

International Law and the Israeli-Palestinian Conflict

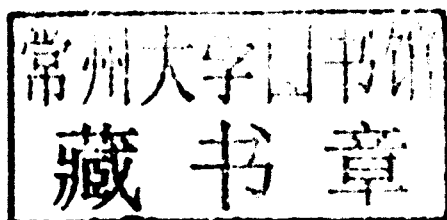
A rights-based approach to
Middle East peace

Edited by

**Susan M. Akram,
Michael Dumper, Michael Lynk
and Iain Scobbie**

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INTERNATIONAL LAW AND THE ISRAELI–PALESTINIAN CONFLICT

The Israeli–Palestinian conflict has long been intertwined with, and has had a profound influence on, the principles of modern international law. Placing a rights-based approach to the Israeli–Palestinian conflict at the centre of discussions over its peaceful resolution, this book provides detailed consideration of international law and its application to political issues.

Through the lens of international law and justice, the book debunks the myth that law is not useful to its resolution, illustrating through both theory and practice how international law points the way to a just and durable solution to the conflict in the Middle East. Contributions from leading scholars in their respective fields give an in-depth analysis of key issues that have been marginalized in most mainstream discussions of the Israeli–Palestinian conflict:

- Palestinian refugees;
- Jerusalem;
- security;
- legal and political frameworks;
- the future of Palestine.

Written in a style highly accessible to the non-specialist, this book is an important addition to the existing literature on the subject. The findings of this book will not only be of interest to students and scholars of Middle Eastern politics, international law, International Relations, and conflict resolution, but will be an invaluable resource for human rights researchers, NGO employees, and embassy personnel, policy staffers, and negotiators.

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INTRODUCTION

*Susan M. Akram, Michael Dumper,
Michael Lynk, and Iain Scobbie*

Introduction

Athenians: “You know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”

Melians: “You should not destroy what is in our common protection, the privilege of being allowed in danger to invoke what is fair and right . . . And you are as much interested in this as any, as your fall would be a signal for the heaviest vengeance and an example for the world to meditate upon.”

Thucydides, *History of the Peloponnesian War*¹

The precepts of modern international law and the decades-old Israel–Palestine conflict have had a long, tangled, and disquieting relationship. Born at the same time in the immediate aftermath of the Second World War, and shaped by some of the same social forces unleashed by the War, the two phenomena have matured in the shadow of each other. Yet, while one has developed into a respected and substantial body of universal legal principles, the other has metastasized into a destructive struggle that has contaminated the entire Middle East and beyond. The tragic irony is that the Israel–Palestine conflict has contributed decisively to the content of modern international law in a number of significant areas – giving enhanced meaning to such concepts as belligerent occupation, the rights of refugees, the prohibition on the acquisition of territory by conquest, the legal status of civilian settlements in occupied lands, the concept of terrorism, and the rules of war and resistance – while its numerous victims have received few of the benefits that the emerging rule of law on international conflicts has promised to endow.

Between 1947 and 1967, the UN’s role in the Israeli–Palestinian conflict was significant: in November 1947, it endorsed the partition of Palestine into a Jewish

and a Palestinian state; as the initial war was winding down, it sponsored the 1949 armistice negotiations that led to an uneasy truce; in 1950, it established the agency – commonly known by its acronym, UNRWA – which would offer a variety of vital services to the Palestinian refugees who were expelled or had fled from their homes in the 1947–9 war; and it sponsored the international peacekeeping initiative following the 1956 Suez war. In the aftermath of the Israeli victory in the June 1967 war and the multifold consequences of the ensuing occupation and the regular ruptures of regional instability, the United Nations (UN) substantially deepened its involvement in the conflict, albeit with few tangible results.

In March 2002, Kofi Annan, the Secretary-General of the United Nations, stated to the state leaders and diplomatic representatives gathered at a meeting of the Arab League in Beirut that: “There is no conflict in the world today whose solution is so clear, so widely agreed upon, and so necessary to world peace as the Israeli-Palestinian conflict.”² Annan was referring both to the general body of international law as well as the scores of specific resolutions adopted by the Security Council and General Assembly on the conflict since the late 1940s. His affirmation of the centrality of law to reaching a just and lasting peace in Israel/Palestine established a critical link between a rights-based approach and the solution to the Palestinian–Israeli conflict. Central to the approach of this book is the necessity of adherence not only to the aforementioned resolutions, but to the legal principles of the *United Nations Declaration of Human Rights* and other rights-based international agreements and covenants. In these principles and resolutions are the contours of a just and lasting resolution to this malignant conflict: self-determination for the Palestinians in a viable and true state of their own; security for Israel and acceptance by its neighbours; an end to the Israeli occupation and the return of all the territories conquered in the 1967 war; the removal of all the settlements constructed by Israel in the occupied territories; a creative solution to the status of Jerusalem that recognizes the legitimate claims of Jews and Palestinians; justice for the millions of Palestinian refugees in accordance with their substantive rights.

In recent decades, there has been an accelerating trend to seek resolutions to major conflicts by reference to international legal principles. Such major regional conflicts as those in *Indochina* (Comprehensive Plan of Action for Indochina) in the 1970s; *Central America* (the CIREFCA agreement in the 1980s); the *Balkans* (Dayton Agreement for Bosnia-Herzegovina); *South Africa* (the entrenchment of a power-sharing constitution and a reconciliation process); *West Africa*; and the *Great Lakes region of Africa* in the 1990s, have seen final peace agreements shaped by the emerging concepts in an international legal framework. In these conflicts, and others, such concepts as sovereignty, war crimes tribunals, reparations and compensation, new constitutions with human rights guarantees, the orderly settlement of property claims, the return of refugees and displaced civilians, minority rights, and the building or rebuilding of the rule of law have been influential features in the agreements. In reviewing the issues that had to be resolved in these conflict settlements, one of the key factors in their durability is the international legal

frameworks on which they are based. In fact, incorporation of a law-based framework may well be the single most important precondition for a lasting resolution to a conflict.

In a malignant struggle where both regional and international political will has failed to bring peace, a rights-based approach – as Annan recognized – has much to offer. A solution to the Israel–Palestine conflict that would lead to a just and lasting peace is not difficult to find. But such a solution would have to be based on the recognized rights of those who live there, rather than allowing the inequities of power politics to continue leading the Middle East to yet another morass. A rights-based approach requires the parties to a conflict to resolve their differences, and to build their new relationship, through the cornerstone principles of national, human, and individual rights which have emerged since the Second World War. This approach – which emphasizes equality, dignity, social and political rights, reconciliation, and human security – has become an integral part of the successful settlement of recent conflicts throughout the world. While the application of the rights-based approach requires flexibility to the circumstances of each particular conflict, it insists that rights are inherently possessed by individuals and peoples, and this provides them with the authority to demand their fulfillment.

In the Middle East, a rights-based approach based upon international law is an essential component for the success of any effort towards a comprehensive peace settlement for the following reasons:

- First, as stated by Kofi Annan the Israeli–Palestinian struggle is the most international of international conflicts. The world community, largely through the United Nations, endorsed the creation of the State of Israel, has cared for the millions of Palestinian refugees for five decades, closely observed the ongoing conflict, and has been intimately engaged in the region through diplomatic initiatives, massive arms sales and peacekeeping missions. Thus, the principles of international law and internationally-recognized rights are deeply engaged;
- Second, there is a strong international legal and political consensus that the Israeli occupation and annexation of Palestinian territories since 1967 is illegal, that the Palestinians are entitled to a viable state on these territories, that Israel is entitled to security within recognized borders, that the Palestinian refugees are entitled to a just solution, that settler-implantation is indefensible, and that violence directed towards civilians is wholly illegitimate;
- Third, there is a yawning gap between the extraordinary contribution that the Middle East conflict has made towards developing international law (primarily through UN resolutions, diplomatic statements, and scholarly comments), and the strange muteness by those who manage the conflict to meaningfully insist that any final settlement of the Middle East conflict must be shaped by the recognized rights of those who live there;
- Fourth, applying a rights-based approach would finally create something close to a level playing field at the Israeli–Palestinian bargaining table, and thus ensure

a real chance for peace. As long as unequal power politics guide Middle East peacemaking, the world will continue to see political agreements and peace proposals that are not only lopsided, but are unworkable precisely because they are so lopsided;

- Fifth, only international law can provide impartial definitions of acceptable behaviour that are universally endorsed. In a world torn by ethnic, religious, ideological, and nationalist struggles, only a rights-based approach is grounded upon principles and language that are universally accepted. As well, only a rights-based approach can provide viable examples of best practices from the successful settlement of comparable conflicts elsewhere; and can remain removed from the competing ethnic, religious, or nationalist historical narratives of victimization and of righteousness.
- Sixth, grounding a final settlement upon a rights-based approach would contribute significantly towards enhancing human security and good governance not only in Israel and Palestine, but more widely in the region as well. Only by implanting the rule of law – starting with final settlement issues, and continuing with the architecture of government and civil society, and finally with the relationships between unhappy neighbours – can peace have a realistic chance of being sustained and human security being ensured and enhanced.

As mentioned above, there has, in recent years been a rapidly-accelerating trend to seek solutions to major conflict situations by reference to international legal principles. States, private actors, and international bodies have adopted this approach for the simple reason that international law – particularly international human rights and humanitarian law – is widely accepted as providing the minimum guarantee of justice and fairness that a politically based process cannot provide by itself. For the same reason, a rights-based, or law-focused framework, is far more likely to be acceptable to a broad set of stakeholders to any conflict than a framework based on power politics. In practice, a rights-based framework is more likely to provide stability, acceptability, and durability to conflict resolution.

The Palestinian–Israeli conflict represents a marked departure from the trend towards incorporation of an international law framework into negotiations and the search for solutions. Indeed, it remains a zone of legal exceptionalism. Binding resolutions are scorned, Security Council investigations are rebuffed, advisory opinions from the International Court of Justice (ICJ) go unheeded, and the obligations of international conventions and treaties are dismissed. In contemporary terms this was seen by Israel's initial outright refusal to co-operate with the UN fact-finding team in the aftermath of the recent Gaza conflict, Operation "Cast Lead." Of the relevant laws that are heeded, most are interpreted wholly without reference to the Palestinians. This obstructionism fails not only the requirements of law, but also the demands of realism. No conflict can be transformed into an equitable and viable resolution where one party can successfully plead exemptions and special entitlements forbidden to others. The lack of political will to enforce compliance with international law and universally recognized rights – the result of Israeli

obstinacy, American obeisance, United Nations paralysis, Arab schisms, and Palestinian impotence – has allowed the matter to fester for more than five decades. Besides eroding the efficacy of international law, the irresolution of this conflict has destabilized the entire region, fueled the tensions between the West and the Arab and Muslim worlds, perpetuated the world's largest and longest-lasting refugee problem, adversely affected the global economy, and consumed an inordinate amount of diplomatic oxygen and goodwill.

Despite the hiatus in progress in the peace negotiations since the election of a HAMAS-dominated Palestinian Authority legislature in 2006, the final status issues – Jerusalem, refugees, borders and sovereignty, resources, and settlements, among others referred to in the Roadmap, sponsored by the Quartet (US, Russia, UN, and EU) – are still scheduled to become the focus of negotiations between Israel and the Palestinians. An equitable and compassionate resolution of each of these issues can be found in a rights-based approach, but there is little evidence that the Quartet sponsoring the Roadmap has sought to be guided by these principles. The Roadmap itself makes only a passing mention of international law (by referring to UNSC resolutions 242, 338, and 1397), while ignoring the multitude of other, more specific and more pertinent solutions and obligations. (Other recent peace proposals – such as the *Geneva Accord*, announced in October 2003 by non-governmental figures from both sides; the *Ayalon–Nusseibeh Statement*, issued in 2002 by a former head of Shin Bet and a senior Palestinian academic; and the unilateral *Sharon initiative* of April 2004 – also suffer from the same omission.) Even if the Roadmap falters, which despite the best efforts of the Obama administration in the U.S.A. appears possible, the final settlement issues that divide the parties will remain on the front burner for any subsequent peace effort.

The failure of parties to reach settlement through negotiations and the continued spiral of violence has revealed the extent to which power politics is unable to bring a just and lasting peace to the Middle East. Thus, the time is ripe for those committed to human security, to a compassionate peace in the Middle East, and to the international rule of law to advocate why a rights-based approach must be a central feature of any negotiations designed to reach a final, just, and lasting settlement between Israel and the Palestinians. Three factors in particular are present which can shape a final peace settlement based on rights. First, the Advisory Opinion issued in July 2004 by the International Court of Justice addressed a number of the outstanding legal and political issues in the Palestinian–Israeli conflict, and strengthened the framework for a rights-based approach. Second, the recent emphasis by the United Nations on rules-based and rights-based approaches towards settling international conflicts (for example, see Kofi Annan's speech on the centrality of the rule of law, delivered at the opening of the UN General Assembly in September 2004) bolsters the position of those who emphasize rights as the cornerstone negotiating principle in resolving the Middle East conflict. And third, there is recognition, at least on the rhetorical level, among a number of international observers of the recent Middle East conflict that the Oslo process faltered and expired primarily because of a missing centerpiece that would bind all parties; most

of these observers have identified the commitment to rights as the absent center-piece.

This book is intended to be used as a tool in a broader campaign to place a rights-based approach at the core of all future peace plans, negotiations, and popular advocacy by non-governmental organizations (NGOs) in the region. This will not be an easy path. The principal powers in the Middle East conflict – Israel and the United States – have neither an interest nor a commitment to applying and enforcing a rights-based approach. Those committed to the application of international law will be advocating rights against power. But, then, every significant struggle for human dignity and equality in modern times has faced the same barriers, and used the same rights-based tools, to achieve their objectives.

The collection of essays in this book draws on the expertise of more than a dozen internationally recognized scholars, all experts in their fields, in order to provide a text for reference and to further the debate over the best way to reach a just and equitable solution. The topics covered in the individual chapters are wide ranging; from the core, or in the parlance of negotiations “final status” issues of the Israeli–Palestinian conflict, to security negotiations and the application of international law in the Palestinian Authority. The chapters have been integrated on the basis of a common adherence to the principles of the rights-based approach to conflict resolution that form the central thesis of the book. They are grouped into four parts: Core issues: Refugees and Jerusalem; Security; Legal and political frameworks for a durable peace; and finally, Debating the future.

In Chapter 1, Susan Akram begins with the central issue: the study of the Palestinian refugee population, offering an analysis of their current status and the prospects, or lack thereof for a durable solution to their plight. In contrast to the assessment in the following chapter by Scott Custer, Akram describes a sizeable “protection gap” for the refugees, a product of their ambiguous legal status which severely impinges on their physical protection and the protection of their rights. The legal and physical vulnerability of the refugee population, who remain bereft of legal status in many “host” states, is compounded by the extra-legal impediments to a satisfactory resolution of their situation, primarily propagated by Israel. In an exemplary expression of the rights-based approach in international law, Akram presents the Israeli obstruction of any potential refugee repatriation as having no basis in, and indeed contravening, international law.

In Chapter 2, Scott Custer, a former legal advisor to UNRWA, turns to a study of the assistance and protection offered by UNRWA to Palestinian refugees. Custer offers a critical comparison of the activities of both UNRWA and UNHCR that counters the accusations of ineffectiveness that have been frequently leveled at UNRWA. While recognizing the deficiencies inherent in the original “assistance-centric” UNRWA mandate, he contends that the agency has broadened its mandate out of necessity in order to include the protection of the legal and human rights of the refugees. The protection offered by UNRWA, Custer argues, is equal to what any other agency could provide under the same conditions. The conclusion of this argument is that the evolution of the UNRWA protection mandate for refugees,

protecting their legal and human rights, is a central part of the rights-based approach to the resolution of the Israeli–Palestinian conflict that is advocated in this text.

The resolution of the Palestinian refugee issue is a primary concern when addressing the Israeli–Palestinian conflict. The potential mechanisms for resolution are enshrined in international law, particularly human rights law. In Chapter 3, Terry Rempel and Paul Prettitore examine the core principles of restitution and compensation, which underpins UN attempts to address refugee crises, particularly for Palestinian refugees. Their discussion is centered on the ability of the rights-based approach to restitution and compensation to provide a viable normative solution to the Palestinian refugee issue. Despite the inherent practical difficulties in providing restitution and compensation, this approach is bolstered by an agreed framework of UN standards and principles which have been utilized, with varying degrees of success in post-conflict arenas, such as Bosnia, Kosovo, South Africa, and Mozambique. Despite the current hindrances, Rempel and Prettitore maintain that restitution and compensation can easily be applied as a normative solution for Palestinian refugees if legislative and judicial changes regarding land reform in post-conflict arenas can be effectively utilized.

The fourth chapter turns to the second core issue: Jerusalem. Mick Dumper continues the theme of the application of international law. Despite the large corpus of international law concerning Jerusalem, Dumper illustrates the lack of consistency and high level of ambiguity that surrounds international legal pronouncements on Jerusalem. Central to this chapter is the practical contrast that this legal ambiguity has produced. While it has allowed Israel to extend total functional control over the city, it has not conferred any legitimacy or recognition of the Israeli position by the international community. Dumper elucidates the twofold nature of the “constructive ambiguity” in international law, which, if exploited by negotiators, may provide scope for the interests and rights of both parties to be accommodated in the final resolution of the Jerusalem issue.

The following two chapters comprise Part II on security. In Chapter 5, Stephanie Koury returns to the subject of self-determination. She offers an analysis of ICJ advisory opinions in different post-colonial areas, including Namibia, Western Sahara, and Palestine, and the legal and political consequences of the rulings. In her chapter, Koury discusses the relatively high level of ICJ and UN support for self-determination in Namibia and Western Sahara, and contrasts the initially low amount of support garnered for an inalienable right of self-determination in Palestine. The role of the ICJ is central to the comparative analysis, documenting the relative lack of ICJ involvement in Palestinian affairs until the twenty-first century, in comparison to the prevailing legal and political strategy of early ICJ involvement in other post-colonial arenas and support for self-determination rights.

In Chapter 6, Omar Dajani presents a study on the implementation of international law in Israeli–Palestinian security negotiations. The background to his work shows the balance of international law regarding security to be weighted in favour of the Palestinians. However, Dajani considers that the complex security negotiations which have been ongoing since the Oslo Accords have ignored international law

and have given a strategic advantage to Israel. This results in primacy being accorded to Israeli security at the expense of Palestinian sovereignty, rights, security, and territorial congruity. The rights-based approach to security presented by Dajani incorporates not only adherence to international law, it incorporates rights, negotiations, and other law-based processes that would address the unbalanced security relationship.

Part III focuses on the nexus between the legal and political. In Chapter 7, John Quigley examines the legal implications of self-determination in international law. He places self-determination in a historical context, highlighting and analyzing the opposing views of self-determination as a right, and as a principle. Particularly germane to his analysis is the issue of unresolved sovereignty in post-colonial areas, using Palestine as the prime example. This approach offers contemporary relevance in Palestine, advocating an exploration of the competing claims to sovereignty of Fatah, Hamas, and Israel. The assessment of self-determination as a fundamental right under international law is of paramount importance to the conflict in Israel/Palestine, and a key component of the rights-based approach continued in following chapters.

Iain Scobbie discusses, in Chapter 8, the legal obligations of an occupying power with regard to natural resources. In his analysis of the right of access to water resources in Palestine, Scobbie re-evaluates the traditional focus on humanitarian law, adopting an approach more grounded in economic, social, and human rights. He argues that the social and economic rights to water for a population under occupation can be seen to have a weight equal to human rights in international law. Scobbie contends that Israel's utilization of Palestinian water supplies is a serious breach of international law regarding the duties incumbent upon an occupying state, as well as the human rights of the local population, and poses a significant challenge to peace negotiations.

While the preceding chapters have directly addressed contemporary issues through a rights-based approach, thereby invoking the application of international law, Chapter 9 by Feras Milhem and Jamil Salem deals with the limited current application of international law in Palestine by both parties. This chapter illustrates the difficulty of establishing a series of legal reforms in Palestine, based on international law principles. They maintain that the challenges facing the effective rule of law in Palestine are considerable. The relationship between the PA Basic Law and international law is unclear as no formal incorporation of international law into the domestic legal system has occurred. Milhem and Salem write that this raises concerns about the implementation of fundamental UN legal principles such as human rights in Palestine. Further complicating the establishment of the rule of law in Palestine are the restrictions of Israeli military law, Palestinian political infighting and widespread corruption, proving a considerable hindrance to the implementation of a rights-based approach to political, judicial, and legal stability.

The final part, Part IV, is a contribution to the debate over the relative merits of the one- or two-state models for the future of Palestine and Israel. Chapter 10, by Ian Lustick, offers a consideration of the most commonly invoked political

framework for durable peace in Israel/Palestine: the two-state solution. In addressing the two-state solution, he considers the viewpoint of its detractors who see it as impractical and even immoral. While acknowledging the deficiencies in such an imperfect model for resolution, Lustick highlights the almost universal popularization and acceptance of the two-state model as a significant factor in its favor. The critique of the one-state alternative provided in this chapter asserts that it has not been made subject to the same rigorous examinations of its practicality and plausibility as the two-state solution, and is rife with self-disconfirming arguments, driven by rhetoric rather than logic. The impracticality of both solutions as mutually exclusive utopias is central to the discussion in this chapter.

The alternative one-state solution is the subject of the final chapter by George Bisharat. Bisharat tackles the issue of the binational one-state solution as a normative rights-based solution. That is, a solution that is based on the implementation of international law. By advocating this approach to a political framework for peace, he seeks to address the fundamental rights of all communities through the implementation of international legal rulings, and also through negotiation, similar to the views expressed in Chapter 6 by Dajani. The rights-based approach to the one-state solution is necessary, but not sufficient, requiring a pragmatic attitude to negotiations in order to provide a viable normative alternative to the shortcomings inherent in the two-state solution.

This body of work is being published at an opportune moment. The prospect of renewal of the negotiations for a solution to the Palestine-Israel conflict has received new impetus with the advent of the Obama administration in the U.S.A. One reason for the lack of progress towards a solution in such negotiations has been that the security-orientated approach being pursued by policy makers hitherto has failed. Such an approach is based upon the existing imbalance of power between Israel and the Palestinians and therefore contains within it many unresolved grievances and is a recipe for further instability and oppression. A rights-based approach provides surer foundations for a lasting peace based as it is on justice and equity. The body of expertise presented in this book will contribute to our understanding of what such an approach comprises and what its implications are for policy makers, the donor community, and activists.

Notes

- 1 Translated by Richard Crawley (London: J. M. Dent, 1963), Chap xvii.
- 2 U.N. Doc. SG/SM/8177 (March 27, 2002).