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**TEMPORARY PROTECTION AS AN INSTRUMENT  
FOR IMPLEMENTING THE RIGHT OF  
RETURN FOR PALESTINIAN REFUGEES**

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# TEMPORARY PROTECTION AS AN INSTRUMENT FOR IMPLEMENTING THE RIGHT OF RETURN FOR PALESTINIAN REFUGEES

Susan M. Akram\* and Terry Rempel\*\*

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I. INTRODUCTION

Temporary protection is widely regarded as an international legal norm now obligatory in certain circumstances on states with regard to their



treatment of a mass influx of refugees, or of persons fleeing situations of armed conflict or civil strife.<sup>1</sup> As a recognized status, it is the most recent of the three major possibilities for protection of refugees a state can offer—the other two being the now-universal obligation of *non-refoulement* (non-return)<sup>2</sup> and the non-obligatory protection of political asylum.<sup>3</sup>

Despite the controversy temporary protection has generated, it has special significance to the Palestinian refugee situation. For historical, legal, and political reasons, Palestinian refugees and stateless individuals have been effectively denied many of the minimal legal protections available to other refugees under the regime of the 1951 Geneva Convention Relating to the Status of Refugees. This denial has had grave consequences for Palestinians in the Israeli-occupied territories and in the diaspora, the latter including those in Arab states.<sup>4</sup> The implications of the legal lacunae in which Palestinians find themselves are more stark in the

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<sup>1</sup> Writing in 1986, Deborah Perluss and Joan Hartman argued that state practice had solidified “temporary refuge,” the non-formalized predecessor to the formal status of temporary protection, into binding customary law for persons fleeing armed conflict. Deborah Perluss & Joan Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT’L L. 551 (1986). Joanne Thorburn indicates the formalization of temporary protection came about in the 1970s, during the mass refugee crisis of the Vietnamese boat people, when the United Nations High Commissioner for Refugees (“UNHCR”) Executive Committee of the High Commissioner (“ExCom”) issued its first official document calling for definition and formulation of temporary refuge. See Joanne Thorburn, *Transcending Boundaries*, 7 INT’L J. REFUGEE L. 459 (1995). For a summary of different views on temporary protection, see Nadia Yakoob, *Workshop Report: Report on the Workshop on Temporary Protection: Comparative Policies and Practices*, 13 GEO. IMMIGR. L.J. 617 (1999). Commentators point out significant differences between the non-formalized and formalized concepts of temporary refuge and temporary protection. See, e.g., Donatella Luca, *Questioning Temporary Protection*, 6 INT’L J. REFUGEE L. 535 (1994).

<sup>2</sup> See generally GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117-71 (2d ed. 1996); 2 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: ASYLUM, ENTRY AND SOJOURN* (1975); James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129 (1990).

<sup>3</sup> Despite efforts of the UNHCR and other international bodies, political asylum has never been accepted as an obligation on any state. See GRAHL-MADSEN, *supra* note 2, at 108 (stating that the Universal Declaration of Human Rights codifies the right to “seek and enjoy” asylum, but not the right to be granted asylum); GOODWIN-GILL, *supra* note 2, at 174-82; see also Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 11 (1993); *Declaration on Territorial Asylum*, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967).

<sup>4</sup> For a short overview of the historical and legal context of the current situation for Palestinian refugees and stateless persons and consequences to their human rights, see Susan M. Akram, *Reinterpreting Palestinian Refugee Rights Under International*

post-Oslo era—when a politically negotiated resolution of the Israeli-Palestinian conflict appears more remote than ever—and Palestinians, particularly in the West Bank and Gaza, have been subjected to heightened oppression and terror tactics by their Israeli occupiers.<sup>5</sup> The escalating Israeli violence, directed at a Palestinian population held captive in towns and villages by curfews and checkpoints, as well as the ongoing Israeli policy of ethnic cleansing,<sup>6</sup> is causing a renewed exodus of Palestinian refugees.

It is in this post-Oslo, second *intifada* framework that a regularized program of temporary protection appears to be a particularly attractive option for Palestinians fleeing renewed conflict in the occupied territories, as well as for Palestinian refugees already in the diaspora who lack third-state citizenship, and for those remaining in Arab states. This article argues for an internationally harmonized approach to temporary protection for Palestinian refugees and stateless persons. Temporary protection would offer diaspora 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 granted asylum, but without the permanent status accompanying integration or resettlement that might compromise their rights to return to their places of origin.

Currently, the promise of an independent Palestinian state is more remote than ever, particularly in the absence of political will amongst the relevant states to enforce its realization. Harmonized temporary protection would create an incentive for participating states to engage in the implementation of durable solutions for this population, and temporary protection tied to refugee choice and right of return would provide tremendous incentives to the Arab states and to the refugees themselves to commit to the process. Moreover, the international community's experience over the last forty years of implementing refugee solutions clearly shows that the only solutions that have been durable are those based on equitable responsibility-sharing driven by refugee choice. On the other hand, if some form of Palestinian state emerges without a just and durable solution to the refugee problem, temporary protection within the Palestinian state would offer protection to Palestinian refugees living in the territory based on a distinct legal status (which differs from the status of non-refugee citizens) until such time as those who so choose can return to their original homes and lands within the pre-1948 boundaries of the state of Israel. Finally, the status of temporary protection with the expectation of repatriation to place of origin is fully consistent with principles of international law on the right of return, as well as with principles gov-

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*Law and a Framework for Durable Solutions, in PALESTINIAN REFUGEES: THE RIGHT OF RETURN* 165 (Naseer Aruri ed., 2001).

<sup>5</sup> See *infra* notes 190-91, 201, 205-08, 212-16, 221-38 and accompanying text.

<sup>6</sup> See *infra* note 120.

erning the design and implementation of durable solutions for refugees in general and Palestinian refugees in particular.

Part II establishes the legal framework of temporary protection and its place in refugee and human rights law. Part III discusses the particular historical, legal and political issues involved in the Palestinian refugee situation relevant to the need for a harmonized rights-based temporary protection regime. Part IV illustrates the failures of the existing regional approach to temporary protection and examines the principles necessary for a rights-based framework for temporary protection. Finally, Part V argues for an internationally-harmonized approach to temporary protection for Palestinian refugees and stateless persons, applying rights-based principles to the search for durable solutions for the Palestinian refugee problem.

## II. THE LEGAL FRAMEWORK OF TEMPORARY PROTECTION AND ITS PLACE IN REFUGEE AND HUMAN RIGHTS LAW

### A. *International Legal Framework: The Refugee Convention and Protocol*

The current international legal regime for refugees is a relatively recent one, established under the framework of the 1951 Geneva Convention Relating to the Status of Refugees (“Refugee Convention”),<sup>7</sup> its companion 1967 Protocol (“Refugee Protocol”),<sup>8</sup> and the Statute of the United Nations High Commissioner for Refugees (“UNHCR”).<sup>9</sup> With the entry into force of the Refugee Convention and the establishment of the UNHCR, the international legal norms affecting bilateral and multilateral arrangements concerning refugees shifted in a number of significant ways. First, the prior practice of recognizing refugees as groups or categories changed to an individualized assessment of whether a person qualified as a “refugee” under a specific, case-by-case definition.<sup>10</sup> Second, the Refugee Convention definition was intended to be ideologically neutral, an objective definition that would view refugee determinations on a non-political basis.<sup>11</sup> Third, the Refugee Convention brought about a

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<sup>7</sup> Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

<sup>8</sup> Protocol Relating to the Status of Refugees, *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

<sup>9</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(v), U.N. GAOR, 5th Sess., Annex, U.N. Doc. A/1775 (1950) [hereinafter UNHCR Statute].

<sup>10</sup> See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 806 (1998); Hathaway, *supra* note 2, at 139; see also Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL’Y 129, 130-32 (2001); ARISTIDE R. ZOLBERG, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 3-29 (1989).

<sup>11</sup> See Steinbock, *supra* note 10, at 739-40; see also Feller, *supra* note 10, at 131-32.

new focus on international responsibility-sharing of refugee flows,<sup>12</sup> moving away from the prior focus on refugees as a solely regional or bilateral problem.<sup>13</sup> The Executive Committee of the High Commissioner's Programme ("ExCom") was established as the entity that would provide the mechanism for determining how such international responsibility toward refugees would be shared.<sup>14</sup> With this regime in place, the international community initiated a consensus model of refugee problem-solving, sharing the responsibility of implementing a multileveled durable solution process driven by the pivotal principle of refugee choice.<sup>15</sup>

The Refugee Convention and Refugee Protocol incorporate two essential state obligations: the application of the now universally-accepted definition of "refugee," which appears in article 1A(2) of the Refugee Convention, and the obligatory norm of *non-refoulement*, which is incorporated in article 33.1 of the Refugee Convention.<sup>16</sup> There have been

<sup>12</sup> The authors are grateful to Joan Fitzpatrick for pointing out the pejorative connotation of "burden-sharing," and will use here the less common but accepted equivalent term, "responsibility-sharing." See Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279, 289 (2000).

<sup>13</sup> The preamble of the Refugee Convention, which reflects the responsibility-sharing commitment of the state parties, notes "that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation." Refugee Convention, *supra* note 7, pmbl., 189 U.N.T.S. at 150-52.

<sup>14</sup> The UNHCR ExCom was set up in 1958 by the Economic and Social Council ("ECOSOC"). It originally comprised twenty-four states, but has grown over time to its present membership of fifty states. In addition to decisions of the ExCom, UNHCR's mandate is determined by its statute, by resolutions of the General Assembly, and by ECOSOC. See GOODWIN-GILL, *supra* note 2, at 7-15.

<sup>15</sup> In her presentation to the Institute for Global Legal Studies, Erika Feller, Director of UNHCR's International Protection Division, emphasized that the main challenges for UNHCR are: protecting refugees in mass influx situations, protecting refugees in individual asylum processes, and realizing durable solutions based on a protection framework. "The overarching theme that has to run through the entire process is responsibility sharing, based on international cooperation and solidarity." Feller, *supra* note 10, at 132.

<sup>16</sup> "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 7, art. 33(1), 189 U.N.T.S. at 176. There is much debate about the parameters of the obligation of *non-refoulement*, both as a principle binding a state party to the Refugee Convention, and as a customary international law source of obligation for both Convention and non-Convention signatories towards persons fleeing situations not covered by the Refugee Convention definition, such as persons fleeing armed conflict, widespread violations of human rights, or other grave emergencies. See GOODWIN-GILL, *supra* note 2, at 121-39.

numerous attempts to codify an obligation to grant political asylum as a peremptory norm, but states have strenuously resisted that effort, and no such obligation appears in the Refugee Convention or Refugee Protocol, or in any other universal human rights instrument.<sup>17</sup> Although it is true that the international consensus at the time the Refugee Convention was drafted was toward third country resettlement and an effort to persuade states to grant asylum, this consensus was primarily a reflection of Western states' attitudes toward the largest group of refugees to which they felt some obligation: post-World War II European refugees and displaced persons.<sup>18</sup> The international consensus has, more recently, returned to the traditional foundation of refugee law—the implementation of refugee return to place of origin, with integration and resettlement viewed as less desirable options by the states and international bodies charged with refugee solutions.<sup>19</sup>

The UNHCR describes three main durable solutions for refugees: repatriation, host country absorption, and third state resettlement.<sup>20</sup> Voluntary repatriation in safety and dignity, based on the fundamental right to return to one's home and country, is recognized both in principle<sup>21</sup> and

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<sup>17</sup> See U.N. HIGH COMM'R FOR REFUGEES, STATE OF THE WORLD'S REFUGEES (1993); see also Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 253 (1996); Jon C. Graf, *Has El Dorado Crumpled So Soon After its Cornerstone Was Laid?: The State of International Refugee Law and the Repatriation of Bosnians in Germany*, 10 IND. INT'L & COMP. L. REV. 115, 121-24 (1999).

<sup>18</sup> These refugees could not return home because their areas of origin suffered massive destruction, their states of origin no longer recognized them as citizens, or because the refugees were unable or unwilling to return to the area because it was now under Communist control or because of the persecution they had suffered there. See Hathaway, *supra* note 2, at 129; GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 66 (1986); Steinbock, *supra* note 10, at 810-13; GOODWIN-GILL, *supra* note 2, at 7-20.

<sup>19</sup> U.N. HIGH COMM'R FOR REFUGEES, STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA 143-46, 164 (1997) [hereinafter HUMANITARIAN AGENDA]; see also *Conclusion on International Protection*, U.N. High Comm'r for Refugees, Exec. Comm., No. 90 (LII), para. (j)-(k) (2001) [hereinafter *Conclusion on International Protection 2001*]; *Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee*, (Third Track), UNHCR ExCom. 53d Sess., at 4, 5, 18, U.N. Doc. A/ACI.96/961 (2002) [hereinafter *Global Consultations on International Protection*]; see also *Global Consultations on International Protection: Local Integration*, 4th Mtg., ¶ 18, U.N. Doc. EC/GC/02/6 (2002).

<sup>20</sup> See *Conclusion on International Protection 2001*, *supra* note 19, at ¶ (j)-(k); see also *Conclusions on International Protection*, UNHCR ExCom, No. 67 (XLII), ¶ (g) (1991).

<sup>21</sup> See *Conclusion on Voluntary Repatriation*, UNHCR ExCom No. 40 (XXXVI) (1985); *Conclusion on Voluntary Repatriation*, UNHCR ExCom No. 18 (XXXI) (1980).

in state practice as the most appropriate solution to refugee flows.<sup>22</sup> In the 1990s alone, approximately 12 million refugees returned or were repatriated around the world, while some 1.3 million refugees and persons of concern to the UNHCR were resettled.<sup>23</sup> In a single year—1999—over 1.6 million refugees returned to their homes, while 45,000 refugees resettled in third states.<sup>24</sup> Moreover, the UNHCR emphasizes that for refugee solutions to be durable, they must be voluntary.<sup>25</sup> The principle of voluntariness is incorporated through individual UNHCR-state agreements,<sup>26</sup> through multiparty peace agreements involving refugee flows,<sup>27</sup> and through UNHCR mechanisms for verification of refugee choice.<sup>28</sup> Voluntariness means that states should not take “measures

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<sup>22</sup> See *infra* note 25 and accompanying text; see *Conclusion on Voluntary Repatriation*, UNHCR ExCom No. 40 (XXXVI) (1985); *Conclusion on Voluntary Repatriation*, UNHCR ExCom No. 18 (XXXI) (1980).

<sup>23</sup> U.N. HIGH COMM’R FOR REFUGEES, REFUGEE RESETTLEMENT IN SELECTED COUNTRIES TBL. V. 20 (1990-1999); U.N. HIGH COMM’R FOR REFUGEES, REFUGEES AND OTHERS OF CONCERN TO THE UNHCR: STATISTICAL OVERVIEW (1999).

<sup>24</sup> *Report of the United Nations High Commissioner for Refugees*, U.N. ESCOR, Substantive Sess., at 6, U.N. Doc. (2000).

<sup>25</sup> The voluntary nature of a refugee’s choice of solutions is considered by UNHCR to be “a pragmatic and sensible approach” to implementing durable solutions. See U.N. High Comm’r for Refugees, *Handbook on Voluntary Repatriation: International Protection 10-11* (1996) [hereinafter *HANDBOOK ON VOLUNTARY REPATRIATION*].

<sup>26</sup> See MARJORIE ZIECK, *UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS* 346 (1997). On the Comprehensive Plan of Action (“CPA”), see generally Arthur Helton, *The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control*, in *LAWYERS COMM. FOR HUM. RTS., UNCERTAIN HAVEN: REFUGEE PROTECTION IN THE FORTIETH ANNIVERSARY OF THE 1951 UNITED NATIONS REFUGEE CONVENTION* 11-60 (1991). On voluntary repatriation in Africa, see Robert F. Gorman, *Taking Stock of the Second International conference on Assistance to Refugees in Africa (ICARA II)*, 14 *J. AFR. . STUD.* 4, 4-11 (1987); see also H. ADELMAN & J. SORENSON, *AFRICAN REFUGEES: DEVELOPMENT AID AND REPATRIATION* 227 (1994). On repatriation in the CIREFCA process, see DENNIS GALLAGHER, *REVIEW OF THE CIREFCA PROCESS* (1994) (Refworld Information on Refugees and Human Rights CD-ROM, 2003). For the UNHCR perspective on voluntary repatriation, see generally *HANDBOOK ON VOLUNTARY REPATRIATION*, *supra* note 25.

<sup>27</sup> See U.N. High Comm’r for Refugees, *Global Consultations on International Protection: Voluntary Repatriation*, 4th mtg., U.N. Doc. EC/GC/02/5 (2002); *Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons*, U.N. GAOR, 44th Sess., Annex 1, Agenda Item 110(b), at 19, U.N. Doc. A/44/527 (1989); *Bosn.-Herz.-Croat.-Yugos.: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes*, 35 *I.L.M.* 75 (1996); U.N. High Comm’r for Refugees, *International Conference on Indo-Chinese Refugees, Declaration and Comprehensive Plan of Action*, U.N. GAOR, 44th Sess., Plen. Mtg., Annex, at 10, U.N. Doc. A/44/523 (1989).

<sup>28</sup> See *HANDBOOK ON VOLUNTARY REPATRIATION*, *supra* note 25, at 30-39.

which push the refugee to repatriate, but also . . . that he or she should not be prevented from returning.”<sup>29</sup>

Refugee law has a unique position in the human rights system, in that its core instruments are more widely ratified and implemented through domestic law than any other human rights conventions.<sup>30</sup> The implementing body of the Refugee Convention and Refugee Protocol—the UNHCR—also commands significant influence in creating and enforcing norms for refugees and, to a lesser extent, internally displaced persons and others in refugee-like situations.<sup>31</sup> *Non-refoulement* is considered a peremptory norm and is widely respected even by states that are not signatories to the Refugee Convention or Refugee Protocol.<sup>32</sup> When states deviate significantly from the constraints of the Refugee Convention and Refugee Protocol, there is a high degree of international pressure to conform, particularly through the ExCom of the UNHCR.<sup>33</sup> A state is obligated under the Refugee Convention regime to provide a process to determine whether any individual seeking protection as a refugee meets the Convention definition.<sup>34</sup> Meeting the refugee definition automatically triggers the protection of *non-refoulement*; it does not entitle the individual to asylum status. Nevertheless, the Refugee Convention requires states to extend protection as long as the conditions justifying *non-refoulement* continue, thus requiring more permanent status if return becomes impossible over the longer term—an obligation of *non-refoulement* through time.<sup>35</sup>

The Refugee Convention restrictively defines the situations in which a state may terminate an individual’s status as refugee. The cessation clauses of article 1C(1) specify two kinds of conditions that can operate to

<sup>29</sup> *Id.* at 10.

<sup>30</sup> See Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 280-81.

<sup>31</sup> See Jennifer Moore, *Restoring the Humanitarian Character of U.S. Refugee Law: Lessons from the International Community*, 15 BERKELEY J. INT’L L. 51, 54 (1997).

<sup>32</sup> “States have been prepared to accept that the principle of non-refoulement should be scrupulously observed. In numerous resolutions of international bodies in which this principle has appeared in recent years, the principle has been stated without any qualification.” G.J.L. Coles, *Temporary Refuge and the Large-Scale Influx of Refugees*, Paper submitted to the UNHCR Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva Apr. 21-24, 1981) EC/SCP/16/Add.1 (July 17, 1981); see also Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2343 n. 52 (1991).

<sup>33</sup> GOODWIN-GILL, *supra* note 2, at 212.

<sup>34</sup> James C. Hathaway & R. Alexander Neve, *Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 158-59 (1997).

<sup>35</sup> GOODWIN-GILL, *supra* note 2, at 123; see also Davor Sopf, *Temporary Protection in Europe After 1990: The “Right to Remain” of Genuine Convention Refugees*, 6 WASH. U. J.L. & POL’Y 109, 134-35 (2001).

terminate refugee status: (1) when the refugee herself takes steps that indicate international protection is no longer necessary;<sup>36</sup> and (2) when conditions change in the country of origin such that there is no longer a basis for claimed persecution.<sup>37</sup> The first set of conditions explicitly terminate refugee status of persons who have voluntarily resumed the protection of their country of nationality;<sup>38</sup> those who have voluntarily reacquired prior nationality;<sup>39</sup> those who have acquired a new nationality and enjoy protection in the new state;<sup>40</sup> and those who have voluntarily re-established themselves in a country they fled or where they refused to return due to persecution.<sup>41</sup> The second set of conditions terminate the refugee status of persons when conditions in their home states have changed such that the reasons for claimed persecution no longer exist (unless there are compelling reasons based on past persecution for such person to refuse the protection of the home state);<sup>42</sup> and the status of stateless persons when such changed circumstances affect the claim of persecution from the state of last habitual residence.<sup>43</sup>

The detailed and specific nature of the cessation clauses indicate they are to be restrictively interpreted, and the UNHCR Handbook reinforces a restrictive interpretation.<sup>44</sup> The combination of the requirement that states examine all claims to refugee status made in their territory, the *non-refoulement* obligation, and the restrictive cessation clauses, squarely place the obligation on states not to return individuals when their lives or safety are at risk, and to maintain that obligation until and unless a cessation condition is met.

### B. *Elements of Temporary Protection: Between Asylum and Non-Refoulement*

Although the Refugee Convention was drafted to address the mass displacements caused by World War II in Europe and has provisions for

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<sup>36</sup> Joan Fitzpatrick, *The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection*, 13 GEO. IMMIGR. L.J. 343, 348-49 (1999); Refugee Convention, *supra* note 7, art. 1C, 189 U.N.T.S. at 154.

<sup>37</sup> U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS para. 164 (2d ed. 1992) (1979) (quoting Refugee Convention, *supra* note 7, art. 1C, 189 U.N.T.S. at 154-56) [hereinafter UNHCR HANDBOOK].

<sup>38</sup> Refugee Convention, *supra* note 7, art. 1C(1), 189 U.N.T.S. at 154.

<sup>39</sup> *Id.* at art. 1C(2), 189 U.N.T.S. at 154.

<sup>40</sup> *Id.* at art. 1C(3), 189 U.N.T.S. at 154.

<sup>41</sup> *Id.* at art. 1C(4), 189 U.N.T.S. at 154.

<sup>42</sup> *Id.* at art. 1C(5), 189 U.N.T.S. at 154.

<sup>43</sup> *Id.* at art. 1C(6), 189 U.N.T.S. at 154.

<sup>44</sup> UNHCR HANDBOOK, *supra* note 37, at para. 116 ("The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.").



group or category determinations, it has been viewed by states primarily as an instrument for individualized refugee assessments.<sup>45</sup> Because individual assessments are considered inappropriate for mass influx, some states view the Refugee Convention as inapplicable to situations of mass refugee flows.<sup>46</sup> New instruments and policies have been devised to bridge the gap between states' obligation of *non-refoulement* and the need for a durable solution in situations where individualized asylum claims overwhelm the capacity of state systems, or where the cause of flight is for non-Convention reasons. It is in this context that temporary protection has emerged as a regularized status in recent years.

Temporary protection in its more recent, formalized sense<sup>47</sup> takes a number of different forms in the areas of the world where it has been implemented and covers migrants or putative refugees fleeing various types of major crises in their home states. It is, however, characterized by a set of common elements. First, it is a grant of protection of a temporary

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<sup>45</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 282.

<sup>46</sup> See Hathaway & Neve, *supra* note 34, at 157-69; see generally Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, *supra* note 17; see also Bonaventure Rutinwa, *Temporary Protection and its Expression Under the 'Reformulation of Refugee Law' Model*, in PERSPECTIVES ON REFUGEE PROTECTION IN SOUTH AFRICA, at 50, 50 (Jeff Handmaker et al. eds., 2001).

One of the matters over which a near total consensus exists is that the traditional regime of refugee protection, based on the 1951 Convention of Refugees and its regional complements is in crisis. The system is no longer adequate to deal with the problem of forced migration in the manner and magnitude it is currently being experienced. The contemporary forced migration phenomenon is characterized by mass influx of composite populations, many of whom are not refugees within the definitions found under existing instruments and therefore, strictly speaking, do not qualify for international protection.

*Id.*

<sup>47</sup> For a thorough study on the range of practice of temporary protection, see INTER-GOVERNMENTAL CONSULTATIONS ON ASYLUM, REFUGEES AND MIGRATION POLICIES IN EUROPE, NORTH AMERICA AND AUSTRALIA (1995) [hereinafter IGC STUDY]. A review of literature on temporary protection shows contrasting perspectives: temporary protection/safe haven as a non-formalized, non-specific status of state tolerance of refugees or "refugee-like" persons for short or long periods of time in their territories; or, the more specific status of temporary protection with specified parameters for beneficiaries, duration of status, standards of rights and criteria for cessation included in domestic legislation. *Id.* For a comparison of perspectives, see Yakoob, *supra* note 1. For views of some of the commentators on temporary protection, see Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migration*, 35 VA. J. INT'L L. 13 (1994); Morton Kjaerum, *Temporary Protection in Europe in the 1990's*, 6 INT'L J. REFUGEE L. 444 (1994); Kay Hailbronner, *Temporary and Local Responses to Forced Migration: A Comment*, 35 VA. J. INT'L L. 81 (1994); Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543 (1998).

nature from the receiving state to specific groups or individuals.<sup>48</sup> Second, it is granted with the expectation that it is an interim solution, and at the end of the time period of the grant, the individual or group will return home or, if return is not desirable, either the receiving or a third state will offer more permanent status.<sup>49</sup> Third, temporary protection may afford fewer rights to the individual receiving the status than she would receive as a Convention refugee.<sup>50</sup> Despite significant variables in these elements, there is a common understanding of what temporary protection entails, and states have recently embraced it enthusiastically for a number of reasons. Common understanding, however, does not mean common agreement about the desirability or advisability of temporary protection in many situations in which it has been used. As Joan Fitzpatrick states:

Temporary protection is like a magic gift, assuming the desired form of its enthusiasts' policy objectives. Simultaneously, it serves as a magic mirror of its observers' fears. For refugee advocates, TP [temporary protection] expands the protection of forced migrants who cannot satisfy the criteria under the 1951 Convention and it promises group-based protection when the determination of an individual's status proves impossible. At the same time, refugee rights organizations fear that informal and discretionary TP may dislodge refugee protection from the realm of enforceable human rights.<sup>51</sup>

From the perspective of the state granting the status, temporary protection has the following advantages: (1) it is a humanitarian response to situations of mass influx, whether toward persons who might qualify as refugees under the Refugee Convention definition, or who would not qualify, but are fleeing emergency situations in their home countries and deserve humanitarian treatment in their place of refuge;<sup>52</sup> (2) it offers an alternative to the receiving states' obligation to provide the full asylum procedures otherwise required for persons seeking refugee status, conserving resources in often overstretched adjudication systems;<sup>53</sup> (3) it absolves receiving states from having to grant asylum to large numbers of putative refugees, palliating divisive domestic political debates; (4) it has frequently been implemented as part of a consensus of responsibility-sharing, thus relieving any individual state of having to absorb the entire refugee flow involved;<sup>54</sup> and (5) it demonstrates both to the arriving alien

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<sup>48</sup> Rutinwa, *supra* note 46, at para. 1.7.

<sup>49</sup> The IGC Study described four common elements of the more formalized temporary protection: admission, or extension of stay; non-refoulement; basic rights/humanitarian standards; and eventual return. IGC STUDY, *supra* note 47, at 11. These elements have particular implications for Palestinians, which will be addressed below.

<sup>50</sup> Rutinwa, *supra* note 46, at para. 1.7.

<sup>51</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 280.

<sup>52</sup> See Rutinwa, *supra* note 46, at para. 1.7.

<sup>53</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 280.

<sup>54</sup> Feller, *supra* note 10, at 133.

and to the world at large that the state is providing protection on only a temporary basis, with the understanding that this status will be revoked once repatriation is feasible.<sup>55</sup>

From the perspective of the putative refugee, temporary protection has both advantages and disadvantages, depending on a number of variables determined by domestic legislation. Generally, however, the advantages include the following: (1) the individual is not required to go through a protracted and often taxing asylum application procedure; (2) the individual may be granted many of the protection rights afforded to an asylee, such as the right to work, the right to freedom of movement, and the right to obtain certain basic benefits for subsistence;<sup>56</sup> and (3) the status is granted for a definite period of time, allowing the individual to make specific plans for repatriation, or for resettlement in a third state, within a certain time frame.<sup>57</sup>

### C. *Temporary Protection Measured Under Guarantees of the Refugee Convention*

Many observers criticize temporary protection as having significant disadvantages, both from the perspective of the individual refugee and from the perspective of the refugee/human rights system itself.<sup>58</sup> States are increasingly substituting informal temporary protection processing for Refugee Convention status determinations, both in cases of mass influx and in cases where individuals in a group are perceived not to fit under the strict Refugee Convention definition.<sup>59</sup> In either situation, the strength and integrity of the Refugee Convention regime—based on concrete state obligations incorporated in the widely-accepted international

<sup>55</sup> Sopf, *supra* note 35, at 143.

<sup>56</sup> See Rutinwa, *supra* note 46, at para. 1.7; Sopf, *supra* note 35 (citing *Conclusion on People Displaced by the Conflict in the Former Yugoslavia* ¶ 4 (1992), available at <http://www.unhcr.ch/legal/bibliographic/papers.4htm> (last visited Aug. 1, 2001) (discussing the meeting of Ministers Responsible for Immigration in London in December 1992). The Conclusion stated that admitted individuals should be provided opportunities to benefit from education and social integration, thereby enhancing the success of future repatriation. *Id.*

<sup>57</sup> In the case of TPS in the United States, the individual has the option of going forward with an asylum claim while s/he is in TPS status if s/he chooses to do so; however, low grant rates for certain TPS groups signal that TPS is intended to be temporary and not a substitute for asylum. See Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 68-69 (1993); see also Susan Martin & Andrew I. Schoenholtz, *Asylum Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 613 (2000).

<sup>58</sup> See, e.g., Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12; Sopf, *supra* note 35; Kjaerum, *supra* note 47; Thorburn, *supra* note 1.

<sup>59</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 280-81.

instruments—are undermined by an ad hoc system that is not grounded in any international convention.<sup>60</sup>

As states increasingly use an informal and ad hoc temporary protection system to replace the highly-codified and regularized refugee regime, they may be undermining the latter norms.<sup>61</sup> This is particularly true in situations where temporary protection is offered to all individuals within a certain designated group or category, whether they would qualify as Refugee Convention refugees or not; but this is also true when temporary protection is offered in response to mass refugee flows. There is no provision in the Refugee Convention that permits suspending the obligation to conduct refugee status determinations under any circumstances, even under conditions of mass influx.<sup>62</sup> Granting temporary protection to individuals under such circumstances denies the permanent protection they might deserve under the Refugee Convention.

A related concern to replacing Refugee Convention status with temporary protection is that when states decide to terminate the grant of temporary protection, they may either forcibly or through negative incentives return individuals to conditions where safety and dignity cannot be guaranteed. As opposed to the Refugee Convention cessation clauses, which have strict requirements, temporary protection in its various regional forms can be terminated at any time, and not necessarily in connection with internationally-monitored mechanisms for safe return.

When states substitute a non-formalized temporary protection system for the Refugee Convention regime, they may fail to grant basic human rights that the Refugee Convention guarantees to refugees. Quite aside from the obligations of non-rejection at the frontier and *non-refoulement* through time, states have additional obligations to provide a number of economic and social rights to recognized refugees and to expand those rights over time. The rights guaranteed by the Refugee Convention are employment, housing, public education, property ownership, freedom of movement, identity papers, travel documents, and social security.<sup>63</sup> The

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> The 1967 Declaration on Territorial Asylum, article 3(2), would permit *non-refoulement* to be suspended for “overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.” *United Nations Declaration on Territorial Asylum*, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, Art. 3(2), U.N. Doc. A/6716 (1967).

<sup>63</sup> Article 17 requires contracting states to grant lawful refugees equally favorable treatment in employment as is granted to their nationals. Article 21 requires states to grant lawful refugees housing benefits at least as favorable as granted to aliens. Article 22 obligates states to give lawful refugees the same elementary education benefits as their nationals, and to grant other education benefits as favorably as possible. Articles 13 and 14 require states to give movable, immovable, and intellectual property ownership and rights on an equal basis as other “aliens generally in the same circumstances,” and in a manner “as favourable as possible.” Article 26

Refugee Convention requires that most of these rights be guaranteed at the same level as to nationals of the state, and all are guaranteed at least at the same level as to other aliens.<sup>64</sup> Because there is no internationally-binding standard that guarantees certain human rights for persons granted temporary protection, a state may deny even basic Refugee Convention rights at its discretion.<sup>65</sup> The Refugee Convention is not the only constraint on states that deny human rights, as they may be bound to such instruments as the International Covenant on Civil and Political

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gives lawful aliens the freedom to choose their place of residence and to move freely subject to regulations applicable to aliens in the same circumstances. Under articles 27 and 28, states agree to issue identification papers and travel documents to refugees lawfully staying in their territories. Refugee Convention, *supra* note 7, arts. 17-28, 189 U.N.T.S. at 164-72.

<sup>64</sup> There are three main categories of status recognized in the Refugee Convention, each of which triggers different levels of rights protections: simple presence, lawful presence, and lawful residence. Simple presence refers to those rights extended to refugees simply by the fact that they have been recognized as refugees, regardless of what other legal status a state does or does not afford them. *Id.*, art. 31, 189 U.N.T.S. at 174. Articles 2, 3, 4, 27 and 33 are all triggered by the fact that the refugee is in the state's territory ("the country in which he finds himself," "refugees within their territories," "any refugee in their territory," and, simply, "refugees"). *Id.*, arts. 2, 3, 4, 27, 33, 189 U.N.T.S. at 156-58, 172, 176. Compare, for example, the language of article 33.1, which specifically applies to illegal presence or entry, "in their territory without authorization." Lawful presence means admission under the specific domestic immigration law of the state. It could, however, mean a number of different types of admission. For example, the kind of temporary admission that is granted for visitor, student, or medical visas. *Id.*, art. 33.1, 189 U.N.T.S. at \_\_\_\_\_. Lawful presence is different from lawful residence. In the Refugee Convention, lawful presence is referred to in articles 18, 26, and 32 ("lawfully in"). The lawful presence requirement does not seem absolute, in that many states place additional restrictions on, or deny, the right to apply for asylum, to persons who have overstayed their period of lawful presence. INTERNATIONAL ORGANIZATION FOR MIGRATION, INTERNATIONAL COMPARATIVE STUDY OF MIGRATION LEGISLATION AND PRACTICE 46-48, 108-09 (2002). Lawful residence, in contrast, means something more than lawful presence. Lawful residence requires evidence of permanent, indefinite, unrestricted residence status. *Id.* at 55-59. If the state recognizes an individual as a refugee, and grants him or her a travel document or re-entry document, the state is presumed to have afforded him or her lawful residence. See GOODWIN-GILL, *supra* note 2, at 307-09. The Refugee Convention provides the largest group of rights to those refugees who have lawful residence in the host country, whether that means having been granted asylum, permanent residence, or some other permanent type of status. Articles 15, 17(1), 19, 21, 23, 24, and 28 refer to "lawfully staying," which was meant to be an exact translation of the French *resident regulierement*, which implies residence. Article 25 refers to those states "in whose territory (the refugee) is residing." See GOODWIN-GILL, *supra* note 2, at 307-09.

<sup>65</sup> See Fitzpatrick, *The End of Protection*, *supra* note 36, at 372.

Rights;<sup>66</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>67</sup> the Convention on the Rights of the Child;<sup>68</sup> the Convention on the Elimination of Racial Discrimination;<sup>69</sup> the Convention on the Elimination of all Forms of Discrimination Against Women;<sup>70</sup> and the Convention Against Torture.<sup>71</sup> European states' actions toward refugees and other non-refugee aliens or migrants are further regulated by the European Convention on Human Rights,<sup>72</sup> the 1954 Convention on the Status of Stateless Persons,<sup>73</sup> and the 1961 Convention on the Reduction of Statelessness.<sup>74</sup>

### III. REVISITING "TEMPORARY PROTECTION" IN THE ARAB WORLD

The Arab world's efforts to create regional standards for the protection offered to displaced Palestinians predate the formalized temporary protection programs in the Western world. As the Palestinian exodus began in large numbers during the 1948-1949 conflict, the neighboring Arab states provided shelter to the hundreds of thousands of refugees flooding their territories. The Arab states' five decades of de facto temporary protection offered to the Palestinians is unprecedented, as it has often been at great social, economic, and political cost. Although critics frequently challenge the Arab states' treatment of Palestinians in terms of violations of rights and failure to offer Palestinians permanent status, they ignore

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<sup>66</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>67</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>68</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>69</sup> Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

<sup>70</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

<sup>71</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

<sup>72</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, as amended by Protocol No. 11, E.T.S. No. 155 (entered into force Nov. 1, 1998) [hereinafter ECHR].

<sup>73</sup> Convention Relating to the Status of Stateless Persons, *opened for signature* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960) [hereinafter 1954 Stateless Convention].

<sup>74</sup> Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975) [hereinafter 1961 Statelessness Convention].

the fact that Arab states are under no legal obligation to grant permanent status to Palestinian refugees. In addition, Arab states have actually supported what the refugees themselves have demanded all along: the right to return to their original lands and homes.

Defining the area of reference of the “Arab world” for purposes of this article is both necessary and complicated, as common Western misconceptions conflate distinct concepts of religion and culture in the Arab and Muslim worlds. The Arab world comprises the following twenty-two Arab states that are members of the Arab League: Algeria, Bahrain, the Comoros Islands, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.<sup>75</sup> Although the populations of these states are culturally and linguistically “Arab,” nine are also African states that speak both non-Arabic and Arabic languages.<sup>76</sup> In addition, although persons of these states consider themselves part of the Muslim world, they are not monolithically Muslim. Within most of these countries there are native populations of Jews and Christians making up sizable segments of the populations.<sup>77</sup> However, the states in which the vast majority of Palestinian refugees reside are Egypt, Jordan, Lebanon, occupied Palestine, Syria, and in lesser numbers, the Gulf states. All are members of the Arab League, the core states affected by a discussion of temporary protection for Palestinians.

The instruments that bind certain states in the region are the Refugee Convention and Refugee Protocol, ratified by the following nine states: Algeria, Djibouti, Egypt, Mauritania, Morocco, Somalia, Sudan, Tunisia, and Yemen.<sup>78</sup> The African-Arab countries are also signatories to the 1969 Organization of African Unity (“OAU”) Convention, the 1981 African Charter on Human and Peoples’ Rights, and the major international human rights instruments.<sup>79</sup> Most of the Arab states have constitutions

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<sup>75</sup> See Khadija Elmadmad, *An Arab Convention on Forced Migration: Desirability and Possibilities*, 3 INT’L J. REFUGEE L. 461, 466 (1991).

<sup>76</sup> See *id.*

<sup>77</sup> For more information on ethnic and religious demographics in Arab countries, see THE WORLD FACTBOOK 2002, available at <http://www.odci.gov/cia/publications/factbook> (last visited Mar. 13, 2003).

<sup>78</sup> For states parties to the 1951 Refugee Convention, see *United Nations Treaty Collection, Convention relating to the Status of Refugees*, <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm> (last visited Mar. 31, 2004). For states parties to the 1967 Protocol, see *United Nations Treaty Collection, Protocol relating to the Status of Refugees*, <http://www.unhcr.ch/html/menu3/b/treaty5.htm> (last visited Mar. 31, 2004).

<sup>79</sup> For ratifications of the major international human rights instruments, see Office of the High Commissioner for Human Rights, *International Human Rights Instruments*, at <http://www.unhcr.ch/html/intlinst.htm> (last visited Mar. 31, 2004). For ratifications of the African instruments, see African Centre for Democracy and Human Rights Studies, at <http://www.acdhrs.org/sign.html> (last visited Feb. 27, 2003).

that claim to be based on Islamic law,<sup>80</sup> but among these states there are neither uniform definitions nor understanding of the specific principles Islamic law establishes.<sup>81</sup> International human rights instruments also bind Arab states. The Convention on the Rights of the Child is the most widely-ratified instrument in the Arab world; only Somalia has not ratified it.<sup>82</sup> Nineteen Arab states have ratified the Convention on the Elimination of Racial Discrimination,<sup>83</sup> fifteen states have ratified the Convention Against Torture,<sup>84</sup> and thirteen states have ratified each of the International Covenant on Civil and Political Rights,<sup>85</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>86</sup> and the Convention on the Elimination of all Forms of Discrimination Against Women.<sup>87</sup> Only a handful of states have ratified either of the two statelessness conventions.<sup>88</sup>

The single most important regional body in the Arab world is the Arab League. It was established by the Arab League Pact in March 1945, with the “purpose of . . . draw[ing] closer the relations between member States and co-ordinat[ing] their activities with the aim of realizing a close collaboration between them . . . .”<sup>89</sup> Through the Arab League, there have been

<sup>80</sup> Elmadmad, *supra* note 75, at 466-67.

<sup>81</sup> See generally Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?* 15 MICH. J. INT’L L. 307 (1994).

<sup>82</sup> For ratifications of the major international human rights instruments, see *supra* notes 78-79.

<sup>83</sup> Djibouti and Oman are non-signatories. Algeria has recognized the competence to receive and process individual communications of the CERD under article 14. For ratifications of the major international human rights instruments, see *supra* note 78.

<sup>84</sup> Djibouti, Iraq, Mauritania, Oman, Syria, and the UAE have not ratified the CAT. Algeria and Tunisia have recognized the competence to receive and process individual communications of the Committee against Torture under article 22 of CAT. *Id.*

<sup>85</sup> Bahrain, Comoros, Djibouti, Mauritania, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE) have not ratified the ICCPR. *Id.*

<sup>86</sup> Bahrain, Comoros, Djibouti, Mauritania, Oman, Qatar, Saudi Arabia and the UAE have not ratified the ICESCR. *Id.*

<sup>87</sup> Bahrain, Mauritania, Oman, Qatar, Somalia, Sudan, Syria and the UAE have not ratified the CEDAW. *Id.*

<sup>88</sup> Algeria, Libya, and Tunisia have ratified the 1965 Convention on the Status of Stateless Persons. Ratification information available at *United Nations Treaty Collection, Convention relating to the Status of Stateless Persons*, <http://www.unhchr.ch/html/menu3/b/treaty3stat.htm> (last visited Feb. 14, 2002). Libya and Tunisia have ratified the 1961 Convention on the Reduction of Statelessness. Ratification information available at *United Nations Treaty Collection, Convention on the Reduction of Statelessness*, [http://www.unhchr.ch/html/menu3/b/treaty4\\_.htm](http://www.unhchr.ch/html/menu3/b/treaty4_.htm) (last visited Feb. 14, 2002).

<sup>89</sup> Pact of the League of Arab States, *opened for signature* Mar. 22, 1945, 70 U.N.T.S. 248, 252 (entered into force May 10, 1945). The League comprises three main bodies: the Council of Ministers, the General Secretariat, and the Permanent



a number of efforts to create a regional system of human rights: the draft Arab Charter on Human Rights (1971),<sup>90</sup> the Cairo Declaration on Human Rights (1993),<sup>91</sup> and the draft Arab Convention on Asylum (1988).<sup>92</sup> However, the major draft documents purporting to provide human rights standards for the Arab/Muslim world have been severely criticized by Arab and non-Arab, Muslim and non-Muslim commentators alike as being deficient by international human rights standards and culturally, rather than legally, grounded.<sup>93</sup> The 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World<sup>94</sup> delineates a broader scope of protection rights than previous instruments, but has no binding force.

Additionally, the Arab League Council and Council of Arab Ministers of the Interior have adopted a series of resolutions concerning the status and treatment of Palestinian refugees in their territories.<sup>95</sup> Through these

Committees for each field of cooperation between member states, as set forth in article 2 of the Arab League Pact. For more on the League of Arab States ("LAS"), see ROBERT W. McDONALD, *THE LEAGUE OF ARAB STATES, A STUDY IN THE DYNAMICS OF REGIONAL ORGANIZATION* (1965).

<sup>90</sup> Council of the League of Arab States, *Arab Charter on Human Rights*, Sept. 15, 1994, reprinted in *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: CASES, TREATIES AND MATERIALS DOCUMENTARY SUPPLEMENT* (Francisco Forrest Martin et al. eds., 1997).

<sup>91</sup> *Cairo Declaration on Human Rights in Islam: World Conference on Human Rights*, Aug. 5, 1990, U.N. GAOR, 44th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [hereinafter *Cairo Declaration*].

<sup>92</sup> In addition, the Organization of Islamic Conferences and other Islamic organizations have drafted various instruments in an attempt to reach a common framework for human rights. See, e.g., Elmadmad, *supra* note 75, at 476 (citing Draft Document on Human Rights in Islam, issued by the Islamic Conference in Dakar (1983); Islamic Declaration of Human Rights of the Islamic Committee of Europe (1981); and the draft Charter on Human and People's rights in the Arab World of Arab Experts in Siracusa (1986)). Elmadmad argues for the creation of an Arab Convention on Forced Migration to address the problem of "protecting those who are unprotected, and for ways of assuring respect for human rights in the Moslem World in general and in the Arab World in particular." *Id.* at 461.

<sup>93</sup> See Mayer, *supra* note 81, at 307; Bassam Tibi, *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations*, 16 HUM. RTS. Q. 277 (1994); ABDULLAH AHMED AN'NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW* (1990).

<sup>94</sup> U.N. HIGH COMM'R FOR REFUGEES, *GROUP OF ARAB EXPERTS: DECLARATION OF THE PROTECTION OF REFUGEES AND DISPLACED PERSONS IN THE ARAB WORLD*, (Refworld Information on Refugees and Human Rights CD-ROM, 2000). The Declaration was adopted by the Group of Arab Experts at the Fourth Arab Seminar. U.N. HIGH COMM'R FOR REFUGEES ET AL., *ASYLUM AND REFUGEE LAW IN THE ARAB WORLD* (1992).

<sup>95</sup> LASC Resolutions are based on proposals and suggestions submitted to the LAS by the permanent Palestinian representative, the General Administration for

resolutions, the League aimed to address urgent issues facing Palestinian refugees in the absence of durable solutions as set forth in United Nations General Assembly Resolution 194(III), December 11, 1948, which reaffirmed, *inter alia*, the right of refugees to return to their homes.<sup>96</sup> The League of Arab States Council (“LASC”) Resolution 424 (1952) established that dispersed Palestinian families should be allowed to be reunited in the current place of residence of the provider or head of the household.<sup>97</sup> LASC Resolution 714 (1954) provided for the issuance of travel documents to refugees.<sup>98</sup> The LASC Ministers of the Interior

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Palestine Affairs at the General Secretariat, and the Supervisory Conference on Palestinian Refugee Affairs in Arab host states. The Supervisory Conference on Palestinian Refugee Affairs comprises representatives of Palestinian refugee affairs departments in Arab host countries, including the Department for Palestinian Refugee Affairs in Lebanon, the General Authority for Palestine Refugees in Syria, and the Department of Palestinian Affairs in Jordan. In most cases, these departments fall within the jurisdiction of the Ministry of Interior, with the exception of Jordan, where the Department of Palestinian Affairs falls within the jurisdiction of the Foreign Ministry and the office of the Prime Minister. For a compilation of LASC Resolutions in English translation, see Palestinian Diaspora and Refugee Centre (SHAML), *The League of Arab States and Palestinian Refugees’ Residency Rights* (Abbas Shiblak, compiler, 1998), available at <http://www.shaml.org> (last visited Mar. 13, 2003).

<sup>96</sup> See G.A. Res. 194(III), U.N. GAOR, 3d Sess., at 21, U.N. Doc. A/810 (1948). Under operative paragraph 11, the General Assembly,

*Resolves* that the refugees wishing to return to their homes and live at peace with their neighbours 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; [and] *Instructs* the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation. . . .

*Id.* For an authoritative analysis of the drafting history of the Resolutions, see *infra* notes 325-340 and accompanying text. For the LAS’s aims in addressing durable solutions, see generally Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95.

<sup>97</sup> Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 16.

<sup>98</sup> *Id.* at 17-18 (citing LASC Resolution 714, Jan. 27, 1954, reprinted in English). The bearer of the travel document is subject to the immigration law of LAS member states. The document is valid for a period of five years and renewable on an annual basis. If the document expires while the bearer is outside the country, it is renewed by the country of issuance. The Resolution also provides details on the format and content of the travel document. The bearer of the travel document does not derive a right of residence in the country of issue. *Id.* at 18 (citing LASC Resolution 715, which exempts Palestinian refugees from fees for the renewal of visas and travel documents). Takkenberg notes that Resolution 715 was never properly implemented by Arab states. LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 140 (1998). LASC Resolution 1705, Sept. 7, 1960, lengthened

(“LASCMI”) Resolution 8 (1982) resolved that bearers of travel documents receive equal treatment, including freedom of residency, employment, and mobility, as citizens of the issuing state.<sup>99</sup>

The Protocol on the Treatment of Palestinians,<sup>100</sup> adopted by the Council of Ministers in 1965 in Casablanca (“Casablanca Protocol”), is the most important instrument for temporary protection of Palestinian refugees in Arab host states. The Casablanca Protocol was a major effort to regularize the status of Palestinians in the states where they had primarily fled in 1948, and which continued to host them. In its five articles, the Casablanca Protocol requires that Palestinians receive the same treatment as nationals of Arab host states with regard to employment,<sup>101</sup> the right to leave and return to the territory of the state in which they reside,<sup>102</sup> freedom of movement between Arab states,<sup>103</sup> issuance and

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the renewal period for travel documents from one year to two years. Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 19. According to LASC Resolution 2019, Sept. 3, 1964, bearers of travel documents have the right to return to the country of issue without being required to obtain a return visa. Saudi Arabia, Lebanon, and Libya expressed reservations about the Resolution. TAKKENBERG, *supra*, at 140 n.47.

<sup>99</sup> Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 66. The Resolution also resolves that crimes committed by Palestinians residing in an Arab state will be prosecuted according to the prevailing laws of that Arab state. *Id.* at 52.

<sup>100</sup> *Id.* at 23-24 [citing Protocol on the Treatment of Palestinians (Casablanca Protocol), Sept. 11, 1965]. For further discussion of the Casablanca Protocol, see TAKKENBERG, *supra* note 98, at 141-44. The Protocol refers to the treatment of Palestinians generally in Arab states. Takkenberg notes that “[t]he change is apparently initiated by the realization that the legal position of non-refugee Palestinians is much the same as that of those who had become refugees in 1948-49.” *Id.* at 141.

<sup>101</sup> “Whilst retaining their Palestinian nationality, Palestinians currently residing in the land of [an Arab host state] have the right of employment on par with its citizens.” Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 23.

<sup>102</sup> “Palestinians residing at the moment in [an Arab host state] in accordance with the dictates of their interests, have the right to leave and return to this state.” *Id.* at 23-24.

<sup>103</sup> “Palestinians residing in other Arab states have the right to enter the land of [an Arab host state] and to depart from it, in accordance with their interests. Their right of entry only gives them the right to stay for the permitted period and for the purpose they entered for, so long as the authorities do not agree to the contrary.” *Id.* at 24.

renewal of travel documents,<sup>104</sup> and freedom of residence, work, and movement.<sup>105</sup>

While the Casablanca Protocol is limited in scope, its provisions relating to employment and freedom of movement are more generous than the 1951 Refugee Convention. The Casablanca Protocol calls upon Arab states to accord Palestinian refugees the right to employment on par with nationals.<sup>106</sup> The Refugee Convention only provides for "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances" with regard to self-employment and liberal professions and the "most favorable treatment accorded to nationals of a foreign country" with regard to wage-earning employment.<sup>107</sup> The Casablanca Protocol provides for freedom of movement between Arab states, although this right "loses much of its meaning"<sup>108</sup> due to the fact that entry is subject to the respective immigration policies of member states. The Refugee Convention only provides for freedom of movement within the host country.<sup>109</sup> Finally, the Casablanca Protocol provides for national treatment regarding visa and residency applications.<sup>110</sup> Under the Refugee Convention, matters concerning visas and residency are left to the discretion of Contracting states.<sup>111</sup> Unlike the Refugee Convention, which provides for transfer of responsibility concerning the issue and extension of travel documents when a refugee has lawfully taken up residence in another contracting state, the Casablanca Protocol stipulates that the country of first refuge is primarily responsible for the issue and extension of travel documents to Palestinian refugees.<sup>112</sup>

Together, the standards set forth in the League of Arab States ("LAS"), resolutions and in the 1965 Casablanca Protocol have afforded Palestinian refugees, in theory if not always in practice, a type of temporary protection in LAS member states with the expectation that refugees

<sup>104</sup> "Palestinians who are at the moment in [an Arab host state] as well as those who were residing and left to the Diaspora, are given, upon request, valid travel documents. The concerned authorities must, wherever they be, issue these documents or renew them without delay." *Id.*

<sup>105</sup> "Bearers of these travel documents residing in LAS states receive the same treatment as all other LAS state citizens, regarding visa and residency applications." *Id.*

<sup>106</sup> *See Id.* at 23.

<sup>107</sup> *See* Refugee Convention, *supra* note 7, arts. 17(1), 18, and 19(1), 189 U.N.T.S. at 164, 166.

<sup>108</sup> TAKKENBERG, *supra* note 98, at 142.

<sup>109</sup> Refugee Convention, *supra* note 7, art. 26, 189 U.N.T.S. at 172.

<sup>110</sup> *See* TAKKENBERG, *supra* note 98, at 143.

<sup>111</sup> *Id.* at 143-44.

<sup>112</sup> *See* Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95 and accompanying text; *see also* TAKKENBERG, *supra* note 98, at 143.

will return to their homes of origin.<sup>113</sup> Provisions relating to employment allowed refugees to enter the labor market in host states. Many of those Arab states hosting the majority of Palestinian refugees incorporated LAS standards into domestic law.<sup>114</sup> Cancellation of visa requirements during the 1950s and issuance of travel documents facilitated the movement of refugees to fill vacancies in the labor market, particularly in the Gulf states.<sup>115</sup> Generally, Palestinian refugees in Jordan and Syria have accrued the widest range of benefits in law and practice.<sup>116</sup> In Jordan, refugees have the added protection of Jordanian nationality, while retaining their status as refugees and their right to return to their homes of origin.<sup>117</sup>

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<sup>113</sup> See *supra* notes 97-99 and accompanying text.

<sup>114</sup> Syria, for example, adopted legislation which exempted Palestinian refugees from provisions of the Civil Service Act that required civil servants to hold Syrian nationality for at least five years prior to government service. See TAKKENBERG, *supra* note 98, at 168 (citing Decree No. 37, 1949); see also *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 July 1951 to 30 June 1952*, U.N. GAOR, 7th Sess., Supp. No. 13, U.N. Doc. A/2171 (1952) (citing legislation “aim[ed] at facilitating the means of work to Palestinians, including: Petition Writers Law No. 119, July 9, 1951; Legislative Decree No. 162, Mar. 10, 1952 (regulating the profession of sworn translators); Legislative Decree No. 250, 162, Mar. 10, 1952 (allowing Palestine public cars to be registered as Syrian public cars); Cooperative Societies Law No. 65, Feb. 28, 1950 (allowing Palestinians to be members of cooperative societies under article 24)). Palestinian refugees in Egypt were accorded the right to practice liberal professions including medicine through Law No. 415, Law No. 416, and Law No. 481, and to practice dentistry through Law No. 37, as well as the right to state employment through Presidential Decree Number 66 of 1962. LAURIE BRAND, *PALESTINIANS IN THE ARAB WORLD: INSTITUTION BUILDING AND THE SEARCH FOR STATE* 52 (1988). Holders of Egyptian travel documents endorsed with a visa other than for a tourist visit are formally exempt from the requirement that native workers be given priority for employment pursuant to Decree No. 657, Article 11(j), 1954. TAKKENBERG, *supra* note 98, at 52.

<sup>115</sup> During the 1950s, a series of reciprocal agreements were concluded between Kuwait and other Arab states that cancelled the need for visas. The first was with Lebanon in 1951-1952, followed by Egypt and Jordan in 1958-1959. BRAND, *supra* note 114, at 111.

<sup>116</sup> Unlike in Jordan, in Syria Palestinian refugees do not have full political rights. In both countries, Palestinian refugees are the subject of close monitoring by state authorities. See ELIA ZUREIK, *PALESTINIAN REFUGEES AND THE PEACE PROCESS* 32, 34 (1996).

<sup>117</sup> In 1970, the Supervisory Conference on Palestinian Affairs, established by the Arab League in 1964 (LASC Resolution 1946, Mar. 31, 1964), adopted Resolution 2600, Mar. 11, 1970, which allowed Palestinians to acquire dual citizenship. The Resolution exempts Palestinians from provisions of LASC Resolution 776, Apr. 5, 1954 (“Agreement on Citizenship”), which prohibits citizens of Arab states from acquiring two nationalities. Resolutions are reprinted in English translation in *Palestinian Diaspora and Refugee Centre (SHAML)*, *supra* note 95, at 43, 38-40. II

Despite attempts by the Arab League to create normative standards of treatment and status grants for Palestinians in the Arab world, there has been little standardization in practice. De facto temporary protection under LASC resolutions and the Casablanca Protocol have not had the desired uniform effect of improving the civil and human rights of the refugees pending the implementation of durable solutions to their plight. Due to their unique historical and legal situation and the "protection gap" discussed below, Palestinians receive differing treatment in the various areas of the world where they are located. Moreover, Palestinian refugees in Arab host states are, in fact, accorded fewer rights than provided for under the Refugee Convention.

Temporary protection has generated both intense interest and controversy. Its proponents claim that temporary protection has expanded the possibilities of international protection beyond the constraints of the Refugee Convention regime.<sup>118</sup> In contrast, its critics claim that temporary protection has unduly narrowed the availability of international protection both to Refugee Convention refugees and to others to whom an expanded definition of "refugee" might apply under a truly humanitarian approach to the refugee definition.<sup>119</sup> This debate, although relevant to the Palestinian refugee situation, does not detract from the particular importance of temporary protection in the search for durable solutions for this refugee and stateless population.

A review of the historical, legal and political background to the Palestinian refugee problem, an overview of temporary protection regimes as applied in Europe, the United States, and Africa, and a review of the current legal status and conditions of Palestinian refugees is necessary before discussing what changes would be brought about by implementing a harmonized temporary protection regime for this population.

### III. HISTORICAL, LEGAL, AND POLITICAL BACKGROUND TO THE PALESTINIAN REFUGEE PROBLEM

More than half a century of persecution inside Palestinians' historic homeland has produced a chronic pattern of forced displacement that can be characterized as a form of forced population transfer or ethnic cleansing.<sup>120</sup> It is estimated that three-quarters of the Palestinian people are

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MOHAMMAD KHALIL, *THE ARAB STATES AND THE ARAB LEAGUE: A DOCUMENTARY RECORD* 127-29 (1962). The exemption addressed political concerns that the acquisition of Jordanian citizenship by a large number of Palestinian refugees would be used as a pretext for cessation of refugee status and cancellation of international assistance. *Id.*

<sup>118</sup> Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 559-60 (1998).

<sup>119</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 280.

<sup>120</sup> See, e.g., *The Realization of Economic, Social and Cultural Rights: The Human Rights Dimensions of Population Transfer, including the Implantation of Settlers*,

refugees and displaced persons.<sup>121</sup> The Palestinian people constitute one of the largest and longest standing unresolved cases of displacement in the world today. Approximately one in three refugees worldwide is Palestinian.<sup>122</sup> More than seven million Palestinians, as of December 2002, are refugees or displaced persons, including: 5.3 million refugees and their descendents who were displaced in 1948—four million of whom are registered with the United Nations Relief and Works Agency for Palestine

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*Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 45th Sess., para. 15, 17, U.N. Doc. E/CN.4/Sub.2/1993/17 (1993) (defining population transfer as “the systematic, coercive and deliberate . . . movement of population into or out of an area”). Population transfer methods include military action, *but also* legislation or other judicial action, planning, recruitment of settlers, public information, and financial subsidies. On ethnic cleansing, see, for example, Chaloka Beyani, *A Political and Legal Analysis of the Problem of the Return of Forcibly Transferred Population*, 16 REFUGEE SURV. Q. 1, 1-3 (1997) (defining ethnic cleansing as “the political drive for acquisition and control of targeted territory to the exclusion of other ethnic groups” or as “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area”); see also Drazon Petrovic, *Ethnic Cleansing—An Attempt at Methodology*, 5 EUR. J. INT’L L. 342 (1994). For a discussion of transfer and ethnic cleansing in the Palestinian case see Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Case*, 6 PALESTINE Y.B. INT’L L. 17-55 (1990/91); NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF ‘TRANSFER’ IN ZIONIST POLITICAL THOUGHT, 1882-1948* (1992); and, Gabriel Piterberg, *Erasure*, 10 NEW LEFT REVIEW 31-46 (2001).

<sup>121</sup> The total Palestinian population worldwide as of December 2002 was estimated at 9.3 million. PALESTINIAN CENTRAL BUREAU OF STATISTICS, PALESTINIANS AT THE END OF THE YEAR 2002 15 (2002), available at <http://www.pCBS.org> (last visited Jan. 10, 2003). See *infra* notes 129-33 for the total estimated Palestinian refugee population.

<sup>122</sup> The figure is based on the total number of ‘Convention Refugees’ as of the end of 2001, estimated at 12 million. See Refugee population by region of origin, 1992-2001 (thousands), in UNHCR STATISTICAL YEARBOOK 2001, REFUGEES, ASYLUM-SEEKERS AND OTHER PERSONS OF CONCERN—TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS annex A.5 at 88 (2000). For the total estimated Palestinian refugee population see *infra* notes 129-33. Data on the Palestinian refugee population is characterized by uneven quality and uncertainty primarily due to the absence of a comprehensive registration system, frequent forced migration, and the lack of a uniform definition of a Palestinian refugee. The U.N. Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) administers the only registration system for Palestinian refugees. UNRWA registration includes only those refugees displaced in 1948 (and their descendents) in need of assistance—approximately 55% of the total refugee population. Additionally, it should be noted that there is some variance in UNRWA records due to the fact that reporting is voluntary. LENA C. ENDRESEN & GEIR OVENSEN, *THE POTENTIAL OF UNRWA DATA FOR RESEARCH ON PALESTINIAN REFUGEES: A STUDY OF UNRWA ADMINISTRATIVE DATA* 16-17 (1994).

Refugees (“UNRWA”) for assistance;<sup>123</sup> approximately 750,000 refugees from the West Bank—including eastern Jerusalem—and the Gaza Strip displaced for the first time in 1967;<sup>124</sup> an estimated 350,000 Palestinians internally displaced inside Israel;<sup>125</sup> another 150,000 Palestinians internally displaced in 1967-occupied Palestine;<sup>126</sup> and approximately 735,000

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<sup>123</sup> The figure for 1948 registered refugees, as of December 2002, is from *UNRWA in Figures: Figures as of 31 December 2002*, at <http://www.un.org/unrwa/publications/pdf/uif-dec02.pdf> (last visited Mar. 30, 2003). The 1948 non-registered refugee population is derived from *The Distribution of Palestinians in 1998 (minimum estimate)*, in SALMAN ABU SITTA, *THE PALESTINIAN NAKBA 1948: THE REGISTER OF DEPOPULATED LOCALITIES IN PALESTINE* tbl. 7 at 27 (1998) (updated based on an average growth rate of the Palestinian refugee population of 3.5% per annum).

<sup>124</sup> The 1967 first-time displaced refugee population is derived from *Report of the Secretary General under General Assembly Resolution 2252 (EX-V) and Security Council Resolution 237 (1967)*, U.N. GAOR, 5th Emergency Spec. Sess., at para. 159, U.N. Doc. A/6797 (1967) (updated based on an average growth rate of the Palestinian refugee population of 3.5% per annum) [hereinafter *Report of the Secretary General under General Assembly Resolution 2252*]. The figure does not include 1948 refugees displaced for a second time in 1967.

<sup>125</sup> The 1948 internally displaced population is derived from initial registration figures from UNRWA. *Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, U.N. GAOR, 6th Sess., Supp. No. 16, at 43, U.N. Doc. A/1905 (1951) (updated based on an average growth rate of the Palestinian population inside Israel of 4.2% per annum). The figure also includes Palestinians displaced inside Israel after 1948, the majority of whom are Bedouin residing in so-called unrecognized villages and in seven townships constructed by the government to concentrate displaced Bedouin in restricted settlement zones. See Arab Ass’n for Hum. Rts., *The Unrecognized Villages*, at <http://www.arabhra.org/article26/factsheet4.htm> (last visited Mar. 6, 2003); Arab Ass’n for Hum. Rts., *The Arab Bedouin of the Negev*, at <http://www.arabhra.org/article26/factsheet3.htm> (last visited Mar. 6, 2003); see also Wakim Wakim, *laji’oun fi watan, ‘al-haadiroun al-haa’iboun fi Isra’iil’* [*Refugees in their Homeland, Present Absentees in Israel*], MAJALLAT AL-DIRASAT AL-FILASTINIYAH, Winter 2001, at 90; Norwegian Refugee Council/Global IDP Project, *Profile of Internal Displacement: Israel* (2002), at <http://www.db.idpproject.org/Sites/idpSurvey.nsf/wCountries/Israel> (last visited Mar. 6, 2003); HILLEL COHEN, HANIFKADIM HANOKHAHIM, HAPLITIM HAFALASTINIM BEISRAEL ME’AZ 1948 [THE PRESENT ABSENTEES: PALESTINIAN REFUGEES IN ISRAEL SINCE 1948] (2000).

<sup>126</sup> The figure includes Palestinians internally displaced during 1967 due to expulsion and demolition of homes, and persons displaced after 1967 due to ongoing land confiscation, house demolition, and revocation of residency rights in eastern Jerusalem. Terry Rempel, *Internally Displaced Palestinians, International Protection, and Durable Solutions* (2002), <http://www.badil.org/Publications/Briefs/brief9.pdf> (last visited Mar. 15, 2003). In addition an estimated 56,000 Palestinians were forced to change residence during the first seven months of the second *intifada* due to the proximity of their homes to Israeli military checkpoints and colonies. Press Release, Palestinian Central Bureau of Statistics, *Impact of the Israeli Measures on the Well-being of Palestinian Children, Women and Household* (2001), available at <http://www>.



Palestinian refugees and other displaced persons from the 1967-occupied territories who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, are outside 1967-occupied Palestine and are unable to return (due to revocation of residency status, deportation, denial of family reunification, etc.) or, owing to such fear, are unwilling to return.<sup>127</sup>

### A. *Root Causes of Palestinian Displacement*

Root causes of Palestinian displacement include: denial of the right to self-determination, armed conflict, colonization, foreign occupation, racial discrimination, and practices of ethnic/religious separation akin to internationally recognized forms of apartheid. The absence of temporal and geographical constraints on displacement of the indigenous Arab population of Palestine, the displacement's ethno/religious character, systematic nature, and lack of effective remedies gives special significance to international protection for this refugee and stateless population. As of 2002, it was estimated that three-quarters of the Palestinian people were displaced. Less than one percent of the total number of displaced Palestinians has been able to return to their homes and villages of origin either inside Israel or in 1967-occupied Palestine.<sup>128</sup>

Denial of the right of the indigenous peoples of Palestine to self-determination is both a cause and condition of the Palestinian refugee question

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pcbs.org/english/press\_r/chld\_prs.htm (last visited Nov. 30, 2001). As of the end of 2002 some 80,000 Palestinians had been rendered homeless due to the destruction of their homes. U.N. Office for the Coordination of Humanitarian Affairs, Humanitarian Action Plan for Occupied Palestinian 2003 (Dec. 10, 2002), <http://www.reliefweb.int/appeals/03appeals.html> (last visited Mar. 15, 2003); see also Norwegian Refugee Council/Global IDP Project, *Profile of Internal Displacement: Palestinian Territories* (Aug. 29, 2003), at <http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wCountries/Palestinian+Territories>.

<sup>127</sup> For further definition of this category of Palestinian refugees see U.N. High Comm'r for Refugees, *Note on the applicability of Article 1D of the 1951 Convention relating to the status of Refugees to Palestinian Refugees* (2002), available at [http://www.badil.org/Protection/Documents/Refugee\\_Law/UNHCR-Note-1D-2002.pdf](http://www.badil.org/Protection/Documents/Refugee_Law/UNHCR-Note-1D-2002.pdf) (last visited Mar. 15, 2003). The figure is derived from GEORGE F. KOSSAIFI, *THE PALESTINIAN REFUGEES AND THE RIGHT OF RETURN* 8 (1996). The figure does not include displaced Palestinians who were able to return to their places of origin in the West Bank and Gaza Strip after the establishment of the Palestinian Authority in 1994. Estimates of returnees through 1997 range from 50,000 to 60,000. Nick Vanhear et al., *Reintegration of the Palestinian Returnees* (1997), available at <http://www.shaml.org/publications/mono6.htm> (last visited Feb. 15, 2003).

<sup>128</sup> For a more detailed analysis see Terry Rempel, *Housing and Property Restitution: The Palestinian Refugee Case*, in *HOUSING AND PROPERTY RESTITUTION: A COMPARATIVE STUDY* 275 (Scott Leckie ed. 2003).

and related problem of statelessness.<sup>129</sup> Early promises of independence<sup>130</sup> by the international community—"Great Powers"—to the indigenous peoples of Palestine following the collapse of the Ottoman Empire, gave way to a considered policy that aimed to bring about the establishment of a "Jewish national home" in Palestine against the expressed wishes of the majority of the indigenous inhabitants of the country.<sup>131</sup> According to the 1922 Mandate for Palestine,<sup>132</sup> the Jewish minority in the country and non-resident Jews residing elsewhere were granted full

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<sup>129</sup> For a discussion on the right of the Palestinian peoples to self-determination see Sally V. Mallison & W. Thomas Mallison Jr., *The Juridical Bases for Palestinian Self-Determination*, 1 PALESTINE Y.B. INT'L L. 36 (1984). For an opposing view see *id.*, note 28, at 42. For further discussion see, for example, *Proceedings of the 65th Annual Meeting of the American Society of International Law*, 65 AM. J. INT'L L. 31 (1971); and, *Proceedings of the 82nd Annual Meeting of the American Society of International Law*, 82 AM. J. INT'L L. 334 (1988).

<sup>130</sup> See, e.g., THE RIGHT OF SELF-DETERMINATION OF THE PALESTINIAN PEOPLE 14-15 (1979) (citing correspondence from Sir Henry McMahon to Sherif Hussein stating, ". . . Great Britain is prepared to recognize and support independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca"). 1 DOCUMENTS ON PALESTINE, FROM THE PRE-OTTOMAN/OTTOMAN PERIOD TO THE PRELUDE TO THE MADRID MIDDLE EAST PEACE CONFERENCE 17-19 (Madhi F. Abdul Hadi, ed. 1997) [hereinafter 1 DOCUMENTS ON PALESTINE]. The principle that the future government of Palestine should be based upon the consent of the governed was further affirmed in British and joint Anglo-French declarations. *Id.*

<sup>131</sup> See, e.g., INSTITUTE OF PALESTINE STUDIES, 1 SURVEY OF PALESTINE 19-20 (1991) (quoting a February 21, 1922 statement of Arab leaders to the British Secretary of State for Colonies declaring that people of Palestine demand their national independence and cannot accept the 1917 Balfour Declaration and British Mandate of Palestine). The Arab delegation further requested that the constitution of an independent Palestine should: "(1) Safeguard the civil, political, and economic interests of the people; (2) Provide for the creation of a national independent Government in accordance with the spirit of paragraph 4, article 12, of the 1922 Covenant; (3) Safeguard the legal rights of all foreigners; (4) Guarantee religious equality to all peoples; (5) Guarantee the rights of minorities; and, (6) Guarantee the rights of the Assisting Power." *Id.* For further discussion of early Palestinian demands for independence see RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS (1997).

<sup>132</sup> During the 1919 Paris Peace Conference, the Allied Powers decided to establish international transition regimes—i.e., Mandates—in those territories formerly under the control of the Ottoman Empire. Palestine was considered a "Class A" Mandate or closest to independence. See LEAGUE OF NATIONS COVENANT, art. 22. Article 22 states:

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

political rights in Palestine.<sup>133</sup> The majority indigenous Palestinian Arab community was only granted civil and religious rights.<sup>134</sup> Palestinians sought refuge in neighboring Arab states largely as a result of the instability and political repression that followed a series of indigenous uprisings against British administration and Zionist colonization. The initial outflow of the indigenous Arab population was small, primarily consisting of the political elite, individuals and members of groups actively opposed to British rule in Palestine, and segments of the upper and emerging middle class.<sup>135</sup> The United Nations subsequently recommended partition of Palestine into two states—Arab and Jewish<sup>136</sup>—as a

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*Id.* The temporary administration of Palestine was entrusted to Great Britain. 8 LEAGUE OF NATIONS O.J. 1007 (1922). 1 SURVEY OF PALESTINE, *supra* note 131, at 4-5.

<sup>133</sup> See 8 LEAGUE OF NATIONS O.J. 1007, at pmb. (1922), stating:

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people.

The Preamble essentially incorporated the 1917 Balfour Declaration, in which the British government affirmed Zionist aspirations for a Jewish state in Palestine. The text of the Balfour Declaration is reprinted in 1 SURVEY OF PALESTINE, *supra* note 131, at 1. For more on the Balfour Declaration see, for example, LEONARD STEIN, THE BALFOUR DECLARATION (1983). For more on the Zionist movement see *infra* note 143.

<sup>134</sup> See 8 LEAGUE OF NATIONS O.J. 1007, at pmb. (1922) (stating, “nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine”). The Mandate violated the intent and terms of the Mandate system set forth in article 22 of the League of Nations Covenant, which was to facilitate the transition of non-self-governing territories to independent states. The Mandate for Palestine also violated basic rules of due process set forth in the Covenant requiring that actions of the Mandatory power be guided by the wishes of the indigenous population. *Id.*

<sup>135</sup> During the 1936-39 uprising, for example, some 40,000 Palestinian Arabs fled the country. RONY GABBAY, A POLITICAL STUDY OF THE ARAB-JEWISH CONFLICT 66 (1959). For a chronological overview of Palestinian uprisings during the period of the British Mandate see 1 SURVEY OF PALESTINE, *supra* note 131, at 15-102.

<sup>136</sup> U.N. Special Committee on Palestine Report to the General Assembly, U.N. GAOR, 2d Sess., Supp. No. 11, at 102, U.N. Doc. A/364 (1947) (effectively recommending the creation of one binational state—referred to as a “Jewish state”—with a population of 498,000 Jews and 407,000 Palestinian Arabs, 90,000 of whom were Bedouins; and one “Arab state” with a population of 725,000 Palestinian Arabs and 10,000 Jews. The city of Jerusalem, which was to have international status, had a population of 105,000 Palestinian Arabs and 100,000 Jews). The “Jewish state” was allotted 56% of the territory of Palestine, including most of the fertile land. Palestinian Arabs owned nearly 90% of the land in the proposed “Jewish state.” Resolution 181 was based on the conclusions of a special U.N. committee established to formulate recommendations concerning the future status of Palestine. See *Report*

politically palatable means to reconcile self-determination claims of the indigenous population with the "Great Powers" political commitment to the Zionist movement.<sup>137</sup> The departure of middle and upper class Palestinians that followed<sup>138</sup> rapidly evolved into a mass exodus. By the time war broke out between the newly established state of Israel and the Arab states in mid-May 1948, some 400,000 Palestinian Arabs, comprising one-third of the indigenous Palestinian Arab community, had already been displaced/expelled from their homes and villages of origin.<sup>139</sup> The creation of a Jewish state on seventy-eight percent of the territory of Mandate Palestine in 1948, and Israel's military occupation of the remaining twenty-two percent of Palestine in 1967,<sup>140</sup> complicated and effectively

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*to the General Assembly*, U.N. Special Committee on Palestine, 11th Sess., U.N. Doc. A/364 (1947). The committee was established after a majority of the General Assembly rejected established procedures set forth in article 77(1)(a) of U.N. Charter chapter 12 concerning the termination of mandate regimes set up under the League of Nations. The General Assembly also rejected member requests to obtain an advisory opinion from the International Court of Justice ("ICJ"). For the text of the proposed questions to be submitted to the ICJ see 1947-48 U.N.Y.B. 1949.I.13 (including proposals from Iraq, U.N. Doc. A/AC.14.21, from Syria, U.N. Doc. A/AC.14/25, and from Egypt, U.N. Doc. A/AC.14/24).

<sup>137</sup> Political Zionism is a movement founded in the nineteenth century in response to anti-Jewish persecution in Europe. Influenced by nineteenth-century nationalism and colonialism, the Zionist movement aimed to establish a 'Jewish state' in Palestine through mass Jewish immigration and settlement (i.e. colonization). One of the earliest formulations of this idea is set forth in a pamphlet written by Theodore Herzl in 1896, which states, "The idea which I have developed in this pamphlet is an ancient one: It is the restoration of the Jewish State. The world resounds with clamor against the Jews, and this has revived the dormant idea". THEODORE HERZL, *THE JEWISH STATE* (1896), excerpts *reprinted in* 1 DOCUMENTS ON PALESTINE, *supra* note 130, at 11; *see also The Basel Program, Aug. 31st, 1897*, excerpts *reprinted in id.* at 14 ("The aim of Zionism is to create for the Jewish people a home in Palestine secured by public law").

<sup>138</sup> It is estimated that some 30,000 Palestinians left the country in the weeks immediately following the adoption of the partition plan. Erskine B. Childers, *The Wordless Wish: From Citizens to Refugees*, in *THE TRANSFORMATION OF PALESTINE* 181 (Ibrahim Abu Lughod ed., 1971).

<sup>139</sup> For a detailed account of displacement during the 1948 conflict and war in Palestine see BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM 1947-49* (1987). For a series of maps illustrating patterns of Palestinian displacement and loss of land according to Zionist/Israeli military operations see SALMAN ABU SITTA, *THE END OF THE PALESTINIAN-ISRAELI CONFLICT, FROM REFUGEES TO CITIZENS AT HOME* 6-12 (2001).

<sup>140</sup> S.C. Res. 242, U.N. SCOR, 1382d mtg., U.N. Doc. S/RES/242 (1967) (calling upon Israel to withdraw from territories occupied during the war, but not referring to the right of the Palestinian people to self-determination). The Palestine Liberation Organization ("PLO") initially rejected the resolution for this reason. *See Statement Issued by the Palestine Liberation Organization Rejecting U.N. Resolution 242, Cairo, 23 Nov. 1967*, *reprinted in* 1 DOCUMENTS ON PALESTINE, *supra* note 130, at 212. The

blocked Palestinian self-determination claims in any part of their historic homeland. As Bell observes:

The 1967 war and subsequent international rooting of the Palestinian self-determination claim in a prohibition on use of force and ongoing occupation rather than within a colonial-racist domination framework has enmeshed self-determination arguments with debate about the applicable humanitarian law regime and standards.<sup>141</sup>

Faced with two massive refugee flows from Palestine, the United Nations General Assembly adopted Resolution 2535 B(XXIV), 10 December 1969,<sup>142</sup> recognizing that “the problem of the Palestine Arab refugees [had] arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights.” The 1993 Declaration of Principles (“Oslo I”),<sup>143</sup> the 1994 Gaza-Jericho Agreement (“Cairo agreement”)<sup>144</sup> and the 1995 Interim Agreement (“Oslo II”),<sup>145</sup> (hereinafter referred to as the “Oslo agreements”) “provide[d] a change of status of territory”<sup>146</sup> but do not recognize the right of the Palestinian people to self-determination. While the establish-

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PLO was subsequently forced to accept Resolution 242 as a quid pro quo for the opening of a political dialogue with the United States. WILLIAM QUANDT, *PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967* 367-75 (2001).

<sup>141</sup> CHRISTINE BELL, *HUMAN RIGHTS AND PEACE AGREEMENTS* 75 (2000).

<sup>142</sup> G.A. Res. 2535 B(XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, at 25-6, U.N. Doc. A/7630 (1970); see also G.A. Res. 3236 (XXIX), U.N. GAOR., 29th Sess., Supp. No. 30, at 78 (1974) (reaffirming the right of the Palestinian people to self-determination and the right of refugees to return to their homes). Since this period, the U. N. has reaffirmed annually the right of the Palestinian people to self-determination and to return to their homes of origin. For a compilation of resolutions concerning Palestine see Institute of Palestine Studies, 1 U.N. Resolutions on Palestine and the Arab-Israeli Conflict, 1947-1974 (George J. Tomeh ed., 1975); 2 U.N. RESOLUTIONS ON PALESTINE AND THE ARAB-ISRAELI CONFLICT, 1975-1981 (Regina S. Sherif ed., 1988); 3 U.N. RESOLUTIONS ON PALESTINE AND THE ARAB-ISRAELI CONFLICT, 1982-1986 (Michael Simpson ed., 1988); 4 U.N. RESOLUTIONS ON PALESTINE AND THE ARAB-ISRAELI CONFLICT, 1987-1991 (Jody Boudreault ed., 1993); and, 5 U.N. RESOLUTIONS ON PALESTINE AND THE ARAB-ISRAELI CONFLICT, 1992-1998 (Katherine LaRiviere & Ida Audeh eds., 1999).

<sup>143</sup> Declaration of Principles on Interim Self-Government Authority, Washington, Sept. 13th, 1993, reprinted in 31 I.L.M. 1525 (1993). II DOCUMENTS ON PALESTINE, FROM THE NEGOTIATIONS IN MADRID TO THE POST-HEBRON AGREEMENT PERIOD 145-159 (Madhi F. Abdul Hadi, ed. 1997) [hereinafter II DOCUMENTS ON PALESTINE].

<sup>144</sup> Agreement on the Gaza Strip and the Jericho Area, Cairo, May 4th, 1994, reprinted in 33 I.L.M. 622 (1994). II DOCUMENTS ON PALESTINE, *supra* note 143, at 175-205.

<sup>145</sup> Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Sept. 28th, 1995, Palest.-Israel, 36 I.L.M. 551, reprinted in 8 PALESTINE Y.B. INT'L L. 353 (1994/95); II DOCUMENTS ON PALESTINE, *supra* note 143, at 246-256.

<sup>146</sup> BELL, *supra* note 141, at 190. Bell further observes that,

ment of a self-governing Palestinian Authority in 1967-occupied territories, excluding eastern Jerusalem, enabled some Palestinians to return to parts of their historic homeland, the collapse of the political process in 2000-2001 and the impossibility of realizing Palestinian self-determination in the near future, has resulted in new outflows.

The majority of Palestinian refugees were displaced during periods of armed conflict in Palestine. Israeli military forces (including pre-state Zionist militia groups) used a combination of tactics, in contravention of international humanitarian and human rights law that led to widespread displacement of the indigenous Arab population.<sup>147</sup> Approximately eighty percent of refugees displaced in 1948<sup>148</sup> and sixty percent of refugees displaced in 1967<sup>149</sup> were either expelled or fled under military assault by Zionist/Israeli military forces. Specific tactics included: targeted military attacks against civilians;<sup>150</sup> "shoot to kill" policies at the

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[The Oslo agreements] devolve power and remove some Israeli forces but do not end occupation. Or they end Israeli occupation but do not create a Palestinian state. They are interim and transitional but may become permanent if negotiations do not succeed. Paradoxically, if negotiations do succeed, substantially the same arrangements may be asserted to comprise a Palestinian state, even while the ability of political elites, and even more so ordinary Palestinians, to self-determine their future is limited.

*Id.* See also Richard Falk, *Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Process*, 8 PALESTINE Y.B. INT'L L. 28 (1994-95) ("Throughout the agreements, there is no acknowledgement whatsoever of Palestinian sovereignty over the West Bank, Gaza, or Jerusalem areas, and no implication that the Palestinian Authority is a vehicle for emerging Palestinian statehood."). For a concise legal analysis of the Oslo agreements see RAJA SHEHADEH, *FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES* (1997).

<sup>147</sup> For general historical accounts of the 1948 and 1967 wars and Israeli military practices see, for example, PETER DODD & HALIM BARAKAT, *RIVER WITHOUT BRIDGES: A STUDY OF THE EXODUS OF THE 1967 PALESTINIAN ARAB REFUGEES* (1969); SIMHA FLAPAN, *THE BIRTH OF ISRAEL: MYTHS AND REALITIES* (1987); NUR MASALHA, *A LAND WITHOUT A PEOPLE, ISRAEL, TRANSFER AND THE PALESTINIANS* (1997); BENNY MORRIS, *ISRAEL'S BORDER WARS, 1949-56* (1993); MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139; DONALD NEFF, *WARRIORS FOR JERUSALEM: SIX DAYS THAT CHANGED THE MIDDLE EAST* (1984); MICHAEL PALUMBO, *THE 1948 EXPULSION OF A PEOPLE FROM THEIR HOMELAND* (1987); ILAN PAPPE, *BRITAIN AND THE ARAB-ISRAELI CONFLICT 1948-1951* (1988); TOM SEGEV, *1949: THE FIRST ISRAELIS* (1986); and INSTITUTE OF PALESTINE STUDIES, *ALL THAT REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948* (Walid Khalidi ed., 1992).

<sup>148</sup> See ABU SITTA, *supra* note 123, at 11.

<sup>149</sup> DODD & BARAKAT, *supra* note 147, at 46.

<sup>150</sup> Incidents occurred in all major cities throughout Palestine as well as in hundreds of villages. For a description of specific incidents see MORRIS, *ISRAEL'S BORDER WARS*, *supra* note 147, at 41, 102, 107, 117-118, 121, 200, 213, 214, and 220. For a description of the general policy see SHARIF KANA'ANA, *STILL ON VACATION* (1992). During the 1967 war Israeli warplanes strafed refugee camps in the Jordan

front lines to prevent the return of refugees to their homes;<sup>151</sup> more than two dozen reported massacres and other atrocities;<sup>152</sup> deliberate expulsion of the civilian population;<sup>153</sup> and looting and destruction of property without military necessity.<sup>154</sup> Armed conflict between Zionist militias/Israeli forces, irregular Palestinian and Arab forces, and Arab armies between May 1948 and the signing of armistice agreements in 1949 led to a mass exodus of close to one-half million Palestinians.<sup>155</sup> During the second Arab-Israeli war in June 1967 some 400,000 Palestinians were dis-

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valley and in other parts of the West Bank. See, e.g., Nur Masalha, *The 1967 Exodus*, in *THE PALESTINIAN EXODUS 1948-67* 63, 94 (Ghada Karmi and Eugene Cotran eds., 2000) (citing reports in *The Guardian*, June 14th, 1967, and *The London Times*, June 22, 1967); NEFF, *supra* note 147, at 228-29; and DODD & BARAKAT, *supra* note 147, at 40-42.

<sup>151</sup> It is estimated that between 1948 and 1956 Israeli forces killed some 5,000 Palestinian refugees attempting to return to their homes. MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139, at 147. Testimonies of Israeli soldiers reveal similar practices in the immediate aftermath of the 1967 war. See, e.g., D. McDOWALL, *PALESTINE AND ISRAEL: THE UPRISING AND BEYOND* 197 (1989).

<sup>152</sup> For a list of reported massacres by Zionist/Israeli forces during the 1948 conflict see ABU SITTA, *supra* note 123, at 16. For details of individual massacres based on documents from Zionist and state archives see MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139, at 72-3, 113-15, 120, 156, 206-7, 213-14, 222-23, 228-30, and 350. For details from U.N. archives see PALUMBO, *supra* note 147, at 47-55, 81, 126-30, 136-37, 171-72, and 168.

<sup>153</sup> For details of expulsion of Palestinians in 1948 based on documents in Zionist and state archives see MORRIS, *ISRAEL'S BORDER WARS*, *supra* note 147, at 54-6, 64, 105, 107, 115, 118-9, 121, 127, 201, 209-10, 212, 215, 227, 239, and 242. For details of expulsions during the 1967 war see Masalha, *supra* note 150, at 81, 85, 87 and 91-4.

<sup>154</sup> For details on looting and destruction of Palestinian refugee property during and after the 1948 war see MORRIS, *ISRAEL'S BORDER WARS*, *supra* note 147, at 32, 50, 52, 54, 62-3, 88, 101-2, 106, 112-3, 116, 119, 125, 128, 215, 221, and 230. For descriptions of the destruction of property during the 1967 war see Masalha, *supra* note 150, at 81, 87, 89-90.

<sup>155</sup> In total it is estimated that some 750,00 to 900,000 Palestinians became refugees between December 1947 and early 1949. U.N. CONCILIATION COMMISSION FOR PALESTINE, *FINAL REPORT OF THE UNITED NATIONS SURVEY MISSION FOR THE MIDDLE EAST: PART I. THE FINAL REPORT AND APPENDICES*, U.N. Doc. A/AC.25/6 (1949). See also demographic calculations in Janet Abu Lughod, *The Demographic Transformation of Palestine*, in *THE TRANSFORMATION OF PALESTINE* 139-163 (Ibrahim Abu Lughod ed., 1971). If the number of persons who lost their livelihoods but not their homes is added (approximately 100 'border' villages where the 1949 armistice line separated villagers from their lands) the total number of refugees reaches around 900,000. Over 50% of the indigenous Palestinian Arab population was displaced during the conflict. Within the territory that became the state of Israel, 85% of the Palestinian Arab population was displaced. For Israeli and British estimates see MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139, at 297-98. For American estimates see ZUREIK, *supra* note 116, at 17. For estimates by village and city of origin see ABU SITTA, *supra* note 123.

placed—half of those for a second time.<sup>156</sup> Palestinian refugees outside their historic homeland in neighboring Arab states have suffered multiple displacements as a result of subsequent periods of armed conflict in Jordan, Lebanon, Kuwait, and Iraq.<sup>157</sup>

Root causes of Palestinian displacement also include foreign occupation and colonization.<sup>158</sup> During the first half of the twentieth century, Zionist colonization of strategic areas of the country created a pattern of internal displacement and urban migration affecting tens of thousands of Palestinian peasant farmers (*fellaheen*). Zionist officials assembled detailed records of Palestinian Arab landholdings, often using aerial photographs of Palestine, to identify lands for acquisition—including expro-

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<sup>156</sup> *Report of the Secretary General under General Assembly Resolution 2252, supra* note 124. THE TRANSFORMATION OF PALESTINE 162 (Ibrahim Abu Lughod ed., 1971). Displacement affected approximately 35% to 40% of the Palestinian population of the West Bank and Gaza Strip. For Israeli estimates see KOSSAIFI, *supra* note 127, at 6 (citing MOSHE EFRAT, THE PALESTINIAN DISPLACED POPULATION FROM THE WEST BANK AND THE GAZA STRIP TO THE EAST BANK OF JORDAN (1993)). For Jordanian estimates see ZUREIK, *supra* note 116, at 23 (citing ABDEL TAYSEER JABER, THE SITUATION OF PALESTINIAN REFUGEES IN JORDAN (1996)). For Palestinian estimates see Tayseer Amro, Badil Resource Center for Palestinian Residency and Refugee Rights, *Displaced Persons: Categories and Numbers Used by the Palestinian Delegation [to the Quadripartite Committee]* (December 1995), at <http://www.badil.org/Publications/Article74/1995/art14j.htm> (last visited Mar. 15, 2003).

<sup>157</sup> In the 1970s, Palestinian refugees were displaced when the Hashemite regime in Jordan expelled the PLO from its bases of operation in the camps from where it staged cross-border attacks on Israel. BRAND, *supra* note 114, at 168-172. In the 1980s, during the Israeli invasion of Lebanon and the civil war in the country, refugees were displaced internally while PLO fighters and political cadres were forced to leave the country and relocate in Tunisia. REX BRYNEN, SANCTUARY AND SURVIVAL, THE PLO IN LEBANON 180-181 (1990). During the 1991 Gulf War, an estimated 350,000 Palestinians living in Kuwait were forced to leave the country on the basis of alleged sympathies with the Iraqi regime of Saddam Hussein. In some cases refugees were pressured by harassment and intimidation to leave; in other cases Kuwaiti authorities refused to renew residency permits. TAKKENBERG, *supra* note 98, at 160-62. More recently, thousands of Palestinian refugees were displaced, many forced out of the homes in which they had been living, following the United States-United Kingdom-led war on Iraq. See, e.g., U.N. High Comm'r for Refugees, *Iraq Emergency*, <http://www.unhcr.ch/cgi-bin/texis/vtx/iraq> (last visited June 20, 2003).

<sup>158</sup> For a discussion of Israel's military occupation and colonization under international law see INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES (Emma Playfair ed., 1992). See also YEHEZKEL LEIN, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK (2002); PALESTINIAN CENTRE FOR HUMAN RIGHTS, A COMPREHENSIVE SURVEY OF ISRAELI SETTLEMENTS IN THE GAZA STRIP (1996). For an opposing view see Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B. HUM. RTS. (1971). For ongoing sources of displacement as a result of Israel's protracted military occupation see *infra* notes 198-244.



riation—and Jewish colonization.<sup>159</sup> According to Avraham Granott, chairman of the Jewish National Fund (“JNF”), “Land was bought in those parts [of Palestine] where there was a danger of a political change in favor of the Arabs, or of their being wrenched from the body of the imminent state.”<sup>160</sup> Palestinian peasant farmers, especially in areas of the country targeted by the Zionist movement for intensive colonization, lost a disproportionate amount of medium to good quality land. By the early 1940s the average peasant family had less than half the agricultural land required for their subsistence.<sup>161</sup> Colonization of border areas and land inside Israel deemed valuable for present or future Jewish settlement intensified<sup>162</sup> after 1948. The establishment of new Jewish colonies in and around Palestinian cities and villages inside Israel attempted to address the “special problem” stemming from the fact that in certain areas of the country “the Jewish population [was] out-numbered by the non-Jewish population.”<sup>163</sup> Between 1948 and 1967 the number of Jewish settlements inside Israel more than doubled.<sup>164</sup> Tens of thousands of Palestinians were displaced by land expropriation, transferred to other parts of the state, or expelled.<sup>165</sup> Since 1967, Israel has established 140 Jewish colonies in 1967-occupied Palestine (including eastern Jerusalem).<sup>166</sup> Similar to

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<sup>159</sup> MERON BENVENISTI, *SACRED LANDSCAPE: THE BURIED HISTORY OF THE HOLY LAND* 70 (2000).

<sup>160</sup> AVRAHAM GRANOTT, *AGRARIAN REFORM AND THE RECORD OF ISRAEL* 37 (1956).

<sup>161</sup> TOWARD THE DE-ARABIZATION OF PALESTINE/ISRAEL 1945-1977 10 (Basheer K. Nijim ed., 1984) (citing ARAB OFFICE, *THE PROBLEM IN PALESTINE* 277. Submitted for the Consideration of the Anglo-American Commission of Inquiry, Memo C-29, titled *The Land Question: Arab Land Hunger*, Vol. II, 9-10). The loss of land to Zionist colonization was exacerbated by economic crisis, a severe housing shortage in Palestine, drought, and rural debt.

<sup>162</sup> A. KELLERMAN, *SOCIETY AND SETTLEMENT: JEWISH LAND OF ISRAEL IN THE TWENTIETH CENTURY* 21 (1993).

<sup>163</sup> MASALHA, *supra* note 147, at 4 (citing YOSEF WEITZ, YOSEF NAHMANI: *ISH HAGALIL* [YOSEF NAHMANI: *MAN OF THE GALILEE*] 118-119 (1969)).

<sup>164</sup> In 1948 there were 286 Jewish settlements. By 1967 Israel had constructed an additional 346 Jewish settlements inside Israel. IBRAHIM MATAR, *JEWISH SETTLEMENTS, PALESTINIAN RIGHTS, AND PEACE* 1-2 (1996).

<sup>165</sup> For details on expulsion of Palestinians from inside Israel after 1948 see MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139, at 152, 154, and 157-58; MASALHA, *supra* note 147, at 12-13, 33; and SEGEV, *supra* note 147, at 33, 61 and 97. See also Gershon Safir, *Zionism and Colonialism: A Comparative Approach*, in *ISRAEL IN COMPARATIVE PERSPECTIVE, CHALLENGING THE CONVENTIONAL WISDOM* 238 (Michael N. Barnett ed., 1996) (stating that with the acquisition of land through war and subsequent expropriation “the earlier differences between the ungodly, i.e., explicitly colonial, powers and Israel had all but disappeared”).

<sup>166</sup> For updated figures and analysis see Foundation for Middle East Peace, *REPORT ON ISRAELI SETTLEMENTS IN THE OCCUPIED TERRITORIES*, <http://www.fmep>.

colonization inside Israel, the construction of outposts and transfer of the civilian Jewish population into the territories occupied by Israel in 1967 aimed to “blur the unequivocally Palestinian character of the area”<sup>167</sup> and isolate Palestinian population centers into non-contiguous zones.<sup>168</sup> Likewise, prominent leaders of the Zionist movement viewed the presence of such a large number of Palestinians as a threat, which could “cause the destruction of the foundations of [the] state.”<sup>169</sup> While there are no authoritative figures, the estimated number of Palestinians affected is likely to exceed several tens of thousands of individuals.

Ongoing displacement is also related to racial discrimination and an institutionalized system of separation akin to internationally recognized forms of apartheid.<sup>170</sup> Reviewing Israel’s compliance with international human rights law, U.N. treaty committees, including the Committee on Economic, Social, and Cultural Rights, have concluded that, “excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens.”<sup>171</sup> Israel’s

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org (last visited Mar. 15, 2003). Satellite imagery, however, reveals more than 300 built-up areas. GIS database, Applied Research Center in Jerusalem (2000), <http://www.arij.org> (last visited May 15, 2002). For more details on Israeli colonization of 1967-occupied Palestine see GEOFF ARONSON, *ISRAEL, PALESTINIANS AND THE INTIFADA: CREATING FACTS ON THE WEST BANK* (1990). See also MERON BENVENISTI, *THE WEST BANK DATA PROJECT, A SURVEY OF ISRAEL’S POLICIES* (1984).

<sup>167</sup> UZI BENZIMAN, SHARON: AN ISRAELI CAESAR 119 (1987).

<sup>168</sup> See, e.g., Matityahu Drobless, *The Settlement in Judea and Samaria: Strategy, Policy and Program* (1980) [Hebrew], reprinted in 1 DOCUMENTS ON PALESTINE, *supra* note 130, at 254-259 (“The disposition of the settlements must be carried out not only around the settlements of the minorities [Palestinians] but also in between them, this in accordance with the settlement policy adopted in the Galilee and in other parts of the country.”). See also WILLIAM WILSON HARRIS, *TAKING ROOT: ISRAELI SETTLEMENT IN THE WEST BANK AND GAZA-SINAI, 1967-1980* (1980).

<sup>169</sup> WALTER LEHN, *THE JEWISH NATIONAL FUND* 357 (1988) (quoting Josef Weitz, deputy chairman of the Jewish National Fund).

<sup>170</sup> For a discussion of racial discrimination inside Israel and international law see, for example, DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* (1990). For opposing views see *id.* For a discussion of racial discrimination in 1967-occupied Palestine see LEIN, *supra* note 158. For a discussion of apartheid and the Palestinian case see, for example, URI DAVIS, *ISRAEL, AN APARTHEID STATE* (1987); MARWAN BISHARA, *PALESTINE/ISRAEL: PEACE OR APARTHEID, PROSPECTS FOR RESOLVING THE CONFLICT* (2001).

<sup>171</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, U.N. Doc. E/C.12/1/Add.27 (1998), para. 10 [hereinafter *CESCR 1998*]. Israel responded to the Committee’s concern stating, “The Government of Israel regards itself as obligated to act to grant equal and fair conditions to Israeli Arabs in the socio-economic sphere, in particular in areas of education, housing and employment.” *Additional Information Submitted by States parties to the Covenant following the Consideration of their reports by the Committee on Economic, Social and*

military occupation and “undeclared annexation” of Jewish colonies in the West Bank, including eastern Jerusalem, and in the Gaza Strip has resulted in “the application of different legal systems, and different protections, to the Jewish and Palestinian populations living in the same territory.”<sup>172</sup> Discriminatory citizenship/nationality,<sup>173</sup> residency laws,<sup>174</sup> and

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*Cultural Rights, Addendum, Israel*, U.N. ESCOR, U.N. Doc. E/1989/5/Add.14 (2001), para. 33 [hereinafter *Additional Information, Israel*]. See also *Concluding Observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/C/79/Add.93 (1998), para. 12 [hereinafter *CCPR 1998*]. According to Israel’s High Court, the Jewish character of the state is defined by three inter-related components: (1) Jews form the majority of the state; (2) Jews are entitled to preferential treatment such as the Law of Return; and (3) a reciprocal relationship exists between the state and the Jews outside of Israel. *Ben Shalom v. Central Election Committee*, 43(4) P.D. 221 (1988); ADALAH, LEGAL VIOLATIONS OF ARAB MINORITY RIGHTS IN ISRAEL 44-45 (1998) (citing the English translation of *Ben Shalom* in 25 ISRAEL L. REV. 219 (1991)). Israeli political geographer Oren Yiftachel classifies Israel as an ‘ethnocratic settler state.’ Ethnocratic settler states aim to alter the geographic and ethnic structure of a state through migration and settlement. Oren Yiftachel, *Israeli Society and Jewish-Palestinian Reconciliation: ‘Ethnocracy’ and its Territorial Contradictions*, 51 MID. EAST J. 505 (1997).

<sup>172</sup> LEIN, *supra* note 158, at 42.

<sup>173</sup> For a detailed analysis of Israel’s citizenship and nationality laws see, for example, Gail J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (2001), available at [http://www.badil.org/Publications/Legal\\_Papers/RoR48.pdf](http://www.badil.org/Publications/Legal_Papers/RoR48.pdf) (last visited Mar. 15, 2003). Boling cites the Law of Return, 1950, 4 L.S.I. 114, (1950), which grants all Jews, regardless of their national origin or citizenship, the right to citizenship and residency in Israel as the Jewish national homeland; and Nationality Law, 1952, 6 L.S.I. 50, (1952), which requires the indigenous Palestinian Arab population to prove, among a list of five conditions for those born before the establishment of the state of Israel and three conditions for those born after, that they were in the state of Israel on or after July 14, 1952, or that they are the offspring of a Palestinian who meets this condition. *Id.* Due to the fact that most Palestinian refugees were displaced outside the borders of the state of Israel on or after July 14, 1952, they are unable to satisfy these conditions and to resume domicile in their homeland. See also *CESCR 1998, supra* note 171, at para. 13 and 36. For Israel’s response to the Committee’s concerns see *Additional Information, Israel, supra* note 171, at paras. 45-48. See also *Concluding Observations of the Committee on the Elimination of Discrimination: Israel*, U.N. Doc. CERD/C/304/Add.45 (1998), para. 18 [hereinafter *CERD 1998*]. Israeli law is applied to all Jewish settlers residing in the occupied territories. LEIN, *supra* note 158, at 66 n.183 (citing Amendment and Extension of the Validity of the Emergency Regulations (Judea and Samaria, the Gaza Strip, Sinai, and South Sinai—Jurisdiction and Legal Assistance) Law, 5744-1984, sect. 6B(a)).

<sup>174</sup> Law and Administrative Ordinance (Amendment No. 11), 1967, 21 L.S.I. 75, (1966-67) (extending the law, jurisdiction, and administration of the state to occupied eastern Jerusalem). Entry to Israel Law, 1952, 6 L.S.I. 159, (1952) (granting permanent residency to those Palestinians recorded in the 1967 census). Only those Palestinian inhabitants present in eastern Jerusalem and included in Israel’s 1967

military orders<sup>175</sup> in effect denationalize millions of Palestinian refugees on ethnic, national and religious grounds, and prevent them from returning to their places of origin inside Israel. Discriminatory property law<sup>176</sup> and military orders<sup>177</sup> have enabled Israel to acquire control of

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census are considered residents. The status of resident alien does not provide a guarantee of residence and may be revoked at any time. *Id.* For further discussion of discriminatory residency policies in eastern Jerusalem see *infra* notes 200-203.

<sup>175</sup> NOGA KADMAN, *FAMILIES TORN APART: SEPARATION OF PALESTINIAN FAMILIES IN THE OCCUPIED TERRITORIES* 17 (1999) (citing 1968 Order Relating to Identity Cards and Population Registry and 1969 Order Relating to Identity Cards and Population Registry). Similar orders were issued in the Gaza Strip. For a comprehensive list of Israeli military orders see JERUSALEM MEDIA AND COMMUNICATION CENTER, *MILITARY ORDERS IN THE OCCUPIED WEST BANK: 1967-1992* (1995).

<sup>176</sup> For a detailed analysis of Israel's property laws see Gail J. Boling, 'Absentees' Property' Laws and Israel's Confiscation of Palestinian Property: A Violation of UN General Assembly Resolution 194 and International Law, 11 *PALESTINE Y.B. INT'L L.* 73 (2000-2001) (citing, inter alia, the 1943 Land (Acquisition for Public Purposes) Ordinance, the 1945 Defense (Emergency) Regulations, the 1948 Abandoned Areas Ordinance, the 1948 Emergency Regulations Concerning Absentee Property, the 1949 Emergency Regulations (Security Zones), the 1949 Emergency Regulations for (Cultivation of Waste [Uncultivated] Lands), the 1950 Absentees' Property Law, the 1950 Development Authority (Transfer of Property) Law, the 1956 Absentees' Property (Amendment) Law, the 1951 State Property Law, the 1958 Prescription Law (No. 38), the 1965 Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law the 1976 Absentees' Property (Compensation) (Amendment) Law and the 1980 Negev Land Acquisition (Peace Treaty with Egypt) Law). See also *CESCR 1998, supra* note 171, at paras. 11, 25, 36; *CERD 1998, supra* note 173, at para. 18; *CCPR 1998, supra* note 171, at para. 25.

<sup>177</sup> For a detailed analysis of Israeli military orders concerning property see RAJA SHEHADEH, *OCCUPIER'S LAW, ISRAEL AND THE WEST BANK* (1985); LEIN, *supra* note 158 (citing 1967 Military Order No. 25, Order Concerning Transactions in Real Property; 1967 Military Order No. 58, Concerning Abandoned Property (Private Property); 1967 Military Order No. 59, Concerning Government Properties; 1967 Military Order No. 150, Abandoned Property of Private Individuals [in the West Bank] (Additional Provisions); 1969 Military Order No. 321, Regarding the Lands Law (Acquisition for Public Needs) (amending the 1953 Jordanian land law Acquisition for Public Needs, Law No. 2 for 1953); 1969 Military Order No. 364, Concerning Government Properties (Amendment No. 4); 1974 Military Order 569, Order Concerning the Registration of Special Transactions in Land; 1981 Military Order No. 949, Regarding the Lands Law (Acquisition for Public Needs); 1983 Military Order 1060, Order Concerning Law on Registration of Unregistered Immovable Property (Amendment No. 2)). In addition, Israeli military commanders have issued orders for the requisition of privately-owned Palestinian land for military needs. See, e.g., LEIN, *supra* note 158, at 32. In 1979 the Israeli military administration was forced to adopt new methods of acquiring Palestinian land in the West Bank for colonization after the High Court ruled private property could not be seized under the pretext of military necessity for the establishment and expansion of Jewish

vast quantities of Palestinian owned property, including refugee property. It is estimated that Israel has expropriated and/or controls more than 20,000 square kilometers of private and communal Palestinian land.<sup>178</sup> Property held by the state and the JNF<sup>179</sup> may not be transferred by sale or in any other manner.<sup>180</sup> The government of Israel also delegates cer-

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settlements. *Id.* at 49 (citing H.C. 390/79, *Dweikat et al. v. Government of Israel et al.*, 34(1) P.D. 1, (1979)). See also *CESCR 1998, supra* note 171, at paras. 12, 22-24, 41-42; *CERD 1998, supra* note 173, at para. 11; *CCPR 1998, supra* note 171, at paras. 13-14.

<sup>178</sup> This includes approximately 17,178 square kilometers of individual and communal Palestinian land inside Israel expropriated from 1948 Palestinian refugees, approximately 1,548 square kilometers expropriated from internally displaced and other Palestinian citizens of Israel, and around 3,209 square kilometers of land expropriated or controlled by Israel in 1967-occupied Palestine. For estimates on Palestinian and Jewish land ownership in Palestine and Israel see, for example, PLO RESEARCH CENTRE, *VILLAGE STATISTICS 1945* (1970); ABU SITTA, *supra* note 123; Palestine Land Society, *Map of the Beer Sheba Northern Sub-District and Western Gaza Sub-District 1948* (2002); SAMI HADAWI, *PALESTINIAN RIGHTS AND LOSSES IN 1948* (1988); *Progress Report of the United Nations Conciliation Commission for Palestine*, U.N. GAOR, 6th Sess., Supp. No. 18, U.N. Doc. A/1985 (1951); GRANOTT, *supra* note 160; 1 A SURVEY OF PALESTINE, *supra* note 131; SABRI JIRYIS, *THE ARABS IN ISRAEL* (1976); Bakir Abu Kishk, *Arab Land and Israeli Policy*, *J. PALESTINE STUD.*, Autumn 1981, at 124; HUSSEIN ABU HUSSEIN & FIONA MCKAY, *ACCESS DENIED: PALESTINIAN ACCESS TO LAND IN ISRAEL* (2003); IAN LUSTICK, *ARABS IN THE JEWISH STATE* (1976); DON PERETZ, *ISRAEL AND THE PALESTINE ARABS* (1958); George E. Bisharat, *Land, Law and Legitimacy in Israel and the Occupied Territories*, 43 AM. U.L.REV. 467 (1994); BENVENISTI, *supra* note 166; KHADER ABUSWAY ET AL., *SIGNED, SEALED AND DELIVERED: ISRAELI SETTLEMENT AND THE PEACE PROCESS* (1997).

<sup>179</sup> The Jewish National Fund ("JNF") was established by decision of the 5th Zionist Congress (1901) to purchase land in Palestine and Syria for Jewish colonization. The JNF was incorporated as an Israeli company in 1953. According to its Memorandum of Association, the JNF is forbidden to sell national land to non-Jews. Leases to non-Jews, moreover, are exceptional and relatively few in number. LEHN, *supra* note 169, at 116. See also KRETZMER, *supra* note 170, at 62. Hemnutah, a subsidiary of the JNF, however, is authorized to sell land to and act as an agent for other purchasers. The subsidiary enables the JNF to purchase land that the Fund itself may hesitate to acquire due to the quality and location of the land, and then to sell or exchange the land for other plots considered to be more desirable. For a more detailed description see LEHN, *supra* note 169, at 64-68.

<sup>180</sup> Palestinian property held by the Israeli Custodian of Absentees' Property has been sold to the Development Authority established under the 1950 Development Authority (Transfer of Property) Law. The Development Authority is forbidden from transferring lands it has obtained from the Custodian to any party but the state, the JNF, or a local authority, on condition that the JNF has prior right to buy such land. Rural property, which comprises the bulk of land expropriated from Palestinian refugees, may not be sold to local authorities. All land classified as 'Israel Lands' under the 1960 Basic Law: Israel Lands (Section 1) may not be transferred by sale or in any other manner. A proposal to call 'Israel lands' 'people's lands' was rejected, as

tain essential public services, including immigration and absorption assistance and development of new communities, to Zionist institutions such as the World Zionist Organization (“WZO”), the Jewish Agency (“JA”), and JNF, which are mandated to serve the Jewish people.<sup>181</sup> The government is therefore able to channel resources to Jewish citizens of the state and avoid charges of overt discrimination while the rights and needs of the Palestinian community in areas delegated to the W.Z.O., J.A., and J.N.F. are systematically ignored. The system of separation between Palestinian Arabs and Jews has been consolidated by the imposition of military government inside Israel between 1948 and 1966<sup>182</sup> and in 1967-occupied Palestine from 1967 until the present.<sup>183</sup> Planning and building laws<sup>184</sup> effectively contain the remaining indigenous Palestinian popula-

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it would necessarily include all the residents of the state including non-Jews. LEHN, *supra* note 169, at 107 (citing Z. Wahrhaftig, Minister of Religious Affairs, address to the Knesset). Israel has claimed a total of 15,025 square kilometers of land inside Israel as ‘state’ land. Sabri Jiryis, *Settlers Law: Seizure of Palestinian Lands*, II PALESTINE Y.B. INT’L L. 17, 21 (1985) (citing ISRAEL GOVERNMENT YEARBOOK 1962-63, at 107). LEHN, *supra* note 169, at 114. While there are no legal impediments on the lease of ‘Israel Lands’ to Palestinians (excluding land held by the JNF), leases to Palestinians are limited and primarily located in urban areas. KRETZMER, *supra* note 170, at 66. See also Alexandre Kedar, *The Jewish State and the Arab Possessor: 1948-67*, in THE HISTORY OF LAW IN A MULTICULTURAL SOCIETY: ISRAEL, 1917-1967 (Ron Harris et al. eds., 2002). Expropriated Palestinian property in 1967-occupied Palestine held by the state is not considered inalienable, however, the use of land acquired under military orders (i.e., construction of Jewish colonies, including related infrastructure such as “bypass roads”), has resulted in de facto permanent acquisition. Bisharat, *supra* note 178, at 535.

<sup>181</sup> World Zionist Organization-Jewish Agency (Status) Law, 1952, 7 L.S.I. 3, (1952) (governing the relationship between the state and the World Zionist Organization-Jewish Agency). KRETZMER, *supra* note 170, at 92, 95. For more on these organizations see, for example, W.T. MALLISON JR., THE LEGAL PROBLEMS CONCERNING THE JURIDICAL STATUS AND POLITICAL ACTIVITIES OF THE ZIONIST ORGANIZATION/JEWISH AGENCY: A STUDY IN INTERNATIONAL AND U.S. LAW (1968).

<sup>182</sup> For a discussion of military government inside Israel between 1948 and 1966 see JIRYIS, *supra* note 178.

<sup>183</sup> For a discussion of Israeli military government in 1967-occupied Palestine (excluding eastern Jerusalem) see SHEHADEH, OCCUPIER’S LAW, *supra* note 177. Under the Oslo agreements Israel’s military government in 1967-occupied Palestine was withdrawn but not abolished. SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS, *supra* note 146, at 39.

<sup>184</sup> For law applying inside Israel, see Planning and Building Law, 1965, 19 L.S.I. 330, (1965). For law applying in 1967-occupied Palestine, see SHEHADEH, OCCUPIER’S LAW, *supra* note 177; LEIN, *supra* note 158 (citing the 1966 City, Village and Building Planning Law No. 79, as amended by the 1971 Military Order No. 418 Concerning the City, Village and Building Planning Law; 1970 Military Order 393; 1971 Military Order 418; 1979 Military Order 783).

tion by maintaining “public” (i.e., Jewish) control over vast areas of land, limiting the expansion of existing Palestinian Arab population centers, and settling Jews in border regions and “internal frontiers” (i.e., areas of dense Palestinian population).<sup>185</sup> Indigenous Palestinian communities are thus forced to grow inward and upward, or to emigrate.<sup>186</sup> The Oslo agreements further segregated 1967-occupied Palestine into Areas A, B, and C<sup>187</sup> (H1 and H2 in Hebron),<sup>188</sup> as well as eastern Jerusalem.<sup>189</sup> Since the beginning of the second *intifada*, Israel has divided the West Bank

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<sup>185</sup> For a discussion of Israel’s planning system inside Israel and its impact on the Palestinian population see, for example, MCKAY & ABU HUSSEIN, *supra* note 178; OREN YIFTACHEL, *PLANNING AS CONTROL: POLICY AND RESISTANCE IN A DEEPLY DIVIDED SOCIETY* (1995). For a similar discussion of the planning system in 1967-occupied Palestine see SHEHADEH, *OCCUPIER’S LAW*, *supra* note 177; Abdul-Ilah Abu-Ayyash, *Israeli Regional Planning Policy in the Occupied Territories*, J. PALESTINE STUD., Spring-Summer 1976, at 82; Rami S. Abdulhadi, *Land Use Planning in the Occupied Palestinian Territories*, J. PALESTINE STUD., Summer 1990, at 46.

<sup>186</sup> Inside Israel, for example, one million Palestinians have access to around 300 square kilometers of land, while five million Jews have access to around 20,000 square kilometers of land. At the outset of the Oslo peace process, an Israeli Civil [Military] Administration report revealed that one million Palestinians in the West Bank had access to 273 square kilometers. At the same time 114,600 Jewish settlers had access to 3,850 square kilometers. 3 REPORT ON ISRAELI SETTLEMENT IN THE OCCUPIED TERRITORIES (Jan. 1993), at <http://www.fmep.org/reports/v3n1.html> (last visited June 10, 2002). In the Gaza Strip 4,800 Jewish settlers had access to 148 square kilometers while 717,000 Palestinians had access to 222 square kilometers. Rempel, *supra* note 128, at 288 n.70.

<sup>187</sup> The division of the West Bank into three types of zones is based on the division of administrative and security powers under Oslo II. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 551 [hereinafter Oslo II]. Under the Interim Agreement, the Palestinian Authority was accorded full control over administrative matters in Areas A and B and over security matters in Area ‘A.’ Israel retains full control over security in Areas B and C. Israel is also responsible for administrative matters in Area A. See Annex I Protocol Concerning Redeployment and Security Arrangements, Oslo II, *supra*, art. V, 36 I.L.M. at 560. On the division of the Gaza Strip see *id.* at art. VI. The division roughly follows the location of Jewish colonies. As of March 2000, Area A comprised 18.2% of the West Bank, Area B 21.8%, and Area C 60.0%. Applied Research Institute Jerusalem & Arab Studies Society Land Research Center, *An Overview of Israel’s Colonization Policy and the Discontents with the Peace Process*, at <http://www.poica.org/casestudies/colonization/index.htm> (last visited Mar. 10, 2002) [hereinafter *Overview of Israel’s Policy*]. Similarly, the 1947 ‘Partition Plan’ roughly followed the location of Jewish colonies already established in Palestine. *Report of the UN Special Committee on Palestine, The Question of Palestine*, *supra* note 136. See also Fawzi Asadi, *Some Geographic Elements in the Arab-Israeli Conflict*, J. PALESTINE STUD., Autumn 1976, at 79.

<sup>188</sup> Protocol Concerning the Redeployment in Hebron, Jan. 17, 1997, Isr.-P.L.O., 36 I.L.M. 650, *reprinted in* II DOCUMENTS ON PALESTINE, *supra* note 143, at 317-320.

into sixty-four non-contiguous Palestinian zones surrounded by forty-six permanent Israeli checkpoints and 126 roadblocks.<sup>190</sup> The system of ethnic/religious separation is being entrenched in the form of a new “security” fence to run the length of the 1949 armistice line (“Green Line”) inside the West Bank, separating Palestinians fenced in those areas from Israel while maintaining links between Jewish colonies and Israel proper.<sup>191</sup>

### B. *Factors Forcing New Refugee Flows*

Throughout the post-1967 period, Palestinians remaining in areas of their historic homeland (i.e., Israel, the West Bank, eastern Jerusalem, and the Gaza Strip) have been subject to continued displacement through a process of “low-intensity transfer.”<sup>192</sup> Palestinians living in 1967-occupied Palestine have been affected most severely. Estimates for the years 1967-1986, for example, indicate that some 21,000 Palestinians per year were displaced from the 1967-occupied Palestine.<sup>193</sup> Sources of direct and

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<sup>189</sup> The Oslo agreements defer discussion on the future status of Jerusalem for final status negotiations between the PLO and Israel. See Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-P.L.O., art. V(3), 33 I.L.M. 622.

<sup>190</sup> For more details, including maps, see Applied Research Institute Jerusalem, <http://www.arij.org>. (last visited Mar. 30, 2002). As of May 2002 Palestinian residents require special permits issued by the Israeli Civil Administration, Israel’s military government, for travel between Palestinian cities and between various zones. Neither Israelis nor Jewish settlers require permits for movement within Israel or through the West Bank and Gaza. The Israeli military, however, prevents Israeli citizens from entering Palestinian-controlled cities and villages for security reasons. Marwan Bishara, *Israel’s Pass Laws will Wreck Peace Hopes: Apartheid in the Territories*, INTERNATIONAL HERALD TRIBUNE, May 22, 2002, at 6; Press Release, LAW—The Palestinian Society for Human Rights and the Environment, *Israel Strengthens Apartheid Policies* (May 23, 2002), available at <http://www.iap.org/newsmay232.htm>; Amira Hass, *Israel Forces Internal Movement Permits on Palestinians*, HA’ARETZ, May 19, 2002. See also Thomas O’Dwyer, *Parts and Apartheid*, HA’ARETZ, May 24, 2002.

<sup>191</sup> The Israeli government authorized construction of the wall on June 23, 2002. It is estimated that approximately ten percent of the West Bank and more than 350,000 Palestinians will be effectively annexed to Israel. Palestinians unlawfully transferred to the direct control of Israel will not be granted residency or citizenship. LAW—The Palestinian Society for the Protection of Human Rights and the Environment, *Israel’s Apartheid Wall: We are Here and They are There*, <http://www.lawsociety.org/wall/wall.html> (last visited Mar. 15, 2003). See also Yehezkel Lein, *Behind the Barrier: Human Rights Violations as a Result of Israel’s Separation Barrier* (2003), [http://www.btselem.org/Download/2003\\_Behind\\_The\\_Barrier\\_Eng.pdf](http://www.btselem.org/Download/2003_Behind_The_Barrier_Eng.pdf) (last visited Mar. 15, 2003).

<sup>192</sup> See *The Human Rights Dimensions of Population Transfer*, *supra* note 120, at 32 (“The causes of population transfer can be dramatic, or subtle and insidious. Transfer can be carried out en masse, or as ‘low-intensity transfers’ affecting a population gradually or incrementally.”).

<sup>193</sup> KOSSAIFI, *supra* note 127, at 8. A more recent study estimates the annual net migration out of the West Bank and Gaza Strip at as much as two percent per annum



indirect low-intensity transfer include revocation of residency rights, expulsion, house demolition, land confiscation, as well as mass detention, torture, military closure and curfews, and other human rights violations. The scope of displacement in 1967-occupied Palestine has been amplified since the beginning of the second Palestinian *intifada* that began in September 2000.

Revocation of residency has been one of the primary sources of ongoing displacement of the indigenous Palestinian population from 1967-occupied Palestine. Residency status has been revoked due to extended stay abroad and acquisition of residency or citizenship in a second country, and based on age and gender restrictions.<sup>194</sup> It is estimated that more than one hundred thousand Palestinians have been affected since 1967.<sup>195</sup> Under the Oslo agreements, Israel ceded the authority to revoke residency rights of Palestinians from the West Bank and the Gaza Strip excluding eastern Jerusalem.<sup>196</sup> However, Israel retained the authority to make the final determination on requests for permanent residency and family reunification, rendering the authority transferred to the Palestinian Authority "largely meaningless."<sup>197</sup> Palestinians wishing to regain

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(approximately 60,000 persons). FAFO—INSTITUTE FOR APPLIED SOCIAL SCIENCE, *GROWING FAST: THE PALESTINIAN POPULATION IN THE WEST BANK AND GAZA STRIP* 153 (Jon Pederson et al. eds., 2001).

<sup>194</sup> For a more detailed description of Israel's residency policies towards Palestinians see, for exampl., Yael Stein, *THE QUIET DEPORTATION: REVOCATION OF RESIDENCY OF EAST JERUSALEM PALESTINIANS* (1997); Lea Tsemel & Ingrid Jaradat Gassner, *THE TRAP IS CLOSING ON PALESTINIAN JERUSALEMITES: ISRAEL'S DEMOGRAPHIC POLICIES IN EAST JERUSALEM FROM THE 1967 ANNEXATION TO THE EVE OF FINAL STATUS NEGOTIATIONS* (1996). For U.N. human rights treaty body committee concerns see *CESCR 1998*, *supra* note 171, at paras. 20, 40. For Israel's response to the Committee on Economic, Social and Cultural Rights see *Additional Information, Israel*, *supra* note 171, at paras. 83-88. See also *CCPR 1998*, *supra* note 171, at para. 20.

<sup>195</sup> Kadman, *supra* note 175, at 18 n.8. Between 1967 and 1999, Israel revoked the residency rights of 6,185 Palestinians living in Jerusalem, affecting some 25,000 people. Badil Resource Center for Palestinian Residency and Refugee Rights, *EVICTION FROM JERUSALEM, RESTITUTION AND THE PROTECTION OF PALESTINIAN RIGHTS* 19 (1999). The table is updated through the end of 1999 with available statistics from the Israeli Interior Ministry. See also 5 AL-MAJDAL 24 (2000), available at [http://www.badil.org/Publications/ Majdal/2000/majdal5.pdf](http://www.badil.org/Publications/Majdal/2000/majdal5.pdf) (last visited Mar. 15, 2003).

<sup>196</sup> Kadman, *supra* note 175, at 95. At the same time, however, Israel introduced an amendment to the 1951 Entry into Israel Law to facilitate expulsion of those Palestinians who had entered 1967-occupied Palestine 'illegally' or without a permit. Shehadeh, *FROM OCCUPATION TO INTERIM ACCORDS*, *supra* note 146, at 142.

<sup>197</sup> Kadman, *supra* note 175, at 77. The agreements also established a special joint committee to handle claims from Palestinians whose residency status had been revoked prior to the Oslo process. See Annex III Protocol Concerning Civil Affairs, Oslo II, *supra* note 187, app. 1, art. 28(3), 36 I.L.M. at 617. For a discussion of

their residency status and non-resident spouses of Palestinian inhabitants of the territories generally must apply for family reunification. However, the family reunification process is limited by quotas, lack of procedural transparency, non-compliance with agreements, violation of due process, and other arbitrary restrictions.<sup>198</sup> Israel has approved only a fraction of applications for family reunification.<sup>199</sup> The Israeli human rights organization B'tselem observes:

Statements of Israeli officials indicate that the objective in rejecting requests for family reunification is purely demographic: to prevent an increase in Palestinians in the Occupied Territories, by prohibiting spouses from immigrating to the Occupied Territories, and encouraging separated families to leave the Occupied Territories.<sup>200</sup>

All family reunification programs for 1967-occupied Palestine ceased after the beginning of the second *intifada*. Israel also halted family reunification programs for Palestinian citizens seeking unification with Palestinian spouses from the West Bank and Gaza Strip.<sup>201</sup>

problems related to implementation of clauses concerning residency status in 1967-occupied Palestine, excluding eastern Jerusalem see KADMAN, *supra* note 175. See also MANAL JAMAL & BUTHAINA DARWISH, BADIL-ALTERNATIVE INFORMATION CENTER, MEMORANDUM NO. 4/97, EXPOSED REALITIES: PALESTINIAN RESIDENCY RIGHTS IN THE "SELF RULE AREAS" THREE YEARS AFTER PARTIAL ISRAELI REDEPLOYMENT (1997).

<sup>198</sup> For a more detailed discussion of Israel's family reunification policy in 1967-occupied Palestine see, for example, KADMAN, *supra* note 175; CANDY WHITOME, *The Right To Unite: The Family Reunification Question In The Occupied Palestinian Territories: Law And Practice* (1990).

<sup>199</sup> It is estimated that between 1967 and the early 1990s Israel approved ten percent or fewer applications for family reunification. The estimate is based on figures cited in John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIGR. L. J. 223, 240-241 (1992). See also MERON BENVENISTI, LEXICON OF JUDEA AND SAMARIA, SETTLEMENTS, ADMINISTRATION AND SOCIETY 21 (1987) (stating that Israel approved between 900 and 1,200 requests per year from 1973 to 1983. The annual rate of approval fell significantly in 1983, however, following a decision to reduce the number of approvals as much as possible.). See also B'tselem, *Family Separation in the Occupied Territories*, at <http://www.btselem.org> (last visited Mar. 15, 2003) (stating that as of 1999 Israel had approved 3,000 family reunification applications out of 24,000 applications submitted to the Palestinian Authority).

<sup>200</sup> KADMAN, *supra* note 175, at 23. For discussion of demographic fear in eastern Jerusalem see EITAN FELNER, A POLICY OF DISCRIMINATION, LAND EXPROPRIATION, PLANNING AND BUILDING IN EAST JERUSALEM 45 (2d ed. 1997) (citing the Interministerial Committee to Examine the Rate of Development for Jerusalem. Recommendation for a Coordinated and Consolidated Rate of Development, Aug. 1973, at 3).

<sup>201</sup> Cabinet Communique, May 12, 2002, New Alien Policy Communicated by the Cabinet Secretariat (on file with the authors). See also Press Release, Adalah, Supreme Court Orders State to Respond to Adalah's Petition Challenging the Legality of the Government's Decision to Prevent Family Unification for Non-Citizen

Expulsion is another source of ongoing displacement. Israel has expelled elected leaders, political activists, Palestinians not holding residency permits for the West Bank and Gaza Strip, and “militants” and their family members.<sup>202</sup> Thousands of Palestinians have been affected over the past three decades.<sup>203</sup> Expulsion of Palestinians from the West Bank and Gaza Strip came to a halt with the beginning of the Oslo process; however, an amendment to the 1952 Entry into Israel Law authorized the expulsion of those Palestinians who entered 1967-occupied Palestine “illegally” or without a permit.<sup>204</sup> In April 2002, Israel resumed expulsion of Palestinians with the forced departure of thirteen alleged (i.e., not one of the expellees was brought to trial) Palestinian “militants” from Bethlehem.<sup>205</sup> In July 2002, the Israeli authorities announced their intention to forcibly transfer from the West Bank to the Gaza Strip relatives of people known or suspected of having organized or participated in attacks against Israelis.<sup>206</sup> On August first, 2002, Israel’s military commander in the West Bank signed an amendment to Military Order 378

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Palestinian Spouses of Israeli Citizens (June 2, 2002); Press Release, Adalah, Adalah Submits 12 New Petitions to the Supreme Court Challenging Family Unification Policy (Aug. 29, 2002). For more details see Adalah, Center for Arab Minority Rights in Israel, at <http://www.adalah.org>; Arab Human Rights Association, at <http://www.arabhra.org> (last visited Feb. 15, 2003).

<sup>202</sup> For a more detailed discussion of expulsion see, for example, TAMI BASH ET AL., DEPORTATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES AND THE MASS DEPORTATION OF DECEMBER 1992 (1993); ANGELA GAFF, AN ILLUSION OF LEGALITY: A LEGAL ANALYSIS OF ISRAEL’S MASS DEPORTATION OF PALESTINIANS ON 17 DECEMBER 1992 (1993); Information Sheet, B’tselem, Renewal of Deportation of Women and Children from the West Bank on Account of “Illegal Residency” (Sept.-Oct. 1991); JOOST HILTERMANN, ISRAEL’S DEPORTATION POLICY IN THE OCCUPIED WEST BANK AND GAZA (1986); Ann M. Lesch, *Israeli Deportation of Palestinians from the West Bank and the Gaza Strip, 1967-1978*, J. PALESTINE STUD., Spring 1979, at 101.

<sup>203</sup> According to official Palestinian statistics, 6,660 Palestinians were expelled between 1967 and 1991 (including 4,000 to Egypt in 1967). ZUREIK, *supra* note 116, at 21. The figure roughly coincides with Israeli figures of Palestinians deported to Egypt during the 1967 war, which are not included.

<sup>204</sup> *Supra* note 203.

<sup>205</sup> Robert Fisk, *Red Cross Attacks Exile of Palestinians*, THE INDEPENDENT, May 23, 2002, available at [http://news.independent.co.uk/world/middle\\_east/story.jsp?story=297948](http://news.independent.co.uk/world/middle_east/story.jsp?story=297948). Press Release, LAW—Palestinian Society for Human Rights and the Environment, LAW Condemns Deportation of Palestinians (May 10, 2002).

<sup>206</sup> Press Release, B’tselem, B’Tselem’s response to the threatened deportation of families of suspects from the West Bank to Gaza (July 19, 2002); Marius Schattner, *Israel pledges 12 hours notice for Palestinians facing Gaza expulsion*, AGENCE FRANCE PRESS, July 21, 2002; Press Release, U.S. Department of State, Excerpt: U.S. to raise issue of Palestinian expulsions with Israel (July 19, 2002); Press Release, Amnesty International, Forcibly transferring relatives of suspected Palestinian suicide bombers would violate international law (July 19, 2002); Press Release, LAW—Palestinian

(1970) allowing for the forcible transfer of Palestinians from the occupied West Bank to the Gaza Strip.<sup>207</sup> The first transfer under the amended order took place on September third, 2002.<sup>208</sup>

Tens of thousands of Palestinians have been displaced by punitive and administrative house demolition.<sup>209</sup> It is estimated that Israel has demol-

Society for Human Rights and the Environment, Israel arrests family members of suspects, demolished their homes and threatened to deport them (July 19, 2002).

<sup>207</sup> Press Release, Amnesty International, Forcible Transfers of Palestinians to Gaza Constitutes a War Crime (Sept. 3, 2002); Press Release, LAW—Palestinian Society for Human Rights and the Environment, Israel's High Court Allows Deportation (Sept. 3, 2002).

<sup>208</sup> On September 3, 2002, the Israeli High Court issued a ruling allowing the forcible transfer of two Palestinians from the West Bank town of Nablus to the Gaza Strip on the grounds that they allegedly assisted their brother to commit attacks against Israelis. The two Palestinians were never charged and no proceedings have been initiated to bring them to trial. The Israeli government claims that it cannot try them because this would expose the source of the evidence against them. Press Release, Amnesty International, *supra* note 206; Press Release, Palestinian Centre for Human Rights, By Accepting the Deportation of two Palestinians from the West Bank to the Gaza Strip, the Israeli High Court Legalizes War Crimes (Sept. 3, 2002).

<sup>209</sup> Administrative house demolition includes homes built without permits. Permits are difficult and often impossible to obtain. For more details see Yael Stein & Zvi Shulman, B'TSELEM, POLICY OF DESTRUCTION: HOUSE DEMOLITION AND DESTRUCTION OF AGRICULTURAL LAND IN THE GAZA STRIP (2002); Yuval Ginbar & Zvi Shulman, B'TSELEM, DEMOLISHING PEACE: ISRAEL'S POLICY OF MASS DEMOLITION OF PALESTINIAN HOUSES IN THE WEST BANK (1997); Parastou Houssari, LAW, BULLDOZED INTO CANTONS: ISRAEL'S HOUSE DEMOLITION POLICY IN THE WEST BANK SINCE THE SIGNING OF THE OSLO AGREEMENTS, SEPTEMBER 1993 TO NOVEMBER 1997 (1997). For U.N. human rights treaty body committee concerns see *CESCR 1998*, *supra* note 171, para. 22; *CCPR 1998*, *supra* note 171, para. 24; *CERD 1998*, *supra* note 173, para. 11. For U.N. human rights reports about house demolition in the context of the second Palestinian *intifada*, see *Report of the High Commissioner on Her Visit of the Occupied Palestinian Territories, Israel, Egypt and Jordan (8-16 Nov. 2000)*, U.N. Doc. E/CN.4/2001/114 (2000), para. 39 and *infra* [hereinafter *High Commissioner Report, 2000*]; *Mission Report on Israel's Violations of Human Rights in the Palestinian Territories Occupied since 1967, submitted by Mr. Giorgio Giacomelli, Special Rapporteur*, U.N. Doc. E/CN.4/S-5/3 (2000), para. 24 and *infra* [hereinafter *Special Rapporteur Report, 2000*]; *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Human Rights Inquiry Commission established pursuant to Commission Resolution 3-5/1, of 19 Oct. 2000*, U.N. Doc. E/CN.4/2001/121 (2001), para. 88 *infra* [hereinafter *Commission Inquiry Report, 2000*]; *Report of the High Commissioner for Human Rights submitted pursuant to decision 2002/103*, U.N. Doc. E/CN.4/2002/184 (2002), para. 13 *infra* [hereinafter *High Commissioner Report, 2002*]; *Report of the Special Rapporteur of the Commission of Human Rights, Mr. John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967*, U.N. Doc. E/CN.4/2002/32 (2002), para. 29 *infra* [hereinafter *Special Rapporteur Report, 2002*]; *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to*

ished more than 20,000 Palestinian homes in the West Bank, including eastern Jerusalem, and the Gaza Strip since 1967.<sup>210</sup> Demolition of Palestinian homes largely continued after the signing of the Oslo agreements, with the exception of homes in Area A and Area B, and large parts of the Gaza Strip, all of which came under the jurisdiction of the Palestinian Authority. Between 1993 and 2000 Israel demolished around 1,000 Palestinian homes across the occupied West Bank, including eastern Jerusalem.<sup>211</sup> The number of Palestinian families affected by house demolition has skyrocketed during the second *intifada*. Between September 2000 and September 2002 the Israeli military demolished over 1,000 Palestinian homes leaving some 8,000 people homeless.<sup>212</sup> Palestinian refugees have been particularly vulnerable. In the occupied Gaza Strip, as of the end of October 2002, 639 shelters accommodating 888 families (4,954 persons) had been destroyed or damaged beyond repair as a result of Israeli mili-

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*an Adequate Standard of Living, Mr. Miloon Kothari, Addendum, Report of Visit to the Occupied Palestinian Territories, 5-10 Jan. 2002*, U.N. Doc. E/CN.4/2003/5/Add.1 (2002), para. 18 and *infra* [hereinafter *Special Rapporteur Report, Housing*].

<sup>210</sup> The figure includes homes demolished for administrative and punitive reasons as well as thousands of refugee shelters demolished in the Gaza Strip for alleged security considerations. See Al-Haq, *House Demolitions as Human Rights Violations*, at [http://www.alhaq.org/issues/hr\\_demolitions.html](http://www.alhaq.org/issues/hr_demolitions.html) (last visited Feb. 15, 2002) (stating that since 1967 Israel has demolished more than 6,000 Palestinian homes in the occupied Palestinian territories); B'tselem, The Israeli Center for Human Rights in the Occupied Territories, *Demolition of Houses Built without Permits 1987-2002*, at [http://www.btselem.org/English/Planning\\_&\\_Building/Statistics.asp](http://www.btselem.org/English/Planning_&_Building/Statistics.asp) (last visited May 20, 2002) (stating that between 1987 and mid-May 2002, Israel demolished, including some partial demolitions, more than 2,500 Palestinian homes); NORMA M. HAZBOUN, *ISRAELI RESETTLEMENT SCHEMES FOR PALESTINIAN REFUGEES IN THE WEST BANK AND GAZA STRIP SINCE 1967* 32 (1996) (citing the UNRWA Accommodation Office, July 1991, stating that during the 1970s and 1980s the Israeli military demolished over 10,000 refugee shelters in several large refugee camps in the Gaza Strip, affecting more than 62,000 refugees).

<sup>211</sup> Punitive demolition of Palestinian homes decreased after 1993 until the beginning of the second Palestinian *intifada* in September 2000. See B'tselem, *House Demolition—Statistics*, at [http://www.btselem.org/english/House\\_Demolitions/Statistics.asp](http://www.btselem.org/english/House_Demolitions/Statistics.asp) (last visited Feb. 2, 2003) (stating that Israel demolished 17 homes for punitive reasons in the years 1994-2000). Administrative demolition of homes, however, proceeded apace. See B'tselem, *Demolition of Houses Built without Permits—1987-2002 Statistics*, at [http://www.btselem.org/english/Planning\\_&\\_Building/Statistics.asp](http://www.btselem.org/english/Planning_&_Building/Statistics.asp) (last visited Feb. 2, 2003) (stating that Israel demolished 951 Palestinian homes for so-called administrative reasons in the years 1994-2000).

<sup>212</sup> Press Release, LAW—The Palestinian Society for Human Rights and the Environment, *Israeli Forces Demolish Three Homes, Leaving 36 Palestinians Homeless* (Sept. 26, 2002). See also Ben Lynfield, *Demolitions not Simply Revenge*, CHRISTIAN SCIENCE MONITOR, Jan. 15, 2002, available at <http://www.csmonitor.com/csmonitor/archivesearch.jhtml>.

tary activity.<sup>213</sup> In April 2002 alone, Israeli military forces demolished 430 refugee shelters in Jenin refugee camp.<sup>214</sup> On August sixth, 2002 the Israeli High Court of Justice ruled that Palestinian homes belonging to families of persons who are believed to have carried out attacks against Israelis could be demolished, without the right to judicial review.<sup>215</sup> As of December thirty-first, 2002, Israeli military forces had demolished 139 homes belonging to families of persons believed to have carried out attacks against Israelis during the second *intifada*.<sup>216</sup>

Palestinians continue to be displaced by Israel's ongoing practice of land confiscation.<sup>217</sup> By the 1990s, when the PLO and Israel entered into official political negotiations, Israel either had expropriated or controlled the majority of private and communal Palestinian Arab property in the occupied West Bank, eastern Jerusalem, and the Gaza Strip.<sup>218</sup> The Oslo agreements effectively entrenched the status quo concerning property in

<sup>213</sup> U.N. Relief and Works Agency for Palestinian Refugees, *UNRWA Emergency Appeal* 11 (Jan.-June 2003), <http://www.un.org/unrwa/emergency/appeals/5th-appeal.pdf> (last visited Mar. 15, 2003). During 2002, Israeli military forces demolished an average of 38 refugee shelters per month on the Gaza Strip. *Id.* at 12.

<sup>214</sup> *Id.* at 12. During Israeli military assaults on Palestinian refugee camps in March and April 2002 approximately 4,000 refugee shelters were damaged. *Report of the Commissioner General of the UN Relief and Works Agency for Palestine Refugees in the Near East, 1 July 2001-30 June 2002*, U.N. GAOR, 57th Sess., Supp. No. 13, at 12, U.N. Doc. A/57/13 (2002).

<sup>215</sup> In its decision, the Israeli High Court relied on article 119 of the 1945 Defense (Emergency) Regulations. 1945 Defense (Emergency) Regulations, *reprinted in* 2 THE PALESTINIAN GAZETTE 1058 (1945). Article 119 authorizes the government to expropriate property where the inhabitants are considered to have aided or abetted attacks. JIRYIS, *supra* note 178, at 17. Press Release, Amnesty International, High Court Decision Gives Green Light for Collective Punishment (Aug. 6, 2002); Press Release, LAW—The Palestinian Society for Human Rights and the Environment, Israel's High Court: No Prior Hearing Before Home Demolitions (Aug. 6, 2002); *World Jurists Criticize Israeli Moves to Expel Families of Suicide Bombers*, AGENCE FRANCE PRESSE, Aug. 7, 2002.

<sup>216</sup> The demolitions affected 228 families or more than 1,500 persons. THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, DEMOLITION OF PALESTINIAN HOUSES BY ISRAELI OCCUPYING FORCES AS A MEANS OF PUNISHMENT AND DETERMENT 4 (2003), at [http://www.pchrgaza.org/files/Reports/English/pdf\\_spec/demolition%20house-2.pdf](http://www.pchrgaza.org/files/Reports/English/pdf_spec/demolition%20house-2.pdf).

<sup>217</sup> See *supra* notes 182-184.

<sup>218</sup> See also ABUSWAY ET AL., *supra* note 178, at 1; *Israeli Settlement and its Consequences—1991, FROM THE FIELD* (Palestinian Human Rights Information Center), June 1991; *Special Rapporteur Report, Housing*, *supra* note 209, at paras. 10-15 (“Estimates place the proportion of Palestinian land confiscated by Israel at more than 70 percent of the West Bank and 33 percent of Palestinian land in East Jerusalem has been confiscated, and all but 7-8 percent of the area has been closed to Palestinian construction.”). For U.N. human rights treaty committee concerns see *CESCR 1998*, *supra* note 171, para. 24.

all areas of historic Palestine (i.e., Israel, the West Bank, and the Gaza Strip). While Palestinian cities, towns, villages and most refugee camps were transferred to the Palestinian Authority, the majority of the surrounding land (sixty percent in the West Bank and forty percent in the Gaza Strip) remained under full Israeli administrative and military control.<sup>219</sup> In addition, Oslo II obligated the Palestinian Authority to “respect the legal rights of Israelis (including corporations owned by Israelis) related to government and absentee land located in areas under the territorial jurisdiction of the council.”<sup>220</sup> Between September 1993 and September 2002 Israel expropriated more than 240 square kilometers of Palestinian land in 1967-occupied Palestine.<sup>221</sup> Israeli forces have also uprooted hundreds of thousands of trees and cleared tens of thousands of *dunums* (one dunum equals one square kilometer) of agricultural land under so-called security measures known as “sweeping.”<sup>222</sup>

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<sup>219</sup> Annex III Protocol Concerning Civil Affairs, Oslo II, *supra* note 187, app. 1, art. 16, 36 I.L.M. at 611.

<sup>220</sup> *Id.* See also SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS, *supra* note 146, at 43 (stating that “most of these ‘legal rights’ were obtained after the Israeli occupation in accordance with military orders and changes in the local law made by the Israeli military government”). The agreement also removed the issue of land claims from the courts and transferred jurisdiction to a joint committee. *Id.*

<sup>221</sup> For the period between September 1993 and the end of 2001, see *Overview of Israel’s Policy*, *supra* note 187. For land confiscation during 2002, see Press Release, Palestinian Centre for Human Rights, Israeli Army Seizes Tract of Land in North of Gaza Strip for Israeli Settlement (May 2, 2002); Applied Research Institute Jerusalem, *More Land Confiscated to Build By-Pass Road in Za’tara* (June 3, 2002), at <http://www.poica.org/casestudies/Za'tara06-03-02/index.htm> (last visited Mar. 15, 2003); Press Release, Palestinian Centre for Human Rights, The Israeli Occupying Forces Commander in Gaza Strip Issues a Military Order to Seize Land to Building a New Settlement Road (July 20, 2002); Applied Research Institute Jerusalem, *Israeli Military Order Seizes 10 Dunums of Land from Al-Bireh Town*, Sept. 11, 2002, at <http://www.poica.org/casestudies/Al-Bireh%2011-9-02/index.htm> (last visited Mar. 15, 2003). It is further estimated that more than 15,000 *dunums* of land will be expropriated to build Israel’s new separation fence along the “Green line” (i.e., 1949 armistice line). See also LEIN, *supra* note 158.

<sup>222</sup> It is estimated that between September 2000 and June 2002 Israel has cleared more than 15,000 *dunums* of agricultural land in the Gaza Strip comprising over nine percent of the total agricultural land in the Gaza Strip. Palestinian Centre for Human Rights, *Uprooting Palestinian Trees And Leveling Agricultural Land* (2002), at [http://www.pchrgaza.org/files/Reports/English/pdf\\_sweeping/sweeping%20land%208.pdf](http://www.pchrgaza.org/files/Reports/English/pdf_sweeping/sweeping%20land%208.pdf) (last visited May 1, 2004). In total it is estimated that more than 32,000 *dunums* of agricultural land were cleared from the beginning of the second Palestinian *intifada* until February 2002. In addition, Israel uprooted some 485,000 trees including olives, citrus, stone fruits, forest, dates, bananas, vines, and others. Applied Research Institute Jerusalem, *An Assessment of the Israeli Practices on the Palestinian Agricultural Sector, September 29, 2000-February 28, 2002*, at <http://www.poica.org/casestudies/agr-losses-feb02/index.htm> (last visited Feb. 15, 2003).

Other sources of persecution leading to new refugee outflows from 1967-occupied Palestine include mass arrests and administrative detentions,<sup>223</sup> torture,<sup>224</sup> excessive use of force against Palestinian civilian demonstrators,<sup>225</sup> extrajudicial killings of Palestinian political activists and “militants,”<sup>226</sup> use of Palestinian civilians as human shields during Israeli

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<sup>223</sup> Since the beginning of the second *intifada*, Israel has arrested more than 15,000 Palestinians. As of the end of March 2003, 1,108 Palestinians were being held in administrative military detention, including 137 minors (age 18 and below). B'tselem, The Israeli Center for Human Rights in the Occupied Territories, *Administrative Detention—Statistics*, at [http://www.btselem.org/english/Administrative\\_Detention/Statistics.asp](http://www.btselem.org/english/Administrative_Detention/Statistics.asp) (last visited Mar. 30, 2003). At the beginning of the Oslo process, Israel held 277 Palestinians in administrative detention. Between 1993 and 1997, an estimated 800 Palestinians were detained administratively for periods ranging from two months to four years. Administrative detention is detention without charge or trial, authorized by administrative order rather than by judicial decree. Administrative detention is used as a substitute for formal trial and punishment, and eliminates the due process requirements. For more details on administration detention see JESSICA MONTELL, B'TSELEM, PRISONERS OF PEACE: ADMINISTRATIVE DETENTION DURING THE OSLO PROCESS (1997); EMMA PLAYFAIR, ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK AND GAZA (1985). For U.N. human rights treaty committee concerns see *CCPR 1998*, *supra* note 171, at para. 21. See also *High Commissioner Report, 2002*, *supra* note 209, at 17.

<sup>224</sup> For more details on torture see, for example, B'TSELEM, TORTURE OF PALESTINIAN MINORS AT THE GUSH ETZION POLICE STATION (2001); YUVAL GINBAR, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE (1998). See also Press Release, LAW—Palestinian Society for Human Rights and the Environment, Israeli Interrogators Torture Palestinians at Asqalan Prison (Jan. 22, 2001); Press Release, LAW—Palestinian Society for Human Rights and the Environment, Israeli Interrogators Torture Palestinian Detainee (Apr. 24, 2001); Press Release, Amnesty International, Israel Fails to Address Increase Use of Torture (Nov. 20, 2001); Press Release, Palestinian Centre for Human Rights, Fear of Torture and Ill-Treatment of Thousands of Palestinian Detainees by Israeli Occupying Forces (Apr. 9, 2002); *Civil and Political Rights including Questions of Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Israel*, U.N. Doc., E/CN.4/2001/66 (2001) (noting allegations that “torture and other ill-treatment is still being carried out by the Israeli security forces and police during interrogation, despite the September 1999 ruling of the Israeli High Court which determined that the systematic use of various interrogation techniques by the authorities was illegal”); *High Commissioner Report, 2002*, *supra* note 209, 20.

<sup>225</sup> See, e.g., *High Commissioner Report, 2000*, *supra* note 209, 26 (“A wide range of observers, including United Nations representatives, expressed the strong view that the very high number of casualties, combined with the nature of the injuries being sustained, including by young people, could only be consistent with a military response which was both excessive and inappropriate.”).

<sup>226</sup> It is estimated that Israel has assassinated 143 Palestinian political activists and resistance fighters since the beginning of the second Palestinian *intifada* in September 2000. An additional 76 Palestinian bystanders, of whom 28 were children, were killed



military operations,<sup>227</sup> and military closure and curfews imposed on the general Palestinian civilian population.<sup>228</sup> The combined effect of these practices, which include serious violations and grave breaches of interna-

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during the assassination operations as of March 2003. Palestinian Centre for Human Rights, *Assassination of Palestinians: An Israeli Official Policy* (2003), at [http://www.pchrgaza.org/files/Reports/English/pdf\\_killing/killing%20report5.pdf](http://www.pchrgaza.org/files/Reports/English/pdf_killing/killing%20report5.pdf) (last visited Mar. 30, 2003). See also Yael Stein, *Israel's Assassination Policy: Extra-judicial Executions* (Jan. 2001), [http://www.btselem.org/Download/Extrajudicial\\_Killings\\_Eng.doc](http://www.btselem.org/Download/Extrajudicial_Killings_Eng.doc) (last visited Feb. 15, 2003); *Statement of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions of the United Nations Commission on Human Rights*, U.N. Doc. CHR/2000/05/10 (2000); *Commission Inquiry Report, 2000*, *supra* note 209, 53 and *infra*.

<sup>227</sup> The Israeli High Court issued an injunction on August 8, 2002 against the use of Palestinian civilians as human shields by the Israeli military. According to human rights organizations, however, the practice, which the Israeli military refers to as the 'neighbor practice,' continues to be used during military operations in 1967-occupied Palestine. See B'tselem, *Investigation: IDF Used Palestinian Civilians in Beit Jala as 'Human Shields'*, (2001); B'tselem, *Use of Palestinian Civilians as Human Shields in Violation of Court Order* (2002); *High Commissioner Report, 2002*, *supra* note 209, 22.

<sup>228</sup> Military closure was first imposed by Israel in March 1993 allegedly in response to attacks by Palestinians in Israel. There are two types of closure: 'external' and 'internal.' Under external closure, which has been in place since 1993, Palestinians must obtain a permit from Israel to enter Jerusalem and Israel proper and for travel abroad. Under internal closure Palestinians are forbidden to travel on main roads and on roads near Israeli colonies. During periods of comprehensive closure Palestinians are forbidden from traveling from 1967-occupied Palestine to Jerusalem and Israel, from traveling abroad, and from traveling on roads between cities, towns and villages in 1967-occupied Palestine. One week into the second *intifada* Israel imposed a comprehensive closure, which remains in effect. Permits to enter Israel and use of the safe passage established under the Oslo agreements to facilitate freedom of movement between the West Bank and Gaza Strip were revoked. During military curfew movement of people is banned and civilians are confined to their residences. Curfews are lifted periodically during the daytime for three to six hours, depending on the severity of the regime. Between June and December 2002, an average of 169 Palestinian localities, with a total average population of more than one million, has been under Israeli military curfew. Figures derived from U.N. Office for the Coordination of Humanitarian Affairs, Humanitarian Information Centre for the Occupied Palestinian Territory, *available at* <http://www.reliefweb.int/library/documents/2002/undp-eue-eth-20dec.pdf> (last visited May 18, 2004). For U.N. human rights treaty committee concerns see *CESCR 1998*, *supra* note 171, 17-19, 39. See also *High Commissioner Report, 2000*, *supra* note 209, para. 49 and *infra*; *Special Rapporteur Report, 2000*, *supra* note 209, para. 22 and *infra*; *Commission Inquiry Report, 2000*, *supra* note 209, para. 80 and *infra*; *High Commissioner Report, 2002*, *supra* note 209, para. 28; *Special Rapporteur Report, 2002*, *supra* note 209, at paras. 33-34 and *infra*.

tional human rights and humanitarian law,<sup>229</sup> has created a humanitarian catastrophe through which “the Palestinian civilian population is scrambling to survive.”<sup>230</sup> As of the end of March 2003, more than 2,200 Palestinians have been killed and over 22,000 injured.<sup>231</sup> More than 50 percent of the civilian Palestinian population is now unemployed.<sup>232</sup> According to U.N. officials:

[The Palestinian economy] can no longer ‘bounce back,’ even if closures were lifted and conditions returned to pre-*intifada* levels. Total economic breakdown is prevented only with continued injections of budgetary support from international donors, the release of a small percentage of PA [Palestinian Authority] revenues held by Israel, and humanitarian aid.<sup>233</sup>

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<sup>229</sup> See *High Commissioner Report, 2000*, *supra* note 209, 19, 20, 25; *Special Rapporteur Report, 2000*, *supra* note 209, paras. 6, 7, 29, 35; *Commission Inquiry Report, 2000*, *supra* note 209, 35-43, 93-95, 113-115; *High Commissioner Report, 2002*, *supra* note 209, 59-60; *Special Rapporteur Report, 2002*, *supra* note 209, para. 8-9. For grave breaches rising to the level of crimes against humanity and war crimes see PETER BOUCKAERT ET AL., HUMAN RIGHTS WATCH, JENIN: IDF MILITARY OPERATIONS (2002); AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES—SHIELDED FROM SCRUTINY: IDF VIOLATIONS IN JENIN AND NABLUS (2002).

<sup>230</sup> Press Release, U.N. Special Coordinator of the Occupied Territories, UN: New Economic Figures for the West Bank and Gaza Show Rapid Deterioration Leading to Human Catastrophe (Aug. 29, 2002) (quoting Terje Roed-Larsen, U.N. Special Coordinator for the Middle East Peace Process). See also Press Release, U.N. Relief and Works Agency, UNRWA Launches \$94 million Appeal for West Bank and Gaza (Dec. 10, 2002) (quoting the Commissioner General of UNRWA stating that “[s]o rapid has been the humanitarian collapse that it will take an emergency programme of the scale we present today to prevent complete breakdown in Palestinian society”).

<sup>231</sup> Palestine Red Crescent Society, *Total Daily Numbers of Deaths & Injuries—West Bank & Gaza*, at [http://www.palestinercs.org/crisistables/table\\_of\\_figures.htm](http://www.palestinercs.org/crisistables/table_of_figures.htm) (last visited Mar. 30, 2003). In addition, more than 475 Israeli civilians and over 220 members of the Israeli security forces have been killed during the same period. B'tselem, *Fatalities in the al-Aqsa Intifada*, at [http://www.btselem.org/English/Statistics/Al-Aqsa\\_Fatalities.asp](http://www.btselem.org/English/Statistics/Al-Aqsa_Fatalities.asp) (last visited Mar. 31, 2003).

<sup>232</sup> The World Bank, *Two Years of Intifada, Closures and Palestinian Economic Crisis, An Assessment 1* (Mar. 5, 2003), available at <http://www.reliefweb.int/library/documents/2003/wb-opt-05mar.pdf> (last visited May 10, 2003) [hereinafter *Two Years of Intifada*]. See also U.N. Special Coordinator of the Occupied Territories, *The Impact of Closure and Other Mobility Restrictions on Palestinian Productive Activities, 1 January 2002 – 30 June 2002* (2002), available at <http://www.reliefweb.int/library/documents/2002/unsco-opt-20sep.pdf> (last visited Mar. 15, 2003) [hereinafter *The Impact of Closure*]; Press Release, U.N. Conf. on Trade and Dev., Report on the Palestinian Economy Reasserts Interdependence of Development and Peace (Oct. 4, 2002); Press Release, U.N. Conf. on Trade and Dev., Report on Palestinian Economy Reasserts Interdependence of Development and Peace (Oct. 5, 2001).

<sup>233</sup> *The Impact of Closure*, *supra* note 232, at 5.

Since the beginning of the second *intifada*, poverty in 1967-occupied Palestine has tripled to 60 percent with rates even higher in the Gaza Strip.<sup>234</sup> Real per capita food consumption has declined by up to 30 percent.<sup>235</sup> The crisis is having a particularly harsh impact on public health, with particularly high reported increases in instances of malnutrition and anemia.<sup>236</sup> Children, women, the elderly, the poor, and refugees are particularly vulnerable.<sup>237</sup> As the situation continues to deteriorate, an increasing number of Palestinians are seeking personal and economic security abroad.<sup>238</sup>

### C. *Palestinian Refugees and International Refugee Protection*

In addition to historic and ongoing persecution for over half a century, the other defining feature of the Palestinian refugee condition is the lack of both national and international protection. Most host states where the majority of Palestinian refugees reside do not recognize or do not apply the full panoply of basic rights afforded to refugees under relevant international and regional instruments. As discussed below, the legal status of Palestinian refugees in these states is most often shaped by domestic political and security considerations. The lack of national protection is compounded by the lack of international protection (often referred to as

<sup>234</sup> *Two Years of Intifada*, *supra* note 232, at 2.

<sup>235</sup> *Id.*

<sup>236</sup> See U.N. Special Coordinator in the Occupied Territories, *Comparative Assessment of the Health Impact Following the Current Crisis* (July 12, 2001), available at <http://www.reliefweb.int>; World Health Organization, *Vulnerability and the International Health Response in the West Bank and Gaza Strip*, (Nov. 30, 2001), available at <http://www.reliefweb.int>; Press Release, CARE, Rapid Nutritional Assessment for West Bank and Gaza Strip (Oct. 16, 2002); Press Release, CARE, World Food Day: Care International Assessment Finds High Levels of Malnutrition, Anemia, and Micronutrient Deficiencies in the West Bank and Gaza Strip (Oct. 16, 2002).

<sup>237</sup> Press Release, UNICEF, UNICEF Concerned About Impact of Violence on Palestinian and Israeli Children (Nov. 15, 2001); Press Release, Save the Children, Education of Children At Risk (Dec. 5, 2001); Press Release, UNICEF, Thousands of Palestinian Children Denied Access to Schools (Oct. 2, 2002). See also *High Commissioner Report, 2000*, *supra* note 209, 34-35; *Special Rapporteur Report, 2000*, *supra* note 209, 27 and *infra*; and, *Special Rapporteur Report, 2002*, *supra* note 209, 40 and *infra*. According to a study by the Graduate Institute of Development Studies at the University of Geneva, "the mainstream poverty profile would be a young resident from the Gaza Strip and, in particular, from the Gaza refugee camps, unemployed with a low skill/education level who would be a member of a large size family." RICCARDO BOCCO, ET AL., *THE ROLE OF INTERNATIONAL AND LOCAL AID DURING THE SECOND INTIFADA*, REPORT V 14 (2002).

<sup>238</sup> There are no reliable figures for total out-migration since the beginning of the second *intifada*. One report notes that 80,000 Palestinians left 1967-occupied Palestine in the first 8 months of 2002. Khalid Abu Toameh, *80,000 Palestinians Emigrated from Territories Since Beginning of Year*, JERUSALEM POST, Aug. 27, 2002, at 4.

the “protection gap”).<sup>239</sup> No international agency is currently recognized by the international community as having an explicit mandate to systematically work for the realization of the basic human rights of Palestinian refugees and to search for and implement durable solutions consistent with international law as reaffirmed in U.N. General Assembly Resolution 194(III).<sup>240</sup> Practically, this anomaly means that most of the over five million Palestinian refugees—nearly one third of the world’s total refugee population—do not have meaningful access to international protection that is legally required or available to other refugee populations.<sup>241</sup>

To fully understand the reasons and consequences of the protection gap, it is necessary to compare certain aspects of the special Palestinian refugee regime with the international regime established for all other refugees.

Article 1A(2) of the Refugee Convention sets out the universally-accepted definition of “refugee” as:

[A]ny person who . . . , as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality

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<sup>239</sup> United Nations bodies have been commenting on, and raising concerns about the protection gap affecting Palestinians. In 1982, the U.N. Joint Inspection Unit recommended “region wide consideration” of the protection gap in order to find “innovative and acceptable measures that could be applied wherever and whenever warranted.” TAKKENBERG, *supra* note 98, at 283-84. Between 1982 and 1993, the U.N. General Assembly called upon the U.N. Secretary General in consultation with the UNRWA “to undertake effective measures to guarantee the safety and security and the legal and human rights of the Palestine refugees in all the territories under Israeli occupation in 1967 and thereafter.” G.A. Res. 39/99, U.N. GAOR, 39th Sess., at I(1), U.N. Doc. A/Res/39/99 (1984). During the same period, the UNHCR ExCom issued numerous conclusions that “[e]xpressed concern about the lack of adequate international protection for various groups of refugees in different parts of the world, including a large number of Palestinians, and hoped that efforts would be undertaken within the United Nations system to address their protection needs.” 4 JODY A. BOUDREAU, UNITED NATIONS RESOLUTIONS ON PALESTINE AND THE ARAB-ISRAELI CONFLICT (1993) (citing Executive Committee Conclusion No. 46 (XXXVIII), 1987, Expressing Concern about the Lack of Adequate International Protection for Palestinians). See *infra* note 554 (emphasis added). See also *Special Rapporteur Report, 2000*, *supra* note 209, at 35; *Commission Inquiry Report, 2000*, *supra* note 209, at 114-115, 134; *High Commissioner Report, 2002*, *supra* note 209, at 61; and *Special Rapporteur Report, 2002*, *supra* note 209, at 54.

<sup>240</sup> See *supra* note 96.

<sup>241</sup> For discussion of international protection available to other refugees, see *supra* notes 63-74 and accompanying text. For discussion of ramifications of the ‘protection gap’ for Palestinians, see *supra* notes 192-238 and *infra* notes 526-96.

and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>242</sup>

This individualized definition of refugee, however, was not intended to apply to Palestinian refugees. Their situation was specifically designated for different treatment than that of other refugees falling within the Refugee Convention regime.<sup>243</sup> Palestinians as a group or category of refugees are covered by the Refugee Convention in article 1D—a provision that the drafting history makes absolutely clear is applicable solely to Palestinians and no other group of refugees.<sup>244</sup> Article 1D provides:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.<sup>245</sup>

When this provision was drafted, Palestinians were afforded a special protection regime consisting of the United Nations Conciliation Commission on Palestine (“UNCCP”), which had a protection mandate,<sup>246</sup> and

<sup>242</sup> See Refugee Convention, *supra* note 7, art. 1A(2), 189 U.N.T.S. at 152-54.

<sup>243</sup> For a detailed discussion of the instruments and agencies comprising the special regime established for Palestinian refugees, the various interpretations of the provisions that apply, and the consequences of the interpretations, see Susan M. Akram & Terry Rempel, *Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework*, 11 PALESTINE Y.B. INT’L L. 1 (2000-2001). For a somewhat different interpretation, see TAKKENBERG, *supra* note 98; see also GOODWIN-GILL, *supra* note 2, at 91-93, 241-46. For a more general discussion of the legal and political issues affecting Palestinian refugees addressed in this author’s interpretation, see Susan M. Akram, *Palestinian refugees and their Legal Status; Rights, Politics, and Implications for a Just Solution*, J. PALESTINE STUD., Spring 2002, at 36. For a collection of critical writing on the history, politics and legal situation of Palestinian refugees, see NASEER ARURI, PALESTINIAN REFUGEES: THE RIGHT OF RETURN (2001).

<sup>244</sup> For a detailed treaty analysis of article 1D and its related provisions in light of the *travaux préparatoires*, and a comparison of various interpretations, see TAKKENBERG, *supra* note 98; see also Susan M. Akram & Guy Goodwin-Gill, Brief Amicus Curaie, Board of Immigration Appeals, Falls Church, Va., *reprinted in* 11 PALESTINE Y.B. INT’L L. 1 (2000-2001).

<sup>245</sup> See Refugee Convention, *supra* note 7, art. 1D, 189 U.N.T.S. at 156.

<sup>246</sup> See Terry Rempel, *The United Nations Conciliation Commission for Palestine: Protection and a Durable Solution for Palestinian Refugees*, Badil Brief No. 5, available at <http://www.badil.org/Publications/Brief/Brief-No.5.html> (last visited June 11, 2003). On December 11, 1948, the General Assembly passed Resolution 194(III), establishing the U.N. Conciliation Commission on Palestine (“UNNCP”) and setting

the UNWRA, which had an assistance mandate.<sup>247</sup> The delegates to the committee drafting the Refugee Convention considered that it was both unnecessary and inadvisable to include Palestinians in the Refugee Convention regime as long as two other agencies were providing them with both protection and assistance.<sup>248</sup> Moreover, for reasons that made the Palestinian case unique, the drafters believed that Palestinians would get less protection than they deserved if they were subsumed with other refugees in the general protection system of the Refugee Convention.<sup>249</sup>

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out its mandate and terms of reference. G.A. Res. 194(III), U.N. GAOR, 3d Sess., 186th Plen. Mtg., at 21, U.N. Doc. A/810 (1948) [hereinafter UNCCP Mandate]. Three State Members were to comprise the UNNCP and were to continue the conciliation efforts of Count Folke Bernadotte, the U.N. Mediator on Palestine, who had been killed by Zionist terrorists just three months earlier. The UNCCP was to “take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them.” *Id.* at 6. The UNCCP had a multilevel mandate: to protect the refugees and further the consensus concerning the durable solution for them, as well as to mediate all outstanding issues between the parties.

<sup>247</sup> UNRWA was established by U.N. General Assembly Resolution 302(IV) on December 8, 1949, and was explicitly established as an interim agency to provide for the refugees basic subsistence needs until the durable solution required by the relevant U.N. Resolutions could be implemented. UNRWA was given only a three-year mandate. G.A. Res. 302(IV), U.N. GAOR, 4th Sess., 273d Plen. Mtg., U.N. Doc. A/1251 (1949). UNRWA’s mandate was clearly limited by the definition of persons who were eligible for UNRWA relief. UNRWA regulations initially adopted the definition of “Palestine refugee” from the United Nations Relief for Palestine Refugees (“UNRPR”), which had been providing the refugees assistance until UNRWA was established. UNRWA’s early working definition was finalized in what are now called “Consolidated Registration Instructions,” and by 1993, the provision defined persons eligible for the UNRWA benefits as those: (1) whose normal residence was Palestine during the period June 1, 1946 to May 15, 1948; (2) who lost both their homes and means of livelihood as result of the 1948 conflict; (3) who took direct refuge in one of the countries or areas where UNRWA provides relief; and (4) who are the direct descendants through the male line of persons fulfilling 1-3 above. See TAKKENBERG, *supra* note 98, at 70-77. According to U.N. Secretary General Hammarskjöld, “this definition is not contained in any resolution of the General Assembly but has been stated in Annual Reports of the Director and tacitly approved by the Assembly. *Id.* at 75.

<sup>248</sup> See U.N. GAOR, 3d Comm., 5th Sess., 328th mtg., U.N. Doc. A/C.3/SR.328 (1950). The reason for the proposed amendment to the UNHCR Statute, the Refugee Convention, and the 1954 Convention on Stateless Persons, which was to set up the special regime for Palestinian refugees, was, according to the delegates proposing it, that Palestine refugees were “the direct result of a decision taken by the United Nations,” and thus, “a direct responsibility on the part of the United Nations.” *Id.* at para. 52, 55.

<sup>249</sup> The proponents of the special regime further believed that “if the Palestine refugees [were included] in a general definition of refugees, they would become submerged and would be relegated to a position of minor importance” and thus, they

For a number of historical and political reasons, however, Palestinian refugees have been considered excluded from the coverage of the Refugee Convention for most purposes.<sup>250</sup> At the same time, the special refugee regime has long since failed to provide the international protection they were to receive as long as their refugee situation remained unresolved.<sup>251</sup> The implications of this protection gap for Palestinians are

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should “continue to be granted a separate and special status.” *Id.* at para. 52, 55. The Arab State representatives were also concerned that if the other relevant U.N. agencies ceased functioning, the Palestine refugees should be protected by the UNHCR. U.N. GAOR, 3d Comm., 5th Sess., 344th mtg., para. 13, U.N. Doc. A/C.3/SR.344 (1950).

<sup>250</sup> The “protection gap” applying to Palestinian refugees and stateless persons is due to a series of instruments and provisions that are interpreted as excluding Palestinians from their coverage. These Palestinian “exclusion clauses” are in the UNHCR Statute, paragraph 7(c); the Refugee Convention, article 1D; and the 1954 Stateless Convention, article 1(2)(I). UNHCR originally took the position that because of paragraph 7(c) of its Statute, it was precluded from any international protection mandate over Palestinians. Gradually, however, UNHCR has increasingly intervened in various states outside the UNRWA area on behalf of Palestinian refugees’ claims to refugee status and in protecting their rights within those states. See TAKKENBERG, *supra* note 98, at 307. These actions have, until now, been a *de facto* recognition of UNHCR responsibility for protecting Palestinians, rather than any policy statement under its mandate. Recently, however, UNHCR has proposed a redefinition of article 1D of the Refugee Convention that would provide some Palestinians outside UNRWA areas with protection under the Refugee Convention, and permit UNHCR’s protection mandate to extend to them. See U.N. HIGH COMM’R FOR REFUGEES, NOTE ON THE APPLICABILITY OF ARTICLE 1D OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES TO PALESTINIAN REFUGEES (2002), available at [http://www.badil.org/Protection/Documents/Refugee\\_Law/UNHCR-Note-1D-2002.pdf](http://www.badil.org/Protection/Documents/Refugee_Law/UNHCR-Note-1D-2002.pdf) (last visited Feb. 19, 2003) [hereinafter NOTE ON ARTICLE 1D].

<sup>251</sup> The distinction in the mandates of the two separate agencies that comprise the special regime for Palestinian refugees – i.e., UNCCP, which had the mandate of providing international protection to the refugees; and, UNRWA, which had a much narrower mandate of providing assistance – although they can overlap in actual practice, is quite marked as a legal matter. The concept of international *protection* has two main aspects: day-to-day protection of the legal and human rights, interests and physical integrity of the refugee under all applicable international and domestic laws; and the most critical aspect for refugees, which is the obligation to promote and implement durable refugee solutions under international legal principles. The UNHCR has defined the main aspects as direct protection and promotional activities. See UNHCR, Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (1981), Opening Statement by the High Commissioner, U.N. Doc. EC/SCP/16/Add.1. *Assistance*, on the other hand, means the provision of basic welfare: food, clothing and shelter for the subsistence needs of refugees. Responding to the massive post World-War II refugee crisis, the United Nations began the task of drafting a series of international instruments that were to create international obligations towards refugees, stateless persons and displaced

persons. During that process, which lasted from 1950-1954, three instruments were drafted: the Statute of the UNHCR; the 1951 Refugee Convention; and the 1954 Convention on Stateless Persons. At the three main drafting stages (the Third Committee of the U.N. General Assembly; the Conference of Plenipotentiaries; and the Conference on the Convention Relating to Stateless Persons), Palestinian refugees were extensively discussed, and a consensus emerged that Palestinians as an entire category should be excluded for the time being from the instruments under discussion for a number of critical reasons. First, the delegates agreed that Palestinians were the special responsibility of the UN, because it was as a result of U.N. Resolution 181 that Palestinians lost their homeland and gave the pretext for the Zionists to expel them from their homes. The responsibility of the international community towards them was completely different from other refugees whose problem did not stem from U.N. action. Thus, the Arab delegates were concerned that if Palestinians were included in the Refugee Convention, their issues and claims would be "submerged and would be relegated to a position of minor importance" Second, there was agreement that Palestinians as an entire category would meet the refugee definition under discussion because of their expulsion and wholesale persecution. Thus, there was no perceived need for a special definition of 'Palestine refugee' for international protection purposes. Third, because the U.N. had already established two agencies—UNCCP and UNRWA—providing, respectively, protection and assistance, it appeared unnecessary to give the newly-created agency that would have both protection and assistance mandates (UNHCR), responsibility for them. U.N. GAOR, 3d Comm., 5th Sess., 328th mtg., U.N. Doc. A/C.3/SR.328 (1950). Fourth, there was already an international consensus that the solution to the Palestinian refugee problem was, in accordance with the demands and legal rights of the refugees, repatriation to their homes, as embodied in G.A. Res. 194(III). Since the primary aim of the Refugee Convention was to create new international obligations on third states to absorb or resettle refugees, the delegates feared that such an emphasis would dilute the legal rights and demands of the refugees to return home. The critical aspect of the separate and special regime for Palestinian refugees was the UNCCP's protection mandate, particularly its authority to seek and implement durable solutions for them. However, it soon became clear that the UNCCP would be unable to implement the required durable solution based on the refugees' demands to return to their homes because of Israeli intransigence. Thereafter, the UN, in a series of measures, gradually reduced the UNCCP's mandate and defunded its major protection role towards the refugees. See G.A. Res. 394(V), U.N. GAOR, 5th Sess., 325th mtg., U.N. Doc. A/AC.25/W.82/Rev.1 (1950). On the change of the UNCCP's mandate, see DAVID P. FORSYTHE, UNITED NATIONS PEACEMAKING: THE CONCILIATION COMMISSION FOR PALESTINE 56 (1972). In light of Res. 394, the UNCCP took the position that it was no longer entrusted with major protection functions towards the refugees. See Akram & Rempel, *supra* note 243, at 18; see also U.N. GAOR, 6th Sess., Annex, Agenda Item 24(a), at 1, U.N. Doc. A/2072 (1952) (further reducing the UNCCP's functions and budget). With the international protection mandate towards the refugees essentially defunct, the Palestinian refugees were left solely with what UNRWA could provide in the way of assistance. Left out of the major international refugee and stateless instruments by the 'exclusion clauses', they were deprived both of the benefits of the special protection regime and of any alternative regime that would have provided them the necessary protection and implemented mechanisms for a durable solution to their prolonged exile. For full



evident in both aspects of refugee protection: in day-to day security and human rights protection and in the search for durable solutions. Most countries in which Palestinians seek protection outside their place of origin interpret the relevant provisions in a manner that fails to grant Palestinian refugees adequate protection—although the precise interpretations differ from state to state.<sup>252</sup> Palestinians, for the most part, have diffi-

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discussion and sources for each of these conclusions, see Akram & Rempel, *supra* note 243; Akram & Goodwin-Gill, *supra* note 244. See also TAKKENBERG, *supra* note 98.

<sup>252</sup> There are two main categories of interpretation of article 1D of the Refugee Convention: one category is of those states that do not recognize or incorporate article 1D in their asylum law at all; and the second is those states that do incorporate 1D. The first category of states, which includes the United States, Canada, Austria and Switzerland, ignore 1D and determine Palestinian claims under the normal criteria of article 1A(2). The consequences of this are examined below. The second group of states does apply 1D, but interprets it in a variety of inconsistent ways, even within their domestic courts. There are at least five distinct interpretations of 1D among and within these states. One interpretation is that 1D excludes Palestinians from within UNRWA areas, but for Palestinians elsewhere, these states apply the normal 1A(2) assessment. This is the interpretation offered by the UNHCR Handbook, and applied in cases in New Zealand and Australia. UNHCR HANDBOOK, *supra* note 37, at 34 para. 143. See, e.g., Refugee Appeal No. 1/92, (Refugee Status Appeals Authority, New Zealand, Apr. 30, 1991), <http://www.refugee.org.nz/rsaa/text/docs/1-92.htm> (last visited Apr. 2, 2001); see also BV96/04744 (Refugee Review Tribunal, Australia, Feb. 12, 1997); N94/04981 and N94/04982 (Refugee Review Tribunal, Australia, Nov. 27, 1996); V95/03840 (Refugee Review Tribunal, Australia, Sept. 20, 1996); Minister of Immigration & Multicultural Affairs v. Quaiader, F.C.R. 1458 (Oct. 16, 2001) (all decisions and summaries on file with author). A second interpretation is that Palestinians everywhere—within UNRWA areas or outside—are excluded from refugee status under the Refugee Convention. Some Australian decisions have taken this approach. See, e.g., N96/11506 (Refugee Review Tribunal, Australia, Jan. 14, 1997); see also N01/36893 (Refugee Review Tribunal, Australia, Mar. 19, 2001); BN94/06049 (Refugee Review Tribunal, Australia, June 25, 1996). A third interpretation is that article 1D gives Palestinians automatic refugee recognition and protection when UNRWA ceases or when Palestinians are outside UNRWA areas and cannot return there. This was the conclusion of at least one German court, and the interpretation of the U.N. High Commissioner's Branch Officer in Germany. See VG 10 A 4.88, InfAusIR 3/90 at 81 (Nov. 3, 1989); see also U.N. HIGH COMM'R FOR REFUGEES BRANCH OFFICE IN GERMANY, REVISED OPINION ABOUT THE LEGAL STATUS OF PALESTINIAN REFUGEES UNDER UNRWA MANDATE AND COMMENTS ON UNRWA REGISTRATION (2000) (on file with authors). A fourth interpretation is that 1D provides for automatic refugee recognition and protection to Palestinians if UNRWA ceases or Palestinians are outside an UNRWA area, but not if they can return or leave with knowledge they would be unable to return. More recent German decisions have followed this reasoning. See 1991 BVerwGE 1 C 42.88; see also 1992 BVerwGE 1 C 21.87. Finally, one court has found that any Palestinian outside an UNRWA area for whatever reason is automatically entitled to refugee status under the Refugee Convention. See El-Issa v. Secretary of State for the Home Department,

culty when they find themselves in third (non-Arab) states and apply for political asylum,<sup>253</sup> residence based on family reunification,<sup>254</sup> or other

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CC/21836/2000; Y78985 (4 Feb. 2002). *But see* Amer Mohammed El-Ali v. Secretary of State for the Home Department, UKIAToo159 (2002) (decision and pleadings on file with author). For a detailed discussion of the jurisprudence of 11 states on Palestinian refugee/asylum claims, see Akram & Goodwin-Gill, *supra* note 244, at 47-52.

<sup>253</sup> The consequences of either failing to apply 1D at all, or interpreting 1D to revert to a 1A(2) analysis, is that because of Palestinians' unique situation, their refugee/asylum claims are overwhelmingly assessed as those of stateless persons with last habitual residence in one or more of the Arab states. Thus, they must prove a well-founded fear of persecution from the last Arab state of habitual residence—a claim which in the majority of cases presents insurmountable barriers. For example, the severe discrimination Palestinians suffer in many Arab states, including the inability to ever have permanent status or security, is rarely determined to be persecution. Some states refuse to recognize persecution by non-state actors, which precludes a Palestinian in Lebanon, for example, from claiming persecution from one of the militias. Some states presume that if there is no recognized persecution, a Palestinian is entitled to return (or can be removed) to the Arab state of last residence, whether or not the state itself recognizes any right of a Palestinian refugee to return there. The majority of Palestinian refugees holding temporary *laissez-passer*, *carte de identité*, or *carte de sojourns* are not permitted to return to the Arab state issuing such documents, even if the refugee has been a long-term resident there. For a sample of cases supporting these conclusions, see *Mousa v. INS*, 223 F.3d 425 (7th Cir. 2000); *El Ghoussein v. INS*, No. 98-70921, 2000 U.S. App. LEXIS 8868 (9th Cir. May 1, 2000); *Alshibat v. INS*, No. 96-70590, 1997 U.S. App. LEXIS 27125 (9th Cir. Sept. 18, 1997); *Maloukh v. INS*, No. 96-9524, 1997 U.S. App. LEXIS 23129 (9th Cir. Sept. 3, 1997); *Bader v. INS*, CA No. 94-70449, 1996 U.S. App. LEXIS 7661 (9th Cir. Mar. 29, 1996); *Faddoul v. INS*, 37 F.3d 185 (5th Cir. 1994); *Aliyan v. INS*, No. 92-70588, 1994 U.S. App. LEXIS 2411 (9th Cir. Feb. 1, 1994); *Suradi v. INS*, No. 90-70217, 1992 U.S. App. LEXIS 2596 (9th Cir. Feb. 21, 1992); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981). For cases in the United Kingdom, see *Alsawaf v. Sec'y of State for the Home Dep't.* [1988] Imm AR 410; *NSH v. Sec'y of State for the Home Dep't.* [1988] Imm AR 410; *Kelzani v. Sec'y of State for the Home Dep't.* [1978] Imm AR 193 (C.A. Apr. 26, 1988); *El-Ali and Daraz v. Sec'y of State for the Home Dep't.* [2002] EWCA Civ. 1103 (C.A.). For cases arising in Canada, see *El-Bekai v. Minister of Citizenship & Immigr.*, [2000] No. IMM-5452-99, 2000 A.C.W.S.J. LEXIS 52715 (Fed. Ct.); *Youssef v. Minister of Citizenship & Immigr.*, [1999] No. IMM-990-98, 1999 A.C.W.S.J. LEXIS 46767 (Fed. Ct.); *Elastal v. Minister of Citizenship & Immigr.*, [1999] No. IMM-3425-97, 1999 Fed. Ct. Trial LEXIS 218 (Fed. Ct.); *Daghmash v. Minister of Citizenship & Immigr.*, [1998] No. IMM-4302-97, 1998 Fed. Ct. LEXIS 688 (Fed. Ct.). For a case arising in New Zealand, see *In re SA, Refugee Appeal No. 1/92*, (Apr. 30, 1992), available at [www.refugee.org.nz/rsaa/text/docs/1-92.htm](http://www.refugee.org.nz/rsaa/text/docs/1-92.htm) (last visited May 18, 2004). For cases arising in Australia, see *Minister of Immigr. & Multicultural Affairs v. Quiader*, [2001] F.C.A. 1458 (16 Oct. 2001); *BV96/04744* (Refugee Review Tribunal, Australia, Feb. 12, 1997); *N94/04981* and *N94/04982* (Refugee Review Tribunal, Australia, Nov. 27, 1996); *V95/03840* (Refugee Review Tribunal, Australia, Sept. 20, 1996); *N94/04641* (Refugee Review Tribunal, Australia, Aug. 27, 1996); *V95/*

related protections that are available to other refugees in the world. Many remain in Western states without recognized legal status, without work permits or the basic essentials to live in freedom and dignity.<sup>255</sup>

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03021 (Refugee Review Tribunal, Australia, June 6, 1996); V95/03257 (Refugee Review Tribunal, Australia, Nov. 28, 1995); V93/01139 (Refugee Review Tribunal, Australia, Aug. 9, 1994); BN93/01741 (Refugee Review Tribunal, Australia, Mar. 23, 1994); *Sahtout v. Minister for Immigr. & Multicultural Affairs*, W324 of 2001 BC200200 (Fed. Ct. Feb. 20, 2002) (decisions and summaries on file with author). For a detailed discussion of the jurisprudence of eleven states on Palestinian refugee/asylum claims, see Akram and Goodwin-Gill, *supra* note 244, at 47-52.

<sup>254</sup> Article 8 of the European Convention of Human Rights has not been extended to protect the right of a stateless Palestinian last residing in a refugee camp in Lebanon to be reunited with his fiancé lawfully residing in Sweden. See L. and S. v. Sweden, European Court of Human Rights, No. 18288/91 (May 13, 1992), available at <http://hudoc.echr.coe.int/Hudoc2doc/hedec/sift/1591.txt>.

<sup>255</sup> Some examples from United States cases reflect the confusion over the legal status of Palestinians as refugees and stateless persons, combined with institutionalized political bias against the Palestinian struggle for independence and self-determination. Although an extreme example, the case of Mazen Al-Najjar is by no means unusual in the treatment of Palestinian refugees by many states. See *Al-Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001). For other decisions in the lengthy case, see *Al-Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001); *Al-Najjar v. Reno*, 97 F. Supp. 2d 1329 (S.D. Fla. 2000). Al-Najjar was held in INS detention for over 4 years on allegations of association with terrorism. *Al-Najjar v. Ashcroft*, 257 F.3d 1330, 1336 (2001). Al-Najjar was held in custody for 3 years, seven months before being released in December 2000. He was rearrested in November 2001 and remained in custody until his deportation in August 2002. *Id.* at 1338. See also Mitch Stacy, *Lebanon Kicks Out Deported Professor*, ASSOCIATED PRESS ONLINE, Sept. 21, 2002, 2002 WL 100407564. No terrorism charges were ever brought, but he was detained and removal sought on the basis of visa violations and evidence the INS refused to disclose. See *Al-Najjar*, 257 F.3d at 1274. He was finally deported in August 2002, ostensibly to Bahrain, after 11 countries refused to accept him. See Stacy, *supra*; Keith Epstein & Michael Fechter, *Controversy Follows Al-Najjar to Lebanon*, TAMPA TRIBUNE, Aug. 28, 2002, at 1. While his plane was en route, Bahrain refused his admission. *Id.* His plane sat on the tarmac in Rome for 25 hours while the U.S. sought another country that would accept him. *Id.* The U.S. landed him in Lebanon, apparently on the promise of a visitor visa, but Lebanon deported him a day later to an unknown country. See Stacy, *supra*. Al-Najjar's situation is typical of thousands of Palestinians everywhere in the world. Al-Najjar, 257 F.3d at 1270. He was born in Gaza in 1957, lived in Saudi Arabia with his family for thirteen years, then moved to Egypt for high school and university. Al-Najjar, 257 F.3d at 1276. From 1979 until 1981, he lived in the UAE with a temporary work visa. *Id.* He had a Palestinian refugee travel document issued by Egypt on which he obtained a student visa to the US. *Id.* at 1270-71. He remained in the U.S. on various statuses from 1981 until 1996, when INS moved to deport him on the basis of violating his student visa in 1986. *Id.* at 1272. Mazen's wife Fedaa, also Palestinian, was born in Saudi Arabia, where she lived with her family until 1988. *Id.* Both Mazen and Fedaa were ineligible for permanent status or citizenship in the Arab states where they had lived—Egypt,

In the Arab states, due to the long-standing consensus that the solution to the Palestinian problem is repatriation to their homes and lands, a series of agreements and resolutions, as mentioned above, bind the host countries to give Palestinian refugees the right to remain in their territories in temporary status.<sup>256</sup> At the same time, most Arab states are not signatories to the 1951 Refugee Convention and are thus not bound by either article 1A(2) or article 1D of that Convention.<sup>257</sup> They are, however, bound by the customary international law principle of *non-refoulement*, obliging them not to expel Palestinian refugees to a place where their “lives or freedom would be threatened.”<sup>258</sup> Due to the Arab states’ failure to recognize Palestinians as refugees under the Refugee Convention—recognition that would guarantee them the minimal rights of that Convention—and the failure of these states to guarantee Palestinian refugees legal protection, they deny Palestinian refugees many basic human rights, despite the requirements of the Casablanca Protocol. Thus, Palestinians are routinely denied the right to work, to travel freely either inside or outside of their territories, to unite with family members, to own pri-

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Saudi Arabia, or the U.A.E—although they may have been eligible for re-entry visas to one or more of those countries had they regularly returned there. *Id.* The U.S. government sought to deport Mazen to Egypt or the UAE, and Fedaa to Saudi Arabia, but none of those countries would accept them. Ultimately, Mazen was deported alone; the fate of Fedaa and the couple’s three U.S. citizen children remains to be determined. See Epstein & Fechter, *supra*, at 1. For discussion of developments in the *Al-Najjar* case, including the use of secret evidence to detain and deport him, see *Al-Najjar Released Following Attorney General’s Review*, 77 INTERPRETER RELEASES 1746 (2000); *BIA Stays Ordering Dr. Al Najjar’s Release; Federal Court Review Sought*, 77 INTERPRETER RELEASES 1712 (2000); *Public Record Evidence Insufficient to Support Al Najjar’s Detention, IJ Rules*, 77 INTERPRETER RELEASES 1566 (2000); *Detention Based on Secret Evidence Violates Due Process Absent Safeguards, District Court Rules*, 77 INTERPRETER RELEASES 937 (2000). For press reports on *Al-Najjar’s* post-deportation ordeal, see Graham et al., *Al-Najjar Deported Again—Maybe*, ST. PETERSBURG TIMES, Sept. 21, 2002, at 1B. See also Stacy, *supra*; Epstein & Fechter, *supra*, at 1. On evidence of institutionalized political bias or racism against Arabs, particularly Palestinians in the secret evidence cases, see Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999); David Cole, *Guilt By Association: It’s Alive and Well at INS*, NATION, Feb. 15, 1993, at 198-99. See generally DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (1999) (discussing the use of ideological exclusion and other grounds in immigration laws to target Arab, particularly Palestinian, noncitizens for their political beliefs and associations).

<sup>256</sup> See *supra* notes 95-105 and accompanying text.

<sup>257</sup> See Refugee Convention, *supra* note 7, 189 U.N.T.S. at 137. On Arab state signatory status to the 1951 Refugee Convention and Protocol, see *supra* note 78.

<sup>258</sup> The obligation of *non-refoulement* is widely regarded as a peremptory norm, and is respected by most states regardless of whether those states are parties to the Refugee Convention. See *supra* note 2 and accompanying text.

vate property, or to benefit from a wide spectrum of international human rights guarantees.<sup>259</sup>

Aside from the implications of the protection gap for the day-to-day protection of Palestinian refugees and stateless persons, the consequences of this gap may be even more profound in the search for durable solutions. Palestinian refugees have been denied an international body to represent them in furthering their search for a durable solution, which significantly affects them in at least three major contexts: (1) international representation to assert their rights as refugees to return, and to obtain restitution and compensation; (2) access to international mechanisms to claim and promote these rights; and (3) an internationally-mandated entity to preserve and promote their individual and collective claims in the context of a negotiated peace plan.<sup>260</sup> Due to its Statute's article 7(c) exclusion clause, the UNHCR has never interceded to protect Palestinian refugees in any of these three aspects in the search for a durable solution, despite its clear mandate to do so<sup>261</sup> and rich practice in these aspects concerning all other refugee populations.<sup>262</sup>

#### D. *Palestinians as Refugees or Stateless Persons*

If the refugee definition incorporated into article 1A(2) of the Refugee Convention was not intended to cover the Palestinian refugees as such, which definition were the drafters of the various relevant instruments

<sup>259</sup> See *infra* notes 538-66 and accompanying text.

<sup>260</sup> For a more detailed discussion of the implications of the protection gap in the search for a durable solution, see Akram, *supra* note 4, at 165.

<sup>261</sup> The UNHCR's protection functions include:

(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities; (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement.

*Statute of the Office of the U.N. High Comm'r for Refugees*, G.A. Res. 428(V), U.N. GAOR, 5th Sess., 325th mtg. (1950).

<sup>262</sup> In the last 20 years, the principles on refugee return, restitution and compensation have been greatly strengthened by provisions in numerous negotiated settlements, such as the Comprehensive Plan of Action in the Indochinese refugee situation. See *Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict*, U.N. Doc. A/46/608-S/23177 (1991), reprinted in 31 I.L.M. 174 (1992) [hereinafter Paris Agreement]. See also *Bosnia and Herzegovina-Croatia-Yugoslavia: Central Framework Agreement for Peace in Bosnia and Herzegovina*, at annex 7, art. 1, U.N. Doc. S/1995/1999 (1995), reprinted in 35 I.L.M. 75 (1996) [hereinafter Dayton Peace Accord]. See *Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons*, U.N. Doc. CIREFCA/89/14 (1989) [hereinafter CIREFCA].

applying to the Palestinians? The only definition of "Palestine refugee" at the time of the Convention's drafting was that adopted first by the United Nations Relief for Palestine Refugees ("UNRPR"), and later by its successor organization, UNRWA, both entrusted with providing assistance to the refugees.<sup>263</sup> It is important to note that the UNRWA definition relates directly to its mandate of providing material assistance (i.e., food, clothing, and shelter) to the refugees. Although the U.N. bodies concerned with the Palestine refugee problem referred to "Palestinian" or "Palestine" refugees, invoking the relief definition, no formal definition of "Palestinian refugee" was adopted for purposes of international protection.<sup>264</sup> Thus, the basic components of the de facto definition of "Palestinian refugee" intended by the U.N. drafters were: a Palestinian national or individual having his or her permanent residence in Palestine who lost home, lands, or livelihood as a result of the 1948 conflict. Because this definition referred to approximately two-thirds of the Palestinian population, it would have been illogical to apply an individualized definition such as the one under consideration for the Refugee Convention.<sup>265</sup>

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<sup>263</sup> UNRWA's first working definition for 'Palestine refugee' was: "Any person who had permanent residence and principal occupation in Palestine from which as a result of the Palestine conflict he has been deprived and who is without sufficient resources for basic maintenance shall be considered a refugee eligible for UNRPR relief." LEAGUE OF RED CROSS SOCIETIES, REPORT OF THE RELIEF OPERATION ON BEHALF OF THE PALESTINE REFUGEES CONDUCTED BY THE MIDDLE EAST COMMISSION OF THE LEAGUE OF RED CROSS SOCIETIES IN CONJUNCTION WITH THE UNITED NATIONS RELIEF FOR PALESTINE REFUGEES, 1949-1950 42 (1950). The working definition of "Palestine refugee" which operated from 1952 until 1993 was: "A Palestine refugee is a person whose normal residence was Palestine for a minimum period of two years preceding the outbreak of the conflict in 1948 and who, as a result of this conflict, has lost both his home and his means of livelihood . . . and who is in need." TAKKENBERG, *supra* note 98, at 72 (citing Operational Instruction No. 104, Feb. 18, 1952) In 1993, this definition was amended: "[Palestine refugee] shall mean any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict." *Id.* at 77 (citing Consolidated Registration Instructions, Jan. 1, 1993, ¶ 2.13).

<sup>264</sup> The legal advisor to the UNCCP secretariat prepared a draft definition of a Palestine refugee for protection purposes. However, by the time the draft was completed, the international community had already begun to dismantle its authority. *Addendum to Definition of a 'Refugee' Under paragraph 11 of the General Assembly Resolution of 11 December 1948*, U.N. Doc. W/61/Add.1, 29 (1951).

<sup>265</sup> Palestinians are considered to have been given a status similar to that of statutory refugees, similar to those described in article 1A(1) of the Refugee Convention. See GRAHL-MADSEN, *supra* note 2, at 140-2; see also GOODWIN-GILL, *supra* note 2, at 93. See also Akram & Goodwin-Gill, *supra* note 244, at 70-72.

The 1951 Refugee Convention covers stateless persons who are refugees.<sup>266</sup> However, an additional regime provides for protection under international law for stateless persons who are not refugees, or for stateless persons who are excluded from coverage in the Refugee Convention. Two other international law instruments affect the status of such persons—the 1954 Convention Relating to the Status of Stateless Persons (“1954 Stateless Convention”),<sup>267</sup> and the 1961 Convention on the Reduction of Statelessness (“1961 Statelessness Convention”).<sup>268</sup> Although these conventions are significant in terms of the legal rights they afford stateless persons and the obligations required of state signatories, they have limited reach as they have been ratified by very few states.<sup>269</sup> In order to obtain the benefits of these conventions, a person must be determined to be “stateless”—defined as “a person who is not considered a national by any State under the operation of its law.”<sup>270</sup> The 1961 Statelessness Convention adopts the same definition of stateless persons, but also recommends that “persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality.”<sup>271</sup> Despite the limited accessions to these two conventions, their basic definition of stateless person is now considered customary international law, and is therefore binding even on states that are not a party to either of these conventions.<sup>272</sup>

The focus of the 1954 Stateless Convention is to improve the status of stateless persons and to grant them the widest possible guarantees of fundamental human rights.<sup>273</sup> The 1961 Statelessness Convention was

<sup>266</sup> Refugee Convention, *supra* note 7, art. 1A, 189 U.N.T.S. at 152-54. See 1954 Stateless Convention, *supra* note 73, pmbl., 360 U.N.T.S. at 130 (“[t]hose stateless persons who are also refugees are covered by the Convention Relating to the Status of Refugees of 28 July 1951.”).

<sup>267</sup> 1954 Stateless Convention, *supra* note 73, 360 U.N.T.S. at 117.

<sup>268</sup> 1961 Statelessness Convention, *supra* note 74, 989 U.N.T.S. at 175.

<sup>269</sup> For the status of ratifications, declarations and reservations of the 1954 Stateless Convention, see UNHCR, <http://www.unhcr.ch/html/menu3/b/treaty3stat.htm>. (last visited Feb. 24, 2003) (showing 22 signatories and 54 state parties, as of February 2002). For the status of ratifications, declarations and reservations of the 1961 Statelessness Convention, see UNHCR, [http://www.unhcr.ch/html/menu3/b/treaty4\\_.htm](http://www.unhcr.ch/html/menu3/b/treaty4_.htm). (last visited Feb. 24, 2003) (showing 5 signatories and 26 state parties, as of February 2002).

<sup>270</sup> 1954 Stateless Convention, *supra* note 73, art. 1, 360 U.N.T.S. at 136.

<sup>271</sup> 1961 Statelessness Convention, *supra* note 74, 989 U.N.T.S. at 175.

<sup>272</sup> See Arthur C. Helton, *State Building, Citizenship and Statelessness, Forced Migration Project Special Reports* (1997), [http://www2.soros.org/fmp2/html/build\\_intro.html](http://www2.soros.org/fmp2/html/build_intro.html). (last visited Feb. 24, 2003).

<sup>273</sup> The 1954 Stateless Convention provides benefits similar to those guaranteed under the Refugee Convention. It also requires states to grant travel documents to stateless persons. Compare Refugee Convention, *supra* note 7, art. 24, 189 U.N.T.S. at 168-70, with 1954 Stateless Convention, *supra* note 73, arts. 24, 26, 27, 28, 360

drafted to address the gaps left by the 1954 Stateless Convention and to reduce or eliminate the phenomenon of statelessness.<sup>274</sup> The 1961 Statelessness Convention requires states to grant nationality to persons born in their territories who would otherwise be stateless.<sup>275</sup> It also prohibits, with some exceptions, depriving someone of his or her nationality.<sup>276</sup> It categorically prohibits denial of nationality on grounds of race, religion, or political opinion.<sup>277</sup> By far the most important aspects of the 1961 Statelessness Convention for Palestinians are the recommendations for an expanded stateless definition, and article 11, which provides for the establishment of an agency with a mandate to protect and assist stateless persons claiming the benefit of that Convention. In 1974, the U.N. General Assembly entrusted the UNHCR with the mandate to protect and assist stateless persons as required by article 11.<sup>278</sup> The UNHCR has never exercised this mandate under the 1961 Statelessness Convention.<sup>279</sup>

Interpretations of the status of Palestinians as stateless persons have varied among and even within those states that are signatories to one of the two statelessness conventions.<sup>280</sup> For example, Germany, which has significant jurisprudence on Palestinian refugee and stateless persons' claims, has a decision from the highest federal court finding that Palestinians are stateless and thus entitled to all the benefits of the two conventions.<sup>281</sup> Despite this decision, the German Federal Ministry of Interior policy is that Palestinians "originating" from Lebanon are not stateless, but have "indeterminate," or "unsettled" status, and therefore are not eligible for the guarantees of the 1961 Statelessness Conven-

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U.N.T.S. at 150, 152 (regarding freedom of movement, identity papers and travel documents, respectively). The 1954 Stateless Convention does not establish an international body to protect stateless persons or to monitor compliance with its terms. See 1954 Stateless Convention, *supra* note 73, 360 U.N.T.S. at 117.

<sup>274</sup> 1961 Statelessness Convention, *supra* note 74, pmb., 989 U.N.T.S. at 176.

<sup>275</sup> See *id.*, art. 1, 989 U.N.T.S. at 176-77.

<sup>276</sup> *Id.*, art. 8, 989 U.N.T.S. at 179.

<sup>277</sup> *Id.*, art. 9, 989 U.N.T.S. at 179.

<sup>278</sup> G.A. Res. 3274 (XXIX), U.N. GAOR, 29th Sess. (1974). This mandate was extended indefinitely by G.A. Res. 31/36, U.N. GAOR, 31st Sess., U.N. Doc. A/RES/31/36 (1976).

<sup>279</sup> See Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232, 254 (1995).

<sup>280</sup> See TAKKENBERG, *supra* note 98, at 92-123; see also Akram & Goodwin-Gill, *supra* note 244.

<sup>281</sup> See TAKKENBERG, *supra* note 98, at 189-90 (describing in English the Federal Administrative Court, Feb. 23, 2003 [Bundesverwaltungsgericht, Urteil vom 23.2. 1993 BVerwGE 1 C 45.90] InfAus1R 7-9/93, regarding Germany's obligations toward Palestinians under the 1954 Stateless Convention and the 1961 Statelessness Convention) (translation on file with author).



tion.<sup>282</sup> The German cantons of Switzerland also categorize Palestinians as having “unknown state or continent of origin.”<sup>283</sup> However, the vast majority of Palestinians coming from many of the Arab states are de facto stateless. By not recognizing them as such, Germany, Switzerland, and other European states deny them rights guaranteed under the 1961 Statelessness Convention, such as obtaining travel documents, employment authorization, and granting nationality to their children born in those countries.<sup>284</sup> Aside from being denied such benefits as travel documents, access to appropriate asylum or residence processing, obtaining authorization to work, and other fundamental rights guarantees, Palestinians have also not received the benefit of UNHCR’s protection mandate under article 11 of the 1961 Statelessness Convention.

### E. *Palestinian Refugees and the Right of Return Under International Law*

The right of return is a critical component of the special protection regime and of the recommendation that Palestinian refugees be granted temporary protection. Thus, a brief analysis of the right of return under international legal principles is necessary.<sup>285</sup>

The legal underpinnings of the right of refugee return are found in three main bodies of law: the law of nationality and state succession;<sup>286</sup> human rights law;<sup>287</sup> and humanitarian law.<sup>288</sup> In each of these bodies of

<sup>282</sup> The German Ministry of Interior identifies Palestinians as persons of “uncertain nationality” or Staatsangehoerigkeit ungelart. GOODWIN-GILL, *supra* note 2, at 245 n.207. See also TAKKENBERG, *supra* note 98, at 190.

<sup>283</sup> Copy of travel document issued to Palestinian asylum-seeker in Bern, Switzerland, stamped under “Nationality:” Staat und Kontinent unbekannt [“State and continent unknown”] (on file with author).

<sup>284</sup> See GOODWIN-GILL, *supra* note 2, at 243-46; TAKKENBERG, *supra* note 98, at 190.

<sup>285</sup> For an authoritative review of the Palestinian right of return under international law see Boling, *supra* note 173; see also W. Thomas Mallison & Sally Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, U.N. Doc. ST/SG/SER.F/4, at 28-38 (1979).

<sup>286</sup> See generally P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 47 (Sijthoff & Noordhoff 1979) (1956); see also CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 182 (1928); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 71 (Kluwer Academic 1988) (1972); *Report of the International Law Commission on the Work of its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 142, U.N. Doc. A/51/10 (1996).

<sup>287</sup> See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. No. A/810 (1948) [hereinafter UNCHR] (“Everyone has the right to leave any country, including his own, and to return to his country”); ICCPR, *supra* note 66, art. 12, 999 U.N.T.S. at 176 (“No one shall be arbitrarily deprived of the right to enter his own country”); CERD, *supra* note 69, art. 5(d)(ii), 660 U.N.T.S. at 220 (recognizing “the right . . . to return to one’s country”).

law, the right of return is found both as a rule of customary law and codified in international treaties. The state responsible for recognizing and implementing the right of return in the Palestinian refugee case is, of course, Israel, which is the state responsible for creating the refugees and has bound itself to the right of return principle through numerous treaty ratifications.

It is important to note that during the British Mandate period, Palestinian nationals had distinct Palestinian citizenship, with recognized British-issue passports stamped "Palestinian citizen under Article One or Three of the Palestinian Citizenship Order, 1925-41."<sup>288</sup> The 1952 Israeli Nationality Law repealed, with retroactive effect, the Palestine Citizenship Orders, provided that every Jewish immigrant was automatically entitled to Israeli nationality (under the "Law of Return"), and established that former Palestinians of Arab origin were eligible for Israeli nationality only under a series of restrictive conditions that effectively disqualified the vast majority of Palestinian Arabs from Israeli citizenship and stripped them of their Palestinian nationality.<sup>290</sup>

Under classic international law principles of nationality and state succession, a state has great discretion in the matter of conferring or denying nationality.<sup>291</sup> However, this discretion has limits. Both customary and treaty law impose limitations on how a successor state may treat the population found on its territory. Customary international law requires that "the population follow the change of sovereignty in matters of nationality."<sup>292</sup> This principle has at least three aspects: that all habitual residents

<sup>288</sup> See generally Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, 2295; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>289</sup> Palestinian Citizenship Order in Council, 1925, S.R. & O., no. 25. See Anis Kassim, *Legal Systems and Developments in Palestine*, 1 PALESTINE Y.B. INT'L L. 19 (1984) (concerning laws under British occupation of Palestine). See also G.A. Res. 181 (III), U.N. GAOR, 128th Plen. Mtg., 1st Sess., U.N. Doc. A/64 (1947) (noting the limited trusteeship of the Mandate under the League of Nations).

<sup>290</sup> Nationality Law, 1952, 6 L.S.I. 50 (1952).

<sup>291</sup> The law of nationality and state succession requires states to readmit their own nationals (or grant them 'the right of return'), and requires that when a territory undergoes change of sovereignty, inhabitants of that territory must be offered the nationality of the successor state. See PLENDER, *supra* note 286, at 71 (stating "[t]he proposition that every State must admit its own nationals to its territory is so widely accepted that it may be described as a commonplace of international law."); see also WEIS, *supra* note 286, at 53 ("The State of nationality is also under an obligation to admit a national born abroad who never resided on its territory if his admission should be demanded by the State of residence.").

<sup>292</sup> Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRITISH Y.B. INT'L L. 284, 320 (1963). For principles of state succession, see 1 L. OPPENHEIM, INT'L LAW 503 (7th ed., 1948); F.A. Mann, *The Effect of Changes of Sovereignty Upon Nationality*, 5 MOD. L. REV. 218-24 (1941).

found on the territory of the successor state must be granted the nationality of the new state; that a successor state may not arbitrarily denationalize, or expel, persons found on its territory; and that residents of the territory expelled during conflict are absolutely entitled to return to their places of habitual residence.<sup>293</sup>

The obligation of a successor state to grant nationality to all residents of that territory is a well-established customary international law rule.<sup>294</sup> More recently, it has been incorporated in the authoritative International Law Commission (ILC) Articles on State Succession, and adopted by the U.N. General Assembly as a principle states are to apply in matters of nationality and state succession.<sup>295</sup> Article 5 of the ILC Articles on State Succession provides: "Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession."<sup>296</sup>

The principle against arbitrary denationalization is also firmly settled under customary law.<sup>297</sup> Article 15 of the ILC Articles on State Succession codifies this principle: "States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground."<sup>298</sup> Article 16 further states: "Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option to which they are entitled in relation to the succession of States."<sup>299</sup> Moreover, when denationalization is based on race or ethnic origin, it is a violation of the general principles of non-discrimination in customary international law, as well as articles 2 and 26 of the International Convention on Civil and Political Rights ("ICCPR"),<sup>300</sup> and article 5(d)(ii) of the

<sup>293</sup> Brownlie, *supra* note 292, at 235-238.

<sup>294</sup> See L. OPPENHEIM, *supra* note 292, at 503 (noting inhabitants attain the nationality of the state that acquires the territory); see also, Brownlie, *supra* note 292, at 320.

<sup>295</sup> *Nationality of Natural Persons in Relation to the Succession of States*, G.A. Res. 55/153, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/153 (2000) [hereinafter *Articles on Nationality*].

<sup>296</sup> *Id.* at art. 5.

<sup>297</sup> See WEIS, *supra* note 286, at 248.

<sup>298</sup> *Articles on Nationality*, *supra* note 295, at art. 15.

<sup>299</sup> *Id.* at art. 16.

<sup>300</sup> Article 2(1) of the ICCPR requires:

Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 66, art. 2, para. 1, 999 U.N.T.S. at 173. Article 26 states:

International Convention on the Elimination of all Forms of Racial Discrimination (“CERD”),<sup>301</sup> both of which are binding on Israel.<sup>302</sup> Arbitrary denationalization—that is, denationalization on discriminatory grounds or for discriminatory or prohibited purposes—is strongly proscribed in conventions,<sup>303</sup> resolutions,<sup>304</sup> and declarations.<sup>305</sup> Closely related to a successor state’s obligation not to expel persons habitually residing on its territory is its obligation not to expel such persons to another state’s territory. This principle is firmly grounded in nationality law,<sup>306</sup> as well as in humanitarian and human rights law, discussed below.

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All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.*, art. 26, 999 U.N.T.S. at 179.

<sup>301</sup> Article 5(d)(ii) obligates State Parties to prohibit and work to eliminate racial discrimination, and to guarantee the right of everyone to “[t]he right to leave any country, including one’s own and to return to one’s country. . . .” CERD, *supra* note 69, 660 U.N.T.S. at 195.

<sup>302</sup> Israel ratified the ICCPR on October 3, 1991, with reservations to article 23, but not to articles 2, 12 or 26. Israel ratified the CERD on January 3, 1979, with reservation to article 22 but not to article 5. The status of ratifications and reservations are available at <http://www.unhcr.ch/html/intlinst.htm> (last visited Feb. 24, 2003).

<sup>303</sup> See, e.g., Harvard Law School, Research in International Law, *The Law of Nationality*, 23 AM. J. INT’L L. 13, 16 (1929). Article 20 provides:

A state may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another State, if such person is a national of the first State or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other State.

*Id.* at 24.

<sup>304</sup> See Draft Principles on Freedom and Non-Discrimination in Respect of Everyone to Leave any Country, Including his Own, and to Return to His Country, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Res. 2B(XV), at 44, 46 U.N. Doc. E/CN.4/846 (1963) [hereinafter Draft Principles on Freedom] (“No one shall be arbitrarily deprived of his nationality. . . as a means of divesting him of the right to return to his country.”); see also *Articles on Nationality*, *supra* note 295.

<sup>305</sup> See UDHR, *supra* note 287; HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 156 (1987) (citing Strasbourg Declaration on the Right to Leave and Return, art. 6, ¶ (b), Nov. 26, 1986, for the proposition that “[n]o person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country”).

<sup>306</sup> See John Fischer Williams, *Denationalization*, 9 BRITISH Y.B. INT’L L. 45, 61 (1927) (stating “a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory.”); see also PLENDER, *supra* note 286, at 87 (“[a] state may not justify its expulsion or non-admission of its own former nationals by drawing attention to the fact that it first took the precaution of denaturalizing

The final aspect of the law of nationality or state succession is the obligation to permit persons to return to their places of origin, or of habitual residence in the case of state succession. This right of return is also a well-settled principle under public international law. The ILC Articles on State Succession incorporate it in article 14 as follows:

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.
2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.<sup>307</sup>

Israel has acceded to the major human rights conventions codifying principles on the right of return and the related obligation of a state not to expel its nationals and to accept their return. Israel is a signatory to the ICCPR.<sup>308</sup> Article 12(4) of the ICCPR states: "No one shall be arbitrarily deprived of the right to enter his own country."<sup>309</sup> Israel has made no reservation to this provision. Israel is also a party to the CERD.<sup>310</sup> Article 5(d)(ii) of the CERD requires states:

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them."); GOODWIN-GILL, *supra* note 2, at 242 ("[f]or international law purposes, States do not enjoy the freedom to denationalize their nationals in order to expel them as 'non-citizens.'" (citations omitted)). On the prohibition of expulsion of individuals and groups under humanitarian law, see Alfred de Zayas, *The Right to One's Homeland, Ethnic Cleansing and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM. L.F. 257 (1995); Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 7 PALESTINE Y.B. INT'L L. 17 (1991); Alfred de Zayas, *Population, Expulsion and Transfer*, 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt ed., 1997).

<sup>307</sup> *Articles on Nationality*, *supra* note 295, at art. 14.

<sup>308</sup> ICCPR, *supra* note 66, 999 U.N.T.S. at 171. Although Israel ratified the ICCPR on October 3, 1991, it has not ratified the First Optional Protocol, which gives the Human Rights Committee jurisdiction to hear individual complaints. See Office of the United Nations High Commissioner for Human Rights, Table of Ratifications of the Major International Human Rights Instruments, <http://www.unhchr.ch/pdf/report.pdf> (last visited June 25, 2003). Israel has also not made a declaration under article 41 that would give the Human Rights Committee competence over interstate claims in which Israel might be involved. See United Nations Treaty Collection, Declarations and Reservations to the ICCPR, [http://www.unhchr.ch/html/menu3/b/treaty5\\_esp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_esp.htm) (last visited Mar. 30, 2003).

<sup>309</sup> ICCPR, *supra* note 66, 999 U.N.T.S. at 176.

<sup>310</sup> CERD, *supra* note 69, 660 U.N.T.S. at 195. Israel ratified the CERD on January 3, 1979, but has not agreed to be bound by art. 22 by which it would be required to litigate disputes under the Convention to the International Court of Justice. Israel has also refused to give the Committee on the Elimination of Racial Discrimination competence over individual complaints against it under article 14.

[t]o prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (d) Other civil rights, in particular . . . (ii) The right to leave any country, including one's own, and to return to one's country.

Israel has also made no reservation to this provision.<sup>311</sup>

The chosen phrases in the ICCPR text—enter, return, arbitrary, and own country—have been the subject of much academic commentary in determining the parameters of the right of return.<sup>312</sup> Interpreting the right to enter as applying to a broader group of persons than those entitled to return is supported by the *travaux préparatoires* of the ICCPR.<sup>313</sup> Article 12(4) thus incorporates a broader right to return for second or third generation refugees born outside their country. The modifier “arbitrarily” is a limitation on the right to return and implies that the state may interfere with this right as long as the interference is not on an arbitrary basis. The Human Rights Committee, the interpreting and enforcing body of the ICCPR, has taken the position that any interference with the right to enter or to return should be lawful, “in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the particular circumstances.”<sup>314</sup>

Many commentators conclude that aside from being required by specific provisions in international treaties, the right to return is obligatory under customary international law in the human rights context.<sup>315</sup> Such conclusions are based on the fact that the right to return is expressly recognized in most international human rights instrument, for example: article 13(2) of the Universal Declaration of Human Rights (“UDHR”);<sup>316</sup>

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<sup>311</sup> General Recommendation XXII on Article 5 emphasizes that refugees and displaced persons have “the right to return to their homes of origin under conditions of safety.” CERD, *supra* note 69, art. 5, 660 U.N.T.S. at 220-22.

<sup>312</sup> For a thorough discussion of these questions, and an argument that return to one's country means, under international law, return to a country with which one has a ‘genuine connection’, see Kathleen Lawand, *The Right of Return of Palestinians in International Law*, 8 INT'L J. REFUGEE L. 532 (1996).

<sup>313</sup> MARC J. BOSSUYT, GUIDE TO THE *Travaux Préparatoires* of the International Covenant on Civil and Political Rights 261 (1987).

<sup>314</sup> General Comment No. 27, U.N. GAOR Hum. Rts. Comm., at paras. 19-21, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999).

<sup>315</sup> For authority affirming that the right of return is a customary international law principle, see THE MOVEMENT OF PERSONS ACROSS BORDERS 39-40 (Louis B. Sohn & Thomas Buergenthal, eds., 1992); HANNUM, *supra* note 305, at 7-16; Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?* 19 MICH. J. INT'L L. 1091; Lawand, *supra* note 312; John Quigley, *Displaced Palestinians and the Right of Return*, 39 HARV. INT'L L.J. 171 (1998).

<sup>316</sup> UNDHR, *supra* note 287, at art. 13(2).

article 12(4) of the ICCPR,<sup>317</sup> article 5(d)(ii) of the CERD;<sup>318</sup> article VIII of the American Declaration of the Rights of Man;<sup>319</sup> article 22(5) of the American Convention on Human Rights;<sup>320</sup> article 12(2) of the African Charter on Human and Peoples Rights,<sup>321</sup> and article 3(2) of Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>322</sup> It is also included in many draft declarations, constitutions, laws, and the jurisprudence of many states.<sup>323</sup>

The right to return is also consistently referred to in U.N. resolutions dealing with rights of refugees.<sup>324</sup> Resolutions refer to the right of return as an “unconditional right,”<sup>325</sup> as an “inalienable right,”<sup>326</sup> and as an

<sup>317</sup> ICCPR, *supra* note 66, art. 12(4), 999 U.N.T.S. at 176.

<sup>318</sup> CERD, *supra* note 69, art. 5(d)(ii), 660 U.N.T.S. at 220.

<sup>319</sup> *See American Declaration of the Rights and Duties of Man*, O.A.S. GA, 3d Sess., O.A.S. Doc. AG/RES. 1591 (XXVIII-O/98) (June 2, 1998).

<sup>320</sup> American Convention on Human Rights: Pact of San-Jose, Costa Rica, Nov. 22, 1969, 1144 U.N.T.S. 123 (1969) [hereinafter American Convention on Human Rights].

<sup>321</sup> African Charter on Human and Peoples Rights, art. 12(2), OAU doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter].

<sup>322</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 4, Sept. 16, 1963, art. 3(2), 46 Europ. T.S. 46 [hereinafter ECHR Protocol].

<sup>323</sup> *See, e.g.*, Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Including One’s Own and to Return to One’s Own Country, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 48th Sess., U.N. Doc. E/CN.4/Sub.2/DEC/1996/102 (1996); Report of the Subcommission on Prevention of Discrimination and Protection of Minorities on its 48th Session, at 89, U.N. Doc. E/CN.4/1997/2-E/CN.4/Sub.2/1996/41 (1996); The Right to Leave Any Country, Including One’s Own, and to Return to One’s Own Country, U.N. Commission on Human Rights, 44th Sess., U.N. Doc. E/CN.4/RES. 1988/46 (1988); Strasbourg Declaration on the Right to Leave and to Return 1986; Declaration on the Right to Leave and the Right to Return (1972); Draft Principles on Freedom, *supra* note 304.

<sup>324</sup> *See, e.g.*, S.C. Res. 1145, U.N. SCOR, 3843d mtg., U.N. Doc. S/RES/1145 (1997) (reaffirming the right of all Croatian refugees to return to their homes of origin); S.C. Res. 1019, U.N. SCOR, 3951st mtg., U.N. Doc. S/RES/1019 (1995) (demanding that the government of Croatia respect the right of the Serb population to remain or return in safety); S.C. Res. 1078, U.N. SCOR, 3710th mtg., U.N. Doc. S/RES/ 1078 (1996), S.C. Res. 1029, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1029 (1995) (calling on the Government of Rwanda to facilitate the return of Rwandan refugees); *see also* S.C. Res 999, U.N. SCOR, 3544th mtg., U.N. Doc. S/RES/999 (1995) (calling for return of refugees after mass displacement in Tajikistan).

<sup>325</sup> G.A. Res. 46/242, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/242 (1992); G.A. Res. 47/147, 47th Sess., U.N. Doc. S/RES/47/147 (1992).

<sup>326</sup> G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31 ¶ 2, U.N. Doc. A/9631 (1974) (referring to Palestinian refugees).

“imprescriptable right.”<sup>327</sup> Resolutions also reaffirm the right of refugees and displaced persons to return to their homes of origin.<sup>328</sup> U.N. General Assembly Resolution 194(III), December 11, 1948, embodies customary law relative to the right of return.<sup>329</sup> Resolution 194, paragraph 11, sets

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<sup>327</sup> S.C. Res. 1311, U.N. SCOR, 4179th mtg., U.N. Doc. S/RES/1311 (2000); S.C. Res. 1255, U.N. SCOR, 4029th mtg., U.N. Doc. S/RES/1255 (1999); S.C. Res. 1255, U.N. SCOR, 4029th mtg., U.N. Doc. S/RES/1255 (1999); S.C. Res. 1225, U.N. SCOR, 3972d mtg., U.N. Doc. S/RES/1225 (1999); S.C. Res. 1287, U.N. SCOR, 4094th mtg., U.N. Doc. S/RES/1287 (2000).

<sup>328</sup> S.C. Res. 1311, U.N. SCOR, 4179th mtg., U.N. Doc. S/RES/1311 (2000); S.C. Res. 1287, U.N. SCOR, 4094th mtg., U.N. Doc. S/RES/1287 (2000); S.C. Res. 1255, U.N. SCOR, 4029th mtg., U.N. Doc. S/RES/1255 (1999); S.C. Res. 1239, U.N. SCOR, 4003d mtg., U.N. Doc. S/RES/1239 (1999); S.C. Res. 1225, U.N. SCOR, 3972th mtg., U.N. Doc. S/RES/1225 (1999); S.C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203 (1998); S.C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1187, U.N. SCOR, 3912th mtg., U.N. Doc. S/RES/1187 (1998); S.C. Res. 1150, U.N. SCOR, 3851st mtg., U.N. Doc. S/RES/1150 (1998); S.C. Res. 1124, U.N. SCOR, 3807th mtg., U.N. Doc. S/RES/1124 (1997); S.C. Res. 1120, U.N. SCOR, 3800th mtg., U.N. Doc. S/RES/1120 (1997); S.C. Res. 999, U.N. SCOR, 3544th mtg., U.N. Doc. S/RES/999 (1995); S.C. Res. 1096, U.N. SCOR, 3735th mtg., U.N. Doc. S/RES/1096 (1997); S.C. Res. 1079, U.N. SCOR, 3712th mtg., U.N. Doc. S/RES/1079 (1996); S.C. Res. 1065, U.N. SCOR, 3680th mtg., U.N. Doc. S/RES/1065 (1996); S.C. Res. 1036, U.N. SCOR, 3618th mtg., U.N. Doc. S/RES/1036 (1996); S.C. Res. 1009, U.N. SCOR, 3563d mtg., U.N. Doc. S/RES/1009 (1995); S.C. Res. 993, U.N. SCOR, 3535th mtg., U.N. Doc. S/RES/993 (1995); S.C. Res. 971, U.N. SCOR, 3488th mtg., U.N. Doc. S/RES/971 (1995); S.C. Res. 947, U.N. SCOR, 3434th mtg., U.N. Doc. S/RES/947 (1994); S.C. Res. 941, U.N. SCOR, 3428th mtg., U.N. Doc. S/RES/941 (1994); S.C. Res. 937, U.N. SCOR, 3407th mtg., U.N. Doc. S/RES/937 (1994); S.C. Res. 906, U.N. SCOR, 3354th mtg., U.N. Doc. S/RES/906 (1994); S.C. Res. 896, U.N. SCOR, 3332th mtg., U.N. Doc. S/RES/896 (1994); S.C. Res. 892, U.N. SCOR, 3325th mtg., U.N. Doc. S/RES/892 (1993); S.C. Res. 884, U.N. SCOR, 3313d mtg., U.N. Doc. S/RES/884 (1993); S.C. Res. 876, U.N. SCOR, 3295th mtg., U.N. Doc. S/RES/876 (1993); S.C. Res. 874, U.N. SCOR, 3292d mtg., U.N. Doc. S/RES/874 (1993); S.C. Res. 859, U.N. SCOR, 3269th mtg., U.N. Doc. S/RES/859 (1993); S.C. Res. 853, U.N. SCOR, 3259th mtg., U.N. Doc. S/RES/853 (1993); S.C. Res. 836, U.N. SCOR, 3228th mtg., U.N. Doc. S/RES/836 (1993); S.C. Res. 820, U.N. SCOR, 3200th mtg., U.N. Doc. S/RES/820 (1993); S.C. Res. 787, U.N. SCOR, 3137th mtg., U.N. Doc. S/RES/787 (1992); S.C. Res. 779, U.N. SCOR, 3118th mtg., U.N. Doc. S/RES/779 (1992); S.C. Res. 752, U.N. SCOR, 3075th mtg., U.N. Doc. S/RES/752 (1992); S.C. Res. 361, U.N. SCOR, 1794th mtg., U.N. Doc. S/RES/361 (1974).

<sup>329</sup> The analysis of Resolution 194 is based on a review of working papers prepared by the Secretariat of the U.N. Conciliation Commission for Palestine (UNCCP). The U.N. General Assembly has reaffirmed Resolution 194(III) annually since 1948. Other resolutions reaffirming the right of return in the Palestine case include: G.A. Res. 273(III), U.N. GAOR (1949) (admitting Israel as a member of the U.N. conditional to the implementation of Resolution 194); S.C. Res. 93, U.N. SCOR, 547th mtg., U.N. Doc. S/2157 (1951) (calling on Israel to facilitate the return of those Palestinians expelled from the demilitarized zone after the 1948 war); G.A. Res. 3236,



forth a clear hierarchy of solutions. Paragraph 11(a) delineates the specific rights and primary durable solution for Palestinian refugees:<sup>330</sup> return, real property restitution, and compensation for loss of, or damage to, property.<sup>331</sup> The Resolution specifically reaffirms the right of refugees to return to their homes.<sup>332</sup> Refugees who choose not to exercise the right of return set forth in paragraph 11 may opt for resettlement in host states or in third countries, as well as for real property restitution and compensation.<sup>333</sup> General Assembly Resolution 194(III) also affirms the principle of individual refugee choice.<sup>334</sup>

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U.N. GAOR, 29th Sess., Supp. No. 31 ¶ 2, U.N. Doc. A/9631 (1974) (reaffirming the right of the Palestinian people to self-determination and the right of refugees to return to their homes). For a list of resolutions, see INSTITUTE FOR PALESTINE STUDIES, *supra* note 142.

<sup>330</sup> The General Assembly, “[r]esolves that 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 loss of or damage to property.” UNCCP Mandate, *supra* note 246. For a general analysis of U.N. General Assembly Resolution 194, see *Analysis of Paragraph 11 of the General Assembly’s Resolution of 11 December 1948, Working Paper Prepared by the Secretariat*, U.N. Conciliation Committee for Palestine, U.N. Doc. A/AC.25/W.45 (1950) [hereinafter *Analysis of Paragraph 11*].

<sup>331</sup> The U.N. Mediator in Palestine, whose recommendations formed the basis of Resolution 194, explicitly noted that the right of return should be *affirmed* (rather than recognized) by the United Nations. That the right of return had already assumed the status of customary law is also reflected in comments made by the U.S. representative at the U.N. concerning the original draft resolution submitted by Great Britain. Paragraph 11, wrote the U.S. representative, “endorsed a generally recognized principle and provided a means for implementing that principle.” For more analysis of the right to restitution and compensation, see *Operations of the Custodian of Absentee Property and Estimation of the Compensation Due to Arab Refugees Not Returning to Their Homes, Working Paper Prepared by the Secretariat of the Commission at Jerusalem*, U.N. Conciliation Committee for Palestine, U.N. Doc. A/AC.25/W.52 (1950); *Note on the Problem of Compensation, Note Drafted by the Secretariat of the Commission at Jerusalem*, U.N. Conciliation Committee for Palestine, U.N. Doc. A/AC.25/W.53 (1950).

<sup>332</sup> The General Assembly clearly meant the return of each refugee to “his or [her] house or lodging and not to his or [her] homeland.” The Assembly rejected two separate amendments that referred in more general terms to the return of refugees to “the areas from which they have come.” *Analysis of Paragraph 11, supra* note 330, 3.

<sup>333</sup> Paragraph 11 instructs the UNCCP, the body mandated to facilitate implementation of durable solutions for Palestinian refugees, to facilitate the resettlement of those refugees choosing not to return and the payment of compensation. UNCCP Mandate, *supra* note 246, para. 11.

<sup>334</sup> By 1948, the principle of refugee choice or voluntariness had already become an established principle of refugee law and practice. The principle of individual refugee choice is repeatedly emphasized in documents prepared by the U.N. Mediator in Palestine, whose recommendations formed the basis for Resolution 194. The U.N. General Assembly intended to confer upon individual refugees the “right of

Finally, widespread state practice implements the rights of resident nationals to enter their state of origin. Such mass displacements as took place in Indochina, Central America, and the Balkans were resolved with a primary focus on repatriation.<sup>335</sup> Peace agreements that affirmed the right of return include: the 1989 Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict in Guatemala;<sup>336</sup> the 1989 Declaration and Comprehensive Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons (“CIREFCA”);<sup>337</sup> the 1989 Comprehensive Plan of Action Concerning Indochinese Refugees (“CPA”);<sup>338</sup> the 1991 Paris Agreement concerning Cambodia;<sup>339</sup> Protocol III of the 1992 comprehensive peace agreement in

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exercising a free choice as to their future.” *Analysis of Paragraph 11, supra* note 330. “The verb ‘choose’ indicates that the General Assembly assumed that [ . . . ] all the refugees would be given a free choice as to whether or not they wished to return home.” In order to make a free choice, the United Nations recognized that refugees should be “fully informed of the conditions under which they would return.” BADIL Resource Center, *The Meaning of the UN General Assembly Resolution 194(III), 11 December 1948 (The Right of Return)*, Occasional Bulletin No. 11 (Apr. 2002), [http://www.badil.org/Publications/Bulletins/B\\_11.htm](http://www.badil.org/Publications/Bulletins/B_11.htm) (last visited June 27, 2003).

<sup>335</sup> See Dayton Peace Accord, *supra* note 262, annex 7, art. 1, 35 I.L.M. at 136 (“All refugees and displaced persons have the right freely to return to their homes of origin.”); Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, Nov. 12, 1995, at art. 4, U.N. Doc. S/1995/951, *reprinted in* 35 I.L.M. 184 (1996) [hereinafter Erdut Agreement] (“The Transitional Administration shall ensure the possibility for the return of refugees and displaced persons to their homes of origin.”); *id.*, para. 7, 35 I.L.M. at 186 (“All persons have the right to return freely to their place of residence in the region and to live there in conditions of security.”); see also Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, June 17, 1994, <http://www.usip.org/library/pa/guatemala/gust~940617.html> (last visited Feb. 23, 2003) (1994) (including the principle that “the Government of the Republic [of Guatemala] undertakes to ensure that conditions exist which permit and guarantee the voluntary return of uprooted persons to their places of origin . . . in conditions of dignity and security”); Paris Agreement, *supra* note 262, art. 20(1), 31 I.L.M. at 187.

<sup>336</sup> Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, *supra* note 335, at principle 1, states:

Uprooted population groups have the right to reside and live freely in Guatemalan territory. Accordingly, the Government of the Republic undertakes to ensure that conditions exist which permit and guarantee the voluntary return of uprooted persons to their places of origin or to the place of their choice, in conditions of dignity and security.

<sup>337</sup> CIREFCA, *supra* note 262.

<sup>338</sup> International Conference on Indo-Chinese Refugees, Declaration and Comprehensive Plan of Action, U.N. Doc. A/CONF.148/2 (1989).

<sup>339</sup> See Paris Agreement, *supra* note 262, art. 20, 31 I.L.M. at 187 (affirming that “Cambodian refugees and displaced persons, located outside Cambodia, shall have the right to return to Cambodia and to live in safety, security and dignity, free from intimidation or coercion of any kind”).

Mozambique;<sup>340</sup> the 1993 Protocol of Agreement Between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees;<sup>341</sup> the 1995 Dayton Peace Agreement;<sup>342</sup> the 1995 Erdut Agreement on Eastern Slavonia, Baranja, and Western Slavonia;<sup>343</sup> and the 1999 Interim Agreement for Peace and Self Government in Kosovo.<sup>344</sup> The international community has employed a variety of means, including conditionality,<sup>345</sup> extraordinary administrative powers,<sup>346</sup> and threat and use of force<sup>347</sup> to ensure return of refugees and displaced persons.

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<sup>340</sup> General Peace Agreement for Mozambique, U.N. SCOR, 47th Sess., at protocol III, art. IV U.N. Doc. S/24635/Annex (1992), available at <http://www.usip/library/pa/Mozambique/Mozambique-03129992-p3.html> (last visited Feb. 25, 2003) (“The parties undertake to co-operate in the repatriation and reintegration of Mozambican refugees and displaced persons,” preferably to their original places of residence).

<sup>341</sup> Protocol of Agreement Between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons, at pmbl. (1993) (recognizing the “inalienable right” of return of Rwandese refugees).

<sup>342</sup> Dayton Peace Accord, *supra* note 262, annex 7, art. 1, 35 I.L.M. at 136 (“All refugees and displaced persons have the right freely to return to their homes of origin.”). The parties to the agreement, moreover, “confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.” *Id.*

<sup>343</sup> Erdut Agreement, *supra* note 335, para. 7, 35 I.L.M. at 186 (“All persons have the right to return freely to their place of residence in the Region and to live there in conditions of security”).

<sup>344</sup> Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, art. 2, para. 3 (“The Parties recognize that all persons have the right to return to their homes.”).

<sup>345</sup> This includes, for example, the “Open-Cities Initiative” in Bosnia-Herzegovina in which cities facilitating minority return became eligible for more comprehensive and substantive donor assistance. Other types of conditionality include the threat of sanctions and the cessation of international assistance.

<sup>346</sup> In Bosnia, for example, the Office of the High Representative (“OHR”) is empowered to remove elected officials obstructing implementation of the Dayton Peace Agreement, revoke discriminatory legislation, and write new legislation. Lynn Hastings, *Implementation of Property Legislation in Bosnia-Herzegovina*, 37 STAN. J. INT’L L. 221, 224-25 (2001).

<sup>347</sup> See, e.g. S.C. Res. 1244, U.N. SCOR, 4011th mtg., at 1, U.N. Doc. S/RES/1244 (1999) (authorizing the Secretary General to establish an international security presence in Kosovo “to provide for the safe and free return of all refugees and displaced persons to their homes); see also S.C. Res. 1264, U.N. SCOR, 4045th mtg., at 3, U.N. Doc. S/RES/1264 (1999) (establishing a multinational force in Kosovo under Chapter VII of the U.N. Charter, and stressing it is the responsibility of Indonesian authorities “to ensure the safe and dignified return of refugees to East Timor”).

The exact parameters of the right under customary international law are difficult to delineate, but article 13(2) of the UDHR, on which many other right of return provisions are based, provides: "Everyone has the right to leave any country, including his own, and to return to his country."<sup>348</sup> Some have argued that the right of return under this and other provisions does not apply to persons who are non-nationals of the expelling state.<sup>349</sup> Not surprisingly, Israeli supporters have advanced this argument with some vehemence.<sup>350</sup> But the view most consistent with other convention provisions, as well as with general principles of international law, is that "everyone" means all persons, nationals or non-nationals, and "his country" must be interpreted as place of origin.<sup>351</sup>

The UDHR, and other international human rights documents, make clear distinctions between provisions applying to nationals and provisions applying to persons from a country or a state.<sup>352</sup> Basic principles of statutory interpretation inform us that the broader term, "his own country," was chosen to include both place of nationality and place of origin.<sup>353</sup> Moreover, if the narrower term were chosen, the effect would be to permit states to avoid their obligations toward inhabitants in their territories by arbitrarily expelling them, removing them of their nationality, and then denying them the right to return on the pretext that they are non-nationals—propositions that are prohibited under public international

<sup>348</sup> UNDHR, *supra* note 287, at art. 13(2).

<sup>349</sup> See Ruth Lapidot, *The Right to Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISRAEL Y.B. HUM. RTS. 103, 107-115 (1986); see also Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 300-312 (1995) (arguing that Israel has a legitimate right to deny Palestinians the right to return and to restitution of their properties as "enemies of the state" and "enemy property").

<sup>350</sup> See generally Lapidot, *supra* note 349; Benevenisti & Zamir, *supra* note 349; Kurt R. Radley, *The Palestine Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586 (1978); and Yehuda Z. Blum, *The Missing Prisoner, Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

<sup>351</sup> See Quigley, *supra* note 199, at 233; Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1114-1121 (1996); Arthur C. Helton & Eliana Jacobs, *What is Forced Migration*, 13 GEO. IMMIGR. L.J. 521 (1995) (concerning the right to return after arbitrary displacement); see also CERD, *supra* note 69, art 5(d)(ii), 660 U.N.T.S. at 220 ("The right to leave any country, including one's own, and to return to one's country.").

<sup>352</sup> This interpretation is confirmed by comparing the use of the term "country" in ICCPR, *supra* note 66, art. 12(4), 999 U.N.T.S. at 176; CERD, *supra* note 69, art. 5(d)(ii), 660 U.N.T.S. at 220; UNDHR, *supra* note 287, at art. 13(2); African Charter, *supra* note 321, art. 12(2), 21 I.L.M. at 61, with the use of the term 'national' in the *American Declaration of the Rights and Duties of Man*, *supra* note 319, at art. viii; American Convention on Human Rights, *supra* note 320, at art. 22(5); ECHR, *supra* note 72, art. 3(2).

<sup>353</sup> See Lawand, *supra* note 312, at 547-58.

law, as discussed above.<sup>354</sup> The ICCPR provision is also based on the UDHR language. Again, the terms chosen are “no one” and “own country,” in contrast to “national,” “state,” or “state of nationality.”<sup>355</sup>

Supporters of the Israeli position have noted that the right of return is an individual right and does not apply to situations of mass exodus.<sup>356</sup> There is, however, no textual support for this position. Nothing in the *travaux préparatoires* implies that the drafters intended suspension of the principle in cases of mass exodus.<sup>357</sup> The UNCHR has very clearly affirmed the right of return for the Palestinian refugees, grounding it in the UDHR.<sup>358</sup>

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<sup>354</sup> HANNUM, *supra* note 305, at 62. See also Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in, and Leave a Country*, 49 INT'L AFF. 341, 350 (1973).

<sup>355</sup> “No one shall be arbitrarily deprived of the right to enter his own country.” ICCPR, *supra* note 66, art. 12(4), 999 U.N.T.S. at 176; “Everyone shall be free to leave any country, including his own.” *Id.*, art. 12(2), 999 U.N.T.S. at 176; “Everyone has the right to leave any country, including his own, and to return to his country.” UNDHR, *supra* note 287, at art. 13(2); Lawand, *supra* note 312, at 549-558.

<sup>356</sup> See Lapidoth, *supra* note 349, at 114; Benvenisti & Zamir, *supra* note 349, at 587-95.

<sup>357</sup> For a thorough discussion of this issue, see Lawand, *supra* note 312; see also Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. OF INT'L L. 1091 (Summer 1998); Quigley, *supra* note 199, at 171 (refuting the arguments that the right of return under international law does not address mass displacement).

<sup>358</sup> U.N. Comm'n on Hum. Rts. Resolution 6 of 1968 states:

Mindful of the principle embodied in the Universal Declaration of Human Rights regarding the right of everyone to return to his own country. . . 2. Affirms the right of all the inhabitants who have left since the outbreak of hostilities in the Middle East to return and that the Government concerned should take the necessary measures in order to facilitate the return of those inhabitants to their own country without delay.

*Question of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East*, U.N. Comm'n on Hum. Rts., U.N. Doc. E/CN.4/RES/6 (1968). See also Resolution 10, which affirms the principle and:

Further calls upon Israel immediately: (d) to ensure the immediate return of deported and transferred persons to their homes without any formalities the fulfillment of which would render their return impossible.

*Question of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East*, U.N. Comm'n on Hum. Rts., U.N. Doc. E/CN.4/RES/10 (1970). See also Resolution No. 6A (XXXI) (1975), reprinted in II UNITED NATIONS RESOLUTIONS ON PALESTINE AND THE ARAB-ISRAELI CONFLICT 1975-1981 207-09 (Regina S. Sherif ed., 1988) (“Reaffirms the inalienable right of the Arab people to return to their homes and property from which they have been displaced and uprooted and calls for their return”).

Under humanitarian law, codified in the Hague Regulations,<sup>359</sup> the Charter of the International Military Tribunal,<sup>360</sup> the Rome Statute of the International Criminal Court,<sup>361</sup> and the Fourth Geneva Convention,<sup>362</sup> there are very clear provisions prohibiting forcible expulsion and affirming that persons forced from their homes due to hostilities have the right to repatriate. Articles 45,<sup>363</sup> 49,<sup>364</sup> 134,<sup>365</sup> and 147<sup>366</sup> of the Fourth

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<sup>359</sup> Regulations Respecting the Laws and Customs of War on Land, art. 46(1), annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2 Am. J. Int'l L. Supp. 90 (1908) [hereinafter Hague Regulations].

<sup>360</sup> See Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279, at art. 6 (explaining "crimes against peace" in 6(a), discussing "war crimes" in 6(b), and describing "crimes against humanity" in 6(c)). "War Crimes" under article 6(b) include "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory . . ." "Crimes Against Humanity" under article 6(c) include: "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war."

<sup>361</sup> The Rome Statute classifies deportation or forcible transfer of civilians as a crime against humanity when committed as part of a systematic attack against civilian populations. It classifies the following as war crimes: "unlawful deportation or transfer. . ."; "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory"; "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand . . ." Rome Statute of the International Criminal Court, arts. 7-8, U.N. DOC. A/CONF/183/9 (1998), 37 I.L.M. 999.

<sup>362</sup> See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

<sup>363</sup> "Protected persons shall not be transferred to a Power which is not a party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities." *Id.* at art. 45.

<sup>364</sup> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased." *Id.* at art. 49.

<sup>365</sup> "The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation." *Id.* at art. 134.

<sup>366</sup> Article 147 classifies as "grave breaches . . . those involving the following acts, if committed against persons or property protected by the present Convention: . . .

Geneva Convention expressly prohibit expulsion and require return of any persons leaving areas of conflict, whether forcibly or otherwise. These principles are extended to non-international armed conflict situations under Protocol II of the Fourth Geneva Convention.<sup>367</sup>

The right of return is, thus, fundamental to the rights framework established through the interrelated provisions and mandates of the UNCCP, UNHCR, UNRWA, and the Refugee and Stateless Conventions for the benefit of Palestinians as refugees and stateless persons. Accurately interpreted, the regime of UNCCP, UNRWA, and article 1D of the Refugee Convention was designed to guarantee that Palestinian refugees would at all times receive both protection and assistance, whether from the two other U.N. agencies, or from UNHCR (preferably in combination with UNRWA). Article 1D of the Refugee Convention was meant to ensure that if the twin agency regime of UNRWA/UNCCP were to fail in either of its functions, the Refugee Convention would automatically cover Palestinian refugees as an entire group or category, without the necessity of applying the individualized definition of refugee in article IA(2). Since the Refugee Convention only obliges states to respect the principle of *non-refoulement*, states are free to grant refugees any additional status they choose, whether asylum, temporary protection, or some other form of more permanent status.

However, article 1D mandates that in the Palestinian case, states must grant “*the benefits of [the] Convention*” to these refugees pending “*the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.*”<sup>368</sup> This language has several implications. First, once article 1D is triggered, states are required to grant Palestinian refugees protection, or “*the benefits of this Convention.*”<sup>369</sup> Second, states are required to grant protection to Palestinian refugees only until their position is settled

unlawful deportation or transfer . . . or a protected person . . . “*Id.* at art. 147. Grave breaches under the Four Geneva Conventions trigger international responsibility to remedy the breach and to try the transgressing state or authority for criminal acts in any state jurisdiction. *Id.* at arts. 146, 148.

<sup>367</sup> Article 17 of Protocol II reads:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art. 17, 1125 U.N.T.S. at 609.

<sup>368</sup> See Refugee Convention, *supra* note 7, art. 1D, 189 U.N.T.S. at 156 (emphasis added).

<sup>369</sup> *Id.*

according to the relevant U.N. resolutions. The relevant resolutions clearly center on U.N. General Assembly Resolution 194(III), which embodies the consensus of refugee repatriation and compensation. This is primarily because the drafting history of article ID makes clear that the drafters intended to create—and did create—the special protection regime with an agreed upon durable solution, and mandated both a primary and an alternative body to bring about that solution, the UNCCP and UNHCR.<sup>370</sup> Third, such protection should be consistent with the international legal rights of refugees both to return to their places of origin and to choose the appropriate solution for their plight.<sup>371</sup>

States, then, are obligated to extend protection to Palestinians until a comprehensive durable solution is found under the framework of U.N. General Assembly Resolution 194 and the body of law it codifies. Such protection need only be temporary and consistent with the Refugee Convention regime that places no greater burden on a state than *non-refoulement* over time. The obligation to provide protection may be affected by the article IC cessation clauses and the article 1E exclusion clause, as there is no evidence that they are inapplicable to Palestinians brought under Convention coverage by article 1D.<sup>372</sup> The following three subsections of article IC are arguably relevant to the Palestinian case: article 1C(3),<sup>373</sup> article IC(5), and article IC(6).<sup>374</sup> However, although these

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<sup>370</sup> See TAKKENBERG, *supra* note 98, at 65-67; Akram & Rempel, *supra* note 243, at 31-36.

<sup>371</sup> See Akram & Rempel, *supra* note 243, at 45-65.

<sup>372</sup> See TAKKENBERG, *supra* note 98, at 128. Similarly, Palestinians seeking refugee status would be subject to the exclusion clauses found in article 1F. Discussion of this issue is beyond the scope of this paper, and not directly relevant to the argument for temporary protection.

<sup>373</sup> Article 1C(3) states that the Refugee Convention ceases to apply if a refugee "has acquired a new nationality, and enjoys the protection of the country of his new nationality." See Refugee Convention, *supra* note 7, art. 1C(3), 189 U.N.T.S. at 154. Nevertheless, for consideration of the applicability of the cessation clauses in general, as discussed below, many Palestinian refugees who were born or lived in Jordan have been able to acquire Jordanian citizenship under the Jordanian Nationality Law of 1954. Palestinian refugees have also obtained citizenship in limited numbers in Iraq, Kuwait, Lebanon, Syria, Saudi Arabia and a few other states in the Arabian Gulf. See TAKKENBERG, *supra* note 98, at 149-71. Far greater numbers of Palestinians in the Arab states have a wide range of identity, travel and other documents, including 'temporary passports', which do not grant them either residence or citizenship. In examining whether grants of citizenship in these states triggers article 1C(3), both factors of acquiring nationality, and enjoying the protection of the new state must exist. On the acquisition of nationality, the UNHCR Handbook makes clear that possession of a passport creates a prima facie presumption of nationality, but that a person claiming not to have nationality "must substantiate his claim, for example, by showing that the passport is a so-called "passport of convenience." See UNHCR HANDBOOK, *supra* note 37, at para. 19. Many of those Palestinians carrying passports of their countries of habitual residence are not considered citizens with rights equal to



non-Palestinian nationals. For example, Jordan has issued both passports and 'residence cards' for time-limited periods. Jordan has also withdrawn grants of citizenship to groups of Palestinians in the past. See *infra* note 577. On the enjoyment of protection of the new country of nationality, three points are important for analyzing article 1C(3). First, the Arab states never intended to permanently resettle the Palestinians in their territories. It was the Arab states delegates that introduced both amendments that became article 1D in the Refugee Convention. The Arab states conceded to establishing Palestinian refugee camps in their territories as a temporary measure. This was consistent with their policy of not prejudicing the Palestinians' demands to return, and with the many U.N. Resolutions reaffirming the Palestinians' right to return, restitution and compensation. See *supra* notes 310-320 and accompanying text. Second, the Arab states entered into a series of agreement and issued domestic legislation as a result of League of Arab States Council Resolutions making clear that their grants of travel, work and identity documents to Palestinians were not intended as grants of citizenship, nationality or permanent status. See *supra* notes 95-105 and accompanying text. Third, the lack of effective protection by the Arab states has meant both discriminatory laws and regulations affecting Palestinians' fundamental rights as well as extreme vulnerability to persecution by both state and non-state actors. See *supra* notes 516-551 and accompanying text. For example, between 800 and 3000 Palestinian refugees were massacred in Lebanon by Lebanese Christian Phalangist militia in 1982 while Israeli soldiers stood by. For a description of this event, see International Campaign for Justice for the Victims of Sabra and Shatila, *The Sabra and Shatila Massacre*, <http://www.indictsharon.net> (last visited Apr. 30, 2004). See also Reuters, *Beirut Palestinians Recall Sabra, Shatila Massacre* (Sept. 16, 2000), available at <http://www.cnn.com/2000/WORLD/meast/09/16/palestinians.anniversary.reut/> (last visited Mar. 8, 2003); LIBRARY OF CONGRESS, ISRAEL: A COUNTRY STUDY 265 (Helen Metz ed., 1990) (describing the "Black September" massacre in Jordan). For accounts of Israeli invasions and military operations in Lebanon, see Human Rights Watch, Israel/Lebanon, "*Operation Grapes of Wrath*" *The Civilian Victims*, Human Rights Watch Publications Vol. 9, No. 8 (1997), <http://www.hrw.org/reports/1997/isrleb/> (last visited Mar. 8, 2003) (detailing a deadly campaign by Israel to forcibly displace the civilians in South Lebanon in 1996 and describing the massacre at Qana, where the IDF slaughtered civilian refugees, then dropped crater bombs to destroy roads leading to the camps of the victims, severely hindering humanitarian assistance).

<sup>374</sup> Articles 1C(5) and (6), are considered together because they both refer to the effects of changed circumstances in the country from which the person has fled claiming persecution, 1C(5) referring to persons with a nationality, and 1C(6) referring to persons who are stateless. Both require cessation of Convention coverage if circumstances have changed in the state of claimed persecution such that there is no longer a basis of persecution. See Refugee Convention, *supra* note 7, arts. 1C(5)-(6), 189 U.N.T.S. at 154. These changed circumstances provisions are applied much more frequently under the Refugee Convention than the 'voluntary re-availment' provisions discussed above. See Sopf, *supra* note 35, at 127, 151. Under current interpretations and applications of article 1A(2) and article 1D to Palestinians, these clauses would apply to individual Palestinian asylum applicants claiming persecution from any state of last residence when conditions changed such that a persecution claim was no longer viable. See *supra* note 239. However, as discussed above, the authors contend that these interpretations are incorrect, and article 1D requires prima

provisions may be applicable to Palestinians seeking asylum, subject to appropriate interpretation under the second sentence of article 1D,<sup>375</sup> they are not necessarily applicable to considerations of a grant of temporary protection—as reflected by state practice through existing temporary protection models.<sup>376</sup> In other words, the language of article 1D provides a separate “cessation clause” for Palestinians it covers that alters the time when Refugee Convention protection terminates. We propose a harmonized temporary protection program that is directly connected to a comprehensive durable solution based on the legal principles of return, restitution, and compensation through shared state responsibility. With such a program, cessation will be clearly defined by the existence of a comprehensive peace plan based on these principles,<sup>377</sup> and temporary protection in the meantime will be granted on a *prima facie* basis without necessity for individual asylum status determinations.

The exclusion clause of article 1E may preclude Palestinians from coverage under the Refugee Convention. Article 1E excludes from the Convention anyone who has “the rights and obligations attached to the possession of nationality of the country of residence.”<sup>378</sup> Article 1E indicates that protection under the Convention is not called for where something approaching national protection is otherwise available.<sup>379</sup> Article

*facie* refugee recognition for all Palestinian refugees and stateless persons, subject to the limitations of article 1E, without the individualized persecution assessment of article 1A(2). Moreover, a temporary protection regime that is consistent with article 1D requires that the TP status be terminated only when a comprehensive and durable solution is found for the Palestinian refugee situation. Changed circumstances for an individual Palestinian *vis-à-vis* a state of last habitual residence should be irrelevant to cessation of TP status in the context of the protection offered under article 1D. See Akram & Rempel, *supra* note 243, at 45-65.

<sup>375</sup> The cessation clauses are restrictive, and accurate interpretation is essential given the complexities of the Palestinian situation. See UNHCR HANDBOOK, *supra* note 37, at para. 116 (stating the cessation clauses are “negative in character and are exhaustively enumerate. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status”). See TAKKENBERG, *supra* note 98, at 127-30, for an overview of the issues arising from articles 1C and 1E relating to the Palestinians.

<sup>376</sup> State practice shows that most states rarely terminate grants of asylum or refugee status based on these provisions, so the cessation clauses are marginally relevant to a discussion of a grant of temporary protection consistent with the Refugee Convention. See Sopf, *supra* note 35, at 127, 151.

<sup>377</sup> The optimal framework for a just and durable solution as part of a comprehensive Israeli-Palestinian-Arab peace plan, consistent with the principles articulated in this paper, are beyond the scope of this discussion, although the authors make reference here to the basic outlines of a necessary framework on the refugee issue. See *infra* notes 614-85 and accompanying text.

<sup>378</sup> Refugee Convention, *supra* note 7, art 1E, 189 U.N.T.S. at 156.

<sup>379</sup> The Convention drafters intended this clause to exclude refugees of German extraction who arrived in the Federal Republic of Germany and were recognized

1E is also intended to be strictly interpreted.<sup>380</sup> In order to be excludable under article 1E, a person must be granted a status which in no respect is inferior to that of a 1951 Refugee Convention “refugee.” Otherwise, the provision may be open to abuse.<sup>381</sup>

Regardless of the interpretation of the article 1C, 1E and 1F cessation and exclusion clauses vis-à-vis Palestinian refugees, their application does not affect the independent mandate of UNHCR toward refugees or persons of concern to that body. Thus, even if Palestinian refugees are denied Refugee Convention or Stateless Convention coverage, they should be eligible for UNHCR protection concerning durable solutions if the General Assembly extends UNHCR’s mandate toward them.<sup>382</sup> Furthermore, Palestinian claims to restitution, compensation for damages and loss of property,<sup>383</sup> and reparations for war crimes and crimes against

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there as having the rights and obligations of German nationals. See Akram & Goodwin-Gill, *supra* note 244, at 65 n.295.

<sup>380</sup> See TAKKENBERG, *supra* note 98, at 130 (citing GRAHL-MADSEN, *supra* note 2, at 270).

<sup>381</sup> GRAHL-MADSEN, *supra* note 2, at 270. Thus, in situations where Palestinians have been given rights of residency, or some form of protection in other states, such rights must be compared with whether they guarantee all the rights the Refugee Convention guarantees to other refugees. As discussed below, Palestinians have benefited from generous laws in Jordan and Syria, which in many ways places them on similar footing to the nationals of those countries. Even in Syria, however, Palestinians do not have the right to vote, to buy most kinds of property, and the right to own more than a single residence. In recognition of the Syrian position towards the solution of the Palestinian refugee question—consistent with the unified position of the Arab states—they are not considered Syrian nationals by the “competent authorities” of the state. They cannot hold Syrian passports, and are issued Palestinian travel documents. See *infra* notes 519-37 and accompanying text.

<sup>382</sup> Currently, the UNHCR Statute precludes extending UNHCR’s mandate towards Palestinian refugees. See UNHCR Statute, *supra* note 9, at par. 7(c). However, UNHCR has extended de facto protection activities towards Palestinians outside UNRWA territories, and the General Assembly has authority to extend UNHCR protection towards persons ‘of concern,’ as it has done in numerous other refugee and refugee-like situations. See Akram & Rempel, *supra* note 243, at 13-14. Moreover, UNHCR’s recently-issued Note on the Interpretation of Article 1D to amend its Handbook, explicitly recognizes the necessity of extending UNHCR protection to this refugee population. See NOTE ON ARTICLE 1D, *supra* note 250.

<sup>383</sup> Provisions in human rights instruments to which Israel is a party expressly protect the right to property, and to restitution of wrongfully confiscated property. See CERD, *supra* note 69, art. 5(d)(v), 660 U.N.T.S. at 220 (protecting the right to property); ICESCR, *supra* note 67, art. 2(2), 993 U.N.T.S. at 5 (prohibiting discrimination in property rights and the right to means of subsistence); ICESCR, *supra* note 67, art. 11(1), 993 U.N.T.S. at 7 (protecting the right to adequate housing and prohibiting illegal government interference in rights to one’s housing). See also *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. ESCOR

humanity,<sup>384</sup> remain independently grounded in general international law, humanitarian, and human rights law principles regardless of any specific refugee law provisions or state practice.<sup>385</sup>

#### IV. THE EXISTING REGIONAL APPROACH TO TEMPORARY PROTECTION, ITS FAILURES, AND PRINCIPLES NECESSARY FOR A RIGHTS-BASED FRAMEWORK

Temporary protection, granted by states toward persons who may or may not fall within the 1951 Refugee Convention definition but are deserving of international protection, although relatively recent in terms of a recognized or formalized status, is not a new concept. It has precedents in temporary refuge, or safe haven, and has been extended in response to large-scale humanitarian emergencies such as in Southeast Asia, where surrounding states accepted, on a de facto basis, the presence of thousands of Vietnamese and Cambodians fleeing conflict,<sup>386</sup> in Paki-

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Comm'n on Hum. Rts., 56th Sess., Annex, Provisional Agenda Item 11(d), U.N. Doc. E/CN.4/2000/62 (2000) (affirming the right to restitution). Under article 21, states must provide victims the following: "restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition." *Id.* Under article 22, restitution must include "restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property." *Id.* Under customary international law, property rights are also of a fundamental character. See UDHR, *supra* note 287, at art. 17; CERD, *supra* note 69, art. 5(d)(v), 660 U.N.T.S. at 220; American Convention of Human Rights, *supra* note 320, at art. 21; African Charter, *supra* note 321, arts. 14, 21(a), 21 I.L.M. at 61-62; ECHR, *supra* note 72, art. 1. Humanitarian law also protects the right to property and restitution. See Hague Regulations, *supra* note 359, at arts. 23, 25, 28; Geneva Convention IV, *supra* note 362, arts. 33, 53, 147, 75 U.N.T.S. at 308-10, 322, 388 (defining as "grave breaches" the "destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly"). For a detailed review of the human rights, humanitarian, and general international law bases of property restitution and compensation, see Akram & Rempel, *supra* note 243, at 48-52.

<sup>384</sup> See *supra* note 217.

<sup>385</sup> Provisions implementing restitution of refugee property have been implemented in most major peace agreements incorporating durable solutions in the last 20 years. See, e.g., the Dayton Peace Accord, *supra* note 262, annex 7, 35 I.L.M. at 136 (providing that refugees "shall have the right to have restored to them property of which they were deprived in the course of hostilities. . . and to be compensated for any property that cannot be restored to them"); General Peace Agreement for Mozambique, *supra* note 340, at protocol III, art. I (providing that "Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it."). For additional examples, see Akram & Rempel, *supra* note 243, at 53-55.

<sup>386</sup> See UNHCR, THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION, 80-103 (2000) [hereinafter HUMANITARIAN ACTION].

stan and Iran which accepted approximately six million Afghan refugees while war raged in their home country;<sup>387</sup> and in Mexico and Honduras, which temporarily admitted hundreds of thousands of refugees from civil war in El Salvador and Guatemala.<sup>388</sup> Africa presents a compelling regional model for temporary protection, as it incorporates a *prima facie*, or group determination, refugee status for persons not meeting the Refugee Convention definition, which does not necessarily create an obligation on the state to grant asylum. The 1969 OAU Convention incorporates a provision for temporary protection, stating: "Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his re-settlement . . . ."<sup>389</sup> The OAU Convention expressly authorizes states to grant either asylum or temporary status if an individual or a group meets the Refugee Convention or a broader definition of refugee.<sup>390</sup> In the throes of decolonization and wars of independence creating large refugee movements,<sup>391</sup> African states took the initiative to re-examine the realities of refugee flows in their territories and drafted an instrument that incorporated both the Refugee Convention definition (without the geographic and temporal limitations), and a much broader definition of refugee. Article I(1) of the OAU Convention states the Refugee Convention article 1A(2) definition, and then provides in article I(2):

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual

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<sup>387</sup> *Id.* at 115-21.

<sup>388</sup> *Id.* at 121-31.

<sup>389</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, *entered into force* June 20, 1974, art. II(5), 1001 U.N.T.S. 45, 48 [hereinafter OAU Refugee Convention].

<sup>390</sup> All but four of the African states were party to the Convention as of June 24, 2002. See Refugee Convention, *supra* note 7, 189 U.N.T.S. at 137. The nonsignatories to the Refugee Convention are Libya, Eritrea, Comoros, and Mauritius. *Id.*

<sup>391</sup> The OAU Refugee Convention was drafted in response to the refugee crisis created all over Africa by wars of independence, and ethnic conflicts following decolonization. By 1965, there were approximately 850,000 refugees in Africa, the numbers were growing rapidly, and it was quickly apparent that the Refugee Convention did not apply to the majority of them. See HUMANITARIAN ACTION, *supra* note 386, at 52. Until the adoption of the Refugee Protocol in 1967, the Refugee Convention covered only those persons who were refugees before January 1, 1951, and in many states, also covered only European refugees. According to the UNHCR, the Refugee Convention did not apply to the majority of refugees the agency was assisting by the mid-1960's. *Id.* at 53.

residence in order to seek refuge in another place outside his country of origin or nationality . . . .<sup>392</sup>

This *prima facie* definition encompasses both groups and individuals, in stark contrast to the individualized definition of the Refugee Convention. The OAU Refugee Convention also incorporates a number of other significant departures from the Refugee Convention. It clarifies and strengthens the *non-refoulement* obligation:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.<sup>393</sup>

It incorporates an obligation of shared responsibility among member states by providing:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States *shall* in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden on the Member State granting asylum. . . .<sup>394</sup>

It also incorporates, for the first time in an international convention, the principle of voluntary repatriation, stating: "The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will . . . ."<sup>395</sup> Finally, although it does not incorporate any obligation to grant asylum, it encourages member states to "use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."<sup>396</sup> Africa continues to bear a large percent-

<sup>392</sup> See OAU Refugee Convention, *supra* note 389, art. I(2), 1001 U.N.T.S. at 47.

<sup>393</sup> *Id.*, art. II(3), 1001 U.N.T.S. at 48.

<sup>394</sup> *Id.*, art. II(4), 1001 U.N.T.S. at 48 (emphasis added). This language contrasts strikingly with the non-obligatory burden-sharing provision found in the preamble of the Refugee Convention. See Refugee Convention, *supra* note 7, pmbl., 189 U.N.T.S. at 150-52.

<sup>395</sup> OAU Refugee Convention, *supra* note 389, art. V(1), 1001 U.N.T.S. at 49. See also HUMANITARIAN ACTION, *supra* note 386, at 57.

<sup>396</sup> OAU Refugee Convention, *supra* note 389, art. II(1), 1001 U.N.T.S. at 48. See also HUMANITARIAN ACTION, *supra* note 386, at 57.

age of the world's refugee flows and,<sup>397</sup> until recently, managed to be surprisingly generous given its relative paucity of resources.<sup>398</sup>

Armed conflicts in Central America caused mass refugee flows throughout the region in the 1980s. Like Africa, the Central American states responded by drafting a broader refugee definition for the region, calling on states to provide protection not only to those meeting the Refugee Convention, but also to "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."<sup>399</sup> The Cartagena Declaration has found wide approval,<sup>400</sup> and has been incorporated in the domestic laws or policies of several states in the region,<sup>401</sup> but has yet to be formally codified in a regional instrument.<sup>402</sup>

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<sup>397</sup> UNHCR's figures reflect that Africa and Asia host the largest absolute numbers of refugees (and persons of concern), and the largest percentages of the world's refugee populations. See HUMANITARIAN ACTION, *supra* note 386, at 310. Africa and Asia together host more than half of the entire world's refugee and "refugee-like" populations. *Id.* For a detailed breakdown of UNHCR refugee statistics, see HUMANITARIAN ACTION, *supra* note 386, at 301-25; see also Press Release, UNHCR, Poor Countries Host Most Refugees; Rich countries Should Share Burden, Says New UNHCR Statistics Book (Nov. 8, 2002) (on file with author) (stating that "most (refugees) are concentrated in developing countries. . . . The fact that seven out of ten refugees are hosted by low-income countries underscores the responsibility of industrialized states to share in international refugee protection").

<sup>398</sup> From the 1960's to the 1980's, Africa was considered a region where refugees were treated with remarkable generosity. African governments permitted large numbers of refugees to reside—some for long periods—on their territories. Large numbers of refugees had secure living conditions, and were provided land and resources for self-sufficiency. Many benefited from generous standards of social, economic, and legal rights, and many were able to reside permanently and obtain citizenship in host states. Moreover, there was broad respect for *non-refoulement*, and voluntary repatriation was the norm. See JEFF CRISP, AFRICA'S REFUGEES: PATTERNS, PROBLEMS AND POLICY CHALLENGES 4 (2000).

<sup>399</sup> *Cartagena Declaration on Refugees*, in 2 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS: REGIONAL INSTRUMENTS 206 (1995).

<sup>400</sup> The Inter-American Commission on Human Rights and the OAS General Assembly have recommended the expanded definition for use in the region. See Annual Report of the Inter-American Commission on Human Rights 1984-1985, OEA/Ser.L/II.66, doc.10, rev. 1, at 190-93 (1985).

<sup>401</sup> For a review of states' actions adopting the Declaration, see generally Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185 (1991).

<sup>402</sup> *Id.*

In 1980 and 1981, the ExCom issued two conclusions concerning temporary protection in situations of large-scale refugee influx.<sup>403</sup> These conclusions recommended, in relevant part:

In the case of large-scale influx, persons seeking asylum should always receive at least temporary protection; and . . . States which, because of their geographical situation or otherwise, are faced with a large-scale influx, should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing.<sup>404</sup>

The UNHCR's proposals that states should grant temporary refuge or temporary protection, pending durable solutions for refugees found in their territories, evolved into various temporary protection statuses under state domestic legislation.

In Europe, temporary protection was instituted in the early 1990s as a widespread European response to the more than two million refugees flooding Europe from the Yugoslav Republics due to the conflict in the Balkans.<sup>405</sup> European practice for dealing with large groups of refugees who either did not fit the Refugee Convention definition or were not perceived as meriting asylum or long-term status was to grant various kinds of temporary statuses: *Duldung*, or tolerated residence in Germany;<sup>406</sup> Exceptional Leave to Remain in the United Kingdom;<sup>407</sup> Provisional Permission to Remain in the Netherlands;<sup>408</sup> or "B" or "F" temporary residence status in other parts of Europe.<sup>409</sup>

<sup>403</sup> UNHCR, Executive Committee, *Conclusion on Temporary Refuge*, No. 19 (XXXI) (1980) [hereinafter *Conclusion on Temporary Refuge*]; UNHCR, Executive Committee, *Conclusion on the Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (XXXII) (1981).

<sup>404</sup> See *Conclusion on Temporary Refuge*, *supra* note 403, at para (b)(i-ii).

<sup>405</sup> See HUMANITARIAN ACTION, *supra* note 386, at 165. See also Matthew J. Gibney, *Between Control and Humanitarianism: Temporary Protection in Contemporary Europe*, 14 GEO. IMMIGR. L.J. 689 (2000).

<sup>406</sup> See Fitzpatrick, *Flight From Asylum*, *supra* note 47, at 49-50.

<sup>407</sup> See Johan Cels, *Responses of European States to De Facto Refugees*, in REFUGEES AND INTERNATIONAL RELATIONS 187, 192 (Gil Loescher & Laila Monahan eds., 1989) (describing temporary statuses offered *de facto* refugees in Europe before the 1990s).

<sup>408</sup> See Gibney, *supra* note 405, at 694; Karoline Kerber, *Temporary Protection on Germany: The Case of the Bosnians*, <http://www.uni-konstanz.de/FuF/ueberfak/fzaal/german/veranstaltungen/mm21/Kerber.html> (last visited June 15, 2003); JOANNE VAN-SELM THORBURN, REFUGEE PROTECTION: LESSONS OF THE YUGOSLAV CRISIS 198-200 (1998).

<sup>409</sup> See Fitzpatrick, *Flight from Asylum*, *supra* note 47, at 21 n.33.



As close to half a million Bosnians flooded into Europe<sup>410</sup> at the height of the harmonization and asylum restriction efforts,<sup>411</sup> the UNHCR sought to encourage appropriate humanitarian responses. It proposed temporary protection as a means by which European states could absorb the refugees in a manner that addressed their control and management concerns.<sup>412</sup> As the crisis continued, UNHCR, as well as European inter-governmental bodies, became increasingly concerned about inconsistent and highly discretionary policies of temporary protection, and initiated a series of proposals to harmonize temporary protection.<sup>413</sup> The UNHCR Executive Committee adopted a series of instruments establishing guidelines on temporary protection,<sup>414</sup> which European states considered as reference documents.<sup>415</sup>

The E.U. Immigration Ministers first responded to UNHCR's efforts and adopted the Conclusion on People Displaced by the Conflict in the Former Yugoslavia at their 1992 meeting in London.<sup>416</sup> This document listed those individuals who should receive protection on a priority basis and described the basic benefits states should offer such individuals until

<sup>410</sup> UNHCR, THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA 208-09 (1997) [hereinafter HUMANITARIAN AGENDA].

<sup>411</sup> See *infra* note 502 and accompanying text.

<sup>412</sup> HUMANITARIAN AGENDA, *supra* note 410, at 208.

<sup>413</sup> See U.N. High Comm'r for Refugees, ExCom, *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, U.N. Doc. EC/47/SC/CRP.27 (1997) [hereinafter *Progress Report*]; UNHCR, *Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia*, U.N. Doc. A/AC.96/830 (1994); Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 294.

<sup>414</sup> See U.N. High Comm'r for Refugees, Executive Committee, *International Protection in Mass Influx*, U.N. Doc. A/AC.96/850 (1995); U.N. High Comm'r for Refugees Executive Committee, *Conclusion on International Protection*, No. 85 (XLIX) (1998); U.N. High Comm'r for Refugees, Executive Committee, *General Conclusion on International Protection*, No. 71 (XLIV) (1993); *Conclusion on the Protection of Asylum-Seekers in Situations of Large-Scale Influx*, *supra* note 403; *Conclusion on Temporary Refuge*, *supra* note 403.

<sup>415</sup> See Commission Proposal for Council Directive, COM(00)303, at 251, 254 (describing minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof).

<sup>416</sup> Press Release 10518/92 (Presse 230), Council of the European Communities General Secretariat, Conclusion of the Meeting of the Ministers Responsible for Immigration, Annex IV: Conclusion on People Displaced by the Conflict in the Former Yugoslavia (Jan. 30, 1992), available at [http://aei.pitt.edu/archive/00001095/01/immigration\\_ministers.pdf](http://aei.pitt.edu/archive/00001095/01/immigration_ministers.pdf) (last visited May 18, 2004) (describing the meeting of Ministers Responsible for Immigration in London) [hereinafter *Conclusion on People Displaced*]; KALIN, TOWARDS A CONCEPT OF TEMPORARY PROTECTION 19 (1996); Sopf, *supra* note 35, at 130.

they could be repatriated in safety.<sup>417</sup> In June 1993, the Immigration Ministers passed a Resolution on temporary protection for "particularly vulnerable persons" from former Yugoslavia,<sup>418</sup> precipitating a policy change in a number of countries that had not yet offered temporary protection to former Yugoslav nationals.<sup>419</sup> Following the Immigration Ministers' Resolution, the E.U. Council and Commission adopted a series of instruments, first under the Maastricht Treaty<sup>420</sup> and later under the Treaty of Amsterdam,<sup>421</sup> moving toward a framework for joint decisions on temporary protection.<sup>422</sup>

The European Council adopted a series of Conclusions, Directives, and Joint actions from early 1999 to July 2001, including the following: conclu-

<sup>417</sup> *Conclusion on People Displaced*, *supra* note 416; *see also* Sopf, *supra* note 35, at 130.

<sup>418</sup> Council Resolution of 25 September 1995 on Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, 1995 O.J. (C 262) 1 [hereinafter Council Resolution of 25 September 1995] (citing Resolution on Certain Common Guidelines as Regards Admission of Particularly Vulnerable Groups of Distressed Persons from the Former Yugoslavia (1993), adopted at the Meeting of Ministers with Responsibility for Immigration in Copenhagen); Karoline Kerber, *Temporary Protection in the European Union: A Chronology*, 14 IMMIGR. L.J. 35, 43 (1999).

<sup>419</sup> Hailbronner, *supra* note 47, at 88.

<sup>420</sup> *See* Council Resolution of 25 September 1995, *supra* note 418 (discussing article K.1 of the E.U. Treaty); Council Decision of 4 March 1996 on an Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, 1996 O.J. (L63) 10 (discussing article K3(2)(a) of the E.U. Treaty).

<sup>421</sup> *See* Action Plan on Minimum Standards for Temporary Protection, 1999 O.J. (C 19) 20.1; *see also* Proposal to the Council for Joint Action based on article K 3(2)(b) of the Treaty on European Union Concerning Temporary Protection of Displaced Persons, COM (97) 93; COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, REPORT ON TEMPORARY PROTECTION OF PERSONS FORCED TO FLEE THEIR COUNTRIES 15-16 (1997). For an analysis of the European temporary protection harmonization process, *see* Caroline Kerber, *Temporary Protection: An Assessment of the Harmonization Policies of European Union Member States*, 9 INT'L J. REFUGEE L. 453, 455 (1997). *See also* Kerber, *supra* note 418, at 43 (discussing the proposal as amended in 1998).

<sup>422</sup> These proposals included definitions, standards, and policies for temporary protection regimes, including provisions for social security, housing, welfare benefits, education, asylum, residence permits, family reunification and employment. There was a great deal of support for the proposals within the E.U. bodies. *See* Commission Proposal for Council Directive Laying Down Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees, COM(01)510 final. However, no measures were adopted and the effort was superseded by action taken by the E.U. under the Treaty of Amsterdam in the face of a renewed refugee influx from Kosovo. *See* TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997 O.J. (C 340) (1997).

sions on displaced persons from Kosovo;<sup>423</sup> joint action to support assistance to displaced persons from Kosovo;<sup>424</sup> a proposal for a Council Directive on minimum standards;<sup>425</sup> and finally, a Council Directive that was issued on July 20, 2001 on minimum standards for temporary protection in the event of a mass influx.<sup>426</sup>

Since 1992, E.U. states have treated temporary protection as an urgent issue, and the E.U. bodies have paid significant attention to temporary protection.<sup>427</sup> Nevertheless, it has been difficult for E.U. member states to reach agreement on details of temporary protection, and the 2001 Council Directive provides only a very general outline of a temporary protection regime. Thus, although the 2001 Council Directive forms the “common basis” of the temporary protection regime in Europe, the actual elements are found in the intergovernmental decisions, the instruments mentioned above that have been reached at various levels during the Bosnian and Kosovar crises, and in the actual implementation of temporary protection within individual European states.<sup>428</sup>

<sup>423</sup> Kerber, *supra* note 418, at 41 (discussing Council of the European Union, Justice and Home Affairs, Conclusions on displaced Persons from Kosovo (1999)).

<sup>424</sup> Council on Establishing Projects and Measures to Provide Practical Support in Relation to the Reception and Voluntary Repatriation of Refugees, Displaced Persons and Asylum Seekers, Including Emergency Assistance to Persons Who Have fled as a Result of Recent Events in Kosovo, 1999 O.J. (L 114) 2 (adopting Common Position 1999/290/JHA, Joint Action of Apr. 26, 1999).

<sup>425</sup> Commission Proposal for Council Directive on Minimum Standards For Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing on the Consequences Thereof, 2000 O.J. (C 311E), COM (00) 303 (2000).

<sup>426</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212) 12 [hereinafter Council Directive].

<sup>427</sup> At the Tampere Summit in Finland in October 1999, the Council acknowledged that the E.U. must reach agreement on temporary protection on an urgent basis. European Council, Tampere European Council, Presidency Conclusions (1999), available at [http://europa.eu.int/council/off/conclu/oct99/oct99\\_en.htm](http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm) (last visited Mar. 9, 2003). See also Gibney, *supra* note 405, at 696.

<sup>428</sup> It is important to note that the Council Directive provides only minimum standards; thus, state policies and practices will remain decisive of the temporary protection status offered in any individual state, to the extent they are not inconsistent with the Directive or Council and Commission action taken under it. The Directive states: “It is in the very nature of minimum standards that member states have the power to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons.” See Council Directive, *supra* note 426, at preamble, para. 12. Moreover, state practices and policies prior to the passage of the Directive may change in accordance with the

Temporary Protected Status (“TPS”) in the United States as a defined legal status is also relatively recent. The United States has not experienced the overwhelming numbers of mass refugee flows such as those in Africa or Asia.<sup>429</sup> Nonetheless, in the last thirty years or so, thousands of individuals, many fleeing civil wars and armed conflict, have sought refuge in the United States. In response to large groups of refugees, or to those not precisely defined as “Convention refugees” (those fleeing war, natural disaster, or upheaval in their home states) the United States has devised various types of statuses to provide short-term protection.<sup>430</sup> From the early discretionary parole status offered to individuals fleeing communist countries,<sup>431</sup> to Extended Voluntary Departure (“EVD”) for groups of individuals from war-torn countries, the U.S. government granted temporary humanitarian protection for people not qualifying under the strict Refugee Convention definition.<sup>432</sup>

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Directive. “This Directive shall not apply to persons who have been accepted under temporary protection schemes prior to its entry in to force.” *Id.* at art. 3(4).

<sup>429</sup> For a comparison of regional distribution of refugees and persons of concern from 1950-1999, see generally HUMANITARIAN ACTION, *supra* note 386, at 310, annex 3 (comparing refugee distribution in 1989: North America, 543,200; Africa 4,811,600; Asia, 6,819,100; and Europe, 1,213,300; with refugee distribution in 1999: North America, 649,600; Africa, 3,523,100; Asia, 4,781,800, and Europe, 2,167,700).

<sup>430</sup> Martin et al., *supra* note 47, at 548. Two additional mechanisms exist in U.S. policy to provide short-term non-Refugee Convention humanitarian protection, pre-dating TPS: Deferred Enforced Departure (DED) and nonenforcement of deportation. *Id.* at 551-52. President Bush created the DED designation to prevent removal of Chinese nationals during the crackdown on the student democracy movement in 1989, and then issued an Executive Order incorporating DED on April 11, 1990. *Id.* at 550-51. DED was resurrected for Salvadorans in June 1992, and extended through 1995. *Id.* at 551. Nonenforcement of deportation is simply a discretionary decision not to act on final orders of deportation. *Id.* at 551-52. Although it has meant that thousands of people have not been forcibly removed despite final deportation orders, it has been used sporadically and more for political expedience than for humanitarian reasons. See 1990 Stat. Y.B. of the INS 173; 1995 Stat. Y.B. of the INS at 77, 86-87. Neither DED nor nonenforcement of deportation provides any reliable mechanism for temporary protection.

<sup>431</sup> Colleen V. Thouez, *New Directions in Refugee Protection*, 22 FLETCHER F. WORLD AFFAIRS 89, 99 (1998). For a discussion on early forms of temporary protection statuses, see Martin et al, *supra* note 47.

<sup>432</sup> EVD was granted at the discretion of the Attorney General to groups of people from particular countries where civil strife made it difficult for them to return. Between 1960 and 1990, EVD was granted to Ethiopians, Ugandans, Iranians, Nicaraguans, Afghans, Poles, and Lebanese. See BILL FRELICK & BARBARA WISCHERMANN, U.S. COMMITTEE FOR REFUGEES, FILLING THE GAP: TEMPORARY PROTECTED STATUS 11-12, 28 (1994); Martin et al., *supra* note 47, at 547.

Temporary Protected Status was finally incorporated as a distinct legal remedy in the Immigration Act of 1990 ("IMMACT 90").<sup>433</sup> Congress passed TPS specifically in response to the pressure of thousands of civil war refugees from El Salvador, in the face of mounting criticism of politically-biased refugee determinations that made it practically impossible for Salvadoran claims to succeed,<sup>434</sup> and after failed efforts to require the Executive Branch to extend EVD to Salvadorans.<sup>435</sup>

Thus, temporary protection has emerged in the 1980s and 1990s as a regionally-specific approach to the problems of mass influx and non-Convention refugees. The common elements and significant differences in three main regions—Europe, the United States, and Africa—will be examined to determine useful parameters for a temporary protection model. A number of different regional temporary protection situations will then be used as illustrations of *failure to be avoided* in, and *principles to be applied* to, the Palestinian refugee case. A detailed discussion of the temporary protection type statuses granted Palestinians in the Arab world then follows in Part V.

#### A. *Elements of Three Temporary Protection Models: Europe, the United States, and Africa*

The main elements of each of the temporary protection regimes, whether in regional or domestic instruments, intergovernmental discussions, or state implementation, address the following questions: (1) Which individuals are to be covered by temporary protection?; (2) What will be the duration of temporary protection status and what measures will be taken at the cessation of status?; and (3) What standards of treatment are to be afforded temporary protection applicants? Very general comparisons can be drawn in the approach to these questions among the three regions.

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<sup>433</sup> Immigration and Nationality Act of 1952, ch. 477, 244(b)(1), 66 Stat. 163, 216 (1952), *amended by* Immigration Act of 1990, Pub. L. No. 101-649, 302(a), 104 Stat. 4978 [hereinafter INA].

<sup>434</sup> Salvadoran and Guatemalan asylum-seekers sued the Attorney General for politically biased asylum determinations that systematically disfavored their claims. *See American Baptist Churches v. Thronburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). Numerous commentators have criticized U.S. asylum and refugee policy as being primarily driven by foreign policy and domestic political pressures. *See, e.g.,* NORMAN ZUCKER & NAOMI ZUCKER, *DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA* (1996) (comparing differential treatment of Cuban and Haitian refugees); T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 1162-67 (4th ed. 1998) (comparing treatment of Salvadorans to Nicaraguans, and Haitians to Cubans); Kevin R. Johnson, *Comparative Racialization: Culture and National Origin in the Latino Communities*, 78 *DENV. U. L. REV.* 633 (2001) (comparing different types of "racialization" of immigrant groups, and the effect on immigration law and policies).

<sup>435</sup> *See* Martin et al., *supra* note 47, at 550.

## 1. Which individuals are to be covered by temporary protection?

In terms of who is to be covered by temporary protection, the European approach focuses on addressing cases of mass influx. In its June 1998 draft proposal to the E.U. on temporary protection, the European Commission defined the intended beneficiaries as third country nationals or stateless persons outside their country of residence who could not return in safety and dignity. The proposal singled out as temporary protection beneficiaries: persons who had fled armed conflict or persistent violence; persons at serious risk of being subject to systematic or widespread human rights abuses; and people forced from their place of origin by campaigns of ethnic or religious persecution.<sup>436</sup>

The Council Directive of July 2001 gives little guidance on beneficiaries of temporary protection, but provides some basic definitions. It defines temporary protection as, "a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin."<sup>437</sup> It further defines displaced persons as:

[t]hird-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organizations, and are unable to return in safe and durable conditions because of the situation prevailing in that country . . . [and] in particular: persons who have fled areas of armed conflict or endemic violence; . . . persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights.<sup>438</sup>

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<sup>436</sup> Amended Proposal for a Joint Action Concerning Temporary Protection of Displaced Persons, COM (98) 372 final at art. 1(b) [hereinafter Amended Proposal]. The Amended Proposal also suggested that based on E.U. practice, the following groups should be included in a formalized temporary protection model: persons fleeing international or internal armed conflict facing serious risks to their lives, physical integrity, and liberty if forced to return to their state of origin; persons facing such risks due to internal strife or communal violence; persons fleeing genocidal violence or similarly grave harm at the hands of non-state actors; and persons fleeing severe natural disasters threatening their physical safety. *Id.* at art. 1(b)-(c). A Resolution passed by the Immigration Ministers in June 1993 defined those to whom temporary protection would apply as including persons who were in internment camps; the seriously injured or ill; those subjected to sexual assault; and persons from combat zones who could not return because of conflict or serious human rights abuses. *See supra* note 418. *See also* Hailbronner, *supra* note 47, at 86-87. UNHCR adopted this as a *Resolution for Common Guidelines on Admitting Particularly Vulnerable People from the Former Yugoslavia*. *See* ELSPETH GUILD, *THE DEVELOPING IMMIGRATION AND ASYLUM POLICIES OF THE EUROPEAN UNION: ADOPTED CONVENTIONS, RESOLUTIONS, RECOMMENDATIONS, DECISIONS AND CONCLUSIONS* 293-309 (1996); Sopf, *supra* note 35, at 130.

<sup>437</sup> *See* Council Directive, *supra* note 426, at art. 2(a).

<sup>438</sup> *Id.* at art. 2(c)(i), (ii).

Various kinds of temporary statuses were either instituted or renewed to provide temporary protection to Bosnians in Europe. Between 1991 and 1995, when the Dayton Accords were signed, five states hosted the largest numbers of Bosnian refugees fleeing ethnic cleansing and large-scale persecution in the breakup of the former Republic of Yugoslavia.<sup>439</sup> Between 1990 and 1999, there were 1,044,000 asylum-seekers from all territories of the former Yugoslavia in Western European states.<sup>440</sup> European states' definitions of individuals or categories benefiting from the various temporary protection statuses ranged from broad definitions such as "citizens of Bosnia and Herzegovina who had to leave their country of origin due to armed conflict . . ."<sup>441</sup> to very specific groups or individuals

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<sup>439</sup> Of the half-million Bosnian refugees in Europe, Germany extended temporary protection to 342,500; Austria, 88,609; Sweden, 60,671; Netherlands, 25,000; and Denmark, 21,458. Total recorded population of Bosnians in the E.U. is 584,017, as of August 1997. Khalid Koser et al., *Temporary Protection and the Assisted Return of Refugees from the European Union*, 10 INT'L J. REFUGEE L. 444, 447 (1998).

<sup>440</sup> HUMANITARIAN ACTION, *supra* note 386, at annex 10, 325.

<sup>441</sup> Humanitarian Issues Working Group of the International Conference on the Former Yugoslavia, Survey on the Implementation of Temporary Protection (1995) (survey on temporary protection) (on file with author). Austria passed a temporary protection law in July 1993, which broadly applied to "citizens of Bosnia and Herzegovina who had to leave their country of origin due to armed conflict, who did not find protection elsewhere, and who entered Austria before 1 July 1993 . . . ." Temporary protection was also granted to Bosnians entering after July 1, 1993, but on the condition that they presented themselves at an official border crossing, and were allowed entry. There is no particular temporary protection eligibility procedure, as the criteria are simply place of origin, entry date, and manner of entry into Austria. Temporary protection recipients may separately file for asylum. *Id.* (discussing Austria). Slightly more complicated than Austria's provisions, Belgium's Aliens Act of 1980 was amended in 1993 to incorporate a temporary protection scheme (displaced persons' status) with two additional policy changes. Beneficiaries of the temporary protection status are identified as persons from the former Yugoslavia of any nationality present in Belgium since 1991. Under the first policy change of 1992, this group was identified as persons coming from a combat zone or belonging to a threatened religious or ethnic minority, as well as conscientious objectors and draft-evaders. The second policy change, the Minister of Interior Note of September 1993, listed additional cumulative criteria granting "displaced persons' status" to Bosnian Muslims who have "fled their area of origin for reasons other than those foreseen in article 1A(2) of the [Refugee Convention] and who could not remain in their area of origin because of the prevailing dangerous situation there." The policy excluded Kosovars, FYR Macedonians and Croatians from the temporary protection scheme, requiring instead that they apply for refugee status. *Id.* (discussing Belgium). Denmark's Special Law of November 1992 granted temporary residence permits to three categories of persons: (1) former Yugoslavians who needed urgent medical or other treatment that was not available to them, who would be brought in by agreement between Denmark and UNHCR; (2) former Yugoslavians arriving in Denmark who fled due to war or similar disturbance and need temporary protection and who have asylum applications pending; and (3) former Yugoslav nationals still in

for whom temporary protection took different forms depending on which category applied.<sup>442</sup>

In the United States, TPS is clearly not a response to mass influx, but is granted to individuals from specific groups designated for the status, at the discretion of the Attorney General, who come from one of the following situations: (1) ongoing armed conflict, which poses a serious threat to life or safety; (2) earthquake, flood, epidemic or other natural disaster causing disruption to living conditions, and the government of the state officially requests protection of its nationals in the United States on a temporary basis; or (3) extraordinary temporary conditions preventing nationals from returning home in safety, unless the Attorney General finds that such temporary grant of protection is not in the national interest.<sup>443</sup> The United States has designated the following twelve countries for TPS status thus far: El Salvador, Kuwait, Lebanon, Liberia, Somalia, Bosnia, Rwanda, Montserrat, Burundi, Sierra Leone, Sudan, and Kosovo.<sup>444</sup>

The African model of temporary protection also focuses on situations of mass influx, based on its expanded definition of “refugee” under the 1969 OAU Convention that includes persons fleeing armed conflict. In practice, African states have combined the two quite distinct regimes of the Refugee Convention, with its individualized definition, and the OAU with its group definition, in many significant ways. They have not, for the most part, differentiated between one category and another in terms of how long they will provide protection or whether they will respect *non-refoulement*.<sup>445</sup>

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Yugoslavia needing immediate protection, who would be brought in by agreement between Denmark and UNHCR. *Id.* (discussing Denmark).

<sup>442</sup> Germany’s temporary protection policy was probably the most complicated of all the European states, as there was no single scheme for temporary protection in place. Persons from Bosnia-Herzegovina falling under various categories, such as “ex-detainees or particularly vulnerable persons,” “individual guarantee of care and maintenance,” “medical evacuees,” and “rejected asylum-seekers whose deportation would pose a threat to life or liberty,” would qualify for any of a number of statuses, such as “Kontingent” or special admission quota, 3-month visa or toleration permit, “Aufenthaltsbefugnis,” or residence permit, “Duldung,” or toleration permit, for the categories listed above, respectively. *Id.* (discussing Germany). The UNHCR reported in 2001 that Germany completed a draft revision to the German Immigration Law and that Germany and the UNHCR were cooperating to determine whether the draft conforms to international standards. See UNHCR, Mid-Year Progress Report 2001-Western Europe 228 (2001), available at [www.unhcr.ch](http://www.unhcr.ch). (last visited Jan. 25, 2003).

<sup>443</sup> INA, *supra* note 433, at ch. 477, 244(b)(1).

<sup>444</sup> Martin et al., *supra* note 47, at 550.

<sup>445</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 283.



2. What will be the duration of temporary protection status and what measures will be taken at the cessation of status?

In the E.U. member states, the approaches to duration of status and conditions at termination varied from offering more permanent status after a set period of temporary protection<sup>446</sup> to required repatriation when conditions in the place of origin were considered to be sufficiently safe.<sup>447</sup> European Union principles and practices have been tied closely to UNHCR conclusions and guidelines in this regard, particularly concerning safe return.<sup>448</sup> In assessing state practice in compliance with pre-2001 recommendations on safe return and cessation of temporary protection, Khalid Koser's 1998 study illustrates by various measures the success of the effort to harmonize temporary protection in the Bosnian case.<sup>449</sup>

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<sup>446</sup> Koser, *supra* note 439, at 450-51.

<sup>447</sup> *Id.*

<sup>448</sup> The 1998 Amended Proposal addressed the issue of duration of status, requiring that "the situation in the country of origin allows a safe return . . . under conditions respecting human dignity." Amended Proposal, *supra* at art. 4(2)(b). The commission's Explanatory Memorandum, attached to the draft proposal, describes the human rights conditions that would satisfy a finding of safe return, including: the right of free return to homes of origin; legal and physical safety; respect for fundamental rights on a nondiscriminatory basis (including respect for family life, freedom of opinion and religion, and property rights); basic assistance and shelter; and a monitoring process to determine the condition of returnees and adequate protection of human rights. *Id.* The Immigration Ministers' Resolution of 1993 also addressed duration of status and conditions of stay in the host states, with the aim that: "[P]ersons from the former Yugoslavia who are admitted to the member states and given temporary protection are to return. . . as soon as the conditions in that area make it possible to do so in safety." Ministers Responsible for Immigration, Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia (Copenhagen 1993), *reprinted in* GUILD, *supra* note 436, at 293, 294; Hailbronner, *supra* note 47, at 87. The UNHCR organized informal consultations on temporary protection, which drew similar conclusions to those in the EC's Explanatory Memo. *See Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, 8th mtg., U.N. Doc. EC/47/SC/CRP.27 (1997), *reprinted at* <http://www.unhcr.ch> (last visited Mar. 30, 2003).

<sup>449</sup> *See* Koser, *supra* note 439, at 447. According to the study, the majority of Bosnians in Germany, Belgium, Italy, and the United Kingdom still held temporary protection status two years after the Dayton Accords were signed; elsewhere, temporary protection mostly expired and more permanent types of residence status were granted temporary protection recipients. In France and the United Kingdom, although Bosnians still retained Exceptional Leave to Remain status, there was an expectation that they would be given residence. The same was true in Italy and Belgium. *Id.* at 450-51. The Koser study applied a "security of residence" test to the Bosnian case and concluded that it was the combination of policies toward settlement and return that determined security of residence of Bosnians in Europe. *Id.* at 449-53.

In practice, few states deported Bosnians.<sup>450</sup> The study concluded that the vast majority of Bosnians in E.U. states received or were slated to receive permanent status, with about 75,000 Bosnians estimated to have returned under repatriation schemes since 1996.<sup>451</sup>

The Council Directive has now standardized the duration of temporary protection, requiring member states to grant temporary protection for one year. Unless automatically terminated (under article 6(1)(b) of the Directive), this period can be extended by six month periods for another year.<sup>452</sup> Member states can apply to the Council for additional one-year extensions.<sup>453</sup> Under article 6, temporary protection terminates when the designated time period has expired. It can also terminate by a majority vote of the Council based on clearly established facts that temporary protection beneficiaries can return to their place of origin in safety.<sup>454</sup> In article 21, the Directive requires states to make voluntary return possible

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<sup>450</sup> In 1998, all states other than Germany, had deported approximately 305 Bosnians. U.N. High Comm'r for Refugees, Office of the Special Envoy and Former Yugoslavia Liaison Unite, Information Notes 1, November-December (1998) [hereinafter UNHCR Information Notes]. In 1997, Germany deported 968 people to Bosnia-Herzegovina alone and in 1998, another 1,809. MATTHEW J. GIBNEY & RANDALL HANSEN, DEPORTATION AND THE LIBERAL STATE: THE FORCIBLE RETURN OF ASYLUM SEEKERS AND UNLAWFUL MIGRANTS IN CANADA, GERMANY AND THE UNITED KINGDOM (working paper No. 77, 2003). Although a significant overall number, it cannot compare either to those who have voluntarily returned or to those Germany accepted. Germany was heavily criticized when it became the first state to begin repatriating Bosnians. Germany's actions were considered extraordinary because the return program violated the UNHCR standards and UNHCR participation, and because Germany entered into a bilateral agreement with Bosnia without consulting UNHCR. Against UNHCR's advice, German Lander interior ministers agreed on October 1, 1996, to begin returns. AMNESTY INTERNATIONAL, "WHO'S LIVING IN MY HOUSE?": OBSTACLES TO THE SAFE RETURN OF REFUGEES AND DISPLACED PEOPLE (1997), at <http://www.web.amnesty.org/ai.nsf/index/EUR630011997> (last visited Jan. 25, 2003). Amnesty International claimed that "temporary protection is being revoked by the German authorities without reference to international standards for the protection of refugees." *Id.* at 15-16. The Netherlands and the United Kingdom acted consistently with the UNHCR on safe returns, but also encouraged voluntary return through different mechanisms. *Id.* at 16. For example, the United Kingdom funded visits for refugees to see for themselves whether conditions were safe for return. Germany and the Netherlands also funded such efforts. Koser, *supra* note 439, at 457. Germany also gave financial assistance packages to returnees. *Id.* at 457 tbl. 7. In a "negative incentive" effort, Austria, Denmark, Italy, and Greece reduced the social and economic benefits for refugees remaining past a temporary protection status grant, seeking to encourage repatriation. Koser, *supra* note 439, at 457.

<sup>451</sup> Koser, *supra* note 439, at 448.

<sup>452</sup> Council Directive, *supra* note 426, at ch. II, art. 4(1).

<sup>453</sup> *Id.* at art. 4(2).

<sup>454</sup> *Id.* at art. 6(1), (2).

when temporary protection is terminated, but to “ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity.”<sup>455</sup> It also requires states to consider humanitarian reasons making return “impossible or unreasonable in specific cases.”<sup>456</sup>

In the United States, the Attorney General has complete discretion over TPS determinations, but once such a determination is made, it applies to all nationals of that state if they entered the United States by the specific cut-off date given with the designation.<sup>457</sup> Temporary Protection Status designations can, and have been, renewed, but the strict cut-off date means that TPS is not a response to ongoing refugee flows.<sup>458</sup> Moreover, TPS is not perceived by the United States as a means of moving large groups of individuals into permanent status,<sup>459</sup> although it has been difficult in practice for the United States to enforce removals at the cessation of the TPS period.<sup>460</sup>

It is difficult to draw clear conclusions on African practice concerning the duration and conditions at cessation of temporary status, as it varies significantly from state to state.<sup>461</sup> Whether due to cultural attitudes, the normative standards of the refugee and human rights instruments binding African states, or perceived absence of options, African states have shown remarkable tolerance in hosting lengthy stays by putative refugees.<sup>462</sup> Despite major problems of security, armed insurgents in refugee camps, and environmental and other resource pressures, African states have incorporated UNHCR standard-setting on the issues of duration of protection and cessation of status in durable solution plans. However,

<sup>455</sup> *Id.* at ch. V, art. 22(1).

<sup>456</sup> *Id.* at ch. V, arts. 22, 23.

<sup>457</sup> INA, *supra* note 433, ch. 477, 244(c).

<sup>458</sup> See Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 285 (noting that because of the ongoing Kosovo situation, the United States granted refugee status to Kosovars rather than designate them as TPS recipients).

<sup>459</sup> *Id.* (noting that the United States does not grant TPS in mass refugee situations, but applies various policies such as containment and/or status determinations outside its territory, or admits some people as refugees).

<sup>460</sup> See Michael. S. Tietelbaum, *Immigration, Refugees and Foreign Policy*, INT'L ORG. 38:3, 64 (1985).

<sup>461</sup> See Jeremy R. Tarwater, *Analysis and Case Studies of the “Ceased Circumstances” Cessation Clause of the 1951 Refugee Convention*, 15 GEO. IMMIGR. L.J. 563 (2001) (using illustrations from Africa as well as other regions to argue that the majority of host country repatriations in the 1990s, although termed “voluntary,” were primarily coercive and that UNHCR guidelines purportedly based on the Refugee Convention cessation clauses are unworkable because states fail to comply with the requirement that conditions in the home state be durable and stable before repatriating refugees).

<sup>462</sup> See Paul Kuruk, *Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees*, 35 STAN. J. INT'L. L. 313, 331-37 (1999).

implementation of the required standards has been heavily criticized.<sup>463</sup> For example, the Plan of Action adopted at the OAU/UNHCR Regional Conference on Refugees in the Great Lakes Region incorporated international standards and UNHCR guidelines on repatriation and cessation of status in host states.<sup>464</sup> The participating states adopted principles and guidelines on repatriation that included the following: (1) the right to return safely to the country of origin; (2) voluntariness based on informed consent; (3) scrupulous observance of *non-refoulement*; (4) access to objective information on conditions in the home country; (5) adherence to return in safety and dignity, based on UNHCR-established factors, such as physical safety, humanitarian and human rights standards existing in the home country, and monitoring by UNHCR of safe return; and (6) respect for private property by the home country.<sup>465</sup> The Plan of Action also set specific requirements for each state to address particular problems of humanitarian and human rights violations vis-à-vis refugees and displaced persons.<sup>466</sup> However, the prior African state practice of tolerating long periods of temporary status has more recently devolved to repatriation under pressure;<sup>467</sup> forced resettlement of temporary protection beneficiaries to areas away from border camps;<sup>468</sup> refusal of entry to

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<sup>463</sup> The UNHCR and the OAU played major roles in the search for durable solutions for refugees and other displaced persons in the Great Lakes Region during the massive refugee crisis affecting Burundi, Rwanda, Tanzania, Zaire, Uganda, Kenya, Zambia and Tunisia. Moreover, the plan incorporated specific reference to major human rights and humanitarian instruments and formally involved the UNHCR, ICRC, OAU, and the UNAMIR, as well as non-governmental organizations in the durable solution process. See OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced persons in the Great Lakes Region: Bujumbura, Burundi (1995) [hereinafter OAU/UNHCR Plan of Action]. Compliance with the standards has received criticism. See Tarwater, *supra* note 461; Hathaway & Neve, *supra* note 34.

<sup>464</sup> See OAU/UNHCR Plan of Action, *supra* note 463. The Plan of Action called on the participating states to conclude Tripartite Repatriation Agreements with other asylum countries and the UNHCR, following the examples of Burundi and Zaire.

<sup>465</sup> *Id.* at Note on Voluntary Repatriation of Refugees para. 13.

<sup>466</sup> See generally *id.*

<sup>467</sup> See UNHCR, STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA (1997) (describing Tanzanian army's forced "redirection" of Rwandese refugees back across the border); see also George Okoth-Obbo, *Does Refugee Protection in Africa Need Mediation?* 9 REFUGEES, CONFLICT AND CONFLICT RES., No. 3, at 40-55 (2000), available at <http://www.queensu.ca/samp/migdocs/Documents/2000/1.htm> (last visited Mar. 9, 2003) (illustrating forced returns by Tanzania of Rwandese refugees and by Kenya of Somali refugees, among others).

<sup>468</sup> See Hathaway & Neve, *supra* note 34, at 127 (describing the Sudanese government's forcible removal of Eritrean refugees from border camps and Mexican authorities' forcible transfer of Guatemalan refugees from self-settled border areas to internal camps, which involved physical violence as well as serious human rights violations).

or forced removal of temporary protection applicants to other neighboring territories;<sup>469</sup> and forced confinement in armed or unsafe camps.<sup>470</sup> African states have also implemented another strategy to contain refugee flows that has drawn great criticism, the creation of safe zones within the country of origin.<sup>471</sup>

### 3. What standards of treatment are to be afforded temporary protection applicants?

Standards of treatment concerning individual rights vary significantly, both within each region and across the three regions under discussion. In the European Union, many member states treat temporary protection beneficiaries on the same level as recognized refugees,<sup>472</sup> others grant rights on an incremental basis,<sup>473</sup> while still others grant full rights in

<sup>469</sup> *Id.* at 124 (discussing the actions of Cote d'Ivoire, Sierra Leone, Ghana, and Guinea in denying entry to boatloads of Liberian refugees suffering from lack of food and water on overcrowded ships, and Zaire's forcible expulsion of thousands of Rwandan refugees back to Rwanda).

<sup>470</sup> *Id.* at 127 (illustrating insecurity and human rights abuses of refugees in armed or restricted camps by host government authorities and non-state elements).

<sup>471</sup> The idea of creating "safe zones" was incorporated in the Plan of Action for the Great Lakes Region. *Id.* For a critique of both the practice and legal basis for creating "safe zones" in Africa, see Rutinwa, *supra* note 46, at 9-11. For a discussion of the failures of "safe zones" to protect individuals' human rights in the situations where they have been established, see *infra* note 494.

<sup>472</sup> In the United Kingdom, Bosnians receive Exceptional Leave to Remain (ELR) status, with rights almost identical to full Convention status, including freedom of movement, full access to social security benefits, access to the national health system, and immediate family reunification rights. Alan Travis, *Last Refugee Flight to Land Next Week*, GUARDIAN, June 16, 1999, at 5; see also Gibney, *supra* note 405, at 698. "Special ELR" entitles certain Kosovars and Bosnians to full income support. Those on regular ELR receive ninety percent of income support and must wait four years before they are eligible for family reunification. Neither type of ELR recipient can receive travel documents. DANISH REFUGEE COUNCIL, LEGAL AND SOCIAL CONDITIONS FOR ASYLUM SEEKERS AND REFUGEES (2000), available at <http://www.flygtning.dk/publikationer/rapporter/legalandsocial/indh/index.php> (last visited May 18, 2004).

<sup>473</sup> In the Netherlands, the main status for Bosnians and Kosovars is Provisional Permission to Remain, with rights phased in over a three-year period. In the first two years, temporary protection recipients can study Dutch, access the National Health Service, secure limited work authorization, receive income support from municipalities where they reside (which is lower than the national government support provided to citizens), and have freedom of movement (but they must be authorized by the municipality if they seek an allowance when they move). DANISH REFUGEE COUNCIL, *supra* note 472. Denmark does not allow family reunification for persons in temporary protection status. However, after three years a holder of Provisional Permission to Remain can apply for family reunification, and at that point is also granted full rights to work. See *id.*

some areas but not in others.<sup>474</sup> The European Commission draft proposal included a framework for harmonizing rights granted by member states to temporary protection beneficiaries. The rights discussed were family reunification, employment, social security, housing, welfare, education, and residence authorization.<sup>475</sup>

The UNHCR's *Progress Report* linked rights under temporary protection to standards of international human rights in general. It urged a progressive improvement of rights according to the individual temporary protection recipient's length of stay in the host state. The Report stated that: "The right to education, employment, freedom of movement, assistance and personal identification should be granted without discrimination, while it is understood that any restrictions imposed must be justified on grounds of legitimate national interest and must be proportional to the interest of the state."<sup>476</sup>

In the European Union's attempt to standardize temporary protection, it has incorporated minimum standards of treatment in the 2001 Council Directive. The Directive requires states to provide residence permits for the period of temporary protection,<sup>477</sup> to allow temporary protection recipients employment or the chance to pursue professional activities, education, and vocational training, and to apply the same general wage, social security, and other employment conditions to temporary protection recipients as to its residents.<sup>478</sup> It requires states to provide suitable housing, social welfare and subsistence means,<sup>479</sup> medical care,<sup>480</sup> and access to education for persons of minority age under the same conditions as nationals.<sup>481</sup> Possibly the most detailed provisions concern family reunification and the definition of family members for purposes of family

<sup>474</sup> For example, in Germany, the most common temporary protection status, *duldung*, entitles one to the same level of social support as German nationals, as well as access to national health provisions. However, an individual is not free to internally resettle anywhere in Germany but is confined to the local district that accepts him. DANISH REFUGEE COUNCIL, *supra* note 472; Gibney, *supra* note 405, at 697. Germany imposes limitations on the right to work, and a temporary protection holder is not entitled to family reunification except for "urgent humanitarian reasons," a condition which is not satisfied if a family member has received asylum elsewhere. PHILIP RUDGE, *ECRE, THE RIGHTS OF PERSONS UNDER TEMPORARY PROTECTION* (1996).

<sup>475</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 303; See Amended Proposal, *supra* note 436, at arts. 6-9. The Immigration Ministers' 1993 Resolution called on member states to provide decent living conditions, authorization to work or appropriate social benefits, health care, schooling for children, and contact or reunification for close relatives. *Id.* See also Hailbronner, *supra* note 47, at 87.

<sup>476</sup> *Progress Report*, *supra* note 413, at para 4(1).

<sup>477</sup> *Id.* at ch. III, art. 8(1).

<sup>478</sup> *Id.* at art. 12.

<sup>479</sup> *Id.* at art. 13.

<sup>480</sup> *Id.* at art. 13(3), (4).

<sup>481</sup> *Id.* at art. 14.

reunification.<sup>482</sup> The 2001 Council Directive requires states to grant residence permits under the temporary protection scheme to family members meeting the definitions for family reunification purposes.<sup>483</sup>

In the United States, a TPS recipient is granted work authorization<sup>484</sup> and cannot be detained on immigration grounds.<sup>485</sup> However, TPS benefits do not include eligibility for federal public assistance, and state benefits are a matter of individual state discretion.<sup>486</sup> In Africa prior to 1990, refugee hosting states guaranteed basic rights consistently.<sup>487</sup> In the 1990s, protection of refugee rights in Africa declined significantly.<sup>488</sup> The focus on rights standards in Africa is on the most basic of elements: strict respect for *non-refoulement* and guarantees of physical security.<sup>489</sup> Nonetheless, UNHCR's African Bureau has, as recently as 2001, reiterated that host states must not focus solely on minimum standards in guaranteeing rights of refugees, but also on fulfilling essential needs that increase over time.<sup>490</sup>

### B. *Lessons from Current Regional Temporary Protection Models*

Temporary protection has operated both in the optimal context of shared responsibility among states receiving the putative refugees and in the context of *burden-sharing*, with stronger states in a region forcing weaker states to absorb the bulk of refugee flows.<sup>491</sup> One of the more

<sup>482</sup> *Id.* at art. 15.

<sup>483</sup> *Id.* at art. 15(6).

<sup>484</sup> See INA, *supra* note 433, at ch. 477, 244(f).

<sup>485</sup> *Id.* at 244(d)(4).

<sup>486</sup> *Id.* at 244(f).

<sup>487</sup> See Rutinwa, *supra* note 46, at 7 (noting that during this period, basic refugee needs were met, including family unity, economic opportunities, relative freedom of movement within the host country, equal access to health, education and job markets and, in some states, full access to social welfare and education systems, as well as government job opportunities).

<sup>488</sup> *Id.* at 14.

<sup>489</sup> *Id.* at 14.

<sup>490</sup> UNHCR Africa Bureau, Discussion Paper on Protracted Refugee Situations in the African Region (Geneva 2001) (calling for a change from a "minimum standards" to an "essential needs" focus premised upon essential needs implying a gradual improvement of rights over time, which is more consistent with UNHCR and international legal standards). The Discussion Paper also calls for promotion of self-reliance, including full enjoyment of civil and socio-economic rights. *Id.* at 3 (emphasizing freedom of movement, access to job markets, self-employment, and education in protracted refugee situations).

<sup>491</sup> For commentators discussing burden-sharing as burden-shifting in the refugee and temporary protection context, see Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, 11 J. REFUGEE STUD. 396 (1988); Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, *supra* note 17; Hathaway & Neve, *supra* note 34.

positive illustrations of how temporary protection can work to complement convention protection for refugees includes the CPA, initiated to address the massive Indochinese refugee flows of the 1970s. The CPA was initiated as a result of the shameful wholesale denial of *non-refoulement* by the frontline states of Malaysia, Singapore, Thailand, Hong Kong, and Indonesia, which refused to accept huge numbers of fleeing Vietnamese and Cambodian boat people.<sup>492</sup> The CPA was designed to prevent frontline states from turning back the desperate refugees by implementing an agreement for short-term temporary protection in those states, with a longer-term obligation of states outside the region to resettle the refugees and provide material assistance.<sup>493</sup> In a massive responsibility-sharing effort, the frontline states permitted the refugees to remain, and allowed resettlement processing by third states to take place in their territories.<sup>494</sup>

The CPA involved seventy governments and was one of the first examples of a commitment to multilateral durable solution mechanisms that included the country of origin as well as stakeholders in the region and third (resettlement) states.<sup>495</sup> The CPA incorporated the following five important aspects: a process to stem unofficial boat departures while increasing opportunities for legal migration under the Orderly Departure Programme; institutionalization of temporary asylum to all those seeking it in neighboring states until a durable solution could be found; guarantees of refugee status determinations for all asylum seekers under the Refugee Convention and international standards; and, guarantees of third-state resettlement for all recognized refugees and mechanisms for repatriation with monitoring and assistance for safe reintegration.<sup>496</sup> Despite acknowledged problems with implementation,<sup>497</sup> the CPA is one of the more successful examples of mechanisms including temporary protection that can ensure durable solutions for large refugee flows when there is real commitment to shared responsibility among relevant states.

A different model of responsibility-sharing that involved organized initiatives of the refugee populations themselves was the repatriation and return that took place in the context of the peace negotiations in the Central American states of El Salvador, Guatemala, and Nicaragua in the late 1980s. During almost ten years of civil conflict and proxy wars in Central

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<sup>492</sup> See HUMANITARIAN ACTION, *supra* note 386, at 82-88.

<sup>493</sup> *Id.* at 84-91.

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* at 84.

<sup>496</sup> *Id.*

<sup>497</sup> Some of the problems plaguing the Indochinese refugee situation, both before and during the CPA, were forced returns, piracy, serious human rights violations, renege commitments, premature closing of camps, and anti-immigrant sentiment in resettlement states. *Id.* at 82-103.



America, over two million people became refugees.<sup>498</sup> Hundreds of thousands scattered across the region sought asylum in neighboring states, in the United States, and in other countries. Less than 150,000 were granted refugee status in the region; the majority remained in tenuous temporary statuses in refugee and internal displacement camps in Mexico, Honduras, Guatemala, and Nicaragua.<sup>499</sup> Even before the 1987 regional peace agreement of Esquipulas II was signed, groups of Salvadoran refugees in Honduras began self-repatriation programs of their own.<sup>500</sup> By the time multilateral peace efforts brought together the states of the region, the United States, and the UNHCR at the 1989 CIREFCA to draft a plan for durable refugee solutions, large numbers of Guatemalan refugees followed their Salvadoran counterparts and returned home from Mexico.<sup>501</sup> By the mid-1990s, all registered Salvadoran refugees in neighboring states had returned home, and between 1984 and June 1999, approximately 42,000 Guatemalan refugees repatriated on their own or with UNHCR assistance.<sup>502</sup>

High refugee participation and voluntary choice were two significant elements contributing to the durability of the CIREFCA process, which lasted from 1989 to 1994.<sup>503</sup> Additional critical principles in the success of CIREFCA were the involvement of all states of the region, the commitment to peace building in tandem with development, an international human rights framework for the major aspects of the peace process officially monitored by the United Nations, and the critical role of local and international non-governmental organizations ("NGOs").<sup>504</sup> The process involved coordination of national, regional and international action to achieve lasting solutions to displacement and refugee flows in the entire region.<sup>505</sup>

Non-formalized temporary protection played a critical role in the ultimate durable solutions for Mozambican refugees who fled to Malawi, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe between 1976 and 1992. Approximately 1.3 million Mozambican refugees remained in Malawi for over a decade before the General Peace Agreement for Mozambique was signed in October 1992.<sup>506</sup> Malawi, one of Africa's poorest states, and the sixth poorest country in the world, gave temporary

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<sup>498</sup> See HUMANITARIAN ACTION, *supra* note 386, at 136.

<sup>499</sup> *Id.* at 136-37.

<sup>500</sup> *Id.* at 137.

<sup>501</sup> *Id.*

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 136-43.

<sup>504</sup> *See id.*

<sup>505</sup> *Id.* at 141.

<sup>506</sup> More than 1.7 million Mozambicans, out of a population of 16 million, became refugees in the three decades of conflict in the country. Of these, four million were internally displaced and approximately one million lost their lives. *Id.* at 148.

protection to a refugee population equivalent to ten percent of its own population.<sup>507</sup> Until 1987, Malawi permitted refugees to settle freely. When numbers and resource constraints became overwhelming, however, Malawi requested the UNHCR to construct camps where it required the refugees to live.<sup>508</sup> As in Central America, the Mozambican refugees began to return on their own before the peace agreement came into effect. The repatriation process under UNHCR auspices began in December 1992 and was part of a larger U.N. peacekeeping and peace building effort.<sup>509</sup>

The UNHCR's repatriation and reintegration assistance in Mozambique exceeded that in either Central America or Cambodia.<sup>510</sup> Among the critical factors contributing to the durable nature of the Mozambican refugee situation were the commitment of the host states to providing temporary protection over a lengthy period, despite enormous drains on their resources; the involvement of major international organizations and donor states to post-conflict rehabilitation and development;<sup>511</sup> and the focus on community development involving former adversaries to the conflict.<sup>512</sup> According to the U.N. Secretary General's Special Representative in Mozambique, two of the primary reasons the U.N. Operation in Mozambique ("ONUMUZ") was successful were: "the strong will of the Mozambican people to build peace . . . and the fact that the international community had been willing to commit substantial funds and other resources from the moment the peace agreement was signed."<sup>513</sup>

Another example of responsibility-sharing arising out of an extreme emergency situation was the 1999 airlift of Kosovar refugees into European states where they were granted temporary protection tied to a resettlement plan for the longer term.<sup>514</sup> The "humanitarian evacuation programme" was initiated by the former Yugoslav Republic of Macedonia ("Macedonia"), which had prevented thousands of Kosovo Albanians

<sup>507</sup> *Id.* at 112.

<sup>508</sup> *Id.* at 113. The large numbers of refugees and inadequate resources to support them over such a long period led to severe problems for Malawi, including a negative impact on the economy, environmental degradation (particularly deforestation), and social problems. *Id.*

<sup>509</sup> The U.N. Operation on Mozambique (ONUMUZ) included significant troops, police, civilian monitors, and an Office for Humanitarian Assistance Coordination to oversee reintegration and refugee/IDP assistance. *Id.* at 148.

<sup>510</sup> *Id.* at 151.

<sup>511</sup> The UNHCR, UNDP, and the World Bank, with significant funding from donor states, committed to development and rehabilitation projects including roads, schools, clinics, and "quick impact projects." *Id.* at 152.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.* (citing A. Ajello, *Winning the Peace: Concept and Lessons Learned of Post Conflict Peacebuilding*, International Workshop (Berlin, 1996)).

<sup>514</sup> Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 279.

from fleeing into Macedonian territory. As a condition of admitting the Kosovars temporarily, the Macedonian government insisted on rapid airlift of the refugees from its territory. The program resulted in the evacuation of approximately 96,000 refugees to 28 states, primarily in Europe.<sup>515</sup> Despite the creative solution it presented, the humanitarian evacuation program raised concerns about states applying ad hoc standards of rights and legal status. Nevertheless, the unprecedented relief effort in Kosovo and engagement of large numbers of states both inside and outside the region, provide another illustration of successful use of temporary protection in the context of shared state responsibility.

Critics of temporary protection point to recent trends that undermine core Refugee Convention principles such as: harmonization of asylum policies;<sup>516</sup> stringent visa requirements and carrier sanctions;<sup>517</sup> bilateral

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<sup>515</sup> As with the Bosnians, Germany accepted the largest number of Kosovars for temporary protection (14,700 people); the United States accepted 9,700; Turkey accepted 8,300; France, Norway, Italy, Canada, and Austria each accepted more than 5,000 refugees for temporary protection. See HUMANITARIAN ACTION, *supra* note 386, at 239.

<sup>516</sup> The breakup of the former Yugoslavia and the Balkan conflicts took place at a time when Western European states were undergoing an extensive reevaluation of their asylum policies and reacting to the perceived threat of an influx of illegal migrants in the guise of refugee claimants. See Fitzpatrick, *Flight from Asylum*, *supra* note 47, at 27-28; Rosemarie Rogers, *Western European Responses to Migration*, in INTERNATIONAL MIGRATION AND SECURITY 107 (Myron Weiner ed., 1993). The E.U. states introduced major structural changes to their asylum systems, which took two basic forms: streamlining and harmonizing the asylum process itself, and creating barriers to deter putative asylum-seekers from accessing an asylum adjudication process in their states. See Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, 30 I.L.M. 68, 73 (1991) (attempting to reduce controls at common borders) [hereinafter Schengen Agreement]; see also Convention Applying the Schengen Agreement of June 14, 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, June 19, 1990, arts. 28-38, 30 I.L.M. 84 (1991) (governing state responsibility for examining asylum applications and permitting an asylum-seeker only one opportunity to seek asylum within any of the member states); Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425, 428 (1991) (incorporating the 1990 Schengen Agreement single-country application provisions for adoption by all the E.U. states). The impetus for inter-governmental and E.U. efforts in these two major areas came from the process of economic integration and the move towards eliminating internal border checks to facilitate free movement of goods and people within the E.U. treaty states. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 [hereinafter Maastricht Treaty].

<sup>517</sup> The instruments introduced visa restrictions for persons coming from high refugee-producing states. See Fitzpatrick, *Flight from Asylum*, *supra* note 47, at 33 n.89. also contained provisions which prevent asylum-seekers from filing claims in

and multilateral burden-shifting arrangements,<sup>518</sup> interdiction<sup>519</sup> and

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member states if they arrived through safe third countries. *Id.* at 33 n.91. In addition, sanctions on carriers for transporting individuals without valid documentation for entry were developed. *Id.* at 33 n.90. Finally, integrated data systems that maintain detailed information about rejected refugee claimants for access by member states were developed, the Schengen Information System (SIS). See Bernd Schattenberg, *The Schengen Information System: Privacy and Legal Protection*, in *FREE MOVEMENT OF PERSONS IN EUROPE: LEGAL PROBLEMS AND EXPERIENCES* 43, 45-51 (Harry G. Schermers et al. eds. 1993).

<sup>518</sup> Other examples of burden-shifting measures to avoid state responsibility toward refugees include U.S. policies toward Haitians arriving by boat and, more recently, toward Cubans. Despite its obvious attractiveness as a mechanism to deal with mass refugee influx, TPS has not been used in the two most recent refugee emergencies facing the United States: the Haitian and Cuban refugee flows. Responding to Haitian boat people entering U.S. waters in the 1970s and 1980s, the United States and Haiti entered into an agreement permitting U.S. interdiction of Haitian boats, and the forcible return of those not qualifying as refugees. See Agreement Between the United States of America and Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No.10241. The Haiti refugee crisis of the 1990s was precipitated by the 1991 overthrow of President Aristide in a military coup. Thousands of Haitians fled the brutal repression that followed, many making their way to U.S. shores in unsafe boats. United States interdictions escalated from 1277 before the coup to 36,500 between November 1991 and May 1992. U.S. Coast Guard, Coast Guard Haitian Rescue Statistics (Oct. 3, 1994). On May 24, 1992, President Bush issued the Kennebunkport Order, requiring the Coast Guard to interdict Haitians and return them to Haiti without permitting them to make refugee status applications. Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992). The Clinton Administration, after apparently discussing a number of policy alternatives to the interdiction program, rejected offering temporary protection to the Haitians. See Martin et al., *supra* note 47, at 554-55. Instead, the Administration sought agreement with other small states in the Caribbean to allow containment and processing of Haitian asylum claims there. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 180 (1995) [hereinafter *WORLD REFUGEE SURVEY*]; U.S. Dep't. of State, Bureau of Population, Refugees and Migration, *Daily Interdiction of Haitian Boat People by U.S. Coast Guard and U.S. Navy, 6/15/94-10/6/94* (1994). Ultimately, 20,000 Haitians were brought to the U.S. Naval Base on Guantanamo, Cuba, where refugee processing commenced. By early 1995, the vast majority of Haitians either voluntarily repatriated, or were forcibly removed to Haiti. *Id.* at 180. In marked contrast to the treatment of Haitians, Cubans coming to the United States in the early 1960s had the benefit of a generous parole policy, allowing them lawful entry and right to remain under the 1966 Cuban Adjustment Act, which permitted Cubans to adjust to permanent residence after one year of parole status. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966). Over 600,000 Cubans entered the United States and obtained lawful permanent resident status between 1961 and 1993. See Martin et al., *supra* note 47, at 555. In the early 1990s, however, attitudes toward the Cubans changed and, as large numbers fled renewed unrest in Cuba, the Clinton Administration announced that Cubans interdicted at sea would be taken to Guantanamo as a safe haven. Those arriving in the United States would be detained. *Id.* at 556-57; see also ZUCKER & ZUCKER, *supra* note 434, at 45-46. Some 30,000 Cubans were housed on Guantanamo

summary exclusion policies;<sup>520</sup> long-term detention or forced confinement of refugees;<sup>521</sup> and the creation of "safe zones."<sup>522</sup> These measures

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or taken to a U.S. base in Panama City. See Martin et al., *supra* note 47, at 556. The majority were paroled into the United States, while about 1,600 returned to Cuba and about 300 were forcibly returned to Cuba. *Id.* at 558; see WORLD REFUGEE SURVEY, *supra*, at 187. These two situations reflect the U.S. Administration's tendency to seek ways to deflect large flows of refugees from its shores rather than to offer short-term humanitarian benefits under domestic law or conduct refugee status determination as required by the Refugee Convention. In the same manner, these two crises show that the United States is not willing to use TPS as a response to mass refugee flows.

<sup>519</sup> The United States has engaged in interdiction at sea of Haitian refugees since the 1970s. The U.S. Coast Guard has forced asylum-seekers onto its vessels, destroyed Haitian boats, and returned thousands to Haiti despite well-documented widespread human rights abuses in that country. See Hathaway & Neve, *supra* note 34, at 122. See also Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993); Arthur Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993). The U.S. Supreme Court held that such interdictions did not violate the United States's obligations of *non-refoulement*. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993). Recently, boatloads of Liberian refugees have been pushed away from port after port in West Africa, and denied entry to many countries, including Sierra Leone, Cote d'Ivoire, Guinea and Ghana, which in the past had hosted thousands of Liberians fleeing civil war. The Liberian refugees remained in unsafe, unhealthy, and overcrowded ships without adequate food and water for long periods of time. See Hathaway & Neve, *supra* note 34, at 124 (citing Jana Mason, *Liberian Refugee Crisis: Africa Reconsiders its Tradition of Hospitality*, REFUGEE REP. 1-10 (1996)).

<sup>520</sup> Both the United States and European states have adopted procedures for summarily excluding putative refugees at entry without offering full status determination or due process review of their claims. The United States Codified summary exclusion in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA]. European governments' approval of summary exclusion procedures are found in the Resolution on Manifestly Unfounded Applications for Asylum of the Ministers of the Member States of the European Communities Responsible for Immigration (1992), reprinted in EUROPEAN CONSULTATION ON REFUGEES AND EXILES, SAFE THIRD: COUNTRIES MYTHS AND REALITIES, App. C (1995).

<sup>521</sup> Examples of forced confinement of refugees include the Vietnamese, Cambodian, and Laotian refugees in Thailand, who, from 1979 to 1993, were forced to remain in isolated and overcrowded holding centers where serious problems included inadequate water and sanitation and lack of physical security for the refugees. Somali refugees held in Kenyan camps were subjected to violence and rape by Kenyan police and military. See Hathaway & Neve, *supra* note 34, at 127 (citing AFRICA WATCH, KENYA: FORCIBLE RETURN OF SOMALI REFUGEES AND GOVERNMENT REPRESSION OF KENYAN SOMALIS, 1989).

<sup>522</sup> Another recent trend undermining generous refugee policies is the institution of "safe zones" within a country experiencing armed conflict and widespread human

have the effect of forcing poorer states to bear the brunt of refugee flows, and undermine a core premise of the Refugee Convention that responsibility toward refugees is to be equitably shared among states. Distressing examples show that temporary protection—at least as it is operating on a regional level—has contribute to these negative trends in significant ways. At the same time, it is clear that in many respects temporary protection has benefited persons who face significant risks to their lives or safety, but who would not qualify for Convention coverage. Temporary protection can also be viewed as complementary protection to the Refugee Convention; or, as some commentators persuasively argue, temporary protection is exactly what the Refugee Convention requires.<sup>523</sup> Despite the criticism temporary protection engenders, it has played a positive role in major refugee emergencies, particularly in the context of committed responsibility sharing.

Assuming that the measure of success of a temporary protection program is interim protection tied to ultimate return of the majority of recipients, then the European experiment with the Bosnian program was perhaps a failure.<sup>524</sup> If, however the measure of success is interim protection tied to a durable solution of the refugee's choice and implementation of safe return, then the Bosnian experiment was surprisingly successful (with the possible exception of the German actions).<sup>525</sup>

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rights abuses. Under the rubric of an individual's "right to remain" in their homes, refugee-receiving states have institutionalized "safe zones," often in tandem with barring refugees from seeking asylum. See Hathaway & Neve, *supra* note 34, at 137. The creation of a U.N.-sanctioned "no-fly zone" in northern Iraq came about as Turkey refused entry to Iraqi Kurds. *Id.* at 135. The Iraqi "no-fly zone" has prevented thousands of Kurds from fleeing to safety in the wake of both Turkish and Iraqi military operations. *Id.* at 136. The U.N.-patrolled "safe areas" were created in Bosnia when European states initially implemented visa restrictions on Bosnians. *Id.* at 135. Thousands of people who could not leave the "safe areas" of Srebrenica, Goradze, and Zepa were killed by Serb troops in 1995. *Id.* at 136. France established refugee camps for Rwandan Hutus in southwest Rwanda, preventing the refugees from fleeing to Zaire, and at the same time denying them access to refugee determinations in France. *Id.* at 137-38. When France abruptly abandoned the camps, thousands of Rwandans were killed. See *id.* at 136-37.

<sup>523</sup> James Hathaway argues that the Refugee Convention's obligation to grant *non-refoulement* through time requires no greater status than temporary protection. See *id.*

<sup>524</sup> See Sopf, *supra* note 35; see also Graf, *supra* note 17; Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12.

<sup>525</sup> See Hailbronner, *supra* note 47, at 81; Koser, *supra* note 439. Koser notes that Belgium, France, Germany, Greece, Italy, and the United Kingdom had no legal provision for transfer of Bosnians granted temporary protection to more permanent status. In Germany, when temporary protection expired for Bosnians, they were "tolerated" under several other statuses pending decisions on deportation. In the host states with the largest Bosnian influx, significant numbers applied for asylum, with mostly negative results in Austria, Belgium, Greece, France, Italy, and the United Kingdom; and mostly positive results in Denmark and the Netherlands. In Sweden,

Thus, to be consistent with international refugee and human rights norms, any temporary protection regime must apply a framework based on rights principles that includes the following: (1) respect for the core Convention principles: *non-refoulement* through time, access to refugee status determinations, and access to durable solutions options tied to refugee choice; (2) responsibility-sharing among states, involving implementation of multiple durable solutions options tied to refugee choice; and (3) durable solutions driven by adherence to international human rights standards, including absolute respect of the right to return in safety and dignity, and implementation of incrementally-based rights tied to length of stay.

V. AN ARGUMENT FOR AN INTERNATIONALLY-HARMONIZED APPROACH TO TEMPORARY PROTECTION FOR PALESTINIANS: APPLYING RIGHTS-BASED PRINCIPLES TO THE SEARCH FOR DURABLE SOLUTIONS

A. *The Current Status of Palestinians in the Arab States*

Despite efforts by the League of Arab States to create region-wide standards for the treatment of Palestinian refugees in the Arab world, chronic protection gaps persist. Approximately 4 million refugees are affected in varying degrees.<sup>526</sup> Day-to-day security and human rights protection is particularly problematic in Lebanon, Kuwait, and other Gulf states,<sup>527</sup> protection has been inconsistent in Egypt and Libya,<sup>528</sup> and

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the majority was processed as asylum-seekers immediately and were never granted temporary protection. *Id.* at 453.

<sup>526</sup> The distribution of Palestinian refugees in these areas is as follows: Jordan (2,716,188), Lebanon (402,977), Syria (423,453), Egypt (60,114), Iraq and Libya (112,177), Saudi Arabia (300,565), Kuwait (38,254), other Gulf countries (120,612), and other Arab countries (6,333). See PALESTINIANS AT THE END OF THE YEAR 2002, *supra* note 121, at 25. The figure is upgraded to 2002 based on an average population growth of 3.5% per annum. The number of registered refugees in Jordan, Lebanon, and Syria as of December 2002 is 2,493,105. UNRWA in *Figures: Figures as of 31 December 2002*, *supra* note 123.

<sup>527</sup> In Lebanon Palestinian refugees face some of the most severe protection gaps primarily as a result of political considerations concerning sectarian power sharing in the country along confessional lines. The majority of Palestinian refugees are Sunni Muslims. Integration of the refugee population is regarded as a threat to the sensitive division of power between Maronite Christians, Sunni Muslims, Shia Muslims, as well as Druze, Greek Orthodox, Greek Catholic, Armenian Orthodox, and Armenian Catholic. TAKKENBERG, *supra* note 98, at 162. Kuwait and other Gulf states strictly control the presence of non-nationals, including Palestinian refugees. The situation of Palestinian refugees in Kuwait and other Gulf countries began to deteriorate during the 1980s. ZUREIK, *supra* note 116, at 35. During and after the 1991 Gulf war several hundred thousand Palestinians in Kuwait came under heavy pressure and administrative restrictions aimed at the rapid forced departure of Palestinians due to

armed conflict in the region renews concern about basic security for Palestinian refugees in Iraq.<sup>529</sup>

Region-wide implementation of standards set forth in LASC resolutions and the 1965 Casablanca Protocol is inconsistent. Only ten of twenty-one Arab states have ratified the Casablanca Protocol.<sup>530</sup> Saudi Arabia, Morocco and Tunisia are not signatories.<sup>531</sup> Several states—Kuwait, Lebanon, and Libya—have ratified the Protocol but with reservations. Kuwait does not accord national treatment to Palestinian refugees with respect to the right to self-employment.<sup>532</sup> In Lebanon the right to employment is subject to “social and economic conditions” in the country; the right to leave and enter is subject to “applicable rules and regulations”; and holders of travel documents must obtain a re-entry visa to return to Lebanon.<sup>533</sup> In Libya the right to employment is subject to

PLO support for the regime of Saddam Hussein during the war. TAKKENBERG, *supra* note 98, at 159-62.

<sup>528</sup> Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 39. See ZUREIK, *supra* note 116, at 35 (describing 3 phases of treatment towards Palestinians in Egypt: 1) (1948-mid 1950s) refugees were settled in urban centers and accorded limited employment opportunities; 2) (mid 1950s-mid 1970s) refugees accorded national treatment; and, 3) (mid 1970s to present) refugees treated as foreigners). See also TAKKENBERG, *supra* note 98, at 150-54; BRAND, *supra* note 114, at 43-63. Refugees in Libya generally enjoy national treatment as set forth in the Casablanca Protocol, however, implementation has been inconsistent. In 1995, for example, Libya ordered all Palestinians to leave the country in protest against the Oslo political process and in response to U.N. imposed economic sanctions over Libya's refusal to extradite two men alleged to have been involved in the Pan Am attack over Lockerbie, Scotland. Hundreds of Palestinian refugees, particularly those from Gaza holding expired Egyptian travel documents and who had lost residency rights in the Gaza Strip were stranded on the border between Libya and Egypt between August 1995 and April 1997 when Libya permitted refugees to remain in the country. TAKKENBERG, *supra* note 98, at 166-67.

<sup>529</sup> *Supra* note 157. See also TAKKENBERG, *supra* note 98, at 154-55. There are an estimated 90,000 Palestinian refugees in Iraq. Refugee population by origin and country or territory of asylum, 1992-2001, in UNHCR STATISTICAL YEARBOOK 2001, REFUGEES, ASYLUM-SEEKERS AND OTHER PERSONS OF CONCERN—TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS, annex A.7 at 93 (2000).

<sup>530</sup> Jordan, Algeria, Sudan, Iraq, Syria, Egypt, Yemen, Kuwait, Lebanon, and Libya. The remaining Arab states joined the League after the Protocol was signed in 1969. On the status of Palestinian refugees in these host states, see generally Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95. See also TAKKENBERG, *supra* note 98, at 154-55, 167-69. For a list of current members of the League of Arab States, and the states that joined the League after 1969 see *id.* at 376.

<sup>531</sup> Tunisia did not attend the 1965 summit in Casablanca during which the Protocol was adopted. TAKKENBERG, *supra* note 98, at 376.

<sup>532</sup> Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 35-36; TAKKENBERG, *supra* note 98, at 376.

<sup>533</sup> TAKKENBERG, *supra* note 98, at 376.



the same conditions imposed upon other nationals of Arab states.<sup>534</sup> LASC Resolution 5093, recommending that the “rules in force in each state” govern the application of the Casablanca Protocol, significantly weakened protection afforded to Palestinian refugees.<sup>535</sup> At least one commentator has suggested that the Resolution “officially revoked the Protocol, which has been superseded by the internal laws of each host state.”<sup>536</sup> However, other commentators question “whether member states are able by mere recommendation to nullify an international agreement which was officially ratified by the member states or to which the member states became bound by other means.”<sup>537</sup>

Protection gaps vary from state to state. Despite the obligation to provide national treatment in the areas of employment, the right to leave and enter, travel documents, and visas and residence, treatment accorded to Palestinian refugees in Egypt, Libya, Kuwait, and other Gulf states is often similar to protection standards accorded to all other categories of foreigners. Standards in Lebanon, in particular, are below those accorded to foreigners and do not meet minimum requirements set forth in the 1951 Refugee Convention. In the area of employment, Palestinian refugees in Lebanon are barred from employment in nearly seventy different professions due to nationality requirements and the principle of reciprocal treatment applicable to foreigners.<sup>538</sup> Palestinian refugees in

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<sup>534</sup> *Id.*

<sup>535</sup> Under Resolution 5093 (1991), LASC amended paragraph 7 of the report of the 46th session of the Conference of Supervisors of Palestinian Affairs in the host countries based on suggestions submitted by Saudi Arabia and Kuwait. Paragraph 7, as amended, reads:

Having taken notice of the memorandum presented by the delegation of Palestine, the Conference expresses the hope that all Arab states, in spirit of brotherhood and solidarity, will seek to abide by the [Casablanca] Protocol Relating to the Treatment of Palestinians, in accordance with the rules and laws in force in each state, and calls upon the Arab states to overcome the negative impact of the Gulf crisis, as regards the implementation of this Protocol in respect of the Palestinian People.

The text of the resolution is reprinted in *Palestinian Diaspora and Refugee Centre (SHAML)*, *supra* note 95, at 35.

<sup>536</sup> Abbas Shiblak, *Residency Status and Civil Rights of Palestinian Refugees in Arab Countries*, J. PALESTINE STUD., Spring 1996, at 42 (1996).

<sup>537</sup> TAKKENBERG, *supra* note 98, at 149.

<sup>538</sup> Decree 621/1 (1995), article 1 provides a list of jobs and professions “restricted to Lebanese citizens only.” Entry into professional syndicates and employment is based on the individual having Lebanese nationality for a minimum of 10 years and reciprocal rights for Lebanese citizens in the foreigner’s state of citizenship. Petter Aesheim, *The Palestinian Refugees and the Right to Work in Lebanon: A Minor Field Study* (2000) (unpublished graduate thesis, Faculty of Law, University of Lund) (on file with author) (citing Law No. 8/70, Mar. 11, 1970, article 5 in UNRWA Handout on the Status of Palestinians in Lebanon). Lebanese law permits foreigners to practice medicine, pharmacy and engineering in Lebanon, for example, if they are

Jordan who arrived in 1967 or after are not officially permitted to work,<sup>539</sup> while refugees in Egypt and Iraq are no longer accorded national treatment with respect to employment.<sup>540</sup> In most Gulf countries, including Kuwait, work permits are tied to an individual employer and are usually not valid for other employment.<sup>541</sup>

In the area of residency, Lebanon imposes greater restrictions on Palestinian refugees than it does on other foreigners.<sup>542</sup> Moreover, Palestinian refugees who arrived in Lebanon after the 1948 war are considered illegal residents.<sup>543</sup> Egypt requires Palestinian refugees resident in the

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nationals of a state that applies the reciprocal treatment principle. See Law No. 8/70 (1970) (Leb.) (regulating the entry in professional syndicates); Law No. 1658 (1979) (Leb.) (regulating the entry into Medical Associations). Generally, Palestinian refugees are unable to acquire Lebanese nationality. Due to the fact that most Palestinian refugees in Lebanon are stateless, there is no possibility of reciprocal agreements and no possibility of entry into professional syndicates or medical associations. Under the 1969 Cairo Agreement between the PLO and the Lebanese government, Palestinian refugees were accorded the right to work; this agreement was unilaterally abrogated by the Lebanese parliament in 1987. It is estimated that only a few hundred Palestinians are issued work permits. Law No. 17561 (1964) (Leb.) delineates the prerequisites for a foreigner to acquire a work permit. Amendments include Decision No. 289/2 (1982) (Leb.) and Decision No. 621/1 (1995) (Leb.). Aesheim, *supra*, at 46, 48.

<sup>539</sup> TAKKENBERG, *supra* note 98, at 162.

<sup>540</sup> Shiblak, *supra* note 536, at 42.

<sup>541</sup> The Kuwait government, for example, maintains strict control over foreign employment. Kuwaiti employers are responsible for their non-Kuwaiti employees in all financial and legal matters, including application for work permits through the Ministry of the Interior or the Ministry of Social Affairs and Labour. BRAND, *supra* note 114, at 113. TAKKENBERG, *supra* note 98, at 158.

<sup>542</sup> Souheil al-Natour, *The Legal Status of Palestinians in Lebanon*, 10 J. REFUGEE STUD. 360, 364-65 (1997) (citing Ministry of Interior Decree No. 319, Aug. 2, 1962 [Arrete no. 319 reglementant les situations des etrangers au Liban]; Decree No. 136, Sept. 20, 1969, placing foreigners in Lebanon on an equal footing excludes Palestinian refugees; and article 4(e), concerning identification cards issued by the General Directorate of the Department of Palestine Refugee Affairs). During the 1980s, following the 1982 departure of the PLO, Lebanon imposed new residency restrictions for Palestinians. Under the new procedures it is estimated that as many as 12,000 refugees were unable to return to the country. *Supra* note 157. In 1995, following Libya's decision to expel Palestinians Lebanon imposed new travel restrictions requiring Palestinian refugees resident in the country to obtain a re-entry visa prior to departure. *Supra* notes 528, 533. Palestinian refugees holding Lebanese travel documents and outside the country at the time were required to apply for a re-entry visa from the nearest Lebanese diplomatic mission. In practice, however, many found it difficult to obtain the necessary visa. TAKKENBERG, *supra* note 98, at 165. Lebanon revoked the requirement of obtaining a re-entry visa in 1999. *Palestinians in Lebanon Welcome Cancellation of Travel Restrictions*, 1 AL-MAJDAL 19, Mar. 1999, available at <http://www.badil.org/Majdal/1999/1m.htm> (last visited Mar. 15, 2003).

<sup>543</sup> TAKKENBERG, *supra* note 98.

country wishing to travel outside of the country to obtain a visa in order to re-enter its territory.<sup>544</sup> In Kuwait, cessation of employment is grounds for cessation of residency.<sup>545</sup> In general, entry to Gulf states for Palestinian refugees holding Arab or foreign passports is difficult.<sup>546</sup> Finally, with regard to travel documents, receipt of a valid travel document in Lebanon is linked to registration with UNRWA or the LRCS.<sup>547</sup> Refugees not registered with either agency receive travel documents with a stamp indicating that the holder is not eligible for return to Lebanon.<sup>548</sup> Palestinian refugees from Gaza displaced to Jordan in 1967 are not eligible for Jordanian citizenship and use Egyptian travel documents when traveling abroad. Return visas are required to re-enter Jordan.<sup>549</sup> A substantial number of holders of Egyptian-issued travel documents outside of the

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<sup>544</sup> Most Palestinians residing in Egypt hold temporary residency permits, which are valid for one to three years. Egyptian law provides for three types of residency status: special (valid for 10 years), ordinary and temporary. Law No. 89/1960, 18 Mar. 1960, O.J. 71 (1960) (Egypt) *amended by* Law No. 49/1968, 124/1980, & 100/1983 (relating to the entry and stay of foreigners and their exit from Egypt). TAKKENBERG, *supra* note 98, at 152. BRAND, *supra* note 114, at 50-51. As of mid-1994 Egypt has imposed entry restrictions on residents of the Gaza Strip, which was under Egyptian control between 1948 and 1967. Entry is limited to students and persons requiring medical care; special permission must be obtained from Egyptian authorities. Shiblak, *supra* note 536, at 39-40.

<sup>545</sup> Residency in Kuwait may be acquired only at the request of a Kuwaiti through the Ministry of the Interior or the Ministry of Social Affairs and Labor. BRAND, *supra* note 114, at 113.

<sup>546</sup> Shiblak, *supra* note 536, at 42. TAKKENBERG, *supra* note 98, at 165. At the end of 2002 Kuwait imposed new measures to reduce the presence of Arab nationals from outside the Gulf region, including Palestinians, for so-called security reasons. Under the new measures, persons from Jordan, the 1967-occupied Palestinian territories, Sudan and Yemen will not be allowed to stay in Kuwait for more than three months. Under the new regulations, Jordanians, Palestinians, Sudanese and Yemenis will be given one-month visas for family visits in Kuwait. After that month, the visa could be extended for up to two more months. At that point, the nationals would be asked to leave the country. Those nationals arriving on business trips would be issued one-month visas. Officials said these visas would not be renewed. Officials said other regulations would be introduced for Iraqi nationals in Kuwait. *Kuwait Restricts Stay of Non-GCC Arabs*, MIDDLE EAST NEWSLINE, Dec. 12, 2002 (on file with authors).

<sup>547</sup> Refugees registered with UNRWA receive a travel document valid for one year and renewable three times. Refugees registered with the League of Red Crescent Societies (LRCS) in 1948, but not with UNRWA in 1950, are also eligible for a travel document valid for one year, renewable for three times. The document is distinguishable from the one accorded to refugees registered with UNRWA by a stamp indicating "Valid for Return". TAKKENBERG, *supra* note 98, at 165.

<sup>548</sup> *Id.*

<sup>549</sup> Egypt administered the Gaza Strip between 1948 and 1967. For more on Egyptian travel documents, see *infra* note 550.

country are no longer able to renew expired travel documents.<sup>550</sup> In contrast, Palestinian refugees in Jordan, Syria, Iraq, Algeria, Morocco, and Tunisia enjoy relatively favorable standards of treatment by host country authorities.<sup>551</sup>

Monitoring and enforcement initiatives have not produced significant or lasting improvements. Investigations conducted by the Conference of Supervisors of Palestinian Affairs<sup>552</sup>—composed of the heads of government departments in host countries that administer Palestinian refugee affairs—have concluded that implementation of LAS standards for the treatment of Palestinians in member states are far below standard.<sup>553</sup> The LAS Council has further requested member states to submit information concerning implementation of the Casablanca Protocol.<sup>554</sup> Protection

<sup>550</sup> Palestinian refugees who took refuge in Egypt in 1948 are eligible for Egyptian travel documents. Between 1948 and 1967, Egypt, as administrative authority of the Gaza Strip, provided travel documents to Palestinians residing there. BRAND, *supra* note 114, at 50-51 (citing Decision No. 28, 1960). Refugees holding expired Egyptian travel documents have been refused entry to the country. During the Gulf war, for example, many ex-Gazan holders of Egyptian travel documents who were forced to leave Kuwait and who had lost their residency status in the Gaza Strip following Israel's 1967 military occupation of the area, were unable to return to Egypt. A significant number eventually found refuge in Iraq. TAKKENBERG, *supra* note 98, at 161.

<sup>551</sup> TAKKENBERG, *supra* note 98, at 169. Of these states, Morocco and Tunisia are signatories to the 1951 Refugee Convention and are eligible for Convention Travel Documents. *Supra* note 78. See also Shiblak, *supra* note 536, at 42 (noting that Palestinian refugees holding travel documents are not permitted to enter Algeria, Morocco, and Tunisia without the prior approval of PLO officials in these countries).

<sup>552</sup> The annual Conference first met in 1964 based on the recommendation of council members. See LASC Resolution, 1946, Mar. 31, 1964, *reprinted in* Diaspora and Refugee Centre (SHAML), *supra* note 95, at 23.

<sup>553</sup> TAKKENBERG, *supra* note 98, at 145. The first investigation took place in 1969. The LASC adopted a follow-up resolution calling upon member states to fully implement the Casablanca Protocol. LASC Resolution 2550, Sept. 13, 1969, states, *inter alia*, that the Palestine Liberation Organization should establish bi-lateral contacts with pertinent bodies in member states and other Arab states to look into necessary solutions for Palestinian travel, residency and employment procedures there, and present a report regarding the outcome of this endeavor to the General Secretariat of the LAS. Diaspora and Refugee Centre (SHAML), *supra* note 95, at 24.

<sup>554</sup> In 1978, the Conference held an extraordinary session to examine implementation of the Casablanca Protocol. LASC Resolution 3743, Sept. 13, 1978. Under LASC Resolution 3807, Mar. 25, 1979, the Council noted that it had only received replies to its request for information on implementation of the Casablanca Protocol from Kuwait, the United Arab Emirates and Iraq. In addition, the Council noted that it had not received a report from the PLO concerning the results of bilateral contacts with Arab states on improving implementation of the Protocol. Diaspora and Refugee Centre (SHAML), *supra* note 95, at 30-31.

gaps, however, remain. During a 1985 field visit to Arab states with significant Palestinian refugee populations, the LAS obtained written assurances from a number of states to relax arbitrary measures imposed on refugees.<sup>555</sup> Following the 1991 Gulf war, however, several states visited by the delegation, including Kuwait, Lebanon, and Libya, imposed new restrictions.<sup>556</sup>

Moreover, regional instruments are limited in scope. Protection provided to Palestinian refugees under LASC resolutions and the Casablanca Protocol is significantly narrower than that provided to refugees under regional instruments in other regions of the world.<sup>557</sup> The Casablanca Protocol does not provide adequate protection in the context of a protracted refugee problem.<sup>558</sup> Neither the 1965 Casablanca Protocol nor LASC resolutions include provisions for the protection of adequate housing, access to public education, property ownership, or social security.<sup>559</sup> Housing conditions for many refugees, particularly in camps, are inadequate, characterized by overcrowding, lack of basic infrastructure, and poor environmental conditions.<sup>560</sup> In Lebanon, Egypt, and the Gulf states, Palestinian refugees do not have comprehensive access to public education.<sup>561</sup> Refugees in Lebanon and Egypt do not have access to pub-

<sup>555</sup> TAKKENBERG, *supra* note 98, at 148.

<sup>556</sup> *Id.*

<sup>557</sup> For an overview of regional instruments see *supra* notes 89-117 and accompanying text.

<sup>558</sup> The scope of protected rights afforded to Palestinian refugees in Arab host states has not expanded over time. See discussion *supra* note 476 and accompanying text. This is due, in large part, to Arab government concerns that expansion of basic rights beyond those set forth in the Casablanca Protocol may lead to *de facto* resettlement (*tawtiin*) of the refugee population. TAKKENBERG, *supra* note 98, at 133.

<sup>559</sup> For a list of protected rights under the 1951 Refugee Convention and the 1965 Casablanca Protocol, see *supra* note 63 and accompanying text.

<sup>560</sup> Overcrowding is related to the lack of resource to expand existing shelters or build new ones, planning and building restrictions in host areas, and the high rate of natural growth of the refugee community commensurate with the lack of access to durable solutions. According to international standards, 3 persons per room or more is generally regarded as a standard measure of overcrowding. In Jordan, for example, more than 40 percent of households in camps have 3 persons per room. MARIE W. ARNEBERG, *LIVING CONDITIONS AMONG PALESTINIAN REFUGEES AND DISPLACED IN JORDAN* (1997).

<sup>561</sup> Shiblak, *supra* note 536, at 43; ZUREIK, *supra* note 116, at 34-36. In Egypt Palestinian refugees were initially accorded national treatment. In addition, Palestinians in need were exempted from university fees. Scholarships and subsidies were cancelled in the early 1960s. BRAND, *supra* note 114, at 53, 61. Generally, there is a weak relationship between education and social progress, due to limited opportunities to translate education into suitable employment in primary host countries in the region.

lic health care.<sup>562</sup> Most Arab states restrict foreign ownership of land.<sup>563</sup> Additionally, refugees in Lebanon and the Gulf states pay the same fees as citizens for social insurance but receive fewer or no benefits.<sup>564</sup> Most Arab host states are not signatories to the 1951 Refugee Convention and its 1967 Protocol or either of the two statelessness conventions.<sup>565</sup> Compliance with standards set forth in regional draft human rights instruments and in international human rights instruments, moreover, varies from state to state.<sup>566</sup> Regional mechanisms for monitoring, enforcement,

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<sup>562</sup> Shiblak, *supra* note 536, at 43. Until the early 1960s refugees in Egypt were provided free health care. Under President Sadat, however, this status was revoked and placed with the same treatment as foreigners. BRAND, *supra* note 114, at 51, 61.

<sup>563</sup> Shiblak, *supra* note 536, at 42. Palestinian refugees in Lebanon are subject to all laws pertaining to non-Lebanese, which restrict foreign ownership of property. al-Natour, *supra* note 542, at 372 (citing Decree No. 11614 (1969)). Foreigners must file an application for a license with the Minister of Finance who transfers it, along with his recommendation, to the Council of Ministers of the Cabinet. The Cabinet may grant a license through a decree, which is not subject to appeal. There are also restrictions concerning purchase of property near the border and the size of property purchased. Foreigners must obtain a presidential consent to acquire immovable property. TAKKENBERG, *supra* note 98, at 164; see also *Report of the Commissioner-General of the U.N. Relief and Works Agency for Palestine Refugees in the Near East*, U.N. Doc. A/2171 (1952) (citing Legislative Order No. 196, July 24, 1942). In practice, however, Palestinian refugees find it difficult to obtain this consent. Palestinian refugees in Kuwait, Libya, and ex-Gazans in Jordan are not permitted to own immovable property. Palestinian refugees in Syria and Egypt may not own arable land. TAKKENBERG, *supra* note 98, at 168. See *Acquisition of Immovable Properties by Foreigners*, Legislative Decree No. 189 (1952). See also Letters of the Minister of Interior to the Real Estate Directorate in Damascus, no. 9816/5/1 (Oct. 13, 1977); no. 4174/5/1 (26-H) (Oct. 29, 1986); and no. 74/5/1 (26-H) (Jan. 1981). See especially Letters of the Minister of Interior to the Real Estate Directorate in Damascus, no. 3917/5/1 (Oct. 1, 1969) and no. 3916/5/1 (Oct. 1, 1969), stating that: "A Palestinian refugee living in Syria is excluded from the legislative decree No. 189 in 1952 which entitled Arabs living in Syria the right of ownership in governorate centers and summer resorts." HAMED SAID AL-MAWED, *THE PALESTINIAN REFUGEES IN SYRIA, THEIR PAST, PRESENT AND FUTURE* 61 (1999). In Egypt, Palestinian refugees were originally exempt from legislation forbidding foreigners from owning agricultural land. Egypt passed a law terminating this exemption in 1985. BRAND, *supra* note 114, at 63.

<sup>564</sup> Shiblak, *supra* note 536, at 43.

<sup>565</sup> *Supra* notes 78, 88.

<sup>566</sup> U.N. human rights treaty body committees commonly recognize the efforts exerted by Arab states to host Palestinian refugees. Common concerns regarding implementation of relevant human rights instruments, however, include protection for ethnic groups and minorities, non-discrimination in incorporation of international instruments into domestic law, monitoring and promotion of human rights, and domestic human rights mechanisms. For details on Arab state signatories, see *Concluding Observations of the Committee on the Elimination of Discrimination, Jordan*, U.N. Doc. CERD/C/304/Add.59 (1999); *Concluding Observations of the*

and standard-setting, including the Arab League, do not include the refugee-generating state of Israel.

### B. *The Current Status of Palestinian Refugees in 1967-Occupied Palestine*

In contrast to protection gaps in Arab states, a long-standing “protection crisis” characterizes the status of refugees in 1967-occupied Palestine.<sup>567</sup> More than 1.5 million refugees, who comprise over fifty percent

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*Committee on the Elimination of Discrimination, Lebanon*, U.N. Doc. CERD/C/304/Add.49 (1998); *Concluding Observations of the Committee on the Elimination of Discrimination, Syria*, U.N. Doc. CERD/C/304/Add.70 (1999); *Concluding Observations of the Committee on the Economic, Social and Cultural Rights, Jordan*, U.N. Doc. E/C.12/1/Add.46 (2000); *Concluding Observations of the Committee on the Economic, Social and Cultural Rights, Lebanon*, U.N. Doc. E/C.12/1993/10 (1993); *Concluding Observations of the Committee on the Economic, Social and Cultural Rights, Syria*, U.N. Doc. E/C.12/1/Add.63 (2001); *Concluding Observations of the Committee on the Convention on the Child, Jordan*, U.N. Doc. CRC/C/15/Add.125 (2000); *Concluding Observations of the Committee on the Convention on the Child, Lebanon*, U.N. Doc. CRC/C/15/Add.54 (1996); *Concluding Observations of the Committee on the Convention on the Child, Syria*, U.N. Doc. CRC/C/15/Add.70 (1997); *Concluding Observations of the Committee on the Convention on Civil and Political Rights, Lebanon*, U.N. Doc. CCPR/C/71/SYR (2001).

<sup>567</sup> The United Nations has long recognized the “protection gap” in 1967-occupied Palestine. During the late 1980s and early 1990s, for example, in the context of the first Palestinian *intifada* the UNHCR issued annual executive committee conclusions that “[e]xpressed concern about the lack of adequate international protection for various groups of refugees in different parts of the world, including a large number of Palestinians, and hoped that efforts would be undertaken within the United Nations system to address their protection needs.” See ExCom. Conclusion No. 50 (XXXIX) (1988); ExCom. Conclusion No. 55 (XL) (1989); ExCom. General Conclusion on International Protection (XLI) (1990); ExCom. General Conclusion on International Protection (XLII) (1991); ExCom. Conclusion No. 68 (XLIII) (1992); and ExCom. Conclusion No. 71 (XLIV) (1993). The United Nations General Assembly also adopted numerous resolutions during the same period recommending efforts by UNRWA and the Secretary General to resolve outstanding protection gaps. See G.A. Res. 2792 C, U.N. GAOR, 26th Sess., 2001st mtg., U.N. Doc. A/RES/2792 (XXVI) (1971); G.A. Res. 2963 C, U.N. GAOR, 27th Sess., 2108th mtg., U.N. Doc. A/RES/2963 (XXVII) (1972); G.A. Res. 3331 D, 29th Sess., 2322d mtg., U.N. Doc. A/RES/3331 (XXIX) (1974); G.A. Res. 3419 C, 30th Sess., 2430th mtg., U.N. Doc. A/RES/3419 (XXX) (1975); G.A. Res. 31/15 D, 31st Sess., 76th mtg., U.N. Doc. A/RES/31/15/D (1976); G.A. Res. 32/90 C, 32d Sess., 101st mtg., U.N. Doc. A/RES/32/90/C (1977); G.A. Res. 33/112 E, 33d Sess., 87th mtg., U.N. Doc. A/RES/33/112/E (1978); G.A. Res. 34/52 F, 34th Sess., 76th mtg., U.N. Doc. A/RES/34/52/F (1979); G.A. Res. 35/13, 35th Sess., 50th mtg., U.N. Doc. A/RES/35/13 (1980); G.A. Res. 36/146, 36th Sess., 100th mtg., U.N. Doc. A/RES/36/146/ (1981); G.A. Res. 36/226, 36th Sess., 103d mtg., U.N. Doc. A/RES/36/226 (1981); G.A. Res. 37/43, 37th Sess., 90th mtg., U.N. Doc. A/RES/37/43 (1982); G.A. Res. 37/120, 37th Sess., 108th mtg., U.N. Doc. A/RES/37/120

of the population of the occupied West Bank, eastern Jerusalem, and the Gaza Strip, are affected.<sup>568</sup> There is virtually no day-to-day security or human rights protection, with dire consequences for a population living under protracted military occupation.

Implementation of regional standards in 1967-occupied Palestine is virtually non-existent. Palestine is a founding member of the League of Arab States, but without the derivative powers of a state<sup>569</sup> is unable to accord national protection to Palestinian refugees resident in the Israeli-occupied West Bank, eastern Jerusalem, and the Gaza Strip.<sup>570</sup> Limited

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(1982); G.A. Res. 38/17, U.N. GAOR, 38th Sess., 66th mtg., U.N. Doc. A/RES/38/17 (1983); G.A. Res. 38/83 E, I, and J, U.N. GAOR, 38th Sess., 98th mtg., U.N. Doc. A/RES/38/83 (1983); G.A. Res. 39/17, U.N. GAOR, 39th Sess., 71st mtg., U.N. Doc. A/RES/39/17 (1984); G.A. Res. 39/99 E, I, and J, U.N. GAOR, 39th Sess., 100th mtg., U.N. Doc. A/RES/39/99 (1984); G.A. Res. 40/25, U.N. GAOR, 40th Sess., 96th mtg., U.N. Doc. A/RES/40/25 (1985); G.A. Res. 40/165 E, I and J, U.N. GAOR, 40th Sess., 118th mtg., U.N. Doc. A/RES/40/165 (1985); G.A. Res. 41/69 E, I and J, U.N. GAOR, 41st Sess., 95th mtg., U.N. Doc. A/RES/41/69 (1986); G.A. Res. 42/69 I, U.N. GAOR, 42d Sess., 89th mtg., U.N. Doc. A/RES/42/69 (1987); G.A. Res. 42/95, U.N. GAOR, 42d Sess., 93d mtg., U.N. Doc. A/RES/42/95 (1987); G.A. Res. 43/57 E and I, U.N. GAOR, 43d Sess., 71st mtg., U.N. Doc. A/RES/43/57 (1988); G.A. Res. 44/47 I, U.N. GAOR, 44th Sess., 78th mtg., U.N. Doc. A/RES/44/47 (1989); G.A. Res. 45/73 I, U.N. GAOR, 45th Sess., 65th mtg., U.N. Doc. A/RES/45/73 (1990); G.A. Res. 46/46 I, U.N. GAOR, 46th Sess., 66th mtg., U.N. Doc. A/RES/46/46 (1991); G.A. Res. 47/69 I, U.N. GAOR, 47th Sess., 85th mtg., U.N. Doc. A/RES/47/69 (1992); and G.A. Res. 48/40 H, U.N. GAOR, 48th Sess., 73d mtg., U.N. Doc. A/RES/48/40 (1993).

<sup>568</sup> As of December 2002 there were 639,448 registered refugees in the West Bank and 893,141 registered refugees in the Gaza Strip. *UNRWA in Figures: Figures as of 31 December 2002*, *supra* note 123. There are few non-registered refugees in 1967-occupied Palestine. According to 1998 estimates non-registered refugees comprised some 9 percent of the total refugee population in the West Bank and less than 1 percent of the refugee population in the Gaza Strip. *ABU SITTA*, *supra* note 123, at 24 tbl. 7.

<sup>569</sup> *TAKKENBERG*, *supra* note 98, at 181, stating:

Although there can be no doubt that the entity 'Palestine' should be considered a state *in statu nascendi* [ . . . ] the entity 'Palestine' currently does not fully satisfy the international legal criteria of statehood: a permanent population, a defined territory, government, and the capacity to enter into relations with out states.

For further discussion see *id.* at 178-83.

<sup>570</sup> See *infra* note 572. ExComm Conclusions and U.N.G.A. resolutions concerning refugee protection ceased following the commencement of the Oslo political process in 1993 despite the continued legal and institutional protection gap in 1967-occupied Palestine. *Supra* note 567. This may be attributed to at least two factors. First, following the beginning of the Oslo process, the United States sought to remove the question of Palestine from U.N. agenda and debate. See *infra* note 614 and accompanying text. Secondly, there may have existed a general assumption that the Palestinian Authority, established by the Oslo agreements, would facilitate resolution of the protection problem. For recent commentary on protection and the limited role of the Palestinian Authority in the context of the second Palestinian uprising see, for



civilian powers transferred to the Palestinian Authority under the Oslo agreements remain subject to Israel's overall authority.<sup>571</sup> Israel's military campaign directed at the Palestinian Authority since the beginning of the second Palestinian *intifada*, as summarized above, brings into question the political, administrative, jurisdictional, and financial viability of the Palestinian Authority.

The PLO, which oversees Palestinian refugee affairs through its Department of Refugee Affairs ("DORA"), is not a government in any legal sense, and has neither the legal status nor the resources to provide effective comprehensive protection for Palestinian refugees, in 1967-occupied Palestine or elsewhere.<sup>572</sup> The PLO has bilateral contacts with host states and has raised protection issues with the Conference of Supervisors of Palestinian Affairs, the Council of Ministers and the Council of Arab Ministers of the Interior.<sup>573</sup> It has also signed agreements with states, including the Cairo Agreement with Lebanon,<sup>574</sup> in order to ensure

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example, *Commission Inquiry Report 2000*, *supra* note 209, at art. IV. Paragraph 7, states, *inter alia*:

The test for the application of the legal regime of occupation is not whether the occupying Power fails to exercise effective control over the territory, but whether it has the ability to exercise such power, a principle affirmed by the United States Military Tribunal at Nuremberg in *In re list and others* (The Hostages Case) in 1948. The Oslo Accords leave Israel with the ultimate control over the OPT and the fact that for political reasons it has chosen not to exercise this control, when it undoubtedly has the military capacity to do so, cannot relieve Israel of its responsibilities as an occupying power.

*Id.*

<sup>571</sup> *Id.* at para. 182.

Neither the Declaration of Principles on Interim Self-Government Arrangements nor the subsequent agreements between Israel and the PLO, establish a Palestinian state and the latter agreements only transfer limited powers and responsibilities to the newly created Palestinian Authority.

For a comprehensive analysis of the powers transferred to the Palestinian Authority and retained by Israel under the Oslo agreements see SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS, *supra* note 146.

<sup>572</sup> While the PLO is a recognized public body that represents the Palestinian people and maintains offices, which are similar or equivalent to diplomatic missions, it does not satisfy other criteria for statehood, including a defined territory, and a government that represents all the Palestinian people. The Palestinian Legislative Council, established under the Oslo process, only represents Palestinians in 1967-occupied Palestine. The PLO has not claimed the status as a government in exile. Mallison & Mallison, *supra* note 129 at 45 (citing Anis Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 DEN. J. INT'L L. & POLY 9 (1980)). On international legal criteria for statehood see TAKKENBERG, *supra* note 98, at 181 n.46 (citing article 1, 1933 Montevideo Convention on Rights and Duties of States, 165 LNTS 19).

<sup>573</sup> TAKKENBERG, *supra* note 98, at 145.

<sup>574</sup> Cairo Agreement, Nov. 3, 1969, P.L.O.-Leb., *reprinted in* Palestinian Diaspora and Refugee Centre (SHAML), *supra* note 95, at 25-26. Article 1.1 of the Agreement

respect for basic economic and social rights.<sup>575</sup> Despite these efforts, however, the status of refugees has not improved significantly.

Israel is not a member of the Arab League and is not bound by LAS standards. As an occupying power, however, Israel is bound by the Fourth Geneva Convention relative to occupied territory to protect the civilian population, including refugees, in the West Bank, eastern Jerusalem, and the Gaza Strip.<sup>576</sup> However, Israel does not accept the *de jure* application of international humanitarian law in these territories.<sup>577</sup> Commentators and U.N. treaty body committees also hold the view that Israel has direct responsibility for international human rights law in 1967-occupied Palestine in all areas where Israel maintains “geographical, functional or personal jurisdiction.”<sup>578</sup> The military reoccupation and siege of Palestinian cities, towns and refugee camps in the context of the second *intifada* attests to Israel’s absolute control over the whole of 1967-occupied Palestine and its concomitant responsibility for human rights protection of the civilian population, including refugees. Israel rejects this

accorded Palestinians in Lebanon the right to employment, residence, and movement. *Id.* Article 1.2 provided for limited autonomy through the establishment of local Palestinian committees in refugee camps in Lebanon, but “in cooperation with local authorities and under Lebanese sovereignty.” *Id.* Additionally, the Agreement permitted the presence of Palestinian armed positions in the camps. *Id.*

<sup>575</sup> *Id.* In 1977 the PLO requested the League to issue a Palestinian passport, however, the request did not receive wide support among LAS members. *Id.* at 12.

<sup>576</sup> International consensus affirms the *de jure* applicability of the 4th Geneva Convention to 1967-occupied Palestine. See, e.g., LEIN, *supra* note 158, at 20 (“The International Red Cross, the UN, and the vast majority of states and international law experts have often stated that the Fourth Geneva Convention is binding on Israel in its activity in the Occupied Territories.”). For a recent commentary see *Commission Inquiry Report, 2000, supra* note 209, paras. 35-43. See also *Special Rapporteur Report, 2002, supra* note 209, paras. 8-10.

<sup>577</sup> Israel argues that humanitarian law does not apply to the West Bank and the Gaza Strip because their annexation by Jordan and Egypt never received international recognition. Israel therefore argues that the West Bank, eastern Jerusalem, and the Gaza Strip does not meet the requirement for application of the Geneva Convention because it was not the territory of a High Contracting Party. See LEIN, *supra* note 158, at 20 (citing Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B. HUM. RTS. 262-66 (1971)).

<sup>578</sup> See, e.g., *Commission Inquiry Report, 2000, supra* note 209, at para. 37, stating, *inter alia*:

[a] prolonged occupation lasting more than 30 years, was not envisaged by the drafters of the Fourth Geneva Convention (see art. 6). Commentators have therefore suggested that in the case of prolonged occupation, the occupying Power is subject to the restraints imposed by international human rights law, as well as the rules of international humanitarian law.

See also *Special Rapporteur Report, 2002, supra* note 209, at paras. 8-9; *CESCR 1998, supra* note 171, at para. 6; *CCPR 1998, supra* note 171, at para. 10; *CERD 1998, supra* note 173, at para. 4.

premise.<sup>579</sup> Finally, Israel is a signatory to both the Refugee Convention and Protocol, though it did not ratify them until 1999. Israel is the only signatory to the 1951 Refugee Convention that does not have legislation to define and protect refugees.<sup>580</sup>

The protection crisis in 1967-occupied Palestine spans the panoply of basic rights afforded to refugees under international and regional instruments. Restrictions on Palestinian economic and institutional development imposed by Israel's military occupation and colonization severely hamper refugees' access to employment.<sup>581</sup> Under the Oslo agreements,

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<sup>579</sup> See, e.g., Consideration of reports submitted by States parties under article 40 of the Covenant, Second Periodic Report, Addendum, Israel, U.N. Doc. CCPR/C/ISR/2001/2 (2001), stating:

Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.

*Id.* at paras. 8-9. See also *Additional Information, Israel*, *supra* note 171, at paras. 2-3.

<sup>580</sup> Einat Fishbain, *Israel Lacks a Refugee Law*, HA'ARETZ, May 26, 2002 (quoting Dan Yakir, Association for Civil Rights in Israel). Israel does not have a refugee board or immigration service to handle refugee status determinations for non-Jews. A person seeking refugee status in Israel must apply to the UNHCR and the Interior Ministry. Claimants are kept in prison until the Interior Ministry accepts the status of refugee. The decisions of the UNHCR office in Israel, however, are usually only considered recommendations by the Interior Ministry. In 2001, for example, 400 individuals applied for refugee status in Israel, 150 cases were sent to Geneva for further examination and determination. Only 15 claimants were granted refugee status. As of 2002, Israel retains the sole authority in determination claims under the 1951 Refugee Convention. Israel has adapted its system in response to the influx of some 6,000 Israeli-allied South Lebanon Army forces after Israel's withdrawal from south Lebanon in 2000. Generally, Israel does not resettle non-Jewish refugees in the country, but rather searches for resettlement slots abroad. On the SLA, see, Amos Harel, *1,000 SLA Refugees to Move Abroad*, HA'ARETZ, June 2, 2000; Relly Sa'ar, *Sharansky Meets U.N. Refugee Boss on SLA*, HA'ARETZ, May 26, 2000; Sharon Gal, *200 SLA Soldiers off to Oz*, HA'ARETZ, Mar. 21, 2001; see also Sharon Gal, *Kurdish Refugees Sent Back to Lebanon*, HA'ARETZ, Mar. 27, 2001; Jalal Bana, *Israel Expels 42 Kurds Who Sought Asylum*, HA'ARETZ, Aug. 10, 2001; Joseph Algazy, *Don't Give Me Your Tired or Hungry*, HA'ARETZ, Jan. 9, 2002; Yossi Klein, *A Refuge Refused, Facing Persecution in Their Native Lands, Hundreds of Asylum Seekers Get the Cold Shoulder in Israel*, HA'ARETZ, Nov. 18, 2002.

<sup>581</sup> *Supra* notes 232-33. For a detailed discussion see SARA ROY, *THE GAZA STRIP, THE POLITICAL ECONOMY OF DE-DEVELOPMENT* (1995). Critically, Israel also maintains control of West Bank and Gaza aquifers through the location of colonies and military zones as well as restrictive drilling regulations. See, e.g., B'TSELEM, *THIRSTY FOR A SOLUTION: THE WATER CRISIS IN THE OCCUPIED TERRITORIES AND ITS RESOLUTION IN THE FINAL-STATUS AGREEMENT* (2000).

Israel ceded authority to revoke residency rights in the occupied West Bank, excluding eastern Jerusalem,<sup>582</sup> and the Gaza Strip; however, it is unclear whether Israel still considers the agreements binding following the collapse of the political process. "Palestinian Passports," which function as travel documents, are void upon nullification of the Oslo agreements.<sup>583</sup> Many Palestinian refugees in the occupied West Bank also hold five-year renewable Jordanian passports.<sup>584</sup> Palestinians still require special Israeli permits to leave and to enter the occupied territories.<sup>585</sup> Palestinian residents holding passports in a second state are not permitted to travel in and out of the occupied territories on foreign passports.

Palestinian refugees are permitted to own immovable property; however, property remains vulnerable to expropriation by Israel.<sup>586</sup> As in other parts of the Arab world, Palestinian refugee housing in 1967-occupied Palestine, particularly in the Gaza Strip, is characterized by overcrowding, lack of infrastructure, and poor environmental conditions.<sup>587</sup> Refugees are also uniquely vulnerable to Israel's practice of house demolition and military attacks on civilian residential areas, including refugee camps.<sup>588</sup> Access to education and health services are also severely limited by Israel's military occupation.<sup>589</sup> In the context of the second *intifada*, basic physical security has become so urgent that it has subsumed concern about protection of all other rights.

<sup>582</sup> *Supra* notes 196-97.

<sup>583</sup> JAMAL & DARWISH, *supra* note 197, at 40. The document, jointly issued by Israel and the Palestinian Authority, includes the holder's serial number issued by the Palestinian Authority and the holder's Israeli-issued ID number. *Id.*

<sup>584</sup> The passport functions similar to a travel document and does not serve to confer renewed Jordanian citizenship to West Bankers nor the national protection derived there from. Palestinians, including refugees, residing in the West Bank acquired the same status as Jordanian citizens following the 'unification' of the West and East Bank in 1950 and the adoption of new nationality legislation in Jordan. In principle, this status remained the same following Jordan's decision to sever legal and administrative ties to the West Bank in 1988, although the validity of the Jordanian passport held by Palestinians in the West Bank was shortened from 5 to 2 years. In October 1995 the Jordanian Department of Civil Affairs and Passports announced that under new regulations, Palestinian residents of the West Bank who held a Jordanian passport before July 1988 could replace their two-year documents with a regular five-year passport, even if Israel had revoked their residency rights. *Id.*

<sup>585</sup> On the residency status of Palestinians in 1967-occupied Palestine see generally JAMAL & DARWISH, *supra* note 197.

<sup>586</sup> See *supra* notes 217-221 and accompanying text.

<sup>587</sup> In the Gaza Strip more than 40 percent of households in camps have 3 persons per room compared to 31 percent in the West Bank. Refugee camp households are more crowded than towns and villages. FAFO – INSTITUTE FOR APPLIED SOCIAL SCIENCE, GROWING FAST: THE PALESTINIAN POPULATION IN THE WEST BANK AND GAZA STRIP 171 (2001).

<sup>588</sup> See *supra* notes 213-14 and accompanying text.

<sup>589</sup> See *supra* notes 236-37 and accompanying text.

### C. *The Status of Palestinians in Europe and the United States*

Protection gaps in Europe for Palestinian refugees largely relate to the interpretation of the status of Palestinian refugees under article 1D of the 1951 Refugee Convention. The exact number of Palestinian refugees in Europe is unknown. Most states do not include Palestinians as a separate ethnic or national group in population censuses. Statistical information often categorizes Palestinians as 'other Middle East.' It is estimated that over 200,000 Palestinian refugees currently reside in Europe.<sup>590</sup> This includes some 30,000-80,000 Palestinian refugees in Germany; 20,000 refugees in Denmark; 15,000 refugees in Britain; 3,000 Palestinians in France, and some 9,000 Palestinian refugees in Sweden.<sup>591</sup>

As detailed above, most European states either do not incorporate article 1D into domestic law or interpret the article incorrectly.<sup>592</sup> Palestinians, for the most part, have difficulty when they apply for political asylum,<sup>593</sup> residence based on family reunification, or other related protections that are available to other refugees in the world. Many remain in European states without recognized legal status, without work permits, and without the basic essentials to live in freedom and dignity. The protection gap vis-à-vis Palestinians in Europe is most evident when compared to rights granted other refugees under the Refugee Convention

<sup>590</sup> The Palestinian Central Bureau of Statistics estimates the total size of the Palestinian population outside the Arab world and the United States at 295,075 at the end of 2002. The Bureau does not provide a breakdown for the number of Palestinians in Europe, however, it can be assumed that a majority of Palestinians outside Arab world and the United States reside in Europe. PALESTINIANS AT THE END OF THE YEAR 2002, *supra* note 121, at 35. The majority of Palestinian refugees in Europe began to arrive during the 1960s and after in search of employment (especially from Lebanon) as well as refuge from the combined effects of Israel's military occupation of the West Bank, eastern Jerusalem, and Gaza Strip in 1967, and subsequent invasion of Lebanon in the 1980s. Few Palestinian refugees found refuge in Europe as a direct result of the 1948 conflict and war in Palestine. Abbas Shibliak, *Palestinian Refugee Communities in Europe, An Overview*, Workshop at the University of Oxford (May 5-6, 2000) (on file with the authors).

<sup>591</sup> Abbas Shibliak, *Palestinian Refugees in Europe, Challenges of Adaptation and Identity*, Workshop on Palestinian Refugee Communities in Europe at St. Anthony's College, University of Oxford (May 5-6, 2000) (On file with the authors).

<sup>592</sup> *Supra* notes 252-54.

<sup>593</sup> According to the Swedish Migration Board, for example, there are 934 stateless Palestinians registered in Sweden. Of these, 895 do not have residency status. Although 200 Palestinians have been ordered deported, no expulsions are being carried out because the Swedish Immigration Department has concluded that expulsions cannot be carried out to the West Bank and Gaza as it is impossible to fly there. The Immigration Department has called for a policy change on Palestinian asylum-seekers that would permit them to claim a 'need for protection' due to armed conflict, entitling them to automatic residence. *See Palestinians to be Allowed to Stay in Sweden*, BBC WORLDWIDE MONITORING, Apr. 11, 2002 (on file with the authors).

and rights granted other stateless individuals under the two Conventions on Statelessness. In the context of the second *intifada* some states have placed tighter restrictions on asylum claims for Palestinians originating from 1967-occupied Palestine.<sup>594</sup>

As in Europe, protection gaps in the United States largely relate to the interpretation of article 1D and the status provided to Palestinian refugees who are not accorded refugee status. It is estimated that more than 200,000 Palestinian refugees reside in the United States.<sup>595</sup> Similar to the situation of Palestinian refugees in Europe, precise figures for the number of Palestinian refugees in the United States are not available. Palestinian nationality is rarely recognized; Palestinians therefore mysteriously disappear, mostly likely categorized as ‘other Middle Eastern.’<sup>596</sup>

#### D. *Principles and Parameters of an Internationally-Harmonized Temporary Protection Regime for Palestinians*

##### 1. Why Regional Temporary Protection is Not Workable for Palestinians

It is clear from the examination of different treatments Palestinians receive, both in areas where they receive a type of temporary protection and elsewhere in the world, that a temporary protection regime based on a regional approach is not desirable. In practice, it has not worked well in terms of any of the concerns raised by states or refugees about temporary protection. The piecemeal and confused applications of refugee, human rights, and statelessness law toward Palestinians have undermined legal standards in all those areas. It is a prime illustration of the *burden-shifting* phenomenon roundly criticized in the United States-Haitian situation, the “safe zones” of the former Yugoslavia and northern Iraq, and the barriers

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<sup>594</sup> ECRE notes that “in light of the current situation in the ME and an increase in asylum applications made by Palestinian nationals, the Home Office is currently not considering asylum applications.” ECRE, Country Report: United Kingdom (2001). The UK’s asylum statistics, however, do not separately designate Palestinians as a nationality, presumably categorizing them under “other ME.”

<sup>595</sup> The Palestinian Central Bureau of Statistics estimates the total size of the Palestinian population in the United States at 231,723 at the end of 2002. PALESTINIANS AT THE END OF THE YEAR 2002, *supra* note 121, at 35. The 1990 U.S. Census estimated 50,000 Palestinians in the U.S. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, ETHNIC AND HISPANIC BRANCH, 1990 CENSUS SPECIAL TABULATIONS. This number, however, is likely low due to the underestimation of minority populations in the United States and it may not include Palestinian refugees who have acquired citizenship in Jordan.

<sup>596</sup> In the 1980 census, the first in which respondents had an opportunity to list their ancestry, only 21,288 individuals listed Palestinian. See Kathleen Christison, *The American Experience: Palestinians in the U.S.*, J. PALESTINE STUD., Summer 1989, at 18 (citing CENSUS OF POPULATION: SUPPLEMENTARY REPORT: ANCESTRY OF THE POPULATION BY STATE: 1980 21 (1983)).

to asylum erected in Western states to deflect refugee flows to poorer regions; and, it is completely inconsistent with the special regime established for Palestinians to ensure them protection and assistance.

As shown, the status and treatment given Palestinians in the UNRWA areas fall below applicable standards in different states and regions, such as the 1969 OAU Convention, the Refugee Convention, and the human rights instruments ratified by various Arab states. Moreover, the status and treatment given Palestinians everywhere is inconsistent with the special regime established to ensure their protection pending a durable solution consistent with refugee law principles of *safe return, absorption, or resettlement based on the refugee's voluntary choice*, as required by article 1D's implicit reference to the law of U.N. General Assembly Resolution 194 in its language: "the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations."<sup>597</sup>

## 2. Why an Internationally-Harmonized Approach is Imperative and Timely

The fifty-four-year human rights and humanitarian emergency that has driven hundreds of thousands of Palestinians from their places of origin has been exacerbated by the beginning of the second *intifada* and the end of the Oslo peace process. Yet, the reasons for the recent and renewed exodus of Palestinians from the West Bank and Gaza are a continuation of all the reasons they have been forced to flee in large and small numbers over time: denial of the right to self-determination; armed conflict, colonization, and foreign occupation; ethnic cleansing and racial discrimination; and apartheid at the hands of the Zionist Israeli state.<sup>598</sup> The clear evidence presented of an ethnic cleansing policy toward the Palestinians is different from the policies toward the Bosnian-Muslims and Kosovar Albanians only in degree and length of time over which it has been carried out.

As described in detail in Part III, 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 Refugee Convention. This would not require that states grant Palestinians asylum, but might authorize a grant of temporary protection until a durable solution is found. Guided by the lessons of temporary protection as implemented by states in both formalized and non-formalized policies, we propose a temporary protection regime for Palestinians involving the following elements.

First, temporary protection must be closely connected to durable solutions guided by *non-refoulement*, voluntary choice, and the right of return.<sup>599</sup> The most remarkable feature of the Palestinian population as

<sup>597</sup> See Refugee Convention, *supra* note 7, art. 1D, 189 U.N.T.S. at 156.

<sup>598</sup> See *supra* notes 129-238 and accompanying text.

<sup>599</sup> See *supra* notes 16, 21-29 and accompanying text.

refugees worldwide is their fifty-four-year steadfast commitment to return to their homes and lands. As compared to the post-World War II refugee population for which the Refugee Convention was principally designed, and many refugee groups since who have sought resettlement, Palestinians have consistently declared their opposition to resettlement, and demanded return.<sup>600</sup> For Palestinians, “[t]he meaning of return in the . . . collective consciousness is the very opposite of that of the *nakba* [the ‘catastrophe’ of 1948], of refuge and of exile.”<sup>601</sup> Today the individual and collective desire of Palestinian refugees to return to their homes of origin inside Israel is expressed not only through countless statements and petitions to political authorities, but also through the establishment of village committees and societies<sup>602</sup> whose purpose is to preserve a living memory of the refugees’ villages of origin and to promote a culture of return, and the emergence of a global Palestinian refugee coalition for return.<sup>603</sup> Israel, the state responsible for the expulsion of Palestinians, on

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<sup>600</sup> For early statements see, for example, FAYEZ A. SAYEGH, *THE PALESTINE REFUGEES* 52 (1952) (citing a resolution issued in 1949 by Palestinian refugees from Syria, Lebanon, Jordan, Egypt and those territories of Palestine not occupied by Zionist/Israeli military forces during the armed conflict and war of 1947-49 *reprinted in al-Islah* (New York), Aug. 19, 1949, which states: “The Arabs of Palestine insist upon the return of the refugees to their homes in accordance with the resolution of the General Assembly, including the provisions thereof for compensation and guarantees of property rights and personal security. They reject any scheme or plan calling for their resettlement in Arab countries.”). For more recent statements see, for example, Statements of Palestinian Refugees from 1967 Occupied Palestine, Israel, Jordan, Lebanon and Syria *in*, LABOUR MIDDLE EAST COUNCIL, CONSERVATIVE MIDDLE EAST COUNCIL, AND LIBERAL DEMOCRAT MIDDLE EAST COUNCIL, *RIGHT OF RETURN, JOINT PARLIAMENTARY MIDDLE EAST COUNCILS COMMISSION OF ENQUIRY – PALESTINIAN REFUGEES* (2001). For a more detailed discussion see Jaber Suleiman, *The Palestinian Liberation Organization: From the Right of Return to Bantustan*, *in* PALESTINIAN REFUGEES AND THE RIGHT OF RETURN 87-102 (Naseer Aruri, ed. 2001).

<sup>601</sup> Suleiman, *supra* note 600, at 87.

<sup>602</sup> On Palestinian identity and memory see, for example, Julie M. Peteet, *Transforming Trust: Dispossession and Empowerment Among Palestinian Refugees*, *in* MISTRUSTING REFUGEES 168-86 (E. Valentine Daniel & John Chr. Knudsen, eds. 1995). For examples of active village societies see <http://www.PalestineRemembered.com> (last visited Mar. 15, 2003).

<sup>603</sup> See, e.g., Declaration issued by the First Popular Refugee Conference in Deheishe Refugee Camp/Bethlehem, Sept. 13, 1996, *at* <http://www.badil.org/Refugees/Documents/1996/1-96.htm> (last visited Mar. 15, 2003) (“[The] time has come for the refugee community to organize itself in popular committees and to design a strategic program of struggle based on the hidden capacities of the people—the refugees themselves—who, with their unity, patience, and clear objectives, have maintained the struggle for their national rights.”). The coalition is comprised of refugee activists and independent community initiatives from the West Bank, Gaza Strip, Lebanon, Syria, and Jordan, internally displaced Palestinians inside Israel, as



the other hand, denies responsibility for their plight and has prevented them from returning to their homes of origin.<sup>604</sup> “From Israel’s point of view,” writes Israeli journalist Danny Rubinstein, “recognition of the right of return means the destruction of the State of Israel.”<sup>605</sup> Recent Israeli legislation prohibits the return of Palestinian refugees to their homes inside Israel unless approved by a majority of eighty members of the 120-member Knesset (parliament).<sup>606</sup> It has thus fallen upon the neighboring Arab states to host the vast majority of the Palestinian refu-

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well as Palestinian refugees residing in Europe and the United States. For more on the development of a global Palestinian right of return movement see Ingrid Jaradat Gassner, *A Programme for an Independent Rights Campaign*, in PALESTINIAN REFUGEES AND THE RIGHT OF RETURN 252-259 (Naseer Aruri ed., 2001).

<sup>604</sup> The decision to prevent the return of Palestinian refugees was taken at a June 1948 Israeli cabinet meeting and confirmed in the *Reply of the Provisional Government of Israel to the Proposal Regarding the Return of Arab Refugees*, U.N. GAOR, 3d Sess., Supp. No. 11, Annex 2, at 27, U.N. Doc. A/648 (1948). During 1949-1950, Israel briefly considered two conditional offers for the return of a limited number of refugees, but never implemented them. For a discussion of these proposals see MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139, at 266-85. More recently see, for example, Labor and Likud Knesset Members, *National Agreement Regarding the Negotiations on Permanent Settlement with the Palestinians*, Jan. 1, 1997, reprinted in J. PALESTINE STUD., Spring 1997, at 160, 62 (“The right of the state of Israel to prevent the entry of Palestinian refugees into its sovereign territory will be recognized”). For a more detailed discussion of Israel’s position on Palestinian refugees see GOVERNMENT PRESS OFFICE, *THE REFUGEE ISSUE, A BACKGROUND PAPER* (1994) [hereinafter *THE REFUGEE ISSUE*]; and, SHLOMO GAZIT, JAFFEE CENTRE FOR STRATEGIC STUDIES, *THE PALESTINIAN REFUGEE PROBLEM* (1995).

<sup>605</sup> Danny Rubinstein, *The Return of the Right of Return*, HA’ARETZ, Feb. 4, 2002. One of the earliest formulations of this premise was set out by Israel’s first Prime Minister, David Ben Gurion. DON PERETZ, *ISRAEL AND THE PALESTINE ARABS* 42 (1958) (quoting Ben Gurion’s response to U.S. pressure in late May 1948 to allow Palestinian refugees to return to their homes: “The United States is a powerful country; Israel is a small and weak one. We can be crushed, but we will not commit suicide.”). More recently see, for example, Ahmad Mashharawi, *Interview with Israeli Justice Minister Yosi Beilin*, AL-QUDS, Jan. 5, 2001 (quoting former Israeli justice minister and one of the architects of the Oslo process stating “[T]he moment Israel loses its Jewish majority, it will lose its national character. It will not be able to exist with the same contents of its creation, since it will be an ordinary state, and not a state as we want it to be”) (FBIS translation).

<sup>606</sup> Bill 1220 for banning the Right of Return, 2001, S.H. 116 (English translation can be found in NIMER SULTANY, *CITIZENS WITHOUT CITIZENSHIP, MADA’S FIRST ANNUAL POLITICAL MONITORING REPORT: ISRAEL AND THE PALESTINIAN MINORITY 2000-2002* (2003)). Article 2 states, inter alia, “Prohibition of Entry of Refugees: Refugees will not be returned to the State of Israel unless approved by a majority of eighty members of the Knesset.” *Id.* . Article 4 further states, inter alia, “Superiority of the Law: The government of Israel will not give guarantees or enter an agreement which contradict the instructions of this law.” *Id.*

gees, with significant consequences to their economies, political stability, and security.

The other remarkable feature of the Palestinian refugee problem is the singular absence of western powers' commitment to an international legal framework addressing protection issues for this population. Compared to the guiding principles applied in other refugee cases, as summarized above, western powers have addressed the Palestinian refugee issue almost exclusively from the perspective of their own geopolitical interests in the region. Foremost among these interests is Israel's security and well-being.<sup>607</sup> Since the return of non-Jewish refugees is perceived by Israel as a security threat,<sup>608</sup> western powers consider the right of return in the Palestinian case impractical.<sup>609</sup> As one commentator correctly observes,

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<sup>607</sup> On U.S. strategic interests in the Middle East see, for example, QUANDT, *supra* note 140, at 14 (stating that early American support for Israel was rooted in a sense of moral commitment to the survivors of the holocaust, as well as in the intense attachment of American Jews to Israel. During the 1980s a "strategic" rationale was added to the traditional list of reasons for supporting Israel, although this view was never universally accepted.). See also Avi Shlaim, *The Impact of US Policy in the Middle East*, J. PALESTINE STUD., Winter 1988, at 15 (1988); CLYDE R. MARK, CONGRESSIONAL RESEARCH SERVICE, ISRAEL-UNITED STATES RELATIONS (2003). On European interests see, for example, the 1980 Venice Declaration reprinted in I DOCUMENTS ON PALESTINE, *supra* note 130, at 284 (recognizing "the right to existence and to security of all the States in the region, including Israel . . ."). See also P. de La Gorce, *Europe and the Arab-Israel Conflict*, J. PALESTINE STUD., Spring 1997, at 5; and, HAIFAA A. JAWAD, EURO-ARAB RELATIONS, A STUDY IN COLLECTIVE DIPLOMACY (1992).

<sup>608</sup> See, e.g., MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, *supra* note 139, at 139 (citing a June 1948 IDF Intelligence Department warning that that return of Palestinian refugees would constitute a serious danger and a potential fifth column behind Israeli front lines). More recently see THE REFUGEE ISSUE, *supra* note 604, at 10 ("The entry into Israel of masses of refugees would pose a very real threat to security, law and order, and the viability of Israel's social fabric, as well as to the demographic viability of Israel as the world's only Jewish state . . .").

<sup>609</sup> See, e.g., President William Clinton, Remarks at Israel Policy Forum Gala, (Jan. 7, 2001), available at [http://www.arts.mcgill.ca/MEPP/PRRN/papers/clinton\\_remarks.html](http://www.arts.mcgill.ca/MEPP/PRRN/papers/clinton_remarks.html) (last visited Mar. 15, 2003) [hereinafter Clinton Remarks] ("[T]here cannot be an unlimited language in an agreement that would undermine the very foundations of the Israeli state or the whole reason for creating the Palestinian state"); National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc/nss.html> (last visited Mar. 15th, 2003) (stating that "Israel also has a large stake in the success of a democratic Palestine. Permanent occupation threatens Israel's identity [i.e., as a Jewish state] and democracy"); Secretary of State Colin Powell, Speech at the University of Louisville (Nov. 19, 2001), reprinted in J. PALESTINE STUD., Winter 2002, at 165, 167 [hereinafter Powell Speech] ("Palestinians must eliminate any doubt, once and for all, that they accept the legitimacy of Israel as a Jewish state."). For earlier positions to the contrary, see, for example, MALLISON, *supra* note 181, at 8 (citing 8 WHITEMAN DIG. INT'L. L. 35 (1967) quoting Letter from Assistant Secretary of State Talbot to Dr. Elmer Berger, Executive Vice President of

“Israeli positions function as base referents and are therefore deployed as ‘pragmatic’ a priori.”<sup>610</sup> Solutions are largely framed in humanitarian terms<sup>611</sup> without reference to the guiding principles applied in other refugee cases.<sup>612</sup> It is not surprising, therefore, that while the Oslo agree-

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the American Council for Judaism (Apr. 20, 1964) stating, “the Department of State does not regard the ‘Jewish people’ concept as a concept of international law”). See also *Palestine Refugee Situation in the Context the Middle East Peace Process*, Eur. Parl. Ass., 14th Sess., Res. 1156 (1998), available at <http://assembly.coe.int> (last visited Mar. 15, 2003) [hereinafter Resolution 1156].

<sup>610</sup> Joseph Massad, *Return or Permanent Exile, in PALESTINIAN REFUGEES, THE RIGHT OF RETURN* 105, 108 (Naseer Aruri, ed. 2001). Thus, for example, PLO acceptance of U.N. Security Council Resolution 242(1967) as a condition for U.S. recognition was deemed by the Reagan administration a “serious evolution of Palestinian thinking toward *realistic* and *pragmatic* positions on the key issues.” Statement by President Ronald Reagan, Statement on United States-P.L.O. Dialogue (Dec. 14, 1988), reprinted in I DOCUMENTS ON PALESTINE, *supra* note 130, at 338 (emphasis added). *Supra* note 146 and accompanying text.

<sup>611</sup> In 1949, for example, UNCCP, acting under article 12 of its mandate set forth in U.N. General Assembly Resolution 194(III), established an Economic Survey Mission (“ESM”) to design an organizational structure to coordinate, supervise, and facilitate measures for relief, resettlement, and economic development—i.e., a Middle East Marshall Plan—to “start [refugees] on the road to rehabilitation and bring an end to their enforced idleness and the demoralizing effect of a dole.” *Final Report of the United Nations Economic Survey Mission for the Middle East, Part I, supra* note 155, at vii. For more details see BENJAMIN SCHIFF, REFUGEES UNTO THE THIRD GENERATION, U.N. AID TO PALESTINIANS (1995). This approach still dominates western policy on durable solutions for Palestinian refugees. See, e.g., *American “Nonpaper” on Israeli-Palestinian Stockholm Negotiations, June 2000*, J. PALESTINE STUD., Autumn 2000, at 154 (stating that the United States has “a vague wording that meets Arab demands for the right of return, but it will be so limited in numbers and additional limitations that it will not have any real significance such that it will meet the needs of the Palestinians without causing concern to Israel.”). Additionally, the proposal outlines a package of over 100 billion U.S. dollars to be invested in refugee rehabilitation. See also President Bill Clinton, *Proposals for a Final Settlement, in J. PALESTINE STUD.*, Spring 2001, at 171-72 [hereinafter Clinton Proposals]; INTERNATIONAL CRISIS GROUP, MIDDLE EAST ENDGAME II: HOW A COMPREHENSIVE MIDDLE EAST PEACE SETTLEMENT WOULD LOOK 7-8 (2002) (outlining a package of resettlement opinions and substantial compensation in lieu of return).

<sup>612</sup> Chimni’s analysis of the language of humanitarianism as “the ideology of hegemonic states” in the context of the contemporary debate on globalization also provides a useful framework in understanding the historical approach of western powers to the Palestinian refugee issue. However, while Chimni argues that the language of humanitarianism has turned repatriation into the only solution, in the Palestinian case, it has turned resettlement into the only option. B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243, 251 (2000).

ments “established different negotiating forums”<sup>613</sup> on refugees they “do not substantively deal with the issue.”<sup>614</sup>

The lack of respect for guiding principles is evident when European and American policies vis-à-vis Palestinian refugees are contrasted with their policy towards other refugees.<sup>615</sup> The European Union, for example, does not explicitly affirm the right of Palestinian refugees to return to their homes and repossess their properties. Policy documents generally recognize the need for a “just,” “viable,” and “acceptable” solution to the Palestinian refugee issue.<sup>616</sup> The Council of Europe considers the right of return in the Palestinian case “politically and practically difficult to achieve” and therefore recommends that the refugee issue “must be

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<sup>613</sup> Forums include the Quadripartite committee composed of Israel, Jordan, Egypt and the Palestinians to “decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967 . . .” Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., art. XII, 32 I.L.M. 1525, 1532 [hereinafter Oslo I]. See also Cairo Agreement, *supra* note 574, at art. XVI; Oslo II, *supra* note 187, art. XXVII, 36 I.L.M. at 567. The parties also agreed to establish a multilateral track to address regional issues, including the refugee issue. For an overview of the Refugee Working Group and the multi-lateral track see, for example, Rex Brynen and Jill Tansley, *The Refugee Working Group of the Middle East Multilateral Peace Negotiations*, 2 PALESTINE ISR. J. 53 (1995); Rex Brynen, *Much Ado About Nothing? The Refugee Working Group and the Perils of Multilateral Quasi-negotiation*, 2 INT’L NEGOTIATIONS 2 (1997).

<sup>614</sup> BELL, *supra* note 141, at 247. The Oslo agreements do not include reference to relevant resolutions of the United Nations (i.e., General Assembly Resolution 194 of 1948, Security Council Resolution 237 of 1967, and General Assembly Resolution 2252 of 1967), nor do they affirm that the refugee issue should be resolved in accordance with international law. See Oslo I, *supra* note 613, 32 I.L.M. at 1525; Oslo II, *supra* note 187, 36 I.L.M. at 551.

<sup>615</sup> On state practice in other refugee cases see *supra* notes 341 to 353, and accompanying text. For a more detailed discussion see Akram & Rempel, *supra* note 243, at n.228-38, n.246-58, n.272-78, n.286-94 and accompanying text.

<sup>616</sup> See, e.g., *The EU & the Middle East: Position & Background*, [http://europa.eu.int/comm/external\\_relations/mepp/faq/index.htm](http://europa.eu.int/comm/external_relations/mepp/faq/index.htm) (last visited Mar. 15, 2003). See also Declaration by the European Union on the Middle East, Oct. 29, 2001, at <http://www.delwbg.cec.eu.int/en/declarations/> (last visited Apr. 30, 2003); Declaration by the European Union on the Middle East (Seville European Council, June 21-22, 2002) available at <http://www.reliefweb.int/w/rwb.nsf/0/790db37e9f6b1596c1256be200567e6f?OpenDocument> (last visited Mar. 15, 2003). The single exception to this general position appears to be a 1973 French initiative, known as the Shuman Paper. EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR RESEARCH, *THE MIDDLE EAST PEACE PROCESS AND THE EUROPEAN UNION* 14 (1999) (stating that the European Community affirms “the choice for Arab refugees of either returning to their homes or being indemnified”). It is also worth noting that European states annually reaffirm U.N. General Assembly Resolution 194(III). On E.U. policy on Palestinian refugees see also Alain Gresh, *The European Union and the Refugee Question*, in PALESTINIAN REFUGEES, THE RIGHT OF RETURN 82-86 (Naseer Aruri ed., 2001).

resolved by resettlement to permanent accommodation.”<sup>617</sup> The United States provides annual assistance to Israel to help finance absorption of new Jewish immigrants,<sup>618</sup> but no longer supports unrestricted return of Palestinian refugees to their homes of origin inside Israel.<sup>619</sup> During the 1970s the United States vetoed several U.N. Security Council resolutions affirming the right of all Palestinian refugees to return to their homes and to repossess their properties.<sup>620</sup> Since the signing of Oslo I in 1993, the United States has “embarked on a strategy that appeared aimed at downgrading the refugees from their international status as wards of the United Nations to a strictly bilateral concern of Israel and the Palestinian National Authority.”<sup>621</sup> Concomitant with this new approach, the United States voted against reaffirming U.N. General Assembly Resolution 194(III).<sup>622</sup>

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<sup>617</sup> Resolution 1156, *supra* note 609. The resolution is based on a field investigation conducted by the Committee on Migration, Refugees and Demography. *Palestine Refugee Situation in the Context of the Middle East Peace Process: Report*, Eur. Parl. Ass., Comm. on Migration, Refugees and Demography, Doc. No. 8042 (1998), available at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2Fdoc98%2Fedoc8042.htm> (last visited Mar. 15, 2003). The conclusions issued by the Committee rapporteur are interesting in that they do not represent the majority of the views of refugees with whom the Committee interviewed.

<sup>618</sup> Between 1997 and 2000, the total grant has averaged around 70 million U.S. dollars per year. LOIS B. MCHUGH, REFUGEE ASSISTANCE IN THE FOREIGN AID BILL: PROBLEMS AND PROSPECTS 3 (2000).

<sup>619</sup> QUANDT, *supra* note 140, at 6. See, e.g., Powell Speech, *supra* note 609 (stating “the parties must strive for a just solution that is both fair and realistic”). Recent U.S. statements, moreover, call upon Palestinians, in the context of final status negotiations, to recognize “the legitimacy of Israel as a Jewish state.” *Id.* See also Press Release, U.S. Department of State, Bush Calls for New Leadership (June 24, 2002). For early U.S. policy supporting the right of Palestinian refugees to return and receive compensation see, for example, Policy Paper Prepared in the Department of State, Palestine Refugees, Secret, Washington, DC, March 15, 1949 [Excerpts], reprinted in DONALD NEFF, *FALLEN PILLARS: U.S. POLICY TOWARD THE PALESTINIANS AND ISRAEL SINCE 1945* 233, 237 (1995). For a review of U.S. policy on Palestinian refugees see *id.* at 55-82. See also INSTITUTE FOR PALESTINE STUDIES, U.S. OFFICIAL STATEMENTS: THE PALESTINIAN REFUGEES (Norbert Scholz ed., 1994).

<sup>620</sup> See S.C. Draft Res., U.N. SCOR, U.N. Doc. S/11940 (1976) (affirming the right of refugees to return to their homes). See also S.C. Draft Res., U.N. SCOR, U.N. Doc. S/12119 (1976); S.C. Draft Res., U.N. SCOR, U.N. Doc. S/13911 (1980).

<sup>621</sup> NEFF, *FALLEN PILLARS*, *supra* note 619, at 81.

<sup>622</sup> Explaining the U.S. vote, then Ambassador to the U.N. Madeline Albright stated, “We believe that resolution language referring to ‘final status’ issues should be dropped, since these issues are now under negotiation by the parties themselves. These include refugees . . .” NEFF, *FALLEN PILLARS*, *supra* note 619, at 55. Letter from Madeline K. Albright, U.S. Ambassador to the U.N., to Ambassadors to the United Nations (Aug. 8, 1994), excerpts reprinted in J. PALESTINE STUD., Winter 1995, at 152.

Western powers largely envision durable solutions for Palestinian refugees within the framework of two ethno-national states in historic Mandate Palestine – Israel and Palestine. According to this framework, refugees will be resettled in a future state of Palestine to be established in most of the West Bank, eastern Jerusalem and the Gaza Strip. This is the framework that guided U.S. mediation of Camp David II final status talks between the PLO and Israel in July 2000.<sup>623</sup> According to then-U.S. President Clinton, who was deeply engaged in the mediation process, “You cannot expect Israel to acknowledge an unlimited right of return to present day Israel [and] give up Gaza and the West Bank and have the settlement blocks as compact as possible, because of where a lot of these refugees came from.”<sup>624</sup> The ‘Road Map’ drafted in 2002 by the “Quartet”—the United States, the European Union, Russia, and the United Nations—is consistent with this framework—i.e., two states and non-recognition of the individual right of return.<sup>625</sup> In relevant part, the draft document merely calls for “an agreed, just, fair, and realistic solution to the refugee issue.”<sup>626</sup> Similar to the Oslo agreements, the “Road Map” makes no reference to international law or to relevant U.N. resolutions as a framework for crafting durable solutions for Palestinian refugees.

This proposal rejects such an approach on the premise that a principled legal framework *does* matter, not just for the Palestinian refugee problem, but also for the overall strength of the refugee system.

With that premise, bringing Palestinian refugees into the framework applied to other mass refugee solutions, our proposed temporary protection regime must adhere to *non-refoulement*, voluntary choice, and the right of return to one’s home. Palestinians have been given no “choice” in

<sup>623</sup> For an analysis of Camp David II see, for example, Robert Malley & Hussein Agha, *Camp David: A Tragedy of Errors*, THE NEW YORK REVIEW OF BOOKS, Aug. 9, 2001, available at <http://www.nybooks.com/articles/14380> (last visited Apr. 30, 2004). Malley was Special Assistant to President Clinton for Arab-Israeli Affairs. See also Akram Hanieh, *The Camp David Papers*, J. PALESTINE STUD., Winter 2001, at 75.

<sup>624</sup> Clinton Remarks, *supra* note 609. See also Clinton Proposals, *supra* note 611.

<sup>625</sup> A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), available at [http://europa.eu.int/comm/external\\_relations/mepp/roadmap.htm](http://europa.eu.int/comm/external_relations/mepp/roadmap.htm) (last visited June 10, 2003) [hereinafter Road Map]. The ‘Road Map’ states, *inter alia*:

The destination is a final and comprehensive settlement of the Israel-Palestinian conflict by 2005, as presented in President Bush’s speech of 24 June, and welcomed by the EU, Russia and the UN in the 16 July and 17 September Quartet Ministerial Statements.

A settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors.

*Id.*

<sup>626</sup> *Id.*

any meaningful sense concerning their desires for a durable solution.<sup>627</sup> In the absence of any international body and mechanism to design and implement durable solutions, the pattern of their status and migration has been one of expulsions and lack of status in many states that have no legal obligation to receive them.<sup>628</sup>

We propose a five-year renewable, formalized temporary protection status for Palestinians, applying the same principles and standards in every state that participates in the regime.<sup>629</sup> Temporary protection

<sup>627</sup> When choice is accepted as a basic principle governing durable solutions, it is often framed within the context of arbitrary limitations, constraints, and/or disincentives whose objective is to limit to the greatest extent possible the number of refugees choosing to exercise their right to return to their homes of origin inside Israel. See, e.g., Resolution 1156, *supra* note 609; American "Nonpaper" on Israeli-Palestinian Stockholm Negotiations, *supra* note 611; Israeli private response to the Palestinian refugee proposal of January 22, 2001, Non-Paper, Draft 2 (on file with author); MIDDLE EAST ENDGAME II, *supra* note 611.

<sup>628</sup> See *supra* notes 225-241.

<sup>629</sup> There are several factors suggesting that five years is an appropriate initial time period for such a temporary protection program, some of which may be relevant to the Palestinian situation. First, in the European context, open-ended temporary protection is seen as undesirable, and both the UNHCR's Informal Consultations and the European Commission's draft report recommend a five-year limit. See *Executive Committee*, U.N. High Comm'r for Refugees, *Progress Report on Informal Consultations on the Provision of International Protection to All who need it*, 8th mtg., at para 4(r), U.N. Doc. EC/47/SC/CRP.27 (1997); and Commission Amended Proposal for a Joint Action concerning Temporary Protection of Displaced Persons, art. 13, 1998 O.J. (C 268) 13, 21. See Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 302. In the Palestinian context, a relatively short, clearly fixed period tied to creating the conditions of safe return is essential for the program's success. Given the length of time the Palestinian refugee situation has remained unresolved and the longstanding resistance of major players to implementing a principled solution, anything less than five years is unrealistic. Given the current critical cycle of violence forcing a renewed exodus, anything greater than five years would give the authority for continued ethnic cleansing. Second, two studies support the conclusion that for mass refugee crises, five years is a critical period determining the feasibility of return. A United Nations survey of the period 1970-1980 showed that large-scale repatriation took place in 50% of the cases surveyed within five years of the creation of the refugee problem. A study of integration of Vietnamese refugees in Finland concluded that assimilation and acculturation of refugees did not occur until five years after their arrival in a host state. See Hathaway & Neve, *supra* note 34, at 182-83 (citing Sadruddin Aga Khan, *United Nations Study on Human Rights and Massive Exodus*, U.N. ESCOR, U.N. Doc. E/CN.4/1503 (1981); and Karmela Liebkind, *Self-Reported Ethnic Identity, Depression and Anxiety Among Young Vietnamese Refugees and their Parents*, 6 J. REFUGEE STUD. 25, 34-35 (1993)). For Palestinians, obviously, the statistics on five year repatriations have little meaning, but it is reasonable to expect that if a temporary protection program creates the appropriate incentives, at least for the latest refugees flows, repatriation could well take place within five years; moreover, for the most recent refugees, five years would be the critical time when

would be offered to all Palestinians fleeing the West Bank and Gaza as a result of military occupation and the resultant humanitarian crisis, as well as to Palestinians residing in any of the participating states who do not already have citizenship or permanent residence, security of residence, or protection. Consistent with the formal temporary protection status offered in Europe after the Balkan crisis, and on the recommendation of UNRWA or UNHCR, states would prioritize their temporary protection slots for urgent humanitarian cases (emergency medical and physical safety cases should be considered for airlift, such as in Kosovo), family reunification, threat to life or safety, victims of severe human rights abuses, and ethnic cleansing.

Second, we propose temporary protection that is internationally harmonized, as part of a process that includes shared responsibility on many levels, and which recognizes and accommodates both the legal and political interests of the states involved.<sup>630</sup> The temporary protection program would be instituted through an international conference geared toward designing and implementing mechanisms to address the root causes of the conflict, and to create conditions that would allow Palestinian refugee repatriation—to create meaningful choice.<sup>631</sup> The temporary protection regime proposed would engage all states that have significant Palestinian populations, and all stakeholders in the outcome of Israeli-Palestinian peace. It must, at a minimum, involve the PLO, all the Arab states, Israel, as well as the Quartet comprising the United States, the E.U. states, Russia, and the United Nations.<sup>632</sup> As part of the international conference on Palestinian refugees, states would commit to the same kind of multilateral repatriation, restitution, compensation, development and monitoring pro-

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they would either develop more permanent ties to the host states, or be more psychologically prepared to return. For the refugees who have been exiled for a generation or more, a five-year limit on their status would be essential to motivating them psychologically to take steps and invest in making their return possible.

<sup>630</sup> For the overall framework accommodating legal and political obligations and constraints that guide this proposal, see generally *Executive Comm.*, U.N. High Comm'r for Refugees, *Agenda for Protection*, U.N. GAOR, 53d Sess., U.N. Doc. A/AC.96/965/Add.1 (2002); *Executive Comm.*, U.N. High Comm'r for Refugees, *Note on International Protection*, U.N. GAOR, 53d Sess., U.N. Doc. A/AC.96.951 (2001).

<sup>631</sup> The centrality of voluntary repatriation to durable solutions for mass influx situations has been repeatedly emphasized by UNHCR policies and practices all over the world. See *Note on International Protection*, *supra* note 630, at 26-27. See also *Executive Comm.*, U.N. High Comm'r for Refugees, *Reintegration: A Progress Report*, 20th mtg., U.N. Doc. EC/51/SC/CRP.5 (2001); U.N. HIGH COMM'R FOR REFUGEES, REINTEGRATION AND SELF-RELIANCE UNIT PROGRAMME AND TECHNICAL SUPPORT SECTION—DIVISION OF OPERATIONAL SUPPORT, OPERATIONAL FRAMEWORK FOR REPATRIATION AND REINTEGRATION ACTIVITIES IN POST CONFLICT SITUATIONS, DRAFT (1998), available at [http://www.acdi-cida.gc.ca/cida\\_ind.nsf/0/0380a30646ec747f85256ae7004de2ac/\\$FILE/ATTMTV96/Po5.pdf](http://www.acdi-cida.gc.ca/cida_ind.nsf/0/0380a30646ec747f85256ae7004de2ac/$FILE/ATTMTV96/Po5.pdf) (last visited May 18, 2004).

<sup>632</sup> For text of the final Road Map of the Quartet, see Road Map, *supra* note 625.



cess as in CIREFCA, Mozambique, and the Dayton process.<sup>633</sup> The five-year temporary protection period would be initiated through an international conference on the Palestinian refugees. This proposal envisions a combination of incentives and disincentives that would create both vested interests in a principled solution for all the states involved and would create pressure on non-complying states to participate. It can safely be assumed that there are many states with a stake in resolving the Israeli-Palestinian/Arab conflict underlying the refugee problem, that perhaps most of those states have a stake in a durable peace, and perhaps as many have a stake in a durable peace that is consistent with international law.

Based on European states' record and investment in applying international human and refugee rights standards under the ECHR and the ECJ,<sup>634</sup> proximity and strategic interests in the Middle East,<sup>635</sup> investment in the development of multi-lateral political, security, and economic institutions in the region,<sup>636</sup> promotion of democracy and human

<sup>633</sup> For discussion on these multilateral mass influx repatriation efforts, see *supra* notes 498-515 and accompanying text.

<sup>634</sup> See *supra* notes 413-28.

<sup>635</sup> See, e.g., the 1980 Venice Declaration reprinted in I DOCUMENTS ON PALESTINE, *supra* note 130, at 284 ( "The nine member states of the European Community consider that the traditional ties and common interests which link Europe to the Middle East oblige them to play a special role and now require them to work in a more concrete way towards peace."). In the 1990s, the European Commission and European Parliament endorsed a policy of cooperation with the south in order to complement the policy of engagement with central and eastern European countries and to give "geopolitical coherence" to the European Union's external relations. THE MIDDLE EAST PEACE PROCESS AND THE EUROPEAN UNION, *supra* note 616, at 16. See also Euro-Mediterranean Partnership, *Regional Strategy Paper, 2002-2006*, at [http://europa.eu.int/comm/external\\_relations/euomed/rsp/rsp02\\_06.pdf](http://europa.eu.int/comm/external_relations/euomed/rsp/rsp02_06.pdf) (last visited June 10th, 2003).

<sup>636</sup> Euro-Mediterranean Partnership, *Regional Strategy Paper, 2002-2006*, *supra* note 635, at 8 (stating that the main objective in the political domain will remain the establishment of a framework—eventually the Charter for Peace and Stability—within which the security concerns of the region may be comprehensively addressed). Since the early 1970s, Europe has attempted to facilitate the establishment of regional mechanisms in the Mediterranean basin and the Middle East that would entail a "progressive institutionalization" of regional cooperation on the model of the European Coal and Steel Community ("ECSC"), as part of a Global Mediterranean Policy ("GMP"). The 1995 Barcelona Conference, which brought together ministers from all member states of the European Union and partners of the Mediterranean Basin—Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey and Palestinian Authority—endorsed the creation of a Euro-Med Partnership to provide political, security, and economic partnerships as well as cooperation in social and cultural affairs. See Euro-Mediterranean Partnership, *Barcelona Declaration*, adopted Nov. 28, 1995, at [http://europa.eu.int/comm/external\\_relations/euomed/bd.htm](http://europa.eu.int/comm/external_relations/euomed/bd.htm) (last visited June 10, 2003).

rights,<sup>637</sup> and immediate concerns about the effects regional instability has on them,<sup>638</sup> European states are likely to have significant interest in a durable peace consistent with international law. If Palestinians continue to flee in greater numbers and find Arab states restricting their entry, they will be seeking entry into Europe based on relative proximity, family ties, economics, and safe refuge. The European states may thus have strong incentive and interest in addressing root causes of the protection

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<sup>637</sup> See, e.g., THE MIDDLE EAST PEACE PROCESS AND THE EUROPEAN UNION, *supra* note 616, at 16 (citing a 1989 European Commission proposal entitled "Towards a New Mediterranean Policy" which placed a new emphasis on human rights and democratic values). The three main goals of E.U. Mediterranean policy set out in the Barcelona Declaration and in the Common Strategy adopted by the European Council in Feira in June 2000 include, "the creation of an area of peace and stability based on fundamental principles, including respect for human rights and democracy." Euro-Mediterranean Partnership, *Regional Strategy Paper, 2002-2006 supra* note 635, at 5. Human rights are also an important element of E.U. bilateral trade relations with Middle Eastern states. See, e.g., European Union, *Third meeting of the Association Council EU-Israel: Declaration of the European Union*, Oct. 21, 2002, at [http://europa.eu.int/comm/external\\_relations/israel/intro/3ac.htm](http://europa.eu.int/comm/external_relations/israel/intro/3ac.htm) (last visited June 10, 2003) [hereinafter *Declaration of the European Union*]. The declaration states:

Our bilateral association is based on shared respect for democratic principles and human rights, an essential element of our association agreement as set out in Article 2. The E.U. upholds the universality, interdependence and indivisibility of human rights. The promotion and protection of human rights including rights of persons belonging to minorities as well as fundamental freedoms constitute a major objective of the E.U.'s foreign policy.

*Id.* at para. 4.

<sup>638</sup> Instability in the Middle East often leads to increased asylum claims in Europe. In the 1980s, for example, large numbers of Palestinians, as well as Lebanese, sought asylum in Europe to escape civil war and armed conflict in Lebanon. Shiblak, *supra* notes 590, 591. Statistics indicate that Palestinian asylum claims increased again in the context of the second *intifada*. See, for example, figures for selected European countries at [www.migrationinformation.org](http://www.migrationinformation.org) (In France, for example, Palestinian asylum claims from the West Bank and Gaza Strip increased from 19 in 1999 to 36 in 2001. In Germany claims increased from 3 to 26 between 1999 and 2000.). Instability in the region also has financial implications for Europe. Israeli military measures to quell the second Palestinian *intifada*, for example, have forced European development assistance to be effectively redeployed to offset the resulting economic collapse. E.U. humanitarian aid, for example, increased by an average of 6.57 million euros per year between 1994 and 1999 to an average of 32.6 million euros per year between 2000 and 2002. Press Release IP/02/1561, European Commission, Commission Approves EUR 29 Million in Support of Palestinian Reform Efforts and In Response to the Deteriorating Situation on the Ground (Oct. 28, 2002). Development assistance to the Palestinian Authority and to Palestinian NGOs decreased from 59.7 million euros per year between 1994 and 1999 to 47 million euros per year between 2000 and 2002. Support to the Palestinian Administration to help meet urgent current expenses increased fourfold to some 100 million euros in 2002. *Id.*

crisis in 1967-occupied Palestine, and in initiating a temporary protection regime that is geared to refugee returns as part of a comprehensive settlement of the historic conflict.

Prospects for European participation in such a temporary protection regime, however, should also be considered in light of disagreements on common foreign policy among E.U. member states,<sup>639</sup> inconsistent interpretation of the status of Palestinian refugees under the 1951 Refugee Convention,<sup>640</sup> and, problems associated with harmonization of temporary protection policy, generally, in Europe.<sup>641</sup> Moreover, the European Union has yet to demonstrate a willingness to use economic leverage as a tool of foreign policy in the Israeli-Palestinian conflict.<sup>642</sup> Despite efforts invested in promoting human rights in the region, for example, the European Union has been hesitant to adopt serious measures to enforce human rights provisions in the E.U.-Israel Trade Association Agree-

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<sup>639</sup> For an overview of E.U. policy in the Middle East see, for example, THE MIDDLE EAST PEACE PROCESS AND THE EUROPEAN UNION, *supra* note 616. See also JAWAD, *supra* note 607. The E.U. position on the Israeli-Palestinian conflict is set forth in the 1980 Venice Declaration and subsequent European Councils of Heads of State and Government. Member states, however, often differ on implementation of general principles. The foreign policy of Germany, the Netherlands, and the United Kingdom, for example, has been regarded, traditionally, as more sensitive to Israel's perceived interests. Germany and the Netherlands (in addition to Italy), for example, prevented the 1973 Schuman Paper drafted by France from being made public due to concerns about the Paper's substance. The Schuman Paper called upon Israel to withdraw from 1967-occupied Palestine, for the internationalization of Jerusalem, and for the choice for Palestinian refugees to return to their homes or to be indemnified. Norway, Sweden, and Austria have historically maintained good relations with both Israelis and Palestinians. France has often spearheaded initiatives, such as the Schuman Paper, that are viewed as sensitive to Arab interests. France also initiated efforts to create the post of Special E.U. Representative to the Middle East Peace Process in the 1990s, and, more recently, the suggestion for early elections in 1967-occupied Palestine and recognition of a provisional state of Palestine. *Id.*

<sup>640</sup> *Supra* notes 252-54 and accompanying text.

<sup>641</sup> *Supra* notes 413-28 and accompanying text.

<sup>642</sup> *Declaration of the European Union, supra* note 637. The European Union has considerable economic leverage, as it is Israel's primary trading partner. Israel imports more products from the European Union than from anywhere else, and exports more products to the European Union than to anywhere else. Israel is the European Union's eighteenth largest export market, and is the twenty-fifth largest importer of goods from the European Union.

ment.<sup>643</sup> The European Union opposes the use of sanctions against Israel.<sup>644</sup>

The PLO and Arab states, particularly those Arab states hosting the majority of Palestinian refugees and sharing a common border with Israel, may have the strongest incentive to participate in a harmonized temporary protection regime. The guiding principles for such a temporary protection regime—i.e., a principled legal framework and shared responsibility—as outlined above, would appear to be attractive to both the PLO and member states of the Arab League. The right of Palestinian refugees to return to their homes, for example, is a central component of PLO policy.<sup>645</sup> Likewise, Arab League resolutions, political statements

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<sup>643</sup> See, e.g., *Declaration of the European Union*, *supra* note 637. The European Union has been reluctant to enforce sanctions for violations of the rules of origin concerning labeling of products made in Jewish colonies in the West Bank and Gaza Strip, even though the E.U.-Israeli Trade Association Agreement clearly identifies wrongful labeling as a material breach of the agreement. Euro-Mediterranean Agreement (E.U.-Israel Association Agreement), Nov. 20, 1995, E.U.-Isr., 2000 O.J. (L 147) 4, available at [http://europa.eu.int/comm/external\\_relations/israel/intro/](http://europa.eu.int/comm/external_relations/israel/intro/) (last visited May 18, 2004). At the same time, it is important to note that the European Community (“EC”) refused to consider Israeli requests for a revision of the 1975 trade association agreement largely on political grounds. It was only in December 1993 that the Council authorized the Commission to begin negotiations leading to a new EC-Israeli association agreement. THE MIDDLE EAST PEACE PROCESS AND THE EUROPEAN UNION, *supra* note 616, at 16.

<sup>644</sup> See, e.g., *The EU & the Middle East: Position & Background*, *supra* note 616, which states, in para. 7:

The EU’s policy is based on partnership and cooperation, and not exclusion. It is the EU’s view that maintaining relations with Israel is an important contribution to the Middle East peace process and that suspending the Association Agreement, which is the basis for EU-Israeli trade relations but also the basis for the EU-Israeli political dialogue, would not make the Israeli authorities more responsive to EU concerns at this time.

See also European Community, *The Hague Statement on the Middle East Peace Process*, Oct. 11, 1991 reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143, at 8 (welcoming “the willingness of Arab states to freeze the trade boycott of Israel in return” for a suspension of Israeli settlement activity); European Parliament Resolution of 16 November 1993, 1993 O.J. (C 329) 46 (calling upon Arab states to put an end to the boycott against Israel). The Resolution also called on member states to adopt laws and regulations prohibiting firms from complying with the dictates of boycotts imposed by non-member countries and called on the Ministers responsible for Common Foreign and Security Policy to devise a common policy on economic sanctions. THE MIDDLE EAST PEACE PROCESS AND THE EUROPEAN UNION, *supra* note 616, at 59.

<sup>645</sup> See, e.g., McDONALD, *supra* note 89, at 92. The text cites a news report from *The Arab World*:

[T]he emblem of the Palestine Liberation Organization conference [in 1964 in Jerusalem] bore a huge map of Palestine on which was superimposed the slogan: “We Shall Return!” The oath by some 350 delegates to the congress declared

and various peace plans affirm the right of return as a key element of a comprehensive solution to the conflict.<sup>646</sup> In addition, Arab states continue to hold the view that the United Nations bears significant responsibility for the creation of the Palestinian refugee issue and must therefore share a large degree of responsibility for its resolution.<sup>647</sup> Provisions for enforcement through incentives and disincentives and a clear timetable for implementation would address potential Arab concerns of Israeli non-

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among other things that "Palestine is our homeland . . . repatriation is our goal . . . struggle is our road . . . unity is our guide . . . Palestine is ours . . . and [we] shall accept no substitute homeland. God and history are our witness that we shall sacrifice our blood for your liberation."

*Id.* (citation omitted, ellipses in original). For more recent policy, see, for example, *Palestinian Proposal on Palestinian Refugees*, Jan. 21, 2001, *Taba*, at art. XX, reprinted in BADIL Resource Center for Palestinian Residency and Refugee Rights, *Principals and Mechanisms for a Durable Solution for Palestinian Refugees*, OCCASIONAL BULLETIN No. 10 (2001), at [http://www.badil.org/Publications/Bulletins/B\\_10.htm](http://www.badil.org/Publications/Bulletins/B_10.htm) (last visited June 10, 2003). The proposal states:

In accordance with United Nations General Assembly Resolution 194 (III), all refugees who wish to return to their homes in Israel and live at peace with their neighbors have the right to do so. The right of every refugee to return shall be exercised in accordance with the modalities set out in the Agreement.

*Id.* at art. XX(5). For a slightly different reading of PLO documents on the right of return see Rashid I. Khalidi, *Observations on the Right of Return*, J. PALESTINE STUD., Winter 1992, at 29.

<sup>646</sup> See, e.g., League of Arab States Council, Res. 231, 10th Sess., Sched. 1 (Mar. 17, 1949), reprinted in KHALIL, *supra* note 117, at 165 ("The Council considers that the lasting and just solution of the problem of refugees would be their repatriation and the safeguarding of all their rights to their properties, lives and liberty, and that these should be guaranteed by the United Nations."). For more recent documentation, see The League of Arab States Council, *The Beirut Declaration*, 14th Sess., at para. 2 (Mar. 28, 2002), available at [http://www.saudiembassy.net/press\\_release/statements/02-ST-0328-Beirut.htm](http://www.saudiembassy.net/press_release/statements/02-ST-0328-Beirut.htm) (last visited Mar. 15, 2003) (calling upon Israel to affirm "Achievement of a just solution to the Palestinian Refugee problem to be agreed upon in accordance with U.N. General Assembly Resolution 194"). *But see also* KHALIDI, *supra* note 131, at 31 (stating that during the early years of Palestinian displacement Arab governments "timidly favored settling Palestinian refugees outside Palestine, partly in deference to the preferences of the powerful new great power in the Middle East, the United States").

<sup>647</sup> See, for example, views expressed by Arab states during the drafting of the 1951 Refugee Convention, *supra* note 248 and accompanying text. Moreover, Arab states historically have preferred to approach solutions for the refugee issue as a multi-lateral and global issue rather than a bilateral issue. For an overview of early negotiations on the refugee issue under the auspices of the U.N. Conciliation Commission for Palestine ("UNCCP") see NEIL CAPLAN, *Futile Diplomacy, The United Nations, the Great Powers and Middle East Peacemaking 1948-1954* (1997). The establishment of a multi-lateral track as part of the Oslo process addressed similar Arab concerns. BRYNEN, *supra* note 157.

compliance.<sup>648</sup> The fact that the temporary protection regime begins with a phased program of return through family reunification with priority slots to Palestinian refugees in frontline Arab states should also address fears that the regime will lead to the forced resettlement (*tawtiin*) of refugees in Arab host states. Enhanced international protection in 1967-occupied Palestine would gradually alleviate the current humanitarian crisis, stem the flow of Palestinians seeking security outside the borders of their historic homeland, and alleviate some of the burden imposed on frontline Arab states.<sup>649</sup> For the PLO, the regime has an additional advantage so far as it is able to address “the disparity in power, wealth, influence, information and negotiating skill between Israel and the PLO”<sup>650</sup> and eliminate the negative negotiation dynamic in which basic rights, including those of the refugees, are subject to bargaining and political trade-offs.<sup>651</sup>

Effective Arab participation in such a regime, however, should also be considered in light of the ability of Arab states to forge effective cooperation and unified participation in such a temporary protection regime;<sup>652</sup> ongoing problems associated with implementation of the 1965 Casa-

<sup>648</sup> Arab states, for example, have attempted to use sanctions as a means of enforcement since the mid-1940s. See League of Arab States Council, *The Boycott of Zionist Goods and Products*, Res. 16, 2d Sess., Sched. 11 (Dec. 2, 1945), reprinted in KHALIL, *supra* note 117, at 161-163. See also *The Arab boycott Regulations* (1986), reprinted in 3 PALESTINE YRBK INT’L L. 189-230 (1986). Several ‘rear line states,’ including Morocco, Tunisia, Oman, and Qatar, ended secondary and tertiary boycotts of Israel during the interim period of the Oslo process. Paul Noble, *The Prospects for Arab Cooperation in a Changing Regional and Global System*, in MIDDLE EAST DILEMMA, THE POLITICS AND ECONOMICS OF ARAB INTEGRATION 65 (Michael C. Hudson, ed. 1999). Following the election of a right-wing government in Israel in 1997 headed by Benjamin Netanyahu of the Likud party, the Arab League adopted League of Arab States Council, Res. 5629 (Mar. 31, 1997), reprinted in II Documents on Palestine, *supra* note 143, at 340 (recommending the “continuation of commitment to primary degree Arab boycott of Israel, and the activation of such boycott, until the realization of just and comprehensive peace in the region”).

<sup>649</sup> The Palestinian Authority and the PLO have petitioned western powers for international protection within the framework of the Geneva Conventions and at various U.N. fora, including the Security Council, since the outset of the second *intifada* in September 2000. See *supra* note 239 and accompanying text.

<sup>650</sup> Falk, *supra* note 146, at 20.

<sup>651</sup> See, e.g., discussions of Camp David II negotiations *supra* note 623. See also Mahmud Abbas (Abu Mazin), Report on Camp David Summit to the P.L.O Central Council (Sept. 9, 2000), excerpts reprinted in J. PALESTINE STUD., Winter 2001, at 168-69.

<sup>652</sup> On Arab cooperation see, for example, Noble, *supra* note 648, at 61 (“Conditions in both the Middle Eastern and global systems seem to pose significant challenges to Arab interests and thus presumably should generate clear incentives for cooperation. Yet the Arab world remains more fragmented than ever.”). But see also Fawaz A. Gerges, *Regional Security After the Gulf Crisis: The American Role*, J. PALESTINE STUD., Summer 1991, at 55, 64-65 (1991). Gerges states:

blanca Protocol,<sup>653</sup> and, weak or non-existent regional refugee and human rights instruments.<sup>654</sup> “[T]he perceived prospects for achieving an honorable settlement and the sense of urgency regarding negotiations have varied considerably among Arab frontline parties,” observes Paul Noble, “as have views about tactics and the extent to which the United States can be relied on to bring about such a settlement.”<sup>655</sup> Frontline Arab states, such as Lebanon, Jordan, Syria, and Egypt, for example, may have a greater political interest in such a regime if it harbors the potential for a resolution of the conflict. By comparison, a similar interest among Arab Gulf states may be tempered by a security reliance on third parties, namely the United States, which may not have strong interests to participate in a temporary protection regime. Non-compliance or weak enforcement of legal principles by participating states would likely render the regime ineffective and lead to the withdrawal of Palestinian and Arab participation.

There are fewer incentives for U.S. participation in an internationally harmonized temporary protection regime. The United States generally does not have the same degree of interest and utility, as the European Union for example, in multilateralism and international law—i.e., two primary features of the temporary protection regime—as tools of foreign policy.<sup>656</sup> Historically, the United States has favored a bilateral approach

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Much criticism has been leveled lately against the ineffectiveness of the Arab League. This view ignores the fact that the League is no more than an extension of the Arab state subsystem and fails to take into account the subtle and important role played by the League in managing inter-Arab quarrels. A brief examination of the League’s role in two of the most dangerous crises in the history of the post-1945 Arab subsystem (the Lebanese crisis of 1958 and the Iraqi-Kuwaiti dispute of 1961) would illustrate this point.

Following American and British military interventions in Lebanon and Kuwait respectively, Arab rulers, using the political framework of the League, agreed among themselves to end the war and the American presence in Lebanon and to send an Arab force to replace British troops in Kuwait.

*Id.*

<sup>653</sup> *Supra* notes 530-37 and accompanying text.

<sup>654</sup> *Supra* notes 90-93 and accompanying text.

<sup>655</sup> Noble, *supra* note 648, at 64. Numerous Arab states assume that their interests are best met through what Noble characterizes as ‘vertical cooperation’ (i.e., cooperation with states outside the Arab world) rather than ‘horizontal cooperation’ (i.e., inter-Arab cooperation). *Id.* A similar pattern is discernable within the field of economic cooperation. Intra-regional trade still accounts for no more than 5 percent of the total in the Mediterranean region, despite the fact that successive Euro-Med Conferences have underlined the importance of intra-regional integration. Euro-Mediterranean Partnership, *Regional Strategy Paper, 2002-2006*, *supra* note 635.

<sup>656</sup> See, e.g., Pascal Boniface, *Reflections on America as a World Power*, J. PALESTINE STUD., Spring 2000, at 5, 6 (“The United States can decide to define single handedly the rules of international law, political or economic, applicable to all countries; to determine what is good for all humanity according to its own

to resolving the Israeli-Arab conflict with direct negotiations between Israel and individual Arab states.<sup>657</sup> Moreover, American policy concerning the Israeli-Palestinian conflict has tended to place more emphasis on process rather than principles.<sup>658</sup> During final status negotiations between the PLO and Israel at Camp David in July 2000, for example, one observer noted, "American negotiators became strangely touchy at the mere mention of principles and rights."<sup>659</sup> The collapse of the Soviet Union and the end of the bipolar international order has not fundamentally altered American perceptions of the US-Israeli strategic partner-

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conscience."). By contrast, Boniface notes that Europeans "have an obvious common interest in promoting [. . .] the development of multilateral constraints that are assumed, codified and reciprocal. A natural outgrowth of this concept are actions aimed at strengthening multilateral frameworks and international institutions and promoting attitudes of cooperation and negotiation." *Id.* See also Foundation for Middle East Peace, *Special Report: The Middle East in the Shadow of War* (2002), available at [http://www.fmep.org/reports/2002/sr\\_Spring2002.html](http://www.fmep.org/reports/2002/sr_Spring2002.html) (last visited Mar. 15, 2003).

<sup>657</sup> QUANDT *supra* note 140, at 5. American thinking about the establishment of a regional security structure following the first Gulf War in 1991 failed to develop into concrete strategies and mechanisms. Gerges, *supra* note 652, at 61, stating:

Western powers have been unable to construct viable security structures in the area because of the different perceptions of threat and of the different security needs of the rival actors. To the majority of Arabs, Israel is still perceived as 'the enemy.' In the absence of a comprehensive settlement of the Arab-Israeli conflict, Arab leaders would be reluctant to enter into close and intimate security arrangements with Israel's patron and strategic ally.

<sup>658</sup> QUANDT, *supra* note 140, at 1, stating:

Sometime in the mid-1970s the term peace process began to be widely used to describe the American-led efforts to bring about a negotiated peace between Israel and its Arab neighbors. . . .

In the years since 1967 the emphasis in Washington has shifted from the spelling out of the ingredients of "peace" to the "process" of getting there. This procedural bias, which frequently seems to characterize American diplomacy, reflects a practical, even legalistic side of American political culture.

According to the U.S. position until 1981, Israeli colonies in 1967-occupied Palestine were illegal under international law. In 1981, the position was reversed by President Reagan. *Id.*, at 6. In comparison, see the E.U. position as stated in the 1980 Venice Declaration, that Israeli colonies "as well as modifications in population and property in the occupied Arab territories, are illegal under international law." I DOCUMENTS ON PALESTINE, *supra* note 130, at 284. See also U.S. Draft of an Israeli-Palestinian Joint Declaration of Principles, Washington, DC, June 30, 1993, reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143, at 134-45. The U.S. Draft largely mirrors Israeli draft proposals and is significant, in comparison to Palestinian draft proposals, because of the exclusion of all references to international law as a framework for resolution of the conflict. Israeli and Palestinian proposals are reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143.

<sup>659</sup> Hanieh, *supra* note 623, at 86.



ship.<sup>660</sup> Nor does the United States share the same concerns of proximity and the immediate impact of instability created by the Israeli-Palestinian conflict that affect Europe. Domestic politics, moreover, continue to have a substantial impact on U.S. foreign policy in the Middle East.<sup>661</sup> For these reasons, the United States remains reluctant to adopt positions inconsistent with Israel's perceived interests.

The prospect of significant U.S. pressure on Israel to come into compliance with international law in crafting durable solutions for Palestinian refugees also appears remote. Rather than supporting sanctions for non-compliance with U.N. resolutions, agreements, and international human rights and humanitarian law, the United States has continued to provide economic and military aid to Israel.<sup>662</sup> Over the past five decades "the

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<sup>660</sup> See, e.g., *The Middle East in the Shadow of War*, *supra* note 656, at 5 ("Leading members of the Bush administration – from the vice president's office to the highest political echelons in the Pentagon . . . view Israel first and foremost a strategic ally, a principal partner in confronting what U.S. strategists have identified as the most pressing contemporary challenge to U.S. interests, not just in the Middle East but internationally—'rogue nations' wielding missiles aimed against the United States and its allies.").

For an overview of the US-Israeli strategic partnership see, e.g., Clyde R. Mark, Congressional Research Service Israel-United States Relations (2003).

<sup>661</sup> See, e.g., SETH P. TILLMAN, *THE UNITED STATES IN THE MIDDLE EAST: INTERESTS AND OBSTACLES* 276 (1982) stating, *inter alia*:

The issue is essentially domestic—what it comes down to, in concrete terms, is that, owing to the unmatched influence of the Israeli lobby in American politics, Israeli security (or, more exactly, the conceptions of Israeli security held by incumbent Israeli governments) has been permitted to preempt other vital interests in American policy. This, rather than the undoubted complexity of the issues, or the strategic, economic, or moral stakes of one case as opposed to another, has been the root cause of chronically unbalanced policy that, despite certain tactical successes, remains a strategic failure.

QUANDT, *supra* note 140, at 8. More recently see Letter from Eighty-one U.S. Senators to President William Clinton Warning Him Against Pressing Israel (Apr. 3, 1998), *reprinted in* J. PALESTINE STUD., Summer 1998, at 154-55; Letter from Two-hundred twenty-one U.S. Representatives to President William Clinton Urging Against Pressuring Israel (May 6, 1998), *reprinted in* J. PALESTINE STUD., Summer 1998, at 158.

<sup>662</sup> As of 1995 the U.S. Congressional Research Service reported that Israel had received more than \$67 billion in foreign economic and military aid. CONGRESSIONAL RESEARCH SERVICE, *ISRAEL: US FOREIGN ASSISTANCE* (Oct. 6, 1995) *reprinted in* J. PALESTINE STUD., Winter 1996, at 148. Recently, the United States provided Israel with \$10 billion in loan guarantees and military aid, despite considerable evidence of severe violations and grave breaches of international humanitarian law in the context of the second Palestinian *intifada*. Israel had requested \$8 billion in loan guarantees and \$4 billion in military aid. Aluf Benn et al, *U.S. to Give Israel \$9B in Loan Guarantees and \$1B Military Aid*, HA'ARETZ, Mar. 21, 2003. For an overview of U.S. policy on the Arab boycott of Israel see, for example, Nancy Jo Nelson, *The United States Legal Response to the Arab Boycott – A Quagmire for the Innocent*, 5 PALESTINE YRBK. INT'L. L. 129-83 (1989).

United States abstained or voted against resolutions expressing some of its most cherished policies such as self-determination and inalienable human rights, and against the spirit of such international covenants as the U.N. Charter and the Fourth Geneva Convention.”<sup>663</sup> U.S. policy has also been slow to respond to new initiatives in the region. It was not until 1975 that the U.S. State Department recognized that the Palestinian issue was at the heart of the conflict.<sup>664</sup> Moreover, it was not until 2001 that the United States officially endorsed the establishment of a Palestinian state, nearly two decades after the PLO offered what it considered to be a historic compromise with the creation of a Palestinian state in 22 percent of historic Mandate Palestine.<sup>665</sup> Regional instability affecting relations with Israel and oil-producing regimes in the region, however, is of ongoing concern to the United States. To the extent that it can be demonstrated that an internationally harmonized temporary protection regime can deliver on U.S. interests in regional stability, the United States may be a reluctant partner.<sup>666</sup>

Admittedly, an internationally harmonized temporary protection regime does not appear to contain significant incentives for Israeli participation. The objective and guiding principles of such a regime are not

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<sup>663</sup> NEFF, *FALLEN PILLARS*, *supra* note 619, at 184. The U.S. cast its veto twenty-nine separate times in the Security Council between 1972 and 1990. At the beginning of the Oslo process in the 1990s, the United States attempted to expunge all “contentious resolutions that accentuate political differences without promoting solutions” resolutions relating to the Palestinian-Israeli conflict from U.N. records. This included resolutions affirming the right of refugees to return to their homes and the right of the Palestinian people to self-determination. *Id.* at 186.

<sup>664</sup> *Id.* at 1 n.1.

<sup>665</sup> On U.S. endorsement of a Palestinian state see, President George W. Bush, Middle East Statement from his U.N. General Assembly Speech (Nov. 10, 2001), *reprinted in J. PALESTINE STUD.*, Winter 2002, at 164. On the Palestinian acceptance of a two-state solution see Palestinian Declaration of Independence II, Algiers, Nov. 15, 1988 *reprinted in I DOCUMENTS ON PALESTINE*, *supra* note 130, at 331.

<sup>666</sup> The link between the Israeli-Palestinian conflict and U.S. interests in regional stability has been seemingly enhanced by the events of September 11, 2001. *See, e.g.*, Camille Mansour, *The Impact of 11 September on the Israeli-Palestinian Conflict*, *J. PALESTINE STUD.*, Winter 2002, at 5. *See also The Middle East in the Shadow of War*, *supra* note 656, stating, *inter alia*:

Only reluctantly have [Bush administration officials] been compelled to focus on Palestine and its interminably warring parties, not because they have any hopes for rapprochement between Sharon and Arafat but because of their concern that the violence between Israel and the Palestinians will ‘spill over’ to Israel’s eastern front, engaging Iraq and Jordan as well as Syria and Lebanon and complicating a US strike against Baghdad.

However, the report further observes that for the Bush administration the Israeli-Palestinian conflict “is not amenable to American power.” *Id.*

amenable to Israel's stated interests vis-à-vis Palestinian refugees.<sup>667</sup> The international character of the regime,<sup>668</sup> the principled framework,<sup>669</sup> and the inclusion of incentives/disincentives to ensure compliance render the regime unattractive to Israel. It is unlikely that the current, and any foreseeable, Israeli government will voluntarily agree to participate in a regime that provides for the individual right of return of Palestinian refugees to their homes of origin inside Israel.<sup>670</sup> The existence of Israeli official and public consensus against the return of Palestinian refugees has become conventional wisdom. According to opinion polls taken in 2002, for example, more than three-quarters of Israeli Jews are opposed to the return of even a limited number of Palestinian refugees, while nearly 78 percent are opposed to recognition of the right of return.<sup>671</sup>

While Israel faces increased economic, academic and cultural isolation (not only from the Arab states),<sup>672</sup> and increasingly harsh criticism from

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<sup>667</sup> *Supra* note 604. More recently see Basic Guidelines of the 30th Government of Israel, Jerusalem, Feb. 27, 2003, at 1.2, available at <http://www.Israel-mfa.gov.il/mfa/go.asp?MFAH0n610> (last visited Mar. 15, 2003) ("The Government will strive to ensure that Israel remains a Jewish, democratic, Zionist state that encourages aliyah and guarantees equal rights to all its citizens.").

<sup>668</sup> Historically, Israel has preferred bilateral negotiations with Arab states and has attempted to prevent what it refers to as the 'internationalization' of the issue. QUANDT, *supra* note 140, at 5.

<sup>669</sup> Israeli draft proposals for interim agreements with the PLO, for example, exclude all reference to international law as a framework for resolution of the conflict. See, e.g., Israeli Delegation, Memorandum to the Palestinians Regarding Autonomy, Feb. 20, 1992, reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143, at 65-66; Israeli Delegation, Memorandum to the Palestinians Regarding Autonomy, Feb. 21, 1992, reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143, at 66-67; Israeli Delegation, The Administrative Council of the Interim Self-Government Arrangements, Aug. 20, 1992, reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143, at 86-92; and, Israel's Revised Self-Government Proposals – Updated Ideas Addressing Palestinian Concerns, Dec. 14, 1992, reprinted in II DOCUMENTS ON PALESTINE, *supra* note 143, at 120-121. For a legal analysis of the agreements see SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS, *supra* note 146. For a comparative analysis of human rights provisions in peace agreements, including the Oslo agreements, see BELL, *supra* note 141.

<sup>670</sup> See *supra* notes 604-06 for an overview of Israel's position on Palestinian refugees.

<sup>671</sup> Market Watch Polls published in MA'ARIV, Mar. 15, 2002, Aug. 30, 2002. See also Ephraim Yuchtman-Yaar & Tamar Hermann, *How the Palestinian and Israeli-Jewish Publics Perceive the Issues*, in THE PALESTINIAN REFUGEES, OLD PROBLEMS – NEW SOLUTIONS 303-17 (Joseph Ginat et al. eds., 2001).

<sup>672</sup> On the Arab boycott, see *supra* note 648. Since the beginning of the second Palestinian *intifada* sanctions and boycotts have become one of the primary tools used by civil society organizations and members of the Palestinian solidarity movement to bring about a change in Israeli policy. General information on civil society initiatives is available at <http://www.bigcampaign.org>, and <http://www.boycottisraeligoods.org>

U.N. bodies and intergovernmental agencies for its policies,<sup>673</sup> it has also demonstrated a willingness to endure intense political, economic, and other forms of pressure in order to uphold Zionist principles and preserve the Jewish character of the state.<sup>674</sup> Increasing isolation and international criticism, however, is also adding pressure to Israel's downward-spiraling economy.<sup>675</sup> It is conceivable, however, that for the Israeli population, the resumption of normal relations with, at a minimum, European states, combined with a greater awareness that agreements not based on a principled framework will continue to fuel the conflict, could be an incentive to participation in at least the international conference on refugees, and perhaps in the first 5-year temporary protection period. Moreover, it is important to note that the apparent consensus against refugee return exists without any serious discussion within Israel of real implications of

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(last visited Mar. 15, 2003). On state sanctions see, for example, Sharon Sadeh, *UK Orders End to Import of Goods Produced in Israeli Settlements*, HA'ARETZ, July 6, 2002; John Hooper & Richard Norton Taylor, *Secret UK Ban on Weapons for Israel, Blocking of Sales Mirrors German Action*, THE GUARDIAN, Apr. 13, 2002; Gideon Alon & Amnon Barzilai, *Council of Europe: Suspend Economic Agreement with Israel*, HA'ARETZ, Apr. 25, 2002; Peter Finn, *Germany, in Protest, Suspends Arms Sales to Israel, Decision May Foreshadow European Trade Sanctions as Criticism of West Bank Incursions Mounts*, WASHINGTON POST FOREIGN SERVICE, Apr. 10, 2002.

<sup>673</sup> On U.N. bodies, see *supra* notes 171, 173, 209, 578, 579 and accompanying text.

<sup>674</sup> This includes, for example, resistance to U.S. pressure during early negotiations on the refugee issue facilitated by the United Nations Conciliation Commission for Palestine. See, for example, comments by Israel's first Prime Minister David Ben Gurion, *supra* note 605. *But see* QUANDT, *supra* note 140, at 421, stating:

Part of the conventional wisdom about US-Israeli relations is that pressure on Israeli governments is bound to backfire. But the record suggests a much more complex reality. [A]t one time or another, each president has tried to persuade Israel to take some action by implying that refusal would be costly. In a surprising number of instances, such efforts at influence have succeeded. The same has been true of dealings with Arab parties.

<sup>675</sup> According to recent figures by Israel's Central Bureau of Statistics, economic decline in Israel has gone beyond the most pessimistic forecasts of the Finance Ministry, the Bank of Israel and the private sector. The Israeli standard of living dropped by an average of 3.3 % in the first nine months of 2002, following a 3.2% decline in 2001. These represent an unprecedented decline in the country's history. See also Avi Temkin, *Bank of Israel: Unemployment will get Much Worse. The Tax Revenue Estimate is too High, Even if There is 1% Growth in 2003*, GLOBES, Nov. 20, 2002 (The number of unemployed rose 17% in January-September 2002, compared with the corresponding period last year, amounting to 40,000 unemployed Israelis. Dr. Karnit Flug, director of research at Bank of Israel predicted that unemployment will increase significantly due to the declining economy, and that tax revenue estimates were too high even on a 1% growth assumption). Moti Bassok and Lior Kagan, *1 Percent Negative Growth in 2002 is Worst in the West*, HA'ARETZ, Jan. 1, 2003. The national deficit for the first two months of 2003 climbed to NIS 5.43 billion – one-third of the entire deficit for the year as predicted by the 2003 budget. Moti Bassok and Amnon Barzilai, *State Deficit Soars to 6 Percent of GDP*, HA'ARETZ, Mar. 4, 2003.

return itself.<sup>676</sup> It is almost implausible to think that over the last five decades there has been no systematic effort to engage the Israeli public in a substantive discussion about durable solutions for Palestinian refugees, including the right of return.<sup>677</sup> The prospect of Israeli participation in an institutionalized temporary protection regime, as discussed above, may well depend more on developments within Israeli civil society than on the initiative of current and future Israeli governments.

The first five years of temporary protection and related conditions would initiate a period of confidence-building measures, hinging on the incentive/disincentive process implemented by all the participating states. As part of this process, Israel will immediately be asked to open up 100,000 slots for family reunification (both to Israel and to the West Bank and Gaza Strip), to be completed within the first two years. Thereafter, 10,000 slots will be opened each year until all family reunification applications are completed.<sup>678</sup> The first 100,000 slots in Israel should prioritize those pending cases from the Arab states, which have carried the large share of the burden for Palestinian refugees over the past five decades. Within these five years, as Israel meets the family reunification targets, the temporary protection participants would make funding available to develop communities within Israel and in the West Bank and the Gaza Strip that would benefit both the reintegrating and the stayee communities.<sup>679</sup> Such development would engage civil society across ethnic and religious communities so that communities affected by reintegration become vested in the success of the process.

A phased process for return, beginning with family reunification, has multiple benefits. This process will be the least disruptive to the stayee communities (Israeli Jewish and Palestinian), because family reunifica-

<sup>676</sup> Israel's first foreign Minister, Moshe Sharret, for example, acknowledged that the Foreign Ministry spoke out publicly against the return of Palestinian refugees as early as the spring of 1948 in order to galvanize Jewish public opinion against return. Labor Party Archives. 2-1/1/1, Protocol of the meeting of the party Knesset Faction and the Secretariat, July 28, 1949, in MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM*, *supra* note 139, at 281.

<sup>677</sup> See, e.g., Ilan Pappé, *Israel at a Crossroads Between Civic Democracy and Jewish Zealotocracy*, J. PALESTINE STUD., Spring 2000, at 24, 33; see also, Ilan Pappé, *Israeli Perceptions of the Refugee Question*, in PALESTINIAN REFUGEES: THE RIGHT OF RETURN 71-76 (Naseer Aruri, ed., 2001); Amal Jamal, *The Palestinians in the Israeli Discourse: A Conditional Partnership*, J. PALESTINE STUD., Autumn 2000, at 36.

<sup>678</sup> For the problem of Israeli denials of thousands of Palestinian applications for family reunification, see *supra* notes 198-200 and accompanying text. For a detailed discussion of Israeli family reunification policies and practices, see *supra* note 198.

<sup>679</sup> For the importance of family unity in finding durable solutions for refugees, see Kate Jastram & Kathleen Newland, Geneva Expert Roundtable, *Family Unity and Refugee Protection*, (Oct. 22, 2001). See also Global Consultations on International Protection, Geneva Expert Roundtable, *Summary Conclusions on Family Unity*, (Nov. 9, 2001), available at [www.unhcr.ch](http://www.unhcr.ch).

tion automatically implies an existing support system to assist the returning family members. The process would provide both returnee and stayee communities with a controlled and incremental period to assess the individual and collective impact of refugee return. For refugees, family reunification would function similar to “go and see visits” sponsored by the UNHCR and other international agencies in other refugee cases.<sup>680</sup> Returnees would have the opportunity not only to assess the viability of return for themselves, but also to report back to individuals, families, and communities eligible to participate in the broader return option. For Israeli Jews, controlled family reunification would address fears of mass influx and would likewise provide a testing ground for the broader return operation.<sup>681</sup> Israel, moreover, already accepts the principle of family reunification.

Staged return beginning with family reunification would also provide the international community and domestic authorities an opportunity to appraise pilot projects initiated during family reunification, to develop a detailed repatriation operations plan, and to secure international funding for the panoply of returnee needs, in addition to basic food and shelter, to make return sustainable. This includes access to education, development of curricula, health, employment, and a robust land claims mechanism. Successful integration of reunifying families, including infrastructure development, schools and curricula, health care services, and equitable use of land and water, would be the measure for the next phase.<sup>682</sup> One of the lessons of the Bosnian return program was that employment, health, education, and social security need to be addressed at the same time as housing reconstruction programs.<sup>683</sup> In Mozambique, the positive donor response to finance the repatriation of millions of refugees was related to thorough consultation during the drafting process of the repatriation plan and the detailed nature of the final operations plans.<sup>684</sup>

Within the first five-year period, a formula for return of additional refugees to their original homes and lands would be worked out by the states involved in the process. During this period, temporary protection participants would also address protection gaps in domestic and regional

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<sup>680</sup> For the importance of “go and see visits” and cross-border contact between communities in UNHCR voluntary repatriation programs, see *Note on International Protection*, *supra* note 630, and sources cited.

<sup>681</sup> *Id.* at 26.

<sup>682</sup> For the importance of detailed operation plans, committed donor funding for development needs of both communities in other refugee repatriation situations, see Evaluation of UNHCR’s Repatriation Operation to Mozambique (Feb. 1, 1996), available at <http://www.unhcr.org> (last visited April 20, 2003). See generally HUMANITARIAN AGENDA, *supra* note 19.

<sup>683</sup> See generally U.N. HIGH COMM’R FOR REFUGEES, GLOBAL REPORT 2001, AT 350-355.

<sup>684</sup> See Evaluation of UNHCR’s Repatriation Operation to Mozambique, *supra* note 682, at 3.

instruments, and seek wider regional ratification of international instruments. Efforts would also focus on the expansion and/or establishment of new regional economic, political and security bodies or mechanisms tied to the dual incentive/disincentive approach discussed above. An important part of this process would involve reform and/or repeal of discriminatory citizenship and property law across the region, according to relevant international standards, to facilitate solutions for regional displacement and outstanding housing and property claims.<sup>685</sup> Consideration of dual citizenship and respect for housing and property rights will be key to this process. Another important feature will be the development of regional instruments relative to the protection of refugees and human rights, including enforcement mechanisms for human rights similar to the ECHR.<sup>686</sup>

After the first five years, the status of reunification and returns based on refugee choice would be evaluated. The UNHCR/UNRWA would monitor refugee choice, and once returns have been secured, states would open other slots based on temporary protection priorities, to accept refugees not wishing to return for resettlement. The incentive/disincentive process should continue in phases, with donor funding focused on development of communities involving both returnee and stayee populations within Israel and the West Bank and Gaza Strip (regardless of what state constructs are in place). The incentives would be targeted money to develop integrated multi-ethnic communities within Israel coupled with requirements to dismantle discriminatory laws, and to phase in restitution with compensation formulae. The disincentives would tie more economic cuts to Israel, and isolation and pressure from the involved states and the U.N. bodies that would be a formal part of the process.

Third, we propose temporary protection that is consistent with recognized international refugee and human rights standards concerning bene-

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<sup>685</sup> The importance of repealing discriminatory property and citizenship legislation in durable solutions for refugees has been reaffirmed repeatedly by UNHCR and international experts. See, e.g., *Note on International Protection*, *supra* note 630, at 26; see also 19 REFUGEE SURVEY Q. 3 (2000) (describing housing and property restriction for returnees); BRET THIELE & SCOTT LECKIE, HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND INTERNALLY DISPLACED PERSONS: INTERNATIONAL, REGIONAL AND NATIONAL LEGAL RESOURCES (2001).

<sup>686</sup> Treaty bodies and regional human rights mechanisms have played a critical role in strengthening refugee protection through monitoring and enforcement capabilities. See BRIAN GORLICK, HUMAN RIGHTS AND REFUGEES: ENHANCING PROTECTION THROUGH INTERNATIONAL HUMAN RIGHTS LAW (working Paper No. 30, 2000); see also U.N. HIGH COMM'R FOR REFUGEES, HUMAN RIGHTS AND REFUGEE PROTECTION (1995).

ficiaries, duration and conditions for cessation of status, and standards of treatment.<sup>687</sup>

### 3. Beneficiaries

Drawing on the principles established by the African,<sup>688</sup> European,<sup>689</sup> and U.S.<sup>690</sup> instruments, policies, and regional practices, guidelines can be readily established for defining and prioritizing the appropriate beneficiaries of Palestinian temporary protection. Temporary protection should be offered to all UNRWA-registered refugees, no matter where they are located, with UNRWA continuing to provide the assistance benefits to those located within the areas of its mandate.<sup>691</sup> Temporary protection should also be offered to all Palestinians who are short-term visa holders, Palestinians in any kind of indeterminate status, and those with no recognized status, on a *prima facie*, or group basis, consistent with article 1D. As temporary protection has worked in a number of mass influx situations, states should prioritize available temporary protection slots for various kinds of cases: the Northern and Western state participants might be asked to take the most Palestinian influx from the West Bank and the Gaza Strip to relieve the immediate pressure from the frontline Arab states. In addition, they might prioritize amongst those cases for emergency medical care, family reunification, unaccompanied minors, and similar emergent situations, according to recommendations from the UNHCR based on guidelines developed in other refugee crises.<sup>692</sup>

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<sup>687</sup> Our proposal is consistent with the international refugee and human rights framework promoted by UNHCR. *See e.g.*, Global Consultations on International Protection, *available at* [www.unhcr.ch](http://www.unhcr.ch).

<sup>688</sup> Under the 1969 OAU Refugee Convention, the reasons for the Palestinian exodus, both over time and currently, would qualify the majority of them under the definition of "refugee" of article I(2), as one who:

owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality . . .

OAU Refugee Convention, *supra* note 389, art. I(2), 1001 U.N.T.S. at 47.

<sup>689</sup> European temporary protection for Bosnians and Kosovars provides ample state practice and legal grounding for granting Palestinians temporary protection, particularly if tied directly to mechanisms for return to their places of origin. *See supra* notes 410 and *infra* and accompanying text.

<sup>690</sup> Under the U.S. TPS legislation, the reasons for the current exodus would clearly qualify the majority of Palestinians for protection, as they are experiencing "ongoing armed conflict which poses a serious threat to life or safety" and "extraordinary temporary conditions. . . preventing them from returning home in safety. . . ." INA, *supra* note 433, at ch. 477, 244(b)(1).

<sup>691</sup> *See supra* note 247 and accompanying text.

<sup>692</sup> *See* Resolution for Common Guidelines on Admitting Particularly Vulnerable People from the Former Yugoslavia, *supra* note 436.



#### 4. Standards of Treatment

A uniform minimum standard of treatment is essential for temporary protection to be successful in reducing the incentive for massive secondary refugee movement from the Arab states, including the 1967-occupied territories, to Western or Northern states. The Arab states would be required to standardize their treatment of Palestinian refugees and to regularize the rights offered to a standard acceptable to all the temporary protection participant states, consistent with recognized legal standards.

Although each of the relevant regions for a Palestinian temporary protection program has differing minimal and optimal rights standards,<sup>693</sup> harmonizing the benefits and rights that are offered under temporary protection will be one of the most critical factors for the program to be successful in the Palestinian case. Aside from concerns about secondary movement, a standard of rights provides a semblance of justice and principle much lacking in the Palestinian situation. Moreover, for the program to be standardized on a basis that is acceptable to states and participants, there must be a framework of applicable human rights standards including civil, economic, and social rights. In the Palestinian situation, the following rights should be considered fundamental: (1) status, identity and travel documents (freedom of movement); (2) family reunification; (3) employment, housing, and education; (4) health and welfare benefits; and (5) duration of status and conditions at cessation.

First, freedom of movement should be accorded to Palestinians as a fundamental right. The Refugee Convention and both conventions on statelessness require states to issue identification and travel documents to refugees/stateless persons lawfully in their territories. These provisions are widely standardized and respected.<sup>694</sup> European temporary protection and U.S. TPS standards require status documents to be issued to those receiving benefits under those programs,<sup>695</sup> and UNHCR and E.U. guidelines require the same.<sup>696</sup> Travel documents and freedom of movement are less respected, both in applicable guidelines and in practice.<sup>697</sup> Nevertheless, at a minimum, freedom of movement within the temporary protection state should be mandated, as noted in the UNHCR Progress Report on temporary protection.<sup>698</sup> Palestinians have long suffered forced confinement to refugee camps, severe restrictions on freedom of

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<sup>693</sup> See *supra* part V.A, B, and C.

<sup>694</sup> See *supra* notes 63-74 and accompanying text.

<sup>695</sup> See *supra* text accompanying notes 443-44.

<sup>696</sup> See *supra* notes 475-83 and accompanying text.

<sup>697</sup> See *supra* part IV.A.3.

<sup>698</sup> "[T]he right to education, employment, freedom of movement, assistance, and personal identification should be granted without discrimination, while it is understood that any restrictions imposed must be justified on grounds of legitimate national interest and must be proportional to the interest of the state." *Progress Report*, *supra* note 413, at para 4(1).

movement without adequate justification, and arbitrary visa restrictions and re-entry requirements, compounded by forced separation from family members.<sup>699</sup>

Second, family reunification must be considered fundamental. Family unity, at least as to the nuclear family, is recognized as a core requirement for temporary protection under the E.U. 2001 Council Directive, which incorporates detailed provisions obligating states to grant residence to family members of temporary protection beneficiaries and to respect rights to family unity.<sup>700</sup> Family rights in the E.U. context are considered fundamental under the ECHR.<sup>701</sup> The United States does not protect family unity under TPS;<sup>702</sup> however, UNHCR has repeatedly stressed the importance of family reunification in temporary protection schemes and in considering durable solutions for refugees.<sup>703</sup> For Palestinians, family separation has been an intergenerational problem, exacerbated by lack of status, identity, and travel documents, as well as by arbitrary criteria that screen out large numbers of applicants, and by severe restrictions on movement. Reunification as a principle for granting temporary protection and for granting residence to derivative family members of temporary protection recipients will enhance the durability of the solution of choice for refugee families.

Third, employment, housing and education rights must be granted to refugees. The Refugee Convention gives the highest priority to employment, housing, and elementary education, requiring states to grant refugees lawfully in their territories rights in each of these areas on par with nationals.<sup>704</sup> Although E.U. state policies concerning granting employment authorization vary significantly, the standard-setting guidelines and Council Directive reflect common agreement that employment should be authorized for temporary protection recipients.<sup>705</sup> In the United States, TPS recipients are authorized to work.<sup>706</sup> For Palestinian refugees, the inability to work in many of the areas where they are located has been a

<sup>699</sup> See *supra* part III.A and B.

<sup>700</sup> See Council Directive, *supra* note 426.

<sup>701</sup> See ECHR, *supra* note 72. *But see* Case No. 18288/9, Eur. Comm'n H.R., May 13, 1992.

<sup>702</sup> For TPS provisions, see INA, *supra* note 433.

<sup>703</sup> See *e.g.*, ExCom Conclusion No. 24 (XXXII) (1981) (Family Reunification) (stating: "(1) every effort should be made to ensure the reunification of separated refugee families; (2) countries of asylum and countries of origin [should] support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay"). See also *Global Consultations on International Protection, Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems*, 3d mtg., U.N. Doc. EC/GC/01/17 (2001).

<sup>704</sup> See *supra* notes 63-64.

<sup>705</sup> See *supra* notes 475-83 and accompanying text.

<sup>706</sup> See INA, *supra* note 433.

major source of poverty, frustration, and instability. A Palestinian temporary protection program would appear far more palatable if its recipients were able to work rather than receive welfare benefits. Housing and education, at least at the elementary level, are also considered core rights under human rights and refugee standards, as is widely reflected in the main international human rights instruments.<sup>707</sup> For Palestinians receiving formalized temporary protection, those who will be able to work and have freedom to secure housing and education will relieve already overstressed UNRWA programs and state benefits. For UNRWA, reduction in services based on reduced need for services, rather than on fiscal shortfalls, would provide the agency with the opportunity and resources to retool programs toward durable solutions. Skill development would also enhance the ability of such individuals to integrate as economic contributors to new communities when they either return to their place of origin, resettle, or integrate in host states.

Fourth, refugees must be granted health and welfare benefits. The majority of Palestinian refugees in the Arab states receive minimum health and welfare benefits through UNRWA.<sup>708</sup> It would be illogical to structure a temporary protection program that did not provide equivalent guarantees to UNRWA standards, and E.U. and international human rights standards would mandate additional guarantees in these areas. Consistent with the Refugee Convention, states would be expected to incrementally improve the rights and benefits offered temporary protection recipients over time. For the second five years, refugee rights would increase consistently with other state temporary protection policies and practice, and with U.N. guidelines.<sup>709</sup> Greater consideration would need to be given to the areas of gender equality, higher education and vocational training benefits, the granting of equal employment opportunities with nationals of the host state, additional economic, social and cultural rights,<sup>710</sup> and expanded notions of family unity.<sup>711</sup> Ultimately, as part of a

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<sup>707</sup> See *supra* notes 73-74 and accompanying text (discussing the statelessness conventions); ICESCR, *supra* note 67, 993 U.N.T.S. at 3; *supra* note 72-74 (discussing the European instruments); African Charter, *supra* note 321, 21 I.L.M. at 58; Casablanca Protocol, *supra* note 100.

<sup>708</sup> See *supra* note 251.

<sup>709</sup> See *supra* note 448 and accompanying text.

<sup>710</sup> Fitzpatrick notes that rights standards for temporary protection beneficiaries should be guaranteed at a level between two concerns; rights cannot be afforded at a level higher than that afforded citizens of the host states, but restrictions must be directly related to a legitimate state objective. She also notes that standards set by the Refugee Convention for economic, social and cultural rights are appropriate standards for temporary protection beneficiaries as well, in particular because many temporary protection beneficiaries would meet the refugee definition and should not be deprived of the guaranteed level of rights simply because they are receiving a less permanent status. See Fitzpatrick, *Temporary Protection of Refugees*, *supra* note 12, at 304. Kalin also supports progressive guarantees of social, economic and cultural rights

comprehensive peace, all those in temporary protection who choose not to return would be offered permanent residence, either in the host state or in resettlement states through a responsibility-sharing formula, such as in the Indochinese orderly departure program.

Finally, duration of status and conditions at cessation of temporary protection must be considered. In the Palestinian case, the duration of status should be tied to safe return in the context of a comprehensive and durable peace settlement of the Israeli-Palestinian conflict, as is most consistent with general refugee law principles, accepted principles for temporary protection, and the special Palestinian regime of article 1D and its companion provisions and instruments.

##### 5. Additional Critical Components of a Successful Temporary Protection Strategy Linked to Return

In order for temporary protection to be meaningfully connected to return and a comprehensive durable solution for Palestinian refugees, it must include solution-oriented components. These components can be usefully categorized as maintaining refugees' social structures, developing refugees' skills and resources, creating linkages between refugees and communities in the home state, and confidence-building measures in both returning and stayee communities prior to return.<sup>712</sup>

###### a. *Respect for Refugees' Social Structures*

Promoting family unity during the temporary protection process will be a significant factor in ensuring durability of the refugee solutions.<sup>713</sup> Community identification as a foundation for self-organizing around repatriation was one of the critical aspects of the durability of refugee

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as established by the Refugee Convention for temporary protection recipients, related to the length of time they remain in such status. *See id.* (citing KALIN, *supra* note 416).

<sup>711</sup> Due to the unique situation of Palestinian refugees and their displacement in many parts of the world, family unity considerations must remain a pivotal criteria for temporary protection benefits. For cultural, identity and economic reasons, Palestinians consider their close families as extending beyond the nuclear family. More appropriate for defining qualifying family members is the UNHCR's approach which recommends that undue restrictions not be placed on family relationships, and recommending special consideration for "vulnerable beneficiaries," such as children, the elderly, disabled, and victims of physical or psychological trauma. *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, *supra* note 448, at para. 4(m).

<sup>712</sup> Hathaway and Neve detail an extremely helpful framework for solutions-oriented temporary protection, from which we derive these critical components for temporary protection to be a successful strategy in the Palestinian case. *See Hathaway & Neve, supra* note 34, at 173-81.

<sup>713</sup> *Id.* at 173-74.

return in the CIREFCA process,<sup>714</sup> and in the Mozambique repatriation.<sup>715</sup>

In the Palestinian situation, the extended family and village ties have been the primary source of support and stability for a scattered and traumatized refugee population. Perhaps even more than other expelled populations, Palestinians have relied on their family and community structures for physical and psychological survival. These relationship-based structures will provide essential resources and the foundation for successful and long-term reintegration into the home country or for permanent integration in the new or old host state. These community structures, which have been largely preserved by Palestinian refugees in various places of exile, also provide the base for self-organization for investment or reinvestment, for building viable communities based on common language and identity, and for preserving culture.<sup>716</sup>

b. *Development of Skills and Resources During Temporary Protection*

A second important factor in a successful temporary protection program is skills-development and resource-development, both prior to and after return or integration. James C. Hathaway and R. Alexander Neve emphasize that economic development programs must be geared toward refugee needs.<sup>717</sup> However, investment must include both the refugee and the stayee or host communities, or resentment will develop that could impede durability. The ONUMUZ example illustrates creative investment in quick impact projects—rehabilitation projects such as roads, schools, and clinics that benefit both the returning and staying communities.<sup>718</sup> A significant additional advantage of collaborative economic and social development projects is that they can foster mutual trust and investment in joint projects in a way that diffuses existing inter-communal tensions. The ONUMUZ, as well as the CIREFCA, illustrate how initial international investment and resources that are focused and creative can generate self-reliance and self-investment within returning communities.<sup>719</sup>

c. *Linkages with Returnees/Stayees*

Although Palestinian refugee return to Israel appears to present insurmountable problems concerning secondary property use or ownership, causing resentment and animosity when such property must be relinquished, the legal framework for respecting property rights in such a con-

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<sup>714</sup> See *supra* text accompanying notes 503-05.

<sup>715</sup> See *supra* notes 508-13 and accompanying text.

<sup>716</sup> *Id.* at 173.

<sup>717</sup> Hathaway & Neve, *supra* note 34, at 176-77.

<sup>718</sup> See *supra* note 508.

<sup>719</sup> See *supra* text accompanying notes 503-13.

text has been well-developed in other refugee situations. However, for such a framework to be established and implemented there must be a simultaneous process of reconciliation, perception of mutual gain in the long-term for both communities involved, and a framework incorporating respect for both primary and secondary property rights. The Dayton Peace Accord, Annex 7, provides the most developed framework, based on legal principles, of the recent major refugee solution mechanisms in the last twenty years concerning housing and other property rights.<sup>720</sup> Aside from legal frameworks and legally-grounded mechanisms to protect rights, there must be immediate links developed between the two communities to begin the reconciliation process.<sup>721</sup> These linkages should begin long before the repatriation process commences, and should be part of the focus during the temporary protection period.

#### d. *Confidence-Building in Anticipation of Repatriation*

Security issues are also a major factor that must be addressed before repatriation commences, but, like secondary property ownership, are not unique issues to the Israeli-Palestine situation. In fact, security issues often dominate the agenda in the search for durable solutions for refugees.<sup>722</sup> Mechanisms have been developed that provide precedent for successful management of security concerns, including U.N. monitoring/peacekeeping,<sup>723</sup> regional monitoring/peacekeeping mechanisms, the

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<sup>720</sup> See *supra* note 335.

<sup>721</sup> See Hathaway & Neve, *supra* note 34, at 178-79.

<sup>722</sup> Security issues have rarely been absent in major refugee flows. For the UNHCR's framework addressing security concerns in the context of implementing durable solutions, see U.N. High Comm'r for Refugees, *Protection of Refugees in Mass Influx Situations, Overall Protection Framework*, U.N. Doc. EC/GC/01/4 (2001). See also U.N. High Comm'r for Refugees, *The Civilian Character of Asylum: Separating Armed Elements from Refugees*, U.N. Doc. EC/GC/01/6 (2001). On security issues addressed in negotiations and agreements on specific situations discussed in this article, see generally *Evaluation of UNHCR's Repatriation Operation to Mozambique*, *supra* note 606; Reclamation and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons, U.N. Doc. CIREFCA/89/14 (1989); Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, U.N. Doc. A/46/608-S/23177 (1991).

<sup>723</sup> For a critique of the success and failures of U.N. peacekeeping efforts in major conflict and post-conflict situations, see David P. Forsythe, *Human Rights and International Security: United Nations Field Operations Redux*, in P.R. BAEHR, *THE ROLE OF THE NATION -STATE IN THE 21ST CENTURY* 265, 268-76 (1998). For a comparison of the intervention (generally considered unsuccessful) efforts of the United Nations Protection Force (UNPROFOR), see 93 AM. J. INT'L. L. 841 (1999); Chronology: U.N. Interim Administration in Kosovo, available at [http://www.un.org/peace/Kosovo/kosovo\\_status.htm](http://www.un.org/peace/Kosovo/kosovo_status.htm). See also Organization for Security and Cooperation in Europe, *Kosovo: Kosovo as Seen, as Told, Part II* (1999), available at [http://www.osce.org.Kosovo/reports/hr/part2/index.htm](http://www.osce.org/Kosovo/reports/hr/part2/index.htm).

involvement of major security organizations (such as the Organization of Security and Co-operation in Europe or North Atlantic Treaty Organization), truth and reconciliation processes or tribunals with effective sanction mechanisms,<sup>724</sup> and the involvement of regional and international NGOs.<sup>725</sup>

## VI. CONCLUSION

Granting temporary protection would be consistent with article 1D of the Refugee Convention as a mechanism toward implementing the appropriate U.N. General Assembly-mandated durable solution for refugee protection. The right of return called for in U.N. General Assembly Resolutions would be to the refugees' place of origin. Temporary protection would provide Palestinian refugees in Arab states, as well as other states of the Palestinian diaspora, a recognized legal status. Consistent with the parameters of temporary protection in Europe, or TPS in the United States, temporary protection for Palestinian refugees should afford them the basic protection rights of other persons who are granted such status when fleeing emergency situations, whether Convention-defined refugees or not. Temporary protection specifically addresses the real needs of Palestinian refugees: the need to work, to travel freely, to live where they choose within the temporary protection state, to reunite with family members, and to travel outside and return with special permission. Temporary protection also specifically addresses the fears of both Arab and other states that they would either have to grant asylum or some more permanent type of status to the refugees, or else expel them. Finally, temporary protection addresses the ongoing concern of Palestinian refugees and the PLO that the post-Oslo process might vitiate the international consensus, so firmly embodied in U.N. General Assembly Resolution 194 and in customary international law, that the durable solu-

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<sup>724</sup> For a comparative review of the experiences of South Africa with its Truth and Reconciliation Process, with the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda, see John Dugard, *Reconciliation and Justice: The South African Experience*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 277 (1988); Herman von Hebel, *An International Tribunal for the Former Yugoslavia: An Act of Powerlessness or a New Challenge for the International Community*, 11 *NETH. Q. HUM. RTS.* 437 (1993); Dapha Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 *EUR. J. INT'L L.* 501 (1996).

<sup>725</sup> In major refugee repatriation situations such as Central America, Bosnia-Herzegovina and Mozambique, non-governmental organizations have played a crucial role in the repatriation and reintegration, as well as redevelopment, process. See U.N. HIGH COMM'R FOR REFUGEES, *STATE OF THE WORLD'S REFUGEES*, *supra* note 17, at 136-53. A detailed analysis of these issues, although critical to the framework required for successful repatriation and related aspects of durable solutions for Palestinian refugees, is beyond the scope of this paper.

tion for Palestinian refugees is return to their place of origin, restitution, and compensation.