

The Right to Return for Palestinian Refugees: A Crisis of Recognition under International  
Law



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'In time of deceit, telling the truth is a revolutionary act'

George Orwell

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## Abstract

This thesis examines the right to return for Palestinian refugees in international law. Hannah Arendt's conception of rights, which identifies the possession of nationality as a pre-condition for accessing abstract human rights, supplies the theoretical basis for our examination. Arendt's insight leads us to conclude that there is no fundamental right to return but only the right of sovereign States to extend such a right. The sources for the right to return in international law support this conclusion because sovereign States have a right to restrict entry to their territories. Therefore, when States refuse to readmit refugees the international framework governing refugees and stateless persons advocates ending their plight through local integration and resettlement. This thesis reveals that these durable solutions define refugees legally out of existence and can turn their right to return into a right of no return. These findings constitute an important contribution to the existing discourse on the right of return for Palestinian refugees by revealing that Palestinian refugees cannot return to Israel without Israel's consent. This thesis also constitutes a novel contribution to the existing discourse by revealing that Palestinian refugees who are excluded from the international framework governing refugees and stateless persons can be impacted by the existing framework because members of the League of Arab States have adopted international conventions, regional agreements and nationality provisions which can pave the way for the integration and naturalization of Palestinian refugees in their territories. This thesis concludes that the right to return is an abstract right and that the international framework governing refugees and stateless persons can define Palestinian refugees out of existence and eradicate their right to return. Therefore, a new international framework should be established that places the right to return above the right of sovereign States to restrict entry to their territories.

## About the Author

I was born a stateless refugee. I was not registered as a Palestinian refugee because Palestine is not considered a sovereign State. Despite this, as I was growing up, I knew I was Palestinian, and I never doubted that I have a right to return to Palestine. As I was growing up, I was told that Israel was responsible for the ongoing plight of Palestinian refugees because it did not allow them to return to their homes and lands after the establishment of Israel in 1948. I never expected that my visit to the Palestinian Consulate would lead me to discover that our own leadership did not want us to return. My discovery came about after my university offered me a master's scholarship which was specifically created for a student who was a Palestinian refugee or from the Palestinian diaspora. I agreed to accept the scholarship after the student who was granted the scholarship could not come to the United Kingdom.<sup>1</sup> To complete the paperwork the University Chancellor asked me to submit a document that proved that I was originally Palestinian. I realized then that I did not possess such a document. The University Chancellor advised me to go to the Palestinian Consulate to request a letter that confirms I am originally Palestinian. The Palestinian official I met at the consulate refused to give me such a letter. 'You don't have a Palestinian accent,' 'You might be a Moroccan or Algerian trying to claim asylum by claiming to be Palestinian' she said. Regarding my accent, I reminded her that when Yasser Arafat<sup>2</sup> came to Gaza, he had an Egyptian accent and that because of our protracted refugee situation many Palestinians do not have a Palestinian accent, and some do not even speak Arabic. I also showed her my passport to prove that I did not need to apply for asylum. I also urged her to contact my family in Palestine to confirm that both my parents are originally Palestinian. At that point, she told me that she cannot give me a letter that proves I am originally Palestinian because during the Oslo Accords it was agreed that we will not be allowed to return. She also told me that I was one of the lucky ones because I became a citizen of a new State. She also accused me of being crazy for wanting to prove that I am Palestinian and claimed that all the youth in the Middle East wanted to have my current citizenship. I never expected to hear these words from someone representing the Palestinian people. On the way out I looked at the picture of Arafat. This was the man who told us repeatedly that he sees Jerusalem at the end of the tunnel and promised us that one day we will all return. In the end, he returned, and we were left behind in a political wilderness where the weak are forgotten and the strong erect thrones above our cemeteries. The Palestinian refugee crisis has been perpetuated because we were left at the mercy of political calculations. Those who took from us everything turned our reality into a nightmare and their dreams into a success story. We live in a world in which the victors write not only their history but also ours and we are expected to die quietly and disappear. In such a world our only hope is international law. But even in that field, a just resolution to the plight of Palestinian refugees is not guaranteed.

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<sup>1</sup> The United Kingdom is officially known as the United Kingdom of Great Britain and Northern Ireland.

<sup>2</sup> Chairman of the Palestine Liberation Organization from 1969 to 2004 and President of the Palestinian National Authority from 1994 to 2004.

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## **DECLARATION**

This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

Signed Hanin Abou Salem (candidate)

Date 30 March 2021

## **STATEMENT 1**

This thesis is being submitted in fulfilment of the requirements for the degree of PhD.

Signed Hanin Abou Salem (candidate)

Date 30 March 2021

## **STATEMENT 2**

This thesis is the result of my own independent work/investigation, except where otherwise stated, and the thesis has not been edited by a third party beyond what is permitted by Cardiff University's Policy on the Use of Third Party Editors by Research Degree Students. Other sources are acknowledged by explicit references. The views expressed are my own.

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I hereby give consent for my thesis, if accepted, to be available online in the University's Open Access repository and for inter-library loan, and for the title and summary to be made available to outside organisations.

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Date 30 March 2021

**Word Count: 80,000**

## **DEDICATION**

To all refugees who have been denied the right to return to their homes and lands.

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## Chapter 1: Introduction

### 1.1. Research Background

The Palestinian refugee problem is ‘the world’s oldest...protracted refugee situation.’<sup>3</sup> The United Nations High Commissioner for Refugees [UNHCR] defines a protracted refugee situation as ‘one in which refugees find themselves in a long-lasting and intractable state of limbo... [and politically] without the prospect’ of a solution.<sup>4</sup> Although this ‘definition does not apply directly to Palestine refugees’ who are excluded from UNHCR’s mandate<sup>5</sup> the definition accurately describes the condition of Palestinians<sup>6</sup> who became refugees after ‘approximately 750,000...were forcibly expelled from their ancestral homeland around the time that... [the State of] Israel proclaimed its independence’<sup>7</sup> [on 14 May 1948].<sup>8</sup> UNHCR’s definition also accurately describes the situation of Palestinians who became displaced as a result of the Arab-Israeli War in 1967<sup>9</sup> which ended with Israel occupying the West Bank<sup>10</sup>

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<sup>3</sup> UNHCR, ‘Protracted Refugee Situations: The Search for Practical Solutions’ (UNHCR, 2006) <<http://www.unhcr.org/4444afcb0.pdf>> accessed 11 June 2017, 106

<sup>4</sup> Ibid 106

<sup>5</sup> UNRWA, ‘Exploding the myths: UNRWA, UNHCR and the Palestine Refugee’ (UNRWA, 27 June 2011) <<https://www.unrwa.org/newsroom/features/exploding-myths-unrwa-unhcr-and-palestine-refugees>> accessed 11 June 2017

<sup>6</sup> UNHCR’s definition also describes the situation of Palestinians displaced because of the 1967 Arab-Israeli war which ended with Israel occupying the West Bank and the Gaza Strip. Israel has also denied the right to return to this group. UNHCR, ‘Protracted Refugee Situations: The Search for Practical Solutions’ (UNHCR, 2006) <<http://www.unhcr.org/4444afcb0.pdf>> accessed 11 June 2017, 106

<sup>7</sup> The Official Gazette, ‘Proclamation of Independence [The Declaration of the Establishment of Israel]’ (*The Knesset*, 14 May 1948) <[https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm)> accessed 2 April 2019

<sup>8</sup> Ardi Imseis, ‘The Status of Palestinian Refugees in International Law’ (*Dalhousie University*, 1 January 1999) <<http://digitalcommons.schulichaw.dal.ca/djls/vol8/iss1/9/>> accessed 11 November 2016, 223

\* ‘Palestinians who are habitually resident in a neighbouring state, including those born in Palestine before 1948, have no right of entry to the Occupied Territories of Gaza and the West Bank, including East Jerusalem.’ Home Office, ‘Asylum Policy Instruction Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) Version 2.0’ (*Home Office*, 9 May 2016) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524502/A-on-Article-1D-and-Palestinians-v2\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf)> accessed 20 October 2021, 5

<sup>9</sup> Also known as the Six Days War.

‘Conflict flared again during the Six-Day War of June 1967 as Israel, citing an imminent threat from its Arab neighbours, mounted a highly effective military campaign. Israeli forces captured significant areas of Arab territory, leaving Israel in possession of the Golan Heights, the Sinai Peninsula, the West Bank, East Jerusalem and the Gaza Strip. The latter three areas contained significant Palestinian populations, which numbered around two million in total...[i]n October 1973, on the Jewish holy day of Yom Kippur, Egyptian and Syrian forces launched attacks on Israel in a bid to reclaim the

and the Gaza Strip.<sup>11</sup> One-third of the '200-300,000 Palestinians' who became refugees in 1967 'were refugees from the 1948 conflict who were moving for a second time.'<sup>12</sup>

Palestinians who were expelled around the time Israel was established became stateless refugees<sup>13</sup> because Great Britain [Britain]<sup>14</sup> terminated its mandate over Palestine on 15 May 1948.<sup>15</sup> This termination led Palestinians, who were transformed from Ottoman Citizens under Ottoman rule<sup>16</sup> into Palestinian citizens under the Palestine mandate,<sup>17</sup> to lose their citizenship without acquiring another one.<sup>18</sup> Since their expulsion, Israel has denied Palestinian refugees the right of return [ROR]<sup>19</sup> to their homes and lands in territories that became part of Israel.<sup>20</sup> Consequently, most Palestinian refugees have lived in a protracted refugee situation in camps managed by the United Nations Relief and Works Agency for

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Sinai and Golan, but were repelled by the IDF [Israeli Defence Force].' Tim Youngs, 'Developments in the Middle East Peace Process 1991-2000' (*House of Commons Library*, 24 January 2001)

<<file:///C:/Users/frees/Downloads/RP01-08.pdf>> accessed 23 February 2021, 12

<sup>10</sup> Post-1967 Jordan, which annexed the West Bank after the 1948 Arab-Israeli War, continued to claim sovereignty over the West Bank. Jordan relinquished its legal and administrative control of the West Bank in 1988 in favour of the Palestinian Liberation Organization [PLO] which 'paved the way in November 1988 for a symbolic declaration by the PLO of an independent Palestinian state in the West Bank and Gaza, with Jerusalem...as its capita.' The following year, the Madrid Peace Process started which sought to build a comprehensive and lasting peace between Arab states and Israel. This led to the launch of the Madrid Middle East Peace Conference in 1991. Ibid 14

<sup>11</sup> 'The wars of 1967 and 1973 saw Israel acquire additional territories, including the Golan Heights (from Syria), the West Bank of the River Jordan and East Jerusalem (from Jordan), and the Gaza Strip and Sinai Peninsula (from Egypt), resulting in a further outflow of refugees.' Ibid 9

'The Gaza Strip...was an administrative province under the British Mandate of Palestine, but was transferred to Egypt as part of the 1949 Armistice Agreement.' Ibid 12 footnote 13

<sup>12</sup> Ibid 13

<sup>13</sup> Laurie Brand, *Palestinians in the Arab World: Institution Building and the Search for State* (Columbia University Press 1998) 8

<sup>14</sup> Officially known as the United Kingdom of Great Britain and Northern Ireland.

<sup>15</sup> National Army Museum, 'The British Army in Palestine' (*National Army Museum*, n.d.)

<<https://www.nam.ac.uk/explore/conflict-Palestine>> accessed 12 January 2019; See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 458

<sup>16</sup> Laurie Brand, *Palestinians in the Arab World: Institution Building and the Search for State* (Columbia University Press 1998) 8

<sup>17</sup> League of Nations, 'Report by His Britannic Majesty's Government to the Council of the League of Nations on the Administration of Palestine and Transjordan for the year 1925' (*UN Information System on the Question of Palestine*, 8 July 1925)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/BE6C3644411DA3ED052565E7006E9AF3>> accessed 1 January 2019, Article 3.Q (A)

<sup>18</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 459

<sup>19</sup> This thesis uses the term 'right of return' when referring to the Palestinian/ Arab discourse and the Israeli discourse because when both discourses examine whether Palestinian refugees have a 'right of return' to Israel they are also examining whether they have a right to return to their original homes and lands and whether they have a right to be compensated for any losses.

<sup>20</sup> UNHCR, 'Protracted Refugee Situations: The Search for Practical Solutions' (*UNHCR*, 2006) <<http://www.unhcr.org/4444afcb0.pdf>> accessed 11 June 2017, 106

Palestine Refugees in the Near East [UNRWA]<sup>21</sup> which was established on 8 December 1949 by the United Nations General Assembly [UNGA] Resolution 302<sup>22</sup> as a temporary agency tasked with providing education, healthcare, and social services to those meeting its definition of 'Palestine refugees' in Lebanon, Syria, Jordan, the occupied West Bank, East Jerusalem and the Gaza Strip.<sup>23</sup> Today over 5.6 million Palestinian refugees are registered with UNRWA.<sup>24</sup> Palestinian refugees outside UNRWA's areas of operations are not accounted for in UNRWA's figures.<sup>25</sup>

Palestinian refugees who live in UNRWA managed camps are living in a protracted refugee situation because, in addition to being denied the ROR, Arab host States have also denied them the right to become permanent residents or full citizens<sup>26</sup> because they do not want their ROR to be replaced with permanent settlement in their territories.<sup>27</sup> Therefore, Bitar rightly observes that '[t]he creation of the Israeli State and its legal and territorial exclusion of Palestinian return meant the latter's effective denationalization, statelessness as well as

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<sup>21</sup> UNRWA, 'Consolidated Eligibility and Registration Instruction' (UNRWA, 1 January 2009) <<https://www.unrwa.org/userfiles/2010011995652.pdf>> accessed 25 February 2017, 30

<sup>22</sup> United Nations, 'General Assembly Resolution. 302' (UNRWA, 8 December 1949) <<https://www.unrwa.org/content/general-assembly-resolution-302>> accessed 1 November 2016

<sup>23</sup> UNRWA, 'Consolidated Eligibility and Registration Instruction' (UNRWA, 1 January 2009) <<https://www.unrwa.org/userfiles/2010011995652.pdf>> accessed 25 February 2017, 30

<sup>24</sup> UNRWA, 'Who We Are' (UNRWA, n.d.) <<https://www.unrwa.org/who-we-are>> accessed 20 October 2020

<sup>25</sup> UNRWA, 'Consolidated Eligibility and Registration Instruction' (UNRWA, 2009) <<https://www.unrwa.org/userfiles/2010011995652.pdf>> accessed 25 February 2017, 9

\* This includes Palestinian refugees who ended up in 'Gulf States, Egypt, Iraq or Yemen, or further afield in Australia, Europe and America.' UNRWA, 'The United Nations and Palestinian Refugees' (UNRWA, 2007) <<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 11

\* This group also 'consists of individuals who are neither Palestine refugees nor displaced persons but who, owing to a well-founded fear of being persecuted for one or more of the 1951 Convention [Relating to the Status of Refugees] grounds, are outside the Palestinian territories occupied by Israel since 1967 and are unable or, owing to such fear, unwilling to return there. Such Palestinians can qualify as refugees under the 1951 Convention [Relating to the Status of Refugees].' Ibid 11-12

\*UNRWA claims this group came into existence in 1967 but UNRWA records reveal that this group came into existence when the agency was established '[i]n May 1951, UNRWA inherited a list of 950,000 persons from its predecessor agencies. In the first four months of operations, UNRWA reduced this list to 860,000 persons, based on painstaking census efforts and identification of fraudulent claims.' UNRWA, 'Frequently Asked Question' (UNRWA, n.d.)

<<https://www.unrwa.org/who-we-are/frequently-asked-questions>> accessed 1 June 2017

<sup>26</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 7; See Abbas Shiblak, 'Stateless Palestinians' (2006) *Forced Migration Review* 26, 9 <[www.fmreview.org/FMRpdfs/FMR26/FMR26full.pdf](http://www.fmreview.org/FMRpdfs/FMR26/FMR26full.pdf)> accessed 25 February 2017

<sup>27</sup> Fida Nasrallah, 'Lebanese Perceptions of the Palestinians in Lebanon: Case Studies' (1997) 10 (3) *Journal of Refugee Studies*, 350 <<https://doi.org/10.1093/jrs/10.3.349>> accessed 25 February 2017

concomitant social, political, and economic rupture.<sup>28</sup> Takkenberg has also rightly observed that 'being stateless, dispossessed, not having a passport of a State, not having even the theoretical option of returning to one's country...has been at the very heart of the Palestinian refugee problem.'<sup>29</sup>

## 1.2. Problem statement

The right of Palestinian refugees to return to Israel has been defined as 'one of the most difficult issues facing'<sup>30</sup> Israel and the Palestinian leadership 'as they seek to resolve the Israeli-Palestinian dispute.'<sup>31</sup> It is a difficult issue because the right of Palestinian refugees to return to Israel is a contemporary legal problem that touches on history, sovereignty, international law and politics and the debate over these concepts has impacted the realities and prospects for Palestinian refugees.

The Israeli discourse on the ROR for Palestinian refugees has always maintained that under international law Palestinian refugees do not have a ROR to territories that became part of Israel and calls for their resettlement in Arab host States.<sup>32</sup> By contrast, the Palestinian discourse on the ROR claims that the ROR 'is well established in International Law.'<sup>33</sup> The Palestinian discourse also cites United Nations General Assembly [UNGA] Resolution 194 (III) of 11 December 1948 which resolved in paragraph 11 that Palestinian refugees 'wishing to return to their homes and live at peace with their neighbours should be permitted to do so

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<sup>28</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 7

<sup>29</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998)195

<sup>30</sup> Yaffa Zilbershats, 'Do the 1948 Palestinian Refugees Have the Right to Return?' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 70 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 31 October 2016

<sup>31</sup> *Ibid* 70

<sup>32</sup> Yoav Gelber, 'The Historic Background,' in Edward J Perkins and others (eds), *Palestinian Refugees: Old Problems-New Solutions* (University of Oklahoma Press 2001) 24; See Yaffa Zilbershats, 'Do the 1948 Palestinian Refugees Have the Right to Return?' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 47 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 31 October 2016

<sup>33</sup> Salman Abu Sitta, 'The Inevitable Return of Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 5



at the earliest practicable date.<sup>34</sup> The Palestinian discourse also claims that Palestinians displaced as a result of the 1967 Arab- Israeli War also have a ROR because UN Security Council [UNSC] Resolution 242 of 22 November 1967 called on Israel to withdraw from the territories that it occupied during the Arab-Israeli War of 1967<sup>35</sup> and for ‘a just settlement of the refugee problem.’<sup>36</sup> This call was repeated in UNSC Resolution 338 of 22 October 1973 after Egypt and Syria attacked Israel ‘to reclaim the Sinai and Golan, but were repelled’ by Israel.<sup>37</sup> Moreover, Abu Sitta has demonstrated that there is ‘no practical justification for the denial of the right to return’<sup>38</sup> because a legal framework has already been established for refugees to return in ‘Kosovo, Bosnia, Abkhazia, Uruguay, Uganda, South Africa,<sup>39</sup> Iraq and Afghanistan.’<sup>40</sup>

Despite the international legal framework that has been established for the ROR for Palestinian refugees they have not been able to return to Israel. The Palestinian discourse on the ROR cites Israel’s policy, which rejects the ROR for Palestinian refugees, as the single obstacle for return.<sup>41</sup> This argument fails to consider how the principle of sovereignty in international law, which gives states the right to control who can enter their territories, can override the individual right to return [RTR].<sup>42</sup> The Palestinian discourse has also failed to

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<sup>34</sup> United Nations, ‘UN Resolution 194 (III)’ (*United Nations*, 11 December 1948) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>> accessed 15 October 2016, Paragraph 11

<sup>35</sup> United Nations, ‘S/RES/242 (1967) of 22 November 1967’ (*UNISPAL*, 22 November 1967) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>> accessed 6 August 2018, Article 1 (i)

<sup>36</sup> *Ibid* Article 2 (b)

<sup>37</sup> United Nations, ‘S/RES/338 (1973) of 22 October 1973’ (*UNISPAL*, 22 October 1973) <<https://unispal.un.org/unispal.nsf/0/7FB7C26FCBE80A31852560C50065F878>> accessed 31 October 2016, Article 2

<sup>38</sup> Although Abu Sitta uses the term right to return instead of the right of return, he is referring to the right of return as depicted within the Palestinian discourse because for him the right to return encompasses the right of refugees to return to their homes and not just to Israel.

<sup>39</sup> The reference to South Africa does not account for the fact that people were not able to return to their original places.

<sup>40</sup> Salman Abu Sitta, ‘The Inevitable Return of Palestinian Refugees,’ in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 17

<sup>41</sup> *Ibid* 23

<sup>42</sup> The term ‘right to return’ is used in this thesis when examining whether Palestinian refugees have a right to return to Israel under international law as outlined in Article 13(2) of the Universal Declaration of Human Rights which states, ‘everyone has the right to leave any country, including his own, and to return to his country.’ United Nations, ‘Universal Declaration of Human Rights’ (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

acknowledge that the international framework governing refugees and stateless persons<sup>43</sup> considers local integration and resettlement as the 'ultimate solution'<sup>44</sup> when return is not possible.<sup>45</sup> This failure could be attributed to the fact that most Palestinian refugees were excluded from the international framework governing refugees and stateless persons as a result of falling under UNRWA's mandate which was expected to 'prevent conditions of starvation and distress...and to further conditions of peace and stability, and... [to undertake] construction measures...with a view to...[terminate]...international assistance for relief.'<sup>46</sup> According to Takkenberg,<sup>47</sup> 'UNRWA's mandate...extends also to the protection of Palestinian refugees, which the agency understands to mean safeguard[ing] and advance[ing] the[ir] rights...under international law.'<sup>48</sup> Registration with UNRWA initially facilitated ration distribution but later became 'equated with acceptance as a refugee and prima facie entitlement to remain'<sup>49</sup> and 'keeps the prospect of repatriation alive.'<sup>50</sup> Despite this, UNRWA 'has no direct mandate to seek durable solutions' to end the plight of Palestinian refugees.<sup>51</sup>

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<sup>43</sup> According to Michelle Foster et al the 'overarching goal of the [1951 Convention Relating to the Status of Refugees] is to provide a new national home to persons driven from their own country by the risk of being prosecuted.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 288

<sup>44</sup> Guy Goodwin-Gill, 'Forced Migration - The Evolution of International Refugee Law and Organization' (*The United Nations Audiovisual Library of International Law*, n.d.) <<http://www.un.org/law/avl>> accessed 1 September 2018

<sup>45</sup> Ibid

'The status of refugees is not...a permanent one. The aim is that ... [the refugee] ... should rid himself of that status as soon as possible, either by repatriation or by naturalization in the country of refuge.' Robert Jennings quoted in Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 367

According to Foster et al the 'commitment to provide surrogate protection or substitute national protection is grounded both in the basic commitment of the interstate system to ensuring that all individuals have a nationality in the legally recognized form of citizenship, and are thus effectively "allocated" to a state, and also in the recognition that nationality provides the essential means by which individuals are able to avail themselves of the full range of protections established by international law.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 289

<sup>46</sup> United Nations, 'General Assembly Resolution. 302' (*UNRWA*, 8 December 1949) <<https://www.unrwa.org/content/general-assembly-resolution-302>> accessed 1 Nov 2016, Article 5

<sup>47</sup> Former Chief of the Ethics Office of UNRWA in Amman.

<sup>48</sup> Lex Takkenberg, 'UNRWA AT 66: Between Light and Shadows' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 *Israel Law Review* 47, 84 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>49</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 437

<sup>50</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 513

<sup>51</sup> Ibid 87

Persons who fall under UNRWA's mandate are excluded from the main international instruments for the protection of refugees and stateless persons<sup>52</sup> and they are the 1951 Convention Relating to the Status of Refugees [1951 Convention]<sup>53</sup> and the 1967 Protocol Relating to the Status of Refugees [1967 Protocol].<sup>54</sup> Both these instruments proclaim the 'fundamental principles of protection,'<sup>55</sup> without which 'no refugee can...attain a satisfactory and lasting solution to his or her plight.'<sup>56</sup> Persons who fall under UNRWA's mandate are also excluded from the 1954 Convention Relating to the Status of Stateless Persons [1954 Convention]<sup>57</sup> and therefore by extension from the 1961 Convention on the Reduction of Statelessness [1961 Convention].<sup>58</sup> Both these instruments want to end the plight of stateless persons through naturalization in host States.<sup>59</sup>

Persons who fall under UNRWA's mandate are also excluded from the scope of the Statute of the UNHCR,<sup>60</sup> which has a 'duty of supervising the application of the provisions of

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<sup>52</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 506

<sup>53</sup> Article 1D of the 1951 Convention Relating to the Status of Refugees states: This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the [UNHCR] 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 [UNGA], these persons shall ipso facto be entitled to the benefits of this Convention.

United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>54</sup> Article 1(2) of the 1967 Protocol states 'For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951" and the words "as a result of such events", in article 1 A (2) were omitted.' United Nations, 'Protocol Relating to the Status of Refugees' (*United Nations Human Rights Office of the High Commissioner*, 31 January 1967)

<<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>> accessed 17 February 2017, Article 1(2)

<sup>55</sup> '[T]he objective of the 1951 Convention and 1967 Protocol is both to establish certain fundamental rights, such as non- refoulement, and to prescribe certain standards of treatment.' Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 509

<sup>56</sup> *Ibid* 506

<sup>57</sup> Article 1(2)(i) of the 1954 Convention states '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 so long as they are receiving such protection or assistance.' United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 20 September 1954) <<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017, Article 1(2)(i)

<sup>58</sup> United Nations, 'Convention on the Reduction of Statelessness, 30 August 1961' (*Refworld*, 30 August 1961) <<https://www.refworld.org/docid/3ae6b39620.html>> accessed 7 December 2018

<sup>59</sup> The two stateless conventions are complimentary. Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 151

<sup>60</sup> Under paragraph 7(c) of the annex to UNGA Resolution No 428 (V), of 14 December 1950, on the Statute of the UNHCR, the mandate of the High Commissioner for Refugees, as defined in that

the...1951 Convention.<sup>61</sup> UNHCR was established by UNGA Resolution 428 (V) of 14 December 1950<sup>62</sup> as a temporary agency with a mandate to help refugees by eliminating their refugee status through local integration in the host country, resettlement in a third country<sup>63</sup> or repatriation when possible.<sup>64</sup> In 2014 UNHCR's representative in Malaysia also revealed that the agency was considering 'a migrant or labour migrant solution' 'built on the economic realities of countries.'<sup>65</sup> According to UNHCR's representative refugee status is temporary therefore the labour migrant solution offers a stable and secure outcome for refugees and a valuable outcome for the receiving countries because they will benefit from the contribution of refugees.<sup>66</sup> This solution aspires to persuade governments to regularize the status of refugees by allowing them to change their refugee status to migrant status and then to full citizens.<sup>67</sup> If the migrant solution is adopted as a durable solution by UNHCR today's refugees will become tomorrow's migrants.

Palestinian refugees who fall under UNRWA's mandate are only temporarily excluded from the international framework governing refugees and stateless persons<sup>68</sup> because, in theory, their exclusion ends if a) UNRWA is dismantled or the agency can no longer provide assistance to Palestinian refugees b) Palestinian refugees leave UNRWA's areas of operation or c) the '[UNGA] adopts a resolution providing for the definitive settlement of the position of Palestinian refugees.'<sup>69</sup> Therefore, we must examine how UNHCR, the 1951

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statute 'shall not extend to a person ... who continues to receive from other organs or agencies of the United Nations protection or assistance.' UNHCR, 'Statute of the Office of the United Nations High Commissioner for Refugees' (*UNHCR*, 14 December 1950)

<<https://www.unhcr.org/uk/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>> accessed 1 November 2016, Paragraph 7(c)

<sup>61</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 3

<sup>62</sup> UNHCR, 'Statute of the Office of the United Nations High Commissioner for Refugees' (*UNHCR*, 14 December 1950) <<https://www.unhcr.org/uk/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>> accessed 1 November 2016

<sup>63</sup> The third country principle shifts the obligation to protect from the country of asylum to a third country.

<sup>64</sup> UNHCR, 'Framework for Durable Solutions for Refugees and Persons of Concern' (*Refworld*, May 2003) <<https://www.refworld.org/docid/4124b6a04.html>> accessed 8 December 2018, 3-5

<sup>65</sup> World101x, 'Full Interview with UNHCR Representative to Malaysia Richard Towle' (*YouTube*, 20 October 2014) <<https://www.youtube.com/watch?v=IUbYLXQV800>> accessed 27 October 2016

<sup>66</sup> *Ibid*

<sup>67</sup> Andrew Shacknove, 'Who is a Refugee?' (1985) 95 (2) *Ethics*, 276 <<https://doi.org/10.1086/292626>> accessed 1 September 2018

<sup>68</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 153

<sup>69</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 522

Convention, the 1967 Protocol, the 1954 Convention and the 1961 Convention can define Palestinian refugees legally out of existence and eradicate their RTR.

Takkenberg claims that Palestinian refugees 'have not been able to benefit from the general discussion concerning protection, the search for durable solutions, [and] the development of refugee law' because they are excluded from the main international instruments for the protection of refugees.<sup>70</sup> This thesis will reveal that despite this exclusion the main international instruments for the protection of refugees and stateless persons can impact the legal status of Palestinian refugees and their RTR. This is made possible through UNHCR's advocacy in Arab host States and the cooperation taking place between UNHCR and UNRWA. This cooperation has resulted in both agencies being described as 'sister Agencies'<sup>71</sup> because despite working to:

[D]istinct mandates, operational and legal definitions, areas of operation, operational realities and constitutive instruments...both [agencies] are guided by a number of key principles of international refugee protection. There is [also] close cooperation between the two agencies to guarantee 'continuity of assistance and protection' for Palestine refugees wherever they are.<sup>72</sup>

It is also assumed that if UNRWA is dismantled before the Palestinian refugee problem is solved then the responsibility of Palestinian refugees who fall under UNRWA's mandate will be transferred to UNHCR.<sup>73</sup> This explains why since its establishment 'UNRWA has registered the descendants of the original refugees and reported on them to UNHCR on an annual basis.'<sup>74</sup> UNRWA has also asserted that 'UNHCR's international protection mandate is not limited to refugees in States parties to the 1951 Convention and the 1967 Protocol but is also applicable worldwide based on its Statute and subsequent [UNGA] Resolutions and [Economic and Social Council] Resolutions.'<sup>75</sup> This indicates that the 1951 Convention can impact Palestinian refugees who fall under UNRWA's mandate. Moreover, according to

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<sup>70</sup> Ibid 354

<sup>71</sup> Ibid 86

<sup>72</sup> Lex Takkenberg, 'UNRWA AT 66: Between Light and Shadows' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 86 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>73</sup> '[T]he two agencies have...entered into a strategic partnership in order to achieve 'continuity of protection' of Palestinian refugees, wherever they reside.' Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 4

<sup>74</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 69

<sup>75</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*UNRWA*, January 2007) <<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 12

UNHCR 'the 1951 Convention extends to Palestinians registered, or eligible to be registered, with UNRWA who no longer find themselves in the Agency's area of operations and are therefore automatically entitled to the protection it provides'<sup>76</sup> because they are considered 'as prima facie fulfilling the inclusion provisions of its Status and therefore as falling within its mandate.'<sup>77</sup>

UNHCR can also impact the legal status of Palestinian refugees in Arab host States who 'have not acceded to the 1951 Convention or the Statelessness conventions'<sup>78</sup> because when countries have no laws in place to protect refugees 'UNHCR is the default... [the agency] step[s] in and provide[s] whatever kind of protection... [it is] able to do in an environment which is not conducive to recognizing the legal status of refugees.'<sup>79</sup> While this thesis acknowledges that Arab States have tried to limit the extent to which UNHCR can provide protection and assistance to Palestinian refugees because they do not want them to be resettled in their territories<sup>80</sup> this does not change the fact that the agency is actively

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<sup>76</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 4; See UNHCR, 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (UNHCR, 2002) <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3da192>> accessed 15 January 2020) 2

<sup>77</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 355

Despite this the UNHCR has not had a consistent position on the applicability of the 1951 Convention Relating to the Status of Refugees to Palestinian refugees.

<sup>78</sup> BADIL quoted in Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 16; See BADIL, 'Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Convention' (BADIL, August 2005) <[https://www.badil.org/phocadownload/Badil\\_docs/publications/Handbook.pdf](https://www.badil.org/phocadownload/Badil_docs/publications/Handbook.pdf)> accessed 23 March 2021, 14; BADIL, 'Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Convention (2<sup>nd</sup> edition)' (BADIL, February 2015) <<file:///C:/Users/frees/Downloads/Art1D-2015Handbook.pdf>> accessed 23 March 2021; BADIL, 'Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Convention (2010 update)' (BADIL, August 2011) <[file:///C:/Users/frees/Downloads/handbook2010-updated%20\(1\).pdf](file:///C:/Users/frees/Downloads/handbook2010-updated%20(1).pdf)> accessed 23 March 2021

<sup>79</sup> World101x, 'Full Interview with UNHCR Representative to Malaysia Richard Towle' (*YouTube*, 20 October 2014) <<https://www.youtube.com/watch?v=IUbyLXQV8O0>> accessed 27 October 2016

<sup>80</sup> BADIL quoted in Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 16; See BADIL, 'Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Convention' (BADIL, August 2005) <[https://www.badil.org/phocadownload/Badil\\_docs/publications/Handbook.pdf](https://www.badil.org/phocadownload/Badil_docs/publications/Handbook.pdf)> accessed 23 March 2021, 14

trying to persuade Arab hosts States and the League of Arab States [LAS] to accede to several international conventions and instruments which can eventually lead those countries to grant Palestinian refugees a permanent legal status through resettlement and naturalization.<sup>81</sup>

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### 1.3. Definition of Key terms

#### The Right to Return [RTR] vs. The Right of Return [ROR]

The terms RTR and ROR have been used interchangeably and independently by international legal scholars who have examined whether Palestinian refugees have a RTR to Israel. For example, Lawand adopts the term RTR to examine whether Palestinian refugees have a RTR to Israel, a future Palestinian State or both States.<sup>82</sup> Whereas Boiling's who uses the term ROR to examine whether Palestinian refugees have a ROR to Israel<sup>83</sup> claims that the term encompasses the RTR to a State, a RTR to one's property and a right to compensation for any losses.<sup>84</sup> This suggests that the term RTR refers to a pure RTR to one's country, as outlined in Article 13(2) of the Universal Declaration of Human Rights [UDHR] which states, 'everyone has the right to leave any country, including his own, and to return to his country.'<sup>85</sup>

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<sup>81</sup> The legal impact that these international conventions and instruments can have on the status of Palestine refugees in Arab host States will be discussed in Chapter 7.

<sup>82</sup> Kathleen Lawand, 'The Right to Return of Palestinians in International Law' (1996) 8 (4) International Journal of Refugee Law <<https://doi.org/10.1093/ijrl/8.4.532>> accessed 5 November 2021

<sup>83</sup> Gail Boiling, 'Palestinian Refugees and the Right of Return: An International Law Analysis' (*BADIL*, January 2001)

<[https://www.badil.org/phocadownload/Badil\\_docs/Working\\_Papers/Brief-No-08.htm](https://www.badil.org/phocadownload/Badil_docs/Working_Papers/Brief-No-08.htm)> accessed 20 October 2021

<sup>84</sup> Ibid

<sup>85</sup> United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, Article 13(2)

See Eric Rosand who agrees that the right to return generally refers to the right to return to one's country argued that implementation of the 'Dayton Accord's provisions, regarding the return of refugees and displaced persons to their former homes in Bosnia...[would] establish a strong precedent for this broadened [RTR] under international law.' Eric Rosand, 'The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?' (1996) 14 (4) Michigan Journal of International Relations.

This thesis uses the term 'ROR' when referring to the Palestinian-Arab discourse and the Israeli discourse because when both discourses examine whether Palestinian refugees have a RTR to Israel they are also examining whether they have a ROR to their original homes and lands and whether they have a right to be compensated for any losses. While the term RTR is used when examining whether Palestinian refugees have a RTR to Israel under international law as outlined in Article 13(2) of the UDHR.<sup>86</sup>

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### Refugees for the Purpose of International Law

In international law, the legal concept for refugees derives from relevant UN treaties and the Statute of the UNHCR. For the purpose of the UN, the legal definition for refugees derives from Article 1(2) of the 1951 Convention,<sup>87</sup> which defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to 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 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>88</sup>

The geographic and temporal limits of the 1951 Convention were removed in Article 1(2) of the 1967 Protocol.<sup>89</sup>

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<<https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1459&context=mjil>> accessed 5 November 2021, 1096

<sup>86</sup> United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, Article 13(2)

<sup>87</sup> Joan Fitzpatrick argues that the 1951 Convention Relating to the Status of Refugees 'is not obsolete, but that it is incomplete, as it has been from the outset' because '[i]t's drafters, included those provisions that were politically feasible which did not amount to all that was required to create a workable, comprehensive international system of refugee protection.' Despite this Fitzpatrick claims that '[a] crisis exists not because the Convention fails to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States Parties involved.' Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal*, 230-31

<[https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>88</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017

<sup>89</sup> Article 1 (2) states '[f]or the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951" and the



Lambert observes that the definition provided by the 1951 Convention 'is based on the existence of a bond between the citizen and the State'<sup>90</sup> and that the 1951 Convention 'does not deal with the cause of refugee flows; in fact it ignores the State of origin as the source of refugees. Rather...[it] concentrates on the persecution of the individual...and the lack of protection in the state of origin.'<sup>91</sup> Moreover, Fitzpatrick observes that '[a] critical flaw in the... [1951] Convention is the fact that it delegates authority to State Parties to devise their own refugee determinations systems.'<sup>92</sup> Despite these flaws, UNHCR<sup>93</sup> adopts a similar definition by defining a refugee as:

[A] person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.<sup>94</sup>

Moreover, according to UNHCR:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not, therefore, make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.<sup>95</sup>

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words "as a result of such events", in article 1 A (2) were omitted.' United Nations, 'Protocol Relating to the Status of Refugees' (*United Nations Treaty Series*, 31 January 1967) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5)> accessed 17 February 2017, Article 1(2)

<sup>90</sup> Hélène Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) xvii

<sup>91</sup> *Ibid* xiii

<sup>84</sup> Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal*, 242

<[https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>93</sup> *Ibid* 243

The UNHCR issued the first version of its Handbook on Procedures and Criteria for Determining Refugee Status in 1979.

<sup>94</sup> UNHCR Quoted in Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed, Oxford University Press 2007) 21; See UNHCR Protection Training Manual for European Border and Entry Officials, 'Session 3 Manual: Who is a Refugee?' (*UNHCR*, n.d.)

<<https://www.unhcr.org/4d944c319.pdf>> accessed 21 October 2020

<sup>95</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (*Refworld*, April 2019) <<https://www.refworld.org/docid/5cb474b27.html>> accessed 11 January 2020, 17

UNHCR also states that:

Persons fleeing or remaining outside a country for reasons pertinent to refugee status qualify as convention refugees, regardless whether those grounds have risen during the conflict... [and that] the determining factor in the [1951] Convention and the UNHCR's statute is clearly the absence of effective protection, rather than the identity of the perpetrator.<sup>96</sup>

For UNHCR individuals who meet:

[T]he criteria of the UNHCR Statute qualify for the protection of the [UNHCR], regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he has been recognized by his host country as a refugee under either of these instruments. Such refugees, being within the UNHCR's mandate, are referred to as 'mandate refugees'.<sup>97</sup>

This means in theory Palestinian refugees can fall under UNHCR's mandate even if they are in states that have not acceded to conventions that address refugees and stateless persons. Despite this according to UNHCR and UNRWA two categories of Palestinian refugees are excluded from the 1951 Convention and UNHCR's mandate<sup>98</sup> and they are persons who are considered 'Palestine Refugees under...Resolution 194 who have been unable to return'<sup>99</sup> and persons recognized as displaced persons in UNGA Resolution 2252 (ES-V) of 4 June 1967<sup>100</sup> and 'have been unable to return to the Palestinian territories occupied by Israel since 1967'.<sup>101</sup> Although both resolutions do not define who is a Palestinian refugee, they indicate that all persons displaced from territories in historic Palestine because of the 1948

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<sup>96</sup> UNHCR quoted in Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 Harvard Human Rights Journal, 241

<[https://heinonline.org/HOL/Page?iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>97</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (*Refworld*, April 2019) <<https://www.refworld.org/docid/5cb474b27.html>> accessed 11 January 2020, 14-15

<sup>98</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*UNRWA*, 2007) <<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 11

<sup>99</sup> *Ibid* 10-11

<sup>100</sup> Article 1 (d) 'Called upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations had taken place and to facilitate the return of those inhabitants who had fled the areas since the outbreak of hostilities.' United Nations, 'A/RES/2252 (ES-V) of 4 July 1967' (*UNISPAL*, 4 July 1967) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7575BE79BBC6930852560DF0056FC78>> accessed 13 March 2017, Article 1 (d)

<sup>101</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*UNRWA*, 2007) <<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 11

and the 1967 Arab-Israeli Wars are refugees and have a ROR to Israel. This could explain why UNRWA concluded that such persons are excluded from the 1951 Convention. This thesis disagrees with this interpretation because Article 1D of the 1951 Convention which excludes Palestinian refugees from the convention and UNHCR's mandate applies only to Palestinian refugees who fall under UNRWA's mandate and not to all Palestinian refugees.<sup>102</sup> Moreover, technically an individual can only be considered a refugee after crossing a border due to reasons identified by the 1951 Convention. Therefore, in theory, Palestinians displaced in 1967 can fall under the scope of the 1951 Convention and UNHCR's mandate if they left the Palestinian territories for convention reasons and are present in a signatory State. Furthermore, receiving assistance from UNRWA should not automatically exclude persons displaced in 1967 from the scope of the 1951 Convention because UNRWA's definition which defines who is a Palestine refugee does not extend to Palestinians displaced in 1967.

According to Takkenberg the exclusion of Palestine refugees from the international framework governing refugees and stateless persons 'may have strengthened the perception by some that Palestinian refugees are not to be considered as genuine refugees in a legal context.'<sup>103</sup> Despite this the drafters of the 1951 Convention acknowledged that Palestinians who were expelled from Palestine around the time Israel was established are refugees when they draft.<sup>104</sup> Moreover, in 1978 a UN report confirmed that 'from 1953 to 1973 the Palestinian issue was treated essentially as a "refugee issue"...' until 'eventually, in 1974 the [UNGA] explicitly recognized that the Palestinian people were entitled to self-

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<sup>102</sup> Article 1D states '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.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>103</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 354; This perception and its legal impact on the status of Palestine refugees beyond UNRWA operating territories will be discussed in Chapter 8.

<sup>104</sup> Article 1D was proposed by Egypt's representative Mr Bey. According to Mr Bey, the Egyptian amendment wanted 'to make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function [referring to the UNRWA and the UNCCP], would automatically come within the scope of the [1951] Convention.' Mr Bey of Egypt quoted in Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998) 64; See United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-ninth Meeting, 28 November 1951, A/CONF.2/SR.29' (*Refworld*, 28 November 1951) <<https://www.refworld.org/docid/3ae68cdf4.html>> accessed 21 October 2020

determination in accordance with the UN Charter, and to reaffirm the inalienable [ROR].<sup>105</sup> Despite this, 'no comprehensive definition has been internationally adopted'<sup>106</sup> that clarifies who is a Palestinian refugee for the purpose of international law.<sup>107</sup>

In 1998 Takkenberg identified a lack of legal literature that addressed the legal status of Palestinian refugees in international law. Existing legal literature focused mainly on the right to self-determination and human rights.<sup>108</sup> Grahl-Madsen attributed the lack of legal literature on the status of Palestinian refugees to the fact that the 'situation [of Palestinian refugees] poses so many special and intricate problems that it would be difficult to keep our work within reasonable limits if we should include this category in our study [on the status of refugees under international law].'<sup>109</sup> In contrast, Takkenberg attributed the lack of legal literature on the status of Palestinian refugees to the fact that 'there are no international instruments specifically dealing with Palestinian refugees' and because most Palestinian refugees are excluded from the international framework governing refugees and stateless persons.<sup>110</sup>

The fact that 'no comprehensive definition has been internationally adopted'<sup>111</sup> that clarifies who is a Palestinian refugee for the purpose of international law<sup>112</sup> has important legal implications for persons who fall under UNRWA's mandate because the definition that the agency has adopted to identify who is a Palestinian refugee does not define legal status.<sup>113</sup>

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<sup>105</sup> United Nations, 'The Right of Return of the Palestinian People' (*UNISPAL*, 1 November 1978) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/805C731452035912852569D1005C1201>> accessed 31 October 2016, 2

<sup>106</sup> Terry Rempel, 'Who are Palestinian Refugees?' (2006) *Forced Migration Review* 26, 6 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/palestine/remple.pdf>> accessed 29 January 2020

<sup>107</sup> 'Narrow definitions rarely take account of the full picture of reality or the interests of all groups.' Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30 (3) *Michigan Journal of International Law*, 781 <<https://repository.law.umich.edu/mjil/vol30/iss3/8>> accessed 29 January 2020

<sup>108</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 7

<sup>109</sup> Atle Grahl-Madsen Quoted in *Ibid* 6

<sup>110</sup> *Ibid* 43

<sup>111</sup> Terry Rempel, 'Who are Palestinian Refugees?' (2006) *Forced Migration Review* 26, 6 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/palestine/remple.pdf>> accessed 29 January 2020

<sup>112</sup> 'Narrow definitions rarely take account of the full picture of reality or the interests of all groups.' Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30 (3) *Michigan Journal of International Law*, 781 <<https://repository.law.umich.edu/mjil/vol30/iss3/8>> accessed 29 January 2020

<sup>113</sup> Chapter 8 will reveal how the lack of a legal definition that clarifies who is a Palestinian refugee for the purpose of international law has led the Court of Justice for the European Union to conclude that

## Palestine refugees for the purpose of UNRWA

UNRWA defines a Palestine refugee as a '[p]erson whose normal place of residence was Palestine during the period of 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict.'<sup>114</sup> UNRWA purposely used the term Palestine refugees instead of Palestinian refugees because the definition applied to everyone, including Jews, who resided in Palestine during the period of 1 June 1946 to 15 May 1948.<sup>115</sup> Persons 'who meet...[UNRWA's] definition, as well as their descendants through the male line, may receive UNRWA services if they are living in its area of operations and are registered with the agency.'<sup>116</sup> In 1959 '[t]he [UN] Secretary-General...recalled...that UNRWA's working definition...is not contained in any resolution of the [UNGA] but has been stated in Annual Reports of the Director and tacitly approved by the Assembly.'<sup>117</sup> Despite this, the definition adopted by UNRWA 'merely establishes criteria for assistance – it does not define refugee status.'<sup>118</sup> This raises an important question which will be examined in this thesis 'if Palestinian refugees no longer fall under UNRWA's mandate are there sufficient facts to permit the finding that they are refugees for the purpose of the 1951 Convention?'

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not all Palestinian refugees registered or eligible to be registered with UNRWA have a right to be recognized as ipso facto refugees under Article 1D paragraph 2 of the 1951 Convention.

<sup>114</sup> UNRWA, 'Palestine refugees' (UNRWA, n.d.) <<https://www.unrwa.org/palestine-refugees>> accessed 1 November 2016

<sup>115</sup> Lex Takkenberg, 'UNRWA AT 66: Between Light and Shadows,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 Israel Law Review 47, 84

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

\* UNRWA purposely used the term Palestine refugees instead of Palestinian refugees because the definition applied to everyone, including Jews, who resided in Palestine during the period of 1 June 1946 to 15 May 1948. According to Takkenberg '[r]eference to the period 1 June 1946 to 15 May 1948 was introduced in the definition to eliminate from the UNRWA registration records persons with host country nationality who were in Palestine only temporarily at the time of the 1948 conflict.' Ibid 84

<sup>116</sup> Ibid 84

<sup>117</sup> Ibid 84

<sup>118</sup> Terry Rempel, 'Who are Palestinian Refugees?' (2006) Forced Migration Review 26, 6 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/palestine/remple.pdf>> accessed 29 January 2020

#### 1.4. Focus and Objective of the Study

In theory 'the [RTR for refugees] is mostly uncontested...[but] in practice [it is] difficult to implement' because the duty of a State to readmit a person is contested.<sup>119</sup> Contestation is usually attributed to the political reality on the ground and/or to disputes over the interpretation of provisions in relevant UN resolutions and UN conventions. Both these reasons are applicable in the case of Palestinian refugees who have been denied the RTR to Israel. The international framework governing refugees and stateless persons<sup>120</sup> considers local integration and resettlement as the 'ultimate solution'<sup>121</sup> when return is not possible.<sup>122</sup> Despite this, an important gap in the literature on the ROR for Palestinian refugees exists with regards to how the international framework governing refugees and stateless persons can impact their legal status and their RTR to Israel. The primary objective of this thesis is to fill this gap by examining how the existing framework can define Palestinian refugees legally out of existence and eradicate their RTR to Israel.<sup>123</sup>

This examination will allow us to understand to what extent the Palestinian Liberation Organization [PLO], Israel and the UN have presented an honest account of the prospects for Palestinian refugees based on international law. This understanding is necessary

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<sup>119</sup> Guy Goodwin-Gill, 'Forced Migration - The Evolution of International Refugee Law and Organization' (*United Nations Audiovisual Library of International Law*, n.d.) <<http://www.un.org/law/avl>> accessed on 1 September 2018

<sup>120</sup> According to Michelle Foster et al the 'overarching goal of the [1951 Convention] is to provide a new national home to persons driven from their own country by the risk of being prosecuted.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 288

<sup>121</sup> Guy Goodwin-Gill, 'Forced Migration - The Evolution of International Refugee Law and Organization' (*United Nations Audiovisual Library of International Law*, n.d.) <<http://www.un.org/law/avl>> accessed 1 September 2018

<sup>122</sup> Ibid

'The status of refugees is not...a permanent one. The aim is that ... [the refugee] ...should rid himself of that status as soon as possible, either by repatriation or by naturalization in the country of refuge' Robert Jennings quoted in Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 367

According to Foster et al the 'commitment to provide surrogate protection or substitute national protection is grounded both in the basic commitment of the interstate system to ensuring that all individuals have a nationality in the legally recognized form of citizenship, and are thus effectively "allocated" to a state, and also in the recognition that nationality provides the essential means by which individuals are able to avail themselves of the full range of protections established by international law.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 289

<sup>123</sup> Hanin Abou Salem, 'Palestinian Refugees: A Crises of Recognition under International Law' (*Aljazeera Center for Studies*, 14 April 2012) <[http://studies.aljazeera.net/mritems/Documents/2012/5/7/20125793825145734Palestinian%20Refugees\\_A%20Crisis%20of%20Recognition.pdf](http://studies.aljazeera.net/mritems/Documents/2012/5/7/20125793825145734Palestinian%20Refugees_A%20Crisis%20of%20Recognition.pdf)> accessed 1 November 2016

because as Chomsky<sup>124</sup> observed 'the power of the government's propaganda apparatus is such that the citizen who does not undertake a research project on the subject can hardly hope to confront government pronouncements with fact.'<sup>125</sup> Therefore, as a Palestinian scholar, I am deliberately applying a new ideological approach by interrogating legal obstacles that go beyond categorising 'Israel' as the only obstacle to the return of Palestinian refugees.

I will depart from the Palestinian comfort zone by considering the legal merit of the Israeli discourse against the ROR for Palestinian refugees by examining to what extent it is supported by international law. By doing so I am crossing a forbidden line within the Palestinian discourse on the ROR which has allowed prominent Palestinian scholars and the Palestinian leadership to justify the need to reach a political compromise on the RTR based on realpolitik. But it has not allowed them to explore how the principle of sovereignty in international law which allows States to control who can enter their territories can override the individual RTR or how the international framework governing refugees and stateless persons can legally define Palestinian refugees out of existence and eradicate their RTR. The fact that the Palestinian discourse has not explored how the principle of sovereignty in international law and the international framework governing refugees and stateless persons can impact Palestinian refugees could be attributed to what Chomsky refers to as a tendency of modern intellectuals to speak truths that fits with their discourse.<sup>126</sup> In his article, *The Responsibility of Intellectuals* Chomsky observed that while:

IT IS THE RESPONSIBILITY of intellectuals to speak the truth and to expose lies. This, at least, may seem enough of a truism to pass over without comment. Not so, however. For the modern intellectual, it is not at all obvious. Thus, we have Martin Heidegger writing, in a pro-Hitler declaration of 1933, that 'truth is the revelation of that which makes a people certain, clear, and strong in its action and knowledge; it is only this kind of "truth" that one has a responsibility to speak.'<sup>127</sup>

Therefore, Chomsky argues that a:

GOOD CASE CAN BE MADE for the conclusion that there is indeed something of a consensus among intellectuals who have already achieved power and affluence, or who sense that they can achieve them by "accepting society" as it is and promoting

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<sup>124</sup> American linguist, philosopher, cognitive scientist, historian, social critic, and political activist.

<sup>125</sup> Noam Chomsky, 'The Responsibility of Intellectuals' (*Chomsky*, 25 February 1967)

<<https://chomsky.info/19670223/>> accessed 6 November 2018, 2

<sup>126</sup> Ibid 2

<sup>127</sup> Ibid 2

the values that are “being honored” in this society...this consensus is most noticeable among the scholar-experts who are replacing the free-floating intellectuals of the past.<sup>128</sup>

Despite this Chomsky observed that:

Intellectuals are in a position to expose the lies of governments, to analyse actions according to their causes and motives and often hidden intentions. In the Western world, at least, they have the power that comes from political liberty, from access to information and freedom of expression. For a privileged minority, Western democracy provides the leisure, the facilities, and the training to seek the truth lying hidden behind the veil of distortion and misrepresentation, [and] ideology...through which the events of current history are presented to us.<sup>129</sup>

As a Palestinian scholar researching the RTR for Palestinian refugees in Britain, I am one of the privileged scholars that Chomsky refers to. Therefore, I have an intellectual responsibility to break away from the intellectual prison that has led Palestinian scholars to align their research on the ROR with the Palestinian discourse. This alignment could either be by choice or by force or a by-product of the political context that Palestinian scholars conduct their research. Unlike these researchers, I will explore how the principle of sovereignty and the international framework governing refugees and stateless persons can impact Palestinian refugees. I hope that the findings of my thesis will encourage Palestinian intellectuals to re-evaluate their discourse by addressing the impact of the existing framework on the legal status of Palestinian refugees and their RTR to Israel.

## **1.5. Significance of the study**

### **Significance for Palestinian refugees and policymakers**

In 2012, I presented a conference paper to Arab politicians and scholars in Doha which revealed how UN conventions that define who is a refugee and how the international community should deal with them can define Palestinian refugees out of existence and eradicate their RTR.<sup>130</sup> After presenting my paper I was told that my life was worth just a bullet and that I should never speak about the subject again. A highly regarded intellectual

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<sup>128</sup> Ibid 19

<sup>129</sup> Ibid 1

<sup>130</sup> Hanin Abou Salem, 'Palestinian Refugees: A Crises of Recognition under International Law' (*Aljazeera Center for Studies*, 14 April 2012) <[http://studies.aljazeera.net/mritems/Documents/2012/5/7/20125793825145734Palestinian%20Refugees\\_A%20Crisis%20of%20Recognition.pdf](http://studies.aljazeera.net/mritems/Documents/2012/5/7/20125793825145734Palestinian%20Refugees_A%20Crisis%20of%20Recognition.pdf)> accessed 1 November 2016



who represents Palestinian refugees told me that my research findings were a threat to the Palestinian discourse on the ROR which was intended to let Palestinian refugees think for as long as possible that international law will allow them to return to Israel. 'So, as scholars, you purposely lied to Palestinian refugees about their prospects of returning to their homes in territories that became part of Israel' I asked. 'Yes,' he replied. 'But why would you lie and leave them to suffer all these years' I asked. 'Because if they know the truth the alternative is war, and no one wants to go to war' he replied. Although I continued to be threatened for daring to search for the truth my research paper led several Arab scholars who attended the conference to examine the subject further. Consequently, Abu Ameer identified a visible 'ignorance of the international system for refugee protection, its mechanism, legal bond, and how to address it' within the Palestinian leadership.<sup>131</sup> While Itani identified a 'visible [research bias] in Palestine studies' leading the discourse to ignore important issues such as 'immigration and asylum.'<sup>132</sup> Al- Ali also identified a lack of a clearly defined concept of asylum in the Arab world that can govern the 'legal and policy framework' towards Palestinian refugees.<sup>133</sup> Consequently, Al- Ali called on the LAS to reactivate the 1993 Arab Convention for the Regulation of Refugee Affairs to enable the concept of asylum to be defined in the Arab world so that it can govern the 'legal and policy framework' towards Palestinian refugees.<sup>134</sup> This development is necessary because as Ziadeh points out decision-makers promoting 'compensation and resettlement projects' to end the Palestinian refugee problem are overlooking the ROR from the perspective of international law.<sup>135</sup> Ziadeh argues that solutions that focus on 'resettlement and compensation rather than return and compensation' have dominated the debate because the focus has been merely on the humanitarian aspect of the Palestinian refugee crises.<sup>136</sup> Ziadeh like the thesis author calls for the emergence of a comprehensive approach that recognizes that:

Thinking politically or legally about the refugee issue is more important than the humanitarian as most of those interested in looking for a solution to this

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<sup>131</sup> Adnan Abu Ameer, 'The Evolution of the Israeli Position On the Palestinian Refugee Issue,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 188

<sup>132</sup> Mariam Itani, 'Palestinian Refugee Studies: Methodological Quandaries and Proposed Solutions,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 35-37

<sup>133</sup> Ibrahim Al- Ali, 'The Palestinian Youth and Arab Revolution,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 83

<sup>134</sup> Ibid 83

<sup>135</sup> Adeeb Ziadeh, 'Social and Political Dimension of Palestinian Refugees between Integration and Alienation,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 103

<sup>136</sup> Ibid 104

(humanitarian) problem in a way disregards the national, political or legal aspects, making the issue of location and the price of the solution in the purely physical sense, the core issue with humane motivations rather than anything else. This...contradicts...our struggle to realize the refugee's [ROR].<sup>137</sup>

The lack of a legal and policy framework towards Palestinian refugees in the Arab world contributed to the ROR for Palestinian refugees losing ground to the politics of solutions. According to Goodwin-Gill the 'politics of solutions'<sup>138</sup> arises because international refugee law depends on States implementing their international obligations towards asylum seekers and refugees while pursuing their national self-interest.<sup>139</sup> In the context of the Palestinian refugee problem, the politics of solutions has been dominated by an attempt to end the right of Palestinian refugees to return to Israel. According to Yazbak Palestinians who ended up 'in refugee camps...suffered from the agendas and interests of the host countries, which sought to erase their identity, and sometimes to marginalise them, while ostracising them socially and politically.'<sup>140</sup> Yazbak also claims that 'host countries...controlled the voices that were allowed to be heard and what authors were permitted to write, in line with the interests of governments, which in many cases contradicted the interests of the Palestinian refugees.'<sup>141</sup> By being excluded from international protection the status of Palestinian refugees has consequently 'been tied to the legal and political interests of the governments under whose authority they currently reside.'<sup>142</sup> Therefore, Shiblak argues that Israel's rejection of the ROR placed Palestinian refugees in Arab host States in a 'perpetual orbit'

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<sup>137</sup> Ibid 105

<sup>138</sup> Guy Goodwin-Gill (2013) 'The Dynamic of International Refugee Law' (2013) 25 (4) *International Journal of Refugee Law*, 651 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 12 February 2021

<sup>139</sup> Ibid 651

<sup>140</sup> Mahmoud Yazbak, 'The Nakba and the Palestinian Silence,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 9

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>141</sup> Ibid 53

<sup>142</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>>

accessed 15 January 2020, 7; See also Suzan Akram who observed that '[i]n the Middle Eastern states that are not UNRWA areas, the situation is not much different, as most are not 1951 Refugee Convention signatories either, nor are they signatories of the international instruments protecting stateless people. This gives the Palestinians a precarious existence in these states with regard to their human and civil rights. The actual rights and status of the refugees remain subject to political and security considerations of the Arab governments. There is no formalized legal status for Palestinians in most Arab states, their legal position depending primarily on administrative policies that change constantly.' Suzan Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002) *Journal of Palestine Studies* 31(3), 44

<<https://doi.org/10.1525/jps.2002.31.3.36>> 22 October 2021

because they are not allowed to naturalize or become permanent residents.<sup>143</sup> While Shiblak claims that Arab States are concerned 'about international pressure for a permanent settlement of Palestinians in their territories'<sup>144</sup> Nasrallah claims that Palestinian refugees also oppose the replacement of their ROR with local integration in host States.<sup>145</sup>

This thesis will help parties who want to end the plight of Palestinian refugees to frame solutions with a sound understanding of the international framework governing refugees and stateless persons. This thesis will also allow Palestinian refugees 'concerned with the legitimate, legal and political expression of their [ROR]' to make an informed decision about their future and play an active role in formulating permanent solutions to their plight.<sup>146</sup> Being able to do so is extremely important because in 2010 the New York Director of UNRWA revealed that Palestinian refugees will end up in a state of limbo if they do not start considering their future. We introduce this lengthy quote because it summarizes the realities and prospects for Palestinian refugees:

The broad contours of what will be a practical and acceptable solution for all parties to the refugee questions are pretty well known among policymakers. We recognize, as I think most do, although it's not a position that we publicly articulate that the [ROR] is unlikely to be exercised to the territory of Israel to any significant or meaningful extent. It's not a politically palatable issue, it is not one that UNRWA publicly advocates but nevertheless it's a known contour to the issue. Therefore, the working assumption is that the vast majority of the refugees will eventually end up either in the future State of Palestine, within which boundaries we have yet to see, and hopefully there will be enough land for them...

Clearly, the alternatives are that the refugees will remain where they are, in some new form of status either as citizens of those states or else alternatively as citizens of Palestine residing abroad in those territories. But the status of the refugees will vary according to their personal circumstances, according to their own personal

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<sup>143</sup> Abbas Shiblak quoted in *Ibid* 7; See Abbas Shiblak, 'Stateless Palestinians' (2006) *Forced Migration Review* 26, 9 <[www.fmreview.org/FMRpdfs/FMR26/FMR26full.pdf](http://www.fmreview.org/FMRpdfs/FMR26/FMR26full.pdf)> accessed 25 February 2017

<sup>144</sup> *Ibid* 28; See BADIL, 'Survey of Palestinian Refugees and Internally Displaced Persons 2004-2005' (*BADIL*, 2006) <[www.badil.org/phocadownload/Badil\\_docs/publications/Survey-04-05.pdf](http://www.badil.org/phocadownload/Badil_docs/publications/Survey-04-05.pdf)> accessed 23 March 2021, 152

<sup>145</sup> Fida Nasrallah quoted in Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 18; See Fida Nasrallah, 'Lebanese Perceptions of the Palestinians in Lebanon: Case Studies' (1998) *Journal of Refugee Studies* 10 (3), 350 <<https://doi.org/10.1093/jrs/10.3.349>> accessed 25 February 2017

<sup>146</sup> National Council on US-Arab Relations, 'Geo-Political Dynamic (III): The Palestinian Future – Impediments to Peace and Possibilities for Progress' (*19<sup>th</sup> Annual Arab-U.S. Policymakers Conference*, 21-22 October 2010) <<https://ncusar.org/auspc/2010>> accessed 7 June 2017, 13

prospects, according to the compensation that might be on offer, the alternative packages, how attractive they may be and the prospects of resettlement elsewhere in the West. But I think it's a practical reality that we all recognize that the numbers who will be permitted to resettle in Western countries or elsewhere in the world are going to be very limited indeed by the huge financial factors involved and the difficulties of being able to absorb significant people, numbers of peoples.

I would say that if one doesn't start a discussion soon with the refugees, for them to start considering what their own future might be, for them to start debating their own role in the societies where they are, rather than being left in a state of limbo where they are helpless, but preserve rather cruel illusions that perhaps one day they will return to their homes, then we are storing up trouble for ourselves.<sup>147</sup>

### **Significance of the study in the context of recent political developments**

The study is also extremely important because in the last few years the United States of America [U.S.] under the leadership of Donald J Trump and the Israeli government under the leadership of Benjamin Netanyahu have been actively working toward the dismantling of UNRWA. In June 2017 Netanyahu accused the agency of 'perpetuating the Palestinian refugee problem' by allowing Palestinian refugees to transmit their refugee status from one generation to another and called for UNRWA to be 'merged with the [UNHCR].'<sup>148</sup> Netanyahu wants Palestinian refugees to fall under UNHCR's mandate because the agency has a specific mandate to aid refugees who are unable to return by eliminating their refugee status.<sup>149</sup> Netanyahu's attack on UNRWA does not account for the fact that UNRWA's recognition of descendants from the male line as refugees<sup>150</sup> complies with the approach adopted by the UN which recognizes descendants of Afghan, Bhutanese, Burmese, Somali,

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<sup>147</sup> Andrew Whitley's speech quoted in Ibid 13

<sup>148</sup> Maayan Lubell, 'Israel's Prime Minister calls for dismantling of UN Palestinian refugee agency' (*The Independent*, 12 June 2017) <<https://www.independent.co.uk/news/world/middle-east/israel-palestinian-refugee-agency-un-dismantle-benjamin-netanyahu-prime-minister-a7785146.html>> accessed 12 June 2017

<sup>149</sup> Hanin Abou Salem, 'Why is Netanyahu trying to disband the UNRWA?' (*Aljazeera*, 22 June 2017) <<https://www.aljazeera.com/indepth/opinion/2017/06/saving-unrwa-means-saving-palestinian-refugees-170619101047716.html>> accessed 22 June 2017

Netanyahu's attack on UNRWA does not account for the fact that Israel voted in favour of UN Resolution 302 which established UNRWA. '[D]uring the Six-Day War [Israel also] requested UNRWA to continue its operations in Gaza and the West Bank...in the Comay-Michel More agreement of June 1967.' Lex Takkenberg, 'UNRWA AT 66: Between Light and Shadows,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 *Israel Law Review* 47, 86 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>150</sup> Colum Lynch, 'For Trump and Co., Few Palestinians Count as Refugees' (*Foreign Policy*, 9 August 2018) <<https://foreignpolicy.com/2018/08/09/in-refugees-israel-palestine-sekulow-middle-east-trumps-orbit-few-palestinians-count-as-refugees/>> accessed 9 August 2018

and Tibetan refugees born in refugeehood as refugees.<sup>151</sup> Moreover, UNHCR also 'recognizes descendants of refugees as refugees for the purposes of their operations.'<sup>152</sup> Netanyahu also fails to acknowledge that had Israel allowed Palestinian refugees to return to their homes in 1948 the Palestinian refugee problem would not exist because children who have inherited their parents' refugee status, would have instead become Israeli citizens.<sup>153</sup> Furthermore, UNRWA cannot be held responsible for perpetuating the Palestinian refugee problem because the agency's mandate has been renewed since its establishment and the number of refugees registered with the agency has grown because a just and lasting solution has not materialized. This was acknowledged in the 2018-2019 UNRWA-U.S. Framework for Cooperation and Annex Report<sup>154</sup> in which the Trump administration and UNRWA confirmed their joint commitment to address 'the needs of Palestinian refugees...until a comprehensive and lasting peace agreement is secured...[and] UNRWA's mandate ends.'<sup>155</sup>

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<sup>151</sup> Ibid

Francesca P. Albanese and Lex Takkenberg also refute 'the argument that the UNRWA definition and registration policy runs against international refugee law and practice.' They support their argument by quoting the UN Secretariat which confirmed that 'Under International Law and the principle of family unity, the children of refugees and their descendants are also considered refugees until a durable solution is found. Both UNRWA and UNHCR recognize descendants as refugees on this basis, a practice that has been widely accepted by the international community, including both donors and refugee hosting countries.' UN Secretariat quoted in Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 4; See Chapter II for a detailed discussion.

<sup>152</sup> Ibid

<sup>153</sup> Hanin Abou Salem, 'Why is Netanyahu trying to disband the UNRWA?' (*Aljazeera*, 22 June 2017) <<https://www.aljazeera.com/indepth/opinion/2017/06/saving-unrwa-means-saving-palestinian-refugees-170619101047716.html>> accessed 22 June 2017

<sup>154</sup> 'UNRWA was established in 1949 to provide support to Palestine refugees pending the just solution of their plight. [and that] In the more than 65 years since its inception, the number of Palestine refugees and others registered by UNRWA has increased through natural population growth to more than 5.7 million persons.' United States Department of State, '2018-2019 Framework for Cooperation Between the United Nations Relief and Works Agency for Palestine Refugees In The Near East And the United States of America - United States Department of State' (*United States Department of State*, 11 December 2017) <<https://www.state.gov/remarks-and-releases-bureau-of-population-refugees-and-migration/framework-for-cooperation-between-the-united-nations-relief-and-works-agency-for-palestine-refugees-in-the-near-east-and-the-united-states-of-america-2018-2019/>> accessed 11 January 2018

<sup>155</sup> The Trump Administration also made a commitment to promote the human development of 'UNRWA- registered refugees and other persons falling under the mandate of UNRWA...by protecting [their] human rights, improving [their] living conditions, and supporting economic empowerment and livelihoods of Palestinian refugees, as outlined in UNRWA's 2016-2021 Medium-Term Strategy... [and the] ...implementation of UNRWA's reform initiatives is expected to continue in 2018-2019.' Ibid

The Trump administration also cut the U.S. contribution to UNRWA by \$65 million in January 2018.<sup>156</sup> Then in August 2018, the U.S. announced that it will '[no longer commit further funding to [UNRWA]]'<sup>157</sup> because the agency's 'business model and fiscal practices' was flawed as a result of being 'tied to UNRWA's endlessly and exponentially expanding community of entitled beneficiaries.'<sup>158</sup> In 2018 leaked internal emails from the White House also revealed that the Trump administration was actively trying to dismantle UNRWA to end the 'refugee status of millions of Palestinians.'<sup>159</sup> Ashrawi<sup>160</sup> also revealed that Kushner<sup>161</sup> and Greenblatt<sup>162</sup> tried to pressure Jordan to resettle Palestinian refugees registered with UNRWA in Jordan. According to Ashrawi, Kushner stated that 'resettlement has to take place in the host countries and these governments can do the job that UNRWA was doing' and he expected Arab Gulf States to cover the costs.<sup>163</sup> By June 2018 Erekat<sup>164</sup> concluded that the Trump administration wants to liquidate 'the issue of the Palestinian refugees.'<sup>165</sup> Meanwhile, U.S. Congress Representative Lamborn and Senator Lankford have tried to

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<sup>156</sup> Gardiner Harris and Rick Gladstone, 'U.S. Withholds \$65 Million From U.N. Relief Agency for Palestinians' (*The New York Times*, 16 January 2016) <<https://www.nytimes.com/2018/01/16/us/politics/us-palestinian-aid-refugee-un.html>> accessed 16 January 2018

<sup>157</sup> US State Department of State, 'On US Assistance to UNRWA – US State Department Press Statement' (*United Nations*, 31 August 2018) <<https://www.un.org/unispal/document/on-us-assistance-to-unrwa-us-state-department-press-statement/>> accessed 31 August 2018

<sup>158</sup> Ibid

<sup>159</sup> Trump's senior advisor charged with solving the Israeli-Palestinian conflict wrote to senior officials that '[i]t is important to have an honest and sincere effort to disrupt UNRWA.' Kushner claimed that UNRWA 'perpetuates a status quo...and doesn't help peace' and therefore '[o]ur goal can't be to keep things stable and as they are... [s]ometimes you have to strategically risk breaking things in order to get there.' Victoria Coates, a senior advisor to Jason Greenblatt, in an email to the White House's national security staff wrote that "UNRWA should come up with a plan to unwind itself and become part of the UNHCR... by the time its charter comes up again in 2019.' Colum Lynch and Robbie Gramer, 'Trump and Allies Seek End to Refugee Status for Millions of Palestinians' (*Foreign Policy*, 3 August 2018) <<https://foreignpolicy.com/2018/08/03/trump-palestinians-israel-refugees-unrwaand-allies-seek-end-to-refugee-status-for-millions-of-palestinians-united-nations-relief-and-works-agency-unrwa-israel-palestine-peace-plan-jared-kushner-greenb/>> accessed 3 August 2018

<sup>160</sup> Member of the Leadership Committee and as an official spokesperson of the Palestinian delegation to the Middle East peace process, beginning with the Madrid Peace Conference of 1991.

<sup>161</sup> Trump's senior advisor charged with solving the Israeli-Palestinian conflict.

<sup>162</sup> U.S. Special Representative for International Negotiations.

<sup>163</sup> Colum Lynch and Robbie Gramer, 'Trump and Allies Seek End to Refugee Status for Millions of Palestinians' (*Foreign Policy*, 3 August 2018)

<<https://foreignpolicy.com/2018/08/03/trump-palestinians-israel-refugees-unrwaand-allies-seek-end-to-refugee-status-for-millions-of-palestinians-united-nations-relief-and-works-agency-unrwa-israel-palestine-peace-plan-jared-kushner-greenb/>> accessed 3 August 2018

<sup>164</sup> Palestinian Chief negotiator.

<sup>165</sup> Colum Lynch and Robbie Gramer, 'Trump and Allies Seek End to Refugee Status for Millions of Palestinians' (*Foreign Policy*, 3 August 2018)

<<https://foreignpolicy.com/2018/08/03/trump-palestinians-israel-refugees-unrwaand-allies-seek-end-to-refugee-status-for-millions-of-palestinians-united-nations-relief-and-works-agency-unrwa-israel-palestine-peace-plan-jared-kushner-greenb/>> accessed 3 August 2018

define Palestinian refugees out of existence through domestic legal means. Lamborn introduced a bill on 18 July 2018 calling on the U.S. to ‘support UNRWA solely to the extent necessary to accomplish its original and intended purpose to resettle refugees from the Arab-Israeli Conflict of 1948.’<sup>166</sup> While Lankford’s bill<sup>167</sup> called upon the U.S. Secretary of State to certify by 2020 that the UN has ended its recognition of Palestinian descendants.<sup>168</sup>

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<sup>166</sup> According to the bill ‘a Palestinian refugee is a person, or the spouse or minor child of a person— (1) who resided, between June 1946 and May 1948, in the region controlled by Britain between 1922 and 1948 known as Mandatory Palestine; (2) who was personally displaced as a result of the Arab-Israeli Conflict of 1948; and (3) who has not accepted an offer of legal residency status, citizenship, or other permanent adjustment in status in another country.’ The bill wants ‘the policy of the United States [should be], consistent with the definition of a refugee in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)) and the requirements for eligibility for refugee status under such Act, that— (1) derivative refugee status may only be extended to the spouse or minor child of such a refugee; and (2) an alien who was firmly resettled in any country is not eligible to retain refugee status.’ Congress, ‘H.R.6451 - UNRWA Reform and Refugee Support Act of 2018’ (*Congress*, 19 July 2018) <<https://www.congress.gov/bill/115th-congress/house-bill/6451/text>> accessed 19 July 2018

<sup>167</sup> The bill proposed the Palestinian Assistance Reform Act which requires the U.S. to redirect funding from UNRWA to other local and international agencies. Congress, ‘S.3425 - Palestinian Assistance Reform Act of 2018’ (*Congress*, 6 September 2018) <<https://www.congress.gov/bill/115th-congress/senate-bill/3425/text>> accessed 9 June 2018

<sup>168</sup> The bill wants ‘to make the UNRWA’s definition of “refugee” consistent with United States law, including sections 101(a)(42), 207(c)(2), and 208 (b)(2)(A)(vi) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42), 1157(c)(2), and 1158 (b)(2)(A)(vi).’ The aim is to ‘reduce the number of Palestinians who are classified as refugees by the United Nations and other international refugee organizations.’ Sec. 2. (3) states that ‘UNRWA’s current mandate provides for an increase in the population of Arab persons who are assured, through their status as “Palestine refugees,” that they will be entitled to return to Israel.’ Sec. 2. (5) claims that the return of UNRWA refugees to Israel would make ‘the Jewish people... a minority population in Israel and Israel would no longer be a Jewish State.’ Sec. 2. (7) attacks UNRWA’s definition of Palestinian refugees because it includes ‘(A) individuals who are several generations removed from the 1948 Arab-Israeli conflict; (B) individuals who were born decades after the conflict ended; and (C) persons who have received citizenship from other countries.’ Sec. 2. (8) also observes that UNRWA considered Palestinian refugees in Jordan who have a Jordanian citizen as refugees. While sec. 2. (9) observes that ‘UNRWA considers persons as “Palestine refugees” if they live in the Gaza Strip or in the West Bank, which is the putative home of a future Palestinian state.’ Sec. 2. (10) observes that support for UNRWA ‘may be construed by Palestinians to be the official guarantor that their demand to return to Israel is an internationally sanctioned right.’ The bill rejects this interpretation. Sec. 2. (11) recalls that on December 23, 2000, President Bill Clinton in his proposal on Israeli-Palestinian peace articulated the need for a policy that makes ‘clear that there is no specific right of return to Israel’ for the Palestinian people and that a ‘Palestinian state would be the focal point for Palestinians who choose to return to the area.’ Sec. 2. (12) accuses ‘UNRWA refugee camps...prevent[ing] Palestinians from peaceably settling and focusing on building their livelihoods and future...[and] encourag[ing] Palestinians to prepare for a return to Israel.’ According to sec. 3. (3), US policy should ‘make the UNRWA’s definition of “refugee” consistent with United States law.’ Sec.4. (5) also observes that US financial support for UNRWA should not be construed to imply support for all Palestinians’ right to return to Israel. Sec.4. (9) also want ‘the United Nations...[to]... prioritize the dismantlement of UNRWA refugee camps in the West Bank and Gaza to allow Palestinians currently residing in such camps to integrate into their local communities and labor force.’ Sec. 4. (12) also wants PR in Syria to ‘be assisted solely by UNHCR as Syrian refugees.’ Sec. 5. (9) wants the Secretary of State to certify no later than June 30, 2020, to the Congress ‘that UNRWA— is working to integrate UNRWA refugees into their local communities and labor force; and...has adopted a definition of refugee that... is consistent with the laws referred to in section 3(3)...only includes individuals who were personally displaced by the 1948 Arab-Israeli conflict; and...excludes individuals who— (i) have subsequently

Although this thesis was submitted after Trump lost the presidential elections in 2021 all the developments that took place during his administration indicate that we must examine how the international framework governing refugees and stateless persons can impact the legal status of Palestinian refugees and their RTR to Israel if they are no longer excluded from the existing framework because UNRWA may no longer exist. This is evident by the fact that the agency ran out of money for the first time in 2020 after receiving the lowest number of voluntary contributions from States.<sup>169</sup>

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## 1.6. Research Originality

A doctoral thesis must contribute to the existing body of knowledge. This thesis satisfies this criterion in several ways. First, it is important to note the rarity of a research that is conducted by a Palestinian researcher with the intention of examining whether Palestinian refugees have a RTR to Israel without seeking from the outset to prove the existence of such a right for the sake of supporting the Palestinian discourse on the ROR. In doing so the researcher is forsaking her right as a scholar to position herself vis-à-vis her research in accordance with her identity. This path is rarely taken by scholars because as Pappé observes 'positionality is the right of scholars to position themselves, vis-à-vis, their research in accordance with whatever identity they choose. As a result, whatever your identity, or your politics of identity, it plays a crucial role in why, what, and how you research a given topic.'<sup>170</sup> Secondly, it is rare to find an interdisciplinary research project produced by an international relations scholar that addresses a topic in international law that does not depend on a theory from international relations to explain international law.<sup>171</sup> The thesis instead relies on

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gained nationality in another country; or (ii) live in Gaza or the West Bank' which is referred to as 'the putative homeland of a future Palestinian state.' In terms of funding the bill in sec. 6. (4) states that 'assistance to Palestinians living in the West Bank, the Gaza Strip, Jordan, Syria, or Lebanon through— the [UNHCR], for services to persons of Palestinian descent who have been denied citizenship in Syria or Lebanon to find individual solutions of local integration or resettlement in third countries.' According to sec. 6. (2) (iv) assistance to UNHCR for 'Palestinians... [will be] contingent upon the implementation of a plan for permanent resettlement in such countries or other third countries.' Ibid

<sup>169</sup> United Nations, 'UN agency for Palestine refugees runs out of money as COVID-19 spreads' (*United Nations News*, 11 November 2020)

<<https://news.un.org/en/story/2020/11/1077332>> accessed 29 March 2021

<sup>170</sup> Ilan Pappé, *The Idea of Israel: A History of Power and Knowledge* (Verso 2014) 145

<sup>171</sup> This interdisciplinary research became dominated by four key international relations theories: realism, liberalism, institutionalism, and constructivism. The thesis could have applied the realist theory from international relations which broadly argues that sovereign states who are driven by self-interest can override international law because international law, which was created by States, is the



Arendt's conception of rights which identifies the possession of nationality as a pre-condition for accessing abstract human rights.<sup>172</sup> Arendt's insight leads us to conclude that there is no fundamental RTR but only the right of sovereign States to extend such a right by granting entry. The sources for the RTR in international law support this conclusion because sovereign States have a right to control who can enter their territories. This means the principle of State sovereignty in international law can override the individual RTR. Although there is a workable foundation in the broader legal discussion within the thesis that demonstrates how sovereign States can override the RTR the thesis takes as its starting point Arendt's conception of rights because her insight about the predicament faced by stateless refugees adds an important layer to our discussion by illuminating the limitations and possibilities of international law.<sup>173</sup> We also rely on Goodwin-Gills approach to international refugee law, the classical methodology of positive international law<sup>174</sup> which derives from Article 38(1) of the Statute of the International Court of Justice, the rules of interpretation in international law as defined by the Vienna Convention of the Law of Treaties of 1969 and a doctrinal methodological approach to reveal how the notion of the RTR with reference to international refugee law<sup>175</sup> and the international framework governing refugees and stateless persons can impact Palestinian refugees despite their current exclusion.<sup>176</sup> Thirdly, this thesis considers the historical context that led to the birth of the Palestinian refugee problem and to the birth of the international framework governing refugees and stateless persons to reveal how the principle of resettlement and local integration, which have been presented as an ideal solution to ending the plight of refugees, prove that the international community has succumbed to the will of sovereign States who cause

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product of state interests. We could have used this argument to argue that Palestinian refugees have not been able to return to Israel because Israel is using its might to override international law. We did NOT adopt this argument because we would have ended up repeating the argument made by the Palestinian discourse. We also did not apply the realist view because it suggests that international law is not really law. This view fails to account for the fact that the principle of sovereignty in international law allows States to pursue their self-interests and to override the individual RTR in some circumstances within the parameters of international law.

<sup>172</sup> Hannah Arendt's discussion of the right to have rights appears in Chapter 9 'The Decline of the Nation State and the End of the Rights of Man.' Hannah Arendt, *The Origins of Totalitarianism* (1973 revised edn, Harcourt 1951)

<sup>173</sup> We will elaborate on how Arendt's conception of rights illuminates the limitations and possibilities of international law vis-à-vis refugees and stateless persons in Chapter 2.

<sup>174</sup> 'The core of legal positivism is the view that the validity of any law can be traced to an objectively verifiable source.' Raymond Wacks, 'Legal positivism,' in *Philosophy of Law: A Very Short Introduction* (2<sup>nd</sup> edn, Ashgate 2014)

<<https://www.veryshortintroductions.com/view/10.1093/actrade/9780199687008.001.0001/actrade-9780199687008-chapter-2>> accessed 29 December 2021

<sup>175</sup> Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 (4) *International Journal of Refugee Law*, 665 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 30 January 2018

<sup>176</sup> In Chapter 2 the thesis will address how we applied each approach to answer our research questions.

population displacement and thereafter refuse to allow refugees to return. Fourthly, the thesis reveals that international law and international refugee law converge in the case of Palestinian refugees because we cannot examine whether Palestinian refugees have a ROR without addressing the sources for the RTR in international law and how international refugee law can impact the legal status of Palestinian refugees and their prospects for return. Despite this international refugee law does not typically form the basis of the literature addressing the ROR for Palestinian refugees within the Palestinian and Israeli discourses. Discussion on the ROR for Palestinian refugees depends largely on the use of literature that is primarily concerned with who is responsible for the birth of the Palestinian refugee problem and whether Palestinian refugees have a ROR in international law. These insights do not account for how the international framework governing refugees and stateless persons can impact Palestinian refugees. This thesis changes the focus of the debate by considering whether the RTR is a legal right and whether the international framework governing refugees and stateless persons can define Palestinian refugees legally out of existence. This examination presents a radically different account of the RTR and develops an analysis that explains how it can be overridden in international law. The particular contribution in this thesis is to adapt our research findings to understand the RTR under international law in the context of international refugee law and develop a new account of the individual RTR which shows that it is an abstract right rather than a legal right. This explains why the international framework governing refugees and stateless persons advocates local integration or permanent resettlement when return is not possible. Another major area of originality in this thesis lies in our examination of how relevant international conventions can impact Palestinian refugees despite their current exclusion. We do this by highlighting the consequences flowing from UNHCR's advocacy which has led members of the LAS to adopt international conventions, regional agreements and nationality provisions that pave the way for the resettlement and naturalization of Palestinian refugees.

This thesis also highlights how the interaction between international law and domestic nationality laws can threaten our right to maintain our identity and to return to our countries of origin if we become refugees. By examining the impact of nationality laws on the RTR for Palestinian refugees to Israel we are introducing a new angle to the debate which we hope will facilitate a combined legal and contextual analysis that allows for a broader understanding of how nationality laws can impact refugees and their RTR to certain territories.

Another major area of originality in this thesis lies in our examination of relevant case law in the Court of Justice of the European Union [CJEU]. Our examination reveals that a group of Palestinian refugees could continue to fall outside the scope of the international framework governing refugees and stateless persons if they no longer fall under UNRWA's mandate. Thus, illustrating the importance of achieving a balance between national legislators and international courts when it comes to defining the legal status of refugees.

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## **1.7. Structure of the Study**

This PhD thesis will be structured as follows:

Chapter 2 will offer an overview of our research questions and the methodological and theoretical approach adopted to answer them. In this chapter, we will discuss why Arendt's conception of rights is an appropriate theoretical framework to understanding why Palestinian refugees have not been able to return to Israel. Chapter 3 offers a historic overview of the most important historical events that paved the way for the birth of the Palestinian refugee problem. This chapter examines how the Zionist project, which sought to create a Jewish State in Palestine based on international law, envisioned the future of existing communities in Palestine and how this played a role in the birth of the Palestinian refugee problem and to proposals calling for the permanent resettlement of Palestinian refugees beyond territories that became part of Israel to dominate the debate. This chapter then reveals how the Balfour Declaration of 1917, the Palestine Mandate of 1922, The Lausanne Peace Treaty of 1923, the 'Convention Great Britain –Palestine in Respect to Rights in Palestine,' and the Palestinian Citizenship Order in Council of 1925 failed to protect existing non-Jewish inhabitants in Palestine because they incorporated the Zionist interpretation of the idea of Israel within their text. Finally, chapter 3 examines how UNGA Resolution 181 (II) of 29 November 1947 tried to protect non-Jewish inhabitants in historic Palestine by giving them the right to become citizens of either state and to move freely between both States. Chapter 4 will offer an overview of the literature addressing the ROR within the Palestinian discourse and the Israeli discourse. This chapter focuses on Palestinian and Israeli commentators because their arguments demonstrate how the two parties to the conflict have developed their discourses and how their discourses can impact the realities and prospects for Palestinian refugees. Chapter 5 will examine whether there is a fundamental RTR to a certain territory in international law and whether Palestinian refugees have a RTR to Israel. Chapter 6 will provide a historic overview of the birth and

evolution of the international framework governing refugees. This overview reveals how the refugee crisis in Europe caused by the Second World War led to the emergence of a comprehensive refugee regime and how the European model which historically incorporated refugees through resettlement programs could hinder the RTR for Palestinian refugees by transforming their status from refugees to residents and finally to citizens of new States. Chapter 7 will assess to what extent UNHCR has encouraged members of the LAS to adopt relevant international conventions and nationality provisions that can lead to the naturalization of Palestinian refugees. Chapter 7 will also examine how relevant resolutions adopted by the LAS and regional agreements adopted by members of the LAS can impact the legal status of Palestinian refugees and their RTR. Chapter 7 will specifically examine to what extent the LAS Resolution 1547 of 1959, which called on Arab States to preserve the Palestinian nationality of Palestinian refugees, has impacted the extent to which Palestinian refugees can be naturalized in the Arab world. This chapter will also examine the impact of the 1965 Protocol for the Treatment of Palestinians in Arab States (recommended treating Palestinian refugees equally to citizens of receiving Arab countries), the LAS Resolution 5093 of 1991 (Palestinian refugees should be treated under the national criteria and legislation that the host country deems appropriate and in accordance with the provisions and applicable in law in each country) and the 1994 Arab Convention for the Regulation of Refugee Affairs. We will also examine how the 2018 Arab Declaration on Belonging and Legal identity, in which members of the LAS committed to addressing statelessness by improving access to nationality for all, can impact the legal status of Palestinian refugees in the Arab world. When reviewing these resolutions and declarations we will focus on how they have impacted the legal status of Palestinian refugees and their prospects. Next, we examine to what extent members of the LAS have adopted nationality law provisions that can lead to the naturalization of Palestinian refugees. Chapter 8 will examine how the CJEU has interpreted the applicability of Article 1D of the 1951 Convention to Palestinian refugees who left UNRWA operating territories and applied for asylum in a Member State of the European Union [EU]. While CJEU jurisprudence does not have direct legal consequences for States who are not members of the EU this chapter will allow the thesis to predict the realities and prospects for Palestinian refugees if UNRWA is dismantled because as Goodwin-Gill rightly argues '[t]he regional certainly influences the universal though not necessarily in the interests of better protection or more durable solutions.'<sup>177</sup> The CJEU's

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<sup>177</sup> Guy Goodwin-Gill, *Regional Perspectives on Refugee Protection* (Cambridge University Press 2013) 357

Chapter 2 will elaborate on the reasons that could lead non-EU member States to apply the CJEU's interpretation of Article 1D to Palestinian refugees.

interpretation can also have important ramifications on the future of Palestinian refugees in Arab host States because the region does not have a comprehensive framework for protecting refugees. The lack of such a framework could create serious protection gaps for Palestinian refugees if UNRWA is dismantled before a political solution materializes. If such a scenario materializes the responsibility of Palestinian refugees will be transferred to UNHCR. This will reshape the political landscape in Arab host States because they will have to address the Palestinian refugee problem through the durable solutions adopted by UNHCR. Since the possibility of repatriation is effectively being blocked by Israel, UNHCR will either integrate Palestinian refugees in host countries or resettle them in a third country. Adopting these durable solutions will transform the position of Arab States towards the ROR because countries like Lebanon that reject resettlement projects will likely call for the resettlement of Palestinian refugees in a third country. Because of this resettlement, Palestinian refugees who fell under UNRWA's mandate could effectively lose their RTR to Israel by being transformed into citizens of new States. This assessment derives from a historic precedent in Iraq. Palestinian refugees who fled Iraq after the U.S. invasion in 2003 ended up stuck in camps near the border with Syria and Jordan after both countries closed their borders. Those who were stuck in no man's land 'had to wait [for] permission to emigrate to countries' including Chile, Brazil, Norway, and Iceland.<sup>178</sup> Finally, Chapter 9 will summarize the thesis findings and discuss their implications for the future of Palestinian refugees. The thesis will conclude that new international norms and approaches need to emerge so that the current international refugee regime can protect the RTR for Palestinian refugees.

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<sup>178</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 213

## Chapter 2: Research Methodology & Theoretical Framework

This chapter first outlines our research questions then it outlines the methodological and theoretical approach that we adopted to answer our research questions. Then the chapter concludes with an overview of the research limitations.

### 2.1. Research Questions

The central question of the study is 'to what extent can the international framework governing refugees and stateless persons define Palestinian refugees out of existence and eradicate their right to return [RTR]?'<sup>179</sup> This question will be addressed by answering five sub-questions:

1. Do stateless Palestinian refugees have a RTR to territories that became part of Israel in 1948?
2. Does the international framework governing refugees and stateless persons advocate naturalization and resettlement as a solution to ending the problem of refugees and stateless persons? If yes how can these durable solutions impact Palestinian refugees who are excluded from the existing framework?
3. Are members of the League of Arab States [LAS] acceding to international conventions and forging a pattern of nationality provisions that can lead to the naturalization of Palestinian refugees in their territories?
4. Can nationality provisions that support the principle of naturalization of refugees and stateless persons define Palestinian refugees out of existence and end their RTR in host States?
5. Are Palestinian refugees recognized as de facto refugees beyond UNRWA<sup>180</sup> operating territories?

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<sup>179</sup> The term 'right to return' is used when examining whether Palestinian refugees have a right to return to Israel under international law as outlined in Article 13(2) of the Universal Declaration of Human Rights which states, 'everyone has the right to leave any country, including his own, and to return to his country.' United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)  
<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)>  
accessed 1 December 2018

<sup>180</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East.

## 2.2. Research Methodology

This is a qualitative desk-based research based mainly on primary research such as books, scholarly journals, United Nations [UN] resolutions that address Palestinian refugees, UN conventions that address refugees and stateless persons and regional conventions and nationality provisions adopted by the LAS that can impact the legal status of Palestinian refugees in their territories.

This thesis will also examine case law from the Court of Justice of the European Union [CJEU] to find out how the court has interpreted the applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees [1951 Convention]<sup>181</sup> to Palestinian refugees who left UNRWA operating territories and applied for asylum in a Member State of the European Union [EU]. The jurisprudence of the CJEU was selected over the jurisprudence of national courts in EU Member States and other courts around the world because the CJEU is responsible for making sure that EU law is applied in the same way in all EU countries.<sup>182</sup> This makes our examination of relevant CJEU case law extremely valuable because it will reveal how the region that gave birth to the 1951 Convention is applying Article 1D to Palestinian refugees.<sup>183</sup> The CJEU interpretation will also allow the thesis to predict the realities and prospects for Palestinian refugees if UNRWA is dismantled. While this thesis acknowledges that CJEU jurisprudence does not have direct legal consequences for non-EU member States the CJEU interpretation of Article 1D could impact the development of international refugee law because in the absence of an 'international tribunal providing definite interpretations of the 1951 Convention'<sup>184</sup> the CJEU<sup>185</sup> is the only regional court that

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<sup>181</sup> '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.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>182</sup> This is extremely important because as Geoff Gilbert observes '[t]he absence of a supervisory tribunal to oversee the application of the 1951 Convention...and its 1967 Protocol has meant that states have developed their interpretation of refugee law independently; harmonization, on the other hand, inevitably leads to equalizing down at the expense of the refugee when it is attempted to attune to those different approaches.' Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 969 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

<sup>183</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>184</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 974 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

is playing a key role in harmonizing the interpretation and application of Article 1D to Palestinian refugees.<sup>186</sup> This harmonization could create a blueprint for State parties to the 1951 Convention who have little or no experience in applying Article 1D to Palestinian refugees.

In terms of methodology, this thesis will apply the classical methodology of positive international law<sup>187</sup> and a doctrinal methodological approach. This combination will enable us to assess if Palestinian refugees have a RTR in international law and how the existing international framework governing refugees and stateless persons can impact their legal status and RTR.

The classical methodology of positive international law was selected because it is the chosen methodology of leading refugee law scholars. The classical methodology of positive international law is Article 38(1) of the Statute of the International Court of Justice which provides three primary sources of international law: treaties, general principles of law, custom and two sources of secondary: judicial decisions, teachings of the jurist as a subsidiary means for the determination of rules of law.<sup>188</sup> The research methodology also relies on rules of interpretation in international law as defined by the Vienna Convention of the Law of Treaties of 1969 [Vienna Convention].<sup>189</sup> According to Article 31(1) of the Vienna Convention when interpreting treaties, one must assume good faith and consider the

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<sup>185</sup> Article 68 and Article 234 of the Treaty Establishing the European Community allowed any court or Tribunal in an EU Member States to refer a case to the CJEU. European Union, 'Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957' (*Refworld*, 25 March 1957) <<https://www.refworld.org/docid/3ae6b39c0.html>> accessed 23 December 2021; Article 73p and Article K.7 of the Treaty of Amsterdam also allowed any court or Tribunal in an EU Member States to refer a case to the CJEU. Council of the European Union, 'Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts' (*Refworld*, 10 November 1997) <<https://www.refworld.org/docid/51c009ec4.html>> accessed 26 February 2021

<sup>186</sup> The 'Common European Asylum system [is] based on the full and inclusive application of the Refugee Convention and other human rights obligations.' H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) xi

<sup>187</sup> 'The core of legal positivism is the view that the validity of any law can be traced to an objectively verifiable source.' Raymond Wacks, 'Legal positivism,' in *Philosophy of Law: A Very Short Introduction* (2<sup>nd</sup> edn, Ashgate 2014) <<https://www.veryshortintroductions.com/view/10.1093/actrade/9780199687008.001.0001/actrade-9780199687008-chapter-2>> accessed 29 12 2021

<sup>188</sup> International Court of Justice, 'Statute of the International Court of Justice' (*International Court of Justice*, 18 April 1946) <<https://www.icj-cij.org/en/statute>> accessed 25 May 2017, Article 38 (1)

<sup>189</sup> United Nations, 'Vienna Convention on the Law of Treaties' (*Refworld*, 23 May 1969) <<https://www.refworld.org/docid/3ae6b3a10.html>> accessed 30 September 2020, Article 31(1)



ordinary meaning in their given context, object and purpose.<sup>190</sup> Article 32 of the Vienna Convention also refers to supplementary means of interpretation including preparatory work and circumstances of conclusion.<sup>191</sup> Although the Vienna Convention does not apply to a treaty drafted before the Vienna Convention was adopted we can apply its rules of interpretation to interpret provisions of relevant UN resolutions and UN conventions in light of their general scheme and purpose because the Vienna Convention 'reposes on a thick layer of customary international law.'<sup>192</sup> Such an examination will allow us to identify the legal norms that exist in terms of the RTR and how they can impact Palestinian refugees. Although this approach divorces law from politics we will adopt it because we want to heed the advice of Goodwin-Gill who observes that scholars can end up making '[a] great, indeed damaging, disservice...to the protection of refugees by pretending that rules exist where there are none.'<sup>193</sup> For example, Goodwin-Gill observes that international organizations that criticise court judgements related to asylum seekers and refugees sometimes 'fail to focus sufficiently on central features of the refugee protection regime, while also premising their argument on 'factual assumptions that are not supported by the decisions in question.'<sup>194</sup>

Goodwin-Gill also calls upon '[i]nternational lawyers...to be tuned in to regional developments, to the specific refinements that come through in the practice of states, to the jurisprudence and doctrine emerging in the rulings of treaty supervisory mechanisms, and to the hint of new challenges too, or for, the regime of refugee protection.'<sup>195</sup> Therefore, this thesis will also incorporate a doctrinal methodological framework to account for how regional

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<sup>190</sup> According to Article 31(1) 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Ibid Article 31(1)

<sup>191</sup> Ibid Article 32

<sup>192</sup> Shabtai Rosenne, 'The Temporal Application of the Vienna Convention on the Law of Treaties' (1970) 4 (1) Cornell International Law Journal, 2 <<https://core.ac.uk/download/pdf/73962771.pdf>> accessed 20 October 2021

This explains why scholars have applied its rules of interpretation to interpret provisions of the 1948 Universal Declaration of Human Rights. Corrie Lewis, 'UNHCR'S Contribution to the Development of International Refugee Law: Its foundation and Evolution,' in H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 127

<sup>193</sup> Jane McAdam, 'Guy S Goodwin-Gill: The International Refugee Law Scholar' (2016) 28 (4) International Journal of Refugee Law, 560 <<https://academic.oup.com/ijrl/article/28/4/552/2354557>> accessed 30 January 2018

<sup>194</sup> Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 (4) International Journal of Refugee Law, 665 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 30 January 2018

<sup>195</sup> Guy Goodwin-Gill, 'Introductory Remarks by Guy S. Goodwin-Gill,' in 'Proceedings of the Annual Meeting (American Society of International Law)' (2013) 357

<<https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/introductory-remarks-by-guy-s-goodwingill/F64B14D7E1C6246F8FD5BD8BA36C63B7>> accessed 30 January 2018

developments in the LAS and relevant CJEU case law can impact the legal status of Palestinian refugees and their RTR. '[A] doctrinal methodology framework involves a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation.'<sup>196</sup> Research-based on a doctrinal method 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'<sup>197</sup> The doctrinal research method 'follows a number of linear steps including assembling the facts, identifying the legal issues, analysing the issues with a view to searching for the law, undertaking background reading and then locating primary material, synthesising all the issues in context, and coming to a tentative conclusion.'<sup>198</sup> This research method is appropriate to our research because we want to secure a deeper understanding of the stance of international law vis-à-vis the RTR for Palestinian refugees and how the international refugee framework governing refugees and stateless persons can impact Palestinian refugees.

This thesis also wants to recommend ways to reform the international framework governing refugees and stateless persons. Therefore, when applying the doctrinal method, the thesis will keep in mind the advice of Henkin, who observed that lawyers must 'use the lens of the law to focus on a nation's obligations... [to its] citizens.'<sup>199</sup> We use the lens of law to focus on a state's obligation towards refugees and stateless persons. Applying the doctrinal method will allow us to use the lens of the law to assess whether international law speaks clearly and distinctly about the RTR and whether such a right is enforceable. Henkin observed in his book *How Nations Behave*, that lawyers should 'think beyond the substantive rules of law to the function of law, the nature of its influence, the opportunities it offers, the limitations it imposes.'<sup>200</sup> This observation is relevant to this thesis because it is essential to understand how international lawyers and courts interpret relevant UN conventions. Understanding the implications of these interpretations on Palestinian refugees is very important because 'international legal norms can impact the ways that policymakers and other elites

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<sup>196</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (*Erasmus Law Review*, 2015) <[https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003\\_006](https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003_006)> accessed 30 January 2018, 131

<sup>197</sup> Ibid 131

<sup>198</sup> Ibid 132

<sup>199</sup> Columbia Law School, 'Louis Henkin 1917-2010' (*Columbia Law School*, 2010) <<http://www.law.columbia.edu/louis-henkin>> accessed 31 January 2018

<sup>200</sup> John Dunoff and Mark Pollack, 'Reversing Field: What Can International Law Teach International Relations?' (*European Society of International Law*, 14 March 2014) <<http://www.esil-sedi.eu/node/564>> accessed 30 January 2018, 5

conceptualize particular problems and conflicts, such as whether an issue involves conflicting interests or claims of right.<sup>201</sup> We will also be able to assess how the international framework governing refugees and stateless persons can impact Palestinian refugees who are currently excluded from the existing framework. This is important because Suhrke and Newman, have observed that:

Conflicting interpretations characterise international refugee law on protection; there has been growing divergence over the past decades between customary international law as defined by contemporary state practice and the law of treaties and declarations.<sup>202</sup>

Conflicting interpretation addressing the legal status of refugees and state obligations led Miller to observe that ‘scholars and practitioners dealing’ with global refugee policy ‘need to understand the international refugee system as it exists today.’<sup>203</sup> Miller’s advice is relevant to our thesis because the way that the existing system defines refugees and the solutions it advocates can impact their legal status and their RTR.

### **2.3. Interdisciplinary research**

This thesis adopts an interdisciplinary approach to examine the RTR for Palestinian refugees in international law.

#### **Goodwin-Gill’s approach to international refugee**

From international law, we apply Goodwin-Gill’s approach to international refugee law to understand the notion of the RTR with reference to international refugee law<sup>204</sup> and how relevant international conventions can impact Palestinian refugees. Goodwin-Gill’s approach ‘is characterized by scrupulous, black letter law analysis, infused with a deep appreciation of history, and a forward-looking, protective approach grounded in the object and purpose of

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<sup>201</sup> Robert Howse and Ruti Teitel quoted in Ibid 5

<sup>202</sup> Sarah Deardorff Miller, ‘Global Refugee Policy: Varying Perspectives, Unanswered Questions’ (*University of Oxford Refugee Studies Centre*, 6-7 December 2012)

<<https://www.rsc.ox.ac.uk/files/files-1/dp-global-refugee-policy-conference.pdf>> accessed 30 January 2018, 3

<sup>203</sup> Astri Suhrke and Edward Newman quoted in Ibid 2

<sup>204</sup> Guy Goodwin-Gill, ‘The Dynamic of International Refugee Law’ (2013) 25 (4) *International Journal of Refugee Law*, 665 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 30 January 2018

the ... Refugee Convention and related human rights instruments.<sup>205</sup> This approach allowed Goodwin-Gill to examine issues in refugee law, foresee issues and frame solutions with a sound understanding of the law.<sup>206</sup>

Goodwin-Gill also observed that in international refugee law 'no international lawyer can avoid being a historian [because history] ... gives us the long view essential to understanding law in the relations of states, and enables us to counter misunderstandings dressed up as advocacy.'<sup>207</sup> Accordingly, this thesis will account for the creation and evolution of international refugee law to understand legal reality as it is and how it can impact Palestinian refugees. Adopting the historic approach will allow us to identify if international refugee law contains definite obligations that guarantee the RTR.

### **Arendt's Conception of Rights**

From political science, we apply Arendt's conception of rights,<sup>208</sup> which identifies the possession of nationality as a pre-condition for accessing abstract human rights<sup>209</sup> as a theoretical basis for examining why Palestinian refugees have not been able to return to territories that became part of Israel. Arendt's conception of rights<sup>210</sup> which reveals that States can strip individuals from their human rights by stripping them of their nationality reveals that the individual RTR has its roots in the principle of sovereignty which gives sovereign States the right to grant or deny entry into their territories. This leads us to conclude that there is no fundamental RTR but only the right of States to extend such a right by granting entry. The sources for the RTR in international law support this conclusion because sovereign States have a right to control who can enter their territories. This means the principle of State sovereignty in international law can override the individual RTR. Although there is a workable foundation in the broader legal discussion within the thesis that demonstrates how sovereign States can override the right to return Arendt's conception of rights which revealed 'the infinite complex red tape existence of [being a] stateless

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<sup>205</sup> Jane McAdam, 'Guy S Goodwin-Gill: The International Refugee Law Scholar' (2016) 28 (4) International Journal of Refugee Law, 560 <<https://academic.oup.com/ijrl/article/28/4/552/2354557>> accessed 30 January 2018

<sup>206</sup> Ibid 560

<sup>207</sup> Ibid 653

<sup>208</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 388

<sup>209</sup> Ibid 392

<sup>210</sup> Ibid 388

[refugee]<sup>211</sup> adds an important layer to our discussion because her insight leads us to conclude that for the RTR to be an absolute right, human rights need to be reconceptualized in a way that does not allow sovereign States to block stateless refugees from returning to their land and homes. Until this takes place the RTR will remain an abstract right without value for persons who have been denied the RTR.

In 1949 Arendt's conception of rights<sup>212</sup> challenged the newly formed human rights framework which considers all humans as subjects of rights when she observed that rights do not grow out of human nature but rather out of institutions<sup>213</sup> and that human nature does not turn humans into bearers of political rights.<sup>214</sup> In her book, *The Origins of Totalitarianism*,<sup>215</sup> Arendt left the realm of theoretical abstraction and challenged the modern conception of human rights based on her own lived experience as a persecuted German Jew in an age of totalitarianism.<sup>216</sup> Arendt who became a stateless refugee after Nazi Germany stripped Jews from their German Citizenship in the Nuremberg Law<sup>217</sup> observed

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<sup>211</sup> Hannah Arendt quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 39; See Letter from Arendt to Jaspers of 29 January 1946 in Hannah Arendt, *Hannah Arendt and Karl Jaspers, Correspondence, 1926-1969*, Lotte Kohler and others (eds), Kimber and others (trans) (Harcourt Brace Jovanovich 1992) 28

<sup>212</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 388

<sup>213</sup> Arendt also argued that the Rights of Man adopted by the French Revolution was contradictory because by insisting on national sovereignty this ensured that human rights can only be protected and enforced by the sovereign State. Consequently, human rights could not be independent of the State. Hannah Arendt, *The Origins of Totalitarianism* (1973 revised edn, Harcourt 1951) 291-2

<sup>214</sup> Hannah Arendt, 'The Rights of Man': What Are They?' (1949) 3:1 *Modern Review*.

<sup>215</sup> Hannah Arendt 'analyzed how the anti-Semitism of European Society, the racist confrontation with Africa on the part of the colonial powers of Europe, and the paradoxes in the declaration of the rights of man were some of the trends in modern society through which this tension between the principle of universal political equality and sociocultural, linguistic, racial, and ethnic difference was reenacted.' Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt*, Morton Schoolman (ed) (Sage Publication 1996) xxvi

<sup>216</sup> 'Hannah Arendt first confronted the politics of the twentieth century as a persecuted Jew, as a stateless émigré in Paris, as a new immigrant and eventually an American Citizen in the United States.' Ibid xxiv

<sup>217</sup> Stephanie DeGooyer and Alastair Hunt, 'The Right to Have Rights' (*Public Books*, 5 March 2018) <<https://www.publicbooks.org/the-right-to-have-rights/>> accessed 1 Apr 2019; See Nuremberg Decrees of 15 September 1935 Stripped German Jews of Citizenship. A copy of the original text of the Decree in Greg Bradsher, 'The Nuremberg Laws' (*National Achieves*, Winter 2010) <<https://www.archives.gov/publications/prologue/2010/winter/nuremberg.html>> accessed 13 February 2020; See Hans Kelsen, *General Theory of Law & State* (Translation Publishers, 2006) 235-6. According to Hans Kelsen '[f]rom the point of view of international law [it was of] no importance' that on 15 September 1934 enacted a law that provided that only persons of 'German or cognate blood' are staatsburger (citizens) with full political rights while others were staatsangehorige (nationals) with no political or civil rights.' Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 44

According to Goodwin-Gill 'the extensive use of denationalization measures was a novel development, exposing the individual foreigner to the loss or denial of standards of treatment abroad

that after Jews were stripped of their citizenship, they lost their 'right to have rights'<sup>218</sup> by no longer belonging to any nation-state<sup>219</sup> that is 'willing and able to guarantee...[their] rights.'<sup>220</sup> According to Arendt as a consequence of being 'depriv[ed] of legality,'<sup>221</sup> the stateless became 'an anomaly' for which the international system and international law did not provide<sup>222</sup> and therefore the world could only place them in 'internment camps.'<sup>223</sup> This led

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to which he or she would have been entitled in the right of citizenship, and underling the urgent importance of an international status for the newly unprotected...Denationalization...was political in intent...the desire of the new regimes to rid...of any 'enemy of the toiling classes.' Guy Goodwin-Gill (2008), 'The Politics of Refugee Protection,' in H  l  ne Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 149

See also James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn Cambridge University Press 2014) 398

<sup>218</sup> '[I]n *Origins*, the "right to have rights" is offered almost as a throw-away expression. The phrase appears just once, as one way, among several others, to describe the kind of right that those without citizenship sorely lack but desperately need. Even though Arendt added a second use of the phrase, this time with the definite article ("the right to have rights") to the revised edition of *Origins* in 1958, the phrase receives no preferential treatment and is not at all the climax to the chapter. Rather, in the six pages following the introduction of the "right to have rights," the chapter continues to explore the predicament of rightlessness in preparation for the third part of *Origins* on full-blown totalitarian movements. The "right to have rights" flared up briefly in Arendt's thinking. It was not meant to be a watershed moment.

After it had been invented by Arendt, the "right to have rights" would wait some fifty years before garnering interest from scholars, activists, and the general public. In fact, it was largely ignored for decades after it was articulated. Although *The Origins of Totalitarianism* was quickly heralded as an important book written by a brilliant new political theorist, none of its first reviewers mentioned the "right to have rights" or the chapter in which it appears. Compared to the heated, even scandalous, public controversy that surrounded the "banality of evil," the "right to have rights" was hardly noticed by anyone. Arendt herself paid the phrase no attention. She does not mention it in subsequent writings, even when the topic at hand, such as rights, statelessness, violence, or civil disobedience, would seem to invite its reprise.' Stephanie DeGooyer and Alastair Hunt, 'The Right to Have Rights' (*Public Books*, 5 March 2018) <<https://www.publicbooks.org/the-right-to-have-rights/>> accessed 1 April 2019

<sup>219</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 388; Arendt also states that she became 'aware of the existence of a right to have rights and a right to belong to some kind of organized community only when millions of people emerged [in the aftermath of WWI and WWII] who had lost and could not regain these rights because of the global political situation.' Ibid 388; According to Seyla Benhabib 'Jews in Germany, Greek and Armenian nationals in the period of the founding of the republic of Turkey (1923), and German refugees in Vichy France -- to name but few cases-- entire groups of people were denaturalized or denationalized, and lost the protection of a sovereign legal body.' Seyla Benhabib, 'The Right to Have Rights in Contemporary Europe' (*The Pennsylvania State University*, February 2005)

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1742&rep=rep1&type=pdf>> accessed 6 February 2020, 8

<sup>220</sup> Hannah Arendt, *The Origins of Totalitarianism* (1973 revised edn, Harcourt 1951) 297

<sup>221</sup> Hannah Arendt quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 56; See Hannah Arendt, 'Statelessness Lecture, 1955, Hannah Arendt Papers,' The Library of Congress (Series: Speeches and Writing File, 1923-1975, nd) Paragraph 14

<sup>222</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 13

Arendt to argue that there 'is no such thing as inalienable human rights'<sup>224</sup> because 'once [Jews] had left their homeland, they remained homeless, once they had left their state, they became stateless; once they had been deprived of their human rights, they were rightless.'<sup>225</sup> Arendt also observed that 'the core of statelessness...is identical with the refugee question' because stateless persons and refugees lack State protection<sup>226</sup> and no longer have access to rights accorded to citizens.<sup>227</sup> For Arendt, the predicament faced by stateless persons revealed that human rights are functionally void because when individuals are stripped of their nationality they are placed outside 'the pale of the law.'<sup>228</sup> Therefore, Arendt concluded that equality is not a 'universally valid principle'<sup>229</sup> instead it's a 'political concept'<sup>230</sup> because individuals do not possess rights but acquire them through State membership.<sup>231</sup>

According to Arendt, this explains why after the first and second world wars, the international community agreed that statelessness should be solved through 'repatriation...to a country of origin'<sup>232</sup> while the problem of refugees was supposed to be solved through 'repatriation or

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<sup>223</sup> Elizabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (2<sup>nd</sup> edn, Yale University Press 2004) 152-5

<sup>224</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 352

<sup>225</sup> Ibid 349; 'The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general—without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself—and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.' Hannah Arendt, *The Origins of Totalitarianism* (1973 revised edn, Harcourt 1951) 302

<sup>226</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 365

<sup>227</sup> Ibid 384, 386

<sup>228</sup> Ibid 386

In May 1960 Israeli agents abducted 'Adolf Eichmann, who had played a central role in the Nazi plan to annihilate six million European Jews, and brought him to Israel to stand trial.'

Israel State Archives 'The Eichmann Trial- Documentation at the ISA' (*Israel State Archives*, n.d.) <<https://www.archives.gov.il/en/publication/eichmann-trial/>> accessed 12 February 2020

According to Arendt Israel committed a 'clear violation of international law in order to bring him justice' by abducting Eichmann from Argentina. Despite this Israel was able to get away with breaking international law because Eichmann was 'de facto' stateless as a result of Germany and Argentina refused 'to claim him as a citizen.' Hannah Arendt quoted in Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt*, Morton Schoolman (ed) (Sage Publication 1996) 181-82

Georgio Agamben who builds on Arendt's analysis describes those born outside all citizenship as experiencing the 'bare life.' Georgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (trans) Daniel Heller-Roazen (Stanford University Press 1998) 126-29

<sup>229</sup> Hannah Arendt, *The Origins of Totalitarianism* (1973 revised edn, Harcourt 1951) 79

<sup>230</sup> Richard Bernstein, 'Hannah Arendt on the Stateless' (2005) 11(1) *parallax* 46, 57-8 <<https://doi.org/10.1080/1353464052000321092>> accessed 23 September 2018

<sup>231</sup> A similar view is held by Bonnie Honig who argues that while the nation state has created right bearing individuals it has also caused others to lose them. Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993)

<sup>232</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 365

naturalization.<sup>233</sup> Despite this naturalization became the only practical substitute for a non-existent homeland when the State of origin refused to 'recognize the prospective repatriate as a citizen.'<sup>234</sup> Arendt also observes that although the international community ended the plight of many stateless persons by naturalizing them in new States this solution ultimately failed in Europe<sup>235</sup> because when '[t]he naturalization system of European countries...was confronted with stateless people...[and] mass application for naturalization'<sup>236</sup> States started to restrict their nationality laws and to 'cancel earlier naturalizations.'<sup>237</sup> Arendt's observations demonstrate how human rights can be forfeited through treaties that uphold the right of sovereign States to decide who are their nationals. In sum, Arendt concludes that the 'loss of national rights in all instances entail the loss of human rights.'<sup>238</sup> Instead of this leading her to conclude that human rights are worthless Arendt concludes that citizenship is a precondition for the concrete realization of abstract human rights.<sup>239</sup> Arendt's conclusion that citizenship is a precondition for rights was adopted by the International Court of Justice in *Liechtenstein v. Guatemala* [1955]<sup>240</sup> which found that the purpose of nationality is 'to determine the person upon whom' rights are conferred.<sup>241</sup> The International Court of Justice

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<sup>233</sup> Ibid 367

<sup>234</sup> Ibid 365

<sup>235</sup> Ibid 372

<sup>236</sup> Ibid 372

<sup>237</sup> Ibid 372

In 1996 Joan Patrick also found that when asylum applications are on the rise approval rates plummet. Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 Harvard Human Rights Journal, 242

<[https://heinonline.org/HOL/Page?iname=&public=false&collection=journals&handle=hein.journals/hhrij9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?iname=&public=false&collection=journals&handle=hein.journals/hhrij9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>238</sup> Ibid 392

<sup>239</sup> These rights include civil, political, and social right.

In 1958 the United States Supreme Court adopted Arendt's conclusion that citizenship is a precondition for rights without citing Arendt in *Perez v. Brownell* and in *Trop v. Dulles*. In *Perez v. Brownell*, the judge stated that '[c]itizenship is a man's basic right, for it is nothing less than the right to have rights' and in *Trop v. Dulles* the US Supreme Court concluded that the loss of Citizenship: '[S]trips the Citizen of his status in the national and international political community... His very existence is at his sufferance of the country in which he happens to find himself. While any one country may afford him some rights... No Country need do so, because he is stateless in short, the Expatriate has lost the right to have rights.' See *United States Supreme Court, 'Perez v. United States Attorney General, 356 U.S. 44; 78 S. Ct. 568; 2 L. Ed. 2d 603, United States Supreme Court, 31 March 1958'* (Refworld, 31 March 1958) <<https://www.refworld.org/cases,USSCT,3ae6b6344.html> > accessed 7 January 2019.

<sup>240</sup> International Court of Justice, 'Nottebohm Case (*Liechtenstein v. Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955' (Refworld, 6 April 1955).

<<https://www.refworld.org/cases,ICJ,3ae6b7248.html>> accessed 9 January 2019

<sup>241</sup> Ibid



also stated that nationality gives rise to 'the existence of reciprocal rights and duties' between the state and the individual holding the nationality.<sup>242</sup>

### **Arendt's Conception of Rights Vs. A Human Rights Approach**

Scholars who adopt a human rights approach [HRA] have argued that Arendt's critique of the human rights framework is context-specific because international human rights law has advanced with the adoption of several international conventions such as the 1951 Convention and the 1954 Convention Relating to the Status of Stateless Persons.<sup>243</sup>

Scholars who adopt the HRA presume that States are bound to give refugees and stateless persons access to certain rights based on their obligations under existing declarations and conventions.<sup>244</sup> This argument was well articulated by Benhabib<sup>245</sup> who in *her book The Reluctant Modernism of Hannah Arendt*<sup>246</sup> argued that nationality is not necessary to access rights because individuals possess universal rights by virtue of being humans.<sup>247</sup> According to Benhabib:

The right to have rights today means the recognition of the universal status of personhood of each and every human being independently of their national citizenship. Whereas for Arendt ultimately citizenship was the prime guarantor for the protection of one's human rights.<sup>248</sup>

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<sup>242</sup> Ibid

In *Adnan V Secretary of State for the Home Department* [1997] stated that to deny a national from entering his/her country is to cut the person 'of from the enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a state to its citizens.' Secretary of State for the Home Department, 'R v. Secretary of State for the Home Department, Ex parte Adan and Others' (United Kingdom: Court of Appeal (England and Wales), 23 July 1999)

<[https://www.refworld.org/cases/GBR\\_CA\\_CIV\\_3ae6b6ad14.html](https://www.refworld.org/cases/GBR_CA_CIV_3ae6b6ad14.html)> accessed 27 February 2021

<sup>243</sup> United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 28 September 1954)

<<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017

<sup>244</sup> Suman Momina, 'Human Rights Based Approach to Refugees: A Look at the Syrian refugee crises and the responses from Germany and the United States' (*Duke University School of Law*, 2017)

<[https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1066&context=df\\_lsc](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1066&context=df_lsc)> accessed 30 December 2021, 60

<sup>245</sup> Political theorist.

<sup>246</sup> Seyla Benhabib examined Hannah Arendt work 'The Human Condition,' 'Rachel Varnhagen: The Life of a Jewish Woman,' and 'The Origins of Totalitarianism.' According to Morton Schoolman Benhabib offers a 'highly controversial reading of Hannah Arendt.' Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt*, Morton Schoolman (ed) (Sage Publication 1996) xx

<sup>247</sup> Ibid xvii

<sup>248</sup> Seyla Benhabib, 'The Right to Have Rights in Contemporary Europe' (*Pennsylvania State University*, February 2005)

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1742&rep=rep1&type=pdf>> accessed 6 February 2020, 9

Benhabib also asserted that sovereignty is constrained by international legal norms that assert, protect, and enforce the rights of human beings.<sup>249</sup>

The thesis did not apply a HRA because although the Universal Declaration for Human Rights and certain international instruments<sup>250</sup> have created a forum for stateless refugees to claim certain rights<sup>251</sup> they can only claim such rights in States that have ratified such treaties. Moreover, citizenship is still necessary to access certain rights.<sup>252</sup> For example, Albanese et al correctly note that:

Some limitations do exist [in the current human rights framework], as aliens (i.e. non-citizens) do not enjoy full freedom to enter and reside in a territory, and do not enjoy the full political rights enshrined in Article 25 of [the International Covenant on Civil and Political Rights].<sup>253</sup>

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A similar argument is made by Albanese et al who argues that 'It is increasingly recognized that the obligations on states to respect, protect, and fulfil the human rights enshrined in the treaties they have ratified, and to do so without discrimination, extends to refugees and asylum seekers. Human rights apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality, or lack of thereof.' Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 172

<sup>249</sup> Ibid 67-68

<sup>250</sup> The 1951 Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the United Nations High Commissioner on Human Rights, the European Court of Human Rights. Benhabib mentions only the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the UNHCR, the World Court and the International Criminal Court. Seyla Benhabib, 'The Right to Have Rights in Contemporary Europe' (*The Pennsylvania State University*, February 2005)

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1742&rep=rep1&type=pdf>> accessed 6 February 2020, 8

<sup>251</sup> Stephanie DeGooyer and Alastair Hunt, 'The Right to Have Rights' (*Public Books*, 5 March 2018) <<https://www.publicbooks.org/the-right-to-have-rights/>> accessed 1 April 2019; See Seyla Benhabib expressed this idea in Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 67-68

<sup>252</sup> Lecture Presented at Yale University February 2005.

<sup>253</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 170

Article 25 of the International Covenant on Civil and Political Rights states:

'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
  - (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
  - (c) To have access, on general terms of equality, to public service in his country.'
- United Nations, 'International Covenant on Civil and Political Rights, 16 December 1966, United Nations' (*Refworld*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 7 January 2019

We also did not adopt a HRA because although there have been discussions about ‘the collapse of traditional conceptions of state-sovereignty,<sup>254</sup> monopoly over territory is [still] exercised through immigration and citizenship policies.’<sup>255</sup> Moreover, sovereign States often act as if their ‘exclusionary territorial control is an unchecked sovereign privilege which cannot be limited or trumped by other norms and institutions.’<sup>256</sup> Therefore, we agree with Benhabib that ‘[t]here is not only a tension, but often an outright contradiction, between human rights declarations and States’ sovereign claims to control their borders.’<sup>257</sup>

The fact that scholars who adopt a HRA recognize that the current human rights framework continues to be limited by State sovereignty proves that Arendt’s conception of rights offers a better framework for understanding why Palestinian refugees have not been able to return to Israel because the limitations that Arendt identified in the newly formed international human rights framework in 1949 have not been eliminated despite developments in international human rights law and international refugee law. This is evident by the fact that her argument that States can strip individuals from their human rights by stripping them of their nationality

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<sup>254</sup> ‘The irony of current political developments is that while state sovereignty in economic, military, and technological domains has been greatly eroded, it is nonetheless vigorously asserted, and national borders, while more porous, are still there to keep out aliens and intruders.’ Ibid 11

<sup>255</sup> ‘It has now become commonplace in normative political thought as well as the social sciences to discuss “the end of the nation-state” and “the demise of Westphalian conceptions of sovereignty.” I want to argue that contemporary developments are much more complicated than is suggested by these phrases, for even in the face of the collapse of traditional conceptions of state-sovereignty, monopoly over territory is exercised through immigration and citizenship policies.’ United Nations, ‘International Covenant on Civil and Political Rights, 16 December 1966, United Nations’ (*Refworld*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 7 January 2019, Article 25

<sup>256</sup> Seyla Benhabib quoted in Stephanie DeGooyer and Alastair Hunt, ‘Nothing but Human: On The Right to Have Rights’ (*Verso Books*, 7 March 2018) <<https://www.versobooks.com/blogs/3663-nothing-but-human-on-the-right-to-have-rights>> accessed 2 April 2019; See Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 67-68

<sup>257</sup> ‘There is not only a tension, but often an outright contradiction, between human rights declarations and states sovereign claims to control their borders as well as to monitor the quality and quantity of admittees. There are no easy solutions to the dilemmas posed by these dual commitments. I will not call for the end of the state system nor for world-citizenship. Rather, following the Kantian tradition of cosmopolitan federalism I will underscore the significance of membership within bounded communities and defend the need for ‘democratic attachments’ that need not be directed only toward existing nation-state structures. Quite to the contrary: as the institution of citizenship is disaggregated and state sovereignty comes under increasing stress, sub-national as well as supra-national spaces for democratic attachments and agency are emerging in the contemporary world, and they need to be advanced with, rather than in lieu of, existing polities. It is important to respect the claims of diverse democratic communities, including their distinctive cultural, legal and constitutional self-understandings, while strengthening their commitments to emerging norms of cosmopolitical justice.’ Seyla Benhabib, ‘The Right to Have Rights in Contemporary Europe’ (*Pennsylvania State University*, February 2005)

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1742&rep=rep1&type=pdf>> accessed 6 February 2020, 14

and denying them entry to their territories is still valid. Moreover, refugees and stateless persons cannot return to their country of former nationality or habitual residence without State consent. This indicates that Arendt's conception of rights is still relevant in the contemporary world because her insight illuminates the limitations of the current international human rights framework. Arendt's observation that a 'law above nations' was required to uphold the 'one right that transcends [a person's] various rights as a citizen: the right never to be excluded from the rights granted by his community'<sup>258</sup> also reveals that her conception of rights illuminates the possibilities of contemporary international law because her observation suggests that abstract human rights can be turned into absolute rights if sovereign States are no longer allowed under international law to strip individuals from their nationality..

### **Arendt's conception of rights and its implications for Palestinian refugees**

Arendt's conception of rights has been described 'as an invitation to interrogate, contest, and amend our assumptions in the name of the possibility of justice.'<sup>259</sup> From Arendt, we got the need to contest the RTR for Palestinian refugees in international law. Arendt's critical account of human rights reveals that for an individual to be a bearer of rights he/she needs to be a citizen.<sup>260</sup> Therefore, when individuals are stripped from their citizenship, they lose their legal status and can no longer claim rights.<sup>261</sup> Arendt's conception helps us to see that citizenship status is not secure and that 'human rights are not an irremissible fact with an irresistible force'<sup>262</sup> because nation-states can turn individuals into rightless individuals. Arendt's insight reveals that stateless persons cannot assert a RTR to a State that does not recognize them as it is nationals. When we extend Arendt's analysis to the ongoing plight of Palestinian refugees, we find that it is not enough for Palestinian refugees to think they have a RTR because the condition of belonging is based on Israel recognizing that they have a RTR. If as Arendt suggests statelessness is a manifestation of rightlessness the implication is that not being a member of a State can be cited as a legitimate reason under international law for disqualifying stateless refugees from the possibility of return. Moreover, States that

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<sup>258</sup> Hannah Arendt, *The Burden of Our Time* (Secker and Warburg 1951) 436-7

<sup>259</sup> Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993) 121-122

<sup>260</sup> Alastair Hunt, 'of Whom?,' in Stephanie DeGooyer and others (eds), *The Right to have Rights* (1st edn, Verso 2018) 92

<sup>261</sup> Lida Maxwell, '...to Have....,' in Stephanie DeGooyer and others (eds), *The Right to have Rights* (1st edn, Verso 2018) 49

<sup>262</sup> Alastair Hunt, 'of Whom?,' in Stephanie DeGooyer and others (eds), *The Right to have Rights* (1st edn, Verso 2018) 83

have the power to strip individuals from their nationality can argue that such persons cannot be victims of rights violations<sup>263</sup> because they are no longer subjects of rights. If this proves to be the case, then the RTR is an abstract right. This supports the argument put forward by Moyn et al who have argued that there is a need to challenge and contest what human rights mean to turn them into accessible rights for all including those currently excluded.<sup>264</sup> This argument is also relevant to the RTR because it reveals that there is a need to challenge and contest what the RTR means and how it can be transformed from an abstract right into an absolute right that cannot be overridden by State sovereignty. This type of transformation would need to turn States who do not allow refugees to return into lawless actors.

Based on Arendt's conception of rights for stateless refugees to reassert their 'right to have rights' they need to acquire a nationality. This means for Palestinian refugees to assert their RTR, they need to acquire Israeli citizenship. This, however, is not possible because restrictions in the Israeli Nationality Law ensured that Palestinian refugees outside the territorial boundaries of Israel are not eligible to become citizens of Israel. After Israel declared its independence on 14 May 1948<sup>265</sup> Palestinian refugees were rendered stateless after Britain terminated its mandate over Palestine on 15 May 1948.<sup>266</sup> As a result of this termination Palestinians who were transformed from Ottoman Citizens under Ottoman rule<sup>267</sup> into Palestinian Citizens under the British Mandate,<sup>268</sup> had their citizenship status terminated.<sup>269</sup> This resulted in Palestinians outside Israel becoming 'stateless [refugees],

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<sup>263</sup> Ibid 90

<sup>264</sup> Samuel Moyn, 'Rights,' in Stephanie DeGooyer and others (eds), *The Right to have Rights* (1st edn, Verso 2018) 60

<sup>265</sup> The Official Gazette, 'Proclamation of Independence [The Declaration of the Establishment of Israel]' (*The Knesset*, 14 May 1948) <[https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm)> accessed 2 April 2019

<sup>266</sup> National Army Museum, 'The British Army in Palestine' (*National Army Museum*, n.d.)

<<https://www.nam.ac.uk/explore/conflict-Palestine>> accessed 12 January 2019

See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 458

<sup>267</sup> Laurie Brand, *Palestinians in the Arab World: Institution Building and the Search for State* (Columbia University Press 1988) 8

<sup>268</sup> League of Nations, 'Report by His Britannic Majesty's Government to the Council of the League of Nations on the Administration of Palestine and Transjordan for the year 1925' (*UN Information System on the Question of Palestine*, 8 July 1925)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/BE6C3644411DA3ED052565E7006E9AF3>> accessed 1 January 2019

The Palestinian Citizenship Order in Council, 1925 was a law of Mandatory Palestine that created a Palestinian citizenship for residents of the territory of the Palestinian Mandate, except for those resident in Transjordan. It was announced on 24 July 1925 and came into force on 1 August 1925.

<sup>269</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 459

without passports.<sup>270</sup> According to Brand '[f]or Palestinian refugees, their status as refugees and as stateless persons is borne of the dissolution and disappearance of an internationally recognized political entity to which they belong.'<sup>271</sup> The same conclusion was reached by the Israeli Tel Aviv district court in *Oseri v. Oseri* [1953] which found 'that with the termination of the Palestine mandate, former Palestine citizens had lost their citizenship without acquiring another one.'<sup>272</sup> While this conclusion is legally sound, it does not account for the fact that Palestinian refugees 'represent a nation that was actively denationalized'<sup>273</sup> because Israel did not allow them to return and become citizens of Israel. When Israel enacted the Israeli Nationality Law [1952]<sup>274</sup> the new law ensured that Palestinian refugees outside Israel would not be eligible to become citizens of Israel since applicants had to be residing in Israel from the day it was established to the day that the Israeli Nationality Law was enacted.<sup>275</sup> This indicates that the stateless status of Palestinian refugees is a result of the Israeli Nationality law purposely excluding Palestinian refugees from its scope.<sup>276</sup> Therefore, Bitar<sup>277</sup> rightly observed that:

The creation of the Israeli state and its legal and territorial exclusion of Palestinian return meant the latter's effective denationalization, [and] statelessness...'<sup>278</sup>

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<sup>270</sup> Laurie Brand, *Palestinians in the Arab World: Institution Building and the Search for State* (Columbia University Press 1988) 8

<sup>271</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 7

<sup>272</sup> *Oseri v. Oseri* (1953) 8 P.M. 76; 171.L.R. 111 (1950) quoted in Guy Goodwin-Gill, *Nationality and Statelessness, Residence and Refugee Status: Issues Affecting Palestinians* (Carleton University 1990) <[file:///C:/Users/TEMP/Downloads/Nationality\\_and\\_statelessness\\_residence\\_and.pdf](file:///C:/Users/TEMP/Downloads/Nationality_and_statelessness_residence_and.pdf)> accessed 12 February 2020, 1-2

<sup>273</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 7

<sup>274</sup> Came into force on 14 July 1952.

<sup>275</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 6

<sup>276</sup> 'Statelessness can be caused by a number of factors such as: discrimination in nationality laws (e.g., racial, religious or gender), conflict between and gaps in nationality laws and State succession' UNHCR, 'What is Statelessness' (UNHCR, n.d) <<https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf>> accessed 15 January 2020

<sup>277</sup> Maher Bitar currently serves as Director for Israeli and Palestinian Affairs on the White House National Security Council staff.

<sup>278</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

Stateless refugees 'as a matter of law, [are] unable to secure the benefits accorded to nationals... [in their] country of origin.'<sup>279</sup>

In the case of stateless Palestinian refugees, they have been unable to secure the right to re-enter territories that became part of Israel. If as Arendt suggests only citizenship can reliably guarantee the 'right to have rights', then it is safest to conclude that Palestinian refugees have not been able to return to Israel because they are not citizens of Israel. This leads us to conclude that the very attempt to present the RTR as a human right without acknowledging that rights acquire their meaning and function with State consent does not offer a realistic picture of the predicament faced by stateless refugees. The major lesson to draw from Arendt's analysis is that human rights do not guarantee access to rights, nor do they always make you a subject of rights.

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## 2.4. Research Limitations

In 1998 Takkenberg identified a lack of legal literature that specifically addresses the legal status of Palestinian refugees in international law. Takkenberg filled the existing gap in the literature by conducting the first extensive 'study into the various aspects of the status of Palestinian refugees in international law.'<sup>280</sup> His study covered developments until early 1997.<sup>281</sup> This thesis will review relevant legal literature from the 1990s onwards. The study is limited to the study of the legal status of 1948 Palestinian refugees and their descendants under international law because most persons who fall under this category are excluded from the international framework governing refugees and stateless persons. For the purpose of this thesis, the study will also examine the legal status of this group of refugees who became second-time refugees. The study does not focus on Palestinians who became first-time refugees during the 1967 Arab Israeli War because UNRWA confirmed that its mandate is limited to the territories it operated in and not throughout the world and that it extended its mandate based on resolution 2252 (ES-V)<sup>282</sup> on an emergency basis.<sup>283</sup>

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<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 7

<sup>279</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 509

<sup>280</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 7

<sup>281</sup> Ibid 43

<sup>282</sup> United Nations, 'A/RES/2252 (ES-V) of 4 July 1967' (*UNISPAL*, 4 July 1967)

### Language Limitations

The author speaks and reads Arabic and therefore was able to consult Arabic sources. The author does not speak or read French, therefore, had to rely on secondary academic sources that translated original documents. As a result of this language barrier in chapter 7, the thesis author was not able to identify which article in the Djibouti Nationality Law allowed female nationals who are married to foreign nationals to transmit their nationality to their children.

### Difficulties in obtaining research data

The author received ethical approval during the Covid19 pandemic to send two questionnaires. The first questionnaire was addressed to a selection of UNHCR country offices operating in several countries who are members of the LAS and the second questionnaire was addressed to a selection of Ambassadors representing members of the LAS.

The purpose of the first questionnaire was to find out what is the legal status of Palestinian refugees in the target countries and whether certain conventions adopted by such countries apply to Palestinian refugees and their descendants. I was confident that UNHCR country offices would agree to answer my questionnaire because on their website they encourage anyone who has questions to contact them. When they did not reply to my email, I assumed that this was a result of the covid lockdown. However, after I contacted them several times and they did not reply I recalled the time when during a workshop a high-ranking UNHCR official declined to answer my question regarding how the agency will solve the Palestinian refugee problem if UNRWA was dismantled before their status is settled. After the workshop, I asked them why they did not answer my question and observed that this was not the first time that a UNHCR official declined to answer the same question. They told me that because Palestinian refugees fall under UNRWA's mandate UNHCR does not want to be seen as attempting to devise solutions to end the plight of Palestinian refugees in a post-UNRWA world as this would create political controversy. Despite this, they revealed that the agency has an office that employs a few people who have been devising plans for dealing

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<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7575BE79BBC6930852560DF0056FC78>> accessed 13 March 2017, Article 6

<sup>283</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) Ibid 306



with Palestinian refugees under UNRWA's mandate if the agency is dismantled. But according to them those plans are confidential and can only be accessed by a few individuals.<sup>284</sup> Recalling this conversation led me to conclude that the agency's unwillingness to reveal how it intends to deal with Palestinian refugees in a post-UNRWA world may offer a better explanation for why UNHCR country offices did not reply to my emails.

The purpose of the second questionnaire was to find out what is the legal status of Palestinian refugees in certain countries who are members of the LAS and whether relevant conventions and nationality provisions adopted by such countries apply to Palestinian refugees. Only one ambassador agreed to participate. However, after I sent them the participant information sheet they did not reply to my email.

In sum, because UNHCR country offices and country ambassadors did not answer my questionnaires, I was unable to confirm if UNHCR acknowledges that its advocacy is leading members of the LAS to adopt international conventions, regional conventions and nationality provisions which can pave the way for the integration and naturalization of Palestinian refugees in their territories. I was also unable to confirm if certain members of the LAS are aware of these implications.

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<sup>284</sup> I also recalled the time when another high ranking UNHCR asked international refugee scholars in a conference to stop talking and/or writing about the need to revise the 1951 Convention Relating to the Status of Refugees because the agency's conversations with signatory States indicate that if the convention was reopened state parties would restrict rather than expand the rights accorded to refugees.

## Chapter 3: The establishment of the Jewish State and the Birth of The Palestinian Refugee Problem

This thesis cannot examine the right to return [RTR]<sup>285</sup> for Palestinian refugees under international law without referring to key historic events that paved the way to the birth of the Palestinian refugee problem. This chapter will help us develop our thesis argument by providing us with the necessary background to understand how the political and legal developments from the beginning of the Zionist project and the breakup of the Ottoman Empire leading up to the British Mandate over Palestine led to the birth of the Palestinian refugee problem and to proposals calling for the permanent resettlement of Palestinian refugees beyond territories that became part of Israel to dominate the debate. This chapter will be structured as follows: We start by examining how political Zionism, which sought to build a Jewish State in Palestine under international law, envisioned the future of existing inhabitants in Palestine. This examination is necessary because the birth of the Palestinian refugee problem and their ongoing plight is directly linked to the 'consensual Zionist interpretation of the idea of Israel' which has monopolized Israeli politics since the birth of the State of Israel in 1948.<sup>286</sup> Next, we reveal how the 1917 Balfour Declaration, which declared Great Britain's [Britain] commitment to establishing a home for Jews in Palestine, and the Palestine Mandate, which placed Palestine under the administration of Britain and called for the implementation of the Balfour Declaration, failed to protect existing non-Jewish inhabitants in Palestine because they incorporated the Zionist interpretation of the idea of Israel within their text. This interpretation wanted to turn the Zionist slogan 'a land without people for a people without a land'<sup>287</sup> into a reality by relocating existing non-Jewish inhabitants from Palestine to make way for unlimited Jewish immigration. Finally, we examine how United Nations General Assembly [UNGA] Resolution 181 (II) of 1947 [Resolution 181], which resolved that historic Palestine should be divided into a Jewish State and an Arab State, tried to protect non-Jewish inhabitants in historic Palestine by giving

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<sup>285</sup> This thesis adopts the term 'right to return' to examine whether Palestinian refugees have a 'right to return' to Israel under international law as outlined in Article 13(2) of the Universal Declaration of Human Rights which states, 'everyone has the right to leave any country, including his own, and to return to his country.' United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

<sup>286</sup> Ilan Pappé, *The Idea of Israel: A History of Power and Knowledge* (Verso 2014) 8

<sup>287</sup> Zionist slogan quoted in Diana Muir, 'Text Concerning Zionism: A land without People for a People without land' (*Jewish Virtual Library*, 2008) <<https://www.jewishvirtuallibrary.org/quot-a-land-without-a-people-for-a-people-without-a-land-quot-diana-muir>> accessed 29 July 2018

them the right to become citizens of either States and to move freely between both States. Finally, this chapter concludes that political and legal developments from the beginning of the Zionist project leading up to the British mandate over Palestine continue to impact the realities and prospects for Palestinian refugees because scholars and politicians continue to present the Palestinian refugee crisis as a problem that needs to be dissolved by permanently resettling them beyond territories that became part of Israel.

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### 3.1. The Jewish State: A Solution to Anti-Semitism

In the late 1880s, the rise in anti-Semitism in Europe<sup>288</sup> led the father of political Zionism Theodor Herzl, to seek a solution to the Jewish Question.<sup>289</sup> Herzl argued that the restoration of the Jewish State would end anti-Semitism in Europe.<sup>290</sup> Herzl favoured establishing the Jewish State in Palestine, but he also considered South America and Africa.<sup>291</sup> In his private diary entries, Herzl argued that '[t]he anti-Semites will become our most dependable friends, the anti-Semitic countries our allies'<sup>292</sup> because he presumed, they would be in favour of getting rid of Jews by allowing them to acquire their own country.<sup>293</sup> Therefore, Herzl played on the anti-Semitic tendencies of imperial powers to persuade them to support the establishment of a Jewish State. For example, in a letter addressed to the German Kaiser, Herzl wrote:

If Jews emigrate, this must result in a decrease in emigration to America. You thereby gain, or, rather, preserve, genuine German citizens, forestall a revolution which might be hard to contain, weaken socialism which the oppressed Jews must flock to because they are cast out by other parties, and gain time for the solution of the social problems.<sup>294</sup>

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<sup>288</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 19

<sup>289</sup> Ibid 7

<sup>290</sup> Israel Ministry of Foreign Affairs, 'Herzl and Zionism' (*Israel Ministry of Foreign Affairs*, 20 July 2004) <<http://mfa.gov.il/MFA/MFA-Archive/2004/Pages/Herzl%20and%20Zionism.aspx>> accessed 29 July 2018

<sup>291</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 69

<sup>292</sup> Ibid 84

<sup>293</sup> Ibid 397

<sup>294</sup> Ibid 62

Similarly, when Herzl approached the British empire, he claimed that the establishment of a Jewish State will help Britain solve the problem of an ongoing flow of Jewish refugees fleeing from Russia.<sup>295</sup>

Herzl also considered the approval of imperial powers for the establishment of the Jewish State necessary because the mass exodus of the Jews was an 'enormous job of transportation, unprecedented in the modern world'<sup>296</sup> which required 'emigration treaties with the heads of some states, transit treaties with others, [and] formal guarantees from all of them.'<sup>297</sup>

In 1896 Herzl called for the establishment of the Jewish State in Palestine (which was under Ottoman rule) in a pamphlet entitled 'The Jewish State.'<sup>298</sup> Herzl wanted to acquire 'Palestine under international law'<sup>299</sup> through the diplomatic backing of imperial powers.<sup>300</sup> Herzl equated legitimacy under international law with the approval of great powers because he believed that '[i]n International dealings there is neither justice nor humaneness.'<sup>301</sup> Herzl also wanted to ensure the supremacy of the Jewish claim over the land through international law<sup>302</sup> by securing the independence of the '[Jewish] State through treaties under public law, and the land through purchases under civil law.'<sup>303</sup>

According to Herzl Jews had a right to acquire Palestine under international law because:

No piece of land has been coveted by so many, and out of that passion it remained desolate and destroyed. But we believe that this desolate corner of the Orient has not only a past, but just as ourselves, has also culture. On this land, where so little grows now, ideas for all of mankind have grown; and it is because of this that no one can

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<sup>295</sup> Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 203, 207

<sup>296</sup> Ibid 28

<sup>297</sup> Ibid 27

<sup>298</sup> Theodor Herzl, *The Jewish State: An attempt at a modern solution for the Jewish Question* (1943 edn, Zionist Organization of America)

<sup>299</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 355

<sup>300</sup> Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn Weidenfield & Nicolson 2013)157; Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (Thomas Yoseloff Ltd 1960) 336

<sup>301</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 285

<sup>302</sup> Ibid 47

<sup>303</sup> Ibid 182

deny that there is an undeniable link between us and this land—if there ever existed any legal claim to any territory on this earth.<sup>304</sup>

Herzl's logic failed to account for the fact that existing inhabitants in Palestine also considered themselves rightful claimants over Palestine.<sup>305</sup>

### 3.2. The First Zionist Congress in Basel

In 1887 Herzl convened the First Zionist Congress in Basel which declared that 'Zionism seeks to establish a home for the Jewish people in Palestine secured under public law.'<sup>306</sup> The First Zionist Congress established the World Zionist Organization [WZO] as a representative of the aspiration of the Jewish people.<sup>307</sup> The Congress also established the Society of Jews and the Jewish company. The Society of Jews was responsible for organizing emigration to Palestine and acted as their legal representative in Palestine<sup>308</sup> while the Jewish Company was responsible for settlements and buying land in Palestine.<sup>309</sup> In his diary, Herzl also revealed that '[s]hould the [Great] Powers declare themselves willing to admit our sovereignty over a neutral piece of land, then the Society will enter into negotiations for the possession of this land.'<sup>310</sup> The Jewish National Fund, established in 1901, was also responsible for buying land in Palestine for Jewish settlements.<sup>311</sup> The WZO also established the Zionist Bank<sup>312</sup> and the Jewish Colonial Trust<sup>313</sup> to fund the mass

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<sup>304</sup> Theodore Herzl quoted in Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 160-61

<sup>305</sup> Arguably Herzl's approach mirrors the imperial 'terra nullius' doctrine.' Terra nullius is a Latin term meaning "land belonging to no one". British colonisation and subsequent Australian land laws were established on the claim that Australia was terra nullius, justifying acquisition by British occupation without treaty or payment. This effectively denied Indigenous people's prior occupation of and connection to the land.' Australians Together, 'Mabo and Native Title' (*Australians Together*, n.d.) <<https://australianstogether.org.au/discover/australian-history/mabo-native-title/>> accessed 20 October 2021

<sup>306</sup> Israel Ministry of Foreign Affairs, 'Herzl and Zionism' (*Israel Ministry of Foreign Affairs*, 20 July 2004) <<http://mfa.gov.il/MFA/MFA-Archive/2004/Pages/Herzl%20and%20Zionism.aspx>> accessed 29 July 2018

<sup>307</sup> Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn Weidenfield & Nicolson 2013) 125

<sup>308</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 126-27

<sup>309</sup> Ibid 126-7

<sup>310</sup> Theodor Herzl, *The Jewish State: An attempt at a modern solution for the Jewish Question* (1943 edn, Zionist Organization of America) 20

<sup>311</sup> Matthew Gilbert, *The Story of Israel* (*Andre Deutsch Ltd*, 2008) 8

<sup>312</sup> 'Zionism: Jewish Colonial Trust' (*The Jewish Virtual Library*)

<<https://www.jewishvirtuallibrary.org/jewish-colonial-trust>> accessed 23 February 2021

<sup>313</sup> David B Green, '1899: A Zionist Trust Is Formed to Settle Palestine' (*Haaretz*, 20 March 2015)

emigration of Jews from Europe to Palestine. All these organizations worked together to allow for the transition from a 'society to a state.'<sup>314</sup> By the start of the 20<sup>th</sup> century, these efforts succeeded in establishing numerous Jewish settlements across Palestine.

Existing communities in Palestine were not allowed to live or work in Jewish settlements.<sup>315</sup> Moreover, Herzl's diary reveals a determination to relocate existing inhabitants to make way for Jewish settlers. These plans were described in detail when he was planning to send Jews to South America. Herzl was planning to give targeted republics 'loans in return for their territorial privileges and guarantees.'<sup>316</sup> Herzl wrote that '[o]ne of the most important concessions they [Republics] will have to make to us is to allow us to have a defensive force. In the beginning we shall need their permission. Gradually we shall get strong, grant ourselves everything that we need, and be able to defy everyone'<sup>317</sup> and 'become a match for all the republics together.'<sup>318</sup> Moreover, Herzl presumed that the local population would be willing to voluntarily part 'with the land'<sup>319</sup> and that it would be easy to relocate them to another country by bringing 'immediate prosperity to the absorbing country.'<sup>320</sup> Herzl also wanted 'to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment' in the Jewish State.<sup>321</sup> Herzl had a similar plan when he targeted Palestine. In his diary, Herzl revealed that he planned to offer the Ottoman Empire a loan by instalment to straighten out its finances in exchange for allowing Jews to immigrate to Palestine and buy land without any restrictions.<sup>322</sup> Herzl expected that by the time the loan was paid up the number of Jewish immigrants and their military power would have increased to an extent that they no longer had to fear the Turks.<sup>323</sup> Herzl failed to persuade the Ottoman Empire to allow an unlimited number of Jews to

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<<https://www.haaretz.com/jewish/.premium-1899-a-zionist-trust-is-formed-to-settle-palestine-1.5340163>> accessed 23 February 2021

<sup>314</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 86

<sup>315</sup> *Ilan Pappé, A History of Modern Palestine* (Cambridge University Press 2004) 51,55

<sup>316</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 70

<sup>317</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 70

<sup>318</sup> *Ibid* 92

<sup>319</sup> *Ibid* 92

<sup>320</sup> Herzl quoted in Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 98

<sup>321</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 88

<sup>322</sup> Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 151

<sup>323</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 412

immigrate to Palestine and buy land because Sultan Abdul Hamid believed a 'Charter granting territorial autonomy...would ultimately lead to an entity with something close to sovereign status.'<sup>324</sup>

This did not stop Herzl's determination to take over Palestine and relocate existing communities by buying land from locals under false pretences. Herzl's plan included the establishment of a centralized system of land purchase which would conduct 'preliminary research in land register...through discreet inquiries and investigations of specific situations.'<sup>325</sup> Then the WZO would send secret agents and local agents 'who must not know they work for the secret agent'<sup>326</sup> to offer the local population 'excessive prices' for their immovable property to make them 'believe that they are cheating us, selling us things more than they are worth. But we are not going to sell them anything back.'<sup>327</sup> The secret agents were expected to conduct simultaneous purchases to prevent price increases.<sup>328</sup> Thereafter, all the land and real estate would be sold and 'traded only among Jews.'<sup>329</sup> Herzl presumed that few local estate owners will not be willing to sell their land. These types of people were to be 'offered a complete transportation—to any place they wish'<sup>330</sup> because Herzl did not want existing inhabitants to remain in the Jewish State. Existing non-Jewish inhabitants were only expected to stay temporarily to 'kill wild animals that Jews are not used to'<sup>331</sup> or to build the necessary infrastructure for the establishment of the Jewish State.<sup>332</sup>

### 3.3. Greater Palestine and Biblical Prophecies

Political Zionism from its inception wanted to take over as much territory as it could in Palestine and beyond. This was evident when the Chancellor of the German Reich, Prince Chlodwig von Hohenlohe-Schillingsfurst, inquired whether Herzl wanted territory up to Lebanon or beyond, Herzl replied '[w]e will ask for what we need-the more immigrants, the

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<sup>324</sup> Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 202

<sup>325</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 90

<sup>326</sup> *Ibid* 89

<sup>327</sup> *Ibid* 88

<sup>328</sup> *Ibid* 145

<sup>329</sup> *Ibid* 89

<sup>330</sup> *Ibid* 90

<sup>331</sup> *Ibid* 98

<sup>332</sup> *Ibid* 208

more land.<sup>333</sup> Herzl made a similar statement when he met the Grand Vizier of the Ottoman Empire. When the Grand Vizier observed 'Palestine is large. What part of it do you have in mind?' Herzl replied that this would 'have to be weighed against the benefits we offer. For more land we shall make more sacrifices.'<sup>334</sup> According to Herzl's diary, this expansionist approach in Palestine was proposed by two British Jews: Samuel Montague, who was a British Member of the British Parliament, and Colonel Albert Goldsmid. Herzl's diary entries reveal that both men told him that they wanted to see the establishment of Greater Palestine.<sup>335</sup> Montague who did not want to appear to be supporting the establishment of a Jewish State<sup>336</sup> proposed buying Palestine from the Ottoman Empire<sup>337</sup> for two million pounds.<sup>338</sup> While Goldsmid observed that 'the pious Christians of England would help the [Jews] if they go to Palestine' because they 'expect the coming of the Messiah after the Jews have returned home.'<sup>339</sup> Reverend William Henry Hechler, who was the Chaplain to the British Embassy in Vienna, also became his staunchest supporter because he believed that Herzl's quest fulfilled a biblical prophecy of Palestine being restored to the Jews.<sup>340</sup> Hechler had calculated that the prophecy would take place between 1897 and 1898 which is the same period that Herzl's pamphlet 'The Jewish State' was published.<sup>341</sup> According to Herzl's diary, Hechler spread before him a map of Palestine and declared '[w]e have prepared the ground for you!'<sup>342</sup> Hechler helped Herzl by introducing him to the Grand Duke of Baden<sup>343</sup> who was shown the 'prophetic tables.'<sup>344</sup> King Victor Emmanuel of Italy also supported Herzl because he reportedly stated '[t]he land [referring to Palestine] is already very Jewish. It will and must become yours; it is only a question of time. Wait till you have half a million Jews there.'<sup>345</sup> King Emmanuel also referred to Napoleons attempt to re-establish the Sanhedrin which is the supreme Jewish religious and judicial authority in Palestine.<sup>346</sup>

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<sup>333</sup> Theodore Herzl quoted in Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 8

<sup>334</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 375-6

<sup>335</sup> Ibid 280, 285

<sup>336</sup> Ibid 350

<sup>337</sup> Ibid 306

<sup>338</sup> Ibid 308

<sup>339</sup> Ibid 382

<sup>340</sup> Ibid 310, 319

<sup>341</sup> Ibid 310

<sup>342</sup> Ibid 311

<sup>343</sup> Ibid 329

<sup>344</sup> Ibid 328

<sup>345</sup> King Victor Emmanuel of Italy quoted in Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, London, Weidenfield & Nicolson 2013) 252

<sup>346</sup> Ibid 253



### 3.4. Colonialism and The road map to Israel

In his quest to establish a Jewish State Herzl presented the Jewish State as a colonial project that would be part of a 'rampart of Europe against Asia, an outpost of civilization as opposed to barbarism. As a neutral state, we shall remain in contact with all of Europe, which would have to guarantee our existence.'<sup>347</sup> When Herzl approached the British empire, he also claimed that by supporting the establishment of a Jewish State 'the Empire will be expanded by a rich colony...which will be a huge conquest.'<sup>348</sup> In a letter addressed to the Grand Duke of Baden, Herzl also wrote 'if it is God's will that we return to our historic fatherland, we should like to do so as representatives of Western civilization, and bring cleanliness, order, and the well-distilled customs of the Occident to this plague-ridden, blighted corner of the Orient.'<sup>349</sup> Herzl also ensured Britain that if it becomes the 'protecting power of the Jews,' Jews throughout the world would become loyal subjects and agents to the British Empire. Herzl wrote:

At a stroke England will get ten million secret but loyal subjects active in all walks of life all over the world...all of them will place themselves at the service of the magnanimous nation that bring long desired help. England will get ten million agents for her greatness and influence...It is surely no exaggeration to say that a Jew would rather purchase and propagate the products of a country that have rendered the Jewish people a benefaction.<sup>350</sup>

Herzl's promise to the British Empire was upheld in the First World War when Zionists supported the British side through various ways including intelligence assistance.<sup>351</sup> Herzl made a similar promise to Czarist Russia when he requested his support for a Jewish settlement in Palestine.<sup>352</sup> Czarist Russia became the first Empire to declare its public support for the Zionist project in Palestine. The Czar of Russia published a statement stating:

If the meaning of Zionism is the wish to create an independent state in Palestine and promise the emigration from Russia of a certain number of our Jewish subjects, then

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<sup>347</sup> Theodor Herzl quoted in Ibid 123

<sup>348</sup> Theodor Herzl quoted in Ibid 209

<sup>349</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 343

<sup>350</sup> Ibid 209

<sup>351</sup> Ilan Pappé, *A History of Modern Palestine: One Land Two Peoples* (Cambridge University Press 2004) 63

<sup>352</sup> Shlomo Avineri, *Herzl: Theodore Herzl and the Foundation of the Jewish State* (1<sup>st</sup> edn, Weidenfield & Nicolson 2013) 223

the Russian government will be willing to view it favourable...in this case [Zionists] can count on the moral and material support of the Russian Government.<sup>353</sup>

Herzl's colonial language suggests that political Zionism was a national movement that wanted to be an integral part of the colonialist project.<sup>354</sup> Despite this, his diary entries suggest that Herzl wanted to establish a Jewish State based on international law so that the Jewish State can outlive colonial empires. This was evident when during his visit to the Russian Embassy in Istanbul he indicated that he 'took precaution of speaking first only of colonialism...on a large scale' when in fact what he wanted was an 'autonomous' territory in Palestine.<sup>355</sup> Herzl also revealed in his diary that he was willing to play 'world powers against each other'<sup>356</sup> and to 'manipulate world history' for the sake of his cause<sup>357</sup> and predicted that:

[T]he next European War cannot harm our enterprise, but only benefit it, because all Jews will transport all their belongings across, to safety...incidentally, when peace is concluded we shall already have a say as money-givers and achieve advantages of recognition through diplomatic channels.<sup>358</sup>

Herzl's prediction came true after events between the First World War [WWI] and the Second World War [WWII] justified dispossessing Palestinians from their right to self-determination because of colonial powers involved in the establishment of Israel incorporating the Zionist interpretation of the idea of Israel within their proposals for the future of Palestine after the dissolution of the Ottoman Empire in 1923.

### **3.5. The Balfour Declaration & Great Britain's determination to establish a national home for Jews in Palestine**

Before the dissolution of the Ottoman Empire at the Lausanne Peace Conference, three proposals sought to determine the future of Palestine after the end of WWI and they are the

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<sup>353</sup> Czar quoted in Ibid 232

<sup>354</sup> Theodor Herzl, *The Complete Diaries of Theodor Herzl*, Raphael Patai ed (1960 edn, Thomas Yoseloff Ltd) 420

<sup>355</sup> Ibid 373-374

<sup>356</sup> Ibid 333

<sup>357</sup> Ibid 391; See also 397

<sup>358</sup> Ibid 65

secret Hussein- McMahon correspondence of 1915-1916,<sup>359</sup> the Sykes-Picot Agreement of 1916<sup>360</sup> and the Balfour Declaration of 1917.<sup>361</sup> Pappé offers a succinct summary for all three proposals by observing that '[t]he first associated the future of Palestine with that of an Arab Hashemite Kingdom in the Arab world; the second proposed placing Palestine under Anglo-French colonial rule; and the last envisaged it as a future Jewish state.'<sup>362</sup>

The Arab Hashemite Kingdom did not materialize because in 1916 Britain and France divided the Ottoman territory between them in the secret Sykes-Picot agreement.<sup>363</sup> After reaching this agreement the British Foreign Secretary Arthur James Balfour wrote a letter to Lord Rothschild on 2 November 1917 declaring that:

His Majesty's government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.<sup>364</sup>

When Balfour made this declaration the population in Palestine totalled 700,000 of which only 60,000 were Jews.<sup>365</sup> By December 1917 Britain was in a position to pave the way for the establishment of a Jewish national home in Palestine because Britain took control of Jerusalem from the Ottoman Empire and imposed its military control over Palestine.<sup>366</sup>

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<sup>359</sup> 'Pre-State Israel: The Hussein- McMahon Correspondence (15 July- August 1916)' (*Jewish Virtual Library*, n.d.) <<https://www.jewishvirtuallibrary.org/the-hussein-mcmahon-correspondence-july-1915-august-1916>> accessed 23 February 2021

\* The First World War lasted from 28 July 1914 to 11 November 1918.

<sup>360</sup> 'Sykes-Picot agreement text' (*UNISPAL*, 16 May 1976) <<https://unispal.un.org/UNISPAL.NSF/0/232358BACBEB7B55852571100078477C>> accessed 23 February 2021

<sup>361</sup> Arthur James Balfour, 'The Balfour Declaration' (*Israel Ministry of Foreign Affairs*, 2 November 1917) <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/The-Balfour-Declaration.aspx>> accessed 12 February 2018

<sup>361</sup> Ibid

<sup>362</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 68

<sup>363</sup> Ibid 66-67

<sup>364</sup> Arthur James Balfour, 'The Balfour Declaration' (*Israel Ministry of Foreign Affairs*, 2 November 1917) <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/The-Balfour-Declaration.aspx>> accessed 12 February 2018

<sup>365</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 73

<sup>366</sup> Eitan Bar-Yosef, 'The Last Crusade? British Propaganda and the Palestine Campaign, 1917-18' (2001) 36 (1) *Journal of Contemporary History*, 1 <<http://www.jstor.org/stable/261132>> accessed 12 February 2018

A Memorandum by Balfour in 1919 reveals that there was no intention to consult existing communities in Palestine on the establishment of a Jewish State.<sup>367</sup> We introduce this lengthy quote because it demonstrates how the commitment of Britain and the allied powers to Zionism led them to disregard the desires of existing inhabitants in Palestine. Balfour wrote:

[I]n Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country...The four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land... Whatever deference should be paid to the view of those living there, the Powers in their selection of a mandatory [powers] do not propose...to consult them.<sup>368</sup>

Balfour expressed the above views even though the Inter-Allied Commission on Mandates in Turkey<sup>369</sup> reported on 29 August 1919 that '[t]he fact came out repeatedly in the Commission's conference with Jewish representatives that the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of land purchase.'<sup>370</sup>

According to Burkett:

The [Balfour] declaration was, in part, a gift to Chaim Weizmann, a British Jewish chemist who'd developed a new process to synthesize acetone, an essential component in the production of cordite essential for the ammunition Britain needed to win the war. Lord Balfour had asked what payment Weizmann wanted in return for use of his process. A national home for my people, he replied.<sup>371</sup>

Montague who described himself as 'one Jewish Minister in the [British] Government,' opposed the Balfour Declaration in the 'Memorandum to the British Government of Edwin Montagu on the Anti-Semitism of the Present (British) Government.'<sup>372</sup> The argument set

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<sup>367</sup> Noam Chomsky, *Fateful Triangle: The United States, Israel & the Palestinians* (Pluto Press 1999) 90

<sup>368</sup> Lord Balfour quoted in Ibid 90

<sup>369</sup> Widely referred to as the King-Crane Commission.

<sup>370</sup> Inter-Allied Commission quoted in Jeremy Salt, *The Unmaking of the Middle East: A History of Western Disorder in Arab Land* (University of California Press 2008) 126

<sup>371</sup> Elinor Burkett, *Golda Meir: The Iron Lady of the Middle East* (Gibson Square 2008) 39-40

<sup>372</sup> Edwin Montagu, 'Montagu Memo on British Government's Anti-Semitism' (*Jewish Virtual Library*, 23 August 2017)

<<http://www.jewishvirtuallibrary.org/montagu-memo-on-british-government-s-anti-semitism>> accessed 12 February 2018

forward by Montague in his memorandum is important in the context of the RTR for Palestinian refugees because he foresaw how the establishment of a Jewish State would strip them from all rights. Montague was against reconstructing Palestine as the 'national home of the Jewish people' because such an approach would mean that Muslims and Christians would have 'to make way for the Jews and that the Jews should be put in all positions of preference and should be peculiarly associated with Palestine...[while] Turks and ...[Muslims] in Palestine will be regarded as foreigners.'<sup>373</sup> Montague also noted that reconstructing Palestine as the 'national home of the Jewish people' could lead to a situation in which citizenship is only granted because of 'a religious test.'<sup>374</sup> Montague argued that such a test could only be accepted 'by those who take a bigoted and narrow view of one particular epoch of the history of Palestine and claim for the Jews a position to which they are not entitled.'<sup>375</sup> Montague argued that Jews were not entitled to an exclusive right in Palestine because Palestine played an important part in the history of Jews, Christians and Muslims.<sup>376</sup> Montague also observed that Palestine cannot absorb all the Jews in the world even 'if all the population' was driven out.<sup>377</sup> Despite this Montague called upon the British Government to 'obtain for Jews in Palestine complete liberty of settlement and life on an equality with the inhabitants of that country who profess other religious beliefs.'<sup>378</sup>

### 3.6. The Palestine Mandate

Montague's concern that reconstructing Palestine as the 'national home of the Jewish people' would lead 'Turks and...[Muslims] in Palestine...[to] be regarded as foreigners'<sup>379</sup> became a reality after Palestine came under the administration of Britain on 25 April in 1920 at the San Remo Conference.<sup>380</sup> Britain's right to administrate Palestine was approved by the League of Nations on 24 July 1922.<sup>381</sup>

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<sup>373</sup> Ibid

<sup>374</sup> Ibid

<sup>375</sup> Ibid

<sup>376</sup> Ibid

<sup>377</sup> Ibid

<sup>378</sup> Ibid

<sup>379</sup> Ibid

<sup>380</sup> Avital Ginat, 'British Mandate for Palestine' (*International Encyclopaedia of the First World War*, n.d.) <[https://encyclopedia.1914-1918-online.net/article/british\\_mandate\\_for\\_palestine](https://encyclopedia.1914-1918-online.net/article/british_mandate_for_palestine)> accessed 7 December 2018

<sup>381</sup> League of Nations, 'Mandate for Palestine - League of Nations (12 August 1922)' (*UNISPAL*, 12 August 1922) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/2FCA2C68106F11AB05256BCF007BF3CB>> accessed 12 February 2018

According to Article 22 of the Covenant of the League of Nations, the League of Nations will support '[c]ertain communities formerly belonging to the Turkish Empire' to become 'independent nations' and that '[t]he wishes of these communities must be a principal consideration in the selection of the Mandatory.'<sup>382</sup> Despite this, the preamble of the Palestine Mandate stated that Britain should fulfil the promise made in the Balfour declaration by establishing 'in Palestine of a national home for the Jewish people.'<sup>383</sup> The Palestine Mandate reaffirmed 'that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.'<sup>384</sup> Despite this, the Palestine Mandate recognized 'the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country'<sup>385</sup> but failed to recognize that existing non-Jewish inhabitants also have a historic connection to Palestine and a right to establish their national home in Palestine. Moreover, Article 2 of the Palestine Mandate which accorded Jews the right to establish a 'Jewish national home' in Palestine only accorded existing inhabitants 'civil and religious rights'<sup>386</sup> but failed to accord them political rights. Furthermore, Article 9 of the Palestine Mandate, which is the only article that refers to natives, placed foreigners and natives on the same footing by stating that 'the judicial system will guarantee the rights of foreigners and natives in term of their 'personal status...and...religious interests.'<sup>387</sup>

The Palestine Mandate also denied existing non-Jewish Inhabitants the right to develop Palestine. This is evident by the fact that Article 4 of the Palestine Mandate only recognized the 'Jewish agency...as a public body' that should 'assist in the development of the country'<sup>388</sup> while Article 11 of the Palestine Mandate gave the Jewish agency widespread powers in terms of 'construct[ing] or operat[ing]...any public works, services and utilities, and to develop any of the natural resources of the country.'<sup>389</sup>

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<sup>382</sup> League of Nations, 'The Covenant of the League of Nations' (*The Avalon Project*, 28 June 1919) <[http://avalon.law.yale.edu/20th\\_century/leagcov.asp#art22](http://avalon.law.yale.edu/20th_century/leagcov.asp#art22)> accessed 29 April 2018

<sup>383</sup> League of Nations, 'Mandate for Palestine - League of Nations (12 August 1922)' (*UNISPAL*, 12 August 1922)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/2FCA2C68106F11AB05256BCF007BF3CB>> accessed 12 February 2018, Article 22

<sup>384</sup> Ibid 2

<sup>385</sup> Ibid 2

<sup>386</sup> Ibid Article 2

<sup>387</sup> Ibid Article 9

<sup>388</sup> Ibid Article 4

<sup>389</sup> Ibid Article 11

Article 7 of the Palestine Mandate which made Britain 'responsible for enacting a nationality law,' also suggests that the Palestine Mandate sought to establish one state in Palestine because it only required Britain 'to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine,' while no such provision was provided for non-Jewish inhabitants of Palestine who were living abroad.<sup>390</sup> Article 28 of the Palestine Mandate also indicates that upon the termination of the mandate only one government will exist in Palestine and that is 'the Government of Palestine' which was expected to 'honour the financial obligations legitimately incurred by the Administration of Palestine during the period of the mandate.'<sup>391</sup>

The fact that the Palestine Mandate did not confirm the right to self-determination for existing non-Jewish inhabitants in Palestine suggests that such communities were expected to face a similar faith to minorities residing in newly founded States in Europe. Such States 'were required to conclude with the Principal Allied forces treaties guaranteeing that minorities residing in the newly founded States had racial, religious, linguistic rights and political rights.'<sup>392</sup> However, in the case of Palestine non-Jewish communities were not privileged enough to be accorded even political rights.

### **3.7. The Lausanne Peace Treaty in 1923**

In contrast to the Palestine Mandate, the Lausanne Peace Treaty signed with Turkey in 1923, which concluded the peace with the victorious Allies in WWI sought to protect the political rights of existing inhabitants in Palestine.<sup>393</sup> Article 30 of the Lausanne Peace Treaty stated that 'Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipso facto, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.'<sup>394</sup> Article 34 of the Lausanne Treaty also protected the rights of Turkish citizens residing abroad by stating that:

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<sup>390</sup> Ibid Article 7

<sup>391</sup> Ibid Article 28

<sup>392</sup> Edward Hallett Carr, *International Relations Between the Two World Wars* (Palgrave 2002) 13

<sup>393</sup> 'Lausanne Peace Treaty' (*Republic of Turkey Ministry of Foreign Affairs*, 24 July 1923)

<[http://www.mfa.gov.tr/lausanne-peace-treaty-part-i\\_-political-clauses.en.mfa](http://www.mfa.gov.tr/lausanne-peace-treaty-part-i_-political-clauses.en.mfa)> accessed 16 June 2018

<sup>394</sup> Ibid Article 30

Turkish nationals of over eighteen years of age who are natives of a territory detached from Turkey under the present Treaty, and who on its coming into force are habitually resident abroad, may opt for the nationality of the territory of which they are natives, if they belong by race to the majority of the population of that territory, and subject to the consent of the Government exercising authority therein. This right of option must be exercised within two years from the coming into force of the present Treaty.<sup>395</sup>

Article 34 indicates that existing inhabitants in Palestine should have become citizens of the Government that took control over Palestine.<sup>396</sup> Ottoman citizens in Palestine, however, did not become British Nationals under the Palestine Mandate because Britain was temporarily administering Palestine. Despite this Britain was determined to clarify citizenship rights in Palestine for Jews in the 'Convention Great Britain –Palestine in respect to rights in Palestine' which was signed with the United States of America on 3 December 1924 [1924 Convention].<sup>397</sup> Article 7 of the 1924 Convention stated '[t]he Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.'<sup>398</sup> Although Article 7 did not address citizenship rights for existing inhabitants this article arguably applies to them because Article 15 confirms that '[n]o discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.'<sup>399</sup> This could explain why when Britain enacted the Palestine Citizenship Order in 1925<sup>400</sup> Arab Palestinians and Jews were given the Palestinian citizenship.

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<sup>395</sup> Ibid Article 34

<sup>396</sup> Ibid Article 34

<sup>397</sup> 'Rights in Palestine' (*Library of Congress*, 3 December 1924)

<<https://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0417.pdf>> accessed 12 February 2018, 1

<sup>398</sup> Ibid Article 7

<sup>399</sup> Ibid Article 15

<sup>400</sup> Mutaz Qafisheh, 'The International Law Foundations of Palestinian Nationality: A Legal Examination of Nationality in Palestine under Britain's Rule' (*BRILL*, 2008)

<<https://ebookcentral-proquest-com.abc.cardiff.ac.uk/lib/Cardiff/detail.action?docID=468339>> accessed 12 February 2018



### 3.8. The Palestine Citizenship Order in Council of 1925

Banku observes that:

At no other time except between 1925 and 1948 did a Palestinian citizen exist' and that 'citizenship laws of the successor states of [Mandate] Palestine (Israel, the West Bank under Jordanian administration, Gaza under Egyptian administration and the current Palestinian Authority) have included some elements of Ottoman nationality legislation and Palestine Mandate citizenship legislation.<sup>401</sup>

The Palestine Citizenship Order, which was based on the British Nationality and Status of Aliens Act of 1914,<sup>402</sup> declared in Article 1 that 'Turkish subjects habitually resident in Palestine on 1 August 1924 to automatically be Palestinian citizens on 1 August 1925.'<sup>403</sup> Article 1 of the Palestine Citizenship Order which transformed Ottoman subjects habitually resident on 1 August 1924 into Palestinian citizens on 1 August 1925:

[D]id not account for inhabitants who had been given provisional nationality under the 1922 Legislative Election... It also did not account for Ottoman subjects resident abroad on 1 August 1924. Individuals who had Ottoman nationality under the 1869 law but were stateless were also not considered automatic Palestinian citizens.... In total, the number of Ottoman citizens resident in Palestine on the date of the order who became Palestinian citizens was nearly 730,000.<sup>404</sup>

Article 2 of the Palestine Citizenship Order gave Ottoman nationals residing outside Palestine on 1 August 1925 the right to opt for a Palestinian Citizenship if they were over 18 years old, born in Palestine and had been in Palestine for six months.<sup>405</sup> One had to opt for a Palestinian citizenship between 1 August 1925 and 31 July 1927.<sup>406</sup> In November 1925 Britain's High Commissioner to Palestine<sup>407</sup> changed the start date for opting for a

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<sup>401</sup> Lauren Banko, 'The Creation of Palestinian Citizenship under an International Mandate: Legislation, Discourses and Practices, 1918–1925' (2012) 16 (5-6) *Citizenship Studies*, 643 <<https://doi.org/10.1080/13621025.2012.698487>> accessed 16 June 2018

<sup>402</sup> Mutaz M Qafisheh, 'The International Law Foundations of Palestinian Nationality: A Legal Examination of Nationality in Palestine under Britain's Rule' (*BRILL*, 2008) <<https://ebookcentral-proquest-com.abc.cardiff.ac.uk/lib/Cardiff/detail.action?docID=468339>> accessed 12 February 2017, 83

<sup>403</sup> Lauren Banko, 'The Creation of Palestinian Citizenship under an International Mandate: Legislation, Discourses and Practices, 1918–1925' (2012) 16 (5-6) *Citizenship Studies*, 651-652 <<https://doi.org/10.1080/13621025.2012.698487>> accessed 16 June 2018

<sup>404</sup> *Ibid* 651-652

<sup>405</sup> *Ibid* 652

<sup>406</sup> *Ibid* 652

<sup>407</sup> Samuel Herbert.

Palestinian citizenship from 1 August 1925 to 1 August 1924.<sup>408</sup> As a result of this change, many Palestinians who were Ottoman citizens became stateless persons. Banku observes that:

Palestinians habitually abroad on 1 August 1924 lost Ottoman citizenship with the Treaty of Lausanne and were unaccounted for in the Citizenship Order-in-Council. Similarly, those residents abroad on 1 August 1925 who could not return to opt for citizenship within the given timeframe lost their Ottoman nationality and had not been given a new nationality by the Palestine Citizenship Order unless they returned to Palestine with six months to spare before the end of July 1926 to meet the residency requirement to apply for citizenship. These individuals usually also needed an unexpired provisional certification of nationality or otherwise needed to prove they or their father had been an Ottoman subject not only to opt for citizenship but also to leave their residence abroad and travel. Without a clear status, these Palestinians often could not obtain the proper travel documents to return to Palestine to reside for the required time period... These Palestinians, then, could not simply reside anywhere, since they had become stateless and without any diplomatic protection.<sup>409</sup>

The former Attorney General of Palestine claimed that under the Palestine Citizenship order 'Arabs and Jews were equally Palestinian citizens.'<sup>410</sup> However, this was not the case because while natives of Palestine living abroad were hindered from becoming Palestinian citizens Jews immigrating to Palestine could be naturalized by showing a provisional certificate of nationality which proved that they have been residents in Palestine since October 1922 or by declaring that they intend to reside permanently in Palestine.<sup>411</sup> Moreover, the Home Office in Britain indicated that it did not want the Palestinian citizenship 'to be passed on indefinitely for former Ottoman subjects residing outside of Palestine.'<sup>412</sup> This explains why the Palestine Citizenship Order stated that those born in Palestine were entitled to become Palestinian citizens, but no reference was made to natives. This was intentional because Britain wanted to ensure that 'descendants of Palestinians with Ottoman nationality were not...ipso facto Palestinians. It also meant that the order did not follow international standards, British nationality law and the 1869 Ottoman law which all stated that children receive their nationality by blood.'<sup>413</sup>

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<sup>408</sup> Lauren Banko, 'The Creation of Palestinian Citizenship under an International Mandate: Legislation, Discourses and Practices, 1918–1925' (2012) 16 (5-6) *Citizenship Studies*, 652 <<https://doi.org/10.1080/13621025.2012.698487>> accessed 16 June 2018

<sup>409</sup> *Ibid* 652-653

<sup>410</sup> *Ibid* 651

<sup>411</sup> *Ibid* 652

<sup>412</sup> *Ibid* 652

<sup>413</sup> *Ibid* 652

In conclusion, while the Lausanne Peace Treaty expected nationals of territories detached from the Ottoman Empire to become nationals of the government that took control of territories that belonged to the Ottoman Empire the Palestine Mandate and the Palestine Citizenship order placed hurdles and restrictions that did not allow all natives of Palestine to become Palestinian citizens. Palestinians studying, working, or living abroad who became stateless refugees because of these restrictions are not accounted for when scholars address the Palestinian refugee problem that emerged around the time that Israel was established in 1948. We call this group of Palestinians the forgotten refugees.

### 3.9. The end of the Second World War and the Birth of the Jewish State

When the British Empire Administrated Palestine the WZO bought 'land from the big landlords and evict[ed] the tenants.'<sup>414</sup> This led to clashes between Jewish migrants and existing communities. These clashes led the Shawn Commission in 1930 to recommend 'the exclusion of the Balfour Declaration from the Mandate charter and a limitation on Jewish immigration and land purchase.'<sup>415</sup> After Britain failed to heed the advice of the Shawn Commission 'minor Arab-Jewish clashes' turned into a widespread revolt in 1936 after the 'Arab Higher Committee...called for a general strike to support the demand for a national government' for Palestine.<sup>416</sup> The British Royal Commission of Inquiry commissioned the Palestine Royal Commission to investigate the cause of unrest<sup>417</sup> and whether 'Arabs or the Jews have any legitimate grievances on account of the way in which the Mandate has been or is being implemented.'<sup>418</sup> On 7 July 1937, the Palestine Royal Commission found:

[T]hough the Mandate was ostensibly based on Article 22 of the Covenant of the League of Nations, its positive injunctions were not directed to the "well-being and development" of the existing Arab population but to the promotion of Jewish interests. Complete power over the legislation as well as administration was delegated to the Mandatory...the establishment of the Jewish national home.<sup>419</sup>

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<sup>414</sup> Ibid 98, 100

<sup>415</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 92

<sup>416</sup> United Nations, 'The Origins and Evolution of the Palestine Problem Part I: 1917-1947 - Study (30 June 1978)' (*UNISPAL*, 30 June 1978)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/aeac80e740c782e4852561150071fdb0?OpenDocument>> accessed 12 February 2018, 32

<sup>417</sup> Ibid 32; The Palestine Royal Commission is widely known as the Peel Commission.

<sup>418</sup> League of Nations, 'Palestine Royal Commission Report' (*His Majesty's Stationary Office*, July 1937) <<https://unispal.un.org/pdfs/Cmd5479.pdf>> accessed 5 June 2017, Vi

<sup>419</sup> Ibid chapter IV section 35

The Palestine Royal Commission concluded that 'the problem cannot be solved by giving either the Arabs or the Jews all they want' and recommended the partition of Mandatory Palestine into a Jewish State and an Arab State.<sup>420</sup> The Palestine Royal Commission also found that for 'Partition... to be effective [and a final settlement to be reached] ...there should be a transfer of land and, as far as possible, an exchange of population.'<sup>421</sup> According to the Palestine Royal Commission, this exchange of population could be voluntary or forced.<sup>422</sup> The Palestine Royal Commission justified the forced exchange of population option based on historic precedence by observing that:

A precedent is afforded by the exchange effected between the Greek and Turkish populations on the morrow of the Greco-Turkish War of 1922... [in which] Greek nationals of the Orthodox religion living in Turkey should be compulsorily removed to Greece, and Turkish nationals of the Moslem religion living in Greece to Turkey. The numbers involved were high--no less than some 1,300,000 Greeks and some 400,000 Turks. But so vigorously and effectively was the task accomplished that within about eighteen months from the spring of 1923 the whole exchange was completed. The courage of the Greek and Turkish statesmen concerned has been justified by the result. Before the operation the Greek and Turkish minorities had been a constant irritant. Now Greco-Turkish relations are friendlier than they have ever been before.<sup>423</sup>

The Palestine Royal Commission imagined a similar future for existing inhabitants in Palestine by recommending their resettlement in Transjordan. The Palestine Royal Commission wrote:

[While] Room exists...within the proposed boundaries of the Jewish State for the Jews now living in the Arab area. It is the far greater number of Arabs who constitute the major problem; and, while some of them could be re-settled on the land vacated by the Jews, far more land would be required for the re-settlement of all of them. Such information as is available justifies the hope that the execution of large-scale plans for irrigation, water-storage, and development in Trans-Jordan, Beersheba and the Jordan Valley would make provision for a much larger population than exists there at the present time.<sup>424</sup>

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<sup>420</sup> Ibid chapter XX section 19

<sup>421</sup> Ibid chapter XXII section 36

<sup>422</sup> 'We think that in the event of Partition friction would be less likely to occur in the hill-country of North Galilee with its wholly Arab population than in the plain-lands where the population is mixed. In the former area, therefore, it might not be necessary to effect a greater exchange of land and population than could be effected on a voluntary basis. But as regards the Plains, including Beisan, and as regards all such Jewish colonies as remained in the Arab State when the Treaties came into force, it should be part of the agreement that in the last resort the exchange would be compulsory.'

Ibid chapter XXII section 43

<sup>423</sup> Ibid chapter XXII 40

<sup>424</sup> Ibid chapter XXII 1

The Arab High Committee rejected the partition of Palestine.<sup>425</sup> In contrast, Ben Gurion<sup>426</sup> at the Twentieth Zionist Congress in Zurich of 1937, expressed his support for resettling Palestinians because according to him such a transfer 'will make possible a comprehensive settlement programme. Thankfully, the Arab people have vast empty areas.'<sup>427</sup> We believe Ben-Gurion supported the recommendations of the Palestine Royal Commission because a month before it was launched, he met the High Commissioner of Britain and recommended the resettlement of Palestinians in Transjordan and expressed a willingness to finance the resettlement program.<sup>428</sup>

The British Government also supported the partition plan because it acknowledged the:

[I]rreconcilable conflict between the aspirations of Arabs and Jews in Palestine, [and] that these aspirations cannot be satisfied under the terms of the present Mandate...[therefore] a scheme of partition on the general lines recommended by the Commission represents the best and most hopeful solution of the deadlock...[because]...[t]he Arabs would obtain their national independence... [And] secure the establishment of the Jewish national home and relieve it from any possibility of its being subject in the future to Arab rule. It would convert the Jewish national home into a Jewish State.<sup>429</sup>

After the end of WWII in 1945, the League of Nations dissolved on 19 April 1946.<sup>430</sup> Less than a year later the British Government announced in February 1947 that it will refer the problem of administrating Palestine to the newly formed United Nations [UN] 'on the ground that the Mandatory Power was faced with conflicting obligations that proved irreconcilable.'<sup>431</sup> While the UN was dealing with the request of the British Government on 22 July 1946 Jewish extremists blew up King David Hotel in Jerusalem which housed 'the British Mandate secretariat and the military intelligence headquarters' because Britain decided to reduce the number of Jews that can immigrate to Palestine.<sup>432</sup> After this incident,

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<sup>425</sup> 'UN Palestine Commission – Partition recommendation – Communication from the Arab Higher Committee' (*UNISPAL*, 19 January 1948)

<<https://www.un.org/unispal/document/auto-insert-211488/>> accessed 23 February 2021

<sup>426</sup> Then head of the executive committee of the Jewish Agency.

<sup>427</sup> David Ben Gurion quoted in Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004) 48

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>428</sup> Ibid 45-46

<sup>429</sup> Ibid 36

<sup>430</sup> Britannica, 'The League of Nations' (*Britannica*, n.d.) <<https://www.britannica.com/topic/League-of-Nations>> accessed 23 February 2021

<sup>431</sup> Ibid 1

<sup>432</sup> Ibid 8

Britain announced that it will abandon the Palestine Mandate.<sup>433</sup> Shortly afterwards the United Nations Special Committee on Palestine [UNSCOP] recommended the partition of Palestine into an Arab State and a Jewish State in Resolution 181.<sup>434</sup>

Pappé claims that UN officials on the UNSCOP were offered 'a ready-made partition programme by the able and well-prepared Zionist representatives'<sup>435</sup> and that the proposal was similar to one presented by Zionist leaders in 1928 which called for 'the partitioning of Palestine into two political units.'<sup>436</sup> We find this striking because Resolution 181 tried in chapter 3 to address some of the most contentious issues that might arise as a result of Palestine being partitioned into two States. Resolution 181 recommended 'the adoption and implementation, with regard the future Government of Palestine, of the Plan of Partition with Economic Union.'<sup>437</sup> Chapter 3(1) of Resolution 181 established equal citizenship rights for Arabs and Jews. Chapter 3(1) stated:

Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights.<sup>438</sup>

This approach marked an important transformation in the way that existing inhabitants were approached because Resolution 181 linked the right to citizenship based on where one resided in Palestine rather than on the religion of the individual. This means that a Jew residing in the boundaries of the newly formed Arab State should have become a citizen of the Arab State while an Arab residing in the boundaries of the Jewish State would become a citizen of the Jewish State. Although chapter 3(1) clearly links citizenship rights with residency it also stated that Arabs and Jews:

[O]ver the age of eighteen years may opt, within one year from the date of recognition of independence of the State in which they reside, for citizenship of the other State...[and that persons who] opt for citizenship of the other State shall be

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<sup>433</sup> Ibid 8

<sup>434</sup> United Nations, 'A/RES/181(II) of 29 November 1947' (*UNISPAL*, 29 November 1947) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>> accessed 12 February 2018

<sup>435</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2006) 123

<sup>436</sup> Ibid 86

<sup>437</sup> United Nations, 'A/RES/181(II) of 29 November 1947' (*UNISPAL*, 29 November 1947) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>> accessed 12 February 2018

<sup>438</sup> Ibid Chapter 3(1)

eligible to vote in the elections to the Constituent Assembly of that State, but not in the elections to the Constituent Assembly of the State in which they reside.<sup>439</sup>

Chapter 3(2) also stated that the Arab State and the Jewish State:

[S]hall be bound by all the international agreements and conventions, both general and special, to which Palestine has become a party. Subject to any right of denunciation provided for therein, such agreements and conventions shall be respected by the State throughout the period for which they were concluded.<sup>440</sup>

Chapter 3 also called upon '[t]he Provisional Council of Government of each State' to hold democratic elections 'within two months of the withdrawal of Great Britain.'<sup>441</sup> According to chapter 3:

Qualified voters for each State for this election shall be persons over eighteen years of age who are: (a) Palestinian citizens residing in that State and (b) Arabs and Jews residing in the State, although not Palestinian citizens, who, before voting, have signed a notice of intention to become citizens of such State.<sup>442</sup>

Chapter 3 also stated that '[d]uring the transitional period no Jew shall be permitted to establish residence in the area of the proposed Arab State, and no Arab shall be permitted to establish residence in the area of the proposed Jewish State, except by special leave of the Commission.'<sup>443</sup> This restriction would have had a bigger impact on Arab Palestinian because they were going to become foreigners in parts of their former country. Chapter 3 offered a solution to this problem when it stated '[t]he undertaking shall contain provisions preserving freedom of transit and visit for all residents or citizens of both States and of the City of Jerusalem, subject to security considerations; provided that each state and the City shall control residence within its borders.'<sup>444</sup> Britain did not execute Resolution 181. Israel proclaimed its independence on 14 May 1948<sup>445</sup> and Britain terminated its Mandate on 15

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<sup>439</sup> Ibid Chapter 3(1)

<sup>440</sup> Ibid Chapter 3(2)

<sup>441</sup> Ibid Chapter 3

<sup>442</sup> Ibid Chapter 3

<sup>443</sup> Ibid Chapter 3

\*This seems to contradict Chapter 3(1) which refers to the right to opt to become a citizen of either State.

<sup>444</sup> Ibid Chapter 3

<sup>445</sup> 'The Land of Israel was the birth place of the Jewish people...[b]y virtue of the natural and historic right of the Jewish People and the resolution of the General Assembly of the United Nations, we hereby proclaim the establishment of the Jewish State in Palestine.' The Official Gazette,

May 1948.<sup>446</sup> By the time Britain terminated its Mandate Jews 'achieved an early semi independence...in the...legal system' and the Jewish Agency in Jerusalem had succeeded in becoming a State within a State.<sup>447</sup>

War ensued between the newly established Jewish State and Arab States<sup>448</sup> who opposed the partition plan and called for the establishment of an independent State of Palestine. Resolution 181 created a fertile ground for the emergence of the 1948 Arab-Israeli War because it was created 'against the wished of the indigenous population and the region on which that State was forced.'<sup>449</sup> Moreover, Resolution 181 failed to account for the fact that if Britain failed to implement the partition plan how could the parties to the conflict succeed in executing such a plan. According to Pappé if the Arab armies did not intervene all of Palestine would have fallen under the control of Israel.<sup>450</sup>

By the end of the 1948 Arab-Israeli War, Israel took control of territory granted to the Arab State in Resolution 181, Egypt controlled the Gaza Strip and Transjordan controlled the eastern parts of Palestine. The majority of Arab Palestinians also became stateless refugees in Jordan, Syria, Lebanon, the West Bank, the Gaza Strip and East Jerusalem<sup>451</sup> after 750,000 Palestinians 'were forcibly expelled from their ancestral homeland [by Zionist forces] around the time that...Israel proclaimed its independence.'<sup>452</sup> Although the UNGA in Resolution 194 (III) of 11 December 1948 [Resolution 194] that Palestinian refugees should be allowed to return to their homes and land in territories that became part of Israel,<sup>453</sup> Israel denied them the right of return [ROR].<sup>454</sup> Instead of facilitating the return of 1948 Palestinian refugees Israel executed an anti-reparation policy in August 1948 by destroying or taking

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'Proclamation of Independence [The Declaration of the Establishment of Israel]' (*The Knesset*, 14 May 1948) <[https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm)> accessed 2 April 2019

<sup>446</sup> United Nations, 'The Origins and Evolution of the Palestine Problem Part I: 1917-1947 - Study (30 June 1978)' (*UNISPAL*, 30 June 1978)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/aeac80e740c782e4852561150071fdb0?OpenDocument>> accessed 12 February 2018, 32

<sup>447</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 89

<sup>448</sup> Egypt, Lebanon, Syria, Iraq and Saudi Arabia.

<sup>449</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 312

<sup>450</sup> Ibid 120

<sup>451</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 10

<sup>452</sup> Ardi Imseis, 'The Status of Palestinian Refugees in International Law' (*Dalhousie University*, 1 January 1999) <[digitalcommons.schulichaw.dal.ca/djls/vol8/iss1/9/](http://digitalcommons.schulichaw.dal.ca/djls/vol8/iss1/9/)> accessed 11 November 2016, 223

<sup>453</sup> United Nations, 'UN Resolution 194 (III)' (*United Nations*, 11 December 1948) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>> accessed 15 October 2016, Paragraph 11

<sup>454</sup> The term right of return encompasses the right to return to Israel, a right to return to one's property and a right to compensation for any losses.



over the property of Palestinians.<sup>455</sup> Israel's Foreign Minister<sup>456</sup> also celebrated the fact that most Palestinians had become refugees. He described the wholesale evacuation of Palestinian refugees as:

The most spectacular event in the contemporary history of Palestine more spectacular in a sense than the creation of the Jewish State is the wholesale evacuation of its Arab population which has swept with it also thousands of Arabs from areas threatened and/or occupied by us outside our boundaries...The reversion to the status quo ante is unthinkable. The opportunities which the present position opens up for a lasting and radical solution of the most vexing problem of the Jewish State are so far reaching as to take one's breath away.<sup>457</sup>

After the wholesale evacuation of Palestinians took place Israel rejected the ROR for Palestinian refugees because it considers them enemies who will undermine the founding principle of the State of Israel which according to Zionists was created exclusively for the Jewish people. Israel has also used the mandatory regulations of 1945 to justify the expulsion of Palestinians in Israel because they are deemed a security risk.<sup>458</sup> Since their expulsion, Israel has repeatedly called for the resettlement of Palestinian refugees in Arab States that have been hosting them since 1948.

In 1948 the London Middle East Intelligence Centre in Cairo and the Consul General in Jerusalem<sup>459</sup> also called for the permanent resettlement of Palestinian refugees in Arab host States. The London Middle East Intelligence Centre in Cairo wrote:

The panic flight of Arabs from the Jewish occupied areas of Palestine ...may possibly point the way to a long-term solution [by resettling them in Arab countries] ... The project [of resettling the refugees in the Arab states] would have to be launched with utmost care. If it were put forward at the present stage the immediate reaction in all Arab minds would be that we had been working for this all along. But if it becomes obvious that through unwillingness on the part of either the Jewish [sic] or Arabs there is little or no chance of the displaced Arabs of Palestine being reinstated in their own homes, it might be put forward as a solution to the problem as it then appeared.<sup>460</sup>

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<sup>455</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 146

<sup>456</sup> Moshe Sharett.

<sup>457</sup> Israel's Foreign Minister Moshe Sharett quoted in Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 62

<sup>458</sup> Ibid 198

<sup>459</sup> William Burdett Jr.

<sup>460</sup> The London Middle East Intelligence Centre in Cairo quoted in Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 39-40

Ending the plight of Palestinian refugees through resettlement was justified by the Consul-General in Jerusalem in the following terms:

Despite the attendant suffering...it is felt security in the long run will be served best if the refugees remain in the Arab states and Arab Palestine instead of returning to Israel. Since the US has supported the establishment of a Jewish State, it should insist on a homogeneous one which [sic] will have the best possible chance of stability. Return of the refugees would create a continuing 'minority problem' and form a constant temptation both for uprisings and intervention by neighbouring Arab states.<sup>461</sup>

Resettlement was proposed as the only realistic solution to end the plight of Palestinian refugees even though by 1949 Palestinian refugees could have returned to territories that became part of Israel because an 'armistice agreement' was signed between Israel, Egypt, Lebanon, the Kingdom of Jordan,<sup>462</sup> and Syria on 3 April 1949.<sup>463</sup> These armistice lines held until the 1967 Arab-Israeli War.<sup>464</sup> Israel could have also agreed upon a framework to facilitate the return of Palestinian refugees after Egypt, Jordan, Lebanon, Syria and Israel signed the Lausanne Protocol in 1949 which recognized the partition plan and called for the return of Palestinian refugees to their homes in Israel.<sup>465</sup> According to Pappé, such a framework was not devised because Israel pretended that it was willing to negotiate on reparation, Jerusalem and partition but as soon as it became a member of the UN it withdrew from negotiations.<sup>466</sup>

After withdrawing from negotiations Israel relied on domestic legal mechanisms to encourage the immigration of Jews while preventing Palestinian refugees from returning to areas that became part of Israel. In 1950 Israel issued several laws to achieve its twin objectives. Israel issued the Israeli Law of Return, which gave every Jew the right to become a citizen of Israel.<sup>467</sup> This law did not apply to Palestinian refugees. When the Law of Return

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<sup>461</sup> William Burdett Jr. quoted in Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge University Press, 2004) 41

<sup>462</sup> Transjordan became the Kingdom of Jordan in March 1948.

<sup>463</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011)10

<sup>464</sup> *Ilan Pappé, A History of Modern Palestine: One Land, Two Peoples* (Cambridge University Press 2004) 134

<sup>465</sup> *Ilan Pappé, The Idea of Israel: A History of Power and Knowledge* (Verso 2014) 112

<sup>466</sup> *Ilan Pappé, A History of Modern Palestine: One Land, Two Peoples* (Cambridge University Press 2004) 144

<sup>467</sup> Right of Aliyah: 'Article 1. Every Jew has the right to come to this country as an oleh.'

'Law of Return 5710-1950' (*Israel Ministry of Foreign Affairs*, 5 July 1970)

<<https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>>  
accessed 22 April 2018

was amended in 1954<sup>468</sup> and 1970 it stated that no visa would be given 'to those with criminal records or who are a danger to public welfare.'<sup>469</sup> While these amendments were targeting Jews, if this law is applied to Palestinian refugees, it could be used to stop them from returning to Israel on the basis that they are a danger to public welfare. In 1950 Israel also issued the Israeli Nationality Law which prevented Palestinian refugees from becoming Israeli citizens because according to section 3 'non-Jews who could not prove their residence there during the four years preceding the creation of Israel were not entitled to citizenship.'<sup>470</sup> According to Kretzmer, 'the rationale behind the conditions in section 3 was to prevent acquiring of citizenship by Arabs who fled from their homes during the war of independence and had then returned illegally.'<sup>471</sup> In 1950 Israel also introduced the Absentees Property Law which stripped Palestinian refugees from their properties.<sup>472</sup> The law defined the property of Palestinian refugees in Israel as absentees' property which should 'pass automatically to the Custodian at the time of the vesting of the property; and the status of the Custodian shall be the same as was that of the owner of the property.'<sup>473</sup> This indicates that Israel will not compensate Palestinian refugees for their properties because under the Absentees Property Law they lost ownership of their properties because they sought refuge in enemy States.<sup>474</sup> In 1954 Israel also introduced the Prevention of Infiltrators Law which in Article 1 defined infiltrators as:

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<sup>468</sup> Law of Return (Amendment 5714-1954)

'Amendment of section 2(b) 1. In section 2 (b) of the Law of Return, 5710-1950

(1) the full stop at the end of paragraph (2) shall be replaced by a semi-colon, and the word "or" shall be inserted thereafter;

(2) the following paragraph shall be inserted after paragraph (2):

'(3) is a person with a criminal past, likely to endanger public welfare.' 'The Law of Return 5710 (1950)' (*The Knesset*, 5 July 1950) <<https://www.knesset.gov.il/laws/special/eng/return.htm>> accessed 22 April 2018

<sup>469</sup> Ibid

<sup>470</sup> 'National Law 5712-1952' (*The Knesset*, 5 September 1952)

<[https://www.knesset.gov.il/review/data/eng/law/kns2\\_nationality\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns2_nationality_eng.pdf)> accessed 22 April 2018

<sup>471</sup> David Kretzmer, *The Legal Status of The Arabs in Israel* (Avalon Publishing 1990) 38

<sup>472</sup> 'Absentees Property Law-5710-1950' (*The Knesset*, 14 March 1950)

<[https://www.knesset.gov.il/review/data/eng/law/kns1\\_property\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns1_property_eng.pdf)> accessed 22 April 2018

<sup>473</sup> Ibid Article 4 (a) (2)

<sup>474</sup> The Absentee Law defined absentee in Article 1 (b) (1) as: 'a person who, at any time during the period between the 16th Kislev, 5708 (29th November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948(1), that the state of emergency declared by the Provisional Council of State on the 10th Iyar, 5708 (19th May, 1948)(2) has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period - (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or the Yemen, or (ii) was in one of these countries or in any part of Palestine outside the area of Israel, or (iii) was a Palestinian citizen and left his ordinary place of residence in Palestine (a) for a place outside Palestine before the 27th Av, 5708 (1st September, 1948); or (b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment (c) "Palestinian citizen" means a person who, on the 16th Kislev, 5708 (29th

[A] person who has entered Israel knowingly and unlawfully and who at any time between the 16th Kislev, 3708 (29th November, 1947) and his entry was - o (1) a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan, Iraq or Yemen; or o (2) a resident or visitor in one of those countries or in any part of Palestine outside Israel; or o (3) a Palestinian citizen or a Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who, during the said period, left his ordinary place of residence in an area which has become a part of Israel for a place outside Israel.<sup>475</sup>

According to Article 1(3) of the Prevention of Infiltrators Law, any Palestinian refugee who attempted to return to his/her home in Israel was an infiltrator.<sup>476</sup> Furthermore, when the Law of Return was amended in 1954 amendments to section 2b stated that in section 3 an entry visa cannot be given 'to those with criminal records or who are a danger to public welfare.'<sup>477</sup> While these amendments were targeting Jews, if in the future Israel agrees in principle to allow a number of Palestinian refugees to return to Israel in practice it can rely on the Law of Return to stop Palestinians refugees from returning to Israel by arguing that they are a danger to public welfare.

In 2017 Niu and Zhang's published a paper entitled 'Comparison of the Policies of Israel's Labour Party and the Likud on Palestinian Refugee,' which found that the two ruling parties in Israel, the Zionist Labour Party and Likud Party, hold similar views when it comes to the ROR for Palestinian refugees since 'neither of them recognize the responsibility of Israel on refugees, and they both denied the "right to return" of refugees.'<sup>478</sup> This is evident by the fact that the Zionist Labour Party which ruled Israel from 1948 to 1977 'rejected the UN

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November, 1947) or thereafter, was a Palestinian citizen according to the provisions of the Palestinian Citizenship Orders, 1925-1941, Consolidated (3), and includes a Palestinian resident who, on the said day or thereafter, had no nationality or citizenship or whose nationality or citizenship was undefined or unclear.' 'Absentees Property Law-5710-1950' (*The Knesset*, 14 March 1950)

<[https://www.knesset.gov.il/review/data/eng/law/kns1\\_property\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns1_property_eng.pdf)> accessed 22 April 2018

<sup>475</sup> 'Israel: Prevention of Infiltration Law [Israel], 1954' (*Refworld*, 16 Auguts1954)

<<https://www.refworld.org/docid/55116dca4.html>> accessed 11 February 2021

<sup>476</sup> Ibid Article 1(3)

<sup>477</sup> Law of Return (Amendment 5714-1954)

'Amendment of section 2(b) 1. In section 2 (b) of the Law of Return, 5710-1950

(1) the full stop at the end of paragraph (2) shall be replaced by a semi-colon, and the word "or" shall be inserted thereafter;(2) the following paragraph shall be inserted after paragraph (2): "(3) is a person with a criminal past, likely to endanger public welfare.' 'Law of Return 5710-1950' (*Israel Ministry of Foreign Affairs*, 5 July 1950)

<<https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>>

accessed 22 April 2018

<sup>478</sup> Song Niu and Xuan Zhang, 'Comparison of the Policies of Israel's Labour Party and the Likud on Palestinian Refugee' (2017) *International Relations and Diplomacy* 5 (1), 20

<[http://mideast.shisu.edu.cn/\\_upload/article/files/b7/3f/a71ae32b40b98315b57e1006e2b5/f3846412-988f-467d-8b75-3fade9169e3e.pdf](http://mideast.shisu.edu.cn/_upload/article/files/b7/3f/a71ae32b40b98315b57e1006e2b5/f3846412-988f-467d-8b75-3fade9169e3e.pdf)> accessed 22 April 2018

Mediation Commissioner's request' to allow all Palestinian refugees to return to their homes and land in what became the State of Israel.<sup>479</sup> Shortly afterwards at the Lausanne Conference of 1949, which was convened by the United Nations Conciliation Commission for Palestine, Israel proposed to allow only 100,000 Palestinian refugees to return to Israel.<sup>480</sup> Then in 1953 'the Compensation Committee under the Israeli cabinet proposed to donate \$1 billion to the International Foundation to sponsor the re-settlement of [Palestinian] refugees in Arab states.'<sup>481</sup> In 1970 Israel's Prime Minister Golda Meir argued that Palestinians should be resettled in Arab countries because Jews were 'coming back' to claim what is historically theirs and that Israel did not take anything away 'from the Arabs' and that the Jewish people are the only people in the world 'whose life, independence, dignity depends on this piece of soil' while expelled Palestinians should end their plight in Arab States because they are Arabs like them.<sup>482</sup>

After the Likud Party won the elections in 1977 Israel continued to call for the resettlement of Palestinian refugees. In 1978 after the Leeds Castle Conference which was held to discuss the 'Israeli peace plan and the Egyptian withdrawal plan regarding [the West Bank] and the Gaza strip' Israel's Foreign Moshe Dayan confirmed to the Israeli Knesset that Israel rejects solving the Palestinian refugee problem based on Resolution 194.<sup>483</sup> Dayan also revealed

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<sup>479</sup> Ibid 21

<sup>480</sup> '(iv) Proposal of Israel of 3 August and Memorandum of Arab States of 15 August 1949 22. Following the reply by the Arab delegations, the delegation of Israel submitted its proposals to the Commission at a meeting on 5 August. After a few general remarks, the Israel representative stated that his Government was prepared to make its contribution to the solution of the refugee problem. This contribution would be limited by considerations affecting the security and the economy of the State. Thus, the refugees would be settled in areas where they would not come in contact with possible enemies of Israel. Moreover, the Government of Israel reserved the right to resettle the repatriated refugees in specific places, in order to ensure that their reinstatement would fit into the general plan of the economic development of Israel. Subject to these conditions, the Government of Israel would be prepared to accept the return to Israel in its present limits of 100,000 refugees, in addition to the total Arab population existing at the end of hostilities (including those who had already returned since then), thus increasing the total number of that population to a maximum of 250,000. This repatriation would form part of a general plan for resettlement of refugees which would be established by a special organ to be created for the purpose by the United Nations.' United Nations Conciliation Commission For Palestine, 'Palestine refugees; Repatriation and Resettlement – UNCCP – Working paper/Revised' (*United Nations*, 2 October 1961) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/5D56C86AA25FA732852568BF007860CC>> accessed 11 February 2021, iv

<sup>481</sup> Song Niu and Xuan Zhang, 'Comparison of the Policies of Israel's Labour Party and the Likud on Palestinian Refugee' (2017) *International Relations and Diplomacy* 5 (1), 21 <<http://mideast.shisu.edu.cn/upload/article/files/b7/3f/a71ae32b40b98315b57e1006e2b5/f3846412-988f-467d-8b75-3fade9169e3e.pdf>> accessed 22 April 2018

<sup>482</sup> Golda Meir, 'Israel Golda Meir interview Prime Minister Interview' (*Thames TV*, 1970) <<https://www.youtube.com/watch?v=w3FGvAMvYpc>> accessed 22 April 2018

<sup>483</sup> Moshe Dayan, '178 statement to the Knesset by Foreign Minister Dayan on the Leeds Castle Conference, 24 July 1978' (*Israel Ministry of Foreign Affairs*, 24 July 1978)

that Israel made it clear during discussions that it wanted to resettle Palestinian refugees in Arab States and that the Egyptian delegation had agreed to such resettlement when he stated 'we agreed that in part they should settle in those countries which they inhabit now. If there are some who economically, or in other respects could be absorbed in Judea and Samaria by mutual agreement.'<sup>484</sup>

In 1991 the Israeli coalition government, between the Likud Party and the Labour Party, also wanted to dissolve the ROR for Palestinian refugees through resettlement. This was evident when the Israeli government called 'on the international community to dissolve the refugee camps in Judea and Samaria and the Gaza Strip, to improve the living conditions of the refugees and work on their resettlement. Israel would promote this action as a partner.'<sup>485</sup> Likewise, when the Labour Party won the elections in 1992 Israel:

[O]ffered to participate in wide-scale projects ranging from the total reintegration of the refugees in the host countries and the administered territories, leading to the eventual dismantlement of the camps throughout the region, to any partial solution that would alleviate the plight of the refugees and improve the quality of life in the camps such as promoting vocational training, improving communications, transportation, and service infrastructure and so on.<sup>486</sup>

The Labour Party also succeeded in side-lining the Palestinian refugee problem to final status negotiations in the 'Declaration of Principles on Interim Self-Government Arrangements'<sup>487</sup> which was signed between Israel and the Palestinian Liberation Organization [PLO] in September 1993.<sup>488</sup> When the Likud Party won the elections in 1996 the 'Guidelines of the Government of Israel' in section 7 confirmed that 'Israel opposes any

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<<http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook3/Pages/178%20Statement%20to%20the%20Knesset%20by%20Foreign%20Minister%20D.aspx>> accessed 22 April 2018

<sup>484</sup> Ibid

<sup>485</sup> Song Niu and Xuan Zhang, 'Comparison of the Policies of Israel's Labour Party and the Likud on Palestinian Refugee' (2017) *International Relations and Diplomacy* 5 (1), 22

<<http://mideast.shisu.edu.cn/upload/article/files/b7/3f/a71ae32b40b98315b57e1006e2b5/f3846412-988f-467d-8b75-3fade9169e3e.pdf>> accessed 22 April 2018

<sup>486</sup> Israel Ministry of Foreign Affairs, 'The Multilateral Talks: Structure and Progress Update' (*Israel Ministry of Foreign Affairs*, 24 November 1992)

<<https://mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/THE%20MULTILATERAL%20ALKS-%20STRUCTURE%20AND%20PROGRESS%20-%20U.aspx>> accessed 11 February 2021

<sup>487</sup> 'Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement")', 13 September 1993' (*Refworld*, 13 September 1993) <<https://www.refworld.org/docid/3de5e96e4.html>> 12 February 2018

<sup>488</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 74

kind of return rights of Arabians over the Israeli land on the West Bank of the Jordan River.<sup>489</sup>

In 1999 at the opening ceremony marking the formal resumption of permanent status negotiations between Israel and the PLO Israel's Foreign Minister David Levy stated that 'Israel is guided by four basic principles in negotiating a permanent status agreement: we will not return to the 1967 lines; united Jerusalem will remain the capital of Israel; settlement blocs will remain under Israeli sovereignty; there will be no foreign army west of the Jordan River.'<sup>490</sup> The reference to the 1967 lines and settlement blocks indicated that Palestinian refugees would not be able to return to those areas. Likewise, in 2000 during the Camp David Summit, Israel's Prime Minister Ehud Barak refused to recognize the ROR.<sup>491</sup> In 2017 the Likud Party Prime Minister Benjamin Netanyahu also called for the resettlement of Palestinian refugees in Arab host States.<sup>492</sup>

Niu and Zhang argue that Israel's proposals demonstrate that the Israeli government wanted to solve the Palestinian refugee problem and that Arab States are responsible for the ongoing plight of Palestinian refugees because they rejected resettlement proposals.<sup>493</sup> This argument fails to account for the fact that resettlement proposals went against the recommendations of Resolution 194 which required Israel to facilitate the return of Palestinian refugees. Niu and Zhang also fail to account for the fact that if Israel had

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<sup>489</sup> 'The Government of Israel will propose to the Palestinians an arrangement whereby they will be able to conduct their lives freely within the framework of self-government. The Government will oppose the establishment of a Palestinian state or any foreign sovereignty west of the Jordan River, and will oppose "the right of return" of Arab populations to any part of the Land of Israel west of the Jordan River.' Israel Ministry of Foreign Affairs, 'Guidelines of the Government of Israel June 1996' (*Israel Ministry of Foreign Affairs*, 18 June 1996)

<<https://mfa.gov.il/mfa/aboutisrael/state/government/pages/guidelines%20of%20the%20government%20of%20israel%20-%20june%201996.aspx>> accessed 12 February 2018

<sup>490</sup> David Levy, 'Speech by Minister of Foreign Affairs David Levy at the Ceremony Marking the Resumption of Permanent Status Negotiations at Erez Checkpoint' (*Israel Ministry of Foreign Affairs*, 13 September 1999)

<http://www.israel.org/MFA/PressRoom/1999/Pages/Speech%20by%20FM%20Levy%20at%20the%20Resumption%20of%20Permanent%20S.aspx>> accessed 11 February 2021

<sup>491</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 188

<sup>492</sup> Hanin Abou Salem, 'Why is Netanyahu trying to disband the UNRWA?' (*Aljazeera*, 22 June 2017) <<https://www.aljazeera.com/indepth/opinion/2017/06/saving-unrwa-means-saving-palestinian-refugees-170619101047716.html>> accessed 22 June 2017

<sup>493</sup> Song Niu and Xuan Zhang, 'Comparison of the Policies of Israel's Labour Party and the Likud on Palestinian Refugee' (2017) *International Relations and Diplomacy* 5 (1), 21

<[http://mideast.shisu.edu.cn/\\_upload/article/files/b7/3f/a71ae32b40b98315b57e1006e2b5/f3846412-988f-467d-8b75-3fade9169e3e.pdf](http://mideast.shisu.edu.cn/_upload/article/files/b7/3f/a71ae32b40b98315b57e1006e2b5/f3846412-988f-467d-8b75-3fade9169e3e.pdf)> accessed 22 April 2018

accepted the ROR that was accorded to Palestinian refugees in Resolution 194, the Palestinian refugee problem would not exist today.<sup>494</sup>

Overall, the resettlement proposals advocated by the Zionist Labour Party and the Likud Party reveal that since its establishment Israel has denied the ROR for Palestinian refugees and has insisted that they must be resettled in Arab host States. This indicates that the Zionist Humanist Ahad Ha'am was correct when he warned in 1914 that Zionist Jews who rejected the existence of Palestinians in Palestine would end up denying that Palestinian have any right in Palestine.<sup>495</sup>

### 3.10. Conclusion

In conclusion, this chapter has demonstrated that Rutinwa<sup>496</sup> is correct when he observed that '[r]efugees are not a consequence of anonymous or abstract historical forces. They are a result of deliberate actions taken by states and individuals, which sometimes have population displacement as their very purpose.'<sup>497</sup> This chapter revealed how the Zionist project from its inception envisioned emptying Palestine from its non-Jewish communities by resettling them elsewhere to establish an exclusive State for Jews. The 1917 Balfour Declaration and the Palestine Mandate failed to protect existing inhabitants in Palestine because they incorporated the Zionist interpretation of the idea of Israel within their text by giving Jews a right to establish a State in Palestine while existing communities in Palestine were only accorded social and cultural rights. In contrast, Resolution 181 tried to protect existing inhabitants by giving them the right to become citizens in either the Arab State or the

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<sup>494</sup> Hanin Abou Salem, 'Why is Netanyahu trying to disband the UNRWA?' (*Aljazeera*, 22 June 2017) <<https://www.aljazeera.com/indepth/opinion/2017/06/saving-unrwa-means-saving-palestinian-refugees-170619101047716.html>> accessed 22 June 2017

<sup>495</sup> Ahad Ha'am observed in 1914 'Yet what do our brethren do in Palestine? ... [t]hey treat the Arabs with hostility and cruelty, deprive them of their rights, offend them without cause and even boast of these deeds ... I can't put up with the idea that our brethren are morally capable of behaving in such a way to humans of another people, and unwittingly the thought comes to my mind: if it is so now, what will be our relation to the others if in truth we shall achieve at the end of times power in Eretz Yisrael?...I do not wish to see his coming... [the Zionists] wax angry towards those who remind them that there is still another people in Eretz Yisrael that has been living there and does not intend at all to leave its place.' Ahad Ha'am quoted in UNISPAL, 'The Origins and Evolution of the Palestine Problem Part I: 1917-1947 - Study (30 June 1978)' (*UNISPAL*, 30 June 1978) <<https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/aeac80e740c782e4852561150071fdb0?OpenDocument>> accessed 12 February 2018, 7

<sup>496</sup> Prof. *Rutinwa* is an Associate Professor of Law at the University of Dar es Salaam.

<sup>497</sup> Bonaventure Rutinwa (2002), 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' in H  l  ne Lambert (ed), *International Refugee Law* (2<sup>nd</sup> ed, Ashgate 2010) 57



Jewish State and to move freely between both States. Despite this Resolution 181 only succeeded in giving legitimacy to the establishment of a Jewish State but failed to pave the way for the establishment of an Arab State. Palestinians who became refugees during the time that Israel was established became stateless persons because Israel did not allow them to return to territories that became part of the Jewish State, nor did it give them the right to gain the Israeli citizenship. Thereafter, proposals calling for the permanent resettlement of Palestinian refugees beyond territories that became part of Israel have been presented as the primary solution to ending the plight of Palestinian refugees within the Palestinian and Israeli literature that addresses the ROR for Palestinian refugees. This solution, which was essentially drawn out by the father of political Zionism, presents Palestinian refugees as a problem that needs to be dissolved by permanently resettling them in the Arab world.

Political and legal events leading up to 1948 also revealed that issues around the meaning of citizenship and its impact on who is included and excluded from historic Palestine was not confined to the post-1948 events. The Zionist project encompassed ideas about inclusion and exclusion by wanting to resettle existing non-Jewish communities to pave the way for the immigration of Jews to Palestine. Citizenship laws adopted by the British Empire and Israel also sought to resettle existing communities in Palestine. The realities and prospects of Palestinian refugees and legal contestations over their ROR to Israel continue to be impacted by this past. The impact that these events had on the post-1948 and the present context will be examined in the next chapter. The next chapter will discuss how the different perceptions of the historical context post-1948 within the Palestinian discourse and the Israeli discourse impacted the legal interpretations around the ROR for Palestinian refugees under international law. This next chapter will reveal that the political and legal developments from the beginning of the Zionist project leading up to the British mandate over Palestine continue to impact the realities and prospects for Palestinian refugees because scholars and politicians within the Palestinian and the Israeli discourse on the ROR for Palestinian refugees continue to present the Palestinian refugees as a problem that needs to be dissolved by permanently resettling them in Arab host States.

## Chapter 4: The Palestinian discourse vs. the Israeli discourse on the right of return for Palestinian Refugees

At the centre of this thesis is the question 'do Palestinian refugees have a right to return [RTR]<sup>498</sup> to territories that became part of Israel in 1948.' A variety of scholars and commentators have come to evaluate the RTR for Palestinian refugees post-1948. A notable feature of that literature is dominated by scholars who typically adopt what can be described as 'either a historic or legal' approach.<sup>499</sup> Both can be seen to centralise different questions, and indeed, prospective solutions for the problems revealed. The historic literature mainly addresses who is responsible for the birth of the Palestinian refugee crisis and which party has a responsibility to end their refugeehood. Key historians in the field are Palestinians and Israelis. The Palestinian historians include Khalidi,<sup>500</sup> Abu Sitta,<sup>501</sup> Masalha,<sup>502</sup> Abu Lughad,<sup>503</sup> Kana-aneh and Nazzal. The Israeli historians include Pappé<sup>504</sup> Morris,<sup>505</sup>

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<sup>498</sup> The term 'right to return' refers to a pure right to return to one's country, as outlined in Article 13 (2) of the Universal Declaration of Human Rights which states, 'everyone has the right to leave any country, including his own, and to return to his country.' United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

<sup>499</sup> Mariam Itani, 'Palestinian Refugee Studies: Methodological Quandaries and Proposed Solutions,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 26

<sup>500</sup> Walid Khalidi is a Palestinian historian who has written extensively on the Palestinian exodus; See Walid Khalidi, *All that Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Institute for Palestine Studies 1992); Walid Khalidi, *Lets We Forget: Palestine Villages Destroyed by Israel in 1948 and the Names of the Martyrs* (3<sup>rd</sup> edn, Institute for Palestine Studies 2001)

<sup>501</sup> Salman Abu Sitta is not a historian but his work on the history of the plight of refugees has made his work a key source for historians. Abu Sitta is known for his ground-breaking project mapping historic Palestine and developing a practical plan for implementing the right of return of Palestinian refugees; See Salman Abu Sitta, *Atlas of Palestine 1948* (Palestine Land Society 2004)

<sup>502</sup> Nur-eldeen Masalha is a Palestinian historian; See Nur Masalha, *Expulsion of the Palestinians: The Concept of Transfer in Zionist Political Thought, 1882-1948* (Institute for Palestine Studies 1992); Nur Masalha, *The Palestine Nakba: Decolonizing History, Narrating the Subaltern, Reclaiming Memory* (Zed Books 2012)

<sup>503</sup> Lila Abu-Lughod is the Joseph L. Buettenwieser Professor of Social Science at Columbia University, and Professor of Anthropology and Women's and Gender Studies. She is the Director of the Middle East Institute and former Director of the Center for the Study of Social Difference.' Lila Abu-Lughod (*Columbia Global*, n.d.) <<https://anthropology.columbia.edu/content/lila-abu-lughod>> accessed 15 January 2020; See Lila Abu-Lughod and Ahmad H. Sa'di (eds.), *Nakba: Palestine, 1948, and the Claims of Memory* (Columbia University Press 2007)

<sup>504</sup> Ilan Pappé, *A History of Modern Palestine: One Land, Two Peoples* (Cambridge University Press 2004); Ilan Pappé, *The Forgotten Palestinians: A History of the Palestinians in Israel* (Cambridge University Press 2011); Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford, One World 2006)

<sup>505</sup> Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004)

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

Shlaim,<sup>506</sup> Yitzhaki, Flapan, Segev, Milstein, Kimmerling and Migdal.<sup>507</sup> The legal literature mainly addresses whether under international law Palestinian refugees have a right of return [ROR]<sup>508</sup> to their homes and properties in territories that became part of Israel in 1948. Key scholars in the field who argue that Palestinian refugees have a ROR are Takkenberg,<sup>509</sup> Hassawi,<sup>510</sup> Gail,<sup>511</sup> Quigley,<sup>512</sup> Thomas Mallison, Sally Mallison<sup>513</sup> and Lawand.<sup>514</sup> Key Israeli scholars who refute the ROR claim for Palestinian refugees under international law are Lapidot, Zilbershats, Goren-Amitai and Shany.

This chapter will focus on Palestinian and Israeli commentators who have examined whether Palestinian refugees have a ROR to Israel because their arguments demonstrate how the two parties to the conflict have developed their discourses and how their discourses impact the realities and prospects for Palestinian refugees. Non-partisan commentators have not been included because they do not reveal how the different perceptions of the historical context that led to the birth of the Palestinian refugee problem within the Palestinian discourse and the Israeli discourse continue to impact the legal interpretations around their ROR. By focusing on Palestinian and Israeli commentators this chapter will also allow the

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<sup>506</sup> Abi Shlaim, *The Iron Wall: Israel and the Arab World* (W. W. Norton 2000)

<sup>507</sup> Baruch Kimmerling and Joel Migdal, *The Palestinian People: A History* (Harvard University Press 2003)

<sup>508</sup> The term right of return encompasses the right to return to Israel, a right to return to one's property and a right to compensation for any losses.

<sup>509</sup> According to Takkenberg 'being stateless, dispossessed, not having a passport of a state, not having even the theoretical option of returning to one's country... has been at the very heart of the Palestinian refugee problem.' Ibid 195; Despite this Takkenberg concludes that because 'the refugee problem could not be solved during all these years highlights the requirement that the Palestinian people be able to exercise their right to self-determination.' Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998) 347

<sup>510</sup> Najwa Hassawi, *The Rights of Palestinian Refugees: Between International Legitimacy and the Palestinian-Israeli Negotiations* (Al-Zaytouna Centre for Studies and Consultations 2008)

<sup>511</sup> Gail Boling, 'Palestinian Refugees and the Right of Return: An International Law Analysis' (*BADIL*, 8 January 2001)

<[https://www.badil.org/phocadownload/Badil\\_docs/bulletins-and-briefs/Brief-No.8.pdf](https://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdf)> accessed 3 June 2017, 1

<sup>512</sup> John Quigley, 'Displaced Palestinians and a Right of Return' (1998) 39 (1) *Harvard International Law*, 171 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/hilj39&div=8&id=&page=>>> accessed 1 January 2019

<sup>513</sup> Thomas Mallison and Sally Mallison, 'An International Law Analysis of the major United Nations Resolutions Concerning the Palestine Question' (*United Nations*, 1979) <<https://www.un.org/unispal/document/international-law-analysis-of-major-un-resolutions-concerning-the-question-of-palestine-ceirpp-study/>> accessed 3 June 2017; See Thomas Mallison and Sally Mallison, *The Palestine Problem in International Law and World Order* (Longman, 1986); Mallison, W. Thomas, and Sally V. Mallison, 'The Right of Return' (1980) 9 (3) *Journal of Palestine Studies*, 125–36.

<sup>514</sup> Kathleen Lawand, 'The Right of Return of Palestinians in International Law' (1996) 8 (4) *International Journal of Refugee Law*, 534 <<https://doi.org/10.1093/ijrl/8.4.532>> accessed 6 November 2018

author to depart from the Palestinian comfort zone by considering the legal merit of the Israeli discourse.

For the purpose of this thesis, the historic and legal literature concerning Palestinian refugees is interlinked because as Goodwin-Gill observes historic narratives impact legal interpretations.<sup>515</sup> Chomsky has also correctly observed that 'it is the responsibility of the intellectual to insist upon the truth, it is also his duty to see events in their historic perspective.'<sup>516</sup> Moreover, the Palestinian leadership 'entered negotiations [with Israel] to effect a historical reconciliation...based on international legality...justice and historical redemption.'<sup>517</sup> Therefore, in this chapter, we will first review the two classic narratives and they are the Palestinian-Arab narrative and the Zionist-Israeli narrative. Both narratives agree that most Palestinians 'were displaced [from historic Palestine] in 1948 and again in 1967'<sup>518</sup> but they disagree on who is responsible for the birth of the Palestinian refugee problem and who is responsible for ending their plight. These historic narratives are presented as historical truths.

The intention here is not to criticize these historic narratives, because as Prior<sup>519</sup> observes modern historians need to 'distinguish between the actual history of the people and the history of their self-understanding.'<sup>520</sup> Instead, our aim is to reveal how the historic narratives have played a key role in the emergence of different legal interpretations regarding the ROR for Palestinian refugees. Following a review of these historic narratives, this chapter will turn to evaluate the legal literature specifically addressing the ROR in the Palestinian and Israeli discourse. As we discuss at the end of this chapter these historical narratives have led to a contested and ideologically charged framing of legal claims and counterclaims in respect of the ROR for Palestinian refugees. As will be demonstrated from the literature, while the Palestinian discourse claims that the ROR for Palestinian refugees is enshrined in

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<sup>515</sup> Guy Goodwin-Gill, 'Palestine Refugees and the Challenges in Setting Legal Protection Outside the Region,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 *Israel Law Review* 47, 70

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>516</sup> Noam Chomsky, 'The Responsibility of Intellectuals' (*Chomsky*, 25 February 1967) <<https://chomsky.info/19670223/>> accessed 6 November 2018, 23

<sup>517</sup> Francis Boyle, *The Palestinian Right of Return under International Law* (Clarity Press, 2011) 30

<sup>518</sup> National Council on US-Arab Relations, 'Geo-Political Dynamic (III): The Palestinian Future – Impediments to Peace and Possibilities for Progress' (*19<sup>th</sup> Annual Arab-U.S. Policymakers Conference*, 21-22 October 2010) <<https://ncusar.org/auspc/2010>> accessed 7 June 2017

<sup>519</sup> The Rev Dr Michael Prior.

<sup>520</sup> Michael Prior, 'Introduction: The Right to Expel: The Bible and Ethnic Cleansing,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 28

international law the Israeli discourse rejects the ROR for Palestinian refugees based on international law. Despite this, both discourses agree that most Palestinian refugees will not be able to return to Israel.<sup>521</sup> Therefore, a final settlement between Israel and the Palestinian leadership will likely lead to the permanent resettlement of Palestinian refugees in States hosting UNRWA,<sup>522</sup> a future Palestinian State or third States. Such a settlement will eradicate the RTR for Palestinian refugees because UNGA Resolution 194 will be superseded by a new UN Resolution that will annul the individual RTR to Israel.

#### 4.1. The Palestinian- Arab narrative

The Palestinian-Arab narrative on the birth of the Palestinian refugee problem was well summarized by the chairman of the Palestinian National Authority [PA] in 2011 when he wrote:

In November 1947, the [UNGA] made its recommendation [in Resolution 181 (II) of 29 November 1947] for the partition of Palestine into an Arab State and a Jewish State] and answered in the affirmative. Shortly thereafter, Zionist forces expelled Palestinian Arabs to ensure a decisive Jewish majority in the future state of Israel, and Arab armies intervened. War and further expulsions ensued.<sup>523</sup>

The Palestinian narrative of events was validated by Palestinian historians who documented the expulsion of Palestinian refugees, and they are Masalha, Khalidi, Kana'aneh and Nazzari.<sup>524</sup> Masalha concluded that the forced expulsion of Palestinian refugees was 'an outcome of Zionist 'transfer thinking', transfer mentality, transfer predisposition and premeditation.'<sup>525</sup> This was evident by the fact that the Israeli Cabinet in 1948 created a 'Transfer Committee'<sup>526</sup> which was responsible for setting plans to resettle Palestinian

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<sup>521</sup> The explanation offered by the Palestinian and Israel discourse concerning why Palestinian refugees have not been able to return to Israel fits with the realist approach to international relations which holds that state interests construct international law and that states fulfil their legal obligations in 'pursuit of interests.' Alice Edwards (2009) 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders,' in Hélène Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 480

<sup>522</sup> United Nations Relief and Work Agency for Palestine Refugees in the Near East.

<sup>523</sup> Mahmoud Abbas, 'Opinion Piece I The Long Overdue Palestinian State' (*The New York Times*, 17 May 2011) <<http://www.nytimes.com/2011/05/17/opinion/17abbas.html>> accessed 10 May 2017

<sup>524</sup> Nur Masalha, 'The Historic Roots of the Palestinian Refugee Question,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 44

<sup>525</sup> Ibid 50

This links back to the historic developments discussed in chapter 3 which demonstrated how the Zionist project encompassed ideas about inclusion and exclusion by wanting to resettle existing non-Jewish communities to pave the way for the immigration Jews to Palestine.

<sup>526</sup> Ibid 52

refugees in Arab countries.<sup>527</sup> Palestinians constituted 85% of the inhabitants and owned 92% of the land in Palestine before they were expelled from territories that became part of Israel.<sup>528</sup> Therefore, Abu Sitta has defined what Israel did to Palestinians as 'geographic genocide'<sup>529</sup> and '[b]y any standards...the largest, most carefully planned and continuous ethnic-cleansing operation in modern history.'<sup>530</sup> Said also described the displacement of Palestinians in 1948 and the 1967 Arab-Israeli War as 'naked Israeli ethnic cleansing. [And that] [a]ny other description of those acts by the Israeli army is a travesty of the truth no matter how many protestations are heard from the unyielding Zionist right-wing.'<sup>531</sup> According to Said:

[T]he Palestinians have endured decades of dispossession and raw agonies rarely visited on other peoples- particularly because their agonies have either been ignored or denied and, even more poignantly, because the perpetrators of this tragedy are celebrated for social and political achievements that make no mention of where those achievements began—of course the locus of the 'Palestinian problem,' but it has been pushed very far down the agenda of negotiations until it finally has popped up to the surface.<sup>532</sup>

The Palestinian narrative concerning the expulsion of most Palestinians from Palestine was validated by Israeli historians Yitzhaki and Milstein who revealed that massacres committed by Zionist forces played a key role in the expulsion of Palestinian refugees.<sup>533</sup> The Israeli army also acknowledged that an 'orchestrated terror campaign' led to the dispossession of around 70% of Palestinian refugees.<sup>534</sup> The Palestinian narrative was also validated by Israeli historians who sought 'to revise the Zionist narrative of the 1948 war' after they gained access to declassified Israeli documents for the period of 1947-1949. This group of historians, known as new historians, included the world-renowned Israeli historian Pappé who concluded that Zionist leaders had a well prepared 'plan for the ethnic cleansing of

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<sup>527</sup> Ibid 51

<sup>528</sup> Salman Abu Sitta, 'Introduction: The Right of Return: Sacred, Legal and Possible,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 195

<sup>529</sup> Ibid 197

<sup>530</sup> Ibid 195

<sup>531</sup> Edward Said, 'Introduction: The Right of Return at Last,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 1

<sup>532</sup> Ibid 1

<sup>533</sup> Nur Masalha, 'The Historical Roots of the Palestinian Refugee Question,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 46

\* Arie Yitzhaki and Uri Milstein.

<sup>534</sup> Jan Abu Shakrah, 'Deconstructing the link: Palestinian refugees and Jewish immigrants from Arab countries,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 209

Palestine' to create an 'exclusively Jewish presence in Palestine.'<sup>535</sup> Pappé reached this conclusion after his archival research revealed that on 10 March 1948:

Orders came with a detailed description of the methods to be employed to forcibly evict the people: large-scale intimidation; laying siege to and bombarding villages and population centres; setting fire to homes, properties and goods; expulsion; demolition; and, finally, planting mines among the rubble to prevent any of the expelled inhabitants from returning. Each unit was issued with its own list of villages and neighbourhoods as the targets of this master plan. Codenamed Plan D (Dalet in Hebrew), this was the fourth and final version of less substantial plans that outlined the fate the Zionists had in store for Palestine and consequently for its native population.<sup>536</sup>

Plan Dalet 'took six months to complete' and upon its completion 'more than half of Palestine's native population...had been uprooted.'<sup>537</sup> The systematic expulsion of Palestinians took place because the U.S. started questioning the partition plan and proposed putting Palestine under an international trusteeship for 5 years followed by a final settlement.<sup>538</sup> Pappé concludes that real peace can only come about when Israelis recognize that their leaders were responsible for the ethnic cleansing of Palestinians and when Palestinian refugees are allowed to exercise their ROR.<sup>539</sup>

Pappé's findings indicate that those who participated in Plan Dalet committed acts that could amount to genocide because Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 defines genocide 'as acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'<sup>540</sup> Article 2 also considers the following as acts of genocide 'a) Killing members of the group b) Causing serious bodily or mental harm to members of the group c) Deliberately inflicting on the group conditions of life calculated to bring about the physical destruction in whole or in part d) Imposing measures intended to prevent births within the group e) Forcibly transferring children of the

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<sup>535</sup> Ilan Pappé, *The Forgotten Palestinians: A History of the Palestinians in Israel* (Cambridge University Press 2011) 20-21

<sup>536</sup> Ibid 20

<sup>537</sup> Ibid 21

<sup>538</sup> Ilan Pappé, *A History of Modern Palestine: One Land, Two Peoples* (Cambridge University Press 2004) 130

<sup>539</sup> Ilan Pappé, *The Forgotten Palestinians: A History of the Palestinians in Israel* (Cambridge University Press 2011) 17

<sup>540</sup> United Nations, 'Convention on the Prevention and Punishment of the Crime of Genocide' (*Refworld*, 9 December 1948) <<https://www.refworld.org/docid/3ae6b3ac0.html>> accessed 23 October 2020, Article 2

group to another group.<sup>541</sup> Zionists who plotted and implemented Plan Dalet targeted Palestinians as a group based on their national, ethnic, racial and religious background to ethnically cleanse Palestine from Palestinians to secure an exclusive State for the Jewish people. This leads this chapter to conclude that Zionists who targeted Palestinians committed acts (expulsions and massacres) that amounted to genocide. This could explain why Israel closed public access to declassified documents on expulsion for the period between 1948-1949<sup>542</sup> and why new historians were viewed as threatening Israel's legitimacy<sup>543</sup> and why leading liberal jurist and former Education Minister Rubinstein defined the work of new historians as 'an onslaught on the very essence and right of the existence of the Jewish people and homeland... it is not an academic work but a frontal ideological attack.'<sup>544</sup>

## 4.2. The Zionist-Israeli narrative

The Zionist-Israeli narrative denies responsibility for the birth of the Palestinian refugee problem. According to this narrative, Israel accepted UNGA Resolution 181, which called for the partition of Palestine into an 'independent Arab and Jewish State and the Special International Regime for the City of Jerusalem' but Arab States rejected it and declared war on Israel in 1948.<sup>545</sup> This narrative claims that Palestinians left 'voluntarily' after Arab armies encouraged them to leave their homes and return after the Arab armies liberated their areas from Zionist forces.<sup>546</sup> According to this narrative, Arab States are responsible for creating the Palestinian refugee problem and therefore they should resettle them in their countries.<sup>547</sup> In the 1950s senior Israeli Foreign Ministry officials referred to the resettlement of Palestinian refugees in the Arab world in the following terms 'if you cannot solve it, dissolve

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<sup>541</sup> Ibid Article 2

<sup>542</sup> Jonathan Cook, 'Why Israel is blocking access to its archives' (*Aljazeera*, 10 June 2016) <<https://www.aljazeera.com/news/2016/6/10/why-israel-is-blocking-access-to-its-archives>> accessed 27 April 2017

<sup>543</sup> Ilan Pappé, *A History of Modern Palestine* (Cambridge University Press 2004) 278

<sup>544</sup> Former Education Minister Amnon Rubinstein Ibid 278

<sup>545</sup> Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004) 2

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>546</sup> Ilan Pappé, *The Forgotten Palestinians: A History of the Palestinians in Israel* (Cambridge University Press 2011) 23

<sup>547</sup> Danny Aylon, 'The Truth About the Refugees: Israel Palestinian Conflict' (*YouTube*, 4 December 2011) <[https://www.youtube.com/watch?v=g\\_3A6\\_qSBBQ](https://www.youtube.com/watch?v=g_3A6_qSBBQ)> accessed 27 April 2017



it.<sup>548</sup> In 1993, Israel's Foreign Minister<sup>549</sup> also observed that Palestinian refugees should not be allowed to return because their return 'would wipe out the national character of the state of Israel.'<sup>550</sup> Israel also refuses to accept responsibility for compensating Palestinian refugees for their loss of land and property in territories that became part of Israel.<sup>551</sup> Israel claims that Arab States expelled an equivalent number of Jews from the Arab world who sought refuge in Israel thus suggesting that a population exchange had taken place. In 1951 Israel's Foreign Minister argued that 'an appropriate amount from any compensation which Israel undertook to pay [Palestinian refugees] would be deducted for Jewish assets frozen in Iraq.'<sup>552</sup> The Israeli Government revived this argument in 2019.

The Zionist-Israeli narrative was partly supported by the new historian Morris who in his book 'The Birth of the Palestinian Refugee Problem Revisited, 1947-1949.' Despite being one of the new historians Morris claimed that classified Israeli military archives revealed that 'there was no pre-war Zionist plan to expel 'the Arabs' from Palestine or the areas of the emergent Jewish State... Nor was the pre-war 'transfer' thinking ever translated, in the course of the war, into an agreed, systematic policy of expulsion.'<sup>553</sup> According to Morris, most Palestinians fled out of fear because they heard that Zionists groups like the Haganah and Israeli Defence Forces Units [IDF] had massacred Palestinians in towns like Deir Yassin.<sup>554</sup> Although Morris acknowledges that 'the final and decisive precipitant to flight in most places was Haganah,<sup>555</sup> IZL,<sup>556</sup> LHI<sup>557</sup> or IDF attack' he maintains that such attacks were inconsistent and 'were in large measure a response to Arab attacks.'<sup>558</sup> Morris also claims that many Palestinians left after Arab governments ordered them to leave temporarily until the Arab armies liberated the areas that have been occupied by Zionist forces.<sup>559</sup> Despite

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<sup>548</sup> Nur Masalha, 'The Historic Roots of the Palestinian Refugee Question,' in Naseer Aruri (ed) *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 53

<sup>549</sup> Shimon Peres then Israel's Foreign Minister.

<sup>550</sup> Shimon Peres, *The New Middle East* (Elemens Books 1993) 198

<sup>551</sup> Nur Masalha, 'The Historic Roots of the Palestinian Refugee Question,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 52

<sup>552</sup> Moshe Sharlett quoted in Jan Abu Shakrah, 'Deconstructing the link: Palestinian refugees and Jewish immigrants from Arab countries,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 209

<sup>553</sup> Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004) 588

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>554</sup> Ibid 599

<sup>555</sup> A Jewish paramilitary organization.

<sup>556</sup> Irgun Zvai Leumi was a Jewish right-wing underground movement.

<sup>557</sup> Zionist paramilitary groups.

<sup>558</sup> Ibid 593, 599

<sup>559</sup> Ibid 28, 590

this Morris concludes 'war and not design...gave birth to the Palestinian refugee problem.'<sup>560</sup> Then Morris contradicts himself by revealing that Palestinians were expelled and that the Palestinian refugee problem materialized because:

[Israel's] policy was to prevent a refugee return at all costs. And if somehow, refugees succeeded in infiltrating back, they were routinely rounded up and expelled...[i]n this sense, it may fairly be said that all 700,000 or so who ended up as refugees were compulsorily displaced or expelled.<sup>561</sup>

Morris justifies the expulsion of Palestinians by observing that at the end of the Second World War [WWII] the Allied powers expelled Sudeten Germans<sup>562</sup> from Czechoslovakia to Germany after Germany lost the war.<sup>563</sup> Morris argues that since enmity justified the expulsion of Sudeten Germans, 'then it was also legitimate to expel Palestinians as they assaulted the Jews' and rejected the Partition Plan.<sup>564</sup> Morris also claims that historical evidence shows that all Palestinian villages were involved in armed struggle against Israel. Therefore, he argues all Palestinians should accept responsibility for their actions<sup>565</sup> and the actions of their leaders which he claims are directly responsible for their plight. Morris specifically refers to the decision of the Palestinian leaders to fight Israel and their refusal to accept compensation as a replacement for returning to territories in Israel.<sup>566</sup> Nevertheless, Morris' portrayal of historical fact is rendered immediately problematic given that this particular argument contradicts his earlier claim that Arab leaders and Zionist forces were

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<sup>560</sup> Ibid 588

<sup>561</sup> Ibid 589

<sup>562</sup> Sudeten Germans are ethnic Germans who lived in the lands of the Bohemian Crown, which later became an integral part of the state of Czechoslovakia.

<sup>563</sup> This argument mirrors the one made by Moshe Sharett's (then the director of the Agency's Political Department) Political advisor Leo Kohn who stated 'Now that the exodus of the Arabs from our country has taken place, what moral right have those who fully endorsed the expulsion of the Sudeten Germans from Czechoslovakia to demand that we readmit these Arabs?' Leo Kohn quoted in Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004) 556

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>564</sup> Benny Morris argument quoted in Mahmoud Yazbak, 'The Nakba and the Palestinian Silence,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 Israel Law Review 47, 56

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>565</sup> Benny Morris, 'The Birth of the Palestinian Refugee Problem, 1947-1949,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 Israel Law Review 47, 60 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>566</sup> Ibid 60

responsible for the flight of Palestinians.<sup>567</sup> Despite this, Morris, described the Israeli-Palestinian conflict as a 'national conflict between two peoples, two national movements fighting each other'<sup>568</sup> and in such a conflict the losers are expected to accept defeat. For Palestinian refugees, this means they must accept that they will not be allowed to return to territories that became part of Israel because according to Morris in the context of realpolitik, the morality of the State trumps the moral right of return for refugees. Morris justifies his position by observing that while he understands 'the focus on the morality of return' and agreed that 'every refugee has the moral right to return'<sup>569</sup> to his or her home in a post-war situation,' for him:

[T]he problem is not one of individual morality, but of realpolitik. The issue is the 700,000 who participated in a war against Israel. Even if not every one of them individually contributed, they were actively engaged as a people. The return of a population of this size would have constituted an Arab majority at the time. This was geopolitically impossible. It is justified on an individual basis: people had the moral right to return, but there is also the morality of states. This applies also to the five million so-called refugees of the present day, as their return would essentially wipe out the Jewish state.<sup>570</sup>

Morris's logic sums up how the Zionist-Israeli narrative has used its historic narrative to justify dispossessing Palestinian refugees from their ROR. Moreover, his argument that the morality of States overrides the morality of individuals furthers the thesis argument by revealing that the principle of sovereignty allows States to restrict rights accorded to individuals. This is evident by the fact that the Zionist-Israeli discourse has framed Israel's right to deny entry to Palestinian refugees as paramount for the survival of Israel as a Jewish State.

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<sup>567</sup> Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004) 588

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>568</sup> Benny Morris, 'The Birth of The Palestinian Refugee Problem, 1947–49' in *1948 Refugees: Proceedings of an International Workshop*, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 60

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>569</sup> Although Morris uses the term right to return, he is essentially addressing the right of return because he is addressing whether Palestinian refugees have a right to return to Israel, a right to return to one's property and a right to compensation for any losses.

<sup>570</sup> Benny Morris argument quoted in Mahmoud Yazbak, 'The Nakba and The Palestinian State,' in *1948 Refugees: Proceedings of an International Workshop*, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 58

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

### 4.3. Resettling Palestinian Refugees in the Arab world

Israel accuses Arab States and Palestinian refugees of perpetuating the refugee problem by refusing to resettle them in Arab host States.<sup>571</sup> Morris supports this argument despite suggesting earlier that the interests of States can override the individual ROR. Morris claims that the decision taken by Arab States 'contrasted with the situation in Europe after the Second World War, when Czechs, Poles, Russians and others absorbed Czech, Polish and Russian refugees.'<sup>572</sup> Arguing that the integration of Palestinian refugees in Arab host States is morally acceptable Morris suggests this is because:

In the context of post-1945, pushing out populations and moving them around was regarded as morally acceptable behaviour, unlike today. Whole sets of populations were removed, and moved, almost without a murmur. This was seen by American, Russian and other leaders as something that would stabilise countries and actually maintain peace by preventing potentially explosive minority problems (of the sort that had destabilised Europe before the First and Second World Wars).<sup>573</sup>

Morris also claims Arab States have a moral responsibility to resettle Palestinian refugees because they were the aggressors in the 1948 war 'and in world history, aggressors often pay the price.'<sup>574</sup> Morris also suggests that Israel had fulfilled its moral responsibility by resettling '70,000 Jews who were displaced' after the 1948 war.<sup>575</sup> This example is problematic because displaced Jews returned to territories that became part of Israel and those who resettled elsewhere did so by choice. In contrast, Palestinian refugees were denied the ROR, and Israel expected them to resettle in Arab States against their will and the will of host States.

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<sup>571</sup> Israel Ministry of Foreign Affairs, 'Dep FM Ayalon addresses UNHCR Ministerial Meeting, Geneva' (*Israel Ministry of Foreign Affairs*, 8 December 2011) <[http://mfa.gov.il/MFA/PressRoom/2011/Pages/DepFM\\_Ayalon\\_addresses\\_UNHCR\\_Meeting\\_8-Dec-2011.aspx](http://mfa.gov.il/MFA/PressRoom/2011/Pages/DepFM_Ayalon_addresses_UNHCR_Meeting_8-Dec-2011.aspx)> accessed 25 April 2017

<sup>572</sup> Benny Morris, 'The Birth of the Palestinian Refugee Problem, 1947-1949,' in *1948 Refugees: Proceedings of an International Workshop*, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 *Israel Law Review* 47, 51 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>573</sup> *Ibid* 51

<sup>574</sup> Benny Morris argument quoted in Mahmoud Yazbak, 'The Nakba and The Palestinian State,' in *1948 Refugees: Proceedings of an International Workshop*, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 56 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>575</sup> *Ibid* 56

In contrast to Morris who acknowledges that Palestinian refugees have a moral ROR '[l]eading Israeli essayists, in the centre and on the left, such as Dan Margalit and former Meretz Minister of Education, Amnon Rubinstein, declared the [RTR] to be [both] immoral and illegal.'<sup>576</sup> According to Gelber Israelis have always rejected the ROR for Palestinian refugees because European Jews never envisaged that Palestinian refugees would be returning because their experience in Europe showed them that 'war refugees seldom returned to their former places of residence if the victorious enemy had occupied their homes. Usually, they resettled and began life anew elsewhere.'<sup>577</sup> Gelber suggests that this explains why the Israelis 'forcibly blocked the returning infiltrators during the truce and after the war.'<sup>578</sup> Morris makes a similar argument when he observes that '[t]he historical experience in various parts of the globe during the 1920s and 1940s' supported the idea of transferring 'ethnic minorities to their core national areas' to end hostilities between groups living in the same territory.'<sup>579</sup> Morris cites the 'transfer of Muslim Turks out of Greek majority areas in Thrace and the Aegean Islands and of Christian Greeks out of Turkish Asia Minor during the early 1920s' to end hostilities between them and allow both countries to establish good relationships.<sup>580</sup> Zilbershats also argues that historically the exchange of populations was a legitimate solution to deal with refugeehood caused by ethnic disputes. Zilbershats cites the partition of India in 1947 into India and Pakistan as an example.<sup>581</sup> Zilbershats also refers to the Palestine Royal Commission of 1937 which called for the partition of Mandatory Palestine into two States and recommended the exchange of populations in reliance on the Greek-Turkish precedent.<sup>582</sup> Zilbershats also suggests that the international community does not believe that the return of many refugees is a reasonable solution to solve a protracted refugee problem. In support of her, argument Zilbershats cites the proposal

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<sup>576</sup> Ilan Pappé, 'Israeli Perceptions of the Refugee Question,' Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 74

<sup>577</sup> Yoav Gelber, 'The Historic Background,' Edward J Perkins and others (eds), in *Palestinian Refugees: Old Problems-New Solutions* (eds) (University of Oklahoma Press, 2001) 24

<sup>578</sup> Ibid 24

<sup>579</sup> Benny Morris, *The Birth of the Palestinian Problem Revisited* (2nd edn, Cambridge University Press 2004) 42

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>580</sup> Ibid 43-45

<sup>581</sup> Yaffa Zilbershats and Nimra Goren-Amitai, 'Return of Palestinian Refugees to the State of Israel' (*The Metzilah Center for Zionist, Jewish, Liberal and Humanist Thought*, 2011) <<https://din-online.info/pdf/mz7.pdf>> accessed 21 February 2018, 83

<sup>582</sup> Yaffa Zilbershats, 'Do the 1948 Palestinian Refugees Have the Right to Return?' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 73

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

presented by the former Secretary-General of the UN Kofi Annan's to resolve the Cyprus dispute in 2004.<sup>583</sup> According to Zilbershats Annan proposed 'a minimal return of refugees,' to ensure that the Greek-Cypriot refugees (who in 1974 fled from the northern parts to the south) and the Turkish-Cypriots (who fled from the south fled to the north) 'could remain a majority in its own territory.'<sup>584</sup>

Similarly, Kontorovich argues that State practice in dealing with protracted occupations illustrate that international norms do not support the return of all refugees to the territory which they fled from and has been settled by others.<sup>585</sup> In support of her argument, Kontorovich cites Western Sahara,<sup>586</sup> Northern Cyprus, Nagorno-Karabakh and the Baltic states as cases in which the international community sought to solve conflicts by promoting the return of a limited number of refugees and the non-expulsion of existing settlers. According to Kontorovich, this 'suggests that refugee return— a remedy for population displacement – as a practical matter is connected to a policy of not creating new displacements, including of settlers.'<sup>587</sup> Therefore, Kontorovich asserts that the ongoing demand for a solution to the Palestinian refugee problem has no parallel in international practice<sup>588</sup> because '[t]here are no comparable situations of a refugee population being recognised as such and given legal status, including an intergenerational definition of refugees; the demands of return enduring for such an extended period are also

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<sup>583</sup> Yaffa Zilbershats and Nimra Goren-Amitai, 'Return of Palestinian Refugees to the State of Israel' (*The Metzilah Center for Zionist, Jewish, Liberal and Humanist Thought*, 2011) <<https://din-online.info/pdf/mz7.pdf>> accessed 21 February 2018, 93

<sup>584</sup> Yaffa Zilbershats, 'Do the 1948 Palestinian Refugees Have the Right to Return?' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 64 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>585</sup> Guy Goodwin-Gill, 'Palestinian Refugees and the Challenges in Seeking Legal Protection Outside the region,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 63 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>586</sup> Baker Plans of the late 1990s and early 2000s –allowed the refugees to return in some number.

<sup>587</sup> Guy Goodwin-Gill, 'Palestinian Refugees and the Challenges in Seeking Legal Protection Outside the region,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 63 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>588</sup> Eugene Kontorovich, 'Refugees and Return in prolonged occupation,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 65 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

exceptional.<sup>589</sup> Kontrovich's argument sums up how the Zionist-Israeli discourse had been able to use historic precedence to justify stripping Palestinian refugees from their ROR to Israel. This demonstrates the strength of our argument at the start of the chapter that history has impacted how the ROR for Palestinian refugees has been interpreted and the type of solutions that have been proposed to end their plight. Kontrovich's argument that State practice in dealing with protracted occupations do not support the return of all refugees to the territory that they fled from furthers our thesis argument by revealing that the international community has historically appeased States who refuse to readmit refugees by advocating resettlement as the only realistic solution to ending the plight of persons who cannot be repatriated.

Further to the argument that return is not a solution, Gazit argues that Palestinian refugees only have a ROR to a future Palestinian State or to become citizens in Arab countries.<sup>590</sup> In both cases, Gazit calls upon Israel and the international community to help in the process of resettlement.<sup>591</sup> Schwartz who also calls for the resettlement of Palestinian refugees in Arab States argues that Arab States are obliged to resettle Palestinian refugees because Israel resettled Jews who were expelled from Arab States. Schwartz also claims, 'Israel can be regarded as the nation state of an indigenous people' because half its population are Jews from the Middle East' who have a right to self-determination and therefore claims 'Zionism can be defined as a liberation movement of an indigenous local ethnic group, which brought a solution for the centuries-old plight and discrimination of Jews from Arab countries.'<sup>592</sup> Between 1948-1967 Israel used this argument to counter compensation claims for Palestinian refugees by arguing that Jews who became refugees as a result of the 1948 war must also be compensated by Arab States.

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<sup>589</sup> Guy Goodwin-Gill, 'Palestinian Refugees and the Challenges in Seeking Legal Protection Outside the region,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) Israel Law Review 47, 63

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>590</sup> Sholomo Gazit, 'Solving the Refugee Problem: A Prerequisite for Peace' (1995) 2 (4) Palestine-Israel Journal <<http://www.pij.org/details.php?id=600>> accessed 1 June 2017

<sup>591</sup> Ibid

<sup>592</sup> Ibid 93

In contrast, Abu Shakrah calls the population exchange narrative a myth<sup>593</sup> and instead claims that Jews emigrated voluntarily from Arab countries due 'to events totally unrelated to the 1948 war. Perceived self-interest, and in most cases a concerted campaign usually involving cruel Zionist tactics, motivated the immigration.'<sup>594</sup>

This thesis disagrees with the population exchange argument because as Abu Shakrah rightly observes:

From a legal and historic perspective...Jewish claims cannot be considered counter-claims to those of the Palestinians. Legally, a counter-claim is one arising 'out of the same transaction or occurrence as the original claim, and between or among the same parties.' Clearly, the Jewish claims do not arise from the same occurrence or even the same time-frame as Palestinian refugee claims. Jewish losses were not at the hands of Palestinian refugees, nor did Arab Jews cause Palestinian dispossession<sup>595</sup>

After the 1967 Arab-Israeli War 'the issue of Jewish refugees ...[was]...neglected in the discourse of refugees in the Arab-Israeli Conflict'<sup>596</sup> under the 'Land for Peace' formula.<sup>597</sup> This policy shift was a consequence of 'the international community and Israeli negotiators believ[ing] [that]...refugees were a thing of the past, and the main topic was about territory and practical issues, and less about narratives.'<sup>598</sup> Therefore, the Minister of Justice terminated the position of the official in charge of the department of Jewish claims from Arab countries because the department complicated the negotiations.<sup>599</sup>

Israeli domestic legislation in 2010-2014 marked a policy shift by refocusing on the expulsion of Jews from Arab countries,<sup>600</sup> and called upon Israel to 'account the property of and compensation for Arab Jews in negotiations, and mark 30 November 1947 as the day of

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<sup>593</sup> Jan Abu Shakrah, 'Deconstructing the link: Palestinian refugees and the Jewish immigration from Arab countries,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 214

<sup>594</sup> Ibid 213

<sup>595</sup> Ibid 214

<sup>596</sup> Adi Schwartz, 'What we can learn from the exodus of Jews from the Arab Countries?' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 91

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>597</sup> Ibid 91

<sup>598</sup> Ibid 96

<sup>599</sup> Ibid 95

<sup>600</sup> Ibid 94



expulsion and exit.<sup>601</sup> According to one of the legal drafters of the first Israeli government's position on the refugee issue, the Israeli government involved the issue of Jewish refugees from the Arab countries to give them an incentive to support a peace settlement with Palestinians.<sup>602</sup> In 2016 the issue of Jewish refugees was also added to the Israeli school Curriculum. This shift indicates that Brynen is correct when he observed that property belonging to Palestinian refugees seized by Israel will not be returned because there is a legal and political reality in Israel that will not allow for such a settlement to materialize.<sup>603</sup> Israel will not accept any settlement that expects them to return to Palestinian refugees land and/or property that Jews have settled in since 1948.

In conclusion, literature that addresses the Palestinian refugee problem from a historic perspective reveals that while the Palestinian discourse holds Israel responsible for the birth and ongoing plight of Palestinian refugees, the Israeli discourse denies such a responsibility and calls for the resettlement of Palestinian refugees in the Arab world. This solution echoes the resettlements projects proposed by the father of Political Zionism in the late 1800s who was determined to relocate existing inhabitants from Palestine to make way for Jews immigrants.<sup>604</sup> As will be argued below, these historic narratives have played a key role in the emergence of different legal interpretations regarding the right of return.

#### **4.4. The Palestinian Discourse on the Right of Return under International Law**

Scholarly literature on a given issue creates a discourse. In the Palestinian discourse, there is a consensus that Palestinian refugees have a ROR to areas that became part of Israel under international law.<sup>605</sup> The Palestinian discourse is based on human rights law and UN

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<sup>601</sup> Ibid 94-95

<sup>602</sup> Israela Oron, 'Re-examination of the Premises', in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 100 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>603</sup> Rex Brynen, 'Restitution and Compensation,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 78 & 82 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>604</sup> See chapter 2

<sup>605</sup> Gail Boling, 'Palestinian Refugees and the Right of Return: An International Law Analysis' (*BADIL*, 8 January 2001) <[https://www.badil.org/phocadownload/Badil\\_docs/bulletins-and-briefs/Brief-No.8.pdf](https://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdf)> accessed 3 June 2017, 1

resolutions that specifically address Palestinians.<sup>606</sup> This discourse is well summarized by Abu Sitta who asserts that the RTR:

[I]s well established in International Law, as confirmed by the UN Declaration for Human Rights, the International Covenant on Civil and Political Rights, regional human rights charters and the International Covenant calling on the Elimination of All Forms of Racial Discrimination.<sup>607</sup>

According to the Palestinian discourse, the ROR for Palestinian refugees is enshrined in UNGA Resolution 194 (III) of 1948 [Resolution 194]<sup>608</sup> which resolved in paragraph 11:

[T]hat the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the governments or authorities responsible.<sup>609</sup>

The Palestinian discourse also asserts that Palestinians displaced because of the Arab-Israeli War of 1967 also have a ROR. The textual basis for this claim is Article 1D of UNGA Resolution 2252 of 1967 which '[c]alled upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations had taken place and to facilitate the return of those inhabitants who had fled the areas since the outbreak of hostilities.'<sup>610</sup> UN Security Council [UNSC] Resolution 242 of 1967 also called on Israel to withdraw from the territories that it occupied in 1967<sup>611</sup> and for all parties to the

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<sup>606</sup> Michael Prior, 'The Right to Expel: the Bible and Ethnic Cleansing,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 2

<sup>607</sup> Salman Abu Sitta, 'The Inevitable Return of Palestinian Refugees,' in *Palestinian Refugees, in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 5

<sup>608</sup> This view is adopted by numerous scholars including Abu Sitta, Alain Gresh, Atif Kubursi, Ingrid Jaradat Gassner, Jan Abu Shakrah, Jaber Suleiman, Susan Akram, Norman G. Finkelstein and Nur Masalha.

<sup>609</sup> United Nations, 'UN Resolution 194 (III)' (*United Nations*, 11 December 1948) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>> accessed 15 October 2016, Paragraph 11

<sup>610</sup> United Nations, 'A/RES/2252 (ES-V) of 4 July 1967' (*UNISPAL*, 4 July 1967) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7575BE79BBC6930852560DF0056FC78>> accessed 13 Mar 2017, Article 1D

<sup>611</sup> United Nations, 'S/RES/242 (1967) of 22 November 1967' (*UNISPAL*, 22 November 1967) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>> accessed 6 August 2018, Article 1 (i)

conflict to respect the territorial sovereignty of one another<sup>612</sup> and called for 'a just settlement of the refugee problem.'<sup>613</sup>

According to Abu Sitta 'Resolution 194...is the embodiment and restatement of international law. There is no equal to this resolution in the UN history, neither in the length of upholding it nor in its unique application to the Palestinian people.'<sup>614</sup> Boling endorses this interpretation by observing that:

Resolution 194...simply reaffirms international legal principles that were already binding and which required states to allow refugees to return to their places of origin, and prohibited mass expulsion of persons - particularly on discriminatory grounds. UN Resolution 194's consistency with international law and practice over the past five decades further strengthens its value as a normative framework for a durable solution for Palestinian refugees today.<sup>615</sup>

According to the Palestinian discourse, Israel is bound by Resolution 194 because its admission to the UN was based on accepting UNGA Resolution 273 of 1949 which called upon Israel to accept all UN Resolutions concerning the Palestinians and Israel.<sup>616</sup> Boyle who supports the Palestinian discourse argues that 'Israel formally agreed to accept...Resolution 181...[and]... Resolution 194...- the Palestinian Right of Return.'<sup>617</sup> Therefore, by denying the right of return for Palestinian refugees Israel is violating 'one of the most important conditions for Israel's admission to the [UN]' and for this reason, the UNGA should suspend Israel from participating in the UN as it did in the case with 'genocidal Yugoslavia' and apartheid South Africa.<sup>618</sup>

Although Israel refuses to adhere to Resolution 194, the UNGA has reaffirmed the resolution on an annual basis and repeatedly expressed its regret that the resolution has not been

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<sup>612</sup> Ibid Article 1 (ii)

<sup>613</sup> Ibid Article 2 (b)

<sup>614</sup> Salman Abu Sitta, 'The Right of Return: Sacred, Legal and Possible,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 197

<sup>615</sup> Gail Boling, 'Palestinian Refugees and the Right of Return: An International Law Analysis' (*BADIL*, 8 January 2001) <[https://www.badil.org/phocadownload/Badil\\_docs/bulletins-and-briefs/Brief-No.8.pdf](https://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdf)> accessed 3 June 2017, 1

<sup>616</sup> Naseer Aruri, 'Towards Convening a Congress of Return and Self-Determination,' in Naseer Aruri, (ed), *Palestinian Refugees: The Right to Return* (Pluto Press, 2001) 261

<sup>617</sup> Francis Boyle, *The Palestinian Right of Return under International Law* (Clarity Press, inc 2011) 24

<sup>618</sup> Ibid 24

implemented.<sup>619</sup> The ROR for Palestinian refugees has also been confirmed in numerous resolutions such as UNGA Resolution 3089 (XXVIII) of 1973<sup>620</sup> and UNGA Resolution 3236 (XXIX) of 1974.<sup>621</sup> The ROR was also reaffirmed in the first report published by the Committee for the Exercise of the Inalienable Rights of the Palestinian People which was established by UNGA Resolution 3376 of 1975<sup>622</sup> and endorsed by UNGA Resolution 31/20 of 1976.<sup>623</sup>

In 1978, a UN report observed that 'from 1953-1973 the Palestinian issue was treated essentially as a refugee issue' until 'eventually, in 1974 the [UNGA] explicitly recognized that the Palestinian people were entitled to self-determination in accordance with the United Nations Charter, and to reaffirm the inalienable right of return.'<sup>624</sup> The report confirmed that '[t]he Juridical opinions and the international instruments cited show clearly that the natural and inherent [ROR] is an acknowledged norm of international law, as one of the 'general principles of law recognized by civilized nations.'<sup>625</sup> The report also confirmed that '[t]he right of a person to return to his home in his native country traditionally has been included among an individual's fundamental rights' and that '[i]n cases where persons had been forced to leave their country because of force majeure, such as war, the [ROR] could not be questioned.'<sup>626</sup> The report also observed that '[t]he [ROR] normally would be a personal, an individual right' and 'only when large groups might have been displaced from their homes

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<sup>619</sup> Jaber Suleiman, 'The Palestinian Liberation Organization: From the right to return to Bantustan,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 89

<sup>620</sup> Paragraph D states 'that the full respect for and realization of the inalienable rights of the people of Palestine... [and that] the enjoyment by Palestine Arab refugees of their right to return to their homes and property, recognized by the [UNGA] in resolution 194 (III)...is indispensable for the achievement of a just settlement of the refugee and for their exercise by the people of Palestine of its right to self-determination.' United Nations, 'A/RES/3090 (XXVIII) 7 December 1973' (*UNISPAL*, 7 December 1973) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7A733DA61846D32B852560DE0055E858>> accessed 31 October 2016, Paragraph D

<sup>621</sup> UNGA Resolution 3236 (XXIX) [1974] also upheld 'the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted and calls for their return.' United Nations, 'A/RES/3236 (XXIX) 22 November 1974' (*UNISPAL*, 22 November 1974) <<https://unispal.un.org/UNISPAL.NSF/0/025974039ACFB171852560DE00548BBE>> accessed 31 October 2016, Article 2

<sup>622</sup> United Nations, 'A/RES/3376 (XXX)' (*United Nations*, 10 November 1975) <<https://unispal.un.org/DPA/DPR/UNISPAL.NSF/0/B5B4720B8192FDE3852560DE004F3C47>> accessed 30 September 2020, Article 2 (b)

<sup>623</sup> United Nations, 'A/RES/31/20' (*United Nations*, 24 November 1976) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/04A36CB3482CC0B2852560DE0049A561>> accessed 30 September 2020

<sup>624</sup> United Nations, 'The Right of Return of the Palestinian People' (*UNISPAL*, 1 November 1978). <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/805C731452035912852569D1005C1201>> accessed 31 October 2016, 2

<sup>625</sup> *Ibid* 7

<sup>626</sup> *Ibid* iii, 1

would it assume a collective dimension.<sup>627</sup> The report also noted that '[t]he [ROR] [is] normally ... a personal, an individual right [because] it is rare that the [ROR] should be invoked on a national scale, that there should be a situation where the greater part of an entire nation should be uprooted from its land, be exiled and then be denied the [RTR].'<sup>628</sup> Despite this rarity, the report acknowledged that 'a notable case in this dimension is that of the Palestinian people, forced to flee their ancestral land by reason of military and political action and then to find the [ROR] denied them on political and legal grounds.'<sup>629</sup> The report concluded that 'any settlement of the Middle East dispute will not be possible without the restoration to the Palestinian people of their inherent and inalienable rights.'<sup>630</sup> UNGA Resolution 52/62 of 1997<sup>631</sup> also confirmed that 'Palestine Arab refugees are entitled to their property and to the income derived therefrom, in conformity with the principles of justice and equity.'<sup>632</sup>

According to Abu Sitta, a legal framework has also been established for implementing the ROR when the international community used diplomacy to implement 'the [RTR]<sup>633</sup> in Tajikistan, Abkhazia, Namibia and Cyprus'<sup>634</sup> and when the international community used military force to implement UN Resolutions that called for the [RTR] in Kuwait, Bosnia, Kosovo and East Timor.<sup>635</sup> Therefore, Abu Sitta argues that 'there is no legal or practical justification for the denial of the [ROR]' and that Israel's rejection of the RTR is 'the single obstacle for peace.'<sup>636</sup> Abu Sitta also observes that Israel's 'oft-repeated Israeli notions of retaining an exclusive and superior Jewish society are immoral, illegal and simply untenable in the long run.'<sup>637</sup>

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<sup>627</sup> Ibid 2

<sup>628</sup> Ibid 1

<sup>629</sup> Ibid 1

<sup>630</sup> Ibid 2

<sup>631</sup> Naseer Aruri, 'Towards Convening a Congress of Return and Self-Determination,' in Naseer Aruri, (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 261

<sup>632</sup> United Nations, 'A/RES/52/62 10 December 1997' (*UNISPAL*, 10 December 1997)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/a06f2943c226015c85256c40005d359c/f00f35b190d892fd052565d7004f68fc>> accessed 21 February 2018, Article 1

<sup>633</sup> Although Abu Sitta uses the term right to return instead of the right of return, he is using it to refer to the right of refugees to return not just to Israel but also to their homes. Thus, he is referring to the right of return.

<sup>634</sup> Salman Abu Sitta, 'The Right of Return: Sacred, Legal and Possible,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 205

<sup>635</sup> Ibid 205

<sup>636</sup> Ibid 23

<sup>637</sup> Ibid 204

'Palestinians have no obligation, moral or legal, to accommodate the Israelis at their expense. By any standards, the Israelis have such an obligation—to correct a monumental injustice they have

The Palestinian discourse does not account for the fact that the United Nations Conciliation Commission for Palestine [UNCCP],<sup>638</sup> established by Resolution 194, interpreted paragraph 11 as meaning that refugees had a choice between return and compensation or no return and compensation.<sup>639</sup> Moreover, Resolution 194 also instructed the UNCCP<sup>640</sup> 'to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of...[UNRWA]<sup>641</sup> and, through him, with appropriate organs and agencies of the [UN].'<sup>642</sup> In other words, the 'UNCCP was mandated to work towards both durable solutions as well as international protection.'<sup>643</sup> After the UNCCP suspended its protection activities, 'no international agency is actively searching for a durable solution to the forced exile of Palestinian refugees.'<sup>644</sup>

The Palestinian discourse also fails to acknowledge that although Bernadotte<sup>645</sup> confirmed in his *'Progress Report of the United Nations Mediator on Palestine'* that Palestinian refugees

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committed. Nevertheless, the refugees' return has nothing to do with Israel's sovereignty. It has nothing to do with whether [the] Oslo agreements succeed or fail. It has nothing to do with settlements, boundaries, or even Jerusalem. Let all these issues take their natural course.' Abu Sitta quoted in Joseph Massad, 'Return or Permanent Exile?' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 115-116

<sup>638</sup> Lex Takkenberg, 'UNRWA at 66: Between Light and Shadows,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 *Israel Law Review* 47, 83 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>639</sup> United Nations, 'The United Nations Conciliation Commission for Palestine, Analysis of paragraph 11 of the General Assembly's Resolution of 11 December 1948A/AC.25/W/45 15 May 1950' (*UNISPAL*, 15 May 1950) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/94F1C22721945319852573CB00541447>> accessed 9 June 2018

<sup>640</sup> Lex Takkenberg, 'UNRWA at 66: Between Light and Shadows,' in '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 83 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>641</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East.

<sup>642</sup> United Nations, 'UN Resolution 194 (III)' (*United Nations*, 11 December 1948) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>> accessed 15 October 2016, Paragraph 11

<sup>643</sup> Harish Parvathaneni, 'UNRWA's Role in Protecting Palestine Refugees' (*BADIL*, 2004) <[https://www.badil.org/phocadownloadpap/Badil\\_docs/Working\\_Papers/WP-E-09.pdf](https://www.badil.org/phocadownloadpap/Badil_docs/Working_Papers/WP-E-09.pdf)> accessed 15 October 2016, 11

<sup>644</sup> BADIL, 'Survey of Palestinian Refugees and Internally Displaced Persons 2004-2005' (*BADIL*, 2006) <[www.badil.org/phocadownload/Badil\\_docs/publications/Survey-04-05.pdf](http://www.badil.org/phocadownload/Badil_docs/publications/Survey-04-05.pdf)> accessed 23 March 2021, vii

<sup>645</sup> The first UN mediator to the Arab-Israeli conflict.

have a ROR and that those who choose not to return have a right to compensation<sup>646</sup> he also wrote that the ROR will not solve the Palestinian refugee crisis and that resettlement in Arab countries could be an ideal solution.<sup>647</sup>

#### 4.5. The Palestinian Discourse: from a Right to Return to a Right to Resettlement

Our survey of literature within the Palestinian discourse revealed that most Palestinian writers who claim that Palestinian refugees have a ROR and disseminate their research in English argue that the RTR to Israel is enshrined in Resolution 194 and Article 13(2) of the Universal Declaration for Human Rights [UDHR]<sup>648</sup> which states '[e]veryone has the right to leave any country, including his own, and to return to his country.'<sup>649</sup> Boyle who observes

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<sup>646</sup> '[T]he right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for property of those who may choose not to return.' United Nations, 'Right of Return of the Palestinian People - CEIRPP, SUPR study' (*UNISPAL*, 1 November 1978) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/805C731452035912852569D1005C1201>> accessed 9 October 2018, 12

Bernadotte also stated that 'It is ... undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and tragedy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which ... was to be included in the Jewish State. The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion. It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes, while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees, who have been rooted in the land for centuries.' Folke Bernadotte quoted in Chris Gunness, 'Bernadotte: His Legacy to Palestine Refugees' (*UNISPAL*, 17 September 2013) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/299A71DD1CF0C7DF85257BEA0051AC00>> accessed 9 October 2018

<sup>647</sup> 'It must NOT be supposed, however, that the establishment of the right of refugees to return to their former homes provides a solution of the problem. The vast majority of the refugees may no longer have homes to return to and their resettlement in the State of Israel presents an economic and social problem of special complexity. Whether the refugees are resettled in the State of Israel or in one or other of the Arab States, a major question to be faced is that of placing them in an environment in which they can find employment and the means of livelihood. But in any case their unconditional right to make a free choice should be fully respected.' Folke Bernadotte quoted in Chris Gunness, 'Bernadotte: His Legacy to Palestine Refugees' (*UNISPAL*, 17 September 2013) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/299A71DD1CF0C7DF85257BEA0051AC00>> accessed 9 October 2018

<sup>648</sup> Manuel Hassassian, 'The Political Refugee Problem in the Light of the Peace Process,' in Edward J Perkins and others (eds), *Palestinian Refugees: Old Problems-New Solutions* (University of Oklahoma Press 2001) 62

<sup>649</sup> United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, Article 13(2)

that the U.S. invoked Article 13(2) on behalf of Soviet Jews invokes the same paragraph to defend the RTR for Palestinian refugees.<sup>650</sup> Some scholars also refer to UNGA Resolution 2252<sup>651</sup> and Bernadotte's Progress Report.<sup>652</sup>

Hawary who asserts that Palestinians have a RTR under international law also claims that it is practically possible for all Palestinian refugees to return because historically 12 million Bangladeshis were able to return at the end of the India-Pakistan war in 1971.<sup>653</sup> Despite this Hawary argues that a large-scale return to Israel will not be realised and calls upon Israel to allow several thousands of Palestinians to return under the pretext of family reunification.<sup>654</sup> Hawary also calls for compensation to be given 'to those who choose to be naturalized in the host countries.'<sup>655</sup>

In contrast, Abu Zayyad argues that the RTR as a principle must be distinguished from the literal exercise of return to areas that became part of Israel in 1948.<sup>656</sup> Based on this distinction he argues that the Palestinian refugee problem should be solved by resettling them in a future Palestinian State.<sup>657</sup> He also suggests enacting a Law of Return that will allow all Palestinians to return. According to Abu Zayyad Israel should support this solution as most Palestinian refugees will not be returning to areas that became part of Israel in 1948.<sup>658</sup>

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<sup>650</sup> Francis Boyle, *The Palestinian Right of Return under International Law* (Clarity Press, inc 2011) 24

<sup>651</sup> Mohamed Hawary, 'Between the Right of Return and Attempts of Resettlement,' in Edward J Perkins and others (eds), *Palestinian Refugees: Old Problems-New Solutions* (University of Oklahoma Press 2001) 36

<sup>652</sup> 'No settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. Most of these refugees have come from territory which ... was to be included in the Jewish State. The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion. It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries.' Ibid 35

<sup>653</sup> Ibid 38

<sup>654</sup> Ibid 39

<sup>655</sup> Ibid 43

<sup>656</sup> Ziad AbuZayyad, 'The Palestinian Right of Return: a Realistic Approach' (1994) 1 (2) Palestine-Israel Journal, 2 <<http://www.pij.org/details.php?id=749>> accessed 6 June 2017

<sup>657</sup> Ibid 3

<sup>658</sup> Ibid 3



Hassassian,<sup>659</sup> who observes that 'juridical opinions assert that the inherent [RTR] is an acknowledged norm of international law'<sup>660</sup> also argues that the RTR can only be exercised to a future Palestinian State.<sup>661</sup> Similarly, Khalidi asserts that a just solution can only come about if Israel accepts 'that all Palestinian refugees and their descendants have a [RTR] to their homes' and Palestinian refugees accept 'that in practice force majeure will prevent most of them from being able to exercise this right.'<sup>662</sup> Therefore, Palestinians cannot continue to focus on achieving 'absolute' justice and should instead recognize that they will only be able to exercise their RTR to the West Bank and Gaza. He refers to this solution as 'attainable' justice.<sup>663</sup> Khalidi also calls upon Israel to allow a couple of thousands of Palestinian refugees who have family members in Israel to return to Israel.<sup>664</sup> Khalidi also advocates the naturalization of Palestinian refugees in Arab States by stating that Palestinians who decide to stay in Jordan must become full citizens and those remaining in Lebanon should become permanent residents.<sup>665</sup> Thus, although Khalidi et al consider the RTR a legal right they accept that the implementation of this right will be restricted for the sake of political pragmatism. By doing so they fail to consider the wishes of Palestinian refugees and host countries. They also fail to clarify who will compensate Palestinian refugees who will be denied the RTR. Khalidi et al also fail to acknowledge that their proposals suggest that the RTR of Palestinian refugees is not necessary for the establishment of a Palestinian State. Moreover, their proposals suggest that if a Palestinian State materializes, like Israel, it can be argued that it does not have enough land space to accommodate all returning refugees. In conclusion, proposals that justify the need to compromise on the RTR suggest that Goodwin-Gill is correct when he observed that although:

[T]he term 'refugee' now carries much greater weight than it did in 1948. It invokes the right of return and various human rights. It also distorts some of the discussion. We can invoke the right of return on an individual basis, but rights can be compromised by agreements between states...The [RTR] has an individual

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<sup>659</sup> Professor of Political Science and Palestinian Authority's diplomatic representative to the United Kingdom in 2005.

<sup>660</sup> Manuel Hassassian, 'The Political Refugee Problem in the Light of the Peace Process,' in Edward J Perkins and others (eds), *Palestinian Refugees: Old Problems-New Solutions* (University of Oklahoma Press 2001) 61

<sup>661</sup> Ibid 61

<sup>662</sup> Rashid Khalidi, 'The Palestinian Refugee Problem: A Possible Solution' (1995) 2 (4) *Palestine-Israel Journal* <<http://www.pij.org/details.php?id=601>> accessed 1 June 2017

<sup>663</sup> Ibid 1

<sup>664</sup> Ibid 2-3

<sup>665</sup> Ibid 3-4

dimension, but it is entangled in the right of self-determination. Therefore, it can be moderated within the realisation of the greater right, that of self-determination.<sup>666</sup>

This explains why the Palestinian discourse has been able to invoke the ROR to Israel as a legal right while simultaneously arguing that the RTR can be compromised to conclude a permanent settlement with Israel which will lead to the establishment of a Palestinian State. Scholars justify this compromise on the basis that Israel will continue to block Palestinian refugees from exercising their RTR.<sup>667</sup> While this argument does not acknowledge that Israel has the right to restrict entry to its territories the Palestinian discourse acknowledges that when a State decides to override the RTR the plight of refugees cannot be solved through legal means.<sup>668</sup> Instead, a political compromise must be reached that appeases the wishes of sovereign States and allows refugees to re-establish themselves in a new State. These findings further the thesis argument by demonstrating that the RTR is a restricted right because it is influenced by State interests and realpolitik. Moreover, these findings set the scene for our next chapter which reveals a link between the RTR, citizenship and sovereignty and how the interaction between them has turned the RTR into an abstract right that can be overridden by States.<sup>669</sup>

In the 1990s the director of the Palestinian Liberation Organization [PLO] Department for Refugee Rights<sup>670</sup> criticised proposals by Arab and Palestinian intellectuals that give free concessions to Israel on the right of return.<sup>671</sup> Rahman's critique is striking because the PLO made such concessions in the 1988 Declaration of Independence by accepting resolution

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<sup>666</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 109 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>667</sup> See Rashid Khalidi, 'The Palestinian Refugee Problem: A Possible Solution' (1995) 2 (4) *Palestine-Israel Journal* <<http://www.pij.org/details.php?id=601>> accessed 1 June 2017; Mohamed Hawary, 'Between the Right of Return and Attempts of Resettlement,' in Edward J Perkins and others (eds), *Palestinian Refugees: Old Problems-New Solutions* (University of Oklahoma Press 2001)

<sup>668</sup> This links to our discussion in chapter 2 which reveals how sovereign states can strip individuals from their 'right to have rights.'

<sup>669</sup> This will be discussed in detail in chapter 5.

<sup>670</sup> As'ad Abdul Rahman Headed the PLO Department for Refugee Rights.

<sup>671</sup> '[that it is not the] mission of Arab intellectuals, especially the Palestinians among them, to give up a basic human right, that of living in one's home, nor should their goal be to find solutions to Israeli problems by intensifying problems for the Palestinians, nor to present free concessions before even reaching the stage of refugee negotiations.' As'ad Abdul Rahman quoted in Joseph Massad, 'Return or Permanent exile?', in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 116

181 which divided historic Palestine into Israel and Palestine.<sup>672</sup> Khalidi also observes that by recognizing Resolution 194 'the PLO...accepted certain crucial limitations on a putative absolute [ROR].'<sup>673</sup> This was confirmed in 1989 when Sha'th<sup>674</sup> and Husayni<sup>675</sup> revealed that return would be exercised to a future Palestinian State and not to Israel.<sup>676</sup> This approach was also adopted in the 1991 Madrid Peace Conference which launched the peace process between Israel and Arab States.<sup>677</sup> The conference only referred to UNSC Resolution 242<sup>678</sup> and UNSC Resolution 338 of 1973.<sup>679</sup> While the Multilateral Group on Refugees established at the conference did not refer to Resolution 194 as a legal reference for solving the Palestinian refugee problem. This indicated that the territory occupied by Israel in 1967 had become the frame of reference in negotiations and that Palestinian refugees will not return to Israel. This was confirmed by Zureik<sup>680</sup> who wrote:

In succumbing to the dictates of the Madrid Conference, Palestinians have been framing the debate, implicitly if not explicitly, over the right of return not one of whether the refugees should return to their 1948 homes, but rather as a debate over (1) whether there should be unhampered right of return for all refugees and displaced Palestinians to an independent state in the West Bank and Gaza: (2) how to compensate the refugees and normalize the civil and human rights of non-returnees in neighbouring countries: (3) whether to grant Palestinian passports to all refugees in their place of refuge: and (4) how to get Israel to allow a symbolic return of some

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<sup>672</sup> Between 1964-1974 the PLO 'sought to create a secular, democratic state in pre-1948 Palestine, a state wherein all Palestinian refugees will be repatriated.' Joseph Massad, 'Return or Permanent Exile?', in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 107

<sup>673</sup> 'The first is that the Palestinians who were made refugees in 1948 are offered an option whereby those 'choosing not to return' become eligible for compensation for their property...Acceptance of that fait accompli of Israel's creation in 1948 at the expense of the Palestinians has now in effect been legitimized by the PLO...the politically impossible demand that all Palestinians made refugees in 1948 be allowed to return is dropped, without dropping the principle that such people have certain rights in the context of a negotiated settlement, and without abandoning the reading of history which is the basis of this principle. This also makes the demand of implementation of the right of return a slightly more realistic one, without the PLO appearing to make a concession.' Quoted in Joseph Massad, 'Return or Permanent Exile?', in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001)106

<sup>674</sup>Nabil Sha'th has held the following titles Palestinian chief negotiator, Palestinian International Cooperation Minister, Planning Minister for the Palestinian National Authority and Acting Prime Minister of the Palestinian National Authority.

<sup>675</sup> Faysal Husayni was a Palestinian Politician.

<sup>676</sup> Ibid 106; See Faysal Husayni, 'Interview with Faysal Husayni, Faysal Husayni' (1989) 72 *The Journal of Palestine Studies*, 11-12. <<https://doi.org/10.2307/2537494>> accessed 7 November 2017

<sup>677</sup> The PLO participated by joining the Jordanian delegation.

<sup>678</sup> United Nations, 'Resolution 242 (1967) of 22 November 1967' (*United Nations*, 22 November 1967) <<https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>> accessed 30 September 2020

<sup>679</sup> United Nations, 'Resolution 338 (1973) of 22 October 1973' (*United Nations*, 22 October 1973) <<http://unscr.com/en/resolutions/doc/338>> accessed 20 September 2020

<sup>680</sup> A member of the Refugee Working Group.

refugees from the 1948 war to Israel proper and to recognize a historical injustice was done to the Palestinian people.<sup>681</sup>

After the conference, a group of Palestinians concluded that the PLO and Arab countries had abandoned 'the Arabs of [1948]' therefore they established the Committee for the Defence of the Right of Internationally Displaced Persons in Israel.<sup>682</sup> In 1993 Arafat<sup>683</sup> confirmed their suspicions when he signed the Oslo Declaration of Principles [DOP]<sup>684</sup> with Rabin.<sup>685</sup> The primary aim of the DOP was to reach a permanent settlement based on UNSC Resolution 242<sup>686</sup> and UNSC Resolution 338.<sup>687</sup> The fact that the DOP did not refer to Resolution 194 led Gassner to call the 'Oslo Accords [which include the DOP] ...an unprecedented existential threat to the future of the Palestinian struggle'<sup>688</sup> because it excluded 'the [RTR] from the political agenda.'<sup>689</sup> While Hagopian concluded that the PLO had nullified the RTR.<sup>690</sup> Said also concluded that the PLO had abandoned the RTR<sup>691</sup> and therefore, arguing for the RTR based on Resolution 194 has become 'futile and unhelpful for finding a lasting solution to the Palestinian refugee problem.'<sup>692</sup> Aruri also concluded that the PLO 'became the first Arab party to sign an agreement that effectively denied the refugees their internationally recognized rights.'<sup>693</sup> Pappé, on the other hand, argued that the DOP had turned the RTR into a subclause.<sup>694</sup> After the DOP was signed the Clinton administration

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<sup>681</sup> Elia Zureik quoted in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 119

<sup>682</sup> Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 118

<sup>683</sup> Then Chairman of the PLO.

<sup>684</sup> 'Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement"), 13 September 1993' (*Refworld*, 13 September 1993) <<https://www.refworld.org/docid/3de5e96e4.html>> 12 February 2018

<sup>685</sup> Then Prime Minister of Israel.

<sup>686</sup> United Nations, 'Resolution 242 (1967) of 22 November 1967' (*United Nations Security Council*, 22 November 1967)

<<https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>> accessed 20 September 2020

<sup>687</sup> United Nations, 'Resolution 338 (1973) of 22 October 1973' (*United Nations Security Council*, 22 October 1973) <<http://unscr.com/en/resolutions/doc/338>> accessed 20 September 2020

<sup>688</sup> Ingrid Jaradat Gassner, 'A Programme for an Independent Rights Campaign,' Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 252

<sup>689</sup> Ibid 255

<sup>690</sup> Elaine Hagopian, 'Preface,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) viii

<sup>691</sup> Wadie Said, 'The obligations of host countries to refugees under international law: the case of Lebanon,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 143

<sup>692</sup> Ibid 145

<sup>693</sup> Ibid 262

<sup>694</sup> Ilan Pappé, 'Israeli Perceptions of the Refugee Question,' Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 73

voted against Resolution 194 for the first time since its inception.<sup>695</sup> America also called upon the UNGA to restrict or terminate UN activity that addresses Palestine and Israel and to consider former UN resolutions concerning Palestinian refugees as 'obsolete and anachronistic.'<sup>696</sup> In 1994 Albright<sup>697</sup> also called all UN resolutions concerning Palestine 'contentious, irrelevant and obsolete.'<sup>698</sup>

In contrast, Suleiman argued that Arafat did not abandon the RTR because Article 1 of the DOP confirmed that the final settlement will be based on UNSC Resolution 242<sup>699</sup> which in Article 2 (b) calls for 'a just solution for Palestinian refugees.'<sup>700</sup> This thesis rejects Suleiman's argument because UNSC Resolution 242 does not apply to Palestinian refugees who were displaced in 1948. Instead, UNSC Resolution 242 addresses Palestinian refugees who were displaced because of the Arab-Israeli War in 1967. Moreover, UNSC Resolution 242 does not clarify whether a just settlement demands the return of all refugees to territories that were occupied by Israel in 1967. Chomsky also correctly observes that 'since 1971, the US position has been that the resolution does not call for Israeli withdrawal.'<sup>701</sup> Furthermore, even if we presume that based on UNSC Resolution 242 Palestinians who were displaced in 1967 have a RTR to territories that were occupied by Israel in 1967, they will not be returning to Israel. Instead, they will be returning to territories that are expected to become part of a future Palestinian State.<sup>702</sup> Returning to such territories will be considered a just settlement for Palestinians who were displaced for the first time in 1967. However, such a settlement will not be a just settlement for Palestinian refugees who sought refuge in territories that were occupied in 1967 after being displaced in 1948. Because such a

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<sup>695</sup> Noam Chomsky, 'The United States and the Refugee Question,' Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 77

<sup>696</sup> Ibid 78

<sup>697</sup> Then U.S. Ambassador to the UN

<sup>698</sup> Madeleine Albright quoted in Naseer Aruri, 'Towards Convening a Congress of Return and Self-Determination,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 265

<sup>699</sup> 'Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement")', 13 September 1993' (*Refworld*, 13 September 1993) <<https://www.refworld.org/docid/3de5e96e4.html>> 12 February 2018, Article I; See United Nations, 'S/RES/242 (1967)' (*UNISPAL*, 22 November 1967) <<https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>> accessed 12 February 2021

<sup>700</sup> Jaber Suleiman, 'The Palestinian Liberation Organization: from the Right of Return to Bantustan,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 96

<sup>701</sup> Noam Chomsky, 'The United States and the Refugee Question,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 79

<sup>702</sup> In 2021 the International Criminal Court determined that it has jurisdiction over the territories occupied by Israel in 1967, despite Israel's insistence to the contrary. International Court of Justice, 'Pre-Trial Chamber I (No. ICC-01/18)' (*ICJ*, 5 February 2021) <[https://www.icc-cpi.int/CourtRecords/CR2021\\_01165.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF)> accessed 5 February 2021

settlement would be replacing their RTR to territories that became part of Israel in 1948 with a RTR to territories occupied in 1967. Therefore, this thesis agrees with Chomsky who described UNSC Resolution 242 as a 'totally rejectionist resolution.'<sup>703</sup>

The DOP led some Palestinians to conclude that the RTR had been nullified and replaced with a humanitarian approach that would allow a limited number of Palestinian refugees to return to Israel under the pretext of family reunification. This conclusion was supported by the revelation that Arafat 'contract[ed] out the final status negotiations to a right-wing London think tank, the Adam Smith Institute...paid for by the British Foreign Office.'<sup>704</sup> The PLO's willingness to compromise on the RTR was also confirmed in the Israeli-Palestinian Interim Agreement on the West Bank and Gaza [1995] which did not refer to Resolution 194. The PLO's approach led Takkenberg to argue that:

As long there is no Palestinian state this applies in principle to the entire territory of the former British mandate. However, after the PLO...has recognized ...Israel, it is obvious that the Palestinian refugees will only be able to exercise their [RTR] in conjunction with their right to self-determination...Accordingly, the implementation of the [RTR] of the Palestinian refugees is likely to be realized only in the context of the establishment of a Palestinian state alongside Israel.<sup>705</sup>

The PLO's approach led to the establishment of the BADIL Resource Centre for Palestinian Residency and Refugee Rights in the West Bank and Gaza [1999] which was informed by the work of Goodwin-Gill, Quigley and Akram.<sup>706</sup> One of BADIL's primary aims was for Israel to recognize 'the [ROR]...as a precondition for negotiations over a concrete solution of the Palestinian refugee question.'<sup>707</sup> Despite these efforts in the Camp David II Middle East Peace Negotiations [2000-2001], Arafat accepted that Israel would not permit all Palestinian refugees to return to Israel after Barak<sup>708</sup> declared that Israel will not accept the ROR or

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<sup>703</sup> Noam Chomsky, 'The United States and the Refugee Question,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 78

<sup>704</sup> Edward Said, 'Introduction: The Right of Return at Last,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 6

<sup>705</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998) 353

<sup>706</sup> Elaine Hagopian, 'Preface,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) viii

<sup>707</sup> This aim was identified in the Principles and Agenda of the Independent, Community-based Campaign for Palestinian Refugee Rights. Ingrid Jaradat Gassner, 'A Programme for an Independent Rights Claim,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 258

<sup>708</sup> Then Israel's Prime Minister.

Resolution 194<sup>709</sup> and the Israeli Knesset passed legislation that prohibited any government from negotiating over the implementation of Resolution 194.<sup>710</sup>

Boyle who served as an 'advisor to the Palestinian Delegation to the Middle East Peace Negotiations'<sup>711</sup> revealed that during the negotiations the Clinton administration 'and Israel attempted to terminate the recognized right of Palestinian refugees to return to their homes in exchange for nothing more than a Palestinian Bantustan on the West Bank and Gaza.'<sup>712</sup> The Obama administration tried to force a similar settlement by trying to force the Palestinian leadership 'to accept a Bantustan... recognize Israel as 'the Jewish State'; and...give up their well-recognized right of Return under...Resolution 194.'<sup>713</sup> Therefore, Boyle advised the PLO not to sign a peace agreement and wait until Israel ceased to exist as his 'former adversary the genocidal Yugoslavia collapsed as a State, lost its U.N membership, and no longer exists as a State.'<sup>714</sup>

Following the failure of Camp David II,<sup>715</sup> the 'Framework for the Conclusion of the Final Status Agreement between Israel and the [PLO],' which was drafted in 1995<sup>716</sup> by Abbas<sup>717</sup> and Beilin,<sup>718</sup> revealed that the PLO agreed that the implementation of the ROR is impracticable.<sup>719</sup> In 2002 Arafat also confirmed that the PLO was willing to implement the

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<sup>709</sup> Ehud Barak quoted in Alain Gresh, 'The European Union and the refugee question,' Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 86

<sup>710</sup> Ilan Pappé, 'Israeli Perceptions of the Refugee Question,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 75

<sup>711</sup> Francis Boyle, *The Palestinian Right of Return under International Law* (Clarity Press, 2011) 16

<sup>712</sup> Ibid 16

<sup>713</sup> Ibid 15

<sup>714</sup> 'The 'State' of Israel has never been anything but a Bantustan for the Jews that was established in Palestine after the Second World War by the White racist and genocidal Western colonial imperial powers in order to control and dominate the Middle East as their behest. As such this Jewish Bantustan will suffer the same terminal fate as did the Bantustans for Blacks founded by the White racist criminal apartheid regime in South Africa and for the same reasons. Consequently, the Palestinians must sign no peace treaty with this apartheid Jewish Bantustan and let it collapse of its own racist and genocidal weight. In this regard, my former adversary the genocidal Yugoslavia collapsed as a State, lost its U.N membership, and no longer exists as a State. The same fate will happen to the genocidal Bantustan for Jews known as 'Israel.' Francis Boyle, *The Palestinian Right of Return under International Law* (Clarity Press, inc 2011) 17

<sup>715</sup> Rex Brynen, 'Imagining a solution: Final Status Arrangements and Palestinian Refugees in Lebanon' (*Palestinian Refugee ResearchNet*, 1 January 1997)

<<http://prrn.mcgill.ca/research/papers/brynen3.htm>> accessed 2 June 2017

<sup>716</sup> United Nations, 'Beilin – Abu Mazen document– Framework for the conclusion of a final status agreement between Israel the PLO' (*United Nations*, 31 October 1995)

<<https://www.un.org/unispal/document/auto-insert-208262/>> (accessed 2 June 2017)

<sup>717</sup> Yasser Arafat's deputy at the PLO at the time.

<sup>718</sup> Deputy Israeli Foreign Minister at the time.

<sup>719</sup> Article VII (Section I) 'Whereas the Palestinian side considers that the right of the Palestinian Refugees to return to their homes is enshrined in international law and natural justice, it recognizes

RTR in a way that complies with Israel's demographic concerns.<sup>720</sup> While in 2003 the PLO confirmed that it is willing to terminate the RTR in the Geneva Initiative, which was a draft *Permanent Status Agreement* for ending the Israeli–Palestinian conflict. The Geneva Initiative which was formulated by several negotiators including Beilin and Abed Rabbo<sup>721</sup> expected the PA established by the Oslo accords and Jordan to resettle Palestinian refugees. While Palestinian refugees in the PA were expected to be resettled in Area C in the West Bank and 'become citizens and lose their refugee status even though there is no state.'<sup>722</sup> The Geneva Initiative also wanted to end the RTR to Israel before the establishment of a Palestinian State by linking compensation paid by Israel to Palestinian refugees to a commitment to end all claims. According to the Geneva Initiative, Palestinian refugees will not be able to make an individual claim because Resolution 194 will be replaced with a new UN resolution that terminates all claims including the RTR.<sup>723</sup> The Geneva Initiative also wanted Palestinian refugees to have the right to make host countries their permanent place of residence or to relocate to a third country. The drafters also accepted that third countries and Israel would have the right to reject resettlement requests made by Palestinian refugees. Despite this in 2011, Abbas confirmed that '[a] key focus of negotiations [with Israel] will be reaching a just solution for Palestinian refugees based on Resolution 194.'<sup>724</sup> Although this position was reaffirmed by the Palestine Ministry of Foreign

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that the prerequisite of the new era of peace and coexistence, as well as the realities that have been created on the ground since 1948, have rendered the implementation of this right impracticable. The Palestinian side, thus, declares its readiness to accept and implement policies and measures that will ensure, in so far as this is possible, the welfare and well-being of these refugees.' Quoted in Naseer Aruri, 'Toward Convening a Congress of Return and Self-Determination,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 267

<sup>720</sup> Arafat wrote 'we seek a fair and just solution to the plight of Palestinian refugees who for 54 years have not been permitted to return to their homes. We understand Israel's demographic concerns and understand that the right of return of Palestinian refugees, a right guaranteed under international law and United Nations Resolution 194, must be implemented in a way that takes into account such concerns. However, just as we Palestinians must be realistic with respect to Israel's demographic desires, Israelis too must be realistic in understanding that there can be no solution to the Israeli-Palestinian conflict if the legitimate rights of these innocent civilians continue to be ignored.' Yasser Arafat, 'The Palestinian Vision of Peace' (*The New York Times*, 3 February 2002) <<http://www.nytimes.com/2002/02/03/opinion/the-palestinian-vision-of-peace.html>> accessed 1 June 2017

<sup>721</sup> Then a Palestinian National Authority Minister.

<sup>722</sup> United Nations, 'Beilin – Abu Mazen document– Framework for the conclusion of a final status agreement between Israel the PLO' (*United Nations*, 31 October 1995) <<https://www.un.org/unispal/document/auto-insert-208262/>> (accessed 2 June 2017)

<sup>723</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 (1) *Israel Law Review* 47, 67 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>724</sup> Mahmoud Abbas, 'The Long Overdue Palestinian State' (*The New York Times*, 17 May 2011) <<http://www.nytimes.com/2011/05/17/opinion/17abbas.html>> accessed 10 May 2017



Affairs,<sup>725</sup> the ministry also confirmed that '[o]ur refugees must be allowed to choose how to implement their rights and normalize their status. The options for our refugees should be return to Israel, return/resettlement to a future Palestinian state, integration in host states, or resettlement in third-party states. Rehabilitation in the form of professional training, education, medical services, provision of housing, etc will also be a necessary component of each of the options.'<sup>726</sup> In 2012 Abbas suggested that the RTR does not apply to areas within Israel when he stated that he has a 'right to see [his native city of Safed which he fled in 1948], but not to live there.'<sup>727</sup> This demonstrates that while the Palestinian discourse on the right of return derives from international law and relevant UN resolutions political compromises that derive from realpolitik limit this approach.

In conclusion, the Palestinian discourse has used the discourse of rights to argue that Palestinian refugees have a legal right under international law to return to their homes in territories that became part of Israel. Although Palestinian scholars and the Palestinian leadership are clearly willing to compromise on the ROR Israeli scholars claim that 'Israel cannot be expected to sign up to an abstract [RTR]'<sup>728</sup> and call upon the international community to curb 'the Palestinian idea of the return of all Palestinians to all of Palestine.'<sup>729</sup> Such scholars have failed to acknowledge that when the Palestinian leadership calls for a just solution to the plight of Palestinian refugees it is calling for the resettlement of most Palestinian refugees in a future Palestinian State, host States<sup>730</sup> or third countries.

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<sup>725</sup> The Palestine Ministry of Foreign Affairs on its official website states 'Our vision requires a just solution to the Palestinian refugee issue in accordance with international law, and specifically... Resolution 194. A just solution must be based on the right of return and reparations. Our position on refugees is also included and supported in the Arab Peace Initiative (API), which calls for 'a just solution to the Palestinian refugee problem to be agreed upon in accordance with... Resolution 194... A just solution to the refugee issue must address two aspects: the right of return and reparations.' Palestine Ministry of Foreign Affairs, 'Refugees' (*Palestine Ministry of Foreign Affairs*, 2014) <<http://www.mofa.pna.ps/en/refugees/>> accessed 1 January 2019

<sup>726</sup> Ibid

<sup>727</sup> Elhanan Miller, 'Why Mahmoud Abbas Is Israel's Best Partner for Peace' (*The New York Times*, 1 March 2017) <[https://www.nytimes.com/2017/03/01/opinion/why-mahmoud-abbas-is-israels-best-partner-for-peace.html?\\_r=0](https://www.nytimes.com/2017/03/01/opinion/why-mahmoud-abbas-is-israels-best-partner-for-peace.html?_r=0)> accessed 5 June 2017

<sup>728</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 (1) *Israel Law Review* 47, 77 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>729</sup> Ibid 47

<sup>730</sup> Manal Hazzan, 'Palestinian Refugees, The right of return and Israeli Legal Practice,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 75 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

#### 4.6. The Israeli discourse on the right of no return under international law

The Israeli discourse has always maintained that under international law Palestinian refugees have no RTR to territories that became part of Israel in 1948.<sup>731</sup> Instead of solving the Palestinian refugee problem based on relevant UN resolutions Israel wants to dissolve the problem by resettling Palestinian refugees in Arab host States. Advocate Hazzan claims that 'Israel's position is not based on a legal framework but on a moral rejection and denial of responsibility for the refugee problem.'<sup>732</sup> However, this assessment can be challenged because Israel has relied on excellent legal scholars to offer a legal justification for rejecting the RTR for Palestinian refugees.<sup>733</sup> This legal reasoning was well articulated by Lapidoth<sup>734</sup> whose argument is published by Israel's Ministry of Foreign Affairs.<sup>735</sup> Lapidoth's argues that the RTR is an empty claim because the first Resolution 194 is not a legally binding agreement. Secondly, Resolution 194 does not confirm a RTR but instead, the term 'should' indicate it is only a recommendation.<sup>736</sup> Finally, she points out that Resolution 194 places two conditions for return 1) a wish to return and 2) a willingness to live in peace next to one's neighbours.<sup>737</sup> Lapidoth claims that Palestinian refugees are not willing to live in peace and therefore they cannot rely on Resolution 194. Those who support this allegation claim the meaning of 'return' in 'Palestinian political thought and the literature at the time suggest that they wanted to undo Israel rather than return peacefully.'<sup>738</sup>

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<sup>731</sup> Yoav Gelber, 'The Historic Background,' in Edward J Perkins and others (eds), *Palestinian Refugees: Old Problems-New Solutions* (University of Oklahoma Press 2001) 24; See Yaffa Zilbershats, 'Do the 1948 Palestinian Refugees Have the Right to Return?' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 27 & 47

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>732</sup> Manal Hazzan, 'Palestinian Refugees, The right of return and Israeli Legal Practice,' in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47, 75

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>733</sup> Ibid 75 also links to arguments above.

<sup>734</sup> Professor of International Law at the Hebrew University of Jerusalem.

<sup>735</sup> Ruth Lapidoth, 'Do Palestinian Refugees Have a Right to Return to Israel?' (*Israel Ministry of Foreign Affairs*, 15 January 2001)

<<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to.aspx>> accessed 1 January 2017

<sup>736</sup> Ibid

<sup>737</sup> Ibid

<sup>738</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 (1) *Israel Law Review* 47, 59

Regarding Article 13 of the UDHR Lapidoth argues that it was ‘intended to apply to individuals asserting an individual right. [And that the drafters had] ...no intention here to address the claims of masses of people who have been displaced as a by-product of war or by political transfers of territory or population.’<sup>739</sup>

Lapidoth also observes that the RTR was not mentioned in the 1978 Camp David Framework for Peace in the Middle East or the 1994 Israeli Jordanian agreement. Finally, Lapidoth argues that if Israel allowed Palestinian refugees to return to Israel ‘this would be an act of suicide on her part, and no state can be expected to destroy itself.’<sup>740</sup> Likewise, Zilbershats has argued that the RTR ‘is incompatible with the interests and the rights of the State of Israel as the state of the Jewish people’ and therefore, Israel should not recognise the RTR even if such recognition will not result in actual return.<sup>741</sup> Zilbershats also argues that Resolution 194 does not vest Palestinian refugees with a RTR ‘as the Resolution does not refer to the term ‘right’ and, when adopted, was rejected by the Palestinians.’<sup>742</sup> Despite this interpretation, Zilbershats acknowledges that ‘[s]ubsequent resolutions of the UN[GA] recognise the right of the Palestinian people to self-determination and the right of the Palestinians to return to their homes’<sup>743</sup> but maintains that Palestinian refugees have no RTR under international law because UNGA Resolutions are not legally binding. Moreover, Zilbershats argues that relevant UNSC Resolutions which are legally binding do not support the RTR claims because they ‘make no reference whatsoever to their ‘[RTR]’...’<sup>744</sup> Furthermore, Zilbershats observes that even UNRWA was not tasked with returning

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<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>739</sup> Ruth Lapidoth, ‘Do Palestinian Refugees Have a Right to Return to Israel?’ (*Israel Ministry of Foreign Affairs*, 15 January 2001)

<<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to.aspx>> accessed 1 Jan 2017

<sup>740</sup> Ibid

<sup>741</sup> Yaffa Zilbershats, ‘Do the 1948 Palestinian Refugees Have the Right to Return?’ in 1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016 (2018) 51 (1) *Israel Law Review* 47

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>742</sup> ‘Article 11 of...Resolution [194] ...must be seen as part of the general strategy and not as an independent right vested in the Palestinians, particularly as the Resolution does not refer to the term ‘right’ and, when adopted, was rejected by the Palestinians.’ Ibid 71

<sup>743</sup> Ibid 71

<sup>744</sup> ‘Security Council Resolutions 237 and 242 of 1967 and 338 of 1973 744 call for a ‘just’ solution to the Palestinian problem, but make no reference whatsoever to their ‘right to return’. It is these decisions of the Security Council that are binding in the relations between the Israelis and the Palestinians, as the Oslo Agreements signed by the two parties vest them with binding force following their adoption by the parties.’ Ibid 71

Palestinian refugees to Israel.<sup>745</sup> In addition, Zilbershats claims Palestinian refugees do not have a RTR under relevant international human rights conventions because they 'do not provide uniform definitions regarding the scope of the right of freedom of movement.'<sup>746</sup> Moreover, Zilbershats claims Article 12(4) of the International Covenant on Civil and Political Rights of 16 December 1966 which states '[n]o one shall be arbitrarily deprived of the right to enter his own country' does not apply to Palestinian refugees because they 'do not satisfy the terms of the article' since 'Israel is not 'their country.'<sup>747</sup> Therefore, she concludes that Article 12(4) 'does not vest them with a [RTR] to...Israel.'<sup>748</sup> Zilbershats also notes that even if Israel 'is regarded as their country, the restriction on their entry is not arbitrary. Israel is entitled to prevent the entry of Palestinians into its territory and, a fortiori, the entry of their descendants, as such a development might endanger the existence of the state and the exercise of the right of the Jewish people to self-determination within it.'<sup>749</sup> Zilbershats also maintains that global practice illustrates that states have not interpreted the right to go back to once habitual residence 'as indirectly obligating the original state to permit the return of the refugees.'<sup>750</sup> Zilbershats also argues that in prolonged ethnic disputes 'the return of refugees who are members of one national ethnic group to territory that is controlled by another group is generally not the appropriate solution for ending a prolonged ethnic dispute.'<sup>751</sup> While Shany et al has concluded that Resolution 194 does not entitle Palestinian refugees to return to the exact place that they fled but that it is instead 'an abstract notion of flexible mode of implementation'<sup>752</sup> and therefore, the RTR should be replaced with compensation and that Palestinian refugees should be taken 'off the refugee list through naturalization and resettlement.'<sup>753</sup>

Although UNGA resolutions are not legally binding<sup>754</sup> Lapidoth et al fail to acknowledge that 'they may be pronouncements of customary law principles...[and] help to influence state

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<sup>745</sup> Ibid 72

<sup>746</sup> Ibid 28

<sup>747</sup> Ibid 29

<sup>748</sup> Ibid 72

<sup>749</sup> Ibid 72

<sup>750</sup> Ibid 72

<sup>751</sup> Ibid 70

<sup>752</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 (1) *Israel Law Review* 47, 109  
<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>753</sup> Ibid 70

<sup>754</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 431

practice... [or] serve as evidence of opinion Juris.<sup>755</sup> Moreover, according to Article 31(1) of the Vienna Convention states must give consideration to UNGA resolutions in good faith and give a rational reason for rejecting their recommendations.<sup>756</sup> Article 13(1)(a) of the Charter of the UN also expects the UNGA 'to initiate studies to make recommendations for the purpose of...encouraging the progress and development of international law and its codification.'<sup>757</sup> Thus, UNGA resolutions cannot be considered mere recommendations. The thesis will discuss the RTR in more detail in chapter 5.

#### 4.7. Conclusion

In conclusion, what this chapter has revealed is the contested and ideologically charged framing of legal claims in respect of the ROR for Palestinian refugees. As has been demonstrated from the literature, while the Palestinian discourse claims that the ROR for Palestinian refugees is enshrined in international law, the Israeli discourse rejects the ROR for Palestinian refugees based on international law. Despite this, both discourses agree that most Palestinian refugees will not be able to return to Israel<sup>758</sup> because Israel rejects the ROR for Palestinian refugees. Moreover, scholars who argue that the right to self-determination and the ROR are both interrelated conclude that Palestinian refugees have a RTR to their own country and not to Israel.<sup>759</sup> Therefore, a final settlement between Israel and the PLO will likely lead to the permanent resettlement of Palestinian refugees in States hosting UNRWA, a future Palestinian State or third States. Such a settlement will eradicate

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<sup>755</sup> Corrie Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its foundation and Evolution,' in H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 141

In Voting Case Procedure Judge Lauterpacht was against giving 'currency to the view that [because UNGA Resolution are not legally binding] they have no force at all, whether legal or other and that therefore they cannot be regarded as forming any sense part of a legal system of supervision.' Quoted in Guy Goodwin-Gill, Jane and McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 431

<sup>756</sup> United Nations, 'Vienna Convention on the Law of Treaties' (*Refworld*, 23 May 1969) <available at: <<https://www.refworld.org/docid/3ae6b3a10.html>> accessed 30 September 2020

<sup>757</sup> United Nations, 'Charter of the United Nations' (*United Nations*, 10 December 1948) <[https://legal.un.org/repertory/art13\\_1a1.shtml](https://legal.un.org/repertory/art13_1a1.shtml)> accessed 30 September 2020, Article 13 (1) (a)

<sup>758</sup> The explanation offered by the Palestinian discourse and the Israeli discourse concerning why Palestinian refugees have not been able to return to Israel fits with the realist approach to international relations which holds that state interests construct international law and that states fulfil their legal obligations in 'pursuit of interests.'

Alice Edwards (2009) 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders,' in H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 480

<sup>759</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998) 353

the ROR for Palestinian refugees because Resolution 194 will be superseded by a new UN Resolution that will annul the individual RTR to Israel.

What this demonstrates is the need to examine what we mean by 'return' as a human right and how the rights of refugees have been defined and arguably compromised by the link between statehood and the application of rights.<sup>760</sup> Such an argument is also made by both Goodwin-Gill and Reisman. Goodwin-Gill suggests that while '[w]e can invoke the [ROR] on an individual basis...rights can be compromised by agreements between states.'<sup>761</sup> In a similar force, Reisman<sup>762</sup> notes that in international law one must realize that while 'attractive moral arguments may be marshalled in favour of arrangements that encompass the interests of all relevant actors...the designing arrangement in the common interest is ultimately an imperative of political efficiency rather than morality.'<sup>763</sup>

Central to the thesis that follows, is the peculiarity of the one-sided nature of discourse around international law in respect of the right of return. For example, on the one hand, it is apparent from the literature that the right of return has been discussed in such a way that enables Palestinian and Israeli scholars to remain silent on the question of how international law privileges the right of sovereign states over the rights of individuals by placing the rights of States to restrict who can enter their territories above the RTR and the right to self-determination over the RTR. Equally so, the same concern arises in relation to the absence of rights talk about how the RTR for Palestinian refugees can be eradicated by international law through relevant international conventions that address refugees and stateless persons. Such conventions co-opt domestic laws to legalize legal norms that can turn the RTR into a right of no return. What proves central to the discussion in chapter 5 is why there has been little to no examination of how sovereign States can strip individuals from their right to have rights and how the principle of sovereignty can impact the legal status of Palestinian refugees and their RTR.

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<sup>760</sup> This links to Hannah Arendt right to have rights argument in Chapter 2.

<sup>761</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 109 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>762</sup> Professor of International Law at Yale Law School.

<sup>763</sup> Michael Reisman, 'On the Causes of Uncertainty and Volatility in International Law' (*United Nations Audiovisual Library of International Law*) <<http://www.un.org/law/avl>> accessed 1 September 2018

## Chapter 5: The Right to Return in International Law

The central question that will be examined in this chapter is whether there is a fundamental right to return [RTR]<sup>764</sup> in international law. This chapter will do so by examining how the RTR has been conceptualized in international law and whether international law supports the RTR for stateless Palestinian refugees.<sup>765</sup> This chapter reveals that Arendt's account of rights fits with the international legal framework from which the RTR derives. That this is not an arbitrary interpretation is proved by the fact that the RTR in international law is linked to one's country of nationality. This corresponds theoretically with Arendt's account that the possession of nationality is a precondition for accessing rights including the RTR and that States can turn individuals into rightless persons with no RTR by stripping them of their nationality.<sup>766</sup>

### 5.1. The Right to Return in International Law

In 1998 Quigley examined the legal foundation for the RTR in international law and concluded that the RTR derives from international human rights law, international humanitarian law and the law of nationality as applied upon state succession.<sup>767</sup> In the same year, Takkenberg<sup>768</sup> in his book *The Status of Palestinian Refugees in International Law* examined the status of Palestinian refugees under international refugee law, international human rights law and international humanitarian law.<sup>769</sup> Takkenberg's second edition of the

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<sup>764</sup> This thesis adopts the term 'right to return' to examine whether Palestinian refugees have a 'right to return' to Israel under international law as outlined in Article 13(2) of the Universal Declaration of Human Rights which states, 'everyone has the right to leave any country, including his own, and to return to his country.' United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)>  
accessed 1 December 2018

<sup>765</sup> This examination is important because as Marti Koskenniemi rightly observes when lawyers are trying to address a legal problem '[i]t is not a matter of lawyers applying 'the law' but grappling with the question 'which law?' and '[t]he question remains always what kind of (or whose) law and what type of (and whose) preference?' Marti Koskenniemi quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 139

<sup>766</sup> This is related to our discussion of Arendt's right to have rights in Chapter 2.

<sup>767</sup> John Quigley, 'Displaced Palestinians and the Right of Return' (1998) 39 (1) *Harvard International Law Journal* 193-198 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/hilj39&div=8&id=&page=>>>  
accessed 1 January 2019

<sup>768</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford Clarendon Press 1998) 345; See Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020)

<sup>769</sup> Ardi Imseis, 'Book Review: The Status of Palestinian Refugees in International Law'

book *Palestinian Refugees in International Law* which he co-authored with Albanese argued that these branches of international law 'constitute the foundation of a number of specific rights and standards of treatment to which Palestinian refugees are entitled'<sup>770</sup> such as the RTR, right to restitution and right to compensation because 'their dispossession which violated international norms has not been readdressed.'<sup>771</sup>

The writings of Quigley and Takkenberg revealed that theoretically, the RTR for Palestinian refugees<sup>772</sup> derives from four separate bodies of international law international human rights law, international humanitarian law, the law of nationality relating to State succession and international refugee law.<sup>773</sup>

Next, we will examine the basis for the RTR in the four bodies of international law.

## 5.2. The Right to Return in International Human Rights Law

In international human rights law, the RTR derives from Article 13(2) of the Universal Declaration for Human Rights of 1948 [UDHR] which states 'everyone has the right to leave any country, including his own and to return to his country.'<sup>774</sup> The RTR also derives from Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 which states 'everyone has...the right to leave any country, including

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(*Dalhousie University Libraries Journal*, 1999) <<https://ojs.library.dal.ca/djls/article/view/5598>> accessed 11 November 2016, 23-29

<sup>770</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 128

According to Takkenberg's and Albanese the second edition was written to fill the gap in the first edition which did not 'discuss the implications of the right of return as a legal right and took for granted that it would be the object of compromise.' Ibid 119

<sup>771</sup> Ibid 129

<sup>772</sup> United Nations, 'The Right of Return of The Palestinian People' (*UNISPAL*, 1 November 1978) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/805C731452035912852569D1005C1201>> accessed 31 October 2016, 1

<sup>773</sup> Leskovic Vendramin, 'The Right to Return of Refugees in International Law: The Case Study of Bosnia and Herzegovina' (*International Institute for European Studies*, 2008) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, 8

<sup>774</sup> United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, Article 13(2)

\*Kesby observes '[t]hat the right to enter was originally conceived in terms of the national's right to leave and return to his state of nationality is reflected in article 13(2) of the Universal Declaration.' Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 17



one's own, and to return to one's country.<sup>775</sup> The RTR is also affirmed in Article 12(4) of the International Covenant on Civil and Political Rights of 1966 [ICCPR] which states 'no one shall be arbitrarily deprived of the right to enter his own country.'<sup>776</sup> The RTR to one's country of nationality was also reaffirmed in the Declaration on the Right to leave and the Right to Return of 1972<sup>777</sup> and in the European Convention on Human Rights of 1963.<sup>778</sup> The RTR was also affirmed in Article 23 of the Vienna Declaration and Programme of Action of 1993<sup>779</sup> and several regional conventions.<sup>780</sup>

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<sup>775</sup> United Nations, 'International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965' (*Refworld*, 21 December 1965) <<https://www.refworld.org/docid/3ae6b3940.html>> accessed 7 January 2019, Article 5(d)(ii)

<sup>776</sup> United Nations, 'International Covenant on Civil and Political Rights, 16 December 1966, United Nations' (*Refworld*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 7 January 2019; See Kesby who observes 'an initial proposal referred to the individual's right 'to return to the country of which he is a national.' 'Return' was later changed to 'enter' to take into account nationals who were born elsewhere and had never actually lived in their country of nationality. At the same time, the phrase 'country of which he is a national' became 'his own country' so as to incorporate permanent residents.' Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 17; See Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987) 261; Stig Jagerskiöld, 'The Freedom of Movement', in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 166, 180

\*According to Foster and Hathaway the right not to be arbitrarily deprived of the right to enter one's country 'prohibits efforts to directly or indirectly deny entry.' Foster and Hathaway refer to examples provided by the Human Rights Committee notes in General Comment No. 27, supra n. 406, at [21] which refer to 'stripping a person of nationality or...expelling an individual to a third country [thereby] arbitrarily prevent[ing] [a] person from returning to his or her own country.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 249 Germany's Federal Administrative Court found that when a State strips a person from his/her nationality the 'state deprives the individual in question of his or her fundamental status as a citizen, and thus necessarily denies residency protection, thereby rendering the person stateless and unprotected—in other words: it excludes him or her from the state's system of protection and peace.' 10 C 50.07 (Ger. BverwG [German Federal Administrative Court], 2009, at [19] (unofficial translation) quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 251

<sup>777</sup> Article 9 of Declaration on the Right to leave and the Right to Return of 1972 refers to the right 'to return to the country which he is a national.' 'The Right to Leave and the Right to Return: A Declaration Adopted by the Uppsala Colloquium, Sweden, June 21, 1972' (1972) 7 (1) *The International Migration Review* <[jstor.org/stable/3002495](http://jstor.org/stable/3002495)> accessed 21 October 2020; See Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987) 150-3

<sup>778</sup> Council of Europe, 'Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963' (*Refworld*, 16 September 1963) <<https://www.refworld.org/docid/3ae6b3780.html>> accessed 6 April 2020, ECHR, Fourth Protocol, Article 3 (2)

<sup>779</sup> Article 23 states '*The World Conference on Human Rights reaffirms that everyone... is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. In this respect it stresses the importance of the Universal Declaration of Human Rights.*' United Nations, 'Vienna Declaration and Programme of Action' (*United Nations Human Rights Office of the High Commissioner*, 25 June 1993) <<https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> accessed 7 Dec 2019, Article 23

While international human rights instruments assert that the RTR is an absolute right the UDHR is not legally binding on signatory states.<sup>781</sup> Despite this Weis<sup>782</sup> has observed that this has not stopped the UDHR from influencing 'law and its development.'<sup>783</sup> Although the thesis agrees with Weise that a 'declaration can acquire a wider legal significance than that of mere non-binding instruments'<sup>784</sup> sovereign States remain a central actor in international law and key scholars in the field of international law who focus on refugees such as McAdam, Goodwin-Gill,<sup>785</sup> Hathaway<sup>786</sup> and Blackman<sup>787</sup> acknowledge the primary role of

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\*Adopted by the UN World Conference on Human Rights

<sup>780</sup> The right to return was also affirmed in several regional conventions such as:

\*'Protocol No.4 to the Convention for the Protection of Human Rights and the Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and the First Protocol [1963].' Article 3, Paragraph 2 of the Protocol states 'No one shall be deprived of their right to enter the territory of the state of which he is a national.' Council of Europe, 'Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963' (*Refworld*, 16 September 1963)

<<https://www.refworld.org/docid/3ae6b3780.html>> accessed 6 April 2020, Article 3

\*Article 12, Paragraph 2 of The African (Banjul) Charter on Human and People's Rights [1961] states 'Everyone has the right to leave any country, including his own, and to return to his country.' Organization of African Unity, 'African Charter on Human and Peoples' Rights ("Banjul Charter")' (*Refworld*, 27 June 1981) <<https://www.refworld.org/docid/3ae6b3630.html>> accessed 7 December 2019, Article 12

\*Article 22 (5) of The American Convention on Human Rights [1969] states 'No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.' *Organization of American States (OAS)*, 'American Convention on Human Rights' (*Refworld*, 22 November 1969) <<https://www.refworld.org/docid/3ae6b36510.html>> accessed 7 December 2019, Article 22 (5)

<sup>781</sup> Paul Weis (1966), 'Territorial Asylum,' in H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 31

<sup>782</sup> Paul Weis is 'a leading expert in refugee law and the international law of nationality and statelessness.' He was the Legal Advisor to the International Refugee Organization [1947-1951] and to the UNHCR [1951-1967]. Eric Fripp, *Nationality and Statelessness in International Law* (Hart publishing 2016) xviii

Weise is also the author of 'Nationality and Statelessness in International Law' published in 1956. A second edition was published in 1979. Louise Holborn described the first edition of the book as 'the first thorough treatise on the existence and nature of rules of public international law relating to nationality and statelessness.' Louise Holborn Quoted in Eric Fripp, *Nationality and Statelessness in International Law* (Hart publishing 2016) xviii; See also two significant books addressing recognition in international law: *Hersch Lauterpacht, Recognition in International Law* (Cambridge University Press, 1947) and Ti-Chiang Chen (1951), *The International Law of Recognition, with Special reference to Practice in Great Britain and the United States* (2018 edn, Franklin Classics Trade Press); See also Richard Plender, *International Migration Law* (Springer 1972) and Richard Plender, *International Migration Law* (Springer 1988). According to Eric Fripp '[s]ince Weis' second edition in 1979 and Plender's in 1988 there has been no single work in English addressing a broad span of the international law of nationality and statelessness.' Eric Fripp, *Nationality and Statelessness in International Law* (Hart publishing 2016) xviii

<sup>783</sup> Paul Weis (1966), 'Territorial Asylum,' H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 31

<sup>784</sup> *Ibid* 31

<sup>785</sup> 'The refugee in international law occupies a legal space characterized, on the one hand, by the principles of State sovereignty and the related principles of territorial supremacy and self-

State sovereignty and therefore they have a right to grant or deny entry to their territory. This is also acknowledged by Albanese et al who observed that:

Some limitations do exist [in the current human rights framework], as aliens (i.e. non-citizens) do not enjoy full freedom to enter and reside in a territory, and do not enjoy the full political rights enshrined in Article 25 of ICCPR.<sup>788</sup>

Goodwin-Gill has also observed that:

No one doubts that states have, in accordance with international law, a right both to exclude and to expel foreign nationals. What may be disputed, however, are the absoluteness of those rights, their extent, and the modalities of their application. The issue of sanctuary and the plight of those in search of refuge, for whatever reason, neatly sets in opposition competing humanitarian and legal interests.<sup>789</sup>

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preservation; and, on the other hand by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty. Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception.' Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 1

<sup>786</sup> '[The] [c]urrent refugee law can be thought of as compromise between the sovereignty prerogative of states to control immigration and the reality of forced movement of persons at risk. Its purpose is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather is to govern disruptions of regulates international migrated in accordance with the interests of states.' James Hathaway, 'A Reconsideration of the Underlying Premise Refugee Law' (1990) 31 *Harvard International Law Journal*, 133 <[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>787</sup> 'In a state centric international legal system, the state is still the primary vehicle by which the individual accesses the rights and protections available under international law...[J]ust as domestic citizenship is the prerequisite for acquiring and exercising civil and political rights within the state—the right to have rights---so too nationality in a state is the sine quo non for exercising most rights the individual has under international law.' Blackman quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 51

<sup>788</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 170

Article 25 of the International Covenant on Civil and Political Rights states:

'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;  
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;  
(c) To have access, on general terms of equality, to public service in his country.' United Nations, 'International Covenant on Civil and Political Rights, 16 December 1966, United Nations' (*Refworld*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 7 January 2019, Article 25

<sup>789</sup> Guy Goodwin-Gill, 'Remarks by Guy S. Goodwin-Gill' (*Proceedings of the ASIL Annual Meeting*, 1986)

<<https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/remarks-by-guy-s-goodwingill/2DF52A6C9CB88F3463DC1D3A70113546>> accessed 23 October 2020, 96

Despite this dispute, individuals do not have an unrestricted right to be granted entry to any State.<sup>790</sup> This fact is recognized in Article 12(3) of the ICCPR which acknowledges that freedom of movement can be legally restricted to 'protect national security.'<sup>791</sup> The RTR can also be restricted if the person is not a national of the country, he/she wished to return to because as Jennings and Watts have observed:

Nationality is the link between [individuals] and international law. It is through the medium of their nationality that individuals can normally enjoy benefits from international law. This has consequences over the whole area of international law...[because] individuals [who] do not possess any nationality enjoy, in general, only limited protection.<sup>792</sup>

This view corresponds theoretically with Arendt's account that the possession of nationality is a precondition for accessing rights. Arendt's account is also supported by the drafting history of the UDHR. During the drafting process, Weiss wrote that:

It is through his connection with a particular state by the ties of nationality that the individual finds his place in international law.<sup>793</sup> Therefore, membership in a nation-state is considered 'one of the most effective means to safeguard and assure the human rights of the individual.'<sup>794</sup>

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<sup>790</sup> See the Convention on Territorial Asylum of 28 March 1954. Article 1 confirmed that 'Every state has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other states.' United Nations, 'Convention on territorial asylum. Concluded at Caracas on 28 March 1954' (*United Nations Treaty Collection*, 28 Mar 1954)

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24378-English.pdf>> accessed 6 April 2020, Article 1

<sup>791</sup> United Nations, 'International Covenant on Civil and Political Rights, 16 December 1966, United Nations' (*Refworld*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 7 January 2019, Article 12(3)

<sup>792</sup> '[N]ationality is the link between [individuals] and international law. It is through the medium of their nationality that individuals can normally enjoy benefits from international law. This has consequences over the whole area of [IL]. Such individuals as do not possess any nationality enjoy, in general, only limited protection...As far as [IL] is concerned, there is, apart from obligations (now quite extensive) expressly laid down by treaty—and in particular general obligations, enshrined in the Charter of the United Nations, to respect human rights and fundamental freedoms—no restriction upon a state maltreating such stateless individuals.' Robert Jennings and Arthur Watts quoted in Eric Fripp, *The Law and Practice of Expulsion and Exclusion from the United Kingdom* (Hart Publishing 2015) 26

<sup>793</sup> Paul Weiss quoted in Eric Fripp, *Nationality and Statelessness in International Law* (Hart publishing 2016) XVI

<sup>794</sup> *Ibid* XVI

In the context of the RTR, the possession of a nationality gives individuals the RTR to their State of nationality because in international law 'the bonds of nationality create duties upon states vis-à-vis other states, such as a duty to readmit one's own nationals from abroad.'<sup>795</sup>

Prior also observes that:

The body of law on nationality requires a country to allow its nationals to reside within its territory, while the 'host' country has the right to demand that an expelled person be re-admitted to his/her own country. Moreover, individual rights require that each person has the right to reside in his/her own country. This right has a universally valid moral quality, and obtains for all peoples and for each individual person who experiences expulsion.<sup>796</sup>

Therefore, despite nationality being 'essentially an institution of domestic law'<sup>797</sup> it also has 'consequences in international law.'<sup>798</sup> This was confirmed in Article 1 of the 1930 Convention Relating to the Conflict of Nationality Laws which states that 'each state shall determine under its own law who are its nationals,' but that nationality laws adopted by sovereign states 'shall be accepted by other states in so far as it is consistent with international conventions, international custom, and principles of law generally recognised with regard to nationality.'<sup>799</sup> Despite this restriction it is important to acknowledge that nationality falls 'in principle within [the] reserved domain of state jurisdiction'<sup>800</sup> and international conventions, institutions and norms reflect the agreement between sovereign States.<sup>801</sup>

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<sup>795</sup> Alice Edwards, Laura van Waas, 'Introduction,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 13 ; See Matthew Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 60

<sup>796</sup> Michael Prior, 'The Right to Expel: the Bible and Ethnic Cleansing,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 27

<sup>797</sup> States regulate the acquisition, loss and deprivation of nationality in their territories.

<sup>798</sup> Alice Edwards, Laura van Waas, 'Introduction,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 12

National laws are also '[m]atters of domestic jurisdiction...are traced by international law.' Lawrence Preuss quoted in Satvinder Juss, 'Free Movement and the World Order,' in Hélène Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 464; Satvinder S. Juss, 'Free Movement and the World Order' (2004) 16 (3) *International Journal of Refugee Law* <<https://doi.org/10.1093/ijrl/16.3.289>> accessed 1 September 2018

<sup>799</sup> League of Nations, 'Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930' (*Refworld*, 13 April 1930)

<<https://www.refworld.org/docid/3ae6b3b00.htm>> accessed 7 January 2019, Article 1

<sup>800</sup> Nationality Decree Issued in Tunis and Morocco PCIJ Rep 1923, Ser B, No 4,7, 24 Quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 41

<sup>801</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 390-91

### 5.3. Nationality a Prerequisite for Accessing Rights

In 1978 Lauterpacht stated that nationality 'is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres.'<sup>802</sup> While Bitar has rightly observed that '[n]ationality...provides...access to fundamental rights and protection... [and that] without the protection conveyed by nationality, the fundamental human rights enshrined by international agreements remain without value'<sup>803</sup> because '[t]o be without a nationality signified falling between the cracks of the international legal system.'<sup>804</sup> This is particularly true for stateless refugees because '[u]nlike nationals, there is no state a stateless person may enter and remain in as of right.'<sup>805</sup> This proves that 'nationality provides a protection which international law by itself cannot confer on a person.'<sup>806</sup>

The UDHR acknowledged 'the critical link between nationality and access to, and enjoyment of...human rights' including the RTR.<sup>807</sup> This is reflected in Article 15 of the UDHR which states that everyone has a right to a nationality and that '[n]o one shall be arbitrarily deprived of his nationality.'<sup>808</sup> The Oxford dictionary defines the word arbitrary as acts that 'are based

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<sup>802</sup> Hersch Lauterpacht quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 51; See Hersch Lauterpacht, 'Foreword to the First Edition in Paul Weis,' *Nationality and Statelessness in International Law* (2<sup>nd</sup> edn, Sijthoff & Noordhoff 1979) xi

<sup>803</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 6

<sup>804</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 42

<sup>805</sup> Ibid 18

<sup>806</sup> Ibid 55

See H F van Panhuys, *The Role of Nationality in International Law: An Outline* (Leiden: Sijthoff, 1959) 220-1

<sup>807</sup> Radha Govil, 'Women, Nationality and Statelessness,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 182

<sup>808</sup> United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 7 December 2018, Article 15

In 1995 UNGA resolution 50/152 also called upon states 'to adapt nationality legislation with a view to reducing statelessness... by preventing arbitrary deprivation of nationality' United Nations, 'A/RES/50/152 97th plenary meeting 21 December 1995' (*United Nations*, 21 December 1995).

<<https://www.un.org/documents/ga/res/50/a50r152.htm>> accessed 1 January 2019

United Nations Human Rights Council, 'Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34' (*Refworld*, 14 December 2009).

<<https://www.refworld.org/docid/4b83a9cb2.html>> accessed 7 January 2019

The report confirmed that nationality cannot be arbitrarily removed.

on random choice or personal whim, rather than on any reason or system.<sup>809</sup> This means that the deprivation of nationality can only be arbitrary if it is not undertaken in accordance with existing domestic laws.

According to Chan, any deprivation of nationality which renders a person stateless is arbitrary and therefore contrary to the UDHR.<sup>810</sup> A report submitted by the Open Society Justice Initiative to the UN Commission on Human Rights [UNCHR], argued that nationality provisions that result in statelessness are arbitrary because they strip a person from their right to a nationality.<sup>811</sup> While the Human Rights Committee in its General Comment No. 27 observed that countries 'must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her country.'<sup>812</sup> Brandvoll interprets this to mean that preventing an individual to return by rendering him/her stateless violates international law.<sup>813</sup> Brandvoll also asserts that a State that renders a person stateless and denies him/her entry is violating the territorial sovereignty of other States as it pushes the responsibility of that person on them.<sup>814</sup> Despite this, the 1961 Convention on the Reduction of Statelessness [1961 Convention] does not prohibit a State from depriving a national of his/her nationality.<sup>815</sup> Article 5 of the 1961 Convention only requires a State to make sure that such a person does not become stateless i.e., can acquire another nationality.<sup>816</sup> This prerequisite is not applicable if the individual has acquired his/her nationality by fraud or has been disloyal to his/her State. In

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<sup>809</sup> Oxford dictionaries, 'Arbitrarily' (*Oxford dictionaries*, n.d.)

<<https://en.oxforddictionaries.com/definition/arbitrarily>> accessed 25 January 2019

<sup>810</sup> Johannes Chan Man-mun summarized in Jorunn Brandvoll, 'Deprivation of Nationality: limitations on rendering persons stateless under international law,' in Alice Edwards and others, *Nationality and Statelessness under international law* (Cambridge University Press, 2014) 197; See Johannes Chan Man-mun, 'The Right to a Nationality was a Human Right: The Current Trend Towards Recognition' (1991) 12 (1-2) *Human Rights Law Journal*, 1, 3

<sup>811</sup> Open Society Justice Initiative, 'Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality, and Combating Statelessness (2005) submitted to the UN Commission on Human Rights for consideration at its 62nd session' (*Open Society Justice Initiative*, November 2005) <[https://www.opensocietyfoundations.org/sites/default/files/citizenship\\_20051101.pdf](https://www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf)> accessed 7 December 2018

<sup>812</sup> United Nations, 'General Comment No. 27: Freedom of Movement (Art.12)' (*United Nations Human Rights office of the High Commissioner*, 2 November 1999) <[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en)> accessed 5 January 2019

<sup>813</sup> Jorunn Brandvoll, 'Deprivation of Nationality: limitations on rendering persons stateless under international law,' in Alice Edwards and others, *Nationality and Statelessness under international law* (Cambridge University Press, 2014) 213

<sup>814</sup> *Ibid* 214

<sup>815</sup> United Nations, 'Convention on the Reduction of Statelessness, 30 August 1961' (*Refworld*, 30 August 1961) <<https://www.refworld.org/docid/3ae6b39620.html>> accessed 7 December 2018

<sup>816</sup> *Ibid* Article 5

such cases, the State has a right to deprive an individual of his/her nationality even if such deprivation will lead to statelessness.<sup>817</sup> Brandvoll also observes that '[i]n human rights law, states are permitted to restrict the right to enter and leave one's own country on the basis of concerns for, among others, national security and public order.'<sup>818</sup> Aleinikoff also found that a general consensus existed amongst States that a person can be stripped of his/her nationality if he/she betrayed the State, committed certain crimes or if the State needs to ensure public order and security.<sup>819</sup>

In sum, the RTR is a human right, but international human rights law also supports the principle of no return<sup>820</sup> by linking the RTR to one's country of nationality. Therefore, sovereignty and citizenship should not be downplayed in favour of the principle of the RTR.<sup>821</sup> It also reveals that Goodwin-Gill is correct when he observes that '[t]he individual is still not considered to be a subject of international law, capable of enforcing his or her rights on the international plane.'<sup>822</sup> International human rights law supports the RTR as long as it does not infringe on the right of the State to decide who can enter its territory and allows States in certain circumstances to strip individuals from their nationality even if this renders them stateless.<sup>823</sup> This corresponds with Bitar's observation that:

Nationality...provides formal standing within a state and, in extension, access to fundamental rights and protection. However, without this connection, an 'individual has no identity under the law. Moreover, without the protection conveyed by nationality, the fundamental human rights enshrined by international agreements remain without value.'<sup>824</sup>

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<sup>817</sup> 'Article 8. 1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless. 2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State: (a) in the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality; (6) where the nationality has been obtained by misrepresentation or fraud.' Ibid Article 8(1)(A)

<sup>818</sup> Jorunn Brandvoll, 'Deprivation of Nationality: limitations on rendering persons stateless under international law,' in Alice Edwards and others, *Nationality and Statelessness under international law* (Cambridge University Press, 2014) 4

<sup>819</sup> Thomas Alexander Aleinikoff, 'Theories of Loss of Citizenship' (1986) 84 Michigan Law Review, 1473-6 <<https://core.ac.uk/download/pdf/232715175.pdf>> accessed 30 March 2021

<sup>820</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 485

<sup>821</sup> This corresponds theoretically with Arendt's account that only the possession of a nationality turns mere human beings into subjects of rights.

<sup>822</sup> Ibid 432

<sup>823</sup> This corresponds with Arendt's account that sovereign States can turn citizens into rightless persons.

<sup>824</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 6



This argument is contrary to Peters argument that 'humanity is becoming the alpha and omega of sovereignty [because]...state sovereignty has its source and telos in humanity, understood as the principle that the state must protect human rights, interests, needs, and security.'<sup>825</sup> Peters line of reasoning is based on the belief that '[t]he ongoing process of a humanization of sovereignty is a cornerstone of the current transformation of international law into an individual-centred system.'<sup>826</sup> According to Peters, this transformation gave birth to a humanized version of State sovereignty that is 'limited by human rights'<sup>827</sup> which places a responsibility on States to protect basic human rights and to be accountable for their actions.<sup>828</sup> Although Peters argument reflects an evolution in the way that some scholars view sovereignty and its relationship with human rights we reject Peters assertion that State sovereignty has 'legal value only to the extent that it respects human rights, interests and needs'<sup>829</sup> [thereby] eliminat[ing] the basic antinomy between human rights and state sovereignty.'<sup>830</sup> Our rejection derives from the fact that the principle of sovereignty in international law, which gives States the right to control who can enter their territories, can override the individual RTR.

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#### 5.4. The Right to Return in International Humanitarian Law

The right of displaced persons to return to their places of origin after the cessation of the hostilities derives from two international conventions and they are the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Conventions (II) of 1899 and (IV) of 1907 [Hague Convention] and the Fourth Geneva Convention related to the Protection of Civilian Persons in time of War of 1949 [1949 Convention].

The source for the RTR in the Hague Convention is Article 43 which states:

The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far

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<sup>825</sup> Anne Peters quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 95; See Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 (3) *European Journal of International Law*, 513 <<https://doi.org/10.1093/ejil/chp026>> accessed 30 March 2021

<sup>826</sup> Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 (3) *European Journal of International Law*, 514 <<https://doi.org/10.1093/ejil/chp026>> accessed 30 March 2021

<sup>827</sup> Ibid 514

<sup>828</sup> Ibid 513

<sup>829</sup> Ibid 514 1

<sup>830</sup> Ibid 543

as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>831</sup>

While the RTR in the 1949 Convention derives from Article 49 which states:

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 other 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.<sup>832</sup>

In 1993 the UN Security Council [UNSC] concluded that the 'Geneva Conventions passed into the body of customary international law, thus making them binding on non-signatories.'<sup>833</sup> This is important because it means all States that engage in armed conflict have an obligation to allow displaced people to return to their homes as soon as hostilities have ceased. Furthermore, it also means that 'no group has a right in customary international law to conquer and annex the territory of another people and expel its population.'<sup>834</sup> Article 8 (2)(a)(vii) of Rome Statute of the International Criminal Court also considers 'unlawful deportation or transfer' a war crime.<sup>835</sup>

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<sup>831</sup> Second International Peace Conference (The Hague), 'Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907' (*International Committee for the Red Cross*, 18 October 1907) <<https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=7194AF23A72A3BA5C12563CD00515F47>> accessed 7 December 2018, Article 43

In 1946 the Nuremberg International Military Tribunal concluded that '[t]he rules of land warfare expressed in the [Hague] Convention undoubtedly represented an advance over existing International Law at the time of their adoption ... but by 1939 these rules ... were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.' 'Nuremberg International Military Tribunal' (*International Committee for the Red Cross*, 30 September- 1 October 1946) <<https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788>> accessed 7 December 2018

<sup>832</sup> International Committee for the Red Cross, 'Fourth Geneva Convention related to the Protection of Civilian Persons in Time of War of 12 August 1949' (*International Committee for the Red Cross*, 12 August 1949) <<https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=77068F12B8857C4DC12563CD0051BDB0>> accessed 7 December 2018

<sup>833</sup> Sam Erugo and Charles O. Adekoya, *Lawyering With Integrity: Essays In Honour of Ernest Ojukwu*, SAN (Lulu Press Inc 2017) 224

<sup>834</sup> Michael Prior, 'The Right to Expel: the Bible and Ethnic Cleansing,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press, 2001) 27

<sup>835</sup> Article 8 (2)(a)(vii) of Rome Statute of the International Criminal Court states 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (d) Deportation or forcible transfer of population;

## 5.5. State Succession and the Law of Nationality

State succession involves the creation of new States. The emergence of a newly independent State could lead persons formerly recognised as nationals of a State to become stateless if the new State does not confer its nationality on them. According to the UN General Assembly [UNGA], 'all persons 'habitually resident' in a given territory are presumed to have a right to acquire the citizenship of a successor state with sovereignty over that territory.'<sup>836</sup> Despite this O'Connell correctly observes that '[i]t cannot be asserted... [t]hat international law... [i]mposes any duty on the successor state to grant nationality.'<sup>837</sup> O'Connell's view is supported by Ziemele who observed that:

Territorial changes do not lead to automatic change of nationality. This change gives 'the success of state' the right under customary international law to confer its nationality upon the people which are permanently resident in the territory concerned.<sup>838</sup>

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2. For the purpose of paragraph 1:

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

Article 8

War crimes 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(vii) Unlawful deportation ...

(viii) 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.

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war

Rome Statute of the International Criminal Court 8 (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(viii) 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

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict. United Nations, 'Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998' (*Refworld*, 17 July 1998)

<<https://www.refworld.org/docid/3ae6b3a84.html>> accessed 28 January 2020, Article 8 (2)(a)(vii)

<sup>836</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 66-67

<sup>837</sup> Daniel O'Connell quoted in Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness,' in Alice Edwards and others (eds), *Nationality and Statelessness under international law* (Cambridge University Press, 2014) 219

<sup>838</sup> *Ibid* 233

In the context of state succession, the right of the State to confer its nationality upon whom it wishes is essential for the formation of its identity because as the International Law Commission has observed '[t]he problem of nationality is closely linked to the phenomenon of population as one constitutive elements of the State, because '..."[i]f states are territorial entities, they are also aggregates of individuals"<sup>839</sup>...'<sup>840</sup>

Ziemele also observed that:

[It] is essential to keep in mind that the population, as identified through the link of nationality, is an essential element of a state. New States might be particularly concerned about the strengthening of their state institutions, including nationality and identity. There should be, and there is in fact, in international law, space for States to do so.<sup>841</sup>

In terms of state practice, Zimmerman also found that automatic change of nationality was not accorded to existing nationals in Eastern European countries that experienced a transfer of territory.<sup>842</sup> Hudson has also observed that the assumption that the population follows the change of sovereignty in matters of nationality is unfounded.<sup>843</sup>

The right of existing communities to acquire the nationality of succeeding States was first acknowledged in the 1999 Draft Articles on Nationality of Natural Persons in Relations to the Succession of States [1999 Draft],<sup>844</sup> which was drafted by the United Nations Committee on International Law.<sup>845</sup> The 1999 Draft acknowledged that:

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<sup>839</sup> James Crawford quoted in International Law Commission, 'Nationality of Natural Persons in Relation to state succession of states with commentaries' (1999) 2 (2) Yearbook of the international law commission, Paragraph 35 <[https://legal.un.org/ilc/documentation/english/a\\_cn4\\_467.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_467.pdf)> accessed 28 January 2020; See James Crawford, *The Creation of States in International Law* (Clarendon Press 1979) 40

<sup>840</sup> International Law Commission, 'Nationality of Natural Persons in Relation to state succession of states with commentaries' (1999) 2 (2) Yearbook of the international law commission, Paragraph 35 <[https://legal.un.org/ilc/documentation/english/a\\_cn4\\_467.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_467.pdf)> accessed 28 January 2020  
Ineta Ziemele, 'State succession and issues of nationality and statelessness,' in Alice Edwards and others (eds), *Nationality and Statelessness under international law* (Cambridge University Press, 2014) 245

<sup>842</sup> Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness,' in Alice Edwards and others (eds), *Nationality and Statelessness under international law* (Cambridge University Press, 2014) 233

<sup>843</sup> Manley Hudson quoted in Ibid 218; See Manley Hudson, *Nationality, Including Statelessness* (Yearbook of the International Law Commission 2, Part Three 1952) 7

<sup>844</sup> International Law Commission, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries 1999' (*Refworld*, 3 April 1999) <<https://www.refworld.org/pdfid/4512b6dd4.pdf>> accessed 20 January 2020

<sup>845</sup> The right of existing communities to gain the nationality of a succeeding state was first adopted by the European Nationality Convention in 1997 which applies only to the Council of Europe.

[D]uring the process of decolonization... transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory. It did not include...a separate section on “Newly independent States”<sup>846</sup>

The 1999 Draft also emphasized ‘that nationality is essentially governed by internal law within the limits set by international law’<sup>847</sup> and therefore, called for the development of rules to endorse the RTR of persons forced to leave their habitual residence as a result of events connected with State succession. The 1999 Draft also called for the right of persons habitually resident in the territory affected by State succession to acquire the nationality of the new State.<sup>848</sup> The 1999 Draft considered access to nationality as fundamental to protecting ‘the human rights and fundamental freedoms of [such] persons.’<sup>849</sup> Although the UNGA adopted the 1999 Draft sovereign States continue to have the right to determine who are their nationals.<sup>850</sup>

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<sup>846</sup> International Law Commission, ‘Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries), 3 April 1999, Supplement No. 10 (A/54/10)’ (*Refworld*, 3 April 1999) <<https://www.refworld.org/docid/4512b6dd4.html>> accessed 7 December 2018

<sup>847</sup> *Ibid*

<sup>848</sup> *Ibid*

<sup>849</sup> 1999 Draft Articles on Nationality of Natural Persons in Relations to the Succession of States was formulated by the UN Committee on International Law. United Nations Committee on International Law, ‘Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries 1999’ (*Refworld*, 3 April 1999) <<https://www.refworld.org/pdfid/4512b6dd4.pdf>> accessed 22 January 2020; In 2006 the Council of Europe adopted the Convention on the Avoidance of Statelessness in Relation to State Succession. This Convention also confirmed that nationality was essential to ending the plight of stateless persons. Council of Europe, ‘Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 15 March 2006, CETS 200’ (*Refworld*, 16 March 2006) <<https://www.refworld.org/docid/4444c8584.html>> accessed 22 January 2020

<sup>850</sup> Article 1 of the 1930 Convention Relating to the Conflict of Nationality Laws stated that ‘each state shall determine under its own law who are its nationals.’ League of Nations, ‘Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930’ (*Refworld*, 13 April 1930) <<https://www.refworld.org/docid/3ae6b3b00.html>> accessed 7 January 2019; After the League of Nations was dissolved with the establishment of the UN the UN Charter confirmed the principle of sovereignty (i.e., that States are the supreme authority in its territory) which gives States the right to determine who are its nationals. The principle of sovereignty was confirmed in Article 2(1) of the United Nations Charter which states that ‘[t]he Organization is based on the principle of the sovereign equality of all its members.’ United Nations, ‘Charter of the United Nations, 24 October 1945, 1 UNTS XVI’ (*Refworld*, 24 October 1945) <<https://www.refworld.org/docid/3ae6b3930.html>> accessed 20 October 2021; The 1999 Draft Articles on Nationality of Natural Persons in Relations to the Succession of States also confirmed ‘that nationality is essentially governed by internal law within the limits set by international law.’ International Law Commission, ‘Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries), 3 April 1999, Supplement No. 10 (A/54/10)’ (*Refworld*, 3 April 1999) <<https://www.refworld.org/docid/4512b6dd4.html>> accessed 7 December 2018

In sum, in the context of State succession, international law cannot force States to confer their nationality on existing communities because conferring nationality remains a sovereign right.<sup>851</sup>

## 5.6. The Right to Return in International Refugee Law

'International refugee law is founded upon treaty law basis' and is primarily defined by the 1951 Convention Relating to the Status of Refugees [1951 Convention]<sup>852</sup> adopted by the UNGA on 28 July 1951. The 1951 Convention was the first international treaty to offer 'the most comprehensive codification of the rights for refugees at the international level'<sup>853</sup> and a single legal definition for who is a refugee for the purpose of international law.<sup>854</sup> Article 1 of the 1951 Convention defines a refugee as someone who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality<sup>855</sup> 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 and being outside the country of his former habitual residence<sup>856</sup> as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>857</sup>

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<sup>851</sup> This corresponds with Arendt's account that no law exists above the State which can force a State to recognize stateless persons as right bearing individuals.

<sup>852</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 72 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>853</sup> Introductory Note by the UNHCR in the United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, 2

<sup>854</sup> UNGA Resolution 429 (V) of 14 December 1950 'decided to Convene a Conference of the Plenipotentiaries to draft and sign a Convention on Refugees and Stateless Person.' The Conference discussions were based on a 'draft prepared by the Ad Hoc Committee on Refugees and Stateless Persons, adopted in its second session in Geneva in August 1950, save that the Preamble was that adopted by the Economic and Social Council, while article 1 was as recommended by the General Assembly and annexed to resolution 429 (V). The conference also unanimously adopted five recommendations covering travel documents, family unity, non-governmental organizations, asylum, and application of the Convention beyond its contractual scope.' Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 507

<sup>855</sup> The drafting history of the 1951 Convention Relating to the Status of Refugees does not define the meaning of nationality. Earlier commentators assumed that nationality was 'roughly equivalent to formal citizenship.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 397

<sup>856</sup> According to Grahl Madsen '[p]ersecution for 'reasons of nationality' is also understood to include persecution for lack of nationality, that is: persecution of stateless persons.' Quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 397; Foster et al also suggests that denationalization 'can be encompassed within the

The 1951 Convention was described as ‘the centrepiece of international refugee protection,’<sup>858</sup> even though it was only intended to help millions of people in Europe who were displaced as a result of [the Second World War] ‘and the ideological dissidents from Eastern Europe, virtually all of whom were assumed to be worthy of protection by reason of their group-defined predicament.’<sup>859</sup> This was evident by the geographic and temporal limits placed in the refugee definition. Despite this limitation, the drafters in the Final Act of the 1951 Conferences of Plenipotentiaries in recommendation IV [E] stated that they want:

The Convention ...[to] have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.<sup>860</sup>

The first United Nations High Commissioner for Refugees [UNHCR]<sup>861</sup> also observed that he wanted the 1951 Convention to ‘become as universal as possible by the accession of the greatest possible number of states’ and for it to apply to ‘any future refugees.’<sup>862</sup> His vision was realized when the ‘geographic and temporal limits’ were removed in the 1967 Protocol Relating to the Status of Refugees [1967 Protocol],<sup>863</sup> which was drafted and submitted by UNHCR ‘to the [UN] General Assembly, via the Economic and Social Council.’<sup>864</sup>

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nationality ground’ if the person denationalized by his/her state and can show that their denationalization puts them at risk. Ibid 398

<sup>857</sup> United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017

<sup>858</sup> Ibid 2

<sup>859</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 175; See United Kingdom: Court of Appeal, ‘Hassan Adan and Others v. Secretary of State for the Home Department, [1997] 2All ER 723, CA, United Kingdom: Court of Appeal (England and Wales), 13 February 1997’ (*Refworld*, 13 February 1997)

<[https://www.refworld.org/cases,GBR\\_CA\\_CIV,3ae6b70ac.html](https://www.refworld.org/cases,GBR_CA_CIV,3ae6b70ac.html)> accessed 22 January 2020; Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal*, 241 <[https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>860</sup> United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017

<sup>861</sup> Gerrit Jan van Heuven Goedhart.

<sup>862</sup> Gerrit Jan van Heuven Goedhart quoted in Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (1<sup>st</sup> edn, Routledge 2012) 27

<sup>863</sup> The 1967 Protocol Relating to the Status of Refugees is an independent instrument, not a revision within the meaning of article 45 of the [1951] Convention.’ Guy Goodwin-Gill Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 508; The 1967 Protocol included all the ‘key provisions, including the individualized definition of refugees [in the 1951 Convention.’ Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal* 233

<[https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021; See Paul Weis,

In 1994 the Executive Committee of the UNHCR observed that the 1951 Convention and the 1967 Protocol are ‘the cornerstone’ and the ‘centre of the international legal framework for the protection of refugees.’<sup>865</sup> This is evident by the fact that as of 2020, 146 out of 195 UN member States are parties to the 1951 Convention<sup>866</sup> and the 1967 Protocol [accession, succession or ratification].<sup>867</sup> Furthermore ‘various regional organizations, such as the Council of Europe, the African Union, and the Organization of American States’ have called for States to become parties to the 1951 Convention.<sup>868</sup> In 2000 Feller<sup>869</sup> asserted that the 1951 Convention succeeded in exceeding its contractual scope because it:

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‘The 1967 Protocol relating to the Status of Refugees and some Questions of the Law of Treaties,’ (1967) 42 *The British Yearbook of International Law*, 39

<sup>864</sup> Corrie Lewis, ‘UNHCR’s Contribution to the Development of International Refugee Law: Its Foundation and Evolution’ (2005) 17 (1) *International Journal of Refugee Law*, 77 <<https://doi.org/10.1093/ijrl/eei004>> accessed 30 March 2021; UNHCR wanted ‘to harmonize the refugee definition in the [1951] Convention...with its own...universal mandate.’ James Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harvard International Law Journal*, 163

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021; See UNHCR, ‘Proposed measures to extend the personal scope of the Convention relating to the Status of Refugees of 28 July 1951 (Submitted by the High Commissioner in accordance with paragraph 5 (b) of General Assembly Resolution 1166 (XII) of 26 November 1957) 12 October 1966, A/AC.96/346’ (*UNHCR*, 12 October 1966) <<https://www.refworld.org/docid/3ae68be8a.html>> accessed 21 October 2020, paras. 5-6 Declaration of States Parties adopted at the December 2001 Ministerial Meeting of States Parties to the 1951 Convention. In the declaration state parties confirmed ‘the enduring importance of the 1951 Convention, as the primary refugee protection instrument, which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope.’ UNHCR, ‘Agenda for Protection, October 2003, Third edition’ (*Refworld*, October 2003) <<https://www.refworld.org/docid/4714a1bf2.html>> accessed 6 April 2020, 23-24

<sup>865</sup> UNHCR, Executive Committee of the High Commissioner’s Programme, ‘General Conclusion on International Protection General Conclusion on International Protection No. 74 (XLV) – 1994’ (*UNHCR*, 7 October 1994) <<https://www.unhcr.org/uk/excom/exconc/3ae68c6a4/general-conclusion-international-protection.html>> accessed 22 January 2020

Executive Committee of the High Commissioner’s Programme reaffirmed that the ‘1951 Convention relating to the Status of Refugees together with its 1967 Protocol continue to serve as the cornerstone of international refugee protection regime.’ UNHCR Executive Committee of the High Commissioner’s Programme, ‘Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection No. 103 (LVI) – 2005’ (*UNHCR*, 7 October 2005) <<https://www.unhcr.org/uk/excom/exconc/43576e292/conclusion-provision-international-protection-including-complementary-forms.html>> accessed 22 January 2020, Preamble, para. 1

<sup>866</sup> United Nations, ‘Chapter V Refugees and Stateless Persons-2. Convention Relating to the Status of Refugees and Stateless Persons’ (*United Nations Treaty Collection*, 28 July 1951) <[https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en)> accessed 22 January 2020

<sup>867</sup> United Nations, ‘Chapter V Refugees and Stateless Persons- 5. Protocol relating to the Status of Refugees’ (*United Nations Treaty Collection*, 31 January 1967) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en)> accessed 22 January 2020

<sup>868</sup> Introductory Note by the UNHCR in United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, 4



[H]as already a legal and political significance that goes well beyond its specific terms: legal in that it provides the basic standards on which principled actions can be founded; political in that it provides a truly universal framework within which states can cooperate and share the burden resulting from forced displacements; and ethical in that it is a unique declaration by 140 state parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged.<sup>870</sup>

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## 5.7. Rights Accorded to Refugees in the 1951 Convention

A person recognized as a refugee by the 1951 Convention is entitled:

[T]o claim...internationally binding rights [from signatory states] ...[including] civil rights...socio-economic rights and rights that enable the pursuit of a solution to refugeehood...the entitlement to these rights persists until and unless an individual is found not to be a refugee.<sup>871</sup>

Refugee status comes to end when it is deemed that the refugee is no longer in need of international protection either because the circumstances in his/her country have changed or because the person has 'acquired the nationality of a new state that is both able and willing to protect the person.'<sup>872</sup>

The 1951 Convention should in principle provide surrogate protection while the refugee faces a risk in his/her country. Despite this Foster et al claim that the central purpose of the Convention 'is to restore at-risk individuals to membership of a national community...and providing them with the most durable forms of legal status.'<sup>873</sup> This view is supported by

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<sup>869</sup> Erika Feller Former UNHCR's Director of International Protection.

<sup>870</sup> Erika Feller, 'Presentation by Ms. Erika Feller, Director, Department of International Protection, UNHCR, at the Conference Organized by the Portuguese Presidency of the Council, with the support of the European Commission (15-16 June 2000, Lisbon)' (UNHCR, 15-16 June 2000) <<http://www.unhcr.org/uk/admin/dipstatements/42b291f22/presentation-ms-erika-feller-director-department-international-protection.html>> accessed 5 June 2017

<sup>871</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 1; See Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 Harvard Human Rights Journal, 250

<[https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>872</sup> Ibid 464

<sup>873</sup> Ibid 363

This interpretation is supported by the UNHCR's Handbook which states: 'If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality.' UNHCR quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 467-68; See UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee

Article 34 of the 1951 Convention which calls upon States to 'naturalize and assimilate refugees.'<sup>874</sup> The drafting history of the 1951 Convention reveals that naturalization and assimilation will lead to cessation of refugee status. This was confirmed by Goedhart who stated:

Both in the theory and in practice, naturalization had always been considered as bringing refugee status to an end ...[R]efugee status, being abnormal, should not be granted for a day longer than was absolutely necessary, and should come to an end (or, possible, should never even come into existence) if... (the refugee) really had the rights and obligations of a citizen of a given country.<sup>875</sup>

## 5.8. The Right to Return in the 1951 Convention

The 1951 Convention does not refer to the RTR in any of its articles. In fact, the principle of non-refoulement,<sup>876</sup> which is one of the two principles that underpin the convention the second being non-discrimination,<sup>877</sup> in Article 33 prohibits the expulsion or involuntary return of a refugee or asylum-seeker to a country where their life or freedom will be at risk on account of race, religion, nationality, membership of a particular social group or political opinion.<sup>878</sup> Non- Refoulement has been described by Goodwin-Gill et al as 'the foundation

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Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (UNHCR, 1979) <<https://www.unhcr.org/4d93528a9.pdf>> accessed 21 October 2020

<sup>874</sup> Article 34 of the 1951 Convention calls upon contracting states to end the plight of refugees by facilitating 'the assimilation and naturalization of refugees...[and] make every effort to expedite naturalization proceedings.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, Article 34

<sup>875</sup> Statement of Mr. van Heuven Goedhart, UNHCR, UN Doc. A/CONF.2/SR.23 (Jul. 16, 1951), at 11 quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 495

<sup>876</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 33

<sup>877</sup> According to Foster et al non-discrimination Foster imposes a duty on signatory parties not to discriminate against non-citizens or residents in terms of 'civil and socio-economic rights.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 357

<sup>878</sup> Article 33 Ibid 3-4

\*The right not to expelled is also enshrined in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

and Article 13 of the International Covenant on Civil and Political Rights (ICCPR). Article 13 states:

'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion

stone of international protection,<sup>879</sup> by Fitzpatrick as '[t]he most enduring contribution of the 1951 Convention'<sup>880</sup> and by Henkin as the 'acorn... [from which] has grown the modern law of asylum for refugees.'<sup>881</sup> According to Goodwin-Gill 'State practice in cases of mass, influx offers some support for the view that non-refoulement...applies both to the individual refugee with a well-founded fear of persecution, and to...large groups of persons who do not...enjoy the protection of the government of their country of origin.'<sup>882</sup> On 13 December 2012 signatory parties to the 1951 Convention reaffirmed 'their commitment to the 1951 Convention and the 1967 Protocol,' and declared 'the principle of non- refoulement'<sup>883</sup> as a principle of 'customary international law' because it has become a general State practice accepted by the international community.<sup>884</sup> This means even non-contracting States, are

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and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

United Nations, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984' (*Refworld*, 10 Dec 1984)

<<https://www.refworld.org/docid/3ae6b3a94.html>> accessed 3 February 2020, Article 3;

Article 6 (6) of The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances also permits states to refuse to extradite 'where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.'

UN Economic and Social Council (ECOSOC), 'United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988' (*Refworld*, 19 December 1988)

<<https://www.refworld.org/docid/49997af90.html>> accessed 30 March 2021, Article 6 (6)

<sup>879</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 421; See Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21 *Refugee Survey Quarterly*, 26

<[https://doi.org/10.1093/rsq/21.1\\_and\\_2.12](https://doi.org/10.1093/rsq/21.1_and_2.12)> accessed 12 February 2018

<sup>880</sup> Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal*, 235

<[https://heinonline.org/HOL/Page?iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>881</sup> Louis Henkin quoted in Corinne Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its foundation and Evolution' (2005) 17 *International Journal of Refugee Law*, 86

<<https://doi.org/10.1093/ijrl/eei004>> accessed 30 March 2021; See Louise Henkin, 'Introduction:

Refugees and Their Human Rights' (1995) 18 *Fordham International Law Journal*, 1080

<sup>882</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 205; Alison Kesby observes that that 'the right not to be returned to torture is qualified by the acts and the status of the person to be expelled-namely by the national security risk he or she poses and the vulnerability of the non-national to expulsion.' Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 29

<sup>883</sup> Non-refoulement was reaffirmed in numerous instruments including 'the 1967 Declaration on Territorial Asylum, 2001 Asian-African Legal Consultative Organization, 2001 Council of the International Institute of Humanitarian Law, Asian-African Legal Consultative in Article III (3) of the Principles concerning Treatment of Refugees, the 2004 Mexico Declaration.' Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 212-213 Non-refoulement was also reaffirmed in Article 3 (1) of the 1984 Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment. United Nations, 'Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution / adopted by the General Assembly, 15 December 1989, A/RES/44/144' (*Refworld*, 15 December 1989) <<https://www.refworld.org/docid/3b00efef7c.html>> accessed 6 April 2020

legally bound by the principle of non- refoulement.<sup>885</sup> Hathaway rejects this interpretation because he observes that States have violated non- refoulement.<sup>886</sup> Goodwin Gill et al also argue that '[s]tate conduct that is inconsistent with a customary principle should generally be treated as a breach of that principle, not as an indication of a new rule.'<sup>887</sup> It is also argued that the RTR does not follow from the principle of non- refoulement because non- refoulement invokes protection against return.<sup>888</sup> Therefore, Goodwin-Gill et al described the principle of non- refoulement as a '[g]eneral principle of non-return.'<sup>889</sup> Moreover, Article 34 of the 1951 Convention calls upon contracting States to end the plight of refugees by facilitating 'the assimilation and naturalization of refugees...[and] make every effort to

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Article 22 (8) of the 1969 American Convention on Human Rights: Freedom of Movement and Residence:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right to leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest. 5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it. 6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law. 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions. 9. The collective expulsion of aliens is prohibited.' Organization of American States, 'American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969' (*Refworld*, 22 November 1969)

<<https://www.refworld.org/docid/3ae6b36510.html>> accessed 3 February 2020, Article 22 (8)

<sup>884</sup> Introductory Note by the UNHCR in the United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, 4

<sup>885</sup> Guy Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1996) 143

<sup>886</sup> This journal article argues that '[c]urrent refugee law does not fully embody either humanitarian or human rights principles. This Article...demonstrate[s] that modern refugee law in fact rejects the goal of comprehensive protection for all involuntary migrants and imposes only a limited duty on states, far short of meeting the needs of refugees in a comprehensive way.' James Hathaway and Michelle Foster, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 353; See James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal*, 132

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>887</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 353

<sup>888</sup> James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal*, 133

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>889</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 345

expedite naturalization proceedings.<sup>890</sup> This indicates that ‘non- Refoulement...implies temporary refugee[hood]’<sup>891</sup> until it can secure permanent exile for refugees in a new state through assimilation and naturalization. Therefore, although Fitzpatrick argues that the 1951 Convention does ‘not guarantee a grant of durable asylum’ we reject the claim that Article 34 ‘appear to be a product of a bygone era’<sup>892</sup> because the 1951 Convention was designed to facilitate the integration of refugees.<sup>893</sup>

Although the final text of the 1951 Convention does not refer to the RTR the 1993 Vienna Declaration and Programme of Action [1993 Declaration], which confirmed ‘that everyone...is entitled to...the [RTR] to one's own country’<sup>894</sup> and ‘stresses the importance of the [UDHR], the 1951 Convention...its 1967 Protocol and regional instruments.’<sup>895</sup> The 1993 Declaration also confirmed that ‘the preferred solution [for refugees is] dignified and safe voluntary repatriation’ underlying ‘the responsibilities of States, particularly as they relate to the countries of origin.’<sup>896</sup> This interpretation is supported by the fact that the source for the RTR in international refugee law is human rights<sup>897</sup> and UNHCR. This is evident by the fact that the 1951 Convention is ‘grounded in Article 14 of the Universal Declaration of Human Rights’<sup>898</sup> which states ‘[e]veryone has the right to seek and to enjoy in other countries asylum from prosecution.’<sup>899</sup> The Preamble of the 1951 Convention also refers to the ‘the

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<sup>890</sup> United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (*Refworld*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 34

<sup>891</sup> Michelle Foster and James Hathaway, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 357

<sup>892</sup> Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal*, 250  
<[https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?Iname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>893</sup> UNHCR, ‘The Integration of Refugees: A discussion Paper’ (*UNHCR*, July 2014)  
<[https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/02/integration\\_discussion\\_paper\\_July\\_2014\\_EN.pdf](https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/02/integration_discussion_paper_July_2014_EN.pdf)> accessed 21 October 2020, Part 2

<sup>894</sup> World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ (*The Office of the United Nations High Commissioner for Human Rights*, 25 June 1993)  
<<https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> accessed 7 December 2018, Paragraph 23

<sup>895</sup> *Ibid*

<sup>896</sup> *Ibid*

<sup>897</sup> In 1964 the International Law Association in its 51<sup>st</sup> Session adopted a resolution on Right of Asylum expressed a desire to establish ‘the right of asylum of the individual in international law, in the light of the current inadequate protection of human rights.’ Quoted in Paul Weis, ‘Territorial Asylum’ (1966) 6 *International Journal of International Law*, 181

<sup>898</sup> Introductory Note by the UNHCR in United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, 2

<sup>899</sup> United Nations, ‘Universal Declaration of Human Rights’ (*United Nations Association of Slovenia*, 10 December 1948)

Charter of the United Nations and the [UDHR]... [specifically to] the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.<sup>900</sup> The Preamble of the 1951 Convention also states that '[b]y its Statute, UNHCR is tasked with, among others, promoting international instruments for the protection of refugees, and supervising their application.'<sup>901</sup> Since UNHCR considers voluntarily return as the preferable solution to ending the plight of refugees one can thus conclude that the 1951 Convention implicitly recognizes the RTR because as Foster et al observe '[t]he most desirable outcome is to return in safety to the country of origin.'<sup>902</sup> This is evident by the fact that 1951 Conventions envisions in Article 1C that, once the risk of persecution is past, refugee status will 'cease to apply' to a refugee<sup>903</sup> and in that case return to the country of nationality or former habitual residence is the preferred solution as foreseen by UNHCR. Goodwin-Gill has also observed that '[m]ass influxes are often resolved by mass repatriation' and that 'the use of local settlements where refugees may rebuild their lives and re-acquire both a measure of self-sufficiency and a degree of human dignity pending eventual return.'<sup>904</sup> Despite this Goodwin-

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<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, Article 14

<sup>900</sup> Preamble of the 1951 Convention Relating to the Status of Refugees in United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951)

<<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, 13

Paragraph 1 in the Preamble of the 1951 Convention also states, 'that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedom without discrimination.'

Paragraph 2 in the Preamble of the 1951 Convention also recalls 'that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.' Ibid Preamble

<sup>901</sup> Ibid 5

<sup>902</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 61

<sup>903</sup> Article 1C of the 1951 Convention states that the Convention will 'cease to apply' to a refugee in the following circumstances: 1. He has voluntarily re-availed himself of the protection of the country of his nationality. 2. Having lost his nationality, he has voluntarily re-acquired it; 3. He has acquired a new nationality, and enjoys the protection of the country of his new nationality; 4. He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of prosecution; 5. He can no longer because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, Article 1C

According to the UNHCR '[a] complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basis legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services.' UNHCR, 'Note on the Cessation Clauses EC/47/SC/CRP.30' (UNHCR, 30 May 1997) <<https://www.unhcr.org/uk/excom/standcom/3ae68cf610/note-cessation-clauses.html>> accessed 15 March 2021, Paragraph 20

<sup>904</sup> Guy Goodwin-Gill, 'Non-Refoulement and the New Asylum Seeker' (1986) 26 Virginia Journal of International Law, 906; See Goodwin-Gill's Suggested Principles for Avoiding and Resolving

Gill calls for 'non-refoulement to be geared towards durable solutions and wants states to focus on root causes, regional solutions and burden sharing,<sup>905</sup> resettlement and safe return.'<sup>906</sup> A similar call was made by Chimni who wants 'a firm link... to be established between the 1951 Convention and the principle of burden-sharing.'<sup>907</sup> This view contrasts with that of Fitzpatrick who argues that the 1951 Convention imposes 'burdens that are no longer politically tolerably to the States parties involved.'<sup>908</sup>

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Problems Arising from the Transfrontier and International Displacement of People in Distress supports his view.

Article 1 calls upon 'All states, in Accordance with the provisions of the International Covenant and Economic, Social and Cultural rights, other relevant instruments and principles of general international law, shall take such steps as shall assure to their peoples the enjoyment, among others, of the rights to work and to just and favourable conditions of employment, to an adequate standard of living, to health, to education and to participation in cultural life.'

Article 3 addresses nationality by calling upon states to recognize 'that nationality, whether formally acknowledged by municipal law or not, corresponds with a genuine connection between individual and state, based upon the social fact of attachment, all states shall refrain from any act which has the object, purpose or effect of severing that relationship, unless permitted by a rule of general international law. In all other cases, including the forcible exchange of populations, the expulsion of nationals is forbidden.'

Article 4 affirms that '[c]ollective expulsion of aliens...is prohibited.'

Article 10 addresses the right to return by calling upon states to ensure that 'People in distress shall be accommodated in the receiving states until such time as they are able to return to their homes in their homeland. They shall be treated with humanity and in accordance with the human rights and fundamental freedoms recognized by general international law.'

Article 12 addresses burden sharing by stating 'All States shall co-operate, in accordance with the principles of international solidarity and burden sharing, in promoting solutions through local integration or resettlement for people in distress who, owing to a well-founded fear of being persecuted for reason of race, religion, nationality or ethnic origin, social group or political opinion, are unable or unwilling to return to their own country.' Quoted in Guy Goodwin-Gill, 'Non- *Refoulement* and the New Asylum Seeker' (1986) 26 *Virginia Journal of International Law*, 916

<sup>905</sup> The principle of burden sharing was also called for in the Preamble of the 1951 Convention Relating to the Status of Refugees which states, 'Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that satisfactory solution of a problem of which the [UN] has recognized the international scope and nature cannot therefore be achieved without international co-operation.' Burden sharing was discussed in UNHCR, 'Mechanism of International Cooperation to Share Responsibilities and the Burdens in Mass Influx Situations' (*UNHCR*, 19 February 2001)

<<https://www.unhcr.org/uk/protection/globalconsult/3ae68f3cc/mechanisms-international-cooperation-share-responsibilities-burdens-mass.html>> accessed 6 April 2020

In 1980 the North-South: A program for Survival Report linked burden sharing with a 'commitment to international cooperation in resettlement of refugees in the future will be necessary to protect countries of first asylum from unfair burden.' Quoted in Bhupinder S Chimni, 'Reforming the International Refugee Regime: A Dialogue Model' (2001) 14 *Journal of Refugee Studies*, 164 <<https://doi.org/10.1093/jrs/14.2.151>> accessed 22 January 2020

<sup>906</sup> Guy Goodwin-Gill, 'Non- *Refoulement* and the New Asylum Seeker' (1986) 26 *Virginia Journal of International Law*, 914

<sup>907</sup> Bhupinder S Chimni, 'Reforming the International Refugee Regime: A Dialogue Model' (2001) 14 *Journal of Refugee Studies*, 155 <<https://doi.org/10.1093/jrs/14.2.151>> accessed 22 January 2020

<sup>908</sup> Joan Fitzpatrick quoted in Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30 (3) *Michigan Journal of International Law*, 777 <<https://repository.law.umich.edu/mjil/vol30/iss3/8>> accessed 29 January 2020

According to the Preamble of the 1951 Convention Relating to the Status of Refugees 'Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory

Although the 1951 Convention is grounded in the UDHR Goodwin-Gill warns researchers not to 'stumble, into a contested, non-authoritative human rights discourse, far removed...from the practice of states in the determination of refugee status.'<sup>909</sup> UNHCR lobbied the UN Human Rights Commission<sup>910</sup> to include a provision on the right of asylum in the draft of the ICCPR the provision was rejected 'due to the prevalence of the view that extending asylum to an individual was the right of the State rather than a fundamental right of the individual.'<sup>911</sup> This led Lewis to conclude that although the 1951 Convention is grounded in the UDHR states do not approach refugees through international human rights because 'the concept of asylum has been viewed as the prerogative of the State, rather than the right of the individual.'<sup>912</sup> This view is supported by the fact that the 1951 Convention placed the responsibility of implementation on signatory states. Therefore, Lewis argues that '[t]he 1951...Convention and the 1967 Protocol remain dead letter law unless their provisions...are incorporated into national law.'<sup>913</sup>

In sum, although international refugee law considers the RTR as the preferred solution to ending the plight of refugees when return is not possible naturalization is considered the ultimate solution.<sup>914</sup> This corresponds with Arendt's account that when the state of origin refused to 'recognize the prospective repatriate as a citizen'<sup>915</sup> the only practical substitute for a non-existent homeland was naturalization.

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solution of the problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017

<sup>909</sup> Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2014) 24 (4) *International Journal of Refugee Studies*, 658 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 1 November 2018

<sup>910</sup> Now the Human Rights Council.

<sup>911</sup> Corrie Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (1<sup>st</sup> edn, Routledge 2012) 30

<sup>912</sup> *Ibid* 82

<sup>913</sup> *Ibid* 94

<sup>914</sup> Alice Edwards, Laura van Waas, 'Introduction,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 4

<sup>915</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 365



## 5.9. Implications of the development of the Right to Return in International Law

The four bodies of international law from which the RTR derives reveal that the RTR is essentially a right claim to one's country.<sup>916</sup> In 1919 Hohfeld articulated the notion of rights claim by observing that if 'A has a right to X,' X has a duty to allow A to enjoy his/her right.<sup>917</sup> This means if persons have a RTR then there must be a correlative duty on their State to allow such persons to benefit from their right by allowing them to return. In this context nationality is a prerequisite for determining where the RTR applies. This interpretation is supported by the decision of the International Court of Justice [ICJ] which stated in the *Liechtenstein v. Guatemala case*<sup>918</sup> that 'nationality serves above all to determine the person upon whom' rights are conferred.<sup>919</sup> The ICJ also observed that nationality gives rise to 'the existence of reciprocal rights and duties between the state and individual holding the nationality.'<sup>920</sup> According to UNHCR one of the rights that are associated with '[nationality] status...[is] the right of entry, re-entry and residence in the state's territory.'<sup>921</sup> This interpretation is supported by the ICCPR which 'does not recognise the right of aliens to enter or reside in the territory of a state party' and confirms that 'it is in principle a matter for the state to decide who it will admit to its territory.'<sup>922</sup> General Comment No. 27, which interpreted Article 12, paragraph 4 of the ICCPR, also concluded persons cannot have a special claim to a given country without being a national of the state this included persons who 'have been stripped of their nationality in violation of international law.'<sup>923</sup>

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<sup>916</sup> Vincent Chetail concludes that the right to admission is primarily conceived as a right 'concentrated on the state of origin.' Quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 17

<sup>917</sup> Wesley Hohfeld quoted in Andrew Heard, 'Human Rights: Chimes in sheep clothing' (*Academia*, 1997) <[https://www.academia.edu/11431763/HUMAN\\_RIGHTS\\_CHIMERAS\\_IN\\_SHEEPS\\_CLOTHING](https://www.academia.edu/11431763/HUMAN_RIGHTS_CHIMERAS_IN_SHEEPS_CLOTHING)> accessed 1 Jan 2018, 14

<sup>918</sup> Widely referred to as the Nottenbohn case.

<sup>919</sup> International Court of Justice, 'Nottebohm Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ), 6 April 1955' (*Refworld*, 6 April 1955) <<https://www.refworld.org/cases,ICJ,3ae6b7248.html>> accessed 7 December 2018

<sup>920</sup> Ibid

<sup>921</sup> UNHCR, 'Handbook on Protection of Stateless Persons, 30 June 2014' (*Refworld*, 30 Jun 2014) <<https://www.refworld.org/docid/53b676aa4.html>> accessed 7 Jan 2019

<sup>922</sup> Sophie Nonnemacher and Ryzard Cholewinski, 'The Nexus between Statelessness and Migration,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 251

<sup>923</sup> United Nations, 'General Comment No. 27: Freedom of movement (Art.12)' (*United Nations Human Rights office of the High Commissioner*, 2 November 1999) <[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en)> accessed 5 January 2019, Article 12

Despite this according to Judge Cancado Trindade of the International Criminal Court article 12 (4) 'extends an unrestricted protection against expulsion to aliens who...have developed such a close relationship with the State of residence that [it] has practically become his 'home country.' Judge

The above observations support Nonnemacher and Cholewinsky's interpretation that although 'States have an obligation under international law to accept the return of their own nationals...states can use their own nationality or immigration laws to delay or deny readmission.'<sup>924</sup> This means that individuals cannot rely on an unfettered right to enter or remain in any country's territory if they are not citizens. When a person does not hold the nationality of the State which he/she considers his/her country, that country does not have a duty to readmit such a person to its territory because 'according to the accepted principles of international law, the admission of aliens is in the discretion of each state.'<sup>925</sup> Therefore, a lack of any legal status in the country 'in which one claims nationality or full membership is a receipt for...dispossession'<sup>926</sup> because '[u]nlike nationals, there is no state that a stateless person may enter and remain in as of right.'<sup>927</sup> Finnis observes 'whoever and wherever one may be, one is both entitled and bound to regard oneself as belonging to a state: statelessness is an anomaly, a disability, and presumptively an injustice.'<sup>928</sup> Chetail argues that the RTR is a right 'concentrated to the state of origin'<sup>929</sup> and Torpey notes that the right to leave and return 'indicates to which extent states and the state system have expropriated and monopolized the legitimate means of movement in our time.'<sup>930</sup>

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Cancado Trindade quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 24

Goodwin Gill also argues that those have lawfully resided in a country for a long-time gain 'acquired rights' which include the right not to be expelled. Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 24

See Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press, 1978) 255-9

<sup>924</sup> Sophie Nonnemacher and Ryzard Cholewinski, 'The Nexus between Statelessness and Migration,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 260

<sup>925</sup> Alice Edwards and Laura van Waas, 'Introduction,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 36

<sup>926</sup> Matthew Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 44

<sup>927</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 18

Alison Kesby nonetheless observes in a connected footnote that the 'Human Rights Commission's interpretation of one's 'own country' in article 12 (4) of the ICCPR may be of certain benefit to certain categories of stateless people.' See Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 260-1.

<sup>928</sup> John Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 *Law Quarterly Review*, Vol. 123 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101495)> accessed 5 January 2019

<sup>929</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 17; See Vincent Chetail, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective,' in Aleinikoff, T. Alexander and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 47

<sup>930</sup> John Torpey quoted in *Ibid* 17; See John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000) 59

## 5.10. Habitual Residence as an Alternative Source for the Right to Return

The fundamental issue in determining entitlement to return is the establishment of a country of nationality or former habitual residence. According to Gilbert, nationality is not confined to citizenship and can include ethnic identity.<sup>931</sup> Rubinstein and Lenagh-Maguire 'argue that countries should commit to a broader notion of membership than nationality.'<sup>932</sup> They base their argument on the UN Human Rights Committee [UNHRC] jurisprudence.<sup>933</sup> For the Ad hoc Committee that drafted the 1951 Convention habitual residence referred to 'the country in which (the refugees) had resided.'<sup>934</sup> According to Foster et al in the 1951 Convention, 'a country of "former" habitual residence...does not require a subsisting relationship.'<sup>935</sup> In contrast, Hathaway observes that rights accorded to refugees in the 1951 Convention are enhanced as 'the bond strengthens between a particular refugee and the State Party in which he or she is present.'<sup>936</sup> Edwards interprets this to mean that not all rights contained in the 1951 Convention are accorded to refugees immediately.<sup>937</sup>

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<sup>931</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 975 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017  
Geoff Gilbert's view is endorsed by the European Union Qualification Directive which in Article 10 (1) (c) states that 'the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another state.'  
Council of the European Union, 'Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU' (*Refworld*, 20 December 2011) <<https://www.refworld.org/docid/4f197df02.html>> accessed 6 April 2020

In the context of the 1951 Convention Relating to the Status of Refugees Foster et al have concluded that 'the Convention ground for nationality is appropriately invoked both by reference to a legal notion of nationality such as statelessness, as well as when a risk is being persecuted is due to a person's identification as a member of culturally, ethnically, linguistically, or otherwise distinct "national" group.'  
James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 399

<sup>932</sup> Kim Rubinstein and Niamh Lenagh-Maguire, 'The Nexus Between Statelessness and Migration,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 264

<sup>933</sup> *Ibid* 264

<sup>934</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn Oxford University Press 2007) 107

<sup>935</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 70

<sup>936</sup> James Hathaway quoted in Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30 (3) *Michigan Journal of International Law*, 793 <<https://repository.law.umich.edu/mjil/vol30/iss3/8>> accessed 29 January 2020

<sup>937</sup> *Ibid* 793

For the purpose of the UNHCR when determining the country of habitual residence for refugees all countries of former habitual residence are countries of reference.<sup>938</sup> According to the UNHCR non-nationals who have a special connection to a certain country also acquire certain rights.<sup>939</sup> In the case of *Nystrom vs. Australia*, the UNHRC argued that:

[T]here are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words his own country invite consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.<sup>940</sup>

In the case of *Stewart v. Canada*, 'which involved a UK national who faced deportation from Canada due to convictions for petty crimes,'<sup>941</sup> the UNHRC found that even though Stewart resided in Canada since he was 7 years old<sup>942</sup> Canada cannot be considered his 'own country.'<sup>943</sup> Moreover, the committee reasoned that because Stewart did not opt to become a citizen of Canada even though the country did not impose any restrictions on him becoming a citizen means that he must bear the responsibility of his decision and that the UK constituted his place in the world.<sup>944</sup> The UNHRC concluded that Stewart did not have a right to re-enter Canada.<sup>945</sup> In contrast, the 1999 UNHRC General Comment No. 27<sup>946</sup>

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<sup>938</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 72

<sup>939</sup> Gergo Gyulai, 'The determination of statelessness,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 119

<sup>940</sup> United Nations, 'Human Rights Committee Communication No. 1557/2007' (*World Courts*, 1 September 2011)

<[http://www.worldcourts.com/hrc/eng/decisions/2011.07.18\\_Nystrom\\_v\\_Australia.pdf](http://www.worldcourts.com/hrc/eng/decisions/2011.07.18_Nystrom_v_Australia.pdf)> accessed 7 January 2019

<sup>941</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 18

<sup>942</sup> UN Human Rights Committee, 'Stewart v. Canada, CCPR/C/58/D/538/1993, UN Human Rights Committee (HRC), 1 November 1996' (*Refworld*, 1 November 1996)

<<https://www.refworld.org/cases,HRC,584a90807.html>> accessed 7 December 2018, Paragraph 2.1

<sup>943</sup> Ibid

<sup>944</sup> See United Nations Human Rights Committee, 'Stewart v. Canada, CCPR/C/58/D/538/1993, UN Human Rights Committee (HRC), 1 November 1996' (*Refworld*, 1 November 1996)

<<https://www.refworld.org/cases,HRC,584a90807.html>> accessed 7 December 2018, Paragraph 12.8; 'It was actually the individual opinion of Elizabeth Evatt and Cecilia Quiroga that found that article 12 (4) of the ICCPR which refers to one's 'own country' is not limited to those who have a 'formal link to the state' rather the aim of the article is to protect 'the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it.' United Nations Human Rights Committee quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 24

<sup>945</sup> Ibid

<sup>946</sup> United Nations, 'General Comment No. 27: Freedom of movement (Art.12)' (*United Nations Human Rights office of the High Commissioner*, 2 November 1999)

<[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en)> accessed 5 January 2019

determined that the obligation to ensure that '[n]o one [is] arbitrarily deprived of the right to enter his own country' may be invoked not only by citizens but 'might embrace other categories of long-term residents, including but not limited to stateless persons.'<sup>947</sup> Therefore, Foster et al observe that in international law stateless persons who have resided in a country for a significant period of time may be said to 'have acquired prima facie the effective nationality'<sup>948</sup> of the host state.<sup>949</sup> Thus, although Grahl-Madsen claims that when determining the country of habitual residence for stateless persons the country of reference should be where the individual was first prosecuted,<sup>950</sup> in international law the country of habitual residence will be the one where the person has the most connection to and spend the most significant period of time living.<sup>951</sup> This type of connection 'creates a bond between the stateless person and the state similar to the one between citizen and state.'<sup>952</sup> This view is supported by 'human rights supervisory bodies [who] have determined that a stateless person with a long-standing and genuine connection to their country of residence is also entitled to claim the state as "his own country" and thus to re-enter that state.'<sup>953</sup> This

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<sup>947</sup> 1999 United Nations Human Rights Committee General Comment No. 27 quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 66

<sup>948</sup> '[A]n effective nationality is one that is recognized by the state in question, can be accessed in practice, and which dependably delivers the entitlements of citizenship, including a clear right to enter and remain in that state's territory. Because of the importance of substantive efficacy, possession of a state's passport or comparable documentations may be taken as no more than prima facie evidence of effective nationality.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 498

The UNHCR observes that 'Palestinians who hold national passports of certain countries but are not granted full rights and benefits of nationals of those countries, cannot be considered as having the effective protection of those countries.' UNHCR 'Note on Cessation Clauses,' supra n. 24, at [15] quoted in *ibid* 498

According to the UNHCR an effective nationality must give the refugee access to 'all rights and benefits entailed by the possession of nationality of the country.' UNHCR 'Note on Cessation Clauses,' supra n. 24, at [15] quoted in *Ibid* 498

<sup>949</sup> *Ibid* 66

<sup>950</sup> *Ibid* 72

<sup>951</sup> *Ibid* 68

<sup>952</sup> *Ibid* 67

<sup>953</sup> *Ibid* 250

'The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country".<sup>9</sup> The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a

interpretation seems to be justified by Article 28 of the 1951 Convention<sup>954</sup> and Article 28 of the 1954 Convention Relating to the Status of Stateless Persons<sup>955</sup> which requires signatory States to readmit persons who have been recognized as refugees and stateless persons. Thus, supporting a RTR to the host State rather than the State of origin.

In the context of refugees, the most controversial issue has been whether a country of former habitual residence is the country that the refugee is legally entitled to return to. According to Foster et al, the view that a right of legal return is acquired has not found favour with most courts and commenters that have considered it.<sup>956</sup> Foster et al also observe that Courts have sensibly avoided focusing on the legal [RTR] --in favour of a wide-ranging factual inquiry into whether the country to which a stateless person was admitted for ongoing residence can truly be said to be the applicants 'abode or the centre of his or her interests.'<sup>957</sup> This approach has led States to apply different standards to identify the country of habitual residence. For example, in Germany and the United States of America [U.S.] only the last country of habitual residence is the reference point.<sup>958</sup> Based on this approach a U.S. decision concerning a stateless Palestinian found that the United Arab Emirates [UAE] was his country of former habitual residence even though he only stayed in the country for 2 years.<sup>959</sup>

In conclusion, linking the RTR with the State of habitual residence reveals that the RTR is not exclusively linked to a RTR to one's country because the question of a legal RTR depends on whether he/she was habitually resident in the country of reference.<sup>960</sup> Moreover, 'the ability to return to a state is... probative on... [a] real or continuing connection'<sup>961</sup> and a

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country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.' UN Human Rights Committee (HRC), 'CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9' (*Refworld*, 2 November 1999) <<https://www.refworld.org/docid/45139c394.html>> accessed 20 March 2021, Paragraph 20

<sup>954</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 28

<sup>955</sup> United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 28 September 1954)

<<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017

<sup>956</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 69-70

<sup>957</sup> *Ibid* 70

<sup>958</sup> *Ibid* 72

<sup>959</sup> *Ibid* 73

<sup>960</sup> *Ibid* 70

<sup>961</sup> Law Reform Commission of Ireland, *supra* n. 311, at 11 [20(1)]. Quoted in *Ibid* 70

'continuity of the legal situation'<sup>962</sup> understood to be central to the notion of habitual residence.'<sup>963</sup>

Thus, the RTR can change from one's country of origin to one's country of habitual residence. This also implies that refugees cannot transmit their RTR to their country of origin to their descendants who have never resided in their country of origin because '[w]hile consideration should always be given to evidence of a subsisting or historic legal [RTR] as one aspect of a flexible inquiry, this criterion should be understood to be relevant to, rather than determinative of, the existence of a country of former habitual residence.'<sup>964</sup> An earlier country of habitual residence considered a 'viable, present, site of protection'<sup>965</sup> could also lead refugees and stateless persons to be excluded from the scope of the international framework governing refugees and stateless persons.

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### 5.11. Implications for Palestinian Refugees

Human rights are constructed, interpreted, and implemented by sovereign States. State sovereignty means that human rights are restricted by States. This means that the RTR is technically a negative right because it depends on State recognition to be valid and State consent to be enforceable. The RTR is not absolute because it does not trump the right of the State. This is evident by the fact that persons cannot force a sovereign State to re-admit them. Therefore 'if persons can't have a special claim to a given country without being a national of the state' it could be argued that Palestinian refugees have no RTR to Israel because they are not nationals of the country. Furthermore, it could also be argued that based on their extended presence in those States they have developed a stronger link with host States. If such a view is adopted the extended presence of Palestinian refugees in host States can turn the RTR to one's country to a RTR to the host State. This interpretation will not end the plight of Palestinian refugees because as DeGroot correctly observes 'the notion

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<sup>962</sup> Louis I. de Winter, 'Nationality or Domicile? The Present State of Affairs' (1969) 128 Coll. Courses of the Hague Academy of International Law 346, at 424. Quoted in Ibid 70

<sup>963</sup> Ibid 70

<sup>964</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 70

<sup>965</sup> Ibid 72

of habitual residence...is very much fact-oriented; it indicates a stable factual residence and does not imply a legal or a formal qualification.<sup>966</sup>

According to Prior:

The exiled Palestinians constitute a quintessential example of a people with a right to return, since, in 1948, a clearly identified population was expelled by their Zionist conquerors, and has never renounced its rights. Nevertheless, Israel continues to deny the displaced Arabs right to return, whether on the basis that they are not nationals of Israel or that Israel is not responsible for their displacement. Thus, by a legal subterfuge, which lacks any semblance of morality and satisfies only the self-delusion of the nation, Israel exculpates itself from the crime of displacing another people.<sup>967</sup>

However, Prior's interpretation that Israel's argument against the RTR is merely a legal subterfuge<sup>968</sup> can be challenged because the four bodies of international law from which the RTR derives revealed that the RTR is essentially a rights claim to one's country of nationality or former habitual residence. This creates a serious legal predicament for Palestinian refugees because they are not nationals of Israel or qualify under habitual residence if descendants. Moreover, refugeehood does not guarantee return because it 'is one form of statelessness.'<sup>969</sup> This point was revealed by Arendt in chapter 2 when she demonstrated through her own experience as a stateless refugee how States can strip individuals from their human rights by stripping them of their nationality. Therefore, the RTR cannot be separated from the possession of nationality which 'is a valuable guarantor of...rights and entitlements.'<sup>970</sup> International law clearly privileges the right of the State over the RTR by not placing a demand on the State of reference to allow such a return. Therefore, we agree with Edwards and Waas that 'despite the great aspirations of international human rights that they are to be enjoyed by all human beings equally and thus transcends citizenship categories,

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<sup>966</sup> Gerard-Rene DeGroot quoted in Matthew Gibney, 'Statelessness and citizenship in ethical and political perspective,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 48

<sup>967</sup> Michael Prior, 'The right to expel: the bible and ethnic cleansing,' in Naseer Aruri (ed), *Palestinian Refugees: The Right to Return* (Pluto Press 2001) 27

<sup>968</sup> A legal subterfuge is 'a concealed plot to elude, escape, undermine, or deceptively oppose another.' US Legal, 'A legal subterfuge' (*US Legal*, n.d.)

<<https://definitions.uslegal.com/s/subterfuge/>> accessed 17 May 2019

<sup>969</sup> Andrew Shacknove, 'Who is a Refugee?' (1985) *Ethics*, 95, 283 <<https://doi.org/10.1086/292626>> accessed 1 September 2018

Matthew Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 48



this is yet to become reality.<sup>971</sup> We also agree with Edwards who observed that ‘as, lawyers, we sometimes overstate the effect of the legal system on ...the protection and empowerment of individuals (particularly refugees and other non-citizens)’ because ‘international human rights and refugee laws contain only a minimum set of standards. These standards are selectively and poorly enforced, usually relying on their coinciding with the political objectives of States to achieve their aims.’<sup>972</sup>

This explains why Albanese et al who argue that Palestinian refugees have a RTR under international law and that their problem should be solved on the basis of ‘international law governing the resolution of refugee problems, as informed by international practice’<sup>973</sup> end up observing that the ‘implementation of the right should be determined on case-by-case basis and...subject to compromise.’<sup>974</sup> According to Albanese et al this compromise involves Palestinian refugees recognizing that they cannot return to Israel without Israel’s consent and that if they are allowed to return this ‘may not necessarily mean returning as citizens of Israel, as conferring citizenship remains Israel’s prerogative.’<sup>975</sup> Moreover, Albanese et al also indicate that the rights of Palestinians refugees cannot override the rights of Israeli citizens when they observe that the ‘satisfaction of the rights of [Palestinian] refugees would not have been then, and would not be today, at the expense of the Jewish inhabitants of Israel.’<sup>976</sup> Albanese et al who also call for the naturalization and resettlement of Palestinian refugees in host states or third States to end their current plight<sup>977</sup> acknowledge that their proposal requires the consent of the target States when they observe that ‘[a]cquiring citizenship depends on domestic recognition’<sup>978</sup> and that ‘local integration is a sovereign decision.’<sup>979</sup>

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<sup>971</sup> Alice Edwards, Laura van Waas, ‘Introduction,’ in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 1

<sup>972</sup> Alice Edwards, ‘Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders’ (2009) 30 (3) *Michigan Journal of International Law*, 767  
<<https://repository.law.umich.edu/mjil/vol30/iss3/8>> accessed 29 January 2020

<sup>973</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 492

<sup>974</sup> *Ibid* 487

<sup>975</sup> *Ibid* 487

<sup>976</sup> *Ibid* 487

<sup>977</sup> *Ibid* 489

<sup>978</sup> *Ibid* 488

<sup>979</sup> *Ibid* 488

We will examine Albanese et al argument that ‘any alternative durable solutions to return to modern-day Israel, including naturalization in the host country or resettlement in third countries’ does not jeopardize the RTR in Chapter 6.5 Durable Solutions and the Cessation

## 5.12. Conclusion

In conclusion, this chapter demonstrated that the RTR is not an absolute right.<sup>980</sup> The RTR should generally be understood to be the right of a sovereign State because each State in the exercise of its sovereignty, has a right to grant or deny entry.<sup>981</sup> This means that there is no fundamental right of the individual to be granted entry but only the right of the State to extend such a right. Moreover, State obligations with regards to refugees do not support the RTR when the State of reference rejects such a return. It is also important to acknowledge that 'domestic immigration law stands apart from international human rights law such that it is solely domestic law which determines the rights of non-citizens.'<sup>982</sup> Thus, we need to acknowledge that the RTR is a contested concept and that exclusion from rights cannot be 'resolved by an appeal to humanity...as articulated in international human rights law'<sup>983</sup> because there is a consensus amongst scholars that while the RTR is mostly uncontested the State nevertheless cannot be stripped of its right to deny entry to undesirable persons. This examination also demonstrated that Arendt's conception of rights offers the best conceptual foundation for understanding why Palestinians as refugees and stateless persons have been unable to return to territories that became part of Israel in 1948. Arendt correctly observed that only citizenship can reliably guarantee access to rights. Embracing Arendt's conceptualization revealed that Palestinian refugees have not been able to return to Israel because they have been rendered stateless and denied entry by Israel. Arendt observes that historically when the state of origin refused to 'recognize the prospective repatriate as a citizen'<sup>984</sup> the only practical substitute for a non-existent homeland was

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<sup>980</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 381

<sup>981</sup> 'The Universal Declaration is silent on states' obligations to grant entry to immigrants, to uphold the right of asylum, and to permit citizenship to alien residents and denizens. These rights have no specific addressees and they do not appear to anchor specific obligations on the part of second and third parties to comply with them. Despite the cross-border character of these rights, the Declaration upholds the sovereignty of individual states. The Geneva Convention of 1951 Relating to the Status of Refugees and its Protocol added in 1967 are the second most important international legal documents governing cross-border movements. Nevertheless, neither the existence of these documents nor the creation of the [UNHCR] have altered the fact that this Convention and its Protocol are binding on signatory states alone and can be brazenly disregarded by non-signatories, and at times, even by signatory states themselves. Thus, a series of internal contradictions between universal human rights and territorial sovereignty, are built right into the logic of the most comprehensive international law documents in our world.' Seyla Benhabib, 'The Right to Have Rights in Contemporary Europe' (*The Pennsylvania State University*, February 2005) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1742&rep=rep1&type=pdf>> accessed 6 February 2020, 12

<sup>982</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 112

<sup>983</sup> Ibid 111

<sup>984</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 365

naturalization. This explains why resettlement has been advocated as the only realistic solution to end the plight of Palestinian refugees in chapter 4<sup>985</sup> and why appealing to international law, is not the answer to solving the Palestinian refugee problem. With this as a background, the focus of the next chapter shifts to how the international framework governing refugees and stateless persons has tried to end the plight of refugees and stateless persons who are unable to return to their country of former nationality or habitual residence and how these durable solutions can impact the realities and prospects of Palestinian refugees. What proves central to the discussion in the next chapter is why there has been little to no examination of how the current international framework governing refugees and stateless persons can impact the legal status of Palestinian refugees and their RTR.

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<sup>985</sup> Chapter 4 revealed that the Palestinian and the Israeli discourse agree that most Palestinian refugees will not be able to return to Israel because Israel does not recognize that Palestinian refugees have a right to return to Israel. Therefore, they advocated permanent resettlement of Palestinian refugees in States hosting UNRWA, a future Palestinian State or third States.

## Chapter 6: Palestine Refugees A History of Exclusion from the International Framework Governing Refugees and Stateless Persons

[H]istory is important, and no international lawyer can avoid being a historian. This gives us the long view essential to understanding law in the relations of States, and enables us to counter misunderstandings dressed up as advocacy –...History, then and now, reminds us of the range of legal and practical matters which were left open, and which have since had to be resolved consistently with the general principles of the [1951 Refugee] Declaration at large.<sup>986</sup>

*Guy Goodwin-Gill*

In the previous chapter, the thesis revealed that the right to return [RTR]<sup>987</sup> is a contested concept because the individual RTR has its roots in the principle of sovereignty which gives sovereign States the right to deny entry to undesirable persons. The primary objective of this chapter is to find out how the international framework governing refugees and stateless persons has attempted to solve the plight of such persons who cannot be repatriated and how these solutions can impact Palestinian refugees. To understand how the durable solutions advocated by the existing framework can impact Palestinian refugees this chapter will first review the historical evolution of international refugee law. This examination is necessary because it will allow the thesis to identify the fundamental principles that emerged when sovereign States created the international framework governing refugees. Understanding these fundamental principles is important because as Goodwin-Gill rightly observes when we address refugee rights within international refugee law '[t]he issue is often one of 'framing,' for everything depends on context, and the question for international lawyers (and for governments, legislators, critics and commentators) is when and in the light of what obligations might circumstances require a State to implement its international obligation.'<sup>988</sup> This chapter will further the thesis argument by revealing how the fundamental principles that define international refugee law and the durable solutions that it advocates to

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<sup>986</sup> Goodwin-Gill, 'The Dynamic of International Refugee Law' (2003) 25 (4) International Journal of Refugee Law, 653 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 1 November 2018

<sup>987</sup> The term right to return refers to the right to return as outlined in Article 13(2) of the Universal Declaration of Human Rights which states, 'everyone has the right to leave any country, including his own, and to return to his country.' United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

<sup>988</sup> Goodwin-Gill, 'The Dynamic of International Refugee Law' (2003) 25 (4) International Journal of Refugee Law, 653 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 1 November 2018, 654

end the plight of refugees who cannot be repatriated can dispossess Palestinian refugees from their status as refugees and from their RTR to Israel.

## 6.1. The Birth of International Refugee Law

Refugees 'have existed as long as history.'<sup>989</sup> Historically all stateless persons were recognized as refugees.<sup>990</sup> International refugee law emerged because of States coordinating their efforts to deal with different groups of refugees at different periods in history. The end of the First World War [WWI] led to the birth of the League of Nations in 1919 whose purpose was to prevent future wars by encouraging cooperation between States. 'The displacement of about 1.5 million Russians' as a result 'of the 1917 Bolshevik revolution, civil war...the 1921 Russian famine... [and denationalization measures]<sup>991</sup> provided the catalyst for collective State interest in the formation of the first International Office for Refugees [in 1921].<sup>992</sup> Initially, States perceived the Russian refugee<sup>993</sup> crisis as a temporary phenomenon.<sup>994</sup> Despite this Nansen who was appointed as the first League of Nations High Commissioner for Russian Refugees<sup>995</sup> was responsible for bringing an end to their refugee status and statelessness through repatriation or resettlement so they can 'fit...back into the normal parameters of the state system.'<sup>996</sup> Nansen's mandate was later

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<sup>989</sup> Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5 Washington University Journal of Law and Policy, 129

<[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol5/iss1/11](https://openscholarship.wustl.edu/law_journal_law_policy/vol5/iss1/11)> accessed 3 March 2021

<sup>990</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 64

<sup>991</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) Refugee Survey Quarterly, 11 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

\*Around 1 to 2 million Russian refugees fled between 1917 and 1922. 'A Soviet decree of 15 December 1922 [which] denationalized the vast majority of refugees, rendering them stateless and invalidating their travel documents.' Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 102

<sup>992</sup> Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 65,75

<sup>993</sup> A Russian refugee was 'any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of the Socialist Soviet Republic and who has not acquired another nationality.' Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 16

<sup>994</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 Israel Law Review 47, 60

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>995</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 421; See Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 66, 95

<sup>996</sup> Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 269

expanded to include Armenian refugees from Turkey [1924]<sup>997</sup> and Assyrians, Assyro-Chaldean and Turkish refugees [1928].<sup>998</sup> Following the death of Nansen in 1930 the League of Nations created the Nansen International Office for Refugees which offered humanitarian assistance and protection to refugees who fell under Nansen's mandate.<sup>999</sup> In 1933 the League of Nations created the Office of the High Commissioner for Refugees to deal specifically with German refugees,<sup>1000</sup> then its mandate expanded to include refugees from Austria.<sup>1001</sup> In 1933 the Nansen International Office for Refugees prepared the first legally binding Convention Relating to the International Status of Refugees [1933 Convention]<sup>1002</sup> which wanted to establish conditions that will ensure that refugees have access to 'civil rights, free and ready access to the courts, security and stability as regards establishment and work, facilities in the exercise of the professions, of industry and of commerce, and in regard to the movement of persons, admission to schools and universities.'<sup>1003</sup> Three out of the eight states that ratified the 1933 Convention added a reservation that secured their sovereign right to expel undesirable persons.<sup>1004</sup> This reservation which upholds the principle of State sovereignty was incorporated in Article 3 of the 1933 Convention which despite prohibiting States from expelling refugees by force accepted that States can expel undesirable persons for reasons of 'national security or public order.'<sup>1005</sup> This demonstrates

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<sup>997</sup> Early 1920s hundreds of thousands fled from Turkey. James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) Harvard International Law Journal, 136 <[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021; 'The first refugee accords emerged between 1922 and 1926 to address the influx of Russian and Armenian Refugees.' These accords include the Arrangement with Regards to the Issue of Certificates of Identity to Russian Refugees and the Arrangement with Regards to the Issue of Certificates of Identity to Russian and Armenian Refugees.' Ibid Footnote 45 in 137

<sup>998</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 422

In 1928 existing arrangements were extended to other groups in the Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in favour of Russian and Armenian Refugees. Footnote 46 in James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) Harvard International Law Journal, 137 <[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>999</sup> Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 75

<sup>1000</sup> Ibid 75

<sup>1001</sup> In the pre-war period the focus was on groups not individuals.

<sup>1002</sup> League of Nations, 'Convention Relating to the International Status of Refugees' (*Refworld*, 28 October 1933) <<https://www.refworld.org/docid/3dd8cf374.html>> accessed 3 March 2021

<sup>1003</sup> Ibid 1

<sup>1004</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 202

<sup>1005</sup> 'Article 3 Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal

how State interests influenced the development of international refugee law. In 1935 existing arrangements in the 1933 Convention were extended to 'political and religious dissidents from USSR.'<sup>1006</sup> This was followed by the 1936 Provisional Arrangement Concerning the Status of Refugees Coming from Germany [1936 Provisional Arrangement]<sup>1007</sup> which reaffirmed the need to protect refugees without undermining the principle of sovereignty. This was evident in Article 4(2) of the 1936 Provisional Arrangement which reaffirmed that the right of refugees not to be expelled except for 'reasons of national security or public order.'<sup>1008</sup> The 1936 Provisional Arrangement also developed international refugee law by defining who is a refugee for the purpose of international law. Article 1 of the 1936 Provisional Arrangement defined a refugee as 'any person who was settled in...[Germany], who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact he or she does not enjoy the protection of the Government of the Reich.'<sup>1009</sup> The reference to the German nationality indicated that the possession of the German nationality was essential to be recognised as a refugee and determined the type of rights they can access.<sup>1010</sup> This was also confirmed in Article 5 of the 1936 Provisional Arrangement which stated that:

The personal status of refugees who have retained their original nationality shall be governed by the rules applicable in the country concerned to foreigners possess in a nationality...[While] the personal status of refugees having no nationality shall be governed by the law of their country of domicile or, failing such, by the law of their country of residence.<sup>1011</sup>

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measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country.' League of Nations, 'Convention Relating to the International Status of Refugees' (*Refworld*, 28 October 1933)

<<https://www.refworld.org/docid/3dd8cf374.html>> accessed 3 March 2021, Article 3 ; See Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 72

<sup>1006</sup> James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 137

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1007</sup> League of Nations, 'Provisional Arrangement concerning the Status of Refugees Coming from Germany' (*Refworld*, 4 July 1936) <<https://www.refworld.org/docid/3dd8d0ae4.html>> accessed 4 March 2021

<sup>1008</sup> *Ibid* Article 4 (2)

<sup>1009</sup> *Ibid* Article 1

<sup>1010</sup> The reference to the German nationality demonstrates that Arendt was correct when she observed that only the possession of nationality can reliably guarantee access to certain rights.

<sup>1011</sup> League of Nations, 'Provisional Arrangement concerning the Status of Refugees Coming from Germany' (*Refworld*, 4 July 1936) <<https://www.refworld.org/docid/3dd8d0ae4.html>> accessed 4 March 2021, Article 5

When the 1933 Convention was replaced by the 1938 Convention Concerning the Status of Refugees Coming from Germany [1938 Convention]<sup>1012</sup> the German nationality continued to define who is a refugee. The 1938 Convention however expanded the protection mandate in Article 1 by allowing persons who formerly ‘possessed [the] German nationality...[and] Stateless persons not covered by previous conventions or agreements who have left German territory after being established therein’ to fall under the scope of the 1938 Convention.<sup>1013</sup> Although the reference to stateless persons meant that the lack of nationality no longer excluded refugees from the scope of international refugee law the 1938 Convention essentially helped Jews ‘who were deprived of German nationality by the Nazi decree of November 25, 1941.’<sup>1014</sup>

In 1938 the Nansen International Office for Refugees and the Office for the High Commissioner for Refugees were liquidated and replaced by the High Commissioner of the League of Nations for Refugees.<sup>1015</sup> In 1943 the Bermuda Conference expanded the protection mandate to ‘all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs.’<sup>1016</sup> In 1943 the United Nations Relief and Rehabilitation Administration [UNRRA] was also

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<sup>1012</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 17

\*Article 1 of the 1938 Convention defined those fleeing Germany as a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or fact, the protection of the German Government and b) Stateless persons not covered by previous conventions or agreements who have left Germany territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.’ League of Nations, ‘Convention concerning the Status of Refugees Coming From Germany’ (*Refworld*, 10 February 1938) <<https://www.refworld.org/docid/3dd8d12a4.html>> accessed 4 March 2021, Article 1

\* The 1933 Convention Relating to the International Status of Refugees and the 1938 Convention Concerning the Status of Refugees coming from Germany became the major two legal instruments of the inter-war period.

<sup>1013</sup> Article 1 defined a refugee ‘as a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or fact, the protection of the German Government and b) Stateless persons not covered by previous conventions or agreements who have left Germany territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.’ League of Nations, ‘Convention concerning the Status of Refugees Coming From Germany’ (*Refworld*, 10 February 1938) <<https://www.refworld.org/docid/3dd8d12a4.html>> accessed 4 March 2021, Article 1

<sup>1014</sup> Lester N. Salwin, ‘Uncertain Nationality Status of German Refugees’ (1946) *Minnesota Law Review*, 372 <<https://scholarship.law.umn.edu/mlr/1824>> accessed 28 March 2021

<sup>1015</sup> Gilbert Jaeger, ‘On the History of the International Protection of Refugees’ (2001) 83 (843) *International Review of the Red Cross*, 729

<[https://www.icrc.org/ar/doc/assets/files/other/727\\_738\\_jaeger.pdf](https://www.icrc.org/ar/doc/assets/files/other/727_738_jaeger.pdf)> accessed 21 October 2020

<sup>1016</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 18



established<sup>1017</sup> to 'provide relief' to refugees in Europe and facilitate their return to their countries at the end of the Second World War [WWII].<sup>1018</sup> The UNRRA was not authorized to help refugees unable to return.<sup>1019</sup> At the time States wanted to end the refugee crisis without undermining their national interests and sovereign right to control who can enter their territories. This led to the establishment of the United Nations [UN] in 1945. The UN was expected to end the possibility of war by establishing 'conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.'<sup>1020</sup>

In 1946 United Nations General Assembly [UNGA] Resolution 8 (I)<sup>1021</sup> defined the refugee problem as 'international in scope and nature,'<sup>1022</sup> and called upon States to help refugees to return to their countries of origin as early as possible<sup>1023</sup> while maintaining that they cannot be forced to return to their country.<sup>1024</sup> In 1946 the UNGA also set up the International Refugee Organization [IRO]<sup>1025</sup> which was mandated to deal with the refugee crisis in Europe caused by WWII. The responsibilities of the UNRRA were mostly transferred to the IRO. While the IRO was expected to help refugees return to their countries<sup>1026</sup> between 1946 and 1952 the IRO ended up returning only 77,000 refugees from Eastern Europe to the USSR<sup>1027</sup> and resettled 1,620,000 refugees 'fleeing political development in Eastern Europe.'<sup>1028</sup> Refugees were resettled in America, Canada, New Zealand, Australia and Latin

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<sup>1017</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 13 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018 \* Although UNRRA used the term the UN it was established before the United Nations.

<sup>1018</sup> *Ibid* 13

<sup>1019</sup> *Ibid* 13; See Michael Marrus, *The Unwanted: European Refugee in the Twentieth Century* (Oxford University Press 1985) 317-24

<sup>1020</sup> United Nations, 'UN Charter' (*United Nations*, 26 June 1945) <<https://www.un.org/en/sections/un-charter/un-charter-full-text/>> accessed 4 March 2021. Preamble Paragraph 1

<sup>1021</sup> United Nations, 'Resolution No. 8 (1)' (*United Nations*, 29 January 1946)

<[https://undocs.org/en/A/RES/8\(I\)](https://undocs.org/en/A/RES/8(I))> accessed 5 March 2021

<sup>1022</sup> *Ibid* C (i)

<sup>1023</sup> *Ibid* C (iii)

<sup>1024</sup> *Ibid* C (ii)

<sup>1025</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 424

<sup>1026</sup> *Ibid* 424; See Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 16 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1027</sup> Goodwin-Gill reveals that 'by June 1947 nearly 650,000 [displaced persons] ...remained without a solution.' This leads the thesis to conclude that the 77,000 refugees who were repatriated were a small number in comparison to the number of refugees who remained displaced. Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 14 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1028</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 203

America.<sup>1029</sup> Third country resettlement was endorsed to avoid population pressures in Europe.<sup>1030</sup> This solution ensured that the first countries of asylum were not burdened by the mass movement of refugees.<sup>1031</sup> According to Goodwin-Gill the IRO promoted resettlement over return because it was 'caught up in the politics of the Cold War' and therefore did not want to return refugees to the USSR. In other words, State interests impacted the way States in Western Europe sought to end the refugee problem for refugees from Eastern Europe. After the UNRRA was transferred to the IRO, the IRO created a draft that became a template for the 1951 Convention Relating to the Status of Refugees [1951 Convention].<sup>1032</sup> The IRO was shut down on 28 February 1952 and its responsibilities were transferred to the United Nations High Commissioner for Refugees [UNHCR].<sup>1033</sup>

The UN became the main architecture of a comprehensive international framework governing refugees and stateless persons<sup>1034</sup> when it established UNHCR<sup>1035</sup> and adopted the 1951 Convention<sup>1036</sup> which separated stateless persons and refugees because the plight of the latter was considered a more urgent matter for States to deal with.<sup>1037</sup>

When the UN established UNHCR it initially gave the agency:

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<sup>1029</sup> According to Goodwin-Gill 'the shift to third country resettlement began to gain momentum, particularly from 1948 onwards.' Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 16 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1030</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Refugee Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 425

<sup>1031</sup> *Ibid* 203

<sup>1032</sup> Irial Glynn, 'The Genesis and Development of Article 1 of the 1951 Refugee Convention' (*University College Dublin*, July 2011)

<<https://cadmus.eui.eu/bitstream/handle/1814/61866/Glynn%20final%20pre-print%2BArticle%201%20of%20the%201951%20Refugee%20Convention.pdf?sequence=2&isAllowed=y>> accessed 14 March 2021, 1

<sup>1033</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 19 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1034</sup> UNHCR, 'The United Nations and Palestinian Refugees' (*UNRWA*, January 2007)

<<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 2

<sup>1035</sup> The UNGA decided to establish the UNHCR in Resolution 319 (IV) of 3 December 1949.

'1. Decides to establish, as of 1 January 1951, a High Commissioner's Office for Refugees in accordance with the provisions of the annex to the present resolution to discharge the functions enumerated therein and such other functions as the General Assembly may from time to time confer upon it' United Nations, 'Refugees and stateless persons 319 (IV)' (*UNHCR*, 03 December 1949) <<https://www.unhcr.org/uk/excom/bgares/3ae69ef54/refugees-stateless-persons.html>> accessed 15 March 2021

\*In 1950 UNGA adopted Statute of the UNHCR as an annexe to UNGA 428 (v). UNHCR, 'The Statute of the Office of the United Nations High Commissioner' (*UNHCR*, 14 December 1950) <<https://www.unhcr.org/3b66c39e1.pdf>> accessed 15 March 2021

<sup>1036</sup> UNHCR, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017

<sup>1037</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 65

[A] limited three-year mandate with the principal aim of helping resettle 1.2 million European refugees left homeless by [WW]II. But with the increase and expansion of the refugee crises, the UNHCR's mandate was extended every five years up to 2004, when the time limitation was lifted...by the [UNGA].<sup>1038</sup>

After UNHCR replaced the IRO, it became responsible for refugees who failed to meet the resettlement criteria set by the IRO.<sup>1039</sup> UNHCR, like the IRO, endorses resettlement as a durable solution to end the plight of refugees who cannot be repatriated. When States drafted the 1951 Convention, they also endorsed the principle of non- refoulement<sup>1040</sup> in Article 33 which prohibited the expulsion or involuntary return of a refugee or asylum-seeker to a country where their life or freedom will be at risk on account of race, religion, nationality, membership of a particular social group or political opinion.<sup>1041</sup> This principle as described by Goodwin-Gill et al became 'the foundation stone of international protection.'<sup>1042</sup> The principle

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<sup>1038</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*Refworld*, January 2007)

<<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 8

<sup>1039</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 19 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1040</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 33

<sup>1041</sup> *Ibid* 3-4

The right not to be expelled is also enshrined in several conventions such as:

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which states: '1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.' United Nations, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85' (*Refworld*, 10 December 1984) <<https://www.refworld.org/docid/3ae6b3a94.html>> accessed 3 February 2020; Article 13 of the International Covenant on Civil and Political Rights (ICCPR) which states 'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.' United Nations, 'International Covenant on Civil and Political Rights, 16 December 1966' (*Refworld*, 16 December 1966) <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 3 February 2020; Article 6 (6) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances also permits states to refuse to extradite in Article 6 (6) which states '[i]n considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.' United Nations, 'United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988' (*Refworld*, 19 December 1988) <<https://www.refworld.org/docid/49997af90.html>> accessed 3 February 2020

<sup>1042</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 421; See Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of

of non-refoulement explains why in Article 34 the 1951 Convention called upon 'Contracting States to end the plight of refugees by facilitating their assimilation and naturalization.'<sup>1043</sup> Although refugees 'enjoyed no guarantee of naturalization'<sup>1044</sup> during the drafting process of Article 34 the USSR correctly observed that '[a]ny such convention would legalize an abnormal situation and the permanent settlement of refugees in countries to which they had been forcibly deported instead of being returned to their homelands.'<sup>1045</sup> The USSR wanted to end the plight of refugees through repatriation because as the leading Soviet Jurist O.E. Polents argued '[t]he problem of refugees and displaced persons substantially boils down to a guarantee of the earliest return of the persons to their countries.'<sup>1046</sup>

In the 1920s the USSR made a similar argument when it argued that repatriation was 'the essential solution' and claimed that 'the League of Nations had perpetuated the refugee problem by assisting' refugees to be resettled.<sup>1047</sup> Despite this position, resettlement was considered the most attractive solution in the inter-war period and after WWII. This was evident when States adopted the 1954 Convention Relating to the Status of Stateless Persons [1954 Convention]<sup>1048</sup> and the 1961 Convention on the Reduction of Statelessness [1961 Convention]<sup>1049</sup> which call upon signatory States to naturalize stateless persons.<sup>1050</sup>

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Refugee Policies in Africa' (2002) 21 Refugee Survey Quarterly, 26

<[https://doi.org/10.1093/rsq/21.1\\_and\\_2.12](https://doi.org/10.1093/rsq/21.1_and_2.12)> accessed 12 February 2018

<sup>1043</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 34

<sup>1044</sup> James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 138

<[http://www.mcrg.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrg.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1045</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 17 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018; See UNGA Official Records, 5<sup>th</sup> Sess., Third Committee, Summary Records, 329<sup>th</sup> Meeting, 29 November 1950, paragraphs 26-28.

<sup>1046</sup> George Ginsburgs, 'The Soviet Union and the Problem of Refugees and Displaced Persons 1917-1956' (1957) 51 (2) *American Journal of International Law*, 325

<<https://www-cambridge-org.abc.cardiff.ac.uk/core/journals/american-journal-of-international-law/article/abs/soviet-union-and-the-problem-of-refugees-and-displaced-persons-19171956/5FD250A220B17E67C1D4EA5F17B8F1DD>> accessed 20 March 2021

<sup>1047</sup> Guy S. Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 *Refugee Survey Quarterly*, 14 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1048</sup> United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 28 September 1954)

<<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017

Article 1(1) defines a 'Stateless person' as someone 'who is not considered as a national by any State under the operation of its law.' *Ibid* Article 1 (1)

<sup>1049</sup> United Nations, 'Convention on the Reduction of Statelessness, 30 August 1961' (*Refworld*, 30 August 1961) <<https://www.refworld.org/docid/3ae6b39620.html>> accessed 2 November 2017

<sup>1050</sup> Article 32 of the 1954 Convention Relating to the Status of Stateless Persons which addresses naturalization states '[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization

In sum, the historic evolution of international law reveals that Goodwin-Gill was correct when he observed that the 'history of the 1920-55 period confirms the continued vitality of self-interest as a motivating factor in the responses of States to refugee flows.'<sup>1051</sup> This explains why pre-1951 States were unwilling 'to make legally binding commitments to refugee relief'<sup>1052</sup> or to set up a permanent fund to international agencies responsible for offering protection and aid to refugees<sup>1053</sup> and why:

[T]he two primary trends of this period---the rejection of a humanitarian basis for refugee law in favour of a more selective human rights focus,<sup>1054</sup> and the definition of human rights in terms consistent with the ideology of the more powerful States---set the stage for the development of contemporary refugee law.<sup>1055</sup>

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proceedings and to reduce as far as possible the charges and costs of such proceedings.' United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 28 September 1954) <<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017, Article 32

The UNHCR in its introductory note to the 1961 Convention on the Reduction of Statelessness states that the 'convention establishes safeguards against statelessness in several different contexts. A central focus of the Convention is the prevention of statelessness at birth by requiring States to grant citizenship to children born on their territory, or born to their nationals abroad, who would otherwise be stateless. To prevent statelessness in such cases, States may either grant nationality to children automatically at birth or subsequently upon application. The Convention further seeks to prevent statelessness later in life by prohibiting the withdrawal of citizenship from States' nationals – either through loss, renunciation, or deprivation of nationality – when doing so would result in statelessness. Finally, the Convention instructs States to avoid statelessness in the context of transfer of territory. For all of these scenarios, the 1961 Convention safeguards are triggered only where statelessness would otherwise arise and for individuals who have some link with a country. These standards serve to avoid nationality problems which might arise between States.' United Nations, 'Convention on the Reduction of Statelessness, 30 August 1961' (*UNHCR*, 30 August 1961)

<[http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness\\_ENG.pdf](http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf)> accessed 15 May 2017, 3-4

<sup>1051</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 8 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1052</sup> James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 139

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1053</sup> *Ibid* 138

<sup>1054</sup> When the 1951 Convention Relating to the Status of Refugees used individualized persecution instead of group persecution in its definition this demonstrated how the States that created the international framework governing refugees were able to shift the focus from groups to individuals at different periods in history.

<sup>1055</sup> 'In sum, the pre-1950 refugee accords and arrangements established protection regimes which compromised humanitarian instincts with protectionism, and concern for the promotion of human rights with the advancement of political goal. The two primary trends of this period---the rejection of a humanitarian basis for refugee law in favour of a more selective human rights focus, and the definition of human rights in terms consistent with the ideology of the more powerful states---set the stage for the development of contemporary refugee law.' James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31(1) *Harvard International Law Journal*, 14 <[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

Thus, we find that the treatment of refugees fluctuated based on whether the political, economic, social and security concerns of States converged with the protection needs of refugees.<sup>1056</sup> This fluctuation was a by-product of sovereign States being primarily responsible for the creation of international refugee law standards and for implementing them through domestic laws. The lack of an independent enforcement mechanism means that the enforcement of international refugee law is primarily based on voluntary compliance by sovereign States. Therefore, international refugee law is always in a state of evolution.

This state of evolution explains why historic trends within Europe which incorporated refugees through resettlement programs have been replaced by restrictive measures after the end of the cold war. These restricted measures included interpreting ‘the [1951 Convention] in a strict and legalistic way...to limit the obligation to provide protection to asylum seekers who may, under a more generous approach, have satisfied the requirements for refugee status.’<sup>1057</sup> According to Chimni, these restrictive measures came about because ‘the refugee no longer possessed ideological or geopolitical value’ for Western States since the refugees are no longer Europeans fleeing communism.<sup>1058</sup> This is why the 1951 Convention ‘is often described as a product of the cold war—designed to allow Western countries to use international law to trumpet their freedoms to the eastern bloc.’<sup>1059</sup> This assertion is supported by the fact that many States have observed that the 1951 Convention ‘is no longer supported by the ideological consensus that existed post

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<sup>1056</sup> This reality led James Hathaway to call for the establishment of a system of collectivized responsibility that has ‘a built-in incentive to take an interest in the ways refugees are treated by other states. Even the states not designated to provide temporary protection under the application of a particular interest convergence group’s responsibility sharing arrangement would remain bound by the duty of non-refoulement.’ Hathaway wants this system which is based on interest-convergence to ensure that a ‘country that wishes to avail itself of the flexibility afforded by a responsibility sharing mechanism would be legally bound to ensure that removal to a partner state does not amount to indirect refoulement.’ James C. Hathaway and Robert Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal*, 149 <<https://core.ac.uk/download/pdf/232691136.pdf>> accessed 6 November 2017

<sup>1057</sup> Nick Poynder, ‘Mind the Gap’: Seeking Alternative Protection Under the Convention Against Torture and the International Covenant on Civil and Political Rights,’ in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 174 \*A second edition was published in 2018 because the authors of the essays in this collection, all internationally recognised refugee scholars and practitioners addressed controversial topics about refugee rights that remain relevant today.

<sup>1058</sup> Bhupinder S Chimni quoted Mathew J Gibney, ‘The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy,’ in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 25

<sup>1059</sup> Mary Crock, ‘The Refugees Convention at 50: Mid-life Crises or Terminal Inadequacy? An Australian Perspective,’ in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 56

[WW]II.<sup>1060</sup> States also complain about the 'social and financial impact of granting asylum to a large number of refugees.'<sup>1061</sup> This explains why the mass outflow of refugees 'has led States to look to each other for fresh ideas on how to restrict the use of the Refugee Convention'<sup>1062</sup> because its 'practical operations...often fly in the face of politically sacrosanct notions of sovereignty and prerogative power.'<sup>1063</sup> Therefore, Kneebone asserts that '[r]efugees...represent a failure of the State system, a 'problem' to be 'solved'...'1064 While Curran claims that 'resistance to global human rights is met by arguments about national sovereignty.'<sup>1065</sup> This could explain why after the 2011 civil war in Syria forced Europe to deal with 'the greatest mass movement of people since the [WWII]' member States of the European Union [EU] called for the adoption of a stricter asylum policy to deal with the massive flow of refugees.<sup>1066</sup>

## 6.2. Principles and Norms that emerged and their Impact on Refugees

The historical evolution of international refugee law reveals that when States cooperated in the inter-war period to create the international framework governing the legal status of refugees three principles emerged that continue to impact the realities and prospects of refugees. The first principle that underpinned the international refugee regime was 'sovereignty' which gives States the right to control their territory without outside interference.<sup>1067</sup> The primacy of State sovereignty within this framework can have important implications for refugees because States can refuse to admit them<sup>1068</sup> and/or adopt restrictive immigration policies to restrict the entry of refugees. This explains why the existing

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<sup>1060</sup> Liz Curran and Susan Kneebone, 'Overview,' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 11

<sup>1061</sup> James Hathaway and Robert Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection' (1997) *Harvard Human Rights Journal* 10, 115, 154 <<https://core.ac.uk/download/pdf/232691136.pdf>> accessed 6 November 2017

<sup>1062</sup> Liz Curran and Susan Kneebone, 'Overview,' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 9

<sup>1063</sup> Liz Curran, 'Global solutions,' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 313

<sup>1064</sup> Susan Kneebone, 'Moving Beyond the State: Refugees, Accountability and Protection,' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 279

<sup>1065</sup> Liz Curran and Susan Kneebone, 'Overview,' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (1st ed, Routledge 2003) 9

<sup>1066</sup> European Commission, 'The EU and the refugee crisis' (*European Commission*, 24 August 2016) <<http://publications.europa.eu/webpub/com/factsheets/refugee-crisis/en/>> accessed 22 May 2017, 1

<sup>1067</sup> Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 66

Aristide Zolberg rightly observes that 'it has been universally acknowledged ever since the state system arose in its modern form that, under the law of nations, the right to regulate entry is a fundamental concomitant of sovereignty.' Aristide Zolberg quoted in Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 68

<sup>1068</sup> *Ibid* 66

framework has been described as State centric.<sup>1069</sup> The second defining principle is 'humanitarianism' which requires States to help refugees 'in an apolitical' and 'non-discriminatory way'.<sup>1070</sup> The third defining principle is temporary protection which refers to the right of States to offer temporary protection to refugees until a permanent solution can be found to end their plight. While repatriation is considered the preferred solution local integration and resettlement became the two-principal solutions that the international refugee framework advocates to end the plight of refugees who cannot be repatriated.<sup>1071</sup> Although several international conventions were adopted to enforce these principles States are not obliged to allow an asylum seeker to enter their territories or give them access to durable solutions when they are present in their territories because the rights and interests of States override the rights and interests of refugees.<sup>1072</sup> Therefore, Goodwin-Gill was correct when he observed that when we address refugee rights within international refugee law '[t]he issue is often one of 'framing'...' <sup>1073</sup>

In conclusion, we derive three important lessons from this period of evolution. The first lesson is that within the international framework governing refugees States have a right to grant or deny temporary or permanent asylum to refugees.<sup>1074</sup> The second lesson is that access to temporary protection is restricted because it is dependent on the political, economic, and cultural needs of the States. The third lesson is that States have a right to grant or deny access to durable solutions. These lessons reveal that the international framework governing refugees concerns the rights of sovereign states rather than the rights of asylum seekers and refugees.

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<sup>1069</sup> Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 83

<sup>1070</sup> Ibid 68

<sup>1071</sup> Aristide Zolberg quoted in Clauden M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 68

\*In addition to these principles three norms characterized the international refugee framework during that period and they are the asylum norm, the assistance norm and the burden sharing norm. 'The asylum norm refers to the right of sovereign states to offer protection to refugees in their territories. The assistance norm placed obligations on states to assist refugees as a special category that is different to aliens and migrants. The burden sharing norm expected states to help refugees financially.' Ibid 70

<sup>1072</sup> These findings further our thesis argument by revealing that Arendt's conception of rights which reveals that sovereign States can strip individuals from their right to have rights corresponds with how the international framework governing refugees has been constructed by States.

<sup>1073</sup> Ibid 654

<sup>1074</sup> This corresponds with the classic view of asylum as developed by Grotius and Vattel and the positivist school of jurists Oppenheim which 'affirms the right of a state to grant or refuse asylum to aliens, and denies the right of the individual to choose a place of exile.' Ibid 70



### 6.3. The Exclusion of Palestine Refugees

In theory, the principles that define the international framework governing refugees can impact the prospects for Palestine refugees. Despite this Palestine refugees 'have not been able to benefit from the general discussion concerning protection, the search for durable solutions, [and] the development of refugee law' because they are excluded from the main international instruments for the protection of refugees.<sup>1075</sup> This exclusion started when the IRO was not mandated to deal with the Palestinian refugee crisis.<sup>1076</sup> Despite this, the IRO played an active role 'in the preparation of the 1951 Convention' which excluded Palestine refugees from the international framework governing refugees.<sup>1077</sup> According to the text of the 1951 Convention refugee status can only be denied based on Article 1D and 1E.<sup>1078</sup> The article relevant to our thesis is Article 1D which provided that:

[This Convention] shall not apply to persons who are at present receiving from organs or agencies of the [UN] other than the [UNHCR] 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 [UNGA], these persons shall ipso facto be entitled to the benefits of this Convention.<sup>1079</sup>

The drafting history of the 1951 Convention reveals that Article 1D was specifically referring to Palestinian refugees who fell under the mandate of the United Nations Relief and Work Agency in the Near East for Palestine Refugees [UNRWA] which was established on 8 December 1949 by UNGA Resolution 302<sup>1080</sup> as a temporary agency tasked with providing education, healthcare, and social services to those meeting its definition of 'Palestine

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<sup>1075</sup> Ibid 354

<sup>1076</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 60  
<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1077</sup> Irial Glynn, 'The Genesis and Development of Article 1 of the 1951 Refugee Convention' (*University College Dublin*, July 2011)

<<https://cadmus.eui.eu/bitstream/handle/1814/61866/Glynn%20final%20pre-print%2BArticle%201%20of%20the%201951%20Refugee%20Convention.pdf?sequence=2&isAllowed=y>> accessed 14 March 2021, 1

<sup>1078</sup> Article 1 E states '[t]his Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951)  
<<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, Article 1 E

<sup>1079</sup> Ibid, Article 1D

<sup>1080</sup> United Nations, 'General Assembly Resolution. 302' (*UNRWA*, 8 December 1949)  
<<https://www.unrwa.org/content/general-assembly-resolution-302>> accessed 1 November 2016

refugees' in Lebanon, Syria, Jordan, the occupied West Bank, East Jerusalem and the Gaza Strip.<sup>1081</sup>

Article 1D was proposed by Egypt's representative Mr Bey who observed 'so long as the problem of the Palestine refugees continued to be a [UN] responsibility the [1951] Convention should not apply to them.'<sup>1082</sup> According to Bey, the Egyptian amendment wanted:

To make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the [UN] at present providing them with protection or assistance ceased to function [referring to UNRWA and the UNCCP], would automatically come within the scope of the [1951] Convention.<sup>1083</sup>

Bey also 'noted...that the present situation of [Palestinian] refugees was a temporary one, and that the relevant resolutions of the [UNGA] provided that they should return to their homes.'<sup>1084</sup> Signatory States expected the Palestinian refugee problem to be solved based on UNGA Resolution 194 [Resolution 194] which called for the repatriation and compensation of Palestinian refugees.<sup>1085</sup> Despite this Bey also observed that '[i]t was only right and proper that, as soon as the Palestine problem had been settled and the refugees no longer enjoyed [UN] assistance and protection, they should be entitled to the benefits of the [1951] Convention.'<sup>1086</sup> This indicates that Bey did not expect a final settlement to end the plight of all Palestine refugees. Moreover, Iraq's representative Mr Al Pachachi revealed 'that the amendment represented an agreed proposal on the part of all the Arab States...

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<sup>1081</sup> UNRWA, 'Consolidated Eligibility and Registration Instruction' (*UNRWA*, 1 January 2009) <<https://www.unrwa.org/userfiles/2010011995652.pdf>> accessed 25 February 2017, 30

<sup>1082</sup> United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-ninth Meeting, 28 November 1951, A/CONF.2/SR.29' (*Refworld*, 28 November 1951) <<https://www.refworld.org/docid/3ae68cdf4.html>> accessed 27 February 2021

<sup>1083</sup> Mr Bey of Egypt quoted in Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998) 64; See United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-ninth Meeting, 28 November 1951, A/CONF.2/SR.29' (*Refworld*, 28 November 1951) <<https://www.refworld.org/docid/3ae68cdf4.html>> accessed 19 March 2021

<sup>1084</sup> United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, A/CONF.2/SR.19' (*Refworld*, 26 November 1951) <<https://www.refworld.org/docid/3ae68cda4.html>> accessed 19 March 2021

<sup>1085</sup> 'The Arab States desired that those refugees should be aided pending their repatriation, repatriation being the only real solution of their problem. To accept a general definition...would be to renounce insistence on repatriation.' Accord Statement of Mr. Baroody of Saudi Arabia, 5 UNGA Official Records 359 (27 Nov 1950) quoted in Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 62

<sup>1086</sup> Mr Bey of Egypt quoted in Tribunal Decisions, '[2002] UKIAT 159' (*Tribunal Decisions*, 29 January 2002) <<https://tribunalsdecisions.service.gov.uk/utiac/2002-ukiat-159>> accessed 30 May 2017

[and that] ...if the Egyptian amendment was rejected, the refugees it was designed to protect might eventually find themselves deprived of any status whatsoever.<sup>1087</sup> Therefore, as noted by Goodwin-Gill Article 1D is a 'contingent inclusion provision' rather than an exclusion clause<sup>1088</sup> because it ensures a continuation of protection for Palestine refugees.<sup>1089</sup>

The drafting history of Article 1D reveals that 'the refugee character of...Palestinian refugees was never in dispute'<sup>1090</sup> and that the drafters recognised the special status of Palestinian refugees and therefore did not submerge them with general refugees.<sup>1091</sup> Moreover, Arab States were determined to ensure that the 1951 Convention does not undermine the status of Palestine refugees, or their right of return [ROR]<sup>1092</sup> as confirmed by Lebanon's representative Mr Azkoul who stated:

[T]he Palestine refugees...differed from all other refugees. In all other cases, persons had become refugees as a result of action taken contrary to the principles of the [UN], and the obligations of the Organization towards them was a moral one only. The existence of the Palestine refugees, on the other hand, was the direct result of a decision taken by the [UN] itself with full knowledge of the consequences. The Palestine refugees were, therefore, a direct responsibility on the part of the [UN] and could not be placed in the general category of refugees without betrayal of that responsibility.<sup>1093</sup>

Saudi Arabia's representative Mr Baroody also observed 'if the [UNGA] were to include the Palestine refugees in a general definition of refugees, they would become submerged and would be relegated to a position of minor importance.'<sup>1094</sup> Therefore, according to Baroody '[t]he Arab States desired that those refugees should be aided pending their repatriation, repatriation being the only real solution of their problem. To accept a general

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<sup>1087</sup> Mr. Al Pachachi quoted in Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 154-55

<sup>1088</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 62

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1089</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 154

<sup>1090</sup> *Ibid* 155

<sup>1091</sup> *Ibid* 158

<sup>1092</sup> The term right of return in the Palestinian and Arab discourse encompasses the right to return to Israel, a right to return to one's property and a right to compensation for any losses.

<sup>1093</sup> Mr. Azkoul of Lebanon, 5 UNGA Official Records 358 (27 November 1950) quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 511

<sup>1094</sup> Statement of Mr. Baroody of Saudi Arabia, 5 UNGA Official Records 359 (27 Nov 1950). Accord statement of Azmi Bey of Egypt, 5 UNGA Official Records 358 quoted in *Ibid* 511

definition...would be to renounce insistence on repatriation.<sup>1095</sup> France's representative Mr Rochefort also agreed that the Palestinian refugee problem was 'completely different from those of the refugees in Europe, and could not see how the Contracting States could bind themselves by a text under the terms of which their obligations would be extended to include a new, large group of refugees.'<sup>1096</sup> Despite this Rochefort acknowledged that the Arab States had secured automatic 'deferred inclusion' for Palestinian refugees.<sup>1097</sup> The American representative Mr Warren also agreed that Palestine refugees should be excluded because their inclusion 'would present the Contracting States with an undefined problem, and so reduce the number of states in Europe that would find it possible to sign the Convention.'<sup>1098</sup> These statements support Goodwin-Gill et al conclusion that Palestine refugees were excluded from the 1951 Convention for 'political and practical reasons'<sup>1099</sup> and Hathaway et al conclusion that:

It was the shared intention of Arab and Western States to deny Palestinians access to the Convention-based regime so long as the UN continued to assist them in their own region, thereby keeping the prospect of repatriation alive. But with an eye to the need to protect the Palestinians until and unless such a fundamental resolution was achieved, the Arab States secured unconditional access for Palestinian refugees to the benefits set by the Refugee Convention should the specialized UN engagement on their behalf ever be terminated.<sup>1100</sup>

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<sup>1095</sup> Statement of Mr. Baroody of Saudi Arabia, 5 UNGA Official Records 359 (Nov. 27, 1950). Accord Statement of Mr. Azmi Bey of Egypt, 5 UNGA Official Records 358 (27 Nov 1950) quoted in *Ibid* 512 \*The UNGA also proposed excluding 'a person who has entered a country with whose nationals he has close ties of ethnic and cultural kinship and, because of such kinship, enjoys the rights and privileges usually attached to the possession of the nationality of such country.' UN Doc. A/C.3/L. 131 (30 Nov 1950) at 2 quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 501, Footnote. Mr. Baroody of Saudi Arabia rejected this proposal because in his view 'persons forced to flee to a neighboring State, the inhabitants of which might have similar racial and cultural characteristics, would be denied the protection both of the Convention and the High Commissioner's Office.' Statement of Mr. Baroody of Saudi Arabia, 5 UNGA Official Records 376 (1 Dec 1950) quoted James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 501

<sup>1096</sup> United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, A/CONF.2/SR.19' (*Refworld*, 26 November 1951) <<https://www.refworld.org/docid/3ae68cda4.html>> accessed 27 February 2021

<sup>1097</sup> Mr Rochefort of France quoted James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 512

<sup>1098</sup> United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, A/CONF.2/SR.19' (*Refworld*, 26 November 1951) <<https://www.refworld.org/docid/3ae68cda4.html>> accessed 27 February 2021

<sup>1099</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 153

<sup>1100</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 513

Based on this historic context it can be argued that Article 1D was developed to ensure that the 1951 Convention does not end up defining Palestine refugees legally out of existence and ending their RTR. Article 1D protected Palestine refugees by ensuring that Article 34 of the 1951 Convention which calls upon 'Contracting States... [to] facilitate the assimilation and naturalization of refugees'<sup>1101</sup> does not play a role in defining Palestine refugees legally out of existence by turning them into citizens of new States. Article 1D also protected Palestine refugees from being permanently resettled in host States or third States as recommended in section IV (D) of the 1951 Convention which states that 'Governments... [must] act in concert in a true spirit of international co-operation in order that...refugees may find asylum and the possibility of resettlement.'<sup>1102</sup> In conclusion, when Article 1D was developed its main purpose was to protect the refugee status of Palestine refugees and their ROR because it was in the interest of State parties who drafted the 1951 Convention to cast the Palestinian refugees as a temporary problem that had to be solved through repatriation because they did not want to resettle them in their territories.

#### 6.4. Article 1D and Interpretative Challenges

Goodwin-Gill et al observe that signatory States did not expect Palestine refugees to need protection under the 1951 Convention because they did not expect a protracted refugee situation to emerge<sup>1103</sup> since 'there was a general assumption that the situation would be resolved by 1954. [Therefore], UNRWA and the... [1951] Convention were not intended to be interpreted for many modern situations.'<sup>1104</sup> This 'accounts in part for the fact that the nationality status of many Palestinian refugees remains unresolved.'<sup>1105</sup> Goodwin-Gill also rightly observes that '[f]rom the perspective of a lawyer or a state, Article 1D raises a number of interpretative challenges...as a result of the Palestinian issue remaining unresolved.'<sup>1106</sup>

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<sup>1101</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>1102</sup> Ibid 11

<sup>1103</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 155

<sup>1104</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 68

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1105</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 438

<sup>1106</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 61

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018; See UNHCR,

The key interpretative challenges are as follows:

The term 'at present receiving'...is inherently ambiguous. It is not clear whether it refers to those receiving protection on 1 January 1951 (when UNHCR came into existence), 28 July 1951 (when the Refugee Convention was opened for signature), or 22 April 1954 (when the...Convention came into force) [or those who are currently receiving assistance from UNRWA].<sup>1107</sup> Similarly, there is no clear definition of a Palestine refugee, and therefore of the scope of application of Article 1D *ratione personae*. It could require reference, among others, to... [UN General Assembly] Resolution 194 (III), Resolution 2252 (ES-V) of 1967, or to the general practice of UNRWA. Moreover, the approach of UNRWA to the definition has been essentially operational, geared towards providing relief and assistance, rather than defining eligibility for refugee status in the sense of Article 1A(2).<sup>1108</sup>

Based on the above interpretative challenges Foster et al who adopt a historically bounded interpretation have concluded that Article 1D excludes a limited number of refugees:

Palestinians entitled to the benefits of the UNCCP and/or UNRWA protection or assistance as of the Convention's adoption on July 28, 1951. Neither descendants of this group nor the Palestinians who became entitled to UN protection or assistance subsequent to that date are excluded; their protection needs should be assessed in the usual way, with no reference to Article 1(D). The exclusion of the historically circumscribed group persists until and unless either the [UN General Assembly] adopts a resolution providing for the definitive settlement of the position of these Palestinians or the [UN] ceases to provide protection or assistance to the excluded class of Palestinians. In the former case...the excluded group will enjoy protection (and hence not need refugee status) or will have the ability like all others to seek recognition of the refugee status on terms of equality in the face of the relevant risk. In the alternative case of the ceasing of the [UN] efforts before a definite resolution is achieved, Palestine refugees...are entitled automatically and without status assessment to receive protection in line with the requirements of Arts. 2-34 of the Refugee Convention in any state party to which they travel. Where the issue is the

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'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, 2 October 2002' (*Refworld*, 2 October 2002) <<http://www.refworld.org/docid/3da192be4.html>> accessed 1 March 2018; UNHCR, 'Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees, 1 March 2009' (*Refworld*, 1 March 2009) <<http://www.refworld.org/pdfid/49c3a3d12.pdf>> accessed 1 March 2018; UNHCR, 'Note on the UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection, 1 May 2013' (*Refworld*, 1 May 2013) <<http://www.refworld.org/docid/518cb8c84.html>> accessed 1 March 2018; UNHCR, 'UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, December 2017, HCR/GIP/17/13' (*UNHCR*, December 2017) <<http://www.unhcr.org/en-au/protection/globalconsult/59ae98b24/call-comments-applicability-article-1d-1951-convention-relating-status.html>> accessed 1 March 2018

<sup>1107</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 68 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1108</sup> *Ibid* 62

relevance of UN or other efforts on behalf of persons other than the Palestinians eligible for protection or assistance in 1951, the exclusion under Art. 1(D) is not permissible. Such protection activities are instead relevant to the assessment of the refugee status only to the extent that they dependably contribute to enabling an applicant's home country to discharge its protection obligations, such that there is no real chance of being persecuted there.<sup>1109</sup>

Despite rejecting the continuation interpretation because of the qualifier 'at present'<sup>1110</sup> Foster et al accept that Article 1D 'exists to ensure that the needs of Palestinian refugees as of July 28, 1951, are addressed until...a true political solution is brokered that provides them with a secure homeland.'<sup>1111</sup> They do however claim that exclusion applies to 'only a clearly circumscribed class, the size of which diminishes each year and will cease to exist in the medium term'<sup>1112</sup> and that such cessation is legal and 'principled' because 'it will restore Palestinians to the position of all other groups who are entitled to protection as refugees so long as they meet the requirements of the refugee definition.'<sup>1113</sup>

In contrast, Goodwin-Gill et al interpret 'at present receiving' as applying to all who were and are receiving assistance and protection from UNRWA.<sup>1114</sup> Therefore, they observe that 'in absence of a settlement in accordance with relevant [UNGA] resolutions, no new determination of eligibility for Convention protection would be required.'<sup>1115</sup> This interpretation is also endorsed by UNRWA which holds that when assistance by the agency

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<sup>1109</sup> 'Palestinians entitled to the benefits of the UNCCP and/or UNRWA protection or assistance as of the Convention's adoption on July 28, 1951. Neither descendants of this group nor the Palestinians who became entitled to UN protection or assistance subsequent to that date are excluded; their protection needs should be assessed in the usual way, with no reference to Article 1(D). The exclusion of the historically circumscribed group persists until and unless either the [UNGA] adopts a resolution providing for the definitive settlement of the position of these Palestinians or the [UN] ceases to provide protection or assistance to the excluded class of Palestinians. In the former case...the excluded group will enjoy protection (and hence not need refugee status) or will have the ability like all others to seek recognition of the refugee status on terms of equality in the face of the relevant risk. In the alternative case of the ceasing of the [UN] efforts before a definite resolution is achieved, Palestinian refugees...are entitled automatically and without status assessment to receive protection in line with the requirements of Arts. 2-34 of the Refugee Convention in any state party to which they travel. Where the issue is the relevance of UN or other efforts on behalf of persons other than the Palestinians eligible for protection or assistance in 1951, exclusion under Art. 1(D) is not permissible. Such protection activities are instead relevant to the assessment of the refugee status only to the extent that they dependably contribute to enabling an applicant's home country to discharge its protection obligations, such that there is no real chance of being persecuted there.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 521

<sup>1110</sup> Ibid 514

<sup>1111</sup> Ibid 517

<sup>1112</sup> Ibid 515

<sup>1113</sup> Ibid 515

<sup>1114</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 157

<sup>1115</sup> Ibid 155

ceases Palestine refugees should automatically fall within the scope of the 1951 Convention.<sup>1116</sup> Both these interpretations are consistent with the ordinary meaning and intention of the drafters, as disclosed in the travaux préparatoires<sup>1117</sup> and Article 1D paragraph 2 which confirms that Palestine refugees 'shall ipso facto be entitled to the benefits of this Convention' if they no longer receive assistance or protection from UNRWA.<sup>1118</sup> While Ipso facto entitlement suggests that no new examination is required for Palestine refugees 'the most common interpretation is that de facto refugees should be eligible for consideration under the general definition... [if they] ...meet the nexus requirements of a 'well-founded fear.'<sup>1119</sup> Qafisheh and Azarov reject this interpretation arguing instead that:

The plain meaning of the terms 'ipso facto' holds that no other criteria need to be used for assessing the situation—they are by the fact of that precondition alone de jure refugees under the 1951 Convention, and should thereby be entitled to refugee status in any State party to the...convention.<sup>1120</sup>

UNHCR also holds that 'no separate determination of well-founded fear...is required'<sup>1121</sup> and that:

It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the [1951] Convention under one of the exclusion clauses.<sup>1122</sup>

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<sup>1116</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*UNRWA*, January 2007) <<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 16

<sup>1117</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 158

<sup>1118</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, Article 1D

<sup>1119</sup> Mutaz Qafisheh and Valentina Azarov quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014), Footnote 360 in 519

<sup>1120</sup> Mutaz Qafisheh and Valentina Azarov quoted in *Ibid*, Footnote 360 in 519

<sup>1121</sup> UNHCR, 'Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection, May 2013' (*UNHCR*, May 2013) <<https://www.refworld.org/docid/518cb8c84.html>> accessed 27 February 2021, 5

<sup>1122</sup> 'With regard to refugees from Palestine, it will be noted that UNRWA operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention. It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses.' UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited' (*UNHCR*, January 1992)



It has also been argued that because Article 1D is framed in collective terms 'it would be unreasonable to read that language away in order to ascribe an individual [definition].'<sup>1123</sup> In conclusion, these readings revealed how the lack of clarity about the position of Palestine refugees vis-à-vis Article 1D has raised several interpretative challenges. These interpretative challenges led scholars to reach different interpretations about the applicability of Article 1D to Palestine refugees. These differing interpretations forward the thesis argument by revealing that if Palestine refugees no longer fall under UNRWA's mandate they will fall within the scope of the 1951 Convention. This means that the principles that define the legal framework governing refugees can impact the realities and prospects of Palestine refugees. With this as a background, the next section will reveal how the 1951 Convention and the durable solutions advocated by UNHCR can define Palestine refugees legally out of existence and obviate their RTR to Israel.<sup>1124</sup>

### **6.5. Durable Solutions and the Cessation of Refugee Status**

Our examination above revealed that in theory it is assumed that Article 1D prevents defining Palestinian refugees out of existence and protects their ROR. This assumption does not account for the fact that if Palestine refugees come within the scope of the 1951 Convention, they may not remain refugees, because the convention advocates naturalization to end the plight of refugees. UNHCR will pave the way for this naturalization by advocating the integration of Palestine refugees in Arab host States or resettling them in a third country. Both solutions will define Palestine refugees out of existence because Article 1C of the 1951 Convention states that the Convention will 'cease to apply' to a refugee in the following circumstances:

1. He has voluntarily re-availed himself of the protection of the country of his nationality.
2. Having lost his nationality, he has voluntarily re-acquired it.
3. He has acquired a new nationality, and enjoys the protection of the country of his new nationality.

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<<https://www.unhcr.org/4d944dfc9.pdf>> accessed 15 March 2021, Paragraph 143

<sup>1123</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 516

<sup>1124</sup> The term right to return refers to the right to return as outlined in Article 13(2) of the Universal Declaration of Human Rights [UDHR] which states, 'everyone has the right to leave any country, including his own, and to return to his country.'

United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

4. He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of prosecution.
5. He can no longer because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.<sup>1125</sup>

Foster et al rightly observe that Article 1C 'reflects a belief that it is unnecessary to offer the surrogate protection of refugee status to an individual who already has access to surrogate protection that approximates that which refugee status would provide.'<sup>1126</sup> Article 1C(1), (2),<sup>1127</sup> (4) and (5) cannot apply to Palestinian refugees because they were not nationals of Israel<sup>1128</sup> but Article 1C(3) can apply to Palestinian refugees.<sup>1129</sup> Moreover, the drafting history of the 1951 Convention confirms that if Palestinian refugees are naturalized, they will cease to be refugees for the purpose of international law.<sup>1130</sup> Local integration without naturalization can also lead to cessation of refugee status because Article 1E states '[t]his Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.'<sup>1131</sup> Palestinian refugees could

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<sup>1126</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, Article 1C According to the UNHCR '[a] complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basis legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services.' UNHCR, 'Note on the Cessation Clauses EC/47/SC/CRP.30' (UNHCR, 30 May 1997) <<https://www.unhcr.org/uk/excom/standcom/3ae68cf610/note-cessation-clauses.html>> accessed 15 March 2021, Paragraph 20

<sup>1126</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 463

<sup>1127</sup> According to Fosters et al Article 1 (C) (2) 'interpreted in context addresses only the acquisition of the nationality of the country in relation to which refugee status was established.' Ibid 471

<sup>1128</sup> Fosters et al would disagree with our interpretation because he argues that in the case of stateless persons 'restoration of protection comes about when such persons are able to return.' Ibid 476

<sup>1129</sup> Cessation usually acquires when the refugee acquires the citizenship of the host state and enjoys its protection. Cessation should come to an end if the newly acquired citizenship affords the former refugee protection. Ibid 495-96

<sup>1130</sup> The drafting history also reveals that delegates at the Conference of Plenipotentiaries confirmed that a new nationality should not be imposed on refugees including persons who have been refugees for a long time because they might want to return to their country.

UN Ad Hoc Committee on Refugees and Stateless Persons, 'Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General, E/AC.32/2' (*Refworld*, 3 January 1950) <<https://www.refworld.org/docid/3ae68c280.html>> accessed 15 March 2021, Chapter XIV Naturalization observation on Article 28 paragraph 2

\*Joly Daniele observed that '[d]espite the advantages to be gained, many, if not most, refugees are reluctant to become citizens of the host country or do so only after a long time has elapsed in exile. Several factors shape this attitude, of which the most important is loyalty to the homeland which they were forced to leave.' Joly Daniele, 'Refugees: Asylum in Europe?' (Avalon Publishing 1992) 64

<sup>1131</sup> According to James Hathaway '[t]hey possess the rights and obligations which are attached to the possession of nationality, although they need not officially be naturalized. It suffices if they are only de

also cease to be refugees and remain stateless if Israel and the Palestinian leadership conclude a peace settlement that requires all Palestinian refugees to return to a future Palestinian State and/or settle in host States that support such a settlement but they refuse to comply.

According to Goodwin-Gill the '[RTR] is not contingent on refugee status; [because] the [1951] Convention itself refers to relevant resolutions.'<sup>1132</sup> A similar view is held by Albanese et al who argue that 'relevant UNGA resolutions, such as resolution 194... are...key in determining who is a Palestinian refugee deserving international protection, as well as the rights that flow from this status.'<sup>1133</sup> Therefore, according to Albanese et al 'a refugee who becomes a citizen of a state, and thus no longer in need of international protection, remains a refugee within the meaning of...resolution 194'<sup>1134</sup> because they:

[M]aintain entitlements connected to their distinctive status to the extent their position and their historic claims are yet to be definitely settled within the meaning of relevant UN resolutions (e.g. UNGA res.194 of 1948, UNGA res.302 of 1949, UNGA res. 2252 of 1967, and UNSC res. 237 of 1967). Furthermore, UNRWA provision of services is not conditioned upon the acquisition of nationality.<sup>1135</sup>

Based on the above argument Albanese et al claim that Palestinian refugees should be assured that 'any alternative durable solutions to return to modern-day Israel, including naturalization in the host country or resettlement in third countries do not jeopardize their historic rights'<sup>1136</sup> which include the 'ROR, restitution, and compensation.'<sup>1137</sup>

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facto citizens of the country with clear guarantees of rights and obligations that bespeak true assimilation to the nationals of that state.' James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 212-13

According to Foster et al 'exclusion under Art. 1 (E) is lawful only in the case of persons who have, in fact, already resided elsewhere and who, whatever their formal status in that country of prior residence, enjoys in practice a subsisting right to enter and remain in that other country permanently and with clear guarantees of rights and obligations that bespeak true assimilation to the nationals of that state.' Ibid 509

<sup>1132</sup> Lex Takkenberg, '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 69

<<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1133</sup> Albanese Francesca, P. and Takkenberg, L, *Palestinian Refugees in International Law* (Kindle edn, 2020) 85

<sup>1134</sup> Ibid 482

<sup>1135</sup> Ibid 102

<sup>1136</sup> Ibid 487

<sup>1137</sup> Ibid 485

We fundamentally disagree with Albanese et al that if Palestinian refugees become citizens of new States they will remain refugees within the meaning of Resolution 194 because Resolution 194, which is used as the textual basis for the ROR claims, is a non-binding resolution predicated on the assumption that refugees retain their status as Palestinian refugees.<sup>1138</sup> Therefore, if Palestinian refugees are integrated into a host State, resettled in a third country or become nationals of a new State including a future Palestinian State they will cease to be refugees and therefore they will no longer be able to claim a RTR to Israel under Resolution 194 which is only applicable to Palestinian refugees who have not accepted compensation or resettlement in exchange of return. Goodwin-Gill who calls on researchers to have a critical view of non-binding resolutions<sup>1139</sup> confirmed this interpretation in 2016 when in reply to a hypothetical question during a conference he confirmed that if a Palestinian refugee takes up another nationality while continuing to get assistance from UNRWA such a person ceases to be a refugee under Article 1C(3) of the 1951 Convention.<sup>1140</sup> If, however, the new nationality is ineffective Palestinian refugees could be eligible for refugee status. Goodwin-Gill cites ‘a case in Scotland where the (Jordanian) nationality of the Palestinian was not effective and the refugee was therefore given protection under Article 1D.’<sup>1141</sup> This protection, however, was not given because he is a Palestinian refugee but rather a Jordanian citizen with an ineffective nationality.

## 6.6. Dual Citizenship and its Impact on the Right to Return

Refugees who end up becoming nationals of a new State can end up losing their existing nationality and their RTR because some States reject dual nationality.<sup>1142</sup> Furthermore, even

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<sup>1138</sup> United Nations, ‘UN Resolution 194 (III)’ (*United Nations*, 11 December 1948) <<https://documents-ddsny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.df?OpenEhement>> accessed 16 January 2016, Paragraph 11

<sup>1139</sup> Guy Goodwin-Gill, ‘The Dynamic of International Refugee Law’ (2013) 25 (4) *International Journal of Refugee Law*, 658 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 1 November 2018

<sup>1140</sup> United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, 1C(3)

<sup>1141</sup> Lex Takkenberg, ‘1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016’ (2018) 51 *Israel Law Review* 47, 69 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1142</sup> For example, in the context of Europe, Article 1(1) (Chapter 1) of the 1963 ‘Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality’ stated that: ‘Nationals of the Contracting Parties who are of full age and who acquire of their own free will, by means of naturalisation, option or recovery, the nationality of another Party shall lose their former nationality. They shall not be authorised to retain their former nationality.’

if we presume that refugees who are naturalized can reclaim their original nationality this does not mean they have a RTR to areas they originally fled. Therefore, one can assume that if Palestinian refugees become nationals of a new State or a future Palestinian State, they will not have a RTR to areas they fled that became part of Israel because they are not nationals of Israel. This analysis is supported by the fact that the President of the Palestinian National Authority [PA] confirmed that he has a 'right to see [his native city of Safed which he fled in 1948], but not to live there.'<sup>1143</sup> The spokesman for Israel's Foreign Ministry also confirmed that the President of the PA does not 'have a right to live in Israel [because he is not an Israeli citizen].'<sup>1144</sup> These statements further the thesis argument by revealing that when a refugee does not possess the nationality of the country that he/she wants to return to his/her individual RTR can be overridden by State sovereignty.<sup>1145</sup>

## 6.7. The Impact of the Stateless Conventions on Palestinian Refugees

Palestinian refugees who are excluded from the 1951 Convention are also excluded from the 1954 Convention Relating to the Status of Stateless Persons [1954 Convention] in Article 1(2)(i) which states:

[P]ersons who are at present receiving from organs or agencies of the [UN] other than the [UNHCR] protection or assistance so long as they are receiving such protection or assistance.<sup>1146</sup>

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Article 1(2) (Chapter 1) also confirmed that 'Nationals of the Contracting Parties who are minors and acquire by the same means the nationality of another Party shall also lose their former nationality if, where their national law provides for the loss of nationality in such cases... They shall not be authorised to retain their former nationality.' Council of Europe, 'Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality' (*Refworld*, 6 May 1963) <<http://www.refworld.org/docid/3ae6b37814.html>> accessed 29 May 2017, Article 1(2)

<sup>1143</sup> Mahmoud Abbas quoted in Elhanan Miller, 'Why Mahmoud Abbas As Israel's Best Partner for Peace' (*The New York Times*, 1 March 2017) <[https://www.nytimes.com/2017/03/01/opinion/wiy-mahmowd%abbas-is-israels-best-partnep-for-peace.html?\\_r=0](https://www.nytimes.com/2017/03/01/opinion/wiy-mahmowd%abbas-is-israels-best-partnep-for-peace.html?_r=0)> accessed 5 June 2017

<sup>1144</sup> Dan Williams, 'Abbas Hints Has No "Right of Return" to Home in Israel' (*Reuters*, 1 November 2012) <<http://www.reuters.com/article/us-palestinians-israel-abbas-refugees-ydUSBRE8A01IL20121141>> accessed 17 May 2017

<sup>1145</sup> This links back to chapter 4 which revealed that Palestinian and Israeli Scholars have advocated resettlement as the only realistic solution to ending the plight of Palestinian refugees who have been denied the right to return to their homes and lands in territories that became part of Israel in 1948. This also demonstrates that Arendt's conception of rights in chapter 2 which identifies the possession of nationality as a pre-condition for accessing human rights including the right to return offers the best explanation for why Palestinian refugees have not and will not be able to return to Israel.

<sup>1146</sup> United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 28 September 1954)

Despite this exclusion, the 1954 Convention can impact Palestinian refugees because Article 1(2)(i) suggests that Palestinian refugees who did not register or receive assistance from UNRWA and those who no longer receive assistance from UNRWA can fall within the scope of the 1954 Convention. Therefore, it is important to understand how the solutions proposed by the 1954 Convention can impact Palestinian refugees. Article 32 of the 1954 Convention endorsed the principle of naturalization as an ideal solution to combat Statelessness by stating that 'Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees [and] make every effort to expedite naturalization proceedings.'<sup>1147</sup> The 1954 Convention also asserts that 'protection...is not a substitute for possession of a nationality; [therefore] the Convention requires that States facilitate the assimilation and naturalization of stateless persons.'<sup>1148</sup> This means that if UNRWA is dismantled States hosting the agency could find themselves having to facilitate the naturalization of Palestinian refugees to end their statelessness. Such facilitation will not necessarily lead all host States to naturalize all Palestinian refugees because Article 9 of the 1954 Convention states:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.<sup>1149</sup>

The 1961 Convention on the Reduction of Statelessness [1961 Convention] which 'aims to prevent and reduce Statelessness by establishing an international framework that ensures the right of every person to a nationality'<sup>1150</sup> can also lead to the naturalization of Palestinian

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<<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017, Article 1(2)(i)

<sup>1147</sup> Ibid

<sup>1148</sup> The introductory note by the UNHCR Ibid 3

<sup>1149</sup> Ibid Article 9

<sup>1150</sup> According to the introductory note by the UNHCR '[a] central focus of the Convention is the prevention of statelessness at birth by requiring States to grant citizenship to children born on their territory, or born to their nationals abroad, who would otherwise be stateless. To prevent statelessness in such cases, States may either grant nationality to children automatically at birth or subsequently upon application. The Convention further seeks to prevent statelessness later in life by prohibiting the withdrawal of citizenship from States' nationals – either through loss, renunciation, or deprivation of nationality – when doing so would result in statelessness. Finally, the Convention instructs States to avoid statelessness in the context of transfer of territory. For all of these scenarios, the 1961 Convention safeguards are triggered only where statelessness would otherwise arise and for individuals who have some link with a country. These standards serve to avoid nationality

refugees if UNHCR persuades UNRWA host States to accede to the 1961 Convention and to forge a regional pattern of nationality provisions that will facilitate the assimilation and naturalization of Palestinian refugees. Moreover, the 1961 Convention could impact host States even if they do not become signatory States because according to UNHCR '[e]ven in States which are not parties, the 1961 Convention serves as a yardstick to identify gaps in nationality legislation and is used by UNHCR as a basis for the technical advice it provides to Governments.'<sup>1151</sup>

## 6.8. International Protection and Durable Solutions: Between Return, Integration and Resettlement

Our examination has so far revealed that international refugee law offers temporary protection to refugees,<sup>1152</sup> pending a permanent settlement. UNHCR which has a 'duty of supervising the application of the provisions of the...[1951] Convention'<sup>1153</sup> under its statutory mandate is primarily responsible for promoting three durable solutions to end refugeehood and they are '[v]oluntary repatriation to and reintegration in their homeland in safety and dignity...[i]ntegration in their countries of asylum...[and] [r]esettlement in third countries.'<sup>1154</sup> In the hierarchy of durable solutions, voluntary repatriation remains the preferred solution. This has been reaffirmed by the World Conference on Human Rights of 1993,<sup>1155</sup> UNSC Resolutions 1078 of 1996<sup>1156</sup> and 1080 of 1996<sup>1157</sup> and UNGA Resolution 55/2 [2000]: UN Millennium Declaration.<sup>1158</sup> Despite this Hathaway has identified:

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problems which might arise between States.' United Nations, 'The Convention on the Reduction of Statelessness' (*UNHCR*, 30 August 1961)

<[http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness\\_ENG.pdf](http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf)> accessed 15 May 2017, The introductory note by the UNHCR 3-4

<sup>1151</sup> The introductory note by the UNHCR in the United Nations, Convention on the Reduction of Statelessness' (*UNHCR*, 30 August 1961) <[https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness\\_ENG.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf)> accessed 21 October 2020, 4

<sup>1152</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 966 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017 Gilbert also rightly observes that '[t]emporary protection does not accord the rights attaching to refugee status and can be revoked when the state of refugee so decides.' Although he makes this comment in relation to Article 6 (1) and (2) of 'The Temporary Protection Directive,' adopted by the European Union Council in 2001,' it is also insightful in terms of how the concept of temporary protection can impact Palestinian refugees because it reveals that temporary protection can come to an end when states providing protection establishes that such a status should cease. Quoted in *Ibid* 982

<sup>1153</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 3

<sup>1154</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*UNRWA*, January 2007) <<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 9

<sup>1155</sup> World Conference on Human Rights [1993] resolved in section 23 '[I]n view of the complexities of the global refugee crises...a comprehensive approach by the international community is

[A] bias toward local or regional solutions...[w]hereas the UNHCR routinely assist refugees (European and analogous groups) in securing asylum including third state resettlement, non-mandate (Third World) persons of concern to UNHCR are typically assisted in ways that localize or confine their displacement.<sup>1159</sup>

In contrast, Goodwin-Gill has observed that '[m]ass influxes are often resolved by mass repatriation' while others are locally settled pending their return.<sup>1160</sup> According to Goodwin-Gill durable solutions that allow refugees to become self-sufficient pending their return should be viewed in a positive light<sup>1161</sup> because they do not impact the ROR. A similar argument is advocated by Akram et al who suggests temporary protection as an ideal solution to ending the plight of Palestinian refugees without compromising their ROR.<sup>1162</sup> According to Akram et al:

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needed...This should include...the achievement of durable solutions, primarily through the preferred solution of dignified and safe voluntary repatriation...[including displaced persons].' World Conference on Human Rights, 'Vienna Declaration and the Programme of Action' (UNHCR, 25 June 1993)

<<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> accessed 21 October 2020

<sup>1156</sup> UNSC Resolution 1078 in section 3 '[r]eaffirmed its commitment to the establishment of conditions conducive to the voluntary repatriation of refugees to their country of origin as a crucial element for the stability of the region.' United Nations, 'Security Council resolution 1078 (1996) [On the situation in the Great Lakes region], 9 November 1996, S/RES/1078 (1996)' (*Refworld*, 9 November 1996) <<https://www.refworld.org/docid/3b00efa2c.html>> accessed 21 October 2020

<sup>1157</sup> UNSC Resolution 1080 in paragraph 3 welcomed 'the offers made by Member States, in consultation with the States concerned in the region, concerning the establishment for humanitarian purposes of a temporary multinational force to facilitate the immediate return of humanitarian organizations and the effective delivery by civilian relief organizations of humanitarian aid to alleviate the immediate suffering of displaced persons, refugees and civilians at risk in eastern Zaire, and to facilitate the voluntary, orderly repatriation of refugees by the United Nations High Commissioner for Refugees as well as the voluntary return of displaced persons, and invites other interested States to offer to participate in these efforts.' United Nations, 'SS/RES/1080 (1996), 15 November 1996' (*United Nations Security Council*, 15 November 1996)

<[https://undocs.org/en/S/RES/1080\(1996\)](https://undocs.org/en/S/RES/1080(1996))> accessed 21 October 2020, Paragraph 3

<sup>1158</sup> UNGA Resolution 55/2 resolved in Part VI (26) '[t]o help refugees and displaced persons to return voluntarily to their homes, in safety and dignity and to be smoothly reintegrated in their society.'

United Nations, 'United Nations Millennium Declaration, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2' (*Refworld*, 18 September 2000)

<<https://www.refworld.org/docid/3b00f4ea3.html>> accessed 14 April 2019

<sup>1159</sup> James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 159

<[http://www.mcrj.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrj.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1160</sup> Guy Goodwin-Gill, 'Non- Refoulement and the New Asylum Seekers' (1986) 26 (4) *Virginia Journal of International Law*, 906

<sup>1161</sup> *Ibid* 907

<sup>1162</sup> Susan Akram & Terry Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees' (2004) 22 *Boston University International Law Journal* 1, 3

<[https://scholarship.law.bu.edu/faculty\\_scholarship/552](https://scholarship.law.bu.edu/faculty_scholarship/552)> accessed 4 November 2021 4-5



Temporary protection would offer...Palestinians...the protection rights they currently lack, along with many of the concomitant rights of an individual granted asylum (such as the right to work, education, healthcare, welfare, family reunification and travel documents), but without the permanent status accompanying integration or resettlement that might compromise their rights to return to their places of origin.<sup>1163</sup>

Akram et al also claim that temporary protection would be an ideal solution if 'a Palestinian State emerges without a just and durable solution to the refugee problem'<sup>1164</sup> because a future Palestinian State could offer Palestinian refugees temporary protection until they can return to Israel.<sup>1165</sup> Although Akram et al claim that temporary protection will not compromise the ROR for Palestinian refugees because they will not be offered a permanent status they then go on to argue that this solution will lead to their permanent settlement in host States because according to Palestinian refugees who are offered temporary protection '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.'<sup>1166</sup> Moreover, Akram et al also implicitly accept that under the temporary protection formula the ROR may be compromised when they observe that resolving the Palestinian refugee problem 'should be tied to safe return in the context of a comprehensive and durable peace settlement of the Israeli-Palestinian conflict'<sup>1167</sup> because as revealed by this thesis in chapter 4 a comprehensive and durable peace settlement of the Israeli-Palestinian conflict will not involve the return of all Palestinian refugees to Israel. While this chapter revealed that the international framework governing refugees advocates local integration and resettlement as ideal solutions when States refuse to repatriate refugees. This leads us to conclude that advocating temporary protection as an ideal solution that will simultaneously improve the lives of Palestinian refugees and allow them to ultimately return to Israel will perpetuate the Palestinian refugee problem rather than solve it. Adopting temporary protection as a solution could also lead to a less favourable outcome for Palestinian refugees as demonstrated by Tize's ethnographic research in Germany, which revealed how permanent temporariness of long-term toleration status, 'subjected [Palestinian] families to years, even decades, of insecurity and uncertainty through constant threats of deportation and restrictions on work, travel and higher education.'<sup>1168</sup>

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<sup>1163</sup> Ibid 4

<sup>1164</sup> Ibid 4

<sup>1165</sup> Ibid 4

<sup>1166</sup> Ibid 158

<sup>1167</sup> Ibid 158

<sup>1168</sup> 'Based on 19 months of ethnographic research, the article shows the story of one family during their 16 years on toleration status and their experiences after gaining permanent residency. The family's experiences illuminate the insecurity and uncertainty large communities on toleration status in

In contrast to Akram et al who like the thesis author believes that offering Palestinian refugees a 'permanent status accompanying integration or resettlement' can comprise their RTR to Israel<sup>1169</sup> UNHCR maintains that local integration or resettlement 'do not prevent refugees from returning to their former country of origin if they so wish and conditions allow.'<sup>1170</sup> Despite this, UNHCR's Resettlement Handbook confirms that:

Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status...Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.<sup>1171</sup>

When refugees are resettled and naturalized in a new country their refugee status is repealed. According to Lewis, UNHCR justifies repealing the status of refugees on the basis that:

A refugee must be admitted to a State in order to obtain alternative protection to that which would normally have been provided by the country of origin and have his/her rights respected by the country of refuge. Eventually, a refugee should be able to dispense with the protection provided by either returning to the country of origin or by becoming a national of a new country, and thus, obtaining the panoply of rights provided to nationals.<sup>1172</sup>

Although UNHCR maintains that voluntary repatriation is the preferred solution since the mid-1990s the UNHCR Executive Committee<sup>1173</sup> has called upon States to accede to

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Berlin-Neukölln experienced, all sharing the fate of constantly wavering between hope, fear and disillusionment. Their struggles also show how the permanent temporariness of long-term toleration status affects both the parents who fled the conflict and their children, most of whom were born and raised in Germany. I argue that toleration status limits the capabilities of children stuck in the stagnant realities of their family's insecure status, along the lines of gender and birth order. Moreover, toleration status as a multigenerational ordeal persists long after the legal insecurity has ended.'

Carola Tize, 'Living in Permanent Temporariness: The Multigenerational Ordeal of Living under Germany's Toleration Status' (2020) 34 (3) *Journal of Refugee Studies*

<<https://doi.org/10.1093/jrs/fez119>> accessed 20 October 2021

<sup>1169</sup> Ibid 4

<sup>1170</sup> UNRWA, 'The United Nations and Palestinian Refugees' (*UNRWA*, January 2007)

<<https://www.unrwa.org/userfiles/2010011791015.pdf>> accessed 1 June 2017, 9

<sup>1171</sup> UNHCR, 'UNHCR Resettlement Handbook' (*UNHCR*, July 2011)

<<https://www.unhcr.org/46f7c0ee2.html>> accessed 22 May 2017, 3

<sup>1172</sup> Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) 20

<sup>1173</sup> The UNHCR has a mandate to end statelessness and the legal status of refugees has systemically encouraged host States to naturalise such persons.

UNGA Resolution 1166 (XII) of 1957 established the UNHCR Executive Committee. The committee advises 'the High Commissioner on the exercise on his statutory function and on the particular assistance activities which should be undertaken by his office.' James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 161

the statelessness conventions<sup>1174</sup> and to reform their nationality laws so they can end and prevent the plight of stateless persons through naturalization.<sup>1175</sup> In 2006 UNHCR's Executive Committee also adopted a 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons.'<sup>1176</sup> The conclusion encouraged States to establish nationality laws that will reduce and prevent statelessness through naturalization.<sup>1177</sup> In 2010 UNHCR's Global Statelessness Strategy also referred to naturalization.<sup>1178</sup> While the 2011 UN Secretary General's Guidance Note on the UN and Statelessness stated that 'all UN entities system-wide must increase their efforts to address statelessness.'<sup>1179</sup> UNHCR's advocacy has also led to the emergence of regional instruments in Africa,<sup>1180</sup> the Americas, Asia and the Middle East that are complementary to the 1951 Convention which calls upon signatory States to naturalize refugees.<sup>1181</sup>

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<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1174</sup> The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

<sup>1175</sup> See UNHCR, 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons No. 78 (XLVI) - 1995, 20 October 1995, No. 78 (XLVI) – 1995' (*Refworld*, 20 October 1995) <<https://www.refworld.org/docid/3ae68c443f.html>> accessed 7 December 2018

<sup>1176</sup> UNHCR, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII)' (*UNHCR*, 6 October 2006) <<https://www.unhcr.org/uk/excom/exconc/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html>> accessed 7 December 2018

<sup>1177</sup> Paragraph '(i) Encourages States to consider examining their nationality laws and other relevant legislation with a view to adopting and implementing safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality; and requests UNHCR to continue to provide technical advice in this regard.' Ibid Paragraph (i)

<sup>1178</sup> UNHCR, 'Statelessness, 13 July 2010' (*Refworld*, 13 July 2010) <<https://www.refworld.org/docid/4c3c5b3f2.html>> accessed 7 December 2018

<sup>1179</sup> United Nations, 'Guidance Note of the Secretary-General: The United Nations and Statelessness' (*United Nations*, June 2011) <<https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf>> accessed 7 December 2018, 3

<sup>1180</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 368

For example, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa broadened the refugee definition set out in the 1951 Convention Relating to the Status of Refugees and declared that it complements the 1951 Convention. See Organization of African Unity, 'Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45' (*Refworld*, 10 September 1969) <<http://www.refworld.org/docid/3ae6b36018.html>> accessed 22 October 2018

<sup>1181</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 293

## 6.9. The UNHCR and the Development of International Refugee Law

The Statute of the UNHCR does not have a preamble that clarifies the purpose and objective of the agency. In the travaux préparatoires, 'there was no significant debate' about UNHCR's responsibility to develop international refugee law.<sup>1182</sup> Despite this Goodwin-Gill et al observe that the actions of the agency count in the process of formulating international law<sup>1183</sup> and the 'development of international refugee law.'<sup>1184</sup> According to Corrie 'the legal foundation for the UNHCR's role related to the development of international treaty law on refugees are found in paragraph 8(a) of the Statute'<sup>1185</sup> which calls upon UNHCR to 'promot[e] the conclusion and ratification of international conventions for the protection of refugees, supervising their application and promising amendments thereto.'<sup>1186</sup> Paragraph 8 also requires UNHCR to promote 'through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection.'<sup>1187</sup> Paragraph 8(b) also requires UNHCR '[t]o negotiate and conclude agreements with individual governments.'<sup>1188</sup> While Paragraph 9 calls upon the agency to 'engage in such additional activities, including repatriation and resettlement, as the [UNGA] may determine.'<sup>1189</sup> In 1989 UNHCR also declared that it:

[H]as a doctrinal responsibility to work for the progressive development of international refugee law...[t]he immediate goal is to...search for durable solutions to their problems which give prime importance to humanitarian considerations and respect for basic rights. For the longer term, the objective is to develop and promote a far-reaching regime of refugee protection based on a solid legal foundation and internationally recognized principles.<sup>1190</sup>

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<sup>1182</sup> Corinne Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its foundation and Evolution' (2005) 17 (1) *International Journal of Refugee Law*, 73 <<https://doi.org/10.1093/ijrl/eei004>> accessed 30 March 2021

<sup>1183</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 430

<sup>1184</sup> *Ibid* vi

<sup>1185</sup> *Ibid* 72

<sup>1186</sup> United Nations, 'Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428 (V)' (*Refworld*, 14 Dec 1950)

<<https://www.refworld.org/docid/3ae6b3628.html>> accessed 22 January 2020

<sup>1187</sup> *Ibid*

<sup>1188</sup> *Ibid*

<sup>1189</sup> *Ibid*

<sup>1190</sup> In 1989 the UNHCR also declared that it 'has a doctrinal responsibility to work for the progressive development of international refugee law...[by] promoting, interpreting, safeguarding and developing the fundamental principles of refugee protection. The immediate goal is to strengthen international commitment to receive refugees, as well as to combat discrimination and negative practices jeopardising refugees and to search for durable solutions to their problems which give prime importance to humanitarian considerations and respect for basic rights. For the longer term, the objective is to develop and promote a far-reaching regime of refugee protection based on a solid legal foundation and internationally recognized principles.'

## 6.10. The UNHCR and Political Calculations

UNHCR publishes its position in its Handbook on Procedures and Criteria for Determining Refugee Status,<sup>1191</sup> while its guidelines and conclusions on international protection are issued by the agency's Executive Committee.<sup>1192</sup> UNHCR's interpretations are not legally binding. Despite this Barnett and Finnemore have rightly observed that the:

[O]fficial standing... [of the UNHCR has] endowed...[it] with 'expert' status and consequent authority in refugee matters. This expertise, coupled with its role in implementing international refugee conventions and law... has allowed the UNHCR to make life and death decisions about refugees without consulting the refugees, themselves, and to compromise the authority of States in various ways setting up refugee camps.<sup>1193</sup>

This thesis disagrees with the suggestion that UNHCR compromises the authority of States because the agency works within limits set by sovereign States. This reality was acknowledged when UNHCR observed that the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees [1967 Protocol] 'were framed to define minimum standards, without imposing obligations going beyond those that States can be reasonably be expected to assume.'<sup>1194</sup> The Former High Commissioner for UNHCR also observed that '[h]aving won the confidence of Western States by her active involvement in Bosnia, [Sadako] Ogata<sup>1195</sup> did not want to risk losing it again by upsetting governments.'<sup>1196</sup> Gilbert

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United Nations, 'Note on International Protection (submitted by the High Commissioner) Note on International Protection (submitted by the High Commissioner) A/AC.96/728' (*UNHCR*, 2 August 1989)

<<https://www.unhcr.org/uk/excom/excomrep/3ae68bfe20/note-international-protection-submitted-high-commissioner.html>> accessed 22 January 2020, Paragraph 3

<sup>1191</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4' (*Refworld*, April 2019)

<<https://www.refworld.org/docid/5cb474b27.html>> accessed 21 October 2020

<sup>1192</sup> UNHCR, 'UN High Commissioner for Refugees Executive Committee' (*UNHCR*, n.d.)

<<https://www.unhcr.org/uk/executive-committee.html>> accessed 21 October 2020

<sup>1193</sup> Bhupinder S Chimni, 'Reforming the International Refugee Regime: A Dialogue Model' (2001) 14 *Journal of Refugee Studies*, 158 <<https://doi.org/10.1093/jrs/14.2.151>> accessed 22 January 2020; See Michael Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 (4) *International Organizations*, 710

<<https://doi.org/10.1162/002081899551048>> accessed 21 October 2020

<sup>1194</sup> UNHCR, 'Note on International Protection, A/AC.96/951, EXCOM Reports, 13 September 2001' (*UNHCR*, 13 September 2001) <<https://www.unhcr.org/excom/excomrep/3bb1c6cc4/note-international-protection.html?query=Panama>> accessed 21 October 2020, 29

<sup>1195</sup> Former High Commissioner of the UNHCR.

<sup>1196</sup> Former High Commissioner quoted in Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 965

also observed that '[t]he Convention Plus Programme' supported by Rudd Lubbers, the then UNHCR High Commissioner in 2004 also had 'the potential of water[ing] down the legal commitments relating to international protection of states that enter into 'special agreements.'<sup>1197</sup> This explains why UNHCR has been accused of favouring 'practical solutions...over legal principle[s].'<sup>1198</sup> UNHCR has also been criticised for allowing the 'politics of good relations' to prevail 'over legal niceties.'<sup>1199</sup> Despite this UNHCR claims that it does not consider the refugee problem a political problem but rather a humanitarian problem. This was clearly stated by the High Commissioner for UNHCR in 1953 when he criticised the refugee definition for disregarding 'realities for the sake of theories' and for focusing on political consideration when the problem was essentially humanitarian.<sup>1200</sup> UNHCR works in a politically charged field therefore it needs to engage in political calculations. Moreover, UNHCR cannot be independent of States<sup>1201</sup> for several reasons: States are part of its executive committee, each State determines the procedure by which to determine refugee status and the absence of a regular budget means UNHCR depends on voluntary contributions by States to survive.<sup>1202</sup> Moreover, international law cannot force a State to admit an undesirable person<sup>1203</sup> or accord durable solutions because 'neither general international law or treaty obliges any state to accord durable solutions.'<sup>1204</sup> Thus, UNHCR cannot control resettlement schemes or local integration without State consent. This was confirmed by the agency's Executive Committee Conclusion on Local Integration [2005] which stated that local integration 'is a sovereign decision...to be exercised by States guided by their treaty obligations and human rights principles and that provisions of this Conclusion

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<<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017; See Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001), 318; 'The UNHCR Note on International Protection You Won't See' (1997) 9 (2) *International Journal of Refugee Law*, 267 <<https://doi.org/10.1093/ijrl/9.2.267>> accessed 21 October 2020

<sup>1197</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 965 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

<sup>1198</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 337

<sup>1199</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 22 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1200</sup> The High Commissioner for UNHCR in 1953 quoted in *Ibid* 18

<sup>1201</sup> Bhupinder S Chimni, 'Reforming the International Refugee Regime: A Dialogue Model' (2001) 14 (2) *Journal of Refugee Studies*, 157 <<https://doi.org/10.1093/jrs/14.2.151>> accessed 22 January 2020

<sup>1202</sup> UNCHR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3' (*UNHCR*, December 2011)

<<https://www.unhcr.org/4d93528a9.pdf>> accessed 21 October 2020, Paragraph 189

<sup>1203</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 202

<sup>1204</sup> Guy Goodwin-Gill, 'The International Law of Refugee Protection,' in Fiddian-Qasmiyeh and others (ed), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021>> accessed 21 October 2020

are for the guidance of States and UNHCR when local integration is to be considered.<sup>1205</sup> In 2005 the Executive Committee of the High Commissioner's Programme also confirmed that 'local integration was a sovereign decision.'<sup>1206</sup> This means if States are unwilling to support UNHCR's mandate or 'wish to exploit population movements for political purposes, as they have done repeatedly...there is little that UNHCR can...do.'<sup>1207</sup> The Executive Committee of the UNHCR Programme [1988] also confirmed that the 'refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of States to respond in concert and wholeheartedly, in a spirit of true humanitarianism and international solidarity.'<sup>1208</sup> Therefore, if UNHCR does not build good relations with States, refugees can end up in legal limbo if they are unable to return or regularize their status in the host State. This explains why refugee status has always been seen as temporary status and their treatment has been heavily influenced by State interest and why the international framework governing refugees avoids controversies by not proposing plans to eradicate 'particular [State] practices'<sup>1209</sup> that force displaced people to live in perpetual exile. This ties in with the principles of State sovereignty and State interest which allow States to deny certain rights that are accorded to refugees such as access to their territories and durable solutions. One of the practices that the existing international refugee law has not attempted to eradicate is the ability of States to block individuals from returning to their country of nationality or former habitual residence. Because of this failure, we find that durable solutions advocated by UNHCR end up institutionalizing exile<sup>1210</sup> at the expense of the RTR of refugees and stateless persons. Therefore, Hathaway is correct in arguing that international refugee law is theoretically flawed because it assumes exile is the appropriate

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<sup>1205</sup> UNHCR, 'UN High Commissioner for Refugees Executive Committee of the High Commissioner's Programme, 'Conclusion on Local Integration No. 104 (LVI) – 2005' (UNHCR, 7 October 2020) <<https://www.unhcr.org/uk/excom/exconc/4357a91b2/conclusion-local-integration.html>> accessed 21 October 2020

<sup>1206</sup> Executive Committee of the High Commissioner's Programme, 'Conclusion on Local Integration No. 104 (LVI) - 2005, 7 October 2005, No. 104 (LVI)' (*Refworld*, 7 October 2005) <<https://www.refworld.org/docid/4357a91b2.html>> accessed 21 October 2020

<sup>1207</sup> Guy Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 (1) *Refugee Survey Quarterly*, 22 <<https://doi.org/10.1093/rsq/hdn003>> accessed 22 January 2018

<sup>1208</sup> Executive Committee of the High Commissioner's Programme, 'International Solidarity and Refugee Protection No. 52 (XXXIX) – 1988' (UNHCR, 10 October 1988) <<https://www.unhcr.org/uk/excom/exconc/3ae68c433c/international-solidarity-refugee-protection.html>> accessed 21 October 2020

<sup>1209</sup> Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' 15 *Harvard Human Rights Journal*, 146 <<https://harvardhrj.com/wp-content/uploads/sites/14/2020/06/15HHRJ133-Anker.pdf>> accessed 21 October 2020

<sup>1210</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 489

solution.<sup>1211</sup> This means that instead of securing asylum and long term exile the international community needs ‘to facilitate return’<sup>1212</sup> by establishing ‘an international system to facilitate the eradication of the conditions that prevent refugees from returning home.’<sup>1213</sup> It is suggested that there is a need to restrict the ability of States to stop refugees from returning. Legal scholars specializing in international refugee law must also refrain from justifying exile. This applies to Hathaway who argues that when exile is the only solution it should only take place in States that are ‘culturally, ethnically, politically, or otherwise affiliated to the refugee population.’<sup>1214</sup> Hathaway assumes that such States would perceive the presence of the refugee population ‘reconcilable to their own national interests.’<sup>1215</sup> This assumption ignores the fact that:

[A] major refugee flow from one country to another has important political repercussions. Within host countries, the arrival of large groups may disrupt an established pattern, such as a fragile ethnic balance or a stable economy. The financial costs of refugee relief, maintenance, and resettlement can be enormous, and resentment about spending money on foreigners may trigger outbreaks of xenophobia on parts of the native population.<sup>1216</sup>

Moreover, in ‘international politics, refugees can become pawns in global power struggles.’<sup>1217</sup> Therefore, Hathaway’s justification for locking refugees in their regions should be rejected because as noted above historically ‘refugee law and policy has been highly politicised.’<sup>1218</sup> This thesis also rejects Hathaway’s claim that the distribution of refugees is based on an accident of geography and therefore certain States are burdened by refugees more than others.<sup>1219</sup> This so-called accident of geography becomes a permanent burden on certain States because of flawed theoretical assumptions. Historically, these assumptions have been promoted by Western countries who do not want to be burdened by the flow of non-European refugees and therefore want ‘refugees to receive protection in safe zones’ in

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<sup>1211</sup> James Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 (1) *Harvard International Law Journal*, 181  
<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1212</sup> *Ibid* 183

<sup>1213</sup> *Ibid* 182

<sup>1214</sup> *Ibid* 181

<sup>1215</sup> *Ibid* 181

<sup>1216</sup> Claudena M. Skran, *Refugees in Inter-War Europe* (Clarendon Press 1995) 2

<sup>1217</sup> *Ibid* 2

<sup>1218</sup> Deborah Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal*, 151 <<https://harvardhrj.com/wp-content/uploads/sites/14/2020/06/15HHRJ133-Anker.pdf>> accessed 21 October 2020

<sup>1219</sup> James Hathaway quoted in Bonaventure Rutinwa, ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ (2002) 21 *Refugee Survey Quarterly*, 18  
<[https://doi.org/10.1093/rsq/21.1\\_and\\_2.12](https://doi.org/10.1093/rsq/21.1_and_2.12)> accessed 12 February 2018



their own region.<sup>1220</sup> These assumptions were also partly responsible for excluding Palestinian refugees from the 1951 Convention and locking them in Arab host States because signatory States considered the Palestinian refugee problem as being ‘completely different from those of the refugees in Europe and could not see how ...[they] could bind themselves by a text under the terms of which their obligations would be extended to include a new, large group of refugees.’<sup>1221</sup> This also explains why even after European Union [EU] Member States signed the 1967 Protocol relating to the status of refugees which in Article 1(2) removed the geographic and temporal limits of the 1951 Convention<sup>1222</sup> they continue to find creative ways to lock refugees in their regions by making difficult for refugees to reach their shores.<sup>1223</sup>

Until the international system develops a mechanism whereby it can facilitate the eradication of the conditions that prevent refugees from returning home international refugee law will continue to promote exile over the RTR when sovereign States reject the RTR.<sup>1224</sup>

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<sup>1220</sup> Ibid 12

<sup>1221</sup> United Nations, ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, A/CONF.2/SR.19’ (*Refworld*, 26 November 1951)

<<https://www.refworld.org/docid/3ae68cda4.html>> accessed 27 February 2021, 11

<sup>1222</sup> Article 1(2) states ‘[f]or the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951" and the words "as a result of such events", in article 1 A (2) were omitted.’ United Nations, ‘Protocol Relating to the Status of Refugees’ (*United Nations Treaty Series*, 31 January 1967)

<[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=V-5&chapter=5](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=V-5&chapter=5)> accessed 17 February 2017, Article 1(2)

<sup>1223</sup> ‘In March 2016, the European Union entered into a landmark agreement with Turkey, through which hundreds of thousands of migrants had transited to reach EU soil, to limit the number of asylum seeker arrivals. Irregular migrants attempting to enter Greece would be returned to Turkey, and Ankara would take steps to prevent new migratory routes from opening. In exchange, the European Union agreed to resettle Syrian refugees from Turkey on a one-to-one basis, reduce visa restrictions for Turkish citizens, pay 6 billion euros in aid to Turkey for Syrian migrant communities, update the customs union, and re-energize stalled talks regarding Turkey’s accession to the European Union. Turkey was at the time the largest refugee-hosting country in the world—a position it continues to hold—with the vast majority of its approximately 3 million refugees coming from Syria, though there were also large numbers of Iraqis, Iranians, and Afghans.’ Kyilah Terry, ‘The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint’ (*Migration Policy Institute*, 8 April 2021) <https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on> accessed 30 October 2021

<sup>1224</sup> This links back to chapter 4 which revealed that Palestinian and Israeli scholars have advocated resettlement as the only realistic solution to ending the plight of Palestinian refugees who have been denied the right to return to their homes and lands in territories that became part of Israel in 1948. \*These findings demonstrate that Arendt’s conception of rights, which identifies the possession of nationality as a pre-condition for accessing human rights and that states can strip individuals from their right to have rights, offers the best theoretical foundation for understanding why the international framework governing refugees and stateless person considers naturalization in a new country as the only practical solution to transform refugees and stateless persons from rightless persons to rightsholders.

## 6.11. Conclusion

Throughout this chapter, the primary objective was to find out how the international framework governing refugees has attempted to solve the plight of refugees and how these solutions can impact Palestinian refugees. This chapter revealed that sovereign States were primarily responsible for the creation of international refugee law. Therefore, in international law 'the refugee...occupies a legal space characterized...by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and...by competing humanitarian principles deriving from general international law...and from treaty.'<sup>1225</sup> This chapter also revealed that the principle of State sovereignty explains why States have always viewed refugee status as temporary status and why their treatment has been heavily influenced by State interest.<sup>1226</sup> This also explains why in the inter-war period and after WWII<sup>1227</sup> resettlement was considered the most attractive solution<sup>1228</sup> to ending the plight of refugees<sup>1229</sup> who could not be repatriated. However, 'no obligations to resettle were assumed'<sup>1230</sup> because the principle of sovereignty ensured that States maintained their right to decide who can enter their territories and who can become permanent residents or citizens. This chapter also revealed that although UNHCR maintains that voluntary repatriation is the preferred solution to end the plight of refugees the international framework governing refugees continues to advocate local integration and resettlement as a solution to ending the plight of refugees and stateless persons who have no prospect of returning to their country of nationality or former habitual residence. This chapter also revealed that both these durable solutions can impact the legal prospects of Palestinian refugees because it is assumed that if they no longer fall under UNRWA's mandate they will no longer be excluded from the international framework governing refugees or the stateless conventions. This chapter also revealed that the existing framework can effectively dispossess Palestinian

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<sup>1225</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 1

<sup>1226</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 966 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017  
Gilbert also rightly observes that '[t]emporary protection does not accord the rights attaching to refugee status and can be revoked when the State of refugee so decides.' Although he makes this comment in relation to Article 6 (1) and (2) of '[t]he Temporary Protection Directive,' adopted by the European Union Council in 2001,' it is also insightful in terms of how the concept of temporary protection can impact Palestinian refugees because it reveals that temporary protection can come to an end when states providing protection establishes that such a status should cease. Quoted in *Ibid* 982

<sup>1227</sup> *Ibid* 203

<sup>1228</sup> *Ibid* 425

<sup>1229</sup> Alice Edwards and Laura van Waas, 'Introduction,' in Alice Edwards and others (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 4

<sup>1230</sup> *Ibid* 358

refugees from their refugee status and their RTR even if they fall under UNRWA's mandate because UNHCR calls upon all States to accede to international conventions and to reform their nationality laws so they can end the plight of persons who cannot be repatriated through naturalization.<sup>1231</sup> With this as a background, the focus of the next chapter shifts to how UNHCR has encouraged members of the League of Arab States to adopt international conventions and regional agreements that promote permanent exile and how this can lead to the permanent settlement of Palestinian refugees in Arab host States.

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<sup>1231</sup> In 1995 the Executive Committee of the High Commissioner's Programme called upon the UNHCR to 'actively...promote accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, in view of the limited number of States parties to these instruments, as well as to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States.' UNHCR, 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons No. 78 (XLVI) - 1995, 20 October 1995, No. 78 (XLVI) – 1995' (*Refworld*, 20 October 1995) <<https://www.refworld.org/docid/3ae68c443f.html>> accessed 7 December 2018, Paragraph c

## Chapter 7: The League of Arab States, the United Nations High Commissioner for Refugees and the naturalization of Palestinian Refugees

The fact that, apart from the duty of the state to readmit its nationals, solutions fall generally outside the area of legal obligation, justifies close attention to the policies and positions of States particularly as revealed in statements in the UNHCR Executive Committee and in their practice.<sup>1232</sup>

Guy Goodwin-Gill

The previous chapter revealed that the international framework governing refugees considers local integration and resettlement as the ‘ultimate solution’<sup>1233</sup> when return is not possible.<sup>1234</sup> While it is assumed that Palestinian refugees who fall under UNRWA’s mandate cannot be impacted by these durable solutions because they are excluded from the existing framework the previous chapter introduced a new angle to the discourse on the right to return [RTR]<sup>1235</sup> to Israel which facilitated a combined contextual and legal analysis that allows for a broader understanding of how the existing framework can impact the legal status of Palestinian refugees and their RTR to Israel. With this as a background, this chapter will shift to examine how UNHCR has encouraged members of the League of Arab States [LAS] to adopt international conventions that can lead to the naturalization of Palestinian refugees in their territories. This chapter will also examine to what extent members of the LAS have adopted nationality provisions, asylum policies and regional conventions that can pave the

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<sup>1232</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 489

<sup>1233</sup> Guy Goodwin-Gill, ‘Forced Migration - The Evolution of International Refugee Law and Organization’ (*The United Nations Audiovisual Library of International Law*, n.d.) <<http://www.un.org/law/avl>> accessed 1 September 2018

<sup>1234</sup> *Ibid*

‘The status of refugees is not...a permanent one. The aim is that ... [the refugee] ...should rid himself of that status as soon as possible, either by repatriation or by naturalization in the country of refuge’ Robert Jennings quoted in Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 367; According to Foster et al the ‘commitment to provide surrogate protection or substitute national protection is grounded both in the basic commitment of the interstate system to ensuring that all individuals have a nationality in the legally recognized form of citizenship, and are thus effectively “allocated” to a state, and also in the recognition that nationality provides the essential means by which individuals are able to avail themselves of the full range of protections established by international law.’ James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 289

<sup>1235</sup> The term right to return refers to the right to return as outlined in Article 13(2) of the Universal Declaration of Human Rights [UDHR] which states, ‘everyone has the right to leave any country, including his own, and to return to his country.’ United Nations, ‘Universal Declaration of Human Rights’ (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

way for the naturalization of Palestinian refugees. This chapter will further the thesis argument that the existing framework governing refugees and stateless persons obviates the RTR by revealing how relevant international conventions, regional conventions and nationality provisions that exclude Palestinian refugees can dispossess Palestinian refugees from their status as refugees and turn their RTR to a right of no return.

Given that Palestine is a member of the LAS this chapter will first offer an overview of the LAS, its purpose, and the status of Palestine within the League. Secondly, this chapter will examine if members of the LAS have formulated a common legal position on the legal status of Palestinian refugees in their territories. Therefore, this chapter will examine how Arab League Resolution 1547 of 1959, which called upon Member States to preserve the Palestinian nationality of Palestinian refugees by not naturalizing them, has impacted the legal status of Palestinian refugees in the LAS. In this section, we offer a detailed overview of the legal status of Palestinian refugees in Jordan, Lebanon, and Syria because most Palestinians who were expelled from territories that became part of Israel in 1948 ended up in UN managed camps in those countries. Thirdly, it will examine how nationality provisions adopted by members of the LAS can lead to the naturalization of Palestinian refugees. Fourthly, it will examine how the 1965 Protocol for the Treatment of Palestinian Refugees in Arab States, which recommended treating Palestinian refugees equally to citizens of receiving Arab States, impacted the legal status of Palestinian refugees. Fifthly, it will examine how UNHCR has encouraged members of the LAS to accede to the 1951 Convention Relating to the Status of Refugees,<sup>1236</sup> the 1967 Protocol Relating to the Status of Refugees,<sup>1237</sup> the 1954 Convention Relating to the Status of Stateless Persons,<sup>1238</sup> the 1961 Convention on the Reduction of Statelessness,<sup>1239</sup> the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child.<sup>1240</sup> Then it will offer an overview of how many members of the LAS

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<sup>1236</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017

<sup>1237</sup> Ibid

<sup>1238</sup> United Nations, 'Convention Relating to the Status of Stateless Persons' (UNHCR, 20 September 1954)

<<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017

<sup>1239</sup> United Nations, 'Convention on the Reduction of Statelessness 30 August 1961' (Refworld, 30 August 1961) <<https://www.refworld.org/docid/3ae6b39620.html>> accessed 2 November 2017

<sup>1240</sup> Goodwin-Gill described 'a critical milestone in legal protection generally.' Guy Goodwin-Gill, *The Refugee in International Law* (Oxford University Press 1996) 257

McAdam also observes that the 1989 Convention on the Rights of the Child 'is the only binding human rights treaty protecting the full range of rights encompassed by the Universal Declaration for Human Rights with the exception of freedom of movement.' Jane McAdam, 'Seeking Asylum under

signed these conventions. Then it will examine how certain provisions within these international conventions can pave the way for the naturalization of Palestinian refugees and their descendants in signatory States. Sixthly, we will examine how the 1994 Arab Convention on Regulating the Status of Refugees in Arab Countries can impact the legal status of Palestinian refugees in Arab host States. Seventhly, it will examine how the 2004 Arab Charter for Human Rights and the 2018 Arab Declaration on Belonging and Legal identity can lead to the naturalization of most Palestinian refugees in members of the LAS.

### 7.1. The League of Arab States and Palestinian Refugees

The LAS was established in 1945 by the Kingdom of Egypt,<sup>1241</sup> the Kingdom of Iraq,<sup>1242</sup> Lebanon, the Kingdom of Saudi Arabia, the Syrian Republic,<sup>1243</sup> North Yemen<sup>1244</sup> and Transjordan.<sup>1245</sup> As of 2021, the LAS has twenty-two members<sup>1246</sup> and they are Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Palestine,<sup>1247</sup> Saudi Arabia, Somalia, Republic of Sudan, Syria, Tunisia, the United Arab Emirates [UAE] and Yemen.<sup>1248</sup>

The 1945 Charter of the LAS recognized Palestine as a member of the League even though Palestine was under the administration of Great Britain. 'Annex 1 Regarding Palestine' of the

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the Convention on the Rights of the Child: A Case for complementary Protection' (2004) 14 (3) International Journal of Children's Rights, 253; See relevant instruments on the right of the child: the 1924 Declaration of the Rights of the Child, the 1946 International Refugee Organization Constitution, the 1959 UN Declaration on the Rights of the Child and 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children.

<sup>1241</sup> Replaced by the Arab Republic of Egypt

<sup>1242</sup> Replaced by the Republic of Iraq

<sup>1243</sup> Replaced by the Syrian Arab Republic

<sup>1244</sup> Replaced by the Republic of Yemen

<sup>1245</sup> Replaced by the Hashemite Kingdom of Jordan

<sup>1246</sup> The People's Democratic Republic of Algeria [1962], the Kingdom of Bahrain [1971], Comoros [1993], Djibouti [1977], the Arab Republic of Egypt, the Republic of Iraq, the Hashemite Kingdom of Jordan, the State of Kuwait [1961], the Lebanese Republic, Libya [1953], the Islamic Republic of Mauritania [1973], the Kingdom of Morocco [1958], the Sultanate of Oman [1971], the State of Qatar [1971], the State of Palestine [1945] replaced by the Palestinian Liberation Organization [1976], the Kingdom of Saudi Arabia [1945], the Federal Republic of Somalia [1974] replaced later by the republic of Somalia, Republic of Sudan, the Syrian Arab Republic, the Tunisian republic [1958], United Arab Emirates and North Yemen [1945] replaced by Republic of Yemen [1967]

<sup>1247</sup> The 1945 Charter of the League of Arab States considered Palestine an independent sovereign state and a member of the League of Arab States. See 'Annex 1 Regarding Palestine; for reasoning behind decision. League of Arab States, 'Charter of Arab League, 22 March 1945' (*Refworld*, 22 March 1945) <<http://www.refworld.org/docid/3ae6b3ab18.html>> accessed 15 September 2018

<sup>1248</sup> League of Arab States Portal, 'الولايات المتحدة الأمريكية,' (*League of Arab States*, n.d.) <<http://www.lasportal.org/ar/aboutlas/Pages/CountryData.aspx>> accessed 22 September 2018

charter explains why Palestine was included as a member State despite not being an independent State. The Annex reads:

Since the termination of the last Great War the rule of the Ottoman Empire over the Arab countries, among them Palestine, which had become detached from that Empire, has come to an end. She has come to be autonomous, not subordinate to any other state.

The Treaty of Lausanne proclaimed that her future was to be settled by the parties concerned.

However, even though she was as yet unable to control her own affairs, the Covenant of the League (of Nations) in 1919 made provision for a regime based upon recognition of her independence.

Her international existence and independence in the legal sense cannot, therefore, be questioned, any more than could the independence of the other Arab countries.

Although the outward manifestations of this independence have remained obscured for reasons beyond her control, this should not be allowed to interfere with her participation in the work of the Council of the League.<sup>1249</sup>

Article 2 of the 1945 Charter of the LAS, stated that the purpose of the League is to:

[S]trengthen the relations between the member-States, the coordination of their policies in order to achieve co-operation between them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of the Arab countries. It has also as its purpose the close co-operation of the member-States, with due regard to the Organization and circumstances of each State, on [a number of matters including] ... [n]ationality.<sup>1250</sup>

Given that Palestine is a member of the LAS, have members of the LAS co-operated to formulate a common legal position to the legal status of Palestinian refugees in their territories?

After the establishment of Israel, members of the LAS hosting Palestinian refugees refused to resettle them in their territories. Israel accused host States of perpetuating the Palestinian refugee problem<sup>1251</sup> and claimed that host States are refusing to resettle Palestinian

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<sup>1249</sup> League of Arab States, 'Charter of Arab League, 22 March 1945' (*Refworld*, 22 March 1945) <<http://www.refworld.org/docid/3ae6b3ab18.html>> accessed 15 September 2018

<sup>1250</sup> *Ibid*

<sup>1251</sup> Israel Ministry of Foreign Affairs, 'Dep FM Ayalon addresses UNHCR Ministerial Meeting, Geneva' (*Israel Ministry of Foreign Affairs*, 8 December 2011) <[http://mfa.gov.il/MFA/PressRoom/2011/Pages/DepFM\\_Ayalon\\_addresses\\_UNHCR\\_Meeting\\_8-Dec-2011.aspx](http://mfa.gov.il/MFA/PressRoom/2011/Pages/DepFM_Ayalon_addresses_UNHCR_Meeting_8-Dec-2011.aspx)> accessed 25 April 2017

refugees so they can continue to be on enemy terms with Israel.<sup>1252</sup> In contrast host States and the LAS official justification for rejecting the resettlement of Palestinian refugees was because they wanted Palestinian refugees to return to their properties and homes in territories that became part of Israel.<sup>1253</sup> This was clearly stated in Arab League Resolution 231 of 1949<sup>1254</sup> which reads:

The Council considers that the lasting and just solution of the problem of the 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.<sup>1255</sup>

In 1959 the LAS also called on its members to preserve the Palestinian nationality of Palestinian refugees in Resolution 1547. Resolution 1547, which was written in Arabic when translated into English reads:

The Council decides to approve the recommendation of the Political Affairs Committee as follows: The Committee on Political Affairs considered the notes by the Secretariat and the Ministry of Foreign Affairs of the United Arab Republic concerning the granting of citizenship by some Arab States to Arab Palestinian refugees residing in their territory and took note of the actions taken by Member States in that regard. The Committee, reaffirms previous resolutions of the Council of the League of Arab States on this matter, recommends that the Governments of Member States give favourable consideration to the creation of employment opportunities for Palestine refugees residing in their territories, while retaining their Palestinian nationality as a general principle.<sup>1256</sup>

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<sup>1252</sup> This interpretation was endorsed by Sir Alexander Galloway, Former Director of UNRWA in Jordan who in 1952 stated 'Arab nations do not want to solve the Arab refugee problem. They want to keep it as an open sore...as a weapon against Israel.' Danny Ayalon, 'The Truth About the Refugees: Israel Palestinian Conflict' (*YouTube*, 4 December 2011)

<[https://www.youtube.com/watch?v=g\\_3A6\\_qSBBQ](https://www.youtube.com/watch?v=g_3A6_qSBBQ)> accessed 27 April 2017

<sup>1253</sup> Benny Morris, *The Birth of the Palestinian Problem Revisited* (2 edn, Cambridge University Press 2004) 2

<<http://larryjhs.fastmail.fm.user.fm/The%20Birth%20of%20the%20Palestinian%20Refugee%20Problem%20Revisited.pdf>> accessed 17 April 2017

<sup>1254</sup> Jalal Al-Husseini, 'The Arab States and the Refugee Issue: A Retrospective View' (*HAI Archive Ouverte*, December 2008)

<[https://halshs.archives-ouvertes.fr/halshs-00343893/file/The\\_Arab\\_States\\_and\\_the\\_Refugee\\_Issue.pdf](https://halshs.archives-ouvertes.fr/halshs-00343893/file/The_Arab_States_and_the_Refugee_Issue.pdf)> accessed 22 September 2018, 2

<sup>1255</sup> *Ibid* 2

<sup>1256</sup> Palestine Planning Institute, 'League of Arab States Resolution No. 1547 of 1959' (*Palestine Planning Institute*, 9 March 1959) <[http://ppc-plo.ps/ar/print\\_page.php?id=241](http://ppc-plo.ps/ar/print_page.php?id=241)> accessed 22 September 2018



Resolution 1547 revealed that more than one member of the LAS had conferred their nationality on Palestinian refugees despite being advised not to confer their nationality on Palestinian refugees. Hamoud in his article 'comments on Arab League Resolutions regarding Palestinian refugees and Palestine,' observes that there is a lack of implementation of Arab League resolutions regarding Palestinian refugees because usually resolutions are not translated into law within the domestic context of Arab League member States.<sup>1257</sup> While Said<sup>1258</sup> notes that although '[m]ost regional organisations are built upon the coalition of the willing the Arab League will not reach this synergy because the Charter of the League of Arab States does not include a clause for enacting resolutions reached by member States. This has to be done through the Arab States themselves.'<sup>1259</sup> This could explain why Resolution 1547 did not condemn the act of granting citizenship to Palestinian refugees nor did it place any penalties on States that naturalized Palestinian refugees. According to Abu Talib<sup>1260</sup>, Arab States do not want to give the LAS the power to sanction or censure members who defy a resolution because this type of reform would gradually lessen '[t]he authoritative power of member States. This is not accepted in the Arab world.'<sup>1261</sup> Therefore, according to '[w]e are used to the Arab leaders making decisions which are not acted upon.'<sup>1262</sup>

Resolution 1547 did not require the States concerned to withdraw the citizenships that they had granted to Palestinian refugees, nor did it require member States to translate the recommendation not to grant Palestinian refugees citizenships into their domestic nationality laws. For example, it did not require State parties to add an exclusion clause in their nationality laws which clearly prohibits conferring their citizenship on Palestinian refugees and their descendants in cases of birth, marriage, or residence. It can be extrapolated from this that Resolution 1547 did not prohibit the naturalization of Palestinian refugees, despite the general principle in the Resolution.

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<sup>1257</sup> Sami Hamoud, 'ملحوظات على القرارات العربية المتعلقة باللاجئين والقضية الفلسطينية' (*Palestinian Refugee Network in Lebanon*, n.d.) <<http://laji-net.net/arabic/default.asp?contentID=17463>> accessed 23 September 2018, 1

<sup>1258</sup> Director of the Al-Ahram Centre for Strategic and Political Studies.

<sup>1259</sup> Ali Abd al-Moneim Said quoted Aljazeera, 'Arab League: Reform or Retire' (*Aljazeera*, 27 March 2005) <<https://www.aljazeera.com/archive/2005/03/200841014144872474.html>> accessed 1 January 2016

<sup>1260</sup> Editor-in-Chief of the Arab Strategic Report.

<sup>1261</sup> Hasan Abu Talib quoted in Ali Abd al-Moneim Said quoted Aljazeera, 'Arab League: Reform or Retire' (*Aljazeera*, 27 March 2005) <<https://www.aljazeera.com/archive/2005/03/200841014144872474.html>> accessed 1 January 2016

<sup>1262</sup> Al-Osboa's Bakri quoted Ibid

Moreover, Resolution 1547 implied that a Palestinian nationality existed and that in the event of Palestinian refugees becoming citizens of a Member State of the LAS they would lose their Palestinian nationality by calling on member states to give them employment rights while retaining 'their Palestinian nationality as a general principle.'<sup>1263</sup> This suggests that the LAS did not recognize the principle of dual citizenship. Moreover, by linking the Palestinian nationality to the RTR Resolution 1547 suggested that in the event of Palestinian refugees becoming naturalized they would no longer have a RTR. The reference made to the Palestinian nationality also suggests that the LAS did not consider Palestinian refugees to be stateless refugees. This analysis is supported by the fact that the LAS recognized the Palestinian nationality. In the 1950s, a Palestinian passport was issued by 'the General Government of Palestine,' which was supported by the LAS.<sup>1264</sup> The Palestinian passports issued lost their validity after the LAS withdrew its support for the 'General Government of Palestine.'<sup>1265</sup> The Palestinian passports were replaced with travel documents issued by members of the LAS to Palestinians residing in their territories.<sup>1266</sup>

Although, Resolution 1547 does not name the States that naturalized Palestinian refugees the resolution was likely referring to Lebanon and Jordan because they naturalized Palestinians in the 1950s. In Lebanon, a 'small number' of Palestinian refugees mostly Christian 'were granted citizenship[s] in the 1950s under the presidency of Camille Chamoun to keep the [demographic] balance between Christians and Muslims in Lebanon.'<sup>1267</sup> Al Hussein notes that around '30,000 wealthy and/or skilled refugees' became Lebanese citizens.<sup>1268</sup> In the 1950s Jordan also naturalized Palestinians after annexing the West Bank (including East Jerusalem) during the Arab-Israeli War in 1948.<sup>1269</sup> Al Hussein reveals that

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<sup>1263</sup> Palestine Planning Institute, 'League of Arab States Resolution No. 1547 of 1959' (*Palestine Planning Institute*, 9 March 1959) <[http://ppc-plo.ps/ar/print\\_page.php?id=241](http://ppc-plo.ps/ar/print_page.php?id=241)> accessed 22 September 2018

<sup>1264</sup> Sami Hamoud, 'ملحوظات على القرارات العربية المتعلقة باللاجئين والقضية الفلسطينية' (*Palestinian Refugee Network in Lebanon*, n.d.) <<http://laji-net.net/arabic/default.asp?contentID=17463>> accessed 23 September 2018, 1

<sup>1265</sup> Ibid 1

<sup>1266</sup> Ibid 1

<sup>1267</sup> Canada: Immigration and Refugee Board of Canada, 'Lebanon: Treatment of Palestinian refugees, including information on identity documents, mobility rights, property rights, access to social services, education and employment, and living conditions, 15 November 2011, LBN103848.E' (*Refworld*, 11 November 2011) <<http://www.refworld.org/docid/507553bd2.html>> accessed 22 September 2018

<sup>1268</sup> Jalal Al-Husseini, 'The Arab States and the Refugee Issue: A Retrospective View' (*HAI Archive Ouverte*, January 2006) <[https://halshs.archivesouvertes.fr/halshs00343893/file/The\\_Arab\\_States\\_and\\_the\\_Refugee\\_Issue.df](https://halshs.archivesouvertes.fr/halshs00343893/file/The_Arab_States_and_the_Refugee_Issue.df)> accessed 22 September 2018, 16

<sup>1269</sup> 'Law No. 6 of 1954 on Nationality (last amended 1987)' (*Refworld*, 1 January 1954) <<https://www.refworld.org/docid/3ae6b4ea13.html>> accessed 9 February 2021

in 1949 the Jordanian delegation informed the United Nations Conciliation Commission for Palestine [UNCCP] 'of its intention to resettle about 200,000 refugees, provided substantial financial aid was obtained from the United Kingdom.'<sup>1270</sup> This revelation suggests that Jordan planned to naturalize Palestinians who came under its rule to resettle them. Al Hussein also reveals that 'on 9 May 1949, the Syrian delegation secretly informed the French member of the UNCCP that it would accept to resettle up to 250,000 refugees, i.e., three times the estimated number of Palestinian refugees residing at that time in Syria.'<sup>1271</sup> Likewise, the Egyptian delegation, which rejected the resettlement of Palestinian refugees in Egypt 'on account of the limited absorption capacity of its economy, [also] hinted that it could revise its position, provided there were border arrangements with Israel and international financial and technical assistance.'<sup>1272</sup> Al Hussein also notes that the Egyptian delegation told Western delegations in the Lausanne Peace Conference that the majority of Palestinian refugees would not agree to return and live under the rule of Israel and therefore the only solution to their plight was their resettlement.<sup>1273</sup> Moreover, in 1951 after the American Ambassador to Egypt attended a meeting with the LAS, he wrote to the Department of State that '[t]hey are of course certain in their own mind that the refugees are not going to get back and that resettlement work must be started ...[p]olitically they do not dare to admit such a possibility and the very word 'resettlement' would be ruinous to their careers. These officials feel that the answer is largely financial and that if adequate sums can be raised a major step will have been taken toward the eventual solution of the problem.'<sup>1274</sup>

The insight offered by the American Ambassador could explain why Resolution 1547 recommended rather than obliged State parties to allow Palestinian refugees to retain their nationality and why Palestinian refugees ended up living under different legal circumstances across the LAS. This reveals that members of the LAS have not formulated a common legal position on the legal status of Palestinian refugees in their territories. Instead, each State has formulated its own legal position as defined by its interests.

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<sup>1270</sup> Ibid 16

<sup>1271</sup> Ibid 3

<sup>1272</sup> Ibid 4

<sup>1273</sup> Ibid 5

<sup>1274</sup> Ibid 11

See 'The Ambassador in Egypt (Caffery) to the Department of State, 7 February 1951,' in Foreign Relations of the United States 1951, The Near East and Africa, Volume V (*Department of State Office of the Historian*, 1951)

<[https://history.state.gov/historicaldocuments/frus1951v05/pg\\_578](https://history.state.gov/historicaldocuments/frus1951v05/pg_578)> accessed 17 March 2021, 578

Given that most Palestinian refugees ended up seeking refuge in Jordan, Syria, and Lebanon this thesis will now examine the legal status of Palestinian refugees in the three countries.

## 7.2. Legal Status in selected States – Jordan, Lebanon and Syria

### The Legal Status of Palestinian Refugees in Jordan

In Jordan Palestinian refugees who fled ‘during and after the 1948 Arab- Israeli War’ were accorded Jordanian nationality while those who fled the West Bank in 1967...already had Jordanian nationality<sup>1275</sup> because the West Bank was united with the East Bank by the Act of Union of the two Banks of Jordan on 24 April 1950.<sup>1276</sup> Palestinians who fled in 1948 became Jordanian citizens based on Article 3 of the 1954 Citizenship Law which stated that a Jordanian citizen is ‘[a]ny person with previous Palestinian nationality except the Jews before the date of May 15, 1948, residing in the Kingdom during the period from December 20, 1949, and February 16, 1954.’<sup>1277</sup>

Green Card Holders	Reside mostly in West Bank. Their Jordanian citizenship was withdrawn by a sovereign act in 1988. They are no longer Jordanian citizens. <sup>1278</sup>
Yellow Card Holders	Living outside the West Bank but maintain a relationship in West Bank. They remain Jordanian citizens.
Blue Card Holders	Palestinian refugees who came to Jordan from Gaza after 1967 did not get a Jordanian citizenship.

Source Ibrahim Al- Ali, ‘The Palestinian Youth and Arab Revolution,’ in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 74

King Abdullah II of Jordan framed Jordan’s decision to confer the Jordanian citizenship on Palestinians in a positive light by highlighting how Palestinian refugees were welcomed into

<sup>1275</sup> Ibid 153

<sup>1276</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 10

<sup>1277</sup> ‘Law No. 6 of 1954 on Nationality (last amended 1987)’ (*Refworld*, 1 January 1954) <<https://www.refworld.org/docid/3ae6b4ea13.html>> accessed 9 February 2021

<sup>1278</sup> Aniz Fawzi Qasem, ‘Palestinians in the Arab Legislations: The Jordan Model’ (2010) 83 *Journal of Palestine Studies*, 117 <<https://www.jstor.org/stable/26378602>> accessed 22 September 2018

Jordan while those who ended up in other Arab countries became stateless refugees 'unable to travel or to work.'<sup>1279</sup>

Jordan's decision to confer its citizenship on Palestinian refugees has legal implications on their RTR. By conferring Jordanian citizenships on Palestinians who sought refuge in the Eastern part of Palestine they became Jordanian citizens rather than Palestinian refugees which means they will not be able to claim a RTR under Resolution 194 which resolved 'that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date'<sup>1280</sup> because it only addresses refugees.<sup>1281</sup> In 1988 Jordan severed its 'legal and administrative ties with the Israeli occupied West Bank.'<sup>1282</sup> Jordan's disengagement raises an important question regarding the RTR for Palestinians holding Jordanian citizenship who remained in the West Bank after 1988 'Are they Jordanian citizens living under Israel's occupation, or are they internally displaced Palestinian refugees?' The same question applies to Palestinians holding Jordanian citizenship who fled the West Bank in 1967. It can be argued that in both cases their legal status as Jordanian citizens means that they cannot be considered Palestinian refugees and therefore they cannot claim a RTR based on Resolution 194.

The same argument applies to Palestinian refugees who ended up seeking refugee beyond the Middle East contexts and became citizens of new States. Both groups are no longer considered Palestinian refugees under international law because Article 1 (3) (c) of the 1951 Convention states that a refugee who has 'acquired a new nationality and enjoys the protection of the country of his new nationality ceases to be a refugee.'<sup>1283</sup> Although both groups of refugees ceased to be refugees after gaining a new citizenship it is argued that those who became Jordanian citizens and resided in the West Bank when it was under the control of Jordan can claim a RTR because when they fled during the 1967 Arab-Israeli War they fled from a territory that was under Jordan's control.<sup>1284</sup>

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<sup>1279</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 10

<sup>1280</sup> United Nations, 'UN Resolution 194 (III)' (*United Nations*, 11 December 1948) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>> accessed 15 October 2016, Paragraph 11

<sup>1281</sup> This links back to our discussion in chapter 6 which revealed that Palestinian refugees will cease to be refugees if they become citizens of a new State.

<sup>1282</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 75

<sup>1283</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1 (3) (c)

<sup>1284</sup> This links back to our discussion in chapter 5 about the right to return being connected to the right to return to the country of nationality.

Moreover, Abdullah II suggests that Palestinian refugees who were given Jordanian citizenship are still refugees when he argues that 'the right of these refugees and their descendants to return to their homes in what is now Israel remains one of the most contentious issues between Israel and the Palestinians.'<sup>1285</sup> According to Abdullah II, the choice of return will be based on the decision made by the individuals concerned.<sup>1286</sup> Abdullah II also claims that if they choose to return, they will be returning to a future Palestine and not to Israel:

[O]nce the Palestinian achieve their right to statehood, Jordanian of Palestinian origin will at last have the right to choose where they want to live. Those who want to be Palestinian citizens and move to Palestine will be free to do so, and all of our citizens who choose to stay in Jordan, whatever their background or origin, will remain Jordanian citizens. Their loyalty will be to the Jordanian flag, not the Palestinian, which for some is not the case today.<sup>1287</sup>

Thus, as far as Abdullah II is concerned there is no prospect of Palestinian refugees returning to territories that became part of Israel in 1948 or of becoming dual citizens. Instead, Palestinian refugees are expected to choose between becoming citizens of Jordan or citizens of a Palestinian State and both options entail giving up on their RTR to Israel.

### **Impact of Jordanian Citizenship on the Right to Return for Palestinian Refugees**

Given how the thesis discussed Arendt theory of rights in chapter 2 and the limits of the RTR in chapter 5 this section has demonstrated that the RTR can be overridden by sovereign States who do not allow refugees to return to their territories and States who end the plight of refugees of such persons by naturalizing them. While embracing Arendt's conception of rights revealed that refugees reassert their right to have rights when they become nationals of a new State chapter 5 revealed that this transformation in legal status can disposes refugees from the RTR. With this as a background if Jordan confers the Jordanian citizenship on all Palestinian refugees in its territories it will be exercising its sovereign right to choose who are its nationals. This will have several legal implications on Palestinian refugees and their RTR. First, by becoming Jordanian nationals they will cease to be stateless refugees under international law. This means they will no longer fall under

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<sup>1285</sup> King Abdullah II, *Our Last Best Chance* (Penguin Group 2011) 10

<sup>1286</sup> Ibid 154

<sup>1287</sup> Ibid 154

UNRWA's mandate or have access to its services. Secondly, they will no longer be able to claim a RTR under Resolution 194 because it only addresses refugees.<sup>1288</sup> Thirdly, Palestinian refugees who are naturalized in Jordan will continue to be Jordanian citizens because historically a group of Palestinians who were naturalized had their Jordanian citizenship withdrawn by a sovereign act in 1988.<sup>1289</sup>

### **The Legal Status of Palestinians in Lebanon**

In Lebanon, the sectarian-based political system led Palestinian refugees to be deprived of their civil rights by being denied the right to work in over 70 fields or owning property.<sup>1290</sup> The Lebanese law classifies Palestinian refugees as foreigners and divides them into three categories 'those included in the UNRWA census...those not included in the UNRWA census and those who came after 1967.'<sup>1291</sup> Some Palestinian refugees are also residency holders and can return and leave the country.<sup>1292</sup> This development took place after the Ministry of Interior issued Decree No 319 of 2 August 1962 which required foreigners to regularize their residence status. According to this decree, Palestinians are considered '[a]liens who do not bear identity papers from their country of origin they are considered residents because they were issued residence cards by the Directorate of the General Security or identity cards by the Directorate of Palestinian Refugees in Lebanon.'<sup>1293</sup>

According to Saleh '[t]he biggest obsession that occupies the Lebanese policymakers, particularly the Christian parties is resettlement.'<sup>1294</sup> Lebanon's restrictive policies towards Palestinian refugees is a by-product of this constant fear. Officially Lebanon claims that it is against the resettlement of Palestinian refugees because it supports the RTR. In contrast, Ziadeh claims that the restrictive policies are in fact a result of an existing 'Palestinophobia' in Arab host States because they fear having to resettle them in the host countries. Ziadeh

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<sup>1288</sup> This links back to our discussion in chapter 6 which revealed that Palestinian refugees will cease to be refugees if they become citizens of a new State.

<sup>1289</sup> Aniz Fawzi Qasem, 'Palestinians in the Arab Legislations: The Jordan Model' (2010) 83 *Journal of Palestine Studies*, 117 <<https://www.jstor.org/stable/26378602>> accessed 22 September 2018

<sup>1290</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 209

<sup>1291</sup> Ibrahim Al- Ali, 'The Palestinian Youth and Arab Revolution,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 75

<sup>1292</sup> *Ibid* 75

<sup>1293</sup> *Ibid* 75

<sup>1294</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 210

believes Palestinophobia could be encountered by focusing on the status of Palestinian refugees legally and politically rather than purely focusing on their humanitarian needs.<sup>1295</sup> Lebanon's restrictive policies forced thousands of Palestinian refugees to go to Europe and the Gulf States.<sup>1296</sup> Al-Ali argues that Arab States should offer Palestinian refugees civil, social and economic rights so they are not forced 'to favour resettlement or relinquish their right of return.'<sup>1297</sup> This recommendation should be implemented but should not be based on the example he relies on to justify his recommendation. Ali-Ali refers to Palestinians in Europe and suggests that because they have civil, social, and economic rights they have not relinquished their RTR. While this might be true in principle their emigration to Europe does not support the RTR argument because Palestinian refugees who leave UNRWA operating territories and end up becoming citizens in a new State cease to be refugees under international law. Furthermore, Al-Ali's suggestion that 'the Jordanian Citizenship does not detract or relinquish the right of return [because] [o]ne can exercise the right of return without prejudice to the right possessed in Jordan'<sup>1298</sup> is not supported by the 1951 Convention which clearly states in Article 1C(3) that when a refugee gains a new nationality, he/she ceases to be a refugee.<sup>1299</sup> Thus, Palestinians who have become Jordanian nationals are no longer Palestinian refugees. Masri in his article 'The Implications of the Acquisition of a New Nationality for the Right of Return of Palestinian Refugees' disagrees with this interpretation because he argues that 'the right of return is independent of refugee status, [therefore] the cessation of the latter should not necessarily abrogate the former.'<sup>1300</sup> Despite this, he acknowledges that the 'underpinnings of the right of return to one's own country, especially the link between the individual and her territory...is somehow weakened in a situation of

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<sup>1295</sup> Adeb Ziadeh, 'Social and Political Dimension of Palestinian Refugees between Integration and Alienation,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 101, 103

<sup>1296</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 209

<sup>1297</sup> Ibrahim Al- Ali, 'The Palestinian Youth and Arab Revolution,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 82

<sup>1298</sup> *Ibid* 75

<sup>1306</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017, Article 1C(3)

According to the UNHCR '[a] complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basis legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services.' UNHCR, 'Note on the Cessation Clauses EC/47/SC/CRP.30' (UNHCR, 30 May 1997) <<https://www.unhcr.org/uk/excom/standcom/3ae68cf610/note-cessation-clauses.html>> accessed 15 March 2021, Paragraph 20

<sup>1300</sup> Mazen Masri, 'The Implications of the Acquisition of a New Nationality for the Right of Return of Palestinian Refugees' (2015) 5 (2) *Asian Journal of International Law*, 356 <<https://doi.org/10.1017/S2044251314000241>> accessed 1 November 2017



naturalization in a different country. However, this weakening of the link should not automatically lead to the deprivation of rights.<sup>1301</sup> Masri's assertion can be refuted by referring to our discussion on Arendt in chapter 2 which revealed that citizenship is a precondition for accessing rights including the RTR. This assertion was confirmed by the International Court of Justice [ICJ] which found that nationality gives rise to 'the existence of reciprocal rights and duties' between the State and the individual holding the nationality.<sup>1302</sup> Such rights and duties do not exist between Palestinian refugees and Israel because they are not citizens of Israel. This explains why Israel has been able to block Palestinian refugees from returning to territories that became part of Israel. Therefore, the RTR for Palestinian refugees stems from their status as refugees. Consequently, if Palestinian refugees are naturalized in a new State, they will cease to be refugees and therefore will lose their RTR for the purpose of Resolution 194.<sup>1303</sup>

In 2016 the Lebanese Working Group on Palestinian Refugees Affairs [Lebanese Working Group] in collaboration with the Lebanese Palestinian Dialogue Committee which is attached to the Presidency of the Council of Ministers published a document entitled 'A Unified Lebanese Vision for the Palestinian Refugees Affairs in Lebanon.'<sup>1304</sup> The document acknowledged that addressing the situation of Palestinian refugees in Lebanon has always 'provoked a sharp division on the Lebanese political scene and with the Palestinians.'<sup>1305</sup> Therefore, the document presented an important shift in the attitude of Lebanon because 'all

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<sup>1301</sup> Ibid 356-386

<sup>1302</sup> the International Court of Justice in *Liechtenstein v. Guatemala* [1955] which found that the purpose of nationality is 'to determine the person upon whom' rights are conferred. The International Court of Justice also stated that nationality gives rise to 'the existence of reciprocal rights and duties' between the state and the individual holding the nationality.

International Court of Justice, 'Nottebohm Case (*Liechtenstein v. Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955' (*Refworld*, 6 April 1955)

<<https://www.refworld.org/cases,ICJ,3ae6b7248.html>> accessed 9 January 2019

See *Adnan V Secretary of State for the Home Department* [1997] stated that to deny a national from entering his/her country is to cut the person 'of from the enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a state to its citizens.' Secretary of State for the Home Department, 'R v. Secretary of State for the Home Department, Ex parte Adnan and Others' (United Kingdom: Court of Appeal) (*Refworld*, 23 July 1999)

<[https://www.refworld.org/cases,GBR\\_CA\\_CIV,3ae6b6ad14.html](https://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html)> accessed 27 February 2021

<sup>1303</sup> This view is adopted by numerous scholars including Abu Sitta, Alain Gresh, Atif Kubursi, Ingrid Jaradat Gassner, Jan Abu Shakrah, Jaber Suleiman, Susan Akram, Norman G. Finkelstein and Nur Masalha.

<sup>1304</sup> Lebanese Palestinian Dialogue Committee, 'A Unified Lebanese Palestinian Vision for Palestinian Refugee Affairs in Lebanon' (*Lebanese Palestinian Dialogue Committee*, 17 November 2016)

<[unified\\_vision-636789928712947012.pdf](unified_vision-636789928712947012.pdf) (*lpcd.gov.lb*)> accessed 30 September 2020

'This inclusive text is the outcome of a debate that took place between January 9, 2015, and November 17, 2016, with the participation of representatives of Lebanese political parties and movements, part of the working group, throughout 52 meetings.' Ibid 16

<sup>1305</sup> Ibid 1

political affiliations,<sup>1306</sup> present...made a common approach on how to deal with Palestinian refugees, while understanding and going beyond the circumstances, implications, differences and contradictions that have shaped for a long period the mutual relations.<sup>1307</sup> The Lebanese Working Group drew its work upon the Lebanese Constitution and laws, human rights, relevant international conventions, and Arab conventions.<sup>1308</sup>

The Group found that improving the humanitarian, socioeconomic and living conditions of Palestinian refugees and granting them their basic rights does not contradict, in any way, with Lebanon's sovereignty and its rejection of resettlement as a postulate of Lebanese consensus, nor with their right to return to the land they have been uprooted from.<sup>1309</sup>

The Lebanese Working Group also confirmed that Palestinian people have the right to 'establish their independent State with Jerusalem as its capital'<sup>1310</sup> and that the international community was responsible for bringing about a just solution to the Palestinian issue and ensuring that they continue to be served by UNRWA<sup>1311</sup> whose continued presence in Lebanon was of 'political importance.'<sup>1312</sup> The Lebanese Working Group considered the RTR of Palestinian refugees as a 'just solution for durable peace' which will serve the interests of all parties concerned.<sup>1313</sup> Therefore, the Lebanese Working Group rejected the resettlement of Palestinian refugees in Lebanon<sup>1314</sup> which the group described as 'the act of acquiring collectively the Lebanese nationality ... and the resulting political rights which are limited to the Lebanese citizens.'<sup>1315</sup> The Lebanese Working Group rejected resettlement for the sake of '[p]reserving the Palestinian identity as a guarantee against resettlement'<sup>1316</sup> and protecting Lebanon's sovereignty.<sup>1317</sup>

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<sup>1306</sup> Lebanese Forces – Hezbollah, Amal Movement, Free Patriotic Movement, Lebanese Phalanges Party, Future Movement, and the Progressive Socialist Party.

<sup>1307</sup> Lebanese Palestinian Dialogue Committee, 'A Unified Lebanese Palestinian Vision for Palestinian Refugee Affairs in Lebanon' (*Lebanese Palestinian Dialogue Committee*, 17 November 2016)

<*unified vision-636789928712947012.pdf (lpdc.gov.lb)*> accessed 30 September 2020, 1

<sup>1308</sup> Ibid 2

<sup>1309</sup> Ibid 2-3

<sup>1310</sup> Ibid 6

<sup>1311</sup> Ibid 6

<sup>1312</sup> Ibid 14

<sup>1313</sup> Ibid 14

<sup>1314</sup> Ibid 6

<sup>1315</sup> Ibid 8

<sup>1316</sup> Ibid 8

<sup>1317</sup> Ibid 8

The Lebanese Working Group concluded that it was 'necessary to bridge the gap resulting from the lack of an official Lebanese definition of 'resettlement' and 'refugee' in general, and 'Palestinian refugee' in particular in Lebanese legislative texts, thus causing confusion, given that Lebanon did not sign the 1951 Refugee Convention.'<sup>1318</sup> The Lebanese Working Group proposed defining resettlement in Lebanon as follows:

Granting Palestinian refugees in Lebanon the Lebanese nationality collectively, to all or some, outside the legal context by virtue of a political decision imposed in the context of a regional or international settlement and contrary to the Constitution, whether done all at once or gradually.<sup>1319</sup>

The Lebanese Working Group also propose defining Palestinian refugees in Lebanon as follows:

Each Palestinian displaced to the Lebanese territories since 1947, due to the uprooting operations and all the accompanying forms of forced displacement, and the subsequent Israeli occupation of Palestine in 1967 and its implications, in addition to all the descendants of Palestinian refugees in Lebanon in the sense defined above.<sup>1320</sup>

Moreover, according to the Lebanese Working Group, Palestinian refugees are:

- a- Refugees registered at the Ministry of Interior and Municipalities.
- b- Refugees of 1948 who are registered with the UNRWA in Lebanon.
- c- Undocumented Palestinian refugees identified by the Lebanese authorities within the non-ID category.<sup>1321</sup>

In conclusion, although Lebanon has been reluctant to naturalize Palestinian refugees or to give them access to civil rights the Lebanese Working Group has succeeded in formulating a 'common approach on how to deal with Palestinian refugees.'<sup>1322</sup> In theory, if this blueprint is implemented Palestinian refugees will be accorded civil rights without losing their RTR because they will not be allowed to naturalize in Lebanon. In practice, however, if this blueprint is implemented Palestinian refugees will be transformed into migrants which will pave the way to them becoming full citizens. This is the most likely outcome because in 2014 UNHCR's representative in Malaysia revealed that the agency was considering a

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<sup>1318</sup> Ibid 7

<sup>1319</sup> Ibid 7

<sup>1320</sup> Ibid 7

<sup>1321</sup> Ibid 7

The UNHCR broadly welcomed the blueprint.

<sup>1322</sup> Ibid 1

'migrant or labour migrant solution' that is 'built on the economic realities of countries.'<sup>1323</sup> This solution aspires to persuade governments to regularize the status of refugees by allowing them to change their refugee status to migrant status and then to full citizens.<sup>1324</sup>

### **The Legal Status of Palestinian Refugees in Syria**

In Syria, Palestinians were not granted citizenship. Instead, they were given equal civil rights to Syrians including the right to work, study and buy property.<sup>1325</sup> This was made possible through the Legislative decree No. 33 of 17 September 1949 which allowed Palestinians to seek employment without the need to have a Syrian nationality.<sup>1326</sup> Law 260 of 1956 also made Palestinians equal to Syrian citizens in terms 'to the right of employment, work, trade and military service, except for running for parliamentary elections.'<sup>1327</sup> The conferring of rights was a sovereign decision and decoupled from citizenship. Therefore, despite treating Palestinian refugees equal to Syrians in most fields, 'Syrian legislators divided Palestinian refugees into 4 categories':

1. 1948 Palestinian Refugees are treated as Syrian citizens in terms of rights.
2. 1956 Palestinian Refugees enjoy the same rights as category 1 'except access to the labour market must be on a temporary basis and are not subject to military service.'
3. 1967 Palestinian Refugees are divided into two groups. The first group are registered as refugees and enjoy the same rights as category 2. The second group are not registered as refugees. This group of individuals 'are treated as foreigners if they hold Egyptian (Gaza Strip) travel documents or as Arab residents if they hold Jordanian (temporary) passports.'
4. 1970 Palestinian Refugees 'non- ID cardholders, those situations are the most complex.' <sup>1328</sup>

<sup>1323</sup> World101x 'World101x: Full Interview with UNHCR Representative to Malaysia Richard Towle' (YouTube, 20 October 2014) <<https://www.youtube.com/watch?v=IUbYlXQV800>> accessed 27 October 2016

<sup>1324</sup> Andrew Shacknove, 'Who is a Refugee?' (1985) 95 (2) Ethics, 276 <<https://doi.org/10.1086/292626>> accessed 1 September 2018

\*As of 15 March 2021, Palestinian refugees in Lebanon continue to be denied civil rights.

<sup>1325</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 207

<sup>1326</sup> Ibrahim Al- Ali, 'The Palestinian Youth and Arab Revolution,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 70

<sup>1327</sup> Ibid 72

<sup>1328</sup> Ibid 73

The way that Syrian legislators divided Palestinian refugees into different categories reveals that the conferring of rights is a sovereign right that can be decoupled from citizenship. The legal implications that could arise for the RTR as a result of naturalizing Palestinians could explain why Qandil argues that Syria has adopted 'the best approach among the Arab countries towards the Palestinian refugee population by neither naturalizing [them] (Jordan), nor depriving them of basic social and civil rights (Lebanon).'<sup>1329</sup> While giving Palestinian refugees equal civil rights without naturalizing them seems like the best approach because it keeps the prospect of return to Israel alive this approach does not offer Palestinian refugees a guaranteed legal status in Syria because there is always a risk that any rights accorded to them can be withdrawn if existing laws or decrees are revised by policymakers. This was practically demonstrated when 'Palestinian refugees started to be framed as a security threat' after the Syrian civil war started in 2011.<sup>1330</sup> Syria's approach can also lead Palestinian refugees to end up in a legal limbo if they are forced to leave its territories. This was demonstrated when the mass movement of Syrian nationals and Palestinian refugees to neighbouring countries<sup>1331</sup> as a result of the civil war, revealed that Palestinian refugees with Palestinian-Syrian documentation faced a protection gap beyond Syria. This became clear when they sought refuge and found themselves denied entry to neighbouring States.<sup>1332</sup> For example, '[a]t the beginning of the conflict in 2011 Jordanian authorities issued visas permitting Palestinian refugees from Syria to enter the country, but in 2012 many began to be turned away at the border or even deported if found in Jordan.'<sup>1333</sup> In 2013 Jordan's Prime Minister Ensour referred to the principle of sovereignty to justify Jordan's policy of non-admittance to Palestinian refugees from Syria. Ensour stated:

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<sup>1329</sup> Magda Qandil, 'The Syrian Revolution and Palestinian Refugees in Syria: Realities and Risks,' in *Palestinian Refugees in the Arab World: Realities and Prospects* Palestine (Aljazeera Centre for Studies 2015) 243

<sup>1330</sup> The Palestinian Return Centre, 'Syria's Palestinian Refugees: An Account of Violence, Precarious Existence and Uncertain Futures' (*The Palestinian Return Centre*, 2018) <<https://prc.org.uk/upload/library/files/SyriasPalestinianRefugeesAccOfViolence.pdf>> accessed 17 March 2021, 14

<sup>1331</sup> As of 2020 'over 438,000 Palestine refugees [remain] inside Syria, and more than 45,200 who are currently reported in Lebanon and Jordan, as well as an estimated 3,000 Egypt and under 1,000 in Gaza.' The Regional Refugee and Resilience Plan, 'Regional Strategic Overview 2021-2022' (*reliefweb*, December 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/RSO2021.pdf>> accessed 17 March 2021, 18

<sup>1332</sup> Human Rights Watch, 'Jordan: Palestinians Escaping Syria Turned Away' (*Human Rights Watch*, 7 August 2014) <<https://www.hrw.org/news/2014/08/07/jordan-palestinians-escaping-syria-turned-away#>> accessed 17 March 2021

<sup>1333</sup> The Palestinian Return Centre, 'Syria's Palestinian Refugees: An Account of Violence, Precarious Existence and Uncertain Futures' (*The Palestinian Return Centre*, 2018) <<https://prc.org.uk/upload/library/files/SyriasPalestinianRefugeesAccOfViolence.pdf>> accessed 17 March 2021, 5

Jordan has made a clear and explicit sovereign decision to not allow the crossing to Jordan by our Palestinian brothers who hold Syrian documents. They should stay in Syria until the end of the crisis. Jordan is not a place to solve Israel's problems... (and) Receiving those [Palestinian] brothers ... would be a prelude to another wave of displacement.<sup>1334</sup>

In 2013 Human Rights Watch also reported that Tarawneh, who was the Head of the Royal Court, and a former Prime Minister informed the agency that Jordan does not want to admit Palestinian refugees from Syria because when the conflict ends in Syria Jordan will not be able to deport them since they are stateless persons. Tarawneh also observed that admitting Palestinian refugees would impact the demography and lead to instability.<sup>1335</sup>

Palestinian refugees from Syria who entered Jordan legally before the non-admittance policy also found themselves facing a protection gap by being denied 'the right to live in the official refugee camps for Syrians and...assistance from other UN agencies... [because they] ...are excluded from the mandate of most international humanitarian agencies responding to the Syrian crisis in Jordan.'<sup>1336</sup> Although UNRWA confirmed in 2021 that 'a total of 45,500 Palestinian refugees from Syria receive...assistance from UNRWA' in Jordan and Lebanon<sup>1337</sup> in both countries Palestinian refugees continue to 'face a difficult and marginalized existence due to their uncertain legal status and limited social protection mechanisms.'<sup>1338</sup>

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<sup>1334</sup> Ibid 6

<sup>1335</sup> Human Rights Watch, 'Jordan: Palestinians Escaping Syria Turned Away' (*Human Rights Watch*, 7 August 2014) <<https://www.hrw.org/news/2014/08/07/jordan-palestinians-escaping-syria-turned-away#>> accessed 17 March 2021

<sup>1336</sup> The Palestinian Return Centre, 'Syria's Palestinian Refugees: An Account of Violence, Precarious Existence and Uncertain Futures' (*The Palestinian Return Centre*, 2018) <<https://prc.org.uk/upload/library/files/SyriasPalestinianRefugeesAccOfViolence.pdf>> accessed 17 March 2021, 11

<sup>1337</sup> UNRWA, 'Syria: 10 years of multiple hardships for Palestine refugees' (*UNRWA*, 15 March 2021) <<https://www.unrwa.org/newsroom/press-releases/syria-10-years-multiple-hardships-palestine-refugees>> accessed 17 March 2021

<sup>1338</sup> The Regional Refugee and Resilience Plan, 'Regional Strategic Overview 2021-2022' (*reliefweb*, December 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/RSO2021.pdf>> accessed 17 March 2021, 18

## Conclusion

Most Palestinian refugees ended up seeking refuge in Jordan, Syria, and Lebanon therefore we examined the legal status of Palestinian refugees in the three countries. This examination furthered the thesis argument by revealing that Arendt's conception of rights, which demonstrated that human rights can be limited by States, explains why despite Jordan, Lebanon and Syria maintaining that Palestinian refugees have a RTR to Israel they have not formulated a uniform approach regarding the legal status of Palestinian refugees in their territories. Instead, each State has formulated its own legal position as defined by its interests. Consequently, we find that in Jordan Palestinian refugees were accorded the Jordanian citizenship so they can work and travel, but they are not considered full or permanent citizens because the working assumption is that when a Palestinian State is established, they will have to choose between remaining Jordanian citizens or becoming Palestinian citizens. In contrast in Syria, Palestinian refugees were not granted the Syrian citizenship but were given equal civil rights to Syrians including the right to work, study and buy property.<sup>1339</sup> While in Lebanon the sectarian political system has been reluctant to naturalize Palestinian refugees or to give them access to civil rights. Despite this, the thesis revealed that the Lebanese Working Group has proposed a similar approach to the one adopted by Syria by resolving that Lebanon should accord civil rights to Palestinian refugees but deny them the right to naturalize so they can maintain their RTR to Israel.

Although Jordan, Lebanon, and Syria have not formulated a common approach regarding the legal status of Palestinian refugees in their territories they maintain that Palestinian refugees have a RTR to Israel and this right should not be replaced with resettlement in host States. This explains why Syria and Lebanon have not naturalized Palestinian refugees and why Jordan maintains that Palestinian refugees who have been naturalized maintain their RTR. Given that, it is useful to examine the nationality laws adopted by members of the LAS to examine whether they have incorporated the recommendation issued in Resolution 1547 which called upon members of the LAS to 'give favourable consideration to the creation of employment opportunities for Palestine refugees residing in their territories, while retaining their Palestinian nationality as a general principle.'<sup>1340</sup>

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<sup>1339</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 207

<sup>1340</sup> Palestine Planning Institute, 'League of Arab States Resolution No. 1547 of 1959' (*Palestine Planning Institute*, 9 March 1959)  
<[http://ppc-plo.ps/ar/print\\_page.php?id=241](http://ppc-plo.ps/ar/print_page.php?id=241)> accessed 22 September 2018

### 7.3. Overview of Nationality provisions in the League of Arab States and the naturalization of Palestinian Refugees

After reviewing the nationality laws of twenty-one out of twenty-one<sup>1341</sup> members of the LAS, only Libya and Iraq added provisions in their nationality laws that explicitly prohibited Palestinian refugees from becoming citizens. This suggests that Resolution 1547 has impacted how some members of the LAS approach the Palestinian refugee problem. Despite this prohibition, both have provisions in their nationality laws that can lead to the naturalization of Palestinian refugees.

In Libya, Section 9 of Law Number (24) for 2010/ 1378 On the Libyan Nationality [Libyan Nationality Law] states '[i]n all cases, it's not possible to grant the Libyan nationality to the Palestinian except the Palestinian' women married to Libyan nationals.<sup>1342</sup> Although Section 9 claims that only a Palestinian woman married to a Libyan citizen can become citizens Section 2 of the Libyan Nationality Law states every person 'born in Libya' is a Libyan.<sup>1343</sup> This means in principle children born to Palestinian refugees in Libya are Libyan citizens. Likewise, one could argue that Section 3 which states that '[e]veryone born in Libya for a Libyan mother and [a] father [who is] ...stateless'<sup>1344</sup> applies to the children of Palestinian refugees because Palestinian fathers are effectively stateless.

Article 6 (II) of The Iraqi Nationality Law of 2006 states that the 'Iraqi nationality shall not be granted to Palestinians as a guarantee to their right of return to their homeland.'<sup>1345</sup> Despite this prohibition Article 11 (1) states that a foreign woman who 'has been married and [has been a] resident within Iraq for five years'<sup>1346</sup> can become an Iraqi citizen. This means a Palestinian woman married to an Iraqi national can become a citizen of Iraq. In principle, Palestinian children born in Iraq to an Iraqi mother can also become Iraqi citizens because Article 3 (a) states '[a] person shall be considered Iraqi if he/ she is born to an Iraqi father or

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<sup>1341</sup> Palestine was not included in the review because the Palestinian National Authority can only issue passports to Palestinians in the West Bank and the Gaza Strip with Israel's approval.

<sup>1342</sup> General People Conference, 'Law Number (24) for 2010/1378 On The Libyan Nationality [Libya], 28 May 2010' (*Refworld*, 28 May 2010)  
<<http://www.refworld.org/docid/4e2d8bf52.html>> accessed 25 September 2018, 3

<sup>1343</sup> *Ibid* 1

<sup>1344</sup> *Ibid* 1

<sup>1345</sup> 'Iraqi Nationality Law [Iraq], Law 26 of 2006, 7 March 2006' (*Refworld*, 7 March 2006)  
<<http://www.refworld.org/docid/4b1e364c2.html>> accessed 25 September 2018, 2

<sup>1346</sup> *Ibid* 3



an Iraqi mother.<sup>1347</sup> Palestinian children born abroad to a Palestinian refugee and an Iraqi mother can also in principle acquire the Iraqi nationality because Article 4 states:

The Minister may consider Iraqi any person born outside Iraq to an Iraqi mother and an unknown or stateless father, if he chooses the Iraqi nationality, within one year from coming of age (reaching the age of maturity), unless he fails to do so, due to difficult circumstances, provided that he is residing within Iraq at the time of application for the Iraqi nationality.<sup>1348</sup>

While Iraq could argue that Article 4 does not apply to Palestinian refugees because the 1945 Charter of the LAS does not consider Palestinians stateless persons, Article 4 can become applicable if the child's father resides in a country that recognises him as a stateless person. Furthermore, if Iraq considers Palestinians foreign nationals or Arab nationals rather than stateless persons, a Palestinian child born in Iraq to a Palestinian father could in principle acquire the Iraqi citizenship based on Article 5 which states:

The Minister may consider Iraqi anyone who was born within Iraq to a non-Iraqi father, who was also born in Iraq, had come of age and had been habitually residing therein at the time of child's birth, provided the child will apply for the Iraqi nationality.<sup>1349</sup>

The relevant provisions that we reviewed in the Libyan Nationality Law and the Iraqi Nationality Law indicate that although both countries have prohibited Palestinians from acquiring their nationalities in both countries Palestinian women married to their nationals and children born in their territories can become citizens.

After reviewing the nationality laws of the remaining nineteen members of the LAS<sup>1350</sup> and Morocco did not have such a provision in their nationality laws. Thus, a Palestinian woman marrying a national from a member of the LAS can be naturalized in all member States. In principle, such a woman would no longer be recognized as a Palestinian national because most members of the LAS reject dual citizenship. Despite this, the nationality laws of most members of the LAS include articles that allow a woman to regain her original nationality in the event of divorce. For such a provision to apply to a Palestinian woman there needs to be

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<sup>1347</sup> Ibid 1

<sup>1348</sup> Ibid 1

<sup>1349</sup> Ibid 1-2

<sup>1350</sup> Republic of Algeria, 'Law No. 1970-86, 15 December 1970, Nationality Law' (*Refworld*, 15 December 1970)

<<http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b8fa1ba4>>  
accessed 25 September 2018

a Palestinian State which has a nationality law that allows a divorced Palestinian woman to be recognized as Palestinian upon divorce from a foreign national. Such a provision would be difficult to add in the case of Palestinian refugees since the Palestinian National Authority [PA] can only issue passports to residents of the West Bank and the Gaza strip.

Our review also found that six out of the twenty-one members of the LAS allow their female nationals to transmit their nationality to their foreign husbands and they are Algeria [2005 amendment],<sup>1351</sup> Comoros [Article 30],<sup>1352</sup> Djibouti, Lebanon [Article 3],<sup>1353</sup> Morocco [2007 amendment]<sup>1354</sup> and Tunisia [Article 21 (2)].<sup>1355</sup> In principle, it should be possible for Palestinian men who marry women from those countries to naturalize but in practice, this is not always possible. For example, although Article 3 of Decree No.15 on Lebanese Nationality of 1925 [Lebanon Nationality Law] states '[a] foreigner who marries a Lebanese woman and has been living in the Lebanese territories for one consecutive year as of the date of this marriage'<sup>1356</sup> can become a Lebanese citizen, Palestinian men married to Lebanese women are not allowed to be naturalized<sup>1357</sup> because Lebanon rejects the naturalization of Palestinian refugees.

After reviewing the nationality laws of twenty-one members of the LAS (excluding Palestine) it was also found that they all have provisions that allow those who reside in their country for a specific number of years to apply for naturalization. For example, aliens residing in Algeria for 7 years can be naturalized [Article 10] along with their minor children [Article 11].<sup>1358</sup> In

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<sup>1351</sup> Ministry of Justice, 'Algeria: Nationality Code (2005) [Algeria], 27 February 2005' (*Refworld*, 27 February 2005) <<http://www.refworld.org/docid/3ae6b4d714.html>> accessed 15 October 2018

<sup>1352</sup> 'Code de la Nationalité Comorienne [Comoros], Loi N° 79-12, 12 December 1979' (*Refworld*, 12 December 1079) <<http://www.refworld.org/docid/4c581c792.html>> accessed 15 October 2018

<sup>1353</sup> High Commissioner of the Republic of France to the countries of Syria, Greater Lebanon, the Alaouite and the Druzes'Djebel, 'Decree No15 on Lebanese Nationality 19 January 1925' (*Refworld*, 19 January 1925) <<http://www.refworld.org/pdfid/44a24c6c4.pdf>> accessed 25 September 2018

<sup>1354</sup> Sarah Touahri 'Morocco's nationality code amended' (*Citizenship Rights in Africa Initiative*, 9 February 2011) <<https://citizenshiprightsafrika.org/moroccos-nationality-code-amended/>> accessed 25 September 2018

<sup>1355</sup> 'Nationality Law' (*Refworld*, 1959) <<http://www.refworld.org/docid/3ae6b4ef1c.html>> accessed 15 October 2018

<sup>1356</sup> High Commissioner of the Republic of France to the countries of Syria, Greater Lebanon, the Alaouite and the Druzes'Djebel, 'Decree No15 on Lebanese Nationality 19 January 1925' (*Refworld*, 19 January 1925) <<http://www.refworld.org/pdfid/44a24c6c4.pdf>> accessed 25 September 2018

<sup>1357</sup> *Ibid* 1

<sup>1358</sup> Republic of Algeria, 'Law No. 1970-86, 15 December 1970, Nationality Law' (*Refworld*, 15 December 1970) <<http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b8fa1ba4>> accessed 25 September 2018

1992 the Canada: Immigration and Refugee Board of Canada asked an Official in the Embassy of Algeria in Ottawa ‘whether a Palestinian who has been working in Algiers for seven or eight years can become an Algerian citizen’ and the official stated that the 1970 legislation ‘is currently applied without modifications.’<sup>1359</sup> In contrast, Palestinian refugees are not allowed to be naturalized in Lebanon even though Article 3 of the nationality law states that any person residing in Lebanon for 5 years can become naturalized.<sup>1360</sup> Likewise, in Syria, although Palestinians fulfil ‘the condition for naturalization [under Citizenship Law Number 276 of 1969], [Palestinians] are not granted citizenship in order to preserve their original nationality.’<sup>1361</sup> Despite this exclusion the Syrian Arab Republic Law No. 260 of 1957 made Palestinians equal to Syrian citizens in terms of rights to education, trade and work including public sector and military services.<sup>1362</sup> This right did not, however, apply to Palestinian refugees who arrived from the Gaza Strip and the West Bank after the 1967 Arab-Israeli war.<sup>1363</sup> Despite supporting the RTR for Palestinian refugees, Syria treated Palestinian refugees with Egyptian travel documents as foreigners and ‘those carrying Jordanian passports as Arab nationals.’<sup>1364</sup> This is striking because this suggests that Syria accepted the naturalization of Palestinian refugees in Jordan.

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<sup>1359</sup> Research Directorate, Immigration and Refugee Board, Canada, ‘Canada: Immigration and Refugee Board of Canada, Algeria: Information on whether a Palestinian who has been working in Algiers for seven or eight years can become an Algerian citizen, 1 April 1992, DZA10650’ (*Refworld*, 1 April 1992) <<http://www.refworld.org/docid/3ae6ac1448.html>> accessed 18 October 2018

See also ‘LBN103848. E’ (*Immigration and Refugee Board of Canada*, n.d.)

<<https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=453652&pls=1>> accessed 18 October 2018

<sup>1360</sup> High Commissioner of the Republic of France to the countries of Syria, Greater Lebanon, the Alaouite and the Druzes’Djebel, ‘Decree No15 on Lebanese Nationality 19 January 1925’ (*Refworld*, 19 January 1925) <<http://www.refworld.org/pdfid/44a24c6c4.pdf>> accessed 25 September 2018

<sup>1361</sup> Asem Khalil quoted in Canada: Immigration and Refugee Board of Canada, ‘Syria: The legal rights and obligations of a Palestinian who has been issued a Syrian travel document, including whether they must report for military service; whether the rights and obligations apply to Palestinians that have resided outside of the country for the majority of their life and only visited it briefly (2009-November 2013)’ (*Refworld*, 22 November 2013)

<<https://www.refworld.org/docid/532024234.html>> accessed 5 March 2021; See Asem Khalil, *Palestinian Refugees in Arab States: A Rights-Based Approach* (European University Institute, Robert Schuman Centre for Advanced Studies 2009) 27

<sup>1362</sup> Canada: Immigration and Refugee Board of Canada, ‘Syria: The legal rights and obligations of a Palestinian who has been issued a Syrian travel document, including whether they must report for military service; whether the rights and obligations apply to Palestinians that have resided outside of the country for the majority of their life and only visited it briefly (2009-November 2013)’ (*Refworld*, 22 November 2013) <<https://www.refworld.org/docid/532024234.html>> accessed 5 March 2021

<sup>1363</sup> Ibid

<sup>1364</sup> Ibid; See Tariq Hammoud, ‘Palestinian Refugees and the Syrian Revolution’ (*Arab Center for Research and Policy Studies*, February 2013)

<[https://www.academia.edu/32699302/Palestinian\\_Refugees\\_and\\_the\\_Syrian\\_Revolution](https://www.academia.edu/32699302/Palestinian_Refugees_and_the_Syrian_Revolution)> accessed 5 March 2021, 3-4

Our examination also revealed that eleven out of twenty-one members of the LAS<sup>1365</sup> have provisions in their nationality laws that allow children born to their female nationals and a stateless father to gain the nationality of their mother. These countries are Algeria [Article 6(3)],<sup>1366</sup> Bahrain [Article 4 (C) of the 1963 Bahraini Citizen Act],<sup>1367</sup> Comoros [Article 1],<sup>1368</sup> Egypt [Article 2 (2)],<sup>1369</sup> Iraq [Article 3 & Article 4],<sup>1370</sup> Jordan [Article 6 (4)],<sup>1371</sup> Libya [Section 3],<sup>1372</sup> Mauritania [Article 8.2],<sup>1373</sup> Morocco [Article 7 (1)],<sup>1374</sup> UAE [UAE Nationality Law (D)],<sup>1375</sup> Yemen [Article 3 (b) and Article 4(a)].<sup>1376</sup> Twelve out of the twenty-one States also allow female nationals married to foreign nationals to transmit their nationality to their children. These countries are Algeria [Article 7 (2)], Bahrain [Royal Order 2011/ Cabinet

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<sup>1365</sup> Djibouti was excluded from this review despite having a provision within its nationality law that allows female citizens married to foreigners to naturalize their children because the author was unable to confirm the validity of this provision as a result of being unable to read the Djibouti citizenship law in its original text [French]. Journal Officiel De La Republique De Djibouti, 'Code de la Nationalité Djiboutienne' (*Refworld*, 24 October 2004) <<https://www.refworld.org/docid/449fe22e4.html>> accessed 3 March 2021

<sup>1366</sup> Republic of Algeria, 'Law No. 1970-86, 15 December 1970, Nationality Law' (*Refworld*, 15 December 1970)

<<http://www.refworld.org/cgi-bin/telex/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b8fa1ba4>> accessed 25 September 2018

<sup>1367</sup> Kingdom of Bahrain, 'Part one: The Citizenship of Bahrain' (*Refworld*, 16 September 1963)

<<https://www.refworld.org/pdfid/3fb9f34f4.pdf>> accessed 3 March 2021, 3

The Bahraini Citizenship Act of 1963, Amended by Law issued on 12th October 1963, and by the Decree No (10) for 1981. 'Article (4): A person shall be deemed a Bahraini national in the following cases: A. If he is born in Bahrain or abroad and his father, at the time of birth, was a Bahraini national. B. If he is born in Bahrain or abroad and his mother, at the time of birth, was a Bahraini national, providing that his father was either unknown or not legally to be related to his father.' Ibid 11

<sup>1368</sup> 'Code de la Nationalité Comorienne [Comoros], Loi N° 79-12, 12 December 1979' (*Refworld*, 12 December 1979) <<https://www.refworld.org/docid/4c581c792.html>> accessed 11 February 2021

<sup>1369</sup> Arab Republic of Egypt, 'Law No. 26 of 1975 Concerning Egyptian Nationality, Official Journal No. 22, 29 May 1975, 29 May 1975' (*Refworld*, 29 May 1975)

<<http://www.refworld.org/docid/3ae6b4e218.html>> accessed 22 October 2018

<sup>1370</sup> 'Iraqi Nationality Law [Iraq], Law 26 of 2006, 7 March 2006' (*Refworld*, 7 March 2006)

<<http://www.refworld.org/docid/4b1e364c2.html>> accessed 25 September 2018

<sup>1371</sup> 'Law No. 6 of 1954 on Nationality (last amended 1987)' (*Refworld*, 1 January 1954)

<<https://www.refworld.org/docid/3ae6b4ea13.html>> accessed 9 February 2021

<sup>1372</sup> General People Conference, 'Law Number (24) for 2010/1378 On the Libyan Nationality [Libya], 28 May 2010' (*Refworld*, 28 May 2010)

<<http://www.refworld.org/docid/4e2d8bf52.html>> accessed 25 September 2018

<sup>1373</sup> The Prime Minister Office, 'Mauritanie : Loi N° 1961-112, Loi portant code de la nationalité mauritanienne [Mauritania], 13 June 1961' (*Refworld*, 13 June 1961)

<<http://www.refworld.org/docid/3ae6b5304.html>> accessed 15 October 2018

<sup>1374</sup> 'Maroc: Dahir n° 1-58-250 du 21 safar 1378 (6 septembre 1958) portant la Code de la nationalité marocaine [Morocco]' (*Refworld*, 6 September 1958)

<<https://www.refworld.org/docid/3ae6b5778.html>> accessed 30 September 2020

\*Superceded by 'Maroc: Code de la nationalité marocaine (2011) [Morocco], Dahir n. 1-58-250 du 21 safar 1378' (*Refworld*, 6 September 1958)

<<https://www.refworld.org/docid/501fc9822.html>> accessed 30 September 2020

<sup>1375</sup> 'UAE Nationality' (*The Official Portal of the UAE Government*, 1975)

<<https://www.government.ae/en/information-and-services/passports-and-traveling/uae-nationality>> accessed 12 October 2018

<sup>1376</sup> 'Law No. 6 of 1990 on Yemeni Nationality, 26 August 1990' (*Refworld*, 26 August 1990)

<<http://www.refworld.org/docid/3ae6b57b10.html>> accessed 22 October 2018

Decision 2014],<sup>1377</sup> Comoros [Article 1],<sup>1378</sup> Egypt [Article 4 (Third)],<sup>1379</sup> Iraq [possible under Article 3],<sup>1380</sup> Libya [possible under Section 2 and Section 11],<sup>1381</sup> Mauritania [Article 8.3 and Article 9.1],<sup>1382</sup> Morocco [Article 9.2],<sup>1383</sup> Saudi Arabia [possible under Article 8],<sup>1384</sup> UAE [possible under UAE Nationality Law (D)],<sup>1385</sup> and Yemen [Article 4 (C)].<sup>1386</sup> Ten out of twenty-one States also have provisions that allow a mother to transmit her nationality to her children regardless of the father's legal status and they are Algeria [Ordinance No 05-01],<sup>1387</sup> Comoros [Article 1],<sup>1388</sup> Egypt [Article 1(1) of Law No.154 for the Year 2004],<sup>1389</sup> Iraq [Article 3],<sup>1390</sup> Kuwait [Article 5.2],<sup>1391</sup> Libya [Section 2],<sup>1392</sup> Mauritania [possible under Article 9],<sup>1393</sup>

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<sup>1377</sup> Hamad Bin Isa Al Khalifa, 'Royal Order No. 28 of 2011, 29 June 2011' (*Peace Agreements*, 29 June 2011) <<https://www.peaceagreements.org/viewmasterdocument/1414>> accessed 30 March 2021

<sup>1378</sup> 'Code de la Nationalité Comorienne [Comoros], Loi N° 79-12, 12 December 1979' (*Refworld*, 12 December 1979) <<http://www.refworld.org/docid/4c581c792.html>> accessed 15 October 2018

<sup>1379</sup> Arab Republic of Egypt, 'Law No. 26 of 1975 Concerning Egyptian Nationality, Official Journal No. 22, 29 May 1975' (*Refworld*, 29 May 1975) <<http://www.refworld.org/docid/3ae6b4e218.html>> accessed 22 October 2018

<sup>1380</sup> 'Iraqi Nationality Law [Iraq], Law 26 of 2006, 7 March 2006' (*Refworld*, 7 March 2006) <<http://www.refworld.org/docid/4b1e364c2.html>> accessed 25 September 2018

<sup>1381</sup> General People Conference, 'Law Number (24) for 2010/1378 On the Libyan Nationality [Libya], 28 May 2010' (*Refworld*, 28 May 2010) <<http://www.refworld.org/docid/4e2d8bf52.html>> accessed 25 September 2018

<sup>1382</sup> 'Mauritanie : Loi N° 1961-112, Loi portant code de la nationalité mauritanienne [Mauritania], 13 June 1961' (*Refworld*, 13 June 1961) <<http://www.refworld.org/docid/3ae6b5304.html>> accessed 15 October 2018

<sup>1383</sup> 'Maroc: Dahir n° 1-58-250 du 21 safar 1378 (6 septembre 1958) portant la Code de la nationalité marocaine [Morocco]' (*Refworld*, 6 September 1958)

<<https://www.refworld.org/docid/3ae6b5778.html>> accessed 30 September 2020

\*Superceded by Maroc: Code de la nationalité marocaine (2011) [Morocco], Dahir n. 1-58-250 du 21 safar 1378 (*Refworld*, 6 September 1958) <<https://www.refworld.org/docid/501fc9822.html>> accessed 30 September 2020

<sup>1384</sup> Interior Ministry, 'Saudi Arabia: Saudi Arabian Nationality Law' (*Gulf Labour Markets and Migration*, 25 January 1954)

<[http://gulfmigration.org/database/legal\\_module/Saudi%20Arabi/National%20Legal%20Framework/Citizenship%20and%20Statelessness/1.1%20Nationality%20Law\\_AR.pdf](http://gulfmigration.org/database/legal_module/Saudi%20Arabi/National%20Legal%20Framework/Citizenship%20and%20Statelessness/1.1%20Nationality%20Law_AR.pdf)> accessed 15 October 2018

<sup>1385</sup> 'UAE Nationality' (*The Official Portal of the UAE Government*, 1975)

<<https://www.government.ae/en/information-and-services/passports-and-traveling/uae-nationality>> accessed 12 October 2018

<sup>1386</sup> 'Law No. 6 of 1990 on Yemeni Nationality, 26 August 1990' (*Refworld*, 26 August 1990)

<<http://www.refworld.org/docid/3ae6b57b10.html>> accessed 22 October 2018

<sup>1387</sup> Ministry of Justice, 'Algeria : Nationality Code (2005) [Algeria], 27 Feb 2005' (*Refworld*, 27 February 2005)

<<http://www.refworld.org/docid/3ae6b4d714.html>> accessed 15 October 2018

<sup>1388</sup> 'Code de la Nationalité Comorienne [Comoros], Loi N° 79-12, 12 December 1979' (*Refworld*, 12 December 1979) <<http://www.refworld.org/docid/4c581c792.html>> accessed 15 October 2018

<sup>1389</sup> 'Egypt Law No.154 of 2004 Amending Some Provisions of Law No.26 of 1975 Concerning Egyptian Nationality' (*Citizenship Rights in Africa Initiative*, 14 July 2004)

<<http://citizenshiprightsafrika.org/egypt-law-no-154-of-2004-amending-some-provisions-of-law-no-26-of-1975-concerning-egyptian-nationality/>> accessed 15 October 2018

<sup>1390</sup> 'Iraqi Nationality Law [Iraq], Law 26 of 2006, 7 March 2006' (*Refworld*, 7 March 2006)

<<http://www.refworld.org/docid/4b1e364c2.html>> accessed 25 September 2018

<sup>1391</sup> 'Nationality Law' (*Refworld*, 1959) <<http://www.refworld.org/docid/3ae6b4ef1c.html>> accessed 22 September 2018

Oman [Article 18],<sup>1394</sup> Sudan [chapter 2 Article 3],<sup>1395</sup> Tunisia [Article 12],<sup>1396</sup> UAE [UAE Nationality by Law (D)].<sup>1397</sup> While four out of the twenty-one states also have provisions that allow their nationality to be conferred on children born to parents without nationality and they are Mauritania [Article 9],<sup>1398</sup> Syria [Article 3 (C)]<sup>1399</sup> and Tunisia [Part 1.2 Article 8].<sup>1400</sup>

While in principle over half of the members of the LAS have provisions that allow women to transmit their nationality to their children in some countries such a transmission can only take place through special decrees or ordinances. For example, in Egypt, Article 2 (1) of Egypt's Nationality Law states '[t]hose who were born in Egypt, of an Egyptian mother and a father...who is stateless' shall be considered Egyptian<sup>1401</sup> and Article 1 (1) of Law No.154 for the Year 2004 stated '[a]nyone born of an Egyptian father, or an Egyptian mother shall be Egyptian.'<sup>1402</sup> Despite this Egyptian women married to Palestinian men were also only able to transmit their nationality to their children after a special Decree on 2 May 2011.<sup>1403</sup> A special decree is not required in all members of the LAS. For example, in Morocco, the

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<sup>1392</sup> 'Law Number (24) for 2010/1378 On the Libyan Nationality [Libya], 28 May 2010' (*Refworld*, 28 May 2010) <<http://www.refworld.org/docid/4e2d8bf52.html>> accessed 25 September 2018, 1

<sup>1393</sup> 'Mauritanie : Loi N° 1961-112, Loi portant code de la nationalité mauritanienne [Mauritania], 13 June 1961' (*Refworld*, 13 June 1961) <<http://www.refworld.org/docid/3ae6b5304.html>> accessed 15 October 2018

<sup>1394</sup> 'Oman: Nationality Law [Oman], Royal Decree No. 38/2014, 2014' (*Refworld*, 13 June 2014) <<http://www.refworld.org/docid/542a75ea4.html>> accessed 15 October 2018

<sup>1395</sup> 'The Sudanese Nationality Act 1994 and Sudanese Nationality Act (Amendment) 2011 (English Translation)' (*Refworld*, 17 May 1994) <<http://www.refworld.org/pdfid/502cc1b92.pdf>> accessed 15 October 2018

<sup>1396</sup> Part 1 which replaced Part 6 in 2010

Ministry of Justice, 'Tunisia Nationality Law' (*Ministry of Justice*, 1958)

<<https://www.justice.gov.tn/index.php?id=319>> accessed 15 Oct 2018

<sup>1397</sup> 'UAE Nationality' (*The Official Portal of the UAE Government*, 1975)

<<https://www.government.ae/en/information-and-services/passports-and-traveling/uae-nationality>> accessed 12 Oct 2018 Updated 20 AUGUST 2020

<sup>1398</sup> 'Mauritanie : Loi N° 1961-112, Loi portant code de la nationalité mauritanienne [Mauritania], 13 June 1961' (*Refworld*, 13 June 1961) <<http://www.refworld.org/docid/3ae6b5304.html>> accessed 15 October 2018

<sup>1399</sup> Ministry of Interior, 'Legislative Decree 267' (*Refworld*, 24 November 1969)

<<http://www.refworld.org/pdfid/4d81e7b12.pdf>> accessed 15 October 2018

<sup>1400</sup> 'Nationality Law' (*Refworld*, 1959) <<http://www.refworld.org/docid/3ae6b4ef1c.html>> accessed 15 October 2018

<sup>1401</sup> Arab Republic of Egypt, 'Law No. 26 of 1975 Concerning Egyptian Nationality, Official Journal No. 22, 29 May 1975' (*Refworld*, 29 May 1975) <<http://www.refworld.org/docid/3ae6b4e218.html>> accessed 27 September 2018

<sup>1402</sup> Ministry of Interior, 'Decree No. 12025 of the Year 2004 Concerning Certain Provisions Enforcing Law No. 154 of the Year 2004 on Amendment of Certain Provisions of Law No. 26 of the Year 1975 Concerning the Egyptian Nationality [Egypt], 12025, 25 July 2004' (*Refworld*, 25 July 2004)

<<http://www.refworld.org/docid/432aaab74.html>> accessed 25 September 2018

<sup>1403</sup> United Nations, 'Convention on the Rights of the Child' (*United Nations Treaty Collection*, 20 November 1989)

<[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en)> accessed 15 October 2018

children of Palestinian men married to Moroccan women were able to become Moroccan citizens after Morocco amended its nationality law in 2007.<sup>1404</sup>

## Conclusion

In 1959 Arab League Resolution 1547 called upon members States to preserve the Palestinian nationality of Palestinian refugees by not naturalizing them. In contrast, UNHCR has called upon members of the LAS to adopt international conventions that require signatory States to end the plight of refugees and stateless persons by naturalizing them in host States. Therefore, it was necessary to examine the nationality laws of twenty-one members of the LAS to find out whether they have incorporated nationality provisions that preserve the Palestinian nationality of Palestinian refugees. This examination furthered our thesis argument by revealing that not all States that support the RTR for Palestinian refugees have translated their commitment into law. This was evident after we found that only Libya and Iraq had added provisions in their nationality laws that explicitly prohibited Palestinian refugees from becoming citizens and that even such States have loopholes in their nationality laws that can lead to the naturalization of Palestinian refugees. We also found that all members of the LAS have provisions within their nationality laws that allow non-citizens to naturalize based on marriage, residence, or birth. This furthers our thesis argument by revealing that legal provisions that support naturalization do not protect the RTR for Palestinian refugees because if they are naturalized, they will cease to be refugees and therefore will no longer be able to argue that they have a RTR to Israel. As of 28 March 2021, Palestinians, who fulfil the eligibility criteria for such naturalization based on existing provisions are excluded on political grounds. Despite this, if a political shift takes place in members of the LAS which allows existing nationality provisions to be applied to Palestinian refugees, they will cease to be Palestinian refugees and lose their RTR to Israel.<sup>1405</sup>

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<sup>1404</sup> Bronwen Manby, 'Citizenship Law in Africa A Comparative Study' (*Open Society Foundation*, 29 January 2016)

<<https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf>> accessed 26 September 2018, 52

<sup>1405</sup> Palestinian refugees who refuse to naturalize to preserve their right to return to Israel under Resolution 194 will face limitations in terms of accessing certain rights in host States because their treatment will rest on the policies of host States. It's also important to note that if Israel and the Palestinian leadership reach a settlement that involves resettling Palestinian refugees in host States or third States the UNGA will end UNRWA's mandate on the basis that a just and lasting solution to the Palestinian refugee problem has materializes. Palestinian refugees who refuse to avail themselves of the solutions available to them under such a settlement will face a legal limbo because in addition to no longer falling under UNRWA's mandate they may be denied ipso fact refugee status under Article 1D paragraph 2 of the 1951 Convention Relating to the Status of Refugees because

Because such a political shift has not yet materialized the next section will examine how the 1965 Protocol on the Treatment of Palestinian Refugees has impacted the legal status of Palestinian refugees and their RTR in Arab host States.

#### 7.4. The 1965 Protocol on the Treatment of Palestinian Refugees

In 1965 the LAS issued the 1965 Protocol on the Treatment of Palestinian Refugees [1965 Protocol]<sup>1406</sup> which recommended treating Palestinian refugees equally to citizens of receiving Arab countries.<sup>1407</sup> Nineteen out of twenty-two members of the LAS signed the 1965 Protocol.<sup>1408</sup> Morocco, Saudi Arabia and Tunisia did not approve the 1965 Protocol.<sup>1409</sup> Three out of the nineteen signatory States added a reservation to Article 1<sup>1410</sup> and they are

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States can argue that the position of Palestinian refugees has been settled in accordance with relevant resolutions adopted by the UNGA. United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D Paragraph 2

<sup>1406</sup> League of Arab States, 'Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")' (Refworld, 11 September 1965) <<http://www.refworld.org/docid/460a2b252.html>> accessed 20 October 2018

<sup>1407</sup> '(1) Whilst retaining their Palestinian nationality, Palestinians currently residing in... [a member state] ... have the right of employment on par with its citizens.

(2) Palestinians residing [in a member state] ... have the right to leave and return to this state.

(3) Palestinians residing in other Arab states have the right to enter... [the territory of another member 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.

(4) Palestinians who are at the moment in ... [a members 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.

(5) Bearers of these travel documents residing in [member] states receive the same treatment as all other... state citizens, regarding visa, and residency applications.' League of Arab States, 'Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")' (Refworld, 11 September 1965) <<http://www.refworld.org/docid/460a2b252.html>> accessed 20 October 2018

<sup>1408</sup> Algerian, Bahrain, Djibouti, Egypt, Jordan, Iraq, Kuwait, Kingdom of Libya, Lebanon, Mauritania, Oman, Palestine, Qatar, Somalia, Sudan, Syria, UAE, and Yemen.

<sup>1409</sup> League of Arab States, 'Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")' (Refworld, 11 September 1965) <<http://www.refworld.org/docid/460a2b252.html>> accessed 20 October 2018

\*If implemented Palestinian refugees who should to be recognized as ipso refugees under Article 1D of the 1951 Convention if UNRWA can no longer assist them may be denied refugee status on the basis of Article 1E of the 1951 Convention which states '[t]his Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>1410</sup> Kuwait reserved the right to interpret Article 1 as excluding the right of 'private business' work on part with Kuwaiti citizens. Libya reserved that 'Palestinian citizens residing in Libya' should be treated equally to 'Arab citizens residing in Libya' rather than Libyan nationals. League of Arab States, 'Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")' (Refworld, 11 September 1965) <<http://www.refworld.org/docid/460a2b252.html>> accessed 20 October 2018



Kuwait, Libya, and Lebanon. Lebanon also added a reservation to Articles 2 and 3.<sup>1411</sup> The reservations made meant that Palestinian refugees continued to be treated as foreigners in the three countries while in Lebanon Palestinian refugees continued to be denied civil rights. The LAS tried to improve the situation of Palestinian refugees in Lebanon by supporting the 1969 Cairo Agreement between the Palestinian Liberation Organization [PLO] and Lebanon which gave Palestinians in Lebanon the right to free movement and the right to work. This agreement failed to improve the situation because Lebanon did not incorporate the agreed rights in its domestic legislation<sup>1412</sup> and the Lebanese parliament terminated the agreement in 1987.<sup>1413</sup> By 1991 the LAS admitted that the protocol could not be implemented because the status of Palestinian refugees is regulated by different demographic, political and economic considerations.<sup>1414</sup> The lack of uniformity in the treatment of Palestinian refugees was cemented in 1991 when the LAS issued Resolution 5093 which stated that 'Palestinians should be treated under the national criteria and legislation that the host country deems appropriate and in accordance with the provisions and applicable in law in each country.'<sup>1415</sup> In Resolution 5093 the LAS acknowledged that sovereign States have a right to determine what rights to accord to individuals within their territories.<sup>1416</sup>

So far, this chapter has revealed how certain nationality provisions adopted by members of the LAS can possibly impact the legal status of Palestinian refugees and their RTR. With this as background, the next section will put the thesis findings in the context of asylum policy in

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<sup>1411</sup> 'Article One: Palestinians residing at the moment in Lebanon are granted the right of employment, together with the right of keeping their Palestinian nationality, in accordance with prevailing social and economic conditions in the Republic of Lebanon.

Article Two: that the phrase: "on equal terms with the Lebanese citizens and in accordance with the laws and regulations in operation" be added.

Article Three: that the phrases "(whenever their interests demand it)" and "allowing Palestinians into Lebanon is conditional upon their obtaining an entry visa issued by the concerned Lebanese authorities" be added.' League of Arab States, 'Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")' (*Refworld*, 11 September 1965)

<<http://www.refworld.org/docid/460a2b252.html>> accessed 20 October 2018

<sup>1412</sup> Sami Hamoud, 'ملحوظات على القرارات العربية المتعلقة باللاجئين والقضية الفلسطينية' [Comments on Arab League Resolutions regarding Palestinian Refugees and Palestine-Translation of Arabic title] (*Palestinian Refugee Network in Lebanon*, n.d.) <<http://laji-net.net/arabic/default.asp?contentID=17463>> accessed 23 September 2018

<sup>1413</sup> 'The Cairo Agreement' (*UNRWA*, 2 November 1969)

<<https://www.unrwa.org/content/cairo-agreement>> accessed 18 October 2018

<sup>1414</sup> Ibid 222

<sup>1415</sup> Ibrahim Al- Ali, 'The Palestinian Youth and Arab Revolution,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 77

<sup>1416</sup> This acknowledgement supports Arendt's conception of rights, which identified the possession of nationality as a pre-condition for accessing human rights including civil, political, and social rights. According to Arendt human nature does not turn humans into bearers of political rights therefore, she concludes that equality is not a 'universally valid principle' instead, it is a 'political concept' because individuals do not possess rights but acquire them through state membership. See chapter 2

the LAS and the international refugee framework as defined by UNHCR and regional approaches. This examination is important because developments in asylum law can impact the development of international law and the realities and prospects of Palestinian refugees.

## 7.5. Asylum Policy in the League of Arab States

The legal status of Palestinian refugees in most members of the LAS is determined by national immigration laws because there is an absence of national asylum legislation. This resulted in Palestinian refugees lacking residency rights even in States that signed the 1965 Protocol.<sup>1417</sup> The legal status of Palestinian refugees and their rights has also been subject to abrupt changes.<sup>1418</sup> For example, in Egypt, '[b]etween 1960 and 1967, following Decision No. 28 (1960) Egypt issued travel documents to Palestinians' and considered Palestinian refugees permanent residents with civil rights.<sup>1419</sup> After Al Sebaee<sup>1420</sup> was allegedly assassinated in Cyprus<sup>1421</sup> by a Palestinian faction in 1978<sup>1422</sup> Egypt 'decreed that all regulations treating Palestinians as nationals should be annulled.'<sup>1423</sup> Meanwhile, in 1995 over 30,000 Palestinians were deported by Libya because it opposed the PLO's decision to sign the Declaration of Principles [DOP] with Israel. Libya deported Palestinians to demonstrate that the Palestinian refugee problem was not solved and that the PLO had no

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<sup>1417</sup> For example, in Bahrain, Kuwait, Oman, Qatar and the UAE [signatory states] and Saudi Arabia [a non-signatory state] Palestinian refugees are treated as foreign workers and can only reside in those countries if they have an employment contract. Upon the termination of their work contracts, Palestinians are required to return to their first country of refugeehood which issued them a travel document or citizenship. Sami Hamoud, 'ملحوظات على القرارات العربية المتعلقة باللاجئين والقضية الفلسطينية' [Comments on Arab League Resolutions regarding Palestinian Refugees and Palestine-Translation of Arabic title] (*Palestinian Refugee Network in Lebanon*, n.d.)

<<http://laji-net.net/arabic/default.asp?contentID=17463>> accessed 23 September 2018

<sup>1418</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 19-20

<sup>1419</sup> Ibid 19-20

<sup>1420</sup> Yousef Al Sebaee, Egypt's Minister of Culture.

<sup>1421</sup> Sami Hamoud, 'ملحوظات على القرارات العربية المتعلقة باللاجئين والقضية الفلسطينية' [Comments on Arab League Resolutions regarding Palestinian Refugees and Palestine-Translation of Arabic title] (*Palestinian Refugee Network in Lebanon*, n.d.)

<<http://laji-net.net/arabic/default.asp?contentID=17463>> accessed 23 September 2018

<sup>1422</sup> Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993* (Oxford University Press 1997) 425

<sup>1423</sup> Oroub EL Abed (2003) quoted in Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 19-20

right to determine their residency rights in Libya.<sup>1424</sup> Deported Palestinians found themselves stuck between the Libyan-Egyptian border until 1998 because Egypt refused to admit them 'without valid Egyptian documents.'<sup>1425</sup> In 2002 Libya also threatened to expel Palestinian refugees because it opposed the Arab Peace Initiative which declared that members of the LAS are willing to normalize relations with Israel if the latter withdrew from territories it occupied in 1967.<sup>1426</sup> These historic episodes prove that the 1965 Protocol failed to protect Palestinian refugees and support Bitar's observation that 'expulsion from countries of first, second, or even third refuge' leave 'individuals who are both refugees and stateless' with limited options.<sup>1427</sup> It is argued that the 1965 Protocol failed to achieve its objective because signatory States were not required to incorporate the agreement into their domestic legislation. Moreover, Arab League Resolution 5093 cemented the legal vulnerability of Palestinian refugees by resolving that the treatment of Palestinian refugees should be determined by the national criteria and legislation deemed appropriate by host countries. Consequently, Resolution 5093 created a lack of regional protection for Palestinian refugees. With this as a background, the next chapter examines how UNHCR's advocacy has led members of the LAS to accede to international conventions that can lead to the naturalization of Palestinian refugees.

## 7.6. The UNHCR and the League of Arab States

UNHCR plays a key role 'in the development of international refugee law.'<sup>1428</sup> This role is accorded to the agency in Article 35 of the 1951 Convention Relating to the Status of Refugees [1951 Convention] which states, 'Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . and shall in particular

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<sup>1424</sup> Reuters, 'Libya's Leader Urges Other Arab Countries to Expel Palestinians' (*The New York Times*, 5 October 1995)

<<https://www.nytimes.com/1995/10/05/world/libya-s-leader-urges-other-arab-countries-to-expel-palestinians.html>> accessed 3 March 2021

<sup>1425</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 21

<sup>1426</sup> Yehudit Ronen, 'Libya's Qadhafi and the Israeli-Palestinian Conflict, 1969-2002' (2004) 40 (1) *Middle Eastern Studies* <<https://doi.org/10.1080/00263200412331301907>> accessed 23 September 2018

<sup>1427</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 7

<sup>1428</sup> H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> ed, Ashgate 2010) p.xi

facilitate its duty of supervising the application of the provisions.<sup>1429</sup> The agency is present in all State parties to the LAS except the occupied Palestinian territories (Gaza, West Bank and East Jerusalem). The agency is also responsible for Refugee Status Determination [RSD] in most members of the LAS. To date UNHCR has signed a Memorandum of Understanding [MOU] with Egypt [1954],<sup>1430</sup> Saudi Arabia [1993],<sup>1431</sup> Jordan [1998],<sup>1432</sup> Lebanon [2003],<sup>1433</sup> Iraq [2016]<sup>1434</sup> and Djibouti [2017].<sup>1435</sup> In 2017, UNHCR also signed an MOU with the LAS.<sup>1436</sup> The agency also signed a Cooperation Agreement with Tunisia in 2011.<sup>1437</sup>

UNHCR plays a key role in the expansion of international refugee law by calling upon States to accede to relevant international conventions and signatory States to fulfil their international obligations towards refugees. The agency encourages all States to reform their migration and refugee legislation to integrate refugees.<sup>1438</sup> Such changes are considered necessary because international treaties remain dead letter law if they are not incorporated and implemented through domestic laws.<sup>1439</sup>

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<sup>1429</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10> > accessed 17 February 2017, Article 35

<sup>1430</sup> UNHCR Egypt, 'What we do: The Government of Egypt authorized UNHCR's operation in the country in 1954' (UNHCR, 1954) <<https://www.unhcr.org/eg/what-we-do>> accessed 1 January 2020

<sup>1431</sup> UNHCR, 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights. Compilation Report - Universal Periodic Review: The Kingdom of Saudi Arabia' (Refworld, March 2013)

<<https://www.refworld.org/pdfid/5135c0902.pdf>> accessed 22 September 2017, 1

<sup>1432</sup> UNHCR, 'UNHCR Global Appeal 2004' (UNHCR, 31 December 2003)

<<https://www.unhcr.org/uk/publications/fundraising/4a0bcb826/unhcr-global-appeal-2004.html>> accessed 22 September 2017, 164

<sup>1433</sup> Ibid 165

<sup>1434</sup> Ibid 165

<sup>1435</sup> UNHCR, 'Fact Sheet Djibouti' (UNHCR, 2017)

<[http://reporting.unhcr.org/sites/default/files/UNHCR%20Djibouti%20Fact%20Sheet%20-%20October%202017%20%5BENG%5D\\_0.pdf](http://reporting.unhcr.org/sites/default/files/UNHCR%20Djibouti%20Fact%20Sheet%20-%20October%202017%20%5BENG%5D_0.pdf)> accessed 28 August 2017, 2

<sup>1436</sup> UNHCR, 'UNHCR and League of Arab States sign agreement to address refugee challenges in the Arab region' (UNHCR, 22 September 2017)

<<https://www.unhcr.org/uk/news/press/2017/9/59c4d7024/unhcr-league-arab-states-sign-agreement-address-refugee-challenges-arab.html>> accessed 22 September 2017

<sup>1437</sup> UNHCR, 'Tunisia Operational Highlights' (UNHCR, 2011)

<<https://www.unhcr.org/4fc880ad0.pdf>> accessed 22 September 2017

<sup>1438</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 5

The UNGA also calls upon the UNHCR to 'promote, where relevant, regional initiatives for refugee protection and durable solutions, and to ensure that regional standards which are developed conform fully with the universally recognized standards.' Executive Committee of the High Commissioner's Programme, 'General Conclusion on International Protection No. 81 (XLVIII) – 1997' (UNHCR, 17 October 1997)

<<https://www.unhcr.org/uk/excom/exconc/3ae68c690/general-conclusion-international-protection.html>> accessed 30 September 2020

<sup>1439</sup> 'Most of the legal and social disabilities suffered by refugees can only be overcome...by changes in domestic law and in administrative practice—in order that refugees to be accorded like treatment to that given other classes of persons within the state in question.' Corrie Lewis, 'UNHCR's Contribution

UNHCR encourages States to change their approach to refugees and stateless persons by reforming their existing nationality laws and acceding to international conventions that aim to expand protection for asylum seekers, refugees, and stateless persons. These conventions support the naturalization of refugees and stateless persons as a solution to their situation where they are unable to return to their former country. The agency also collaborates with the UN High Commissioner for Human Rights and other UN bodies to influence the development of domestic law within states<sup>1440</sup> to ensure 'protection principles are effectively integrated into policy planning and implementation.'<sup>1441</sup> After reviewing all the country reports submitted by UNHCR to the Human Rights Committee it should be noted that UNHCR repeatedly calls upon members of the LAS to accede to the 1951 Conventions and the 1967 Protocol by inserting the following paragraph in all its submissions:

Accession to the 1951 Refugee Convention and establishment of a national legal framework would provide a clearer basis for the Government...to provide refugees with international protection. This would formally recognize ... solidarity towards refugees and underline the importance attached by Jordan to cooperate with the international community in efforts to finding solutions for refugees. It would also allow the Government to deal with issues related to asylum in a structured manner, thus complementing...obligations under international human rights instruments, as well as provisions in its Constitution.<sup>1442</sup>

As of 2021, nine out of twenty-one members of the LAS [excluding Palestine] have signed the 1951 Convention and the 1967 Protocol and they are Algeria, Djibouti, Egypt, Mauritania, Morocco, Somalia, Sudan, Tunisia, and Yemen.<sup>1443</sup> These countries do not host UNRWA, therefore, Palestinian refugees should in principle fall within the scope of the 1951 Convention and UNHCR's mandate. The remaining thirteen States are not State parties to the 1951 Convention.<sup>1444</sup> Four States out of the thirteen State parties that have not signed

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to the Development of International Refugee Law: Its foundation and Evolution' (2005), in H  l  ne Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 140

<sup>1440</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 5

<sup>1441</sup> Ibid 5

<sup>1442</sup> UNHCR, 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights Compilation Report - Universal Periodic Review: JORDAN' (*Refworld*, March 2013) <<http://www.refworld.org/pdfid/513d90172.pdf>> accessed 25 February 2017, 5

<sup>1443</sup> United Nations, 'Convention Relating to the Status of Refugees' (*United Nations Treaty Collection*, 28 July 1951)

<[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en)> accessed 25 February 2017

<sup>1444</sup> Ibid

the 1951 Convention and the 1967 Protocol host UNRWA and they are Jordan, Lebanon, Syria, and the PA.<sup>1445</sup> The remaining nine States do not host UNRWA, and they are Bahrain, Comoros, Iraq, Kuwait, Libya, Oman, Qatar, Saudi Arabia and the UAE. Although these countries are not bound by the 1951 Convention, State parties that have signed certain regional and international Conventions could become bound by the 1951 Convention. For example, eight<sup>1446</sup> out of the twenty-two members of the LAS have signed the 1969 Convention Governing the Specific Aspects of Refugee Problems [1969 OAU].<sup>1447</sup> These countries are Algeria, Comoros, Djibouti, Egypt, Libya, Somalia, The Republic of Sudan, and Tunisia. According to UNHCR:

[T]he OAU Convention and the Cartagena Declaration<sup>1448</sup> broaden the concept of the refugee enshrined in the 1951 Convention... and its 1967 Protocol. They resulted from perception and an experience in Africa and Latin America that there was a need to complement the 1951 Convention, as modified by the 1967 Protocol, in order to provide adequate responses to new dimensions of mass displacements of persons in need of international protection and assistance.<sup>1449</sup>

The agency has also observed that '[f]or Africa, the 1951...Convention... [and the] 1967 Protocol and the OAU Convention of 1969 must be regarded as forming a whole.'<sup>1450</sup> This means countries that have not signed the 1951 Convention and the 1967 Protocol have

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<sup>1445</sup> UNRWA, 'Consolidated Eligibility and Registration Instruction' (UNRWA, 1 January 2009) <<https://www.unrwa.org/userfiles/2010011995652.pdf>> accessed 25 February 2017, 30

<sup>1446</sup> Algeria, Comoros, Djibouti, Egypt, Libya, Somalia, The Republic of Sudan, Tunisia Organization of African Unity, 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (UNHCR, 11 September 1969)

<<https://www.unhcr.org/uk/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html>> accessed 13 October 2017, 10

<sup>1447</sup> Ibid 9

<sup>1448</sup> Cartagena Declaration adopted by the Organization of American States.

<sup>1449</sup> UNHCR, 'Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group) EC/1992/SCP/CRP.6' (UNHCR, 6 April 1992)

<<http://www.unhcr.org/uk/excom/scip/3ae68cd214/persons-covered-oau-convention-governing-specific-aspects-refugee-problems.html>> accessed 14 October 2017

<sup>1450</sup> I. Persons Covered By The OAU Convention

#### A. Introduction

'1. For Africa, the 1951 United Nations Convention relating to the Status of Refugees, its 1967 Protocol and the OAU Convention of 1969 must be regarded as forming a whole. The OAU Convention itself is a humanitarian response to the individual as well as the mass character of the refugee problem in Africa. It is a collective undertaking by the Member States of the OAU to receive and protect refugees in accordance with their respective national legislations. Member States undertake to apply the Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group of political opinions.' Ibid

accepted them by signing the 1969 OAU Convention.<sup>1451</sup> This interpretation applies to Libya which is party to the 1969 OAU Convention.

UNHCR has a responsibility under its mandate to prevent and reduce statelessness.<sup>1452</sup> Therefore, the agency encourages States to accede to the 1954 Convention Relating to the Status of Stateless Persons [1954 Convention]<sup>1453</sup> and the 1961 Convention on the Reduction of Statelessness [1961 Convention].<sup>1454</sup> The 1954 Convention calls upon States in Article 32 to change their nationality provisions to facilitate naturalization<sup>1455</sup> and 'the 1961 Convention aims to prevent and reduce statelessness by establishing an international framework that ensures that every person has a right to a nationality.'<sup>1456</sup>

After reviewing all the reports submitted by UNHCR to the High Commissioner for Human Rights it was found that UNHCR repeatedly encourages members of the League of Arab States to accede to the two stateless conventions by inserting the following paragraph:

Accession to the Statelessness Conventions would establish a framework to prevent and reduce statelessness and avoid the detrimental effects of statelessness on individuals and society by ensuring minimum standards of treatment for stateless persons.<sup>1457</sup>

UNHCR submissions also distinguish the aims of each of the statelessness Conventions in the following terms:

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<sup>1451</sup> The 1969 OAU was the first regional solution to try to solve the refugee problem in a regional context. The OAU was followed by the 1984 Cartagena Declaration in Latin America. The Cartagena Declaration in Latin America recognizes victims of violence and general conflict as refugees and focuses on voluntary return instead of local integration. H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) xiii-xiv

<sup>1452</sup> UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2018, 8 March 2018' (*Refworld*, 8 March 2018) <<https://www.refworld.org/docid/5aa10fd94.html>> accessed 15 October 2017, 2

<sup>1453</sup> United Nations, 'Convention Relating to the Status of Stateless Persons' (*UNHCR*, 20 September 1954) <<http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-statusstateless-persons.html>> accessed 12 April 2017

<sup>1454</sup> United Nations, 'Convention on the Reduction of Statelessness 30 August 1961' (*Refworld*, 30 August 1961) <<https://www.refworld.org/docid/3ae6b39620.html>> accessed 2 November 2017

<sup>1455</sup> United Nations, 'Chapter V Refugees and Stateless Persons: Convention Relating to the Status of Stateless Persons' (*United Nations Treaty Collection*, 28 September 1954) <[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en)> accessed 15 October 2017, Article 32

<sup>1456</sup> UNHCR, 'UN Conventions on Statelessness' (UNHCR, n.d.) <<https://www.unhcr.org/uk/un-conventions-on-statelessness.html>> accessed 15 October 2017

<sup>1457</sup> UNHCR, 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights Compilation Report - Universal Periodic Review : JORDAN' (*Refworld*, March 2013) <<http://www.refworld.org/pdfid/513d90172.pdf>> accessed 15 Oct 2017, 5-6

The 1954 Convention relating to the Status of Stateless Persons ensures minimum standards of treatment for stateless persons in respect to a number of fundamental rights. These include, but are not limited to, the right to education, employment, housing, and public relief. Importantly, the 1954 Convention also guarantees stateless persons a right to identity and travel documents and to administrative assistance.<sup>1458</sup>

Furthermore, the 1961 Convention on the Reduction of Statelessness establishes an international framework to ensure the right of every person to nationality by establishing safeguards to prevent statelessness at birth and later in life. This treaty is therefore complementary to standards contained in other human rights treaties that address the right to a nationality. An increase in the number of State parties to the two Statelessness Conventions is essential to strengthening international efforts to prevent and reduce statelessness and ensuring full enjoyment of a number of these rights.<sup>1459</sup>

Despite UNHCR's efforts, only three out of the twenty-two members of the LAS have acceded to the 1954 Convention relating to the Status of Stateless Persons without reservation and they are Algeria [Accession], Libya [Accession] and Tunisia [Accession].<sup>1460</sup> These countries are now legally bound by the 1954 Convention. While Libya and Tunisia are legally bound by the provisions of the 1954 Convention, they also acceded to the 1961 Convention. Only Tunisia made a reservation to the 1961 Convention.<sup>1461</sup>

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<sup>1458</sup> Ibid 5

<sup>1459</sup> Ibid 6

<sup>1460</sup> United Nations, 'Chapter V Refugees and Stateless Persons: Convention Relating to the Status of Stateless Persons' (*United Nations Treaty Collection*, 28 September 1954) <[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en)> accessed 15 October 2017

<sup>1461</sup> 'Reservation: [The Government of Tunisia] declares that it does not consider itself bound by the provisions of article 11 concerning the establishment of a body responsible for assisting in the presentation of claims to obtain nationality to the appropriate authorities, or of article 14, which provides for the competence of the International Court of Justice to rule on disputes concerning the interpretation or application of the Convention. Declaration: The Republic of Tunisia declares that, in accordance with article 8, paragraph 3, of the [Convention], it retains the right to deprive a person of Tunisian nationality in the following circumstances as provided for in its existing national law: 1. If he occupies a post in the public service of a foreign State or in foreign armed forces and retains it for more than one month after being enjoined by the Government of Tunisia to leave the post, unless it is found that it was impossible for him to do so. 2. If he is convicted of an act held to be a crime or an offence against the external or internal security of the State. 3. If he engages, for the benefit of a foreign State, in acts which are incompatible with his status as a Tunisian national and which are prejudicial to Tunisia's interests. 4. If he is convicted in Tunisia or abroad for an act held to be a crime under Tunisian law and carrying a sentence of at least five years' imprisonment. 3 5. If he is convicted of evading his obligations under the law regarding recruitment into the armed forces. 6. If it is discovered, subsequent to issuance of the naturalization certificate, that the person concerned did not fulfil the conditions required by law allowing him to be naturalized. 7. If the alien has made a false declaration, employed fraudulent means or knowingly submitted a document containing a false or incorrect statement for the purpose of obtaining naturalization.' United Nations, 'Declarations and



UNHCR has also actively encouraged members of the LAS to change their nationality laws by allowing women to confer their citizenship on their children. According to the agency '[n]ationality laws which do not grant women equality with men in conferring nationality to their children are a cause of statelessness.'<sup>1462</sup> A survey of nationality legislations conducted by UNHCR revealed that as of March 2018, twenty-five countries do not grant women an equal right to men to confer their citizenship on their children. Fourteen of these countries are members of the LAS and they are Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria and the UAE.<sup>1463</sup> The agency notes that the nationality laws in Kuwait, Lebanon, Qatar and Somalia create the greatest risk of statelessness because women are not allowed to 'confer their nationality on their children with no, or very limited, exceptions.'<sup>1464</sup> In contrast nationality laws in Bahrain, Iraq, Jordan, Libya, Oman, Saudi Arabia, Sudan, Syria and the UAE have measures that prevent statelessness for children born to stateless or unknown fathers. Likewise, Mauritania which allows women to confer their nationality to their children in limited circumstances also has provisions that 'ensure that statelessness will only arise in very few circumstances.'<sup>1465</sup>

UNHCR has also actively encouraged members of the LAS to adopt the 1979 Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]. Article 9 (2)<sup>1466</sup> of CEDAW states 'State Parties shall grant women equal rights with men with respect to the nationality of their children.'<sup>1467</sup> This means that signatory parties whose nationality laws do not already confer this right are required to amend their nationality laws.

UNHCR wants all States to adopt the CEDAW without reservation to Article 9 (2) so that women can confer their nationality to their children. According to UNHCR, this will prevent

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Reservations to the 1961 Convention on the Reduction of Statelessness' (UNHCR, 20 September 2006) <<https://www.unhcr.org/416113864.pdf>> accessed 30 September 2020, 2-3

<sup>1462</sup> UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2018, 8 March 2018' (Refworld, 8 March 2018) <<https://www.refworld.org/docid/5aa10fd94.html>> accessed 15 October 2017, 2

<sup>1463</sup> Ibid 6

<sup>1464</sup> Ibid 6

<sup>1465</sup> Ibid 6

<sup>1466</sup> United Nations, 'Convention on the Elimination of All Forms of Discrimination against Women' (United Nations Treaty Collection, 18 December 1979)

<[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-8&chapter=4&clang=\\_en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-8&chapter=4&clang=_en)> accessed 15 October 2018, Article 9 (2)

<sup>1467</sup> Ibid 7

and reduce statelessness in the case of children who cannot acquire the nationality of their fathers.<sup>1468</sup>

Nineteen<sup>1469</sup> out of the twenty-two members of the LAS have signed the CEDAW.<sup>1470</sup> Twelve out of the nineteen States made reservations. From amongst this group, eight<sup>1471</sup> States made a reservation to Article 9 (2)<sup>1472</sup> which states 'State Parties shall grant women equal rights with men with respect to the nationality of their children.'<sup>1473</sup> Members of the LAS did not make a reservation to Article 9 (2) of CEDAW have in principle agreed that women should have the right to transmit their nationality to their children.

UNHCR also encourages members of the LAS to adopt the 1989 Convention on the Rights of the Child [1989 Convention]. Twenty out of twenty-two members of the LAS have signed the 1989 Convention.<sup>1474</sup> Somalia and the Republic of Sudan are the only members of the LAS that have not joined the 1989 Convention while the UAE was the only country that made a reservation to Article 7. The UAE's reservation reads:

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<sup>1468</sup> '[Statelessness]...can occur (i) where the father is stateless; (ii) where the laws of the father's country do not permit conferral of nationality in certain circumstances, such as when the child is born abroad (iii) where a father is unknown or not married to the mother at the time of birth; (iv) where a father has been unable to fulfil administrative steps to confer his nationality or acquire proof of nationality for his children because, for example, he has died, has been forcibly separated from his family, or cannot fulfil onerous documents or other requirements; or (v) where a father has been unwilling to fulfil administrative steps to confer his nationality to acquire proof of nationality of his children.' UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2018, 8 March 2018' (*Refworld*, 8 March 2018)

<<https://www.refworld.org/docid/5aa10fd94.html>> accessed 15 October 2017, 3

<sup>1469</sup> Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates and Yemen.

<sup>1470</sup> United Nations, 'Convention on the Elimination of All Forms of Discrimination against Women' (*United Nations Treaty Collection*, 18 December 1979)

<[https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch\\_IV\\_8p.pdf](https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf)> accessed 15 October 2018

<sup>1471</sup> Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, UAE.

<sup>1472</sup> United Nations, 'Convention on the Elimination of All Forms of Discrimination against Women' (*United Nations Treaty Collection*, 18 December 1979)

<[https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch\\_IV\\_8p.pdf](https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf)> accessed 15 October 2018

<sup>1473</sup> *Ibid* 7

<sup>1474</sup> Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Palestine, Saudi Arabia, Syria, Tunisia, United Arab Emirates and Yemen. According to McAdam the Convention on the right of the Child sets 'down the minimum rights which State owe to children.' According to Goodwin-Gill and Hurwitz when children are involved 'a duty to protect may arise, absent of any well-founded fear of persecution or possibility of serious harm.' Jane McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for complementary Protection' (2004) 14 (3) *International Journal of Children's Rights*, 251-52

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.<sup>1475</sup>

The UAE's reservation also suggested an important link between nationality laws and sovereignty by stating that '[t]he [UAE] is of the view that the acquisition of nationality is an internal matter and one that is regulated and whose terms and conditions are established by national legislation.'<sup>1476</sup> In contrast to this approach, Egypt and Morocco have indicated that the international Conventions take precedence over their domestic laws including their nationality Law. Article 26 of Law No. 26 of 1975 Concerning Egyptian Nationality states '[i]nternational treaties and conventions concerning nationality, which were concluded between Egypt and foreign countries, shall be enforced, even if they are contradictory to the provisions of the present law.'<sup>1477</sup> In 2011 Morocco in its Constitution also confirmed the primacy of international conventions over domestic law.<sup>1478</sup>

It is striking that although most members of the LAS who signed the CEDAW made a reservation to Article 9 (2)<sup>1479</sup> only the UAE made a reservation to Article 7 of the 1989 Convention. This discrepancy could be related to the fact that Article 7 of the 1989 Convention merely refers to the right of the child 'to acquire a nationality'<sup>1480</sup> without specifying that a child has a right to acquire the nationality of the country in which he/she is born. Secondly, Article 7 paragraph 2 calls upon States to implement their obligations in 'accordance with their national law and their obligations under the relevant international

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<sup>1475</sup> United Nations, 'Convention on the Rights of the Child' (*United Nations Human Rights Office*, 20 November 1989) <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 15 October 2018

<sup>1476</sup> United Nations, 'Convention on the Rights of the Child' (*United Nations*, 20 November 1989) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec)> accessed 3 March 2021

<sup>1477</sup> Arab Republic of Egypt, 'Law No. 26 of 1975 Concerning Egyptian Nationality, Official Journal No. 22, 29 May 1975' (*Refworld*, 29 May 1975) <<http://www.refworld.org/docid/3ae6b4e218.html>> accessed 22 October 2018

<sup>1478</sup> UNHCR, 'UNHCR Submission on Morocco: UPR 27th Session, September 2016' (*Refworld*, September 2016) <<http://www.refworld.org/docid/5a12b5452.html>> accessed 22 October 2018

<sup>1479</sup> United Nations, 'Convention on the Elimination of All Forms of Discrimination against Women' (*United Nations Treaty Collection*, 18 December 1979) <[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-8&chapter=4&clang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-8&chapter=4&clang=en)> accessed 15 October 2018, Article 9 (2)

<sup>1480</sup> United Nations, 'Convention on the Rights of the Child' (*United Nations Human Rights Office*, 20 November 1989) <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 15 October 2018, Article 7

instruments...in particular where the child would otherwise be stateless.<sup>1481</sup> Hence, paragraph 2 paragraph gives States that have not signed relevant international agreements and whose nationality laws do not confer citizenship upon birth the liberty not to confer their citizenship on children born in their territory. This interpretation does not apply to States that have signed relevant international conventions without placing a reservation to the right of refugees and stateless persons to gain the citizenship of the State that recognized their refugee status. In contrast, Article 9 (2) of CEDAW places an obligation on signatory parties to make sure that their nationality laws allow women to transmit their nationality to their children. This means signatory parties whose nationality laws do not already confer this right are required to amend their nationality laws. This could explain why members of the LAS who made no reservation to Article 7 of the 1989 Convention, found it necessary to make a reservation to Article 9 (2) of CEDAW.

In conclusion, this section has revealed how the adoption of certain international conventions promoted by UNHCR can lead members of the LAS to amend their nationality laws and the possible effects these amendments can have on the legal status of stateless Palestinian refugees and their RTR. In sum the amendments that international conventions addressing refugees and stateless persons expect signatory States to naturalize refugees and stateless persons and their descendants. While this legal transformation will allow stateless refugees to access rights that are exclusively accorded to nationals this legal transformation can have a negative impact on Palestinian refugees because if they become nationals of a new State, they will cease to be refugees under international law and therefore they will not be able to argue that they are Palestinian refugees who have a RTR to territories that became Israel in 1948.<sup>1482</sup> This demonstrates that Arendt was right when she observed that '[re]fugees driven from country to country represent the vanguard of their people—if they keep their identity.'<sup>1483</sup> Therefore, if Palestinian refugees want to maintain their identity as Palestinian refugees, they cannot become citizens of a new State.

In sum, this section revealed that UNHCR and the international conventions that address refugees and stateless persons can define Palestinian refugees legally out of existence and eradicate their RTR to Israel. With this as a background, the chapter will shift to examining how regional conventions adopted by members of the LAS can impact the legal status of

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<sup>1481</sup> Ibid

<sup>1482</sup> This links to our discussion in Chapter 6

<sup>1483</sup> Hannah Arendt (1943), 'We Refugees,' in H el ene Lambert (ed) in *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 12

Palestinian refugees. This examination is important because regional developments can impact the development of international law.

### **7.7. Regional Conventions that can Impact the legal status of Palestinian Refugees**

International treaties are also 'reinforced by regional ones.'<sup>1484</sup> Therefore, this section will review regional conventions that have been adopted by members of the LAS that support the naturalization of refugees and stateless persons. This examination is necessary because it will support the thesis argument by demonstrating the impact of naturalisation on Palestinian refugees and the RTR. This section will also show that there has been a move towards the end of the RTR to Israel as a solution to ending the Palestinian refugee problem. This movement privileges sovereignty and naturalisation over return.<sup>1485</sup>

#### **The 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries**

In 1994 all twenty-two members of the LAS signed the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries [1994 Convention].<sup>1486</sup> Our survey showed that nine out of the twenty-two members of the LAS added reservations and they are Bahrain, Egypt, Iraq, Kuwait, Morocco, Oman, Qatar, Saudi Arabia and UAE.<sup>1487</sup> The 1994 Convention could in principle bring an end to the free reign that members of the LAS have been exercising in terms of how they treat Palestinian refugees in their territories because the first paragraph of the 1994 Convention sought to cement the bond of fraternity between:

[T]he provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees and the 1992 Cairo Declaration on the Protection of Refugees and Displaced People.<sup>1488</sup>

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<sup>1484</sup> Alice Edwards (2009), 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders,' in H  l  ne Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate, 2010) 505

<sup>1485</sup> This links to our discussion in Chapter 5

<sup>1486</sup> League of Arab States, 'Arab Convention on Regulating Status of Refugees in the Arab Countries' (*Refworld*, 1994) <<http://www.refworld.org/docid/4dd5123f2.html>> accessed 22 October 2018

<sup>1487</sup> *Ibid*

<sup>1488</sup> *Ibid*

The first paragraph is striking because it refers to the 1951 Convention and the 1967 Protocol although as of 2021 only nine<sup>1489</sup> members of the LAS have ratified or acceded<sup>1490</sup> to the 1951 Convention and the 1967 Protocol. Despite this, only Kuwait made a reservation asking for the 1994 Convention to be put on hold because not all members of the LAS are parties to the Convention and Protocol.<sup>1491</sup> While Bahrain, Qatar, Saudi Arabia, and the UAE made a general reservation. Despite the reservations made, twenty-one out of twenty-two members of the LAS who signed the 1994 Convention agreed with how the 1951 Convention has defined who is a refugee because Article 1 of the 1994 Convention adopts a similar definition by defining a refugee as:

Any person who is outside the country of his nationality or outside his habitual place of residence in case of not having a nationality and owing to well-grounded fear of being persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion, unable or unwilling to avail himself of the protection of or return to such country.

Any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.<sup>1492</sup>

Article 3 of the 1994 Convention also requires signatory states to incorporate 'within the limits of their respective national legislation, to accept refugees defined in Article 1.'<sup>1493</sup> Morocco was the only country that added a reservation to Article 1 paragraph 2 because it broadened the refugee definition in the 1951 Convention by referring to natural disasters.<sup>1494</sup> Here it is important to note that nine<sup>1495</sup> out of the twenty-one members of the LAS that we

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<sup>1489</sup> Algeria [1951 Convention: Declaration, 1967 Protocol: Accession], Djibouti [Declaration for both], Egypt [Accession for both], Mauritania [Accession for both], Morocco [1951 Convention: Declaration, 1967 Protocol: Accession], Somalia [Accession for both], Republic of Sudan [Accession for both], Tunisia [1951 Convention: Declaration, 1967 Protocol Accession] and Yemen [Accession for both]. Only Egypt, Somalia and the Republic of Sudan added reservations to the 1951 Convention while no reservations were made for the 1967 Protocol.

<sup>1490</sup> By ratifying or acceding to the 1951 Convention and its 1967 Protocol the 9 Arab League Member States have become legally bound by the provisions in the Convention and its Protocol.

<sup>1491</sup> League of Arab States, 'Arab Convention on Regulating Status of Refugees in the Arab Countries' (*Refworld*, 1994) <<http://www.refworld.org/docid/4dd5123f2.html>> accessed 22 October 2018

<sup>1492</sup> *Ibid*

<sup>1493</sup> *Ibid*

<sup>1494</sup> *Ibid*

<sup>1495</sup> Algeria, Comoros, Djibouti, Egypt, Libya, Somalia, The Republic of Sudan, Tunisia.

reviewed have also signed the 1969 OAU Convention which also broadened the refugee definition.<sup>1496</sup> According to UNHCR this broadening 'resulted from perception and an experience in Africa and Latin America that there was a need to complement the 1951 Convention...in order to provide adequate responses to new dimensions of mass displacements of persons in need of international protection and assistance.'<sup>1497</sup> Therefore, UNHCR noted that 'for Africa, the 1951 [Convention], the 1967 Protocol and the OAU Convention...must be regarded as forming a whole.'<sup>1498</sup> A similar argument could be made about the 1994 Convention. It could be argued that members of the LAS who have not signed the 1951 Convention and the 1967 protocol have accepted the principles enshrined within them by becoming parties to the 1994 Convention.

It is striking that although Arab States inserted Article 1D in the 1951 Convention, which excluded Palestinian refugees who fall under UNRWA's mandate from the scope of the Convention to protect their refugee status and RTR a similar clause was not added to the 1994 Convention. The absence of such a clause means that in principle all the Articles in the 1994 Convention apply to Palestinian refugees residing in members of the LAS. This can have huge ramifications on the legal status of Palestinian refugees because the 1994 Convention repeats many of the articles within the 1951 Convention. For example, Article 4 of the 1994 Convention, like the 1951 Convention accepts that a person who is naturalized is no longer a refugee.<sup>1499</sup> Article 4 (5) of the 1994 Convention even goes beyond the 1951 Convention by stating that if 'the circumstances in connection with which he has been

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See African Commission on Human and Peoples Rights, 'Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa' (*African Commission on Human and Peoples Rights*, n.d.) <<https://www.achpr.org/ratificationtable?id=50>> accessed 30 September 2020

<sup>1496</sup> Organization of African Unity, 'Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")', 10 September 1969, 1001 U.N.T.S. 45' (*Refworld*, 10 September 1969) <<http://www.refworld.org/docid/3ae6b36018.html>> accessed 22 October 2018

<sup>1497</sup> UNHCR, 'Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)' (*UNHCR*, 6 April 1992)

<<http://www.unhcr.org/uk/excom/scip/3ae68cd214/persons-covered-oau-convention-governing-specific-aspects-refugee-problems.html>> accessed 22 October 2018

<sup>1498</sup> I. Persons Covered by the OAU Convention

A. Introduction

1. For Africa, the 1951 United Nations Convention relating to the Status of Refugees, its 1967 Protocol and the OAU Convention of 1969 must be regarded as forming a whole. The OAU Convention itself is a humanitarian response to the individual as well as the mass character of the refugee problem in Africa. It is a collective undertaking by the Member States of the OAU to receive and protect refugees in accordance with their respective national legislations. Member States undertake to apply the Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group of political opinions.' *Ibid* 1

<sup>1499</sup> League of Arab States, 'Arab Convention on Regulating Status of Refugees in the Arab Countries' (*Refworld*, 1994) <<http://www.refworld.org/docid/4dd5123f2.html>> accessed 22 October 2018

recognized as a refugee have ceased to exist, he can no longer continue to refuse to avail himself of the protection of the country of his nationality.<sup>1500</sup> Article 4 (5) suggests that Palestinian refugees could lose their status as refugees if an independent Palestinian State materializes in the West Bank and Gaza, and they refuse to relocate to these territories. Moreover, Article 4 (6) states '[b]eing a person of no nationality (stateless), and because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, he is able to return to his former habitual place of residence.'<sup>1501</sup> This suggests that the RTR for Palestinian refugees could mean the RTR to their former habitual residence rather than to their former homes in territories that became part of Israel. Article 4 (6) could be used to argue that in the event of Palestinian refugees having to flee from one Member State of the LAS to another their RTR will be limited to returning to the country of their habitual residence. This interpretation means that the RTR has been transformed from a RTR to territories that became part of Israel to a RTR to the country of asylum.

Article 7 of the 1994 Convention which states that refugees should not be discriminated against based on 'race, religion, gender and country of origin, political or social affiliation'<sup>1502</sup> could also be used to naturalize Palestinian refugees in members of the LAS because one could argue that since Palestinian refugees fulfil the eligibility criteria for naturalization based on existing nationality provisions in most member States, Palestinian refugees cannot be denied the right to citizenship to protect their Palestinian nationality as this would amount to discrimination based on national origin. States practising this form of discrimination would be violating international law<sup>1503</sup> and international human rights law because article 15 of the UDHR which states '[w]e all have the right to be a citizen of a country and nobody should prevent us, without good reason, from being a citizen of another country if we wish.'<sup>1504</sup>

The fact that no reservation was made regarding the potential ramifications that the 1994 Convention could have on Palestinian refugees residing in member States of the LAS could be attributed to the fact that they were concerned with developing a legal framework that would allow them to address new dimensions of mass displacements of people through a

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<sup>1500</sup> Ibid

<sup>1501</sup> Ibid

<sup>1502</sup> Ibid

<sup>1503</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 351

<sup>1504</sup> United Nations, 'Universal Declaration of Human Rights' (*United Nations Association of Slovenia*, 10 December 1948)

<[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018, Article 15



coordinated approach. While such concerns are understandable, it is unacceptable that the LAS failed to address the impact that the 1994 Convention could have on Palestinian refugees. Addressing these ramifications is necessary because while Palestinian refugees are excluded from the 1951 Convention, they will not be excluded from the 1994 Convention. Likewise, UNRWA host States who are not parties to the 1951 Convention, will find themselves bound by the 1951 Convention because they signed the 1994 Convention.

Furthermore, members of the LAS that are hosting Palestinian refugees beyond UNRWA operating territories could find themselves legally obliged to naturalize Palestinian refugees because in principle they fall within the scope of UNHCR which like the 1994 Convention is based on the 1951 Convention.<sup>1505</sup> Under such circumstances, it is expected that UNHCR which is present in all members of the LAS will play a key role in determining who is a Palestinian refugee and who has ceased to be a refugee.<sup>1506</sup> The agency will be in a position to play this role because it is responsible for Refugee Status Determination in the majority of members of the LAS. Moreover, such a development would be justified by Article XIX of the 1945 LAS Charter which states:

This Charter may be amended with the consent of two-thirds of the States belonging to the League... to make firmer and stronger the ties between the member-States...to regulate the relations of the League with any international bodies to be created in the future to guarantee security and peace.<sup>1507</sup>

In conclusion, our examination above revealed that when members of the LAS adopted the 1994 Convention, they unknowingly supported the move towards the end of the RTR to Israel as a solution to ending the Palestinian refugee problem by privileging naturalisation over return and by transforming the RTR to Israel with a RTR to the country of asylum or a future Palestinian State. With this as a background, the next section will examine how the 2002 Arab Peace Initiative can impact the legal status of Palestinian refugees in Arab host States and their RTR to Israel.

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<sup>1505</sup> League of Arab States, 'Arab Convention on Regulating Status of Refugees in the Arab Countries' (*Refworld*, 1994) <<http://www.refworld.org/docid/4dd5123f2.html>> accessed 22 October 2018

<sup>1506</sup> The UNHCR operates in Israel. In 2018 Israel declared all of Jerusalem including East Jerusalem the capital of Israel. Hence one could argue that the UNHCR office should also be responsible for East Jerusalem.

<sup>1507</sup> League of Arab States, 'Charter of Arab League, 22 March 1945' (*Refworld*, 22 March 1945) <<http://www.refworld.org/docid/3ae6b3ab18.html>> accessed 15 September 2018, Article XIX

## The 2002 Arab Peace Initiative

In 2002 the Council of the LAS adopted the Arab Peace Initiative declaring that they are willing to establish normal relations with Israel if it withdrew:

[F]rom all the Arab territories occupied since June 1967 [including Syrian Golan Heights and Lebanese territories in the south of Lebanon], in implementation of Security Council Resolutions 242 and 338, reaffirmed by the Madrid Conference of 1991 and the land for peace principle, and Israel's acceptance of an independent Palestinian state, with East Jerusalem as its capital.<sup>1508</sup>

The Arab Peace Initiative also called for 'a just solution to the refugee problem to be agreed upon in accordance with Resolution 194' and rejected 'all forms of Palestinian patriation which conflict with the special circumstances of the Arab host countries.'<sup>1509</sup> Although this sentence suggests that signatory States are willing to establish normal relations with Israel if all Palestinian refugees are allowed to return to territories occupied by Israel in 1967 King Abdullah II of Jordan noted that on the issue of refugees, 'the operative word...is to be agreed upon.'<sup>1510</sup> The 'operative word...to be agreed upon' implies that signatory States are willing to compromise on the number of Palestinian refugees who would be allowed to return. According to Abdullah II when he alerted Israeli counterparts to the operative word some expressed surprise while others admitted not reading the initiative.<sup>1511</sup> Israel's reaction led Abdullah II to observe that 'for a country that claims to have no partner in peace Israel's reaction to the Arab Peace Initiative, which was approved by the Organization of the Islamic Conference, is quite revealing'<sup>1512</sup> because it showed that:

One of Israel's greatest talents has been exaggerating the threat posed by other countries it considers strategic enemies, perpetuating the story of being a tiny nation surrounded by hostile powers. This myth has allowed the Israelis to portray their own calculated acts of aggression as self-defence and, in some cases, to persuade other nations to attack its enemies instead.<sup>1513</sup>

In contrast to Israel who failed to realize that the Arab Peace Initiative offered Israel the opportunity to reach a permanent settlement with Arab States, Chafiq concluded that in the Arab Peace Initiative Arab States cheated the Palestinians by recognizing the legitimacy of

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<sup>1508</sup> League of Arab States, 'Arab Peace Initiative: full text' (*The Guardian*, 28 March 2002) <<https://www.theguardian.com/world/2002/mar/28/israel7>> accessed 7 June 2017

<sup>1509</sup> *Ibid*

<sup>1510</sup> King Abdullah II, *Our last best chance* (Penguin Group 2011) xiv

<sup>1511</sup> *Ibid* xiv

<sup>1512</sup> *Ibid* xiv

<sup>1513</sup> *Ibid* 17

the 'Zionist presence' and waiving the RTR by implying that Israel's consent would be required to reach 'an agreed-upon just solution.'<sup>1514</sup> Chafiq also observes that by rejecting 'all forms of Palestinian patriation which conflict with the special circumstances of the Arab host countries' the initiative appeased the demands made by Lebanon which 'insisted on the rejection of all forms of settlement.'<sup>1515</sup>

In sum, the interpretation put forward by Abdullah II and the text of the Arab Peace Initiative lead this chapter to conclude that if Palestinian refugees are unable to return to Israel they will not be allowed to integrate in Lebanon and therefore will have to be resettled in a third country. This also suggests that if signatory States and Israel sign a peace deal that requires most Palestinian refugees to return to a future Palestinian State and they refuse to abide by such an agreement they will have to be resettled in a third country. This could explain why in 2011 Israel's Deputy Minister of Foreign Affairs in his address to the '[UNHCR] ministerial-level event on the 60th anniversary of the UN Convention Relating to the Status of Refugees,'<sup>1516</sup> urged the international community to take advantage of the political shifts in the Arab World by rewriting UNRWA's mandate so that Palestinian refugees can be resettled like other refugees who have already been resettled by UNHCR.<sup>1517</sup> With this as a background, the next section will examine how the 2004 Charter for Human Rights can impact the legal status of Palestinian refugees and their RTR in Arab host States.

### **The 2004 Arab Charter for Human Rights**

In 2004 the LAS adopted the Arab Charter for Human Rights [Arab Charter]. Article 24 of the Arab Charter states:

1. Every person has the right to a nationality, and no citizen shall be deprived of his nationality without a legally valid reason.

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<sup>1514</sup> Mounir Chafiq, 'The Arab Initiative and the Prospects for the Arab Vision towards the Right of Return,' in *Palestinian Refugees in the Arab World Realities and Prospects* (Palestinian Return Centre and Aljazeera Research Centre 2015) 239

<sup>1515</sup> Ibid 239

<sup>1516</sup> Israel Ministry of Foreign Affairs, 'Dep FM Ayalon addresses UNHCR Ministerial Meeting, Geneva' (*Israel Ministry of Foreign Affairs*, 8 December 2011) <[http://mfa.gov.il/MFA/PressRoom/2011/Pages/DepFM\\_Ayalon\\_addresses\\_UNHCR\\_Meeting\\_8-Dec-2011.aspx](http://mfa.gov.il/MFA/PressRoom/2011/Pages/DepFM_Ayalon_addresses_UNHCR_Meeting_8-Dec-2011.aspx)> accessed 25 April 2017

<sup>1517</sup> Ibid

As this thesis was being written the United Arab Emirates and the Kingdom of Bahrain signed the Abraham Accord with Israel on 15 September 2020. The Abraham Accords normalizes relations between the three countries without Israel having to withdraw from territories that it occupied in 1967

2. The State Parties shall undertake, in accordance with their legislation, all appropriate measures to allow a child to acquire the nationality of his mother with regard to the interest of the child.
3. No one shall be denied the right to acquire another nationality in accordance with the applicable legal procedures of his country.<sup>1518</sup>

Article 24 (3) suggests that members of the LAS cannot deny Palestinian refugees the right to acquire their nationality if the nationality law of that country allows foreigners to naturalize. Article 24 (2) also suggests that children born to a father who is a Palestinian refugee and a mother who is a national of a Member State of the LAS should be naturalized. Such naturalization will reduce the number of individuals recognized as Palestinian refugees because they will cease to be refugees which means they will also no longer be able to argue that they have a RTR to Israel.

Due to the ongoing advocacy by UNHCR momentum was built in the LAS to end gender discrimination in nationality laws by allowing women to pass their nationality to their children and spouses.<sup>1519</sup> In October 2017 the LAS in collaboration with the Global Campaign for Equal Nationality Rights, UNHCR, the United Nations Entity for Gender Equality and the Empowerment of Women [UN Women] and the United Nations Children's Fund [UNICEF] convened the First Arab Conference on Good Practices and Regional Opportunities to Strengthen Women's Nationality Rights [Arab Conference].<sup>1520</sup> 'The aim of the conference was to reaffirm the importance of documentation and the sharing and strengthening of existing efforts in the region in order to expand good practices in the promotion of women's rights and gender equality in nationality, also to study challenges and develop frameworks for solutions.'<sup>1521</sup>

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<sup>1518</sup> League of Arab States, 'Arab Charter on Human Rights' (*University of Oslo Faculty of Law*, 22 May 2004)

<<https://www.jus.uio.no/english/services/library/treaties/02/2-01/arab-human-rights-revised.xml>> accessed 11 March 2018

<sup>1519</sup> Catherine Harrington, 'Ground-breaking Arab League Declaration Heightens Global Momentum to End Gender Discrimination in Nationality Laws' (*Women's Refugee Commission*, 8 March 2018) <<https://www.womensrefugeecommission.org/blog/2807-groundbreaking-arab-league-declaration-heightens-global-momentum-to-end-gender-discrimination-in-nationality-laws>> accessed 8 March 2018

<sup>1520</sup> League of Arab States, 'The First Arab Conference on Good Practices & Regional Opportunities to Strengthen Women's Nationality Rights' (*Equal Nationality Rights*, 2 October 2017) <<http://equalnationalityrights.org/images/zdocs/Final-Declaration-of-the-Arab-Conference-on-Nationality-English.pdf>> accessed 8 March 2018, 1-2

<sup>1521</sup> 'The aim of the conference was to reaffirm the importance of documentation and the sharing and strengthening of existing efforts in the region in order to expand good practices in the promotion of women's rights and gender equality in nationality, also to study challenges and develop frameworks for solutions.' League of Arab States, 'The First Arab Conference on Good Practices & Regional Opportunities to Strengthen Women's Nationality Rights' (*Equal Nationality Rights*, 2 October 2017)

The outcome document reaffirmed that every person has a right to a nationality as enshrined in the Universal Declaration of Human Rights [UDHR] and the Arab Charter on Human Rights. The outcome document also commended the actions and commitments made by States to reform their nationality laws to grant equal nationality rights for women and men. The outcome document also recalled:

[T]he traditions of the Arab region and the principles set out in the Arab Charter on Human Rights, the UN Convention on the Rights of the Child... [and 1979 Convention] ...which promotes the right of all persons to legal identity, family, as well as the 2014 Sharjah Principles for the Protection of Refugee Children, which sets out measures to ensure that refugee children enjoy these rights in particular.<sup>1522</sup>

The outcome document also acknowledges that 'situations of conflict, asylum and forced displacement threaten the rights of women, children and affected families, whose vulnerability is compounded by the absence of documentation necessary for the composition of the family, the protection of its unity, identity, personal status and the nationality of its children.'<sup>1523</sup> Despite this acknowledgement, the document also affirmed 'that each State has the right to legally determine its nationals in conformity with international standards and obligations.'<sup>1524</sup> The outcome document also refers to international human rights conventions ratified by the LAS and their national laws.

In the conference, the LAS also adopted 12 objectives to promote women's rights in the area of nationality. Objectives 1, 2, 5, 7, 10 and 11 are relevant to this thesis because they refer to issues that can impact the legal status of Palestinian refugees in member states of the LAS. The first objective calls for reform in nationality laws in 'conformity with international standards;' the second objective calls upon such reform 'to grant women and men equal rights in conferring nationality to children and spouses and to acquire, change or retain nationality in conformity with international standards and not contrary to national interests;' the fifth objective encourages members of the LAS to lift reservations to the CEDAW 'which protects the equal rights of women and men to acquire, retain or change their nationality and confer it to children;' the seventh objective emphasizes 'the importance of addressing the issues of women's rights and gender equality within the framework of the 2030 Sustainable

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<<http://equalnationalityrights.org/images/zdocs/Final-Declaration-of-the-Arab-Conference-on-Nationality-English.pdf>> accessed 8 March 2018, 2

<sup>1522</sup> Ibid 2

<sup>1523</sup> Ibid 2

<sup>1524</sup> Ibid 2

Development Plan and the Comprehensive Refugee Response Framework’; the tenth objective urges the LAS ‘to make every effort to reduce statelessness in the context of the international obligations of Member States and the application of the Sustainable Development Goals’; and the eleventh objective wants the LAS to ‘update the 1954 Arab Convention on Nationality in line with political, social and economic developments.’<sup>1525</sup>

Although the outcome document does not name the countries that have already reformed their nationality laws the ‘Background Note on Gender Equality, Nationality Laws and Statelessness 2018’ produced by UNHCR revealed that five members of the LAS have already undertaken reforms in their nationality laws to address gender inequality and they are Egypt [2004], Algeria [2005], Iraq [partial reform in 2006], Morocco [2007], Tunisia [remaining gaps addressed in 2010].<sup>1526</sup> In 2004 Egypt amended its Nationality Act to entitle children born to Egyptian mothers and foreign fathers to Egyptian citizenship. In 2007, Morocco also amended its nationality laws to enable women married to foreigners to pass their nationality on to their children. In 2014, Tunisia’s interim government announced it was withdrawing all its reservations to Article 9 of the CEDAW.<sup>1527</sup>

The 2017 outcome document led the LAS, UNHCR, and the government of Tunisia to organize the Ministerial Conference on Belonging and Identity on 28 February 2018. The conference concluded with the LAS signing the Arab Declaration on Belonging and Legal identity [Arab Declaration]. In the Arab Declaration, the LAS committed to addressing statelessness by improving access to nationality for all<sup>1528</sup> and to address statelessness based on the UN Sustainable Development Goals which calls upon States to offer legal documentations to everyone including those born in the country by 2030. In Article 9 of the Arab Declaration members of the LAS confirmed that they are committed to changing their nationality laws to give men and women an equal right to transmit their citizenship to their

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<sup>1525</sup> League of Arab States, ‘The First Arab Conference on Good Practices & Regional Opportunities to Strengthen Women’s Nationality Rights’ (*Equality Nationality Rights*, 2 October 2017) <<http://equalnationalityrights.org/images/zdocs/Final-Declaration-of-the-Arab-Conference-on-Nationality-English.pdf>> accessed 8 March 2018, 3

<sup>1526</sup> UNHCR, ‘Background Note on Gender Equality, Nationality Laws and Statelessness 2018, 8 March 2018’ (*Refworld*, 8 March 2018) <<https://www.refworld.org/docid/5aa10fd94.html>> accessed 15 October 2017, 3

<sup>1527</sup> United Nations, ‘Reference: C.N.220.2014. Treaties-IV.8 (Depositary Notification)’ (*United Nations*, 17 April 2014) <<https://treaties.un.org/doc/Publication/CN/2014/CN.220.2014-Eng.pdf>> accessed 30 May 2018

<sup>1528</sup> League of Arab States, ‘Arab Declaration on Belonging and Legal Identity’ (*Refworld*, 28 February 2018) <<http://www.refworld.org/docid/5a9ffbd04.html>> accessed 30 May 2018

children and spouses.<sup>1529</sup> Despite this, in Article 13 members of the LAS confirmed that they are committed to providing Palestinian refugees residing in Arab countries social and economic rights equal to that given to citizens without going against Arab League Resolution 1547 which encouraged 'Arab states...to preserve the Palestinian nationality of the refugees.'<sup>1530</sup> While Article 13 suggests that Palestinian refugees will not be naturalized Article 13 confirms that the LAS does not want to go against international agreements.<sup>1531</sup> This suggests that the Arab Declaration can lead to the naturalization of Palestinian refugees born in Arab league territories and/or married to nationals of such countries. Moreover, if the LAS agrees to naturalize refugees and stateless persons member states will not be able to deny the same right to Palestinian refugees because they will be violating international law.<sup>1532</sup> This indicates that Palestinian refugees can be defined legally out of existence if amendments in existing nationality laws take place because as we discussed earlier, they will cease to be recognized as Palestinian refugees and with this cessation, they will no longer be able to argue that they have a RTR to Israel under Resolution 194

## 7.8. Conclusion

This chapter revealed that even though UNHCR claims that return is the preferred solution for ending the plight of refugees and stateless persons when repatriation is not possible the agency's primary focus is on resettling refugees and stateless persons in host States through naturalization. This explains why UNHCR has actively encouraged members of the LAS to adopt international conventions and regional agreements that expect signatory States to end the plight of refugees and stateless persons through naturalization. This chapter revealed that although these conventions and agreements are supposed to protect the rights of refugees, they can also undermine the RTR for Palestinian refugees by paving the way for their resettlement and naturalization in territories belonging to the LAS despite

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<sup>1529</sup> Ibid

<sup>1530</sup> Mohammad Khaled al-Aza'r, 'Arab Protection for Palestinian Refugees: Working Paper No.8' (BADIL, November 2004) <[http://www.badil.org/phocadownloadpap/Badil\\_docs/Working\\_Papers/wp-8%20khalid%20al-azare.pdf](http://www.badil.org/phocadownloadpap/Badil_docs/Working_Papers/wp-8%20khalid%20al-azare.pdf)> accessed 30 May 2018, 14

<sup>1531</sup> League of Arab States, 'Arab Declaration on Belonging and Legal Identity' (Refworld, 28 February 2018) <<http://www.refworld.org/docid/5a9ffbd04.html>> accessed 30 May 2018, Article 13

<sup>1532</sup> Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press 1998) 351

their exclusion from the international framework governing refugees and stateless persons.<sup>1533</sup>

This chapter also revealed that members of the LAS have not developed a regional strategy with respect to Palestinian refugees and that UNRWA host States generally do not want to naturalize Palestinian refugees in their territories. Despite this members of the LAS have forged a pattern of nationality provisions, asylum policies and regional conventions that can pave the way for the naturalization of Palestinian refugees in their territories if the political will emerges to permanently resettle Palestinian refugees. This political will, will likely emerge because members of the LAS who are hosting Palestinian refugees have lost much of their bargaining powers vis-à-vis Israel, when they adopted international conventions, regional agreements and nationality provisions that can allow refugees, stateless persons, and certain foreigners to naturalize in their territories.

These findings furthered the thesis argument that the existing framework governing refugees and stateless persons can impact Palestinian refugees despite their current exclusion by revealing how relevant international conventions and nationality provisions can dispossess Palestinian refugees from their status as refugees and turn their RTR to a right of no return.<sup>1534</sup> Despite this, the existing framework governing refugees and stateless persons cannot force sovereign States to naturalize refugees and stateless persons because the principle of sovereignty allows States to override rights accorded to refugees. Therefore, 'neither general international law or treaty obliges any state to accord durable solutions.'<sup>1535</sup> This explains why members of the LAS have been able to deny Palestinian refugees access to durable solutions despite acceding to international conventions and regional agreements that require them to naturalize all refugees and stateless persons in their territories. When

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<sup>1533</sup> While this thesis acknowledges that UNHCR's 'efforts can be cast in a positive light by arguing that the conventions that they advocate can break the impasse for Palestinian refugees who will unlikely return to Israel by giving them access to durable solutions. This should not distract us from that UNHCR advocacy can undermine the right to return for Palestinian refugees.

<sup>1534</sup> These findings also demonstrated that Arendt's conception of rights, which revealed that human rights do not guarantee access to rights, nor do they always make individuals subjects of rights and that only membership in a new State can transform refugees and stateless persons from rightless individuals into right holders offers the best theoretical foundation for understanding why UNHCR considers naturalization as the only practical solution for ending the plight of refugees and stateless persons who cannot be repatriated.

<sup>1535</sup> Guy Goodwin-Gill, 'The International Law of Refugee Protection,' Elena Fiddian-Qasmiyeh and others (eds), in *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014)

<<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021>> accessed 21 October 2020



refugees and stateless persons cannot be repatriated or regularize their status in the host State they can end up in a legal limbo.

With this as a background, the focus of this chapter shifts to examining how the international framework governing refugees will define the legal status of Palestine refugees and their RTR if they no longer fall under UNRWA's mandate but continue to be denied access to durable solutions in Arab host States. Rulings by the Court of Justice for the European Union [CJEU] will provide us with a concrete example of how Palestinian refugees will be treated if they no longer fall under UNRWA's mandate. Therefore, the next chapter will examine how the CJEU has interpreted the legal status of Palestinian refugees who left UNRWA territories in light of the 1951 Convention.

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## Chapter 8: The Court of Justice for the European Union & the applicability of Article 1D to Palestine Refugees

'The international legal protection of refugees and asylum seekers benefits from an elaborate, if incomplete regime, and just as there are contested legal questions within the existing framework, so too there will be novel legal challenges from without.'<sup>1536</sup>

Guy Goodwin-Gill

Europe was the birthplace of the 1951 Convention Relating to the Status of Refugees [1951 Convention] which defined who is a refugee for the purpose of international law and what rights refugees have vis-à-vis signatory States. Although Article 1D of the 1951 Convention [Article 1D] excluded Palestinian refugees who fall under UNRWA's mandate the same article confirmed that they will be recognized as 'ipso facto...entitled to the benefits of this [c]onvention' if they no longer receive protection or assistance from the agency.<sup>1537</sup> This chapter will examine how the region that gave birth to the 1951 Convention is defining the legal status of persons who left UNRWA's operating territories and applied for asylum in the European Union [EU]. We will do this by examining how the Court of Justice for the European Union [CJEU] has interpreted the legal status of Palestinian refugees in light of the 1951 Convention. The jurisprudence of the CJEU was selected over the jurisprudence of national courts in EU Member States because the CJEU is responsible for making sure that EU law is applied in the same way in all EU countries. This makes the CJEU's interpretation of Article 1D extremely valuable because it reveals how the EU is applying Article 1D to Palestinian refugees.<sup>1538</sup> This will also allow the thesis to predict the realities and prospects

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<sup>1536</sup> Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 (4) *International Journal of Refugee Law*, 666 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 12 February 2021

<sup>1537</sup> 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the [UNHCR] 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.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>1538</sup> This is extremely important because as Geoff Gilbert observes '[t]he absence of a supervisory tribunal to oversee the application of the 1951 Convention...and its 1967 Protocol has meant that states have developed their interpretation of refugee law independently; harmonization, on the other hand, inevitably leads to equalizing down at the expense of the refugee when it is attempted to attune to those different approaches.' Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 969 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

for Palestinian refugees based on an accurate understanding of how their status is being legally settled beyond UNRWA's operating territories in the context of the 1951 Convention.<sup>1539</sup> We will do so by identifying contentious points of law that arose when the CJEU was deciding the legal status of Palestinian refugees. This is important for the purpose of this thesis because:

[Refugee law] adjudication is not a conventional lawyer's...exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.<sup>1540</sup>

In the absence of an 'international tribunal providing definite interpretations of the 1951 Convention'<sup>1541</sup> the CJEU,<sup>1542</sup> which issues binding interpretations of EU law<sup>1543</sup> is playing a key role in harmonizing the interpretation and application of the 1951 Convention to Palestinian refugees.<sup>1544</sup>

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<sup>1539</sup> This is extremely important because the 1951 Convention Relating to the Status of Refugees does not explain how refugee status should be determined. Paragraph 189 of the UNHCR Handbook provides that '[i]t is left to each state Contacting State to establish the procedure that it considers the most appropriate, having regard to its particular constitutional and administrative structure.' UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (*Refworld*, February 2019) <<https://www.refworld.org/docid/5cb474b27.html>> accessed 11 January 2020, Paragraph 189

<sup>1540</sup> Regina v. Immigration Appeal Tribunal, ex parte Shah, [1999] 2 All E.R. 545, 561 (H.L.) (U.K.) Lord Hoffman quoting Judge Sedley in an earlier decision, Ex Parte Shah, [1997] Imm. AR 145) quoted in Hélène Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 257

<sup>1541</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) European Journal of Internal Law, 974 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

<sup>1542</sup> Article 68 and Article 234 of the Treaty Establishing the European Community allowed any court or Tribunal in an EU Member States to refer a case to the CJEU. European Union, 'Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957' (*Refworld*, 25 March 1957) <<https://www.refworld.org/docid/3ae6b39c0.html>> accessed 23 December 2021; Article 73p and Article K.7 of the Treaty of Amsterdam also allowed any court or Tribunal in an EU Member States to refer a case to the CJEU. European Union, 'Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts' (*Refworld*, 10 November 1997) <<https://www.refworld.org/docid/51c009ec4.html>> accessed 26 February 2021

<sup>1543</sup> The European Migration Network, *Asylum and Migration Glossary 6.0.* (2018) 69

<sup>1544</sup> The 'Common European Asylum system [is] based on the full and inclusive application of the Refugee Convention and other human rights obligations.' Hélène Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) xi

## 8.1. The Court of Justice of the European Union

The CJEU is responsible for settling 'legal disputes between national governments and EU institutions' and making sure that EU law is applied in the same way in all EU countries.<sup>1545</sup> Within the EU the CJEU also has jurisdiction under Article 12(1)(a) of the 'Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011'<sup>1546</sup> to interpret the meaning of Article 1D which excluded Palestinian refugees who fall under UNRWA's mandate.<sup>1547</sup>

It is acknowledged that decisions reached by the CJEU do not have direct legal consequences for UNRWA host States because they are not members of the EU.<sup>1548</sup> Foster et al also argue that 'there is no basis to view [EU interpretation of the 1951 Convention] ...as necessarily amounting to authoritative understandings of the [Convention]. To the contrary, such regional law normally acknowledges that it is subordinate to international law, and must be interpreted in line with it—not the other way around.'<sup>1549</sup>

Despite this, it is important to recognize that the Common European Asylum System is harmonizing the interpretation and application of the 1951 Convention. Moreover, the CJEU rulings provide us with a concrete example of how Palestinian refugees will be treated if they no longer fall under UNRWA's mandate because as Goodwin-Gill rightly observes '[t]he

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<sup>1545</sup> European Union, 'Court of Justice of the European Union' (*EUROPA*, n.d.) <[https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en)> accessed 1 September 2018

<sup>1546</sup> Council of the European Union, 'Council Directive 2011/95/EU of The European Parliament and of the Council of 13 December 2011' (*Eur-Lex*, 13 December 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>> accessed 1 September 2018

\*According to Paragraph 1 '[a] number of substantive changes are to be made to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. In the interests of clarity, that Directive should be recast.' Paragraph 10 also confirmed 'the principles underlying Directive 2004/83/EC as well as to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.' Ibid Paragraph 1

<sup>1547</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>1548</sup> The Arab world does not have a comprehensive framework for protecting refugees. This creates a protection gap for Palestinian refugees if UNRWA is dismantled before a political solution materializes. Therefore, CJEU rulings are enlightening.

<sup>1549</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 12

regional certainly influences the universal, though not necessarily in the interests of better protection or more durable solutions.<sup>1550</sup>

## 8.2. Advocate General opinion on Article 1D

When a case is raised with the CJEU, the court appoints an advocate general to consider written and oral submissions that raise a new point of law and deliver an opinion on the appropriate legal solution.<sup>1551</sup> The opinion of the advocate general is not legally binding. Despite this, their legal reasoning is important because '[i]n the absence of dissenting opinions filed by the...judges, the opinions...play an important role and are referred to in later cases.'<sup>1552</sup> According to advocate general Sharpston Article 1D was a negotiated 'compromise that...singles out, in particular, displaced Palestinians for special consideration and, in some respects, special protection within the overall framework of international refugee law.'<sup>1553</sup> This compromise led to the emergence of '[a] (non-exhaustive) examination of pertinent decisions by national courts of Member States shows a striking disparity, both in approach and in result...[n]one of these interpretations are, of course, binding on the [CJEU].'<sup>1554</sup> According to Bailliet '[a] significant diversity in the interpretation of the 1951 Convention by national tribunals, ranging from variances in the ...application of exclusion and cessation clauses, and diverse conceptions of 'effective protection by the State'...'1555 is linked to '[t]he evolution of international refugee law...[which]...lacks an international refugee court to provide authoritative statements on the interpretation of the 1951 Convention.'<sup>1556</sup> While Goodwin-Gill claims that 'there was no presumption...that some sort of inter-or supra-State adjudication or oversight was required' when the convention was adopted.<sup>1557</sup> This

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<sup>1550</sup> Guy Goodwin-Gill, *Regional Perspectives on Refugee Protection* (Cambridge University Press 2013) 357

<sup>1551</sup> European Parliament Think Tank, 'Role of Advocates General at the CJEU' (*European Parliament Think Tank*, 10 October 2019)

<[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2019\)642237](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2019)642237)> accessed 20 January 2020

<sup>1552</sup> Ibid 1

<sup>1553</sup> Eleanor Sharpston, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Eur-Lex*, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0031>> accessed 1 September 2018, Paragraph 45

<sup>1554</sup> Ibid Paragraph 37

<sup>1555</sup> Cecilia Bailliet, 'National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within the UNHCR Guidelines on International Protection' (*European Society of International Law*, 10th Anniversary Conference, Vienna, 4-6 September 2014, Conference Paper No. 7/201) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2545473](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545473)> accessed 1 November 2018, 9

<sup>1556</sup> Ibid 1

<sup>1557</sup> Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 (4) *International Journal of Refugee Law*, 655 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 1 November 2018

thesis disagrees with the assumption that the absence of an international refugee court is responsible for disputes over interpretations because Article 38 of the 1951 Convention gives State parties the right to get a firm legal interpretation of Article 1D from the International Court of Justice [ICJ] <sup>1558</sup> but to this date signatory States have not asked the court for such an interpretation. With this as a background, the CJEU offers a supra-national interpretation to extrapolate from how the 1951 Convention will be applied to Palestinian refugees if they no longer fall under UNRWA's mandate.

### 8.3. Case law addressing Palestinian refugees

The CJEU has to date pronounced itself on several important questions of interpretation related to the applicability of Article 1D to Palestinian refugees who left UNRWA operating areas and applied for asylum in an EU Member State. The first case that the CJEU dealt with was *Nawras Bolbol V Bevándorlási és Állampolgársági Hivatal (Hungary)*.<sup>1559</sup> The Opinion of the advocate general was delivered on 4 March 2010<sup>1560</sup> and the CJEU delivered its judgement on 17 June 2010.<sup>1561</sup> The second case submitted to the CJEU is that of *Mostafa Abed El Karem El Kott, Chadi Amin A Radim Hazem Kamel Ismail v Bevándorlási és Állampolgársági Hivatal ENSZ Menekültügyi Főbiztosság (Hungary)*.<sup>1562</sup> The opinion of the advocate general was delivered on 13 September 2012<sup>1563</sup> and the CJEU made its

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<sup>1558</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 38

\*In theory there is a possibility of interpretation by the ICJ but so far it has been left to national States.

<sup>1559</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010 (C-31/09)' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018

<sup>1560</sup> Court of Justice of the European Union, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Eur-Lex*, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0031>> 6 March 2021, Paragraph 2, 36

<sup>1561</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010 (Case C-31/09)' (*Info Curio Case Law*, 12 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018

<sup>1562</sup> Court of Justice of the European Union, 'Reference for a preliminary ruling from the Fővárosi Bíróság (Budapest, Hungary) lodged on 11 July 2011 - Abed El Karem El Kott Mostafa and Others v Bevándorlási és Állampolgársági Hivatal, Hivatal, ENSZ Menekültügyi Főbiztosság (Case C-364/11)' (*Info Curio Case Law*, 11 July 2011)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=114086&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1327530>> accessed 1 December 2018

<sup>1563</sup> Court of Justice of the European Union, 'Opinion of the Advocate General Sharpston delivered on 13 September 2012 (Case C-364/11)' (*Info Curio Case Law*, 13 September 2012)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=126801&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018

judgement on 19 December 2012.<sup>1564</sup> The third case was submitted to the CJEU by the Administrativen sad Sofia-grad (Bulgaria) in the case of *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*.<sup>1565</sup> The opinion of the advocate general was delivered on 17 May 2018<sup>1566</sup> and the CJEU judgement was delivered on 12 July 2018.<sup>1567</sup>

In all three cases, Palestinian refugees argued that they should be recognized as ‘ipso facto’ refugees because they are no longer present in UNRWA operating territories. The applicants based their argument on Article 1D paragraph 2 which states:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the [UNHCR] 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 [UNGA], these persons shall ipso facto be entitled to the benefits of this Convention.<sup>1568</sup>

#### 8.4. Nawras Bolbol V Bevándorlási és Állampolgársági Hivatal

In the case of *Nawras Bolbol V Bevándorlási és Állampolgársági Hivatal*,<sup>1569</sup> the Fővárosi Bíróság (Budapest Metropolitan Court) asked the CJEU to make a judgement on whether under Directive 2004/83/EC<sup>1570</sup> a member State must accord refugee status to a Palestinian who has sought asylum in an EU Member State.<sup>1571</sup>

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<sup>1564</sup> Court of Justice of the European Union, ‘Judgment of the Court (Grand Chamber) 19 December 2012 (Case C-364/11)’ (*Info Curio Case Law*, 19 December 2012) <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1330675>> accessed 1 December 2018

<sup>1565</sup> Court of Justice of the European Union, ‘Judgement of the Court (Grand Chamber) 25 July 2018 (C 585/16)’ (*Eur-Lex*, 25 July 2018) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0585>> accessed 1 December 2018

<sup>1566</sup> Court of Justice of the European Union, ‘Opinion of Advocate General Mengozzi delivered on 17 May 2018 (C 585/16)’ (*Info Curio Case Law*, 17 May 2018) <<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=202056&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018

<sup>1567</sup> Court of Justice of the European Union, ‘Judgement of the Court (Grand Chamber) 25 July 2018 (C-585/16)’ (*Eur-Lex*, 25 July 2018) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0585>> accessed 1 December 2018

<sup>1568</sup> United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (*UNHCR*, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D

<sup>1569</sup> Court of Justice of the European Union, ‘Judgment of the Court (Grand Chamber) 17 June 2010 (C-31/09)’ (*Info Curio Case Law*, 17 June 2010) <<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018

<sup>1570</sup> Council of the European Union, ‘Council Directive 2004/83/EC’ (*Eur-Lex*, 29 April 2004)

This request was made after the Hungarian Office for Immigration and Citizenship (referred to as BAH in the case) rejected Bolbol's asylum application because 'she did not leave her country for any of the reasons set out in Article 1A' of the 1951 Convention.<sup>1572</sup> Article 1A (2) which the BAH referred to defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to 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 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>1573</sup>

During the CJEU preliminary judgement, the BAH argued that:

Ms Bolbol's application for refugee status is unfounded since she did not leave her country for any of the reasons set out in Article 1A..., and that Article 1D does not automatically grant a basis for refugee status but is merely a provision concerning the Convention's scope *ratione personae*. Therefore, Palestinians are entitled to refugee status only where they meet the definition of 'refugee' within the meaning of Article 1A... which must be determined on a case-by-case basis.<sup>1574</sup>

In contrast, Bolbol asked the CJEU to grant her refugee status arguing that 'she meets the conditions laid down in... [Article 1D paragraph 2]' and is therefore 'entitled to recognition as a refugee irrespective of whether she qualifies as a refugee under Article 1A.'<sup>1575</sup> According to Bolbol:

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<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 1 December 2018

<sup>1571</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010 (C-31/09)' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 35

<sup>1572</sup> *Ibid* Paragraph 32

<sup>1573</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1A (2)

<sup>1574</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010 (C-31/09)' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 32

<sup>1575</sup> *Ibid* Paragraph 31



The purpose of Article 1D is to make clear that where a person registered or entitled to be registered with UNRWA resides, for any reason, outside UNRWA's area of operations and, for good reason, cannot be expected to return there, the States party to the Geneva Convention must automatically grant him refugee status.<sup>1576</sup>

Bolbol also argued that 'through her father, she is entitled to be registered with UNRWA... [and that] she should be recognised as a refugee without further examination' because she is outside UNRWA's 'area of operations.'<sup>1577</sup> The Budapest Municipal Court asked the CJEU to answer three questions for the preliminary ruling:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?
2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?
3. Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope *ratione personae* of the Directive [2004/83 of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted]?

### **Advocate General Opinion on Bolbol**

On 4 March 2010, the advocate general observed that because all EU member states are signatories to the 1951 Convention, they must transpose international law obligations under the Convention into EU law.<sup>1578</sup> 'At EU level, their obligations are reflected in Directive 2004/83.'<sup>1579</sup> The advocate general also referred to Article 12 of the EU Joint Position of 4 March 1996, which harmonised the application of the definition of the term 'refugee,' in

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<sup>1576</sup> Ibid Paragraph 31

<sup>1577</sup> Ibid Paragraph 31

<sup>1578</sup> Court of Justice of the European Union, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Eur-Lex*, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CC0031&from=EN>> 6 March 2021, Paragraph 2, 36

<sup>1579</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 2

Article 1D. Article 12 stated '[a]ny person who deliberately removes himself from the protection and assistance found in Article 1D...is no longer automatically covered by that Convention. In such cases, refugee status is in principle to be determined in accordance with Article 1A.'<sup>1580</sup> Based on this Sharpston observed that her answers to the questions posed by the Budapest Municipal Court will be based on eight guiding principles and they are:

First, all genuine refugees deserve protection and assistance...<sup>1581</sup>

Second, the historical intention behind Article 1D was clearly to give some form of *special treatment and consideration* to displaced Palestinians.<sup>1582</sup>

Third, whatever the initial hopes of the General Assembly (as reflected in 1951 by the draftsmen of the Convention) that UNRWA would need to deal only with temporary provision of assistance, the problems associated with the situation in Palestine have proved intractable over the succeeding decades, as the successive renewals of UNRWA's mandate have demonstrated... Thus, the original intention of the draftsmen of the Convention must be coloured by the reality of subsequent history.<sup>1583</sup>

Fourth, the Convention draftsman intended displaced Palestinians who [fell under the mandate of the UNRWA] ... not to be able to apply for refugee status under the Convention, as overseen by the UNHCR (hence the first sentence of Article 1D). Whilst they are being cared for by UNRWA, such persons are excluded *ratione personae* from the Convention.<sup>1584</sup>

Fifth, as a corollary to (or possibly by way of compensation for) that exclusion, under certain circumstances, displaced Palestinians falling within the second sentence of Article 1D are *ipso facto* entitled to the *benefits* of the Convention (and not merely to cease to be excluded from its scope on cessation of protection or assistance from UNRWA). The very presence of the second sentence implies a greater consequence than that, when its specific conditions are fulfilled, such persons merely join the queue with every other potential applicant for refugee status under Article 1A (2).<sup>1585</sup>

Sixth, the concept of 'cessation of protection or assistance'... cannot be construed in a way that would result in such persons being, effectively, trapped in the UNRWA zone, unable (even if forcibly separated from UNRWA assistance) to leave and claim refugee status elsewhere until the situation in 'Palestine problem' is entirely resolved and UNRWA wound up. Such an outcome would be wholly unacceptable.<sup>1586</sup>

Seventh... Article 1D cannot be interpreted either as entitling every displaced Palestinian, whether or not actually being or having been in receipt of UNRWA assistance, to leave the UNRWA zone voluntarily and claim automatic refugee status elsewhere. Such an interpretation would provide disproportionately favourable treatment for displaced Palestinians at the expense of other genuine applicants for refugee status displaced by other conflicts in the world.<sup>1587</sup>

Finally, the two sentences that comprise Article 1D are meant together to address the concern to provide special treatment and consideration for persons displaced by the

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<sup>1580</sup> Court of Justice of the European Union, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Eur-Lex*, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CC0031&from=EN>> 6 March 2021, Paragraph 22

<sup>1581</sup> Ibid Paragraph 49

<sup>1582</sup> Ibid Paragraph 50

<sup>1583</sup> Ibid Paragraph 51

<sup>1584</sup> Ibid Paragraph 52

<sup>1585</sup> Ibid Paragraph 53

<sup>1586</sup> Ibid Paragraph 54

<sup>1587</sup> Ibid Paragraph 55

situation in Palestine... It therefore seems reasonable...to seek a reading for the provision as a *whole* that strikes a reasonable balance between caring for displaced Palestinians (under Article 1D) and caring for other potential refugees (under the 1951 Convention as a whole).<sup>1588</sup>

Based on these guiding principles the advocate general concluded that only Palestinian refugees who have been receiving assistance or protection from any UN agency other than UNHCR before leaving UNRWA operating territories should come within the scope of Article 1D.<sup>1589</sup> The advocate general also concluded that only a person who has 'ceased, otherwise than of his own volition, to benefit from the protection or assistance that he enjoyed'<sup>1590</sup> should automatically be granted refugee status.<sup>1591</sup> The advocate general justified this conclusion by referring to Article 12 (1)(a) of Directive 2004/83 which states:

A third-country national or a stateless person is excluded from being a refugee, if: he or she falls within the scope of Article 1 D ..., relating to protection or assistance from organs or agencies of the [UN] other than the [UNHCR]. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the [UNGA], these persons shall ipso facto be entitled to the benefits of this Directive.<sup>1592</sup>

## CJEU Judgement on Bolbol

On 17 June 2010, the CJEU Judgment reached a similar conclusion. The CJEU agreed with the advocate general's opinion that the EU legislation is 'based on the full and inclusive application of the Geneva Convention'<sup>1593</sup> and found that it 'has jurisdiction to interpret the meaning of... [Article 1D]' because Directive 2004/83/EC<sup>1594</sup> 'includes a reference to Article

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<sup>1588</sup> Ibid Paragraph 56

<sup>1589</sup> Ibid Conclusion Paragraph 1, 93

<sup>1590</sup> Ibid Conclusion paragraph 2, 101

<sup>1591</sup> Ibid Conclusion paragraph 3, 109

<sup>1592</sup> Council of the European Union, 'Council Directive 2004/83/EC' (*Eur-Lex*, 29 April 2004) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 1 December 2018, Chapter III Article 12(1)(a)

<sup>1593</sup> Ibid Paragraph 12

<sup>1594</sup> Council of the European Union, 'Council Directive 2004/83/EC' (*Eur-Lex*, 29 April 2004) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 1 December 2018

\*Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. No longer in force, Date of end of validity: 21/12/2013.

Geoff Gilbert observes that the same criteria was not applied to third States that an EU Member State can send a refugee back to. This led Gilbert to conclude that '[t]he minimalism of the EU draft directive suggests it was deliberately drawn up to allow as many states as possible to be deemed

1D' in Article 12(1)(a).<sup>1595</sup> Article 12(1)(a) which the court refers to 'reflects Article 1D'<sup>1596</sup> states '[t]his Convention shall not apply to persons who are at present receiving' assistance from UNRWA.<sup>1597</sup> The advocate general observed that because Article 12(1)(a) 'contents itself with referring directly back to Article 1D ...it should bear exactly the same meaning.'<sup>1598</sup>

With this as a background the CJEU found that the wording of Article 1D excludes those who are 'at present receiving assistance' from UNRWA and that:

[O]nly those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.<sup>1599</sup>

The CJEU also found 'that persons who have not actually availed themselves of protection or assistance from UNRWA, prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) of the Directive'<sup>1600</sup> (which reflects Article 1A(2) in the 1951 Convention) defines a refugee as:

[A] third country national who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular

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safe third countries rather than giving the safety of the applicant for refugee status the higher priority.' Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 985 <<https://doi.org/10.1093/ejil/15.5.963>> accessed 1 December 2018

<sup>1595</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 34

<sup>1596</sup> Eleanor Sharpston, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Info Curio Case Law*, 4 March 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=79353&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2019, Paragraph 26

<sup>1597</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 31 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1D Paragraph 2

<sup>1598</sup> Eleanor Sharpston, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Info Curio Case Law*, 4 March 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=79353&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2019, Paragraph 92

<sup>1599</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 51

<sup>1600</sup> *Ibid* Paragraph 54

social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.<sup>1601</sup>

In conclusion, the CJEU judgement reaffirmed the opinion of the advocate general that Bolbol is not entitled to be recognized as an ipso facto refugee under Article 1D because before her asylum application she did not receive assistance from UNRWA.

### **Implications of CJEU judgement in Bolbol on Palestinian refugees**

The CJEU judgement in Bolbol ‘which clarified the requirement of protection and assistance’<sup>1602</sup> has important legal implications for Palestinian refugees because the way the court interpreted the applicability of Article 1D to Palestinian refugees simultaneously expands and limits the number of Palestinian refugees who can be recognized as ipso facto refugees. The first implication is that all Palestinian refugees who availed themselves of protection or assistance from UNRWA and ceased to receive such assistance for reason beyond their control ‘shortly before applying for asylum’ should be recognized as ipso facto refugees in State parties to the 1951 Convention because as the Home Office in the United Kingdom [UK] rightly noted the CJEU judgement made it clear that:

Article 12(1)(a) ... (and therefore Article 1D by extension) applied in the present, and not merely to those receiving assistance in July 1951 [as suggested by the UK].<sup>1603</sup> [Thus] [i]t potentially applied to all Palestinian refugees currently eligible to receive UNRWA protection or assistance.<sup>1604</sup>

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<sup>1601</sup> Ibid Paragraph 54

<sup>1602</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 110

<sup>1603</sup> When the CJEU was dealing with the case of Bolbol the UK submitted a written statement arguing ‘that the use of the words ‘at present’ refers to 1951, when the Convention was drafted. It submits that the drafting parties had in mind only the group of persons identified as already receiving assistance and protection from UNRWA when the Convention came into force.’ Court of Justice of the European Union, ‘Opinion of Advocate General Sharpston delivered on 4 March 2010’ (*Eur-Lex*, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CC0031&from=EN>> 6 March 2021, Paragraph 62

<sup>1604</sup> Home Office, ‘Asylum Policy Instruction Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) Version 2.0’ (*Home Office*, 9 May 2016)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524502/A-on-Article-1D-and-Palestinians-v2\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf)> accessed 20 October 2021, 7

The second implication is that Palestinian refugees who voluntarily leave UNRWA's territories of operations before the cessation of UNRWA assistance for reasons beyond their control and those who did not avail themselves of protection or assistance from UNRWA are not excluded from the 1951 Convention. While this means such persons can apply for refugee status under the 1951 Convention, they cannot claim ipso facto refugee status. Instead, they will have to be individually assessed for refugee status under Article 2(c) of the Directive (which reflects Article 1A(2) of the 1951 Convention).<sup>1605</sup> This means that Palestinian refugees from this category could end up falling outside the scope of the 1951 Convention if they are not recognized as refugees within the meaning of Article 2(c).<sup>1606</sup> Therefore, the thesis author like Albanese et al agrees with the UNHCR's assessment when it observed that the 'CJEU's... interpretation' has created 'a protection gap for Palestinian refugees who did not register with UNRWA or did not avail themselves of its protection and assistance despite being registered with the agency.'<sup>1607</sup> UNHCR also argued that the CJEU interpretation of Article 1D contradicts the objective and purpose of Article 1D because the 'refugee character' of all Palestinian refugees who fall under UNRWA's mandate 'is already established'...[in Article 1D]' as evident by the *travaux préparatoires*.<sup>1608</sup>

The third implication is that Palestinian refugees who are not recognized as refugees under Article 2(c) may qualify for EU subsidiary protection under Article 2(e) of the Directive

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<sup>1605</sup> This will also apply to persons who did not avail themselves of protection or assistance from any organ or agency of the UN other than the UNHCR. Ibid Paragraph 61

<sup>1606</sup> UNGA Resolution 429 (V) of 14 December 1950 'decided to Convene a Conference of the Plenipotentiaries to draft and sign a Convention on Refugees and Stateless Person.' The Conference discussions were based on a 'draft prepared by the Ad Hoc Committee on Refugees and Stateless Persons, adopted in its second session in Geneva in August 1950, save that the Preamble was that adopted by the Economic and Social Council, while article 1 was as recommended by the General Assembly and annexed to resolution 429 (V). The conference also unanimously adopted five recommendations covering travel documents, family unity, non-governmental organizations, asylum, and application of the Convention beyond its contractual scope.' Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 507

<sup>1607</sup> UNHCR quoted in Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 112

<sup>1608</sup> UNHCR quoted in Ibid 112

Albanese and Takkenberg like the thesis author agree with the UNHCR that the CJEU's interpretation has created a protection gap.

In contrast to the CJEU interpretation Akram, Goodwin-Gill, Albanese and Takkenberg claim that the legal status of Palestinian refugees and the rights that flow from this recognition including protection rights derive from Article 1D, Paragraph 7 of the UNHCR Statute, UNRWA's refugee definition and relevant UN Resolutions such as UNGA resolution 194. Ibid 85

UNHCR's interpretation is premised on the assumption that Palestinian refugees are 'already recognized by the international community via various UN[GA] resolutions...they are not required to establish individually that their treatment constitutes persecution within the meaning of Article 1(A)(2) of the 1951 Convention.' 2017 UNHCR Guidelines on Article 1D, para.22 (iii)(d) quoted in Ibid 118

2004/83/EC<sup>1609</sup> and by extension Article 2(f) of the Directive 2011/95/EC when it superseded Directive 2004/83/EC.<sup>1610</sup> While Palestinian refugees who qualify for subsidiary protection will not face a protection gap this does not change the fact that they will receive a lesser form of protection than the one they would have received had they been recognized as refugees<sup>1611</sup> because as Albanese et al correctly observe '[s]ubsidiary protection does not allow the panoply of rights granted through asylum under the 1951 Convention, but simply a minimum set of rights in the country, including legal stay.'<sup>1612</sup> Moreover, those who do not qualify for subsidiary protection and cannot be repatriated will likely face a protection gap as foreseen by UNHCR.<sup>1613</sup>

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<sup>1609</sup> '[P]erson eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.' Council of the European Union, 'Council Directive 2004/83/EC' (*Eur-Lex*, 29 April 2004) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 1 December 2018, Article 2 (e)

<sup>1610</sup> Article 2 (f) which stated 'A third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person, to their country of former habitual residence, would face a real risk of suffering serious harm as defined in Art. 15 of Directive 2011/95/EU (Recast Qualification Directive) and to whom Art. 17(1) and (2) of said Directive do not apply, and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country.' Council of the European Union, 'Directive 2011/95/EU of The European Parliament and of the Council of 13 December 2011' (*Eur-Lex*, 13 December 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>> accessed 26 February 2021

<sup>1611</sup> Council of the European Union, 'Council Directive 2004/83/EC' (*Eur-Lex*, 29 April 2004) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 1 December 2018, Chapter III Article 12 (1) (a)

<sup>1612</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 166

<sup>1613</sup> Albanese and Takkenberg found that in Luxembourg Palestinians denied protection who cannot be returned because of lack of valid documentation often remain in limbo.' Ibid 300

According to Article 17 of Directive 2004/83/EC persons can be excluded from being eligible for subsidiary protection in the following circumstances: 'Article 17 Exclusion 1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious crime; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present. 2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein. 3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.' Council of the European Union, 'Council Directive 2004/83/EC' (*Eur-Lex*, 29 April 2004)

The fourth implication is that Article 12(1)(a) which states that persons who are excluded from the 1951 Convention are also 'excluded from being a refugee'<sup>1614</sup> could strengthen 'the perception by some that Palestinian refugees are not to be considered as genuine refugees in a legal context.'<sup>1615</sup> This argument could however be countered by pointing out that Article 1D recognized that persons receiving assistance or protection from UNRWA fulfil the positive requirements of recognition as refugees because of their assumed ipso facto entitlement to the benefits of the Convention. UNHCR has also observed that '[t]he exclusion clauses...in the 1951 Convention...describe those situations in which persons who fulfil the positive requirements of recognition as refugees are nonetheless constrained from being recognized as such.'<sup>1616</sup> UNHCR was specifically referring to Article 1F which excludes persons who have 'committed a crime against peace, a war crime, or a crime against humanity' and those who have 'committed a serious non-political crime outside the country of refuge before his admission to that country as a refugee' and those who have 'been guilty of acts contrary to the purposes and principles of the [UN]'.<sup>1617</sup> The major difference between Article 1F and Article 1D is that Article 1F permanently excludes persons who have

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<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 1 December 2018; According to Article 17 of Directive 2011/95/EU persons can be excluded from being eligible for subsidiary protection in the following circumstances:

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious crime;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.' Council of the European Union, 'Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011' (*Eur-Lex*, 13 December 2011) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN>> accessed 1 September 2018

<sup>1614</sup> Council of the European Union, 'Council Directive 2004/83/EC' (*Eur-Lex*, 29 April 2004) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>> accessed 26 February 2021, Chapter III Article 12 (1) (a)

<sup>1615</sup> *Ibid* 354

<sup>1616</sup> UNHCR, 'Note on the Exclusion Clauses EC/47/SC/CRP.29' (*UNHCR*, 30 May 1997)

<<http://www.unhcr.org/uk/excom/standcom/3ae68cf68/note-exclusion-clauses.html>> accessed 14 January 2020, Paragraph 5

<sup>1617</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1F



committed certain crimes from the scope of the refugee convention,<sup>1618</sup> while Article 1D has kept the door open for the formal recognition of Palestinian refugees if protection or assistance cease to exist before their situation has been resolved based on relevant UNGA resolutions. This, however, does not change the fact that Palestinian refugees who are excluded under Article 1D cannot be formally recognized as refugees if they do not fulfil the criteria set by the CJEU. This exclusion has caused several Palestinian refugees who applied for asylum in the EU to be rejected even though UNHCR has observed that Article 1D should be ‘interpreted within narrow limits and in a manner, which does not undermine the integrity of international protection.’<sup>1619</sup> According to UNHCR individuals excluded from ‘refugee status’ will not always be expelled from the country of asylum because ‘the excluded person is still entitled to the protection of relevant municipal and international laws.’<sup>1620</sup> This was evident in the case of Bolbol when the CJEU observed that the prohibition of her removal derives from Article 38 of the Law on Asylum and Article 51(1) of Law No II of 2007 on Entry and Stay.<sup>1621</sup>

The fifth implication is that Palestinian refugees who can no longer access protection or assistance from UNRWA for reasons beyond their control could remain excluded from the scope of the convention if they seek assistance or protection from any other organ or agency of the UN other than UNHCR. Because State parties to the 1951 Convention could argue that based on Article 1D paragraph 1 complete cessation can only come about if the organ or agency of the UN assisting Palestinian refugees can no longer assist them. This thesis disagrees with this interpretation because it does not correspond with the drafting history of the 1951 Convention which reveals that Article 1D was specifically referring to Palestinian refugees who fall under UNRWA’s mandate. Egypt’s representative who proposes Article 1D made it clear that ‘[t]he objective of the Egyptian amendment was to make sure that Arab

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<sup>1618</sup> Ibid Article 1F

<sup>1619</sup> UNHCR, ‘Note on the Exclusion Clauses EC/47/SC/CRP.29’ (UNHCR, 30 May 1997) <<http://www.unhcr.org/uk/excom/standcom/3ae68cf68/note-exclusion-clauses.html>> accessed 14 January 2021, Paragraph 6

<sup>1620</sup> Ibid B (6)

<sup>1621</sup> ‘Bolbol benefits from a prohibition on expulsion on the basis of Article 38 of the Law on Asylum and Article 51(1) of Law No II of 2007 on Entry and Stay, on the grounds that the readmission of Palestinians was at the discretion of the Israeli authorities and Ms Bolbol would be exposed to torture or inhuman and degrading treatment in the Gaza Strip on account of the critical conditions there.’

Court of Justice of the European Union, ‘Judgment of the Court (Grand Chamber) 17 June 2010’ (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 30

refugees from Palestine who were still refugees when the organs or agencies of the [UN] at present providing them with protection or assistance ceased to function [referring to UNRWA and UNCCP], would automatically come within the scope of the [1951] Convention.<sup>1622</sup>

The potential implications identified by the thesis author should not be read as suggesting that the CJEU interpretation of Article 1D should be construed in negative terms but rather as a constructive critique that illuminates the possibilities and limitations of the interpretation adopted by the court. The thesis acknowledges that the CJEU's interpretation of Article 1D in *Bolbol* led to a more favourable approach to Palestinians' asylum claims in some EU countries. For example, in the UK *Bolbol* was considered a landmark ruling<sup>1623</sup> because it overturned the findings of the Court of Appeal in *El-Ali v SSHD* [2002] EWCA Civ 1103 (26 July 2002) which 'interpreted the words 'at present receiving' as limiting the effect of Article 1D... to Palestinians who became refugees as a result of the 1948 conflict and who were receiving UNRWA assistance when the Convention was adopted on 28 July 1951.'<sup>1624</sup> The 2016 Asylum Policy Instruction by the UK Home Office, which confirmed the binding nature of the CJEU ruling in *Bolbol*, also revealed that the ruling would play an important role in improving consistency in the application of Article 1D to Palestinian refugees.<sup>1625</sup> While we applaud these positive developments they should not blind us to the fact that the

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<sup>1622</sup> Mr Bey of Lebanon quoted in Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press, 1998) 64; See United Nations, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-ninth Meeting, 28 November 1951, A/CONF.2/SR.29' (*Refworld*, 28 November 1951)

<<https://www.refworld.org/docid/3ae68cdf4.html>> accessed 19 March 2021

<sup>1623</sup> When the CJEU was dealing with the case of *Bolbol* the UK submitted a written statement arguing 'that the use of the words 'at present' refers to 1951, when the Convention was drafted. It submits that the drafting parties had in mind only the group of persons identified as already receiving assistance and protection from UNRWA when the Convention came into force.' Court of Justice of the European Union, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (*Eur-Lex*, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CC0031&from=EN>> 6 March 2021, Paragraph 62

<sup>1624</sup> Home Office, 'Asylum Policy Instruction Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) Version 2.0' (*Home Office*, 9 May 2016)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524502/A-on-Article-1D-and-Palestinians-v2\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf)> accessed 20 October 2021, 7

<sup>1625</sup> 'The CJEU's rulings on Article 12(1)(a) of the Directive are binding on the UK and Article 1D must be interpreted in a way which is compatible with its findings. In practice, they mean that refugees who were previously assisted by UNRWA and who seek asylum outside the area of UNRWA operation are excluded from the scope of the Refugee Convention, unless they can show that UNRWA assistance or protection has ceased for reasons beyond their control or independent of their volition.' Home Office, 'Asylum Policy Instruction Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) Version 2.0' (*Home Office*, 9 May 2016) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524502/A-on-Article-1D-and-Palestinians-v2\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf)> accessed 20 October 2021, 8

interpretation applied by the CJEU has also created ‘a protection gap for Palestinian refugees who did not register with UNRWA or did not avail themselves of its protection and assistance despite being registered with the agency’<sup>1626</sup> if they do not qualify for refugee status or subsidiary protection.

In conclusion, the implications arising from the CJEU ruling in *Bolbol* is that all Palestinian refugees who are at present receiving protection or assistance from UNRWA are excluded from the 1951 Convention under Article 1D and therefore only such persons are entitled to be recognized as ipso facto refugees if UNRWA assistance ceases for reasons beyond their control. Meanwhile, Palestinian refugees who did not receive protection or assistance from UNRWA or who left its areas of operation voluntarily have a right to apply for refugee status under the 1951 Convention in signatory States but they must fulfil the refugee criteria in Article 1A(2) of the 1951 Convention to be recognized as refugees. Those who do not qualify for refugee status may get subsidiary protection. While persons denied both statuses will find themselves facing a legal limbo.

### **8.5. *Abed El Karam El Kott and Others v The Hungarian Office for Immigration and Citizenship (CJEU-C-364/11)***

The case of *Abed El Karam El Kott and Others v The Hungarian Office for Immigration and Citizenship* concerned three stateless persons who left UNRWA refugee camps in Lebanon and applied for asylum in Hungary because of threats to their personal security in Lebanon.<sup>1627</sup> The Hungarian Office for Immigration and Citizenship rejected their asylum application.<sup>1628</sup> The applicants claimed that they are ipso facto refugees based on article 1D

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<sup>1626</sup> UNHCR quoted in Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 112

<sup>1627</sup> Court of Justice of the European Union, ‘Reference for a preliminary ruling from the Fővárosi Bíróság (Budapest, Hungary) lodged on 11 July 2011 - *Abed El Karem El Kott Mostafa and Others v Bevándorlási és Állampolgársági Hivatal, Hivatal, ENSZ Menekültügyi Főbiztosság (Case C-364/11)*’ (*Info Curio Case Law*, 11 July 2011)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=114086&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1327530>> accessed 1 December 2018, Paragraph 13, 14, 15, 16

<sup>1628</sup> Although ‘[t]wo men received tolerated stay and one was granted subsidiary protection. All three men lodged requests for judicial review against the decisions...refusing their refugee status.’

European Database of Asylum Law, ‘The Court of Justice of the European Union and Palestinian refugees – Case C-364/11, *El Kott*’ (*EDAL*, 21 February 2014)

<<https://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-and-palestinian-refugees-%E2%80%93-case-c-36411-el-kott>> accessed 23 December 2021

and Article 12(1) of Council Directive 2004/83/EC.<sup>1629</sup> The Metropolitan Court of Budapest asked the CJEU to answer two questions ‘in what circumstances can the protection of Palestinians by the UNRWA near their former place of residence be considered to have terminated and whether in cases of cessation of protection, refugee status should be automatically granted.’<sup>1630</sup>

### **Advocate General Opinion on El-Kott and Others**

On 13 September 2012, the advocate general noted that the questions raised in this case are identical to Bolbol except for the fact that Bolbol had not received protection or assistance from UNRWA before applying for asylum in Hungary.<sup>1631</sup> Despite this difference, the advocate general reaffirmed that Palestinian refugees who fell under UNRWA’s mandate should be recognized as ipso facto refugees under the second sentence of Article 12(1)(a) if the protection or assistance provided to the applicants by UNRWA ceased for reasons beyond their control.<sup>1632</sup>

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<sup>1629</sup> Court of Justice of the European Union, ‘Reference for a preliminary ruling from the Fővárosi Bíróság (Budapest, Hungary) lodged on 11 July 2011 - Abed El Karem El Kott Mostafa and Others v Bevándorlási és Állampolgársági Hivatal, Hivatal, ENSZ Menekültügyi Főbiztosság (Case C-364/11)’ (*Info Curio Case Law*, 11 July 2011)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=114086&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1327530>> accessed 1 December 2018, Paragraph 36, 37

<sup>1630</sup> European Database of Asylum Law, ‘The Court of Justice of the European Union and Palestinian refugees – Case C-364/11, El Kott’ (*EDAL*, 21 February 2014)

<<https://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-and-palestinian-refugees-%E2%80%93-case-c-36411-el-kott>> accessed 10 March 2021; See Court of Justice of the European Union, Opinion of Advocate General Sharpston delivered on 13 September 2012 (Case C-364/11)’ (*Info Curio Case Law*, 13 September 2012)

<<http://curia.europa.eu/juris/document/document.jsf;jsessionid=7802F60E9B2ABE13A964E4E318047A4D?text=&docid=126801&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=438390>> accessed 10 March 2021, Paragraph 19

<sup>1631</sup> Court of Justice of the European Union, Opinion of Advocate General Sharpston delivered on 13 September 2012 (Case C-364/11)’ (*Info Curio Case Law*, 13 September 2012)

<<http://curia.europa.eu/juris/document/document.jsf;jsessionid=7802F60E9B2ABE13A964E4E318047A4D?text=&docid=126801&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=438390>> accessed 10 March 2021, Paragraph 2

<sup>1632</sup> *Ibid* Paragraph 84

## CJEU Judgement on EI-Kott and Others

On 19 December 2012, the CJEU determined that Palestinian refugees who were forced to flee UNRWA camps for reasons beyond their control should be recognised as ipso facto refugees in the EU.<sup>1633</sup> The CJEU also found that the absence or voluntary departure from UNRWA's area of operations is not sufficient to end the exclusion of Palestinian refugees from the 1951 Convention.<sup>1634</sup> The CJEU also found that it would have to be proven that UNRWA is unable to carry out its mission.<sup>1635</sup> In this case, the individual must not necessarily 'show that he has a well-founded fear of being persecuted within the meaning of Article 2(c) of the directive, but must nevertheless submit – as did the applicants in the main proceedings – an application for refugee status.'<sup>1636</sup>

According to the CJEU the words 'shall ipso facto be entitled to the benefits of the Directive' must be interpreted in a manner consistent with Article 1D, as permitting the persons concerned to benefit 'as of right' from the regime of the Convention and the benefits conferred by it.<sup>1637</sup> Despite this, the CJEU found that this 'does not entail; an unconditional

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<sup>1633</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 19 December 2012 (Case C-364/11)' (*Info Curio Case Law*, 19 December 2012) <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1330675>> accessed 1 December 2018, Paragraph 82

<sup>1634</sup> 'The fact that that provision of the Geneva Convention, to which the first sentence of Article 12(1)(a) of Directive 2004/83 refers, simply excludes from the scope of the convention persons who 'are at present receiving' protection or assistance from such an organ or agency of the United Nations cannot be construed as meaning that mere absence or voluntary departure from UNRWA's area of operations would be sufficient to end the exclusion from refugee status laid down in that provision.' Ibid Paragraph 49

<sup>1635</sup> Ibid Paragraph 56

<sup>1636</sup> 'Thus, a person who is *ipso facto* entitled to the benefits of Directive 2004/83 is not necessarily required to show that he has a well-founded fear of being persecuted within the meaning of Article 2(c) of the directive, but must nevertheless submit – as did the applicants in the main proceedings – an application for refugee status, which must be examined by the competent authorities of the Member State responsible. In carrying out that examination, those authorities must verify not only that the applicant actually sought assistance from UNRWA (see, in that regard, *Bolbol*, paragraph 52), and that the assistance has ceased but also that the applicant is not caught by any of the grounds for exclusion laid down in Article 12(1)(b) or (2) and (3) of the directive.' Ibid Paragraph 76

<sup>1637</sup> 'In those circumstances, the Fővárosi Bíróság (Budapest Municipal Court) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'For the purpose of Article 12(1)(a) of [Directive 2004/83]:

(1) Do the benefits of the Directive mean recognition as a refugee, or either of the two forms of protection covered by the Directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion within the scope *ratione personae* of the Directive?

(2) Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an involuntary obstacle caused by legitimate or objective

right to refugee status'<sup>1638</sup> because protection will be deemed to have terminated only if UNRWA is dismantled or can no longer provide support and services pursuant to its mandate or a refugee cannot live safely in UNRWA's territories of operation.<sup>1639</sup> Furthermore, an individual who leaves UNRWA's operating territories because of a personal risk must prove that it is 'impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency.'<sup>1640</sup> The CJEU, which left it to the discretion of national authorities to decide whether the applicant's departure was due to reasons beyond their control,<sup>1641</sup> required EU Member States dealing with the asylum application to verify three facts:

1. The applicant sought assistance from UNRWA.
2. Assistance has ceased for a reason beyond the applicant's control and independent of his/her volition.
3. The applicant is not caught by any of the grounds for exclusion laid down in Art. 12(1)(b) or (2) and (3) of Directive 2004/83.<sup>1642</sup>

A person who fulfils the above requirements is 'entitled to the benefits of Directive [2004/83]' which 'means that that Member State must recognise him as a refugee within the meaning of Article 2(c) of the directive and that person must automatically be granted refugee status.'<sup>1643</sup>

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reasons such that the person entitled thereto is unable to avail himself of that protection or assistance?' Ibid Paragraph 41

<sup>1638</sup> 'In the light of that objective, a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations if his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency.' Ibid Paragraph 63

<sup>1639</sup> Ibid Paragraph 82

<sup>1640</sup> Ibid Paragraph 63

<sup>1641</sup> The CJEU in its guidance for national authorities observed that 'as regards the examination, in an individual case, of the circumstances giving rise to the departure from the UNRWA area of operations, the national authorities must take account of the objective of Article 1D of the Geneva Convention, to which Article 12(1)(a) of Directive 2004/83 refers, namely to ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.' Ibid Paragraph 62

<sup>1642</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 19 December 2012' (*Info Curio Case Law*, 19 December 2012)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1330675>> accessed 1 December 2018, Paragraph 82 (1) and Paragraph 82 (2)

<sup>1643</sup> 'In the light of the foregoing considerations, the answer to Question 1 is that the second sentence of Article 12(1)(a) of Directive 2004/83 must be interpreted as meaning that, where the competent authorities of the Member State responsible for examining the application for asylum have established that the condition relating to the cessation of UNRWA protection or assistance is satisfied as regards the applicant, the fact that that person is *ipso facto* 'entitled to the benefits of [the] directive' means that that Member State must recognise him as a refugee within the meaning of Article 2(c) of the

The CJEU also interpreted Article 11 (f) and Article 14 (f) of Directive 2004/83 to mean that a person ceases to be a refugee if the circumstances which led to that person qualifying as a refugee no longer exist.<sup>1644</sup>

### Implications of CJEU Judgement in *El-Kott and Others* [*El-Kott*]

The CJEU judgement in *El-Kott* has important legal implications for Palestinian refugees because it clarified under what conditions (i.e., objective reasons) Palestinian refugees can be recognized as ipso facto refugees under Article 1D.<sup>1645</sup> The first implication is that this judgement confirmed that Palestinian refugees who receive protection or assistance from UNRWA and who can no longer access such assistance for reasons beyond their control should be recognised as ipso facto refugees.<sup>1646</sup> The second implication is that the CJEU revealed that being '*ipso facto* entitled to the benefits of Directive 2004/83 within the meaning of Article 12(1)(a) does not...entail an unconditional right to refugee status'<sup>1647</sup> as asserted by UNHCR<sup>1648</sup> because as the UK Home Office correctly observed this judgment:

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directive and that person must automatically be granted refugee status, provided always that he is not caught by Article 12(1)(b) or (2) and (3) of the directive.' Ibid Paragraph 81

<sup>1644</sup> Ibid Paragraph 77

<sup>1645</sup> The CJEU judgement in *El-Kott* 'clarified the significance of whether the individual can re-avail him/herself of assistance/ protection for reasons beyond his/her control, together with personal safety of the individual as a basis for departure from their country of habitual residence.' Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 110

<sup>1646</sup> 'In the light of that objective, a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations if his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency.' Ibid Paragraph 63; See Paragraph 82 (1) and Paragraph 82 (2).

<sup>1647</sup> 'It should, however, be noted that the fact that the persons concerned are *ipso facto* entitled to the benefits of Directive 2004/83 within the meaning of Article 12(1)(a) does not, as rightly observed by the Hungarian and German Governments, entail an unconditional right to refugee status.' Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 19 December 2012' (*Info Curio Case Law*, 19 December 2012)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1330675>> accessed 1 December 2018, Paragraph 75

\*Albanese and Takkenberg agree with this assessment. Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 116

<sup>1648</sup> According to the UNHCR 'the 1951 Convention extends to Palestinians registered, or eligible to be registered, with UNRWA who no longer find themselves in the Agency's area of operations and are therefore automatically entitled to the protection it provides.' Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, 4; See UNHCR, 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (*UNHCR*, 2002)

Made it clear that it did not mean that a Palestinian in receipt of UNRWA assistance and who decided to leave UNRWA areas of operation would automatically be entitled to Convention refugee status on application. It would be for the Member State responsible for examining the asylum claim to ascertain whether its assistance had ceased to be available to that person, being outside the UNRWA area of operations.<sup>1649</sup>

This explains why Albanese et al concluded that:

In essence, El Kott stipulates that under Article 1D, Palestinian refugees' entitlements are neither full nor unconditional: what counts is whether the individual in question, falling under UNRWA's mandate, is no longer under UNRWA's protection or assistance because it has become impossible owing to objective circumstances.<sup>1650</sup>

The third implication is that the CJEU judgement could lead to inconsistent refugee recognition for Palestinian refugees across countries because as Albanese et al correctly observed the court failed 'to provide guidance on practical aspects...[such as]...what constitutes an assessment of safety on the ground.'<sup>1651</sup> The practical consequence of this failure was demonstrated when the Swedish Migration Department (SMD) refused to grant refugee status to a Palestinian refugee who fled from Syria to Lebanon before reaching Sweden because Lebanon was deemed a safe destination.<sup>1652</sup>

The fourth implication is that the CJEU judgement could lead to inconsistent refugee recognition for Palestinian refugees who leave UNRWA operating territories because of a

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<<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3da192>> accessed 15 January 2020) 2

<sup>1649</sup> Home Office, 'Asylum Policy Instruction Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) Version 2.0' (*Home Office*, 9 May 2016)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524502/A-on-Article-1D-and-Palestinians-v2\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf)> accessed 20 October 2021, 8

\* 'Palestinians who were not receiving or eligible to receive the protection or assistance of UNRWA as per the first paragraph of Article 1D may qualify as refugees if they fulfil the refugee criteria of Article 1A (2) of the Refugee Convention and are not excluded under the provisions of Article 1F. Article 1D does not apply to them and their asylum claims should be considered in the normal way.' Ibid 9

<sup>1650</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 116

<sup>1651</sup> Ibid 110

<sup>1652</sup> Action Group for Palestinian Refugees, 'Swedish Authorities to Reconsider Asylum Application by Palestinian Family from Syria' (*Action Group for Palestinian Refugees*, 21 December 2021)

<<https://www.actionpal.org.uk/en/post/11942/flash-news/swedish-authorities-to-reconsider-asylum-application-by-palestinian-family-from-syria>> accessed 21 December 2021



personal risk if they cannot prove that the protection or assistance provided by UNRWA falls short of the expected threshold that the agency is expected to provide.<sup>1653</sup> This limitation is very problematic because UNRWA 'is not responsible for security or law and order in the camps or the physical protection of Palestine refugees and has no police force or intelligence service. This responsibility falls within the sovereignty of the respective host government.'<sup>1654</sup> This means the agency cannot protect Palestinian refugees at risk from any party within host States.

The fifth implication is that the CJEU judgement could also lead to inconsistent refugee recognition for Palestinian refugees who apply for asylum if UNRWA has not suspended its core services because the CJEU failed to clarify the threshold that UNRWA must fall short of for it to be determined that it can no longer guarantee the living conditions of Palestinian refugees in accordance with its mandate.<sup>1655</sup>

The potential implications identified by the thesis author suggest that the CJEU ruling in *El Kott* illuminate the limitations and possibilities that may arise as a result of the CJEU's interpretation of Article 1D and its applicability to Palestinian refugees. Case law in several EU Member States revealed that the CJEU's interpretation of Article 1D in *El Kott* led some countries to apply a less favourable approach to Palestinians' asylum claims while others ended up applying a more favourable approach. For example, Albanese et al found that after Italy applied the 'CJEU's... interpretation of Article 1D... [this] resulted in a less favourable approach to Palestinians' asylum claims'<sup>1656</sup> because before *El Kott* Italy 'recognized Palestinian refugees ipso facto as Convention refugees without requiring evidence of a well-founded fear of persecution.'<sup>1657</sup> Meanwhile, in the Netherlands, after the State Secretary denied refugee status to a Palestinian refugee from Gaza because they argued that the claimant can return to Gaza and receive assistance from UNRWA<sup>1658</sup> a Tribunal Court in

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<sup>1653</sup> Ibid Paragraph 63

<sup>1654</sup> UNRWA, 'Frequently Asked Question' (UNRWA, n.d.) <<https://www.unrwa.org/who-we-are/frequently-asked-questions>> accessed 20 October 2021

<sup>1655</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 116

<sup>1656</sup> Ibid 281

<sup>1657</sup> Ibid 282

<sup>1658</sup> 'The stateless claimant argued that the general situation in Gaza is so dire that it had left him and his family without the prospect of a normal life and, in the case of a return, would expose him to a personal situation of serious insecurity. On the contrary, the State Secretary considered that the claimant fell under the exclusion basis of Article 1D of the Refugee Convention, because he registered with and received assistance from UNRWA, and because he could return to UNRWA's

2020, which referenced El Kott, annulled the decision after concluding that UNRWA is unable to provide those under its mandate with their daily necessities and therefore accepted that this may expose the claimant to a personal situation of serious insecurity.<sup>1659</sup> This ruling revealed how different assertions about UNRWA's ability to provide sufficient protection or assistance could lead to inconsistent refugee recognition.<sup>1660</sup> Meanwhile, Malta a Palestinian refugee reported that his asylum application was rejected because the court concluded that he can 'receive protection from ...UNRWA.'<sup>1661</sup>

In conclusion, the CJEU judgement in El Kott indicates that Palestinian refugees who can no longer receive assistance or protection for reasons beyond their control should be recognized as ipso facto refugees for the purpose of Article 1D. Meanwhile, persons who did not receive protection or assistance from UNRWA can be recognized as refugees if they meet the refugee criteria under article 1A(2) of the 1951 Convention. While persons who do not meet the refugee criteria may receive subsidiary protection if they fulfil the criteria for subsidiary protection. Persons who are denied both statuses will face a protection gap. Case law in several EU member countries also revealed that the applicability of Article 1D to Palestinian refugees will be impacted by whether the country of asylum concludes that UNRWA can fulfil its mandate and whether the country or countries that the claimant fled from are safe destinations.<sup>1662</sup>

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mandate area to seek its assistance.' European Database of Asylum Law, 'The Netherlands: UNRWA unable to provide protection and assistance to Palestinian refugees in Gaza' (*EDAL*, 24 August 2020) <<https://www.asylumlawdatabase.eu/en/content/netherlands-unrwa-unable-provide-protection-and-assistance-palestinian-refugees-gaza>> accessed 21 December 2021

<sup>1659</sup> Ibid

<sup>1660</sup>The striking thing about this case is that the claimant went from being denied refugee status to being recognized as a refugee based on an argument that could have been used as a precedent to argue that all Palestinian refugees from Gaza who received assistance from UNRWA and applied for asylum at the time should be recognized as ipso facto refugees in the Netherlands. European Database of Asylum Law, 'The Netherlands: UNRWA unable to provide protection and assistance to Palestinian refugees in Gaza' (*EDAL*, 24 August 2020) <<https://www.asylumlawdatabase.eu/en/content/netherlands-unrwa-unable-provide-protection-and-assistance-palestinian-refugees-gaza>> accessed 21 December 2021

<sup>1661</sup> Kristina Abela, 'Helpless' Palestinian appeals to president after asylum request is rejected' (*Times Malta*, 21 December 2021) <<https://timesofmalta.com/articles/view/helpless-palestinian-appeals-to-president-after-asylum-request-is.874579>> accessed 21 December 2021

<sup>1662</sup> In 2021 Denmark became the first EU member State to concluded that refugees from Syria, including Palestinian refugees should be stripped of their residency permit and returned to Damascus because it is a safe to go back to. Eleanor Sly, 'Denmark to send almost 100 Syrian refugees home as Damascus is 'safe' (*The Independent*, 3 March 2021) <<https://www.independent.co.uk/news/world/europe/denmark-syrian-refugees-residency-permits-b1811466.html>> accessed 21 December 2021

## 8.6. Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite [State Agency for Refugees, 'the DAB'] (c-585/16)

The case concerned Ms Alheto who held a Palestinian National Authority [PA] passport and was registered with UNRWA in Gaza.<sup>1663</sup> Alheto travelled to Bulgaria on a tourist visa from Amman and applied for international protection on 11 November 2014.<sup>1664</sup> Alheto claimed 'that to return to the Gaza Strip would expose her to a serious threat to her life since she would risk experiencing torture and persecution there' from Hamas.<sup>1665</sup> On 12 May 2015 Ms Alheto's refugee application was rejected because her 'statements had not proven any risk of persecution...[or that she was]... forced to leave the Gaza Strip.'<sup>1666</sup>

After Alheto appealed the decision<sup>1667</sup> the Administrativen sad Sofia-grad [Administrative Court of Sofia] asked the CJEU on 18 November 2016 to provide a preliminary ruling concerning 'the interpretation of Article 12(1) of Directive 2011/95/EU...on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, and Article 35 and Article 46 (3) of [the Procedure] Directive 2013/32/EU of the European Parliament...on common procedures for granting and withdrawing international protection.'<sup>1668</sup>

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<sup>1663</sup> Court of Justice of the European Union, 'Opinion of Advocate General Mengozzi delivered on 17 May 2018 (C 585/16)' (*Info Curio Case Law*, 17 May 2018)  
<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=202056&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 18

<sup>1664</sup> Ibid Paragraph 18

<sup>1665</sup> Ibid Paragraph 19

<sup>1666</sup> Ibid Paragraph 20

<sup>1667</sup> Alheto argued 'that the decision infringed Articles 8 and 9 of the ZUB and Article 15(c) of Directive 2004/83, as interpreted by the Court of Justice in its judgment of 17 February 2009, *Elgafaji* (C-465/07, EU:C:2009:94) [and that] [t]he Deputy Director's view that the situation in the Gaza Strip...was based solely on a report dated 9 April 2015 ... which did not provide a basis for properly assessing the situation in the Gaza Strip for the purposes of applying the principle of *non-refoulement*.' Ibid Paragraph 21

<sup>1668</sup> Ibid Paragraph 23

## Advocate General Opinion & CJEU Judgment in *Alheto*

The opinion of the advocate general was delivered on 17 May 2018.<sup>1669</sup> According to the advocate general persons who fall under UNRWA's mandate should be recognized as ipso facto refugees in EU Member States without having to demonstrate a well-founded fear of persecution if they can prove that protection or assistance from UNRWA has ceased for reasons beyond their control.<sup>1670</sup> The CJEU delivered its judgment on 12 July 2018. The CJEU found that Palestinian refugees under UNRWA's mandate cannot obtain refugee status in the EU while receiving effective protection or assistance from UNRWA.<sup>1671</sup> The

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<sup>1669</sup> Court of Justice of the European Union, 'Opinion of Advocate General Mengozzi delivered on 17 May 2018 (C 585/16)' (*Info Curio Case Law*, 17 May 2018)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=202056&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018

<sup>1670</sup> Paragraph 92 states '[a]s set out in paragraphs 85 to 87 of the present judgment Article 12(1)(a) of Directive 2011/95 contains, first, a ground for exclusion, to the effect that any third-country national or stateless person receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commission for Refugees is to be excluded from being a refugee in the European Union, and secondly, a ground for no longer applying that ground for exclusion, to the effect that, when such protection or assistance has ceased without the position of that national or stateless person being definitively settled in accordance with the relevant resolutions adopted by the United Nations, that national or stateless person is ipso facto to be entitled to the benefits of the directive.' Court of Justice of the European Union, 'Judgement of the Court (Grand Chamber) 25 July 2018 (C 585/16)' (*Eur-Lex*, 25 July 2018)

<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0585>> accessed 1

December 2018; Paragraph 99 states '[t]he second sentence of Article 12(1)(a) of Directive 2004/83 and the second sentence of Article 12(1)(a) of Directive 2011/95 satisfy those criteria, since they set out a rule whose content is unconditional and sufficiently precise to be relied on by an individual and applied by a court. Furthermore, those provisions provide that, in the circumstances to which they relate, an applicant may 'ipso facto' be entitled to the benefits of this directive.' Ibid 12 (1)(a)

<sup>1671</sup> Paragraph 85 states '[o]n account of that specific refugee status established in those territories of the Near East for Palestinians, persons registered with UNRWA are, in principle, by virtue of the first sentence of Article 12(1)(a) of Directive 2011/95, which corresponds to the first paragraph of Article 1(D) of the Geneva Convention, excluded from refugee status in the European Union. That said, it follows from the second sentence of Article 12(1)(a) of Directive 2011/95, which corresponds to the second paragraph of Article 1(D) of the Geneva Convention, that, when an applicant for international protection in the European Union no longer receives protection or assistance from UNRWA, that exclusion ceases to apply.' Ibid; See also Paragraph 83 states '[a]s is apparent from the order for reference, this question arises on account of the fact that the Deputy Director of the DAB failed specifically to examine, in the contested decision, whether the protection or assistance which the applicant in the main proceedings received from UNRWA in the area of operations of that agency had ceased, in circumstances where, had that fact been established, she would potentially have been eligible, in Bulgaria, for refugee status in accordance with Article 1(D) of the Geneva Convention and Article 12(1)(a) of Directive 2011/95.' Court of Justice of the European Union, 'Judgement of the Court (Grand Chamber) 25 July 2018 (C 585/16)' (*Eur-Lex*, 25 July 2018)

<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0585>> accessed 1 December 2018;

Paragraph 84 also stated '[i]n that regard, it must be noted, as was recalled in paragraphs 6 and 7 of the present judgment, that UNRWA is an agency of the United Nations which was established to protect and assist, in the Gaza Strip, the West Bank, Jordan, Lebanon and Syria, Palestinians who are 'Palestine refugees'. It follows that a person, such as the applicant in the main proceedings, who

CJEU also found that Palestinian refugees whose personal safety was at risk and 'it is impossible for UNRWA [...] to guarantee that the living conditions of that individual would be compatible with its mission' should be recognized as ipso facto refugees.<sup>1672</sup>

### **Implications of CJEU judgement in Alheto**

The CJEU judgement in Alheto has important legal implications for Palestinian refugees. The first implication is that the CJEU judgment confirmed that Palestinian refugees should be recognized as ipso facto refugees if UNRWA cannot guarantee their living conditions. The second implication is that the ruling could lead Palestinian refugees who were denied ipso facto refugee status in some EU Member States to be recognized as refugees. The second implication that was identified by Albanese et al is that Palestinian refugees could in the future be returned to any country that hosts UNRWA because the CJEU judgement found that countries can assess 'the refugee's returnability against any other country where the person may have passed through, and not against the country of habitual residence.'<sup>1673</sup>

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is registered with UNRWA, is eligible to receive protection and assistance from that agency in the interests of her well-being as a refugee.' Ibid

<sup>1672</sup> Paragraph 86 states '[a]s the Court has held, the second sentence of Article 12(1)(a) of Directive 2011/95 applies where it becomes evident, based on an assessment, on an individual basis, of all the relevant evidence, that the personal safety of the Palestinian concerned is at serious risk and that it is impossible for UNRWA, whose assistance was requested by that person, to guarantee that the living conditions of that individual would be compatible with its mission, and that person is forced to leave the UNRWA area of operations owing circumstances beyond his control. In that case, that Palestinian may, unless he or she falls within the scope of any of the grounds for exclusion set out in Article 12(1)(b), Article 12(2) and Article 12(3) of that directive, ipso facto be entitled to the benefits of that directive, without necessarily having to demonstrate a well-founded fear of being persecuted, within the meaning of Article 2(d) of that directive, until the time when he is able to return to the territory of former habitual residence (judgment of 19 December 2012, *Abed El Karem El Kott and Others*, C 364/11, EU:C:2012:826, paragraphs 49 to 51, 58 to 65, 75 to 77 and 81).' Ibid

<sup>1673</sup> Ibid 121

Albanese et al argument is supported in Paragraph 150 (5) of the CJEU judgement which states 'Point (b) of the first paragraph of Article 35 of Directive 2013/32 must be interpreted as meaning that a person registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) must, if he or she is a beneficiary of effective protection or assistance from that agency in a third country that is not the territory in which he or she habitually resides but which forms part of the area of operations of that agency, be considered as enjoying sufficient protection in that third country, within the meaning of that provision, when it:

- agrees to readmit the person concerned after he or she has left its territory in order to apply for international protection in the European Union; and
- recognises that protection or assistance from UNRWA and supports the principle of non-refoulement, thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence.'

Court of Justice of the European Union, 'Judgement of the Court (Grand Chamber) 25 July 2018 (C 585/16)' (*Eur-Lex*, 25 July 2018)

## 8.7. Article 1E and its Potential Impact on Palestinian Refugees

CJEU's judgements indicate that Palestinian refugees who have left UNRWA territories and subsequently applied for asylum in the EU could be rejected based on Article 1E of the 1951 Convention which states:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.<sup>1674</sup>

UNHCR has observed that Article 1E excludes 'persons not considered to be in need of international protection (i.e., those who have access to national or other protection).'<sup>1675</sup>

Although the cases reviewed by the CJEU have not referred to Article 1E, Article 1E can become relevant if UNRWA host States adopt laws that allow Palestinian refugees to become permanent residents or give them access to the same rights and obligations afforded to nationals or aliens.<sup>1676</sup> Our interpretation is supported by Article 12(1)(b) of Directive 2011/95/EU which states:

[H]e or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to

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<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0585>> accessed 1 December 2018, Paragraph 150 (5)

<sup>1674</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1E

<sup>1675</sup> UNHCR, 'Note on the Exclusion Clauses EC/47/SC/CRP.29' (*UNHCR*, 30 May 1997) <<http://www.unhcr.org/uk/excom/standcom/3ae68cf68/note-exclusion-clauses.html>> accessed 14 January 2021, Footnote 1

<sup>1676</sup> This exclusion would also apply to a Palestinian refugee who had the opportunity to gain permanent residence or equivalent in UNRWA host States but chose not to accept it so they can retain their status as a Palestinian refugee retain their right to return. This is evident by the fact that in *Bolbol* the advocate general noted that 'Article 1C provides for various circumstances in which the Convention ceases to apply to a person who qualified for refugee status under Article 1A (2) – essentially, because he either no longer needs, or should no longer need, its protection.' Eleanor Sharpston, 'Opinion of Advocate General Sharpston delivered on 4 March 2010' (Official Journal of the European Union, 4 March 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0031>> accessed 1 September 2018, Paragraph 6; See Article 1C(5) of the 1951 Convention which states that the Convention will 'cease to apply' to a refugee who 'can no longer because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 Feb 2017

the possession of the nationality of that country; or rights and obligations equivalent to those.<sup>1677</sup>

Article 12(1)(b) suggests that ‘the possession of nationality’ or the possession of equivalent rights and obligations to nationals of the country could be considered grounds for excluding an individual from the 1951 Convention. This means if UNRWA is dismantled before the status of Palestinian refugees is resolved they could continue to be excluded from the 1951 Convention based on article 1E and Article 12(1)(b).

### 8.8. Implications of CJEU case law on Palestinian Refugees

Albanese et al correctly note that CJEU judgements in *Bolbol* and *El-Kott*:

[A]ffirmed important general principles, including Article 1D’s purpose of enduring continuity of protection of Palestinian refugees; its application to Palestinians who became refugees after 1951 (e.g. in 1967); recognition of UNRWA as currently ‘the only [UN] Organ or agency other than the [UN]HCR’ to which the first paragraph of Article 1D...refers; the protracted nature of the Palestinian refugee situation; that it is not only the cessation of UNRWA ‘as an entity’ that can bring about cessation of protection and assistance; and that, if the alternative protection or assistance of UNRWA is determined to have ceased under Article 1D(2), the Palestinian refugee is to be recognized as entitled ‘as of right’ (ipso facto) to the ‘benefits’ of the 1951 Convention.<sup>1678</sup>

While we acknowledge that the CJEU ‘clarified important aspects of the application of Article 1D’<sup>1679</sup> to Palestinian refugees the court’s interpretation has also simultaneously expanded and limited the number of Palestinian refugees who can be recognized as ipso facto refugees. The CJEU revealed that Palestinian refugees who never received assistance or protection from UNRWA cannot be recognized as ipso facto refugees. Instead, they will have to apply for refugee status in State parties to the 1951 convention which means there is a possibility that some will be denied refugee status if their asylum application is considered manifestly unfounded.<sup>1680</sup> CJEU case law also revealed that over time the right to return [RTR] to one’s country/ original habitual residence is replaced with a RTR to the country that

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<sup>1677</sup> European Union, ‘Directive 2011/95/EU of The European Parliament and of the Council of 13 December 2011’ (*Eur-Lex*, 13 December 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>> accessed 26 February 2021, Article 12(1)(b)

<sup>1678</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020)110

<sup>1679</sup> *Ibid* 4

<sup>1680</sup> Geoff Gilbert, ‘Is Europe Living Up to its Obligations to Refugees?’ (2004) 15 (5) *European Journal of Internal Law*, 982 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

has hosted the refugee. Consequently, the CJEU replaced the RTR to Israel with a RTR to UNRWA operating territories. This approach fails to consider the contextual issues affecting the possibility of return. For individuals unable to return to both territories the CJEU replaced one ineffective RTR with another. CJEU case law furthers the thesis argument by revealing that if UNRWA can no longer fulfil its mandate or is dismantled Palestinian refugees who did not avail themselves of assistance from UNRWA could end up in a legal limbo if they are not recognized as refugees for the purpose of the 1951 Convention and are not eligible for subsidiary protection. Moreover, Palestinian registered with UNRWA who arrive from a country deemed a safe destination may find themselves denied refugee status in EU national courts.<sup>1681</sup>

This ties in with the overall thesis argument that Palestinian refugees can end up in a legal limbo if UNRWA is dismantled because individuals denied ipso facto refugee status will have to prove that they are refugees for the purpose of Article 1A(2) of the 1951 Convention and that they are not excluded under the provisions of Article 1F.<sup>1682</sup> While this can lead some to conclude that Palestinian refugees should accept resettlement in Arab States this thesis revealed that the status of Palestinian refugees can only be transformed if host States, or asylum States are willing to permanently settle them.<sup>1683</sup>

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<sup>1681</sup> a) UNRWA is dismantled or is unable to fulfil its mandate b) where the person had to leave UNRWA territories for reasons beyond their control or c) the refugee can show that his or her 'personal safety is at serious risk' and it is 'impossible for the agency to guarantee his living conditions.' Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (*Info Curio Case Law*, 17 June 2010) <<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 51

Hathaway rightly observes that persons denied 'basic rights such as food, health care, or education are excluded from the international refugee definition, unless that deprivation stems from civil or political status.' James Hathaway, 'A Reconsideration of the Underlying Premise Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 150

<[http://www.mcrj.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrj.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1682</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1A(2) and Article 1F

<sup>1683</sup> This demonstrates that Arendt's argument in Chapter 2 which revealed that stateless refugees lose the right to have rights and that only the possession of a nationality guarantees access to human rights offers the best theoretical framework for understanding why some Palestinian refugees will end up in a legal limbo if UNRWA is dismantled before their status is permanently settled.



## 8.9. Conclusion

The primary object of this chapter was to find out how the international framework governing refugees will define the legal status of Palestine refugees and their RTR if they no longer fall under UNRWA's mandate. To do so the thesis examined how the CJEU interpreted the legal status of Palestinian refugees who left UNRWA territories in light of the 1951 Convention. The CJEU 'clarified important aspects of the application of Article 1D...without removing all ambiguity.'<sup>1684</sup> In *Bolbol* the CJEU found that Palestinian refugees can only be recognized as ipso facto refugees under Article 1D if they received protection or assistance from UNRWA before leaving its areas of operations and applying for refugee status under the 1951 Convention.<sup>1685</sup> While in *El Kott*, the CJEU found that, mere voluntary departure from UNRWA operating territories does not amount to cessation of protection or assistance<sup>1686</sup> and that cessation can only come about if a) UNRWA is dismantled or is unable to fulfil its mandate<sup>1687</sup> b) where the person had to leave UNRWA territories for reasons beyond their control or c) the refugee can show that his or her 'personal safety is at serious risk' and it is 'impossible for the agency to guarantee his living conditions.'<sup>1688</sup> Moreover, CJEU case law also revealed that States are only obliged to recognize the refugee status of 'persons who truly face the risk of being persecuted' for convention reasons in their country of nationality

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<sup>1684</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 4

<sup>1685</sup> Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (*Info Curio Case Law*, 17 June 2010)

<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 51

Hathaway rightly observes that persons denied 'basic rights such as food, health care, or education are excluded from the international refugee definition, unless that deprivation stems from civil or political status.' James Hathaway, 'A Reconsideration of the Underlying Premise Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 150

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1686</sup> 'The fact that that provision of the Geneva Convention, to which the first sentence of Article 12(1)(a) of Directive 2004/83 refers, simply excludes from the scope of the convention persons who 'are at present receiving' protection or assistance from such an organ or agency of the United Nations cannot be construed as meaning that mere absence or voluntary departure from UNRWA's area of operations would be sufficient to end the exclusion from refugee status laid down in that provision.' Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 19 December 2012' (*Info Curio Case Law*, 19 December 2012)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1330675>> accessed 1 December 2018, Paragraph 49

<sup>1687</sup> *Ibid* Paragraph 56

<sup>1688</sup> CJEU quoted in Marguerite Perin, 'European and International Law and Palestinian Refugees: *Bolbol*, *El Kott* and The Application of Article 1D of The Geneva Convention' (2014) 3 (2) *UCL Journal of Law and Jurisprudence*, 103

<<https://discovery.ucl.ac.uk/id/eprint/1470694/1/European%20and%20International%20law%20and%20Palestinian%20Refugees.pdf>> accessed 29 November 2021

or former habitual residence.<sup>1689</sup> Establishing such a risk, however, does not mean that Palestinian refugees who are denied ipso facto refugee status under Article 1D will be recognized as convention refugees. This was evident in the case of Bolbol who was not recognized as a refugee despite being offered protection under the non-refoulement principle. CJEU case law also revealed that the reference State for examining asylum applications by Palestinian refugees was the country of former habitual residence and not territories that became part of Israel. This links to our discussion in previous chapters which revealed that the RTR to territories that became part of Israel in 1948 has been replaced with a RTR to host States. If the conclusion and factual assumptions made by the CJEU are adopted by other countries the assumed consequences flowing from the CJEU decisions are that not all Palestinian refugees registered or eligible to register with UNRWA will be recognized as refugees if the agency is dismantled or can no longer fulfil its mandate.<sup>1690</sup> Moreover, Palestinian refugees will have a RTR to their country of former habitual residence rather than Israel. Therefore, this thesis agrees with Goodwin-Gill that ‘jurisprudence does not offer an easy solution for all Palestinian refugees outside the region.’<sup>1691</sup> Goodwin-Gill ‘suggests that this outcome may not be intentional, but is rather a result of the way in which ambiguous words and phrases have been interpreted, particularly in the light of states’ other concerns.’<sup>1692</sup> We disagree with this interpretation. Instead, we agree with Goodwin-Gill observation that:

States still see asylum as an exception to their sovereign power to decide on the entry and removal of non-citizens and are as concerned today as they were in 1951 about having perhaps signed a ‘blank cheque’ on the admission of refugees. Consequently, they tend to argue that the ‘right to asylum’ should be interpreted restrictively.<sup>1693</sup>

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<sup>1689</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 110; See Article 1A (2) in the United Nations, ‘Convention and Protocol Relating to the Status of Refugees’ (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017

<sup>1690</sup> Hathaway rightly observes that persons denied ‘basic rights such as food, health care, or education are excluded from the international refugee definition, unless that deprivation stems from civil or political status.’ James Hathaway, ‘A Reconsideration of the Underlying Premise Refugee Law’ (1990) 31 (1) *Harvard International Law Journal*, 150 <[http://www.mcrj.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrj.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1691</sup> ‘1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016’ (2018) 51 *Israel Law Review* 47, 63 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1692</sup> *Ibid* 63

<sup>1693</sup> *Ibid* 62

Restrictive interpretations have already led to the emergence of different standards across the world. For example, Australia interpreted having a 'well-founded fear of being persecuted' for Convention reasons to mean that an individual must face a real chance of harm 'everywhere' in his/ her country to meet the refugee definition.<sup>1694</sup> Asylum seekers must also show that the authorities in their country cannot protect them. If the authorities or an independent organisation or group can protect them, they can be denied refugee status.<sup>1695</sup> This example demonstrates how a group of Palestinian refugees who fall under UNRWA's mandate could be excluded from the 1951 Convention even if UNRWA is dismantled or can no longer fulfil its mandate.

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<sup>1694</sup> Refugee Advice and Case Work Service, 'Who is a refugee' (RACS, n.d.)  
<<http://www.racs.org.au/wp-content/uploads/2016/10/Who-is-a-refugee.pdf>> 17 February 2017

<sup>1695</sup> Ibid

Before *BolBol* and *El Kott* in 2008 the Tribunal Court in the UK also found that Palestinian refugees who cited discrimination and persecution as a reason for applying for asylum are not refugees for convention reasons because 'the differential treatment of Palestinian refugees [in Lebanon which excludes them from certain social and economic rights] stems entirely from their statelessness' and thus 'in accordance with international norms.' *Lebanon V Secretary of State for the Home Department*, [2008] UKAIT 00014' (UKAIT, February 25, 2008), Paragraph 143. Case quoted in James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 234-35; See '*MM and FH (Stateless Palestinians - KK, IH, HE reaffirmed) Lebanon v. Secretary of State for the Home Department*, [2008] UKAIT 00014' (*United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority*, 25 February 2008)  
<[https://www.refworld.org/cases,GBR\\_AIT,47cd6c532.html](https://www.refworld.org/cases,GBR_AIT,47cd6c532.html)> accessed 5 January 2022

## Chapter 9: Research conclusion

### 9.1. Thesis findings

The primary objective of this thesis was to find out whether under international law Palestinian refugees have a right to return [RTR]<sup>1696</sup> to territories that became part of Israel in 1948 and whether the international framework governing refugees and stateless persons which considers local integration and resettlement as the ‘ultimate solution’<sup>1697</sup> when return is not possible<sup>1698</sup> can impact the legal status of Palestinian refugees and their RTR.

Literature addressing the right of return [ROR]<sup>1699</sup> in the Palestinian discourse and the Israeli discourse revealed a contested and ideologically charged framing of legal claims and counterclaims in respect of the ROR for Palestinian refugees. As a result of this framing, the Palestinian discourse claims that the ROR for Palestinian refugees is enshrined in international law while the Israeli discourse claims that Palestinian refugees have no ROR under international law. Despite this difference, both discourses agree that most Palestinian refugees will not be able to return to Israel because Israel rejects their ROR. This framing

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<sup>1696</sup> The term ‘right to return’ refers to a pure right to return to one’s country, as outlined in Article 13 (2) of the Universal Declaration of Human Rights which states, ‘everyone has the right to leave any country, including his own, and to return to his country.’ United Nations, ‘Universal Declaration of Human Rights’ (*United Nations Association of Slovenia*, 10 December 1948) <[http://www.unaslovenia.org/sites/default/files/file/leskovic\\_vendramin-the\\_right.pdf](http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf)> accessed 1 December 2018

<sup>1697</sup> Guy Goodwin-Gill, ‘Forced Migration - The Evolution of International Refugee Law and Organization’ (*The United Nations Audiovisual Library of International Law*, n.d.) <<http://www.un.org/law/avl>> accessed 1 September 2018

<sup>1698</sup> Ibid

‘The status of refugees is not...a permanent one. The aim is that ... [the refugee] ...should rid himself of that status as soon as possible, either by repatriation or by naturalization in the country of refuge’ Robert Jennings quoted in Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 367; According to Foster et al the ‘commitment to provide surrogate protection or substitute national protection is grounded both in the basic commitment of the interstate system to ensuring that all individuals have a nationality in the legally recognized form of citizenship, and are thus effectively “allocated” to a state, and also in the recognition that nationality provides the essential means by which individuals are able to avail themselves of the full range of protections established by international law.’ James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 289

<sup>1699</sup> The ‘right of return’ encompasses the right to return to a State, a right to return to one’s property and a right to compensation for any losses. Gail Boiling, ‘Palestinian Refugees and the Right of Return: An International Law Analysis’ (*BADIL*, January 2001) <[https://www.badil.org/phocadownload/Badil\\_docs/Working\\_Papers/Brief-No-08.htm](https://www.badil.org/phocadownload/Badil_docs/Working_Papers/Brief-No-08.htm)> <[https://www.badil.org/phocadownload/Badil\\_docs/Working\\_Papers/Brief-No-08.htm](https://www.badil.org/phocadownload/Badil_docs/Working_Papers/Brief-No-08.htm)> accessed 5 November 2021

allowed Palestinian and Israeli scholars to discuss the ROR and the inability of Palestinian refugees to return to Israel in a way that enables them to remain silent on the question of how international law privileges the right of sovereign States to restrict who can enter their territories above the individual RTR. As a result of this framing, there has been little to no examination of how the RTR can be eradicated through relevant international conventions that seek to end the plight of refugees who cannot be repatriated through local integration and resettlement.

This thesis filled the existing literature by challenging and reframing the debate. This thesis drew on Arendt's conception of rights,<sup>1700</sup> which revealed that human rights do not guarantee access to rights and that only membership in a new State can allow refugees and stateless persons to become right holders.<sup>1701</sup> Arendt's conception of rights allowed the thesis to challenge the settled discourse on the ROR for Palestinian refugees in favour of an informed legal understanding of the limits of the RTR in international law. Embracing Arendt's conception of rights revealed that individuals have a RTR under international law. However, upon examining the RTR we find that this right remains highly theoretical<sup>1702</sup> because 'the State-based system of international law is consent-based.'<sup>1703</sup>

This thesis also revealed that although the RTR is a human right, international human rights law can also support the principle of no return<sup>1704</sup> because the principle of sovereignty allows sovereign States to legitimately reject the RTR.<sup>1705</sup> States also have a right to strip persons from their nationality, under certain circumstances, which consequently strips them from their RTR. The premise of our analysis is uncontested as all refugee scholars acknowledge that a State cannot be forced to admit non-citizens and that the 'right of asylum is a sovereign right.'<sup>1706</sup>

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<sup>1700</sup> Hannah Arendt, *The Origins of Totalitarianism* (2017 edn, Penguin Books 1951) 388

<sup>1701</sup> For an overview of Arendt's conception of rights please refer to Chapter 2.

<sup>1702</sup> Our examination highlights the discrepancy between the principle of the right to return in international human rights law and the legal right to return in international law.

<sup>1703</sup> Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30 (3) *Michigan Journal of International Law*, 783 <<https://repository.law.umich.edu/mjil/vol30/iss3/8>> accessed 29 January 2020

<sup>1704</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, University Press 2007) 485

<sup>1705</sup> Satvinder Juss, 'Free Movement and the World Order' (2004) 16 (3) *International Journal of Refugee Law*, 327, 329 <<https://doi.org/10.1093/ijrl/16.3.289>> accessed 1 September 2018; The 'legal right of a state to exclude people is often asserted as an expression of its sovereignty.' Ibid 461

<sup>1706</sup> H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) 175 Albanese and Takkenberg also agree with this view when they observe that 'host states have no obligation to grant

This thesis also revealed that when a State exercises its sovereign right to reject the RTR the international framework governing refugees and stateless persons consider changing the legal status of such persons as the ultimate solution to ending the plight of persons unable to return.<sup>1707</sup> This thesis also revealed that over time the RTR to one's country of nationality or original country of habitual residence is replaced with a RTR to the last country of habitual residence. Exercising such a right is dependent on State consent. The fact that the RTR is restricted by State consent indicates that it is not an absolute right. While this could lead some to conclude that the RTR is an abstract right because 'law provides no guarantee of compliance in a world of sovereign nation-states in which coercive authority is denied to the international community'<sup>1708</sup> this thesis revealed that the RTR is an abstract right because there is a hierarchy of rights in international law that privileges the right of the State to control its borders over the individual RTR. Therefore, sovereignty and the possession of nationality should not be downplayed in favour of a human rights language that focuses on the RTR as an individual right. If we ignore these facts, we are obscuring the realities of international law from which the RTR derives. International law scholars need to acknowledge that the current discourse on the RTR has no value for those unable to return. Therefore, we can no longer avoid discussion about the need to either restrict the ability of States to stop refugees from exercising their RTR or we need to acknowledge that the RTR is an abstract right that has no value without State consent. This discussion needs to happen now because refugees living in a protracted refugee situation and with no prospect of return or access to durable

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asylum under international law.' Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 488

\*While the UNHCR claims that certain refugee rights are absolute (i.e. prohibition of refoulement) but this argument does not change the fact that '[t]he assessment as to who is a refugee, i.e. the determination of refugee status under the 1951 Convention, is incumbent upon the Contracting State to which the refugee submits an application for refugee status. States therefore have the primary responsibility for determining the status of individuals who arrive on their territory, and in particular for determining whether an individual is a Convention Refugee entitled to international protection.'

UNHCR, 'Chapter Three Refugee Status and Resettlement' (UNHCR, n.d.)

<<https://www.unhcr.org/3d464c954.pdf>> accessed 28 December 2021, 75; See UNHCR, 'A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians N° 27, 2017' (UNHCR, 2017) <<https://www.unhcr.org/3d4aba564.pdf>> accessed 20 October 2021, 75

<sup>1707</sup> Guy Goodwin-Gill, 'Forced Migration - The Evolution of International Refugee Law and Organization' (*United Nations Audiovisual Library of International Law*, n.d.)

<<http://www.un.org/law/avl>> accessed 1 September 2018

<sup>1708</sup> James Hathaway, 'A Reconsideration of the Underlying Premise Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 132

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

solutions are living in a legal limbo since '[t]here is no right to asylum in international law.'<sup>1709</sup> In international law 'the individual still has no right to be granted asylum. The right itself is in the form of a discretionary power...a correlative right of the individual continues to be rejected.'<sup>1710</sup> Moreover, States view 'refugee policy... as a specialized branch of immigration policy' which aims to regulate the movement of people across borders.<sup>1711</sup> This means refugees who are unable to return to their country of nationality/ former habitual residence or access durable solutions can also be denied protection in States that are party to the 1951 Convention Relating to the Status of Refugees [1951 Convention] because in international refugee law '[i]t is not the affront to dignity or the lesser legal status that counts, but whether this or that individual is at risk of persecution.'<sup>1712</sup> Therefore, Goodwin-Gill correctly observes, '[t]he international refugee lawyer knows that...the refugee regime will not provide refuge for every victim or potential victim of every human rights violation' because only persons who are considered refugees for the purpose of Article 1A (2) of the 1951 Convention can fall within the scope of the convention.<sup>1713</sup>

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## 9.2. Implications for Palestinian Refugees

With respect to the RTR for Palestinian refugees, the thesis findings are potentially damaging because they suggest that the principle of State sovereignty in international law is the root cause for the inability of Palestinian refugees to return to Israel. The thesis findings also suggest that Palestinian refugees are not entitled to return to Israel under international law because the RTR is tied to citizenship or habitual residence and Palestinian refugees are not citizens or habitual residents of Israel. The thesis findings also reveal that Palestinian refugees do not have a RTR to Israel without Israel's consent. The thesis findings also suggest that Israel's decision to deny Palestinian refugees the RTR is consistent with

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<sup>1709</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 965 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

<sup>1710</sup> Guy Goodwin-Gill and Jane McAdam quoted in H el ene Lambert (ed), *International Refugee Law* (2<sup>nd</sup> edn, Ashgate 2010) xiii

<sup>1711</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) *European Journal of Internal Law*, 968 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

<sup>1712</sup> Guy Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 4 (25) *International Journal of Refugee Law*, 663 <<https://doi.org/10.1093/ijrl/eeu003>> accessed 12 February 2021

<sup>1713</sup> *Ibid* 661

Hathaway also notes that persons denied 'basic rights such as food, health care, or education are excluded from the international refugee definition, unless that deprivation stems from civil or political status.' James Hathaway, 'A Reconsideration of the Underlying Premise Refugee Law' (1990) 31 (1) *Harvard International Law Journal*, 150 <[http://www.mcrg.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrg.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

international law. This means Palestinian refugees theoretically and legally do not possess a right to enter Israel without Israel's consent. The thesis findings also reveal that the RTR to Israel has been replaced with a RTR to UNRWA's operating territories. For individuals unable to return to UNRWA's operating territories international law has thus replaced one ineffective RTR with another.<sup>1714</sup>

The thesis findings also demonstrated that durable solutions (local integration and resettlement) which are advocated by UNHCR to end the plight of refugees and stateless persons living in protracted refugee situations can define Palestinian refugees out of existence and turn their theoretical RTR into a right of no return. This thesis also revealed that because of advocacy by UNHCR, members of the League of Arab States [LAS] have made significant efforts to bring themselves into compliance with the international framework governing refugees and stateless persons by acceding to international conventions and adopting regional agreements that address refugees and stateless persons which can pave the way for the resettlement and naturalization of Palestinian refugees. The thesis also revealed that members of the LAS have adopted nationality provisions that can lead to the naturalization of Palestinian refugees if the political will to naturalize them materializes.

The thesis findings also revealed that a group of Palestinian refugees could end up in a legal limbo as a result of being denied refugee status if UNRWA is dismantled. The practical implications of our theoretical findings were demonstrated by our examination of relevant case law in the Court of Justice of the European Union [CJEU]. The cases we reviewed revealed that the CJEU found that Article 1D of the 1951 Convention [Article 1D] is not a standard for establishing ipso facto refugee status for all Palestinian refugees who are registered with UNRWA. In *Bolbol* the CJEU found that only Palestinian refugees who received protection or assistance from UNRWA can be recognised as ipso facto refugees under Article 1D paragraph 2 if UNRWA protection or assistance ceases for reasons beyond their control,<sup>1715</sup> while also finding that 'persons who are or have been eligible to receive

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<sup>1714</sup> Palestinian refugees who apply for asylum in an EU Member State and are unable to return to the country that hosted them may depending on their personal circumstances end up being recognized as refugees. Alternatively, they may receive subsidiary protection. If they are denied both status they will end up in a legal limbo.

<sup>1715</sup> 'It follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.' Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (*Info Curio Case Law*, 17 June 2010)



protection or assistance from [UNRWA]<sup>1716</sup> but ‘have not actually availed themselves of protection or assistance...prior to their application for refugee status, may...have that application examined pursuant to Article 2(c) of the Directive [2004/83]’ (and by extension Article 2(d) of the Directive 2011/95/EC after it superseded Directive 2004/83/EC).<sup>1717</sup> In *EI-Kott* the CJEU also found that Palestinian refugees who can no longer access UNRWA protection or assistance for reasons beyond their control should be recognized as ipso facto refugees.<sup>1718</sup> In *EI-Kott* the CJEU also found that cessation can only come about if UNRWA is dismantled or is unable to fulfil its mandate,<sup>1719</sup> or the claimant can show that their ‘personal safety is at serious risk’ and it is ‘impossible for...[UNRWA] to guarantee... [their] living conditions.’<sup>1720</sup> The thesis also revealed that the CJEU’s ‘failure to provide guidance on ... what constitutes an assessment of safety on the ground’<sup>1721</sup> has led to inconsistent refugee recognition in and across different EU Member States for Palestinian refugees.

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<<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 51

Hathaway also rightly observes that persons denied ‘basic rights such as food, health care, or education are excluded from the international refugee definition, unless that deprivation stems from civil or political status.’ James Hathaway, ‘A Reconsideration of the Underlying Premise Refugee Law’ (1990) 31 (1) *Harvard International Law Journal*, 150

<[http://www.mcrq.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrq.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1716</sup> *Ibid* Paragraph 51

<sup>1717</sup> *Ibid* Paragraph 54

<sup>1718</sup> Court of Justice of the European Union, ‘Opinion of Advocate General Sharpston delivered on 13 September 2012 (Case C-364/11)’ (*Info Curio Case Law*, 13 September 2012)

<<http://curia.europa.eu/juris/document/document.jsf?jsessionid=7802F60E9B2ABE13A964E4E318047A4D?text=&docid=126801&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4383901>> accessed 10 March 2021, Paragraph 84

<sup>1719</sup> ‘It should be noted in that regard that it is not only the abolition itself of the organ or agency giving protection or assistance which brings about the cessation of the protection or assistance provided by that organ or agency within the meaning of the second sentence of Article 12(1)(a) of Directive 2004/83 but also the fact that it is impossible for that organ or agency to carry out its mission.’ Court of Justice of the European Union, ‘Judgment of the Court (Grand Chamber) 19 December 2012’ (*Info Curio Case Law*, 19 December 2012)

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1330675>> accessed 1 December 2018, Paragraph 56;

‘The fact that that provision of the Geneva Convention, to which the first sentence of Article 12(1)(a) of Directive 2004/83 refers, simply excludes from the scope of the convention persons who ‘are at present receiving’ protection or assistance from such an organ or agency of the United Nations cannot be construed as meaning that mere absence or voluntary departure from UNRWA’s area of operations would be sufficient to end the exclusion from refugee status laid down in that provision.’ *Ibid* Paragraph 49

<sup>1720</sup> *Ibid* Paragraph 82(1) and Paragraph 82(2)

<sup>1721</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 110

### 9.3. The Predicted Impact of CJEU rulings on Palestinian Refugees

If the conclusion and factual assumptions of the CJEU are adopted by non-EU countries the assumed consequences flowing from the CJEU decisions are that Palestinian refugees who received protection or assistance from UNRWA should be recognized as ipso facto refugees if the agency is dismantled provided they are not caught by any of the grounds for exclusion in Article 1F of the 1951 Convention.<sup>1722</sup> Meanwhile, Palestinian refugees who have not availed themselves of protection or assistance from UNRWA will have to submit an asylum application. Persons who meet the refugee criteria under article 1A(2) of the 1951 Convention will be recognised as refugees.<sup>1723</sup> While persons who do not meet the refugee criteria under article 1A(2) will not be recognised as refugees.<sup>1724</sup> Palestinian refugees who are denied refugee status may qualify for subsidiary protection if such protection is available in the State of asylum. While persons who do not qualify for subsidiary protection<sup>1725</sup> or are

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<sup>1722</sup> Article 1F of the 1951 Convention reflect Article 12 of the Directive 2004/83 and Article 12 of the Directive 2011/95/EC Court of Justice of the European Union, 'Judgment of the Court (Grand Chamber) 17 June 2010' (Info Curio Case Law, 17 June 2010) <<http://curia.europa.eu/juris/document/document.jsf?text=unrwa&docid=82833&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=503486#ctx1>> accessed 1 December 2018, Paragraph 82(2)

Hathaway rightly observes that persons denied 'basic rights such as food, health care, or education are excluded from the international refugee definition, unless that deprivation stems from civil or political status.' James Hathaway, 'A Reconsideration of the Underlying Premise Refugee Law' (1990) 31 (1) Harvard International Law Journal, 150 <[http://www.mcrg.ac.in/RLS\\_Migration\\_2019/Readings\\_MODULE\\_F/Hathaway\\_Underlying%20Premise%20of%20Refugee%20Law.pdf](http://www.mcrg.ac.in/RLS_Migration_2019/Readings_MODULE_F/Hathaway_Underlying%20Premise%20of%20Refugee%20Law.pdf)> accessed 30 March 2021

<sup>1723</sup> '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 out-side 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 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.' United Nations, 'Convention and Protocol Relating to the Status of Refugees' (UNHCR, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 1A(2)

<sup>1724</sup> Geoff Gilbert, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 (5) European Journal of Internal Law, 982 <<http://www.ejil.org/pdfs/15/5/399.pdf>> accessed 2 December 2017

<sup>1725</sup> According to Article 17 of Directive 2004/83/EC persons can be excluded from being eligible for subsidiary protection in the following circumstances: Article 17 Exclusion 1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious crime; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present. 2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein. 3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by

in States that do not offer such protection will face a protection gap as foreseen by UNHCR<sup>1726</sup> which correctly noted that the 'CJEU's... interpretation that only Palestinians who have 'actually availed' themselves of the protection or assistance of UNRWA fall within the scope of Article 1D'<sup>1727</sup> will create 'a protection gap for Palestinian refugees 'whose refugee character is already established.'<sup>1728</sup>

Moreover, CJEU case law revealed that over time the RTR to one's country of nationality or country of habitual residence is replaced with a RTR to the State that has been hosting refugees. Consequently, the CJEU replaced the RTR to territories that became part of Israel in 1948 with a RTR to UNRWA operating territories. For individuals unable to return to both territories the CJEU replaced one ineffective RTR with another. Consequently, such persons can only end their predicament if they are recognized as refugees or qualify for subsidiary protection in the State of asylum.

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imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.' Council of the European Union, 'Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC' (*Refworld*, 29 April 2004) <<https://www.refworld.org/docid/4157e75e4.html>> accessed 1 December 2018; According to Article 17 of Directive 2011/95/EU persons can be excluded from being eligible for subsidiary protection in the following circumstances:

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
  - (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
  - (b) he or she has committed a serious crime;
  - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
  - (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.
3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.' European Union, 'Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011' (*Official Journal of the European Union*, 13 December 2011) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN>> accessed 1 September 2018

<sup>1726</sup> UNHCR quoted in *Ibid* 112

<sup>1727</sup> Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 112-113

<sup>1728</sup> UNHCR quoted in *Ibid* 112

Albanese et al also argue that 'divergent interpretations of Palestinian refugees seeking asylum outside UNRWA's area of operations as internationally recognized refugees under relevant UN resolutions, may contribute to further displacement.' Francesca P. Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Kindle edn, 2020) 6

The limitations identified by the thesis should not be read as suggesting that the RTR as a principle is worthless. States need to clarify what the RTR means for them.<sup>1729</sup> The RTR should be a legal matter, not a theoretical matter. The fact that a positive RTR is not asserted in international law is remarkable.<sup>1730</sup> For the RTR to be a real right, we need to legalize the RTR in a way that will satisfy the need to return and a mechanism for implementing such a right must also exist. In the absence of such a mechanism, the RTR is an abstract right. Until this takes place the non-legal value of the RTR will not solve the Palestinian refugee problem. The Palestinian refugee problem should be solved by law, not by non-legal solutions that have so far dominated the debate. A coherent theory of State responsibility to grant entry must be developed. Therefore, we need a new international legal framework that addresses the RTR to emerge. Hence, this thesis concludes that the RTR does not ensure that such a right can be claimed because respect for sovereignty will remain an obstacle to the RTR. Therefore, this thesis agrees with Farmer<sup>1731</sup> that 'rights-based rhetoric should be accompanied by refugee-driven accountability mechanism.'<sup>1732</sup>

We also need a radical reappraisal of how we understand State sovereignty and how we approach the principle of the RTR. Legal scholars should not be content with affirming a right that depends on State consent to be acknowledged and implementable. For the theoretical RTR to be transformed into a legal right a new international legal framework needs to be developed which places the RTR above the right of sovereign States to restrict entry to their territories.<sup>1733</sup> This is necessary because this thesis revealed that we cannot reduce the inability of Palestinian refugees to exercise their RTR to Israel to one of enforcement because the lack of enforcement stems from the fact that Israel has a right under international law to deny entry to Palestinian refugees. Furthermore, if the primary aim of the international framework governing refugees and stateless persons is to facilitate the voluntary return of refugees UNHCR must encourage States to allow refugees to return and refrain from encouraging host States to integrate, resettle, and naturalize refugees who are

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<sup>1729</sup> Satvinder Juss, 'Free Movement and the World Order' (2004) 16 (3) *International Journal of Refugee Law*, 309 <<https://doi.org/10.1093/ijrl/16.3.289>> accessed 1 September 2018

<sup>1730</sup> *Ibid* 330

<sup>1731</sup> Alice Farmer, Researcher with Human Rights Watch's Children's Rights Division.

<sup>1732</sup> Alice Farmer quoted in Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 470

<sup>1733</sup> Goodwin-Gill, G S, 'Non-Refoulement and the New Asylum Seekers,' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer Academic Publishers 1988) 914

unable to return.<sup>1734</sup> This argument must take place now if we do not want international law to become a tool to define certain people legally out of existence. Indeed, in the future, the author intends to explore ways to turn the RTR into an effective right.

Goodwin-Gill has observed that limiting 'the competence of States to exclude or expel foreign nationals remains a sensitive issue, so that any proposed limitations may be negatively construed as imposing impossible burdens or even threatening the very existence of the nation.'<sup>1735</sup> Despite this restricting the ability of States to deny entry to refugees is necessary because until this happens many Palestinian refugees unable to return to Israel are at risk of remaining excluded from the international framework governing refugees and stateless persons even if UNRWA is no longer able to operate or is dismantled. Consequently, they will not be able to lay claim to rights available to refugees and stateless persons. And even if they are eligible to claim such rights Palestinian refugees could be offered temporary protection because as Fitzpatrick's observes developed States are substituting 'temporary protection in place of durable asylum.'<sup>1736</sup> In such a context UNHCR will likely endorse temporary protection until Palestinian refugees can return to their host States<sup>1737</sup> because historically UNHCR has encouraged temporary protection as a 'pragmatic and flexible method of affording international protection of a temporary nature in situations of conflict or persecution involving large scale outflows.'<sup>1738</sup>

This thesis has demonstrated how replacing the RTR with local integration and resettlement can be problematic. Replacing durable solutions with temporary solutions is equally

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<sup>1734</sup> UNHCR under its statutory mandate is responsible for promoting three durable solutions to end refugeehood and they are voluntary repatriation, local integration in host countries and resettlement in third countries. In the hierarchy of durable solutions, voluntary repatriation is considered the preferred solution. Therefore, the UNHCR can focus on advocating voluntary return.

<sup>1735</sup> Guy Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers,' in David Martin (ed), in *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer Academic Publishers 1988) 113

<sup>1736</sup> Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal*, 23

[https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/hhrj9&men\\_hide=false&men\\_tab=toc&kind=&page=229](https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/hhrj9&men_hide=false&men_tab=toc&kind=&page=229)> accessed 23 March 2021

<sup>1737</sup> Such a return would only be possible if the states hosted the refugees allowed them to return.

<sup>1738</sup> 'Considers that temporary protection, which has been described by the High Commissioner in the context of the Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia as including admission to safety, respect for basic human rights, protection against *refoulement*, and safe return when conditions permit to the country of origin, can be of value as a pragmatic and flexible method of affording international protection of a temporary nature in situations of conflict or persecution involving large scale outflows.' Executive Committee of the High Commissioner's Programme, 'General Conclusion on International Protection No. 74 (XLV) – 1994' (*UNHCR*, 7 October 1994)

<https://www.unhcr.org/uk/excom/exconc/3ae68c6a4/general-conclusion-international-protection.html>> accessed 30 September 2020, Paragraph r

problematic because although UNHCR confirmed that ‘admission to safety’ is an integral aspect of temporary refugeehood,<sup>1739</sup> the fact remains temporary protection does not solve all protracted refugee problems.<sup>1740</sup> This thesis also revealed that any final settlement between Israel and the Palestinian leadership will lead to the cessation of refugee status of Palestinian refugees and their permanent resettlement in host countries, third countries or a future Palestinian State.<sup>1741</sup> Therefore, it is incorrect to suggest that the RTR for Palestinian refugees is protected by existing United Nations General Assembly [UNGA] resolutions and international law. These findings lead this thesis to conclude that the international framework governing refugees and stateless persons as developed and interpreted by sovereign States can define Palestinian refugees out of existence and eradicate their RTR. Therefore, this thesis rejects the way that scholars have shaped legal arguments to defend the RTR for Palestinian refugees. Legal scholars should not be content with affirming a right that cannot be implemented without State consent. Moreover, they must acknowledge that under international law many Palestinian refugees<sup>1742</sup> are at risk of being left in a legal limbo if they no longer fall under UNRWA’s mandate before their status is permanently settled. Therefore, it is necessary for all parties who want to solve the Palestinian refugee problem to have a clear understanding of how their legal status will be defined in light of the 1951 Convention if UNRWA can no longer serve them. This understanding will allow all parties concerned to frame solutions with a sound understanding of how the international framework governing refugees and stateless persons can impact Palestinian refugees. This thesis helped all parties concerned to reach this understanding by revealing the range of legal and practical matters which were left open to interpretation when Palestinian refugees were excluded from the international framework governing refugees and stateless persons.

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<sup>1739</sup> Ibid r

<sup>1740</sup> Carola Tize ethnographic research about one Palestinian family in Germany revealed how the permanent temporariness of long-term toleration status ‘subjected [Palestinian] families to years, even decades, of insecurity and uncertainty through constant threats of deportation and restrictions on work, travel and higher education.’ Carola Tize, ‘Living in Permanent Temporariness: The Multigenerational Ordeal of Living under Germany’s Toleration Status’ (2020) 34 (3) *Journal of Refugee Studies* <<https://doi.org/10.1093/jrs/fez119>> accessed 20 October 2021

<sup>1741</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 482

<sup>1742</sup> Those who did not avail themselves of protection and assistance from UNRWA and those who are deemed to live in safe countries.

#### 9.4. Recommendations

Solving the Palestinian problem depends on legal scholars countering any legal misunderstandings that have allowed the Palestinian discourse and the Israeli discourse to construct a contested and ideologically charged framing of legal claims in respect of the RTR for Palestinian refugees. Therefore, this thesis calls upon signatory States to the 1951 Convention to ask the International Court of Justice [ICJ] to interpret the applicability of the convention to Palestinian refugees. Signatory States can ask the ICJ for an opinion by exercising their right under Article 38 of the 1951 Convention which gives signatory States the right to refer any dispute over the interpretation or application of the convention to the ICJ.<sup>1743</sup> Alternatively, UNHCR can ask the ICJ for an advisory opinion under Article 65 of the ICJ Statute which gives UNHCR a right to ask the ICJ for an advisory opinion on the interpretation of the 1951 Convention.<sup>1744</sup> The ICJ should be asked to answer three questions:

1. Are Palestinian refugees outside UNRWA operating territories ipso facto refugees under Article 1D paragraph 2 of the 1951 Convention?
2. If UNRWA ceases to exist will all Palestinian refugees under its mandate be considered ipso facto refugees under Article 1D paragraph 2 of the 1951 Convention?
3. When a State party to the 1951 Convention is dealing with an asylum application submitted by a Palestinian refugee should Israel or the last host country of habitual residence be considered his/her country for the purpose of return?

It is hoped that after the ICJ offers a definite answer about the application of the 1951 Convention to Palestinian refugees this will bring an end to the contested and ideologically charged framing of legal claims in respect of the RTR for Palestinian refugees which has turned the Palestinian refugee problem into 'the world's oldest...protracted refugee

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<sup>1743</sup> United Nations, 'Convention and Protocol Relating to the Status of Refugees' (*UNHCR*, 28 July 1951) <<http://www.unhcr.org/uk/3b66c2aa10>> accessed 17 February 2017, Article 38

<sup>1744</sup> Article 65 of the International Court of Justice Statute '1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.' International Court of Justice, 'Statute of the International Court of Justice' (*International Court of Justice*, 26 June 1945) <<https://www.icj-cij.org/en/statute>> 12 February 2021

situation.<sup>1745</sup> It is also hoped that the opinion of the ICJ will encourage all parties that want to end the Palestinian refugee problem to pursue solutions that are based on an informed legal understanding of the limits of the RTR in international law.

At the time of writing, there is no such case on the horizon. This is attributable to the fact that State parties to the 1951 Convention and UNHCR have not asked the ICJ for an opinion. Until the ICJ is asked for an opinion, Palestinian refugees living in UNRWA operating territories will remain at a legal disadvantage because, in addition to being denied the RTR to Israel, they continue to be denied access to durable solutions. This also applies to Palestinian refugees who are denied refugee status and subsidiary protection after leaving UNRWA's territories of operation. This demonstrates that Goodwin-Gill was correct when he observed that while '[w]e can invoke the right of return on an individual basis...rights can be compromised by agreements between States.'<sup>1746</sup>

With this as a background, this thesis will end by offering an overview of how the Palestinian refugee problem will likely be solved if the ICJ is not asked for an opinion.

## 9.5. Realities and Prospects for Palestinian Refugees in the League of Arab States

In theory, the Palestinian refugee problem should be solved through a just and lasting solution. In 1993 UNSC Resolution 836, which sought to end the conflict in the Republic of Bosnia and Herzegovina, defined a lasting solution as one which requires the reversal of the consequences that came about because of ethnic cleansing and recognizing that all refugees have a RTR.<sup>1747</sup> While repatriation is the ideal solution to ending the plight of refugees Israel's rejection of the RTR makes local integration and resettlement the only viable solutions in the hierarchy of durable solutions. But these solutions can only be

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<sup>1745</sup> UNHCR, 'Protracted Refugee Situations: The Search for Practical Solutions' (UNHCR, 2006) <<http://www.unhcr.org/4444afcb0.pdf>> accessed 11 June 2017, 106

<sup>1746</sup> '1948 Refugees: Proceedings of an International Workshop, Hebrew University of Jerusalem Faculty of Law, 14–15 December 2016' (2018) 51 *Israel Law Review* 47, 109 <<https://www.cambridge.org/core/journals/israel-law-review/article/1948-refugees/1E997E364691F4379C6F77EC05BC84AD>> accessed 21 February 2018

<sup>1747</sup> 'Stressing that the lasting solution to the conflict in the Republic of Bosnia and Herzegovina must be based on the following principles: immediate and complete cessation of hostilities; withdrawal from territories seized by the use of force and "ethnic cleansing"; reversal of the consequences of "ethnic cleansing" and recognition of the right of all refugees to return to their homes; and respect for the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina.' United Nations, 'S/RES/836(1993)' (*United Nations Digital Library*, 4 June 1993) <<https://digitallibrary.un.org/record/166973?ln=en>> accessed 26 February 2021, 2



pursued with the consent of host States or third countries that are willing to resettle Palestinian refugees. Assuming that host States agree to give Palestinian refugees access to durable solutions they can follow the model proposed by the UN Conference on the Indo-Chinese Refugees of 1979 which favoured resettlement in the first country of asylum<sup>1748</sup> but then replaced this option with third-country asylum.<sup>1749</sup> It was during this period that UNHCR raised its resettlement division within the department of international protection.<sup>1750</sup> Based on this historic precedent UNRWA host States could first integrate Palestinian refugees in their territories. If this solution turns out to be politically problematic for host States, they could then collaborate with UNHCR to resettle Palestinian refugees in third countries who are willing to receive them. However, adopting this approach comes with one risk for host States and that is after they integrate Palestinian refugees it could be argued that they no longer have the right to resettle them in third countries because the 1951 Convention and UNHCR disqualify from their scope persons who have 'rights and obligations which are attached to the possession of the nationality' within host States.<sup>1751</sup>

Alternatively, UNRWA host States could follow the Hong Kong model. In 1981 Hong Kong issued the Immigration Amendment Ordinance Hong Kong which gave Vietnamese refugees a right to remain pending compulsory resettlement in a third country.<sup>1752</sup> UNRWA host States could also issue a law that makes resettlement compulsory on Palestinian refugees. On the other hand, UNRWA host States could apply the Bosnia model whereby temporary protection was premised on return.<sup>1753</sup> After '[e]thnic cleansing in Bosnia forced masses of displaced persons to western Europe, temporary protection [was offered] ...[and] return was selected as the most appropriate solution.'<sup>1754</sup> Temporary protection has been described as a strategy 'to de-legalize refugee protection and to relocate it in the realm of politics and

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<sup>1748</sup> United Nations, 'Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General, 7 November 1979, A/34/627' (*Refworld*, 20 and 21 July 1979) <<https://www.refworld.org/docid/3ae68f420.html>> accessed 11 January 2020, Paragraph II (12)

<sup>1749</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 450

<sup>1750</sup> *Ibid* 499-500

<sup>1751</sup> *Ibid* 61

\*This is confirmed in UNHCR Statute, para. 7 (b) and Article 1 E of the 1961 Convention on the Reduction of Statelessness. UNHCR, 'Statute of the Office of the United Nations High Commissioner for Refugees' (*UNHCR*, 14 December 1950)

<<https://www.unhcr.org/uk/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>> accessed 1 November 2016, Paragraph 7(c)

<sup>1752</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 552

<sup>1753</sup> *Ibid* 340-41

<sup>1754</sup> *Ibid* 342

humanitarian assistance.<sup>1755</sup> This solution will only be viable if Palestinian refugees are expected to return to a future Palestinian State because Israel rejects their ROR. In theory, UNRWA host States could force Palestinian refugees to resettle in a future Palestinian State because it could be argued that based on the 1993 Declaration of Principles, which defined the framework that would lead to a final settlement between Israel and the Palestinian Liberation Organization,<sup>1756</sup> there is no well-founded fear of persecution in territories ruled by the Palestinian National Authority (PA).<sup>1757</sup> Historically, a similar argument was made after the peace accord ended the civil war in El Salvador.<sup>1758</sup>

### **Rwanda, Cyprus, Bosnia and Kosovo: A precedent for solving the Palestinian Refugee Problem**

Next, we will provide a brief overview of how the UN and parties to the conflict dealt with the RTR demands of persons who became refugees as a result of conflicts in Rwanda, Cyprus, Kosovo, and Bosnia. The approach adopted by the UN and parties to the conflict to address the RTR demands in each case will be reviewed because they reveal how the Palestinian refugee problem can be resolved and what factors can lead the problem to remain unresolved.<sup>1759</sup>

#### Rwanda

In 1959 around two million Tutsis<sup>1760</sup> were forced to flee from Rwanda to Uganda after the Hutus<sup>1761</sup> overthrew the Tutsi royal family.<sup>1762</sup> Shortly before Rwanda and Belgium gained

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<sup>1755</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press Inc 2007) 343

<sup>1756</sup> Palestinian Liberation Organization.

<sup>1757</sup> Palestinian National Authority.

<sup>1758</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> edn, Cambridge University Press 2014) 132

<sup>1759</sup> Eric Rosand who agrees that the right to return generally refers to the right to return to one's country argued that implementation of the 'Dayton Accord's provisions, regarding the return of refugees and displaced persons to their former homes in Bosnia...[would] establish a strong precedent for this broadened the right to return under international law.' Eric Rosand, 'The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?' (1996) 14 (4) Michigan Journal of International Relations.

<sup>1760</sup> An ethnic minority group in Rwanda.

<sup>1761</sup> An ethnic majority group in Rwanda.

<sup>1762</sup> BBC, 'Rwanda genocide: 100 days of slaughter' (BBC, 4 April 2019)

<<https://www.bbc.co.uk/news/world-africa-26875506>> accessed 29 November 2021

their independence in 1962 '[t]he international community chose ... to plan for the local integration of the Tutsi refugees in Uganda, rather than to push for mass repatriation.'<sup>1763</sup> This plan sought to end the refugee crises through 'economic development and self-sufficiency; in host States rather than 'political citizenship and refugee rights.'<sup>1764</sup> The Tutsi exiled leadership rejected such attempts because they wanted to restore their State.<sup>1765</sup>

In the 1990s exiled members of the Tutsi group who wanted to restore their State formed the Rwandan Patriotic Front [RPF] which succeeded in invading parts of Rwanda.<sup>1766</sup> Fighting ensued between the RPF and the Hutu led government until both parties signed the Arusha Accords<sup>1767</sup> which called for the establishment of a shared government and acknowledged that refugees have a RTR to their homes and that their return was essential to achieving peace.<sup>1768</sup> The Arusha Accords after Hutu extremists accused Tutsi's of assassinating the Hutu President in 1994 and used these accusations as a pretext to launch a genocidal campaign against Tutsis.<sup>1769</sup> The genocidal campaign led millions of Tutsis to become refugees in neighbouring countries.<sup>1770</sup> During the genocidal campaign, the international community in UNSC Resolution 918 of 1994 resolved that the implementation of the Arusha Accords was essential to resolving the conflict.<sup>1771</sup> After the PRF captured the capital in July 1994 many Hutus also fled to neighbouring countries. Over 3.5 million refugees including Tutsi's and Hutus were able to return to Rwanda after Rwanda's new president confirmed his commitment to the Arusha Accords and advanced the idea of a shared national identity

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<sup>1763</sup> Katy Long, 'Rwanda's first refugees: Tutsi exile and international response 1959–64' (2012) *Journal of Eastern African Studies* 6 (2), 212 <<https://doi.org/10.1080/17531055.2012.669571>> accessed 29 November 2021

<sup>1764</sup> *Ibid* 212

<sup>1765</sup> *Ibid* 219

<sup>1766</sup> BBC, 'Rwanda genocide: 100 days of slaughter' (*BBC*, 4 April 2019) <<https://www.bbc.co.uk/news/world-africa-26875506>> accessed 29 November 2021

*Ibid*

<sup>1767</sup> The Protocol Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the integration of Armed Forces of the Two parties, signed at ARUSHA in 1993.

<sup>1768</sup> BBC, 'Rwanda genocide: 100 days of slaughter' (*BBC*, 4 April 2019) <<https://www.bbc.co.uk/news/world-africa-26875506>> accessed 29 November 2021

<sup>1769</sup> *Ibid*

<sup>1770</sup> *Ibid*

<sup>1771</sup> In Article 19 the UNSC invited 'the Secretary-General and his Special Representative, in coordination with the OAU and countries in the region, to continue their efforts to achieve a political settlement in Rwanda within the framework of the Arusha Peace Agreement.' United Nations, 'Security Council resolution 918 (1994) [UN Assistance Mission for Rwanda], 17 May 1994, S/RES/918 (1994)' (*Refworld*, 17 May 1994) <<https://www.refworld.org/docid/3b00f2093c.html>> accessed 28 November 2021, Article 19

that was not ethnic-based and encouraged refugees to return.<sup>1772</sup> Meanwhile, Hutus who refused to return out of fear that they would be targeted upon return continue to be scattered in African countries. In 2013 UNHCR recommended the cessation of their refugee status from 30 June 2013 after concluding that no groups were threatened in Rwanda and therefore.<sup>1773</sup> Here it is important to note that:

Most of [the]...returning refugees of the 1959 exodus took over the land and properties abandoned by Hutus fleeing in 1994, making their return even to this day more difficult. In some cases, these Hutus that fled after the 1994 genocide had themselves taken over the land and other properties of... Tutsis... [who] fled the country ...in 1959.<sup>1774</sup>

The precedent in Rwanda suggests that the Palestinian refugees can return to Israel if the final peace agreement between Israel and the PA like the Arusha Accords acknowledges that Palestinian refugees have ROR to their properties in Israel and that their return is essential for the establishment of a permanent peace settlement. The Rwanda precedent also suggests that Israel can promote peaceful co-existence between returning refugees and Israelis by naturalizing Palestinian refugees and advancing the idea of a shared Israeli citizenship that accords equal rights to all regardless of their origins or religion. This scenario will unlikely materialize because Israel rejects the right of return for Palestinian refugees and considers Israel an exclusive State for the Jewish people.<sup>1775</sup> The precedent in Rwanda also suggests that if Israel continues to reject the ROR for Palestinian refugees this could exacerbate the use of violence in the region. The precedent in Rwanda also suggests that if Palestinian refugees are offered the opportunity to return to who refuse to repatriate may find themselves in a state of limbo in neighbouring countries.

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<sup>1772</sup> Rwanda's president also advanced the idea of a shared Rwandan identity to maintain peace between different ethnic groups in country.

<sup>1773</sup> UNHCR, 'Ending of refugee status for Rwandans approaching' (UNHCR, 28 June 2013) <<https://www.unhcr.org/uk/news/briefing/2013/6/51cd7df06/ending-refugee-status-rwandans-approaching.html>> access 29 November 2021

<sup>1774</sup> TRT World, 'Home remains no-go area for many Rwandan refugees 25 years after genocide' (TRT World, 11 December 2019) <<https://www.trtworld.com/magazine/home-remains-no-go-area-for-many-rwandan-refugees-25-years-after-genocide-32093>> accessed 25 October 2021

<sup>1775</sup> This was confirmed by Israel's Knesset which voted in favour of a Bill that described Israel as 'the nation state of the Jewish people.' Raoul Wootliff, 'Final text of Jewish nation-state law, approved by the Knesset early on July 19' (The Times of Israel, 18 July 2018) <<https://www.timesofisrael.com/final-text-of-jewish-nation-state-bill-set-to-become-law/>> accessed 28 November 2021

## Cyprus

In 1974 Greek Cypriot nationalists who wanted to unify Cyprus with Greece attempted to overthrow the unity government established between Greek Cypriots and Turkish Cypriots after Cyprus gained its independence from Great Britain [Britain] in 1960.<sup>1776</sup> In the Treaty of Guarantee, Britain, Turkey, and Greece were responsible for ensuring the island's independence.<sup>1777</sup> Turkey used this treaty as a pretext to invade and occupy the northern part of the Island to protect around 50,000 Turkish Cypriots who fled from Greek Cypriot nationalists in the south.<sup>1778</sup> Turkey's invasion led 200,000 Greek Cypriots to flee from the north to the south.<sup>1779</sup>

The UN repeatedly called on refugees to be allowed to return to their homes.<sup>1780</sup> After Turkish Cypriots in the north unilaterally declared the Turkish Republic of Northern Cyprus,<sup>1781</sup> UNGA Resolution 37/253 of 1983 also 'call[ed] for... urgent measures for the voluntary return of the refugees to their homes in safety.'<sup>1782</sup> Despite this Greek, Cypriots were prevented from returning to their properties in the north.<sup>1783</sup> In 2004 Annan<sup>1784</sup>

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<sup>1776</sup> Global IDP, 'Profile of Internal Displacement: Cyprus' (*Refworld*, 27 April 2005)

<<https://www.refworld.org/pdfid/3bd98d542.pdf>> accessed 29 November 2021, 4

<sup>1777</sup> Laura Neack, 'A Government of Their Own' (2002) *Bulletin of the Atomic Scientists*, 73

<<https://journals.sagepub.com/doi/pdf/10.2968/058006015>> accessed 28 November 2021

<sup>1778</sup> *Ibid* 74

<sup>1779</sup> *Ibid* 74

<sup>1780</sup> Article 5 in UNGA Resolution 3212 (XXIX) of 1974 'Considers that all the refugees should return to their homes in safety and calls upon the parties concerned to undertake urgent measures to that end.' United Nations, 'A/RES/3212(XXIX)' (*Permanent Mission of the Republic of Cyprus to the United Nations*, 1 November 1974) <<https://www.cyprusun.org/?p=3916>> accessed 29 November 2021; UNGA Resolution 3395 of 1975 in Article '4. Calls upon the parties concerned to undertake urgent measures to facilitate the voluntary return of all refugees to their homes in safety and to settle all other aspects of the refugee problem.' United Nations, 'A/RES/3395(XXX)' (*Permanent Mission of the Republic of Cyprus to the United Nations*, 20 November 1975)

<<https://www.cyprusun.org/?s=A%2FRES%2F3395%28XXX%29>> accessed 29 November 2021

<sup>1781</sup> Global IDP, 'Profile of Internal Displacement: Cyprus' (*Refworld*, 27 April 2005)

<<https://www.refworld.org/pdfid/3bd98d542.pdf>> accessed 29 November 2021, 4

<sup>1782</sup> UNGA Resolution 37/253 in Article '11. Calls for respect of the human rights and fundamental freedoms of all Cypriots, including the freedom of movement, the freedom of settlement and the right to property, and the instituting of urgent measures for the voluntary return of the refugees to their homes in safety.' United Nations, 'Question of Cyprus., 16 May 1983, A/RES/37/253' (*Refworld*, 16 May 1983)

<<https://www.refworld.org/docid/3b00f00ce.html>> accessed 28 November 2021

<sup>1783</sup> In 1996, the European Court of Human Rights revealed that Turkey had prevented Greek Cypriots from returning to their properties, when it ruled that Turkey had violated the European Convention on Human Rights and the Protection of Fundamental Freedoms by preventing a Greek Cypriot from accessing her land in Northern Cyprus. The court also ordered Turkey to compensate the refugee for

proposed reunifying the island as a federated State<sup>1785</sup> and allowing Greek Cypriots and Turkish Cypriots to remain a majority in their own territory.<sup>1786</sup> Annan's proposal also recognized that 'dispossessed owners who, within six years of entry into force of the Foundation Agreement, [can] make use of their unlimited right of return'<sup>1787</sup> and proposed a property restitution framework so that disposed owners can regain their properties or be compensated for any losses.<sup>1788</sup> In a 2004 referendum, Turkish Cypriots voted in favour of

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financial losses. European Court of Human Rights, 'ECTHR - Loizidou v Turkey, Application no. 15318/89, 18 December 1996' (*European Database of Asylum Law*, 18 December 1996)

<<https://www.asylumlawdatabase.eu/en/content/ecthr-loizidou-v-turkey-application-no-1531889-18-december-1996>> accessed 29 November 2021

<sup>1784</sup> Former Secretary-General of the UN Kofi Annan.

<sup>1785</sup> According to Article 2 (1)(a) 'The United Cyprus Republic is an independent state in the form of an indissoluble partnership, with a federal government and two equal constituent states, the Greek Cypriot State and the Turkish Cypriot State. Cyprus is a member of the United Nations and has a single international legal personality and sovereignty. The United Cyprus Republic is organised under its Constitution in accordance with the basic principles of rule of law, democracy, representative republican government, political equality, bi-zonality, and the equal status of the constituent states.' United Nations, 'The Comprehensive Settlement of the Cyprus Problem' (*United Nations*, 31 March 2004) <[https://peacemaker.un.org/sites/peacemaker.un.org/files/Annan\\_Plan\\_MARCH\\_30\\_2004.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/Annan_Plan_MARCH_30_2004.pdf)> accessed 28 November 2021

<sup>1786</sup> Ibid

<sup>1787</sup> Annex VII Article 16 (8) 'These limitations shall not apply to reinstatement of religious sites, or to properties eligible for reinstatement which belong to dispossessed owners who, within six years of entry into force of the Foundation Agreement, make use of their unlimited right of return and establishment of residence in villages which were predominantly inhabited by Maronites in 1974 or the Karpas villages of Rizokarpaso/Dipkarpaz, Agialousa/Yeni Erenköy, Agia Trias/Sipahi, and Melanarga/Adacay or the Tillyria villages of Agios Georgoudi, Agios Theodoros, Alevga, Kokkina/Erenköy, Mansoura and Selladi tou Appi. To this effect, the Property Board shall not dispose in any permanent way of relevant properties during the first six years after entry into force of the Foundation Agreement.' Ibid Annex VII Article 16 (8)

<sup>1788</sup> Article 10 (1) 'The claims of persons who were dispossessed of their properties by events prior to entry into force of this Agreement shall be resolved in a comprehensive manner in accordance with international law, respect for the individual rights of dispossessed owners and current users, and the principle of bi-zonality. 2. In areas subject to territorial adjustment, properties shall be reinstated to dispossessed owners. 3. In areas not subject to territorial adjustment, the arrangements for the exercise of property rights, by way of reinstatement or compensation, shall have the following basic features: a. Dispossessed owners who opt for compensation, as well as institutions, shall receive full and effective compensation for their property on the basis of value at the time of dispossession adjusted to reflect appreciation of property values in comparable locations. Compensation shall be paid in the form of guaranteed bonds and appreciation certificates; b. All other dispossessed owners have the right to reinstatement of one third of the value and one-third of the area of their total property ownership, and to receive full and effective compensation for the remaining two-thirds. However, they have the right to reinstatement of a dwelling they have built, or in which they lived for at least ten years, and up to one donum of adjacent land, even if this is more than one-third of the total value and area of their properties; c. Dispossessed owners may choose any of their properties for reinstatement, except for properties that have been exchanged by a current user or bought by a significant improver in accordance with the scheme. A dispossessed owner whose property cannot be reinstated, or who voluntarily defers to a current user, has the right to another property of equal size and value in the same municipality or village. S/he may also sell his/her entitlement to another dispossessed owner from the same place, who may aggregate it with his/her own entitlement; d. Current users, being

the proposal while Greek Cypriots voted against it because it allowed Turkish settlers who moved to North Cyprus to remain.<sup>1789</sup> As a result of this referendum, Greek Cypriot refugees continue to live in a protracted refugee situation. Moreover, a 2010 ruling by the European Court of Human Rights in *Demopoulos and Others v Turkey*, which rejected a Greek Cypriot petition regarding property compensation because they had not exhausted domestic remedies in Northern Cyprus, suggested that Greek Cypriot refugees do not have an unqualified RTR to their properties in North Cyprus because the court argued that when considering property restoration claims the court must consider how much time has passed, changing circumstances, and the potential harm full restoration will have on the current population.<sup>1790</sup>

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persons who have possession of properties of dispossessed owners as result of an administrative decision, may apply for and shall receive title, if they agree in exchange to renounce their title to a property, of similar value and in the other constituent state, of which they were dispossessed; e. Persons who own significant improvements to properties may apply for and shall receive title to such properties provided they pay for the value of the property in its original state; and f. Current users who are Cypriot citizens and are required to vacate property to be reinstated shall not be required to do so until adequate alternative accommodation has been made available. 4. Property claims shall be received and administered by an independent, impartial Property Board, governed by an equal number of members from each constituent state, as well as non-Cypriot members. The Property Board shall be organized into branches in accordance with sound economic practice. No direct dealings between individuals shall be necessary.' Ibid Article 10 (1)

<sup>1789</sup> Global IDP, 'Profile of Internal Displacement: Cyprus' (*Refworld*, 27 April 2005)

<<https://www.refworld.org/pdfid/3bd98d542.pdf>> accessed 29 November 2021, 5

<sup>1790</sup>'The notion of "home" has been interpreted dynamically by this Court; however, care must be taken to respect the intentions of the authors of the Convention as well as common sense (see *Khamidov v. Russia*, no. 72118/01, § 131, 15 November 2007). Thus, it is not enough for an applicant to claim that a particular place or property is a "home"; he or she must show that they enjoy concrete and persisting links with the property concerned (see, for example, *Gillow v. the United Kingdom*, 24 November 1986, 46, Series A no. 109). The nature of the ongoing or recent occupation of a particular property is usually the most significant element in the determination of the existence of a "home" in cases before the Court. However, where "home" is claimed in respect of property in which there has never been any, or hardly any, occupation by the applicant or where there has been no occupation for some considerable time, it may be that the links to that property are so attenuated as to cease to raise any, or any separate, issue under Article 8 (see, for example, *Andreou Papi v. Turkey*, no. 16094/90, 54, 22 September 2009). Furthermore, while an applicant does not necessarily have to be the owner of the "home" for the purposes of Article 8, it may nonetheless be relevant in such cases of claims to "homes" from the past that he or she can make no claim to any legal rights of occupation or that such time has elapsed that there can be no realistic expectation of taking up, or resuming, occupation in the absence of such rights (see, mutatis mutandis, *Vrahimi v. Turkey*, no. 16078/90, § 60, 22 September 2009, where the applicant had never had any "possession" in the property which had been owned by a company). Nor can the term "home" be interpreted as synonymous with the notion of "family roots", which is a vague and emotive concept (see, for example, *Loizidou*, judgment on the merits, cited above, 66).' European Court of Human Rights, '*Demopoulos and Others v. Turkey*' (*European Court of Human Rights*, 1 March 2010)

<<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-97649%22%5D%7D>> accessed 29 November 2021  
Paragraph 136

The precedent in Cyprus reveals that Palestinian refugees will continue to live in a protracted refugee situation if Israel continues to deny them the ROR (assuming they cannot access durable solutions). Moreover, the Cyprus precedent suggests that although Israel and the PA have agreed that not all Palestinian refugees will return to Israel Palestinian refugees could hinder the emergence of a permanent peace settlement if they reject the final settlement. The ECHR ruling in Demopoulos et al. v. Turkey also suggests that Palestinian refugees do not have an absolute RTR to their homes because the new de facto reality in Israel must be considered when considering their ROR and compensation claims. While in terms of restitution Annan's proposal could be used as a blueprint this would need agreement between both parties which is unlikely because under Israel's 1950 Absentees Property Law Palestinian refugees lost ownership of their properties for seeking refuge in enemy States.<sup>1791</sup> This indicates that Israel will not return or compensate Palestinian refugees for their properties.<sup>1792</sup>

### Bosnia and Kosovo

In the 1990s ethnic tensions in the six republics that formed the Socialist Federal Republic of Yugoslavia [Yugoslavia] led to the breakup of Yugoslavia.<sup>1793</sup> In 1992 the Serbian army

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<sup>1791</sup> The law defined the property of Palestinian refugees in Israel as absentees' property which should 'pass automatically to the Custodian at the time of the vesting of the property; and the status of the Custodian shall be the same as was that of the owner of the property.' 'Absentees Property Law-5710-1950' (*The Knesset*, 14 March 1950)

<[https://www.knesset.gov.il/review/data/eng/law/kns1\\_property\\_eng.pdf](https://www.knesset.gov.il/review/data/eng/law/kns1_property_eng.pdf)> accessed 22 April 2018, Article 4 (a) (2)

<sup>1792</sup> The Absentee Law defined absentee in Article 1 (b) (1) as: 'a person who, at any time during the period between the 16th Kislev, 5708 (29th November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948(1), that the state of emergency declared by the Provisional Council of State on the 10th Iyar, 5708 (19th May, 1948)(2) has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period - (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or the Yemen, or (ii) was in one of these countries or in any part of Palestine outside the area of Israel, or (iii) was a Palestinian citizen and left his ordinary place of residence in Palestine (a) for a place outside Palestine before the 27th Av, 5708 (1st September, 1948); or (b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment (c) "Palestinian citizen" means a person who, on the 16th Kislev, 5708 (29th November, 1947) or thereafter, was a Palestinian citizen according to the provisions of the Palestinian Citizenship Orders, 1925-1941, Consolidated (3), and includes a Palestinian resident who, on the said day or thereafter, had no nationality or citizenship or whose nationality or citizenship was undefined or unclear.' Ibid Article 1 (b) (1)

<sup>1793</sup> NATO, 'Short History of NATO' (NATO, n.d.)

<[https://www.nato.int/cps/en/natohq/declassified\\_139339.htm](https://www.nato.int/cps/en/natohq/declassified_139339.htm)> accessed 29 November 2021



attacked Bosniak Muslims after Bosnia and Herzegovina declared independence.<sup>1794</sup> The Serbian attack led Bosniaks to become internally displaced and refugees in neighbouring countries.<sup>1795</sup> The UN confirmed in UNSC Resolution 836 of 1993 that the refugees have a ROR to their homes and that their return was essential to ending the conflict.<sup>1796</sup> Despite this refugees were only able to return after NATO launched an Air campaign against the Serbian Army which paved the way for the parties to the conflict<sup>1797</sup> to sign the 1995 Dayton Peace Agreement which divided Bosnia into two federations (one for the Bosniaks and one for the Serbs).<sup>1798</sup> Although the peace agreement confirmed that all refugees have a ROR to their homes and that all parties involved must facilitate their return<sup>1799</sup> most refugees, who were

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<sup>1794</sup> Britannica, 'Bosnia War' (*Britannica*, n.d.) <<https://www.britannica.com/event/Bosnian-War>> accessed 28 November 2021

<sup>1795</sup> Migration News, 'Kosovar Refugees' (*Migration News*, May 1990) <<https://migration.ucdavis.edu/mn/more.php?id=1801>> accessed 28 November 2021

<sup>1796</sup> 'Stressing that the lasting solution to the conflict in the Republic of Bosnia and Herzegovina must be based on the following principles: immediate and complete cessation of hostilities; withdrawal from territories seized by the use of force and "ethnic cleansing"; reversal of the consequences of "ethnic cleansing" and recognition of the right of all refugees to return to their homes; and respect for the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina.' United Nations, 'S/RES/836 (1993)' (*United Nations Digital Library*, 4 June 1993) <<https://digitallibrary.un.org/record/166973?ln=en>> accessed 26 February 2021, 2

<sup>1797</sup> Signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.

<sup>1798</sup> 'Article III The Parties welcome and endorse the arrangements that have been made concerning the boundary demarcation between the two Entities, the Federation of Bosnia and Herzegovina and Republika Srpska, as set forth in the Agreement at Annex 2. The Parties shall fully respect and promote fulfillment of the commitments made therein.'

Europe - Miscellaneous, 'Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina' (*Refworld*, 21 November 1995)

<<https://www.refworld.org/docid/3de495c34.html>> accessed 28 November 2021, Article III

<sup>1799</sup> Chapter One: Protection in Annex 7: Agreement on Refugees and Displaced Persons of the Dayton Peace Agreement reads 'Article I Rights of Refugees and Displaced Persons 1. All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties 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. 2. The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion. 3. The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating without delay conditions suitable for return of refugees and displaced persons, the Parties shall take immediately the following confidence building measures: (a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect; (b) the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, of ethnic or religious hostility or hatred; (c) the dissemination, through the media, of warnings against, and the prompt suppression of, acts of retribution by military, paramilitary, and police services, and by other public officials or private

able to reclaim their properties sold them and moved to areas in which their ethnic group was a majority because of a real or perceived fear of living as a minority amongst former enemies.<sup>1800</sup> Meanwhile, some refugees were 'unable to reclaim their pre-war properties' because they were destroyed<sup>1801</sup> or as a result of former parties to the conflict adopting 'laws on "abandoned property"...to legitimize the...property confiscation that took place during the war.'<sup>1802</sup> In some cases, these laws were repealed as a result of pressure from UNHCR.<sup>1803</sup>

A similar scenario emerged in Kosovo after the Serbian army launched an ethnic cleansing campaign against separatist Kosovar Albanians which led hundreds of thousands of Kosovar Albanians to flee.<sup>1804</sup> In 1999 NATO launched an air campaign on the Serbian army to stop the ethnic cleansing campaign,<sup>1805</sup> NATO ended its campaign after signing a peace agreement with the Serbian army.<sup>1806</sup> UNSC Resolution 1244 of 1999 [UNSC 1244]

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individuals; (d) the protection of ethnic and/or minority populations wherever they are found and the provision of immediate access to these populations by international humanitarian organizations and monitors; (e) the prosecution, dismissal or transfer, as appropriate, of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups. 4. Choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Parties shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life. The Parties shall facilitate the flow of information necessary for refugees and displaced persons to make informed judgments about local conditions for return. 5. The Parties call upon the United Nations High Commissioner for Refugees ("UNHCR") to develop in close consultation with asylum countries and the Parties a repatriation plan that will allow for an early, peaceful, orderly and phased return of refugees and displaced persons, which may include priorities for certain areas and certain categories of returnees. The Parties agree to implement such a plan and to conform their international agreements and internal laws to it. They accordingly call upon States that have accepted refugees to promote the early return of refugees consistent with international law.' Europe - Miscellaneous, 'Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, 14 December 1995' (*Refworld*, 14 December 1995) <<https://www.refworld.org/docid/3de497992.html>> accessed 23 December 2021, Protection in Annex 7

<sup>1800</sup> Migration News, 'Kosovar Refugees' (*Migration News*, May 1990)

<<https://migration.ucdavis.edu/mn/more.php?id=1801>> accessed 28 November 2021

<sup>1801</sup> UNHCR, 'UNHCR South-eastern Europe Information Notes' (*UNHCR*, 20 September 2000)

<<https://www.unhcr.org/3c3ef2e44.pdf>> accessed 28 December 2021, 2

<sup>1802</sup> For example, Serbia 'issued a Law on Use of Abandoned Property in 1996 that revoked ownership rights in cases where the owner had not been making active use of the housing in question.' Scott Leckie, 'New Directions in Housing and Property Restitution,' Scott Leckie (ed), *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (Translation Publishers, Inc. 2003) 46

<sup>1803</sup> Ibid 46

<sup>1804</sup> NATO, 'Short History of NATO' (*NATO*, n.d.)

<[https://www.nato.int/cps/en/natohq/declassified\\_139339.htm](https://www.nato.int/cps/en/natohq/declassified_139339.htm)> accessed 29 November 2021

<sup>1805</sup> Ibid

<sup>1806</sup> Ibid

provided 'a framework for the resolution of the conflict in Kosovo by authorising the deployment of an international civilian and military presence that would provide an international transitional administration and security presence that would oversee the return of refugees and the withdrawal of military forces from Kosovo.'<sup>1807</sup> UNSC Resolution 1244 also established the UN Interim Administration Mission in Kosovo which was made responsible for promoting 'security, stability and respect for human rights in Kosovo and in the region'<sup>1808</sup> and 'assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.'<sup>1809</sup> Although the peace agreement allowed refugees to return to Kosovo<sup>1810</sup> most returned to areas where their ethnic group was a majority because they did not or were not able to live amongst former enemies.

The precedent in Bosnia and Kosovo reveals that Palestinian refugees can return to their homes if Israel permits them to return. The precedent in Kosovo/Bosnia also suggests that if Palestinian refugees are allowed to return, they will unlikely want to live and/or be able to live as a minority amongst Israelis. Likewise, Israelis will not likely want to live as a minority amongst Palestinian refugees if their return to their original areas turns them into a majority in such areas. Moreover, returning refugees will only be able to return to their homes and/or be compensated for destroyed homes if Israel adopts a restitution framework that allows dispossessed Palestinian owners to regain their properties or be compensated for any losses. The Bosnia/Kosovo precedent also suggests that if Palestinian refugees are allowed

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<sup>1807</sup> United Nations, 'Security Council Resolution 1244 (1999) on the situation relating Kosovo' (*United Nations*, 10 June 1999) <<https://peacemaker.un.org/kosovo-resolution1244>> accessed 28 November 2021, Summary of UNSC 1244

<sup>1808</sup> United Nations, 'United Nations Interim Administration Mission in Kosovo: report of the Secretary-General' (*United Nations Digital Library*, 3 June 2019) <<https://digitallibrary.un.org/record/3807394>> accessed 23 December 2021, Paragraph 2

<sup>1809</sup> Article '10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.'

Article 11 (K) assured 'the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.' United Nations, 'Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo], 10 June 1999, S/RES/1244 (1999)' (*Refworld*, 10 June 1999) <<https://www.refworld.org/docid/3b00f27216.html>> accessed 23 December 2021, Article 10 and 11

<sup>1810</sup> Office of the High Representative, 'Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, 14 December 1995' (*Refworld*, 14 December 1995)

<<https://www.refworld.org/docid/3de497992.html>> accessed 28 November 2021, 'CHAPTER ONE: PROTECTION Article I Rights of Refugees and Displaced Persons

to return, they will likely opt to live in areas where they will be a majority, or in areas where Arab-Isrealis are a majority.

Overall, the precedent in Rwanda, Cyprus, Bosnia, and Kosovo supports the thesis argues that the right of refugees to return depends on the consent of the State. This was evident in Rwanda, Kosovo and Bosnia since refugees were able to return to their country or parts of their country and in some cases to their former homes after the parties to the conflict signed a peace agreement that acknowledged that refugees have a RTR to their homes and that such a return was essential to ending the conflict. Moreover, refugees were able to return because the parties to the conflict facilitated their return. This indicates that Palestinian refugees will only be able to return to Israel if Israel accepts and facilitates their return. Meanwhile, the Cyprus precedent revealed that any attempts to resolve the Palestinian refugee problem will fail if the refugees reject the final settlement.

## 9.6. Final Remarks

In conclusion, this thesis believes that in the absence of a Palestinian State the most likely outcome is that UNRWA host States will prefer to resettle Palestinian refugees in third countries. This assessment derives from a historic precedent in Iraq when Palestinian refugees who fled Iraq after the U.S. invasion in 2003 ended up stuck in camps near the border with Syria and Jordan after both countries closed their borders.<sup>1811</sup> Those who were stuck in no man's land because they had 'no country of their own to return to...found themselves in a vicious legal and existential state of uncertainty'<sup>1812</sup> and 'had to wait [for] permission to emigrate to countries' such as Chile, Brazil, Norway and Iceland amongst others.<sup>1813</sup> If UNRWA host States decide to solve the Palestinian refugee problem through

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<sup>1811</sup> Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee Studies Centre University of Oxford*, 12 January 2008)

<<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>>

accessed 15 January 2020, 3

<sup>1812</sup> Ibid 3

<sup>1813</sup> Marlis Saleh, 'Implications of Revolutions and Changes in the Arab World on the Palestinian Refugees,' in *Palestinian Refugees in the Arab World: Realities and Prospects* (Palestine Return Centre & Aljazeera Centre for Studies 2015) 213

\*Jordan ended up hosting some of the Palestinian Refugees from Iraq in Al-Ruwaished Camp and Syria hosted some in Al-Hol Camp. Two camps were also created along the Syrian-Iraqi Borders. 'A number of Palestinian refugees in Al-Ruwaished Camp have been granted asylum in Brazil as part of the 'Solidarity Resettlement Programmes' proposed in the 2004 Mexico Plan of Action.' Maher Bitar, 'RSC Working Paper No. 44 Unprotected Among Brothers: Palestinians in the Arab World' (*Refugee*

third-country resettlement this solution will effectively terminate their RTR to Israel and potentially define them legally out of existence by transforming them into citizens of new States. While Palestinian refugees who could not be integrated or resettled will find themselves facing a legal limbo. Despite these potential outcomes resettlement as a durable solution for the ongoing Palestinian refugee crisis is the most likely outcome because in 2010 Whitley<sup>1814</sup> revealed that Palestinian refugees should consider resettlement because they will not be able to return to Israel. We introduce this lengthy quote because it summarizes the realities and prospects for Palestinian refugees.

The broad contours of what will be a practical and acceptable solution for all parties to the refugee questions are pretty well known among policymakers. We recognize, as I think most do, although it's not a position that we publicly articulate that the right of return is unlikely to be exercised to the territory of Israel to any significant or meaningful extent. It's not a politically palatable issue, it's not one that UNWRA publicly advocates but nevertheless it's a known contour to the issue. Therefore, the working assumption is that the vast majority of the refugees will eventually end up either in the future State of Palestine, within which boundaries we have yet to see, and hopefully there will be enough land for them...

Clearly, the alternatives are that the refugees will remain where they are, in some new form of status either as citizens of those states or else alternatively as citizens of Palestine residing abroad in those territories. But the status of the refugees will vary according to their personal circumstances, according to their own personal prospects, according to the compensation that might be on offer, the alternative packages, how attractive they may be and the prospects of resettlement elsewhere in the West. But I think it's a practical reality that we all recognize that the numbers who will be permitted to resettle in Western countries or elsewhere in the world are going to be very limited indeed by the huge financial factors involved and the difficulties of being able to absorb significant people, numbers of peoples.

I would say that if one doesn't start a discussion soon with the refugees, for them to start considering what their own future might be, for them to start debating their own role in the societies where they are, rather than being left in a state of limbo where they are helpless, but preserve rather cruel illusions that perhaps one day they will return to their homes, then we are storing up trouble for ourselves.<sup>1815</sup>

Although the logic propelling Whitley's views reflects how policymakers are approaching the Palestinian refugee problem a public backlash forced Whitley to apologize for his remarks to

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*Studies Centre University of Oxford*, 12 January 2008) <<https://www.rsc.ox.ac.uk/files/files-1/wp44-unprotected-among-brothers-2008.pdf>> accessed 15 January 2020, Footnote 1 in 3

<sup>1814</sup> Then the New York Director of UNRWA.

<sup>1815</sup> Andrew Whitley's speech quoted in National Council on US-Arab Relations, 'Geo-Political Dynamic (III): The Palestinian Future – Impediments to Peace and Possibilities for Progress' (19<sup>th</sup> Annual Arab-U.S. Policymakers Conference, 21-22 October 2010) <<https://ncusar.org/auspc/2010>> accessed 7 June 2017, 13

UNRWA.<sup>1816</sup> Whitley wrote that his remarks were ‘inappropriate and wrong’ and confirmed that they ‘did not represent UNRWA’s views.’<sup>1817</sup> After expressing his ‘sincere regrets and apologies’ he concluded that ‘[i]t is definitely not my belief that the refugees should give up on their basic rights, including the [RTR].’<sup>1818</sup> Despite retracting his remarks, when he initially made them, he indicated while commenting on the views of another speaker ‘that...unfortunately, I cannot for now as a serving UN official, say many of the things that she has said so well.’<sup>1819</sup> Therefore, his apology should not distract us from the fact that he was correct when he indicated that Palestinian refugees will not be able to return to Israel and that resettlement is the only viable solution to ending their plight. He was also correct to note that ‘if one doesn’t start a discussion soon with the refugees’ they will be ‘left in a state of limbo.’<sup>1820</sup> This discussion needs to take place now because as Cohen rightly observed ‘it’s hard to fault Whitley’s logic. [Because] [o]f the 50 million people who lost their homes because of war and conflict in the twentieth century, practically none of the original displaced returned to their homes...The historical record shows that refugees...are invariably absorbed by host countries’<sup>1821</sup> when States do not allow refugees to return.

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<sup>1816</sup> Chris Gunness was the then Spokesman and Director of Strategic Communications at UNRWA. Andrew Whitley, ‘UNRWA New York Director Apologizes and Retracts Comments on Right of Return’ (UNRWA, 3 November 2010) <<https://www.unrwa.org/newsroom/official-statements/unrwa-new-york-director-apologises-and-retracts-comments-right-return?id=837>> accessed 7 June 2017]

<sup>1817</sup> Ibid

<sup>1818</sup> Ibid

<sup>1819</sup> Andrew Whitley’s speech quoted in National Council on US-Arab Relations, ‘Geo-Political Dynamic (III): The Palestinian Future – Impediments to Peace and Possibilities for Progress’ (19<sup>th</sup> Annual Arab-U.S. Policymakers Conference, 21-22 October 2010) <<https://ncusar.org/auspc/2010>> accessed 7 June 2017, 12

<sup>1820</sup> Andrew Whitley’s speech quoted in Ibid 13

<sup>1821</sup> Ben S Cohen, ‘The Palestinians and Israel: Just Say No’ (*Huntington Post*, 28 October 2010) <[http://www.huffingtonpost.com/ben-s-cohen/the-palestinians-and-isra\\_b\\_775556.html](http://www.huffingtonpost.com/ben-s-cohen/the-palestinians-and-isra_b_775556.html)> accessed 25 May 2017

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