Nowhere to Run

Gay Palestinian Asylum-Seekers in Israel

Michael Kagan & Anat Ben-Dor

TEL AVIV UNIVERSITY
The Buchmann Faculty of Law
Public Interest
LAW PROGRAM
(Supported by the Ford Foundation)

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Abstract

In the Occupied Palestinian Territories, some gay men face torture and potentially lethal violence at the hands of PA security forces, members of their own families, and armed militant groups. Brutal repression of homosexuality by a wide array of actors in Palestinian society puts an unknown number of people at risk, and represents an important violation of human rights for people living in the Occupied Territories.

Meanwhile, Israel prohibits these people from even filing asylum applications, simply because of their nationality. The United Nations has intervened in a few cases to promote resettlement of gay Palestinian men to third countries, but the UN refugee office in Jerusalem has generally cooperated with Israel in excluding Palestinians from the asylum system.

Israel has increasingly recognized equal rights for gays, lesbians and trans-gendered people and has taken substantial steps in recent years to implement the right to seek asylum. Asylum claims based on sexual orientation are becoming increasingly routine in international refugee law. If respect for the rights of gay men in the Occupied Territories does not improve, and if the State of Israel's current refusal to receive Palestinian asylum-seekers does not change, innocent people will be put in mortal danger. Israel's continued refusal to consider asylum claims from gay Palestinians violates the general rule of international law – recognized by Israel's High Court – against returning a foreigner to a territory where his or her life or freedom may be in danger. Under international law, no state may discriminate by nationality with regard to refugee protection.

This report analyzes evidence that gay Palestinians are at risk of severe human rights violations in PA-controlled areas and analyzes Israel's obligations to asylum-seekers under international law. It then makes recommendations as to how Israel and the United Nations can better protect gay Palestinian asylum-seekers.

Table of Contents

I	Authors' Preface	5
II	Persecution of gay men in the Palestinian Territories	7
III	Inability to find protection in Israel	20
IV	Israel's basic obligation to protect refugees	23
V	Refugee claims based on sexual orientation: The legal basis	28
VI	Special legal issues for Palestinian asylum-seekers	33
VII	Seeking asylum in Israel: The current system	39
VIII	Conclusions and recommendations	45

I

Authors' Preface

Gay Palestinians are caught in the middle of the Israeli-Palestinian conflict. They are persecuted in the Occupied Territories by militant groups, Palestinian security forces and members of their own families. When they flee, they are hunted inside Israel by police who seek to return them to the territories from which they have escaped, usually forcing them to live in hiding and eventually run away again.

Were these people not Palestinians, or if they fled somewhere other than Israel, they might find a safe haven with less difficulty. But as Palestinians, the most accessible country to which they can run is often Israel, where they are seen as a security and demographic threat.
If its current practices with regard to Palestinian asylum-seekers do not change, Israel will be in breach of several bodies of international law, many of which Israel helped to write. We argue that current Israeli practices also go against norms recognized in Israel's own High Court jurisprudence. More importantly, innocent people who have managed to escape mortal danger once will be returned to face it again. There is nothing in Israel's own laws that requires that people be put in danger in this way, and it is certainly against the humanitarian values both of a democracy and of the Jewish tradition.

The Refugee Rights Clinic at Tel Aviv University has been representing and assisting a small number of gay Palestinians since 2002, attempting to find them safe haven despite the lack of any formal avenue by which to do so. We represent Palestinian asylum-seekers in Israel simply because they are here. The Clinic represents asylum-seekers and refugees of all nationalities.

The plight of gay Palestinians is easily politicized, and some may argue that now is not the right time to pursue this issue. For some, reports of abuses against sexual minority can provide ammunition by which to demonize Palestinian society in order to portray Israel's adversary as barbaric. For others who are generally critical of Israeli policies in the Occupied Territories it is tempting try to explain brutality against gay men as a symptom of societal stress stemming from the occupation. This report makes no such claims.

In short, we believe that the plight of gay men should have little direct relevance on any of the contentious issues of the Israeli-Palestinian conflict. This report does not in any way touch on the debate over the fate of the 1948 Palestinian refugees and their descendents, which is one of the more difficult topics in Israeli-Palestinian peace negotiations. As a matter of law, the right to

seek asylum abroad is entirely separate from the question of refugee return. One of the tragedies confronting gay Palestinians today is that the ongoing Israeli-Palestinian conflict detracts from their ability to find safe haven from dangers that stem from their sexual identity. We hope that even people who may disagree about the core issues dividing Israelis and Palestinians may be able to reach agreement about how to protect gay Palestinians.

We publish our findings first because we believe it is essential that attacks against gay men in the Occupied Territories be properly reported, and second because we believe that individuals who might be tortured or killed should not be forced to wait for peace to arrive in the Middle East simply to be able to ask for asylum in Israel. Both legally and politically, asylum should be non-political.

Our interest in this subject came about through Palestinians who sought refuge in Israel. Although Palestinian organizations in the Occupied Territories bear first responsibility for persecuting gay Palestinians, our primary interest remains on the Israeli response to those who escape and seek safety on the other side of the Green Line. We should note from the outset that gay Palestinians, though the subject of this report, are not the only category of Palestinians who may need to seek asylum in Israel. The Refugee Rights Clinic has also represented Palestinian women fleeing domestic violence, for example. Yet, although there are a range of possible asylum claims that may be made by Palestinians, this report applies to only a relatively small number of the people who reside in the Occupied Territories. The arguments advanced in this report would only support a small minority of Palestinians from the West Bank and Gaza Strip in making successful refugee claims in Israel or anywhere else, since international refugee law only protects asylum-seekers who are at a genuine risk today of persecution for specific reasons. Those who only flee generalized violence or economic hardship are generally not covered by international refugee law.

Our main argument in this report is simply that Palestinians, like everyone else, should be allowed to seek asylum, as recognized in the Universal Declaration of Human Rights. Not every Palestinian who applies would necessarily have a valid claim, and Israel is not obligated to provide sanctuary to individuals who are actually dangerous, Palestinian or otherwise. We believe that the best way to balance security against the need to protect people from persecution is simply to address each Palestinian case by the same standards applicable to everyone else. Because the Palestinian territories are Israel's nearest neighbor, Israel needs a humane, rights-respecting policy to deal with Palestinians who seek asylum here.

At the end of the day, our concern is simple. There is an urgent need to prevent abuses against gay men in the Occupied Palestinian Territories, but until this can be accomplished there is an equally urgent need to protect those gay men who manage to escape. Under current Israeli policy, people who have fled their homes in mortal fear are denied safe haven, simply because they are Palestinians. We believe that this is illegal and morally untenable for a democracy. We write this report in the hope that this will change.

Michael Kagan & Anat Ben-Dor
March 2008

II

Persecution of gay men in the Palestinian Territories

Methodology

This report is a result of a several years' work by the Refugee Rights Clinic at Tel Aviv University (2003-2007) with a number of gay Palestinians who fled the Occupied Palestinian Territories (OPT) and sought protection in Israel. Their cases presented a series of unusual legal and practical problems. Although Israel has a nascent asylum system, Palestinians are excluded by virtue of their nationality from applying for asylum. Despite the clear and immediate danger to their lives, they have been treated by the State of Israel as undocumented migrants, and thus constantly exposed to arrest and deportation back to the Occupied Territories. Because they are Palestinians, they have been subject to more rapid deportation with fewer procedural safeguards than other migrants in Israel. Attempts to secure protection for gay Palestinians in third countries, though successful in a few cases, are extremely complex and have been burdened by the lack of documentation about the plight of gay men in the OPT.

This reality called for shedding some light on the plight of gay Palestinians who seek protection as refugees in Israel. The underlining assumption of this report is that victims of such persecution are entitled to protection according to the 1951 Geneva Convention relating to the Status of Refugees. The report focuses on the way Israel, a party to the Refugee Convention and an immediate and natural destination for the victims of such persecution, has failed to respond to the challenge.

This report is based on in-depth interviews conducted over a period of four years with several gay Palestinians. We have not attempted to provide a full description or evaluation of the situation of sexual minorities in the Palestinian Occupied Territories. The number of fully documented cases is relatively small (10 cases). However, LGBT organizations which were consulted during the writing of this report (in particular Aguda: Israel's Lesbian, Gay, Bi-sexual and Transgender Association and the Jerusalem Open House) confirmed they are aware of the phenomenon described in it and have also encountered similar cases over the years.

The main source for the information provided in the report are interviews conducted for refugee protection applications filed with the United Nations or for requests submitted to the Israeli Ministry of the Interior for permits to stay in Israel. The interviewees allowed the use of their

testimonies and affidavits for this report, provided their identities would not be exposed. To protect their safety and privacy, their names and personal details have not been disclosed. Minor details of their testimonies, which could have led to their identification, have been altered or omitted.

All the interviews were conducted by qualified lawyers trained in refugee-specific interviewing techniques. Interviews were held repeatedly over a period of time (often over the course of several months) and were carefully examined for inconsistencies. Special attention was given to the level of detail and coherence of the testimony. Where possible the testimonies were compared with external information gathered from other sources.

Three of the interviewees were examined by psychiatrists and found to be suffering from post-traumatic stress disorder (PTSD), while two of them bear physical scars which are compatible with cigarette burns and other forms of torture reported in their testimonies. At the time of writing of this report, three of our interviewees have been granted resettlement by third countries after their cases were assessed by UNHCR headquarters in Geneva as well as by the receiving countries and judged to be credible. A fourth has managed to leave to a third country by other means.

The informants testified in Arabic, English, and sometimes in Hebrew. In some cases, the work on the testimony was interrupted due to an arrest for illegal stay in Israel or due to deportation to the Occupied Palestinian Territories. Often, the interviewees themselves had difficulties in relating their stories, and the interview had to be interrupted and resumed at a later date. Since the interviewees did not have legal status in Israel throughout the process, meetings with them were held at a variety of places: prisons, alternative detention locations, occasional meeting places, and the offices of the Refugee Rights Clinic at Tel Aviv University.

Due to the small number of interviewees, we have not attempted to draw any conclusions about the scale of persecution against sexual minorities in the OPT. Instead, we have provided a qualitative description of the experience of a small number of people. We should note that all our interviewees were young men, most of them in their early twenties. The majority were from the West Bank, only one from the Gaza Strip. Their family origins were of varied background; some came from educated urban families, others from villages, some received higher education, others only primary education. All came from Muslim families, and a few reported that some members of their family were religious. However, given our limited sample size and the Muslim majority among the Palestinian population of the West Bank, we have no conclusive evidence to suggest that the problem of persecution of gays is confined to Muslims. Homophobic discrimination and violence has been reported in nearly all regions of the world, and it is not our purpose here to define its political, cultural or religious origins. However, the experiences of these individuals indicate that homophobic violence by both private and official parties is a serious human rights problem in the OPT. Unlike well-known human rights problems connected with the Israeli occupation, in this instance Palestinians are the main agents of persecution against other Palestinians.

The Testimonies

Intolerance of gays by the surrounding society

All the interviewees reported that, from an early age, they knew that homosexuality would not be tolerated by their society. A, a young man in his twenties who was interviewed in 2003, told us:

> Gays have been persecuted in Gaza as far back as I can remember. Until 1993, militias of men with masked faces regularly attacked known gay men. For example, in 1991 or 1992, a 25-year-old gay man named Ismail was attacked in his house by four men who broke his arm and leg. They wrote on the walls that he was a homosexual. Almost no one from his family came to his help afterwards. He soon disappeared altogether. Four other men I knew were taken out of their homes and beaten in the square for suspected or known homosexuality. In my town, a pharmacist was caught having relations with another man and was later killed by that man's family. In 1992 or 1993, a young man named Ibrahim was killed by his father for sleeping with another man. The father poured acid over Ibrahim's entire body. Although the entire [refugee] camp knew exactly what had happened, no police investigation was launched and the father went unpunished. The brutal punishment was widely accepted as natural and befitting the "crime" of homosexuality.

B, who was born in Ramallah, said:

> There are some people in the territories who are rumored to be gay. Such a rumor is of course negative. "Luti"[homosexual] is a very bad word. They are also described as "maniacs," or "those who sleep with children," etc. Although I was attracted to men, I kept away from such people. I did not want to be associated with them. If a person is known to be gay, he will be socially ostracized. That's in the best case. In the worst case, he would suffer humiliation and violence.

C, who grew up in a village in the West Bank, reported an incident in his village:

> When I was a teenager, I had sexual relations with other young men from the village. One of them, a young man called M., wasn't discreet enough and was suspected of being a gay by the villagers. Graffiti was sprayed against him in the village, and at one point he was caught by a local gang. They captured him, set him on fire, and told him it was a punishment for his sins, and a warning to others. He suffered severe burns, especially to his face. I saw him a few years later and it was a shocking sight. To my knowledge, no legal action was ever taken against the attackers, and no one was even questioned. In Palestinian society, violence against gays is tolerated, viewed as justified and even encouraged.

These testimonies expose a bleak reality in which gays are exposed to humiliation, extreme violence and death, and are not provided with any protection from the authorities in the Occupied Territories (Israeli or Palestinian). Our interviewees reported that, from a young age, they knew they had to hide their sexual identity.

Reasons given for the societal persecution of gays

We do not in this report attempt to explain why Palestinian society is hostile toward homosexuality. As noted above, homophobia exists in Jewish Israeli society, in the United States, in Latin America, and in the Muslim and Arab world generally. When asked this question, our interviewees typically cited violation of religious and social mores. However, they also frequently connect their plight to tensions related directly to the Israeli-Palestinian conflict.

D, a twenty year old from the West Bank said:

> In Palestinian culture, being homosexual is not only a great offense on the part of the homosexual, but is also a disgrace to his entire family and an abomination against Islam. It is also viewed as an act against the Palestinian struggle for independence. Known homosexuals are presumed to be weak and to identify and collaborate with Israeli Jews. The sanctions are extremely harsh, beginning with physical and verbal abuse and often ending in death at the hands of one's own family or others. Of the three gay men I knew in the Palestinian Authority areas, all were in deep hiding. I do not know whether they are still alive, and if so, where they are living.

A from Gaza also pointed out the direct effect of the political situation on the situation of the gays in the Palestinian territories:

> Under direct Israeli control, we in Gaza enjoyed at least some of the official tolerance prevalent inside Israel toward gays. Many had made contacts, friends and relationships in Israel. Many also adopted liberal attitudes of self-acceptance. While we detested the occupation, we feared the PA's open hostility toward gays. Life for gays in Gaza thus changed drastically when the PA took control of the Strip. In addition to being despised, we were seen as a dangerous "fifth column" in the Palestinian struggle against Israel. All this took place against the backdrop of extreme hatred of homosexuals within Palestinian society, in which gays are despised as an abomination.
>
> For their part, knowing that gays are despised in the PA, the Israeli police and military apparatus target Palestinian gays for blackmail, thus turning many into their own informants. All this in turn feeds the hatred and mistrust of gays in the PA, and the perception that we are "collaborators." The PA police accordingly seek to "smoke out" every homosexual and secure him as their agent and informant. Those who do not cooperate are harassed, beaten, tortured, imprisoned and eventually killed.

Our interviewees also consistently reported that their interrogations by the Palestinian Authority police included allegations of cooperation with the Israeli security services. The fact that many have fled to Tel Aviv and lived there for substantial periods of time only served to strengthen the allegations of cooperation with Israel.

Because homophobia is so widespread both in the Middle East and worldwide, we hesitate to conclude that Palestinian homophobia results mainly from the Israeli-Palestinian conflict. However,

it does appear plausible that the conflict heightens the dangers to gay Palestinian men in the OPT. They confront being suspected not just of perceived immorality, but of national disloyalty.

Living in hiding

Fear prompted our interviewees to hide their sexual identities. B said:

> All the relationships between gays in the Occupied Territories have to be in secret. There is no known meeting place. How do you find a partner? In the street, through glances. Then you look for a place where no one will know and no one will see. Abandoned houses, sometimes at home, but only if it is totally safe that no one is there and no one will come.

F, a young man, also from Ramallah, said he did not find it difficult to hide the true nature of his relationship with his classmate:

> We knew we had to hide the nature of our relationship. It wasn't too hard. In our society men tend to keep company with one another. He visited my house, and I visited his house. Our families did not suspect us. We also spent time together in public gardens, in cars. I knew this couldn't go on forever, that eventually our families would pressure us to marry. But we were young, and I thought that, for now, we could do whatever we wanted.

The problems started for F when this relationship ended. It was extremely difficult to find another partner:

> I still lived at home. Times were difficult; it was 2001, the first year of the Second Intifada. It was hard to form relations with other men. My only way was the internet, but I soon learned that the gays in Ramallah were afraid. They never exposed their real identities. I was looking for a serious relationship. It was hard for me to put my trust when everyone was lying. Meeting men from Jerusalem was difficult because of the political situation [apparently a reference to restrictions on movement between Ramallah and Jerusalem].

The role of the family

Our interviewees described their families' attempts to regulate their behavior and make it conform. For some of them, when their sexual orientation was exposed, close relatives became a major threat to their safety.

A told us he was the youngest brother in his family. At the age of 16, his brothers, who suspected he was gay, started watching his movements and warned him not to be seen with other men who were suspected of being gay. They started enforcing a code of what they called 'clean behavior.' When they found out he smoked cigarettes, one of his brothers beat him with a hose and club.

D's brother discovered he was gay after he was arrested by the Palestinian police. After D was released and ran away to Israel, his brother kept threatening him:

> Each day – sometimes twice a day, he would call [to where I was staying in Israel], cursing and promising to kill me. He said he would hang me in front of our entire village, that everybody would see how he would kill me. N said he would find me even if I had facial surgery. Sometimes, he said he would tell the Hamas to "take care of me." The calls continued for between six and seven months, until the summer of 2000. During the first four months, he called daily, then a few days apart. During several of the calls, N spoke explicitly about my being gay. He said he knew who my girlfriend [a transgendered man] really was, and that he would kill her too.

F grew up in a large urban family. In 2005, he was blackmailed by other youngsters due to his sexual identity. He told his family that he'd been robbed. F's father insisted that the case be reported to the police saying: "I am your father, it is my duty to protect you." After a short investigation, the police informed F's father that the youngsters claimed that F had been offering them sexual services. F said that his father was furious and ashamed. His father found a way to close the case quietly with the other boys' families and made F sign a paper that he had no further complaints. From that day on, F was incarcerated in the family's house:

> From that day my life at home became very miserable. My father forbade me from using the phone. He did not allow me to leave the house without him. I could only go with him to his work. He did not allow me to go out in the evenings. My brother, N who was three years younger than me, took the role of elder brother. He kept watching my step. I was very depressed.

Later in 2005, F was allowed to leave the house for his studies. One morning, after returning home late the night before, he was attacked and stabbed by his brother. F was later stabbed again by his brother, and survived an additional violent attack by his father. Every attack led to his hospitalization, but F never complained to any formal authority and no investigation was ever carried out.

E, also from Ramallah, said he was lucky not to lose his mother's support. But he said his whole family suffered due to his sexual identity:

> My family suffered because of me. When my sisters walked in the street people would say "here are the sisters of the bitch." People used to throw stones at my house; every week we had to fix the windows. My brother was furious that I was bringing so much suffering upon our family. He used to curse me, and if I had friends visiting, he cursed them as well. I remember once, when I had friends, he started cursing us. We were on the veranda and he was in the house, he called me and I started walking towards him, but he was so agitated that he simply broke the glass door in my face. I was bleeding, and he reached and threw me on the floor and started hitting me. It took all of my friends' strength to stop him.

The surrounding society

All our interviewees expressed fear of exposure of their gay identity. The responses of people around them ranged from verbal abuse to actual violence. C told us that when he visited his village, he was careful to alter his appearance and remove his earring. This did not help:

> One time they noticed that my ear was pierced and harassed me about it. They shouted that I was a "homo," a "sex pervert," a "maniac," and a "collaborator with Israeli security." They hit me, kicked me, and beat me with sticks. I was afraid they would kill me.

E was kidnapped and severely beaten, and this led to his identity as a gay man being exposed:

> Some days passed and I tried to go back to school, but this was terrible. Everyone knew what had happened to me, not only in school, but also in the neighborhood. People would tell me that I am a "bad Palestinian," that I am gay, that I sleep with people for money and that I work with the Israelis. This was one of the worst days of my life. I decided I could not continue my studies in school. I went to the principal and he agreed that I would study at home for the exams. It was the end of the year anyway.

However, the societal harassment and abuse had an unexpected effect on E:

> I kept getting abusive phone calls to my home, people warned me that I should stop being gay. My house was often stoned. At that stage I decided that I didn't care any more. I thought that I would be the first gay Palestinian. I knew my mother would not leave me, and I also thought the police would protect me.

E's reference to himself as the "first gay Palestinian" demonstrates how impossible it is to live openly as a gay man in Palestinian society. Shortly after giving this testimony, when security forces arrived at his house to arrest him, E managed to avoid arrest and shortly afterwards left the Occupied Territories.

Abuse and torture by official authorities

From the anecdotal evidence of the ten cases analyzed in this report, it appears that gay men living in the OPT in the late 1990s immediately before the Second Intifada often endured arrest and torture at the hands of Palestinian Authority police. Gay Palestinians whom we interviewed who had left the OPT more recently, especially from 2003 onwards, reported less official involvement by Palestinian police in their persecution. However, they reported an increase in other less official threats, such as kidnapping, violence and intimidation by militias and by individuals who presented themselves as members of the security authorities but whose actual identity is difficult to ascertain. Rather than representing any change in official policy, this trend appears to correspond to the general breakdown of the Palestinian Authority over the last five years.

A's ordeal started in Gaza in 1998, when a PA officer tried to pressure him into becoming an informant on any 'immoral activities' taking place in the area. When A failed to provide any reports, he was arrested by 5 officers at his house and taken to an interrogation center, where he was met by several other officers. He was slapped and beaten with clubs and asked to confess to his harmful conduct. The policemen accused him of being involved in making pornographic films. When A refused to admit to the accusations, he was hung from the ceiling and later immersed in a pool of water.

> The officers undressed me, tied my hands, and pulled me up to the ceiling. I tried to touch the bottom with my feet but could not reach it. All the pressure was on my hands. As I remained hanging, three officers beat me over my entire body while they cursed me and demanded that I "confess"… Two to four hours later, I was taken down and dressed. My eyes were again covered.
>
> I was taken to a stench-filled room about 3 x 3 meters and undressed yet again. Most of the room was taken up by a pool filled with filthy, smelly water. In the pool was a man whose hands were tied to the ceiling with a long rope. Only his head protruded from the water. The officers took off my clothes, tied my hands, and lowered me into the pool.
>
> I asked the other man in the room what he was doing there. He said he had been accused of matchmaking for gays. He said he'd been there for three days. I was left immersed up to my neck in the filthy water for two or three hours. Officers would enter and leave the room. One of the times, one of the officers hit me hard on the head with a stick.

A was forced to watch while other people were tortured. He described being in one room with a person whose fingernails were pulled off. He was also made to watch while the policemen forcefully inserted a bottle into another man's body.

> I was then taken to yet another room, in which a young man was present. Two officers soon entered bringing a coke bottle with them. They said to him: "we want to check what's more pleasant for you: a man's sexual organ or a coke bottle." The officers tried to force him to sit on the bottle, but he resisted. They called in another officer who helped them push him by force onto the bottle. All the while, the officers laughed at him, saying he must be "enjoying it." When the boy was allowed to get up, he took out the bottle. I saw a gush of blood spout from his rectum. I assume the officers were scared they'd caused him serious injury, because they called in the station doctor. I understood this was the doctor assigned to take care of the tortured. The young man was taken out of the room on a stretcher.
>
> Again, about an hour and a half later, I was taken out of the room to the office. The two officers asked whether I wanted to "see other things" or was I "ready to talk." I responded that I couldn't recount things I didn't do. He said "Okay. Keep it that way. Let's see if your family can help you."

A was then locked inside a small dark room full of insects and rodents; he was not sure how many hours he spent there. He was finally released thanks to an officer who knew him. However, two months later he was arrested once more. He was tortured also on his second arrest, this time suffering burning by cigarettes and flagellation. A psychiatrist who examined A in May 2003 diagnosed him as suffering from chronic post-traumatic stress disorder and panic disorder with agoraphobia.

D was also arrested in 1999 in the West Bank by several armed officers who came to his family's house. At that time D was already living in Tel Aviv with a transsexual partner. However, he returned to his family home in the West Bank at the request of his family. Once there, D was taken to a police station, where he was accused of collaboration with Israel and badly beaten. During his three weeks of incarceration he was tortured:

> Almost every day, sometimes twice a day, I was immersed up to my neck in a sewage pool in one of the torture rooms in the station. They tried to force me to walk into the pool on my own. But I resisted, and they lowered me in with ropes. A couple of times, they tied me up and threw me into the water. One of these times, my forehead hit the stone perimeter and I was badly cut. The "treatments" lasted hours at a time – typically from 7:00 a.m. to noon. The nauseating stench of the sewage was unbearable, but it was impossible to hold my breath for more than a few minutes.
>
> When I was not being beaten, interrogated or immersed in the sewage pool, I was made to join the other prisoners, performing forced construction labor in the building. The rest of the time, I was locked in a dark tiny cell one meter square by two meters high. As in the other cells in the row, there was a tiny window opening into the corridor, and a pipe across the top, 50 cm below the ceiling. One time, I was hanged upside-down from that pipe. When I needed to go to the toilet, I shouted until someone came to take me. With tremendous effort, I managed not to defecate or urinate inside my cell. I ate and drank very little.

After about four days of questioning, the officers started to ask questions about D's sexual orientation. They pressed him to admit he was gay and that he had a sexual relationship with another man:

> On other occasions, the policemen and interrogators would order me to stand on one leg and raise my hands. When I put my leg down, they would hit me. One of them said: "He wants to be Jew." Another said: "Look at this *Lutt*i (queer/homosexual)."

After 3 weeks, D's brother came to visit him in prison. D said his brother laughed when he saw his shaved head and bruised face. By that time, his brother had found out about D's sexual orientation. He'd talked with D's partner on the phone and realized D was living with a man. D was released shortly after his brothers' visit. He believes that his brother engineered his release because he wanted to kill him to 'preserve the family's honor'.

Arrest and beatings were also reported by C, who was arrested in the West Bank in 1998 and accused by his interrogators of being a collaborator and a "sex pervert." He was beaten with fists

and with a pole. A family member managed to obtain C's release by paying a bribe. On the night of his release, C fled to Tel Aviv. He said that a summons to an investigation kept arriving at his house after he was gone.

G reported a ten-hour arrest in 2001 in the West Bank. At the time G had been living for some years in Tel Aviv but would return home for visits. G testified that his interrogators accused him of being gay and an Israeli collaborator. He was severely beaten and humiliated:

> At this point, a few hours after the beginning of the interrogation, my head was forcefully shaved, leaving random strips of hair on my head. I felt humiliated and degraded, like a dog. I wept like a baby and almost urinated in my pants. As I screamed louder and louder, they hit me with more force.

As mentioned above, testimonies from the last few years do not show the same level of violence and torture by official arms of the Palestinian Authority. The interviewees who endured more recent attacks have often not been sure whether the people who threatened or attacked them were actually members of the official Palestinian security forces, or if they just presented themselves as such. F's story illustrates the way in which quasi-official authorities have been involved in these more recent incidents.

F was lured into a meeting with another man in 2006, while he was looking for potential partners on the internet. He met a man and entered his car, and then another car pulled up. At gunpoint, F was ordered to enter the other car, and his eyes were blindfolded:

> The car drove off and they removed the blindfold. The person in the front of the car kept asking me questions: "Who are you working for? Is it Israeli intelligence?" The person sitting beside me kept hitting me with his fists and with his gun. They wanted to know everything about me. I was very careful not to mention my visits to Jerusalem or to the Open House [a LGBT association]. I thought that if they knew I went to Jerusalem, they would be sure I am a collaborator. They took my purse and my phone. They kept phoning places and asking about me. They called a person who works with the Muchabarat [security police] in the university to come and identify me. When he came he told me: "I know you, I have been following you for a long time. You have a bad smell!"

F was released after he promised to provide information on other gay men. He moved to a relative's house, but kept receiving angry phone calls for not keeping his part of the bargain. Later, when he returned to his house, he was followed. He testified that at one time a car with four armed men was parked near his friend's house. A man called him and threatened him that if he did not keep his side of the bargain, they would not keep theirs.

Intimidation and kidnapping by armed militias

D reported that after he was released from a three-week imprisonment by Palestinian Authority police in 1999, three masked men arrived at his family's house with a megaphone. They called his name and gave his mother a letter summoning him to an inquiry at the local Hamas offices. One

of D's brothers told him that if the police would not kill him, Hamas would. That same day, D fled from the Occupied Territories.

E was kidnapped from his house in 2004 by two armed men who threatened him with a gun and forced him to enter a car. E testified that he was forced to lie facedown on the floor. His captors, except for one, wore ski masks.

> Then the one whose face was not covered turned me over and held me by the front of my shirt. He started asking questions: "With how many men did you sleep? Have you slept with Israeli men? Are you a collaborator? Why did you go into Jerusalem?" After every question he pulled my body up and then smashed me to the ground. I tried to soften the impact with my hands, and soon the palms of my hands were bleeding.
>
> Then he took out his gun. He told me to say "La Allah e'la Allah" (the traditional Muslim prayer to be recited before death). I was crying. I was sure I was going to die. I tried to grab the pistol with my hand and shove it away from my mouth. Suddenly he fired a shot. I thought my ears had exploded. The bullet passed very close to my ear. I was holding my ears with both my hands.

E was later released near his house, but the incident could not be suppressed. All his family, relatives, neighbors and police had been alerted about his disappearance and despite the late hour were waiting at his house. E had a difficult time explaining what had happened to him. The next day he took sleeping pills and was rushed to the hospital. He then dropped out of his school and remained at home. His anxiety was heightened when he received a summons to come to the police, who wanted to look into the kidnapping.

Inability to find official protection in the Occupied Territories

Since most of the interviewees suffered from the official or semi-official authorities, they did not dare to turn to the same authorities, since they knew they would not receive protection. E and F, who suffered blackmail and kidnapping by private individuals or a militia, were the exceptions. But instead of receiving effective protection, they only endured further abuse and harassment by the police.

F described his visit to the Muchabarat [security police] in July 2004, after the kidnapping incident:

> When I went to the office of the Muchabarat I was beaten, and they wanted me to tell them who kidnapped me. I said I didn't know, and that only two people's faces had been unmasked and I did not recognize them. The police hit me and said I was lying. An officer told them not to beat me in the face, because it would leave marks. At another office they kept telling me that because I was gay they would cut my hair and send me to a prison in Nablus. I kept saying I had no idea who the kidnappers were. I was sure they belonged to one of those organizations and would get back at me.

F, who under family pressure filed a complaint with the police of blackmail and robbery, was later forced by his family to withdraw the complaint, since the family was afraid the fact he was gay would be widely publicized. On another occasion, in 2006, F and another student were pulled out of their class by three soldiers:

> They stood us in the hallway and asked for our IDs. Many curious students gathered to watch. Someone asked: "What are you doing with them?" The soldier said: "They are just gays." Then he went on to ask if we had been visiting the 'Independence Garden' (a park in Jerusalem which is known as a meeting place for gays). Finally they let us go.

F tried to reach safety by leaving his family's house in Ramallah and moving to the house of relatives who lived in "Area B," a zone where Israeli authorities are responsible for security. However, threatening phone calls from people who introduced themselves as "Muchabarat" (security services) kept coming. Later F's brother arrived at the relatives' house and stabbed F in the shoulder. After receiving medical treatment, F returned to the family's house in Ramallah.

Media and human rights reports

The persecution of gay Palestinians in the Occupied Territories has received fairly limited public attention. However, the few publications available paint a similar picture to the testimonies described in this report. We cite here a few examples.

Vered Levy-Barzilai, in her article entitled "Cry for Help" published in 2001 in the Israeli newspaper *Haaretz*,[1] described the inability of a young gay couple to live together in safety. The couple -- a gay Palestinian and an American citizen -- had to flee a village in the West Bank after their relationship was exposed. The Palestinian family threatened to kill them and the village religious council ostracized them. A violent attack ensued. After fleeing to Israel (where the Palestinian had to stay illegally), their efforts to get a visa to the US or a European country failed. UNHCR and other refugee organizations have also turned the couple down.

In a 2002 article published by the American magazine *The New Republic,*[2] a young Gazan, nicknamed Tayseer, provided an account of his torture by the Palestinian Authority after his gay identity was exposed. A second seventeen-year old, also interviewed in the article, claimed to have been tortured in Nablus.

The *New Republic* article was cited in Brian Whitaker's book *Unspeakable Love – Gay and Lesbian Life in the Middle East*.[3] Whitaker points out that while in some Arab countries it is possible to flee from relatives to the anonymity of big cities, the Palestinian territories are small, with the close-knit communities making it difficult to hide.[4] A further problem is that gay sexuality tends to become caught up in national politics. Whitaker quotes Bassem Eid of the Palestinian

1. Vered Levy-Barzilai, "Cry For Help", Haaretz, September 10, 2001
2. Yossi Klien Halevi, "Refugee Status; Tel Aviv Dispatch", The New Republic, August 19, 2002 – August 26, 2002
3. B. Whitaker, *Unspeakable Love – Gay and Lesbian Life in the Middle East*, University of California Press and Saqi Books, 2006
4. Whitaker, p. 37.

Human Rights Monitoring Group who explained: "As homosexuality is seen as a crime against nature, it is not hard to link it to collaboration – a crime against nation."[5]

A brief mention of the phenomenon is found in the US State Department Human Rights Report of 2003: "In the Palestinian territories several Palestinians alleged that PA security officers tortured them because of their sexual orientation. Homosexuals were persecuted by both the public and by PA security officers. Homosexuals were subject to harassment and physical abuse, and some were arrested."[6]

According to various reports, lesbian women fear the same fate. In a 2004 *Haaretz* article[7] reporter Vivian Abu-Ra'ed described the formation of a lesbian Palestinian group via the internet. Since exposure as a lesbian could lead to severe retaliation, members of the group were hesitant to allow newcomers to join it. Membership was allowed only on the basis of personal acquaintance. The internet forum led to the formation of a Palestinian lesbian organization called Aswat (voices). In a 2007 article in the British *Guardian* newspaper,[8] Brian Whitaker described the complex connections between nationality, gender and sexuality which challenge Aswat's activists. On their website, Aswat writes: 'Our society has no mercy for sexual diversity and/or any expression of 'otherness' away from societal norms."[9]

5. Whitaker, p. 37.
6. US Department of State, Israel and the Occupied Territories, Country Reports on Human Rights Practices, 2003, found at: http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm, last visited April 8, 2007
7. Vivian Abu-Raed, "For them Exiting the Closet is a Danger to Life", Haaretz, May 25, 2004
8. Brian Whitaker, "Coming Out in Arabic", Guardian Unlimited, October 2, 2006, found at: http://www.guardian.co.uk/elsewhere/journalist/story/0,,1885792,00.html, last visited April 8, 2007
9. http://www.aswatgroup.org/english/article.php?article=15&category=9 last visited April 8, 2007

III

Inability to find protection in Israel

Since 1993 Israel has declared a policy of "closure" which forbids the entry of Palestinian residents of the Occupied Territories into Israel. Although our interviewees succeeded in entering Israel, they did so illegally and were therefore subject to immediate deportation if captured by the police.[10]

Some of the interviewees lived in Israel for many years. For some this has become an additional risk factor, which prevents them from returning to the Occupied Territories, since they are afraid they will be perceived as collaborators. Unable to get any legal status in Israel, some of them have slept in the streets.[11] Forming friendships and sometimes partnerships with Israelis improved their situation since it provided them with mental and material support. However, often this did not change their status vis-à-vis the authorities.[12]

Almost all of our interviewees had found their way to the Agudah, the Tel Aviv-based LGBT association. The Agudah had issued membership cards and a short letter to the Israeli police, stating that the holder of the card faced a life-threatening situation in the Occupied Palestinian Territories because he was gay, and that he should not be deported there. Shaul Gonen, who served for many years as the minorities coordinator at the Agudah, told us that before 2001 Israeli policemen informally refrained from deportation of people who presented the letters of the Agudah. However, after the Second Intifada the certificates no longer protected their holders.

10. The Entry to Israel Law forbids the deportation of a foreigner who has been arrested for illegal stay during the first three days of his arrest (section 13(d)); during this time, the foreigner may turn to the authorities or to the courts to challenge the deportation. However, a different rule applies to Palestinians who stay illegally in Israel: according to section 13G(b), a police officer may order the immediate deportation of a Palestinian who stays in Israel illegally. Subsection (c) prescribes that only an officer is authorized to order such deportation, the order should be given in writing, and the Palestinian should be given a prior hearing. According to the information provided by some of our interviewees, regular policemen often deported them without a hearing or a written order.
11. The1952 Entry to Israel Law makes it extremely difficult for a person without legal status to survive in Israel. Section 12A of the Law criminalizes the provision of a sleeping place to a foreign resident who has entered Israel illegally or is staying in Israel illegally. In addition, subsection (b) criminalizes the employment of a foreign resident. Subsection (c) criminalizes providing transportation to people who stay illegally in Israel.
12. However, in one case submitted to the Tel Aviv Administrative Court by the Association for Civil Rights in Israel on behalf of a gay couple (an Israeli citizen and a Palestinian resident of the Occupied Territories), the State preferred to allow the couple to proceed with a family unification process rather than answer the petitioner's argument that he is entitled to asylum under the 1951 Refugee Convention. AD (Tel Aviv) 1965/04 John Doe Vs. The Ministry of the Interior. A copy of the petition (Hebrew) can be found at: http://www.acri.org.il/hebrew-acri/engine/story.asp?id=870

Since Palestinians are barred from even applying for refugee status in Israel (see in detail below), the Refugee Rights Clinic at Tel Aviv University initiated procedures to promote resettlement abroad for some of the interviewees. Their status in Israel during the interim period, while they await a decision on their applications, has become a major problem.

C's case demonstrates the authorities' refusal to provide any status even on a temporary basis. In February 2004, C's lawyer applied to the Minister of the Interior at the time, Abraham Poraz, and asked for a temporary interim status which would enable C to remain in Israel while his refugee resettlement application was being considered. The application was founded on the principle of *non-refoulement*, which prohibits the return of a person to a place where he or she would be in a life-endangering situation. During the same month, Minister Poraz met with representatives of the Agudah, who raised the problem of the lack of protection for Palestinian gays. While expressing his concern that providing protection would encourage false claims, the Minister promised that the petition would be handled favorably by his office. However, C never received a permit to stay in Israel. A year later, in March 2005, C was arrested for illegal stay in Israel. After his arrest, his lawyer contacted the police station and warned that her client should not be deported to the Occupied Territories, since such deportation would put him in serious danger. C was told he would be taken to a judge the next day. However the next morning he was driven to a West Bank checkpoint and sent to the Occupied Territories

C explains:

> At approximately 10:30 a.m. the next day, a policeman entered my cell and said I was going home. I pleaded that I could not be returned to the Occupied Territories, as I'd be in danger there. He responded that those were his orders. My hands were handcuffed behind my back, causing me some pain.
>
> In the car there was another older Arab man, also handcuffed. During the ride I pleaded with the policemen and told them I would be murdered upon return to the West Bank. One of them responded: "This is your problem. I'm not responsible for you." I said that I was supposed to see a judge that evening, and that what they were doing was not according to the judge's orders. The officer answered that those were his orders.

C was let off the car at the Modi'in checkpoint and told to go. He walked a short distance and managed to hitch a ride to Jerusalem. By evening he had returned to Tel Aviv.

In April 2005, C was arrested again for illegal stay in Israel. This time he was indicted and brought before a judge, who released him to house arrest at a friend's house in Tel Aviv. He stayed for four months, until he received approval to resettle in a European country. He no longer lives in Israel.

D reported a similar experience. His petition for resettlement abroad was filed in June 2004. At the time, D was living illegally in Israel. In December 2004, a request for an interim permit to stay and work in Israel was submitted on his behalf to the Ministry of the Interior, but never answered. In April 2005, D was arrested in Tel Aviv and taken to the Bat-Yam police station. At the police station he suffered degrading treatment:

> I gave them my membership card from the Gay and Lesbian Association and explained to them that I have no choice but to be in Israel, and that my life would be in danger in the Territories. I also explained that I had asked for a permit to be in Israel and showed them the slip of paper I got from the Ministry of the Interior. One of them told me: "You can wipe your ass with those papers."
>
> One of the interrogators, called K, started insulting me when he saw the gay association membership card. He said: "So, you take it up your ass? You fuck men?" He started cursing me and said: "You are coming here and ruining our country. Don't move, you maniac, I'll kill you, I'll fuck you."... When I told him I would be killed in the Territories he said: "So what, a dog is dead."

Finally D was able to persuade the policemen to arrest him and bring him before a judge, instead of deporting him immediately to the Territories. The judge ordered a 24-hour detention. Yet a few hours later, despite his protests, he was driven to one of the checkpoints and ordered to walk into the Territories. D pleaded with the soldiers, and had them call his lawyer. His lawyer tried to explain the situation to the officer in charge, but the latter stuck by his decision. D spent the night in the Occupied Territories, near an Israeli army patrol, too scared to sleep. In the morning the soldiers at the checkpoint allowed him to reenter Israel. His lawyers made further attempts to secure a permit for D to stay in Israel while his refugee application was pending, but these efforts all failed. D finally left Israel in August 2005 after receiving approval for refugee resettlement in a European country. Three months after his departure, the Minister finally sent a detailed letter refusing to grant D any permit to stay in Israel. .

The Israeli High Court of Justice was asked, at least in one case, to intervene and prohibit the deportation of a gay Palestinian to the Occupied Territories, where he claimed he would face serious danger to his life.[13] The petitioner, who had spent most of his adult life in Israel, was interrogated and tortured by police in 1991, his family had ostracized him, and he'd been physically assaulted by family members. In a short decision, Justice Prokachia ruled that the Court would not interfere with the discretion of the Interior Ministry. The Court relied on the decision of the "Threatened Committee" in the Ministry of Defense, which declared that the petitioner had never actually collaborated with Israel and that on this basis alone he would not be in danger if returned.[14] The only allowance the Court was willing to make was to deport the petitioner away from his hometown Jenin, where the danger to him would be greatest. However, in this case the High Court was not asked to thoroughly assess the international refugee law arguments that we suggest are the strongest basis for Israel's obligation to at least temporarily protect Palestinians fleeing persecution in the OPT.

13. HC 9815/04 **John Doe Vs. the Minister of the Interior**, a copy of the unpublished decision, dated March 16, 2005, is on file with the authors.
14. The "Threatened Committee" operates in the Ministry of Defense and is empowered to provide temporary permits to stay in Israel to Palestinians whose lives would be in danger, typically due to collaboration with Israel. All the proceedings are conducted in writing, and the applicant is not heard. The committee's proceedings and reasons for its decisions are neither given to the applicant nor published.

IV

Israel's basic obligation to protect refugees

The Refugee Convention

Israel, along with a number of Jewish nongovernmental organizations, helped to draft the 1951 Convention relating to the Status of Refugees, which established the basic global standards relating to refugee protection and asylum. Israel became one of the first states to ratify the Convention in 1954, and is still one of the few states in the Middle East to have joined it. The Convention was originally intended to provide protection to refugees from World War II, in particular Jews, Roma, homosexuals, and others who survived the Nazi Holocaust. The Convention's 1967 Protocol (which has also been ratified by Israel) extended this protection to all future victims of persecution. Israel is also a member of the UNHCR Executive Committee, which helps to guide UNHCR's work and set standards for refugee protection for governments. In 2002 Israel became the first country in the Middle East to set up its own mechanism for refugee status determination.

The Refugee Convention's basic definition of a refugee is:

> Any person who …owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

Though the Refugee Convention excludes certain kinds of people, such as those who have committed a war crime or "serious non-political crime," no country may add additional exclusion grounds. The Convention's article 42 states expressly that no state may enter any reservation to the refugee definition (article 1). UNHCR has emphasized, "The exclusion clauses in the 1951 Convention are exhaustive."[15]

15. UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees at para. 3, HCR/GIP/03/05 (2003).

No forced return

The bedrock right guaranteed to refugees by the Refugee Convention is the principle of *non-refoulement*, the prohibition of forcing foreigners to return to territories where they would be in danger. The Refugee Convention's article 33 provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Israel is also a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which contains an even wider obligation to refrain from deportation. Article 3 provides: "No State Party shall expel ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

The principle of *non-refoulement* is also a part of customary international law, and is included by implication in the International Bill of Rights.[16] The Israeli High Court has ruled that the *non-refoulement* principle is recognized in Israel as a principal of customary international law and as part of the right to life enshrined in the Basic Law: Human Dignity and Liberty.[17] As such, the principle limits and dictates all government actions when deporting a person from Israel.

Equality

Equality and non-discrimination are the cardinal foundations of human rights. The Universal Declaration of Human Rights and both of the covenants that form the International Bill of Rights include the same basic rule: All states must guarantee the exercise of civil, political, economic, social and cultural rights without discrimination of any kind as to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[18] The Israeli High Court has ruled on numerous occasions that equality is a basic principal in Israeli law and is "the breath and soul of our constitutional regime."[19] According to former Chief Justice Barak, every law in Israel should be interpreted as aiming to achieve equality among all people, without discrimination based on religion or nationality. Differential treatment due to religion or nationality is "suspect" as being discriminatory.[20]

International law emphatically prohibits discrimination in matters of refugee protection. The Refugee Convention's article 3 provides: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." No

16. See U.N. Human Rights Committee, General Comment 20 on article 7 para. 9 (1992); UNHCR Executive Co - mittee Conclusion 77(a) (1995).
17. HC 4702/94 Al-Tai'i et al v. Minister of the Interior, 49(3) P.D. 843, 844.
18. Universal Declaration of Human Rights, arts. 1-2; International Covenant on Civil and Political Rights, art. 2(1); International Covenant on Economic, Social and Cultural Rights, art. 2(2).
19. HC 98/69 Bergman v. The Minister of Finance, 23 (1) P.D. 693, 698.
20. HC 6698/95 Kaadan v. Israel Land Authority, 44(1)258.275-276.

state may enter a reservation to waive this provision.[21] There are no exceptions in the Convention to this bar on discrimination by country of origin.

Granting asylum is a nonpolitical act

Israel is not the first country to be asked to grant asylum across lines of conflict. The United States and European states have for years hosted thousands of refugees from countries where the governments, if not much of the population, have been hostile to the West – Iraq, Afghanistan, and Saudi Arabia, among others. Earlier, Western countries provided asylum to Eastern Europeans who fled Communist regimes during the Cold War. Iran hosted more than 200,000 Iraqi refugees who fled during the brutal Iran-Iraq war. Thousands of deserters from the Iraqi army in the 1991 Gulf War were housed in camps in Saudi Arabia, despite the hostility between the two countries. Many refugees from Bosnia- Herzegovina fled to Serbia during the war in the former Yugoslavia, and many refugees from Croatia and Serbia fled to Bosnia. There is nothing exceptional about people crossing lines of conflict in search of safety from persecution.

Since military and political confrontations often feed persecution and refugee flight, refugees' safety often depends on their ability to avoid becoming trapped by the conflict. For this reason, the international community has repeatedly emphasized that granting asylum is a fundamentally peaceful, nonpolitical, social and humanitarian act.[22]

The Fourth Geneva Convention specifically provides that refugees must be exempt from the normal restrictions that are applied to nationals of enemy states. It says: "The Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government."[23] This provision should include refugees under the 1951 Convention, who by definition lack the protection of their governments.

Asylum claims by Palestinians give rise to understandable concerns. How will Israel protect its people's security while granting asylum to Palestinians? How will Israel prevent itself from being overwhelmed by a flood of Palestinians? How can Palestinians' right to seek asylum be separated from the controversy over the "right of return"? Yet, given the poor human rights record of the Palestinian Authority and the proximity between Israel and Palestinian areas, Israel is a natural haven for persecuted Palestinians. Were Israel to completely close its doors to Palestinian asylum-seekers, people in mortal danger could find themselves with no place to flee.

The principle that asylum is nonpolitical and humanitarian means that Israel should assess a person's individual asylum claim even if Israel is embroiled in a conflict with his or her country, be it the Palestinians or any other Middle Eastern state. At the same time, asylum requests by Palestinians should not be considered to have any connection to disagreements and negotiations

21. Convention relating to the Status of Refugees, article 42.
22. Statute of the Office of the United Nations High Commissioner for Refugees, art. 2; Refugee Convention preamble ("Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between states."), UNHCR Executive Committee Conclusion 92 (1992) ("recalling … that the grant of asylum is a peaceful and humanitarian act which should not be regarded as unfriendly by another State.")
23. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, article 44.

at the heart of the Israeli-Palestinian conflict. The determination that an individual Palestinian faces persecution in PA-controlled territory should not be considered a political judgment against the PA. Likewise, granting asylum to a Palestinian in Israel would set no precedent, and have no relevance, to the dispute over whether Palestinian refugees from 1948 have a right of return. The right to seek asylum invokes a separate body of law from the debate over refugee return; the Palestinians we discuss in this report are seeking international protection in Israel as a foreign country, not return or repatriation to ancestral homes.

Most Palestinians in the Occupied Territories would not be entitled to asylum in Israel. An asylum claim by a Palestinian today must be based on a current and future risk of persecution, not on issues arising only from past wars. In addition, it would not be enough for a Palestinian to simply flee general violence in the Palestinian territories. In order to qualify under the Refugee Convention, a person must be in danger for reason of "race, religion, nationality, membership of a particular social group or political opinion." Merely being in the wrong place at the wrong time during a spell of violence would not be enough under the Refugee Convention.

Balancing asylum and security

Israel is not at all required to provide asylum to an individual who threatens its national security, including (especially) people likely to carry out attacks against Israelis. Israel's obligation is merely to evaluate asylum claims and security concerns on an individual basis. What Israel cannot do, consistent with the principle of equality, is deny Palestinians asylum across the board on the basis of their nationality.

States' authority and responsibility to protect the security of their citizens has always been clear in international refugee law, as in international law generally. The Refugee Convention's article 33 provides an exception to the principle of *non-refoulement* (no forced return) in cases where a person poses a threat:

> The [principle of *non-refoulement*] may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The Convention also excludes from refugee status any person who in the past has committed serious nonpolitical crimes, crimes against peace, war crimes, crimes against humanity, or acts contrary to the purposes of the United Nations.[24]

Israel would be well within its rights to refuse asylum to any person who might attempt to attack Israel or its people, or to any person who has participated in attacks against Israeli civilians in the past, as well as to any person who has committed serious common crimes (i.e., murder, rape, etc.). The Refugee Convention's article 1F excludes people who have committed war crimes or serious nonpolitical crimes outside the country of asylum. The key limit on this is that any refusal of asylum must be made based on evidence against an individual person, not on discrimination

24. Refugee Convention, art 1F.

against an entire nationality. The Refugee Convention's article 9 allows states in time of war or emergency to take security measures "in the case of a particular person." But the Convention's article 3 prohibits discrimination by nationality. We discuss the way this principle should be applied in Israel later in this report.

Should Israel feel a necessity to detain asylum-seekers to allow the security services to assess whether an asylum-seeker (whether Palestinian or of any other nationality) poses a threat, it can rely on UNHCR's Executive Committee, which has noted that governments may have reason to detain asylum-seekers in order to protect national security.[25] According to UNHCR, an asylum-seeker may be detained for a limited period of time until cleared by the security services. Such detention must be provided for by law, subject to judicial review, and limited in time unless there is specific evidence against a particular person.[26] UNHCR guidelines on detention clarify that security-based detention of asylum seekers can be undertaken when there is specific evidence that the asylum-seeker has a criminal record or affiliations that might harm public security if he/she are allowed to enter.[27] These guidelines, like other Convention clauses, do not permit a nationality-based test, according to which asylum-seekers of a specific nationality are singled out for detention.

25. UNHCR Executive Committee Conclusion No. 44, para. B (1986).
26. UNHCR Executive Committee Conclusion No. 44, paras B,C ("If necessary, detention may be resorted to only on grounds prescribed by law … [and recognizing] the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention.").
27. UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 3 (4), found at: http://www.unhcr.org.au/pdfs/detentionguidelines.pdf

V

Refugee claims based on sexual orientation: The legal basis

Asylum-seekers who are targeted for human rights violations because of their sexual orientation must prove that they meet the core criteria of the international refugee definition. A refugee must have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion."

Israel has not yet developed its own jurisprudence interpreting the refugee definition. However, the refugee criteria have been progressively interpreted by courts and governments in major asylum states, by UNHCR, and through the work of prominent legal scholars. A general consensus has emerged among UNHCR and major English-speaking common law jurisdictions that people fleeing homophobic violence can qualify as refugees under the 1951 Convention.

Persecution against gays, lesbians and transgendered people

The documented cases of gay and transgendered Palestinian men fleeing violence in PA-controlled territories indicate that they may claim persecution under the Refugee Convention on two separate grounds. First, gay men appear particularly prone to being perceived as "collaborators" with Israel. This supports a claim of persecution for reason of political opinion, which is not dealt with in this report. Second, and more prominently, their refugee claims rest on their being persecuted for reason of membership in a particular social group.

Since all of the known Palestinian refugee cases based on sexual orientation have concerned men, the particular social group can be defined as gay and transgendered Palestinian men. However, the Refugee Convention could equally protect Palestinian women, should they also face persecution for reason of their sexual orientation.

The following discussion will explain the basis for defining such social groups under the Refugee Convention.

Particular social groups in the Refugee Convention

The phrase "membership in a particular social group" has attracted substantial judicial attention in key asylum states. Among major common law jurisdictions and UNHCR, there is now a general consensus in regard to both what constitutes a particular social group, and the fact that a particular social group can be defined by sexual orientation.

The basic definition of a particular social group emerged in American and Canadian decisions, and has been encapsulated in recent UNHCR Guidelines. In general, these sources follow the legal doctrine *ejusdem generis* ("of the same kind"), meaning that the term "particular social group" should be interpreted by analogy to the other categories of persecution in the Convention (race, religion, political opinion, or nationality).[28] As the U.S. Board of Immigration Appeals has explained, "The other four grounds of persecution … restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[29] Hence, particular social groups can be defined by immutable characteristics (i.e., sex or kinship), shared past experiences, or any other characteristic that members "should not be required to change because it is fundamental to their individual identities or conscience."[30] The Canadian Supreme Court later endorsed a similar definition.[31]

Membership in a particular social group need not be formal, and need not require the members to actively associate with each other. UNHCR has issued Guidelines that summarize the approach taken by judicial decisions and government regulations:

> A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights. … It is widely accepted in State practice that an applicant need not show that the members of a particular social group know each other or associate with each other as a group. That is, there is no requirement that the group be "cohesive."[32]

Sexual orientation as a basis for a particular social group

Sexual identity is immutable, and something so fundamental to a person's identity and dignity that he or she should not be expected to change it.[33] It is also likely to produce unique common experiences among certain groups. In societies where non-heterosexuals are shunned, shamed, or threatened, common experiences of marginalization, insecurity and humiliation are likely to be especially intense.

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28. See Hathaway at 160.
29. Matter of Acosta, 19 I. & N. Dec 211, 233 (BIA 1985), overruled in part on other grounds by In re Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).
30. *Id*.
31. See Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.
32. UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 (7 May 2002) Paras 11, 15.
33. See Hernandez-Montiel v. Immigration and Naturalization Service, 225 F.3d 1084, 1093 (U.S. 9th Cir. 2000).

In 1986, the German Federal Administrative Court recognized homosexuals as a particular social group in the case of an Iranian man threatened for his sexual orientation. The court noted that the Nazi regime had persecuted homosexuals in concentration camps, and considered sexual orientation to be an immutable characteristic.[34]

The U.S. Board of Immigration Appeals first recognized refugee status based on persecution for reason of homosexuality in 1990.[35] In 2000, a U.S. Court of Appeal held that "gay men with female sexual identities" constituted a particular social group in Mexico.[36] UNHCR,[37] the Canadian Supreme Court[38] and the British House of Lords[39] have specifically noted that sexual orientation can define a particular social group. Leading contemporary scholars have endorsed this view as well.[40] UNHCR has explained the standard interpretation of sexual orientation claims in the following way:

> The imposition of severe criminal penalties for homosexual conduct could amount to persecution. … Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.[41]

Israeli RSD decisions are in the first instance not reasoned, and no data is published regarding these decisions. However, the authors do know of one case of a gay man from an Asian country who was recognized as a refugee in Israel and granted asylum based on his sexual orientation. This decision is in accordance with High Court decisions, in other contexts, recognizing the social significance of sexual orientation, and to a great extent the special social experiences of people in same-sex relationships. In *El Al Israel Airlines Ltd. v. Danilowitz*, Justice Barak recognized same-sex relationships as a "social unit, based on shared life."[42] In her concurring opinion in the same case, Justice Dorner noted that the court's assessment of discrimination based on sexual orientation "is decided on the basis of the accepted social concepts."[43] Dorner then went on to summarize the social and legal attitudes toward homosexuality, from criminalization and discrimination to increasing acceptance and equality.[44] Israeli law recognizes same-sex partnership for purposes

34. Verwaltungsgerichthof Hessen, August 21, 1986, Ref. 10 OE 69/83, reported in 1 Int'l J. Refugee L. 110 (1986) (discussed in Hathaway at 163).
35. In re Toboso-Alfonso, 20 I. & N. Dec. at 821, 823 (granting asylum to a gay Cuban man).
36. See Hernandez-Montiel, supra, at 1094.
37. UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ("Gender Guidelines"), HCR/GIP/02/01 (7 May 2002) Paras 16-17.
38. See Ward at 739.
39. Ex parte Shah, Islam and others v. Secretary of State for the Home Department, [1999] 2 AC 629, [1999] 2 All ER 545 (25 March 1999) (Lord Hoffman).
40. See Goodwin-Gill at 361; Hathaway, at 163-164.
41. UNHCR, Gender Guidelines, supra at 17.
42. Case No. 721/94 at para 15.
43. Id. at para. 4.
44. Id. at paras. 5-9.

of immigration.[45] Israeli courts have not yet dealt with refugee applications based on sexual orientation.

Accepting refugee claims based on sexual orientation would be a logical extension of principles of equality in Israeli law. The consistent interpretation of the Refugee Convention by multiple leading courts and by UNHCR clearly requires gay and transsexual Palestinian men to be considered a particular social group.

Persecution by "non-state agents"

Refugee claims based on gender and sexual orientation frequently involve violence by private parties. Although much of the risk stems directly from the PA, testimonies from asylum-seekers fleeing the PA-controlled areas often involve violent attacks by close family members, sometimes with deadly weapons or force. They also have involved threats by armed criminal gangs and militant groups. Such threats raise somewhat different issues than situations in which a government (or in this case, the PA) directly persecutes a person.

International refugee law considers persecution to consist of two elements: the infliction of serious harm, plus a failure of protection. If membership in a particular social group (or political opinion, race, etc.) is the reason for either the harm or the failure of protection, then that person is being persecuted within the meaning of the Refugee Convention.[46]

It is now well-established in international law that a refugee may be persecuted by a private party (also known as a "non-state actor") because the government is either unable or unwilling to provide effective protection. The UNHCR Handbook explains that private acts of violence "can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."[47] This is established law from the European Court of Human Rights, and in Australia, Belgium, Canada, Denmark, France, Luxembourg, the Netherlands, New Zealand, Sweden, the United Kingdom and the United States.[48] There is nothing in the Refugee Convention's text that would permit a state to exclude someone just because the source of the harm he or she fears happens to be a private party and not a government.

There are now numerous examples of courts and immigration tribunals applying these rules in gender-related refugee cases. An American immigration tribunal held that the Togolese

45. The Ministry of the Interior has published a procedure entitled "partners of Israeli citizens and residents who are unmarried, including same-sex partners". The Court's requirements for immigration of a gay partner under these regulations were similar to those of a heterosexual partner, see Administrative petition (Tel Aviv) 2790/04 Rosenberg v. The Minister of the Interior, decision by Justice Fogelman dated December 29, 2004.
46. See UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of Refugees para. 21, HC/GIP/02/01 (7 May 2002); Ex Parte Shah (AP), [1999] 2 WLR 1015 (House of Lords).
47. UNHCR Handbook, para. 65.
48. European Council for Refugees and Exiles (ECRE), Research Paper on Non-State Agents of Persecution (2000) (available at http://www.ecre.org/policy/research_papers.shtml); Deborah Anker, The Law of Asylum in the United States (FULL CITATION); GET CITATION OF CANADA BOOK; *Refugee Appeal: 2039/93 Re MN (New Zealand Refugee Status Appeals Authority* 12 February 1996);Department of Immigration and Multicultural Affairs (Australia), Guidelines on Gender Issues for Decision-Makers 18 (1996) (available at http://www.uchastings.edu/cgrs/law/guidelines/aust.pdf).

government did not offer adequate protection to a woman who wanted to avoid genital mutilation.[49] In domestic violence cases involving women refugees, American and Canadian tribunals have found protection failures in Bangladesh, Jordan, Sierra Leone, Egypt, Bulgaria, Pakistan and Ecuador.[50] However, when governments have developed effective programs to combat family violence, refugee claims are denied.[51] Canadian tribunals, for instance, have refused domestic violence-based asylum claims from both Israel and Italy.[52]

The same principles apply in cases of persecution based on sexual orientation. A person who flees private violence against gay men, for instance, should be able to win refugee protection so long as it is clear the his government in unable or unwilling to protect him from that violence.

49. See In re Kasinga, Interim Dec. 3278, at 8 (U.S. BIA).
50. See Deborah Anger, Law of Asylum in the United States, 3rd Ed at pp. 258-261 (1999); Lorne Waldman, The De - nition of Convention Refugee at pp. § 8.232 (2001).
51. See ANKER at 265.
52. ANKER at 265-266.

VI

Special legal issues for Palestinian asylum-seekers

There is no provision in the Refugee Convention excluding Palestinians from refugee protection *per se*, and the principle of equality prohibits any across the board rules against Palestinians. However, there are some special provisions in refugee law that affect *some* (but not all) Palestinian asylum-seekers. These rules – embodied in the Refugee Convention's article 1D – stem from the fact that "Palestine refugees" from Arab-Israeli wars continue to fall within the mandate of the U.N. Relief and Works Agency for Refugees in the Near East (UNRWA). They prevent the vast majority of Palestinian refugees from qualifying under the 1951 Refugee Convention or the UNHCR mandate. This essentially serves to keep current asylum claims by individual Palestinians separate from the conflict over how to resolve the larger Palestinian refugee question.

Any examination of these issues can become confusing because courts and UNHCR have taken a number of different approaches to the interpretation of article 1D. However, at the end of the day these questions do not prevent Palestinians with current fears of persecution from seeking asylum in Israel or anywhere else. No matter which interpretive version is applied, Palestinian asylum-seekers cannot be returned to territories where they are in danger of persecution. Essentially, the principle of *non-refoulement* and the right to seek asylum apply to Palestinians the same as any other nationality.

Refugee Convention Article 1D

Many Palestinians are affected – though not always excluded – by one of the Refugee Convention's exclusion clauses, article 1D. Article 1D has two parts, the first of which says:

> 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.

In 1951, this provision applied to two groups of refugees: refugees from the Korean conflict, and "Palestine Refugees" who were displaced during the Israeli War of Independence. The Korean

refugees were assisted by the UN Korean Reconstruction Agency, while the Palestinian refugees have been assisted by UNRWA. Only the Palestinian situation remains relevant today.

UNHCR has concluded that this provision has two essential purposes.[53] First, it avoids overlapping mandates between UNHCR and UNRWA. Second, it ensures "continuity of protection" for Palestinian refugees in case UNRWA assistance ceases for any reason (see below).

Who is affected by Article 1D?

Article 1D potentially affects any Palestinian refugee who falls within UNRWA's mandate and who resides in Lebanon, Syria, Jordan, the West Bank or the Gaza Strip. One of the challenges in interpreting 1D is that UNRWA's mandate has evolved over time. In July 1951, when the Refugee Convention was finalized, the operative UNRWA definition was the one used by the agency in its first census: "[A Palestine refugee is] a needy person, who, as result of the war in Palestine, has lost his home and his means of livelihood." A new UNRWA definition of a "Palestine refugee" emerged in 1952: "A Palestine refugee is a person whose normal residence was Palestine for a minimum period of two years preceding the outbreak of the conflict in 1948 and who, as a result of this conflict has lost both his home and his means of livelihood." Subsequently, over the years UNRWA limited its registrations to refugees who were actually in need of relief services, meaning that many displaced Palestinians who were less needy were not registered.

In 1993, UNRWA changed its basic definition to the one in use today:

> [Palestine refugee] shall mean any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict.

UNRWA's work has not been strictly limited to 1948 refugees, however. After the 1967 (Six Day) war, the UN General Assembly asked UNRWA to assist "other persons in the area who are at present displaced."[54] This measure led to the *de facto* inclusion within UNRWA's mandate of Palestinians displaced in 1967.[55]

Who is not affected by Article 1D?

It should already be clear that many Palestinians who could potentially seek asylum today in Israel or elsewhere are entirely unaffected by Article 1D. Article 1D applies only to people receiving UNRWA assistance. It therefore applies only to Palestinian families who were displaced in 1948 or (in some cases) in the 1967 war.

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53. UNHCR, Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugees (October 2002) (hereafter "UNHCR Note on Palestinian Refugees").
54. GA Res 2252 (ES-V) (4 July 1967).
55. It should be noted that many who fled from the West Bank to the East Bank (Jordan) were registered with Jordan as internally displaced (Jordan had annexed the W. Bank, so in Jordanian eyes they had not crossed an international border).

Other Palestinians can apply for asylum like any other person. Today, less than 30 percent of the Palestinians in the West Bank are UNRWA-registered refugees or descendents of refugees from these wars. In the Gaza Strip, however, more than 82 percent of the residents are UNRWA refugees.

Are the descendents of the original 1948 refugees covered by Article 1D?

Only a minority of today's Palestinian UNRWA refugees were alive in 1948. The vast majority of people under UNRWA's care today are the children and grandchildren of the original refugees.[56] Normally, article 1D is presumed to include these later generations of refugees as well. However, a UK court has ruled that article 1D applies only to people who were already receiving UNRWA assistance when the Refugee Convention was completed in 1951.[57] In other words, the vast majority of today's UNRWA refugees would be entirely unaffected by article 1D, and would be treated like any other asylum-seeker.

UNHCR has not adopted this position, and there are a number of reasons why Israel might wish not to do so as well. It is true that UNRWA's mandate over descendents of the original refugees was not explicit until 1982, when the General Assembly asked UNRWA to issue identity cards to "all Palestine refugees and their descendents," including families displaced in both 1948 and 1967.[58] However, it seems that the UK court may have been factually wrong in assuming that UNRWA did not in actuality assist new generations of refugees as early as 1951. A UNRWA report issued at that time indicated that the agency was already assisting "infants under one year."[59]

Were the UK position to be adopted, article 1D would essentially become irrelevant as the original 1948 refugees die out. This would seem to complicate one of the objectives of article 1D: to avoid an overlap in responsibilities between UNHCR and UNRWA.

Can UNRWA give assistance inside Israel?

The way in which article 1D applies to Palestinian asylum-seekers in Israel could depend in part on whether UNRWA can be said to operate in Israel.

According to international law and the United Nations, UNRWA does not operate inside Israel. However, UNRWA does operate a refugee camp in Chuf'at in East Jerusalem, which under Israeli law has been annexed to Israel. Does this mean that UNRWA can provide assistance to Palestinian refugees inside Israel, as defined by Israeli law?

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56. Following standard laws in Arab states, UNRWA considers a descendent to be only someone whose father was a UNRWA refugee. UNRWA status may not be passed down through mothers. The legitimacy of this rule is very much in doubt given international law banning gender discrimination. However, this issue will not be dealt with here.
57. Amer Mohamed el-Ali v. Secretary of State for the Home Department [2003] 1 WLR 95 (26 July 2002) (affirming judgment by the Immigration Appeal Tribunal available at www.iaa.gov.uk/el_ali.pdf).
58. GA Res 37/120 I (16 December 1982).
59. The UNRWA director's Annual Report for 1951-1952 stated that UNRWA's registered refugees included "infants under one year." Hence, it seems that already in 1951 UNRWA was assisting Palestinian refugee descendants, who were not alive in 1948 and who were born in exile.

A UNRWA-registered Palestinian from the Gaza Strip or West Bank could in theory access UNRWA assistance in Chuf'at. However, there are three main reasons why in practice many Palestinians who cannot access UNRWA assistance elsewhere in the Palestinian territories also cannot go to Chuf'at.

First, going to Chuf'at would not solve the problem of a Palestinian who lacks a permit to be in Israel. A person applying for asylum in Israel is inherently attempting to win such a permit. Short of a severe violation of a person's freedom of movement, there would be no way to allow someone to be in Chuf'at but not live in the rest of Israel.

Second, in order to be consistent with the principle of *non-refoulement*, Israel would have to ensure that a person in danger in PA-controlled areas would be safe in Chuf'at. The social values that produce homophobic violence in the first place are likely to be the same in Chuf'at as in PA-controlled areas. It is doubtful whether Israeli police would be able to provide sufficient protection to someone in the Chuf'at camp; that person would probably have to leave the camp and find security elsewhere in Israel.

Finally, although the Chuf'at camp is technically in the Jerusalem municipality, the route of the West Bank barrier cuts the camp off from Jerusalem. In terms of life on the ground, the camp is now outside Jerusalem.

Article 1D's second paragraph: Continuity of protection

Article 1D is mainly an exclusion clause, but it also includes a means of including refugees within the Convention's protection. In order to ensure what UNHCR calls "continuity of protection" to Palestinian refugees who have lost their access to UNRWA assistance, the article's second paragraph provides for the automatic inclusion of some Palestinian refugees:

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.

UNHCR has emphasized that the framers of the Convention wanted to make sure that if Palestinian refugees were confronted with any gap in UNRWA assistance they could rely instead on UNHCR and the 1951 Convention.[60]

There are two general interpretations of article 1D's second paragraph, though both lead to the same conclusion.

UNHCR's position is that as soon as a UNRWA refugee leaves UNRWA's areas of operation, he or she ceases to be assisted by UNRWA, and is *ipso facto* a Convention refugee.[61] But UNHCR

60. UNHCR Note on Palestinian Refugees, para. 2.
61. UNHCR Note on Palestinian Refugees, para. 7.

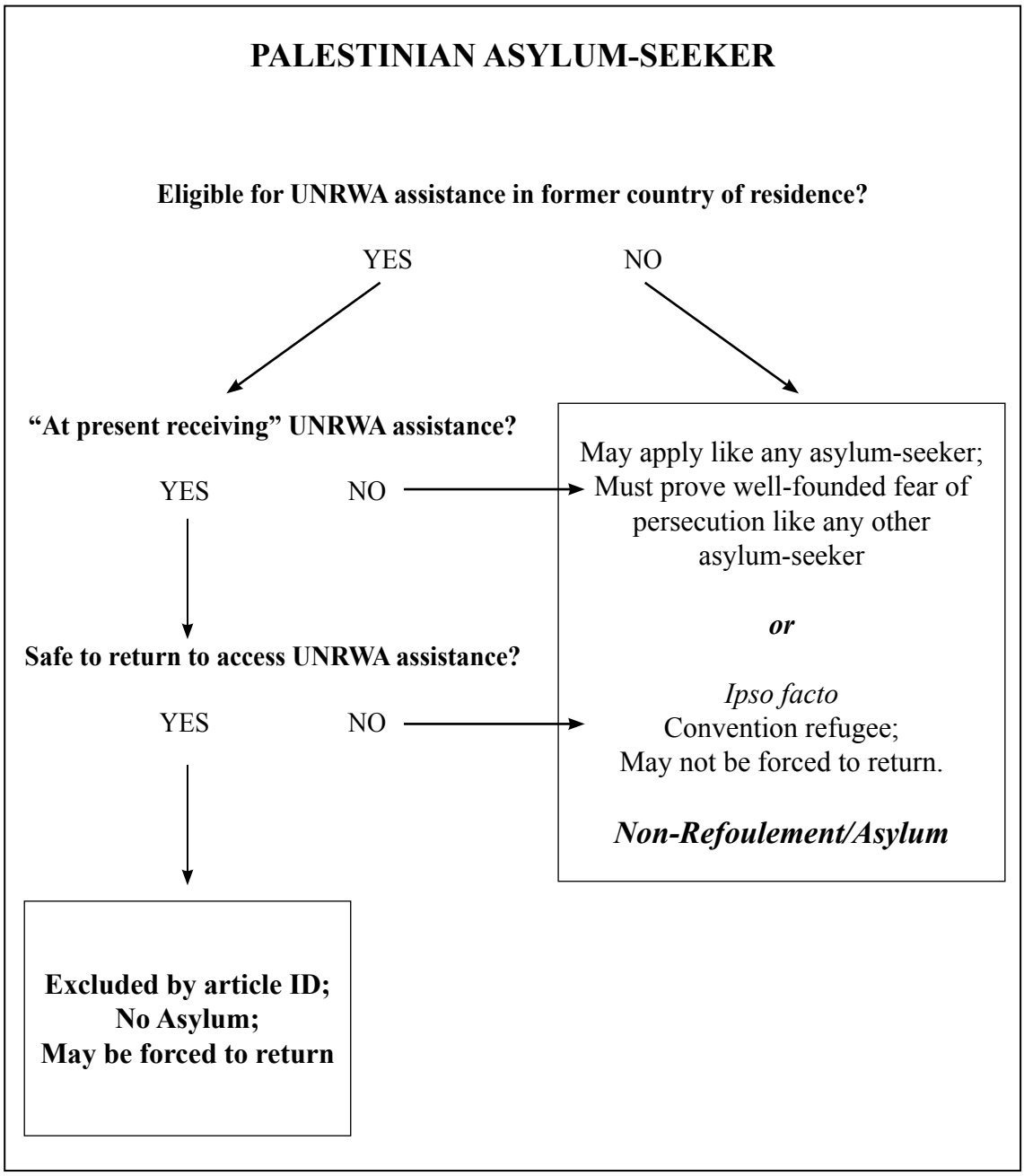
argues that such a person may still be returned to a UNRWA area, unless he or she faces a serious threat to his or her safety or freedom there.[62] Germany takes a similar approach.[63]

Other governments and scholars have avoided automatic protection by simply ignoring article 1D in its entirety. The U.S. and Canada have adopted a simple rule by which Palestinian asylum-seekers apply for refugee status like any other applicant, without any application of article 1D. Under this approach, a Palestinian asylum-seeker can become a recognized Convention refugee by proving that he or she faces a well-founded fear of persecution.

Under either approach, a Palestinian asylum-seeker has the opportunity to prove that he or she would be in danger of human rights violations if forced to return. The bottom line of both interpretations is the same: the principle of *non-refoulement* applies to Palestinian refugees the same as to any other refugee. This conclusion is also required by the Convention against Torture, which prohibits Israel from returning people to territories where they would be tortured. This applies to Palestinians who are at risk of torture by PA authorities, regardless of their UNRWA status.

The overlapping and conflicting interpretations of article 1D can obscure the end result for real-life refugees. An asylum-seeker, Palestinian or not, who is in danger of persecution in his or her home cannot be forced to return there. Palestinian asylum-seekers must be accorded the right to make individual applications so that the risks they may face can be properly assessed. The different legal interpretations of article 1D are in essence parallel roads to the common destination of protection from persecution and *refoulement*. The following chart illustrates these parallel but consistent interpretations.

62. Id. para. 8.
63. Elna Sondergaard, Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Convention 175-180 (2005).


PALESTINIAN ASYLUM-SEEKER
Eligible for UNRWA assistance in former country of residence?
YES
NO
"At present receiving" UNRWA assistance?
YES
NO
May apply like any asylum-seeker;
Must prove well-founded fear of persecution like any other asylum-seeker
or
Ipso facto
Convention refugee;
May not be forced to return.
Non-Refoulement/Asylum
Safe to return to access UNRWA assistance?
YES
NO
Excluded by article ID;
No Asylum;
May be forced to return

VII

Seeking asylum in Israel: The current system

Israel's general asylum system

In 2001, Israel took its first steps toward fully implementing the Convention by initiating a government mechanism to hear asylum claims. In early 2002, the Minister of the Interior issued an internal directive to establish a government panel to decide refugee claims under the Refugee Convention.[64]

In current practice, asylum-seekers in Israel make their first contact with the Correspondent for the U.N. High Commissioner for Refugees (UNHCR). UNHCR interviews asylum-seekers, reviews their written submissions, and then presents cases to the National Status Granting Board (NSGB), which decides their claims. Rejected applicants may appeal, but their appeals are reviewed using the same procedure by UNHCR and the NSGB.

Tremendous strides have been made for many refugees in Israel during these past six years. Asylum-seekers who have been screened by UNHCR now receive temporary worker residence permits (B1 visas). Recognized refugees receive renewable A5 residence visas, which include the right to work and access to healthcare. At the request of UNHCR, Israel has also granted temporary protection in the form of renewable work permits to all asylum-seekers from Liberia, Sierra Leone, Ivory Coast, and the Democratic Republic of Congo, in recognition of the brutal civil wars in these countries.[65]

Nevertheless, there are substantial concerns about the fairness of the status determination procedure. Asylum-seekers are not provided copies of their UNHCR and NSGB files, and are given only brief explanations for the decisions in their cases. There is no independent appeal, and to date UNHCR has not fully implemented the right to counsel since as of 2007 lawyers from only

64. The "Regulations for the Treatment of Asylum Seekers in Israel" are attached as appendix A.

65. The protection of Sierra-Leonian citizens ended in August 2006; those who were not recognized as refugees under the Convention and have not left Israel of their own accord are now being detained for illegal stay and are subject to deportation. Temporary protection to the Liberians formally ended on March 31, 2007. Recently UNHCR announced that temporary protection to nationals from Ivory Coast will cease at the end of 2008. In January 2008 the Ministry of the Interior began providing a form of temporary protection to Eritrean nationals since they are at risk of torture and indefinite detention if returned to their country.

two organizations are permitted to participate. Asylum-seekers do not receive temporary visas unless screened by UNHCR under unclear standards and procedures.

Much of the burden of refugee protection in Israel is borne by UNHCR, even though the government is ultimately responsible. In practice, this results in a general diffusion of responsibility, and raises concerns about the fairness of procedures. The NSGB procedure continues to rely extensively on UNHCR to screen cases and make recommendations, while UNHCR has been faulted in the Middle East and in other regions for failing to implement its own standards of fairness in asylum procedures.[66]

Of particular concern, asylum-seekers with pending cases are sometimes detained by Israeli police if they are arrested before being able to make an asylum application. There are currently no specific regulations or legal rules pertaining to the detention of asylum-seekers. At the time of the writing of this report, over 1,000 asylum seekers, among them women with young children, are being detained under harsh conditions at the Ketziut prison.

Following a substantial increase in the number of asylum-seekers arriving from Egypt at the beginning of 2007,[67] the nascent Israeli system is at the brink of a crisis. Problems have ensued in the registration of new applicants (thus leaving them exposed to detention), and in the interviewing of asylum-seekers in detention (extending the waiting period for an interview to three or four months). UNHCR Israel warned that the number of new arrivals might jeopardize refugee protection in Israel.[68] On July 1st, the Prime-Minister's Office declared a new policy of return to Egypt of all asylum-seekers, refugees and migrant workers who have "infiltrated" the Israeli-Egyptian border. The Prime Minister added that if the influx of refugees would be brought under control, Israel would grant temporary status to a limited number of refugees from Darfur. In December 2007 the first Darfurian received a one-year residence permit in Israel. Following this announcement, a new holding facility was established, which, for the first time in Israel, is also used to detain of young children.

Complete exclusion of Palestinians

Israel's current asylum system entirely excludes Palestinians simply because they are Palestinian. Palestinian asylum-seekers are not permitted to submit applications, neither to the NSGB nor to

66. *See, e.g.,* European Council for Refugees and Exiles & U.S. Committee for Refugees, *Responding to the Asylum and Access Challenge: An Agenda for Comprehensive Engagement in Protracted Refugee Situations* (April 2003); Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala* (2002); Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-200*2, American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1 (2002); Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 Int'l Journal of Refugee Law 251 (1999).
67. In a recent Administrative Appeal the State wrote that from January to the beginning of August 2007, over 2,600 people crossed the Egypt-Israel border illegally into Israel. For comparison, the average number of applications for asylum during the years 2001-2005 was 800 per year (although this figure probably does not represent all the people who crossed the border illegally, but only those who asked for asylum).
68. Letter dated July 23, 2007 written by Mr. Michael Bavly to the State attorneys (copy on file with the authors).

UNHCR's Jerusalem office.[69] A handful of Palestinians with assistance from Tel Aviv University's Refugee Rights Clinic have submitted applications to UNHCR's Geneva Headquarters for emergency resettlement, though this procedure usually requires the assistance of an NGO and is an exceptional measure employed in unique cases.

Since 2002 it has become extremely difficult for any Palestinian resident of the Occupied Territories to obtain any sort of permit to stay in Israel.[70] The Citizenship and Entry to Israel Law (Interim Order) 2003, published in August 2003, prohibits granting a visa or a permit to stay in Israel to a Palestinian resident of the Occupied Territories. The law was enacted with very narrow exceptions, which can potentially serve Palestinian asylum-seekers. First, the Minister can grant work permits to Palestinians for up to six months, which would at least prevent immediate deportation of asylum-seekers. Second, the Minister can grant a longer-term residence permit if doing so is "of special interest to the State." The Minister could conclude that granting asylum to a refugee fleeing persecution fits this category. Granting asylum is both a legal obligation on the state, and consistent with "the values of the State of Israel as a Jewish and democratic state," as defined by the Basic Law: Human Dignity and Liberty. Interpreting the temporary law this way would prevent Israel's policy from conflicting with the Refugee Convention. We should note, however, that this argument was brought by the Refugee Rights Clinic on behalf of a few gay Palestinians to no avail. In 2005 the Law was further amended to allow men who are over 35 years old and women who are over 25 years old to unite with their Israeli partners. Gay Palestinians who have Israeli partners and fit the relevant age criteria could receive status under this exception.

At the end of March 2007 the Knesset extended the Citizenship and Entry to Israel Law (Interim Order) until the end of July 2008. A few important amendments were made. The use of sweeping nationality-based bans was expanded. The law now prohibits granting citizenship or any permit to stay in Israel to any resident or citizen of four countries: Iran, Lebanon, Syria and Iraq.[71] In addition, a specific clause entitled "security prevention" was inserted to allow the refusal of a permit based on security considerations. The law does not limit the 'security prevention' to reasons rising from the applicant herself; rather, if a family member of the applicant poses a security risk, the applicant will be rejected. The Law states that if the security authorities assess that in the applicant's country of origin or place of residence 'activity which might endanger the security of Israel or its citizens' takes place, the applicant will be refused.[72] By adopting these sweeping exclusions, the law has further distanced itself from the principle of individual liability.

69. As mentioned above (ft. 12), the Association for Civil Rights in Israel (ACRI) applied to the UNHCR Jerusalem office in December 2003 for the protection of a Palestinian gay man who feared persecution in the Occupied Territories. UNHCR answered that they do not have authority to deal with Palestinians in areas where there is UNRWA activity. ACRI then petitioned the Administrative Court in Tel Aviv, asking alternatively for asylum or for family unification, based on a partnership with an Israeli partner. The petition was resolved when the Ministry allowed the couple to continue their application for partnership-based status (the couple applied for status before the Government decision of May 2002, which suspended all family unification applications with Palestinian).
70. Government decision no. 1813 dated May 12, 2002 suspended all pending requests of Palestinians to unite with family members and declared that new applications would not be accepted by the Ministry. The reasoning was that 'the security situation and the implications of immigration and naturalization of foreigners from a Palestinian origin in Israel' require the formation of a new policy, and until such policy is legislated, all applications are suspended.
71. The Citizenship and Entry to Israel Law (Interim Order), 2003, published on March 28, 2003, Law Books 2092, p. 295, article 2; the various "enemy states" are not enumerated in the law. The Minister of the Interior may publish a list or change it from time to time.
72. Article 3D.

Instead it bases security exclusions on group-based measures, and does not allow a person to rebut the presumption that he poses a security threat.

The new version of the law also includes an extremely narrow humanitarian clause. A special professional committee will be established to hear petitions for a special humanitarian consideration.[73] However, this clause is relevant only to an applicant who has a family member who resides legally in Israel (this excludes many gay asylum-seekers who do not have Israeli partners). In addition, the law clearly states that the fact that an applicant has an Israeli partner or children does not constitute a special humanitarian basis for allowing the application.[74] The structure of the 'special humanitarian permits' clause brings us to the conclusion that very few gay asylum-seekers could receive refuge protection via this mechanism. Resort would therefore have to be made to the general 'special permits' clause, which states that permits might be issued if Israel has a special interest in doing so.[75]

Several petitions served to the High Court in 2003 challenged the constitutionality of this law, the petitioners arguing that the law infringes the basic right to family life and the right to equality (since most of the people affected by the law would necessarily be Arabs of Israeli nationality). The state argued that the law was grounded solely on security considerations and that, due to the ongoing conflict, every Palestinian poses a security risk, which can't be removed by individual screening. The state further argued that it is under no obligation to allow the immigration of foreign spouses, particularly those who are enemy nationals. By a thin majority, the Court ruled that the law should not be struck down.[76]

The Israeli debate over the duty to conduct individual security screening

As mentioned above, refugee law permits a state to exclude from protection applicants who might pose a security risk. However, this exclusion must be based on specific evidence which implicates the individual, and not on an over-reaching nationality-based exclusion. This principle of 'personal liability', which is well-established in international law, is often challenged by Israeli

73. Article 3A; this humanitarian exception is designed to be very limited. The Ministry of the Interior and the security authorities have a clear majority in the professional committee. In addition, the law allows the Minister of the Interior to set a cap on the number of permits granted for special humanitarian reasons.
74. Article 3A1(e).
75. Article 3C. It should be added that in a letter to the UNHCR Israeli correspondent, the Legal Advisor to the Go - ernment, Attorney Menahem Mazoz, proposed that the law, even in its amended version, allows some discretion, which would allow the state to receive refugees from enemy countries (copy on file with the authors).
76. HC 7052/03 Adalah Vs. Minister of the Interior, decision dated May 14, 2006, see at: http://elyon1.court.gov.il/Files/03/520/070/a47/03070520.a47.HTM (Hebrew). Justice Levi, who voted with the six judges who upheld the law, criticized it as offending the democratic nature of the state and its delicate relationship with the Arab minority who form a considerable number of Israel's citizens. He agreed with the six minority judges, that eventually the flat ban on Palestinians would have to be replaced by an individual security screening. However, Judge Levi refrained from striking down the law, remarking that, as an interim order, it would expire within 9 months, and the Israeli Parliament would have to amend it to minimize its bad implications.

laws and policies.[77] The 2003 Citizenship and Entry to Israel Law mentioned above excluded all Palestinian residents of the Occupied Territories from receiving any status in Israel, despite the fact that only a few individuals were actually involved in terror attacks.[78]

In the Adalah case, the panel was divided, among other issues, on the question of the duty of the state to conduct an individual screening to verify that an applicant does not pose a security risk. Justice Cheshin ruled that in times of conflict there is an assumption that all 'enemy nationals' pose a security risk, and that the state is under no legal obligation to rebut this assumption.[79] Cheshin acknowledged that his ruling entails a collective punishment which should be avoided in a democracy, but ruled that the potential loss of lives in terror attacks is such a harsh result that it justifies collective limitations.[80]

However, Justice Cheshin's analysis in the Adalah case should not be read as conclusive in the case of a gay Palestinian fleeing persecution. As mentioned above, Justice Cheshin's analysis was based on his view that there is no basic right of an Israeli citizen to have his spouse immigrate to Israel.[81] In the case of a person fleeing persecution, the basic right to life is threatened. Under these circumstances, a different balance should be struck between general security considerations and the individual's right to life and protection from torture.[82]

Justice Barak, in a dissenting opinion, ruled that although a prohibition on the entry of all Palestinians is more effective in promoting the security of Israeli citizens, it has such an adverse effect on human rights that it cannot be considered a proportional measure.[83] According to Justice Barak, a democracy must take calculated risks in order to maintain human rights.[84] These risks are minimized by individual screening, which should be improved.[85] Disagreement on the effectiveness of the individual security screening underlined the argument between Cheshin and Barak. Justice Cheshin argued that such screening would never be effective, since a person may be recruited by terrorist groups years after he was cleared by the security screening and received the permit.[86]

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77. One example is the attempt of the Government Press Office to refuse to issue a "reporter's certificate" to Pale - tinians from the Occupied Territories. This policy was struck down by the High Court in HC5627/02, 8813/02 **Seif Vs. Government Press Office** PD 58 (5) 70. Another example was the holding of eight Lebanese citizens in administrative detention in Israel for several years as hostages, with the hope of exchanging them for an Israeli soldier. The High Court declared their detention illegal. Following the decision in Criminal Additional Hearing 7048/97 **John Does Vs. Minster of Defense** PD54 (1) 721, the Knesset legislated a new law: The Law for the Incarceration of Illegal Combatants of 2002, which served as grounds for the continued detention of two of the detainees. Others examples are house demolitions of suicide bombers, although their women and children, who did not participate in the terror attack, were living in the house, HC 2006/97 Ganimat v. IDF General Uzi Dayan, PD 51 (2) 651; and last – the exclusion of people from the family unification procedure if any of their family members have been involved in security offences, Administrative Petition (J-m) 286/07 Abasi Vs. Population Registry, decision handed down on May 20, 2007.
78. According to information submitted by the state during the hearing in the Adalah case (HC 7052/03), 130,000 Palestinians have been granted status in Israel since 1994, and only 26 people were under investigation due to suspicion of involvement in terror activity (paras. 13, 16 of Justice Prokachia's decision).
79. HC 7052/03, Para 81 of Justice Cheshin's opinion.
80. HC 7052/03, Para 115 of Justice Cheshin's opinion.
81. HC 7052/03, Paras 33, 60 of Justice Cheshin's opinion.
82. Section 4, the Basic Law of Human Dignity and Liberty enshrines the right to life. It should be noted, however, that at least one of the petitioners in the Adalah case argued that his wife would be in danger if returned to the Occupied Territories. There is no discussion of this argument in the Court's decision.
83. HC 7052/03, Para 92 of Justice Barak's Decision.
84. HC 7052/03, Paras 93, 111 of Justice Barak's Decision.
85. HC 7052/03, Paras 94, 113 of Justice Barak's Decision.
86. HC 7052/03, Paras 109-114 of Justice Cheshin's opinion.

Refusal of asylum to citizens of "enemy or hostile" states

Since the Palestinian exclusion may be based in part on a temporary law, it is also important to note a parallel policy that prevents most asylum-seekers from Middle Eastern states from obtaining asylum in Israel. Israel may be the only country that officially refuses asylum to citizens of all of its neighbors, while granting asylum to refugees from farther away. This limitation goes to the heart of Israel's commitment to the right to seek asylum, since in most countries the largest groups of refugees come from the states in closest geographic proximity . It effectively violates the Refugee Convention in two respects. First, it adds an extra exclusion to the refugee definition. Second, it imposes discrimination in the provision of refugee protection.

The 1954 Prevention of Infiltration Law presumes any national of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan (which at the time included the West Bank and East Jerusalem), Iraq or Yemen, or any resident or visitor in those countries, to be an "infiltrator." Infiltrators can be sentenced to up to five years in prison, although in practice sentences are usually less. It should be noted that this law does not prohibit the granting of status in Israel to an enemy national (such a prohibition was introduced to Israeli legislation only recently by the Citizenship and Entry to Israel Law described above). The Interior Ministry's asylum regulations provide that "The State of Israel reserves the right not to absorb into Israel, or to grant a permit to enable the stay in Israel, of subjects of enemy or hostile states – as determined from time to time by the relevant authorities."[87] In practice, asylum-seekers from Iran and Sudan have also been considered enemy nationals, although not listed in the original law.[88] Egypt and Jordan continue to be classified as enemy or hostile states despite their peace treaties with Israel.

Asylum-seekers from these "enemy" states may apply for asylum and have their cases considered by UNHCR and the NSGB. According to the regulations, asylum-seekers may be released from detention on a case-by-case basis. However, they are generally denied long-term asylum. UNHCR has agreed to seek resettlement for such refugees in third countries.[89]

A first, limited sign of a change in Israel's refusal to provide protection to any "enemy national" came in July 2007, when Prime-Minister Ulmert announced that Israel would provide asylum to a limited number of Darfurian refugees, if the arrival of Sudanese refugees would be brought under control.[90]

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87. Article 6, Regulation on the Treatment of Asylum Seekers in Israel. Several requests made by the authors to the Ministry of Foreign Affairs to provide information as to who the relevant authorities are for the purposes of this clause, what the procedure is, and which are the "enemy or hostile countries", have not been answered.
88. The granting of resident permits to 600 refugees from Darfur marks a positive development on the part of the Government, which no longer views all refugees from Sudan as enemies. However, this humanitarian gesture is still based on a group rationale rather than on individual screening.
89. According to information provided by UNHCR Israel, approximately 55 "enemy nationals" asylum-seekers have been resettled from Israel over the years. Currently, there are over 2,500 Sudanese asylum-seekers in Israel, and it seems that UNHCR is unable to continue this arrangement.
90. A press release was published on July 1, 2007 at the Prime-Minister's Office official web-site at: http://www.pmo.gov.il/PMO/Communication/Spokesman/2007/07/spokedar010107.htm. Last visited September 16, 2007

VIII

CONCLUSIONS AND RECOMMENDATIONS

Risks to sexual minorities in Palestinian areas

Gay Palestinian men whose sexual identity is exposed are targeted for discrimination and persecution in the Occupied Palestinian Territories, including ostracism, verbal and physical abuse from their immediate society (family, friends, acquaintances), and in some cases danger to their lives. Gays are also targeted by the Palestinian authorities. There are credible accounts of detention and torture by PA police and security authorities. In the current political context, gay identity often leads to a secondary charge of collaboration with Israel, which adds an additional risk factor. Efforts to improve human rights conditions in the OPT should include steps to combat homophobic violence both by official police and private parties within Palestinian society.

Refugee status based on sexual orientation

People fleeing homophobic violence and who lack government protection are eligible for international protection under the Refugee Convention. This is the emerging consensus of leading courts, governments and UNHCR, and is consistent with the way Israeli courts have handled other cases of homophobic discrimination. Gay Palestinians who would be targeted for violence because of their sexual orientation should be eligible for protection in states that are party to the Refugee Convention, including Israel.

Adopting Israeli asylum policy to human rights obligations

Palestinians are not *per se* excluded from refugee protection by any body of international law. Israel's current practice of refusing to allow Palestinians even to submit asylum applications violates the Refugee Convention, the Fourth Geneva Convention, the Convention against Torture, and other bodies of human rights law that prohibit discrimination by national origin. It also effectively adds an extralegal exclusion clause to the Refugee Convention, which is expressly prohibited by treaty. Although Israel has legitimate security concerns, neither international nor Israeli law permits a country to single out a nationality for a blanket ban on asylum applications.

This practice should end, and be replaced by individual security screening of asylum-seekers in keeping with the terms of the Refugee Convention.

Israel is not bound to allow any person who claims asylum, Palestinian or otherwise, to automatically roam freely within the country. Israel should establish clear regulations governing the detention and security screening of asylum-seekers. Such procedures should provide Israel's security services the opportunity to check whether an individual poses any threat inside Israel, while also establishing time limits on detention and allowing for judicial review.

Israel should "apply the provisions of this Convention to refugees without discrimination as to … country of origin," as the Convention's article 3 sets out. When individual Palestinians prove refugee status under the Refugee Convention and pose no security risk they should become eligible for refugee protection in Israel, like refugees of other nationalities. Based on the principle of nondiscrimination, the exceptions made for refugees in the Fourth Geneva Convention, and the humanitarian and nonpolitical nature of asylum, Israel should avoid singling out particular nationalities for lesser refugee protection. Israel should especially avoid completely excluding particular nationalities.

In keeping with the fundamental principle of equality, the government should respect Palestinians' basic rights to submit asylum applications and to have their cases fairly considered by the National Status Granting Board. Israel should stringently avoid deporting any Palestinian in danger of fundamental human rights violations in PA-controlled territories. Israel Defense Forces, Border Police and other law enforcement agencies likely to encounter Palestinians in Israel should have instructions and training to avoid deporting Palestinians who express any fear of persecution until their refugee claims can be thoroughly assessed.

In order to interpret current Israeli legislation in conformity with international law, the Ministry of the Interior should consider all people fleeing persecution, consistent with the principle of equality, to be "of special interest to Israel." This will allow Palestinians in danger of persecution to qualify for an exception under the Citizenship and Entry into Israel Law's temporary provision.

The Minister should also void the current internal regulations restricting asylum to citizens of "enemy or hostile" states. In order to interpret Israeli law so as to be consistent with international law, the Minister should consider the 1954 Prevention of Infiltration Law and the Citizenship and Entry to Israel Law (Interim Order), 2003 to include an implicit exception for people with *bona fide* refugee claims.

In the future, the Israeli Government should consider enacting either formal regulations or legislation that will make the exception for refugees fleeing persecution more explicit.

UN policy and resettlement in third countries

UNHCR should be commended for facilitating the resettlement of a handful of gay Palestinians from Israel. UNHCR should continue seeking resettlement opportunities in third countries in exceptional cases, where the refugee in question voluntarily seeks to leave Israel. This is necessary especially when family members or others may pose a threat to a Palestinian refugee even

within Israel. However, Palestinian refugee protection should not depend solely on resettlement. Resettlement is not likely to be viable in all cases because no third country is bound by law to accept refugees for resettlement, and processing is often slow. Israel is bound by the Refugee Convention to protect refugees already in its territory, and bears the primary responsibility for their protection. Moreover, no nationality should be singled out for a lesser form of refugee protection.

UNHCR's efforts in a few individual cases unfortunately have been somewhat overshadowed by UNHCR-Israel's general cooperation with Israel in refusing to even register Palestinian asylum applications in most cases. The few success stories were initiated instead by the Tel Aviv University Refugee Rights Clinic, which filed them directly with UNHCR headquarters in Geneva. UNHCR, in keeping with its own mandate to supervise international refugee law, should cease its participation in a discriminatory policy that violates the Refugee Convention, and which could put innocent people in grave danger. Just as it does in other countries, UNHCR should seek to protect Palestinian refugees who flee to Israel to avoid persecution, even if the Israeli government objects.