

Israel – Hamas 2023 Symposium – Refugee Law

lieber.westpoint.edu/refugee-law

November 17, 2023

by Jane McAdam, Guy S. Goodwin-Gill | Nov 17, 2023



International refugee law and human rights law are both crystal clear when it comes to protecting people from persecution and other serious harm. People must not be forced back to any place where they face a real risk of being persecuted or subjected to torture, cruel, inhuman, or degrading treatment or punishment, or arbitrary deprivation of life. This is known as the principle of *non-refoulement*.

The principle of *non-refoulement* unequivocally encompasses non-rejection at the frontier, because protection begins with the refugee's ability to secure admission to territory. This means that people at a border crossing seeking protection must be allowed to enter to have their needs assessed, a principle recognized by States in successive UN High Commissioner for Refugees (UNHCR) Executive Committee conclusions over the years. As the European Court of Human Rights has made clear in its own assessment of international law, State practice and UNHCR guidance, "the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border."

This post outlines the bespoke regime of international legal protections applicable to Gaza's Palestinians, and argues that their situation demands not only their recognition as refugees by all States, but also recognition of their right to self-determination and to a solution consistent with international law.

The Situation in Gaza

Gazans remain trapped. The border crossings into Egypt and Israel remain closed to them, and official statements make clear that there is no intention to allow them in. King Abdullah of Jordan, for instance, has spoken about a “red line” if Palestinian refugees are pushed out of Gaza, observing, “No refugees in Jordan, no refugees in Egypt.” Egypt's Minister of Foreign Affairs said, “I see no reason why Egypt, which is hosting 9 million refugees—hosting them and providing them integration into our society at considerable burden on our economy—should have to bear solely [the] additional influx of Gazans.”

These statements must be understood within a broader political context. Both Egypt and Jordan want an overall solution—ideally a two-State solution—as the UN has promised, that is consistent with international law. From their perspective, admitting refugees could be seen to undermine this goal.

Egypt and Jordan are concerned that Israel may be using the war to effect a mass transfer of Palestinians to Jordan and Egypt, which the Jordanian Foreign Minister has called unacceptable. If Israel refuses to accept a two-State solution or an end of occupation, then “the third option is to try get rid of as many Palestinians as possible. That is the real concern.”

Israel, as Jordan knows only too well, has never accepted responsibility for creating refugees in the past and has ignored the right of those displaced to return. Moreover, some of its activities in the West Bank and Eastern Jerusalem have been directed, explicitly and implicitly, at promoting a sense of terror, of fear for life and freedom, that fosters the further displacement of Palestinians from their land, livelihood, and community.

Gaza has been under siege for weeks and under the effective control of Israel for decades. Israel's total blockade on Gaza means there is very limited access to water, food, electricity and fuel. With Israel's ground offensive intent on eliminating Hamas in a small area densely populated by civilians, the human toll and humanitarian need are rising rapidly. Many experts say that this is collective punishment—a war crime—by targeting innocent civilians in retaliation for the crimes committed by Hamas.

States' Obligations

Not letting Gazans cross into Egypt or Israel is a violation of those States' obligations under international refugee law and international human rights law, as well as the obligation of all States—consistently upheld by the General Assembly and the Security Council—for

promoting solutions consistent with international law (that do not include ethnic cleansing or genocide, or other crimes in international law). This is notwithstanding the fact that most Gazans are Palestinian refugees normally protected by the UN Relief and Works Agency (UNRWA) under a bespoke legal regime. They are dependent on UNRWA for almost all aspects of daily life. It runs schools, hospitals, relief and social services, with critical support and assistance from Palestinians themselves. The agency has warned that without fuel and other supplies, it will have to cease its operations in Gaza. As it is, it cannot provide adequate medical care or deliver basic supplies and sustenance.

Palestinian refugees were recognized as refugees entitled to special protection *prior* to the creation of UNHCR and the 1951 Refugee Convention. Article 1D of the Convention is often said to “exclude” Palestinians from status and protection, but it is not so much an “exclusion” clause as a contingent, inclusion clause. It recognises the refugee character of Palestinian refugees as a group but makes their inclusion within the Convention regime contingent upon certain events, particularly the cessation of protection without their situation “being definitively settled in accordance with the relevant resolutions adopted by the General Assembly.”

States negotiating the Refugee Convention agreed that Palestine refugees were in need of international protection, but Convention protection was not required while they were receiving protection from UNRWA. During the drafting of the Refugee Convention, the Egyptian delegate stated that if UNRWA protection ceased, “the Palestine refugees should automatically enjoy the benefits of the Convention. The Egyptian Government had no doubt at all that such refugees came under the terms of article 1.”

Thus, the “non-applicability” of the 1951 Convention was intended to be temporary and contingent, essentially deferring the incorporation of Palestine refugees until certain preconditions were satisfied. A Palestinian registered with UNRWA would be entitled *ipso facto* to the benefit of the Refugee Convention—without having to demonstrate a well-founded fear of persecution—if it could be shown that their personal safety was at serious risk; UNRWA was unable to guarantee living conditions compatible with its mission; and the refugee was compelled to leave UNRWA’s area of operation owing to circumstances beyond their control. This would need to be assessed either individually or on a group basis. Given the scale of Israeli attacks, a group assessment would seem to be called for now.

At present, UNRWA itself concedes that it cannot provide protection and assistance to Palestinian refugees in Gaza. Palestinian refugees who flee Gaza in search of refuge ought to enjoy the protection and the benefits of the Refugee Convention without being required to establish a well-founded fear of being persecuted. This does *not* necessarily mean that the individual Palestinian refugee is thereupon entitled to asylum and residence, but it does mean that they should be treated as a refugee, and the receiving State is required to provide protection and to seek an appropriate solution in light of that status, and in cooperation with UNHCR and UNRWA. In practice, many States in the past have resisted providing automatic

Convention protection and consider that the key issue is not so much the status of Palestinians as refugees, but whether they are able to return to their (former) State of residence, or as stateless persons, they are claiming to be refugees as against that country.

Quite aside from the Refugee Convention regime, however, protection from *refoulement* under human rights law prohibits removal where a person faces a real risk of being persecuted or subjected to torture, cruel, inhuman, or degrading treatment or punishment, or arbitrary deprivation of life. It is self-evident that the conditions on the ground in Gaza at present give rise to such risks. It is less clear what legal status accrues for people protected on this basis. In some parts of the world, they receive the same status as refugees, whereas in others, they are protected from removal but with fewer rights and entitlements.

Concluding Thoughts

In mid-October, an Israeli diplomat said there is “endless space” for Palestinians in the Sinai Desert in Egypt and they should all go there. This strikes at the heart of Palestinians’ intergenerational fear of banishment and is manifestly inconsistent with Palestinians’ right of self-determination. Despite the humanitarian crisis, many Palestinians do not want to leave Gaza in case they are never allowed to go back. This is a legacy of the 1948 Arab–Israel war when an estimated 750,000 Palestinians fled and/or were forced to leave their homes or were expelled and were living in refugee camps in the Gaza Strip, the West Bank, Jordan, Lebanon and Syria. Not only were they barred from returning, but they were also effectively and retroactively deprived of any entitlement to claim membership of the new State.

However, anyone who does wish to leave in the current circumstances must be allowed to do so, and other countries must not refuse them entry given the real risk to their lives. At the same time, the right to *non-refoulement* must not lead to the root causes being ignored. This means still greater emphasis by the international community on Israel’s obligation to recognize and to facilitate Palestinians’ right of self-determination, and particularly their right to live in a community that is not disfigured by settler violence, discriminatory legislation, discriminatory treatment, and *de facto* annexation.

Professor Jane McAdam is Scientia Professor of Law and Director of the Kaldor Centre for International Refugee Law at UNSW Sydney.

Guy S. Goodwin-Gill is an Honorary Professor in the Faculty of Law & Justice at the University of New South Wales and the Kaldor Centre for International Refugee Law, and is Emeritus Fellow of All Souls College, Oxford, Emeritus Professor of International Refugee Law, and an Honorary Associate of Oxford’s Refugee Studies Centre.

Photo credit: Sete Ruiz

[SUBSCRIBE](#)

[RELATED POSTS](#)

[The Legal Context of Operations Al-Aqsa Flood and Swords of Iron](#)

by [Michael N. Schmitt](#)

October 10, 2023

–

[Hostage-Taking and the Law of Armed Conflict](#)

by [John C. Tramazzo](#), [Kevin S. Coble](#), [Michael N. Schmitt](#)

October 12, 2023

–

[Siege Law and Military Necessity](#)

by [Geoff Corn](#), [Sean Watts](#)

October 13, 2023

–

[The Evacuation of Northern Gaza: Practical and Legal Aspects](#)

by [Michael N. Schmitt](#)

October 15, 2023

–

[A “Complete Siege” of Gaza in Accordance with International Humanitarian Law](#)

by [Rosa-Lena Lauterbach](#)

October 16, 2023

–

The ICRC's Statement on the Israel-Hamas Hostilities and Violence: Discerning the Legal Intricacies

by Ori Pomson

October 16, 2023

–

Beyond the Pale: IHRL and the Hamas Attack on Israel

by Yuval Shany, Amichai Cohen, Tamar Hostovsky Brandes

October 17, 2023

–

Strategy and Self-Defence: Israel and its War with Iran

by Ken Watkin

October 18, 2023

–

The Circle of Suffering and the Role of IHL

by Helen Durham, Ben Saul

October 19, 2023

–

Facts Matter: Assessing the Al-Ahli Hospital Incident

by Aurel Sari

October 19, 2023

–

Iran's Responsibility for the Attack on Israel

by Jennifer Maddocks

October 20, 2023

–

Inside IDF Targeting

by John Merriam

October 20, 2023

–

A Moment of Truth: International Humanitarian Law and the Gaza War

by Amichai Cohen

October 23, 2023

–

White Phosphorus and International Law

by Kevin S. Coble, John C. Tramazzo

October 25, 2023

–

After the Battlefield: Transnational Criminal Law, Hamas, and Seeking Justice – Part I

by Dan E. Stigall

October 26, 2023

–

The IDF, Hamas, and the Duty to Warn

by Michael N. Schmitt

October 27, 2023

–

After the Battlefield: Transnational Criminal Law, Hamas, and Seeking Justice – Part II

by Dan E. Stigall

October 30, 2023

–

Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions

by Marco Sassòli

October 30, 2023

–

Participation in Hostilities during Belligerent Occupation

by Ioannis Bamnios

November 3, 2023

–

What is and is not Human Shielding?

by Michael N. Schmitt

November 3, 2023

–

The Obligation to Allow and Facilitate Humanitarian Relief

by Ori Pomson

November 7, 2023

–

Attacks and Misuse of Ambulances during Armed Conflict

by Luke Moffett

November 8, 2023

–

Distinction and Humanitarian Aid in the Gaza Conflict

by Jeffrey Lovitky

November 13, 2023

–

Targeting Gaza's Tunnels

by David A. Wallace, Shane Reeves

November 14, 2023