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The American University in Cairo

School of Global Affairs and Public Policy

**THE PALESTINIAN REFUGEE REGIME: TENSIONS BETWEEN
THE COLLECTIVE RIGHT OF RETURN AND INDIVIDUAL
RIGHTS**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Shatha Oqab Abdulsamad

January 2020

The American University in Cairo
School of Global Affairs and Public Policy

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DEDICATION

While not a refugee myself, my own life experiences have been indelibly marked by the heavy legacy of Palestinian displacement and the continued colonization of Palestine. This research is an extension of my belief in the just plight of Palestinian refugees and to them I dedicate this research.

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THE PALESTINIAN REFUGEE REGIME: TENSIONS BETWEEN THE
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Shatha Oqab Abdulsamad

Supervised by Professor Hani Sayed

ABSTRACT

Since their initial displacement in 1948, the United Nations had devised a special temporary refugee regime for Palestinians, distinct from the international refugee regime. The distinct regime was structured in order to acknowledge Palestinian displacement as a result of a deliberate policy of state building by Israel as a national home for Jewish people in Palestine, as well as the effect of the United Nations Partition Plan. Premised as different from other refugee problems, the distinct regime devised for Palestinians was intended to be temporary, pending a final settlement that ensures their repatriation. The temporality and structure of the distinct regime were informed by international expertise at the time and the interwar approach to resolving other refugee crises. With time and with no prospect of a solution in sight, Palestinian displacement became more and more conceptualized as a problem of refugees, giving rise to the inability of the distinct regime to speak effectively to their changing needs. This thesis argues that engaging with displaced Palestinians as an expression of a political problem has contributed to the precarity of their protracted situation. The thesis argues that the demise of one of the legs of the distinctive regime, UNCCP, the precarity of the legal status and inconsistent treatment of displaced Palestinians in their host states and the protection gap they experience in the context of secondary forced displacement are tensions and anxieties that signify the inability of the distinctive regime to provide effective protection, further compounding their plight. The thesis stresses the need for the distinct regime to evolve in a direction that offers a higher level of protection for displaced Palestinians in light of their protracted situation. It examines and investigates the major contentions in the area of expanding protection for displaced Palestinians, as well as the tensions between the different forms of protection that these contentions reference. The thesis argues that each of these contentions has its own merits and limitations. Finally, the thesis argues that in light of the protracted displacement of Palestinians, the need to implement a rights-based approach to durable solutions and the protection of their individual rights without jeopardizing the right to the UN-sanctioned durable solutions devised for their plight is rather heightened.

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I– Introduction

Palestinians comprise one of the largest and longest-lasting forced displaced group in the world,¹ now exceeding seventy years without a solution in sight. The complexity of their situation rests on their political objectification in a prolonged conflict and the vulnerability of their humanitarian condition.² Unable to return to their country of origin as a result of a prolonged political impasse, displaced Palestinians are in a “long-lasting and intractable state of limbo”.³

The major wave of Palestinian exodus began on the heels of the creation of the state of Israel in 1947. Although the exact numbers of those who were displaced is disputed, estimates suggest that between 750,000-800,000 Palestinians were displaced; comprising around 85 percent of the Palestinian Arab population in the territory that became known as Israel.⁴ This was followed by subsequent waves of displacement waves, particularly in the aftermath of the 1967 Arab-Israeli war and the consequent occupation of the rest of Mandate Palestine. Today, an estimated 8.7 million Palestinians remain displaced.⁵

Owing to historical and political reasons, displaced Palestinians are treated in a unique way under the international refugee regime as they are set outside of the 1951 Convention Relating to the Status of Refugees and its related instruments.⁶ Instead, the United Nations conceived a separate *ad hoc* institutional framework to address their displacement. In

¹ BADIL RESOURCE CENTER FOR PALESTINIAN RESIDENCY & REFUGEE RIGHTS, *Survey of Palestinian Refugees and Internally Displaced Persons* (2018). Available at: <https://www.badil.org/en/publication/survey-of-refugees.html>

² Noura Erakat, *Palestinian Refugees and the Syrian Uprising: Filling the Protection Gap during Secondary Forced Displacement*, 26 INTERNATIONAL JOURNAL OF REFUGEE LAW 581–621 (2014), available at: <https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/eeu047> (last visited Feb 21, 2020).

³ UNHCR Executive Committee of the High Commissioner’s Programme, ‘Protracted Refugee Situations’, UN doc. EC/54/ SC/CRP.14, 10 June 2004.

⁴ Susan M. Akram & Terry Rempel, *RECOMMENDATIONS FOR DURABLE SOLUTIONS FOR PALESTINIAN REFUGEES: A CHALLENGE TO THE OSLO FRAMEWORK*, 11 THE PALESTINE YEARBOOK OF INTERNATIONAL LAW ONLINE xiii–71 (2000).

⁵ *Supra* note 1, Badil.

⁶ *Supra* note 4, Akram & Rempel.

1948, the UN General Assembly passed Resolution 194 creating the UN Conciliation Commission for Palestine (UNCCP), mandated with concluding the 1948 war and working towards a final settlement of all outstanding issues between the parties.⁷ The following year, and in response to the needs of hundreds of thousands of displaced Palestinians, the UN established the UN Relief and Works Agency for Palestine (UNRWA) as a subsidiary organ of the UNGA to provide relief and works services to the refugees. This institutional setup comprised the distinct temporary regime applicable to displaced Palestinians, rendering them the only group of people to whom a separate and specific regime applies.⁸

While temporary on paper, the distinct regime is rendered quite permanent in practice.⁹ In the absence of a solution to their displacement, the temporary regime has given rise to legal, practical and political implications that have further exacerbated their vulnerability and contributed to their protracted displacement. This complexity of their situation is particularly manifested in the context of secondary forced displacement and the precarity of their legal status in some host states. For example, in the context of the Syrian crises that began in March 2011, roughly 120,000 refugees¹⁰ from the over 5.5 million refugees who fled Syria¹¹ were Palestinian. Surrounding countries have treated these Palestinian refugees enduring secondary forced displacement disparately from their Syrian counterparts owing to their distinct regime.¹² While the Syrian refugee crises is not the first to render

⁷ Karen AbuZayd, An Essay on the Causes and Factors of the Unresolved Palestinian Refugee Problem: A View from an UNRWA Commissioner General, IN STILL WAITING FOR TOMORROW: THE LAW AND POLITICS OF UNRESOLVED REFUGEE CRISES (Susan Akram & Tom Syring, 2014), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=1765191> (last visited Feb 21, 2020).

⁸ PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES, (Michael Dumper ed., 2006).

⁹ Michael Kagan, *Is there Really a Protection Gap? UNRWA's Role vis-a-vis Palestinian Refugees*, 28 REFUGEE SURVEY QUARTERLY 511–530 (2009), <https://academic.oup.com/rsq/article-lookup/doi/10.1093/rsq/hdp037> (last visited Feb 19, 2020).

¹⁰ UNRWA, Palestine refugees in Syria: a tale of devastation and courage, UNRWA, available at: <https://www.unrwa.org/newsroom/features/palestine-refugees-syria-tale-devastation-and-courage> (last visited Apr 25, 2020).

¹¹ UNHCR, Situation Syria Regional Refugee Response, available at: <https://data2.unhcr.org/en/situations/syria> (last visited Apr 25, 2020).

¹² *Supra* note 2, Erakat; AMNESTY INTERNATIONAL, *Lebanon: Denied refuge: Palestinians from Syria seeking safety in Lebanon*, available at: <https://www.amnesty.org/en/documents/document/?indexNumber=MDE18%2f002%2f2014&language=en> (last visited Mar 16, 2020); Magda Qandil, *Palestinian Refugees Fleeing Syria : Restricted Access to Safe*

Palestinians subject to secondary forced displacement, it highlighted the insufficiency of their distinct regime to offer effective protection.

Against this backdrop and the mounting financial deficit of UNRWA, following the USA's decision as the Agency's largest donor to cut its funding in 2018,¹³ in addition to the growing threat of the liquidation of the Palestine question following new normalisation agreements between Arab States and Israel, the future of displaced Palestinians is rendered murkier. In light of their protracted situation, the notion that a durable solution to their displacement hinges on a political resolution of the Palestine question hence poses additional threats to the rights and plight of displaced Palestinians.

Compounding their already precarious and complex protracted situation, these developments raise many questions pertaining to the future of displaced Palestinians, particularly in relation to the extent to which their distinct regime has been rendered permanent. This thesis attempts to explore this question further. The research question that this thesis aims to answer is: How practically relevant is the supposedly temporary distant

Territory and Protection in the Middle East, 316 JOURNAL OF PALESTINIAN REFUGEE STUDIES 1–6 (2013), available at: <https://platform.almanhal.com/Details/Article/69282?lang=ar> (last visited Mar 21, 2020); Susan M. Akram, *Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing*, 7 MIDDLE EAST LAW & GOVERNANCE 287–318 (2015), available at: <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=112011870&site=ehost-live> (last visited Mar 16, 2020); Nasim Ahmed, *Palestinians from Syria Has Again Exposed the Gap in Protection for the Refugees*, 316 JOURNAL OF PALESTINIAN REFUGEE STUDIES 1–3 (2013), available at: <https://platform.almanhal.com/Details/Article/69274?lang=ar> (last visited Feb 21, 2020); Leah Morrison, *Discrimination and the Abuse of Human Rights Characterises the Current Plight of Palestinian Refugees from Syria*, 316 JOURNAL OF PALESTINIAN REFUGEE STUDIES 1–8 (2014), available at: <https://platform.almanhal.com/Details/Article/69305?lang=ar> (last visited Mar 21, 2020); Gabriela Wengert & Michelle Alfaro, *Can Palestinian refugees in Iraq find protection?*, 1 FORCED MIGRATION REVIEW 19–21 (2006), available at: <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=22486502&site=ehost-live> (last visited Feb 21, 2020); Human Rights Watch, *Egypt: Don't Force Palestinians Back to Syria*, HUMAN RIGHTS WATCH (2013), available at: <https://www.hrw.org/news/2013/01/18/egypt-dont-force-palestinians-back-syria> (last visited Mar 18, 2020); Human Rights Watch, *Lebanon: Palestinians Barred, Sent to Syria*, HUMAN RIGHTS WATCH (2014), available at: <https://www.hrw.org/news/2014/05/05/lebanon-palestinians-barred-sent-syria> (last visited Mar 16, 2020).

¹³ UNRWA, *Immense support for the renewal of the UNRWA mandate at the UN General Assembly*, UNRWA, available at: <https://www.unrwa.org/newsroom/press-releases/immense-support-renewal-unrwa-mandate-un-general-assembly> (last visited Apr 25, 2020).

legal regime covering Palestinian refugees today given their protracted situation? And if not, then how can it evolve towards more protection of displaced Palestinians in light of their protracted situation? This is a very important policy, political and legal question, and the answer to it could serve as a normative guiding direction towards evolving their distinct regime.

This thesis argues that understanding Palestinian displacement as a, first and foremost, political question has informed and shaped not only the set-up and temporality of their distinct regime, but also the scope and type of protection it offered. The thesis further argues that in light of their protracted displacement, the distinctive regime has proved to be insufficient to speak to their changing needs, as manifested in the tensions and anxieties that emerged. In light of this, the thesis will argue that conflating a durable solution that ensures their repatriation with the protection of their individual rights exacerbates their plight, for durable solutions and individual rights are two distinct and complementary forms of protection. The need for the latter is rather heightened in light of the unattainability of a solution to their plight and their protracted displacement.

Chapter II of this thesis explores why and how a distinctive regime came into existence for displaced Palestinians in light of the wider context from which it emerged, including the making of the international refugee regime. It argues that the political context and the legacy of the interwar approach to resolving refugee crises shaped the temporality of the regime and the understanding of Palestinian displacement as a, first and foremost, political question. Chapter III then goes on to explore the relevance of the distinctive regime in light of the political understanding of Palestinian displacement, as well from the perspective of the institutional distinctiveness of their regime. In light of the protracted nature of their displacement, it is argued that the crippled distinctive regime, the precarious status and inconsistent treatment of displaced Palestinians by their host states and the protection gap they experience in the context of secondary forced displacement are signifiers of the inability of the distinct regime to speak to their changing needs or to provide them with

effective protection. Chapter IV investigates the major contentions for increased protection. While it does not argue for inclusion under the protection mandate of UNHCR, it argues that owing to the unattainability of a durable solution, the need to fulfill the protection of individual rights is heightened.

II– A Temporary Distinctive Framework Governing Palestinian Displacement

One of the key characteristics of the unresolved displacement of Palestinians is the distinctive refugee status and protection regime concerned with them. Owing to historical and political reasons, a unique framework of specific norms and institutional arrangements different from those of other refugees was established to the assistance and protection of Palestinians following their displacement in 1948. This chapter explores why and how a distinctive regime came into existence for displaced Palestinians in light of the wider context from which it emerged. First, the chapter examines what is meant by the notion of protection under international law. The second chapter briefly examines the historical roots of Palestinian displacement. The third section examines the conception of refugee problems and the development of the definition of a refugee under international law. The fourth section examines the UN response to the displacement of Palestinians, while the last section of the chapter examines the set-up of the distinctive regime governing displaced Palestinians in light of the wider international context that influenced it at the time the international refugee regime was in the making. It will be argued that while the displacement of Palestinians is a combined effect of the UN Partition Plan and the creation of the state of Israel as a national home for Jews, the institutional response of the UN reflects that Palestinian displacement was not understood as a refugee problem requiring international protection, but rather as part of a political context over territorial arrangements and ethnic minorities that needed to be resolved. This understanding deems Palestinian displacement also different from the individualized conception of a refugee entitled to international protection on the basis of the different grounds of persecution enumerated in the 1951 Convention.

A– The Protection of Individuals under International Law

The concept of protection has a legal dimension which is often associated with entitlements

under the law and mechanisms to vindicate claims in respect of those entitlements.¹⁴ Under international law, the construction of a definition of protection is directly linked to the territorially based nation-state system. Protection in this context is perceived as akin to the sovereign's duty towards his or her subjects.¹⁵ The idea of the sovereign state as a protector derives from nationality being the principal link between the individual and international law.¹⁶ As individuals were not recognized as subjects of international rights and obligations, the determination of responsibilities on the international plane fell to the sovereign state whose protection an individual enjoyed.¹⁷ In the nation-state system, one's legal status is thus dependent upon protection by the highest authority that controls the territory upon which one resides.¹⁸ In this nation-state-centric international order, nationality is the essential condition for securing the protection of an individual's rights in the international plane.¹⁹

The concept of protection of a sovereign within the nation-state system pertains first and foremost to enabling citizens to exercise their rights. Hannah Arendt observes that in practice only citizens have rights that can only be conceived by belonging to State as the highest form of political community. She notes that "human rights were protected and enforced only as national rights" by the State as the institution "whose supreme task was to protect and guarantee man his rights as man, as citizen and as national."²⁰ Protection as an exercise of rights or, as Arendt put it, "the right to have rights" comes from belonging to a State as the highest form of political community.²¹ One's status as a rights-bearing person and as one who is protected by the legal-political authorities and as one who is to

¹⁴ Arthur C. Helton, *What is Refugee Protection?*, 2 INTERNATIONAL JOURNAL OF REFUGEE LAW 119–129 (1990), <https://academic.oup.com/ijrl/article/2877576/What> (last visited Oct 10, 2020).

¹⁵ Dallah Stevens, *What Do We Mean by Protection?*, 20 INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 233–262 (2013), <https://www.jstor.org/stable/24675883> (last visited Jan 8, 2021).

¹⁶ ALEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* (1998).

¹⁷ SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=283582> (last visited Jan 15, 2021).

¹⁸ *Id.*, Benhabib.

¹⁹ *Supra* note 16, Takkenberg.

²⁰ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (New ed. with added prefaces ed. 1973).

²¹ *Id.*, Arendt.

be treated as a person entitled to the enjoyment of rights is thus contingent upon membership or belonging to a State.²² Arendt thus describes the loss of home and political status to be “identical with expulsion from humanity altogether.”²³

As citizenship was the prime guarantor for the protection of one’s human rights, one’s right to have rights is thus lost when one loses the protection of a sovereign. As the State is the only one that defends and protects the rights of all who are its citizens,²⁴ the loss of citizenship rights was deemed tantamount to the loss and deprivation not only of citizenship rights but of human rights altogether.²⁵ The perplexity that the entitlement to human rights — including those incorporated in the UN Charter and the Universal Declaration of Human Rights — can only be conceived in national state laws have thus rendered those deprived of the protection of a sovereign without entitlement to rights that are ought to be natural and inalienable.

With protection understood as the right to have rights, both the use of denationalization measures in a territorially based nation-state system²⁶ and the loss of the protection owed by states to their nationals abroad²⁷ exposed the individual foreigner’s loss or denial of standards of treatment abroad, hence underlining the need for an international status for the newly unprotected.²⁸ Coupled with the ever-growing concern for the protection of human rights, which has particularly manifested itself in numerous international declarations and conventions devoted to the realization of these rights particularly following the Second World War,²⁹ it was deemed necessary to provide legal protection and rights for those individuals, an act not only of charity but also of survival owing to their anomalous status

²² *Supra* note 17, Benhabib.

²³ *Supra* note 20, Arendt.

²⁴ *Supra* note 17, Benhabib.

²⁵ *Supra* note 20, Arendt.

²⁶ Guy S Goodwin-Gill, *THE POLITICS OF REFUGEE PROTECTION*, 27 REFUG SURV Q 16 (2008).

²⁷ *Supra* note 15, Stevens.

²⁸ *Supra* note 26, Goodwin-Gill.

²⁹ Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT’L. L. J. 207–258 (1975), <https://heinonline.org/HOL/P?h=hein.journals/hilj16&i=221> (last visited Jan 5, 2021).

in international law and their invisibility in national law.³⁰ In response, several institutional arrangements emerged as an exception to the protectionist norm.³¹ These arrangements attempted to assert the claims of individual human rights by offering international or diplomatic protection, the culmination of which was the adoption of the international refugee regime, which will be further discussed in this chapter.

As an institutional response to the loss of the pertinent authorities' compliance with the entitlements of individuals under international law, such as the core rights declared in the Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the international refugee regime offers another source of protection that acts to respect and uphold fundamental human rights.³² The protection of the international refugee regime is considered traditionally to include maintaining physical security and providing redress under law as well as offering lifesaving interventions, fair treatment upon reception, compliance with essential humanitarian standards and *non-refoulement*.³³ The protection responsibilities of the international refugee regime³⁴ do not represent the ideal protection but rather act as a benchmark of what the minimum level of protection entails to overcome the lack of protection of a sovereign in the nation-state system.

B– The Historical Roots of Palestinian Displacement

An understanding of the origin of the Palestinian refugee question is not only important to understand the nature of their plight but also to identify elements of continuity between their displacement and their current situation. While 1947-1948 was a foundational

³⁰ Michael Barnett, *Humanitarianism with a Sovereign Face: UNHCR in the Global Undertow*, 35 THE INTERNATIONAL MIGRATION REVIEW 244–277 (2001), <https://www.jstor.org/stable/2676060> (last visited Jan 7, 2021)

³¹ James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L. L. J. 129–184 (1990), <https://heinonline.org/HOL/P?h=hein.journals/hilj31&i=137> (last visited Feb 24, 2020).

³² *Supra* note 14, Helton.

³³ *Id.*, Helton.

³⁴ Contained in paragraphs 8 and 9 of the UNHCR Statute. See UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, UN Doc. A/RES/428(V), (Dec. 14, 1950).

moment in the birth of the question of Palestinian displacement, the conception of it is intertwined not only with the events that befell Palestine between 1947 and 1948, but also with events that proceeded and enabled it.³⁵ The roots of the displacement of Palestinians are to be found in, on the one hand, the emergence of Zionism in Europe in the late 1880's at a time when socio-political and economic transformations were taking place in Palestine during the last decades of the Ottoman Empire rule over it, and on the other hand, in the thirty years of British control over Palestine (1918-1948)³⁶. Further, it has roots in the way the League of Nations first, and the UN then, attempted to resolve mounting tension between political Zionist claims to Palestine as a national home for Jews on the one hand and the native Palestinians' demand for self-determination on the other.³⁷

While the events of 1947-1948 marked the date of birth of the Palestinian displacement question, the date of its conception goes back to the emergence of Zionism as a national revival movement in central and eastern Europe.³⁸ Prompted by the growing pressure on Jews to assimilate totally in central and eastern Europe or risk persecution, the objective of the first Zionist Congress held in 1897 in Basel, Switzerland, was to establish a Jewish state.³⁹ Claiming biblical territory and reinventing it as the cradle of their new nationalist movement, by the beginning of the twentieth century most leaders of the Zionist movement associated this national revival movement with the colonization of Palestine.⁴⁰

Supported by British colonialism,⁴¹ Zionism's aspirations to establish a national home for Jews in Palestine culminated in the articulation of the Balfour Declaration and later in the

³⁵ Walid Khalidi, *The Hebrew Reconquista of Palestine: From the 1947 United Nations Partition Resolution to the First Zionist Congress of 1897*, 39 JOURNAL OF PALESTINE STUDIES 24–42 (2009), available at: <http://jps.ucpress.edu/cgi/doi/10.1525/jps.2010.XXXIX.1.24> (last visited Sep 21, 2020).

³⁶ *Id.* Khalidi.

³⁷ NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE (2019), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=5703762> (last visited Sep 21, 2020).

³⁸ *Supra* note 35, Khalidi; ILAN PAPPÉ, THE ETHNIC CLEANSING OF PALESTINE (2006).

³⁹ *Id.* Pappé.

⁴⁰ *Id.* Pappé.

⁴¹ Rashid Khalidi, *1948 and after in Palestine: Universal Themes?*, 40 CRITICAL INQUIRY 314–331 (2014), <https://www.journals.uchicago.edu/doi/10.1086/676410> (last visited Sep 21, 2020).

1922 Mandate for Palestine. The privileging of the Zionist settler sovereignty over Palestinian peoplehood⁴² was first articulated in the 1917 Balfour Declaration, whereby the British Foreign Secretary Lord Balfour committed Britain to establishing a Jewish national home in Palestine while completely ignoring the wishes or rights of the native inhabitants.⁴³ Akram notes the inconsistencies in Britain's role as a mandatory power whereby it committed to bringing Palestine to independence while simultaneously committing to a national home for the Jewish people.⁴⁴ The Balfour Declaration effectively negated the status of Palestine's 90 per cent native inhabitants as a political community and dismissed their demands for self-determination.⁴⁵

Britain's privileging of Zionism remained dominant and was further espoused in international deliberations by incorporating the Balfour Declaration verbatim into the League of Nations mandate for Palestine.⁴⁶ After the First World War, the League of Nations comprised of the Great Powers established the Mandate system to shepherd the people of former Ottoman and German colonial territories to statehood and independence with the help of "advanced nations".⁴⁷ Khalidi argues that the British Mandate over Palestine "systematically advantaged the Zionist movement and the minority Jewish population over the indigenous Arab majority and their national movement, which the British never fully recognized or allowed any access to institutions of national self-representation or government".⁴⁸ Through systematic policies enacted in the mandate period, the British authorities in Palestine operationalized the Balfour Declaration by

⁴² *Supra* note 37, Erakat.

⁴³ Arthur James Balfour, *The Balfour Declaration* (Nov. 2, 1917), <https://unispal.un.org/DPA/DPR/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/e210ca73e38d9e1d052565fa00705c61?OpenDocument> (last visited Nov 30, 2020).

⁴⁴ SUSAN AKRAM & TOM SYRING, *STILL WAITING FOR TOMORROW: THE LAW AND POLITICS OF UNRESOLVED REFUGEE CRISES* (2014), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=1765191> (last visited Feb 21, 2020).

⁴⁵ *Supra* note 37, Erakat.

⁴⁶ *Supra* note 41, Khalidi; *Id.*, Erakat.

⁴⁷ Covenant of the League of Nations, art.22.

⁴⁸ *Supra* note 41, Khalidi.

facilitating Jewish migration and naturalization in Palestine,⁴⁹ facilitating Jewish settlement and land acquisition,⁵⁰ and altering the socio-political dynamics of the Palestinian society to weaken the position of Palestinians; who sought to create an anti-colonial national movement.⁵¹

In response to their colonial erasure Palestinians rebelled and revolted repeatedly, most notably in 1920, 1921 and 1929.⁵² The height of Palestinian uprising was the Great Revolt (1936-1939) which was quashed by the British forces and which gutted the Palestinian national movement ensuring it would not have the capacity to rekindle the revolt and looming partition.⁵³

By the end of the Second World War, the annihilation of Nazi Germany of European Jews coupled with the averse position of Western governments to absorb the massive Jewish refugee crises that emerged allowed the Jewish Agency to entwined the refugee crisis with Zionism, but also allowed the waning British Empire and the League of Nations' Permanent Mandates Commission to see the Mandate of Palestine as an opportunity to resolve Europe's Jewish refugee question.⁵⁴ In its referral, Britain asked the UN to incorporate the Jewish refugees into its deliberations on Mandate Palestine.⁵⁵ At a special

⁴⁹ See Mutaz Qafisheh, *Genesis of Citizenship in Palestine and Israel. Palestinian Nationality during the Period 1917-1925*, 11 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 1–36 (2009), <http://search.ebscohost.com/login.aspx?direct=true&db=poh&AN=37257573&site=ehost-live> (last visited Sep 21, 2020).

⁵⁰ Issa Khalaf, *The Effect of Socioeconomic Change on Arab Societal Collapse in Mandate Palestine*, 29 INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES 93–112 (1997), <https://www.jstor.org/stable/163853> (last visited Sep 21, 2020); Sabri Jiryis, *The Legal Structure for the Expropriation and Absorption of Arab Lands in Israel*, 2 JOURNAL OF PALESTINE STUDIES 82–104 (1973), <https://www.jstor.org/stable/2535632> (last visited Sep 21, 2020).

⁵¹ *Supra* note 37, Erakat.

⁵² *Id.* Erakat.

⁵³ *Id.* Erakat.

⁵⁴ *Id.* Erakat; JOHN QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* (2 ed. 2005), <https://heinonline.org/HOL/P?h=hein.beal/cpalest0001&i=14> (last visited Sep 21, 2020); VICTOR KATTAN & RICHARD FALK, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949* (2009), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3386314> (last visited Sep 21, 2020).

⁵⁵ *Id.* Erakat.

session, the UN General Assembly established the United Nations Special committee on Palestine (UNSCOP) to investigate questions relevant to the problem of Palestine and to recommend solutions to be considered.⁵⁶ Although UNSCOP did not reach a consensus on the question of Palestine,⁵⁷ on 29 November 1947, the General Assembly endorsed the Partition Plan by passing Resolution 181 which stated that the UN General Assembly “Recommends to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation... of the Plan of Partition.”⁵⁸ The Partition Plan proposed that Jews, which constituted 33 percent of the population of Palestine at the time, were to establish a Jewish state over 57 percent of Palestine’s landmass, which was rejected by Palestinians⁵⁹ on the basis that the status quo favored them and that an arbitrary redistribution of land and the suppression of the native majority’s rights to self-governance was in violation of the principle of self-determination.⁶⁰ Erakat argues that the “political imperative to use the Mandate for Palestine as a means to resolve the Jewish refugee crisis overrode the question of law” as UN Resolution 181 did not even consider the legality of partition itself.⁶¹ Pappé further argues that the UN “violated basic rights of the Palestinians, and totally ignored the concern for Palestine... at the very height of the anti-colonialist struggle in the Middle East”.⁶²

While the adoption of the Partition Plan accelerated the British withdrawal from Palestine, it plunged the country into unrest as guerrilla warfare erupted and tensions escalated dramatically. Superior in both quality and organization, the Zionist leadership prepared for

⁵⁶ Guy Goodwin-Gill & Susan M. Akram, *Foreword to Amicus Brief on the Status of Palestinian Refugees under International Refugee Law Monographs*, 11 PAL. Y.B. INT’L L. 185–260 (2000), <https://heinonline.org/HOL/P?h=hein.intyb/palesyb0011&i=197> (last visited Feb 19, 2020).

⁵⁷ *Id.* Goodwin-Gill & Akram.

⁵⁸ UNGA, Resolution 181 (II), Future Government of Palestine, UN Doc. A/RES/181(II) (29) November 1947,

<https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7f0af2bd897689b785256c330061d253?OpenDocument> (last visited Sep 21, 2020).

⁵⁹ *Supra* note 54, Kattan & Falk.

⁶⁰ *Supra* note 37, Erakat.

⁶¹ *Id.* Erakat; SUSAN M. AKRAM ET AL., INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE (2011), available at:

<http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=668187> (last visited Apr 20, 2020).

⁶² *Supra* note 38, Pappé.

the use of force to implement partition and establish a Jewish state by force.⁶³ Zionist full-scale military operations between January – May 1948 resulted in the forced displacement of 250,000 Palestinians.⁶⁴ On May 14, Israel declared independence and the following day Great Britain relinquished its Mandate over Palestine. Through violence and terror, the ethnic cleansing of Palestinians⁶⁵ started, and thus their mass displacement. It is estimated that between 750,000-800,000 Palestinians, comprising around 85 percent of the Palestinian Arab population in the territory that became the State of Israel, became displaced.⁶⁶

C– The Conception and Definition of the Status of ‘Refugees’ in Context

At the time the Palestinians were displaced, the concepts of ‘refugee’ and ‘refugee protection’ were majorly informed by the massive displacements created by the First and Second World Wars and the responses provided by the international community at the time.⁶⁷ Moreover, the conditions qualifying refugee status were different than the contemporary understanding that is offered by the international refugee regime as we know it today.

At the time, the problem of refugees reflected changes within the broader scope of international politics during the inter-war period.⁶⁸ Responding to circumstance following the First World War, the different treaties and arrangements adopted under the auspices of the League of Nations gave rise to a dominant conception requisite to a declaration of refugee status.⁶⁹ Adopting a category-oriented approach that identified refugees according

⁶³ *Supra* note 37, Erakat.

⁶⁴ *Supra* note 38, Pappé.

⁶⁵ *Id.*, Pappé.

⁶⁶ *Supra* note 4, Akram & Rempel.

⁶⁷ FRANCESCA P. ALBANESE & LEX TAKKENBERG, *PALESTINIAN REFUGEES IN INTERNATIONAL LAW* (Second Edition ed.) (2020).

⁶⁸ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 *INTERNATIONAL JOURNAL OF REFUGEE LAW* 238–262 (2002), https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/14.2_and_3.238 (last visited Nov 15, 2020).

⁶⁹ *Id.*, Barnett.

to group affiliation and origin,⁷⁰ refugee status was conceived as a means of providing international protection and freedom of movement to groups who lacked the *de jure* and *de facto* protection of any state.⁷¹ The first international legal standards governing the protection of refugees emerged in response to the displacement of nearly 1.5 million Russian refugees caused by the Russian Revolution of 1917.⁷² Most of these had no identification paper.⁷³ Under the auspices of the League of Nations, *ad hoc* arrangements intended for the purpose of clarifying the legal position of these refugees and improving their conditions were made.⁷⁴ The Council of the League of Nations appointed the first high Commissioner for Russian Refugees to deal with the legal status, relief needs and repatriation or resettlement opportunities of the Russians left without protection or legal status, scattered throughout Europe.⁷⁵

Similar arrangements extended only to certain groups of refugees⁷⁶ of ethnic or territorial origin that were left without protection or legal status in Europe in connection with the First World War (Armenians, Assyrians, Assyro-Chaldaens).⁷⁷ Until the Second World War, refugee crises were typically addressed in an *ad hoc* fashion through *ad hoc* treaties and arrangements implemented under the authority of *ad hoc* institutions.⁷⁸ This was followed by a succession of *ad hoc* international bodies to deal with different refugee crises that emerged, such as the High Commissioner for Refugees for Germany (1933) and the High Commissioner's Office for all refugees (1938), and the Intergovernmental Committee

⁷⁰*Id.*, Barnett.

⁷¹ James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920—1950*, 33 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 348–380 (1984), <http://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/evolution-of-refugee-status-in-international-law-19201950/C1B0A2DCE594FD04919B3EE150F49718> (last visited Sep 23, 2020).

⁷² *Supra* note 31, Hathaway.

⁷³ Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 680–703 (1938), <https://www.jstor.org/stable/2190591> (last visited Nov 16, 2020).

⁷⁴ League of Nations, Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees, League of Nations, Treaty Series Vol. XIII No. 355 (July 5, 1922), available at: <https://www.refworld.org/docid/3dd8b4864.html> [accessed 15 November 2020].

⁷⁵ *Supra* note 67, Albanese & Takkenberg; *Supra* note 71, Hathaway.

⁷⁶ *Supra* note 73, Holborn.

⁷⁷ *Supra* note 71, Hathaway.

⁷⁸ *Supra* note 4, Akram & Rempel; *Supra* note 67, Albanese & Takkenberg.

on Refugees (1938).⁷⁹

While meant “to facilitate, and to justify, aid and protection,”⁸⁰ the legal definitions of refugees in the interwar period were not used by agencies to identify individuals who might qualify for refugee status.⁸¹ Instead, they were used to define the status of groups that had already been termed refugees by the League of Nations. The refugee instruments adopted under the League of Nations incorporated refugee definitions that described groups or categories of persons who would be covered, such as the Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees (1926)⁸² and the Provisional Arrangement concerning the Status of Refugees coming from Germany (1936).⁸³ Accordingly, until the late 1930’s, refugees had been treated as a group or category as opposed to an individualized approach to determine refugee status on a case-by-case basis.⁸⁴

By stressing the lack of diplomatic protections as the defining feature of a refugee,⁸⁵ the dominant view in the interwar years was that refugees were persons who have left or been forced to leave their country for political reasons and who had lost diplomatic protection by their home governments without acquiring the nationality or diplomatic protection of any other state.⁸⁶ As refugees represented an anomaly in the nation state-system, the need for temporary legal protection emerged.⁸⁷ Thus, the refugee problem was seen not only as specific to certain categories and groups of people of identified ethnic or territorial origin,

⁷⁹ *Id.*, Albanese & Takkenberg; *Supra* note 71, Hathaway.

⁸⁰ GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (3rd ed ed. 2007).

⁸¹ Claudena Skran & Carla N. Daughtry, *The study of refugees before “Refugee Studies”*, 26 REFUGEE SURVEY QUARTERLY 15–35 (2007), <https://academic.oup.com/rsq/article-lookup/doi/10.1093/rsq/hdi0240> (last visited Nov 15, 2020).

⁸² League of Nations, Arrangement of 12 May 1929 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Treaty Series Vol. LXXXIX, No. 2004 (May 12, 1926).

⁸³ *Supra* note 4, Akram & Rempel.

⁸⁴ *Id.*, Akram & Rempel; *Supra* note 67, Albanese & Takkenberg.

⁸⁵ *Supra* note 81, Skran & Daughtry.

⁸⁶ *Supra* note 73, Holborn; *Id.*, Skran & Daughtry.

⁸⁷ *Id.*, Skran & Daughtry.

but also seen to be temporary.⁸⁸ Providing diplomatic protection by states was thus at the core of the refugee problem.⁸⁹

The notion of legal protection of refugees being a key action on the part of the international community lingered post the interwar period. In the Second World War, the Allied Forces established the United Nations Relief and Rehabilitation Administration, which was succeeded by the International Refugee Organization, following the establishment of the United Nations, in order to assist the millions of displaced during the Second World War. Until then, different solutions continued to be proposed to different refugee crises as had been the case during the interwar period.⁹⁰ The tens of millions of displaced and unprotected persons caused by the denial of state protection as a result of the Second World War represented an “international legal dilemma” that needed to be resolved.⁹¹ The idea that these unprotected persons who do not, or are no longer able to, enjoy the protection of the state are deserving of ‘diplomatic’ protection was at the heart of the international refugee regime that was being conceptualized following the Second World War.⁹²

The making of the international refugee framework was thus conceptualized to provide protection, first and foremost, to the masses of displaced and unprotected persons in Europe, as a result of the Second World War. Despite its contemporary universal and standardized approach to deal with refugees today, the international refugee regime, represented by the 1951 Convention and the UNHCR Statute, was not initially conceived to all refugees worldwide. In the drafting process of the 1951 Convention and the UNHCR Statute, which took place in a number of stages, there was intense discussion among the drafters over its scope. At the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the aim of the international community, particularly western countries, was to find a definitive solution to the mass displacement in Europe resulting

⁸⁸ *Supra* note 68, Barnett.

⁸⁹ *Supra* note 81, Skran & Daughtry.

⁹⁰ *Supra* note 67, Albanese & Takkenberg.

⁹¹ *Supra* note 71, Hathaway.

⁹² *Supra* note 67, Albanese & Takkenberg.

from the Second World War.⁹³ Similar to pre-war instruments, the drafters incorporated categories of refugees based on their national origin, the territory they left and the lack of consular or diplomatic protection of their former country, in addition to a more generic refugee definition with reference to events that occurred prior to 1 January 1951.⁹⁴ There was intense discussion among the drafters on whether the convention should apply to European refugees only or to other refugees as well.⁹⁵ Aware that other persons were displaced outside of Europe, such as the ongoing refugee crises in Asia,⁹⁶ discouraged Western countries from committing to a universal refugee protection framework.⁹⁷ To Western countries, the problem of refugees was European only.

The universal conception of the definition of a refugee came into effect with the adoption of the Protocol Relating to the Status of Refugees (1967 Protocol) that removed the temporal and geographical limitations of the 1951 Convention.⁹⁸ The 1967 Protocol 'universalized' the 1951 Convention,⁹⁹ as it qualified a normative framework defining refugees as provided in Article 1A(2). Unlike instruments of the interwar period, refugee status is decided on a case-by-case basis whereby a refugee is defined as a person who "owing to a well-founded fear of persecution 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."¹⁰⁰

⁹³ UN, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/SR.22 (Nov. 26, 1951), available at: <https://digitallibrary.un.org/record/696436?ln=en> (last visited Sep 27, 2020).

⁹⁴ *Supra* note 67, Albanese & Takkenberg.

⁹⁵ *Supra* note 93, UN Doc. A/CONF.2/SR.22.

⁹⁶ *Id.*, UN Doc. A/CONF.2/SR.22

⁹⁷ *Supra* note 67, Albanese & Takkenberg.

⁹⁸ *Protocol Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>

⁹⁹ *Supra* note 71, Hathaway.

¹⁰⁰ Convention Relating to the Status of Refugees art. 1D, Jul. 28, 1951, 189 U.N.T.S. 137. (hereinafter 1951 Convention), art. 1A(2)

D–The United Nations’ Response to Palestinian Displacement: A Political and Humanitarian Approach

From the time the question of Palestine was created, the international community has recognized it as a problem demanding special attention. This was manifested in the adoption by the UN General Assembly, in a special session, of Resolution 186 concerning the appointment of a United Nations Mediator in Palestine on the same day Israel unilaterally declared itself as a State.¹⁰¹ The meeting record of the Resolution¹⁰² brings to light that many member states understood the role of the United Nations vis-à-vis the question of Palestine to amount to arranging mediation pursuant to the Partition Plan of 1947, particularly in light of the *de facto* partial fulfillment of the Partition Plan represented by the creation of the state of Israel as a Jewish state.

In accordance with the UN General Assembly resolution, a committee of the UN General Assembly composed of representatives of the Permanent Members of the UN Security Council unanimously appointed Count Folke Bernadotte, President of the Swedish Red Cross, as the UN Mediator on Palestine.¹⁰³ Count Bernadotte was proclaimed for his "major humanitarian efforts"¹⁰⁴ during the Second World War. As vice-chairman of the Swedish Red Cross during the Second World War, Count Bernadotte aided in the exchange of disabled British and German war prisoners thus saving the lives of 20,000 persons, as well as playing a role as intermediary in a bid for peace between the Nazi's and the United States and the United Kingdom.¹⁰⁵

¹⁰¹ Assembly resolution 186 (S-2), Appointment and terms of reference of a United Nations Mediator in Palestine, UN Doc. A/RES/186 (S-2) (May 12, 1948), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/A9A8DA193BD46C54852560E50060C6FD> (last visited Sep 25, 2020).

¹⁰² Meeting Record, United Nations General Assembly, Second Session: Hundred and Thirty-Fifth Plenary Meeting, (May 14, 1948), <http://digitallibrary.un.org/record/734727> (last visited Sep 25, 2020).

¹⁰³ Press Release, United Nations, Palestine question - Biography, Activities of Mediator, (Sep. 17, 1948), <https://www.un.org/unispal/document/auto-insert-199741/> (last visited Sep 25, 2020).

¹⁰⁴ *Id.*, UN Press Release.

¹⁰⁵ *Id.*, UN Press Release.

It can be inferred, from both the appointment of a philanthropist as Count Bernadotte and from his functions as the UN Mediator, that the United Nations regarded the question of displaced Palestinians as a humanitarian issue that is part of a bigger political context which needed to be resolved, rather than as a refugee issue requiring diplomatic protection. Accordingly, Bernadotte's functions as Mediator were political and humanitarian in nature as they included promoting "a peaceful adjustment of the future situation of Palestine", cooperating with the Truce Commission for Palestine, and coordinating assistance and cooperation of "appropriate and specialized agencies of the UN" and other humanitarian organizations for the "promotion of the welfare of the inhabitants of Palestine."¹⁰⁶

Furthermore, as Bernadotte's proposal presented to Arab and Jewish authorities confirms, the displacement of Palestinians is understood as a humanitarian aspect subsumed in a wider political conflict over territorial arrangements and ethnic minorities,¹⁰⁷ which were common after the Second World War,¹⁰⁸ requiring reconciliation by peaceful means.¹⁰⁹ After clarifying that he interprets his role as providing "a reasonable framework of reference within which the two parties may find it possible to continue their consultations" towards the end of a peaceful adjustment, Count Bernadotte makes suggestions to achieve this on the basis of territorial arrangements and respect of ethnic minorities.¹¹⁰ Bernadotte proposes forming "a union comprising two members, one Arab and one Jewish" with the boundaries of each "determined in the first instance by negotiation" and "definitively fixed by a Boundaries Commission" while guaranteeing that "religious and minority rights be fully protected by each member of the Union" and further recognizing "the right of residents of Palestine who, because of conditions created by the conflict there have left

¹⁰⁶ *Supra* note 101, UN Doc. A/RES/186 (S-2).

¹⁰⁷ Count Folke Bernadotte, Palestine Question/ Peaceful Settlement- UN Mediator (Bernadotte)- Proposals presented to Arab and Jewish Authorities, UN (June 27, 1948), <https://www.un.org/unispal/document/auto-insert-178534/> (last visited Sep 25, 2020).

¹⁰⁸ See border and populations shifts in the aftermath of WW II in Europe (e.g. between Germany and Poland, and between Poland, Czech Republic and Germany). Also, globally, see the UK partition of British India into India, Bangladesh, and Pakistan, and the division of Korea.

¹⁰⁹ *Supra* note 107, Bernadotte.

¹¹⁰ *Id.*, Bernadotte

their normal places of abode, to return to their homes without restrictions and to regain possession of their property.”¹¹¹

In light of this context, the UN response to the displacement of Palestinians was based on humanitarian basis, as manifested in Count Bernadotte’s request for assistance of the UN “on the organization of social and humanitarian services in Palestine in accordance with Resolution 186”¹¹² in the form of “immediate care” and “epidemic prevention,”¹¹³ and which later culminated in a plan to aid displaced Palestinians with the assistance of leading humanitarian organizations such as the World Health Organization, the International League of Red Cross Societies, and the International Children’s Emergency Fund’s Programmed Committee.¹¹⁴ The humanitarian concern and drive to Bernadotte’s approach vis-à-vis displaced Palestinians was accompanied with a firm view that the right of refugees to return to their homes at the earliest practicable date should be affirmed and established.¹¹⁵

Following Count Bernadotte’s assassination by Jewish terrorists on 17 September 1948, the UN General Assembly adopted resolution 212(III) to set up a UN Relief Fund for Palestine Refugees (UNRPR)¹¹⁶, thus relieving the Acting Mediator of the humanitarian

¹¹¹ *Id.*, Bernadotte

¹¹² Press Release, United Nations, Palestine question - Assistance on Social & Humanitarian Services in Palestine (July 30, 1948), <https://www.un.org/unispal/document/auto-insert-204122/> (last visited Sep 25, 2020).

¹¹³ Press Release, United Nations, Palestine question – Mediator Press Conference on Jerusalem and Refugees (Aug.2, 1948), <https://www.un.org/unispal/document/auto-insert-199220/> (last visited Sep 25, 2020).

¹¹⁴ Press Release, United Nations, Palestine question – Mediator’s Plan for Aid to Palestine Refugees (Aug.16, 1948), <https://www.un.org/unispal/document/auto-insert-195721/> (last visited Sep 25, 2020).

¹¹⁵ Press Release, United Nations, Palestine question – Cable from Mediator Concerning Arab Refugees (Aug.5, 1948), <https://www.un.org/unispal/document/auto-insert-205562/> (last visited Sep 25, 2020); UN Mediator for Palestine, Progress Report of the United Nations Mediator on Palestine, 3rd sess., supp. 11, UN Doc. A/648 (Sep. 16, 1948), available at: <https://unispal.un.org/UNISPAL.NSF/0/AB14D4AAFC4E1BB985256204004F55FA> (last visited Sep 25, 2020).

¹¹⁶ Assembly resolution 212 (III), Assistance to Palestine Refugees, UN Doc. A/RES/212 (III), (Nov. 19, 1948), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/EDC284B4A5508FD7852560E500670213>.

relief functions.¹¹⁷ Further, the UN General Assembly accepted various recommendations submitted by Count Bernadotte, in his last progress report¹¹⁸ concerning displaced Palestinians, in its resolution 194 of 11 December 1948, including establishing the UN Conciliation Commission for Palestine (UNCCP).¹¹⁹

The UNCCP took over the main political functions of the Mediator, particularly “to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them.”¹²⁰ As for the question of the displaced Palestinians; as one of the most pressing outstanding issues along with the settlement of territorial disputes, demilitarization and access to Jerusalem and the protection of Holy places, the UN General Assembly reiterated, in the same resolution, that “the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.”¹²¹ Paragraph 11 also instructed the UNCCP “to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.”¹²²

Among the efforts of the UNCCP to advance the implementation of paragraph 11 of resolution 194, the Lausanne Conference of April 1949 was held, where it appeared impossible to reconcile the positions of Arab States and Israel regarding the repatriation or

¹¹⁷ *Supra* note 16, Takkenberg.

¹¹⁸ *Supra* note 115, UN Doc. A/648.

¹¹⁹ Assembly resolution 194 (III), Progress Report of the United Nations Mediator, UN Doc. A/RES/194 (III), (Dec. 11, 1948), <https://unispal.un.org/UNISPAL.NSF/0/C758572B78D1CD0085256BCF0077E51A> (last visited Sep 25, 2020).

¹²⁰ *Id.*, UN Doc. A/RES/194 (III).

¹²¹ *Id.*, UN Doc. A/RES/194 (III).

¹²² *Id.*, UN Doc. A/RES/194 (III).

compensation of the displaced without agreeing on the political contours first.¹²³ As the chances for repatriation seemed to wind down, the UN Officials started to consider settling the refugees in Arab countries.¹²⁴ To study the economic feasibility of this alternative solution, the UNCCP established an Economic Survey Mission (ESM) on 23 August 1949, charged with the task of examining the economic situation in countries affected by hostilities in Palestine and with making recommendations to the UNCCP for an integrated programme which would facilitate the repatriation, resettlement and economic and social rehabilitation of the displaced Palestinians in a manner conducive to the maintenance of peace and stability in the area.¹²⁵

In its interim report, the ESM acknowledged that “the repatriation of Arab refugees requires political decisions” and that “resettlement of the refugees outside of Palestine is a political issue poised against the issue of repatriation, compensation of the refugees and a final territorial settlement”, and hence “that the only immediate constructive step in sight is to give the refugees an opportunity to work where they now are.”¹²⁶ In line with this, the ESM recommended the establishment of an agency under the auspices of the UN to direct a “programme of public works, calculated to improve the productivity of the area” and to take over the relief effort.¹²⁷ The UN General Assembly incorporated the ESM recommendations in its resolution 302 (IV) of 8 December 1949¹²⁸ which established the United Nations Relief and Works Agency for Palestine Refugees in the Near East

¹²³ The position of the Arab States held that repatriation, resettlement and compensation should be implemented in advance to any peace negotiations while the Israeli side rejected to accept as a principle the injunction contained in paragraph 11 of UNGA resolution 194 not to negotiate on any point separately and outside the framework of a general political settlement. See UNCCP, Historical Survey of Efforts of the United Nations Conciliation Commission for Palestine to Secure the Implementation of Paragraph 11 of General Assembly Resolution 194 (III), UN Doc. A/AC.25/W/81/Rev.2 (2 October 1961), available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/3E61557F8DE6781A052565910073E819>

¹²⁴ *Supra* note 16, Takkenberg.

¹²⁵ UNCCP, United Nations Conciliation Commission for Palestine Summary Record of the Ninetieth Meeting, UN Doc. A/AC.25/SR.90 (Aug. 23, 1949), available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/e74d6857e97bc5cd85256c1e006bbb0c?OpenDocument>

¹²⁶ *Supra* note 67, Albanese & Takkenberg.

¹²⁷ *Supra* note 16, Takkenberg.

¹²⁸ *Id.*, Takkenberg.

(UNRWA), in recognition of UNGA resolution 194's provision of continued assistance to the relief of the displaced Palestinians, and with the mandate to "carry out in collaboration with local governments the direct relief and works programmes" as recommended by the ESM.¹²⁹ According to paragraph 6 of the resolution, UNRWA is to carry out its mandate of providing direct relief and work programmes temporarily, unless otherwise extended by the UN General Assembly.¹³⁰

As such, the United Nation's understanding of the Palestinian displacement was first and foremost as a question of a political and humanitarian nature rather than as a refugee question. Hence, as initially manifested in the functions of the Mediator, the UN's response was political and humanitarian in nature. The aspect of finding a political solution that resolves the displacement problem was assigned to the UNCCP, while humanitarian and relief work vis-à-vis the displaced Palestinians was eventually assigned to UNRWA. These two legs of the UN's response to the question of Palestine, informed and influenced by the international context in which the international refugee regime was established as the next section demonstrates, form the basis of the distinctive framework governing displaced Palestinians.

E– A Distinctive Legal Framework for Palestinian Displacement

Since its creation, the mass displacement of Palestinians was recognized as a political and humanitarian problem demanding special attention, rather than a refugee problem. While the Palestinian displacement problem is unique in the special responsibility of the United Nations for creating the refugee flow in the first place, elements of the problem are not exclusive to Palestinian refugees.¹³¹ Nevertheless, owing to understanding their displacement in humanitarian and political terms rather than as a refugee question, a

¹²⁹ Assembly resolution 302 (IV), Assistance to Palestine Refugees, UN Doc. A/RES/302 (IV), (Dec. 8 1949), [https://undocs.org/en/A/RES/302\(IV\)](https://undocs.org/en/A/RES/302(IV)) (last visited Sep 26, 2020).

¹³⁰ *Id.*, UN Doc. A/RES/302 (IV).

¹³¹ *Supra* note 4, Akram & Rempel.

distinctive framework devoted to dealing with them was created separate from the international refugee regime which was in the making at the time. This distinctive regime, with its own specific institutional arrangements, was set out in a context that informed and influenced its creation and set up. This section sets out the foundation of Palestinian refugees' status in international law. It explores why and how a special regime was conceived for them building on the general international regime created for the protection of refugees from the interwar period until the drafting and adoption of the Statute of the Office of the UN High Commissioner for Refugees (UNHCR) of 1950 and the Convention Relating to the Status of Refugees of 1951 (hereinafter '1951 Convention').

At the time the Palestinians were displaced, the international refugee regime, as we know it today, was in the making. During the drafting process of the 1951 Convention, the issue of Palestinian displacement was discussed when the Third Committee of the General Assembly, in December 1950, considered the report of the *Ad Hoc* Committee.¹³² In the context of advocating for a narrow definition of the term 'refugees' in the UNHCR Statute; restricted to persons who had become refugees as a result of events in Europe before 1 January 1951, the French representative argued that the General Assembly had extended its protection to the displaced Palestinians by setting up UNCCP and UNRWA.¹³³ In practice, this meant that while the UNCCP continued to work towards the long-term goals of repatriation and compensation, UNRWA's mandate was constructed to complement that of UNCCP by handling the economic welfare and development of the displaced, rather than pursuing protection.¹³⁴

Stemming from an understanding that Palestinian displacement was "the direct result of a decision taken by the United Nations itself, with full knowledge of the consequences" Arab States, on their part, advocated that "the mandate of the High Commissioner's Office shall

¹³² *Supra* note 16, Takkenberg.

¹³³ *Id.*, Takkenberg.

¹³⁴ This is confirmed by UNCCP working documents such as the Memorandum on the Relations between UNRWA and UNCCP Working Paper, UN Doc. A/AC.25/W/42 (March 3, 1950), available at: <https://www.un.org/unispal/document/auto-insert-211905/>

not extend to categories of refugees at present placed under the competence of other organs or agencies of the United Nations.”¹³⁵ Arab States understood the Palestinian displacement as “ a direct responsibility on the part of the United Nations and could not be placed in the general category of refugees without betrayal of that responsibility”.¹³⁶

In effect, both Arab and Western States were of the view that Palestinian displacement does not qualify as a refugee problem for the purpose of the 1951 Convention and UNHCR Statute. Arab States considered that including displaced Palestinians in a general definition of refugees would leave them submerged and “relegated into a position of minor importance,” insisting that displaced Palestinians should be “aided pending their repatriation”. While the creation of UNRWA, with its mandate to provide assistance as a form of protection, may have formed the moment in which the question of the Palestinian displacement was starting to be captured as a refugee issue, UNRWA’s mandate lacked an explicit protection.¹³⁷ Repatriation was regarded as “the only real solution of their problem” which would be renounced if they were included into a general refugee definition.¹³⁸ In this sense, humanitarian assistance and the promotion of repatriation as the only just solution for the Palestine question formed the staple of protection offered to displaced Palestinians.

In light of this context, the humanitarian and political basis of the UN’s response to the Palestinians displacement qualified as a distinctive framework excluded from the international refugee regime. Yet, the international experience of dealing with refugee problems from the interwar period heavily shaped and informed the set-up and approach towards dealing with the Palestinian displacement. This was particularly manifested in both the group definition of Palestinians for the purpose of Article 1D of the 1951 convention, as well as in the *ad hoc* response to Palestinian displacement. While the typical approach

¹³⁵ *Supra* note 16, Takkenberg.

¹³⁶ UN General Assembly, Fifth Session Official Records, 3rd Committee, 328 Meeting (Nov. 27, 1959), available at: <https://digitallibrary.un.org/record/819334?ln=en> (last visited Sep 27, 2020).

¹³⁷ *Supra* note 129, UN Doc. A/RES/302 (IV).

¹³⁸ *Id.*, UNGA.

addressing refugee crises in the interwar years was through *ad hoc* arrangements implemented under the authority of *ad hoc* institutions,¹³⁹ such *ad hoc* arrangements were not exclusive to refugee problems. Similar *ad hoc* arrangements were also created to deal with mass outflows created following the Second World War with regards to non-European refugees, such as those made to deal with the mass outflows of the India partition of 1947 and those of the Korean war of 1950.¹⁴⁰ To this end, the creation of both UNCCP and UNRWA mirrored these *ad hoc* arrangements.¹⁴¹ For example, UNRWA was created as a three-year temporary agency to provide relief and assistance to displaced Palestinians pending a final settlement to all questions, including a durable solution.¹⁴² UNRWA's mandate is repeatedly renewed every three years by the UNGA.¹⁴³ As recently as 13 December 2019,¹⁴⁴ the UNGA extended UNRWA's mandate until 30 June 2023.¹⁴⁵

While Palestinians were not the only group to face displacement, they were the only non-European group to be assigned a distinctive UN framework with the intervention of the UN. This distinct regime can be seen as both a manifestation of a political and humanitarian response of the UN to the displacement of Palestinians in connection with the Partition Plan and the ensuing creation of the state of Israel, as well as a failure to acknowledge Palestinian displacement as a refugee issue, as echoed by the French representative in the drafting process of the Convention.¹⁴⁶ However, as the political conflict had been a protracted one, the displacement of Palestinians has lingered and so has the staple of protection offered to them. It was this reality that had triggered the Arab League, as will be elaborated in the next chapter, to create a regional protection framework for Palestinians through the adoption of the 1965 Casablanca Protocol on the Treatment of Palestinians.

¹³⁹ *Supra* note 4, Akram & Rempel; *Supra* note 67, Albanese & Takkenberg.

¹⁴⁰ *Id.*, Albanese & Takkenberg

¹⁴¹ *Supra* note 4, Akram & Rempel; *Id.*, Albanese & Takkenberg.

¹⁴² *Supra* note 129, UN Doc. A/RES/302 (IV).

¹⁴³ UNRWA, United Nations Relief and Works Agency for Palestine Refugees, Who We Are UNRWA, available at: <https://www.unrwa.org/who-we-are> (last visited Apr 25, 2020).

¹⁴⁴ *Supra* note 13, UNRWA.

¹⁴⁵ *Supra* note 143, UNRWA.

¹⁴⁶ *Supra* note 16, Takkenberg.

F– Conclusion

Palestinian displacement is a combined effect of the UN Partition Plan of 1947 and the creation of the State of Israel in 1948. At the time, the defining feature of refugee problems was the lack of diplomatic protections of certain categories and groups of people of identified ethnic or territorial origin. Providing diplomatic protection by states was thus at the core of the refugee problem. The conception of who is a refugee was thus constructed by different *ad hoc* arrangements intended for the purpose of clarifying the legal position of these refugee groups rather than offering a normative framework for determining refugee status.

The UN response to the displacement of Palestinians, reflected in the *ad hoc* UN agencies mandated to protect and assist displaced Palestinians; namely UNCCP and UNRWA, makes clear that Palestinian displacement was not conceived as a refugee question deserving of international protection. Instead, Palestinian displacement, as made clear through the UN deliberations, was understood as part and parcel of a political predicament that the UNCCP was charged to resolve in its peace-making efforts, rather than a refugee question. Resolving the question of the displaced Palestinians was only seen possible once the UNCCP succeeds in resolving the political problem. Accordingly, UNRWA was charged with providing relief work and assistance pending on when repatriation, or a political solution, is made possible. Humanitarian assistance and the promotion of repatriation were thus the staple of protection offered to displaced Palestinians. The legacy of the interwar approach to resolving refugee crises influenced both the temporality of their regime and the solution elaborated to their question.

In effect, the mass displacement of Palestinians was seen as different from the mass displacements of the First and Second World Wars, and thus different from the conception of a refugee problem deserving of diplomatic protection pre-1951 Convention. Moreover, their displacement was also understood as different from the post-1951 conception of a

refugee that can claim international protection in an individualized approach on the basis of the different grounds of persecution enumerated in the 1951 Convention.

III– The Relevance of the Temporary Distinctive Framework Governing Displaced Palestinians: Seven Decades Later

The distinctive *ad hoc* regime that was devised for the Palestinians was intended to be temporary, pending a final settlement of the conflict in a manner that ensures their repatriation. While UNCCP was expected to mediate towards a final settlement to the conflict, UNRWA was assigned to provide relief and assistance until UNCCP's efforts would bear fruits. These two institutional bodies constitute the legs of the *ad hoc* regime that was made distinct from the initially temporary international refugee regime. While the latter evolved to adapt to the changing needs of refugees globally, the distinctive *ad hoc* regime remains in existence seven decades later, in a completely different context than that in which it was conceived, rendering it semi-permanent despite its temporary nature. This chapter will examine the distinctive temporary regime seven decades after its inception and probe its relevance from the perspective of the evolved international refugee regime. First, the chapter will examine the implications of understanding Palestinian displacement on the premise that it is, first and foremost, a political question distinct from the refugee question in light of the changing political context from which it emerged. Second, the relevance and sustainability of the regime will be assessed in light of the protracted nature of Palestinian displacement. It will be argued that understanding Palestinian displacement as an expression of a political problem has contributed to the precarity of their protracted situation and that the tensions and anxieties that their distinctive regime is witnessing is a signifier of its inability to speak to their changing needs.

A– Palestinian Displacement as a Political Question: Seven Decades Later

Since its conception, the distinctive regime governing displaced Palestinians was premised on an understanding of their displacement as a humanitarian question subsumed in a wider political conflict over territorial arrangements and ethnic minorities, rather than as a refugee question. Not only did this understanding of their displacement inform the

institutional set up of the regime that governs them, as manifested in its two legs, but also in the distinctiveness of their regime from the international refugee one.

This understanding of Palestinian displacement as different from a refugee question was reflected and affirmed in the initial response of the UN as well as with the nuanced approach of Arab States. As established in the first chapter, against the backdrop of its Partition Plan, the UN captured Palestinian displacement as a political question and one of the most pressing outstanding issues that needs to be resolved. This was reflected in the institutional set up of the framework that governs them. On their part, Arab States, despite the significant nuances in their approach towards repatriation,¹⁴⁷ viewed the displacement of Palestinians as a consequence of the UN Partition Plan and the denial of Arab national right to self-determination in Palestine, rendering it a political question that is the direct responsibility the UN.¹⁴⁸ Arab States further held that addressing displaced Palestinians as a refugee issue would lead to a relegation and marginalization of the question of Palestine.¹⁴⁹ It is this understanding of Palestinian displacement as a political issue, rather than a refugee question, that rendered their regime distinct from the international refugee regime.¹⁵⁰

Capturing Palestinian displacement as a political issue was both informed and reflected by the assumption that a political long-term solution of the Palestine question, and thus the repatriation of the displaced, was going to be a matter of time. This assumption seemed authoritatively confirmed by the language of paragraph 11 of Resolution 194(III), referenced in Resolution 302,¹⁵¹ which stated that “the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date.”¹⁵² While the intention of the drafters was that the displaced “should be

¹⁴⁷ Rashid I. Khalidi, *Observations on the Right of Return*, 21 JOURNAL OF PALESTINE STUDIES 29–40 (1992), <https://www.jstor.org/stable/2537217> (last visited Feb 19, 2020).

¹⁴⁸ *Supra* note 136, UNGA.

¹⁴⁹ *Id.*, UNGA.

¹⁵⁰ See chapter II.

¹⁵¹ *Supra* note 129, UN Doc. A/RES/302 (IV).

¹⁵² *Supra* note 119, UN Doc. A/RES/194 (III).

allowed to return when stable conditions had been established” rather than be “conditional upon the establishment of a formal peace,”¹⁵³ it appeared impossible to reconcile the positions of Arab States and Israel regarding the repatriation or compensation of the displaced, in accordance with Resolution 194, without agreeing on the political contours first.¹⁵⁴ This proved to have clear implications on the status of the displaced Palestinians in Arab host States; complemented by the resonance of repatriation, or the notion of return, throughout the Palestinian polity and its quest for national self-determination.

Since 1948, the Palestinians have viewed themselves as the victims of politicide as they were prevented by Britain from obtaining the same independence eventually attained by the peoples of all neighboring Arab countries.¹⁵⁵ In this sense, Palestinians understand their displacement in national and humanitarian terms as an injustice and a wrongdoing to them that can only be righted through their repatriation, or return to their homeland.¹⁵⁶ To this end, Khalidi explains that “only by understanding the centrality of the catastrophe of politicide and expulsion that befell the Palestinian people...is it possible to understand the Palestinians’ sense of the right of return”.¹⁵⁷ Viewing displacement as part of a process of political erasure that befell Palestinians, return then became a crucial element in the Palestinian political rhetoric since 1948, highlighting a tension, similar to that expressed earlier by Arab States,¹⁵⁸ between the idea of “return” and describing displaced Palestinians as mere “refugees.”¹⁵⁹ This tension can be seen in a resolution adopted by the first Palestine National Council (PNC) in 1964 stating that the term “refugees” to describe displaced Palestinians would be replaced by the word “returners,” as well as by the resistance to UNRWA’s earliest efforts to provide relief and rehabilitation of displaced Palestinians and

¹⁵³ UNCCP, Analysis of Paragraph 11 of the General Assembly’s Resolution of 11 December 1948, UN DOC. A/AC.25/W/45 (May 15, 1950), available at: <https://unispal.un.org/UNISPAL.NSF/0/94F1C22721945319852573CB00541447> (last visited on 2 October 2020).

¹⁵⁴ *Supra* note 123, UN Doc. A/AC.25/W/81/Rev.2.

¹⁵⁵ *Supra* note 147, Khalidi.

¹⁵⁶ *Id.*, Khalidi

¹⁵⁷ *Id.*, Khalidi

¹⁵⁸ *Supra* note 136, UNGA.

¹⁵⁹ *Supra* note 147, Khalidi.

the fierce opposition of Palestinian camp populations in the early 1950s to resettlement efforts.¹⁶⁰

The fear that the refugee label “would render them an anonymous mass of exiles rather than recognize their national identity and desire to return,”¹⁶¹ informed the Palestinian emphasis, particularly in the 1950s and 1960s, on return as a natural consequence of the achievement of the main objective of the total liberation of Palestine¹⁶² and thus a rejection to being labelled or treated as refugees.¹⁶³ The Palestinian emphasis on the right to collective national self-determination rather than the question of Palestinian refugees remained in place after the second wave of Palestinian displacement that resulted from the 1967 war. This was manifested in the opposition of the Palestine Liberation Organization (PLO) to UN Security Council resolution 242 of 1967, which affirmed the necessity for “achieving a just settlement of the refugee problem”,¹⁶⁴ on the basis that the resolution “effaces the national rights of our people and deals with their cause as a refugee problem,” by implying that the Palestinians were a refugee problem and not a national one.¹⁶⁵ Further, as the thrust of refugee law in the aftermath of World War II has not been so much on repatriation but on resettlement, Palestinians feared its application would undermine their desire to return but also because historically, the emphasis on the Palestinian situation was substantially different.¹⁶⁶

Until 1968, the idea of return was generally subsumed under the idea of the total liberation

¹⁶⁰ *Id.*, Khalidi

¹⁶¹ Michael Kagan, *The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East*, 22 J REFUG STUD 417–438 (2009), <https://academic.oup.com/jrs/article/22/4/417/1579199> (last visited Feb 19, 2020).

¹⁶² *Supra* note 147, Khalidi.

¹⁶³ *Supra* note 161, Kagan.

¹⁶⁴ UNSC, Resolution 242 (1967), UN Doc. S/RES/242 (Nov. 22, 1967), available at: <https://www.un.org/unispal/document/auto-insert-184858/> (last visited Oct. 3, 2020).

¹⁶⁵ *Supra* note 147, Khalidi.

¹⁶⁶ *Supra* note 161, Kagan; Elia Zureik, *Palestinian Refugees and Peace*, 24 JOURNAL OF PALESTINE STUDIES 5–17 (1994), <https://www.jstor.org/stable/2537978> (last visited Oct 6, 2020).

of Palestine, including the territories occupied in 1967,¹⁶⁷ the latter being an expression of achieving national self-determination. While central, the right of return did not seem particularly important or pressing on its own as it was subsumed in an emphasis on the collective right to self-determination. In this view, both the international community and Israel sought to label Palestinians as refugees so as to substitute humanitarian aid for justice; a view that was fed by the UN's tendency between the 1950s until the 1967 war to put more emphasis on funding UNRWA than on addressing the core issues of Palestinian displacement,¹⁶⁸ particularly after the demise of the UNCCP which began in 1950.¹⁶⁹ Accordingly, the importance attached to the idea of return in the Palestinian political discourse in the late 1960s meant, by implication, that the return of displaced Palestinians is a natural consequence of the main objective of the total liberation of Palestine,¹⁷⁰ and thus the actualization of the collective national right of self-determination.

Beginning in 1974, however, the PLO abandoned an exclusive claim to the entirety of Palestine,¹⁷¹ hence moving towards allowing a territorial compromise; while insisting that the right of return was “at the forefront” of the Palestinian people's rights.¹⁷² According to Khalidi, “it can be surmised that by moving... towards the idea of a Palestinian state alongside Israel, the PLO was implicitly giving up its claims to the areas seized in 1948, and the stress on the right of return was an attempt to obtain a *quid pro quo*.”¹⁷³ The most

¹⁶⁷ In this era there was little thought among Palestinians of compromise or diplomatic solutions as they envisaged a return to the status quo antebellum via a dissolution of Israel and a recreation of Arab Palestine. Accordingly, the assumption was that when Palestine was liberated, the Palestinians would return to it. For more see *Supra* note 147, Khalidi.

¹⁶⁸ *Supra* note 161, Kagan.

¹⁶⁹ *Supra* note 4, Akram & Rempel.

¹⁷⁰ *Supra* note 147, Khalidi.

¹⁷¹ In 1974, the PLO adopted the ten-point Provisional Political Program which mentioned the idea of establishing an independent national authority of the people on any piece of Palestinian land which is liberated, thus advocating for the first time the idea of establishing a Palestinian state in only part of Palestine. This represented the first step by an authoritative Palestinian body to abandon an exclusive claim to the entirety of Palestine, thereby laying the basis for a compromise settlement. The resolutions of the 19th session of the PNC of November 1988 reflect the most explicit culmination of this position favoring a negotiated settlement resulting in a Palestinian state alongside Israel. For more see *Id.* Khalidi.

¹⁷² The PNC declared in the ten-point Provisional Political Program adopted by its 12th session that that the right of return is at the forefront of the Palestinian people's rights. For more see *Id.* Khalidi.

¹⁷³ *Id.* Khalidi, (emphasis added).

explicit culmination of this Palestinian trend favoring a negotiated settlement resulting in a two-state solution and the adoption of internationally recognized principles for a peaceful settlement was manifested in the 1988 Palestinian Declaration of Independence in Algiers.¹⁷⁴ The Declaration explicitly grounded the Palestinian right to an independent state in resolution 181 (the Partition Plan),¹⁷⁵ and grounded return, for the first time, as a right sanctioned by UN resolutions while framing it in collective terms as part of a list of national rights.¹⁷⁶ This linkage between the right of return and specific UN resolutions was manifested in other authoritative statements by PLO leaders, such as those made by PLO Chairman Yasser Arafat, at different occasions describing the UN General assembly resolution 194 as calling for “repatriation of the Palestinian refugees or the payment of compensation for the property of those choosing not to return”.¹⁷⁷ As Khalidi argues, by grounding the Palestinian right of return in international legitimacy, “the PLO has thus come full circle, to acceptance of the UN resolution that remains the basis of the consensus of the international community, including the United States, as to the framework for a settlement of the Palestinian problem.”¹⁷⁸

Accepting international legitimacy as the framework for settlement includes not only an acceptance of resolution 194 pertaining to the question of the displaced, but also a *de facto* acceptance of the existence of Israel. In light of a lack of a unified Palestinian conception of what the right of return means in practical terms in a context of a negotiated settlement, the destination of those exercising their right to return is left ambiguous.¹⁷⁹ While the asserted right of return has been interpreted by some as return to original pre-1948 homes and places of origin, others interpret it as a return of some Palestinians to a limited part of historic Palestine.¹⁸⁰ To this end, Khalidi argues that by accepting resolution 194, the PLO

¹⁷⁴ *Id.* Khalidi.

¹⁷⁵ *Id.* Khalidi.

¹⁷⁶ *Supra* note 161, Kagan.

¹⁷⁷ *Supra* note 147, Khalidi.

¹⁷⁸ *Id.* Khalidi.

¹⁷⁹ *Id.* Khalidi.

¹⁸⁰ *Supra* note 161, Kagan.

has also accepted “crucial limitations on a putative absolute right of return”¹⁸¹ as it dropped “the politically impossible demand that all Palestinians made refugees in 1948 be allowed to return” without dropping the principle that such people have certain rights in the context of a negotiated settlement”.¹⁸²

The tension over the destination of Palestinian return was more clearly manifested in the context of the peace process that started in the early 1990s. The Declaration of Principles between the PLO and Israel excluded reference to resolution 194, while instead premising the agreements between the two sides towards “a permanent settlement” on UN Security Council resolutions 242 and 338.¹⁸³ While reference to the right of return was ritually made by Palestinian officials in all internal fora, this right had no concrete expression in any of the agreements signed between Israel and the PLO, thus threatening the rights of Palestinian refugees as provided in resolution 194.¹⁸⁴

As far as the question of Palestinian displacement is concerned, resolutions 242 and 338 only call for “achieving a just settlement of the refugee problem,”¹⁸⁵ as opposed to resolution 194, which calls for repatriation and compensation.¹⁸⁶ In the context of the peace talks between the two sides on the premise of these resolutions, the seemingly more plausible chance of establishing a Palestinian state in the West Bank and the Gaza Strip brought to light a difference in view on the destination of Palestinian return, but also on solutions to the problem of the displaced Palestinians other than repatriation.¹⁸⁷

¹⁸¹ *Supra* note 147, Khalidi.

¹⁸² *Id.* Khalidi.

¹⁸³ Declaration of Principles on Interim Self-Government Arrangements (September 1993).

¹⁸⁴ Nur Masalha, *The PLO, Resolution 194 and the “right of return”*: evolving Palestinian attitudes towards the refugee question from the 1948 nakba to the Camp David summit of July 2000, 7 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW ONLINE 127–155 (2000), http://brill.com/view/journals/yimo/7/1/article-p127_.xml (last visited Oct 8, 2020).

¹⁸⁵ *Supra* note 164, UN Doc. S/RES/242.

¹⁸⁶ *Supra* note 119, UN Doc. A/RES/194 (III).

¹⁸⁷ John Quigley, *Security Council Resolution 242 and the Right of Repatriation*, 37 JOURNAL OF PALESTINE STUDIES 49–61 (2007), <https://www.jstor.org/stable/10.1525/jps.2007.37.1.49> (last visited Oct 7, 2020).

After many rounds of talks between the PLO and Israel in the peace process, it became clear that the fate of displaced Palestinians was both contentious¹⁸⁸ and central to reaching an agreement.¹⁸⁹ While the question of the displaced Palestinians was relegated among the “permanent status issues,”¹⁹⁰ the difference of view over their question assumed particular significance at the time of the “final status” talks between the two sides in 1999 and 2000.¹⁹¹ Not surprisingly, the PLO and Israel disagreed on what is required by a “just settlement” as called for by resolution 242.¹⁹² While the PLO understood it to require repatriation to Israel, the latter maintained its longstanding position that the resolution does not impose such an obligation.¹⁹³

Since 1948, Israel made it clear that it was not disposed to accept the repatriation of displaced Palestinians without an overall settlement.¹⁹⁴ Despite the fact that the peace agreements that Israel concluded with Jordan and Egypt eliminated the risk of military attacks by them, Israel nevertheless maintained its position on refusing to repatriate displaced Palestinians within the context of its negotiations with the PLO on the basis that it needed to preserve its Jewish identity.¹⁹⁵ To justify its refusal to repatriate displaced Palestinians, Israel further proposed that the Palestinians “exchange the individual right of

¹⁸⁸ *Id.*, Quigley.

¹⁸⁹ Elia Zureik, *The Palestinian Refugee Problem: Conflicting Interpretations*, 4 GLOBAL DIALOGUE 1–12 (2002), <http://search.ebscohost.com/login.aspx?direct=true&db=poh&AN=59175606&site=ehost-live> (last visited Apr 18, 2020).

¹⁹⁰ Joseph Massad, *Return or Permanent Exile?*, IN PALESTINIAN REFUGEES: THE RIGHT OF RETURN (Naser Aruri, 2001), available at: <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3386514> (last visited Apr 15, 2020).

¹⁹⁰ *Id.*, Massad.

¹⁹¹ *Supra* note 187, Quigley.

¹⁹² *Id.*, Quigley.

¹⁹³ *Id.*, Quigley.

¹⁹⁴ *Id.*, Quigley.

¹⁹⁵ *Id.*, Quigley; Menachem Klein, *The Palestinian Refugees of 1948: Models of Allowed and Denied Return*, in PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES (Michael Dumper 2006); John Quigley, *International Law and the Palestine Refugees*, 28 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 405 (2005), https://repository.uchastings.edu/hastings_international_comparative_law_review/vol28/iss3/6; Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent*, 19 MICH. J. INT’L L. 1091–1140 (1997), <https://heinonline.org/HOL/P?h=hein.journals/mjil19&i=1105> (last visited Apr 18, 2020).

return to Israel for a collective return embodied in the establishment of a state that could absorb those refugees who wished to relocate there”.¹⁹⁶ However, neither of these arguments address the legal entitlements that displaced Palestinian’s have to their home areas.¹⁹⁷ In that context, the existence of another state where persons of the displaced population group predominate does not negate return as a right.¹⁹⁸

Accordingly, Israel took the phrase “just settlement” of resolution 242 to imply a territorial compromise accompanied by a variety of solutions that could be considered “just,” but not repatriation.¹⁹⁹ The background of the drafting history of that phrase and the history of its adoption, however, suggest that the intention of the resolution’s drafters was repatriation as called for in resolution 194.²⁰⁰ As cited by Quigley, in the debates leading to the adoption of resolution 242, there was no indication of any dispute as to the meaning of “just” with regard to a settlement of the problem of displaced Palestinians; that matter being clear from prior years as refugees were entitled to return at their option as indicated by the General Assembly in resolution 194.²⁰¹ Accordingly, no member of the Security Council suggested that “just settlement” did not require Israel to offer repatriation as it had been clear in prior years that displaced Palestinian’s were entitled to return at their choice.

In this context, the Israeli approach towards displaced Palestinians, manifested in repatriation to a future Palestinian state or resettlement in host states, fulfills neither the displaced Palestinian’s collective right of return linked to self-determination, nor their individual right of return. While the shift in the Palestinian political rhetoric from a focus on a collective approach to return linked to national self-determination to an individual

¹⁹⁶ *Id.*, Klein.

¹⁹⁷ *Supra* note 187, Quigley. For more on the basis of individual right of return in international law read: John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT’L. L. J. 171–230 (1998), <https://heinonline.org/HOL/P?h=hein.journals/hilj39&i=177> (last visited Apr 15, 2020).

¹⁹⁸ *Id.*, Quigley.

¹⁹⁹ *Supra* note 187, Quigley; *Supra* note 189, Zureik.

²⁰⁰ *Id.*, Quigley.

²⁰¹ *Id.*, Quigley.

right of return seemed better suited in the context of a negotiated settlement,²⁰² it helped Palestinian official negotiators explain that while a Palestinian state could provide Palestinians with a homeland and set an important milestone for the enjoyment of their national sense of identity, its creation however would not by itself realize all the individual rights of the refugees, including of return, restitution and, where possible, compensation.²⁰³ To this end, the individualist Palestinian conception of the right of return or repatriation has allowed Palestinian negotiators to explain why return to a new state of Palestine in the West Bank and Gaza Strip, as an expression of exercising self-determination, would not be an adequate solution to the refugee problem and would not substitute for repatriation to the territory that is now Israel, as each individual refugee has to have the right to decide.²⁰⁴ After the start of the second *intifada* in 2000, no further negotiations on the question of displaced Palestinians were held, thus leaving their future ambiguous and their plight hinging on a political settlement or on an “international will to achieve a result based on what the international community regards as required”.²⁰⁵

The different approaches to the question of the displaced Palestinians have brought to light a perceived tension over the scope of repatriation and whether it is a collective or an individual right. The Israeli approach to base return in the right to self-determination within the scope of a political negotiations has addressed the collective right to self-determination and the individual right of return as being mutually exclusive. According to this view, within the scope of a negotiated settlement, displaced Palestinians are denied an individual right of return, supposedly, in favor of the separate collective one whose implementation can be viewed as a helpful precondition for the realization of their national right to self-determination in a future Palestinian state.²⁰⁶ It thus fails to acknowledge that while the individual and collective rights of return can be complementary, they are not mutually

²⁰² *Supra* note 161, Kagan.

²⁰³ *Supra* note 67, Albanese & Takkenberg.

²⁰⁴ *Supra* note 195, Klein.

²⁰⁵ *Supra* note 187, Quigley.

²⁰⁶ Gail J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, BADIL RESOURCE CENTER FOR PALESTINIAN RESIDENCY AND REFUGEE RIGHTS (2007).

exclusive and thus one cannot negate the other.²⁰⁷

In effect, this continues to render displaced Palestinians as pawns in the negotiations for a final settlement as it continues to overlook their legal entitlement, as individuals, to choose between a right of return or compensation guaranteed under international law²⁰⁸ in addition to a separate collective right of return linked to self-determination. Accordingly, the individual right that displaced Palestinians have, as provided in resolution 194, to choose between repatriation or compensation is denied; pending a political settlement between the two sides despite the fundamental divergence in positions between them, which is seemingly impossible to bridge. Effectively, the exercise of the agency and choice of each and every displaced Palestinian individual remains contingent on a political settlement.

B– The Relevance and Sustainability of the Distinctive Regime: Seven Decades Later

While the international refugee regime initially reflected the general concern for the fate of European refugees in Europe following the Second World War, the expectation that the displacement of Palestinians would only be a temporary question, until a just and durable solution that allows their return is reached, kept Palestinians outside of the international refugee regime. Further, the fear of “relegating” the question of Palestine into a refugee question, particularly in light of the UN’s responsibility for the displacement of Palestinians has further contributed to their exclusion from the international refugee regime.²⁰⁹ The idea of keeping displaced Palestinians out of UNHCR’s mandate and within the scope of UNCCP and UNRWA; the two legs of the distinctive regime assigned for them, can also be understood as a combined effect of maintaining the UN’s full

²⁰⁷ *Supra* note 187, Quigley; *Id.*, Boling; Michael Kagan, *Restitution as a Remedy for Refugee Property Claims in the Israel-Palestinian Conflict*, 19 FLA. J. INT’L L. 421–490 (2007), <https://heinonline.org/HOL/P?h=hein.journals/fjil19&i=427> (last visited Feb 19, 2020); Susan Akram, *Reinterpreting Refugee Rights Under International Law*, IN PALESTINIAN REFUGEES: THE RIGHT OF RETURN (Naser Aruri 2001), available at: <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3386514> (last visited Apr 15, 2020).

²⁰⁸ *Id.*, Quigley.

²⁰⁹ *Supra* note 136, UN General Assembly.

humanitarian and political responsibility over their plight as well as of the need to resolve their displacement question through return,²¹⁰ rather than resettlement, which was promoted to other refugee problems in the period after the Second World War.²¹¹

The distinctive regime, which offered humanitarian assistance and the promotion of a political solution in accordance with resolution 194, thus consisted of “alternative protection” arrangements as opposed to those offered to other refugees.²¹² As opposed to the refugees that the drafters of the 1951 Convention had in mind, displaced Palestinians were admitted to neighboring countries on what was expected to be temporary basis and thus the citizenship of their host countries was not available to them.²¹³ Also, displaced Palestinians were generally willing to return to their place of origin but were unable to do so owing to the various measures that Israel had enacted in the immediate aftermath of their displacement,²¹⁴ as opposed to refugees of the 1951 Convention who had left their country of habitual residence and were unable or unwilling to return due to fear of persecution.²¹⁵

However, despite the expected temporality of their plight, displaced Palestinian remain unable to return as a result of a prolonged political impasse, rendering them in a “long-lasting and intractable state of limbo”.²¹⁶ While the UN’s initial institutional response to Palestinian displacement reflected an understanding of their question as different from a

²¹⁰ See Chapter II; *Supra* note 119, UN Doc. A/RES/194 (III).

²¹¹ B. S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, 23 REFUGEE SURVEY QUARTERLY 55–73 (2004), <http://search.ebscohost.com/login.aspx?direct=true&db=poh&AN=44549948&site=ehost-live> (last visited Oct 9, 2020).

²¹² *Supra* note 56, Goodwin-Gill & Akram.

²¹³ *Supra* note 67, Albanese & Takkenberg.

²¹⁴ *Supra* note 4, Akram & Rempel.

²¹⁵ *Supra* note 67, Albanese & Takkenberg explain that “the context in which Second World War refugees found themselves was different from that of 1948 Palestinian refugees. For most of the former, a new ‘homeland’ had to be found as return to the state of nationality was not possible...For them, admission to, and legal residence and basic rights, in another country had to be secured. As a consequence, the core of the international protection mandate originally conferred on UNHCR revolved primarily around legal protection” offered by the country of asylum.

²¹⁵ *Supra* note 4, Akram & Rempel; *Id.*, Albanese & Takkenberg.

²¹⁶ *Supra* note 3, UN doc. EC/54/ SC/CRP.14.

refugee problem, their prolonged, and often multiple, displacement has further exacerbated their vulnerability and the precarity of their situation. Following the inception of their temporary distinctive regime, displaced Palestinians continued to face unfolding realities, challenges and events which their distinctive regime was not engineered to respond to. This has rendered them more and more conceptualized as a refugee problem, despite the initial conception of their plight as a political and humanitarian issue. The lingering political impasse on which their return stumbles has brought to light different tensions and anxieties pertaining to their legal status, treatment, as well as the relevance and sustainability of their distinctive institutional regime. The following sections will examine some of these tensions.

1. A Crippled Institutional Distinctive Regime

Informed by the legacy of the interwar approach to resolving refugee crises through *ad hoc* arrangements on the basis of nationality, the distinctive institutional regime comprising UNCCP and UNRWA was assigned for displaced Palestinians.²¹⁷ While UNCCP was established with the aim of negotiating a solution between the parties and facilitating the return of the displaced,²¹⁸ UNRWA was devised to temporarily provide relief and work programmes until UNCCP's efforts succeed.²¹⁹ Hence, while the UNCCP continued to work towards the long-term goals of repatriation and compensation, UNRWA's mandate was constructed to complement that of UNCCP by handling the economic welfare and development of the displaced, rather than pursuing protection.²²⁰

With the expectation that the question of Palestinian displacement is a matter of time that would soon be resolved with their repatriation and compensation, their assistance was

²¹⁷ See chapter II, section D.

²¹⁸ *Supra* note 119, UN Doc. A/RES/194 (III); Michael Dumper, *Palestinian Refugees, in* PROTRACTED REFUGEE SITUATIONS: POLITICAL, HUMAN RIGHTS AND SECURITY IMPLICATIONS (Gil Loescher et al., 2008), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3039604> (last visited Oct 9, 2020).

²¹⁹ *Supra* note 129, UN Doc. A/RES/302 (IV).

²²⁰ *Supra* note 134, UN Doc. A/AC.25/W/42.

deemed a temporary measure required until a just and durable solution was found rather than being a need that would continue in perpetuity.²²¹ In light of the expected temporality of their plight, their distinctive regime hence offered an “alternative protection scheme”²²² premised on return and repatriation being the solution for the question of Palestinian displacement, as held in resolution 194.²²³ The staple of the “alternative protection scheme”²²⁴ devised for displaced Palestinians revolved primarily around efforts of UNCCP, rather than on their host countries, in comparison to the 1951 Convention refugees whose international protection revolved around legal protection offered by the country of asylum.²²⁵

However, while the UNCCP intervened to offer protection to displaced Palestinians through, among other things, mediating towards a solution in its early years,²²⁶ in 1952 the General Assembly cut down the UNCCP budget allowing it to operate only from New York due to the difficulty in breaking the status quo and advancing negotiations between the relevant parties.²²⁷ After concentrating its work on compensation until the mid-1960’s, UNCCP was prevented from implementing its mandate since.²²⁸ In 1966, as a result of lack of support of its work due to political impasse²²⁹ and defunding, the UNCCP fell into

²²¹ *Supra* note 119, UN Doc. A/RES/194 (III).

²²² *Supra* note 56, Goodwin-Gill & Akram.

²²³ *Supra* note 67, Albanese & Takkenberg explain that “the context in which Second World War refugees found themselves was different from that of 1948 Palestinian refugees. For most of the former, a new ‘homeland’ had to be found as return to the state of nationality was not possible...For them, admission to, and legal residence and basic rights, in another country had to be secured. As a consequence, the core of the international protection mandate originally conferred on UNHCR revolved primarily around legal protection” offered by the country of asylum.

²²⁴ *Supra* note 56, Goodwin-Gill & Akram.

²²⁵ *Supra* note 67, Albanese & Takkenberg.

²²⁶ *Supra* note 4, Akram & Rempel; *Id.*, Albanese & Takkenberg.

²²⁷ *Id.*, Albanese & Takkenberg; *Id.*, Akram & Rempel.

²²⁸ *Id.*, Albanese & Takkenberg.

²²⁹ UNCCP, 10th Progress Report (From 23 January to 19 November 1951), UN Doc. A/1985 (November 11, 1951), available at: <https://www.un.org/unispal/document/auto-insert-186738/>; and more recently: UNCCP, Seventy-fourth Report of the UNCCP, UN Doc. A/75/305 (Aug. 11, 2020) available at: <https://www.un.org/unispal/document/seventy-fourth-report-of-the-united-nations-conciliation-commission-for-palestine-a-75-305/>

abeyance and its operations were ceased,²³⁰ turning into a mere symbolic presence on paper.

As UNRWA's mandate did not include the pursuit of protection as it was aimed to complement that of UNCCP,²³¹ the demise of UNCCP as the UN agency mandated with providing protection has thus left displaced Palestinians without an effective protection activity.²³² Meanwhile, UNRWA continued to operate as the main UN agency serving displaced Palestinians without a protection mandate.

Outliving its temporary nature, the distinctive regime devised for displaced Palestinians; premised on an alternative protection scheme, has proved to fall short of providing sufficient and effective protection for its target group. This was first reflected in the second wave of Palestinian displacement following the Six-Day War in 1967 and the occupation of the West Bank and the Gaza Strip, as it exposed the limitations of UNRWA's protection mandate.²³³ In the same year the Protocol Relating to the Status of Refugees (1967 Protocol) entered into force and 'universalized' the 1951 Convention,²³⁴ by removing the temporal and geographical limitations,²³⁵ a number of Palestinians, including those already displaced in 1948, approached UNHCR offices for protection.²³⁶

With the failure to find a political solution to the Palestine question and after the demise of UNCCP, humanitarian necessity prompted UNRWA to undertake new functions beyond

²³⁰ Susan Akram, *Myths and Realities of the Palestinian Refugee Problem: Reframing the Right of Return*, in INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE (Akram et. Al., 2011)

<http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=668187> (last visited Apr 20, 2020).

²³¹ *Supra* note 129, UN Doc. A/RES/302 (IV).

²³² *Supra* note 218, Dumper; *Supra* note 4, Akram & Rempel; *Supra* note 67, Albanese & Takkenberg; *Supra* note 2, Erakat.

²³³ *Id.*, Albanese & Takkenberg.

²³⁴ *Supra* note 71, Hathaway.

²³⁵ *Supra* note 98, UNTS 267.

²³⁶ *Supra* note 67, Albanese & Takkenberg.

its initial mandate of providing assistance and relief.²³⁷ This trend of expanding UNRWA's mandate is characterized by being largely reactive as it came in response to different political and humanitarian challenges on the ground.²³⁸ However, despite the evolution and expansion of UNRWA's mandate in response to events in the Middle East, the evolving protection needs of displaced Palestinians and their exacerbated vulnerability further emphasized the deficiency and limitations of their distinctive regime to provide effective protection.²³⁹

Further, as UNRWA was created as a temporary agency until a just and durable solution for Palestine refugees was achieved, the UNRWA mandate was set to expire in one year.²⁴⁰ Seventy years later, its mandate is repeatedly renewed every three years by the UNGA.²⁴¹

²³⁷ For more on the evolution of UNRWA's mandate see: Lance Bartholomeusz, *The Mandate of UNRWA at Sixty*, 28 REFUGEE SURVEY QUARTERLY 452–474 (2009), <https://academic.oup.com/rsq/article/28/2-3/452/1584583> (last visited Oct 13, 2020); Scott Custer, United Nations Relief and Works for Palestine Refugees in the Near East (UNRWA): Protection and Assistance to Palestine Refugees, IN INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE (Susan Akram, et al. ed, 2011); *Id.*, Albanese & Takkenberg; *Supra* note 16, Takkenberg.; CLOSING PROTECTION GAPS: HANDBOOK ON PROTECTION OF PALESTINIAN REFUGEES IN STATES SIGNATORIES TO THE 1951 REFUGEE CONVENTION, (Badil Resource Center for Palestinian Residency & Refugee Rights ed., 2005), available at: <http://www.badil.org/en/publication/handbook-on-protection.html>; *Supra* note 9, Kagan.

²³⁸ For example, following the Israeli invasion in Lebanon in 1982, the UN General Assembly adopted resolution 37/120 of 1982 on 'Protection of Palestine Refugees' urging the Secretary-General in consultation with UNRWA to "undertake effective measures to guarantee the safety and security and the legal and human rights" of displaced Palestinians. Also, immediately following the outbreak of the first *intifada*, the UNSC adopted resolution 605 of 1987 which extended UNRWA's mandate to all Palestinians living under Israeli occupation. Also, following a new escalation of violence in 1990, the UNSC adopted resolution 681 of 1990 which provided UNRWA with an explicit mandate to monitor and observe the situation regarding all Palestinian civilians under Israeli occupation and to report to the Secretary-General and through the latter to UNSC. Also, following the expulsion of Palestinians from Kuwait in the aftermath of the Iraqi invasion of Kuwait and the position of the PLO with Saddam Hussien, UNRWA operated closely with UNHCR to assist the displaced to explore possibilities to return to their former countries of asylum. Similarly, after Ghaddafi ordered the expulsion of Palestinians from Libya in 1995, UNRWA worked jointly with UNHCR to provide assistance to those stranded on the Libyan-Egyptian border. Also, in the second *intifada* in 2000, UNRWA introduced an Operational Support Officers (OSO) programme to facilitate its emergency activities. For more, see *Id.*, Custer; *Id.*, Albanese & Takkenberg; *Id.*, Kagan; *Id.*, Badil; *Id.*, Takkenberg; *Id.*, Bartholomeusz.

²³⁹ The idea of "effective protection" encompasses that refugees and asylum seekers should have access to or at least the prospect of a durable solution. For more see *Id.*, Badil,

²⁴⁰ UNRWA, United Nations Relief and Works Agency for Palestine Refugees, About UNRWA, available at: https://www.unrwa.org/sites/default/files/about_unrwa_two_pager_english_2020.pdf (last visited Nov 19, 2020).

²⁴¹ *Supra* note 143, UNRWA.

While it is the sole UN agency providing for some 5.6 million displaced Palestinians registered with it across its five fields of operation, UNRWA is funded almost entirely by voluntary contributions and financial support.²⁴² Outpaced by the growth in needs,²⁴³ the temporary agency's financial survival depends on the sustainability of funds. For example, following the USA's decision, as the agency's largest donor, to cut its funding in 2018 has left it operating with a large deficit.²⁴⁴ While, until the time of writing, the incoming American Administration is expected to resume its funding to UNRWA, at least partially,²⁴⁵ the latter's reliance on voluntary contributions and financial support subjects it to changing political interests and agendas. In effect, displaced Palestinians are rendered as pawns in political manoeuvres, further exacerbating their vulnerability.

2. Inconsistent Treatment and Status of Displaced Palestinians in Arab States

At the level of Arab States, their original response to Palestinian influx was to admit them as an expression of solidarity with and sympathy towards the displaced.²⁴⁶ However, while admitting displaced Palestinians, neighboring Arab States (with the exception of Jordan) did not make citizenship available to them.²⁴⁷ Arab States at the time expected that the displacement of Palestinians in 1948 would be on temporary basis,²⁴⁸ a position shared by the UN in resolution 194.²⁴⁹ As Palestinian displacement was viewed as the consequence of the UN Partition Plan and the denial of Arab national right to self-determination in Palestine, there has been a long-standing consensus among Arab States that the question of

²⁴² *Supra* note 240, UNRWA.

²⁴³ *Id.* UNRWA.

²⁴⁴ *Supra* note 13, UNRWA.

²⁴⁵ Stephen Farrell al-Mughrabi Nidal, *U.N. refugee agency for Palestinians appeals for money to pay salaries*, REUTERS, November 9, 2020, <https://www.reuters.com/article/israel-palestinians-unrwa-int-idUSKBN27P22W> (last visited Nov 21, 2020).

²⁴⁶ Abbas Shiblak, *Residency Status and Civil Rights of Palestinian Refugees in Arab Countries*, 25 JOURNAL OF PALESTINE STUDIES 36–45 (1996), <https://www.jstor.org/stable/2538257> (last visited Nov 19, 2020).

²⁴⁷ *Supra* note 67, Albanese & Takkenberg; Jalal Al Hussein, *UNRWA and the Refugees: A Difficult but Lasting Marriage*, 40 JOURNAL OF PALESTINE STUDIES 6–26 (2010), <https://www.jstor.org/stable/10.1525/jps.2010.xl.1.006> (last visited Feb 19, 2020).

²⁴⁸ *Supra* note 246, Shiblak.

²⁴⁹ *Supra* note 164, UN Doc. S/RES/242.

Palestinian displacement is the direct responsibility of the UN and that repatriation to their homes and lands is the only solution.²⁵⁰

As a solution to Palestinian displacement that ensures the return of the displaced did not materialize, it became necessary to define the status of displaced Palestinians.²⁵¹ Two main principles, which are not necessarily compatible, seem to have influenced the attitudes of host Arab States in this respect.²⁵² The first was to express solidarity with and sympathy towards displaced Palestinians, while the second, less compatible one, was the emphasis on the preservation of Palestinian identity by maintaining their status as refugees.²⁵³

As an expression of solidarity with and sympathy towards displaced Palestinians, the League of Arab States adopted in 1965 a regional framework for the protection of basic rights – mostly economic and social rights – encapsulated in the Casablanca Protocol on the treatment of Palestinians.²⁵⁴ The Protocol, at least in theory, recognized the economic and social rights of displaced Palestinians.²⁵⁵ These included the right to work on par with citizens,²⁵⁶ and enjoy freedom of movement²⁵⁷ and full residency,²⁵⁸ though not political rights.

The attitude of Arab States towards displaced Palestinians was also influenced by an emphasis to preserve Palestinian identity by maintaining their status as displaced or refugees so as to evade responsibility for their plight.²⁵⁹ Hence, Arab States decided that

²⁵⁰ *Supra* note 136, UNGA.

²⁵¹ *Supra* note 246, Shiblak.

²⁵² *Id.*, Shiblak; *Supra* note 16, Takkenberg.

²⁵³ *Id.*, Shiblak; *Id.*, Takkenberg.

²⁵⁴ League of Arab States, *Protocol on the Treatment of Palestinian Refugees* (“Casablanca Protocol,”) (Sep. 11, 1965) available at: <https://unispal.un.org/UNISPAL.NSF/0/E373EB5C166347AE85256E36006948BA> (last visited Oct 27, 2020) (hereinafter Casablanca Protocol).

²⁵⁵ *Id.*, Casablanca Protocol.

²⁵⁶ *Id.*, art. 1

²⁵⁷ *Id.*, arts. 2,3,4.

²⁵⁸ *Id.*, art. 5.

²⁵⁹ *Supra* note 246, Shiblak.

displaced Palestinians should not be naturalized as this was perceived as undermining their claims under resolution 194.²⁶⁰ Fearing that it would legitimize Israeli gains and the dispossession of the Palestinians, Arab States resisted integration or resettlement.²⁶¹ Neighboring Arab countries most concerned (Jordan, Egypt, Lebanon and Syria) have thus refused to resettle displaced Palestinians on grounds that their assimilation would play into the hands of Israel and would serve as *de facto* normalization of Israel in the region.²⁶²

The protection framework, however, suffers from some limitations. Besides being only binding upon those member states who were willing to accept it, either in full or in reservation,²⁶³ its scope was limited as it excluded political rights,²⁶⁴ as well as the protection of fundamental rights, such as adequate housing, access to public education, property ownership, or social security.²⁶⁵ Further, while displaced Palestinians were given the right to remain in their host states with only temporary status,²⁶⁶ in practice their status is largely determined by the political and security considerations of the governments of host states.²⁶⁷ After all, the political and security considerations were a primary factor in elaborating the Casablanca Framework and the position of displaced Palestinians in Arab host states.²⁶⁸ In effect, this renders their fate and status subject to shifting political conditions and changing circumstance.²⁶⁹ This further crystalized when the League of Arab States adopted resolution 5093 which reinforced that the implementation of the Casablanca

²⁶⁰ *Supra* note 67, Albanese & Takkenberg.

²⁶¹ *Supra* note 246, Shiblak.; *Id.*, Takkenberg and Albanese; MICHAEL DUMPER, THE FUTURE FOR PALESTINIAN REFUGEES: TOWARD EQUITY AND PEACE (2007).

²⁶² *Id.*, Dumper; ROBERT W. MACDONALD, CHAPTER 4. INTERNAL DYNAMICS AND POLICY FORMULATION 73–101 (1965), <http://www.degruyter.com/princetonup/view/book/9781400875283/10.1515/9781400875283-007.xml> (last visited Nov 19, 2020).

²⁶³ *Supra* note 67, Albanese & Takkenberg.

²⁶⁴ *Supra* note 254, Casablanca Protocol.

²⁶⁵ Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L L.J. 1–162 (2004),

<https://heinonline.org/HOL/P?h=hein.journals/builj22&i=8> (last visited Oct 18, 2020).

²⁶⁶ *Supra* note 16, Takkenberg.; *Supra* note 67, Albanese & Takkenberg.

²⁶⁷ *Id.*, Takkenberg.

²⁶⁸ *Supra* note 67, Albanese & Takkenberg.

²⁶⁹ *Supra* note 246, Shiblak; *Supra* note 16, Takkenberg.

Protocol are ought to be “in accordance with the laws and regulations of each State.”²⁷⁰ Allowing Arab States to prioritize their own legislative processes over the Protocol has rendered displaced Palestinians more susceptible to internal political interests and calculations.²⁷¹

The tension and incompatibility between the two principles that influenced Arab attitudes towards displaced Palestinians; namely expressing support by providing a minimum level of social and economic rights while rejecting integration or resettlement, has manifested itself with the inconsistent compliance with the Casablanca Protocol²⁷² amid unfolding political changes. As the legal status of displaced Palestinians differs from one host country to another, the treatment of displaced Palestinians has been inconsistent between different Arab States, but also within the same state throughout time. In light of the general absence of a formal legal status under national law, the legal status of displaced Palestinians is largely determined by and dependent on administrative orders and ministerial decrees, which can easily be reversed in response to shifting political circumstances.²⁷³

The rise of the Palestinian national movement and the perhaps inevitable confrontation with host states have waned the commitment to provide protection to displaced Palestinian. Over time, practical challenges and changes in political conditions and relations with the PLO have weakened the support for the question of displaced Palestinians;²⁷⁴ even among states that were initially fully committed to the Casablanca Protocol, such as Egypt. For example, while not an UNRWA area of operation, as a signatory to the Casablanca

²⁷⁰ League of Arab States, *Implementing the Protocol for the Treatment of Palestinians according to the laws and regulations in force in each country*, (Sep. 12, 1991), available in Arabic at: <http://muqtafi.birzeit.edu/InterDocs/images/246.pdf>.

²⁷¹ *Supra* note 1, Badil.

²⁷² *Supra* note 67, Albanese & Takkenberg; *Supra* note 1, Badil.

²⁷³ *Supra* note 16, Takkenberg.; *Supra* note 237, Badil; *Supra* note 246, Shiblak.

²⁷⁴ Changes in political relations with the PLO in Jordan in the 1970s, in Lebanon and Syria in the 1980s, and the PLO's support of Iraq during the 1991 Gulf war have had far reaching impact on the treatment of displaced Palestinians in these countries, with the latter culminating in the adoption of an official revocation of the Casablanca Protocol. For more see *Supra* note 67, Albanese & Takkenberg; *Supra* note 246, Shiblak.

Protocol, Egypt, under President Gamal Abdel Nasser granted displaced Palestinians almost equal rights to Egyptians Citizens.²⁷⁵ However, the souring political tensions between Egypt's Sadat and the PLO impacted the legal situation of Palestinians which were slowly stripped of their rights, unless they held citizenship.²⁷⁶ Similarly, as both an UNRWA area of operation and a signatory of the Casablanca Protocol, Jordan's policy shifted towards displaced Palestinians following the Black September conflict of 1970 between Jordan and the PLO.²⁷⁷

While these countries have initially committed to provide protection to displaced Palestinians in accordance with the Casablanca Protocol but defaulted to changing political circumstances, others never fully implemented it in the first place. For example, while being both a signatory of the Casablanca Protocol and an UNRWA area of operation, Lebanon is considered the most hostile state to displaced Palestinians.²⁷⁸

While the largest arrival of Palestinians in Lebanon dates to 1948, they are still considered as foreigners under Lebanese law,²⁷⁹ leaving them deprived of any special legal status and from basic rights enjoyed by Lebanese, or other foreigners on Lebanese territories.²⁸⁰ Their precarious legal status has exposed them to legal and institutional discrimination and restrictions embedded in law and practice. Because they are not formally citizens of another state, displaced Palestinians in Lebanon are unable to claim the same rights as other

²⁷⁵ OROUB EL-ABED, UNPROTECTED: PALESTINIANS IN EGYPT SINCE 1948 (2008), <http://ebookcentral.proquest.com/lib/aucegypt/detail.action?docID=3262333> (last visited Mar 21, 2020); *Supra* note 1, Badil; *Supra* note 67, Albanese & Takkenberg.

²⁷⁶ The souring relations between the PLO and Egypt, following Sadat's visit to Jerusalem and the assassination of Egyptian writer, Yousef al-Sibai, culminated with issuing administrative regulations 47 and 48 of 1978 decreeing that all regulations treating Palestinians as nationals were to be annulled. For more see *Supra* note 275, El-Abed.

²⁷⁷ *Supra* note 67, Albanese & Takkenberg; *Id.*, Badil.

²⁷⁸ *Supra* note 261, Dumper.

²⁷⁹ JAD CHAABAN ET AL., *Survey on the Economic Status of Palestine Refugees in Lebanon* (2016), available at:

https://www.unrwa.org/sites/default/files/content/resources/survey_on_the_economic_status_of_palestine_refugees_in_lebanon_2015.pdf.

²⁸⁰ *Id.*, Chaaban et al.

foreigners living and working in Lebanon.²⁸¹ Further, they are denied several important rights such as social security, mobility, both within (in and out of the camps) and outside the country, as well as access to public services, such as housing, education, and health and other rights reserved for Lebanese citizens.²⁸²

In terms of employment, as rights to employment and property are regulated in Lebanon on the basis of reciprocal rights granted to Lebanese in other countries, Palestinians, as non-citizens of any other State, are unable to claim the same rights as other foreigners living and working in Lebanon, including owning property.²⁸³ Also, there are several laws and decisions by the Ministry of Labour restricting employment opportunities for displaced Palestinians as they are barred from practicing thirty-nine professions.²⁸⁴ This is further advanced by syndicate bylaws which require members to be Lebanese or the fulfillment of the principle of reciprocity of treatment.²⁸⁵ Access to justice is also reportedly curtailed as they are vulnerable to arbitrary arrest and detention by state security forces.²⁸⁶ The socioeconomic situation of displaced Palestinians in Lebanon is further exacerbated by the deteriorating conditions in light of the country's weakening situation and the prolonged Syrian crisis.²⁸⁷

The prolonged foreigner status of displaced Palestinians which robs them of many rights in Lebanon stems from the strong rejection by the Lebanese authorities of permanent settlement and naturalization.²⁸⁸ This is often used as justification for the various discriminatory laws and policies against them. However, the Lebanese reluctance to

²⁸¹ UNRWA, Where We Work- Lebanon, available at: <https://www.unrwa.org/where-we-work/lebanon>.

²⁸² *Supra* note 67, Albanese & Takkenberg.

²⁸³ Susan Akram, *The Search for Protection for Stateless Refugees in the Middle East: Palestinians and Kurds in Lebanon and Jordan*, 30 INTERNATIONAL JOURNAL OF REFUGEE LAW 407–443 (2018), <https://academic.oup.com/ijrl/article/30/3/407/5227402> (last visited Feb 21, 2020).

²⁸⁴ *Supra* note 281, UNRWA.

²⁸⁵ *Supra* note 279, Chaaban et al.

²⁸⁶ *Supra* note 67, Albanese & Takkenberg.

²⁸⁷ *Supra* note 279, Chaaban et al.

²⁸⁸ *Id.*, Chaaban et al; Are Knudsen, *Widening the Protection Gap: The 'Politics of Citizenship' for Palestinian Refugees in Lebanon, 1948–2008*, 22 J REFUG STUD 51–73 (2009), available at: <https://academic.oup.com/jrs/article/22/1/51/1570693> (last visited Feb 21, 2020).

consider granting displaced Palestinians more rights rather stems from profound concerns that this would be a step towards their permanent settlement, and thus a threat to the delicate demographic and sectarian balance in the country.²⁸⁹

Between a rock and a hard place, displaced Palestinians are caught in a limbo that compounds their plight.²⁹⁰ Unable to return to Palestine, the precarity of their legal status and their political objectification further expose the protection insufficiency of the distinctive regime that governs them, but also of the perceived tension between their protection and their right of return.

3. A Protection Gap in Secondary Forced Displacement

Following the demise of UNCCP, the evolution of UNRWA's mandate to provide incremental protection to displaced Palestinians has been insufficient to provide effective protection nor close a protection gap endured by displaced Palestinians, particularly in the field of durable solutions.²⁹¹ While resolution 194 set forth repatriation and compensation as the primary durable solution for displaced Palestinians,²⁹² there is no international agency mandated with searching for durable solutions for displaced Palestinians, particularly in the context of secondary forced displacement, thus exposing them to a protection gap.²⁹³ The lack of an international agency to search for durable solutions on their behalf in the context of "overlapping refugeedom" or multiple experiences of displacement,²⁹⁴ coupled with their inability to return to their homeland have rendered

²⁸⁹ JABER SULEIMAN, *Marginalised Community: The Case of Palestinian Refugees in Lebanon* (2006).

²⁹⁰ *Supra* note 288, Knudsen.

²⁹¹ UNRWA, *What protection means for UNRWA in concept and practice - UNRWA Consultant's Report*, 31 March 2008, available at: <https://www.un.org/unispal/document/auto-insert-206093/> (last visited Apr 22, 2020); *Supra* note 237, Custer; *Supra* note 2, Erakat; *Supra* note 237, Badil.

²⁹² *Supra* note 119, UN Doc. A/RES/194 (III).

²⁹³ *Supra* note 2, Erakat; *Supra* note 237, Badil; *Supra* note 56, Goodwin-Gill & Akram; *Supra* note 9, Kagan.

²⁹⁴ Elena Fiddian-Qasmiyeh, *Invisible Refugees and/or Overlapping Refugeedom? Protecting Sahrawis and Palestinians Displaced by the 2011 Libyan Uprising*, 24 INT J REFUGEE LAW 263–293 (2012), <https://academic.oup.com/ijrl/article/24/2/263/1538077> (last visited Oct 13, 2020).

displaced Palestinians at greater vulnerability, in contrast with other refugees. This is particularly the case in light of their exclusion from the international refugee regime owing to their distinctive legal regime and the limited geographical and protection mandate of UNRWA.

Displaced Palestinians experienced “overlapping refugeedoms” or multiple experiences of displacement²⁹⁵ within and from their Arab host countries as a result of political and social instability, crises and armed conflict.²⁹⁶ These episodes of multiple displacements include: the expulsion of numerous Palestinian families from Jordan as part of the expulsion of the nascent Palestinian resistance movement, Palestine Liberation Organization (PLO) in 1970,²⁹⁷ the civil war that ravaged Lebanon since 1975 and the 1982 Israeli invasion of Lebanon whereby an estimated 100,00 Palestinians were forced to leave the country,²⁹⁸ the expulsion of nearly 400,000 Palestinians from Kuwait following the First Gulf War in 1991 in response to the PLO’s political support of Saddam Hussein’s occupation,²⁹⁹ the expulsion in 1995 of nearly 30,000 Palestinians from Libya in protest of the PLO’s entry into a peace agreement with Israel,³⁰⁰ the displacement of several thousands of Palestinians from Iraq following the US-led war against and occupation of Iraq,³⁰¹ and most recently the forced displacement of at least 120,000 Palestinians due to the Syrian civil war of 2011.³⁰²

By virtue of the distinctiveness of their regime, Palestinians, including those experiencing different episodes of secondary or multiple forced displacement, are excluded from the

²⁹⁵ *Id.*, Fiddian-Qasmiyeh

²⁹⁶ *Supra* note 237, Badil.

²⁹⁷ *Id.*, Badil.

²⁹⁸ *Id.*, Badil.

²⁹⁹ Yann Le Troquer & Rozenn Hommery al-Oudat, *From Kuwait to Jordan: The Palestinians’ Third Exodus*, 28 JOURNAL OF PALESTINE STUDIES 37–51 (1999), <https://www.jstor.org/stable/2538306> (last visited Oct 13, 2020).

³⁰⁰ *Supra* note 237, Badil.

³⁰¹ HUMAN RIGHTS WATCH, *Nowhere to Flee: The Perilous Situation of Palestinians in Iraq* (2006), <https://www.hrw.org/reports/2006/iraq0706/> (last visited Oct 13, 2020).

³⁰² *Supra* note 11, UNHCR.

protection benefits, including durable solutions, offered to their counterpart refugees by the international refugee regime.³⁰³ According to UNHCR's own interpretation of Article 1D, UNHCR rejects any general mandate over most displaced Palestinians who are registered under UNRWA.³⁰⁴ To this end, unlike refugees who are persons of concern to UNHCR, displaced Palestinians endure an "uneven" legal regime in the absence of an international agency to search for durable solutions on their behalf.³⁰⁵

However, even in the context of secondary forced displacement of Palestinians to and from UNRWA areas of operation, displaced Palestinians experience exacerbated vulnerability owing to both their protracted displacement and the precarity of their legal status in host countries. This was particularly manifested in the secondary displacement of Palestinians from Syria in the context of the Syrian crises that began in 2011. Nearly 120,000 refugees,³⁰⁶ from the over 5.5 million refugees who fled Syria³⁰⁷ were Palestinian asylum seekers who fled to Syria since 1948. Surrounding countries have treated these Palestinians disparately from their Syrian counterparts owing to their distinct regime.³⁰⁸ For example, since April 2012, Jordan began denying the admission of Palestinians from Syria while arbitrarily detaining them in a refugee holding facility, known as Cyber City, without any options for release other than return to Syria.³⁰⁹ This policy has subjected hundreds of

³⁰³ According to Article 1D 1951 Convention, the competence of UNHCR shall not extend to a person "at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance". For more, see *Supra* note 100, 1951 Convention.

³⁰⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR, Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the status of Refugees*, Geneva, UNHCR, 2009, para. 2; U.N. High Commissioner for Refugees (UNHCR), "Note on the Applicability of Article 1D of the 1951 Convention relating to the status of Refugees", Geneva, UNHCR, 2002, para. 2.

³⁰⁵ *Supra* note 2, Erakat.

³⁰⁶ UNRWA, Palestine refugees in Syria: a tale of devastation and courage, UNRWA, available at: <https://www.unrwa.org/newsroom/features/palestine-refugees-syria-tale-devastation-and-courage> (last visited Apr 25, 2020).

³⁰⁷ *Supra* note 11, UNHCR.

³⁰⁸ *Supra* note 2, Erakat; *Supra* note 12, Amnesty International, Qandil, Akram, Ahmed, Morrison, Wengert & Alfaro, Human Rights Watch.

³⁰⁹ HUMAN RIGHTS WATCH, *Not Welcome: Jordan's Treatment of Palestinians Escaping Syria* (2014); Human Rights Watch, *Jordan: Bias at the Syrian Border*, HUMAN RIGHTS WATCH (2012), <https://www.hrw.org/news/2012/07/04/jordan-bias-syrian-border> (last visited Mar 16, 2020).

Palestinian refugees from Syria to *refoulement*.³¹⁰ According to UNRWA, Palestinian refugees from Syria are extremely vulnerable, owing to the tragic circumstances of their flight as well as the precarious conditions experienced in Jordan, which render them highly dependent on assistance.³¹¹

Lebanon's response to the influx of refugees from Syria was even more restrictive towards Palestinians from Syria.³¹² The Lebanese government refused to authorize the establishment of new refugee camps, leading to an overcrowding of already existing Palestinian refugee camps.³¹³ Further, since August 2013, Lebanon sealed its borders to Palestinians from Syria.³¹⁴ Since May 2014, the Lebanese authorities have announced restrictive regulations for the entry of Palestinians from Syria into the country while refusing to register those who have entered the country in order to avoid responsibility for them.³¹⁵

As for the small number of Palestinians who fled Syria to Egypt, while they should fall under UNHCR's mandate since they are outside of UNRWA's areas of operation and as Egypt is a signatory of the 1951 Convention, they have been nevertheless denied registration. Egypt has prohibited UNHCR from registering them in contravention of Article 1(D) of the Convention, on grounds that they are ineligible for UNHCR's protection in Egypt.³¹⁶ This has left Palestinians who fled Syria to Egypt without access to basic

³¹⁰ BADIL RESOURCE CENTER FOR PALESTINIAN RESIDENCY & REFUGEE RIGHTS, CLOSING PROTECTION GAPS: HANDBOOK ON PROTECTION OF PALESTINIAN REFUGEES IN STATES SIGNATORIES TO THE 1951 REFUGEE CONVENTION (Susan Akram & Nidal Al-Azza eds., Second Edition ed. 2015), available at: <https://www.badil.org/en/publication/handbook-on-protection.html>; Ricardo Santos, *Palestinian Refugees from Syria in Jordan: An Overview*, AL-MAJDAL, 2014.

³¹¹ UNRWA, *Syria Regional Crisis Emergency Appeal 2019* (2019), available at: https://www.unrwa.org/sites/default/files/content/resources/2019_syria_ea_final.pdf.

³¹² *Supra* note 289, Santos.

³¹³ UNRWA, *Syria Crisis Response Annual Report 2013* (2014), available at: https://www.unrwa.org/sites/default/files/syria_crisis_response_annual_report_2013_1.pdf.

³¹⁴ HUMAN RIGHTS WATCH, *Lebanon: Palestinians Fleeing Syria Denied Entry* (2013).

³¹⁵ *Supra* 310, Badil.

³¹⁶ AMNESTY INTERNATIONAL, *Jordan: Growing restrictions, tough conditions: The plight of those fleeing Syria to Jordan*, <https://www.amnesty.org/en/documents/document/?indexNumber=MDE16%2f003%2f2013&language=en>

international protection.³¹⁷

Further, Egypt has made refugees scapegoats in its turbulent political climate.³¹⁸ Making it a policy to arrest and deport refugees to other countries, including back to Syria, Egypt detained Palestinians and other Syrian refugees, including children, for not having up to date permits or for attempting to leave Egypt illegally.³¹⁹ While in some cases detained Syrian refugees were able to legally leave Egypt to seek shelter elsewhere, Palestinians were generally not able to do so unless they return to Syria.³²⁰

In light of their protracted displacement, the initial understanding of their plight as a political and a temporary question has only exacerbated the vulnerability of displaced Palestinians. Their crippled institutional regime, their precarious legal status in host states and their multiple displacements rather reflect the limitation of their regime and the scope of protections it offers to respond to their needs as a protracted question, over seven decades later. The egregious, longstanding denial of international protection and the lack of access to voluntary durable solutions available to other refugees as a matter of law and right has left displaced Palestinians suspended between their political objectification in a prolonged conflict on the one hand, and the vulnerability of their humanitarian condition, on the other hand.³²¹

C– Conclusion

Since the first wave of Palestinian displacement in 1948 onwards, neither Arab efforts at the UN, Palestinian resistance nor direct negotiations between the PLO and Israel have led to any resolution of the plight of displaced Palestinians. Rather, the peace process diluted

(last visited Mar 16, 2020); Miriam Berger, *Fleeing Syria, Palestinians find Haven and Hardships in Egypt*, EGYPT INDEPENDENT, March 18, 2013.

³¹⁷ *Id.*, Berger

³¹⁸ *Supra* note 2, Erakat.

³¹⁹ *Supra* note 316, Amnesty International.

³²⁰ *Id.*, Amnesty International.

³²¹ *Supra* note 2, Erakat; *Supra* note 4, Akram & Rempel.

the relevance of resolution 194 to the plight of the displaced, revealing a perceived tension between the individual right of return and the collective right of return. In addition, the direct negotiations between the two sides have revealed an intractable divide between the two sides which further render displaced Palestinians as pawns in the negotiations for a final settlement; adding more ambiguity to their fate and future. In the absence of a political settlement between the two sides, the plight of displaced Palestinians remains unresolved while they remain prevented from exercising their right of return, leaving them in a protracted situation.

On another level, the demise of UNCCP as the UN body mandated with finding a solution that would facilitate their return has left their distinctive regime standing on one leg offering limited protection. Between a rock and a hard place, displaced Palestinians are caught in a limbo that compounds their plight.³²² Unable to return to Palestine, the precarity of their legal status and their political objectification further exposed the protection insufficiency of the distinctive regime that governs them, but also of the perceived tension between their protection and their right of return.

Accordingly, the implications of initially capturing Palestinian displacement as an expression of a political problem only, rather than as a refugee problem, has proved to contribute to the precarity of their protracted situation seven decades later. The tensions and anxieties that their distinctive regime is witnessing, manifested mainly with its insufficiency to offer effective protection, is a signifier of its inability to speak to their changing needs, seven decades later.

³²² *Supra* note 288, Knudsen.

IV– Moving Forward: Evolving the Distinctive Temporary Regime Towards More Protection

Since its establishment, the distinct regime governing displaced Palestinians was premised on two determinant factors that continued to shape the approaches towards them in terms of protection and durable solutions until today. These are the nature of their plight and the temporality of their flight. Premised on an initial conceptualizing of their plight as a political, rather than as a refugee, issue that is unique in the special responsibility of the UN in creating it, displaced Palestinians were signaled out of the international refugee regime and excluded from the UN's permanent international protection body, UNHCR. Also, the assumption that their flight is temporary and that a solution to it is a matter of time has contributed to forming the type of protections and solutions offered to them under the distinct regime, as opposed to those offered to other refugees. As the previous chapters have demonstrated, the distinct regime has outlived its temporary nature and has proved, over time, to be insufficient in offering effective protection in light of the protracted displacement of Palestinians. This chapter will thus examine and investigate the main directions and contentions in the area of expanding the level of protection for displaced Palestinians. First, in light of the tension in the relationship between collective and individual rights, the chapter will examine and discuss the main contentions in the area of expanding the scope of protections of displaced Palestinians. Second, the chapter will expose and discuss the tensions, limitations and merits in each of these contentions, with a focus on the multi-faceted forms of protection. It will be argued that implicit to any of these contentions is a dilemma between its pros and cons which is a balance that is difficult to strike. Without endorsing or supporting one contenting over the other, it will also be argued that in light of the distant possibility of the attainability of a durable solution, the need to fulfill the protection of individual rights is rather heightened.

A– Contentions for Increased Protection: To Include or not to Include or Temporary Protection

While initially conceptualized as a political question, the displacement of Palestinians and their return is complicated by its collective or national dimension linked to the right of self-determination of the Palestinian people.³²³ There are two ways in which the collective dimension of return, linked to self-determination, is viewed. The first is the view that the restoration of the right of return is a precondition to the exercise of the right to self-determination.³²⁴ The second is that the realization of the right to self-determination will bring about the right of return.³²⁵ Anchored in different bodies of international law, a separate individual right of return exists that is supplementary and complementary to the collective one.³²⁶ However, the emphasis on the collective dimension of the right of return, as manifested in the PLO's early political rhetoric and in the attitude of Arab States towards displaced Palestinians, has subsumed the individual's right to claim return in a collective right that can only be claimed through the group.

While resolution 194 sets forth the framework for a solution to the plight of displaced Palestinians, it also conferred upon the displaced, as individuals, the right of exercising a free choice between their repatriation, compensation or restitution.³²⁷ However, the denial of individual choice and the unattainability of the individual right have resulted in their protracted exile. This gave rise to the need for other relevant individual rights, including

³²³ Kathleen Lawand, *The Right to Return of Palestinians in International Law*, 8 INT J REFUGEE LAW 532–568 (1996), <https://academic.oup.com/ijrl/article/8/4/532/1576056> (last visited Apr 18, 2020).

³²⁴ The Committee on the Exercise of the Inalienable Rights of the Palestinian People, *Right of return of the Palestinian People* (1978), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/805C731452035912852569D1005C1201> (last visited Nov 23, 2020).

³²⁵ Chama L. C. Mubanga-Chipoya, *Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom*, E/CN.4/Sub.2/1988/35 (1988), <http://digitallibrary.un.org/record/43700> (last visited Nov 23, 2020).

³²⁶ *Supra* note 206, Boling; John Quigley, *Mass Displacement and the Individual Right of Return*, 68 BRITISH YEARBOOK OF INTERNATIONAL LAW 65–125 (1998), <https://academic.oup.com/bybil/article/68/1/65/340995> (last visited Apr 17, 2020).

³²⁷ *Supra* note 153, U.N. Doc. A/AC.25/W/45.

socio-economic, political and refugee-specific rights, until a time when they are able to claim and exercise their individual choice of a durable solution. While the enjoyment of some of these rights have been critical to Palestinians since the early days of their displacement (e.g. education), others have gained relevance over time, including in situations of secondary forced displacement (e.g. non-refoulment). This has triggered different contentions in the area of increasing the scope of protection for displaced Palestinians and the different approaches to secure such protection.

Falling in a legal lacuna that sets them outside the international regime for refugee protection, displaced Palestinians are treated as ineligible for the protections available to all other refugees in the world.³²⁸ Major international legal instruments governing the rights and obligations of states towards refugees are often interpreted in a manner that effectively restricts the set of rights offered to displaced Palestinians in comparison to those guaranteed to other refugees.³²⁹ In light of the resulting void in promoting effective protection, in contrast to that offered to other refugees, a major debate emerged over whether or not to include displaced Palestinians within UNHCR's protection mandate in order to expand the scope of protection offered to them. A third contention in the debate for increased protection of displaced Palestinians argues for a harmonized approach to temporary protection.

1. Arguing for Inclusion under UNHCR Mandate

Article 1D of the 1951 Convention provides that the convention “shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons

³²⁸ Susan M. Akram, *Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution*, 31 JOURNAL OF PALESTINE STUDIES 36–51 (2002), <https://www.jstor.org/stable/10.1525/jps.2002.31.3.36> (last visited Feb 19, 2020).

³²⁹ *Supra* note 207, Akram.

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.”³³⁰

While it is interpreted as meaning that UNHCR has no protection mandate over displaced Palestinians in UNRWA areas of operation, Article 1D is also understood to mean that displaced Palestinians are excluded from the coverage and benefits of the 1951 Convention and the 1967 Protocol in as long as they receive protection or assistance from other organs or agencies of the UN. However, this contention argues that the general consensus of the drafters indicates the overwhelming need to provide displaced Palestinians not only with a continuity of protection, but also a heightened level of protection on par with their special status.³³¹ Premised on the plain language, drafting history and purpose of Article 1D of the 1951 Convention in the context of the making of the distinctive regime governing displaced Palestinians, it is argued that Article 1D is thus widely misinterpreted.³³²

According to this contention, a careful treaty analysis of Article 1D of the 1951 Convention demonstrates that far from being an exclusionary clause, it was intended as a contingent inclusion clause so as to ensure continued protection and assistance to displaced Palestinian at all times, either through a distinct regime combining UNCCP and UNRWA or through a fallback regime comprising UNHCR and the 1951 Convention.³³³ Further, it holds that Palestinians were covered by this provision as an entire group, or category, rather than as individuals, and that it was meant to extend protection and assistance for displaced Palestinians until such time as a durable solution was found in accordance with the international consensus of return, restitution and compensation established by UNGA resolutions, particularly resolution 194.³³⁴

³³⁰ *Supra* note 100, 1951 Convention art. 1D.

³³¹ *Supra* note 207, Akram.

³³² *Id.*, Akram

³³³ *Supra* note 283, Akram.

³³⁴ *Id.*, Akram

Premised on a conceptual dichotomy established in the language of Article 1D between 'protection' and 'assistance' as two substantially different concepts in refugee law,³³⁵ UNRWA and UNCCP, mandated originally to provide assistance and protection respectively, are understood to serve as the two legs on which the distinct regime for displaced Palestinians stands. Accordingly, the demise of UNCCP, as the major vehicle entrusted with protecting the substantive rights of displaced Palestinians, is understood to have berefted the distinct regime of its core protection function,³³⁶ leaving displaced Palestinians in a protection gap.³³⁷ As the regime covering displaced Palestinians is left with the restricted mandate of UNRWA and its "virtually nonexistent" protection function, as it was neither designed nor equipped to take over the UNCCP's protection function,³³⁸ UNCCP's protection function must be fulfilled by another appropriately mandated UN organ.³³⁹ The choices available are reconstituting the UNCCP's protection mandate, amending UNRWA's mandate to explicitly include the full range of international functions, or including displaced Palestinians under UNHCR's mandate.³⁴⁰ According to this contention, however, the failure of UNCCP to fulfil its protection mandate triggers the alternative regime under Article 1D which empowers UNHCR to fulfil that function.³⁴¹ Consistent with the institutional set-up of the distinct regime which provides one agency for protection and another for assistance, the protective duties of UNHCR are thus applicable to displaced Palestinians.³⁴²

Under this contention, including displaced Palestinians within the protective mandate of UNHCR would, among other things, make available to displaced Palestinians all the expanded panoply of rights available to other refugees, offer appropriate representation of those rights and a forum where they can be raised and enforced, promote the appropriate

³³⁵ *Supra* note 207, Akram; *Supra* note 9, Kagan.

³³⁶ *Supra* note 328, Akram.

³³⁷ *Supra* note 207, Akram; *Supra* note 2, Erakat; *Supra* note 237, Badil; *Supra* note 310, Badil.

³³⁸ *Id.*, Akram

³³⁹ *Id.*, Akram

³⁴⁰ *Id.*, Akram

³⁴¹ *Id.*, Akram

³⁴² *Id.*, Akram

mechanism to handle displaced Palestinian's claims for return, restitution and compensation, and would confront Israeli laws that deny displaced Palestinians their right to return to their homes and to reclaim their properties.³⁴³

2. Arguing for Conditional Grounds for Inclusion under UNHCR Mandate

Contrary to the former contention, UNHCR's own official interpretation of Article 1D is different. With the aim of avoiding overlapping competencies between UNHCR and UNRWA, the first clause of Article 1D is interpreted as an exclusion clause,³⁴⁴ qualifying a geographical division of competencies between UNRWA and UNHCR. To this end, Article 1D is read to exclude displaced Palestinians from UNHCR's mandate in areas where UNRWA provides assistance. The second clause of Article 1D, on the other hand, is interpreted as an inclusion clause with the purpose of ensuring the continuity of protection and assistance for displaced Palestinians.³⁴⁵ According to this interpretation, the inclusion clause qualifies with the aim of ensuring the "continuity of protection" for displaced Palestinians when "the protection or assistance of UNRWA has ceased" owing to one or more of the "objective reasons for leaving or preventing them from (re)availing themselves of UNRWA's protection or assistance."³⁴⁶

The qualification for including displaced Palestinians under UNHCR's mandate is read restrictively. According to UNHCR, the inclusion assessment "needs to be carried out not only having regard to UNRWA's mandate and operations, but also to the circumstances of the individual and to relevant and up-to-date country of origin information."³⁴⁷

³⁴³ *Id.*, Akram

³⁴⁴ UNHCR, Guidelines on International Protection No.13: Applicability of Article 1D of the 1951 Refugee Convention Relating to the Status of Refugees to Palestinian Refugees, HRC/GIP/17/13 (Dec. 2017), available at:

<https://www.unhcr.org/publications/legal/5ddfca844/guidelines-international-protection-13-applicability-article-1d-1951-convention.html>

³⁴⁵ *Id.*, UNHCR.

³⁴⁶ *Id.*, UNHCR.

³⁴⁷ *Id.*, UNHCR.

Accordingly, inclusion within UNHCR does not automatically qualify upon being outside of UNRWA's areas of operation, but rather upon the "objective reasons" for leaving or preventing them from (re)availing themselves to UNRWA.³⁴⁸ Thus, under UNHCR's interpretation of Article 1D, the inclusion clause and the extension of its own protection mandate outside of UNRWA's areas of operation is only triggered under specific circumstances. These include: the termination of the mandate of UNRWA, the inability of UNRWA to fulfil its protection or assistance mandate, threat to the applicant's life, physical integrity, security or liberty or other serious protection-related reasons, and practical, legal and safety barriers preventing an applicant from (re)availing to the protection or assistance of UNRWA.³⁴⁹

Premised on a view that UNRWA has had a protection function since its inception,³⁵⁰ UNHCR does not consider the *de facto* demise of UNCCP as a development that deprives displaced Palestinians of protection and that qualifies, in itself, as grounds for inclusion within its mandate. Rather, UNHCR views that UNRWA's mandate comprises of a core protective function that had already existed at the time of its inception and that has further developed over time.³⁵¹ Despite the absence of an explicit mention of the word "protection" in UNRWA's mandate provided by the General Assembly in its founding resolution,³⁵² UNHCR insists that since its inception, UNRWA's mandate comprises both assistance and protection functions inside its areas of operation.³⁵³ This view not only challenges the distinct regime's institutional and mandate split; between UNCCP's protection mandate and UNRWA's relief and assistance mandate, but also the difference between UNRWA

³⁴⁸ *Id.*, UNHCR.

³⁴⁹ *Id.*, UNHCR.

³⁵⁰ *Supra* note 344, UNHCR; *Supra* note 237, Custer; Mark Brailsford, *Incorporating Protection into UNRWA Operations*, in UNRWA AND THE PALESTINIAN REFUGEES AFTER SIXTY YEARS: SOME REFLECTIONS (Sari Hanafi eds. 2014).

³⁵¹ *Id.*, UNHCR.

³⁵² *Supra* note 129, UN Doc. A/RES/302 (IV).

³⁵³ UNHCR's guidelines on the applicability of Article 1D notes in its footnote that "UNRWA has had a protection mandate from its inception. Nevertheless, the protection function has grown over time and has increased since 2010 with the adoption of a protection policy and the development of protection tools and standard." See *Supra* note 344, UNHCR.

and UNHCR's mandates.³⁵⁴

3. Arguing for Developing an Interim Temporary Protection Program

Interpreting Article 1D in a manner similar to that upon which the contention for inclusion under UNHCR's mandate is premised on, this contention argues that the intention of drafters of the 1951 Convention was to ensure that if the twin-agency regime of UNRWA/UNCCP should fail in either of its functions, the 1951 Convention would automatically cover displaced Palestinians as an entire group or category without the necessity of applying the individualized definition of refugee in Article 1A(2).³⁵⁵ It is argued that the drafting history of Article 1D makes clear that the drafters intended to create the distinct special regime with an agreed upon durable solution, and mandated both a primary and an alternative body to bring about the solution; the UNCCP and UNHCR.³⁵⁶ This contention argues that if Article 1D were properly interpreted, Palestinians would be recognized as *prima facie* refugees in any state and would qualify for the benefits of the Convention until a durable solution in accordance with resolution 194 is found.

Accordingly, once Article 1D is triggered then states are mandated to grant protection or the benefits of the Convention to displaced Palestinians only until their position is settled according to Resolution 194.³⁵⁷ As such, a proper interpretation of Article 1D according to this contention authorizes states to grant displaced Palestinians temporary protection, rather than asylum.

By addressing how the distinct regime and its special arrangements have influenced the agreed-upon durable solutions in the case of Palestinian displacement, this contention holds that the protection extended to displaced Palestinians should be consistent with the

³⁵⁴ *Supra* note 67, Albanese & Takkenberg.

³⁵⁵ *Supra* note 265, Akram & Rempel.

³⁵⁶ *Id.*, Akram & Rempel.

³⁵⁷ *Id.*, Akram & Rempel.

international legal rights of refugees both to return to their places of origin and to choose the appropriate solution for their plight.³⁵⁸ By focusing on the durable solutions based on the right of return, this contention argues that states are obligated to extend protection to displaced Palestinians until a comprehensive durable solution is found under the framework of Resolution 194. Owing to the legal underpinnings of the right of refugees to return, which are not only found in the law of nationality and state succession, human rights law and humanitarian law, but also as a rule of customary law and codified in international treaties as well as in UN dealings regarding rights of refugees and in widespread state practice, States are thus obligated to provide temporary protection consistent with the 1951 Convention.³⁵⁹ While such protection must be consistent with the international refugee regime, it places no greater burden on a state than *non-refoulement* over time.³⁶⁰

Although temporary protection (TP) is relatively recent as a recognized or a formalized status, the concept is not new in terms of state practice. In response to problems of mass influx and non-Convention refugees, states have granted protection to persons who may or may not fall within the Convention refugee definition but are deserving of international protection.³⁶¹ In the context of Palestinian displacement, taking into consideration the general non-applicability of the international refugee regime in the Arab region, the Casablanca Protocol has thus represented an early form of temporary protection for displaced Palestinians, as it was ought to be applicable pending the quest for durable solutions.³⁶² Owing to the inconsistent regional implementation of the Casablanca Protocol and premised on the inconsistency of the status and treatment of displaced Palestinians with the distinct regime established to ensure their protection pending a durable solution consistent with refugee law principles, this contention argues for a harmonized TP regime for displaced Palestinians.

³⁵⁸ *Id.*, Akram & Rempel.

³⁵⁹ *Id.*, Akram & Rempel.

³⁶⁰ *Id.*, Akram & Rempel.

³⁶¹ *Id.*, Akram & Rempel.

³⁶² *Supra* note 67, Albanese & Takkenberg.

B– Discussion: Merits and Limitations

UNHCR’s interpretation of Article 1D can be challenged on different grounds. First, considering “objective reasons” for leaving or preventing displaced Palestinians from (re)availing themselves to UNRWA as the only grounds for inclusion once outside of UNRWA’s areas of operation does not seem consistent with the plain language of Article 1D. The plain language of the phrase “for any reason” in the first sentence of the second clause must be read to be not only encompassing of any eventuality which might terminate the protection or assistance offered to displaced Palestinians, but also of an individual’s own actions in removing himself or herself from UNRWA’s area of operations, or interference by the State with the provision of protection or assistance of UNRWA.³⁶³ After all, the distinct regime put in place was one of both protection and assistance, namely through UNRWA and UNCCP. Hence, to suggest that Palestinians should be given a choice between assistance or protection “is to subvert the fact that they were recognized as deserving and requiring both.”³⁶⁴

A second shortcoming in UNHCR’s position on triggering the entitlement *ipso facto* of Palestinians to its mandate is the personal scope of Article 1D. The determination of when a displaced Palestinian qualifies under the special regime envisaged by this provision is based on a definitional limitation as it only covers Palestinians “falling under the mandate of UNRWA.”³⁶⁵ Unlike UNHCR, which works on the basis of an individualized legal definition of a refugee as provided in Article 1A(2) of the 1951 Convention,³⁶⁶ UNRWA lacks a legally ratified definition of its mandate.³⁶⁷ The UN General assembly did not establish, neither in resolution 302 nor in resolution 194, any uniform definition of the term “Palestine refugees”.³⁶⁸ UNRWA’s working definition was developed by the agency for

³⁶³ *Supra* note 56, Goodwin-Gill & Akram.

³⁶⁴ *Id.*, Goodwin-Gill & Akram.

³⁶⁵ *Supra* note 344, UNHCR.

³⁶⁶ *Supra* note 100, 1951 Convention art. 1D.

³⁶⁷ *Supra* note 9, Kagan.

³⁶⁸ *Supra* note 237, Custer.

the purposes of determining eligibility for its relief assistance,³⁶⁹ rather than as a comprehensive set of criteria defining the status of a Palestinian refugee.³⁷⁰ For the purpose of inclusion within UNHCR's mandate, adopting UNRWA's limited working definition is thus ill-suited for identifying people with current international protection needs.³⁷¹ It is further deficient as it is based on past assistance needs rather than current threats and protection gaps.³⁷²

Third, UNHCR's position defies the plain language of the first clause of Article 1D, which sets as a precondition for exclusion from the benefits of the Convention that the person concerned is receiving from organs of the UN other than UNHCR "protection or assistance".³⁷³ Premised on the narrow conception that assistance is an essential function of protection, UNHCR argues that UNRWA have always had a protection mandate.³⁷⁴ However, this defies the plain language of the first clause of Article 1D which, on its face, does not require that displaced Palestinians receive both protection and assistance, but rather suggests that if a displaced Palestinian is receiving only a bare minimum of assistance from UNRWA, then that person shall fall *ipso facto* within UNHCR's mandate and the benefits of the 1951 Convention.³⁷⁵

On the other hand, challenging the contention pushing for an inclusion within UNHCR's mandate, and thus the protection-assistance dichotomy central to this contention, is the fact that other UN actors continue the essential core of UNCCP's mission of seeking a solution

³⁶⁹ UNRWA's definition of Palestine refugees contains an economic element based on losing livelihood. See UNRWA, *The United Nations and Palestinian Refugees* (2007), available at: <https://www.unrwa.org/userfiles/2010011791015.pdf>

³⁷⁰ Frontiers Center, *Falling Through the Cracks: Legal and Practical gaps in Palestinian refugee status. A case study of unrecognised refugees in Lebanon* (2005), available at: https://prn.mcgill.ca/research/papers/050815_fallingthroughthecracks.pdf.

³⁷¹ *Supra* note 9, Kagan.

³⁷² *Id.*, Kagan.

³⁷³ *Supra* note 56, Goodwin-Gill & Akram; *Supra* note 100, 1951 Convention art. 1D.

³⁷⁴ Material assistance is considered a "*sine quo non*" of international protection (emphasis added). See UNHCR, Note of International protection, UN doc. A/AC.96/830 (Sep. 7, 1994), available at: <https://www.unhcr.org/excom/excomrep/3f0a935f2/note-international-protection-submitted-high-commissioner.html>

³⁷⁵ *Supra* note 56, Goodwin-Gill & Akram.

to the Palestine question.³⁷⁶ For example, the Secretary-General via his role in the Quartet is directly involved in trying to promote a resolution of the Palestine question, which was one of the core missions of the UNCCP.³⁷⁷ However, one concern in such an argument is that something is lost by not having a UN body or agency that is explicitly bound by the terms of resolution 194, as UNCCP was.³⁷⁸

These differences in views over the interpretation of Article 1D and whether or not to include displaced Palestinians under UNHCR's mandate have their merits and limitations. For example, the discourse for a full inclusion under UNHCR's protection mandate significantly contributes to highlighting the plight of, and the various degrees of discrimination experienced by, displaced Palestinians in UNRWA's areas of operation.³⁷⁹ Also, it highlights the divorce between UN legalese on the Palestine question and the functions of the actual structures on the ground.³⁸⁰ While it maintains the focus on the original, and still unmet, protection commitments of the international community towards displaced Palestinians,³⁸¹ this discourse raises questions about the future of UNRWA, particularly in light of the wider political context. While intended to expand the panoply of rights for displaced Palestinians, the inclusion discourse can easily be conflated with the deconstructive and hostile line of debate, emanating mainly from conservative ring wing politics, that makes reference to UNRWA-UNHCR comparison.³⁸² In the context of the temporary nature of UNRWA and the uncertainty around its future, a conflation of the two very different lines of debate is very likely to be triggered by UNRWA's "worst financial deficit"³⁸³ and the threat of the liquidation of the Palestinian question as a result of new normalization agreements between Arab States and Israel. Against the backdrop of the

³⁷⁶ *Supra* note 237, Custer.

³⁷⁷ *Id.*, Custer.

³⁷⁸ *Supra* note 9, Kagan.

³⁷⁹ *Supra* note 67, Albanese & Takkenberg

³⁸⁰ *Supra* note 9, Kagan.

³⁸¹ *Supra* note 67, Albanese & Takkenberg.

³⁸² *Supra* note 237, Custer; *Supra* note 9, Kagan; Daniel Pipes, *UNRWA: The Refugee Curse*, NEW YORK POST, August 19, 2003, available at: <http://www.danielpipes.org/1206/unrwa-the-refugee-curse>.

³⁸³ UNRWA is facing its worst financial deficit as a result of the decision of the USA, the Agency's largest donor, to cut its funding in 2018. See *Supra* note 13, UNRWA.

shaky grounds on which UNRWA stands, arguments for inclusion within UNHCR's mandate run the risk of being misused to argue in favor of ceasing UNRWA's operations all together. However, this challenge pertaining to the future of UNRWA seems to be less problematic under the contention in favor of a TP program. By proposing that UNRWA should continue to provide assistance benefits to displaced Palestinians located within the areas of its mandate, the TP proposal overcomes the binary of UNHCR/ UNRWA.³⁸⁴

On another level, while intended to expand the scope of protection offered to displaced Palestinians, the shift to UNHCR would put to tension the different personal scopes of the two regimes. This tension pertains to the shift from the group or category scope of the distinct regime, to the individualized personal scope of UNHCR. As the distinct regime addresses displaced Palestinians as a group or a category, it is also ought to guarantee certain rights which they are entitled to by virtue of being members of the group. For example, unlike individuals acknowledged as refugees for the purpose of the 1951 Convention, displaced Palestinians are entitled a right of return even in cases where they acquire a third-state nationality.³⁸⁵ Also, as members of the group to which resolution 194 applies, displaced Palestinians are entitled an individual choice between return, repatriation or restitution.³⁸⁶ In addition, where displaced Palestinians, as members of a group, are ipso facto entitled to the benefits and protections of the 1951 Convention under Article 1D, a shift away from their distinctive regime would only trigger the benefits of the Convention in cases where individuals, on a case-by-case basis, meet the normative framework acknowledging refugee status on the basis of the persecution grounds enumerated in article 1A(2) of the 1951 Convention.³⁸⁷ However, the contention in favor of a TP program overcomes these limitations pertaining to the personal scope of Article 1D and the right of return. On the one hand, it proposes offering TP not only to UNRWA-registered refugees but to all Palestinians who are short-term visa holders, to Palestinians in any kind of

³⁸⁴ *Supra* note 265, Akram & Rempel.

³⁸⁵ *Supra* note 187, Quigley.

³⁸⁶ *Supra* note 153, U.N. Doc. A/AC.25/W/45.

³⁸⁷ *Supra* note 100, 1951 Convention art. 1A(2).

indeterminate status, as well as those with no recognized status on a prima facie or group basis consistent with Article 1D. On the other hand, granting TP is consistent with the appropriate UN-mandated durable solutions as it is rather a mechanism to provide interim protection pending a durable solution consistent with resolution 194.³⁸⁸

The main challenge, however, with the TP regime is that while it is ought to grant displaced Palestinians in Arab states, as well as other states of the Palestinian diaspora, a recognized legal status, the standard of treatment offered might depend on a number of variables determined by domestic legislation.³⁸⁹ Further, while the proposed TP is intended to offer interim protection until a time when a durable solution consistent with resolution 194 is made possible, it may afford fewer rights to individuals receiving the status than she would as a convention refugee.³⁹⁰

While seeking to level up the scope of protection offered to displaced Palestinians, each of the different contentions entails an inherent dilemma between its benefits on the one hand and its costs on the other. While each offers a direction or a policy option, the pros and cons of each go hand in hand.

Apart from their limitations and merits, each of the contentions tends to address different types of protection. While the first contention for the inclusion of displaced Palestinians under the mandate of UNHCR focuses on the need to promote a durable solution in line with resolution 194, the second contention, in contrast, focuses on questions of individual status recognition and protection. The third contention, in contrast, focuses on promoting a rights-based approach in the search for durable solutions by promoting a standard of treatment and interim protection of individual rights pending a durable solution.

In light of the multi-faceted nature of protection and the perspective of a TP program, it is

³⁸⁸ *Supra* note 265, Akram & Rempel.

³⁸⁹ *Id.*, Akram & Rempel.

³⁹⁰ *Id.*, Akram & Rempel.

particularly important to explore and discuss the different kind of protection referenced in the debate on whether to include or not to include displaced Palestinians under the mandate of UHNCR. For example, UNHCR's argument that UNRWA has had a protection mandate since its inception³⁹¹ rests on the consideration that assistance is a *sine quo non* of international protection.³⁹² Hence, while assistance as a form of protection by means of relieving the hardship on displaced Palestinians was at the core of UNRWA's mandate, it did not involve seeking a resolution to the underlying cause of their plight.³⁹³ The later fell within the protective mandate of UNCCP which included promoting a durable solution to the Palestine question that will resolve the displacement question.³⁹⁴

Protection in the form of the promotion of a just and durable solution is key to the enjoyment of protection and the realization of rights.³⁹⁵ Thus, the void left by UNCCP, as the internationally recognized agency with an explicit mandate to systematically work for the search and implementation of durable solutions consistent with resolution 194 triggered the contention for inclusion within UNHCR's mandate.³⁹⁶ While UNRWA is uniquely placed to highlight the need for a just solution for the plight of displaced Palestinians, its role, despite the gradual growth in its protection nature,³⁹⁷ remains limited in the durable solutions realm as the effort to reach a solution is rather political.³⁹⁸ Thus, the discourse on including displaced Palestinians within UNHCR's mandate to guarantee their protection in the durable solutions realm is questionable in light of what UNHCR, as a nonpolitical actor,³⁹⁹ can actually do to replace UNCCP in its political efforts.⁴⁰⁰ Further, despite the consensus regarding the UN special responsibility to see a solution to the Palestine

³⁹¹ *Supra* note 344, UNHCR.

³⁹² *Supra* note 374, UN doc. A/AC.96/830.

³⁹³ *Supra* note 9, Kagan.

³⁹⁴ *Supra* note 119, UN Doc. A/RES/194 (III).

³⁹⁵ *Supra* note 291, UNRWA.

³⁹⁶ *Supra* note 207, Akram.

³⁹⁷ *Supra* note 237, Custer.

³⁹⁸ *Supra* note 291, UNRWA.

³⁹⁹ Article 2 of Chapter 1 of the UNHCR Statute provides that the work of UNHCR "shall be of an entirely non-political character". See *Supra* note 34, UN Doc. A/RES/428(V).

⁴⁰⁰ *Supra* note 9, Kagan.

question, including the displacement problem;⁴⁰¹ which is also authoritatively confirmed by the International Court of Justice (ICJ)'s 2004 *Wall Opinion*,⁴⁰² this remains a question of political will that neither UNHCR nor UNRWA can be required to bear the responsibility for.⁴⁰³ After all, while the protection gap in terms of promoting a durable solution in accordance with resolution 194 is real, it is a gap in terms of political will that neither the mandate of UNHCR, nor that of UNRWA can do much about, for both agencies would be confronted with the same political constraints.⁴⁰⁴ Acknowledging that promoting durable solutions is question of political will, the TP proposal envisions a combination of incentives and disincentives that would create both vested interests in a solution for all the states involved that would create pressure on non-complying states to participate.⁴⁰⁵ Further, by engaging all states that have a significant Palestinian population, the proposed TP plan would be made as part of an international process that includes shared responsibility on many levels and accommodates both legal and political interests of the states involved.

In contrast to the promotion of just and durable solutions as a form of protection, the contention that UNRWA's work has an inherent protection function that has evolved over the years addresses another area of protection which pertains to relieving the general hardship on displaced Palestinians and ensuring the respect of their rights.⁴⁰⁶ Without involving seeking a durable solution, this form of protection rather focuses on efforts to ensure the respect by host states of the rights of displaced Palestinians, the promotion of their general welfare and the advancement of their rights.⁴⁰⁷ This includes, among other things, promoting the observance of humanitarian law during times of armed conflict,

⁴⁰¹ See Chapter II.

⁴⁰² International Court of Justice (ICJ), *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (July 9, 2004), para. 49, available at: <https://www.un.org/unispal/document/auto-insert-178825/> (last visited Oct 26, 2020).

⁴⁰³ *Supra* note 237, Bartholomeusz, Custer, Badil; *Supra* note 9, Kagan.

⁴⁰⁴ *Supra* note 9, Kagan; *Supra* note 237, Custer.

⁴⁰⁵ *Supra* note 265, Akram & Rempel.

⁴⁰⁶ *Supra* note 291, UNRWA.

⁴⁰⁷ *Id.*, UNRWA; *Supra* note 350, Brailsford; *Supra* note 237, Custer.

promoting freedom of movement for displaced Palestinians, the maintenance of law and order be relevant governments, urging the relaxation of social and economic restriction that impair the right of refugees to live with basic dignity.⁴⁰⁸ However, this form of protection is also impaired in view of UNRWA's limited influence over the conduct of both host states in exile and Israel in the occupied territories.⁴⁰⁹ Further, this form of protection is constrained and challenged by internal political conflicts and the manner in which power is exercised within the Palestinian communities.⁴¹⁰ For example, in the spirit of fully carrying out this type of protection encompassing promoting law and order, by calling on host governments to disarm militant elements in the refugee camps, particularly those in Lebanon, UNRWA will be put in conflict with the Palestinian civilian authority in the camps.⁴¹¹

Another form of protection anchored in the contention for inclusion within UNHCR pertains to the protection of individual rights. In light of the unattainability of a durable solution to their plight, this form of protection is particularly relevant to displaced Palestinians as it guarantees the protection of individual rights.⁴¹² Without involving the search and implementation of a durable solution, the focus on questions of individual protection is essential for displaced Palestinians as it not only relates to relieving their general hardship but also as it guarantees and protects the range of basic and fundamental human rights that they are entitled to.⁴¹³ For example, UNHCR's simple recognition that an individual meets the criteria of a refugee as defined in the 1952 Convention requires states to grant the person the widest possible guarantees of fundamental human rights, including the freedom of movement,⁴¹⁴ access to courts,⁴¹⁵ administrative assistance,⁴¹⁶

⁴⁰⁸ *Supra* note 9, Kagan.

⁴⁰⁹ *Id.*, Kagan; *Supra* note 291, UNRWA.

⁴¹⁰ *Id.*, UNRWA.

⁴¹¹ *Id.*, UNRWA; *Supra* note 9, Kagan.

⁴¹² *Id.*, Kagan.

⁴¹³ *Supra* note 207, Akram.

⁴¹⁴ *Supra* note 100, 1951 Convention art. 26

⁴¹⁵ *Id.*, 1951 Convention art. 16.

⁴¹⁶ *Id.*, 1951 Convention art.25.

right of acquisition of movable and immovable property,⁴¹⁷ freedom from undue restriction on employment,⁴¹⁸ right to association,⁴¹⁹ identity papers,⁴²⁰ travel documents,⁴²¹ and housing rights.⁴²² However, while central to UHNCR's work, this form of protection appears much less developed and integrated in the work of UNRWA.⁴²³ This is attributed to the high level of discretion of host states, which is often shaped by political considerations.⁴²⁴

Despite the lack of a standardized treatment by Arab host States,⁴²⁵ the treatment of displaced Palestinians was generally governed by a determination not to dilute their right of return while also keeping domestic politics in check.⁴²⁶ In this sense, efforts at improving and alleviating the situation of displaced Palestinians and granting them more rights were feared to dissolve the Palestine question or jeopardize their durable solutions confirmed in resolution 194. Further, despite the Arab League-sponsored Casablanca Protocol, in which displaced Palestinians are granted the right to work, reside and have freedom of movement,⁴²⁷ implementation is lacking as many Arab States appeared reluctant to be seen as legitimizing the dispossession of Palestinians.⁴²⁸ Further eroding the international legal guarantees that the international human rights framework extends to displaced Palestinians, this restricted reaction towards the rights of displaced Palestinians is also anchored in the political, social and ethnic makeup of some Arab host States, particularly in Lebanon, thus leaving displaced Palestinians with little protection of their basic rights.⁴²⁹

⁴¹⁷ *Id.*, 1951 Convention art. 13.

⁴¹⁸ *Id.*, 1951 Convention art. 17.

⁴¹⁹ *Id.*, 1951 Convention art. 15.

⁴²⁰ *Id.*, 1951 Convention art. 27.

⁴²¹ *Id.*, 1951 Convention art. 28.

⁴²² *Id.*, 1951 Convention art. 21.

⁴²³ *Supra* note 9, Kagan.

⁴²⁴ *Supra* note 67, Albanese & Takkenberg.

⁴²⁵ *Id.*, Albanese & Takkenberg.

⁴²⁶ *Supra* note 261, Dumper.

⁴²⁷ *Supra* note 254, Casablanca Protocol.

⁴²⁸ *Supra* note 261, Dumper.

⁴²⁹ *Id.*, Dumper.

However, the framework of a regularized program of temporary protection would offer displaced Palestinians in any of the main regions to which they have fled the protection rights they currently lack, along with many of the concomitant rights of an individual right granted asylum but without the permanent status accompanying integration or resettlement that might compromise their right of return.⁴³⁰ A harmonized TP would not only create an incentive for participating states to engage in the implementation of durable solutions in accordance with resolution 194; being tied to refugee choice and right of return it would specifically address the fears of Arab states and provide tremendous incentives to the Arab states and to the refugees themselves to commit to the process.⁴³¹ Further, the proposed plan ensures a uniform minimum standard of treatment of displaced Palestinians by standardizing their treatment and regularizing the rights offered to them in a manner consistent with recognized legal and human rights standards, including civil, economic and social rights.⁴³² Building on the early form of TP offered by the Casablanca Protocol, the TP plan proposed is tailored to specifically address the individual needs of displaced Palestinians by identifying a set of rights as fundamental including: status, identity and travel documents (freedom of movement); family reunification, employment, housing and education; health and welfare benefits.⁴³³ According to the TP plan, an effective Arab participation would mean the ability of Arab states to forge effective cooperation and unified participation that would allow the promotion and protection of individual rights by UNRWA.⁴³⁴ On the other hand, if some form of a Palestinian state emerges without a just and durable solution to the refugees problem, then TP within the Palestinian state could offer protection to displaced Palestinians in the territory based on a distinct legal status until such time as those who so choose can return to their original homes.⁴³⁵

While temporary protection could unduly narrow the availability of international protection

⁴³⁰ *Supra* note 265, Akram & Rempel.

⁴³¹ *Id.*, Akram & Rempel.

⁴³² *Id.*, Akram & Rempel.

⁴³³ *Id.*, Akram & Rempel.

⁴³⁴ *Id.*, Akram & Rempel.

⁴³⁵ *Id.*, Akram & Rempel.

to displaced Palestinians under the international refugee regime, which might apply with an expanded interpretation of Article 1D, it would afford displaced Palestinians with the basic protection rights of other persons who are granted a TP status, whether convention defined refugees or not.⁴³⁶ By applying a right-based approach to the search for durable solutions, implementing a harmonized temporary protection regime for displaced Palestinians offers an opportunity to expand the possibilities of international protection beyond the constraints of the international refugee regime.⁴³⁷

In exploring the question pertaining to how to evolve the distinct regime devised for Palestinians, it should thus be recognized that each of the directions or policy options intended to expand the level of protection offered to displaced Palestinian has its own merits and limitations. In light of this dilemma, determining one direction for the evolution of the distinct regime remains a difficult task. Yet, the need to implement a rights-based approach to durable solutions and promoting the protection of their individual rights without jeopardizing the right to the UN-sanctioned durable solutions devised for their plight is rather heightened.

C– Conclusion

Triggered by the void in the scope of protections offered to displaced Palestinians, particularly in contrast with those offered to other refugee groups, a major debate over whether or not to include displaced Palestinians within UNHCR’s protection mandate has evolved, coupled with voices calling for temporary protection. This debate gave rise to different interpretations of Article 1D, the assistance- protection dichotomy provided in the language of Article 1D, but also to the multi-faceted nature of protection. While intended to expand the panoply of rights for displaced Palestinians, each of these contentions has its own merits and limitations. However, understanding the multi-faceted nature of protection

⁴³⁶ *Id.*, Akram & Rempel.

⁴³⁷ *Id.*, Akram & Rempel.

serves as grounds to detangle the conflation between individual rights and durable solutions, but also to push for applying a rights-based approach to durable solutions that promotes the protection of their individual rights without jeopardizing the right to the UN-sanctioned durable solutions devised for their plight.

V- Conclusion

Owing to historical and political reasons, a unique temporary framework of specific norms and institutional arrangements, different from that of other refugees, was established to the assistance and protection of displaced Palestinians. Acknowledging that Palestinian displacement is a combined effect of the UN Partition Plan and the ensuing creation of the state of Israel as a national home for Jews, the UN's response captured their displacement in political and humanitarian terms rather than as a question of refugees in need of international protection. This was coupled with an expectation that a resolution of their plight is a matter of time, thus informing and shaping not only the set-up and temporary nature of the institutional *ad hoc* arrangements of their regime, but also the scope and type of protection that it would offer.

The distinctive temporary regime has proved to be insufficient to address the protection needs of displaced Palestinians in light of their protracted displacement. The precarity of their legal status coupled with the general political volatility in their host states has further exposed the insufficiency of the distinctive regime to offer effective protection, thus compounding the plight and vulnerability of displaced Palestinians. While prevented from exercising their right to return, the peace process' dilution of the relevance of international law as confirmed in resolution 194 has rendered them pawns in the negotiations for a final settlement, adding more ambiguity to their future and perpetuating the protraction of their situation.

The tensions and anxieties that the distinctive regime is witnessing, manifested with its insufficiency to offer effective protection, is a signifier of its inability to speak to their changing needs seven decades later. Triggered by this protection void, particularly in contrast with the level and form of protection offered to other refugee groups, a major debate evolved on how to best expand the scope of protection they are offered. While intended to expand the panoply of rights for displaced Palestinians, each of these

contentions has its own limitations. However, understanding the multi-faceted nature of protection serves as grounds to detangle the conflation between individual rights and durable solutions, but also to push for applying a rights-based approach to their protection and the promotion of an interim protection of their individual rights without jeopardizing the right to the UN-sanctioned durable solutions devised for their plight.