

THE PALESTINE QUESTION IN
INTERNATIONAL LAW

THE PALESTINE QUESTION IN INTERNATIONAL LAW

Compiled and Edited by
VICTOR KATTAN



**British Institute of
International and
Comparative Law**

Contents

<i>Foreword</i>	
John Dugard	v
<i>List of Contributors</i>	xi
<i>Introduction: Palestine and International Law: An Overview</i>	
Victor Kattan	xix
<i>Maps</i>	
Courtesy of the Palestinian Academic Society for the Study of International Affairs (PASSIA)	lvix
PART I International Law in the Middle East	
1. Jean Allain, ‘Orientalism and International Law: the Middle East as Underclass of the International Legal Order’ (2004) 17 <i>Leiden Journal of International Law</i> , 391–404	3
PART II Origins of the Arab–Israeli Conflict	
2. Michael Akehurst, ‘The Arab–Israeli Conflict and International Law’ (1973) 5 <i>New Zealand Universities Law Review</i> , 231–49	19
PART III Palestinian Refugees	
3. John B Quigley, ‘Displaced Palestinians and a Right of Return’ (1998) 39 <i>Harvard International Law Journal</i> , 171–229	41
4. Iain Scobbie, ‘The Responsibility of Great Britain in Respect of the Creation of the Palestine Refugee Question’ (2003–4) 11 <i>Yearbook of Islamic and Middle Eastern Law</i> , 39–58	101
5. Victor Kattan, ‘The Nationality of Denationalized Palestinians’ (2005) 74 <i>Nordic Journal of International Law</i> , 67–102	121
6. Michael Lynk, ‘The Right to Restitution and Compensation in International Law and the Displaced Palestinians’ (2003) 21(2) <i>Refugee</i> 96–113	157
7. Lex Takkenberg, ‘The protection of Palestinian Refugees in the Territories Occupied by Israel’ (1991) 3 <i>International Journal of Refugee Law</i> 414–34	175

PART IV The Defence (Emergency) Regulations

8. Martha Roadstrum Moffett, 'Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, in the Occupied Territories' (1989) *Al Haq* 199

PART V The Legal Status of Jerusalem

9. Antonio Cassese, 'Legal Considerations on the International Status of Jerusalem' (1986) 3 *Palestine Yearbook of International Law*, 13–39 295
10. Ardi Imseis, 'Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem' (2000) 15 *American University International Law Review*, 1039–69 323

PART VI UN Security Council Resolution 242

11. John McHugo, 'Resolution 242: A Legal Reappraisal of the Right-Wing Israeli interpretation of the Withdrawal phrase with Reference to the Conflict between Israel and the Palestinians' (2002) 51 *International & Comparative Law Quarterly*, 851–82 357

PART VII Self-Determination and Belligerent Occupation

12. Adam Roberts, 'The Palestinians, the Uprising and International Law' (1989) 2 *Journal of Refugee Studies*, 26–39 391
13. Jamal L El-Hindi, 'The West Bank Aquifer and Conventions regarding Laws of Belligerent Occupation' (1989–90) 11 *Michigan Journal of International Law*, 1400–23 405
14. Samira Shah, 'On the Road to Apartheid: The Bypass Road Network in the West Bank' (1997–8) 29 *Columbia Human Rights Law Review*, 221–90 429
15. Ardi Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' (2003) 44 *Harvard International Law Journal*, 65–138 499
16. Orna Ben-Naftali, Aeyal M Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law*, 551–614 573

17. Iain Scobbie, ‘An Intimate Disengagement: Israel’s withdrawal from Gaza, the Law of Occupation and of Self-Determination’ (2004–5) 11 *Yearbook of Islamic and Middle Eastern Law*, 3–41 637

PART VIII Palestinian Statehood

18. Francis Boyle, ‘The Creation of the State of Palestine’ (1990) 1 *European Journal of International Law*, 301–6 669
19. James Crawford, ‘The Creation of the State of Palestine: Too much too soon?’ (1990) 1 *European Journal of International Law*, 307–13 675
20. Omar M Dajani, ‘Stalled between Seasons: the International Legal Status of Palestine during the Interim Period’ (1997) 26 *Denver Journal of International Law & Policy*, 27–92 683

PART IX The Wall

21. Roger O’Keefe, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary’ (2004) 37 *Revue Belge De Droit International*, 92–149. 751
22. Pieter HF Bekker, ‘The World Court’s Ruling Regarding Israel’s West Bank Barrier and the Primacy of International Law: An Insider’s Perspective’ (2005) 38 *Cornell International Law Journal*, 553–68 817
23. Aeyal M Gross, ‘The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation’ (2006) 19 *Leiden Journal of International Law*, 393–440 833
24. Victor Kattan, ‘The Legality of the West Bank Wall: Israel’s High Court of Justice v. The International Court of Justice’, *Vanderbilt Journal of Transnational Law* (2007) 40 1425–1521 881

Part X Palestinian–Israeli Negotiations

25. Omar M Dajani, ‘The Role of International Law in Palestinian–Israeli Peace Talks’ (2007) 32 *Yale Journal of International Law* 189–252 981

List of Contributors

MICHAEL AKEHURST spent most of his career in the Department of Law at Keele University. He studied law at Emmanuel College, Cambridge (MA, LLB) and was a Docteur de L'Université de Paris. He was awarded the Diploma of the Hague Academy of International Law in 1965 and spent his early career with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) in Beirut. He was a member of the Editorial Committee of the *British Yearbook of International Law*, where he published most of his work. He was the author of *A Modern Introduction to International Law* (now *Akehurst's Modern Introduction to International Law*, by Peter Malanczuk), which has appeared in seven editions (1970–97) and is one of the most successful student texts ever published. In the foreword to a *Gedenkschrift* published in his memory he was described as 'one of the most gifted international lawyers of his generation.' He died in Crewe on 4 October 1989, at the age of 49.

JEAN ALLAIN is Senior Lecturer in Public International Law at Queen's University of Belfast and the co-editor of the *Irish Yearbook of International Law*. He previously taught at the American University in Cairo, where he wrote *International Law in the Middle East: Closer to Power than Justice* (Ashgate, Aldershot, 2004), which considers, inter alia, the Palestinian refugee question and the establishment of the State of Israel. Dr Allain's 2002 public lectures at the Ibrahim Abu-Lughod Institute of International Studies, Birzeit University, were published by the Institute as a booklet entitled: *On Achieving Palestinian Statehood: Concepts, Ends and Means from the Perspective of International Law*; as was a 2005 Strategic Paper entitled: *Beyond the Armed Struggle: the Relationship of International Law and International Organizations to the Palestinian Cause*. He received his doctorate from the Graduate Institute of International Studies, University of Geneva.

ORNA BEN-NAFTALI holds a law degree from Tel-Aviv University Law Faculty and advanced degrees from Harvard University and the Fletcher School of Law and Diplomacy. She served at the Department of Peacekeeping Operations/UN, and currently heads the International Law Division at the Law School, the College of Management Academic Studies, Israel. She is member of the executive board of B'tselem: The Israeli Information Center for Human Rights in the Occupied Territories; and of the editorial board of the *European Journal of International Law*. She has published numerous scholarly articles on the Israel–Palestine conflict in English and Hebrew.

PIETER BEKKER is a Partner in the International Dispute Resolution Group at McDermott Will & Emery LLP in New York. His practice focuses on public international law advice and international arbitration. He is a former staff lawyer in the Registry of the International Court of Justice (ICJ) and serves on the Executive Council of the American Society of International Law. He chairs the Committee on Intergovernmental Settlement of Disputes within the American Branch of the International Law Association. Dr Bekker, who holds Dutch citizenship, has basic and doctoral degrees in International Law from Leiden University (The Netherlands) and a Masters degree from Harvard Law School. The author of three books and over 100 articles in leading journals, he is an Adjunct Professor at Fordham University School of Law in New York. Dr Bekker served as Senior Counsel to Palestine in the ICJ advisory proceeding concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.

FRANCIS BOYLE is a Professor of International Law at the University of Illinois, College of Law. He received a JD degree *magna cum laude* in political science from Harvard University. Before moving to Illinois he was a teaching fellow at Harvard and an associate at its Center for International Affairs. He also practised tax and international tax with Bingham, Dana & Gould in Boston. Professor Boyle served as Legal Advisor to the Palestine Liberation Organization on the Palestinian Declaration of Independence and the Creation of the State of Palestine from 1987 to 1989, including the accession by Palestine to the Geneva Conventions and Protocols. He then served as Legal Advisor to the Palestinian Delegation to the Middle East Peace Negotiations from 1991 to 1993. He continues to serve as sometime Legal Advisor to the Provisional Government for the State of Palestine on various issues, including its prospective membership in the United Nations Organization. He is the author of *Palestine, Palestinians and International Law* (Clarity Press, Atlanta, 2003), an Arabic language version of which was published by Sharouk International in 2004.

ANTONIO CASSESE is a Professor of International Law at the University of Florence, Italy, previously Professor of International Law at the University of Pisa and the European University Institute. He was the first President of the International Criminal Tribunal for the former Yugoslavia from 1993 to 1997. In 2004 he was appointed by the UN Secretary-General to be the Chairman of an International Commission of Inquiry that visited Darfur in the Sudan. He is a member of the Italian delegation to the UN Commission on Human Rights, the Council of Europe Steering Committee on Human Rights, and the Council of Europe Committee Against Torture. He is the co-founder and co-editor of the *European Journal of International*

Law, and the Founder and Editor-in-Chief of the *Journal of International Criminal Justice*, as well as the author of numerous books and articles on international human rights law, humanitarian law, and international criminal law.

JAMES CRAWFORD SC, FBA, LLD is Whewell Professor of International Law, Director of the Lauterpacht Centre for International Law and a Fellow of Jesus College, Cambridge. He was a member of the United Nations International Law Commission from 1992 to 2001 and Special Rapporteur on State Responsibility (1997–2001). In addition to scholarly work on statehood, self-determination, collective rights and international responsibility, he has appeared frequently before the International Court of Justice and before other international tribunals, and is actively engaged as expert, counsel and arbitrator in investment arbitration, including many cases under the NAFTA. He appeared before the ICJ as counsel to Palestine in the 2004 advisory opinion on the *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory*.

OMAR DAJANI is a Visiting Professor of Law at the University of California, Hastings College of the Law, and an Associate Professor at the University of the Pacific, McGeorge School of Law, where he has taught since 2004. Previously, he was based in the occupied Palestinian territories, where he served, first, as legal adviser to the Palestinian team in peace talks with Israel and, subsequently, on the peace team of United Nations Special Envoy Terje Roed-Larsen. Prior to working in the Middle East, he clerked for Judge Dorothy Nelson on the US Court of Appeals for the Ninth Circuit and was a litigation associate at the Washington office of Sidley & Austin. He received his BA in History and American Culture from Northwestern University and his JD from Yale Law School. He is a member of the State Bar of California, the Council on Foreign Relations, the International Institute of Strategic Studies and the 21st Century Trust.

JOHN DUGARD SC is an honorary professor of law at the University of Leiden and the Centre for Human Rights of the University of Pretoria. He is a graduate of the University of Stellenbosh (BA, LLB) and the University of Cambridge (LLB, LLD). He is a member of the International Law Commission (1999–present) and was Special Rapporteur to the Commission on the subject of diplomatic protection from 1999 to 2006. He has sat as an ad hoc judge on the International Court of Justice. Since 2001 he has served as Special Rapporteur to the UN Human Rights Council (previously Commission on Human Rights) on the human rights situation in the Occupied Palestinian Territory.

JAMAL EL-HINDI is a senior official in the Financial Crimes Enforcement Network (FinCEN) of the US Department of the Treasury, where he oversees the development, implementation and enforcement of US anti-money laundering and counter-terrorism finance regulations. Before joining Treasury in December 2000, Mr El-Hindi was an associate at Patton Boggs LLP in Washington, DC, where his legal practice focused on US regulation of international business transactions, representation of foreign sovereigns and international banking litigation. He is a past president and current advisory board member of the Washington Foreign Law Society. He received his JD and a master's degree in Modern Middle Eastern & North African Studies from the University of Michigan. He also holds a Diploma in International Relations from the London School of Economics & Political Science, and an undergraduate degree in Journalism from the University of North Carolina. His additional work on water issues with respect to Israel and Palestine includes the article 'Compensation as Part of Equitable Utilization in the Israel–Palestinian Water Context' (2000) 22 *Arab Studies Quarterly* 113.

AEYAL GROSS teaches at the Tel-Aviv University Faculty of Law. He received his LLB from Tel-Aviv University and his SJD from Harvard Law School. He was awarded the Diploma in Human Rights by the European University Institute and, in 1995, was an intern with the European Commission on Human Rights. Dr Gross served on the board of the Association for Civil Rights in Israel. He was also a board member at the Concord Center for the Interplay between International Norms and Israeli Law in the College of Management, and at the Academic Committee of the Minerva Center for Human Rights at Tel-Aviv University. He has taught at Columbia University's School of International and Public Affairs and was a fellow at the Stellenbosch Institute for Advanced Studies in South Africa. He is currently a visiting fellow with the Institute for Advanced Legal Studies, and is teaching at SOAS, both at the University of London.

ARDI IMSEIS LLM (Columbia), LLB (Dalhousie), BA Hons (Toronto) of Osgoode Hall, Barrister-at-Law, is a Legal Officer with UNRWA, West Bank Field Office, Jerusalem, Occupied Palestinian Territory. Since 2002 he has served with UNRWA as a policy and legal advisor to the Office of the Commissioner-General in the Gaza Strip and the office of the Director of UNRWA Operations in the West Bank. Imseis is also an Assistant Professor of public international law at Birzeit University and his work has been published in numerous law reviews and journals. He is a former Human Rights Fellow and Harlan Fiske Stone Scholar, Columbia University School of Law, and Social Sciences and Humanities Research Council of Canada Doctoral Fellow.

VICTOR KATTAN is a Research Fellow in Public International Law at the British Institute of International and Comparative Law (BIICL) on the project on Human Rights in International Law and Iran. Prior to this he was a Visiting Fellow there. He has an LLB (Hons) from Brunel University, an LLM from Leiden University, and is currently a doctoral candidate at the School of Oriental and African Studies, University of London where he was awarded a scholarship from the Arts and Humanities Research Council to undertake a study on the partition of territory in international law. He has been the Assistant Editor of the *Yearbook of Islamic and Middle Eastern Law* since 2005 (appointed a General Editor in 2008) and has published articles in international law journals in the United States and Europe. In 2003–4, he worked in the Occupied Palestinian Territories as UN Development Programme TOKTEN consultant to the BADIL Resource Centre for Palestinian Residency and Refugee Rights. He has also worked on projects for BADIL as an external consultant.

MICHAEL LYNK is Associate Professor at the Faculty of Law, The University of Western Ontario, London, Ontario, where he teaches labour, human rights and constitutional and administrative law. He has also taught labour law at the University of Ottawa and Victoria University of Wellington (New Zealand). Professor Lynk is a graduate of Dalhousie University (LLB) and Queens University (LLM) Before becoming an academic, he practised labour law in Ottawa and Toronto for a decade. He is a senior co-editor of the *Labour Law Casebook* (7th edn), which is the national casebook used in law schools across the country. Professor Lynk is also an editor of the *Canadian Labour and Employment Law Journal*. In addition to his labour law activities, he has worked with UNRWA in the West Bank, and has written law review articles and media commentary on political and legal developments in that region.

JOHN McHUGO is an English solicitor and a consultant to Trowers & Hamblins where he was head of public international law until he retired in early 2007. He was listed as Counsel for Bahrain at the ICJ in 1994 during the jurisdiction and admissibility proceedings in the case concerning Maritime Jurisdiction and Territorial Questions between Qatar and Bahrain. During 2001–2 he was an honorary visiting fellow at the Scottish Centre for International Law at Edinburgh University. He studied Arabic at Oxford University and the American University in Cairo and is a specialist on legal documentation in Arabic.

KEREN MICHAELI is a DPhil candidate at St Antony's College, the University of Oxford. She is a graduate of Georgetown University (LLM) and the Law School, the College of Management Academic Studies, Israel

(LLB). She is currently a tutor in public international law, international human rights law and the law of war at the University of Oxford.

MARTHA ROADSTRUM MOFFETT received her BA from Smith College in the field of political science and a law degree from Boston University School of Law. She served as a trial lawyer with the United States Department of Justice in Washington, DC, where she worked in the Antitrust Division and as a Special Assistant United States Attorney prosecuting federal crimes. After three years, she went into private practice with the Washington, DC law firm of Hogan & Hartson. While her husband was assigned to the Middle East for *The Christian Science Monitor*, based in Jerusalem, she worked for Al Haq, where she wrote an article on the British Defence Emergency Regulations of 1945, as reproduced in this book. Subsequently, she became Jerusalem staff attorney for the New York-based Lawyers Committee for Human Rights. In 1994 she left her law work to become a Christian Science Practitioner and Lecturer.

ROGER O'KEEFE, BA, LLB (Hons) (Sydney), LLM, PhD (Cantab), is University Lecturer in Law and Deputy Director of the Lauterpacht Centre for International Law at the University of Cambridge, as well as Fellow and College Lecturer in Law at Magdalene College, Cambridge. He has published articles in numerous international law journals and is a member of the Conseil scientifique of the *Revue Belge de Droit International*. In 2003 he was a member of an expert panel convened in Brussels by the European Coordinating Committee of NGOs on the Question of Palestine to provide informal advice on the legal means at the disposal of the European Union and its Member States to ensure respect by Israel of its international commitments. He was a speaker at the conference *Palestine and International Law*, hosted in 2005 by the School of Oriental and African Studies, University of London.

JOHN QUIGLEY is President's Club Professor in Law at the Ohio State University in Columbus, Ohio USA. Prior to joining the Ohio State Faculty in 1969, he was a research scholar at Moscow State University and a research associate in comparative law at Harvard Law School, from which he holds an LLB degree. He has published numerous scholarly articles on the Arab–Israeli conflict as well as on the law of State responsibility, war and peace, the United Nations and human rights. His books in international law include *The Case for Palestine: An International Law Perspective* (Duke University Press, Durham, 2005) and *The Genocide Convention: An International Law Analysis* (Ashgate, Aldershot, 2006).

SIR ADAM ROBERTS was Montague Burton Professor of International Relations at Oxford University and a Fellow of Balliol College, from 1986

to 2007. He is a Fellow of the British Academy. He did a BA degree in History at Oxford, and was a Lecturer in International Relations at LSE from 1968 to 1981 before returning to Oxford. He has a long-standing interest in the study of resistance movements (both non-violent and violent) in response to external control. His books include (edited with Benedict Kingsbury), *United Nations, Divided World: The UN's Roles in International Relations* (2nd edn, OUP, Oxford, 1993) and (edited with Richard Guelff), *Documents on the Laws of War* (3rd edn, OUP, Oxford, 2000). He has written extensively on Middle East problems. He co-authored a report, *Academic Freedom under Israeli Military Occupation*, International Commission of Jurists, London and Geneva, 1984 and is the author of 'Prolonged Military Occupation: The Israeli-occupied Territories Since 1967' (1990) 84 *American Journal of International Law* 44–103.

IAIN SCOBIE is the Sir Joseph Hotung Research Professor in Law, Human Rights and Peace Building in the Middle East at the School of Oriental and African Studies, University of London. Professor Scobie studied at the Universities of Edinburgh and Cambridge, and at the Australian National University. He is a member of the Executive Board of the European Society of International Law, and of its International Legal Theory interest group; of the Governing Board of the Scottish Centre for War Studies, which is based in the University of Glasgow; of the Lieber Society on the Law of Armed Conflict; and of the International Advisory Council of Diakonia's International Humanitarian Law Programme, which is based in Jerusalem. He is also a member of the Scientific Advisory Board of the *European Journal of International Law*. He has published widely on the question of Palestine in international law journals.

SAMIRA SHAH is a Senior Attorney in the litigation department at Cravath, Swaine & Moore LLP in New York. She received her AB in Near Eastern Languages and Civilizations (1992) and her MA in Middle Eastern Studies (1993) from the University of Chicago. She was awarded a Fulbright grant to study in Syria at *L'Institut Français d'Etudes Arabes de Damas* (1994–5). While in Syria, she interned at the United Nations High Commission for Refugees (1995). She earned her JD from Columbia University School of Law in New York (1998), where she was a Harlan Fiske Stone Scholar. While in law school, she was awarded a Human Rights Internship Grant during the summer of 1996 to intern at Al-Haq in Ramallah. At Al-Haq, she studied the impact of the bypass road network on the West Bank and its legality under international law. After receiving her law degree, she clerked for the Honorable William H Walls in the United States District Court for the District of New Jersey (1998–9) before working as an associate at Cravath, Swaine & Moore LLP.

LEX TAKKENBERG is General Counsel of UNRWA in Jerusalem. He earned degrees in Dutch law (1980 and 1985) and international law (1983) from the University of Amsterdam. In 1997, he obtained a doctorate in international law from the Catholic University of Nijmegen. His doctoral dissertation, *The Status of Palestinian Refugees in International Law*, was published in English (1998) and Arabic (2003) and is recognized as the leading text on the subject. Lex joined UNRWA in 1989 as a Refugee Affairs Officer in Gaza. He then served in Gaza as Deputy, Field Relief & Social Services Officer (1990–2) and in Syria as Chief, Relief and Social Service Programme (1993–4). He returned to Gaza as Chief, Field Relief and Social Services Programme (1992–7) and Deputy Director of UNRWA Operations (1997–2000). He subsequently held the positions of Deputy Director of UNRWA Affairs (2000–4) and Director of UNRWA Affairs (2004–6) in Syria.