in relation to the Palestinian refugees. By excluding the Palestinian refugees from general refugee protection the situation assumes a direct responsibility of the UN. The responsibility question arises in reference to implementing durable solutions which are affirmed in numerous UN resolutions. Seeking durable solutions for the Palestinian refugees lays its foundation in UN resolutions and international law. The United Nations has therefore played an overall important role in the Palestinian refugee problem ever since the outbreak of the conflict.

The international community has recognised the organisation as the main catalyst of the refugee problem due to the establishment of the Partition Plan¹⁰³, and hence mainly responsible for the creation of mass displacement of individuals during 1948-49. As a form of compensation the United Nations created a special regime that was to promote durable solutions for the refugees, and to provide protection and assistance. The basis of the regime was established under Resolution 194 (III). This special regime should according to the resolution consist of a Conciliation Commission that should facilitate the implementation of the durable solutions for Palestinian refugees being mainly repatriation, resettlement and compensation.¹⁰⁴

In a historical context UN and the Palestinian refugees can be originated from the UN Mediator for Palestine, followed by the relief agency for Palestinian refugees (UNRPR). This was later transformed into the Conciliation Commission for Palestine (UNCCP) and the creation of UNRWA. Due to the failure of both the mediator and the UNCCP to solve the complicated situation, UNRWA became the agency that today remains the most active in the work constituting the assistance of Palestinian refugees. Consequently the special regime created by the UN regarding the Palestinian refugees consists of the inactive UNCCP, UNRWA and article 1D of the 1951 Refugee Convention. The work of the specialised agencies shall accordingly be elaborated and analysed in order to evaluate the fields of operation as well as corresponding responsibilities.

7.1 UNCCP

The Conciliation Commission for Palestine was established in 1948 under Resolution 194 (III) with the main purpose to facilitate and promote durable solutions for the Palestinian refugees. This involved the process of

¹⁰³ General Assembly Resolution 181 of 29 November 1947

¹⁰⁴ www.badii.org/Refugees/History/United_Nations.htm, 2003-06-02

repatriation, compensation or resettlement based on the individual wish of the refugee. The Commission was to work towards achieving final settlements as well as promoting economic development in the area. Being established as a successor to the Mediator for Palestine, the Commission was to assume the responsibilities and work according to the former recommendations. The work involved implementation of both the Partition Plan and the durable solutions stated in Resolution 194 (III) regarding the right to repatriate. The commission was accordingly imposed with the overall mandate to cooperate and assist the governments working with the durable solutions in the Palestine question, as well as providing protection to the refugees.¹⁰⁵

In the early years of its operation UNCCP made various attempts to cooperate with state governments in their work concerning the promotion of solutions. At the same time they were however to provide adequate protection for the refugees. Due to the complex and dual character of their mandate, the agency was often put under extreme high pressure and seemed to contradict itself in various manners. Involving both protection mechanisms for all refugees and displaced persons in Palestine, as well as facilitating the implementation of durable solutions for the refugees by means of conciliation, made it impossible to reconcile with its internal mandate. They were left with the question of compensation as the only possible issue to solve. They had been given the responsibility of providing international protection that the UNHCR generally performs, but since they failed to accomplish this task the concept of international protection for the Palestinian refugees fell into oblivion.¹⁰⁶

The main reason of the failure of UNCCP was the lack of cooperation between the states involved. Despite the collapse of the agency they managed to succeed in their work promoting compensation matters. They managed to accomplish a three-step plan solving the issue of compensation. The three steps involved the estimation of value of abandoned property, releasing bank accounts that had been frozen by the Israeli banks as well as identifying individual refugee holdings that were abandoned due to the conflict. An extensive compensation scheme was further developed to settle the issue of compensation for Palestinian refugees. Based on the concept of lump-sum agreements Israel agreed to pay compensation for property abandoned by the refugees choosing to repatriate. Al though the agency can be considered as a failure, the work of resulted in a extensive individual identification and evaluation of refugee properties documented in the UN archives.

Even though UNCCP failed to accomplish their aims, the agency was never formally abolished. The General Assembly noted the that problems had not been solved and passed a resolution concerning the functions of UNCCP.¹⁰⁷

¹⁰⁵ Resolution 194 (III) paragraphs 2, 6, 10, 11.2 and 14.

¹⁰⁶ Rempel (2000)

¹⁰⁷ General Assembly Resolution 394 (V) of 14 December 1950

Due to the economic limitation and the political character of the situation the commission was not replaced by any explicit agency. When the UNCCP was established it was assumed that the question of repatriation would be possible to implement in a rather fast and uncomplicated manner. Their mandate was intended to extend for a short period and was accordingly not prepared or given the facilities to continue with their obligations under their mandate. UNCCP was imposed with a demanding task trying to satisfy both the Palestinian refugees and Israel demands with means of conciliation. Israel's lack of cooperation and unwillingness to allow refugees to return to their homes contradicting the rules of international law, worsened the situation. The UNCCP can therefore not alone be blamed failing to solve the complicated situation.¹⁰⁸

At this point, the United Nations had consider an alternative of settling refugees in Arab countries. The UNCCP established the Economic Survey Mission under paragraph 12 of Resolution 194 (III) with purpose to study the economic feasibility in the area as an alternative. After their study they issued recommendations to establish an agency engaged in public works to improve the productivity in the area and relief works. This agency was to be named the United Nations Relief and Work Agency, UNRWA.¹⁰⁹

7.2 UNRWA

General Assembly Resolution 302 (IV) established The United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA) in 1949 as a successor to the former UN Relief for Palestine Refugees. It was created as a subsidiary organ under the United Nations General Assembly, aiming to assist the individuals who left Palestine as a result of the conflict. UNRWA was established on a short-term mandate and instructed to operate with its assistance until the durable solutions stated in Resolution 194 (III) were implemented. Due to the complicated situation of solving the refugee set of problems the mandate was extended and the agency has continued to work ever since. The main purpose of UNRWA is to provide assistance for the Palestinian refugees based on the concept of need. They are thus given a more functional role rather coming into existence when a solution has been facilitated by the UNCCP. The mandate of UNRWA did not involve with facilitating a solution for the refugees as such.

7.2.1 Resolution 302 (IV)

Due to the unexpected consequences of the Partition Plan generating the Palestinian refugee problem, the United Nations established Resolution 302 (IV).¹¹⁰ The resolution created UNCCP and UNRWA who were to provide

¹⁰⁸ Takkenberg (1998), p. 24-28

¹⁰⁹ General Assembly Resolution 513 (IV) of 26 January 1952

¹¹⁰ General Assembly Resolution 302 (IV) of 8 December 1949

specific protection as well as assistance for the Palestinian refugees, replacing the general refugee protection provided by UNHCR. Before the creation of UNRWA international voluntary organisations (for example ICRC) supplied with assistance and urgent need for the refugees in the area. The United Nations did however recognise that there was a significant need for continued assistance to relieve the Palestinian refugees, prevent starvation and situations of distress, as well as to establish conditions of peace and stability in the area. UNRWA was to function as a collaborator with local governments with relief programmes and consult with interested governments concerning measures to be taken when relief and work projects come to an end.¹¹¹

The resolution also appointed a director of the agency to work as a chief officer responsible to the Secretary General for the operation of the programme.¹¹² UNRWA was finally instructed to cooperate with UNCCP and consult with the agency in the best interests of their respective tasks with particular reference to paragraph 11 of resolution 194 (III) promoting the most sustainable solutions for the Palestinian refugees.¹¹³

7.2.2 The mandate of UNRWA

The mandate of UNRWA is stated in Resolution 302 (IV) and based on the recommendations of the Economic Survey Mission. It involves the issues of assistance and development in the area of operation through working programmes, and the process of providing direct relief for the persons in need. According to the Resolution the work and relief programmes is to function until the refugees were able to return to their homes.¹¹⁴

The assistance provided by UNRWA includes basic health and social services, as well as education to the refugees within in their geographical area of operation (Lebanon, Syria, Jordan, and the West Bank and Gaza Strip). The agency provides daily assistance to the Palestinian refugees within their field of operation in relation to the social and economic rights area. The legal and diplomatic protection is however not included in its mandate, but was intended to be the responsibility of UNCCP. Implementing durable solutions for the refugees does thus not fall into the mandate of UNRWA. The authority of UNRWA is not as explicit as the mandate of UNHCR which provides an overall international protection to all other refugees in the world. UNRWA is entitled to provide general assistance but due to its limited authorities it is restricted to perform a complete protection. Basic protection on a humanitarian and flexible approach is however consistent with its mandate, as well as promoting local integration as an alternative solution to the refugee problem. As long as the work of the agency is in favour with Resolution 194 (III) there is no

¹¹¹ Ibid, p. 5 and 7

¹¹² Ibid, p. 9

¹¹³ Ibid, p. 20

¹¹⁴ Ibid, p. 7

violation of its obligations towards the Palestinian refugees or international law.¹¹⁵

The mandate of UNRWA is not only limited regarding the actual protection but also in relation to locality. UNRWA is only allowed to provide assistance in their fields of operation including those refugees who are registered with the agency and accordingly falling within its definition. Despite various attempts widening the mandate of UNRWA, they remain the only official agency in the area providing assistance to refugees in need, leaving no other international agency charged with the responsibility. UNRWA has thereby become a major symbol to the Palestinian refugees of international responsibility forsaking the majority of the refugees in a limbo situation due to the gap in overall international protection.¹¹⁶

7.3 UNHCR and International Protection

The office of the United Nations High Commissioner for Refugees (UNHCR) was created in 1951 as a temporary agency due to the consequences of mass displacement in the world. UNHCR became the main agency involved in international protection for refugees. According to its statute the purpose is to

*“provide international protection “ and “seek permanent solutions to the refugee problems by means of voluntary repatriation or assimilations into new countries”*¹¹⁷

The protection of UNHCR includes an overall protection scheme with legal and political protection, material and practical assistance representing refugees in the international context, as well as promoting their rights ensuring they receive an appropriate standard of treatment. The work involves supporting legislation and international conventions on a both regional and global level in the light of the refugee. It furthermore considers close cooperation with governments, states and international organs to prevent generation of refugee flows and ensuring that refugees will experience a safe return to their homes.¹¹⁸

The 1951 Convention relating to the Status of Refugees (Refugee Convention) forms the basis of the work of UNHCR. It functions as a safety mechanism including certain minimum standards of treatment and thereby granting specific rights to refugees as well as certain standards of treatment, striving towards reaching the equivalent standard as inhabitants in the country of refuge.¹¹⁹ UNHCR has limited authorities only admitting

¹¹⁵ Ibid, p. 5;

Rempel (2000)

¹¹⁶ See below section 7.5.1

¹¹⁷ UNHCR Statute, p. 1

¹¹⁸ UNHCR Statute, p. 6-8

¹¹⁹ 1951 Refugee Convention, articles 3, 13-24

protection to those refugees who fall under the definitions stated in article 1 of the 1951 Refugee Convention and accordingly determined refugee status. The mandate can however be expanded through directives from the General Assembly or the Economic and Social Council being their immediate superiors.¹²⁰

According to fundamental human right principles, all refugees should be able to seek and receive international protection since they are neither able to seek protection from their own government, nor guaranteed assistance from the country of refuge.¹²¹ International protection includes both legal and diplomatic protection as well as material and practical assistance. International protection in general is provided by the United Nations through the Office of the High Commissioner for Refugees (UNHCR). The most fundamental form of international protection is the principle of non-refoulement guaranteeing that the refugee shall not be sent back to any country where he or she will experience torture or inhumane, degrading treatment.¹²² In the Palestinian refugee context this principle is however not of relevance since they are not permitted to return to their country as such. The UNHCR is furthermore restricted by their mandate to provide international protection to the majority of Palestinian refugees. The need for international protection is however still an issue of significant value even though the form of protection is different.

7.3.1 UNHCR and the Palestinian Refugees

UNHCR's attitude and approach towards Palestinian refugees is of restricted character due to the restrictions in the provisions stated in both the Refugee Convention and the Statute of UNHCR.¹²³ The protection of Palestinian refugees under the mandate of UNHCR is thus seen to be of limited nature for a limited number of refugees. Refugees who can avail themselves under the refugee definition stated in the 1951 Refugee Convention are entitled to overall protection by the agency. Palestinian refugees are however only entitled to protection from UNHCR if protection or assistance from other responsible UN agencies have ceased to exist, or if not included in the specialised agencies' mandate. This is stated in article 1D of the Refugee Convention primarily referring to UNRWA and the Palestinian refugees. Restrictions are not only met through these legal provisions, but also by the fact that most Arab states in the area have not signed or ratified the 1951 Refugee Convention. This has resulted in great difficulties cooperating with these states. The work of UNHCR in the Palestinian context today mainly involves limited operations of administration issuing travel documents and registration cards. They have however also intervened in serious conflicts by assisting in the areas outside UNRWA's field of operation.

¹²⁰ UNHCR Statute, p. 3

¹²¹ UDHR article 14.1, 1951 Refugee Convention article 33.1

¹²² 1951 Refugee Convention, article 33

¹²³ 1951 Refugee Convention, article 1D; UNHCR Statute, p. 7 (c)

According to the Handbook of the UNHCR Determining Refugee Status, the approach stated in article 1D is rather contradictory since it refers to a dual mandate of UNRWA providing both assistance and protection. This is however incorrect since UNRWA are only authorised to provide assistance and not legal and diplomatic protection. This consequently leaves the refugees who fall under the protection mandate of UNRWA with no legal and diplomatic protection from UNHCR. The functions of UNHCR in general are rather unclear and there is an urgent need to clarify its role and areas of protection in the Palestinian refugee context. The question of the non-political character of the agency's work is also in need of clarification and possible development in order to strengthen the rights of the refugees.

7.3.1.1 Article 1D

“ This convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

*When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.”*¹²⁴

The general purpose of article 1D is to ensure that Palestinian refugees receive an overall protection until their situation is solved in a satisfactory manner. Even though the provision is drafted in general terms and not explicitly referring to Palestinian refugees this is affirmed when interpreted in accordance with the statutes of UNHCR and UNRWA, together with Resolution 194 (III) and its establishment of UNCCP. It is also confirmed in the drafting process of article 1D stating there was a shared intention between the Arab and Western states to exclude the Palestinian refugees from ordinary protection scheme and rather entail them with specific treatment from the United Nations.¹²⁵

Despite the explicit wording of article 1D its application is however far from being easily interpreted. It is on the contrary considered a very complex and ambiguous article implied with various interpretations referring to both an exclusion and inclusion clause. The general interpretation of the article normally considers the article to be exclusive. Reading the first part of the article together with the second paragraph the article can however be interpreted as a suspensive clause rather than an exclusion clause.¹²⁶

¹²⁴ 1951 Refugee Convention, article 1D

¹²⁵ Takkenberg (1998), p.90-91

¹²⁶ Grahl-Madsen (1966), p. 263

The first part of the article is of restrictive nature where all refugees receiving protection or assistance from other organs of the UN are excluded from the convention. The second paragraph however limits the exclusion by implying an inclusion clause guaranteeing that those refugees who have ceased to receive protection from other agencies are to be included under the convention. As regards the inclusion part of the article, most scholars refer to the first paragraph expressing that if the individual is included under the protection scheme of the first paragraph falling under the mandate of UNRWA, they are qualified as refugees under the convention. Determining refugee status should thus not only be determined by the general article 1A but by article 1 as a whole. This can be confirmed by the overall object and purpose of the provision. Abiding by this interpretation, article 1D can be referred to as a more specific case provision rather than an exclusion clause. If considered refugees by the United Nations determination process once should thus be sufficient in order to receive corresponding protection or assistance.¹²⁷

Refugees under the protection from UNRWA can however in certain situations fall under the protection of UNHCR. The second part of Article 1D is directly linked with article 1A.2 both giving rise to convention refugee status. Article 1D.2 needs more in depth analysis in order to recognise its significance. Scholars in this field of study have extensively discussed the application of the provision which are important to consider in this context.¹²⁸

The reference to “*such*” protection or assistance is according to the drafters a direct reference to the first paragraph and thereby to UNRWA’s field of operation. The actual assistance or protection refers to persons falling under the mandate of UNRWA who are able to receive protection or assistance from the agency.

The term “*has ceased*” generally refers to the assistance or protection from UNRWA and the possibility of receiving protection or assistance from UNRWA due to any reason no longer exists. The determining issue in this case is the ability and possibility to receive protection or assistance. If the individual has voluntarily left the area of UNRWA’s operation, he/she is not to be included since they thus not in need of assistance or protection. Only in cases where UNRWA’s mandate has come to an end, the cessation is said to be justified following the legitimacy of article 1D.2. According to the provision the cessation of protection is to be applied on an individual basis, and determined on the possibility to receive protection or assistance from UNRWA on a case by case basis disregarding the overall situation for the refugees. The aim of the provision is to determine if a refugee falling under the mandate of UNRWA is able to return to UNRWA’s area of operations in a legal manner. It must be stressed that the purpose of article 1D was not to provide Palestinian refugees with the choice of either convention protection

¹²⁷ Takkenberg (1998), Chapter 3 ; Grahl-Madsen (1966), p.263-265

¹²⁸ Takkenberg (1998), p. 104-121

by UNHCR or special assistance by UNRWA. UNRWA is enjoyed with the main responsibility of the Palestinian refugees and only when their operations do not function may alternatives come into question.

Furthermore certain clarification of the term “*ipso facto*” may be considered. In this context the term refers to all refugees defined in paragraph 1D.1 that has for any reason, all though not on voluntary basis, failed to receive protection from UNRWA. They will accordingly automatically fall within the scope of the convention and benefit from the rights stated therein. The automatic change results in a direct reference to convention refugee status without a new determination procedure required, exchanging article 1A.2 with article 1D.2. According to the UNHCR Handbook Determining Refugee Status, convention refugee status can be determined if circumstances that originally qualify for assistance or protection from UNRWA are present, making sure that the conditions still persist and has not been included under cessation or exclusion clauses or being outside areas of UNRWA’s operation.¹²⁹

Article 1C of the Refugee Convention is also of interest in the Palestinian refugee context. The provision contains general cessation clauses excluding persons from refugee status in certain conditions. Paragraph 1C. 3 refers to cessation of refugee status if a new nationality has be given. This provision shall however be read in direct reference with article 1A.2 and not explicitly 1D. Article 1C.3 and 1D.1 is thus said to supplement each other.¹³⁰

Unfortunately all states do not interpret article 1 D in this liberal manner with the aim and purpose of achieving a high protection level for all refugees. The interpretation of article 1D has on the contrary been rather restrictive excluding many Palestinians from protection as such. Many states withhold the opinion that the Palestinians who have been in the hands of UNRWA and situated in their areas of operation can only be recognised as refugees under the 1951 Refugee Convention if they are able to prove that UNRWA has ceased, or that they were no longer allowed to stay in the area. This has resulted in huge difficulties for Palestinian to apply for asylum in states with restrictive definitions.¹³¹

7.3.1.2 The protection gap

Article 1D is also ambiguous in the context of referring to protection *or* assistance. Palestinian refugees are entitled to benefits of the convention if protection *or* assistance ceases. UNRWA is concerned with assistance and UNCCP is intended to provide with protection. Due to the failure of UNCCP the protection has ceased to exist for all Palestinian refugees. Given the collapse and lack of functions of the UNCCP the protection for the Palestinian refugees should according to be handed over to UNHCR, while

¹²⁹ UNHCR (1992), p. 143

¹³⁰ Takkenberg (1998), p. 127-129

¹³¹ Takkenberg (1991), note 18

assistance shall proceed within the responsibility of UNRWA. This is affirmed through article 1D of the Refugee Convention stating that UNHCR is obliged to provide protection to Palestinian refugees if other protection ceases to exist. They are thereby responsible for the fulfilment of the gap that arises in the level of protection. The reason why this fulfilment has not been successfully implemented in the Palestinian context is dependent upon a number of reasons.

Primarily confusion arises concerning the regulations stated in statute of UNHCR. Palestinian refugees are excluded from their mandate through paragraph 7.C of the statute. The provision does not include a following second sentence widening the protection mandate similar to the second part of article 1D in the Refugee Convention. This could however be explained by the time schedule making the inclusion clause in article 1D prior to the provisions of the statute. Another more significant obstacle is the non-political nature of UNHCR. According to paragraph two of its statute, UNHCR is an agency of strictly non-political character and shall only involve in social and humanitarian operations. One of the main reasons for the creation of UNRWA was the inability for UNHCR to act under the political pressure of the Arab-Israeli conflict. The policy of non-political interference in general however is difficult to conform due the nature of refugee protection and the political character of negotiations of possible solutions. Given that the organisation is highly dependent upon contributions and finances from the international community, they are furthermore imposed with economic limitations, including refugees already receiving some form of assistance or protection would thus be an operation constituting serious economic burden.¹³²

7.4 Other agencies of UN and additional protection

Due to the lack of protection among the majority of Palestinian refugees the United Nations has tried improve the situation by providing additional protection. Various agencies and committees have been established in order to upgrade the situation for Palestinian refugees living in the region. General Assembly Resolution 3376 created the Committee on the Exercise of Inalienable Rights of the Palestinian People, with the purpose to provide the General Assembly with a programme of implementation to facilitate the exercise of fundamental human rights of the Palestinian refugees. This would include their right to self-determination, national independence and return to their homes and property. The Division for Palestine Rights¹³³ was later formed, assisting the Committee in administrative issues, such as planning and organising international meetings, as well as maintaining close relations with international organisations.¹³⁴

¹³² The discussion was initiated by Akram (2000)

¹³³ General Assembly Resolution 32/40 of 2 December 1977

¹³⁴ www.un.org/depts/dpa/qp/new/committee.htm, 2003-06-15

The Office of the United Nations Special Coordinator for the Occupied Territories (UNSCO) was not specifically established in relation to the Palestinian refugee problem as such. It was intended to specifically include the Palestinian refugees in the West Bank and Gaza being residents of the occupied territories. The agency facilitates in the cooperation between different UN programmes, promoting resolutions and declarations in favour of the Palestinian refugees as well as maintaining close connection with non-governmental organisations operating in the area.¹³⁵

The general agencies of the UN are also involved in the Palestinian refugee context providing services according to their mandate and fields of operation. Examples of such agencies are UNDP, UNESCO, UNICEF and WHO.

7.4.1 Attempts of Providing Additional Protection

Not only have additional agencies been created by the United Nations. Due to the limited working mandate of UNRWA there have been various attempts initiating an expansion of its mandate and strengthening the situation for the Palestinian refugees. After the war in 1967 and the conflicts in Lebanon during the early 1980s, the General Assembly expressed the need to protect the Palestinian refugees and displaced persons. This occurred through the establishment of a resolution where UNRWA together with the Secretary General should undertake effective measures the guarantee the safety and legal human rights of the population in the occupied territories.¹³⁶ Civil and political rights were in great need to be protected but could not be processed by UNRWA. Due to the gap of protection and mandate more active cooperation between UNRWA and UNHCR was suggested, but the response from UNHCR was relatively weak and the plans were never implemented.¹³⁷

7.4.1.1 International Committee of the Red Cross

When the areas of Gaza and the West Bank were occupied by Israel in the 1967 war the refugees living in the area became citizens of occupied territory and thus entitled to receive protection through international humanitarian law provided by the ICRC.¹³⁸ Israel did not however affirm the legality of applying international humanitarian law and the provisions stated in the Geneva Convention. They agreed to accept only the humanitarian provisions of the convention, which was not approved by ICRC or by the contracting parties to the convention. It was however argued

¹³⁵ www.arts.mcgill.ca/mepp/unsco/unabout.html, 2003-06-15

¹³⁶ General Assembly Resolution 37/120 I of 16 December 1982

¹³⁷ The UN Joint Inspection Unit was instructed to carry out a review of UNRWA and its functions. In its report they concluded the problems of gap in protection.

¹³⁸ Geneva Convention IV

that Israel is legally obliged to protect civilians who are found in occupied territories due to the outbreak of previous hostilities. Israel's position resulted in impossibility of implementing international supervision and protection in the area as stipulated in the Geneva Convention.¹³⁹ The role of ICRC in the occupied territories is thus dependent upon Israel's will to cooperate.

7.4.1.2 Refugee Affairs Officer Programme

Non-implementation of the Geneva Conventions resulted in further attempts by the United Nations together with the ICRC to extend the work of UNRWA and provide with additional general assistance and protection for the Palestinians living in the occupied territories. Security Council Resolution 605 discussed possible ways for the international community to ensure the civilian population adequate protection. The Refugee Affairs Officer programme (RAO) was introduced as a method to operate general assistance for civilians living in occupied territories. Its main purpose was to observe and report of abnormal circumstances by visiting different areas in the region. They were further to assist UNRWA in the delivery of services. RAO worked in cooperation with a Palestinian assistant to try to resolve the situation during confrontations between occupation forces and the Palestinians. They reported to the field offices, that in turn reported to the Secretary General reporting to the Security Council. The RAO programme was successful in the region but was heavily criticised by Israel. They considered the work of RAO as a violation of UNRWA's mandate breaching the Comay-Micheltore Agreement, which permitted UNRWA to continue its work of providing assistance to refugees situated in the area even after the occupation of the West Bank and Gaza.¹⁴⁰ Despite its criticism the RAO programme initiated the establishment of the Temporary International Presence in Hebron (TIPH). It was a compromise form Israel since they have not agreed to station UN peace-keepers in the occupied areas. TIPH was established in order to promoting stability and restore normal living conditions in the region.¹⁴¹

Successful attempts of extending the mandate of UNRWA has functioned in situations of emergency on temporary basis, including more persons under their mandate. This has been operated through the Security Council who has sent missions to the region to protect Palestinian civilians under Israeli occupation.¹⁴² Most significantly, the Security Council has expressed their deep concern for the Palestinian civilians and initiated a resolution explicitly providing the Secretary General together with the Red Cross through the work of UNRWA to observe and supervise the Palestinian situation under Israeli occupation. This initiative was influenced by the results obtained from the RAO working programme. The resolution made

¹³⁹ Geneva Convention IV, articles 9,11

¹⁴⁰ Takkenberg (1991), p. 423-432

¹⁴¹ Takkenberg (1998), p. 303

¹⁴² Security Council Resolution 672 of 12 October 1990

UNRWA the official monitor of the application of the Geneva Conventions and significantly strengthened its mandate creating a legal aid system in the region.¹⁴³

7.5 Other relevant UN resolutions in the Palestinian refugee context

Resolution 194 (III) is the guiding provision concerning the Palestinian refugees and forms the framework for durable solutions. Due to the serious problems of implementation, additional resolutions have evolved from the original resolution restating the facts in an attempt to put greater emphasis on the rights for the Palestinian refugees.

The first major attempt was the adoption of Resolution 513 (VI) of the General Assembly establishing the UN agency UNRWA, with purpose to facilitate in the process of reintegrating the displaced Arabs into economic life in the region.¹⁴⁴ The resolution referred to the repatriation methods stated in the initial resolution or resettlement elsewhere. When the conflicts broke out in 1967 there was a serious need to restate the resolutions and put pressure on the parties to implement its obligations. Various solutions, including both the refugees displaced in the 1948 war and the newly displaced individuals of the 1967 conflict, were established but were not very effective.¹⁴⁵ One of the main reasons for the failure of the General Assembly resolutions was its non-binding character and the need to rely upon diplomatic methods to gain success.

The binding effects of the Security Council's Resolutions were not issued as regularly as the General Assembly's due to its political influence and corresponding consequences. During the 1967 war the Security Council issued Resolution 237, explicitly calling upon Israel to facilitate the return of those in relations to the 1967 conflict, preventing Israel to argue that they were exempted from responsibility due to the absence of mentioning Israel by name in resolution 194 (III).¹⁴⁶ Security Council resolution 242 was another attempt to stabilize the situation in the region by generally calling upon Israel for a just settlement of the Palestinian refugees and lasting peace in the Middle East. The parties were hereby, according to certain principles, committed to negotiate in good faith to reach a permanent agreement regarding the refugee problem.¹⁴⁷ Resolution 338 further stressed upon the necessity to of Israel to withdraw from the occupied territories of the West Bank and Gaza and the immediate return of the displaced persons who were forced to leave their homes.¹⁴⁸

¹⁴³ Security Council Resolution 681 of 20 December 1990

¹⁴⁴ General Assembly Resolution 513 (VI) of 26 January 1952, p. 2

¹⁴⁵ General Assembly Resolutions 2452, 2535, 2963 and 2452

¹⁴⁶ Security Council Resolution 237 of 14 June 1967

¹⁴⁷ Security Council resolution 242 of 22 November 1967

¹⁴⁸ Mallison (1979), p. 37-38

The most fundamental action taken by the United Nations in this question was the successful work of the General Assembly establishing a resolution referring to the inalienable rights of the Palestinian people.¹⁴⁹ They recognised overall national rights to the Palestinian people as well as individual rights. By making their rights inalienable they were of fundamental value and impossible to cease. This resolution is closely linked to the resolutions covering the general right to self-determination. This aspect will however, due to limitations, not be covered in this paper.

¹⁴⁹ Resolution 3236 (XXIX) of 22 November 1974

8 Problems of Implementation and the Question of Responsibility

Given the right to return and receive compensation under international refugee law and UN resolutions, the solutions should be regarded as uncomplicated to implement. This is however not the case regarding the Palestinian refugees. The problem of solving the Palestinian refugee problem has remained unanswered for over 50 years. The question why this specific refugee problem remains unsettled even though there are specific international law instruments relating to the problem remains unanswered. It seems that the main reason for the failure to implement the rights for the Palestinian refugees under international law lies in the different views of the parties involved and their interpretation of the principles of law. The problems arise already in the initial phase and the fundamental issues such as the actual cause of the refugee generation and the following implications of responsibility. Clarifying the responsibility question seems to be crucial since it dominates the consequences of the solutions. Once the responsibility for the generation of refugees is settled, the question of repatriation, resettlement and compensation can be solved. No state does however admit responsibility realising the immense legal consequences and costs.

Regarding the cause of the refugee problem, the Palestinians believe that Israel and the Zionist movement created the generation of refugees. They initiated the war as a response to the UN Partition Plan that forced thousands of people to leave their homes and flee the country. Due to their behaviour they should accordingly be held responsible for the creation of refugees and offer repatriation and compensation under the principles of international law. The Palestinians further emphasise the importance of UN Resolution 194 (III) that specifically states the principles of international law in question. The Resolution should thus be the point of departure when reaching a solution to the problem. Israel, adversely, blames the Arab states for generating the Palestinian refugee problem, since they refused to accept the establishment of the state of Israel under the UN Partition Plan and consequently declared war on Israel. The Arab states should thus be held responsible for their war of aggression and provide compensation to the refugees and resettle them into their countries. Since Israel never accepted the establishment of the guiding UN Resolution 194 (III) they do not approve of the Palestinian claims of repatriation and compensation. Instead they claim discharge from liability since the resolution does not explicitly mention Israel as the responsible nation.

8.1 Questioning the legitimacy of UN Resolution 194 (III)

Despite the separate opinions between the parties, UN resolution 194 (III) is fundamental in relation to refugee settlement. It is considered the cornerstone for the implementation of Palestinian refugee rights through its restatements of the corresponding principles of general international law. The resolution has strengthened the Palestinian refugees' and created a greater foundation for the legality of their rights as refugees. As specifically established for the Palestinian refugees, the resolution can be considered an additional source of law stating the suitable legal solutions to the problem. Israel has however not approved the resolution. They have discordantly involved in various attempts to challenge its legitimacy in order to be relieved from responsibility. Their main argument is the unbinding, recommendatory nature of a resolution established by the General Assembly with no legal implications upon states. Due to the annual reconfirmation by the UN and the international community, Resolution 194 (III) has gained customary law status and is thereby unique in its character of binding nature. The right of return and compensation has in addition independently gained international law status since the emergence of the problem in the late 1940s. The argument is therefore not legally valid in the discussion.

Since Israel is not explicitly mentioned in the wording of the resolution, they furthermore argue that they are not obliged to abide by the resolution. Israel is however the only country of origin that can be in question which accordingly makes them legally bound by the provisions stated in the resolution. Israel is the only state of origin that can be obliged under international law to repatriate the Palestinian refugees from 1948 and provide with appropriate compensation. Israel has also mentioned the legality of the later Security Council Resolution 242 arguing that it has nullified Resolution 194 (III). Resolution 242 does not include any detailed implementation mechanisms as Resolution 194 (III), but instead calls for "a just settlement of the refugee problem". The Security Council states in its resolution that the more specific implementation provisions mentioned in Resolution 194 (III) shall be incorporated and implemented. This line of argumentation is therefore another illegitimate statement.

One of the main arguments from Israel follows that the implementation of Resolution 194 (III) would seriously threaten the Jewish character of the state. It would result in a minority population and no solution that seriously threatens the Jewish population and their proceedings can be accepted by the state of Israel. Even though the Jewish character of the state can be changed due to the return of refugees this can not be a legitimate reason for the denial of repatriation following breaches of principles of international law.

The validity of Resolution 194 (III) has moreover been commented by other states. The United States officially support the view of Israel and their

denial of the Palestinian refugees' right of return, since it would seriously endanger the Jewish character of the state and destroy the intention of the UN Partition Plan creating two separate states in the region. The Arab states were originally not in favour of the Resolution since it officially recognised Israel as a state as such, but later they came to accept the provisions set forth in the Resolution and argued together with the Palestinians that it was the most appropriate provision to follow in order to solve the refugee problem in a satisfying legal manner.

8.2 The problems of implementing Repatriation and Compensation as durable solutions

The legal suggestions of solving the Palestinian refugee problem through repatriation and compensation has not been successful. mainly due to disagreement between the parties in relation to legitimacy and responsibility of implementation issues. Despite the fact that the principles have been openly stated in Resolution 194 (III) and in international law instruments the interpretation and practice of the parties is another. The principles of repatriation and compensation should be considered in relation to each other with one compromising the other. The greater the compensation matters can be solved the less need for refugees to repatriate and vice versa.

The question of responsibility is crucial when searching for durable solutions. The problem remains unsolved today with none of the parties wishing to assume responsibility for the unfortunate situation. The question could be solved in a satisfying manner if general international law instruments would be unconditionally accepted. The responsibility question however remains unrecognised inhibiting means to solve the problems.

8.2.1 Repatriation

Repatriation is in general considered the most suitable durable solution for refugees. Regarding the Palestinian refugees' right of return the question is rather delicate. The problem has deep fundamental concerns with both sides failing to see other people on its land. The Palestinians have their dream of returning back to their homes and rebuilding their nation, while the Israelis are threatened by the principle of return. The main argument from the Israeli point of view is the impossibility of exercising repatriation due to the lack of space in the region. The Palestinian are not welcome since there is no area of land available for them without moving other individuals from the area consequently creating new flights of people. According to studies made by Salam Abu-Sitta¹⁵⁰ the argumentation of overpopulation is a myth. In order to explain the delusion he suggest dividing Israel into three areas; A, B, and C. Area A consists of 8% of Israel with 2/3 constituting Jewish population. This is the same area that as the land which they gained in 1948.

¹⁵⁰ Abu-Sitta (2001), p 197-199

Area B has a mixed population and includes 6% of Israel where 10% of the Jewish population lives. Following this calculation 78% of the Jews live in 14% of Israel, and Area C constituting 86% of Israel is the land and home of the Palestinian refugees. Arguing that there is lack of space is therefore indefensible. In addition Israel accepts the immigration of Russian Jews into Israel with no consideration of overpopulation, further explaining the delusion of lack of land area in the region.

Another argument from Israel denying the Palestinians the right of return, is the threat of the existence of Israel as such and the Jewish character of the state. Israel promotes maintaining stability, security and existence of the state of Israel.

Due to the length of time that has elapsed since the plight of the refugees and the overall situation today, repatriation can be seen as an important moral principle rather than a practical question. Repatriation is a significant symbol for the peace process towards reaching durable solutions for the refugees. The Palestinians requires a confirmation from Israel that they have the right to practice the right of return even though the majority of the refugees will most certainly not return. There will most certainly not be a significant return of refugees since most of the Palestinians have already settled in other parts of the region and do not have a specific home to return to. There are however a number of Palestinians who wish to return to their homes and they should be entitled to do so. Israel has agreed to repatriate a limited number of refugees on humanitarian grounds and family reunification matters. This does not however signify that the concept of repatriation as such is acknowledged by the state of Israel. If Israel however admits the responsibility for generating the Palestinian refugees the right of return will be recognised, but mainly on a moral basis.

8.2.2 Compensation

Compensation can perhaps be considered the most practicable and realistic solution to implement for the Palestinian refugees to make ends meet. If Israel agrees to pay compensation there will be a significant change in the attitude of the Palestinians against Israel and in the discussion of a durable peace process. The existence of documents concerning property and ownership further strengthens the concept of compensation as a durable and realistic solution for the Palestinian refugees. The process is however complicated due to the fact that property from 1948-49 has become difficult to identify and evaluate. It has in most cases been transformed into Israel's economy and impossible to distinguish. The property value has changed substantially and estimating the proper value has become difficult. This refers to both movable and immovable property. The situation should not however prevent the Palestinians to receive compensation. Compared to other solutions compensation is generally recognised as the most feasible solution in the refugee context.

The moral value of acknowledging responsibility would play a significant role in the matter of compensation. The means of how to settle the concept of compensation and responsibility are however contradictory. The Palestinians claim that Israel is responsible for the payment of compensation to the refugees that were forced to flee the region due to the war in 1948/49. Israel, on the contrary, blames the Arab states for generating the war and should therefore be held responsible for compensation. Israel has agreed to pay compensation to the Palestinian state if the Arab states in return pay compensation to the Jewish refugees from the 1948/49 war. The number of Jewish refugees is only negligible in comparison to the significant number of Palestinian refugees that fled. Israel advances with counterclaims demanding compensation for Jewish owned property that was expropriated by Jordan as a consequence of the conflict. The Palestinians argue that the movement of Jews was not an imperative action and that the Palestinians can under no circumstances be held responsible.

Not only are the responsibility questions to be realised regarding compensation, but other significant questions arise in this matter such as, who is to be compensated, what is the source of payments, the distribution of payments and how is the property to be valued and identified. Valuating and identifying property has been the task of the UNCCP. They have accomplished successful work evaluating the property that was left behind, establishing compensation schemes to settle the question of payments. Once the compensation issues can be settled there can be means provided by UNCCP to evaluate the costs.

There is also a fundamental disagreement between the parties regarding the recipients and forms of compensation. Israel only accepts individual payments to refugees for expropriated land to internal refugees. In all other cases, global payments to a global foundation fund under the auspices of the UN in relation to a general peace agreement, is manageable. They may pay to the Palestinian authorities that would take responsibility for reintegration and rehabilitation. They do not under any circumstances provide compensation as a result of responsibility, but only on strictly humanitarian grounds.

Compensation should according to international law be given as an effective remedy, stating that a claimant should be placed back into the position they were before as if the breaches would not have occurred. Israel has agreed to pay compensation for abandoned land if it is arranged as part of a general peace settlement. They furthermore favour compensation through a global collective fund financed by international donors to be used for resettlement plans. The general fund should replace UNRWA and be responsible for the distributing the money and the assimilation and integration process. Compensation together with resettlement of the refugees in their host countries would be the most sustainable solution according to the Israeli government. The Palestinians stress the importance that compensation shall not be considered as a substitute for repatriation but rather as an alternative and an additional issue. Lost property shall under all circumstances be

compensated and other means of compensation shall be questioned if it based on the will of the refugee.

8.3 The limited responsibility for the Palestinian refugees

UNRWA has been responsible for the Palestinian refugees for over 50 years. They have mainly involved in acute assistance providing basic health and shelter services. Legal and diplomatic protection from the agency is absent due to the limited mandate received from the United Nations. The original aim was to divide the responsibilities of the Palestinian refugees between UNRWA and UNCCP. UNRWA was authorised to provide assistance, while UNCCP was to involve in protection matters. The involvement of two separate agencies aimed towards strengthening and heightening the level of protection was however not as successful as predicted. The collapse of the UNCCP and the limited intervention possibilities of the UNHCR, combined with the limited protection mandate of UNRWA, caused a huge gap in the protection of Palestinian refugees. This resulted in no international agency with direct mandate to work for legal and diplomatic protection for the Palestinian refugees. Realising the fundamental human rights of all Palestinian refugees as well as searching for durable solutions according to Resolution 194 (III) has thus stagnated, leaving the Palestinian refugees in a limbo situation with a very weak international human rights regime. It remains unclear what rights they are entitled to and how they may exercise these possible rights, as well as whom they shall turn to for international protection.

There is a general widespread knowledge of the great protection gap in international protection for Palestinian refugees but the remedies have not been constructive. The UN General Assembly has expressed their concern initiated by the conflicts in Lebanon in the early 1980s. They adopted a resolution calling upon the Secretary General together with UNRWA to undertake effective measures to guarantee the safety, security and legal and human rights of the Palestinian refugees. This resolution has been affirmed annually.¹⁵¹

In the discussion it remains uncertain what agency or entity shall represent the interests of the Palestinian refugee that initially were authorised by UNCCP. The most successful solution could perhaps be to establish a more distinct coordination between UNHCR, UNRWA and other UN agencies to exchange information and widen the level of protection. They should discuss the meaning of Resolution 194 (III) and the possibility of reaching durable solutions, as well as clarifying the status of Palestinian refugee under the 1951 Refugee Convention.

¹⁵¹ General Assembly Resolution 37/120 of 16 December 1982

9 Conclusion- Future Prospects and Compromises

There are many paradoxes in relation to the Palestinian refugee set of problems. The existence of Palestinian refugees can be seen as a form of symbolism. As long as they remain there is a sign that the Arab-Israeli conflict is persistent. Since the parties take different views of the set of problems in relation to the Palestinian refugees, they are unable to reconcile leading to a stagnation of the situation. On the one hand the Palestinians argue that they have valid and legitimate claims for repatriation and compensation under international law and custom. Israel however rejects these claims by adopting internal legislation legalising expropriation of Palestinian property and permitting all Jews to immigrate to Israel, while at the same time denying the Palestinians their right to repatriate. Instituting internal laws is not in accordance with the agreed peace settlement. UN and the international community maintains its position that if the extensive refugee problem shall be solved successfully, the solution must be based on international law and practise and not in internal legislation unrecognised by the international community.

The responsibility of the UN and the international community has resulted in various attempts to reconcile and open for negotiations between the parties. Even though Israel's overall argumentation can be seen as legally unfounded in many aspects, the Palestinian view of strict abidance by the resolution should be questioned. The solutions and discussions held at the rise of the problems can be said to be unrealistic to carry out today with the situation totally changed. If the Palestinian refugees had returned immediately the question would have been different. The process of returning all Palestinian refugees to their homes and property today can however seem rather impossible to realize. The Palestinians do have the law on their side but may have to search for a way to modify Resolution 194 (III) in order to make it possible to apply in the reality of today.

The right of return to the 1949 boundaries is unrealistic. To proceed from the boundaries established 1967 would be more practical. An alternative could be to restore to the Palestinians the territory occupied in 1967 and the corresponding right to return to that region.

Israel frequently refers to the dissolution of the Jewish state if the Palestinian refugees would return to their homes according to the international law principles. Their concern can, from the Palestinian point of view, be seen as rather enlarged and unnecessary since the majority of the refugees will probably not choose to return since they have nothing to return to. The question of willingness to repatriate can in a fairly easy manner be investigated by the registration system of UNRWA. Solutions based on choice of the refugee can be settled through questionnaires to the refugees registered with the agency. In this manner it can be shown if the threat of

the Jewish demography of the state of Israel will be actualised or not. The answer is most likely no.

The right of return and actual return comprises quite different features. The most satisfying solution for Israel could perhaps be to seek for solutions that are more rewarding than repatriation leading to a smaller amount of refugees choosing the matter of return to their homes. It would be favourable to find a way to promote a right of return to the refugees while at the same time avoiding the actual return that threatens the existence of the state of Israel. The right of return would be successful if recognised in relation with the right to self-determination.

Despite the huge gap between the parties, compromising attempts moving closer towards a durable solution have been initiated. As regards the absolute right of return, a compromising Palestinian approach interpreting the right of return as return to national soil rather than return to their actual former homes, has been considered. The Palestinians must realise that the return to 1949 boundaries is unrealistic and impossible to complete. Israel must also relieve its principles and allow the Palestinian refugees who wish to return due to family unification and other humanitarian grounds. Return to national soil could be accomplished through the establishment of a Palestinian state after the 1967 boundaries (West Bank and Gaza). The established Palestinian state must not only provide homes for refugees wishing to return but also be recognised internationally as a state. The state will thereby be entitled with abilities to grant Palestinian citizenship solving the prolonged problem of statelessness.

If compromising solutions are to be sustainable, Israel has to lighten their line of policy and accept some refugee return as well as admit some degree of responsibility for the refugee problem by providing with some degree of compensation. Since Israel wishes to solve the problem on humanitarian grounds and solve the problem of refugees in relation to a general peace agreement, an attempt to lighten the burden of responsibility by renaming the set of problems could be considered. Israel believes that the Palestinian refugee problem is no more than a humanitarian problem and should thus be treated as such. Israel does not acknowledge any responsibility obligations but would rather agree to assist in solving the humanitarian disaster. One can question the significance and differences of treating the problem as a humanitarian problem rather than a problem of state responsibility. The most significant difference is the burden of responsibility that effects the state that is to be blamed. The degree of assistance and consequences for the refugees can be questioned. Is it more extensive in comparison to responsibility obligations or is it on the contrary weakened?

Resettlement is an alternative favoured by Israel. Since the majority of the Palestinian refugees are resettled in host states awaiting durable solutions, Israel argues that the most appropriate solution would be to integrate them fully and grant them citizenship in their host countries. Most Palestinians are however heavily opposing this alternative since they refuse any

resettlement outside their homeland. The majority of the Arab host states also disagree with this alternative mainly due to political and economic reasons. Jordan is the only country today that offers citizenship to Palestinian refugees including complete protection of social and political rights. Israel agrees to finance resettlement and rehabilitation of refugees and replace the work of UNRWA and assume responsibility of the host state.

Other means to solve this heavily complicated problem can be to look at other similar conflicts and their respective solutions. Solutions in former conflicts such as Kosovo, Bosnia and Guatemala have based their refugee cases on the individual right of the refugees to return to their homes, restitution of property and compensation. The peace agreements involve voluntary repatriation and reintegration under the auspices of UNHCR. Looking more closely at the Dayton Peace Accords established for Bosnia it describes the unqualified right for refugees to repatriate to their homes of origin. The provisions set forth in this particular settlement is said to identically correspond with the rights expressed in Resolution 194 (III) being return, repossession and compensation. The repatriation schemes involved protection from the agencies of UN and the involvement of the international community. The important concept of claims commission were also set up in relation to the peace agreements, providing for individuals to bring forward their claims to do justice.

The Palestinian refugee case is not unique with the guiding framework of a UN resolution for a sustainable solution. UN resolutions have been significant in other repatriation cases. The Security Council has, for example, issued resolutions in relation to the Dayton Peace Accords (SC Resolution 1145) and in relation to the settlement of refugees in Georgia (SC resolution 1097).

Although these refugee situations can not be identified as equal to the Palestinian refugee problem, they may function as guidelines and can be used as models for solving the extensive Palestinian refugee problem. They should under all circumstances be taken into consideration when reaching a sustainable solution. When seeking ways to achieve sustainable solutions for the Palestinian refugees, international law and UN Resolutions accepted and recognised by the international community should be the guiding principles rather than politicians views and attitudes. Regarding compensation matters a comparison can be made to the holocaust situation and the compensation funds offered to the Jewish people. Comparing the situation today with the situation for the Jews during the holocaust should however been initiated with great caution. The persecution of the Jews does not under any circumstances justify the persecution of the Palestinian refugees and their unfortunate situation. The Palestinian refugee problem has to be regarded as a unique case with legitimate durable solutions including compromises from both parties.

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<http://domino.un.org/UNISPAL.NSF?OpenDatabase>

UNRWA Official Homepage
<http://www.un.org/unrwa/>

Appendix

United Nations General Assembly Resolution 194 (III)

11 December 1948

The General Assembly,

Having considered further the situation in Palestine,

1. Expresses its deep appreciation of the progress achieved through the good offices of the late United Nations Mediator in promoting a peaceful adjustment of the future situation of Palestine, for which cause he sacrificed his life; and

Extends its thanks to the Acting Mediator and his staff for their continued efforts and devotion to duty in Palestine;

2. Establishes a Conciliation Commission consisting of three States Members of the United Nations which shall have the following functions:

(a) To assume, in so far as it considers necessary in existing circumstances, the functions given to the United Nations Mediator on Palestine by resolution 182;(S-2) of the General Assembly of 14 May 1948;

(b) To carry out the specific functions and directives given to it by the present resolution and such additional functions and directives as may be given to it by the General Assembly or by the Security Council;

(c) To undertake, upon the request of the Security Council, any of the functions now assigned to the United Nations Mediator on Palestine or to the United Nations Truce Commission by resolutions of the Security Council; upon such request to the Conciliation Commission by the Security Council with respect to all the remaining functions of the United Nations Mediator on Palestine under Security Council resolutions, the office of the Mediator shall be terminated;

3. Decides that a Committee of the Assembly, consisting of China, France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America, shall present, before the end of the first part of the present session of the General Assembly, for the approval of the Assembly, a proposal concerning the names of the three States which will constitute the Conciliation Commission;

4. Requests the Commission to begin its functions at once, with a view to the establishment of contact between the parties themselves and the Commission at the earliest possible date;

5. Calls upon the Governments and authorities concerned to extend the

scope of the negotiations provided for in the Security Council's resolution of 16 November 1948 and to seek agreement by negotiations conducted either with the Conciliation Commission or directly, with a view to the final settlement of all questions outstanding between them;

6. Instructs the Conciliation Commission to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them;

7. Resolves that the Holy Places - including Nazareth - religious buildings and sites in Palestine should be protected and free access to them assured, in accordance with existing rights and historical practice; that arrangements to this end should be under effective United Nations supervision; that the United Nations Conciliation Commission, in presenting to the fourth regular session of the General Assembly its detailed proposals for a permanent international régime for the territory of Jerusalem, should include recommendations concerning the Holy Places in that territory, that with regard to the Holy Places in the rest of Palestine the Commission should call upon the political authorities of the areas concerned to give appropriate formal guarantees as to the protection of the Holy Places and access to them, and that these undertakings should be presented to the General Assembly for approval;

8. Resolves that, in view of its association with three world religions, the Jerusalem area, including the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem, the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat, should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control;

Requests the Security Council to take further steps to ensure the demilitarization of Jerusalem at the earliest possible date;

Instructs the Commission to present to the fourth regular session of the General Assembly detailed proposals for a permanent international régime for the Jerusalem area which will provide for the maximum local autonomy for distinctive groups consistent with the special international status of the Jerusalem area;

The Conciliation Commission is authorized to appoint a United Nations representative, who shall co-operate with the local authorities with respect to the interim administration of the Jerusalem area;

9. Resolves that, pending agreement on more detailed arrangements among the Governments and authorities concerned, the freest possible access to Jerusalem by road, rail or air should be accorded to all inhabitants of Palestine;

Instructs the Conciliation Commission to report immediately to the Security Council, for appropriate action by that organ, any attempt by any party to impede such access;

10. Instructs the Conciliation Commission to seek arrangements among the Governments and authorities concerned which will facilitate the economic development of the area, including arrangements for access to ports and airfields and the use of transportation and communication facilities;

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

Instructs the Conciliation Commission 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;

12. Authorizes the Conciliation Commission to appoint such subsidiary bodies and to employ such technical experts, acting under its authority, as it may find necessary for the effective discharge of its functions and responsibilities under the present resolution;

The Conciliation Commission will have its official headquarters at Jerusalem. The authorities responsible for maintaining order in Jerusalem will be responsible for taking all measures necessary to ensure the security of the Commission. The Secretary-General will provide a limited number of guards for the protection of the staff and premises of the Commission;

13. Instructs the Conciliation Commission to render progress reports periodically to the Secretary-General for transmission to the Security Council and to the Members of the United Nations;

14. Calls upon all Governments and authorities concerned to co-operate with the Conciliation Commission and to take all possible steps to assist in the implementation of the present resolution;

15. Requests the Secretary-General to provide the necessary staff and facilities and to make appropriate arrangements to provide the necessary funds required in carrying out the terms of the present resolution.