

**“Temporary Protection for Palestinian Refugees:  
A Proposal”**

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## TEMPORARY PROTECTION FOR PALESTINIAN REFUGEES: A PROPOSAL

*Susan M. Akram and Terry Rempel\**

### Introduction

Temporary protection is widely regarded as an international legal norm that is now obligatory on states in certain circumstances with regard to their treatment of a mass influx of refugees, or persons fleeing situations of armed conflict or civil strife.<sup>1</sup> As a recognized status, it is the most recent of the three major possibilities for protection of refugees which a state can offer—the other two being the now-universal obligation of *non-refoulement* (“non-return”)<sup>2</sup>, and the non-obligatory protection of political asylum<sup>3</sup>.

Despite the controversy temporary protection has generated, it has special significance to the Palestinian refugee situation. For historical, legal and political reasons, Palestinian refugees and stateless individuals have been effectively denied many of the minimal legal protections available to other refugees under the 1951 Refugee Convention regime. This has had grave consequences, both for Palestinians within the Israeli-occupied territories and in the diaspora, the latter including those within the Arab states.<sup>4</sup> The implications of the legal lacunae in which Palestinians find themselves are more stark in the post-Oslo era—when a politically negotiated resolution of the conflict appears more remote than ever—and Palestinians, particularly in the West Bank and Gaza, have been subjected to heightened oppression and terror tactics by their Israeli occupiers. The escalating Israeli violence, directed at a Palestinian population held captive in towns and villages by lengthy curfews and checkpoints, as well as ongoing ethnic cleansing and low-intensity population transfer, is causing a renewed exodus of Palestinian refugees.

It is in this post-Oslo, second *intifada* framework that a regularized program of temporary protection appears to be a particularly attractive option for Palestinians fleeing renewed conflict in the occupied territories, as well as those Palestinian refugees already in the

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<sup>1</sup> For a summary of different views on temporary protection, see Nadia Yakoob, *Workshop Report: Report on the Workshop on Temporary Protection: Comparative Policies and Practices*, 13 Geo. Immigr. L.J. 617 (1999). Commentators point out significant differences between the non-formalized and formalized concepts of temporary refuge and temporary protection. See Donatella Luca, *Questioning Temporary Protection, Together with a Selected Bibliography on Temporary Refuge/Temporary Protection*, 6 Int'l J. Refugee L. 535 (1994).

<sup>2</sup> See generally, Guy Goodwin-Gill, *The Refugee in International Law*, 117-171 (2d ed., 1996); Atle Grahl-Madsen, *The Status of Refugees in International Law: Asylum Entry and Sojourn* (1975); James Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l. L. J. 129 (1990).

<sup>3</sup> See Grahl-Madsen, *supra* note 2, at 108.

<sup>4</sup> For a short overview of the historical and legal context of the current situation for Palestinian refugees and stateless persons, and consequences for their human rights, see Susan M. Akram, *Reinterpreting Palestinian Refugee Rights Under International Law*, in *Palestinian Refugees: The Right of Return* 165 (Naseer Aruri, ed., 2001) [hereinafter *Palestinian Refugee Rights*].

diaspora who lack third-state citizenship, and those remaining in Arab states. In this paper, the authors argue for an internationally-harmonized approach to temporary protection for Palestinian refugees and stateless persons. Temporary protection would offer diaspora Palestinians in any of the main regions to which they have fled the protection rights they currently lack, with many of the concomitant rights of an individual granted asylum, but without the permanent status accompanying integration or resettlement that might compromise their right to return to their places of origin.

Currently, a comprehensive negotiated solution to the protracted conflict is more remote than ever, particularly in the absence of political will amongst the relevant states to enforce its realization. Harmonized temporary protection would create an incentive for participating states to engage in the implementation of durable solutions for Palestinian refugees. While TP tied to refugee choice and right of return would provide tremendous incentive to the Arab states and to the refugees themselves to commit to the process, a set of special incentives and disincentives is designed to encourage Israeli participation. Moreover, the international community's experience over the last forty years of implementing refugee solutions, shows clearly that the only solutions which have been durable are those based on equitable responsibility-sharing driven by refugee choice. Finally, the status of temporary protection with the expectation of repatriation to place of origin is fully consistent with principles of international law on the right of return, as well as principles governing the design and implementation of durable solutions for refugees in general, and Palestinian refugees in particular.

## **I. The Legal Framework of Temporary Protection, and its Place in Refugee and Human Rights Law:**

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

The current international legal regime for refugees is a relatively recent one, established in the framework of the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention, or CSR51)<sup>5</sup>, its companion 1967 Protocol (Refugee Protocol, or PSR67)<sup>6</sup>, and the Statute of the United Nations High Commissioner for Refugees (UNHCR).<sup>7</sup> With this regime in place, the international community initiated a consensus model of refugee problem-solving, sharing the responsibility of implementing a multi-leveled durable solution process driven by the pivotal principle of refugee choice.<sup>8</sup>

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<sup>5</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention, or CSR51].

<sup>6</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol, or PSR67].

<sup>7</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. 428(v), U.N. GAOR, 5<sup>th</sup> Sess., Annex, U.N. Doc. A/1775 (1950).

<sup>8</sup> According to Erika Feller, the Director of UNHCR's International Protection Division, in order to address the main challenges in protection of refugees, "[t]he overarching theme that has to run through the entire process is responsibility sharing, based on international cooperation and solidarity." Erika Feller, The Institute for Global Legal Studies Inaugural Colloquium: *The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime*, 5 Wash. U. J.L. & Pol'y 129, 132 (2001).

The Refugee Convention and Protocol incorporate two essential state obligations: the application of the now universally-accepted definition of “refugee” which appears in Article 1A(2) of CSR51, and the obligatory norm of *non-refoulement*, which is incorporated in Article 33.1 of the Convention.<sup>9</sup> *Non-refoulement* as a peremptory norm, is widely respected even by states not signatories to the CSR51 or PSR67.<sup>10</sup> Meeting the refugee definition automatically triggers the protection of *non-refoulement*; it does not entitle the individual to asylum status. Nevertheless, the Convention requires states to extend protection as long as the conditions justifying *non-refoulement* continue, thus requiring more permanent status if return becomes impossible over the longer term—an obligation of *non-refoulement* through time.<sup>11</sup>

UNHCR describes the three main durable solutions for refugees as repatriation, host country absorption, and third-state resettlement.<sup>12</sup> Voluntary repatriation in safety and dignity, based on the fundamental right to return to one’s home and country, is recognized both in principle<sup>13</sup> and in state practice as the most appropriate solution to refugee flows.<sup>14</sup> In the 1990’s alone, approximately 12 million refugees returned or were repatriated around the world, while some 1.3 million refugees and persons of concern to UNHCR were resettled.<sup>15</sup> In a single year—1999—over 1.6 million refugees returned to their homes, while 45,000 refugees resettled to third states.<sup>16</sup>

The Convention restrictively defines the situations in which a state may terminate an individual’s status as refugee. The detailed and specific nature of the cessation clauses indicate they are to be restrictively interpreted.<sup>17</sup> The combination of the requirement

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<sup>9</sup> “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 5, Art. 33.1

<sup>10</sup> “...States have been prepared to accept that the principle of *non-refoulement* should be scrupulously observed. In numerous resolutions of international bodies in which this principle has appeared in recent years, this principle has been stated without any qualification.” G.J.L. Coles, *Temporary Refuge and the Large-Scale Influx of Refugees*, Paper submitted to the UNHCR Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, EC/SCP/16/Add.1 (1981).

<sup>11</sup> Goodwin-Gill, *supra* note 2, at 123. See also, Davor Sopf, *Temporary Protection in Europe After 1990: The “Right to Remain” of Genuine Convention Refugees*, 6 Wash. U. J. L & Pol’y. 109, 134-35 (2001).

<sup>12</sup> See General Conclusion on International Protection, UNHCR ExCom, No. 90 (LII), para (j)-(k) (2001). See also, Conclusions on International Protection: Resettlement as an Instrument of Protection, UNHCR ExCom, No. 67 (XLII), para (g) (1991).

<sup>13</sup> See Conclusion on Voluntary Repatriation, UNHCR ExCom, No. 40 (XXIX) (1985); Conclusion on Voluntary Repatriation, UNHCR ExCom, No. 18 (XXXI) (1980).

<sup>14</sup> See *id.*

<sup>15</sup> *Refugee Resettlement in Selected Countries, 1990-1999*, table V.20, Refugees and Others of Concern to the UNHCR, 1999, Statistical Overview (Geneva: UNHCR, 1999).

<sup>16</sup> *Report of the UNHCR to ECOSOC*, E/2000/18, at 6 (27 April 2000).

<sup>17</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/1P/Eng/REV.2, para. 116 (ed. 1992) (1979) (hereinafter *UNHCR Handbook*) (“The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.”).

that states must examine all claims to refugee status made in their territory, the *non-refoulement* obligation, and the restrictive cessation clauses, squarely place the obligation on states not to return individuals when their lives or safety are at risk, and to maintain that obligation until and unless a cessation condition is met.

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

Although the Refugee Convention was drafted to address the mass displacements caused by World War II in Europe and has provisions for group or category determinations, it has been viewed by states as primarily an instrument for individualized refugee assessments.<sup>18</sup> Thus, some states view the Refugee Convention as inapplicable to situations of mass refugee flows.<sup>19</sup> New instruments and policies have been devised to bridge the gap between states' obligations of *non-refoulement* and the need for a durable solution in situations where individualized asylum claims overwhelm the capacity of state systems, or the cause of flight is for non-Convention reasons. It is in this context that temporary protection has emerged as a regularized status in recent years.

Temporary protection in its more recent, formalized sense,<sup>20</sup> is characterized by a set of common elements. First, it is a grant of protection of a temporary nature from the receiving state to specific groups or individuals.<sup>21</sup> Second, it is granted with the expectation that it is an interim solution, and that at the end of the time period of the grant, the individual or group will either return home or, if return is not desirable, that either the receiving or a third state will offer more permanent status.<sup>22</sup> Third, temporary protection may afford fewer rights to the individual receiving the status than she would receive as a Convention refugee.<sup>23</sup>

From the perspective of the state, temporary protection has the following advantages: 1) it is a humanitarian response to situations of mass influx, whether of persons who might qualify as refugees under the CSR51 definition, or who would not qualify, but are fleeing emergency situations in their home countries and deserve humanitarian treatment in their

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<sup>18</sup> Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 Am. J. Int'l. L. 279, 282 (2000) [hereinafter Fitzpatrick, *Elements*].

<sup>19</sup> See James Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 Harv. Hum. Rts. J. 115, 157-69 (1997); see generally, Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harv. Hum. Rts. J. 229.

<sup>20</sup> For a thorough study on the range of practice of temporary protection, see Inter-governmental Consultations on Asylum (IGC), *Refugees and Migration Policies in Europe, North America and Australia: Report on Temporary Protection in States in Europe, North America and Australia* (1995).

<sup>21</sup> Bonaventure Rutinwa, *Temporary Protection and its Expression Under the 'Reformulation of Refugee Law' Model*, in *Perspectives on Refugee Protection in South Africa*, para 1.7 (Handmaker, de la Hunt & Klaaren, eds., 2001).

<sup>22</sup> Describing the more formalized temporary protection, the IGC study found four common elements: admission, or extension of stay; non-refoulement; basic rights/humanitarian standards; and eventual return. IGC Study, *supra* note 20, at 11. This has particular implications for Palestinians, which will be addressed below.

<sup>23</sup> Rutinwa, *supra* note 21, at para. 1.7.

place of refuge;<sup>24</sup> 2) it is an alternative to the receiving states' obligation to provide full asylum procedures otherwise required for persons seeking refugee status, conserving resources in often overstretched adjudication systems;<sup>25</sup> 3) it absolves receiving states from having to grant asylum to large numbers of putative refugees, addressing domestic political debates; 4) it has frequently been implemented as part of responsibility-sharing, thus relieving any individual state of having to absorb the entire refugee flow involved;<sup>26</sup> and 5) it demonstrates both to the arriving alien and the world at large that the state is providing protection on a temporary basis, with the understanding that this status will be revoked once repatriation is feasible.<sup>27</sup>

From the perspective of the putative refugee, temporary protection has both advantages and disadvantages, depending on a number of variables determined by domestic legislation. Generally, however, the advantages include: 1) the individual is not required to go through a protracted and often taxing asylum application procedure; 2) the individual may be granted many of the protection rights afforded to an asylee: the right to work, the right to freedom of movement, the right to obtain certain basic benefits for subsistence;<sup>28</sup> 3) the status is granted for a definite period of time, allowing the individual to make specific plans for repatriation, or for resettlement in a third state within a certain timeframe<sup>29</sup>.

#### *Temporary Protection Measured under Guarantees of the Refugee Convention:*

Aside from their core obligation of *non-refoulement* through time, under the Refugee Convention states must provide a number of economic and social rights to recognized refugees, and to expand those rights over time. The rights guaranteed by the Convention are employment, housing, public education, property ownership, freedom of movement, identity papers, travel documents and social security.<sup>30</sup> The Convention requires that most of these rights be guaranteed at the same level as nationals of the state, and all are guaranteed at least at the same level as for other aliens.<sup>31</sup> The Refugee Convention is not the only constraint on states that deny human rights, as they may be bound to such

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<sup>24</sup> *Id.*

<sup>25</sup> See Fitzpatrick, *Elements*, *supra* note 18, at 280.

<sup>26</sup> Feller, *supra* note 8, at 133.

<sup>27</sup> See Sopf, *supra* note 11, at 143.

<sup>28</sup> See Rutinwa, *supra* note 21, at para. 1.7; see Sopf, *supra* note 11 [citing Conclusion on People Displaced by the Conflict in the Former Yugoslavia 4 (1992), available at <http://www.unhcr.ch/legal/bibliographic/papers.4htm> (last visited Aug. 1, 2001)].

<sup>29</sup> See Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 San Diego L. Rev. 1, 68-69 (1993); see also, Martin & Schoenholtz, *Asylum Practice: Successes, Failures, and the Challenges Ahead*, 14 Geo. Immigr. L.J. 589, 613 (2000).

<sup>30</sup> See Refugee Convention, *supra* note 5, arts. 13, 14, 17, 21, 22, 26, 27 and 28 (on rights to property, housing, education, movement, identity and travel documents).

<sup>31</sup> There are three main categories of status recognized in the Refugee Convention, each with different levels of rights-protections: simple presence; lawful presence; and lawful residence. See Refugee Convention, *Id.* arts. 2, 3, 4, 27 and 33; *cf.* arts. 18, 26 and 32 and arts. 15, 17(1), 19, 21, 23, 24 and 28. See Goodwin-Gill, *supra* note 2, at 307-309.

instruments as the International Convention on Civil and Political Rights (ICCPR);<sup>32</sup> the International Convention on Economic, Social and Cultural Rights (ICESCR);<sup>33</sup> the Convention on the Rights of the Child (CRC);<sup>34</sup> the Convention on the Elimination of Racial Discrimination (CERD);<sup>35</sup> the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);<sup>36</sup> and the Convention Against Torture (CAT).<sup>37</sup> European states' actions towards refugees and other non-refugee aliens or migrants are further regulated by the European Convention on Human Rights,<sup>38</sup> the 1954 Convention on the Status of Stateless Persons,<sup>39</sup> and the 1961 Convention on the Reduction of Statelessness.<sup>40</sup> However, since there is no internationally-binding standard that guarantees certain human rights for persons granted temporary protection, a state may deny even basic Convention rights in its discretion.<sup>41</sup>

### *Revisiting 'Temporary Protection' in the Arab World*

Although part of a larger region of the Arab world, the states in which the vast majority of Palestinian refugees reside are Egypt, Jordan, Lebanon, occupied Palestine, Syria, Iraq and, in lesser numbers, the Gulf states. All are members of the Arab League, and thus make up the relevant region for discussing temporary protection for Palestinians.<sup>42</sup>

The instruments that bind certain states in the region are the Refugee Convention or Protocol, ratified by nine states.<sup>43</sup> The African Arab countries are also signatories to the

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<sup>32</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, and for the United States on Sept. 8, 1992) [hereinafter ICCPR].

<sup>33</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>34</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

<sup>35</sup> Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force 1969) [hereinafter CERD].

<sup>36</sup> Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

<sup>37</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

<sup>38</sup> European Convention for Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force on Sept. 3, 1953) [hereinafter ECHR].

<sup>39</sup> Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960) [hereinafter 1954 Stateless Convention].

<sup>40</sup> Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975) [hereinafter 1961 Statelessness Convention].

<sup>41</sup> Joan Fitzpatrick, *The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Refugee Status and Withdrawal of Temporary Protection*, 13 Geo. Immigr. L. J. 343, 372 (1999) [hereinafter Fitzpatrick, *End of Protection*].

<sup>42</sup> The larger region comprises the twenty-one Arab states that are members of the Arab League: Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen See Khadija Elmadmad, *An Arab Convention on Forced Migration: Desirability and Possibilities*, 3 Int'l J. Refugee L. No. 3, 461, 466 (1991).

<sup>43</sup> For states parties to the 1951 Refugee Convention, and the 1967 Protocol, see respectively, <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>, and <http://www.unhcr.ch/html/menu3/b/treaty5.htm>.

1969 OAU Convention, the 1981 African Charter on Human and Peoples' Rights and the major international instruments on human rights.<sup>44</sup> International human rights instruments also bind Arab states, including CRC;<sup>45</sup> CERD;<sup>46</sup> the CAT;<sup>47</sup> ICCPR;<sup>48</sup> ICESCR<sup>49</sup>; and CEDAW.<sup>50</sup> Only a handful of states have ratified either of the two statelessness conventions.<sup>51</sup>

The single most important regional body in the Arab world is the Arab League. It was established by the Arab League Pact in March 1945, with the “purpose of...draw(ing) closer the relations between member States and coordinat(ing) their activities with the aim of realizing a close collaboration between them...”<sup>52</sup> Through the Arab League, there have been a number of efforts to create a regional system of human rights.<sup>53</sup> The 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World<sup>54</sup> delineates a broad range of protection rights for refugees and displaced persons, but has no binding force.<sup>55</sup>

The Arab world's efforts to create regional standards for the protection offered to displaced Palestinians predate the formalized TP programs in the Western world. As the first Palestinian exodus began in large numbers during the 1947-1949 conflict in Palestine, the neighboring Arab states provided shelter to the hundreds of thousands of refugees flooding their territories. Less than two decades later armed conflict in the region led to another Palestinian exodus. Once again, refugees found safe refuge in neighboring Arab states. The Arab states' five decades of *de facto* temporary protection offered to the Palestinians is unprecedented, as it has often been at great social, economic and political cost. Although critics frequently challenge the Arab states' treatment of Palestinians in terms of violations of rights and for not offering Palestinians permanent status, they ignore the fact that the Arab states are under no legal obligation to grant

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<sup>44</sup> For ratifications of the major international human rights instruments, see <http://www.unhchr.ch/pdf/report.pdf> [hereinafter UNCHR Ratifications]; for ratifications of the African instruments, see African Centre for Democracy and Human Rights Studies, available at <http://www.acdhhs.org/sign.html>.

<sup>45</sup> See UNCHR Ratifications, *supra* note 44.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> For ratification information on the 1954 Stateless Convention, see <http://www.unhchr.ch/html/menu3/b/treaty3stat.htm>. For ratification information on the 1961 Statelessness Convention, see <http://www.unhchr.ch/html/menu3/b/treaty4.htm>.

<sup>52</sup> Pact of the League of Arab States, 22 March 1945, 70 U.N.T.S. 248, 252 (entered into force: 10 May 1945) [hereinafter Arab League Pact].

<sup>53</sup> See, e.g., draft Arab instruments reprinted in *International Human Rights Law and Practice* (Francisco Forrest Martin, et al., eds., 1997); see also draft Islamic instruments, cited in Elmadmad, *supra*, note 42, at 476.

<sup>54</sup> Group of Arab Experts, *Declaration of the Protection of Refugees and Displaced Persons in the Arab World*, 19 November 1992, Refworld 2000 CD-Rom. (Geneva: UNHCR Centre for documentation and Research).

<sup>55</sup> *Id.*

permanent status to Palestinian refugees, and that the Arab states have in fact supported what the refugees themselves have demanded all along: the right to return to their original lands and homes.

The Arab League Council and the Council of Arab Ministers of the Interior have adopted a series of resolutions concerning the status and treatment of Palestinian refugees in their territories.<sup>56</sup> The Protocol on the Treatment of Palestinians<sup>57</sup> adopted by the Council of Ministers in 1965 in Casablanca – ‘Casablanca Protocol’ – is the most important instrument relevant to temporary protection of Palestinian refugees in Arab host states.<sup>58</sup> The Casablanca Protocol was a major effort to regularize the status of Palestinians in the states where they had primarily fled in 1948, and which continued to host them. In its five articles, the Casablanca Protocol requires that Palestinians receive the same treatment as nationals of Arab host states with regard to employment; the right to leave and return to the territory of the state in which they reside; freedom of movement between Arab states; issuance and renewal of travel documents; and the same treatment regarding freedom of residence, work and movement.<sup>59</sup>

Together, the standards set forth in LASC resolutions and the 1965 Casablanca Protocol have afforded Palestinian refugees, in theory if not always in practice, a type of temporary protection in Arab League member states with the expectation that refugees will return to their homes of origin. Provisions relating to employment allowed refugees to enter the labor market in host states. Many of those Arab states hosting the majority of Palestinian refugees incorporated League standards on employment into domestic law.<sup>60</sup> Suspension of visa requirements during the 1950s, and issuance of travel documents facilitated freedom of movement and enabled refugees to fill vacancies in the labor market, particularly in the Gulf states.<sup>61</sup> Generally, Palestinian refugees in Jordan and Syria have accrued the widest range of benefits in law and in practice.<sup>62</sup> In Jordan, refugees have the added protection afforded through the acquisition of Jordanian

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<sup>56</sup> For a compilation of LASC resolutions in English translation, see Abbas Shibliak, *The League of Arab States and Palestinian Refugees’ Residency Rights*. Monograph Series 11. [Ramallah: The Palestinian Diaspora and Refugee Centre (SHAML), 1998].

<sup>57</sup> Protocol on the Treatment of Palestinians, 11 September 1965, *reprinted Id.*, at 23-24 [hereinafter Casablanca Protocol]. For further discussion of the Protocol, see Lex Takkenberg, *The Status of Palestinian Refugees in International Law*, 141-144 (1998).

<sup>58</sup> The Casablanca Protocol refers to the treatment of Palestinians generally in Arab states, recognizing “...that the legal position of non-refugee Palestinians is much the same as that of those who had become refugees in 1948-49.” See Takkenberg, *supra* note 57, at 141.

<sup>59</sup> See Casablanca Protocol, art. 1-5, Shibliak, *League of Arab States*, *supra*, note 56, at 23-24.

<sup>60</sup> See, e.g., on employment of Palestinian refugees in the Arab world, Laurie Brand, *Palestinians in the Arab World: Institution Building and the Search for State* (Columbia University Press, 1988), and Takkenberg, *supra* note 57, at 52.

<sup>61</sup> During the 1950s a series of reciprocal agreements was concluded between Kuwait and other Arab states that cancelled the need for visas. Brand, *supra* note 60, at 111.

<sup>62</sup> See Elia Zureik, *Palestinian Refugees and the Peace Process. A Final Status Issues Paper*, at 32, 34 (Washington, DC: Institute for Palestine Studies, 1996).

nationality, while retaining their status as refugees and their right to return to their homes of origin.<sup>63</sup>

Despite attempts by the Arab League to create normative standards of treatment and status grants for Palestinians in the Arab world, however, actual practice is inconsistent. *De facto* temporary protection under LASC resolutions and the 1965 Casablanca Protocol has not had the effect of improving the civil and human rights of the refugees pending the implementation of durable solutions to their plight. Due to their unique historical and legal situation and the ‘protection gap’ discussed below, Palestinians receive vastly differing treatment in the different areas of the world where they find themselves. Palestinian refugees in Arab host states, Casablanca Protocol notwithstanding, are accorded fewer rights than provided for under the 1951 Refugee Convention.

## II. Palestinian Refugees, International Protection and Durable Solutions:

More than half a century of persecution of Palestinians inside their historic homeland has produced a chronic pattern of forced displacement that can only be characterized as a form of forced population transfer or ethnic cleansing.<sup>64</sup> It is estimated that three-quarters of the Palestinian people are refugees and displaced persons.<sup>65</sup> Approximately one in three refugees worldwide is Palestinian.<sup>66</sup> More than 7 million people in the world are Palestinian refugees (December 2002): 5.3 million refugees and their descendants who

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<sup>63</sup> See Resolution 2600 of 11 March 1970 adopted by the Supervisory Conference on Palestinian Affairs of the LASC, which allowed Palestinians to acquire dual citizenship. *Reprinted in*, Shiblak, League of Arab States, *supra* note 56, at 43, and 38-40 (English translation). *Op. cit.*, Mohammad Khalil, II The Arab States and the Arab League: A Documentary Record, at 127-29 (Beirut: Khayats, 1962).

<sup>64</sup> See, e.g., *The Human Rights Dimensions of Population Transfer, including the Implantation of Settlers, Preliminary Report* prepared by Mr. A.S. al-Khawasneh and Mr. R. Hatano, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45<sup>th</sup> Sess., Provisional Agenda Item 8, E/CN.4/Sub.2/1993/17 (1993), defining population transfer as “the systematic, coercive and deliberate ... movement of population into or out of an area.” Methods include military action, legislation or other judicial action, planning, recruitment of settlers, public information, and financial subsidies. *Id.* at 15, 17. On ethnic cleansing see, Chaloka Beyani, *A Political and Legal Analysis of the Problem of the Return of Forcibly Transferred Population*, 16 *Refugee Surv. Q.* 3 (1997). See also Drazon Petrovic, *Ethnic Cleansing – An Attempt at Methodology*, 5 *Eur. J. Int’l L.* 3, at 342-59 (1994). For more discussion of transfer and ethnic cleansing in the Palestinian case, see Susan M. Akram and Terry Rempel, *Temporary Protection As An Instrument for Implementing the Right of Return for Palestinian Refugees*, 52 *DePaul Law Review* 1101 at 1122-1146 and sources cited [hereinafter Akram and Rempel, *Temporary Protection*].

<sup>65</sup> The total Palestinian population worldwide as of December 2002 was estimated at 9.3 million. Palestinian Central Bureau of Statistics, *Palestinians at the End of the Year 2002*, at 15. (Ramallah, Palestine). See *infra* notes 67-71 for the total estimated Palestinian refugee population.

<sup>66</sup> The figure is based on the total number of ‘Convention Refugees’ as of the end of 2001, estimated at 12 million. Annex A.5, *Refugee population by region of origin, 1992-2001 (thousands)*. UNHCR Statistical Yearbook 2001. Refugees, Asylum-Seekers and Other Persons of Concern – Trends in Displacement, Protection and Solutions, at 88 (Geneva: UNHCR, 2000); and the total estimated Palestinian refugee population. See *infra* notes 67-71. For UNRWA statistics on Palestinian refugees eligible for assistance, see Lena C. Endresen and Geir Ovnsen, *The Potential of UNRWA Data for Research on Palestinian Refugees, A Study of UNRWA Administrative Data*, at 16-17 (Oslo: FAFO – Institute for Applied Social Science, 1994).

were displaced in 1948 – 4 million of whom are registered with the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) for assistance<sup>67</sup>; approximately 750,000 refugees from the West Bank--including eastern Jerusalem--and the Gaza Strip displaced for the first time in 1967<sup>68</sup>; an estimated 350,000 Palestinians internally displaced inside Israel<sup>69</sup>; another 150,000 Palestinians internally displaced in 1967 occupied Palestine<sup>70</sup>; and, approximately 735,000 Palestinian refugees and other displaced persons from the 1967 occupied territories who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the 1967 occupied Palestinian territories and are unable (due to revocation of residency status, deportation, denial of family reunification, etc.) or, owing to such fear, unwilling to return there.<sup>71</sup>

Root causes of Palestinian displacement include: denial of the right to self-determination, armed conflict, colonization, foreign occupation, racial discrimination and practices of

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<sup>67</sup> Figure for 1948 registered refugees (as of December 2002) is from the Public Information Office, UNRWA Headquarters (Gaza), December 2002. See <http://www.un.org/unrwa/index.html>. [last visited 30 March 2003]. The 1948 non-registered refugee population is derived from Table 7, 'The Distribution of Palestinians in 1998 (minimum estimate),' Salman Abu Sitta, *The Palestinian Nakba 1948, The Register of Depopulated Localities in Palestine*, at 27 (London: The Palestinian Return Centre, 1998); and the average annual growth rate (3.5%) of the Palestinian refugee population.

<sup>68</sup> The 1967 first time displaced refugee population is derived from *Report of the Secretary General under General Assembly Resolution 2252 (ES-V) and Security Council Resolution 237*, UN SCOR, 22<sup>nd</sup> Sess., Supp. for Oct.-Dec. 1967, UN Doc. S/8158 (1967, also issued as U.N. Doc. A/6797) and the average annual growth rate (3.5%) of the Palestinian population. The figure does not include 1948 refugees displaced for a second time in 1967.

<sup>69</sup> The 1948 internally displaced population inside is derived from initial registration figures from UNRWA in *Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, UN GAOR, 6<sup>th</sup> Sess., Supp. No. 16, UN Doc. A/1905, 30 June 1951 and average annual growth rate (4.2%) of the Palestinian population inside Israel. The figure also includes Palestinians displaced inside Israel after 1948, and the Arab Bedouin of the Negev. See Arab Association for Human Rights, *The Unrecognized Villages*, available at <http://www.arabhira.org> [last visited, 14 Nov. 2002].

<sup>70</sup> The figure includes Palestinians internally displaced during the 1967 due to expulsion and demolition of homes, and persons displaced after 1967 due to ongoing land confiscation, house demolition, and revocation of residency rights in eastern Jerusalem. Terry Rempel, *Internally Displaced Palestinians, International Protection, and Durable Solutions*. Information & Discussion Brief No. 9. (Bethlehem: BADIL Resource Center for Palestinian Residency & Refugee Rights, November 2002). See also, *Impact of the Israeli Measures, Survey on the Well-being of Palestinian Children, Women and the Palestinian Households*. (Ramallah: Palestinian Central Bureau of Statistics, June 2001). As of the end of 2002 some 80,000 Palestinians had been rendered homeless due to the destruction of their homes. *Humanitarian Plan of Action 2003, Occupied Palestinian Territory* (Geneva and New York: United Nations, November 2002). See also, *Profile of Internal Displacement: Palestinian Territories* (Geneva: Norwegian Refugee Council/Global IDP Project, 2002) (Figures as of 13 November 2002).

<sup>71</sup> For further definition of this category of Palestinian refugees see, Note on the applicability of Article 1D of the 1951 Convention relating to the status of Refugees to Palestinian Refugees. (Geneva: Office of the United Nations High Commissioner for Refugees, October 2002). The figure is derived from Table 6, *Estimated Forced Migration from the West Bank and Gaza Strip, 1967-86*, in George F. Kossaiifi, *The Palestinian Refugees and the Right of Return*, at 8 (Washington, DC: The Center for Policy Analysis on Palestine, 1996). On Palestinian returnees after Oslo, see Abbas Shiblak, *Reintegration of the Palestinian Returnees*. Monograph Series 6 [Ramallah: Palestinian Diaspora and Refugee Center (SHAML), 1997], available at <http://www.shaml.org/publications/monos/mono6.htm>.

ethnic/religious separation akin to internationally recognized forms of apartheid.<sup>72</sup> The absence of temporal and geographical constraints on displacement of the indigenous Arab population of Palestine, its ethno/religious character, systematic nature, and lack of effective remedies gives special significance to international protection for this refugee and stateless population. Less than one percent of the total number of displaced Palestinians has been able to return to their homes and villages of origin either inside Israel or in the 1967 occupied Palestinian territories.<sup>73</sup>

### *Palestinian Refugees and International Refugee Protection*

The other defining feature of the Palestinian refugee condition is the lack of both national and international protection. Most host states where the majority of Palestinian refugees reside do not recognize or do not apply the full panoply of basic rights afforded to refugees under relevant international and regional instruments. As discussed below, the legal status of Palestinian refugees in these states is more often shaped by domestic political and security considerations. The lack of national protection is compounded by the lack of international protection (often referred to as the ‘protection gap’).<sup>74</sup> No international agency is currently recognized by the international community as having an explicit mandate to systematically work for the realization of the basic human rights of all Palestinian refugees, and to search for and implement durable solutions consistent with international law as affirmed in UN General Assembly Resolution 194(III). Practically, this anomaly means that most of the nearly seven million Palestinian refugees, or nearly one-third of the world’s total refugee population, do not have meaningful access to international protection, in the sense that such protection is legally required or available to other refugee populations.

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

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

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<sup>72</sup> For a detailed discussion of these factors and sources, see Akram and Rempel, *Temporary Protection*, *supra* note 64.

<sup>73</sup> For a more detailed analysis see Terry Rempel, *Housing and Property Restitution: The Palestinian Refugee Case*, in *Housing and Property Restitution: A Comparative Study* (Scott Leckie ed., New York: Transnational Press, forthcoming 2003).

<sup>74</sup> United Nations bodies have been commenting on, and raising concerns about the protection gap affecting Palestinians. See *Mission report on Israel’s violations of human rights in the Palestinian territories occupied since 1967*, submitted by Mr. Giorgio Giacomelli, Special Rapporteur, ESOC, 5<sup>th</sup> Spec. Sess., Agenda Item 3, E/CN.4/S-5/3, at para. 35 (2000); *Report of the Human Rights Inquiry Commission established pursuant to Commission resolution 3-5/1, of 19 October 2000*, U.N. ESOC, 57<sup>th</sup> Sess., Provisional Agenda Item 8, at paras. 114-115, 134 (2001); *Report of the High Commissioner for Human Rights submitted pursuant to decision 2002/103*, U.N. ESOC, 58<sup>th</sup> Sess., Agenda Item 4, at para. 61 (2002); and, *Report of the Special Rapporteur of the Commission of Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, U.N. ESOC, 58<sup>th</sup> sess., Provisional Agenda Item 8, at para. 54 (2002).

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

This individualized definition of refugee, however, was not intended to apply to Palestinian refugees. Their situation was specifically designated for different treatment than for other refugees falling within the Refugee Convention regime.<sup>75</sup> Palestinians as a group or category of refugees are covered by the Refugee Convention in Article 1D—a provision which the drafting history makes absolutely clear is applicable solely to Palestinians and no other group of refugees.<sup>76</sup>

Article 1D provides:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.<sup>77</sup>

When this provision was drafted, Palestinians were afforded a special protection regime consisting of the United Nations Conciliation Commission on Palestine (UNCCP), which had a protection mandate<sup>78</sup>, and the United Nations Relief and Works Agency for Palestine refugees (UNRWA), which had an assistance mandate.<sup>79</sup> The delegates to the

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<sup>75</sup> For a detailed discussion of the instruments and agencies comprising the special regime established for Palestinian refugees, the various interpretations of the provisions that apply, and the consequences of the interpretations, see Susan M. Akram and Terry Rempel, *Recommendations for Durable Solutions for Palestinian Refugees: A Challenge to the Oslo Framework*, 11 Palestine Y.B. Int'l L. (2001-2002). For a somewhat differing interpretation, see Takkenberg *supra* note 57; see also, Goodwin-Gill, *supra* note 2, at 91-93, 241-46. For a collection of critical writing on the history, politics and legal situation of Palestinian refugees, see Aruri, *Palestinian Refugees*, *supra* note 4.

<sup>76</sup> For a detailed treaty analysis of Article 1D and its related provisions in light of the *travaux préparatoires*, a comparison of various interpretations, as well as a discussion on the problems of defining 'Palestinian refugee', see Takkenberg, *supra* note 57; see also Susan M. Akram and Guy Goodwin-Gill, *Brief Amicus Curiae, Board of Immigration Appeals, Falls Church, Va.*, 11 Palestine Y.B. of Int'l. L. 1 (2001-2002).

<sup>77</sup> Refugee Convention, *supra* note 5, art. 1D.

<sup>78</sup> On December 11, 1948, the General Assembly passed Resolution 194(III), establishing the UN Conciliation Commission on Palestine and setting out its multilevel protection mandate and terms of reference. GA Res. 194(III), U.N. Doc. A/810, at 21 (1948) (hereinafter UNCCP Mandate).

<sup>79</sup> UNRWA was established by UN General Assembly Resolution 302(IV) on December 8, 1949, as an

committee drafting the Refugee Convention considered that it was both unnecessary and inadvisable to include Palestinians in the Refugee Convention regime as long as two other UN agencies were providing them with the twin functions of protection and assistance.<sup>80</sup> Moreover, for reasons that made the Palestinian case unique, the drafters believed that Palestinians would get less protection than they deserved if they were subsumed with other refugees in the general protection system of the Refugee Convention.<sup>81</sup>

However, for a number of historical and political reasons, Palestinian refugees have been considered excluded from the coverage of the Refugee Convention for most purposes,<sup>82</sup> and at the same time, the special refugee regime long-since failed to provide the international protection they were to receive as long as their refugee situation remained unresolved.<sup>83</sup> The implications of this protection gap for Palestinians is evident in both

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interim agency to provide subsistence for the refugees until their required durable solution could be implemented. UNRWA was given only a three-year mandate. G.A. Res. 302(IV), U.N. Doc. A/1251 (1949). UNRWA's mandate was limited by the definition of persons who were eligible for UNRWA relief. By 1993, UNRWA defined eligible persons as: "[Those] (1) whose normal residence was Palestine during the period June 1, 1946 to May 15, 1948; (2) who lost both their homes and means of livelihood as a result of the 1948 conflict; (3) who took direct refuge in one of the countries or areas where UNRWA provides relief; and (4) who are the direct descendants through the male line of persons fulfilling 1-3 above." See UNRWA Consolidated Registration and Eligibility Instructions, 1 Jan. 1993.

<sup>80</sup> See *Remarks of the delegates to the Third Committee of the General Assembly*, "Palestine refugees were 'the direct result of a decision taken by the United Nations', and thus, 'a direct responsibility on the part of the United Nations.'" U.N.GAOR, 5th Sess., 328<sup>th</sup> mtg., para. 52, 55 (1950) (Mr. Azkoul, Lebanon)

<sup>81</sup> The proponents of the special regime further believed that 'if the Palestine refugees (were included) in a general definition of refugees, they would become submerged and would be relegated to a position of minor importance'....thus, they should 'continue to be granted a separate and special status.' *Id.* (Mr. Baroody, Saudi Arabia) The Arab State representatives were also concerned that if the other relevant UN agencies ceased functioning, the Palestine refugees should be protected by the UNHCR. U.N.GAOR, 5th Sess., 344<sup>th</sup> mtg., para. 13 (1950) (Mr. Raafat, Egypt).

<sup>82</sup> The 'protection gap' applying to Palestinian refugees and stateless persons is due to a series of instruments and provisions that are interpreted as excluding Palestinians from their coverage. These Palestinian 'exclusion clauses' are in the UNHCR *Statute*, *supra* note 7, at para. 7(c); the Refugee Convention, Art. 1D *supra* note 5; the 1954 Stateless Convention, *supra* note 39, Art. 1(2)(I). UNHCR originally took the position that because of para. 7(c) of its Statute, it was precluded from any international protection mandate over Palestinians. Recently, however, UNHCR has proposed a redefinition of Article 1D of the Refugee Convention that would provide some Palestinians outside UNRWA-areas with protection under the Convention, and permit UNHCR's protection mandate to extend to them. See Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees (UNHCR, 2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/rsd/rsddocview.pdf?CATEGORY=RSDLEGAL&id=3da192be4>.

<sup>83</sup> The distinction in the mandates of the two separate agencies that comprise the special regime for Palestinian refugees – i.e., UNCCP, which had the mandate of providing international protection to the refugees; and, UNRWA, which had a much narrower mandate of providing assistance – although they can overlap in actual practice, is quite marked as a legal matter. The concept of international *protection* has two main aspects: day-to-day protection of the legal and human rights, interests and physical integrity of the refugee under all applicable international and domestic laws; and the most critical aspect for refugees, which is the obligation to promote and implement durable refugee solutions under international legal principles. See UNHCR, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx*, Opening Statement by the High Commissioner at 1, 32<sup>nd</sup> Sess., EC/SCP/16/Add.1

aspects of refugee protection: in day to day security and human rights protection, and in the search for durable solutions. Most countries in which Palestinians seek protection outside their place of origin interpret the relevant provisions in a manner that fails to grant them adequate protection—although the precise interpretations differ from state to state.<sup>84</sup> Palestinians for the most part have difficulty when they find themselves in third (non-Arab) states and apply for political asylum,<sup>85</sup> residence based on family reunification, or other related protections that are available to other refugees in the world.<sup>86</sup> Many remain in Western states without recognized legal status, without work permits, and without the basic essentials to live in freedom and dignity.<sup>87</sup>

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

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(1981). *Assistance*, on the other hand, means the provision of basic welfare: food, clothing and shelter for the subsistence needs of refugees. Soon after the establishment of the UNCCP, it became clear that that body would be unable to implement the required durable solution based on the refugees’ demands to return to their homes because of Israeli intransigence. Thereafter, in a series of measures, the UN reduced the UNCCP’s mandate, and de-funded its major protection role toward the refugees. See David P. Forsythe, *United Nations Peacemaking: The Conciliation Commission for Palestine* 56 (1972).

<sup>84</sup> There are two main categories of interpretation of Art. 1D of CSR51: one category is of those states that do not recognize or incorporate Art. 1D in their asylum law at all; and the second is those states that do incorporate 1D. The first category of states, which includes the United States, Canada, Austria and Switzerland, ignore 1D and determine Palestinian claims under the normal criteria of Art. 1A(2). The second group of states does apply 1D, but interprets it in a variety of inconsistent ways, even within domestic courts. There are at least five distinct interpretations of 1D among and within these states. For a review of the cases, see Akram and Rempel, *supra* note 64. For a detailed discussion of the jurisprudence of 11 states on Palestinian refugee/asylum claims, see Akram and Goodwin-Gill, *Brief Amicus Curiae*, *supra* note 76 at 23-4, 47-52.

<sup>85</sup> For examples of cases and discussion, see Akram and Rempel, *Temporary Protection*, *supra* note 64. See also Akram and Goodwin-Gill, *Brief Amicus Curiae*, *supra* note 76..

<sup>86</sup> On the jurisprudence, see Akram and Goodwin-Gill, *Brief Amicus Curiae*, *supra* note 76.

<sup>87</sup> Examples from United States cases reflect the consequences of confusion over the legal status of Palestinians as refugees and stateless persons. For a description of such issues, see Akram and Rempel, *Temporary Protection*, *supra* note 64, at 1151-55, and sources cited.

Aside from the implications of the ‘protection gap’ for the day-to-day protection of Palestinian refugees and stateless persons, the consequences of this gap may be even more profound for the search for durable solutions. Palestinians as refugees have been denied an international body to represent them in furthering their search for a durable solution, significantly affecting them in at least three major contexts: international representation to assert their rights as refugees to return, obtain restitution and compensation; access to international mechanisms to claim and promote these rights; and an internationally-mandated entity to preserve and promote their individual as well as collective claims in the context of a negotiated peace plan.<sup>88</sup> Due to the ‘exclusion clause’ of Art. 7(c) in its Statute, UNHCR has never interceded to protect Palestinian refugees in any of these three aspects of the search for a durable solution, despite its clear mandate<sup>89</sup> and rich practice in these aspects concerning all other refugee populations.<sup>90</sup>

### *Palestinians as Refugees or Stateless Persons*

Although the UN bodies concerned with the Palestine refugee problem referred to ‘Palestinian’ or ‘Palestine’ refugees as meaning the relief definition incorporated in the UNRWA regulations, no formal definition of ‘Palestinian refugee’ was adopted for purposes of international protection.<sup>91</sup> The basic components of the *de facto* definition of ‘Palestinian refugee’ meant by the UN drafters were based on UNRWA’s assistance definition, which were: a Palestinian national or individual having his/her permanent residence in Palestine who lost home, lands, or livelihood as a result of the 1948 conflict. Because this definition referred to approximately 2/3 of the Palestinian population, it would be illogical to apply an individualized definition such as the one under consideration for the Refugee Convention.<sup>92</sup>

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<sup>88</sup> For a more detailed discussion of the implications of the ‘protection gap’ in the search for a durable solution, see Akram, *supra* note 4, at 165.

<sup>89</sup> The UNHCR’s protection functions, as spelled out in its Statute, include “Promoting the conclusion and ratification of international conventions for the protection of refugees...assisting governmental and private efforts to promote voluntary repatriation or assimilation...obtaining permission for refugees to transfer their assets and especially those necessary for their resettlement...”, UNHCR *Statute*, *supra* note 7, at para 8.

<sup>90</sup> In the last 30 years, the principles on refugee return, restitution and compensation have been greatly strengthened by provisions in numerous negotiated settlements. See, e.g., Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, U.N. Doc. A/46/608-S/23177 (1991); the Bosnia-Serbia settlements in the Dayton Peace Accords, see Dayton Peace Accords, *infra* note 114, at art. 1 (full text available at <http://www1.umn.edu/humanrts/icty/dayton/daytonaccord.html>); and the peace agreements on Guatemala and El Salvador under the CIREFCA accords, see Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons, U.N. Doc. CIREFCA/89/14 (1989).

<sup>91</sup> The legal advisor to the UNCCP secretariat prepared a draft definition of a Palestine refugee for protection purposes, however, by the time the draft was completed, the international community had already begun to dismantle its authority. *Addendum to Definition of a ‘Refugee’ Under paragraph 11 of the General Assembly Resolution of 11 December 1948* (Prepared by the Legal Advisor), UN Doc. W/61/Add.1(1951).

<sup>92</sup> Palestinians are considered to have been given a status similar to that of statutory refugees, as described in Article 1A(1) of the Refugee Convention. See Grahl-Madsen, *supra* note 2, at 140-2; see also, Goodwin-Gill, *supra* note 2, at 93. See also, Akram and Goodwin-Gill, *Brief Amicus Curiae*, *supra* note 76, at 70-72.

Stateless persons who are refugees are covered by the 1951 Refugee Convention.<sup>93</sup> The rights of stateless persons who are not refugees, or stateless persons who are excluded from the coverage of the Refugee Convention, are governed by the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness.<sup>94</sup> Although these Conventions are significant in terms of the legal rights they afford stateless persons and the obligations required of state signatories, they have limited reach, as they have been ratified by very few states.<sup>95</sup>

In order to obtain the benefits of these Conventions, a person must be determined to be 'stateless'—defined as “a person who is not considered a national by any State under the operation of its law.”<sup>96</sup> The 1961 Convention adopts the same definition of stateless persons, but also recommends that “persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.”<sup>97</sup> This basic definition of “stateless person” is now considered customary international law, and therefore binding even on states that are not party to one or other of these Conventions.

The focus of the 1954 Convention is to improve the status of stateless persons, and to grant them the widest possible guarantees of fundamental human rights.<sup>98</sup> For Palestinians, the most important aspect of the 1961 Convention is the recommendation for an expanded “stateless” definition, and Article 11, which provides for the establishment of an agency with a mandate to protect and assist stateless persons claiming the benefit of that Convention. In 1974, the UN General Assembly entrusted the UNHCR with the mandate to protect and assist stateless persons as required by Article 11.<sup>99</sup> The UNHCR has never exercised this mandate under the 1961 Convention.<sup>100</sup>

As for the interpretation of the status of Palestinians as stateless persons, these have varied among and even within those states that are signatories to one or other of the two statelessness Conventions.<sup>101</sup> However, the vast majority of Palestinians coming from

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<sup>93</sup> Refugee Convention, *supra* note 5, art. 1A.. *See also*, 1954 Stateless Convention: “[T]hose stateless persons who are also refugees are covered by the Convention Relating to the Status of Refugees of 28 July 1951”, preamble.

<sup>94</sup> 1954 Stateless Convention, *supra* note 39; 1961 Statelessness Convention, *supra* note 40.

<sup>95</sup> For the status of ratifications, declarations and reservations of the 1954 Stateless Convention, *see* website of the UN Office of the High Commissioner for Human Rights, *available at* <http://www.unhchr.ch/html/menu3/b/treaty3.stat.htm> (showing 22 signatories and 54 state parties, as of February 2002). For the status of ratifications, declarations and reservations of the 1961 Convention on Statelessness, *see* website of the UN Office of the High Commissioner for Human Rights, *available at* <http://www.unhchr.ch/html/menu3/b/treaty4.htm> (showing 5 signatories and 26 state parties, as of February 2002).

<sup>96</sup> 1954 Stateless Convention, *supra* note 39, art. 1.

<sup>97</sup> 1961 Statelessness Convention, *supra* note 40.

<sup>98</sup> *See, e.g.*, arts. 24, 26, 27, 28 of the 1954 Stateless Convention, *supra* note 39.

<sup>99</sup> G.A. Res. 3274 (XXIX), 10 December 1974. This mandate was extended indefinitely by G.A. Res. 31/36, 30 November, 1976.

<sup>100</sup> *See* C. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 Int'l J. Refugee L. 232, 254 (1995).

<sup>101</sup> *See* Takkenberg, *supra* note 57, at 92-123; *see also*, Akram and Goodwin-Gill, *Brief Amicus Curiae*

many of the Arab states are *de facto* stateless. By not recognizing them as such, Germany, Switzerland, and other European states deny them rights guaranteed under the 1961 Convention such as obtaining travel documents, employment authorization, and granting nationality to their children born in those countries.<sup>102</sup> Aside from being denied such benefits as travel documents, access to appropriate asylum or residence processing, obtaining authorization to work and other fundamental rights guarantees, Palestinians have also not received the benefit of UNHCR's protection mandate under Article 11 of the 1961 Convention.

Appropriately interpreted, the regime of UNCCP, UNRWA and Article 1D of the Refugee Convention were designed to guarantee that Palestinian refugees would at all times receive both protection and assistance, whether by two other UN agencies, or by UNHCR (preferably in combination with UNRWA). Article 1D was meant to ensure that if the twin-agency regime of UNRWA/UNCCP should fail in either of its functions, the Refugee Convention would automatically cover Palestinian refugees as an entire group or category, without the necessity of applying the individualized definition of refugee in Article 1A(2). Since the Refugee Convention only obliges states to respect the principle of *non-refoulement*, states are free to grant any additional status to refugees they choose, whether asylum or temporary protection or some other form of more permanent status.

However, Article 1D mandates that in the Palestinian case, states must grant “*the benefits of [the] Convention*” to these refugees pending “*the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.*” This language has several implications. First, once Article 1D is triggered, states are required to grant Palestinian refugees protection (“the benefits of this Convention”). Second, states are required to grant protection to Palestinian refugees only until their position is settled according to the relevant UN resolutions. The relevant resolutions clearly center on UNGA 194(III), which embodies the consensus of refugee repatriation and compensation. This is so primarily because the drafting history of Article 1D makes clear that the drafters intended to create—and did create—the special protection regime with an agreed-upon durable solution and mandated both a primary and alternative body to bring about that solution, the UNCCP and the UNHCR. Third, such protection should be consistent with the international legal rights of refugees both to return to their places of origin and to choose the appropriate solution for their plight.

### *Palestinian Refugees and Durable Solutions Based on the Right of Return*

The right of return is a critical component of the special protection regime, and of the recommendation that Palestinian refugees be granted temporary protection.<sup>103</sup> The legal underpinnings of the right of refugee return are found in three main bodies of law: the

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*supra* note 76.

<sup>102</sup> See Goodwin-Gill, *supra* note 2, at 243-246; Takkenberg, *supra* note 57, at 190.

<sup>103</sup> On the Palestinian right of return under international law, see W.T. Mallison and S. Mallison, An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question, U.N. Doc. ST/SG/SER.F/4 (1979).

law of nationality and state succession;<sup>104</sup> human rights law;<sup>105</sup> and humanitarian law.<sup>106</sup> In each of these bodies of law, the right of return is found both as a rule of customary law and codified in international treaties. The state responsible for recognizing and implementing the right of return in the Palestinian refugee case is, of course, Israel, which is the state responsible for creating the refugees, and has bound itself to the principle through numerous treaty ratifications.

The right to return is also consistently referred to in resolutions of the UN dealing with rights of refugees.<sup>107</sup> Concerning Palestinians specifically, UN General Assembly Resolution 194(III), 11 December 1948, embodies customary law relative to the right of

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<sup>104</sup> The obligation of a successor state to grant nationality to all residents of that territory is a well-established customary international law rule, which requires that 'the population follows the change of sovereignty in matters of nationality.' See Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 British Y.B. Int'l L. 284, at 320 (1963). It is important to note that during the British Mandate period, Palestinian nationals had distinct "Palestinian Citizenship," with recognized British-issued passports. The 1952 Israeli Nationality Law retroactively repealed the Palestine Citizenship Orders, and provided that every Jewish immigrant was automatically entitled to Israeli nationality [under the 'Law of Return'], and that former Palestinians of Arab origin were eligible for Israeli nationality under a series of restrictive conditions which effectively disqualified the vast majority of Palestinian Arabs from Israeli citizenship, and stripped them of their Palestinian nationality. 1952 Nationality Law, 5712/1952, 93 Official Gazette 22 (1952), Sec. 3. See Anis F. Kassim, *Legal Systems and Developments in Palestine*, 1 Palestine Y.B. Int'l L. 19 (1984). Denationalization based on race or ethnic origin is a violation of the general principles of non-discrimination in customary international law, as well as of the ICCPR and the CERD, both of which are binding on Israel. See Art. 2(1) and Art. 26 of the ICCPR, *supra* note 32, and art 5(d)(ii) of the CERD, *supra* note 35.

<sup>105</sup> Many commentators conclude that aside from specific provisions in international treaties, the right to return is obligatory under customary international law in the human rights context. The right of return is expressly recognized in most international human rights instruments, for example. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. No. A/810 (1948) [hereinafter UDHR], art. 13(2); ICCPR, *Id.*, art. 12(4); CERD, *Id.*, art. 5(d)(ii). See American Declaration of the Rights and Duties of Man, art. viii, O.A.S. Res. XXX, International Conference of American States, 9th Conf., O.A.S. Doc. OEA/Ser. L/V/I.4 Rev. XX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 rev. 7 at 15 (2000); American Convention on Human Rights, art. 22(5), Nov. 22, 1969, Art. 22.5, 1144 UNTS 123, *reprinted in* Basic Documents Pertaining to Human Rights in Inter-American System, OAS/Ser. L/V/I.4 rev. 7 at 23 (2000); 1981 African Charter on Human and Peoples Rights, OAU doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), art. 12(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 4.(1963), 46 Europ. T.S. 46, art. 3(2).

<sup>106</sup> Under humanitarian law principles, codified in the Hague Regulations, The Charter of the International Military Tribunal and the Fourth Geneva Convention, there are very clear provisions prohibiting forcible expulsion, and affirming that persons forced from their homes due to hostilities have the right to repatriate. See, e.g., Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, arts. 45, 134, 147 (entered into force Oct. 21, 1950), expressly prohibiting expulsion, and requiring return of any persons leaving areas of conflict, whether forcibly or otherwise.

<sup>107</sup> See, e.g., S.C. Res. 1145, U.N. SCOR, 52<sup>nd</sup> Sess., U.N. Doc. S/RES/1145 (1997) (reaffirming the right of all Croatian refugees to return to their homes of origin); S.C. Res. 1019, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1019 (1995) (demanding that the government of Croatia respect the right of the Serb population to remain or return in safety); S.C. Res. 1078, U.N. SCOR, 51<sup>st</sup> Sess., U.N. Doc. S/RES/1078 (1996), and S.C. Res. 1029, U.N. SCOR, 50<sup>th</sup> Sess., U.N. Doc. S/RES/1029 (1995) (calling on the Government of Rwanda to facilitate the return of Rwandan refugees); see also, S.C. Res 999, U.N. SCOR, 50<sup>th</sup> Sess., U.N. Doc. S/RES/999 (1995) (calling for return of refugees after mass displacement in Tajikistan).

return.<sup>108</sup> Resolution 194, paragraph 11, delineates the specific rights and the primary durable solution for Palestinian refugees.<sup>109</sup> The primary durable solution for Palestinian refugees is return, real property restitution, and compensation for loss of or damage to property.<sup>110</sup> The resolution specifically affirms the right of refugees to return *to their homes*.<sup>111</sup> Refugees who choose not to exercise the rights set forth in paragraph 11(a) may opt for resettlement in host states or in third countries, as well as real property restitution, and compensation.<sup>112</sup> General Assembly Resolution 194(III) also affirms the principle of individual refugee choice.<sup>113</sup>

Finally, widespread state practice implements the rights of resident nationals to enter their state of origin. Such mass displacements as took place in Indochina, Central America, and the Balkans, were resolved with a primary focus on repatriation.<sup>114</sup> Numerous peace agreements also affirm the right of return.<sup>115</sup> The international

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<sup>108</sup> The analysis of Resolution 194 is based on a review of working papers prepared by the Secretariat of the UN Conciliation Commission for Palestine (UNCCP). The UN General Assembly has reaffirmed Resolution 194(III) annually since 1948. For a complete list of resolutions, *see* UN Resolutions on Palestine and the Arab-Israeli Conflict, 1947-1998, Five Volumes, Washington, DC: Institute for Palestine Studies.

<sup>109</sup> For a general analysis of UN Resolution 194, *see Analysis of paragraph 11 of the General Assembly's Resolution of 11 December 1948*, UN Doc. A/AC.25/W.45 (1950) (United Nations Conciliation Comm. for Palestine, Working paper prepared by the Secretariat).

<sup>110</sup> For analysis of the right to restitution and compensation, *see Operations of the Custodian of Absentee Property and estimation of the compensation due to Arab refugees not returning to their homes*. Working paper prepared by the Secretariat of the Commission at Jerusalem. U.N. Conciliation Comm. for Palestine, Doc. A/AC.25/W.52 (1950); *Note on the problem of compensation*. Working paper prepared for the Secretariat of the Commission at Jerusalem. United Nations Conciliation Comm. for Palestine, UN Doc. A/AC.25/W.53 (1950).

<sup>111</sup> The General Assembly clearly meant the return of each refugee to "his[her] house or lodging and not to his[her] homeland." The Assembly rejected two separate amendments that referred in more general terms to the return of refugees to "the areas from which they have come." *Analysis of paragraph 11, supra* note 109.

<sup>112</sup> Paragraph 11(b) thus "instructs" the UN Conciliation Commission for Palestine (UNCCP), to facilitate the resettlement of those refugees choosing not to return and the payment of compensation. UNCCP Mandate, *supra* note 78, para. 11(b).

<sup>113</sup> By 1948, the principle of refugee choice had already become an established principle of refugee law and practice. The principle of individual refugee choice is emphasized in documents of the UN Mediator in Palestine, whose recommendations formed the basis for Resolution 194. *Analysis of paragraph 11, supra* note 109.

<sup>114</sup> *See* Article 1 of the Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina: Agreement on Refugees and Displaced Persons, 21 Nov. 1995, Republic of Bosnia and Herzegovina - the Federation of Bosnia and Herzegovina - the Republika Srpska, annex 7, art. 1, U.N. Doc. S/1995/999 (1995) *see also*, The Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, Nov. 12, 1995, (The Erdut Agreement); Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Oslo, 17 June 1994 (on Guatemala); and final Act of the Paris Conference on Cambodia, Art. 20.1, pt. v, U.N. Doc. A/46/608 (1991).

<sup>115</sup> *See* the CIREFCA, Dayton, Erdut, and Paris Agreements, *supra* notes 90 and 114. *See also* The Rome Process: General Peace Agreement for Mozambique, 4 October 1992, Protocol III, IV Return of Mozambican refugees and displaced persons and their social reintegration, 12 March 1992, art. 4. *See* Protocol of Agreement Between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons, 9 June 1993. *See also*,

community has employed a variety of means, including conditionality<sup>116</sup>, extraordinary administrative powers<sup>117</sup>, mass information campaigns<sup>118</sup>, and threat and use of force<sup>119</sup> to ensure return of refugees and displaced persons.

States, then, are obligated to extend protection to Palestinians until a comprehensive durable solution is found under the framework of UNGA Resolution 194 and the body of law it codifies. Such protection need only be temporary, consistent with the Refugee Convention regime that places no greater burden on a state than *non-refoulement* through time. The obligation to provide protection may be affected by the Article 1C cessation clauses and the exclusion clause of Article 1E, as there is no evidence that they are inapplicable to Palestinians brought under Convention coverage by Article 1D.<sup>120</sup> However, although these provisions may be applicable to Palestinians who have sought asylum, subject to appropriate interpretation under the second sentence of Article 1D,<sup>121</sup> they are not necessarily applicable to considerations of a grant of temporary protection—as reflected by state practice through existing TP models.<sup>122</sup> In other words, the language of 1D provides a separate ‘cessation clause’ for Palestinians covered by 1D, that alters the time when Refugee Convention protection terminates. Moreover, we propose a harmonized TP program that is directly connected to a comprehensive durable solution based on the legal principles of return, restitution and compensation through shared state responsibility. With such a program, cessation will be clearly-defined by the existence of

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Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999. Framework, Article II: Confidence Building Measures, 3.

<sup>116</sup> This includes, for example, the ‘Open-Cities Initiative’ in Bosnia-Herzegovina in which cities facilitating minority return became eligible for more comprehensive and substantive donor assistance. Other conditions include the threat of sanctions and the cessation of international assistance. Lynn Hastings, *Implementation of the Property Legislation in Bosnia-Herzegovina*, 37 *Stan. J. Int’l L.* 221, 232 (2001).

<sup>117</sup> In Bosnia, for example, the Office of the High Representative (OHR) is empowered to remove elected officials obstructing implementation of the Dayton Peace Agreement, revoke discriminatory legislation, and write new legislation. Hastings, *Id.*, at 225.

<sup>118</sup> Review of UNHCR Mass Information Activities, Evaluation Report, 1 April 1998.

<sup>119</sup> See, e.g., Security Council Resolution 1244 (1999) authorizing the Secretary General to establish an international security presence in Kosovo “to provide for the safe and free return of all refugees and displaced persons to their homes.” U.N. SCOR, 54<sup>th</sup> Sess., 4011<sup>th</sup> mtg., U.N. Doc. S/RES/1244 (1999). See also, Security Council Resolution 1264, establishing a multinational force in Kosovo under Chapter VII of the UN Charter, and stressing it is the responsibility of Indonesian authorities “to ensure the safe and dignified return of refugees to East Timor.” U.N. SCOR, 54<sup>th</sup> Sess., 4045<sup>th</sup> mtg., U.N. Doc. S/RES/1264 (1999).

<sup>120</sup> See Takkenberg, *supra* note 57, at 128. Similarly, Palestinians seeking refugee status would be subject to the exclusion clauses found in Article 1F. Discussion of this issue is beyond the scope of this paper, and not directly relevant to the argument for temporary protection.

<sup>121</sup> The cessation clauses are restrictive, and accurate interpretation is essential given the complexities of the Palestinian situation. See *UNHCR Handbook*, *supra* note 17, at para.116. For an overview of the issues arising from Articles 1C and 1E relating to the Palestinians, see Takkenberg, *supra* note 57, at 127-130. See also, Akram and Rempel, *Temporary Protection*, *supra* note 64, at 1174-1176, and sources cited.

<sup>122</sup> State practice has also shown that most states rarely terminate grants of asylum or refugee status based on these provisions, so the cessation clauses are marginally relevant to a discussion of a grant of TP consistent with the Refugee Convention. See Sopf, *supra* note 11, at 127, 151.

a comprehensive peace plan based on these principles<sup>123</sup>, and TP in the meantime will be granted on a *prima facie* basis without necessity for individual asylum status determinations.

Even if Palestinian refugees are denied Refugee Convention or stateless convention coverage, they should be eligible for UNHCR protection concerning durable solutions.<sup>124</sup> Furthermore, Palestinian claims to restitution, compensation for damage and loss of property<sup>125</sup>, and reparations for war crimes and crimes against humanity remain independently-grounded in general international law, humanitarian, and human rights law principles, regardless of any specific refugee law provisions or state practice.<sup>126</sup>

### **III. The Existing Regional Approach to Temporary Protection, and a Rights-Based TP Framework.**

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<sup>123</sup> The optimal framework for a just and durable solution as part of a comprehensive Israeli-Palestinian-Arab peace plan, consistent with the principles articulated in this paper, are beyond the scope of this discussion, although the authors make reference here to the basic outlines of a necessary framework on the refugee issue. See discussion, *infra*, Section IV.

<sup>124</sup> Currently, para. 7(c) of the UNHCR Statute precludes extending UNHCR's mandate towards Palestinian refugees. See *supra* note 82. However, UNHCR has extended *de facto* protection towards Palestinians outside UNRWA territories, and the General Assembly has authority to extend UNHCR protection towards persons 'of concern', as it has done in numerous other refugee and refugee-like situations. See Takkenberg, *supra* note 57, at 307; see generally, Akram and Rempel, *Recommendations for Durable Solutions*, *supra* note 75, at 13-24. Moreover, UNHCR's recently-issued Note on the Interpretation of Article 1D to amend its Handbook, explicitly recognizes the necessity of extending UNHCR protection to this refugee population. See *supra* note 71.

<sup>125</sup> Provisions in human rights instruments to which Israel is a party expressly protect the right to property, and to restitution of wrongfully confiscated property. See Art. 5(d)(v) of the CERD (protecting the right to property); Art. 2(2) of the CESC (prohibiting discrimination in property rights and the right to means of subsistence); Art. 11(1) of the CESC (protecting the right to adequate housing and prohibiting illegal government interference in rights to one's housing). See also Commission on Human Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, affirming the right to restitution. Under customary international law, property rights are also of a fundamental character. See Art. 17 of the UDHR; Art. 5(d)(v) of the CERD; Art. 21 of the American Convention of Human Rights; Arts. 14 and 21(2) of the African Charter; and Art. 1 of Protocol 1 of the ECHR. Humanitarian law also protects the right to property and restitution. See Hague Regulations Convention IV, Arts. 23, 25 and 28; the Fourth Geneva Convention, Arts. 33, 53 and 147 (defining as 'grave breaches' the "destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly."). For a detailed review of the human rights, humanitarian and general international law bases of property restitution and compensation, see Akram and Rempel, *Recommendations for Durable Solutions*, *supra* note 75, at 48-52.

<sup>126</sup> Provisions requiring restitution of refugee property appear in most major peace agreements incorporating durable solutions in the last 20 years. See, e.g., the Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, 14 Dec. 1995 (Art. 1(1) provides that refugees "shall have the right to have restored to them property of which they were deprived in the course of hostilities...and to be compensated for any property that cannot be restored to them"); General Peace Agreement for Mozambique, Protocol III, 12 March 1992, IV, Return of Mozambican Refugees and Displaced Persons and their Social Reintegration (Art. (e) provides that "Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it."). For additional examples, see Akram and Rempel, *Recommendations for Durable Solutions*, *supra* note 75, at 53-55.

Temporary protection, although relatively recent in terms of a recognized, or formalized, status granted by states towards persons who may or may not fall within the 1951 Refugee Convention definition but are deserving of international protection, is not a new concept. It has precedents in temporary refuge, or safe haven, extended in response to large-scale humanitarian emergencies such as in Southeast Asia, where surrounding states accepted, on a *de facto* basis, the presence of thousands of Vietnamese and Cambodians fleeing conflict;<sup>127</sup> in Pakistan and Iran, which accepted approximately 6 million Afghan refugees while war raged in their home country;<sup>128</sup> and in Mexico and Honduras, which temporarily admitted hundreds of thousands of refugees from civil war in El Salvador and Guatemala.<sup>129</sup>

Temporary Protection emerged in the 1980's and '90's as a regionally-specific approach to the problems of mass influx and non-Convention refugees. Different regional TP situations from the models applied in Africa, Europe and the Americas are used as illustrations of *failures to be avoided* and *principles to be applied* to the Palestinian refugee case. A discussion of the temporary protection-type statuses granted Palestinians in the Arab world follows in Section IV.

#### *Lessons From Current Regional TP Models.*

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

TP has operated both in the optimal context of shared responsibility among states receiving the putative refugees, and in the context of *burden-shifting*, with stronger states in a region forcing weaker states to absorb the bulk of refugee flows.<sup>130</sup> The more positive illustrations of how TP can work to complement Convention protection for refugees include the Comprehensive Plan of Action (CPA), initiated to address the massive Indochinese refugee flows of the 1970's.<sup>131</sup> The CPA was designed to prevent front-line states from turning back the desperate refugees by implementing an agreement for short-time temporary protection in those states, with a longer-term obligation of states outside the region to resettle the refugees and to provide material assistance.<sup>132</sup> In a

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<sup>127</sup> See UNHCR, *Fifty Years of Humanitarian Action*, at 80-103 (2000) [hereinafter *Fifty Years*].

<sup>128</sup> See *id.* at 115-121.

<sup>129</sup> See *id.* at 121-131.

<sup>130</sup> See commentators discussing burden-sharing as burden-shifting in the refugee and temporary protection context: Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, 11 *J. Refugee Stud.* 396 (1998); Fitzpatrick, *Elements*, *supra* note 18, and Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migration*, 35 *Va. J. Int'l. L.* 13 (1994); James Hathaway & R. Alexander Neve, *supra* note 19.

<sup>131</sup> See UNHCR, *Fifty Years*, *supra* note 127, at 82-88.

<sup>132</sup> *Id.* at 84-91.

massive responsibility-sharing effort, the front-line states permitted the refugees to remain and allowed resettlement processing by third states to take place on their territories.<sup>133</sup>

The CPA involved 70 governments, and was one of the first examples of a commitment to multilateral durable solution mechanisms that included the country of origin as well as stakeholders in the region and third (resettlement) states.<sup>134</sup> Despite acknowledged problems with implementation,<sup>135</sup> the CPA is one of the more successful examples of mechanisms including temporary protection that can ensure solutions that are durable for large refugee flows when there is real commitment to shared responsibility amongst relevant states.

A different model of responsibility-sharing which involved organized initiatives of the refugee populations themselves was the repatriation and return that took place in the context of the peace negotiations in the Central American states of El Salvador, Guatemala and Nicaragua in the late 1980's. During almost ten years of civil conflict and proxy wars in Central America over two million people became refugees.<sup>136</sup> Scattered across the region, hundreds of thousands sought asylum in neighboring states, in the United States and in other countries. Less than 150,000 were granted refugee status in the region; the majority remained in tenuous temporary statuses in refugee and internally displaced camps in Mexico, Honduras, Guatemala, and Nicaragua.<sup>137</sup> Even before the 1987 regional peace agreement of Esquipulas II was signed, groups of Salvadoran refugees in Honduras began self-repatriation programs on their own.<sup>138</sup> By the time multilateral peace efforts brought together the states of the region as well as the United States and UNHCR at the 1989 *Conferencia Internacional sobre Refugiados Centroamericanos* (CIREFCA) to draft a plan for durable refugee solutions, large numbers of Guatemalan refugees followed their Salvadoran counterparts and returned home from Mexico. By the mid-1990's all the registered Salvadoran refugees in neighboring states had returned home, and between 1984 and June 1999, approximately 42,000 Guatemalan refugees repatriated on their own or with UNHCR assistance.<sup>139</sup>

High refugee participation and voluntary choice were two significant elements contributing to the durability of the CIREFCA process, which lasted from 1989 until 1994.<sup>140</sup> Additional critical principles in the success of CIREFCA were the involvement of all states of the region; the commitment to peacebuilding in tandem with development; an international human rights framework for the major aspects of the peace process

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 84.

<sup>135</sup> Some of the problems plaguing the Indochinese refugee situation, both before and during the CPA, were forced returns; piracy; serious human rights violations; renege commitments; premature closing of camps; and anti-immigrant sentiment in resettlement states. *Id.* at 82-103.

<sup>136</sup> *Id.* at 136.

<sup>137</sup> *Id.* at 136-7.

<sup>138</sup> *Id.* at 137.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 136-143.

officially monitored by the United Nations; and the critical role of local and international ngo's. The process involved coordination of national, regional and international action to achieve lasting solutions to displacement and refugee flows in the entire region.<sup>141</sup>

Non-formalized temporary protection played a critical role in the ultimate durable solutions for Mozambican refugees who fled to Malawi, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe between 1976 and 1992. Approximately 1.3 million Mozambican refugees remained in Malawi for over a decade before the General Peace Agreement for Mozambique was signed in October 1992.<sup>142</sup> Malawi, one of Africa's poorest states and the sixth poorest country in the world, gave temporary protection to a refugee population equivalent to 10% of its own population.<sup>143</sup> Until 1987, Malawi permitted the refugees to settle freely; when numbers and resource constraints became overwhelming, Malawi requested UNHCR to construct camps where it required the refugees to live.<sup>144</sup> As in Central America, the Mozambican refugees began to return on their own before the peace agreement came into effect. The repatriation process under UNHCR auspices began in December 1992, and was part of a larger UN peacekeeping and peacebuilding effort.<sup>145</sup>

UNHCR's repatriation and reintegration assistance in Mozambique exceeded that in either Central America or Cambodia.<sup>146</sup> Among the critical factors contributing to the durable nature of the Mozambican refugee situation were the commitment of the host states to providing temporary protection over a lengthy period, despite enormous drains on their resources; the involvement of major international organizations and donor states to post-conflict rehabilitation and development; the focus on community development involving former adversaries to the conflict.<sup>147</sup>

Another novel example of responsibility-sharing arising out of an extreme emergency situation was the 1999 airlift of Kosovar refugees into European states where they were granted temporary protection tied to a resettlement plan for the longer term.<sup>148</sup> As a condition of admitting the Kosovars temporarily, the Macedonian government insisted on rapid airlift of the refugees from its territory. The program resulted in the evacuation of approximately 96,000 refugees to 28 states, primarily in Europe.<sup>149</sup> Despite the creative

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

<sup>142</sup> More than 1.7 million Mozambicans, out of a population of 16 million, became refugees in the three decades of conflict in the country; four million were internally displaced; about a million lost their lives. *Id.* at 148.

<sup>143</sup> *Id.* at 112.

<sup>144</sup> *Id.* at 113.

<sup>145</sup> The UN Operation in Mozambique (ONUMUZ) included significant troops, police, civilian monitors, and an Office for Humanitarian Assistance Coordination to oversee reintegration and refugee/IDP assistance. *Id.* at 148.

<sup>146</sup> *Id.* at 151.

<sup>147</sup> UNHCR, UNDP and the World Bank, with significant funding from donor states, committed to development and rehabilitation projects including roads, schools, clinics, and "quick impact projects." *Id.* at 152.

<sup>148</sup> Fitzpatrick, *Elements*, *supra* note 18, at 279.

<sup>149</sup> As with the Bosnians, Germany accepted the largest number of Kosovars for TP, 14,700 people; the US accepted 9,700; Turkey, 8,300; France, Norway, Italy, Canada and Austria each accepted more than 5,000

solution it presented, the humanitarian evacuation program raised concerns about states applying *ad hoc* standards of rights and legal status. Nevertheless, the unprecedented relief effort in the Kosovo case, and engagement of large numbers of states both inside and outside the region, provide another illustration of successful use of TP in the context of shared state responsibility.

In 1980 and 1981, the ExCom issued two Conclusions concerning temporary protection in situations of large-scale refugee influx.<sup>150</sup> These Conclusions recommended that states should grant temporary refuge, or temporary protection, pending durable solutions for refugees found in their territories, and the proposals evolved into various temporary protection statuses under state domestic legislation.<sup>151</sup> Various kinds of temporary statuses were instituted to provide temporary protection to both Bosnians and Kosovars in Europe between 1991 and 1995. EU principles and practices on TP became closely tied to the UNHCR Conclusions and guidelines, and were ultimately incorporated in a European Council Directive on minimum standards for TP in the event of mass influx.<sup>152</sup> In the US, temporary protected status (TPS) has been fairly recently codified in domestic legislation. First passed as a specific remedy for hundreds of thousands of civil war refugees from El Salvador, TPS evolved into a time-limited status granted to persons of designated nationalities fleeing civil strife.<sup>153</sup>

To be consistent with the international refugee and human rights norms incorporated, at least in principle, in the now-formalized TP regimes, any TP framework must be based on rights principles that include the following: (1) respect for the core Convention principles of *non-refoulement* through time; access to refugee status determinations and to durable solutions driven by refugee choice; (2) responsibility-sharing among states, involving implementation of multiple durable solutions options tied to refugee choice; and (3) durable solutions that adhere to international human rights standards, including respect and implementation of the right to return in safety and dignity, and of incrementally-based rights tied to length of stay.<sup>154</sup>

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refugees for temporary protection. See Fifty Years, *supra* note 127, at 239.

<sup>150</sup> Conclusion on Temporary Refuge, UNHCR ExCom, No. 19 (XXXI) (1980); Conclusion on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, UNHCR ExCom, No. 22 (XXXII) (1981).

<sup>151</sup> See Conclusion on Temporary Refuge, *id.* at para. (b)(i-ii).

<sup>152</sup> Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L212) 12, Council Directive 2001/55/EC [hereinafter Council Directive].

<sup>153</sup> See Immigration and Nationality Act of 1952, ch. 477, Sec. 244(b)(1), 66 Stat. 163, 216 (1952), amended by Immigration Act of 1990, Pub. L. No. 101-649, Sec. 302(a), 104 Stat. 4978. For a complete discussion of TP in Europe and TPS in the US, see Akram and Rempel, *Temporary Protection*, *supra* note 64, at 1185-1193, and sources cited.

<sup>154</sup> James Hathaway argues that the Refugee Convention's obligation to grant non-refoulement through time requires no greater status than temporary protection. See Hathaway and Neve, *supra* note 19.

#### **IV. An Argument for an Internationally-Harmonized Approach to Temporary Protection for Palestinians: Applying Rights-Based Principles to the Search for Durable Solutions.**

##### *The Current Status of Palestinians in the Arab States and in Occupied Palestine*

Despite efforts by the League of Arab States to create region wide standards for the treatment of Palestinian refugees in the Arab world chronic protection gaps persist. Approximately 4 million refugees are affected in varying degrees.<sup>155</sup> Day-to-day security and human rights protection is particularly problematic in Lebanon, Kuwait, and other Gulf states<sup>156</sup>; protection has been inconsistent in Egypt and Libya<sup>157</sup>; and armed conflict in the region renews concern about basic security for Palestinian refugees in Iraq.<sup>158</sup>

Region wide implementation of standards set forth in LASC resolutions and the 1965 Casablanca Protocol is inconsistent. Protection gaps vary from state to state. Despite obligations to provide national treatment in the areas of employment, the right to leave and enter, travel documents, and visas and residence, treatment accorded to Palestinian refugees in Egypt, Libya, Kuwait and other Gulf states is often similar to protection standards accorded to all other categories of foreigners. Standards in Lebanon, in particular, are below that accorded to foreigners and do not meet minimum requirements set forth in the 1951 Refugee Convention. In the area of employment, Palestinian refugees in Lebanon are barred from employment in nearly seventy different professions due to nationality requirements and the principle of reciprocal treatment applicable to foreigners.<sup>159</sup> Palestinian refugees in Jordan who arrived in 1967 or after are not officially

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<sup>155</sup> The number of registered refugees in Jordan, Lebanon, and Syria as of December 2002 is 2,493,105. Public Information Office, UNRWA Headquarters (Gaza) (December 2002).

<sup>156</sup> In Lebanon Palestinian refugees face some of the most severe protection gaps primarily as a result of political considerations concerning sectarian power sharing in the country along confessional lines. Takkenberg *supra* note 57, at 162. Kuwait and other Gulf states strictly control the presence of non-nationals, including Palestinian refugees. The situation of Palestinian refugees in Kuwait and other Gulf countries began to deteriorate during the 1980s. Zureik *supra* note 62, at 35. During and after the 1991 Gulf war several hundred thousand Palestinians in Kuwait came under heavy pressure aimed at forcing them out. Takkenberg, *supra* note 57, at 159-162.

<sup>157</sup> Shiblak, League of Arab States, *supra* note 56, at 39. Zureik describes 3 phases of treatment towards Palestinians in Egypt: 1) (1948-mid 1950s) refugees were settled in urban centers and accorded limited employment opportunities; 2) (mid 1950s-mid 1970s) refugees accorded national treatment; and, 3) (mid 1970s to present) refugees treated as foreigners. Zureik, *supra*, note 62, at 35. *See also* Takkenberg, *supra* note 57, at 150-154; and Brand *supra* note 60, at 43-63. Refugees in Libya generally enjoy national treatment as set forth in the Casablanca Protocol, however, implementation has been inconsistent. In 1995, for example, Libya ordered all Palestinians to leave the country in protest against the Oslo political process. Hundreds of Palestinian refugees were stranded on the border between Libya and Egypt between August 1995 and April 1997 when Libya permitted refugees to remain in the country. Takkenberg, *supra* note 57, at 166-67.

<sup>158</sup> There are an estimated 90,000 Palestinian refugees in Iraq. Annex A.7 'Refugee population by origin and country or territory of asylum, 1992-2001,' UNHCR Statistical Yearbook 2001, *supra* note 66, at 93. *See also*, Takkenberg, *supra* note 57, at 154-155.

<sup>159</sup> Decree 621/1 (1995), Art. 1 provides a list of jobs and professions "restricted to Lebanese citizens only." Law No. 8/70 (11 March 1970), Art. 5. Unofficial UNRWA handout on the Palestinians' status in Lebanon, *cited in* Petter Aesheim, *The Palestinian Refugees and the Right to Work in Lebanon, A Minor Field Study*.

permitted to work<sup>160</sup>, while refugees in Egypt and Iraq are no longer accorded national treatment with respect to employment.<sup>161</sup> In most Gulf countries, including Kuwait, work permits are tied to an individual employer and are usually not valid for other employment.<sup>162</sup>

In the area of residency, Lebanon imposes greater restrictions on Palestinian refugees vis-à-vis residency than it does on other foreigners.<sup>163</sup> Moreover, Palestinian refugees who arrived in Lebanon after the 1948 war are considered illegal residents.<sup>164</sup> Egypt requires Palestinian refugees resident in the country wishing to travel outside of the country to obtain a visa in order to re-enter its territory.<sup>165</sup> In Kuwait cessation of employment is grounds for cessation of residency.<sup>166</sup> In general, entry to Gulf states for Palestinian refugees holding Arab or foreign passports is difficult to obtain.<sup>167</sup> Finally, with regard to travel documents, receipt of a valid travel document in Lebanon is linked to registration with UNRWA or the League of Red Crescent Society.<sup>168</sup> Refugees not registered with either receive travel documents with a stamp indicating that the holder is not eligible for

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Graduate Thesis. Faculty of Law, University of Lund (2000), at 47. [Copy on file with authors]. Only a few hundred Palestinians are issued work permits. Law 17561 (18 September 1964) delineates the prerequisites for a foreigner to acquire a work permit. Amendments include Decision No. 289/2 (18 December 1982) and Decision No. 621/1 (15 December 1995). Aesheim, *supra*, at 46 and 48.

<sup>160</sup> Takkenberg *supra* note 57, at 162.

<sup>161</sup> Shiblak, League of Arab States, *supra* note 56, at 42.

<sup>162</sup> The Kuwait government, for example, maintains strict control over foreign employment through the Ministry of the Interior or the Ministry of Social Affairs and Labour. Brand, *supra* note 60, at 113. Takkenberg *supra* note 57, at 158.

<sup>163</sup> Decree No. 319 (2 August 1962), issued by the Ministry of the Interior. [Arrete no. 319 reglementant les situations des etrangers au Liban]. Source: UNHCR Refworld [<http://www.unhcr.ch/research/rsd.htm>]. Decree No. 136 (20 September 1969), issued by the Ministry of the Interior, places foreigners in Lebanon on an equal footing, but excludes Palestinian refugees Souheil al-Natour, *The Legal Status of Palestinians in Lebanon*, 10 *Journal of Refugee Stud.* No. 3, at 364-365 (1997). During the 1980s, Lebanon imposed new residency restrictions for Palestinians so that an estimated 12,000 refugees were unable to return to the country. See Takkenberg, *supra* note 57, at 165. For subsequent policies, see also Al-Majdal, Issue No. 1, at 19 (Bethlehem: BADIL Resource Center for Palestinian Residency & Refugee Rights, 1999).

<sup>164</sup> Takkenberg, *supra* note 57, at 163.

<sup>165</sup> Most Palestinians residing in Egypt hold temporary residency permits, which are valid for one to three years. For residency restrictions in Egypt, see Takkenberg, *supra* note 57, at 152. *Op. cit.*, Brand, *supra* note 60, at 50-51. For more recent policies, see Abbas Shiblak, *Residency Status and Civil Rights of Palestinian Refugees in Arab Countries*, 1999 *J. Palestine Stud.* 42 (1996), at 39-40 [hereinafter Shiblak, *Residency Status*].

<sup>166</sup> Residency in Kuwait may be acquired only at the request of a Kuwaiti through the Ministry of the Interior or the Ministry of Social Affairs and Labor. Brand, *supra* note 60, at 113.

<sup>167</sup> Shiblak, *Residency Status*, *supra* note 165, at 42. Takkenberg, *supra* note 57, at 165. At the end of 2002 Kuwait imposed new measures to reduce the presence of Arab nationals from outside the Gulf region, including Palestinians, for so-called security reasons. *Kuwait Restricts Stay of Non-GCC Arabs*, Middle East NewsLine, Vol. 4, No. 472, 12 December 2002.

<sup>168</sup> Refugees registered with UNRWA receive a travel document valid for one year and renewable three times. Refugees registered with the League of Red Crescent Societies (LRCS) in 1948, but not with UNRWA in 1950, are also eligible for a travel document valid for one year, renewable three times. The document is distinguishable from the one accorded to refugees registered with UNRWA by a stamp indicating "Valid for Return". Takkenberg, *supra* note 57, at 165.

return to Lebanon.<sup>169</sup> Palestinian refugees from Gaza, displaced to Jordan in 1967 are not eligible for Jordanian citizenship and use Egyptian travel documents when traveling abroad. Return visas are required to re-enter Jordan.<sup>170</sup> A substantial number of holders of Egyptian issued travel documents outside of the country are no longer able to renew expired travel documents.<sup>171</sup> In contrast, Palestinian refugees in Jordan, Syria, Iraq, Algeria, Morocco, and Tunisia enjoy relatively favorable standards of treatment by host country authorities.<sup>172</sup>

Protection provided to Palestinian refugees under LASC resolutions and the Casablanca Protocol is significantly narrower than that provided to refugees under respective instruments in other regions of the world.<sup>173</sup> The Casablanca Protocol does not provide adequate protection in the context of a protracted refugee problem.<sup>174</sup> Neither the 1965 Casablanca Protocol or LASC resolutions include provisions for the protection of adequate housing, access to public education, property ownership, and social security.<sup>175</sup> Housing conditions for many refugees, particularly in camps, are inadequate, characterized by overcrowding, lack of basic infrastructure, and poor environmental conditions.<sup>176</sup> In Lebanon, Egypt and the Gulf states Palestinian refugees do not have comprehensive access to public education.<sup>177</sup> Refugees in Lebanon and Egypt do not have access to public health care.<sup>178</sup> Most Arab states restrict foreign ownership of land.<sup>179</sup> Additionally, refugees in Lebanon and the Gulf states pay the same fees for social

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<sup>169</sup> *Id.*

<sup>170</sup> Egypt administered the Gaza Strip between 1948 and 1967, *see infra* note 171.

<sup>171</sup> Palestinian refugees who took refuge in Egypt in 1948 are eligible for Egyptian travel documents. In addition, when Egypt administered the Gaza Strip between 1948 and 1967, it also provided travel documents to Palestinians there (Decision No. 28, 1960). Brand, *supra* note 60, at 50-51. Refugees holding expired Egyptian travel documents have been refused entry to the country. During the Gulf war, for example, many ex-Gazan holders of Egyptian travel documents who were forced to leave Kuwait and who had lost their residency status in the Gaza Strip following Israel's 1967 military occupation of the area, were unable to return to Egypt. A significant number eventually found refuge in Iraq. Takkenberg, *supra* note 57, at 161.

<sup>172</sup> Takkenberg, *supra* note 57, at 169. Of these states, Morocco and Tunisia are signatories to the 1951 Refugee Convention and are eligible for Convention Travel Documents. *Supra* note 77. Shiblak notes, however, that Palestinian refugees holding travel documents are not permitted to enter Algeria, Morocco, and Tunisia without the prior approval of PLO officials in these countries. Shiblak, *Residency Status*, *supra* note 165, at 42.

<sup>173</sup> For an overview of regional instruments *see supra* notes 43-51, and accompanying text.

<sup>174</sup> The scope of protected rights afforded to Palestinian refugees in Arab host states has not expanded over time. This is due, in large part, to Arab government concerns that expansion of basic rights beyond those set forth in the Casablanca Protocol may lead to *de facto* resettlement (*tawtiin*) of the refugee population.

<sup>175</sup> For a list of protected rights under the 1951 Refugee Convention and the 1965 Casablanca Protocol, *see*, respectively *supra* notes 30 and 59, and accompanying text.

<sup>176</sup> *See*, Living Conditions Among Palestinian Refugees and Displaced in Jordan (Oslo: FAFO – Institute for Applied Social Science, 1997).

<sup>177</sup> Shiblak, *Residency Status*, *supra* note 165, at 43; Zureik *supra* note 62, at 34-36. *See also*, Brand *supra* note 60, at 53, 61.

<sup>178</sup> *See* Shiblak, *Residency Status*, *supra* note 165, at 43. *See also*, Brand, *supra* note 60, at 51, 61.

<sup>179</sup> *See* Shiblak, *Residency Status*, *supra* note 165, at 42; Takkenberg, *supra* note 57, at 168; Hamed Said al-Mawad, The Palestinian Refugees in Syria, Their Past Present and Future, Prepared for the Expert and Advisory Services Fund (International Development Research Centre, 1999); *see also*, Brand, *supra* note 60, at 63.

insurance but receive fewer or no benefits.<sup>180</sup> As noted above, most Arab host states are not signatories to the 1951 Refugee Convention and its 1967 Protocol or either of the two statelessness conventions. Compliance with standards set forth in regional draft human rights instruments and in international human rights instruments varies from state to state.<sup>181</sup> Regional mechanisms for monitoring, enforcement, and standard-setting, including the Arab League, do not include the refugee generating state –Israel.

In contrast to protection gaps in Arab states, the status of refugees in 1967 occupied Palestine is characterized by a long-standing ‘protection crisis.’<sup>182</sup> More than 1.5 million refugees, who comprise over 50 percent of the population of the West Bank, eastern Jerusalem, and the Gaza Strip, are affected.<sup>183</sup> Day-to-day security and human rights protection is virtually absent with dire consequences for a population living under protracted military occupation.

Implementation of regional standards in 1967 occupied Palestine is virtually non-existent. Palestine is a founding member of the League of Arab States, but without the derivative powers of a state<sup>184</sup>, is unable to accord national protection to Palestinian refugees resident in the West Bank, eastern Jerusalem, and the Gaza Strip.<sup>185</sup> Limited civilian powers transferred to the Palestinian Authority under the Oslo agreements are circumscribed and remain subject to Israel’s overall authority.<sup>186</sup> Israel’s military campaign directed at the Palestinian Authority since the beginning of the second Palestinian *intifada*, as summarized above, moreover, brings into question the political, administrative, jurisdictional, and financial viability of the Authority.

The Palestine Liberation Organization (PLO), which oversees Palestinian refugee affairs through its Department of Refugee Affairs (DoRA), is not a government in any legal

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<sup>180</sup> Shiblak, *Residency Status*, *supra* note 165, at 43.

<sup>181</sup> UN human rights treaty body committees commonly recognize the efforts exerted by Arab states to host Palestinian refugees, but significant concerns remain regarding implementation of relevant human rights instruments. For details on Arab state signatories *see*, Akram and Rempel, *Temporary Protection*, *supra* note 64.

<sup>182</sup> The United Nations has long recognized the ‘protection gap’ in 1967 occupied Palestine. For cites to UN Conclusions and General Assembly Resolutions, *see* Akram and Rempel, *Temporary Protection*, *Id*, at 1208.

<sup>183</sup> As of December 2002 there were 639,448 registered refugees in the West Bank and 893,141 registered refugees in the Gaza Strip. Public Information Office, UNRWA Headquarters (Gaza) (December 2002). There are few non-registered refugees in 1967 occupied Palestine. Table 7: The Distribution of Palestinians in 1998 (minimum estimate), Abu Sitta, *supra* note 67, at 24.

<sup>184</sup> *See* Takkenberg stating “... the entity ‘Palestine’ currently does not fully satisfy the international legal criteria of statehood: a permanent population, a defined territory, government, and the capacity to enter into relations with out states.” Takkenberg *supra* note 57, at 181; *see also, id*, at 178-83.

<sup>185</sup> ExCom. Conclusions and UNGA resolutions concerning refugee protection ceased following the commencement of the Oslo political process in 1993 despite the continued legal and institutional protection gap in 1967 occupied Palestine. *Supra* note 567. *See also, Report of the Human Rights Inquiry Commission*, *supra* note 74.

<sup>186</sup> The authors of the *Report of the Human Rights Inquiry Commission established pursuant to Commission resolution 3-5/1, of 19 October 2000* conclude that neither the DOP nor subsequent agreements establish a Palestinian state, and they transfer only limited powers to the PA. *Supra* note 74, at 182.

sense, and thus has neither the legal status nor the resources to provide effective comprehensive protection for Palestinian refugees, neither in 1967 occupied Palestine or elsewhere.<sup>187</sup> The PLO has bilateral contacts with host states and has raised protection issues with the Conference of Supervisors of Palestinian Affairs, the Council of Ministers and the Council of Arab Ministers of the Interior.<sup>188</sup> It has also signed agreements with states, including the Cairo Agreement<sup>189</sup> with Lebanon, in order to ensure respect for basic economic and social rights.<sup>190</sup> Despite these efforts, however, the status of refugees has not improved significantly.

Israel is not a member of the Arab League and is not bound by LAS standards. As an occupying power, however, the 4th Geneva Convention relative to occupied territory binds Israel to protect the civilian population, including refugees, in the West Bank, eastern Jerusalem, and the Gaza Strip.<sup>191</sup> The military reoccupation and siege imposed on Palestinian cities, towns and refugee camps in the context of the second *intifada* attests to Israel's absolute control over the whole of 1967 occupied Palestine and concomitant responsibility for human rights protection of the civilian population, including refugees.<sup>192</sup> Finally, Israel is a signatory to both the Refugee Convention and Protocol; however, it did not ratify them until 1999. Israel is the only signatory to the 1951 Refugee Convention that does not have legislation to define and protect refugees.<sup>193</sup>

The protection crisis in 1967 occupied Palestine spans the panoply of basic rights afforded to refugees under international and regional instruments. Access to employment is severely hampered by restrictions on Palestinian economic and institutional

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<sup>187</sup> While the PLO is a recognized public body that represents the Palestinian people and maintains offices which are similar or equivalent to diplomatic missions it does not satisfy other criteria for statehood. Anis F. Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, 9 Den. J. Int'l L. & Pol'y 1 at 9 (1980) cited in Sally V. Mallison and W. Thomas Mallison Jr., *The Juridical Bases for Palestinian Self-Determination*, 1 Palestine Y. B. Int'l L., at 45.

<sup>188</sup> Takkenberg *supra* note 57, at 145.

<sup>189</sup> Cairo Agreement, 3 November 1969, reprinted in Shiblak *supra* note 56, at 25-26.

<sup>190</sup> *Id.* In 1977 the PLO requested the League to issue a Palestinian passport, however, the request did not receive wide support among LAS members. Shiblak, *supra* note 56, at 12.

<sup>191</sup> International consensus affirms the *de jure* applicability of the 4<sup>th</sup> Geneva Convention to 1967 occupied Palestine. See Land Grab, Israel's Settlement Policy in the West Bank, at 20 (Jerusalem: B'tselem-The Israeli Information Center for Human Rights in the Occupied Territories, 2002). For a recent commentary, see *Report of the Human Rights Inquiry Commission supra* note 74, at paras. 35-43. See also *Report of the Special Rapporteur of the Commission of Human Rights, Mr. John Dugard, supra* note 74, at paras. 8-10.

<sup>192</sup> Commentators and UN treaty body committees also hold the view that Israel has direct responsibility for international human rights law in 1967 occupied Palestine in all areas where Israel maintains "geographical, functional or personal jurisdiction." See, *Report of the Human Rights Inquiry Commission supra* note 74, at para. 37. See also, *Report of the Special Rapporteur of the Commission of Human Rights, Mr. John Dugard, supra* note 74, at paras. 8-9. See also, *Consideration of reports submitted by States parties under article 40 of the Covenant, Second Periodic Report, Addendum, Israel*. UN Doc. CCPR/C/ISR/2001/2, 4 December 2001, at paras. 8 and 9.

<sup>193</sup> Dan Yakir, Association for Civil Rights in Israel, quoted in Einat Fishbain, *Israel Lacks a Refugee law*, Ha'aretz, May 26, 2002. Generally, Israel does not resettle non-Jewish refugees in the country, but rather searches for resettlement slots abroad. See, Amos Harel, *1,000 SLA Refugees to Move Abroad*, Ha'aretz, June 2, 2000; Relly Sa'ar, *Sharansky Meets UN Refugee Boss on SLA*, Ha'aretz, May 26, 2000; Sharon Gal, *200 SLA Soldiers off to Oz*, Ha'aretz, Mar. 21, 2001.

development imposed by Israel's military occupation and colonization.<sup>194</sup> Under the Oslo agreements Israel ceded authority to revoke residency rights in the West Bank, excluding eastern Jerusalem, and the Gaza Strip, however, it is unclear whether Israel still considers the agreements binding following the collapse of the political process. 'Palestinian Passports', which function as travel documents, are void upon nullification of the Oslo agreements.<sup>195</sup> Many Palestinian refugees in the West Bank also hold 5-year renewable Jordanian passports. Palestinians still require special Israeli permits to leave and enter the occupied territories. Palestinian residents holding passports in a second state are not permitted to travel in and out of the occupied territories on foreign passports.

Palestinian refugees are permitted to own immovable property; however, property remains vulnerable to expropriation by Israel.<sup>196</sup> As in other parts of the Arab world, Palestinian refugee housing in 1967 occupied Palestine, particularly in the Gaza Strip, is characterized by overcrowding, lack of infrastructure, and poor environmental conditions.<sup>197</sup> Refugees are also uniquely vulnerable to Israel's practice of house demolition and military attacks on civilian residential areas, including refugee camps. Access to education and health services are also severely limited by Israel's military occupation. In the context of the second *intifada*, Palestinians' physical security is the most critical of protection needs.

### *The Status of Palestinians in Europe and the United States*

Protection gaps in Europe for Palestinian refugees largely relate to the interpretation of the status of Palestinian refugees under Article 1D of the 1951 Refugee Convention. The exact number of Palestinian refugees in Europe is unknown. Most states do not include Palestinians as a separate ethnic or national group in population censi. Statistical information often categorizes Palestinians as 'other Middle East.' It is estimated that over 200,000 Palestinian refugees are currently residing in Europe.<sup>198</sup> This includes some 30,000-80,000 Palestinian refugees in Germany; 20,000 refugees in Denmark; 15,000

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<sup>194</sup> For a detailed discussion *see*, Sara Roy, *The Gaza Strip, The Political Economy of De-Development* (Washington, DC: The Institute for Palestine Studies, 1995). On Israeli control of Palestinian-area aquifers through colonization, military zones and restrictive drilling regulations, *see*, *Thirsty for a Solution, The Water Crisis in the Occupied Territories and its Resolution in the Final Status Agreement*. Position Paper (Jerusalem: B'tselem – The Israeli Centre for Human Rights in the Occupied Territories, July 2000).

<sup>195</sup> Manal Jamal and Buthaina Darwish, *Exposed Realities: Palestinian Residency Rights in the "Self-Rule Areas" Three Years after Partial Israeli Redeployment*, at 40 (Bethlehem: BADIL Resource Center for Palestinian Residency & Refugee Rights, 1997).

<sup>196</sup> *See supra* notes 70-73, and accompanying text.

<sup>197</sup> In the Gaza Strip more than 40 percent of households in camps have 3 persons per room compared to 31 percent in the West Bank. Refugee camp households are more crowded than towns and villages. *Growing Fast, The Palestinian Population in the West Bank and Gaza Strip*, at 171 (Oslo: FAFO – Institute for Applied Social Science, 2001).

<sup>198</sup> The Palestinian Central Bureau of Statistics estimates the total size of the Palestinian population outside the Arab world and the United States at 295,075 at the end of 2002. *Palestinians at the End of the Year 2002*, *supra* note 65, at 35. *See also*, Abbas Shiblak, *Palestinian Refugee Communities in Europe, an overview*, Workshop on Palestinian Refugee Communities in Europe, St. Anthony's College, 5-6 May 2000, University of Oxford. [On file with the authors].

refugees in Britain; 3,000 Palestinians in France, and some 9,000 Palestinian refugees in Sweden.<sup>199</sup>

As detailed above, most European states either do not incorporate Article 1D into domestic law or interpret the Article incorrectly. Palestinians for the most part have difficulty when they apply for political asylum<sup>200</sup>, residence based on family reunification, or other related protections that are available to other refugees in the world. Many remain in European states without recognized legal status, without work permits, and without the basic essentials to live in freedom and dignity. The protection gap vis-à-vis Palestinians in Europe is most evident when compared to rights granted other refugees under the Refugee Convention and rights granted other stateless individuals under the two Conventions on Statelessness. In the context of the *al-Aqsa intifada* some states have placed tighter restrictions on asylum claims for Palestinians originating from 1967 occupied Palestine.<sup>201</sup>

Like Europe, protection gaps in the United States largely relate to the interpretation of Article 1D and the status provided to Palestinian refugees who are not accorded refugee status. It is estimated that more than 200,000 Palestinian refugees reside in the United States.<sup>202</sup> Similar to the situation of Palestinian refugees in Europe, precise figures for the number of Palestinian refugees in the United States are not available. Palestinian nationality is rarely recognized; Palestinians therefore mysteriously disappear, most likely categorized as ‘other Middle Eastern.’<sup>203</sup> As in Europe, Palestinians have difficulties due to the confused and inconsistent application of the provisions of the Refugee Convention and Protocol, and consequently suffer the same protection gaps in rights guarantees.

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<sup>199</sup> Abbas Shiblak, *Palestinian Refugees in Europe, Challenges of Adaptation and Identity*, Summary Report of Workshop on Palestinian Refugee Communities in Europe, St. Anthony’s College, University of Oxford, 5-6 May, 2000. [On file with the authors].

<sup>200</sup> According to the Swedish Migration Board, there are 934 stateless Palestinians registered in Sweden. Of these, 895 do not have residency status. The Immigration Department has called for a policy change on Palestinian asylum-seekers that would permit them to claim a ‘need for protection’ due to armed conflict, entitling them to automatic residence. See *Palestinians to be Allowed to Stay in Sweden*, BBC Worldwide Monitoring, April 11, 2002.

<sup>201</sup> ECRE notes that ‘in light of the current situation in the ME and an increase in asylum applications made by Palestinian nationals, the Home Office is currently not considering asylum applications.’ ECRE 2001 Country Report: United Kingdom (London: European Council on Refugees and Exiles, 2002). The UK’s asylum statistics, however, do not separately designate Palestinians as a nationality, presumably categorizing them under “other ME”.

<sup>202</sup> The Palestinian Central Bureau of Statistics estimates the total size of the Palestinian population in the United States at 231,723 at the end of 2002. *Palestinians at the End of the Year 2002*, *supra* note 65, at 35. The 1990 US Census estimated the number of Palestinians in the US at around 50,000. U.S. Department of Commerce, Bureau of the Census, Ethnic and Hispanic Branch, 1990 Census Special Tabulations. This number, however, is likely low due to the underestimation of minority populations in the United States and it may not include Palestinian refugees who have acquired citizenship in Jordan.

<sup>203</sup> In the 1980 census, the first in which respondents had an opportunity to list their ancestry, only 21,288 individuals listed Palestinian. *Census of Population: Supplementary Report: Ancestry of the Population by State: 1980*, at 21 (Washington: US Department of Commerce, Bureau of the Census, 1983).

*Principles and Parameters of an Internationally-Harmonized Temporary Protection Regime for Palestinians*

As shown, the status and treatment given Palestinians in the UNRWA areas fall below applicable standards in the different states and regions, such as the 1969 OAU Convention, the Refugee Convention, and the human rights instruments ratified by various Arab states. Moreover, the status and treatment given Palestinians everywhere is inconsistent with the special regime established to ensure their protection pending a durable solution consistent with refugee law principles of *safe return, absorption or resettlement based on the refugee's voluntary choice*, as required by Article 1D's implicit reference to the law of UNGA Resolution 194 in its language: "the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations."

As described in detail in Section II, if Article 1D were properly interpreted, Palestinians would be recognized as *prima facie* refugees in any state, and would qualify for the benefits of the Refugee Convention. This would not require states to grant Palestinians asylum, but might authorize a grant of temporary protection until a durable solution is found.

Guided by the lessons of temporary protection as implemented by states in both formalized and non-formalized policies, we propose a TP regime for Palestinians involving the following elements:

***First, TP that is closely connected to durable solutions guided by non-refoulement, voluntary choice and the right of return.***

The most remarkable feature of the Palestinian people as refugees worldwide is their 55-year steadfast commitment to return to their homes and lands. Today the individual and collective desire of Palestinian refugees to return to their homes of origin inside Israel is expressed through the establishment of village committees and societies whose purpose is to preserve a living memory of the refugees' villages of origin and promote a culture of return, and the emergence of a global Palestinian refugee coalition for return.<sup>204</sup> Israel, the state responsible for the expulsion of Palestinians, on the other hand, denies responsibility for their plight and has prevented them from returning to their homes of origin.<sup>205</sup> "From Israel's point of view, recognition of the right of return means the

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<sup>204</sup> See Ingrid Jaradat Gassner, *A Programme for an Independent Rights Campaign*, in Aruri, *supra*, note 4, at 252-259.

<sup>205</sup> The decision to prevent the return of Palestinian refugees was taken at a June 1948 Israeli cabinet meeting and confirmed in the Reply of the Provisional Government of Israel to the Proposal Regarding the Return of Arab Refugees, 1 August 1948, from Moshe Sharett. Annexed to *Progress Report of the UN Mediator on Palestine, Part II*, U.N. GAOR, 3<sup>rd</sup> Sess., Supp. No. 11, U.N. Doc. A/648 (1948). More recently see, e.g., Labor and Likud Knesset Members, *National Agreement Regarding the Negotiations on Permanent Settlement with the Palestinians*, Tel Aviv, 22 January 1997, in 26 J. Palestine Stud. No. 3, at 162 (Spring 1997).

destruction of the State of Israel.”<sup>206</sup> Recent legislation prohibits the return of Palestinian refugees to their homes inside Israel unless approved by a majority of eighty members of the 120-member Knesset (parliament).<sup>207</sup> The other remarkable feature of the Palestinian refugee problem is the singular absence of commitment by western powers to an international legal framework in addressing protection issues for this population. Compared to the guiding principles applied in other refugee cases, as summarized above, western powers have addressed the Palestinian refugee issue almost exclusively from the perspective of their own geopolitical interests in the region. Foremost among these interests is Israel’s security and well-being.<sup>208</sup> Since the return of non-Jewish refugees is perceived by Israel as a security threat<sup>209</sup>, Western powers consider the right of return in the Palestinian case impractical.<sup>210</sup> Solutions are largely framed in humanitarian terms<sup>211</sup>

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<sup>206</sup> Danny Rubinstein, *The Return of the Right of Return*, Ha’aretz, Feb. 4, 2002 [English]. For early formulations of this premise, see Don Peretz, *Israel and the Palestine Arabs*, at 42. (Washington, DC: The Middle East Institute, 1958). More recently see, e.g., former Israeli justice minister and one of the architects of the Oslo process stating “[T]he moment Israel loses its Jewish majority, it will lose its national character...” Interview by Ahmad Mashharawi *Israeli Minister Beilin on U.S. Proposal, the Right of Return, Sharon, and other Issues*, al-Quds (Jerusalem), Jan. 5, 2001 [via FBIS/WNC].

<sup>207</sup> Bill 1220, The Fifteenth Knesset. ‘Bill for Banning the Right of Return’ particularly arts. 2 and 4. Unofficial translation. [On file with the authors].

<sup>208</sup> On US strategic interests in the Middle East see, e.g., Clyde R. Mark, “Israel-United States Relations,” Congressional Research Service (updated 10 February 2003); see also, Avi Shlaim, *The Impact of US Policy in the Middle East*, 27 J. Palestine Stud. No.2 (Winter 1998). On European interests see, for e.g., the 1980 Venice Declaration recognizing “the right to existence and to security of all the States in the region, including Israel...” reprinted in I Documents on Palestine, From the Pre-Ottoman/Ottoman Period to the Prelude of the Madrid Middle East Peace Conference. Mahdi F. Abdul Hadi (ed) Jerusalem: PASSIA, Palestinian Academic Society for the Study of International Affairs, 1997, at 284. See also, P. de La Gorce, *Europe and the Arab-Israel Conflict*, 26 J. Palestine Stud. No.3, at 5-16 (Spring 1997).

<sup>209</sup> See, for e.g., June 1948 IDF Intelligence Department warning that that return of Palestinian refugees would constitute a serious danger and a potential fifth column behind Israeli front lines. Israel State Archives, FM2426/9, the Director, IDF Intelligence Department, to Shiloah, 16 June 1948, cited in Benny Morris, *The Birth of the Palestinian Refugee Problem 1947-1949* (1987), at 139.

<sup>210</sup> See, for e.g., William Jefferson Clinton, Remarks at Israel Policy Forum Dinner, stating that “there cannot be an unlimited language in an agreement that would undermine the very foundations of the Israeli state or the whole reason for creating the Palestinian state”, 37 Weekly Comp. Pres. Doc. 28, 33 (Jan. 7, 2001); The National Security Strategy of the United States of America, which states that “Israel also has a large stake in the success of a democratic Palestine. Permanent occupation threatens Israel’s identity [i.e., as a Jewish state] and democracy,” at 10 (Washington, D.C: President of the U.S., 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf>); and, Secretary of State Colin Powell, *US Vision for Middle East Peace*, Louisville, Kentucky, 19 November 2001 (excerpts), stating that “Palestinians must eliminate any doubt, once and for all, that they accept the legitimacy of Israel as a Jewish state,” 31 J. Palestine Stud. No. 2, at 166 (Winter 2002).

<sup>211</sup> In 1949, for example, the United Nations Conciliation Commission for Palestine (UNCCP), acting under Article 12 of its mandate set forth in UNGA 194(III), established an Economic Survey Mission (ESM) to design an organizational structure to facilitate measures for relief, resettlement, and economic development. U.N. Economic Survey Mission for the Middle East, *Final Report of the United Nations Economic Survey Mission for the Middle East, Part I*, at vii, U.N. GAOR, 47<sup>th</sup> Sess., A/AC.25/6 (1949). This approach still dominates western policy on durable solutions for Palestinian refugees. See, e.g., *American “Non-Paper” on Israeli-Palestinian Stockholm Negotiations*, June 2000, 30 J. Palestine Stud. No. 1, at 154 (Autumn 2000). Additionally, the proposal outlines a package of over US\$100 billion to be invested in refugee rehabilitation. *Id.* at 155. See also, President Bill Clinton, *Proposals for a Final Settlement*, Washington, 23 Dec. 2000, 30 J. Palestine Stud. No. 3, at 171-72 (Spring 2001); and, Middle East Endgame II: How a Comprehensive Middle East Peace Settlement Would Look, at 7-8, outlining a package of resettlement

without reference to the guiding principles applied in other refugee cases.<sup>212</sup> Neither the Oslo Agreements nor the current “Road Map” deviate from this approach.<sup>213</sup>

Western powers largely envision durable solutions for Palestinian refugees within the framework of two ethno-national states in historic Mandate Palestine – Israel and Palestine. According to this framework refugees will be resettled in a future state of Palestine to be established in most of the West Bank, eastern Jerusalem and the Gaza Strip. This is the framework that guided US mediation of Camp David II final status talks between the PLO and Israel in July 2000.<sup>214</sup> The ‘Road Map’ drafted in 2002 by the ‘Quartet’ – i.e., United States, European Union, Russia and the United Nations – is consistent with this framework – i.e., two states and non-recognition of the individual right of return.<sup>215</sup> Similar to the Oslo agreements, the ‘Road Map’ makes no reference to international law and relevant UN resolutions as a framework for crafting durable solutions for Palestinian refugees.

This proposal rejects such an approach on the premise that a principled legal framework *does matter*, not just for the Palestinian refugee problem, but for the overall strength of the refugee system. With that premise, bringing Palestinian refugees into the framework applied to other mass refugee solutions, our proposed TP regime must adhere to *non-refoulement*, voluntary choice, and the right of return to one’s home. Palestinians have been given no ‘choice’ in any meaningful sense concerning their desires for a durable solution.<sup>216</sup> In the absence of any international body and mechanism to design and

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opinions and substantial compensation in lieu of return (Brussels: International Crisis Group, 2002, available at [http://www.crisisweb.org/projects/middleeast/arab-israeliconflict/reports/A400705\\_16072002.pdf](http://www.crisisweb.org/projects/middleeast/arab-israeliconflict/reports/A400705_16072002.pdf)).

<sup>212</sup> Chimni’s analysis of the language of humanitarianism as “the ideology of hegemonic states” in the context of the contemporary debate on globalization also provides a useful framework in understanding the historical approach of western powers to the Palestinian refugee issue. However, while Chimni argues that the language of humanitarianism has turned repatriation into the only solution, in the Palestinian case, it has turned resettlement into the only option. B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. Refugee Stud. No. 3, at 244, 251 (2000).

<sup>213</sup> Christine Bell, *Human Rights and Peace Agreements*, at 247 (Oxford University Press, 2000). The Oslo agreements do not include reference to relevant resolutions of the United Nations (i.e., UNGA 194 of 1948, UNSC 237 of 1967, and UNGA 2252 of 1967) nor do they affirm that the refugee issue should be resolved in accordance with international law.

<sup>214</sup> For an analysis of Camp David II, see, e.g., Robert Malley and Hussein Agha, *Camp David: A Tragedy of Errors*, The New York Review of Books, Aug.9, 2001. Malley was Special Assistant to President Clinton for Arab-Israeli Affairs. See also, Akram Hanieh, *The Camp David Papers*, 30 J. Palestine Stud. No. 2, 75-91 (Winter 2001).

<sup>215</sup> The ‘Road Map’ states that “The destination is a final and comprehensive settlement of the Israel-Palestinian conflict by 2005, as presented in President Bush’s speech of 24 June, and welcomed by the EU, Russia and the UN in the 16 July and 17 September Quartet Ministerial Statements.” “A settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors.” A Performance-Based Road map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Final, 30 April 2003), available at: [http://europa.eu.int/comm/external\\_relations/mepp/roadmap.htm](http://europa.eu.int/comm/external_relations/mepp/roadmap.htm).

<sup>216</sup> When choice is accepted as a basic principle governing durable solutions, it is often framed within the context of arbitrary restrictions whose objective is to limit to the greatest extent the number of refugees choosing to exercise their right to return to their homes of origin inside Israel. See, e.g., Council of Europe, Eur. Parl. Ass. Res. 1156, 14<sup>th</sup> Sess. (1998); American “Non-Paper” on Israeli-Palestinian Stockholm

implement durable solutions, the pattern of their status and migration has been one of expulsions and lack of status in many states that have no legal obligation to receive them as described above.

We propose a 5-year renewable, formalized temporary protection status for Palestinians, applying the same principles and standards in every state that participates in the regime.<sup>217</sup> TP would be offered to all Palestinians fleeing the West Bank and Gaza as a result of military occupation and the resultant humanitarian crisis, as well as to Palestinians residing in any of the participating states who do not already have citizenship or permanent residence plus security of residence and protection. Consistent with the formal TP status offered in Europe after the Balkan crisis, and on the recommendation of UNRWA or UNHCR, states would prioritize their TP slots for urgent humanitarian cases (emergency medical and physical safety cases should be considered for airlift, such as in Kosovo); family reunification; threat to life or safety; victims of severe human rights abuses, and ethnic cleansing.

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Negotiations, *supra* note 211; *Israeli private response to the Palestinian refugee proposal of January 22, 2001*, “Non-Paper - Draft 2, 23 January, 2001, Taba, reprinted as Annex to Bulletin No. 10: Principles and Mechanisms for a Durable Solution for Palestinian Refugees, available at <http://www.badil.org/Publications/Bulletins/B-10a.htm>; and, Middle East Endgame II: How a Comprehensive Middle East Peace Settlement Would Look *supra* note 211.

<sup>217</sup> There are several factors suggesting that 5 years is an appropriate initial time period for such a TP program, some of which may be relevant to the Palestinian situation. First, in the European context, open-ended TP is seen as undesirable, and both the UNHCR’s Informal Consultations and the European Commission’s draft report recommend a limit of five years. See UNHCR ExComm, *Progress Report on Informal Consultations on the Provision of International Protection to All who need it*, U.N. Doc. EC/47/SC/CRP.27, para. 4(r) (1997)[hereinafter *UNHCR Progress Report*]; and Amended Proposal for a Joint Action concerning Temporary Protection of Displaced Persons, COM (9), 372 final, Art. 13. See Fitzpatrick, *Elements*, *supra* note 18, at 302. In the Palestinian context, a relatively short, clearly fixed period tied to creating the conditions of safe return is essential for the program’s success. Given the length of time the Palestinian refugee situation has remained unresolved and the longstanding resistance of major players to implementing a principled solution, anything less than 5 years is unrealistic. In the current critical cycle of violence forcing a renewed exodus, anything greater than 5 years would permit continued ethnic cleansing. Second, two studies support the conclusion that for mass refugee crises, 5 years is a critical period determining the feasibility of return: a UN survey of the period 1970-1980 showed that large-scale repatriation took place in 50% of the cases within five years of the creation of the refugee problem; and a study of integration of Vietnamese refugees in Finland concluded that assimilation and acculturation of refugees did not occur until five years after their arrival in a host state. See Sadruddin Aga Khan, *United Nations Study on Human Rights and Massive Exodus*, U.N. ESCOR, U.N. Doc. E/CN.4/1503 (1981); and Karmela Liebkind, *Self-Reported Ethnic Identity, Depression and Anxiety Among Young Vietnamese Refugees and their Parents*, 6 J. Refugee Stud. 25, 34-35 (1993), cited and discussed in Hathaway & Neve, *supra* note 19, at 182-3. For Palestinians, obviously, the statistics on 5 year repatriations has little meaning, but it is reasonable to expect that if a TP program creates the appropriate incentives, at least for the latest flows, repatriation could well take place within 5 years; moreover, for the most recent refugees, 5 years would be the critical time when they would either develop longer ties to the host states or be more psychologically prepared to return. For the refugees who have been exiled for a generation or more, 5 years would be an essential psychological component to generate activity and investment in making their return possible. After over 5 decades of waiting, an open-ended process would be as meaningless to the Palestinian refugees as their current unending limbo status.

***Second, TP that is internationally-harmonized, as part of a process that includes shared responsibility on many levels, which recognizes and accommodates both legal and political interests of the states involved.***

The TP program would be instituted through an international conference geared towards designing and implementing mechanisms to address the root causes of the conflict, and to creating conditions that would allow Palestinian refugee repatriation—to create meaningful choice. The TP regime proposed would engage all states that have significant Palestinian populations, and all stakeholders in the outcome of Israeli-Palestinian peace. It must, at a minimum, involve the PLO, all the Arab states and Israel, as well as the Quartet comprised of the US, the EU states, Russia, and the United Nations. As part of the international conference on Palestinian refugees, states would commit to the same kind of multilateral repatriation, restitution, compensation, development and monitoring process as in CIREFCA, Mozambique, and the Dayton process. This proposal envisions a combination of incentives and disincentives that would create both vested interests in a principled solution for all the states involved, and create pressure on non-complying states to participate. The incentives would include targeted assistance to develop integrated multi-ethnic communities within Israel, coupled with requirements to dismantle discriminatory laws, and to phase in restitution with compensation formulae. Inclusion of displaced Arab Jews within the broader durable solutions plan may provide further incentive for participation.<sup>218</sup> The disincentives would tie more economic cuts to Israel, isolation and pressure, from the involved states and the UN bodies that would be a formal part of the process. Normalization, at least at the governmental and regional levels, would be premised on Israeli participation in the TP regime, and the phased-in process of family reunification over the first 5 years.

***Third, the TP Plan proposed here would include phases and a timetable that link temporary protection to the implementation of durable solutions based on refugee choice and the right of return.***

The first 5 years of TP and related conditions would initiate a period of confidence-building measures, hinging on the incentive/disincentive process implemented by all the participating states. As part of this process, Israel will immediately be asked to open up 100,000 slots for family reunification (both to Israel and to the WBG), to be completed within the first two years; then 10,000 each year until all family reunification applications are completed. The first 100,000 slots in Israel should prioritize those pending cases from the Arab states. Within these five years, as Israel meets the family reunification targets, the TP participants would make funding available to develop communities within Israel and in the West Bank/Gaza that would benefit both the reintegrating and the stayee communities. Such development would engage civil society across the ethnic/religious

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<sup>218</sup> Although Arab Jewish claims to restitution and compensation of property are not ‘counterclaims’ to Palestinian property rights in any legal sense as is often asserted, their claims are nonetheless valid as against their states of origin. For a discussion of the issues of Arab Jewish claims as separate from Palestinian claims against Israel, see Jan Abu Shakrah, *Deconstructing the Link: Palestinian Refugees and Jewish Immigrants from Arab Countries*, in Aruri, *supra* note 4, at 208.

communities so that communities affected by reintegration become vested in the success of the process.

A phased process for return, beginning with family reunification has multiple benefits. This process will be least disruptive to the stayee communities (Israeli and Palestinian) because family reunification automatically implies an existing support system to assist the returning family members. The phased process would provide both returnee and stayee communities with an opportunity to assess the individual and collective impact of refugee return prior to a broader return operation--similar to 'go and see visits' sponsored by UNHCR and other international agencies in other refugee cases.<sup>219</sup> Palestinian refugees in 1967 occupied Palestine undertook similar visits in 2000. Evaluation of the return program in Guatemala observed that "...[I]n the case of Guatemala, repatriation not only did not wait for peace, it helped force it."<sup>220</sup> For Israeli Jews, controlled family reunification would address fears of mass influx and security, and likewise, provide a testing ground for the broader return operation. Israel, moreover, already accepts the principle of family reunification.<sup>221</sup>

One of the lessons of the Bosnian return program was that employment, health, education, and social security, need to be addressed at the same time as housing reconstruction programs.<sup>222</sup> In Mozambique the positive donor response to finance the repatriation of millions of refugees was related to thorough consultation during the drafting process of the repatriation plan and the detailed nature of the final operations plans.<sup>223</sup> Successful integration of reunifying families, including infrastructure development, schools and curricula, health care services, equitable use of land and water, would be the measure for the next phase.

Within the first five-year period, a formula for return of additional refugees to their original homes and lands would be worked out by the states involved in the process. During this period TP participants would also address protection gaps in domestic law, and seek wider regional ratification of international instruments.<sup>224</sup> Efforts would also focus on the expansion/and or establishment of new regional economic, political and security bodies or mechanisms tied to the dual incentive/disincentive approach discussed above. An important part of this process would involve reform and or repeal of

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<sup>219</sup> See, for e.g., UNHCR bus-shuttles in Bosnia-Herzegovina. Ayaki Ito, *Politicization of Minority Returns in Bosnia and Herzegovina – The First Five Years*, 13 Int'l J. Refugee L. No.1-2, at 115 (2001); and, Minority Bus Shuttle Project in Kosovo, Implemented by the Danish Refugee Council, UNHCR/ECHO Evaluation Report, 28 February 2001.

<sup>220</sup> Arafat Jamal, *Refugee Repatriation and Reintegration in Guatemala, Lessons Learned from the UNHCR's Experience*, at 2, EPAU/2000/003 (UNHCR, Evaluation and Policy Analysis Unit & Regional Bureau for the Americas and the Caribbean, 2000).

<sup>221</sup> On early family reunification policy to Israel see, e.g., Peretz, *supra* note 206, at 50-55.

<sup>222</sup> Review of the UNHCR Housing Programme in Bosnia and Herzegovina, Inspection and Evaluation Service, November 1998, Eval/05/98. See also, Catherine Phoung, "Freely to Return": *Reversing Ethnic Cleansing in Bosnia-Herzegovina*, 13 J. Refugee Stud. No. 2, at 169 (2000).

<sup>223</sup> Evaluation of UNHCR's Repatriation Operation to Mozambique, 1 February 1996, Office of the UN High Commissioner for Refugees, at para. 4(d).

<sup>224</sup> *Supra* notes 43-51 and accompanying text.

discriminatory citizenship and property law across the region according to relevant international standards to facilitate solutions for regional displacement and outstanding housing and property claims. Consideration of dual citizenship and respect for housing and property rights will be key to this process. Another important feature will be the development of regional instruments relative to the protection of refugees and human rights<sup>225</sup>, including enforcement mechanism/s for human rights similar to the ECHR.<sup>226</sup> After the first 5 years, the status of reunification and returns based on refugee choice would be evaluated. UNHCR/UNRWA would monitor refugee choice, and once returns have been secured, states will open other slots, based on TP priorities, to accept refugees not wishing to return for resettlement. The incentive-disincentive process should continue in phases, with donor funding focused on development of communities involving both returnee and stayee populations within Israel and the West Bank and Gaza Strip (regardless of what state constructs are in place).

***Fourth, TP that is consistent with recognized international refugee and human rights standards concerning beneficiaries, duration and conditions for cessation of status, and standards of treatment***

Drawing on the principles established by the African,<sup>227</sup> European<sup>228</sup> and US<sup>229</sup> area instruments, policies and regional practices; guidelines can be readily established for defining and prioritizing the appropriate beneficiaries of Palestinian temporary protection. TP should be offered to all UNRWA-registered refugees no matter where they are located, with UNRWA continuing to provide the assistance benefits to those located within the areas of its mandate. TP should also be offered to all Palestinians who are short-term visa holders, Palestinians in any kind of ‘indeterminate’ status, and those with no recognized status, on a *prima facie*, or group basis, consistent with Article 1D. As TP has worked in a number of mass influx situations, states should prioritize available TP slots for various kinds of cases: the Northern and Western state participants might be asked to take the most Palestinian influx from the West Bank and Gaza, to relieve the immediate pressure from the frontline Arab states; they might, in addition prioritize amongst those cases for emergency medical, family reunification, unaccompanied minors, and

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<sup>225</sup> *See Id.*

<sup>226</sup> The Arab League Legal Department, for example, has examined the idea of the establishment of an Arab Court to address regional disputes. Robert W. MacDonald, *The League of Arab States, A Study in the Dynamics of Regional Organization*. Princeton: Princeton University Press, 1965, at 138-39.

<sup>227</sup> Under the 1969 OAU Refugee Convention, the reasons for the Palestinian exodus--both over time and currently--would qualify the majority of them under the definition of ‘refugee’ of Art. I(2), as one who: “...owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality...”

<sup>228</sup> European TP for Bosnians and Kosovars provides ample state practice and legal grounding for granting Palestinians TP, particularly if tied directly to mechanisms for return to their places of origin.

<sup>229</sup> Under the US’ TPS legislation, the reasons for the current exodus would clearly qualify the majority of Palestinians for protection, as they are experiencing ‘ongoing armed conflict which poses a serious threat to life or safety’ and ‘extraordinary temporary conditions....preventing them from returning home in safety....’ INA ch. 477, Sec. 244(b)(1).

similar emergent situations, according to recommendations from UNHCR based on guidelines developed in other refugee crises.<sup>230</sup>

A uniform minimum standard of treatment is essential for TP to be successful in this context, to reduce the incentive for massive secondary refugee movement from the Arab states, including the 1967 occupied territories, to Western or Northern states. The Arab states would be required to standardize their treatment of Palestinian refugees, and to regularize the rights offered to a standard acceptable to all the TP participant states, and consistent with recognized legal standards.

Although each of the relevant regions for a Palestinian TP program has differing minimal and optimal rights standards, harmonizing the benefits and rights that are offered under TP will be one of the most critical factors for the program to be successful in the Palestinian case. Besides concerns about secondary movement, a standard of rights provides a semblance of justice and principle—much lacking in the Palestinian situation. Moreover, for the program to be standardized on a basis that is acceptable to states and participants, there must be a framework of applicable human rights standards including civil, economic and social rights. In the Palestinian situation, the following rights should be considered fundamental:

\*status, identity and travel documents (freedom of movement):

The Refugee Convention and both conventions on statelessness require states to issue identification and travel documents to refugees/stateless persons lawfully in their territories. These provisions are widely standardized and respected. European TP and US TPS standards require status documents to be issued to those receiving benefits under those programs, and UNHCR and EU guidelines require the same. Travel documents and freedom of movement are less well-respected, both in applicable guidelines and in practice. Nevertheless, at a minimum, freedom of movement within the TP state should be mandated, as noted in the UNHCR Progress Report on TP.<sup>231</sup> Palestinians have long suffered forced confinement to refugee camps, severe restrictions on freedom of movement without adequate justification, arbitrary visa restrictions and re-entry requirements, compounded by forced separation from family members.

\*family reunification:

Family unity, at least as to the nuclear family, is recognized as a core requirement for TP under the EU 2001 Council Directive, which incorporates detailed provisions obligating

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<sup>230</sup> See UNHCR, *Resolution for Common Guidelines on Admitting Particularly Vulnerable People from the Former Yugoslavia*, cited in Elspeth Guild, *The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions* 293-309 (1996).

<sup>231</sup> (“the right to education, employment, freedom of movement, assistance and personal identification should be granted without discrimination, while it is understood that any restrictions imposed must be justified on grounds of legitimate national interest and must be proportional to the interest of the state.”). UNHCR, *Progress Report*, *supra* note 217.

states to grant residence to family members of TP beneficiaries and respect rights to family unity. Family rights in the EU context are considered fundamental under the ECHR.<sup>232</sup> The US does not protect family unity under TPS; however, UNHCR has repeatedly stressed the importance of family reunification in temporary protection schemes and in considering durable solutions for refugees.<sup>233</sup> For Palestinians, family separation has been an intergenerational problem, exacerbated by lack of status, identity and travel documents, arbitrary criteria that screen out large numbers of applicants, and severe restrictions on movement. Using family reunification as a principle for granting TP and for granting residence to derivative family members of TP recipients will enhance the durability of the solution of choice for refugee families.

\*employment, housing and education:

The Refugee Convention gives the highest priority to employment, housing and elementary education, requiring states to grant refugees lawfully in their territories rights in each of these areas on par with nationals. Although EU state policies concerning granting employment authorization varied significantly, the standard-setting guidelines and the Council Directive reflect common agreement that employment should be authorized for TP recipients. In the US, TPS recipients are authorized to work. For Palestinian refugees, the inability to work in many of the areas where they are located has been a major source of poverty, frustration and instability. A Palestinian TP program would appear far more palatable if its recipients were able to work rather than require welfare benefits. Housing and education, at least at the elementary level, are also considered core rights under human rights and refugee standards, as is widely reflected in the main international human rights instruments. For UNRWA, reduction in services based on less need, rather than fiscal shortfalls, would provide the agency with the opportunity and resources to retool programs towards durable solutions. Skill development will also enhance the ability of such individuals to integrate as economic contributors to new communities when they either return to their place of origin, resettle or integrate in host states.

\*health and welfare benefits:

The majority of Palestinian refugees in the Arab states receive minimum health and welfare benefits through UNRWA. It would be illogical to structure a TP program that did not provide equivalent guarantees to UNRWA standards, and EU and international human rights standards would mandate additional guarantees in these areas. Consistent

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<sup>232</sup> See Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L212) 12, Council Directive 2001/55/EC.

<sup>233</sup> See, e.g., ExCom Conclusion No. 24 (XXXII)-1981, Family Reunification ((1)"every effort should be made to ensure the reunification of separated refugee families"; (2) countries of asylum and countries of origin [should] support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay"). See also *Global Consultations on International Protection, 3<sup>rd</sup> meeting, Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems*, EC/GC/01/17, 4 Sept. 2001.

with the Refugee Convention, states would be expected to incrementally improve the rights and benefits offered TP recipients over time. For the second 5 years, refugee rights will increase, consistent with other state TP policies and practice, and UN guidelines. Greater consideration would need to be given to the areas of, particularly; gender equality; higher education and vocational training benefits; the granting of equal employment opportunities with nationals of the host state; additional economic, social and cultural rights<sup>234</sup>; and expanded notions of family unity.<sup>235</sup> Ultimately, as part of a comprehensive peace, all those in TP who choose not to return will 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.

In the Palestinian case, the duration of status should be tied to safe return in the context of a comprehensive and durable peace settlement of the Israeli-Palestinian conflict, as most consistent with general refugee law principles, accepted principles for temporary protection, and the special Palestinian regime of Article 1D and its companion provisions and instruments.

In order for TP to be meaningfully connected to return and a comprehensive durable solution for Palestinian refugees, it must include solution-oriented components. These components can be usefully categorized as maintaining refugees' social structures; developing refugees' skills and resources; creating linkages between refugees and communities in the home state; and confidence-building measures in both returning and stayee communities prior to return.<sup>236</sup>

## Conclusion

An internationally harmonized TP regime is flexible enough to provide solutions to the various protection problems. In the context of ongoing low-intensity conflict--unilateral separation or partial Israeli withdrawal--such a regime would enhance protection of the civilian population living under protracted military occupation, and ease the burden on frontline Arab states. Such a regime would also provide EU member states with a mechanism to address a likely increase in Palestinian asylum claims. The package of

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<sup>234</sup> Fitzpatrick notes that rights standards for TP beneficiaries should be guaranteed at a level between two concerns: rights cannot be afforded at a level higher than that afforded citizens of the host states, but restrictions must be directly related to a legitimate state objective. She also notes that standards set by the Refugee Convention for economic, social and cultural rights are appropriate standards for TP beneficiaries as well, in particular because many TP beneficiaries would meet the refugee definition and should not be deprived of the guaranteed level of rights simply because they are receiving a less permanent status. *See* Fitzpatrick, *Elements*, *supra* note 18, at 304.

<sup>235</sup> Due to the unique situation of Palestinian refugees and their displacement in many parts of the world, family unity considerations must remain pivotal for TP benefits. For cultural, identity and economic reasons, Palestinians consider their close families as extending beyond the nuclear family. *See* UNHCR's approach recommending that undue restrictions not be placed on family relationships, and that special consideration be given for 'vulnerable beneficiaries', such as children, the elderly, and victims of trauma. *UNHCR Progress Report*, *supra* note 217, at para 4(m).

<sup>236</sup> Hathaway and Neve detail a useful framework for solution-oriented TP, from which we draw critical components for a successful Palestinian TP regime. *See* Hathaway and Neve, *supra* note 19, at 173-181.

incentives and disincentives would also provide leverage to steer the parties towards a resolution of the conflict based on objective criteria. For a Palestinian state, temporary protection would also be an appropriate status to grant to Palestinian refugees residing or wishing to reside in its territory, but for whom residency in a West Bank/Gaza Strip state is neither appropriate nor legally compelled. It would not be consistent with the internationally-recognized right of return to 'repatriate' the refugees to yet another area, such as a Palestinian state, which was not their place of origin. Temporary protection would also support the legal argument that Palestinian refugees would not need to give up their absolute right to return to their homes and lands in order to improve their living conditions pending return. Granting temporary protection to Palestinian refugees would be consistent with Article 1D as a mechanism towards implementing the appropriate UNGA-mandated durable solution. The right of return called for in UNGA Resolution 194(III) would be to the refugees' place of origin. Temporary protection would provide Palestinian refugees in Arab states, as well as other states of the Palestinian diaspora, a recognized legal status. Consistent with the parameters of temporary protection in Europe, or TPS in the United States, temporary protection for Palestinian refugees should afford them the basic protection rights of other persons who are granted such status when fleeing emergency situations, whether Convention-defined refugees or not. Temporary protection specifically addresses the real needs of Palestinian refugees: the need to work, to travel freely, to live where s/he chooses within the temporary protection state, to reunite with family members, and to travel outside and return with special permission. Temporary protection also specifically addresses the fears of both the Arab and other states that they would either have to grant asylum or some more permanent type of status to the refugees, or expel them. Finally, it addresses the ongoing concern of Palestinian refugees and the PLO that the post-Oslo process might subvert the international consensus that the durable solution for Palestinian refugees is return to their place of origin, restitution, and compensation, as embodied in UN General Assembly Resolution 194 and grounded in international law.