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Introduction

Palestinians are a unique people under the international refugee regime established by the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention)¹ and related instruments. They are the only group of people in the world to whom a specific and separate analysis applies to determine their status under the 1951 Refugee Convention. Their status and the extent of the protections to which they are afforded are determined by the interrelationship of Article 1D of the 1951 Refugee Convention; Paragraph 7 of the Statute of the United Nations High Commissioner for Refugees (UNHCR Statute)²; and the refugee definition utilized by the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA Statute).³

The 1951 Refugee Convention contains a special provision that applies specifically to expelled Palestinians. At the same time, the UNHCR Statute and the UNRWA Statute, defining the contours of the United Nations High Commissioner for Refugees (UNHCR) and United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) spheres of jurisdiction and corresponding duties, also include special provisions meant to apply only to the Palestinian situation. These instruments are crucial in determining the *de jure* status of displaced Arab Palestinians. Therefore, the meaning of these special Palestinian clauses must be clarified in order to arrive at the result envisioned by these governing international instruments.⁴

The United States has ratified the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).⁵ As such, the United States is bound to uphold its terms, and by incorporation, the terms of the 1951 Refugee Convention.⁶ The focus of this brief is the appropriate interpretation of Article 1D of the 1951 Refugee Convention, and the obligations of State Parties arising under Article 1D. Article 1D applies only to Palestinian refugees. Under Article 1D, Palestinian refugees who leave UNRWA's area of operations, or who are otherwise not "at present receiving . . . protection or assistance" from UNRWA, fall "*ipso facto*," or *by that fact alone* within the 1951 Refugee Convention, regardless of whether they qualify independently as refugees with a well-founded fear of persecution. By reviewing the history and purpose of Article 1D in the context of the creation of the Palestinian refugee problem, this brief demonstrates that the *ipso facto* language was intended to provide Palestinian refugees with continuity of protection, albeit under various organizations and instrumentalities. For State Parties to the 1951 Refugee Convention and the 1967 Protocol to ignore the language and history of Article 1D and to apply an artificially restrictive interpretation derogates their international obligations.

This brief concludes, Article 1D's plain language, drafting history and applicable canons of treaty construction all allow for only one interpretation of its meaning. Article 1D, as a contingent inclusion clause is the only interpretation consistent with the protective scheme envisioned for the world's refugees in general, and for Palestinians in particular, under the 1951 Refugee Convention and its 1967 Protocol.

¹ Convention Relating to the Status of Refugees (1951 Refugee Convention), Art. 1D, 189 U.N.T.S. 137 July 28, 1951.

² Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), G.A. Res. 428(V), U.N. GAOR 5th Sess., A/1775 (1950).

³ Consolidated Regulations Instructions (UNRWA Statute), January 1., 1993, para. 2.13; *See also* George F. Kossafi, *The Palestinian Refugees and the Right of Return*, Cen. Pol'y Anal. Palest., Info. Paper No. 7 (1996).

⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987), in which the Supreme Court stated: "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed, from the entire [Refugee Act of 1980], it is that one of Congress' primary purposes was to bring U.S. refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968."

⁵ Protocol Relating to the Status of Refugees (1967 Protocol), 606 U.N.T.S. 267, January 31, 1967.

⁶ Although the United States is not a party to the 1951 Refugee Convention, in ratifying the 1967 Protocol it has

Argument

I. What Was the Regime Established for Protection of Palestinian Refugees? Separate Treatment: Three Provisions and Three Agencies.

Palestinian refugees were singled out for particular treatment from all other refugees in the 1951 Refugee Convention. Article 1A sets out the general definition of "refugee" as:

[A]ny person who . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷

However, a different regime that applies solely to the Palestinians and no other group of refugees is established because of the language and interrelationship of Article 1D, Paragraph 7 of the UNHCR Statute and the UNRWA Statute. Article 1D of the 1951 Refugee Convention 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.⁸

Similarly, Paragraph 7 of the UNHCR Statute provides that "the competence of the High Commissioner . . . shall not extend to a person: . . . [w]ho continues to receive from other organs or agencies of the United Nations protection or assistance".⁹

The "other agencies of the United Nations" to which these instruments refer is actually one agency--the UNRWA. UNRWA provides aid to Palestinian refugees primarily in the areas of health, nutrition, education, and housing.¹⁰ This narrow relief has been further limited by UNRWA's definition of "refugees" eligible for aid. UNRWA eligibility is limited to persons:

- (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 refuge in one of the countries or areas where UNRWA provides relief¹¹; and
- (4) who are direct descendants through the male line of persons fulfilling 1-3 above.¹²

The narrow assistance provided by UNRWA contrasts markedly with the protection provided under the UNHCR Statute and the 1951 Refugee Convention. The assistance function of UNRWA only provides for the Palestinian refugees' basic quotidian needs listed above.

acceded in Article 1 "to apply Articles 2 to 34 inclusive of the Convention to refugees as . . . defined" in paragraph 2, that is, as if the dateline in article 1A(2) of the 1951 Refugee Convention were omitted. 1967 Protocol, ^{supra} note 5, Art. 1, 606 U.N.T.S. at 267.

⁷ 1951 Refugee Convention, *supra* note 1, Art. 1A, 189 U.N.T.S. at 138.

⁸ 1951 Refugee Convention, *supra* note 1, Art. 1D, 189 U.N.T.S. at 139.

⁹ UNHCR Statute, *supra* note 2.

¹⁰ Luke T. Lee, *The UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees*, 78 Am. J. Int'l L. 480, note 4 (1984).

¹¹ UNRWA's mandate is to serve Palestinians in Lebanon, Syria, Jordan, Gaza Strip and, after the 1967 displacements, Egypt.

¹² UNRWA Statute, *supra* at note 3 (Consolidated Regulations Instructions).

However, the 1951 Refugee Convention and the UNHCR Statute provide a more comprehensive scheme of protection for refugees that qualify under the instruments' respective definitional requirements.¹³ Rather than mere food, clothing and shelter needs, the 1951 Refugee Convention guarantees refugees' freedom of movement,¹⁴ access to courts,¹⁵ administrative assistance,¹⁶ rights regarding movable and immovable property,¹⁷ freedom of religion,¹⁸ and housing rights¹⁹ among many others. Likewise, the UNHCR Statute establishes its primary task as providing international protection.²⁰ Under the UNHCR Statute, some of the protective duties of the High Commissioner include:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
-
- (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to territories of States;
- (e) Endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for resettlement.²¹

Although UNRWA was not authorized to serve the protective function given the UNHCR, this was not because the General Assembly believed that Palestinian refugees were any less deserving of protection. There was a very specific reason for granting only the "assistance" function to UNRWA and for excluding the "protection" function from UNHCR vis-a-vis the Palestinians: the Palestinian refugee situation was considered of such import that a separate "protection" agency was established for the sole purpose of resolving the Palestinian refugee crisis. This agency was the United Nations Conciliation Commission for Palestine (UNCCP).

The UNCCP was born of a suggestion contained within the Progress Report of the United Nations Mediator on Palestine, submitted May 14, 1948 to the United Nations General Assembly. The Mediator, Count Folke Bernadotte, concluded:

The right of the Arab refugees to return to their homes in Arab-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission described . . . below.

The political, economic, social and religious rights of all Arabs in the Jewish territory of Palestine should be fully guaranteed and respected by the authorities. The conciliation commission provided for in the following paragraph should supervise the observance of this guarantee. It should also lend its good offices, on the invitation of the parties, to any efforts toward exchanges of populations with a view to eliminating troublesome minority problems, and on the basis of adequate compensation for property owned.

In view of the special nature of the Palestine problem and the dangerous complexities of Arab-Jewish relationships, the United Nations should establish a Palestine conciliation commission. This commission, which should be appointed for a limited period, should be responsible to the United Nations and act under its authority.²²

¹³ 1951 Refugee Convention, *supra* note 1, Art. 1A; UNHCR Statute, *supra* note 2, Art. 6A(ii).

¹⁴ 1951 Refugee Convention, *supra* note 1, Art. 26.

¹⁵ *Id.* at art. 16.

¹⁶ *Id.* at art. 25.

¹⁷ *Id.* at art. 13.

¹⁸ *Id.* at art. 4.

¹⁹ *Id.* at art. 21.

²⁰ UNHCR Statute, *supra* note 2.

²¹ *Id.*

Shortly after he composed this report recommending the establishment of a Conciliation Commission, Bernadotte was assassinated in the streets of Jerusalem by Jewish terrorists who opposed his peacekeeping efforts. Bernadotte's recommendation regarding the creation of a Conciliation Commission met with overwhelming support from the General Assembly in its third session in 1948.²³ As the Polish delegate observed: "[T]here was general agreement on the appointment of a conciliation commission although there were differences of view on its composition and terms of reference".²⁴ Although the debates on the functional aspects of the proposed Conciliation Commission revealed great differences of opinion on many aspects of the plan,²⁵ all the delegates understood that the Conciliation Commission's function at the most generalized level would be to facilitate a political solution to the Palestinian refugee problem, and guarantee protection to the expelled Palestinian population. Even the delegate representing the "Provisional Government of Israel" understood that the Conciliation Commission "would be the instrument of the United Nations in the settlement of the political dispute in Palestine".²⁶

On December 11, 1948, the General Assembly passed Resolution 194(III) establishing the UNCCP and setting forth its composition and terms of reference.²⁷ The resolution provided for the UNCCP to consist of three States Members of the United Nations. These members were to continue the efforts of the United Nations Mediator on Palestine²⁸ and to begin conciliation efforts immediately.²⁹ The UNCCP was further instructed to "take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them".³⁰ Most significantly for the purposes of this brief, the General Assembly also resolved that refugees were entitled to repatriation and compensation. Paragraph 11 of Resolution 194 (III) provides:

The General Assembly, [h]aving considered further the situation in Palestine, . . . *[r]esolves* that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under the principles of international law or in equity, should be made good by the Governments or authorities responsible; *[i]nstructs* the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation³¹

Thus, the UNCCP was entrusted with protecting the refugees' most pressing concerns: repatriation and compensation.

In contrast, on December 8, 1949, the United Nations General Assembly established

²² Progress Report of the United Nations Mediator on Palestine, U.N. GAOR, 3d Sess., Supp. No. 11, at 51, U.N. Doc. A/648 (1948).

²³ U.N. GAOR, 1st Comm., 3d Sess., 142d-236th mtg., at 768-933, U.N. Doc A/C.1/SR 142-236 (1948).

²⁴ U.N. GAOR, 1st Comm., 3d Sess., 142d-236th mtg., at 824, U.N. Doc A/C.1/SR 142-236 (1948).

²⁵ The greatest differences in opinion arose in reference to whether the UNCCP's mandate would incorporate the terms of the UN resolution of 29 November 1947 which established the partition of Palestine. The Cuban delegate had the most scathing attack on such a proposal: He stated that his delegation had voted against the resolution of 29 November partially because "the November resolution was unjust because it gave to a group of foreign Jewish immigrants a part of the territory of Palestine which had belonged to the Arabs for centuries" and because "it was wrong to make the Arabs suffer in order to repair the wrongs which other nations had done to the Jews". U.N. GAOR: 1st Comm., 3d Sess., 142d-236th mtg. at 802, U.N. Doc A/C.1/SR. 142-236 (1948).

²⁶ U.N. GAOR:, 1st Comm., 3d Sess., 142d-236th mtg. at 827, U.N. Doc A/C.1/SR. 142-236 (1948).

²⁷ G.A. Res. 194(III), U.N. Doc. A/810, at 21, (1948)(UNCCP Mandate). *See*, Appendix A: Compilation and Summary of United Nations Resolutions Regarding Compensation and Return of Palestinian Arab Refugees.

²⁸ G.A. Res. 194(III)(2)(c), U.N. Doc. A/810, at 21, (1948).

²⁹ G.A. Res. 194(III)(4), U.N. Doc. A/810, at 21, (1948).

³⁰ G.A. Res. 194(III)(6), U.N. Doc. A/810, at 21, (1948).

³¹ G.A. Res. 194(III)(11), U.N. Doc. A/810 at 21, (1948).

UNRWA's bifurcated mission in Resolution 302: to (1) provide direct relief and (2) to establish a "works program".³² As the explicit terms of its mandate suggest, UNRWA's mission was limited to merely an assistance function. The agency was authorized to provide "direct relief" and establish a "works program" to those *de facto* refugees that qualified under UNRWA's own definitional requirements.³³ The international community recognized that mere "assistance" alone was inadequate to address the refugee question; rather it recognized that the Palestinian refugee question was one of such urgency that it required some temporary emergency relief in addition to the protective efforts already in place. In fact, UNRWA was created as an interim measure only-to function while a final solution that provided for large-scale repatriation or resettlement was being negotiated. Such assistance would save lives in the short run and preserve the status quo so that when negotiations resumed, there would still be refugees alive for whom to negotiate.³⁴

The purpose of the UN member states in founding and defining the jurisdiction of the relevant agencies concerned with the Palestinian refugees is clear from the language of the UN Resolutions on the subject. The first provision of Resolution 302(IV) explicitly states that the short-term relief provided for by its terms was not intended to supplant the long-term goals of resettlement and repatriation. Resolution 302(IV)'s first provision reads:

The General Assembly, [r]ecalling its resolutions 212(III) of 19 November 1948 and 194 (III) of 11 December 1948, affirming in particular the provisions of paragraph 11 of the latter resolution, . . . [r]equests the Secretary-General to appoint the Director of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East"³⁵

Resolution 212(III) states:

Whereas the problem of the relief of Palestine refugees is one of immediate urgency and the United Nations Mediator of Palestine in his report of 18 September 1948, part three states that "action must be taken to determine the necessary measures [of relief] and to provide for their implementation" and that "the choice is between saving the lives of many thousands of people now or permitting them to die": . . . The General Assembly . . . Considers, on the basis of the Acting Mediator's recommendation, that a sum of responsible approximately 29,500,000 dollars will be required to provide relief for 500,000 refugees for a period of nine months from 1 December 1948 to 31 August 1949; and that an additional amount of approximately 2,500,000 dollars will be required for administrative and local operational expenses³⁶

Paragraph 11 of Resolution 194(III),³⁷ states that "the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date and that compensation should be paid for the property which, under the principles of international law or in equity should be made good by the Governments or authorities".

³² G.A. Res. 302(IV), U.N. Doc. A/1251 at 23 (1949).

³³ UNRWA's refugee definition *supra*, note 12 and accompanying text.

³⁴ The First Interim Report of the United Nations Economic Survey Mission for the Middle East (ESM Report) states: "Recognizing that the plight of the refugees is both a symptom and a cause of grave economic instability, the Mission recommends in this report that steps be taken to establish a programme of useful public works for the employment of able-bodied refugees as a first measure towards their rehabilitation; and that meanwhile, relief, restricted to those in need, be continued throughout the coming year.

. . .

These measures, together with those which the Mission, in a subsequent and final report will suggest for the greater use by the peoples and Governments of the Near East of the still undeveloped riches of their own lands, will not alone bring peace. But if the Palestine refugees be left forgotten and desolate in their misery, peace will recede yet further from these distracted lands [emphasis added]". ESM Report, U.N. Doc. A/AC.25/6 (1949).

³⁵ G.A. Res. 302(IV), *supra*, note 32.

³⁶ G.A. Res. 212(III)(citations omitted) A/810 (1948).

³⁷ *See supra*, note 31 and accompanying text.

By incorporating paragraph 11, the General Assembly made it clear that the relief that was to be provided by UNRWA was not intended to prejudice the efforts by the international community to negotiate a long-term solution that would include both repatriation and compensation. There was no doubt in the General Assembly that this assistance was only temporary and was not intended to exist in lieu of any protective function.

Every recommendation to the UN, and every UN Resolution concerning the Palestinians drafted at the time UNCCP, UNHCR and UNRWA were created affirms that the consensus of the world community was that resolution of the Palestinian problem had to involve realizing the refugees' right of return to their homes and to appropriate compensation for their losses.³⁸

The protective function, meanwhile, was being carried out by the UNCCP. In 1949, the UNCCP concentrated most of its efforts on attempting to persuade Israel first to accept the validity of the internationally-binding right of the refugees to repatriation and later to make tangible offers of limited repatriation.³⁹ These efforts culminated in Israel's offer of limited repatriation stipulating that 100,000 refugees could return.⁴⁰ In 1951 however, Israel officially retracted its offer.⁴¹ Thus, the central stalemate continued: the Arab policy was to demand full repatriation; whereas the Israelis refused to offer, at first, more than the 100,000, and later, any repatriation at all.⁴² In response to this impasse on the issue of repatriation, the General Assembly approved the creation of an UNCCP suboffice designed to investigate compensation alternatives. In Resolution 394(V), the General Assembly,

Not[ed] with concern:

(a) That agreement has not been reached between the parties on the final settlement of the questions outstanding between them,

(b) That the repatriation, resettlement, economic and social rehabilitation of the refugees and the payment of compensation have not been effected,

Recognizing that, in the interests of the peace and stability of the Near East, the refugee question should be dealt with as a matter of urgency,

...

2. [The General Assembly] *Directs* the United Nations Conciliation Commission for Palestine to establish an office which, under the direction of the Commission, shall:

(i) Make such arrangements as it may consider necessary for the assessment and payment of compensation in pursuance of paragraph 11 of [Resolution 194(III)];

(b) Work out such arrangements as may be practicable for the implementation of the other objectives of paragraph 11 . . . ;

(c) Continue consultations with the parties concerned regarding measures for the protection of the rights, property and interests of the refugees.⁴³

Thus, the formation of the UNCCP's Refugee Office marked a change in policy and "signaled the beginning of the demise of the [UNCCP] as anything but a symbol".⁴⁴ In early 1951, the UNCCP took the view that the Fifth Assembly had brought about a "new phase" in the life of the UNCCP. "In light of Resolution 394, the UNCCP argued that its task was to concentrate exclusively on the refugee problem from a practical point of view rather than on the principled basis used up to that time."⁴⁵

The UNCCP was further emasculated in 1952 when the General Assembly met in its

³⁸ See Appendix A.

³⁹ DAVID P. FORSYTHE, UNITED NATIONS PEACEMAKING 70 (Johns Hopkins University Press 1972).

⁴⁰ *Id.* at 70.

⁴¹ U.N. Doc. A/AC.25/W.82/rev. 1, at 18 (1951), cited in FORSYTHE, *supra* note 39, at 83.

⁴² FORSYTHE, *supra* note 39, at 83.

⁴³ G.A. Res. 394(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 24, U.N. Doc A/1775 (1950).

⁴⁴ FORSYTHE, *supra* note 39, at 56.

⁴⁵ U.N. Doc. A/AC.25/W.82/Rev. 1, at 21 (1951), cited in FORSYTHE, *supra* note 39, at 84..

Sixth Session. The Assembly members still could not agree on what changes to make in the UN peacekeeping effort. The United States' delegate saw no prospect for breaking the status quo, and therefore the Secretary-General recommended a budget in which the UNCCP would be based in New York with no major expenditures.⁴⁶ Thus, within four years of its formation, the UNCCP devolved from an agency charged with the "protection of the rights, property and interests of the refugees,"⁴⁷ to little more than a symbol of UN concern for the unresolved aspects of the Arab-Israeli conflict.

Under the restrictive terms of its mandate, UNRWA was not equipped to take over the UNCCP's protective role. In fact, UNRWA's limited mission had an even narrower scope than it appeared since Resolution 302 explicitly adopted the findings and suggestions of the Economic Survey Mission (ESM).⁴⁸ The Report concluded that "[t]he continuing political stalemate in the relations between the Arab countries and Israel precludes any *early* solution of the refugee problem by means of repatriation or large-scale resettlement".⁴⁹ The ESM Report detailed the *ad hoc* contributions received on behalf of the refugees from various charitable organizations and nation-states.⁵⁰ However, it pointed out that "the funds so far subscribed will not last through the winter".⁵¹ The ESM Report continued, "In the face of this emergency, the United Nations Economic Survey Commission . . . has found it essential to concentrate first upon the refugees and to report without delay upon this distressing subject, leaving for a subsequent report other matters of longer term"⁵²

By incorporating the ESM findings, the terms of UNRWA's mandate reinforced the notion that it would only be a temporary, short-term measure to a problem that demanded a long-term, comprehensive solution. The UNRWA has a two-prong purpose; firstly to provide for the basic quotidian needs of Palestinian Refugees and secondly, to establish public works programs.⁵³ Regarding the first prong of UNRWA's stated mission of "direct relief," its enabling resolution incorporated the ESM belief that rations should gradually be reduced, stating, "[The General Assembly] . . . [r]equests the Secretary-General in consultation with the operating agencies to continue the endeavor to reduce the numbers of rations by progressive stages in light of the findings and recommendations of the Economic Survey Mission".⁵⁴ Therefore, the apparent goal of UNRWA was to eventually discontinue direct relief altogether.

UNRWA's other goal of establishing a public works program was likewise limited in scope. UNRWA's mandate reflected the ESM suggestion of a "programme of public works, calculated to improve the productivity of the area, and such continuing relief as will be needed should be organized as an integrated operation, in cooperation with the governments of the countries where the refugees were located".⁵⁵

⁴⁶ GAOR: 6th Sess., Annexes, Agenda Item 24 (a) (A/2072, 24 January 1952), p. 1.

⁴⁷ G.A. Res. 194(III), *supra*, note 27.

⁴⁸ G.A. Res. 302(IV), *supra* note 34 ("[The General Assembly] . . . [e]stablishes the United Nations Relief and Works Agency for Palestinian Refugees in the Near East [t]o carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission").

⁴⁹ ESM Report, *supra* note 34 at 16 (emphasis added).

⁵⁰ *Id.* at 14-15.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Luke T. Lee, *supra*, note 10.

⁵⁴ The ESM Report expressed concern that many of the refugees would face a winter of disease and starvation should all relief be cut off. Yet, it nevertheless recommended that the "extent of direct relief provided through United Nations funds should be stringently cut within the next two months" and pointed out that "[u]seful, gainful employment could be found for all the refugees able and willing to work". ESM Report, *supra* note 34 at 16. Therefore, the ESM recommended that the "present UNRPR system of relief be continued through the winter months until 1 April 1950 without reducing the existing minimum ration but with the number of rations reduced from 940,000 to 652,000. ESM Report, *supra* note 34 at Appendix 1A, pp. 16, 17.

⁵⁵ *Id.* at 17.

After the UNCCP was stripped of its protective function, the major vehicle entrusted with protecting the substantive rights of the Palestinian refugees dissolved, and Palestinian refugees were left only with whatever UNRWA could provide. However, as discussed above, UNRWA's mandate never envisioned a protection role, rather it was designed only to temporarily provide for the refugees' basic quotidian needs.⁵⁶

II. Why Was a Separate Regime Established for Palestinian Refugees?

From the time the Palestinian refugee crisis was created over fifty years ago, the international community has continually recognized it as a problem demanding special attention. This belief has been affirmed every year in countless General Assembly Resolutions that proclaim Palestinians' rights to repatriation and compensation.⁵⁷ This belief was manifested in the creation of two separate UN agencies, the UNRWA and the UNCCP which were devoted exclusively to dealing with the Palestinian refugee problem. Finally, this belief was manifested in the *ipso facto* provision included in Article 1D that created a safety net for Palestinians when their alternative protection scheme failed, thus ensuring a continuity of protection.⁵⁸ Because Palestinian refugees have been guaranteed continuous protection under this scheme, the implication is that they must qualify in a manner similar to that of *statutory refugees* or *prima facie* refugees recognized under the 1951 Refugee Convention. In light of this special status, it is important to understand the reasons that the international community felt that their particular refugee crisis warranted special measures. Even more important for the purposes of this brief is understanding that the circumstances initially mobilizing the international community to create a separate protection regime for Palestinians still exist today.

A. History of Persecution of Palestinians by the State of Israel, and Responsibility of the United Nations Body.

The Palestinian special refugee status is partially a product of the international community's memory of the historical events that created the refugee problem in the first place, and also the recognition that the United Nations body itself was partially responsible for denying Palestinians their nationality, and effectuating the expulsion of the Palestinian people from their place of origin.

1. Goals of Zionism: The Usurpation of Palestine

The tenets of Zionism dictated the usurpation of Palestine. The movement formed in the late nineteenth century among Jews in Europe to establish a Jewish state, "Eretz Israel", in Palestine, a land that during the first millennium B.C. had been the site of a Hebrew kingdom. Zionism as a political philosophy, preaches that Jews are one people and one nation requiring their own land, to which all Jews must eventually return. Therefore, Zionism spurns the concept of religious fellowship and seeks to endow Jews with national attributes. Thus, while Christians and Moslems live in many nations and owe allegiance to various flags; Jews, according to Zionist dogma, are only one nation, thus in need of their own nation-state.⁵⁹

⁵⁶ UNRWA's mandate has never been expanded to include more protection, notwithstanding UNRWA's protective efforts during the *intifada* (Palestinian uprising). These increased efforts were taken in spite of UNRWA's limited mandate. See BENJAMIN SCHIFF, REFUGEES ONTO THE THIRD GENERATION 226-70 (Syracuse University Press 1995).

⁵⁷ See Appendix A.

⁵⁸ 1951 Refugee Convention, *supra* note 1 and accompanying text; see also notes 8-19 and accompanying text.

⁵⁹ SAMI HADAWI, BITTER HARVEST 34 (Olive Branch Press 1989).

The destruction of Palestine was not the unintended consequence of unforeseen events. It was and still is an essential part of the Zionist plan to transform Palestine into "Eretz Israel". One historian states:

The truth of the matter is that it was the concerted policy of the Zionist movement to oust the Palestine Arabs from their homes and country, because they needed Palestine free from Arabs to make room for their planned mass immigration. Without Arab lands and property it is not clear how the Zionists could establish a Jewish state.⁶⁰

As the late Dr. Fayez A. Sayegh once put it:

Just as the heart-beat consists of two rhythmic operations--pumping-in and pumping out--so too the program of Zionism consists of two interrelated operations, each of which is essential for the heart-beat of Zionism and neither of which is dispensable: the detachment of Jews from their respective countries and their mass transfer to Palestine, and the detachment of the indigenous Palestinian Arabs and their mass transfer from Palestine.⁶¹

2. Palestine: Characteristics of the Land and People Subjected to Zionist Colonization:

Palestine became predominantly Arab and Islamic by the end of the seventh century. In 1516, Palestine became a province of the Ottoman Empire. Through the years it retained its Arab character.⁶² Despite the steady arrival in Palestine of Jewish colonists after 1882, it is important to realize that not until the few weeks immediately preceding the establishment of the state of Israel in the spring of 1948 was there ever anything other than a huge Arab majority.⁶³

There were several distinguishable characteristics of this Arab majority. All of them spoke Arabic, and were mainly Sunni Muslims, although minorities were Christians, Druze, and Shiite Muslims--all of whom spoke Arabic too. Approximately 65% of the Palestinian Arabs were agricultural people who lived in about 500 villages where ground crops as well as fruits and vegetables were grown.⁶⁴ The principal Palestinian cities--Nablus, Jerusalem, Nazareth, Acre, Jaffa, Jericho, Ramallah, Hebron, and Haifa--were built in the main by Palestinian Arabs who continued to live there even after the encroaching Zionist colonies expanded to within very close proximity.⁶⁵

3. Setting the Stage for Colonization: The Ottoman Land Code:

In 1858, the Ottomans set the stage for Zionists to accomplish their territorial objectives in Palestine, when they established the Land Code that required:

the registration in the name of individual owners of agricultural land, most of which had never previously been registered and which had formerly been treated according to traditional forms of land tenure, in the hill areas of Palestine generally masha'a, or communal usufruct. The new law meant that for the first time

⁶⁰ *Id.*

⁶¹ RASHID KHALIDI, *BLAMING THE VICTIMS* 238 (Edward W. Said & Christopher Hitchens eds., Verso 1988).

⁶² EDWARD W. SAID, *THE QUESTION OF PALESTINE* 11 (Times Books 1979).

⁶³ *Id.* at 11.

⁶⁴ *Id.* at 11-12.

⁶⁵ *Id.* at 11-12.

⁶⁶ RASHID KHALIDI, *supra* note 61 at 211.

a peasant could be deprived not of title to his land, which he had rarely possessed before, but rather of the right to live on it, cultivate it and pass it on to his heirs, which had formerly been inalienable if taxes were paid regularly. Under the provisions of the 1858 law, communal rights of tenure were often ignored, as many peasants with long-standing traditional rights failed to register out of fear of taxation and other state exaction, notably conscription. Instead, members of the upper classes, adept at manipulating or circumventing the legal process, registered large areas of land as theirs.⁶⁶

Thus, removing the owners of the land became a simple matter because the Ottoman Land Code of 1858 allowed the accumulation of much fertile land in the hands of a relatively small number of urban merchants and notables, and the tiller of the land was often different from the owner.⁶⁷

Zionists would later capitalize on the ubiquity of absentee owners that this law created. According to the Central Zionist Archives, 52.6% of the Zionists' land purchases were acquired from "large absentee landlords" during the period 1878-1936.⁶⁸ Another survey estimated that 58% was purchased from Non-Palestinian absentee and 36% from Palestinian absentee landlords.

4. Twentieth Century Developments:

During World War I, the Allies became interested in the status of Palestine. The Allies expressed in a number of official declarations and pronouncements that they were dedicated to "guaranteeing [Arab] liberation and the development of their civilization;" to establish, "national governments and administrations deriving their authority from the initiative and the free choice of the native population;" to recognize Arab independence as soon as "effectively established;" and "to ensure impartial and equal justice to all, to facilitate the economic development of the country . . . to foster the spread of education"⁷⁰ A correspondence-later known as the Hussein-McMahon Correspondence-consisting of ten letters, was exchanged during the period July 1915 to March 1916, and culminated in a British promise of Arab independence.⁷¹

Before the ink was dry on the British pledge of Arab independence, the British government was busy negotiating secretly with the French and Russian governments for the division among themselves of the Asiatic provinces of the Ottoman Empire after victory. The Sykes-Picot Agreement stipulated:

Parts of Palestine [were] to be placed under "an international administration of which the form will be decided upon after consultation with Russia and after subsequent agreement with the other Allies and the representatives of the Sherif of Mecca."⁷²

During the war period, Zionists continued their aggressive acquisition of land in Palestine. As the King-Crane Commission would later report to President Woodrow Wilson in 1919: "the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine."⁷³ In order to further its purpose of supplanting Palestine with Eretz

⁶⁷ *Id.* at 216.

⁶⁸ KENNETH STEIN, *THE LAND QUESTION IN PALESTINE, 1917-1939*, 226-7 (University of North Carolina Press 1984) *quoting* a table drawn from the Central Zionist Archives.

⁶⁹ KHALIDI, *supra* note 61, at 225 *quoting* figures taken from pre-World War I land sale figures in a table in an unpublished work written by a parliamentary colleague of the deputy for Jerusalem, Ruhi al-Khalidi.

⁷⁰ HADAWI, *supra* note 59, at 9-10.

⁷¹ *Id.* at 10 (McMahon's commitment to Arab independence in the correspondence was as follows: "As for these regions lying within those frontiers wherein Great Britain is free to act without detriment to the interest of her ally France, I am empowered in the name of the Government of Great Britain to give the following assurances and make the following reply to your letter: "Subject to the above modifications, Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.").

⁷² *Id.* at 11-12.

⁷³ JOHN QUIGLEY, *PALESTINE AND ISRAEL* 11-12 (Duke University Press 1990).

Israel, in 1901 the Fifth Zionist Congress established the Jewish National Fund (JNF) as "a trust for the Jewish people, which can be used exclusively for the purchase of land in Palestine and Syria".⁷⁴ Although initially a small scale operation, the JNF became effective immediately.⁷⁵ The JNF established headquarters, named an executive officer and established fund-raising devices.⁷⁶

The Sixth Zionist Congress further clarified JNF's mission and tactics. Some of the clarifications which emerged included: (1) Purchases were to be made of "agricultural, arable, and garden lands, as well as forests and pieces of land of every type"⁷⁷; (2) The JNF was authorized "to build on or to have cultivated or also to lease (subleasing being prohibited) the purchased land to Jews"⁷⁸; and (3) The JNF was further authorized to begin land purchases whenever a majority of its directors so decided.⁷⁹

In 1907, the JNF declared that the "primary object" for which it was organized was:

to purchase, take on lease or in exchange, or otherwise require any lands, forests, rights of possession and other rights, easements and other immovable property in the prescribed region (which expression shall in this Memorandum mean Palestine, Syria, any other parts of Turkey in Asia and the Peninsula of Sinai) or any part thereof, for the purpose of settling Jews on such lands.⁸⁰

In the same year, the Eighth Zionist Congress decided to open a Palestine Office in Jaffa, which began operations in early 1908. Its duties included checking speculation and to avoiding random and unsystematic purchases of small and/or scattered parcels of land unsuitable for large-scale colonization.⁸¹

Around this same time, Theodore Herzl, Zionism's first leader, also began to seek the backing of the European governments in establishing a Jewish state.⁸² He felt this was an opportune time to ask for their support since many European nations had just finished dividing Africa and would probably be sympathetic to Zionism's plans to colonize Palestine. Herzl was especially interested in soliciting Britain because it was "the first to recognize the need for colonial expansion".⁸³

The Zionist movement hoped to build on this earlier British interest and on its contemporary needs in the Middle East. After Herzl's death in 1904 Chaim Weizman assumed the lead. A research chemist, Weizman did military research for Britain during World War I and gained a position in the British admiralty through Lord Balfour, who was then foreign secretary. Like Herzl, Weizmann argued that sponsorship of Zionism could help Britain.⁸⁴

As Britain was taking territory from the Ottoman Empire in World War I, Weizmann increased his efforts to solicit support from the British. In 1917, he convinced Lord Balfour to propose to the cabinet a policy statement in support of Zionism. At Balfour's request, Weizmann and Lord Rothschild, who headed the Zionist Federation in Britain, drafted the statement. Balfour convinced the cabinet to approve the statement, which Balfour then issued as a letter to Rothschild. The letter said that Britain "viewed with favor the establishment in Palestine of a

⁷⁴ Walter Lehn, the Director of the Middle East Center at the University of Texas at Austin (1960-66), gives the most comprehensive treatment of the JNF and provides much of the research mentioned here. Walter Lehn, *The Jewish National Fund*, J. Palest. Stud. 74-96 (Summer 1974).

⁷⁵ *Id.* at 79.

⁷⁶ *Id.*

⁷⁷ *Id.* at 80.

⁷⁸ *Id.* (This was to mean that the JNF could either itself develop the land or lease it, but only to Jews. Subleasing was prohibited because Jewish lessees were to work the land themselves and not profit from the labor of others.)

⁷⁹ *Id.* at 80.

⁸⁰ *Id.* at 81.

⁸¹ *Id.* at 82-83.

⁸² QUIGLEY, *supra* note 73, at 6.

⁸³ *Id.* at 7.

⁸⁴ *Id.*

national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country."⁸⁵ The letter became known as the Balfour Declaration. The next month Britain captured Jerusalem.⁸⁶

In 1922, the League of Nations gave Britain, at its own request, a mandate to administer Palestine.⁸⁷ This mandate incorporated the language of the Balfour Declaration exactly as adopted by the British cabinet in 1917. Notwithstanding the fact that it violated the self-determination rights of Palestinians, the League gave its endorsement to the concept of a Jewish national home in Palestine. Furthermore, the League of Nations asked the World Zionist Organization to set up an agency to oversee Jewish immigration and settlement.⁸⁸ The mandate instrument said that "an appropriate Jewish Agency shall be recognized as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home."⁸⁹

Although "[i]n its early years, JNF acquisitions were modest,⁹¹ now backed by the Balfour Declaration, the JNF stepped up its land purchasing.⁹¹ Its more aggressive acquisition policy was aided by the establishment of the Palestine Foundation Fund by the World Zionist Organization to finance settlement of land purchased by the JNF in 1920.⁹²

Other events in 1920 also prepared the stage for a new phase of activity and for increased purchases. Two events hastened Jewish acquisition of land in Palestine: the issuance of the Land Transfer Ordinance and the establishment of the Land Registry Offices. In addition, the government certified the JNF "as having purposes of public utility" and registered it as a foreign company authorized to engage in business, specifically the purchase and development of land in Palestine.⁹³ As a consequence JNF holdings began to increase substantially, over 13 fold from 1920 to 1930, and again by almost twice from 1940 to May 1948.⁹⁴

Although Zionist "policy during the early years appears to have been a vague one of buying as much and as soon as possible," in 1921, the JNF developed "a rational and considered land policy", and began to make larger purchases.⁹⁵ The new land policy was dictated by several considerations: agricultural settlement remained, an important objective, which required the acquisition of large or small but contiguous tracts of land. However strategic, security and national political objectives now also became important considerations in making land purchases.⁹⁶

Since title to the land purchased by the JNF was to be held in perpetuity, "as the inalienable property of the Jewish people", use of the land required the development of a system of long-term leasing, the lessor being the JNF.⁹⁷ The lessor had rights, such as to inspect the property, to decrease the amount of land held, and to take back the land if the lessee might, depending on the nature of his violation of his terms, receive compensation for improvements he had made. All the terms of the lease, including the lessee's rights, were subject to one overriding condition, made explicit in the lease: the lessee must be Jewish.⁹⁸ Therefore, the land could not

⁸⁵ QUIGLEY, *supra* note 73, at 7.

⁸⁶ *Id.*, at 8.

⁸⁷ *Id.*, at 10-13.

⁸⁸ *Id.*, at 10-13.

⁸⁹ *Id.* at 16.

⁹⁰ Lehn, *supra* note 74, at 84.

⁹¹ QUIGLEY, *supra* note 73, at 17.

⁹² *Id.*

⁹³ Lehn, *supra* note 74, at 83.

⁹⁴ *Id.* at 84-85.

⁹⁵ *Id.* at 86. In 1921 by acquiring another 43, 021 dunums it doubled its previous holdings.

⁹⁶ *Id.* at 89.

⁹⁷ *Id.* at 90.

be leased to a non-Jew, nor could the lease be subleased, or sold, or mortgaged, or given, or bequeathed to any but a Jew. The lease also stated that only Jews could be employed on the land or participate in any work connected with the cultivation of land.⁹⁹ Violation of these terms of the lease rendered the lessee liable for damages to the lessor and upon a third violation the lessor had the right to abrogate the lease without any compensation to the lessee.¹⁰⁰ These terms are evidenced in the JNF lease, Article 23 that states *inter alia*:

The lessee undertakes to execute all works connected with the cultivation of the holding only with Jewish labour. Failure to comply with this duty by the employment of non-Jewish labour shall constitute adequate proof as to the damages and amount thereof, and the right of the Fund to be paid the compensation referred to, and it shall not be necessary to serve on the lessee any notarial or other notice. Where the lessee has contravened the provisions of this Article three times the Fund may apply the right of restitution of the holding, without paying any compensation whatever.¹⁰¹

The JNF eventually became, next to the government, the largest landowner in Palestine, its practices were adopted or at times imposed on other Jewish landowners. The result of JNF activity was that the land "[ceased] to be land from which the Arab can gain any advantage either now or at any time in the future."¹⁰² This practice was contrary to the provisions of the Mandate by the League of Nations, as well as a constant and increasing source of danger to the country. However, in spite of these and subsequent criticisms of the JNF, and of repeated Palestinian Arab protests, nothing was done by the British mandate government to prevent the JNF from continuing to place restrictive covenants on its land. This practice continues to this day in Israel, where the JNF remains the second largest landowner, the largest being the state.¹⁰³

Thus, as its history bears out, the achievements of the JNF in "redeeming" the land of Palestine, for which purpose it was established, can be evaluated only within the larger context of the conflict for control of Palestine. Josef Weitz, the head of the Jewish Agency's colonization department reiterated the sentiment that their conflict with the Palestinians was a zero-sum gain:

Amongst ourselves it must be clear that there is no place in the country for both peoples together . . . [there is] no other way but to transfer the Arabs from here to neighboring countries, to transfer all of them, not one village, not one tribe, should be left.¹⁰⁴

5. Expulsion by Force:

The most detailed account of the expulsion of Palestinian refugees is provided by Israeli historian Benny Morris in his study *The Birth of the Palestinian Refugee Problem, 1947-1949*, which was based on recent declassification and opening of most Israeli state and private political papers from 1947.¹⁰⁵ The Zionists' territorial acquisition policy was not the exclusive means used to pursue "Eretz Israel . . . without Arabs".¹⁰⁶ The Zionists accomplished the second phase of the expulsion of Arabs from Palestine largely through violence and terror. In 1947, because of the

⁹⁸ *Id.*

⁹⁹ *Id.* at 91-92.

¹⁰⁰ *Id.* at 92-93.

¹⁰¹ *Id.* at 93 n. 56.

¹⁰² *Id.* at 93, noted by John Hope Simpson in 1930.

¹⁰³ *Id.*

¹⁰⁴ QUIGLEY, *supra* note 73, at 25 (quoting JOSEF WEITZ, A SOLUTION TO THE REFUGEE PROBLEM 13 (Davar 1967)).

¹⁰⁵ BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM (Cambridge University Press 1987).

¹⁰⁶ *Id.*

growing tension in the area,¹⁰⁷ the British requested that a special session of the United Nations General Assembly be called to prepare a preliminary study on the question of Palestine for consideration by the General Assembly at its next regular session.¹⁰⁸ At the special session, the General Assembly established the United Nations Special Committee on Palestine (UNSCOP), to investigate all questions relevant to the problem of Palestine and to recommend solutions to be considered by the regular session in September 1947.¹⁰⁹ Although UNSCOP did not reach a consensus on the question of Palestine, on November 1947, the General Assembly adopted Resolution 181(II), recommending a Plan of Partition whereby Palestine would be divided into a Jewish state and an Arab state.¹¹⁰ The Partition Plan gave 54% of the land area to the proposed Jewish State, despite the fact that the Jewish population was less than one third of the entire population.¹¹¹

From December 1947 to May 1948, civil and guerrilla warfare erupted in response to the plan. These hostilities triggered the start of the exodus of Palestine's Arabs.¹¹² The Arab flight from the countryside began with a trickle from a handful of villages in December 1947 and became steady, though still small-scale, emigration over January-February 1948.¹¹³ In March, in certain parts of the country, the rural emigration turned into an exodus. In general, the exodus was a direct response to attacks and retaliatory strikes by the Zionist settlers' defense force (Haganah) and to fears of such attacks.¹¹⁴

By January 1948, the Zionists began an organized expulsion of Arab communities. Morris states:

The inhabitants of Arab Caesarea, who lived on leased Jewish (PICA) lands, began to evacuate out of fear on 12 January, and others followed on 9 February. On 15 February the village was captured and most of its remaining inhabitants fled or were ordered to leave. Some 20 villagers stayed behind but were expelled on 20 February, after a Palmach unit surrounded the village and destroyed the Arabs' houses . . . This operation was preceded by a Haganah General Staff decision, apparently taken in the first days of February, which was reported to Mapam's Political Committee by Galili on 5 February. The decision to destroy the houses, which were mostly Jewish property, was opposed by Yitzhak Rabin, the Palmach's OC Operations, but he was overruled.¹¹⁵

The potential boost this exodus represented to Zionism's goal of "Eretz Israel . . . without Arabs" was not lost on Zionist leaders.¹¹⁶ On March 31, 1948, Weitz, the director of the JNF's Lands Department, noted that "[t]here is a tendency among our neighbors . . . to leave their villages".¹¹⁷ This "tendency," of course, was being promoted and expanded in part by Weitz himself, who was responsible for the land acquisition and, in great measure, for the establishment of new

¹⁰⁷ Hostilities included Arab revolts and terrorist attacks against the increasing Jewish emigration; and anti-British terrorism commonly perpetrated by two Jewish guerilla groups: the Irgun Zvat Leumi and Lohamei Herut Yisrael. Adding to Britain's difficulties in the region was the political embarrassment they suffered when they tried to quell the hostilities by restricting Jewish immigration in the "White Paper" of 1939.

¹⁰⁸ MORRIS, *supra* note 105, at 6.

¹⁰⁹ G.A. res. 106 (S-1), U.N. Doc. A/310 (1947).

¹¹⁰ G.A. Res. 181 (II), U.N. Gaor, 1st Special Sess., Supp. No. 1, 322-43, (1947)(The partition resolution specified geographic boundaries and asserted religious and minority rights. It also provided for an "Economic Union", that would entail joint economic development, especially in areas of irrigation, land reclamation and soil conservation).

¹¹¹ *Id.*

¹¹² MORRIS, *supra* note 105, at 41.

¹¹³ *Id.* at 52.

¹¹⁴ *Id.*

¹¹⁵ MORRIS, *supra* note 105, at 54, (quoting HHA 66.10, protocol of the meeting of the Mapam Political Committee, statement by Galili, 5 February 1948).

¹¹⁶ MORRIS, *supra* note 105.

¹¹⁷ *Id.* at 55.

settlements. The conditions of war and anarchy of early 1948 at last enabled the Zionists to physically take possession of these tracts of land.¹¹⁸

Benny Morris cites "clear traces of an expulsion policy on both national and local levels" from the beginning of April, 1948.¹¹⁹ Sometime between April 8-10, orders went out from the Haganah General Staff to the Haganah units involved to clear away and, if necessary, expel most of the remaining Arab rural communities.¹²⁰

Arieh Yitzhaqi, historian and researcher, stated:

If we assemble the facts, we realize that, to a great extent, the battle followed the familiar pattern of the occupation of an Arab village in 1948. In the first months of the War of Independence, Haganah and Palmach troops carried out dozens of operations (where) the method adopted being to raid an enemy village and blow up as many houses as possible in it. In the course of these operations, many old people, women and children were killed wherever there was resistance.¹²¹

From April to June of 1948 there was a mass exodus of Arabs from Israel.¹²² The Haganah were using many different methods by which to extract the Arab populous, everything from scare tactics to physical round-ups. This was conducted in the major Israeli cities as well as throughout the countryside.¹²³ "The evacuation of Arab civilians had become a war aim," said Haganah officer Uri Avnery, who would later become a member of Israel's parliament.¹²⁴ The Arabs of Palestine were "ejected and forced to flee into Arab territory".¹²⁵ "Wherever the Israeli troops advanced into Arab country, the Arab population was bulldozed out in front of them."¹²⁶ It typically sufficed, recalled Avnery, "to fire a few shots in the direction of Arab villages to see the inhabitants, who had not fought for generations, take flight".¹²⁷

UN Mediator, Count Folke Bernadotte reported shortly before his assassination that "almost the whole of the Arab population fled or was expelled from the area under Jewish occupation".¹²⁸ Figures on Arab Palestinian populations before and after expulsion are: Jaffa 70,000 to 3,600; Haifa 70,000 to 2,900; Jerusalem 70,000 to 3,500; Tiberias 5,300 to virtually none; Safad 9,530 to virtually none; Beisan 5,180 to virtually none; and Beersheeba 6,500 to virtually none.¹²⁹ The Arab population on December 31, 1948, according to an Israeli government count, was only 36,814.¹³⁰

¹¹⁸ *Id.* at 54-58.

¹¹⁹ *Id.* at 64.

¹²⁰ *Id.* at 61-64. The implementation of Plan D was not limited to the Haganah, on April 9th the most outstanding incident which accelerated the panic flight of Arab inhabitants was the massacre of over 250 men, women and children in the Palestinian Arab village of Deir Yassin. Deir Yassin was only one of a number of such massacres by the Zionist militias. *Id.* at 113.

¹²¹ HADAWI, *supra* note 59, at 88.

¹²² MORRIS, *supra* note 105 at 61.

¹²³ *Id.* at 61-131.

¹²⁴ QUIGLEY, *supra* note 73, at 82 (quoting Michael Palumbo, *The Palestinian Catastrophe*, Palest. Post, Jun. 30, 1948 at 119).

¹²⁵ *Id.* at 82-83 (quoting EDGAR O'BALLANCE, *THE ARAB-ISRAELI WAR, 1948* (1981)).

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting Uri Avnery, *Les refugies arabes obstacle a la paix*, Le Monde, May 9, 1964 at 2).

¹²⁸ Progress Report of the United Nations Mediator on Palestine, U.N. GAOR, 3d Sess., Supp. No. 11, at 14.

¹²⁹ QUIGLEY, *supra* note 73, at 86.

¹³⁰ MORRIS, *supra* note 105, at 66 (The notion that the Arabs themselves encouraged Arab inhabitants to flee has been dismissed by most historians. There is no hard evidence that such 'encouragement' ever took place).

6. Efforts to Preserve the New Status Quo: Deciding Against a Return of the Refugees.

The exodus of the Arab inhabitants from Palestine was seen as a great triumph for Zionism and as such, was deemed to necessitate measures that would preserve this new status quo. Weitz regarded the Arab exodus, which he had helped promote, as an implementation of the transfer schemes of the late 1930's, which had envisaged the movement of the Arab minority out of the future Jewish State so that it would become demographically homogeneous, politically stable and secure against subversion from within.¹³¹ During March and April 1948, Weitz desperately sought political backing and help to implement the transfer. From May 1948, Weitz pressed to oversee the "transfer policy" which was to focus on measures assuring that there could be and would be no return for the Palestinian refugees.¹³² One of the first unofficial Transfer Committee members, Danin, suggested that as a matter of policy, they should destroy Arab houses, "settle Jews in all the area evacuated," and expropriate Arab property.¹³³

On June 5, 1948, Weitz presented to Ben-Gurion, the first Prime Minister of Israel, a three-page memorandum entitled "Retroactive Transfer, A Scheme for the Solution of the Arab Question in the State of Israel".¹³⁴ The memorandum stated that the war had brought about "the uprooting of masses [of Arabs] from their towns and villages and their flight out of the area of Israel . . . This process may continue as the war continues and our army advances."¹³⁵ The war and the exodus had so deepened Arab enmity "as perhaps to make possible the existence of hundreds of thousands of Arabs in the State of Israel and the existence of the state with hundreds of thousands of inhabitants who bear that hatred."¹³⁶ "Israel, therefore, must be inhabited largely by Jews, so that there will be in it very few non-Jews" and that "the uprooting of the Arabs should be seen as a solution to the Arab question in the State of Israel and, in line with this, it must from now on be directed according to a calculated plan geared towards the goal of 'retroactive transfer'."¹³⁷ To consolidate and amplify the transfer, the Committee proposed the following actions:

- (1) Preventing the Arabs from returning to their places.
- (2) [Extending] help to the Arabs to be absorbed in other places.

Regarding the first line, the Committee proposed:

- (1) Destruction of villages as much as possible during military operations.
- (2) Prevention of any cultivation of land by them, including reaping, collection [of crops], picking [olives] and so on, also during times of cease-fire.
- (3) Settlement of Jews in a number of villages and towns so that no "vacuum" is created.
- (4) Enacting legislation [geared toward barring a return]
- (5) [Making] propaganda [aimed at non-return]¹³⁸

Ben-Gurion approved the Committee and its start of organized destruction of the Arab villages. Using his JNF apparatus and network of land-purchasing agents and intelligence operatives, Weitz had his agents tour the countryside to determine which villages should be

¹³¹ MORRIS, *supra* note 105, at 133-134

¹³² *Id.*, at 135.

¹³³ *Id.*

¹³⁴ *Id.* at 136.

¹³⁵ *Id.*

¹³⁶ *Id.* at 136.

¹³⁷ *Id.*

¹³⁸ *Id.*

destroyed and which should be preserved as suitable for Jewish settlement and set in motion the leveling of Arab villages as.¹³⁹

On August 18, 1948, Ben-Gurion called a meeting to review Israeli policy on the issue of return of the refugees which was attended by the country's senior political leaders and senior political and Arab affairs officials. The meeting was a milestone in the finalization of Israeli policy on a possible return of the refugees. One attending official summed it up the following day: "The view of the participants was unanimous, and the will to do everything possible to prevent the return of the refugees was shared by all".¹⁴⁰ The participants were united on the need to bar return and there was general, if not complete, agreement about the means to attain this end: destruction of villages, settlement of Jews in new villages and on abandoned lands, cultivation of Arab fields, purchase and expropriation of Arab lands, and the use of propaganda to persuade the refugees that they would not be allowed back.¹⁴¹ The political decision to bar the return of Arab refugees was reaffirmed, repeatedly, at various levels of government over the following months as successive communities of exiles asked to be allowed back.¹⁴²

7. Changing the Demographic and Physical Face of Palestine:

In the course of 1948 and the first half of 1949, the physical and demographic face of Palestine was forever changed. The possibility of an Arab refugee return more and more remote until, by mid-1949, it became virtually inconceivable.¹⁴³ The processes responsible were the gradual destruction of the abandoned Arab villages, the cultivation and/or destruction of Arab fields and the share-out of the Arab lands to Jewish settlements on abandoned lands and sites and the settlement of Jewish immigrants in empty Arab housing in the countryside and in urban neighborhoods.¹⁴⁴ Taken together, they assured that there would be nowhere and nothing to which the refugees could return.

a. Destruction of Villages:

About 350 Arab villages and towns were the target of depopulation in the course of the 1948-9 war and during its immediate aftermath.¹⁴⁵ By mid-1949, the majority of these sites were either completely or partly in ruins and uninhabitable due to vandalism and looting, and to deliberate demolition, with explosives, bulldozers and, occasionally handtools, by Haganah and IDF units or neighboring Jewish settlements in the months after their conquest.¹⁴⁶ After the start of general hostilities in December 1947, the dynamiting of Arab houses and parts of villages became a major component of most Haganah retaliatory strikes.¹⁴⁷

The destruction of the villages became a major political enterprise.¹⁴⁸ During the rest of 1948, and through 1949 and the early 1950's, the destruction of abandoned Arab sites, usually already half-destroyed, continued.¹⁴⁹ Quantification of the destruction in the course of 1948 and early 1949 is impossible: how many of the 350-odd villages were completely destroyed, how many largely destroyed and how many partially destroyed is unclear.¹⁵⁰

¹³⁹ *Id* at 137.

¹⁴⁰ *Id* at 148.

¹⁴¹ *Id.* at 148-49.

¹⁴² *Id.* at 154.

¹⁴³ *Id.* at 155.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 156.

¹⁴⁷ *Id.* at 156-158.

¹⁴⁸ *Id.* at 160.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 169.

b. Take over and allocation of Palestinian lands:

The Jewish take-over of the Arab lands in Palestine began with the ad hoc reaping of crops in abandoned Arab lands by Jewish settlements in the spring of 1948.¹⁵¹ As the summer crops ripened and as the Arab evacuation gained momentum, Jewish harvesting of Arab fields spread throughout the country.¹⁵² During late April and early May 1948, requests from settlements and regional councils to harvest abandoned fields poured into the Committee for Abandoned [Arab] Property, headed by Gad Machnes, which began to organize the cultivation. The Committee for Abandoned Property-which soon became the Arab Property Department and then the Villages Department in the Office of the Custodian for Abandoned Property-regarded the abandoned crop as Jewish state-property and sold the right to reap it to Jewish farmers and settlements.¹⁵³ The land administration authorities leased tens of thousand of dunams of abandoned Arab lands to Israeli settlements and farmers.¹⁵⁴ By October 320,000 dunams of "abandoned" land for cultivation had been formally another 80,000 was expected to soon be approved for Jewish cultivation.¹⁵⁵ During the second half of 1949, a further one million dunams was anticipated to be leased.¹⁵⁶

c. Establishment of New Settlements:

Between November 30, 1947, the first day of the Arab-Jewish hostilities, and the beginning of March 1949, the number of Jewish settlements increased by 53, followed by 80 more at the end of August 1949.¹⁵⁷ Almost all these settlements were established on Arab-owned lands and dozens of them were established for territory earmarked in the 1947 United Nations Partition Resolution for the Palestine Arab state.¹⁵⁸ The settlements, mostly kibbutzim (collective farms), had expanded and deepened the Jewish hold on parts of Palestine, gradually making more of the country "Jewish". Each new settlement or cluster of settlements staked out the Jewish claim to a new area.¹⁵⁹

The strategy for resettlement of new Jewish immigrants was to settle them in abandoned Arab villages and homes; to especially inhabit abandoned homes in mixed Jewish Arab and Arab districts in the mixed cities.¹⁶⁰ It was the Transfer Committee that first proposed that the government adopt as part of a coherent and multi-faceted program the bar of the return of Arab refugees, and the settlement of new immigrants in abandoned Arab housing.¹⁶¹ In April 1949, it was reported that of 190,000 immigrants who had arrived since the establishment of the State, 110,000 had been settled in abandoned Arab houses.¹⁶²

B. Denial of Citizenship to Palestinians in their Country of Origin, and their Status as Stateless Persons under International Law.

Not only were the new Palestinian refugees barred from returning to their homes, but they

¹⁵¹ *Id.* at 170.

¹⁵² *Id.* at 170-171.

¹⁵³ *Id.* at 171.

¹⁵⁴ *Id.* at 176.

¹⁵⁵ *Id.* at 176-179.

¹⁵⁶ *Id.* at 179.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 179 n. 99.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 188-189.

¹⁶¹ *Id.* at 190.

¹⁶² *Id.* at 195.

also were retroactively deprived of their citizenship. Under Ottoman rule the inhabitants of Palestine were considered Turkish nationals. As discussed, after World War I, the British became the mandatory power of the area. Under the British mandate system, the inhabitants of such territories were not to be considered nationals of the administering powers, although they might benefit from the exercise of diplomatic protection.¹⁶³ Accordingly, Palestinian citizens¹⁶⁴ were treated in Great Britain on the same footing as British Protected Persons;¹⁶⁵ at the same time a Palestinian citizen was not a British subject.¹⁶⁶

Mandate-citizenship was regulated by the Palestinian Citizenship Order, 1925-41¹⁶⁷ and included acquisition by birth.¹⁶⁸ Palestinian citizens were eligible for a British passport issued by the government of Palestine. The passport referred to the national status of its holder as 'Palestinian citizen under Article One or Three of the Palestinian Citizenship Order, 1925-41'.¹⁶⁹ Palestinian citizenship, as a product of the mandatory authority, terminated with the mandate and with the proclamation of the state of Israel on May 15, 1948. Although there is some argument under international law that citizenship and other laws continue even after a certain territory has been annexed or abandoned, only one case has come to such a decision in the Palestinian context.¹⁷⁰

Thus, Palestinians' nationality status fell within a legal lacuna. Although Israel had no nationality legislation until 1952, Israeli courts have held that on the termination of the mandate, former citizens of Palestine had lost their citizenship without acquiring any other.¹⁷¹ For purposes of Israeli municipal law, the issue was resolved by a Supreme Court decision¹⁷² and by the 1952 Nationality Law¹⁷³. The 1952 Nationality Law confirmed repeal of the Palestinian Citizenship

¹⁶³ See League Council Resolution of 22 Apr. 1923, Official Journal, 604, *quoted* in PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 20 (1979), which reads: "The Council of the League of Nations; Having considered the report of the Permanent Mandates Commission on the national status of the inhabitants of territories under B and C mandates; In accordance with the principles laid down in Art. 22 of the Covenant resolves as follows: (1) The status of the native inhabitants of a mandated territory is distinct from that of the Mandatory Power and cannot be identified therewith by any process having general application; (2) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them; (3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalization from the Mandatory Power in accordance with arrangements which it is open to such Power to make, with this object, under its own law; (4) It is desirable that native inhabitants who receive protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate."

¹⁶⁴ Their citizenship derived from their status as Turkish nationals.

¹⁶⁵ Weis, *supra* note 163 at 18-20, 22.

¹⁶⁶ In a judicial decision by the English High Court in *R v. Ketter* [1940] 1 KB 787, it was held that the appellant, a native of Palestine born at the time when that territory was under Turkish sovereignty, but holding a passport marked 'British Passport-Palestine', had not become a British subject by virtue of art. 30 of the Treaty of Lausanne of 24 July 1923 (UKTS, No. 16/1923), nor under the terms of the Mandate agreement of 24 July 1922, since Palestine was not transferred to and, consequently, was not annexed by Great Britain by either Treaty of Mandate; *cited* in Weis, *supra* note 163 at 21.

¹⁶⁷ S.R. & O., 1925, No. 25.

¹⁶⁸ Art. 3, Palestinian Citizenship Order; cf. Bierwith, 1990, 61.

¹⁶⁹ LEX TAKKENBERG, THE STATUS OF PALESTINIANS REFUGEES IN INTERNATIONAL LAW at 180, n. 35 (Clarendon Press 1998), *citing* a copy of passport that he has on file.

¹⁷⁰ *A.B. v. M.B.*, 17 ILR 110 (1950), (holding that "So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel, was resident in the territory which today constitutes the State of Israel, is also a national of Israel.")

¹⁷¹ See *Oseri v. Oseri* (1953) 8PM 76; 17 ILR 111 (1950); *Estate of Shifris, Pesakim Mehoziim*, vol. iii, 222 (1950-51).

¹⁷² *Hussein v. Governor of Acre Prison, Piskei Din*, vol. vi (1952), (holding that Palestinian citizenship ceased to exist, in the territory of Israel and in other parts of the former mandated territory of Palestine, after the establishment of the state of Israel and the annexation of the other parts to neighboring states). See also *Nakara v. Minister of the Interior* (1953) 7 PD 955; 20 ILR 49 (1953).

¹⁷³ Nationality Law, 5712/1952, 93 *Official Gazette* 22 (1952).

Orders 1925-42, retroactively to the day of the establishment of the state of Israel.¹⁷⁴ It declared itself the exclusive law on citizenship, which was available by way of return, residence, birth and naturalization.¹⁷⁵ Former Palestinian citizens of Arab origin were eligible for Israeli nationality provided that they met the conditions of Section 3, which states:

- (a) A person who immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israel national under section 2, shall become an Israel national with effect from the day of the establishment of the State if:
 - (1) he was registered on the 4th Adar, 5712 (March 1, 1952) as an inhabitant under the Registration of Inhabitants Ordinance, 5709-1949; and
 - (2) he is an inhabitant of Israel on the day of the coming into force of this Law; and
 - (3) he was in Israel, or in an area which became Israel territory after the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.
- (ii) A person born after the establishment of the State who is an inhabitant of Israel on the day of the coming into force of this Law, and whose father or mother becomes an Israel national under subsection (a), shall become an Israel national which effect from the day of his birth.¹⁷⁶

These strict requirements meant that the vast majority of those who as a result of the 1948 war were displaced outside the territory of what became Israel, were effectively denied Israeli citizenship.

Under international law most Palestinians are stateless since most are not considered a national by any State under the operation of its law. Under the 1954 Statelessness Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention), a stateless person is defined as "a person who is not considered as a national by any State under the operation of its law".¹⁷⁷ The 1961 UN Convention on the Reduction of Statelessness (1961 Convention) adopts the same definition of stateless persons.¹⁷⁸ Although the United States has ratified neither the 1954 nor the 1961 Statelessness Conventions¹⁷⁹, it is widely recognized that the definition of "statelessness" that Article 1 of the 1954 Statelessness Convention establishes has become customary international law.¹⁸⁰ In 1949, just one year after the Palestinian refugee crisis occurred, the United Nations conducted a Study of Statelessness, that established a broader definition for the term "stateless persons". The study's definition included not only *de jure* stateless persons but also *de facto* stateless persons—those persons who "having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities."¹⁸¹ The 1961 Convention reflects this expanded definition, and 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.'¹⁸²

The legal relevance of statelessness to the Palestinian refugee regime is not the same as for other stateless persons whose claims to refugee status are to be examined under Article 1A(2) of the 1951 Refugee Convention.¹⁸³ In recognition of the denial of statehood and nationality to the Palestinians as a people, and of the United Nations body's partial responsibility for this, the

¹⁷⁴ *Id.* at §18, para. (a).

¹⁷⁵ *Id.* at §1.

¹⁷⁶ *Id.* At §3.

¹⁷⁷ Art. 1, 1954 UN Convention Relating to the Status of Stateless Persons: 360 UNTS 117.

¹⁷⁸ 1961 UN Convention on the Reduction of Statelessness. 989 U.N.T.S. 175 (30 Aug. 1961)

¹⁷⁹ Forty-two states have ratified the 1954 Convention; 17 have ratified the 1961 Convention. Nevertheless, the definition of statelessness as well as a number of other general principles on the application of the concept of statelessness are relatively uncontroversial, and have been accepted as customary international law. GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 243-246 (Clarendon Press 1996).

¹⁸⁰ *Id.* at 244 n.199.

¹⁸¹ A Study of Statelessness, at 9. UN doc. E/1112 (1 Feb. 1949); E/1112/Add.1 (19 May 1949).

¹⁸² 1961 UN Convention on the Reduction of Statelessness: UN doc. A/CONF.9/15, Final Act.

¹⁸³ 1951 Refugee Convention, *supra*, note 1, Art. 1A(2).

1951 Refugee Convention drafters established a separate regime under Article 1D¹⁸⁴, the UNRWA Statute¹⁸⁵, the UNCCP Mandate¹⁸⁶ and the UNHCR Statute¹⁸⁷ *providing for heightened protection for the Palestinians which changed the normal refugee consequences of statelessness under the 1951 Refugee Convention*. This is the least understood aspect of the Palestinian refugee regime, and of Article 1D.

Most countries have dealt with asylum claims from Palestinian refugees in the same way as those from any other country, applying the normal analysis of Article 1A(2) to these claims. These states either do not apply Article 1D at all; or misinterpret the time that Article 1D second sentence triggers; or misinterpret Article 1D entirely by assuming it means Palestinian claims are to be adjudicated in the same manner as other refugees under the 1951 Refugee Convention. The United States, for example, has not incorporated Article 1D of the 1951 Refugee Convention into its refugee definition under the 1980 Refugee Act.¹⁸⁸ The statutory definition includes only the Article 1A(2) definition of a refugee as "any person who...is unable or unwilling to return to...[his country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁸⁹ Although the US incorporates variations of the exclusion and cessation clauses of the 1951 Refugee Convention Articles 1C, 1E and 1F, there is no reference to the provisions of Article 1D in the INA¹⁹⁰. In similar fashion, Canada's Immigration Act defines a 'Convention Refugee' in its Paragraph 1, subsection 2, which is based on Article 1A(2) of the 1951 Refugee Convention, and incorporates Convention Articles 1E and 1F, but does not refer to 1D.¹⁹¹ Canada examines Palestinian claims based on the usual Article 1A(2) analysis; nevertheless, Canadian grants of asylum to Palestinians are very high, in recognition of the widespread persecution they face.¹⁹²

Austria and Switzerland also take a similar approach. Austria incorporates the 1951 Refugee Convention definition of Article 1A(2) in total in its 1991 Asylum Law.¹⁹³ The 1991 Asylum Law refers to the 1951 Refugee Convention Articles 1C and 1F, but does not refer to Article 1D.¹⁹⁴ Palestinians are, thus, treated like any other 1951 Refugee Convention refugees.¹⁹⁵ The Swiss Asylum Law does not incorporate 1951 Refugee Convention language, but rather has its own refugee definition, which requires a showing of whether the person is persecuted in his country of residence.¹⁹⁶ Although the Swiss law has cessation clauses similar to Article 1C, there is no provision based on 1D.¹⁹⁷

¹⁸⁴ *Id.*, Art. 1D.

¹⁸⁵ UNRWA Statute, *supra*, at note 3.

¹⁸⁶ UNCCP Mandate, *supra*, at note 27.

¹⁸⁷ UNHCR Statute, *supra*, at note 2.

¹⁸⁸ The Refugee Act of 1980, 19 *ILM*703 (1980).

¹⁸⁹ Immigration and Nationality Act of 1990 30 *ILM*298 (1991) (INA) § 101(a)(42)(A) and § 208(a), 8 USC § 1101(a)(42)(A) and § 1158(a).

¹⁹⁰ *Id.* See, Immigration and Nationality Act Amendments of 1986, 26 *ILM*528 (1987).

¹⁹¹ Canada Immigration Act, 1976-77 c. 52, s. 1.

¹⁹² TAKKENBERG, *supra* note 169 at 102, n. 63 (Takkenberg reports that of a sampling of 156 Palestinian claims in Canada between 1989 and 1991, 92% were granted). See, for example, cases of the Canadian Immigration and Refugee Board (IRB): CRDD N. 726, No. C90-00163, decision of 1 Oct. 1990, (a Palestinian UNRWA-registered refugee living in the Gaza Strip was involved in anti-Israeli activities. The IRB concluded "the claimant has a well-founded fear or persecution by reason of political opinion"); see also, CRDD N. 205, No. T89-03533/34 (16 May 1990)(concerning the grant of asylum to a Palestinian refugee from Lebanon); CRDD N. 327, No. T89-05579 (5 July 1990)(granting asylum to a Palestinian from the West Bank).

¹⁹³ The 1991 Asylum Law [Asylgesetz 1991, BGBl 1992/8], entered into force on 1 June 1992.

¹⁹⁴ *Id.*

¹⁹⁵ UNHCR reports that very few Palestinians have been recognized as refugees in Austria. Between 1988 and 1991, of almost 100 Palestinians who applied, only "several" were given refugee status.

¹⁹⁶ Article 3, Asylum Law of Switzerland (*discussed* in Bundesamt für Flüchtlinge & Schweizerische Zentralstelle für Flüchtlingshilfe/Office central suisse d'aide aux réfugiés).

¹⁹⁷ *Id.*

Australia's Migration Act of 1958 refers entirely to the 1951 Refugee Convention refugee definition¹⁹⁸; yet it does not seem to apply Article 1D.¹⁹⁹ The United Kingdom also incorporates the 1951 Refugee Convention, but appears to ignore the application of Article 1D.²⁰⁰

The effect of these states' failure to apply Article 1D has been that they then erroneously apply the 1951 Refugee Convention Article 1A(2) analysis for stateless persons to Palestinians.²⁰¹ The 1951 Refugee Convention language applicable to a putative refugee who is stateless requires that: "[a person] not having a nationality and being outside the country or his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."²⁰² Most Palestinian cases appear to be denied on the basis that they cannot show a well-founded fear of returning to the 'country of former habitual residence.'²⁰³ The UNHCR Handbook contributes to this confusion by stating: "a refugee from Palestine who finds himself outside [the UNRWA area] does not enjoy the assistance mentioned and may be considered for *determination of his refugee status* under the criteria of the 1951 Refugee Convention."²⁰⁴ The UNHCR's suggestion that if a Palestinian is no longer receiving 'assistance', his claim can be considered for determination of his refugee status under the 1951 Refugee Convention criteria, is clearly wrong, as it eviscerates the meaning of the ipso facto clause. These interpretations simply fail to conform to the appropriate 1951 Refugee Convention analysis required by Article 1D. By refusing to apply Article 1D, or failing to apply it properly, these states are subverting the intention of the 1951 Refugee Convention drafters, and have breached their obligations under that instrument.²⁰⁵

C. Denial of Citizenship to Palestinians, and their Lack of Protection in Countries of Refuge.

1. Denied Citizenship in Countries of Refuge:

At the same time that the majority of Palestinian refugees were denied Israeli citizenship, local citizenship in their respective countries of refuge, for the most part has also been unavailable. It is estimated that of 6,375,800 Palestinian refugees, only approximately 2,643,764 have been granted citizenship anywhere in the world.²⁰⁶ The denial of citizenship has occurred for a

¹⁹⁸ Migration Act of 1958 of Australia, Section 6A.

¹⁹⁹ See, e.g., decision of the Australian Federal Court of 22 May 1989, *Damouni and Another v. Minister for Immigration, Local Government and Ethnic Affairs*, 85 ILR 182 (1991).

²⁰⁰ See, e.g., *Alsawaf v. Secretary of State for the Home Department*, 5 IJRL 465, [1988] Imm. A.R. 410 Court of Appeal (Civil Division).

²⁰¹ Alternatively, they may apply the provision requiring a showing of well-founded fear of the country of 'nationality' based on the assumption that any one of a number of travel or identity documents issued to Palestinians reflects their nationality in the state of issuance.

²⁰² 1951 Refugee Convention, *supra* note 1 at Art. 1A(2).

²⁰³ Canada's Convention Refugee Determination Division for some time applied the principle that because stateless persons cannot be returned to any state (no state other than the state of nationality being required to admit anyone), stateless persons cannot be *refouled*, and so cannot be refugees. This principle was used primarily to deny Palestinians who were expelled from the Gulf states refugee protection in Canada. This view has since been repudiated by the Canadian Federal Court. See *Desai v. Canada (Minister of Citizenship and Immigration)* [1994] FCJ No. 2032. See, GOODWIN-GILL, *supra*, note 179 at 42, n. 43.

²⁰⁴ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (UNHCR Handbook) para. 143 (reedited 1992).

²⁰⁵ This brief does not argue that Palestinians who have been granted citizenship and receive corresponding state protection should be recognized as ipso facto refugees under Article 1D. Rather the focus here is on the majority of Palestinians who are not "definitively settled" in accordance with the relevant UN Resolutions, and have not received citizenship along with permanent protection from another state.

²⁰⁶ DONNA E. ARZT, *REFUGEES TO CITIZENS* 60 (Council on Foreign Relations 1997).

variety of reasons. First, Palestinian refugees were admitted to neighboring countries on what was expected to be a temporary basis thus, local citizenship appeared unnecessary.²⁰⁷ Additionally, there was and continues to be a political consensus in the Arab world that the only acceptable solution to the Palestinian refugee problem is repatriation and self-determination. Most of the refugees themselves wished to become neither Israeli citizens nor citizens of their host countries since either would acquiesce in the legitimacy of the state of Israel. Palestinians' citizenship status (or lack thereof) will be examined below on a state-by-state basis.

a. West Bank:²⁰⁸

Until 1988, most West Bank residents automatically held Jordanian citizenship. After Jordan announced its Decision of Administrative "Disengagement" from the West Bank in July 1988, it began to regard the residents as non-Jordanians, continuing to issue them travel documents, but only for two years' duration. As other Arab states perceive the two-year paper as a refugee document only, many have refused to grant entry visas to its holders. In October of 1995, the Jordanian Department of Civil Affairs and Passports announced that under new regulations, West Bankers who had a Palestinian passport before July 1988 could replace their two-year documents with a regular five-year passport, even if they had lost their right to West Bank residency. However, the new passport will not serve to confer renewed Jordanian citizenship to West Bankers; the move is apparently just a humanitarian gesture on the kingdom's part. Moreover, until the Palestinian Authority began issuing its own travel documents in November 1995, West Bankers who traveled abroad had to acquire permits from the Israeli civil administration; they lost their right of return if they overstayed their travel visas. Further, the legal status of spouses married to non-Palestinians and of family members who do not reside in the West Bank remains a complex, generally unresolved issue. Of 1,200,000 Palestinians in the West Bank, only approximately 7,500 have full citizenship.

b. Gaza Strip:²⁰⁹

It is estimated that of the 880,000 Palestinians residing in the Gaza Strip, virtually none have citizenship of any state. Between 1948 and 1967, all Gazans were issued *laissez-passer* travel documents by Egypt, the administering power, which continued to renew them even after 1967. However, when Kuwait expelled hundreds of thousands of Palestinians after the Gulf War in 1991, Egypt refused to recognize valid Egyptian-issued documents held by about 25,000 Gazans who had been working in Kuwait and out of the Strip for many years.

After the Israeli occupation began, Gazan residents were required to have Israeli-issued identity cards, which could be revoked by the civil administration. Spouses and children of identity card holders (including those born in Gaza) who did not themselves hold such cards had to apply for family reunification in order to receive residency permits. Because few such applications were granted, many Gazan wives and children were living in the Strip illegally. Gazans seeking to leave Gaza needed *laissez-passer* documents from either Egypt or Israel. The procedure for international travel since autonomy began is unclear. But to travel to Israel or the West Bank, Gazans still need special work permits and magnetic identity cards.

²⁰⁷ Benny Morris states: "In any case, no one regarded the exodus as permanent; surely the refugees would within weeks return to their homes, in the wake of the Arab invaders". MORRIS, *supra* note 105, at 66.

²⁰⁸ ARZT, *supra* note 206 at 40-41.

²⁰⁹ ARZT, *supra* note 206 at 41-43.

c. Jordan:²¹⁰

Jordan has been by far the most hospitable country of refuge for displaced Palestinians. Jordan at first granted full citizenship to all Palestinian refugees and their descendants who were "habitually residents in 1954". It did not matter whether they lived on the East Bank or West Bank, because in that era Jordan had incorporated the West Bank and Palestinians drifted back and forth fairly readily. Many families had branches and homes on both sides of the river. However, once Israel took over control of the West Bank, the situation became more confused. In 1983, the Jordanian government created a dual system: yellow cards, which represented full residency and full citizenship rights for persons who had left the West Bank for the East Bank before June 1 of that year; and green cards, providing a renewable two-year Jordanian "passport" and no right of residence for those who left the West Bank after June 1, 1983. Green card holders can visit Jordan for only up to one month at a time. Thus it is really no more than a travel document, of the type also issued to Palestinians by Egypt, Syria, Lebanon, and Israel. As already noted, Jordan has recently announced that green card holders can apply again for five-year passports, but such a passport does not constitute full formal citizenship.

The main category of Palestinians in Jordan who are not Jordanian citizens consists of those displaced from the Gaza strip in 1967. They constitute approximately 70,000 persons. As noncitizens, they need official permission to work and then they can do so only in the private sector. The noncitizens use Egyptian travel documents when traveling abroad and need return visas to get back into Jordan. Permission to remain or return is granted or denied at the whim of the Jordanian government.

d. Syria:²¹¹

Syria officially treats Palestinians "like Syrians by origin in Syria, in all matters pertaining to . . . the rights of employment, work, commerce and national obligations and by keeping their nationality of origin."²¹² They also have full, unrestricted access to government schools and universities. However, unlike Jordan, Syria does not grant citizenship to Palestinians, unless they are women married to Syrian men (but not vice versa) or had Syrian citizenship before 1948. Instead Palestinians are issued Palestinian travel documents. It is estimated that fewer than 3,500 of the 350,000 refugees have Syrian citizenship. Syria prohibits Palestinian residents of the newly autonomous areas of Gaza and Jericho from entering the country, even for short visits. The government has also refused to cooperate with the Palestinian Authority itself; it is perhaps the only Arab state that does not recognize the travel documents that the Authority has recently been issuing.

e. Lebanon:²¹³

Lebanon may be the most inhospitable country of refuge for Palestinians. In 1995, the government decided that all Palestinians, even those holding Lebanese travel documents, would

²¹⁰ ARZT, *supra* note 206 at 43-45.

²¹¹ ARZT, *supra* note 206 at 48.

²¹² Law no. 260 (July 10, 1956)(*cited in* ARZT, *supra* note 206, at 48). Additionally, it is relevant that although it can be said that Palestinians are Syrian citizens "in all but name," that must be understood within the context of Syria's notorious human rights record. Hundreds of Palestinians are languishing in Syria's notoriously over-crowded jails, many held without trial, others with sentences as long as 12 years, for crimes such as spying for the PLO, trying to emigrate without permission, traveling to Israel, or for no known grounds. It has also been reported that since the 1960's, between 90,000 and 120,000 Syrian Kurds have had their citizenship revoked. In that sense, Syrian citizenship, at least in its current guise, is not such a valuable form of protection, even if the government was readily willing to grant it to Palestinians, which is doubtful.

²¹³ ARZT, *supra* note 206 at 45-47.

henceforth require visas to exit and reenter the country. About 25,000 Palestinians who have managed to obtain non-Lebanese passports are said to have been denied residency altogether. Only 30,000 of Lebanon's Palestinian population of 372,700 has been granted citizenship. Lebanese officials have on more than one occasion expressed an intention to expel all Palestinians at the earliest possible occasion. "Opposition to their resettlement is one of the few issues that unites the Lebanese government and public opinion across most of the sectarian communities, particularly since the 1989 Ta'if Accord".²¹⁴ The Beirut-based anthropologist Rosemary Sayigh states that the two publicly declared Lebanese policies toward the Palestinians—reestablishment of state control over them and refusal of *tawtin* (naturalization)—have been supplemented by a third, undeclared one: "encouraging Palestinian emigration through the intensification of various pressure".

f. Egypt:²¹⁵

Egypt was responsible for the military administration of the Gaza Strip between 1949 and 1967; however, Palestinian migration from Gaza to Egypt was kept to a minimum, with an exception only for foreign university students, who were given government scholarships. During the 1967 war, members of the Gazan police, the Palestinian Liberation Army, and their families retreated with the Egyptian army, thereby doubling the number of Palestinians in Egypt to about 33,000. Since then, the borders have been generally closed to Palestinians.²¹⁶ Currently, only Palestinian university students are being admitted.

Beginning in 1949, the Egyptian government issued either Egyptian identity cards or All-Palestine Government (APG) travel documents to Palestinians in both Egypt and Gaza. The short-lived APG had been formed in 1948 to serve as a representative body for the refugees. Its travel documents provided only for one year's residency and forbade the bearer from working. These documents were replaced in 1960 by United Arab Republic (U.A.R.) travel papers, but these were little more than "symbols of nationalistic pride". They required frequent renewal, sometimes granted only when financial security could be demonstrated. In 1962, the U.A.R. disbanded and as a result of growing sympathy for the Palestinian cause among the Egyptian public and government, Palestinians were now authorized to work in public sector jobs and to send their children to government schools.

These "mild privileges" apparently came to an end in 1977 as a response to a demonstration held by the PLO and Palestinian students protesting Anwar Sadat's trip to Jerusalem. The status of Palestinians in Egypt was downgraded from "residents" to "foreigners," who must pay hard currency to obtain permission to remain. Although relations have improved somewhat recently, the Palestinians' educational, health, and employment privileges have not been restored.

2. Lack of Protection in Countries of Refuge:

Palestinians' special status as *ipso facto* refugees is underscored by the lack of permanent status and lack of protection by third states in which they have found temporary refuge. These states themselves have, at various times, either engaged directly in persecuting the Palestinian refugees, or failed to provide them with appropriate protection either from Israeli persecution or

²¹⁴ Rosemary Sayigh, *Palestinians in Lebanon: Harsh Present, Uncertain Reality*, J. of Palest. Stud. 25, 37 (Autumn 1995).

²¹⁵ ARZT, *supra* note 206 at 55-56.

²¹⁶ Arzt cites the example of Libyan expulsions of its Palestinian population in the fall of 1995. Egypt refused entry to all Palestinians expelled from Libya. Instead Egypt bused those with Jordanian passports to Jordan. ARZT, *supra* note 206, at 55-56.

persecution by other groups within those states. As far as state persecution, Lebanon²¹⁷, Syria²¹⁸, Jordan²¹⁹, Egypt²²⁰ and various of the states in the Arabian Gulf²²¹ have killed, imprisoned, tortured, expelled and denied basic human and economic rights to the Palestinians residing in their territories.²²²

In Lebanon, during fifteen years of civil war involving Palestinians and various Lebanese military and militia groups, there were many massacres of Palestinian civilians both inside and outside the many refugee camps. Three of the official Palestinian refugee camps were completely destroyed, but deliberate bombings and massacres by the Lebanese army, Lebanese militias and Israeli forces occurred also at the camps of Ein El-Hilweh; Burj el-Barajneh; Mieh Mieh and Sabra and Chatila. The most well-known single atrocity was on 17 September, 1982, when Lebanese Christian militias, entering the Sabra and Chatila camps with the assistance and full cooperation of Israeli Defence Forces, massacred hundreds of Palestinian civilians, including women and children.²²³ The Lebanese militias were given approval for the massacre by the occupying Israeli forces after the Palestinian Liberation Organization (PLO) army was forced to leave Lebanon with its families and communities left defenseless in the camps.²²⁴ Amongst these listed refugee camps alone, thousands of Palestinians have lost their lives. Since 1982, rightist militias in Lebanon have bulldozed Palestinian homes, killed or evicted Palestinians living outside the camps, imprisoned thousands of ordinary people whose only crime was being Palestinian, and destroyed Palestinian social and cultural institutions, in a concerted campaign of persecution.²²⁵

In Lebanon the Israeli army also killed and injured thousands of Palestinians (as well as Lebanese) civilians during its invasion in 1982, and destroyed thousands of Palestinian homes as well as targeting direct assaults on Palestinian refugee camps.²²⁶ The persecution by Israel and its proxy army the South Lebanon Army, continues in the south of Lebanon, both in the territory Israel has occupied since 1982, and outside the occupation zone where Israeli shelling and bombing against Palestinians as well as South Lebanese occurs on a regular basis.²²⁷

Jordan and Syria have also persecuted, or failed to protect, their Palestinian refugee population. In 1970, during the infamous "Black September" purge, King Hussein's forces

²¹⁷ Sayigh, *supra* note 214 at 37.

²¹⁸ See LAURIE A. BRAND, *PALESTINIANS IN THE ARAB WORLD: INSTITUTION BUILDING AND THE SEARCH FOR STATE* (New York: Columbia University Press, 1988).

²¹⁹ See ARAB REFUGEES IN THE MIDDLE EAST (A.G. Mezerik ed., International Review Service 1980); see also ISSA NAKHLEH, *ENCYCLOPEDIA OF THE PALESTINE PROBLEM* (Intercontinental Books 1991).

²²⁰ See DAVID GILMOUR, *DISPOSSESSED: THE ORDEAL OF THE PALESTINIANS* (Sphere Books Ltd. 1982).

²²¹ See HUMAN RIGHTS WATCH, *A VICTORY TURNED SOUR: HUMAN RIGHTS IN KUWAIT SINCE LIBERATION* (1991). The Report documents torture, arbitrary detention, extrajudicial killings and summary trials before martial law courts, as well as large-scale deportation of Palestinians from Kuwait following the Gulf War.

²²² For a thorough bibliography of the history of persecution of Palestinians in third states, see GILMOUR, *supra* note 220. See also REFUGEES IN THE MIDDLE EAST WITH SPECIAL FOCUS ON THE PALESTINIAN REFUGEE SITUATION: REPORT FROM THE NORDIC NGO SEMINAR, (A. Oerum ed., Norwegian Refugee Council, 1993); Mitchell Bard, *Homeless in Gaza: Arab Mistreatment of Palestinian Refugees*, POLICY REVIEW, Winter 1989, at 36; NAKHLEH, *supra* note 219; and ARAB REFUGEES IN THE MIDDLE EAST, *supra* note 219.

²²³ Takkenberg cites "hundreds" as being killed. Michael Jansen and others claim the toll was much higher: "The exact number of dead will never be known... At a rough estimate, perhaps a thousand people in all were slaughtered in Sabra-Chatila. But over 900 other people, mostly women and children, are known to have been put onto trucks and driven away; nothing has been heard of them since. ... If so, 2,000 people may have perished." MICHAEL JANSEN, *THE BATTLE OF BEIRUT, WHY ISRAEL INVADED LEBANON* 106 (Zed Press 1983).

²²⁴ JANSEN, *supra* note 223 at 91, 97-106. See also, ROBERT FISK, *PITY THE NATION* (Atheneum 1990)

²²⁵ See GILMOUR, *supra* note 220. See also bibliographies in COLIN SMITH, *THE PALESTINIANS* (Minority Rights Group, 1975); COLIN SMITH, *THE PALESTINIANS* (Minority Rights Group 4th ed. 1982); COLIN SMITH, *THE PALESTINIANS* (Minority Rights Group, 5th ed. 1984).

²²⁶ COLIN SMITH, *THE PALESTINIANS* (Minority Rights Group 1975).

²²⁷ See HUMAN RIGHTS WATCH, *WORLD REPORT, "LEBANON"*, (1985 to the present).

massacred thousands of Palestinians, many of them civilians.²²⁸ In the Gulf States, Palestinians' situation has been precarious. In Saudi Arabia and the Gulf States, the most recent example of the lack of protection was the mass expulsion of Palestinians that occurred in 1990-91 following Yasser Arafat's declaration of support for Iraq.²²⁹

D. Persecution of Palestinians Continues Today:

The literature on the fifty-year history of massive human rights violations by Israel against Palestinians within the West Bank and Gaza, as well as in the occupied South of Lebanon and the Golan Heights is, in the words of one source, "encyclopaedic".²³⁰ Sources of credible documentation of human rights violations and violations of humanitarian law-primarily gross violations of the Fourth Geneva Convention-are many and varied. They include Palestinian²³¹, international²³² and Israeli human rights groups.²³³ Israel has systematically engaged in such widespread abuses of the human and humanitarian rights of Palestinians over the past fifty-plus years that it is impossible to adequately recount in this brief the categories and numbers of such violations. They include widespread and systematic torture, sanctioned by the Israeli Supreme Court²³⁴; extra-judicial killing²³⁵; expulsion of the civilian population from occupied and disputed

²²⁸ ARZT, *supra* note 206, at 44.

²²⁹ A.M. Lesch, *Palestinians in Kuwait*, 20 (Summer 1991) J. OF PALESTINE STUD. 42, 43. *See also* REFUGEES IN THE MIDDLE EAST WITH SPECIAL FOCUS ON THE PALESTINIAN REFUGEE SITUATION: REPORT FROM THE NORDIC NGO SEMINAR, *supra* note 222 and HUMAN RIGHTS WATCH, *supra* note 221.

²³⁰ *See* RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK (Institute for Palestine Studies 1985).

²³¹ Such documentation includes the following publications by Al-Haq, Law in the Service of Man, Ramallah, West Bank: PROTECTION DENIED: CONTINUING ISRAELI HUMAN RIGHTS VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES (1991); A NATION UNDER SIEGE: AL-HAQ ANNUAL REPORT ON HUMAN RIGHTS VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES (1990); PUNISHING A NATION: HUMAN RIGHTS VIOLATIONS DURING THE PALESTINIAN UPRISING DECEMBER 1987-DECEMBER 1988 (1988); LYNN WELCHMAN, A THOUSAND AND ONE HOMES: ISRAEL'S DEMOLITION AND SEALING OF HOUSES IN THE OCCUPIED PALESTINIAN TERRITORIES (Al-Haq, 1993); JOOST R. HILTERMANN, ISRAEL'S DEPORTATION POLICY IN THE OCCUPIED WEST BANK AND GAZA (Al-Haq, 1986).

²³² International organization publications include: Amnesty International News Releases: MDE 15/77/98, News Service 167/98, 9 September, Israel/Occupied Territories/Palestinian Authority: Five Years After Oslo, Durable Peace Must be Based on Justice; MDE 15/70/98, News Service 148/98, 31 July 1998, Israel and Occupied Territories: Amnesty International Calls for Implementation of Human Rights Committee Recommendations; MDE 15/24/98, News Service 48/98, 17 March 1998, Israel and Occupied Territories: Oral Statement to the United Nations on Human Rights on the Israeli Occupied Territories; MDE 15/21/98, News Service 40/98, 6 March 1998, Israel/Lebanon: Israeli Supreme Court Endorses Hostage-Taking; MDE 15/89/97, News Service 168/97, 8 October 1997, Israel/Jordan: Amnesty International Condemns Attempted Killing by Israeli Intelligence; MDE 15/29/97, 10 July 1997, Israel/South Lebanon: Israel's Forgotten Hostages-Lebanese National Held Unlawfully for Years in Detention; MDE 15/21/97, News Service 69/97, 30 April 1997, Israel/Occupied Territories: The Despair of Administrative Detainees; vMDE 15/49/96, News Service 128/96 24 July 1996, Israel/Lebanon: Amnesty International Demands Effective Protection for Civilians, Calls for Proper Inquiry into Killings by Israel; MDE 15/30/96, News Service 77/96, 18 April 1996, Israel/South Lebanon: Amnesty International Deplores Continued Attacks on Civilians; MDE 15/08/96, News Service 21/96, 5 February 1996, Summary of Amnesty International's Concerns and Recommendations in Israel and the Occupied Territories including Areas under the Jurisdiction of the Palestinian Authority.

²³³ Israeli human rights documentation include: B'TSELEM, ANNUAL REPORT 1989: VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (1989); B'TSELEM, THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA: FOLLOW-UP TO MARCH 1991 B'TSELEM REPORT (1992); B'TSELEM, VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED TERRITORIES-1990/1991, (1992); DAVID ZUCKER, ET AL., RESEARCH ON HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, 1979-1983 (International Center for Peace in the Middle East, 1985).

²³⁴ MDE 15/73/96, News Service 216/96, 15 November 1996, Israel: Amnesty International Deplores Decision to Use "Heightened Physical Pressure" On Member of Islamic Jihad MDE 15/23/97, News Service 83/97, 9 May 1997,

territories²³⁶; prolonged detention without charge or fair trial²³⁷; use of excessive force, including deliberately breaking bones of children and youths for stone-throwing²³⁸; and collective punishment, such as demolishing Palestinian homes, military closures of entire civilian areas, and expropriation of Palestinian land for the sole benefit of the Jewish state or Jewish settlers, without notice or compensation.²³⁹

Israel and the Occupied Territories: United Nations Calls for Halt to Torture; MDE 15/22/97, News Service 80/97, 6 May 1997, Israel and the Occupied Territories: Committee Against Torture Must Take Strong Action; MDE 15/06/99, News Service 008/99, 13 January 1999, Israel and Occupied Territories: High Court Postponement of Torture Case Leaves Victims Unprotected; MDE 15/05/99, News Service 006/99, 12 January 1999, Israel: High Court Should End the Shame of Torture; MDE 15/31/98, News Service 87/98, 15 May 1998, Israel: Torture Still Used Systematically as Israel Presents its Report to the Committee Against Torture; MDE 15/2/98, News Service 02/98, 7 January 1998, Israel: Amnesty International Calls on Israel's High Court to Respect International Law by Rejecting Torture; MDE 15/94/97, News Service 187/97, 11 November 1997, CAT: Israel Continues to Defy the Committee Against Torture; Allegra Pacheco, Proving Torture: No Longer Necessary in Israel, Paper Presented at the Torture Conference (1999); Lori A. Allen, Why Position Abuse? How Israeli Torture of Palestinians Makes Sense, Paper Presented at the Torture Conference, 1999; TORTURE: HUMAN RIGHTS, MEDICAL ETHICS AND THE CASE OF ISRAEL (Neve Gordon & Ruchama Marton, eds., Zed Books 1995); HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES (1994); AL-HAQ, LAW IN THE SERVICE OF MAN, TORTURE AND INTIMIDATION IN THE WEST BANK: THE CASE OF AL-FAR'AA PRISON (1984); AMNESTY INTERNATIONAL USA, ISRAEL AND THE OCCUPIED TERRITORIES: TORTURE AND ILL-TREATMENT OF POLITICAL DETAINEES (1994); B'TSELEM, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE (1998).

²³⁵ HUMAN RIGHTS WATCH, A LICENSE TO KILL: ISRAELI OPERATIONS AGAINST "WANTED" AND MASKED PALESTINIANS (1993).

²³⁶ See, for example, THE INTERNATIONAL CENTRE FOR INFORMATION ON PALESTINIAN AND LEBANESE PRISONERS, DEPORTEES AND MISSING PERSONS, ISRAELI POLICY OF DEPORTATION (1989). Regarding deportations from the West Bank and Gaza, see J.M. HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 165-77 (Martinus Nijhoff Publishers 1995).

²³⁷ AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES - THE MILITARY JUSTICE SYSTEM IN THE OCCUPIED TERRITORIES: DETENTION, INTERROGATION AND TRIAL PROCEDURES (1991); HUNT, JUSTICE? THE MILITARY COURT SYSTEM IN THE ISRAEL-OCCUPIED TERRITORIES (Gaza Center for Rights and Law, 1987); INTERNATIONAL COMMISSION OF JURISTS, INQUIRY INTO THE ISRAELI MILITARY COURT SYSTEM IN THE OCCUPIED WEST BANK AND GAZA: REPORT OF A MISSION (1989); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN ISRAEL AND THE OCCUPIED TERRITORIES (1991); Serge Schemann, *In Israel, Coercing Prisoners is Becoming Law of the Land*, NEW YORK TIMES, 8 May 1997; TERESA THORNHILL, MAKING WOMEN TALK: THE INTERROGATION OF PALESTINIAN WOMEN SECURITY DETAINEES BY THE ISRAELI GENERAL SECURITY SERVICES (1992); AMNESTY INTERNATIONAL USA, ISRAEL AND THE OCCUPIED TERRITORIES: ADMINISTRATIVE DETENTION DURING THE PALESTINIAN INTIFADA (1989).

²³⁸ See for example, A.E. NIXON, THE STATUS OF PALESTINIAN CHILDREN DURING THE UPRISING IN THE OCCUPIED TERRITORIES (1990); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L. L. 44 (1990). During only the first six months of the *intifada* (popular uprising which began in 1987), Israel killed 200 Palestinians and injured thousands as part of the 'Iron Fist Policy' instituted by former Prime Minister Rabin, which included orders to deliberately break the bones of stone-throwing children and youths. UNRWA, ANNUAL REPORT, 1987-88, U.N. GAOR, 43rd Sess., Supp. No. 13, U.N. Doc. A/43/13, 9. By 30 June, 1994, according to UNRWA, Israel had killed more than 1,400 Palestinians and injured over 80,000: see UNRWA, Annual Reports, for the period 1 July 1987 to 30 June 1994.

²³⁹ On house demolitions, see LYNN WELCHMAN, A THOUSAND AND ONE HOMES: ISRAEL'S DEMOLITION AND SEALING OF HOUSES IN THE OCCUPIED PALESTINIAN TERRITORIES (Al-Haq, 1993); GEOFFREY ARONSON, ISRAEL, PALESTINIANS AND THE INTIFADA: CREATING FACTS ON THE WEST BANK (1990); UNITED NATIONS, ISRAELI SETTLEMENTS IN GAZA AND THE WEST BANK (INCLUDING JERUSALEM): THEIR NATURE AND PURPOSE, REPORT OF THE COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE (1982), Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES (Playfair ed., 1992); Matar, *Exploitation of Land and Water*

III. How Must Article 1D be Interpreted With Regard To Its History and Protection Purpose?

A. Possible Interpretations of Article 1D:

Article 1D of the 1951 Refugee Convention has been interpreted several ways. However, Article 1D's plain language, its drafting history and applicable canons of statutory construction allow for only one accurate interpretation of its meaning. That is, Palestinian refugees who leave UNRWA's area of operations or who are otherwise not "at present receiving . . . protection or assistance"²⁴⁰ from UNRWA, fall *ipso facto*, or *by that fact alone*, within the 1951 Refugee Convention, whether or not they individually qualify as refugees with a well-founded fear of persecution. This interpretation of Article 1D is the only result that is consistent with the special protective scheme envisioned for Palestinian refugees. Thus, as a contingent inclusion clause, Article 1D merely regulates the moment at which full 1951 Refugee Convention benefits automatically accrue to Palestinian refugees in the same manner as all recognized refugees worldwide.

There are numerous conflicting interpretations and applications of Article 1D by the UNHCR Handbook²⁴¹, by learned commentators, and in worldwide jurisprudence²⁴². Under the 1969 Vienna Convention on the Law of Treaties, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose"²⁴³. This section will examine the differing interpretations given Article 1D, and suggest the most appropriate interpretation according to the plain language, the drafters' intentions and the scope and purpose analyses required by Article 31(1) of the Vienna Convention on the Law of Treaties.

1. Plain Language:

Although it is clear that the relevant instruments single out Palestinian refugees as requiring special treatment under international law, this is not because the Palestinians' plight was somehow less urgent than that of other refugees, or that they were considered unworthy of the protective scheme established by the 1951 Refugee Convention. To the contrary, the plain language of the Palestinian clause reveals that Palestinian refugees are to be ensured *heightened* protection.

The Palestinian clause sets forth several preconditions that must be satisfied in order for it to apply. First, the Palestinian "person" must be "at present receiving" "protection or assistance" from UNRWA.²⁴⁴ This requirement indicates that if an individual is not "at present receiving" protection *or* assistance, then she is not covered by Article 1D. It does not require that the displaced Palestinian receive both protection and assistance. This language is widely inclusive. On its face, it suggests that if a Palestinian who is a *de facto* refugee is receiving only a bare minimum of assistance from UNRWA, he will fall within Article 1D rather than by the standard 1951 Refugee Convention definition of Article 1A(2).

Additionally, the *ipso facto* provision in Article 1D does not use the term "refugee" to identify those who presumably will be entitled to 1951 Refugee Convention protection, rather the

Resources for Jewish Colonies in the Occupied Territories, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES (Playfair ed., 1992).

²⁴⁰ 1951 Refugee Convention, *supra* note 1 at Art. 1D.

²⁴¹ UNHCR Handbook, *supra* note 204.

²⁴² See *supra* note 185-200 and accompanying text.

²⁴³ Vienna Convention on the Law of Treaties, Art. 31(1), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

²⁴⁴ 1951 Refugee Convention, *supra* note 1 at Art. 1D.

provision uses the term "persons". By using the more inclusive "persons," it is a logical conclusion that a *de facto* refugee does not necessarily have to qualify as a *de jure* refugee under Article 1. Comparing other articles of the 1951 Refugee Convention draws support for this conclusion in that all of the substantive provisions of the 1951 Refugee Convention (Articles 1-34), confer rights only upon "refugees" as defined in Article 1. Not a single provision uses the same broad "persons" as in the *ipso facto* language.

Therefore, the plain language of the Palestinian exclusion clause states that any "person" who "for any reason," is not presently receiving protection and assistance from UNRWA, is not covered by Article 1D. The most common interpretation is that these *de facto* refugees should be eligible for consideration under the general definition of 1A, where they would be required to meet the nexus requirement of a well-founded fear based on the enumerated grounds.²⁴⁵ However, this interpretation defies the plain language of the clause. The clause states that Palestinian refugees who are not covered by 1D are not merely eligible for consideration under the 1A definition, but rather they "shall *ipso facto* be entitled to the benefits of this convention".²⁴⁶ This automatic entitlement mandated by the ordinary meaning of *ipso facto* is distinct from merely being "eligible for consideration" for such benefits. Therefore, the clause's plain language indicates that Article 1D does not act as an exclusion clause for Palestinian refugees receiving aid from UNRWA, rather it functions as a contingent inclusion clause that merely regulates the moment at which full 1951 Refugee Convention benefits accrue to Palestinian refugees in the same manner as all refugees worldwide.

a. **The First Sentence: "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".**

The first question to answer in interpreting the first sentence of Article 1D is which agency or agencies are covered by the language 'at present receiving from organs or agencies...'? To answer this, one must determine the time of reference for the words 'at present'. Do they mean the date of signing the 1951 Refugee Convention, or the date of ratification, or the date of entry into force, or the date the provision is being applied to a particular individual? Atle Grahl-Madsen suggests the appropriate date is the signing of the 1951 Refugee Convention:

If the words 'at present' have any meaning at all, they must refer to a specific time, and the choice of wording suggests that the reference is to the date of signature of the Convention: 28 July 1951. If any other date was meant, this would probably have been explicitly stated, as in Article 10 'date of entry into force of this Convention' and Article 7(3) 'date of entry into force of this Convention for that State'.

...

It is consequently only 'organs or agencies of the United Nations' existing on 28 July 1951, and their possible successor bodies, which come within the scope of Article 1D.²⁴⁷

James Hathaway suggests that the applicable date is that of entry into force.²⁴⁸ For pur-

²⁴⁵ See UNHCR Handbook, *supra* note 204.

²⁴⁶ 1951 Refugee Convention, *supra* note 1 Art. 1D.

²⁴⁷ Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. I, refugee Character, Leyden, Sijthoff (1966) at 264.

²⁴⁸ HATHAWAY, J.C., *THE LAW OF REFUGEE STATUS*, Toronto, Vancouver, Butterworths (1991) at 208, n. 17. (Hathaway cites for support of this proposition, the statement of the United Kingdom Representative, Mr. Hoare, during the drafting conference: '[P]aragraph [D] [is intended] to exclude persons who were defined as those who at the time when the convention came into force were receiving protection or assistance from United Nations organs or agencies...'). UN doc. A/CONF.2/SR.19, 20.

poses of this brief, the distinction between date of signing and date of entry into force is irrelevant. The important distinction is between the earlier date of signing, date of entry into force or ratification and the later date of application of the provision to a particular case. Only organs or agencies of the United Nations in existence on the entry into force date of 28 July 1951 are covered by Article 1D. The International Refugee Organization was defunct by that date, and thus, under this interpretation, was not covered by Article 1D. The only possible agency that 1D could have referred to, under these principles, was UNRWA.

The UNHCR Handbook suggests that it is the date of application to a particular case that governs the phrase 'at present'.²⁴⁹ The UNHCR Handbook states:

Exclusion under [Article 1D] applies to any person who is in receipt of protection or assistance from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees. Such protection or assistance was previously given by the former United Nations Korean Reconstruction Agency (UNKRA) and is currently given by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). There could be other similar situations in the future.²⁵⁰

The UNHCR Handbook is almost certainly incorrect in suggesting by the language 'there could be other similar situations in the future' that other non-UNHCR UN agencies could be created after the 1951 Refugee Convention has been signed, ratified or entered into force, with mandate of protection or assistance over refugees who could then be excluded under Article 1D. There are several reasons why it is absolutely clear that the only group of refugees to which Article 1D ever applied, and to which it was ever meant to apply by the drafters, were the Palestinians.

First, the 1951 Refugee Convention *travaux préparatoires* show quite clearly that the drafters intended to make arrangements for existing groups of refugees, in order to ascertain as definitively as possible what the scope and extent of the signatory states' obligations would be. These intentions are clearly reflected in the temporal and geographic limitations included in Article 1(A)(2) and Article 1(B)(1) of the 1951 Refugee Convention, which show that the signatories intended the 1951 Refugee Convention to apply only to those persons becoming refugees after January 1, 1951, and/or to those persons becoming refugees after that date in Europe. Despite the general language in which the rest of the substantive articles of the 1951 Refugee Convention are drafted, there is no indication that Article 1D is applicable to any later groups of refugees while the rest of the 1951 Refugee Convention provisions apply only to specific categories of refugees as defined in Article 1. It was not until the drafting of the 1967 Protocol that the signatories agreed to abandon the principle that the 1951 Refugee Convention applied only to specific categories of refugees.

Second, the reference in the UNHCR Handbook to the application of Article 1D to Korean refugees is also incorrect. Both Grahl-Madsen and Hathaway make clear that, contrary to the UNHCR Handbook's statement, since South Korea considered Korean refugees as citizens, the war refugees were outside the scope of the 1951 Refugee Convention.²⁵¹ The creation of the United Nations Korean Reconstruction Agency is, thus, irrelevant to the application of Article 1D.²⁵²

Third, the language in the second sentence 'without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly' reinforces the premise that Article 1D referred explicitly to one category of refugees for which the General Assembly had already adopted numerous resolutions by that time—the Palestinians.²⁵³

²⁴⁹ UNHCR Handbook, *supra* note 204.

²⁵⁰ *Id.* at 142.

²⁵¹ Grahl-Madsen, *supra* note 247 at 64 n. 152; Hathaway, *supra* note 248 at 208 n.117.

²⁵² The United Nations Korean Reconstruction Agency was established by UNGA Res. 410 (V), 1 Dec. 1950.

²⁵³ See Appendix A.

Fourth, as the later detailed discussion of the drafting history of Article 1D amply illustrates, the only situation the drafters ever discussed with regard to this provision was that of the Palestinians.

The second question which must be answered in interpreting the phrase 'at present receiving' is whether it refers only to those Palestinian refugees registered with UNRWA by the date of entry into force of the 1951 Refugee Convention. Grahl-Madsen suggests that that cannot be the appropriate interpretation:

There is reason to believe that Article 1D applies not only to those individuals who were actually receiving protection or assistance from UNRWA on 29 July 1951, but also to those individuals who became the concern of UNRWA at any later date, including those born after the signing of the Convention; or, in other words, that Article 1D applies to persons within the mandate of UNRWA as a class or category, and not to individual persons. If this were not so, we would get a rather artificial distinction between those who became UNRWA refugees before or on 28 July 1951, and those who became UNRWA refugees after that date.²⁵⁴

The UNHCR Handbook differs from this interpretation. It takes a number of positions that are clearly at odds with learned commentators and with the drafting history and purpose and scope of Article 1D reviewed at length in this brief. According to the UNHCR Handbook:

With regard to refugees from Palestine, it will be noted that UNRWA operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention. It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses.²⁵⁵

There are a number of fallacies in this paragraph regarding the UNHCR's interpretation of both the first and second sentences of Article 1D. Concerning the phrase 'at present receiving', the Handbook states that 'a refugee from Palestine who finds himself outside [the area of UNRWA operations] does not enjoy the assistance mentioned...'. However, as previously shown, UNRWA's mandate extends to all Palestinians who became refugees as a result of the 1948 war and their descendants. Article 1D applies to all 'Palestine refugees' falling under that mandate. Thus it is irrelevant for the application of the first sentence of Article 1D whether the individual is actually residing within UNRWA's area of operations.

Lex Takkenberg, an officer of UNRWA, suggests the following about the UNHCR Handbook's reading of this provision:

The UNHCR Handbook . . . misses the point by stating that "a refugee from Palestine who finds himself outside [UNRWA's area of operations] does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention" [emphasis supplied] . . . [W]hether or not a certain individual is personally receiving UNRWA assistance is irrelevant. What counts is whether the individual concerned falls under UNRWA's mandate, that is, that that individual has the possibility of requesting the services provided by that organization if so required and taking into consideration the applicable procedures and criteria. This possibility not only exists for those who have left the area, as long as they are able to return.²⁵⁶

²⁵⁴ Grahl-Madsen, *supra* note 247 at 265. Hathaway also observes that Art. 1D "applies to all Palestinians eligible to receive UNRWA assistance in their home region". Hathaway, *supra* note 248 at 208.

²⁵⁵ UNHCR Handbook, *supra* note 204 at 143.

²⁵⁶ TAKKENBERG, *supra* note 169, at 101. Amici disagree with Takkenberg's interpretation of the second sentence of Article 1D reflected in this paragraph, concerning the point at which the ipso facto clause is triggered in an individual Palestinian asylum claim. This point is taken up below, in the discussion of the second sentence of Article 1D.

All the learned commentators agree on one aspect of Article 1D: all refugees falling under UNRWA's mandate are contingently removed from the application of the 1951 Refugee Convention unless the second sentence of Article 1D applies.²⁵⁷

However, a number of states apply the UNHCR Handbook's suggested interpretation of the first sentence of Article 1D. They hold that since UNRWA only operates in parts of the Near and Middle East, Article 1D, first sentence, only applies to those areas of the world. With this logic, they do not apply Article 1D at all, considering refugee/asylum claims by Palestinians only under Article 1A(2) of the 1951 Refugee Convention, or under parallel provisions of their domestic law.²⁵⁸ This issue will be considered with the jurisprudence applying Article 1A(2) to Palestinian cases, below.

Keeping in mind the clearly-expressed intention of the 1951 Refugee Convention drafters--to separately provide for an entire category of refugees already receiving benefits from UNRWA--one can only conclude that Article 1D was meant to cover all refugees falling under the mandate of UNRWA, regardless of when, or whether, they are actually registered with that agency, or are actually receiving assistance. The original language of Paragraph 7(c) of the UNHCR Statute reinforces this interpretation. That provision initially referred to 'categories of refugees at present placed under the competence of other organs or agencies of the United Nations'.²⁵⁹ Article 1D was incorporated into the text of the 1951 Refugee Convention after Paragraph 7(c) was drafted into the UNHCR Statute.²⁶⁰

Thus, the most appropriate conclusion to be drawn from the first sentence of Article 1D is that all refugees falling under UNRWA's mandate were to be provisionally excluded from the benefits of the 1951 Refugee Convention--because another scheme was already in place which gave Palestinians heightened protection and assistance--unless and until that alternate protection scheme failed, triggering the second sentence of Article 1D.

b. The Second Sentence, First Clause of Article 1D: "When Such Protection or Assistance has Ceased for any Reason...":

The clause must be read keeping the object and purpose of Article 1D in mind: that it was without doubt meant to ensure continuity of protection to every Palestinian by means of different organizations and instrumentalities. This point is underscored by comparing the language in the UNHCR Statute, which refers to 'a person who continues to receive...protection or assistance...'²⁶¹; the 1951 Refugee Convention language, referring to 'persons who are at present receiving...protection or assistance...'²⁶²; and the 1954 Statelessness Convention referring to 'persons who are at present receiving...protection or assistance so long as they are receiving such protection or assistance'²⁶³ with the clause in the second sentence of Article 1D pointing to the time 'when such protection or assistance has ceased for any reason.'

Second, the clause must be read to give meaning to the entire phrase: "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". The

²⁵⁷ Grahl-Madsen, *supra* note 247 at 265; Hathaway, *supra* note 248 at 208; TAKKENBERG, *supra* note 169, at 100-101.

²⁵⁸ TAKKENBERG, *supra* note 169, at 101.

²⁵⁹ UNHCR Statute, *supra* note 2 at 7(c).

²⁶⁰ The final changes in the language of the provision were based on semantics, and not meant to affect the meaning or substance. TAKKENBERG, *supra* note 169, at 99.

²⁶¹ UNHCR Statute, *supra* note 2 at 7(c).

²⁶² 1951 Refugee Convention, *supra* note 1 at Art. 1D.

²⁶³ 1954 Statelessness Convention, *supra* note 177.

plain meaning of the word "or" in this phrase means that those *de facto* refugees who are not receiving *either* protection *or* assistance require the alternate protection scheme of the 1951 Refugee Convention triggered by Article 1D, second sentence.

Third, the phrase 'for any reason' must be given appropriate emphasis in the context of the sentence, with the scope and purpose in mind. As a matter of plain language, the words 'for any reason' are all-encompassing. They certainly cover any eventuality which might terminate the protection or assistance given a Palestinian "person" under the initial scheme. If the language was intended to be limited to the sole eventuality of the end of UNRWA's mandate, the language 'for any reason' would not have been included at all. That was, in fact, the reason originally foreseen and discussed by the drafters of the 1951 Refugee Convention: that UNRWA would cease to function without resolution of the Palestinian question.²⁶⁴ If they had intended to confine the triggering of the alternate scheme of protection to the possibility of UNRWA ceasing to function, they would certainly not have included the additional 'for any reason' language. There is, thus, no reason to conclude that the 'for any reason' language does not encompass an individual's own actions in removing himself or herself from the UNRWA area of operations, or the winding up of UNRWA, or interference by the State with the provision of protection or assistance by UNRWA.

A number of states, however, have interpreted this phrase to mean that the second sentence of Article 1D only applies if UNRWA ceases to function without final resolution of the Palestinian question. For example, the Judicial Division of the Council of State of the Netherlands, the highest administrative court in that country, concluded that the second sentence of Article 1D was not triggered when a Palestinian refugee left UNRWA's mandate area on his own, but only when UNRWA ceased to function.²⁶⁵ In that case, the UNHCR had submitted an opinion to the contrary, but the Dutch court disagreed on the interpretation of the drafting history of Article 1D.²⁶⁶ In Refugee Appeal No. 1/92 Re SA (30 April 1992), the Refugee Status Appeals Authority in New Zealand applied the same logic: "[the second sentence of Article 1D] addresses the situation where UNRWA ceases to operate at all."²⁶⁷

The Australian Refugee Review Tribunal (RRT) considered an appeal from the Refugee Status Appeals Authority (RSAA) concerning the appeal of a Palestinian refugee born north of East Jerusalem in 1965 in an area incorporated into Israel as part of the West Bank in 1967.²⁶⁸ The RSAA considered him to be a stateless Palestinian. The issue according to the RSAA, and on appeal to the RRT, was whether Article 1D excludes the grant of refugee status under the 1951 Refugee Convention to a Palestinian who voluntarily leaves an area of UNRWA assistance, and continues to be eligible for UNRWA assistance. The RSAA found that the first paragraph of Article 1D operates to disentitle a person from eligibility for refugee status when the person is within a certain geographic area and presently receiving protection and assistance from an agency of the United Nations. It interpreted the *ipso facto* provision as applying *only* when "the situation where UNRWA assistance ceases to operate at all".²⁶⁹ The RSAA explained its interpretation of Article 1D as: "The apparent intention of [paragraph 2, the *ipso facto* clause] was that if for any reason UNRWA's operation ceased (e.g. for lack of finance) the suspensive effect of Article 1D

²⁶⁴ TAKKENBERG, *supra* note 169, at 105.

²⁶⁵ Judicial Division, Council of State [Afdeling Rechtspraak, Raad van State], 6 Aug. 1987, No. R02.83.2767-A en B. *See* TAKKENBERG, *supra* note 169, at 105, n. 71.

²⁶⁶ "The Division infers from the wording, purpose and history of Article 1(D) (first and second sentences) of the Convention that as long as the UNRWA exists as an organisation for the provision of protection or assistance to Palestinian refugees, the Convention does not apply to persons who voluntarily relinquish this protection by moving to an area outside the area of protection provided by that organisation.." 20 NYIL 314 (1989); TAKKENBERG, *supra* note 169, at 105 n. 71-72.

²⁶⁷ TAKKENBERG, *supra* note 169, at n.72

²⁶⁸ Australian Refugee Review Tribunal, BV96/04744 (12 February 1997).

²⁶⁹ *Id* at 72.

would terminate and entitlement to the benefits of the 1951 Refugee Convention would then come into operation...".²⁷⁰

On appeal, the Refugee Tribunal Appeals Authority upheld the RSAA, and without further discussion of when the *ipso facto* clause was triggered, held that Article 1D did not exclude the grant of refugee status to a Palestinian who voluntarily leaves an area of UNRWA assistance, as long as he meets the Article 1A(2) of the 1951 Refugee Convention definition of a refugee.

Danish cases from 1985-1990 followed a different interpretation, finding that the first sentence of Article 1D only applied to Palestinian refugees living in UNRWA's mandate area. Consequently, for Palestinians outside that area, UNRWA's assistance was deemed to have 'ceased', automatically qualifying them for recognition as 1951 Refugee Convention refugees.²⁷¹ This interpretation changed in 1990, when the Danish Directorate for Aliens denied refugee status to pending claims of Palestinian asylum seekers, applying a more restrictive interpretation of Article 1D proposed by the Danish Ministry of Foreign Affairs.²⁷² It is quite true that the eventuality that most preoccupied the minds of the drafters of this provision was the end of UNRWA's mandate. However, the interpretation of Article 1D should not be limited only to the circumstances foreseen by the drafters when the plain language 'for any reason', coupled with the clear purpose and scope of the provision, require that it be interpreted without such temporal limitations. The German Federal Administrative Court, the final court of appeals in administrative matters, in a June 4, 1991 decision discussing in detail Article 1D, stated:

In particular, considerations with regard to a specific refugee problem extant at the time when the 1951 Convention was drafted as well as those considerations related to its envisioned solution, do not change the fact, however, that article 1D of the 1951 Convention in accordance with its terms and in the light of its object and purpose intends to assure any individual Palestinian refugee of aid, as long as a permanent settlement in accordance with the resolutions of the United Nations has not materialized, either in the form of protection or assistance from the organ or agency of the United Nations assigned with this task, or by enjoying the benefits laid down in the 1951 Convention from the states parties. In view of the humanitarian objective of the convention, protection or assistance may, therefore, have ceased for the purpose of article 1D in respect of an individual whilst the organ or agency of the United Nations continues to provide protection or assistance to the category of persons to whom that individual belongs, either collectively or in the state of his former habitual residence.²⁷³

Takkenberg also concludes that "[the interpretation] that article 1D, second sentence, is not applicable where the Palestinian refugee concerned has voluntarily left UNRWA's area of operations, is therefore not supported by the wording as well as the object and purpose of that provision. Unlike in respect of article 1A, paragraph 2, for the application of article 1D, second sentence, the intentions of the refugee are irrelevant."²⁷⁴

There is additional disagreement, both in the jurisprudence and among commentators, about the effect on the triggering provision of Article 1D, second sentence, of a Palestinian who has left an UNRWA mandate area and is unable to return there legally. Goodwin-Gill makes no distinction between this and any other reason for which assistance or protection may have ceased which entitles the individual to *ipso facto* recognition as a refugee.²⁷⁵ Lex Takkenberg, on the other hand, makes the argument that that 'for any reason' does not include the situation where a

²⁷⁰ *Id* at 73.

²⁷¹ TAKKENBERG, *supra* note 169, at 106, n.74.

²⁷² Migration News Sheet, Mar. 1992; Le Monde 1/2 Mar. 1992.

²⁷³ Bundesverwaltungsgericht, Urteil vom 4.6.1991-Bverwg 1 C 42.88 [Federal Administrative Court, decision of 4 June 1991] published in InfAuslR 10/91, 305. German case law on Article 1D is far more developed than that of any other state party to the 1951 Refugee Convention. Translation by Lex Takkenberg, *see* TAKKENBERG, *supra* note 169, at. 111, n. 91.

²⁷⁴ TAKKENBERG, *supra* note 169, at 111-112.

²⁷⁵ GOODWIN-GILL, *supra* note 179.

Palestinian refugee has left an UNRWA-mandate area and is able to return there.²⁷⁶ Takkenberg's interpretation of Article 1D is flawed. First, the interpretation is inimical to the plain language of Article 1D. It ignores the provision that states that if protection or assistance from UNRWA ceases "*for any reason*," then the person is *ipso facto* entitled to the benefits of the 1951 Refugee Convention. Nothing in the language of the clause warrants an interpretation whereby the Palestinian has to demonstrate sufficient reason why they cannot return to an area of UNRWA operations. The additional language 'whether she is able to return' has no basis in the 1951 Refugee Convention, *jus cogens*, or other binding international law.

Second, the argument that the *ipso facto* clause should not apply to a Palestinian who can legally return to an UNRWA area because Article 1D is not meant to give such individual a choice between UNRWA assistance and 1951 Refugee Convention benefits, is weak. It is true that UNRWA was given the *primary* responsibility towards Palestinian refugees, but most important was the motivation to give Palestinians *heightened* protection. The drafters did not envision a time when Palestinians would have neither protection nor assistance; the scheme put in place was one of *both protection and assistance through UNRWA and UNCCP*. Thus, to suggest that Palestinians should not be given a choice between assistance or protection is to subvert the fact that they were recognized as deserving and requiring both.

Third, this argument is often based on an erroneous reading of what states are obligated to provide under Article 1D's, second sentence. By recognizing Palestinians' *ipso facto* refugee status, states are obliged, under 1951 Refugee Convention Article 33.1, only to grant a status of non-refoulement, however that is manifested under domestic law. They are not obligated to grant the refugee asylum. Their obligation of *non-refoulement* would cease, as would the application of the second sentence of Article 1D, once a definitive settlement to the Palestinian problem was reached, according to the terms of the cessation clause of Article 1C.

Fourth, interpreting Article 1D as requiring the refugee to prove that he could not legally return to an UNRWA area places an impossible burden on the refugee for two reasons: 1) the refugee is often unable to prove whether he can legally return to an UNRWA area, and 2) requiring him to bear this burden defeats one of the very purposes of the alternate scheme of Article 1D, which is to avoid a protracted process and thus a weak protection scheme for Palestinians. Both these problems are amply demonstrated in the large body of cases in which states have required a showing from the refugee that he or she could not legally return to one of the host Arab states, and the many cases in which that was the reason for denial of protection. In a case decided by the German Federal Administrative Court on 21 January 1992, the pitfalls of this argument are obvious:

There is, therefore, no case of cessation of protection or assistance of UNRWA, resulting in the application of the 1951 Convention, when the foreigner leaves the state in which UNRWA operates, although he is not able to return there, or when he continues to reside abroad while by doing so he loses his right of return. In the case where the foreigner wants to leave the area of operations of UNRWA, he should avail himself of travel documents as required by the host state, and adhere to the duration of their validity. If for whatever reasons he disregards the relevant regulations, the protection or assistance of UNRWA has, in accordance with the criteria stated above, not ceased in the sense of the 1951 Convention. It is then also no longer relevant whether the host state later delays, actually complicates, or even explicitly refuses his return. In deciding whether UNRWA's protection or assistance has ceased, the relevant measures of the host state, offset against the conduct of the person concerned, are not decisive.²⁷⁷

Additionally, this interpretation leads to an absurd result. The logical corollary to this

²⁷⁶ TAKKENBERG, *supra* note 169, at 123.

²⁷⁷ Bundesverwaltungsgericht, Urteil vom 21.1.1992-Bverwg 1C 21.87 [Federal Administrative Court, decision of 21 Jan. 1992], published in InfAusIR 7/92, 205. Translation by Lex Takkenberg, *see* TAKKENBERG, *supra* note 169, at 115, n. 99.

interpretation is that even if the Palestinian refugee had been residing in a non-UNRWA region for an extended period of time and had no ties to, or right of protection in, an UNRWA area, he could still be denied asylum if he could somehow "return" to an UNRWA area. In addition to having no textual basis, this interpretation would yield a result that completely subverted the drafters' intent.

The reasons for this distinction in interpreting the second sentence of Article 1D are not persuasive, particularly in light of Takkenberg's own reading of the object and purpose of the provision, and the history behind the drafting of Article 1D; his own words persuade differently from the conclusion he draws:

[T]he present writer is of the opinion that there is a qualitative difference between Palestinian refugees on the one hand and nationals and other residents of the host countries on the other. The difference is that in respect of Palestinian refugees it has already been decided by the international community many years ago that, as long as no durable solution to their problem has been found, they should enjoy an international status. Unlike citizens of the host country, their flight makes them refugees for the second-or sometimes third-time and after having arrived in a new country of refuge they should not have to prove what they already are: internationally recognized refugees!²⁷⁸

It does not matter why such protection or assistance has ceased. If it has stopped "for any reason," the Palestinian is not covered by Article 1D. The ordinary meaning of "for any reason" includes the voluntary actions of the individual in removing themselves from the area of operations of UNRWA; the cessation of UNRWA as an agency; or interference by a State with the assistance being given by UNRWA.²⁷⁹

c. The Second Sentence, Second Clause of Article 1D: *"..without the Position of Such Persons Being Definitively Settled in Accordance with the Relevant Resolutions Adopted by the General Assembly of the United Nations..."*

Article 1D refers to Palestinians who are not "definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations". The "relevant resolutions" include Resolution 194(III), which states that refugees have the right to be repatriated and compensated for their losses.²⁸⁰ Thus, the drafters intended that this "definitively settled" language would apply only when Palestinians were "definitively settled" according to the terms of Resolution 194(III) and all related Resolutions. Resolution 194 has been reaffirmed by the General Assembly almost yearly since 1948.²⁸¹ The United Nations has never wavered from its terms.²⁸² The United States also supports these Resolutions, signing on as recently as 1995.²⁸³

As outlined above, Resolution 194(III) envisions a comprehensive settlement of Palestin-

²⁷⁸ TAKKENBERG, *supra* note 169, at 117-118.

²⁷⁹ It does not appear that, at the time of the drafting of the 1951 Refugee Convention, Arab states at the time ever contemplated that they themselves might be responsible for frustrating UNRWA in carrying out its functions, or that they might be unable (for example, as in the case of Lebanon, because of foreign occupation) to allow UNRWA to operate.

²⁸⁰ See Appendix A.

²⁸¹ See Appendix A. There were only three years between 1952 and 1990 where the General Assembly did not reaffirm its commitment to the terms of Resolution 194(III): in 1956, 1960 and 1964. The most recent Resolution was established on February 3, 1999. G.A. Res. 53 /46, U.N. Doc. A/Res/53/46 (3 Feb 1999); (viewed 2/22/99), gopher://gopher.unorg: 70/00/ga/res/53/ses 53-46.en>.

²⁸² See Id.

²⁸³ G.A. Res. 50/28, U.N. Doc A/Res/50/28 (6 December 1995). This Resolution states: "The General Assembly . . . Notes with regret that repatriation or compensation of the refugees, as provided for in paragraph 11 of its resolution 194(III), has not yet been effected and that, therefore, the situation of the refugees continues to be a matter of concern

ians, as a people, whereby they are entitled to repatriation and compensation for property loss. Thus, "definitively settled" cannot mean anything less than such a comprehensive settlement. It cannot mean that because some Palestinians are granted citizenship in Jordan and a small minority in other states, that Palestinians are "definitively settled" for purposes of Article 1D. First, even those Palestinians who are granted something approaching citizenship rights are, in many cases, still vulnerable to inferior state protection.²⁸⁴ Second, the vast majority of Palestinians have not been granted citizenship in their countries of refuge and thus can hardly be called "definitively settled" under the terms of Resolution 194.²⁸⁵ A comprehensive settlement whereby the refugees are granted en masse repatriation rights and compensation has not occurred. Most recently, The Oslo Peace Accords II and the Wye Agreement defer the issue to final status talks. No final status talks have commenced.²⁸⁶ Therefore, no Palestinian refugee can be described as "definitively settled" for purposes of Article 1D until, as a group, they are repatriated and compensated for their losses.

d. The Second Sentence, Third Clause of Article 1D: "...these Persons Shall Ipso Facto be Entitled to the Benefits of this Convention."

The UNHCR Handbook's interpretation of Article 1D asserts that Palestinian refugees who are not at present receiving assistance or protection from UNRWA, "*may be considered* for determination of his refugee status under the criteria of the 1951 Refugee Convention [emphasis added]".²⁸⁷ Although the UNHCR Handbook purports to be interpreting the *ipso facto* language, the effect of this interpretation is as if Article 1D did not contain any such language at all. The UNHCR Handbook's suggestion that the cessation of UNRWA protection or assistance merely entitles the Palestinian to consideration under the terms of Article 1A defies the plain meaning of "*ipso facto*" which means that once this one condition is satisfied, no other criteria need be assessed--they are by the fact of that pre-condition alone, a *de jure* refugee under the 1951 Refugee Convention. As Grahl-Madsen argues:

the words "*ipso facto*" imply that "no new screening is required for the persons concerned to become entitled to the benefits of the Convention and that on cessation of UNRWA assistance and/or protection, those concerned will become a kind of statutory refugee . . . statutory refugees are those within the scope

. . . [and] The General Assembly . . . Reaffirms the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967."

²⁸⁴ See THE PALESTINIANS: THE MINORITY RIGHTS GROUP 18-23 (1987). For example, Palestinians who were granted citizenship in Israel are unable to access many public benefits, since they are prohibited from joining the Israeli military and many benefits flow from the fact of past military service which is mandatory for all other Israeli citizens. Another example is Black September in Jordan in 1970, where King Hussein's forces massacred thousands of Palestinians, many of them, civilians. Jeff Jacoby, "*A Convert to Peacemaking*," The Boston Globe, February 11, 1999, A27. Jordan also cut off administrative links when in 1988 it disengaged from the West Bank, invalidating its travel documents for Palestinians living there. "PLO Called 'Not Ready' for West Bank Duties," San Diego Union-Tribune, August 10, 1988, A3.

²⁸⁵ The occasions of mass expulsions of Palestinians from their countries are infamous and numerous. One recent example is Kuwait's expulsion of close to 350,000 Palestinians during the Persian Gulf War. ARZT, *supra* note 206, at 67. Likewise in 1995, when Qaddafi expelled thousands of Palestinians residing in Libya as a gesture of defiance for UN sanctions and the burgeoning peace process in Israel. Frederick B. Baer, *International Refugees as Political Weapons*, 37 Harv. Int'l L. J., 243, 249-50 (1996).

²⁸⁶ See Declaration of Principles on Interim Self-Government Arrangements, Art. V(3) (1993), stating: "It is understood that these negotiations (on permanent status) shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest."

²⁸⁷ UNHCR Handbook, *supra* note 204 at para. 143.

of article 1A(1) of the Convention, having qualified or been treated as refugees under earlier treaties and arrangements."²⁸⁸

The UNHCR Handbook's interpretation renders the *ipso facto* clause superfluous. Additionally, this artificially restrictive interpretation of *ipso facto* defies the drafters' intention of creating a parallel protective scheme for Palestinians who are *per se* refugees when their alternative protection fails. As the drafting history demonstrates, the only intention of Article 1D was to prevent the Palestinian refugee problem from becoming "submerged" with other categories of refugees. The UNHCR Handbook's approach also is inconsistent with the contingent temporary absorption scheme of the refugees in the neighboring Arab states. If the United Nations community believed there was no permanent solution to the refugee problem, then the Arab states and UNHCR would have been discussing their obligations for permanently absorbing the Palestinian refugees. The absence of such discussion is one factor supporting that the United Nations members states believed that if Israel did not allow repatriation of the refugees, the latter would be automatically protected in all 1951 Refugee Convention states by operation of the *ipso facto* clause.

Jurisprudence purportedly applying the *ipso facto* language in Article 1D shows disparate and inconsistent results. In the German case of 21 January 1992 cited above concerning a Palestinian who left Lebanon in 1982 and who showed that she was no longer able to return to Lebanon²⁸⁹, the Federal Administrative Court applied Article 1(2)(i) of the 1954 Statelessness Convention. The court ruled that what was decisive was not whether the claimant actually receives assistance from UNRWA, but whether the UN organs and agencies continue to carry out their activities in relation to the group of persons to which the claimant belongs. In the circumstances, the court found the claimant was registered with UNRWA and could "theoretically" enjoy the assistance of that agency, and that it was not relevant that she could no longer return to Lebanon. This decision is difficult to justify, either on principle or on the facts relating to Lebanon and the latter's declared policy to reduce the numbers of Palestinians in its territory.²⁹⁰

In a separate decision in 1992, the same German Court again considered the impact of Article 1D.²⁹¹ The ruling here was very similar. Here, the court emphasized that inability to return to receive protection or assistance from UNRWA is not sufficient to indicate that such protection or assistance has ceased. It also stated that the second paragraph of Article 1D does not apply merely because the claimant leaves UNRWA's sphere of activity.

These two German decisions show that even if a state recognizes the legal import of the *ipso facto* provision, the intended mandate of Article 1D may still be manipulated to create a standard that simply excludes Palestinians from the protection intended for them. These two decisions result in the state ignoring the provision altogether, since it essentially leads to a blanket denial of Palestinians. The 1992 decisions specified that if a Palestinian still belonged to the "group" that is still receiving aid from UNRWA, they would not be entitled to invoke the *ipso facto* language. Presumably the "group" the court is referring to is Palestinians. This inevitably leads to the inequitable result that, notwithstanding the fact that many Palestinians within UNRWA's jurisdiction are not receiving aid, as long as UNRWA exists, a state can deny Palestinians refugee status even under the *ipso facto* rubric.

Earlier German decisions produced a different analytical approach to Article 1D. In 1989,

²⁸⁸ GRAHL-MADSEN, *supra* note 247.

²⁸⁹ Bundesverwaltungsgericht=Federal Administrative Court, BVerwG 1 C 18.90, 21 January 1992, *InfAusIR* 5-6/92, 161-5.

²⁹⁰ *See infra* (stating that Lebanon's policy is to get rid of Palestinians in its jurisdiction).

²⁹¹ Bundesverwaltungsgericht=Federal Administrative Court, BVerwG 1 C 21.87, 21 January 1992, *InfAusIR* 7/92, 205-210.

an administrative court in Berlin ruled that a Palestinian refugee who can no longer claim the protection of UNRWA for reasons beyond his control is entitled *ipso facto* to the benefits of the 1951 Refugee Convention.²⁹² In 1991, the same court that would produce the two decisions mentioned above in 1992, held that protection or assistance cannot be said to have ceased where it is the consequence of the behavior of the person concerned, for example, where the departure from UNRWA's area of operations amounts to "voluntary renunciation".²⁹³ Here it was particularly relevant that the claimant could not return to the Gaza Strip because of its occupation since his departure by Israel.

2. Drafters' Intentions:

The *travaux préparatoires* of both the 1951 Refugee Convention and the UNHCR Statute further illuminate Article 1D's intended effect as a contingent inclusion clause.²⁹⁴ The 1951 Refugee Convention and the UNHCR Statute were adopted within six months of each other and were drafted somewhat simultaneously. During the three main drafting stages, Palestinian refugees were explicitly discussed. The first time the subject was raised was in the *Ad Hoc* Committee on Statelessness and Related Problems, which produced a Draft Convention Relating to the Status of Refugees.²⁹⁵ The issue of Palestinian refugees was again discussed when the Third Committee of the General Assembly considered the report of the *Ad Hoc* Committee, in December 1950. At this stage, the UNHCR Statute was adopted. Finally, Palestinian refugees were the subjects of extensive debate in July 1951, during the Conference of Plenipotentiaries that completed the drafting of the 1951 Refugee Convention.

a. Third Committee of the General Assembly:

The problem of the definition of the term refugee to be applied by UNHCR and the definition to be inserted in the draft convention was ultimately referred to the Third Committee of the General Assembly.²⁹⁶ The French representative supported the definition adopted by ECOSOC. That definition was restricted to persons who had become refugees "as a result of events in Europe before 1 January 1951". In an attempt to justify why, in his view, the new High Commissioner should not automatically be involved in dealing with categories of refugees from outside Europe, the French representative referred, among other categories of non-European refugees, to the Palestinian refugees:

The General Assembly had extended its protection to the Arabs by setting up two bodies, an office to deal with relief questions and a conciliation commission. It was now proposed to set up a new organ to deal with repatriation and resettlement. It could therefore be said that the General Assembly had already delegated certain of its powers with regard to the Arab refugees and that it had delegated those powers to

²⁹² Verwaltungsgericht=Administrative Court, Berlin, VG 10 A 4.88, 3 November 1989, *InfAuslr* 3/90.

²⁹³ *Id.*

²⁹⁴ Article 32 of the Vienna Convention on the Law of Treaties provides that the preparatory work of a treaty and the circumstances of its conclusion are a "supplementary means of interpretation." Much of the following discussion on the *travaux préparatoires* has been taken from Lex Takkenberg's summary on the subject. TAKKENBERG, *supra* note 169.

²⁹⁵ The United States' delegate proposed that the Committee's definition of "refugee" should explicitly exclude Palestinians. This appeared to have been primarily motivated by the desire to know in advance the extent of the financial responsibility with regard to refugees placed under the protection of the United Nations. However, after criticism from France, the U.S. delegate announced that his government was prepared to eliminate from the definition all exceptions save those concerning persons of German ethnic origin residing in Germany. The draft definition did not exclude Palestinians.

²⁹⁶ TAKKENBERG, *supra* note 169, 60-61.

organs other than the High Commissioner's Office.²⁹⁷

Several days later, the representative of Egypt introduced an amendment submitted jointly by the delegations of Egypt, Lebanon and Saudi Arabia that, amongst other things, proposed adding to section C of that draft statute, dealing with the competence of the High Commissioner the following paragraph:

The mandate of the High Commissioner's Office shall not extend to categories of refugees at present placed under the competence of other organs or agencies of the United Nations.²⁹⁸

The Lebanese representative explained the purpose of the amendment:

The delegations concerned were thinking of the Palestine refugees, who differed from all other refugees. In all other cases, persons had become refugees as a result of action taken contrary to the principles of the United Nations and the obligation of the Organization toward them was a moral one only. The existence of Palestine refugees, on the other hand, *was the direct result of a decision taken by the United Nations itself*, with full knowledge of the consequences. The Palestine refugees were therefore a direct responsibility on the part of the United Nations and could not be placed in the general category of refugees without betrayal of that responsibility. Furthermore, the obstacle to their repatriation was not dissatisfaction with their homeland, but the fact that a Member of the United Nations was preventing their return [emphasis added].²⁹⁹

The representative of Saudi Arabia added that:

If the General Assembly were to include the Palestine refugees in a general definition of refugees, *they would become submerged and would be relegated to a position of minor importance*. The Arab states desired that those refugees should be aided pending their repatriation, repatriation being the only real solution of their problem. To accept a general definition without the clause proposed by the delegations of Egypt and Lebanon, as well as his own, would be to renounce insistence on repatriation . . . Pending a proper settlement of [the Arab-Israeli Conflict], the Palestine refugees should continue to be granted a *separate and special status* [emphasis added].³⁰⁰

The amendment proposed by the three Arab states met with general approval from the drafters of the statute.³⁰¹ An informal working group was formed which took into consideration the various amendments concerning the definition of the term "refugee". The working group presented a revised joint compromise text that contained two draft definitions, one for the statute of the UNHCR and the other for the draft convention.³⁰² The definition for the statute was consequently adopted by the Third Committee of the General Assembly in an amended form, containing a clause in line with the amendment of the Arab states (the present paragraph 7(c) of the UNHCR Statute). The UNHCR Statute as a whole was adopted by the General Assembly on December 14, 1950.³⁰³ The Third Committee had also included a clause, similar to paragraph 7 (c) of the UNHCR Statute, in the definition for the draft convention. It was decided, however, that the text of the definition for the draft convention should be merely recommended for consideration to the conference of plenipotentiaries, which the General Assembly had agreed to convene in order to complete the drafting process.³⁰⁴

²⁹⁷ U.N. GAOR, 3rd Comm., 5th Sess., 326th mtg., para. 48 (1950).

²⁹⁸ U.N. Doc. A/C.3/L.128 (1950).

²⁹⁹ U.N. GAOR, 3rd Comm., 5th Sess., 328th mtg., para. 47.

³⁰⁰ U.N. GAOR, 3rd Comm., 5th Sess., 328th mtg., para. 52, 55.

³⁰¹ U.N. GAOR, 3rd Comm., 5th Sess., 330th mtg., para. 7-8.

³⁰² U.N. Doc. A/C.3/L.131/Rev. 1.

³⁰³ G.A. Res. 428(V), Dec. 14, 1950, U.N. Doc. A/50/428

b. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons:

The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons met in Geneva from July 2 to July 25, 1951. During the three weeks of intensive debate, the most controversial issue was again the definition of the term "refugee". The Egyptian delegate brought up the Palestinian refugee question. He stated that Article 1C of the draft convention - corresponding to the present Article 1D of the 1951 Refugee Convention - provided a temporary exclusion only: once the United Nations assistance ceased, the Palestinian refugees should *automatically* enjoy the benefits of the 1951 Refugee Convention. The Egyptian government had no doubt at all that such refugees came under the terms of Article 1.³⁰⁵

In order "to avoid any misunderstanding as to the interpretation to be placed on paragraph C", the representative of Egypt introduced another amendment, the text of which is almost identical to the second sentence of the present Article 1D of the 1951 Refugee Convention.³⁰⁶ According to the Egyptian representative, the object of his amendment "was to make sure that Arab refugees from Palestine, who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function, would automatically come within the scope of the Convention".³⁰⁷ The representative of Iraq added "that the amendment represented an agreed proposal on the part of all the Arab States . . . It was obvious that, if the Egyptian amendment was rejected, the refugees it was designed to protect might eventually find themselves deprived of any status whatsoever".³⁰⁷ This interpretation of Article 1D advanced by the Egyptian delegate was not objected to by any other state.³⁰⁸

Before the amendment was put to a vote the representative of France made it clear that the text of the amended draft Article 1C would take effect only for those states which had adopted the wider geographical alternative in the definition of the term "refugee".³⁰⁹ The other delegations agreed to this interpretation and the Egyptian amendment was consequently adopted by 14 votes to 2, with 5 abstentions.³¹¹

In light of the *travaux préparatoires* of paragraph 7(c) of the UNHCR Statute and Article 1D of the 1951 Refugee Convention, it is clear that amongst the respective drafters, there was consensus that the Palestinian refugees were genuine refugees in need of protection. In fact, it was the *Arab* delegation that advocated for the exclusion clause, not because they believed that Palestinians were not "refugees", but rather because they feared that the Palestinian refugee problem deserved even more specialized attention than the 1951 Refugee Convention's general definition of "refugee" could provide. This concern was based more on political rather than legal considerations. The Arab states were afraid that, when included under the UNHCR Statute, the Palestinian refugees "would become submerged [with other categories of refugees] and would be relegated to a position of minor importance".³¹² They mainly wanted to ensure that the drafters did not prejudice the Palestinians' prospect of repatriation.

The *travaux préparatoires* reviewed above demonstrate that the international

³⁰⁴ G.A. Res. 429 (V), Dec. 14, 1950, U.N. Doc. A/50/429

³⁰⁵ Summ. Rec. of the 2nd mtg., July 2, 1951, U.N. Doc. A/CONF.2/SR.2, at 22.

³⁰⁶ Summ. Rec. of the 29th mtg., July 19, 1951, U.N. Doc. A/CONF.2/SR.29, at 6.

³⁰⁷ *Id.*

³⁰⁸ Summ. Rec. of the 29th mtg., July 19, 1951, U.N. Doc. A/CONF.2/SR.29, at 8

³⁰⁹ *Id.*, at 8-9.

³¹⁰ A compromise position was reached amongst the drafters whereby each contracting nation could, at the time of ratification, chose between a definition of "refugee" that included the geographical restriction of refugees that had left their countries "as a result of events occurring in Europe before January 1, 1951" and one with no such geographical limitation.

³¹¹ Summ. Rec. of the 29th mtg., July 17, 1951, U.N. Doc. A/CONF.2/SR.29, at 9

³¹² See FORSYTHE, *supra* note 39.

community had no intention of *excluding* Palestinians from the general legal regime for the protection of refugees. On the contrary, the Arab representatives made it clear that their proposed exclusion clause was only to exclude Palestinian refugees temporarily. Their belief was warranted since they assumed that the protection would be carried out by the UNCCP.

The *travaux préparatoires* show that Article 1D was not intended to be an exclusion clause at all. The French and Arab delegates proposed the amendment to the initial draft of Article 1D with the expressed intent of ensuring that Palestinian persons who were still *de facto* refugees when they no longer received protection or assistance from UNRWA or, when it ceased to function altogether, received automatic *de jure* recognition under Article 1A. Rather, as the French and Egyptian delegates explained, Article 1D was meant to be a contingent inclusion clause, merely postponing the incorporation of Palestinian refugees until those preconditions were satisfied.³¹³ The French delegate stated his belief that the Egyptian interpretation was correct -the text provided for "deferred inclusion" rather than the exclusion of these refugees.³¹⁴

When other delegates expressed doubts as to whether the intention of the Arab states was properly reflected in the text, the amendment, referred to above but reproduced here, was introduced:

When [UNRWA] 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 [emphasis added].³¹⁵

This amendment places the refugees to which it applies in a position similar to the statutory refugees mentioned in Article 1A (2) of the 1951 Refugee Convention. Although awkward to include a whole category of refugees conditionally by way of an exception to an exclusion clause, this is exactly what the drafters did. As the conference came under considerable pressure to complete the drafting within the time available, there was no additional time to redraft the provisions.³¹⁶

3. Purpose and Scope of Coverage:

The purpose and scope of the 1951 Refugee Convention is consistent with the conclusion that Article 1D is a contingent inclusion provision for Palestinian refugees to assure them heightened protection. The purpose and scope of this provision is further clarified by comparing it to other relevant articles of the 1951 Refugee Convention.

a. Comparison of Article 1D with Article 1A(1) and *prima facie* Refugee Status:

Palestinians are recognized by the international community as *ipso facto* refugees not only because of their unique situation of becoming refugees on the authority of a resolution of the United Nations body itself, but also in recognition of the original and ongoing persecution against them as an entire people. There are two analogous categories of refugees which the 1951 Refugee Convention, the UNHCR and UNHCR Handbook recognize as automatically qualifying for refugee status, which categories give clues to the meaning of the *ipso facto* status of Palestinians: 'statutory refugees' described in Article 1A(1) of the 1951 Refugee Convention, and

³¹³ Summ. Rec. of the 3rd mtg., July 3, 1951, U.N. Doc. A/CONF.2/SR.3, at 10.

³¹⁴ *Id.*

³¹⁵ *Id.*

prima facie refugees recognized in general by the UNHCR and UNHCR Handbook.

Grahl-Madsen and Goodwin-Gill suggest that the treatment of Palestinian refugees under Article 1D is quite similar to the treatment of other refugees categorized under Article 1A(1) of the 1951 Refugee Convention as statutory refugees; i.e., persons recognized as refugees *per se*. According to Grahl-Madsen³¹⁷, the words *ipso facto* imply that 'no new screening is required for the persons concerned to become entitled to the benefits of the Convention', and that when UNRWA assistance ceases, those persons covered by the language of Article 1D 'will become a kind of "statutory refugees". Statutory refugees are those under Article 1A(1) of the 1951 Refugee Convention who qualified as refugees, or were *de facto* recognized as refugees under treaties and arrangements prior to the 1951 Refugee Convention, and who were 'grandfathered' into automatic 1951 Refugee Convention coverage.³¹⁸ These refugees were recognized as such as a group, without further determination of whether they met the 1951 Refugee Convention definition of Article 1A(2).³¹⁹

Like statutory refugees, the 1951 Refugee Convention also envisions the possibility of recognition of other refugees as *prima facie* refugees based solely on their membership in a group, when the group itself is acknowledged as being persecuted *per se*. The UNHCR recognizes that *prima facie* refugee status can give an individual refugee within the particular group automatic refugee recognition.³²⁰ The UNHCR Handbook, paragraph 44, states:

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.³²¹

Every ground on which the 1951 Refugee Convention recognizes persecution—race, religion, nationality, political opinion and social group—contemplates that there will be situations in which there will be *prima facie* refugees in the particular category. The UNHCR Handbook clarifies this.³²²

Professor Guy Goodwin-Gill reiterates the recognition of *prima facie* refugees under the 1951 Refugees Convention:

Wherever large numbers of people are affected by repressive laws or practices of general or widespread application, the question arises whether each member of the group can, by reason of such

³¹⁶ TAKKENBERG, *supra* note 169, at 67.

³¹⁷ GRAHL-MADSEN, *supra* note 247, at 140-2.

³¹⁸ GOODWIN-GILL, *supra* note 179.

³¹⁹ The categories so designated were: refugees from the period of the first world war; inter-war refugees; 'neo-refugees'; and displaced persons and unaccompanied minors.

³²⁰ In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court held that while the UNHCR Handbook, (*supra* note 204), is not binding upon the INS, it does provide significant guidance in construing the Protocol, to which Congress sought to conform.

³²¹ UNHCR Handbook, *supra* note 204.

³²² *See, e.g., id.* at Paragraph 70: "The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution"; Paragraph 73 provides that: "Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground"; Paragraph 79 provides that: "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."

membership alone, be considered to have a well-founded fear of persecution . . . Where large groups are seriously affected by a government's political, economic, and social policies or by the outbreak of uncontrolled violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual . . . Where individual or collective measures of enforcement are employed, such as coercion by denial of employment or education, restrictions on language and culture, denial of access to food supplies, expropriation of property without compensation and forcible or involuntary relocation, then fear of persecution in the above sense may exist; *mere membership of the affected group can be sufficient* [emphasis added].³²³

The unique historical events that created the refugee problem and the subsequent events that have barred Palestinians' ability to return, denied them compensation and have turned them into stateless persons under international law, have been identified by the international community as *per se* persecution of an entire people, entitling them to a special *ipso facto* refugee status, similar to the *prima facie* status envisioned by the 1951 Refugee Convention and United Nations Handbook. This is precisely why a separate regime was created for the Palestinians under the UNHCR Statute and under Article 1D discussed above. Additionally, the Palestinians' *prima facie* refugee status is reaffirmed every year.³²⁴

b. Comparison of Article 1D with Article 1A(2):

There are a number of state parties to the 1951 Refugee Convention that, incorrectly interpreting Article 1D, do not apply that provision at all, and consider requests for determination of refugee status of Palestinians exclusively under Article 1A(2). Canada, the United States, Austria and Switzerland are all in this category. There is a second group of states which, although acknowledging the applicability of Article 1D apply domestic asylum provisions based on 1A(2) to Palestinian claims. This group includes the Federal Republic of Germany³²⁵ and the Netherlands³²⁶.

Another category of states applies the analysis suggested by Lex Takkenberg, that Palestinian refugees who have left UNRWA's area of operations out of a well-founded fear of persecution may make their claims to refugee status under Article 1A(2), and not Article 1D.³²⁷

Finally, the last category applies Article 1A(2) to Palestinians who did not become refugees in 1948 because they were at that time living in the West Bank and Gaza and never fled; or to Palestinians who never took refuge in a country falling within UNRWA's mandate.³²⁸ Australian immigration decisions have also considered, but rejected, the appropriate interpretation of Article 1D submitted here by *amici*. The Refugee Review Tribunal held that a Palestinian refugee was not excluded from the 1951 Refugee Convention once he left Gaza, where he was registered with UNRWA.³²⁹ However, the RRT applies the usual Article 1A 1951 Refugee Convention definition of refugee, rather than examining carefully the intent and effect of the *ipso facto* clause. It concludes: "I do not accept the Applicant's advisor's submission that the

³²³ GOODWIN-GILL, *supra* note 179, at 76-77.

³²⁴ See Appendix A.

³²⁵ In the Federal Republic of Germany, Palestinian refugees may directly invoke the 1951 Refugee Convention, but Art. 1A(2) controls the adjudication of their claims.

³²⁶ In the Netherlands, Art. 15 of the 1965 Aliens Act adopts Article 1A(2) of the 1951 Refugee Convention. The Judicial Division of the Council of State has held that, despite whether Article 1D would suspend the application of the 1951 Refugee Convention, asylum claims of Palestinian refugees are to be adjudicated under Art. 1A(2) under the Aliens Act.

³²⁷ See TAKKENBERG, *supra* note 169.

³²⁸ In 1948 approximately 200,000 Palestinians fled to Gaza, at the time under Egyptian. Other Palestinian refugees took direct refuge in Egypt, of those 11,000 were outside the UNRWA's operation area. TAKKENBERG, *supra* note 169 at 125.

³²⁹ In RRT Reference: V96/04714 (7 October 1996).

Applicant is... ipso facto entitled to the benefits of this Convention. The Tribunal takes the article to mean that Applicants who no longer have assistance from UNRWA are entitled to be assessed pursuant to Article 1A, they have the benefit of the article only if they have a well founded fear of persecution for a Convention ground and there is a real chance of persecution should they return."³³⁰ In so concluding, the RRT discusses briefly the UNRWA interpretation of Article 1D offered by Lex Takkenberg and the UNHCR interpretation, but fails to consider any of the treaty construction, the history and drafters' intentions offered here that support a different result.

Recent Canadian case law treats Palestinian refugees like any other applicants for refugee status under the 1951 Refugee Convention.³³¹ The IRB reviewed the evidence and concluded "that the claimant has a well-founded fear of persecution by reason of political opinion."³³²

In contrast to these cases are two recent Greek decisions rendered by the Suspension Committee of the Council of State. The decisions are extremely brief, but one relies squarely on the application of Article 1D to suspend the deportation of the Palestinian refugee applicants. The first is a decision dated November 19, 1993 in the matter of Mohamed Sharif Ahmad, in which the Committee finds:

WHEREAS evidence results from the above-mentioned facts in the above reflections whereby the petitioner, of Palestinian origin, was born in Syria, but all of whose family members except one of his brothers (who, according to the presentations in the petition, is being detained in Syria on political grounds) are in Australia, of which they have already become citizens. From this evidence results, likewise, that one of the petitioner's brothers residing in Australia has already invited him to become a permanent resident of that country.... In view of the above, and given likewise that, according to written confirmation from the UNHCR representative in Greece dated November 18, 1993, the petitioner is a refugee under the protection of the UNHCR in Athens, in keeping with Article 1D (or 1.4) of the 1951 Geneva Convention regarding the status of refugees... there is, in the opinion of the Committee, reason for granting temporary suspension of the execution of the challenged Orders...³³³

In the second case, a decision dated July 8, 1993, in the matter of Mohamed Ahmed Radwan, the Suspension Committee does not mention Article 1D, but the corresponding section of the Greek law of asylum. It is difficult to determine the precise basis of the decision, but the Committee states:

Th[e] evidence reveals that the petitioner, as an Israeli citizen of Palestinian origin, allegedly entered Greece on September 15, 1983, to be a student here....from the UNHCR representation in Greece, it appears that the petitioner is a refugee under its protection, in the UNHCR's words, and is in possession of the appropriate identification card, while his possible return to Israel is deemed to be dangerous because of the troubles prevailing in the Gaza Strip, which is his home. Finally, the petitioner asserts that his brother Ziad Ahmad Radwan died January 15, 1989, due to injuries inflicted on him by the Israeli Armed Forces, and he submits a newspaper clipping...which describes the above event. Given these facts, it is the Committee's considered opinion that immediate execution of the challenged orders would cause the petitioner serious harm...Consequently, it favors the case of granting the petitioner a temporary stay of execution of the above orders....³³⁴

³³⁰ *Id.*

³³¹ See Decisions of the Immigration and Refugee Board (IRB), the administrative tribunal entrusted with determining refugee status on behalf of the Canadian Government, *inter alia*, decision of 1 October 1990 [1990], CRDD No. 726, No. C90-00163, regarding an UNRWA-registered Palestinian from Gaza, who was involved in anti-Israeli political activities.

³³² *Id.* Similar in reasoning and result are the decisions of 16 May 1990, [1990] CRDD N. 205, No. T89-03533/34 (Palestinian refugee from Lebanon); and decision of 5 July 1990, [1990] CRDD No. 327, No. T89-05589 (Palestinian from the West Bank). See IRB Documentation Centre; see also, TAKKENBERG, *supra* note 169 at 110.

³³³ *Mohamed Sharif Ahmad v. The Ministry of Public Order*, 790/1993, (1993) at 3

³³⁴ *Mohamed Ahmed Radwan v. Ministry of Public Order*, 520/1993, (1993) at 3

The decision leaves many questions unanswered, and reflects confusion on the part of the Commission, as well. It is unclear whether the petitioner is a resident of Gaza, in which case he would not likely be an Israeli citizen, despite what the Commission claims. Since Gaza "is his home", the petitioner lived in an UNRWA area, and thus Article 1D would apply. Nevertheless, the Greek Commission appears to be influenced by UNHCR in Greece to apply Article 1D to suspend deportation of Palestinians.

c. Comparison of Article 1D with Article 1C:

Article 1C embodies the "cessation clauses"-situations in which an individual who has been recognized as a refugee, ceases to be one under the terms of the 1951 Refugee Convention. The aim of this article is that international protection should be offered only so long as it is necessary. Article 1C, paragraph 3, is important to the issue of the interpretation of Article 1D. That provision states that the 1951 Refugee Convention ceases to apply if a refugee "has acquired a new nationality, and enjoys the protection of the country of his new nationality."³³⁵ As discussed above, many Palestinian refugees who were born or lived in Jordan were able to acquire Jordanian citizenship.³³⁶ Palestinian refugees have also obtained citizenship, although in limited numbers, in Iraq, Kuwait, Lebanon, Syria, Saudi Arabia, and a few other states in the Arabian Gulf.³³⁷ The 1951 Refugee Convention does not exempt Palestinians from the application of the cessation and exclusion clauses. However, Article 1C requires that two factors be determined before refugee status can cease: the individual must acquire a new nationality, and must have the protection of the new country of nationality.

Concerning the first requirement, the acquisition of new nationality, the analysis of acquisition of nationality is set out in the UNHCR Handbook, which requires:

Possession of such a passport creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example, by showing that the passport is a so-called "passport of convenience" (an apparently regular national passport that is sometimes issued by a national authority to non-nationals).³³⁸

As the previous discussion indicates, even Palestinians who have been issued passports of their countries of habitual residence, are not considered nationals with equal rights as non-Palestinian nationals. For example, Jordan has issued passports indicating varying degrees of rights of nationality and/or protection. Jordan has also withdrawn the grant of citizenship to entire groups of Palestinians in the past.

Concerning the second requirement--the enjoyment of protection of the new country of nationality--that is particularly relevant in the Palestinian context, as in many, many cases, such protection is completely absent. Three points are important on this aspect of Article 1C. First, the Arab states never intended to permanently resettle the Palestinians in their territories, as the plethora of United Nations General Assembly and Security Council Resolutions on the Palestinians' right to return and compensation makes very clear. It was the Arab nations that introduced Article 1D into the 1951 Refugee Convention, and they believed that the arrangement for housing Palestinian refugees on their territories would indeed be temporary.³³⁹ The Arab states conceded to the establishment of refugee camps for the Palestinians in their territories as a

³³⁵ 1951 Refugee Convention, *supra* note 1 at Art. 1C, 3.

³³⁶ Jordanian Nationality Law of 4 February 1954.

³³⁷ *See supra* section III.A.3.b.

³³⁸ UNHCR Handbook, *supra* note 204 at 19.

³³⁹ *See supra* section III.A.2.a.

provisional measure. This was consistent with their policy of not prejudicing Palestinians' right of return. Therefore they included the *ipso facto* language which formalized the temporary arrangement whereby Member States would be responsible only for temporarily bearing the burden of the Palestinians, unless and until final solution was reached. If there was no final solution, and either protection or assistance was not available to an individual refugee, then recognizing Palestinians as *per se* refugees,³⁴⁰ the 1951 Refugee Convention itself would apply and Palestinians would avail themselves of any of the durable solutions available to other 1951 Refugee Convention refugees.

Second, Arab states have issued many of their own agreements concerning granting Palestinians travel and work documents, yet making clear that these did not imply that the refugees had citizenship, nationality or permanent status in their territories. Third, the lack of permanent protection for Palestinians has been made abundantly clear in the history of persecution and the vulnerability of Palestinian refugees in Arab states to Israeli persecution discussed above. A few recent examples include the massacres of Palestinians in 1982 after the Israeli invasion, the expulsion and persecution of Palestinians in Saudi Arabia, Kuwait and the other Gulf States in 1990-1991 during and after the Gulf War.

d. Comparison of Article 1D with Article 1E:

The 1951 Refugee Convention Article 1E states:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.³⁴¹

Article 1E indicates that 1951 Refugee Convention protection is not called for where something approaching national protection is otherwise available.³⁴² There is no basis in the drafting history to assume the 1951 Refugee Convention drafters intended Palestinians to be excluded from applying the provisions of Articles 1C and Article 1E. However, Article 1E must be strictly interpreted. Grahl-Madsen states that "In order to be excludable under Article 1E, a person must be granted a status which in no respect is inferior to that of a 1951 Refugee Convention "refugee". Otherwise, the provision may be open to abuse."³⁴³

Thus, in situations where Palestinians have been given rights of residency, or some form of protection in other states, such rights must be compared with whether they guarantee all the rights the 1951 Refugee Convention guarantees to other refugees. As previously discussed, Palestinians have benefited from generous laws in Syria, which place them in many ways on similar footing to Syrian nationals.³⁴⁴ Even in Syria, however, Palestinians do not have the right to vote, to buy most kinds of property, and the right to own more than a single home. In recognition of the Syrian position towards the solution of the Palestinian refugee question-which

³⁴⁰ See *supra* section II.A, regarding prima facie refugees.

³⁴¹ 1951 Refugee Convention, *supra* note 1 at Art. 1E.

³⁴² The UNHCR Handbook clarifies that the Convention drafters intended this clause to exclude refugees of German extraction who arrived in the Federal Republic of Germany and were there recognized as possessing the rights and obligations of a person with German nationality. See UNHCR Handbook, *supra* note 204, at . 34, n. 19.

³⁴³ GRAHL-MADSEN, *supra* note 247, at 270.

³⁴⁴ UNRWA's Annual Report for 1951-52 describes the Syrian legislation which integrates Palestinians in Syria in different spheres: UNRWA, ANNUAL REPORT (1951-52). See also, Al-Kitab al-Sanawi L-il-Qadiyyah al-Filastaniyah (The Yearbook of the Palestine Question), (1971) in which Law No. 260 is cited. This law states: "Palestinians residing in Syria as of the date of the publication of this law are to be considered as originally Syrian in all things covered by the law and legally valid regulations connected with the right to employment, commerce, and national service, while preserving their original nationality."

is in line with the unified position of all the Arab states-that country does not consider them Syrian nationals. Thus, they cannot hold Syrian national passports; they are issued travel documents for Palestinian refugees.

In order to accurately interpret the interrelationship of the cessation and exclusion clauses of Articles 1C and 1E with Article 1D, the history of the Palestinian refugee issue and the concerns of the Article 1D drafters must be kept in mind. Moreover, these clauses cannot be understood without keeping in mind the ongoing persecution of Palestinians both at the hands of the state of Israel and the Arab states, and the lack of protection afforded Palestinian refugees as a people. The cessation and exclusion clauses must be restrictively interpreted to ensure the heightened protection scheme of Article 1D in light of these critical factors affecting Palestinian refugees.

B. Lack of Clarity in United States Law:

Like Germany and Australia, the United States has produced inconsistent decisions regarding Palestinians' *de jure* status under the 1951 Refugee Convention. Such inconsistencies mean that United States case law is uncertain precedent, and should not be given much weight. However, in *Faddoul v. INS*, the Fifth Circuit implicitly addressed the United States' duties under the *ipso facto* provision to a Palestinian who had been residing outside UNRWA's geographic scope and was a *de facto* refugee.³⁴⁶ In denying asylum to the applicant who had been residing in Saudi Arabia, the court asserted, ". . . statelessness alone does not warrant asylum. Section 101(a)(42)(A) [of the Immigration and Nationality Act] clearly indicates that stateless individuals must demonstrate the same well-founded fear of persecution as those with nationalities."³⁴⁷ While, on its face the court's statement seems to accept the 1951 Refugee Convention's analysis regarding stateless persons,³⁴⁸ it ignores the *ipso facto* mandate.³⁴⁹ Furthermore, it makes a direct concession to that effect in its dicta. The Court casually drops a footnote stating,

Faddoul also argues that he should be accorded refugee status because the United Nations deems all stateless Palestinians to be 'refugees.' The INA does not afford asylum to all aliens that might properly be defined as refugees, rather it limits such relief to individuals who are 'refugees' with in the meaning of section 1101(a)(42)(A) of this title.³⁵⁰

³⁴⁵ Palestinian asylum claims are rejected on various grounds. Often the court cites credibility issues. *See Alshiabat v. INS*, 125 F.3d 857 (9th Cir. 1997); *Aliyan v. INS*, 17 F.3d 393, (9th Cir. 1994). *But See Suradi v. INS*, 960 F.2d 152 (9th Cir. 1992), (reversing the BIA's finding that applicant was not credible, stating that petitioner's brevity and lack of detail could easily stem from his limited comprehension of English, coupled with the INS' failure to provide an interpreter at the hearing). Courts have also been unsympathetic to claims of asylum based on forced conscription into their host countries' armies even where such conscription entails fighting other Palestinians. *See Hajeissa v. INS*, 59 F.3d 175 (9th Cir. 1995), (holding that although petitioner was not a Syrian citizen, the Syrian government was still entitled to draft him since this was not tantamount to persecution on account of political opinion). Significantly, one of the only recent cases involving Palestinians that actually granted asylum to petitioner involved a female resident of Lebanon who suffered persecution at the hands of Sunni Palestinians. *Ezz-Eddine v. INS*, 900 F.2d 259 (6th Cir. 1990)(found a well-founded fear of persecution on account of religion and membership in a particular social group for a woman who was a Shia Muslim and had been threatened by a Sunni Palestinian).

³⁴⁶ *Faddoul v. INS*, 37 F.3d 185 (5th Cir. 1994).

³⁴⁷ *Id.* at 189.

³⁴⁸ Article 1 of the 1951 Refugee Convention mandates that signatories grant refugee status to persons 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 . . . 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."

³⁴⁹ Notwithstanding the UNHCR Handbook's interpretation of the Exclusion Clause, the proper inquiry is not whether statelessness confers *per se* refugee status but whether as a Palestinian who is a *de facto* refugee coming from a country outside of UNRWA's area of operation, petitioner is entitled to such *per se* status.

³⁵⁰ *Faddoul v. INS*, *supra* note 346 at 189 n. 6.

Ignoring for a moment that this brazen admission contradicts *INS v. Cardoza-Fonseca*, the court seems to suggest that it might recognize this brief's interpretation of the *ipso facto* provision.

In any event, lack of clear precedent gives the Board of Immigration Appeals the opportunity to carefully examine the respective interpretations given to Article 1D and the *ipso facto* provision. If, in light of the history of that Article, its plain language, the context in which it was drafted, the scope and purpose of the provision in the 1951 Refugee Convention, the BIA agrees with the interpretation offered here by *amici*, there is no adverse precedential bar to the BIA applying the accurate interpretation of Article 1D to these Appellants.

Conclusion

There is only one possible accurate interpretation of the plain language of the 1951 Refugee Convention's Article 1D. If State Parties to the 1951 Refugee Convention fail to give meaning to the *ipso facto* provision, then Article 1D comprises almost completely superfluous language. If State Parties fail to adequately address the issue of the *ipso facto* language, or apply an artificially restrictive interpretation of it, they derogate their duties as signatories to the 1951 Refugee Convention. Article 1D acts as a contingent inclusion clause for Palestinians who are at present receiving aid from UNRWA. Once the aid ceases "for any reason," they should be *ipso facto* included in the protective regime established by the 1951 Refugee Convention. Thus, Palestinians who do not already have full and unconditional citizenship in a state in which their lives and rights are protected, who are either living outside of UNRWA's area of operation or alternatively within that area but not registered with UNRWA, should be *ipso facto* entitled to refugee status in any nation that is a signatory to the 1951 Refugee Convention or subsequent 1967 Protocol. If the explicit terms of Article 1D are ignored or fatally manipulated, the State may as well exclude all persons of Palestinian origin from any refugee protection at all, since that is the effect such derogation will have on this particular group of refugees.